

# Citing Unpublished Opinions in Federal Appeals

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# I. Introduction

The Appellate Rules Advisory Committee<sup>1</sup> has proposed a new Federal Rule of Appellate Procedure 32.1, which would permit attorneys and courts in federal appeals in all circuits to cite unpublished opinions.<sup>2</sup> Currently, by local rules, courts in four circuits (the Second,<sup>3</sup> Seventh,<sup>4</sup> Ninth,<sup>5</sup> and Federal<sup>6</sup> Circuits) forbid citation to their unpublished opinions in unrelated cases; we call these “restrictive” circuits. Courts in six circuits (the First,<sup>7</sup> Fourth,<sup>8</sup> Sixth,<sup>9</sup> Eighth,<sup>10</sup> Tenth,<sup>11</sup> and Eleventh<sup>12</sup> Circuits) discourage citation to their unpublished opinions, but permit it when there is no published opinion on point; we call these “discouraging” circuits. Courts in the

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1. Hon. Samuel Alito, chair. We are grateful to the chair and the committee for their guidance and cooperation.

2. Below is the text of the proposed rule as adopted by the Appellate Rules Advisory Committee at its April 2005 meeting and approved by the Standing Committee on Rules of Practice and Procedure (Hon. David Levi, chair) at its June 2005 meeting:

## **Rule 32.1 Citing Judicial Dispositions**

**(a) Citation Permitted.** A court may not prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other written dispositions that have been designated as “unpublished,” “not for publication,” “non-precedential,” “not precedent,” or the like.

**(b) Copies Required.** If a party cites a federal judicial opinion, order, judgment, or other written disposition that is not available in a publicly accessible electronic database, the party must file and serve a copy of that opinion, order, judgment, or disposition with the brief or other paper in which it is cited.

At its September 2005 meeting, the Judicial Conference approved the proposed rule with an amendment that would apply it only to opinions issued in 2007 or later. The next body to act on the proposal is the Supreme Court of the United States, which is expected to act by May 2006. *See* 28 U.S.C. § 2074. If the Supreme Court approves the proposed rule and Congress fails to act, the rule will become effective December 1, 2006. *Id.*

The rule originated as a proposal by the Department of Justice. *See, e.g.,* Niketh Velamoor, Note, *Proposed Federal Rule of Appellate Procedure 32.1 to Require That Circuits Allow Citation to Unpublished Opinions*, 41 Harv. J. on Legis. 561 (2004); *see also* Stephen B. Burbank, *The Politics of the Federal Judiciary: Tiered Appellate Decisionmaking*, 89 *Judicature* 20 (2005) (discussing the recent history of the rule proposal).

3. 2d Cir. R. § 0.23.
4. 7th Cir. R. 53(b)(2)(iv).
5. 9th Cir. R. 36–3(b).
6. Fed. Cir. R. 47.6(b).
7. 1st Cir. R. 32.3(a)(2), 36(c).
8. 4th Cir. R. 36(c).
9. 6th Cir. R. 28(g).
10. 8th Cir. R. 28A(i).
11. 10th Cir. R. 36.3(B).
12. 11th Cir. I.O.P. 36.5.

remaining three circuits (the Third,<sup>13</sup> Fifth,<sup>14</sup> and District of Columbia<sup>15</sup> Circuits) more freely permit citation to unpublished opinions; we call these “permissive” circuits.<sup>16</sup>

The issue of whether unpublished opinions could be cited arose in the 1970s when federal courts of appeals developed plans for selective publication of their opinions.<sup>17</sup> At its March 1964 meeting, the Judicial Conference of the United States resolved “That the judges of the courts of appeals and the district courts authorize the publication of only those opinions which are of general precedential value and that opinions authorized to be published be succinct.”<sup>18</sup>

Over the next 10 years, individual circuits developed publication plans,<sup>19</sup> and many of the circuits adopted rules stating whether unpub-

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13. *E.g.*, *In re Mays*, 256 B.R. 555, 558 (D.N.J. 2000); *Equal Employment Opportunity Comm’n v. Watson Standard Co.*, 119 F.R.D. 632 (W.D. Pa. 1988). *But see* 3d Cir. I.O.P. 5.7 (“The court by tradition does not cite to its not precedential opinions as authority. Such opinions are not regarded as precedents that bind the court because they do not circulate to the full court before filing.”).

14. 5th Cir. R. 47.5.4.

15. D.C. Cir. R. 28(c), 36(c)(2).

16. In 2000, Federal Judicial Center staff members classified restrictive circuits as having “strict noncitation rules,” discouraging circuits as having “loose noncitation rules,” and permissive circuits as “other.” Judith A. McKenna, Loral L. Hooper & Mary Clark, *Case Management Procedures in the Federal Courts of Appeals* 35 tbl. 19 (2000). At that time, the First and District of Columbia Circuits were restrictive circuits. In 2004, Dean Martha Dragich Pearson classified restrictive circuits as not allowing citations to their unpublished opinions, discouraging circuits as disfavoring such citations, and permissive circuits as allowing them. Martha Dragich Pearson, *Citation of Unpublished Opinions as Precedent*, 55 *Hastings L.J.* 1235, 1308 app. A (2004). (Curiously, she classified the Eighth Circuit as a circuit not allowing citations to its unpublished opinions although her table states that they are “allowed for preclusive [e]ffect or if persuasive and no published opinion available.” *Id.*)

Professor Stephen Barnett prefers a two-group classification scheme: circuits allowing citation to their unpublished opinions (discouraging and permissive circuits) and circuits forbidding such citation (restrictive circuits). *E.g.*, Stephen R. Barnett, *No-Citation Rules Under Siege: A Battlefield Report and Analysis*, 5 *J. App. Prac. & Process* 473, 474–75 (2003).

17. “Limited publication has been considered by the federal judicial establishment since the 1940’s.” William L. Reynolds & William M. Richman, *The Non-Precedential Precedent—Limited Publication and No-Citation Rules in the United States Courts of Appeals*, 78 *Colum. L. Rev.* 1167, 1169 (1978). Limited publication of opinions is one of several tools adopted by courts to more efficiently handle growing caseloads. *E.g.*, Penelope Pether, *Inequitable Injunctions: The Scandal of Private Judging in the U.S. Courts*, 78 *Stan. L. Rev.* 1435, 1442–65, 1483–1504 (2004).

18. Reports of the Proceedings of the Judicial Conference of the United States 11 (1964). *See also* Donna Stienstra, *Unpublished Dispositions: Problems of Access and Use in the Courts of Appeals* 6 (Federal Judicial Center 1985), reprinted in *Managing Appeals in Federal Courts* (Michael Tonry & Robert A. Katzmann eds., Federal Judicial Center 1988) at 497, 501; Reynolds & Richman, *supra* note 17, at 1169 n.17.

19. Reynolds & Richman, *supra* note 17, at 1169–71; Michael Hannon, *A Closer Look at Unpublished Opinions in the United States Courts of Appeals*, 3 *J. App. Prac. & Process* 199, 207–



lished opinions could be cited. Seven circuits adopted restrictive rules,<sup>20</sup> one circuit adopted a discouraging rule,<sup>21</sup> three circuits were permissive,<sup>22</sup>

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08 (2001); Deborah Jones Merritt & James J. Brudney, *Stalking Secret Law: What Predicts Publication in the United States Courts of Appeals*, 54 Vand. L. Rev. 69, 75–76 (2001).

20. On April 1, 1970, the First Circuit adopted a rule declaring that some opinions would not be published (Rule 8), and on November 4, 1971, the clerk issued a memorandum prohibiting the citation of unpublished opinions in unrelated cases. The prohibition became a local rule January 1, 1973 (Rule 14). *Brochu v. Ortho Pharmaceutical Corp*, 642 F.2d 652, 658 n.12 (1st Cir. 1981); Reynolds & Richman, *supra* note 17, at 1180.

On October 31, 1973, the Second Circuit adopted a rule prohibiting the citation of unpublished opinions in unrelated cases (§ 0.23). *United States v. Joly*, 493 F.2d 672, 675–76 & n.6 (2d Cir. 1974); Reynolds & Richman, *supra* note 17, at 1180, 1207.

On April 11, 1973, the Sixth Circuit adopted a rule stating that unpublished opinions should never be cited (Rule 11). William L. Reynolds & William M. Richman, *Limited Publication in the Fourth and Sixth Circuits*, 1979 Duke L.J. 807, 813 (1979).

On February 1, 1973, the Seventh Circuit adopted a rule specifying under what circumstances opinions would be published and prohibiting citation to unpublished opinions in unrelated cases. *United States v. Erving*, 388 F. Supp. 1011, 1017 (W.D. Wis. 1975).

On January 11, 1973, the Eighth Circuit adopted as an appendix to its local rules a plan for the publication of opinions. David Dunn, Note, *Unreported Decisions in the United States Courts of Appeals*, 63 Cornell L. Rev. 128, 135 & n.45 (1977). On November 1, 1978, the circuit amended its plan for the publication of opinions to prohibit citation to unpublished opinions in unrelated cases. Reynolds & Richman, *supra* note 17, at 1180.

On March 1, 1973, the Ninth Circuit adopted a rule distinguishing published opinions from unpublished memorandum dispositions (Rule 21) and prohibiting citation to memorandum dispositions in unrelated cases (Rule 21(c)). *United States v. Allard*, 600 F.2d 1301, 1306 n.5 (9th Cir. 1979); Reynolds & Richman, *supra* note 17, at 1180.

On April 19, 1972, the District of Columbia Circuit adopted a rule prohibiting citation to unpublished opinions in unrelated cases (Rule 8(f)). *Carothers v. Presser*, 636 F. Supp. 817, 822 n.2 (D.D.C. 1986); *United States v. Joly*, 493 F.2d 672, 676 n.9 (2d Cir. 1974); Reynolds & Richman, *supra* note 17, at 1180.

21. On October 8, 1976, the Fourth Circuit adopted a rule specifying the criteria for publishing opinions (Rule 18) and disfavoring citation to unpublished opinions (Rule 18(d)). *Hupman v. Cook*, 640 F.2d 497, 501 n.7 (4th Cir. 1981); Reynolds & Richman, *supra* note 17, at 1181, 1207 tbl. I.

22. The Third Circuit has not restricted citation to unpublished opinions in briefs. *E.g.*, *In re Mays*, 256 B.R. 555, 558 (D.N.J. 2000); *Equal Employment Opportunity Comm'n v. Watson Standard Co.*, 119 F.R.D. 632 (W.D. Pa. 1988). But by the 1990s the court's internal operating procedures stated that the court would not cite to its unpublished opinions as authority. Mark D. Hinderks & Steve A. Leben, *Restoring the Common in the Law: A Proposal for the Elimination of Rules Prohibiting the Citation of Unpublished Decisions in Kansas and the Tenth Circuit*, 31 Washburn L.J. 155, 162 n.42 (1992).

Until 1996, unpublished opinions by the court of appeals for the Fifth Circuit were binding precedents. 5th Cir. R. 47.5.3 to .4; *Cavalier v. Caddo Parish Sch. Bd.*, 403 F.3d 246, 257 (5th Cir. 2005); *United States v. Don B. Hart Equity Pure Trust*, 818 F.2d 1246, 1250 (5th Cir. 1987).

The Tenth Circuit's rules provided that unpublished opinions could be cited when relevant (Rule 17(c)). Dunn, *supra* note 20, at 135.

and two circuits were yet to be created.<sup>23</sup> Since then, three restrictive circuits have become discouraging,<sup>24</sup> one restrictive circuit has become permissive,<sup>25</sup> and one permissive circuit first became restrictive and then became discouraging.<sup>26</sup> The new circuits include a restrictive circuit<sup>27</sup> and a discouraging circuit.<sup>28</sup>

At its June 2004 meeting, the Standing Committee on Rules of Practice and Procedure asked the Appellate Rules Advisory Committee to ask the Federal Judicial Center to conduct empirical research that would yield results helpful to the Standing Committee's consideration of the Appellate Rules Advisory Committee's proposed rule. We undertook a research effort with three components: (1) a survey of judges, (2) a survey of attorneys, and (3) a survey of case files.<sup>29</sup>

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23. The Eleventh Circuit came into being October 1, 1981, Act of Oct. 14, 1980, Publ L. No. 96-452, 94 Stat. 1994, and the Federal Circuit came into being October 1, 1982, Act of Apr. 2, 1982, Publ L. No. 97-164, 96 Stat. 25. *See also* Commission on Structural Alternatives for the Federal Courts of Appeals, Final Report 19-21 (Federal Judicial Center 1998).

24. The Sixth Circuit began permitting citation to unpublished opinions when there is no published opinion on point on February 1, 1982 (Rule 24(b)). *See, e.g.,* Baer v. R&F Coal Co., 782 F.2d 600, 602 & n.1 (6th Cir. 1986); *Re* Rules of the United States Court of Appeals for the Tenth Circuit, Adopted November 18, 1986, 955 F.2d 36, 38 n.4 (10th Cir. 1992).

In the 1990s, the Eighth Circuit began permitting citation to unpublished opinions when there is no published opinion on point (Rule 28A(k)). *See, e.g.,* Kirt Shuldberg, Comment, *Digital Influence: Technology and Unpublished Opinions in the Federal Courts of Appeals*, 85 Cal. L. Rev. 541, 569 & n.133 (1997).

Effective December 16, 2002, the First Circuit now permits citation to unpublished opinions when there is no published opinion on point (Rule 32.3(a)(2)). *See, e.g.,* Hoilett v. Allen, 365 F. Supp. 2d 110, 114 n.9 (D. Mass. 2005) (following 1st Cir. R. 32.3(a)(2) and relying on unpublished First Circuit opinion); Barnett, *supra* note 16, at 474.

25. The District of Columbia Circuit permits citation to unpublished opinions issued in 2002 or later. D.C. Cir. R. 28(c)(1)(B). *See also* Pearson, *supra* note 16, at 1236 n.8, 1308 app. A.

26. Beginning November 18, 1986, the Tenth Circuit forbade citation to unpublished opinions in unrelated cases (Rule 36.3). *Re* Rules of the United States Court of Appeals for the Tenth Circuit, Adopted November 18, 1986, 955 F.2d 36 (10th Cir. 1992); Peter Jan Honigsberg & James A. Dikel, *Unfairness in Access to and Citation of Unpublished Federal Court Decisions*, 18 Golden Gate U. L. Rev. 277, 286 (1988). Since November 29, 1993, the circuit has permitted citation to unpublished opinions when there is no published opinion on point. *E.g.,* Shuldberg, *supra* note 24, at 569 n.131.

The Fifth Circuit remains a permissive circuit, although its unpublished opinions issued in 1996 or later are not binding precedent. 5th Cir. R. 47.5.4.

27. The Federal Circuit does not permit citation to unpublished opinions in unrelated cases. Fed. Cir. R. 47.6(b).

28. The Eleventh Circuit permits citation to unpublished opinions, 11th Cir. R. 36-2, but: "Reliance on unpublished opinions is not favored by the court," 11th Cir. I.O.P. 36.5.

29. We are grateful to our colleagues Joe Cecil, Jim Eaglin, Tyeika Hartsfield, Estelita Huidobro, Carolyn Hunter, Dean Miletich, Donna Pitts-Taylor, and Jeannette Summers for their assistance with this research. We are grateful to Geoffrey Erwin, Sylvan Sobel, and Russell Wheeler for their review of this report.

We surveyed all 257 sitting circuit judges and asked them how citation rules are likely to affect the time it takes to prepare unpublished opinions, the length of unpublished opinions, and the frequency of unpublished opinions. We also asked judges in circuits whose courts permit citation to unpublished opinions in unrelated cases—the discouraging circuits and the permissive circuits—whether these citations require additional work, are helpful, and are inconsistent with published authority. We asked judges in restrictive circuits whether special characteristics of their circuits would create problems if attorneys were permitted to cite unpublished opinions in unrelated cases. The courts of appeals in both the First and the District of Columbia Circuits changed their local rules recently to relax their restrictions on citations to unpublished opinions, and we asked judges in those circuits about the effects of the rule changes.

To get a representative sample of appellate attorneys who practice in each circuit, we selected the authors of briefs filed in a random sample of appeals in each circuit where a counseled brief was filed on both sides—cases we call fully briefed appeals. We asked attorneys about their desires to cite unpublished opinions in the cases selected, and we asked them about the probable impact of a rule permitting citation to unpublished opinions.

We examined citations in a random sample of cases filed in each circuit to determine how often attorneys and courts cite unpublished opinions in unrelated cases. We have also collected data on whether the cases are resolved by published or unpublished opinions, or without opinions, and how long the published and unpublished opinions are.

## II. Survey of Judges

Judges in circuits that permit citation to unpublished opinions in unrelated cases do not think the number of unpublished opinions that they author, the length of their unpublished opinions, or the time it takes them to draft unpublished opinions would change if the rules on citing unpublished opinions were to change. Judges in circuits that recently relaxed their rules on citation to unpublished opinions reported some increase in such citations, but no impact on their work.

Judges in circuits that permit citation to unpublished opinions in unrelated cases reported that these citations create only a small amount of additional work and are seldom inconsistent with published authority, but they are no more than occasionally helpful.

Judges in circuits that forbid citation to unpublished opinions in unrelated cases, on the other hand, predicted that relaxing the rules on citation to unpublished opinions will result in shorter opinions or opinions that take more time to prepare.

We surveyed all 257 sitting circuit judges, including 165 active judges and 92 senior judges; 222 responded (86%). The response rate for individual circuits ranged from 64% in the District of Columbia Circuit (7 out of 11 judges) to 95% in the Sixth Circuit (21 out of 22 judges). (See Exhibit A, Judge Survey Response Rates, *infra* page 31.)

Ten judges (4%) responded to the survey but did not answer its questions (one judge in a restrictive circuit—a senior judge in the Second Circuit who observed that senior judges in that circuit do not prepare unpublished opinions; five judges in discouraging circuits—three judges in the Fourth Circuit who opined that their local rule works well as it is, one judge in the Eighth Circuit who referred us to the views expressed by Judge Arnold in *Anastasoff v. United States*, 223 F.3d 898 (8th Cir. 2000), and one judge in the Tenth Circuit; and four judges in permissive circuits—one judge in the Fifth Circuit and three judges in the District of Columbia Circuit who opined that their local rule works well as it is).

### *A. Preparing Unpublished Opinions*

Most judges in circuits that permit citation to the court's unpublished opinions said that a change in the rules making such opinions either more or less citable would have no impact on the number of unpublished opinions, the length of unpublished opinions, or the time it takes to draft them. Among judges in the circuits that prohibit citation to their unpublished opinions in unrelated cases, nearly half said that their unpublished opinions would get shorter if they were to become citable, and over half of the

judges said that their unpublished opinions would take more time to write. Most judges in the Second, Ninth, and Federal Circuits said that citations to unpublished opinions would create special problems for their circuits, but most judges in the Seventh Circuit said that such citations would not create special problems.

## 1. If Citation Were Prohibited (Discouraging and Permissive Circuits)

We asked judges in circuits that permit citation to their unpublished opinions to tell us what would happen if citation to the court's unpublished opinions were prohibited. We posed these questions to the 155 judges in the discouraging circuits (105 judges in the First, Fourth, Sixth, Eighth, Tenth, and Eleventh Circuits)<sup>30</sup> and the permissive circuits (50 judges in the Third, Fifth, and District of Columbia Circuits).<sup>31</sup>

### *a. Length of Unpublished Opinions*

We asked: If attorneys in your circuit were prohibited from citing your court's unpublished opinions, would the length of the unpublished opinions that you author increase, decrease, or stay the same? If there would be an increase or decrease, which best describes the degree of change? Choices were very great, great, moderate, small, and very small.

In circuits that permit citation to the court's unpublished opinions, judges would not expect the length of unpublished opinions to change if they were not citable. We received answers to these questions from 79% of the judges asked. A large majority (101 out of 123, or 82%) said that the length of their unpublished opinions would stay the same if attorneys were prohibited from citing them. (See Exhibit B, Length of Unpublished Opinions If Citation Was Prohibited, *infra* page 32.) Among the judges who said that their unpublished opinions would change in length, approximately twice as many said that they would decrease in length as said that they would increase in length (15, or 12%, compared with 7, or 6%). Only six judges (5%) said that the change would be more than moderate; four said that there would be a great decrease or a very great decrease and two said that there would be a great increase.

### *b. Drafting Time*

We asked: If attorneys in your circuit were prohibited from citing your court's unpublished opinions, would the amount of time spent by your

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30. Three judges in the Fourth Circuit and one judge in the Eighth Circuit said that they regard their circuit as a circuit that prohibits citation to unpublished opinions.

31. One judge in the Third Circuit and one judge in the Fifth Circuit said that they regard their circuit as a circuit that prohibits citation to unpublished opinions.

chambers in preparing unpublished opinions increase, decrease, or stay the same? If there would be an increase or decrease, which best describes the degree of change? Choices were very great, great, moderate, small, and very small.

In circuits that permit citation to the court's unpublished opinions, judges would not expect the time it takes to prepare unpublished opinions to change if the opinions were not citable. We received answers to these questions from 79% of the judges asked. A large majority (103 out of 123, or 84%) said that the amount of time spent preparing unpublished opinions would stay the same if attorneys were prohibited from citing them. (See Exhibit C, *Time Preparing Unpublished Opinions If Citation Was Prohibited*, *infra* page 33.) Among the judges who said that the amount of time preparing unpublished opinions would change, all but one said that the amount of time would decrease. Only three judges (2%) said that the change would be more than moderate; all three said there would be a great decrease or a very great decrease.

## 2. If Citation Were Allowed Only Sometimes (Permissive Circuits)

We asked judges in circuits that freely permit citation to the court's unpublished opinions to tell us what would happen if citation to the court's unpublished opinions were permitted only when there is no published opinion on point. We posed these questions only to the 50 judges in the permissive circuits (the Third, Fifth, and District of Columbia Circuits).

### *a. Length of Unpublished Opinions*

We asked: If attorneys were allowed to cite an unpublished opinion of your court only when there was no published opinion on point, would the length of the unpublished opinions that you author increase, decrease, or stay the same? If there would be an increase or decrease, which best describes the degree of change? Choices were very great, great, moderate, small, and very small.

In circuits that freely permit citation to the court's unpublished opinions, judges would not expect the length of unpublished opinions to change if those opinions could be cited only when there is no published opinion on point. We received answers to these questions from 72% of the judges asked. A large majority (27 out of 36, or 75%) said that the length of the unpublished opinions that they authored would not change if attorneys were permitted to cite them only when there was no published opinion on point. (See Exhibit D, *Length of Unpublished Opinions If Citation Was Allowed Only Sometimes*, *infra* page 34.) Among the judges who said that their unpublished opinions would change in length, all but one said that the length would increase. Only two judges (6%) said that the change

would be more than moderate; both said that there would be a great increase or a very great increase.

*b. Drafting Time*

We asked: If attorneys in your circuit were allowed to cite an unpublished opinion of your court only when there was no published opinion on point, would the amount of time spent by your chambers in preparing unpublished opinions increase, decrease, or stay the same? If there would be an increase or decrease, which best describes the degree of change? Choices were very great, great, moderate, small, and very small.

In circuits that freely permit citation to the court's unpublished opinions, judges would not expect the time it takes to prepare unpublished opinions to change if the opinions could be cited only when there is no published opinion on point. We received answers to these questions from 74% of the judges asked. A large majority (28 out of 37, or 76%) said that the amount of time spent preparing unpublished opinions would stay the same if attorneys were permitted to cite them only when there is no published opinion on point. (See Exhibit E, *Time Preparing Unpublished Opinions If Citation Was Allowed Only Sometimes*, *infra* page 35.) All of the judges who said that the amount of time preparing unpublished opinions would change said that it would increase (9, or 24%). Only one said that the change would be more than moderate; this judge said that there would be a great increase.

### 3. If Citation Were Always Allowed

We asked judges in circuits that either do not permit citation to their unpublished opinions or permit citation to their unpublished opinions only when there is no published opinion on point to tell us what would happen if citation to the court's unpublished opinions were freely permitted.

*a. Number of Unpublished Opinions (Discouraging Circuits)*

We posed these questions to the 105 judges in the discouraging circuits (the First, Fourth, Sixth, Eighth, Tenth, and Eleventh Circuits).

We asked: If no restrictions were placed on the ability of an attorney to cite an unpublished opinion of your court for its persuasive value, do you think that the number of unpublished opinions that you author would increase, decrease, or stay the same? If there would be an increase or decrease, which best describes the degree of change? Choices were very great, great, moderate, small, and very small.

In circuits that permit citation to the court's unpublished opinions only when there is no published opinion on point, judges would not expect the number of unpublished opinions that they author to change if citation to the opinions were permitted more freely. We received answers to these

questions from 79% of the judges asked. A large majority of judges (66 out of 83, or 80%) said that the number of unpublished opinions that they author would stay the same if attorneys could cite the court's unpublished opinions more freely. (See Exhibit F, Number of Unpublished Opinions If Citation Was Freely Permitted, *infra* page 36.) Among the judges who said that the number of unpublished opinions that they author would change, more than three times as many said that the number would decrease as said that the number would increase (13, or 16%, compared with 4, or 5%). Only six judges (7%) said that the change would be more than moderate; four said that there would be a great decrease or a very great decrease, and two said that there would be a great increase.

*b. Length of Unpublished Opinions (Restrictive and Discouraging Circuits)*

We posed these questions to the 207 judges in the restrictive circuits (102 judges in the Second, Seventh, Ninth, and Federal Circuits) and the discouraging circuits (105 judges in the First, Fourth, Sixth, Eighth, Tenth, and Eleventh Circuits). The wording of the questions was slightly different for the two types of circuits.

*Restrictive Circuits*—Of judges in the restrictive circuits we asked: If attorneys in your circuit were allowed to cite unpublished opinions of your court, would the length of the unpublished opinions that you author increase, decrease, or stay the same? If there would be an increase or decrease, which best describes the degree of change? Choices were very great, great, moderate, small, and very small.

*Discouraging Circuits*—Of judges in the discouraging circuits we asked: If no restrictions were placed on the ability of an attorney to cite an unpublished opinion of your court for its persuasive value, would the length of the unpublished opinions that you author increase, decrease, or stay the same? If there would be an increase or decrease, which best describes the degree of change? Choices were very great, great, moderate, small, and very small.

We received answers to these questions from 83% of the judges asked. A large majority of judges (69 out of 88, or 78%) in the *restrictive circuits* said that the length of the unpublished opinions that they author *would change* if attorneys were permitted to cite them, but a substantial majority of judges (58 out of 84, or 69%) in the *discouraging circuits* said that the length of the unpublished opinions that they author *would not change* if attorneys were permitted to cite them freely. (See Exhibit G, Length of Unpublished Opinions If Citation Was Freely Permitted, *infra* page 37.)

A plurality of judges in restrictive circuits said that the length of their unpublished opinions would decrease if attorneys were permitted to cite them. Among the large majority of judges in restrictive circuits who said that their unpublished opinions would change in length, most (41 out of 69,



or 59%) said that the opinions would decrease in length. Most of these judges (33 out of 41, or 80%) said that the decrease would be more than moderate; 16 judges said there would be a very great decrease, and 17 judges said there would be a great decrease. Of the judges who said that their unpublished opinions would increase in length, half said that the increase would be moderate or less, and half said that the increase would be more than moderate. Six judges said that there would be a very great increase in the length of their unpublished opinions, and eight judges said that there would be a great increase in the length of their unpublished opinions.

Very few judges in discouraging circuits said that the length of their unpublished opinions would decrease if attorneys were permitted to cite those opinions more freely. Among the minority of judges (26 out of 84, or 31%) in discouraging circuits who said that their unpublished opinions would change in length, a large majority (22 out of 26, or 85%) said that the opinions would increase in length. Most of these judges (12 out of 22, or 55%) said that the increase would be moderate or less; two judges said that there would be a very great increase, and eight judges said that there would be a great increase. Only four judges (5%) in discouraging circuits said that the length of their unpublished opinions would decrease if attorneys could cite unpublished opinions more freely; half said that there would be a great decrease and half said that the decrease would be moderate or less.

*c. Drafting Time (Restrictive and Discouraging Circuits)*

We posed these questions to the 207 judges in the restrictive circuits (102 judges in the Second, Seventh, Ninth, and Federal Circuits) and the discouraging circuits (105 judges in the First, Fourth, Sixth, Eighth, Tenth, and Eleventh Circuits). The wording of the questions was slightly different for the two types of circuits.

*Restrictive Circuits*—Of judges in the restrictive circuits we asked: If attorneys in your circuit were allowed to cite unpublished opinions of your court, would the amount of time spent by your chambers in preparing unpublished opinions increase, decrease, or stay the same? If there would be an increase or decrease, which best describes the degree of change? Choices were very great, great, moderate, small, and very small.

*Discouraging Circuits*—Of judges in the discouraging circuits we asked: If no restrictions were placed on the ability of an attorney to cite an unpublished opinion of your court for its persuasive value, would the amount of time spent by your chambers in preparing unpublished opinions increase, decrease, or stay the same? If there would be an increase or decrease, which best describes the degree of change? Choices were very great, great, moderate, small, and very small.

We received answers to these questions from 84% of the judges asked. A very large majority of judges (160 out of 173, or 92%) who answered these questions said that the amount of time they spend preparing unpublished opinions would stay the same or increase if attorneys could cite the unpublished opinions more freely. (See Exhibit H, Time Preparing Unpublished Opinions If Citation Was Freely Permitted, *infra* page 38.) A majority of judges (50 out of 89, or 56%) in the *restrictive circuits* said that the time they would take to prepare unpublished opinions would *increase* if attorneys were permitted to cite the opinions, but a majority of judges (47 out of 84, or 56%) in the *discouraging circuits* said they would take the *same* amount of time to prepare unpublished opinions if attorneys were permitted to cite the opinions freely.

Among the majority of judges in restrictive circuits who said that the amount of time they spend preparing unpublished opinions would increase if attorneys could cite them, a substantial majority (33 out of 50, or 66%) said that the increase would be more than moderate. This includes more than a third of all judges (37%) in restrictive circuits who responded to the questions. Twelve judges said the increase would be very great; 21 judges said the increase would be great. Among the small minority of judges (12 out of 89, or 13%) who said that the amount of time would decrease, four said the decrease would be very great, and four said the decrease would be great.

Among the minority of judges in discouraging circuits who said that the amount of time they spend preparing unpublished opinions would change if attorneys could cite the opinions freely, all but one said that the amount of time would increase. Eleven judges said that the increase would be more than moderate—four said the increase would be very great, and seven said that the increase would be great. One judge said that there would be a great decrease.

*d. Problems (Restrictive Circuits)*

We posed these questions to the 102 judges in the restrictive circuits (the Second, Seventh, Ninth, and Federal Circuits).

We asked: Would a rule allowing the citation of unpublished opinions in your circuit cause problems because of any special characteristics of your court or its practices? If your answer is “yes,” please describe the relevant characteristics.

We received an answer to the first question from 84% of the judges asked. A substantial majority of the judges (58 out of 86, or 67%) said that a rule permitting citation to the court’s unpublished opinions would be especially problematic for their circuit. (See Exhibit I, Problems with Proposed Rule, *infra* page 39.) But although a substantial majority of judges (53 out of 74, or 72%) in the Second, Ninth, and Federal Circuits said that there

would be special problems, a majority of judges (7 out of 12, or 58%) in the Seventh Circuit said that there would not be special problems.

Fifty-seven judges offered thoughts on the effect of permitting citation to unpublished opinions in their courts. (See Appendix A, *infra* page 65.) Twenty judges predicted that citations to unpublished opinions would increase judges' workload. Thirteen judges predicted that unpublished opinions would become shorter if they could be cited. Seven judges expressed concern about the quality of the court's unpublished opinions. Six judges observed that citations to unpublished opinions are unlikely to be helpful. Five judges predicted that if unpublished orders could be cited, it could take the court longer to resolve the cases in which they are issued. Three judges predicted that allowing citation to unpublished opinions could ultimately result in the opinions being precedential. One judge predicted that permitting citations to unpublished opinions would provide the government with an advantage. A few judges offered thoughts on more than one of these topics, and eight judges expressed other thoughts.

## *B. Work of Chambers Reviewing Briefs (Discouraging and Permissive Circuits)*

Most judges told us that citations to unpublished opinions create a small or very small amount of additional work for them, are occasionally or seldom helpful, and are seldom inconsistent with published authority.

We posed questions to the 155 judges in the discouraging circuits (105 judges in the First, Fourth, Sixth, Eighth, Tenth, and Eleventh Circuits) and permissive circuits (50 judges in the Third, Fifth, and District of Columbia Circuits).

### 1. Work

We asked: When a brief cites an unpublished opinion of your court, how much additional work does this citation create for you and your chambers staff? Choices were a very great amount, a great amount, some, a small amount, and a very small amount.

Citations to unpublished opinions do not appear to create much additional work for the court. We received answers to this question from 75% of the judges asked.<sup>32</sup> Almost all judges (114 out of 116, or 98%) said that an unpublished opinion creates less than a great amount of additional work. (See Exhibit J, Unpublished Citation's Additional Work, *infra* page 40.) Approximately half of the judges who responded said that citations to unpublished opinions create a very small amount of additional work (57 out of

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32. Five judges wrote "none," which was not one of the choices offered.

116, or 49%; 40 out of 82, or 49%, in discouraging circuits, and 17 out of 34, or 50%, in permissive circuits).

## 2. Helpfulness

We asked: Which of the following best describes how often the citation of an unpublished opinion of your court has been helpful? Choices were very often, often, occasionally, seldom, and never.

Citations to unpublished opinions do not appear to be helpful very often. We received answers to this question from 79% of the judges asked. A very large majority (116 out of 123, or 94%) said that citations to unpublished opinions have been helpful less than “often.” (See Exhibit K, Unpublished Citation’s Helpfulness, *infra* page 41.) A large minority (48 out of 123, or 39%) said that citations to unpublished opinions are occasionally helpful, and another large minority (54 out of 123, or 44%) said that citations to unpublished opinions are seldom helpful. A smaller minority (14 out of 123, or 11%) said that citations to unpublished opinions are never helpful. Six judges (5%) said that citations to unpublished opinions are often helpful, and one judge (1%) said that such citations are very often helpful.

## 3. Inconsistency

We asked: Which of the following best describes how often an attorney has cited an unpublished opinion of your court that is inconsistent or difficult to reconcile with a published opinion of your court? Choices were very often, often, occasionally, seldom, and never.

We received answers to this question from 79% of the judges asked. Almost all judges (119 out of 122, or 98%) said that cited unpublished opinions have been inconsistent or difficult to reconcile with published authority less than “often.” (See Exhibit L, Unpublished Citation’s Inconsistency, *infra* page 42.) Many judges (33 out of 122, or 27%) said that cited unpublished opinions are occasionally inconsistent, most (67 out of 122, or 55%) said that cited unpublished opinions are seldom inconsistent, and a few (19 out of 122, or 16%) said that cited unpublished opinions are never inconsistent. Only two judges (2%) said that such opinions are often inconsistent, and only one judge (1%) said that such opinions are very often inconsistent. Although the majority response in most circuits was seldom or never, a substantial majority of Sixth Circuit judges (14 out of 20, or 70%) said that cited unpublished opinions are occasionally inconsistent with published authority.

### *C. Effect of New Local Rules (A Discouraging Circuit — the First Circuit; and a Permissive Circuit — the District of Columbia Circuit)*

Two circuits have recently changed their local rules on citations to unpublished opinions. The courts of appeals for the First Circuit and the District of Columbia Circuit used to prohibit citations to their unpublished opinions in unrelated cases.

The court of appeals for the First Circuit still discourages such citations but permits them if they have persuasive value and if there is no published opinion on point. The First Circuit used to be a restrictive circuit and is now a discouraging circuit.

The court of appeals for the District of Columbia Circuit now permits citation to unpublished opinions as precedent. The District of Columbia Circuit used to be a restrictive circuit and is now a permissive circuit. However, only unpublished opinions issued after the effective date of the rule change, January 1, 2002, maybe be cited in unrelated cases.

We asked questions of the 10 judges in the First Circuit and the 11 judges in the District of Columbia Circuit. These judges told us that attorneys are now citing unpublished opinions more often, but this has not had an impact on their work.

#### 1. Frequency of Citation

We asked: Since this new local rule took effect, have attorneys cited unpublished opinions much more often, somewhat more often, as often as before, somewhat less often, or much less often?

We received answers to this question from 70% of the judges in the First Circuit. Most judges (5 out of 7, or 71%) said that attorneys cite unpublished opinions more often than before; of these judges, one judge said that it happens much more often, and four judges said that it happens somewhat more often. (See Exhibit M, Frequency of Citation to Unpublished Opinions After Local Rule Change, *infra* page 43.) Two judges said that it happens as often as before.

We received answers to this question from 36% of the judges in the District of Columbia Circuit. Most judges (3 out of 4, or 75%) said that attorneys cite unpublished opinions somewhat more often than before; one judge said that it happens as often as before. (See Exhibit M, Frequency of Citation to Unpublished Opinions After Local Rule Change, *infra* page 43.)

#### 2. Drafting Time

We asked: Since this new local rule took effect, has the amount of time that you have spent drafting unpublished opinions increased, decreased, or

remained unchanged? If the amount of time that you have spent drafting unpublished opinions has changed, has the change been very great, great, small, or very small?

We received answers to these questions from 80% of the judges in the First Circuit. Almost all of the judges (7 out of 8, or 88%) said the amount of time they spend drafting unpublished opinions has not changed since the opinions became citable; one judge said that there has been a small increase in time spent drafting unpublished opinions. (See Exhibit N, Time Preparing Unpublished Opinions After Local Rule Change, *infra* page 44.)

We received answers to these questions from 36% of the judges in the District of Columbia Circuit. All four judges said that the amount of time they spend drafting unpublished opinions has not changed since the opinions became citable. (See Exhibit N, Time Preparing Unpublished Opinions After Local Rule Change, *infra* page 44.)

### 3. Work

We asked: Has the new local rule made your work harder or easier? If the new local rule has made your work harder or easier, has the change been very great, great, small, or very small?

We received answers to these questions from 80% of the judges in the First Circuit. Almost all of the judges (7 out of 8, or 88%) said that there has been no appreciable change in the difficulty of their work since their circuit adopted a new rule permitting citation to unpublished opinions; one judge said that the work has become harder, but it has been a very small change. (See Exhibit O, Work After Local Rule Change, *infra* page 45.)

We received answers to these questions from 36% of the judges in the District of Columbia Circuit. All four judges said that there has been no appreciable change in the difficulty of their work since their circuit adopted a new rule permitting citation to unpublished opinions. (See Exhibit O, Work After Local Rule Change, *infra* page 45.)

### III. Survey of Attorneys

A random sample of federal appellate attorneys expressed a substantial interest in citing unpublished opinions. Most attorneys said that a rule permitting citation to unpublished opinions would not impose a burden on their work, and most expressed support for such a rule.

To get a representative sample of attorneys practicing in each of the 13 circuits, we surveyed the authors of the briefs filed in the cases selected for the survey of case files—a random sample of cases in each circuit. So that our sample would be balanced between appellant and appellee attorneys, we surveyed authors of briefs in cases that were fully briefed, by which we mean a counseled brief was filed on both sides. We identified 384 attorneys to survey, ranging from 12 in the Fourth Circuit to 41 in the Eighth Circuit. We received 343 responses (89%).<sup>33</sup> (See Exhibit P, Attorney Survey Response Rates, *infra* page 46.)

#### A. Citing Unpublished Opinions in Briefs

A substantial number of attorneys told us that they would have been likely to cite an unpublished opinion if their court's rules on such citations had been more lenient.

##### 1. Wanted to Cite an Unpublished Opinion

###### a. Opinions by this Circuit

We asked: When doing your legal research for this appeal, did you encounter one or more *unpublished* opinions, memoranda, or orders of the court of appeals for *this circuit* that you would have liked to cite, but did not because of the court's rules on citations to unpublished opinions?

Approximately two-fifths (39%) of the attorneys said "yes."<sup>34</sup> (See Exhibit Q, Wanted to Cite This Court's Unpublished Opinion, *infra* page 47.) More attorneys in restrictive circuits said "yes" (49%, ranging from 33% in the Second Circuit to 75% in the Federal Circuit) than in the discouraging

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33. Some attorneys who responded to the survey did not answer every question. For one of the fully briefed cases in the survey of case files, briefs were filed too late for attorneys in that case to be included in the survey of attorneys.

We sent each attorney a questionnaire with a cover letter from the chair of the Advisory Committee on Appellate Rules. If we did not get a response after several weeks, we sent the questionnaire again. If we still did not get a response, we faxed a third copy of the questionnaire. If we still did not get a response, we examined the brief for an alternate attorney to survey. If there was such an attorney, we eliminated the first attorney from the sample and surveyed the alternate.

34. For the attorney survey, averages across circuits are computed so that each circuit is weighted equally.

circuits (37%, ranging from 25% in the Eleventh Circuit to 46% in the Eighth Circuit) or the permissive circuits (31%, ranging from 21% in the District of Columbia Circuit to 40% in the Fifth Circuit).<sup>35</sup>

*b. Opinions by Other Courts*

We asked: When doing your legal research for this appeal, did you encounter one or more *unpublished* opinions, memoranda, or orders of one or more *other courts* that you would have liked to cite, but did not because of the court's rules on citations to unpublished opinions?

Approximately one quarter of the attorneys (26%) said "yes." (See Exhibit R, *Wanted to Cite Another Court's Unpublished Opinion*, *infra* page 48.) More attorneys in restrictive circuits said "yes" (31%, ranging from 19% in the Second Circuit to 44% in the Ninth Circuit) than in the discouraging circuits (23%, ranging from 8% in the First Circuit to 50% in the Eighth Circuit) or the permissive circuits (25%, ranging from 15% in the Fifth Circuit to 41% in the Third Circuit).

## 2. Would Have Cited an Unpublished Opinion

*a. Opinions by this Circuit*

We asked: Had this circuit's rules on citation to unpublished opinions been *more lenient* than they are, do you think you would have cited one or more unpublished opinions, memoranda, or orders of the court of appeals for *this circuit* in your brief or briefs in this appeal?

Nearly half of the attorneys (48%) said "yes." (See Exhibit S, *Would Have Cited This Court's Unpublished Opinion*, *infra* page 49.) More attorneys in the restrictive circuits said "yes" (59%, ranging from 43% in the Second Circuit to 80% in the Federal Circuit) than in the discouraging circuits (45%, ranging from 26% in the First Circuit to 56% in the Sixth Circuit) or the permissive circuits (39%, ranging from 26% in the District of Columbia Circuit to 46% in the Third Circuit).

*b. Opinions by Other Courts*

We asked: Had the circuit's rules on citation to unpublished opinions been *more lenient* than they are, do you think you would have cited one or more unpublished opinions, memoranda, or orders of one or more *other courts* in your brief or briefs in this appeal?

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35. It is perhaps surprising that so many attorneys in circuits that ostensibly permit citation to unpublished opinions said they wished they could have cited such opinions in the selected cases. But the court of appeals for the District of Columbia Circuit only permits citation to its unpublished opinions issued in 2002 or later, and the lack of a local rule by the court of appeals for the Third Circuit explicitly addressing the issue creates an environment in which some attorneys are unsure whether they should cite unpublished opinions or not.



Approximately one third of the attorneys said “yes” (32%). (See Exhibit T, *Would Have Cited Another Court’s Unpublished Opinion*, *infra* page 50.) More attorneys in the restrictive circuits said “yes” (34%, ranging from 21% in the Federal Circuit to 50% in the Ninth Circuit) and in the discouraging circuits (33%, ranging from 4% in the First Circuit to 54% in the Eighth Circuit) than in the permissive circuits (29%, ranging from 20% in the Fifth Circuit to 44% in the Third Circuit).

## *B. The Impact of the Proposed Rule*

### **1. Burden**

Attorneys reported that a rule permitting citation to unpublished opinions in unrelated cases would have little impact on the attorneys’ workloads.

We asked: What effect on your appellate work would a new rule of appellate procedure freely permitting citations to unpublished opinions in all circuits (but not changing whether such opinions are binding precedent or not) have on your federal appellate work? Choices were substantially more burdensome, a little bit more burdensome, no appreciable impact, a little less burdensome, and substantially less burdensome.

A plurality of attorneys (38%) said that a rule permitting citation to unpublished opinions in unrelated cases would have “no appreciable impact” on their workloads. (See Exhibit U, *Impact on Work of New Rule*, *infra* page 51.) Regarding the choices ranging from substantially less burdensome to substantially more burdensome as a scale from 1 to 5, with 3.0 representing “no appreciable impact,” the average burden rating among the attorneys answering this question was 3.1, which corresponds to very slightly more burdensome. The average change in burden predicted by attorneys was slightly higher in the restrictive and discouraging circuits (3.1) than in the permissive circuits (2.9). The averages for individual circuits ranged from 2.7 in the Federal Circuit (slightly less burdensome) to 3.6 in the Ninth Circuit (slightly more burdensome).

Approximately 10% of the attorneys said that a rule freely permitting citation to unpublished opinions in unrelated cases would make their work substantially *more* burdensome. The rates for this answer by circuit were highest in the Ninth Circuit (22%) and the First Circuit (19%). The rates for all other circuits were 13% or less.

Approximately 7% of the attorneys said that a rule freely permitting citation to unpublished opinions in unrelated cases would make their work substantially *less* burdensome. The rates for individual circuits ranged from 0% in two circuits (the Second and Seventh Circuits) to 19% in the Federal Circuit.

## 2. Open-Ended Question

We asked: The Appellate Rules Advisory Committee has proposed a new national rule, which would permit citation to the courts of appeals' unpublished opinions; what impact would you expect such a rule to have?

Although attorneys were not asked explicitly whether they would support or oppose the proposed rule, their support or opposition was often apparent from their answers. Of the 307 attorneys who answered this question, most were supportive of the proposed rule (169, or 55%), many were neutral (75, or 24%), and many opposed the proposed rule (63, or 21%). (See Exhibit V, *Attitude Toward Proposed Rule*, *infra* page 52. See Appendix B, *infra* page 77, for a compilation of the responses.)

Many attorneys commented on the implications of having a substantial amount of additional legal authority to cite. Ninety-three attorneys saw this as having access to additional valuable resources, but four attorneys worried about bias in the additional authority. Thirty-three attorneys observed that a substantial amount of legal authority to cite entails a substantial amount of additional work, but seven attorneys said that they already review the unpublished opinions anyway.

Many attorneys commented on how unpublished opinions are used. Four attorneys discussed strategies for using unpublished opinions even when it is not permissible to cite them. Twenty-six attorneys observed that unpublished opinions are not precedents, which implies that they would not be very useful. Another 16 attorneys provided additional comments calling into question the usefulness of unpublished opinions as authorities. Fifteen attorneys opined that unpublished opinions tend not to be of as high quality as published opinions in their drafting, but one attorney said that their quality is good.

A strong historical reason for restricting citation to unpublished opinions was the fact that many attorneys did not have easy access to them. But now that so many opinions are available electronically at attorneys' desktops, this reason appears to have less force. Twelve attorneys mentioned how accessible unpublished opinions are now, but 15 attorneys said that they are still often less accessible than published opinions.

Many attorneys commented on what impact on the court and the law the ability to cite unpublished opinions might have. Twenty-six attorneys predicted an increase in legal consistency, but three attorneys predicted a decrease in consistency. Seventeen attorneys predicted that unpublished opinions would improve in quality if they could be cited. Three attorneys, on the other hand, predicted that they would just get shorter. Two attorneys predicted that they would get longer. Five attorneys predicted that cases resulting in unpublished opinions would take longer to resolve.

*Citing Unpublished Opinions in Federal Appeals*

Several attorneys addressed broad policy issues related to whether attorneys can cite unpublished opinions. Nine attorneys opined that the ability to cite unpublished opinions would make courts more accountable. Four attorneys observed that the proposed rule would further blur the distinction between published and unpublished opinions. And 12 attorneys suggested that perhaps the distinction should be eliminated.

Sixty-six attorneys provided other comments: 32 were supportive of the proposed rule, 31 were neutral, and three were opposed to it.

## IV. Survey of Case Files

On average, the courts of appeals published approximately one-third of their opinions in our sample of cases, but most of the courts resolved half to most of their cases without opinions. And many of the unpublished opinions in our sample—most for some courts—are under 500 words in length, which means they are so short as to be of limited value as authorities.

It is relatively common for a fully briefed federal appeal—a case with counseled briefs filed on both sides—to include in a brief or opinion a citation to an unpublished opinion in an unrelated case; that is, cited as legal authority rather than concerning the history of the case. This occurs much more often in the briefs than in the opinions. But citations to unpublished opinions account for only 1.4% of citations to opinions. Citations to unpublished opinions, especially in the briefs, often are in string citations, which suggests that the citations are not crucial.

Many of the unpublished opinions cited were written by courts other than the ones hearing the appeals.

Of the 650 cases we reviewed for this study, we found six opinions—three by the court of appeals for the Sixth Circuit and three by the court of appeals for the Tenth Circuit—that cite the court’s own unpublished opinions.

### A. Opinions

From all of the appeals filed in federal courts of appeals in 2002, we selected at random 50 in each circuit.<sup>36</sup> We selected cases filed in 2002 so that they would be filed recently enough for many documents to be available electronically, but long enough ago so that almost all of them would be resolved. In fact, all but six (99%) have been resolved.<sup>37</sup>

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36. The number of cases filed in 2002 per circuit ranged from 1,105 for the District of Columbia Circuit to 12,365 for the Ninth Circuit. (See Exhibit W, Cases Filed in 2002, *infra* page 58.)

37. As of December 2, 2005, all cases selected in the First, Fourth, Fifth, Sixth, Seventh, Eighth, Eleventh, and Federal Circuits have been resolved. Still unresolved are one case in the Second Circuit, *Ni v. Ashcroft* (2d Cir. 02–4903, filed Dec. 9, 2002) (immigration appeal scheduled to be ready for argument the week of Oct. 3, 2005); one case in the Third Circuit, *Aruanno v. Cape May City Jail* (3d Cir. 02–1395, filed Feb. 7, 2002) (prisoner appellant’s appointed attorney suggested May 4, 2004 that the court summarily vacate the district court’s orders and remand for development of a more complete record); one case in the Ninth Circuit, *United States v. Murillo* (9th Cir. 02–50200, filed Apr. 24, 2002) (decision pending in a sentencing guidelines appeal consolidated with nine others); one case in the Tenth Circuit, *Initiative and Referendum Institute v. Walker* (10th Cir. 02–4123, filed July 24, 2002) (*en banc* rehearing pending in an action challenging a requirement by Utah’s constitu-

Ninety-one of the appeals were resolved by opinions published in West's *Federal Reporter* (14%). The percentage of cases resolved by published opinions ranged from 2% for the courts of appeals for the Fourth Circuit and the Eleventh Circuit to 34% for the court of appeals for the Eighth Circuit. (See Exhibit X, Dispositions (with Opinion Rates and Publication Rates), *infra* page 54, for the individual circuits' data.)

Nearly a third of the appeals were resolved by unpublished opinions (199, or 31%). An opinion is considered unpublished if it is not published in the *Federal Reporter*, but West and Lexis publish most of them online and West now publishes most of them in a print series called the *Federal Appendix*.<sup>38</sup> We found all unpublished opinions published in the *Federal Appendix* for the courts of appeals for eight of the circuits: the First, Fourth, Sixth, Seventh, Eighth, Ninth, Tenth, and Federal Circuits. We found most unpublished opinions published in the *Federal Appendix* for the courts of appeals for two of the circuits (the Second and Fifth Circuits) and some published in the *Federal Appendix* for the courts of appeals for two of the circuits (the Third and District of Columbia Circuits).

The court of appeals for the Eleventh Circuit only permitted electronic access to their unpublished opinions in April 2005, and it has permitted this access only prospectively. All of the unpublished opinions of this court that we examined were "tabled" in the *Federal Appendix*, showing only whether the lower court was affirmed or reversed. The court of appeals for the Third Circuit publishes most of its signed unpublished opinions in the *Federal Appendix*, but only tables most of its per curiam unpublished opinions there. The court of appeals for the Fifth Circuit used to publish some and table some unpublished opinions in the *Federal Appendix*, but now publishes all of them there.

Most or all unpublished opinions are on Westlaw for all courts except the court of appeals for the Eleventh Circuit, which only started making unpublished opinions available electronically recently. Approximately half of the courts post most or all of their unpublished opinions on their websites—courts of appeals for the First, Second, Third, Fourth, Fifth, and Eighth Circuits.<sup>39</sup> All published and unpublished opinions are available

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tion of a two-thirds supermajority for voters to enact legislation concerning the taking of wildlife); and two cases in the District of Columbia Circuit, *Town of Cortlandt v. Federal Energy Regulatory Commission* (D.C. Cir. 02-1331, filed Nov. 1, 2002) (Federal Energy Regulatory Commission appeal held in abeyance pending resolution of an action in the district court by an intervenor in this appeal) and *Constellation Power Source, Inc. v. Federal Energy Regulatory Commission* (D.C. Cir. 02-1367, filed Nov. 27, 2002) (Federal Energy Regulatory Commission appeal that arose out of the 2000 California energy crisis held in abeyance pending the resolution of other cases arising from that crisis).

38. West began publishing the *Federal Appendix* in September 2001.

39. This does not include the courts that post unpublished opinions on their websites for a limited time.

through PACER<sup>40</sup> for cases in four circuits—the First, Fourth, Eighth, and District of Columbia Circuits—and some opinions are available through PACER for cases in the Tenth Circuit.

Some courts follow a pattern in which published opinions are signed and unpublished opinions are per curiam. This is true for the cases we examined in the courts of appeals for the Fourth, Fifth, and Eighth Circuits. The courts of appeals for the Seventh and Tenth Circuits designate their unpublished opinions as “orders.” The court of appeals for the Sixth Circuit designates some of them “orders,” and the court of appeals for the District of Columbia Circuit designates some of them “judgments” and some of them “orders.” The court of appeals for the Second Circuit designates them “summary orders,” and the court of appeals for the Ninth Circuit designates them “memorandum” opinions or dispositions.

Among the cases in our sample decided by opinions, an average of 34% were decided by published opinions, with the rates for individual circuits ranging from 3% for the court of appeals for the Fourth Circuit to 86% for the court of appeals for the First Circuit.<sup>41</sup> (See Exhibit Y, Publication of Opinions in Closed Cases with Opinions, *infra* page 55, for the individual circuits’ data.)

Almost all of the published opinions in our sample are over 1,000 words in length, which corresponds to about four pages of office text (or two pages in the *Federal Reporter*). The only exceptions are one published opinion by the court of appeals for the Second Circuit, which is 900 words in length,<sup>42</sup> and the only published opinion in our sample by the court of appeals for the Eleventh Circuit, which is 679 words in length.<sup>43</sup>

An average of 72% of each court’s unpublished opinions are fewer than 1,000 words in length, which we regard as short. The rates for individual courts ranged from 43% for the court of appeals for the Seventh Circuit to 100% for the courts of appeals for the Eighth and District of Columbia Circuits.

Some who have expressed concern about the proposal to uniformly permit citations to unpublished opinions have observed that unpublished

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40. Public Access to Court Electronic Records (PACER) provides fee-based online access to federal courts’ docket and related information. Fees are waived for the Federal Judicial Center.

41. Our sample estimates are very reliable. To test the reliability of these estimates, we selected 50 cases at random for each circuit from appeals filed in 2003 and determined whether each case was still open or was resolved by published opinion, unpublished opinion, or docket judgment. With respect to the percentage of cases resolved by opinion among closed cases, there was very high agreement among the circuits comparing our samples of cases filed in 2002 and 2003,  $r = .79$ ,  $p = .001$ . There was also very high agreement comparing the percentage of opinions that are published,  $r = .86$ ,  $p < .001$ .

42. *Ni v. United States Department of Justice*, 424 F.3d 172 (2d Cir. 2005).

43. *United States v. Anderson*, 328 F.3d 1326 (11th Cir. 2003).

opinions are often so very short as to not be useful as authority, and some have expressed concern that permission to cite unpublished opinions could result in their becoming so very short as to not be useful as authority. A crude, but useful, index of an opinion so very short as to be minimally useful as authority is an opinion under 500 words in length.<sup>44</sup> We found no published opinion that short in our sample. An average of 52% of the courts' unpublished opinions are that short, ranging from 0% for the court of appeals for the Sixth Circuit to 100% for the court of appeals for the Eighth Circuit. (See Exhibit Z, Very Short, Short, and Other Unpublished Opinions, *infra* page 56, and Exhibit AA, Percentage of Unpublished Opinions That Are Very Short, *infra* page 57.)

Although the rate of very short unpublished opinions spanned the full range of possible values, on average the rates were higher the more permissive the court with respect to citations to unpublished opinions. The average rate for restrictive courts was 43%, the average rate for discouraging courts was 53%, and the average rate for restrictive courts was 61%. But because the variation among the courts is so great, this trend is not statistically significant.<sup>45</sup>

A majority of the appeals were not resolved by an opinion (354 or 54%). We refer to these cases as resolved by "docket judgments." Typically, the cases have docket entries stating how the cases were resolved (e.g., appeal voluntarily dismissed, certificate of appealability denied) and an order to that effect may be in the case file, but not a document in the form of an opinion.<sup>46</sup>

In most courts, docket judgments are very short—just a few words. In the court of appeals for the First Circuit, however, they can be as long as a few hundred words, and they often cite opinions as authority. But they do not appear as opinions on Westlaw or in the *Federal Appendix*. The court of appeals for the Federal Circuit, on the other hand, does publish the equivalent of docket judgments—a few dozen words resolving the appeal—on Westlaw and in the *Federal Appendix*.

The court of appeals for the District of Columbia Circuit makes available electronically through the docket sheets its one- or two-page orders resolving cases without published opinions. Sometimes these orders are designated per curiam and list the names of the judges on the panel to which the case was assigned. Most of these orders are published in the *Fed-*

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44. For data on how many published and unpublished opinions were shorter or longer than 500 words during a 1978–1979 reporting year, see William L. Reynolds & William M. Richman, *An Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform*, 48 U. Chi. L. Rev. 573, 598–600 (1981).

45.  $r = .20$ ,  $p = .51$ .

46. The court of appeals for the Fourth Circuit uses form opinions to deny certificates of appealability; other courts would resolve these cases by docket judgments.

*eral Appendix*, and we consider them unpublished opinions. Sometimes the orders do not identify the judges to whom the case was assigned and bear only the name of the clerk. Most of these are not published in the *Federal Appendix*. We refer to these orders as “clerk’s orders” and consider them the equivalent of docket judgments.

## B. Citations

We examined all of the citations in the briefs and opinions filed in the 650 selected cases.<sup>47</sup> We did not examine pro se briefs, and we did not examine memoranda supporting or opposing motions. One or more counseled briefs were filed in 41% of the cases. The rates for individual circuits ranged from 22% for the court of appeals for the Fourth Circuit to 54% for the court of appeals for the Eighth Circuit. (See Exhibit BB, Appeals with Counseled Briefs, *infra* page 58, for the individual circuits’ data.) We consider cases with one or more counseled briefs filed “briefed cases,” and we consider cases with one or more counseled briefs filed on both sides “fully briefed cases.”<sup>48</sup>

We counted and analyzed citations to opinions and other authorities, but did not count citations to constitutions, statutes, regulations, and similar authorities, because statutory authorities usually are too difficult to enumerate.<sup>49</sup> The following statistics also omit citations to opinions in related cases. Of the 18,098 nonstatutory citations in the 650 case files, 17,038

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47. This includes 294 opinions and 633 briefs (213 appellant and petitioner briefs, 260 appellee and respondent briefs, 145 reply briefs, and 15 intervenor and *amicus curiae* briefs).

48. Extrapolating from our sample, taking into account how many consolidated appeals each brief concerned, we estimate that in 2002 there were the following numbers of counseled briefs filed in each of the circuits:

Circuit	Estimated Counseled Briefs	Counseled Briefs Per Judgeship	Counseled Briefs Per Case
First	1,536	256	0.89
Second	3,544	273	0.66
Third	3,612	258	0.98
Fourth	1,456	97	0.31
Fifth	5,991	352	0.68
Sixth	5,119	320	1.11
Seventh	2,505	228	0.72
Eighth	4,082	371	1.28
Ninth	8,581	306	0.69
Tenth	2,886	241	1.09
Eleventh	6,483	540	0.88
District of Columbia	1,228	102	1.11
Federal	1,382	115	0.77
All Circuits	48,406	270	0.80

49. For example, do sections 1842 and 1843 count as separate authorities or part of the same authority? How about paragraphs (a) and (b)?



(94%) are citations to court opinions,<sup>50</sup> 649 (4%) are citations to agency or arbitrator decisions, and 411 (2%) are citations to other authorities.<sup>51</sup> (See Exhibit CC, *Authorities Cited*, *infra* page 59.) We used WestCheck and Westlaw to examine every citation to an opinion in every brief and opinion in the selected cases. We determined that 244 of the court opinions cited are unpublished opinions. This is 1.5% of the citations to opinions. Appendix C describes all citations to nonstatutory authorities. (See Appendix C, *infra* page 125.)

There are citations to unrelated unpublished opinions—in a brief or an opinion—in 13% of the cases, including an average of 30% of the briefed cases and an average of 36% of the fully briefed cases. This rate is approximately the same for restrictive, discouraging, and permissive courts. (See Exhibit DD, *Briefed Cases with Citations to Unrelated Unpublished Opinions*, *infra* page 60.)

When unpublished opinions are cited, especially in briefs, they often are included in string citations, and it does not appear to someone not intimately involved in the cases that inclusion or exclusion of these citations would make much of a difference.

Approximately half of the cases with citations to unpublished opinions have citations only to unpublished opinions of other courts—other courts of appeals, district courts, and state courts. There are citations to unrelated unpublished opinions by the court of appeals deciding the case in 6% of the cases, including an average of 14% of the briefed cases and an average of 18% of the fully briefed cases. This rate is approximately three times as high for discouraging courts as it is for restrictive and permissive courts. (See Exhibit EE, *Briefed Cases with Citations to Unrelated Unpublished Opinions by the Deciding Court*, *infra* page 61.)

We expected unpublished opinions of courts in restrictive circuits to be cited to and by those courts less often than unpublished opinions by other courts are cited to and by the other courts. We did not expect the rate of such citations to be dramatically lower for permissive courts than for discouraging courts. But the court of appeals for the District of Columbia Circuit has been a permissive court for only a short time, and the average for discouraging courts is driven relatively high by relatively very high rates for the courts of appeals for the Sixth and Tenth Circuits.

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50. These include citations to Supreme Court opinions (22%), citations to published opinions by the court hearing the appeal (42%), citations to published opinions by other federal courts of appeals (17%), citations to published opinions by other federal courts (6%), citations to published opinions by state courts (6%), citations to opinions by foreign courts (0.1%), and citations to unpublished court opinions (1%).

51. The citations to other authorities include citations to restatements (29); treatises (112); dictionaries (43); other books (58); articles (108); reports, manuals, and websites (58); movies (2); and a famous poem.

We found opinions by courts of appeals for six circuits—the First,<sup>52</sup> Third,<sup>53</sup> Sixth,<sup>54</sup> Seventh,<sup>55</sup> Tenth,<sup>56</sup> and District of Columbia<sup>57</sup> Circuits—that cite unrelated unpublished opinions.

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52. One unpublished opinion by the court of appeals for the First Circuit cites an unpublished opinion by another federal court of appeals. In *United States v. Quiñones Rodríguez*, 70 Fed. Appx. 591, 591, 2003 WL 21699845 (1st Cir. 2003), the court distinguished two unpublished opinions by the court of appeals for the Eleventh Circuit, *United States v. Clements*, 2002 WL 1049106 (11th Cir. 2002), and *United States v. Joseph*, 2002 WL 1396783 (11th Cir. 2002).

53. Two published opinions by the court of appeals for the Third Circuit cite unpublished district court opinions. In *W.V. Realty Inc. v. Northern Insurance Company of New York*, 334 F.3d 306, 313–14 & n.6 (3d Cir. 2003), the court cited three unpublished opinions by the district court for the Eastern District of Pennsylvania: *Slater v. Liberty Mutual Insurance Co.*, 1999 WL 178367 (E.D. Pa. 1999), *Cooper v. Nationwide Mutual Insurance Co.*, 2002 WL 31478874 (E.D. Pa. 2002), and *General Refractories Co. v. Fireman's Fun Insurance Co.*, 2002 WL 376923 (E.D. Pa. 2002). In *In re Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Products Liability Litigation*, 401 F.3d 143, 169 (3d Cir. 2005) (Ambro, J., concurring), a concurring judge cited an unpublished opinion by the district court for the Eastern District of Pennsylvania, *In re Magic Marker Securities Litigation*, 1979 WL 1248 (E.D. Pa. 1979).

54. Four opinions by the court of appeals for the Sixth Circuit cite unpublished federal opinions. Three of these opinions cite the court's own unpublished opinions.

In *Smith v. Henderson*, 376 F.3d 529, 536 (6th Cir. 2004), the court cited one of its unpublished opinions, *Brown v. Chase*, 14 Fed. Appx. 482, 2001 WL 814931 (6th Cir. 2001). In *Klimik v. Kent County Sheriff's Department*, 91 Fed. Appx. 396, 400, 2004 WL 193168 (6th Cir. 2004), the court quoted one of its other unpublished opinions, *Bower v. Fillage of Mount Sterling*, 44 Fed. Appx. 670, 2002 WL 1752270 (6th Cir. 2002). In *Moore v. Potter*, 47 Fed. Appx. 318, 320, 2002 WL 31096673 (6th Cir. 2002), the court cited one of its unpublished orders, *Savage v. Unknown FBI Agents*, 1998 WL 69318 (6th Cir. 1998).

In *Hauck v. Commissioner of Internal Revenue*, 64 Fed. Appx. 492, 493, 2003 WL 21005238 (6th Cir. 2003), the court cited an unpublished opinion by the district court for the Western District of Texas, *Perez v. United States*, 2001 WL 1836185 (W.D. Tex. 2001).

55. One published opinion by the court of appeals for the Seventh Circuit cites a depublished district court opinion. In *United States v. George*, 363 F.3d 666, 672 (7th Cir. 2004), the court cited an opinion by the district court for the Eastern District of Pennsylvania that was initially published, *United States v. Llera Plaza*, 179 F. Supp. 2d 492 (E.D. Pa. 2002), but subsequently withdrawn by the court and replaced by a new published opinion, *United States v. Llera Plaza*, 188 F. Supp. 2d 549 (E.D. Pa. 2002).

56. In four cases the court of appeals for the Tenth Circuit cited unpublished opinions by federal courts of appeals. In three of these cases the court cited its own unpublished opinions.

In *United States v. Cruz-Alcala*, 338 F.3d 1194, 1197, 1199 (10th Cir. 2003), the court cited one of its own unpublished opinions, *United States v. Molina-Barajas*, 47 Fed. Appx. 552 (10th Cir. 2002), and an unpublished opinion by the court of appeals for the Ninth Circuit, *United States v. Viveros-Castro*, 1998 WL 225053 (9th Cir. 1998). In *Wiransane v. Ashcroft*, 366 F.3d 889, 898 (10th Cir. 2004), the court cited one of its own unpublished opinions, *Limerta v. Ashcroft*, 88 Fed. Appx. 363, 2004 WL 309333 (10th Cir. 2004), and an unpublished opinion by the court of appeals for the Third Circuit, *Lauw v. Ashcroft*, 2003 WL 22881647 (3d Cir. 2003). In *Jackson v. Barnhart*, 60 Fed. Appx. 255, 257, 2003 WL 1473554 (10th Cir. 2003), the court cited one of its own unpublished opinions, *Bellamy v. Massanari*, 29 Fed. Appx. 567, 2002 WL 120532 (10th Cir. 2002).

We found three opinions by the court of appeals for the Sixth Circuit<sup>58</sup> and three opinions by the court of appeals for the Tenth Circuit<sup>59</sup> that cite the courts' own unpublished opinions. Interestingly, one of these opinions also cites an unpublished opinion by the court of appeals for the Ninth Circuit, a restrictive court.<sup>60</sup>

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The court published three opinions in *O Centro Espirita Beneficiente Uniao do Vegetal v. Ashcroft* (10th Cir. 02–2323, filed Dec. 3, 2002, judgment Nov. 12, 2004). First the court published an opinion by a two-judge panel staying the district court's preliminary injunction pending appeal. *O Centro Espirita Beneficiente Uniao do Vegetal*, 314 F.3d 463 (10th Cir. 2002). This opinion, *id.* at 467, cites an unpublished opinion by the court of appeals for the Eighth Circuit, *United States v. Brown*, 1995 WL 732803 (8th Cir. 1995). The appeal was initially decided by a three-judge panel in a published opinion, *O Centro Espirita Beneficiente Uniao do Vegetal v. Ashcroft*, 342 F.3d 1170 (10th Cir. 2003), but reheard en banc and decided by a published per curiam opinion, *O Centro Espirita Beneficiente Uniao do Vegetal*, 389 F.3d 973 (10th Cir. 2004). An opinion concurring with the en banc opinion, *id.* at 1020 (McConnell, J.), and an opinion concurring in part and dissenting in part, *id.* at 984 (Murphy, J.), also cite the unpublished Eighth Circuit opinion.

57. One published opinion by the court of appeals for the District of Columbia Circuit cites an unpublished consent decree filed in the district court for the District of Columbia. In *Northeast Maryland Waste Disposal Authority v. Environmental Protection Agency*, 358 F.3d 936, 941 n.5 (D.C. Cir. 2004), the court cited a consent decree in another case requiring the Environmental Protection Agency to promulgate certain standards.

58. *See supra* note 54.

59. *See supra* note 56.

60. *Id.*

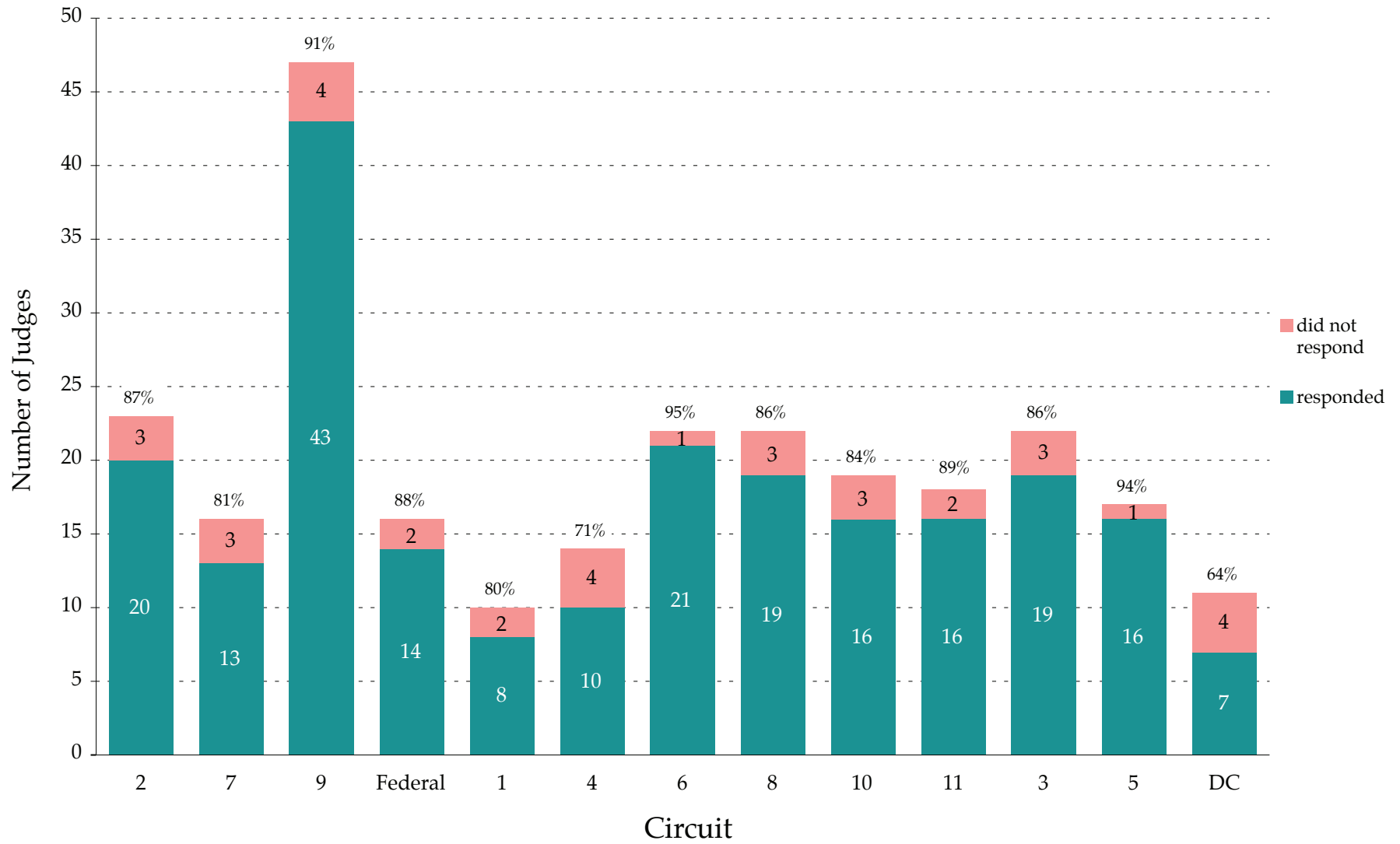
## V. Exhibits

With the exception of one pie chart, the following 31 exhibits present data by circuit. Circuits are grouped by type of citation rule, with the restrictive circuits on the left, the permissive circuits on the right, and the discouraging circuits in between.

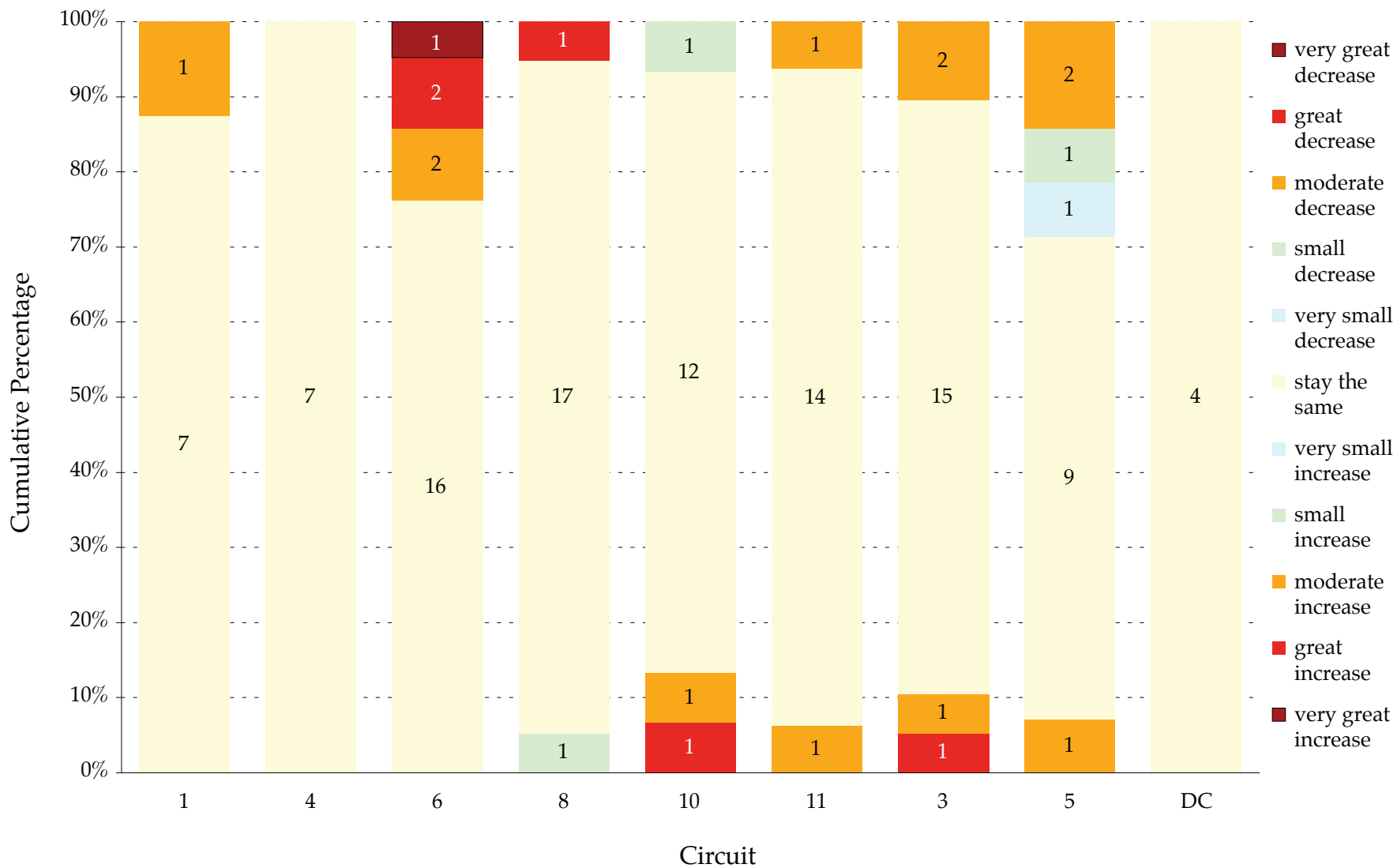
For most of the exhibits pertaining to the survey of judges, not all circuits are included, because the exhibits display data for questions that were applicable to only some of the circuits.

Some of the exhibits pertaining to the survey of attorneys and the survey of cases have shaded regions behind the bars for each circuit. These shaded regions display averages for the three types of circuits (restrictive, discouraging, and permissive).

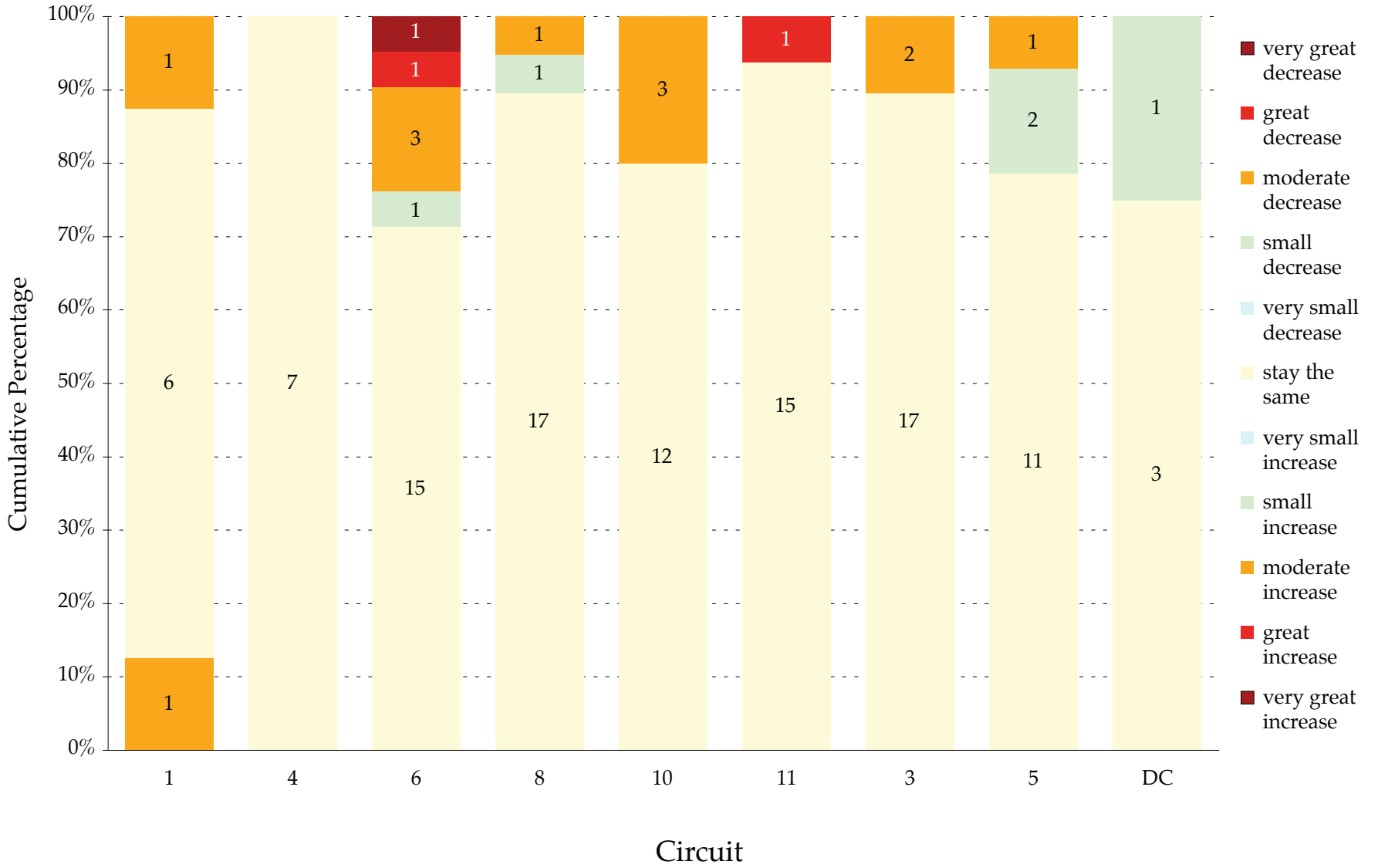
## A. Judge Survey Response Rates



## B. Length of Unpublished Opinions If Citation Was Prohibited

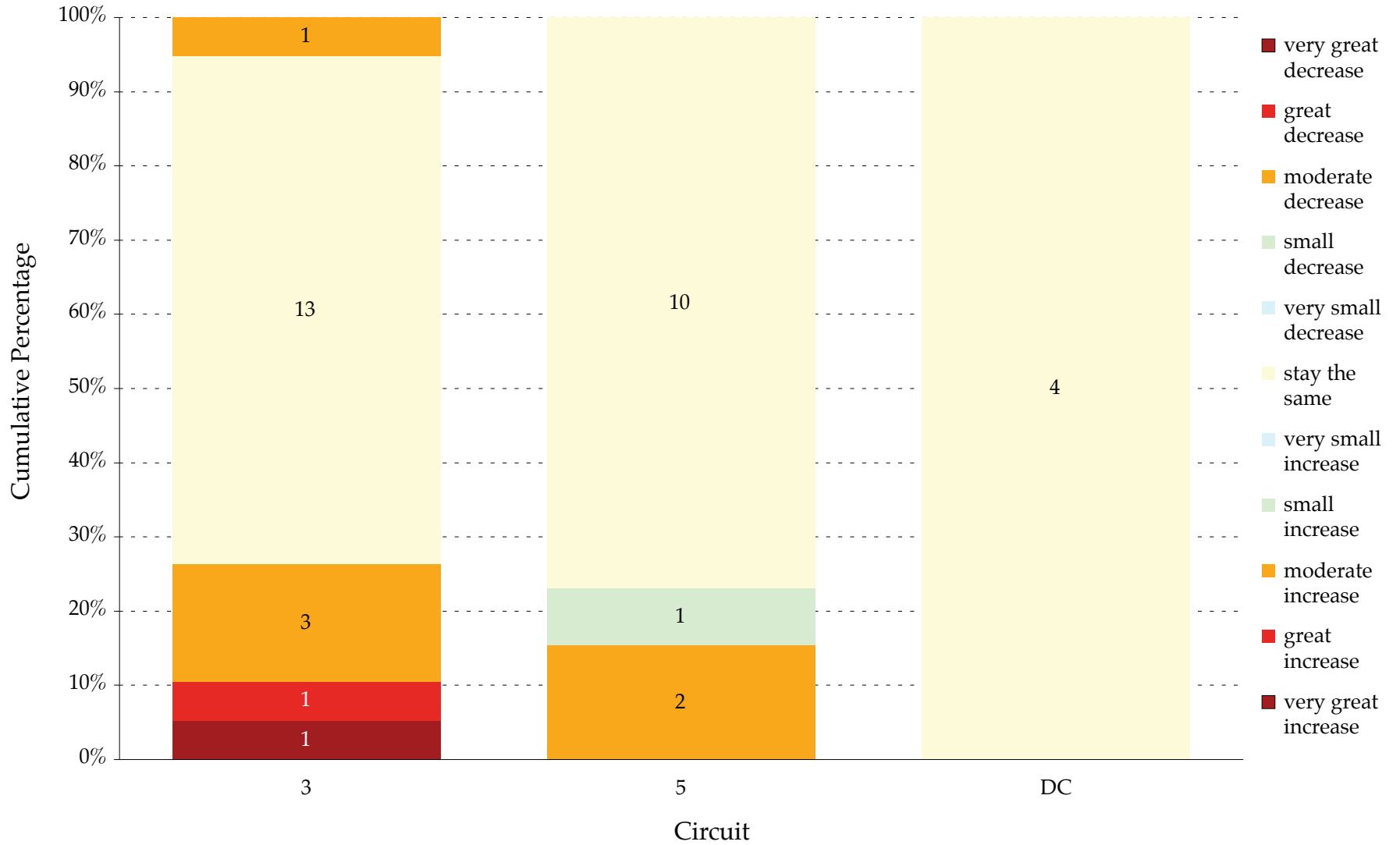


### C. Time Preparing Unpublished Opinions If Citation Was Prohibited



### D. Length of Unpublished Opinions If Citation Was Allowed Only Sometimes

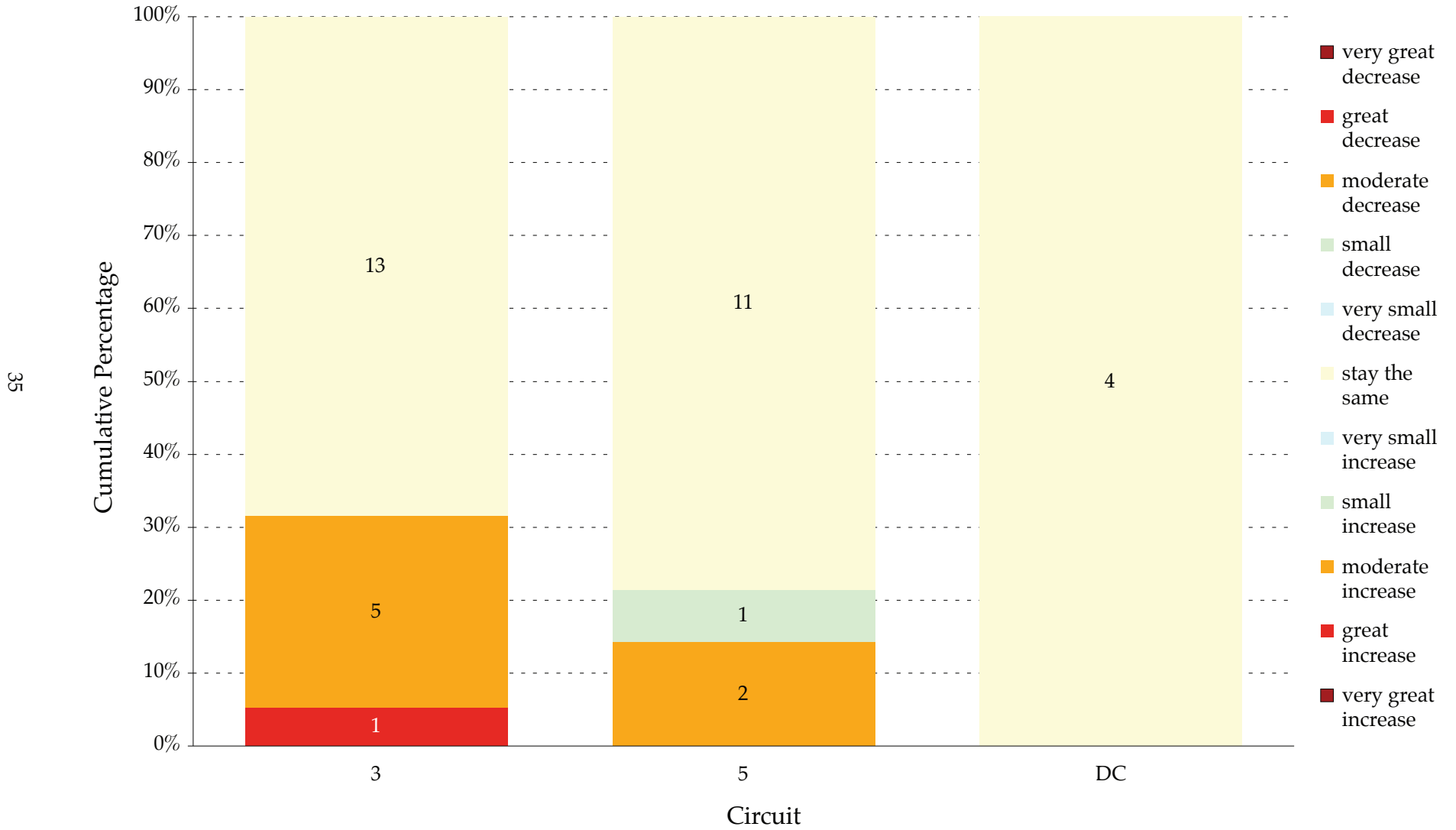
34



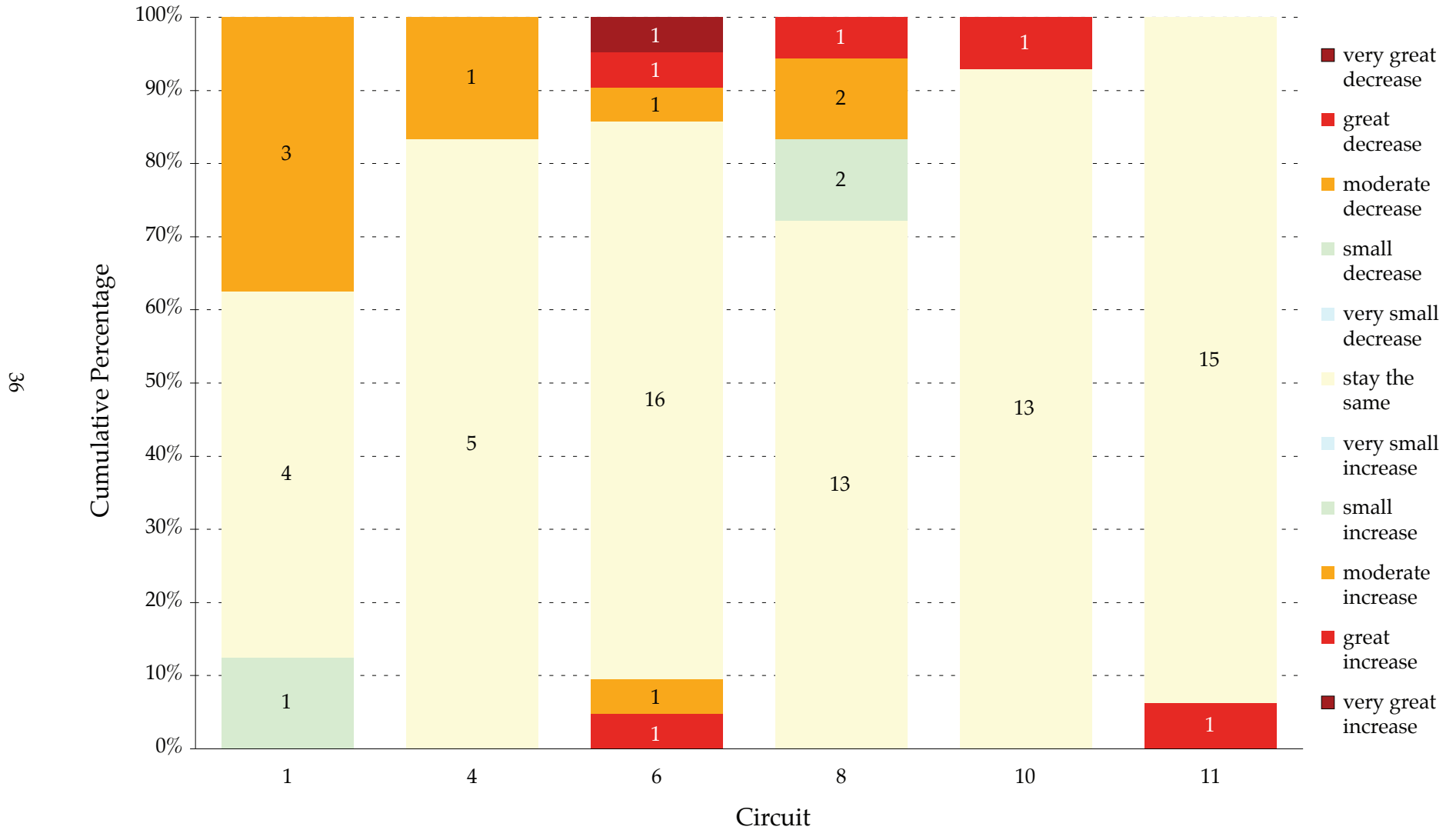
*Citing Unpublished Opinions in Federal Appeals*



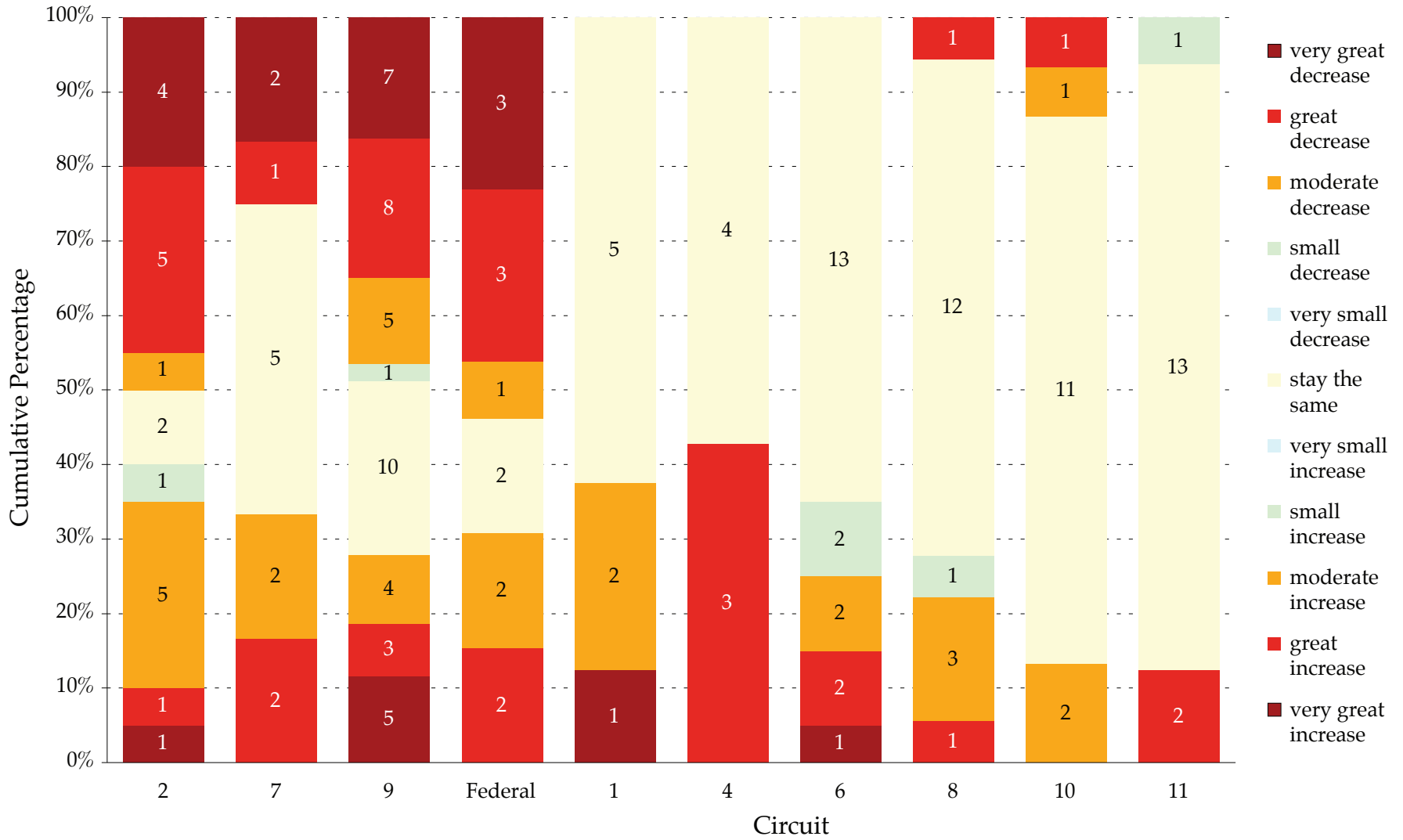
### E. Time Preparing Unpublished Opinions If Citation Was Allowed Only Sometimes



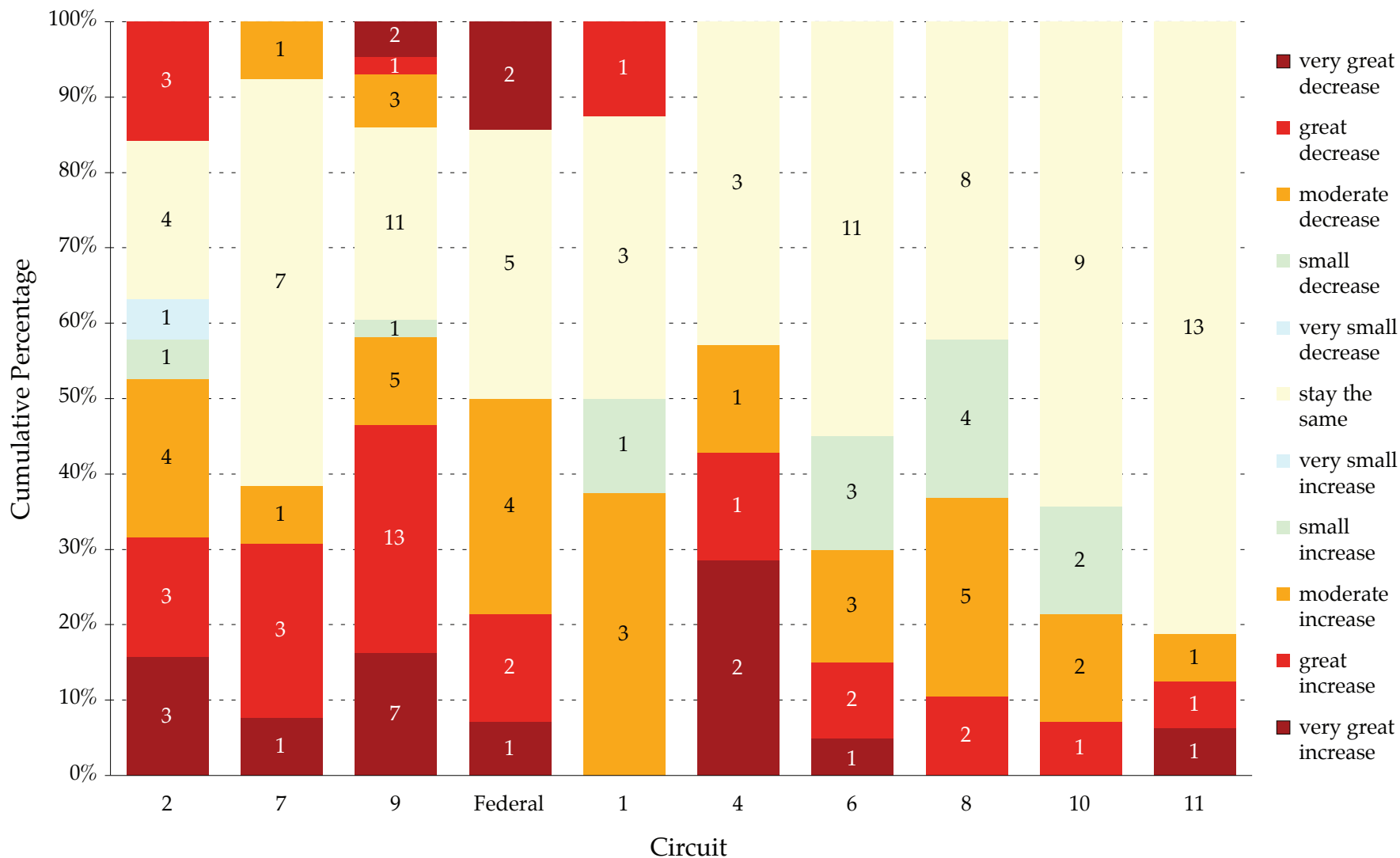
### F. Number of Unpublished Opinions If Citation Was Freely Permitted



### G. Length of Unpublished Opinions If Citation Was Freely Permitted

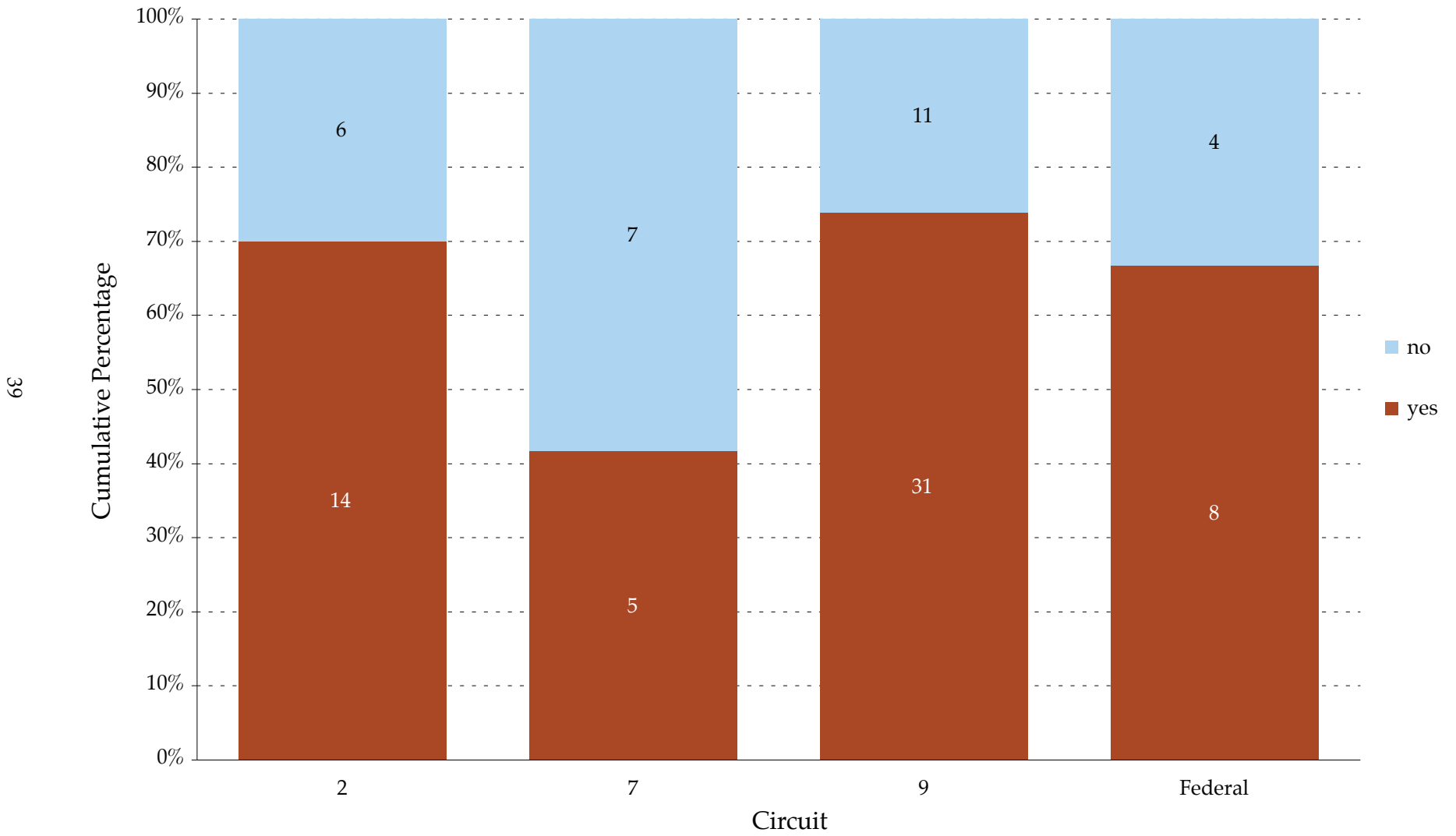


## H. Time Preparing Unpublished Opinions If Citation Was Freely Permitted

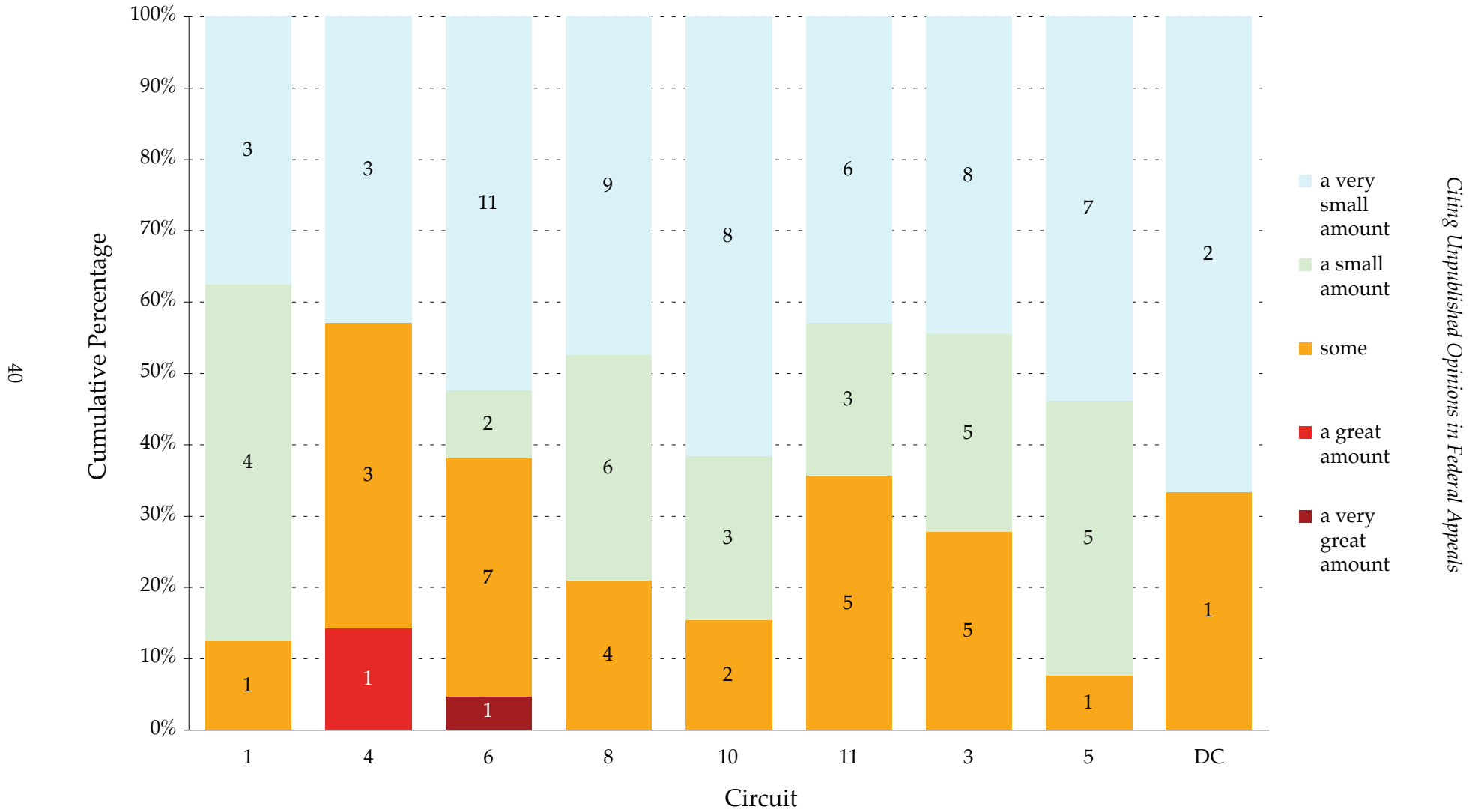


Citing Unpublished Opinions in Federal Appeals

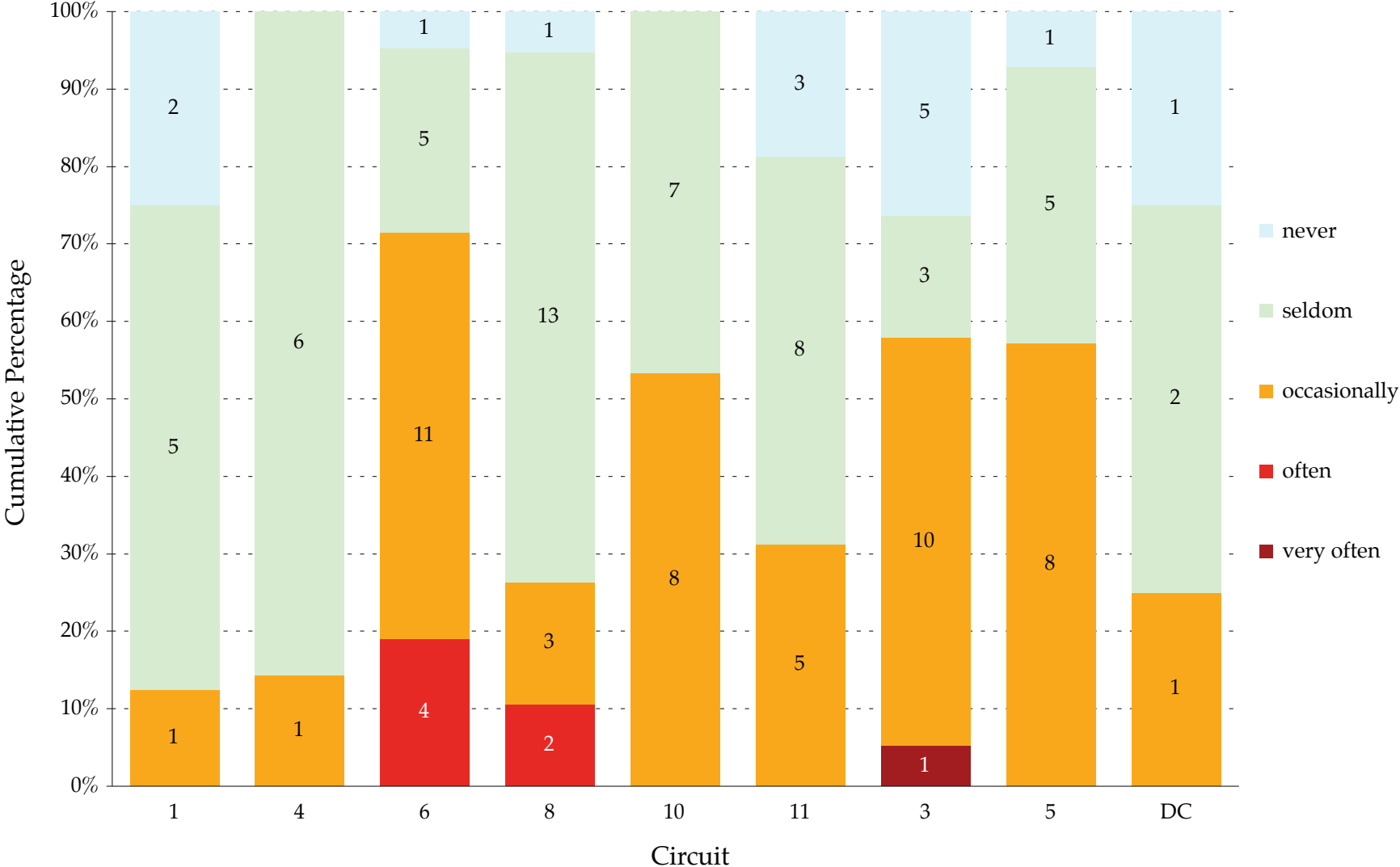
# I. Problems with Proposed Rule



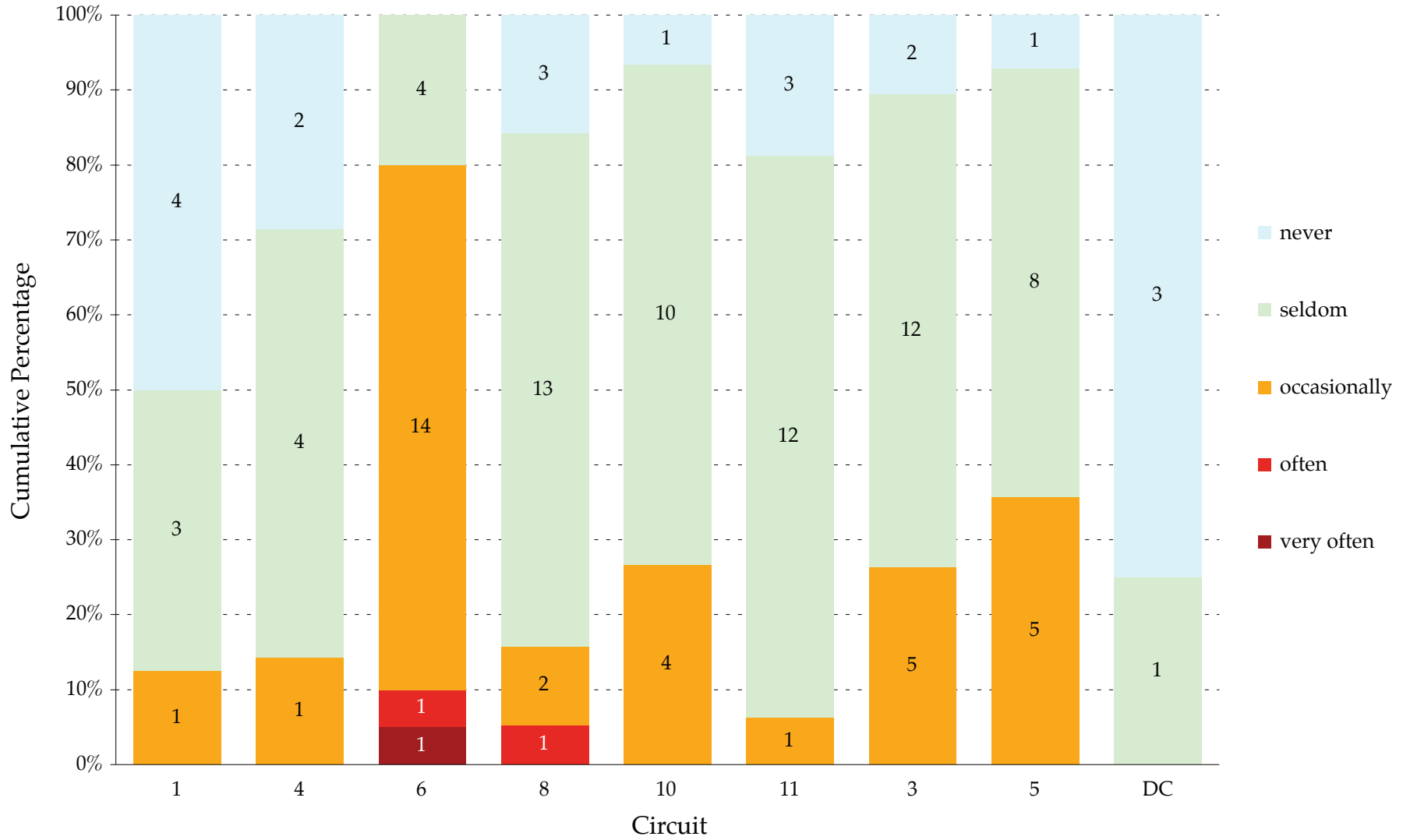
### J. Unpublished Citation's Additional Work



### K. Unpublished Citation's Helpfulness

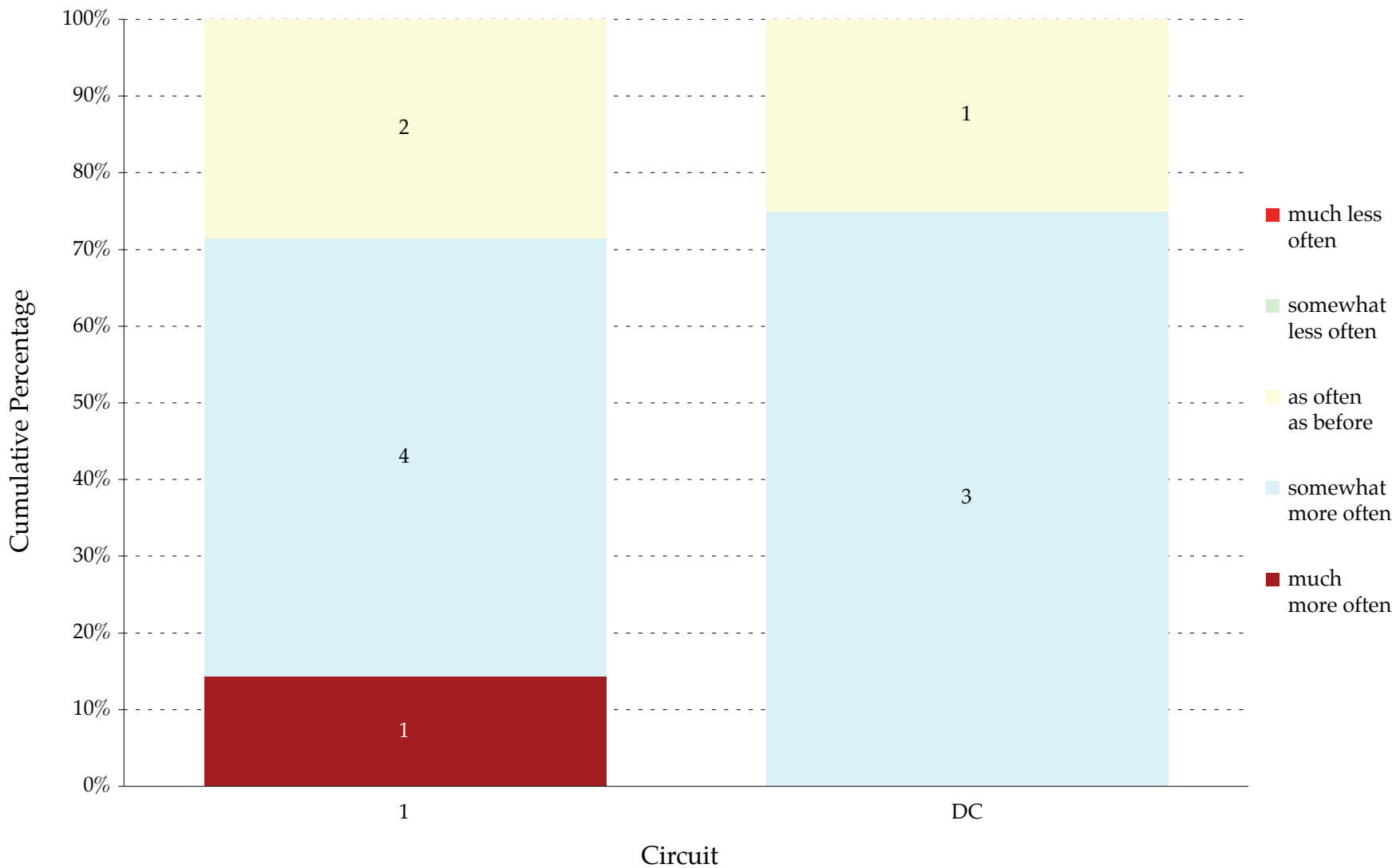


### L. Unpublished Citation's Inconsistency

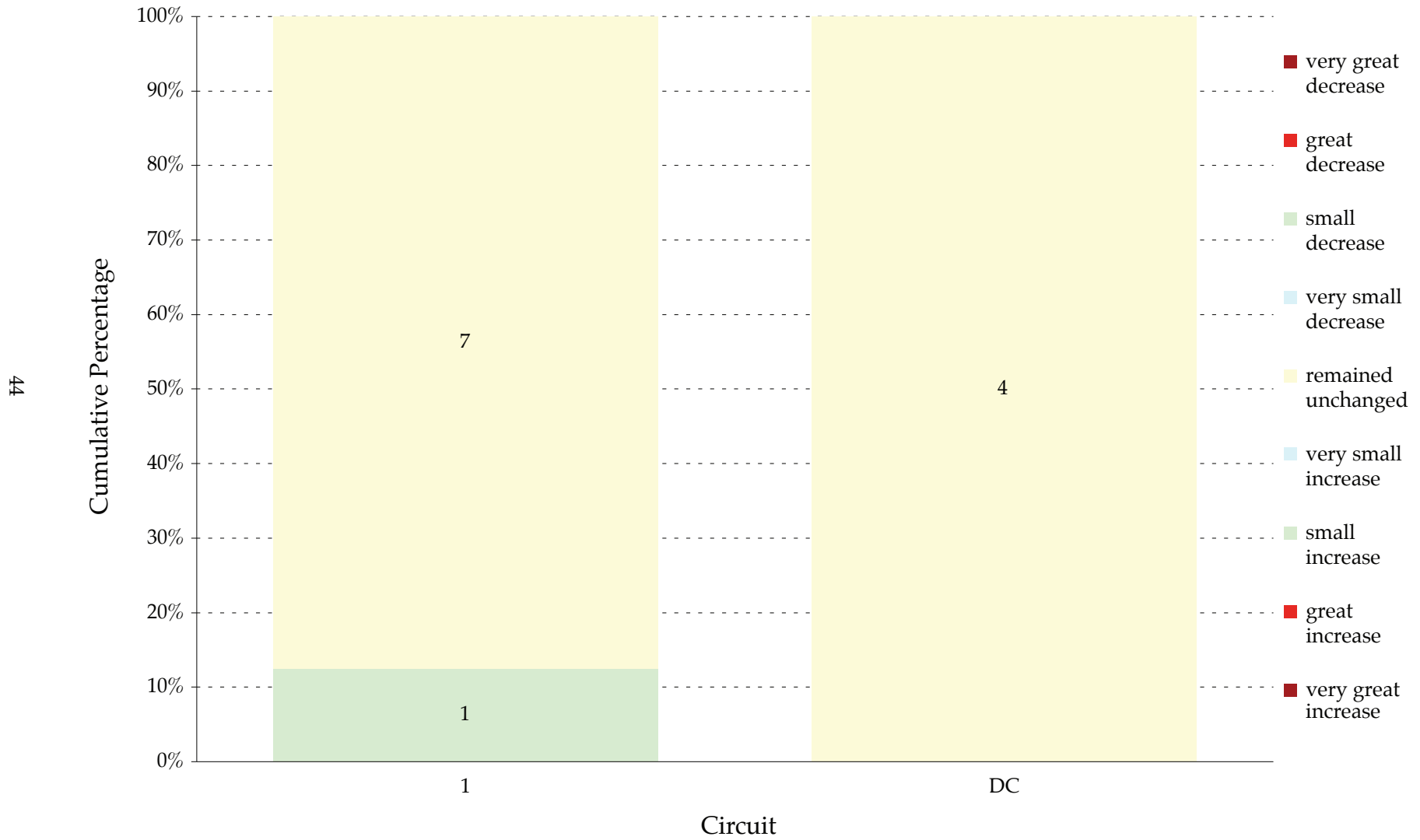




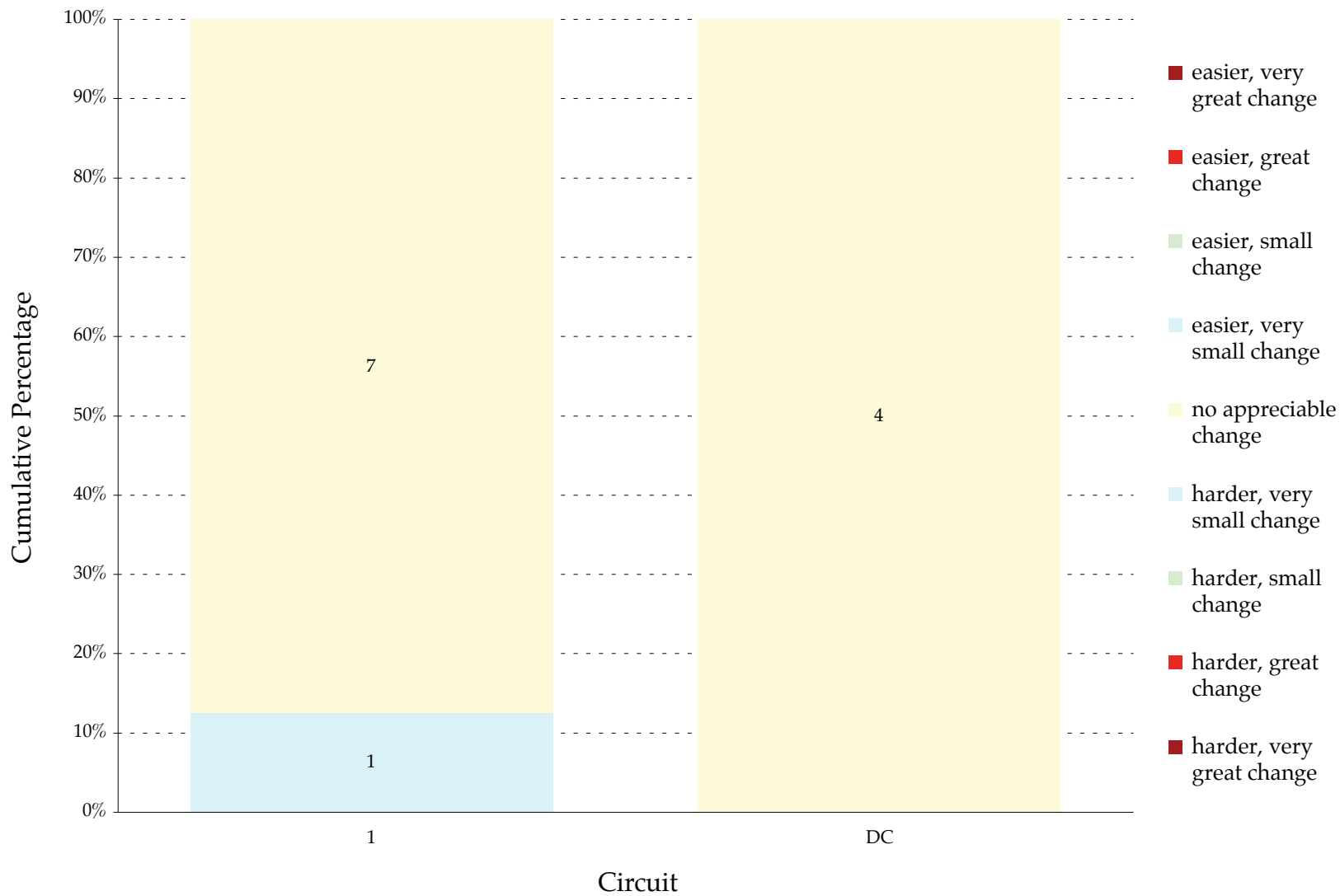
### M. Frequency of Citation to Unpublished Opinions After Local Rule Change



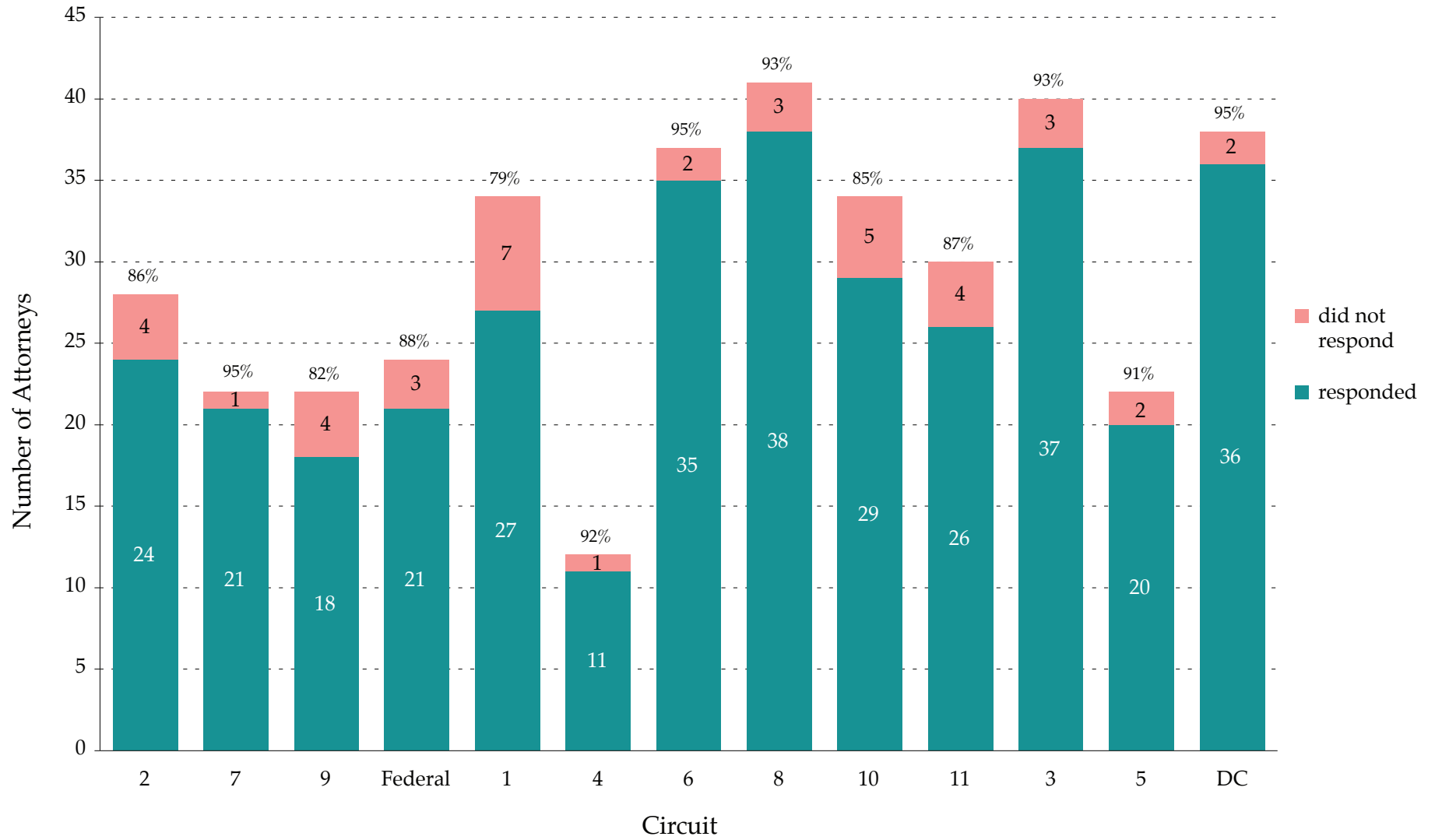
# N. Time Preparing Unpublished Opinions After Local Rule Change



