MUNICIPAL APPEALS

INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, 2021 VIRTUAL MID-YEAR SEMINAR

DANIELLE L. GOLDSTEIN, CITY OF LOS ANGELES (THEY/THEM) – OFFICE OF THE CITY ATTORNEY, AFFIRMATIVE LITIGATION DIVISION

JUSTIN HOUPPERT - CITY OF CHICAGO (HE/HIM) – DEPARTMENT OF LAW, APPEALS DIVISION

WHAT WE'LL DISCUSS

- Briefing the appeal (DG)
- Arguing the appeal (JH)
- Questions

APPELLATE BRIEFS

DANIELLE GOLDSTEIN

CITY OF LOS ANGELES – OFFICE OF THE CITY ATTORNEY, AFFIRMATIVE LITIGATION DIVISION

BRIEFING: START WITH THE RULES



(a) Form of Brief. Briefs must conform to FRAP 32(a), except as set forth below:

(1) Cover. The title appearing on the front cover of a brief must include the name of the party or parties for whom the brief is filed. The docket number of the case must appear in type at least one inch high.

(4) Word Limitations.

(A) Principal Brief. A principal brief is acceptable if it contains no more than 14,000 words.

(B) Reply Brief. A reply brief is acceptable if it contains no more than 7,000 words.

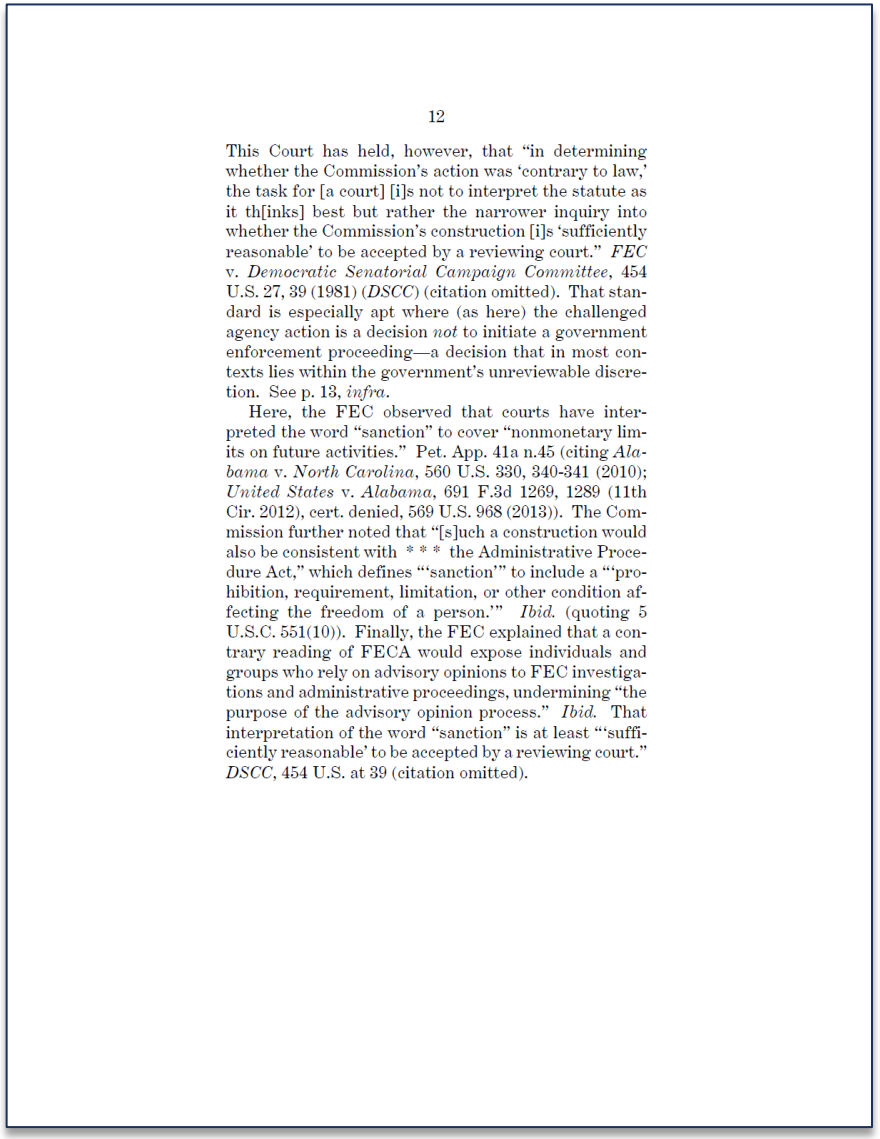
D.C. Circuit Notice - Use of Preferred Typefaces

Inbox ×

ecfnoticing@cadc.uscourt… 5:22 PM (0 minutes ago)

to me

Today the court announces a revision to the Circuit's Handbook of Practice and Internal Procedures to encourage the use of typefaces that are easier to read and to discourage use of the Garamond typeface. An extract from the Circuit Handbook reflecting the revision is available on the courts website under "Events and Announcements" and under "Rules and Procedures."



