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The Briefs on the Merits

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Brief writing for the Supreme Court is not fundamentally different from brief writing for other appellate tribunals. The general subject cannot be covered in complete detail in a work whose function is to describe practice in the Supreme Court.¹ This chapter will concentrate on those aspects of brief writing that are especially significant in the Supreme Court.

Immediately upon the entry of an order accepting a case for oral argument, counsel for the petitioner or appellant should begin preparation of the main brief on the merits. Work on the preparation of the joint appendix should also begin at this point.

13.1 Time Schedule for Filing

Rule 25 sets forth the time schedule for filing briefs on the merits. The schedule, with specific filing dates, is also set forth in the Clerk's Memorandum to Counsel in Cases Granted Review, along with the Clerk's *Guide for Counsel*. Both are sent to counsel immediately upon the grant of review. See Sec. 12.8, *supra*; Appendix III, *infra*. The 2007 revision of Rule 25 added the requirement that an "electronic version of every brief on the merits be sent to the Clerk of the Court and to opposing counsel of record at the time the brief is filed." Rule 25.8.

The Clerk has issued detailed guidelines for counsel to follow in complying with the requirements of Rule 25.8. See Guidelines for Electronic Submission of Briefs on the Merits (Oct. 1, 2007). Electronic versions of all opening, reply, supplemental, and amicus curiae briefs "must be in text searchable portable document format (PDF) compatible with the latest version of Adobe Acrobat with all fonts embedded" and must be appropriately named and include a statement of service. The Guidelines emphasize in bold face type that "E-mailing a brief does not obviate the requirement that a hard copy be timely filed." See Appendix ____.

¹The subject receives comprehensive treatment in R. STERN, APPELLATE PRACTICE IN THE UNITED STATES 225–359 (2d ed. 1989), F. WIENER, BRIEFING AND ARGUING FEDERAL APPEALS 37–274 (1967), and EDWARD D. RE & JOSEPH R. RE, BRIEF WRITING AND ORAL ARGUMENT (9th ed. 2005). Helpful articles on appellate briefing technique also appear in ABA SECTION OF LITIGATION, LITIGATION MANUAL: SPECIAL PROBLEMS AND APPEALS (3d ed. 1999).

(a) *Opening Brief on the Merits*

The main brief on the merits for the petitioner or appellant must be filed within 45 days of the entry of the Court order granting the petition for certiorari, noting probable jurisdiction, or postponing consideration of an appeal, unless the Court's order granting review specifies a shorter time period. Rule 25.1, 25.4. This 45-day period runs simultaneously with the 45 days allowed the petitioner or appellant under Rule 26.1 for preparing, duplicating, and filing the joint appendix. See Sec. 12.2, *supra*. Therefore, the entry of an order granting review of a case is a signal to counsel for the petitioner or appellant to begin work immediately on both the appendix and the main brief on the merits. Counsel should designate, prepare, and print the joint appendix far enough in advance of the filing date to permit its page numbers to be used as record references in the opening brief.

This 45-day filing deadline means, of course, that the required 40 copies of the opening brief must be filed within that time limit, unless the time is shortened or extended. Where the deferred appendix system is used, as authorized by Rule 26.4(a), the petitioner or appellant may exercise the option under Rule 26.4(b) to serve and file nonbooklet format copies of the opening brief, conforming to Rule 33.2, within this 45-day period. The petitioner or appellant must thereafter serve and file the 40 printed copies of the brief within 10 days after the deferred appendix has been filed. See Sec. 12.3, *supra*.

The 45-day time limit governs even if a petition is granted too late in a term for the case to be argued that term. Prior experience had shown that granting automatic extensions to August 25 during the summer, as the rules once permitted, would on occasion delay the availability of cases for oral argument in the early portions of the ensuing term. The Clerk will take into account whether granting an extension after the close of the argument schedule or during the summer recess will affect the scheduling of arguments during the next term. See Sec. 13.1(f), *infra*.

The 1999 revision to Rule 25.1 clarified that a respondent or appellee supporting the petitioner or appellant must meet the petitioner's or appellant's time schedule for filing briefs.

(b) *Opposing Brief on the Merits*

The brief on the merits for the respondent or appellee must be filed within 30 days after the brief for the petitioner or appellant is filed. Rule 25.2. Where the deferred appendix system has been utilized, the respondent or appellee may exercise the option under Rule 26.4(b) to serve and file nonbooklet format copies of the opening brief, conforming to Rule 33.2, within this 30-day period. The respondent or appellee must thereafter serve and file the 40 printed copies of the brief within 10 days after the deferred appendix has been filed. See Sec. 12.2, *supra*.

(c) *Reply Briefs*

A petitioner or appellant may file a reply brief within 30 days after the brief for the respondent or appellee is filed. However, the reply "must *actually*

be received by the Clerk not later than 2 p.m. one week before the date of oral argument.” Rule 25.3 (emphasis added). Thus, counsel may not have the normal 30 days to prepare a reply brief. Mailing on the seventh day before argument will not be sufficient. Rules 25.1 and 25.3 make clear that a respondent or appellee supporting the petitioner or appellant may also file a reply brief subject to the same time limits. For more details, see Sec. 13.13, *infra*.

(d) *Supplemental Briefs*

Any party may file a supplemental brief up to the time the case is called for hearing, or thereafter by leave of Court. Rule 25.5. However, such a brief is restricted to “late authorities, newly enacted legislation, or other intervening matter that was not available in time to be included in a brief.”

(e) *Briefs After Argument*

After a case has been argued or submitted, no brief may be filed “except that of a party filed by leave of the Court.” Rule 25.6. Only the Court, not the Clerk, may grant leave to file a supplemental or other brief after the argument. See, e.g., *Tennard v. Dretke*, 541 U.S. 1061 (2004), granting motion of petitioner “for leave to file a supplemental brief after argument.” Leave will normally be granted only because of some special circumstance, such as the need to reply to unexpected questions by the Court or comments by opposing counsel during the argument, or some significant unexpected happening after argument, such as new legislation or court decisions. Such leave is sometimes granted orally during the course of the oral argument.

(f) *Extensions and Reductions of Time for Filing Briefs*

An application to extend the time specified in paragraphs (a) and (b) above for filing briefs on the merits “may be presented in the form of a letter to the Clerk setting out specific reasons why an extension of time is justified.” Rules 25.4, 30.4. The application “shall be filed within the period sought to be extended.” Rule 30.2. The use of the word “filed” (rather than “presented,” as in a previous version of the rule) reflects the fact that a document can be, under Rule 29.2, timely filed by being placed in the mail, even if it is not actually received by the Clerk’s Office within the relevant time period.

A “party aggrieved by the Clerk’s action may request that the application be submitted to a Justice or to the Court,” Rule 30.4, but few such requests are made, and the Clerk’s action is seldom, if ever, overturned.

An application to extend the time to file a reply brief on the merits must be presented to a Justice in the first instance. Rules 25.4, 30.3. “Once denied, such an application may not be renewed.” *Id.*

The 1995 revision of Rule 25.4 added a new admonition that “[a]n application to extend the time to file a brief on the merits is not favored.” The Clerk’s Comment stated that this addition was intended to discourage unwarranted requests for time extensions. Although Rule 30.4 no longer contains a provision authorizing the Clerk to grant extensions of time for filing briefs on the merits only when, in his opinion, such extension “would not prejudicially * * * impede

the progress of the argument calendar,” the Clerk doubtless will continue to give heed to that factor in considering applications for extensions of time.

If a case has been advanced for a hearing, the time for filing the briefs on the merits “may be abridged as circumstances require pursuant to an order of the Court on its own motion or that of a party.” Rule 25.4. Cases in which the Court ordered briefs to be filed sooner than normal are listed in Sec 14.4, footnote 19, *infra*. When certiorari is granted late in the term, or at the beginning of a new term, it is not unusual for the Court to advance the briefing schedule.

13.2 Physical Form, Number, and Color

The physical form of the brief is the same as for the petition for certiorari, as described in Rule 33. See Sec. 6.23, *supra*.

Forty copies of the brief, duplicated pursuant to Rule 33.1, are required to be filed. The Clerk will not accept briefs in word-processed double-spaced format, as is commonplace in federal courts of appeals. All merits briefs must be printed in booklet format, in conformance with Rule 33.1, in clear Century family (e.g., Century Expanded, New Century Schoolbook, or Century Schoolbook) 12-point type, with footnotes in Century family 10-point type, and with 2-point or more leading between lines. Rule 33.1(b). The 2007 revision of Rule 25 added a requirement that “[a]n electronic version of every brief on the merits shall be transmitted to the Clerk of Court and to opposing counsel of record at the time the brief is filed in accordance with guidelines established by the Clerk.” Rule 25.8.

Counsel must print additional copies of the brief for their own use and to serve opposing counsel. Under Rule 29.3, when the brief conforms to Rule 33.1, “three copies shall be served on each other party separately represented in the proceeding.” If more than three copies are desired, counsel must make their own arrangements.

A party allowed to proceed in forma pauperis should file with the Clerk one typed copy of the brief on the merits and serve one typed copy on each other party separately represented in the proceeding. See Rule 29.3. The Clerk will then supervise the printing of the brief for in forma pauperis parties and will arrange to have each party or counsel receive three copies of the printed brief. See Sec. 8.15, *supra*. It should be noted that, where the petitioner or appellant has been permitted to proceed in forma pauperis, the 30-day period for filing the opposing brief on the merits runs from the date when the respondent or appellee receives the typed copy—not the printed copy—of the opening brief of the petitioner or appellant.

Apart from the in forma pauperis situation, however, the Court will not permit the filing of any brief on the merits that does not comply with Rule 33.1.² That rule prescribes the methods of reproduction, the page and type

²In particularly urgent cases, the Court may establish an expedited briefing and argument schedule and permit the initial filing of briefs in unprinted form. But in that event, it is expected that the unprinted briefs will be replaced by printed ones as soon as possible. See *National League of Cities v. Brennan*, 419 U.S. 1100 (1975), where, as a condition to the continuance of a stay order, the filing of jurisdictional statements and replies thereto was expedited, the order stating: “Neither the jurisdictional statements nor the replies need be *initially* printed.” (Emphasis added.)

sizes, and other details, which are described in Sec. 6.23, *supra*. As the Court explained in *Snider v. All State Administrators, Inc.*, 414 U.S. 685, 686 (1974), Rule 33 is “functional in nature, and is designed to assure the Court that appendices, petitions, briefs, and the like which are subject to its provisions will be of uniform size and good legibility. We are not disposed to waive these standards.” Requiring briefs to be of uniform size makes possible their inclusion in the permanent sets of documents prepared for the Court’s records and maintained by the various depository libraries.

Rules 33.1(e) and 33.1(g) prescribe the colors of the covers of the briefs and other documents. The briefs on the merits of petitioners and appellants must be “light blue,” and of respondents and appellees “light red”; except for the adjective “light,” those are the same colors the Court had previously prescribed for the courts of appeals in Federal Rule of Appellate Procedure 32. An amicus brief on the merits in support of the petitioner or appellant, or in support of neither, must be “light green,” whereas an amicus brief in support of the respondent or appellee must be “dark green.” Reply briefs, which are gray in the courts of appeals, are yellow in the Supreme Court, which reserves gray for all government briefs. Rule 33.1(e). The covers of joint appendices are to be tan in the Supreme Court, although they are white in the courts of appeals. *Id.* In the Supreme Court, petitions for certiorari and jurisdictional statements are white. Petitions for rehearing and supplemental briefs have a tan cover. Rule 33.1(e) further provides that any document not listed in Rule 33.1(g) also “shall have a tan cover.” The Clerk’s Office furnishes counsel a chart depicting the various colors for brief covers. See also the table in Sec. 1.21, *supra*.

13.3 Length

The Supreme Court did not impose limits on the length of briefs until 1980. In major constitutional cases, it was often justifiable and desirable to present the results of thorough historical and other research in detail, and complex antitrust and other cases often required detailed analysis of very long records. Briefs of more than 100 pages in such cases were not uncommon, and their length was often fully warranted. Many cases did not fall into these categories, of course, and briefs often were longer than the Court thought necessary.

Most other American appellate courts had already limited the length of briefs, usually to a maximum of 50 pages unless leave to file a longer brief was granted.³ The explosion in the Supreme Court’s workload from 1,181 cases filed in the 1950 Term to over 4,000 cases in the 1980 Term to more than 8,000 cases today (see Sec. 1.16, *supra*) compelled that Court to resort to the same protective measures. For many years the Supreme Court imposed limits of 50 pages for merits briefs and 20 pages for reply briefs. The 2007 revision to the rules replaced page limits with word limits. Rule 24.3 now provides that “[a] brief on the merits may not exceed the word limitations specified in Rule 33.1(g)” — 15,000 words for main briefs on the merits and 7,500 words

³R. STERN, *supra* note 1, at 240–43.

for reply briefs. The methods of reproduction are the same as for petitions for certiorari, discussed in Sec. 6.23, *supra*. In addition, Rule 24.6 requires briefs to be, inter alia, “concise” and “free of irrelevant, immaterial, or scandalous matter.”

An application may be submitted to the Court or a Justice for leave to file a longer brief for good cause, “but application for such leave is not favored.” Rule 33.1(d). The application must comply with Rule 22, which governs applications to individual Justices. Under Rule 33.1(d), such an application “must be received by the Clerk at least 15 days before the filing date of the document in question, except in the most extraordinary circumstances.” Since most lawyers will not know how long their briefs will be that far in advance of the due date, this restriction in itself handicaps the submission of a successful application. Consequently, few applications to file longer briefs are made, and ever fewer are granted.⁴

The 2007 revision of Rule 33 clarified what items need not be counted in the word limitation. Rule 33.1(d) now reads:

The word limits do not include the questions presented, the list of parties and the corporate disclosure statement, the table of contents, the table of cited authorities, the listing of counsel at the end of the document, or any appendix. The word limits include footnotes. Verbatim quotations required under Rule 14.1(f), if set out in the text of the brief rather than in the appendix, are also excluded.

The 2007 revision of Rule 33 removed the previous uncertainty as to whether the listing of counsel at the end of the document violated the page limit when it ran over onto a page, which was sometimes unnumbered, following the last permitted page of the brief. Rule 33.1(d) now explicitly excludes the listing of counsel at the end of a document from the word limits.

The original version of this rule stated that the page limitations “are exclusive of the questions presented page,” suggesting that the questions presented could not exceed one page. The new word limits remove this uncertainty as well. In most cases, to be sure, the questions need not and should not be longer than one page. But there may well be cases in which competent counsel cannot conscientiously keep the questions that short—particularly if an introductory paragraph is needed to make the questions intelligible.

Longer questions have been accepted so far without challenge. Counsel should be aware, however, that the Court frowns on unduly long questions. Sec. 6.25, *supra*. Adherence to the questions presented in the petition for

⁴In *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), the petitioners requested leave to file a 50-page reply brief in response to four briefs, totaling 188 pages, filed by the respondents. The Court permitted a 30-page reply brief.

In response to a motion for a consolidated briefing schedule filed by the Solicitor General, the Court entered this order in *AT&T v. Iowa Utilities Board*, 522 U.S. 1101 (1998), a complex case involving cross appeals and numerous parties:

Petitioners may file briefs, not to exceed 50 pages, only on the questions presented in their petition on or before April 3, 1998. Cross-petitioners/respondents may file briefs, not to exceed 75 pages, that both respond to petitioners and address the questions presented in the cross-petitions on or before May 18, 1998. Petitioners may file briefs, not to exceed 50 pages, that both reply on their issues and respond to cross-petitioners' issues on or before June 17, 1998. Cross-petitioners may file briefs, not to exceed 25 pages, that only reply to cross-respondents' briefs on or before July 17, 1998.

certiorari will normally be acceptable, although minor clarifications or improvements in the phrasing of the questions are permissible. Rule 24.1(a).

Former Rule 33.7 provided that the Clerk shall return any document that does not comply with Rule 33 and that the Court may impose “appropriate sanctions” for violations of the rule. The elimination of this language does not reflect any softening of the requirement that documents strictly comply with the rules. The Clerk still has authority under Rule 1.1 “to reject any submitted filing that does not comply with” the rules, and that authority is exercised with some frequency.

Any appendix that is attached as a part of the brief on the merits must also comply with the Rule 33 requirements as to form, page size, and type size. That means, among other things, that any statutes, rules, or other matter reproduced in such an appendix must be printed in clear Century family 12-point type, and footnotes in the appendix material must be in Century family 10-point type, with 2-point or more leading between lines. Rule 33.1(b). The failure to comply with these requirements in the appendix contributed to the Court’s striking of a brief on the merits in *Huffman v. Pursue, Ltd.*, 419 U.S. 892 (1974).⁵

The full order of the Court in *Huffman* bears repeating, for it stands as a warning to the bar that briefs on the merits must comply with the various requirements of Rules 33 and 24. If violations of those rules are egregious enough, the Court may strike the brief and take other action against the counsel who submit such briefs. That order reads:

Brief for appellants does not comply with this Court’s Rules 39 and 40 [now Rules 33 and 24] with respect to conciseness, statement of questions without unnecessary detail, and printing of appendices thereto. Accordingly, * * * brief of appellants is hereby stricken. Counsel for appellants may file a brief complying with the Rules within 20 days of the date of this order. Oral argument will be allowed only by counsel who have filed briefs that conform to the Rules.

