U.S. Supreme Court Brief Writing Style Guide

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U.S. SUPREME COURT BRIEF WRITING STYLE GUIDE

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There are few tasks more daunting to a lawyer than being asked to write, for the first time, a U.S. Supreme Court brief. You know that, whether it's a petition for certiorari, a brief in opposition, a merits brief, or an amicus brief, your product will be read by Supreme Court Justices and could eventually affect the law throughout the entire nation. You therefore want it to be as well written as possible.

The most obvious way to accomplish that is to research the legal issue thoroughly, devise persuasive arguments, and craft a well-organized, well-reasoned, and engagingly written brief. That's what you hope to prepare, of course, in *every* case regardless of the court; but it's particularly expected in the Supreme Court.

That isn't enough, though. The U.S. Supreme Court, like most other tribunals, has its own traditions, customs, and practices that are well known to regular practitioners but not necessarily to others. If you want your brief to be as effective as possible, you want it to conform to those traditions, customs, and practices. Failing to follow them might not be as off-putting as typos or misspellings or grammatical errors; but they equally tell the reader — the Justice or clerk — that you don't truly know how the game is played in the land's highest court.

As NAAG Supreme Court Counsel for the past 20 years, I have had the opportunity to read literally thousands of Supreme Court briefs. This guide is an effort to pass along insights I have thereby obtained on the "style" of these briefs. Most briefs filed with the Court are nicely written and follow the Court's protocol. Others, however, do not — including some written by state Attorney General offices. I have seen virtually every mistake a brief writer can make, on both substance and style. My goal here is to point out common mistakes of style so that, at the very least, your briefs will adhere to the Court's conventions.

Topic 1: General Rule — Ditch Local Idiosyncrasies

In some courts, an advocate begins oral argument by stating her name and who she represents and reserving rebuttal time. In other courts, the advocate dives right into the argument. Some courts expect argument to begin with a review of the facts. Other courts want their advocates to go straight to the legal issue. So the answer to the question, "how should I begin my oral argument," is: "It depends on the customs and practices of the particular court before which you are practicing." An obvious corollary is that you should not adhere to a custom your local courts observe if you are appearing in a court outside your jurisdiction that operates differently.

The same, of course, holds true when it comes to writing briefs in the U.S. Supreme Court. You should eliminate local idiosyncrasies and adopt the Supreme Court's own idiosyncrasies. Here are some examples of local idiosyncrasies to eliminate:

● Many courts require that briefs begin with a Statement of the Case that sets out the procedural history, followed by a Statement of the Facts that describes the factual background. See, *e.g.*, N.C. R. App. P. 28(b)(3), (4). Not the U.S. Supreme Court, which expects one Statement, typically called the Statement of the Case. And that Statement typically describes the facts before the procedural history.

● Some courts have adopted legal-writing guru Bryan Garner's suggestion that all citations be placed in footnotes. The U.S. Supreme Court has not.[1]

● Limit the use of block quotes. The occasional, relatively short, block quote is fine. Inserting block quote after block quote is not. Nor should any block quote take up more than half a page. As Justice Scalia and Bryan Garner have written, "Be especially loath to use a lengthy, indented quotation. It invites skipping. In fact, many block quotes have probably never been read by anyone."[2] The solution is to set out the underlying facts or reasoning in your own words, with an occasional one- or two-sentence quote as needed.

● I have read dozens of briefs from Louisiana attorneys (not in the AG Office) that refer to the Court as "this Honorable Court" — as in, "This Honorable Court held in *Katz v. United States*, 389 U.S. 347 (1967), that electronic wiretaps are searches under the Fourth Amendment." Maybe Louisiana courts like to hear themselves referred to as "honorable." But this stilted language is out of place in the U.S. Supreme Court. Meanwhile, New Jersey courts apparently demand that lawyers, when citing statutory codes and case reporters, italicize the codes and reporters — e.g., 42 *U.S.C.* §1983 or 389 *U.S.* 347. That idiosyncratic citation style has no place in the U.S. Supreme Court.

● Some courts still expect case names to be underlined, rather than italicized. With one exception, case names in U.S. Supreme Court briefs are italicized.[3]

* * * * *

How can you tell what flies and what doesn't fly in U.S. Supreme Court briefs (apart from this manual)? Simple: Read briefs filed by the U.S. Solicitor General's office and by top Supreme Court practitioners. Myriad such briefs are available online, at the Solicitor General's webpage (https://www.justice.gov/osg/supreme-court-briefs) and on SCOTUSblog (http://www.scotusblog.com/). You can also take a look at *The Solicitor General's Style Guide* (2d ed. 2015), which provides that office's citation and style rules.

Topic 2: Some U.S. Supreme Court-Specific Styles

The Court's rules mandate what font to use (the Century family), how many words a brief

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1 See Antonin Scalia & Bryan Garner, *Making Your Case: The Art of Persuading Judges* 133-35 (Thomson/West 2008) (Justice Scalia expressing his disapproval of Bryan Garner's suggestion that citations be placed in footnotes).

2 *Id.* at 128. Every rule has its exceptions, of course. For example, in the rare case it is helpful to include a long passage from a trial or hearing transcript.

3 The exception is in briefs filed on 8½ x 11 inch paper, rather than the usual (for the Court) 6⅛ x 9¼ booklet. For state attorneys, that means briefs in opposition to *in forma pauperis* cert petitions. In such briefs, either underlining or italics are acceptable.

may contain, and so on. My goal is to go beyond what's in the rules and to discuss unwritten customs. Before turning to specific sections of a U.S. Supreme Court brief, it's worth recounting a few Court-specific styles that cut across many sections.

● Don't refer to the Court as "the Supreme Court," as in "the Supreme Court has held that . . . ." It's "the Court held"; "this Court held"; or "*Grutter* held . . . ."

