

Summer 2015

## Summing It Up With Panache: Framing a Brief's Summary of the Argument, 48 J. Marshall L. Rev. 991 (2015)

Judith Fischer

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# SUMMING IT UP WITH PANACHE: FRAMING A BRIEF'S SUMMARY OF THE ARGUMENT

JUDITH D. FISCHER\*

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## I. INTRODUCTION

Experts have called an appellate brief's summary of the argument section "the most important part of a brief,"<sup>1</sup> its "structural centerpiece,"<sup>2</sup> and "your first serious opportunity to argue the merits of your appeal."<sup>3</sup> Two theories, framing theory and priming theory, help explain why the summary is so important. Framing theorists define a frame as a mental structure that provides a lens through which a recipient will "locate, perceive, identify, and label" an experience.<sup>4</sup> The way a point is framed affects what readers focus on when forming their opinions.<sup>5</sup> A similar concept, priming theory,<sup>6</sup> holds that exposing

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\* Judith D. Fischer is a professor of law emeritus at the University of Louisville's Louis D. Brandeis School of Law. She thanks Professor Ariana Levinson for her insightful comments on an earlier draft and Robin Rice and Sunnye Bush-Sawtelle for their excellent research assistance.

<sup>1</sup> *Interview with Justice Clarence Thomas, in Interviews with Supreme Court Justices*, 13 SCRIBES J. LEGAL WRITING 99, 113 (2010); see also ANTONIN SCALIA AND BRYAN A. GARNER 80 (2008) (stating that for many judges, "the summary of the argument [is] the single most important part of the brief.")

<sup>2</sup> RUGGERO J. ALDISERT, *WINNING ON APPEAL: BETTER BRIEFS AND ORAL ARGUMENT* 184 (2d ed. 2003) (quoting former Loyola Law School dean and former Supreme Court clerk David Burcham).

<sup>3</sup> MAYER BROWN LLP, *FEDERAL APPELLATE PRACTICE* 331 (2008).

<sup>4</sup> *E.g.*, ERVING GOFFMAN, *FRAME ANALYSIS: AN ESSAY ON ORGANIZATION OF EXPERIENCE* 21 (1974) (stating that frames provide "schemata of interpretation").

<sup>5</sup> James N. Druckman, *On the Limits of Framing Effects: Who Can Frame?*, 63 J. POL. 1041, 1043 (2001).

a reader to chosen information “plants a seed in the brain.”<sup>7</sup> Because the summary of the argument appears near the beginning of a brief, it allows the legal advocate to take advantage of both framing and priming to begin to convince the Court. Thus, it’s a mistake for an advocate to treat the section as an afterthought.<sup>8</sup>

The United States Supreme Court’s rules require that a brief contain a summary of the argument section,<sup>9</sup> as do the federal rules<sup>10</sup> and those of some states.<sup>11</sup> And because the section can affect a court’s thinking early, some experts advise including it even if it is not required.<sup>12</sup> Judges, lawyers, and law professors have offered plentiful observations about the section,<sup>13</sup> but the sources are short on specifics about what makes an effective summary.

In this article, I first examine what experts have written about the importance of the summary of the argument section and what makes an effective one. I then go beyond the generalities and examine some actual summaries of the argument from United States Supreme Court briefs. Many were written by noted Supreme Court advocates or by the Solicitor General’s office, which is known for its outstanding advocacy.<sup>14</sup> The summaries introduced arguments on such controversial topics as affirmative action, gay marriage, and the separation of church and state. I

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<sup>6</sup> Kathryn M. Stanchi, *The Power of Priming in Legal Advocacy: Using the Science of First Impressions to Persuade the Reader*, 89 OR. L. REV. 305, 307 (2010).

<sup>7</sup> *Id.* at 306, 307 (citing E. TORY HIGGINS, KNOWLEDGE ACTIVATION: ACCESSIBILITY, APPLICABILITY, AND SALIENCE, IN SOCIAL PSYCHOLOGY: HANDBOOK OF BASIC PRINCIPLES 133, 134 (E. Tory Huggins & Arie W. Kruglanski eds, 1996).

<sup>8</sup> *Interview with Justice Samuel Alito, in Interviews with Supreme Court Justices*, 13 SCRIBES J. LEGAL WRITING 169, 178 (2010) (stating that writers who take the summary lightly have missed an opportunity); Carter G. Phillips, *Advocacy before the United States Supreme Court*, 15 T.M. COOLEY L. REV. 177, 184 (1998) (noting that some lawyers spend too little time on the summary of the argument).

<sup>9</sup> SUP. CT. R. 24 (1) (h).

<sup>10</sup> F.R. APP. P. 28 (a) (7).

<sup>11</sup> *E.g.*, FLA. R. APP. P. 9.210 (b) (4); IND. R. APP. P. 46 (A) (7); NEV. R. APP. P. 28 (A) (8); PA. R. APP. P. 2111 (a) (6).

<sup>12</sup> ALDISERT, *supra* note 2, at 183 (1992) (stating that “the good brief writer will consider [the summary of the argument] mandatory”); *see also* URSULA BENTELE ET AL., APPELLATE ADVOCACY: PRINCIPLES AND PRACTICE 333 (5th ed. 2012) (stating that many practitioners include the section “in the well-founded belief that busy judges find them useful.”).

<sup>13</sup> *E.g.*, *Interview with Justice Samuel Alito, supra* note 8, at 178 (advising that the section should be self-contained); Robert E. Crotty, *50 Writing Tips for Commercial Lawyers*, 58 PRAC. LAW. 45, 52 (2012) (stating that the section should “have impact”); MARY BETH BEAZLEY, A PRACTICAL GUIDE TO APPELLATE ADVOCACY 189 (3d ed. 2010) (stating that the section can “present a ‘holistic’ picture of the case.”).

<sup>14</sup> *See* Frank H. Easterbrook, *Friedman Lecture in Appellate Advocacy*, 23 FED. CIRCUIT B.J. 1 (2013) (stating, “[t]here is no better, or more successful, appellate practice group than the Office of the Solicitor General.”).

analyze characteristics of these summaries, including their opening and closing lines, in order to shed some light on this important component of an appellate brief.