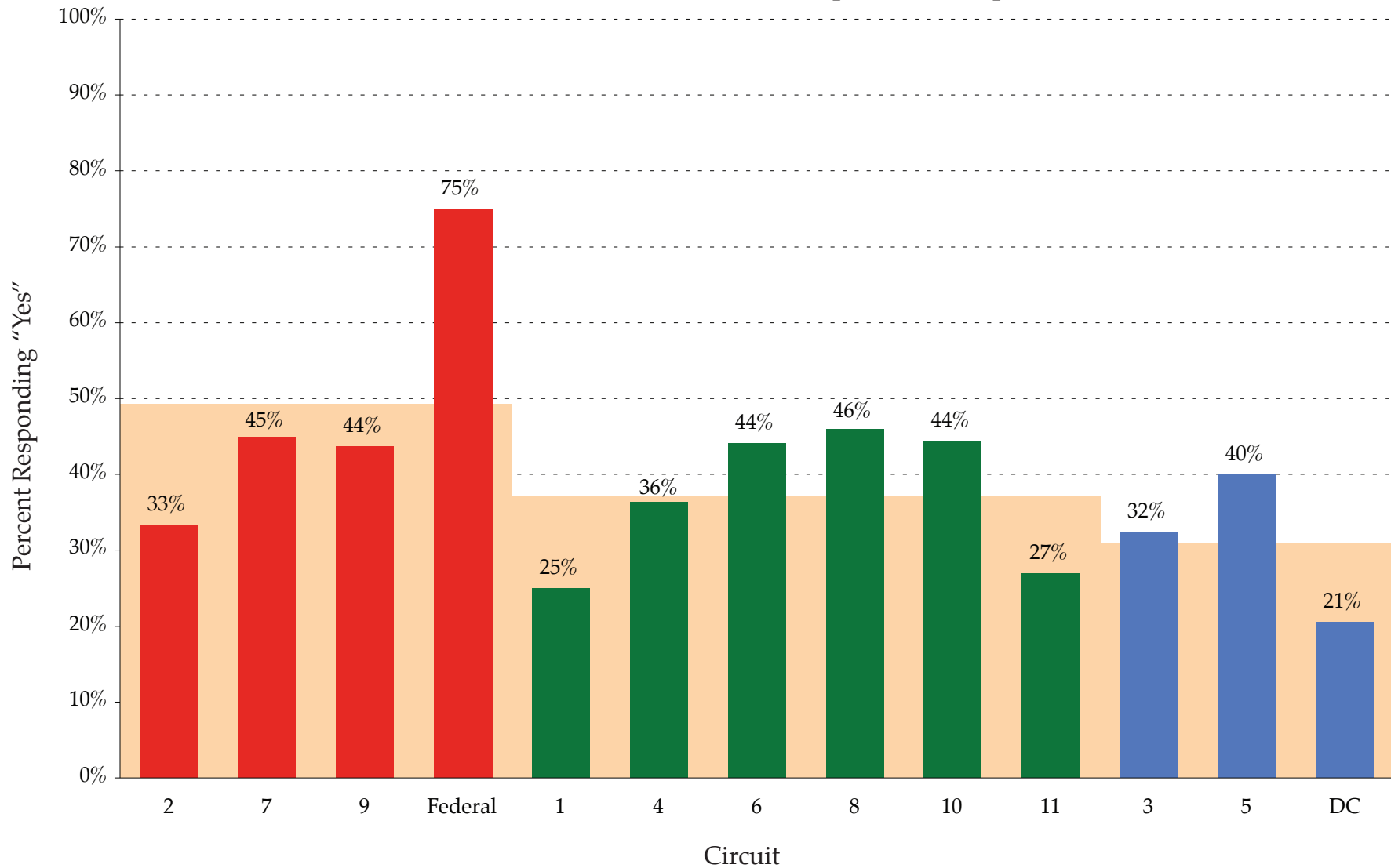
### O. Work After Local Rule Change



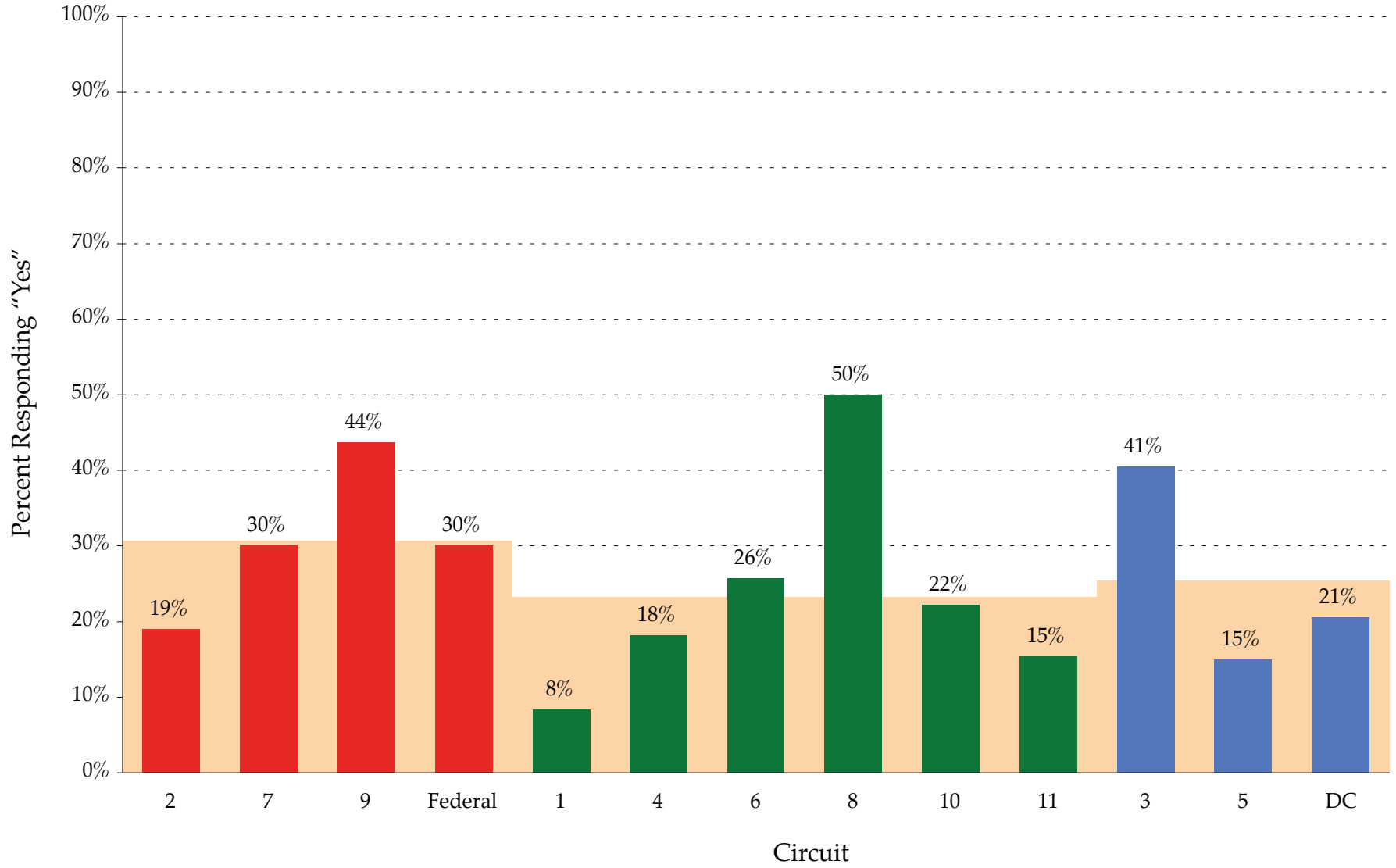
### P. Attorney Survey Response Rates



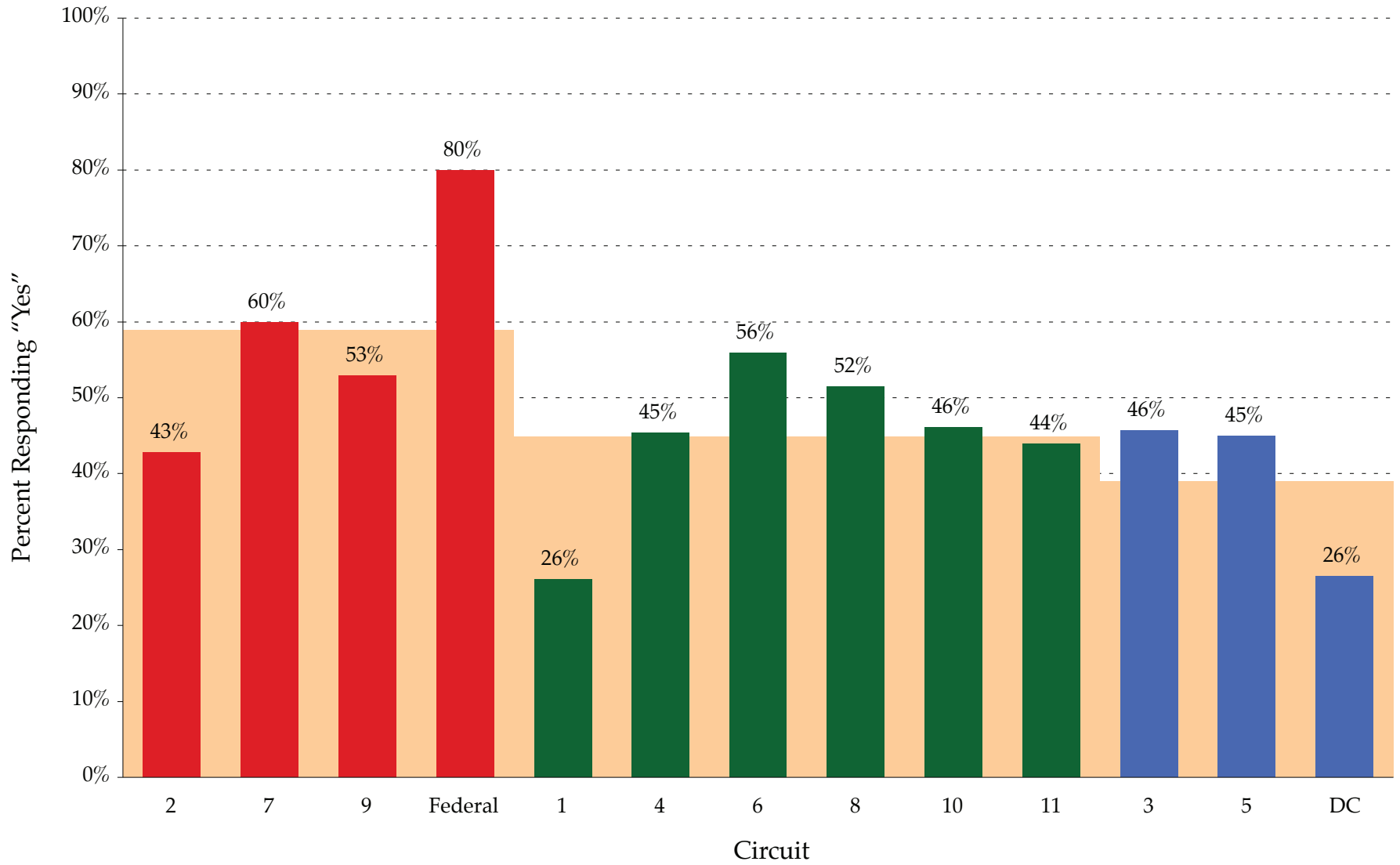
### Q. Wanted to Cite This Court's Unpublished Opinion



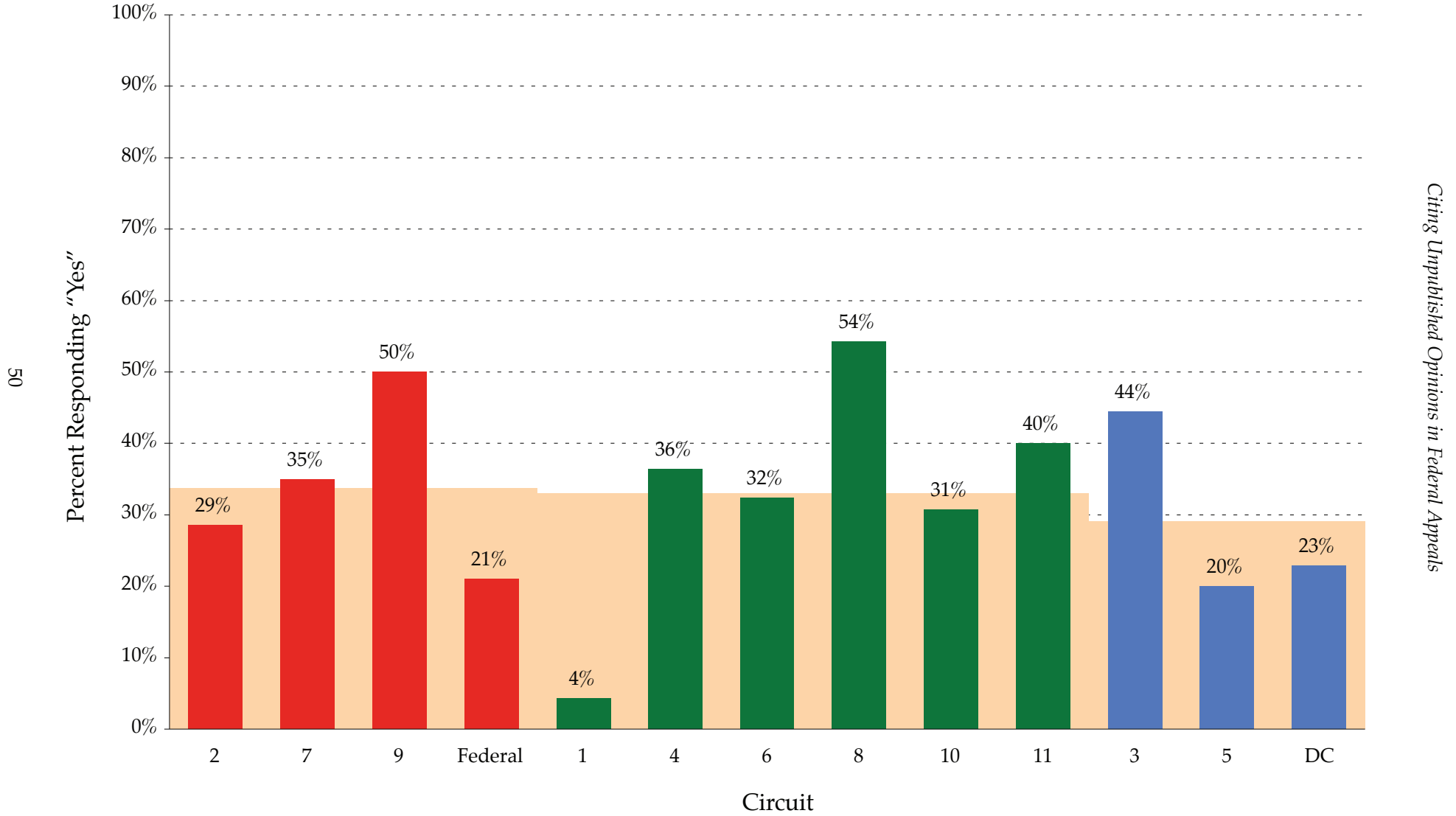
### R. Wanted to Cite Another Court's Unpublished Opinion



### S. Would Have Cited This Court's Unpublished Opinion

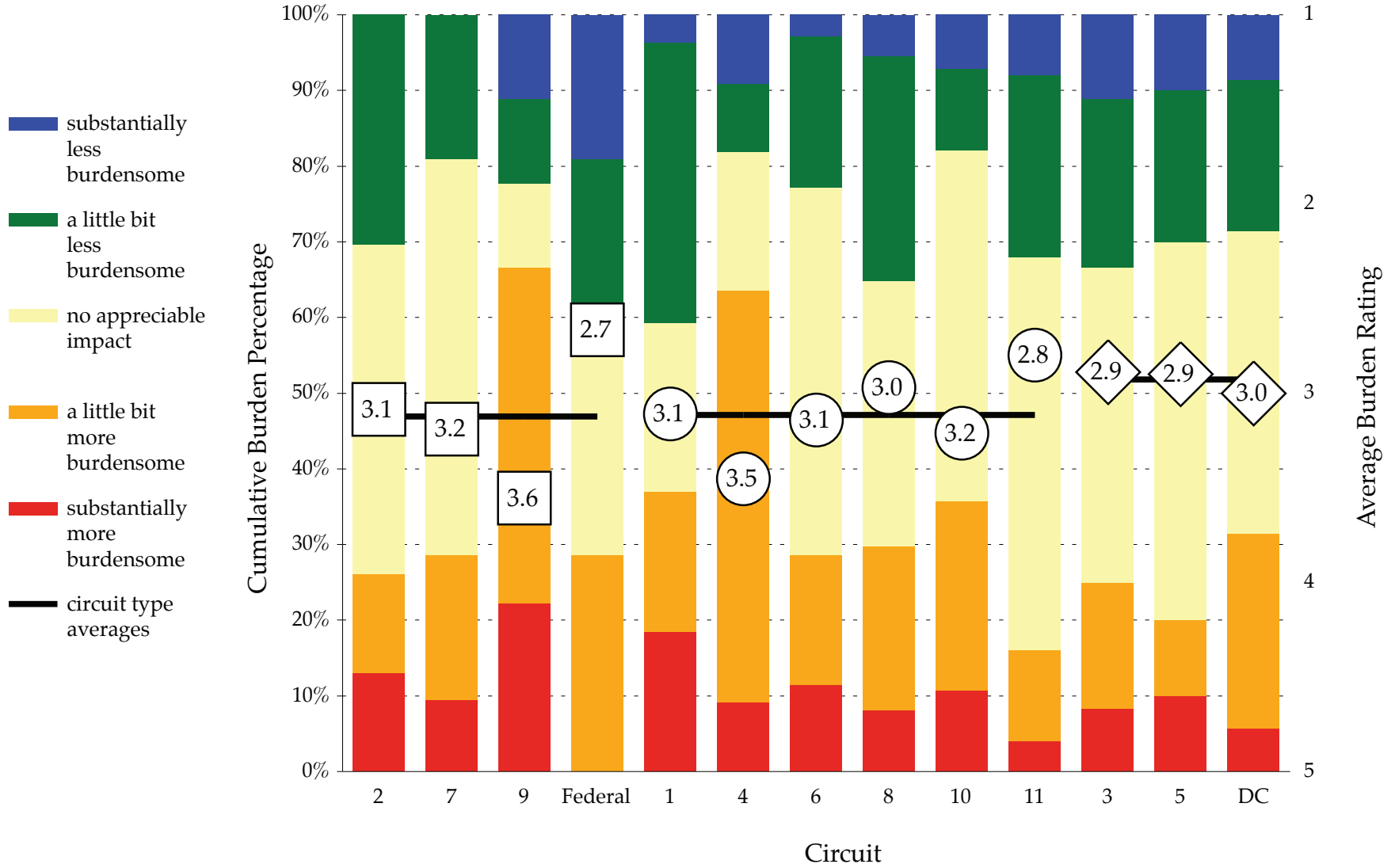


### T. Would Have Cited Another Court's Unpublished Opinion

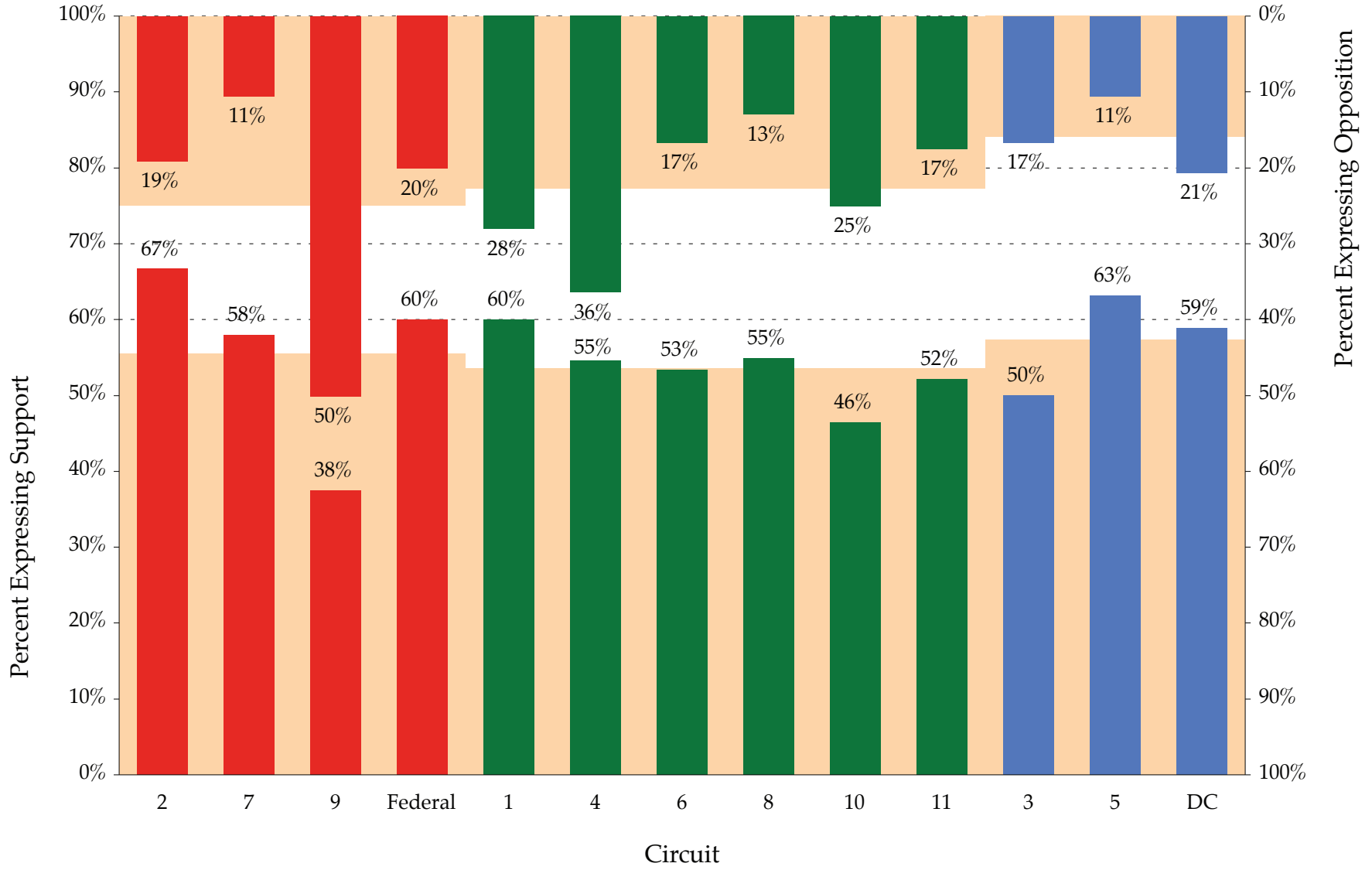




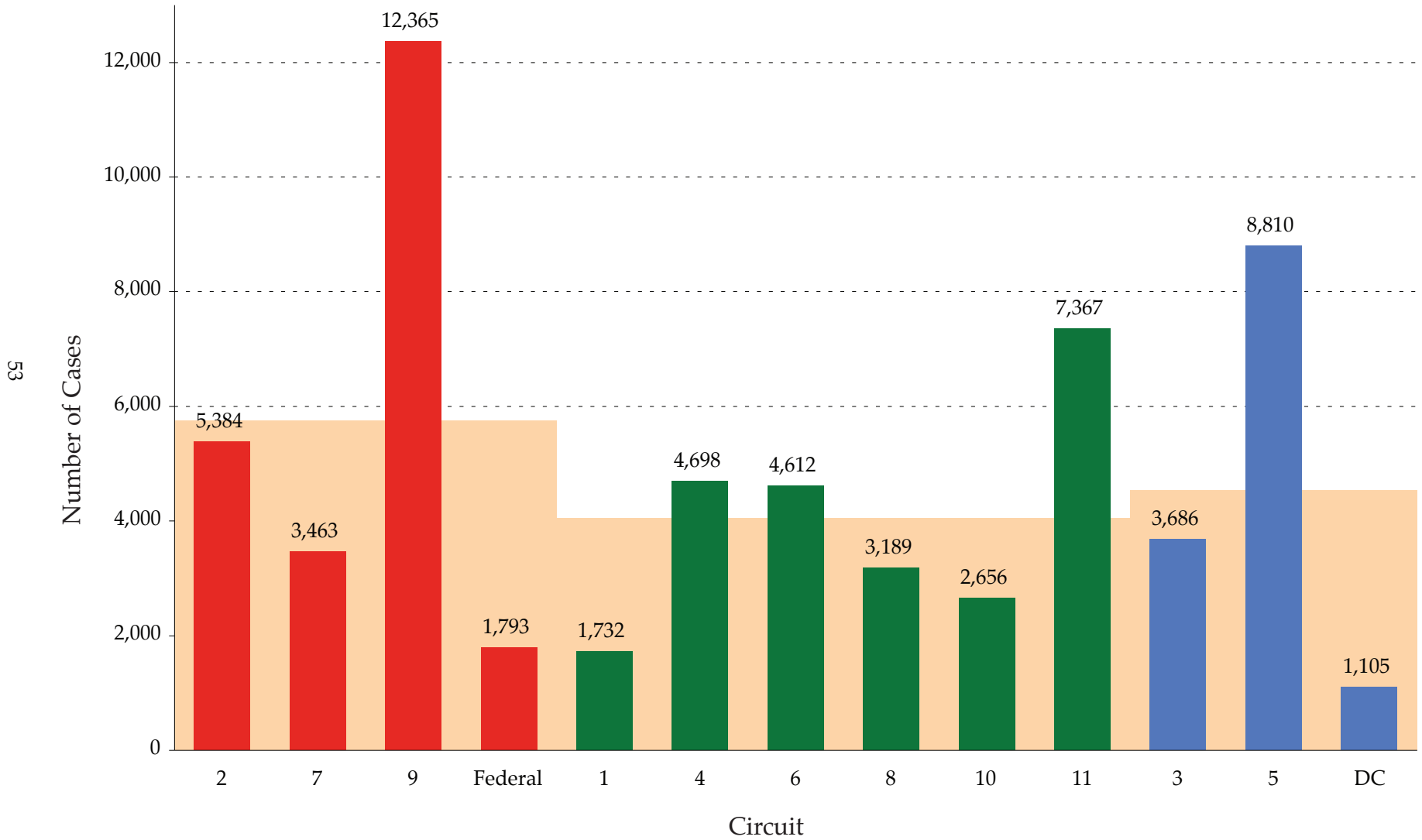
### U. Impact on Work of New Rule



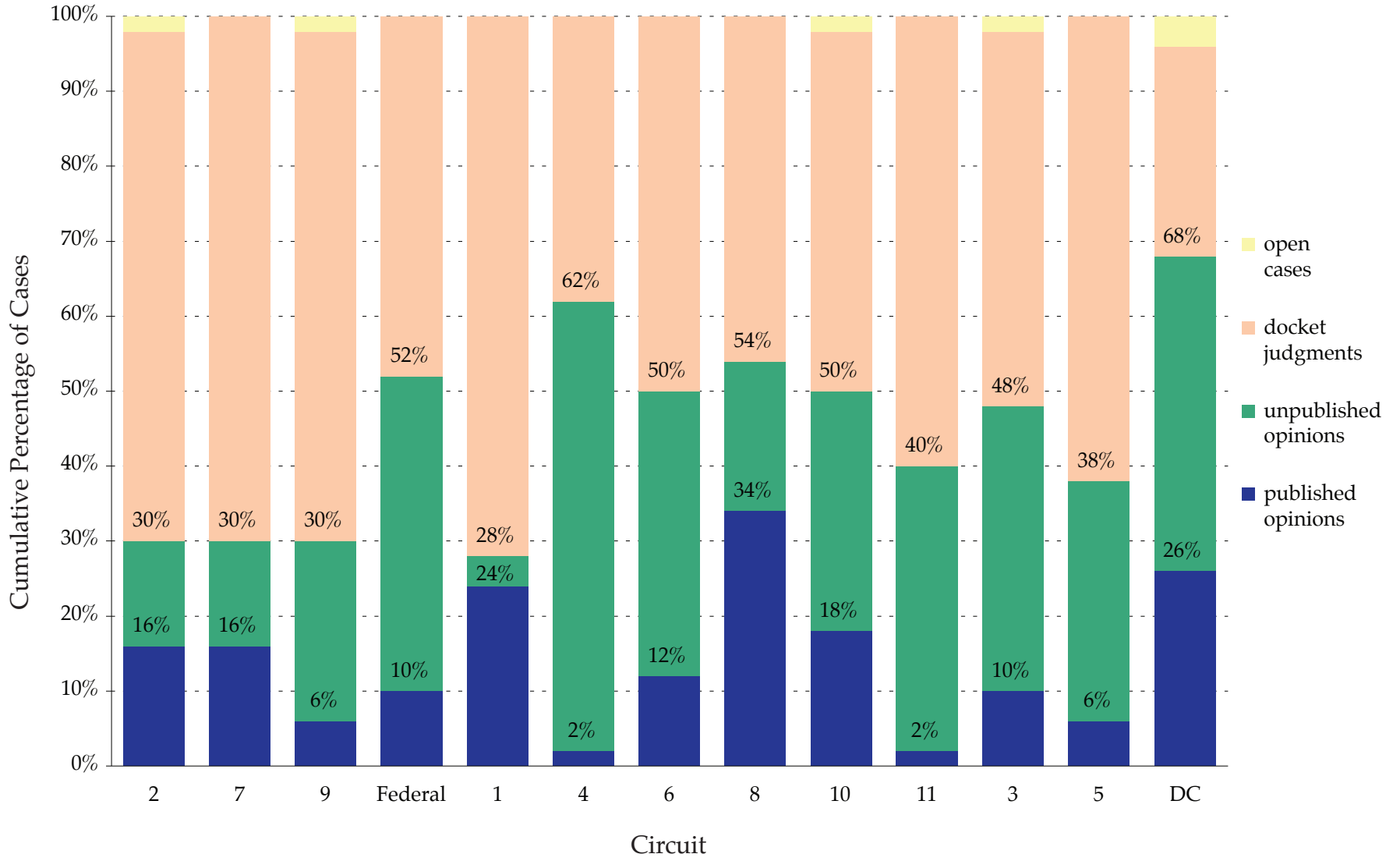
### V. Attitude Toward Proposed Rule



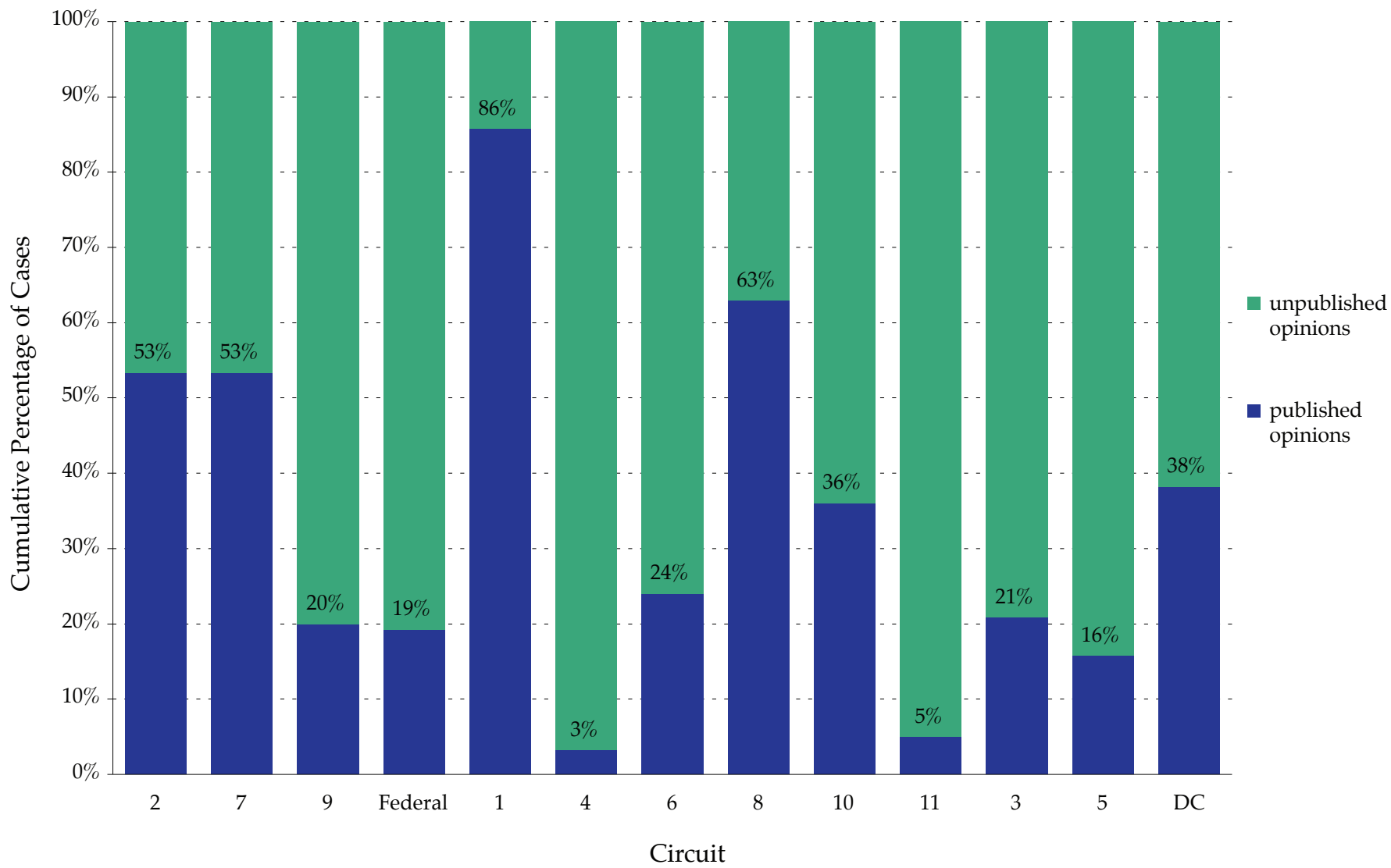
### W. Cases Filed in 2002



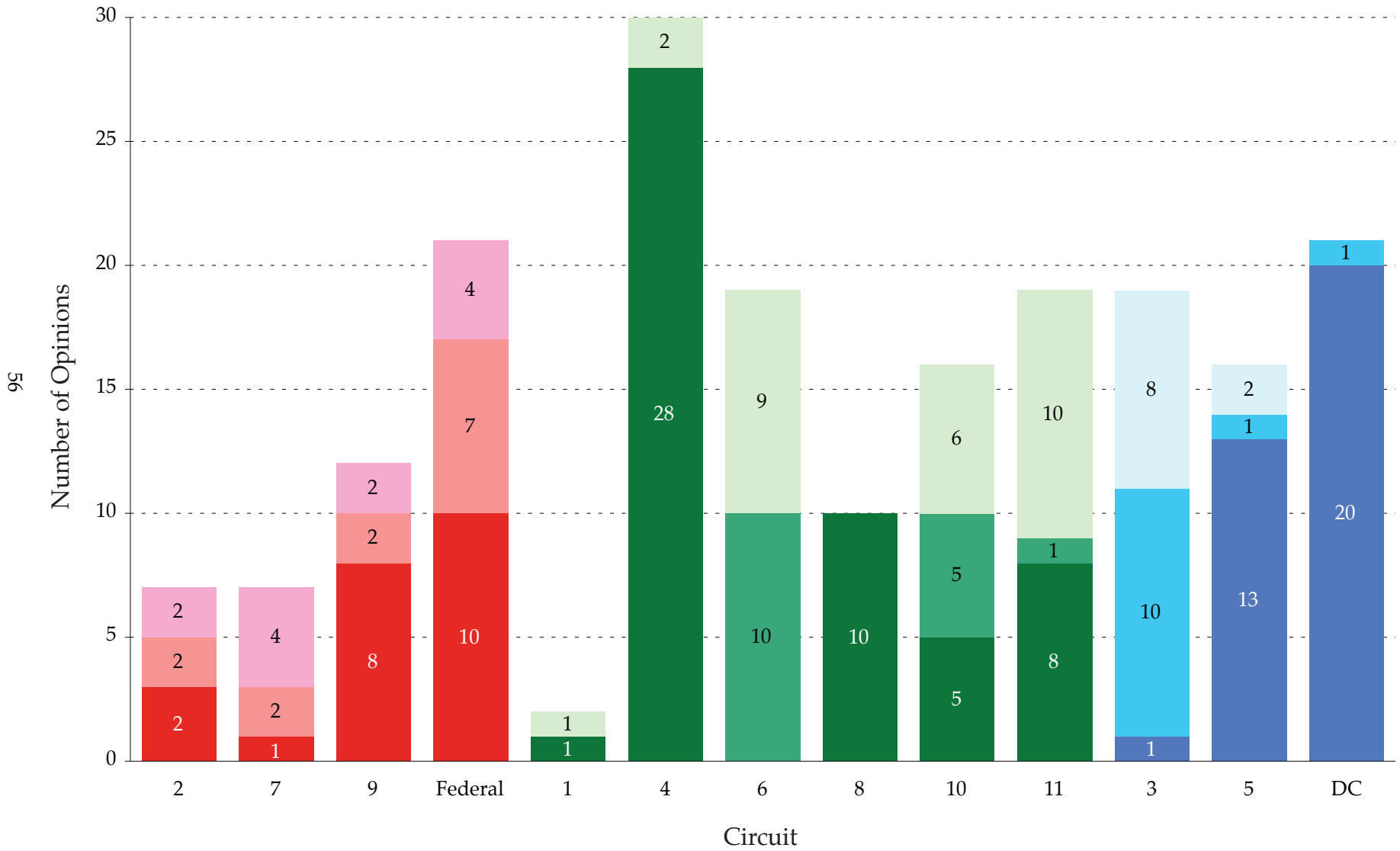
## X. Dispositions (with Opinion Rates and Publication Rates)



## Y. Publication of Opinions in Closed Cases with Opinions

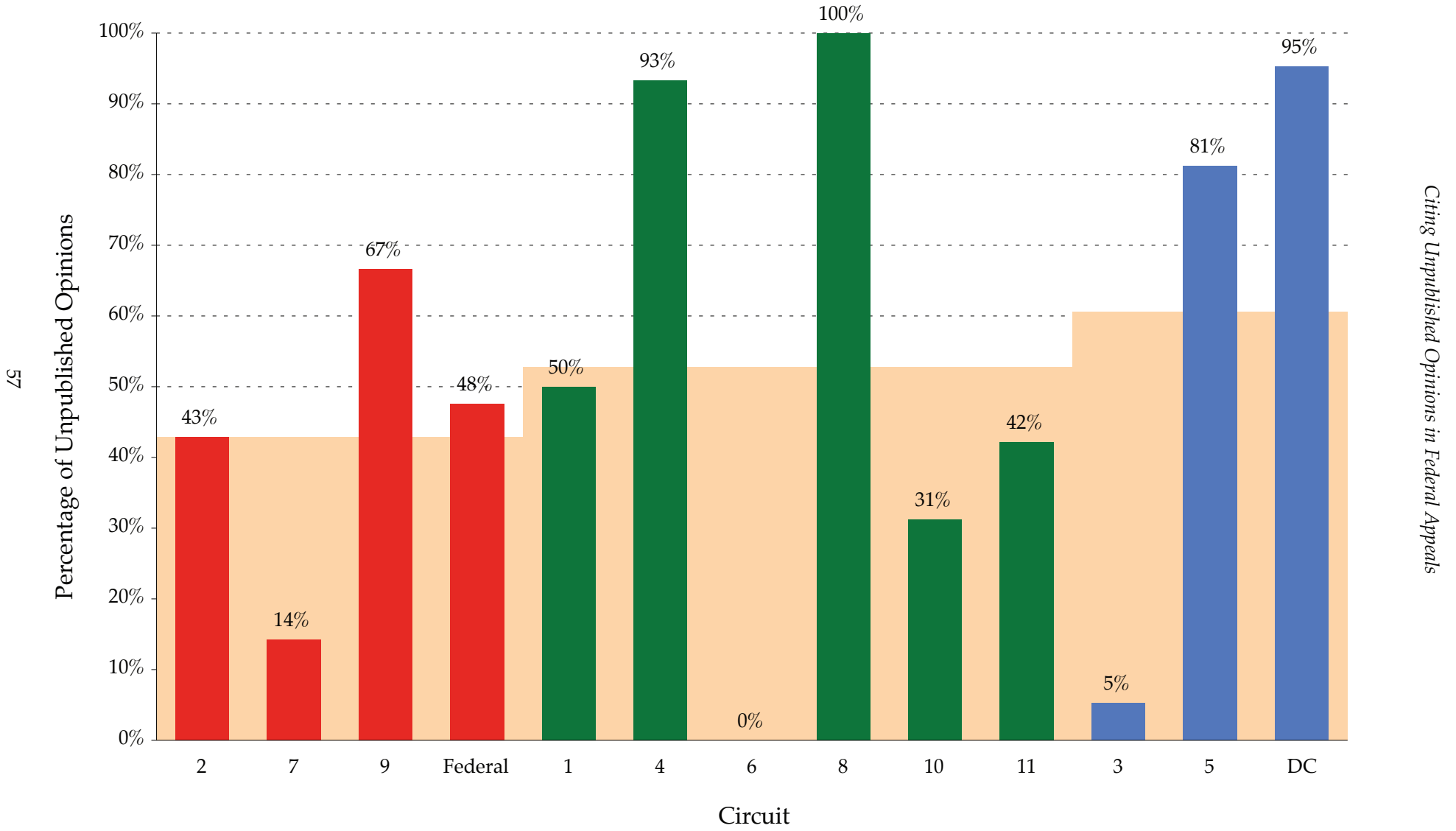


Z. Very Short, Short, and Other Unpublished Opinions  
 (dark = very short; medium = short; light = other)

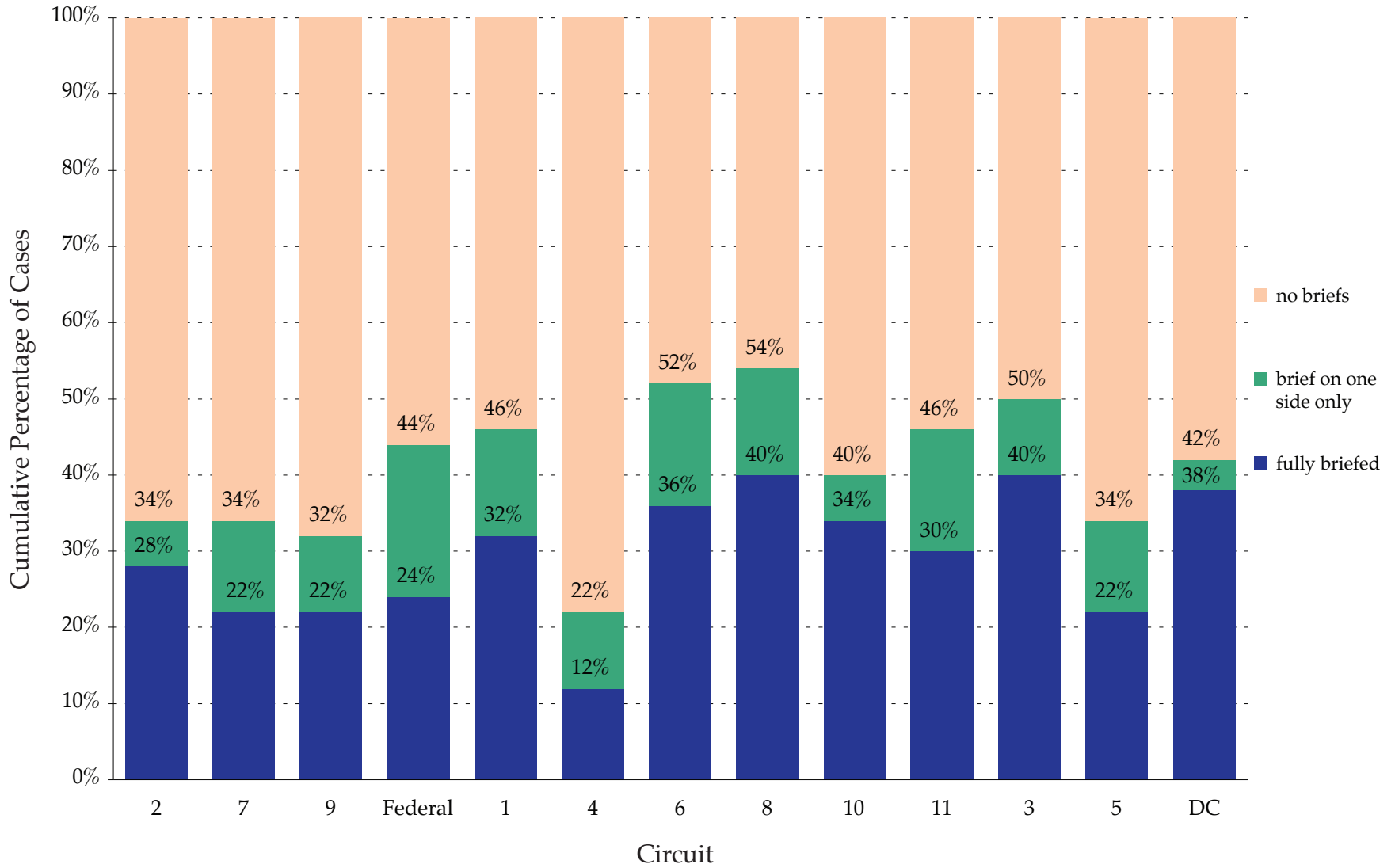


Citing Unpublished Opinions in Federal Appeals

## AA. Percentage of Unpublished Opinions That Are Very Short

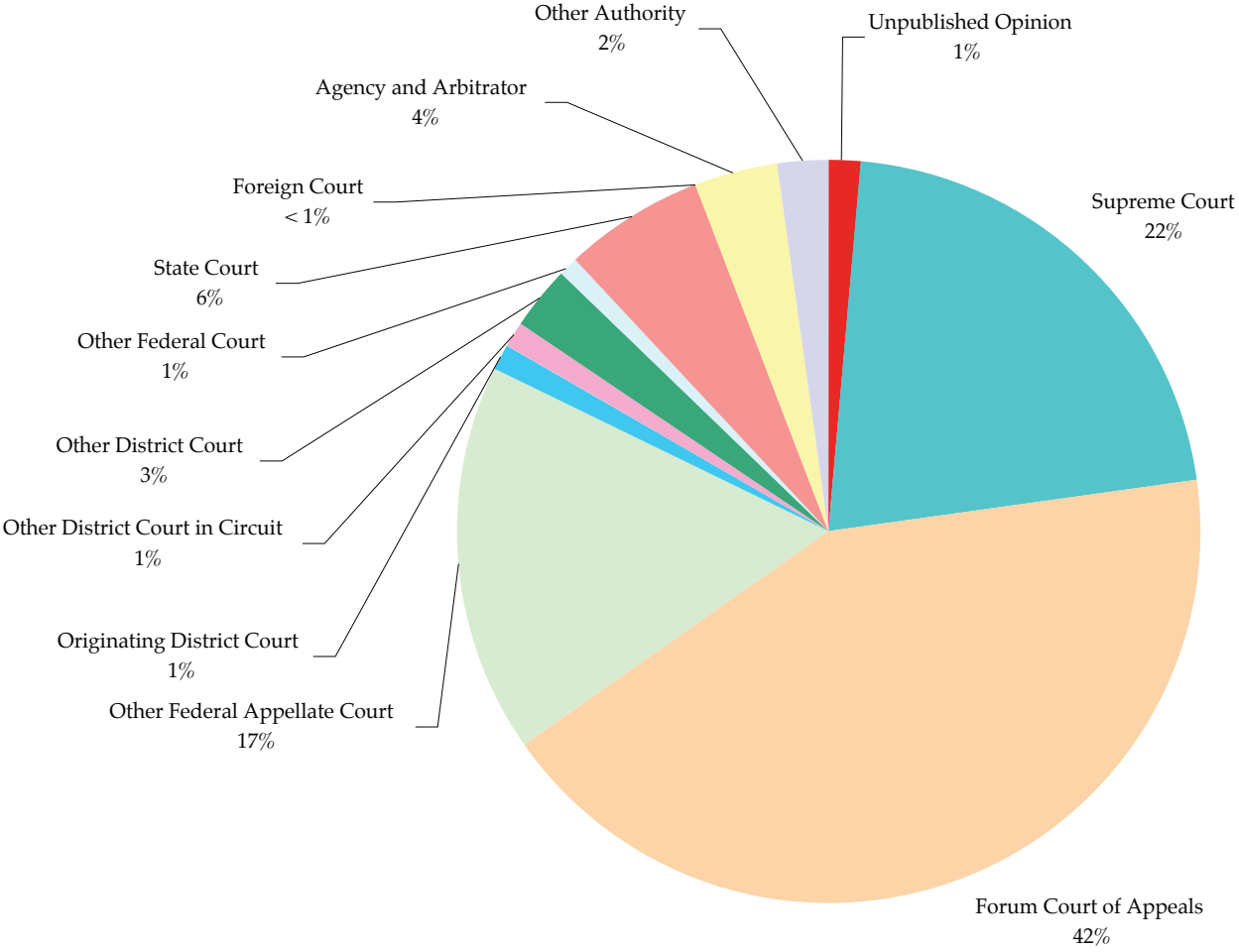


## BB. Appeals with Counseled Briefs

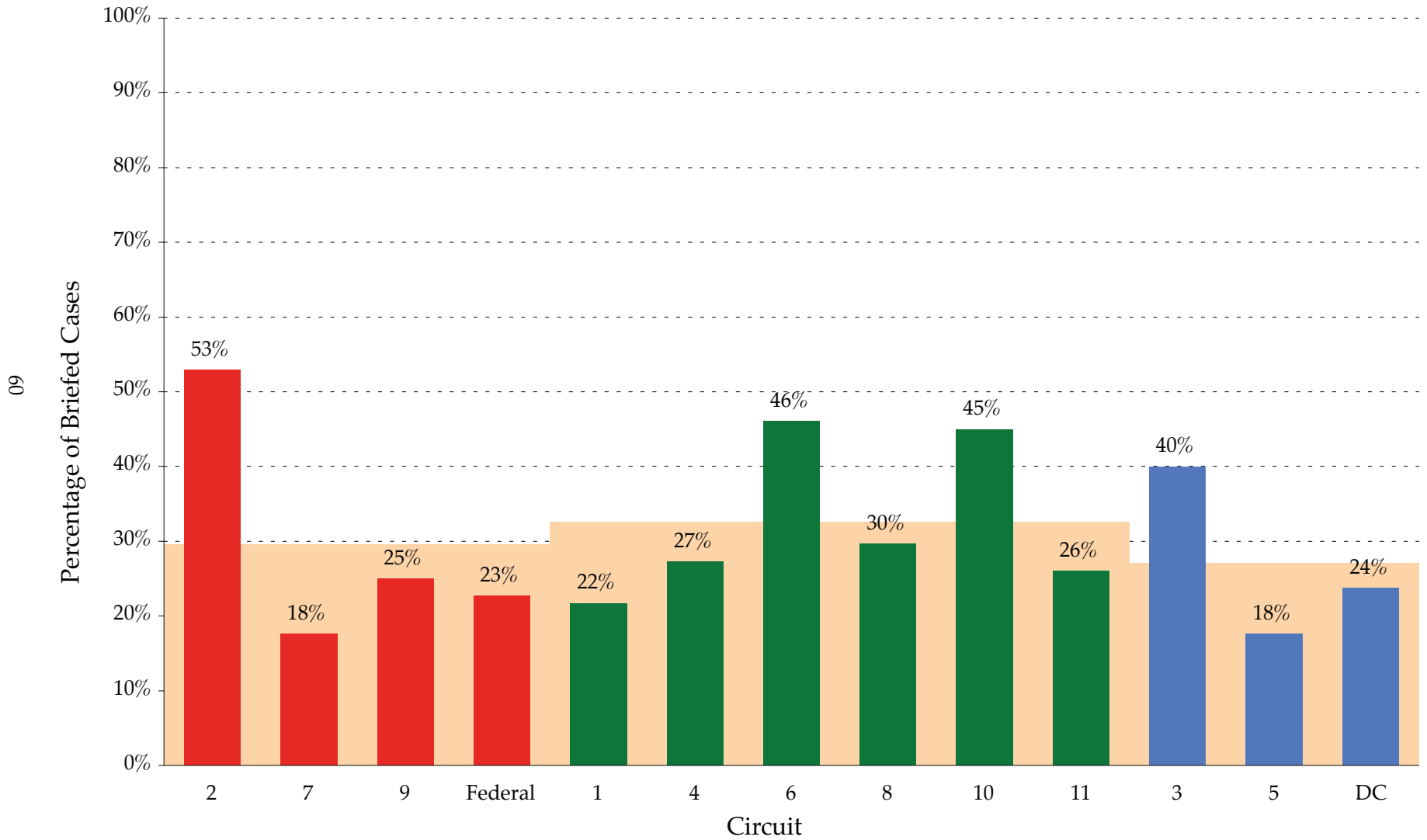




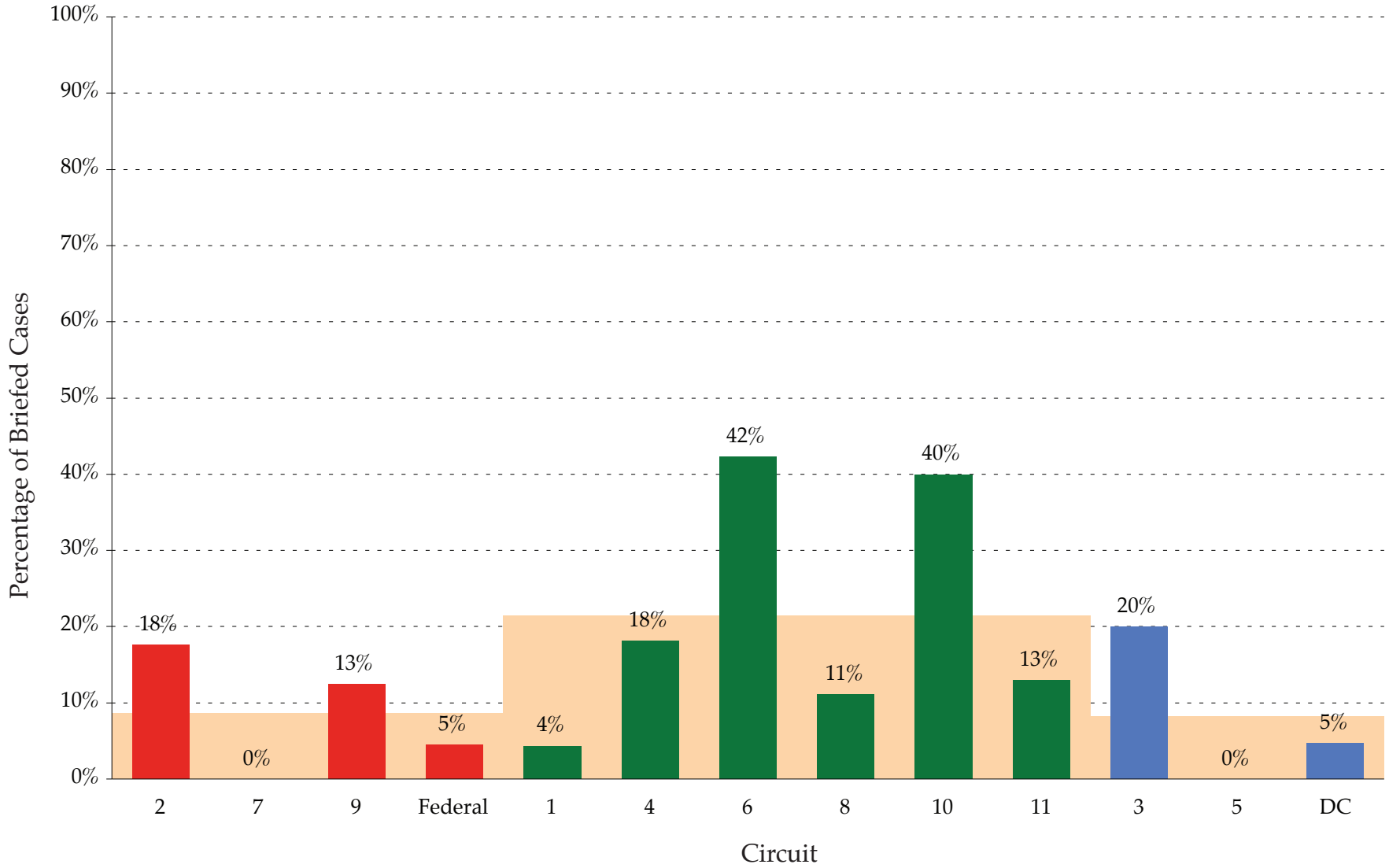
# CC. Authorities Cited



## DD. Briefed Cases with Citations to Unrelated Unpublished Opinions



## EE. Briefed Cases with Citations to Unrelated Unpublished Opinions by the Deciding Court



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## VI. Appendices

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## Appendix A: Judges' Predictions of Problems Posed by Citations to Unpublished Opinions

We asked judges in the restrictive circuits (the Second, Seventh, Ninth, and Federal Circuits) whether a rule allowing the citation of unpublished opinions would cause problems because of any special characteristics of their court or its practices. Those who responded “yes” were invited to describe the relevant characteristics. This appendix compiles their responses.

Responses are organized by major theme: an increase in workload (20 responses), unpublished opinions becoming shorter (13 responses), a concern about the quality of the court’s unpublished opinions (seven responses), the small likelihood that citations to unpublished opinions would be helpful (six responses), a concern about increased time to resolve cases (five responses), a concern that unpublished opinions might come to be regarded as precedential (three responses), an observation that the rule change would be advantageous to the government (one response), and other thoughts (eight responses). A few responses covered more than one theme and are cross-referenced accordingly.

We present the judges’ responses anonymously and essentially verbatim, with some copyediting. Each response is identified by circuit and ordinal position in this report. So response 7-4 is the fourth response here from a Seventh Circuit judge.

### *1. Second Circuit*

Fourteen Second Circuit judges said that citations to their court’s unpublished opinions would create special problems; six judges said that they would not. Three judges did not return an answer to this question. (One judge who said that citations to unpublished opinions would create problems did not elaborate.)

#### **a. Unpublished Opinions Would Become Shorter**

Three judges predicted that unpublished opinions would become shorter if they could be cited.

J2-1. Presently, we prepare unpublished opinions that carefully respond to the issues raised on appeal, but are not as extensive or work-intensive as published opinions. If unpublished opinions are citable, there will likely be two effects. In most cases the unpublished opinions will be reduced to a bare minimum. This will have the effect of depriving litigants of the general reasoning of the dispositive decision and perhaps make it

more difficult for the litigant to seek further review whether by rehearing or by petitioning the Supreme Court. In some cases, the result could be the opposite—a greater expenditure of time and effort than would otherwise be the case to create a more fulsome unpublished opinion that approaches the kind of effort required by a published opinion. If the rule were applied retroactively, there would be an impairment of the circuit's *corpus juris* as unpublished opinions never intended for citation could be included in briefs. The Second Circuit would vastly prefer to decide on its own whether unpublished opinions are citable as opposed to having the issue decided for the court by outsiders.

J2-2. If unpublished opinions are citable, two different effects are foreseeable. In most cases, the unpublished opinion will be reduced to a bare minimum. This will deprive litigants of the general reasoning provided in our unpublished opinions up to now, and perhaps make it more difficult for a litigant to seek further review. In other cases, the result may be just the opposite; more care and effort than necessary may be expended in making these opinions more like published opinions, at the expense of scarce judicial time and resources. One should ask: what has been the purpose of unpublished opinions up to now? The purpose, as our circuit has regarded it, is to make clear to litigants and counsel what the basis of the court's decision is, and to show in summary fashion that the panel has considered each and every point argued by each side. Unpublished opinions are appropriate when existing precedent governs the issues raised. If made citable, both virtues of the unpublished opinion—its clarity and its economy—may be undermined.

J2-3. The proposed rule would endanger the practice of giving a reasoned decision in *all* cases, because it would lead to useless one-line orders.

## b. Unpublished Opinions Are Not Helpful in Other Cases

Three judges observed that citations to unpublished opinions are unlikely to be helpful.

J2-4. Our guideline for the use of unpublished summary orders restricts them to cases adequately covered by pre-existing precedent. Our rule of practice does not permit citation to summary orders as authority for a proposition of law (although they may of course be cited with reference to the disposition of the particular case). We consider this practice highly beneficial to the quality of justice in our circuit for the following reason. Our judges, like others elsewhere, are over-worked and are putting in long hours. Realistically, they cannot really work longer hours; changes would simply affect allocation of judges' time. Under our present practice, we devote little time to the explanations in summary orders because their non-citability limits their potential to cause harm. Consequently, our judges can devote more time to the published opinions, that is to say, to the cases that



play a significant role in shaping and explaining the law. If unpublished orders become citable, we would need to worry lest a carelessly written passage of a summary order cause problems. Our judges would be compelled to take substantial time away from the opinions that are important to the development of the law, devoting that time instead to the cases that have little or nothing to say about the law. Since summary orders are properly used only in cases adequately covered by existing precedent, counsel have little need to cite them. The desire to cite them arises primarily in circumstances where the order—prepared in haste—said something ill advised, which would not have been said had the order been citable. Allowing them to be cited would serve little useful purpose but would cause a wasteful misallocation of judicial time—taking valuable time away from the difficult task of getting it right in the opinions that play a role in shaping and explaining the law.

J2-5. (a) Since summary orders are never pre-circulated to the full court and do not appear as slips, judges who were not on the panel have no opportunity ever to know what they say. So I'd be disinclined to give a summary order cite any weight. I worry that litigants will be lulled into relying on material that the judges will not credit or consider. (b) Summary orders do not purport to state all the facts and circumstances that bear upon the result. Ordinarily, they say that "the parties are assumed to be familiar with the facts, procedural history, and the appellate issues presented." (c) Sometimes a summary order is indicated because the briefing is so poor that the salient issues are not raised, the best precedents are omitted, or the issue is scrambled. While I do research, I'm not willing to do the lawyering for any party; so a summary order is often unhelpful even if the issue is ostensibly interesting.

J2-6. Because of the volume of cases heard by this court, fact-bound, non-precedential decisions are best handled in summary fashion. Citation of the orders out of their factual context would be misleading.

### c. Increased Workload

Three judges predicted that citations to unpublished opinions would increase judges' workload. (In addition to comments J2-7 and J2-8, see comment J2-4.)

J2-7. More work with no benefit to the cause of justice. Anything worth saying to those other than the parties and trial lawyers should end up in a per curiam or other published opinion.

J2-8. Such a rule would greatly delay the resolutions of cases and add considerably to our workload.

#### d. Disposition Time

Three judges predicted that if unpublished orders could be cited, it could take the court longer to resolve the cases in which they are issued. (In addition to comments J2-9 and J2-10, see comment J2-8.)

J2-9. Speedy disposition of cases, a characteristic of this court, would be affected.

J2-10. A characteristic of our court is to issue summary orders promptly.

#### e. Quality of Unpublished Opinions

One judge expressed concern about the quality of the court's unpublished orders. (See comment J2-4.)

#### f. Other Thoughts

Three judges had other thoughts.

J2-11. Our summary orders are generally quite detailed. I am sure much of that is because 20% of our cases are pro se and we are the only circuit to allow pro se litigants to argue.

J2-12. It would harm the collegiality of the court, because of strong differences in opinion as to how summary orders should be prepared.

J2-13. Our court uses staff decision making far less than other circuits.

## 2. *Seventh Circuit*

Only five Seventh Circuit judges said that citations to their court's unpublished opinions would create special problems; seven judges said that they would not. Four judges did not return an answer to this question. (Comment 7-5 below comes from a judge who said citations to unpublished opinions would not create special problems.)

#### a. Unpublished Opinions Would Become Shorter

Three judges predicted that unpublished opinions would become shorter if they could be cited.

J7-1. If attorneys were allowed to cite unpublished orders in our circuit, it would immeasurably increase the amount of time spent by judges in reviewing the draft orders of the staff law clerks, who do not usually operate under the direct supervision of a judge. One reason it would take a great deal more time is because each and every case citation would have to be verified more thoroughly than is now done in the Rule 34 cases (cases decided on briefs without oral argument) and short argument cases (ten minutes). These cases are routinely handled and include the proposed

judgment and sentencing recommendation sent to us for review, modification, approval, or declination. Because of the large volume of the same, the publication time of these orders, as well as the time allotted to the orally argued cases, would be impacted and thus interfere with the present caseload flow. If every case, in effect, were to be treated as a polished, thoughtfully considered published opinion, I am confident that this circuit might well have to seriously consider limiting the number of cases heard on oral argument as well as the time allotted for each case. This is because precious time and resources will be taken from an already overburdened caseload and allocated to the Rule 34 and short argument matters. Thus, the court may be forced to adopt the procedure of issuing cursory, one-line orders in many cases as some other circuits have done, rather than our present procedure of issuing well reasoned, cited, and thoughtful extensive and thorough opinions. The result would be detrimental to the court system, judges, litigants and the bar, and I seriously urge that the judicial authorities considering this question give serious consideration before adopting the procedure of allowing the citing of unpublished orders in this circuit.

J7-2. I oppose citing unpublished opinions/orders. We have too many published ones as it is. Our orders now are quite detailed. I will do shorter ones—e.g., “the evidence is sufficient,” etc.—if they are going to be cited back to us.

J7-3. We provide a full statement of reasons in *all* cases—no one-word affirmances. We could not continue the practice if all our opinions could be thrown back in our faces.

## b. Unpublished Opinions Are Not Helpful in Other Cases

Two judges observed that citations to unpublished opinions are unlikely to be helpful.

J7-4. In general, the “unpublished” dispositions in the Seventh Circuit are detailed, factually intensive treatments of a subject. Generally also, they represent applications of such well established standards as the *McDonnell Douglas* test, substantial evidence review of Social Security or immigration rulings, or *Anders* review of a criminal appeal. Finding the hidden advance in the law will be a search for a needle in a haystack. It is also quite unnecessary, given the percentage of opinions that are published in this circuit, which is in turn a direct consequence of our policy to grant oral argument in all fully counseled cases. Later publication of “unpublished” orders has been an adequate corrective for the occasional slip.

J7-5. Citing unpublished opinions (orders) will not facilitate the resolution of cases nor improve the quality or uniformity of circuit law.

### c. Quality of Unpublished Opinions and the Slippery Slope to Precedent

One judge expressed concern about the quality of the court's unpublished orders and predicted that allowing citation to unpublished opinions could ultimately result in their being precedential.

J7-6. If we are going to cite "unpublished" opinions, we might as well publish everything. Non-argued cases with little or no merit deserve no more than short orders, and snippets from them should not have precedential value. In our circuit, staff attorneys prepare routine drafts that judges approve but do not research or write. These definitely should not be available for citation.

### d. Increased Workload

One judge predicted that citations to unpublished opinions would increase judges' workload. (See comment J7-1.)

## 3. *Ninth Circuit*

Thirty-one Ninth Circuit judges said that citations to their court's unpublished opinions would create special problems, 11 judges said that they would not, and one judge said that he did not know. Four judges did not return an answer to this question. (One judge who said that citations to unpublished opinions would create problems did not elaborate.)

### a. Increased Workload

Fifteen judges predicted that citations to unpublished opinions would increase judges' workload.

J9-1. Our local rule contemplates a memorandum disposition of a paragraph or two—the result and the reason. Changing this practice to a published disposition would put pressure on the court to expand the dispositions into more substantive recitations. Simply because we issue an unpublished disposition does not mean that we do not spend considerable time reviewing the record and reviewing the case. However, many cases do not merit an extensive explanation. Switching to citable dispositions will definitely increase the workload of already very busy judges. Finally, there is no need for citation. We ran an experimental citation approach, and attorneys did not find occasion for citation. Our limited citation rule addresses key issues concerning *res judicata*, circuit splits, etc.

J9-2. Because of the great caseload of the Ninth Circuit, the Ninth Circuit would be particularly impacted. Also, because 37.5% of our case volume is immigration cases, "publishable" case memos would have to be more carefully checked against earlier rulings to avoid intra-circuit splits in

what tend to be repetitive situations. I may be repeating what I said earlier, but the more experience I have on this court, the more grateful I am that unpublished dispositions are not citable. Oh, I almost forgot. Often we do not call a case for a vote for a rehearing en banc because, although wrongly decided by the panel, it does not involve Rule 35 and Rule 40 issues. And it will only affect the parties. If all memorandum dispositions are to be cited, the number of en banc calls will surely rise.

J9-3. Currently my court issues very brief unpublished opinions. The parties are aware of the facts. If there is no disagreement among the parties concerning the appropriate standard of review, or the applicable law, we generally omit reference to the citations supporting these principles. If those opinions are now to be published, we will be required to set forth the relevant facts and discuss principles of law that are not in dispute so that counsel will be able to determine whether the unpublished opinion is pertinent or distinguishable.

J9-4. We assume unpublished memoranda are addressed only to the parties, who know the history and the facts of the case. We only state what we decide and why. If they were citable, then we would have to assume they are written to the public at large and describe the history and facts, and this would increase dramatically the time involved in preparing them. Also, the issues decided and why might have to be explained in more depth.

J9-5. The practice in our court with respect to unpublished opinions is to make them very brief with no recitation of the facts, the standard of review, etc., unless they are directly at issue. We assume that the unpublished opinions are for the parties and that this information need not be part of the disposition. If publication is involved and citation is permitted, we write for the general public, a much more time-consuming process.

J9-6. This is a very large circuit. It should have been divided many years ago. To permit citations to unpublished opinions will increase the burden on the court very significantly. The solution is to create two or more circuits out of the geographic monster of the Ninth. It is a remnant of a sparsely populated west. That west is now heavily populated. *The time for restructuring is now.*

J9-7. Right now, neither the lawyers nor the judges need to pay any attention to unpublished dispositions. If they can be cited, that would change. Much time could be required to address unpublished dispositions, all of which time would be wasted, in my opinion. I have yet to see any meaningful explanation of either the necessity or benefit of citing unpublished opinions.

J9-8. I am not sure how special this characteristic is in relation to the problem, but here it is: We have a much higher case volume than other circuits. (Not per judge, but overall.) That will mean a *huge* number of previ-

ously uncitable memorandum dispositions will be citable. More work for us, and a *lot* more work for the lawyers.

J9-9. We are already laboring under a back-breaking caseload. The immigration caseload continues to expand. Having to spend more time reading and researching cases when the caseload is already extremely heavy would create an additional burden on chambers.

J9-10. Some judges and panels may increase the time they put in on unpublished opinions. At present, unpublished opinions get less work by some judges. I think allowing citation of unpublished opinions will dramatically increase the work of the circuit.

J9-11. About one-half of our unpublished dispositions are written by central staff attorneys (not elbow clerks). Judges review them minimally, mostly for result. That practice could not be maintained.

J9-12. Probably it would cause more burden with our already excessive caseload, because many judges would write longer dispositions.

J9-13. The number of unpublished opinions is great, and it would require substantially more time to complete opinions.

J9-14. It would probably greatly interfere with our screening program and cripple our productivity.

J9-15. Much more attention to the facts of the case would be required to provide a context.

## **b. Unpublished Opinions Would Become Shorter**

Five judges predicted that unpublished opinions would become shorter if they could be cited.

J9-16. In my circuit there is a clear distinction between precedential and non-precedential. We believe it is important to inform the parties of the reason for the decision without worrying about some phrase unintentionally being a cloud on the precedent of the circuit. That is why I believe the rule change would result in shorter, less explanatory dispositions. I hope it will not lead to simple judgment orders as in some other circuits.

J9-17. Because prior memorandum dispositions were written with the clear understanding that they had no precedential value, changing the rule now means that underlying assumption was wrong. I would have written such dispositions quite differently, and far more tersely, had I known the rule would be undermined by the proposed change now under consideration.

J9-18. Given our large volume of cases, the only way to avoid an increased burden of writing “publishable-quality” dispositions will be to revert to extremely summary format; otherwise our “published” opinion backlog will increase. I would therefore opt for very summary dispositions.

J9-19. Most of our judges share bench memos, which tend to be fairly long. Often the bench memos are converted into unpublished dispositions without much change. Obviously, they would have to be pared down substantially if they were to become citable.

J9-20. I would try to say as little as possible in all unpublished opinions. This would result in a considerable disservice to lawyers and litigants. The volume of our work leaves little alternative, however.

### c. Quality of Unpublished Opinions

Two judges expressed concerns about the quality of the court's memorandum dispositions.

J9-21. We have two kinds of unpublished decisions—those issued in calendared cases before regular panels (not all of which are argued), and those issued in “screening” cases, in which drafts are prepared by central staff and approved by three-judge panels after oral presentations and brief reviews of documents. I would be comfortable having the first group cited, as long as they are not precedential, because a substantial amount of chambers work, by both law clerks and judges, go into them. As to the second group—screened cases—the dispositions are exceedingly short, and I have much less confidence in whatever reasoning does appear. Allowing them to be cited would be pointless, as they would (I hope) never be “persuasive” on any issue. Thus, while I hope someday to persuade my court to allow citations to the first kind of disposition, we need to have autonomy to accommodate our own practices.

J9-22. Our dispositions that come out of our screening panels in large volume are essentially right as to result, but somewhat short on reasoning.

### d. Disposition Time

Two judges predicted that if unpublished orders could be cited, it could take the court longer to resolve the cases in which they are issued.

J9-23. The sheer volume of cases precludes this rule as being a viable solution to whatever perceived problem the rule purportedly addresses. It would also preclude us from handling the hundreds of cases a month through screening sessions. I truly believe that our length of time from filing to disposition would grow exponentially and that we would never catch up.

J9-24. Some judges would AWOP (affirm without opinion) more cases. Some would devote hours to fine-tuning, revising, and researching. Delay in filing would ensue.

### e. Unpublished Opinions Are Not Helpful in Other Cases

One judge observed that citations to unpublished opinions are unlikely to be helpful. (See comment J9-1.)

### f. Slippery Slope to Precedent

One judge predicted that allowing citation to unpublished opinions could ultimately result in their being precedential.

J9-25. To increase the number of citable decisions, even non-precedential ones, given the number of precedential decisions we have, would exacerbate the problem of size. Neither lawyers nor law clerks can be expected to appreciate the difference between citable-precedential and citable-persuasive, so citable-persuasive dispositions will slither into being precedential. We lack the resources to give 10,000 dispositions the same attention and scrutiny as precedential opinions must have; all that is necessary is for three judges to agree on the disposition, not each word, but if dispositions can be cited for some kind of value that should change. If they do not have any value, what is the point of citing them? Bottom line: it is a back door way to make everything precedential.

### g. Other Thoughts

Five judges had other thoughts.

J9-26. Although I personally support allowing the citation of unpublished decisions as persuasive (not binding) authority, the opposition on our court is such that it would cause many judges to alter their writing method.

J9-27. We try to tell the parties why we decided what we decided, with a bit of a nod to the record. But truly 99.9% of the unpublished cases do not decide any law *or* provide new factual insights.

J9-28. Problems with citations to unpublished opinions in this circuit arise from our volume of cases and our practice of writing detailed unpublished dispositions to inform the parties.

J9-29. It would increase the volume of citable cases by a factor of 5 or 6 to 1. We only allow citation of about 18% of all dispositions on the merits.

J9-30. Our circuit provides fewer opportunities to compromise and reach consensus. In some cases rifts would be magnified.

## 4. *Federal Circuit*

Eight Federal Circuit judges said that citations to their court's unpublished opinions would create special problems; four judges said that they would



not, and two judges said that they did not know. Two judges did not return an answer to this question.

### a. Quality of Unpublished Opinions

Three judges expressed concerns about the quality of the court's non-precedential (unpublished) opinions.

JF-1. We are a national court. Thus, barring unusual intervention by Congress or the Supreme Court, we establish national rules. We therefore would have to be even more careful than we now are with each statement we make in an opinion so that what is cited back to us does not unintentionally preclude the proper resolution of later cases. And, frankly, it is very possible, even likely, that once non-precedential opinions become citable, a move will ensue to make them precedential. Thus, what we originally write with the understanding that it is non-precedential, albeit citable, may become precedent as well.

JF-2. Many of our non-precedential opinions are in *pro se* appeals by federal employees from decisions of the Merit Systems Protection Board. Because these cases are often poorly briefed, it is easy to miss potentially important legal issues or to make statements in opinions that, with better briefing, would likely not be made. Allowing citation of these decisions would add to the clutter of briefs and suggest that the court has reached considered decisions on particular issues when in fact that is often not true.

JF-3. The majority of our jurisdiction is exclusive. We circulate all published panel opinions to the whole court for comments before they are released and all members of the court carefully review them. Counsel should not be able to cite opinions that have not been through that process.

### b. Unpublished Opinions Would Become Shorter

Two judges predicted that unpublished opinions would become shorter if they could be cited.

JF-4. All opinions are "published" in one form or another—what we are talking about is *non-precedential* opinions. If our non-precedential opinions could be cited, then the *pro se* petitioners would get less useful opinions; there would be more summary affirmances; and non-precedential citations would only clutter up the briefs. A terribly short-sighted idea.

JF-5. If attorneys could cite our non-precedential opinions, I would push for summary dispositions or have non-precedential opinions say as little as possible.

### c. Slippery Slope to Precedent

Two judges predicted that allowing the citation to unpublished opinions could ultimately result in their being precedential. (In addition to comment JF-6, see comment JF-1.)

JF-6. First, we have many complex patent cases that are best resolved by non-precedential opinion. Second, the law develops in a more orderly fashion when some cases are not made precedential.

### d. Increased Workload

One judge predicted that citations to unpublished opinions would increase judges' workload.

JF-7. Courts that favor the citation of non-precedential opinions employ legions of staff attorneys to process them, while in this court non-precedential opinions are handled in chambers. In light of budgetary constraints, the central staffs of courts can be expected to decline, and the work returned to chambers where it belongs. I would expect this to affect the views of the proponents of a new role.

### e. Government Advantage

One judge predicted that permitting citations to unpublished opinions would provide the government with an advantage.

JF-8. The government is a party to most appeals here and can fully read non-precedential opinions. It will have many more opinions to cite in briefs under a revised rule.

## Appendix B: Attorneys' Thoughts on the Impact of the Proposed Rule

Attorneys were asked what impact they would expect to result from the proposed lifting of restrictions on citation to unpublished opinions. Although attorneys were not asked explicitly whether they would support or oppose the proposed rule, their support or opposition was often apparent from their answers. Of the 307 attorneys who answered this question, most were supportive of the proposed rule (169, or 55%), many were neutral (75, or 24%), and many opposed the proposed rule (63, or 21%).

We classified the attorneys' responses by theme and sub-theme: the availability of additional authority (more authority, bias, more work, already reviewed), the usefulness of unpublished opinions (strategy, not precedent, not useful, poor quality, good quality), access to unpublished opinions (accessible, less accessible), impact on the court (more consistency, less consistency, higher quality opinions, shorter opinions, longer opinions, delay), and broad policy issues (accountability, a blurred distinction between published and unpublished opinions, whether opinions should ever be unpublished). Several comments fell into more than one category.

The comments are compiled here. Generally comments falling into more than one category are compiled in the category with the fewest comments. Generally supportive comments are presented before neutral and opposing comments, with longer comments presented first.

We present the attorneys' responses anonymously and essentially verbatim, with some copyediting. Each response is identified with an "A" for attorney and a number for ordinal position in this report. So, for example, response A-148 is the 148th attorney response presented here.

### *1. The Availability of Additional Authority*

Many attorneys commented on the implications of having a substantial amount of additional legal authority to cite. Ninety-three attorneys saw this as having access to additional valuable resources, but four attorneys worried about bias in the additional authority. Thirty-three attorneys observed that a substantial amount of legal authority to cite entails a substantial amount of additional work, but seven attorneys said that they already review the unpublished opinions anyway.

### a. More Authority

Ninety-three attorneys observed that the ability to cite unpublished opinions gives them more options in the way of authority to support their arguments. Most of these attorneys (84) were supportive of the new proposed rule; nine were neutral. In addition to the attorney comments compiled here, 25 other attorneys mentioned more authority: attorneys A-73 (supportive), A-75 (neutral), and A-76 (neutral) (comments compiled under *1.c. More Work*); attorneys A-89 (supportive), A-90 (supportive), A-91 (supportive), and A-92 (supportive) (comments compiled under *1.d. Already Reviewed*); attorney A-99 (supportive) (comment compiled under *2.a. Strategy*); attorneys A-101 (supportive), A-102 (supportive), A-104 (supportive), A-107 (neutral), and A-108 (neutral) (comments compiled under *2.b. Not Precedent*); attorney A-123 (supportive) (comment compiled under *2.c. Not Useful*); attorney A-154 (supportive) (comment compiled under *3.a. Accessible*); attorneys A-173 (supportive), A-176 (supportive), and A-177 (supportive) (comments compiled under *4.a. More Consistency*); attorney A-193 (supportive) (comment compiled under *4.b. Less Consistency*); attorneys A-197 (supportive), A-198 (supportive), A-201 (supportive), A-203 (supportive) (comments compiled under *4.c. Higher Quality Opinions*); attorney A-214 (supportive) (comment compiled under *4.f. Delay*); and attorney A-227 (supportive) (comment compiled under *5.b. Blurred Distinction*).

A-1 (supportive, Tenth Circuit). I am in favor of a new Federal Rule of Appellate Procedure uniformly allowing citation of unpublished opinions. Such a rule would promote consistency and eliminate the maddening situation where, as a litigant, you have found a case directly on point, but are unable to cite it. Although the Tenth Circuit—where I practice predominantly—has a fairly lenient rule on citation of unpublished opinions, the Ninth Circuit, for example, has a much harsher rule. I have been in the frustrating position in district courts of the Ninth Circuit where I am forbidden from citing an unpublished Ninth Circuit case to the district court—authority which presumably would be quite persuasive, if not dispositive. Although courts and commentators frequently state that unpublished opinions only deal with propositions that can be found in published decisions, I have not found that to be the case. Even when that is true to some extent, fact patterns are always different and sometimes critical. An unpublished decision is self-evidently so; even if not binding, I have never understood the rationale behind not being able to cite it at all.

A-2 (supportive, Seventh Circuit). Such a rule would be helpful in two respects in particular. In some cases, such a rule would permit citation to the court's most recent application of a settled rule, making it clear that earlier published decisions are still good law and have not been superseded by more recent decisions. This would be helpful where the court has begun issuing unpublished decisions after issuing a series of published decisions

on the same topic, and the most recent published opinion is several years old. In other cases, such a rule would permit citation to cases involving similar or identical facts. This would be helpful in cases in which all of the court's published decisions on a particular issue may be distinguished based on their facts, whereas, in an unpublished decision, the court has applied the same legal rule to facts similar or identical to those involved in the case pending before the court.

A-3 (supportive, District of Columbia Circuit). My practice has been almost exclusively in the U.S. Court of Appeals for the D.C. Circuit. I would expect little impact overall, in terms of numbers of cases impacted by the change. However, I would expect the rule to have a beneficial impact with respect to certain cases. I have experienced instances (before the rule in the D.C. Circuit was changed in Jan. 2002 to permit citation to unpublished opinions issued by that circuit) where the *only* case comparable to the issue I was addressing involved an unpublished opinion, or where an unpublished opinion would have been a useful example of an additional comparable situation, but I could not bring this to the court's attention, because the rule barred citation to unpublished opinions. I believe both my client (the federal government) and the court were ill served by the rule in these instances.

A-4 (supportive, Seventh Circuit). I think it would be very helpful. It is difficult to predict the future, so judges who order an opinion to be unpublished cannot foresee what effect that opinion would have in the future. In other cases, I have found unpublished opinions to be directly on point with my issue, but I could not cite them.

Many years ago, the Illinois Appellate Court would direct that only "abstracts" of opinions be published, which turned out to be the West headnotes. There have been more than a few times when one of these "abstracts" was directly on point with my issue. You get the idea.

In the long run, publishing all opinions is better for the profession, because it provides a better basis to obtain on-point precedent. To save space, perhaps "non-published" opinions should only be available online.

A-5 (supportive, District of Columbia Circuit). I suppose that I would favor permitting citation to unpublished opinions, as there is just a chance that one of these "red-headed stepchildren" will contain the nugget of wisdom that will guide the court to a correct decision.

The case I was selected for was an unusually weak case for the plaintiffs and appellants, so it did not present any difficult legal questions that might have prompted us to research unpublished opinions. As I recall, it was decided without argument and resulted in an unpublished decision (which always feels anticlimactic). I think that most opinions should be published and that the issuance of non-precedential decisions is hard to

justify, but I honestly do not think that this case would give much guidance to anyone.

A-6 (supportive, Second Circuit). I expect that the impact would be a favorable one from the perspective of an office such as mine (United States Attorney's Office). In many appellate cases, it would be useful to bring other similar cases to the court's attention, even though they are unpublished. This did not apply to the appellate immigration case that is the subject of this survey because there is now a wealth of published immigration case law in this circuit and others. I am not aware of the percentage of lawyers who do not have access to unpublished opinions through Westlaw, Lexis, or another computerized service, although lack of access problems could be addressed to some extent by requiring a party who cites to an unpublished opinion to provide a copy of it.

A-7 (supportive, District of Columbia Circuit). In my experience, I occasionally find an unpublished decision that is the closest precedent for the case on which I am working. The ability to cite the unpublished decision could facilitate our presentation of the argument in such an occasional situation. But many times I find that the unpublished decision is cumulative to many other published decisions on the same or similar point. And the unpublished decision itself may cite and rely on an earlier, published decision that may be cited without limitation. The D.C. Circuit has modified its local rule to permit citation of its unpublished decisions issued after Jan. 1, 2002. In a sense, the proposed national rule would not have much impact on our practice.

A-8 (supportive, Eleventh Circuit). I do not believe such a rule change would have an appreciable impact in the Eleventh Circuit, in which I practice, since such citations are currently citable—although not binding, of course. In those circuit courts of appeal that currently prohibit citation to unpublished decisions, the proposed rule change would have an impact, I believe. Advocates would be inclined to research and cite such unpublished decisions, where before they did not. I think it would enhance the breadth and quality of briefs, since persuasive, well-reasoned, unpublished decisions could provide further logical and policy arguments for both counsel and appellate courts to ponder in fashioning arguments and decisions, respectively.

A-9 (supportive, Tenth Circuit). I expect that the proposed rule would have a tremendous impact on the litigants and the courts. In my practice, I often read unpublished cases that support a position favorable to my client. Sometimes an unpublished case is the only available source to support a particular position for my client. In such an instance, a rule permitting citation to courts of appeals' unpublished opinions would provide me with the opportunity to support my client's position with some authority. It would

promote a fair outcome of the proceedings because litigants would be permitted to more fully advise the court of similar cases.

A-10 (supportive, Second Circuit). Such a rule would be helpful. There have been instances in which a new governing rule has been established in an unpublished opinion, and instances in which an established precedent has been applied to facts identical to those in a case we have been handling. Indeed, in some instances we have moved to publish because the opinions would apply to many of our cases. The availability of these opinions would assist in ensuring a uniform jurisprudence in the circuit and would be useful to litigants to have more persuasive authority to cite.

A-11<sup>61</sup> (supportive, Second Circuit). Such a rule would be helpful. There have been instances in which a new governing rule has been established in an unpublished opinion, and instances in which an established precedent has been applied to facts identical to those in a case we have been handling. Indeed, in some instances we have moved to publish because the opinions would apply to many of our cases. The availability of these opinions would assist in ensuring a uniform jurisprudence in the circuit and would be useful to litigants to have more persuasive authority to cite.

A-12 (supportive, District of Columbia Circuit). My impression is that unpublished cases can be useful and there would be no detrimental effect in citing to them (as long as the unpublished status is noted in the citation). Although I have not studied the issue, I feel like unpublished cases sometimes make explicit generally assumed legal principles that otherwise are not cited or discussed (this especially seems to be the case in unpublished opinions deciding matters brought pro se).

A-13 (supportive, First Circuit). I think the rule would have a salutary effect. When an unpublished opinion is squarely on point, particularly one from the same circuit, it is eminently sensible to permit its citation. More than once I have been precluded from citing and discussing a persuasive and well-reasoned unpublished opinion that is on all fours, or close to it, with the case being briefed. As long as the parties understand the precedential limitations of unpublished opinions, their citation should be permissible.

A-14 (supportive, Eleventh Circuit). I believe the ability to cite unpublished opinions would be helpful. Many times legal analysis by appellate courts on a new issue, or slightly new issue, is useful to the parties and the courts. If parties are permitted to cite law reviews, they should be able to cite unpublished opinions, which are likely more useful. The reason I did

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61. Attorneys A-10 and A-11 submitted survey responses with identical text.

not cite or would not have cited unpublished opinions in my case was because the area of law had already been thoroughly vetted.

A-15 (supportive, Tenth Circuit). I think such a national rule permitting citation to unpublished opinions would be especially useful, particularly in some areas of the law where, for whatever reason, published opinions are as a rule exceptionally rare. This is particularly true in the context of habeas appeals under 28 U.S.C. § 2255 with respect to which there is a surprising dearth of “published” authority. I am, in other words, very much in favor of the proposed new rule.

A-16 (supportive, First Circuit). It would allow attorneys to cite to cases that may be factually closer to the matter on appeal but that have not been deemed important enough by the court to be published. There are many unpublished cases that contain nuggets of holdings that have not been articulated in published opinions and that fit squarely and are dispositive of issues that are still litigated below for lack of a definitive ruling in a published opinion.

A-17 (supportive, Eighth Circuit). It would be of significant value. Whether the opinion is published or unpublished, it is still the opinion of the appellate court and has some value. I have experienced a number of occasions where I could not locate a published opinion that is as squarely on point on a specific issue as any unpublished opinion. A less restrictive rule on the citation to an unpublished opinion would be of value and is recommended.

A-18 (supportive, District of Columbia Circuit). I believe the proposed rule would improve decision making and briefing. Often unpublished decisions have salient analysis that should be brought to the court’s attention. As a practitioner, it is frustrating to find a recent unpublished decision directly on point, and not to be able to cite the decision. As a practical matter, “unpublished” decisions are being published anyway.

A-19 (supportive, Eighth Circuit). I believe the proposed rule would be beneficial to the court in providing the court with all applicable precedent. In a number of cases, language in unpublished opinions addresses an issue more completely than in published opinions. Being able to cite such language, particularly from unpublished cases in our circuit, would enhance the arguments made to the court.

A-20 (supportive, Second Circuit). I believe the impact would be to encourage greater advocacy through citation to cases without precedential impact but with persuasive merit. The rule, however, should require the author of the brief to attach a copy of the unpublished decision and to cite any electronic source for the same (e.g., Westlaw). I strongly support the proposed new national rule.

A-21 (supportive, District of Columbia Circuit). To the extent that unpublished opinions are non-binding, such a rule would nonetheless permit



drawing the court's attention to dispositions of similar cases. This would essentially operate like an "accord" citation. To the extent that unpublished opinions are non-binding, there should be no requirement, only permission, to cite to such opinions.

A-22 (supportive, Seventh Circuit). From my own perspective, being engaged in many habeas corpus cases on appeal, there are some procedural practices that would be reflected in unpublished opinions that would occasionally be helpful to illustrate through judicial opinions. Short of that, I'm not sure I would often take advantage of a more lenient rule to this effect.

A-23 (supportive, Seventh Circuit). Any time you expand the universe of cases on which you can rely, you provide an attorney with more and presumably better reasoning to present. Since I never saw any real legitimate basis for limiting citations to published opinions (sometimes the unpublished cases are better), I would be happy to see this rule change.

A-24 (supportive, First Circuit). I believe a more lenient rule of citation would be beneficial to my appellate practice, and to the circuit court, because oftentimes an unpublished opinion will possess an analogous fact pattern or more clear statement of the law. Even if the opinion is not binding precedent, it can be beneficial to guide the court.

A-25 (supportive, First Circuit). Given the availability of unpublished opinions on services such as Westlaw, it would allow practitioners access to cases which may be more on point factually to their own. The ability to cite these cases should assist in presenting argument in a more cogent and relevant manner.

A-26 (supportive, Ninth Circuit). The impact would be positive since frequently there are numerous unpublished decisions from this circuit and other circuits that are directly on point with the facts of a case. Because the cases are unpublished, the attorney is constrained from using the cases as precedent.

A-27 (supportive, First Circuit). It would make it more likely that I would find cases "on point." My only concern is that the holdings in these opinions are (sometimes) not explained as thoroughly as in published opinions, which could lead to the cases being used improperly (out of context).

A-28 (supportive, Eighth Circuit). I have, in the last two years, seen approximately three or four unpublished opinions with factual bases directly on point with the facts of my own case. Relaxation of the rule would aid me in responding to readings when such a thing occurs.

A-29 (supportive, Fifth Circuit). Attorneys may then have access to additional cases that are on point or close to it. Oftentimes I encounter cases that resemble the factual pattern of my case, but I am unable to use the information, because the case is unpublished.

A-30 (supportive, Second Circuit). While I did not come across useful unpublished cases during this appeal, I have done so in other cases. I have never fully understood why such decisions should be off-limits, particularly when they are on point and well reasoned.

A-31 (supportive, Fourth Circuit). To the extent that a court has addressed a particular legal issue, albeit in an unpublished decision, I may be able to address issues raised by the court through my brief or oral argument in a more direct and thorough manner.

A-32 (supportive, First Circuit). Unpublished opinions can facilitate, in many instances, the presentation of an argument. Many times the facts are squarely applicable to the matter under consideration. Often they present authority in a very precise manner.

A-33 (supportive, Third Circuit). This rule would have a positive impact because it might permit additional arguments to be raised to the court's attention. The court could then give the unpublished opinion whatever weight it deems appropriate.

A-34 (supportive, First Circuit). Very little, but only positive in my opinion. It is not unusual for me to want to cite 1-3 such opinions in a brief in the First Circuit, but I do *not* because of the rule strongly discouraging it.

A-35 (supportive, Tenth Circuit). It would make analysis of the law more comprehensive and give the courts better guidance. Some unpublished opinions contain good surveys of an area of law, which should be helpful to all.

A-36 (supportive, Second Circuit). I think it would be helpful—there are cases that could be cited that I am unable to cite now (although I've learned to ignore unpublished opinions because I cannot use them).

A-37 (supportive, Sixth Circuit). Greater ability to direct the appellate court to cases in which similar, but *unique or unusual*, fact patterns were handled in a manner consistent with my client's position.

A-38 (supportive, Sixth Circuit). It would allow practitioners to cite to more current authority. (It seems as if the amount of unpublished opinions in the past several years has significantly increased.)

A-39 (supportive, Second Circuit). I would support the new rule. Judges will give the weight that such decisions deserve. I have always found it frustrating to see an opinion but not be able to use it.

A-40 (supportive, Fifth Circuit). I occasionally find unpublished authority from this circuit that would be helpful in supporting arguments to a district court or appellate panel.

A-41 (supportive, Federal Circuit). I am in favor of this rule. Many of the circuit's opinions I deal with are unpublished but are extremely important, because they pronounce new legal principles.

A-42 (supportive, Sixth Circuit). Such a rule would result in utilizing more court of appeals precedent in support or opposition to my legal arguments. I would rarely cite to other circuits.

A-43 (supportive, Fifth Circuit). We would have more resources available along with factual instances or scenarios useful in explaining a theory we may be either defending or attacking.

A-44 (supportive, Eleventh Circuit). It would widen the pool of cases available and would give one greater confidence as to the predictability of the outcome of the court's decision.

A-45 (supportive, Sixth Circuit). I would expect the proposed rule to have a positive impact, allowing the citation to additional material without imposing substantial burdens.

A-46 (supportive, Ninth Circuit). It would allow more comprehensive understanding of trends in the law in the different courts and allow reference to broader legal analysis.

A-47 (supportive, Ninth Circuit). Allow a lot more case law for the court to consider, allowing easier references so the court would see what is happening in other courts.

A-48 (supportive, Third Circuit). It will be of assistance in some cases, because there are many unpublished opinions that contain useful analysis of critical issues.

A-49 (supportive, Federal Circuit). In some appeals, it would permit citations to authorities that are closer to the subject appeal than any of the citable authorities.

A-50 (supportive, Eighth Circuit). Extremely helpful. The rule would expand the range of citable precedent and enable the preparation of more thorough briefs.

A-51 (supportive, Third Circuit). The proposed rule would allow appellate advocates to advance persuasive reasoning from unpublished opinions.

A-52 (supportive, Eighth Circuit). I believe that such a rule would allow the court to be better-informed about potentially relevant case law.

A-53 (supportive, Eleventh Circuit). I think this would be a good rule change causing few if any problems, but making research a bit easier.

A-54 (supportive, Second Circuit). There would be more law that could be referenced that might address otherwise unaddressed questions.

A-55 (supportive, District of Columbia Circuit). Slightly more work, but some unpublished opinions would be of significant value in my cases.

A-56 (supportive, Eighth Circuit). It would enable us to cite a broader array of case authority. I think it would be helpful.

A-57 (supportive, Eleventh Circuit). It would improve and make more equitable the access to and use of important decisions.

A-58 (supportive, Fifth Circuit). I think it could facilitate more thorough treatment of some issues before the court.

A-59 (supportive, Fourth Circuit). I think it would be a good rule. Sometimes the cases most on point are unpublished.

A-60 (supportive, Tenth Circuit). It would be helpful because the Tenth Circuit has so many unpublished opinions.

A-61 (supportive, Second Circuit). I would expect such a rule to assist me in the presentation of my arguments.

A-62 (supportive, District of Columbia Circuit). Such a rule would be helpful in addressing novel issues of law.

A-63 (supportive, District of Columbia Circuit). Positive. There is useful precedent in them.

A-64 (neutral, Fifth Circuit). The times when we have found it necessary to cite to unpublished dispositions have occurred when there is no precedent available in our circuit. Indeed, when the Fifth Circuit issues an opinion on a new issue they have not ruled upon, you will often see them citing to their own previously unpublished dispositions on the issue.

I cannot imagine such a rule having any appreciable impact on our side of the fence.

A-65 (neutral, Fifth Circuit). I practice primarily in the Fifth Circuit, which already has a very workable Local Rule 47.5.4 for citing unpublished opinions. In my experience, citing to unpublished cases often allows me to provide the court with a fact pattern similar to the case at bar. In this sense, it makes my work more effective. Citations to unpublished opinions is neither more nor less burdensome than not citing to them.

A-66 (neutral, Tenth Circuit). None for me, but for the practice across the country, it would improve appellate practice because parties can cite to whatever persuasive authority is available. The circuit in which I practice, the Tenth Circuit, allows citation to unpublished cases as long as they are attached to the briefs. That is why the proposed rule would have no effect on my practice.

A-67 (neutral, Third Circuit). Twofold impact. On the one hand, allow me to cite unpublished opinions in support of my client's position, and therefore potentially make my work a little less burdensome in that I have more chances to find support for my client's position. On the other hand, it enables my opposing counsel to do the same thing, thereby making my job harder.

A-68 (neutral, Third Circuit). It would clear up confusion between the circuits' different rules; it will enable citation of persuasive authority; it will, however, also increase misuse of non-precedential authority; it may increase the accuracy of judicial dispositions.

## b. Bias

Four attorneys predicted that the additional authority provided by unpublished opinions would have a disproportionate impact on the government. Two attorneys representing appellants in criminal appeals predicted a disproportionate bias in favor of the government and two attorneys representing the government predicted a disproportionate impact against the government. All four of these attorneys opposed the proposed rule.

A-69 (opposed, Eighth Circuit). A negative impact. It would open the door to citation of older cases not intended to be authority or cited, and it would change the nature of future cases resulting in more delay in issuing otherwise simple decisions. We also believe that most unpublished opinions are weighted heavily toward affirming convictions, which is fundamentally unfair to defense research efforts.

A-70 (opposed, Third Circuit). I do criminal defense work and have never had occasion to cite or rely on an unpublished opinion. In my experience, most unpublished opinions on the criminal side tend to favor the government, so the proposed rule would just add more arrows to the government's quiver.

A-71 (opposed, Seventh Circuit). Besides making the work of attorneys litigating in the federal courts of appeals more burdensome, if it is applied retroactively, it will have a disproportionately adverse impact on the government's litigation. This is because one of the factors used to decide whether the government will seek further review of an adverse decision is whether the decision has been published.

A-72 (opposed, First Circuit). Because I anticipate that defense attorneys would be using them more than we would.

## c. More Work

Thirty-three attorneys observed that the ability to cite unpublished opinions would create more work for them. Most of these attorneys (24) opposed the proposed rule, four attorneys supported it, and five were neutral. In addition to the attorney comments compiled here, 17 other attorneys mentioned more work: attorney A-55 (supportive) (comment compiled under *1.a. More Authority*); attorney A-71 (opposed) (comment compiled under *1.b. Bias*); attorney A-97 (opposed) (comment compiled under *2.a. Strategy*); attorneys A-117 (opposed) and A-121 (opposed) (comments compiled under *2.b. Not Precedent*); attorney A-134 (opposed) (comment compiled under *2.c. Not Useful*); attorneys A-139 (opposed), A-143 (opposed), A-144 (opposed), A-145 (opposed), and A-147 (opposed) (comments compiled under *2.d. Poor Quality*); attorney A-163 (opposed) (comment compiled under *3.b. Less Accessible*); attorneys A-186 (supportive), A-191 (neutral), and A-192 (neutral) (comments compiled under *4.a. More*

*Consistency*); attorney A-207 (neutral) (comment compiled under 4.c. *Higher Quality Opinions*); and attorney A-211 (opposed) (comment compiled under 4.d. *Shorter Opinions*).

A-73 (supportive, Seventh Circuit). While it would add to research time, it would open up available arguments, especially for unsettled or changing areas of law, such as immigration. I would welcome the change.

A-74 (supportive, Tenth Circuit). More helpful to attorneys doing legal research. It will take longer, but be more useful!

A-75 (neutral, Tenth Circuit). The new rule would make my appellate work both more burdensome and less burdensome. Legal research would be more burdensome as I would feel compelled to search for relevant unpublished cases rather than limiting my research to published opinions. However, when dealing with novel legal issues or fact patterns it would be helpful to be able to freely cite to unpublished decisions, especially those from other circuits.

A-76 (neutral, Sixth Circuit). It would be helpful when such an unpublished opinion was favorable, but generally it would put a heavier burden on a practitioner when he did research to locate and distinguish all such decisions.

A-77 (opposed, Fourth Circuit). It would probably result in more frivolous motions and arguments. If we can freely cite unpublished opinions of all circuits many will make motions and objections that they would otherwise not have made. Many attorneys, especially those who practice criminal law, will feel they are duty bound to press matters only supported in unpublished opinions. Not to do so will leave them open to a section 2255 attack. The fact that the unpublished opinions are still not binding will not change this. The rule change sends a mixed message: the case is *not binding*, but you can cite it. But why cite if it's not binding? How will courts interpret this? I vote, no change.

A-78 (opposed, Sixth Circuit). In a very few cases with truly "novel" issues, it may well be helpful in directing the reviewing court to relevant legal reasoning applied in prior cases as to that unique question. However, the rule will have the unfortunate effect of opening the floodgates to a myriad of arguments (based on dicta, in many instances) premised on unpublished opinions relative to questions and issues not novel or unique that have been well settled in prior published opinions, thereby increasing the burden of drafting appellate briefs, particularly responsive briefs.

A-79 (opposed, First Circuit). Such a change would dramatically increase the time it takes to prepare a brief. I am an immigration attorney and, as the courts know, there are thousands of such cases pending at any given time, and thousands of unpublished immigration cases. Increasing my reason to include all of these cases—which would be the prudent course to take if both sides may cite them—would be unduly burdensome.

A-80 (opposed, Tenth Circuit). It might significantly increase research time, as I would be more inclined to search unpublished opinions for holdings on point. It would not significantly help my arguments because my circuit's rules already allow citation to unpublished opinions if it is the only authority on point. If there is a published case on point, I would not cite to an unpublished opinion anyway.

A-81 (opposed, Federal Circuit). It would increase the necessary time dedicated to legal research to locate previously uncited and non-precedential decisions as well as to locate and review the additional cases cited by the opposition. This additional research would likely increase the total cost to the client for preparing appellate briefs.

A-82 (opposed, Fourth Circuit). I would expect such a rule would result in attorneys citing unpublished opinions in an effort to change precedent. Thus, I would anticipate each brief would contain a section that would argue for a change in precedent, citing unpublished opinions for the reason for the change.

A-83 (opposed, Ninth Circuit). It will cause confusion and more work for attorneys, because in some cases unpublished opinions or the reasoning therein will be inconsistent with other unpublished opinions, and attorneys will have to spend time reconciling the cases.

A-84 (opposed, Ninth Circuit). It would require much more time to write each brief—given the sheer numbers of unpublished decisions—to ensure that you were not in conflict or overlooking something.

A-85 (opposed, Seventh Circuit). Would require additional research into hundreds more unpublished opinions. Would likely increase the time necessary to complete any given appeal.

A-86 (opposed, Federal Circuit). More time expended in briefing responses to citations to unpublished opinions by opposing counsel. No appreciable impact upon outcome of appeals.

A-87 (opposed, First Circuit). Would increase the universe of cases to find and read, create more work, and take longer to write and file briefs.

A-88 (opposed, First Circuit). It would make research take longer.

#### d. Already Reviewed

Seven attorneys said that they already review unpublished opinions, so the opportunity to cite them would not entail additional work. Six of these attorneys supported the proposed rule; one was neutral.

A-89 (supportive, Second Circuit). In considering my response to the survey, it is important to note that in my brief to the U.S. Court of Appeals for the Second Circuit, I cited one unpublished opinion of the Second Circuit using the Westlaw citation, and a second opinion of the Second Circuit that is reported in the *Federal Appendix*.

Because of the wide reliance on electronic libraries, “unpublished” opinions are equally as accessible as published opinions. Although unpublished opinions are not considered binding precedent, attorneys generally believe that they are nonetheless important as they provide a basis for at least a subtle argument for consistency by the court. Moreover, if the unpublished opinion is premised upon facts and circumstances very close to those presented by the attorney’s case, then the citation to the unpublished opinion is viewed as particularly appropriate. For an attorney preparing a submission, the use of unpublished opinions does not involve any additional work or research, as unpublished opinions necessarily come to the attorney’s attention during a Westlaw or Lexis computer inquiry.

From the practitioner’s standpoint, unpublished opinions provide an additional source of reference material. The writer hopes that the use of unpublished opinions will not be perceived by the judiciary as increasing its workload by necessitating an increase of effort and care in drafting unpublished opinions.

A-90 (supportive, Fifth Circuit). In theory, opinions are to be unpublished only when the result is in all respects clearly dictated by existing precedent. In practice, however, judges may have a tendency to use the unpublished opinion as a mechanism for results-oriented adjudications of a particular case, comfortable that the analysis in the opinion will not negatively impact the court’s jurisprudence more generally as it applies to other cases. If the national rule renders all opinions, published and unpublished, binding precedent, it should curb the tendency for such misuse of unpublished opinions. I would personally favor such a rule.

If the rule merely authorizes citation to unpublished opinions but leaves in place local rules regarding whether such opinions have precedential value, then in my estimation, the rule will have little impact, beyond obviously expanding the universe of cases that may be cited in briefs. Practitioners who research electronically (this is the exclusive method for all attorneys in my firm) are required to cull through unpublished opinions anyway, as they are included in the federal court of appeals databases of the major online research companies. So there should be no appreciable impact on research time. The rule would simply expand the range of cases that may actually be cited in briefs.

A-96 (supportive, Second Circuit). It would not make the work any more or less burdensome because most research is done electronically—pulling up both published and unpublished cases. It would, however, be beneficial to both the parties as well as the courts (I believe), because it would provide more reasoned decisions from which to draw from, especially in areas where there are few cases on point. While of course not precedential, additional reasoning is always helpful.



A-97 (supportive, Tenth Circuit). I believe it would allow for better-reasoned arguments and greater intellectual honesty. Unpublished opinions are readily available on Westlaw and Lexis/Nexis, and I read them, even though I cannot cite to them. The work level for me is therefore the same, but it may be a disservice to my client and the court not to be able to point out to the court that a comparable fact pattern had a certain outcome.

A-98 (supportive, Fifth Circuit). I support the change as proposed. Attorneys in the Fifth Circuit cite them frequently, particularly in cases involving novel issues. Work would be a little less burdensome if we did not have to attach them to the brief.

A-99 (supportive, Federal Circuit). It will be good because many lawyers cite to unpublished opinions anyway and footnote a justification for doing so.

A-100 (neutral, Tenth Circuit). I do not believe it would have a significant impact on my work. To some extent it would make research slightly less frustrating because I would not come across cases that I would be unable to cite.

## *2. The Usefulness of Unpublished Opinions*

Many attorneys commented on how unpublished opinions are used. Four attorneys discussed strategies for using unpublished opinions even when it is not permissible to cite them. Twenty-six attorneys observed that unpublished opinions are not precedents, which implies that they would not be very useful. Another 16 attorneys provided additional comments calling into question the usefulness of unpublished opinions as authorities. Fifteen attorneys opined that unpublished opinions tend not to be of as high quality as published opinions in their drafting, but one attorney said that their quality is good.

### *a. Strategy*

Four attorneys mentioned strategies for bringing unpublished opinions to the attention of the court when they are not permitted to cite them directly. Attorney A-96 said that an attorney can cite a decision that the unpublished opinion reviewed so that the citation to the unpublished opinion appears as part of the subsequent history of the cited decision. Attorneys A-97 and A-98 suggest that attorneys can simply incorporate the argument of unpublished opinions without citing them. Attorney A-99 wonders if this would be plagiarism.

Two of these attorneys supported the proposed rule, one was neutral, and one opposed it.

A-96 (supportive, District of Columbia Circuit). It will have a positive impact, insofar as it will allow litigants to point to the actual case that contains the language on which they want to rely. As it stands now, we cite to the lower court or agency decision and add the “enforced” citation (unpublished) in hopes that the court or clerks will read the unpublished appellate citation. This is a ridiculous way to get these citations to the court’s attention, especially when the lower court or agency decision, which was published, does not really contain language directly on point, but the unpublished appellate decision does. Appellate courts respect other appellate courts, even if the precedent is not binding, but without the ability to cite directly to an unpublished appellate decision, we are left with having to cite to a district court or agency opinion which, even if published, is not as persuasive as a decision by an appellate panel. (I have not addressed unpublished district court decisions because they just do not come up much in my practice (labor), because district courts do not deal with labor issues, and because these questions seem geared to unpublished appellate decisions.) Also, speaking from my clerking experience at the district court level, there were many cases in my circuit in which the appellate court had essentially announced or decided a new rule, but had not published it, for some unknown reason. Given that there is no requirement that courts explain why they do not publish a decision, and given that there’s no standard for what to publish or not, the rule against citing to unpublished decisions seems unfairly arbitrary.

A-97 (opposed, District of Columbia Circuit). I believe that the proposed rule would make the preparation of appellate briefs somewhat more burdensome. It would also impose an ethical duty on counsel to check unpublished opinions, for which counsel would have to absorb the additional time or costs if not passed on directly to the client. This invites citation to any unpublished opinion, whether specifically provided for by rule or not. In my opinion, counsel should simply incorporate the argument of such unpublished authority. If the logic is persuasive, it matters little whether it originated with another court or the parties’ lawyers. The burden of the proposed rule outweighs the benefits.

A-98 (neutral, Federal Circuit). On occasion, I have found that the most relevant case is unpublished. In those circumstances, we tend to follow the reasoning, without citation to the unpublished opinion. In those instances, I would still present my appellate argument in a similar fashion but would also cite the unpublished opinion to show that the reasoning had previously been considered and accepted by the court. I would still search for the most relevant published opinion because binding precedent is more persuasive.

A-99 (supportive, Eleventh Circuit). The proposed rule change seems directed to circuits that publish their unpublished decisions on Westlaw

and Lexis but then do not allow the cases to be cited. My circuit, the Eleventh Circuit, does not make its unpublished decisions available on Westlaw or Lexis, but allows attorneys in the circuit to cite unpublished decisions. So, in some circuits, you can read the cases but not cite them. Here, you can cite them but not read them.

[Footnote added by attorney:] It is worthwhile to note the unfairness of this. Attorneys who practice in Atlanta, who can pick up hard copies of unpublished cases in the clerk's office, and government attorneys, who are always counsel of record in federal criminal cases and get copies of every unpublished criminal case, have access to and can cite unpublished circuit cases the rest of us do not know exist.

So the proposed rule change would have little impact in the Eleventh Circuit until the Eleventh Circuit makes its unpublished decisions readily available online. In general, the proposed rule may increase citation of unpublished decisions, but not significantly. The block-lettered warning that appears atop unpublished cases on Lexis and Westlaw has a chilling effect that may wane if the rules limiting citation of those cases are eliminated, but attorneys will still prefer to cite cases with precedential value. I can cite unpublished cases from other circuits freely now, but I do it only one or two appeals each year.

That being said, I feel strongly that when I find good arguments that may help my clients I should make them, regardless of whether I find the arguments in published or unpublished cases. Rules that prohibit citation to unpublished cases must create a bit of an ethical dilemma for attorneys in circuits that have them. When those attorneys find good arguments in unpublished cases, I wonder: do they (1) ignore them, (2) make the arguments without acknowledging their sources (and thereby commit plagiarism), or (3) cite the cases in violation of the circuit rules?

## **b. Not Precedent**

Twenty-six attorneys observed that it is well understood that unpublished opinions are not binding precedents in the way that published opinions are. Five of these attorneys were supportive of the proposed rule, 10 were neutral, and 11 were opposed to it. In addition to the attorney comments compiled here, three other attorneys reminded us that unpublished opinions are not precedent: attorney A-158 (neutral) (comment compiled under 3.a. *Accessible*); attorney A-211 (opposed) (comment compiled under 4.d. *Shorter Opinions*); and attorney A-216 (opposed) (comment compiled under 4.f. *Delay*).

A-100 (supportive, Third Circuit). I would appreciate a rule permitting such citation as long as it was clear that those cases could not be offered for any precedential value. Often unpublished cases lack strong analysis (or any analysis) of a given issue. As a result, they are not "worth"

much. Every once in a while, however, they provide helpful analysis which could help judges form their opinions. Such a rule would not necessarily create more work for me, but I could see judges having to work harder if they feel compelled to actually read unpublished cases cited in the parties' briefs.

A-101 (supportive, Tenth Circuit). If the rule does not change the fact that unpublished decisions are not binding precedent, I think the new rule would have no impact. I prepare a lot of appeals, and unpublished decisions can be very useful if they are very close to the facts of your case or the number of similar unpublished decisions is significant for some reason. I regularly cite to them, and their use does not affect my work, because all my research now is done electronically.

A-102 (supportive, Ninth Circuit). I believe that this would make the writing of briefs easier. I am not sure that the rule would have a great impact on the decisions of the courts, as they would not view unpublished decisions as precedent. On the other hand, to the extent that judges are able to get more information, including a clearer picture of what has happened at the administrative level, reference to unpublished decisions could make a difference.

A-103 (supportive, Third Circuit). I personally favor the proposed rule, but do not believe it would have a great impact. A good lawyer cites precedential opinions where possible. If there is no published authority on a particularly obscure point, however, why should the parties and the court not have the benefit of looking at how a different court or panel approached the issue, even if it is not precedential?

A-104 (supportive, Tenth Circuit). As long as these opinions continue to lack value as precedent, I do not think such a rule would be unduly burdensome. It is helpful to practitioners to cite unpublished opinions for persuasive authority, and I would think it would be helpful to members of the court to know the results reached by their colleagues.

A-105 (neutral, Eleventh Circuit). I think it might be useful to cite to the facts of unpublished opinions and how the court issuing the unpublished opinions applied the existing case law to the facts of the particular case. This would be for illustration purposes only. I cannot really envision the citation to unpublished opinions being of much help in light of their non-binding nature. Other than to illustrate how an appellate court analyzed a case, I see little use. However, I do not have a significant appellate practice at the present time and do not have a great deal of appellate experience compared to many practitioners.

A-106 (neutral, Eleventh Circuit). I do not believe it would have much of an effect on my work, nor on my colleagues', since we are currently permitted to cite unpublished decisions. The hesitancy in citing such deci-

sions stems from their lack of binding effect, a circumstance that will not be affected by the proposed rule change.

A-107 (neutral, Seventh Circuit). If such an opinion were favorable it might be useful by analogy. But if not binding as precedent, the fact that unpublished opinions could go either way would make the process very burdensome, especially if they are not Shepardized.

A-108 (neutral, Ninth Circuit). Allowing citation to all opinions would make formulating arguments easier in many cases, but would not necessarily make the arguments any more persuasive if unpublished opinions remain without binding precedent authority.

A-109 (neutral, Fifth Circuit). I would resort to unpublished opinions only in the event of a total lack of supporting precedent in published opinions and then only to provide the court guidance in the instant case.

A-110 (neutral, Seventh Circuit). The courts will take notice of such unpublished opinions, but if such opinions are not binding precedent, there will not be much influence on legal opinions and courts' decisions.

A-111 (neutral, District of Columbia Circuit). Very little, because such opinions still hold no precedential weight. It will only encourage showboating by legal nerds who want the court to know that they know some law.

A-112 (neutral, Federal Circuit). Not a significant impact because I believe that the federal appellate courts will continue to follow the *stare decisis* with respect to published decisions only.

A-113 (neutral, Eleventh Circuit). Unless the unpublished opinions have some precedential value the rule change would probably have minimal impact.

A-114 (opposed, Fifth Circuit). As a civil and criminal appellate attorney with experience in both the private and government sectors, I can honestly say there is already enough abuse with citation of cases. The use of unpublished cases would make this situation worse. The Fifth Circuit's rules already allow for the citation of unpublished opinions in certain appropriately limited circumstances. As a former intermediate appellate staff attorney, I also believe that courts should have the right to shield certain decisions from use as precedent. It is part and parcel of the percolation effect for legal issues and the occasional need for decisions based solely on the facts of a particular case. In short, allowing citation to all opinions would have a negative impact on the appellate process and would lead to further abuses on briefing. I oppose such a rule.

A-115 (opposed, First Circuit). The decision of a court to publish or not publish a particular adjudication of an issue or a case is usually tied to their intent of it having prospective generalized application. For one reason or another, a judge may dispose of an issue or a case in a manner that pro-

notes judicial management, but without pretension to precedent; and that distinction is usually reflected in the decision to publish or not. If an unpublished opinion has no precedential value, it should not be relied upon by a party; if it does, it should be published. I do not fathom the logic of the recommendation.

A-116 (opposed, District of Columbia Circuit). Citing to unpublished opinions, which have no precedential value, would seem to complicate the task of the brief writer. Why cite opinions that have no binding effect? The case for which I was attorney of record was an OSHA case. The OSHRC has promulgated rules providing that ALJ decisions can be cited but have no precedential value. As a result, I devote substantial time agonizing over whether or not to cite to such decisions, which can be disregarded by the OSHRC. To me, the real issue here is the policy reasons underlying unpublished opinions.

A-117 (opposed, Sixth Circuit). The diligent practitioner would feel a need to consider the universe of unpublished opinions, increasing the time spent on an appeal. Even with the assistance of computers, that time could prove considerable in some cases at least. Yet the unpublished opinions would have no binding effect (as question 5 above indicates). Therefore, the practitioner would wonder about the utility of the additional work while also feeling obligated to engage in the work. Thus the impact could prove more negative than positive and a source of frustration.

A-118 (opposed, Tenth Circuit). There is a reason unpublished opinions are not cited in the official reporters. It seems that allowing attorneys to cite to unpublished opinions would simply inject more uncertainty into the already uncertain business of interpreting case law. Moreover, practically speaking, judges will probably accord less deference to unpublished opinions, thereby making their use of little real value.

A-119 (opposed, Ninth Circuit). As long as the unpublished opinions remained non-binding, it would seem that the effort in using the unpublished opinions would be somewhat wasted. Either they should mean something (and I do not think they should), and that would make it worth citing and replying to the unpublished opinions, or they should not mean anything and therefore should not be cited to.

A-120 (opposed, Fifth Circuit). Such references would unnecessarily clutter the appellate briefs and divert the parties' attention from the published opinions that control the issue under review.

A-121 (opposed, Third Circuit). It would be much more burdensome to have to respond to and distinguish cases of no precedential value.

A-122 (opposed, First Circuit). Generally, if the unpublished decisions are not going to have precedential value, why bother?

### c. Not Useful

Sixteen attorneys observed that unpublished opinions generally are not useful. Most of these attorneys (nine) were neutral concerning the proposed rule, six opposed it, and one attorney supported it. In addition to the attorney comments compiled here, two other attorneys mentioned that unpublished opinions are seldom useful: attorney A-138 (opposed) (comment compiled under *2.d. Poor Quality*); and attorney A-213 (opposed) (comment compiled under *4.e. Longer Opinions*).

A-123 (supportive, First Circuit). I think the impact would be modest. The case law in my practice area (energy law) is fairly well established, and there are very few instances in which I would find unpublished case law to be applicable. That said, the proposed rule would be helpful in those rare instances in which I could cite to an unpublished opinion.

A-124 (neutral, Eighth Circuit). The impact would be to essentially replicate briefing methods currently utilized in the local district court, where unpublished opinions appear to be routinely cited regardless of the court issuing the opinion. Any additional burden would fall most heavily on the judges and law clerks of the court of appeals who would be required to review the significantly greater number of cases made available for citations. Given the rather perfunctory legal analysis of most unpublished opinions, many of which are cited only because the opposing party is also utilizing unpublished opinions, it seems doubtful that much of significant value would be added to appellate briefing by a new rule on this issue.

A-125 (neutral, Third Circuit). None. I have rarely found unpublished court of appeals cases helpful. My experience is that unpublished opinions are unpublished for a reason; i.e., either there is nothing remarkable about the case or the opinion is not worthy as precedent. Allowing citation of unpublished cases of lower courts, however, could be helpful. In many states, court of chancery opinions are generally unpublished, but oftentimes are the only opinions available discussing corporate law.

A-126 (neutral, First Circuit). It strikes me as silly that unpublished opinions are readily available on Westlaw but cannot be cited. Nevertheless, only very seldom is an unpublished opinion critical. In most instances the published opinion is more fully explained than an unpublished one and thus more helpful.

A-127 (neutral, Seventh Circuit). I do not believe that permitting the citation of unpublished opinions would have an appreciable impact, because the occasions where I have wanted to cite such a decision have been so few.

A-128 (neutral, Fourth Circuit). No significant impact. There are enough published cases already. Cases are unpublished for a reason, and I expect few unpublished cases will find their way into appellate briefs.

A-129 (neutral, First Circuit). None. Usually the unpublished opinions are cases where the facts or factual scenario have been already resolved under controlling and binding published opinions.

A-130 (neutral, Eleventh Circuit). Very little. In my circuit, I attempt to cite the binding precedent on each issue, and I cannot ever remember this being an unpublished opinion.

A-131 (neutral, Second Circuit). The impact would be very minimal as unpublished opinions deal with basic hornbook issues.

A-132 (neutral, Eighth Circuit). None. There are plenty of published cases on which to rely.

A-133 (opposed, Federal Circuit). A few appellate lawyers will advance extremely broad interpretations of the law, based upon unpublished decisions. These arguments will be tedious to rebut. The problem lies in the circuits' rationale for unpublished decisions: that they do not break new legal ground. It is but a short step from that premise to the argument that unpublished decisions are next-best-to-precedential, because, by definition, they (merely) reflect a panel's reading of existing law. This would inevitably encourage lawyers to make use of the ambiguity and place great emphasis upon unpublished decisions that are helpful to the clients, while acknowledging in lip service that the unpublished decisions themselves do not control.

A-134 (opposed, Second Circuit). I would spend additional and significant time searching through unpublished decisions. I guess they would remain as terse as they are now. Thus, it would be difficult to discern whether the cases are factually similar, as many unpublished decisions are fairly light on the facts. The judges might spend more time on the unpublished decisions (i.e., give more information and explanations). I take it on faith that the unpublished decisions do not add anything new to the law. However, I have seen a few that really were significant and deserved greater exposition.

A-135 (opposed, Tenth Circuit). Except in rare instances, the need for citation to unpublished opinions is non-existent. The Commissioner of Social Security, however, uses them frequently. The Tenth Circuit, disturbingly, has begun citing as authority the unpublished opinions of other circuits. There is usually a reason that opinions are not published. Permitting citation to unpublished opinions from other circuits would be a mistake.

A-136 (opposed, Tenth Circuit). In the Tenth Circuit and in the field of immigration law there appear to be few unpublished cases that do anything but reiterate published decisions. I do not feel that it would make much difference to my practice.



#### d. Poor Quality

Fifteen attorneys observed that unpublished opinions are not drafted with the same degree of care as published opinions. Most of these attorneys (12) opposed the proposed rule; three were neutral. In addition to the attorney comments compiled here, two other attorneys expressed concern about the quality of unpublished opinions: attorney A-208 (neutral) (comment compiled under 4.c. *Higher Quality Opinions*) and attorney A-239 (neutral) (comment compiled under 5.c. *Should Be Precedent*).

A-137 (neutral, District of Columbia Circuit). None, though I've found generally that unpublished opinions are less detailed and less thorough than published opinions, and therefore, less useful for appellate work.

A-138 (opposed, Eleventh Circuit). In my opinion, having a federal rule allowing the citation of unpublished opinions would have a negative impact on appellate practice. My basic understanding is that if an appellate decision establishes a new rule of law or applies an established rule in a different way or to significantly different facts, the court will, and must, publish the opinion. Unpublished opinions are thus only issued when prior precedent applies directly to the issues raised. They give the parties a reason for the ruling, but do not establish new precedent. It is reasonable to conclude that courts will generally pay closer attention to the language and reasoning of published decisions because they establish precedent.

My fear is that having a federal rule allowing the citation of unpublished opinions will improperly give greater weight to unpublished decisions that may not have gone through the rigors imposed on precedent-producing decisions. There is irony in the case for which I was selected to participate in this survey. That case directly illustrates the dangers of reliance on unpublished decisions. The appeal raised the issue of whether attempted illegal reentry was a specific intent offense. The Eleventh Circuit had ruled in a published opinion that it was not. But that decision did not offer any legal reasoning and merely adopted the reasoning of an unpublished decision from another circuit. However, a close look at that unpublished decision suggests that the other circuit was dealing with a case of illegal reentry and not attempted illegal reentry. The problem was that the unpublished decision was not clear. In fact, the other circuit later issued a published opinion contrary to that of the Eleventh Circuit. Thus, reliance on an unpublished decision resulted, in my opinion, in bad precedent that has yet to be corrected. If anything, I would hope that reliance on unpublished opinions would be lessened and not encouraged.

A-139 (opposed, District of Columbia Circuit). I think it will require counsel to invest unnecessary effort in reviewing, digesting, and distinguishing earlier decisions that were the result of poor advocacy.

In my view, there are two legitimate reasons for making a ruling (and its reasons) non-precedential: First, that the case calls for the application of

well-settled rule to facts that are either peculiar (in this category should fall many sufficiency-of-evidence issues), have already arisen in a published case, or are simply too clear to cause any reasonable dispute. Second, that the case has been so poorly litigated that the court cannot be sure that the resulting decision will be of any value to anyone other than the parties.

Citations to each class of unpublished decision give rise to a different kind of burden. Fact-bound cases make for either difficult or merely duplicative reading. In the former case, opposing counsel must engage in the tedious task of distinguishing the facts; in the latter case, of organizing the various repeated factual patterns into categories, and then distinguishing them as a group.

On the other hand, cases that are poorly litigated often lead to troublesome decisions, for the simple reason that the court is not well advised as to all the possible arguments. The court's resolution was no doubt correct as to those parties because the arguments not made are necessarily waived; the court cannot decide what was not presented to it. However, the decision on the facts presented (excluding the defaults of advocacy) may not be correct as a general legal proposition. If such decisions may be cited—even for merely persuasive value—opposing counsel will be required to show why the decision is not persuasive; that is, that one or more crucial arguments were omitted in the earlier case. Assuming the prior unpublished decision is not unduly lengthy or complicated, the burden would not be tremendous, however, because those arguments would have to be made in the case at hand in any event.

A-140 (opposed, Eleventh Circuit). I disfavor allowing the citation of unpublished decisions. Generally, unpublished decisions are short memorandum-type opinions with hardly any factual discussion or legal analysis. Therefore, citing to these cases should contribute little, if anything, in the adjudication of a notice of appeal. To the contrary, it might make writing a brief more burdensome for appellees. Appellants with questionable claims could be encouraged to rely excessively on seemingly similar unpublished decisions in support of their arguments. If this rule is approved, it should at least be limited to those cases where there is no precedential case law on the matter before the court, and where no other circuit court has published an opinion addressing the issue.

A-141 (opposed, Sixth Circuit). I personally like to think that the circuit courts put more thought into their published opinions than their unpublished opinions. As such, I think citations to unpublished opinions may contribute to bad precedent—as circuit courts might be reluctant to overrule cited unpublished opinions, which though bad are on point. I would hate for the U.S. Attorney's Office to be able to cite the opinion in my case. I believe it was thoughtless and rushed and overly deferential to the dis-

strict court judge who, I believe that both parties would concede, was not even on point.

A-142 (opposed, District of Columbia Circuit). I think it is a terrible idea. Unpublished opinions are not as developed, either factually or legally, as are published decisions, and they will become precedents although they have not received the same care as published opinions. They are often drafted by staff attorneys, not even by the judges' own clerks. The only good thing about a national rule is it would be better than all the individual rules now outstanding, but I still think the whole concept is a bad idea.

A-143 (opposed, District of Columbia Circuit). There is already ample published authority. The new rule would result in having to distinguish or otherwise argue against all kinds of unpublished orders, opinions, etc., which would be more burdensome on attorneys and the courts. It might hurt the quality of the briefing and writing. Judges, clerks, and attorneys may get distracted by opinions and orders that were never intended for publication or citation, and that could only harm the entire process.

A-144 (opposed, Second Circuit). I believe such a rule would be ill-advised, because of the number and nature of unpublished opinions available online. Research would take considerably longer and raise client costs, without producing a superior product. Many unpublished opinions are not very well written, which could lead to mischief—namely, someone citing them in an effort to distort the law. I oppose the new rules.

A-145 (opposed, Tenth Circuit). I believe that often unpublished opinions are not as carefully crafted or thought out as published opinions, so the use of unpublished opinions should be limited. Further, the sheer number of opinions issued by the courts of appeals every year would make my work more burdensome if the rules were made more lenient.

A-146 (opposed, Eleventh Circuit). I believe the net effect of such a new rule will be negative. Published opinions are more carefully written than unpublished. Some of us who regularly do appellate work find a cacophony of voices in the law now. Unpublished opinions will only add to the discordant effect.

A-147 (opposed, Fourth Circuit). Increase citations in briefs and require responses to unpublished opinions cited in opposition's brief. Main concern is that unpublished opinions are often unpublished due to a quirk in the record not apparent in the opinion and could result in dubious precedent.

A-148 (opposed, District of Columbia Circuit). It worries me. I am concerned that, in the past, unpublished opinions may have been issued with the understanding that they would not be precedent. To allow the citation of these opinions may confer more weight on them than they were intended to carry.

A-149 (opposed, Ninth Circuit). I would expect some courts to make unpublished opinions less available to the public. Responding to arguments based on unpublished opinions will be difficult because it is often difficult to discern the factual basis for an unpublished decision.

#### e. Good Quality

One attorney remarked that unpublished opinions are actually of good quality. This attorney supported the proposed rule.

A-150 (supportive, Sixth Circuit). Since these cases are now readily available to practitioners in this age of computer research, I think it is reasonable to allow their citation. The court has to apply the same careful legal reasoning in reaching its decision, whether published or unpublished, so I see no reason not to allow citation of unpublished as well as published decisions.

### *3. Access to Unpublished Opinions*

A strong historical reason for restricting citation to unpublished opinions was the fact that many attorneys did not have easy access to them. But now that so many unpublished opinions are available electronically from attorneys' desktops, this reason appears to have less force. Twelve attorneys mentioned how accessible unpublished opinions are now, but 15 attorneys said that unpublished opinions are still often less accessible than published opinions.

#### a. Accessible

Twelve attorneys observed that in this electronic age, unpublished opinions are now quite accessible, much more accessible than they were when proscriptions on citing unpublished opinions were put in place. Most of these attorneys (nine) were supportive of the proposed rule; three were neutral. In addition to the attorney comments compiled here, three other attorneys mentioned that unpublished opinions are now very accessible: attorneys A-89 (supportive) and A-92 (supportive) (comments compiled under *1.d. Already Reviewed*); and attorney A-132 (supportive) (comment compiled under *2.e. Good Quality*).

A-151 (supportive, Third Circuit). Given the advancements in electronic case research and the wide availability of many unpublished dispositions on government and commercial electronic case research services, I believe that relaxation of the current rules on the citation of unpublished opinions would, in general, prove beneficial. In addition, I believe that promulgating a uniform rule concerning the use of unpublished opinions in the federal courts of appeals would have a positive spillover effect on

lower courts. I, from time to time, have encountered disparate views even among judges within the same court concerning the utility of unpublished opinions. Presumably, a uniform rule in the federal court of appeals would encourage lower courts to follow suit.

A-152 (supportive, First Circuit). Since these decisions are readily available, although technically “unpublished,” they should be available for citation without changing their status as precedent. In practice, I have found that these cases are often cited notwithstanding the current rule, especially in areas where there is little other case law. A change in the rule would obviate the need to argue both that the citation to the case was improper, and then address the case on its merits. In fact, that occurred in the subject appeal when opposing counsel cited an unpublished California case in violation of California court rules. It does not make sense to pretend these cases do not exist, when they are readily accessible.

A-153 (supportive, Sixth Circuit). I fully support the more liberal approach to citing unpublished opinions. With computer-assisted research, there is no appreciable difference in research time. Including unpublished opinions with briefs might be a little more burdensome.

A-154 (supportive, Tenth Circuit). We would have more guidance on issues that have often only been fully addressed in unpublished opinions. With computerized research, it would be easy for the practitioner to locate the same.

A-155 (supportive, Sixth Circuit). A positive impact. No reason any more to limit citation to only published opinions. “Unpublished” opinions are available in computer research libraries.

A-156 (supportive, Third Circuit). It would be beneficial and is long overdue. Today, most lawyers are aware of the unpublished decisions and it makes sense to allow their use.

A-157 (neutral, Sixth Circuit). I think the impact would be minimal. Given the availability of unpublished opinions on electronic databases, most researchers, including the court personnel, know of the holdings in unpublished opinions, so the reasoning and ultimate decisions in unpublished cases are often reflected in final decisions of courts. Citation to unpublished opinions simply would reflect the reality of today’s research capabilities. Preference should still be for published opinions if available.

A-158 (neutral, District of Columbia Circuit). I expect that the impact would be minor: (1) unpublished opinions are available on Westlaw, so accessibility of unpublished opinions should not be a significant problem; and (2) an appellate court would probably continue to give more weight to a published opinion, even if the rules permitted citation to unpublished opinions (although an appellate court might give significant weight to an unpublished opinion if it involved one of the very litigants then before the court).

A-159 (neutral, Eighth Circuit). More extensive research required equals minimal impact, given computer research methods.

An informal survey of six other attorneys in our office revealed about an *even split* on the desirability of having unpublished opinions to be citable or precedent.

## b. Less Accessible

Fifteen attorneys said that unpublished opinions are not always as accessible as published opinions, at least not to everyone. Most of these attorneys (12) opposed the proposed rule; two were supportive; one was neutral. In addition to the attorney comments compiled here, three other attorneys remarked that unpublished opinions are less accessible than published opinions: attorney A-99 (supportive) (comment compiled under 2.a. *Strategy*); attorney A-210 (opposed) (comment compiled under 4.d. *Shorter Opinions*); and attorney A-219 (supportive) (comment compiled under 5.a. *Accountability*).

A-160 (neutral, Third Circuit). Realistically, I do not know that it would have much of an impact; however, I believe such a rule may have the opposite effect to the one presumably intended. I presume the intended effect would be to open the court's consideration to those diverse opinions it would, under the present status of procedure, otherwise dismiss. While this intent is laudable, I believe it ignores the problem of open access to opinions. Not to attorneys, mind you, as they have resources available for ready access to unpublished opinions. Rather, the non-attorney, to whom these courts are open and for whom these courts truly operate, would be prejudiced as he or she does not have (or may not have) such resources available. Now, a non-attorney may visit his or her local courthouse and retrieve all published opinions. Would he or she be able to retrieve all unpublished opinions there as well? If not, is that person truly better off being able to cite cases he or she cannot find?

A-161 (opposed, Eleventh Circuit). I think that such a rule would have minimal impact on my practice, but might not be a good idea generally. In my circuit, unpublished opinions are not available on Westlaw and not published for a reason. Although they can be useful in limited situations, in busy circuits such as ours, unpublished opinions dilute the body of law as a whole and should not be more widely used. I am not sure of the practices in other circuits but do know that many circuits do not publish much and therefore unpublished opinions are cited more. A more permissive rule might disincentive publication.

A-162 (opposed, Tenth Circuit). I have not seen this proposed rule. Nevertheless, unless the unpublished opinions of every circuit are readily available and easily accessible for all lawyers via available legal research methods, it may make it difficult for some attorneys to compete. If the rule

still requires that copies of unpublished opinions must be attached to the briefs, it will make the briefs and appendix more lengthy, requiring more paper, copying time, and scanning time for electronic filing.

A-163 (opposed, Fourth Circuit). One practical problem I foresee is that the major providers—Lexis and Westlaw—do not always have the same catalogue of unpublished decisions. That has come up in trial court briefing—research cited on Westlaw by the other party was not retrievable on Lexis. That is what I see as the main pitfall of such a rule. A second problem is just that extra time needed to research other circuit's unpublished decisions. That is not hugely burdensome, but would be an effect.

A-164 (opposed, Sixth Circuit). It would reward practitioners with access to unpublished materials and penalize those without.

It is fundamentally unfair for one side to have access to law that the other side does not have.

This attempt to “liberalize” rules is really just a way to undermine the rule of precedent.

It smacks of the unprincipled disregard for law that permeates the Bush administration!

No! No! A thousand times no! And I mean it!

A-165 (opposed, District of Columbia Circuit). In my field—Freedom of Information Act litigation—and with the limited resources of an attorney who does not have access to Westlaw or Nexis, I would expect this to benefit the government, which has the capacity to comb all courts for unpublished decisions favorable to it, something I cannot do.

A-166 (opposed, Eighth Circuit). It would make brief writing and legal research more difficult for sole practitioners and lawyers from another circuit appearing in those circuits, like me. I appeared in the Eighth Circuit, but my “home” circuit is the Eleventh Circuit. Having to locate unpublished opinions would be difficult.

A-167 (opposed, First Circuit). Attorneys without ready access to Lexis or Westlaw would be burdened by this rule. Additionally, considering that even attorneys who do have access normally pass the cost of computerized research on to their clients, the proposed rule will result in increased costs.

A-168 (opposed, Second Circuit). Am simply concerned about access to those unpublished decisions that are (1) not my own and (2) not available through the various reporting services we have access to (limited funds for access to comprehensive reporters).

A-169 (opposed, Third Circuit). It would be unfair to litigants whose attorneys do not have the resources to discover unpublished opinions. It unbalances what I believe is a level playing field.

A-170 (opposed, Eighth Circuit). Without having Westlaw or Lexis, I might be at a disadvantage, because I might miss a case that my opponent has access to.

A-171 (opposed, Tenth Circuit). It would make it more difficult for those who have no electronic research subscription.

#### *4. Impact on the Court*

Many attorneys commented on what impact on the court and the law the ability to cite unpublished opinions might have. Twenty-six attorneys predicted an increase in legal consistency, but three attorneys predicted a decrease in consistency. Seventeen attorneys predicted that unpublished opinions would improve in quality if they could be cited. Three attorneys, on the other hand, predicted that unpublished opinions would just get shorter, and two attorneys predicted that they would get longer. Five attorneys predicted that cases resulting in unpublished opinions would take longer to resolve.

##### *a. More Consistency*

Twenty-six attorneys predicted that their ability to cite unpublished opinions would result in more legal consistency. Most of these attorneys (23) supported the proposed rule; three were neutral. In addition to the attorney comments compiled here, five other attorneys mentioned that the ability to cite unpublished opinions could result in more legal consistency: attorneys A-197 (supportive), A-199 (supportive), A-202 (supportive), and A-205 (supportive) (comments compiled under *4.c. Higher Quality Opinions*); and attorney A-215 (neutral) (comment compiled under *4.f. Delay*).