● Citations to U.S. Supreme Court opinions should be to the official U.S. Reporter, without any parallel citations to the unofficial ("S. Ct." and "L. Ed.") reporters. The proper cite, therefore, is *Roe v. Wade*, 410 U.S. 113 (1973) — **not** *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973). If the decision is not yet included in the official reporter, use the S. Ct. (and only the S. Ct.) cite.

● Don't refer to the lower court decisions in your very case by the case name. Let's say, for example, that you're seeking certiorari from the Ninth Circuit's decision in *Smith v. Jones*. The cert petition should not say, "The Ninth Circuit held in *Smith v. Jones* that . . . ." That's like my saying, "Dan thinks that's a good idea." It sounds wrong to the ear (at least the ear of a regular Supreme Court practitioner). The better style is to say, "The Ninth Circuit held below that . . .," or simply "The Ninth Circuit held . . . ."

● Similarly, the case name should not appear when citing the lower court decisions in your very case. Nor should you cite the reporters, federal or regional. Rather, cite only the cert petition appendix — which, of course, contains the lower court decisions. Thus, the proper cite (in, say, a merits brief) is "Pet. App. 17a," not "*Smith v. Jones*, 473 F.3d 1234 (9th Cir. 2008); Pet. App. 17a." (In the cert petition itself, the cite would be "App. 17a" or "App., *infra*, 17a.")

● When referring to a specific federal court of appeals, don't include the words "Court of Appeals." It's therefore, "the Ninth Circuit held . . . ." not "the Ninth Circuit Court of Appeals held . . . ."

With that background, let's walk through the different sections of a Supreme Court brief. We'll begin at the beginning: the cover page.

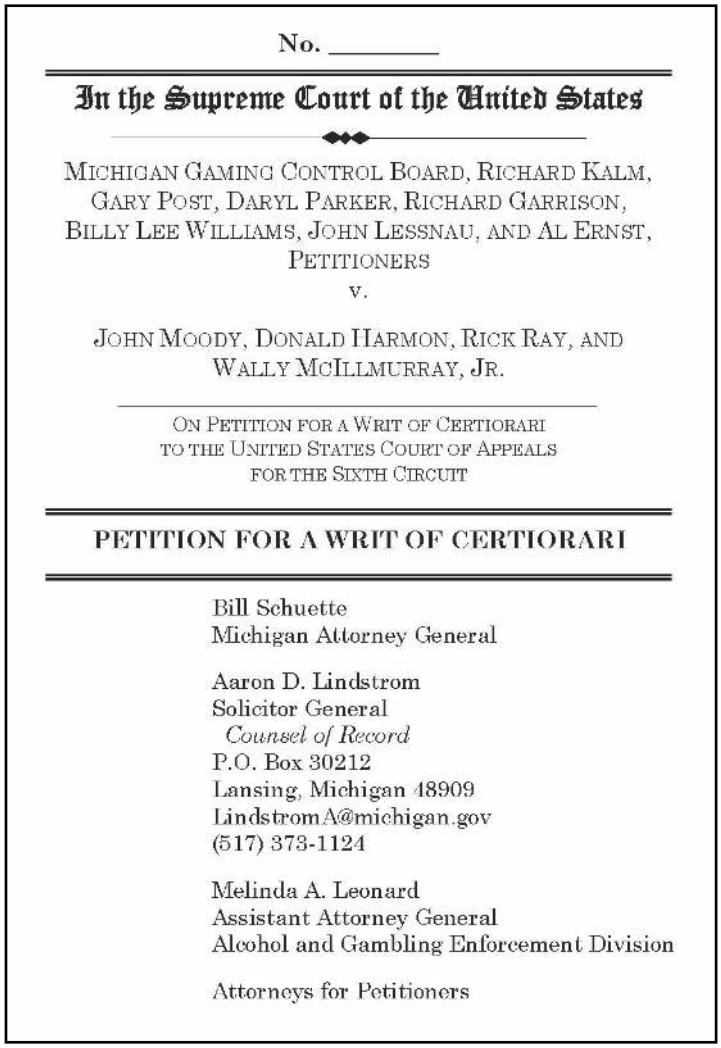
Topic 3: The Cover Page

Don't worry; we won't be spending much time on this. For the most part, what goes on a cover page of a Supreme Court brief is obvious and can be gleaned from looking at virtually any brief filed with the Court by the U.S. Solicitor General's office or an experienced Supreme Court practitioner. What can go wrong? A few things, actually.

But let's start with what the cover page *should* look like. Here's a properly executed cover page in a recent merits brief filed by the Michigan Attorney General's office (*See* **Figure 1**).

Simple enough, or so it would seem. And yet over the years I have seen many errors on cover pages. Here are some things to remember:

Figure 1:



No. _____

In the Supreme Court of the United States

MICHIGAN GAMING CONTROL BOARD, RICHARD KALM, GARY POST, DARYL PARKER, RICHARD GARRISON, BILLY LEE WILLIAMS, JOHN LESSNAU, AND AL ERNST, PETITIONERS

v.

JOHN MOODY, DONALD HARMON, RICK RAY, AND WALLY MCILLMURRAY, JR.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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● Do not include the state bar numbers of any of the attorneys listed on the cover page. Your state courts might want them, but the U.S. Supreme Court does not.

● Do not include, across from the signature block, an additional block saying "Please serve: [name, address]."

● When multiple law offices serve as counsel for a party, the cover-page signature block contains two columns. The office for which the counsel of record works typically appears in the right column.

● Do not place at or near the top of the page the words "October Term 2016" (or whatever Term you think it is). The Court used to require that the cover page set out the Term, but eliminated that requirement when it realized no one could figure out what to write in the summer, when the Court is in recess but the Term is not officially over.

● Do provide the email address of the counsel of record; do not provide a fax number (who faxes things anymore?). *See* Supreme Court Rule 34.1(f).

● In a capital case, the words "Capital Case" appear above the Question Presented; they do not appear on the cover page.