## II. EXPERTS' VIEWS ABOUT THE SUMMARY OF THE ARGUMENT SECTION

Experts have noted that many judges read the summary of the argument early in their review of a brief in order to get a feel for the case. Judge Ruggero Aldisert observed that after the appellant's issue statement and the trial court's opinion, appellate judges generally turn to each side's summary of the argument,<sup>15</sup> which "will likely create the first, and perhaps last, impression of the Court toward the legal merits of the client's case."<sup>16</sup> Justice Antonin Scalia and Bryan Garner counseled, "[D]on't omit this part—and give it the attention it deserves."<sup>17</sup> And Justice Samuel Alito stated simply, "It's the first thing I read."<sup>18</sup>

Two purposes are commonly identified for the summary section. The first is to inform the judge about the content of the brief.<sup>19</sup> Judges do not want to read a mystery story,<sup>20</sup> so the summary should provide an overview<sup>21</sup> or "road map" of the argument section.<sup>22</sup> Because the summary may function as a

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<sup>15</sup> ALDISERT, *supra* note 2, at 183; *see also* Robert Baldock et al., *What Appellate Advocates Seek from Appellate Judges and What Appellate Judges Seek from Appellate Advocates: Panel Two*, 31 N.M. L. REV. 265, 268 (2001) (stating that Judge Carlos Lucero first reads the statement of the issues and then the summary of the argument).

<sup>16</sup> ALDISERT, *supra* note 2, at 184 (quoting former Loyola Law School dean and former Supreme Court clerk David Burcham).

<sup>17</sup> SCALIA & GARNER, *supra* note 1, at 80; *see also* Bryan J. Pattison, *Writing to Persuade*, 24 UTAH B.J. 10, 12 (2011) (quoting Judge Gregory Orme of the Utah Court of Appeals as saying lawyers who slight the summary miss an opportunity to "pre-sell" their argument). *But see Interview with Justice Antonin Scalia, in Interviews with Supreme Court Justices*, 13 SCRIBES J. LEGAL WRITING 51, 74 (2010) (stating that Justice Scalia often skips the summary of the argument and that its value is mainly to refresh his memory about a brief he has already read.).

<sup>18</sup> *Interview with Justice Samuel Alito, supra* note 8, at 169, 178.

<sup>19</sup> ALDISERT, *supra* note 2, at 184; BENTELE ET AL., *supra* note 12, at 333; LAUREL CURRIE OATES ET AL., *JUST BRIEFS* 116 (2d ed. 2008).

<sup>20</sup> ALDISERT, *supra* note 3, at 184.

<sup>21</sup> CATHY GLASER ET AL., *THE LAWYER'S CRAFT: AN INTRODUCTION TO LEGAL ANALYSIS, WRITING, RESEARCH, AND ADVOCACY* 377 (2002); *see also* MAYER BROWN LLP, *supra* note 3, at 331 (2008) (stating that the summary of the argument "serves as a roadmap"); MICHAEL E. TIGAR & JANE B. TIGAR, *FEDERAL APPEALS: JURISDICTION AND PRACTICE* 456 (3d ed. 1999) (stating that the summary is an opportunity to present an overview); Dan Schweitzer, *Fundamentals of Preparing a United States Supreme Court Amicus Brief*, 5 J. APP. PRAC. & PROCESS 523, 540 (2003) (stating that the summary "provides the Court with a roadmap to your brief.").

<sup>22</sup> BEAZLEY, *supra* note 13, at 189; *see also* BENTELE ET AL., *supra* note 12,

memory aid if some time has passed,<sup>23</sup> an advocate might write it as if the judge will read only that section.<sup>24</sup>

The summary has a second purpose: to capture the court's attention and begin to convince it to rule for the writer's side.<sup>25</sup> The preliminary parts of the brief, such as the question presented and the statement of the case, are expected to be somewhat objective.<sup>26</sup> But in the summary of the argument, counsel can switch to overt persuasion. The summary section can "be both more dramatic and more argumentative" than the introductory parts of the brief.<sup>27</sup> It "provides the 'flavor' of the case,"<sup>28</sup> piquing the judge's interest before the more thoroughly developed argument section.<sup>29</sup> Here counsel can introduce the brief's theme,<sup>30</sup> priming the judges to see the rest of the brief in a chosen light,<sup>31</sup> and "control[ing] the 'feel' [they] get from a case."<sup>32</sup> Accordingly, the summary should "go beyond mere assertion," and be appealing, not dry.<sup>33</sup> As Judge Aldisert advised, "You'd better sell the sizzle as soon as possible; the steak can wait."<sup>34</sup>

Ways to sell the sizzle include engaging the court's emotions<sup>35</sup> or presenting a strong logical argument<sup>36</sup> based on the law. And vivid language persuades more powerfully than heavy, lifeless prose.<sup>37</sup> Livening up the language might mean saying a stock price

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at 333 (recommending that the summary should ordinarily follow the organization of the brief).

<sup>23</sup> STEPHEN SHAPIRO ET AL., SUPREME COURT PRACTICE 730 (10th ed. 2013); Christian A. Fisanick, *Travelogue of Appellate Practice*, 23 No. 4 Litigation, sum. 1997, at 49, 50.

<sup>24</sup> Pattison, *supra* note 17, at 12; *see also* Crotty, *supra* note 13, at 52 (stating that if the court reads only the summary it should be able to understand the arguments).

<sup>25</sup> BEAZLEY, *supra* note 13, at 189.

<sup>26</sup> *See, e.g., id.* (discussing the different sections of an appellate brief).

<sup>27</sup> *Id.* at 190.

<sup>28</sup> ALDISERT, *supra* note 2, at 183; *see also* Stanchi, *supra* note 6, at 310 (stating that the summary can prime the reader's viewpoint on the case).

<sup>29</sup> Pattison, *supra* note 17, at 10, 12 (quoting Judge Gregory Orne); *see also* Crotty, *supra* note 13, at 52 (stating that the summary of the argument "should have impact").

<sup>30</sup> Stanchi, *supra* note 6, at 312; *see also* Eva M. Guzman, *Practical Considerations: Seeking Review in a Court of Last Resort*, 30 FAM. ADVOC., spr. 2014, at 42 (stating that the summary of the argument should present the 'hook' or theme of the case).

<sup>31</sup> Stanchi, *supra* note 6, at 310.

<sup>32</sup> *Id.*

<sup>33</sup> FREDERICK BERNAYS WIENER, EFFECTIVE APPELLATE ADVOCACY 83 (rev'd ed., Christopher T. Lutz & William Pannill, eds., 2004).

<sup>34</sup> ALDISERT, *supra* note 2, at 152 (italics omitted).

<sup>35</sup> Anna Hemingway, *Making Effective Use of Practitioners' Briefs in the Law School Curriculum*, 22 ST. THOMAS L. REV. 417, 428 (2010); Stanchi, *supra* note 6, at 324.

<sup>36</sup> Hemingway, *supra* note 35, at 428; Stanchi, *supra* note 6, at 330.