13.4 Names of Counsel of Record and Other Attorneys

The rules with respect to the names of counsel on the cover and at the end of briefs on the merits are the same as for petitions for certiorari, as

⁵Although the Court made no reference to the jurisdictional statement filed in the *Huffman* appeal, that statement was 89 pages long. Attached to it were 27 appendices numbering 462 pages. Much of the material reproduced in the appendices had been photographically reduced to less than 11-point type. The appendices also included more than 4,500 still photographs taken from various movies that were allegedly obscene, but the photographs were so small that *The New York Times* account (October 25, 1974) found “it fairly difficult to distinguish what is taking place, even with a scenario provided by the Ohio prosecutor.” The Court merely noted probable jurisdiction over the appeal (415 U.S. 974 (1974)), reserving its criticism for the appellants’ brief on the merits (419 U.S. 892 (1974)).

The brief on the merits that was stricken was 118 pages long, with a 31-page appendix containing material that was reduced to less than 11-point type. The Court’s order (419 U.S. 892 (1974)) does not specifically state that this brief was too long, although the order does refer to the noncompliance with the rules respecting conciseness and printing of appendices to the brief. The replacement brief was 95 pages long, with a 39-page appendix in proper type size. This replacement brief was accepted by the Court without comment, and nothing was said of the entire matter in the ensuing opinion on the merits of the appeal (420 U.S. 992 (1975)).

described in Sec. 6.15, *supra*. Printed names are sufficient, without manuscript signatures. As at the petition stage, a single counsel of record must be identified on the brief, even if the brief is being filed by multiple law firms or on behalf of multiple parties. It should be noted, however, that the counsel of record need not be the attorney who will present oral argument. It is also permissible to list some attorneys as “of counsel.”

Only attorneys named on the brief who are members of the Supreme Court Bar at the time the case is argued or the brief is filed will be listed at the beginning of the opinion in the United States Reports as “on the brief.” In contrast, the Reporter does not list the names of attorneys on petitions for certiorari, jurisdictional statements, or the opposing documents in connection with the summary orders granting or denying review.

Firm names never appear in the Reports, though there is no rule forbidding their use on briefs. Firm names are helpful to the Clerk’s Office in communicating with counsel. Adding the filing date after the attorneys’ names, though not required, is also permitted.

13.5 Service of Briefs

Rule 25.7 provides that:

The Clerk will not file any brief that is not accompanied by proof of service as required by Rule 29.

Rule 29 governs the service and proof of service of all documents required to be served. Thus, the requirements as to service of briefs are the same as for petitions for certiorari. See Sec. 6.32, *supra*.

13.6 Form of Citations and References to Parties

The rules do not specify any particular methods of citing cases or referring to parties. The usage in the Court’s printed opinions, which in the main conforms to that favored by the Reporter, may serve as a guide to counsel as to what the Court likes, even though in some respects it differs from the forms recommended in the 18th edition of *A Uniform System of Citation* (Bluebook, 18th ed. 2005), usually followed by law reviews.⁶ The following suggestions are believed to accord with the preferred practices:

(1) Supreme Court decisions should be cited to the official United States Reports, followed by the year of the decision. E.g., *Honig v. Doe*, 484 U.S. 305 (1988). Unofficial reports, such as the Supreme Court Reporter or the Lawyers Edition, which appear several months after the actual decisions, need not be cited unless a case has not yet been officially reported. Often, however, these reports are also cited as a convenience to counsel, many of whom do not have the bulkier official reports in their offices. Very recent opinions

⁶The subject is treated more fully in R. STERN, *supra* note 1, at 339–46.

may be cited to the official slip opinions issued by the Court, or to U.S. Law Week, which publishes the decisions a few days after they first are announced by the Court, or to an electronic database such as Westlaw or Lexis; they should be cited only until the other reports appear. Counsel can also call the Reporter of Decisions at 202-479-3390, who may be able to provide the citations for cases as they will appear in the official reports in advance of publication.

Cases before 91 U.S. should be cited by the name of the reporter, often abbreviated (e.g., *Coal Co. v. Blatchford*, 11 Wall. (for Wallace) 172 (1871)), as they were initially until 1874 and still are by the Court.⁷ The unofficial U.S. numbers printed in later editions of these early volumes have often been included as a convenience to counsel who usually will not have the older volumes. Briefs should give both numbers (as *Marbury v. Madison*, 1 Cranch (5 U.S.) 137 (1803)). Historical accuracy might best be served by placing the U.S. number in parentheses after the reporter's name. However, the Bluebook places the reporter's name in parentheses following the U.S. number (as *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)). Either form is acceptable. Given the substantial length of case captions appearing at the beginning of some Supreme Court opinions, it is both convenient and consistent with the Court's own practice to use the abbreviated case caption appearing at the top of the even-numbered pages of the opinion in the U.S. Reports.

(2) Citations to the lower federal courts should include the identity of the court and the year. It is most common to follow the form used by Thomson/West and the Bluebook (e.g., *Jones v. Smith*, 473 F.3d 850 (4th Cir. 2007)). The Court's own form (*Jones v. Smith*, 473 F.3d 850 (CA4 2007)) is, of course, also acceptable. Cases from the Court of Appeals for the District of Columbia Circuit need be cited only to the Federal Reporter. District Court cases should be cited as *Richards v. FleetBoston Financial Corp.*, 427 F. Supp. 2d 150 (D. Conn. 2006). If a lower court opinion has not been officially reported, or will remain unpublished but is available on an electronic database (such as Westlaw or Lexis), it may be cited as follows: *Kagen v. Flushing Hospital Medical Center*, 2000 U.S. Dist. LEXIS 16312 (E.D.N.Y. 2000) (unreported). However, when referring to the lower court opinions in the case before the Court, reference should be made to the appendix to the petition (Pet. App. 1a) and not the published case reports. The petition appendix is conveniently available to all of the Justices.

(3) State court citations should be to the official state reports if a case has been officially reported. The unofficial citation should also be included; since most attorneys lack ready access to official state reports except for their own states, citation to the reporter system is both a convenience and a courtesy to opposing counsel, which should be reciprocated. Moreover, since Supreme

⁷E.g., *Welch v. Texas Highways Dep't*, 483 U.S. 468, 482–84, 491–93, 498–502, 507–09 (1987); *Navarro Sav. Ass'n v. Lee*, 446 U.S. 458, 460–65 (1980). Using those numbers not only provides the original historical flavor but is historically accurate, while citing the Dallas volumes, which start with other Philadelphia court opinions also reported by Mr. Dallas, as “U.S.” certainly is not. On the other hand, adding the retrospectively established United States volume number has the advantage of putting the volume in overall chronological sequence and showing judges and lawyers (who may be unaware of the names of the first seven Supreme Court Reporters) that the volumes are part of the United States Reports.

Court Rule 14.1(d) requires the certiorari petition to provide citations to both the “official and unofficial reports” of the opinions below, it is fair to assume that the Court finds some value in the unofficial citations.

(4) Citation should be to the page of the opinion on which the significant passage occurs, as well as to the first page. E.g., *American Ins. Ass’n v. Garamendi*, 539 U.S. 396, 411 (2003).

(5) Federal statutes should be cited to the United States Code and, if there is good reason, also to the Statutes at Large.

(6) Use *supra* to refer to authorities only sparingly. It is easier to repeat the citation than for the Court to have to hunt through the brief for it. If *supra* is used in a citation, always include the page reference, at least if it is more than a page away. If the citation is long, an abbreviation will be sufficient. E.g., *GTE*, 427 U.S. at 54; or see *GTE*, discussed at p. 22, *supra*. Other informative forms are permissible.

(7) Avoid excessive use of footnotes. They make it harder for the judicial reader to follow the argument. Citations in the text are both less distracting and more likely to be read. If it cannot be avoided, however, a long string citation should probably be relegated to a footnote (e.g., a citation of many state statutes to show the standards adopted by state legislatures in response to a problem).

(8) Judge Prettyman of the Court of Appeals for the District of Columbia Circuit once advised: “Don’t keep saying ‘appellant’ and ‘appellee.’ By the time the reader gets to the third page he becomes completely confused as to which is which.”⁸ The same can be said of the terms “petitioner” and “respondent,” particularly where the petitioner in an earlier stage of the case was not the petitioner in the Supreme Court. A Justice is likely to be reading briefs in a number of cases at the same sitting. Although the Supreme Court rules are silent on the matter, it often is better to use the names of the individuals or corporations (or abbreviations thereof), or some descriptive appellation such as “the plaintiff,” “the defendant,” “the employee,” “the taxpayer,” or “the contractor.” The Federal Rules of Appellate Procedure now recommend using more descriptive appellations in briefs on appeal to the courts of appeals.⁹ Where there is only one private party in a case involving the United States or some other governmental agency, the use of “petitioner” or “respondent” may be appropriate if the governmental party is referred to as “the United States,” “the Government,” or “the Labor Board.” But if there is more than one private party, use of the more descriptive designations should be considered.

(9) Citations to the printed joint appendix should read “J.A. 36.” The Court’s rules include “App. 12” as an example of a reference to the Joint Appendix. Rule 24.1(g). However, the traditional abbreviation “J.A.” is still acceptable

⁸Judge Prettyman, *Some Observations Concerning Appellate Advocacy*, 39 VA. L. REV. 285, 292 (1953).

⁹See FED. R. APP. P. 28(d):

In briefs and at oral argument, counsel should minimize use of the terms “appellant” and “appellee.” To make briefs clear, counsel should use the parties’ actual names or the designations used in the lower court or agency proceeding, or such descriptive terms as “the employee,” “the injured person,” “the taxpayer,” “the ship,” or “the stevedore.”

and often preferable in order to avoid confusion with any other appendices. Citations to the appendix accompanying the petition for certiorari typically read “Pet. App. 36.” References to portions of the record not contained or not yet printed in the appendix may be made in any appropriate form, such as “Record 226,” “R. 226,” or “Complaint, p. 6.”

13.7 Organization of Brief

The organization of briefs is described in Rule 24. In general, the present rule, with one major deviation,¹⁰ adheres to the form long used by the Office of the Solicitor General and recommended in the first edition of this book.

After the cover, which must be prepared in the manner specified in Rule 34.1, the brief for the petitioner or appellant should contain the sections enumerated below in the order indicated, as set forth in Rule 24. The capitalized words are the titles generally used. Although it was previously common for the brief to contain a caption preceding item 4, *infra*, internal captions are not required. A form is set forth at Appendix IV, *infra*.

(1) QUESTIONS PRESENTED. Since 1980, the Court’s rules have required the Questions Presented to appear on the first page immediately after the cover. As in a petition for certiorari, the questions should be “expressed concisely in relation to the circumstances of the case” and will be “deemed to comprise every subsidiary question fairly included therein.” See Rules 14.1(a) and 24.1(a), and Secs. 13.8, *infra*, and 6.25–6.27, *supra*.

(2) LIST OF PARTIES AND CORPORATIONS. Immediately following the Questions Presented, on a separate page, must come a list of all parties in the court below, unless all are named in the caption. Rule 24.1(b). In a brief filed by a corporation, reference should also be made to any prior document prepared under Rule 33.1 (i.e., in booklet form) listing affiliated corporations (usually the petition for certiorari, the jurisdictional statement, or the opposing documents). “[O]nly amendments to the statement to make it current need be included.” Rule 29.6. If there has been no prior document, or if the only prior document was prepared under Rule 33.2, the list should appear here. Although prior practice permitted these lists to be placed in footnotes, such as on the first page of the body of the brief, the current rule requires the list of parties to follow the Questions Presented and to precede the tables of contents and authorities.

(3) TABLES OF CONTENTS AND AUTHORITIES. After the above items, the brief must contain tables of contents and authorities “if the brief exceeds five pages.” Rule 24.1(c). As former Rule 33.5 specified, each table should contain page references to the headings and authorities cited. Customarily, different classes of authorities (e.g., cases, constitutional provisions, statutes, textbooks) appear under separate subheadings. Except for the cases,

¹⁰As in petitions for certiorari, the Questions Presented now come immediately after the cover, before the Table of Contents.

the arrangement need not be alphabetical; statutes often can be more conveniently listed in numerical order.¹¹

(4) OPINIONS BELOW. Citations of the “opinions and orders entered in the case by courts and administrative agencies” must be included in the brief. Rule 24.1(d). Both official and unofficial reports must be cited.

(5) JURISDICTION. The next section of the brief should be “[a] concise statement of the basis for jurisdiction in this Court, including the statutory provisions and time factors on which jurisdiction rests.” Rule 24.1(e). This statement can be similar to the one used in the petition for certiorari. See Sec. 6.28, *supra*.

(6) CONSTITUTIONAL PROVISIONS and STATUTES INVOLVED. This section of the brief includes the citation to and the text of constitutional provisions, treaties, statutes, ordinances, and regulations involved in the case, as in the petition for certiorari. See Rule 24.1(f), and Secs. 6.24 and 7.10, *supra*. If the provisions and statutes are longer than one or two pages, they should be set forth in an appendix at the end of the brief, in which case the section in the body of the brief need only provide the citations and state that they are printed in the appendix. It is also sufficient if the relevant statutes and regulations have previously been set out in the petition for certiorari or the jurisdictional statement (or an appendix to either document), in which case the brief should so state.

(7) STATEMENT OF THE CASE. This section should be “[a] concise statement of the case, setting out the facts material to the consideration of the questions presented, with appropriate references” to the joint appendix or to the record. See Rule 24.1(g), and Sec. 13.9, *infra*.

(8) SUMMARY OF ARGUMENT. See Rule 24.1(h), and Sec. 13.10, *infra*.

(9) ARGUMENT. “The argument, exhibiting clearly the points of fact and of law presented and citing the authorities and statutes relied on,” follows the Summary. See Rule 24.1(i), and Sec. 13.11, *infra*.

(10) CONCLUSION. This section is a statement specifying with particularity the relief requested. It should not be a peroration or a final summation, but should make clear the party’s view as to the ultimate disposition of the case.¹² See Rule 24.1(j). The Conclusion should be followed by the words “Respectfully submitted” and the names and addresses of counsel, as specified in Secs. 6.15, *supra*, and 13.4, *supra*.

The brief for the respondent or appellee should follow the same form, “except that items required by subparagraphs 1(a), (b), (d), (e), (f), and (g)

¹¹Briefs on the merits are not likely to be affected by the limitation of the Table of Contents requirement to briefs exceeding five pages. The prior requirement of a Table of Authorities for briefs exceeding three pages was omitted from the 1990 rules.

¹²In *American Telephone & Telegraph Co. v. Central Office Telephone, Inc.*, 524 U.S. 214, 226 n.2 (1998), the Court emphasized that, “[c]ontrary to the dissent’s assertion,” it has “no obligation to search the record for the existence of a nonjurisdictional point not presented, and to consider a disposition (remand rather than reversal) not suggested by either side.”

of this Rule [(1), (2), (4), (5), (6), and (7) above] need not be included unless the respondent or appellee is dissatisfied with their presentation by the opposing party.” Rule 24.2. In other words, the sections referred to above under the titles Questions Presented, List of Parties, Opinions Below, Jurisdiction, Statutes Involved, and Statement of the Case may be omitted by the respondent or appellee. The respondent may, of course, make its brief completely independent of the petitioner’s brief and cover all items. The respondent will almost always wish to include its own Statement of the Case, although other items often can be, and sometimes should be, omitted rather than repeated.

The nature of some of the above items—Tables of Contents and Authorities, Opinions Below, Jurisdiction, Statutes Involved, and Conclusion—is sufficiently apparent from the above descriptions, and needs no elaboration. The other items will now be discussed separately.

13.8 Content of the Questions Presented

Rule 24.1(a) provides that petitioner’s briefs on the merits shall contain:

The questions presented for review under Rule 14.1(a). The questions shall be set out on the first page following the cover, and no other information may appear on that page. The phrasing of the questions presented need not be identical with that in the petition for a writ of certiorari or the jurisdictional statement, but the brief may not raise additional questions or change the substance of the questions already presented in those documents. At its option, however, the Court may consider a plain error not among the questions presented but evident from the record and otherwise within its jurisdiction to decide.

The manner of presenting questions in petitions for certiorari and jurisdictional statements is treated at length in Secs. 6.25 and 6.27, *supra*, and need not be repeated here. As to the length of the questions presented, see Sec. 13.3, *supra*.

The questions presented in briefs on the merits can often, though not always, be copied from the questions in the petition or jurisdictional statement. Counsel may not normally add to the substance of the questions previously assigned or specified. But, as the second sentence in the above quoted paragraph indicates, it is not improper for counsel to rephrase or rearrange the points so as to state them more clearly or accurately, or to eliminate points or merge several into a single question. Often this is desirable. However, if the Court’s order granting certiorari specifies the questions that it will consider, counsel should not make any changes to the Court’s own language.

A question set forth in a petition or jurisdictional statement will be considered abandoned if not reiterated and argued in the brief on the merits once review has been granted. See *Russell v. United States*, 369 U.S. 749, 754 n.7 (1962); *Posters ‘N’ Things, Ltd. v. United States*, 511 U.S. 513, 527 (1994); *United States v. International Business Machines Corp.*, 517 U.S. 843, 855 n.3 (1996). But, as indicated, the phrasing of the question reiterated in the brief on the merits can be “somewhat different” from that appearing in the petition. *Hampton v. Mow Sun Wong*, 426 U.S. 88, 98–99 (1976).

It should be noted that the last sentence of Rule 24.1(a) embodies the long-recognized “plain error” exception to the general provisions in Rule 14.1(a)

limiting petitioners and appellants to the questions presented in their petitions for certiorari and jurisdictional statements. The general rule and its exceptions are considered more fully in Sec. 6.26, *supra*, where the cases are reviewed. Such plain errors, which can include a jurisdictional defect or a constitutional violation, may be noticed during the oral argument before the Court or upon the Court's own examination of the record, including the trial court transcript. *Sibbach v. Wilson & Co.*, 312 U.S. 1, 16 (1941); *Vachon v. New Hampshire*, 414 U.S. 478, 479 (1974). But the Court long ago warned that it will notice such errors only in exceptional circumstances, and only "if the errors are obvious, or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings." *United States v. Atkinson*, 297 U.S. 157, 160 (1936); *Silber v. United States*, 370 U.S. 717, 718 (1962); and see *Mahler v. Eby*, 264 U.S. 32, 45 (1924); *Weems v. United States*, 217 U.S. 349, 362 (1910). Counsel obviously cannot assume that the Court will necessarily utilize this power to overlook a failure to raise a particular question that later becomes evident. The only safe advice is to raise all possible "certworthy" questions in the petition for certiorari or jurisdictional statement, and to repeat those questions in the brief on the merits.