● The fourth component of the cover page (after the case name) is what Rule 34.1(d) calls "the nature of the proceeding and the name of the court from which the action is brought." At the certiorari stage, it should say (for example), "On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit." At the merits stage, delete "Petition for"; it should read "On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit." Many a counsel has forgotten to delete those two words when they prepared the merits brief.

● One final pointer. The fifth component of the cover page is the name of the document. These should be: "Petition for a Writ of Certiorari" (though some folks leave out the "a"); "Brief in Opposition"; and "Brief for the Petitioner [Respondent]." Reply briefs at the merits stage are generally called "Reply Brief for the Petitioner"; at the cert stage, I have seen well-regarded practitioners put "Reply Brief"; "Reply Brief for the Petitioner"; and "Reply to Brief in Opposition." (Some folks

say "Brief *for* Petitioner"; others say "Brief *of* Petitioner." Either way is fine. And some folks say "Brief for *the* Petitioner"; others leave out the word "the," so it reads "Brief for Petitioner." Again, either way is fine.)

Multi-state amicus briefs are a bit trickier to name. Some begin, "Brief of [or for] the States of _____ as Amici Curiae in Support of Petitioner [Respondent]." Others begin, "Brief of Amici Curiae States of _____ in Support of Petitioner [Respondent]." (The difference, for those of you who haven't had your coffee yet, is the placement of the words "Amici Curiae.") Either way is fine. Also, some multi-state amicus briefs list on the cover page the names of all the states that join the brief; others list only the name of the lead state, followed by the number of additional states that join (*e.g.*, "Brief of Amici Curiae State of Ohio and 19 Other States in Support of Respondents"). Again, either way is fine, though I'm partial to the former approach.

Enough of cover pages. On to . . . .

Topic 4: Question(s) Presented

The Question Presented section is a very important part of a cert petition. Typically, it is the first thing the Justices and their clerks read and generates that all-important first impression. Justice Brennan reportedly said that he knew immediately after reading the Question Presented whether he might be interested in voting to grant certiorari.

At the merits stage, crafting this part of the brief is less important. The petitioner is stuck with the question(s) she wrote at the cert-stage; and the Court rarely cares if or how respondent recasts it. Nonetheless, the questions presented can matter greatly to counsel at the merits stage because they demarcate the issues before the Court. Many a counsel has had to explain at oral argument why a particular argument she was making was "fairly subsumed" within the question presented.

With all that said, my goal here is not to explain how to write a first-rate question presented. This is a guide on *style*. A bit of what follows may bleed into substance, but my focus will remain on how the Question Presented section should look. Here is an example of a properly written Question Presented section, from Utah's successful cert petition in *Utah v. Strieff*, 579 U.S. ___ (2016). (*See* **Figure 2**).

Figure 2:

QUESTION PRESENTED

Should evidence seized incident to a lawful arrest on an outstanding warrant be suppressed because the warrant was discovered during an investigatory stop later found to be unlawful?

That seems, once again, simple enough. But inexperienced Supreme Court practitioners are skilled at finding ways to write this section that don't conform to Supreme Court style.

- The natural place to start is with the section's name. It is "Question[s] Presented." That's it. It is *not* "Question Presented for Review." If you are the respondent, it is *not* "Question Presented (restated)" or "Counterstatement of Question Presented."

And don't underline the heading "Question Presented" (or any of the other main headings of the brief, such as Statement of the Case, Summary of Argument, Argument, and Conclusion).

● Please, please, please do not put the questions in all caps. Sentences written in all caps are very hard to read; and it is simply not the accepted style at the Supreme Court. Reading the following gives judges a headache:

> SHOULD EVIDENCE SEIZED INCIDENT TO A LAWFUL ARREST ON AN OUTSTANDING WARRANT BE SUPPRESSED BECAUSE THE WARRANT WAS DISCOVERED DURING AN INVESTIGATORY STOP LATER FOUND TO BE UNLAWFUL?

● A few words on numbering the questions. First, if you are presenting only one question, do not place the number "1" before it. Second, if you are presenting multiple questions, they should be listed as Arabic 1, 2, etc., not Roman I, II, etc.

● If you are citing a case, provide the full citation (*e.g.*, "Whether *Nevada v. Hall*, 440 U.S. 410 (1979), which permits a sovereign State to be haled into the courts of another State without its consent, should be overruled.").

● Don't place any footnotes in the Questions Presented. I've seen briefs, for example, refer to "*Miranda*" warnings in the body of the question and then insert a footnote containing the full cite to *Miranda v. Arizona*. No. Either give the full cite to *Miranda* in the body of the question or simply say "*Miranda*," knowing that everyone will understand what that means.

A few other matters of style don't come down to right and wrong, but personal preference.

● Many cert petitions include in the question a reference to a circuit split. For example, a recent, successful cert petition presented the following question:

> Under federal employment discrimination law, does the filing period for a constructive discharge claim begin to run when an employee resigns, *as five circuits have held*, or at the time of an employer's last allegedly discriminatory act giving rise to the resignation, *as three other circuits have held*? [Emphasis added.]

Some practitioners prefer including circuit-split language of that sort; others do not. Both ways are acceptable.

● The "Whether" vs. "Does" debate. A recent question presented to the Court was, "Whether the First Amendment bars the government from demoting a public employee based on a supervisor's perception that the employee supports a political candidate." The question could easily have been rephrased as, "Does the First Amendment bar the government from demoting a public employee based on a supervisor's perception that the employee supports a political candidate?"

Either way is fine. My only suggestion is that if you use the "Whether" approach, do not end the sentence with a question mark; use a period. (That's because the sentence is implicitly saying, "The question presented is whether the First Amendment bars . . . ." That's not a question; it's a statement about what question is being presented.)

● The question should be worded exactly how you want it to appear in the merits brief, if cert is granted. That means, among other things, that you should not begin the question with phrases such as, "Should this Court grant certiorari to . . . ." or "Should this Court resolve a conflict between . . . ." Phrases like that make no sense at the merits stage.