A-172 (supportive, Eleventh Circuit). I would expect a positive impact from such a rule in terms of promoting uniformity among and between panel decisions issued by the various courts of appeals, at least within the same circuit. In fact, I recently encountered a case decision in my circuit where it would have been extremely beneficial for a subsequent panel to have been exposed to and provided with a prior panel decision, both in terms of consideration of the prior panel's reasoning and ultimate decision by the new panel and, from a practitioner's standpoint, understanding and reconciling the subsequent panel's published decision with the predecessor panel's unpublished decision. In that case, the published decision clearly conflicts with the earlier rendered unpublished decision, but there is no evidence that the panel rendering that opinion had any opportunity to consider the fact that an earlier panel of the same court had reached a very different (and dispositive) conclusion on the same issue it was considering. Such a result is neither desirable from a consistency standpoint, nor does it instill confidence in the value of the decision. In my opinion, it would have



been far more preferable for the subsequent panel to have had the opportunity to read and consider the prior unpublished panel decision before rendering its decision and to, thereafter, either adopt that earlier panel's reasoning, or to discuss why that prior decision was inapposite to, distinguishable from, or simply wrongly decided in terms of how it related to the new case under consideration by the court. It appears that the proposed rule change would permit such, and I would consider that to be far preferable to the "blind" manner in which the decision arose in the example I have cited above.

A-173 (supportive, Fourth Circuit). It would enable federal appellate attorneys to offer courts more support and authority for the positions they take. It would foster greater consistency of decisions in each circuit. It would enable each circuit to see what issues may warrant more published decisions if the parties routinely are forced to cite only to unpublished decisions because of a dearth of published decisions. It would enable attorneys to demonstrate that the positions they take are based on the court's own rulings and not simply fashioned out of whole cloth.

A-174 (supportive, Federal Circuit). In my experience, I have had to relitigate issues previously decided in unpublished opinions. Permitting citation to such opinions might reduce the need to relitigate issues by discouraging the filing of appeals or by enabling settlements. Otherwise, I do not see a rule that simply allows citation of unpublished, non-precedential opinions having much impact, aside from saving me the trouble of figuring out what rule applies in the circuit, i.e., the general benefit of uniformity for those of us who practice in all 13 circuits.

A-175 (supportive, Eleventh Circuit). The rule change would be desirable inasmuch as abundant non-precedential material is presently cited without restriction. If the new rule allows citation by reference to a national electronic database such as Lexis or Westlaw (without attaching a copy), it will make practice easier. Attorneys should be free to argue to a court what it or other courts have done in other cases. Otherwise courts are able to conceal and disregard questionable and inconsistent dispositions.

A-176 (supportive, Third Circuit). I expect a rule permitting citation to the courts of appeals' unpublished opinions would be beneficial to the parties and the court insofar as such a rule would provide for the broadest consideration of issues relevant to any given appeal and also would help ensure consistency and fairness, two central goals of any system of justice.

A-177 (supportive, District of Columbia Circuit). It would assist counsel in the rare case in which the only cases on point (or nearly the only cases on point) are not published. It also would result in a fairer judicial process that—by eliminating the second-class status of unpublished decisions—would likely yield more consistent judicial decision making.

A-178 (supportive, Federal Circuit). I think it is a good idea, which will, among other things, promote uniformity in results. Unpublished decisions reached their results by application of case law. That result is worth studying in future cases and thus worth citing, even if it is only of the “it is what it is” variety.

A-179 (supportive, Eighth Circuit). I think it would be useful, if for no other reason, as a guide or reminder to the court of what has been done in prior cases. The court will determine to what degree, if any, an unpublished opinion could provide guidance in a particular case.

A-180 (supportive, District of Columbia Circuit). It would enable attorneys, in some cases, to learn about, and to cite, cases, making the court’s precedents more consistent and coherent, and might focus the court’s use of precedent in a constructive way. I do not see a downside.

A-181 (supportive, Fifth Circuit). It would allow for quicker review as law is being developed and interpreted. It might prevent multiple re-argument of issues that have been considered and make it somewhat easier and quicker to explain arguments.

A-182 (supportive, Eleventh Circuit). I screen out cases that are unpublished that might be useful before looking at them. Citations to unpublished opinions would lead to greater uniformity within the circuit panels.

A-183 (supportive, First Circuit). It might require more internal consistency intra-circuit. Therefore, it may accentuate diverse and different positions within the circuits.

A-184 (supportive, Third Circuit). The proposed rule would promote consistency within the circuit and especially within the trial courts (district courts) within the circuit.

A-185 (supportive, First Circuit). Helpful to be able to cite unpublished opinions, particularly in those circuits where the panels’ views vary (e.g., the Ninth Circuit).

A-186 (supportive, Eighth Circuit). It would make brief preparation moderately more expensive, but would promote consistency and better development of the law.

A-187 (supportive, Fifth Circuit). It would permit citations to opinions that may result in consistent rulings on particular issues throughout all circuits.

A-188 (supportive, Eighth Circuit). It would allow the court to consider all previous decisions and thereby render a more informed opinion.

A-189 (supportive, Sixth Circuit). I think it would be good for jurisprudence because it would encourage uniformity in the law.

A-190 (supportive, Eighth Circuit). More uniform rulings and less diversity among circuits.

A-191 (neutral, District of Columbia Circuit). (1) It could reveal the existence of unpublished opinions by different panels within the same circuit that were inconsistent. That would be a good thing. (2) It would raise a concern that a lawyer might be deemed to have committed malpractice if he/she did not discover and cite an unpublished opinion on point and favorable to his or her position. This would not be a great concern if unpublished opinions were always available through Lexis and Westlaw searches.

A-192 (neutral, Sixth Circuit). I expect such a rule would result in longer briefs on appeal, and more time. Even if precedential weight did not change, plaintiffs would seek to rely on unpublished opinions and defendants would feel compelled to distinguish them. Appellate law clerks and judges may be more burdened. However, it *could* lead to greater consistency among rulings, especially within a circuit.

## b. Less Consistency

On the other hand, three attorneys predicted that the ability to cite unpublished opinions would result in less consistency in the law. Two of these attorneys opposed the proposed rule, and one supported it.

A-193 (supportive, Ninth Circuit). I think more conflicts would appear among “citable” opinions, but that a fuller presentation of relevant authority would be allowed. I am for it.

A-194 (opposed, Ninth Circuit). I would think that it would lower the quality and the certainty of the decisional law in the most important appellate courts, the federal courts of appeal, since these courts make most of the decisional law on a day-to-day basis.

A-195 (opposed, Eighth Circuit). It would lead to a less coherent body of case law. The court selects for publication its opinions that it wishes to have precedential effect. There should be a mechanism that allows the courts to decide cases without making law.

## c. Higher Quality Opinions

Seventeen attorneys predicted that their ability to cite unpublished opinions could result in unpublished opinions becoming higher in quality. Most of those attorneys (14) supported the proposed rule; three were neutral. In addition to the attorney comments compiled here, four other attorneys mentioned that the ability to cite unpublished opinions might result in better unpublished opinions: attorney A-90 (supportive) (comment compiled under *1.d. Already Reviewed*); and attorneys A-232 (supportive), A-235 (supportive), and A-236 (supportive) (comments compiled under *5.c. Should Be Precedent*).

A-196 (supportive, Fourth Circuit). The immediate effect is likely to be an incremental increase in decisions cited in appellate briefs and slightly more burdensome research and brief preparation. The long-term impact could be heightened discipline by the judges who have relied too heavily on unpublished opinions as a way of disposing of cases. Most appellate lawyers with whom I have discussed this issue hold the view that a rule allowing citation of unpublished opinions will indirectly but surely improve the quality of those opinions and reduce the uncertainty and confusion that the present practice has generated. Allowing citation to unpublished opinions may lead to increased scrutiny of these opinions by the judges themselves, which may result in a slightly increased burden on them and their law clerks.

A-197 (supportive, Seventh Circuit). In a nutshell, it would be a vast improvement. (1) It will promote uniformity within circuits. (2) It will improve the quality of unpublished decisions. (3) It will help to reduce the perception (especially by the parties, as opposed to their attorneys) that their cases were not considered as important as others, because their decision was not published, while others were. (4) It will help define the law in fact-specific areas (e.g., in my case, which dealt with several frequently recurring issues regarding informants and search warrants) by increasing the database, making it more likely that the parties can find a (citable) decision with similar facts.

A-198 (supportive, Federal Circuit). It would be beneficial, for at least two reasons. First, it would discipline courts with respect to their unpublished opinions, by subjecting them to greater sunshine. Second, it would permit courts and counsel greater resort to prior judicial analysis, if not for their controlling weight, at least for their persuasiveness.

A-199 (supportive, Federal Circuit). Relaxing the current prohibition would help promote consistency throughout all of the deliberations of the courts of appeals. It also would make it clear that all decisions are reached with equal care—there are no “second class” decisions made with less attention to the law and facts.

A-200 (supportive, Federal Circuit). It would make judges more conscientious in writing what they now render “unpublished.” All written opinions should be prepared with the expectation that others will rely on them, and such others should be permitted to do so.

A-201 (supportive, Seventh Circuit). It would not make the work more or less burdensome but it would: (1) improve the quality of advocates’ briefs by increasing the quantity of precedential resources, and (2) improve the quality of the unpublished opinions.

A-202 (supportive, Seventh Circuit). I would hope that decisions would be more consistent and carefully written if unpublished opinions

could be cited. This rule may also lead to fewer unpublished opinions. I think this would be a positive development.

A-203 (supportive, Tenth Circuit). Would help lawyers who would like to cite analogous cases but are now prohibited from doing so. Would make circuit courts more careful in drafting unpublished decisions.

A-204 (supportive, Eleventh Circuit). It would force appellate courts to craft their unpublished opinions more carefully.

A-205 (supportive, Fourth Circuit). Improve consistency of holdings and quality of opinions.

A-206 (neutral, Eleventh Circuit). As far as citing cases, not a lot of impact. Where I think it would impact in the Eleventh Circuit is this: Because the court's unpublished opinions are not available to the public, even on PACER, the judges tend to be a little less careful with precedent than they would be if we could see what they are doing in every case. I believe that the reason they do this is that they think there is just not enough time to make every case come out consistently with precedent. I realize the judges are overworked, but attempting to address that problem by not making all the court's opinions available is not a very good answer.

For my money, a rule that requires the court to make all opinions available to publishers and PACER subscribers would solve the problem. The restrictions on citation of the courts that do make the opinions available are reasonable and understandable. They generally do not prevent the citation of an unpublished opinion as persuasive authority.

A-207 (neutral, District of Columbia Circuit). I believe that there would be two significant impacts. First, the courts of appeals will reduce the number of unpublished opinions as they give greater care to all opinions given their possible citation in future cases. Second, appellate counsel will bear an increased obligation in at least some cases to research unpublished opinions to find cases that may be helpful to their position or that opposing counsel may cite in opposition. This will add to the burdens on appellate counsel.

A-208 (neutral, Third Circuit). My impression is that unpublished opinions are less scholarly and undergo less scrutiny internally by the court than opinions that are going to be published. If unpublished opinions can be cited, hopefully the quality of those opinions will improve, which would increase the workload on the courts.

#### d. Shorter Opinions

Three attorneys predicted that if unpublished opinions could be cited, courts would issue unpublished opinions with less content. Two of these attorneys opposed the proposed rule; one was neutral.

A-209 (neutral, Eighth Circuit). I expect judges will say less in unpublished opinions so as to reduce the opportunity to elicit a rationale for the decision.

A-210 (opposed, Second Circuit). I expect that adoption of a new national rule permitting the citation of unpublished opinions would have a negative impact on the administration of justice in the Second Circuit. If the proposed rule is adopted and unpublished opinions can be cited as authority, the court would have two choices. The court could write the equivalent of a published opinion in every case, or it could revert to its prior practice of deciding cases either without opinion or in a few sentences. Writing full opinions in every case would, I suspect, prove to be impossible, as Judges Kozinski and Reinhardt confirmed in their excellent article on this topic in the *California Lawyer*. This means that a return to the practice of deciding cases without opinion would be the likely outcome. In my experience the change to summary orders has been beneficial to the public perception of the courts, since litigants receive a reasoned explanation of the decision, not just an impenetrable order. It would certainly be an unintended consequence of the proposed rule to deprive litigants of the reasons for the decision in their case just because lawyers want more verbiage to cite in future cases.

The proposed rule would also have an adverse effect on the ability of many lawyers to properly represent their clients. Unlike other forms of persuasive authority, such as law review articles, every unpublished opinion on the subject will have to be accounted for in the brief. Since these opinions contain only an abbreviated statement of the facts, lawyers who wish to distinguish the cases will have to obtain the briefs. This clearly favors institutional and wealthy litigants who can spend the time and money necessary to retrieve briefs. The unconscious favoritism of large litigants over single practitioners is also apparent in the advisory committee's decision not to require that copies of unpublished decisions be served with the brief. It is easy to forget that not all lawyers have broadband Internet access or access to expensive databases such as Westlaw or Lexis. Poor clients and lawyers in small practices will be placed at a further disadvantage if this rule is adopted. This is even more true for pro se litigants and prisoners.

A-211 (opposed, Ninth Circuit). I believe that the proposed rule will lead the circuits to render summary dispositions under Rule 36(a)(2) in cases where they would otherwise perhaps write an unpublished opinion. I practice primarily before the Federal Circuit and my experience has been that the court already summarily affirms or dismisses under Rule 36(a)(2) in many cases where at least a non-precedential opinion should have been written. Assuming that the court would afford greater attention to the content of its unpublished opinions knowing that other courts of appeals may be seeing them under the proposed rule, I believe it would utilize Rule

36(a)(2) in certain cases in lieu of spending the additional time and resources necessary to “fine tune” an unpublished opinion for possible scrutiny by other circuit judges. Given that the Federal Circuit’s caseload is a fraction of that of the regional circuits, I believe it is reasonable to assume that the regional circuits would similarly increase their use of summary dispositions.

The proposed rule’s effect on appellate practitioners would vary based on each circuit’s local rules. In circuits that would not assign precedential weight to its own unpublished opinions, there would be little reason to expend a great deal of time and resources seeking on-point unpublished opinions from any circuit. The potential persuasive benefits of such opinions would likely be outweighed by the added burden, which would ultimately be shifted to the client.

In circuits treating such opinions as precedential, practitioners’ burden would be directly proportional to the number of unpublished opinions the circuits would issue under the proposed rule. Practitioners would be ethically obligated to research unpublished opinions to the same degree as published opinions. Failure to locate a favorable, directly on-point unpublished opinion could create malpractice liability as well. If, however, the circuits substituted summary dispositions under Rule 36(a)(2) for unpublished opinions to a great extent, there would not really be that much additional authority to research.

#### e. Longer Opinions

Two attorneys predicted that if they could cite unpublished opinions, perhaps such opinions would become longer and richer in content. One of these attorneys opposed the proposed rule, and one was neutral.

A-212 (neutral, Third Circuit). For me, the rule would have very little impact because I cite unpublished opinions freely now. I suspect, however, that such a rule might adversely affect the productivity of the courts. Knowing that cases can and will be cited, circuit judges might be reluctant to produce two- or three-page NPOs. Instead, they might feel the need to write and explain more, increasing the length of NPOs and adding to the significant workload that judges already have.

A-213 (opposed, Third Circuit). It has been my experience, at least with respect to the Third Circuit’s non-precedential opinions, that the opinions have little value beyond the particular facts of that given case. Generally, the opinions cite other published (and precedential) opinions; as a result, attorneys can cite to the other, published opinions when drafting briefs and presenting their arguments to the court. In addition, non-published opinions often do not provide the facts in sufficient detail to fully understand the case; the court generally only gives a background of the case, with the understanding that the parties are well familiar with the

case. The lack of a complete factual background makes it difficult to cite a non-published opinion in support of your argument, or to distinguish it when cited by an adversary. If the rules are amended to allow citations to unpublished opinions, the court of appeals may find itself in the position of drafting and “publishing” more detailed and comprehensive non-published opinions—i.e., opinions akin to the court’s published opinions. If not, I anticipate that the appellate work will become a little bit more burdensome because practitioners will cite non-published opinions that appear to be directly applicable but which may lack a sufficiently detailed factual picture to allow for a meaningful distinction to be drawn. Ultimately, the result may be the ability to cite to non-published opinions that appear to contradict published opinions.

#### f. Delay

Five attorneys predicted that the ability to cite unpublished opinions could result in a delay in resolving cases in which they are issued. Three of these attorneys opposed the proposed rule, one attorney supported it, and one attorney was neutral. In addition to the attorney comments compiled here, one other attorney mentioned delay: attorney A-69 (opposed) (comment compiled under *1.b. Bias*).

A-214 (supportive, Federal Circuit). Courts may be less inclined to issue certain opinions in writing or, alternatively, may take more time to issue opinions. But this proposed rule will be beneficial to practitioners looking for precedent on narrow issues.

A-215 (neutral, Federal Circuit). I would expect it to result in some slowing in the process of getting opinions finalized. I would also expect it to provide some marginal improvement in the overall consistency of appellate decisions, since the courts should be somewhat better informed about how other appellate courts have dealt with similar situations.

A-216 (opposed, Ninth Circuit). I do not see the purpose of such a rule if unpublished decisions are not binding. I would think this would hinder judges from making certain necessary compromises to reach an equitable decision, knowing that the decision may be cited to and be used in other cases.

A-217 (opposed, Federal Circuit). It would increase the workload of the judges, who will take more time to issue “unpublished decisions.” This effect will delay cases which merit “published” decisions.

### 5. *Broad Policy Issues*

Several attorneys addressed broad policy issues related to whether attorneys can cite unpublished opinions. Nine attorneys opined that the ability to cite unpublished opinions would make courts more accountable. Four



attorneys observed that the proposed rule would further blur the distinction between published and unpublished opinions. And 12 attorneys suggested that perhaps the distinction should be eliminated.

### a. Accountability

Nine attorneys said that allowing citation to unpublished opinions would make the courts more accountable for their decisions. All of these attorneys supported the proposed rule. In addition to the attorney comments compiled here, one other attorney mentioned accountability: attorney A-226 (supportive) (comment compiled under *5.b. Blurred Distinction*).

A-218 (supportive, Sixth Circuit). I think it would be a significant improvement. Not only would it free litigants to cite well-reasoned unpublished opinions, but it would remind the courts that they need to take all appeals seriously even if the case does not appear to merit a published opinion, because they would know that all opinions would be a part of the body of law that contributed to decisions of all cases and the development of the law.

A-219 (supportive, Eleventh Circuit). Positive: The Eleventh Circuit often issues unpublished opinions in cases that we (the U.S. Attorney's Office) consider important—they tend to “bury” a holding that is important to us. It is possible that such a rule would force the court to look more closely at which opinions they published. Negative: If Westlaw does not publish unpublished cases, how would we access them?

A-220 (supportive, Third Circuit). I am positive that the rule will be beneficial. I am positive that it is counterproductive and contrary to the rules of logic to have decisions that may not be cited, as if absolving the courts of any responsibility for the decisions they make and allowing them to avoid consequences of dealing with citations to those decisions.

A-221 (supportive, Seventh Circuit). Positive. Unpublished opinions allow appellate courts to hide tough decisions that many times assist criminal defendants. Unfortunately, the precedential value is then lost.

A-222 (supportive, Federal Circuit). Excellent idea! Precedent is precedent. A rule saying “no fair pointing out what we have actually done” has no place in a principled system of justice.

A-223 (supportive, District of Columbia Circuit). Public scrutiny of federal officials, whether in the judicial, legislative, or executive branches, always leads to more democracy.

A-224 (supportive, Seventh Circuit). It would make the appellate courts more accountable and give them incentive to more carefully draft opinions that follow the law.

A-225 (supportive, First Circuit). Potentially enhance the fairness of the process.

## b. Blurred Distinction

Four attorneys observed that permission to cite unpublished opinions could result in a blurred distinction between published and unpublished opinions. Two of these attorneys supported the proposed rule, and one attorney was neutral.

A-226 (supportive, Eighth Circuit). To the extent that my responses to the rest of the survey are inconsistent with what is contained herein, this statement supersedes statements made in the informal survey form. As noted in the survey, I have done enough briefing since the appeal was argued to have difficulty remembering too much about my choice of cases.

In my circuit, the local rule allows but discourages the citation of unpublished opinions. Accordingly, a rule change permitting the citation to unpublished opinions will not change how I do an appeal. In my circuit such a rule change may cause my circuit to delete the phrase discouraging the citation to unpublished cases from that rule. Accordingly, the rule change to the Federal Rules of Appellate Procedure may encourage greater citation to unpublished cases in my circuit (or may not).

In addition to responding to the survey itself, I would respectfully submit the following observations for your consideration.

(1) The fact that some “unpublished” cases are presently being published by West, and the fact that some circuits permit the citation to unpublished opinions *may* mean that the distinction between published and unpublished cases is becoming less of a distinction. Hopefully, the survey responses will help you meaningfully determine whether local circuit rules permitting the citation of unpublished opinions in fact actually result in attorneys taking advantage of such a rule and citing to unpublished opinions.

(2) If such a rule change were to result in more attorneys citing to unpublished opinions, the rule change would serve the public objective of encouraging greater scrutiny of unpublished opinions by other jurists and the public. It may further the objective of holding judges and their clerks accountable to the public and to our system of justice to the extent that the highlighting of bad unpublished opinions makes other jurists aware of jurisprudential error. The other judges might be able to fix the problem unless the unpublished cases are reheard en banc or unless the issue arises again in another case. However, highlighting problems in the unpublished jurisprudence may mean that judges become aware of issues that have been incorrectly resolved in unpublished opinions but for which there has not yet been a published opinion issued. Once they become aware of bad decisions, concerned judges in the circuit in which this decision was issued may then choose to hear another case en banc regarding the issue that the unpublished opinion improperly decided so that the published precedent takes the right approach to a particular problem. Potentially, depending on

the timing of the hearing of this other case, this issue could result in the correction of the unpublished opinion in a hearing en banc or even in the context of a section 2255 motion (in the rare case in which the issues were important enough).

On the other hand, problems in published jurisprudence, it could be argued, are highlighted by the losing party. If a petition for rehearing en banc were filed by the alleged victim of allegedly bad jurisprudence, then the judges would arguably have the same opportunity to review and scrutinize the unpublished opinion as they would if the unpublished opinion were brought to their attention by citation to this authority in briefs in other cases. However, this argument fails, because the aggrieved party in a civil case (other than one in which counsel is appointed) may not have the money to continue to pursue the appeal after the unpublished opinion is issued. Thus, under the current system, in circuits where the citation to unpublished opinions is prohibited, the degree of scrutiny by other judges of fellow jurists' unpublished opinions may depend at least to some extent on the financial situation of the parties involved in the litigation, even if the mistake is egregious and may be repeated in future cases by the same panel of judges.

Accordingly, I feel a set of appellate rules which does not promote or permit the citation of unpublished opinions (assuming that more unpublished opinions would be cited under such a system) provides for less judicial (and possibly public) scrutiny of unpublished opinions than a system which does permit the citation of unpublished opinions.

(3) Louisiana lawyers working on cases involving state law cite in their briefs to cases from their higher courts. However, because in matters of state law Louisiana lawyers work under the French civil law system, such higher court cases are not binding on Louisiana lower courts. Accordingly, citing to any Louisiana court case in a Louisiana matter probably has the same effect as citing to unpublished case law in federal court. Because of this parallel, it *may* be possible to predict some of the effects of this proposed rule change by studying the dynamics of the effect of citing non-binding case law in Louisiana courts and how Louisiana's view of its own case law impacts how attorneys handle appeals involving solely questions of state law.

A-227 (supportive, Seventh Circuit). I imagine that it would help practitioners because it can be frustrating to find an unpublished case that is very on point and not be able to cite it, even just as persuasive authority. But I think the effect on the courts themselves would not be entirely positive. Would such a rule eliminate the practical difference between published and unpublished opinions? Sometimes judges do not dissent in a particular instance because they know the decision will be unpublished. If

a judge in that instance knew the opinion could be cited, he or she might decide to dissent after all.

A-228 (supportive, Sixth Circuit). The distinction between published and unpublished opinions is eroding, and such a new rule would assist in eliminating this distinction.

A-229 (neutral, Third Circuit). Unpublished opinions would look more like published opinions. In immigration matters, unpublished decisions tend to be denials of the alien's claims. Publishing more denials would help serve as a useful guide to practitioners to identify those claims not worth pursuing administratively or before the courts.

### c. Should Be Precedent

Twelve attorneys suggested that maybe the courts' opinions should always be published or always be precedential. Most of these attorneys (nine) supported the proposed rule; three were neutral.

A-230 (supportive, Third Circuit). In my case, I do not remember encountering any unpublished opinions that I would have liked to cite but did not cite as a result of any rule concerning the citation of unpublished opinions.

As you know, there are different kinds of unpublished opinions. If an opinion is available from Westlaw or Lexis, I do not see any reason why it should be treated any differently from an opinion published in the West reporter system. There is more reason for concern if the opinion is only published in a specialized service or periodical, and even more if it is truly unpublished and must be obtained from the court or the parties.

In general, however, I feel strongly that no court should be permitted to deny precedential effect to any of its decisions. Doing so is unfair to the losing party, who in effect is being told that the court is deciding the case against him for reasons it would not apply to other litigants. It is unfair to future litigants, who are being told that the court may not decide a case in their favor even though it decided an indistinguishable case in favor of a similarly situated party. Although it is usually undesirable for an appellate court to make a decision without any explanation at all, I think this is preferable to issuing an explanation that is not based on principles to which the court is willing to give general application.

For these reasons, I think it should be permissible to cite any decision, published or unpublished. In general, I do not think that one party's citation of an unpublished opinion subjects the other party to any unfairness or significant burden so long as the other party receives a copy of the opinion and an opportunity to respond. If an unpublished opinion is cited for the first time in a reply brief, it may be desirable to give the appellee an opportunity to make a submission to address it.

A-231 (supportive, Eighth Circuit). It is difficult to say what impact such a rule would have because, in most cases, you are able to find a published decision that states the same point for which you might want to cite an unpublished opinion. However, when you *need* to cite an unpublished opinion because there is no other authority on point, there should be no obstacle to doing so. Such a rule likely will not lead to wholesale citation to unpublished opinions, but might make a considerable difference in some cases. I also support such a rule for the reasons stated in Judge Richard Arnold's withdrawn opinion on unpublished opinions in the Eighth Circuit.

A-232 (supportive, Eighth Circuit). It might give appellate courts more pause when issuing short opinions limited to the particular facts of a case. I think permitting citation to unpublished opinions is a good idea, mainly for the reasons set forth in Judge Richard Arnold's opinion on the matter, which was later withdrawn. From the advocate's standpoint, I think it will be helpful.

A-233 (supportive, Fifth Circuit). I do not know what impact this rule change will have. I do, however, support the rule change and believe all opinions should be published. In my practice of over 25 years, I have had opinions both favorable and unfavorable to my clients be designated as "unpublished" and have never understood the logic underlying the rule.

A-234 (supportive, District of Columbia Circuit). In my opinion, the core question is what impact would permitting citation to unpublished opinions have on courts of appeals, not appellate practitioners. Permitting citation to unpublished opinions could well have the beneficial effect of encouraging courts of appeals to discontinue their use.

A-235 (supportive, Second Circuit). I would expect the rule to make courts of appeals somewhat more careful about what they say in "unpublished" opinions. I believe the orderly developmental and uniform application of the law would be enhanced by a rule prohibiting the designation of opinions as "unpublished" or "non-binding."

A-236 (supportive, Federal Circuit). I believe it would be beneficial and improve the quality of legal opinions of the courts. I further believe that there should be no "unpublished" opinions.

A-237 (supportive, District of Columbia Circuit). I believe that the new proposed rule is a good idea. A better idea though would be to not have unpublished decisions except in the most routine cases.

A-238 (supportive, Eighth Circuit). I am hugely in favor of this rule. I do not think unpublished opinions should be less valuable than published opinions. A decision is a decision.

A-239 (neutral, Tenth Circuit). I would have some concern that such a rule, if enacted abruptly, would permit citation to opinions that are sometimes not well thought out. I believe a better rule would be to allow citation

to opinions that are written after the date the rule becomes effective. At bottom, I believe there should be *no* unpublished opinions. Things should be left the way they are for previous unpublished opinions and, in the future, there should be none allowed.

A-240 (neutral, Second Circuit). There would be no point to citing the unpublished opinions if they are not binding precedent. I would prefer that the opinions be considered to have the same precedential value as any other appellate decision. This would be of great help to my appellate practice.

A-241 (neutral, Tenth Circuit). The impact would depend on how the court was to consider the precedential value of the unpublished opinion. If such opinions have some value, then it makes no sense to allow the courts of appeals to issue unpublished opinions.

## *6. Other Comments*

Sixty-six attorneys provided other comments: 32 were supportive of the proposed rule, 31 were neutral, and three were opposed to it.

### *a. Other Supportive Comments*

Thirty-two attorneys provided other supportive comments.

A-242 (supportive, Fifth Circuit). I would hope that all written decisions, whether published or not, could be cited in any appeal brief. The reasoning of the written decision and how a particular panel addressed an issue should always be available to other panels deciding the same issue.

Besides, it makes no sense to have a “class” of decisions that cannot be relied on in any manner.

A-243 (supportive, District of Columbia Circuit). I believe that the proposed rule is a good one, and one that will have a very minimal impact on the workload of the attorneys preparing appellate briefs. I have never understood the reasoning behind the rule forbidding the citation of an unpublished decision.

A-244 (supportive, Sixth Circuit). I think it would improve federal court practice, and I doubt that it would make federal practice any more burdensome. Attorneys might spend a bit more time researching, but could probably reduce time spent writing memoranda.

A-245 (supportive, Third Circuit). I think the rule permitting citation to the courts of appeals’ unpublished opinions should be enacted. Courts should determine whether all cases are applicable, not just those deemed to be worthy of publication.

A-246 (supportive, Sixth Circuit). It would help ensure awareness of counsel and court personnel of case law development. Assistance in track-

ing trends would be of such benefit so as to outweigh any detriment in research time and cost.

A-247 (supportive, District of Columbia Circuit). Allowing these opinions to carry persuasive weight affords a reasonable compromise between the Ninth Circuit's concerns regarding judicial economy and the Eighth Circuit's constitutional concerns.

A-248 (supportive, Eighth Circuit). I believe that permitting citations to unpublished opinions would be helpful to the appellate court when the opinions are relevant to the case.

A-249 (supportive, First Circuit). It would be occasionally helpful for the reviewing court, without being more burdensome for litigators. I favor the rule change.

A-250 (supportive, Sixth Circuit). It would make the appellate attorney's work somewhat easier when there is a desire to cite unreported cases with similar issues.

A-251 (supportive, Fifth Circuit). Other than my answer to question 5 above (much less burdensome), I do not have an expectation.

A-252 (supportive, Fifth Circuit). It would make a positive impact. I support allowing attorneys to cite to an unpublished opinion.

A-253 (supportive, Sixth Circuit). Such a rule would certainly benefit the participants as well as the courts.

A-254 (supportive, Sixth Circuit). It is an important change. All decisions should be available for citation.

A-255 (supportive, Tenth Circuit). Little or no impact. Unpublished opinions are often more helpful than not.

A-256 (supportive, Third Circuit). I think it's a good idea but it probably will not make that much difference.

A-257 (supportive, Tenth Circuit). The new rule would actually aid in the presentation of cases.

A-258 (supportive, Sixth Circuit). It would be an improvement over the status quo.

A-259 (supportive, First Circuit). It would be helpful to counsel and the courts.

A-260 (supportive, Eleventh Circuit). I believe that it would be a good rule to adopt.

A-261 (supportive, District of Columbia Circuit). Same. I would welcome this rule change.

A-262 (supportive, Eighth Circuit). It would assist appellate research.

A-263 (supportive, Second Circuit). I would fully support the change.

A-264 (supportive, Ninth Circuit). Would be helpful and appreciated.

A-265 (supportive, First Circuit). I believe it would be helpful.

- A-266 (supportive, Third Circuit). I think it would be useful.
- A-267 (supportive, Second Circuit). This would be a good idea.
- A-268 (supportive, Third Circuit). It would promote justice.
- A-269 (supportive, District of Columbia Circuit). Beneficial impact.
- A-270 (supportive, Fourth Circuit). Extremely helpful.
- A-271 (supportive, District of Columbia Circuit). A positive effect.
- A-272 (supportive, Federal Circuit). A positive impact.
- A-273 (supportive, Eighth Circuit). Positive.

## b. Other Neutral Comments

Thirty-one attorneys provided miscellaneous neutral comments.

A-274 (neutral, Second Circuit). The primary impact would be that I would rely more upon computer searches of Lexis and Westlaw than I currently do. Now I find the digests of unreported cases in statutory and other compilations provide a thorough review of the law on a particular topic. If unpublished decisions may be cited, I would supplement my current digest and computer research with greater computer research.

A-275 (neutral, Sixth Circuit). None. The Sixth Circuit's Rule 26(a) allows a party to cite unpublished opinions if one feels the need to do so. In practice, I believe lawyers will cite the cases if they are helpful. I think there might be an impact if the rule explicitly stated that there is no distinction in precedential value, but only after a long period of time operating under such a rule.

A-276 (neutral, Eleventh Circuit). Unpublished opinions may be cited as persuasive authority in the Eleventh Circuit. *United States v. Futrell*, 209 F.3d 1286, 1289 (11th Cir. 2000) (citing 11th Cir. R. 36-2); *United States v. Rodriguez-Lopez*, 365 F.3d 1134, 1138 n.4 (11th Cir. 2004); *United States v. Liss*, 265 F.3d 1220, 1228 n.2 (11th Cir. 2001).

A-277 (neutral, Sixth Circuit). The Sixth Circuit would surrender totally to its fear of commitment and stop publishing anything; the *Federal Appendix* would take on value and, in time, further enrich West Publishing.

A-278 (neutral, Third Circuit). I do not see such a rule as having a "sea change" impact on appellate practice. Rather, it would be a common sense way of putting on the table issues that are under discussion already.

A-279 (neutral, Tenth Circuit). I think it should be limited to your own circuit. Otherwise it would be considerably more work with little consequence on the outcome.

A-280 (neutral, Seventh Circuit). It would make citations to unpublished opinions on points that should be made by courts in published opinions.



A-281 (neutral, Federal Circuit). Very little, because I work only before the Federal Circuit and its published opinions are normally sufficient.

A-282 (neutral, Sixth Circuit). Minimal. The Sixth Circuit, where I practice, already freely allows citation of unpublished opinions.

A-283 (neutral, Eighth Circuit). No impact on the parties. It would probably impact the court more.

A-284 (neutral, District of Columbia Circuit). I would not expect it to have any significant impact.

A-285 (neutral, Seventh Circuit). It would have no appreciable impact on the work.

A-286 (neutral, Seventh Circuit). It would have no appreciable impact.

A-287 (neutral, Tenth Circuit). More people would cite them.

A-288 (neutral, Eighth Circuit). No appreciable impact.

A-289 (neutral, District of Columbia Circuit). No appreciable impact.

A-290 (neutral, Sixth Circuit). Very little impact.

A-291 (neutral, Eighth Circuit). Not much impact.

A-292 (neutral, Third Circuit). Little or none.

A-293 (neutral, Ninth Circuit). Little impact.

A-294 (neutral, First Circuit). Very little.

A-295 (neutral, Third Circuit). Very little.

A-296 (neutral, Sixth Circuit). Very little.

A-297 (neutral, Fifth Circuit). Don't know.

A-298 (neutral, Sixth Circuit). Uncertain.

A-299 (neutral, Eighth Circuit). Not much.

A-300 (neutral, Eighth Circuit). Unknown.

A-301 (neutral, Fifth Circuit). Minimal.

A-302 (neutral, Eleventh Circuit). Minimal.

A-303 (neutral, Eighth Circuit). None.

A-304 (neutral, Tenth Circuit). None.

### c. Other Comments in Opposition

Three attorneys provided miscellaneous comments in opposition to the proposed rule.

A-305 (opposed, Third Circuit). I presume that the courts act with care in designating opinions as precedential or not and issue the precedential opinions as guides. I would expect the proposed rule to have the effect of complicating and diluting these guiding principles.

A-306 (opposed, Sixth Circuit). It would make appellate practice more burdensome.

A-307 (opposed, Ninth Circuit). A bad impact.

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## Appendix C: Citations in Federal Appellate Case Files

We examined 650 cases selected at random from among the appeals filed in 2002 in the 13 federal courts of appeals—50 cases for each circuit. We examined how each case was resolved—published opinion, unpublished opinion, or docket judgment—and we examined all citations in the counseled briefs and the opinions in the case files. This appendix includes descriptions of all citations to nonstatutory authorities in the case files.

Of the 650 cases in this sample, 537 are appeals from district courts,<sup>62</sup> five are appeals from the United States Tax Court,<sup>63</sup> 47 are appeals from the Board of Immigration Appeals,<sup>64</sup> and 61 are appeals from other courts and agencies.<sup>65</sup>

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62. This includes 495 appeals in the numbered circuits, ranging from 36 in the Ninth Circuit to 49 in the Eleventh Circuit.

63. This includes one case in the Second Circuit, one case in the Fifth Circuit, two cases in the Sixth Circuit, and one case in the Eighth Circuit.

64. The sample includes appeals from the Board of Immigration Appeals (BIA) in all numbered circuits except for the Eighth Circuit. In this sample there are 14 BIA appeals in the Ninth Circuit, 12 in the Second Circuit, and from one to four in each of the other numbered circuits with BIA appeals.

65. This includes 20 District of Columbia Circuit cases and 38 Federal Circuit cases. The other three cases are an appeal from the Federal Energy Regulatory Commission in the First Circuit, an appeal from the National Labor Relations Board in the Eighth Circuit, and an appeal from the Office of Workers Compensation Programs in the Tenth Circuit.

## 1. First Circuit<sup>66</sup>

Until recently, the First Circuit did not permit citation to unpublished opinions in unrelated cases; but now the circuit permits such citation if the opinion is persuasive and there is no published opinion on point.<sup>67</sup>

Of the 50 cases randomly selected, 46 are appeals from district courts (23 from the District of Massachusetts, 17 from the District of Puerto Rico, four from the District of Maine, and two from the District of New Hampshire),<sup>68</sup> three are appeals from the Board of Immigration Appeals, and one is an appeal from the Federal Energy Regulatory Commission.<sup>69</sup>

The publication rate in this sample is 24%. Twelve of the cases were resolved by published opinions (11 signed and one per curiam), two were resolved by unpublished per curiam opinions published in the *Federal Appendix*, and 36 were resolved by docket judgments.

Published opinions averaged 4,335 words in length, ranging from 1,955 to 9,157. Unpublished opinions averaged 904 words in

length, ranging from 270 to 1,538. One opinion was under 1,000 words in length (7%, an unpublished opinion), and this opinion was also under 500 words in length.<sup>70</sup>

Sixteen of the appeals were fully briefed. In 27 of the appeals no counseled brief was filed, and in seven of the appeals a counseled brief was filed only for one side.

There are citations to unpublished court opinions in seven of the cases. In two cases the citations are only to opinions in related cases; in five cases there are citations to unpublished opinions in unrelated cases. In one case the court cited unrelated unpublished opinions; in four other cases only the parties cited unrelated unpublished opinions.

The two unrelated unpublished opinions cited by the court in one of these cases are by the court of appeals for another circuit. Of the unrelated unpublished opinions cited by the parties in these cases, one is by the court of appeals for the First Circuit, one is by the court of appeals for another circuit, two are by First Circuit district courts, two are by other district courts, and two are by state courts.

C1-1. In an unsuccessful pro se appeal of the district court's refusal to modify a sentence for carjacking, *United States v. Quiñones Rodríguez* (1st Cir. 02-2616, filed 12/19/2002, judgment 06/17/2003), resolved by unpublished opinion at 70 Fed. Appx. 591, 2003 WL 21699845, the court distinguished in a footnote two unpublished opinions by the court of appeals for the Eleventh Circuit apparently cited by the appellant in his pro se brief.

C1-2. In an unsuccessful appeal of a malpractice award, *Primus v. Galgano* (1st Cir. 02-1419, filed 04/26/2002, judgment 05/21/2003), resolved by published opinion

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66. Docket sheets and opinions are on PACER. Both published and unpublished opinions are also on the court's Web and intranet sites and on Westlaw. Briefs are usually filed electronically, but were available to us from the court only by e-mail.

67. 1st Cir. L.R. 32.3(a)(2) ("Citation of an unpublished opinion of this court is disfavored. Such an opinion may be cited only if (1) the party believes that the opinion persuasively addresses a material issue in the appeal; and (2) there is no published opinion from this court that adequately addresses the issue. The court will consider such opinions for their persuasive value but not as binding precedent.")

The court adopted a rule proscribing citation to its unpublished opinions November 4, 1971, but on December 16, 2002, the court adopted the current rule permitting such citation if there is no published opinion on point.

68. This sample did not include any appeals from the District of Rhode Island.

69. In 2002, 1,732 cases were filed in the court of appeals for the First Circuit.

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70. The 36 docket judgments averaged 142 words in length, ranging from 21 to 1,186. All but one was under 1,000 words in length; all but two were under 500 words in length.

at 329 F.3d 236, both parties cited unpublished opinions.

The doctor's brief cites three published opinions by Massachusetts's supreme judicial court and one unpublished opinion by Massachusetts's superior court in a string headed by "see, e.g.," to support a statement that "The Plaintiff must demonstrate the injuries sustained were more likely caused by the negligent acts of the treating physician than any other possible source of the injury."

The plaintiff cited an unpublished 1997 opinion by the court of appeals for the First Circuit as the first in a string of three opinions, including a published 1976 First Circuit opinion, supporting a statement that the defendant precluded himself from arguing the application of the statutory damages cap by failing to ask for a jury instruction on the cap or object to the instructions given.

C1-3. In an unsuccessful appeal of a district court judgment that insurance coverage for legal defense did not include legal representation as a custodian of records in an investigation by the U.S. attorney, *Center for Blood Research, Inc. v. Coregis Insurance Co.* (1st Cir. 02-1011, filed 01/10/2002, judgment 09/30/2002), resolved by published opinion at 305 F.3d 38, both parties cited unpublished opinions.

The insured's brief cites an unpublished opinion by the court of appeals for the Seventh Circuit with published opinions by Maryland's court of special appeals and the court of appeals for the Sixth Circuit to support a statement that "a mere letter identifying a person as the target of an investigation, or requesting information, did not 'demand something of right' and therefore did not constitute a claim." The brief cites an unpublished opinion by the district court for the Northern District of Illinois with a published decision by Massachusetts's appeals court to support a statement that "it would have been unfair to the insured to require it to place itself at risk by subjecting itself to further legal

process in order to obtain the litigation defense protection for which it paid." The brief notes that the unpublished opinion was reversed on other grounds by a published opinion by the court of appeals for the Seventh Circuit with quoted language that supports the argument.

The insurance company's brief cites an unpublished opinion by California's court of appeal and a published opinion by Minnesota's court of appeals to support a statement that "an investigative subpoena is not a proceeding in which the insured 'may be subjected to a binding adjudication of liability for damages or other relief.'" The insurance company's reply brief informs the court that the insured's citation to an unpublished opinion by California's court of appeal is in opposition to California's rules of court and also distinguishes the opinion.

C1-4. In an unsuccessful appeal of summary judgment that an insurance company's termination of the plaintiff's long-term disability benefits did not violate ERISA, *Lopes v. Metropolitan Life Insurance Co.* (1st Cir. 02-2273, filed 10/04/2002, judgment 06/09/2003), resolved by published opinion at 332 F.3d 1, both parties cited unpublished opinions.

In a discussion of "the issue when the plan administrator is also the issuing insurance company," the insured's brief quotes an unpublished opinion by the district court for the Middle District of Pennsylvania. The quotation begins, "A heightened arbitrary and capricious standard will be applied because there is a conflict of interest since the defendants both issued the policy and administer claims made thereunder."

The insurance company's brief states "This Court has not expressly decided whether a reviewing court should consider evidence outside of the administrative claim file. At times, however, this Court has indicated that it is appropriate for a reviewing court to limit its consideration to the informa-

tion available to the administrator.” The brief cites five district court opinions to support a statement that “District courts in this circuit have expressly and repeatedly held that such a limited review is appropriate, particularly when conducting a review under an arbitrary and capricious standard.” One of these is an unpublished opinion by the district court for the District of Massachusetts, three are published opinions by the district court for the District of Massachusetts, and one is a published opinion by the district court for the District of Maine.

C1–5. In an unsuccessful appeal of a 10-year drug sentence, *United States v. Palmero* (1st Cir. 02–1398, filed 04/10/2002, judgment 02/07/2005), resolved by docket judgment, the government noted that the Supreme Court had granted review of a published opinion by the court of appeals for the Seventh Circuit and an unpublished opinion by the district court for the District of Maine in a case that was subsequently resolved by *United States v. Booker*, 125 S. Ct. 738 (2005).

### Individual Case Analyses

***Center for Blood Research, Inc. v. Coregis Insurance Co.* (1st Cir. 02–1011, filed 01/10/2002, judgment 09/30/2002).**

*Appeal from:* District of Massachusetts.

*What happened:* Unsuccessful appeal of a district court judgment that insurance coverage for legal defense did not include legal representation as a custodian of records in an investigation by the U.S. attorney.

*Appellant’s brief:* The insured’s 6,043-word appellant brief cites 26 published opinions (two by the First Circuit, three by other circuits, two by districts in other circuits, seven by Massachusetts’s supreme judicial court, four by Massachusetts’s appeals court, one by Massachusetts’s superior court, one by Maine’s supreme judicial court, one by Minnesota’s supreme court, two by Minnesota’s court of appeals, two by Maryland’s court of special appeals, and one by Michigan’s court of appeals), two unpublished opinions (one by another circuit and one by a district in another circuit), and *Black’s Law Dictionary*.

The brief cites an unpublished Seventh Circuit opinion with published opinions by Maryland’s court of special appeals and the Sixth Circuit to support the statement, “Courts which have found the absence of a covered ‘claim’ usually have done so based on the conclusion that a mere letter identifying a person as the target of an investigation, or requesting information, did not ‘demand something of right’ and therefore did not constitute a claim.” (Page 20.)

The brief cites an unpublished opinion by the Northern District of Illinois with a published decision by Massachusetts’s appeals court to support a statement that “it would have been unfair to the insured to require it to place itself at risk by subjecting itself to further legal process in order to obtain the litigation defense protection for which it paid.” (Page 16.) The brief notes that the unpublished opinion was reversed on other grounds by a published Seventh Circuit opinion with quoted language that supports the argument.

*Appellee’s brief:* The insurance company’s 4,408-word appellee brief cites 11 published opinions (three by the Supreme Court, one by the First Circuit, one by another circuit, one by the District of Massachusetts, one by a district in another circuit, one by Massachusetts’s supreme judicial court, one by Massachusetts’s appeal court, one by Massachusetts’s superior court, and one by Minnesota’s court of appeals), one unpublished opinion by California’s court of appeal, and two dictionaries.

The brief cites an unpublished opinion by California’s court of appeal and a published opinion by Minnesota’s court of appeals to support a statement that “at least two courts have concluded that an investigative subpoena is not a proceeding in which the insured ‘may be subjected to a binding adjudication of liability for damages or other relief.’” (Pages 10–11.)

*Appellant’s reply brief:* The insured’s 2,605-word reply brief cites three published opinions (one by the District of Massachusetts, one by Massachusetts’s supreme judicial court, and one by Minnesota’s court of appeals), one unpublished opinion by California’s court of appeal, and *Black’s Law Dictionary*.

The reply brief cites the unpublished opinion by California’s court of appeal relied on by the appellee in order to inform the court that this citation is in opposition to the rules of the court that issued the opinion. (Pages 8–9.) The brief also distinguishes the opinion. (Pages 9–10.)

*Opinion:* (3) The court’s published 2,209-word signed opinion, *Center for Blood Research, Inc. v.*

*Coregis Insurance Co.*, 305 F.3d 38 (1st Cir. 2002) (five headnotes), cites eight published opinions (one by the First Circuit, six by Massachusetts's supreme judicial court, and one by Massachusetts's appeals court) and the unpublished opinion by the District of Massachusetts in this case. According to Westlaw (05/19/2005), the court's opinion has been cited in one published opinion by the First Circuit, one unpublished opinion by a district in another circuit, three secondary sources, one appellate brief in one case before Illinois's supreme court, and four trial court briefs in four cases (three in the District of Massachusetts and one in a district in another circuit).

***United States v. Pellowitz* (1st Cir. 02–1052, filed 01/11/2002, judgment 03/13/2003).**

*Appeal from:* District of Maine.

*What happened:* Pro se appeal by a criminal defendant of the denial of a motion for return of briefcases denied, because the briefcases were returned to his parents.

*Related case:* *United States v. Pellowitz* (1st Cir. 02–1545, filed 05/09/2002, judgment 03/04/2003) (unsuccessful pro se appeal of the denial of a request for production of American Express records, because the habeas corpus petition had not yet been filed).

*Appellee's brief:* The government's 3,709-word appellee brief cites 19 published opinions (four by the U.S. Supreme Court, five by the First Circuit, and 10 by other circuits).

*Opinion:* (1) The court's 173-word docket judgment cites two published First Circuit opinions.

***United States v. Cacho-Negrete* (1st Cir. 02–1147, filed 02/06/2002, judgment 04/02/2002).**

*Appeal from:* District of Puerto Rico.

*What happened:* Criminal appeal voluntarily dismissed.

*Related case:* *United States v. Cuevas-Rodriguez* (1st Cir. 02–1084, filed 01/24/2002, judgment 04/10/2002) (criminal appeal of codefendant dismissed for lack of prosecution).

*Opinion:* (1) The court's 26-word docket judgment cites no opinions.

***Northeast Utilities Service Co. v. Federal Energy Regulatory Commission* (1st Cir. 02–1158, filed 02/11/2002, judgment 10/04/2002).**

*Appeal from:* Federal Energy Regulatory Commission.

*What happened:* Unsuccessful appeal by New England power companies of regulations concerning "installed capacity deficiency charges" for

electric power. State regulators and purchasing utilities intervened.

*Related cases:* The briefs and opinion also covered two consolidated petitions: *Sithe New England Holdings, LLC v. Federal Energy Regulatory Commission* (1st Cir. 01–1933, filed 06/29/2001, judgment 10/04/2002) and *Northeast Utilities Service Co. v. Federal Energy Regulatory Commission* (1st Cir. 01–1952, filed 07/02/2001, judgment 10/04/2002).

*Petitioner's brief:* The petitioners' 13,198-word brief cites 27 published court opinions (nine by the U.S. Supreme Court; three by the First Circuit, including one in a related case; and 15 by other circuits), 27 published administrative decisions (25 by the Federal Energy Regulatory Commission, including 11 decisions related to this case, and two by the Federal Power Commission), and one treatise.

*Intervenor's brief:* The intervenors' 13,605-word brief cites 26 published court opinions (two by the U.S. Supreme Court; three by the First Circuit, including one in a related case; and 21 by other circuits) and 16 published decisions by the Federal Energy Regulatory Commission, including 12 decisions related to this case.

*Respondent's brief:* The commission's 8,667-word respondent brief cites 18 published court opinions (two by the U.S. Supreme Court; five by the First Circuit, including one in a related case; and 11 by another circuit) and 19 published administrative decisions (18 by the Federal Energy Regulatory Commission, including nine decisions related to this case, and one by the Federal Power Commission).

*Petitioner's reply brief:* The petitioner's 6,795-word reply brief cites 14 published court opinions (two by the U.S. Supreme Court, two by the First Circuit, and 10 by another circuit) and 14 published decisions by the Federal Energy Regulatory Commission, including two decisions related to this case.

*Opinion:* (3) The court's published 3,602-word signed opinion, *Northeast Utilities Service Co. v. Federal Energy Regulatory Commission*, 308 F.3d 71 (1st Cir. 2002) (seven headnotes), cites nine published court opinions (three by the U.S. Supreme Court; four by the First Circuit, including one in a related case; and two by another circuit) and five related published decisions by the Federal Energy Regulatory Commission. According to Westlaw (05/19/2005), the court's opinion has been cited in one published opinion by a district in the First Circuit, one unpublished opinion by the District of Columbia Circuit, two published decisions by

the Federal Energy Regulatory Commission, five secondary sources, one petition for a writ of certiorari in the U.S. Supreme Court, six appellate briefs in two First Circuit cases, and one trial court brief in a First Circuit district.

***United States v. Doherty* (1st Cir. 02–1228, filed 02/27/2002, judgment 03/01/2002).**

*Appeal from:* District of Massachusetts.

*What happened:* Criminal appeal voluntarily dismissed.

*Opinion:* (1) The court's 22-word docket judgment cites no opinions.

***Cirino-Morales v. McNeil Consumer Products, Inc.* (1st Cir. 02–1242, filed 03/01/2002, judgment 06/18/2002).**

*Appeal from:* District of Puerto Rico.

*What happened:* Appeal voluntarily dismissed by a plaintiff claiming disability discrimination in employment.

*Appellant's brief:* The plaintiffs' 5,838-word appellant brief cites 35 published opinions (one by the U.S. Supreme Court, nine by the First Circuit, 11 by other circuits, one by a district court in the First Circuit, 10 by district courts in other circuits, and three by bankruptcy courts in other circuits) and one treatise.

*Opinion:* (1) The court's 32-word docket judgment cites no opinions.

***United States v. Cespedes* (1st Cir. 02–1262, filed 03/13/2002, judgment 04/22/2002).**

*Appeal from:* District of Massachusetts.

*What happened:* Criminal appeal voluntarily dismissed.

*Related cases:* Consolidated with four other appeals: *United States v. Hornbecker* (1st Cir. 01–1969, filed 07/10/2001, judgment 01/09/2003), *United States v. Vargas* (1st Cir. 01–2549, filed 11/05/2001, judgment 12/17/2003), *United States v. Ramirez* (1st Cir. 01–2654, filed 11/28/2001, judgment 10/22/2002), *United States v. Hernando-Ovalle* (1st Cir. 02–1251, filed 03/14/2002, judgment 12/18/2002). Subsequent to the termination of the selected case, the appeal by Hornbecker was severed from the consolidation. In the appeals by Hornbecker, Vargas, and Hernando-Ovalle, the district court was affirmed; the appeal by Ramirez was dismissed for lack of prosecution.

*Opinion:* (1) The court's 21-word docket judgment cites no opinions.

***United States v. De la Cruz-Tavares* (1st Cir. 02–1323, filed 03/26/2002, judgment 11/21/2003).**

*Appeal from:* District of Puerto Rico.

*What happened:* Unsuccessful appeal of an illegal reentry sentence enhancement for a prior conviction of burglary as a prior crime of violence.

*Related case:* *United States v. De la Cruz-Tavares* (1st Cir. 02–1324, filed 03/26/2002, judgment 06/05/2002) (criminal appeal dismissed as duplicative and for failure to prosecute).

*Appellant's brief:* The defendant's 2,557-word appellant brief cites 11 published opinions (three by the U.S. Supreme Court, six by the First Circuit, one by another circuit, and one by Puerto Rico's supreme court).

*Appellee's brief:* The government's 2,829-word appellee brief cites eight published court opinions (one by the U.S. Supreme Court, three by the First Circuit, and four by other circuits) and one published decision by the Board of Immigration Appeals.

*Opinion:* (1) The court's 197-word docket judgment cites three published opinions (one by the U.S. Supreme Court, one by the First Circuit, and one by another circuit).

***In re Atlantic Pipe Corp.* (1st Cir. 02–1339, filed 03/26/2002, judgment 09/18/2002).**

*Appeal from:* District of Puerto Rico.

*What happened:* Partially successful petition for a writ of mandamus. A pipe subcontractor in complex litigation over damages resulting from an aqueduct pipeline's bursting objected to a court order requiring it to participate and help pay for mediation against its will. The court of appeals held that the district judge had inherent power to order such mediation, but the court's order did not provide for sufficient safeguards of fairness.

*Related cases:* *In re Atlantic Pipe Corp.* (1st Cir. 02–2533, filed 12/03/2002, judgment 12/10/2002 (writ of prohibition denied)) and *In re American International Insurance Co.* (1st Cir. 02–2661, filed 12/03/2003, judgment 03/04/2004 (writ of mandamus denied because the petitioner had not been diligent in requesting that the district court rule on its motion to dismiss)).

*Petitioner's brief:* The petitioner's 4,180-word brief cites six published opinions (two by the U.S. Supreme Court, three by the First Circuit, and one by another circuit) and one Federal Judicial Center manual.

*Respondent's brief:* The contractor's 5,222-word respondent brief cites 21 published opinions (six by the U.S. Supreme Court, six by the First Circuit, two by another circuit, two by the District of Puerto Rico, and five by districts in other circuits) and the district court case "appealed."



*Respondent's brief:* A start-up subcontractor's 5,328-word respondent brief cites 19 published opinions (four by the U.S. Supreme Court, six by the First Circuit, two by another circuit, two by the District of Puerto Rico, and five by districts in other circuits) and the district court case "appealed."

*Respondent's brief:* The insurance companies' 1,454-word respondent brief cites no opinions.

*Opinion:* (3) The court's published 5,823-word signed opinion, *In re Atlantic Pipe Corp.*, 304 F.3d 165 (1st Cir. 2002) (19 headnotes), cites 22 published opinions (six by the U.S. Supreme Court, eight by the First Circuit, six by other circuits, and two by districts in other circuits), an unpublished order by the District of Puerto Rico in this case, and six law review articles. According to Westlaw (05/20/2005), the court's opinion has been cited in one published First Circuit dissent, one published opinion by a First Circuit bankruptcy court, one published opinion by a district court in another circuit, one published opinion by Alabama's supreme court, one published opinion by Rhode Island's supreme court, one unpublished First Circuit opinion, one unpublished opinion by the Virgin Islands' territorial court, 36 secondary sources, one appellate brief in a Texas supreme court case, and three trial court briefs in three cases in districts in other circuits (two in district courts and one in a bankruptcy court).

***United States v. Palmero* (1st Cir. 02–1398, filed 04/10/2002, judgment 02/07/2005).**

*Appeal from:* District of Massachusetts.

*What happened:* Unsuccessful appeal of a 10-year drug sentence.

*Related cases:* A codefendant's appeal was voluntarily dismissed, *United States v. Rodriguez* (1st Cir. 02–1397, filed 04/10/2002, judgment 09/16/2002).

*Appellant's brief:* The defendant's 9,376-word appellant brief cites 26 published opinions (one by the U.S. Supreme Court, nine by the First Circuit, 15 by other circuits, and one by a district in another circuit).

*Appellee's brief:* The government's 6,757-word appellee brief cites 40 published opinions (15 by the U.S. Supreme Court, 12 by the First Circuit, and 13 by other circuits) and one unpublished opinion by a First Circuit district.

The Supreme Court decided *United States v. Booker*, 125 S. Ct. 738 (2005), after this case was briefed, but before the court resolved the appeal. The government's brief cites the Seventh Circuit's published opinion in *United States v. Booker*, 376 F.3d 967 (7th Cir. 2004), and notes that the Su-

preme Court granted review of that case and a pending First Circuit appeal of the unpublished opinion by the District of Maine resolving *United States v. Fanfan*, 2004 WL 1723114 (D. Me. 2004).

*Opinion:* (1) The court's 245-word docket judgment cites two published opinions (one by the U.S. Supreme Court and one by the First Circuit). A petition for rehearing filed 04/04/2005 is pending.

***Primus v. Galgano* (1st Cir. 02–1419, filed 04/26/2002, judgment 05/21/2003).**

*Appeal from:* District of Massachusetts.

*What happened:* Unsuccessful appeal of a malpractice award of \$1,460,000. The plaintiff, who received healthcare from military physicians because her husband is in the military, sued an Arizona government doctor and a Massachusetts private doctor for failure to diagnose and treat breast cancer. She filed an action against the Arizona surgeon in the District of Arizona and an action against Dr. Galgano in the District of Massachusetts. The actions were consolidated in the District of Massachusetts. In a published opinion, *Primus v. Galgano*, 187 F. Supp. 2d 1 (D. Mass. 2002), the district court denied Dr. Galgano's motions arguing that the evidence did not support the verdict and the damages should be capped by a Massachusetts statute.

The court of appeals affirmed, holding as a matter of first impression that a defendant waives a right to the Massachusetts statutory damages cap unless the defendant seeks an appropriate jury instruction.

*Related case:* *Primus v. United States* (1st Cir. 04–1085, filed 01/22/2004, judgment 11/17/2004) (unsuccessful civil appeal of a bench trial verdict in favor of the government doctor).

*Appellant's brief:* The doctor's 4,533-word appellant brief cites 13 published opinions (one by another circuit, seven by Massachusetts's supreme judicial court, and five by Massachusetts's appeals court), one unpublished opinion by Massachusetts's superior court, and the related case against the government doctor.

The brief cites three published opinions by Massachusetts's supreme judicial court and one unpublished opinion by Massachusetts's superior court in a string headed by "see, e.g.," to support the statement, "The Plaintiff must demonstrate the injuries sustained were more likely caused by the negligent acts of the treating physician than any other possible source of the injury." (Page 9.)

*Appellee's brief:* The plaintiff's 6,488-word appellee brief cites 16 published opinions (one by the U.S. Supreme Court, three by the First Circuit,

one by another circuit, the District of Massachusetts's opinion in this case, seven by Massachusetts's supreme judicial court, and three by Massachusetts's appeals court), one unpublished First Circuit opinion, one treatise, and the *Restatement (Second) of Torts*.

The cited unpublished opinion is a 1997 First Circuit opinion appearing as the first in a string citation of three opinions, including one published 1976 First Circuit opinion, supporting the statement that the defendant precluded himself from arguing the application of the statutory damages cap by failing to ask for a jury instruction on the cap or object to the instructions given. (Page 6.)

*Appellant's reply brief:* The doctor's 741-word reply brief cites three published opinions by Massachusetts's appeals court.

*Opinion:* (3) The court's published 5,380-word signed opinion, *Primus v. Galgano*, 329 F.3d 236 (1st Cir. 2003) (13 headnotes), cites 13 published opinions (seven by the First Circuit, the District of Massachusetts's opinion in this case, and five by Massachusetts courts) and one law review note. In addition, the opinion gives the case number for the action transferred from the District of Arizona. According to Westlaw (05/20/2005), the court's opinion has been cited in six published opinions (three in the First Circuit, two in the District of Massachusetts, and one in a First Circuit district), eight secondary sources, and three trial court briefs in two District of Massachusetts cases.

***Lu v. Harvard School of Dental Medicine (1st Cir. 02-1420, filed 04/18/2002, judgment 10/29/2002).***

*Appeal from:* District of Massachusetts.

*What happened:* A pro se plaintiff appealed the dismissal of his *qui tam* action. According to the appellees' brief, the plaintiff had a history of filing lawsuits based on vague allegations of widespread conspiracy. The appellees were granted a summary affirmance "for the reasons given by the district judge."

*Appellee's brief:* The defendants' 3,166-word appellee brief cites nine published opinions (five by the First Circuit, two by other circuits, one by the District of Massachusetts, and one by another First Circuit district).

*Opinion:* (1) The court's 53-word docket judgment cites no opinions.

***Santana v. United States (1st Cir. 02-1437, filed 04/22/2002, judgment 08/26/2003).***

*Appeal from:* District of Puerto Rico.

*What happened:* Successful appeal of the denial of qualified immunity. A newly elected governor

of Puerto Rico, a member of the Popular Democratic Party, abruptly fired the executive director of Puerto Rico's Human Resources and Occupational Development Council, a member of the New Progressive Party, who was appointed to that position by the previous governor, also a member of the New Progressive Party. The district court denied motions for qualified immunity by the governor, and the current executive director of the Human Resources and Occupational Development Council, Puerto Rico's secretary of labor and human resources. Each appealed. The selected case is an appeal by an employee of the United States Department of Labor, also a defendant in the case, of what he called a constructive denial of qualified immunity. These appeals were consolidated. The plaintiff did not respond to the federal employee's appellant brief because a motion to dismiss his appeal for lack of jurisdiction was pending.

*Related cases:* The court's opinion resolved the two consolidated appeals, *Santana v. Calderón* (1st Cir. 02-1436, filed 04/22/2002, judgment 08/26/2003) (appeal by the governor and the current executive director) and *Santana v. Rivera* (1st Cir. 02-1438, filed 04/22/2002, judgment 08/26/2003) (appeal by the secretary of labor and human resources), and facially resolved the selected appeal because it bore that appeal's case number. A consolidated interlocutory appeal by the plaintiff was dismissed as premature, *Santana v. Calderón* (1st Cir. 02-1439, filed 04/22/2002, judgment 08/21/2002).

*Appellant's brief:* The federal government's 3,679-word appellant brief cites 25 published opinions (nine by the U.S. Supreme Court, nine by the First Circuit, four by other circuits, and three by the District of Puerto Rico).

*Opinion:* (3) The court's published 6,581-word signed opinion, *Santana v. Calderón*, 342 F.3d 18 (1st Cir. 2003) (five headnotes), cites 22 published opinions (13 by the U.S. Supreme Court; seven by the First Circuit; and two by the District of Puerto Rico, including the decision appealed). According to Westlaw (05/20/2005), the court's opinion has been cited in six First Circuit opinions (five published and one unpublished), two published opinions by other circuits, nine published opinions by the District of Puerto Rico, four opinions by other First Circuit districts (one published and three unpublished), one published opinion by Montana's supreme court, four secondary sources, two appellate briefs in one First Circuit case, and two trial court briefs in one case in a First Circuit district.

**Vinnie v. Maloney (1st Cir. 02–1511, filed 05/03/2002, judgment 01/31/2003).**

*Appeal from:* District of Massachusetts.

*What happened:* Certificate of appealability denied.

*Related cases:* The selected case was consolidated with *Vinnie v. Maloney* (1st Cir. 02–1587, filed 05/21/2002, judgment 01/31/2003) (certificate of appealability denied). Previous appeals include *Vinnie v. Department of Corrections* (1st Cir. 97–2317, filed 11/14/1997, judgment 12/17/1997) (interlocutory appeal dismissed for lack of jurisdiction) and *Vinnie v. Department of Corrections* (1st Cir. 00–2099, filed 09/14/2000, judgment 06/01/2001) (unsuccessful prisoner appeal). A subsequent appeal was terminated on the same day as the selected case, *Vinnie v. Maloney* (1st Cir. 02–2175, filed 09/16/2002, judgment 01/31/2003) (certificate of appealability denied).

*Opinion:* (1) The court’s 188-word docket judgment cites two U.S. Supreme Court opinions.

**United States v. Morales-Rodriguez (1st Cir. 02–1522, filed 05/07/2002, judgment 06/25/2002).**

*Appeal from:* District of Puerto Rico.

*What happened:* Criminal appeal dismissed for failure to prosecute.

*Related cases:* A concurrent appeal by the same appellant was briefed and proceeded to judgment, *United States v. Morales-Rodriguez* (1st Cir. 02–1521, filed 05/07/2002, judgment 02/24/2003) (ineffective assistance of counsel claim deferred, but sentence vacated upon the government’s admission that it breached a plea agreement). Also dismissed for failure to prosecute was *United States v. Morales-Rodriguez* (1st Cir. 02–1523, filed 05/07/2002, judgment 06/25/2002).

*Opinion:* (1) The court’s 82-word docket judgment cites no opinions.

**Jose v. Verdini (1st Cir. 02–1581, filed 05/15/2002, judgment 06/03/2003).**

*Appeal from:* District of Massachusetts.

*What happened:* Certificate of appealability denied.

*Opinion:* (1) The court’s 32-word docket judgment cites no opinions.

**United States v. Santiago (1st Cir. 02–1610, filed 05/29/2002, judgment 03/06/2003).**

*Appeal from:* District of Massachusetts.

*What happened:* Unsuccessful criminal appeal of a conviction for unlawful possession of ammunition.

*Appellant’s brief:* The defendant’s 5,276-word appellant brief cites 10 published opinions (nine by the First Circuit and one by another circuit).

*Appellee’s brief:* The government’s 2,592-word appellee brief cites 17 published opinions (14 by the First Circuit and three by other circuits).

*Opinion:* (1) The court’s 171-word docket judgment cites three published First Circuit opinions.

**Felix v. McDonald (1st Cir. 02–1626, filed 05/24/2002, judgment 08/22/2002).**

*Appeal from:* District of Massachusetts.

*What happened:* Pro se prisoner appeal voluntarily dismissed.

*Related cases:* Several other appeals by the prisoner were dismissed as premature, *Felix v. Canty* (1st Cir. 02–1627, filed 05/29/2002, judgment 09/25/2002), *Felix v. Walsh* (1st Cir. 02–1628, filed 05/30/2002, judgment 09/25/2002), *Felix v. Prouty* (1st Cir. 02–1629, filed 05/30/2002, judgment 09/25/2002), *Felix v. Nunes* (1st Cir. 02–1630, filed 05/30/2002, judgment 09/25/2002), *Felix v. Commonwealth of Massachusetts* (1st Cir. 02–1631, filed 05/31/2002, judgment 09/25/2002), *Felix v. Harshbarger* (1st Cir. 02–1632, filed 05/31/2002, judgment 09/25/2002), *Felix v. Sasuti* (1st Cir. 02–1633, filed 06/03/2002, judgment 09/25/2002), *Felix v. Singletory* (1st Cir. 02–1634, filed 06/03/2002, judgment 09/25/2002) (13 appellants), and *Felix v. Millis Plumbing Co.* (1st Cir. 02–1637, filed 06/03/2002, judgment 09/25/2002). Case 02–1632 was also selected for this study.

*Opinion:* (1) The court’s 34-word docket judgment cites no opinion.

**Felix v. Harshbarger (1st Cir. 02–1632, filed 05/31/2002, judgment 09/25/2002).**

*Appeal from:* District of Massachusetts.

*What happened:* Pro se prisoner appeal dismissed as premature, because not all of the defendants had been dismissed, in a case against the Department of Justice, the Commonwealth of Massachusetts, the City of Boston, the Town of Weymouth, the Weymouth Police Department, 133 individuals, and seven businesses.

*Related cases:* The court dismissed several of the prisoner’s appeals as premature, *Felix v. Canty* (1st Cir. 02–1627, filed 05/29/2002, judgment 09/25/2002), *Felix v. Walsh* (1st Cir. 02–1628, filed 05/30/2002, judgment 09/25/2002), *Felix v. Prouty* (1st Cir. 02–1629, filed 05/30/2002, judgment 09/25/2002), *Felix v. Nunes* (1st Cir. 02–1630, filed 05/30/2002, judgment 09/25/2002), *Felix v. Commonwealth of Massachusetts* (1st Cir. 02–1631, filed 05/31/2002, judgment 09/25/2002), *Felix v. Sasuti* (1st Cir. 02–1633, filed 06/03/2002, judgment 09/25/2002), *Felix v. Singletory* (1st Cir. 02–1634, filed 06/03/2002, judgment 09/25/2002),

and *Felix v. Millis Plumbing Co.* (1st Cir. 02–1637, filed 06/03/2002, judgment 09/25/2002). Another appeal from the same district court case, also selected for this study, was dismissed voluntarily, *Felix v. McDonald* (1st Cir. 02–1626, filed 05/24/2002, judgment 08/22/2002).

*Opinion:* (1) The court’s docket judgment cites no opinions.

***United States v. Newton* (1st Cir. 02–1643, filed 05/29/2002, judgment 04/29/2003).**

*Appeal from:* District of New Hampshire.

*What happened:* Unsuccessful criminal appeal. The court held that a retrial the defendant agreed to reluctantly was not double jeopardy.

*Appellant’s brief:* The defendant’s 11,965-word appellant brief cites 33 published opinions (two by the U.S. Supreme Court, 25 by the First Circuit, and six by other circuits).

*Appellee’s brief:* The government’s 9,722-word appellee brief cites 24 published opinions (seven by the U.S. Supreme Court, 15 by the First Circuit, and two by other circuits).

*Appellant’s reply brief:* The defendant’s 5,011-word reply brief cites 11 published opinions (two by the U.S. Supreme Court, eight by the First Circuit, and one by another circuit).

*Opinion:* (3) The court’s published 5,601-word signed opinion, *United States v. Newton*, 327 F.3d 17 (1st Cir. 2003)<sup>71</sup> (19 headnotes), cites 19 published opinions (11 by the U.S. Supreme Court and eight by the First Circuit). According to Westlaw (05/20/2005), the court’s opinion has been cited in three published opinions by the First Circuit, one published opinion by another circuit, six secondary sources, and three appellate briefs in three cases (one in the First Circuit and two in other circuits).

***Washington v. United States* (1st Cir. 02–1723, filed 06/11/2002, judgment 02/13/2003).**

*Appeal from:* District of Massachusetts.

*What happened:* Certificate of appealability denied.

*Opinion:* (1) The court’s 171-word docket judgment cites no opinions.

***United States v. Cortes-Borrero* (1st Cir. 02–1733, filed 06/13/2002, judgment 11/25/2002).**

*Appeal from:* District of Puerto Rico.

*What happened:* Criminal appeal voluntarily dismissed.

*Related cases:* Consolidated cases include *United States v. Arroyo-Ruiz* (1st Cir. 02–1524, filed

05/06/2002, judgment 03/04/2003) (criminal appeal voluntarily dismissed), *United States v. Lucena-Aviles* (1st Cir. 02–1971, filed 08/08/2002, judgment 01/27/2005) (partially successful criminal appeal), *United States v. Delgado-Baez* (1st Cir. 02–2049, filed 08/26/2002, judgment 03/17/2003) (criminal appeal voluntarily dismissed), and *United States v. Jorge-Santiago* (1st Cir. 02–2559, filed 12/31/2002, judgment pending) (*Anders* motion pending<sup>72</sup>). See also *United States v. Jorge-Santiago* (1st Cir. 02–2558, filed 12/31/2002, judgment 01/30/2003) (dismissed as duplicative of 02–2559).

*Opinion:* (1) The court’s docket judgment cites no opinions.

***United States v. Norris* (1st Cir. 02–1736, filed 06/28/2002, judgment 08/16/2002).**

*Appeal from:* District of Puerto Rico.

*What happened:* Criminal appeal dismissed for failure to file the notice of appeal on time.

*Opinion:* (1) The court’s 57-word docket judgment cites one U.S. Supreme Court opinion.

***Guzman v. Immigration and Naturalization Service* (1st Cir. 02–1762, filed 06/20/2002, judgment 04/25/2003).**

*Appeal from:* Board of Immigration Appeals.

*What happened:* Unsuccessful immigration appeal. The petitioner fled the Guatemalan military during the Guatemalan civil war and entered the United States illegally in 1990. In 1997, the INS initiated deportation proceedings and the petitioner sought asylum on the ground that he would be killed if he returned to Guatemala. The court of appeals held that because his fear was based mostly on a one-time kidnapping and because the civil war ended in 1996, he did not merit asylum.

*Petitioner’s brief:* The petitioner’s 1,944-word brief cites five published court opinions (one by the U.S. Supreme Court, one by the First Circuit, and three by other circuits) and one published decision of the Board of Immigration Appeals.

*Respondent’s brief:* The government’s 4,122-word brief cites 16 published court opinions (three by the U.S. Supreme Court, six by the First Circuit, and seven by other circuits) and two published decisions of the Board of Immigration Appeals.

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71. *Cert. denied*, 540 U.S. 928 (2003).

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72. See *Anders v. California*, 386 U.S. 738 (1976) (holding that court-appointed appellate counsel may seek to withdraw on the grounds that the appeal would be frivolous only upon briefing the court of “anything in the record that might arguably support the appeal”).

*Opinion:* (3) The court's published 2,300-word signed opinion, *Guzman v. Immigration and Naturalization Service*, 327 F.3d 11 (1st Cir. 2003) (12 headnotes), cites 10 published opinions (two by the U.S. Supreme Court, five by the First Circuit, and three by other circuits). According to Westlaw (05/20/2005), the court's opinion has been cited in 18 First Circuit opinions (14 published and four unpublished), one published opinion by another circuit, one administrative decision by the Board of Immigration Appeals, two ALR federal articles, 18 appellate briefs in 16 cases (two briefs in two U.S. Supreme Court cases, four briefs in four First Circuit cases, and 12 briefs in 10 cases in other circuits).

***Leskinova v. Immigration and Naturalization Service* (1st Cir. 02–1802, filed 06/28/2002, judgment 12/05/2002).**

*Appeal from:* Board of Immigration Appeals.

*What happened:* Unsuccessful immigration appeal.

*Related case:* *Leskinova v. Immigration and Naturalization Service* (1st Cir. 02–1803, filed 06/28/2002, judgment 12/05/2002) (husband's unsuccessful immigration appeal).

*Opinion:* (1) The court's 210-word docket judgment cites two published First Circuit opinions.

***Andreyev v. Sealink, Inc.* (1st Cir. 02–1808, filed 07/02/2002, judgment 08/20/2002).**

*Appeal from:* District of Puerto Rico.

*What happened:* Appeal voluntarily dismissed after the court observed that the order "does not determine the rights and liabilities of any of the parties to the action."

*Opinion:* (1) The court's 32-word docket judgment cites no opinions.

***United States v. Leon* (1st Cir. 02–1813, filed 07/03/2002, judgment 09/27/2002).**

*Appeal from:* District of Massachusetts.

*What happened:* Voluntarily dismissed criminal appeal by the government.

*Opinion:* (1) The court's 34-word docket judgment cites no opinions.

***Gómez-Candelaria v. Rivera-Rodríguez* (1st Cir. 02–1838, filed 07/11/2002, judgment 09/18/2003).**

*Appeal from:* District of Puerto Rico.

*What happened:* Successful appeal by a mayor and director of human resources, both members of the Popular Democratic Party, of a judgment of employment discrimination against 24 municipal employees who were members of the New Pro-

gressive Party. The court held that trial errors required a new trial.

*Related case:* The court's opinion resolved four appeals. The selected case was consolidated with a second successful appeal by the mayor and director, which was filed after the district court denied their motion for judgment as a matter of law and for a new trial, *Gómez-Candelaria v. Rivera-Rodríguez* (1st Cir. 02–2076, filed 08/29/2002, judgment 09/18/2003). These appeals were consolidated with successful appeals by the municipality, *Gómez-Candelaria v. Rivera-Rodríguez* (1st Cir. 02–1529, filed 05/06/2002, judgment 09/18/2003) (filed after the main verdict and judgment) and *Gómez-Candelaria v. Rivera-Rodríguez* (1st Cir. 02–2077, filed 08/30/2002, judgment 09/18/2003) (filed after the motion for a new trial was denied).

*Amicus brief:* The Commonwealth of Puerto Rico's secretary of labor and human resources filed a 4,066-word amicus curiae brief arguing that the plaintiffs had no property interests in their jobs and citing 11 published opinions (three by the U.S. Supreme Court, five by the First Circuit, two by the District of Puerto Rico in this case, and one by Puerto Rico's supreme court) and one unpublished order by the District of Puerto Rico in a related case.

*Appellant's brief:* The mayor and director's 9,752-word appellant brief cites 40 published opinions (10 by the U.S. Supreme Court and 30 by the First Circuit) and one unpublished order by the District of Puerto Rico in a related case.

*Appellee's brief:* The plaintiffs' 12,812-word appellee brief cites 35 published opinions (13 by the U.S. Supreme Court, 16 by the First Circuit, and six by other circuits), a deposition transcript from a related case in the District of Puerto Rico, and one treatise.

*Appellant's reply brief:* The mayor and director's 1,506-word reply brief cites two U.S. Supreme Court opinions.

*Opinion:* (3) The court's published 9,157-word<sup>73</sup> signed opinion, *Gómez v. Rivera Rodríguez*, 344 F.3d 103 (1st Cir. 2003) (30 headnotes), cites 70 published opinions (nine by the U.S. Supreme Court, 41 by the First Circuit, 15 by other circuits, two by the District of Puerto Rico in this case, and three by districts in other circuits), one treatise, and the *Restatement (Second) of Agency*. According to Westlaw (05/20/2005), the court's opinion has

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73. The word count does not include a 10-page appendix enumerating the damages awarded to each of the 24 plaintiffs.

been cited in six published opinions by the First Circuit, 10 published opinions by the District of Puerto Rico, one published opinion by another district in the First Circuit, three unpublished opinions by districts in other circuits, one unpublished opinion by Rhode Island's superior court, 21 secondary sources, one verdict and settlement summary, two appellate briefs in two cases (one in another circuit and one in another state), and six trial court briefs in six cases (two in a First Circuit district and four in a district in another circuit).

***Guerrero v. Immigration and Naturalization Service* (1st Cir. 02–1844, filed 07/12/2002, judgment 10/24/2002).**

*Appeal from:* District of Massachusetts.

*What happened:* Immigration appeal unsuccessful by summary affirmance.

*Related cases:* *Guerrero v. Immigration and Naturalization Service* (1st Cir. 02–1209, filed 02/25/2002, judgment 03/14/2002) (immigration appeal voluntarily dismissed) and *Guerrero v. Immigration and Naturalization Service* (1st Cir. 02–1616, filed 05/22/2002, judgment 07/02/2002) (unsuccessful habeas corpus appeal).

*Opinion:* (1) The court's 41-word docket judgment cites one published First Circuit opinion.

***Hughes v. Spencer* (1st Cir. 02–1868, filed 07/19/2002, judgment 11/04/2002).**

*Appeal from:* District of Massachusetts.

*What happened:* Certificate of appealability denied.

*Opinion:* (1) The court's 92-word docket judgment cites one U.S. Supreme Court opinion.

***Desir v. Hall* (1st Cir. 02–1894, filed 07/26/2002, judgment 10/23/2002).**

*Appeal from:* District of Massachusetts.

*What happened:* Certificate of appealability denied.

*Related case:* *Auborg v. Spencer* (1st Cir. 02–1895, filed 07/26/2002, judgment 10/23/2002) (certificate of appealability denied).

*Opinion:* (1) The court's 47-word docket judgment cites no opinions.

***Barnes v. Merrill* (1st Cir. 02–1922, filed 08/01/2002, judgment 12/05/2002).**

*Appeal from:* District of Maine.

*What happened:* Certificate of appealability denied.

*Opinion:* (1) The court's 796-word docket judgment cites 13 published opinions (four by the U.S. Supreme Court, two by the First Circuit, and seven by other circuits) and one treatise.

***United States v. Wall* (1st Cir. 02–1925, filed 08/01/2002, judgment 11/18/2003).**

*Appeal from:* District of Maine.

*What happened:* Unsuccessful criminal appeal of a conviction for distribution of cocaine that caused a death.

*Related case:* The briefs and opinion also covered a consolidated unsuccessful appeal of a separate conviction for fraudulently acquiring supplies of Oxycontin, *United States v. Wall* (1st Cir. 02–1926, filed 08/01/2002, judgment 11/18/2003).

*Appellant's brief:* The defendant's 11,097-word appellant brief cites 51 published opinions (13 by the U.S. Supreme Court, 23 by the First Circuit, 14 by other circuits, and one by a district in another circuit).

*Appellee's brief:* The government's 14,819-word appellee brief cites 50 published opinions (eight by the U.S. Supreme Court, 30 by the First Circuit, and 12 by other circuits), *The American Heritage Dictionary*, and the Social Security Administration's ranking of popular first names on its website.

*Appellant's reply brief:* The defendant's 2,605-word reply brief cites three published opinions (one by the U.S. Supreme Court and two by the First Circuit).

*Opinion:* (3) The court's published 4,250-word signed opinion, *United States v. Wall*, 349 F.3d 18 (1st Cir. 2003) (11 headnotes), cites 15 published opinions (three by the U.S. Supreme Court, 11 by the First Circuit, and one by another circuit). According to Westlaw (05/20/2005), the court's opinion has been cited in two published First Circuit opinions, two secondary sources, and two appellate briefs in two cases (one in the First Circuit and one in another circuit).

***Compton v. Deputy Orthopaedics* (1st Cir. 02–1933, filed 08/02/2002, judgment 11/13/2002).**

*Appeal from:* District of Massachusetts.

*What happened:* Employment discrimination appeal dismissed for failure to file a brief.

*Opinion:* (1) The court's 84-word docket judgment cites no opinions.

***United States v. Uribe-Londono* (1st Cir. 02–2027, filed 08/22/2002, judgment 05/20/2005).**

*Appeal from:* District of Puerto Rico.

*What happened:* Unsuccessful appeal of a plea of guilty of sexual exploitation of children.

*Related case:* *United States v. Uribe-Londono* (1st Cir. 02–2028, filed 08/22/2002, judgment 09/10/2002) (duplicative criminal appeal voluntarily dismissed).

*Appellant's brief:* The defendant's 1,776-word appellant brief cites seven published opinions (five by the U.S. Supreme Court and two by other circuits).

*Appellee's brief:* The government's 4,976-word appellee brief cites 17 published opinions (two by the U.S. Supreme Court, 13 by the First Circuit, and two by other circuits).

*Appellant's reply brief:* The defendant's 848-word reply brief cites five published opinions (four by the U.S. Supreme Court and one by another circuit).

*Opinion:* (3) The court's published 1,955-word per curiam opinion, *United States v. Uribe-Londono*, 409 F.3d 1 (1st Cir. 2005) (nine headnotes), cites seven published opinions (two by the U.S. Supreme Court and five by the First Circuit). According to Westlaw (05/21/2005), the court's opinion has not been cited elsewhere.

***Acosta-Perez v. Guillermo Rodriguez* (1st Cir. 02–2058, filed 08/26/2002, judgment 10/21/2002).**

*Appeal from:* District of Puerto Rico.

*What happened:* Civil appeal voluntarily dismissed.

*Opinion:* (1) The court's 33-word docket judgment cites no opinions.

***United States v. Cameron* (1st Cir. 02–2108, filed 09/03/2002, judgment 11/05/2002).**

*Appeal from:* District of Maine.

*What happened:* Criminal appeal voluntarily dismissed.

*Opinion:* (1) The court's 26-word docket judgment cites no opinions.

***United States v. Medina-Sanchez* (1st Cir. 02–2231, filed 09/26/2002, judgment 09/26/2002).**

*Appeal from:* District of Puerto Rico.

*What happened:* Motion to stay a criminal trial denied.

*Opinion:* (1) The court's 26-word docket judgment cites one published opinion by another circuit.

***Davis v. Commonwealth of Massachusetts* (1st Cir. 02–2242, filed 09/27/2002, judgment 03/24/2003).**

*Appeal from:* District of Massachusetts.

*What happened:* Unsuccessful pro se appeal of the dismissal of a federal challenge to a state probate court action. The court determined that there was no federal jurisdiction over the claims.

*Related cases:* *Davis v. Service Employees International Union* (1st Cir. 96–1577, filed 06/07/1996, judgment 10/23/1996) (unsuccessful pro se employment discrimination appeal), *Davis v. Wonder-*

*land Greyhound Park, Inc.* (1st Cir. 96–1604, filed 06/11/1996, judgment 08/27/1996) (unsuccessful pro se employment discrimination appeal), *Davis v. Hanover Insurance Co.* (1st Cir. 96–1650, filed 06/13/1996, judgment 10/11/1996) (unsuccessful pro se civil appeal), *Davis v. City of Malden* (1st Cir. 00–2519, filed 12/05/2000, judgment 06/15/2001) (unsuccessful pro se civil appeal).

*Appellee's brief:* The commonwealth's 2,281-word appellee brief cites seven published opinions (three by the U.S. Supreme Court and four by the First Circuit), an action in the District of Massachusetts by the appellant's sister, and a Massachusetts state court action in which defense counsel was at attorney.

*Opinion:* (1) The court's 370-word docket judgment cites two published First Circuit opinions.

***United States v. Castle* (1st Cir. 02–2243, filed 10/03/2002, judgment 01/24/2003).**

*Appeal from:* District of Massachusetts.

*What happened:* Criminal appeal voluntarily dismissed.

*Opinion:* (1) The court's 26-word docket judgment cites no opinions.

***Lopes v. Metropolitan Life Insurance Co.* (1st Cir. 02–2273, filed 10/04/2002, judgment 06/09/2003).**

*Appeal from:* District of Massachusetts.

*What happened:* Unsuccessful appeal of summary judgment that an insurance company's termination of the plaintiff's long-term disability benefits did not violate ERISA.

*Appellant's brief:* The insured's 4,376-word appellant brief cites eight published opinions (one by the U.S. Supreme Court, two by the First Circuit, two by other circuits, and three by districts in other circuits), one unpublished opinion by a district in another circuit, and one dictionary.

In a discussion of "the issue when the plan administrator is also the issuing insurance company" (page 14), the brief quotes an unpublished opinion by the Middle District of Pennsylvania. The quotation begins, "A heightened arbitrary and capricious standard will be applied because there is a conflict of interest since the defendants both issued the policy and administer claims made thereunder." (Page 15.)

*Appellee's brief:* The insurance company's 3,927-word appellee brief cites 20 published opinions (one by the U.S. Supreme Court, 12 by the First Circuit, one by another circuit, four by the District of Massachusetts, and two by other First Circuit districts) and one unpublished opinion by the District of Massachusetts.

The brief states, “This Court has not expressly decided whether a reviewing court should consider evidence outside of the administrative claim file. At times, however, this Court has indicated that it is appropriate for a reviewing court to limit its consideration to the information available to the administrator.” (Page 7.) The brief cites five district court opinions to support the statement, “District courts in this circuit have expressly and repeatedly held that such a limited review is appropriate, particularly when conducting a review under an arbitrary and capricious standard.” (Page 8.) One of these is an unpublished opinion by the District of Massachusetts, three are published opinions by the District of Massachusetts, and one is a published opinion by the District of Maine.

*Opinion:* (3) The court’s published 2,662-word signed opinion, *Lopes v. Metropolitan Life Insurance Co.*, 332 F.3d 1 (1st Cir. 2003) (three headnotes), cites 11 published opinions (three by the U.S. Supreme Court, seven by the First Circuit, and one by another circuit). According to Westlaw (05/23/2005), the court’s opinion has been cited in four First Circuit opinions (three published and one unpublished), three published opinions by the District of Massachusetts, three published opinions by other districts in the First Circuit, two published opinions by districts in other circuits, six secondary sources, six appellate briefs in five cases (three briefs in two cases in the First Circuit and three briefs in three cases in other circuits), and 34 trial court briefs in 25 cases (16 briefs in nine cases in First Circuit districts and 18 briefs in 16 cases in other circuits).

***Khalil v. Immigration and Naturalization Service* (1st Cir. 02–2344, filed 10/22/2002, judgment 07/24/2003).**

*Appeal from:* Board of Immigration Appeals.

*What happened:* Unsuccessful asylum appeal by a Coptic Egyptian.

*Related case:* *Khalil v. Ashcroft*, 1st Cir. 03–1934, filed 07/02/2003, judgment 06/03/2004 (unsuccessful immigration appeal).

*Petitioner’s brief:* The petitioner’s 4,988-word brief cites 24 published court opinions (six by the U.S. Supreme Court, six by the First Circuit, and 12 by other circuits), seven published decisions by the Board of Immigration Appeals, and one United Nations handbook.

*Respondent’s brief:* The government’s 4,994-word respondent brief cites 22 published court opinions (two by the U.S. Supreme Court, 11 by the First Circuit, and nine by other circuits) and

one published decision by the Board of Immigration Appeals.

*Opinion:* (3) The court’s published 2,505-word signed opinion, *Khalil v. Ashcroft*, 337 F.3d 50 (1st Cir. 2003) (11 headnotes), cites 11 published opinions (one by the U.S. Supreme Court and 10 by the First Circuit). According to Westlaw (05/23/2005), the court’s opinion has been cited in seven First Circuit opinions (four published and three unpublished), two published opinions by other circuits, five secondary sources, one petition for a writ of certiorari in the U.S. Supreme Court, and 14 appellate briefs in 12 cases (four briefs in four First Circuit cases and 10 briefs in eight cases in another circuit).

***United States v. Ferullo* (1st Cir. 02–2369, filed 11/04/2002, judgment 10/14/2003).**

*Appeal from:* District of Massachusetts.

*What happened:* Criminal sentence summarily affirmed.

*Related case:* *United States v. Maggio* (1st Cir. 02–2370, filed 11/04/2002, judgment 07/25/2003) (codefendant’s criminal appeal voluntarily dismissed).

*Appellant’s brief:* The defendant’s 1,366-word appellant brief cites six published opinions (three by the First Circuit and three by other circuits).

*Opinion:* (1) The court’s 221-word docket judgment cites four published opinions (two by the First Circuit and two by other circuits).

***Campbell v. United States* (1st Cir. 02–2387, filed 10/30/2002, judgment 08/25/2004).**

*Appeal from:* District of Massachusetts.

*What happened:* Certificate of appealability denied.

*Related cases:* *United States v. Campbell* (1st Cir. 00–1647, filed 05/24/2000, judgment 08/21/2000) (criminal appeal dismissed as untimely) and *United States v. Campbell* (1st Cir. 00–2493, filed 12/04/2000, judgment 10/11/2001) (unsuccessful criminal appeal).

*Opinion:* (2) The court’s unpublished 1,538-word per curiam opinion, *Campbell v. United States*, 108 Fed. Appx. 1, 2004 WL 1888604 (1st Cir. 2004) (five headnotes), cites 16 published opinions (eight by the U.S. Supreme Court; seven by the First Circuit, including the appellant’s unsuccessful appeal of his conviction; and one by another circuit). According to Westlaw (05/23/2005), the court’s opinion has been cited in two unpublished opinions in another First Circuit district, one unpublished opinion by a district in another circuit, and one secondary source.



**Smart v. Commissioner (1st Cir. 02–2413, filed 11/04/2002, judgment 04/19/2004).**

*Appeal from:* District of New Hampshire.

*What happened:* Certificate of appealability denied.

*Opinion:* (1) The court's 1,186-word docket judgment cites seven published opinions (five by the U.S. Supreme Court and two by the First Circuit).

**In re Calore Express Co. (1st Cir. 02–2422, filed 11/08/2002, judgment 05/02/2003).**

*Appeal from:* District of Massachusetts.

*What happened:* Bankruptcy appeal dismissed as settled.

*Related cases:* *United States v. Calore Express Co.* (1st Cir. 97–1482, filed 04/29/1997, judgment 03/30/2001) (bankruptcy appeal voluntarily dismissed) and *In re Calore Express Co.* (1st Cir. 01–1464, filed 04/03/2001, judgment 05/02/2002) (successful bankruptcy appeal by the government).

*Opinion:* (1) The court's 33-word docket judgment cites no opinions.

**United States v. Quiñones Rodríguez (1st Cir. 02–2616, filed 12/19/2002, judgment 06/17/2003).**

*Appeal from:* District of Puerto Rico.

*What happened:* Unsuccessful pro se appeal of the district court's refusal to modify a sentence for carjacking.

*Appellee's brief:* The government's 3,416-word appellee brief cites nine published opinions (three by the First Circuit, including one affirming the appellant's 1994 conviction; five by other circuits; and the opinion by the District of Puerto Rico explaining an upward departure in the appellant's sentence).

*Opinion:* (2) The court's unpublished 270-word per curiam opinion, *United States v. Quiñones-Rodríguez*, 70 Fed. Appx. 591, 2003 WL 21699845 (1st Cir. 2003) (no headnotes), cites three published opinions (two by the First Circuit, including one affirming the appellant's 1994 conviction, and one by the District of Puerto Rico explaining an upward departure in the appellant's sentence) and two unpublished opinions by another circuit.

In a footnote, the opinion distinguishes two unpublished Eleventh Circuit cases, apparently cited by the appellant in his pro se brief. (Page two note 1, 70 Fed. Appx. at 591.)

According to Westlaw (05/23/2005), the court's opinion has not been cited elsewhere.

**United States v. Castillo-Jimenez (1st Cir. 02–2677, filed 12/20/2002, judgment 10/18/2004).**

*Appeal from:* District of Puerto Rico.

*What happened:* Mostly unsuccessful criminal appeal, but with a modified sentence concerning drug testing during supervised release.

*Appellant's brief:* The defendant's 2,161-word appellant brief cites 10 published opinions (one by the First Circuit and nine by other circuits).

*Appellee's brief:* The government's 1,524-word appellee brief cites seven published opinions (two by the U.S. Supreme Court, four by the First Circuit, and one by another circuit).

*Opinion:* (1) The court's 79-word docket judgment cites two published First Circuit opinions.

**United States v. Ramos-Martinez (1st Cir. 02–2712, filed 12/31/2002, judgment 09/25/2003).**

*Appeal from:* District of Puerto Rico.

*What happened:* Criminal appeal dismissed for failure to file a brief.

*Related cases:* The selected case was consolidated with codefendants' appeals, *United States v. Datiz-Rodriguez* (1st Cir. 02–2331, filed 10/28/2002, judgment 10/09/2004) (certain conditions of supervised release vacated), *United States v. Prieto-Sanchez* (1st Cir. 02–2406, filed 11/05/2002, judgment 06/10/2003) (pro se motion to dismiss criminal appeal granted), *United States v. Santos-Baez* (1st Cir. 02–2407, filed 11/05/2002, judgment 10/19/2004) (certain conditions of supervised release vacated), *United States v. Irizarry-Richard* (1st Cir. 02–2453, filed 11/21/2002, judgment 11/23/2004) (unsuccessful criminal appeal), *United States v. Prieto-Agostini* (1st Cir. 02–2481, filed 11/21/2002, judgment 11/04/2004) (unsuccessful criminal appeal), and *United States v. Rodriguez-Valentin* (1st Cir. 97–2482, filed 11/29/2004, judgment 11/23/2004) (unsuccessful criminal appeal).

*Opinion:* (1) The court's 69-word docket judgment cites no opinions.

**United States v. Cruz Franco (1st Cir. 02–2717, filed 12/31/2002, judgment 05/06/2004).**

*Appeal from:* District of Puerto Rico.

*What happened:* Criminal appeal remanded for resentencing in light of new case law. The defendant's court-appointed attorney filed an *Anders* brief and a motion to withdraw as counsel. The defendant filed a pro se response. While the *Anders* motion was pending, the court decided *United States v. Melendez-Santana*, 353 F.3d 93 (1st Cir. 2003). Counsel for both the defendant and the government then argued that *Melendez-Santana* invalidated the part of the sentence that delegated discretion to a probation officer with respect to drug testing required during supervised release.

*Related cases:* Consolidated with *United States v. Cabrera Wilson* (1st Cir. 02–2716, filed 12/31/2002, judgment 07/08/2003) (criminal appeal voluntarily dismissed). A companion case is *United States v. Cruz Franco* (1st Cir. 02–2718, filed 01/07/2003, judgment 01/29/2003) (voluntarily dismissed as duplicative of the selected case).

*Anders brief:* The appellant’s counsel’s 2,865-word *Anders* brief cites 17 published opinions (six by the U.S. Supreme Court and 11 by the First Circuit).

*Appellant’s brief:* The 1,189-word brief by appellant’s counsel following the *Melendez-Santana* decision cites two published First Circuit opinions.

*Appellee’s brief:* The government’s 834-word appellee brief cites five published opinions (one by the U.S. Supreme Court and four by the First Circuit).

*Opinion:* (1) The court’s 133-word docket judgment cites one published First Circuit opinion.

## 2. Second Circuit<sup>74</sup>

The Second Circuit does not permit citation to its unpublished opinions in unrelated cases.<sup>75</sup>

Of the 50 cases randomly selected, 37 are appeals from district courts (14 from the

Eastern District of New York; 13 from the Southern District of New York; three each from the District of Connecticut, the Northern District of New York, and the Western District of New York; and one from the District of Vermont), one is an appeal from the United States Tax Court, and 12 are appeals from the Board of Immigration Appeals.<sup>76</sup>

The publication rate in this sample will be from 16% to 18% once all the cases are resolved. Eight of the cases were resolved by published opinions (six signed and two per curiam), seven were resolved by unpublished summary orders (five of which were published in the *Federal Appendix*), 34 were resolved by docket judgments, and one case has not yet been resolved.

Published opinions averaged 6,004 words in length, ranging from 900 to 22,255. Unpublished summary orders averaged 848 words in length, ranging from 315 to 1,728. Six opinions were under 1,000 words in length (40%, one published and five unpublished), and three of these were under 500 words in length (20%, all unpublished).

Fourteen of the cases were fully briefed. In 33 of the appeals no counseled brief was filed, and in three of the appeals a counseled brief was filed only for one side.<sup>77</sup>

There are citations to unpublished court opinions in ten of these cases. In one case the citation is only to an opinion in a related case; in nine cases there are citations to unpublished opinions in unrelated cases. All of the citations to unrelated unpublished opinions are in briefs, not opinions.

Four of the unrelated unpublished opinions cited are by the court of appeals for the Second Circuit, four are by courts of appeals for other circuits, 12 are by Second Circuit

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74. Docket sheets are on PACER. Most opinions are on the court’s website and on Westlaw. (Of the 15 cases in this sample resolved by published opinions or unpublished summary orders, all but one published opinion and all unpublished summary orders are on the court’s website, and all published opinions and all but one unpublished summary order are on Westlaw.) Briefs are on Westlaw for most cases with opinions on Westlaw. (Of the 14 published opinions and unpublished summary orders in this sample on Westlaw, all briefs are on Westlaw for five cases with published opinions and six cases with unpublished summary orders.)

75. 2d Cir. L.R. § 0.23 (“Where disposition is by summary order, the court may append a brief written statement to that order. Since these statements do not constitute formal opinions of the court and are unreported or not uniformly available to all parties, they shall not be cited or otherwise used in unrelated cases before this or any other court.”).

The court adopted its rule prohibiting citation to its unpublished opinions in unrelated cases on October 31, 1973.

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76. In 2002, 5,384 cases were filed in the court of appeals for the Second Circuit.

77. One fully briefed case was not included in the attorney survey because the briefs were not filed until after the June 2005 meeting of the Standing Committee.

district courts, and four are by district courts in other circuits.

C2-1. An unsuccessful criminal defendant, see *United States v. Fricker* (2d Cir. 02-1038, filed 01/16/2002, judgment 09/06/2002), resolved by unpublished summary order, cited two unpublished opinions by the court of appeals for the Second Circuit in a discussion of whether a convicted defendant merits a two-level upward sentencing adjustment if the defendant testifies at his trial. The brief cites a U.S. Supreme Court opinion to support an argument that an upward adjustment was not merited in this case and then cites two unpublished and one published Second Circuit opinions to support a statement that such upward adjustments should be reserved for clear lies.

C2-2. Both the appellant and the appellee cited unpublished opinions in an unsuccessful appeal of the district court's refusal to set aside an arbitration decision concerning the shipping of steel slabs, *Duferco International Steel Trading v. T. Klaveness Shipping A/S* (2d Cir. 02-7238, filed 03/07/2002, judgment 06/24/2003), resolved by published opinion at 333 F.3d 383.

The appellee cited an unpublished opinion by the court of appeals for the Second Circuit with two published opinions by the same court to support a statement that the court reviews legal issues de novo and findings of fact for clear error in a review of a district court's confirmation of an arbitration award.

The appellee also cited three unpublished opinions by the district court for the Southern District of New York. Its brief cites two of these opinions in its discussion of the standard of review of an arbitration award. The brief cites the third unpublished Southern District of New York opinion as part of quoted text from the published district court opinion in this case.

The appellant quoted an unpublished Southern District of New York opinion con-

cerning the relationship between liability for damages and selection of a port.

C2-3. The government cited an unpublished opinion by the court of appeals for the Second Circuit in an immigration appeal that is still open, *Ni v. Ashcroft* (2d Cir. 02-4903, filed 12/09/2002, judgment pending). The unpublished opinion is cited with a published opinion by the court of appeals for another circuit to support a statement that the immigration judge did not err in finding that the petitioner had submitted a frivolous asylum application.

C2-4. Both the school district and a parent cited unpublished opinions in a successful appeal by the school district of a determination that it failed to provide a disabled student with an adequate individualized education program, *Grim v. Rhinebeck Central School District* (2d Cir. 02-7483, filed 04/30/2002, judgment 10/08/2003), resolved by published opinion at 346 F.3d 377.

The school district's appellant brief extensively cites unpublished opinions by the courts of appeals for the Fourth and Tenth Circuits. The brief also includes an unpublished opinion by the district court for the Southern District of New York in a string citation including a U.S. Supreme Court opinion and three published opinions by courts of appeals for the Sixth, Eighth, and Tenth Circuits.

The parent's appellee brief cites an unpublished opinion by the district court for the Northern District of Illinois to support a statement recognizing deference to a school district over educational policy.

C2-5. A fire department's reply brief cites two unpublished opinions in the department's successful appeal of a judgment against it concerning efforts to shut down group housing for recovering alcoholics and drug addicts, *Tsombanidis v. City of West Haven* (2d Cir. 02-7470, filed 04/29/2002, judgment 12/15/2003), resolved by published opinion at *Tsombanidis v. West Haven Fire De-*

*partment*, 352 F.3d 565 (2003). (The city's consolidated appeal was unsuccessful.) The brief includes 13 opinions in a nine-page string citation to support a statement that mere enforcement of state law is not sufficient to establish liability where incorporation of state law into local regulations might. One of these opinions is an unpublished opinion by the district court for the Northern District of Illinois, and the citation shows that it was affirmed by the court of appeals for the Seventh Circuit. Another of these citations is a published opinion by the district court for the Southern District of Ohio, and the citation shows that it was affirmed in part and vacated in part by an unpublished opinion by the court of appeals for the Sixth Circuit.

C2-6. Both the appellants and the appellees cited unpublished district court opinions in a mostly unsuccessful appeal by non-settling defendants of a partial settlement agreement in a multidistrict investment fraud case, *Ellis v. Daiwa Securities America, Inc.* (2d Cir. 02-7084, filed 01/23/2002, judgment 05/15/2003), resolved by published opinion at *Gerber v. MTC Electronic Technologies Co.*, 329 F.3d 297, *cert denied*, 540 U.S. 966 (2003).

The non-settling defendants and appellants cited unpublished opinions by the district courts for the Southern District of New York and the Northern District of California. Their brief includes the unpublished Southern District of New York opinion with a published Southern District of New York opinion in a "see also" string citation following a two-and-a-half page argument that a plaintiff cannot circumvent the Private Securities Litigation Reform Act over settlements by joining actions filed before its effective date. The brief includes the unpublished Northern District of California opinion with two other district court opinions in a string citation supporting a statement concerning which claims the Private Securities Litigation Reform Act controls.

The plaintiffs and appellees cited one unpublished opinion by the district court for the Eastern District of New York and three unpublished opinions by the district court for the Southern District of New York. Their brief includes the unpublished Eastern District of New York opinion in a string citation with five published opinions (one by the court of appeals for the Second Circuit, three by other federal courts of appeals, and one by a Second Circuit district court) to support an argument that the one-satisfaction rule applies only where the settlement and judgment represent common damages. The brief cites one unpublished Southern District of New York opinion as an example of a case that deferred judgment reduction until trial, another unpublished Southern District of New York opinion to argue that it was both wrongly decided and distinguishable, and the third unpublished Southern District of New York opinion to rebut the appellants' reliance on it.

The settling defendants and appellees cited two unpublished opinions by the district court for the Southern District of New York and one unpublished opinion each by the district courts for the Eastern District of Pennsylvania and the Northern District of California. Their brief includes an unpublished Southern District of New York opinion with a published opinion by another district court as examples of courts barring non-settling defendants from asserting claims in an attempt to shift their liability to settling defendants. The brief cites the other Southern District of New York opinion only to argue that the appellants' citation to it is inapposite. The brief cites the unpublished opinion by the district court for the Eastern District of Pennsylvania with a published opinion by another district court to support a statement that adding plaintiffs after the effective date of the Private Securities Litigation Reform Act does not alter the commencement date of a pending action. And the brief cites the un-

published Northern District of California opinion to rebut the appellants' reliance on it.

C2-7. In an unsuccessful asylum appeal, *Ni v. United States Department of Justice* (2d Cir. 02-4764, filed 11/18/2002, judgment 09/13/2005), the government cited two unpublished opinions—one by the court of appeals for the Ninth Circuit and one by the district court for the Southern District of New York. The Ninth Circuit citation notes that a published Ninth Circuit opinion cited by the petitioner has been superseded by regulations. The brief cites the Southern District of New York opinion as in accord with a federal regulation and a U.S. Supreme Court opinion to support a statement that the court reviews a refusal by the Board of Immigration Appeals to reopen or remand a case for abuse of discretion.

C2-8. In an unsuccessful appeal of a crack cocaine conviction, *United States v. King* (2d Cir. 02-1460, filed 08/05/2002, judgment 09/17/2003), resolved by published opinion at 345 F.3d 149, the defendant cited an unpublished opinion by the district court for the Southern District of New York concerning child pornography to support an argument that he did not knowingly possess more than five grams of cocaine unless he knew the amount was more than five grams.

C2-9. In an unsuccessful appeal of a defendant's bankruptcy relief by a successful civil plaintiff, *In re Dairy Mart Convenience Stores, Inc.* (2d Cir. 02-5010, filed 02/01/2002, judgment 11/20/2003), resolved by published opinion at 351 F.3d 86, the standard of review section of the defendants' appellee brief includes a short "see also" string citation, which is headed by a published opinion by the court of appeals for the Second Circuit, and which then includes an unpublished opinion by the district court for the Southern District of New York, which in turn is cited as citing another published opinion by the court of appeals for the Second Circuit.

## Individual Case Analyses

***Varszegi v. Armstrong* (2d Cir. 02-0107, filed 04/22/2002, judgment 09/03/2002).**

*Appeal from:* District of Connecticut.

*What happened:* Pro se prisoner's appeal withdrawn.

*Related cases:* *Varszegi v. Meachum* (2d Cir. 95-2300, filed 05/22/1995, judgment 06/06/1995) (pro se appeal dismissed for failure to pay fees), *Varszegi v. Meachum* (2d Cir. 98-2577, filed 06/29/1998, judgment 03/18/1999) (pro se appeal dismissed for failure to comply with the scheduling order), *Varszegi v. United States* (2d Cir. 98-2654, filed 06/30/1998, judgment 07/24/1998) (pro se appeal dismissed for lack of certificate of appealability), *Varszegi v. Stamford Police Department* (2d Cir. 99-0035, filed 02/04/1999, judgment 08/25/1999) (unsuccessful pro se appeal), *Varszegi v. Delgado* (2d Cir. 99-0130, filed 05/06/1999, judgment 03/06/2000) (unsuccessful pro se appeal), *Varszegi v. Bove* (2d Cir. 99-0246, filed 08/23/1999, judgment 01/07/2000) (pro se appeal dismissed for failure to comply with the scheduling order), *Varszegi v. Armstrong* (2d Cir. 02-2133, filed 03/01/2002, judgment 07/29/2002) (certificate of appealability denied).

*Opinion:* (1) The court's docket judgment cites no opinions.

***Johnson v. Kellman* (2d Cir. 02-0236, filed 08/20/2002, judgment 08/04/2003).**

*Appeal from:* Eastern District of New York.

*What happened:* Pro se prisoner appeal of the dismissal of the prisoner's complaint dismissed for failure to comply with the Prisoner Litigation Reform Act.

*Opinion:* (1) The court's docket judgment cites no opinions.

***Boddie v. Fisher* (2d Cir. 02-0341, filed 11/22/2002, judgment 03/06/2003).**

*Appeal from:* Western District of New York.

*What happened:* Pro se prisoner appeal dismissed.

*Opinion:* (1) The court's docket judgment cites no opinions.

***Gill v. United National* (2d Cir. 02-0350, filed 12/04/2002, judgment 08/04/2003).**

*Appeal from:* Southern District of New York.

*What happened:* Pro se prisoner appeal dismissed for failure to pay the filing fee or file a motion for in forma pauperis status. The court denied the appellant's motion to reinstate the appeal because the appeal lacked merit.

*Related case:* *Gill v. Bush* (2d Cir. 02–9446, filed 12/04/2002, judgment 12/31/2002) (pro se appeal dismissed for failure to pay the filing fee).

*Opinion:* (1) The court’s docket judgment cites no opinions.

***United States v. Fricker* (2d Cir. 02–1038, filed 01/16/2002, judgment 09/06/2002).**

*Appeal from:* Southern District of New York.

*What happened:* Unsuccessful appeal of a conviction for insider trading.

*Appellant’s brief:* The defendant’s 12,835-word appellant brief cites 18 published opinions (two by the U.S. Supreme Court, 13 by the Second Circuit, one by another circuit, one by the Southern District of New York, and one by a district in another circuit), two unpublished Second Circuit opinions, evidence admitted in two related criminal prosecutions in the Southern District of New York, and one Web article.

The brief cites two unpublished Second Circuit opinions in a discussion of the argument that a two-level sentencing “upward adjustment is not intended to be automatically applied whenever a defendant testifies at his trial and is nonetheless convicted.” (Page 36.) The brief cites a U.S. Supreme Court opinion to support the argument and then cites two unpublished and one published Second Circuit opinions to support the statement: “Moreover, a review of the cases decided by this Court indicates that this upward adjustment has been reserved for situations where the defendant ‘has clearly lied’ with regard to material matters . . . .” (Page 37.)

*Appellee’s brief:* The government’s 9,771-word appellee brief cites 38 published opinions (three by the U.S. Supreme Court, 32 by the Second Circuit, one by the Southern District of New York, one by another Second Circuit district, and one by a district in another circuit).

*Opinion:* (2) The court’s unpublished 1,467-word summary order cites eight published opinions (two by the U.S. Supreme Court and six by the Second Circuit). The order is on the court’s website, but not on Westlaw.

***United States v. Saltzman* (2d Cir. 02–1058, filed 01/25/2002, judgment 02/13/2002).**

*Appeal from:* Eastern District of New York.

*What happened:* Criminal appeal voluntarily withdrawn with prejudice.

*Opinion:* (1) The court’s docket judgment cites no opinions.

***United States v. Stakes* (2d Cir. 02–1146, filed 02/27/2002, judgment 01/17/2003).**

*Appeal from:* Eastern District of New York.

*What happened:* Partially successful criminal appeal in which the court remanded the case for consideration of mandatory factors in the restitution component of the sentence.

*Appellant’s brief:* The defendant’s 4,124-word appellant brief cites 12 published opinions (11 by the Second Circuit and one by another circuit).

*Appellee’s brief:* The government’s 2,776-word appellee brief cites four published Second Circuit opinions.

*Appellant’s reply brief:* The defendant’s 1,092-word reply brief cites two published Second Circuit opinions.

*Opinion:* (2) The court’s unpublished 786-word summary order, *United States v. Stakes*, 58 Fed. Appx. 531, 2003 WL 151260 (2d Cir. 2003) (two headnotes), cites four published Second Circuit opinions. According to Westlaw (04/05/2005), the court’s summary order has not been cited elsewhere.

***United States v. Kishk* (2d Cir. 02–1157, filed 03/06/2002, judgment 04/11/2003).**

*Appeal from:* Eastern District of New York.

*What happened:* Unsuccessful appeal of a conviction for making a false statement.

*Appellant’s brief:* The defendant’s 4,746-word appellant brief cites 13 published opinions (four by the U.S. Supreme Court, four by the Second Circuit, four by other circuits, and one by the Eastern District of New York).

*Appellee’s brief:* The government’s 6,017-word appellee brief cites 32 published opinions (three by the U.S. Supreme Court, 22 by the Second Circuit, six by other circuits, and one by a district in another circuit).

*Opinion:* (2) The court’s unpublished 800-word summary order, *United States v. Kishk*, 63 Fed. Appx. 11, 2003 WL 1868479 (2d Cir. 2003) (three headnotes), cites seven published opinions (two by the U.S. Supreme Court, four by the Second Circuit, and one by another circuit). According to Westlaw (04/05/2005), the court’s summary order has been cited in three secondary sources and two briefs in one Southern District of New York case.

***United States v. King* (2d Cir. 02–1460, filed 08/05/2002, judgment 09/17/2003).**

*Appeal from:* Eastern District of New York.

*What happened:* Unsuccessful appeal of a crack cocaine conviction. The court held that the defendant could be convicted of possessing more than five grams of cocaine even if the government had not proved he knew he possessed more than five grams of cocaine, so long as the government

proved that he knew he possessed cocaine and it was more than five grams in quantity.

*Appellant's brief:* The defendant's 7,032-word appellant brief cites 30 published opinions (15 by the U.S. Supreme Court, six by the Second Circuit, seven by other circuits, and two by New York's court of appeals) and one unpublished opinion by a Second Circuit district.

The brief cites the unpublished opinion by the Southern District of New York as "interpreting 'knowingly' . . . to require the defendant's knowledge that depictions were of actual minors, and not 'virtual child pornography.'" (Page 20.)

*Appellee's brief:* The government's 4,822-word appellee brief cites 27 published opinions (nine by the U.S. Supreme Court, nine by the Second Circuit, and nine by other circuits).

*Opinion:* (3) The court's published 1,927-word per curiam opinion, *United States v. King*, 345 F.3d 149 (2d Cir. 2003) (five headnotes), cites 17 published opinions (six by the U.S. Supreme Court, four by the Second Circuit, and seven by other circuits). According to Westlaw (09/22/2004), the court's opinion has been cited in two published Second Circuit opinions, two unpublished Second Circuit opinions, one published opinion by another circuit, one unpublished opinion by another circuit's district, one secondary source, one appellate brief in a Second Circuit case, and one appellate brief in an Eighth Circuit case.

***Livingston v. Herbert* (2d Cir. 02–2083, filed 02/04/2002, judgment 08/28/2002).**

*Appeal from:* Northern District of New York.

*What happened:* Pro se petition for certificate of appealability denied.

*Opinion:* (1) The court's docket judgment cites no opinions.

***Fernandez v. United States* (2d Cir. 02–2129, filed 03/04/2002, judgment 04/24/2002).**

*Appeal from:* Southern District of New York.

*What happened:* Pro se petition for certificate of appealability denied.

*Related case:* *Fernandez v. United States* (2d Cir. 02–3533, filed 03/04/2002, judgment 04/24/2002) (pro se motion to file successive habeas corpus petition denied).

*Opinion:* (1) The court's docket judgment cites no opinions.

***Samuel v. Stinson* (2d Cir. 02–2145, filed 03/06/2002, judgment 07/23/2002).**

*Appeal from:* Eastern District of New York.

*What happened:* Pro se prisoner's certificate of appealability denied.

*Opinion:* (1) The court's docket judgment cites no opinions.

***Winfield v. Herbert* (2d Cir. 02–2199, filed 03/27/2002, judgment 08/08/2002).**

*Appeal from:* Eastern District of New York.

*What happened:* Certificate of appealability denied.

*Opinion:* (1) The court's docket judgment cites no opinions.

***Brown v. Burge* (2d Cir. 02–2345, filed 06/05/2002, judgment 06/14/2002).**

*Appeal from:* Western District of New York.

*What happened:* Pro se prisoner appeal dismissed for failure to seek a certificate of appealability from the district court.

*Related case:* *Brown v. Burge* (2d Cir. 02–3576, filed 05/23/2002, judgment 07/15/2002) (motion to file a successive habeas corpus petition denied).

*Opinion:* (1) The court's docket judgment cites no opinions.

***Simon v. Miller* (2d Cir. 02–2472, filed 07/29/2002, judgment 12/27/2002).**

*Appeal from:* Southern District of New York.

*What happened:* Pro se prisoner's certificate of appealability denied.

*Opinion:* (1) The court's docket judgment cites no opinions.

***Fashewe v. United States* (2d Cir. 02–2528, filed 08/23/2002, judgment 02/13/2003).**

*Appeal from:* Eastern District of New York.

*What happened:* Pro se petition for certificate of appealability denied.

*Related cases:* *United States v. Fashewe* (2d Cir. 97–1257, filed 04/29/1997, judgment 05/08/1998) (unsuccessful criminal appeal), *Fashewe v. United States* (2d Cir. 01–3058, filed 07/30/2001, judgment 08/24/2001) (pro se petition for writ of mandamus instructing district court to rule on habeas corpus motion denied without prejudice to refile if the district court does not rule).

*Opinion:* (1) The court's docket judgment cites no opinions.

***Beatty v. United States* (2d Cir. 02–3535, filed 03/08/2002, judgment 04/10/2002).**

*Appeal from:* Southern District of New York.

*What happened:* Pro se successive application for habeas corpus relief transferred from the district court and then withdrawn by the petitioner.

*Related cases:* *In re Beatty* (2d Cir. 96–3110, filed 10/15/1996, judgment 12/03/1996) (pro se petition for writ of mandamus denied), *United States v. Beatty* (2d Cir. 98–1460, filed 08/07/1998, judg-

ment 10/01/1999) (unsuccessful criminal appeal), *United States v. Smith* (2d Cir. 99–1079, filed 02/11/1999, judgment 12/29/1999) (same), *United States v. Smith* (2d Cir. 99–1080, filed 02/11/1999, judgment 12/29/1999) (same), *Beatty v. United States* (2d Cir. 01–2493, filed 08/08/2001, judgment 05/24/2002) (unsuccessful appeal of a district court refusal to reconsider a criminal sentence).

*Opinion:* (1) The court’s docket judgment cites no opinions.

***Brown v. Burge* (2d Cir. 02–3576, filed 05/23/2002, judgment 07/15/2002).**

*Appeal from:* Western District of New York.

*What happened:* Application to file a successive habeas corpus petition denied.

*Opinion:* (1) The court’s docket judgment cites no opinions.

***Rodriguez-Taveras v. Ashcroft* (2d Cir. 02–4039, filed 02/11/2002, judgment 09/15/2003).**

*Appeal from:* Board of Immigration Appeals.

*What happened:* Appeal withdrawn by consent.

*Opinion:* (1) The court’s docket judgment cites no opinions.

***Thornton v. Commissioner of Internal Revenue* (2d Cir. 02–4051, filed 02/14/2002, judgment 10/22/2003).**

*Appeal from:* United States Tax Court.

*What happened:* Unsuccessful pro se appeal of a petition to review a tax deficiency filed seven days too late.

*Appellee’s brief:* The government’s 2,296-word appellee brief cites 21 published opinions (three by the U.S. Supreme Court, six by the Second Circuit, and 12 by other circuits).

*Opinion:* (2) The court’s unpublished 390-word summary order, *Thornton v. Commissioner of Internal Revenue*, 78 Fed. Appx. 747, 2003 WL 22426967 (2d Cir. 2003) (one headnote), cites two published opinions (one by the U.S. Supreme Court and one by the Second Circuit). According to Westlaw (04/05/2005), the court’s order has been cited in two secondary sources.

***Doukoure v. Immigration and Naturalization Service* (2d Cir. 02–4122, filed 04/16/2002, judgment 09/08/2004).**

*Appeal from:* Board of Immigration Appeals.

*What happened:* Appeal of the denial of asylum by an immigrant from Mauritania withdrawn.

*Petitioner’s brief:* The petitioner’s 2,888-word brief cites two published court opinions (one by the U.S. Supreme Court and one by a circuit other

than the Second) and four published opinions by the Board of Immigration Appeals.

*Opinion:* (1) The court’s docket judgment cites no opinions.

***Krayevsky v. Immigration and Naturalization Service* (2d Cir. 02–4287, filed 07/12/2002, judgment 05/27/2004).**

*Appeal from:* Board of Immigration Appeals.

*What happened:* Immigration appeal withdrawn.

*Opinion:* (1) The court’s docket judgment cites no opinions.

***Lin v. Immigration and Naturalization Service* (2d Cir. 02–4454, filed 09/05/2002, judgment 08/02/2004).**

*Appeal from:* Board of Immigration Appeals.

*What happened:* Deportation appeal withdrawn by stipulation.

*Opinion:* (1) The court’s docket judgment cites no opinions.

***Ilichev v. Immigration and Naturalization Service* (2d Cir. 02–4538, filed 09/27/2002, judgment 03/17/2005).**

*Appeal from:* Board of Immigration Appeals.

*What happened:* Immigration appeal withdrawn on a stipulation to reconsider the petitioner’s application for asylum.

*Opinion:* (1) The court’s docket judgment cites no opinions.

***Zhang v. Immigration and Naturalization Service* (2d Cir. 02–4540, filed 09/27/2002, judgment 06/10/2004).**

*Appeal from:* Board of Immigration Appeals.

*What happened:* Immigration appeal withdrawn.

*Opinion:* (1) The court’s docket judgment cites no opinions.

***Zheng v. Department of Justice* (2d Cir. 02–4739, filed 11/12/2002, judgment 05/12/2004).**

*Appeal from:* Board of Immigration Appeals.

*What happened:* Petition for review of a decision by the Board of Immigration Appeals withdrawn by stipulation.

*Opinion:* (1) The court’s docket judgment cites no opinions.

***Ni v. United States Department of Justice* (2d Cir. 02–4764, filed 11/18/2002, judgment 09/13/2005).**

*Appeal from:* Board of Immigration Appeals.

*What happened:* Unsuccessful appeal of the denial of asylum by a Chinese citizen, because, in part, his claims that his wife was sterilized after having a second child contradicted his wife’s



statement that she fled China to avoid sterilization.

*Petitioner's brief:* The petitioner's 12,657-word brief cites 53 published court opinions (11 by the U.S. Supreme Court, 18 by the Second Circuit, 22 by other circuits, and two by districts in other circuits), 10 published decisions by the Board of Immigration Appeals, a United Nations immigration handbook, and two media articles included in the joint appendix and cited in the brief by title.

*Respondent's brief:* The government's 14,769-word respondent brief cites 45 published court opinions (seven by the U.S. Supreme Court, 25 by the Second Circuit, 11 by other circuits, one by a Second Circuit district, and one by Britain's privy council), six published decisions of the Board of Immigration Appeals, and two unpublished court opinions (one by another circuit and one by a Second Circuit district).

To support the statement that "[t]his Court reviews the BIA's refusal to reopen or remand a case under an abuse of discretion standard," the government's brief cites a federal regulation and a U.S. Supreme Court opinion. The brief cites an unpublished opinion by the Southern District of New York as in "accord." (Page 50.)

The brief also cites an unpublished opinion by the Ninth Circuit as noting that a published Ninth Circuit opinion cited by the petitioner has been superseded by regulations. (Page 57.)

*Opinion:* (3) The court's published 900-word per curiam opinion, *Ni v. United States Department of Justice*, 424 F.3d 172 (2d Cir. 2005) (six headnotes), cites eight published opinions (one by the U.S. Supreme Court and seven by the Second Circuit). According to Westlaw (09/19/2005), the court's opinion has not been cited elsewhere.

***Zhang v. United States Department of Justice* (2d Cir. 02-4813, filed 11/25/2002, judgment 07/12/2005).**

*Appeal from:* Board of Immigration Appeals.

*What happened:* Immigration appeal dismissed as settled.

*Opinion:* (1) The court's docket judgment cites no opinions.

***Jiang v. Immigration and Naturalization Service* (2d Cir. 02-4818, filed 11/25/2002, judgment 04/11/2003).**

*Appeal from:* Board of Immigration Appeals.

*What happened:* Pro se petition to review a decision by the Immigration and Naturalization Service dismissed as untimely.

*Opinion:* (1) The court's docket judgment cites no opinions.

***Bogonis v. Attorney General* (2d Cir. 02-4861, filed 12/03/2002, judgment 08/31/2005).**

*Appeal from:* Board of Immigration Appeals.

*What happened:* Immigration appeal.

*Petitioner's brief:* The petitioner's 2,753-word brief cites six published court opinions (one by the U.S. Supreme Court, three by the Second Circuit, and two by another circuit) and two published opinions by the Board of Immigration Appeals.

*Respondent's brief:* The government's 8,100-word respondent brief cites 52 published court opinions (four by the U.S. Supreme Court, 19 by the Second Circuit, and 29 by other circuits) and three published decisions by the Board of Immigration Appeals.

*Petitioner's reply brief:* The petitioner's 188-word reply brief cites one published opinion by another circuit.

*Opinion:* (2) The court's unpublished 315-word summary order, *Bogonis v. United States Immigration and Naturalization Service*, 147 Fed. Appx. 216, 2005 WL 2108099 (2d Cir. 2005) (one headnote), cites one published Second Circuit opinion. According to Westlaw (09/06/2005), the court's summary order has not been cited elsewhere.

***Ni v. Ashcroft* (2d Cir. 02-4903, filed 12/09/2002, judgment pending).**<sup>78</sup>

*Appeal from:* Board of Immigration Appeals.

*What happened:* Still-open immigration appeal by a Chinese woman challenging a finding that her asylum application was frivolous.

*Petitioner's brief:* The petitioner's 2,916-word brief cites eight published court opinions (seven by circuits other than the Second Circuit and one by a Second Circuit district) and four published opinions by the Board of Immigration Appeals.

*Respondent's brief:* The government's 2,349-word respondent brief cites 11 published opinions (three by the U.S. Supreme Court, seven by the Second Circuit, and one by another circuit) and one unpublished opinion by the Second Circuit.

The unpublished opinion is cited with a published opinion by the Eleventh Circuit in a string citation headed by "see," to support a statement that the immigration judge "did not err in finding that the petitioner had submitted a frivolous asylum application and the decision below should be affirmed." (Page 13.)

*Opinion:* (0) The appeal is still open.

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78. Although this case was fully briefed, the authors of the briefs were not included in the attorney survey, because the briefs were not filed until June and September of 2005.

***In re Dairy Mart Convenience Stores, Inc.* (2d Cir. 02–5010, filed 02/01/2002, judgment 11/20/2003).**

*Appeal from:* Southern District of New York.

*What happened:* Unsuccessful appeal denying relief to a successful civil plaintiff from a defendant in bankruptcy.

*Appellant’s brief:* The plaintiff’s 7,631-word appellant brief cites nine published opinions (two by the Second Circuit, two by other circuits, two by the Southern District of New York’s bankruptcy court, one by another Second Circuit district, one by another Second Circuit district’s bankruptcy court, and one by Connecticut’s appellate court) and one treatise.

*Appellee’s brief:* The defendants’ 7,725-word appellee brief cites 22 published opinions (two by the U.S. Supreme Court, four by the Second Circuit, one by the Second Circuit’s bankruptcy appellate panel, four by other circuits, one by the Southern District of New York, five by the Southern District of New York’s bankruptcy court, four by other Second Circuit districts’ bankruptcy courts, and one by a bankruptcy court in another circuit), one unpublished opinion by the Southern District of New York, and one treatise.

The brief cites the unpublished Southern District of New York opinion in its “Standard of Review” section in a short string citation headed by “*see also.*” The string begins with a published Second Circuit opinion and then includes the unpublished district court opinion, which is quoted as saying, “We may overturn a denial of a motion to lift the automatic stay only upon a showing of abuse of discretion,” and cited as citing another published Second Circuit opinion. (Page 3.)

*Appellee’s brief:* The unsecured creditors’ 5,146-word appellee brief cites 23 published opinions (two by the U.S. Supreme Court, nine by the Second Circuit, three by other circuits, one by another circuit’s bankruptcy appellate panel, four by the Southern District of New York, one by the Southern District of New York’s bankruptcy court, one by another Second Circuit’s bankruptcy court, one by a district in another circuit, and one by a bankruptcy court in another circuit) and one treatise.

*Opinion:* (3) The court’s published 2,620-word signed opinion, *In re Dairy Mart Convenience Stores, Inc.*, 351 F.3d 86 (2d Cir. 2003) (12 headnotes), cites 11 published opinions (two by the U.S. Supreme Court; two by the Second Circuit; two by other circuits; two by the Southern District of New York, including one in an earlier phase of this case; two by the Southern District of New York’s bankruptcy court; and one by another Sec-

ond Circuit district), an unpublished opinion by a Second Circuit district in an earlier phase of this case, and one treatise. According to Westlaw (04/05/2005), the court’s opinion has been cited in one published Second Circuit opinion, three unpublished opinions by the Southern District of New York, two published opinions by the Southern District of New York’s bankruptcy court, 19 secondary sources, one appellate brief in another circuit, and nine trial court briefs in nine cases (three bankruptcy court cases in the Southern District of New York, two district court cases in other circuits, and four bankruptcy court cases in other circuits).

***Huminski v. Predom* (2d Cir. 02–6199, filed 08/12/2002, judgment 10/07/2004).**

*Appeal from:* District of Vermont.

*What happened:* Partially successful cross-appeal by a director of courthouse security of a denial of qualified immunity in an action alleging that she and state court judges violated the plaintiff’s First Amendment rights in barring him from courthouse grounds in reaction to his ambiguous threats. The court of appeals held that the plaintiff had a First Amendment right to attend court proceedings, but that right was not yet well established at the time of the defendants’ actions, so the security director had qualified immunity from an action based on that right. But the plaintiff also had a First Amendment right to display messages on his van and park it in the court’s parking lot, and this right was well established, so the security director did not have qualified immunity from a claim arising from that right.

The court denied the security director’s petition for rehearing, but granted the plaintiff’s motion for clarification or rehearing.

*Related cases:* The appeal was consolidated with a successful cross-appeal by the judges, *Huminski v. Rutland County* (2d Cir. 02–6150, filed 08/12/2002, judgment 10/07/2004) (the judges had judicial immunity), and partially successful appeals by the plaintiff, *Huminski v. Corsones* (2d Cir. 02–6201, filed 08/12/2002, judgment 10/07/2004) (the plaintiff’s appeal, regarded as the lead case) and *Huminski v. Rutland County* (2d Cir. 03–6059, filed 01/16/2003, judgment 10/07/2004) (the plaintiff’s certified interlocutory appeal).

*Cross-appellee’s brief:* The plaintiff’s 14,596-word appellant brief cites 82 published opinions (36 by the U.S. Supreme Court; 26 by the Second Circuit, including one by a previous appeal in this case; 14 by other circuits; three by the District of Vermont in this case; one by another Second Cir-

cuit district; one by a district in another circuit; and one by Vermont's supreme court), two unpublished opinions in related cases (one in Vermont's supreme court and one in Vermont's district court), one newspaper article, and one website.

*Amicus curiae brief:* The Thomas Jefferson Center for the Protection of Free Expression's 2,189-word amicus curiae brief cites 12 published opinions (four by the U.S. Supreme Court; five by the Second Circuit, including one by a previous appeal in this case; one by another circuit; and two by the District of Vermont in this case).

*Cross-appellant's brief:* The security director's 6,677-word cross-appellant and appellee brief cites 33 published opinions (15 by the U.S. Supreme Court, nine by the Second Circuit, six by other circuits, one by the District of Vermont in this case, one by a district in another circuit, and one by the District of Columbia's court of appeals).

*Cross-appellee's reply brief:* The plaintiff's 19,696-word reply brief cites 99 published opinions (45 by the U.S. Supreme Court, 22 by the Second Circuit, 20 by other circuits, three by the District of Vermont in this case, four by other Second Circuit districts, and five by districts in other circuits), one law review article, two newspaper articles, and *Black's Law Dictionary*.

*Cross-appellant's reply brief:* The security director's 4,641-word reply brief cites 18 published opinions (five by the U.S. Supreme Court, 11 by the Second Circuit, and two by other circuits).

*Opinion:* (3) The court published a 22,204-word signed opinion, *Huminski v. Corsones*, 386 F.3d 116 (2d Cir. 2004) (32 headnotes), citing 88 published opinions (37 by the U.S. Supreme Court; 32 by the Second Circuit, including a previous interlocutory appeal; 12 by other circuits; three by the District of Vermont in earlier phases of this case; and four by Vermont's supreme court), five unpublished opinions in related cases (one by the Second Circuit, two by the District of Vermont, and two by Vermont's district court), and two legal articles. According to Westlaw (04/06/2005), the court's opinion has been cited in three Second Circuit opinions (one published and two unpublished), one published opinion by another circuit, one secondary source, and one appellate brief in another circuit.