13.9 Content of the Statement of the Case

This portion of a brief is sometimes called the statement of facts.¹³ "The statement of the facts is regarded by many advocates and judges as the most important part of the brief,"¹⁴ not merely as a necessary preliminary to the Argument. In the words of Justice Jackson:

The purpose of a hearing is that the Court may learn what it does not know, and it knows least about the facts. It may sound paradoxical, but most contentions of law are won or lost on the facts. The facts often incline a judge to one side or the other.¹⁵

Rule 24.1(g) provides that there shall be:

A concise statement of the case, setting out the facts material to the consideration of the questions presented, with appropriate references to the joint appendix, *e.g.*, App. 12, or to the record, *e.g.*, Record 12.

¹³Rule 14.1(g), the equivalent Supreme Court Rule for petitions for certiorari, calls for "[a] concise statement of the case setting out the facts material to consideration of the questions presented." A more precisely detailed description in the Federal Rules of Appellate Procedure requires both "a statement of the case briefly indicating the nature of the case, the course of proceedings, and the disposition below," followed by "a statement of facts relevant to the issues submitted for review with appropriate references to the record." FED. R. APP. P. 28(a)(6), 28(a)(7).

¹⁴These are the words of Judge Albert Tate, Jr. (later of the Court of Appeals of the Fifth Circuit), when he was a Justice on the Supreme Court of Louisiana, in *The Art of Brief Writing: What a Judge Wants to Read*, 4 LITIGATION 11, 14 (No. 2, 1978). Judge Bright of the Eighth Circuit also has stated that "[i]n]o part of the brief is more important than the statement of facts, for however much the court may know about the applicable principles of law, it knows nothing of the facts of the case before the lawyers submit their briefs." *Appellate Briefwriting: Some "Golden" Rules*, 17 CREIGHTON L. REV. 1069, 1071 (1984). Indeed, "[t]he law doesn't matter a bit, *except* as it applies to a particular set of facts." Judge Kozinski, *The Wrong Stuff*, 1992 B.Y.U. L. REV. 325, 330.

¹⁵Justice Jackson, *Advocacy Before the Supreme Court: Suggestions for Effective Case Presentations*, 37 A.B.A.J. 801, 803 (1951).

The requirement in the last clause as to joint appendix and record references is emphasized by Rule 24.5, which states that every reference to the joint appendix or the record in any part of a brief “shall indicate the appropriate page number,” and if to an exhibit, both by the page numbers “at which the exhibit appears, at which it was offered in evidence, and at which it was ruled on by the judge * * *, e.g., Pl. Exh. 14; Record 199, 2134.”

The Statement should contain, normally in chronological sequence, a recital of the facts of the case that are pertinent to the questions before the Supreme Court. A chronological arrangement is usually preferable, since it is easier for the Court to follow and understand. In many cases it is advisable, however, to preface the chronological story with an introductory paragraph relating how the action started, the nature of the proceeding, and the nature of the judgments below. In some cases, a topical division of the facts may be preferable to the chronological. Especially in cases involving a complex regulatory scheme, it may be desirable to begin the Statement with a section describing the statutory or regulatory background necessary to understand the relevant facts and procedural history. Counsel should select the arrangement that will best enable judges who, it should be assumed, know nothing of the facts to understand the case. Clarity should be the controlling criterion. The Statement should be broken up with appropriately numbered section headings to facilitate comprehension.

The Statement will usually end with a summary of the holding of the trial court or administrative agency and of the court immediately below the Supreme Court. How detailed this summary should be will vary with the individual case. A brief analysis may be sufficient when the opinion below is analyzed or summarized at some length in the Argument.

Since the rule requires the Statement to be separate from the Argument, the Statement should not be argumentative, although an argumentative introduction in the Statement is generally tolerated to acquaint the reader with the thrust of the argument and to make the factual recital more intelligible. The facts should be set forth and the arguments left until later.

The Statement should not merely state the facts that support one side of the case. The rule requires the inclusion of “the facts material to the consideration of the questions presented.” Obviously counsel is not giving the Court a fair picture of the case if he or she omits facts that favor the opposition.

Counsel must be candid not only because of the rule and his or her obligation as a member of the bar, but also because of the obligation to the client. The Court may, very reasonably, lose confidence in both the factual and legal statements of counsel who does not make a fair disclosure.¹⁶ And any attempt to gloss over or conceal unfavorable facts will be futile. Opposing counsel is almost certain to call the Court’s attention to the omission,

¹⁶Justice Wilkins of the Supreme Judicial Court of Massachusetts has stated that “[n]othing will forfeit confidence of the court more effectively than the misstatement of the record or the statement of a fact off the record.” *The Argument of an Appeal*, 33 CORNELL L.Q. 40, 42 (1947). Judge Wald also has warned: “Above all, be accurate on the record; a mistaken citation or overbroad reading can destroy your credibility vis-a-vis the entire brief.” *19 Tips from 19 Years on the Appellate Bench*, 1 J. APPELLATE PRAC. & PROC. 7, 11 (1999). See also Sec. 14.16, note 59, *infra*.

and apart from that, the Justices themselves are very likely to discover it. Accordingly, when there are unfavorable facts, they should be fairly set forth. Counsel may, and of course usually will, try to combine such a statement of possibly harmful matter with other facts that minimize its force and importance.

This does not mean that the Statement cannot serve a persuasive function. A good lawyer will produce a Statement that is fair and adequate, and at the same time, to the extent that the facts permit, leaves the impression that right and justice demand a decision in his or her favor. Legal theory is often flexible or in flux, giving the facts of particular cases a powerful formative influence on development of the law.

The answering brief for the respondent or appellee need not include a Statement, if counsel is willing to accept the Statement as made in the brief for the petitioner or appellant. If not, the respondent or appellee may merely correct the inaccuracies or omissions in the opposing Statement. Almost always, however, the answering brief should present a self-contained Statement of its own, since the opening brief usually will not leave the Court with what opposing counsel regards as an adequate picture of the case. The nature of the case, and the range and significance of the facts that are undisputed, will determine how extensive a Statement the answering brief should contain.

Any Statement is incomplete if it does not fully and candidly disclose all factual and legal developments that may alter the issues before the Court or affect the necessity or propriety of the Court's deciding those issues. As the Court said of a failure by both sides in a case to alert the Court in their briefs to recent amendments to a state law under constitutional scrutiny, "[w]e find it difficult to understand the failure of counsel fully to inform the Court of these amendments to Connecticut law." *Fusari v. Steinberg*, 419 U.S. 379, 387 n.12 (1975); see also Secs. 13.11(k), 14.16, and 14.17(d), *infra*.

13.10 Content of the Summary of Argument

Rule 24.1(h) makes a summary of argument mandatory for all principal briefs on the merits, filed by either the petitioner or the respondent, whatever their length.¹⁷ It provides that briefs on the merits shall contain:

A summary of the argument, suitably paragraphed. The summary should be a clear and concise condensation of the argument made in the body of the brief; mere repetition of the headings under which the argument is arranged is not sufficient.

Summaries are not required, however, for reply briefs, "if appropriately divided by topical headings." See Rule 24.4, and Sec. 13.13, *infra*. Counsel should be aware that the words devoted to the Summary are counted in determining compliance with the 15,000-word limit on briefs on the merits. Rule 33.1(d).

¹⁷Prior to 1980, when there were no page limits for briefs, summaries were required for "any briefs [including briefs on the merits] wherein the argument portion extends beyond twenty printed pages." Former Rule 40(1)(f).

The purpose of the Summary is to permit busy Justices, who may not have had time to read the brief in its entirety before oral argument, speedily to learn the substance of the argument presented. The Summary may be the only part of the brief that a Justice reads before the oral argument, or rereads shortly before or even during the oral argument. The Summary is also important for a Justice reading the entire brief, bridging the Statement, which has hopefully left the reader favorably disposed toward the party's side of the case, and the Argument, which explains the legal reasons for the desired outcome. It is thus a clear advantage to preface the Argument with an adequate Summary.

As Rule 24.1(h) makes clear, the Summary should not be a mere outline, or statement of points or titles. It should be a persuasive narrative argument in short form, which stands by itself, directed to the heart of the argument on each point, and citing only the few leading authorities thought to be controlling. Prior to the adoption of the Federal Rules of Appellate Procedure, the Court of Appeals for the District of Columbia Circuit required in its Rule 17(7) a summary of the argument of the type used in the Supreme Court. That rule, in language that may be helpful in preparing a Summary for the Supreme Court, described the summary as follows:

The summary of the argument should not be a mere repetition of the statement of points or of the assignments of error. The summary should be a succinct, but accurate and clear, picture of the argument actually made in the brief concerning the points or assignments. Because the summary of argument if properly prepared is most helpful to the court in following the oral argument and will often render unnecessary the making of inquiries by the court which consume time allowed for argument, counsel are urged to prepare the summary with great care.

The Summary cannot, of course, contain all the details of the Argument or all the citations. It will often be necessary to omit a refutation of all but the most important of the opposing arguments. Details of facts and legislative history and distinctions of opposing cases should be limited to the most important and decisive material. The Summary will suffer as much if it is too long as if it is too condensed.

Although any generalization as to how long the Summary should be is dangerous, since this will inevitably depend on the nature of the particular case, the Summary should normally run from 600 to 1,200 words (two to four pages), but not more than 10 percent of the argument it is summarizing, bearing in mind that the Summary words count in computing the brief's 15,000-word limit. Perhaps an example will best indicate the proper form for a summary.¹⁸

1. There can be no question that, by imposing \$4 million in punitive damages, the jury in this case punished BMW for hundreds of transactions that had no connection to Alabama. The Alabama Supreme Court so found, and the jury argument of Dr. Gore's counsel confirms it.

The Alabama Supreme Court correctly concluded that extraterritorial punishment of this sort is unconstitutional. In particular, the application of Alabama law to punish transactions that have no connection to Alabama was entirely arbitrary and unpredictable and therefore violated BMW's right to due process.

¹⁸From brief for petitioner in *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996).

It also infringed the sovereignty of Alabama's sister states. Finally, the application of Alabama law to punish BMW for non-Alabama transactions violated the Commerce Clause by unabashedly regulating out-of-state commerce.

Regrettably, the Alabama Supreme Court failed to remedy the constitutional violation it had identified. Rather than granting a new trial or applying the jury's \$4,000 per car formula to the number of cars for which the jury legitimately could punish (either Dr. Gore's car alone or, at most, the 14 cars sold in Alabama), the court simply undertook its usual excessiveness inquiry and cut the punitive damages in half. But there is no reason to presume that a properly functioning jury would have imposed a punishment of anywhere near \$2 million for BMW's Alabama-related conduct alone. Indeed, this jury's choice of a \$4,000 per car punishment strongly suggests that it would have chosen \$4,000 as the appropriate punishment for BMW's conduct with respect to Dr. Gore or \$56,000 as the appropriate punishment for BMW's entire Alabama-related conduct. Had a properly functioning jury returned such a verdict, the Alabama Supreme Court would have had no authority under state law to increase it. Accordingly, by using the tainted \$4 million punishment as its starting point and then merely reducing it to the maximum that a properly functioning jury permissibly could impose, the Alabama Supreme Court perpetuated the constitutional violation. For that reason, the judgment must be reversed with instructions to either grant a new trial or apply the jury's \$4,000 per car formula to the cars for which the jury legitimately could punish.

2. The \$2 million punitive damages award must be set aside for the independent reason that it is grossly excessive in violation of the Due Process Clause. The punishment is a breathtaking 500 times the actual and potential harm allegedly suffered by Dr. Gore and is 35 times the harm to all 14 Alabama BMW owners (assuming an average harm of \$4,000). In addition, the punitive damages are 1,000 times the civil penalty for violating Alabama's repair disclosure statute and over 70 times the maximum civil penalty that could be imposed for 14 violations.

Such disproportionate punishment cannot be justified by reference to the nature of the conduct. On the scale of reprehensibility, BMW's conduct in this case barely registers. The use of a 3% disclosure threshold is consistent with the statutes of the overwhelming majority of states that have legislated on the subject. Indeed, Alabama itself adopted a 3% disclosure threshold after the trial in this case. BMW's disclosure policy also is consistent with industry custom. Finally, BMW had no notice when it sold Dr. Gore's vehicle that its use of a 3% disclosure threshold would be deemed to violate the common law of any state.

It also would be wholly inappropriate to justify Dr. Gore's \$2 million windfall by reference to the numerous other purchasers of refinished BMWs. Because the other purchasers were not parties to Dr. Gore's litigation, there is nothing to stop them from attempting to impose additional punishment against BMW for the very same conduct. It is cold comfort to suggest that other courts and juries can take into account the \$2 million punishment in this case. No procedure exists to require them to do so, and experience in other multiple victim contexts demonstrates that they will not. Moreover, such an approach ignores the very real possibility that the verdict in this case is aberrational. If succeeding juries were to absolve BMW entirely or at least find, like the *Yates* jury, that BMW's conduct does not merit punitive damages, it would, in retrospect, turn out to be exceedingly unfair to have enhanced BMW's punishment in this case on the erroneous assumption that each and every non-disclosure of refinishing would be deemed to be punishable misconduct.

The *only* fair and workable solution to these problems is to require that the punitive damages in each case be limited to punishment for what the defendant did to the plaintiff in that case. When that approach is applied here, it is manifest that a \$2 million punishment for what BMW did to Dr. Gore is grossly excessive and must be set aside.

13.11 Content of the Argument

(a) *Argumentative Headings and Subheadings*

Usually a brief contains more than one argument or point. If so, the arguments should be arranged in a logical manner, using headings as signposts. Headings such as “Point I” or “The Perjury Count” tell the reader little; headings that are both declaratory and argumentative help the reader understand exactly what point is being made in the succeeding paragraphs and pages. In effect, such a heading serves as a valuable summary of the ensuing argument. Obviously, it cannot be a complete summary, nor should the heading be long, involved, or complicated. An effective heading might read as follows:

I. The Fact That BMW’s Disclosure Policy Affected Sales To Numerous Other BMW Owners Does Not Justify The \$2 Million Punishment.

Subheadings are also used in most briefs. They play an important role in maintaining the reader’s interest and in ensuring that the structure of the argument is completely clear. It is generally advisable to break up the Argument so that no more than three or four pages pass without a new subheading. Subheadings are ordinarily preceded by letters (A, B, C) to distinguish them from the headings, which are preceded by Roman numerals (I, II, III), and subheadings often employ a different type style (e.g., only initial capitals rather than all capitals used in the main headings).

(b) *Be as Brief as You Can*

The Argument—and the brief as a whole—should be as short as the nature of the case will permit. Former Rule 24.3 instructed that briefs should be “as short as possible.” This remains sound advice. Many briefs will not require a full 15,000 words. While a brief should include all pertinent material, it should avoid repetition and omit matter that has no significance to the question before the Court. Counsel should remember that the Court will be more grateful for a short brief than it will be impressed by an unnecessarily long one. Rule 24.6 now provides:

A brief shall be concise, logically arranged with proper headings, and free of irrelevant, immaterial, or scandalous matter. The Court may disregard or strike a brief that does not comply with this paragraph.

One substantial benefit of the 2007 revision of the rules is that the substitution of word limits for page limits eliminated the incentive to use 11-point type, which was permitted by the prior rules, in an effort to maximize the amount of material within the page limits. The 12-point type and the word limits required by Rule 33.1(b) make the brief easier to read while continuing to limit the length of the documents. In this, as in other matters, counsel should strive to make a brief as “user friendly” as possible for overburdened readers.

(c) *Use Good, Clear English*

The importance of good, clear grammatical English cannot be overstated. Long, confusing sentences do not advance an argument, nor does excessive use of stilted language or foreign phrases. A brief is not a deed or will or

contract, which perhaps must be written in legal jargon. It is an exercise in persuasion, written for Justices who may have time only to read it hastily, not to study it carefully. Good brief writing is not essentially different from good writing in other contexts, and all of the usual rules apply. Writers should attempt to keep sentences short, to avoid excessive use of the passive voice, to use active verbs frequently, and to break up long paragraphs. Textual footnotes and long block quotations should be avoided where possible and kept to a minimum. The brief should flow along simply, clearly and logically so that the reader cannot fail to understand each thought. Cases are won by convincing the Court that the argument is sound, not by impressing the Court with the brilliance of counsel.¹⁹ This is not to say, however, that there is no room for style in briefs. Good writing with a personal style and an occasional metaphor will hold the reader's interest.²⁰

(d) *Selection and Arrangement of Points*

Learned judges and experienced appellate advocates have recommended both that an argument should begin with its strongest point and also that one should immediately get to the heart of the case.²¹ These may not be the same. If a party has to win all of a number of points to prevail, his opponent's strongest point—and his weakest—may be the heart of the case. Sometimes the Court will expect a jurisdictional question to be discussed first. See Rule 24.1(e). Thus, the most effective arrangement will depend on the circumstances of the particular case.