<sup>37</sup> *See* ROSS GUBERMAN, POINT MADE: HOW TO WRITE LIKE THE NATION'S TOP ADVOCATES 188 (2d ed. 2014) (referring to a quotation made by Gerry Spence).

“plunged” instead of “fell,” or that a party “heeded” a point instead of “took [it] into consideration.”<sup>38</sup> Such verbs can sharpen ideas and engage the reader’s emotions through imagery.<sup>39</sup>

Experts agree that the summary should be short,<sup>40</sup> without excessive detail.<sup>41</sup> Because the table of contents and the point headings also provide an overview, a lengthy summary of the argument may irritate a judge by seeming repetitive.<sup>42</sup> Various experts have advised including only a few paragraphs,<sup>43</sup> or limiting the summary to a single page,<sup>44</sup> two pages,<sup>45</sup> or five to ten percent of the argument’s length.<sup>46</sup> They also advise keeping citations to a minimum or, if possible, omitting them entirely.<sup>47</sup> Of course, if a governing authority is mentioned, it must be cited.<sup>48</sup>

The summary should not be a simple digest of the argument section.<sup>49</sup> Nor should it simply repeat the brief’s point headings.

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<sup>38</sup> *Id.* at 191. For Guberman’s list of “50 zinger verbs,” see *id.* at 198.

<sup>39</sup> Guberman’s list of “zinger verbs” includes *besiege, etch, pluck, slash,* and *strike*. *Id.* at 198-99.

<sup>40</sup> *E.g.*, CHARLES R. CALLEROS, *LEGAL METHOD AND WRITING* 441 (5th ed. 2006) (stating, “[y]ou must keep it short”); Anna Hemingway, *Making Effective Use of Practitioners’ Briefs in the Law School Curriculum*, 22 *ST. THOMAS L. REV.* 417, 428 (stating that summaries of the argument can be brief, “even in landmark cases”); David Mills, *Writing the Holistic Brief: Making It More Than the Summary of Its Parts*, 60 *FED. L.*, Aug. 2013, 58, 58 (stating that the summary should be kept short).

<sup>41</sup> BEAZLEY, *supra* note 13, at 191; see also OATES ET AL., *supra* note 19, at 117 (stating that counsel should avoid writing too much).

<sup>42</sup> CALLEROS, *supra* note 40, at 441; see also Schweitzer, *supra* note 21, at 541 (stating that the summary should not be “superficial or redundant”).

<sup>43</sup> RICHARD NEUMANN & KRISTEN KONRAD TISCIONE, *LEGAL REASONING AND LEGAL WRITING* 326 (7th ed. 2013).

<sup>44</sup> BENTELE, et al., *supra* note 12, at 333; Guzman, *supra* note 30, at 42; Mills, *supra* note 40, at 58.

<sup>45</sup> OATES ET AL., *supra* note 19, at 117.

<sup>46</sup> TIGAR & TIGAR, *supra* note 21, at 456; see also MAYER BROWN LLP, *supra* note 3, at 331 (stating that for appellate briefs, the summary of the argument should be no more than two to four pages); SHAPIRO ET AL., *supra* note 23, at 730 (stating that the summary of the argument should be about two to four pages, and not more than ten percent of the brief’s length).

<sup>47</sup> BEAZLEY, *supra* note 13, at 192 (stating that the summary “need not contain numerous citations to authority”); MAYER BROWN LLP, *supra* note 3, at 331 (stating that most citations should be omitted, but that a dispositive precedent or fact should be cited); OATES ET AL., *supra* note 19, at 117 (advising that citations to authority be kept to a minimum); Judge Patricia Millett, United States Court of Appeals for the D.C. Circuit, panelist at Legal Writing Institute Conference (July 1, 2014) (advising brief writers to try to eliminate citations from the summary of the argument).

<sup>48</sup> MAYER BROWN LLP, *supra* note 3, at 331; see also GLASER ET AL., *supra* note 21, at 337 (stating that the summary should include “minimal citation,” citing only to a controlling statute or case).

<sup>49</sup> Phillips, *supra* note 8, at 184 (stating that it is a “terrible mistake” to write a digest of the argument section and use it as the summary of the argument.)

The federal rules state that explicitly,<sup>50</sup> and most of the judges in one study agreed.<sup>51</sup> Repeating the headings wastes valuable space and can seem redundant.<sup>52</sup> Instead, counsel should write something fresher.

Some suggest writing the summary of the argument last, after the argument section is prepared.<sup>53</sup> That way, counsel can ensure that it really does reflect the substance of the argument yet presents a fresh take on it.<sup>54</sup>

The summaries discussed below show how twenty lawyers applied, or sometimes ignored, the experts' guidance.

### III. THE SUMMARIES OF THE ARGUMENT FROM SELECTED SUPREME COURT BRIEFS

To examine lawyers' practices in writing summaries of the argument, I chose merit briefs from ten relatively recent United States Supreme Court cases,<sup>55</sup> for a total of twenty briefs, some written by well-known advocates. I computed the numbers of words and citations in the summaries and noted whether they were divided into subsections. Then, because the opening and closing in a piece of discourse are recognized as major positions of emphasis, I specifically examined that language.

The quality of a summary of the argument cannot be fairly judged by whether the writer's side won the case, because many other factors, including the state of the law, the record below, and the judge's viewpoint, can affect the outcome. Still, because readers may be interested to know how the Court ruled in the selected cases, I include that information.

Some briefs include an introduction<sup>56</sup> not required by the

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<sup>50</sup> FED. R. APP. P. 28(a)(c); *see also* David Lewis, 2003 *New England Appellate Judicial Survey*, 29 VT. B.J. 41, 41 (2003) (stating that the summary should do more than repeat the point headings).

<sup>51</sup> Lewis, *supra* note 50, at 41 (reporting judges' opinions that the summary should not just repeat the point headings).

<sup>52</sup> NEUMANN ET AL., *supra* note 43, at 326; *see also* MAYER BROWN LLP, *supra* note 3, at 331 (stating that the summary "should do more than simply repeat the headnotes found in the table of contents.>").

<sup>53</sup> TIGAR & TIGAR, *supra* note 21, at 456 (stating that the summary "will be the last substantive part of the brief the advocate writes"); *see also* OATES ET AL., *supra* note 19, at 115 (suggesting that the advocate prepare one draft of the summary before writing the argument and a second version afterward).

<sup>54</sup> Crotty, *supra* note 13, at 52 (advising the advocate to write the summary last, because "[y]ou cannot effectively summarize your argument until you finally know what your argument is."); Phillips, *supra* note 8, at 184 (stating that writing the summary last will help the advocate to "avoid rehashing the argument").