● Many excellent Questions Presented begin with a prefatory paragraph or two before setting out the actual question(s). The Court is quite used to receiving questions in that form and is fine with them. A few caveats, though.

First, not every case requires a prefatory statement. As in the Utah example, straightforward criminal procedure issues don't need much of a set-up. (By contrast, petitions based on lower court failures to apply AEDPA usually do.) If you don't need one, don't include one. In the Supreme Court, as in all courts, less is usually more.

Second, a prefatory statement is not a Summary of Argument. Its goal is to provide the background information that allows the reader to understand the issue being presented. If the question concerns the meaning of a complicated statutory provision, it is often helpful to describe that provision first. For example, the successful cert petition in *Jesinoski v. Countrywide Home Loans, Inc.*, 574 U.S. ___ (2014), presented the following question:

> **QUESTION PRESENTED**
>
> The Truth in Lending Act provides that a borrower "shall have the right to rescind the transaction until midnight of the third business day following . . . the delivery of the information and rescission forms required under this section . . . by notifying the creditor . . . of his intention to do so." 15 U.S.C. § 1635(a). The Act further creates a "[t]ime limit for [the] exercise of [this] right," providing that the borrower's "right of rescission shall expire three years after the date of consummation of the transaction" even if the "disclosures required . . . have not been delivered." *Id.* § 1635(f).
>
> The question presented is:
>
> Does a borrower exercise his right to rescind a transaction in satisfaction of the requirements of Section 1635 by "notifying the creditor" in writing within three years of the consummation of the transaction, as the Third, Fourth, and Eleventh Circuits have held, or must a borrower file a lawsuit within three years of the consummation of the transaction, as the First, Sixth, Eighth, Ninth, and Tenth Circuits have held?

Note that the prefatory paragraph didn't argue the merits of the case. It simply set out enough of the statutory background to allow the reader to understand the statutory-interpretation issue.

Having said that, I am seeing more and more argumentative prefatory paragraphs in cert petitions filed by experienced practitioners.[4] My view is that, just as a Statement of the Case should be non-argumentative but subtly suggest to the reader that your position is correct, so should a Question Presented section. But the Question Presented section is generally not the place to argue your case directly. An exception is where the petition's core argument is that the lower court decision directly conflicts with a U.S. Supreme Court decision. Your Question Presented might then describe the Supreme Court decision in a prefatory paragraph, describe the lower court decision, and then ask "whether, in holding X, the state supreme court decision directly conflicts with this Court's decision in Y."

Third, if possible keep the Question Presented section to one page. Although the Court does not bar Question Presented sections that hit a second page, it disfavors them.

4 Here's an example: http://sblog.s3.amazonaws.com/wp-content/uploads/2014/02/2014-01-17-Acebo-Cert-Petition-FINAL.pdf)

Fourth, after the prefatory discussion add the sentence, "The question presented is:". It can come at the end of the prefatory paragraph(s) or come (as in the *Jesinoski* example above) in a stand-alone paragraph. Either way, that's the proper transition from background material to the actual question being presented.

Topic 5: The Prefatory Sections

Next comes a series of "sections" that feel like makeweight: Parties to the Proceeding; Table of Contents; Table of Authorities; Opinions Below; Jurisdiction; and Constitutional and Statutory Provisions Involved. With one important exception, these sections are not important in the scheme of things. They won't convince a Justice to vote your way. Still, the goal of this style guide is to help your petitions read and look the right way. With that in mind, let's turn to these sections.

A. Parties to the Proceeding

This section is needed only if the cover page does not include all the parties. If, for example, the only parties are the state and a criminal defendant, both of whose names must appear on the cover page, you do not need to have a Parties to the Proceeding section. And when you don't need this section, I see no reason to include it.

When you do include this section, try to make it as simple as possible. For example:

> **PARTIES TO THE PROCEEDING**
>
> Petitioners Terry L. Cline, Lyle Kelsey, and Catherine C. Taylor were the appellants in the court below. Respondents are Oklahoma Coalition for Reproductive Justice and Nova Health Systems, doing business as Reproductive Services, and were appellees in the court below.

Or, in a case with more parties (*United States v. Texas*, 15-674):

> **PARTIES TO THE PROCEEDING**
>
> Petitioners were appellants in the court of appeals. They are: the United States of America; Jeh Charles Johnson, in his official capacity as Secretary of Homeland Security; R. Gil Kerlikowske, in his official capacity as Commissioner of U.S. Customs and Border Protection; Ronald D. Vitiello, in his official capacity as Deputy Chief of U.S. Border Patrol, U.S. Customs and Border Protection; Sarah R. Saldaña, in her official capacity as Director of U.S. Immigration and Customs Enforcement; and León Rodríguez, in his official capacity as Director of U.S. Citizenship and Immigration Services.
>
> Respondents were appellees in the court of appeals. They are: The State of Texas; State of Alabama; State of Georgia; State of Idaho; State of Indiana; State of Kansas; State of Louisiana; State of Montana; State of Nebraska; State of South Carolina; State of South Dakota; State of Utah; State of West Virginia; State of Wisconsin; Paul R. LePage, Governor, State of Maine; Patrick L. McCrory, Governor, State of North Carolina; C.L. "Butch" Otter, Governor, State of Idaho; Phil Bryant, Governor, State of Mississippi; State of North Dakota; State of Ohio; State of Oklahoma; State of Florida; State of Arizona; State of Arkansas; Bill Schuette, Attorney General, State of Michigan; State of Nevada; and the State of Tennessee. [Footnote omitted]

B. Table of Contents

The Table of Contents is the one exception to my earlier comment that these prefatory sections are not important. In Supreme Court briefs, as in all appellate briefs, a Table of Contents can be quite important. It serves as a de facto summary of argument, telling the reader up front not only what you will be arguing but why your position is correct.

Any discussion of what a Table of Contents should look like is really a discussion of how to craft the headings of sections and subsections in the Statement of the Case and Argument. At the risk of going out of order (since we're not yet up to the Statement and Argument), here are some general rules for headings in Supreme Court briefs.