On rehearing, the court published a 22,255-word signed opinion, *Huminski v. Corsones*, 396 F.3d 53, 2005 WL 94542 (2d Cir. 2005) (32 headnotes), citing the same sources as the original opinion did. According to Westlaw (04/05/2005),

the court's opinion on rehearing has been cited in one published opinion by a Second Circuit district.

***Commodity Futures Trading Commission v. Martin A. Armstrong, SA* (2d Cir. 02–6263, filed 10/21/2002, judgment 02/28/2003).**

*Appeal from:* Southern District of New York.

*What happened:* Pro se appeal dismissed.

*Related cases:* *Commodity Futures Trading Commission v. Martin A. Armstrong, SA* (2d Cir. 02–6262, filed 10/21/2002, judgment 02/28/2003) (pro se appeal dismissed), *Commodity Futures Trading Commission v. Martin A. Armstrong, SA* (2d Cir. 02–6264, filed 10/21/2002, judgment 02/28/2003) (pro se appeal dismissed).

*Opinion:* (1) The court's docket judgment cites no opinions.

***Sager Spuck Statewide v. Hartford Casualty* (2d Cir. 02–7072, filed 01/18/2002, judgment 04/23/2002).**

*Appeal from:* Northern District of New York.

*What happened:* Civil appeal withdrawn by stipulation.

*Opinion:* (1) The court's docket judgment cites no opinions.

***Ellis v. Daiwa Securities America, Inc.* (2d Cir. 02–7084, filed 01/23/2002, judgment 05/15/2003).**

*Appeal from:* Eastern District of New York.

*What happened:* Mostly unsuccessful appeal by non-settling defendants of a partial settlement agreement in a multidistrict investment fraud case.

*Related cases:* The lead case is *Kayne v. MTC Electronic Technologies Co.* (2d Cir. 02–7023, filed 01/08/2002, judgment 05/15/2003). Other appeals decided with the selected case are *Gerber v. Daiwa Securities America, Inc.* (2d Cir. 02–7083, filed 01/23/2002, judgment 05/15/2003), *Farr v. Driol* (2d Cir. 02–7143, filed 02/13/2002, judgment 05/15/2003), and *Kayne v. MTC Electronic Technologies Co.* (2d Cir. 02–7215, filed 02/12/2002, judgment 05/15/2003). A companion case, *Gerber v. BDO Dunwoody Ward Mallette* (2d Cir. 02–7026, filed 01/08/2002, judgment 05/16/2003), was withdrawn by stipulation. Another case, *Farr v. Driol* (2d Cir. 02–7147, filed 02/13/2002, judgment 05/22/2002), was dismissed for failure to file Forms C and D.

*Appellant's brief:* The non-settling defendants' 8,836-word appellant brief cites 22 published opinions (four by the U.S. Supreme Court, four by the Second Circuit, three by other circuits, one by the Eastern District of New York in a related case, four by another Second Circuit district, and six by

districts in other circuits), two unpublished opinions (one by a Second Circuit district and one by a district in another circuit), and four related cases (two in federal district courts and two in a California superior court).

The brief devotes two-and-a-half pages to an argument that a plaintiff cannot circumvent control of the Private Securities Litigation Reform Act over settlements by joining actions filed before December 22, 1995. (Pages 31–33.) The brief cites two opinions by the Southern District of New York in a “*see also*” string. One of these opinions is published, but the first cited is unpublished, *Levy v. United States General Accounting Office*, 1998 WL 193191. Its citation shows that it was affirmed by a published Second Circuit opinion.

The brief cites three district court opinions to support the statement, “Courts have interpreted section 108 [of the Private Securities Litigation Reform Act] to require application of the [Act] to all [Securities Exchange Act of 1934] claims asserted after [December 22, 1995].” (Page 30.) Two of these opinions are published and one is an unpublished opinion by the Northern District of California, *Hockey v. Medhekar*, 1997 WL 203704.

*Appellee’s brief:* The plaintiffs’ 6,908-word appellee brief cites 41 published opinions (six by the U.S. Supreme Court; nine by the Second Circuit; 14 by other circuits; two by the Eastern District of New York, including one in a related case; nine by other Second Circuit districts; and one by a district in another circuit) and four unpublished opinions (one by the Eastern District of New York and three by other Second Circuit districts).

The brief cites a published Second Circuit opinion to support the statement that “The ‘one satisfaction’ rule applies only where ‘the settlement and judgment represent common damages.’” (Page 14.) An 18-line string citation follows, including citations to six opinions—one published Second Circuit opinion, three published opinions by other circuits, one published opinion by a Second Circuit district, and one unpublished opinion by the Eastern District of New York—each accompanied by a parenthetical elaboration.

The brief cites an unpublished opinion by the Southern District of New York as an example of “pre-PSLRA authority in this Circuit subsequent to [*In re*] *Jiffy Lube [Securities Litigation]*, 927 F.2d 155 (4th Cir. 1991),] that allowed deferral of even the judgment reduction methodology until the time of trial, even where the non-settling defendants’ contribution claims were barred.” (Pages 18–19.)

The brief cites a published opinion by the Southern District of New York for the principle that “*American Pipe* tolling applie[s] even to individual claims filed prior to a class certification ruling.” (Page 27, citing *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974).) The brief devotes nearly a page to an argument that: “The contrary holding in [an unpublished opinion by the Southern District of New York] is both wrongly decided and distinguishable.” (Page 28.)

The brief also cites an unpublished opinion by the Southern District of New York, *Levy v. United States General Accounting Office*, 1998 WL 193191, which was affirmed in a published Second Circuit opinion, in order to rebut the appellants’ reliance on the opinion: “Non-settling Defendants cite a number of ‘relation-back’ statute of limitations cases decided under FRCP 15(c) ([citations]) to argue that the PSLRA applies to the later-added plaintiffs. This analysis is faulty for several reasons.” (Page 24.)

*Appellee’s brief:* The settling defendant’s 7,146-word brief cites 29 published opinions (one by the U.S. Supreme Court, three by the Second Circuit, 10 by other circuits, three by a Second Circuit district, 11 by districts in other circuits, and one by California’s court of appeal), four unpublished opinions (two by a Second Circuit district and two by districts in other circuits), and two related district court cases.

The brief includes an unpublished opinion by the Southern District of New York in a string citation with a published opinion by a district in another circuit to support the statement, “Federal courts recognize that ‘a rose by any other name is still a rose’ and do not hesitate to bar non-settling defendants from asserting tort and contract claims that are, in effect, attempts to shift their liability to settling defendants.” (Page 20.)

The brief cites a published opinion by the District of Maryland and an unpublished opinion by the Eastern District of Pennsylvania in a string headed by “*see*” to support the statement, “The addition of new plaintiffs through amended complaints filed in 1996 and 1997 does not alter the fundamental fact that this action was ‘commenced’ before the PSLRA’s effective date.” (Page 13.)

In one footnote, the brief asserts that a published opinion by the Eastern District of Michigan and an unpublished opinion by the Northern District of California do not support the appellants’ argument that “courts have applied the PSLRA not only to actions commenced after the enactment date, but to ‘claims asserted’ after that date

as well.” (Page 13, note 7, citing *Hockey v. Medhekar*, 1997 WL 203704.) In another footnote, the brief asserts that two opinions by the Southern District of New York cited by the appellants, one published and one unpublished, “are inapposite.” (Page 17, note 10, citing *Levy v. United States General Accounting Office*, 1998 WL 193191.)

*Opinion:* (3) The court’s published 6,367-word signed opinion, *Gerber v. MTC Electronic Technologies Co.*, 329 F.3d 297 (2d Cir. 2003)<sup>79</sup> (nine headnotes), cites 10 published opinions (four by the Second Circuit, three by other circuits, two by Second Circuit districts, and one by a district in another circuit). According to Westlaw (04/06/2005), the court’s opinion has been cited in one published opinion by another circuit, seven opinions by Second Circuit districts (three published and four unpublished), four opinions by districts in other circuits (three published and one unpublished), 10 secondary sources, one petition to the U.S. Supreme Court for a writ of certiorari, six appellate briefs in four appeals in other circuits, and 14 trial court briefs in eight cases (seven briefs in two cases in a Second Circuit district, four briefs in four district court cases in other circuits, and two in bankruptcy court cases in other circuits).

***Fernicola v. Healthcare Underwriters Mutual Insurance Co.* (2d Cir. 02–7151, filed 02/07/2002, judgment 11/18/2002).**

*Appeal from:* Southern District of New York.

*What happened:* Pro se real property civil appeal dismissed because plaintiffs and appellants filed to file their brief.

*Related cases:* *In re Fernicola* (2d Cir. 01–3001, filed 01/08/2001, judgment 03/02/2001) (pro se petition for writ of mandamus denied), *In re Fernicola* (2d Cir. 02–3002, filed 01/02/2002, judgment 02/22/2002) (same).

*Opinion:* (1) The court’s docket judgment cites no opinions.

***Charter Oak Insurance Co. v. Trio Realty Co.* (2d Cir. 02–7185, filed 02/20/2002, judgment 02/24/2004).**

*Appeal from:* Southern District of New York.

*What happened:* Civil appeal withdrawn.

*Opinion:* (1) The court’s docket judgment cites no opinions.

***Duferco International Steel Trading v. T. Klaveness Shipping A/S* (2d Cir. 02–7238, filed 03/07/2002, judgment 06/24/2003).**

*Appeal from:* Southern District of New York.

*What happened:* Unsuccessful appeal of the district court’s refusal to set aside an arbitration decision concerning the shipping of steel slabs.

*Appellant’s brief:* The appellant’s 8,643-word brief cites 22 published opinions (two by the U.S. Supreme Court, 14 by the Second Circuit, two by other circuits, two by the Southern District of New York, one by another Second Circuit district, and one by the court of appeal for England and Wales), one unpublished opinion by the Southern District of New York, two treatises, and two law review articles.

The unpublished opinion is quoted in a footnote: “It is well settled that ‘[w]hen a charter names a port [or berth] and the master proceeds there without protest, the owner accepts the port [or berth] as a safe port, and is bound to the conditions that exist there.’” (Page 9, note 11, quotation alterations in original.) The opinion is cited as quoting a published opinion by the Southern District of New York. Two treatises and two law review articles are cited in the same paragraph to support the same principle.

*Appellee’s brief:* The appellee’s 6,439-word brief cites 23 published opinions (15 by the Second Circuit, two by other circuits, and six by the Southern District of New York, one of which was the district court’s opinion in this case) and four unpublished opinions (one by the Second Circuit and three by the Southern District of New York).

The unpublished Second Circuit opinion is cited to support the statement, “In reviewing the district court’s confirmation of an arbitration award, the court reviews legal issues *de novo* and findings of fact for clear error.” (Page 10.) The statement is supported by a citation to a published Second Circuit opinion, followed by a string of two citations headed by “*see also*,” the first of which is the unpublished opinion and the second of which is another published Second Circuit opinion.

The brief cites an unpublished Southern District of New York opinion to support the statement, “A reviewing court is required to confirm the award if it finds even ‘a barely colorable justification’ in the award, regardless of its view on the merits.” (Page 8.)

After quoting a published Second Circuit opinion (“A court must not disturb an award simply because of an arguable difference of opinion regarding the meaning or applicability of the

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79. *Cert. denied*, 540 U.S. 966 (2003).

laws.”), the brief invites the reader to “see” an unpublished Southern District of New York opinion for another quotation: “manifest disregard standard is extremely high and the reviewing court is not to substitute its own judgment of the facts or interpretation of the contract for that of the arbitrators, even when convinced that they were plainly wrong.” (Pages 12–13 and note 19.)

The third citation to an unpublished Southern District of New York opinion is part of quoted text from the published district court opinion in this case.

*Appellant’s reply brief:* The appellant’s 3,998-word reply brief cites nine published opinions (one by the U.S. Supreme Court, four by the Second Circuit, one by another circuit, two by the Southern District of New York, and one by New York’s court of appeals).

*Opinion:* (3) The court’s published 4,391-word signed opinion, *Duferco International Steel Trading v. T. Klaveness Shipping A/S*, 333 F.3d 383 (2d Cir. 2003) (15 headnotes), cites 26 published opinions (six by the U.S. Supreme Court, 18 by the Second Circuit, one by another circuit, and the opinion by the Southern District of New York in this case) and one treatise. According to Westlaw (04/06/2005), the court’s opinion has been cited in five Second Circuit opinions (three published and two unpublished), three opinions by other circuits (two published and one unpublished), 16 opinions by the Southern District of New York (six published and 10 unpublished), three published opinions by other Second Circuit districts, one published opinion by a district in another circuit, one published opinion by New York’s appellate division, one unpublished opinion by New York’s supreme court, one unpublished opinion by Connecticut’s superior court, one unpublished opinion by Alabama’s supreme court, 36 secondary sources, three briefs in three U.S. Supreme Court cases, five appellate briefs in three cases in other circuits, and 10 trial court briefs in five cases (six briefs in three Southern District of New York district court cases, one brief in a Southern District of New York bankruptcy court case, and two briefs in a case in another Second Circuit district).

***Parra v. Geico Insurance Co.* (2d Cir. 02–7324, filed 03/27/2002, judgment 08/07/2002).**

*Appeal from:* Eastern District of New York.

*What happened:* In a pro se appeal, the court of appeals vacated the district court’s dismissal of the complaint for the limited purpose of permitting the plaintiff to properly identify the defendants.

*Opinion:* (1) The court’s docket judgment cites no opinions.

***Shaw v. Greenwich Anesthesiology Associates, P.C.* (2d Cir. 02–7407, filed 04/15/2002, judgment 01/02/2003).**

*Appeal from:* District of Connecticut.

*What happened:* Civil appeal withdrawn by stipulation.

*Related cases:* *Shaw v. Greenwich Anesthesiology Associates, P.C.* (2d Cir. 01–9005, filed 08/27/2001, judgment 11/14/2001) (appeal withdrawn without prejudice by stipulation), *Shaw v. Greenwich Anesthesiology Associates, P.C.* (2d Cir. 02–7443, filed 04/24/2002, judgment 01/02/2003) (cross-appeal withdrawn by stipulation).

*Opinion:* (1) The court’s docket judgment cites no opinions.

***Tsombanidis v. City of West Haven* (2d Cir. 02–7470, filed 04/29/2002, judgment 12/15/2003).**

*Appeal from:* District of Connecticut.

*What happened:* This is a cross-appeal by the plaintiffs in a successful action against a city and its fire department for efforts to shut down group housing for recovering alcoholics and drug addicts. The fire department’s appeal was successful and the plaintiffs’ cross-appeal against the fire department was unsuccessful. The city’s appeal, which was briefed separately, was unsuccessful.

*Related cases:* The selected case was consolidated with *Tsombanidis v. West Haven Fire Department* (2d Cir. 02–7171, filed 02/14/2002, judgment 12/15/2003) (unsuccessful appeal by the city), and *Tsombanidis v. City of West Haven* (2d Cir. 02–7449, filed 04/24/2002, judgment 12/15/2003) (successful appeal by the fire department).

*Cross-appellee’s brief:* The fire department’s 9,777-word appellant and cross-appellee brief cites 47 published opinions (six by the U.S. Supreme Court, 19 by the Second Circuit, 15 by other circuits, one by a Second Circuit district, and six by districts in other circuits).

*Cross-appellant’s brief:* The plaintiffs’ 12,561-word appellee and cross-appellant brief cites 41 published opinions (eight by the U.S. Supreme Court, 14 by the Second Circuit, nine by other circuits, two by the District of Connecticut, three by other Second Circuit districts, and five by districts in other circuits) and one dictionary.

*Cross-appellee’s reply brief:* The fire department’s 2,490-word reply brief cites 20 published opinions (one by the U.S. Supreme Court, two by the Second Circuit, 12 by other circuits, and five by districts in other circuits) and two unpublished opin-

ions (one by another circuit and one by a district in another circuit).

The brief cites an unpublished opinion by the Northern District of Illinois, noting that it was affirmed by a published opinion by the Seventh Circuit, as second in a string headed by a published opinion by the Seventh Circuit to support the statement: “A local government’s *mere enforcement* of state law, as opposed to express incorporation or adoption of state law into local regulations or codes, has been found insufficient to establish liability.” (Page 2.) This two-citation string is followed by a “*see also*” string of 11 citations over eight pages, most with long parenthetical quotations. One of these citations is a published opinion by the Southern District of Ohio, and the brief notes that the decision was affirmed in part and vacated in part by an unpublished Sixth Circuit opinion.

*Cross-appellant’s reply brief:* The plaintiffs’ 2,348-word reply brief cites 15 published opinions (three by the U.S. Supreme Court, six by the Second Circuit, and six by other circuits).

*Opinion:* (3) The court’s published 6,834-word signed opinion, *Tsombanidis v. West Haven Fire Department*, 352 F.3d 565 (2d Cir. 2003) (25 headnotes), cites 34 published opinions (six by the U.S. Supreme Court, 18 by the Second Circuit, seven by other circuits, and three by the district court in this case). According to Westlaw (04/06/2005), the court’s opinion has been cited in two unpublished Second Circuit opinions, one unpublished opinion by a Second Circuit district, two opinions by districts in other circuits (one published and one unpublished), two unpublished administrative decisions, 17 secondary sources, and four trial court briefs in three district court cases in other circuits.

***Grim v. Rhinebeck Central School District* (2d Cir. 02–7483, filed 04/30/2002, judgment 10/08/2003).**

*Appeal from:* Southern District of New York.

*What happened:* Successful appeal by a school district of the district court’s determination that the school district failed to provide a disabled student with an adequate individualized education program (IEP).

*Appellant’s brief:* The school district’s 9,881-word appellant brief cites 28 published opinions (two by the U.S. Supreme Court, 10 by the Second Circuit, 12 by other circuits, three by Second Circuit districts, and one by a district in another circuit) and three unpublished opinions (two by other circuits and one by the Southern District of New York).

The unpublished opinion by the Southern District of New York is cited with a U.S. Supreme Court opinion and three published opinions by other circuits in a string citation to support the principle that “deference is particularly warranted with regard to administrative decisions concerning the methodology to be used in educating the disabled student.” (Pages 28–29.)

The brief cites an unpublished opinion by the Fourth Circuit with a published opinion by another circuit to support the principle that trained educators are “exactly [the] kinds of persons to whom the federal courts are to give deference.” (Page 30.) Each citation includes a parenthetical quotation. The unpublished opinion is cited again as part of a string citation including two published and two unpublished opinions by other circuits to complete the invitation, “Concerning other procedural violations requiring a showing of an actual deprivation of educational benefits, *see also*.” (Page 33.) Finally, this unpublished Fourth Circuit opinion is cited repeatedly to support a two-page discussion concerning the timing of the district’s development of the disabled student’s IEP.

The brief includes an unpublished Tenth Circuit opinion in the string citation illustrating “other procedural violations requiring a showing of an actual deprivation of educational benefits” (page 33), and cites the unpublished opinion in three additional places. The brief cites the unpublished opinion to support a statement that “The court below erred in adopting a standard requiring greater specificity with regard to those IEP’s” (page 38), with seven lines of text and 10 lines of footnote amplifying the support. The unpublished opinion is also included in two string citations, headed “*see also*” and also including three published opinions by other circuits. In one case the brief includes the parenthetical explanation, “IEP upheld though allegedly not containing measurable short-term objectives or objective criteria for measuring student’s success” (page 40), and in the other case the brief includes the parenthetical explanation, “any deficiency in the IEP process must result in prejudice to the student or his parents before a court may find that the IDEA was violated” (page 41).

*Appellee’s brief:* The parent’s 5,015-word appellee brief cites 19 published opinions (one by the U.S. Supreme Court, three by the Second Circuit, 12 by another circuit, one by a Second Circuit district, and two by districts in other circuits) and one unpublished opinion by a district in another circuit.

The brief cites an unpublished opinion by the Northern District of Illinois to support the statement, "Simply put, because the state and local education agencies 'have much greater expertise in educational policy,' the court should not 'reverse the hearing officer's decision simply because [the court] disagrees with the decision.'" (Page 16.)

*Opinion:* (3) The court's published 2,740-word signed opinion, *Grim v. Rhinebeck Central School District*, 346 F.3d 377 (2d Cir. 2003) (six headnotes), cites six published opinions (one by the U.S. Supreme Court, three by the Second Circuit, and two by other circuits) and the Southern District of New York's unpublished opinion in this case. According to Westlaw (04/05/2005), the court's opinion has been cited in one published opinion by another circuit, one published opinion by the Southern District of New York, four opinions by other Second Circuit districts (two published and two unpublished), eight secondary sources, and one petition for writ of certiorari in the U.S. Supreme Court.

The court initially resolved the appeal with an unpublished 2,504-word summary order, *Grim v. Rhinebeck Central School District*, 74 Fed. Appx. 137, 2003 WL 22092349 (2d Cir. 2003) (no headnotes), citing three published opinions (one by the U.S. Supreme Court and two by the Second Circuit) and the Southern District of New York's unpublished opinion in this case. According to Westlaw (04/05/2005), the court's order has been cited in two secondary sources.

A day later the court issued an unpublished 2,653-word amended summary order, citing six published opinions (one by the U.S. Supreme Court, three by the Second Circuit, and two by other circuits) and the Southern District of New York's unpublished opinion in this case. The amended order expands one paragraph and adds three citations. The published opinion appears to be a copy-edited version of the amended summary order.

***Raimondo v. Merrill Lynch & Co.* (2d Cir. 02–7577, filed 05/17/2002, judgment 01/02/2003).**

*Appeal from:* Southern District of New York.

*What happened:* Settled appeal.

*Opinion:* (1) The court's docket judgment cites no opinions.

***Schachter v. United States Life Insurance Company in the City of New York* (2d Cir. 02–7840, filed 07/23/2002, judgment 10/02/2003).**

*Appeal from:* Eastern District of New York.

*What happened:* Unsuccessful pro se civil appeal of an action on behalf of a home attendant; appeal was dismissed for lack of standing. The plaintiff argued that the attendant's receiving only 43% of the amount paid by the plaintiff's insurance company amounted to a violation of the Thirteenth Amendment's prohibition on involuntary servitude.

*Related cases:* Previous unsuccessful appeals by the appellant include *Schachter v. Community School Board District 24* (2d Cir. 93–7019, filed 01/07/1993, judgment 01/28/1993) (pro se appeal dismissed sua sponte for failure to file a timely notice of appeal) and *Schachter v. Community School Board District 24* (2d Cir. 93–7663, filed 07/08/1993, judgment 04/08/1994) (unsuccessful pro se appeal).

*Appellee's brief:* The insurer's 1,170-word appellee brief cites four U.S. Supreme Court opinions.

*Opinion:* (2) The court's unpublished 451-word summary order, *Schachter v. United States Life Insurance Company in the City of New York*, 77 Fed. Appx. 41, 2003 WL 22273044 (2d Cir. 2003) (two headnotes), cites five published opinions (one by the U.S. Supreme Court and four by the Second Circuit). According to Westlaw (04/06/2005), the court's summary order has not been cited elsewhere.

***Witherspoon v. Rappaport* (2d Cir. 02–7920, filed 08/07/2002, judgment 11/05/2002).**

*Appeal from:* Eastern District of New York.

*What happened:* Civil appeal withdrawn by stipulation.

*Opinion:* (1) The court's docket judgment cites no opinions.

***The Robeworks, Inc. v. Russell-Newman, Inc.* (2d Cir. 02–9132, filed 09/27/2002, judgment 08/05/2003).**

*Appeal from:* Southern District of New York.

*What happened:* Civil appeal withdrawn by consent.

*Related case:* *Russell-Newman, Inc. v. The Robeworks, Inc.* (2d Cir. 03–7586, filed 06/06/2003, judgment 08/05/2003) (civil appeal withdrawn by consent).

*Opinion:* (1) The court's docket judgment cites no opinions.

***Hondros v. Villa Marin GMC, Inc.* (2d Cir. 02–9165, filed 10/04/2002, judgment 04/01/2003).**

*Appeal from:* Eastern District of New York.

*What happened:* Civil appeal withdrawn by stipulation.

*Related cases:* Consolidated appeals, *General Motors Corp. v. Villamarin Chevrolet, Inc.* (2d Cir.



02–9162, filed 10/04/2002, judgment 04/01/2003) and *Villa Marin Chevrolet, Inc. v. General Motors Corp.* (2d Cir. 02–9167, filed 10/04/2002, judgment 04/01/2003), also were withdrawn by stipulation.

*Opinion:* (1) The court’s docket judgment cites no opinions.

***Fernicola v. General Motors Acceptance Corp.* (2d Cir. 02–9486, filed 12/24/2002, judgment 03/28/2003).**

*Appeal from:* Northern District of New York.

*What happened:* Motion to proceed in forma pauperis denied and appeal dismissed as without arguable basis.

*Related cases:* *Fernicola v. Andrejewski* (2d Cir. 00–7305, filed 03/20/2000, judgment 05/04/2000) (pro se appeal dismissed as untimely), *Fernicola v. Andrejewski* (2d Cir. 00–7383, filed 04/03/2000, judgment 05/22/2000) (pro se appeal dismissed as untimely), *Fernicola v. Eannace* (2d Cir. 00–9364, filed 10/26/2000, judgment 01/09/2002) (unsuccessful pro se appeal), *Fernicola v. Healthcare Underwriters Mutual Insurance Co.* (2d Cir. 01–3001, filed 01/08/2001, judgment 03/02/2001) (pro se petition for writ of mandamus denied), *Fernicola v. United States* (2d Cir. 02–3002, filed 01/02/2002, judgment 02/22/2002) (pro se petition for writ of mandamus denied), *Fernicola v. Healthcare Underwriters Mutual Insurance Co.* (2d Cir. 02–7151, filed 02/07/2002, judgment 11/08/2002) (pro se appeal dismissed as settled), *Fernicola v. General Motors Acceptance Corp.* (2d Cir. 02–7557, filed 05/10/2002) (in forma pauperis status granted and district court judgment vacated so that appellants may be heard as to whether a filing injunction should be imposed). Case 02–7151 was also selected for this study.

*Opinion:* (1) The court’s docket judgment cites no opinions.

***Weeks v. New York State Division of Parole* (2d Cir. 02–9510, filed 12/31/2002, judgment 10/23/2003).**

*Appeal from:* Eastern District of New York.

*What happened:* Unsuccessful appeal of an unsuccessful employment discrimination action.

*Appellant’s brief:* The employee’s 2,657-word appellant brief cites nine published opinions (four by the U.S. Supreme Court, two by the Second Circuit, and three by a Second Circuit district).

*Appellee’s brief:* The Division of Parole’s 4,786-word appellee brief cites 24 published opinions (six by the U.S. Supreme Court; 14 by the Second Circuit, including an earlier related appeal; three

by other circuits, and one by the Eastern District of New York).

*Appellant’s reply brief:* The employee’s 1,728-word reply brief cites six published opinions (three by the U.S. Supreme Court and three by a Second Circuit district).

*Opinion:* (2) The court’s unpublished 1,102-word summary order, *Weeks v. New York State Division of Parole*, 78 Fed. Appx. 764, 2003 WL 22427940 (2d Cir. 2003) (two headnotes), cites six published opinions (one by the U.S. Supreme Court and five by the Second Circuit, including an opinion in a related appeal). According to Westlaw (04/06/2005), the court’s summary order has been cited in two secondary sources.

### 3. Third Circuit<sup>80</sup>

Citations to unpublished opinions are permitted in the Third Circuit, but there is a tradition against such citations in court opinions.<sup>81</sup>

Of the 50 cases randomly selected, 46 are appeals from district courts (18 from the Eastern District of Pennsylvania, 11 from the District of New Jersey, 10 from the Middle District of Pennsylvania, four from the Western District of Pennsylvania, two from the District of Delaware, and one from the District of the Virgin Islands) and four are appeals from the Board of Immigration Appeals.<sup>82</sup>

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80. Docket sheets are on PACER. Published opinions and most unpublished opinions (17 out of 19 in this sample) are on the court’s website, its intranet site, and Westlaw. Some briefs are on Westlaw. (Of the 25 cases in this sample with opinions on Westlaw and counseled briefs in the case file, all briefs are on Westlaw for seven cases, and some briefs are on Westlaw for two cases.)

81. 3d Cir. I.O.P. 5.7 (“The court by tradition does not cite to its not precedential opinions as authority. Such opinions are not regarded as precedents that bind the court because they do not circulate to the full court before filing.”).

The court’s internal operating procedure rule discouraging the court’s citation to its unpublished opinions was adopted July 1, 1990. The words “by tradition” were added in 1994.

82. In 2002, 3,686 cases were filed in the court of appeals for the Third Circuit.

The publication rate in this sample will be from 10% to 12% once all the cases are resolved. Five of the appeals were resolved by published signed opinions (including one with a concurrence, one with a partial concurrence, and one with a dissent), 19 were resolved by unpublished opinions (13 of which were signed and published in the *Federal Appendix* and six of which were per curiam opinions—including one opinion published in the *Federal Appendix* and five opinions tabled in the *Federal Appendix*), 25 were resolved by docket judgments, and one case has not yet been resolved.

Published opinions averaged 8,470 words in length, ranging from 2,470 to 16,512. Unpublished opinions averaged 1,190 words in length, ranging from 176 to 5,892. Eleven opinions (46%, all unpublished) were under 1,000 words in length, and one of these (4%) was under 500 words in length.

Twenty of the cases were fully briefed. In 25 of the appeals no counseled brief was filed, and in five of the appeals a counseled brief was filed only for one side.<sup>83</sup>

There are citations to unpublished court opinions in 14 of the cases. In four cases the citations are only to opinions in related cases; in 10 cases there are citations to unpublished court opinions in unrelated cases. One published opinion and one published concurrence cite unpublished district court opinions; in the other eight cases the citations to unrelated unpublished opinions are only in the briefs.

The four unrelated unpublished opinions cited by the court in these cases are all opinions by the district court for the Eastern District of Pennsylvania. Five of the unrelated unpublished opinions cited by the parties are by the court of appeals for the Third Circuit,

one is by a court of appeals for another circuit, seven are by Third Circuit district courts, one is by a Third Circuit bankruptcy court, four are by district courts in other circuits, one is by a bankruptcy court in another circuit, and one is by Delaware's court of chancery.

C3-1. In a published opinion, *W.V. Realty Inc. v. Northern Insurance Company of New York*, 334 F.3d 306 (3d Cir. 2003) (overturning a Middle District of Pennsylvania jury award based on a finding of insurance bad faith, because irrelevant and prejudicial evidence concerning discovery misconduct was admitted at trial), resolving 02-2910 (filed 07/15/2002, judgment 06/27/2003), the court of appeals for the Third Circuit cited three unpublished opinions by the district court for the Eastern District of Pennsylvania to show how trial courts in Pennsylvania have handled discovery misconduct in bad-faith cases.

The opinion cites two of these opinions and a published opinion by the district court for the Middle District of Pennsylvania to support the statement that “those cases in which courts have permitted bad faith claims to go forward based on conduct which occurred after the insured filed suit all involved something beyond a discovery violation, suggesting that the conduct was intended to evade the insurer's obligations under the insurance contract.”

In two places, the court's opinion also cites an unpublished opinion by the district court for the Eastern District of Pennsylvania that the insurance company cited in its briefs, *Slater v. Liberty Mutual Insurance Co.*, 1999 WL 178367 (E.D. Pa. 1999). First, the court's opinion cites a published opinion by Pennsylvania's superior court that quotes *Slater*. Second, the court's opinion cites *Slater* and a published opinion by Pennsylvania's court of common pleas following a discussion of a published opinion by Pennsylvania's superior court amplifying the statement that “[i]n those cases in which nothing more than dis-

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83. It is possible that the case that is not yet resolved may ultimately be fully briefed. The case is a prisoner's appeal in which appointed counsel requested by motion a remand for development of a more complete record.

covery violations were alleged, courts have declined to find bad faith.”

The insurance company’s appellant brief cites four unpublished opinions by the district court for the Eastern District of Pennsylvania. The brief cites *Slater* and another unpublished opinion by the district court for the Eastern District of Pennsylvania in an argument that discovery misconduct is not relevant to insurance bad faith. The brief cites another two unpublished opinions by the district court for the Eastern District of Pennsylvania and a published opinion by Pennsylvania’s superior court to support the statement that the state’s bad-faith statute clearly mandates that certain issues be tried without a jury.

To rebut an assertion by the insured that the insurance company’s opening brief misstates the holding of a published opinion by Pennsylvania’s court of appeals, in its reply brief the insurance company quoted the Pennsylvania opinion extensively, and the quotation includes a citation by the Pennsylvania superior court to *Slater*. The brief also states that a published opinion by the district court for the Middle District of Pennsylvania cites *Slater* with approval.

C3–2. In an unsuccessful appeal of a preliminary allocation of attorney fees in pending multidistrict litigation over fen-phen diet drugs, *Brown v. American Home Products Corp.* (3d Cir. 02–4074, filed 11/07/2002, judgment 03/20/2005), resolved by published opinion at *In re Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Products Liability Litigation*, 401 F.3d 143 (finding the preliminary allocation not yet appealable), a concurring judge cited an unpublished opinion by the district court for the Eastern District of Pennsylvania with seven published district court opinions from various circuits as examples of “decisions in which courts have delegated the task of allocating fees among counsel to lead counsel or have relied on an agreement reached by counsel.”

In its appellee brief, the plaintiffs’ management committee cited an unpublished opinion by the district court for the Eastern District of Pennsylvania and an unpublished opinion by the bankruptcy court for the District of Colorado. The brief includes the Eastern District of Pennsylvania opinion in a string of citations supporting a statement that “It is by now an unassailable proposition that a federal district court presiding over a mass tort MDL may properly award a fee to the plaintiffs’ management structure appointed by it, payable out of the fees derived from the representation of the individual litigants whose cases are subject to coordinated pre-trial proceedings in the MDL transferee court.” The string includes citations to published opinions by four federal courts of appeals, two district courts within those circuits, and the Federal Judicial Center’s *Manual for Complex Litigation, Third*. The brief includes the bankruptcy court opinion in a string of citations to support a statement that “This material [referring to material assembled by the committee for the benefit of other plaintiffs’ attorneys] is classic ‘attorney work product’ entitled to protection against compelled disclosure to any person who does not provide fair compensation for the effort involved in creating it.” The other citations in the string are three published opinions by the court of appeals for the Third Circuit.

C3–3. In a case affirming a cocaine conviction on the granting of an *Anders*<sup>84</sup> motion, *United States v. Shaw* (3d Cir. 02–2269, filed 05/09/2002, judgment 05/22/2003), resolved by unpublished opinion at 65 Fed. Appx. 851, 2003 WL 21197052, the government’s appellee brief includes one published and two unpublished Third Circuit opinions in a footnote string citation supporting a statement

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84. See *Anders v. California*, 386 U.S. 738 (1976) (holding that court-appointed appellate counsel may seek to withdraw on the grounds that the appeal would be frivolous only upon briefing the court of “anything in the record that might arguably support the appeal”).

that the court has disposed of wholly frivolous appeals by dismissal and by affirmance.

C3-4. Similarly, in a case affirming a conviction for illegally entering the United States after conviction for an aggravated felony on the granting of an *Anders* motion, *United States v. Douglas* (3d Cir. 02-4103, filed 11/07/2002, judgment 06/16/2003), resolved by unpublished opinion at 67 Fed. Appx. 733, 2003 WL 21380555, the same government attorneys who appeared in the *Shaw* case included the same Third Circuit opinions—one published and two unpublished—in a footnote string citation supporting a statement that the court has disposed of appeals with *Anders* motions by dismissal and by affirmance.

C3-5. In an unsuccessful appeal of the denial of summary judgment to emergency medical technicians who responded to a 911 call for a man having a seizure and responded to his erratic behavior by calling the police, after which the man died, *Rivas v. City of Passaic* (3d Cir. 02-3875, filed 10/17/2002, judgment 04/26/2004), resolved by published opinion at 365 F.3d 181, the briefs cite several unpublished opinions.

The technicians cited an unpublished opinion by the court of appeals for the Third Circuit in their appellant brief to support their argument that “the court below failed to comb the record and Local Rule 56.1 statement.”

The plaintiffs cited two unpublished district court opinions. Their appellee brief cites an unpublished opinion by the district court for the Eastern District of Pennsylvania as holding that “it was foreseeable that a 911 call misdirected to a private ambulance company rather than the authorized Fire Department Rescue units appropriately staffed to respond to such emergencies would result in serious harm or death.” The brief also cites an unpublished opinion by the district court for the Northern District of Illinois as holding that the “plaintiff had a valid claim against para-

medics for failure to intervene to protect decedent’s safety when the police placed decedent face down in the street, handcuffed him, choked him and inflicted additional injuries on him.”

The technicians’ reply brief includes an unpublished opinion by the court of appeals for the Sixth Circuit in a string of two citations intended to show that “Consistent with the Third Circuit’s holding in *Anela [v. City of Wildwood]*, 790 F.2d 1063 (3d Cir. 1986)], other courts have granted summary judgment for defendants in § 1983 cases where the plaintiff could not identify the accountable state actors and the circumstantial evidence of said actors’ identities was too attenuated.” The other opinion cited in the string is a published opinion by the court of appeals for the Tenth Circuit.

C3-6. In an unsuccessful pro se appeal of an injunction against a malicious prosecution claim in a securities and bankruptcy action, *Signator Investors v. Olick* (3d Cir. 02-3437, filed 09/06/2002, judgment 11/07/2003), resolved by unpublished opinion tabled at *Signator Investors v. Olick*, 85 Fed. Appx. 874, 2003 WL 22881726, an investment company’s appellee brief twice cites an unpublished opinion by the court of appeals for the Third Circuit as concluding that “the Supreme Court would not create a distinct cause of action for the spoliation of evidence brought outside an existing personal injury or products liability action.”

C3-7. In an unsuccessful ERISA appeal of summary judgment in favor of an employer in an action for severance benefits, *Young v. Pennsylvania Rural Electric Ass’n* (3d Cir. 02-3946, filed 10/25/2002, judgment 11/17/2003), resolved by unpublished opinion at 80 Fed. Appx. 785, 2003 WL 22701472, the employer’s appellee brief cites one unpublished and two published opinions by the court of appeals for the Third Circuit to support a statement that “‘Serious consideration’ of changes in plan benefits is sufficient to

trigger a fiduciary duty to provide complete and truthful information about such changes in response to an employee's inquiry."

C3-8. In an unsuccessful appeal of a jury verdict in favor of an insurance company in which the claimant claimed damage to his furniture store from a boulder dislodged by hurricane Floyd, *McGinnis v. Ohio Casualty Insurance Co.* (3d Cir. 02-2802, filed 06/28/2002, judgment 05/23/2003), resolved by unpublished opinion at 67 Fed. Appx. 127, 2003 WL 21205882, the insurance company cited one unpublished opinion and two published opinions by the district court for the Eastern District of Pennsylvania in its appellee brief to support a statement that "It is clear that in the Eastern District, the Court is the gatekeeper in bad faith."

C3-9. In an unsuccessful appeal of the denial of a preliminary injunction in a dispute over intellectual property rights in a french fry vending machine, *Silver Leaf, LLC v. Tasty Fries, Inc.* (3d Cir. 02-2767, filed 06/27/2002, judgment 10/30/2002), resolved by unpublished opinion at 51 Fed. Appx. 366, 2002 WL 31424691, the distributor's appellant brief cites two unpublished opinions by the district court for the Southern District of New York to support a statement that "bad faith on the part of the party seeking to enforce an exculpatory clause will invalidate such a clause." One of the opinions is included in a string citation with two published opinions by the appellate division of New York's supreme court, and the other is included in a footnote appended to the string citation and headed "see also."

C3-10. In a voluntarily dismissed appeal of the dismissal of a bankruptcy case by the district court for the District of Delaware, *In re Primestone Investment Partners L.P.* (3d Cir. 02-1409, filed 02/08/2002, judgment 05/28/2002), resolved by docket judgment, both the debtor and the creditor cited unpublished opinions in their briefs.

In addition to citing three unpublished orders issued in this case, the debtor's brief cites an unpublished opinion by the district court for the District of South Carolina. The brief includes this unpublished opinion in a string of three opinions that "have recognized that '[p]etitions in bankruptcy arising out of a two-party dispute do not per se constitute a bad-faith filing by the debtors.'" The other two opinions in the string are published opinions by the Ninth Circuit's bankruptcy appellate panel and the Middle District of Florida's bankruptcy court.

The creditor's brief cites two unpublished opinions—one by the bankruptcy court for the Middle District of Pennsylvania and one by a Delaware court of chancery. The brief cites the unpublished bankruptcy court opinion as quoted by a published opinion by the district court for the Eastern District of Pennsylvania listing good-faith factors. The brief cites the chancery court opinion and a law review article to support the theory that businesses on the verge of bankruptcy have an incentive to take large financial risks.

### *Individual Case Analyses*

***Fullard v. Argus Research Lab* (3d Cir. 02-1077, filed 01/10/2002, judgment 03/29/2002).**

*Appeal from:* Eastern District of Pennsylvania.

*What happened:* Civil appeal dismissed by stipulation.

*Opinion:* (1) The court's docket judgment cites no opinions.

***United States v. Ali* (3d Cir. 02-1142, filed 01/17/2002, judgment 03/04/2002).**

*Appeal from:* District of New Jersey.

*What happened:* Criminal appeal dismissed as untimely.

*Opinion:* (1) The court's 87-word docket judgment cites four published opinions (one by the U.S. Supreme Court and three by the Third Circuit).

***Dottle v. Brennan* (3d Cir. 02-1308, filed 01/31/2002, judgment 01/09/2003).**

*Appeal from:* Western District of Pennsylvania.

*What happened:* Certificate of appealability denied.

*Opinion:* (1) The court's docket judgment cites no opinions.

***United States v. Saxton* (3d Cir. 02–1328, filed 02/05/2002, judgment 11/07/2002).**

*Appeal from:* Middle District of Pennsylvania.

*What happened:* Unsuccessful appeal of a criminal sentence enhancement by the husband of a prothonotary and clerk of court who embezzled funds so that the couple could have a lavish lifestyle.

*Related case:* *United States v. Saxton* (3d Cir. 02–1326, filed 02/05/2002, judgment 11/07/2002) (prothonotary's unsuccessful appeal).

*Appellant's brief:* The defendant's 1,327-word appellant brief cites seven published opinions (one by the Third Circuit and six by other circuits).

*Appellee's brief:* The government's 2,609-word appellate brief cites five published opinions (four by the Third Circuit and one by another circuit).

*Opinion:* (2) The court's unpublished 904-word signed opinion, *United States v. Saxton*, 54 Fed. Appx. 351, 2002 WL 31882238 (3d Cir. 2002), cites six published opinions (five by the Third Circuit and one by another circuit). According to Westlaw (03/21/2005), the court's opinion has not been cited elsewhere.

***Aruanno v. Cape May City Jail* (3d Cir. 02–1395, filed 02/07/2002, judgment pending).**

*Appeal from:* District of New Jersey.

*What happened:* Prisoner's appeal. The prisoner's appointed attorney has requested that the court summarily vacate the district court's orders and remand for development of a more complete record.

*Related case:* *Aruanno v. Cape May City Jail* (3d Cir. 02–1772, filed 03/19/2002, judgment 4/30/2002) (prisoner petition dismissed for want of prosecution).

*Opinion:* (0) The case is still open.

***In re Primestone Investment Partners L.P.* (3d Cir. 02–1409, filed 02/08/2002, judgment 05/28/2002).**

*Appeal from:* District of Delaware.

*What happened:* Voluntary dismissal of a bankruptcy debtor's appeal of the dismissal of its bankruptcy case.

*Appellant's brief:* The debtor's 13,840-word appellant brief cites 41 published opinions (one by the U.S. Supreme Court, five by the Third Circuit, nine by other circuits, one by another circuit's bankruptcy appellate panel, one by the District of Delaware, one by the District of Delaware's bankruptcy court, two by other Third Circuit districts,

one by another Third Circuit district's bankruptcy court, two by districts in other circuits, and 18 by bankruptcy courts in other circuits' districts), one unpublished opinion by a district in another circuit, three unpublished orders in this case (two by the District of Delaware and one by the District of Delaware's bankruptcy court), and one treatise.

The brief includes a citation to an unpublished opinion by the District of South Carolina in a string of three opinions that "have recognized that '[p]etitions in bankruptcy arising out of a two-party dispute do not per se constitute a bad-faith filing by the debtors.'" (Page 50.) The other two opinions in the string are published opinions by the Ninth Circuit's bankruptcy appellate panel and the Middle District of Florida's bankruptcy court.

*Appellee's brief:* The creditor's 12,490-word appellee brief cites 64 published opinions (three by the U.S. Supreme Court, eight by the Third Circuit, 16 by other circuits, one by another circuit's bankruptcy appellate panel, one by the District of Delaware, four by the District of Delaware's bankruptcy court, three by other Third Circuit districts, two by other Third Circuit District's bankruptcy courts, 10 by other districts in other circuits, 15 by bankruptcy courts in other circuits' districts, and one by Louisiana's court of appeals), two unpublished opinions (one by the Middle District of Pennsylvania's bankruptcy court and one by Delaware's court of chancery), two legal treatises, two law review articles, and another legal text.

The brief cites an unpublished opinion by Delaware's court of chancery and a law review article to support the statement, "Since equity holders have little or nothing at stake in an insolvent business, they are motivated to adopt high-risk business strategies knowing that they will reap the benefits of success while only the creditors suffer the consequences of failure." (Page 23.) The citation to the opinion includes the following parenthetical quotation: "The possibility of insolvency can do curious things to incentives, exposing creditors to risks of opportunistic behavior." (Page 24.)

The brief extensively cites a published opinion by the Eastern District of Pennsylvania. The brief attributes a list of good-faith factors to this opinion—"In this Circuit, lower courts have identified what Primestone agrees is a 'representative list' of 'recurrent factors' used to identify the absence of good faith" (page 27)—and acknowledges that the published opinion by the Eastern District of Pennsylvania quotes an unpublished opinion by the

Middle District of Pennsylvania's bankruptcy court.

*Appellant's reply brief:* The debtor's 7,745-word reply brief cites 24 published opinions (two by the U.S. Supreme Court, four by the Third Circuit, nine by other circuits, one by a Third Circuit district, four by districts in other circuits, and four by bankruptcy courts in other circuits), one treatise, and three legal articles.

*Opinion:* (1) The court's docket judgment cites no opinions.

***Harris v. Johnson* (3d Cir. 02–1496, filed 02/20/2002, judgment 07/10/2002).**

*Appeal from:* Western District of Pennsylvania.

*What happened:* Certificate of appealability denied.

*Opinion:* (1) The court's 234-word docket judgment cites two published opinions (one by the U.S. Supreme Court and one by the Third Circuit).

***Kimmagine-Zoldi v. CNA* (3d Cir. 02–1501, filed 02/21/2002, judgment 08/26/2002).**

*Appeal from:* Eastern District of Pennsylvania.

*What happened:* Civil appeal voluntarily dismissed.

*Opinion:* (1) The court's docket judgment cites no opinions.

***J.M. v. Deptford Township School District* (3d Cir. 02–1527, filed 02/22/2002, judgment 08/19/2002).**

*Appeal from:* District of New Jersey.

*What happened:* Appeal of a civil rights judgment dismissed for failure to file a brief.

*Opinion:* (1) The court's docket judgment cites no opinions.

***Zhelyatdinov v. Attorney General* (3d Cir. 02–1559, filed 02/26/2002, judgment 05/17/2002).**

*Appeal from:* Board of Immigration Appeals.

*What happened:* Immigration appeal dismissed for lack of jurisdiction.

*Opinion:* (1) The court's docket judgment cites no opinions.

***United States v. Williams* (3d Cir. 02–1649, filed 03/08/2002, judgment 01/07/2003).**

*Appeal from:* Middle District of Pennsylvania.

*What happened:* Unsuccessful appeal of a criminal sentence for investment fraud.

*Related case:* *United States v. Viggiano* (3d Cir. 02–1650, filed 03/08/2002, judgment 01/07/2003) (unsuccessful appeal by codefendant of his sentence resolved by same opinion as selected case).

*Appellant's brief:* The defendant's 3,801-word brief cites 14 published opinions (one by the U.S. Supreme Court, nine by the Third Circuit, and four by other circuits).

*Appellee's brief:* The government's 3,560-word appellee brief cites 16 published opinions (one by the U.S. Supreme Court, 13 by the Third Circuit, and two by another circuit) and eight related cases (the codefendant's appeal, the case from which the appellant appealed, and six other codefendants' trial court cases).

*Appellant's reply brief:* The defendant's 2,045-word reply brief cites 10 published opinions (one by the U.S. Supreme Court, five by the Third Circuit, and four by other circuits).

*Opinion:* (2) The court's unpublished 1,915-word signed opinion, *United States v. Williams*, 57 Fed. Appx. 907, 2003 WL 42471 (3d Cir. 2003) (three headnotes), cites eight published opinions (two by the U.S. Supreme Court, five by the Third Circuit, and one by another circuit) and *Black's Law Dictionary*. According to Westlaw (03/21/2005), the court's opinion has not been cited elsewhere.

***IBF Special Purpose Corp. III v. First American Development Group/Carib. Ltd. Partnership* (3d Cir. 02–1689, filed 03/12/2002, judgment 03/04/2003).**

*Appeal from:* District of the Virgin Islands.

*What happened:* Civil appeal voluntarily dismissed.

*Opinion:* (1) The court's docket judgment cites no opinions.

***In re Baines* (3d Cir. 02–1747, filed 03/15/2002, judgment 04/22/2002).**

*Appeal from:* Eastern District of Pennsylvania.

*What happened:* Request to file a successive habeas corpus petition denied.

*Opinion:* (1) The court's docket judgment cites no opinions.

***Cai v. Attorney General* (3d Cir. 02–1928, filed 04/05/2002, judgment 04/29/2003).**

*Appeal from:* Board of Immigration Appeals.

*What happened:* Successful immigration appeal because the Immigration and Naturalization Service failed to consider the impact of having several children on a deportation to China.

*Petitioner's brief:* The petitioner's 14,015-word brief cites 24 published court opinions (five by the U.S. Supreme Court, eight by the Third Circuit, nine by other circuits, and two by districts in other circuits), seven published decisions of the Board of Immigration Appeals, and several media

articles included in the joint appendix, only one of which is cited in the brief by title.

*Respondent's brief:* The government's 4,305-word respondent brief cites 23 published court opinions (nine by the U.S. Supreme Court, three by the Third Circuit, and 11 by other circuits) and three published decisions of the Board of Immigration Appeals.

*Opinion:* (2) The court's unpublished 2,188-word signed opinion, *Cai v. Ashcroft*, 63 Fed. Appx. 625, 2003 WL 1972020 (3d Cir. 2003) (one headnote), cites five published court opinions (four by the Third Circuit and one by another circuit), three published decisions of the Board of Immigration Appeals, two unpublished decisions of the Board of Immigration Appeals in this case, and one unpublished decision of the immigration court in this case. According to Westlaw (03/21/2005), the court's opinion has been cited in one published opinion by the Third Circuit and one appellate brief in an Eighth Circuit case.

***United States v. Shaw* (3d Cir. 02–2269, filed 05/09/2002, judgment 05/22/2003).**

*Appeal from:* District of New Jersey.

*What happened:* Cocaine conviction affirmed on the granting of an *Anders* motion.

*Anders brief:* The defendant's counsel's 1,629-word *Anders* brief cites five published opinions (one by the U.S. Supreme Court and four by the Third Circuit).

*Appellee's brief:* The government's 2,253-word brief cites 15 published opinions (four by the U.S. Supreme Court, nine by the Third Circuit, and two by other circuits) and two unpublished Third Circuit opinions.

Footnote 5 in the brief supports the statement, "This Court has disposed of [wholly frivolous] appeals either by dismissal or by affirmance." (Pages 9–10.) The footnote begins with a string of citations to three Third Circuit opinions—one published and two unpublished.

*Opinion:* (2) The court's unpublished 729-word signed opinion, *United States v. Shaw*, 65 Fed. Appx. 851, 2003 WL 21197052 (3d Cir. 2003) (two headnotes), cites four published opinions (one by the U.S. Supreme Court and three by the Third Circuit). According to Westlaw (03/21/2005), the court's opinion has not been cited elsewhere.

***United States v. Gori* (3d Cir. 02–2409, filed 05/22/2002, judgment 04/08/2003).**

*Appeal from:* District of New Jersey.

*What happened:* Unsuccessful appeal of a criminal sentence concerning drug quantity.

*Appellant's brief:* The defendant's 4,942-word appellant brief cites 24 published opinions (five by the U.S. Supreme Court, eight by the Third Circuit, 10 by other circuits, and one by another circuit's district).

*Appellee's brief:* The government's 8,337-word appellee brief cites 37 published opinions (eight by the U.S. Supreme Court, 15 by the Third Circuit, 13 by other circuits, and one by another circuit's district).

*Opinion:* (3) The court's published 2,470-word signed opinion, *United States v. Gori*, 324 F.3d 234 (3d Cir. 2003) (nine headnotes), cites 21 published opinions (three by the U.S. Supreme Court, 11 by the Third Circuit, and seven by other circuits). According to Westlaw (03/21/2005), the court's opinion has been cited in four Third Circuit opinions (one published and three unpublished), two opinions by other circuits (one published and one unpublished), two opinions by Third Circuit districts (one published and one unpublished), two unpublished opinions by other districts, one published opinion by Ohio's court of appeals, two secondary sources, and one appellate brief in a Third Circuit case.

***United States v. Morgan* (3d Cir. 02–2500, filed 05/30/2002, judgment 06/16/2003).**

*Appeal from:* Eastern District of Pennsylvania.

*What happened:* Criminal cocaine conviction affirmed on the granting of an *Anders* motion.

*Related case:* *United States v. Morgan* (3d Cir. 02–2530, filed 06/06/2002, judgment 06/16/2003) (consolidated appeal filed pro se).

*Anders brief:* The defendant's counsel's 2,551-word *Anders* brief cites six published opinions (three by the U.S. Supreme Court, one by the Third Circuit, and two by other circuits).

*Appellee's brief:* The government's 2,235-word appellee brief cites seven published opinions (four by the U.S. Supreme Court, two by the Third Circuit, and one by another circuit).

*Opinion:* (2) The court's unpublished 679-word signed opinion, *United States v. Morgan*, 69 Fed. Appx. 516, 2003 WL 21401747 (3d Cir. 2003) (three headnotes), cites four published opinions (two by the U.S. Supreme Court and two by the Third Circuit). According to Westlaw (03/21/2005), the court's opinion has been cited in one secondary source.

***Silver Leaf, LLC v. Tasty Fries, Inc.* (3d Cir. 02–2767, filed 06/27/2002, judgment 10/30/2002).**

*Appeal from:* District of New Jersey.

*What happened:* Unsuccessful appeal of the denial of a preliminary injunction in a dispute over



intellectual property rights in a french-fry vending machine.

*Appellant's brief:* The distributor's 6,024-word appellant brief cites 19 published opinions (five by the Third Circuit, two by other circuits, three by the District of New Jersey, four by districts in other circuits, two by New York's court of appeals, two by New York's appellate division, and one by Colorado's court of appeals), two unpublished opinions by a district in another circuit, and one treatise.

The brief includes an unpublished opinion by the Southern District of New York in a string of three citations, including two published opinions by New York's appellate division, headed by "see, e.g.," to support the statement, "Accordingly, bad faith on the part of the party seeking to enforce an exculpatory clause will invalidate such a clause." (Page 14.)

The brief follows this string citation with a citation to another unpublished opinion by the Southern District of New York in a footnote headed by "see also." (Page 15, note 6.)

*Appellee's brief:* The manufacturer's 8,171-word appellee brief cites 29 published opinions (two by the U.S. Supreme Court, nine by the Third Circuit, two by other circuits, two by the District of New Jersey, and 14 by New York courts—eight by the court of appeals, four by the supreme court's appellate division, one by the supreme court's appellate term, and one by the supreme court's special term), one related case in New Jersey's superior court, and one treatise.

*Appellant's reply brief:* The distributor's 3,306-word reply brief cites 15 published opinions (six by the Third Circuit, two by other circuits, one by the District of New Jersey, one by a district in another circuit, and five by New York courts—three by the court of appeals and two by the supreme court's appellate division).

*Opinion:* (2) The court's unpublished 2,695-word signed opinion, *Silver Leaf, LLC v. Tasty Fries, Inc.*, 51 Fed. Appx. 366, 2002 WL 31424691 (3d Cir. 2002) (no headnotes), cites 20 published opinions (one by the U.S. Supreme Court, 14 by the Third Circuit, three by New York's court of appeals, one by New York's appellate division, and one by New York's appellate term). According to Westlaw (03/21/2005), the court's opinion has been cited in one trial brief in a case from the District of New Jersey, one trial brief in another Third Circuit district, and one secondary source.

***McGinnis v. Ohio Casualty Insurance Co.* (3d Cir. 02–2802, filed 06/28/2002, judgment 05/23/2003).**

*Appeal from:* Eastern District of Pennsylvania.

*What happened:* Unsuccessful appeal of a jury verdict in favor of an insurance company where the claimant claimed damage to his furniture store from a boulder dislodged by hurricane Floyd.

*Appellant's brief:* The insured's 4,107-word appellant brief cites seven published opinions (five by the Third Circuit, one by a Third Circuit district, and one by Pennsylvania's superior court).

*Appellee's brief:* The insurance company's 5,804-word appellee brief cites six published opinions (four by the Eastern District of Pennsylvania, one by another Third Circuit district, and one by Pennsylvania's superior court), one unpublished opinion by the Eastern District of Pennsylvania, and the *Restatement (Second) of Torts*.

The brief cites three opinions by the Eastern District of Pennsylvania to support the statement, "It is clear that in the Eastern District, the Court is the gatekeeper in bad faith." (Page 20.) Two of these opinions are published, and the first cited is unpublished.

*Opinion:* (2) The court's unpublished 1,056-word signed opinion, *McGinnis v. Ohio Casualty Insurance Co.*, 67 Fed. Appx. 127, 2003 WL 21205882 (3d Cir. 2003) (two headnotes), cites no opinions. According to Westlaw (03/21/2005), the court's opinion has been cited in two secondary sources.

***United States v. Humphries* (3d Cir. 02–2870, filed 07/10/2002, judgment 08/06/2002).**

*Appeal from:* Eastern District of Pennsylvania.

*What happened:* Criminal appeal voluntarily dismissed.

*Opinion:* (1) The court's docket judgment cites no opinions.

***W.V. Realty Inc. v. Northern Insurance Company of New York* (3d Cir. 02–2910, filed 07/15/2002, judgment 06/27/2003).**

*Appeal from:* Middle District of Pennsylvania.

*What happened:* A jury award based on a finding of insurance bad faith overturned, because irrelevant and prejudicial evidence was admitted at trial. The court held that discovery misconduct in a bad-faith case was not necessarily evidence of insurance bad faith.

*Appellant's brief:* The insurance company's 13,929-word appellant brief cites 33 published opinions (three by the U.S. Supreme Court, eight by the Third Circuit, two by other circuits, one by the Middle District of Pennsylvania, 11 by another Third Circuit district, one by a district in another circuit, four by Pennsylvania's supreme court, and three by Pennsylvania's superior court), four un-

published opinions by a Third Circuit district, one related case that was the subject of a discovery dispute, and one treatise.

Two unpublished opinions by the Eastern District of Pennsylvania and a published opinion by Pennsylvania's superior court are cited to support the statement that the state's bad-faith statute clearly mandates that certain issues be tried without a jury. (Page 53.)

The brief quotes an unpublished opinion by the Eastern District of Pennsylvania, *Slater v. Liberty Mutual Insurance Co.*, 1999 WL 178367 (E.D. Pa. 1999), as stating "the alleged bad faith in conducting discovery was 'independent of the contract of insurance,' and did not arise from the parties' 'insurer-insured relationship' but from their 'relationship as litigants.'" (Page 46.) Another unpublished opinion by the Eastern District of Pennsylvania is cited to support the statement, "Evidence of other bad faith claims is inadmissible and prejudicial as it seeks to prove a broad pattern of improper conduct, when a plaintiff's claim must properly be limited to the conduct in processing his particular claim." (Page 56.)

*Appellee's brief:* The insured's 10,750-word appellee brief cites 36 published opinions (two by the U.S. Supreme Court, six by the Third Circuit, one by another circuit, three by the Middle District of Pennsylvania, seven by other Third Circuit districts, eight by Pennsylvania's supreme court, three by Pennsylvania's superior court, one by Pennsylvania's commonwealth court, one by Arizona's supreme court, two by California's court of appeal, one by Indiana's court of appeals, and one by Missouri's court of appeals), one related case that was the subject of the discovery dispute, and the *Restatement (Second) of Torts*.

*Appellant's reply brief:* The insurance company's 5,341-word reply brief cites 15 published opinions (five by the Third Circuit, one by another circuit, one by the Middle District of Pennsylvania, two by another Third Circuit district, four by Pennsylvania's supreme court, and two by Pennsylvania's superior court), one unpublished opinion by a Third Circuit district, and one treatise.

The insurance company's reply brief cites an unpublished opinion by the Eastern District of Pennsylvania that is also cited in the insurance company's opening brief, *Slater v. Liberty Mutual Insurance Co.*, 1999 WL 178367 (E.D. Pa. 1999). To rebut an assertion by the insured that the insurance company's opening brief misstates the holding of a published opinion by Pennsylvania's court of appeals, the insurance company quotes the Pennsylvania opinion extensively, and the

quotation includes a citation by the Pennsylvania superior court to the unpublished opinion by the Eastern District of Pennsylvania. (Page 11.) The brief also states that a published opinion by the Middle District of Pennsylvania cites *Slater* with approval. (Page 13.)

*Opinion:* (3) The court's published 5,880-word opinion, *W.V. Realty Inc. v. Northern Insurance Company of New York*, 334 F.3d 306 (3d Cir. 2003) (11 headnotes), cites 19 published opinions (eight by the Third Circuit, three by other circuits, one by the Middle District of Pennsylvania, one by another Third Circuit district, one by Pennsylvania's supreme court, four by Pennsylvania's superior court, and one by Pennsylvania's court of common pleas), three unpublished opinions by a Third Circuit district, one treatise, *Black's Law Dictionary*, and the *Restatement (Second) of Torts*.

The opinion cites two unpublished opinions by the Eastern District of Pennsylvania and one published opinion by the Middle District of Pennsylvania, with the citations headed by "see, e.g.," to support the following statement: "On the other hand, those cases in which courts have permitted bad faith claims to go forward based on conduct which occurred after the insured filed suit all involved something beyond a discovery violation, suggesting that the conduct was intended to evade the insurer's obligations under the insurance contract." (Page 11, 334 F.3d at 314.)

The court's opinion cites in two places an unpublished opinion by the Eastern District of Pennsylvania that is cited in the insurance company's briefs, *Slater v. Liberty Mutual Insurance Co.*, 1999 WL 178367 (E.D. Pa. 1999). First, the opinion cites the published opinion by Pennsylvania's superior court that quotes the district court opinion. (Page 10, 334 F.3d at 313.) Second, the opinion cites the unpublished district court opinion, along with a published opinion by Pennsylvania's court of common pleas, headed by "see also," following the discussion of a published opinion by Pennsylvania's superior court amplifying the following statement: "In those cases in which nothing more than discovery violations were alleged, courts have declined to find bad faith." (Pages 10-11, 334 F.3d at 313-14.)

According to Westlaw (03/21/2005), the court's opinion has been cited in six Third Circuit opinions (four published and two unpublished), seven opinions by a Third Circuit district (one published and six unpublished), seven secondary sources, four appellate briefs in two cases in Pennsylvania's superior court, one appellate brief in Texas's supreme court, and five trial court

briefs in four cases (four in the Middle District of Pennsylvania and one trial court brief in a case in another Third Circuit district).

***United States v. Rivera* (3d Cir. 02–2919, filed 07/12/2002, judgment 05/30/2003).**

*Appeal from:* Middle District of Pennsylvania.

*What happened:* Unsuccessful appeal of a criminal sentence for possession of a firearm in connection with another felony offense—possession of heroin with intent to distribute.

*Appellant’s brief:* The defendant’s 1,342-word appellant brief cites eight published opinions (one by the U.S. Supreme Court, five by the Third Circuit, and two by other circuits).

*Appellee’s brief:* The government’s 1,636-word brief cites two published Third Circuit opinions.

*Opinion:* (2) The court’s unpublished 504-word signed opinion, *United States v. Rivera*, 65 Fed. Appx. 867, 2003 WL 21246541 (3d Cir. 2003) (one headnote), cites one published Third Circuit opinion. According to Westlaw (03/21/2005), the court’s opinion has not been cited elsewhere.

***H.C. v. Lewis* (3d Cir. 02–2931, filed 07/18/2002, judgment 05/09/2003).**

*Appeal from:* District of New Jersey.

*What happened:* Certificate of appealability denied.

*Opinion:* (1) The court’s docket judgment cites no opinions.

***Douglas v. Gillis* (3d Cir. 02–2936, filed 07/12/2002, judgment 01/24/2003).**

*Appeal from:* Eastern District of Pennsylvania.

*What happened:* Certificate of appealability denied.

*Related case:* *Douglas v. Gillis*, (3d Cir. 02–2071, filed 04/24/2002, judgment 01/24/2003) (certificate of appealability denied).

*Opinion:* (1) The court’s docket judgment cites no opinions.

***Do Little Corp. v. Township of Bristol* (3d Cir. 02–2971, filed 07/19/2002, judgment 04/25/2003).**

*Appeal from:* Eastern District of Pennsylvania.

*What happened:* Unsuccessful appeal of the dismissal as time-barred of a complaint alleging that a township breached an agreement to sell property to the plaintiff.

*Related case:* *Do Little Corp. v. Township of Bristol* (3d Cir. 02–3008, filed 07/23/2002, judgment 04/25/2003) (consolidated appeal resolved by same opinion as selected case).

*Appellant’s brief:* The plaintiff’s 4,421-word appellant brief cites 11 published opinions (two by

the U.S. Supreme Court and nine by the Third Circuit).

*Appellee’s brief:* The township’s 4,766-word appellee brief cites 14 published opinions (five by the U.S. Supreme Court, seven by the Third Circuit, one by another circuit, and one by a Third Circuit district).

*Opinion:* (2) The court’s unpublished 818-word signed opinion, *Do Little Corp. v. Bristol*, 65 Fed. Appx. 825, 2003 WL 1950049 (3d Cir. 2003) (two headnotes), cites three published Third Circuit opinions. According to Westlaw (03/21/2005), the court’s opinion has not been cited elsewhere.

***Signator Investors v. Olick* (3d Cir. 02–3437, filed 09/06/2002, judgment 11/07/2003).**

*Appeal from:* Eastern District of Pennsylvania.

*What happened:* Unsuccessful pro se appeal of an injunction against a malicious prosecution claim in a securities and bankruptcy action.

*Appellee’s brief:* The investment company’s 5,351-word appellee brief cites 17 published opinions (one by the U.S. Supreme Court; 11 by the Third Circuit, including an opinion in a related appeal; two by other circuits; two by Pennsylvania’s supreme court; and one by Pennsylvania’s superior court); six unpublished Third Circuit opinions, including five in related appeals; and one unpublished order in a related district court case.

In a footnote, the brief quotes an unpublished Third Circuit opinion as saying that “on the basis of the existing state of Pennsylvania law, . . . the U.S. Supreme Court would not create a distinct cause of action for the spoliation of evidence brought outside an existing personal injury or products liability action.” (Page 5, note 4.) The brief reiterates the court’s determination later in the main text: “Additionally, this Court has recently concluded that there is no separate tort under Pennsylvania law for ‘spoliation’ [citation].” (Page 14.)

*Opinion:* (2) The court’s unpublished 625-word per curiam opinion, tabled at *Signator Investors v. Olick*, 85 Fed. Appx. 874, 2003 WL 22881726 (3d Cir. 2003), cites two published opinions (one opinion in a related appeal by the Third Circuit and one opinion by another circuit) and one unpublished opinion in a related Third Circuit appeal. According to Westlaw (11/06/2004), the court’s opinion has not been cited elsewhere.

***Wise v. DA Philadelphia City* (3d Cir. 02–3466, filed 09/10/2002, judgment 12/26/2002).**

*Appeal from:* Eastern District of Pennsylvania

*What happened:* Certificate of appealability denied.

*Opinion:* (1) The court's 111-word docket judgment cites two published opinions (one by the U.S. Supreme Court and one by the Third Circuit).

***United States v. Namey* (3d Cir. 02–3491, filed 09/13/2002, judgment 08/05/2003).**

*Appeal from:* Western District of Pennsylvania.

*What happened:* Unsuccessful appeal of the denial of habeas corpus relief for ineffective assistance of counsel.

*Related case:* The selected case was consolidated with *United States v. Namey* (3d Cir. 02–3327, filed 08/28/2002, judgment 08/05/2003) (unsuccessful appeal of refused sentencing downward departure).

*Appellant's brief:* The defendant's 6,706-word appellant brief cites 11 published opinions (five by the U.S. Supreme Court, five by the Third Circuit, and one by a Third Circuit district).

*Appellee's brief:* The government's 7,466-word appellee brief cites 23 published opinions (four by the U.S. Supreme Court, 13 by the Third Circuit, five by other circuits, and one by a district in another circuit).

*Appellant's reply brief:* The defendant's 3,720-word reply brief cites seven published opinions (one by the U.S. Supreme Court, five by the Third Circuit, and one by a Third Circuit district).

*Opinion:* (2) The court's unpublished 803-word signed opinion, *United States v. Namey*, 71 Fed. Appx. 947, 2003 WL 21796721 (3d Cir. 2003) (two headnotes), cites three published opinions (one by the U.S. Supreme Court and two by the Third Circuit). According to Westlaw (03/21/2005), the court's opinion has been cited in three secondary sources.

***Nunes v. Attorney General* (3d Cir. 02–3546, filed 09/16/2002, judgment 04/08/2004).**

*Appeal from:* Board of Immigration Appeals.

*What happened:* Unsuccessful pro se asylum appeal.

*Related case:* *Nunes v. Attorney General* (3d Cir. 03–2419, filed 05/14/2003, judgment 01/06/2004) (unsuccessful appeal of the denial of habeas corpus relief for ineffective assistance of counsel).

*Respondent's brief:* The government's 4,586-word respondent brief cites 12 published opinions (two by the U.S. Supreme Court, five by the Third Circuit, and five by other circuits).

*Opinion:* (2) The court's unpublished 1,700-word per curiam opinion, tabled at *Nunes v. Ashcroft*, 90 Fed. Appx. 436, 2004 WL 228691 (3d Cir.

2004), cites three published opinions (two by the Third Circuit and one by another circuit), one unpublished Third Circuit opinion resolving the related appeal, and one Web reference to a State Department report. According to Westlaw (03/21/2005), the court's opinion has not been cited elsewhere.

***In re Vega* (3d Cir. 02–3681, filed 09/27/2002, judgment 10/25/2002).**

*Appeal from:* Eastern District of Pennsylvania.

*What happened:* Permission to file a successive habeas corpus petition denied.

*Opinion:* (1) The court's 236-word docket judgment cites two published opinions (one by the U.S. Supreme Court and one by the Third Circuit).

***Cuffari v. S-B Power Tool Co.* (3d Cir. 02–3763, filed 10/07/2002, judgment 11/07/2002).**

*Appeal from:* District of New Jersey.

*What happened:* Unsuccessful appeal of the exclusion of an expert witness in a product liability case.

*Appellant's brief:* The plaintiffs' 2,439-word appellant brief cites six published opinions (one by the U.S. Supreme Court, one by the District of New Jersey, one by a Third Circuit district, two by New Jersey's supreme court, and one by New Jersey's appellate division).

*Appellee's brief:* The manufacturer's 4,061-word appellee brief cites six published opinions (two by the U.S. Supreme Court and four by the Third Circuit).

*Opinion:* (2) The court's unpublished 967-word signed opinion, *Cuffari v. S-B Power Tool Co.*, 80 Fed. Appx. 749, 2003 WL 22520411 (3d Cir. 2003) (one headnote), cites four published opinions (two by the U.S. Supreme Court and two by the Third Circuit). According to Westlaw (03/21/2005), the court's opinion has been cited in one secondary source and one brief in a district court case in the Third Circuit.

***In re Wilson* (3d Cir. 02–3776, filed 10/08/2002, judgment 11/13/2002).**

*Appeal from:* District of Delaware.

*What happened:* Pro se petition for a writ of mandamus directing the district court to rule on in forma pauperis applications denied as moot upon the district court's granting the applications.

*Opinion:* (2) The court's unpublished 176-word per curiam opinion, tabled at *In re Wilson*, 52 Fed. Appx. 190, 2002 WL 31758426 (3d Cir. 2002), cites three unpublished district court orders by the District of Delaware granting the petitioner's in forma pauperis applications. According to West-

law (03/21/2005), the court's opinion has not been cited elsewhere.

***United States v. McFadden* (3d Cir. 02–3778, filed 10/08/2002, judgment 09/10/2003).**

*Appeal from:* Eastern District of Pennsylvania.

*What happened:* Certificate of appealability denied.

*Opinion:* (1) The court's 118-word docket judgment cites two published opinions (one by the U.S. Supreme Court and one by the Third Circuit).

***Rivas v. City of Passaic* (3d Cir. 02–3875, filed 10/17/2002, judgment 04/26/2004).**

*Appeal from:* District of New Jersey.

*What happened:* Unsuccessful appeal of the denial of summary judgment to emergency medical technicians who responded to a 911 call for a man having a seizure and responded to his erratic behavior by calling the police, after which the man died. In the same opinion, the court affirmed the denial of summary judgment to the police officers in a consolidated appeal.

*Related case:* *Rivas v. City of Passaic* (3d Cir. 02–3916, filed 10/22/2002, judgment 04/26/2004) (unsuccessful appeal by police officers).

*Appellant's brief:* The technicians' 13,316-word appellant brief cites 25 published opinions (nine by the U.S. Supreme Court, 13 by the Third Circuit, one by another circuit, one by the District of New Jersey, and one by another Third Circuit district) and one unpublished Third Circuit opinion.

The brief cites an unpublished Third Circuit opinion in its first of four arguments. The argument asserts in part that "the court below failed to comb the record and Local Rule 56.1 statement." (Page 36.) The cited unpublished opinion is quoted concerning "the difficulty we have had in parsing what precisely is alleged against each appellant" as stating in part, "The parties persist in the practice of arguing through conclusory statements supported by generalized reference to the extensive statements of fact with which they each open their briefs." (Page 41.)

*Appellee's brief:* The plaintiffs' 14,081-word appellee brief cites 29 published opinions (10 by the U.S. Supreme Court, 13 by the Third Circuit, two by other circuits, two by the District of New Jersey, one by another Third Circuit district, and one by a district in another circuit) and two unpublished opinions (one by a Third Circuit district and one by a district in another circuit).

The brief cites an unpublished opinion by the Eastern District of Pennsylvania as holding that "it was foreseeable that a 911 call misdirected to a

private ambulance company rather than the authorized Fire Department Rescue units appropriately staffed to respond to such emergencies would result in serious harm or death." (Pages 53–54.)

The other unpublished opinion cited is by the Northern District of Illinois. The brief cites the opinion as holding that the "plaintiff had a valid claim against paramedics for failure to intervene to protect decedent's safety when the police placed decedent face down in the street, handcuffed him, choked him and inflicted additional injuries on him" and in part quotes the opinion as stating, "In effect the firefighters and paramedics contend that they can be present on a scene in their role as employees of the District watching other State actors cause the death of an individual and yet stand by idle, 'because it's not their job.' District Judge Bucklo rejected a similar argument by paramedics of the City of Chicago . . . calling it 'an argument of breathtaking cynicism.'" (Page 41.)

*Appellant's reply brief:* The technicians' 6,989-word reply brief cites 45 published opinions (14 by the U.S. Supreme Court, 13 by the Third Circuit, nine by other circuits, two by the District of New Jersey, six by other Third Circuit districts, and one by a district in another circuit), one unpublished opinion by another circuit, and the *Restatement (Second) of Torts*.

The brief includes an unpublished opinion by the Sixth Circuit in a string of two citations headed by "see, e.g.," to support the statement, "Consistent with the Third Circuit's holding in *Anela [v. City of Wildwood]*, 790 F.2d 1063 (3d Cir. 1986)], other courts have granted summary judgment for defendants in § 1983 cases where the plaintiff could not identify the accountable state actors and the circumstantial evidence of said actors' identities was too attenuated." (Page 21.) The opinion is cited as "affirming summary judgment to § 1983 excessive force claim arising out of plaintiff's arrest where plaintiff was unable to identify officer who allegedly pushed him into police car." (*Id.*) The other opinion cited in the string is a published opinion by the Tenth Circuit.

*Opinion:* (3) The court's published 11,595-word signed opinion and partial concurrence, *Rivas v. City of Passaic*, 365 F.3d 181 (3d Cir. 2004) (17 headnotes), cites 37 published opinions (15 by the U.S. Supreme Court, 18 by the Third Circuit, and four by other circuits). According to Westlaw (03/21/2005), the court's opinion has been cited in two unpublished opinions by the Third Circuit, three unpublished opinions by Third Circuit dis-

tracts, seven secondary sources, one brief in a U.S. Supreme Court case, and five trial briefs in five Third Circuit district cases.

**United States v. Magana-Gomez** (3d Cir. 02–3885, filed 10/21/2002, judgment 03/24/2003).

*Appeal from:* Eastern District of Pennsylvania.

*What happened:* Criminal appeal voluntarily dismissed.

*Opinion:* (1) The court’s docket judgment cites no opinions.

**Young v. Pennsylvania Rural Electric Association** (3d Cir. 02–3946, filed 10/25/2002, judgment 11/17/2003).

*Appeal from:* Middle District of Pennsylvania.

*What happened:* Unsuccessful ERISA appeal of summary judgment in favor of an employer in an action for severance benefits.

*Appellant’s brief:* The employee’s 8,236-word appellant brief cites 19 published opinions (one by the U.S. Supreme Court, 16 by the Third Circuit, one by another circuit, and one by a Third Circuit district).

*Appellee’s brief:* The employer’s 14,966-word appellee brief cites 29 published opinions (two by the U.S. Supreme Court, 20 by the Third Circuit, three by other circuits, one by the Middle District of Pennsylvania, one by another Third Circuit district, and two by districts in other circuits), one unpublished Third Circuit opinion, and the *Restatement (Second) of Trusts*.

The brief cites three Third Circuit opinions in a string to support the statement, “‘Serious consideration’ of changes in plan benefits is sufficient to trigger a fiduciary duty to provide complete and truthful information about such changes in response to an employee’s inquiry.” (Page 24.) The first opinion in the string is unpublished; the other two are published.

*Appellant’s reply brief:* The employee’s 1,871-word reply brief cites five published Third Circuit opinions.

*Opinion:* (2) The court’s unpublished 2,147-word signed opinion, *Young v. Pennsylvania Rural Electric Ass’n*, 80 Fed. Appx. 785, 2003 WL 22701472 (3d Cir. 2003) (two headnotes), cites eight published Third Circuit opinions. According to Westlaw (03/21/2005), the court’s opinion has been cited in five secondary sources.

**Beckman v. Integrated Systems International** (3d Cir. 02–4008, filed 10/30/2002, judgment 03/11/2003).

*Appeal from:* Eastern District of Pennsylvania.

*What happened:* Civil appeal voluntarily dismissed without prejudice.

*Opinion:* (1) The court’s docket judgment cites no opinions.

**Brown v. American Home Products Corp.** (3d Cir. 02–4074, filed 11/07/2002, judgment 03/20/2005).

*Appeal from:* Eastern District of Pennsylvania.

*What happened:* In multidistrict litigation over fen-phen diet drugs, plaintiffs’ attorneys unsuccessfully appealed an award of \$80 million in attorney fees to a “Plaintiffs’ Management Committee,” claiming that appellants did not rely on the committee’s efforts. The court concluded that the preliminary fee allocation was not a final appealable order.

*Related cases:* Part of multidistrict litigation known as *In re Diet Drugs* (MDL 1203). Consolidated appeals resolved by the same opinion include *Brown v. American Home Products Corp.* (3d Cir. 03–2627, filed 06/02/2003, judgment 03/20/2005), *Brown v. American Home Products Corp.* (3d Cir. 03–2695, filed 06/10/2003, judgment 03/20/2005), *Brown v. American Home Products Corp.* (3d Cir. 03–2766, filed 06/20/2003, judgment 03/20/2005), *Gooch-Kiel v. American Home Products Corp.* (3d Cir. 02–4020, filed 10/31/2002, judgment 03/20/2005), *Brown v. American Home Products Corp.* (3d Cir. 02–4021, filed 10/31/2002, judgment 03/20/2005), and *Brown v. American Home Products Corp.* (3d Cir. 03–4830, filed 12/29/2003, judgment 03/20/2005).

Related appeals dismissed for lack of prosecution include *Brown v. American Home Products Corp.* (3d Cir. 03–2763, filed 06/20/2003, judgment 03/30/2004), *Brown v. American Home Products Corp.* (3d Cir. 03–2764, filed 06/20/2003, judgment 03/30/2004), and *Brown v. American Home Products Corp.* (3d Cir. 03–2765, filed 06/20/2003, judgment 03/30/2004).

*Appellant’s brief:* The appellants’ 10,154-word brief cites 30 published opinions (five by the U.S. Supreme Court; eight by the Third Circuit, including one by an earlier phase of this case; eight by other circuits; three by the Eastern District of Pennsylvania; one by another Third Circuit district; two by districts in other circuits; one by Tennessee’s supreme court; one by California’s court of appeal; and one by Indiana’s court of appeals), the district court filing and two unpublished orders in this case, seven related state trial court cases (one in North Dakota, two in Oregon, two in South Dakota, and two in Texas), the *Restatement (Second) of Contracts*, and the *Restatement of Restitution*.

*Appellee’s brief:* The Committee’s 14,753-word appellee brief, which concerns the selected appeal and 02–4020, cites 44 published opinions (nine by

the U.S. Supreme Court; 17 by the Third Circuit, including one from an earlier phase of this case; 12 by other circuits; one by the Eastern District of Pennsylvania; four by districts in other circuits; and one by Alabama's supreme court), three unpublished opinions (two by the Eastern District of Pennsylvania, including one by this case, and one by a bankruptcy court in another circuit), one related Texas trial court case, four law review articles, two Federal Judicial Center publications, and one internet Web page.

The citation to an unpublished opinion by the Eastern District of Pennsylvania in another case is included in a string of citations supporting the statement, "It is by now an unassailable proposition that a federal district court presiding over a mass tort MDL may properly award a fee to the plaintiffs' management structure appointed by it, payable out of the fees derived from the representation of the individual litigants whose cases are subject to coordinated pretrial proceedings in the MDL transferee court." (Pages 26–27.) The string includes citations to published opinions by four circuits, two districts within those circuits, and the Federal Judicial Center's *Manual for Complex Litigation, Third*.

The citation to an unpublished District of Colorado bankruptcy court opinion is included in a string of citations, headed by "see, e.g.," also including three published Third Circuit opinions, with each citation including an explanatory parenthetical. The citations support the statement, "This material [referring to material assembled by the committee for the benefit of other plaintiffs' attorneys] is classic 'attorney work product' entitled to protection against compelled disclosure to any person who does not provide fair compensation for the effort involved in creating it." (Page 57.)

*Appellant's reply brief:* The appellant's 7,210-word reply brief cites 29 published opinions (seven by the U.S. Supreme Court, five by the Third Circuit, nine by other circuits, two by districts in other circuits, and one by each of six states' supreme courts—California's, Massachusetts's, New Jersey's, Ohio's, Oregon's, and Texas's), four trial court cases (two in Oregon and two in Texas), one Federal Judicial Center manual, the *Restatement (Second) of Contracts, the Restatement of Restitution*, and one internet Web page.

*Opinion:* (3) The court's 16,512-word signed opinion and concurrence, *In re Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Products Liability Litigation*, 401 F.3d 143 (3d Cir. 2005) (10 headnotes), cites 69 published opinions (13 by the

U.S. Supreme Court; 28 by the Third Circuit, including three in related appeals; 23 by other circuits; one by the Eastern District of Pennsylvania; and four by districts in other circuits), one unpublished opinion by the Eastern District of Pennsylvania, and one law review article. According to Westlaw (04/06/2005), the court's opinion has not been cited elsewhere.

The concurrence cites six unpublished district court opinions, including an unpublished opinion and a published opinion by the Eastern District of Pennsylvania, to support the statement, "Perhaps implicitly acknowledging the lack of detailed guidance from our Court, Appellees cite a number of decisions in which courts have delegated the task of allocating fees among counsel to lead counsel or have relied on an agreement reached by counsel." (401 F.3d at 168.)

***Forsythe v. Walters* (3d Cir. 02–4079, filed 11/06/2002, judgment 06/20/2003).**

*Appeal from:* Western District of Pennsylvania.

*What happened:* Certificate of appealability denied.

*Opinion:* (1) The court's 162-word docket judgment cites three published opinions (one by the U.S. Supreme Court and two by the Third Circuit) and the district court's unpublished opinion in this case.

***Northfield Insurance Co. v. Pantages* (3d Cir. 02–4084, filed 11/08/2002, judgment 06/06/2003).**

*Appeal from:* Middle District of Pennsylvania.

*What happened:* Civil appeal dismissed by stipulation.

*Opinion:* (1) The court's docket judgment cites no opinions.

***United States v. Douglas* (3d Cir. 02–4103, filed 11/07/2002, judgment 06/16/2003).**

*Appeal from:* District of New Jersey.

*What happened:* Conviction for illegally entering the United States after conviction for an aggravated felony affirmed on the granting of an *Anders* motion.

*Anders brief:* The appellant counsel's 2,271-word *Anders* brief cites eight published opinions (two by the U.S. Supreme Court, five by the Third Circuit, and one by another circuit).

*Appellee's brief:* The government's 2,012-word appellee brief cites 11 published opinions (four by the U.S. Supreme Court, four by the Third Circuit, and three by another circuit) and two unpublished Third Circuit opinions.

To support a statement that the court has disposed of appeals with *Anders* motions by dismissal or affirmance, the brief begins a footnote

with a string of three Third Circuit opinions, headed by “e.g.” (Page 8, note 4.) The first opinion cited is a published opinion and the other two are unpublished opinions.

*Opinion:* (2) The court’s unpublished 931-word signed opinion, *United States v. Douglas*, 67 Fed. Appx. 733, 2003 WL 21380555 (3d Cir. 2003) (three headnotes), cites one U.S. Supreme Court opinion. According to Westlaw (03/21/2005), the court’s opinion has not been cited elsewhere.

***Spada v. Flemming Co.* (3d Cir. 02–4155, filed 11/18/2002, judgment 09/15/2005).**

*Appeal from:* Eastern District of Pennsylvania.

*What happened:* Appeal of the remand of a civil action following the amendment of the complaint to add a non-diverse defendant initially stayed by the appellant’s bankruptcy and then voluntarily dismissed.

*Appellant’s brief:* The appellant’s 4,100-word brief cites 11 published opinions (one by the U.S. Supreme Court, four by the Third Circuit, five by other circuits, and one by the Eastern District of Pennsylvania), two related cases in Pennsylvania’s court of common pleas, and one treatise.

*Opinion:* (1) The court’s docket judgment cites no opinions.

***Ogundipe v. Attorney General* (3d Cir. 02–4262, filed 11/21/2002, judgment 09/21/2003).**

*Appeal from:* Eastern District of Pennsylvania.

*What happened:* Interlocutory appeal dismissed as moot in deportation case.

*Opinion:* (1) The court’s docket judgment cites no opinions.

***Caballero v. Meyers* (3d Cir. 02–4263, filed 11/22/2002, judgment 07/31/2003).**

*Appeal from:* Middle District of Pennsylvania.

*What happened:* Certificate of appealability denied.

*Opinion:* (1) The court’s 106-word docket judgment cites one U.S. Supreme Court opinion.

***Spillane v. Hendricks* (3d Cir. 02–4311, filed 11/27/2002, judgment 01/08/2004).**

*Appeal from:* District of New Jersey.

*What happened:* Certificate of appealability denied.

*Opinion:* (1) The court’s 107-word docket judgment cites one U.S. Supreme Court opinion.

***Lamacchia v. Secretary of Defense* (3d Cir. 02–4321, filed 11/29/2002, judgment 05/06/2003).**

*Appeal from:* Eastern District of Pennsylvania.

*What happened:* Civil appeal dismissed for failure to file a brief.

*Opinion:* (1) The court’s docket judgment cites no opinions.

***Terrell v. Hawk* (3d Cir. 02–4462, filed 12/16/2002, judgment 03/09/2004).**

*Appeal from:* Middle District of Pennsylvania.

*What happened:* Dismissed pro se *Bivens* action by a prisoner whose art supplies were destroyed remanded for a determination of whether the claims were valid under the Federal Tort Claims Act.

*Appellee’s brief:* The government’s 3,952-word appellee brief cites 46 published opinions (14 by the U.S. Supreme Court, 20 by the Third Circuit, three by other circuits, three by the Middle District of Pennsylvania, two by other Third Circuit districts, one by Pennsylvania’s supreme court, and three by Pennsylvania’s superior court).

*Opinion:* (2) The court’s unpublished 1,177-word per curiam opinion, tabled at *Terrell v. Hawk*, 94 Fed. Appx. 970, 2004 WL 736949 (3d Cir. 2004), cites 14 published opinions (six by the U.S. Supreme Court, one by the Third Circuit, and seven by other circuits). According to Westlaw (03/21/2005), the court’s opinion has not been cited elsewhere.

***Jung v. Attorney General* (3d Cir. 02–4469, filed 12/13/2002, judgment 03/02/2004).**

*Appeal from:* Board of Immigration Appeals.

*What happened:* Unsuccessful immigration appeal by a native of South Korea who claimed she wanted to stay in the United States to marry her fiancé.

*Petitioner’s brief:* The petitioner’s 5,523-word brief cites 24 published court opinions (16 by the U.S. Supreme Court, two by the Third Circuit, five by other circuits, and one by a Third Circuit district) and 14 published decisions of the Board of Immigration Appeals. Seven of these citations appear to be in two pages of the brief that are missing from the copies filed with the court. (The length of the brief without missing pages was computed by adding twice the average number of words per page to the number of words counted in the pages filed.)

*Respondent’s brief:* The government’s 4,406-word respondent brief cites 17 published court opinions (six by the U.S. Supreme Court, four by the Third Circuit, six by other circuits, and one by a Third Circuit district) and six published decisions of the Board of Immigration Appeals.

*Opinion:* (2) The court’s unpublished 863-word per curiam opinion, *Jung v. Ashcroft*, 91 Fed. Appx. 221, 2004 WL 413231 (3d Cir. 2004) (one headnote), cites two published court opinions



(one by the U.S. Supreme Court and one by the Third Circuit) and three published decisions of the Board of Immigration Appeals. According to Westlaw (03/21/2005), the court's opinion has not been cited elsewhere.

***Rice v. Commissioner of Social Security* (3d Cir. 02-4529, filed 12/23/2002, judgment 07/10/2003).**

*Appeal from:* Middle District of Pennsylvania.

*What happened:* Unsuccessful pro se appeal of the dismissal of a Social Security complaint for failure to follow court orders.

*Appellee's brief:* The government's 3,887-word appellee brief cites 10 published opinions (one by the U.S. Supreme Court and nine by the Third Circuit) and one unpublished order by the Middle District of Pennsylvania in this case.

*Opinion:* (2) The court's unpublished 1,728-word per curiam opinion, tabled at *Rice v. Barnhart*, 80 Fed. Appx. 287, 2003 WL 21840681 (3d Cir. 2003), cites four published opinions (three by the Third Circuit and one by another circuit). According to Westlaw (03/21/2005), the court's opinion has not been cited elsewhere.

***Doe v. Groody* (3d Cir. 02-4532, filed 12/24/2002, judgment 03/19/2004).**

*Appeal from:* Middle District of Pennsylvania.

*What happened:* Unsuccessful appeal of the denial of qualified immunity to police officers who searched occupants of a house where the warrant specified only a different occupant and the affidavit supporting the warrant requested a warrant to search all occupants.

*Appellant's brief:* The police officers' 4,801-word appellant brief cites 26 published opinions (13 by the U.S. Supreme Court, five by the Third Circuit, two by Pennsylvania's supreme court, four by Pennsylvania's superior court, one by Pennsylvania's court of common pleas, and one by Massachusetts's supreme judicial court).

*Appellee's brief:* The plaintiffs' 5,892-word appellee brief cites 17 published opinions (five by the U.S. Supreme Court, four by the Third Circuit, two by other circuits, two by Pennsylvania's supreme court, and four by Pennsylvania's superior court).

*Opinion:* (3) The court's published 8,178-word signed opinion and dissent, *Doe v. Groody*, 361 F.3d 232 (3d Cir. 2004), cites 33 published opinions (16 by the U.S. Supreme Court, nine by the Third Circuit, five by other circuits, two by Pennsylvania's supreme court, and one by Pennsylvania's superior court). According to Westlaw (03/21/2005), the court's opinion has been cited in one published Third Circuit opinion, five opin-

ions by Third Circuit districts (one published and four unpublished), two opinions by other districts (one published and one unpublished), seven secondary sources, four appellate briefs in two U.S. Supreme Court cases, one appellate brief in a case in a Massachusetts appeals court, and two trial briefs in two Middle District of Pennsylvania cases.

#### 4. Fourth Circuit<sup>85</sup>

The court of appeals for the Fourth Circuit disfavors citation to its unpublished opinions in unrelated cases, but permits it if an opinion has "precedential value" and there is no published opinion on point.<sup>86</sup>

Of the 50 cases randomly selected, 48 are appeals from district courts (15 from the Eastern District of Virginia, 12 from the Eastern District of North Carolina, five from the District of South Carolina, four each from the Western District of Virginia and the Northern District of West Virginia, three from the District of Maryland, two each from the Middle District of North Carolina and the Western District of North Carolina, and one from the Southern District of West Virginia), and two

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85. Docket sheets and opinions are on PACER. Opinions are also on the court's website, its intranet site, and Westlaw. Some briefs are on Westlaw. (Of the 12 cases with counseled briefs in this sample, all briefs are on Westlaw for two cases, and some briefs are on Westlaw for one case.)

86. 4th Cir. L.R. 36(c) ("In the absence of unusual circumstances, this Court will not cite an unpublished disposition in any of its published opinions or unpublished dispositions. Citation of this Court's unpublished dispositions in briefs and oral arguments in this Court and in the district courts within this Circuit is disfavored, except for the purpose of establishing *res judicata*, estoppel, or the law of the case. [¶] If counsel believes, nevertheless, that an unpublished disposition of this Court has precedential value in relation to a material issue in a case and that there is no published opinion that would serve as well, such disposition may be cited if counsel serves a copy thereof on all other parties in the case and on the Court.").

The court's rule on citation to its unpublished opinions has been in effect essentially as it is since October 8, 1976.

are appeals from the Board of Immigration Appeals.<sup>87</sup>

The publication rate in this sample is 2%. One of the appeals was resolved by a published signed opinion, 30 were resolved by unpublished per curiam opinions published in the *Federal Appendix* (four of which were printed and the rest of which were typewritten<sup>88</sup>), and 19 were resolved by docket judgments.

The published opinion was 7,716 words in length. Unpublished opinions averaged 273 words in length, ranging from 28 to 2,143. Twenty-eight opinions were under 1,000 words in length (90%, all unpublished), and all of these were under 500 words in length.

Six of the appeals were fully briefed. In 39 of the appeals no counseled brief was filed, and in five of the appeals a counseled brief was filed only for one side.

There are citations to unpublished court opinions in 20 of these cases. In 17 cases the citations are only to opinions in related cases; in three cases there are citations to unpublished opinions in unrelated cases. All of the citations to unrelated unpublished opinions are in briefs, not opinions.

Three of the unrelated unpublished opinions cited are by the court of appeals for the Fourth Circuit and one is by a Fourth Circuit district court.

C4-1. In *McWaters v. Rick* (4th Cir. 02-1436, filed 04/25/2002, judgment 12/27/2002), in which the court of appeals decided that a complaint by a former county supervisor against the county should be dismissed, *McWaters v. Cosby*, 54 Fed. Appx. 379, 2002 WL 31875539, the supervisor's appellee

brief quotes an unpublished Fourth Circuit opinion: "A panel of this Court has said that 'the fundamental tenet of equal protection jurisprudence is not changed by [*Village of Willowbrook v. Olech*, 528 U.S. 562 (2000)].'"

C4-2. *Bailey v. Kennedy* (4th Cir. 02-1818, filed 07/31/2002, judgment 11/17/2003), in which the court of appeals dismissed the plaintiffs' appeal as improperly interlocutory, was consolidated with the defendants' unsuccessful appeal of the denial of qualified immunity, see *Bailey v. Kennedy*, 349 F.3d 731 (4th Cir. 2003). The defendants' appellant brief in the consolidated case, which is also the defendants' cross-appellee brief in the selected case, includes an unpublished Fourth Circuit opinion in a string citation to support a statement that "In responding to calls involving a possible danger to human life, both the United States Supreme Court and the Fourth Circuit have repeatedly recognized that warrantless entries into homes by law enforcement officers are objectively reasonable." A parenthetical note in the citation suggests that the reason for the citation is to show the court's application of text from a Supreme Court opinion.

C4-3. In an unsuccessful pro se employment discrimination appeal from the district court for the Eastern District of North Carolina, *Sharp v. Fishburne* (4th Cir. 02-2016, filed 09/10/2002, judgment 02/14/2003), resolved by unpublished opinion at 56 Fed. Appx. 140, 2003 WL 329404, the defendants' informal appellee brief cites an unpublished opinion by the district court for the Western District of North Carolina to support a statement that "One court has held that erroneous advice by a government agency causing plaintiff to delay her filing may toll the 180-day period if 'but for' that poor advice, plaintiff's charge would have been timely filed." The brief also cites an unpublished opinion by the court of appeals for the Fourth Circuit that partially affirmed a published district

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87. In 2002, 4,698 cases were filed in the court of appeals for the Fourth Circuit.

88. The court used to "print" substantive unpublished opinions for distribution to a mailing list of interested parties, but as of fiscal year 2005, for budget reasons, the court now formats all unpublished opinions as "typewritten" and distributes them only electronically.

court opinion in order to complete the citation of the district court opinion.

### *Individual Case Analyses*

#### ***In re Swift* (4th Cir. 02–0120, filed 02/11/2002, judgment 03/06/2002).**

*Appeal from:* Middle District of North Carolina.

*What happened:* Pro se prisoner's motion to file a successive habeas corpus petition denied.

*Related cases:* *In re Swift* (4th Cir. 97–0539, filed 02/24/1997, judgment 03/17/1997) (denial of pro se prisoner's motion to file a successive habeas corpus petition), *United States v. Swift* (4th Cir. 99–7233, filed 09/22/1999, judgment 12/29/1999) (certificate of appealability denied), and *In re Swift* (4th Cir. 00–0700, filed 07/12/2000, judgment 08/01/2000) (denial of pro se prisoner's motion to file a successive habeas corpus petition).

*Opinion:* (1) The court's docket judgment cites no opinions.

#### ***In re Franklin* (4th Cir. 02–0156, filed 04/11/2002, judgment 05/14/2002).**

*Appeal from:* District of South Carolina.

*What happened:* Motion to file a successive habeas corpus petition denied.

*Related cases:* *Franklin v. Taylor* (4th Cir. 94–6334, filed 03/30/1994, judgment 06/21/1994) (denial of habeas corpus relief affirmed) and *In re Franklin* (4th Cir. 93–8019, filed 03/16/1993, judgment 06/01/1993) (petition for habeas corpus relief through mandamus denied).

*Opinion:* (1) The court's docket judgment cites no opinions.

#### ***In re Pettaway* (4th Cir. 02–0163, filed 04/25/2002, judgment 05/21/2002).**

*Appeal from:* Eastern District of Virginia.

*What happened:* Motion to file a successive habeas corpus petition denied.

*Related case:* *Pettaway v. Angelone* (4th Cir. 99–6599, filed 05/05/1999, judgment 08/26/1999) (certificate of appealability denied).

*Opinion:* (1) The court's docket judgment cites no opinions.

#### ***In re Black* (4th Cir. 02–0275, filed 10/21/2002, judgment 11/06/2002).**

*Appeal from:* District of South Carolina.

*What happened:* Motion to file a successive habeas corpus petition denied.

*Opinion:* (1) The court's docket judgment cites no opinions.

#### ***Abiola v. United States Immigration and Naturalization Service* (4th Cir. 02–1228, filed 03/01/2002, judgment 06/11/2002).**

*Appeal from:* Board of Immigration Appeals.

*What happened:* Immigration appeal dismissed on the government's motion. Three children of the junta-deposed, and subsequently deceased, winner of the 1993 election for president of Nigeria were deported *in absentia* because their attorney did not give them notice of their deportation hearing or attend the hearing himself.

*Petitioners' brief:* The petitioners' 3,558-word brief cites 16 published court opinions (seven by the U.S. Supreme Court, three by the Fourth Circuit, and six by other circuits) and three published opinions by the Board of Immigration Appeals.

*Opinion:* (1) The court's docket judgment cites no opinions.

#### ***Cumberland County Hospital System, Inc. v. Ford Motor Co.* (4th Cir. 02–1284, filed 03/13/2002, judgment 04/15/2002).**

*Appeal from:* Eastern District of North Carolina.

*What happened:* Civil appeal dismissed by stipulation.

*Opinion:* (1) The court's docket judgment cites no opinions.

#### ***Goff Building, LLC v. Norwest Bank, Minnesota, NA* (4th Cir. 02–1323, filed 03/26/2002, judgment 01/03/2003).**

*Appeal from:* Northern District of West Virginia.

*What happened:* Bankruptcy review dismissed as moot. A debtor moved to dismiss its Chapter 11 petition and commenced a second case, but the bankruptcy court dismissed the second petition as duplicative and the district court affirmed.

*Appellant's brief:* The appellant's 2,120-word brief cites six published opinions (two by other circuits, one by a Fourth Circuit district court, one by a Fourth Circuit bankruptcy court, and two by bankruptcy courts in other circuits).

*Appellee's brief:* The appellee's 4,355-word brief cites 17 published opinions (one by the U.S. Supreme Court, three by the Fourth Circuit, four by other circuits, one by a Fourth Circuit district court, one by a Fourth Circuit bankruptcy court, and seven by bankruptcy courts in other circuits).

*Opinion:* (2) The court's 28-word unpublished per curiam opinion, *In re Goff Building, LLC*, 53 Fed. Appx. 690, 2003 WL 23427 (4th Cir. 2003) (no headnotes), cites no authorities. According to Westlaw (02/02/2005), the court's opinion has not been cited elsewhere.

***Akinro v. Gbenga* (4th Cir. 02–1399, filed 04/17/2002, judgment 07/23/2002).**

*Appeal from:* District of Maryland.

*What happened:* Unsuccessful pro se prisoner civil appeal.

*Related case:* *Akinro v. Maryland* (4th Cir. 01–2405, filed 11/28/2001, judgment 07/08/2002) (unsuccessful pro se civil appeal).

*Opinion:* (2) The court’s unpublished 98-word per curiam opinion, *Akinro v. Gbenga*, 40 Fed. Appx. 866, 2002 WL 1611623 (4th Cir. 2002) (no headnotes), cites only the district court’s unpublished opinion. According to Westlaw (02/08/2005), the court’s opinion has not been cited elsewhere.

***McWaters v. Rick* (4th Cir. 02–1436, filed 04/25/2002, judgment 12/27/2002).**

*Appeal from:* Eastern District of Virginia.

*What happened:* Successful appeal of a refusal to dismiss a former Powhatan County supervisor’s complaint that expenses for travel while in office were improperly investigated, *McWaters v. Rick*, 195 F. Supp. 2d 781 (E.D. Va. 2002). The court of appeals held that the defendants were entitled to qualified immunity.

*Related case:* Consolidated with an appeal by one of the defendants filed a day earlier by a different attorney, *McWaters v. Cosby* (4th Cir. 02–1430, filed 04/24/2002, judgment 12/27/2002).

*Appellant’s brief:* The county supervisors’ 11,833-word appellant brief cites 86 published opinions (25 by the U.S. Supreme Court, 41 by the Fourth Circuit, 13 by other circuits, four by the Eastern District of Virginia, two by other Fourth Circuit districts, and one by Virginia’s supreme court).

*Appellee’s brief:* The former supervisor’s 8,057-word appellee brief cites 28 published opinions (11 by the U.S. Supreme Court, 12 by the Fourth Circuit, four by other circuits, and one by Virginia’s supreme court) and one unpublished Fourth Circuit opinion.

The unpublished Fourth Circuit opinion is cited to support the statement that “A panel of this Court has said that ‘the fundamental tenet of equal protection jurisprudence is not changed by [*Village of Willowbrook v. Olech*, 528 U.S. 562 (2000)].” (Page 22.) The point in controversy was whether, for qualified immunity purposes, it was settled law that the Equal Protection Clause proscribed discrimination against a class of one.

*Appellant’s reply brief:* The county supervisors’ 5,384-word reply brief cites 28 published opinions (nine by the U.S. Supreme Court, 15 by the Fourth

Circuit, three by other circuits, and one by Virginia’s supreme court).

*Opinion:* (2) The court’s 2,143-word unpublished printed per curiam opinion, *McWaters v. Cosby*, 54 Fed. Appx. 379, 2002 WL 31875539 (4th Cir. 2002) (two headnotes), cites five published opinions (three by the U.S. Supreme Court, one by the Fourth Circuit, and the Eastern District of Virginia opinion in this case). According to Westlaw (02/08/2005), the court’s opinion has been cited in one published Fourth Circuit district court opinion, one appellate brief in another circuit’s case, and three briefs in two district court cases in two Fourth Circuit districts.

***Pledger v. City of Virginia Beach* (4th Cir. 02–1511, filed 05/15/2002, judgment 07/31/2002).**

*Appeal from:* Eastern District of Virginia.

*What happened:* Unsuccessful pro se civil appeal of the district court’s refusal to reconsider the denial of relief from final judgment.

*Appellee’s brief:* The city’s 1,587-word appellee brief cites eight published opinions (three by the U.S. Supreme Court and five by the Fourth Circuit).

*Opinion:* (2) The court’s unpublished 97-word per curiam opinion, *Pledger v. City of Virginia Beach*, 42 Fed. Appx. 592, 2002 WL 1760840 (4th Cir. 2002) (no headnotes), cites only the district court’s unpublished opinion. According to Westlaw (02/08/2005), the court’s opinion has not been cited elsewhere.

***Madey v. Duke University* (4th Cir. 02–1585, filed 06/03/2002, judgment 06/06/2002).**

*Appeal from:* Middle District of North Carolina.

*What happened:* Civil appeal dismissed for administrative error.

*Opinion:* (1) The court’s docket judgment cites no opinions.

***IGEN International, Inc. v. Roche Diagnostics GMBH* (4th Cir. 02–1607, filed 06/06/2002, judgment 07/22/2002).**

*Appeal from:* District of Maryland.

*What happened:* Civil appeal voluntarily dismissed.

*Related case:* Consolidated with an appeal filed two weeks earlier by the appellee, *IGEN International, Inc. v. Roche Diagnostics GMBH* (4th Cir. 02–1537, filed 05/23/2002, judgment 07/09/2003). Following the dismissal of the plaintiff’s appeal, oral argument was heard in the defendant’s appeal, and the court affirmed in part and reversed in part, *IGEN International, Inc. v. Roche Diagnostics GMBH*, 335 F.3d 303 (4th Cir. 2003).

*Opinion:* (1) The court's docket judgment cites no opinions.

***Bailey v. Kennedy* (4th Cir. 02–1818, filed 07/31/2002, judgment 11/17/2003).**

*Appeal from:* Western District of North Carolina.

*What happened:* Appeal by plaintiffs from summary judgment decisions dismissed as improperly interlocutory. The plaintiffs sued police officers for the wrongful arrest of one of them based on a neighbor's report that he was suicidal.

*Related case:* The appeal was consolidated with an unsuccessful appeal by the defendants in the same case challenging the district court's denial of qualified immunity, *Bailey v. Kennedy* (4th Cir. 02–1761, filed 07/16/2002, judgment 11/17/2003).

*Cross-appellee's brief:* The defendant's 13,929-word appellant brief in 02–1761 cites 45 published opinions (15 by the U.S. Supreme Court, 15 by the Fourth Circuit, four by other circuits, one by a Fourth Circuit district, five by North Carolina's supreme court, and five by North Carolina's court of appeals) and one unpublished Fourth Circuit opinion.

The unpublished Fourth Circuit opinion is the fourth of four opinions in a string citation headed "see, e.g.," and supporting the statement, "In responding to calls involving a possible danger to human life, both the United States Supreme Court and the Fourth Circuit have repeatedly recognized that warrantless entries into homes by law enforcement officers are objectively reasonable." (Page 43.) The other opinions cited in the string are two Supreme Court opinions and a published Fourth Circuit opinion. A parenthetical note in the citation suggests that the reason for the citation is to show the circuit's application of text from a Supreme Court opinion: "citing the following quote from *Thompson v. Louisiana*, 469 U.S. 17, 21, 105 S. Ct. 409, 83 L. Ed. 2d 246 (1984): '[P]olice may make warrantless entries on the premises where "they reasonably believe that a person within is in need of immediate aid.'""

*Cross-appellant's brief:* The plaintiffs' 14,020-word appellee brief in 02–1761 and cross-appellant brief in 02–1818 cites 72 published opinions (23 by the U.S. Supreme Court, 18 by the Fourth Circuit, five by other circuits, one by a Fourth Circuit district, 13 by North Carolina's supreme court, and 12 by North Carolina's court of appeals).

*Cross-appellee's reply brief:* The defendants' 13,825-word reply brief cites 54 published opinions (14 by the U.S. Supreme Court, 21 by the Fourth Circuit, five by other circuits, eight by

North Carolina's supreme court, and six by North Carolina's court of appeals).

*Cross-appellant's reply brief:* The plaintiffs' 4,609-word reply brief cites 15 published opinions (five by the U.S. Supreme Court, four by the Fourth Circuit, two by other circuits, three by North Carolina's supreme court, and one by North Carolina's court of appeals).

*Opinion:* (3) The court's 7,716-word published opinion, *Bailey v. Kennedy*, 349 F.3d 731 (4th Cir. 2003) (16 headnotes), principally concerns the consolidated appeal concerning qualified immunity. The opinion cites 30 published opinions (10 by the U.S. Supreme Court, 13 by the Fourth Circuit, one by another circuit, two by North Carolina's supreme court, and four by North Carolina's court of appeals). According to Westlaw (02/08/2005), the court's opinion has been cited in three Fourth Circuit opinions (two published and one unpublished), one published opinion by the Western District of North Carolina, five opinions by other Fourth Circuit districts (three published and two unpublished), six secondary sources, two briefs in a U.S. Supreme Court case, and five briefs in five district court cases (two in the Western District of North Carolina, one in another Fourth Circuit district, and two in districts in other circuits). One Fourth Circuit opinion is a published denial of rehearing the consolidated case.

***Wells v. Ikon Office Solutions, Inc.* (4th Cir. 02–1869, filed 08/13/2002, judgment 10/24/2002).**

*Appeal from:* Eastern District of North Carolina.

*What happened:* Civil appeal voluntarily dismissed.

*Opinion:* (1) The court's docket judgment cites no opinions.

***Harrison v. Bratton* (4th Cir. 02–1938, filed 08/27/2002, judgment 01/22/2003).**

*Appeal from:* Eastern District of Virginia.

*What happened:* Pro se civil appeal dismissed for failure to prosecute.

*Opinion:* (1) The court's docket judgment cites no opinions.

***Sharp v. Fishburne* (4th Cir. 02–2016, filed 09/10/2002, judgment 02/14/2003).**

*Appeal from:* Eastern District of North Carolina.

*What happened:* Unsuccessful pro se employment discrimination appeal.

*Related case:* *Sharp v. Fishburne* (4th Cir. 01–2210, filed 10/10/2001, judgment 01/22/2002) (pro se civil appeal dismissed).

*Appellee's brief:* The defendants' informal 9,043-word appellee brief cites 38 published opinions

(four by the U.S. Supreme Court, 14 by the Fourth Circuit, two by other circuits, two by the Eastern District of North Carolina, six by other Fourth Circuit districts, one by a Fourth Circuit bankruptcy court, three by North Carolina's supreme court, and six by North Carolina's court of appeals), two unpublished opinions (one by the Fourth Circuit and one by a Fourth Circuit district), and one treatise.

The unpublished Fourth Circuit opinion is a partial affirmance, cited to complete the citation of a published district court opinion.

The unpublished district court opinion supports the statement, "One court has held that erroneous advice by a government agency causing plaintiff to delay her filing may toll the 180-day period if 'but for' that poor advice, plaintiff's charge would have been timely filed." (Page 9.)

*Opinion:* (2) The court's unpublished 90-word per curiam opinion, *Sharp v. Fishburne*, 56 Fed. Appx. 140, 2003 WL 329404 (4th Cir. 2003) (no headnotes), cites only the district court's unpublished opinion. According to Westlaw (02/08/2005), the court's opinion has not been cited elsewhere.

***Tejan v. Immigration and Naturalization Service* (4th Cir. 02–2290, filed 11/07/2002, judgment 09/04/2003).**

*Appeal from:* Board of Immigration Appeals.

*What happened:* Unsuccessful immigration appeal.

*Petitioner's brief:* The petitioner's 3,100-word brief cites 10 published court opinions (five by the U.S. Supreme Court and five by other circuits), two published decisions of the Board of Immigration Appeals, and one medical treatise.

*Respondent's brief:* The government's 9,862-word respondent brief cites 30 published court opinions (five by the U.S. Supreme Court, five by the Fourth Circuit, and 20 by other circuits) and five published decisions of the Board of Immigration Appeals. Two of these citations appear to be in two of the three pages of the brief that are missing from the copies filed with the court. (The length of the brief without missing pages was computed by adding three times the average number of words per page to the number of words counted in the pages filed.)

*Opinion:* (2) The court's unpublished 452-word printed per curiam opinion, *Tejan v. Ashcroft*, 75 Fed. Appx. 130, 2003 WL 22070539 (4th Cir. 2003) (two headnotes), cites two published Fourth Circuit opinions. According to Westlaw (02/08/2005), the court's opinion has been cited in one secondary source.

***United States v. Kennedy* (4th Cir. 02–4072, filed 01/29/2002, judgment 09/23/2002).**

*Appeal from:* Western District of Virginia.

*What happened:* Unsuccessful appeal of criminal conviction for distribution of cocaine.

*Appellant's brief:* The defendant's 3,216-word appellant brief cites six published opinions from other circuits and one ALR article.

*Appellee's brief:* The government's 1,509-word appellee brief cites five published opinions by other circuits.

*Opinion:* (2) The court's unpublished 320-word printed per curiam opinion, *United v. Kennedy*, 46 Fed. Appx. 200, 2002 WL 31104571 (4th Cir. 2002) (no headnotes), cites three published opinions by other circuits. According to Westlaw (02/08/2005), the court's opinion has not been cited elsewhere.

***United States v. Knight* (4th Cir. 02–4238, filed 03/18/2002, judgment 06/10/2002).**

*Appeal from:* Western District of North Carolina.

*What happened:* Stipulated dismissal of a criminal appeal.

*Opinion:* (1) The court's docket judgment cites no opinions.

***In re Wiggan* (4th Cir. 02–4343, filed 04/30/2002, judgment 06/26/2002).**

*Appeal from:* Southern District of West Virginia.

*What happened:* Pro se prisoner's petition for writ of mandamus denied as moot.

*Related case:* *United States v. Wiggan* (4th Cir. 00–4318, filed 04/21/2000, judgment 02/11/2003) (unsuccessful criminal appeal).

*Opinion:* (2) The court's unpublished 109-word per curiam opinion, *In re Wiggan*, 38 Fed. Appx. 936, 2002 WL 1376185 (4th Cir. 2002) (no headnotes), cites no opinions. According to Westlaw (02/08/2005), the court's opinion has not been cited elsewhere.

***United States v. Siriphat* (4th Cir. 02–4626, filed 08/09/2002, judgment 08/26/2002).**

*Appeal from:* Eastern District of Virginia.

*What happened:* Bail appeal voluntarily dismissed by the government.

*Opinion:* (1) The court's docket judgment cites no opinions.

***United States v. Felder* (4th Cir. 02–4858, filed 10/31/2002, judgment 04/06/2004).**

*Appeal from:* District of South Carolina.

*What happened:* Criminal sentence vacated and case remanded for reconsideration of whether a

prior state guilty plea was for mere possession or for possession with intent to distribute cocaine.

*Related case:* Consolidated with *United States v. Felder* (4th Cir. 02–4922, filed 11/21/2002, judgment 04/06/2004) (unsuccessful criminal appeal).

*Appellant's brief:* The defendant's 3,509-word appellant brief cites four published Fourth Circuit opinions.

*Appellee's brief:* The government's 2,169-word appellee brief cites 21 published opinions (one by the U.S. Supreme Court and 20 by the Fourth Circuit).

*Appellant's reply brief:* The defendant's 561-word reply brief cites three published opinions (one by the U.S. Supreme Court and two by the Fourth Circuit).

*Opinion:* (2) The court's unpublished 1,465-word printed per curiam opinion, *United States v. Felder*, 60 Fed. Appx. 108, 2004 WL 728197 (4th Cir. 2004) (three headnotes), cites 12 published opinions (two by the U.S. Supreme Court and 10 by the Fourth Circuit). According to Westlaw (02/08/2005), the court's opinion has not been cited elsewhere.

***United States v. Grubb* (4th Cir. 02–4946, filed 12/03/2002, judgment 06/06/2003).**

*Appeal from:* Western District of Virginia.

*What happened:* Criminal appeal voluntarily dismissed.

*Opinion:* (1) The court's docket judgment cites no opinions.

***Jenkins v. Bell* (4th Cir. 02–6016, filed 01/07/2002, judgment 02/27/2002).**

*Appeal from:* Eastern District of North Carolina.

*What happened:* Certificate of appealability denied.

*Opinion:* (2) The court's unpublished 102-word per curiam opinion, *Jenkins v. Bell*, 30 Fed. Appx. 115, 2002 WL 279411 (4th Cir. 2002) (no headnotes), cites only the district court's unpublished opinion. According to Westlaw (02/08/2005), the court's opinion has not been cited elsewhere.

***Redden v. Galley* (4th Cir. 02–6035, filed 01/09/2002, judgment 06/05/2002).**

*Appeal from:* District of Maryland.

*What happened:* Certificate of appealability denied.

*Related case:* Consolidated with *Redden v. Mades* (4th Cir. 02–6190, filed 02/05/2002, judgment 06/05/2002) (unsuccessful pro se section 1983 appeal).

*Opinion:* (2) The court's unpublished 150-word per curiam opinion, *Redden v. Galley*, 34 Fed. Appx. 135, 2002 WL 984403 (4th Cir. 2002) (no

headnotes), cites the two unpublished district court opinions in these two cases. According to Westlaw (02/08/2005), the court's opinion has not been cited elsewhere.

***In re McCall* (4th Cir. 02–6048, filed 01/10/2002, judgment 04/02/2002).**

*Appeal from:* Eastern District of North Carolina.

*What happened:* Denial of pro se prisoner's petition for a writ of mandamus, because the relief sought could be obtained by other means.

*Related cases:* *United States v. McCall* (4th Cir. 97–5024, filed 12/31/1997, judgment 06/02/1998) (criminal appeal voluntarily dismissed) and *United States v. McCall* (4th Cir. 00–6057, filed 01/10/2000, judgment 03/30/2000) (certificate of appealability denied).

*Opinion:* (2) The court's unpublished 291-word per curiam opinion, *In re McCall*, 32 Fed. Appx. 80, 2002 WL 489374 (4th Cir. 2002) (no headnotes), cites five published opinions (two by the U.S. Supreme Court and three by the Fourth Circuit). According to Westlaw (02/08/2005), the court's opinion has not been cited elsewhere.

***Bynum v. Bradford* (4th Cir. 02–6319, filed 02/21/2002, judgment 06/03/2002).**

*Appeal from:* Eastern District of Virginia.

*What happened:* Pro se prisoner's section 1983 appeal dismissed as frivolous.

*Opinion:* (2) The court's unpublished 106-word per curiam opinion, *Bynum v. Bradford*, 36 Fed. Appx. 100, 2002 WL 1162404 (4th Cir. 2002) (no headnotes), cites only the district court's unpublished opinion. According to Westlaw (02/08/2005), the court's opinion has not been cited elsewhere.

***Tucker v. Beck* (4th Cir. 02–6331, filed 02/25/2002, judgment 04/02/2002).**

*Appeal from:* Eastern District of North Carolina.

*What happened:* Pro se prisoner appeal dismissed for failure to prosecute.

*Opinion:* (1) The court's docket judgment cites no opinions.

***United States v. Rainey* (4th Cir. 02–6332, filed 02/25/2002, judgment 07/23/2002).**

*Appeal from:* Eastern District of Virginia.

*What happened:* Certificate of appealability denied.

*Related cases:* *United States v. Rainey* (4th Cir. 95–5447, filed 06/07/1995, judgment 06/22/1995) (criminal appeal voluntarily dismissed), *United States v. Rainey* (4th Cir. 95–5451, filed 06/09/1995, judgment 10/15/1996) (criminal sentence for cocaine distribution vacated for judge's

failure to apply the minimum sentence, and case remanded for sentencing before a different judge), *United States v. Rainey* (4th Cir. 97–4124, filed 02/19/1997, judgment 04/14/1998) (20-year sentence affirmed), *United States v. Rainey* (4th Cir. 99–7160, filed 09/01/1999, judgment 05/16/2000) (certificate of appealability denied for pro se prisoner appeal), and *United States v. Rainey* (4th Cir. 01–6879, filed 05/31/2001, judgment 10/25/2001) (unsuccessful pro se prisoner appeal).

*Opinion:* (2) The court’s unpublished 98-word per curiam opinion, *United States v. Rainey*, 41 Fed. Appx. 648, 2002 WL 1613771 (4th Cir. 2002) (no headnotes), cites only the district court’s unpublished opinion. According to Westlaw (02/08/2005), the court’s opinion has not been cited elsewhere.

***Williams v. Haney* (4th Cir. 02–6453, filed 03/19/2002, judgment 07/08/2002).**

*Appeal from:* Northern District of West Virginia.

*What happened:* Unsuccessful pro se prisoner’s section 1983 appeal.

*Opinion:* (2) The court’s unpublished 108-word per curiam opinion, *Williams v. Haney*, 39 Fed. Appx. 877, 2002 WL 1452493 (4th Cir. 2002) (no headnotes), cites only the district court’s unpublished opinion. According to Westlaw (02/08/2005), the court’s opinion has not been cited elsewhere.

***Goodwyn v. United States* (4th Cir. 02–6639, filed 04/24/2002, judgment 08/23/2002).**

*Appeal from:* Eastern District of North Carolina.

*What happened:* Unsuccessful pro se prisoner appeal of the district court’s dismissal of his habeas corpus petition.

*Opinion:* (2) The court’s unpublished 85-word per curiam opinion, *Goodwyn v. United States*, 42 Fed. Appx. 669, 2002 WL 1941541 (4th Cir. 2002) (no headnotes), cites only the district court’s unpublished opinion. According to Westlaw (02/08/2005), the court’s opinion has not been cited elsewhere.

***Dewitt v. Mailroom Personnel* (4th Cir. 02–6654, filed 04/29/2002, judgment 04/03/2003).**

*Appeal from:* District of South Carolina.

*What happened:* Pro se prisoner appeal voluntarily dismissed.

*Related case:* Consolidated with an appeal filed eight months later, *Dewitt v. Mailroom Personnel* (4th Cir. 03–6002, filed 01/02/2003, judgment 04/03/2003) (pro se prisoner appeal voluntarily dismissed).

*Opinion:* (1) The court’s docket judgment cites no opinion.

***McNeill v. Sutton* (4th Cir. 02–6723, filed 05/10/2002, judgment 07/02/2002).**

*Appeal from:* Eastern District of North Carolina.

*What happened:* Pro se prisoner appeal dismissed for failure to prosecute.

*Opinion:* (1) The court’s docket judgment cites no opinion.

***United States v. Moseley* (4th Cir. 02–6900, filed 06/14/2002, judgment 09/11/2002).**

*Appeal from:* Eastern District of Virginia.

*What happened:* Certificate of appealability denied.

*Opinion:* (2) The court’s unpublished 224-word per curiam opinion, *United States v. Moseley*, 47 Fed. Appx. 209, 2002 WL 31017806 (4th Cir. 2002) (no headnotes), cites three published opinions (one by the Fourth Circuit and two by other circuits) and the district court’s unpublished opinion. According to Westlaw (02/08/2005), the court’s opinion has not been cited elsewhere.

***Johns v. Matthew* (4th Cir. 02–6939, filed 06/24/2002, judgment 08/26/2002).**

*Appeal from:* Eastern District of Virginia.

*What happened:* Unsuccessful pro se prisoner appeal.

*Opinion:* (2) The court’s unpublished 91-word per curiam opinion, *Johns v. Matthew*, 43 Fed. Appx. 691, 2002 WL 1963609 (4th Cir. 2002) (no headnotes), cites only the district court’s unpublished opinion. According to Westlaw (02/08/2005), the court’s opinion has not been cited elsewhere.

***United States v. Dodge* (4th Cir. 02–6973, filed 06/27/2002, judgment 08/29/2002).**

*Appeal from:* Northern District of West Virginia.

*What happened:* Certificate of appealability denied.

*Opinion:* (2) The court’s 109-word unpublished per curiam opinion, *United States v. Dodge*, 43 Fed. Appx. 701, 2002 WL 1987414 (4th Cir. 2002) (no headnotes), cites only the district court’s unpublished opinion. According to Westlaw (02/08/2005), the court’s opinion has not been cited elsewhere.

***United States v. Rosario* (4th Cir. 02–7022, filed 07/09/2002, judgment 12/12/2002).**

*Appeal from:* Eastern District of North Carolina.

*What happened:* Pro se prisoner appeal dismissed for failure to file a timely notice of appeal.

*Appellee’s brief:* The government’s 368-word informal appellee brief cites one published Fourth Circuit opinion.



*Opinion:* (2) The court's unpublished 230-word per curiam opinion, *United States v. Rosario*, 52 Fed. Appx. 215, 2002 WL 31771440 (4th Cir. 2002) (no headnotes), cites one published Fourth Circuit opinion. According to Westlaw (02/08/2005), the court's opinion has not been cited elsewhere.

***Althouse v. Lowery* (4th Cir. 02–7138, filed 08/02/2002, judgment 10/31/2002).**

*Appeal from:* Eastern District of North Carolina.

*What happened:* Unsuccessful pro se prisoner appeal of the denial of *Bivens* relief, with the court of appeal affirming "substantially on the reasoning of the district court."

*Opinion:* (2) The court's unpublished 147-word per curiam opinion, *Althouse v. Lowery*, 49 Fed. Appx. 476, 2002 WL 31430348 (4th Cir. 2002) (no headnotes), cites two published opinions (one by the U.S. Supreme Court and one by the Fourth Circuit) and the district court's unpublished order. According to Westlaw (02/08/2005), the court's opinion had not been cited elsewhere.

***Eury v. Angelone* (4th Cir. 02–7261, filed 08/28/2002, judgment 11/14/2002).**

*Appeal from:* Eastern District of Virginia.

*What happened:* Pro se prisoner appeal dismissed as premature.

*Related case:* *Eury v. Goins* (4th Cir. 02–7438, filed 10/01/2002, judgment 12/03/2002) (pro se prisoner appeal dismissed for failure to prosecute).

*Opinion:* (2) The court's unpublished 135-word per curiam opinion, *Eury v. Angelone*, 50 Fed. Appx. 639, 2002 WL 31521348 (4th Cir. 2002) (no headnotes), cites one U.S. Supreme Court opinion. According to Westlaw (02/08/2005), the court's opinion has not been cited elsewhere.

***Brown v. Ashcroft* (4th Cir. 02–7349, filed 09/17/2002, judgment 11/07/2002).**

*Appeal from:* Eastern District of Virginia.

*What happened:* Pro se prisoner appeal dismissed for failure to prosecute.

*Opinion:* (1) The court's docket judgment cites no opinions.

***United States v. Medrano* (4th Cir. 02–7502, filed 10/15/2002, judgment 01/06/2003).**

*Appeal from:* Eastern District of Virginia

*What happened:* Certificate of appealability denied.

*Opinion:* (2) The court's 230-word unpublished per curiam opinion, *United States v. Medrano*, 53 Fed. Appx. 710, 2003 WL 57334 (4th Cir. 2003) (no headnotes), cites two published opinions (one by the U.S. Supreme Court and one by the Fourth

Circuit) and the district court's unpublished opinion. According to Westlaw (02/08/2005), the court's opinion has not been cited elsewhere.

***Phillips v. Angelone* (4th Cir. 02–7512, filed 10/16/2002, judgment 01/06/2003).**

*Appeal from:* Western District of Virginia.

*What happened:* Certificate of appealability denied to pro se prisoner appealing district court's dismissal of his habeas corpus petition.

*Opinion:* (2) The court's unpublished 120-word per curiam opinion, *Phillips v. Angelone*, 53 Fed. Appx. 712, 2003 WL 57366 (4th Cir. 2003) (no headnotes), cites only the district court's unpublished memorandum opinion. According to Westlaw (02/08/2005), the court's opinion has not been cited elsewhere.

***Spencer v. Stiff* (4th Cir. 02–7529, filed 10/16/2002, judgment 10/31/2002).**

*Appeal from:* Eastern District of Virginia.

*What happened:* Pro se prisoner appeal voluntarily dismissed.

*Related case:* *In re Spencer* (4th Cir. 01–7467, filed 08/06/2001, judgment 11/20/2001) (petition for writ of mandamus denied).

*Opinion:* (1) The court's docket judgment cites no opinion.

***Brown v. Anderson* (4th Cir. 02–7572, filed 10/22/2002, judgment 03/25/2003).**

*Appeal from:* Eastern District of North Carolina.

*What happened:* Certificate of appealability denied to pro se prisoner appealing district court's dismissal of his habeas corpus petition.

*Opinion:* (2) The court's unpublished 255-word per curiam opinion, *Brown v. Anderson*, 61 Fed. Appx. 76, 2003 WL 1522585 (4th Cir. 2003) (no headnotes), cites three published opinions (two by the U.S. Supreme Court and one by the Fourth Circuit). According to Westlaw (02/08/2005), the court's opinion has not been cited elsewhere.

***Brown v. Metts* (4th Cir. 02–7573, filed 10/22/2002, judgment 04/09/2003).**

*Appeal from:* District of South Carolina.

*What happened:* Unsuccessful pro se prisoner appeal of the denial of relief on his civil rights complaint, with the court of appeal affirming on the reasoning of the district court.

*Related cases:* Consolidated with *Brown v. Metts* (4th Cir. 02–7775, filed 11/21/2002, judgment 04/09/2003) (unsuccessful pro se prisoner appeal). Other related cases include *Brown v. Metts* (4th Cir. 00–6512, filed 04/18/2000, judgment 09/05/2000) (prior successful pro se prisoner appeal) and *United States v. Brown* (4th Cir. 02–4764,

filed 09/24/2002, judgment 01/08/2003) (criminal appeal dismissed).

*Appellee's brief:* The government's informal 831-word appellee brief cites three published opinions (two by the U.S. Supreme Court and one by the Fourth Circuit).

*Opinion:* (2) The court's unpublished 97-word per curiam opinion, *Brown v. Metts*, 60 Fed. Appx. 496, 2003 WL 1826797 (4th Cir. 2003) (no headnotes), cites only the district court's unpublished opinion. According to Westlaw (02/08/2005), the court's opinion has not been cited elsewhere.

***In re Riggleman* (4th Cir. 02-7590, filed 10/24/2002, judgment 12/06/2002).**

*Appeal from:* Northern District of West Virginia.

*What happened:* Pro se prisoner petition for writ of habeas corpus dismissed for failure to prosecute.

*Opinion:* (1) The court's docket judgment cites no opinions.

***United States v. Davis* (4th Cir. 02-7607, filed 10/28/2002, judgment 01/07/2003).**

*Appeal from:* Eastern District of North Carolina.

*What happened:* Certificate of appealability denied to pro se prisoner appealing district court's dismissal of his habeas corpus petition.

*Related case:* *In re Davis* (4th Cir. 02-7176, filed 08/14/2002, judgment 11/14/2002) (petition for writ of mandamus denied).

*Opinion:* (2) The court's unpublished 228-word per curiam opinion, *United States v. Davis*, 53 Fed. Appx. 719, 2003 WL 57934 (4th Cir. 2003) (no headnotes), cites two published opinions (one by the U.S. Supreme Court and one by the Fourth Circuit) and the district court's unpublished order. According to Westlaw (02/08/2005), the court's opinion has not been cited elsewhere.

***Henson v. Angelone* (4th Cir. 02-7673, filed 11/04/2002, judgment 02/05/2003).**

*Appeal from:* Eastern District of Virginia.

*What happened:* Unsuccessful appeal by a prisoner of a decision by a magistrate judge.

*Related cases:* *Henson v. Gray* (4th Cir. 02-7937, filed 12/27/2002, judgment 06/24/2003) (dismissed for failure to pay the filing fee) and *Henson v. Angelone* (4th Cir. 03-6054, filed 01/08/2003, judgment 03/28/2003) (dismissed as moot).

*Opinion:* (2) The court's 100-word unpublished per curiam opinion, *Henson v. Angelone*, 55 Fed. Appx. 213, 2003 WL 246125 (4th Cir. 2003) (no headnotes), cites only the district court's unpublished opinion. According to Westlaw (02/08/2005), the court's opinion has not been cited elsewhere.

***Muhammad v. Brooks* (4th Cir. 02-7727, filed 11/14/2002, judgment 03/13/2003).**

*Appeal from:* Eastern District of Virginia.

*What happened:* Certificate of appealability denied.

*Opinion:* (2) The court's 225-word unpublished per curiam opinion, *Muhammad v. Brooks*, 59 Fed. Appx. 593, 2003 WL 1093016 (4th Cir. 2003) (no headnotes), cites three published opinions (two by the U.S. Supreme Court and one by the Fourth Circuit). According to Westlaw (02/08/2005), the court's opinion has not been cited elsewhere.

***Graham v. Johnson* (4th Cir. 02-7850, filed 12/10/2002, judgment 08/28/2003).**

*Appeal from:* Western District of Virginia.

*What happened:* Pro se prisoner's habeas corpus appeal dismissed for failure to timely file the notice of appeal.

*Opinion:* (2) The court's unpublished 242-word per curiam opinion, *Graham v. Johnson*, 74 Fed. Appx. 260, 2003 WL 22023332 (4th Cir. 2003) (no headnotes), cites three U.S. Supreme Court opinions. According to Westlaw (02/08/2005), the court's opinion has not been cited elsewhere.

## 5. Fifth Circuit<sup>89</sup>

As of January 1, 1996, unpublished opinions by the court of appeals for the Fifth Circuit are no longer precedent, but they may be cited as persuasive authority.<sup>90</sup>

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89. Docket sheets are on PACER. Published opinions are on the court's website, its intranet site, and Westlaw. Unpublished opinions are on the court's website and its intranet site. Most unpublished opinions are also on Westlaw. (Of the 16 cases in this sample resolved by unpublished opinions, the opinions for 11 of the cases are on Westlaw.) Most briefs are on Westlaw. (Of the 16 cases with counseled briefs in this sample, all briefs are on Westlaw for 11 cases, and some briefs are on Westlaw for one case.)

90. 5th Cir. L.R. 47.5.4 ("Unpublished opinions issued on or after January 1, 1996, are not precedent, except under the doctrine of res judicata, collateral estoppel or law of the case (or similarly to show double jeopardy, abuse of the writ, notice, sanctionable conduct, entitlement to attorney's fees, or the like). An unpublished opinion may, however, be persuasive. An unpublished opinion may be cited, but if cited in any document being submitted to the court, a copy of the unpublished opinion must be attached to each document.").