<sup>55</sup> *See infra* Table A (listing the ten cases).

<sup>56</sup> *E.g.*, Brief for Respondents at 1, *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013) (No. 11-345), 2012 U.S. S. Ct. Briefs LEXIS 3173 at \*1 (showing the use of an introductory section). Other briefs include an argumentative "statement" in addition to the summary of the argument

rules, near the beginning of the brief and before the summary of the argument. This article does not analyze those extra sections but focuses instead on the required summary of the argument section.

A. *The Lengths, Numbers of Citations, and Structures of the Selected Summaries*

Although the effectiveness of summaries of the argument cannot be determined through a formulaic analysis, some of their characteristics can be quantified. In light of experts' advice to keep the summary short and to limit citations, I noted the summaries' word counts and numbers of citations. I also noted whether the summaries were divided into subparts.

When the ten selected cases were decided, the word limit for United States Supreme Court briefs was 15,000.<sup>57</sup> Lawyers tend to use most of those words. In a sampling of six briefs analyzed here,<sup>58</sup> the lowest total number of words was 14,227.<sup>59</sup> The lengths of the twenty summaries are shown in Table A: Statistics from Selected Summaries.

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section. *E.g.*, Brief for Respondents at 1-4, *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011) (No. 10-277), 2011 U.S. S. Ct. Briefs LEXIS 247 at \*8 (showing the use of an argumentative statement).

<sup>57</sup> SUP. CT. R. 33(1) (g).

<sup>58</sup> Brief for Petitioner, *Fisher*, 133 S. Ct. 2411 (2013) (No. 11-345); Brief for Respondents, *Fisher*, 133 S. Ct. 2411 (2013) (No. 11-345); Brief for Petitioner, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (No. 12-144); Brief for Respondent, *Hollingsworth*, 133 S. Ct. 2652 (2013) (No. 12-144); Brief for Petitioner, *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014) (No. 12-696); Brief for Respondent, *Galloway*, 134 S. Ct. 1811 (2014) (No. 12-696).

<sup>59</sup> Brief for Petitioner, *Fisher*, 133 S. Ct. 2411 (2013) (No. 11-345).

Case	Brief for	Number of words in the summary of the argument	Number of sources cited (other than a governing constitutional provision or statute)	Whether the summary was divided into subsections
<i>Fisher v. Univ. of Tex. at Austin</i> , 133 S. Ct. 2411 (2013)	Petitioner	1,508	6	No
<i>Fisher</i>	Respondent	1,000	2	Yes
<i>Hollingsworth v. Perry</i> , 133 S. Ct. 2652 (2013)	Petitioner	662	5	Yes
<i>Hollingsworth</i>	Respondent	850	8	Yes
<i>Kelo v. City of New London, Conn.</i> , 545 U.S. 469 (2005)	Petitioner	503	0	No
<i>Kelo</i>	Respondent	734	8	No
<i>Kyllo v. United States</i> , 533 U.S. 27 (2001)	Petitioner	903	5	No
<i>Kyllo</i>	Respondent	945	1	Yes
<i>McCreary County, Ky. v. ACLU of Ky.</i> , 545 U.S. 844 (2005)	Petitioner	632	4	No
<i>McCreary County</i>	Respondent	912	7	No
<i>McCutcheon v. FEC</i> , 134 S. Ct. 1434 (2014)	Appellant	761	1	No
<i>McCutcheon</i>	Appellee	505	1	Yes
<i>Schuette v. Coalition to Defend Affirmative Action</i> , 134 S. Ct. 1623 (2014)	Petitioner	505	5	Yes
<i>Schuette</i>	Respondent	870	5	No
<i>United States v. Stevens</i> , 559 U.S. 460 (2010)	Petitioner	660	0	Yes
<i>United States v. Stevens</i>	Respondent	679	1	No
<i>Town of Greece, N.Y. v. Galloway</i> , 134 S. Ct. 1811 (2014)	Petitioner	1,107	8	Yes
<i>Galloway</i>	Respondent	749	3	Yes
<i>Van Orden v. Perry</i> , 545 U.S. 677 (2005).	Petitioner	874	7	No
<i>Van Orden</i>	Respondent	438	2	No

Table A: Statistics from Selected Summaries

Table A shows that the authors of the twenty selected briefs followed the advice to keep their summaries short. The summaries averaged 789 words, with the petitioners averaging slightly more, at 811, than the respondents, at 767. This is about 5% of the allotted word count, well within the suggested 5% to 10% limit that commentators often suggest.<sup>60</sup> Even the longest summary,<sup>61</sup> at 1,508 words, fell very near the 10% limit.

The lawyers also kept their citations to a minimum. The fewest citations appeared in two summaries: the petitioner's in the *Kelo* eminent domain case, which mentioned only the governing Fifth Amendment to the United States Constitution,<sup>62</sup> and the petitioner's in *United States v. Stevens*, which mentioned only the governing First Amendment and the statute at issue.<sup>63</sup> As the above Table shows, four other summaries included only one citation. The respondent's summary in the *Kelo* case included the greatest number of citations: seven cases and one statute.

Eleven of the summaries did not have subparts, but nine did include numbered or lettered subdivisions. Dividing the prose into subparts risks breaking up the flow of the prose, but some advocates do like that approach.<sup>64</sup> In the summaries selected for this article, for example, noted advocates Patricia Millett<sup>65</sup> and Erwin Chemerinsky<sup>66</sup> did not use subdivisions, but Theodore Olson<sup>67</sup> and Gregory Garre<sup>68</sup> did.

## B. *The Opening Lines*

Rhetoricians explain that the beginning of a unit of discourse is a key position of emphasis.<sup>69</sup> That applies especially to the

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<sup>60</sup> See *supra* note 46, and accompanying text.

<sup>61</sup> Brief for Petitioner at 18, *Fisher*, 133 S. Ct. 2411 (2013) (No. 11–345).

<sup>62</sup> Brief for Petitioners at 9, *Kelo v. City of New London*, 545 U.S. 469 (2005) (No. 04–108).

<sup>63</sup> Brief for the United States at 7–10, *United States v. Stevens*, 559 U.S. 460 (2010) (No. 08–769).

<sup>64</sup> See GUBERMAN, *supra* note 37, at 13 (stating that “[t]he top advocates love numbered lists.”).

<sup>65</sup> See Brief for Respondent at 11–13, *Stevens*, 559 U.S. 460 (2010) (No. 08–769).