● In the Argument section, a heading should be a complete sentence that makes a positive point for your position. It should not be a word or phrase, such as "Introduction" or "Application of Balancing Test." (By contrast, an introduction placed at the beginning of the brief may be called "Introduction.")

● A heading should never be more than one sentence. If you think you need two sentences to convey the argument being made in the section, think again.

● At the same time, that one sentence should not be unduly long. The Table of Contents as a whole should summarize your argument; but no individual heading needs to do so. For example, the heading to Section I in the state's attorney's opening brief in *Michigan v. Bryant*, 131 S. Ct. 1143 (2011), is too long:

> I. Preliminary inquiries of a wounded citizen concerning the perpetrator and circumstances of the shooting are nontestimonial because "made under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency," that emergency including not only aid to a wounded victim, but also the prompt identification and apprehension of an apparently violent and dangerous individual.

● Don't put headings in all caps. As the Seventh Circuit's *Requirements and Suggestions for Typography in Briefs and Other Papers* says, headings written in all-caps "are very hard to follow."

C. Table of Authorities

As far as I can tell, there are no Supreme Court-specific rules when it comes to this table. Most practitioners begin with cases, and include both federal and state cases together; then move on to constitution, statutes, and regulations (though these are occasionally separated out); and then provide "other authorities."

D. Opinions Below

Cert petitions and petitioner's opening merits brief must contain this section. Here are a few examples of cert petitions that simply and directly present the lower court opinions, each slightly different than the others:

Case 1 (*Puerto Rico v. Franklin California Tax-Free Trust*, 579 U.S. ___ (2016)):

The First Circuit's decision has not yet been published in the Federal Reporter, but is reported at 2015 WL 4079422 and reprinted in the Appendix ("App.") at 1-68a. Similarly, the district court's opinion has not yet been published, but is reported at 2015 WL 522183 and reprinted at App. 69-137a.

Case 2 (*United States v. Bryant*, 579 U.S. ___ (2016)):

The opinion of the court of appeals (App., *infra*, 1a- 16a) is reported at 769 F.3d 671. The oral ruling of the district court denying respondent's motion to dismiss (App., *infra*, 32a) is unreported.

Case 3 (*Johnson v. Lee*, 578 U.S. ___ (2016)):

The opinion of the court of appeals (App. 1a- 20a) is reported at 788 F.3d 1124. A previous opinion of that court (App. 72a-74a) is unpublished, as are the most recent opinion of the district court denying habeas relief (App. 21a-25a), the related report and recommendation of the magistrate judge (App. 26a-71a), an earlier opinion of the district court (App. 75a-76a), and the magistrate's report related to that opinion (App. 77a-130a). The orders of the California Supreme Court (App. 131a), the California Court of Appeal (App. 132a-133a), and the Superior Court for Los Angeles County (App. 134a-135a) denying Lee's state habeas petitions are also unpublished, as are the opinion of the California Court of Appeal affirming Lee's conviction (App. 137a-162a) and the order of the California Supreme Court denying review on direct appeal (App. 136a).

Case 4 (*Maryland State Comptroller of the Treasury v. Wynne*, 575 U.S. ___ (2015)):

The opinion of the Court of Appeals of Maryland is reported at 431 Md. 147. App. 1-52. The opinion and order of the Circuit Court for Howard County are unreported. App. 53-129. The order and oral ruling of the Maryland Tax Court also are unreported. App. 130-41.

A few things to note about them.

● The opinions are listed in reverse chronological order (*i.e.*, beginning with the federal court of appeals or state appellate court decision for which review is sought).

● You do not need to provide the case names. The Supreme Court knows that (with one exception discussed below) the opinions all involve *this* case.

● The exception is that in federal habeas corpus cases, you should provide the relevant state-court decisions. (Technically, it was a different case in state court. A direct appeal of a state conviction is part of the *criminal* case; federal habeas corpus cases are, of course, *civil* cases that collaterally challenge the criminal conviction.) This is particularly important where the issue is whether a federal courts of appeals violated AEDPA when it held that a state court unreasonably applied clearly established law. The Supreme Court can assess that issue only by reviewing the state-court decision. You therefore want to provide it in the appendix to the cert petition; and therefore must list it in the Opinions Below section.

● Descriptions of the opinions are generally not needed. So in a First Amendment case, you do not need to write: "The Eighth Circuit's decision holding that [State] Code §1234 violates the First Amendment is reported at . . . ."

● Denials of rehearing applications are not listed in Opinions Below. Rather, they are set out in the Jurisdiction section, to which we now turn.

E. Jurisdiction

Once again, the goal is to be simple and direct. The section generally begins with the key dates relevant to jurisdiction, followed by the statutory basis for jurisdiction. That means the section should set out the date on which the decision under review was entered; followed by the date on which any petition for rehearing was denied; followed by any extension(s) the Circuit Justice may have granted; followed by the statutory basis for Supreme Court review. That's it.

For example, from the United States' cert petition in *Department of Transportation v. Association of American Railroads*, 575 U.S. ___ (2015):

> **JURISDICTION**
>
> The judgment of the court of appeals was entered on July 2, 2013. A petition for rehearing was denied on October 11, 2013 (App., *infra*, 51a-52a). On December 31, 2013, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including February 7, 2014. On January 28, 2014, the Chief Justice further extended the time to March 10, 2014. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

When the petition seeks review of a federal court of appeals decision, the Supreme Court's jurisdiction is being invoked under 28 U.S.C. §1254(1); when the petition seeks review of a state-court decision, the Court's jurisdiction is being invoked under 28 U.S.C. §1257(a).