The 1980 limitation on the length of briefs confronted Supreme Court brief writers with a problem long faced by writers in most other courts. Counsel may not have space in 15,000 words to argue all the points they would like; the weakest points may have to be omitted. Counsel must have the self-confidence to select the strongest arguments, although that is often easier to say than to do.²²

¹⁹See R. STERN, *supra* note 1, at 329–35, which attempts to summarize the difficulties many lawyers have with writing good English. For another effort to diagnose the problem, see C. Lutz, *Why Can't Lawyers Write?*, in ABA SECTION OF LITIGATION, *THE LITIGATION MANUAL: SPECIAL PROBLEMS AND APPEALS* 200–11 (3d ed. 1999).

²⁰Judge Wald has encouraged brief writers to “[p]epper your briefs with relevant metaphors and quotations.” *19 Tips from 19 Years on the Appellate Bench*, 1 J. APPELLATE PRAC. & PROC. 7, 21 (1999). Brief writers should, however, apply the pepper with restraint and avoid overblown rhetoric. *Id.* Judge Randolph has noted that “judges are [not] particularly persuaded by rhetorical flourishes. As a matter of fact, they may be put off by them unless done well, but they're so rarely done well.” J. Cole, *An Interview with Judge Randolph*, LITIGATION 50, 53 (Spring 1999).

²¹The subject is treated in more detail, with references to what others have written, in R. STERN, *supra* note 1, at 287–92.

²²*Id.* at 287–90. This problem is heightened by the very limited amount of time that the Justices can devote to reading the briefs. See A. Frey, K. Geller, & S. Gilles, *High Court Briefs: Saying Lots to Justices Who Have Little Time*, INSIDE LITIG. 29 (Jan. 1987), which estimates that in the average case, the Justices will spend “[a] half hour to an hour for each side” reading the briefs. Even when there is room for weaker arguments, a better strategy is to file a shorter brief containing only the strongest points. As Judge Wald put it: “Your main points have to stick with us on first contact—the shorter and punchier the brief the better.” *19 Tips from 19 Years on the Appellate Bench*, 1 J. APPELLATE PRAC. & PROC. 7, 10 (1999). Judge Bright has similarly advised that “[t]he need to concentrate on a very few claims is partly a matter of directing the Court's attention, during the increasingly limited time available for the consideration of the typical case, to the truly crucial issues. But it is also partly a matter of not obscuring the crucial issues by concealing them amid a thicket of minor or subsidiary claims.” *Appellate Briefwriting: Some “Golden” Rules*, 17 CREIGHTON L. REV. 1069, 1071 (1984).

(e) *Follow Your Own Pattern*

Although no pat formula can govern the preparation of a brief, counsel should almost always organize the Argument so as to emphasize his or her own affirmative case and not follow the opponent's pattern. Counsel should not, of course, fail to meet the opponent's points. Indeed, the petitioner should seek to anticipate and meet the opposing main argument in the opening brief and not hold the rebuttal for a reply that may have to be quickly prepared. See Sec. 13.1, *supra*, and Sec. 13.13, *infra*.

(f) *Argue Reasons and Principles*

The first and most important factor to remember is that counsel is writing for a *supreme* court whose decisions are not reviewable by any higher tribunal. Consequently, the Court is not bound by authorities to any greater extent than it wishes to be and is much freer to reach what it regards as the correct or sensible decision than any subordinate tribunal.²³ This means that, although prior authority is not to be ignored, counsel should place great emphasis on convincing the Court on grounds of reason and principle, apart from authority.²⁴ Very few cases that reach the Supreme Court are completely indistinguishable from prior decisions, and the Court has great facility in distinguishing cases it does not wish to follow. Arguments that insist that the Court must reach a result because of decisions in other cases, without any other persuasive reason, are not likely to fare very well. Past authority cannot even be relied on with complete confidence when the prior decision is that of

²³Justice Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735 (1949). Chief Justice Schaefer of Illinois has made the same point as follows (*Appellate Advocacy*, 23 TENN. L. REV. 471, 476 (1954)): "[T]he law does not live in black letter rules. It lives in the conditions of actual life that have given birth to those rules. It is on that plane that cases are actually decided." Since the Court wants to know why the rule has evolved and why it should apply to the particular case, counsel should shape both the brief and the argument "in terms of the consideration[s] from which the rules of law actually stem. That is, it seems to me, the characteristic as I have been able to analyze it, that separates the great argument and the great lawyer from the mediocre one." Judge Wald adds that counsel should "[b]e sure and tell us why it is important to come out your way, in part by explaining the consequences if we don't. The logic and common sense of your position should be stressed; its appropriateness in terms of precedent or statutory parsing comes later." 19 *Tips from 19 Years on the Appellate Bench*, 1 J. APPELLATE PRAC. & PROC. 7, 11 (1999). In developing such arguments, it is often helpful to provide citations to relevant academic commentary, restatements of the law, and model codes. See Justice Ginsburg, *Address at the Annual Dinner of the American Law Institute* 53–55 (May 19, 1994) (describing the Court's reliance on restatements and model codes). For a discussion of the Court's citation of philosophical studies, see N. Rao, *A Backdoor to Policy Making: The Use of Philosophers by the Supreme Court*, 65 U. CHI. L. REV. 1371 (1998). In the end, however, the Court will always be more interested in the reasons that support an argument than the pedigree of the authorities cited.

²⁴Justice Rutledge, while a member of the Court of Appeals for the District of Columbia Circuit, stated with respect to briefs in that court (*The Appellate Brief*, 9 D.C. B.A.J. 147, 157 (1942), and 28 A.B.A.J. 251, 253 (1942)):

Perhaps my own major criticism of briefs, apart from that relating to analysis, would be the lack of discussion on principle. Some cases are ruled so clearly by authority, directly in point and controlling, that discussion of principle is superfluous. But these are not many. It has been surprising to find how many appealed cases present issues not directly or exactly ruled by precedent.

The last statement is even more true in the Supreme Court.

a majority of the presently sitting Justices in an identical situation. Few cases of that nature reach the Court, and if they do, the Court's decision to grant certiorari suggests that at least some of the Justices may be willing to reconsider their own prior decision.

Briefing a constitutional question presents particular challenges. Constitutional arguments can be historical, textual, structural, prudential, or doctrinal—or a combination of these approaches. See PHILIP BOBBITT, *CONSTITUTIONAL FATE: A THEORY OF THE CONSTITUTION* 7–8 (1982) (explaining these five archetypes of constitutional argument). While one of these types of arguments may be dominant in any given case, counsel may have to consider and address all of them. Moreover, Justice Breyer has observed:

[T]he fact that most judges agree that * * * language, history, tradition, precedent, purpose and consequence * * * are useful does not mean that they agree about just where and how to use them. Some judges emphasize the use of language, history, and tradition. Others emphasize purpose and consequence. These differences of emphasis matter * * *.

STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 8 (2005). Indeed, various Justices have remarkably different approaches to constitutional interpretation. Justice Breyer, for example, has argued that the Constitution should be interpreted with reference to the active liberty of participation in democratic self-government. *Id.* Justice Scalia, in contrast, contends that the Constitution should be interpreted in accordance with its original meaning. See ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (1997).²⁵

In addition, *stare decisis* carries less weight in constitutional cases; the Supreme Court generally considers itself freer to overrule constitutional decisions than other decisions. See, e.g., *Glidden Co. v. Zdanok*, 370 U.S. 530, 543 (1962) (noting the Court's "considered practice" not to apply *stare decisis* "as rigidly in constitutional as in nonconstitutional cases"); cf. *Planned Parenthood v. Casey*, 505 U.S. 833, 867 (1992) (joint opinion of O'Connor, Kennedy, and Souter, JJ.) (arguing for an especially strong application of *stare decisis* when "the Court's interpretation of the Constitution calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution"). Accordingly, individual Justices are more likely to adhere to their prior dissenting views regarding the Constitution. See, e.g., *Kimel v. Florida Board of Regents*, 528 U.S. 62, 97 (2000) (Stevens, J., joined by Souter, Ginsburg, and Breyer, JJ.) ("Despite my respect for *stare decisis*, I am unwilling to accept *Seminole Tribe* as controlling precedent."). See also *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2794 (2007) (opinion of Kennedy, J.). As a result, in some constitutional

²⁵See also, e.g., *United States v. Virginia*, 518 U.S. 515, 557 (1996) (Ginsburg, J.) (stating that a "prime part of the history of our Constitution * * * is the story of the extension of constitutional rights and protections to people once ignored or excluded"); *id.* at 568 (Scalia, J., dissenting) (arguing that the Court's function in constitutional cases is to "prevent backsliding from the degree of restriction the Constitution imposed upon democratic government, not to prescribe * * * progressively higher degrees"); *Lawrence v. Texas*, 539 U.S. 559, 578 (2003) (Kennedy, J.) ("As the Constitution endures, persons in each generation can invoke its principles in their own search for greater freedom").

cases, counsel will have a high degree of confidence as to which way some Justices will vote and should take this into account in writing the brief.

Counsel briefing a constitutional issue must begin with an analysis of the text of the governing provision, its history and objectives, and the structure of the Constitution. Citing key rulings of the Court, including majority, concurring and sometimes dissenting opinions, is necessary to flesh out a constitutional argument in a brief. But the Court's analysis does not stop with these materials and extends to consideration of the practical needs of government officials at the federal and state level, views expressed by other branches of government, law enforcement experience, the practical needs of commerce, American history and tradition, and even the experience of foreign nations addressing similar matters. Effective briefs on constitutional issues often survey the weight of legal scholarship and address pertinent literature from other academic disciplines—all with the underlying understanding that, in Chief Justice Marshall's words, "it is a *constitution* we are expounding." *McCulloch v. Maryland*, 4 Wheat. (17 U.S.) 316, 407 (1819) (emphasis in original).

(g) *How to Treat Cases*

Because of the importance of reason and principle, the Court is not likely to be receptive to an Argument that consists primarily of a long string of quotations from, or abstracts of, other cases, particularly cases from lower courts. Cases that are on point or analogous, or that stand for a supporting principle, should of course be forcefully brought to the Court's attention. But what the Justices particularly want to know is why a case or line of cases should or should not be followed or applied.²⁶ It is usually sufficient to detail the best one or two cases on a point and merely to cite the remainder, with perhaps a one-sentence or parenthetical summary of each holding. The same is true as to quotations, which should be no longer than necessary and not merely cumulative. Judges are often not as impressed by even their own prior statements as an outsider might suspect; they are more aware than outsiders can be that the words were written, as Chief Justice Schaefer of the Illinois Supreme Court has said, "with a particular situation in mind and confined to that really."²⁷ Quotations should be accurate, and all omissions of matter

²⁶In the address referred to in footnote 24, Justice Rutledge stated (9 D.C. B.A.J. at 157–58, 28 A.B.A.J. at 253):

Discussion on principle is related directly to analysis of facts. If that is clearly and fully made, the former follows almost automatically. What judges want to know is why this case, or line of cases, should apply to these facts rather than that other line on which the opponent relied with equal certitude, if not certainty. Too often the *why* is left out. The discussion stops with assertion that this case or line of cases rules the present one. Assertion is not demonstration. * * * The argument which stops at this point may give judges the lead it is desired they follow. But it is bob-tailed, nevertheless. The lead may be the wrong one, or the judge may think it such. The attorney's reasons for thinking it the right one may keep the judge out of error, if he can be saved. In a close case, where the authorities pertinent by analogy are conflicting and especially when they are equally pertinent and numerous on both sides, the discussion of the underlying principles as related to the present application counts heavily to swing the scales.

²⁷As Chief Justice Schaefer observed:

Both in the oral argument and in the written brief be wary of how you use the court's own language. A man does not sit very long on an appellate court before he becomes extremely cautious

deemed immaterial should be indicated. It is, of course, improper to omit unfavorable portions of a quotation, which might give a different impression. Indeed, counsel should “take care not only to avoid garbling the quotation but to avoid the least appearance of doing so.”²⁸ In case of doubt, quote the whole passage, since it is much better for the Court to question the strength of your citation than your integrity. But excessively long quotations should be avoided.

The number of citations needed for a particular proposition will depend upon the Court’s familiarity with it. Reference to one or two leading and preferably recent cases standing for a well-recognized principle will be better appreciated than a long string of authorities. Where a point is less likely to be familiar to the presently sitting Justices, further elaboration of the authorities may be advisable. Where a case is important enough to be discussed at any length, a bare abstract or quotation will not have the persuasive value of a short argument as to why the case is the same as (or, if your opponent’s, different from) the case at bar.

(h) *Statutes and Legislative History*

When dealing with the meaning of statutes,²⁹ make a full argument with respect both to the statutory language and to the purpose and legislative history. But start with the language and structure of the law. “The starting point in every case involving construction of a statute is the language itself.” *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 197 (1976); *TVA v. Hill*, 437 U.S. 153, 173 (1978); *Consumer Prod. Safety Comm’n v. GTE Sylvania*, 447 U.S. 102, 108 (1980); *Kelly v. Robinson*, 479 U.S. 36, 43 (1986); *United States v. Ron Pair*

as to the meaning of what some judge, including himself, has said in some earlier case. Your naivete about that when you are a judge lasts just until the first time somebody quotes back at you something you have written yourself. After that experience, your guard is eternally up. Having seen how what you wrote with a particular situation in mind and confined to that really—and perhaps you were a little careless, even though you tried not to be—can be quoted as applicable in quite different circumstances, you are going to be cautious about taking the words at their sheer face value, whether it be your language or some other judge’s.

Chief Justice Schaefer, *The Appellate Court*, 3 U. CHI. L. S. REC. 10, 11 (1954).

In the same passage Chief Justice Schaefer emphasized that “opinions do not all have the same value,” even to the writer. In close cases, “[y]ou convince yourself as Cardozo once said, 51 percent, and then you write an opinion that indicates you are convinced 99 percent. Your colleagues may go along with the opinion convinced in varying degrees from somewhere in the 40 percent area up to somewhere in the 70 percent range. The opinion that emerges is the opinion of the court, but it is actually a very close decision, not to be stretched, not to be expanded, and not to be distorted.”

²⁸Stated by Justice Wilkins of the Supreme Judicial Court of Massachusetts, in *The Argument of an Appeal*, 33 CORNELL L.Q. 40, 43 (1947).

Judge Prettyman has written (*Some Observations Concerning Appellate Advocacy*, 39 VA. L. REV. 285, 292 (1953)):

Never rely upon a quoted extract from an opinion, unless it accurately sums up the decision upon the point. Sentences out of context rarely mean what they seem to say, and nobody in the whole world knows that better than the appellate judge. He has learned it by the torturing experience of hearing his own sentences read back to him.

²⁹On this subject see Justice F. Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527 (1947). See also Note, *A Decade of Legislative History in the Supreme Court: 1950–1959*, 46 VA. L. REV. 1408 (1960); R. POSNER, *THE FEDERAL COURTS* 261–93 (1985); F. Easterbrook, *Statutes’ Domain*, 50 U. CHI. L. REV. 553 (1983).

Enters., 489 U.S. 235 (1989). In *Garcia v. United States*, 469 U.S. 70, 75 (1984), then-Justice Rehnquist stated for the Court:

When we find the terms of a statute unambiguous, judicial inquiry is complete, except in “rare and exceptional circumstances.”

Even when the language employed in a statute is not conclusive, the language always remains the foremost guide to legislative intention.³⁰ The reason, as the Court emphasized in *S&E Contractors, Inc. v. United States*, 406 U.S. 1, 14 n.9 (1972), is found in the caveat of Justice Holmes: “We do not inquire what the legislature meant; we ask only what the statute means.”³¹

The Court will, in appropriate circumstances, apply traditional canons of construction in interpreting statutory language. See, e.g., *Gonzales v. Carhart*, 127 S. Ct. 1610 (2007) (applying doctrine of constitutional avoidance to Partial-Birth Abortion Ban Act of 2003 so as not to pose an undue burden on a woman’s right to abortion); *Lopez v. Gonzales*, 127 S. Ct. 625, 631 (2006) (“where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion”) (alteration in original; internal quotation marks omitted); *Zadvydas v. Davis*, 533 U.S. 678, 682, 690 (2001) (applying the doctrine of constitutional doubt in construing a statute to allow detention of aliens only for a reasonable time); *Neder v. United States*, 527 U.S. 1, 21 (1999) (when a statute includes terms that have “accumulated settled meaning under * * * the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms”); *Beck v. Prupis*, 529 U.S. 494, 500–01 (2000) (when Congress uses a word or phrase with a settled meaning at common law, it is presumed to know and adopt that meaning unless the statute indicates otherwise); *Bank America Corp. v. United States*, 462 U.S. 122, 130 (1983) (giving “great weight to the contemporaneous interpretation of a challenged statute by an agency charged with enforcement”); *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 348 (1998) (specific language “governs the general”); *Beach v. Ocwen Fed. Bank*, 523 U.S. 410, 418 (1998) (“where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts rationally and purposely in the disparate inclusion and exclusion”). But see *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 167 (2004) (when statutory meaning is clear, no need to inquire into purposes because “it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed”) (internal citations omitted); *Director, Office of Workers’ Comp. Programs v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 135 (1995) (describing “the proposition that [a] statute * * * should be liberally construed to achieve its purposes” as the “last redoubt of losing causes”); *Board of Governors v. Dimension Fin. Corp.*, 474

³⁰*United States v. American Trucking Ass’ns*, 310 U.S. 534, 543 n.18 (1940); *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 390–95 (1951); *United States v. Oregon*, 366 U.S. 643, 648 (1961); *United States v. Rutherford*, 442 U.S. 544, 551 (1979).

³¹O. W. Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 419 (1899).

U.S. 361, 373–74 n.6 (1986) (rejecting “application of ‘broad’ purposes of legislation at the expense of specific provisions”); *Mohasco Corp. v. Silver*, 447 U.S. 807, 826 (1980) (the Supreme Court will “respect” the “compromise embodied in the words chosen by Congress,” rather than distorting unambiguous language by resort to interpretative maxims).