Of the 50 cases randomly selected, 45 are appeals from district courts (11 from the Southern District of Texas; eight from the Eastern District of Texas; seven from the Western District of Texas; six from the Northern District of Texas; three each from the Eastern District of Louisiana, the Middle District of Louisiana, and the Southern District of Mississippi; and two each from the Western District of Louisiana and the Northern District of Mississippi), one is an appeal from the United States Tax Court, and four are appeals from the Board of Immigration Appeals.<sup>91</sup>

The publication rate in this sample is 6%. Three of the appeals were resolved by published signed opinions, 16 were resolved by unpublished per curiam opinions (11 of which are published in the *Federal Appendix*—six in cases on the court’s conference calendar and five in cases on the court’s summary calendar; and five of which are tabled in the *Federal Appendix*<sup>92</sup>—three in cases on the court’s conference calendar and two in cases on the court’s summary calendar), and 31 were resolved by docket judgments.

Published opinions averaged 4,805 words in length, ranging from 2,845 to 7,489. Unpublished opinions averaged 390 words in length, ranging from 41 to 1,266. Fourteen opinions were under 1,000 words in length (74%, all unpublished), and 13 of these were under 500 words in length (68%).

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The court adopted a rule distinguishing published from unpublished opinions on October 15, 1981. Until 1996, the court regarded unpublished opinions as precedential.

91. In 2002, 8,810 cases were filed in the court of appeals for the Fifth Circuit.

92. The court only sends published opinions to Westlaw. But as of July 2003, the court now posts unpublished opinions on the Internet and Westlaw retrieves them from there. So Westlaw has the text of only some unpublished opinions issued before July 2003, but is expanding its collection over time to include opinions back to 1998.

Eleven of the appeals were fully briefed. In 33 of the appeals no counseled brief was filed, and in six of the appeals a counseled brief was filed only for one side.

There are citations to unpublished court opinions in four of these cases. In one case the citations are only to opinions in related cases; in three cases there are citations to unpublished opinions in unrelated cases. All of the citations to unrelated unpublished opinions are in briefs, not opinions.

None of the unrelated unpublished opinions cited are by the court of appeals for the Fifth Circuit. One of the opinions is by a Fifth Circuit district court, one is by a district court in another circuit, and two are by Texas’s courts of appeals.

C5–1. In a partially successful appeal by the plaintiff in an action for automobile accident insurance benefits, *Hamburger v. State Farm Mutual Automobile Insurance Co.* (5th Cir. 02–21126, filed 10/14/2002, judgment 03/02/2004), resolved by published opinion at 361 F.3d 875, the appellant cited an unpublished opinion by the district court for the Northern District of Texas in a discussion of the reasonableness of the insurer’s conduct in bad-faith actions.

C5–2. In a successful civil appeal by the manufacturer of plumbing products in an action by a distributor for breach of a distribution contract, *Coburn Supply Co. v. Kohler Co.* (5th Cir. 02–41317, filed 09/18/2002, judgment 08/06/2003), resolved by published opinion at 342 F.3d 372, the defendant cited a different unpublished opinion in each of its briefs. The defendant’s appellant brief devotes 21 lines of text, encompassing two paragraphs, to an unpublished opinion by the district court for the District of Massachusetts concerning reasonable notice in terminating a contract to distribute dental equipment. The reply brief identifies an unpublished opinion by a Texas court of appeals as a “particularly demonstrative example from

Texas case law” concerning franchise agreements.

C5–3. In an unsuccessful appeal of summary judgment awarded to a store in an action for false imprisonment of a suspected shoplifter, *Vilandos v. Sam’s Club Wal-Mart Stores Inc.* (5th Cir. 02–20762, filed 07/15/2002, judgment 04/03/2003), resolved by unpublished opinion at 65 Fed. Appx. 509, 2003 WL 1923003, the shopper’s appellant brief devotes 14 lines of text to a discussion of an unpublished opinion by a Texas court of appeals concerning how much time is reasonable to detain a suspected shoplifter.

### Individual Case Analyses

***United States v. Eddings* (5th Cir. 02–10493, filed 04/29/2002, judgment 10/28/2002).**

*Appeal from:* Northern District of Texas.

*What happened:* Pro se prisoner appeal dismissed for failure to file a brief in support of certificate of appealability.

*Related cases:* The prisoner filed three other appeals the same day and a fourth four months later: *United States v. Eddings* (5th Cir. 02–10489, filed 04/29/2002, judgment 10/28/2002); *United States v. Eddings* (5th Cir. 02–10490, filed 04/29/2002, judgment 10/28/2002); *United States v. Eddings* (5th Cir. 02–10492, filed 04/29/2002, judgment 10/28/2002); and *United States v. Eddings* (5th Cir. 02–10953, filed 08/28/2002, judgment 10/28/2002). All of the appeals were dismissed on the same day for failure to file briefs.

*Opinion:* (1) The court’s docket judgment cites no opinions.

***Von Essen, Inc. v. Marnac, Inc.* (5th Cir. 02–10573, filed 05/15/2002, judgment 03/11/2003).**

*Appeal from:* Northern District of Texas.

*What happened:* Unsuccessful appeal of an award of attorney fees consolidated with an unsuccessful appeal of the district court’s confirmation of an arbitration award. After the appeals were consolidated, the attorney fee award was not briefed. The text of the court’s opinion is “Affirmed.”

*Related case:* *Von Essen, Inc. v. Marnac, Inc.* (5th Cir. 02–10143, filed 02/07/2002, judgment 03/11/2003) (unsuccessful appeal of arbitration award).

*Opinion:* (2) The court’s unpublished 41-word per curiam opinion, *Von Essen Inc. v. Marnac Inc.*,

64 Fed. Appx. 416, 2003 WL 1524557 (5th Cir. 2003) (no headnotes), cites no opinions. (The text of the opinion is the single word “Affirmed.” Everything else is reference material.) According to Westlaw (02/11/2005), the court’s opinion has not been cited elsewhere.

***Pace v. Cockrell* (5th Cir. 02–10664, filed 06/07/2002, judgment 07/09/2002).**

*Appeal from:* Northern District of Texas.

*What happened:* Pro se prisoner appeal dismissed as untimely.

*Opinion:* (1) The court’s docket judgment cites no opinions.

***Selver v. Ford Motor Credit Co.* (5th Cir. 02–11044, filed 09/19/2002, judgment 01/24/2003).**

*Appeal from:* Northern District of Texas.

*What happened:* Pro se prisoner appeal dismissed upon denial of a motion to proceed in forma pauperis.

*Opinion:* (2) The court’s unpublished 294-word per curiam opinion, *Selver v. Ford Motor Credit Co.*, 58 Fed. Appx. 597, 2003 WL 261876 (5th Cir. 2003) (no headnotes), cites two published Fifth Circuit opinions and two unpublished opinions in previous actions by the prisoner (one by the Fifth Circuit and one by the Northern District of Texas). The two unpublished opinions cited are dismissals for frivolousness and, according to the court, count as two previous “strikes.”

According to Westlaw (07/19/2004), this judgment has not been cited elsewhere. The court’s internal website, however, shows that this judgment was cited as one of three “strikes” against the prisoner in an order that he be “BARRED from bringing any civil action or appeal in forma pauperis while he is incarcerated or detained in any facility unless he shows that he is under imminent danger of serious physical injury,” *Selver v. Collin County District Court* (5th Cir. 02–41560, unpublished per curiam opinion filed 04/22/2003).

***United States v. Ross* (5th Cir. 02–11053, filed 09/20/2002, judgment 04/22/2003).**

*Appeal from:* Northern District of Texas.

*What happened:* Certificate of appealability denied.

*Related case:* *United States v. Fields*, 72 F.3d 1200 (5th Cir. 1996) (94–10185) (largely unsuccessful appeal by the defendant and his codefendants of convictions for cocaine distribution).

*Opinion:* (1) The court’s docket judgment cites no opinions.

***United States v. Sillemon* (5th Cir. 02–11344, filed 12/13/2002, judgment 12/12/2003).**

*Appeal from:* Northern District of Texas.

*What happened:* Unsuccessful criminal appeal. The defendant was sentenced to 99 years in prison, three years of supervised release, restitution of \$43,336, and a special assessment of \$900 for four bank robberies. The court of appeals held that the trial court did not abuse its discretion in denying a continuance upon defendant's switching retained counsel shortly before trial.

*Appellant's brief:* The defendant's 3,941-word appellant brief cites eight published opinions (two by the U.S. Supreme Court and six by the Fifth Circuit).

*Appellee's brief:* The government's 3,972-word appellee brief cites 11 published opinions (one by the U.S. Supreme Court and 10 by the Fifth Circuit).

*Opinion:* (2) The court's 207-word unpublished per curiam summary opinion, *United States v. Sillemon*, 82 Fed. Appx. 976, 2003 WL 22955877 (5th Cir. 2003) (no headnotes), cites three published Fifth Circuit opinions. According to Westlaw (02/10/2005), the court's opinion has not been cited elsewhere.

***Craig v. Cockrell* (5th Cir. 02–20119, filed 02/01/2002, judgment 04/23/2002).**

*Appeal from:* Southern District of Texas.

*What happened:* Pro se prisoner appeal—certificate of appealability denied.

*Opinion:* (1) The court's docket judgment cites no opinions.

***Martin v. City of Pasadena* (5th Cir. 02–20662, filed 06/18/2002, judgment 07/08/2003).**

*Appeal from:* Southern District of Texas.

*What happened:* A city voluntarily dismissed its appeal of summary judgment in favor of a plaintiff who challenged the city's removal of a fundraising brick and bench honoring the plaintiff's brother, whom the city objected to her honoring because he had killed a police officer.

*Appellant's brief:* The city's 4,933-word appellant brief cites 15 published opinions (nine by the U.S. Supreme Court, two by the Fifth Circuit, two by other circuits, and two by districts in other circuits) and one historical book.

*Appellee's brief:* The plaintiff's 4,188-word appellee brief cites 18 published opinions (seven by the U.S. Supreme Court, four by the Fifth Circuit, six by other circuits, and one by a district in another circuit).

*Appellant's reply brief:* The appellant's 1,194-word reply brief cites four published opinions by other circuits.

*Opinion:* (1) The court's docket judgment cites no opinions.

***United States v. Giraldo* (5th Cir. 02–20694, filed 06/24/2002, judgment 08/06/2002).**

*Appeal from:* Southern District of Texas.

*What happened:* Pro se prisoner appeal dismissed for lack of jurisdiction.

*Related cases:* Three related cases were dismissed: *United States v. Giraldo* (5th Cir. 99–20646, filed 07/12/1999, judgment 02/07/2000), *United States v. Giraldo* (5th Cir. 96–20029, filed 01/12/1996, judgment 02/06/1996), and *United States v. Giraldo* (5th Cir. 93–2644, docket sheet not available). One related case, *United States v. Giraldo* (5th Cir. 96–20390, filed 04/24/1996, judgment 04/11/1997), was affirmed, *United States v. Giraldo*, 111 F.3d 21 (5th Cir. 1997).

*Opinion:* (1) The court's docket judgment cites no opinions.

***Vilandos v. Sam's Club Wal-Mart Stores Inc.* (5th Cir. 02–20762, filed 07/15/2002, judgment 04/03/2003).**

*Appeal from:* Southern District of Texas.

*What happened:* Unsuccessful appeal of summary judgment awarded to a store in an action for false imprisonment of a suspected shoplifter.

*Appellant's brief:* The shopper's 9,463-word appellant brief cites 22 published opinions (two by the U.S. Supreme Court, eight by the Fifth Circuit, seven by Texas's supreme court, and five by Texas's courts of appeals), one unpublished opinion by Texas's court of appeals, and the *Restatement (Second) of Torts*.

Fourteen lines of the plaintiff's appellant brief discuss the cited unpublished opinion by a Texas court of appeals. (Page 29.) The facts in the cited opinion are used to argue how much time it is reasonable to detain a shopper who is accused of shoplifting.

*Appellee's brief:* The store's 6,487-word appellee brief cites 46 published opinions (three by the U.S. Supreme Court, 20 by the Fifth Circuit, nine by other circuits, nine by Texas's supreme court, and five by Texas's courts of appeals) and the *Restatement (Second) of Torts*.

*Appellant's reply brief:* The shopper's 2,893-word reply brief cites seven published opinions (one by the U.S. Supreme Court, three by the Fifth Circuit, two by Texas's supreme court, and one by Texas's court of appeals).

*Opinion:* (2) The court's unpublished 164-word per curiam opinion, *Vilandos v. Sam's Club Wal-Mart*, 65 Fed. Appx. 509, 2003 WL 1923003 (5th Cir. 2003) (no headnotes), cites two published Fifth Circuit opinions. According to Westlaw (02/02/2005), the court's opinion has not been cited elsewhere.

***Crooks v. Thomas* (5th Cir. 02–21091, filed 10/10/2002, judgment 10/27/2003).**

*Appeal from:* Southern District of Texas.

*What happened:* Unsuccessful pro se prisoner appeal of summary judgment against a section 1983 civil rights action. The courts concluded that the prisoner's failure to receive notice of the motion was harmless error.

*Appellee's brief:* The defendant's 7,186-word appellee brief cites 46 published opinions (five by the U.S. Supreme Court, 39 by the Fifth Circuit, and two by other circuits).

*Opinion:* (2) The court's unpublished 1,266-word per curiam opinion, *Crooks v. Thomas*, 78 Fed. Appx. 981, 2003 WL 22430743 (5th Cir. 2003) (two headnotes), cites seven published opinions (two by the U.S. Supreme Court and five by the Fifth Circuit). According to Westlaw (02/10/2005), the court's opinion has not been cited elsewhere.

***Hamburger v. State Farm Mutual Automobile Insurance Co.* (5th Cir. 02–21126, filed 10/14/2002, judgment 03/02/2004).**

*Appeal from:* Southern District of Texas.

*What happened:* Partially successful appeal by the plaintiff in an action for insurance benefits for an automobile accident.

*Related case:* *Hamburger v. State Farm Mutual Automobile Insurance Co.* (5th Cir. 02–21184, filed 10/30/2002, judgment 03/02/2004) (cross-appeal).

*Appellant's brief:* The plaintiff's 14,236-word appellant brief cites 40 published opinions (three by the U.S. Supreme Court, 15 by the Fifth Circuit, seven by other circuits, four by districts in other circuits, five by Texas's supreme court, and six by Texas's courts of appeals) and one unpublished opinion by a Fifth Circuit district.

The brief cites the unpublished opinion—an opinion by the Northern District of Texas—to support the statement, "Thus, the focus of a bad faith inquiry is on the reasonableness of the insurer's conduct in rejecting or delaying payment of the claim, which is determined by viewing the facts available to the insurer at the time of denial." (Page 32.)

*Appellee's brief:* The insurance company's 12,994-word appellee and cross-appellant brief cites 57 published opinions (four by the U.S. Supreme Court, 12 by the Fifth Circuit, four by other circuits, one by the Southern District of Texas, 20 by Texas's supreme court, and 16 by Texas's courts of appeals).

*Appellant's reply brief:* The plaintiff's 2,944-word reply brief cites six published opinions (four by Texas's supreme court and two by Texas's courts of appeals).

*Cross-appellant's reply brief:* The insurance company's 1,339-word reply brief cites no opinions.

*Opinion:* (3) The court's published 7,489-word signed opinion and partial dissent, *Hamburger v. State Farm Mutual Automobile Insurance Co.*, 361 F.3d 875 (5th Cir. 2004) (18 headnotes), cites 34 published opinions (one by the U.S. Supreme Court, nine by the Fifth Circuit, two by other circuits, nine by Texas's supreme court, and 13 by Texas's courts of appeals). According to Westlaw (02/10/2005), the court's opinion has been cited in six district court opinions by Fifth Circuit districts (one published and five unpublished), one unpublished district court opinion by a district in another circuit, 10 secondary sources, two appellate briefs in two cases before Texas courts, and 12 trial court briefs in 10 district court cases (seven in Fifth Circuit districts and three in districts in other circuits).

***United States v. Whitelaw* (5th Cir. 02–21273, filed 11/22/2002, judgment 07/07/2003).**

*Appeal from:* Southern District of Texas.

*What happened:* Pro se prisoner appeal—certificate of appealability denied.

*Related case:* *United States v. Whitelaw* (5th Cir. 99–20665, filed 07/19/1999, judgment 12/21/2000) (conviction affirmed).

*Opinion:* (1) The court's docket judgment cites no opinions.

***Charles v. Greenburg* (5th Cir. 02–30203, filed 02/25/2002, judgment 01/22/2003).**

*Appeal from:* Eastern District of Louisiana.

*What happened:* Plaintiff's civil rights appeal dismissed as settled.

*Opinion:* (1) The court's docket judgment cites no opinions.

***Forrest v. Cain* (5th Cir. 02–30277, filed 03/20/2002, judgment 10/28/2002).**

*Appeal from:* Eastern District of Louisiana.

*What happened:* Pro se prisoner appeal—certificate of appealability denied.

*Opinion:* (1) The court's docket judgment cites no opinions.

**United States v. Green (5th Cir. 02–30729, filed 07/24/2002, judgment 03/11/2003).**

*Appeal from:* Middle District of Louisiana.

*What happened:* Unsuccessful criminal appeal of a conviction for possession of a gun by a felon. The court of appeals rejected the defendant's argument that he should have been permitted a justification jury instruction, because there was no evidentiary foundation for it.

*Appellant's brief:* The defendant's 5,914-word brief cites 24 published opinions (four by the U.S. Supreme Court, 13 by the Fifth Circuit, and seven by other circuits).

*Appellee's brief:* The government's 4,198-word amended brief cites 17 published opinions (one by the U.S. Supreme Court, 13 by the Fifth Circuit, and three by other circuits).

*Opinion:* (2) The court's unpublished 235-word per curiam summary opinion, tabled at *United States v. Green*, 64 Fed. Appx. 416, 2003 WL 1524562 (5th Cir. 2003), cites five published Fifth Circuit opinions. According to Westlaw (02/10/2005), the court's opinion has not been cited elsewhere.

**Douglas v. City of Baton Rouge (5th Cir. 02–30846, filed 08/22/2002, judgment 08/15/2003).**

*Appeal from:* Middle District of Louisiana.

*What happened:* Unsuccessful pro se appeal of the district court's refusal to appoint counsel for plaintiffs in a civil rights case.

*Opinion:* (2) The court's unpublished 342-word per curiam summary opinion, *Douglas v. City of Baton Rouge*, 71 Fed. Appx. 376, 2003 WL 21954207 (5th Cir. 2003) (no headnotes), cites four published Fifth Circuit opinions. According to Westlaw (02/10/2005), the court's opinion has not yet been cited elsewhere.

**Associated Marine Equipment LLC v. Jin Yi Shipping Inc. (5th Cir. 02–30928, filed 09/16/2002, judgment 10/10/2002).**

*Appeal from:* Eastern District of Louisiana.

*What happened:* Plaintiff's civil marine appeal voluntarily dismissed.

*Opinion:* (1) The court's docket judgment cites no opinions.

**Deville v. Barnhart (5th Cir. 02–30936, filed 09/17/2002, judgment 10/23/2002).**

*Appeal from:* Western District of Louisiana.

*What happened:* Plaintiff's Social Security appeal voluntarily dismissed.

*Opinion:* (1) The court's docket judgment cites no opinions.

**Branch v. Cain (5th Cir. 02–30946, filed 9/18/2002, judgment 04/23/2003).**

*Appeal from:* Middle District of Louisiana.

*What happened:* Pro se prisoner appeal—certificate of appealability denied.

*Opinion:* (1) The court's docket judgment cites no opinions.

**United States v. Hernandez (5th Cir. 02–30967, filed 09/23/2002, judgment 01/31/2003).**

*Appeal from:* Western District of Louisiana.

*What happened:* Certificate of appealability denied.

*Related cases:* Prior cases include an affirmance on direct appeal of a conviction for armed bank robbery, *United States v. Hernandez* (5th Cir. 98-30925, filed 08/31/1998, judgment 01/10/2000), and a dismissal for lack of jurisdiction, *United States v. Hernandez* (5th Cir. 02–30827, filed 08/19/2002, judgment 09/04/2002).

*Opinion:* (1) The court's docket judgment cites no opinions.

**In re Mendizabal (5th Cir. 02–40104, filed 01/24/2002, judgment 05/07/2002).**

*Appeal from:* Eastern District of Texas.

*What happened:* Motion for permission to file a successive habeas corpus petition denied.

*Opinion:* (1) The court's docket judgment cites no opinions.

**United States v. Caballero-Rodriguez (5th Cir. 02–40229, filed 02/13/2002, judgment 02/20/2003).**

*Appeal from:* Southern District of Texas.

*What happened:* Criminal conviction for violating terms of supervised release summarily affirmed.

*Related case:* The appeal was consolidated with *United States v. Milla-Rodriguez* (5th Cir. 02–40111, filed 01/26/2002, judgment 02/20/2003), an appeal by the same defendant under a different name of a conviction for being in the United States after deportation.

The defendant acknowledged that the issue raised on appeal pertained only to the second case and was foreclosed by Fifth Circuit precedent, but was raised to preserve it for U.S. Supreme Court review. The court of appeals rejected the constitutional challenge to the sentencing provisions.

*Appellant's brief:* The defendant's 3,948-word brief cites 18 published opinions (11 by the U.S. Supreme Court, six by the Fifth Circuit, and one by another circuit).

*Opinion:* (2) The court's unpublished 276-word per curiam opinion, tabled at *United States v. Caballero-Rodriguez*, 61 Fed. Appx. 921, 2003 WL 1105864 (5th Cir. 2003), cites three published opin-

ions (two by the U.S. Supreme Court and one by the Fifth Circuit). According to Westlaw (02/10/2005), the court's opinion has not been cited elsewhere.

**Caldwell v. Cockrell (5th Cir. 02–40400, filed 03/15/2002, judgment 04/03/2002).**

*Appeal from:* Eastern District of Texas.

*What happened:* Pro se prisoner appeal dismissed for lack of prosecution.

*Opinion:* (1) The court's docket judgment cites no opinions.

**Evelt v. Graham (5th Cir. 02–40686, filed 05/07/2002, judgment 05/12/2003).**

*Appeal from:* Eastern District of Texas.

*What happened:* In a claim for false arrest, the court of appeals affirmed a denial of qualified immunity to the arresting officer, but reversed the denial of immunity to his supervisor.

*Appellant's brief:* The police officers' 4,860-word brief cites 29 published opinions (10 by the U.S. Supreme Court, 16 by the Fifth Circuit, one by another circuit, one by Texas's court of criminal appeals, and one by Texas's court of appeals).

*Appellee's brief:* The plaintiffs' 4,371-word brief cites 34 published opinions (14 by the U.S. Supreme Court, 19 by the Fifth Circuit, and one by another circuit).

*Appellant's reply brief:* The defendants' 2,033-word reply brief cites 15 published opinions (five by the U.S. Supreme Court, eight by the Fifth Circuit, one by Texas's court of criminal appeals, and one by Texas's court of appeals).

*Opinion:* (3) The court's published 4,081-word signed opinion, *Evelt v. DETNTFF*, 330 F.3d 681 (5th Cir. 2003) (12 headnotes), cites 12 published opinions (one by the U.S. Supreme Court and 11 by the Fifth Circuit). According to Westlaw (02/10/2005), the court's opinion has been cited in two unpublished Fifth Circuit opinions, one published opinion by another circuit, one published opinion by the Eastern District of Texas, three unpublished opinions by other Fifth Circuit districts, eight secondary sources, 10 appellate briefs in seven Fifth Circuit cases, and 18 trial court briefs in 15 cases (14 in Fifth Circuit districts and one in a district in another circuit).

**Gutierrez v. Ornelas (5th Cir. 02–40693, filed 05/08/2002, judgment 11/07/2002).**

*Appeal from:* Southern District of Texas.

*What happened:* Unsuccessful pro se prisoner appeal.

*Appellee's brief:* The defendant's 1,644-word brief cites 10 published opinions (four by the U.S.

Supreme Court, three by the Fifth Circuit, and three by other circuits).

*Opinion:* (2) The court's unpublished 378-word per curiam summary opinion, *Gutierrez v. Ornelas*, 54 Fed. Appx. 413, 2002 WL 31718270 (5th Cir. 2002) (no headnotes), cites 10 published opinions (nine by the Fifth Circuit and one by a district in another circuit). According to Westlaw (02/02/2005), the court's opinion has not been cited elsewhere.

**Moody v. Cockrell (5th Cir. 02–40758, filed 05/20/2002, judgment 09/17/2002).**

*Appeal from:* Eastern District of Texas.

*What happened:* Pro se prisoner appeal—certificate of appealability denied.

*Opinion:* (1) The court's docket judgment cites no opinions.

**United States v. Brooks (5th Cir. 02–40912, filed 06/21/2002, judgment 10/15/2002)**

*Appeal from:* Eastern District of Texas.

*What happened:* Criminal appeal dismissed for failure to order a transcript. One month before the dismissal, the appellant's appointed attorney was permitted to withdraw.

*Opinion:* (1) The court's docket judgment cites no opinions.

**Shoemaker v. UNOVA Inc. (5th Cir. 02–40958, filed 06/27/2002, judgment 05/28/2003).**

*Appeal from:* Eastern District of Texas.

*What happened:* Unsuccessful appeal of the defendant's summary judgment by former executives of a subsidiary of the defendant suing for unpaid bonuses. After briefly describing the nature of the case, the court of appeals affirmed "essentially for the reasons given by the district court." (Page 2.)

*Appellant's brief:* The plaintiffs' 7,108-word appellant brief cites 24 published opinions (one by the U.S. Supreme Court, three by the Fifth Circuit, three by other circuits, one by the district court and one by the bankruptcy court in a district in another circuit, seven by Texas's supreme court, four by Texas's courts of appeals, two by Alabama's supreme court, one by New Jersey's superior court, and one by Ohio's court of appeals).

*Appellee's brief:* The defendant's 7,340-word appellee brief cites 44 published opinions (one by the U.S. Supreme Court, eight by the Fifth Circuit, one by another circuit, one by a Fifth Circuit district, 15 by Texas's supreme court, 17 by Texas's courts of appeals, and one by Ohio's court of appeals).

*Appellant's reply brief:* The plaintiffs' 2,119-word reply brief cites eight published opinions



(two by the Fifth Circuit, one by another circuit, one by a district in another circuit, one by Texas's supreme court, two by Texas's courts of appeals, and one by Ohio's court of appeals).

*Opinion:* (2) The court's unpublished 214-word per curiam opinion, *Shoemaker v. UNOVA Inc.*, 69 Fed. Appx. 658, 2003 WL 21356029 (5th Cir. 2003) (no headnotes), cites no opinions. According to Westlaw (02/02/2005), the court's opinion has not been cited elsewhere.

***United States v. Alonzo* (5th Cir. 02–41049, filed 07/25/2002, judgment 02/26/2003).**

*Appeal from:* Southern District of Texas.

*What happened:* Unsuccessful pro se appeal of the denial of a sentence modification.

*Related case:* *United States v. Alonzo* (5th Cir. 01–40391, filed 04/13/2001, judgment 01/02/2002) (unsuccessful criminal appeal).

*Appellee's brief:* The government's 4,399-word appellee brief cites 15 published opinions (two by the U.S. Supreme Court and 13 by the Fifth Circuit).

*Opinion:* (2) The court's unpublished 336-word per curiam summary opinion, *United States v. Alonzo*, 62 Fed. Appx. 556, 2003 WL 1202782 (5th Cir. 2003) (no headnotes), cites two published Fifth Circuit opinions. According to Westlaw (02/02/2005), the court's opinion has not been cited elsewhere.

***Hamilton v. Cockrell* (5th Cir. 02–41050, filed 07/25/2002, judgment 01/27/2003).**

*Appeal from:* Eastern District of Texas.

*What happened:* Pro se prisoner appeal—certificate of appealability denied.

*Opinion:* (1) The court's docket judgment cites no opinions.

***Coburn Supply Co. v. Kohler Co.* (5th Cir. 02–41317, filed 09/18/2002, judgment 08/06/2003).**

*Appeal from:* Eastern District of Texas.

*What happened:* Successful civil appeal by the manufacturer of plumbing products in an action by a distributor for breach of a distribution contract.

*Appellant's brief:* The defendant's 12,681-word appellant brief cites 40 published opinions (18 by the Fifth Circuit, two by other circuits, two by districts in other circuits, seven by Texas's supreme court, nine by Texas's courts of appeals, one by Kentucky's court of appeals, and one by Massachusetts's appeals court), one unpublished opinion by a district in another circuit, and the *Restatement (Second) of Torts*.

The brief devotes 21 lines of text, encompassing two paragraphs, to an unpublished decision

by the District of Massachusetts concerning reasonable notice in terminating a contract to distribute dental equipment.

*Appellee's brief:* The plaintiff's 14,495-word appellee brief cites 37 published opinions (20 by the Fifth Circuit, four by other circuits, five by Texas's supreme court, one by Texas's commission of appeals, five by Texas's courts of appeals, one by Kentucky's court of appeals, and one by Massachusetts's appeals court).

*Appellant's reply brief:* The defendant's 6,534-word reply brief cites 19 published opinions (six by the Fifth Circuit, three by other circuits, two by districts in other circuits, three by Texas's supreme court, three by Texas's courts of appeals, one by Kentucky's court of appeals, and one by Massachusetts's appeals court) and one unpublished opinion by a Texas court of appeals.

The brief identifies an unpublished opinion by a Texas court of appeals as a "particularly demonstrative example from Texas case law" and cites its holding that "implied duration provisions apply only to 'exclusive franchise or distributorship agreements' in order to protect a 'vulnerable franchisee from loss.'" (Pages 13–14.)

*Opinion:* (3) The court's published 2,845-word signed opinion, *Coburn Supply Co. v. Kohler Co.*, 342 F.3d 372 (5th Cir. 2003) (eight headnotes), cites 17 published opinions (four by the Fifth Circuit, one by another circuit, two by districts in the Fifth Circuit, four by Texas's supreme court, five by Texas's courts of appeals, and one by Massachusetts's appeals court) and the *Restatement (Second) of Torts*. According to Westlaw (02/10/2005), the court's opinion has been cited in one unpublished Fifth Circuit opinion, nine secondary sources, seven appellate briefs in four cases (three in the Fifth Circuit and one in another circuit), and six trial court briefs in three cases (two in Fifth Circuit districts and one in a district in another circuit).

***Kadlec v. Tran* (5th Cir. 02–41453, filed 10/17/2002, judgment 11/25/2002).**

*Appeal from:* Southern District of Texas.

*What happened:* Pro se prisoner appeal dismissed for failure to pay the docketing fee.

*Opinion:* (1) The court's docket judgment cites no opinions.

***United States v. Gomez* (5th Cir. 02–50055, filed 01/18/2002, judgment 04/18/2002).**

*Appeal from:* Western District of Texas.

*What happened:* Pro se prisoner appeal—certificate of appealability denied.

*Opinion:* (1) The court's docket judgment cites no opinions.

**Judd v. United States District Court (5th Cir. 02–50503, filed 05/15/2002, judgment 06/25/2002).**

*Appeal from:* Western District of Texas.

*What happened:* Pro se prisoner appeal dismissed as violating sanctions imposed in *Judd v. University of New Mexico* (5th Cir. 98–51060, filed 11/03/1998, judgment 05/13/1999) (courts of the circuit directed to refuse pro se filings from this prisoner until he satisfies a \$105 sanction) and *Judd v. United States District Court* (5th Cir. 98–51118, filed 11/20/1998, judgment 11/09/2000) (same).

*Related cases:* Other related actions according to the docket sheet are *Judd v. United States District Court* (5th Cir. 98–51119, filed 11/20/1998, judgment 04/16/1999), *Judd v. United States District Court* (5th Cir. 98–51135, filed 11/30/1998, judgment 02/05/1999), *Judd v. United States District Court* (5th Cir. 98–5115, filed 12/03/1998, judgment 04/16/1999), *Judd v. United States District Court* (5th Cir. 98–51195, filed 12/17/1998, judgment 12/01/2000), *Judd v. United States District Court* (5th Cir. 98–51207, filed 12/21/1998, judgment 03/03/1999), *Judd v. United States District Court* (5th Cir. 99–50023, filed 01/12/1999, judgment 09/22/1999), *Judd v. United States District Court* (5th Cir. 99–50479, filed 05/14/1999, judgment 06/21/1999), *Judd v. United States District Court* (5th Cir. 99–50480, filed 05/14/1999, judgment 06/21/1999), *Judd v. United States District Court* (5th Cir. 99–50481, filed 05/14/1999, judgment 06/17/1999), *Judd v. United States District Court* (5th Cir. 00–50898, filed 09/20/2000, judgment 10/25/2000), *Judd v. United States District Court* (5th Cir. 00–51345, filed 12/29/2000, judgment 02/26/2001), *Judd v. United States District Court* (5th Cir. 01–50047, filed 01/12/2001, judgment 02/26/2001), *Judd v. United States District Court* (5th Cir. 01–50138, filed 02/07/2001, judgment 03/15/2001), *Judd v. United States District Court* (5th Cir. 01–50139, filed 02/07/2001, judgment 03/15/2001), *Judd v. United States District Court* (5th Cir. 01–50252, filed 03/21/2001, judgment 04/24/2001).

*Opinion:* (1) The court’s docket judgment cites no opinions.

**United States v. Andazola-Quezada (5th Cir. 02–50579, filed 06/10/2002, judgment 02/19/2003).**

*Appeal from:* Western District of Texas.

*What happened:* Unsuccessful pro se appeal that sought retroactive application of changes to the sentencing guidelines.

*Opinion:* (2) The court’s 220-word unpublished per curiam opinion, tabled at *United States v. Andazola-Quezada*, 61 Fed. Appx. 919, 2003 WL

1112349 (5th Cir. 2003), cites four published opinions (two by the U.S. Supreme Court and two by the Fifth Circuit). According to Westlaw (02/10/2005), the court’s opinion has not been cited elsewhere.

**United States v. Barnes (5th Cir. 02–50703, filed 07/12/2002, judgment 10/09/2002).**

*Appeal from:* Western District of Texas.

*What happened:* Pro se prisoner appeal dismissed for failure to pay the docketing fee.

*Related case:* *United States v. Barnes* (5th Cir. 02–50661, filed 06/28/2002, judgment 02/20/2003) (certificate of appealability denied).

*Opinion:* (1) The court’s docket judgment cites no opinions.

**United States v. Hernandez-Tenorio (5th Cir. 02–50995, filed 09/17/2002, judgment 09/23/2004).**

*Appeal from:* Western District of Texas.

*What happened:* Unsuccessful appeal of a conviction for importing \$35 million worth of marijuana and cocaine. The court ruled that a reasonable jury could disbelieve the defendants’ defense that they did not know the drugs were hidden in the bus they drove.

*Related case:* Briefs for this case bear the case number of the codefendant’s appeal, *United States v. Cervantes-Moscoso* (5th Cir. 02–50884, filed 08/20/2002, judgment 09/23/2004), which was filed first.

*Appellant’s brief:* The defendant’s 7,502-word brief cites 71 published opinions (one by the U.S. Supreme Court, 53 by the Fifth Circuit, and 17 by other circuits).

*Appellee’s brief:* The government’s 10,417-word brief cites 35 published opinions (32 by the Fifth Circuit and three by other circuits).

*Opinion:* (2) The court’s unpublished 603-word per curiam summary opinion, *United States v. Cervantes-Moscoso*, 108 Fed. Appx. 990, 2004 WL 2137354 (5th Cir. 2004) (one headnote), cites six published Fifth Circuit opinions. According to Westlaw (02/10/2005), the court’s opinion has not been cited elsewhere.

**United States v. Alarcon-Lechuga (5th Cir. 02–51046, filed 09/28/2002, judgment 04/23/2003).**

*Appeal from:* Western District of Texas.

*What happened:* Criminal conviction summarily affirmed on the government’s motion.

*Appellant’s brief:* The defendant’s 2,070-word brief cites 13 published opinions (seven by the U.S. Supreme Court and six by the Fifth Circuit).

*Opinion:* (2) The court’s unpublished 332-word per curiam opinion, tabled at *United States v. Alarcon-Lechuga*, 67 Fed. Appx. 244, 2003 WL 21142511

(5th Cir. 2003), cites three published opinions (two by the U.S. Supreme Court and one by the Fifth Circuit). According to Westlaw (02/10/2005), the court's opinion has not been cited elsewhere.

***In re Kearns* (5th Cir. 02–51258, filed 11/20/2002, judgment 01/10/2003).**

*Appeal from:* Western District of Texas.

*What happened:* Pro se petition for writ of mandamus dismissed for failure to file a motion for in forma pauperis status.

*Related cases:* *United States v. Kearns* (5th Cir. 02-51088, filed 10/09/2002, judgment 03/21/2003) (dismissed for failure to file a brief) and *United States v. Kearns* (5th Cir. 02-51128, filed 10/21/2002, judgment 03/21/2003) (same).

*Opinion:* (1) The court's docket judgment cites no opinions.

***De la Cruz-Jimenez v. Ashcroft* (5th Cir. 02–60059, filed 01/28/2002, judgment 05/10/2002).**

*Appeal from:* Board of Immigration Appeals.

*What happened:* Immigration appeal dismissed for lack of jurisdiction.

*Opinion:* (1) The court's docket judgment cites no opinions.

***Al Sharifee v. Ashcroft* (5th Cir. 02–60174, filed 03/15/2002, judgment 07/16/2002).**

*Appeal from:* Board of Immigration Appeals.

*What happened:* Immigration appeal dismissed for failure to file a brief.

*Opinion:* (1) The court's docket judgment cites no opinions.

***Callahan v. BancorpSouth Insurance Services of Mississippi, Inc.* (5th Cir. 02–60269, filed 04/16/2002, judgment 02/04/2003).**

*Appeal from:* Southern District of Mississippi.

*What happened:* Unsuccessful appeal of a judgment against an employment discrimination plaintiff. The court stated that "further writing beyond the careful and well-written opinion and order of the district court is not required."

*Appellant's brief:* The employee's 8,024-word appellant brief cites 27 published opinions (five by the U.S. Supreme Court, 11 by the Fifth Circuit, six by other circuits, and five by district courts outside the Fifth Circuit).

*Appellee's brief:* The employers' 7,107-word appellee brief cites 21 published opinions (three by the U.S. Supreme Court, 12 by the Fifth Circuit, three by other circuits, two by the Southern District of Mississippi, and one by another Fifth Circuit district).

*Appellant's reply brief:* The employee's 2,447-word reply brief cites 13 published opinions

(three by the U.S. Supreme Court, five by the Fifth Circuit, three by other circuits, and two by districts in other circuits).

*Opinion:* (2) The court's unpublished 135-word per curiam summary opinion, tabled at *Callahan v. BancorpSouth Insurance*, 61 Fed. Appx. 121, 2003 WL 342343 (5th Cir. 2003), cites no opinions. According to Westlaw (02/10/2005), the court's opinion has been cited in one unpublished opinion by a Fifth Circuit district.

***Estate of Burris v. Commissioner of Internal Revenue* (5th Cir. 02–60315, filed 04/29/2002, judgment 08/29/2002).**

*Appeal from:* United States Tax Court.

*What happened:* Commissioner's appeal of a tax court judgment in favor of an estate voluntarily dismissed.

*Opinion:* (1) The court's docket judgment cites no opinions.

***Wilson v. Fancher* (5th Cir. 02–60401, filed 05/22/2002, judgment 10/02/2002).**

*Appeal from:* Southern District of Mississippi.

*What happened:* Pro se prisoner appeal—certificate of appealability denied.

*Opinion:* (1) The court's docket judgment cites no opinions.

***Nelson v. City of Greenville* (5th Cir. 02–60487, filed 06/18/2002, judgment 10/25/2002).**

*Appeal from:* Northern District of Mississippi.

*What happened:* Appeal in an employment discrimination case dismissed for lack of jurisdiction, apparently on ripeness grounds.

*Opinion:* (1) The court's docket judgment cites no opinions.

***Lozano-De la Torre v. Ashcroft* (5th Cir. 02–60497, filed 06/21/2002, judgment 10/23/2002).**

*Appeal from:* Board of Immigration Appeals.

*What happened:* Pro se immigration appeal dismissed for lack of jurisdiction.

*Opinion:* (1) The court's docket judgment cites no opinions.

***Brewer v. Jackson* (5th Cir. 02–60651, filed 08/08/2002, judgment 09/12/2002).**

*Appeal from:* Southern District of Mississippi.

*What happened:* Prisoner appeal dismissed for failure to pay the filing fee.

*Opinion:* (1) The court's docket judgment cites no opinions.

***Pride Ford Lincoln Mercury v. Motors Insurance Corp.* (5th Cir. 02–60956, filed 11/15/2002, judgment 11/05/2003).**

*Appeal from:* Northern District of Mississippi.

*What happened:* Successful appeal in an insurance company coverage case of the district court's refusal to permit the jury to award punitive damages.

*Appellant's brief:* The plaintiff's 13,713-word appellate brief cites 37 published opinions (one by the U.S. Supreme Court, 18 by the Fifth Circuit, two by the Northern District of Mississippi, one by another Fifth Circuit district, 14 by Mississippi's supreme court, and one by South Carolina's supreme court) and one law review article.

*Appellee's brief:* The defendant's 3,775-word appellee brief cites 17 published opinions (five by the Fifth Circuit, one by the Northern District of Mississippi, one by another Fifth Circuit district, and 10 by Mississippi's supreme court).

*Appellant's reply brief:* The plaintiff's 6,666-word reply brief cites 27 published opinions (one by the U.S. Supreme Court, nine by the Fifth Circuit, two by the Northern District of Mississippi, one by another Fifth Circuit district, and 14 by Mississippi's supreme court).

*Opinion:* (2) The court's unpublished 1,194-word per curiam opinion, *Pride Ford Lincoln Mercury Inc. v. Motors Insurance Corp.*, 80 Fed. Appx. 329, 2003 WL 22508427 (5th Cir. 2003) (two headnotes), cites six published opinions (five by the Fifth Circuit and one by Mississippi's supreme court). According to Westlaw (02/10/2005), the court's opinion has not been cited elsewhere.

***Bolomope v. Ashcroft* (5th Cir. 02–61137, filed 12/26/2002, judgment 08/04/2003).**

*Appeal from:* Board of Immigration Appeals.

*What happened:* Immigration appeal voluntarily withdrawn.

*Petitioner's brief:* The petitioner's 1,038-word brief cites one U.S. Supreme Court opinion.

*Opinion:* (1) The court's docket judgment cites no opinions.

## 6. Sixth Circuit<sup>93</sup>

The Sixth Circuit disfavors citation to an unpublished opinion in an unrelated case, but

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93. Docket sheets are on PACER. Published opinions are on the court's website, its intranet site, and Westlaw. Unpublished opinions are on Westlaw and most of them are also on the court's intranet site. (Of the 19 unpublished opinions resolving cases in this sample, 16 are on the court's intranet site. One of them is also on the court's website.) Briefs are not available electronically.

permits it if the opinion has "precedential value" and there is no published opinion on point.<sup>94</sup>

Of the 50 cases randomly selected, 46 are appeals from district courts (12 from the Eastern District of Michigan; seven from the Northern District of Ohio; five from the Western District of Michigan; four each from the Eastern District of Kentucky, the Western District of Kentucky, the Eastern District of Tennessee, and the Western District of Tennessee; and three each from the Southern District of Ohio and the Middle District of Tennessee), two are appeals from the United States Tax Court, and two are appeals from the Board of Immigration Appeals.<sup>95</sup>

The publication rate in this sample is 12%. Six of the cases were resolved by published signed opinions (one with a dissent), 19 were resolved by unpublished opinions published in the *Federal Appendix* (including six signed opinions, three per curiam opinions, and 10 orders), and 25 were resolved by docket judgments.

Published opinions averaged 3,592 words in length, ranging from 1,602 to 5,095. Unpublished opinions averaged 1,467 words in length, ranging from 508 to 4,497. Ten opinions were under 1,000 words in length

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94. 6th Cir. L.R. 28(g) ("Citation of unpublished decisions in briefs and oral arguments in this Court and in the district courts within this Circuit is disfavored, except for the purpose of establishing res judicata, estoppel, or the law of the case. If a party believes, nevertheless, that an unpublished disposition has precedential value in relation to a material issue in a case, and that there is no published opinion that would serve as well, such decision may be cited if that party serves a copy thereof on all other parties in the case and on this Court.").

The court adopted a rule prohibiting citation to unpublished opinions effective April 11, 1973. The court amended its rules effective February 1, 1982, to permit citation to unpublished opinions if there is no published opinion on point.

95. In 2002, 4,612 cases were filed in the court of appeals for the Sixth Circuit.

(40%, all unpublished), and none of them was under 500 words in length.

Eighteen of the appeals were fully briefed. In 24 of the appeals no counseled brief was filed, and in eight of the appeals a counseled brief was filed only for one side.

There are citations to unpublished court opinions in 16 of the cases. In four cases the citations are only to opinions in related cases; in 12 cases there are citations to unpublished opinions in unrelated cases. In four cases the court cited unrelated unpublished opinions; in eight other cases only the parties cited unrelated unpublished opinions.

Of the unrelated unpublished opinions cited by the court in these cases, three are by the court of appeals for the Sixth Circuit and one is by a district court in another circuit. Of the unrelated unpublished opinions cited by the parties in these cases, 51 are by the court of appeals for the Sixth Circuit, four are by district courts in the Sixth Circuit, five are by district courts in other circuits, three are by the United States Tax Court, and three are by state courts.

C6-1. In an unsuccessful appeal of summary judgment by the district court for the Western District of Michigan in favor of a sheriff's department that denied non-emergency services to the plaintiff who complained about his neighbor, a senior officer on the force, *Klimik v. Kent County Sheriff's Department* (6th Cir. 02-1774, filed 06/21/2002, judgment 01/30/2004), resolved by unpublished opinion at 91 Fed. Appx. 396, 2004 WL 193168, the court quoted a specification from one of its other unpublished opinions as to how a "class of one" can be established.

In its appellee brief, the sheriff's department cited an unpublished opinion by the district court for the Western District of Michigan as an opinion relied on by the district court in this case, an opinion holding that a sheriff's department is not a legal entity subject to suit. The brief identifies five

opinions cited by the district judge in the unpublished opinion, including an unpublished Sixth Circuit opinion.

C6-2. In a successful appeal of summary judgment for the postal service in an employment discrimination case, *Smith v. United States Postal Service* (6th Cir. 02-6073, filed 09/06/2002, judgment 07/15/2004), resolved by published opinion at *Smith v. Henderson*, 376 F.3d 529 (6th Cir. 2004), the court cited one of its unpublished opinions and the Code of Federal Regulations to support a statement that there was a material issue of fact whether a letter was a request for reasonable accommodations. The citation acknowledges the unpublished opinion's citation to a published opinion by a court of appeals for another circuit.

C6-3. In an unsuccessful pro se plaintiff's employment discrimination appeal, *Moore v. Potter* (6th Cir. 02-5465, filed 04/17/2002, judgment 09/18/2002), resolved by unpublished opinion at 47 Fed. Appx. 318, 2002 WL 31096673, the court cited an unpublished Sixth Circuit order along with two U.S. Supreme Court opinions to support a statement that courts apply the state personal injury limitation period to Rehabilitation Act claims.

C6-4. In an unsuccessful pro se tax appeal, *Hauck v. Commissioner of Internal Revenue* (6th Cir. 02-2301, filed 11/05/2002, judgment 05/02/2003), resolved by unpublished order at 64 Fed. Appx. 492, 2003 WL 21005238, the court cited an unpublished opinion by the district court for the Western District of Texas to support a statement that a computerized reporting system established by the Internal Revenue Service has replaced Form 23C, which was used before 1984.

In its appellee brief, the government cited six unpublished opinions—three by district courts and three by the United States Tax Court. The brief cites unpublished opinions by the district courts for the District of Nevada, the Northern District of Oklahoma, and

the Eastern District of Virginia to rebut the taxpayer's argument that Form 23C is the only authorized assessment form. The brief cites three unpublished Tax Court memoranda to support the position that the government may rely on a non-certified transcript of account to verify a tax assessment.

C6-5. The State of Michigan cited 31 unpublished opinions in unrelated cases in its appellee brief in an unsuccessful pro se appeal by a prisoner of the district court for the Eastern District of Michigan's judgment awarding costs to the defendants, *Jones v. Kolb* (6th Cir. 02-2112, filed 09/13/2002, judgment 12/10/2003), resolved by unpublished order at 84 Fed. Appx. 560, 2003 WL 23095569.

The brief discusses four unpublished Sixth Circuit opinions to support a statement that "In a number of unpublished decisions, this Court has addressed what constitutes meritless claims, grievances, or lawsuits."

The brief cites another unpublished Sixth Circuit opinion as stating that "this Court for the second time announced *what should be an absolute rule*: 'a finding of guilt based upon some evidence of a violation of prison rules "essentially checkmates [a] retaliation claim.'" The brief notes that the unpublished opinion cites a published opinion by the Eighth Circuit and the brief cites another unpublished opinion by the Sixth Circuit as quoting the Eighth Circuit opinion. And the brief quotes seven lines of text from an unpublished Sixth Circuit opinion to support a statement that "This Court has also stated that there is no constitutional violation where an inmate is found guilty of a misconduct."

The brief cites five unpublished Sixth Circuit opinions to support a statement that "A number of unpublished decisions of this Court have found that a guilty finding on a major misconduct does not constitute adverse action." Two of these opinions are also cited elsewhere. The brief cites five unpublished

Sixth Circuit opinions to acknowledge "Other unpublished decisions of this Court have found to the contrary."

In a footnote, the brief cites eight unpublished Sixth Circuit opinions to support a statement that "a number of cases have held that a guilty finding on a major misconduct is sufficient proof under the burden shifting analysis that the prison official would have taken the same action in the absence of any retaliatory intent, i.e. that the state officials win on the causation element." In another footnote, the brief cites five unpublished Sixth Circuit opinions to support a statement that "Here, Jones was found to be guilty. Where an inmate is found to be not guilty, this Court has entered contradictory opinions on whether a retaliation claim is cognizable." Two of the opinions are cited as holding that a claim is not possible and three are cited as holding to the contrary. One of these five opinions is also cited elsewhere in the brief.

The brief cites an unpublished Sixth Circuit opinion to support a statement that "This Court has held that spitting in an inmate's food or serving them contaminated food, which Jones alleges Kolb did in retaliation, is adverse action."

The brief observes that the court of appeals for the Sixth Circuit said in a published opinion that it would reserve "to another day the question of whether 'exhausted claims' in a 'mixed complaint' should be addressed when such claims would otherwise meet the pleading requirements or whether such claims should be dismissed in their entirety." The brief cites an unpublished Sixth Circuit opinion to support its footnote observation that "This Court made this statement despite having apparently decided in an unpublished decision two months earlier that total exhaustion was not required." The brief then notes, "District Courts within Michigan have split on this issue." The brief identifies one published opinion by the district court for the Western District of Michigan holding that

total exhaustion is not required and two unpublished opinions by the district court for the Western District of Michigan holding that total exhaustion is required.

C6-6. The State of Ohio cited seven unpublished Sixth Circuit opinions in an unsuccessful appeal of its summary judgment in a case alleging retaliation against nursing homes for speaking out against state policies, *King v. Haas* (6th Cir. 02-4141, filed 10/10/2002, judgment 01/06/2004), resolved by unpublished opinion at 85 Fed. Appx. 480, 2004 WL 74649.

The brief cites an unpublished Sixth Circuit opinion and a published Second Circuit opinion to support a statement that "In order to state a claim for retaliation under the Due Process Clause and the First Amendment, a plaintiff must allege that he or she engaged in conduct that was constitutionally protected, and that retaliation against the protected conduct was a substantial or motivating factor in the defendant's actions." In a footnote, the brief also cites the unpublished Sixth Circuit opinion to support a statement that "This Court has consistently rendered summary judgment in a defendant's favor when the complained-of conduct would have occurred regardless of the protected activity." The brief also cites this opinion in the summary of argument as the support for one of 13 enumerated points, which begins, "The District Court properly rendered summary judgment in Defendants' favor on Plaintiffs' First Amendment and Due Process 'retaliation' claims."

The brief cites an unpublished Sixth Circuit opinion to support a statement that "This Court has held that a district court may impose monetary sanctions upon an attorney who fails to cooperate during discovery and/or engages in abusive litigation practices." The brief also cites this opinion in the summary of argument as the support for the last of 13 enumerated points: "The District Court properly sanctioned Plaintiffs' counsel

for engaging in discovery abuses that impeded Defendants' ability to prepare for trial."

The brief quotes an unpublished Sixth Circuit opinion as stating that "If any conceivable legitimate state interest is rationally furthered by the faulted state action, it [is] not 'arbitrary and capricious' or 'abusive.'" The brief cites another unpublished Sixth Circuit opinion to support a statement that "Plaintiffs have not proven that Defendants engaged in any conduct that is so oppressive or 'conscience shocking' that it would give rise to a substantive due process claim."

The brief cites an unpublished Sixth Circuit opinion to support a statement that "As for Plaintiffs' allegations of 'prejudice' or 'bias,' this Court has held that 'a judge's adverse rulings against a party do not render him biased.'"

To counter the appellants' argument that a particular item of evidence was not considered, the brief cites in a footnote an unpublished Sixth Circuit opinion to support a statement that "It should be presumed that the District Court considered all of the relevant evidence even if such evidence is not painstakingly listed in its decision."

The brief cites an unpublished Sixth Circuit opinion and a published Sixth circuit opinion to support a statement that "In order to hold a defendant liable for an alleged 'failure to train,' a plaintiff must show that: 1) the defendant is directly responsible for the training; 2) the training program is inadequate to the task that must be performed; 3) the inadequacy 'is the result of deliberate indifference'; and 4) 'the inadequacy is closely related to or actually caused' the alleged injury."

C6-7. Both sides cited unpublished opinions in a voluntarily dismissed appeal by a corporation of the refusal by the district court for the Middle District of Tennessee to order arbitration of a claim by a departing chief executive officer for severance benefits, *Reardon*

*v. Cambio Health Solutions, LLC* (6th Cir. 02–6274, filed 10/24/2002, judgment 10/28/2003).

The appellant’s brief cites an unpublished Sixth Circuit opinion to support a statement that “This Court has held that where a District Court has denied a party’s motion for stay pending arbitration, or to compel arbitration, it will accord no deference to the District Court’s Opinion, and instead conduct a *de novo* review.” The brief also asks the reader to “*see also*” an unpublished opinion by the district court for the Western District of Kentucky after citing a published opinion by the court of appeals for the Second Circuit to support a statement that “The Second Circuit has held that where, as here, an arbitration clause is broad, ‘there arises a presumption of arbitrability’ and arbitration of even a collateral matter will be ordered if the claim alleged ‘implicates issues of contract construction or the parties’ rights and obligations under it.’” The brief cites two unpublished opinions by Delaware’s court of chancery and a published opinion by Delaware’s supreme court to support a statement that “Delaware Courts have . . . recognized that contemporaneous documents in the same transaction be construed together.”

The appellee’s brief devotes three pages to an argument that “this case is readily distinguishable from this Court’s unpublished opinion” cited by the appellants. The brief cites another unpublished Sixth Circuit opinion to support a statement that “A party waives its right to arbitrate when it acts inconsistently with its rights to proceed with arbitration and thereby prejudices the other party.”

The appellant’s reply brief cites an unpublished Sixth Circuit opinion, which cites published decisions by Tennessee’s supreme court and Tennessee’s court of appeals, to support an assertion of “a cardinal rule of contract interpretation under Tennessee law requiring a court to give effect to parties’ in-

tent and not to enforce an absurd result.” The brief devotes a page-long paragraph to discussion of another unpublished Sixth Circuit opinion supporting the corporation’s argument that it has not waived its right to arbitration. The next paragraph of the brief discusses the unpublished opinion by the district court for the Western District of Kentucky that the appellant cited in its opening brief, asserting that “The court found that to establish that a party waived its right to arbitrate, it must be proven that the party knew of their right to arbitrate, yet took actions inconsistent with such right to the other party’s prejudice.”

C6–8. In a successful civil appeal involving interpretation of a commercial lease, *Tel-Towne Properties Group v. Toys “R” Us–Delaware, Inc.* (6th Cir. 02–1251, filed 03/01/2002, judgment 01/26/2005), resolved by unpublished opinion at 123 Fed. Appx. 656, 2005 WL 180985, both parties cited unpublished opinions.

To support a statement that “reluctance to grant summary judgment sua sponte applies equally to sua sponte entry of judgment on the pleadings,” the appellants cited an unpublished Sixth Circuit opinion and a published Sixth Circuit opinion that was “superseded by statute on other grounds.” The appellee cited these opinions to rebut the appellants’ reliance on them, stating that the two cases involved “pro se plaintiffs where the courts were understandably concerned about protecting the rights of the unrepresented.” The appellants cited the unpublished opinion in their reply brief to respond to the appellee’s rebuttal.

The appellants also cited a second unpublished Sixth Circuit opinion as an example of a case holding that it was improper for the district court to deny the plaintiff’s motion to amend the complaint. In their reply brief they also cited an unpublished opinion by Michigan’s court of appeals to support the statement that “reasonable ambiguity . . .



means that parol evidence is admissible to determine what the parties actually intended, despite the existence of an integration clause in the lease.”

The appellee also cited an unpublished Sixth Circuit opinion to support a statement that “The interpretation and construction of a written contract are matters of law and are reviewed *de novo*.”

C6–9. Both parties cited unpublished Sixth Circuit opinions in the plaintiffs’ appeal, dismissed by stipulation, of the district court’s refusal to order a docket sheet correction, *Kraft v. Worrall, Scott & Page* (6th Cir. 02–5554, filed 05/02/2002, judgment 03/26/2003).

The plaintiffs cited an unpublished Sixth Circuit opinion to support statements that “Given the inaccuracies of the other docket sheet entries, it is clear that the notations on the documents in the file more accurately reflect when events occurred in this matter. Under such circumstances, it is appropriate for the district court to direct the clerk to correct the docket sheet.”

The defendants cited two unpublished Sixth Circuit opinions to support an argument that “The district court docket complies with [the Federal Rules of Civil Procedure] as it indicates that the judgments were entered on September 27, 1991.” One opinion is cited as holding that “Rule 79 entry occurs when ‘the substance of the separate document is reflected in an appropriate notation on the docket sheet.’” The other opinion is cited as holding that “a judgment is entered ‘when the judgment is noted in the civil docket of the district court.’”

C6–10. In an appeal by the state in a case in which prisoners challenged interference with their religious practices, *Miller v. Wilkinson* (6th Cir. 02–3299, filed 03/15/2002, judgment 11/07/2003), the court held in a published opinion that the Religious Land Use and Institutionalized Persons Act is unconstitutional, *Cutter v. Wilkinson*, 349 F.3d

257 (6th Cir. 2003), but the Supreme Court reversed, 125 S. Ct. 2113, 2005 WL 1262549 (2005). Parties on both sides cited unpublished opinions in their briefs.

The state’s brief cites two unpublished opinions by district courts for the Northern District of California and the Northern District of Indiana in a footnote along with eight published opinions, including three by courts of appeals for other circuits, one by a Sixth Circuit district court, and four by district courts in other circuits, as examples of how the Religious Freedom Restoration Act had caused disruptive effects on the operation of other states’ prisons.

The prisoner’s brief cites an unpublished Sixth Circuit opinion in addition to published opinions by the courts of appeals for the Sixth, Ninth, and Tenth Circuits to support a statement that the “current law in the circuit courts of appeal . . . requires that prison officials accommodate religious exercise only when the exercise involves a tenet or belief that is central to the religion.”

C6–11. In an unsuccessful appeal of a directed verdict in favor of a police sergeant in an action for excessive force, *Frohmuth v. Bourk* (6th Cir. 02–6284, filed 10/28/2002, judgment 06/03/2004), resolved by unpublished opinion at *Frohmuth v. Metropolitan Government of Nashville and Davidson County*, 101 Fed. Appx. 56, 2004 WL 1238919, the sergeant cited two unpublished Sixth Circuit opinions. His brief devotes two paragraphs to a discussion of an unpublished Sixth Circuit opinion cited as a case in which “this Court held that the minimal amount of force utilized by officers making an arrest could not be deemed excessive as a matter of law.” The next paragraph discusses another unpublished Sixth Circuit opinion in which “This Court found that pushing the metal door open hard enough to allegedly injure plaintiff did not amount to excessive force as a matter of law.”

C6–12. In an unsuccessful appeal by a surviving wife against a surviving sister in a civil case involving proceeds of a life insurance policy, *Life Insurance Company of North America v. Leeson* (6th Cir. 02–3401, filed 04/15/2002, judgment 11/06/2003), resolved by unpublished opinion at 81 Fed. Appx. 521, 2003 WL 22682432, the wife cited an unpublished Sixth Circuit opinion to rebut the district court’s reliance on it, observing that the unpublished opinion “does not state the applicable policy language.”

### Individual Case Analyses

***United States v. Flores* (6th Cir. 02–1009, filed 01/03/2002, judgment 12/05/2003).**

*Appeal from:* Eastern District of Michigan.

*What happened:* Unsuccessful criminal appeal challenging the designation of alternate jurors at random just before deliberation. The court ruled that such selection violates the Federal Rules of Criminal Procedure, but does not merit reversal.

*Related case:* Consolidated with a codefendant’s appeal, *United States v. Delgado* (6th Cir. 01–2090, filed 08/17/2001, judgment 12/05/2003), which was resolved by the same opinion.

*Appellant’s brief:* The defendant’s 6,344-word appellant brief cites 14 published opinions (two by the U.S. Supreme Court, nine by the Sixth Circuit, and three by other circuits).

*Appellee’s brief:* The government’s 13,695-word appellee brief cites 38 published opinions (11 by the U.S. Supreme Court, 20 by the Sixth Circuit, and seven by other circuits) and one treatise.

*Opinion:* (3) The court’s published 3,338-word signed opinion, *United States v. Delgado*, 350 F.3d 520 (6th Cir. 2003) (18 headnotes), cites 22 published opinions (seven by the U.S. Supreme Court, eight by the Sixth Circuit, and seven by other circuits). According to Westlaw (05/09/2005), the court’s opinion has been cited in three Sixth Circuit opinions (one published and two unpublished), one unpublished opinion by another circuit, one unpublished opinion by California’s court of appeal, two unpublished opinions by Ohio’s court of appeals, and five secondary sources.

***Attorneys’ Liability Assurance Society v. Fitzgerald* (6th Cir. 02–1050, filed 01/09/2002, judgment 01/29/2002).**

*Appeal from:* Western District of Michigan.

*What happened:* Civil appeal voluntarily dismissed.

*Opinion:* (1) The court’s docket judgment cites no opinions.

***Mainville v. United States* (6th Cir. 02–1153, filed 02/07/2002, judgment 08/23/2002).**

*Appeal from:* Western District of Michigan.

*What happened:* Certificate of appealability denied.

*Related case:* *United States v. Mainville* (6th Cir. 95–2133, filed 10/19/1995, judgment 05/08/1997) (unsuccessful criminal appeal).

*Opinion:* (1) The court’s docket judgment cites no opinions.

***Parr v. Smith* (6th Cir. 02–1162, filed 02/08/2002, judgment 07/31/2002).**

*Appeal from:* Eastern District of Michigan.

*What happened:* Certificate of appealability denied.

*Opinion:* (1) The court’s docket judgment cites no opinions.

***Tel-Towne Properties Group v. Toys “R” Us–Delaware, Inc.* (6th Cir. 02–1251, filed 03/01/2002, judgment 01/26/2005).**

*Appeal from:* Eastern District of Michigan.

*What happened:* Successful civil appeal involving interpretation of a commercial lease.

*Appellant’s brief:* The plaintiff’s 13,103-word appellant brief cites 37 published opinions (one by the U.S. Supreme Court, 14 by the Sixth Circuit, three by other circuits, two by the Eastern District of Michigan, seven by Michigan’s supreme court, and 10 by Michigan’s court of appeals), two unpublished Sixth Circuit opinions, one treatise, and two dictionaries.

To support the statement that “reluctance to grant summary judgment sua sponte applies equally to sua sponte entry of judgment on the pleadings,” the brief cites a published Sixth Circuit opinion and an unpublished Sixth Circuit opinion. (Pages 24–25.) The brief notes that the published opinion was “superseded by statute on other grounds.”

The brief cites a second unpublished Sixth Circuit opinion as an example of a case holding that it was improper for the district court to deny the plaintiff’s motion to amend the complaint. (Page 47 and note 20.)

*Appellee’s brief:* The defendant’s 9,651-word appellee brief cites 40 published opinions (one by the U.S. Supreme Court, nine by the Sixth Circuit, four by other circuits, three by the Eastern District of Michigan, two by other districts in the Sixth Circuit, 13 by Michigan’s supreme court, six by

Michigan's court of appeals, one by Mississippi's supreme court, and one by Utah's court of appeals), two unpublished Sixth Circuit opinions, three treatises, and one legal article.

The brief cites one unpublished Sixth Circuit opinion and two published Sixth Circuit opinions to support the statement, "The interpretation and construction of a written contract are matters of law and are reviewed *de novo*." (Page 13.)

The appellee's brief also cites an unpublished opinion cited by the appellant's brief to rebut the appellant's reliance on the opinion. According to the appellee, "both [the unpublished opinion cited and a published Sixth Circuit opinion cited] involve pro se plaintiffs where the courts were understandably concerned about protecting the rights of the unrepresented." (Page 17.)

*Appellant's reply brief:* The plaintiff's 4,029-word reply brief cites 16 published opinions (one by the U.S. Supreme Court, four by the Sixth Circuit, three by another circuit, three by the Eastern District of Michigan, one by another Sixth Circuit district, two by Michigan's court of appeals, one by Mississippi's supreme court, and one by Utah's court of appeals) and two unpublished opinions (one by the Sixth Circuit and one by Michigan's court of appeals).

The reply brief cites the unpublished Sixth Circuit opinion cited in the opening brief as an example of the plaintiff's entitlement to amend its complaint. The reply brief includes this opinion in a string of two citations—with a published Sixth Circuit opinion—to support the statement that "this court has stated many times the principle that 'cases "should be tried on their merits rather than the technicalities of pleadings.'"" (Page 10.)

The brief also cites these two opinions to support the statement, "Recognizing that 'a busy district judge must seek to move his cases along with a heavy docket facing him,' this Court continues to *require* that a party opposing a motion to amend make 'at least some significant showing of prejudice' if the motion is to be denied. This court continues to find an abuse of discretion in not allowing an amendment where the lower court fails 'to consider the competing interests of the parties and the likelihood of prejudice to the opponent.'" (Page 11, citations omitted.)

The brief also cites a published and an unpublished opinion by Michigan's court of appeals to support the statement that "reasonable ambiguity . . . means that parol evidence is admissible to determine what the parties actually intended, despite the existence of an integration clause in the lease." (Page 8.)

*Opinion:* (2) The court's unpublished 3,649-word signed opinion, *Tel-Towne Properties Group v. Toys "R" Us-Delaware, Inc.*, 123 Fed. Appx. 656, 2005 WL 180985 (6th Cir. 2005) (two headnotes), cites 18 published opinions (10 by the Sixth Circuit, five by Michigan's supreme court, and three by Michigan's court of appeals) and two treatises. According to Westlaw (05/09/2005), the court's opinion has been cited in one unpublished opinion from the Eastern District of Michigan.

***Sewell v. Commissioner of Social Security* (6th Cir. 02-1314, filed 03/20/2002, judgment 12/11/2002).**

*Appeal from:* Eastern District of Michigan.

*What happened:* Unsuccessful appeal of the denial of social security disability benefits.

*Appellant's brief:* The plaintiff's 7,055-word appellant brief cites 11 published opinions (one by the U.S. Supreme Court and 10 by the Sixth Circuit).

*Appellee's brief:* The commissioner's 13,242-word appellee brief cites 26 published opinions (four by the U.S. Supreme Court and 22 by the Sixth Circuit).

*Appellant's reply brief:* The plaintiff's 1,075-word reply brief cites no opinions.

*Opinion:* (2) The court's unpublished 694-word order, *Sewell v. Commissioner of Social Security*, 52 Fed. Appx. 771, 2002 WL 31780952 (6th Cir. 2002) (one headnote), cites five published Sixth Circuit opinions. According to Westlaw (05/09/2005), the court's order has been cited in two secondary sources.

***Merino-Mora v. Jennifer* (6th Cir. 02-1375, filed 03/29/2002, judgment 04/25/2005).**

*Appeal from:* Eastern District of Michigan.

*What happened:* The government's appeal of a habeas corpus decision in favor of a detained immigrant voluntarily dismissed in light of the U.S. Supreme Court's resolution of *Clark v. Martinez*, 125 S. Ct. 716 (2005).

*Related case:* *Rosales-Garcia v. Holland* (6th Cir. 99-5683, filed 05/20/1999, judgment 03/05/2003) (reversing the denial of habeas corpus relief to a detained Cuban immigrant whom Cuba will not accept in removal).

*Opinion:* (1) The court's docket judgment cites no opinions.

***Williams v. Price* (6th Cir. 02-1510, filed 04/25/2002, judgment 09/19/2002).**

*Appeal from:* Eastern District of Michigan.

*What happened:* Certificate of appealability denied.

*Opinion:* (1) The court's docket judgment cites no opinions.

***Brown v. Commissioner of Internal Revenue* (6th Cir. 02–1630, filed 05/21/2002, judgment 12/19/2002).**

*Appeal from:* United States Tax Court.

*What happened:* Unsuccessful pro se tax appeal transferred from the District of Columbia Circuit, *Brown v. Commissioner of the Internal Revenue Service* (D.C. Cir. 02–1012, filed 01/07/2002, transferred 05/13/2002).

*Appellee's brief:* The commissioner's 3,794-word appellee brief cites 12 published opinions (one by the U.S. Supreme Court; five by other circuits, including two in related appeals; one by a district in another circuit in a related case; one by the United States Claims Court in a related case; and four by the United States Tax Court, including one in a related case) and one unpublished order by the Sixth Circuit in a related appeal.

The unpublished Sixth Circuit order is an affirmation, cited to complete the citation of a published tax court opinion.

*Opinion:* (2) The court's unpublished 709-word order, *Brown v. Commissioner of Internal Revenue*, 53 Fed. Appx. 356, 2002 WL 31863695 (6th Cir. 2002) (no headnotes), cites five published opinions (one by the U.S. Supreme Court; one by the Sixth Circuit; two by other circuits, including one in a related appeal; and the published opinion in this case by the United States Tax Court). According to Westlaw (05/09/2005), the court's order has not been cited elsewhere.

***Burton v. Smith* (6th Cir. 02–1654, filed 05/24/2002, judgment 09/16/2002).**

*Appeal from:* Eastern District of Michigan.

*What happened:* Prisoner's pro se habeas corpus appeal dismissed, because the order appealed is not appealable.

*Related case:* A concurrent appeal resulted in a denial of a certificate of appealability, *Burton v. Smith* (6th Cir. 02–1499, filed 04/24/2002, judgment 09/26/2002).

*Opinion:* (1) The court's docket judgment cites no opinions.

***In re Truss* (6th Cir. 02–1684, filed 05/31/2002, judgment 07/09/2002).**

*Appeal from:* Eastern District of Michigan.

*What happened:* Original pro se proceeding dismissed for lack of prosecution.

*Related cases:* *United States v. Truss* (6th Cir. 96–1974, filed 08/08/1996, judgment 05/21/1998) (criminal sentence vacated and case remanded for resentencing), *Truss v. United States* (6th Cir. 00–

2000, filed 09/01/2000, judgment 03/28/2001) (certificate of appealability denied), and *In re Truss* (6th Cir. 01–1919, filed 07/03/2001, judgment 12/12/2001) (pro se motion to file a second motion to vacate a sentence denied).

*Opinion:* (1) The court's docket judgment cites no opinions.

***Klimik v. Kent County Sheriff's Department* (6th Cir. 02–1774, filed 06/21/2002, judgment 01/30/2004).**

*Appeal from:* Western District of Michigan.

*What happened:* Unsuccessful appeal of summary judgment for a sheriff's department that denied non-emergency services to the plaintiff who complained about his neighbor, a senior officer on the force.

*Appellant's brief:* The plaintiff's 3,360-word appellant brief cites 16 published opinions (six by the U.S. Supreme Court, three by the Sixth Circuit, one by another circuit, two by the Western District of Michigan, three by districts in other circuits, and one by Oklahoma's supreme court).

*Appellee's brief:* The sheriff's department's 4,283-word appellee brief cites 18 published opinions (eight by the U.S. Supreme Court, five by the Sixth Circuit, two by other circuits, two by the Western District of Michigan, and one by another Sixth Circuit district) and two unpublished opinions (one by the Sixth Circuit and one by the Western District of Michigan).

The brief cites an unpublished opinion by the Western District of Michigan as an opinion relied on by the district court in this case, an opinion holding that a sheriff's department is not a legal entity subject to suit. (Pages 13–15.) The brief identifies five opinions cited by the district judge in the unpublished opinion—a published opinion by the Sixth Circuit, two published opinions by the Western District of Michigan, one published opinion by the Eastern District of Michigan, and one unpublished opinion by the Sixth Circuit.

*Appellant's reply brief:* The plaintiff's 768-word reply brief cites no opinions.

*Opinion:* (2) The court's unpublished 4,497-word signed opinion, *Klimik v. Kent County Sheriff's Department*, 91 Fed. Appx. 396, 2004 WL 193168 (6th Cir. 2004) (two headnotes), cites 28 published opinions (10 by the U.S. Supreme Court, 13 by the Sixth Circuit, and five by other circuits) and an unpublished Sixth Circuit opinion.

The opinion quotes an unpublished opinion by the court to support the statement that under the Supreme Court's holding in *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000), "a 'class of one' plain-

tiff may demonstrate that a government action lacks a rational basis [by] 'negativ[ing] every conceivable basis which might support' the government action." (Page 7, 91 Fed. Appx. at 400.) The unpublished Sixth Circuit opinion is cited as quoting another Supreme Court opinion.

According to Westlaw (05/09/2005), the court's opinion has not been cited elsewhere.

***Jones v. Kolb* (6th Cir. 02–2112, filed 09/13/2002, judgment 12/10/2003).**

*Appeal from:* Eastern District of Michigan.

*What happened:* Unsuccessful pro se appeal by a prisoner of the district court's judgment awarding costs to the defendants.

*Related cases:* Previous and concurrent pro se appeals by the prisoner include *Jones v. Kolb* (6th Cir. 02–1822, filed 06/27/2002, judgment 10/04/2002) (prisoner appeal voluntarily dismissed), *Jones v. Kolb* (6th Cir. 02–1943, filed 08/06/2002, judgment 12/09/2003) (unsuccessful prisoner appeal), *Jones v. Kolb* (6th Cir. 02–1997, filed 08/15/2002, judgment 12/09/2003) (prisoner appeal dismissed for lack of jurisdiction), *Jones v. Kolb* (6th Cir. 02–2179, filed 09/30/2002, judgment 12/10/2003) (unsuccessful prisoner appeal), *Jones v. Kolb* (6th Cir. 02–2407, filed 12/10/2002, judgment 09/17/2003) (prisoner appeal dismissed for failure to pay the filing fee), *Jones v. Kolb* (6th Cir. 03–1673, filed 06/03/2003, judgment 12/18/2003) (unsuccessful appeal of a bar on further district court filings), *Jones v. Kolb* (6th Cir. 03–1767, filed 06/25/2003, judgment 12/12/2003) (prisoner appeal dismissed).

*Appellee's brief:* The state's 14,180-word appellee brief cites 54 published opinions (14 by the U.S. Supreme Court, 24 by the Sixth Circuit, six by other circuits, one by a Sixth Circuit district, one by a district in another circuit, four by Michigan's supreme court, and four by Michigan's court of appeals), 34 unpublished opinions (32 by the Sixth Circuit, including three in related appeals, and two by a Sixth Circuit district), five related Sixth Circuit appeals, and *Black's Law Dictionary*.

The brief cites the three related unpublished Sixth Circuit opinions as prior actions constituting strikes under the Prison Litigation Reform Act. (Page 10.)

The prisoner claimed that prison officials interfered with his grievances. The state's brief argues that a prisoner has a First Amendment right only to file meritorious grievances. The brief discusses four unpublished Sixth Circuit opinions to support the statement: "In a number of unpublished decisions, this Court has addressed what consti-

tutes meritless claims, grievances, or lawsuits." (Page 21.)

The brief begins an 8-page discussion of whether the "issuance of a major misconduct ticket should . . . be the basis of a First Amendment retaliation claim" with the statement that in an unpublished Sixth Circuit opinion "this Court for the second time announced *what should be an absolute rule*: 'a finding of guilt based upon some evidence of a violation of prison rules "essentially checkmates [a] retaliation claim.'" (Page 44.) The brief notes that the unpublished opinion cites a published opinion by the Eighth Circuit and the brief cites another unpublished opinion by the Sixth Circuit as quoting the Eighth Circuit opinion.

The brief also quotes seven lines of text from an unpublished Sixth Circuit opinion to support the statement, "This Court has also stated that there is no constitutional violation where an inmate is found guilty of a misconduct." (Pages 44–45.)

The brief cites five unpublished Sixth Circuit opinions to support the statement, "A number of unpublished decisions of this Court have found that a guilty finding on a major misconduct does not constitute adverse action." (Page 49.) Two of these opinions are also cited elsewhere. The brief cites five unpublished Sixth Circuit opinions to acknowledge "Other unpublished decisions of this Court have found to the contrary." (Page 50.)

In a footnote, the brief cites eight unpublished Sixth Circuit opinions to support the statement that "a number of cases have held that a guilty finding on a major misconduct is sufficient proof under the burden shifting analysis that the prison official would have taken the same action in the absence of any retaliatory intent, i.e. that the state officials win on the causation element." (Page 50, note 15.) In another footnote, the brief cites five unpublished Sixth Circuit opinions to support the statement, "Here, Jones was found to be guilty. Where an inmate is found to be not guilty, this Court has entered contradictory opinions on whether a retaliation claim is cognizable." (Page 51, note 16.) Two of the opinions are cited as holding that a claim is not possible and three are cited as holding to the contrary. One of these five opinions is also cited elsewhere in the brief.

The brief cites an unpublished Sixth Circuit opinion to support the statement, "This Court has held that spitting in an inmate's food or serving them contaminated food, which Jones alleges Kolb did in retaliation, is adverse action." (Page 44.)

The brief observes that the Sixth Circuit said in a published opinion that it would reserve “to another day the question of whether ‘exhausted claims’ in a ‘mixed complaint’ should be addressed when such claims would otherwise meet the pleading requirements or whether such claims should be dismissed in their entirety.” (Page 15.) The brief cites an unpublished Sixth Circuit opinion to support its footnote observation that “This Court made this statement despite having apparently decided in an unpublished decision two months earlier that total exhaustion was not required.” (Page 15, note 8.) The brief then notes, “District Courts within Michigan have split on this issue.” (Page 17.) The brief identifies one published opinion by the Western District of Michigan holding that total exhaustion is not required and two unpublished opinions by the Western District of Michigan holding that total exhaustion is required.

*Opinion:* (2) The court’s unpublished 508-word order, *Jones v. Kolb*, 84 Fed. Appx. 560, 2003 WL 23095569 (6th Cir. 2003) (one headnote), cites two published Sixth Circuit opinions. According to Westlaw (05/09/2005), the court’s order has not been cited elsewhere.

***Jorgensen v. Cason* (6th Cir. 02–2155, filed 09/25/2002, judgment 02/19/2004).**

*Appeal from:* Eastern District of Michigan.

*What happened:* Unsuccessful appeal of the denial of habeas corpus relief. In a trial for sexually assaulting a 13-year-old stepson, defense counsel mentioned during opening argument that the boy’s biological father was in prison for rape. The court of appeals determined that the district court’s declaration of a mistrial was a manifest necessity, so the second trial was not double jeopardy.

*Appellant’s brief:* The petitioner’s 5,107-word appellant brief cites 39 published opinions (six by the U.S. Supreme Court, eight by the Sixth Circuit, two by other circuits, one by a circuit court in another circuit’s district, six by Michigan’s supreme court, and 16 by Michigan’s court of appeals).

*Appellee’s brief:* The state’s 2,518-word appellee brief cites 12 published opinions (seven by the U.S. Supreme Court, four by the Sixth Circuit and one by Michigan’s supreme court) and three unpublished orders in the petitioner’s state court case (one by the trial court, one by the court of appeals, and one by the supreme court).

*Opinion:* (2) The court’s unpublished 2,528-word signed opinion, *Jorgenson v. Cason*, 89 Fed. Appx. 972, 2004 WL 326233 (6th Cir. 2004) (one headnote), cites 13 published opinions (seven by

the U.S. Supreme Court, five by the Sixth Circuit, and one by another circuit). According to Westlaw (05/09/2005), this case has not been cited elsewhere.

***Otworth v. Vanderploeg* (6th Cir. 02–2201, filed 10/04/2002, judgment 03/19/2003).**

*Appeal from:* Western District of Michigan.

*What happened:* Unsuccessful pro se appeal. Of the two defendants, only one filed an appellee brief.

*Related case:* The selected appeal was consolidated with *Otworth v. Vanderploeg* (6th Cir. 02–2035, filed 08/23/2002, judgment 03/19/2003) (unsuccessful pro se appeal).

*Appellee’s brief:* The defendant’s 730-word appellee brief, originally filed in the consolidated appeal and then refiled in the selected case, cites two published opinions (one by the U.S. Supreme Court and one by the Sixth Circuit) and a treatise.

*Opinion:* (2) The court’s unpublished 935-word order, *Otworth v. Vanderploeg*, 61 Fed. Appx. 163, 2003 WL 1465399 (6th Cir. 2003) (four headnotes), cites six published opinions (three by the U.S. Supreme Court and three by the Sixth Circuit). According to Westlaw (05/09/2005), the court’s order has been cited in one appellate brief in a case in another circuit.

***Crowley v. Renico* (6th Cir. 02–2224, filed 10/11/2002, judgment 11/10/2003).**

*Appeal from:* Eastern District of Michigan.

*What happened:* Unsuccessful pro se prisoner habeas corpus appeal.

*Related case:* The selected case was consolidated with *Crowley v. Renico* (6th Cir. 02–2290, filed 11/04/2002, judgment 11/10/2003) (unsuccessful pro se prisoner habeas corpus appeal).

*Appellee’s brief:* The state’s 1,675-word appellee brief cites 10 published opinions (five by the U.S. Supreme Court, three by the Sixth Circuit, one by the Eastern District of Michigan, and one by Michigan’s supreme court).

*Opinion:* (2) The court’s unpublished 524-word order, *Crowley v. Renico*, 81 Fed. Appx. 36, 2003 WL 22701297 (6th Cir. 2003), cites five published opinions (three by the Sixth Circuit, one by another circuit, and one by the Eastern District of Michigan). According to Westlaw (05/09/2005), the court’s order has not been cited elsewhere.

***Hauck v. Commissioner of Internal Revenue* (6th Cir. 02–2301, filed 11/05/2002, judgment 05/02/2003).**

*Appeal from:* United States Tax Court.

*What happened:* Unsuccessful pro se tax appeal.

*Appellee's brief:* The commissioner's 8,216-word appellee brief cites 22 published opinions (two by the U.S. Supreme Court, three by the Sixth Circuit, 10 by other circuits, and seven by the United States Tax Court) and six unpublished opinions (three by districts in other circuits and three by the United States Tax Court).

The brief cites unpublished opinions by the district courts for the District of Nevada, the Northern District of Oklahoma, and the Eastern District of Virginia to rebut the taxpayer's argument that Form 23C is the only authorized assessment form. (Page 20.)

The brief cites three unpublished Tax Court memoranda to support the commissioner's position that the IRS may rely on a non-certified transcript of account to verify a tax assessment. (Page 22.)

*Opinion:* (2) The court's unpublished 825-word order, *Hauk v. Commissioner of Internal Revenue*, 64 Fed. Appx. 492, 2003 WL 21005238 (6th Cir. 2003) (one headnote), cites three published opinions (two by the Sixth Circuit and one by another circuit) and one unpublished opinion by a district court in another circuit.

The opinion cites an unpublished opinion by the Western District of Texas to support a statement that "the computerized 'RACS Report' has simply replaced the IRS Form 23C for assessments after 1984." (Page 3, 64 Fed. Appx. at 493.)

According to Westlaw (05/09/2005), the court's order has been cited in three unpublished tax court opinions and four secondary sources.

***Borom v. Detroit Board of Education* (6th Cir. 02–2323, filed 11/08/2002, judgment 03/05/2003).**

*Appeal from:* Eastern District of Michigan.

*What happened:* Stipulated dismissal of plaintiffs' appeal of a civil rights judgment.

*Opinion:* (1) The court's docket judgment cites no opinions.

***Parr v. Berghuis* (6th Cir. 02–2412, filed 12/10/2002, judgment 04/01/2003).**

*Appeal from:* Western District of Michigan.

*What happened:* Pro se prisoner appeal dismissed as late.

*Related case:* *Parr v. Berghuis* (6th Cir. 02–2413, filed 12/10/2002, judgment 07/14/2003) (certificate of appealability denied).

*Opinion:* (1) The court's docket judgment cites no opinions.

***Hamid v. Immigration and Naturalization Service* (6th Cir. 02–3166, filed 02/08/2002, judgment 07/15/2003).**

*Appeal from:* Board of Immigration Appeals.

*What happened:* Unsuccessful immigration appeal.

*Petitioner's brief:* The petitioner's 4,299-word brief cites 10 published court opinions (one by the Sixth Circuit, eight by other circuits, and one by a district in another circuit) and two published decisions of the Board of Immigration Appeals.

*Respondent's brief:* The government's 4,642-word respondent brief cites nine published court opinions (three by the U.S. Supreme Court, five by the Sixth Circuit, and one by another circuit) and three published decisions of the Board of Immigration Appeals.

*Petitioner's reply brief:* The petitioner's 1,282-word reply brief cites one published decision of the Board of Immigration Appeals.

*Opinion:* (3) The court's published 1,602-word signed opinion, *Hamid v. Ashcroft*, 336 F.3d 465 (6th Cir. 2003) (eight headnotes), cites three published court opinions (one by the Sixth Circuit and two by other circuits) and one published decision of the Board of Immigration Appeals. According to Westlaw (05/09/2005), the court's opinion has been cited in two Sixth Circuit opinions (one published and one unpublished), two published opinions by other circuits, three unpublished administrative decisions, two secondary sources, one petition for a writ of certiorari in the U.S. Supreme Court, one appellate brief in a case in another circuit, and three trial briefs in two cases (one trial brief in a case in a Sixth Circuit district and two trial briefs in a case in another circuit's district).

***Pratt v. United States* (6th Cir. 02–3251, filed 03/04/2002, judgment 09/18/2002).**

*Appeal from:* Northern District of Ohio.

*What happened:* Certificate of appealability denied.

*Opinion:* (1) The court's docket judgment cites no opinions.

***In re Bowker* (6th Cir. 02–3274, filed 03/01/2002, judgment 06/21/2002).**

*Appeal from:* Northern District of Ohio.

*What happened:* Petition for a writ of mandamus dismissed.

*Opinion:* (1) The court's docket judgment cites no opinions.

***Miller v. Wilkinson* (6th Cir. 02–3299, filed 03/15/2002, judgment 11/07/2003).**

*Appeal from:* Southern District of Ohio.

*What happened:* Appeal by the state in a case where prisoners challenged interference with their religious practices. The court held the Religious Land Use and Institutionalized Persons Act to be unconstitutional, but the U.S. Supreme

Court reversed, *Cutter v. Wilkinson*, 125 S. Ct. 2113 (2005).

*Related cases:* The district court case was consolidated with two similar actions, the appeals from which were consolidated with the selected case, *Cutter v. Wilkinson* (6th Cir. 02–3270, filed 03/08/2002, judgment 11/07/2003) (two prisoners) and *Gerhardt v. Lazaroff* (6th Cir. 02–3301, filed 03/15/2002, judgment 11/07/2003) (one prisoner).

*Appellant’s brief:* The state’s 13,989-word appellant brief cites 85 published opinions (42 by the U.S. Supreme Court, six by the Sixth Circuit, 17 by other circuits, one by the Southern District of Ohio, three by other Sixth Circuit districts, 14 by districts in other circuits, one by California’s supreme court, and one by Washington’s supreme court) and three unpublished opinions (one by the Sixth Circuit concerning a previous conviction of one of the prisoners and two by districts in other circuits).

The brief cites two unpublished opinions by district courts in other circuits (the Northern District of California and the Northern District of Indiana) in a footnote along with eight published opinions (three by other circuits, one by a Sixth Circuit district, and four by districts in other circuits) as examples of how the Religious Freedom Restoration Act had caused disruptive effects on the operation of other states’ prisons.

*Appellee’s brief:* The prisoners’ 14,466-word appellee brief cites 65 published opinions (43 by the U.S. Supreme Court, seven by the Sixth Circuit, 11 by other circuits, one by a district in another circuit, one by Ohio’s supreme court, one by California’s supreme court, and one by Washington’s supreme court), one unpublished Sixth Circuit opinion, one treatise, one journal article, one legal newspaper article, two encyclopedias of religion, and seven religious texts.

The brief cites an unpublished Sixth Circuit opinion in addition to published opinions by the Sixth, Ninth, and Tenth Circuits to support the statement that the “current law in the circuit courts of appeal . . . requires that prison officials accommodate religious exercise only when the exercise involves a tenet or belief that is central to the religion.” (Page 27.)

*Appellee’s brief:* The government’s 11,614-word appellee brief as intervenor, cites 83 published opinions (47 by the U.S. Supreme Court, seven by the Sixth Circuit, 20 by other circuits, four by districts in other circuits, one by Massachusetts’s supreme judicial court, one by Minnesota’s supreme court, two by Washington’s supreme court, and

one by Wisconsin’s supreme court) and four law review articles.

*Amicus brief:* The American Jewish Congress and other organizations advocating religious liberty filed a 5,450-word amicus curiae brief, citing 47 published opinions (25 by the U.S. Supreme Court, seven by the Sixth Circuit, 13 by other circuits, one by a district in another circuit, and one by Washington’s supreme court) and one government report.

*Appellant’s reply brief:* The state’s 7,120-word reply brief cites 62 published opinions (40 by the U.S. Supreme Court, 14 by the Sixth Circuit, six by other circuits, and two by districts in other circuits).

*Opinion:* (3) The court’s published 4,961-word signed opinion, *Cutter v. Wilkinson*, 349 F.3d 257 (6th Cir. 2003) (10 headnotes), cites 31 published opinions (14 by the U.S. Supreme Court, one by the Sixth Circuit, 11 by other circuits, one by a Sixth Circuit district, and four by districts in other circuits) and one law review article. According to Westlaw (05/09/2005), the court’s opinion has been cited in two unpublished Sixth Circuit opinions, eight published opinions by other circuits, one published opinion by a Sixth Circuit district, 11 opinions by districts in other circuits (three published and eight unpublished), 21 secondary sources, 17 briefs in the U.S. Supreme Court in four cases (including U.S. Supreme Court review of this case), 14 appellate briefs in eight cases (12 briefs in six cases in other circuits and two briefs in two cases in California’s supreme court), and eight trial court briefs in six cases (two briefs in two cases in a Sixth Circuit district and six briefs in four cases in districts in other circuits).

***Life Insurance Company of North America v. Leeson* (6th Cir. 02–3401, filed 04/15/2002, judgment 11/06/2003).**

*Appeal from:* Southern District of Ohio.

*What happened:* Unsuccessful appeal by a surviving wife against a surviving sister in a civil case involving proceeds of a life insurance policy.

*Appellant’s brief:* The wife’s 3,782-word appellant brief cites 20 published opinions (four by the U.S. Supreme Court, 12 by the Sixth Circuit, one by another circuit, one by a district in another circuit, one by Delaware’s supreme court, and one by Michigan’s court of appeals) and one unpublished Sixth Circuit opinion.

The brief rebuts the district court’s reliance on an unpublished Sixth Circuit opinion by observing that the unpublished opinion “does not state the applicable policy language.” (Page 11, note 1.)



*Appellee's brief:* The sister's 2,904-word appellee brief cites two published opinions (one by the Sixth Circuit and one by another circuit).

*Appellant's reply brief:* The wife's 1,938-word reply brief cites seven published opinions (two by the Sixth Circuit, three by other circuits, one by a district in another circuit, and one by Delaware's supreme court).

*Opinion:* (2) The court's unpublished 1,147-word per curiam opinion, *Life Insurance Company of North America v. Leeson*, 81 Fed. Appx. 521, 2003 WL 22682432 (6th Cir. 2003) (one headnote), cites one published Sixth Circuit opinion. According to Westlaw (05/09/2005), the court's opinion has been cited in one secondary source.

***United States v. Meyer* (6th Cir. 02–3582, filed 05/23/2002, judgment 02/23/2004).**

*Appeal from:* Northern District of Ohio.

*What happened:* Unsuccessful criminal appeal.

*Appellant's brief:* The defendant's 4,383-word appellant brief cites eight published opinions (two by the U.S. Supreme Court and six by the Sixth Circuit) and the case in the Northern District of Ohio appealed.

*Appellee's brief:* The government's 3,322-word appellee brief cites 13 published opinions (three by the U.S. Supreme Court, nine by the Sixth Circuit, and one by another circuit).

*Opinion:* (3) The court's published 4,433-word signed opinion and dissent, *United States v. Meyer*, 359 F.3d 820 (6th Cir. 2004) (12 headnotes), cites 15 published opinions (three by the U.S. Supreme Court and 12 by the Sixth Circuit). According to Westlaw (05/09/2005), the court's opinion has been cited in two unpublished Sixth Circuit opinions, one unpublished opinion by a district in another circuit, five secondary sources, and one appellate brief in one case in another circuit.

***In re ATD Corp.* (6th Cir. 02–3785, filed 07/12/2002, judgment 12/17/2003).**

*Appeal from:* Northern District of Ohio.

*What happened:* Unsuccessful appeal by a bankruptcy debtor. The court of appeals held that it was proper for the bankruptcy court to exempt unsecured creditors from a bar date order, because the bankruptcy rules specified that creditors such as appellees did not have to file specific claims.

*Appellant's brief:* The debtor's 9,541-word appellant brief cites 18 published opinions (four by the U.S. Supreme Court, five by the Sixth Circuit, one by the Sixth Circuit's bankruptcy appellate panel, three by other circuits, one by a district in another circuit, and four by bankruptcy courts in

other circuits), one treatise, and *Black's Law Dictionary*.

*Appellee's brief:* The creditors' 7,235-word appellee brief cites 23 published opinions (five by the U.S. Supreme Court, four by the Sixth Circuit, six by other circuits, one by a district in another circuit, and seven by bankruptcy courts in other circuits).

*Appellant's reply brief:* The debtor's 3,372-word reply brief cites 12 published opinions (five by the U.S. Supreme Court, three by the Sixth Circuit, one by another circuit, one by a district in another circuit, and two by bankruptcy courts in another circuit), two treatises, and *Black's Law Dictionary*.

*Opinion:* (3) The court's published 2,122-word signed opinion, *In re ATD Corp.*, 352 F.3d 1062 (6th Cir. 2003) (five headnotes), cites nine published opinions (two by the U.S. Supreme Court, three by the Sixth Circuit, one by another circuit, one by the Northern District of Ohio's bankruptcy court, and two by bankruptcy courts in other circuits). According to Westlaw (05/02/2005), the court's opinion has been cited in one published opinion by the Northern District of Ohio's bankruptcy court, eight secondary sources, and two trial court briefs in two cases (one in the Northern District of Ohio's bankruptcy court and one in the Southern District of Ohio's bankruptcy court).

***United States v. Fraser* (6th Cir. 02–4001, filed 09/10/2002, judgment 04/03/2003).**

*Appeal from:* Northern District of Ohio.

*What happened:* Unsuccessful appeal of a conviction of conspiracy to maintain a fraudulent telemarketing scheme.

*Appellant's brief:* The defendant's 8,177-word appellant brief cites 16 published opinions (seven by the U.S. Supreme Court, six by the Sixth Circuit, and three by other circuits).

*Appellee's brief:* The government's 4,625-word appellee brief cites 10 published opinions (two by the U.S. Supreme Court and eight by the Sixth Circuit).

*Opinion:* (2) The court's unpublished 2,176-word per curiam opinion, *United States v. Fraser*, 63 Fed. Appx. 814, 2003 WL 1819648 (6th Cir. 2003) (one headnote), cites 12 published opinions (two by the U.S. Supreme Court, nine by the Sixth Circuit, and one by another circuit). According to Westlaw (05/04/2005), the court's opinion has not been cited elsewhere.

***King v. Haas* (6th Cir. 02–4141, filed 10/10/2002, judgment 01/06/2004).**

*Appeal from:* Northern District of Ohio.

*What happened:* Unsuccessful appeal of summary judgment granted to the state in a case alleging retaliation against nursing homes for speaking out against state policies.

*Appellant's brief:* The plaintiffs' 9,145-word appellant brief cites 28 published opinions (two by the U.S. Supreme Court, nine by the Sixth Circuit, 13 by other circuits, and four by districts in other circuits).

*Appellee's brief:* The state's 14,356-word appellee brief cites 35 published opinions (seven by the U.S. Supreme Court, 25 by the Sixth Circuit, and three by other circuits) and seven unpublished Sixth Circuit opinions.

The brief cites an unpublished Sixth Circuit opinion and a published Second Circuit opinion to support the statement, "In order to state a claim for retaliation under the Due Process Clause and the First Amendment, a plaintiff must allege that he or she engaged in conduct that was constitutionally protected, and that retaliation against the protected conduct was a substantial or motivating factor in the defendant's actions." (Pages 40–41.) In a footnote, the brief also cites the unpublished Sixth Circuit opinion to support the statement, "This Court has consistently rendered summary judgment in a defendant's favor when the complained-of conduct would have occurred regardless of the protected activity." (Page 41, note 15.) The brief also cites this opinion in the summary of argument as the support for one of 13 enumerated points, which begins, "The District Court properly rendered summary judgment in Defendants' favor on Plaintiffs' First Amendment and Due Process 'retaliation' claims." (Page 23.)

The brief cites an unpublished Sixth Circuit opinion to support the statement, "This Court has held that a district court may impose monetary sanctions upon an attorney who fails to cooperate during discovery and/or engages in abusive litigation practices." (Page 60.) The brief also cites this opinion in the summary of argument as the support for the last of 13 enumerated points: "The District Court properly sanctioned Plaintiffs' counsel for engaging in discovery abuses that impeded Defendants' ability to prepare for trial." (Page 26.)

The brief quotes an unpublished Sixth Circuit opinion as stating, "If any conceivable legitimate state interest is rationally furthered by the faulted state action, it [is] not 'arbitrary and capricious' or 'abusive.'" (Page 37.) The brief cites another unpublished Sixth Circuit opinion to support the statement that "Plaintiffs have not proven that Defendants engaged in any conduct that is so op-

pressive or 'conscience shocking' that it would give rise to a substantive due process claim." (Page 38.)

The brief cites an unpublished Sixth Circuit opinion to support the statement, "As for Plaintiffs' allegations of 'prejudice' or 'bias,' this Court has held that 'a judge's adverse rulings against a party do not render him biased.'" (Page 50.)

To counter the appellants' argument that a particular item of evidence was not considered, the brief cites in a footnote an unpublished Sixth Circuit opinion to support the statement, "It should be presumed that the District Court considered all of the relevant evidence even if such evidence is not painstakingly listed in its decision." (Page 51, note 18.)

The brief cites an unpublished Sixth Circuit opinion and a published Sixth Circuit opinion to support the statement, "In order to hold a defendant liable for an alleged 'failure to train,' a plaintiff must show that: 1) the defendant is directly responsible for the training; 2) the training program is inadequate to the task that must be performed; 3) the inadequacy 'is the result of deliberate indifference'; and 4) 'the inadequacy is closely related to or actually caused' the alleged injury." (Page 51.)

*Appellant's reply brief:* The plaintiffs' 1,920-word reply brief cites eight published opinions (one by the U.S. Supreme Court, two by the Sixth Circuit, and five by other circuits).

*Opinion:* (2) The court's unpublished 1,037-word signed opinion, *King v. Haas*, 85 Fed. Appx. 480, 2004 WL 74649 (6th Cir. 2004) (one headnote), cites three published Sixth Circuit opinions. According to Westlaw (05/05/2005), the court's opinion has been cited in one published opinion by a district in another circuit.

***In re First Ohio Title Services Inc. (6th Cir. 02–4262, filed 11/06/2002, judgment 05/12/2003).***

*Appeal from:* Southern District of Ohio.

*What happened:* Bankruptcy appeal voluntarily dismissed.

*Opinion:* (1) The court's docket judgment cites no opinions.

***Hila v. Ashcroft (6th Cir. 02–4398, filed 12/13/2002, judgment 02/07/2003).***

*Appeal from:* Board of Immigration Appeals.

*What happened:* Immigration appeal dismissed as untimely.

*Opinion:* (1) The court's docket judgment cites no opinions.

**Cohen v. Trans Union (6th Cir. 02–4420, filed 12/18/2002, judgment 06/06/2003).**

*Appeal from:* Northern District of Ohio.

*What happened:* Unsuccessful pro se appeal of a summary judgment for defendants in a case brought under the Fair Credit Reporting Act. The plaintiff unsuccessfully argued that tax liens against him with an incorrect middle initial for him should not have been included in his credit reports.

*Appellee's brief:* Trans Union's 4,751-word appellee brief cites 19 published opinions (one by the U.S. Supreme Court, nine by the Sixth Circuit, six by other circuits, two by districts in other circuits, and one by Ohio's supreme court).

*Appellee's brief:* Equifax's 400-word appellee brief cites no opinions.

*Appellee's brief:* CBC Credit Services' 2,232-word appellee brief cites seven published opinions (three by the Sixth Circuit, three by other circuits, and one by Ohio's supreme court).

*Opinion:* (2) The court's unpublished 903-word order, *Cohen v. Trans Union*, 67 Fed. Appx. 325, 2003 WL 21321162 (6th Cir. 2003) (four headnotes), cites five published opinions (one by the U.S. Supreme Court and four by the Sixth Circuit). According to Westlaw (05/05/2005), the court's opinion has been cited in two secondary sources.

**Wood v. Metropolitan Trucking, Inc. (6th Cir. 02–5126, filed 02/01/2002, judgment 03/25/2002).**

*Appeal from:* Eastern District of Tennessee.

*What happened:* Civil appeal voluntarily dismissed.

*Opinion:* (1) The court's docket judgment cites no opinions.

**Duke v. Thoms (6th Cir. 02–5157, filed 02/07/2002, judgment 08/14/2002).**

*Appeal from:* Eastern District of Kentucky.

*What happened:* Unsuccessful pro se prisoner habeas corpus appeal.

*Opinion:* (2) The court's unpublished 799-word order, *Duke v. Thoms*, 41 Fed. Appx. 837, 2002 WL 1879965 (6th Cir. 2002) (no headnotes), cites five published opinions (two by the U.S. Supreme Court and three by the Sixth Circuit) and one unpublished opinion by another circuit affirming the habeas corpus petitioner's original conviction. According to Westlaw (05/05/2005), the court's order has not been cited elsewhere.

**Riggins v. United States (6th Cir. 02–5197, filed 02/14/2002, judgment 08/09/2002).**

*Appeal from:* Western District of Kentucky.

*What happened:* Certificate of appealability denied.

*Related cases:* *United States v. Riggins* (6th Cir. 93–5075, filed 01/19/1993, judgment 02/23/1994) (judgment of acquittal reversed), *United States v. Riggins* (6th Cir. 95–5552, filed 04/25/1995, judgment 02/13/1997) (successful appeal by the government in a criminal case against two defendants), and *United States v. McVean* (6th Cir. 98–6139, filed 08/28/1998, judgment 03/08/2000) (unsuccessful criminal appeal by the same two defendants).

*Opinion:* (1) The court's docket judgment cites no opinions.

**Love v. Fortafil Fibers Inc. (6th Cir. 02–5279, filed 03/05/2002, judgment 04/10/2002).**

*Appeal from:* Eastern District of Tennessee.

*What happened:* Pro se plaintiff's employment discrimination appeal dismissed for lack of prosecution.

*Opinion:* (1) The court's docket judgment cites no opinions.

**Cohn v. Parallel Products of Kentucky, Inc. (6th Cir. 02–5319, filed 03/19/2002, judgment 04/10/2002).**

*Appeal from:* Western District of Kentucky.

*What happened:* Plaintiff's appeal dismissed for lack of prosecution.

*Opinion:* (1) The court's docket judgment cites no opinions.

**Moore v. Potter (6th Cir. 02–5465, filed 04/17/2002, judgment 09/18/2002).**

*Appeal from:* Western District of Tennessee.

*What happened:* Unsuccessful pro se plaintiff's employment discrimination appeal.

*Opinion:* (2) The court's 795-word unpublished order, *Moore v. Potter*, 47 Fed. Appx. 318, 2002 WL 31096673 (6th Cir. 2002) (two headnotes), cites nine published opinions (four by the U.S. Supreme Court, four by the Sixth Circuit, and one by another circuit) and one unpublished Sixth Circuit order.

The opinion cites an unpublished Sixth Circuit order along with two U.S. Supreme Court opinions to support the statement that courts apply the state personal injury limitation period to Rehabilitation Act claims. (Page 2, 47 Fed. Appx. at 320.)

According to Westlaw (05/09/2005), the court's order has been cited in one secondary source.

**Meyer v. United States (6th Cir. 02–5477, filed 04/18/2002, judgment 08/21/2003).**

*Appeal from:* Eastern District of Kentucky.

*What happened:* Unsuccessful pro se appeal by a prisoner petitioner.

*Appellee's brief:* The government's 1,113-word appellee brief cites seven published opinions (two by the U.S. Supreme Court and five by the Sixth Circuit).

*Opinion:* (1) The court's docket judgment cites no opinions.

***Kraft v. Worrall, Scott & Page (6th Cir. 02-5554, filed 05/02/2002, judgment 03/26/2003).***

*Appeal from:* Middle District of Tennessee.

*What happened:* Plaintiffs' appeal of the district court's refusal to order a docket sheet correction dismissed by stipulation.

*Appellant's brief:* The plaintiffs' 1,313-word appellant brief cites three published opinions (one by the U.S. Supreme Court, one by the Sixth Circuit, and one by another circuit) and one unpublished Sixth Circuit opinion.

The brief cites an unpublished Sixth Circuit opinion to support the statement, "Given the inaccuracies of the other docket sheet entries, it is clear that the notations on the documents in the file more accurately reflect when events occurred in this matter. Under such circumstances, it is appropriate for the district court to direct the clerk to correct the docket sheet." (Page 6.)

*Appellee's brief:* The defendant's 2,180-word appellee brief cites two published Sixth Circuit opinions and two unpublished Sixth Circuit opinions.

The brief cites two unpublished Sixth Circuit opinions to support an argument that "The district court docket complies with [the Federal Rules of Civil Procedure] as it indicates that the judgments were entered on September 27, 1991." (Pages 6-7.) One opinion is cited as holding that "Rule 79 entry occurs when 'the substance of the separate document is reflected in an appropriate notation on the docket sheet.'" The other opinion is cited as holding that "a judgment is entered 'when the judgment is noted in the civil docket of the district court.'"

*Appellant's reply brief:* The plaintiffs' 134-word reply brief cites no opinions.

*Opinion:* (1) The court's docket judgment cites no opinions.

***Ray v. United States Immigration and Naturalization Service Executive (6th Cir. 02-5789, filed 06/26/2002, judgment 08/13/2002).***

*Appeal from:* Western District of Tennessee.

*What happened:* Pro se prisoner appeal dismissed for lack of jurisdiction.

*Opinion:* (1) The court's docket judgment cites no opinions.

***United States v. Yett (6th Cir. 02-5958, filed 08/05/2002, judgment 01/06/2004).***

*Appeal from:* Eastern District of Kentucky.

*What happened:* Unsuccessful appeal of a conviction for criminal possession of firearms. The court of appeals rejected the defendant's claim that one of the weapons not included in his conviction should not have been considered in his sentence.

*Appellant's brief:* The defendant's 4,007-word appellant brief cites 12 published opinions (three by the U.S. Supreme Court and nine by the Sixth Circuit).

*Appellee's brief:* The government's 3,368-word appellee brief cites 11 published opinions (three by the U.S. Supreme Court and eight by the Sixth Circuit).

*Opinion:* (2) The court's unpublished 1,327-word per curiam opinion, *United States v. Yett*, 85 Fed. Appx. 471, 2004 WL 74644 (6th Cir. 2004) (three headnotes), cites 12 published opinions (four by the U.S. Supreme Court, seven by the Sixth Circuit, and one by another circuit). According to Westlaw (05/05/2005), the opinion has been cited in one secondary source.

***Broadcast Music, Inc. v. Shooters of Memphis, Inc. (6th Cir. 02-6026, filed 08/27/2002, judgment 12/23/2002).***

*Appeal from:* Western District of Tennessee.

*What happened:* Defendants' copyright appeal dismissed for lack of prosecution.

*Opinion:* (1) The court's docket judgment cites no opinions.

***Smith v. United States Postal Service (6th Cir. 02-6073, filed 09/06/2002, judgment 07/15/2004).***

*Appeal from:* Western District of Kentucky.

*What happened:* Successful appeal of summary judgment for the postal service in an employment discrimination case. The court of appeals reversed the district court's finding that the plaintiff could not have proved constructive discharge.

*Appellant's brief:* The employee's 4,212-word appellant brief cites 14 published opinions (two by the U.S. Supreme Court, eight by the Sixth Circuit, three by other circuits, and one by Florida's district court of appeal).

*Appellee's brief:* The postal service's 7,764-word appellee brief cites 21 published opinions (four by the U.S. Supreme Court, seven by the Sixth Circuit, five by other circuits, one by a Sixth Circuit district, one by a district in another circuit, one by Kentucky's court of appeals, one by California's

supreme court, and one by California's court of appeal.)

*Appellant's reply brief:* The employee's 1,270-word reply brief cites no opinions.

*Opinion:* (3) The court's published 5,095-word signed opinion, *Smith v. Henderson*, 376 F.3d 529 (6th Cir. 2004) (six headnotes), cites 18 published opinions (eight by the Sixth Circuit, seven by other circuits, one by a Sixth Circuit district, one by a district in another circuit, and one by Kentucky's court of appeals) and two unpublished opinions (one by the Sixth Circuit and the district court's unpublished opinion in this case).

The opinion cites the unpublished Sixth Circuit opinion and 29 C.F.R. § 1630.02(o)(3) to support a statement that there was a material issue of fact whether a letter was a request for reasonable accommodations. (Page 12, 376 F.3d at 536.) The citation acknowledged the unpublished opinion's citation to a published opinion by another circuit.

According to Westlaw (05/05/2005), the court's opinion has been cited in four unpublished Sixth Circuit opinions, 10 secondary sources, and two trial court briefs in one case in the Eastern District of Michigan.

***Zahaf v. Ashcroft* (6th Cir. 02–6219, filed 10/15/2002, judgment 02/11/2004).**

*Appeal from:* Western District of Kentucky.

*What happened:* Unsuccessful immigration habeas corpus appeal by an Algerian citizen over whom federal courts do not have jurisdiction because he filed immigration paperwork improperly.

*Appellant's brief:* The immigrant's 4,257-word appellant brief cites four U.S. Supreme Court opinions.

*Appellee's brief:* The government's 7,178-word appellee brief cites 26 published opinions (11 by the U.S. Supreme Court, four by the Sixth Circuit, 10 by other circuits, and one by a district in another circuit) and two treatises.

*Appellant's reply brief:* The immigrant's 2,596-word reply brief cites five published opinions (three by the U.S. Supreme Court, one by the Sixth Circuit, and one by a district in another circuit).

*Opinion:* (2) The court's unpublished 1,793-word signed opinion, *Zahaf v. Ashcroft*, 89 Fed. Appx. 966, 2004 WL 261011 (6th Cir. 2004) (two headnotes), cites two published opinions (one by the U.S. Supreme Court and one by the Sixth Circuit). According to Westlaw (05/09/2005), the court's opinion has not been cited elsewhere.

***United States v. Burford* (6th Cir. 02–6231, filed 10/17/2002, judgment 06/14/2005).**

*Appeal from:* Eastern District of Tennessee.

*What happened:* Joint motion to remand in light of *United States v. Booker* granted in a criminal appeal of a drug sentence.

*Appellant's brief:* The defendant's 1,043-word appellant proof brief cites one U.S. Supreme Court opinion.

*Opinion:* (1) The court's docket judgment cites one U.S. Supreme Court opinion.

***Parker v. Gibbons* (6th Cir. 02–6250, filed 10/23/2002, judgment 04/01/2003).**

*Appeal from:* Western District of Tennessee.

*What happened:* Unsuccessful pro se prisoner appeal.

*Opinion:* (2) The court's 552-word unpublished order, *Parker v. Gibbons*, 62 Fed. Appx. 95, 2003 WL 1795836 (6th Cir. 2003) (one headnote), cites three published opinions (one by the U.S. Supreme Court and two by the Sixth Circuit) and two unpublished opinions in related cases (one by the Sixth Circuit and one by the Western District of Tennessee). According to Westlaw (05/09/2005), the court's order has not been cited elsewhere.

***Reardon v. Cambio Health Solutions, LLC* (6th Cir. 02–6274, filed 10/24/2002, judgment 10/28/2003).**

*Appeal from:* Middle District of Tennessee.

*What happened:* Voluntarily dismissed appeal by a corporation of the district court's refusal to order arbitration of a claim by a departing chief executive officer for severance benefits.

*Related case:* *Cambio Health Solutions, LLC v. Sloate* (6th Cir. 02–6392, filed 11/18/2002, judgment 07/17/2003) (unsuccessful appeal of a refusal to compel arbitration).

*Appellant's brief:* The corporation's 6,946-word appellant brief cites 28 published opinions (seven by the U.S. Supreme Court, two by the Sixth Circuit, 12 by other circuits, one by Tennessee's supreme court, four by Tennessee's court of appeals, and two by Delaware's supreme court), four unpublished opinions (one by the Sixth Circuit, one by a Sixth Circuit district, and two by Delaware's court of chancery), one treatise, and the *Restatement (Second) of Contracts*.

The brief cites an unpublished Sixth Circuit opinion to support the statement, "This Court has held that where a District Court has denied a party's motion for stay pending arbitration, or to compel arbitration, it will accord no deference to

the District Court's Opinion, and instead conduct a *de novo* review." (Page 13.)

The brief asks the reader to "*see also*" an unpublished opinion by the Western District of Kentucky after citing a published opinion by the Second Circuit to support the statement, "The Second Circuit has held that where, as here, an arbitration clause is broad, 'there arises a presumption of arbitrability' and arbitration of even a collateral matter will be ordered if the claim alleged 'implicates issues of contract construction or the parties' rights and obligations under it.'" (Page 22.)

The brief cites two unpublished opinions by Delaware's court of chancery and a published opinion by Delaware's supreme court to support the statement, "Delaware Courts have . . . recognized that contemporaneous documents in the same transaction be construed together." (Page 21.)

*Appellee's brief:* The executive's 7,894-word appellee brief cites 12 published opinions (four by the U.S. Supreme Court, three by the Sixth Circuit, three by other circuits, and two by Tennessee's court of appeals) and three unpublished opinions (two by the Sixth Circuit, and one by the Middle District of Tennessee in a related case).

The brief devotes three pages to an argument that "this case is readily distinguishable from this Court's unpublished opinion" cited by the appellants. (Pages 24–27.)

The brief cites another unpublished opinion by the Sixth Circuit to support the statement, "A party waives its right to arbitrate when it acts inconsistently with its rights to proceed with arbitration and thereby prejudices the other party." (Page 28.)

In a footnote, the brief describes a case between the corporation and another departing officer in which the Middle District of Tennessee also denied the corporation's motion to compel arbitration in an unpublished memorandum and order. (Page 12 note 3.) (The corporation's appeal of this decision was unsuccessful.)

*Appellant's reply brief:* The corporation's 3,772-word reply brief cites 11 published opinions (one by the U.S. Supreme Court, three by the Sixth Circuit, four by other circuits, one by a Sixth Circuit district, one by Tennessee's supreme court, and one by Tennessee's court of appeals), three unpublished opinions (two by the Sixth Circuit and one by a Sixth Circuit district), and one treatise.

The brief cites an unpublished Sixth Circuit opinion, which cites published decisions by Tennessee's supreme court and Tennessee's court of appeals, to support an assertion of "a cardinal

rule of contract interpretation under Tennessee law requiring a court to give effect to parties' intent and not to enforce an absurd result." (Page 8.)

The brief devotes a page-long paragraph to discussion of another unpublished Sixth Circuit opinion supporting the corporation's argument that it has not waived its right to arbitration. (Pages 10–11.) The next paragraph of the brief discusses the unpublished opinion by the Western District of Kentucky also cited in the corporation's opening brief, asserting that "The court found that to establish that a party waived its right to arbitrate, it must be proven that the party knew of their right to arbitrate, yet took actions inconsistent with such right to the other party's prejudice." (Page 11.)

*Opinion:* (1) The court's docket judgment cites no opinions.

***Frohmuth v. Bourk* (6th Cir. 02–6284, filed 10/28/2002, judgment 06/03/2004).**

*Appeal from:* Middle District of Tennessee.

*What happened:* Unsuccessful appeal of a directed verdict in favor of a police sergeant in an action for excessive force.

*Related case:* A codefendant police officer unsuccessfully appealed a jury verdict in favor of the plaintiff in a consolidated appeal resolved by the same opinion, *Frohmuth v. Welch* (6th Cir. 02–6285, filed 10/28/2002, judgment 06/03/2004).

*Appellant's brief:* The plaintiff's 3,801-word appellant brief cites nine published opinions (two by the U.S. Supreme Court and seven by the Sixth Circuit).

*Appellee's brief:* The sergeant's 5,227-word appellee brief cites five published opinions (one by the U.S. Supreme Court, three by the Sixth Circuit, and one by the Middle District of Tennessee in an earlier phase of this case) and two unpublished Sixth Circuit opinions.

The brief devotes two paragraphs to a discussion of an unpublished Sixth Circuit opinion cited as a case in which "this Court held that the minimal amount of force utilized by officers making an arrest could not be deemed excessive as a matter of law." (Page 17.) The next paragraph of the brief discusses another unpublished Sixth Circuit opinion in which "This Court found that pushing the metal door open hard enough to allegedly injure plaintiff did not amount to excessive force as a matter of law." (Pages 18–19.)

*Appellant's reply brief:* The plaintiff's 1,346-word reply brief cites two published opinions (one by the U.S. Supreme Court and one by the Sixth Circuit).

*Opinion:* (2) The court's unpublished 2,474-word signed opinion with a concurrence and dissent, *Frohmoth v. Metropolitan Government of Nashville and Davidson County*, 101 Fed. Appx. 56, 2004 WL 1238919 (6th Cir. 2004) (two headnotes), cites nine published opinions (one by the U.S. Supreme Court, seven by the Sixth Circuit and one by the Middle District of Tennessee). According to Westlaw (05/06/2005), the court's opinion has been cited in one secondary source and one trial court document in a Sixth Circuit district.

***United States v. Snyder* (6th Cir. 02–6287, filed 10/29/2002, judgment 02/25/2003).**

*Appeal from:* Eastern District of Tennessee.

*What happened:* Criminal appeal voluntarily dismissed.

*Opinion:* (1) The court's docket judgment cites no opinions.

***Messer v. Columbus Show Case Co.* (6th Cir. 02–6558, filed 12/30/2002, judgment 05/06/2003).**

*Appeal from:* Eastern District of Kentucky.

*What happened:* Stipulated dismissal of an appeal and cross-appeal.

*Opinion:* (1) The court's docket judgment cites no opinions.

## 7. Seventh Circuit<sup>96</sup>

The Seventh Circuit does not permit citation to unpublished opinions in unrelated cases.<sup>97</sup>

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96. Docket sheets have been on PACER since January 1, 2005. Before then, they were on the court's website. They are also on the court's intranet site. Published opinions are on the court's website, its intranet site, and Westlaw. Unpublished orders are only on Westlaw. Almost all briefs are on the court's website and its intranet site. (Of the 17 cases with counseled briefs in this sample, all briefs are on the court's website and its intranet site for 16 cases, but only the appellant's brief, not the appellee's brief or the appellant's reply brief, is on the court's website and intranet site for one case.) A few briefs are on Westlaw. (Of the 17 cases with counseled briefs in this sample, briefs are on Westlaw for three cases.)

97. 7th Cir. L.R. 53(b)(2)(iv) ("Unpublished orders: . . . Except to support a claim of res judicata, collateral estoppel or law of the case, shall not be cited or used as precedent (A) in any federal court within the circuit in any written document or in oral argument; or (B) by any such court for any purpose.").

The court adopted a distinction between published and unpublished opinions on February 1, 1973, and has

Of the 50 cases randomly selected, 48 are appeals from district courts (20 from the Northern District of Illinois, 10 from the Northern District of Indiana, six from the Southern District of Indiana, four each from the Eastern District of Wisconsin and the Western District of Wisconsin, three from the Central District of Illinois, and one from the Southern District of Illinois) and two are appeals from the Board of Immigration Appeals.<sup>98</sup>

The publication rate in this sample is 16%. Eight of the appeals were resolved by published signed opinions, seven were resolved by unpublished orders published in the *Federal Appendix*, and 35 were resolved by docket judgments.

Published opinions averaged 4,147 words in length, ranging from 1,536 to 8,070. Unpublished opinions averaged 1,451 words in length, ranging from 373 to 3,106. Three opinions were under 1,000 words in length (20%, all unpublished), and one of these was under 500 words in length (7%).

Eleven of the appeals were fully briefed. In 33 of the appeals no counseled brief was filed, and in six of the appeals a counseled brief was filed only for one side.

There are citations to unpublished court opinions in four of these cases. In one case the citation is only to an opinion in a related case; in three cases there are citations to unpublished opinions in unrelated cases. One published opinion cites a depublished district court opinion from another circuit; in the other two cases the citations to unrelated unpublished opinions are only in the briefs.

None of the unrelated unpublished opinions cited is by courts of appeals. Three of the unrelated unpublished opinions cited are by the district court for the Northern Dis-

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proscribed citation to its unpublished opinions in unrelated cases since then.

98. In 2002, 3,463 cases were filed in the court of appeals for the Seventh Circuit.

trict of Illinois and one is by the district court for the Eastern District of New York. In addition, one case includes citations to a depublished opinion by the district court for the Eastern District of Pennsylvania.

C7-1. In an unsuccessful appeal of a conviction for a counterfeit check scheme, *United States v. Mustapha* (7th Cir. 02-4000, filed 11/12/2002, judgment 04/14/2004), resolved by published opinion at *United States v. George*, 363 F.3d 666 (7th Cir. 2004), the appellant's brief cites an opinion by the district court for the Eastern District of Pennsylvania that was initially published, but subsequently withdrawn by the court and replaced by a new published opinion. The brief acknowledges the vacation and reconsideration of the depublished opinion, but cites it extensively to support an argument against the reliability of fingerprint identification. The court cited the same depublished opinion in its rejection of the appellant's argument.

C7-2. In an unsuccessful pro se appeal seeking habeas corpus relief for ineffective assistance of counsel, *United States v. Sims* (7th Cir. 02-2397, filed 05/30/2002, judgment 07/01/2003), resolved by docket judgment, the government's brief cites three unpublished district court opinions—two by the district court for the Northern District of Illinois and one by the district court for the Eastern District of New York.

The brief cites one unpublished opinion by the district court for the Northern District of Illinois to support a statement that "a large number of unsuccessful pleadings" filed by the appellant in district court "do not toll the period in which to file a timely Rule 60(b)(6) motion." The brief cites the other unpublished opinion by the district court for the Northern District of Illinois and a published opinion by the Northern District of Indiana to support a statement that "The final order or judgment denying a § 2255 motion becomes effective when docketed."

The brief cites an unpublished opinion by the district court for the Eastern District of New York and a published opinion by the court of appeals for the Second Circuit to support a statement that "What is a 'reasonable time' for purposes of Rule 60(b) is a 'question to be answered in light of all the circumstances.'" The brief also cites this unpublished opinion by the district court for the Eastern District of New York and a published opinion by the court of appeals for the Third Circuit to support a statement that "Other courts have held delays of roughly the same time or less to be unreasonable under Rule 60(b)(6) where the errors alleged were or should have been known earlier."

C7-3. In an unsuccessful appeal by an employer of bricklayers of a judgment in favor of the bricklayers' union requiring an audit of the employer's payroll records, *Bricklayers Local 21 of Illinois Apprenticeship and Training Program v. Banner Restorations, Inc.* (7th Cir. 02-3512, filed 09/27/2002, judgment 09/22/2004), resolved by published opinion at 385 F.3d 761, both parties cited an unpublished opinion by the district court for the Northern District of Illinois. The employer urged the court of appeals to follow the lead of a district court judge in requiring a signed agreement between an employer and a union for the employer to be bound by a collective bargaining agreement. The union countered that the unpublished opinion is consistent with the district court's judgment in the case appealed.

### *Individual Case Analyses*

***Miniat v. Ed Miniat Inc.* (7th Cir. 02-1094, filed 01/11/2002, judgment 10/31/2002).**

*Appeal from:* Northern District of Illinois.

*What happened:* Unsuccessful civil appeal in a corporate governance case, in which the plaintiff and appellant, an attorney, appeared pro se.

*Appellee's brief:* The defendants' 6,989-word appellee brief cites 16 published opinions (five by the Seventh Circuit, four by Illinois's supreme court, and seven by Illinois's appellate court).



*Opinion:* (3) The court's 2,206-word published signed opinion, *Miniat v. Ed Miniat, Inc.*, 315 F.3d 712 (7th Cir. 2002) (nine headnotes), cites seven published opinions (two by the Seventh Circuit, three by Illinois's supreme court, and two by Illinois's appellate court). According to Westlaw (03/22/2005), the court's opinion has been cited in three unpublished opinions (two by the Northern District of Illinois, one by another Seventh Circuit district), five secondary sources, one Seventh Circuit appellate brief, one appellate brief in another circuit, and five briefs in three Northern District of Illinois cases.

***Turner-El v. Moran* (7th Cir. 02–1127, filed 01/15/2002, judgment 02/07/2002).**

*Appeal from:* Northern District of Illinois.

*What happened:* Pro se prisoner appeal dismissed for failure to pay the docketing fee.

*Opinion:* (1) The court's docket judgment cites no opinions.

***General Motors Corp. v. Murphy* (7th Cir. 02–1273, filed 02/04/2002, judgment 02/15/2002).**

*Appeal from:* Southern District of Illinois.

*What happened:* Writ of mandamus granted to recall district court's remand.

*Opinion:* (1) The court's docket judgment cites no opinions.

***Harris v. Schettle* (7th Cir. 02–1357, filed 02/11/2002, judgment 04/16/2002).**

*Appeal from:* Western District of Wisconsin.

*What happened:* Pro se prisoner appeal dismissed for failure to pay the docketing fee.

*Opinion:* (1) The court's docket judgment cites no opinions.

***O'Neill v. Deuth* (7th Cir. 02–1579, filed 03/08/2002, judgment 03/22/2002).**

*Appeal from:* Northern District of Indiana.

*What happened:* Permission to file a successive habeas corpus petition denied.

*Opinion:* (1) The court's docket judgment cites no opinions.

***Whitacre v. United States* (7th Cir. 02–1581, filed 03/08/2002, judgment 04/23/2002).**

*Appeal from:* Northern District of Illinois.

*What happened:* Pro se appeal concerning motion to vacate a sentence voluntarily dismissed.

*Opinion:* (1) The court's docket judgment cites no opinions.

***Shah v. Village of Hoffman Estates* (7th Cir. 02–1587, filed 03/11/2002, judgment 05/13/2002).**

*Appeal from:* Northern District of Illinois.

*What happened:* Civil appeal dismissed as settled.

*Opinion:* (1) The court's docket judgment cites no opinions.

***Quinn v. Belhaven Convalescent Center, Inc.* (7th Cir. 02–1654, filed 03/18/2002, judgment 12/03/2002).**

*Appeal from:* Northern District of Illinois.

*What happened:* Pro se civil appeal dismissed for lack of prosecution.

*Opinion:* (1) The court's docket judgment cites no opinions.

***Hadley v. Jockisch* (7th Cir. 02–1691, filed 03/22/2002, judgment 02/06/2004).**

*Appeal from:* Central District of Illinois.

*What happened:* Pro se prisoner's unsuccessful civil rights appeal.

*Appellee's brief:* The prison's 1,899-word appellee brief cites three published Seventh Circuit opinions.

*Opinion:* (2) The court's unpublished 373-word order, *Hadley v. Jockisch*, 86 Fed. Appx. 998, 2004 WL 260283 (7th Cir. 2004) (no headnotes), cites four published Seventh Circuit opinions. According to Westlaw (03/22/2005), the court's order has not been cited elsewhere.

***United States v. Genova* (7th Cir. 02–1725, filed 03/26/2002, judgment 05/09/2002).**

*Appeal from:* Northern District of Illinois.

*What happened:* Criminal appeal voluntarily dismissed. The appellant was mayor of Calumet City, Illinois, and was convicted of using public money personally.

*Related cases:* In a published opinion, *United States v. Genova*, 333 F.3d 750 (7th Cir. 2003), the court resolved four consolidated appeals: *United States v. Gulotta* (7th Cir. 02–1602, filed 03/13/2002, judgment 06/20/2003) (affirming criminal conviction and sentence but vacating and remanding with respect to forfeiture issue), *United States v. Stack* (7th Cir. 02–1650, filed 03/18/2002, judgment 06/20/2003) (reversing RICO conviction), *United States v. Stack* (7th Cir. 02–1914, filed 04/15/2002, judgment 06/20/2003) (cross-appeal reinstating convictions for personal use of public money and remanding for sentencing), and *United States v. Genova* (7th Cir. 02–2053, filed 04/26/2002, judgment 06/20/2003) (affirming criminal conviction and sentence but vacating and remanding with respect to forfeiture issue).

*Opinion:* (1) The court's docket judgment cites no opinions.

**Fredericksen v. City of Lockport (7th Cir. 02–1728, filed 03/26/2002, judgment 11/25/2002).**

*Appeal from:* Northern District of Illinois.

*What happened:* Civil appeal dismissed.

*Related case:* *Talano v. City of Lockport* (7th Cir. 00–1697, filed 03/17/2000, judgment 04/26/2001) (complaint against city concerning demolition of property dismissed for lack of jurisdiction).

*Opinion:* (1) The court’s docket judgment cites no opinions.

**Davis v. Indianapolis Public Schools (7th Cir. 02–1735, filed 03/27/2002, judgment 05/21/2002).**

*Appeal from:* Southern District of Indiana.

*What happened:* Civil appeal dismissed as settled.

*Opinion:* (1) The court’s docket judgment cites no opinions.

**Staple v. Ameritech Mobile Communications, Inc. (7th Cir. 02–1780, filed 03/29/2002, judgment 09/11/2002).**

*Appeal from:* Northern District of Illinois.

*What happened:* Civil appeal voluntarily dismissed.

*Opinion:* (1) The court’s docket judgment cites no opinions.

**Morrow v. Vannatta (7th Cir. 02–1837, filed 04/05/2002, judgment 04/09/2003).**

*Appeal from:* Northern District of Indiana.

*What happened:* Unsuccessful pro se appeal of a denial of habeas corpus relief to a state prisoner complaining of improper reduction in good-time credits.

*Related case:* *Morrow v. Vannatta* (7th Cir. 02–2270, filed 05/16/2002, judgment 07/25/2002) (habeas corpus appeal dismissed for lack of jurisdiction).

*Appellee’s brief:* The respondent’s 7,005-word appellee brief cites 27 published opinions (four by the U.S. Supreme Court, 15 by the Seventh Circuit, six by other circuits, one by Illinois’s appellate court, and one by Wisconsin’s court of appeals).

*Opinion:* (2) The court’s 864-word unpublished order, *Morrow v. Vannatta*, 64 Fed. Appx. 553, 2003 WL 1870721 (7th Cir. 2003) (five headnotes), cites nine published opinions (three by the U.S. Supreme Court and six by the Seventh Circuit). According to Westlaw (03/22/2005), the court’s order has not been cited elsewhere.

**United States v. Rose (7th Cir. 02–1927, filed 04/16/2002, judgment 07/31/2003).**

*Appeal from:* Northern District of Illinois.

*What happened:* Criminal appeal dismissed for failure to prosecute.

*Related case:* *United States v. Rose* (7th Cir. 02–2007, filed 04/25/2002, judgment 07/31/2003) (criminal appeal dismissed for failure to prosecute).

*Opinion:* (1) The court’s judgment cites no opinions.

**United States v. Payne (7th Cir. 02–1975, filed 04/22/2002, judgment 03/19/2003).**

*Appeal from:* Southern District of Indiana.

*What happened:* Unsuccessful appeal of the sentence imposed for mail fraud and money laundering in a Ponzi scheme.

*Related case:* Consolidated with *United States v. Payne* (7th Cir. 02–1976, filed 04/22/2002, judgment 03/19/2003) (unsuccessful appeal of the same sentence as applied to a companion information).

*Appellant’s brief:* The defendant’s 4,380-word appellant brief cites 22 published opinions (eight by the U.S. Supreme Court, 12 by the Seventh Circuit, and two by other circuits) and one law review article.

*Appellee’s brief:* The government’s 4,426-word appellee brief cites 22 published opinions (two by the U.S. Supreme Court, 19 by the Seventh Circuit, and one by another circuit).

*Appellant’s reply brief:* The defendant’s 3,309-word reply brief cites 26 published opinions (six by the U.S. Supreme Court, 17 by the Seventh Circuit, two by other circuits, and one by a Seventh Circuit district).

*Opinion:* (2) The court’s unpublished 2,613-word order, *United States v. Payne*, 62 Fed. Appx. 648, 2003 WL 1796001 (7th Cir. 2003) (two headnotes), cites 20 published opinions (one by the U.S. Supreme Court and 19 by the Seventh Circuit). According to Westlaw (03/22/2005), the court’s order has been cited in one secondary source.

**United States v. Savage (7th Cir. 02–2141, filed 05/06/2002, judgment 02/14/2003).**

*Appeal from:* Western District of Wisconsin.

*What happened:* Unsuccessful appeal of a drug conviction.

*Related cases:* The selected case was consolidated with his wife’s appeal, which was voluntarily dismissed, *United States v. Savage* (7th Cir. 02–2142, filed 05/06/2002, judgment 11/20/2002). There also were unsuccessful appeals by other codefendants, *United States v. Koerth* (7th Cir. 01–3767, filed 10/24/2001, judgment 12/05/2002)

and *United States v. Boos* (7th Cir. 02–3006, filed 08/02/2002, judgment 05/15/2003).

*Appellant's brief:* The defendant's 5,660-word appellant brief cites eight published opinions (three by the U.S. Supreme Court and five by the Seventh Circuit).

*Appellee's brief:* The government's 5,631-word appellee brief cites 18 published opinions (five by the U.S. Supreme Court and 13 by the Seventh Circuit) and the two codefendants' appeals.

*Appellant's reply brief:* The defendant's 3,744-word reply brief cites 10 published opinions (five by the U.S. Supreme Court and five by the Seventh Circuit).

*Opinion:* (2) The court's unpublished 3,106-word order, *United States v. Savage*, 59 Fed. Appx. 821, 2003 WL 352045 (7th Cir. 2003) (three headnotes), cites six published opinions (two by the U.S. Supreme Court and four by the Seventh Circuit, including the resolution of a codefendant's appeal). According to Westlaw (03/22/2005), the Court's opinion has been cited in one secondary source.