<sup>66</sup> See Brief for Petitioner at 6–9, *Van Orden v. Perry*, 545 U.S. 677 (2005) (No. 03–1500).

<sup>67</sup> See Brief for Respondents at 13–16, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (No. 12–144).

<sup>68</sup> See Brief for Respondents at 18–22, *Fisher*, 133 S. Ct. 2411 (2013) (No. 11–345).

<sup>69</sup> *E.g.*, JOSEPH M. WILLIAMS, *STYLE: TEN LESSONS IN CLARITY AND GRACE* 103 (9th ed. 2007) (identifying the first sentence of a passage as a stress position).

summary of the argument,<sup>70</sup> because judges and their clerks are busy and want the summary to tell them immediately what the case is about.<sup>71</sup> An advocate may accomplish this by beginning the summary of the argument with a workmanlike statement like this: “I. FELA provides that a rail worker may recover damages for any harm ‘resulting in whole or in part from’ the employer’s negligence. 45 U.S.C. § 51.”<sup>72</sup> This sentence does alert the court to the topic of the case. But by opening with an acronym,<sup>73</sup> including a quotation, and ending with a citation, the sentence is long on numbers and short on punch. Instead of cumbersome wording that “muck[s] up” the opening,<sup>74</sup> a pithier sentence would be more engaging.<sup>75</sup>

The following openings from the twenty selected summaries of the argument show the lawyers’ varied techniques for priming the Court to agree with their sides.

*Fisher v. University of Texas at Austin* was an equal protection case in which the petitioner alleged that she was unfairly denied admission to the University of Texas because the university considered race as a factor in admissions decisions.<sup>76</sup> Fisher, who is Caucasian, alleged that although she was qualified for admission, minority students were admitted in preference to her, in violation of the Equal Protection clause. The Fifth Circuit held that the university’s procedure was constitutional.<sup>77</sup>

On Fisher’s appeal to the Supreme Court, her summary of the argument began this way: “If any state action should respect racial equality, it is university admission. . . . Strict scrutiny thus remains the rule, not the exception, when universities use race as a factor in admissions decisions.”<sup>78</sup> This opening introduces the brief’s theme: that racial equality can be achieved only by disregarding race, and that a university’s decisions involving race

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<sup>70</sup> See BEAZLEY, *supra* note 13, at 224 (identifying the beginning of a section as a place of the reader’s “peak attention”); CALLEROS, *supra* note 40, at 217 (stating that “judges are strongly influenced by first impressions”); LAUREL CURRIE OATES & ANNE ENQUIST, *THE LEGAL WRITING HANDBOOK* 271 (5th ed. 2010) (stating that the beginning and end of a section are places of greatest emphasis); Stanchi, *supra* note 6, at 333 (emphasizing the importance of an introductory sentence).

<sup>71</sup> ALDISERT, *supra* note 2, at 184.

<sup>72</sup> Brief for Respondent at 13, *CSX Transp., Inc. v. McBride*, 131 S. Ct. 2630 (2011) (No. 10–235).

<sup>73</sup> Many judges dislike acronyms, which can make material difficult to comprehend. Mark Cooney, *Acronymious*, JUL. 2012 MICH. B.J. at 48, 48; see also SCALIA & GARNER, *supra* note 1, at 120 (advising lawyers to avoid acronyms, especially unfamiliar ones).

<sup>74</sup> See generally Bryan A. Garner, *The Clear Opener*, 100-AUG. A.B.A. J. 28 (advising judges on how to open a judicial opinion.)

<sup>75</sup> See ALDISERT, *supra* note 2, at 185.

<sup>76</sup> *Fisher*, 133 S. Ct. at 2411.

<sup>77</sup> *Id.* at 2415. *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213, 247 (5th Cir. 2011).

<sup>78</sup> Brief for Petitioner at 18, *Fisher*, 133 S. Ct. 2411 (2013) (No. 11–345).

should be measured strictly.

The University of Texas and others filed a responding brief with Gregory Garre as counsel.<sup>79</sup> His summary began by directly countering the petitioner's argument: "UT's individualized consideration of race in holistic admissions did not subject petitioner to unequal treatment in violation of the Fourteenth Amendment."<sup>80</sup> Garre's statement thus set up his theme: that it was appropriate for the university to consider race as part of a holistic approach.

Fisher's arguments succeeded in persuading the Court to remand the case to the Fifth Circuit to apply more exacting scrutiny to the university's procedures.<sup>81</sup>

Another equal protection challenge concerning university procedures was brought in *Schuette v. Coalition to Defend Affirmative Action*.<sup>82</sup> At issue was a proposal adopted by Michigan voters to ban consideration of race in university admissions. The petitioner, who defended the proposal, began with an appeal to logic:

Article 1, § 26 does not violate equal protection. A law that infringes equal protection classifies a group and then treats that group differently without adequate justification. But § 26 does not single out groups for differing treatment; quite the opposite, it prohibits public universities from classifying applicants by race or sex and treating them differently.<sup>83</sup>

The respondent, by contrast, appealed to emotion by alluding to the troubling history of slavery and its aftermath:

The Fourteenth Amendment promised the four million newly freed slaves Equal Protection of Laws, including federal protection for equality in the processes by which the states may enact new laws and policies. That promise and almost all the promises of the Fourteenth Amendment were, however, soon forgotten as this Court

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<sup>79</sup> Gregory Garre is recognized as a leading Supreme Court advocate. Kedar S. Bhatia, *Top Supreme Court Advocates of the Twenty-First Century*, 2 J. LEGAL METRICS 561, 570 (2013). Garre's co-counsel included renowned advocate Maureen Mahoney, see Kedar S. Bhatia, *Top Female Advocates before the Supreme Court*, DAILYWRIT.com (Apr. 30, 2012) <http://dailywrit.com/2012/04/top-female-advocates-before-the-supreme-court/>, and University of Virginia professor Douglas Laycock, see Univ. of Virginia School of Law, Faculty page, available at [www.law.virginia.edu/lawweb/faculty.nsf/FHPbI/2210483](http://www.law.virginia.edu/lawweb/faculty.nsf/FHPbI/2210483) (last visited Jun. 19, 2015).

<sup>80</sup> Brief for Respondents at 18, *Fisher*, 133 S. Ct. 2411 (2013) (No. 11–345).

<sup>81</sup> *Fisher*, 133 S. Ct. at 2421–22. On remand, the Fifth Circuit ruled in favor of the university. *Fisher v. Univ. of Tex. at Austin*, 758 F.3d 633, 660 (5th Cir. 2014).

<sup>82</sup> *Schuette v. Coal. to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equality By Any Means Necessary (BAMN)*, 134 S. Ct. 1623 (2014).