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This Court has held, however, that "in determining whether the Commission's action was 'contrary to law,' the task for [a court] [i]s not to interpret the statute as it th[inks] best but rather the narrower inquiry into whether the Commission's construction [i]s 'sufficiently reasonable' to be accepted by a reviewing court." *FEC* v. *Democratic Senatorial Campaign Committee*, 454 U.S. 27, 39 (1981) (*DSCC*) (citation omitted). That standard is especially apt where (as here) the challenged agency action is a decision *not* to initiate a government enforcement proceeding—a decision that in most contexts lies within the government's unreviewable discretion. See p. 13, *infra*.

Here, the FEC observed that courts have interpreted the word "sanction" to cover "nonmonetary limits on future activities." Pet. App. 41a n.45 (citing *Alabama* v. *North Carolina*, 560 U.S. 330, 340-341 (2010); *United States* v. *Alabama*, 691 F.3d 1269, 1289 (11th Cir. 2012), cert. denied, 569 U.S. 968 (2013)). The Commission further noted that "[s]uch a construction would also be consistent with * * * the Administrative Procedure Act," which defines "'sanction'" to include a "'prohibition, requirement, limitation, or other condition affecting the freedom of a person.'" *Ibid.* (quoting 5 U.S.C. 551(10)). Finally, the FEC explained that a contrary reading of FECA would expose individuals and groups who rely on advisory opinions to FEC investigations and administrative proceedings, undermining "the purpose of the advisory opinion process." *Ibid.* That interpretation of the word "sanction" is at least "'sufficiently reasonable' to be accepted by a reviewing court." *DSCC*, 454 U.S. at 39 (citation omitted).

CONSIDER DRAFTING IN YOUR TEMPLATE

Don't end up with an impenetrable wall of text

FRAMING IS CRITICAL

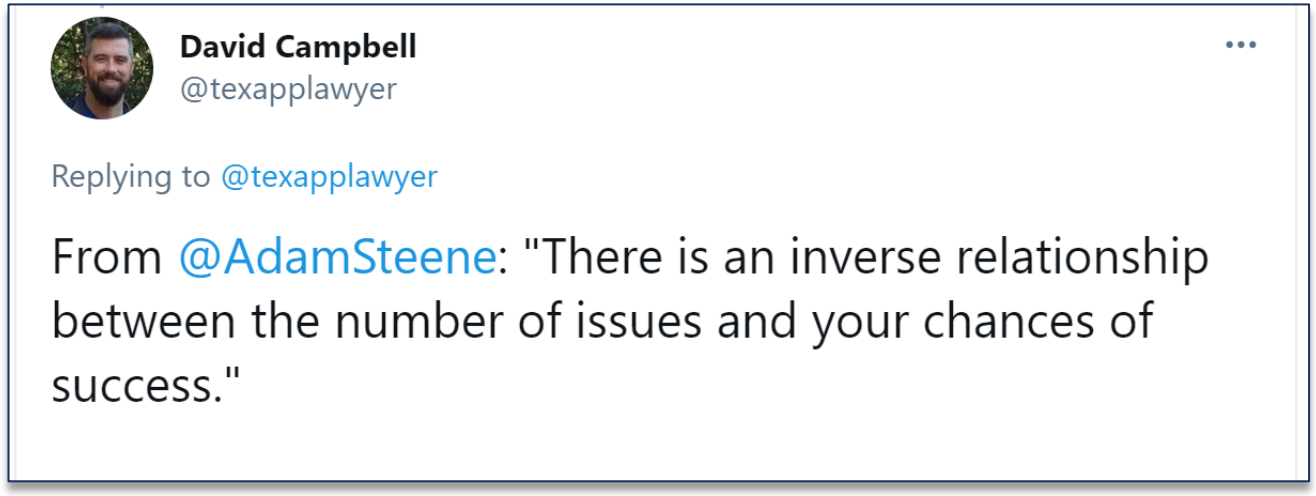
I. INTRODUCTION

This case is not about suppressing speech or stifling viewpoints. It is not about a conspiracy to restrain trade. Instead, this case is about Parler's demonstrated unwillingness and inability to remove from the servers of Amazon Web Services ("AWS") content that threatens the public safety, such as by inciting and planning the rape, torture, and assassination of named public officials and private citizens. There is no legal basis in AWS's customer agreements or otherwise to compel AWS to host content of this nature. AWS notified Parler repeatedly that its content violated the parties' agreement, requested removal, and reviewed Parler's plan to address the problem, only to determine that Parler was both unwilling and unable to do so. AWS suspended Parler's account as a last resort to prevent further access to such content, including plans for violence to disrupt the impending Presidential transition.