***Despiau v. Retirement Board* (7th Cir. 02–2183, filed 05/08/2002, judgment 07/03/2002).**

*Appeal from:* Northern District of Illinois.

*What happened:* Civil appeal dismissed for want of prosecution.

*Opinion:* (1) The court's docket judgment cites no opinions.

***Sente-Estaban v. Immigration and Naturalization Service* (7th Cir. 02–2198, filed 05/10/2002, judgment 02/12/2003).**

*Appeal from:* Board of Immigration Appeals.

*What happened:* Asylum appeal by a gay man, who fled Guatemala because he was raped, voluntarily dismissed.

*Petitioner's brief:* The petitioner's 6,306-word brief cites 20 published court opinions (one by the U.S. Supreme Court, 15 by the Seventh Circuit, and four by other circuits), one published opinion by the Board of Immigration Appeals, two United Nations handbooks, and three United States government reports.

*Respondent's brief:* The government's 6,732-word respondent brief cites 22 published court opinions (eight by the U.S. Supreme Court, eight by the Seventh Circuit, and six by other circuits) and three published opinions by the Board of Immigration Appeals.

*Petitioner's reply brief:* The petitioner's 3,052-word reply brief cites 11 published opinions (one by the U.S. Supreme Court, four by the Seventh Circuit, four by other circuits, one by the court of

military appeals, and one by Illinois's appellate court), one United Nations handbook, three United States government reports, and two dictionaries.

*Opinion:* (1) The court's docket judgment cites no opinion.

***United States v. Bridgeman* (7th Cir. 02–2272, filed 05/16/2002, judgment 10/29/2002).**

*Appeal from:* Northern District of Indiana.

*What happened:* Certificate of appealability denied.

*Related case:* *United States v. Bridgeman* (7th Cir. 02–2425, filed 06/03/2002, judgment 06/25/2002) (pro se prisoner appeal dismissed for lack of jurisdiction).

*Opinion:* (1) The court's docket judgment cites no opinions.

***United States v. Rodriguez* (7th Cir. 02–2296, filed 05/21/2002, judgment 06/10/2002).**

*Appeal from:* Northern District of Illinois.

*What happened:* Criminal appeal voluntarily dismissed.

*Opinion:* (1) The court's docket judgment cites no opinions.

***United States v. Smith* (7th Cir. 02–2318, filed 05/22/2002, judgment 06/20/2002).**

*Appeal from:* Northern District of Illinois.

*What happened:* Criminal appeal voluntarily dismissed as duplicative of appeal filed by counsel.

*Related case:* *United States v. Smith* (7th Cir. 02–2396, filed 05/30/2002, judgment 06/25/2003) (criminal appeal dismissed on a successful *Anders* motion).

*Opinion:* (1) The court's docket judgment cites no opinions.

***United States v. Sims* (7th Cir. 02–2397, filed 05/30/2002, judgment 07/01/2003).**

*Appeal from:* Northern District of Illinois.

*What happened:* Unsuccessful pro se appeal, by a person convicted of dealing drugs, of the denial of relief from judgment against his habeas corpus petition alleging ineffective assistance of counsel.

*Related cases:* The court resolved other appeals filed by the appellant, *United States v. Sims* (7th Cir. 02–4138, filed 12/04/2002, judgment 07/20/2004) and *United States v. Sims* (7th Cir. 03–1088, filed 01/13/2003, judgment 07/20/2004), with a published opinion, *United States v. Sims*, 376 F.3d 705 (7th Cir. 2004) (affirming denial of motion for return of seized property).

*Appellee's brief:* The government's 9,391-word appellee brief cites 38 published opinions (eight

by the U.S. Supreme Court; 17 by the Seventh Circuit, including one in a related appeal; seven by other circuits; four by the Northern District of Illinois, including one in a related case; one by another Seventh Circuit district; and one by a district in another circuit) and three unpublished opinions (two by the Northern District of Illinois and one by a district in another circuit).

The brief cites an unpublished opinion by the Northern District of Illinois to support the statement that “a large number of unsuccessful pleadings” filed by the appellant in district court “do not toll the period in which to file a timely Rule 60(b)(6) motion.” (Page 25.)

The brief cites an unpublished opinion by the Northern District of Illinois and a published opinion by the Northern District of Indiana to support the statement, “The final order or judgment denying a § 2255 motion becomes effective when docketed.” (Pages 23–24.)

The brief cites an unpublished opinion by the Eastern District of New York and a published opinion by the Second Circuit to support the statement, “What is a ‘reasonable time’ for purposes of Rule 60(b) is a ‘question to be answered in light of all the circumstances.’” (Page 23.) The brief also cites this unpublished opinion by the Eastern District of New York and a published opinion by the Third Circuit to support the statement, “Other courts have held delays of roughly the same time or less to be unreasonable under Rule 60(b)(6) where the errors alleged were or should have been known earlier.” (Page 26.)

*Opinion:* (1) The court’s docket judgment cites no opinions.

***United States v. Hendricks* (7th Cir. 02–2693, filed 06/28/2002, judgment 02/21/2003).**

*Appeal from:* Northern District of Indiana.

*What happened:* Unsuccessful appeal of a conviction and sentence for being a felon in possession of a firearm.

*Appellant’s brief:* The defendant’s 8,868-word appellant brief cites 20 published opinions (five by the U.S. Supreme Court, 13 by the Seventh Circuit, and two by other circuits).

*Appellee’s brief:* The government’s 8,172-word appellee brief cites 24 published opinions (two by the U.S. Supreme Court, 20 by the Seventh Circuit, and two by other circuits).

*Appellant’s reply brief:* The defendant’s 4,427-word reply brief cites 14 published opinions (three by the U.S. Supreme Court, 10 by the Seventh Circuit, and one by another circuit).

*Opinion:* (3) The court’s published 8,070-word signed opinion, *United States v. Hendricks*, 319 F.3d

993 (7th Cir. 2003) (25 headnotes), cites 42 published opinions (12 by the U.S. Supreme Court, 27 by the Seventh Circuit, and three by other circuits). According to Westlaw (03/22/2005), the court’s opinion has been cited in 13 Seventh Circuit opinions (five published and eight unpublished), one published opinion by another circuit, one unpublished opinion by the Northern District of Illinois, one unpublished opinion by another Seventh Circuit district, two unpublished opinions by other districts, one unpublished opinion in another state, three secondary sources, 10 appellate briefs in nine cases in other circuits, and two trial court briefs in two cases in the Northern District of Illinois.

***Von Flowers v. Doyle* (7th Cir. 02–2811, filed 07/15/2002, judgment 10/10/2002).**

*Appeal from:* Eastern District of Wisconsin.

*What happened:* Pro se civil appeal dismissed for failure to pay the filing fee.

*Opinion:* (1) The court’s docket judgment cites no opinions.

***Walls v. United States* (7th Cir. 02–2843, filed 07/17/2002, judgment 12/03/2002).**

*Appeal from:* Central District of Illinois.

*What happened:* Certificate of appealability denied.

*Opinion:* (1) The court’s judgment cites no opinions.

***Danks v. Davis* (7th Cir. 02–2971, filed 07/30/2002, judgment 01/21/2004).**

*Appeal from:* Northern District of Indiana.

*What happened:* Unsuccessful appeal of the denial of habeas corpus relief for a murder trial delayed 6½ years because of the defendant’s incompetence.

*Appellant’s brief:* The petitioner’s 6,916-word appellant brief cites 28 published opinions (11 by the U.S. Supreme Court; six by the Seventh Circuit; two by other circuits; three by Indiana’s supreme court; three by Indiana’s court of appeals, including one opinion in an earlier phase of this case; one by Michigan’s supreme court; one by Montana’s supreme court; and one by Texas’s court of criminal appeals) and one treatise.

*Appellee’s brief:* The government’s 4,296-word appellee brief cites seven published opinions (four by the U.S. Supreme Court, two by the Seventh Circuit, and one by Indiana’s court of appeals in an earlier phase of this case).

*Appellant’s reply brief:* The petitioner’s 2,485-word reply brief cites 17 published opinions (nine by the U.S. Supreme Court; one by the Seventh Circuit; two by other circuits; one by Indiana’s

court of appeals in an earlier phase of this case; one by Kansas's supreme court; one by Michigan's supreme court; one by Ohio's supreme court; and one by Texas's court of criminal appeals).

*Opinion:* (3) The court's published 2,280-word signed opinion, *Danks v. Davis*, 355 F.3d 1005 (7th Cir. 2004) (four headnotes), cites 11 published opinions (three by the U.S. Supreme Court, four by the Seventh Circuit, three by other circuits, and one by Indiana's court of appeals in an earlier phase of the case). According to Westlaw (03/22/2005), the court's opinion has been cited in one unpublished Seventh Circuit opinion.

***Szymanski v. Smith* (7th Cir. 02–2977, filed 07/31/2002, judgment 08/13/2002).**

*Appeal from:* Western District of Wisconsin.

*What happened:* Unsuccessful petition to file a successive habeas corpus petition.

*Opinion:* (1) The court's docket judgment cites no opinions.

***United States v. Whaley* (7th Cir. 02–3016, filed 08/05/2002, judgment 09/19/2002).**

*Appeal from:* Southern District of Indiana.

*What happened:* Criminal appeal voluntarily dismissed.

*Related case:* *United States v. Whaley* (7th Cir. 02–2951, filed 07/29/2002, judgment 09/19/2002) (criminal appeal voluntarily dismissed).

*Opinion:* (1) The court's docket judgment cites no opinions.

***Donovan v. Seher* (7th Cir. 02–3089, filed 08/12/2002, judgment 05/15/2003).**

*Appeal from:* Northern District of Illinois.

*What happened:* Civil appeal dismissed as settled.

*Opinion:* (1) The court's docket judgment cites no opinions.

***Toles v. Bartow* (7th Cir. 02–3287, filed 09/03/2002, judgment 10/09/2003).**

*Appeal from:* Eastern District of Wisconsin.

*What happened:* Habeas corpus appeal dismissed for lack of prosecution.

*Related case:* *Toles v. Bartow* (7th Cir. 02–3286, filed 09/03/2002, judgment 04/25/2003) (habeas corpus appeal dismissed for lack of prosecution).

*Opinion:* (1) The court's docket judgment cites no opinions.

***Wright v. Cotton* (7th Cir. 02–3410, filed 09/17/2002, judgment 12/23/2002).**

*Appeal from:* Southern District of Indiana.

*What happened:* Certificate of appealability denied.

*Opinion:* (1) The court's docket judgment cites no opinions.

***United States v. Turner* (7th Cir. 02–3438, filed 09/19/2002, judgment 12/17/2003).**

*Appeal from:* Northern District of Indiana.

*What happened:* Unsuccessful appeal of a cocaine conviction. The appeal was consolidated with an unsuccessful appeal of a separate cocaine conviction, *United States v. Turner* (7th Cir. 02–3437, filed 09/19/2002, judgment 12/17/2003). For some reason, the defendant's brief only addressed the consolidated appeal.

*Appellant's brief:* The defendant's 3,148-word appellant brief cites 11 published opinions (three by the U.S. Supreme Court, seven by the Seventh Circuit, and one by Indiana's supreme court).

*Appellee's brief:* The government's 3,863-word appellee brief cites 16 published opinions (two by the U.S. Supreme Court, 12 by the Seventh Circuit, one by another circuit, and one by Indiana's supreme court).

*Appellant's reply brief:* The defendant's 1,477-word reply brief cites three published opinions (two by other circuits and one by Indiana's supreme court).

*Opinion:* (2) The court's unpublished 1,089-word order, *United States v. Turner*, 84 Fed. Appx. 670, 2003 WL 23018558 (7th Cir. 2003) (one headnote), cites three published opinions (one by the Seventh Circuit, one by Indiana's supreme court, and one by Indiana's court of appeals). According to Westlaw (03/22/2005), the court's order has not been cited elsewhere.

***Bricklayers Local 21 of Illinois Apprenticeship and Training Program v. Banner Restorations, Inc.* (7th Cir. 02–3512, filed 09/27/2002, judgment 09/22/2004).**

*Appeal from:* Northern District of Illinois.

*What happened:* An employer of bricklayers' unsuccessful appeal of a judgment in favor of a bricklayers' union requiring an audit of the employer's payroll records.

*Appellant's brief:* The employer's 12,100-word appellant brief cites 15 published opinions (two by the U.S. Supreme Court, eight by the Seventh Circuit, four by other circuits, and one by a district in another circuit) and one unpublished opinion by the Northern District of Illinois.

The employer cites or discusses the unpublished district court opinion on eight pages scattered among the 39 pages of its brief. (Pages 4, 7–8, 20–21, 28–30.) The employer urged the court of

appeals to follow the lead of a district court judge in requiring a signed agreement between an employer and a union for the employer to be bound by a collective bargaining agreement.

*Appellee's brief:* The union's 4,816-word appellee brief cites 10 published opinions (five by the Seventh Circuit, four by other circuits, and one by the Northern District of Illinois) and one unpublished opinion by the Northern District of Illinois.

The union's brief cites the same unpublished district court opinion as cited by the employer's brief. The brief first cites it to support the statement that "The critical factors necessary for the determination of whether Section 302 has been complied with are (1) whether there is writing that clearly refers to the collective bargaining agreements and (2) whether the conduct of the Defendants in paying past contributions and liquidated damages evidences an intent to be bound by the collective bargaining despite the lack of a written assent." (Pages 14–15.) Later, the brief devotes nearly two pages to an argument that the unpublished opinion is consistent with the district court's judgment in this case. (Pages 20–22.)

*Appellant's reply brief:* The employer's 5,827-word reply brief cites 13 published opinions (one by the U.S. Supreme Court, eight by the Seventh Circuit, three by another circuit, and one by a district in another circuit) and one unpublished opinion by the Northern District of Illinois.

The employer's reply brief devotes one quarter of one page to a reminder that the same unpublished opinion cited in the other briefs supports the appellant's case. (Page 15.)

*Opinion:* (3) The court's published 5,002-word signed opinion, *Bricklayers Local 21 of Illinois Apprenticeship and Training Program v. Banner Restoration, Inc.*, 385 F.3d 761 (7th Cir. 2004) (12 headnotes), cites 24 published opinions (two by the U.S. Supreme Court, 12 by the Seventh Circuit, and 10 by other circuits). According to Westlaw (03/22/2005), the court's opinion has been cited in three secondary sources. The author of the opinion's published 556-word denial of a motion to recall the mandate pending a petition to the Supreme Court for a writ of certiorari, *Bricklayers Local 21 of Illinois Apprenticeship and Training Program v. Banner Restoration, Inc.*, 384 F.3d 911 (7th Cir. 2004) (Ripple, J., in chambers) (two headnotes), cites eight published opinions (six by the Seventh Circuit, including the main opinion in this case, and two by another circuit). According to Westlaw (03/22/2005), the judge's opinion has been cited in one secondary source.

***United States v. Contreras* (7th Cir. 02–3564, filed 10/01/2002, judgment 06/15/2004).**

*Appeal from:* Northern District of Illinois.

*What happened:* Unsuccessful appeal of a drug conviction consolidated with the government's successful appeal of downward sentencing departure for alien status and a codefendant's unsuccessful appeal.

*Related cases:* Consolidated appeals include *United States v. Macedo* (7th Cir. 02–3563, filed 10/01/2002, judgment 06/15/2004) (codefendant's unsuccessful appeal) and *United States v. Contreras* (7th Cir. 02–3842, filed 10/29/2002, judgment 06/15/2004) (government's successful cross-appeal). An additional related appeal was voluntarily dismissed, *United States v. Macedo* (7th Cir. 02–3843, filed 10/29/2002, judgment 06/24/2003) (government's cross-appeal voluntarily dismissed in codefendant's case).

*Appellant's brief:* The defendant's 2,440-word appellant brief cites eight published opinions (seven by the Seventh Circuit and one by another circuit).

*Appellee's brief:* The government's 9,898-word appellee brief cites 43 published opinions (two by the U.S. Supreme Court, 33 by the Seventh Circuit, and eight by other circuits).

*Appellant's reply brief:* The defendant's 3,660-word reply brief cites 20 published opinions (four by the U.S. Supreme Court, 12 by the Seventh Circuit, and four by other circuits).

*Cross-appellant's reply brief:* The government's 5,137-word reply brief cites 35 published opinions (21 by the U.S. Supreme Court, four by the Seventh Circuit, nine by other circuits, and one by a district in another circuit).

*Opinion:* (3) The court's published 5,669-word signed opinion, *United States v. Macedo*, 371 F.3d 957 (7th Cir. 2004) (nine headnotes), cites 41 published opinions (one by the U.S. Supreme Court, 36 by the Seventh Circuit, and four by other circuits). According to Westlaw (03/22/2005), the court's opinion has been cited in two Seventh Circuit opinions (one published and one unpublished), one unpublished opinion by the Northern District of Illinois, two unpublished opinions by a district in another circuit, one secondary source, and one trial court brief in a Northern District of Illinois case.

***Cubie v. Walls* (7th Cir. 02–3568, filed 10/01/2002, judgment 12/24/2002).**

*Appeal from:* Northern District of Illinois.

*What happened:* Certificate of appealability denied.

*Opinion:* (1) The court's docket judgment cites no opinion.

***Vickeroy v. Wisconsin Department of Transportation* (7th Cir. 02–3591, filed 10/03/2002, judgment 07/31/2003).**

*Appeal from:* Eastern District of Wisconsin.

*What happened:* Unsuccessful pro se appeal of a civil action for damages relating to a traffic accident, dismissed as pursued on unavailable legal theories.

*Appellee's brief:* The 7,995-word appellee brief by the state's department of transportation, which was alleged to have contributed to the accident through faulty traffic signs, cites 70 published opinions (19 by the U.S. Supreme Court, 30 by the Seventh Circuit, four by other circuits, two by a Seventh Circuit district, six by districts in other circuits, six by Wisconsin's supreme court, and three by Wisconsin's court of appeals), a related case filed in state court, and the *Restatement (Second) of Judgments*.

*Appellee's brief:* The 6,813-word appellee brief by the city and county where the accident occurred, which were alleged to have responded to the accident improperly, cites 31 published opinions (three by the U.S. Supreme Court, 15 by the Seventh Circuit, two by other circuits, one by a Seventh Circuit district, five by other districts, four by Wisconsin's supreme court, and one by Wisconsin's court of appeals).

*Appellee's brief:* The 2,629-word appellee brief by the other driver, his employer, the leasor of the vehicle, and the driver's insurance company cites five published opinions (two by the U.S. Supreme Court and three by the Seventh Circuit).

*Opinion:* (2) The court's unpublished 687-word order, *Vickeroy v. Wisconsin Department of Transportation*, 73 Fed. Appx. 172, 2003 WL 21782593 (7th Cir. 2003) (four headnotes), cites three U.S. Supreme Court opinions. According to Westlaw (03/21/2005), the court's order has been cited in one secondary source.

***Taylor v. Geller* (7th Cir. 02–3600, filed 10/04/2002, judgment 01/31/2003).**

*Appeal from:* Northern District of Indiana.

*What happened:* Pro se prisoner appeal dismissed for failure to file a docketing statement.

*Opinion:* (1) The court's docket judgment cites no opinion.

***Pursley v. Briley* (7th Cir. 02–3640, filed 10/09/2002, judgment 01/24/2003).**

*Appeal from:* Northern District of Illinois.

*What happened:* Certificate of appealability denied.

*Opinion:* (1) The court's docket judgment cites no opinions.

***Wolf v. Ellis* (7th Cir. 02–3726, filed 10/21/2002, judgment 01/29/2003).**

*Appeal from:* Western District of Wisconsin.

*What happened:* Pro se civil rights appeal dismissed for lack of jurisdiction.

*Opinion:* (1) The court's docket judgment cites no opinions.

***Montaño v. City of Chicago* (7th Cir. 02–3738, filed 10/21/2002, judgment 07/13/2004).**

*Appeal from:* Northern District of Illinois.

*What happened:* Defendants' successful appeal of the district court's dismissal without prejudice of federal civil rights claims pending resolution of state claims in state court. The court held it was an abuse of discretion to decline jurisdiction over the state claims.

*Related cases:* *Montaño v. City of Chicago* (7th Cir. 01–4284, filed 12/20/2001, judgment 03/20/2002) (interlocutory appeal challenging summary judgment dismissed as premature), *Montaño v. City of Chicago* (7th Cir. 02–1034, filed 01/07/2002, judgment 03/20/2002) (cross-appeal of a stay dismissed as untimely).

*Appellant's brief:* The city's 11,602-word appellant brief cites 41 published opinions (15 by the U.S. Supreme Court, 21 by the Seventh Circuit, one by another circuit, and four by Illinois's appellate court).

*Appellee's brief:* The plaintiffs' 6,306-word appellee brief cites 11 published opinions (two by the U.S. Supreme Court, five by the Seventh Circuit, three by other circuits, and one by the Northern District of Illinois) and an unpublished Seventh Circuit opinion from an earlier phase of this case.

*Appellant's reply brief:* The city's 6,204-word reply brief cites 26 published opinions (eight by the U.S. Supreme Court, 12 by the Seventh Circuit, five by other circuits, and one by Illinois's supreme court).

*Opinion:* (3) The court's published 4,647-word signed opinion, *Montaño v. City of Chicago*, 375 F.3d 593 (7th Cir. 2004) (10 headnotes), cites 47 published opinions (15 by the U.S. Supreme Court, 28 by the Seventh Circuit, and four by other circuits) and an unpublished Seventh Circuit opinion concerning an earlier phase of this case. According to Westlaw (03/22/2005), the court's opinion has been cited in two published Seventh Circuit opinions, two secondary sources, and four trial briefs in four Northern District of Illinois cases.

**Lemus-Rodriguez v. Ashcroft (7th Cir. 02–3908, filed 11/04/2002, judgment 11/26/2003).**

*Appeal from:* Board of Immigration Appeals.

*What happened:* Unsuccessful immigration appeal holding that the firing of a rifle into the air to celebrate the new year is not a cultural purpose.

*Petitioner's brief:* The immigration petitioner's 2,996-word brief cites 16 published opinions (nine by the U.S. Supreme Court, five by the Seventh Circuit, and two by another circuit).

*Respondent's brief:* The government's 3,660-word respondent brief cites 16 published court opinions (five by the U.S. Supreme Court, four by the Seventh Circuit, and seven by other circuits) and one published decision of the Board of Immigration Appeals.

*Petitioner's reply brief:* The immigration petitioner's 2,054-word reply brief cites 16 published court opinions (nine by the Seventh Circuit, five by other circuits, and two by districts in other circuits) and two published decisions of the Board of Immigration Appeals.

*Opinion:* (3) The court's published 1,536-word signed opinion, *Lemus-Rodriguez v. Ashcroft*, 350 F.3d 652 (7th Cir. 2003) (six headnotes), cites 24 published opinions (one by the U.S. Supreme Court, six by the Seventh Circuit, 15 by other circuits, and two by California's court of appeal). According to Westlaw (03/22/2005), the court's opinion has been cited in three published opinions (two by the Seventh Circuit and one by another circuit), three secondary sources, three appellate briefs in three cases in another circuit, and one Northern District of Illinois trial brief.

**Hayes v. Litscher (7th Cir. 02–3983, filed 11/12/2002, judgment 12/02/2002).**

*Appeal from:* Eastern District of Wisconsin.

*What happened:* Pro se petition for writ of mandamus denied.

*Opinion:* (1) The court's docket judgment cites no opinions.

**United States v. Mustapha (7th Cir. 02–4000, filed 11/12/2002, judgment 04/14/2004).**

*Appeal from:* Northern District of Illinois.

*What happened:* Unsuccessful appeal of a conviction for a counterfeit check scheme.

*Related cases:* A codefendant's unsuccessful criminal appeal was consolidated with the selected case, *United States v. George* (7th Cir. 02–2996, filed 08/01/2002, judgment 04/14/2004).

*Appellant's brief:* The defendant's 10,382-word appellant brief cites 16 published opinions (six by the U.S. Supreme Court, eight by the Seventh Circuit, one by a district in another circuit, and one

by the District of Columbia's court of appeals), one depublished opinion by the Eastern District of Pennsylvania, and a case in a district in another circuit discussed by a cited opinion.

The brief cites an opinion by the Eastern District of Pennsylvania that was originally published, but subsequently vacated, withdrawn from the *Federal Supplement*, and replaced by another published opinion, also cited by the brief. The depublished opinion is cited to support the statement, "Mr. Mustapha filed a motion *in limine* to exclude the testimony of FBI fingerprint examiner Smith on January 29, 2000, prior to jury selection and shortly after an Eastern District of Pennsylvania court issued its January 7, 2002, landmark ruling barring fingerprint examiners from presenting evaluation testimony as to their opinion that a particular latent print may be conclusively identified as belonging to a particular person on the grounds that such testimony is unreliable." (Page 13.) The brief cites the depublished opinion extensively in an 8-page discussion of the reliability of fingerprint identification. (Pages 13–20.)

*Appellee's brief:* The government's 11,975-word appellee brief cites 36 published opinions (three by the U.S. Supreme Court, 26 by the Seventh Circuit, five by other circuits, one by the Northern District of Illinois, and one by a district in another circuit).

*Appellant's reply brief:* The defendant's 3,092-word reply brief cites four published opinions (one by the U.S. Supreme Court, two by the Seventh Circuit, one by a Seventh Circuit district) and the same depublished opinion by the Eastern District of Pennsylvania cited in the opening brief.

The reply brief devotes three pages to a discussion of fingerprint reliability, citing the unpublished opinion extensively. (Pages 1–4.)

*Opinion:* (3) The court's published 3,765-word signed opinion, *United States v. George*, 363 F.3d 666 (7th Cir. 2004) (29 headnotes), cites 20 published opinions (five by the U.S. Supreme Court, 12 by the Seventh Circuit, two by other circuits, and one by a district in another circuit) and the depublished opinion by Eastern District of Pennsylvania cited by the appellant. According to Westlaw (03/21/2005), the court's opinion has been cited in one published opinion by the Seventh Circuit, one unpublished opinion by the Northern District of Illinois, one published opinion by Indiana's court of appeals, seven secondary sources, and one trial brief in a Northern District of Illinois case.



**Woodworth v. United States (7th Cir. 02–4016, filed 11/15/2002, judgment 12/06/2002).**

*Appeal from:* Northern District of Indiana.

*What happened:* Permission to file a successive petition for habeas corpus relief denied.

*Opinion:* (1) The court’s docket judgment cites no opinions.

**United States v. Carter (7th Cir. 02–4031, filed 11/19/2002, judgment 04/28/2003).**

*Appeal from:* Central District of Illinois.

*What happened:* Drug crime appeals of three brothers dismissed on a successful consolidated *Anders* motion.

*Related cases:* *United States v. Carter* (7th Cir. 02–3973, filed 11/12/2002, judgment 04/28/2003) and *United States v. Carter* (7th Cir. 02–3977, filed 11/12/2002, judgment 04/28/2003).

*Anders brief:* The appellants’ counsels’ 6,193-word *Anders* brief cites 14 published opinions (four by the U.S. Supreme Court, nine by the Seventh Circuit, and one by another circuit).

*Opinion:* (2) The court’s unpublished 1,427-word order, *United States v. Carter*, 65 Fed. Appx. 559, 2003 WL 21018025 (7th Cir. 2003) (four headnotes), cites 19 published opinions (five by the U.S. Supreme Court, 13 by the Seventh Circuit, and one by another circuit). According to Westlaw (03/22/2005), the court’s order has been cited in one secondary source.

**Gladney v. Davis (7th Cir. 02–4045, filed 11/21/2002, judgment 01/23/2003).**

*Appeal from:* Northern District of Indiana.

*What happened:* Pro se prisoner appeal dismissed for failure to pay the filing fee.

*Opinion:* (1) The court’s docket judgment cites no opinions.

**Rosenthal v. St. John’s Northwestern Military Academy, Inc. (7th Cir. 02–4091, filed 11/27/2002, judgment 04/30/2003).**

*Appeal from:* Northern District of Illinois.

*What happened:* Civil appeal voluntarily dismissed.

*Related case:* *Rosenthal v. St. John’s Northwestern Military Academy, Inc.* (7th Cir. 02–3766, filed 10/23/2002, judgment 12/06/2002) (civil appeal voluntarily dismissed).

*Opinion:* (1) The court’s docket judgment cites no opinions.

**Easley v. Parke (7th Cir. 02–4115, filed 12/02/2002, judgment 03/07/2003).**

*Appeal from:* Southern District of Indiana.

*What happened:* Habeas corpus appeal dismissed for failure to prosecute.

*Opinion:* (1) The court’s docket judgment cites no opinion.

**Martin v. Hanks (7th Cir. 02–4402, filed 12/31/2002, judgment 02/14/2003).**

*Appeal from:* Southern District of Indiana.

*What happened:* Appeal of the denial of habeas corpus relief to a state prisoner dismissed.

*Related case:* *Martin v. Hanks* (7th Cir. 02–4403, filed 12/31/2002, judgment 02/14/2003) (habeas corpus appeal dismissed for lack of jurisdiction).

*Opinion:* (1) The court’s docket judgment cites no opinions.

## 8. Eighth Circuit<sup>99</sup>

Unpublished opinions by the court of appeals for the Eighth Circuit are not precedent; citation to them in unrelated cases is disfavored, but permitted if they “have persuasive value” and there is no published opinion on point.<sup>100</sup>

Of the 50 cases randomly selected, 48 are appeals from district courts (11 from the Eastern District of Missouri; eight from the Eastern District of Arkansas; six from the Western District of Missouri; five each from

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99. Docket sheets and opinions are on PACER. Opinions and most briefs are on the court’s Web and intranet sites. (Of the 27 cases in this sample with counseled briefs, two briefs—one brief each in two cases—are not on the court’s Web and intranet sites.) Opinions and some briefs are on Westlaw. (Of the 27 cases in this sample with counseled briefs, all briefs are on Westlaw for three cases, some briefs are on Westlaw for seven cases, and no briefs are on Westlaw for eight cases.)

100. 8th Cir. L.R. 28A(i) (“Unpublished opinions are decisions which a court designates for unpublished status. They are not precedent and parties generally should not cite them. When relevant to establishing the doctrines of *res judicata*, collateral estoppel, or the law of the case, however, the parties may cite any unpublished opinion. Parties may also cite an unpublished opinion of this court if the opinion has persuasive value on a material issue and no published opinion of this or another court would serve as well.”).

The court adopted a distinction between published and unpublished opinions on January 1, 1973, and originally prohibited citation to its unpublished opinions in unrelated cases. In 1996, the court amended its rules to allow citation to unpublished opinions if they are persuasive and there is no published opinion on point.

the Southern District of Iowa and the District of Nebraska; four from the Western District of Arkansas; and three each from the Northern District of Iowa, the District of Minnesota, and the District of South Dakota,<sup>101</sup> one is an appeal from the United States Tax Court, and one is an appeal from the National Labor Relations Board.<sup>102</sup>

The publication rate in this sample is 34%. Seventeen of the appeals were resolved by published signed opinions (including one with a concurrence and a dissent), 10 were resolved by unpublished per curiam opinions published in the *Federal Appendix*, and 23 were resolved by docket judgments.

Published opinions averaged 2,596 words in length, ranging from 1,521 to 6,149. Unpublished opinions averaged 220 words in length, ranging from 62 to 495. Ten opinions were under 1,000 words in length (37%, all unpublished), and all 10 of these were under 500 words in length.

Twenty of the appeals were fully briefed. In 23 of the appeals no counseled brief was filed, and in seven of the appeals a counseled brief was filed only for one side.

There are citations to unpublished court opinions in 12 of these cases. In four cases the citations are only to opinions in related cases; in eight cases there are citations to unpublished opinions in unrelated cases. All of the citations to unrelated unpublished opinions are in briefs, not opinions.

Four of the unrelated unpublished opinions cited are by the court of appeals for the Eighth Circuit, two are by courts of appeals for other circuits, two are by Eighth Circuit district courts, three are by district courts in other circuits, and five are by the United States Tax Court.

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101. This sample did not include any appeals from the District of North Dakota.

102. In 2002, 3,189 cases were filed in the court of appeals for the Eighth Circuit.

C8-1. The State of Nebraska cited two unpublished opinions by the court of appeals for the Eighth Circuit in its appellee brief in an unsuccessful pro se prisoner appeal, *Brunzo v. Clarke* (8th Cir. 02-2553, filed 06/14/2002, judgment 03/06/2003), resolved by unpublished opinion at 56 Fed. Appx. 753, 2003 WL 873986. Both of these opinions were issued on rehearings following vacations of published opinions cited by the pro se appellant, but the state cited the opinions for their holdings concerning the constitutionality of disciplinary segregation as well as to show the invalidity of the appellant's authorities.

C8-2. In an unsuccessful appeal that challenged sentencing enhancements based on the victim's vulnerability and the fact that the defendant physically restrained the victim during the offense, *United States v. Brings Plenty* (8th Cir. 02-3971, filed 12/06/2002, judgment 07/08/2003), resolved by published opinion at 335 F.3d 732, both parties cited an unpublished opinion by the court of appeals for the Eighth Circuit. The government cited the opinion in its appellee brief to support a statement that "There appears [to be] only one case in this circuit addressing whether physical restraint enhancement applies in an instance in which a perpetrator dragged his victim from room to room in the course of assaulting her. In that case, this Court upheld the imposition of the physical restraint enhancement." The defendant's reply brief devotes more than a page to a discussion of this opinion, factually distinguishing it and also stating that "since *Sazue* decided the issue before it without discussion, analysis, or citation to authority concerning the issue before this Court, it provides no persuasive value. Therefore, the government's citation of the case is inconsistent with Eighth Circuit Local Rule 28A(i)."

C8-3. In an unsuccessful criminal sentence appeal, *United States v. Gammons* (8th Cir. 02-1003, filed 01/02/2002, judgment 10/02/2002), resolved by unpublished opin-

ion at 47 Fed. Appx. 419, 2002 WL 31175539, the government's appellee brief cites an unpublished opinion of the court of appeals for the Eighth Circuit to support its argument that the defendant's sentence was within the sentencing guidelines range.

C8-4. An employee cited several unpublished opinions in both his appellant brief and his reply brief in his successful appeal of the district court's conclusion that his previous discrimination settlement agreement with his employer barred a challenge to denial of disability retirement benefits, *Seman v. FMC Corp. Retirement Plan* (8th Cir. 02-1883, filed 04/09/2002, judgment 07/01/2003), resolved by published opinion at 334 F.3d 728.<sup>103</sup> Two of these opinions are by courts of appeals for other circuits, one is by the Eighth Circuit district court from which the case is appealed, and one is by a district court in another circuit.

Both briefs cite an unpublished opinion from the court of appeals for the Tenth Circuit to support an argument that release of an employer from future actions does not necessarily release the employer's benefit plan. The reply brief also notes that a published district court opinion was reversed in part "on other grounds" by an unpublished opinion by the court of appeals for the Sixth Circuit.

The opening brief also quotes an unpublished opinion by the district court for the Eastern District of Louisiana to support the principle that release of an employer only releases the benefit plan if the plan is unfunded so that an action against the plan is really an action against the employer.

The brief cites an unpublished opinion by the district court for the District of Massachusetts and a published opinion by Minnesota's supreme court to support a statement that "a court is to construe a settlement agreement in a manner that reflects the intent of the parties."

C8-5. In an employer's unsuccessful appeal of a remand to state court of a sexual harassment case, *Lindsey v. Dillard's, Inc.* (8th Cir. 02-1455, filed 02/21/2002, judgment 10/07/2002), resolved by published opinion at 306 F.3d 596, the employer cited an unpublished opinion by the district court for the Western District of Missouri, in both its appellant brief and its reply brief, to support the relevance of the amount of a settlement demand to the amount in controversy for jurisdictional purposes.

C8-6. In an unsuccessful pro se prisoner's habeas corpus appeal, *Gibson v. Reese* (8th Cir. 02-3030, filed 08/09/2002, judgment 02/10/2003), resolved by unpublished opinion at 55 Fed. Appx. 793, 2003 WL 262491, the government's appellee brief includes in a string citation an unpublished opinion by the district court for the Eastern District of Pennsylvania. The issue concerns applying custody credit for parole revocation to the sentence for the crime that violated the terms of parole.

C8-7. In an unsuccessful pro se appeal of the dismissal of an action to enjoin foreclosure on a mortgage, *Young v. United States Department of Housing and Urban Development* (8th Cir. 02-3117, filed 08/23/2002, judgment 10/20/2003), resolved by unpublished opinion at 78 Fed. Appx. 553, 2003 WL 22383010, the Department of Housing and Urban Development's appellee brief includes an unpublished opinion by the district court for the Northern District of Texas in a string citation concerning private rights of action against the department under the Fair Housing Act.

C8-8. The Internal Revenue Service cited five unpublished tax court opinions in its appellee brief in an unsuccessful pro se appeal of a judgment denying a tax deduction for law school expenses by a legal librarian, *Galligan v. Commissioner of Internal Revenue* (8th Cir. 02-3734, filed 11/17/2002, judgment 04/15/2003), resolved by unpublished opinion at 61 Fed. Appx. 314, 2003 WL 1877174.

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103. See on remand, 2004 WL 329237 (D. Minn. 2004).

The IRS's brief cites two unpublished tax court opinions to support a statement that "The Tax Court has also denied deductions to taxpayers who would have been economically disadvantaged by a switch to the career for which they were newly qualified." The brief includes the other three in a string citation supporting a statement that "Courts have thus routinely disallowed deductions for the law school expenses of taxpayers in any number of law-related occupations."

### *Individual Case Analyses*

#### ***United States v. Gammons (8th Cir. 02–1003, filed 01/02/2002, judgment 10/02/2002).***

*Appeal from:* Eastern District of Missouri.

*What happened:* Unsuccessful appeal concerning challenges to a criminal sentence, because the sentencing agreement foreclosed the challenges.

*Anders brief:* The appellant's counsel's 6,602-word *Anders* brief cites 23 published opinions (two by the U.S. Supreme Court, seven by the Eighth Circuit, and 14 by other circuits).

*Appellee's brief:* The government's 3,994-word appellee brief cites 14 published opinions (two by the U.S. Supreme Court and 12 by the Eighth Circuit) and one unpublished Eighth Circuit opinion.

The citation to the unpublished Eighth Circuit opinion, headed by the word "see," supports the statement, "Furthermore, Gammons' sentence of 168 months would have been within the applicable guideline range, even if Gammons had received a three level reduction for acceptance of responsibility." (Pages 21–22.) The government's brief does not acknowledge that the opinion cited is unpublished.

*Opinion:* (2) A court's unpublished 495-word per curiam opinion, *United States v. Gammons*, 47 Fed. Appx. 419, 2002 WL 31175539 (8th Cir. 2002) (no headnotes), cites eight published opinions (two by the U.S. Supreme Court, five by the Eighth Circuit, and one by another circuit). According to Westlaw (02/28/2005), the court's opinion has not been cited elsewhere.

#### ***Loveless v. United States (8th Cir. 02–1128, filed 01/15/2002, judgment 04/03/2002).***

*Appeal from:* District of Nebraska.

*What happened:* Pro se prisoner's petition for permission to file a successive habeas corpus petition denied.

*Opinion:* (1) The court's docket judgment cites no opinions.

#### ***Leach v. Norris (8th Cir. 02–1253, filed 01/29/2002, judgment 02/25/2002).***

*Appeal from:* Western District of Arkansas.

*What happened:* Pro se prisoner's application for certificate of appealability denied.

*Opinion:* (1) The court's docket judgment cites no opinions.

#### ***NLRB v. Wolfe Electric Co. (8th Cir. 02–1382, filed 02/11/2002, judgment 12/24/2002).***

*Appeal from:* National Labor Relations Board.

*What happened:* Successful petition by the NLRB to enforce its order against Wolfe Electric Company requiring that the company cease its refusal to hire union members and requiring the company to offer jobs to nine specific union members whose applications for work the company had refused to consider. The International Brotherhood of Electrical Workers, AFL-CIO, Local 265 intervened in support of the order.

*Respondent's brief:* Wolfe Electric's 7,139-word brief cites 24 published court opinions (seven by the U.S. Supreme Court, six by the Eighth Circuit, and 11 by other circuits), 25 decisions of the National Labor Relations Board (24 published and one unpublished), and one dictionary.

*Intervenor's brief:* The union's 13,617-word brief cites 15 published court opinions (eight by the U.S. Supreme Court and seven by the Eighth Circuit), 37 published decisions of the National Labor Relations Board, and the *Restatement (Second) of Agency*. All of the cited court opinions, except for two U.S. Supreme Court opinions, had the NLRB as a party. One of the published enforcements is cited in its own right. One published enforcement had not yet occurred when the brief was filed.

*Petitioner's brief:* The NLRB's 12,878-word brief cites 46 published court opinions (13 by the U.S. Supreme Court, 22 by the Eighth Circuit, and 11 by other circuits) and 30 published decisions of the National Labor Relations Board. All of the cited court opinions have the NLRB as a party.

*Respondent's reply brief:* Wolfe's 5,081-word reply brief cites 13 published court opinions (five by the U.S. Supreme Court, five by the Eighth Circuit, and three by other circuits), 11 decisions of the National Labor Relations Board (10 published and one unpublished).

*Opinion:* (3) The court's published 1,521-word opinion, *National Labor Relations Board v. Wolfe Electric Co.*, 314 F.3d 325 (8th Cir. 2002) (four headnotes), cites three published Eighth Circuit opinions and three published decisions of the Na-

tional Labor Relations Board in addition to the board's subsequently published decision in this case. According to Westlaw (02/28/2005), the court's opinion has been cited in one published National Labor Relations Board decision, five secondary sources, one U.S. Supreme Court brief, and one appellate brief in an Eighth Circuit case.

***United States v. Stulock* (8th Cir. 02–1401, filed 02/13/2002, judgment 10/25/2002).**

*Appeal from:* Eastern District of Missouri.

*What happened:* Unsuccessful appeal that claimed error in assessing enhancement for use of a computer in connection with the transmission of pornography, for obstruction of justice, and for possession of child pornography depicting violence.

*Appellant's brief:* The defendant's 9,275-word appellant brief cites 14 published opinions (one by the U.S. Supreme Court and 13 by the Eighth Circuit).

*Appellee's brief:* The government's 6,593-word appellee brief cites eight published opinions (one by the U.S. Supreme Court, five by the Eighth Circuit, and two by another circuit).

*Appellant's reply brief:* The defendant's 2,659-word reply brief cites eight published opinions (two by the U.S. Supreme Court, five by the Eighth Circuit, and one by another circuit).

*Opinion:* (3) The court's published 1,645-word opinion, *United States v. Stulock*, 308 F.3d 922 (8th Cir. 2002) (six headnotes), cites five published opinions (three by the Eighth Circuit and two by another circuit). According to Westlaw (02/28/2005), the court's opinion has been cited in two published Eighth Circuit opinions, one published opinion by another circuit, one published opinion by a district in another circuit, one unpublished opinion by a Virginia circuit court, four secondary sources, and seven appellate briefs in six cases (three in the Eighth Circuit and three in other circuits).

***Lindsey v. Dillard's, Inc.* (8th Cir. 02–1455, filed 02/21/2002, judgment 10/07/2002).**

*Appeal from:* Western District of Missouri.

*What happened:* Unsuccessful appeal of the remand of a sexual harassment employment case to state court. Plaintiff dismissed her claim under the Americans with Disabilities Act and the trial court remanded the state claims. The appellate court held that although the district court remanded the case on the erroneous grounds that it lacked jurisdiction over the case, the district court had discretion to decline supplemental jurisdiction over the state claims. The court rejected the employer's

argument that diversity of the parties made jurisdiction mandatory, because the employer did not remove the case until the complaint was amended to add the federal claim, by which time it was too late to remove on diversity grounds.

*Appellant's brief:* The employer's 3,593-word appellant brief cites 25 published opinions (four by the U.S. Supreme Court, 12 by the Eighth Circuit, three by the Western District of Missouri, five by other districts in the Eighth Circuit, and one by Missouri's court of appeals) and one unpublished opinion by the Western District of Missouri.

The unpublished opinion is included in a string of two citations headed by "see also" in an argument concerning the relevance of a settlement demand in determining the amount in controversy. (Page 12.) The other opinion in the string citation is a published opinion by the Eastern District of Missouri.

*Appellee's brief:* The employee's 906-word appellee brief cites three published opinions (one by the Eighth Circuit and two by the Western District of Missouri).

*Appellant's reply brief:* The employer's 1,026-word reply brief cites 11 published opinions (six by the Eighth Circuit, two by the Western District of Missouri, two by other districts in the Eighth Circuit, and one by Missouri's court of appeals) and one unpublished opinion by the Western District of Missouri.

The unpublished opinion cited in the reply brief is the same as the one cited in the opening brief.

*Opinion:* (3) The court's published 1,981-word opinion, *Lindsey v. Dillard's, Inc.*, 306 F.3d 596 (8th Cir. 2002) (five headnotes), cites eight published opinions (three by the U.S. Supreme Court, four by the Eighth Circuit, and one by another circuit). According to Westlaw (02/28/2005), the court's opinion has been cited in two Eighth Circuit opinions (one published and one unpublished), one published opinion by another circuit, seven opinions by Eighth Circuit districts (four published and three unpublished), two opinions by other districts (one published and one unpublished), five secondary sources, four appellate briefs in four Eighth Circuit cases, and three trial court briefs in three cases (one in an Eighth Circuit district and two in other districts).

***Bowman v. Barnhart* (8th Cir. 02–1497, filed 02/26/2002, judgment 11/20/2002).**

*Appeal from:* Eastern District of Arkansas.

*What happened:* Successful appeal of a denial of Social Security disability benefits. The court found

that the administrative law judge erred in discounting the claimant's allegations of disabling pain.

*Appellant's brief:* The claimant's 4,836-word appellant brief cites 19 published opinions (two by the U.S. Supreme Court and 17 by the Eighth Circuit) and two medical reference books.

*Appellee's brief:* The commissioner's 6,767-word appellee brief cites 39 published opinions (one by the U.S. Supreme Court and 38 by the Eighth Circuit), one related case filed in the Eastern District of Arkansas, two Social Security rulings, and two medical reference books.

*Appellant's reply brief:* The claimant's 3,624-word reply brief cites 16 published opinions (12 by the Eighth Circuit and four by other circuits), one Social Security ruling, one dictionary, and one medical reference book.

*Opinion:* (3) The court's published 2,057-word opinion, *Bowman v. Barnhart*, 310 F.3d 1080 (8th Cir. 2002) (11 headnotes), cites seven published Eighth Circuit opinions and one medical reference book. According to Westlaw (02/28/2005), the court's opinion has been cited in six Eighth Circuit opinions (five published and one unpublished), one published opinion by the Eastern District of Arkansas, and three opinions by other Eighth Circuit districts (two published and one unpublished), eight secondary sources, and 13 appellate briefs in 13 cases (10 in the Eighth Circuit and three in other circuits).

***Barnes v. City of St. Louis* (8th Cir. 02–1547, filed 03/01/2002, judgment 03/26/2003).**

*Appeal from:* Eastern District of Missouri.

*What happened:* Plaintiffs' civil appeal voluntarily dismissed.

*Opinion:* (1) The court's docket judgment cites no opinions.

***Gilreath v. State of Missouri* (8th Cir. 02–1750, filed 03/25/2002, judgment 06/04/2002).**

*Appeal from:* Western District of Missouri.

*What happened:* Pro se prisoner's application for certificate of appealability denied.

*Opinion:* (1) The court's docket judgment cites no opinions.

***United States v. Castaneda* (8th Cir. 02–1768, filed 03/26/2002, judgment 10/28/2002).**

*Appeal from:* District of Nebraska.

*What happened:* Criminal appeal challenging a refusal to grant a downward departure held unreviewable.

*Appellant's brief:* The defendant's 1,230-word appellant brief cites four published Eighth Circuit opinions.

*Appellee's brief:* The government's 1,034-word appellee brief cites 10 published Eighth Circuit opinions.

*Opinion:* (2) The court's unpublished 233-word per curiam opinion, *United States v. Castaneda*, 49 Fed. Appx. 92, 2002 WL 31409548 (8th Cir. 2002) (no headnotes), cites three published Eighth Circuit opinions. According to Westlaw (02/28/2005), the court's opinion has been cited in one appellate brief in an Eighth Circuit case.

***Scott v. United States* (8th Cir. 02–1815, filed 04/03/2002, judgment 05/14/2002).**

*Appeal from:* Eastern District of Missouri.

*What happened:* Summary affirmance in a pro se civil appeal.

*Opinion:* (1) The court's docket judgment cites no opinions.

***Seman v. FMC Corp. Retirement Plan* (8th Cir. 02–1883, filed 04/09/2002, judgment 07/01/2003).**

*Appeal from:* District of Minnesota.

*What happened:* Successful appeal by a former employee of the denial of disability retirement benefits under ERISA, with a finding that the employee's release of claims against his employer to settle age and disability discrimination claims did not release his claim for disability retirement benefits.

*Appellant's brief:* The employee's 13,452-word appellant brief cites 30 published opinions (one by the U.S. Supreme Court, 14 by the Eighth Circuit, nine by other circuits, five by districts in other circuits, and one by Minnesota's supreme court) and three unpublished opinions (one by another circuit, one by the District of Minnesota, and one by a district in another circuit).

The brief quotes an unpublished Tenth Circuit opinion to support the principle that release of an employer does not necessarily imply release of the employer's benefit plan. (Pages 24–25.) The brief notes that the Tenth Circuit cited a published district-court opinion by another circuit. The brief adds a string of two "see also" citations—published opinions by another circuit and a district in another circuit.

The brief quotes an unpublished opinion by the Eastern District of Louisiana to support the principle that release of an employer only releases the benefit plan if the plan is unfunded so that an action against the plan is really an action against the employer. (Pages 26–27.)

The brief cites two opinions to support the statement that "a court is to construe a settlement agreement in a manner that reflects the intent of the parties"—an unpublished opinion by the Dis-

tract of Minnesota and a published opinion by Minnesota's supreme court.

*Amicus brief:* A 2,817-word amicus curiae brief by AARP cites 22 published opinions (eight by the U.S. Supreme Court, seven by the Eighth Circuit, and seven by other circuits) and one law review symposium.

*Appellee's brief:* The employer's 9,932-word appellant brief cites 38 published opinions (two by the U.S. Supreme Court, 21 by the Eighth Circuit, five by other circuits, five by the District of Minnesota, four by districts in other circuits, and one by Minnesota's court of appeals).

*Appellant's reply brief:* The employee's 6,945-word reply brief cites 18 published opinions (nine by the Eighth Circuit, five by other circuits, and four by districts in other circuits) and two unpublished opinions by other circuits.

The reply brief cites the same unpublished Tenth Circuit opinion as cited in the opening appellant brief—as part of a string of citations supporting the statement, “If an ERISA plan is a funded plan, a waiver of claims against the employer that sponsors and administers the plan does not release the plan.” (Page 2.) The three other opinions in the string citation are a published opinion by the Fourth Circuit and two published opinions by districts in other circuits, one of which is cited as reversed in part on other grounds in an unpublished Sixth Circuit opinion.

*Opinion:* (3) The court's published 2,531-word opinion, *Seman v. FMC Corp. Retirement Plan*, 334 F.3d 728 (8th Cir. 2003) (seven headnotes), cites eight published Eighth Circuit opinions. According to Westlaw (02/28/2005), the court's opinion has been cited in two published opinions by districts in other circuits, 14 secondary sources, two briefs in one U.S. Supreme Court case, four appellate briefs in three cases (two in the Eighth Circuit and one in another circuit), and 26 trial court briefs in 18 cases (three in Eighth Circuit districts and 15 in other districts).

***Hornaday v. Kemna* (8th Cir. 02–1982, filed 04/18/2002, judgment 07/10/2002).**

*Appeal from:* Eastern District of Missouri.

*What happened:* Pro se state prisoner's application for a certificate of appealability denied.

*Opinion:* (1) The court's docket judgment cites no opinions.

***Berry v. Graves* (8th Cir. 02–2044, filed 04/25/2002, judgment 01/22/2003).**

*Appeal from:* Southern District of Iowa.

*What happened:* Unsuccessful appeal of the denial of habeas corpus relief on ineffective assistance of counsel grounds.

*Appellant's brief:* The petitioner's 3,086-word appellant brief cites 13 published opinions (seven by the U.S. Supreme Court and six by the Eighth Circuit).

*Appellee's brief:* The state attorney general's 3,826-word appellee brief cites 28 published opinions (eight by the U.S. Supreme Court, 10 by the Eighth Circuit, six by other circuits, two by district courts outside the circuit, one by Iowa's supreme court, and one opinion in an earlier phase of this case by Iowa's court of appeals) and one unpublished opinion by Iowa's court of appeals in an earlier phase of this case.

*Opinion:* (2) The court's unpublished 188-word per curiam opinion, *Berry v. Graves*, 55 Fed. Appx. 392, 2003 WL 145636 (8th Cir. 2003) (no headnotes), cites two published Eighth Circuit opinions. According to Westlaw (02/28/2005), the court's opinion has not been cited elsewhere.

***United States v. Mack* (8th Cir. 02–2061, filed 04/29/2002, judgment 09/12/2002).**

*Appeal from:* Eastern District of Missouri.

*What happened:* Pro se prisoner's unsuccessful appeal of a refusal to modify his sentence for car-jacking.

*Appellee's brief:* The government's 1,035-word appellee brief cites no opinions.

*Opinion:* (2) The court's 302-word unpublished per curiam opinion, *United States v. Mack*, 45 Fed. Appx. 559, 2002 WL 31027592 (8th Cir. 2002), cites no opinions. According to Westlaw (03/21/2005), the court's opinion has not been cited elsewhere.

***In re Purdy* (8th Cir. 02–2157, filed 05/09/2002, judgment 05/13/2002).**

*Appeal from:* District of Minnesota.

*What happened:* Pro se petition for writ of mandamus denied.

*Opinion:* (1) The court's docket judgment cites no opinions.

***United States v. Wells* (8th Cir. 02–2233, filed 05/16/2002, judgment 10/17/2003).**

*Appeal from:* District of Nebraska.

*What happened:* Unsuccessful appeal of a conviction for possession of crack cocaine.

*Appellant's brief:* The defendant's 4,252-word appellant brief cites 14 published opinions (four by the U.S. Supreme Court, seven by the Eighth Circuit, and three by another circuit).

*Appellee's brief:* The government's 11,378-word appellee brief cites 20 published opinions (five by

the U.S. Supreme Court, 14 by the Eighth Circuit, and one by another circuit).

*Opinion:* (3) The court's published 3,907-word opinion, *United States v. Wells*, 347 F.3d 280 (8th Cir. 2003) (23 headnotes), cites 23 published opinions (six by the U.S. Supreme Court, 15 by the Eighth Circuit, and two by other circuits). According to Westlaw (02/28/2005), the court's opinion has been cited in six Eighth Circuit opinions (five published and one unpublished), seven secondary sources, and four appellate briefs in four cases (two in the U.S. Supreme Court and two in the Eighth Circuit).

***Butcher v. Norris* (8th Cir. 02–2279, filed 05/21/2002, judgment 07/08/2002).**

*Appeal from:* Western District of Arkansas.

*What happened:* Certificate of appealability denied.

*Opinion:* (1) The court's docket judgment cites no opinions.

***Turner v. Blackburn* (8th Cir. 02–2321, filed 05/23/2002, judgment 08/08/2002).**

*Appeal from:* Western District of Arkansas.

*What happened:* Summary affirmance in a pro se civil appeal.

*Related cases:* *Turner v. United States President* (8th Cir. 02–2318, filed 05/23/2002, judgment 08/08/2002) (summary affirmance in a pro se civil appeal), *Turner v. Phillips* (8th Cir. 02–2320, filed 05/23/2002, judgment 08/08/2002) (same).

*Opinion:* (1) The court's docket judgment cites no opinions.

***Truitt v. United States* (8th Cir. 02–2439, filed 06/05/2002, judgment 08/09/2002).**

*Appeal from:* Western District of Missouri.

*What happened:* Civil appeal dismissed upon joint motion.

*Opinion:* (1) The court's docket judgment cites no opinions.

***Davidson v. Countryman* (8th Cir. 02–2526, filed 06/13/2002, judgment 07/30/2002).**

*Appeal from:* Southern District of Iowa.

*What happened:* Pro se civil appeal dismissed for failure to pay the docketing fees.

*Opinion:* (1) The court's docket judgment cites no opinions.

***Brunzo v. Clarke* (8th Cir. 02–2553, filed 06/14/2002, judgment 03/06/2003).**

*Appeal from:* District of Nebraska.

*What happened:* Unsuccessful pro se state prisoner appeal of a summary judgment. The prisoner

challenged his placement in "administrative confinement" as opposed to "general population."

*Appellee's brief:* The appellees' 5,072-word brief cites 27 published opinions (10 by the U.S. Supreme Court, eight by the Eighth Circuit, and nine by other circuits) and two unpublished Eighth Circuit opinions.

Both of the unpublished opinions cited were on rehearing of vacated published opinions cited by the appellant. The opinions were not cited only to show that the appellant's citations were vacated, but also for their holdings concerning the constitutionality of disciplinary segregation. And one of their holdings was cited before the discussion of appellant's vacated citations: "This Circuit has held that 30 days in disciplinary segregation and approximately 290 days in administrative segregation does not constitute an atypical and significant hardship compared to the burdens of ordinary prison life." (Page 22.)

*Opinion:* (2) The court's unpublished 145-word per curiam opinion, *Brunzo v. Clarke*, 56 Fed. Appx. 753, 2003 WL 873986 (8th Cir. 2003) (no headnotes), cites three published Eighth Circuit opinions. According to Westlaw (02/28/2005), the court's opinion has not been cited elsewhere.

***In re Bey* (8th Cir. 02–2571, filed 06/17/2002, judgment 06/26/2002).**

*Appeal from:* Eastern District of Missouri.

*What happened:* Pro se prisoner's petition for writ of mandamus denied.

*Opinion:* (1) The court's docket judgment cites no opinions.

***United States v. Gillon* (8th Cir. 02–2643, filed 06/24/2002, judgment 10/31/2003).**

*Appeal from:* Northern District of Iowa.

*What happened:* Unsuccessful criminal appeal that challenged the indictment on the ground that it failed to allege drug quantity and a factual basis for enhancement, claimed error in denial of a motion to suppress drugs found in the defendant's vehicle, and claimed ineffective assistance of counsel.

*Related case:* *United States v. Gillon* (8th Cir. 01–1461, filed 02/23/2001, judgment 04/16/2001) (appeal of the denial of a motion to suppress dismissed as premature).

*Appellant's brief:* The defendant's 6,345-word appellant brief cites 20 published opinions (two by the U.S. Supreme Court, eight by the Eighth Circuit, eight by other circuits, and two by Iowa's supreme court).

*Appellee's brief:* The government's 8,105-word appellee brief cites 53 published opinions (10 by



the U.S. Supreme Court, 39 by the Eighth Circuit, and four by other circuits) and two unpublished judgments from an earlier appeal in this case.

*Appellant's reply brief:* The defendant's 6,877-word reply brief cites 44 published opinions (six by the U.S. Supreme Court, 23 by the Eighth Circuit, 13 by other circuits, one by New York's appellate division, and one by North Carolina's court of appeals).

*Opinion:* (3) The court's published 2,543-word opinion, *United States v. Gillon*, 348 F.3d 755 (8th Cir. 2003) (14 headnotes), cites 19 published opinions (six by the U.S. Supreme Court and 13 by the Eighth Circuit). According to Westlaw (02/28/2005), the court's opinion has been cited in four published Eighth Circuit opinions, one published opinion by another circuit, five secondary sources, and four appellate briefs in four Eighth Circuit cases.

***Akins v. Arkansas Department of Correction* (8th Cir. 02–2645, filed 06/24/2002, judgment 08/20/2002).**

*Appeal from:* Eastern District of Arkansas.

*What happened:* Pro se prisoner appeal dismissed for failure to pay the filing fees.

*Opinion:* (1) The court's docket judgment cites no opinions.

***Avant v. Department of Agriculture* (8th Cir. 02–2723, filed 06/28/2002, judgment 09/30/2002).**

*Appeal from:* Western District of Missouri.

*What happened:* Pro se civil appeal dismissed for failure to file a brief.

*Opinion:* (1) The court's docket judgment cites no opinions.

***Wesley v. Norris* (8th Cir. 02–2852, filed 07/19/2002, judgment 10/17/2002).**

*Appeal from:* Western District of Arkansas.

*What happened:* Pro se state prisoner's petition for permission to file a successive habeas corpus petition denied.

*Opinion:* (1) The court's docket judgment cites no opinions.

***Inge v. Luebbers* (8th Cir. 02–2951, filed 08/01/2002, judgment 08/28/2002).**

*Appeal from:* Eastern District of Missouri.

*What happened:* Pro se prisoner's petition for permission to file a successive habeas corpus petition denied.

*Opinion:* (1) The court's docket judgment cites no opinions.

***Ewing v. Dormire* (8th Cir. 02–2959, filed 08/01/2002, judgment 09/16/2002).**

*Appeal from:* Western District of Missouri.

*What happened:* Pro se prisoner's application for certificate of appealability denied.

*Opinion:* (1) The court's docket judgment cites no opinions.

***Eanes v. Bowersox* (8th Cir. 02–2984, filed 08/05/2002, judgment 10/22/2002).**

*Appeal from:* Eastern District of Missouri.

*What happened:* Certificate of appealability denied.

*Opinion:* (1) The court's docket judgment cites no opinions.

***United States v. McIntosh* (8th Cir. 02–3014, filed 08/08/2002, judgment 08/20/2002).**

*Appeal from:* Eastern District of Arkansas.

*What happened:* Unsuccessful pro se criminal appeal concerning presentence guidelines.

*Opinion:* (1) The court's docket judgment cites no opinions.

***Gibson v. Reese* (8th Cir. 02–3030, filed 08/09/2002, judgment 02/10/2003).**

*Appeal from:* District of Minnesota.

*What happened:* Pro se prisoner's unsuccessful appeal of the denial of habeas corpus relief for failure to credit time served for parole revocation in the sentence for the crime that violated the terms of parole.

*Appellee's brief:* The government's 3,231-word appellee brief cites seven published opinions (one by the U.S. Supreme Court, four by the Eighth Circuit, one by another circuit, and one by a district in another circuit) and one unpublished opinion by a district in another circuit.

The unpublished opinion cited is by the Eastern District of Pennsylvania. It appears second in a two-cite string citation headed by "see" following a Supreme Court citation. The first citation in the string is a published Eighth Circuit opinion. The parenthetical for the unpublished citation reads, "section 3585(b) precluded a federal prisoner from receiving prior custody credit on current sentence for time already credited against parole violation sentence." (Page 10.)

*Opinion:* (2) The court's unpublished 294-word per curiam opinion, *Gibson v. Reese*, 55 Fed. Appx. 793, 2003 WL 262491 (8th Cir. 2003) (no headnotes), cites two published opinions (one by the U.S. Supreme Court and one by the Eighth Circuit). According to Westlaw (02/28/2005), the court's opinion has not been cited elsewhere.

***Young v. United States Department of Housing and Urban Development* (8th Cir. 02–3117, filed 08/23/2002, judgment 10/20/2003).**

*Appeal from:* Eastern District of Arkansas.

*What happened:* Unsuccessful pro se appeal of the dismissal of an action to enjoin foreclosure on a mortgage. The Youngs received a HUD loan to remodel their home, but failed to make payments for 12 years. Ocwen Federal Bank, who bought the loan from HUD, sought foreclosure in Arkansas state court. The Youngs claimed that a shower broke because of faulty workmanship by a HUD contractor and their debt should therefore be offset.

*Related case:* An earlier attempted interlocutory appeal, *Young v. Department of Housing and Urban Development* (8th Cir. 01–3046, filed 08/28/2001, judgment 09/04/2001), was dismissed for lack of an appealable order.

*Appellee's brief:* HUD's 1,858-word appellee brief cites 20 published opinions (three by the U.S. Supreme Court, one by the Eighth Circuit, nine by other circuits, one by the Eastern District of Arkansas, and six by districts outside the Eighth Circuit) and one unpublished opinion by a district in another circuit.

The unpublished opinion is a 1984 opinion by the Northern District of Texas listed as the first of four citations in a "see also" string citation following citation to a published opinion supporting the principle that "the Fair Housing Act did not provide for a private right of action against HUD, whose actions could only be challenged, if at all, under the APA." (Page 5.)

*Appellee's brief:* Ocwen Bank's 3,348-word appellee brief cites 10 published opinions (four by the Eighth Circuit, five by other circuits, and one by a district outside the Eighth Circuit).

*Appellee's brief:* Appellees also included Ocwen's attorneys in the foreclosure action against the Youngs. Their 2,724-word brief cites six published opinions (one by the U.S. Supreme Court, one by the Eighth Circuit, two by other circuits, and two by Arkansas's supreme court). In addition, the brief cites a previous attempted interlocutory appeal by appellants in this case.

*Opinion:* (2) The court's unpublished 149-word per curiam opinion, *Young v. United States Department of Housing and Urban Development*, 78 Fed. Appx. 553, 2003 WL 22383010 (8th Cir. 2003) (no headnotes), cites one published opinion by the Fifth Circuit. According to Westlaw (03/02/2005), the court's opinion has not been cited elsewhere.

***United States v. Big Crow* (8th Cir. 02–3142, filed 08/28/2002, judgment 11/12/2002).**

*Appeal from:* District of South Dakota.

*What happened:* The government voluntarily dismissed its appeal of a criminal sentence while the defendant's appeal of the conviction was pending. The court ultimately decided that occupation of tribal property without paying rent does not constitute theft.

*Related case:* *United States v. Big Crow* (8th Cir. 02–2917, filed 07/29/2002, judgment 05/05/2003) (conviction reversed).

*Opinion:* (1) The court's docket judgment cites no opinions.

***United States v. Brown* (8th Cir. 02–3317, filed 09/18/2002, judgment 06/11/2003).**

*Appeal from:* Eastern District of Arkansas.

*What happened:* Unsuccessful appeal of the district court's refusal to accept the defendant's guilty plea.

*Related case:* *United States v. Pennicot* (8th Cir. 02–3895, filed 11/26/2002, judgment 06/11/2003) (unsuccessful appeal by codefendant).

*Appellant's brief:* The defendant's 1,585-word appellant brief cites eight published opinions (two by the U.S. Supreme Court, four by the Eighth Circuit, and two by other circuits).

*Appellee's brief:* The government's 10,047-word appellee brief cites 18 published opinions (three by the U.S. Supreme Court and 15 by the Eighth Circuit).

*Opinion:* (3) The court's published 1,844-word opinion, *United States v. Brown*, 331 F.3d 591 (8th Cir. 2003) (seven headnotes), cites nine published opinions (one by the U.S. Supreme Court, seven by the Eighth Circuit, and one by another circuit) and one treatise. According to Westlaw (02/28/2005), the court's opinion has been cited in one published Eighth Circuit opinion, one unpublished opinion by an Eighth Circuit district, three secondary sources, and two appellate briefs in two Eighth Circuit cases.

***Holmes v. Chao* (8th Cir. 02–3335, filed 09/19/2002, judgment 04/25/2003).**

*Appeal from:* Eastern District of Missouri.

*What happened:* Unsuccessful pro se appeal of a holding that the district court lacked jurisdiction to review denial of federal workers' compensation benefits.

*Appellee's brief:* The Secretary of Labor's 4,994-word appellee brief cites 30 published opinions (nine by the U.S. Supreme Court, 13 by the Eighth Circuit, and eight by other circuits).

One Eighth Circuit opinion cited was decided two months before the Secretary filed her brief, and it originally was designated not for publication. But the brief states that two weeks before the brief was filed it was ordered published. Originally published in the *Federal Appendix*, it now is also in the *Federal Reporter*. The Westlaw record does not show how the opinion came to be published. Both citations to this opinion in the brief are in string citations including one other published Eighth Circuit opinion supporting the proposition that denials of federal workers' compensation benefits can be judicially reviewed only in substantial, cognizable constitutional challenges.

*Opinion:* (2) The court's 75-word unpublished per curiam opinion, *Holmes v. Chao*, 61 Fed. Appx. 994, 2003 WL 1980369 (8th Cir. 2003) (no headnotes), cites one published Eighth Circuit opinion, the opinion cited by the Secretary that originally was not designated for publication but later ordered published. According to Westlaw (02/28/2005), the index opinion has not been cited elsewhere.

***Eckford v. Arkansas* (8th Cir. 02–3376, filed 09/26/2002, judgment 12/12/2002).**

*Appeal from:* Eastern District of Arkansas.

*What happened:* Summary affirmance in a pro se civil appeal.

*Opinion:* (1) The court's docket judgment cites no opinions.

***United States v. Gibson* (8th Cir. 02–3397, filed 09/27/2002, judgment 03/10/2003).**

*Appeal from:* Southern District of Iowa.

*What happened:* Unsuccessful appeal of a criminal sentence based on the quantity of methamphetamine distributed.

*Anders brief:* The appellant's counsel's 1,033-word *Anders* brief cites five published opinions (one by the U.S. Supreme Court and four by the Eighth Circuit).

*Opinion:* (2) The court's unpublished 254-word per curiam opinion, *United States v. Gibson*, 57 Fed. Appx. 717, 2003 WL 1193737 (8th Cir. 2003) (no headnotes), cites three published opinions (one by the U.S. Supreme Court and two by the Eighth Circuit). According to Westlaw (02/28/2005), the court's opinion has not been cited elsewhere.

***Hensley v. Barnhart* (8th Cir. 02–3512, filed 10/15/2002, judgment 12/09/2003).**

*Appeal from:* Eastern District of Arkansas.

*What happened:* Initially a successful appeal of the denial of disability benefits, on rehearing the

court ruled in favor of the commissioner and affirmed the district court's denial of benefits.

*Appellant's brief:* The claimant's 8,823-word appellant brief cites 29 published opinions (two by the U.S. Supreme Court and 27 by the Eighth Circuit), two Social Security rulings, and a medical reference book.

*Appellee's brief:* The commissioner's 9,524-word appellee brief cites 50 published opinions (three by the U.S. Supreme Court, 46 by the Eighth Circuit, and one by the Eastern District of Arkansas), one Social Security ruling, and four medical and occupational reference books.

*Appellant's reply brief:* The plaintiff's 3,253-word reply brief cites 11 published opinions (nine by the Eighth Circuit and two by another circuit), one Social Security ruling, and a medical reference book.

*Opinion:* (3) The court's original published 1,807-word opinion, *Hensley v. Barnhart*, 334 F.3d 768 (8th Cir. 2003) (three headnotes), cites seven published Eighth Circuit opinions. According to Westlaw (02/28/2005), the court's opinion has been cited in one unpublished Eighth Circuit opinion, three published opinions by an Eighth Circuit district, and one secondary source.

The court's published 1,468-word opinion on rehearing, *Hensley v. Barnhart*, 352 F.3d 353 (8th Cir. 2003) (seven headnotes), cites 10 published opinions (one by the U.S. Supreme Court and nine by the Eighth Circuit). According to Westlaw (02/28/2005), the court's opinion has been cited in eight published Eighth Circuit opinions, 15 unpublished opinions by an Eighth Circuit district, seven secondary sources, and four appellate briefs in three Eighth Circuit cases.

***Hernandez v. Tarrell* (8th Cir. 02–3520, filed 10/15/2002, judgment 08/21/2003).**

*Appeal from:* District of South Dakota.

*What happened:* Successful appeal by a sheriff of the denial of qualified immunity in a suit for wrongful death arising from a high-speed chase.

*Related case:* *Hernandez v. Jarman* (8th Cir. 02–3519, filed 10/15/2002, judgment 08/21/2003) (successful appeal by a codefendant chief of police of the denial of qualified immunity).

*Appellant's brief:* The sheriff's 6,123-word appellant brief cites 26 published opinions (four by the U.S. Supreme Court, 16 by the Eighth Circuit, five by other circuits, and one by a district in another circuit).

*Appellee's brief:* The plaintiff's 7,429-word appellee brief cites 22 published opinions (seven by the U.S. Supreme Court, 11 by the Eighth Circuit, and four by other circuits).

*Appellant's reply brief:* The sheriff's 4,373-word reply brief cites 36 published opinions (10 by the U.S. Supreme Court, 18 by the Eighth Circuit, seven by other circuits, and one by a district in another circuit).

*Opinion:* (3) The court's published 2,620-word opinion, *Hernandez v. Jarman*, 340 F.3d 617 (8th Cir. 2003) (14 headnotes), cites 11 published opinions (five by the U.S. Supreme Court and six by the Eighth Circuit). According to Westlaw (02/28/2005), the court's opinion has been cited in two opinions by another circuit (one published and one unpublished), four unpublished opinions by Eighth Circuit districts, one published opinion by another district, five secondary sources, and four appellate briefs in three cases (two in the Eighth Circuit and one in another circuit).

***In re Souders* (8th Cir. 02-3649, filed 10/30/2002, judgment 01/02/2003).**

*Appeal from:* Eastern District of Missouri.

*What happened:* Pro se prisoner's petition for writ of mandamus denied.

*Opinion:* (1) The court's docket judgment cites no opinions.

***Galligan v. Commissioner of Internal Revenue* (8th Cir. 02-3734, filed 11/17/2002, judgment 04/15/2003).**

*Appeal from:* United States Tax Court.

*What happened:* Unsuccessful pro se appeal of a judgment denying a tax deduction for law school expenses by a legal librarian, *Galligan v. Commissioner of Internal Revenue*, T.C. Memo. 2002-150, 83 T.C.M. (CCH) 1859, 2002 WL 1300002. In a brief unpublished opinion, the appellate court affirmed the tax court "for the reasons explained by the tax court."

*Appellee's brief:* The government's 5,465-word brief cites 12 published court opinions (two by the Eighth Circuit, two by other circuits, one by an Eighth Circuit district, and seven by the tax court); six unpublished tax court opinions, including the tax court's opinion in this case; two published revenue rulings; and one private letter ruling.

Two unpublished tax court opinions are cited as the support for a statement that "The Tax Court has also denied deductions to taxpayers who would have been economically disadvantaged by a switch to the career for which they were newly qualified." (Page 16.) Three unpublished tax court opinions were cited in a string citation led by a citation to a published tax court opinion, supporting a statement that "Courts have thus routinely disallowed deductions for the law school ex-

penses of taxpayers in any number of law-related occupations." (Page 21.) The private letter ruling was first cited by the taxpayers and is cited by the government in a footnote to distinguish the facts in that case and to remind the court that "private letter rulings may not be used or cited as precedent." (Page 20, note 9.)

*Opinion:* (2) The court's unpublished 62-word per curiam opinion, *Galligan v. Commissioner of Internal Revenue*, 61 Fed. Appx. 314, 2003 WL 1877174 (8th Cir. 2003) (no headnotes), cites no opinions. According to Westlaw (03/02/2005), the affirmance was noted in the *Federal Tax Coordinator* in four citations to the tax court's decision.

***Evergreen Investments, LLC v. FCL Graphics, Inc.* (8th Cir. 02-3762, filed 11/12/2002, judgment 07/02/2003).**

*Appeal from:* Western District of Missouri.

*What happened:* Unsuccessful appeal of a summary judgment decision that a letter of intent did not constitute a binding agreement to sell a corporation. The courts and parties agreed that Illinois law governed the action.

*Appellant's brief:* The plaintiff's 8,845-word appellant brief cites 31 published opinions (two by the Eighth Circuit, 10 by other circuits, six by district courts outside the circuit, six by Illinois's supreme court, six by Illinois's appellate courts, and one by a Texas appellate court), two unpublished orders by the district court in this case, and one treatise.

*Appellee's brief:* The defendant's 4,315-word appellee brief cites 23 published opinions (one by the U.S. Supreme Court, two by the Eighth Circuit, four by another circuit, five by Illinois's supreme court, and 11 by Illinois's appellate courts) and one treatise.

*Appellant's reply brief:* The plaintiff's 4,664-word reply brief cites 28 published opinions (seven by another circuit, four by districts in other circuits, three by Illinois's supreme court, and 14 by Illinois's appellate courts) and two dictionaries.

*Opinion:* (3) The court's published 3,212-word opinion, *Evergreen Investments, LLC v. FCL Graphics, Inc.*, 334 F.3d 750 (8th Cir. 2003) (12 headnotes), cites 23 published opinions (one by the U.S. Supreme Court, nine by the Eighth Circuit, six by another circuit, two by Illinois's supreme court, and five by Illinois's appellate courts). According to Westlaw (02/28/2005), the court's opinion has been cited in eight published Eighth Circuit opinions, three published opinions by an Eighth Circuit bankruptcy court, three secondary sources, three appellate briefs in three Eighth Cir-

cuit cases, and one trial court brief in an Eighth Circuit district.

***United States v. Aguilar-Portillo* (8th Cir. 02–3817, filed 11/18/2002, judgment 07/01/2003).**

*Appeal from:* Northern District of Iowa.

*What happened:* Unsuccessful criminal appeal of a drug conviction consolidated with a partially successful cross-appeal by the government. The court reversed a downward departure for cultural assimilation.

*Related case:* *United States v. Aguilar-Portillo* (8th Cir. 02–4093, filed 12/19/2002, judgment 07/01/2003) (government’s cross-appeal).

*Appellant’s brief:* The defendant’s 2,904-word appellant brief cites nine published opinions (seven by the Eighth Circuit, one by another circuit, and one by the Northern District of Iowa).

*Cross-appellant’s brief:* The government’s 9,361-word cross-appellant and appellee brief cites 49 published opinions (three by the U.S. Supreme Court, 37 by the Eighth Circuit, eight by other circuits, and one by a district in another circuit).

*Appellant’s reply brief:* The defendant’s 3,651-word reply brief cites nine published opinions (two by the U.S. Supreme Court, four by the Eighth Circuit, and three by other circuits).

*Cross-appellant’s reply brief:* The government’s 1,098-word reply brief cites seven published opinions (one by the U.S. Supreme Court, three by the Eighth Circuit, and three by other circuits).

*Opinion:* (3) The court’s published 1,998-word opinion, *United States v. Aguilar-Portillo*, 334 F.3d 744 (8th Cir. 2003) (16 headnotes), cites 18 published opinions (two by the U.S. Supreme Court, 14 by the Eighth Circuit, and two by other circuits). According to Westlaw (02/28/2005), the court’s opinion has been cited in 10 Eighth Circuit opinions (six published and four unpublished), three published opinions by another circuit, one published opinion by a district in another circuit, six secondary sources, and 17 appellate briefs in 17 cases (13 in the Eighth Circuit and four in another circuit).

***United States v. Brings Plenty* (8th Cir. 02–3971, filed 12/06/2002, judgment 07/08/2003).**

*Appeal from:* District of South Dakota.

*What happened:* Unsuccessful appeal that challenged sentencing enhancements based on the victim’s vulnerability and the fact that the defendant physically restrained the victim during the offense.

*Appellant’s brief:* The defendant’s 3,851-word appellant brief cites 27 published opinions (one by the U.S. Supreme Court, seven by the Eighth Cir-

cuit, 16 by other circuits, and three by South Dakota’s supreme court) and *Black’s Law Dictionary*.

*Appellee’s brief:* The government’s 2,942-word appellee brief cites 14 published opinions (eight by the Eighth Circuit and six by other circuits) and one unpublished Eighth Circuit opinion.

The unpublished opinion is cited to support the statement, “There appears [to be] only one case in this circuit addressing whether physical restraint enhancement applies in an instance in which a perpetrator dragged his victim from room to room in the course of assaulting her. In that case, this Court upheld the imposition of the physical restraint enhancement.” (Page 11.)

*Appellant’s reply brief:* The defendant’s 2,531-word reply brief cites 11 published opinions (six by the Eighth Circuit and five by other circuits) and one unpublished Eighth Circuit opinion.

The defendant’s reply brief devotes more than a page to a discussion of the unpublished Eighth Circuit opinion cited by the government. The reply brief states: “since *Sazue* decided the issue before it without discussion, analysis, or citation to authority concerning the issue before this Court, it provides no persuasive value. Therefore, the government’s citation of the case is inconsistent with Eighth Circuit Local Rule 28A(i).” (Page 10.) The brief then factually distinguishes the unpublished opinion.

*Opinion:* (3) The court’s published 1,947-word opinion, *United States v. Plenty*, 335 F.3d 732 (8th Cir. 2003) (four headnotes), cites 11 published opinions (one by the U.S. Supreme Court, six by the Eighth Circuit, three by other circuits, and one by South Dakota’s supreme court) and *Black’s Law Dictionary*. According to Westlaw (02/28/2005), the court’s opinion has been cited in one published Eighth Circuit opinion, one published opinion by another circuit, and three secondary sources.

***Bentley v. Harmon* (8th Cir. 02–4038, filed 12/16/2002, judgment 04/09/2003).**

*Appeal from:* Eastern District of Arkansas.

*What happened:* Summary affirmance in a pro se state prisoner’s appeal.

*Opinion:* (1) The court’s docket judgment cites no opinions.

***United States v. Rowland*, (8th Cir. 02–4108, filed 12/23/2002, judgment 09/03/2003).**

*Appeal from:* Southern District of Iowa.

*What happened:* Unsuccessful appeal of a conviction for possession of a firearm by a felon upon a guilty plea following a denied motion to suppress search of a vehicle.

*Appellant's brief:* The defendant's 3,206-word appellant brief cites 10 published opinions (two by the U.S. Supreme Court and eight by the Eighth Circuit).

*Appellee's brief:* The government's 2,706-word appellee brief cites 14 published opinions (three by the U.S. Supreme Court, eight by the Eighth Circuit, and three by other circuits).

*Appellant's reply brief:* The defendant's 648-word reply brief cites two published Eighth Circuit opinions.

*Opinion:* (3) The court's published 4,707-word opinion, *United States v. Rowland*, 341 F.3d 774 (8th Cir. 2003) (22 headnotes), cites 26 published opinions (seven by the U.S. Supreme Court, 15 by the Eighth Circuit, three by other circuits, and one by the Southern District of Iowa) and the unpublished district court opinion in this case. According to Westlaw (02/28/2005), the court's opinion has been cited in three Eighth Circuit opinions (two published and one unpublished), four opinions by Eighth Circuit districts (one published and three unpublished) one published opinion by Ohio's court of appeals, four secondary sources, and one appellate brief in one Eighth Circuit case.

***United States v. Collins* (8th Cir. 02–4131, filed 12/26/2002, judgment 11/21/2003).**

*Appeal from:* Southern District of Iowa.

*What happened:* Successful criminal appeal. The defendant was a police officer who had returned money and guns seized from a drug user who became an informant after the seizure. One condition of his status as an informant was that he not use illegal drugs. After his cover had been blown and he could no longer work as an informant, he requested return of his seized property. The police officer returned the guns and some of the money seized, keeping the rest for the department. The police officer was convicted of disposing of firearms to an unlawful user of controlled substances. The defendant argued on appeal that the jury instruction requiring the government "to prove that at the time the firearms were returned, the Defendant knew or had reasonable cause to believe there was a risk that Mr. Chepanonis would unlawfully use a controlled substance while in possession of the firearms" failed to require proof that the Mr. Chepanonis was a user of controlled substances. The defendant also appealed an upward sentencing departure and failure to grant a downward departure. The government cross-appealed a downward departure, *United States v. Collins* (8th Cir. 03–1239, filed 01/27/2003, judgment 11/21/2003). The court of appeals held that the conviction should be re-

versed because the trial judge constructively amended the indictment by broadening the scope of the relevant statute considerably when the judge instructed the jury that an unlawful user of a controlled substance included someone with a risk of unlawful use. Because the court reversed the conviction, it did not address the sentencing issues.

*Appellant's brief:* The defendant's 10,523-word appellant brief cites 30 published opinions (three by the U.S. Supreme Court, 22 by the Eighth Circuit, and five by other circuits).

*Appellee's brief:* The government's 9,686-word appellee and cross-appellant brief cites 41 published opinions (five by the U.S. Supreme Court, 26 by the Eighth Circuit, nine by other circuits, and one by an Eighth Circuit district).

*Appellant's reply brief:* The defendant's 3,360-word reply brief cites nine published opinions (one by the U.S. Supreme Court, six by the Eighth Circuit, and two by other circuits).

*Cross-appellant's reply brief:* The government's 1,416-word reply brief cites 15 published opinions (eight by the U.S. Supreme Court, six by the Eighth Circuit, and one by another circuit).

*Opinion:* (3) The court's published 1,941-word opinion, *United States v. Collins*, 350 F.3d 773 (8th Cir. 2003) (three headnotes), cites six published Eighth Circuit opinions. According to Westlaw (02/28/2005), the court's opinion has been cited in one unpublished opinion by an Eighth Circuit district, one published opinion by North Carolina's court of appeals, and three secondary sources.

***Doe v. Nelson* (8th Cir. 02–4135, filed 12/27/2002, judgment 08/20/2003).**

*Appeal from:* District of Nebraska.

*What happened:* Unsuccessful appeal of the dismissal of a complaint challenging a school board member's leading the audience in prayer at a public school graduation.

*Appellant's brief:* The student's 13,569-word appellant brief cites 42 published opinions (26 by the U.S. Supreme Court, 10 by the Eighth Circuit, two by other circuits, three by Eighth Circuit districts, and one by Nebraska's supreme court) and the Bible.

*Amicus brief:* A 3,778-word amicus curiae brief by the Anti-Defamation League cites 23 published opinions (18 by the U.S. Supreme Court, three by other circuits, one by an Eighth Circuit district, and one by Nebraska's supreme court).

*Appellee's brief:* The school board member's 4,322-word appellee brief cites 18 published opinions (11 by the U.S. Supreme Court, four by the

Eighth Circuit, two by other circuits, and one by the District of Nebraska).

*Appellee's brief:* The school district's 13,811-word appellee brief cites 63 published opinions (12 by the U.S. Supreme Court, 35 by the Eighth Circuit, nine by other circuits, three by districts in other circuits, two by Nebraska's supreme court, and two by Nebraska's court of appeals).

*Appellant's reply brief:* The student's 4,719-word reply brief cites 23 published opinions (eight by the U.S. Supreme Court, four by the Eighth Circuit, two by other circuits, three by Eighth Circuit districts, one by a district in another circuit, two by Nebraska's supreme court, one by Oregon's supreme court, one by Oregon's court of appeals, and one by California's court of appeal).

*Opinion:* (3) The court's published 6,149-word opinion, concurrence, and dissent, *Doe v. School District of the City of Norfolk*, 340 F.3d 605 (8th Cir. 2003) (11 headnotes), cites 38 published opinions (16 by the U.S. Supreme Court, 11 by the Eighth Circuit, eight by other circuits, one by the District of Nebraska, and two by Nebraska's supreme court). According to Westlaw (02/28/2005), the court's opinion has been cited in five Eighth Circuit opinions (three published and two unpublished), one published opinion by an Eighth Circuit district, nine secondary sources, five appellate briefs in three Eighth Circuit cases, and four trial court briefs in four cases (three in the District of Nebraska and one in another Eighth Circuit district).

***Cisar v. Home Depot U.S.A., Inc. (8th Cir. 02-4148, filed 12/30/2002, judgment 12/08/2003).***

*Appeal from:* Northern District of Iowa.

*What happened:* Unsuccessful appeal of a jury verdict in favor of the defendant on product liability negligence claim.

*Related case:* *Cisar v. Home Depot U.S.A., Inc.* (8th Cir. 03-1097, filed 01/10/2003, judgment 12/08/2003) (defendant's cross-appeal mooted by plaintiffs' unsuccessful appeal).

*Appellant's brief:* The plaintiffs' 4,136-word appellant brief cites 11 published opinions (nine by the Eighth Circuit, one by another circuit, and one by Iowa's supreme court) and the *Restatement (Third) of Torts*.

*Appellee's brief:* The defendant's 5,612-word appellee and cross-appellant brief cites 17 published opinions (nine by the Eighth Circuit and eight by Iowa's supreme court).

*Appellant's reply brief:* The plaintiffs' 2,162-word reply brief cites 12 published opinions (eight by the Eighth Circuit, one by another circuit, and three by Iowa's supreme court).

*Cross-appellant's reply brief:* The defendant's 843-word reply brief cites four published opinions (two by the Eighth Circuit and two by Iowa's supreme court).

*Opinion:* (3) The court's published 1,715-word opinion, *Cisar v. Home Depot U.S.A., Inc.*, 351 F.3d 800 (8th Cir. 2003) (five headnotes), cites two published Eighth Circuit opinions. According to Westlaw (02/28/2005), the court's opinion has not been cited elsewhere.

## 9. Ninth Circuit<sup>104</sup>

The court of appeals for the Ninth Circuit does not permit citation to its unpublished opinions in unrelated cases.<sup>105</sup>

Of the 50 cases randomly selected, 36 are appeals from district courts (10 from the Central District of California; six from the Southern District of California; four from the District of Arizona; three each from the Eastern District of California, the Northern District of California, the District of Nevada, and the Western District of Washington; two from the District of Idaho; and one each from the District of Alaska and the District of Montana)<sup>106</sup>

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104. Docket sheets are on PACER. Published opinions are on the court's website and intranet site, and on Westlaw. Unpublished memorandum dispositions are on Westlaw and some are also on the court's intranet site. (Of the 12 cases in this sample resolved by unpublished memorandum dispositions, the memoranda are on the court's intranet site for four cases.) For cases resolved by published opinions or unpublished memorandum dispositions, most briefs are on Westlaw. (Of the 14 cases in this sample with counseled briefs resolved by opinion or memorandum disposition, all briefs are on Westlaw for 10 cases and some briefs are on Westlaw for two cases.)

105. 9th Cir. L.R. 36-3(b) ("Unpublished dispositions and orders of this Court may not be cited to or by the courts of this circuit, except in the following circumstances. [Enumerated related-case circumstances follow.]").

The court adopted a distinction between published and unpublished opinions on March 1, 1973, and has proscribed citation to its unpublished opinions since then.

106. This sample does not include any appeals from the District of Guam, the District of Hawaii, the District

and 14 are appeals from the Board of Immigration Appeals.<sup>107</sup>

The publication rate in this sample will be either 6% or 8% once all of the cases are resolved. Three of the appeals were resolved by published signed opinions, 12 were resolved by unpublished memorandum opinions published in the *Federal Appendix* (including one with a dissent), 34 were resolved by docket judgments, and one case has not yet been resolved.

Published opinions averaged 2,284 words in length, ranging from 1,632 to 3,108. Unpublished opinions averaged 557 words in length, ranging from 123 to 1,495. Ten opinions were under 1,000 words in length (67%, all unpublished), and eight of these were under 500 words in length (53%).

Eleven of the appeals were fully briefed, but the briefs in one of these cases are under seal, apparently because of trade secrets. In 34 of the appeals no counseled brief was filed, and in five of the appeals a counseled brief was filed only for one side.

There are citations to unpublished court opinions in four of these cases. All of these are citations to unrelated cases. All of these citations are in briefs, not opinions.

Two of the unrelated unpublished opinions cited are by the court of appeals for the Ninth Circuit, but citation to these opinions may have just been to complete citations to published opinions. The other unrelated unpublished opinions cited are district court opinions, one by a Ninth Circuit district court and three by other district courts.

C9-1. In an unsuccessful appeal of the denial of asylum, *Reyes-Mota v. Ashcroft* (9th Cir. 02-72782, filed 08/29/2002, judgment 09/19/2003), resolved by unpublished opinion at 76 Fed. Appx. 159, 2003 WL 22176700,

the petitioner cited a depublished opinion by the court of appeals for the Ninth Circuit. The brief notes that the depublished opinion was superseded by a published opinion and it may be that only citation to the superseding opinion was intended.

C9-2. In a pending case concerning federal sentencing guidelines, *United States v. Murillo* (9th Cir. 02-50200, filed 04/24/2002, judgment pending), the government's appellee brief notes that a cited published opinion by the court of appeals for the Ninth Circuit was amended on denial of rehearing by a published opinion concerning the sentence and an unpublished opinion concerning the conviction.

C9-3. In a successful reopening of an immigration case because of ineffective assistance of counsel, *Algarne v. Immigration and Naturalization Service* (9th Cir. 02-72045, filed 07/10/2002, judgment 05/20/2003), resolved by unpublished opinion at *Algarne v. Ashcroft*, 65 Fed. Appx. 167, 2003 WL 21186544, the petitioner cited an unpublished order by the district court for the Northern District of California to support a statement that his case was "squarely controlled by" a published opinion by the court of appeals for the Ninth Circuit.

C9-4. The Bureau of Prisons cited three unpublished opinions by district courts in other circuits (one by the district court for the District of Kansas and two by the district court for the District of Minnesota) in an unsuccessful prisoner's appeal, *Bramwell v. United States Bureau of Prisons* (9th Cir. 02-55516, filed 03/27/2002, judgment 10/27/2003), resolved by published opinion at 348 F.3d 804, *cert. denied*, 125 S. Ct. 45 (2004). The unpublished opinions are listed in the Bureau's appellee brief in a footnote headed "accord" and appended to a string citation of 10 published opinions supporting the Bureau's main legal argument.

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of the Northern Mariana Islands, the District of Oregon, or the Eastern District of Washington.

107. In 2002, 12,365 cases were filed in the court of appeals for the Ninth Circuit.



## Individual Case Analyses

### **United States v. Phelps (9th Cir. 02–10014, filed 01/10/2002, judgment 03/19/2002).**

*Appeal from:* Northern District of California.

*What happened:* Pro se appeal dismissed as duplicative of another case, *United States v. Phelps* (9th Cir. 02–10044, filed 01/24/2002, judgment 03/17/2003), which was dismissed as moot in light of the companion cases.

*Other related cases:* Companion cases include *United States v. Phelps* (9th Cir. 99–10042, filed 02/04/1999, judgment 03/21/2002) (judgment of the district court vacated and case remanded) and *United States v. Phelps* (9th Cir. 01–10119, filed 02/28/2001, judgment 03/21/2002) (judgment of the district court vacated and case remanded).

Prior related cases include *United States v. Phelps* (9th Cir. 92–10534, filed 09/10/1992, judgment 08/30/1994) (judgment of the district court affirmed); *Phelps v. United States District Court for the Northern District of California* (9th Cir. 94–80219, filed 06/29/1994, judgment 07/21/1994) (pro se petition for writ of mandamus denied); *Phelps v. United States* (9th Cir. 01–80069, filed 04/25/2001, judgment 06/15/2001) (petition for a writ of mandamus denied); and *Phelps v. United States* (9th Cir. 01–80162, filed 07/17/2001, judgment 08/22/2001) (petition for writ of habeas corpus dismissed because court of appeals does not have jurisdiction to consider such a petition as an original matter).

A subsequent related case is *Phelps v. United States* (9th Cir. 02–15368, filed 02/28/2002, judgment 09/12/2002) (certificate of appealability denied).

*Opinion:* (1) The court's docket judgment cites no opinions.

### **United States v. Gómez-Rendón (9th Cir. 02–10181, filed 04/09/2002, judgment 06/18/2003).**

*Appeal from:* District of Arizona.

*What happened:* Unsuccessful appeal challenging a criminal sentence for an immigration violation as inconsistent with a plea agreement.

*Appellant's brief:* The defendant's 5,328-word appellant brief cites 31 published opinions (five by the U.S. Supreme Court, 25 by the Ninth Circuit, and one by a district in another circuit) and one Ninth Circuit appeal raising similar legal issues.

*Appellee's brief:* The government's 2,513-word appellee brief cites 12 published Ninth Circuit opinions.

*Opinion:* (2) The court's unpublished 428-word memorandum, *United States v. Gómez-Rendón*, 68

Fed. Appx. 815, 2003 WL 21437639 (9th Cir. 2003) (no headnotes), cites no opinions. According to Westlaw (03/15/2005), the court's memorandum has not been cited elsewhere.

### **United States v. Acosta-Tapia (9th Cir. 02–10427, filed 08/23/2002, judgment 07/10/2003).**

*Appeal from:* District of Nevada.

*What happened:* Unsuccessful criminal appeal. The defendant conditionally pleaded guilty to possession of methamphetamine, reserving the right to appeal denial of a motion to suppress results of a vehicle search where consent was impaired by a language barrier.

*Related case:* The codefendant also appealed in a case briefed separately, but resolved by the same opinion, *United States v. Ortiz* (9th Cir. 02–10429, filed 08/23/2002, judgment 07/10/2003).

*Appellant's brief:* The defendant's 4,876-word appellant brief cites 18 published opinions (seven by the U.S. Supreme Court, seven by the Ninth Circuit, one by another circuit, one by a Ninth Circuit district, one by a district in another circuit, and one by Nevada's supreme court), the companion case, and two Spanish-English dictionaries.

*Appellee's brief:* The government's 6,461-word appellee brief cites 24 published opinions (seven by the U.S. Supreme Court, 11 by the Ninth Circuit, three by another circuit, one by a Ninth Circuit district, one by a district in another circuit, and one by Nevada's supreme court), the companion case, and two Spanish-English dictionaries.

*Appellant's reply brief:* The defendant's 1,516-word reply brief cites three published opinions (two by the U.S. Supreme Court and one by the Ninth Circuit).

*Opinion:* (2) The court's unpublished 842-word memorandum, *United States v. Acosta-Tapia*, 69 Fed. Appx. 885, 2003 WL 21659424 (9th Cir. 2003) (two headnotes), cites five published opinions (one by the U.S. Supreme Court, three by the Ninth Circuit, and one by another circuit). "Because the relevant facts are known to the parties, we discuss them here briefly and only as necessary." (Page 2.) According to Westlaw (03/15/2005), the court's opinion has not been cited elsewhere.

### **United States v. Ramon Gauna-Mendoza (9th Cir. 02–10444, filed 08/30/2002, judgment 10/11/2002).**

*Appeal from:* District of Arizona.

*What happened:* Pro se criminal appeal dismissed as premature.

*Related case: United States v. Gauna-Mendoza* (9th Cir. 02–10300, filed 6/17/2002, judgment 08/19/2002) (pro se criminal appeal dismissed as premature).

*Opinion:* (1) The court's docket judgment cites no opinions.

***Tripati v. Stewart* (9th Cir. 02–15575, filed 03/26/2002, judgment 05/21/2002).**

*Appeal from:* District of Arizona.

*What happened:* Certificate of appealability denied.

*Opinion:* (1) The court's docket judgment cites no opinions.

***Krajca v. Southland Corp.* (9th Cir. 02–16102, filed 06/04/2002, judgment 08/14/2002).**

*Appeal from:* District of Nevada.

*What happened:* Civil appeal dismissed for failure to prosecute.

*Related case: Krajca v. Southland Corp.* (9th Cir. 01–16104, filed 06/06/2001, judgment 08/24/2002) (unsuccessful civil appeal).

*Opinion:* (1) The court's docket judgment cites no opinions.

***Benson v. Oregon* (9th Cir. 02–16197, filed 06/18/2002, judgment 07/09/2002).**

*Appeal from:* Eastern District of California.

*What happened:* Plaintiff's civil appeal voluntarily dismissed.

*Opinion:* (1) The court's docket judgment cites no opinions.

***Critton v. Hall* (9th Cir. 02–16215, filed 06/19/2002, judgment 07/28/2003).**

*Appeal from:* Eastern District of California.

*What happened:* Habeas corpus relief summarily reversed in light of new Supreme Court case.

*Opinion:* (1) The court's 49-word docketed order cites one U.S. Supreme Court opinion.

***Cendejas v. Danzig* (9th Cir. 02–16875, filed 09/30/2002, judgment 07/24/2003).**

*Appeal from:* Northern District of California.

*What happened:* Unsuccessful pro se plaintiff's appeal in an employment discrimination suit against the Navy.

*Appellee's brief:* The government's 5,086-word appellee brief cites 27 published opinions (six by the U.S. Supreme Court, 17 by the Ninth Circuit, three by other circuits, and one by a Ninth Circuit district).

*Opinion:* (2) The court's unpublished 450-word memorandum, *Cendejas v. Johnson*, 71 Fed. Appx. 639, 2003 WL 2175172 (9th Cir. 2003) (no headnotes), cites seven published Ninth Circuit opin-

ions. According to Westlaw (03/15/2005), the court's memorandum has not been cited elsewhere.

***Romaine v. Woods* (9th Cir. 02–17128, filed 10/30/2002, judgment 02/25/2003).**

*Appeal from:* District of Arizona.

*What happened:* Certificate of appealability denied.

*Related case: Romaine v. Woods* (9th Cir. 98–17356, filed 12/18/1998, judgment 12/06/2001) (successful habeas corpus appeal by petitioner).

*Opinion:* (1) The court's docket judgment cites no opinions.

***Hollis v. Roe* (9th Cir. 02–17503, filed 12/27/2002, judgment 04/30/2003).**

*Appeal from:* Northern District of California.

*What happened:* Certificate of appealability denied.

*Opinion:* (1) The court's docket judgment cites no opinions.

***United States v. Aguilar-Miranda* (9th Cir. 02–30355, filed 11/05/2002, judgment 10/31/2003).**

*Appeal from:* District of Idaho.

*What happened:* Criminal appeal voluntarily dismissed after a stipulated limited remand to correct the judgment of conviction.

*Opinion:* (1) The court's docket judgment cites no opinions.

***All Alaskan Seafoods, Inc. v. Tyco Electronics Corp.* (9th Cir. 02–35214, filed 02/22/2002, judgment 12/17/2003).**

*Appeal from:* Western District of Washington.

*What happened:* The court of appeals affirmed the district court's judgment awarding \$70,000 in costs to the defendant in a product liability suit concerning a ship fire. The briefs are under seal.

*Related cases:* A prior appeal from the same district court case was *All Alaskan Seafoods, Inc. v. Ray Chemical Corp.* (9th Cir. 98–35540, filed 06/03/1998, judgment 12/07/1999) (affirming judgment on a defense jury verdict). The selected case was consolidated with *All Alaskan Seafoods, Inc. v. Tyco Electronics Corp.* (9th Cir. 01–36106, filed 12/03/2001, judgment 12/17/2003) (unsuccessful civil appeal).

*Opinion:* (2) The court's unpublished 1,495-word memorandum, *All Alaskan Seafoods, Inc. v. Tyco Electronics Corp.*, 83 Fed. Appx. 948, 2003 WL 22977439 (9th Cir. 2003) (five headnotes), cites nine published Ninth Circuit opinions, including an earlier appeal in this case. According to Westlaw (03/15/2005), the court's opinion has not been cited elsewhere.

***Hatfield v. City of Bremerton* (9th Cir. 02–35434, filed 05/03/2002, judgment 07/09/2003).**

*Appeal from:* Western District of Washington.

*What happened:* Unsuccessful appeal of summary judgment in a suit by a high-ranking police officer and his wife for injuries related to a new mayor's reorganization of the police department. The court affirmed on grounds different from the district court's.

*Appellant's brief:* The police captain's 10,908-word appellant brief cites 43 published opinions (five by the U.S. Supreme Court, 30 by the Ninth Circuit, three by other circuits, three by Washington's supreme court, and two by Washington's court of appeals).

*Appellee's brief:* The city and mayor's 13,270-word appellee brief cites 50 published opinions (16 by the U.S. Supreme Court, 12 by the Ninth Circuit, 10 by other circuits, four by districts outside the Ninth Circuit, four by Washington's supreme court, three by Washington's court of appeals, and one by Idaho's supreme court) and the *Restatement (Second) of Torts*.

*Appellant's reply brief:* The police captain's 1,851-word reply brief cites four published opinions (one by the U.S. Supreme Court, two by the Ninth Circuit, and one by another circuit).

*Opinion:* (2) The court's 548-word unpublished memorandum, *Hatfield v. City of Bremerton*, 73 Fed. Appx. 198, 2003 WL 21580527 (9th Cir. 2003) (three headnotes), cites 10 published opinions (four by the U.S. Supreme Court and six by the Ninth Circuit). According to Westlaw (07/07/2004), the court's opinion has not been cited elsewhere.

***Wilderness Society v. Rey* (9th Cir. 02–35678, filed 07/22/2002, judgment 01/06/2003).**

*Appeal from:* District of Montana.

*What happened:* Appeal voluntarily dismissed after mediation.

*Related case:* Consolidated with *Friends of the Bitterroot v. Rey* (9th Cir. 02–35680, filed 07/22/2002, judgment 01/06/2003) (also dismissed after mediation).

*Opinion:* (1) The court's docket judgment cites no opinions.

***Nickerson v. Alaska* (9th Cir. 02–35719, filed 08/01/2002, judgment 02/14/2003).**

*Appeal from:* District of Alaska.

*What happened:* Pro se civil appeal dismissed for lack of jurisdiction.

*Related cases:* *Nickerson v. Estate of Wiro* (9th Cir. 00–16628, filed 08/31/2000, judgment 09/20/2001) (unsuccessful civil appeal), *Nickerson*

*v. Bering Strait School District* (9th Cir. 02–35829, filed 09/11/2002, judgment 02/25/2003) (civil appeal dismissed for lack of jurisdiction).

*Opinion:* (1) The court's docket judgment cites no opinions.

***Lema v. United States Immigration and Naturalization Service* (9th Cir. 02–35901, filed 09/20/2002, judgment 09/02/2003).**

*Appeal from:* Western District of Washington.

*What happened:* Unsuccessful immigration appeal from a published denial of a habeas corpus petition, *Lema v. United States Immigration and Naturalization Service*, 214 F. Supp. 2d 1116 (W.D. Wash. 2002). After a lawful permanent resident was convicted of delivering cocaine, the INS attempted to deport him to Ethiopia, but Ethiopia would not issue the necessary travel documents, so he petitioned for release from custody. The district court denied the petition.

*Related case:* This case was argued before the same panel as *Martinez-Vazquez v. Immigration and Naturalization Service* (9th Cir. 03–350261, filed 01/15/2003, judgment 10/01/2003), "because they may raise similar issues regarding detention by the INS." The court of appeals held that the petitioner was not entitled to release because he had not cooperated fully in obtaining travel documents from Ethiopia.

*Appellant's brief:* The petitioner's 4,159-word appellant brief cites six published opinions (two by the U.S. Supreme Court and four by the Ninth Circuit).

*Appellee's brief:* The government's 6,146-word appellee brief cites 21 published opinions (eight by the U.S. Supreme Court, seven by the Ninth Circuit, two by other circuits, the published opinion by the Western District of Washington in this case, and three by districts in other circuits).

*Appellant's reply brief:* The petitioner's 3,573-word reply brief cites 12 published opinions (five by the U.S. Supreme Court, six by the Ninth Circuit, and one by the Western District of Washington).

*Opinion:* (3) The court's published 2,111-word signed opinion, *Lema v. U.S. Immigration and Naturalization Service*, 341 F.3d 853 (9th Cir. 2003) (seven headnotes), cites eight published opinions (two by the U.S. Supreme Court, four by the Ninth Circuit, one by another circuit, and the published opinion by the Western District of Washington in this case) and one treatise. According to Westlaw (03/15/2005), the court's opinion has been cited in one published Ninth Circuit opinion, one unpublished opinion by another circuit, two unpublished opinions by district courts in other

circuits (one published and one unpublished), three secondary sources, two appellate briefs in two Ninth Circuit cases, and two trial court briefs in one case in a district in another circuit.

**Wade v. CMS Medical Services (9th Cir. 02–36088, filed 12/05/2002, judgment 01/15/2004).**

*Appeal from:* District of Idaho.

*What happened:* Unsuccessful pro se prisoner appeal in a case claiming deliberate indifference to medical needs.

*Appellee's brief:* The medical services providers' 7,864-word appellee brief cites 30 published opinions (seven by the U.S. Supreme Court, 18 by the Ninth Circuit, four by other circuits, and one by Idaho's supreme court).

*Opinion:* (2) The court's unpublished 307-word memorandum, *Wade v. CMS Medical Services, Inc.*, 86 Fed. Appx. 291, 2004 WL 68719 (9th Cir. 2004) (two headnotes), cites four published Ninth Circuit opinions. According to Westlaw (03/15/2005), the court's memorandum has been cited in one secondary source.

**United States v. Murillo (9th Cir. 02–50200, filed 04/24/2002, judgment pending).**

*Appeal from:* Southern District of California.

*What happened:* This sentencing-guideline case concerning a cocaine conviction is still open. The court has allowed supplemental briefing on *Blakely v. Washington*.

*Related cases:* *United States v. Reina* (9th Cir. 02–50054, filed 02/01/2002, judgment 09/16/2003) (unsuccessful criminal appeal), *United States v. Perlaza* (9th Cir. 02–50084, filed 02/20/2002, judgment pending), *United States v. Palacios* (9th Cir. 02–50089, filed 02/22/2002, judgment pending), *United States v. Marquez* (9th Cir. 02–50093, filed 02/25/2002, judgment pending), *United States v. Solis-Barnaza* (9th Cir. 02–50102, filed 02/27/2002, judgment pending), *United States v. Rengifo-Audiver* (9th Cir. 02–50108, filed 03/01/2002, judgment pending), *United States v. Valencia-Sánchez* (9th Cir. 02–50133, filed 03/13/2002, judgment pending), *United States v. Castro-Carvajal* (9th Cir. 02–50136, filed 03/15/2002, judgment pending), *United States v. Aborno* (9th Cir. 02–50188, filed 04/09/2002, judgment pending), *United States v. Lopez* (9th Cir. 02–50199, filed 04/24/2002, judgment pending), *United States v. Carrasco* (9th Cir. 02–50207, filed 04/30/2002, judgment pending), *Ramírez v. Castro* (9th Cir. 02–56436, filed 08/26/2002, judgment 03/19/2003) (certificate of appealability denied).

*Appellant's brief:* The defendant's 13,898-word appellant brief cites 86 published opinions (45 by

the U.S. Supreme Court, 40 by the Ninth Circuit, and one by another circuit), two treatises, and one newspaper article.

*Appellee's brief:* The government's 32,432-word appellee brief (filed in 10 of the consolidated appeals) cites 134 published opinions (26 by the U.S. Supreme Court, 86 by the Ninth Circuit, and 22 by other circuits), one unpublished Ninth Circuit opinion, two treatises, *Black's Law Dictionary*, and the *Restatement (Second) of Foreign Relations Law of the United States*.

The brief cites a published Ninth Circuit opinion to support the statement, "Courts of appeal are required to give due deference to the sentencing court's application of the guidelines to the facts." (Page 110.) The citation notes that the cited opinion was amended on denial of rehearing by another published Ninth Circuit opinion, which was supplemented by an unpublished Ninth Circuit opinion. The unpublished opinion on rehearing affirmed a conviction, and the published opinion on rehearing affirmed the sentence.

*Appellant's reply brief:* The defendant's 6,803-word reply brief cites 60 published opinions (28 by the U.S. Supreme Court, 27 by the Ninth Circuit, four by other circuits, and one by a district in another circuit).

*Appellant's supplemental brief:* The defendant's 2,252-word supplemental brief cites six published opinions (three by the U.S. Supreme Court and three by the Ninth Circuit) and one brief filed by the government in *Blakely v. Washington*.

*Appellee's supplemental brief:* The government's 4,019-word supplemental brief cites 13 published opinions (three by the U.S. Supreme Court, six by the Ninth Circuit, and four by other circuits).

*Opinion:* (0) The case is still open.

**Hereford Corp. v. Legion for the Survival of Freedom, Inc. (9th Cir. 02–55072, filed 01/14/2002, judgment 06/24/2002).**

*Appeal from:* Southern District of California.

*What happened:* Plaintiffs' civil appeal voluntarily dismissed.

*Opinion:* (1) The court's docket judgment cites no opinions.

**Davis v. Hamlett (9th Cir. 02–55117, filed 01/17/2002, judgment 08/20/2002).**

*Appeal from:* Central District of California.

*What happened:* Certificate of appealability denied.

*Opinion:* (1) The court's docket judgment cites no opinions.

***Belcher v. Taylor* (9th Cir. 02–55385, filed 03/07/2002, judgment 08/16/2002).**

*Appeal from:* Central District of California.

*What happened:* Certificate of appealability denied.

*Opinion:* (1) The court's docket judgment cites no opinions.

***Pedraza v. Pliler* (9th Cir. 02–55454, filed 03/19/2002, judgment 11/27/2002).**

*Appeal from:* Central District of California.

*What happened:* Certificate of appealability denied.

*Opinion:* (1) The court's docket judgment cites no opinions.

***Bramwell v. United States Bureau of Prisons* (9th Cir. 02–55516, filed 03/27/2002, judgment 10/27/2003).**

*Appeal from:* Central District of California.

*What happened:* Unsuccessful appeal of the dismissal of a prisoner's suit for \$290 in damages for sunglasses inadvertently destroyed by prison staff. The complaint was dismissed on the ground that under the Federal Tort Claims Act, sovereign immunity is not waived for the detention of goods by federal law enforcement officers. The prisoner appeared initially pro se, but after the parties filed their briefs the court determined that appointment of counsel would benefit the court's review.

*Appellee's first brief:* The Bureau of Prison's 3,278-word initial appellee brief cites 35 published opinions (seven by the U.S. Supreme Court, 19 by the Ninth Circuit, six by other circuits, two by the Central District of California, and one by a district in another circuit).

*Appellant's supplemental brief:* The 2,516-word appellant brief submitted by the prisoner's pro bono counsel cites 14 published opinions (four by the U.S. Supreme Court, two by the Ninth Circuit, seven by other circuits, and one by a district in another circuit) and one law review article.

*Appellee's supplemental brief:* The Bureau of Prison's 4,495-word supplemental appellee brief cites 36 published opinions (four by the U.S. Supreme Court, 18 by the Ninth Circuit, 11 by other circuits, one by the Central District of California, and two by districts in other circuits), three unpublished opinions by districts in other circuits, and *Black's Law Dictionary*.

The unpublished district court opinions are listed in a footnote headed "*accord*," appended to a string citation of 10 published opinions (nine appellate and one district court) supporting the bureau's main legal argument. (Page 10, note 3.)

*Appellant's supplemental reply brief:* The appellant's 1,607-word reply brief cites 14 published opinions (three by the U.S. Supreme Court, five by the Ninth Circuit, and six by other circuits).

*Opinion:* (3) The court's published 1,632-word signed opinion, *Bramwell v. United States Bureau of Prisons*, 348 F.3d 804 (9th Cir. 2003)<sup>108</sup> (seven headnotes), cites 22 published opinions (four by the U.S. Supreme Court, seven by the Ninth Circuit, and 11 by other circuits). According to Westlaw (03/15/2005), the court's opinion has been cited in four Ninth Circuit opinions (one published and three unpublished), one unpublished opinion by a district in another circuit, one unpublished opinion by Massachusetts's superior court, three secondary sources, four appellate briefs in two Ninth Circuit cases, one trial court brief in a district in another circuit, and two briefs concerning the prisoner's petition to the U.S. Supreme Court for certiorari.

***Davis v. Roe* (9th Cir. 02–55530, filed 04/01/2002, judgment 06/13/2002).**

*Appeal from:* Central District of California.

*What happened:* Certificate of appealability denied because petitioner failed to file a timely notice of appeal.

*Opinion:* (1) The court's docket judgment cites no opinions.

***AT&T Wireless Services of California, LLC v. City of San Diego* (9th Cir. 02–55616, filed 04/15/2002, judgment 07/24/2002).**

*Appeal from:* Southern District of California.

*What happened:* Plaintiffs' civil appeal voluntarily dismissed.

*Opinion:* (1) The court's docket judgment cites no opinions.

***Uplinger v. Barron* (9th Cir. 02–55746, filed 05/07/2002, judgment 06/14/2002).**

*Appeal from:* Central District of California.

*What happened:* Pro se prisoner appeal dismissed as premature.

*Related cases:* The prisoner's three other premature appeals were also dismissed: *Uplinger v. Barron* (9th Cir. 02–55743, filed 05/07/2002, judgment 06/14/2002), *Uplinger v. Barron* (9th Cir. 02–55744, filed 05/07/2002, judgment 06/14/2002), and *Uplinger v. Barron* (9th Cir. 02–55745, filed 05/07/2002, judgment 06/14/2002).

*Opinion:* (1) The court's docket judgment cites no opinions.

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108. *Cert. denied*, 125 S. Ct. 45 (2004).

**Gibbs v. State Bar of California (9th Cir. 02–55857, filed 05/24/2002, judgment 06/14/2002).**

*Appeal from:* Central District of California.

*What happened:* Civil appeal dismissed as late.

*Related cases:* *Gibbs v. United States District Court for the Northern District of California* (9th Cir. 00–71292, filed 10/16/2000, judgment 12/11/2000) (writ of mandamus denied), *Gibbs v. United States District Court for the Northern District of California* (9th Cir. 01–71754, filed 11/13/2001, judgment 12/26/2001) (writ of mandamus denied), *Gibbs v. Leaf* (9th Cir. 02–15034, filed 01/09/2002, judgment 05/13/2002) (appeal dismissed for failure to pay docketing fees), *In re Gibbs* (9th Cir. 02–70166, filed 01/31/2002, judgment 03/14/2002) (writ of mandamus denied), *In re Gibbs* (9th Cir. 02–70351, filed 03/01/2002, judgment 04/11/2002) (writ of mandamus denied), *In re Gibbs* (9th Cir. 02–70452, filed 03/15/2002, judgment 04/11/2002) (writ of mandamus denied), *Gibbs v. United States District Court for the Northern District of California* (9th Cir. 02–70987, filed 05/02/2002, judgment 05/16/2002) (writ of mandamus denied), *Gibbs v. United States District Court for the Eastern District of California* (9th Cir. 02–71397, filed 05/23/2002, judgment 08/16/2002) (petitioner’s writ of mandamus denied), *Gibbs v. Hubbard* (9th Cir. 02–16094, filed 06/03/2002, judgment 02/25/2003) (certificate of appealability denied), *Gibbs v. State Bar of California* (9th Cir. 02–55939, filed 06/04/2002, judgment 08/30/2002) (appeal dismissed for failure to prosecute), *Gibbs v. Veale* (9th Cir. 02–16138, filed 06/07/2002, judgment 07/31/2002) (appeal dismissed as late).

*Opinion:* (1) The court’s docket judgment cites no opinions.

**Biggs v. Cox (9th Cir. 02–56440, filed 08/27/2002, judgment 12/12/2002).**

*Appeal from:* Southern District of California.

*What happened:* Pro se prisoner appeal voluntarily dismissed.

*Related case:* *Biggs v. Duncan* (9th Cir. 01–15917, filed 05/10/2001, judgment 08/12/2003) (unsuccessful pro se prisoner appeal).

*Opinion:* (1) The court’s docket judgment cites no opinions.

**Santos v. Cambra (9th Cir. 02–56452, filed 08/27/2002, judgment 10/16/2002).**

*Appeal from:* Southern District of California.

*What happened:* Pro se habeas corpus appeal dismissed as late.

*Opinion:* (1) The court’s docket judgment cites no opinions.

**United States v. James (9th Cir. 02–56456, filed 08/28/2002, judgment 02/25/2003).**

*Appeal from:* Southern District of California.

*What happened:* Certificate of appealability denied.

*Opinion:* (1) The court’s docket judgment cites no opinions.

**Battle v. Merkle (9th Cir. 02–56569, filed 09/18/2002, judgment 03/18/2003).**

*Appeal from:* Central District of California.

*What happened:* Certificate of appealability denied.

*Opinion:* (1) The court’s docket judgment cites no opinions.

**Gonzales-Lemus v. Mitchell (9th Cir. 02–57071, filed 12/13/2002, judgment 04/22/2003).**

*Appeal from:* Central District of California.

*What happened:* Certificate of appealability denied.

*Opinion:* (1) The court’s docket judgment cites no opinions.

**Barlow v. Adams (9th Cir. 02–70167, filed 01/31/2002, judgment 03/15/2002).**

*Appeal from:* Central District of California.

*What happened:* Motion to file a successive habeas corpus petition denied.

*Opinion:* (1) The court’s docket judgment cites no opinions.

**Balendran v. Immigration and Naturalization Service (9th Cir. 02–70521, filed 03/25/2002, judgment 12/18/2002).**

*Appeal from:* Board of Immigration Appeals.

*What happened:* Immigration appeal dismissed for failure to prosecute.

*Opinion:* (1) The court’s docket judgment cites no opinions.

**Martínez-Argueta v. Immigration and Naturalization Service (9th Cir. 02–70580, filed 03/29/2002, judgment 03/14/2003).**

*Appeal from:* Board of Immigration Appeals.

*What happened:* Unsuccessful pro se immigration appeal in an action seeking asylum.

*Appellee’s brief:* The government’s 11,586-word replacement respondent brief cites 39 published court opinions (six by the U.S. Supreme Court, 31 by the Ninth Circuit, and two by another circuit) and one published decision of the Board of Immigration Appeals.

*Opinion:* (2) The court’s 324-word unpublished memorandum, *Martínez-Argueta v. Ashcroft*, 58 Fed. Appx. 373, 2003 WL 119362 (9th Cir. 2003) (one headnote), cites six published Ninth Circuit

opinions. According to Westlaw (03/15/2005), the court's memorandum has been cited in one secondary source.

***Garcia v. Ashcroft* (9th Cir. 02–70889, filed 04/25/2002, judgment 03/24/2004).**

*Appeal from:* Board of Immigration Appeals.

*What happened:* Partially successful pro se immigration appeal. The court found error in the immigration judge's findings that the petitioners were not in the United States continuously and were not of good moral character.

*Respondent's brief:* The government's 8,624-word respondent brief cites 30 published opinions (12 by the U.S. Supreme Court, 17 by the Ninth Circuit, and one by another circuit).

*Opinion:* (2) The court's unpublished 414-word memorandum, *Garcia v. Ashcroft*, 94 Fed. Appx. 498, 2004 WL 605167 (9th Cir. 2004) (two headnotes), cites four published Ninth Circuit opinions. According to Westlaw (03/15/2005), the court's memorandum has been cited in one secondary source.

***Ram v. Immigration and Naturalization Service* (9th Cir. 02–70899, filed 04/25/2002, judgment 12/11/2002).**

*Appeal from:* Board of Immigration Appeals.

*What happened:* Immigration appeal dismissed for lack of prosecution.

*Opinion:* (1) The court's docket judgment cites no opinions.

***Juarez-Morales v. Immigration and Naturalization Service* (9th Cir. 02–71015, filed 05/03/2002, judgment 02/18/2003).**

*Appeal from:* Board of Immigration Appeals.

*What happened:* Immigration appeal remanded to the Board of Immigration Appeals on the motion of the Immigration and Naturalization Service.

*Opinion:* (1) The court's docketed order cites no opinions.

***González v. Immigration and Naturalization Service* (9th Cir. 02–71776, filed 06/20/2002, judgment 07/30/2003).**

*Appeal from:* Board of Immigration Appeals.

*What happened:* Unsuccessful pro se immigration appeal, because the petitioner failed to show a clear probability of persecution in Guatemala.

*Respondent's brief:* The government's 4,742-word respondent brief cites 35 published court opinions (five by the U.S. Supreme Court, 29 by the Ninth Circuit, and one by another circuit) and one published decision by the Board of Immigration Appeals.

*Opinion:* (2) The court's unpublished 1,107-word memorandum, *Gonzalez v. Immigration and Naturalization Service*, 70 Fed. Appx. 968, 2003 WL 21774125 (9th Cir. 2003) (one headnote), cites 12 published opinions (two by the U.S. Supreme Court and 10 by the Ninth Circuit). According to Westlaw (03/15/2005), the court's memorandum has not been cited elsewhere.

***In re Bell* (9th Cir. 02–71796, filed 06/21/2002, judgment 09/13/2002).**

*Appeal from:* Eastern District of California.

*What happened:* Writ of mandamus denied.

*Prior Cases:* *Bell v. Hill* (9th Cir. 99–55286, filed 03/04/1999, judgment 04/19/1999) (certificate of appealability denied), *In re Bell* (9th Cir. 01–70510, filed 03/27/2001, judgment 05/23/2001) (writ of mandamus denied), *In re Bell* (9th Cir. 01–71627, filed 10/15/2001, judgment 11/09/2001) (writ of mandamus denied).

*Opinion:* (1) The court's docket judgment cites no opinions.

***González v. Ashcroft* (9th Cir. 02–71866, filed 06/27/2002, judgment 09/13/2002).**

*Appeal from:* Board of Immigration Appeals.

*What happened:* Respondent's motion to dismiss immigration appeal for lack of jurisdiction granted.

*Opinion:* (1) The court's docket judgment cites no opinions.

***Algarne v. Immigration and Naturalization Service* (9th Cir. 02–72045, filed 07/10/2002, judgment 05/20/2003).**

*Appeal from:* Board of Immigration Appeals.

*What happened:* Over a dissent, the court reopened an immigration case because prior counsel was ineffective.

*Related case:* *Algarne v. Immigration and Naturalization Service* (9th Cir. 96-70465, filed 06/07/1996, judgment 07/18/1997) (immigration appeal dismissed for failure to file a brief).

*Petitioner's brief:* The petitioner's 8,438-word brief cites 36 published court opinions (three by the U.S. Supreme Court, 30 by the Ninth Circuit, two by other circuits, one by a Ninth Circuit district), two published decisions by the Board of Immigration Appeals, and one unpublished order by a Ninth Circuit district.

The brief cites an unpublished order by the Northern District of California to support the statement that this case is "squarely controlled by" a published Ninth Circuit opinion. (Page 25.)

*Respondent's brief:* The government's 5,402-word respondent brief cites 20 published court opinions (four by the U.S. Supreme Court, 15 by

the Ninth Circuit, and one by another circuit), one published decision of the Board of Immigration Appeals, and one treatise.

*Petitioner's reply brief:* The petitioner's 3,408-word reply brief cites 17 published opinions (three by the U.S. Supreme Court and 14 by the Ninth Circuit).

*Opinion:* (2) The court's unpublished 338-word memorandum and dissent, *Algarne v. Ashcroft*, 65 Fed. Appx. 167, 2003 WL 21186544 (9th Cir. 2003) (one headnote), cites three published Ninth Circuit opinions. According to Westlaw (03/15/2005), the court's memorandum has not been cited elsewhere.

***Reyes-Mota v. Ashcroft* (9th Cir. 02-72782, filed 08/29/2002, judgment 09/19/2003).**

*Appeal from:* Board of Immigration Appeals.

*What happened:* The court affirmed an immigration judge's denial of asylum because the petitioner had failed to establish that there was more than a generalized possibility of persecution in Guatemala.

*Petitioner's brief:* The petitioner's 5,178-word brief cites 13 published court opinions (four by the U.S. Supreme Court and nine by the Ninth Circuit), one depublished Ninth Circuit opinion, and five published decisions by the Board of Immigration Appeals.

The brief cites a depublished Ninth Circuit opinion, noting that it was amended by a superseding published panel opinion, and the brief also cites the superseding opinion separately. It may be that only citation to the superseding opinion is intended.

*Respondent's brief:* The government's 4,677-word respondent brief cites 30 published court opinions (seven by the U.S. Supreme Court, 21 by the Ninth Circuit, and two by other circuits) and six published decisions by the Board of Immigration Appeals.

*Opinion:* (2) The court's unpublished 123-word memorandum, *Reyes-Mota v. Ashcroft*, 76 Fed. Appx. 159, 2003 WL 22176700 (9th Cir. 2003) (no headnotes), cites two published Ninth Circuit opinions. According to Westlaw (03/16/2005), the court's memorandum has not been cited elsewhere.

***Gomes v. Hildreth* (9th Cir. 02-73052, filed 09/23/2002, judgment 12/16/2002).**

*Appeal from:* District of Nevada.

*What happened:* Motion to file a successive habeas corpus petition denied.

*Prior case:* *Gomes v. Hatcher* (9th Cir. 00-17395, filed 12/12/2000, judgment 06/18/2001) (certificate of appealability denied).

*Opinion:* (1) The court's docket judgment cites no opinions.

***Hsu v. Ashcroft* (9th Cir. 02-73070, filed 09/23/2002, judgment 09/11/2003).**

*Appeal from:* Board of Immigration Appeals.

*What happened:* Respondent's motion to dismiss petition for lack of jurisdiction granted, with one judge dissenting.

*Opinion:* (1) The court's docket judgment cites no opinions.

***Avila-Corona v. Ashcroft* (9th Cir. 02-73108, filed 09/25/2002, judgment 02/05/2003).**

*Appeal from:* Board of Immigration Appeals.

*What happened:* Immigration appeal voluntarily dismissed.

*Opinion:* (1) The court's docket judgment cites no opinions.

***Ponce v. Ashcroft* (9th Cir. 02-73157, filed 09/27/2002, judgment 06/23/2004).**

*Appeal from:* Board of Immigration Appeals.

*What happened:* Unsuccessful immigration appeal. The court held that it lacked jurisdiction to review the immigration judge's findings of no hardship.

*Petitioner's brief:* The petitioner's 5,974-word brief cites 15 published court opinions (three by the U.S. Supreme Court, 11 by the Ninth Circuit, and one by another circuit), six published decisions by the Board of Immigration Appeals, and three pending Ninth Circuit appeals raising legal issues similar to issues in the selected case.

*Respondent's brief:* The government's 5,461-word respondent brief cites 30 published court opinions (seven by the U.S. Supreme Court, 10 by the Ninth Circuit, and 13 by other circuits) and two published decisions by the Board of Immigration Appeals.

*Opinion:* (2) The court's unpublished 313-word memorandum, *Ponce v. Ashcroft*, 101 Fed. Appx. 734, 2004 WL 1404718 (9th Cir. 2004) (no headnotes), cites five published Ninth Circuit opinions. According to Westlaw (03/16/2005), the court's memorandum has not been cited elsewhere.

***Avendano-Ramirez v. Ashcroft* (9th Cir. 02-73395, filed 10/17/2002, judgment 04/23/2004).**

*Appeal from:* Board of Immigration Appeals.

*What happened:* Unsuccessful immigration appeal for cancellation of removal, because a person removed within five years is defined by statute as not of good moral character.



*Petitioner's brief:* The petitioner's 8,764-word brief cites 18 published court opinions (five by the U.S. Supreme Court, seven by the Ninth Circuit, five by other circuits, and one by a district in another circuit) and three published decisions by the Board of Immigration Appeals.

*Respondent's brief:* The government's 3,006-word respondent brief cites eight published court opinions (two by the U.S. Supreme Court and six by the Ninth Circuit).

*Petitioner's reply brief:* The petitioner's 1,547-word reply brief cites two published court opinions (one by the U.S. Supreme Court and one by the Ninth Circuit) and two published decisions by the Board of Immigration Appeals.

*Opinion:* (3) The court's published 3,108-word signed opinion, *Avendano-Ramirez v. Ashcroft*, 365 F.3d 813 (9th Cir. 2004) (nine headnotes), cites 28 published opinions (five by the U.S. Supreme Court, 19 by the Ninth Circuit, three by other circuits, and one by Ohio's court of appeals). According to Westlaw (03/16/2005), the court's opinion has been cited in five Ninth Circuit opinions (four published and one unpublished), one published opinion by another circuit, one published opinion by a Ninth Circuit district, and 20 appellate briefs in 19 Ninth Circuit cases.

***Escobar-Avila v. Ashcroft* (9th Cir. 02-73572, filed 10/25/2002, judgment 12/23/2002).**

*Appeal from:* Board of Immigration Appeals.

*What happened:* Immigration appeal dismissed as untimely.

*Related cases:* Also dismissed were consolidated cases apparently involving other family members, *Escobar-Avila v. Ashcroft* (9th Cir. 02-73557, filed 10/25/2002, judgment 12/23/2002), *Escobar-Avila v. Ashcroft* (9th Cir. 02-73563, filed 10/25/2002, judgment 12/23/2002), *Escobar-Avila v. Ashcroft* (9th Cir. 02-73568, filed 10/25/2002, judgment 12/23/2002), and *Escobar-Avila v. Ashcroft* (9th Cir. 02-73570, filed 10/25/2002, judgment 12/23/2002).

*Opinion:* (1) The court's docket judgment cites no opinions.

## 10. Tenth Circuit<sup>109</sup>

The Tenth Circuit disfavors citation to unpublished opinions in unrelated cases, but permits it if they are persuasive and there is no published opinion on point.<sup>110</sup>

Of the 50 cases randomly selected, 46 are appeals from district courts (11 from the District of Utah, 10 from the District of Colorado, eight from the District of New Mexico, six from the Western District of Oklahoma, five from the District of Kansas, four from the Northern District of Oklahoma, and two from the District of Wyoming),<sup>111</sup> three are appeals from the Board of Immigration Appeals, and one is an appeal from the Office of Workers' Compensation Programs.<sup>112</sup>

The publication rate in this sample will be from 18% to 20% once all the cases are resolved. Nine of the cases were resolved by published opinions (including one with two concurrences; one with a dissent; and a per curiam en banc opinion with two opinions

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109. Docket sheets and some opinions are on PACER. (Of the 25 cases in this sample resolved by opinions, the opinions are on PACER for three cases.) Opinions are on the court's intranet site and on Westlaw. A few briefs are on Westlaw. (Of the 17 cases in this sample that were resolved by opinions and in which counseled briefs were filed, all briefs are on Westlaw for two cases and some briefs are on Westlaw for two cases.)

110. 10th Cir. L.R. 36.3(B) ("Citation of an unpublished decision is disfavored. But an unpublished decision may be cited if: (1) it has persuasive value with respect to a material issue that has not been addressed in a published opinion; and (2) it would assist the court in its disposition.").

Until 1986, the court permitted citations to its unpublished opinions. The court adopted a rule prohibiting citation to its unpublished opinions in unrelated cases November 18, 1986. On November 29, 1993, the court relaxed its rules to permit citation to persuasive unpublished opinions if there is no published opinion on point.

111. This sample did not include any appeals from the Eastern District of Oklahoma.

112. In 2002, 2,656 cases were filed in the court of appeals for the Tenth Circuit.

concurring in part and dissenting in part, one opinion concurring, and one opinion dissenting), 16 were resolved by unpublished orders published in the *Federal Appendix* (13 with the designation “order and judgment”; one with a dissent; and three with the designation “order”), 24 were resolved by docket judgments, and one case has not yet been resolved.

Published opinions averaged 9,535 words in length, ranging from 2,981 to 33,814. Unpublished orders averaged 1,428 words in length, ranging from 327 to 6,003. Ten opinions were under 1,000 words in length (40%, all unpublished), and five of these were under 500 words in length (20%).

Seventeen of the appeals were fully briefed. In 30 of the appeals, no counseled brief was filed, and in three of the appeals a counseled brief was filed only for one side.

There are citations to unpublished court opinions in 12 of the cases. In three cases the citations are only to opinions in related cases; in nine cases there are citations to unpublished opinions in unrelated cases. In four cases the court cited unrelated unpublished opinions; in five other cases only the parties cited unrelated unpublished opinions.

Of the unrelated unpublished opinions cited by the court in these cases, three are by the court of appeals for the Tenth Circuit and three are by courts of appeals for other circuits. Of the unrelated unpublished opinions cited only by the parties in these cases, eight are by the court of appeals for the Tenth Circuit, three are by courts of appeals for other circuits, six are by district courts for Tenth Circuit districts, and 20 are by other district courts.

C10-1. In a published opinion affirming a drug sentence, *United States v. Cruz-Alcala*, 338 F.3d 1194 (10th Cir. 2003), resolving 02-2290 (filed 10/22/2002, judgment 08/11/2003), the court cited one of its own unpublished opinions and an unpublished opinion by the court of appeals for the Ninth Circuit.

In a discussion of whether the defendant waived his right to counsel in prior misdemeanor prosecutions used to enhance his sentence, the opinion states the following: “There is, however, no precedential authority from this court regarding whether an involuntary or unknowing waiver of counsel causes a ‘complete denial of counsel.’” The opinion then cites an unpublished Tenth Circuit opinion with the signal “*but cf.*”

To support the court’s determination of which subsection of the sentencing guidelines controls enhancement for a prior sentence to probation and time served, the opinion cites four opinions by other circuits, including an unpublished opinion by the court of appeals for the Ninth Circuit.