<sup>83</sup> Brief for Petitioner at 12, *Schuette*, 134 S. Ct. 1623 (2014) (No. 12–682).

and the nation ceded federal protection and allowed the southern states in particular to deny equality altogether.<sup>84</sup>

The petitioner's argument won when the Court decided that the voters had the right to pass the proposal.<sup>85</sup>

*Hollingsworth v. Perry* also concerned an equal protection challenge, this time to a voter-approved proposition banning marriage between persons of the same sex.<sup>86</sup> By the time the case reached the Supreme Court, California officials had decided not to argue in favor of the proposition, so its private backers brought the Supreme Court petition.<sup>87</sup> A threshold question, then, was whether the petitioners had standing to bring the case.<sup>88</sup> They began their summary by directly confronting that problem: "1. Petitioners do have standing to defend Proposition 8 in lieu of public officials who have declined to do so."<sup>89</sup> This straightforward opening was necessary to confront an obstacle that ultimately proved fatal to the petitioners' side.<sup>90</sup>

Theodore Olson<sup>91</sup> and David Boies, who had been opposing lawyers in the controversial *Bush v. Gore* case,<sup>92</sup> represented the respondents. They chose to begin their summary with a direct reference to the equities of the case: "Proposition 8 is an arbitrary, irrational, and discriminatory measure that denies gay men and lesbians their fundamental right to marry in violation of the Due Process and Equal Protection Clauses."<sup>93</sup> With this strong language, Olson and Boies appealed to a sense of fairness, effectively priming the justices to agree with their arguments. They ultimately won when the Court held that the petitioners had no standing to bring the case,<sup>94</sup> thus leaving in place the district court's decision that the proposition was unconstitutional.<sup>95</sup>

Eminent domain was the legal subject in *Kelo v. City of New London*, where the petitioners opposed a local government's taking

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<sup>84</sup> Brief on the Merits for Respondents at 17, *Schuette*, 134 S. Ct. 1623 (2014) (No. 12–682). There were several respondents in the case; this article focuses on the brief of the first named respondent, the Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality By Any Means Necessary (BAMN).

<sup>85</sup> *Schuette*, 134 S. Ct. at 1638.

<sup>86</sup> *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2659 (2013).

<sup>87</sup> *Id.* at 2660.

<sup>88</sup> *Id.* at 2661.

<sup>89</sup> Brief of Petitioners at 12, *Hollingsworth*, 133 S. Ct. 2652 (2013) (No. 12–144).

<sup>90</sup> *Hollingsworth*, 133 S. Ct. at 2660, 2668.

<sup>91</sup> See Bhatia, *supra* note 79, at 570 (listing Olson among the top Supreme Court advocates).

<sup>92</sup> *Bush v. Gore*, 531 U.S. 98 (2000).

<sup>93</sup> Brief for Respondents at 13, *Hollingsworth*, 133 S. Ct. 2652 (2013) (No. 12–144).

<sup>94</sup> *Hollingsworth*, 133 S. Ct. at 2668.

<sup>95</sup> *Id.* at 2660.

of private property for use by a commercial entity.<sup>96</sup> Their summary of the argument opened with an appeal to Americans' emotional attachment to their homes: "To Petitioners, like most Americans, their homes are their castles."<sup>97</sup> The brevity of this sentence intensifies its impact.<sup>98</sup>

The respondents' summary evoked logic rather than emotion: "At the heart of this case are a series of decisions made by the Connecticut legislature and the elected officials of the City of New London as to what will best serve the economic, social, structural and environmental interests of New London's citizens."<sup>99</sup>

These sentences primed the Court for two contrasting approaches to the case. The petitioners tapped into deep-seated feelings about homes. By contrast, the respondents relied on legal principles, telling a "justice' story"<sup>100</sup> to argue that the city's decision was correct despite an outcome displeasing to some.

In *Kelo*, the justice story prevailed when the Court approved the city's exercise of eminent domain.<sup>101</sup>

A police search was the subject of *Kyllo v. United States*.<sup>102</sup> *Kyllo* had been convicted of manufacturing marijuana after the police used a heat-seeking device to gather information about activities inside his home. *Kyllo's* summary of the argument began this way: "The text of the Fourth Amendment expressly provides for protection of the home against unreasonable searches and seizures."<sup>103</sup> The summary in the brief for the United States, by Seth Waxman,<sup>104</sup> began, "The use of the thermal imager in this case was not a Fourth Amendment search."<sup>105</sup>

Again, these opening sentences employed contrasting approaches. The petitioner evoked emotions about the home, while the respondent relied on a logical argument—that using a heat-seeking device is not a search at all.<sup>106</sup>

The Court ultimately held that using the heat-seeking device

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<sup>96</sup> *Kelo v. City of New London*, 545 U.S. 469 (2005).

<sup>97</sup> Brief for Petitioners at 9, *Kelo*, 545 U.S. 469 (2005) (No. 04–108).

<sup>98</sup> See BEAZLEY, *supra* note 13, at 224 (stating that a short sentence can create emphasis).

<sup>99</sup> Brief for Respondents at 11, *Kelo*, 545 U.S. 469 (2005) (No. 04–108).

<sup>100</sup> See Stanchi, *supra* note 6, at 330 (explaining the concept of a "justice story," whereby a defendant can assert that although bad things have happened, justice has already been reached).

<sup>101</sup> *Kelo*, 545 U.S. at 490.

<sup>102</sup> *Kyllo v. United States*, 533 U.S. 27 (2001).

<sup>103</sup> Brief for Petitioner at 10, *Kyllo*, 533 U.S. 27 (2001) (No. 99–8508).

<sup>104</sup> See Bhatia, *supra* note 79, at 570 (listing then-Solicitor General Waxman as one of the top Supreme Court advocates).

<sup>105</sup> Brief for the United States at 10, *Kyllo*, 533 U.S. 27 (2001) (No. 99–8508).