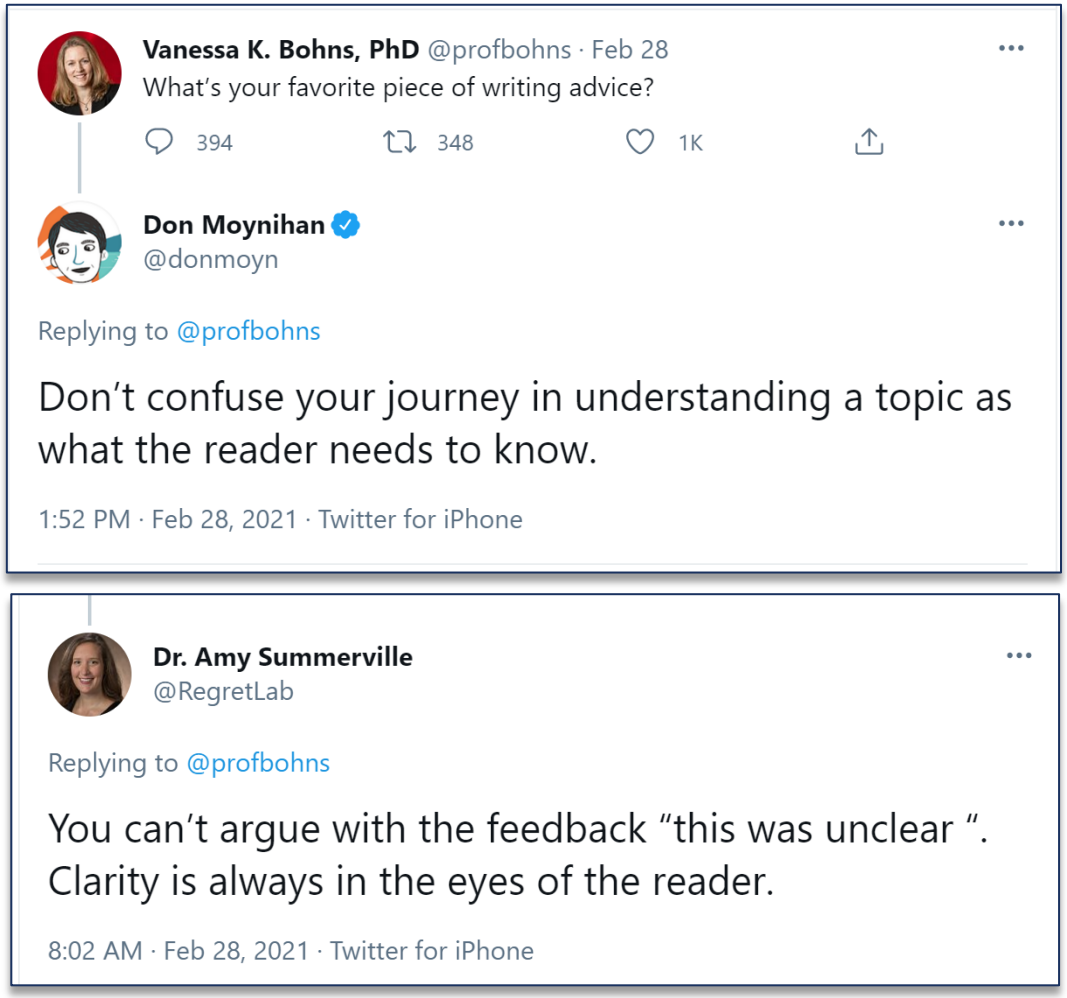
Despite Parler's rhetoric, its lawsuit is no more than a meritless claim for breach of contract. But the facts are unequivocal: If there is any breach, it is Parler's demonstrated failure and inability to identify and remove such content. AWS was well within its rights to suspend Parler immediately for those failures. Parler also cannot hold AWS liable in tort for enforcing the agreement's express terms. And there is no antitrust claim where, as here, Parler cannot plausibly plead an agreement to cause it harm and the complained-of conduct is undeniably compatible with a legitimate purpose.

- Figure out your narrative—have an elevator pitch before you start.

SELECT YOUR ISSUES CAREFULLY



CLARITY TAKES TIME



- Plan enough time for several rounds of edits.
- If you're not clear on what you're saying, you can't help the court.
- But the court doesn't need to see the work you did to get there.
- Consider the most probing questions you are likely to get in oral argument—and whether the answers should go into the brief.

ASK NOT WHAT YOUR READER CAN DO FOR YOU

- Cut words. Repeat.
- Use subheadings liberally.
- Use block quotes sparingly.

> "I didn't have time to write a short letter, so I wrote a long one instead."
>
> – ***Mark Twain***