When a petition seeks review of a state-court judgment, the question often arises whether that judgment is final — a prerequisite to Supreme Court jurisdiction. Some practitioners prefer to tackle the issue head-on in the Jurisdiction section. If that's your approach, make it short and sweet. For example, this is what Ohio wrote in its petition in *Ohio v. Clark*, 135 S. Ct. 2173 (2015), which sought review of an Ohio Supreme Court decision reversing a conviction based on a purported Confrontation Clause violation:

> **JURISDICTIONAL STATEMENT**
>
> The Supreme Court of Ohio entered its judgment in this case on October 30, 2013. The State filed a motion for reconsideration, which was denied on December 24, 2013. On March 13, 2014, Justice Kagan granted a 45-day extension of time to file this petition for writ of certiorari until May 8, 2014. The State of Ohio invokes the Court's jurisdiction under 28 U.S.C. § 1257. The Supreme Court of Ohio's decision qualifies as a "[f]inal judgment or decree[]" within the meaning of that statute. *Id.*; *see Michigan v. Bryant*, 131 S. Ct. 1143, 1151-52 (2011) (granting review when state supreme court found Confrontation Clause violation and remanded for new trial); *see also Kansas v. Marsh*, 548 U.S. 163, 168 (2006); *New York v. Quarles*, 467 U.S. 649, 651 n.1 (1984).

F. Constitutional and Statutory Provisions Involved

This section, too, must be included in cert petitions and the opening briefs for petitioners. You have two options: to present some or all of these provisions in the body of the brief or to put them in an appendix. Both approaches are acceptable to the Court. Which one you take depend on the provisions' length and whether the case turns on a particular provision, the precise phrasing of which you may wish to set out in an easy-to-find place at the beginning of the brief.

My rule of thumb is that you don't want this section to be longer than three pages. I've read briefs where the Statement of the Case doesn't begin until page 8 because of a very long Constitutional and Statutory Provisions Involved section. That's not how your brief should begin.

Feel free to use ellipses liberally to keep this section concise. In a recent cert petition raising a Confrontation Clause issue (*Kansas v. Carr*, 577 U.S. ___ (2016)), Kansas set out the relevant constitutional provision as:

> **The Sixth Amendment to the United States Constitution** provides in relevant part that "[i]n all criminal prosecutions, the accused shall enjoy the right … to be confronted with the witnesses against him …" U.S. Const. amend. VI.

Similarly, if an AEDPA case involves 28 U.S.C. §§ 2254(d)(1) and (e)(1), include only those subsections, not the entirety of § 2254.

Also: The only provisions that must be included are those that are directly relevant to the question presented. If, for example, the case involves the meaning of the AEDPA statute of limitations, you do not need to provide the state criminal statute the defendant was convicted of violating. That statute has nothing to do with the issue you're presenting to the Court.

Topic 6: Introduction

Many briefs filed in the Court, at both the cert-stage and merits-stage, begin with an introduction. Although the U.S. Solicitor General's office does not use them, most of the leading Supreme Court practitioners do. The typical approach is to have a formal section, called Introduction, that appears before the prefatory sections.[5] Another common approach is to open the Statement of the Case with a few paragraphs that serve as a de facto introduction.[6]

5 A good example appears at page 1 of this brief: http://www.scotusblog.com/wp-content/uploads/2015/09/14-1175-ts.pdf

6 A good example appears at page 3 of this brief: http://www.scotusblog.com/wp-content/uploads/2016/02/14-1468_pet.authcheckdam.pdf

A caution: Many briefs have an Introduction, a Summary of Argument, and an opening to the Argument that serves as another overview of the party's position. The challenge is ensuring that these sections don't get redundant. Toward that end, avoid having the Introduction read like a Summary of Argument, walking through the various arguments the brief will make, one at a time, in order. An effective Introduction is more thematic than that, presenting the big-picture sense of why your position is correct.

Topic 7: Statement of the Case

Because this is a *style* guide, not a manual on how to write effective appellate briefs, my focus will be on how this section should *look* — not on the various techniques for making the Statement as effective as possible. Still, many of my style pointers help accomplish the core goal of the Statement, which is to set out the relevant facts and procedural history (and, in some cases, statutory background) in an accurate, non-argumentative way that nonetheless subtly shows why your legal position is correct.

Title

Most practitioners call this section the "Statement of the Case." The U.S. Solicitor General calls it "Statement." Either title is fine. The key is that, in contrast to many lower courts (especially state courts), this section encompasses both the background facts *and* procedure.

Structure

● Most Statements have at least two subsections, one providing the factual background, one providing the procedural background. In a case about excessive-force claims brought by pretrial detainees (*Kingsley v. Hendrickson*, 576 U.S. ___ (2015)), petitioner's Statement was simply:

> **STATEMENT OF THE CASE**
>
> A. Factual Background
>
> B. Proceedings Below

• Another technique is to have the Statement's headings tell a bit of a story. In a case about the meaning of the Prison Litigation Reform Act's three-strikes provision (*Coleman v. Tollefson*, 575 U.S. ___ (2015)), Michigan's Statement looked like this:

> **Statement of the Case**
>
> A. The history of *in forma pauperis* status
>
> B. Coleman incurs three dismissals
>
> C. Coleman brings four more actions after his third action was dismissed but while it is pending on appeal
>
> D. The district-court decisions
>
> E. The Sixth Circuit's decision

• When the principal issue in a case is the meaning of a specific statute, Statements usually include a subsection that discusses the statute's background and lays out its core provisions. For example, in *Universal Health Services, Inc. v. United States ex rel. Escobar*, 579 U.S. ___ (2016), a case involving how the False Claims Act interacts with Medicaid requirements, the Statement's subsections were:

> **STATEMENT OF THE CASE**
>
> A. Background And Purpose Of The FCA
> B. MassHealth's Provider Regulations For Mental Health Centers
> C. Factual Background
> D. Proceedings Below

• A simple case's Statement may not need any subsections. Even in those cases, however, the Statement should separate the discussion of the facts from the discussion of the district court decision from the discussion of the appellate court decision. The typical way by which Supreme Court briefs accomplish that is by placing a number at the start of the first paragraph of each new component of the Statement. Thus, for example, the first paragraph describing the facts opens with the number 1; the first paragraph describing the district court decision opens with the number 2; and the first paragraph describing the court of appeals decision opens with the number 3.[7]

Lawyers who don't practice before the U.S. Supreme Court often find that practice an odd one. Trust me: The Justices are used to that style and like it. The U.S. Solicitor General's office, which is the gold standard of U.S. Supreme Court practice, uses that style in every one of its briefs. Indeed, that office — and other leading practitioners — use occasional numbered paragraphs throughout their briefs, not just in the Statement.