<sup>106</sup> See *Kyllo*, 533 U.S. at 40 (holding that use of the device did constitute a search under the Fourth Amendment).

did amount to an unlawful search.<sup>107</sup>

Displays of the Ten Commandments on government property were challenged in two cases handed down on the same day, *McCreary County, Ky. v. American Civil Liberties Union of Kentucky*<sup>108</sup> and *Van Orden v. Perry*.<sup>109</sup> The *McCreary County* petitioners defended their displays by opening with a succinct reference to legal principles: “The Foundations Display passes every test developed by this Court.”<sup>110</sup>

The respondents objected to the displays in more emotional language: “Three times in a little more than a year, Pulaski and McCreary counties, Kentucky, erected Ten Commandments displays in highly visible locations in their county courthouses.”<sup>111</sup> The reader can almost hear the advocate’s exasperation at these repeated attempts. His side won; the Court held that the Kentucky displays violated the Establishment Clause.<sup>112</sup>

In *Van Orden*, the petitioners, who opposed the Ten Commandments display,<sup>113</sup> appealed to emotions against the establishment of religion: “At the very seat of Texas government, between the Texas State Capitol and the Texas Supreme Court, is a large monument quoting a famous passage of religious scripture taken, almost verbatim, from the King James Bible.”<sup>114</sup>

Defending the display, the respondent also evoked emotion by citing Texas tradition: “For over four decades, a granite monument depicting the Ten Commandments has stood on the Texas Capitol Grounds. Defined by statute as a ‘museum’ and maintained by a professional curator, the Grounds feature seventeen different monuments to people, events, and ideals that have contributed to the diversity, culture, and history of Texas.”<sup>115</sup>

In contrast to its holding about the Kentucky displays, the Court held that the Texas display was constitutional, finding it an appropriate acknowledgement of the Ten Commandments’ role in the nation’s history.<sup>116</sup>

*McCutcheon v. FEC*<sup>117</sup> concerned limits on the amount of

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<sup>107</sup> 533 U.S. at 40.

<sup>108</sup> *McCreary Cnty., Ky. v. ACLU of Ky.*, 545 U.S. 844 (2005).

<sup>109</sup> *Van Orden v. Perry*, 545 U.S. 677 (2005).

<sup>110</sup> Brief for Petitioners at 5, *McCreary Cnty.*, 545 U.S. 844 (2005) (No. 03–1693).

<sup>111</sup> Brief for Respondents at 7, *McCreary Cnty.*, 545 U.S. 844 (2005) (No. 03–1693).

<sup>112</sup> *McCreary Cnty.*, 545 U.S. at 881.

<sup>113</sup> Counsel of record for the petitioner was then-professor Erwin Chemerinsky, now dean of the University of California at Irvine Law School. See [www.law.uci.edu/faculty/full-time/chemerinsky](http://www.law.uci.edu/faculty/full-time/chemerinsky).

<sup>114</sup> Brief for Petitioner at 6, *Van Orden*, 545 U.S. 677 (2005) (No. 03-1500).

<sup>115</sup> Brief for Respondent at 8, *Van Orden*, 545 U.S. 677 (2005) (No. 03-1500).

<sup>116</sup> *Van Orden*, 545 U.S. at 690.

<sup>117</sup> *McCutcheon v. F.E.C.*, 134 S. Ct. 1434 (2014).

political contributions made by corporations. The appellant's<sup>118</sup> summary of the argument began with a direct statement that the limit was unconstitutional: "BCRA's aggregate contribution limits impose an unconstitutional burden on core First Amendment activity."<sup>119</sup> This sentence appeals to logic, but it lacks spark, partly because it begins with a lifeless acronym.<sup>120</sup>

The appellee's summary<sup>121</sup> also began dryly, with a cumbersome citation:<sup>122</sup> "In *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam), this Court upheld Congress's authority to impose aggregate limits on individual political contributions in order to prevent circumvention of the base limits on contributions to particular candidates, parties, and political committees."<sup>123</sup>

The appellant's arguments prevailed when the Court held that the limit on contributions was unconstitutional.<sup>124</sup>

*United States v. Stevens* involved a defendant who was convicted of violating a statute banning depictions of animal cruelty.<sup>125</sup> The lawyers for both sides had to decide how to deal with potentially strong reactions aroused by harm to animals. Elena Kagan,<sup>126</sup> then serving as the Solicitor General, was counsel of record on the brief for the United States, which supported the statute. In the first line of her summary, she chose to maintain a measured tone while still mentioning animal cruelty: "Section 48's prohibition of the commercial trade in depictions of the illegal torture and killing of animals is constitutional."<sup>127</sup>

Patricia Millett,<sup>128</sup> counsel for the respondent, attempted to diffuse any strong emotions against her client by beginning this

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<sup>118</sup> The party was an "appellant" rather than "petitioner" because the case was an appeal brought under 28 U.S.C. § 1253. *Id.* at 1444.

<sup>119</sup> Brief for Appellant Shaun McCutcheon at 17, *McCutcheon*, 134 S. Ct. 1434 (2014) (No. 12–536).

<sup>120</sup> See Cooney, *supra* note 73, at 48 (explaining that many judges dislike acronyms).

<sup>121</sup> See Bhatia, *supra* note 79, at 570 (listing Donald B. Verrilli, Jr., then the Solicitor General, as a top Supreme Court advocate).

<sup>122</sup> Many commentators believe a citation clutters the beginning of a sentence, detracting from the writer's point. *E.g.*, BEAZLEY, *supra* note 13, at 128.

<sup>123</sup> Brief for the Appellee at 16, *McCutcheon*, 134 S. Ct. 1434 (2014) (No. 12–536).

<sup>124</sup> *McCutcheon*, 134 S. Ct. at 1462.

<sup>125</sup> *United States v. Stevens*, 559 U.S. 460, 466–67 (2010).

<sup>126</sup> Supreme Court Justice Elena Kagan, in her former role as an advocate, has been listed as one of the nation's top advocates. GUBERMAN, *supra* note 37, at 323.

<sup>127</sup> Brief for the United States at 7, *Stevens*, 559 U.S. 460 (2010) (No. 08–769).

<sup>128</sup> See Bhatia, *supra* note 79, at 570 (listing Millett among top Supreme Court advocates). Patricia Millett is now a judge on the D.C. Circuit. United States Court of Appeals, District of Columbia Circuit, <http://www.cadc.uscourts.gov/internet/home.nsf/Content/VL+-+Judges+-+PAM> (last visited Jun. 19, 2015).

way: “This case is not about dogfighting or animal cruelty. The government and Stevens stand together opposing that.”<sup>129</sup> She then steered her summary to a constitutional argument—that the statute violated her client’s right to free speech. She won the case.<sup>130</sup>

The separation of church and state was at issue in *Town of Greece, N.Y. v. Galloway*.<sup>131</sup> The town had regularly invited local clergymen to open its meetings with prayers, most of which were explicitly Christian.<sup>132</sup> The respondents were citizens who attended town meetings and objected that by including mostly Christian prayers, the town’s practice violated the Establishment Clause of the First Amendment.<sup>133</sup>

The opening of the petitioner’s summary of the argument evoked feelings about the nation’s traditions: “Legislative prayer is a firmly embedded practice in this Nation, long exercised by deliberative public bodies at the federal, state, and local levels to solemnize the proceedings of lawmaking institutions.”<sup>134</sup>

The respondents’ summary opened with an appeal to logic and the law, with an undercurrent of emotion about religious coercion. It began, “Petitioner’s prayer practice is unconstitutional for two independent but mutually reinforcing reasons. It puts coercive pressure on citizens to participate in the prayers, and those prayers are sectarian rather than inclusive.”<sup>135</sup> This opening repeats the substance of two of the brief’s major point headings,<sup>136</sup> and thus provides an overview of the brief.