USE SIMPLE, CONVERSATIONAL LANGUAGE

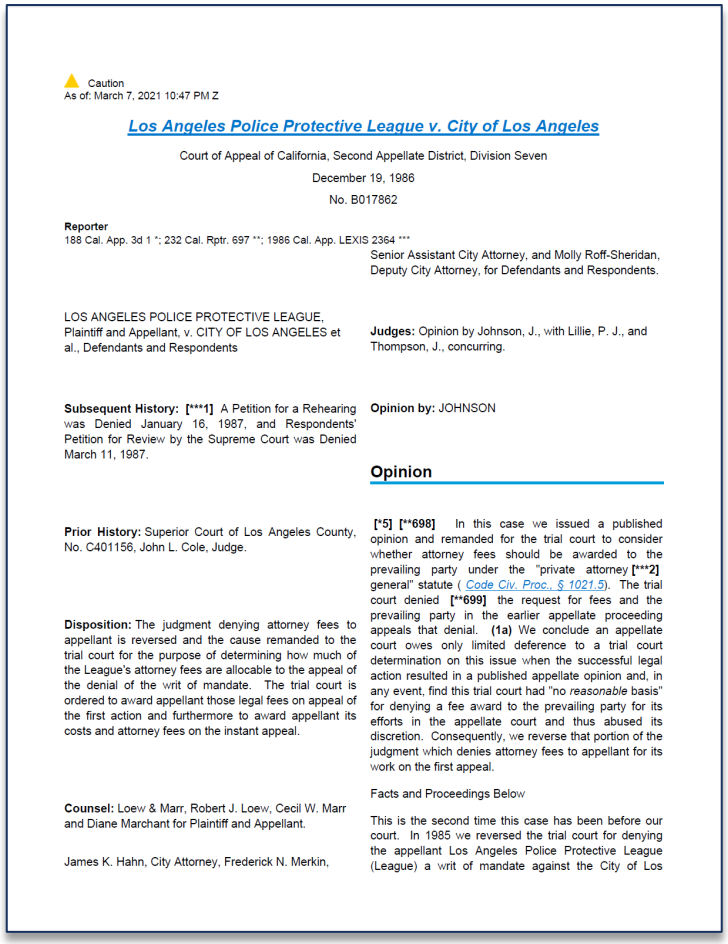


- Flourishes and formal language are distracting and won't help in most appellate courts.
- Read your brief out loud to identify stumbling blocks.
- Consider asking non-experts to read your brief.

WOULD YOU ENJOY YOUR OWN BRIEF?

- Tone matters. Speak as the government you want to see in the world.
- At your absolute busiest, would you hate reading your brief?
- Could you effectively skim your brief?

THE STANDARD GUIDES THE SUBSTANCE



Caution
As of: March 7, 2021 10:47 PM Z

Los Angeles Police Protective League v. City of Los Angeles

Court of Appeal of California, Second Appellate District, Division Seven

December 19, 1986

No. B017862

Reporter
188 Cal. App. 3d 1 *; 232 Cal. Rptr. 697 **; 1986 Cal. App. LEXIS 2364 ***

LOS ANGELES POLICE PROTECTIVE LEAGUE, Plaintiff and Appellant, v. CITY OF LOS ANGELES et al., Defendants and Respondents

Subsequent History: [***1] A Petition for a Rehearing was Denied January 16, 1987, and Respondents' Petition for Review by the Supreme Court was Denied March 11, 1987.

Prior History: Superior Court of Los Angeles County, No. C401156, John L. Cole, Judge.

Disposition: The judgment denying attorney fees to appellant is reversed and the cause remanded to the trial court for the purpose of determining how much of the League's attorney fees are allocable to the appeal of the denial of the writ of mandate. The trial court is ordered to award appellant those legal fees on appeal of the first action and furthermore to award appellant its costs and attorney fees on the instant appeal.

Counsel: Loew & Marr, Robert J. Loew, Cecil W. Marr and Diane Marchant for Plaintiff and Appellant.

James K. Hahn, City Attorney, Frederick N. Merkin, Senior Assistant City Attorney, and Molly Roff-Sheridan, Deputy City Attorney, for Defendants and Respondents.

Judges: Opinion by Johnson, J., with Lillie, P. J., and Thompson, J., concurring.

Opinion by: JOHNSON

Opinion

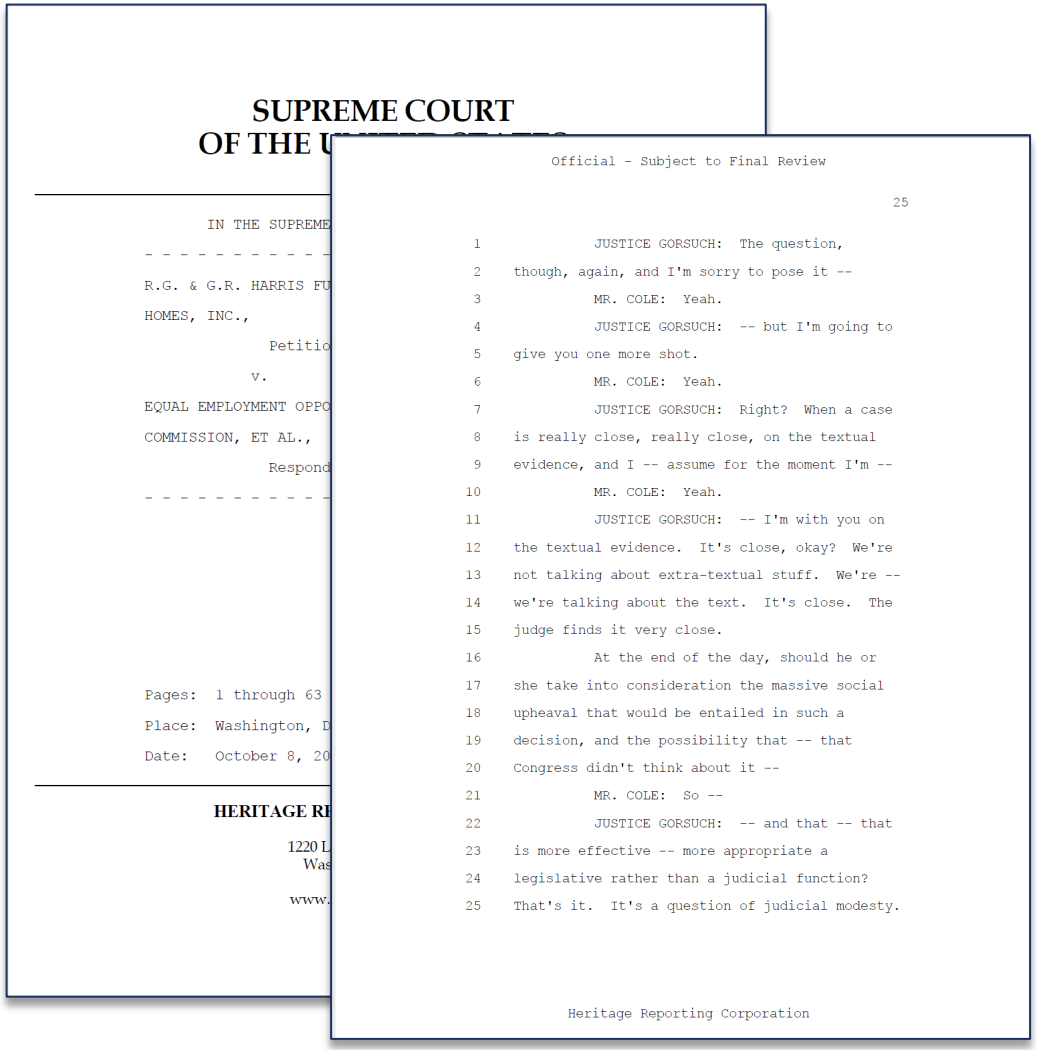
[*5] [698]** In this case we issued a published opinion and remanded for the trial court to consider whether attorney fees should be awarded to the prevailing party under the "private attorney **[***2]** general" statute (Code Civ. Proc., § 1021.5). The trial court denied **[**699]** the request for fees and the prevailing party in the earlier appellate proceeding appeals that denial. **(1a)** We conclude an appellate court owes only limited deference to a trial court determination on this issue when the successful legal action resulted in a published appellate opinion and, in any event, find this trial court had "no *reasonable* basis" for denying a fee award to the prevailing party for its efforts in the appellate court and thus abused its discretion. Consequently, we reverse that portion of the judgment which denies attorney fees to appellant for its work on the first appeal.