Note that I say "occasional numbered paragraphs." The Statement should not look like a Complaint, with each and every paragraph numbered. Only those paragraphs that transition to a new topic should begin with a number.

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7 A good example appears in Utah's merits brief in *Utah v. Strieff*, 579 U.S. ___ (2016). See http://www.scotusblog.com/wp-content/uploads/2015/12/14-1373-ts.pdf

Other Style Pointers

● When setting out the facts, include supporting citations. (A citation does not have to appear after every sentence describing facts; but at the least, every paragraph in the factual background section should have a citation.) Sometimes, those citations can be to a lower court's opinion in the case. Those are the easiest — just cite the appropriate page in the cert petition appendix. And if it's a merits brief, cite to the Joint Appendix (*e.g.*, JA 211) where possible.

When no lower court opinion supports a factual assertion, a cert-stage brief must cite something in the lower court record. Try to make such citations as short and simple as possible. For example, cite to the court of appeals' record (abbreviated as "R. __") or joint appendix ("CA JA"). Cites to a trial transcript can be "Tr. __"; and so on. The goal is to make your brief easy on the reader's eyes, not weighed down with long descriptions of lower court documents.

● As a general rule, the story of the case — the facts and then the case's trip through the courts — should be told in chronological order. Most importantly, that means it is the very rare case where you will want to summarize the facts by walking through the testimony of specific witnesses.

● I noted earlier that Supreme Court briefs should limit the number and length of block quotes. Statements of the Case present special risks on that score. I have seen many Statements that set out the facts by inserting a multi-page block quote of a lower court's description of the facts. Please, please, please don't do that. Occasional quoted language is fine; long block quotes of that sort are not.

● The "story" the Statement tells culminates with the decision by the federal court of appeals or state appellate court. Your Statement should therefore end with a summary of that court's reasoning (and a summary of the dissent, if any). Different cases warrant summaries of different lengths. I have seen effective two-paragraph summaries and effective four-page summaries. But it is almost never a good idea simply to say, "the [State] Supreme Court affirmed," and then leave it to the Argument (or Reasons) section to lay out that court's reasoning.

Topic 8: The Argument

A. Cert Petitions

I have already published a guide on cert petitions and briefs in opposition — *Preparing Cert Petitions and Oppositions* (NAGTRI 2008)[8] — which I do not wish to duplicate here. My present focus is on style, not broader strategic and tactical issues such as what arguments are most likely to convince the Court to grant certiorari and how to raise "vehicle" problems with the other side's petition. Here are a few suggestions that fall into the "style" camp.

● The argument section of a cert petition is called the "Reasons for Granting the Writ" or the "Reasons for Granting the Petition." Because the Court is deciding whether or not to grant the *petition*, the latter title is technically correct. But the former title is commonly used as well. As far as I can tell, the Court is fine with either.

8 The guide is available on NAAG's website at http://bit.ly/2tjkEi0.

● The Reasons section usually has subsections that address the different grounds for granting certiorari, such as:

> **Reasons for Granting the Petition**
>
> I. State supreme courts are divided on the question presented.
>
> II. The case presents an issue of national importance.
>
> III. The [State] Supreme Court's decision is incorrect.[9]

What you don't want to do, but I've seen done on occasion, is insert the heading "Argument" between Reasons for Granting the Petition and section I; or insert a long heading between them that tries to summarize the entire case, *e.g.*:

> **Reasons for Granting the Petition**
>
> **The Court should grant certiorari to address whether the Fourth Amendment is violated when a police officer searches digital information on a cell phone incident to arrest because the lower courts are deeply divided on the issue, the issue arises frequently and is critical to law enforcement, and the court of appeals decided it incorrectly.**
>
> I. The federal courts of appeals are divided on the question presented.
>
> II. The case presents an issue of national importance.
>
> III. The court of appeals decision is incorrect.

And it is rarely a good idea to have one long heading of the sort added just above in place of the more precise subsections.

B. Merits Briefs

There isn't much to add to at this point. Most of the points presented in Topics 1 and 2 (General Rule — Ditch Local Idiosyncrasies; and Some U.S. Supreme Court-Specific Styles) apply to the Argument section of a merits brief. And various other suggestions, such as Topic 5(B)'s discussion of section headings, do as well. To all of that, I'll add just a few additional thoughts.

● Sections traditionally are numbered I, II, III, etc. or A, B, and C, etc. Reserve Arabic numbers (1, 2, 3, etc.) for subsections.

● Very few Arguments should have more than three main sections. When you see a brief with §§ I through VII, it probably isn't well written.

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9 As my guide explains, a cert petition should begin by describing the conflict among the state high courts and/or federal courts of appeals. With a few exceptions (such as AEDPA cases where the state is seeking a summary reversal), any argument that the lower court erred should be saved for the final section of the petition.

● I stated in Topic 5(B) that a heading in the Argument section should not be a word or phrase, such as "Introduction" or "Background." So what do you do if you believe the argument will be most effective if it first describes the legal background (*e.g.*, the general Fourth Amendment rules that are then applied)?