In interpreting a statute, the Court will consider its place in a broader statutory scheme, rather than viewing statutory language in isolation. *Zuni Public School District No. 89 v. Department of Educ.*, 127 S. Ct. 1534, 1541 (2007); *Reno v. Koray*, 515 U.S. 50, 56 (1995). The Court has summarized this principle as follows:

The words of a statute must be read in their context and with a view to their place in the overall statutory scheme. A court must therefore interpret the statute as a symmetrical and coherent regulatory scheme and fit, if possible, all parts into an harmonious whole. Similarly, the meaning of one statute may be affected by other Acts, particularly where Congress has spoken subsequently and more specifically to the topic at hand.

FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000) (internal citations and quotations omitted).

The Court also strives to avoid statutory interpretations that are “absurd or glaringly unjust.” *Ingalls Shipbuilding, Inc. v. Director, Office of Workers’ Compensation Programs*, 519 U.S. 248, 261 (1997); see also *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 69–70 (1994) (“We do not assume that Congress, in passing laws, intended” absurd results). The Court has stated that in matters of statutory construction, it “must be guided to a degree by common sense.” *FDA*, 529 U.S. at 133.

Counsel should take care in making use of legislative history and other external sources in statutory interpretation. Some members of the current Court, most prominently Justice Scalia, have been vocal in their opposition to reliance on legislative history.³² It is unclear to what extent this resistance has actually affected the Court’s decision making,³³ as there remain many cases in which the Court looks to legislative history for guidance. See, e.g., *Safeco Ins. Co. of Am. v. Burr*, 127 S. Ct. 2201, 2211 & n.11 (2007); *Holly Farms Corp. v. National Labor Relations Bd.*, 517 U.S. 392, 399 n.6 (1996);

³² “[T]he law is what the law says, and we should content ourselves with reading it rather than psychoanalyzing those who enacted it.” *Bank One Chicago, N.A. v. Midwest Bank & Trust Co.*, 516 U.S. 264, 279 (1996) (Scalia, J., concurring in part and concurring in the judgment). See also JUSTICE SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 29–37 (1997). Other Justices have expressed similar misgivings. See, e.g., *Public Citizen v. United States Dep’t of Justice*, 491 U.S. 440, 473 (1989) (Kennedy, J., concurring) (“it does not foster a democratic exegesis for this Court to rummage through unauthoritative materials to consult the spirit of the legislation in order to discover an alternative interpretation of the statute with which the Court is more comfortable”). But see Kozinski, *Should Reading Legislative History Be An Impeachable Offense?*, 31 SUFFOLK L. REV. 807 (1998); Breyer, *On The Uses Of Legislative History In Interpreting Statutes*, 65 S. CAL. L. REV. 845 (1992); *Zuni Pub. Sch. Dist. No. 89 v. Department of Educ.*, 127 S. Ct. 1534, 1550 n.2 (Stevens, J., concurring) (“any competent counsel challenging the validity of a presumptively valid regulation would examine the legislative history of its authorizing statute before filing suit”).

³³ See J. Schacter, *The Confounding Common Law Originalism in Recent Supreme Court Statutory Interpretation: Implications for the Legislative History Debate and Beyond*, 51 STAN. L. REV. 1 (1998); R. Kelso, *Statutory Interpretation Doctrine on the Modern Supreme Court and Four Doctrinal Approaches to Judicial Decision-Making*, 25 PEPP. L. REV. 37 (1997).

Inter-Modal Rail Employees Ass'n v. Atchison, T. & S. F. Ry. Co., 520 U.S. 510, 515 (1997); *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). The best approach is first to argue that the statutory language itself leads to the desired conclusion, and then to separately argue that the legislative history or “background of the statute” supports this reading. In the end, the Court will look at all indicia of legislative intent,³⁴ and counsel cannot foretell when the Court will find language so unambiguous that other expressions of intent will not be given weight.

Committee reports and statements of committee members or the sponsors of legislation carry the most weight.³⁵ Statements in hearings by persons responsible for the preparation or drafting of a bill are also frequently consulted as guides to its meaning.³⁶ Debates on the floor of Congress are often considered, “though not entitled to the same weight” as committee reports. *United States v. Auto Workers*, 352 U.S. 567, 585–87 (1957); *Chandler v. Roudebush*, 425 U.S. 840, 858 n.36 (1976). As stated in *S&E Contractors, Inc. v. United States*, 406 U.S. 1, 13 n.9 (1972), “[i]n construing laws we have been extremely wary of testimony before committee hearings and of debates on the floor of Congress save for precise analyses of statutory phrases by the sponsors of the proposed laws [citing cases].” The Court has also said that other remarks during the course of legislative debate or hearings are not treated as significant expressions of legislative intention,³⁷ although they may on occasion reflect the general legislative understanding.³⁸ Changes in the form of a bill as it proceeds through various drafts may also be significant.³⁹ But “the

³⁴*Cass v. United States*, 417 U.S. 72, 77–79 (1974); *United States v. American Trucking Ass'ns*, 310 U.S. 534, 542–44 (1940); *United States v. Dickerson*, 310 U.S. 554, 562 (1940); *Commissioner v. Estate of Bosch*, 387 U.S. 456, 463 (1967); *Anderson Bros. Ford v. Valencia*, 452 U.S. 205, 222 n.20 (1981). “Where the mind labours to discover the design of the legislature, it seizes everything from which aid can be derived.” *United States v. Fisher*, 2 Cranch. (6 U.S.) 358, 386 (1805) (Marshall, C.J.).

³⁵*Wright v. Vinton Branch Bank*, 300 U.S. 440, 463–64 (1937); *United States v. United Mine Workers*, 330 U.S. 258, 278–80 (1947); *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 474–75 (1921); *Chicago, M., St. P. & P.R.R. v. Acme Fast Freight*, 336 U.S. 465, 472–77 (1949); *Mitchell v. Kentucky Fin. Co.*, 359 U.S. 290, 293–95 (1959); *National Woodwork Mfrs. Ass'n v. NLRB*, 386 U.S. 612, 639–40 (1967); *Lewis v. United States*, 445 U.S. 58, 63 (1980); *Garcia v. United States*, 469 U.S. 70, 75 (1984); *Eldred v. Ashcroft*, 537 U.S. 186, 209 n.16 (2003) (“[i]n surveying legislative history we have repeatedly stated that the authoritative source for finding the Legislature’s intent lies in the Committee Reports on the bill, which represent[t] the considered and collective understanding of those [Members of Congress] involved in drafting and studying proposed legislation”) (internal citations omitted).

³⁶E.g., *Humphrey v. Smith*, 336 U.S. 695, 698–700 n.9 (1949); *United States v. American Trucking Ass'ns*, 310 U.S. 534, 547 n. (1940); *Western Union Tel. Co. v. Lenroot*, 323 U.S. 490, 496–98 (1945); *United States v. Auto Workers*, 352 U.S. 567, 573–75 (1957). A statement on the floor by a congressman immediately following his introduction of an amendment, which later became part of the final enactment, has been held to be “clearly probative of a legislative judgment.” *Simpson v. United States*, 435 U.S. 6, 13 (1978). But cf. *Chrysler Corp. v. Brown*, 441 U.S. 281, 311 (1979) (“the remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history”); see also *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 117–20 (1980).

³⁷*Zedner v. United States*, 126 S. Ct. 1976, 1991 (2006) (describing as naïve the belief “that what is said by a single person in a floor debate * * * represents the view of Congress as a whole”) (Scalia, J., concurring); *Garcia v. United States*, 469 U.S. 70, 76 (1984); *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 125 (1942); *United States v. United Mine Workers*, 330 U.S. 258, 276–77 (1947); *McCaughn v. Hershey Chocolate Co.*, 283 U.S. 488, 493–94 (1931), and cases cited.

³⁸*Federal Trade Comm'n v. Raladam Co.*, 283 U.S. 643, 650–51 (1931); *Humphrey's Executor v. United States*, 295 U.S. 602, 625 (1935); *Arizona v. California*, 373 U.S. 546, 572 (1963).

³⁹*Wright v. Vinton Branch Bank*, 300 U.S. 440, 464 n. 9 (1937).

fears and doubts of the opposition are no authoritative guide to the construction of legislation.” *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 483 (1981). See, e.g., *National Woodwork Mfrs. Ass’n v. NLRB*, 386 U.S. 612, 639–40 (1967). Subsequent legislative history may or may not be given weight. Compare *Andrus v. Shell Oil Co.*, 446 U.S. 657, 666 n.8 (1980), with *Consumer Prod. Safety Comm’n v. GTE Sylvania*, 447 U.S. 102, 117–18 (1980), decided by the same Justices one week apart. See also *Alexander v. Choate*, 469 U.S. 287, 308 n.27 (1985); *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990) (“Subsequent legislative history is a ‘hazardous basis for inferring the intent of an earlier Congress.’ ”); *Babbitt v. Sweet Home Chapter of Cmty. for a Great Oregon*, 515 U.S. 687, 707 (1995) (using House and Senate Reports of the 1982 amendments to the Endangered Species Act of 1973 to interpret language in the original version).

Congressional inaction or silence can sometimes support an inference that Congress has approved or ratified an agency interpretation of a statute, particularly when such interpretations are generally known or longstanding. *Johnson v. Transportation Agency, Santa Clara County, Cal.*, 480 U.S. 616, 629 n.7 (1987) (congressional inaction after a decision eight years earlier interpreting Title VII of the Civil Rights Act to allow affirmative action indicated legislative acceptance of the interpretation); *Bob Jones Univ. v. United States*, 461 U.S. 574, 599–601 (1983); *United States v. Rutherford*, 442 U.S. 544, 554 & n.10 (1979); *Zemel v. Rusk*, 381 U.S. 1, 11–12 (1965). That is especially true where Congress has amended a law in other respects and left “untouched” a longstanding administrative or judicial interpretation. *Zemel*, 381 U.S. at 11. But the Court has sometimes failed to give effect even to subsequently passed legislation, premised on an understanding of prior law, as a definitive interpretation of the meaning of earlier legislation. *Mackey v. Lanier Collection Agency*, 486 U.S. 825, 839–40 & n.15 (1988); *R.J. Reynolds Co. v. Durham County*, 479 U.S. 130, 151–52 n.22 (1986) (subsequent enactments with a “narrow focus,” which imply a particular interpretation of prior law, are “not persuasive as to Congressional purpose”).

The Court always wants to see the statutory language, and also the pertinent passages from legislative history. Indeed, the Justices have chastised attorneys at oral argument for relying on statutes not set out in the brief or appendix. The exact language, not a paraphrase or summary, should be made available. If very lengthy, statutory matter can be set forth in full in an appendix to the brief. Despite the general undesirability of repetition in briefs, it is usually wise to quote the pertinent language at the appropriate point of the Argument, even though the statute will also be set forth in the Statutes Involved or an appendix.

Arguments that on their face relate only to the policy or wisdom of a particular interpretation “are more properly addressed to legislators or administrators, not to judges.” *Chevron, U.S.A., Inc. v. Natural Res. Defense Council*, 467 U.S. 837, 864 (1984). This, however, does not preclude reference to the practical consequences of adopting a particular construction of a statute or to the effects of that construction upon achievement of the purposes of the statute. In the extreme case, as noted above, the Court will reject literal statutory interpretations that produce patently absurd results. See *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 68–70 (1994).

In view of the uncertainty inherent in applying such rules of interpretation, the safest course for counsel is to present all arguments that reasonably support the desired result—using the plain language, the structure of the statute, the canons of construction, the legislative history, and the practical consequences of competing interpretations—without seeming to rely exclusively on any particular theory of statutory construction. See, e.g., *Zuni Pub. Sch. Dist. No. 89 v. Department of Educ.*, 127 S. Ct. 1534, 1541–42 (2007); *Cohen v. de la Cruz*, 523 U.S. 213 (1998); *Muscarello v. United States*, 524 U.S. 125 (1998).

(i) *Avoid Overstatement*

The effect of an argument and of authorities should not be exaggerated. Complete candor is as necessary in the Argument as in the Statement (see Sec. 13.9, *supra*). Any overstatement is almost certain to backfire. This is particularly true as to the inaccurate use of citations.⁴⁰ If an authority relied on is a dictum, say so yourself; do not wait for your opponent to point it out. Do not strain the facts or language of a case to make it appear indistinguishable; admit that there may be a slight difference, but argue, if you can, that the controlling principle is the same and that the difference is of no consequence.

This is not merely an admonition to lawyers to be honest and ethical. Most appellate advocates are. But an entirely conscientious lawyer develops blind spots that make him or her unable to appreciate how authorities or facts of record will appear to an impartial outsider such as a judge, much less to the opponent. A good appellate lawyer will be aware of this inevitable advocate's bias and will attempt to avoid it in the brief, perhaps by submitting the brief for review by a lawyer not so immersed in the case.

(j) *Avoid Personalities or Scandalous Matter*

If the record contradicts a statement in an opposing brief, say so without suggesting that your opponent intended to mislead. Pointing out that the opposition's statements are contradicted or unsupported by the record or judicially noted facts is sufficient without more. Any scandalous matter, personal attack on opposing counsel or a lower court judge, or imputation of improper conduct by counsel have no place whatever in the brief. Rule 24.6 warns that "[t]he Court may disregard or strike" briefs containing scandalous matter. See *In re Fletcher*, 344 U.S. 862 (1952); *Knight v. Bar Ass'n*, 321 U.S. 803 (1944); *Missouri, K. T. R.R. Co. v. Texas*, 275 U.S. 494 (1927); *Royal Arcanum v. Green*, 237 U.S. 531, 546 (1915); *Green v. Elbert*, 137 U.S. 615 (1891). When such matter appears, a motion to strike all or a portion of the offensive brief becomes appropriate; or the Court may act on its own motion. Indeed, the Court has the power to impose disciplinary sanctions on offending counsel by levying fines, disallowing the right to participate in oral argument until a proper brief has been filed, suspending them from practice, and even issuing

⁴⁰See the quotation from Justice Rutledge in Sec. 14.16, note 60, *infra*.

orders to show cause why they should not be disbarred. See *In the Matter of Teddy I. Moore*, 529 U.S. 1063 (2000).

(k) *Facts Outside the Record—General Rule*

That parties and courts, including appellate courts, are limited to reliance upon facts in the record is an accepted principle that, like most principles, is generally but not invariably true. The entire system of determining disputes by trial before a court rests on the assumption that decisions must be based on the evidence submitted to (and held admissible by) the court and nothing else. In the normal situation, attempts to rely on nonrecord facts in appellate courts are “unprofessional conduct.”⁴¹

On occasion counsel have sought to influence the Court’s decision in a case by attaching to a brief or to a petition for rehearing some additional or different evidence that is not part of the certified record, such as an affidavit or an unsworn statement. The Court has consistently condemned such efforts, as well as any arguments based thereon in the brief or petition. *Russell v. Southard*, 12 How. 139, 158–59 (1851) (“This court must affirm or reverse upon the case as it appears in the record”); *Hopt v. Utah*, 114 U.S. 488, 491–92 (1885) (“The lawfulness of the conviction and sentence of the defendant is to be determined by the formal record * * * and not by *ex parte* affidavits”); *Adickes v. Kress & Co.*, 398 U.S. 144, 157–58 n.16 (1970) (“Manifestly, it [an unsworn statement of a witness] cannot be properly considered by us in the disposition of the case”). While the Supreme Court has yet to do more than condemn and then ignore such attempts, counsel should be aware of the serious risks involved and avoid possibly prejudicing his or her case.⁴² The Court has, however, (though rarely) itself requested the disclosure of nonrecord facts that suggested the unconstitutionality of a defendant’s criminal conviction, in the hope of enabling a state court “to take action which might dispose of the case” without deciding constitutional questions. *Giles v. Maryland*, 386 U.S. 66, 74, 80 (1967).

(1) *Facts Subject to Judicial Notice*. Facts that are subject to judicial notice constitute a well-recognized exception to the general rule. The taking of judicial notice of a fact outside the record is part of the inherent power and function of every court, whether a trial or appellate tribunal.⁴³ Judicial notice does not play a large part in most litigation, and thus does not to any significant extent undermine the general principle as to staying within the record.

The definition in the Federal Rules of Evidence (Rule 201(b)), which in substance states the preexisting general law, is that:

⁴¹AMERICAN BAR ASSOCIATION STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE, Prosecutor Function Standard 3–5.9; Defense Function Standard 4–7.9 (2d ed. 1979).

⁴²In the event that counsel believes that nonrecord facts may properly be brought to the Court’s attention, a motion to enlarge the record may be filed. *Kyles v. Whitley*, 513 U.S. 958 (1994) (granting motion to enlarge the record); *Campbell v. Louisiana*, 522 U.S. 1013 (1997) (same).

⁴³ABA STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE, COMPILATION 98, 135–36 (1974).

A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

The subject of judicial notice, which is treated at length in many works on the law of evidence, cannot be explored fully in this book.⁴⁴

Courts may take judicial notice of “legislative facts” and, subject to the limitations set forth in the Federal Rules of Evidence, of “adjudicative facts.” The Advisory Committee’s Note to Federal Rule 201 explains that:

Adjudicative facts are simply the facts of the particular case. Legislative facts, on the other hand, are those which have relevance to legal reasoning and the lawmaking process, whether in the formulation of a legal principle or ruling by a judge or court or in the enactment of a legislative body.

These guidelines are not very specific. The Supreme Court has frequently referred to factual materials outside the record in two contexts discussed below.