Facts and Proceedings Below

This is the second time this case has been before our court. In 1985 we reversed the trial court for denying the appellant Los Angeles Police Protective League (League) a writ of mandate against the City of Los

- The standard of review has a significant impact on the substance.
- As the appellant, the standard of review can guide your selection of issues. You are often at a disadvantage. Where you aren't, point that out.
- As the appellee, the standard often works in your favor. Where it does, emphasize it.
- Pay attention to waiver issues.

BEING RIGHT ON THE LAW IS JUST THE BEGINNING



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Place: Washington, D
Date: October 8, 20

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JUSTICE GORSUCH: The question, though, again, and I'm sorry to pose it --
MR. COLE: Yeah.
JUSTICE GORSUCH: -- but I'm going to give you one more shot.
MR. COLE: Yeah.
JUSTICE GORSUCH: Right? When a case is really close, really close, on the textual evidence, and I -- assume for the moment I'm --
MR. COLE: Yeah.
JUSTICE GORSUCH: -- I'm with you on the textual evidence. It's close, okay? We're not talking about extra-textual stuff. We're -- we're talking about the text. It's close. The judge finds it very close.
At the end of the day, should he or she take into consideration the massive social upheaval that would be entailed in such a decision, and the possibility that -- that Congress didn't think about it --
MR. COLE: So --
JUSTICE GORSUCH: -- and that -- that is more effective -- more appropriate a legislative rather than a judicial function? That's it. It's a question of judicial modesty.

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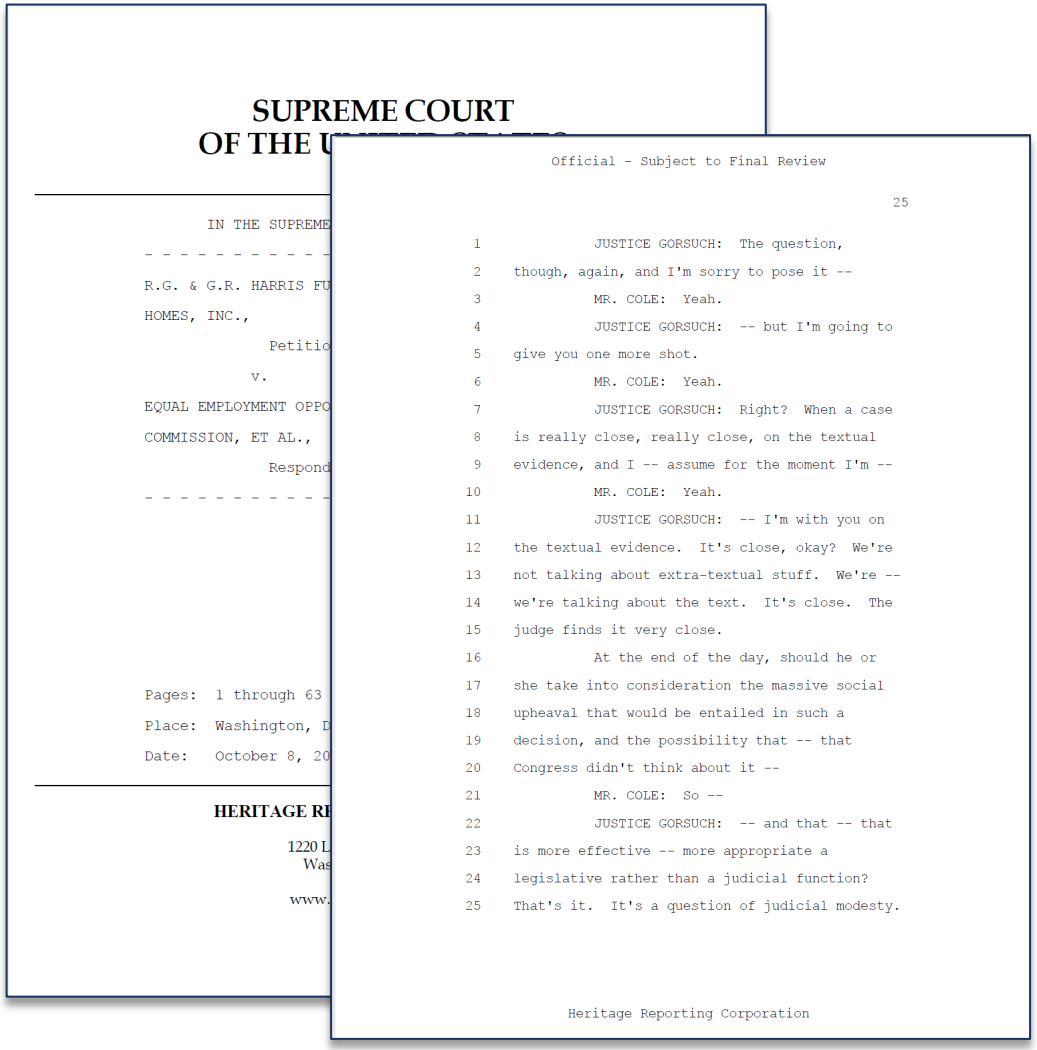
"Courts have been known to award judgments that seem to be unjust or defy common sense. A defective statute, or a defective Supreme Court precedent, can (in the eyes of most judges, at least) require such a result. But don't count on it." Scalia & Garner.