The Court held for the town, deciding that the prayer practice was constitutional.<sup>137</sup>

The above summaries illustrate lawyers’ varied approaches to framing the summary of the argument section and suggest that counsel’s choices about crafting it will depend on an assessment of the particular case. For example, in *Stevens*, Patricia Millett chose to begin her summary with an appeal to logic in order to deflect attention from her client’s connection with harm to animals. By contrast, in *Hollingsworth*, Theodore Olson and David Boies began by drawing on the equities surrounding the issue of same-sex marriage. Each of those briefs was on the winning side.

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<sup>129</sup> Brief for Respondent at 11, *Stevens*, 559 U.S. 460 (2010) (No. 08–769).

<sup>130</sup> See *Stevens*, 559 U.S. at 482 (holding the statute overbroad and thus invalid under the First Amendment).

<sup>131</sup> *Town of Greece, N.Y. v. Galloway*, 134 S. Ct. 1811, 1815 (2014).

<sup>132</sup> *Id.* at 1816–17.

<sup>133</sup> *Id.* at 1817.

<sup>134</sup> Brief for Petitioner at 12, *Galloway*, 134 S. Ct. 1811 (2014) (No. 12–696).

<sup>135</sup> Brief for Respondents at 17, *Galloway*, 134 S. Ct. 1811 (2014) (No. 12–696).

<sup>136</sup> *Id.* at ii–iii.

<sup>137</sup> *Galloway*, 134 S. Ct. at 1828.

### C. *The Endings*

In addition to the opening of a piece of discourse, the ending is another key position of emphasis.<sup>138</sup> A striking conclusion to the summary of the argument can favorably dispose the court toward the writer's side. In the examples below, the lawyers wrote endings calculated to leave vivid impressions with the Court.

The summaries of the argument in the *McCreary County* case illustrate how lawyers can stake out their positions with compelling endings. The Petitioners, arguing that the Kentucky Ten Commandments display was constitutional, ended their summary this way: "At any rate, the Display passes every test, including all aspects of Justice O'Connor's proposed test. Whatever the test, it should respect our religious heritage by distinguishing between real establishments and permissible acknowledgments of religion."<sup>139</sup> The respondents ended by arguing that the petitioners' motivation "lacks any secular purpose and conveys the Counties' message that it endorses that religious message."<sup>140</sup> Both sides appealed to logic and the law in forceful sentences.

A particularly pointed ending appeared in the petitioners' summary in the *Kelo* case: "Government may pursue tax revenue and economic development, and corporations may pursue profits, but not at the expense of constitutional rights."<sup>141</sup> And in *United States v. Stevens*, Patricia Millett wrote a compelling ending to her summary. Arguing that a statute banning depictions of animal cruelty would not "dry up" a business, she directed the focus to free speech: "In short, the only thing Section 48 dries up is protected speech about an important issue—or at least one perspective on that debate."<sup>142</sup> The brevity of these ending sentences enhanced their impact.

Theodore Olson concluded his *Hollingsworth* summary by arguing, "Because a 'bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest,' *Romer*, 517 U.S. at 634 (internal quotation marks omitted; alteration in original), Proposition 8 is unconstitutional."<sup>143</sup> While the lengthy citation and complicated syntax distract somewhat from the sentence's flair, its argument about disfavored groups is a strong one. Olson won on procedural

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<sup>138</sup> BEAZLEY, *supra* note 13, at 223; Stanchi, *supra* note 6, at 347.

<sup>139</sup> Brief for Petitioners at 7, *McCreary Cnty.*, 545 U.S. 844 (2005) (No. 03–1693).

<sup>140</sup> Brief for Respondents at 10, *McCreary Cnty.*, 545 U.S. 844 (2005) (No. 03–1693).

<sup>141</sup> Brief for Petitioners at 11, *Kelo*, 545 U.S. 469 (2005) (No. 04–108).

<sup>142</sup> Brief for Respondent at 13, *Stevens*, 559 U.S. 460 (2010) (No. 08–769).

<sup>143</sup> Brief for Respondents at 16, *Hollingsworth*, 133 S. Ct. 2652 (2013) (No. 12–144).

grounds.<sup>144</sup>

Gregory Garre's summary in the *Fisher* case ends with this language: "Abruptly reversing course here would upset legitimate expectations in the rule of law—not to mention the profoundly important societal interests in ensuring that the future leaders of America are trained in a campus environment in which they are exposed to the full educational benefits of diversity."<sup>145</sup> At forty-seven words, this sentence is rather long, but Garre effectively used a dash<sup>146</sup> to break it up and craft a forceful ending.

The *Galloway* respondent's summary ends with powerful wording about mixing church and state: "[The town's] position is irreconcilable with this Court's decisions and with any reasonable conception of religious liberty or freedom of conscience."<sup>147</sup>

Each of these lawyers chose vivid wording and compelling content to deliver an ending with punch.

#### IV. CONCLUSION

Writing a summary of the argument is an art, not a science. Except on a few matters like word count and numbers of citations, mathematical computations will not shed light on how to frame the summary. Even noting whether a particular summary was on the winning side is not a fair measure of its merit, because a case's outcome is influenced by many other factors, including the state of the law, the record from the courts below, and judges' predispositions.

But art can be observed and appreciated. The examples in this article show how a summary of the argument with some panache can grab a court's attention. Lifeless wording and cumbersome citations can fall flat, but vibrant language, attention to sentence structure, and a deft appeal to emotion or logic can pique a judge's interest at the outset of a brief.

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<sup>144</sup> *Hollingsworth*, 133 S. Ct. at 2660, 2668.

<sup>145</sup> Brief for Respondents at 22, *Fisher*, 133 S. Ct. 2411 (2013) (No. 11–345).

<sup>146</sup> See GUBERMAN, *supra* note 37, at 259 (recommending the dash to emphasize a point).

<sup>147</sup> Brief of Respondents at 20, *Galloway*, 134 S. Ct. 1811 (2014) (No. 12–696).