On rare occasions, counsel (usually the Solicitor General’s Office) seeks to call the Court’s attention to official documents not in the record that shed light on the arguments in a case. In such circumstances, copies of the documents may be “lodged” (not “filed”) with the Clerk’s Office with a short explanation of the reason for doing so. Rule 32.3 provides that any party or amicus curiae that desires to “lodge non-record material with the Clerk must set out in a letter, served on all parties, a description of the material proposed for lodging and the reasons why the non-record material may properly be considered by the Court.” The rule further provides that the “material proposed for lodging may not be submitted until and unless requested by the Clerk.” In the past, the Court has stricken improper lodged material.⁴⁵

(2) *The Brandeis Brief*. The general requirement that a brief stick to the facts in the record does not preclude the use of the so-called Brandeis brief technique in bringing to the Court’s attention published material containing facts that bear upon the reasonableness of legislation. See *Muller v. Oregon*, 208 U.S. 412, 421 (1908), where the Court stated, in reliance upon the materials contained in the famous Brandeis brief, that “[w]e take judicial cognizance of all matters of general knowledge,” which there consisted of scientific writings establishing that overly long working hours were detrimental to the health of women. Facts of this character, not restricted to the parties to the case, have often been considered even though they may not have been clearly indisputable. Often such facts, even if not technically within the scope of

⁴⁴See Advisory Committee Note to Federal Rule of Evidence 201; 1 WEINSTEIN’S FEDERAL EVIDENCE, ch. 201 (2d ed. 2002); 2 K. DAVIS & R. PIERCE, JR., ADMINISTRATIVE LAW TREATISE §§10.5–10.6 (4th ed. 2002); 9 J. WIGMORE, EVIDENCE §§2565–2583 (Chadbourne rev. 1981); 3 MCCORMICK ON EVIDENCE, ch. 35 (6th ed. 2006).

⁴⁵In *Smith v. Robbins*, 528 U.S. 259 (2000), the Court struck a lodged uncertified transcript of oral argument before the Ninth Circuit. And in *United States v. Navajo Nation*, 537 U.S. 488 (2003), the Court struck an “expert” report containing debatable extra-record materials lodged by an amicus curiae.

judicial notice, are close to it, and the Court has not refused to consider them. Cf. *Brown v. Board of Educ.*, 347 U.S. 483 (1954).⁴⁶

(3) *Facts Relating to Mootness—Disclosing Subsequent Relevant Developments.* Any important factual or legal development occurring after the decision below was rendered, or after the Court has granted review, should be brought to the Court's attention in the brief or, if necessary, in the oral argument, if the development may change the status of the case or the need for the Court to resolve the questions raised. See Sec. 13.9, *supra*. Such facts, which would usually be indisputable, may change the status of a case, often by making it moot. Common examples are that a party has died, an election been held, a strike terminated, a statute or regulation repealed or modified, a case settled or decided, or a criminal sentence served. Facts of this sort occurring after a case has been instituted may terminate the controversy between the parties. Since Article III, Section 2, of the United States Constitution limits the judicial power to cases and controversies, mootness of the controversy for this reason will make the case nonjusticiable in the federal courts.

In *Fusari v. Steinberg*, 419 U.S. 379 (1975), where important amendments to a state statute under review had been enacted subsequent to the lower court decision but before the parties' briefs were filed in the Supreme Court, the Court expressed annoyance at the failure of both parties to point out and discuss such amendments in either their briefs or oral arguments. One of the briefs, which totaled 122 pages, had made a cryptic reference to the change of law in one of its footnotes, leaving the impression that the change was negligible. This led Chief Justice Burger to remark in his concurring opinion that it is "disconcerting to this Court to learn of relevant and important developments in a case after the entire Court has come to the Bench to hear arguments," and that all parties "had an obligation to inform the Court that the system which the District Court had enjoined had been changed." 419 U.S. at 390. Developments relating to the possible mootness of the case "should be called to the attention of the Court *without delay*" (emphasis the Court's). *Tiverton Bd. of License Comm'rs v. Pastore*, 469 U.S. 238, 240 (1985).

(l) *Vary the Type Style Whenever Appropriate*

The 2007 revision of Rule 33.1(b) mandated the use of Century family (e.g., Century Expanded, New Century Schoolbook, or Century Schoolbook) 12-point type in every booklet-format document. This replaced the previous Rule 33.1(b), which required only that the typeface be similar to that used in the United States Reports and that it be consistent throughout the document. Nonetheless, a prolonged narrative discussion of legal arguments frequently needs variations in type style to keep the reader's interest. Argumentative

⁴⁶Chief Judge Posner has, however, noted the potential pitfalls of forays into the social sciences by judges, including Brandeis himself, who lacked the training "to analyze and absorb the theories and data of social science." *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* 255 (1999).

headings should be put in boldface type; subheadings can likewise be put in boldface or italics. Sometimes a critical finding of fact or trial colloquy can be set in boldface or italics so as to have maximum impact on the reader. These devices should, however, be used judiciously. Overuse of italics or boldface causes them to lose their effect and, in the extreme, becomes distracting and confusing to the reader. Charts, tables, and graphs can also be used to break the monotony of a lengthy brief and to dramatize a particular point; bullet-point lists (if relatively short) can be very effective in drawing attention to three or four key propositions. If comparisons or differences between court rulings, statutory provisions, or factual situations are being highlighted, parallel columns may be effective. For example, if one wishes to demonstrate the close identity of certain language used in both Section 14(e) of the Securities Exchange Act of 1934 and Rule 10b-5 of the Securities and Exchange Commission, the most vivid and interesting method is to set forth the respective provisions in side-by-side columns:

Section 14(e)

It shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, or to engage in any fraudulent, deceptive, or manipulative acts or practices. ***

Rule 10b-5

It shall be unlawful for any person ***

(1) To employ any device, scheme, or artifice to defraud,

(2) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading. ***

Other illustrations of the use of such parallel columns are found in Appendix IV at G and I, *infra*.

13.12 Preparing the Brief

For most lawyers, preparing a brief in the Supreme Court is a more demanding undertaking than preparing briefs in other courts. The time available is short and the standards are exceptionally high. Few lawyers will present a brief to a more sophisticated judicial audience, and Supreme Court cases often attract opposing counsel of the highest caliber. The following suggestions are designed to assist counsel in meeting these challenges.

(a) *Drafting the Brief*

The improbability of review being granted in any particular case makes it impractical to begin drafting a brief before the Court has agreed to hear a case. Work must begin, however, immediately upon the grant of review. Counsel who do not have extensive experience in the Supreme Court should obtain

several model briefs that have been successful in the recent past to get a sense of the style and the presentation of arguments. Briefs are now available through Westlaw and LEXIS and on the Internet.⁴⁷ Counsel should also make sure that they are familiar with all of the Court's rules with respect to the format and substance of briefs.

Counsel should not attempt to recast the petition for certiorari, with only minor modifications, as a merits brief. At the petition stage, the focus is on convincing the Court of the general importance and certworthiness of the issues presented, while the merits play a secondary role. At the merits stage, however, the focus of the arguments must shift to a more detailed analysis of the facts, Supreme Court precedent, statutory and constitutional language, legislative history, statutory and regulatory policy, and pertinent academic commentary. A significant amount of additional research is usually required.

A case that reaches the Supreme Court ordinarily has been handled by a number of different lawyers at different stages of the proceedings. Before drafting begins, it is helpful to ask co-counsel to circulate ideas for the brief. Depending on the resources available, an academic consultant versed in the relevant fields of law might be retained to participate in the briefing and preparation for argument. The drafters of the brief should consider suggestions from these sources before selecting the strongest points to make in the brief and deciding how to frame the arguments.

Ideally, the draft of the entire brief will be prepared by one attorney with substantial experience in appellate practice. Often, however, limits on available time do not permit such an approach. It is sometimes necessary to split up the initial drafting of a brief among a number of attorneys. A single attorney, ordinarily the attorney who will present the oral argument, should then be responsible for melding the various sections into one stylistically consistent whole.⁴⁸ Once the draft is close to completion, it often is useful to have it read relatively quickly by an astute lawyer who has not worked on the case, both to determine whether the points are clear and persuasive and to attempt to anticipate the impression the brief will make on the Justices and their clerks.

A draft of the brief must be completed well in advance of the due date so that there is sufficient time for lawyers familiar with the case, as well as the client, to review the brief and offer comments. A single attorney, however, should be authorized to make final decisions about what revisions will be made. Briefs written by committee are almost never effective—too many drafters make for poorly written briefs, and arguments necessarily suffer when they reflect many people's additions but no one's deletions.⁴⁹ These problems become especially acute when, as is now common, a brief is filed by multiple

⁴⁷Briefs filed by the Solicitor General are available at the Office of the Solicitor General's Web site, <http://www.usdoj.gov/osg>. Many Supreme Court briefs are reproduced at http://supreme.findlaw.com/Supreme_Court/briefs. Selected briefs filed by Supreme Court practitioners at the law firm of Mayer Brown LLP may be found at <http://www.appellate.net>.

⁴⁸Chief Justice Rehnquist criticized the performance of oral advocates who did not play a large role in drafting the briefs. *From Webster to Word-Processing*, 1 J. APPELLATE PRAC. & PROC. 1, 4–6 (1999).

⁴⁹See C. Lutz, *Why Can't Lawyers Write?*, in ABA SECTION OF LITIGATION, *THE LITIGATION MANUAL: SPECIAL PROBLEMS AND APPEALS* 200, 202–03 (3d ed. 1999).

parties represented by different law firms. Before drafting begins, the parties should try to agree on a single attorney with final editorial control over the brief. Numerous drafts of a brief are usually required to perfect it. Good writing means good rewriting, with the goal of simplifying, sharpening, and strengthening every portion of the brief.

(b) *Finalization, Proofreading, and Cite-Checking*

Many brief writers do not start their preparation soon enough to allow sufficient time at the end for revising and rewriting, for checking citations and quotations, and for preparing the tables of contents and authorities, all in time for the brief to go to the printer and be filed with the Court. All good writers know that these processes are essential, take time, and produce better briefs. Everyone—printers, typists, and lawyers—makes mistakes, clerical and otherwise. Whoever’s fault the mistakes may be, the counsel of record is ultimately responsible for the filed brief. The best protection against such errors is to have several persons, including some who did not participate in the brief writing, review the final draft.⁵⁰

The Court will not make corrections to briefs. The Clerk’s policy regarding the correction of errors in briefs filed with the Court is to allow a representative to visit the Clerk’s Office and effect changes to all 40 copies, or to file 40 substitute briefs after receiving the Clerk’s approval. Errata sheets and letters from counsel concerning errors are not acceptable.

13.13 Reply Briefs

The 2007 rules revisions substantially changed the time for filing reply briefs. Until 1990 a reply brief could be filed at any time after the respondent’s brief was filed but “no later than one week before the date of oral argument.” After the 1990 rules revisions, the petitioner or appellant had to file the reply brief within 35 days but no later than one week before the date of oral argument. The 2007 revision of Rule 25.3 reads:

The petitioner or appellant shall file 40 copies of the reply brief, if any, within 30 days after the brief for the respondent or appellee is filed, but any reply brief must actually be received by the Clerk not later than 2 p.m. one week before the date of oral argument.

The obvious reason for the change in 1990 was to avoid having reply briefs reach the Justices at almost the last minute before each argument session. According to the Clerk’s Comment to the 2007 revision of Rule 25, the most recent change reflects the fact that the time period between granting the petition for a writ of certiorari and the date of oral argument has decreased in recent years. In addition, technological improvements have reduced the amount

⁵⁰Judge Wald has advised counsel to “proofread with a passion. You cannot imagine how disquieting it is to find several spelling or grammatical errors in an otherwise competent brief. It makes the judge go back to square one in evaluating the counsel. It says—worst of all—the author never bothered to read the whole thing through, but she expects us to.” *19 Tips from 19 Years on the Appellate Bench*, 1 J. APPELLATE PRAC. & PROC. 7, 22 (1999).

of time needed to prepare booklet-format briefs and briefs can be readily submitted electronically. Thirty days should be ample time for petitioner's counsel, who has already filed a major brief in the case, to prepare a reply brief.⁵¹ Because of the pressure of time and the limitation to 7,500 words, a reply can in practice—and should in any event—be used only to answer points not adequately covered in the main brief and to address only the most material arguments made by the respondent or appellee. In many cases this can be done in fewer than 7,500 words.

Unless the Clerk notifies counsel otherwise, counsel may assume (1) that 30 days is available for the reply brief, but (2) that additional time will not be allowed in the absence of some unusual circumstance. Occasionally, the number of cases awaiting argument is not large enough for all of the cases to be scheduled for argument more than 37 days after the respondent's brief is filed. Sometimes, too, an argument is expedited because of the need for a prompt decision. In these situations, the Clerk's Office will notify counsel as soon as possible and attempt to work out a feasible schedule. It should be noted that a reply brief is not timely unless it is actually *received* by the Clerk not later than 2 p.m. seven days before argument. Unlike the normal rule for filing (Rule 29.2), mailing on the last day is not sufficient. On the other hand, the 2007 rules revisions amended Rule 25.4 to make explicit that the time period for filing a reply brief may be extended as provided in Rule 30.3.

If, for good reason, counsel is unable to file 40 copies of the reply brief reproduced pursuant to Rule 33.1 a week before the date of argument, the Clerk may accept a timely filing of 10 clearly legible copies in page-proof or word-processed form. Blurred or even slightly faint copies are not suitable. Opposing counsel must also be served. As soon thereafter as possible, 40 copies of a brief reproduced pursuant to Rule 33.1 should be filed.

The provision in Rule 24.4 that reply briefs shall conform to the requirements governing the answering briefs of a respondent or an appellee means that only the Argument and Conclusion are needed, except to the extent that counsel wishes to comment on the Statement, Questions Presented, Statutes, or jurisdictional material presented in the opposing brief. Such comment would usually be in argumentative form. If topical headings are employed, a Summary of Argument need not be included; in some cases a Summary may be helpful, especially if the reply brief contains a number of independent arguments, but it is often desirable to omit it. Many reply briefs begin with a short introduction that provides an overview and reorients the reader who has just finished reviewing the opposing brief. Simplicity, directness, and minimization of footnotes and other complexities are critical to an effective reply brief, which is likely to obtain only a few minutes of judicial attention. Very short headings for subdivisions of the reply brief promote ready comprehension. If the brief exceeds five pages, there must be a Table of Contents and a Table of Authorities, if any are cited. Rule 24.1(c). See Sec. 13.7, *supra*.

⁵¹Rule 30.3 provides that a Justice may grant an extension of time to file a reply brief on the merits, and the Court has done so on rare occasions and for good cause shown. See *Pierce Co. v. Guillen*, No. 01-1229 (motion filed Sept. 2002).

13.14 Amicus Curiae Briefs

Rule 37 governs the filing of briefs submitted by a person not a party to the case, as a friend of the Court or *amicus curiae*. Sec. 6.40, *supra*, deals with the filing of amicus briefs prior to consideration of a petition for certiorari or jurisdictional statement, and a good deal of what is said in that section applies here as well. This section is concerned with amicus briefs on the merits, in cases before the Court for oral argument.⁵²

Paragraph 3(a) of Rule 37, which applies to such briefs, provides that:

An *amicus curiae* brief in a case before the Court for oral argument may be filed if accompanied by the written consent of all parties, or if the Court grants leave to file under subparagraph 3(b) of this Rule. The brief shall be submitted within 7 days after the brief for the party supported is filed, or if in support of neither party, within 7 days after the time allowed for filing the petitioner's or appellant's brief. An electronic version of every *amicus curiae* brief in a case before the Court for oral argument shall be transmitted to the Clerk of Court and to counsel for the parties at the time the brief is filed in accordance with guidelines established by the Clerk. The electronic transmission requirement is in addition to the requirement that booklet-format briefs be timely filed. The *amicus curiae* brief shall specify whether consent was granted, and its cover shall identify the party supported or indicate whether it suggests affirmance or reversal. The Clerk will not file a reply brief for an *amicus curiae*, or a brief for an *amicus curiae* in support of, or in opposition to, a petition for rehearing.

The 1990 rules revision added the language respecting an amicus brief that “suggests affirmance or reversal,” and also the language that no amicus brief supporting a rehearing petition will be received. See also Rule 44.5 (“The Clerk will not file any brief for an *amicus curiae* in support of, or in opposition to, a petition for rehearing”). The 2007 revision of Rule 37.3(a) mandated the electronic filing of merits-stage *amicus curiae* briefs and emphasized that booklet briefs must still be timely filed in addition to the electronic transmission.

Under Rule 37.4:

No motion for leave to file an *amicus curiae* brief is necessary if the brief is presented on behalf of the United States by the Solicitor General; on behalf of any agency of the United States allowed by law to appear before this Court when submitted by the agency's authorized legal representative; on behalf of a

⁵²The subject of amicus briefs is treated more fully in R. STERN, *supra* note 1, at 301–10; F. WIENER, BRIEFING AND ARGUING FEDERAL APPEALS 235–73 (1967); S. Shapiro, *Amicus Briefs in the Supreme Court*, 10 LITIGATION 21 (Spring 1984); S. Krislov, *The Amicus Curiae Brief: From Friendship to Advocacy*, 72 YALE L.J. 694 (1965); B. Ennis, *Effective Amicus Briefs*, 33 CATH. U.L. REV. 603, 608 (1984); J. Kearney & T. Merrill, *The Influence of Amicus Curiae Briefs On The Supreme Court*, UNIV. OF PA. L. REV. 148 (2000). As to obtaining the support as amicus of the Solicitor General, see J. Roberts, *Riding the Coattails of the Solicitor General*, LEGAL TIMES, Mar, 29, 1993, at 30. A supportive amicus brief filed by the Solicitor General can carry significant weight with the Court; in most terms, the Solicitor General's success rate as an amicus curiae exceeds 70%. L. EPSTEIN ET AL., THE SUPREME COURT COMPENDIUM 634 (2d ed. 1996). Counsel should always give serious consideration to asking for the Solicitor General's support as an amicus curiae in appropriate cases. Such requests for amicus support often are initiated by communicating with the Division of the Department of Justice, Executive Department, or federal administrative agency that has the most direct interest in the matter, whose recommendations are then transmitted to the Solicitor General's office. Telephone conferences or meetings to discuss the case are usually requested by lawyers seeking government amicus support.