BEING RIGHT ON THE LAW IS JUST THE BEGINNING



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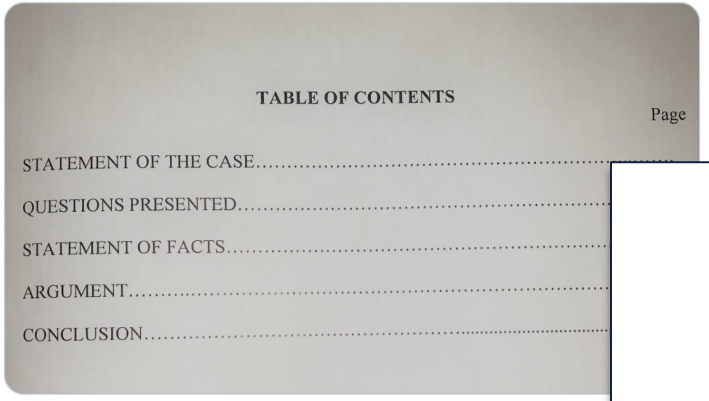
Heritage Reporting Corporation

- Your argument will be far more persuasive if you are right in reason as well as the rules.
- Usually there is a reason for the rule—with difficult facts, focus on framing from that perspective and tying your facts to the reason the rule exists.
  - In an immunities case, your position might bar recovery for a sympathetic plaintiff. Consider focusing on the implications for government decisionmaking if the immunity was eroded.
  - Emphasize how your facts illustrate this principle.

YOUR TABLE OF CONTENTS SHOULD TELL YOUR STORY

Dan Friedman
@judgedan65

It's your brief. But understand, if the table of contents in your appellant's brief looks like this, you have complied with Md. R. 8-504(a)(1) but forfeited the very first opportunity to tell the Court what your case is about. #AppellateTwitter



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STATEMENT OF THE CASE.....

QUESTIONS PRESENTED.....

STATEMENT OF FACTS.....

ARGUMENT.....

CONCLUSION.....

6:48 AM · Feb 11, 2021 · Twitter Web App

Eva Guzman
@JusticeGuzman

Adding to the discussion about a well-written Table of Contents: headers in the TOC's argument section can be helpful for preparing notes on petitions I'll be urging the Court to grant. I copy it and fill in as I write my talking points.

11:25 AM · Feb 13, 2021 · Twitter for iPhone

10 Retweets **5** Quote Tweets **64** Likes

3. **Table of Contents** This must include page references.

Practice Tip: Use full sentences for your table of contents headings so that your table of contents reads as an outline of your case. Some judges read the table of contents first, and you should take advantage of the opportunity to lay out your case in a concise, logical roadmap. For example, rather than using a heading like "Argument," tell the reader what your argument is.

THE MOST IMPORTANT ISSUE FOR ISSUE STATEMENTS: READABILITY

[1] Petitioner's Issue Statement:
"Does the public burning of an American Flag during the course of a political demonstration constitute free speech subject to the protection of the First Amendment?"[11]

[2] Respondent's Issue Statement:
"Whether Tex. Penal Code Ann. § 42.09(a)(3), which penalizes such "physical mistreat[ment]" of "a national flag" as the actor "knows will seriously offend one or more persons likely to observe or discover his action," facially violates the First and Fourteenth Amendments to the United States Constitution."[12]

Texas v. Johnson, 491 U.S. 397 (1989)