A common solution is to set out that background under a heading that states a helpful legal principle. For example, in *Utah v. Strieff*, 579 U.S. ___ (2016), the first subsection in Utah's opening merits was titled: "Because the exclusionary rule exists only to compel respect for constitutional rights, it applies only when it appreciably deters future police misconduct." That nicely captured the background Fourth Amendment rule the section was describing; and captured it in a way that advanced the state's core argument — that the exclusionary rule should not apply in the context at issue because that would *not* "appreciably deter[] future police misconduct." Likewise, in *Gobeille v. Liberty Mutual Insurance Co.*, 577 U.S. ___ (2016), an ERISA preemption case, Vermont described the Court's key ERISA preemption cases in an opening subsection titled, "ERISA does not preempt generally applicable state health care regulations that neither mandate particular employee benefits nor interfere with plan administration."

Another approach is to summarize the background law in the opening paragraph (or two or three) of the Argument or a specific section. Oklahoma did this in its merits brief in *Glossip v. Gross*, 576 U.S. ___ (2015), which addressed whether its use of the drug midazolam in its three-drug lethal injection protocol violated the Eighth Amendment. Oklahoma's merits argument began with a section titled, "Oklahoma's Use of Midazolam Does Not Create a 'Substantial Risk Of Serious Harm' to Petitioners." Its first two paragraphs described the general Eighth Amendment test the Court established in *Baze v. Rees*, 553 U.S. 35 (2008), for assessing challenges of that sort. The rest of the section showed why the state's protocol passed that test.

Topic 9: Conclusion

The Conclusion in a Supreme Court brief should do no more than state the relief being sought. That can usually be done in one sentence: "The petition for a writ of certiorari should be granted"; "The judgment of the [State] Supreme Court should be reversed." If you want to add "For the foregoing reasons, . . .," that's fine.

The key is that the Conclusion is *not* the place for a closing peroration, a dramatic summation of your position. The U.S. Supreme Court does not want or expect that. If you really think it's necessary to make a closing statement of some sort, you should do so at the very end of the Argument itself, in a paragraph separated from the end of the Argument's final subsection by asterisks. The plaintiff states' brief in the Affordable Care Act case did this effectively. At the end of the final section of the Argument, which argued that the individual mandate is not a valid exercise of Congress' tax power, the brief added the following closing statement:

> * * *
>
> In the end, the federal government's tax power argument suffers from the very same failing as every other constitutional argument that it advances in defense of the ACA. Congress may not "break down all constitutional limitation [on its] powers ... and completely wipe out the sovereignty of the states" by invoking its tax power to enforce commands that it lacks the authority to impose. *Bailey*, 259 U.S. at 38. The federal government implicitly recognizes as much when it acknowledges that the Court would have to read the individual mandate out of section 5000A to uphold the statute under the tax power. Govt.'s Br. 60-62. That the federal government's tax power argument would require this Court to effectively ignore what Congress itself described as an "essential" piece of the Act, ACA § 1501(a)(2)(I), is reason enough to reject it. The statute the federal government defends under the tax power is not the statute that Congress enacted. In *that* statute, the penalty provision is merely the tail and the mandate is the proverbial dog, not vice-versa. And *that* statute imposes a command that is unprecedented and invokes a power that is both unbounded and not included among the limited and enumerated powers granted to Congress. It is therefore unconstitutional, no matter what power the federal government purports to invoke.

Topic 10: Appendices

A. Cert Petitions

Supreme Court Rule 14.1(i) sets out what materials must be included in the appendix to a cert petition and in what order. Most notably, the petition appendix (colloquially known as the "Pet. App.") should include the lower court opinions and the relevant statutory provisions, if the latter do not appear in the Constitutional and Statutory Provisions Involved section. A few additional thoughts on the Pet. App.:

● Most petitions do not include *any* of the lower court record. Petitions are supposed to present clean legal issues already addressed by the lower courts. They therefore should not need to rely heavily on additional record materials. Indeed, the Supreme Court does not usually even obtain the record until *after* it grants certiorari. (Only a few times each Term does the Court ask the lower court to send over the record while the Court is still assessing whether to grant certiorari.)

● In some cases, however, a particular part of the record is critical — either to the merits (*e.g.*, the transcript of the interrogation at which the defendant's *Miranda* rights were allegedly violated) or to establishing jurisdiction (*e.g.*, to show that the federal issue was raised below). You should include that part of the record in the Pet. App. when that's the case.

● For roughly the same reasons — to help show that the lower court was correct on the merits or that the federal issue was *not* raised below — a brief in opposition may wish to provide critical portions of the record in its own appendix. This should be done sparingly; but it can be very helpful in a small percentage of cases.

● Sometimes, the lower court decision for which review is sought is very short and lacks analysis because it relied almost entirely on a prior decision in which that court addressed the legal issue at length. You will usually want to include that prior decision in the Pet. App.

B. Merits Briefs

Once you're at the merits stage, the role of an appendix attached to your brief changes. The separate Joint Appendix should contain any pleadings and other record material the Court needs to assess the case. And the lower court opinions already appear in the cert petition appendix and do not need to be reprinted anywhere else. So is there any need for an appendix to a merits brief?

The answer is yes. Although the relevant statutes and regulations should already appear in the cert petition or its appendix, it is common to include them again in an appendix to the Brief for Petitioner [or Respondent]. The goal is to make things as easy as possible for a Justice (or clerk) reading your brief. In a statutory construction case, the reader will often want to study different provisions as she moves through the brief. You make it easier for her to do that by including the relevant provisions in an appendix. Merits briefs from the U.S. Solicitor General's office almost always include such an appendix.

You may also want to include in a merits-brief appendix the record material that is critical to the case. If, for example, the question presented asks whether particular jury instructions were constitutional or consistent with a federal statute, you may wish to include the jury instructions in an appendix to your opening merits brief. Again, that serves your core goal — making it easier for the Justices to read your brief and understand your argument. Other cases may warrant including portions of the trial transcript, the lab report of a DNA technician, and so on.

That said, don't overdo it. Not every case calls for a merits-brief appendix. (Fourth Amendment cases typically do not.) And when you provide one, include only the most important materials.

* * * * *

With the entire brief, including appendices, covered, this style guide will now conclude. As always, if you have any questions about Supreme Court practice — style or otherwise — please never hesitate to contact me.

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