C10-2. In a published opinion determining that an immigration judge should have afforded the petitioner’s claims of Chinese ethnicity more credibility and evaluated the persecution of ethnic Chinese in Indonesia, *Wiransane v. Ashcroft*, 366 F.3d 889 (10th Cir. 2004), resolving 02-9555 (filed 08/15/2002, judgment 04/27/2004), the court cited unpublished opinions by the courts of appeals for the Tenth and Third Circuits to support a statement that an immigrant’s claim for asylum or restriction on removal depends on current conditions: “Subsequent events in Indonesia may well undercut Petitioner’s claims.”

C10-3. In an unpublished opinion reversing the rescission of Social Security disability benefits, *Jackson v. Barnhart*, 60 Fed. Appx. 255, 2003 WL 1473554 (10th Cir. 2003), resolving 02-5065 (filed 05/20/2002, judgment 03/24/2003), the court cited an unpublished Tenth Circuit opinion as an example of its applying a regulation concerning disability coverage for alcoholism even after other related regulations had been amended.

C10-4. In a case affirming en banc a preliminary injunction against enforcement of drug laws against religious use of a hallucinogenic tea called *hoasca*, *O Centro Espirita*

*Beneficiente Uniao do Vegetal v. Ashcroft* (10th Cir. 02–2323, filed 12/03/2002, judgment 11/12/2004), resolved by published opinion at 389 F.3d 973, *cert. granted*, 125 S. Ct. 1846 (2005), both the court and the parties cited unpublished opinions.

In an opinion by a two-judge panel staying the preliminary injunction pending resolution of the appeal, the court cited an unpublished opinion by the court of appeals for the Eighth Circuit with a published opinion by the district court for the Northern District of Indiana to support a statement that “Even after enactment of [the Religious Freedom Restoration Act], religious exemptions from or defenses to the [Controlled Substances Act] have not fared well.” An opinion concurring with the en banc opinion and an opinion concurring in part and dissenting in part also cite this unpublished Eighth Circuit opinion. The first of these opinions cites the Eighth Circuit opinion for the same reason that the panel opinion does, and the second of these opinions cites it to distinguish it. The government also cited this unpublished Eighth Circuit opinion in its appellant brief to the three-judge panel that initially heard the appeal.

The plaintiffs cited unpublished opinions in both their brief to the three-judge panel that initially heard the appeal and their brief to the en banc court. Their panel brief cites an unpublished Tenth Circuit opinion with a published Sixth Circuit opinion to support a statement that “A party has not carried its burden of proof if it has not persuaded the factfinder.” In a discussion of the standard for a preliminary injunction, their en banc brief cites a different unpublished Tenth Circuit opinion to support the statement that the court has recently affirmed that the proper standard for determining the status quo is “the last uncontested status.” In a discussion of the relative weight of preserving the status quo and preventing irreparable harm, the brief cites a published Tenth Cir-

cuit opinion to support a statement that preservation of the status quo eclipses prevention of irreparable harm, and the brief cites an unpublished opinion by the district court for the District of Kansas to support a statement that “Other courts in this circuit have held that the purpose is dual; the prevention of irreparable harm and maintenance of the status quo.”

The government’s en banc reply brief cites the same unpublished Tenth Circuit opinion as cited by the plaintiffs en banc to support a statement that “the only possible conclusion is that the injunction here dramatically changes the status quo.”

C10–5. In an ultimately dismissed appeal of a dismissal of a Colorado state prisoner’s complaint, *Beierle v. Colorado Department of Corrections* (10th Cir. 02–1502, filed 11/13/2002, judgment 08/30/2005), the prisoner cited four unrelated unpublished opinions—three by the court of appeals for the Tenth Circuit and one by the court of appeals for the Eighth Circuit—to support an argument for the appointment of counsel.

The brief cites two of the Tenth Circuit cases to support a statement that “Although this Court has not addressed in a published opinion the standards applicable to [a request for appointed counsel,] it has indicated in at least two unpublished decisions that if a district court finds that a plaintiff satisfies this Circuit’s standards for appointment of counsel under section 1915(e), the district court must make a ‘good faith effort to find an attorney to represent him.’” The brief cites the third unpublished Tenth Circuit opinion in a string of citations in “accord” with the Supreme Court’s statement that “section 1915 ‘informs lawyers that the court’s requests to provide legal assistance are *appropriate* requests, hence not to be ignored or disregarded in the mistaken belief that they are improper,’ and ‘may meaningfully be read to legitimize a court’s request to represent a

poor litigant and therefore to confront the lawyer with an important ethical decision.”

The brief leads a string of citations by other jurisdictions with a citation to the unpublished Eighth Circuit opinion to support a statement that “The majority of courts to have considered the issue . . . have concluded that federal courts have the inherent power to appoint counsel for indigent parties in appropriate civil cases.” In a footnote, the opinion is cited to show that the court of appeals reached a holding in conflict with a published holding by a district court in the Eighth Circuit adverse to the prisoner’s position.

The state cited two of the unpublished Tenth Circuit opinions to rebut them, and the prisoner cited these and the unpublished Eighth Circuit opinion in his reply brief.

C10–6. In an unsuccessful appeal of an unsuccessful claim of age discrimination in employment, *Kaster v. Safeco Insurance Co.* (10th Cir. 02–3386, filed 10/28/2002, judgment 12/03/2003), resolved by unpublished opinion at 82 Fed. Appx. 28, 2003 WL 33854633, the employer’s brief includes three unpublished opinions in a string citation of eight opinions supporting a statement that the plaintiff “does not attempt to distinguish the numerous . . . authorities cited by the district court in its Opinion” to support a conclusion that the plaintiff did not establish a prima facie case. One of the unpublished opinions is by the court of appeals for the Tenth Circuit, one is by the court of appeals for the Seventh Circuit, and one is by the district court for the Southern District of Florida. The brief also cites an unpublished opinion by the district court for the District of Kansas to support a statement that “the equitable tolling doctrine has never been applied to provide plaintiff with an additional 180 or 300 day time period to file a charge.” The plaintiff’s reply brief distinguishes the three unpublished opinions that the employer’s brief said he had not distinguished.

C10–7. In a pending appeal concerning the constitutionality of requiring a two-thirds supermajority for Utah voters to enact legislation concerning the taking of wildlife, *Initiative and Referendum Institute v. Walker* (10th Cir. 02–4123, filed 07/24/2002, judgment pending), the appellees defending constitutionality cited an unpublished Tenth Circuit opinion as upholding, against a First Amendment challenge, Wyoming’s supermajority requirement for initiatives. The plaintiffs’ appellant brief distinguishes this opinion and notes in a footnote their previous objection to the defendants’ citation to the unpublished opinion, but acknowledges that the district court relied on it.

An amicus curiae brief cites an unpublished opinion by the district court for the Eastern District of Pennsylvania to support the principle that “individuals interested in wildlife issues in general” are not a discrete and insular minority. The opinion is cited as citing published opinions by the courts of appeals for the Third and Ninth Circuits.

C10–8. In an unsuccessful appeal of a criminal sentence for bank fraud on a plea of guilty, *United States v. Gordon* (10th Cir. 02–4171, filed 09/17/2002, judgment 06/18/2003), resolved by published opinion at *United States v. Osborne*, 332 F.3d 1307 (10th Cir. 2003), the appellant’s brief quotes an unpublished opinion by the court of appeals for the Tenth Circuit to support an argument that the sentence should be reduced from 84 months to 70 months to reflect “only the actual checks that were fraudulently made and intended to be cashed,” acknowledging that “counsel could not find a Tenth Circuit opinion directly on point.”

C10–9. In a tobacco company’s partially successful appeal of a multimillion dollar judgment in favor of a smoker who lost both legs as a result of smoking-related peripheral vascular disease, *Burton v. R.J. Reynolds Tobacco Co.* (10th Cir. 02–3262, filed 07/23/2002, judgment 02/09/2005), resolved by pub-

lished opinion at 397 F.3d 906, both parties, especially the tobacco company, cited unpublished opinions extensively. The tobacco company cited 18 unpublished opinions—one by the court of appeals for the Sixth Circuit, three by the district court for the District of Kansas, and 14 by district courts in other circuits. The plaintiff cited five unpublished opinions—one by the district court for the District of Kansas and four by districts in other circuits.

### *Individual Case Analyses*

***Circuit City Stores West Coast, Inc. v. Marketplace One, LLC* (10th Cir. 02–1052, filed 02/11/2002, judgment 10/10/2002).**

*Appeal from:* District of Colorado.

*What happened:* Civil appeal dismissed as settled.

*Opinion:* (1) The court's docketed judgment cites no opinions.

***Rutter & Wilbanks Corp. v. Shell Oil Co.* (10th Cir. 02–1119, filed 03/12/2002, judgment 07/01/2003).**

*Appeal from:* District of Colorado.

*What happened:* Appeal by third-party movant voluntarily dismissed.

*Related cases:* The selected case is one of several appeals by third-party movants, all of which were voluntarily dismissed, *Rutter & Wilbanks Corp. v. Shell Oil Co.* (10th Cir. 02–1117, filed 03/12/2002, judgment 07/01/2003), *Rutter & Wilbanks Corp. v. Shell Oil Co.* (10th Cir. 02–1118, filed 03/12/2002, judgment 07/01/2003), *Rutter & Wilbanks Corp. v. Shell Oil Co.* (10th Cir. 02–1120, filed 03/12/2002, judgment 07/01/2003), *Rutter & Wilbanks Corp. v. Shell Oil Co.* (10th Cir. 02–1121, filed 03/12/2002, judgment 07/01/2003), *Rutter & Wilbanks Corp. v. Shell Oil Co.* (10th Cir. 02–1123, filed 03/12/2002, judgment 07/01/2003), *Rutter & Wilbanks Corp. v. Shell Oil Co.* (10th Cir. 02–1125, filed 03/12/2002, judgment 07/01/2003), *Rutter & Wilbanks Corp. v. Shell Oil Co.* (10th Cir. 02–1126, filed 03/12/2002, judgment 07/01/2003), *Ainsworth v. Shell Oil Co.* (10th Cir. 02–1127, filed 03/13/2002, judgment 07/01/2003), *Ainsworth v. Shell Oil Co.* (10th Cir. 02–1128, filed 03/13/2002, judgment 07/01/2003), *Wiggins v. Shell Oil Co.* (10th Cir. 02–1209, filed 05/06/2002, judgment 07/01/2003). Case number 02–1126 was also selected for this study.

*Opinion:* (1) The court's docketed judgment cites no opinions.

***Rutter & Wilbanks Corp. v. Shell Oil Co.* (10th Cir. 02–1126, filed 03/12/2002, judgment 07/01/2003).**

*Appeal from:* District of Colorado.

*What happened:* Appeal by third-party movant voluntarily dismissed.

*Related cases:* The selected case is one of several appeals by third-party movants, all of which were voluntarily dismissed, *Rutter & Wilbanks Corp. v. Shell Oil Co.* (10th Cir. 02–1117, filed 03/12/2002, judgment 07/01/2003), *Rutter & Wilbanks Corp. v. Shell Oil Co.* (10th Cir. 02–1118, filed 03/12/2002, judgment 07/01/2003), *Rutter & Wilbanks Corp. v. Shell Oil Co.* (10th Cir. 02–1119, filed 03/12/2002, judgment 07/01/2003), *Rutter & Wilbanks Corp. v. Shell Oil Co.* (10th Cir. 02–1120, filed 03/12/2002, judgment 07/01/2003), *Rutter & Wilbanks Corp. v. Shell Oil Co.* (10th Cir. 02–1121, filed 03/12/2002, judgment 07/01/2003), *Rutter & Wilbanks Corp. v. Shell Oil Co.* (10th Cir. 02–1123, filed 03/12/2002, judgment 07/01/2003), *Rutter & Wilbanks Corp. v. Shell Oil Co.* (10th Cir. 02–1125, filed 03/12/2002, judgment 07/01/2003), *Ainsworth v. Shell Oil Co.* (10th Cir. 02–1127, filed 03/13/2002, judgment 07/01/2003), *Ainsworth v. Shell Oil Co.* (10th Cir. 02–1128, filed 03/13/2002, judgment 07/01/2003), *Wiggins v. Shell Oil Co.* (10th Cir. 02–1209, filed 05/06/2002, judgment 07/01/2003). Case number 02–1119 was also selected for this study.

*Opinion:* (1) The court's docketed judgment cites no opinions.

***Lovato v. Suthers* (10th Cir. 02–1132, filed 03/15/2002, judgment 7/15/2002).**

*Appeal from:* District of Colorado.

*What happened:* Certificate of appealability denied.

*Opinion:* (2) The court's unpublished 784-word order and judgment, *Lovato v. Suthers*, 42 Fed. Appx. 400, 2002 WL 1500844 (10th Cir. 2002) (three headnotes), cites six published opinions (three by the U.S. Supreme Court and three by the Tenth Circuit). According to Westlaw (04/12/2005), the court's order and judgment has not been cited elsewhere.

***Lander v. Summit County School District* (10th Cir. 02–1160, filed 04/10/2002, judgment 08/13/2004).**

*Appeal from:* District of Colorado.

*What happened:* Successful appeal of the dismissal of a complaint by a public school teacher that she was terminated for criticizing management decisions. The court of appeals reversed the

district court's conclusion that the criteria were not matters of public concern.

*Appellant's brief:* The teacher's 5,252-word appellant brief cites 26 published opinions (eight by the U.S. Supreme Court, 16 by the Tenth Circuit, one by another circuit, and one by the District of Colorado).

*Appellee's brief:* The school district's 5,550-word appellee brief cites 34 published opinions (three by the U.S. Supreme Court, 20 by the Tenth Circuit, five by other circuits, one by the District of Colorado, one by Colorado's supreme court, and four by Colorado's court of appeals).

*Appellant's reply brief:* The teacher's 1,619-word reply brief cites seven published opinions (one by the U.S. Supreme Court, four by the Tenth Circuit, and two by Colorado's court of appeals).

*Opinion:* (2) The court's unpublished 4,276-word signed order and judgment with a dissent, *Lander v. Summit County School District*, 109 Fed. Appx. 215, 2004 WL 1809525 (10th Cir. 2004) (two headnotes), cites 25 published opinions (three by the U.S. Supreme Court, 15 by the Tenth Circuit, and seven by other circuits). According to Westlaw (04/12/2005), the court's order and judgment has been cited in one appellate brief in a Tenth Circuit case.

***Negron v. Barker* (10th Cir. 02–1248, filed 05/30/2002, judgment 08/13/2003).**

*Appeal from:* District of Colorado.

*What happened:* Pro se appeal dismissed for failure to pay fees.

*Opinion:* (1) The court's docketed judgment cites no opinions.

***Oliver v. United States* (10th Cir. 02–1283, filed 06/24/2002, judgment 08/13/2002).**

*Appeal from:* District of Colorado.

*What happened:* Pro se prisoner appeal voluntarily dismissed.

*Related case:* The court denied the appellant's motion to consolidate this appeal with another appeal by him, *Oliver v. United States* (10th Cir. 02–1319, filed 07/15/2002, judgment 11/14/2002) (unsuccessful appeal).

*Opinion:* (1) The court's docketed judgment cites no opinions.

***Arellano v. Watkins* (10th Cir. 02–1358, filed 08/08/2002, judgment 03/31/2003).**

*Appeal from:* District of Colorado.

*What happened:* Unsuccessful pro se prisoner appeal of a dismissal. The district court dismissed the prisoner's complaint for failure to pay an initial partial filing fee or file a certified copy of his prison trust fund account statement.

*Opinion:* (2) The court's unpublished 327-word signed order and judgment, *Arellano v. Watkins*, 60 Fed. Appx. 760, 2003 WL 1690315 (10th Cir. 2003) (no headnotes), cites no opinions. According to Westlaw (04/12/2005), the court's opinion has not been cited elsewhere.

***Fleetwood v. Webb* (10th Cir. 02–1396, filed 09/05/2002, judgment 05/07/2003).**

*Appeal from:* District of Colorado.

*What happened:* Prisoner's pro se appeal of the dismissal of his civil rights complaint for failure to file necessary papers dismissed.

*Related case:* *Fleetwood v. Lucero*, (10th Cir. 02–1218, filed 05/14/2002, judgment 10/29/2002) (dismissed for lack of prosecution).

*Appellee's brief:* The appellee's 575-word brief cites two U.S. Supreme Court opinions.

*Opinion:* (2) The court's unpublished 363-word signed order, *Fleetwood v. Webb*, 62 Fed. Appx. 914, 2003 WL 21019623 (10th Cir. 2003) (no headnotes), cites one published Tenth Circuit opinion. According to Westlaw (04/12/2005), the court's order has not been cited elsewhere.

***Beierle v. Colorado Department of Corrections* (10th Cir. 02–1502, filed 11/13/2002, judgment 08/30/2005).**

*Appeal from:* District of Colorado.

*What happened:* The appeal of a dismissal of a Colorado state prisoner's complaint was ultimately dismissed upon the completion of the prisoner's sentence. The selected appeal is of a dismissal of the prisoner's complaint that termination of his sex offender treatment program, with implications for parole eligibility, was wrongful and without a hearing. After the pro se appellant and the appellees filed their briefs, the court granted the prisoner's motion for appointment of counsel and a second round of briefs was filed. In addition to arguing that the prisoner should have had a hearing on his removal from the prison program, appointed counsel argued on appeal that the district court should have appointed counsel. More than a year after the case was heard, the appeal was dismissed as moot.

*Related cases:* Previously the District of Colorado dismissed as frivolous the prisoner's pro se complaint that he was threatened with a requirement to work on his Sabbath and was wrongfully disciplined for sexually stalking a female guard, behavior that the prisoner denied. The prisoner appealed the dismissal, *Beierle v. Zavares* (10th Cir. 99–1383, filed 09/01/1999, judgment 06/12/2000), and the denial of a preliminary injunction sought during the appeal, *Beierle v. Zavares* (10th Cir. 99–

1530, filed 11/19/1999, judgment 06/12/2000). The court of appeals affirmed the denial of the preliminary injunction, because the complaint was never served on the defendants, but reversed the trial court's dismissal of the complaint, finding some of the prisoner's claims plausible, *Beierle v. Zavares*, 215 F.3d 1336 (table), 2000 WL 757725 (10th Cir. 2000).

After the Supreme Court decided *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the prisoner sought habeas corpus relief challenging a sentence enhancement. The court of appeals affirmed the district court's dismissal on the grounds that *Apprendi* did not apply retroactively on collateral review, *Beierle v. Reed*, 62 Fed. Appx. 917, 2003 WL 21101482 (10th Cir. 2003), resolving *Beierle v. Reed* (10th Cir. 02-1384, filed 08/26/2002, judgment 05/15/2003).

In a separate action, the prisoner filed a pro se class action challenging prison conditions. The court of appeals affirmed the district court's dismissal, because class actions may not be pursued pro se and the prisoner had been moved to a different prison, *Beierle v. Colorado Department of Corrections*, 79 Fed. Appx. 373, 2003 WL 22407426 (10th Cir. 2003), resolving *Beierle v. Colorado Department of Corrections* (10th Cir. 03-1174, filed 04/24/2003, judgment 10/22/2003).

*Appellee's initial brief:* The Colorado Department of Corrections' 1,383-word appellee brief in response to the prisoner's initial pro se brief cites four published opinions (three by the Tenth Circuit and one by another circuit) and one treatise.

*Appellant's brief:* The prisoner's 9,144-word counseled brief cites 82 published opinions (24 by the U.S. Supreme Court, 30 by the Tenth Circuit, 19 by other circuits, seven by districts outside the Tenth Circuit, and one each by Vermont's and Florida's supreme courts); five unpublished opinions (four by the Tenth Circuit, including the prior appeal in this case, and one by another circuit); and two law review notes.

The three unrelated unpublished Tenth Circuit opinions cited in the brief are cited frequently throughout six pages of the 35-page brief. In addition to being cited to support related statements, two are cited to support the statement that "Although this Court has not addressed in a published opinion the standards applicable to [a request for appointed counsel,] it has indicated in at least two unpublished decisions that if a district court finds that a plaintiff satisfies this Circuit's standards for appointment of counsel under section 1915(e), the district court must make a 'good faith effort to find an attorney to represent him.'"

(Page 24.) The third unpublished opinion cited is in an "accord" string citation with one of the other unpublished opinions amplifying support for the Supreme Court's statement that "[S]ection 1915 'informs lawyers that the court's requests to provide legal assistance are *appropriate* requests, hence not to be ignored or disregarded in the mistaken belief that they are improper,' and 'may meaningfully be read to legitimize a court's request to represent a poor litigant and therefore to confront the lawyer with an important ethical decision.'" (Pages 23-24.)

The brief leads a string of citations by other jurisdictions with a citation to an unpublished opinion by the Eighth Circuit to support the statement, "The majority of courts to have considered the issue . . . have concluded that federal courts have the inherent power to appoint counsel for indigent parties in appropriate civil cases." (Page 18.) In a footnote, the opinion is cited to show that the court of appeals in that circuit reached a holding in conflict with a published holding by a district court in that circuit adverse to the prisoner's position. (Page 19, footnote 15.)

*Appellee's brief:* The Colorado Department of Corrections' 5,514-word appellee brief cites 36 published opinions (12 by the U.S. Supreme Court, 10 by the Tenth Circuit, six by other circuits, four by districts in other circuits, two by Colorado's supreme court, one by Colorado's appellate court, and one by Vermont's supreme court) and three unpublished Tenth Circuit opinions, including the prior appeal in this case.

The two unrelated unpublished Tenth Circuit opinions cited were cited to rebut the appellant's citation of them, stating at the end of a paragraph that they dealt not with a district judge's failure to make sufficient effort to appoint counsel that a magistrate judge ordered requested, but failure of the magistrate judge to request counsel in the first place. (Page 16.)

*Appellant's reply brief:* The prisoner's 5,338-word reply brief cites 50 published opinions (five by the U.S. Supreme Court, 23 by the Tenth Circuit, 13 by other circuits, two by the District of Colorado, one by another Tenth Circuit district, five by other districts, and one by Colorado's court of appeals) and four unpublished opinions (three by the Tenth Circuit, including the prior appeal in this case, and one by another circuit).

The two unrelated unpublished Tenth Circuit opinions are also cited in both the prisoner's appellant brief and the Colorado Department of Corrections' appellee brief. One was cited to support the statement that in that case, "this Court

held that the record revealed good faith efforts to request counsel where it showed that the district court had contacted four attorneys, each of whom declined to take the case. By contrast, the district court's statement in this case provides no such details indicating that it made a good faith effort to request counsel for Mr. Beierle." (Pages 11–12.) The second opinion was cited with a published opinion by another circuit, "both reversing because the district court made no record of its failure to obtain volunteer counsel in an appropriate case" (page 12, footnote 9), as a "see, e.g." string citation supporting the footnote statement, "The State's argument that the absence of a record that 'anything other than a good faith effort [had] been made' constitutes a sufficient record of good faith efforts (State's Brief at 17) is contrary to law and common sense, and should not be credited by the Court." (Page 12, footnote 9.)

As in the appellant brief, the unpublished opinion by another circuit is cited to show that the court of appeals in that circuit reached a holding in conflict with a published opinion by one of the circuit's districts. (Page 4, footnote 2.)

*Opinion:* (1) The court's docketed judgment cites no opinions.

***Ward v. Walmart Stores, Inc.* (10th Cir. 02–2014, filed 01/14/2002, judgment 03/13/2002).**

*Appeal from:* District of New Mexico.

*What happened:* Civil appeal dismissed by stipulation.

*Related case:* The case was consolidated with *Ward v. Walmart Stores, Inc.* (10th Cir. 01-2375, filed 12/27/2001, judgment 03/13/2002) (civil appeal dismissed by stipulation).

*Opinion:* (1) The court's docketed judgment cites no opinions.

***United States v. Bono* (10th Cir. 02–2035, filed 02/08/2002, judgment 03/11/2003).**

*Appeal from:* District of New Mexico.

*What happened:* Unsuccessful appeal of a conviction for dealing in crack cocaine.

*Related case:* This case was consolidated with *United States v. Scull*, 10th Cir. 02–2025, filed 01/23/2002, judgment 03/11/2003) (unsuccessful criminal appeal), which was briefed separately but resolved by the same opinion.

*Appellant's brief:* The defendant's 7,728-word appellant brief cites 31 published opinions (10 by the U.S. Supreme Court, 16 by the Tenth Circuit, and five by other circuits).

*Appellee's brief:* The appellee's 10,017-word brief cites 18 published opinions (four by the U.S. Supreme Court and 14 by the Tenth Circuit).

*Appellant's reply brief:* The appellant's 2,362-word reply brief cites 11 published opinions (three by the U.S. Supreme Court, five by the Tenth Circuit, and three by other circuits).

*Opinion:* (3) The court's published 6,396-word opinion, *United States v. Scull*, 321 F.3d 1270 (10th Cir. 2003) (27 headnotes), cites 39 published opinions (nine by the U.S. Supreme Court, 22 by the Tenth Circuit, six by other circuits, one by a district in another circuit, and one by New Mexico's supreme court). According to Westlaw (04/12/2005), the court's opinion has been cited in 11 published opinions (six by the Tenth Circuit, one in a Tenth Circuit district, one in a district in another circuit, one in California's supreme court, one in Maryland's court of appeals, and one in North Carolina's court of appeals), 10 unpublished opinions (five in the Tenth Circuit, three in Tenth Circuit districts, one in Michigan's court of appeals, and one in Ohio's court of appeals), 11 secondary sources, and 26 appellate briefs in 23 Tenth Circuit cases, two appellate briefs in a Fifth Circuit case, one appellate brief in North Carolina's supreme court, and one appellate brief in Kansas's court of appeals.

***Carabajal v. LeMaster* (10th Cir. 02–2115, filed 05/03/2002, judgment 12/09/2002).**

*Appeal from:* District of New Mexico.

*What happened:* Certificate of appealability denied in a case claiming ineffective assistance of counsel.

*Appellant's brief:* The appellant's 12,532-word brief cites 19 published opinions (eight by the U.S. Supreme Court, two by the Tenth Circuit, one by another circuit, five by New Mexico's supreme court, and three by New Mexico's court of appeals).

*Opinion:* (2) The court's unpublished 1,305-word signed order and judgment, *Carabajal v. LeMaster*, 52 Fed. Appx. 473, 2002 WL 31745054 (10th Cir. 2002) (two headnotes), cites six published opinions (four by the U.S. Supreme Court, one by the Tenth Circuit, and one by New Mexico's supreme court). According to Westlaw (04/12/2005), the court's order and judgment has been cited in one secondary source.

***Woolstenhulme v. Lemaster* (10th Cir. 02–2128, filed 05/21/2002, judgment 01/10/2003).**

*Appeal from:* District of New Mexico.

*What happened:* Certificate of appealability denied.

*Related case:* A prisoner sought to challenge one plea bargain in this petition and another in another petition filed the same day and resolved by



the same order and judgment, *Woolstenhulme v. Lemaster* (10th Cir. 02–2129, filed 05/21/2002, judgment 01/10/2003) (certificate of appealability denied).

*Opinion:* (2) The court’s unpublished 842-word signed order and judgment, *Woolstenhulme v. Lemaster*, 58 Fed. Appx. 388, 2003 WL 77612 (10th Cir. 2003) (two headnotes), cites two published opinions (one by the U.S. Supreme Court and one by the Tenth Circuit). According to Westlaw (04/12/2005), the court’s order and judgment has not been cited elsewhere.

***United States v. Singleton* (10th Cir. 02–2157, filed 06/17/2002, judgment 08/01/2003).**

*Appeal from:* District of New Mexico.

*What happened:* Certificate of appealability denied.

*Opinion:* (2) The court’s unpublished 781-word signed order, *United States v. Singleton*, 62 Fed. Appx. 254, 2003 WL 1712119 (10th Cir. 2003) (one headnote), cites three published Tenth Circuit opinions and one unpublished Tenth Circuit opinion from an earlier phase of this case. According to Westlaw (04/12/2005), the court’s order and judgment has not been cited elsewhere.

***United States v. Cruz-Alcala* (10th Cir. 02–2290, filed 10/22/2002, judgment 08/11/2003).**

*Appeal from:* District of New Mexico.

*What happened:* Unsuccessful appeal of a drug sentence.

*Appellant’s brief:* The defendant’s 3,328-word appellant brief cites 10 published opinions (nine by the Tenth Circuit and one by a district in another circuit).

*Appellee’s brief:* The government’s 3,097-word appellee brief cites 17 published opinions (three by the U.S. Supreme Court, 12 by the Tenth Circuit, and two by other circuits).

*Appellant’s reply brief:* The defendant’s 894-word reply brief cites 11 published opinions (one by the U.S. Supreme Court, seven by the Tenth Circuit, and three by other circuits).

*Opinion:* (3) The court’s published 3,120-word signed opinion, *United States v. Cruz-Alcala*, 338 F.3d 1194 (10th Cir. 2003) (eight headnotes), cites 25 published opinions (four by the U.S. Supreme Court, 12 by the Tenth Circuit, and nine by other circuits) and two unpublished opinions (one by the Tenth Circuit and one by another circuit).

In a discussion of whether the defendant waived his right to counsel in prior misdemeanor prosecutions used to enhance his sentence, the opinion states “There is, however, no precedential authority from this court regarding whether an

involuntary or unknowing waiver of counsel causes a ‘complete denial of counsel.’” (Page 4, 338 F.3d at 1197.) The opinion then cites an unpublished Tenth Circuit opinion with the signal “*but cf.*”

To support the court’s determination of which subsection of the sentencing guidelines controls enhancement for a prior sentence to probation and time served, the opinion cites four opinions by other circuits, including an unpublished opinion by the Ninth Circuit. (Page 10, 338 F.3d at 1199.)

According to Westlaw (04/12/2005), the court’s opinion has been cited in one published Tenth Circuit opinion, one published opinion by another circuit, three secondary sources, and 10 appellate briefs in seven cases (five in the Tenth Circuit and two in other circuits).

***United States ex rel. Tate v. Honeywell, Inc.* (10th Cir. 02–2318, filed 11/26/2002, judgment 08/26/2003).**

*Appeal from:* District of New Mexico.

*What happened:* Civil appeal dismissed as settled.

*Opinion:* (1) The court’s docketed judgment cites no opinions.

***O Centro Espirita Beneficiente Uniao do Vegetal v. Ashcroft* (10th Cir. 02–2323, filed 12/03/2002, judgment 11/12/2004).**

*Appeal from:* District of New Mexico.

*What happened:* Applying the Religious Freedom Restoration Act (RFRA), the district court issued a preliminary injunction against enforcement of the Controlled Substances Act (CSA) on religious use of *hoasca*, also known as *ayahuasca*, a tea-like mixture made from two Brazilian plants—*psychotria viridis* and *banisteriopsis caapi*—the first of which contains a hallucinogen called dimethyltryptamine (DMT). The court of appeals stayed the injunction pending resolution of the government’s appeal, a panel of the court affirmed the district court’s injunction over a dissent, and then the court affirmed the district court’s injunction en banc. En banc the court held that preliminary injunctions changing the status quo require a heightened standard of persuasion (by a vote of 7 to 6) and the preliminary injunction issued in this case was within the district judge’s discretion (by a vote of 8 to 5). (Ironically, only two judges agreed with both parts of the court’s holding.) The Supreme Court granted the government’s petition for a writ of certiorari, 125 S. Ct. 1846 (2005), and heard the case on November 1, 2005.

*Appellant's brief:* The government's 13,472-word appellant brief cites 33 published opinions (17 by the U.S. Supreme Court; six by the Tenth Circuit, including the court's stay of the injunction in this case pending appeal; seven by other circuits; and three by districts in other circuits), one unpublished opinion by another circuit, and one academic article.

The brief cites two opinions cited by the court in its opinion staying the district court's injunction pending the appeal—an unpublished opinion by the Eighth Circuit and a published opinion by the Northern District of Indiana—to support the statement, "As this Court noted in granting a stay pending appeal, post RFRA case law follows [the] precedent" "that 'Congress can constitutionally control the use of drugs that it determines to be dangerous, even if those drugs are to be used for religious purposes.'" (Page 36, citation omitted, quoting a published Eleventh Circuit opinion.)

*Appellee's brief:* The plaintiffs' 14,196-word appellee brief cites 50 published opinions (19 by the U.S. Supreme Court, 10 by the Tenth Circuit, 17 by other circuits, one by the temporary emergency court of appeals, two by districts in other circuits, and one by New York's appellate division), two unpublished opinions (one by the Tenth Circuit and one by the district court in this case), one academic article, and one United Nations report.

The brief cites an unpublished opinion by the Tenth Circuit and a published opinion by the Sixth Circuit to support the statement, "A party has not carried its burden of proof if it has not persuaded the factfinder." (Page 20.)

*Amicus curiae brief:* A 5,236-word amicus curiae brief filed by Christian organizations cites 21 published opinions (six by the U.S. Supreme Court; seven by the Tenth Circuit, including the court's stay of the injunction in this case pending appeal; four by other circuits; one by California's supreme court; one by Oregon's supreme court; one by Arizona's court of appeals; and one by Oklahoma's court of criminal appeals) and two law review articles.

*Appellant's reply brief:* The government's 7,254-word reply brief cites 29 published opinions (three by the U.S. Supreme Court, two by the Tenth Circuit, 20 by other circuits, and four by districts in other circuits).

*Appellee's supplemental brief:* The plaintiffs' 13,927-word supplemental appellee brief en banc cites 45 published opinions (14 by the U.S. Supreme Court; 15 by the Tenth Circuit, including the two earlier opinions in this appeal; 10 by other circuits; one by the District of New Mexico; four

by districts in other circuits; and one by Arizona's court of appeals), two unpublished opinions (one by the Tenth Circuit and one by a Tenth Circuit district), two treatises, three law review articles, one law review note, and one state department report posted on the Web.

In a discussion of the standard for a preliminary injunction, the brief cites an unpublished Tenth Circuit opinion to support the statement that the court has recently affirmed that the proper standard for determining the status quo is "the last uncontested status." (Page 14.)

In a discussion of the relative weight of preserving the *status quo* and preventing irreparable harm when deciding on a preliminary injunction, the brief cites a published Tenth Circuit opinion to support the statement, "In this circuit . . . , preservation of the status quo has tended to eclipse the need to prevent irreparable harm." The brief then cites an unpublished opinion by the District of Kansas to support the statement, "Other courts in this circuit have held that the purpose is dual; the prevention of irreparable harm and maintenance of the status quo." (Page 23.)

*Appellant's supplemental brief:* The government's 9,932-word supplemental appellant brief *en banc* cites 65 published opinions (25 by the U.S. Supreme Court, 12 by the Tenth Circuit, 26 by other circuits, and two by districts in other circuits).

*Supplemental amicus curiae brief:* A 6,583-word supplemental amicus curiae brief *en banc* filed by Christian organizations cites 25 published opinions (six by the U.S. Supreme Court; nine by the Tenth Circuit, including the two previous opinions in this case; five by other circuits; the District of New Mexico's opinion in this case; one by California's supreme court; one by Oregon's supreme court; one by Arizona's court of appeals; and one by Oklahoma's court of criminal appeals), one treatise, and four law review articles.

*Appellee's supplemental reply brief:* The plaintiffs' 5,651-word supplemental reply brief *en banc* cites 23 published opinions (three by the U.S. Supreme Court; three by the Tenth Circuit, including the panel opinion in this appeal; 13 by other circuits; three by districts in other circuits; and one by the tax court).

*Appellant's supplemental reply brief:* The government's 4,199-word supplemental reply brief *en banc* cites 20 published opinions (four by the U.S. Supreme Court, 13 by the Tenth Circuit, and three by other circuits), one unpublished opinion by the Tenth Circuit, and two law review articles.

The appellants' *en banc* reply brief cites the same unpublished Tenth Circuit opinion as cited

in the appellees' en banc opening brief: "If, as plaintiffs assert (Pl. Br. 14), the proper way to determine the status quo is to 'look at the substance of the injunction and compare it to the status quo ante,' *Evans v. Fogarty*, 2002 U.S. App. LEXIS 17592, at \*10, 44 Fed. Appx. 924, 928 (10th Cir. 2002), the only possible conclusion is that the injunction here dramatically changes the status quo." (Page 9.)

*Opinion*: (3) The court published a 1,359-word signed order staying the district court's injunction pending resolution of the appeal, *O Centro Espirita Beneficiente Uniao de Vegetal*, 314 F.3d 463 (10th Cir. 2002) (seven headnotes), citing 15 published opinions (four by the U.S. Supreme Court, five by the Tenth Circuit, five by other circuits, and one by a district in another circuit) and one unpublished opinion by another circuit.

The opinion cites an unpublished opinion by the Eighth Circuit and a published opinion by the Northern District of Indiana to support the statement, "Even after enactment of RFRA, religious exemptions from or defenses to the CSA have not fared well." (314 F.3d at 467.)

According to Westlaw (04/13/2005), the court's order has been cited in four published Tenth Circuit opinions, including the two subsequent opinions in this case; one published opinion by a Tenth Circuit district; three secondary sources; the petition for a writ of certiorari in the U.S. Supreme Court in this case; and two appellate briefs in two Tenth Circuit cases.

Initially the court resolved the appeal with a published 12,380-word signed opinion with a dissent, *O Centro Espirita Beneficiente Uniao do Vegetal v. Ashcroft*, 342 F.3d 1170 (10th Cir. 2003) (10 headnotes), citing 35 published opinions (15 by the U.S. Supreme Court; 12 by the Tenth Circuit, including the stay issued earlier in the case; seven by other circuits; and one by a district in another circuit), one treatise, and one law review article. According to Westlaw (04/13/2005), the court's opinion has been cited in four published opinions by Tenth Circuit districts, one published opinion by another district, one published opinion by Kansas's court of appeals, eight secondary sources, the petition for a writ of certiorari in the U.S. Supreme Court in this case, 10 appellate briefs in nine Tenth Circuit cases, and two trial court briefs in two cases (one in a Tenth Circuit district and one in another district).

The court agreed to rehear the appeal *en banc* and published a 33,814-word per curiam opinion with two opinions concurring in part and dissenting in part, one opinion concurring, and one opin-

ion dissenting, *O Centro Espirita Beneficiente Uniao do Vegetal*, 389 F.3d 973 (10th Cir. 2004) (one headnote), citing 117 published opinions (20 by the U.S. Supreme Court; 24 by the Tenth Circuit, including the two previous opinions in this case; 38 by other circuits; the opinion by the District of New Mexico in this case; four by other Tenth Circuit districts; 12 by districts in other circuits; one by Florida's supreme court; one by Illinois's supreme court; three by Illinois's appellate court; one by Louisiana's supreme court; one by Michigan's supreme court; one by Minnesota's supreme court; one by Oregon's supreme court; three by Pennsylvania's supreme court; one by New Jersey's court of chancery; one by Oklahoma's court of appeals; one by South Carolina's court of appeals; and three by Texas's courts of civil appeals), one unpublished opinion by another circuit, five legal treatises, one other academic book, three law review articles, four other academic articles, and two classic texts.

An opinion concurring with the en banc opinion in part and dissenting in part cites the same unpublished opinion by the Eighth Circuit as the court's opinion staying the injunction pending appeal. In the part of the opinion arguing that the district court should have been reversed, the dissenting judge cited three opinions to support the statement that courts have routinely rejected religious exemptions from laws controlling substances even after RFRA was passed. (Page 20, 389 F.3d at 984.) These include a published opinion by the Seventh Circuit, a published opinion by the Northern District of Indiana, and the unpublished opinion by the Eighth Circuit.

An opinion concurring with the *en banc* opinion also cites this unpublished Eighth Circuit opinion. According to the concurring opinion, "There is no support in the cases cited [by the dissent] for the proposition that any religious use of any drug is outside the scope of RFRA (or, before [*Employment Division v. Smith*, 494 U.S. 872 (1990),] free exercise) protection." (Pages 20–21, 389 F.3d at 1020.) The concurring judge said that "the Eighth Circuit found that the 'broad use' of marijuana advocated by the church in question, which included supplying the drug to the sick and distributing it to anyone who wished it, including children with parental permission, made accommodation impossible." (Page 21, 389 F.3d at 1020.)

According to Westlaw (04/13/2005), the court's opinion has been cited in one published opinion by another circuit, one unpublished opinion by a district in another circuit, two secondary

sources, the petition for a writ of certiorari in the U.S. Supreme Court in this case, one appellate brief in the Tenth Circuit, and one trial court brief in a Tenth Circuit district.

***United States v. Rodriguez-Silos* (10th Cir. 02–3103, filed 03/27/2002, judgment 06/21/2002).**

*Appeal from:* District of Kansas.

*What happened:* Appeal by the defendant of a downward sentencing departure as insufficient dismissed for lack of jurisdiction.

*Opinion:* (1) The court’s docketed judgment cites no opinions.

***Burton v. R.J. Reynolds Tobacco Co.* (10th Cir. 02–3262, filed 07/23/2002, judgment 02/09/2005).**

*Appeal from:* District of Kansas.

*What happened:* Partially successful appeal by a tobacco company of a judgment in favor of a smoker for his smoking-related peripheral vascular disease and addiction. The court reversed a judgment for fraudulent concealment and \$15 million in punitive damages attached to that judgment, but affirmed other claims against the tobacco company.

*Related case:* After the district court entered judgment on the jury verdict, but before the court determined the amount of punitive damages, the defendant filed an appeal, *Burton v. R.J. Reynolds Tobacco Co.* (10th Cir. 02–3201, filed 06/17/2002, judgment 11/27/2002), which was initially consolidated with the index appeal, but subsequently dismissed as premature.

*Appellant’s brief:* The tobacco company’s 31,210-word appellant brief cites 158 published opinions (22 by the U.S. Supreme Court; 39 by the Tenth Circuit; 23 by other circuits; 27 by the District of Kansas, including five opinions in the same case; 23 by districts in other circuits; 17 by Kansas’s supreme court; and seven by other state courts, including one by Alabama’s supreme court, one by California’s court of appeal, one by Maine’s supreme judicial court, one by Massachusetts’s supreme judicial court, one by New York’s court of appeals, one by the appellate division of New York’s supreme court, and one by Tennessee’s supreme court), 18 unpublished opinions (one by another circuit, three by the District of Kansas, and 14 by districts in other circuits), two state court judgments (one by the California Superior Court and one by the Florida Circuit Court), two briefs in other cases (one in a pending U.S. Supreme Court case and one in a case before a Kansas state trial court), the *Restatement (Second) of Torts*, two treatises, one other book, and one law review article.

As the numbers indicate, the tobacco company’s brief cites unpublished opinions rather liberally. None is an opinion by the court of appeals for the Tenth Circuit, however.

In a footnote, the tobacco company’s brief lists 27 opinions to support the argument that the common knowledge of smoking dangers precludes claims based on failure to warn. One of these opinions is by another court of appeals and nine are by district courts in other circuits.

To support the statement that “[n]umerous other courts throughout the country concur” with a holding by another court of appeals that fraudulent concealment claims are preempted by the Federal Cigarette Labeling and Advertising Act, the brief cites three published district court and state court opinions and one unpublished opinion by a district court in another circuit in the main text with parenthetical explanations and two published district court and state court opinions and three unpublished opinions by district courts in other circuits in a footnote (without parenthetical explanations). (Pages 35–36.)

To support the argument that a defendant’s damages payments in other cases should be considered in assessing punitive damages, the brief cites one opinion by another circuit, two opinions by the District of Kansas, and one opinion by a district in another circuit. One of the District of Kansas opinions was not published.

The two unpublished state court judgments cited are damages awarded against the defendant in other cases—\$10 million in punitive damages in the California case and \$36 billion in total damages in the Florida case.

The brief cites two published and one unpublished opinions in other cases by the trial judge in this case to show that in other cases the judge had concluded that the fraudulent concealment cause of action in Kansas was limited to contract or fiduciary cases. (Page 28.)

The brief cites two opinions by a different judge in the same district, both of which held that the Seventh Amendment requires punitive damages to be determined by the jury, even in a diversity case. One of these opinions was published and the other was not. The brief quotes from the published opinion and states that one of the quotations was the judge in the published opinion quoting his prior unpublished opinion. (Page 73.)

Finally, in a footnote the brief cites two opinions by district courts in other circuits to support the argument that the common knowledge of smoking dangers precludes a negligent testing

claim. One of the opinions cited was not published.

*Appellee's brief:* The plaintiff's 20,983-word appellee brief cites 41 published opinions (four by the U.S. Supreme Court; 10 by the Tenth Circuit; three by other circuits; 11 by the District of Kansas, including five opinions in the same case; three by districts in other circuits; six by Kansas's supreme court; two by Kansas's court of appeals; one by Florida's supreme court; and one by Florida's district court of appeal), one brief filed in an Ohio state trial court, and *Black's Law Dictionary*.

*Appellant's reply brief:* The tobacco company's 14,746-word reply brief cites 63 published opinions (nine by the U.S. Supreme Court; 14 by the Tenth Circuit; 11 by other circuits; 12 by the District of Kansas, including three opinions in the same case; seven by districts in other circuits; six by Kansas's supreme court; and four by other state courts, including two by Florida's courts of appeal, one by New Mexico's court of appeals, and one by South Carolina's supreme court), five unpublished opinions (one by the District of Kansas and four by districts in other circuits), the *Restatement (Second) of Torts*, one treatise, and one legal article.

The brief cites an unpublished opinion by the District of Kansas as in "accord" with a published District of Kansas opinion quoted as saying that a "buyer/seller relationship does not create a fiduciary duty because the parties are dealing at arm's length and seeking for themselves the best advantage." (Page 6.) The brief also cites a *published* opinion by a district in another circuit as in "accord" with an *unpublished* opinion by a different district in a different circuit, which is quoted as saying that if "a plaintiff could assert a duty inconsistent with the Labeling Act merely by styling it 'fraudulent suppression,' the preemption provision of the Labeling Act would be deprived of any meaningful application." (Pages 9–10.)

The brief cites one published opinion and one unpublished opinion by two different districts in two different circuits to support the statement that "since Reynolds filed its opening brief, at least two other well-reasoned decisions have reaffirmed that post-July 1969 fraudulent concealment claims are preempted by the Labeling Act." (Page 10.)

An unpublished opinion is listed among two published opinions, all by different district courts in different circuits, as in "accord" with a quotation from a published opinion by another circuit stating that knowledge of the link between smoking and plaintiff's specific ailment "is irrelevant in

light of the serious nature of the other diseases known at that time to be caused by smoking." (Page 17.)

Three district court opinions by three different districts in three different circuits, two unpublished and one published, are cited as in "accord" with a published opinion by another circuit that observed that "allegations that tobacco companies 'still refuse to admit, and continue to conceal' the addictive nature of smoking do not constitute continuing fraud given public's awareness that smoking causes addiction." (Pages 20–21.) One of these unpublished opinions is cited elsewhere in the brief; the other was affirmed by a published appellate opinion.

*Opinion:* (3) The court's published 9,529-word signed opinion with a dissent, *Burton v. R.J. Reynolds Tobacco Co.*, 397 F.3d 906 (10th Cir. 2005) (20 headnotes), cites 45 published opinions (three by the U.S. Supreme Court; 14 by the Tenth Circuit; two by other circuits; seven by the District of Kansas, including three in this case; 15 by Kansas's supreme court; three by Kansas's court of appeals; and one by South Carolina's court of appeals) and three treatises. According to Westlaw (04/07/2005), the court's opinion has been cited in five secondary sources and one appellate brief in one Tenth Circuit case.

***Rural Water District No. 1 v. City of Wilson* (10th Cir. 02–3290, filed 08/09/2002, judgment 02/20/2003).**

*Appeal from:* District of Kansas.

*What happened:* Civil appeal dismissed for failure to file a brief.

*Opinion:* (1) The court's docketed judgment cites no opinions.

***Holley v. Andraschko* (10th Cir. 02–3372, filed 10/16/2002, judgment 10/22/2003).**

*Appeal from:* District of Kansas.

*What happened:* Unsuccessful pro se appeal of the denial of habeas corpus relief on the grounds that the expiration of the prisoner's sentence mooted the petition.

*Related case:* Decided by the same opinion was *Holley v. Lansing* (10th Cir. 02–3374, filed 10/16/2002, judgment 10/22/2003) (a second habeas corpus petition mooted by the prisoner's release).

*Opinion:* (2) The court's unpublished 757-word signed order and judgment, *Holley v. Andraschko*, 80 Fed. Appx. 614, 2003 WL 22407416 (10th Cir. 2003) (one headnote), cites five published opinions (two by the U.S. Supreme Court and three by the Tenth Circuit). According to Westlaw

(04/12/2005), the court's order and judgment has been cited in one unpublished opinion from a district in another circuit and in one secondary source.

***Kaster v. Safeco Insurance Co.* (10th Cir. 02–3386, filed 10/28/2002, judgment 12/03/2003).**

*Appeal from:* District of Kansas.

*What happened:* Unsuccessful appeal of an unsuccessful claim of age discrimination in employment.

*Appellant's brief:* The plaintiff's 8,331-word appellant brief cites 24 published opinions (three by the U.S. Supreme Court, 14 by the Tenth Circuit, six by other circuits, and one by the District of Kansas).

*Appellee's brief:* The employer's 7,658-word appellee brief cites 20 published opinions (three by the U.S. Supreme Court, nine by the Tenth Circuit, five by other circuits, two by the District of Kansas, and one by a district in another circuit) and four unpublished opinions (one by the Tenth Circuit, one by another circuit, one by the District of Kansas, and one by a district in another circuit).

The brief includes eight opinions in a string citation supporting a statement that the plaintiff "does not attempt to distinguish the numerous . . . authorities cited by the district court in its Opinion" to support a conclusion that the plaintiff did not establish a prima facie case. (Pages 18–19.) These eight opinions include one published opinion by the Tenth Circuit, four published opinions by other circuits, one unpublished opinion by the Tenth Circuit, one unpublished opinion by the Seventh Circuit, and one unpublished opinion by the Southern District of Florida.

The brief cites an unpublished opinion by the District of Kansas case to support a statement that "the equitable tolling doctrine has never been applied to provide plaintiff with an additional 180 or 300 day time period to file a charge." (Page 18.)

*Appellant's reply brief:* The plaintiff's 4,193-word reply brief cites 25 published opinions (three by the U.S. Supreme Court, eight by the Tenth Circuit, 11 by other circuits, two by the District of Kansas, and one by a district in another circuit) and three unpublished opinions (one by the Tenth Circuit, one by another circuit, and one by a district in another circuit).

The plaintiff's reply brief distinguishes eight opinions cited by the district court that the defendant's appellee brief states the plaintiff had not yet distinguished. Three of these are unpublished opinions—one by the Tenth Circuit, one by the Seventh Circuit, and one by the Southern District of Florida.

*Opinion:* (2) The court's unpublished 864-word signed order and judgment, *Kaster v. Safeco Insurance Co.*, 82 Fed. Appx. 28, 2003 WL 33854633 (10th Cir. 2003) (three headnotes), cites six published opinions (one by the U.S. Supreme Court, four by the Tenth Circuit, and the opinion by the District of Kansas in this case). According to Westlaw (04/12/2005), the court's opinion has been cited in eight opinions by the District of Kansas (seven published and one unpublished), one unpublished opinion by a district in another circuit, and two secondary sources.

***United States v. Cesspooch* (10th Cir. 02–4008, filed 01/15/2002, judgment 08/08/2002).**

*Appeal from:* District of Utah.

*What happened:* Certificate of appealability denied in a case the district court dismissed for lack of prosecution.

*Related case:* *United States v. Cesspooch* (10th Cir. 97–4013, filed 02/04/1997, judgment 04/29/1998) (prior unsuccessful criminal appeal).

*Opinion:* (2) The court's unpublished 384-word signed order and judgment, *United States v. Cesspooch*, 44 Fed. Appx. 359, 2002 WL 1813895 (10th Cir. 2002) (one headnote), cites one U.S. Supreme Court opinion and the unpublished Tenth Circuit opinion resolving the prisoner's earlier appeal of his conviction. According to Westlaw (04/12/2005), the court's order and judgment has not been cited elsewhere.

***United States v. Blake* (10th Cir. 02–4034, filed 02/22/2002, judgment 03/04/2003).**

*Appeal from:* District of Utah.

*What happened:* Successful cross-appeal by the government of a defendant's sentence consolidated with the defendant's unsuccessful appeal and a codefendant's unsuccessful appeal.

*Related cases:* *United States v. Larson* (10th Cir. 02–4013, filed 01/23/2002, judgment 03/04/2003) (codefendant's appeal) and *United States v. Blake* (10th Cir. 02–4016, filed 01/28/2002, judgment 03/04/2003) (defendant's appeal).

*Appellant's brief:* The defendant and cross-appellee's 5,798-word appellant brief cites 21 published opinions (two by the U.S. Supreme Court, 15 by the Tenth Circuit, three by other circuits, and one by the District of Utah).

*Appellee's brief:* The government's 8,815-word cross-appellant and appellee brief cites 30 published opinions (two by the U.S. Supreme Court, 20 by the Tenth Circuit, seven by other circuits, and one by the District of Utah).

*Appellant's reply brief:* The defendant's 2,396-word cross-appellee and reply brief cites 10 pub-

lished opinions (one by the U.S. Supreme Court, eight by the Tenth Circuit, and one by a Tenth Circuit district).

*Opinion:* (2) The court's unpublished 6,003-word signed order and judgment, *United States v. Larson*, 63 Fed. Appx. 416, 2003 WL 723961 (10th Cir. 2003) (12 headnotes), cites 29 published opinions (eight by the U.S. Supreme Court, 14 by the Tenth Circuit, and seven by other circuits). According to Westlaw (04/12/2005), the court's opinion has been cited in four secondary sources, one appellant brief in a Tenth Circuit case, and one trial court brief in a district in another circuit.

***Ruben v. Ballard Medical Products* (10th Cir. 02–4035, filed 02/28/2002, judgment 05/09/2002).**

*Appeal from:* District of Utah.

*What happened:* Civil appeal dismissed after mediation.

*Opinion:* (1) The court's docketed judgment cites no opinions.

***Orritt v. United States* (10th Cir. 02–4083, filed 05/20/2002, judgment 11/04/2002).**

*Appeal from:* District of Utah.

*What happened:* Civil appeal dismissed as settled.

*Opinion:* (1) The court's docketed judgment cites no opinions.

***United States v. Osborne* (10th Cir. 02–4119, filed 07/23/2002, judgment 06/18/2003).**

*Appeal from:* District of Utah.

*What happened:* Unsuccessful appeal of a criminal sentence for bank fraud on a plea of guilty.

*Related cases:* The court's opinion also affirmed the codefendants' sentences: *United States v. Reese* (10th Cir. 02–4167, filed 09/10/2002, judgment 06/18/2003) and *United States v. Gordon* (10th Cir. 02–4171, filed 09/17/2002, judgment 06/18/2003). Case number 02–4171 was also selected for this study.

*Appellant's brief:* The defendant's 4,011-word appellant brief cites seven published Tenth Circuit opinions.

*Appellee's brief:* The government's 3,285-word appellee brief cites five published opinions (two by the Tenth Circuit and three by other circuits).

*Opinion:* (3) The court's published 3,130-word signed opinion, *United States v. Osborne*, 332 F.3d 1307 (10th Cir. 2003) (12 headnotes), cites 12 published opinions (11 by the Tenth Circuit and one by another circuit). According to Westlaw (04/12/2005), the court's opinion has been cited in four opinions by the Tenth Circuit (one published and three unpublished), one published opinion by another circuit, three secondary

sources, and eight appellate briefs in eight cases (six in the Tenth Circuit and two in another circuit).

***Initiative and Referendum Institute v. Walker* (10th Cir. 02–4123, filed 07/24/2002, judgment pending).**

*Appeal from:* District of Utah.

*What happened:* In an action challenging a requirement by Utah's constitution of a □ supermajority for voters to enact legislation concerning the taking of wildlife, the state defendants' cross-appeal was consolidated with the plaintiffs' appeal. The plaintiffs appealed a dismissal of the action on the ground that the provision did not violate the First Amendment of the U.S. Constitution, and the state cross-appealed the plaintiffs' standing.

Initially the case was heard by a three-judge panel, but before the panel reached a decision the full court voted to hear the case en banc. En banc arguments were held 11/15/2005.

*Related case:* *Initiative and Referendum Institute v. Walker* (10th Cir. 02–4105, filed 06/28/2002, judgment pending) (plaintiff's appeal).

*Appellant's brief:* The plaintiffs' and cross-appellees' 11,159-word appellant brief cites 46 published opinions (23 by the U.S. Supreme Court, seven by the Tenth Circuit, nine by other circuits, two by Utah's supreme court, one by Utah's court of appeals, two by Colorado's supreme court, one by Nebraska's supreme court, and one by Washington's supreme court), one unpublished Tenth Circuit opinion, one law review article, one report by one of the plaintiffs, and one newspaper article attached to the complaint.

The brief distinguishes three opinions relied upon by the defendants and amici as inapplicable to this appeal because they concern general regulation of the initiative process—a published Tenth Circuit opinion, an unpublished Tenth Circuit opinion, and a published opinion by another circuit. (Pages 14–15.) In a footnote, the brief comments on the plaintiffs' previous objection to the defendants' reliance on an unpublished Tenth Circuit opinion, but acknowledges that the district court relied on it as well.

*Appellee's brief:* The state's 6,492-word appellee and cross-appellant brief cites 42 published opinions (27 by the U.S. Supreme Court, seven by the Tenth Circuit, seven by other circuits, and one by a district in another circuit) and one unpublished Tenth Circuit opinion.

The state cited the same unpublished Tenth Circuit opinion cited by the plaintiffs as an opin-

ion upholding Wyoming's supermajority requirement for initiatives against a First Amendment challenge. (Pages 10–11.)

*Amicus curiae brief:* Various amici filed a 7,521-word brief, citing 49 published opinions (25 by the U.S. Supreme Court, two by the Tenth Circuit, seven by other circuits, four by districts in other circuits, three by Utah's supreme court, three by California's supreme court, one by California's court of appeal, one by Colorado's supreme court, one by Idaho's supreme court, one by West Virginia's supreme court of appeals, and one by Arizona's court of appeals) and one unpublished opinion by a district in another circuit.

To support the principle that "individuals interested in wildlife issues in general" are not a discrete and insular minority, the amicus brief cites an unpublished opinion by the Eastern District of Pennsylvania, which is cited as citing published opinions by the Third and Ninth Circuits. (Page 22.)

*Appellant's reply brief:* The plaintiffs' and cross-appellees' 9,742-word reply brief cites 37 published opinions (18 by the U.S. Supreme Court, 11 by the Tenth Circuit, five by other circuits, two by Utah's supreme court, and one by Colorado's supreme court), four books, and one National Conference of State Legislatures report.

*Opinion:* (0) The case is still open.

***Tate v. Potter* (10th Cir. 02–4125, filed 07/24/2002, judgment 11/20/2002).**

*Appeal from:* District of Utah.

*What happened:* Civil appeal voluntarily dismissed.

*Opinion:* (1) The court's docketed judgment cites no opinions.

***Zazueta-Verdugo v. United States* (10th Cir. 02–4146, filed 08/16/2002, judgment 09/23/2002).**

*Appeal from:* District of Utah.

*What happened:* Permission to file successive petitions for habeas corpus relief dismissed for failure to file a motion.

*Opinion:* (1) The court's docketed judgment cites no opinions.

***United States v. Gordon* (10th Cir. 02–4171, filed 09/17/2002, judgment 06/18/2003).**

*Appeal from:* District of Utah.

*What happened:* Unsuccessful appeal of a criminal sentence for bank fraud on a plea of guilty.

*Related cases:* The court's opinion also affirmed the codefendants' sentences: *United States v. Osborne* (10th Cir. 02–4119, filed 07/23/2002, judgment 06/18/2003) and *United States v. Reese* (10th Cir. 02–4167, filed 09/10/2002, judgment

06/18/2003). Case number 02–4119 was also selected for this study.

*Appellant's brief:* The defendant's 2,957-word appellant brief cites one published Tenth Circuit opinion and one unpublished Tenth Circuit opinion.

To support an argument that the defendant's sentence should be reduced from 84 months to 70 months to reflect "only the actual checks that were fraudulently made and intended to be cashed," the brief quotes an unpublished Tenth Circuit opinion, acknowledging that "counsel could not find a Tenth Circuit opinion directly on point." (Page 11.)

*Appellee's brief:* The government's 1,434-word appellee brief cites five published opinions (one by the U.S. Supreme Court and four by the Tenth Circuit).

*Opinion:* (3) The court's published 3,130-word signed opinion, *United States v. Osborne*, 332 F.3d 1307 (10th Cir. 2003) (12 headnotes), cites 12 published opinions (11 by the Tenth Circuit and one by another circuit). According to Westlaw (04/12/2005), the court's opinion has been cited in four opinions by the Tenth Circuit (one published and three unpublished), one published opinion by another circuit, three secondary sources, and eight appellate briefs in eight cases (six in the Tenth Circuit and two in another circuit).

***Utah Animal Rights Coalition v. Salt Lake City Corp.* (10th Cir. 02–4174, filed 09/17/2002, judgment 06/16/2004).**

*Appeal from:* District of Utah.

*What happened:* Unsuccessful appeal by animal rights advocates of their constitutional challenge to the amount of time it took Salt Lake City to review their application for a permit to demonstrate during the winter Olympics.

*Appellant's brief:* The advocates' 5,783-word appellant brief cites 15 published opinions (eight by the U.S. Supreme Court, five by the Tenth Circuit, one by another circuit, and one by a Tenth Circuit district).

*Appellee's brief:* The city's 3,691-word appellee brief cites seven published opinions (five by the U.S. Supreme Court and two by the Tenth Circuit).

*Appellant's reply brief:* The advocates' 2,306-word reply brief cites eight published opinions (five by the U.S. Supreme Court, two by the Tenth Circuit, and one by another circuit).

*Opinion:* (3) The court's published 14,619-word signed opinion with two concurrences, *Utah Animal Rights Coalition v. Salt Lake City Corp.*, 371 F.3d



1248 (10th Cir. 2004) (nine headnotes), cites 71 published opinions (34 by the U.S. Supreme Court, 16 by the Tenth Circuit, 18 by other circuits, and three by Utah's supreme court), two treatises, one case book, three law review articles, one law review note, and two movies. According to Westlaw (04/12/2005), the court's opinion has been cited in five opinions by the Tenth Circuit (one published and four unpublished), five published opinions by other circuits, one unpublished opinion by a district in another circuit, one published opinion by New York's supreme court, two secondary sources, five appellate briefs in four cases (three in the Tenth Circuit and one in another circuit), and two trial court briefs in two cases (one in a Tenth Circuit district and one in a district in another circuit).

***Campanella v. United States* (10th Cir. 02–4214, filed 10/30/2002, judgment 06/26/2003).**

*Appeal from:* District of Utah.

*What happened:* Pro se appeal dismissed for failure to file a brief and pay fees.

*Related cases:* *Campanella v. State of Utah* (10th Cir. 02–4235, filed 11/22/2002, judgment 10/10/2003) (petition to proceed in forma pauperis denied), *Campanella v. Utah County Jail* (10th Cir. 02–4215, filed 10/30/2002, judgment 10/10/2003) (petition to proceed in forma pauperis denied), and *Campanella v. State of Utah* (10th Cir. 02–4183, filed 09/24/2002, judgment 10/10/2003) (petition to proceed in forma pauperis and certificate of appealability denied).

*Opinion:* (1) The court's docketed judgment cites no opinions.

***Jackson v. Barnhart* (10th Cir. 02–5065, filed 05/20/2002, judgment 03/24/2003).**

*Appeal from:* Northern District of Oklahoma.

*What happened:* Rescission of social security disability benefits reversed.

*Appellant's brief:* The claimant's 9,315-word appellant brief cites 32 published opinions (three by the U.S. Supreme Court, 23 by the Tenth Circuit, three by other circuits, one by a Tenth Circuit district, and two by districts in other circuits) and three medical texts.

*Appellee's brief:* The government's 8,892-word appellee brief cites 29 published opinions (two by the U.S. Supreme Court, 25 by the Tenth Circuit, and two by other circuits) and two medical texts.

*Appellant's reply brief:* The claimant's 2,361-word reply brief cites 13 published opinions (five by the Tenth Circuit, seven by other circuits, and one by a Tenth Circuit district).

*Opinion:* (2) The court's unpublished 2,589-word signed order and judgment, *Jackson v. Barnhart*, 60 Fed. Appx. 255, 2003 WL 1473554 (10th Cir. 2003) (three headnotes), cites nine published opinions (seven by the Tenth Circuit and two by other circuits) and one unpublished opinion by the Tenth Circuit.

The court cited an unpublished Tenth Circuit opinion as an example of its applying a regulation concerning disability coverage for alcoholism even after other related regulations had been amended. (Pages 3–4, 60 Fed. Appx. at 256, note 1.)

According to Westlaw (04/12/2005), the court's opinion has been cited in one published opinion by a district in another circuit, one secondary source, and two appellate briefs in one Tenth Circuit case.

***Wilson v. Independent School District No. 7* (10th Cir. 02–5144, filed 09/12/2002, judgment 11/05/2002).**

*Appeal from:* Northern District of Oklahoma.

*What happened:* Interlocutory appeal of partial summary judgment denied.

*Related case:* A related appeal of right involving the same issues and operative facts as the selected appeal was dismissed by stipulation, *Earp v. Independent School District No. 7* (10th Cir. 02–5145, filed 09/12/2002, judgment 04/12/2005).

*Opinion:* (1) The court's docketed judgment cites no opinions.

***Lowe v. Potter* (10th Cir. 02–5205, filed 12/11/2002, judgment 12/03/2003).**

*Appeal from:* Northern District of Oklahoma.

*What happened:* Pro se appeal dismissed for failure to file an appellant's brief.

*Opinion:* (1) The court's docket judgment cites no opinions.

***American Lung Association of Oklahoma v. Post 1320 Veterans of Foreign Wars* (10th Cir. 02–5209, filed 12/16/2002, judgment 01/24/2003).**

*Appeal from:* Northern District of Oklahoma.

*What happened:* Civil appeal dismissed as settled.

*Opinion:* (1) The court's docketed judgment cites no opinions.

***Clark v. United States Department of the Army* (10th Cir. 02–6009, filed 01/11/2002, judgment 02/20/2002).**

*Appeal from:* Western District of Oklahoma.

*What happened:* Civil appeal voluntarily dismissed.

*Opinion:* (1) The court's docketed judgment cites no opinions.

***Elk Association LP v. Far West Healthcare, Inc.* (10th Cir. 02–6089, filed 03/12/2002, judgment 04/24/2002).**

*Appeal from:* Western District of Oklahoma.

*What happened:* Civil appeal dismissed as settled.

*Opinion:* (1) The court's docketed judgment cites no opinions.

***Thompson v. Guilfoyle* (10th Cir. 02–6256, filed 08/12/2002, judgment 01/07/2003).**

*Appeal from:* Western District of Oklahoma.

*What happened:* Pro se appeal dismissed.

*Opinion:* (1) The court's docketed judgment cites no opinions.

***Duncan v. Beck* (10th Cir. 02–6291, filed 09/13/2002, judgment 10/01/2002).**

*Appeal from:* Western District of Oklahoma.

*What happened:* Request for permission to file a successive habeas corpus petition dismissed.

*Related cases:* *Duncan v. Champion* (10th Cir. 99–6029, filed 01/26/1999, judgment 11/08/1999) (certificate of appealability denied) and *Duncan v. Beck* (10th Cir. 02–6377, filed 11/26/2002, judgment 12/12/2002) (petition to file successive habeas corpus petition treated as a petition to rehear 02–6291 and denied).

*Opinion:* (1) The court's docket judgment cites no opinions.

***Vance v. United States* (10th Cir. 02–6346, filed 10/24/2002, judgment 03/17/2003).**

*Appeal from:* Western District of Oklahoma.

*What happened:* Unsuccessful pro se appeal of the district court's denial of the plaintiff's claim that a tax judgment was obtained through fraud.

*Related case:* *United States v. Vance* (10th Cir. 99–6291, filed 08/10/1999, judgment 06/02/2000) (affirming the reduction of tax obligations to judgment).

*Appellee's brief:* The government's 5,373-word appellee brief cites 28 published opinions (one by the U.S. Supreme Court, 22 by the Tenth Circuit, and five by other circuits) and two unpublished judgments—the decisions by the Western District of Oklahoma and the Tenth Circuit in the original case.

*Opinion:* (2) The court's unpublished 1,282-word signed order and judgment, *Vance v. United States*, 60 Fed. Appx. 236, 2003 WL 1194218 (10th Cir. 2003) (no headnotes), cites six published opinions (one by the U.S. Supreme Court and five by the Tenth Circuit) and two unpublished judg-

ments—the decisions by the Western District of Oklahoma and the Tenth Circuit in the original case. According to Westlaw (04/12/2005), the court's order and judgment has been cited in one unpublished opinion by the Tenth Circuit, two secondary sources, and one appellate brief in a Tenth Circuit case.

***Tillis v. Ward* (10th Cir. 02–6389, filed 12/06/2002, judgment 05/15/2003).**

*Appeal from:* Western District of Oklahoma.

*What happened:* Certificate of appealability denied.

*Opinion:* (2) The court's unpublished 450-word signed order, *Tillis v. Ward*, 65 Fed. Appx. 254, 2003 WL 21101495 (10th Cir. 2003) (one headnote), cites two published opinions (one by the U.S. Supreme Court and one by the Tenth Circuit). According to Westlaw (04/12/2005), the court's order has been cited in one unpublished opinion in a Tenth Circuit district.

***United States v. O'Flanagan* (10th Cir. 02–8014, filed 02/26/2002, judgment 08/15/2003).**

*Appeal from:* District of Wyoming.

*What happened:* Unsuccessful appeal of a criminal sentence.

*Appellant's brief:* The defendant's 3,367-word appellant brief cites 14 published opinions (eight by the Tenth Circuit and six by other circuits).

*Appellee's brief:* The government's 4,696-word appellee brief cites 17 published opinions (two by the U.S. Supreme Court, seven by the Tenth Circuit, and eight by other circuits).

*Appellant's reply brief:* The defendant's 2,300-word reply brief cites five published opinions by other circuits.

*Opinion:* (3) The court's published 2,981-word opinion, *United States v. O'Flanagan*, 339 F.3d 1229 (10th Cir. 2003) (four headnotes), cites 15 published opinions (five by the U.S. Supreme Court, three by the Tenth Circuit, and seven by other circuits). According to Westlaw (04/12/2005), the court's opinion has been cited in two published Tenth Circuit opinions, three unpublished opinions (one in the Tenth Circuit, one in another circuit, and one in a Tenth Circuit district), two secondary sources, and three appellate briefs in three Tenth Circuit cases.

***Humphrey v. Everett* (10th Cir. 02–8030, filed 03/28/2002, judgment 12/20/2002).**

*Appeal from:* District of Wyoming.

*What happened:* Certificate of appealability denied.

*Opinion:* (2) The court's unpublished 354-word signed order and judgment, *Humphrey v. Everett*,

53 Fed. Appx. 533, 2002 WL 31846326 (10th Cir. 2002) (no headnotes), cites two published opinions (one by the U.S. Supreme Court and one by Wyoming's supreme court). According to Westlaw (04/12/2005), the court's order and judgment has not been cited elsewhere.

***Berhanmeskel v. Ashcroft* (10th Cir. 02-9521, filed 04/02/2002, judgment 03/30/2004).**

*Appeal from:* Board of Immigration Appeals.

*What happened:* Immigration appeal dismissed for failure to prosecute.

*Petitioner's brief:* The petitioner's 7,972-word brief cites 30 published court opinions (six by the U.S. Supreme Court, four by the Tenth Circuit, 19 by other circuits, and one by a district in another circuit), 13 published decisions of the Board of Immigration Appeals, and *Black's Law Dictionary*.

*Respondent's brief:* The government's 4,692-word respondent brief cites 14 published opinions (three by the U.S. Supreme Court, four by the Tenth Circuit, and seven by other circuits).

*Opinion:* (1) The court's docketed judgment cites no opinions.

***Olsen v. Director* (10th Cir. 02-9529, filed 05/10/2002, transferred 05/22/2002).**

*Appeal from:* Office of Workers' Compensation Programs.

*What happened:* Workers' compensation petition transferred to the Ninth Circuit.

*Related cases:* Also transferred were *Olsen v. Department of Labor* (10th Cir. 01-9519, filed 05/24/2001, transferred 05/22/2002) and *Olsen v. Director* (10th Cir. 01-9540, filed 11/09/2001, transferred 05/22/2002).

*Opinion:* (1) The court's docketed judgment cites no opinions.

***Wiransane v. Ashcroft* (10th Cir. 02-9555, filed 08/15/2002, judgment 04/27/2004).**

*Appeal from:* Board of Immigration Appeals.

*What happened:* Successful immigration appeal. The court determined that the immigration judge should have afforded the petitioner's claims of Chinese ethnicity more credibility and evaluated the persecution of ethnic Chinese in Indonesia.

*Petitioner's brief:* The petitioner's 7,142-word brief cites 24 published court opinions (eight by the U.S. Supreme Court, 10 by the Tenth Circuit, and six by other circuits), six published decisions by the Board of Immigration Appeals, one legal article, and one newspaper article.

*Amicus brief:* The American Immigration Law Foundation filed a 7,130-word amicus curiae brief to challenge new procedures of the Board of Immigration Appeals resulting in a large number of

affirmances without opinion, citing 52 published court opinions (nine by the U.S. Supreme Court, eight by the Tenth Circuit, and 35 by other circuits), two published decisions by the Board of Immigration Appeals, and two newspaper websites.

*Respondent's brief:* The government's 9,082-word respondent brief cites 50 published court opinions (10 by the U.S. Supreme Court, 13 by the Tenth Circuit, and 27 by other circuits), two published decisions by the Board of Immigration Appeals, and two treatises.

*Opinion:* (3) The court's published 4,356-word signed opinion, *Wiransane v. Ashcroft*, 366 F.3d 889 (10th Cir. 2004) (22 headnotes), cites 20 published court opinions (two by the U.S. Supreme Court, seven by the Tenth Circuit, and 11 by other circuits), two published decisions by the Board of Immigration Appeals, two unpublished opinions (one by the Tenth Circuit and one by another circuit), two treatises, and a Human Rights Watch report.

The court cited unpublished opinions by the Tenth and Third Circuits to support a statement that an immigrant's claim for asylum or restriction on removal depends on current conditions: "Subsequent events in Indonesia may well undercut Petitioner's claims." (Page 16.)

According to Westlaw (04/12/2005), the court's opinion has been cited in 10 Tenth Circuit opinions (two published and eight unpublished), one unpublished opinion by another circuit, two secondary sources, and 14 appellate briefs in 14 cases (two in the U.S. Supreme Court and 12 in the Tenth Circuit).

***Nyombi v. Ashcroft* (10th Cir. 02-9563, filed 09/27/2002, judgment 01/22/2004).**

*Appeal from:* Board of Immigration Appeals.

*What happened:* Successful asylum appeal by a Ugandan. The court remanded the case, because the immigration judge gave insufficient reasons for deciding the asylum applicant lacked credibility.

*Petitioner's brief:* The petitioner's 6,115-word brief cites 13 published court opinions (six by the U.S. Supreme Court, two by the Tenth Circuit, and five by other circuits) and five published decisions by the Board of Immigration Appeals.

*Respondent's brief:* The government's 7,047-word respondent brief cites 31 published court opinions (nine by the U.S. Supreme Court, six by the Tenth Circuit, 16 by other circuits) and one published decision by the Board of Immigration Appeals.

*Opinion:* (2) The court's unpublished 1,480-word signed order and judgment, *Nyombi v. Ashcroft*, 86 Fed. Appx. 380, 2004 WL 100518 (10th Cir. 2004) (one headnote), cites seven published opinions (one by the U.S. Supreme Court, four by the Tenth Circuit, and two by other circuits). According to Westlaw (04/12/2005), the court's order and judgment has been cited in one secondary source and one appellant brief in a Tenth Circuit case.

## 11. Eleventh Circuit<sup>113</sup>

In the Eleventh Circuit, unpublished opinions are not binding precedent, but they may be cited as persuasive authority.<sup>114</sup>

Of the 50 cases randomly selected, 49 are appeals from district courts (11 from the Southern District of Florida, eight each from the Middle District of Florida and the Northern District of Georgia, six from the Middle District of Alabama, five from the Middle District of Georgia, four from the Southern District of Georgia, and two each from the Northern District of Alabama and the South-

ern District of Alabama) and one is an appeal from the Board of Immigration Appeals.<sup>115</sup>

The publication rate in this sample is 2%. One of the appeals was resolved by a published per curiam opinion, 19 were resolved by unpublished per curiam opinions tabled in the *Federal Appendix* (one with a partial dissent), and 30 were resolved by docket judgments.

The published opinion was 679 words in length. Unpublished opinions averaged 1,446 words in length, ranging from 93 to 3,871. Ten opinions were under 1,000 words in length (50%, one published and nine unpublished), and eight were under 500 words in length (40%, all unpublished).

Fifteen of the appeals were fully briefed. In 27 of the appeals no counseled brief was filed, and in eight of the appeals a counseled brief was filed only for one side.

There are citations to unpublished court opinions in seven of these cases. In one case the citations are only to opinions in related cases; in six cases there are citations to unpublished opinions in unrelated cases. All of the citations to unrelated unpublished opinions are in briefs, not opinions.

Three of the unrelated unpublished opinions cited are by the court of appeals for the Eleventh Circuit, eight are by courts of appeals for other circuits, one is by a district court in another circuit, and one is by New York's supreme court.

C11-1. Both the government and the defendant cited unpublished appellate opinions in an unsuccessful appeal of a sentencing designation of career offender and an order of restitution, *United States v. Martinez* (11th Cir. 02-14267, filed 08/05/2002, judgment 03/18/2004), resolved by unpublished opinion tabled at 99 Fed. Appx. 885, 2004 WL 625765 (published opinion withdrawn on the defendant's successful motion for rehearing).

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113. Docket sheets are on PACER, and they include links to many briefs. (Docket sheets in criminal cases became available electronically December 1, 2004. Of the 23 cases in this sample with briefs, all briefs are on PACER for 11 cases, some briefs are on PACER for seven cases, and no briefs are on PACER for five cases.) Published opinions are on Westlaw. Unpublished opinions issued before April 18, 2005, are not available electronically. Most briefs are on Westlaw. (Of the 20 cases with counseled briefs resolved by opinion, all briefs are on Westlaw for 16 cases, some briefs are on Westlaw for one case, and no briefs are on Westlaw for three cases.)

114. 11th Cir. L.R. 36-2 ("Unpublished opinions are not considered binding precedent. They may be cited as persuasive authority, provided that a copy of the unpublished opinion is attached to or incorporated within the brief, petition, motion or response in which such citation is made.").

At the time the Eleventh Circuit split from the Fifth, unpublished opinions in the Fifth Circuit were precedential. The court adopted a rule designating unpublished opinions non-precedential on April 1, 1987.

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115. In 2002, 7,367 cases were filed in the court of appeals for the Eleventh Circuit.

The government's appellee brief cites an unpublished opinion by the court of appeals for the Eleventh Circuit to support the statement that "as a panel of this Court has observed, an order of 'immediate' restitution may help an inmate earn higher wages while in prison through the Inmate Financial Responsibility Program." The brief also includes an unpublished opinion by the court of appeals for the Sixth Circuit in a string of nine opinions—including eight published opinions by the courts of appeals for the Eleventh Circuit, the Sixth Circuit, and two other circuits—supporting a statement that "A deferential standard of review for a district court's factual finding regarding prior offenses was followed before *Buford* [*v. United States*, 532 U.S. 59 (2001),] and, of course, after it."

The defendant's reply brief cites four unpublished federal appellate opinions. These include the same unpublished Sixth Circuit opinion in its rebuttal of the government's string citation. The brief also cites an unpublished opinion by the court of appeals for the Fourth Circuit as authority for the standard of review in determining whether the defendant was a career offender. And the brief includes two unpublished opinions (one by the court of appeals for the Second Circuit and one by the court of appeals for the Fourth Circuit) with three published opinions (one by the court of appeals for the Eleventh Circuit and two by courts of appeals for other circuits) to support a statement that "The failure of the district court's restitution order in this case to comply with express statutory requirements amounts to plain error."

C11-2. In an unsuccessful appeal of a conviction for illegal reentry and use of a false passport, *United States v. Urbaz* (11th Cir. 02-11675, filed 03/28/2002, judgment 09/18/2002), resolved by unpublished opinion tabled at 49 Fed. Appx. 289, 2002 WL 31174134, the government cited an unpublished opinion by the court of appeals for the Eleventh Circuit and an unpublished opinion

by the court of appeals for the First Circuit. The brief cites the unpublished Eleventh Circuit opinion to show that the court has already rejected an argument to overrule a published Eleventh Circuit opinion. The brief cites the unpublished First Circuit opinion in stating that a published Eleventh Circuit opinion adopted its reasoning.

C11-3. In a partially successful securities appeal, *Lockhart Holdings, Inc. v. Doyle Painting Contractors, Inc.* (11th Cir. 02-10295, filed 01/17/2002, judgment 07/03/2002), resolved by unpublished opinion tabled at 45 Fed. Appx. 886, 2002 WL 1676368, both parties cited an unpublished opinion by the court of appeals for the Eleventh Circuit and an unpublished opinion by New York's supreme court.

The appellant's brief states that the district court relied on the unpublished Eleventh Circuit opinion, which partially affirmed and partially reversed a published opinion by the district court for the Middle District of Georgia, which the brief also cites. The appellee's brief states that in the unpublished opinion the court affirmed the portion of the lower court's opinion adverse to the appellant's argument.

The appellant's brief states that "the only cases that we have been able to locate on point completely support [the appellant's] position." The two opinions cited are a published New York appellate opinion and an unpublished opinion by a New York trial court. In a footnote, the appellee's brief rebuts the appellant's reliance on the unpublished opinion.

C11-4. The appellant cites an unpublished opinion in each of its briefs in an appeal dismissed by stipulation concerning an award of attorney fees in an employment discrimination action, *Bogle v. McClure* (11th Cir. 02-14980, filed 09/12/2002, judgment 01/05/2004).

The defendants' appellant brief twice cites an unpublished opinion by the court of

appeals for the Fourth Circuit. First the brief includes the opinion with two Supreme Court opinions in a string citation following a Supreme Court quotation. In a parenthetical, the unpublished opinion is quoted as stating, “in measuring the degree of a plaintiff’s success, ‘only those changes in a defendant’s conduct which are mandated by a judgment . . . may be considered.’” On the following page, the brief cites the same opinion and parenthetically quotes it as stating that “When injunctive relief is sought and denied, ‘there is even less occasion to permit a change in conduct to serve as the basis for a fee award under § 1988.’”

The defendant’s reply brief invites the reader to compare three opinions justifying reductions in attorney fee awards for unsuccessful claims—a published opinion by the court of appeals for the Seventh Circuit, an unpublished opinion by the district court for the Eastern District of Louisiana, and a published opinion by the district court for the District of Nevada.

C11–5. In an employer’s unsuccessful appeal of an employment discrimination judgment in favor of the plaintiff, and a partially successful cross-appeal by the plaintiff of dismissed claims, *Brewton v. Georgia Department of Public Safety* (11th Cir. 02–14782, filed 09/03/2002, judgment 07/17/2003), resolved by unpublished opinion tabled at 77 Fed. Appx. 505, 2003 WL 21804100, the defendant’s reply brief devotes a 10-line paragraph to a discussion of an unpublished opinion by the court of appeals for the Ninth Circuit in which the court “reversed an outcome-determinative sanction under Rule 37(c) as abuse of discretion.”

C11–6. In an unsuccessful appeal of a drug sentence, *United States v. Tolbert* (11th Cir. 02–11460, filed 04/11/2002, judgment 12/23/2002), resolved by unpublished opinion tabled at 55 Fed. Appx. 901, 2002 WL 31932873, the government’s appellee brief cites an unpublished opinion by the court of

appeals for the Ninth Circuit to support an argument for a three-level enhancement.

### *Individual Case Analyses*

#### ***United States v. Feliz* (11th Cir. 02–10050, filed 01/03/2002, judgment 06/27/2002).**

*Appeal from:* Southern District of Florida.

*What happened:* Unsuccessful appeal of the denial of a downward departure in a sentence for wrongful reentry.

*Appellant’s brief:* The defendant’s 3,278-word appellant brief cites seven published opinions (three by the Eleventh Circuit and four by other circuits).

*Appellee’s brief:* The government’s 1,912-word appellee brief cites four published Eleventh Circuit opinions.

*Opinion:* (2) The court’s unpublished 454-word per curiam opinion, tabled at *United States v. Feliz*, 45 Fed. Appx. 878, 2002 WL 1424156 (11th Cir. 2002), cites two published Eleventh Circuit opinions. According to Westlaw (03/16/2005), the court’s opinion has not been cited elsewhere.

#### ***Harper v. Hooks* (11th Cir. 02–10230, filed 01/14/2002, judgment 03/12/2002).**

*Appeal from:* Middle District of Georgia.

*What happened:* Civil rights appeal dismissed for failure to file an appellant’s brief.

*Opinion:* (1) The court’s docketed judgment cites no opinions.

#### ***Payne v. United States Department of Labor* (11th Cir. 02–10270, filed 01/15/2002, judgment 05/15/2002).**

*Appeal from:* Northern District of Georgia.

*What happened:* Summary judgment reversed because the pro se plaintiff was not given proper notice.

*Appellee’s brief:* The government’s 6,744-word appellee brief cites 28 published opinions (four by the U.S. Supreme Court, six by the Eleventh Circuit,<sup>116</sup> 10 by other circuits, and eight by districts in other circuits) and one related case in the Northern District of Georgia.

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116. Opinions by the court of appeals for the Fifth Circuit issued before October 1, 1981, and opinions by Unit B of the court of appeals for the Fifth Circuit issued after September 30, 1981, are regarded as Eleventh Circuit opinions. See *Stein v. Reynolds Securities, Inc.*, 667 F.2d 33, 34 (11th Cir. 1982) (Unit B decisions); *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (pre-split decisions).

*Opinion:* (2) The court's unpublished 395-word per curiam opinion, tabled at *Payne v. USDOL*, 37 Fed. App. 502, 2002 WL 1049318 (11th Cir. 2002), cites three published Eleventh Circuit opinions. According to Westlaw (03/17/2005), the court's opinion has not been cited elsewhere.

***Lockhart Holdings, Inc. v. Doyle Painting Contractors, Inc.* (11th Cir. 02-10295, filed 01/17/2002, judgment 07/03/2002).**

*Appeal from:* Middle District of Georgia.

*What happened:* Partially successful civil appeal in a securities case. The court of appeals agreed with the district court that most of the counter-plaintiffs' claims were time-barred, but not their claim of promissory estoppel.

*Appellants' brief:* The counter-plaintiffs' 8,147-word appellant brief cites 32 published opinions (five by the Eleventh Circuit, one by another circuit, one by the Middle District of Georgia, two by another Eleventh Circuit district, one by a district in another circuit, five by Georgia's supreme court, 12 by Georgia's court of appeals, one by Mississippi's supreme court, one by Ohio's supreme court, one by Kentucky's court of appeals, one by Massachusetts's appeals court, and one by New York's appellate division) and two unpublished opinions (one by the Eleventh Circuit and one by New York's supreme court).

The brief cites an unpublished Eleventh Circuit partial affirmance and partial reversal of a published opinion by the Middle District of Georgia, which the brief also cites. According to the brief, the district court relied on the unpublished Eleventh Circuit opinion. (Pages 12-13.)

The brief cites two opinions to support the statement, "By contrast, the only cases that we have been able to locate on point completely support [the counter-plaintiffs'] position." (Page 13.) One opinion is a published New York appellate opinion and the other is an unpublished New York trial court opinion.

*Appellee's brief:* The counter-defendant's 7,136-word appellee brief cites 14 published opinions (one by the U.S. Supreme Court, three by the Eleventh Circuit, one by another circuit, one by the Middle District of Georgia, one by another Eleventh Circuit district, three by Georgia's supreme court, and four by Georgia's court of appeals) and two unpublished opinions (one by the Eleventh Circuit and one by New York's supreme court).

The appellee's brief cites the same two unpublished opinions as does the appellants' brief. The brief cites the unpublished Eleventh Circuit opinion to support the statement that "This court, in

an unpublished opinion, affirmed [the] portion of the District Court's decision [in a published opinion adverse to the appellant's argument]." (Page 20.) In a footnote, the appellee's brief rebuts the appellants' reliance on the unpublished opinion by New York's supreme court. (Page 21, note 6.)

*Appellant's reply brief:* The counter-plaintiffs' 2,672-word reply brief cites three published opinions (one by an Eleventh Circuit District, one by Georgia's supreme court, and one by Georgia's court of appeals).

*Opinion:* (2) The court's unpublished 1,333-word per curiam opinion, tabled at *Lockhart Holdings v. Doyle Painting Contractors*, 45 Fed. Appx. 886, 2002 WL 1676368 (11th Cir. 2002), cites nine published opinions (two by the U.S. Supreme Court, four by Georgia's supreme court, and three by Georgia's court of appeals). According to Westlaw (03/17/2005), the court's opinion has not been cited elsewhere.

***United States v. Ayala* (11th Cir. 02-10424, filed 01/24/2002, judgment 10/17/2002).**

*Appeal from:* Southern District of Georgia.

*What happened:* Unsuccessful pro se appeal of a refusal to reduce a criminal sentence.

*Appellee's brief:* The government's 955-word appellee brief cites three published opinions (one by the U.S. Supreme Court, one by the Eleventh Circuit, and one by another circuit).

*Opinion:* (2) The court's unpublished 490-word per curiam opinion, tabled at *United States v. Ayala*, 52 Fed. Appx. 486, 2002 WL 31415610 (11th Cir. 2002), cites two published Eleventh Circuit opinions. According to Westlaw (03/17/2005), the court's opinion has not been cited elsewhere.

***United States v. Tejada* (11th Cir. 02-10470, filed 01/28/2002, judgment 02/22/2002).**

*Appeal from:* Southern District of Florida.

*What happened:* Criminal appeal voluntarily dismissed.

*Opinion:* (1) The court's docket judgment cites no opinions.

***Crosskey v. Barnhart* (11th Cir. 02-10527, filed 01/30/2002, judgment 05/02/2002).**

*Appeal from:* Middle District of Alabama.

*What happened:* Social security disability benefits appeal remanded on the government's motion.

*Appellant's brief:* The appellant's 2,606-word brief cites 23 published opinions (one by the U.S. Supreme Court, 21 by the Eleventh Circuit, and one by the Middle District of Alabama).

*Opinion:* (1) The court's docket judgment cites no opinions.

**Anderson v. Alabama (11th Cir. 02–10607, filed 02/01/2002, judgment 04/19/2002).**

*Appeal from:* Southern District of Alabama.

*What happened:* Pro se prisoner's motion for a certificate of appealability in a habeas corpus case denied.

*Opinion:* (1) The court's docket judgment cites no opinions.

**Oakwood Reinsurance Co. v. Texel Corp. (11th Cir. 02–11063, filed 02/27/2002, judgment 04/15/2002).**

*Appeal from:* Southern District of Florida.

*What happened:* Civil appeal dismissed for lack of prosecution.

*Opinion:* (1) The court's docket judgment cites no opinions.

**Gray v. Johnson (11th Cir. 02–11069, filed 02/27/2002, judgment 06/03/2002).**

*Appeal from:* Northern District of Georgia.

*What happened:* Pro se prisoner's motion for a certificate of appealability in a habeas corpus case denied.

*Opinion:* (1) The court's docket judgment cites no opinions.

**Edinborough v. Protection One Alarm Monitoring, Inc. (11th Cir. 02–11391, filed 03/15/2002, judgment 04/30/2002).**

*Appeal from:* Northern District of Georgia.

*What happened:* Civil appeal dismissed for lack of prosecution.

*Opinion:* (1) The court's docket judgment cites no opinions.

**United States v. Kelley (11th Cir. 02–11417, filed 03/18/2002, judgment 11/20/2002).**

*Appeal from:* Southern District of Florida.

*What happened:* Anders motion granted in an unsuccessful appeal of a conviction for dealing in marijuana plants.

*Anders brief:* The defendant's counsel's 1,439-word Anders brief cites six published opinions (one by the U.S. Supreme Court, two by the Eleventh Circuit, and three by other circuits).

*Opinion:* (2) The court's unpublished 93-word opinion "by the court," tabled at *United States v. Kelley*, 54 Fed. Appx. 690, 2002 WL 31719318 (11th Cir. 2002), cites one U.S. Supreme Court opinion. According to Westlaw (03/17/2005), the court's opinion has not been cited elsewhere.

**United States v. Tolbert (11th Cir. 02–11460, filed 04/11/2002, judgment 12/23/2002).**

*Appeal from:* Northern District of Florida.

*What happened:* Unsuccessful appeal of a drug sentence.

*Appellant's brief:* The defendant's 4,980-word appellant brief cites 12 published opinions (11 by the Eleventh Circuit and one by another circuit) and a related district court case.

*Appellee's brief:* The government's 8,492-word appellee brief cited 32 published opinions (three by the U.S. Supreme Court and 29 by the Eleventh Circuit) and one unpublished opinion by another circuit.

The government's rebuttal to the defendant's second issue on appeal is an argument that "the district court properly determined that the offense involved a substantial risk of harm to human life or the environment." (Page 30.) After three pages of argument, the first opinion cited is an unpublished opinion by the Ninth Circuit to support the statement, "These factors warranted the three level enhancement as provided for in section 2D1.1(b)(5) as the criteria identified in Application Note 20 was [sic] clearly established." (Page 33.)

*Appellant's reply brief:* The defendant's 1,273-word reply brief cites five published opinions (one by the U.S. Supreme Court, three by the Eleventh Circuit, and one by another circuit).

*Opinion:* (2) The court's unpublished 216-word per curiam opinion, tabled at *United States v. Tolbert*, 55 Fed. Appx. 901, 2002 WL 31932873 (11th Cir. 2002), cites no opinions. According to Westlaw (10/14/2004), the court's opinion has not been cited elsewhere.

**Thompson v. Brown (11th Cir. 02–11653, filed 03/27/2002, judgment 05/15/2002).**

*Appeal from:* Middle District of Georgia.

*What happened:* Pro se prisoner appeal dismissed for lack of jurisdiction.

*Opinion:* (1) The court's docket judgment cites no opinions.

**United States v. Urbaez (11th Cir. 02–11675, filed 03/28/2002, judgment 09/18/2002).**

*Appeal from:* Southern District of Florida.

*What happened:* Unsuccessful appeal of a conviction for illegal reentry and use of a false passport.

*Appellant's brief:* The defendant's 7,786-word appellant brief cites 30 published opinions (15 by the U.S. Supreme Court, 10 by the Eleventh Circuit, four by other circuits, and one by a district in another circuit).

*Appellee's brief:* The government's 5,997-word appellee brief cites 25 published opinions (seven by the U.S. Supreme Court, 16 by the Eleventh Circuit, and two by other circuits) and two un-



published opinions (one by the Eleventh Circuit and one by another circuit).

The brief cites an unpublished Eleventh Circuit opinion to rebut an argument that a published Eleventh Circuit opinion should be overruled: "A panel of this Court recently rejected that argument when it held that '[t]he principle enunciated in *Carter* was borrowed from *Morissette* . . . , and was well-established when *Peralt-Reyes* was decided. Therefore, we are bound to follow *Peralt-Reyes* by concluding that the crime of attempted reentry requires only general intent.'" (Page 17.)

The brief also cites an unpublished First Circuit opinion in stating that a published Eleventh Circuit opinion adopted its reasoning: "Next, the Court 'found no merit' in the distinction between the crime of illegal reentry and attempted illegal reentry for the purposes of the level of intent required, adopting the First Circuit's reasoning in *United States v. Reyes-Medina*, 53 F.3d 327 (1st Cir. 1995) (unpub.)." (Page 16.) The Court of Appeals for the Eleventh Circuit did indeed state, "We find *Reyes-Medina* persuasive and adopt its holding." *United States v. Peralt-Reyes*, 131 F.3d 956, 957 (11th Cir. 1997).

*Opinion:* (2) The court's unpublished 3,371-word per curiam opinion, tabled at *United States v. Urbaz*, 49 Fed. Appx. 289, 2002 WL 31174134 (11th Cir. 2002), cites 23 published opinions (five by the U.S. Supreme Court and 18 by the Eleventh Circuit). According to Westlaw (03/17/2005), the court's opinion has not been cited elsewhere. The court denied rehearing *en banc*, *United States v. Urbaz*, 54 Fed. Appx. 688, 2002 WL 31652587 (11th Cir. 2002) (table).

***Humphrey v. United States* (11th Cir. 02–11683, filed 03/28/2002, judgment 06/03/2002).**

*Appeal from:* Middle District of Georgia.

*What happened:* Pro se prisoner appeal dismissed for lack of jurisdiction.

*Opinion:* (1) The court's docket judgment cites no opinions.

***United States v. Griffin* (11th Cir. 02–11806, filed 04/03/2002, judgment 08/20/2002).**

*Appeal from:* Northern District of Florida.

*What happened:* Pro se criminal appeal dismissed for failure to pay the filing fees.

*Opinion:* (1) The court's docket judgment cites no opinions.

***United States v. Johnson* (11th Cir. 02–12043, filed 04/15/2002, judgment 12/17/2002).**

*Appeal from:* Southern District of Alabama.

*What happened:* Unsuccessful appeal of a district judge's refusal to recuse himself from a su-

pervised release revocation case, where the defendant had tested positive for alcohol and cocaine. The court ruled that the judge did not abuse his discretion in keeping the case after rescinding a subpoena for mitigating evidence following ex parte communications with probation officers.

*Related cases:* *United States v. Thomas* (11th Cir. 93–6708, filed 08/23/1993, judgment 07/08/1994) (unsuccessful criminal appeal), *Thomas v. United States* (11th Cir. 02–13614, filed 07/01/2002, judgment 09/19/2002) (pro se motion for certificate of appealability denied).

*Appellant's brief:* The defendant's 4,218-word appellant brief cites 18 published opinions (four by the U.S. Supreme Court, five by the Eleventh Circuit, and nine by other circuits).

*Appellee's brief:* The government's 3,356-word appellee brief cites 11 published opinions (two by the U.S. Supreme Court and nine by the Eleventh Circuit).

*Opinion:* (2) The court's unpublished 827-word per curiam opinion, tabled at *United States v. Johnson*, 55 Fed. Appx. 902, 2002 WL 31032046 (11th Cir. 2002), cites 10 published opinions (eight by the Eleventh Circuit and two by other circuits). According to Westlaw (03/16/2005), the court's opinion has not been cited elsewhere.

***Blankenship v. United States* (11th Cir. 02–12297, filed 04/26/2002, judgment 11/26/2002).**

*Appeal from:* Northern District of Florida.

*What happened:* Pro se motion for a certificate of appealability denied.

*Opinion:* (1) The court's docket judgment cites no opinions.

***Bilzerian v. Securities and Exchange Commission* (11th Cir. 02–12412, filed 04/30/2002, judgment 08/21/2003).**

*Appeal from:* Middle District of Florida.

*What happened:* Unsuccessful pro se bankruptcy appeal by a debtor trying to use bankruptcy protection to avoid a civil action by the Securities and Exchange Commission following a criminal conviction for securities fraud.

*Appellee's brief:* The receiver's 10,878-word appellee brief cites 55 published opinions (five by the U.S. Supreme Court; 10 by the Eleventh Circuit, including one in related litigation; 16 by other circuits, including two in related litigation; one by another circuit's bankruptcy appeal panel; three district court opinions by the Middle District of Florida; four bankruptcy court opinions by the Middle District of Florida, including two in related litigation; one bankruptcy court opinion by another Eleventh Circuit district; five district

court opinions by districts in other circuits, including two in related litigation; and 10 bankruptcy court opinions by districts in other circuits), three unpublished opinions in related litigation (one by the Middle District of Florida and two by a district in another circuit), and one treatise.

*Appellee's brief:* The Securities and Exchange Commission's 5,384-word appellee brief cites 20 published opinions (four by the Eleventh Circuit, including one in related litigation; nine by other circuits, including two in related litigation; one by the district court in the Middle District of Florida in related litigation; one by the bankruptcy court in the Middle District of Florida in related litigation; three by district courts in other circuits in related litigation; and two by bankruptcy courts in other circuits), two unpublished opinions by district courts in other circuits in related litigation, and one treatise.

*Opinion:* (2) The court's unpublished 227-word per curiam opinion, tabled at *Bilzerian v. SEC*, 82 Fed. Appx. 213, 2003 WL 22075379 (11th Cir. 2003), cites no opinions. According to Westlaw (03/16/2005), the court's opinion has not been cited elsewhere.

***United States v. Wilson* (11th Cir. 02–12484, filed 05/02/2002, judgment 05/24/2002).**

*Appeal from:* Southern District of Georgia.

*What happened:* Criminal appeal voluntarily dismissed.

*Opinion:* (1) The court's docket judgment cites no opinions.

***Rowland v. United States* (11th Cir. 02–12572, filed 05/08/2002, judgment 06/07/2002).**

*Appeal from:* Northern District of Alabama.

*What happened:* Pro se prisoner appeal dismissed for failure to pay filing fees.

*Opinion:* (1) The court's docket judgment cites no opinions.

***Casimir v. United States Attorney General* (11th Cir. 02–12664, filed 05/13/2002, judgment 07/16/2003).**

*Appeal from:* Board of Immigration Appeals.

*What happened:* Unsuccessful immigration appeal.

*Appellant's brief:* The immigrant's 3,107-word appellant brief cites eight published court opinions (three by the U.S. Supreme Court and five by circuits other than the Eleventh) and 11 published opinions by the Board of Immigration Appeals.

*Appellee's brief:* The government's 10,605-word appellee brief cites 65 published opinions (14 by the U.S. Supreme Court, 13 by the Eleventh Cir-

cuit, and 38 by other circuits) and three published opinions by the Board of Immigration Appeals.

*Opinion:* (2) The court's unpublished 1,431-word per curiam opinion, tabled at *Casimir v. United States Attorney General*, 77 Fed. Appx. 504, 2003 WL 21803727 (11th Cir. 2003), cites 10 published court opinions (one by the U.S. Supreme Court, six by the Eleventh Circuit, and three by other circuits) and two published opinions by the Board of Immigration Appeals. According to Westlaw (03/18/2005), the court's opinion has not been cited elsewhere.

***In re Barthmaier* (11th Cir. 02–12811, filed 05/20/2002, judgment 06/14/2002).**

*Appeal from:* Middle District of Florida.

*What happened:* Application for a successive habeas corpus petition denied.

*Opinion:* (1) The court's docket judgment cites no opinions.

***Lochmere Development Group v. Eiger Fund* (11th Cir. 02–12865, filed 05/22/2002, judgment 03/25/2003).**

*Appeal from:* Middle District of Florida.

*What happened:* Civil appeal mutually dismissed in business litigation concerning a Florida residential real estate development.

*Appellant's brief:* The plaintiffs' 11,019-word appellant brief cites 39 published opinions (13 by the Eleventh Circuit, one by another circuit, two by the Middle District of Florida, two by districts in other circuits, five by Florida's supreme court, and 16 by Florida's district courts of appeal), one Web page, and the *Restatement (Second) of Torts*.

*Opinion:* (1) The court's docket judgment cites no opinions.

***United States v. Pickett* (11th Cir. 02–13299, filed 06/17/2002, judgment 01/22/2003).**

*Appeal from:* Middle District of Florida.

*What happened:* Unsuccessful appeal of the revocation of supervised release of a physician imprisoned for Medicare fraud on a finding that his putative employment was a sham.

*Related cases:* *United States v. Pritchett* (11th Cir. 96–7087, filed 11/12/1996, judgment 09/18/1997), *United States v. Pickett* (11th Cir. 97–2125, filed 02/06/1997, judgment 07/22/1998), *Pickett v. United States* (11th Cir. 03–10836, filed 02/18/2003, judgment 05/12/2003) (certificate of appealability denied), *United States v. Pickett* (11th Cir. 03–13427, filed 07/07/2003, judgment 11/18/2003) (appeal voluntarily dismissed).

*Appellant's brief:* The defendant's 1,807-word appellant brief cites one published Eleventh Circuit opinion.

*Appellee's brief:* The government's 2,265-word appellee brief cites five published opinions (one by the U.S. Supreme Court and four by the Eleventh Circuit).

*Appellant's reply brief:* The defendant's 591-word reply brief cites one published Eleventh Circuit opinion.

*Opinion:* (2) The court's unpublished 634-word per curiam opinion, tabled at *United States v. Pickett*, 58 Fed. Appx. 836, 2003 WL 221755 (11th Cir. 2003), cites two published Eleventh Circuit opinions. According to Westlaw (03/16/2005), the court's opinion has not been cited elsewhere.

***United States v. Caviness* (11th Cir. 02–13782, filed 07/11/2002, judgment 12/23/2003).**

*Appeal from:* Southern District of Florida.

*What happened:* Unsuccessful appeal of the district court's failure to reduce a criminal sentence based on amendments to sentencing guidelines.

*Related cases:* *United States v. Caviness* (11th Cir. 90–5754, filed 09/12/1990, judgment 12/08/1992) (criminal appeal), *Powell v. United States* (11th Cir. 94–5229, filed 11/25/1994, judgment 07/16/1996) (prisoner's motion to vacate sentence).

*Appellant's brief:* The defendant's 2,794-word appellant brief cites 11 published opinions (one by the U.S. Supreme Court, seven by the Eleventh Circuit, and three by other circuits).

*Appellee's brief:* The government's 2,760-word appellee brief cites 11 published opinions (one by the U.S. Supreme Court and 10 by the Eleventh Circuit).

*Appellant's reply brief:* The defendant's 1,031-word reply brief cites 10 published opinions (one by the U.S. Supreme Court, six by the Eleventh Circuit, and three by other circuits).

*Opinion:* (2) The court's unpublished 437-word per curiam opinion, tabled at *United States v. Caviness*, 90 Fed. Appx. 381, 2003 WL 23185907 (11th Cir. 2003), cites two published Eleventh Circuit opinions. According to Westlaw (03/16/2005), the court's opinion has not been cited elsewhere.

***Smiley v. United States* (11th Cir. 02–13901, filed 07/18/2002, judgment 04/30/2003).**

*Appeal from:* Middle District of Alabama.

*What happened:* Pro se motion for certificate of appealability denied.

*Opinion:* (1) The court's docket judgment cites no opinions.

***Simon v. United States Attorney General* (11th Cir. 02–13924, filed 07/18/2002, judgment 01/03/2003).**

*Appeal from:* Southern District of Florida.

*What happened:* Deportation appeal dismissed for failure to file an appellant brief.

*Opinion:* (1) The court's docket judgment cites no opinions.

***United States v. Oliver* (11th Cir. 02–14223, filed 08/02/2002, judgment 03/21/2003).**

*Appeal from:* Northern District of Georgia.

*What happened:* Unsuccessful appeal of a drug conviction and sentence.

*Appellant's brief:* The defendant's 5,546-word appellant brief cites 22 published opinions (one by the U.S. Supreme Court, 19 by the Eleventh Circuit, one by another circuit, and one by an Eleventh Circuit district).

*Appellee's brief:* The government's 9,219-word appellee brief cites 35 published opinions (one by the U.S. Supreme Court and 34 by the Eleventh Circuit) and one treatise.

*Opinion:* (2) The court's unpublished 3,871-word per curiam opinion, tabled at *United States v. Oliver*, 64 Fed. Appx. 742, 2003 WL 1701648 (11th Cir. 2003), cites 15 published Eleventh Circuit opinions. According to Westlaw (03/18/2005), the court's opinion has not been cited elsewhere.

***United States v. Martinez* (11th Cir. 02–14267, filed 08/05/2002, judgment 03/18/2004).**

*Appeal from:* Southern District of Florida.

*What happened:* Unsuccessful appeal of a sentencing designation of career offender and an order of restitution on the defendant's motion for rehearing.

*Appellant's brief:* The defendant's 4,475-word appellant brief cites 20 published opinions (one by the U.S. Supreme Court, 11 by the Eleventh Circuit, four by other circuits, one by Florida's supreme court, and three by Florida's district courts of appeal).

*Appellee's brief:* The government's 6,477-word appellee brief cites 21 published opinions (four by the U.S. Supreme Court, 11 by the Eleventh Circuit, and six by other circuits) and two unpublished opinions (one by the Eleventh Circuit and one by another circuit).

The government's brief cites an unpublished Eleventh Circuit opinion to support the statement that "as a panel of this Court has observed, an order of 'immediate' restitution may help an inmate earn higher wages while in prison through the Inmate Financial Responsibility Program." (Page 25.)

The brief also includes an unpublished Sixth Circuit opinion in a string of nine citations supporting the statement, "A deferential standard of review for a district court's factual finding regard-

ing prior offenses was followed before *Buford* [*v. United States*, 532 U.S. 59 (2001),] and, of course, after it.” (Page 19.) The other eight citations in the string are published appellate opinions—three by the Eleventh Circuit, three by the Fifth Circuit, one by the Sixth Circuit, and one by the Seventh Circuit.

*Appellant’s reply brief:* The defendant’s 4,341-word reply brief cites 27 published opinions (four by the U.S. Supreme Court, 13 by the Eleventh Circuit, eight by other circuits, one by Florida’s supreme court, and one by Florida’s district court of appeal) and four unpublished opinions by other circuits.

The reply brief cites the same unpublished Sixth Circuit opinion as the appellee brief does in its rebuttal of the government’s string citation: “The government has further cited a number of Fifth, Sixth and Seventh Circuit cases to support its contention that a deferential standard of review applies here. Those decisions do not confirm application of such a standard, however, except as to those challenges involving a claim of functional consolidation; moreover, none of those cases involves the circumstance presented here, where state law requires, as a matter of course, a consolidated sentencing procedure, pursuant to a single guidelines scoresheet, for all cases pending in a single trial court against the defendant.” (Page 7, citation omitted.)

The brief cites an unpublished Fourth Circuit opinion to support the statement that “for purposes of career offender designation, whether prior federal cases were consolidated for sentencing under federal procedural rule is a ‘purely legal question’ subject to *de novo* review; by contrast, clear error review applies to determination of whether prior offenses were consolidated because they were part of a ‘common scheme or plan.’” (Page 4.)

The brief includes two unpublished opinions—one by the Second Circuit and one by the Fourth Circuit—among five opinions cited to support the statement, “The failure of the district court’s restitution order in this case to comply with express statutory requirements amounts to plain error.” (Page 16.) The other three opinions cited—by the Eleventh, Second, and Fifth Circuits—are published.

*Opinion:* (2) Initially, the court published a 1,749-word per curiam opinion for publication, *United States v. Martinez*, 320 F.3d 1285, 2003 WL 257139 (11th Cir. 2003) (nine headnotes) (withdrawn), citing nine published opinions (one by the U.S. Supreme Court, five by the Eleventh Cir-

cuit, two by other circuits, and one by Florida’s supreme court). According to Westlaw (12/02/2004), the court’s withdrawn opinion was cited by one published Eleventh Circuit opinion, three secondary sources, and nine appellate briefs in eight Eleventh Circuit cases.

The court’s unpublished 123-word per curiam opinion on rehearing, tabled at *United States v. Martinez*, 99 Fed. Appx. 885, 2004 WL 625765 (11th Cir. 2004), cites no opinions. (Although the opinion contains 123 words, the text of the opinion is just the word “Affirmed.” The rest of the opinion is the designation “per curiam,” a citation to an Eleventh Circuit rule, and quoted text from the rule in a footnote.) According to Westlaw (10/14/2004), the court’s opinion has not been cited elsewhere.

***Murray v. Wiley* (11th Cir. 02–14477, filed 08/16/2002, judgment 02/04/2003).**

*Appeal from:* Northern District of Georgia.

*What happened:* Pro se habeas corpus appeal dismissed as frivolous.

*Opinion:* (1) The court’s docket judgment cites no opinions.

***Brewton v. Georgia Department of Public Safety* (11th Cir. 02–14782, filed 09/03/2002, judgment 07/17/2003).**

*Appeal from:* Southern District of Georgia.

*What happened:* Unsuccessful appeal by an employer of an employment discrimination judgment in favor of the plaintiff, and a partially successful cross-appeal by the plaintiff of dismissed claims. The appeal largely concerned a discovery sanction under Federal Rule of Civil Procedure 37(c) in which the court granted plaintiff partial summary judgment upon the exclusion of testimony from a witness not properly disclosed. A dissenting appellate judge opined that the sanction was too stiff under the circumstances.

*Related case:* *Brewton v. Georgia Department of Public Safety* (11th Cir. 02–14999, filed 09/13/2002, judgment 07/17/2003) (cross-appeal).

*Appellant’s brief:* The Department of Public Safety’s 14,978-word appellant brief cites 67 published opinions (eight by the U.S. Supreme Court, 24 by the Eleventh Circuit, 17 by other circuits, two by the Southern District of Georgia, one by another Eleventh Circuit district, 12 by districts in other circuits, and three by Georgia’s court of appeals) and one treatise.

*Appellee’s brief:* The plaintiff’s 13,974-word appellee and cross-appellant brief cites 118 published opinions (21 by the U.S. Supreme Court, 57 by the Eleventh Circuit, 28 by other circuits, eight

by districts in other circuits, and four by Georgia's court of appeals), two treatises, one dictionary, and the *Restatement (Second) of Agency*.

*Appellant's reply brief:* The department's 13,903-word reply brief cites 64 published opinions (seven by the U.S. Supreme Court, 23 by the Eleventh Circuit, 25 by other circuits, and nine by districts in other circuits) and one unpublished opinion by another circuit.

The brief devotes a 10-line paragraph to a discussion of an unpublished Ninth Circuit opinion in which the court "reversed an outcome-determinative sanction under Rule 37(c) as abuse of discretion." (Pages 22–23.)

*Cross-appellant's reply brief:* The plaintiff's 6,885-word reply brief cites 64 published opinions (13 by the U.S. Supreme Court, 35 by the Eleventh Circuit, 13 by other circuits, one by the Southern District of Georgia, and two by districts in other circuits), one treatise, and *Black's Law Dictionary*.

*Opinion:* (2) The court's unpublished 2,799-word per curiam opinion and partial dissent, tabled at *Brewton v. Georgia Department of Public Safety*, 77 Fed. App. 505, 2003 WL 21804100 (11th Cir. 2003), cites 19 published opinions (four by the U.S. Supreme Court, 13 by the Eleventh Circuit, and two by other circuits). According to Westlaw (03/16/2005), the court's opinion has not been cited elsewhere.

***Bedford v. Secretary* (11th Cir. 02–14896, filed 09/09/2002, judgment 10/15/2002).**

*Appeal from:* Southern District of Florida.

*What happened:* Pro se prisoner's motion for a certificate of appealability denied.

*Opinion:* (1) The court's docket judgment cites no opinions.

***Jones v. Bellsouth Business Systems* (11th Cir. 02–14907, filed 09/09/2002, judgment 11/29/2002).**

*Appeal from:* Northern District of Alabama.

*What happened:* Civil appeal voluntarily dismissed.

*Opinion:* (1) The court's docket judgment cites no opinions.

***In re Bryan* (11th Cir. 02–14978, filed 09/12/2002, judgment 04/21/2003).**

*Appeal from:* Northern District of Georgia.

*What happened:* Unsuccessful pro se appeal of fees awarded to the appellant's attorneys in an adversarial tax proceeding in the bankruptcy court.

*Appellee's brief:* The defendant's 4,629-word appellee brief cites 16 published opinions (four by the U.S. Supreme Court, eight by the Eleventh

Circuit, two by districts in other circuits, and two by bankruptcy courts in other circuits).

*Opinion:* (2) The court's unpublished 2,025-word per curiam opinion, tabled at *Bryan v. Kane*, 67 Fed. Appx. 583, 2003 WL 21068341 (11th Cir. 2003), cites seven published Eleventh Circuit opinions. According to Westlaw (03/18/2005), the court's opinion has not been cited elsewhere.

***Bogle v. McClure* (11th Cir. 02–14980, filed 09/12/2002, judgment 01/05/2004).**

*Appeal from:* Northern District of Georgia.

*What happened:* Civil defendants' appeal of an award of attorney fees in an employment discrimination action dismissed by stipulation. The defendants argued that the award should have been reduced because the court denied the plaintiffs' reinstatement.

*Related case:* The defendants unsuccessfully appealed the judgment in favor of the plaintiffs and other issues concerning attorney fees separately, *Bogle v. McClure* (11th Cir. 02-13213, filed 06/11/2002, judgment 06/06/2003), resolved by published opinion at *Bogle v. McClure*, 332 F.3d 1347 (11th Cir. 2003).

*Appellant's brief:* The defendants' 5,235-word appellant brief cites 22 published opinions (10 by the U.S. Supreme Court, 11 by the Eleventh Circuit, and one by another circuit), one unpublished opinion by another circuit, and the related appeal.

The brief twice cites the unpublished opinion by the Fourth Circuit. It includes the opinion in a string of three citations—the other two are Supreme Court opinions—headed by "see also" following a Supreme Court quotation. In a parenthetical, the unpublished opinion is quoted as stating, "in measuring the degree of a plaintiff's success, 'only those changes in a defendant's conduct which are mandated by a judgment . . . may be considered.'" (Page 17.) On the following page of the brief, the same opinion is cited with a "see also" introduction and parenthetically quoted as stating, "When injunctive relief is sought and denied, 'there is even less occasion to permit a change in conduct to serve as the basis for a fee award under § 1988.'" (Page 18.)

*Appellee's brief:* The plaintiffs' 2,083-word appellee brief cites nine published opinions (two by the U.S. Supreme Court, six by the Eleventh Circuit, and one by the Northern District of Georgia).

*Appellant's reply brief:* The defendants' 1,961-word reply brief cites 11 published opinions (two by the U.S. Supreme Court, four by the Eleventh Circuit, three by other circuits, and two by districts in other circuits) and one unpublished opinion by a district in another circuit.

The brief states, “The Supreme Court standard used by the *Jaimes* court [citing *Jaimes v. Toledo Metropolitan Housing Authority*, 715 F. Supp. 843 (N.D. Ohio 1989)], which resulted in a reduction in the award of attorneys’ fees, is also appropriate in this case” (page 3), and invites the reader to “compare” three opinions justifying reductions in attorney fee awards for unsuccessful claims—a published Seventh Circuit opinion, an unpublished opinion by the Eastern District of Louisiana, and a published opinion by the District of Nevada.

*Opinion:* (1) The court’s docket judgment cites no opinions.

***Mims v. Hicks* (11th Cir. 02–15094, filed 09/19/2002, judgment 10/21/2002).**

*Appeal from:* Southern District of Georgia.

*What happened:* Pro se prisoner petition dismissed for lack of jurisdiction.

*Opinion:* (1) The court’s docket judgment cites no opinions.

***United States v. Anderson* (11th Cir. 02–15233, filed 09/25/2002, judgment 04/25/2003).**

*Appeal from:* Southern District of Florida.

*What happened:* Unsuccessful appeal of an enhancement to an illegal reentry conviction for prior conviction of a felony. The court held that a plea of *nolo contendere* followed by a withheld adjudication of guilt satisfied the requirements for the enhancement, because the imposition of a sentence of time served qualified as punishment for the felony.

*Appellant’s brief:* The defendant’s 2,109-word appellant brief cites seven published Eleventh Circuit opinions.

*Appellee’s brief:* The government’s 1,574-word appellee brief cites five published opinions (one by the U.S. Supreme Court, two by the Eleventh Circuit, and two by other circuits).

*Opinion:* (3) The court’s published 679-word per curiam opinion, *United States v. Anderson*, 328 F.3d 1326 (11th Cir. 2003) (five headnotes), cites five published opinions (four by the Eleventh Circuit and one by another circuit). According to Westlaw (03/18/2005), the court’s opinion has been cited in one published Eleventh Circuit opinion, one published opinion by another circuit, one secondary source, and nine appellate briefs in five cases (three in the Eleventh Circuit and two in other circuits).

***Graves v. United States* (11th Cir. 02–15495, filed 10/07/2002, judgment 01/10/2003).**

*Appeal from:* Northern District of Georgia.

*What happened:* Motion for a certificate of appealability dismissed for failure to pay the filing fees.

*Opinion:* (1) The court’s docket judgment cites no opinions.

***Rivera v. Florida State Prison* (11th Cir. 02–15715, filed 10/18/2002, judgment 01/31/2003).**

*Appeal from:* Middle District of Florida.

*What happened:* Pro se motion for a certificate of appealability denied.

*Opinion:* (1) The court’s docket judgment cites no opinions.

***Clemmons v. Barbour* (11th Cir. 02–15827, filed 10/24/2002, judgment 07/16/2003).**

*Appeal from:* Middle District of Alabama.

*What happened:* Pro se prisoner appeal voluntarily dismissed by stipulation.

*Opinion:* (1) The court’s docket judgment cites no opinions.

***United States v. Jackson* (11th Cir. 02–15963, filed 10/30/2002, judgment 07/31/2003).**

*Appeal from:* Middle District of Alabama.

*What happened:* Unsuccessful appeal of a criminal conviction for being a felon in possession of a firearm.

*Appellant’s brief:* The defendant’s 3,032-word appellant brief cites eight published opinions (two by the U.S. Supreme Court and six by the Eleventh Circuit).

*Appellee’s brief:* The government’s 1,978-word appellee brief cites five published Eleventh Circuit opinions.

*Opinion:* (2) The court’s unpublished 1,273-word per curiam opinion, tabled at *United States v. Jackson*, 77 Fed. Appx. 508, 2003 WL 22410533 (11th Cir. 2003), cites 14 published opinions (six by the U.S. Supreme Court and eight by the Eleventh Circuit). According to Westlaw (03/16/2005), the court’s opinion has not been cited elsewhere.

***United States v. Kirk* (11th Cir. 02–16132, filed 11/07/2002, judgment 07/08/2003).**

*Appeal from:* Middle District of Georgia.

*What happened:* Unsuccessful appeal of a firearm and fraudulent check conviction.

*Appellant’s brief:* The defendant’s 1,581-word appellant brief cites two published opinions (one by the U.S. Supreme Court and one by the Eleventh Circuit).

*Appellee’s brief:* The government’s 3,447-word appellee brief cites nine published opinions (three by the U.S. Supreme Court, four by the Eleventh Circuit, and two by Georgia’s court of appeals).

*Opinion:* (2) The court's unpublished 2,182-word per curiam opinion, tabled at *United States v. Kirk*, 76 Fed. Appx. 283, 2003 WL 21685594 (11th Cir. 2003), cites 11 published opinions (three by the U.S. Supreme Court, seven by the Eleventh Circuit, and one by another circuit). According to Westlaw (03/18/2005), the court's opinion has not been cited elsewhere.

***United States v. El-Amin* (11th Cir. 02–16380, filed 11/22/2002, judgment 02/02/2004).**

*Appeal from:* Middle District of Florida.

*What happened:* On a certificate of appealability, unsuccessful pro se appeal of the district court's refusal to allow a criminal defendant to withdraw a guilty plea.

*Related cases:* The selected appeal was decided by the same opinion as *United States v. El-Amin* (11th Cir. 02–16378, filed 11/22/2002, judgment 02/02/2004), tabled at 92 Fed. Appx. 780 (unsuccessful pro se criminal appeal), which was briefed separately.

*Appellee's brief:* The government's 2,393-word appellee brief cites 10 published opinions (four by the U.S. Supreme Court, five by the Eleventh Circuit, and one by another circuit).

*Opinion:* (2) The court's unpublished 2,763-word per curiam opinion, tabled at *United States v. El-Amin*, 92 Fed. Appx. 780, 2004 WL 298385 (11th Cir. 2004), cites 10 published opinions (one by the U.S. Supreme Court, four by the Eleventh Circuit, and five by other circuits). According to Westlaw (03/18/2005), the court's opinion has not been cited elsewhere.

***In re Cascella* (11th Cir. 02–16550, filed 12/04/2002, judgment 02/07/2003).**

*Appeal from:* Middle District of Florida.

*What happened:* Pro se petition for a writ of mandamus dismissed.

*Opinion:* (1) The court's docket judgment cites no opinions.

***Ellis v. United States* (11th Cir. 02–16552, filed 12/04/2002, judgment 03/12/2003).**

*Appeal from:* Middle District of Alabama.

*What happened:* Pro se motion for a certificate of appealability denied.

*Opinion:* (1) The court's docket judgment cites no opinions.

***Proenza-Sanfiel v. Crosby* (11th Cir. 02–16606, filed 12/06/2002, judgment 03/21/2003).**

*Appeal from:* Middle District of Florida.

*What happened:* Pro se motion for a certificate of appealability denied.

*Opinion:* (1) The court's docket judgment cites no opinions.

***Timms v. United States* (11th Cir. 02–16721, filed 12/12/2002, judgment 03/27/2003).**

*Appeal from:* Southern District of Florida.

*What happened:* Certificate of appealability denied.

*Opinion:* (1) The court's docket judgment cites no opinions.

***United States v. Jackson* (11th Cir. 02–16828, filed 12/18/2002, judgment 01/06/2003).**

*Appeal from:* Middle District of Alabama.

*What happened:* Criminal appeal voluntarily dismissed without prejudice.

*Opinion:* (1) The court's docket judgment cites no opinions.

## 12. District of Columbia Circuit<sup>117</sup>

Citation to unrelated unpublished opinions, proscribed before 2002, is now permitted.<sup>118</sup> But unpublished district court opinions may not be cited in unrelated cases, and unpublished opinions of other courts of appeals may only be cited as permitted in briefs to those courts.<sup>119</sup>

Of the 50 cases randomly selected, 30 are appeals from the district court for the District of Columbia, nine are appeals from the Federal Energy Regulatory Commission, three are appeals from the National Labor Relations Board, two are appeals from the Environmental Protection Agency, two are appeals from the Federal Aviation Administra-

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117. Docket sheets and disposition orders are on PACER. Published opinions and most unpublished opinions are on Westlaw. (Of the 21 cases in this sample resolved by unpublished opinions, the opinions are on Westlaw for 17.) Published opinions are also on the court's website. A few briefs are on Westlaw. (Of the 21 cases in this sample with counseled briefs, all briefs are on Westlaw for one case and one brief is on Westlaw for another case.)

118. D.C. Cir. L.R. 28(c)(1). *See id.* at 28(c)(1)(B) ("All unpublished orders or judgments of this court, including explanatory memoranda (but not including sealed opinions) entered on or after January 1, 2002, may be cited as precedent.").

119. *Id.* at 28(c)(2).

tion, two are appeals from the Federal Communications Commission, one is an appeal from the Occupational Safety and Health Review Commission, and one is an appeal from the Surface Transportation Board.<sup>120</sup>

The publication rate in this sample will be from 26% to 30% once all the cases are resolved. Thirteen of the cases were resolved by published opinions (11 signed, including two with concurrences, and two per curiam), 21 were resolved by unpublished opinions (including eight judgments, of which six are designated per curiam and all but one of which are published in the *Federal Appendix*, and 13 per curiam orders, of which one is published in the *Federal Appendix*), 14 were resolved by clerk's orders,<sup>121</sup> and two cases have not yet been resolved.

Published opinions averaged 4,931 words in length, ranging from 2,755 to 10,001. Unpublished opinions averaged 261 words in length, ranging from 21 to 632. Twenty-one opinions were under 1,000 words in length (62%, all of the unpublished opinions and none of the published opinions), and 20 of them were under 500 words in length (59%).

Nineteen of the cases were fully briefed. In 29 of the appeals no counseled brief was filed, and in two of the appeals a counseled brief was filed only for one side. The two cases not yet resolved were held in abeyance before briefing, and briefs may or may not ultimately be filed in those cases.

There are citations to unpublished court opinions in eight of the cases. In three cases the citations are only to opinions in related

cases; in five cases there are citations to unpublished opinions in unrelated cases. In one case the court cited an unrelated unpublished order; in four other cases only the parties cited unrelated unpublished opinions.

The unpublished order cited by the court is an unpublished consent decree filed in the district court for the District of Columbia. Of the unrelated unpublished opinions cited only by the parties in these cases, one is by the court of appeals for the District of Columbia Circuit, two are by courts of appeals for other circuits, one is by the district court for the District of Columbia, and two are by district courts in other circuits.

CDC-1. The court cited an unpublished consent decree filed in the district court for the District of Columbia in a successful petition by an environmental organization to have the Environmental Protection Agency reconsider regulations concerning "small municipal waste combustion units," *New York Public Interest Research Group v. Environmental Protection Agency* (D.C. Cir. 02-1299, filed 09/24/2002, judgment 02/24/2004), resolved by published opinion at *Northeast Maryland Waste Disposal Authority v. Environmental Protection Agency*, 358 F.3d 936 (D.C. Cir. 2004). The consent decree apparently requires the Environmental Protection Agency to promulgate "standards to regulate units with a design capacity of 35 tpd or less" by November 30, 2005.

CDC-2. The appellant cited an unpublished order by the court of appeals for the District of Columbia Circuit in an unsuccessful appeal of the enforcement of an airline's System Board of Adjustment ruling in favor of an airline pilot who left an aircraft full of passengers rather than begin a flight that would give him a work shift in excess of 16 hours, *Pan American Airways Corp. v. Air Line Pilots Association* (D.C. Cir. 02-7084, filed 07/18/2002, judgment 05/05/2003), resolved by unpublished per curiam judgment at 62 Fed. Appx. 356, 2003 WL 21025273. The un-

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120. In 2002, 1,105 cases were filed in the court of appeals for the District of Columbia Circuit.

121. These are short orders resolving the cases, orders that do not bear the names of the judges to whom the cases have been assigned. We regard these as equivalent to docket judgments in other circuits. Unpublished per curiam orders and judgments, on the other hand, may be as short as clerk's orders, but they bear the names of the judges on the panel to which the cases are assigned. We regard these as equivalent to unpublished opinions in other circuits.



published order stayed enforcement of an administrative interpretation of the 16-hour rule. The flight at issue in the selected case occurred 15 months before the court of appeals finally determined the agency's interpretation—an interpretation that the union favored—was correct in a published opinion also cited in the appellant's brief.

CDC-3. Both parties cited unpublished opinions in an initially unsuccessful appeal of the district court's judgment that federal courts did not have jurisdiction over alien prisoners held at Guantanamo Bay, Cuba, *Habib v. Bush* (D.C. Cir. 02-5284, filed 09/11/2002, judgment 07/19/2004), initially resolved by published opinion at *Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003). The Supreme Court vacated the court of appeals' decision, *Rasul v. Bush*, 124 S. Ct. 2686 (2004), so the court of appeals remanded the case to the district court, *Al Odah v. United States*, 1003 Fed. Appx. 676, 2004 WL 1613572 (D.C. Cir. 2004).

The habeas corpus petitioners cited an unpublished opinion by the court of appeals for the Fourth Circuit with a published opinion by the court of appeals for the Fourth Circuit and a published opinion by the district court for the Eastern District of Virginia in a footnote supporting a statement that "The United States prosecutes crimes committed in Guantanamo—including crimes committed by aliens—because the enclave is 'within its territorial jurisdiction.'" Their reply brief cites the same Fourth Circuit opinions to support a statement that "The United States, of course, has long taken the position that Guantanamo Bay is within the 'territory' and 'territorial jurisdiction' of the United States. Under the terms of the lease, Guantanamo Bay is subject to the 'complete jurisdiction and control' of the United States. [Citation.] When it suits them, the federal government relies upon this language for its contention that crimes committed on Guantanamo Bay are 'within its territorial jurisdiction.'"

The petitioners' opening brief also cites an unpublished opinion by the district court for the Southern District of New York with published opinions by the court of appeals for the Ninth Circuit and the district courts for the District of Massachusetts, the Southern District of Florida, and the Northern District of California in a footnote supporting a statement that "Arbitrary detention violates customary international law and is within [Alien Tort Claims Act] jurisdiction." An amicus curiae brief cites the same unpublished opinion as the first of six opinions cited to support a statement that "U.S. courts have repeatedly held that arbitrary detention violates international law."

CDC-4. The petitioner cited an unpublished opinion by the court of appeals for the Sixth Circuit in a successful appeal of the Surface Transportation Board's refusal to set aside arbitrators' finding that outsourcing was causally related to a railroad merger, *Union Pacific Railroad Co. v. Surface Transportation Board* (D.C. Cir. 02-1340, filed 11/08/2002, judgment 02/03/2004), resolved by published opinion at 358 F.3d 31. The brief cites the unpublished Sixth Circuit opinion to support a statement that "Although no Court has confronted the issue directly, at least one court assumed, without analysis, that judicial review is limited to whether the Board properly applied *Lace Curtain*[, *Chicago and North Western Transportation Co.* ("*Lace Curtain*"), 3 I.C.C. 2d 729 (1987), affirmed *sub nom. International Brotherhood of Electrical Workers v. I.C.C.*, 862 F.2d 330 (D.C. Cir. 1988)]."

CDC-5. The appellant cited unpublished opinions by the district courts for the District of Columbia and the Eastern District of Michigan in an unsuccessful appeal of a refusal to enjoin the termination of employees, *Drivers, Chauffeurs, and Helpers Local 639 v. District of Columbia Public Schools* (D.C. Cir. 02-7082, filed 07/17/2002, judgment 09/17/2003), resolved by unpublished per curiam judgment at 2003 WL 22204128 (find-

ing no error in the district court's determination that the school district's transformation plan was a legitimate reduction in force). The union's appellant brief cites four opinions—three published opinions by courts of appeals for other circuits and one unpublished opinion by the district court for the District of Columbia—to support a statement that “Deprivation of health insurance alone has been viewed by other courts as irreparable injury.” And in an argument that the school district's incompetence rose to a violation of due process, the brief quotes a paragraph from a Supreme Court opinion and then invites the reader to “see, e.g.,” an unpublished opinion by the district court for the Eastern District of Michigan and a published opinion by the district court for the Western District of Michigan.

### *Individual Case Analyses*

***Williams Energy Marketing & Trading Co. v. Federal Energy Regulatory Commission* (D.C. Cir. 02–1022, filed 01/11/2002, transferred 02/06/2002).**

*Appeal from:* Federal Energy Regulatory Commission.

*What happened:* Petition for review of a decision by the Federal Energy Regulatory Commission transferred to the Ninth Circuit as part of multidistrict litigation.

*Related cases:* Other cases transferred to the Ninth Circuit as part of the same multidistrict litigation include the following: *Southern California Edison Co. v. Federal Energy Regulatory Commission* (D.C. Cir. 01–1528, filed 12/28/2001, transferred 02/06/2002), *Turlock Irrigation District v. Federal Energy Regulatory Commission* (D.C. Cir. 01–1530, filed 12/28/2001, transferred 02/06/2002), *Imperial Irrigation District v. Federal Energy Regulatory Commission* (D.C. Cir. 01–1531, filed 12/28/2001, transferred 02/06/2002), *Coral Power L.L.C. v. Federal Energy Regulatory Commission* (D.C. Cir. 01–1532, filed 12/28/2001, transferred 02/06/2002), *City of Burbank v. Federal Energy Regulatory Commission* (D.C. Cir. 01–1533, filed 12/28/2001, transferred 02/06/2002), *Sacramento Municipal Utility District v. Federal Energy Regulatory Commission* (D.C. Cir. 02–1029, filed 01/15/2002, transferred 02/06/2002), *California Electricity Oversight Board v. Federal Energy Regulatory Com-*

*mission* (D.C. Cir. 02–1030, filed 01/17/2002, transferred 02/06/2002), *City of Los Angeles Department of Water and Power v. Federal Energy Regulatory Commission* (D.C. Cir. 02–1032, filed 01/18/2002, transferred 02/06/2002), *Dynegy Power Marketing, Inc. v. Federal Energy Regulatory Commission* (D.C. Cir. 02–1048, filed 02/05/2002, transferred 02/06/2002). Case number 02–1030 was also selected for this study.