THE MOST IMPORTANT ISSUE FOR ISSUE STATEMENTS: READABILITY

- Fundamentally a Goldilocks exercise
  - Just enough, but not too much, content and detail re governing law, facts, open issue
  - Just enough, but not too much, persuasive zhuzh
- Different folks have different approaches
  - One (often long) sentence
  - "Deep" statements of several short sentences providing context
    - Scalia & Garner recommend breaking the question into such a statement of no more than 75 words
- Depends on the standard of review and your strategic position
- The main thing is readability

FACTUAL BACKGROUND: THE UNDERRATED MVP

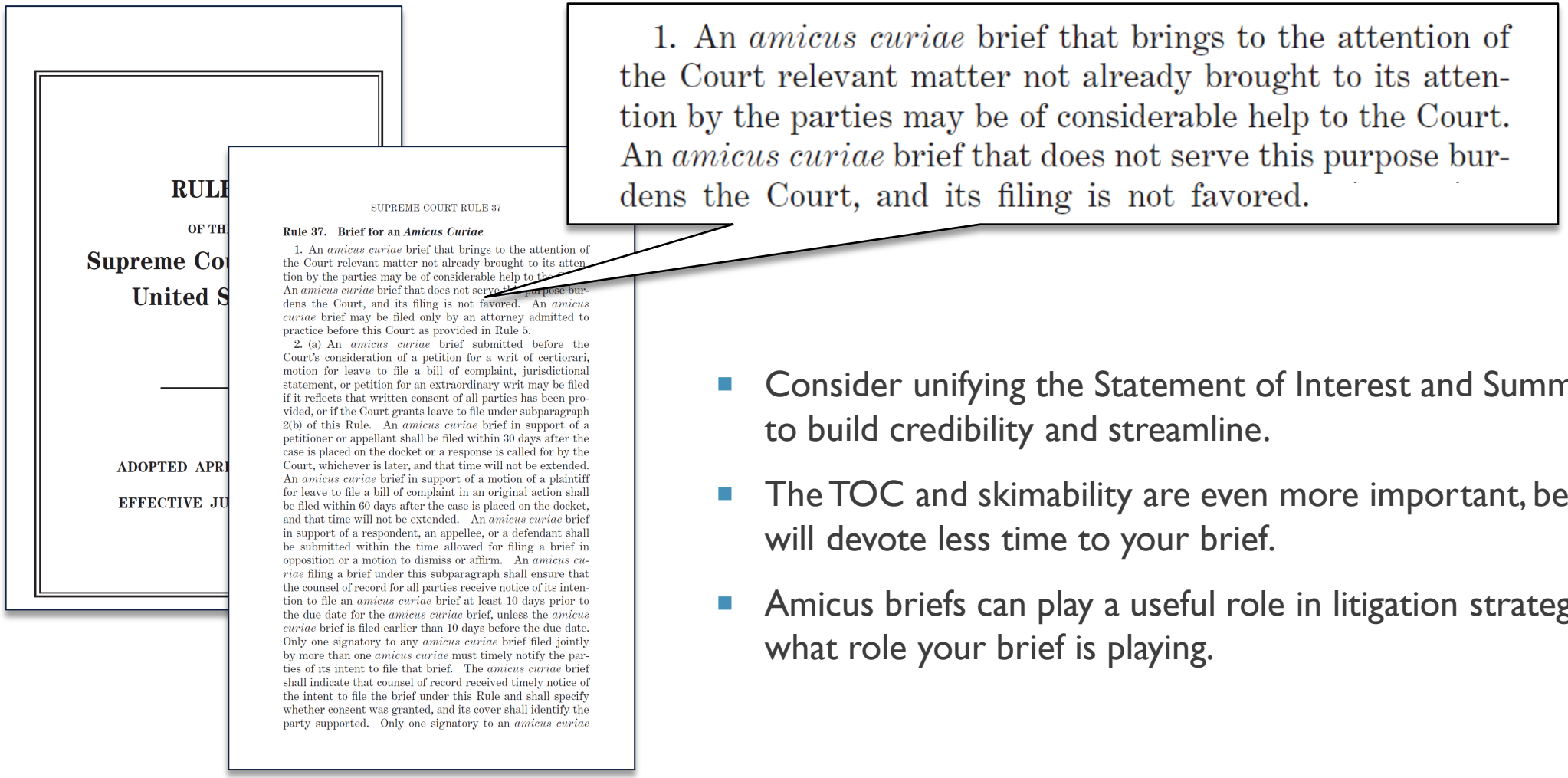
Practice Tips: The statement of the case is your first real opportunity to draw the reader in, explain what the case is about, and convince the reader to care about it. It should read like a story of what happened, not like a minute order summarizing the proceedings below. Tell a story that is interesting, compelling, and makes the reader want to side with your client. Generally, the statement of the case should include the facts relied upon in your argument section. However, you need not include every detail in the statement of facts. You can elaborate further in the argument section when doing so will make it easier for the reader to digest the additional detail.

Don't avoid inconvenient facts. If you leave out an important fact that seems to benefit your opponent, the judges will notice the omission, and they will start to wonder if you are omitting other relevant information as well. If the judges start doubting your credibility as they read your statement of the case, you will be in trouble by the time they get to your legal argument. Conversely, including all relevant facts – even those that work against your case – shows candor, honesty, and integrity.

The Appellate Lawyer Representatives' Guide to Practice in the U.S. Court of Appeals for the Ninth Circuit (Feb. 2021 ed.) at 87.