State, Commonwealth, Territory, or Possession when submitted by its Attorney General; or on behalf of a city, county, town, or similar entity when submitted by its authorized law officer.

Counsel for an amicus (other than the United States, a state, or political subdivision) should address a letter to the counsel of record for each party, requesting written consent to the filing of an amicus brief and stating whatever reasons may be deemed appropriate. If an entity other than the United States or a state joins in the sponsoring of an amicus brief submitted by a governmental entity, permission from the other parties or the Court must be obtained; the brief will no longer be regarded as a government brief. Unless there are compelling reasons to withhold consent, most attorneys receiving a request will consent to the filing of an amicus brief even in support of the opposing party. Virtually all timely motions to file an amicus brief are granted in any event, and a party does not want to appear to the Court as having been fearful of the content of the proffered amicus brief or unreasonable in withholding consent. The written consent should consist of a reply letter from counsel for each party to counsel for the amicus, stating simply that consent is hereby given to the filing of the brief. These letters must be filed with the Clerk, and a reference to such consents on file with the Clerk should be made in the opening paragraph of the amicus brief. It is also acceptable to file with the Clerk a letter consenting generally to the filing of briefs by any amicus. Any motion for leave to file should identify any party who has refused to consent. Rule 37.3(b).

For the reasons stated in Sec. 6.40, *supra*, amicus briefs may not be filed by lawyers who are not members of the Supreme Court Bar or by nonlawyers appearing pro se.

It is essential that, in cases before the Court on the merits, the amicus brief comply with the requirement in Rule 37.3(a) that it be presented, along with the motion if one is necessary, “within 7 days after the brief for the party supported is filed, or if in support of neither party, within 7 days after the time allowed for filing the petitioner’s or appellant’s brief.” Adherence to this rule enables the opposing party to respond to the amicus brief in an answering or reply brief. Ordinarily,⁵³ an amicus cannot obtain an extension of time to file its brief, though its time will be extended if the party supported obtains an extension of time to file the party’s brief. Late filings account for nearly all the denials by the Court of leave to file amicus briefs on the merits. See, e.g., *Doran v. Salem Inn, Inc.*, 421 U.S. 927 (1975).

⁵³Occasionally, for good cause, the Court has granted motions to file an amicus brief out of time. *Stoneridge Inv. Partners v. Scientific-Atlanta*, 168 L. Ed. 2d 794 (2007) (motions of former SEC Commissioners and members of Congress to file amicus briefs after Solicitor General filed a brief taking a position inconsistent with that recommended by the SEC); *United States v. Salerno*, 479 U.S. 1015 (1986) (motion of American Bar Association); *International Union, Auto. Worker v. Brock*, 475 U.S. 1093, 477 U.S. 274 (1986) (motion of Chamber of Commerce, AFL-CIO, NAACP, National Association of Manufacturers, Sierra Club, etc., which urged that “good cause for filing an *amicus* brief out of time exists in this case because the government waited until after petitioners had filed their brief on the merits in this Court before suggesting in any way that the Court should overrule its decisions establishing the standing of organizations like *amici* to assert the rights of their members in federal court litigation”). In *Behrens v. Pelletier*, 514 U.S. 1106 (1995), the Solicitor General sought leave to file an amicus brief 30 days following the decision in two other relevant cases then pending before the Supreme Court. The Court responded with an order resetting the briefing schedule for *all* parties to the case.

The requirement of timeliness applies to the federal and state governments, which otherwise may file amicus briefs without the consent of the parties or of the Court. On several occasions the Court has denied the Solicitor General's motion for leave to file amicus briefs out of time. Once when the Solicitor General, following oral argument, advised the Clerk that the Government "was prepared to file a brief amicus within three weeks," the Court responded that "the Rules of this Court do not allow the filing of briefs *amicus* after oral argument." *United Air Lines, Inc. v. McMann*, 434 U.S. 192, 194 n.3 (1977).

The motion for leave to file should begin by describing the relief requested and stating that consent to file has been requested of the other parties and that an identified party, or parties, has refused. Rule 37.3(b) provides:

When a party to a case before the Court for oral argument has withheld consent, a motion for leave to file an *amicus curiae* brief may be presented to the Court. The motion, prepared as required by Rule 33.1 and as one document with the brief sought to be filed, shall be submitted within the time allowed for filing an *amicus curiae* brief, and shall indicate the party or parties who have withheld consent and state the nature of the movant's interest.

Before 1995, the rules stated that the motion should set forth "the nature of applicant's interest" and also "facts or questions of law that have not been, or reasons for believing that they will not be, presented by the parties." Former Rule 37.4. Despite the elimination of this language, the motion should demonstrate what the amicus brief will add to the briefs filed by the parties.⁵⁴

In preparing both the motion for leave to file and the amicus brief itself, counsel should keep in mind the admonition contained in the introductory subsection to Rule 37.1:

An *amicus curiae* brief that brings to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help to the Court. An *amicus curiae* brief that does not serve this purpose burdens the Court, and its filing is not favored.

The fact that the briefs for the party and the amicus must be filed within a week of each other often makes it difficult for them to coordinate their presentations to the Court. If, at the time the amicus brief is being prepared, the amicus does not know what the party's brief will say, the amicus can have little assurance that it is presenting facts and arguments not presented by the party being supported. As soon as an attorney ascertains that an amicus brief will be filed, he or she should communicate with counsel for the party to be

⁵⁴A chambers opinion of Chief Judge Posner suggests appropriate reasons for filing an amicus brief that might be incorporated into the motion:

An *amicus* brief should normally be allowed when * * * the *amicus* has an interest in some other case that may be affected by the decision in the present case (though not enough affected to entitle the *amicus* to intervene and become a party to the present case), or when the *amicus* has unique information that can help the court beyond the help that the lawyers for the parties are able to provide.

Ryan v. Commodity Futures Trading Comm'n, 125 F.3d 1062, 1063 (7th Cir. 1997). Commentators have, however, suggested that the *Ryan* criteria are too narrow. L. Mumford, *When Does the Curiae Need an Amicus?* 1 J. APPELLATE PRAC. & PROC. 279 (1999).

supported. Preliminary discussion (including, where appropriate, the exchange of drafts between the lawyers) will enable them to avoid duplication, and give each lawyer an opportunity to benefit from suggestions by the other with respect to both strategy and detail.⁵⁵ They may agree that the amicus enlarge upon points that the party cannot, or prefers not to, expound in detail. An amicus may be more knowledgeable than a party as to facts underlying particular arguments.⁵⁶ An amicus would often be in a superior position “to inform the court of interests other than those represented by the parties, and to focus the court’s attention on the broader implication of various possible rulings”; governmental amici almost always will be better able to reflect the public interest.⁵⁷ Such amici might present facts and reasons not already presented by a party and thus satisfy the standard set forth in Rule 37.1.

The motion for leave to file an amicus brief may not exceed 1,500 words and must be served on the parties to the case. Rule 37.5. “A party served with the motion may file an objection thereto, stating concisely the reasons for withholding consent.” Rule 37.5. The objection to the motion is not to be filed in booklet format, but should be prepared under Rule 33.2. See Rule 37.5. In some circumstances, an objection to the motion may be registered by a nonparty. Thus, when the movant seeks leave to file an amicus brief because a similar issue is presented in another case in which it is involved, the opponent in that other case may wish to oppose what the movant has said in the motion or the proposed amicus brief. The nonparty may do so either by filing a memorandum opposing the motion for leave to file the amicus brief, as was done in *Brunswick v. Pueblo Bowl-O-Mat*, 429 U.S. 477 (1977), or by moving for leave to file an amicus brief in reply thereto.

The motions, briefs, and responses filed under Rule 37 “shall comply with the applicable provisions of Rules 21, 24 and 33.1,” which govern briefs and motions generally as to such matters as methods of duplication, number of copies, and the like. Rule 37.5. Rule 33.1(g) specifies differing shades of green as the color for covers of amicus briefs—“light green” for briefs supporting “Petitioner or Appellant or *** Neither Party,” and “dark green” for briefs supporting “Respondent or Appellee.” Every brief and motion must be accompanied by “proof of service as required by Rule 29.” Rule 37.5. The Court

⁵⁵S. Shapiro, *supra* note 52, at 24; B. Ennis, *supra* note 52, at 605–08.

⁵⁶For example, an association of psychologists might better be able to marshal facts pertaining to the general effects of severe criminal sentences or mandatory notice to the parents of a child attempting to obtain an abortion. Justice Breyer has offered the following comments about the role of amicus briefs discussing scientific or technical subjects:

In our Court, as a matter of course, we hear, not only from parties, but from outside groups which file briefs * * * which help us to become more informed, for example, about the relevant scientific “state of the art.” In the “right to die” case we received about sixty such documents, from organizations of doctors, psychologists, nurses, hospice workers, and handicapped persons, among others. Many discussed pain control technology, thereby helping us to identify areas of technical consensus and disagreement. In my own view, such briefs play an important role in educating judges, helping to make us, not experts, but moderately educated lay persons, and that education helps to improve the quality of our decisions.

The Interdependence of Science and Law 9, Address at the Annual Meeting of the American Association for the Advancement of Science (Feb. 16, 1998).

⁵⁷B. Ennis, *supra* note 52.

has declined to excuse amici from complying with the printing requirements of Rules 33.1 and 21.2(b), even for good cause shown. *In re Whittington*, 390 U.S. 977 (1968) (four Justices dissenting).

The Court quite frequently invites the Solicitor General to file an amicus brief in a case in which the government is not a party. Usually this occurs when the Court is considering a petition for certiorari, but the Court may also issue such requests after review has been granted. E.g., *Felker v. Turpin*, 517 U.S. 1182 (1996); *International Paper Co. v. Ouellette*, 475 U.S. 1081 (1986). The Solicitor General regards such “invitations” as mandatory.

Rule 37.3(a) explicitly requires that an amicus brief “in a case before the Court for oral argument” shall “identify the party supported or indicate whether it suggests affirmance or reversal.” The party supported must be identified on the cover and should also be identified at the beginning of the text.

In content, amicus briefs on the merits are governed by the same rules as other briefs “except that it suffices to set out in the brief the interest of the *amicus curiae*, the summary of the argument, the argument, and the conclusion.” Rule 37.5. Tables of contents and authorities should be included for documents exceeding five pages, as prescribed in Rule 24.1(c). The amicus brief may include Questions Presented and a Statement of Facts, but they are not required. Pertinent facts can be discussed in the argument.

The Questions Presented should appear at the beginning of the brief, on the page immediately following the cover, as in other briefs. Rule 24.1(a). The amicus is not entitled to present additional questions for review. *United Parcel Serv. v. Mitchell*, 451 U.S. 56, 60 n.2 (1981), and cases there cited.

The 1997 revisions added an important new subsection to Rule 37. This section (Rule 37.6), as amended in 2007, reads as follows:

Except for briefs presented on behalf of *amicus curiae* listed in Rule 37.4, a brief filed under this Rule shall indicate whether counsel for a party authored the brief in whole or in part and whether such counsel or a party made a monetary contribution intended to fund the preparation or submission of the brief, and shall identify every person, other than the *amicus curiae*, its members, or its counsel, who made such a monetary contribution. The disclosure shall be made in the first footnote on the first page of text.

The Clerk’s Comment accompanying the 1997 provision stated that “Rule 37.6 is added to Rule 37 to identify those, other than the *amicus curiae*, its members, or its counsel, who made a contribution to the preparation or submission of the brief.” The 2007 changes also require disclosure of whether a party made a monetary contribution to the preparation or submission of the brief in its capacity as a member of the entity filing as *amicus curiae*. However, according to the Clerk, “such disclosure is limited to monetary contributions that are intended to fund the preparation or submission of the brief; general membership dues in an organization need not be disclosed.” Although the rule does not apply to the governmental amicus briefs specified in Rule 37.4, it applies to all private party amicus briefs.

The reasons for this provision has not been fully explained, but the language of the rule reflects the Court’s perception that some parties to a case had silently been authoring or financing *amicus curiae* briefs in support of their positions. Rule 37.6 constitutes the Court’s effort to curb such practices

by requiring full disclosure of the pertinent facts in the amicus briefs. The Court, which is inundated with amicus briefs in important cases, undoubtedly detected that some of them bore striking resemblance, in substance and style, to the merits brief of the party being supported by the amicus. There were known instances where counsel for a party not only solicited or inspired the filing of an amicus brief but also wrote all or substantial portions of that brief. Nor was it unknown for such counsel, having failed to compress all the party's arguments within the pre-2007 50-page limit imposed on merits briefs, to seek a person or entity willing to assume an amicus role and also willing to let the party's counsel compose the amicus brief (with the former 30-page limit) so as to present the additional arguments for the party. Thus, a party counsel, by preparing an amicus brief, could expand to 24,000 words (formerly 80 pages) the party's written submissions to the Court. The Rule 37.6 disclosure requirements are designed to discourage party counsel from taking over the preparation and submission of supporting amici briefs. And those counsel intent on continuing such practices should expect the Court to accord their amicus briefs a lesser degree of credibility.

At the same time, Rule 37.6 does not mean to discourage party counsel from soliciting supporting briefs from amici curiae. Nor does the rule require disclosure of any coordination and discussion between party counsel and amici counsel regarding their respective arguments, including the helpful practice of supplying amicus counsel with copies of the party's lower court briefs or drafts of the party's Supreme Court brief or petition. Often some form of consultation and communication is both appropriate and essential if the amicus brief is to be confined, as it should be under Rule 37.1, to "relevant matter not already brought to [the Court's] attention by the parties." Moreover, Rule 37.6 does not require disclosure of the fact that party counsel may have reviewed an amicus brief in order to identify inaccuracies and avoid repetition of matter already presented in the party's brief. That such a review may result in advice by party counsel that the amicus counsel rewrite, delete, or add certain matter would not appear to constitute authoring the amicus brief "in whole or in part."

Rule 37.6 certainly requires that disclosure must be made whenever party counsel actually writes or rewrites all or a substantial portion of the amicus brief. Although the rule does not define "in part" authoring, the phrase would seem to include any instance in which party counsel takes an active role in writing or rewriting a substantial or important "part" of the amicus brief, with the word "part" interpreted to mean something more substantial than editing a few sentences. Just how much more constitutes "in part" authoring must depend on the individual situation as well as the common sense and good faith of counsel, with borderline situations being referred to the Clerk's Office for advice.

Finally, attention must be paid to the portion of Rule 37.6 that requires identification in the amicus brief of "every person other than the *amicus curiae*, its members, or its counsel, who made" a monetary contribution to the preparation or submission of the brief. The Court wants to know not only whether party counsel authored the amicus brief in whole or in part, but who, other than the amicus, its members, or its counsel, bore the financial burden of

preparing and submitting the amicus brief.⁵⁸ Furthermore, the 2007 revision of Rule 37.6 requires that an amicus brief indicate “whether such counsel or a party made a monetary contribution intended to fund the preparation or submission of the brief,” beyond the payment of general membership dues, such as payments specially earmarked to defray the expense of the amicus brief.

The words “preparation or submission” of the brief are not otherwise defined in Rule 37.6. But they appear to encompass all costs involved in authoring and physically transmitting the amicus brief to the Court. Commercial printers often assume the burden of filing and serving the brief, incorporating such costs in the final printing bill. In that event, the amicus brief need reveal only if an unrelated person or entity is paying the printing bill. The Court is not interested in knowing the dollar amounts involved in such procedures. It simply wants to know the identity of the person or entity (other than the amicus) who has incurred or underwritten such preparation and submission costs.

Although the words “amicus curiae” suggest that an amicus brief is filed by a friend of the Court for the purpose of aiding the Justices, in modern times the amicus customarily seeks to support one side of a case. The lawyer is usually not speaking as a private person, but is retained by a person, company, or organization having an interest in how the case is decided, and whose identity should be disclosed. Some amicus briefs, and perhaps an increasing number, now seem to come from law professors or other lawyers presenting their personal views. E.g., *Bob Jones Univ. v. United States*, 461 U.S. 574, 576–77 (1983), in which two professors sought leave to file “as ‘friends of the Court’ in the original sense of that term”; *Padilla v. Rumsfeld*, 542 U.S. 426 (2004), in which amicus briefs were filed by at least five groups of professors; and *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), in which an amicus brief was filed by a group of legal scholars and historians. In 1991, an amicus brief was filed on his own behalf by Erwin N. Griswold, former Dean and tax professor at Harvard Law School, and former Solicitor General, in a case involving the constitutional status of special trial judges attached to the Tax Court. *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868 (1991). The Court granted him leave to file the brief but not to argue orally.

In recent years the number of amicus briefs has substantially increased. They are now filed in most cases argued before the Supreme Court. In a recent term, for example, a total of 399 amicus briefs were filed in 74 of the 79 cases decided. In other words, amicus briefs were filed in over 90 percent of the cases. Four or more amicus briefs were filed in over half of the decided cases—42 of the 79. Most of the amicus briefs are filed with the consent of the parties, and motions for leave to file where the parties did not consent are almost always granted⁵⁹ unless they are untimely. All things considered,

⁵⁸Some nonparty organizations, desirous of helping an impecunious amicus present its views to the Court, may assist in writing the amicus brief. The nonparty organization, by paying its own lawyers, would thereby seem to be making a “monetary contribution to the preparation” of the amicus brief. Unless and until the Clerk’s Office advises otherwise, prudence dictates that such a “monetary contribution” be revealed to the Court.