- You can win or lose in the fact section.
- What work is detail doing?
  - You are asking the reader to remember a ton of facts, which is a ton of work. So it had better be a story, not a recitation.
  - For example, consider whether you need precise dates, or whether you're better served by "soon after" or "later that year."
- Contextualize—but don't avoid—bad facts.
- Implement your unified narrative in the fact section.

A NOTE ON AMICUS BRIEFS



- Consider unifying the Statement of Interest and Summary of Argument to build credibility and streamline.
- The TOC and skimability are even more important, because the court will devote less time to your brief.
- Amicus briefs can play a useful role in litigation strategy; be clear on what role your brief is playing.

IN CONCLUSION



APPELLATE ORAL ARGUMENT

JUSTIN HOUPPERT
CITY OF CHICAGO – DEPARTMENT OF LAW, APPEALS DIVISION



PREPARATION: THE WEEK BEFORE THE ARGUMENT

- Preparation ahead of argument is often more important than the argument itself.
- Reread all the briefs and review outlines of the record and case law.
- Create an outline for the argument
  - Base outline on main points in your brief.
  - Aim for a single sheet front and back with bullet points.
  - Determine what points from opponent's response/reply need addressing.
- Write out and practice aloud ten tough questions and answers.

PREPARATION: THE DAY BEFORE THE MOOT COURT

- Begin practicing affirmative argument aloud.
- Memorize short introduction.
  - Limit introduction to short opening sentence addressing the court followed by a single sentence stating the result you want and why.
  - For example, “May it please the court. This court should affirm summary judgment for the City because the undisputed facts show that the defendant officers had probable cause to arrest the plaintiff.”
- Rehearse affirmative arguments until almost memorized.
- Keep time during practice runs

PREPARATION: THE MOOT COURT

- Video record the moot to watch later.
- Don’t worry about time at the moot court.
- Try out all affirmative points.
- Receive and respond to as many questions as possible.
- Afterwards, discuss reactions to affirmative points and answers and ask for suggestions on how to improve either.
- Leave a day before argument to watch the recording and to incorporate lessons from the moot.

THE ARGUMENT: WHAT TO BRING TO THE PODIUM

- Bring as little as possible and no loose papers.
- Bring your single sheet outline.
- I also bring a binder with tabbed and hole-punched briefs and record/legal outlines.
- I also bring a legal pad for note taking during the other side's argument.
- Some prefer a file folder or tri-folder with argument outline and record/legal outlines.
- Don't bring props or visual aids.

THE ARGUMENT: AFFIRMATIVE ARGUMENT

- Recite memorized introduction without looking at outline.
- Transition into first argument point, “First, I would like to address ____.”
- Stay calm, speak slowly and conversationally.
- Avoid sounding overly aggressive or argumentative.
- This should be a conversation with the people who will be deciding your case.

THE ARGUMENT: ADJUSTMENTS AS APPELLEE

- If you are appellee, stick with the affirmative arguments you outlined and practiced.
- Integrate notes from appellant's arguments as necessary, including key points to rebut.
- But also recognize what isn't worth addressing from appellant in limited time allotted.
- You can acknowledge key points made by judges during appellant's argument.
- But don't pander to any particular judge.
- Recognize points in your outline that may not be worth time if unaddressed by appellant or court did not seem interested.
- Your focus should be issues the court cares about.

THE ARGUMENT: QUESTIONS

- It is vital to stop speaking the moment you hear a judge's voice.
- Stop, look at the judge, and really listen to what is being asked.
- Answer questions, yes or no, if asked that way, and then explain.
- Be respectful, "Respectfully, you Honor, no, that is not the case because __."
- Again, remember that it's a conversation, not a hostile argument.

THE ARGUMENT: QUESTIONS (CONTINUED)

- Break down multi-part questions and take them one part at a time.
- If question raises something not briefed, don’t be afraid to say so and offer a post-argument written response.
- Recognize soft-ball questions when they’re asked.

THE ARGUMENT: STAYING ON TRACK

- One of the key and most difficult skills is transitioning from answers back to argument.
- I actually use the bullet points in my outline to note where I stopped when interrupted.
- As I begin to finish my answer, I will move back to that bullet point.
- Or move on to the next bullet point if the answer fully addressed the previous point.

THE ARGUMENT: CONCESSIONS

- Another key skill is recognizing when a judge is trying to obtain a concession and what to do.
- You must know ahead of time which points you absolutely cannot concede.
- It is hard to win an appeal at argument, but it is easy to lose one by the wrong concession.
- But it is also important to recognize when a point is one you can concede and move on.

THE ARGUMENT: WHEN LESS IS MORE

- Sometimes, you may have a cold bench.
- Other times, the panel may make it clear that they are on your side.
- Don’t feel the need to use all your allotted time if you have made all your points.
- “If there are questions, I’m happy to answer them. Otherwise, we’ll rest on our brief on any remaining issues.”

THE ARGUMENT: REBUTTAL

- Realize that, as appellant, you have only a small amount of rebuttal time.
- Reserve that time up front if necessary.
- Be conscious of running over that time during your opening argument.
- Focus on the one or two most important points discussed by the appellee and the court.

POST ARGUMENT

- Take advantage of rules like FRAP 28(j) that allow for submission of post-argument briefing.
- Update the court on any new developments in the law.
- Respond to any post-argument submissions from your opponent.