⁵⁹In the 1981 Term, the parties consented to the filing of 150 of the 231 amicus briefs filed by non-governmental amici. Eighty-one out of the 84 motions for leave to file were granted. K. O’Connor & L. Epstein, *Court Rules and Workload: A Case Study of Rules Governing Amicus Curiae Participation*, 8 JUST.

the amicus who has a legitimate interest in a case does not face too great a hurdle in being allowed to file a brief.

Not infrequently a good amicus brief may help shape the judicial decision.⁶⁰ The Court's ruling may rest on a ground emphasized by the amicus, not a party, or "rely on factual information, cases or analytical approaches provided only by an *amicus*."⁶¹ The reasoning may "be narrower or broader than the parties had urged, because of a persuasive *amicus* brief."⁶² On rare occasions the Court will decide cases on a ground "raised only in an *amicus* brief." *Teague v. Lane*, 489 U.S. 288, 300, 330 (1989); *Mapp v. Ohio*, 367 U.S. 643, 646 n.3 (1961). In the *Freytag* case the Court adopted the theory argued in the Griswold brief, not the positions of the parties. See also *Humana Inc. v. Forsyth*, 525 U.S. 299, 310 (1999) (adopting interpretation of statute advocated in amicus brief of the National Association of Insurance Commissioners).⁶³ And in *Zuni Public School District No. 89 v. Department of Education*, 127 S. Ct. 1546, 1534 (2007), the Court "dr[e]w reassurance from the fact that no group of statisticians, nor any individual statistician, has told us directly in briefs * * * that the language before us cannot be read as we have read it."

The facts that the amicus wishes to present may not be in the record of the case. Although not necessarily of common knowledge, they should resemble the type of facts presented in Brandeis briefs.⁶⁴ See, for example, *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003); *Regents v. Bakke*, 438 U.S. 265, 316–17, 321–24 (1978); *San Antonio Sch. Dist. v. Rodriguez*, 411 U.S. 1, 56–57 n.111 (1973). Preferably they should be incontrovertible and "have the ring of truth on their face."⁶⁵ Compare Sec. 13.11(k), *supra*. If disputable, such facts may

SYS. J. 35, 40 (Spring 1983). The Court may, however, deny timely motions to file amicus briefs that do not appear to make a substantive contribution to the case. See, e.g., *Stenberg v. Carhart*, 529 U.S. 1016 (2000).

⁶⁰For a comprehensive statistical study of amicus filings at the merits stage in the Supreme Court between 1946 and 1995, see J. Kearney & T. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743 (2000). See also G. Caldiera & J. Wright, *Amici Curiae Before The Supreme Court: Who Participates, When and How Much*, 52 J. POL. (NO. 3), 791 (1990).

⁶¹Facts appearing in amicus briefs were referred to in *Lawrence v. Texas*, 539 U.S. 558, 572, 577 (2003); *Grutter v. Bollinger*, 539 U.S. 306, 330–32 (2003); *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 345 (1987); *Turner v. Safley*, 482 U.S. 78, 93, 95 n. (1987); *Pennsylvania v. Delaware Valley Council*, 483 U.S. 721, 728, 748 (dissent) (1987); *Maryland v. Craig*, 497 U.S. 836 (1990); *Elgin, Joliet & E. Ry. Co. v. Burley*, 327 U.S. 661 (1946), in which, as Justice Frankfurter's dissent (*id.* at 663–77) explains, the majority in large part adopted the position presented in a number of amicus briefs quoted in the dissenting opinion. See *id.* at 631.

⁶²B. Ennis, *supra* note 52, at 608. Whether and to what extent a decision rests upon what was said by an amicus is difficult to ascertain without comparing the Court's opinions with the briefs filed by the parties and the amicus—and even then only the Justices themselves can really know. Some examples are given in Mr. Ennis' article. Others known to the authors personally are *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945), and *Keeton v. Hustler Magazine*, 465 U.S. 770 (1984).

⁶³The Court has, however, indicated reluctance to consider arguments raised for the first time by an amicus. See *Davis v. United States*, 512 U.S. 452, 457 n.* (1994) ("Although we will consider arguments raised only in an *amicus* brief, * * * we are reluctant to do so when the issue is one of first impression involving the interpretation of a federal statute on which the Department of Justice expressly declines to take a position"); *Reno v. Koray*, 515 U.S. 50, 55 n.2 (1995) (declining to consider amicus's equal protection argument similar to one waived by party in court of appeals).

⁶⁴"They should not relate to the facts of the particular case as between the parties, but should resemble the 'legislative facts' having 'relevance to legal reasoning and the law making process' described by the Advisory Committee on the Federal Rules of Evidence in its treatment of the subject of judicial notice." R. STERN, *supra* note 1, at 307.

⁶⁵*Id.*

be challenged by the opposing party or even by other amici. Nevertheless, the presentation of information as to how a decision one way or the other will affect persons or companies differently situated than the parties is a principal and helpful function of an amicus brief.

Even though amicus briefs are generally recognized to be advocate's briefs, a brief will be more effective if the author keeps in mind that he or she is supposed to be writing as a friend of the Court.⁶⁶ The brief should analyze and balance the arguments of both sides and manifest its concern with the development of the law and not merely the result in the particular case. The brief should be moderate in tone, and in general more objective than the usual advocate's brief. A brief of that sort will be more helpful to the Court, and more persuasive, not less.

Not all amicus briefs are read by all of the Justices.⁶⁷ The number is so great that most of the Justices have their law clerks sift out the briefs or parts of briefs that they think add enough to the parties' briefs to be worth reading. Many "say little more than 'me too'—the *amicus* agrees with one side in the controversy."⁶⁸ Such briefs may impress the members of the amicus organization, but they will not help with the Supreme Court. Merely stating one's views as to how a case should be decided is not a legitimate reason for filing an amicus brief. In *Sony Corp. v. Universal City Studios*, 464 U.S. 417, 434 n.16 (1984), the Court proclaimed that:

The stated desires of *amici* concerning the outcome of this or any litigation * * * are not evidence in the case, and do not influence our decision; we examine an *amicus curiae* brief solely for whatever aid it provides in analyzing the legal questions before us.

Briefs that add nothing to the substantive factual or legal presentations by the parties are not likely to survive the preliminary examination by the law clerks or to influence favorably a Justice or clerk who reads them. On the contrary, they will be regarded as wasteful of valuable Court time. Therefore, it is essential that the brief avoid repetition of arguments already made by a party or another *amicus curiae*. The brief should make its points concisely and not focus on the virtues of the amicus organization or other irrelevancies. Where several amici have a similar interest in a case before the Supreme Court, they are often well advised to file a consolidated amicus brief that avoids repetition and dilution of judicial attention.

Except in highly unusual circumstances,⁶⁹ the Court does not permit counsel or a party by motion, letter, or otherwise to add a name to an amicus brief already filed or to advise the Court of one's desire to be associated with a brief's sponsor. The Court will, however, accept for filing a short amicus

⁶⁶S. Shapiro, *supra* note 52, at 24.

⁶⁷See T. Mauro, *Bench Pressed*, AM. LAW. 85–86 (Mar. 2005).

⁶⁸S. Shapiro, *supra* note 52.

⁶⁹In *National Organization for Women v. Idaho*, 455 U.S. 918 (1982), the new governor of Virginia was granted leave to join in an amicus brief filed by the governor of Maine. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 503 U.S. 981 (1992), Senator Specter was granted leave to join an amicus brief filed by numerous members of Congress. See also *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 1154 (1996) (granting motion of Attorney General of Indiana to withdraw as *amicus curiae*).

brief stating one's agreement with a brief previously filed, attaching it to a motion for leave to file the brief if the parties have not consented. But such a brief is not likely to have a favorable effect on the Court unless it contains some additional reasoning. The Court is well aware that a preponderance of amici on one side of a case may indicate nothing about the merits, but only that "[t]here is no self-interested organization out there" supporting the other side. *Jaffee v. Redmond*, 518 U.S. 1, 36 (1996) (Scalia, J., dissenting).

Since there appears to be no good reason why a nonparty should be able to state his views more than once, an amicus is permitted to file only one brief on the merits. Rule 37.3(a) states that "[t]he Clerk will not file a reply brief for an *amicus curiae*, or a brief for an *amicus curiae* in support of, or in opposition to, a petition for rehearing." Amici also are generally not permitted to file other types of responsive and supplemental briefs. *Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100*, 419 U.S. 1080 (1974) (motion for leave to file a reply brief as *amicus curiae* denied); *Kewanee Oil Co. v. Bicorn Corp.*, 416 U.S. 965 (1974) (motion for leave to file a supplemental brief as *amicus curiae* after argument denied). An amicus may, however, file a brief both before and after review has been granted. But the second filing is entirely independent of the first, and new consents or new motions for leave of Court must accompany the second filing.

An amicus other than the Solicitor General is seldom permitted to participate in oral argument, and then only by special leave of Court and usually after obtaining the consent of the party supported by the amicus to share some of that party's argument time. See Sec. 14.7, *infra*; and see, e.g., *Wheeler v. Barrera*, 414 U.S. 1140 (1974) (allowing United States to participate in oral argument as an amicus, with additional time allotted for that purpose); *Train v. City of New York*, 419 U.S. 818 (1974) (denying leave to the state of Michigan to participate in oral argument as an amicus); *Zicherman v. Korean Air Lines Co.*, 515 U.S. 1156 (1995) (denying private amicus leave to participate in oral argument). But see *Smith v. Texas*, 127 S. Ct. 855 (2007) (granting motion of the State of California to participate in oral argument as amicus); *Norfolk S. Ry. v. Shanklin*, 529 U.S. 344 (2000) (granting motion of the state of Texas et al. to participate in oral argument as amici).

The Court on occasion may appoint or invite an attorney to brief and argue a case pending before it as an *amicus curiae* "in support of the petitioner" or "in support of the judgment below." See, e.g., *Williams v. Georgia*, 348 U.S. 957, 349 U.S. 375, 380–81 (1955); *Bob Jones Univ. v. United States*, 456 U.S. 922 (1982), 459 U.S. 812 (1983); *Keeton v. Hustler Magazine*, 465 U.S. 770, 771 (1984); *Toibb v. Radloff*, 501 U.S. 157, 160 n.4 (1991); *Ornelas v. United States*, 517 U.S. 690, 695 n.4 (1966); *Hohn v. United States*, 524 U.S. 236, 241 (1998); *Dickerson v. United States*, 539 U.S. 428, 430 (2000); *Becker v. Montgomery*, 531 U.S. 1110 (2001). See Sec. 14.2, *infra*. But those are not true amicus situations and the provisions of Rule 37 are inapplicable. In such cases, the Court has invited the amicus to participate because for some reason no other counsel would have represented that side of the case. If the Court has not already done so, the Clerk will advise the counsel so designated as an amicus with respect to the procedures and filing schedule to be followed.

13.15 Supplemental Briefs

Even after the time for filing the principal briefs and the reply brief has expired, a party may file a supplemental brief calling the Court's attention to "late authorities, newly enacted legislation, or other intervening matter that was not available in time to be included" in a previously filed brief. Rule 25.5. The rule specifies that the party "may file 40 copies of a supplemental brief, restricted to such new matter and otherwise presented in conformity with these Rules." Such a brief may be filed without leave of the Court, and therefore without the need for a motion by the party, "up to the time the case is called for oral argument." An improper supplemental brief will, however, be stricken. See *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 1013 (1997). In addition to setting forth the new authorities, a supplemental brief may argue their significance. On occasion, the Court may also ask for supplemental briefs addressing certain questions. See *Swint v. Chambers County Comm'n*, 513 U.S. 958 (1994) (removing case from oral argument calendar and directing parties to file supplemental briefs regarding court of appeals' jurisdiction); *Vermont Agency for Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765 (1999) (directing parties to file supplemental briefs the day after oral argument addressing standing question).

Rule 33.1(g) limits supplemental briefs to 3,000 words. The same rule states that the cover of supplemental briefs should be tan.

The rules providing for supplemental briefs do not state that copies of the new authorities must be submitted to the Court, but it is highly advisable to do so, except perhaps when they are available in a published report readily accessible to the Justices. If a new authority is made a part of the supplemental brief, even as an appendix, it must be reproduced in conformance with Rule 33. See Sec. 6.23, *supra*. If the authority is long, this might be much more expensive than merely submitting duplicate copies of the authority in the form in which it was received by counsel. As a practical matter, in order to save time and money, the Clerk's Office has permitted counsel to file 11 photocopies of the authority for distribution to the Justices, but not as part of the supplemental brief.

Counsel may also, at the time of the oral argument, ask leave of Court to file a brief after the argument. If a good reason is shown, the Court may grant the motion. The Court may also request counsel to submit supplemental briefs on questions raised by the Justices at the argument. The Court will usually want all briefs submitted, if possible, prior to the conference following the argument—held within two days of the argument—since the case normally will be decided (at least preliminarily) at that time. This will often necessitate filing briefs in unprinted form.⁷⁰ Counsel should therefore specifically ask the

⁷⁰In *Rogers v. United States*, 522 U.S. 964 (1997), the Court permitted the petitioner to file a supplemental brief in typescript the day after argument and the day before the case was scheduled for conference in order to address questions at oral argument suggesting that certiorari should be dismissed as improvidently granted. Likewise, in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), the Court allowed counsel to file a supplemental memorandum commenting on arguments made by a lawyer from the Solicitor General's Office in a related case argued during the following hour.

Court or the Clerk whether such a supplemental brief may be submitted in ordinary word-processed form. Forty copies reproduced in accordance with Rule 33.1 should be filed as soon as possible.

Parties may also file additional briefs after the Court has ordered a case to be reargued, although the rules are silent on this matter. Indeed, the Court may request the briefing of additional points.⁷¹ Such briefs are not supplemental in the sense that they are limited to new authorities or materials, although counsel should not, of course, merely reiterate the contents of the earlier briefs. It is unclear whether, in the absence of a request from the Court, leave of Court is required, but filing a motion for leave is the safest course. Any such motion should be accompanied by the brief, preferably in a single document, although separate documents are permissible. Counsel should in any event notify the Clerk's Office and ascertain when such a brief should be filed. The brief might appropriately be entitled "Brief for Petitioner on Reargument." It need contain only sections entitled Summary of Argument and Argument, and under Rule 24.1(c), tables of contents and authorities if the brief is longer than five pages.

Ordinarily, when leave is granted to file a brief on reargument, the motion is granted in full, with no limitations on the arguments that may be addressed or considered in the accompanying brief. But in *Bray v. Alexandria Clinic*, 505 U.S. 1240 (1992), the Court entered just such a limiting order. In that case, the Court granted leave to file an attached brief on reargument but only with respect to arguments addressing two specified statutory construction issues. As to the third and related statutory issue that was addressed in the brief, the motion for leave to file was denied.⁷² Terming the Court's order "peculiar," Justice Stevens in dissent urged that full discussion of the entire statute at issue should be allowed on the reargument; he indicated that he intended to read the entire brief in preparing for the reargument and welcomed comment by the opposing parties "on all issues discussed therein." Justice Blackmun joined this dissent, while Justice O'Connor would have granted the motion "in its entirety."

Occasionally, a party may wish to file an additional brief after a case has been argued. The party normally wishes to bring to the Court's attention a relevant new decision, statute, or other development since the case was argued, and to analyze and argue the impact of the new matter on the questions pending before the Court. Rules 25.5 and 25.6 permit a supplemental brief to be filed after argument in such circumstances but only "by leave of Court" and only by a party, not an amicus. See Sec. 14.24, *infra*. The party who wishes to submit a brief following the oral argument must preface the brief with a motion for leave to file, explaining why the brief should be entertained at such a late date. Both the motion and the brief will then be

⁷¹E.g., *Brown v. Board of Educ.*, 345 U.S. 972 (1953); *Illinois v. Gates*, 462 U.S. 213 (1983). See Sec. 5.11, *supra*. In *Boyle v. United Technologies Corp.*, 485 U.S. 931 (1988), the Court permitted the parties and amici to file supplemental briefs on reargument, limited to 20 pages for parties and 10 pages for amici.

⁷²The Court simultaneously permitted the opposing parties to file a supplemental brief responding only to the two statutory issues specified by the Court.

circulated to the Court, which will determine whether to grant the motion.⁷³ Both the motion and the brief should be printed as required under Rule 33.1, and joined as one document bearing a tan cover.

The Court has suggested that a supplemental brief is an appropriate way of calling the Court's attention to facts that make, or may make, the case moot. See *Tiverton Bd. of License Comm'rs v. Pastore*, 469 U.S. 238 (1985). The occurrence of such facts would also be grounds for seeking leave to file such a brief after argument.

Sometimes, without making a motion pursuant to Rule 21 or 22, counsel will merely submit a letter to the Clerk for distribution to the Court with any material that is attached. This is not the approved procedure, although the Clerk has on occasion treated such a letter as a motion for leave to file when, without making any argument, it merely called the Court's attention to a new and important statute, decision, or other fact, such as death of a party. An original plus 11 copies of the motion (or letter) should be submitted. The better and safer practice, however, is to conform to the rules, and submit a formal motion for leave to file the new material either as an attached brief or as an attachment to the motion itself (e.g., a new statute).

⁷³E.g., *McCreary County v. ACLU*, 545 U.S. 844 (2005) (motion to file supplemental brief after argument granted); *NEA v. Finley*, 523 U.S. 1070 (1998) (same); *Public Serv. Comm'n v. Mid-LA Gas Co.*, 463 U.S. 319 (1983) (same); *Arizona v. San Carlos Tribe*, 463 U.S. 545 (1983) (same).