*Opinion:* (1) The court's unpublished 85-word clerk's order cites no opinions. The court's order is not on Westlaw.

***California Electricity Oversight Board v. Federal Energy Regulatory Commission* (D.C. Cir. 02–1030, filed 01/17/2002, transferred 02/06/2002).**

*Appeal from:* Federal Energy Regulatory Commission.

*What happened:* Petition for review of a decision by the Federal Energy Regulatory Commission transferred to the Ninth Circuit as part of multidistrict litigation.

*Related cases:* Other cases transferred to the Ninth Circuit as part of the same multidistrict litigation include the following: *Southern California Edison Co. v. Federal Energy Regulatory Commission* (D.C. Cir. 01–1528, filed 12/28/2001, transferred 02/06/2002), *Turlock Irrigation District v. Federal Energy Regulatory Commission* (D.C. Cir. 01–1530, filed 12/28/2001, transferred 02/06/2002), *Imperial Irrigation District v. Federal Energy Regulatory Commission* (D.C. Cir. 01–1531, filed 12/28/2001, transferred 02/06/2002), *Coral Power L.L.C. v. Federal Energy Regulatory Commission* (D.C. Cir. 01–1532, filed 12/28/2001, transferred 02/06/2002), *City of Burbank v. Federal Energy Regulatory Commission* (D.C. Cir. 01–1533, filed 12/28/2001, transferred 02/06/2002), *Williams Energy Marketing & Trading Co. v. Federal Energy Regulatory Commission* (D.C. 02–1022, filed 01/11/2002, transferred 02/06/2002), *Sacramento Municipal Utility District v. Federal Energy Regulatory Commission* (D.C. Cir. 02–1029, filed 01/15/2002, transferred 02/06/2002), *City of Los Angeles Department of Water and Power v. Federal Energy Regulatory Commission* (D.C. Cir. 02–1032, filed 01/18/2002, transferred 02/06/2002), *Dynegy Power Marketing, Inc. v. Federal Energy Regulatory Commission* (D.C. Cir. 02–1048, filed 02/05/2002, transferred 02/06/2002). Case number 02–1022 was also selected for this study.

*Opinion:* (1) The court's unpublished 85-word clerk's order cites no opinions. The court's order is not on Westlaw.

***San Diego Gas & Electric Co. v. Federal Energy Regulatory Commission* (D.C. Cir. 02–1058, filed 02/13/2002, transferred 02/14/2002).**

*Appeal from:* Federal Energy Regulatory Commission.

*What happened:* Petition for review of a decision by the Federal Energy Regulatory Commission transferred to the Ninth Circuit as part of multidistrict litigation.

*Opinion:* (1) The court's unpublished 32-word clerk's order cites no opinions. The court's order is not on Westlaw.

***Producer Coalition v. Federal Energy Regulatory Commission* (D.C. Cir. 02–1073, filed 02/15/2002, judgment 06/20/2003).**

*Appeal from:* Federal Energy Regulatory Commission.

*What happened:* Unsuccessful petition for review of the Federal Energy Regulatory Commission's jurisdiction over transfers of natural gas pipelines.

*Related cases:* Petitions for review were also denied in 10 consolidated cases: *Williams Gas Processing–Gulf Coast Co. v. Federal Energy Regulatory Commission* (D.C. Cir. 01–1327, filed, 07/26/2001, judgment 06/20/2003), *Williams Gas Processing–Gulf Coast Co. v. Federal Energy Regulatory Commission* (D.C. Cir. 02–1006, filed 01/07/2002, judgment 06/20/2003), *Williams Gas Processing–Gulf Coast Co. v. Federal Energy Regulatory Commission* (D.C. Cir. 02–1007, filed 01/07/2002, judgment 06/20/2003), *Amerada Hess Corp. v. Federal Energy Regulatory Commission* (D.C. Cir. 02–1051, filed 02/11/2002, judgment 06/20/2003), *Amerada Hess Corp. v. Federal Energy Regulatory Commission* (D.C. Cir. 02–1052, filed 02/11/2002, judgment 06/20/2003), *Amerada Hess Corp. v. Federal Energy Regulatory Commission* (D.C. Cir. 02–1053, filed 02/11/2002, judgment 06/20/2003), *Transcontinental Gas Pipe Line Corp. v. Federal Energy Regulatory Commission* (D.C. Cir. 02–1072, filed 02/15/2002, judgment 06/20/2003), *Transcontinental Gas Pipe Line Corp. v. Federal Energy Regulatory Commission* (D.C. Cir. 02–1074, filed 02/15/2002, judgment 06/20/2003), *Producer Coalition v. Federal Energy Regulatory Commission* (D.C. Cir. 02–1075, filed 02/15/2002, judgment 06/20/2003), *Producer Coalition v. Federal Energy Regulatory Commission* (D.C. Cir. 02–1076, filed 02/15/2002, judgment 06/20/2003).

*Petitioner's brief:* The pipeline companies' 7,698-word petitioner brief cites eight published court opinions (one by the U.S. Supreme Court, four by the District of Columbia Circuit, and three by other circuits); 27 published decisions by the Fed-

eral Energy Regulatory Commission, including six decisions appealed and three other related decisions; and one published decision by the Federal Power Commission.

*Respondent's brief:* The commission's 12,243-word respondent brief cites 31 published court opinions (six by the U.S. Supreme Court, 20 by the District of Columbia Circuit, and five by other circuits); 50 published decisions by the Federal Energy Regulatory Commission, including eight decisions appealed and four other related decisions; and two published decisions by the Federal Power Commission.

*Petitioner's reply brief:* The pipeline companies' 3,047-word reply brief cites five published court opinions (one by the U.S. Supreme Court, two by the District of Columbia Circuit, and two by other circuits); 15 published decisions by the Federal Energy Regulatory Commission, including one related decision; and one published decision by the Federal Power Commission.

*Opinion:* (3) The court's published 6,364-word signed opinion, *Williams Gas Processing–Gulf Coast Co. v. Federal Energy Regulatory Commission*, 331 F.3d 1011 (D.C. Cir. 2003) (seven headnotes), cites 18 published court opinions (four by the U.S. Supreme Court, 10 by the District of Columbia Circuit, and four by other circuits) and 20 published decisions by the Federal Energy Regulatory Commission. According to Westlaw (05/12/2005), the court's opinion has been cited in two published District of Columbia Circuit opinions, one published opinion by another circuit, two published FERC decisions, three secondary sources, three briefs and one certiorari petition in one U.S. Supreme Court case, and six appellate briefs in four cases (three in the District of Columbia Circuit and one in another circuit).

***Brotherhood of Teamsters, Auto Truck Drivers, Line Drivers, Car Haulers, and Helpers Local 70 of Alameda County v. National Labor Relations Board* (D.C. Cir. 02–1094, filed 03/18/2002, judgment 03/13/2003).**

*Appeal from:* National Labor Relations Board.

*What happened:* Labor dispute concerning whether transportation time from the parking lot to the work site would be compensated. The dispute was dismissed by stipulation. The selected case is the union's appeal, which was consolidated with an appeal by the employer.

*Related case:* *United Parcel Service, Inc. v. National Labor Relations Board* (D.C. Cir. 02–1043, filed 02/01/2002, judgment 03/13/2003) (employer's appeal dismissed by stipulation).

*Petitioner's brief:* The union's 1,001-word petitioner brief cites 11 published court opinions (three by the U.S. Supreme Court, seven by the District of Columbia Circuit, and one by another circuit) and one published decision by the National Labor Relations Board.

*Intervenor's brief:* The employer's 7,434-word intervenor brief cites 17 published court opinions (six by the U.S. Supreme Court, four by the District of Columbia Circuit, six by other circuits, and one by a district in another circuit), nine published decisions by the National Labor Relations Board, and one treatise.

*Respondent's brief:* The board's 6,859-word respondent brief cites 30 published court opinions (11 by the U.S. Supreme Court, 10 by the District of Columbia Circuit, and nine by other circuits) and 16 published decisions by the National Labor Relations Board.

*Petitioner's reply brief:* The union's 638-word reply brief cites one published opinion by the District of Columbia Circuit and two published decisions by the National Labor Relations Board.

*Intervenor's reply brief:* The employer's 3,390-word reply brief cites eight published court opinions (four by the U.S. Supreme Court and four by the District of Columbia Circuit) and 10 published decisions by the National Labor Relations Board.

*Opinion:* (2) The court's unpublished 30-word per curiam order cites no opinions. The court's order is not on Westlaw.

***Winstar Broadcasting Corp. v. Federal Communications Commission (D.C. Cir. 02-1159, filed 05/23/2002, judgment 07/24/2002).***

*Appeal from:* Federal Communications Commission.

*What happened:* Petition for review voluntarily dismissed.

*Opinion:* (1) The court's unpublished 47-word clerk's order, *Winstar Broadcasting Corp. v. Federal Communications Commission*, 2002 WL 1676514 (D.C. Cir. 2002), cites no opinions. According to Westlaw (05/12/2005), the court's order has not been cited elsewhere.

***Public Service Company of Colorado v. Federal Communications Commission (D.C. Cir. 02-1163, filed 05/24/2002, judgment 05/16/2003).***

*Appeal from:* Federal Communications Commission.

*What happened:* Unsuccessful appeal of utility pole rates set by the FCC.

*Petitioner's brief:* The pole owner's 9,914-word petitioner brief cites 19 published court opinions (seven by the U.S. Supreme Court, seven by the

District of Columbia Circuit, four by other circuits, and one by Colorado's court of appeals in this case), 10 decisions by the Federal Communications Commission (two published decisions in this case and eight unpublished decisions), one unpublished order in this case by a Colorado district court, and one treatise.

*Respondent's brief:* The commission's 10,817-word respondent brief cites 22 published court opinions (seven by the U.S. Supreme Court; 10 by the District of Columbia Circuit; three by other circuits; and two by Colorado's court of appeals, including one in this case), 12 decisions by the Federal Communications Commission (eight published, including four decisions in this case, and four unpublished), and one unpublished order in this case by a Colorado district court.

*Intervenor's brief:* Cable companies filed a 5,840-word intervenor brief citing six published court opinions (two by the U.S. Supreme Court, two by the District of Columbia Circuit, one by another circuit, and one by Colorado's court of appeals in this case), seven decisions by the Federal Communications Commission (five published, including two decisions in this case, and two unpublished), and one unpublished order in this case by a Colorado district court.

*Petitioner's reply brief:* The pole owner's 5,975-word reply brief cites five published court opinions (two by the U.S. Supreme Court, one by the District of Columbia Circuit, one by another circuit, and one by Colorado's court of appeals in this case), nine decisions by the Federal Communications Commission (four published, including one decision in this case, and five unpublished), and one unpublished order in this case by a Colorado district court.

*Opinion:* (3) The court's published 2,755-word per curiam opinion, *Public Service Company of Colorado v. Federal Communications Commission*, 328 F.3d 675 (D.C. Cir. 2003) (two headnotes), cites three published court opinions (two by the District of Columbia Circuit and one by Colorado's court of appeals in this case), six decisions by the Federal Communications Commission (four published decisions in this case and two unpublished decisions), and one unpublished order in this case by a Colorado district court. According to Westlaw (05/12/2005), the court's opinion has been cited in two FCC decisions (one published and one unpublished) and three secondary sources.

***Town of Fairview, Texas v. Federal Aviation Administration (D.C. Cir. 02-1206, filed 07/01/2002, judgment 12/17/2002).***

*Appeal from:* Federal Aviation Administration.

*What happened:* Petition voluntarily dismissed.

*Opinion:* (1) The court's unpublished 43-word clerk's order cites no opinions. The court's order is not on Westlaw.

***Raley's v. National Labor Relations Board* (D.C. Cir. 02–1219, filed 07/05/2002, judgment 11/13/2002).**

*Appeal from:* National Labor Relations Board.

*What happened:* Agency appeal dismissed for lack of jurisdiction.

*Opinion:* (2) The court's 169-word unpublished per curiam order, *Raley's v. National Labor Relations Board*, 2002 WL 31545974 (D.C. Cir. 2002) (no headnotes), cites two published opinions by the District of Columbia Circuit. According to Westlaw (05/12/2005), the court's order has not been cited elsewhere. The court's 144-word unpublished denial of the petitioner's motion to clarify the court's opinion, *Raley's v. National Labor Relations Board*, 2003 WL 289116 (D.C. Cir. 2003) (no headnotes), cites one published opinion by the District of Columbia Circuit. According to Westlaw (05/12/2005), the court's order has not been cited elsewhere.

***El Paso Merchant Energy L.P. v. Federal Energy Regulatory Commission* (D.C. Cir. 02–1224, filed 07/11/2002, judgment 12/26/2002).**

*Appeal from:* Federal Energy Regulatory Commission.

*What happened:* Petition for review of a decision by the Federal Energy Regulatory Commission dismissed as incurably premature. Some consolidated petitions were also dismissed and the others were transferred to the Ninth Circuit by the same order.

*Related cases:* The selected appeal was consolidated with six others: *Dynegy Power Marketing, Inc. v. Federal Energy Regulatory Commission* (D.C. Cir. 02–1161, filed 05/24/2002, judgment 12/26/2002) (petition dismissed as premature), *Arizona Electric Power Cooperative, Inc. v. Federal Energy Regulatory Commission* (D.C. Cir. 02–1216, filed 07/05/2002, transferred 12/26/2002) (transferred to the Ninth Circuit as part of multidistrict litigation), *Duke Energy North America, LLC v. Federal Energy Regulatory Commission* (D.C. Cir. 02–1218, filed 07/05/2002, judgment 12/26/2002) (petition dismissed as premature), *Williams Energy Marketing & Trading Co. v. Federal Energy Regulatory Commission* (D.C. Cir. 02–1226, filed 07/12/2002, judgment 12/26/2002) (petition dismissed as premature), *Metropolitan Water District of Southern California v. Federal Energy Regulatory Commission* (D.C. Cir. 02–1227, filed 07/12/2002,

transferred 12/26/2002) (transferred to the Ninth Circuit as part of multidistrict litigation), *Reliant Energy Power Generation, Inc. v. Federal Energy Regulatory Commission* (D.C. Cir. 02–1229, filed 07/15/2002, judgment 12/26/2002) (petition dismissed as premature).

*Opinion:* (2) The court's 291-word unpublished per curiam order, *Dynegy Power Marketing, Inc. v. Federal Energy Regulatory Commission*, 2002 WL 31926838 (D.C. Cir. 2002) (no headnotes), cites one published District of Columbia Circuit opinion. According to Westlaw (05/12/2005), the court's order has not been cited elsewhere.

***Haley v. Federal Aviation Administration* (D.C. Cir. 02–1233, filed 07/16/2002, judgment 03/04/2004).**

*Appeal from:* Federal Aviation Administration.

*What happened:* Pro se petition for review of sanctions for employing persons who tested positive for drugs dismissed as untimely.

*Respondent's brief:* The administration's 9,008-word respondent brief cites 10 published court opinions (six by the U.S. Supreme Court and four by the District of Columbia Circuit) and three Federal Aviation Administration orders, including two in the petitioner's case.

*Opinion:* (2) The court's unpublished 366-word per curiam judgment, *Haley v. Federal Aviation Administration*, 89 Fed. Appx. 274, 2004 WL 438550 (D.C. Cir. 2004) (no headnotes), cites two published District of Columbia Circuit opinions. According to Westlaw (05/12/2005), the court's judgment has not been cited elsewhere.

***National Association of State Utility Consumer Advocates v. Federal Communications Commission* (D.C. Cir. 02–1261, filed 08/16/2002, judgment 06/29/2004).**

*Appeal from:* Federal Communications Commission.

*What happened:* Unsuccessful appeal of an order adjusting the manner in which local exchange carriers may recover the fixed costs they incur in providing service to residential and single-line business customers.

*Petitioner's brief:* The petitioner's 10,430-word brief cites 18 published court opinions (four by the U.S. Supreme Court; 10 by the District of Columbia Circuit; and four by other circuits, including one in a related case); three published decisions by the Federal Communications Commission, including two in related cases; a technical report available on the Internet; and the Federal Communications Commission's website.

*Respondent's brief:* The commission's 11,455-word respondent brief cites 23 published court opinions (five by the U.S. Supreme Court; 12 by the District of Columbia Circuit; and six by other circuits, including one opinion in a related case); five decisions by the Federal Communications Commission, including the decision appealed and another related decision; and one book.

*Intervenor's brief:* Telephone companies filed a 3,451-word intervenor brief, citing eight published court opinions (five by the District of Columbia Circuit and three by other circuits, including one in a related case) and five published decisions by the Federal Communications Commission, including the decision appealed and another in a related case.

*Petitioner's reply brief:* The petitioner's 5,619-word reply brief cites one published District of Columbia Circuit opinion; three published decisions by the Federal Communications Commission, including the decision appealed and another related decision; and one treatise.

*Opinion:* (3) The court's published 3,279-word signed opinion, *National Ass'n of State Utility Consumer Advocates v. Federal Communications Commission*, 372 F.3d 454 (D.C. Cir. 2004) (four headnotes), cites nine published court opinions (one by the U.S. Supreme Court, seven by the District of Columbia Circuit, and one by another circuit), four published decisions by the Federal Communications Commission, and a famous poem. According to Westlaw (05/12/2005), the court's opinion has been cited in one published opinion by another circuit, one secondary source, and one appellate brief in another circuit.

***Cingular Wireless LLC v. Federal Communications Commission* (D.C. Cir. 02-1268, filed 08/22/2002, judgment 12/20/2002).**

*Appeal from:* Federal Communications Commission.

*What happened:* Petition voluntarily dismissed.

*Related case:* Until the selected case was voluntarily dismissed, it was consolidated with *Cellco Partnership v. Federal Communications Commission* (D.C. Cir. 02-1262, filed 08/19/2002, judgment 02/13/2004) (petition for review denied).

*Opinion:* (1) The court's unpublished 66-word clerk's order, *Cellco Partnership v. Federal Communications Commission*, 2002 WL 31863849 (D.C. Cir. 2002), cites no opinions. According to Westlaw (05/13/2005), the court's order has not been cited elsewhere.

***New York Public Interest Research Group v. Environmental Protection Agency* (D.C. Cir. 02-1299, filed 09/24/2002, judgment 02/24/2004).**

*Appeal from:* Environmental Protection Agency.

*What happened:* Successful petition by an environmental organization to have the Environmental Protection Agency reconsider regulations to "small municipal waste combustion units."

*Related cases:* A consolidated petition was dismissed voluntarily, *Wasatch Energy Systems v. Environmental Protection Agency* (D.C. Cir. 01-1051, filed 02/02/2001, judgment 07/18/2001). The court's published opinion also resolved five consolidated challenges to the same regulators: *Northeast Maryland Waste Disposal Authority v. Environmental Protection Agency* (D.C. Cir. 01-1053, filed 02/02/2001, judgment 02/24/2004) (partially successful municipal waste combustor's challenge), *Sierra Club v. Environmental Protection Agency* (D.C. Cir. 01-1054, filed 02/05/2001, judgment 02/24/2004) (successful environmental organization's challenge), *Dutchess County Resource Recovery Agency v. Environmental Protection Agency* (D.C. Cir. 01-1055, filed 02/05/2001, judgment 02/24/2004) (partially successful municipal waste combustor's challenge), *Northeast Maryland Waste Disposal Authority v. Environmental Protection Agency* (D.C. Cir. 02-1280, filed 09/06/2002, judgment 02/24/2004) (successful environmental organization's challenge), and *Northeast Maryland Waste Disposal Authority v. Environmental Protection Agency* (D.C. Cir. 03-1093, filed 04/01/2003, judgment 02/24/2004) (successful environmental organization's challenge).

*Petitioner's brief:* The petitioners' 11,651-word brief cites 16 published opinions (two by the U.S. Supreme Court and 14 by the District of Columbia Circuit).

*Respondent's brief:* The agency's 20,819-word respondent brief cites 28 published opinions (four by the U.S. Supreme Court, 22 by the District of Columbia Circuit, and two by other circuits) and one related case in the district court for the District of Columbia.

*Petitioner's reply brief:* The petitioners' 5,434-word reply brief cites eight published opinions by the District of Columbia Circuit.

*Opinion:* (3) The court's published 10,001-word per curiam opinion, *Northeast Maryland Waste Disposal Authority v. Environmental Protection Agency*, 358 F.3d 936 (D.C. Cir. 2004) (12 headnotes), cites 32 published opinions (11 by the U.S. Supreme Court and 21 by the District of Columbia Circuit), one unpublished consent decree by the district

court for the District of Columbia, and one dictionary.

The opinion cites a consent decree by the District of Columbia district court as requiring the Environmental Protection Agency to promulgate “standards to regulate units with a design capacity of 35 tpd or less” by November 30, 2005. (Page 6, note 5, 358 F.3d at 941 note 5.)

According to Westlaw (05/13/2005), the court’s opinion has been cited in two published District of Columbia Circuit opinions, one unpublished opinion by the district court for the District of Columbia, seven secondary sources, three appellate briefs in three District of Columbia Circuit cases, and two trial court briefs in two cases in the district court for the District of Columbia.

***International Union of Operating Engineers v. National Labor Relations Board* (D.C. Cir. 02–1300, filed 09/25/2002, judgment 12/02/2003).**

*Appeal from:* National Labor Relations Board.

*What happened:* Unsuccessful challenge by a union claiming that the psychiatric hospitalization of an employee was in retaliation for union activity.

*Petitioner’s brief:* The union’s 12,696-word petitioner brief cites 24 published court opinions (four by the U.S. Supreme Court, 14 by the District of Columbia Circuit, and six by other circuits) and 11 published decisions by the National Labor Relations Board, including the decision appealed.

*Respondent’s brief:* The board’s 10,223-word respondent brief cites 16 published court opinions (five by the U.S. Supreme Court, eight by the District of Columbia Circuit, and three by other circuits) and seven published decisions by the National Labor Relations Board, including the decision appealed.

*Intervenor’s brief:* The employer’s 10,339-word intervenor brief cites four published court opinions (two by the U.S. Supreme Court and two by other circuits) and 10 published decisions by the National Labor Relations Board.

*Petitioner’s reply brief:* The union’s 7,030-word reply brief cites 14 published court opinions (five by the U.S. Supreme Court, two by the District of Columbia Circuit, and seven by other circuits) and 10 published decisions by the National Labor Relations Board.

*Opinion:* (3) The court’s published 3,849-word signed opinion, *International Union of Operating Engineers v. National Labor Relations Board*, 350 F.3d 105 (D.C. Cir. 2003) (four headnotes), cites eight published court opinions (one by the U.S. Supreme Court, five by the District of Columbia Circuit, and two by other circuits) and three pub-

lished National Labor Relations Board orders, including the order appealed. According to Westlaw (05/13/2005), the court’s opinion has been cited in eight secondary sources and three appellate briefs in two District of Columbia Circuit cases.

***Town of Cortlandt v. Federal Energy Regulatory Commission* (D.C. Cir. 02–1331, filed 11/01/2002, judgment pending).**

*Appeal from:* Federal Energy Regulatory Commission.

*What happened:* Administrative appeal held in abeyance pending resolution of an action in the district court by an intervenor in the selected appeal, *Millennium Pipeline Company, L.P. v. Evans* (D.D.C. 04–cv–0233, filed 02/13/2004).

*Related cases:* Consolidated appeals include *Villages of Croton-on-Hudson v. Federal Energy Regulatory Commission* (D.C. Cir. 02–1332, filed 10/28/2002, judgment pending) (held in abeyance), *County of Westchester v. Federal Energy Regulatory Commission* (D.C. Cir. 02–1338, filed 11/08/2002, judgment pending) (held in abeyance), *Riverkeeper, Inc. v. Federal Energy Regulatory Commission* (D.C. Cir. 02–1348, filed 11/15/2002, judgment pending) (held in abeyance), *City of New York v. Federal Energy Regulatory Commission* (D.C. Cir. 02–1349, filed 11/15/2002, judgment pending) (held in abeyance), and *Great Lakes United v. Federal Energy Regulatory Commission* (D.C. Cir. 02–1353, filed 11/19/2002, judgment 12/27/2002) (voluntarily dismissed).

*Opinion:* (0) The case is still open.

***Union Pacific Railroad Co. v. Surface Transportation Board* (D.C. Cir. 02–1340, filed 11/08/2002, judgment 02/03/2004).**

*Appeal from:* Surface Transportation Board.

*What happened:* Successful appeal of the Surface Transportation Board’s refusal to set aside arbitrators’ finding that outsourcing was causally related to a railroad merger.

*Petitioner’s brief:* The railroad company’s 14,854-word petitioner brief cites 33 published court opinions (six by the U.S. Supreme Court, 12 by the District of Columbia Circuit, 11 by other circuits, one by the district court for the District of Columbia, and three by other district courts), one unpublished opinion by another circuit, 15 decisions by the Surface Transportation Board (10 published and five unpublished, including the three decisions appealed), four decisions by the National Mediation Board, and four arbitrator decisions.

The brief cites an unpublished Sixth Circuit opinion to support the statement, “Although no Court has confronted the issue directly, at least one court assumed, without analysis, that judicial review is limited to whether the Board properly applied *Lace Curtain* [, *Chicago and North Western Transportation Co.* (“*Lace Curtain*”), 3 I.C.C. 2d 729 (1987), *affirmed sub nom. International Brotherhood of Electrical Workers v. I.C.C.*, 862 F.2d 330 (D.C. Cir. 1988)].” (Page 16.)

*Amicus brief:* The National Railway Labor Conference filed a 4,107-word amicus curiae brief, citing 17 published court opinions (eight by the U.S. Supreme Court, seven by the District of Columbia Circuit, and two by other circuits) and four decisions by the Surface Transportation Board (three published and one unpublished).

*Respondent’s brief:* The government’s 10,561-word respondent brief cites 47 published court opinions (16 by the U.S. Supreme Court, 17 by the District of Columbia Circuit, 12 by other circuits, and two by districts in other circuits), 15 decisions by the Surface Transportation Board (nine published and six unpublished, including two decisions in this case).

*Petitioner’s reply brief:* The railroad company’s 7,427-word reply brief cites 40 published court opinions (seven by the U.S. Supreme Court, 16 by the District of Columbia Circuit, 10 by other circuits, one by the district court for the District of Columbia, and six by other district courts), nine decisions by the Surface Transportation Board (six published and three unpublished), three decisions by the National Mediation Board, and three arbitrator decisions.

*Opinion:* (3) The court’s published 4,050-word signed opinion and concurrence, *Union Pacific Railroad Co. v. Surface Transportation Board*, 358 F.3d 31 (D.C. Cir. 2004) (seven headnotes), cites 24 published court opinions (nine by the U.S. Supreme Court, eight by the District of Columbia Circuit, and seven by other circuits) and four published decisions by the Interstate Commerce Commission. According to Westlaw (05/13/2005), the court’s opinion has been cited in one unpublished decision by the Surface Transportation Board, three secondary sources, and one appellate brief in a case in another circuit.

***Constellation Power Source, Inc. v. Federal Energy Regulatory Commission* (D.C. Cir. 02–1367, filed 11/27/2002, judgment pending).**

*Appeal from:* Federal Energy Regulatory Commission.

*What happened:* A case that arose out of the 2000 California energy crisis and has been held in

abeyance pending the resolution of other cases arising from that crisis. The California Power Exchange Corporation, the Northern California Power Agency, the Pacific Gas and Electric Company, the City of Santa Clara, Pinnacle West Companies, the Public Service Company of New Mexico, the Southern California Edison Company, the California Power Exchange Corporation, the Southern California Edison Company, and the Pacific Gas and Electric Company were permitted to intervene. Final briefs are due 03/24/2006.

*Related case:* Consolidated with *Powerex Corp. v. Federal Energy Regulatory Commission* (D.C. Cir. 03–1285, filed 09/18/2003, judgment pending).

*Opinion:* (0) The court’s 101-word unpublished per curiam consolidation order, *Constellation Power Source, Inc. v. Federal Energy Regulatory Commission*, 2004 WL 326223 (D.C. Cir. 2004) (no headnotes), cites no opinions. According to Westlaw (05/26/2005), the court’s order has been cited in one published District of Columbia Circuit opinion.

***Three Y, LLC v. Environmental Protection Agency* (D.C. Cir. 02–1372, filed 12/04/2002, judgment 06/29/2004).**

*Appeal from:* Environmental Protection Agency.

*What happened:* Unsuccessful agency appeal. EPA designated a piece of property in Edgewater, New Jersey, across the Hudson River from New York City, a Superfund site because of contamination from oil storage and recycling. The owner of adjoining land included in the Superfund site designation challenged the decision.

*Related case:* The case was consolidated with *Honeywell International, Inc v. Environmental Protection Agency* (D.C. Cir. 02–1371, filed 12/04/2002, judgment 06/29/2004), a challenge by companies associated with oil storage and recycling on the land. The court of appeals held that the petitioner’s property was properly included within the Superfund site boundaries.

*Petitioner’s brief:* The landowner’s 7,265-word petitioner brief cites nine published opinions (eight by the District of Columbia Circuit and one by another circuit).

*Respondent’s brief:* EPA’s 14,391-word respondent brief responds to the petitions in both cases and cites 46 published opinions (five by the U.S. Supreme Court, 39 by the District of Columbia Circuit, and two by other circuits).

*Petitioner’s reply brief:* The landowner’s 3,615-word reply brief cites three published District of Columbia Circuit opinions and one General Accounting Office report.



*Opinion:* (3) The court's published 4,819-word signed opinion, *Honeywell International, Inc. v. Environmental Protection Agency*, 372 F.3d 441 (D.C. Cir. 2004) (seven headnotes), cites 15 published opinions (two by the U.S. Supreme Court and 13 by the District of Columbia Circuit). According to Westlaw (05/13/2005), the court's opinion has been cited in one published opinion by the District of Columbia Circuit, five secondary sources, and one appellate brief in a District of Columbia Circuit case.

***American Wrecking Corp. v. Secretary of Labor* (D.C. Cir. 02-1379, filed 12/17/2002, judgment 12/19/2003).**

*Appeal from:* Occupational Safety and Health Review Commission.

*What happened:* Partially successful appeal of a finding that a demolition subcontractor violated Occupational Safety and Health Administration regulations, resulting in a worker's being killed by 14 tons of loose bricks. The court found substantial evidence of violation, but not substantial evidence of willful violation. As a prevailing party, the subcontractor sought approximately \$300,000 in fees. The court awarded the subcontractor approximately \$40,000.

*Petitioner's brief:* The subcontractor's 7,964-word petitioner brief cites six published court opinions (five by the District of Columbia Circuit and one by another circuit) and five decisions by the Occupational Safety Health Review Commission.

*Respondent's brief:* The government's 8,193-word respondent brief cites 22 published court opinions (one by the U.S. Supreme Court, 14 by the District of Columbia Circuit, and seven by other circuits); five decisions by the Occupational Safety Health Review Commission, including one in this case; and one law review article.

*Petitioner's reply brief:* The subcontractor's 1,686-word reply brief cites one published District of Columbia Circuit opinion and seven decisions by the Occupational Safety Health Review Commission.

*Opinion:* (3) The court resolved the appeal with a published 5,024-word signed opinion, *American Wrecking Corp. v. Secretary of Labor*, 351 F.3d 1254 (D.C. Cir. 2003) (17 headnotes), citing 15 published court opinions (three by the U.S. Supreme Court, six by the District of Columbia Circuit, and six by other circuits) and nine decisions by the Occupational Safety and Health Review Commission, including three in this case. According to Westlaw (05/13/2005), the court's opinion has been cited in two published opinions by the Dis-

trict of Columbia Circuit, one unpublished opinion by another circuit, five decisions by the Occupational Safety and Health Review Commission, three secondary sources, and five appellate briefs in four cases (four appellate briefs in three cases in the District of Columbia Circuit and one appellate brief in one case in another circuit).

The court resolved the fee request with a published 4,911-word per curiam opinion, *American Wrecking Corp. v. Secretary of Labor*, 364 F.3d 321 (D.C. Cir. 2004)<sup>122</sup> (seven headnotes), citing 14 published court opinions (one by the U.S. Supreme Court; 10 by the District of Columbia Circuit, including the opinion resolving the appeal; and three by other circuits) and five decisions by the Occupational Safety and Health Review Commission, including three in this case. According to Westlaw (05/13/2005), the court's opinion has been cited in one published opinion by the District of Columbia Circuit, one published opinion by a bankruptcy court in another circuit, one published opinion by the Court of International Trade, three administrative decisions, and six secondary sources.

***In re Tepper* (D.C. Cir. 02-3061, filed 06/24/2002, judgment 08/27/2002).**

*Appeal from:* District of the District of Columbia.

*What happened:* Pro se motion to file a successive habeas corpus petition denied.

*Opinion:* (2) The court's unpublished 163-word per curiam order cites no opinions. The court's order is not on Westlaw.

***United States v. Williams* (D.C. Cir. 02-3066, filed 07/17/2002, judgment 08/12/2003).**

*Appeal from:* District of the District of Columbia.

*What happened:* Granting a joint motion by the defendant and the government, the court of appeals vacated a criminal sentence and remanded the case for resentencing.

*Opinion:* (2) The court's unpublished 91-word per curiam order cites no opinions. The court's order is not on Westlaw.

***United States v. Gantt* (D.C. Cir. 02-3095, filed 10/22/2002, judgment 02/11/2003).**

*Appeal from:* District of the District of Columbia.

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122. See also 47-word per curiam order awarding fees, *American Wrecking Corp. v. Secretary of Labor*, 2004 WL 848178 (D.C. Cir. 2004), citing no opinions.

*What happened:* Unsuccessful petition for release on bail pending appeal.

*Opinion:* (2) The court's unpublished 259-word per curiam judgment, *United States v. Gantt*, 55 Fed. Appx. 574, 2003 WL 346267 (D.C. Cir. 2003) (no headnotes), cites two published District of Columbia Circuit opinions. According to Westlaw (05/13/2005), the court's judgment has not been cited elsewhere.

***United States v. Azize* (D.C. Cir. 02–3112, filed 12/23/2002, judgment 01/28/2004).**

*Appeal from:* District of the District of Columbia.

*What happened:* Unsuccessful appeal of a conviction for ecstasy possession.

*Appellant's brief:* The defendant's 3,953-word appellant brief cites 31 published opinions (19 by the U.S. Supreme Court, seven by the District of Columbia Circuit, one by another circuit, three by the district court for the District of Columbia, and one by a district court in another circuit).

*Appellee's brief:* The government's 11,654-word appellee brief cites 20 published opinions (10 by the U.S. Supreme Court and 10 by the District of Columbia Circuit).

*Opinion:* (2) The court's unpublished 409-word judgment and memorandum, *United States v. Azize*, 88 Fed. Appx. 416, 2004 WL 210702 (D.C. Cir. 2004) (four headnotes), cites four published opinions (three by the U.S. Supreme Court and one by the District of Columbia Circuit). According to Westlaw (05/13/2005), the court's judgment has been cited in one secondary source.

***In re Westine* (D.C. Cir. 02–5050, filed 02/07/2002, judgment 02/26/2002).**

*Appeal from:* District of the District of Columbia.

*What happened:* Pro se petition for writ of habeas corpus dismissed as filed in the wrong court.

*Opinion:* (2) The court's unpublished 36-word per curiam order cites no opinions. The court's order is not on Westlaw.

***Lockett v. Bush* (D.C. Cir. 02–5055, filed 02/19/2002, judgment 11/14/2002).**

*Appeal from:* District of the District of Columbia.

*What happened:* Unsuccessful pro se prisoner appeal. The court granted appellees summary affirmance.

*Opinion:* (2) The court's unpublished 395-word per curiam order cites seven published opinions (one by the U.S. Supreme Court and six by the District of Columbia Circuit). According to West-

law (05/13/2005), the court's order has not been cited elsewhere.

***United States v. Schofield* (D.C. Cir. 02–5057, filed 02/20/2002, judgment 04/16/2002).**

*Appeal from:* District of the District of Columbia.

*What happened:* Civil appeal voluntarily dismissed.

*Opinion:* (1) The court's unpublished 44-word clerk's order cites no opinions. The court's order is not on Westlaw.

***Coleman v. United States Parole Commission* (D.C. Cir. 02–5064, filed 02/26/2002, judgment 05/08/2002).**

*Appeal from:* District of the District of Columbia.

*What happened:* Prisoner's appeal dismissed for failure to pay the filing fee.

*Opinion:* (1) The court's unpublished 145-word clerk's order cites no opinions. The court's order is not on Westlaw.

***Lathram v. Snow* (D.C. Cir. 02–5075, filed 03/07/2002, judgment 08/01/2003).**

*Appeal from:* District of the District of Columbia.

*What happened:* Partially successful appeal of summary judgment granted to the government in an action for employment discrimination by a female public affairs specialist for the customs service.

*Appellant's brief:* The employee's 8,687-word appellant brief cites 51 published opinions (16 by the U.S. Supreme Court, 13 by the District of Columbia Circuit, 19 by other circuits, two by the district court for the District of Columbia, and one by a district court in another circuit) and one treatise.

*Appellee's brief:* The government's 9,236-word appellee brief cites 45 published opinions (nine by the U.S. Supreme Court, 20 by the District of Columbia Circuit, 12 by other circuits, and four by the district court for the District of Columbia).

*Appellant's reply brief:* The employee's 6,469-word reply brief cites 32 published opinions (seven by the U.S. Supreme Court, 11 by the District of Columbia Circuit, 11 by other circuits, and three by the district court for the District of Columbia).

*Opinion:* (3) The court's published 4,425-word signed opinion, *Lathram v. Snow*, 336 F.3d 1085 (D.C. Cir. 2003) (seven headnotes), cites 15 published opinions (six by the U.S. Supreme Court, eight by the District of Columbia Circuit, and one by another circuit) and two unpublished orders

by the district court in this case. According to Westlaw (05/13/2005), the court's opinion has been cited in two published opinions by the District of Columbia Circuit, 14 opinions by the district court for the District of Columbia (11 published and four unpublished), five secondary sources, one petition for writ of certiorari in the U.S. Supreme Court, four appellate briefs in four cases (three in the District of Columbia Circuit and one in another circuit), and two trial briefs in two district court cases (one in the district court for the District of Columbia and one in a district in another circuit).

***Gibbs v. Smithsonian Institution* (D.C. Cir. 02-5084, filed 03/20/2002, judgment 07/29/2002).**

*Appeal from:* District of the District of Columbia.

*What happened:* Civil judgment summarily affirmed.

*Related case:* The selected case was consolidated with *Vance v. Smithsonian Institution* (D.C. Cir. 02-5051, filed 02/14/2002, judgment 07/29/2002) (civil appeal dismissed for lack of prosecution).

*Opinion:* (2) The court's unpublished 456-word per curiam order, *Gibbs v. Smithsonian Institution*, 2002 WL 1751251 (D.C. Cir. 2002), cites five published opinions (one by the U.S. Supreme Court and four by the District of Columbia Circuit). According to Westlaw (05/13/2005), the court's order has not been cited elsewhere.

***Chevron U.S.A. Inc. v. Federal Energy Regulatory Commission* (D.C. Cir. 02-5086, filed 03/20/2002, judgment 10/10/2003).**

*Appeal from:* District of the District of Columbia.

*What happened:* Unsuccessful appeal by the Federal Energy Regulatory Commission of the district court's narrowing of its regulatory authority concerning natural gas transportation over the Outer Continental Shelf.

*Related cases:* The selected appeal was from a district court action by oil companies against the Federal Energy Regulatory Commission in which a producer coalition intervened. It was consolidated with six other appeals from two other district court actions by pipeline companies against the Federal Energy Regulatory Commission. A producer coalition and the Independent Petroleum Association of America supported the Federal Energy Regulatory Commission's appeals. Three appeals arose from one district court case, *Williams Companies v. Federal Energy Regulatory Commission* (D.C. Cir. 02-5056, filed 02/20/2002, judgment 10/10/2003) (unsuccessful appeal by

the Federal Energy Regulatory Commission), *Williams Companies v. Federal Energy Regulatory Commission* (D.C. Cir. 02-5078, filed 03/07/2002, judgment 10/10/2003) (unsuccessful appeal by the producer coalition), and *Williams Companies v. Federal Energy Regulatory Commission* D.C. Cir. 02-5082, filed 03/12/2002, judgment 10/10/2003) (unsuccessful appeal by the Independent Petroleum Association of America). Three appeals arose from the other district court case, *Duke Energy Field Services, LP v. Federal Energy Regulatory Commission* (D.C. Cir. 02-5077, filed 03/07/2002, judgment 10/10/2003) (unsuccessful appeal by the Federal Energy Regulatory Commission), *Duke Energy Field Services, LP v. Federal Energy Regulatory Commission* (D.C. Cir. 02-5081, filed 03/12/2002, judgment 10/10/2003) (unsuccessful appeal by the Independent Petroleum Association of America), and *Duke Energy Field Services, LP v. Federal Energy Regulatory Commission* (D.C. Cir. 02-5085, filed 03/20/2002, judgment 10/10/2003) (unsuccessful appeal by the producer coalition).

*Appellant's brief:* The Federal Energy Regulatory Commission's 11,421-word appellant brief cites 29 published opinions (14 by the U.S. Supreme Court, 14 by the District of Columbia Circuit, and the appealed opinion by the district court for the District of Columbia).

*Appellee's brief:* The oil companies' 7,611-word appellee brief in 02-5086 cites 18 published opinions (three by the U.S. Supreme Court, 13 by the District of Columbia Circuit, one by another circuit, and the appealed opinion by the district court for the District of Columbia) and a dictionary.

*Appellant's reply brief:* The Federal Energy Regulatory Commission's 6,486-word reply brief cites 27 published opinions (13 by the U.S. Supreme Court, 11 by the District of Columbia Circuit, two by other circuits, and the appealed opinion by the district court for the District of Columbia).

*Opinion:* (3) The court's published 2,755-word signed opinion, *Williams Companies v. Federal Energy Regulatory Commission*, 345 F.3d 910 (D.C. Cir. 2003) (three headnotes), cites eight published opinions (two by the U.S. Supreme Court, four by the District of Columbia Circuit, one by another circuit, and the appealed opinion by the district court for the District of Columbia) and one technical manual. According to Westlaw (05/09/2005), the court's opinion has been cited in one published District of Columbia Circuit opinion, two published decisions by the Federal Energy Regulatory Commission, the *Federal Register*, three

other secondary sources, three briefs in one U.S. Supreme Court case, and three appellate briefs in one District of Columbia Circuit case.

***Thompson v. United States* (D.C. Cir. 02–5105, filed 03/29/2002, judgment 04/11/2002).**

*Appeal from:* District of the District of Columbia.

*What happened:* Habeas corpus appeal dismissed on the government's motion.

*Opinion:* (1) The court's unpublished 44-word clerk's order cites no opinions. The court's order is not on Westlaw.

***Clark v. Mineta* (D.C. Cir. 02–5155, filed 05/14/2002, judgment 07/10/2002).**

*Appeal from:* District of the District of Columbia.

*What happened:* Civil appeal dismissed as premature.

*Opinion:* (2) The court's unpublished 111-word per curiam order, *Clark v. Mineta*, 2002 WL 1477292 (D.C. Cir. 2002), cites no opinions. According to Westlaw (05/13/2005), the court's order has not been cited elsewhere.

***Gartrell v. Ashcroft* (D.C. Cir. 02–5179, filed 05/30/2002, judgment 04/11/2003).**

*Appeal from:* District of the District of Columbia.

*What happened:* Appeal by the government of a decision in favor of prisoners dismissed as settled.

*Opinion:* (1) The court's unpublished 29-word clerk's order, *Gartrell v. Ashcroft*, 2003 WL 1873847 (D.C. Cir. 2003), cites no opinions. According to Westlaw (05/13/2005), the court's order has not been cited elsewhere.

***Johnson v. Westfall* (D.C. Cir. 02–5183, filed 06/04/2002, judgment 07/19/2002).**

*Appeal from:* District of the District of Columbia.

*What happened:* Pro se prisoner appeal dismissed for failure to inform the court of a valid mailing address.

*Opinion:* (1) The court's unpublished 90-word clerk's order cites no opinions. The court's order is not on Westlaw.

***Morales v. Doe* (D.C. Cir. 02–5236, filed 07/31/2002, judgment 12/20/2002).**

*Appeal from:* District of the District of Columbia.

*What happened:* Unsuccessful pro se prisoner appeal.

*Opinion:* (2) The court's unpublished 169-word per curiam order, *Morales v. Doe*, 53 Fed. Appx.

126, 2002 WL 31866258 (D.C. Cir. 2002) (no headnotes), cites one published District of Columbia Circuit opinion. According to Westlaw (05/13/2005), the court's order has not been cited elsewhere.

***Habib v. Bush* (D.C. Cir. 02–5284, filed 09/11/2002, judgment 07/19/2004).**

*Appeal from:* District of the District of Columbia.

*What happened:* Unsuccessful appeal of the district court's judgment that federal courts did not have jurisdiction over alien prisoners held at Guantanamo Bay, Cuba, by an Australian citizen detained in Pakistan in August 2001, transferred to Egypt, taken to Afghanistan, and then transferred to Guantanamo Bay. The Supreme Court reversed, however, in *Rasul v. Bush*, 124 S. Ct. 2686 (2004), and the court of appeals remanded the case to the district court for further action.

*Related cases:* For briefing purposes, the selected case was consolidated with *Rasul v. Bush* (D.C. Cir. 02–5288, filed 09/11/2002, judgment 07/19/2004) (British and Australian citizens captured in Afghanistan and transferred to Guantanamo Bay). For decision purposes, these two appeals were consolidated with *Al Odah v. United States* (D.C. Cir. 02–5251, filed 08/12/2002, judgment 07/19/2004).

*Appellant's brief:* The habeas corpus petitioners' 13,415-word appellant brief cites 52 published American court opinions (25 by the U.S. Supreme Court; five by the District of Columbia Circuit; nine by other circuits; two by the district court for the District of Columbia, including an opinion appealed in a consolidated case; 10 by district courts in other circuits; and one by the United States Court of Berlin), four unpublished American court opinions (one by another circuit, the decision by the district court for the District of Columbia appealed and the decision by the district court for the District of Columbia appealed in a consolidated case, and one by a district court in another circuit), five opinions by foreign courts (three by the European Court of Human Rights, one by the International Court of Justice, and one by the Organization of American States' Inter-American Commission on Human Rights), five law review articles, the *Restatement (Third) of the Foreign Relations Law of the United States*, one news article, and two websites.

The brief cites an unpublished opinion by the Fourth Circuit with a published opinion by the Fourth Circuit and a published opinion by the Eastern District of Virginia in a footnote supporting the statement, "The United States prosecutes

crimes committed in Guantanamo—including crimes committed by aliens—because the enclave is ‘within its territorial jurisdiction.’” (Pages 36–37 and note 17.)

The brief cites an unpublished opinion by the Southern District of New York with published opinions by the Ninth Circuit, the District of Massachusetts, the Southern District of Florida, and the Northern District of California in a footnote supporting the statement, “Arbitrary detention violates customary international law and is within [Alien Tort Claims Act] jurisdiction.” (Page 49 and note 36.)

*Amicus brief:* Human rights organizations and legal scholars filed a 6,464-word amicus curiae brief, citing 25 published American court opinions (16 by the U.S. Supreme Court, one by the District of Columbia Circuit, three by other circuits, an opinion by the district court for the District of Columbia appealed in a consolidated case, and five by district courts in other circuits), three unpublished American court opinions (the decision by the district court for the District of Columbia appealed, the decision by the district court for the District of Columbia appealed in a consolidated case, and an opinion by a district court in another circuit), two nineteenth century opinions by English courts (1 by the court of common pleas and one by the admiralty court), 14 opinions by other foreign courts (six by the European Court of Human Rights, four by the United Nations Human Rights Committee, one by the United Nations Working Group on Arbitrary Detention, two by the Organization of American States’ Inter-American Commission on Human Rights, and one by the International Court of Justice), nine treatises, two law review articles, the *Restatement (Third) of the Foreign Relations Law of the United States*, two United Nations reports, and one United States government Web report.

The brief cites the same unpublished opinion by the Southern District of New York as the appellants’ brief cites. It is the first of six opinions cited to support the statement, “U.S. courts have repeatedly held that arbitrary detention violates international law.” (Page 12.) Four of the other opinions cited are the same as the appellants cited (published opinions by the Ninth Circuit, the District of Massachusetts, the Southern District of Florida, and the Northern District of California) and the other is a published opinion by the District of Kansas, which the brief notes was affirmed by a published opinion by the Tenth Circuit.

*Appellee’s brief:* The government’s 14,743-word appellee brief cites 66 published opinions (27 by

the U.S. Supreme Court, 20 by the District of Columbia Circuit, nine by other circuits, three by the district court for the District of Columbia, four by district courts in other circuits, one by the U.S. Court of Berlin, one by the United States Navy’s board of review, and one by the court of military justice), one treatise, one White House news release on the Web, and one other website.

*Amicus brief:* Organizations opposing the court’s jurisdiction over the prisoners filed a 7,283-word amicus curiae brief, citing 33 published opinions (16 by the U.S. Supreme Court; nine by the District of Columbia Circuit; four by other circuits; and four by district courts in other circuits, including one in a related case), two treatises, one law review article, and one newspaper article.

*Appellant’s reply brief:* The habeas corpus petitioners’ 6,868-word reply brief cites 20 published opinions (15 by the U.S. Supreme Court, three by the District of Columbia Circuit, and two by other circuits), one unpublished opinion by another circuit, and two law review articles.

The petitioners’ reply brief cites the same unpublished Fourth Circuit opinion as its opening brief. The brief cites this unpublished opinion with a published Fourth Circuit opinion (the same one cited in the opening brief) to support the statement, “The United States, of course, has long taken the position that Guantanamo Bay is within the ‘territory’ and ‘territorial jurisdiction’ of the United States. Under the terms of the lease, Guantanamo Bay is subject to the ‘complete jurisdiction and control’ of the United States. [Citation.] When it suits them, the federal government relies upon this language for its contention that crimes committed on Guantanamo Bay are ‘within its territorial jurisdiction.’” (Page 17.)

*Opinion:* (3) The court’s published 8,901-word signed opinion and concurrence, *Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003) (five headnotes), cites 64 published opinions (29 by the U.S. Supreme Court, 19 by the District of Columbia Circuit, 14 by other circuits, the opinion by the district court for the District of Columbia appealed, and one by New York’s court of appeals), eight law review articles, one website, and one book. According to Westlaw (05/13/2005), the court’s opinion has been cited in one U.S. Supreme Court opinion, two published opinions by the District of Columbia Circuit, six opinions by other circuits (five published and one unpublished), seven published opinions by the district court for the District of Columbia, six published opinions by district courts in other circuits, one

published opinion by the Court of Federal Claims, 154 secondary sources, three petitions for a writ of certiorari to the U.S. Supreme Court, 34 briefs in four U.S. Supreme Court cases, 15 appellate briefs in nine cases (10 briefs in five cases in the District of Columbia Circuit, three briefs in three cases in other circuits, and two briefs in one case in North Dakota's supreme court), and eight trial court briefs in seven district court cases (three briefs in three cases in the District of Columbia district, and five briefs in four cases in districts in other circuits).

Following the Supreme Court's reversal, the court vacated the district court's judgment in an unpublished 97-word per curiam judgment, *Al Odah v. United States*, 1003 Fed. Appx. 676, 2004 WL 1613572 (D.C. Cir. 2004) (no headnotes), citing no opinions. According to Westlaw (05/13/2005), the court's judgment has been cited in two secondary sources.

***In re Savage* (D.C. Cir. 02–5309, filed 09/12/2002, judgment 11/22/2002).**

*Appeal from:* District of the District of Columbia.

*What happened:* Pro se prisoner's petition for a writ of mandamus denied.

*Opinion:* (2) The court's unpublished 21-word per curiam order, *In re Savage*, 2002 WL 31654861 (D.C. Cir. 2002), cites no opinions. According to Westlaw (05/13/2005), the court's order has not been cited elsewhere.

***Schrecker v. Department of Justice* (D.C. Cir. 02–5317, filed 10/09/2002, judgment 11/18/2003).**

*Appeal from:* District of the District of Columbia.

*What happened:* Unsuccessful appeal of the district court's finding that the government had finally responded adequately to a history professor's Freedom of Information Act request for records of McCarthy-era investigations.

*Appellant's brief:* The professor's 5,748-word appellant brief cites 15 published opinions (1 by the U.S. Supreme Court; 10 by the District of Columbia Circuit, including one related to this appeal; one by another circuit; and three by the district court for the District of Columbia, all of which are related to this appeal), a famous novel, and *Who Was Who*.

*Amicus brief:* Various organizations promoting public information filed a 4,090-word amicus curiae brief, citing 13 published opinions (two by the U.S. Supreme Court; seven by the District of Columbia Circuit, including one related to this appeal; three by the district court for the District of

Columbia, including one related to this appeal; and one by a district court in another circuit), Social Security Administration life tables available on the Internet, and *Who Was Who*.

*Appellee's brief:* The government's 6,007-word appellee brief cites 24 published opinions (three by the U.S. Supreme Court; 12 by the District of Columbia Circuit, including one related to this appeal; two by another circuit; six by the district court for the District of Columbia, including three related to this appeal; and one by a district court in another circuit) and *Who Was Who*.

*Appellant's reply brief:* The professor's 4,618-word reply brief cites 13 published opinions (two by the U.S. Supreme Court; seven by the District of Columbia Circuit, including one related to this appeal; one by another circuit; two by the district court for the District of Columbia; and one by a district court in another circuit).

*Opinion:* (3) The court's published 4,512-word signed opinion, *Schrecker v. United States Department of Justice*, 349 F.3d 657 (D.C. Cir. 2003) (10 headnotes), cites 21 published opinions (two by the U.S. Supreme Court; 16 by the District of Columbia Circuit, including one related to this appeal; and three by the district court for the District of Columbia, all of which are related to this appeal), Social Security Administration life tables, and *Who Was Who*. According to Westlaw (05/09/2005), the court's opinion has been cited in one unpublished opinion by the District of Columbia Circuit, two published opinions by the district court for the District of Columbia, one published opinion by a district court in another circuit, eight secondary sources, one appellate brief in one case in another circuit, and one trial court brief in one case in a district in another circuit.

***Judicial Watch, Inc. v. National Energy Policy Development Group* (D.C. Cir. 02–5355, filed 11/12/2002, judgment 05/10/2005).**

*Appeal from:* District of the District of Columbia.

*What happened:* Dismissal by mandamus of an action to obtain information about the workings of the National Energy Policy Development Group, which was chaired by the Vice President of the United States. Judicial Watch and the Sierra Club brought separate actions in the district court for the District of Columbia and the district court ordered discovery. (The Sierra Club's action was filed originally in the district court for the Northern District of California and subsequently transferred to the district court for the District of Columbia.) The Vice President appealed the discov-

ery order in the action by Judicial Watch and filed a separate petition for a writ of mandamus in that action. The selected case is the appeal. On the following day, the Vice President appealed the discovery order in the action by the Sierra Club. The two appeals and the petition for a writ of mandamus were consolidated. The court of appeals originally denied the interlocutory appeals and the mandamus petition, but after Supreme Court review the court ruled en banc that the district court actions should be dismissed. The briefs reviewed for this study are the briefs filed for the en banc review; the original panel decision was based on motions.

*Related cases:* *In re Cheney* (D.C. Cir. 02–5354, filed 11/12/2002, judgment 05/10/2005) (petition for a writ of mandamus in the action by Judicial Watch) and *Sierra Club v. Cheney* (D.C. Cir. 02–5356, filed 11/13/2002, judgment 05/10/2005) (appeal in the action by the Sierra Club).

*Appellant's brief:* The Vice President's 16,735-word appellant and petitioner brief cites 32 published opinions (23 by the U.S. Supreme Court, including the opinion vacating the court of appeals' panel opinion; seven by the District of Columbia Circuit, including the vacated panel opinion; and two by the district court for the District of Columbia, including the opinion under review and an opinion in a related case), one law review article, four books, and a government report available on the Web.

*Appellee's brief:* The 14,122-word appellee and respondent brief by Judicial Watch and the Sierra Club cites 62 published opinions (22 by the U.S. Supreme Court, including the opinion vacating the court of appeals' panel opinion; 30 by the District of Columbia Circuit, including the vacated panel opinion; one by another circuit; seven by the district court for the District of Columbia, including an opinion in the case under review and an opinion in a related case; and two by a district court in another circuit), two government reports, two government websites, one newspaper article, and one dictionary.

*Amicus brief:* Ten organizations that advocate open government filed a 3,463-word amicus curiae brief, citing 15 published opinions (three by the U.S. Supreme Court, including the opinion vacating the court of appeals' panel opinion; eight by the District of Columbia Circuit; and four by the district court for the District of Columbia, including an opinion in a related case); seven reports, including five on the Web; three other websites; and two books.

*Appellant's reply brief:* The Vice President's 6,231-word reply brief cites 17 published opinions (eight by the U.S. Supreme Court, including the opinion vacating the court of appeals' panel opinion; seven by the District of Columbia Circuit, including the vacated panel opinion; one by another circuit; and one by the district court for the District of Columbia), one report, and one book.

*Opinion:* (3) The court initially resolved the appeals and petition with a published 12,198-word signed opinion with a concurrence and a dissent, *In re Cheney*, 334 F.3d 1096 (D.C. Cir. 2003) (15 headnotes), citing 50 published opinions (24 by the U.S. Supreme Court, 23 by the District of Columbia Circuit, two by other circuits, and an opinion by the district court for the District of Columbia in this case), two unpublished orders by the district court for the District of Columbia in this case, two law review articles, and one government report. According to Westlaw (05/25/2005), the court's opinion has been cited in the Supreme Court opinion vacating it, one published opinion by the District of Columbia Circuit, one unpublished opinion by another circuit, two published opinions by the district court for the District of Columbia, one published opinion by another district court, 31 secondary sources, five briefs in the U.S. Supreme Court review of this case, two other briefs in two other U.S. Supreme Court cases, six appellate briefs in five cases (four briefs in three cases in the District of Columbia Circuit and two briefs in two cases in other circuits), and three trial court briefs in two cases (1 brief in a case in the district court for the District of Columbia and two briefs in a case in another district court).

After the Supreme Court vacated the court of appeals' decision, the court reheard the case en banc and issued a published 3,363-word signed opinion, *In re Cheney*, 406 F.3d 723 (D.C. Cir. 2005) (seven headnotes), citing nine published opinions (three by the U.S. Supreme Court, including the opinion vacating the court of appeals' panel opinion; five by the District of Columbia Circuit, including the vacated panel opinion; and an opinion by the district court for the District of Columbia in this case), one government report, and one treatise. According to Westlaw (05/11/2005), the court's opinion has not been cited elsewhere.

***Craig v. United States* (D.C. Cir. 02–5373, filed 11/25/2002, judgment 03/07/2003).**

*Appeal from:* District of the District of Columbia.

*What happened:* Appeal of a judgment in favor of defendants in a civil rights case dismissed for failure to file an appellant's brief.

*Opinion:* (1) The court's unpublished 84-word clerk's order cites no opinions. The court's order is not on Westlaw.

***Jenco v. Islamic Republic of Iran* (D.C. Cir. 02–7019, filed 02/14/2002, judgment 03/28/2002).**

*Appeal from:* District of the District of Columbia.

*What happened:* Civil appeal voluntarily dismissed.

*Opinion:* (1) The court's unpublished 44-word clerk's order cites no opinions. The court's order is not on Westlaw.

***Sanders v. D.C. Department of Employment Services* (D.C. Cir. 02–7027, filed 03/29/2002, judgment 08/14/2002).**

*Appeal from:* District of the District of Columbia.

*What happened:* Unsuccessful pro se appeal; civil judgment summarily affirmed.

*Opinion:* (2) The court's unpublished 226-word per curiam order, *Sanders v. D.C. Department of Employment Services*, 2002 WL 1876970 (D.C. Cir. 2002), cites three published District of Columbia Circuit opinions. According to Westlaw (05/16/2005), the court's order has not been cited elsewhere.

***Brown v. Koester Environmental Services* (D.C. Cir. 02–7075, filed 06/28/2002, judgment 10/17/2003).**

*Appeal from:* District of the District of Columbia.

*What happened:* Unsuccessful appeal of summary judgment granted to an employer in an employment discrimination case.

*Related case:* An appeal by the coplaintiff was dismissed for lack of prosecution, *Brown v. Koester Environmental Services* (D.C. Cir. 02–7077, filed 06/28/2002, judgment 03/13/2003).

*Appellant's brief:* The employee's 11,450-word appellant brief cites 33 published court opinions (11 by the U.S. Supreme Court, 10 by the District of Columbia Circuit, three by other circuits, three by the district court for the District of Columbia, one by a district court in another circuit, and five by the District of Columbia's court of appeals).

*Appellee's brief:* The employer's 6,352-word appellee brief cites 24 published court opinions (five by the U.S. Supreme Court, four by the District of Columbia Circuit, 10 by other circuits, three by the district court for the District of Columbia, and two by district courts in other circuits).

*Appellant's reply brief:* The employee's 4,077-word reply brief cites 10 published court opinions (three by the U.S. Supreme Court, three by the

District of Columbia Circuit, and four by other circuits).

*Opinion:* (2) The court's unpublished 401-word judgment, *Brown v. Koester Environmental Services, Inc.*, 78 Fed. Appx. 719, 2003 WL22426889 (D.C. Cir. 2003) (no headnotes), cites four published opinions (three by the U.S. Supreme Court and one by the District of Columbia Circuit). According to Westlaw (05/16/2005), the court's judgment has not been cited elsewhere.

***Drivers, Chauffeurs, and Helpers Local 639 v. District of Columbia Public Schools* (D.C. Cir. 02–7082, filed 07/17/2002, judgment 09/17/2003).**

*Appeal from:* District of the District of Columbia.

*What happened:* Unsuccessful appeal of a refusal to enjoin the termination of employees, because the court found no error in the district court's determination that the school district's transformation plan was a legitimate reduction in force.

*Appellant's brief:* The union's 9,056-word appellant brief cites 23 published court opinions (seven by the U.S. Supreme Court, eight by the District of Columbia Circuit, six by other circuits, one by the district court for the District of Columbia, and one by a district court in another circuit), two unpublished opinions (1 by the district court for the District of Columbia and one by a district court in another circuit), and one decision by the District of Columbia's Public Employees Relations Board.

The brief cites four opinions—three published opinions by other circuits and one unpublished opinion by the district court for the District of Columbia—to support the statement, "Deprivation of health insurance alone has been viewed by other courts as irreparable injury." (Page 33.)

In an argument that the school district's incompetence rose to a due process violation, the brief quotes a paragraph from a Supreme Court opinion and then invites the reader to "see, e.g.," an unpublished opinion by the Eastern District of Michigan and a published opinion by the Western District of Michigan. (Page 31.)

*Appellee's brief:* The school district's 2,992-word appellee brief cites eight published opinions (1 by the U.S. Supreme Court and seven by the District of Columbia Circuit).

*Appellant's reply brief:* The union's 91-word reply brief cites six published opinions (1 by the U.S. Supreme Court and five by the District of Columbia Circuit).

*Opinion:* (2) The court's unpublished 449-word per curiam judgment, *Drivers, Chauffeurs, and Helpers Local 639 v. District of Columbia Public*



*Schools*, 2003 WL 22204128 (D.C. Cir. 2003) (1 headnote), cites three published opinions by the District of Columbia Circuit. According to Westlaw (05/16/2005), the court's judgment has not been cited elsewhere.

***Pan American Airways Corp. v. Air Line Pilots Association* (D.C. Cir. 02–7084, filed 07/18/2002, judgment 05/05/2003).**

*Appeal from:* District of the District of Columbia.

*What happened:* Unsuccessful appeal of the enforcement of an airline's System Board of Adjustment ruling in favor of an airline pilot who left an aircraft full of passengers rather than begin a flight that would give him a work shift in excess of 16 hours. The court of appeals affirmed the district court's judgment in a fully briefed appeal without opinion "for the reasons stated by the district court in the memorandum opinion in support thereof." The district court's opinion was published as *Pan American Airways Corp. v. Air Line Pilots Association, International*, 206 F. Supp. 2d 12 (D.D.C. 2002).

*Appellant's brief:* The airline's 5,641-word appellant brief cites 25 published opinions (three by the U.S. Supreme Court, six by the District of Columbia Circuit, 13 by other circuits, and three by districts in other circuits), one unpublished order by the District of Columbia Circuit, and a practice guide.

The unpublished order cited in the appellant's brief stayed enforcement of an administrative interpretation of the 16-hour rule forbidding airlines to require pilots to initiate flights that would make their shifts longer than 16 hours, even if because of weather or mechanical delays. The flight at issue in the selected case occurred 15 months before the court of appeals finally determined the agency's interpretation—an interpretation the union favored—was correct in a published opinion also cited in the appellant's brief.

*Appellee's brief:* The union's 3,990-word appellee brief cites 35 published opinions (14 by the U.S. Supreme Court, three by the District of Columbia Circuit, 15 by other circuits, the published district court opinion in this case, and two by districts in other circuits).

*Appellant's reply brief:* The airline's 832-word reply brief cites three published opinions (two by other circuits and one by a district in another circuit).

*Opinion:* (2) The court's unpublished 97-word per curiam judgment, *Pan American Airways Corp. v. Air Line Pilots Association International*, 62 Fed. Appx. 356, 2003 WL 21025273 (D.C. Cir. 2003) (no

headnotes), cites no opinions. According to Westlaw (05/16/2005), the court's judgment has been cited in two secondary sources.

***Kim v. Amtrak National Railroad Passenger Corp.* (D.C. Cir. 02–7103, filed 09/04/2002, judgment 09/26/2003).**

*Appeal from:* District of the District of Columbia.

*What happened:* Unsuccessful appeal of summary judgment granted to the employer in a case alleging age discrimination in employment.

*Appellant's brief:* The employee's 9,663-word appellant brief cites 18 published opinions (five by the U.S. Supreme Court, seven by the District of Columbia Circuit, five by other circuits, and one by the district court for the District of Columbia), the unpublished opinion by the district court appealed, and a practice guide.

*Appellee's brief:* The employer's 10,471-word appellee brief cites 20 published opinions (five by the U.S. Supreme Court, seven by the District of Columbia Circuit, one by another circuit, five by the district court for the District of Columbia, one by a district court in another circuit, and one by New York's court of appeals).

*Appellant's reply brief:* The employee's 5,467-word reply brief cites 10 published opinions (five by the U.S. Supreme Court, three by the District of Columbia Circuit, one by another circuit, and one by the district court for the District of Columbia).

*Opinion:* (2) The court's unpublished 228-word per curiam judgment, *Kim v. Amtrak National Railroad Passenger Corp.*, 76 Fed. Appx. 336, 2003 WL 22239543 (D.C. Cir. 2003) (no headnotes), cites one published District of Columbia Circuit opinion. According to Westlaw (05/16/2005), the court's judgment has not been cited elsewhere.

***Caldwell v. Proctor* (D.C. Cir. 02–7121, filed 10/09/2002, judgment 01/02/2003).**

*Appeal from:* District of the District of Columbia.

*What happened:* Prisoner appeal dismissed for lack of prosecution.

*Opinion:* (1) The court's unpublished 110-word clerk's order cites no opinions. The court's order is not on Westlaw.

***Soudavar v. Islamic Republic of Iran* (D.C. Cir. 02–7129, filed 10/24/2002, judgment 06/10/2003).**

*Appeal from:* District of the District of Columbia.

*What happened:* Unsuccessful pro se appeal of decision by the district court that it did not have jurisdiction over the plaintiff's complaint against Iran.

*Appellee's brief:* Iran's 3,528-word brief cites 15 published opinions (two by the U.S. Supreme Court, two by the District of Columbia Circuit, seven by other circuits, and four by district courts in other circuits) and the solicitor general's brief in a pending petition for a writ of certiorari in the Supreme Court.

*Opinion:* (2) The court's unpublished 632-word per curiam judgment, *Soudavar v. Islamic Republic of Iran*, 67 Fed. Appx. 618, 2003 WL 21401768 (D.C. Cir. 2003) (four headnotes), cites five published opinions (two by the U.S. Supreme Court and three by the District of Columbia Circuit). According to Westlaw (05/16/2005), the court's judgment has been cited in one published opinion by the district court for the District of Columbia, six secondary sources, and three trial court briefs in three cases (two in the district court for the District of the District of Columbia and one in a district in another circuit).

***Father Flanagan's Boys Home v. District of Columbia Government* (D.C. Cir. 02-7157, filed 12/10/2002, judgment 04/17/2003).**

*Appeal from:* District of the District of Columbia.

*What happened:* Appeal of a district court judgment in favor of the defendants in a civil rights case dismissed in part for lack of jurisdiction and summarily affirmed in part.

*Opinion:* (2) The court's unpublished 473-word per curiam order, *Father Flanagan's Boys Home v. District of Columbia Government*, 2003 WL 1907987 (D.C. Cir. 2003), cites five published opinions (1 by the U.S. Supreme Court and four by the District of Columbia Circuit). According to Westlaw (05/16/2005), the court's order has been cited in one secondary source.

### 13. Federal Circuit<sup>123</sup>

The Federal Circuit does not permit citation to unpublished opinions in unrelated cases.<sup>124</sup>

Of the 50 cases randomly selected, 12 are appeals from district courts (two from the Northern District of Illinois and one each from the Northern District of California, the Northern District of Florida, the Southern District of Florida, the Eastern District of Louisiana, the District of Massachusetts, the District of New Jersey, the Southern District of New York, the Northern District of Ohio, the Eastern District of Texas, and the Southern District of Texas), eight are appeals from the Court of Federal Claims, 16 are appeals from the Court of Appeals for Veterans Claims, one is an appeal from the Board of Patent Appeals and Interferences, one is an appeal from the Trademark Trial and Appeal Board, and 12 are appeals from the Merit Systems Protection Board.<sup>125</sup>

The publication rate in this sample is 10%. Five of the cases were resolved by signed published opinions, 21 were resolved

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123. Docket information is available through PACER. All opinions and almost all orders resolving cases are on Westlaw. The only exception in this sample is a dismissed appeal from the Court of Appeals for Veterans Claims. Briefs are not on Westlaw for appeals from the Merit Systems Protection Board, but they are on Westlaw for most other cases. (Of the 12 cases in this sample that were not appeals from the Merit Systems Protection Board and in which counseled briefs were filed, all briefs are on Westlaw for eight cases, some briefs are on Westlaw for two cases, and no briefs are on Westlaw for two cases.)

124. Fed. Cir. L.R. 47.6(b) ("An opinion or order which is designated as not to be cited as precedent is one unanimously determined by the panel issuing it as not adding significantly to the body of law. Any opinion or order so designated must not be employed or cited as precedent.")

The court's original local rules, adopted October 1, 1982, distinguished published and unpublished opinions and proscribed citation to the latter in unrelated cases.

125. In 2002, 1,793 cases were filed in the court of appeals for the Federal Circuit.

by unpublished opinions published in the *Federal Appendix* (13 signed, of which 11 are designated “orders,” and eight per curiam, of which four are designated “decisions”), and 24 were resolved by the equivalent of docket judgments (20 dismissal orders and four affirming judgments without opinion), all but one of which are published in the *Federal Appendix*.

Published opinions averaged 6,895 words in length, ranging from 2,124 to 19,084. Unpublished opinions averaged 692 words in length, ranging from 53 to 3,074. Seventeen opinions were under 1,000 words in length (65%, all unpublished), and 10 of these were under 500 words in length (38%).

Twelve of the appeals were fully briefed. In 28 of the appeals no counseled brief was filed, and in 10 of the appeals a counseled brief was filed only for one side.

There are citations to unpublished court opinions in eight of the cases. In three cases the citations are only to opinions in related cases; in five cases there are citations to unpublished opinions in unrelated cases. All of the citations to unrelated unpublished opinions are in briefs, not opinions.

Of the unrelated unpublished opinions cited by the parties in these cases, one is by the court of appeals for the Federal Circuit, three are by district courts, one is by the Court of Federal Claims, and one is by a state appellate court.

CF-1. In an unsuccessful pro se appeal by a former employee of Clark Air Force Base in the Philippines of a decision by the Merit Systems Protection Board that the Whistleblower Protection Act does not provide relief for former employees, *Guzman v. Office of Personnel Management* (Fed. Cir. 02-3173, filed 03/19/2002, judgment 12/17/2002), resolved by unpublished decision at 53 Fed. Appx. 927, 2002 WL 31863832, the government cited an unpublished Federal Circuit opinion to point out that the petitioner should not have cited it, because the court forbids citations to

its unpublished opinions, and to point out that it would support the government’s position anyway.

CF-2. In a voluntarily dismissed patent appeal concerning methods of using the telephone to control other devices, *Glenayre Electronics, Inc. v. Jackson* (Fed. Cir. 02-1537, filed 08/13/2002, judgment 05/29/2003), resolved by unpublished order at 66 Fed. Appx. 875, 2003 WL 21377730, the inventor—the defendant and appellant—cited an unpublished opinion by the district court for the Northern District of Illinois, the district from which the case was appealed. The inventor appealed the district court’s refusal to permit him to file counterclaims against the plaintiff’s customers. The brief cites the unpublished opinion to support a statement that “the district court abused its discretion by failing to accord appropriate consideration to the fact that none of [the plaintiff’s] customers has agreed to be bound by a judgment against [the plaintiff].” The defendant’s brief quotes a published opinion by the district court for the Western District of Pennsylvania, and the quotation includes a citation to an unpublished opinion by the district court for the District of Massachusetts.

CF-3. In an appeal by the FDIC that challenged its dismissal for lack of standing as a plaintiff in an action challenging the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 as breaching contracts with banks, *Federal Deposit Insurance Corp. v. United States* (Fed. Cir. 02-5104, filed 04/19/2002, judgment 07/25/2003), resolved by unpublished order dismissing the appeal as moot, *WestFed Holdings, Inc. v. United States*, 70 Fed. Appx. 589, 2003 WL 21774148 (Fed. Cir. 2003), the FDIC cited an unpublished opinion by the district court for the Eastern District of Louisiana and an unpublished opinion by the Court of Federal Claims. Its brief cites the Eastern District of Louisiana opinion and a published opinion by the court of appeals for the Fourth Circuit

to support a statement that “the FIRREA limitations period is tollable by agreement, the terms of which agreements will be enforced.” The brief cites the unpublished opinion by the Court of Federal Claims as collecting cases relevant to the brief’s statement that “Whether due diligence has been exercised is determined on a case-by-case basis.”

CF-4. In an unsuccessful appeal of a finding of infringement of patents for enteric coating of pills to protect them from stomach acid, *Astra Aktiebolag v. Cheminor Drugs, Ltd.* (Fed. Cir. 03-1135, filed 12/04/2002, judgment 12/11/2003), resolved by unpublished opinion at *In re Omeprazole Patent Litigation*, 84 Fed. Appx. 76, 2003 WL 22928641 (Fed. Cir. 2003), the plaintiffs’ appellee and cross-appellant brief cites an unpublished opinion by the district court for the District of Delaware in order to distinguish the opinion, because it was cited by defendants in consolidated cases.

CF-5. In an unsuccessful appeal of summary judgment in favor of the government in an action challenging the denial of a logging permit as an unconstitutional taking, *Seiber v. United States* (Fed. Cir. 03-5010, filed 11/01/2002, judgment 04/19/2004), resolved by published opinion at 364 F.3d 1356, the government cited an opinion by California’s court of appeals that originally was published, but, as the government’s brief acknowledges, was ordered depublished by California’s supreme court. The opinion is cited as an example of a court specifically recognizing “that the doctrine of public ownership of wildlife represents a ‘background principle’ of property law which bars a taking claim based on regulations designed to protect wildlife from harm.”

### Individual Case Analyses

***Linear Technology Corp. v. Impala Linear Corp.* (Fed. Cir. 02-1118, filed 01/10/2002, judgment 02/15/2002).**

*Appeal from:* Northern District of California.

*What happened:* Permission to appeal district court orders certified by the district court for interlocutory appeal denied in an action concerning a patent for controlling circuits in synchronously switched voltage regulators.

*Related cases:* *Linear Technology Corp. v. Impala Linear Corp.* (Fed. Cir. 02-1068, filed 12/03/2001, judgment 02/15/2002) (lead appeal), *Linear Technology Corp. v. Impala Linear Corp.* (Fed. Cir. 02-1069, filed 12/03/2001, judgment 02/15/2002) (appeal), *Linear Technology Corp. v. Impala Linear Corp.* (Fed. Cir. 02-1119, filed 01/10/2002, judgment 02/15/2002) (cross-appeal).

*Opinion:* (2) The court’s unpublished 1,155-word signed order, *Linear Technology Corp. v. Impala Linear Corp.*, 31 Fed. Appx. 700, 2002 WL 398833 (Fed. Cir. 2002) (three headnotes), cites three published opinions (1 by the U.S. Supreme Court and two by the Federal Circuit). According to Westlaw (04/28/2005), the court’s order has been cited in two published Federal Circuit opinions in related appeals, three secondary sources, and one appellate brief in a Federal Circuit case.

***Watts v. XL Systems, Inc.* (Fed. Cir. 02-1139, filed 01/16/2002, judgment 03/06/2003).**

*Appeal from:* Eastern District of Texas.

*What happened:* Unsuccessful appeal of a jury verdict of infringement of a patent for a pipe connection. The plaintiff’s consolidated cross-appeal was also unsuccessful.

*Related case:* *Watts v. XL Systems, Inc.* (Fed. Cir. 02-1140, filed 01/16/2002, judgment 03/06/2003) (unsuccessful cross-appeal).

*Appellant’s brief:* The defendant’s 14,916-word appellant brief cites 37 published opinions (five by the U.S. Supreme Court, 25 by the Federal Circuit, five by other circuits, and two by district courts).

*Appellee’s brief:* The plaintiff’s 14,355-word cross-appellant and appellee brief cites 41 published opinions (two by the U.S. Supreme Court, 25 by the Federal Circuit, six by other circuits, four by district courts, one by Texas’s supreme court, and three by Texas’s courts of appeals), one related case, and the *Restatement (First) of Torts*.

*Appellant’s reply brief:* The defendant’s 6,961-word reply brief cites 40 published opinions (three by the U.S. Supreme Court, 20 by the Federal Circuit, 12 by other circuits, two by district courts, one by New Hampshire’s supreme court, and two by Texas’s courts of civil appeals).

*Appellee’s reply brief:* The plaintiff’s 5,022-word reply brief cites 12 published opinions (two by the U.S. Supreme Court, two by the Federal Circuit,

five by another circuit, one by Texas's supreme court, and two by Texas's courts of appeals).

*Opinion:* (1) The court's 20-word per curiam judgment without opinion, *Watts v. XL Systems, Inc.*, 56 Fed. Appx. 922, 2003 WL 932439 (Fed. Cir. 2003), cites no opinions. According to Westlaw (04/28/2005), the court's judgment has not been cited elsewhere.

***Bailey v. Dart Container Corp. of Michigan* (Fed. Cir. 02–1165, filed 01/29/2002, judgment 10/28/2002).**

*Appeal from:* District of Massachusetts.

*What happened:* Patent appeal concerning molded plastic coffee cup lids dismissed as settled.

*Related case:* The court dismissed the defendants' "conditional" cross-appeal, holding that their role as appellees afforded them sufficient opportunity to make their arguments, *Bailey v. Dart Container Corp. of Michigan*, 292 F.3d 1360 (Fed. Cir. 2002), resolving *Bailey v. Dart Container Corp. of Michigan* (Fed. Cir. 02–1166, filed 01/29/2002, judgment 06/07/2002).

*Appellant's brief:* The plaintiff's 13,096-word appellant brief cites 20 published opinions (16 by the Federal Circuit, three by the District of Massachusetts in this litigation, and one by the Court of Federal Claims) and one unpublished opinion by the Federal Circuit in a related appeal.

*Appellee's brief:* The defendants' 14,006-word appellee brief cites 32 published opinions (two by the U.S. Supreme Court, 28 by the Federal Circuit, and two by the District of Massachusetts in this litigation) and one unpublished opinion by the Federal Circuit in a related appeal.

*Appellant's reply brief:* The plaintiff's 7,068-word reply brief cites 29 published opinions (two by the U.S. Supreme Court, 26 by the Federal Circuit, and one by another circuit).

*Opinion:* (1) The court's 19-word order, *Bailey v. Dart Container Corp. of Michigan*, 50 Fed. Appx. 982, 2002 WL 31553783 (Fed. Cir. 2002), cites no opinions. According to Westlaw (04/14/2005), the court's order has not been cited elsewhere.

***Ohio Cellular Products Corp. v. Adams USA, Inc.* (Fed. Cir. 02–1168, filed 01/30/2002, judgment 06/10/2002).**

*Appeal from:* Northern District of Ohio.

*What happened:* Fourth party defendant's cross-appeal voluntarily dismissed in patent litigation concerning the manufacture of "cross-linked foamed polyolefin padding used primarily in athletic equipment such as football helmets."

*Related cases:* Previous appeals include *Ohio Cellular Products Corp. v. Adams USA, Inc.* (Fed. Cir. 98–1448, filed 07/09/1998, judgment 06/12/2000), resolved initially by published opinion at 175 F.3d 1343 (1999) (allowing successful defendants in a patent infringement action to amend the judgment to subject the unsuccessful plaintiff's sole shareholder to personal liability for attorney fees), reversed by *Nelson v. Adams USA, Inc.*, 529 U.S. 460 (2000), so ultimately resolved by a remand to the district court; *Nelson v. Adams USA, Inc.* (Fed. Cir. 00–1066, filed 11/04/1999, judgment 01/24/2002) (dismissed as moot).

Consolidated appeals include *Ohio Cellular Products Corp. v. Adams USA, Inc.* (Fed. Cir. 02–1079, filed 12/12/2001, judgment 11/07/2002), resolved by judgment without opinion at 50 Fed. Appx. 422, 2002 WL 31497320 (unsuccessful appeal of attorney fees awarded to successful defendants); and *Ohio Cellular Products Corp. v. Adams USA, Inc.* (Fed. Cir. 02–1228, filed 02/27/2002, judgment 04/12/2002), resolved by unpublished order at 34 Fed. Appx. 714, 2002 WL 826017 (cross-appeal dismissed for failure to pay the docketing fee).

*Opinion:* (1) The court's 110-word order, *Ohio Cellular Products Corp. v. Adams USA, Inc.*, 38 Fed. Appx. 595, 2002 WL 1333873 (Fed. Cir. 2002), cites no opinions. According to Westlaw (04/28/2005), the court's order has not been cited elsewhere.

***Idolor v. Espiritu* (Fed. Cir. 02–1226, filed 02/26/2002, judgment 03/29/2002).**

*Appeal from:* Eastern District of Louisiana.

*What happened:* Pro se appeal of the dismissal of a complaint for child support transferred to the court for the correct circuit.

*Opinion:* (2) The court's unpublished 238-word signed order, *Idolor v. Espiritu*, 33 Fed. Appx. 512, 2002 WL 553746 (Fed. Cir. 2002) (no headnotes), cites no opinions. According to Westlaw (04/28/2005), the court's order has not been cited elsewhere.

***Benedict v. General Motors Corp.* (Fed. Cir. 02–1353, filed 04/25/2002, judgment 07/19/2002).**

*Appeal from:* Northern District of Florida.

*What happened:* Appeal from a published decision, *Benedict v. General Motors Corp.*, 184 F. Supp. 2d 1197 (N.D. Fla. 2002), dismissed by the parties.

*Opinion:* (1) The court's 18-word order, *Benedict v. General Motors Corp.*, 42 Fed. Appx. 466, 2002 WL 1733706 (Fed. Cir. 2002), cites no opinions. According to Westlaw (04/28/2005), this order has been cited in one unpublished district court opinion (acknowledging the dismissal of the ap-

peal of the district court case with a published opinion).

***Phonometrics, Inc. v. Trimark Hotel, Inc.* (Fed. Cir. 02–1424, filed 06/13/2002, judgment 09/11/2003).**

*Appeal from:* Southern District of Florida.

*What happened:* Unsuccessful appeal of summary judgment granted to defendants in consolidated patent actions against hotel chains concerning a method of providing guests with real-time information about the cost of their telephone calls.

*Related cases:* Nine consolidated appeals briefed together and resolved by the same judgment include *Phonometrics, Inc. v. Hyatt Corp.* (Fed. Cir. 02–1418, filed 06/13/2002, judgment 09/11/2003), *Phonometrics, Inc. v. Hyatt Corp.* (Fed. Cir. 02–1419, filed 06/13/2002, judgment 09/11/2003), *Phonometrics, Inc. v. Holiday Inns, Inc.* (Fed. Cir. 02–1420, filed 06/13/2002, judgment 09/11/2003), *Phonometrics, Inc. v. Best Western International, Inc.* (Fed. Cir. 02–1421, filed 06/13/2002, judgment 09/11/2003), *Phonometrics, Inc. v. Inter-Continental Hotels Corp.* (Fed. Cir. 02–1422, filed 06/13/2002, judgment 09/11/2003), *Phonometrics, Inc. v. Best Western International, Inc.* (Fed. Cir. 02–1423, filed 06/13/2002, judgment 09/11/2003), *Phonometrics, Inc. v. Meditrust Corp.* (Fed. Cir. 02–1425, filed 06/13/2002, judgment 09/11/2003), *Phonometrics, Inc. v. Clubhouse Inns of America* (Fed. Cir. 02–1426, filed 06/13/2002, judgment 09/11/2003), and *Phonometrics, Inc. v. Forte Hotels, Inc.* (Fed. Cir. 02–1511, filed 07/31/2002, judgment 09/11/2003).

Prior appeals include *Phonometrics, Inc. v. Hospitality Franchise Systems, Inc.* (Fed. Cir. 99–1086, filed 11/25/1998, judgment 09/09/2000), resolved by opinion published at 203 F.3d 790 (successful appeal by the plaintiff on a holding that the complaint was adequate even though it did not reflect the court of appeals’ construction of claims); *Phonometrics, Inc. v. Aston Hotels and Resorts* (Fed. Cir. 00–1023, filed 10/14/1999, judgment 04/25/2001), resolved by unpublished order at *Phonometrics, Inc. v. ITT Sheraton Corp.*, 232 F.3d 914 (table), 2000 WL 576492 (vacating attorney fee award upon reversal of defendants’ summary judgment); *Phonometrics, Inc. v. EZ-8 Motel, Inc.* (Fed. Cir. 00–1460, filed 07/17/2000, judgment 10/03/2001) and *Phonometrics, Inc. v. Nikko Hotels (U.S.A.), Inc.* (Fed. Cir. 00–1515, filed 08/17/2000, judgment 10/03/2001), resolved by judgment without opinion at *Phonometrics, Inc. v. Hospitality Franchise Systems, Inc.*, 20 Fed. Appx. 850, 2001 WL 1182363 (affirming district court); *Phonometrics, Inc. v. Hotel Corp. of the Pacific* (Fed. Cir. 01–1018,

filed 10/18/2000, judgment 10/03/2001), resolved by judgment without opinion at *Phonometrics, Inc. v. Hospitality Franchise Systems, Inc.*, 20 Fed. Appx. 859, 2001 WL 1190428 (affirming district court); *Phonometrics, Inc. v. Choice Hotels International, Inc.* (Fed. Cir. 01–1045, filed 10/24/2000, judgment 10/09/2001), resolved by unpublished opinion at 21 Fed. Appx. 910, 2001 WL 1217219 (unsuccessful appeal of defendants’ summary judgment); *In re Phonometrics, Inc.* (Fed. Cir. 01–M639, filed 11/21/2000, judgment 01/03/2001), *In re Phonometrics, Inc.* (Fed. Cir. 01–M640, filed 11/21/2000, judgment 01/03/2001), *In re Phonometrics, Inc.* (Fed. Cir. 01–M641, filed 11/21/2000, judgment 01/03/2001), *In re Phonometrics, Inc.* (Fed. Cir. 01–M642, filed 11/21/2000, judgment 01/03/2001), *In re Phonometrics, Inc.* (Fed. Cir. 01–M645, filed 11/21/2000, judgment 01/03/2001), *In re Phonometrics, Inc.* (Fed. Cir. 01–M646, filed 11/21/2000, judgment 01/03/2001), *In re Phonometrics, Inc.* (Fed. Cir. 01–M648, filed 11/21/2000, judgment 01/03/2001), *In re Phonometrics, Inc.* (Fed. Cir. 01–M649, filed 11/21/2000, judgment 01/03/2001), *In re Phonometrics, Inc.* (Fed. Cir. 01–M652, filed 11/21/2000, judgment 01/03/2001), *In re Phonometrics, Inc.* (Fed. Cir. 01–M653, filed 11/21/2000, judgment 01/03/2001), *In re Phonometrics, Inc.* (Fed. Cir. 01–M654, filed 11/21/2000, judgment 01/03/2001), *In re Phonometrics, Inc.* (Fed. Cir. 01–M655, filed 11/21/2000, judgment 01/03/2001), resolved by unpublished order at 2 Fed. Appx. 908, 2001 WL 69160 (denying mandamus petition for disqualification of district court judge); *Phonometrics, Inc. v. ITT Sheraton Corp.* (Fed. Cir. 02–1208, filed 02/21/2002, judgment 11/13/2002), resolved by judgment without opinion at 50 Fed. Appx. 992, 2002 WL 31553834 (affirming district court judgment); *Phonometrics, Inc. v. Westin Hotel Co.* (Fed. Cir. 02–1314, filed 04/03/2002, judgment 02/12/2003), resolved by opinion published at 319 F.3d 1328 (affirming defendant’s summary judgment); and *Sutton v. Interstate Hotels, LLC* (Fed. Cir. 02–1502, filed 07/19/2002, judgment 11/21/2003), *Sutton v. RHI, Inc.* (Fed. Cir. 02–1503, filed 07/19/2002, judgment 11/21/2003), *Sutton v. La Quinta Inns, Inc.* (Fed. Cir. 02–1504, filed 07/19/2002, judgment 11/21/2003), *Sutton v. Economy Inns of America* (Fed. Cir. 02–1505, filed 07/19/2002, judgment 11/21/2003), resolved by *Phonometrics, Inc. v. Economy Inns of America*, 349 F.3d 1356 (affirming Rule 11 sanctions against the plaintiff’s attorney). The plaintiff’s 6,838-word appellant brief cites nine published opinions (two by the U.S. Supreme Court; six by the Federal Cir-

cuit, including two in related appeals; and one by another circuit), five previous related Federal Circuit cases, and one treatise.

*Appellee's brief:* The defendants' 7,827-word appellee brief cites 18 published opinions (three by the U.S. Supreme Court; 12 by the Federal Circuit, including four in related appeals; two by other circuits; and one related opinion by the Southern District of Florida), five unpublished opinions by the Federal Circuit in related appeals, and four pending related appeals concerning Rule 11 sanctions against the plaintiff's attorney.

*Appellant's reply brief:* The plaintiff's 3,196-word reply brief cites 10 published opinions (four by the U.S. Supreme Court; five by the Federal Circuit, including three in related appeals; and one by another circuit), one unpublished Federal Circuit opinion in a related appeal, four related Federal Circuit appeals, and one dictionary.

*Opinion:* (1) The court's 20-word per curiam judgment without opinion, *Phonometrics v. Marriott International, Inc.*, 75 Fed. Appx. 764, 2003 WL 22129271 (Fed. Cir. 2003), cites no opinions. According to Westlaw (04/28/2005), the court's judgment has not been cited elsewhere.

***Zhou v. Keagy (Fed. Cir. 02-1528, filed 08/08/2002, judgment 03/11/2003).***

*Appeal from:* Board of Patent Appeals and Interferences.

*What happened:* Unsuccessful patent appeal concerning a fingerprint-recognition system.

*Appellant's brief:* The appellants' 14,765-word brief cites 51 published opinions (four by the U.S. Supreme Court and 47 by the Federal Circuit and its predecessors<sup>126</sup>), one treatise, and the *American Heritage Dictionary*.

*Appellee's brief:* The appellees' 9,944-word brief cites 18 published opinions (two by the U.S. Supreme Court and 16 by the Federal Circuit and its predecessors) and one treatise.

*Appellant's reply brief:* The appellants' 6,601-word reply brief cites 31 published Federal Circuit opinions.

*Opinion:* (1) The court's 20-word per curiam judgment without opinion, *Zhou v. Keagy*, 57 Fed. Appx. 874, 2003 WL 1194267 (Fed. Cir. 2003), cites no opinions. According to Westlaw (04/29/2005), this judgment has not been cited elsewhere.

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126. Predecessors to the Court of Appeals for the Federal Circuit are the Court of Customs and Patent Appeals, the Court of Customs Appeals, and the appellate jurisdiction of the Court of Claims.

***Glenayre Electronics, Inc. v. Jackson (Fed. Cir. 02-1537, filed 08/13/2002, judgment 05/29/2003).***

*Appeal from:* Northern District of Illinois.

*What happened:* Patent appeal voluntarily dismissed. In a declaratory action by a manufacturer against an inventor of methods of using the telephone to control other devices, the district court denied the inventor's motion to file counterclaims against the plaintiff's customers.

*Appellant's brief:* The inventor's 4,276-word appellant brief cites five published opinions (four by the Federal Circuit and one by another circuit), one unpublished opinion by the Northern District of Illinois, three related district court cases (two in the Northern District of Illinois and one in another district), and one treatise.

The brief cites an unpublished opinion by the Northern District of Illinois to support a statement that "the district court abused its discretion by failing to accord appropriate consideration to the fact that none of Glenayre's customers has agreed to be bound by a judgment against Glenayre." (Page 15.)

*Appellee's brief:* The manufacturer's 5,538-word appellee brief cites 18 published opinions (two by the U.S. Supreme Court; five by the Federal Circuit; five by other circuits; three by the Northern District of Illinois, including two in related cases; and three by other districts), three unpublished opinions (1 by the Federal Circuit in a related case, one by the Northern District of Illinois in a related case, and one by another district), three related district court cases (two in the Northern District of Illinois and one in another district), and one treatise.

The brief quotes a published opinion by the Western District of Pennsylvania, which states, in part: "Courts have recognized that the manufacturer or supplier of an accused device, such as the duck phones here, is the true defendant in a customer suit." (Page 13.) In the quotation are citations to a published opinion by the First Circuit and an unpublished opinion by the District of Massachusetts.

*Opinion:* (1) The court's 29-word order, *Glenayre Electronics, Inc. v. Jackson*, 66 Fed. Appx. 875, 2003 WL 21377730 (Fed. Cir. 2003), cites no opinions. According to Westlaw (04/29/2005), the court's order has not been cited elsewhere.

***In re Pacer Technology (Fed. Cir. 02-1602, filed 09/19/2002, judgment 08/04/2003).***

*Appeal from:* Trademark Trial and Appeal Board.

*What happened:* Unsuccessful appeal of the denial of a trademark for the cap of a glue bottle.

*Appellant's brief:* The trademark applicant's 4,392-word appellant brief cites seven published court opinions (three by the U.S. Supreme Court and four by the Federal Circuit) and two decisions by the Trademark Trial and Appeal Board.

*Appellee's brief:* The Patent and Trademark Office's 4,309-word appellee brief cites 20 published court opinions (four by the U.S. Supreme Court, 14 by the Federal Circuit, and two by other circuits).

*Appellant's reply brief:* The trademark applicant's 2,319-word reply brief cites two published Federal Circuit opinions.

*Opinion:* (3) The court's published 2,588-word signed opinion, *In re Pacer Technology*, 338 F.3d 1348 (Fed. Cir. 2003) (four headnotes), cites 15 published court opinions (three by the U.S. Supreme Court and 12 by the Federal Circuit) and the decision by the Trademark Trial and Appeal Board appealed. According to Westlaw (04/29/2005), the court's opinion has been cited in two Federal Circuit opinions (1 published and one unpublished), 13 decisions by the Trademark Trial and Appeal Board, 12 secondary sources, and one appellate brief in a Federal Circuit case.

***De Vries v. Shell Exploration and Production Co.* (Fed. Cir. 03–1107, filed 11/22/2002, judgment 08/11/2003).**

*Appeal from:* Southern District of Texas.

*What happened:* Summary judgment against patent plaintiffs—an individual and a corporation—affirmed in a case concerning helical spoilers on subsea pipelines. The selected case is the individual's appeal, which was consolidated with the corporation's appeal, *Submarine Pipeline Spoilers (U.S.A.), Inc. v. Shell Exploration and Production Co.* (Fed. Cir. 03–1093, filed 11/21/2002, judgment 08/11/2003).

*Appellant's brief:* The plaintiffs' 5,867-word appellant brief cites 29 published opinions (five by the U.S. Supreme Court, 20 by the Federal Circuit, three by other circuits, and one by a district court) and one dictionary.

*Appellee's brief:* The defendant's 12,334-word appellee brief cites 31 published opinions (1 by the U.S. Supreme Court, 28 by the Federal Circuit, and two by another circuit) and four dictionaries.

*Appellant's reply brief:* The plaintiffs' 6,706-word reply brief cites 24 published opinions (five by the U.S. Supreme Court and 19 by the Federal Circuit).

*Opinion:* (1) The court's 20-word unpublished per curiam judgment without opinion, *Submarine Pipeline Spoilers (U.S.A.), Inc. v. Shell Exploration and Production Co.*, 71 Fed. Appx. 851, 2003 WL

21949843 (Fed. Cir. 2003), cites no opinions. According to Westlaw (04/29/2005), the court's judgment has not been cited elsewhere.

***Eazypower Corp. v. ICC Innovative Concepts Corp.* (Fed. Cir. 03–1129, filed 11/29/2002, judgment 01/31/2003).**

*Appeal from:* Northern District of Illinois.

*What happened:* Appeal of the denial of summary judgment dismissed for lack of jurisdiction. The appellant was sanctioned \$1,873.75 on 05/01/2003 for filing the appeal.

*Opinion:* (2) The court's unpublished 238-word signed order, *Eazypower Corp. v. ICC Innovative Concepts Corp.*, 56 Fed. Appx. 493, 2003 WL 343357 (Fed. Cir. 2003) (no headnotes), cites no opinions. According to Westlaw (10/21/2004), the court's order has not been cited elsewhere.

***Astra Aktiebolag v. Cheminor Drugs, Ltd.* (Fed. Cir. 03–1135, filed 12/04/2002, judgment 12/11/2003).**

*Appeal from:* Southern District of New York.

*What happened:* Unsuccessful appeal of a finding of infringement of patents for enteric coating of pills to protect them from stomach acid. The plaintiffs cross-appealed against other defendants in consolidated cases.

*Related cases:* The lead case in this consolidated appeal was *Astra Aktiebolag v. Andrx Pharmaceuticals, Inc.* (Fed. Cir. 03–1101, filed 11/20/2002, judgment 12/11/2003). Three consolidated appeals involved the same defendants as the selected case, *Astra Aktiebolag v. Andrx Pharmaceuticals, Inc.* (Fed. Cir. 03–1133, filed 12/04/2002, judgment 12/11/2003), *Astra Aktiebolag v. Cheminor Drugs, Ltd.* (Fed. Cir. 03–1134, filed 12/04/2002, judgment 12/11/2003), and *Astra Aktiebolag v. Andrx Pharmaceuticals, Inc.* (Fed. Cir. 03–1136, filed 12/04/2002, judgment 12/11/2003). Ten consolidated appeals involved other defendants, *Astra Aktiebolag v. Andrx Pharmaceuticals, Inc.* (Fed. Cir. 03–1102, filed 11/20/2002, judgment 12/11/2003), *Astra Aktiebolag v. Andrx Pharmaceuticals, Inc.* (Fed. Cir. 03–1103, filed 11/20/2002, judgment 12/11/2003), *Astra Aktiebolag v. Kremers Urban Development Co.* (Fed. Cir. 03–1104, filed 11/20/2002, judgment 12/11/2003), *Astra Aktiebolag v. Kremers Urban Development Co.* (Fed. Cir. 03–1105, filed 11/20/2002, judgment 12/11/2003), *Astra Aktiebolag v. Kremers Urban Development Co.* (Fed. Cir. 03–1106, filed 11/20/2002, judgment 12/11/2003), *Astra Aktiebolag v. Genpharm Inc.* (Fed. Cir. 03–1131, filed 12/04/2002, judgment 12/11/2003), *Astra Aktiebolag v. Genpharm Inc.* (Fed. Cir. 03–1132, filed



12/04/2002, judgment 12/11/2003), *Astra Aktiebolag v. Genpharm Inc.* (Fed. Cir. 03-1171, filed 12/18/2002, judgment 12/11/2003), *Astra Aktiebolag v. Genpharm Inc.* (Fed. Cir. 03-1172, filed 12/18/2002, judgment 12/11/2003), and *Astra Aktiebolag v. Andrx Pharmaceuticals, Inc.* (Fed. Cir. 03-1173, filed 12/18/2002, judgment 12/11/2003).

*Appellant's brief:* The defendants' 14,708-word appellant brief cites 41 published opinions (two by the U.S. Supreme Court, 28 by the Federal Circuit, nine by other circuits, the appealed decision by the Southern District of New York, and one by another district), eight related cases in the Southern District of New York, one treatise, and one dictionary.

*Appellee's brief:* The plaintiffs' 19,882-word appellee and cross-appellant brief cites 70 published opinions (five by the U.S. Supreme Court, 58 by the Federal Circuit, four by other circuits, two by district courts, and one by the court of claims), one unpublished opinion by a district court, one treatise, two dictionaries, and one other book.

In responding to appeals by other defendants in consolidated cases, the brief states that two are inapposite. One of these is a published Federal Circuit opinion and the other is an unpublished opinion by the District of Delaware. According to the brief, in the latter case, "the court did not, as Defendants urge, use foreign prosecution statements to vary or contradict the plain meaning of the claims." (Page 39.)

*Appellant's reply brief:* The defendants' 6,750-word reply brief cites 24 published opinions (1 by the U.S. Supreme Court, 21 by the Federal Circuit, one by a district court, and one by the court of claims) and two treatises.

*Opinion:* (2) The court's unpublished 3,074-word signed opinion, *In re Omeprazole Patent Litigation*, 84 Fed. Appx. 76, 2003 WL 22928641 (Fed. Cir. 2003) (eight headnotes), cites 10 published opinions (1 by the U.S. Supreme Court, eight by the Federal Circuit, and the appealed opinion by the Southern District of New York) and one dictionary. According to Westlaw (04/29/2005), the court's opinion has been cited in one unpublished opinion by the Southern District of New York, one secondary source, and one trial court brief in another district.

***Walker v. Department of the Army* (Fed. Cir. 02-3123, filed 02/07/2002, judgment 06/07/2002).**

*Appeal from:* Merit Systems Protection Board.

*What happened:* Unsuccessful pro se appeal of a decision by the Merit Systems Protection Board's affirmance of the Army's dismissal of a civilian employee.

*Respondent's brief:* The Army's 3,250-word informal respondent brief cites seven published opinions (six by the Federal Circuit and one by the Court of Claims).

*Opinion:* (2) The court's unpublished 746-word per curiam opinion, *Walker v. Department of the Army*, 35 Fed. Appx. 453, 2002 WL 1272018 (Fed. Cir. 2002) (1 headnote), cites one published Federal Circuit opinion and the unpublished decision by the Merit Systems Protection Board appealed. According to Westlaw (04/23/2005), the court's opinion has been cited in one secondary source.

***Guzman v. Office of Personnel Management* (Fed. Cir. 02-3173, filed 03/19/2002, judgment 12/17/2002).**

*Appeal from:* Merit Systems Protection Board.

*What happened:* Unsuccessful pro se appeal of a decision by the Merit Systems Protection Board, *Guzman v. Office of Personnel Management*, 91 M.S.P.R. 129 (2001) (table). A former employee of Clark Air Force Base in the Philippines challenged the Office of Personnel Management's denial of benefits under the Civil Service Retirement System under the Whistleblower Protection Act, but that Act does not provide relief for former employees.

*Respondent's brief:* The government's 1,455-word informal respondent brief cites five published opinions (two by the U.S. Supreme Court and three by the Federal Circuit) and two unpublished Federal Circuit opinions.

One unpublished Federal Circuit opinion cited by the government concerns an earlier phase of the petitioner's case. The government cited the other unpublished Federal Circuit opinion in a footnote to point out that the petitioner should not have cited it, because the court forbids citations to its unpublished opinions, and to point out that it would support the government's position anyway.

*Opinion:* (2) The court's unpublished 1,362-word per curiam decision, *Guzman v. Office of Personnel Management*, 53 Fed. Appx. 927, 2002 WL 31863832 (Fed. Cir. 2002) (1 headnote), cites one published Federal Circuit opinion and one unpublished Federal Circuit opinion. The unpublished opinion cited concerns an earlier phase of the petitioner's case. According to Westlaw (04/29/2005), the opinion in the selected case has been cited in two secondary sources.

***Bronson v. Merit Systems Protection Board* (Fed. Cir. 02-3181, filed 04/02/2002, judgment 04/08/2004).**

*Appeal from:* Merit Systems Protection Board.

*What happened:* Unsuccessful pro se appeal of a dismissal for lack of jurisdiction, *Bronson v. Office of Personnel Management*, 91 M.S.P.R. 127 (2002) (table). The petitioner challenged the Office of Personnel Management's refund of \$19,644.72 in retirement deductions to his spouse, but OPM had not yet issued a final decision. The court initially dismissed the appeal for failure to prosecute, *Bronson v. Office of Personnel Management*, 47 Fed. Appx. 932, 2002 WL 31156061 (Fed. Cir. 2002), but reconsidered, *Bronson v. Office of Personnel Management*, 74 Fed. Appx. 57, 2003 WL 22071565 (Fed. Cir. 2003).

*Respondent's brief:* The government's 1,585-word informal respondent brief cites seven published Federal Circuit opinions and two published opinions by the Merit Systems Protection Board.

*Opinion:* (2) The court's unpublished 611-word per curiam decision, *Bronson v. Merit Systems Protection Board*, 95 Fed. Appx. 342, 2004 WL 842755 (Fed. Cir. 2004) (no headnotes), cites three published Federal Circuit opinions and two opinions by the Merit Systems Protection Board (1 published and one unpublished). The unpublished opinion cited is from an earlier phase of this case. According to Westlaw (04/29/2005), the court's opinion has not been cited elsewhere.

***Ratcliff v. Merit Systems Protection Board* (Fed. Cir. 02-3185, filed 04/05/2002, judgment 02/05/2003).**

*Appeal from:* Merit Systems Protection Board.

*What happened:* Unsuccessful pro se appeal of the Merit Systems Protection Board's dismissing as untimely a petition to review the cancellation of a promotion.

*Respondent's brief:* The board's 5,500-word respondent brief cites 15 published court opinions (1 by the U.S. Supreme Court and 14 by the Federal Circuit) and four published decisions by the Merit Systems Protection Board.

*Opinion:* (2) The court's unpublished 519-word per curiam opinion, *Ratcliff v. Merit Systems Protection Board*, 55 Fed. Appx. 942, 2003 WL 262355 (Fed. Cir. 2003) (no headnotes), cites four published Federal Circuit opinions. According to Westlaw (04/29/2005), the court's opinion has been cited in one secondary source.

***Cruise v. Department of Homeland Security* (Fed. Cir. 02-3188, filed 04/10/2002, judgment 07/14/2003).**

*Appeal from:* Merit Systems Protection Board.

*What happened:* Unsuccessful pro se appeal of a decision by the Merit Systems Protection Board

that a Secret Service investigator was not wrongfully terminated.

*Respondent's brief:* The government's 5,978-word informal respondent brief cites 27 published court opinions (two by the U.S. Supreme Court, 23 by the Federal Circuit, and two by the court of claims) and two published decisions by the Merit Systems Protection Board.

*Opinion:* (2) Initially the appeal was dismissed by unpublished order, *Cruise v. Department of the Treasury*, 46 Fed. Appx. 963, 2002 WL 31133838 (Fed. Cir. 2002), citing no opinions, for lack of prosecution. One month later, the court reopened the case by unpublished order, *Cruise v. Department of the Treasury*, 50 Fed. Appx. 432, 2002 WL 31439797 (Fed. Cir. 2002), citing no opinions. The court ultimately resolved the appeal by an unpublished 519-word per curiam opinion, *Cruise v. Department of Homeland Security*, 70 Fed. Appx. 555, 2003 WL 21675120 (Fed. Cir. 2003) (two headnotes), citing five published Federal Circuit opinions and the unpublished decision by the Merit Systems Protection Board appealed. According to Westlaw (04/24/2005), the court's opinion has been cited in one appellate brief in one case in California's court of appeal.

***Kraushaar v. Department of Agriculture* (Fed. Cir. 02-3192, filed 04/10/2002, judgment 03/10/2003).**

*Appeal from:* Merit Systems Protection Board.

*What happened:* Unsuccessful pro se appeal of a decision by the Merit Systems Protection Board that a Lake Tahoe forestry technician was not wrongfully relieved of law enforcement responsibilities when he disclosed that he had been advised by a counselor not to carry a firearm in the presence of his supervisor, with whom there was considerable tension.

*Respondent's brief:* The government's 6,140-word respondent brief cites 15 published court opinions (1 by the U.S. Supreme Court, 12 by the Federal Circuit, and two by the court of claims) and 17 published decisions by the Merit Systems Protection Board.

*Opinion:* (2) The court's unpublished 1,978-word per curiam decision, *Kraushaar v. Department of Agriculture*, 60 Fed. Appx. 295, 2003 WL 1194290 (Fed. Cir. 2003) (three headnotes), cites seven published court opinions (1 by the U.S. Supreme Court and six by the Federal Circuit) and the unpublished decision by the Merit Systems Protection Board appealed. According to Westlaw (04/24/2005), the court's decision has been cited in one secondary source.

***Comulada v. Department of the Army* (Fed. Cir. 02–3288, filed 06/12/2002, judgment 10/02/2002).**

*Appeal from:* Merit Systems Protection Board.

*What happened:* Summary affirmance in a pro se appeal of the Merit Systems Protection Board's refusal to review the Army's five-day suspension of the petitioner because the Board has jurisdiction to review only suspensions of more than two weeks.

*Opinion:* (2) The court's unpublished 238-word signed order, *Comulada v. Department of the Army*, 49 Fed. Appx. 890, 2002 WL 31370057 (Fed. Cir. 2002) (no headnotes), cites one published Federal Circuit opinion. According to Westlaw (04/29/2005), the court's order has not been cited elsewhere.

***Campion v. Merit Systems Protection Board* (Fed. Cir. 02–3332, filed 07/16/2002, judgment 04/17/2003).**

*Appeal from:* Merit Systems Protection Board.

*What happened:* Unsuccessful pro se appeal of a decision by the Merit Systems Protection Board that it did not have jurisdiction over the case because the petitioner was not veteran-eligible.

*Respondent's brief:* The board's 3,009-word informal respondent brief cites seven published opinions (1 by the U.S. Supreme Court and six by the Federal Circuit) and the decision by the Merit Systems Protection Board appealed.

*Opinion:* (3) The court's published 2,124-word signed opinion, *Campion v. Merit Systems Protection Board*, 326 F.3d 1210 (Fed. Cir. 2003) (six headnotes), cites eight published court opinions (three by the U.S. Supreme Court and five by the Federal Circuit) and three unpublished orders by the Merit Systems Protection Board in this case. According to Westlaw (05/02/2005), the court's opinion has been cited in four Federal Circuit opinions (1 published and three unpublished), two published decisions by the Merit Systems Protection Board, six secondary sources, and two appellate briefs in two Federal Circuit cases.

***Powers v. Department of the Treasury* (Fed. Cir. 02–3377, filed 09/03/2002, judgment 05/13/2003).**

*Appeal from:* Merit Systems Protection Board.

*What happened:* Unsuccessful pro se appeal by employee dismissed by the Internal Revenue Service for repeatedly accessing taxpayer records without authorization.

*Respondent's brief:* The Department of the Treasury's 2,471-word informal respondent brief cites 21 published court opinions (16 by the Federal Circuit, one by another circuit, and four by

the Court of Claims) and one published decision by the Merit Systems Protection Board.

*Opinion:* (2) The court's unpublished 584-word per curiam decision, *Powers v. Department of the Treasury*, 63 Fed. Appx. 480, 2003 WL 21085364 (Fed. Cir. 2003) (two headnotes), cites three published Federal Circuit opinions and the unpublished decision by the Merit Systems Protection Board that was appealed. According to Westlaw (05/02/2005), the court's decision has been cited in two secondary sources.

***Deaton v. Office of Personnel Management* (Fed. Cir. 03–3046, filed 11/21/2002, judgment 04/11/2003).**

*Appeal from:* Merit Systems Protection Board.

*What happened:* Unsuccessful pro se appeal of the denial of disability retirement under the Federal Employees' Retirement System.

*Respondent's brief:* The Office of Personnel Management's 1,550-word informal respondent brief cites three published court opinions (1 by the U.S. Supreme Court and two by the Federal Circuit) and the unpublished decision of the Merit Systems Protection Board appealed.

*Opinion:* (2) The court's unpublished 844-word per curiam opinion, *Deaton v. Office of Personnel Management*, 67 Fed. Appx. 597, 2003 WL 1875577 (Fed. Cir. 2003) (two headnotes), cites four published court opinions (1 by the U.S. Supreme Court and three by the Federal Circuit) and the unpublished decision of the Merit Systems Protection Board appealed. According to Westlaw (05/02/2005), the court's opinion has been cited in one secondary source.

***Conaway v. United States Postal Service* (Fed. Cir. 03–3069, filed 12/05/2002, judgment 01/08/2003).**

*Appeal from:* Merit Systems Protection Board.

*What happened:* Appeal dismissed for failure to prosecute.

*Opinion:* (1) The court's 47-word order, *Conaway v. United States Postal Service*, 55 Fed. Appx. 565, 2003 WL 152381 (Fed. Cir. 2003), cites no opinions. According to Westlaw (05/02/2005), the court's order has been cited in two decisions of the Merit Systems Protection Board.

***Easterday v. Office of Personnel Management* (Fed. Cir. 03–3100, filed 12/30/2002, judgment 04/23/2003).**

*Appeal from:* Merit Systems Protection Board.

*What happened:* Pro se appeal of a decision by the Merit Systems Protection Board, *Easterday v. Office of Personnel Management*, 93 M.S.P.R. 301

(2002) (table), dismissed for failure to pay the docketing fee or file a brief.

*Opinion:* (1) The court's 62-word order, *Easterday v. Office of Personnel Management*, 64 Fed. Appx. 215, 2003 WL 21129924 (Fed. Cir. 2003), cites no opinions. According to Westlaw (05/02/2005), the court's order has not been cited elsewhere.

***Cienega Gardens v. United States (Fed. Cir. 02–5050, filed 01/18/2002, judgment 06/12/2003).***

*Appeal from:* Court of Federal Claims.

*What happened:* Successful appeal of summary judgment granted to the government. The court of appeals found a regulatory taking in a statute that voided real estate developers' rights to prepay federally insured mortgages for low-income housing in order to extinguish low-income restrictions.

*Related cases:* In *Cienega Gardens v. United States*, 265 F.3d 1237 (Fed. Cir. 2001), the court resolved *Cienega Gardens v. United States* (Fed. Cir. 00–5104, filed 07/10/2000, judgment 09/18/2001), reversing the Court of Federal Claims' award of summary judgment to the government on the ground that the takings claims were not ripe. In *Cienega Gardens v. United States*, 194 F.3d 1231 (Fed. Cir. 1998), the court reversed a trial court judgment of \$3,061,107 in favor of the developers on a contract theory, resolving *United States v. Cienega Gardens* (Fed. Cir. 97–5126) (appeal) and *Sherman Park v. United States* (Fed. Cir. 97–5134) (cross-appeal).

*Appellant's brief:* The developers' 16,699-word appellant brief cites 46 published opinions (26 by the U.S. Supreme Court; 11 by the Federal Circuit, of which two are earlier opinions in this case; seven by the Court of Federal Claims and the federal claims court, of which four are earlier opinions in this case; one by a district court; and one by New Jersey's supreme court).

*Appellee's brief:* The government's 15,902-word appellee brief cites 54 published opinions (20 by the U.S. Supreme Court; 18 by the Federal Circuit, of which two are earlier opinions in this case; two by other circuits; 12 by the Court of Federal Claims and the federal Claims Court; one by a district court; and one by New Jersey's supreme court) and one treatise.

*Appellants' reply brief:* The developers' 7,249-word reply brief cites 31 published opinions (16 by the U.S. Supreme Court; seven by the Federal Circuit, of which one is an earlier opinion in this case; seven by the Court of Federal Claims and the federal Claims Court, of which one is an earlier opinion in this case; and one by California's court of appeal) and two treatises.

*Opinion:* (3) The court's published 19,084-word signed opinion, *Cienega Gardens v. United States*, 331 F.3d 1319 (Fed. Cir. 2003) (27 headnotes), cites 46 published opinions (22 by the U.S. Supreme Court; 15 by the Federal Circuit, of which two are earlier opinions in this case; one by another circuit; and eight by the Court of Federal Claims and Court of Claims, of which one is an earlier opinion in this case), the unpublished opinion of the lower court, the *Restatement (Third) of Property*, and one treatise. According to Westlaw (05/03/2005), the court's opinion has been cited in 27 published opinions (five in the Federal Circuit, two in other circuits, and 20 in the Federal Court of Claims), four unpublished opinions (1 in another district and three in the Federal Court of Claims), 15 secondary sources, two U.S. Supreme Court briefs in two cases, nine appellate briefs in nine cases (seven in the Federal Circuit, one in another circuit, and one in Michigan's supreme court), one trial court brief in the Northern District of Illinois, and one petition for a writ of certiorari to the Supreme Court.

***Nicon, Inc. v. United States (Fed. Cir. 02–5056, filed 01/29/2002, judgment 03/22/2002).***

*Appeal from:* Court of Federal Claims.

*What happened:* Civil appeal of partial summary judgment dismissed as premature.

*Opinion:* (2) The court's unpublished 132-word signed order, *Nicon, Inc. v. United States*, 33 Fed. Appx. 506, 2002 WL 553775 (Fed. Cir. 2002) (no headnotes), cites no opinions. According to Westlaw (05/02/2005), the court's order has been cited in one secondary source.

***Simmons v. New York (Fed. Cir. 02–5100, filed 04/16/2002, judgment 11/01/2002).***

*Appeal from:* Court of Federal Claims.

*What happened:* Dismissal summarily affirmed in a pro se appeal. The plaintiffs alleged improper conduct by a New York penitentiary nurse, but their case was dismissed for failure to state any claims against the United States.

*Related cases:* Dismissed by the same opinion were coplaintiffs' individual pro se appeals, *Abney v. United States* (Fed. Cir. 02–5101, filed 04/16/2002, judgment 11/01/2002) (summarily affirmed), *Jackson v. United States* (Fed. Cir. 02–5102, filed 04/16/2002, judgment 11/01/2002) (summarily affirmed), and *Delisser v. United States* (Fed. Cir. 02–5103, filed 04/16/2002, judgment 11/01/2002) (summarily affirmed).

*Opinion:* (2) The court's unpublished 236-word signed order, *Simmons v. New York*, 50 Fed. Appx. 988, 2002 WL 31553790 (Fed. Cir. 2002) (no head-

notes), cites one published Federal Circuit opinion. According to Westlaw (05/02/2005), the court's opinion has been cited in one secondary source.

***Federal Deposit Insurance Corp. v. United States* (Fed. Cir. 02-5104, filed 04/19/2002, judgment 07/25/2003).**

*Appeal from:* Court of Federal Claims.

*What happened:* Appeal by the FDIC of its dismissal as a plaintiff for lack of standing dismissed as moot. WestFed Holdings, Western Federal Savings and Loan Association, the Resolution Trust Corporation, and the FDIC sued the United States, claiming that the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA) breached a contract.

*Related cases:* *Federal Deposit Insurance Corp. v. United States* (Fed. Cir. 02-5078, filed 03/05/2002, judgment 06/02/2003) (unsuccessful appeal) and *Federal Deposit Insurance Corp. v. United States* (Fed. Cir. 02-5079, filed 03/05/2002, judgment 06/02/2003) (unsuccessful appeal). In addition, the appellant claimed that it was a party in approximately 25 cases pending in the Court of Federal Claims related to the Supreme Court's decision in *United States v. Winstar Corp.*, 518 U.S. 839 (1996). The appellee claimed that there were approximately 100 pending cases related to *Winstar* in all.

*Appellant's brief:* The FDIC's 14,420-word appellant brief cites 82 published opinions (15 by the U.S. Supreme Court; 20 by the Federal Circuit; 14 by other circuits; 23 by the Court of Federal Claims, including one in the case appealed; eight by district courts; one by Delaware's supreme court; and one by Delaware's court of chancery), two unpublished opinions (1 by the Court of Federal Claims and one by a district court), the two related Federal Circuit appeals, four treatises, and the *Restatement (Second) of Contracts*.

The brief cites an unpublished opinion by the Eastern District of Louisiana and a published opinion by the Fourth Circuit to support the statement that "the FIRREA limitations period is tollable by agreement, the terms of which agreements will be enforced." (Page 61.)

The brief cites an unpublished opinion by the Court of Federal Claims as collecting cases relevant to the brief's statement, "Whether due diligence has been exercised is determined on a case-by-case basis." (Page 59.)

*Appellee's brief:* The 10,903-word appellee brief by the United States cites 82 published opinions (17 by the U.S. Supreme Court; 21 by the Federal Circuit; 18 by other circuits; 20 by the Court of

Federal Claims, including one in the case appealed; five by district courts; and one by Washington's court of appeals), two unpublished opinions (1 by another circuit and one by a district court), the two related Federal Circuit appeals, and one treatise.

The brief cites an unpublished opinion by the District of Massachusetts and a published opinion by the Sixth Circuit to support the statement, "Common examples are a breach of contract claim or a takings claim. And while parties often advance several theories of recovery in connection with their claims, those theories of recovery are not themselves claims." (Page 25.) The District of Massachusetts opinion is described parenthetically as "dismissing counts of a complaint because they 'do not, apparently, set out separate causes of action; rather, they describe various theories of damages.'"

*Appellant's reply brief:* The FDIC's 7,134-word reply brief cites 39 published opinions (10 by the U.S. Supreme Court, nine by the Federal Circuit, nine by other circuits, seven by the Court of Federal Claims, four by district courts, and one by Delaware's supreme court), one unpublished opinion by a district court, and three treatises.

The appellant cited the same unpublished opinion by the Eastern District of Louisiana and the same published opinion by the Fourth Circuit as it cited in its appellant brief to support the statement, "The FIRREA statute is tollable by agreement." (Page 30.)

*Opinion:* (1) The court's unpublished 16-word order, *WestFed Holdings, Inc. v. United States*, 70 Fed. Appx. 589, 2003 WL 21774148 (Fed. Cir. 2003), cites no opinions. According to Westlaw (04/24/2005), the court's order has not been cited elsewhere.

***Paalan v. United States* (Fed. Cir. 02-5108, filed 05/10/2002, judgment 08/02/2002).**

*Appeal from:* Court of Federal Claims.

*What happened:* Dismissed pro se appeal from a published decision, *Paalan v. United States*, 51 Fed. Cl. 738 (2002). The plaintiff sought military back pay and other compensation, including takings remedies. The trial court's decision was not appealable, however, because it only dismissed some of the plaintiff's claims.

*Opinion:* (2) The court's unpublished 373-word signed order, *Paalan v. United States*, 44 Fed. Appx. 494, 2002 WL 1906755 (Fed. Cir. 2002) (no headnotes), cites one published Federal Circuit opinion. According to Westlaw (05/02/2005), the court's opinion has not been cited elsewhere.

**Gibson v. United States (Fed. Cir. 02–5178, filed 09/25/2002, judgment 02/04/2003).**

*Appeal from:* Court of Federal Claims.

*What happened:* Unsuccessful pro se appeal of the dismissal of plaintiff's complaint for lack of jurisdiction. The plaintiff had sought reward money for providing the government with information about terrorism.

*Appellee's brief:* The government's 1,725-word informal appellee brief cites 11 published court opinions (three by the U.S. Supreme Court, six by the Federal Circuit, and two by the Court of Federal Claims) and the case in the Court of Federal Claims appealed.

*Opinion:* (2) The court's unpublished 473-word signed opinion, *Gibson v. United States*, 55 Fed. Appx. 938, 2003 WL 250060 (Fed. Cir. 2003) (no headnotes), cites four published opinions (1 by the U.S. Supreme Court and three by the Federal Circuit). According to Westlaw (05/02/2005), the court's opinion has been cited in one secondary source.

**Seiber v. United States (Fed. Cir. 03–5010, filed 11/01/2002, judgment 04/19/2004).**

*Appeal from:* Court of Federal Claims.

*What happened:* Unsuccessful appeal of summary judgment in favor of the government in an action challenging the denial of a logging permit as an unconstitutional taking.

*Appellant's brief:* The plaintiffs' 6,156-word appellant brief cites 30 published opinions (17 by the U.S. Supreme Court; six by the Federal Circuit; one by another circuit; two by the Court of Federal Claims, including the opinion appealed; three by Oregon's supreme court; and one by Oregon's court of appeals), one unpublished memorandum order by a district court in a related case, a complaint filed by the plaintiffs in another district court, four law review articles, and two reference books.

*Appellee's brief:* The government's 11,262-word appellee brief cites 46 published opinions (16 by the U.S. Supreme Court; 14 by the Federal Circuit; two by other circuits; two by the Court of Federal Claims, including the opinion appealed; 11 by Oregon's supreme court; and one by Oregon's court of appeals), one unpublished opinion by Oregon's court of appeals in a related case, and one related pending case in Oregon's circuit court.

*Amicus brief:* Several conservation societies filed a 6,966-word amicus curiae brief, citing 55 published opinions (18 by the U.S. Supreme Court, nine by the Federal Circuit, six by other circuits, six by the Court of Federal Claims, three by Oregon's supreme court, two by Oregon's

court of appeals, one by Alaska's supreme court, one by New Jersey's supreme court, one by New York's supreme court, one by New York's appellate division, one by Pennsylvania's supreme court, one by Rhode Island's supreme court, two by Washington's supreme court, two by Wisconsin's supreme court, and one by Florida's district court of appeal), one depublished opinion by California's court of appeal, four legal articles, one treatise, and the *Restatement (Second) of Torts*.

The brief cites an opinion that was published by California's court of appeal, but, as the brief acknowledges, was ordered depublished by California's supreme court, as an example of a court specifically recognizing "that the doctrine of public ownership of wildlife represents a 'background principle' of property law which bars a taking claim based on regulations designed to protect wildlife from harm." (Page 12.)

*Appellant's reply brief:* The plaintiffs' 5,718-word reply brief cites 32 published opinions (17 by the U.S. Supreme Court, two by the Federal Circuit, two by other circuits, seven by Oregon's supreme court, two by Oregon's court of appeals, one by Arkansas's supreme court, and one by Wisconsin's supreme court), a related case in Oregon's circuit court, three legal articles, and one legal history text.

*Opinion:* (3) The court's published 7,813-word signed opinion, *Seiber v. United States*, 364 F.3d 1356 (Fed. Cir. 2004)<sup>127</sup> (20 headnotes), cites 41 published opinions (16 by the U.S. Supreme Court, 20 by the Federal Circuit, one by another circuit, the opinion by the Court of Federal Claims appealed, one by Oregon's supreme court, and two by Oregon's court of appeals), and two unpublished opinions related to this appeal (1 by Oregon's court of appeals and one by Oregon's circuit court). According to Westlaw (04/25/2005), the court's opinion has been cited in three published opinions by the Federal Circuit, three published opinions by the Court of Federal Claims, six secondary sources, four briefs in three U.S. Supreme Court cases (including the appellants' petition for a writ of certiorari in this case), and two appellate briefs in two cases (1 in the Federal Circuit and one in another circuit).

**Schickler v. United States (Fed. Cir. 03–5035, filed 12/13/2002, judgment 07/22/2003).**

*Appeal from:* Court of Federal Claims.

*What happened:* Plaintiff's pro se appeal dismissed for failure to file a brief.

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127. *Cert. denied*, 125 S. Ct. 113 (2004).

*Opinion:* (1) The court's 45-word order, *Schickler v. United States*, 70 Fed. Appx. 584, 2003 WL 21774141 (Fed. Cir. 2003), cites no opinions. According to Westlaw (05/03/2005), the court's order has been cited in one secondary source.

***Johnson v. Principi* (Fed. Cir. 02–7048, filed 01/11/2002, judgment 10/25/2004).**

*Appeal from:* Court of Appeals for Veterans Claims.

*What happened:* Veterans appeal dismissed because of recently decided cases.

*Opinion:* (1) The court's 17-word order, *Johnson v. Principi*, 115 Fed. Appx. 59, 2004 WL 2792026 (Fed. Cir. 2004), cites no opinions. According to Westlaw (05/03/2005), the court's order has not been cited elsewhere.

***Winters v. Principi* (Fed. Cir. 02–7064, filed 01/11/2002, judgment 10/22/2004).**

*Appeal from:* Court of Appeals for Veterans Claims.

*What happened:* Veterans appeal dismissed because of recently decided cases.

*Opinion:* (1) The court's 17-word order, *Winters v. Principi*, 115 Fed. Appx. 437, 2004 WL 2924311 (Fed. Cir. 2004), cites no opinions. According to Westlaw (05/03/2005), the court's order has not been cited elsewhere.

***Butler v. Principi* (Fed. Cir. 02–7074, filed 01/11/2002, judgment 07/21/2004).**

*Appeal from:* Court of Appeals for Veterans Claims.

*What happened:* Veterans appeal voluntarily dismissed.

*Opinion:* (1) The court's 31-word order, *Butler v. Principi*, 106 Fed. Appx. 54, 2004 WL 1765411 (Fed. Cir. 2004), cites no opinions. According to Westlaw (05/03/2005), the court's order has not been cited elsewhere.

***Thurman v. Principi* (Fed. Cir. 02–7083, filed 01/11/2002, judgment 06/14/2004).**

*Appeal from:* Court of Appeals for Veterans Claims.

*What happened:* Veterans appeal voluntarily dismissed.

*Opinion:* (1) The court's 31-word order, *Thurman v. Principi*, 103 Fed. Appx. 374, 2004 WL 1531857 (Fed. Cir. 2004), cites no opinions. According to Westlaw (05/03/2005), the court's order has not been cited elsewhere.

***Walker v. Principi* (Fed. Cir. 02–7105, filed 01/14/2002, judgment 07/27/2004).**

*Appeal from:* Court of Appeals for Veterans Claims.

*What happened:* Veterans appeal voluntarily dismissed.

*Opinion:* (1) The court's 31-word order, *Walker v. Principi*, 107 Fed. Appx. 203, 2004 WL 1859646 (Fed. Cir. 2004), cites no opinions. According to Westlaw (05/03/2005), the court's order has not been cited elsewhere.

***Davis v. Principi* (Fed. Cir. 02–7163, filed 02/13/2002, judgment 07/21/2004).**

*Appeal from:* Court of Appeals for Veterans Claims.

*What happened:* Veterans appeal voluntarily dismissed.

*Opinion:* (1) The court's 31-word order, *Davis v. Principi*, 106 Fed. Appx. 59, 2004 WL 1765491 (Fed. Cir. 2004), cites no opinions. According to Westlaw (05/03/2005), the court's order has not been cited elsewhere.

***Kirkhof v. Principi* (Fed. Cir. 02–7164, filed 02/13/2002, judgment 06/14/2004).**

*Appeal from:* Court of Appeals for Veterans Claims.

*What happened:* Veterans appeal voluntarily dismissed.

*Opinion:* (1) The court's 31-word order, *Kirkhof v. Principi*, 102 Fed. Appx. 705, 2004 WL 1531887 (Fed. Cir. 2004), cites no opinions. According to Westlaw (05/03/2005), the court's order has not been cited elsewhere.

***Lyng v. Principi* (Fed. Cir. 02–7189, filed 02/22/2002, judgment 06/09/2004).**

*Appeal from:* Court of Appeals for Veterans Claims.

*What happened:* Veterans appeal voluntarily dismissed.

*Opinion:* (1) The court's 31-word order, *Lyng v. Principi*, 101 Fed. Appx. 830, 2004 WL 1385914 (Fed. Cir. 2004), cites no opinions. According to Westlaw (05/03/2005), the court's order has not been cited elsewhere.

***Creech v. Principi* (Fed. Cir. 02–7192, filed 02/22/2002, judgment 12/30/2003).**

*Appeal from:* Court of Appeals for Veterans Claims.

*What happened:* Veterans appeal voluntarily dismissed.

*Opinion:* (1) The court's 30-word order, *Creech v. Principi*, 85 Fed. Appx. 750, 2003 WL 23170127 (Fed. Cir. 2003), cites no opinions. According to

Westlaw (05/03/2005), the court's order has not been cited elsewhere.

***Cervenka v. Principi* (Fed. Cir. 02–7245, filed 03/22/2002, judgment 06/10/2004).**

*Appeal from:* Court of Appeals for Veterans Claims.

*What happened:* Veterans appeal voluntarily dismissed.

*Opinion:* (1) The court's 31-word order, *Cervenka v. Principi*, 101 Fed. Appx. 834, 2004 WL 1386155 (Fed. Cir. 2004), cites no opinions. According to Westlaw (05/03/2005), the court's order has not been cited elsewhere.

***Mellinger v. Principi* (Fed. Cir. 02–7265, filed 03/25/2002, judgment 10/02/2002).**

*Appeal from:* Court of Appeals for Veterans Claims.

*What happened:* Dismissed pro se appeal of a decision by the Court of Appeals for Veterans Claims, *Mellinger v. Principi*, 18 Vet. App. 17 (2002). The claimant sought retroactive benefits for her husband back to 1958 for heart disease that had erroneously been determined noncompensable, but the Court of Veterans Affairs determined that it could award only two years of retroactive benefits. The court of appeals determined that it did not have jurisdiction to review that decision.

*Opinion:* (2) The court's unpublished 491-word signed order, *Mellinger v. Principi*, 49 Fed. Appx. 898, 2002 WL 31369694 (Fed. Cir. 2002) (1 headnote), cites no opinions. According to Westlaw (05/03/2005), the court's opinion has been cited in one secondary source.

***Reed v. Principi* (Fed. Cir. 02–7290, filed 03/27/2002, judgment 07/26/2004).**

*Appeal from:* Court of Appeals for Veterans Claims.

*What happened:* Veterans appeal voluntarily dismissed.

*Opinion:* (1) The court's 31-word order, *Reed v. Principi*, 106 Fed. Appx. 720, 2004 WL 1853445 (Fed. Cir. 2004), cites no opinions. According to Westlaw (05/03/2005), the court's order has not been cited elsewhere.

***Cosme v. Principi* (Fed. Cir. 02–7306, filed 04/04/2002, judgment 10/15/2004).**

*Appeal from:* Court of Appeals for Veterans Claims.

*What happened:* Veterans appeal dismissed.

*Opinion:* (1) The court's order is not on Westlaw.

***Snyder v. Principi* (Fed. Cir. 02–7335, filed 05/13/2002, judgment 02/11/2003).**

*Appeal from:* Court of Appeals for Veterans Claims.

*What happened:* Veterans appeal remanded in light of a recent decision by the court.

*Related cases:* By the same order, the court also remanded eight other veterans appeals, *Booth v. Principi* (Fed. Cir. 02–7321, filed 05/06/2002, judgment 02/11/2003), *Booth v. Principi* (Fed. Cir. 02–7329, filed 05/10/2002, judgment 02/11/2003), *Chisholm v. Principi* (Fed. Cir. 02–7330, filed 05/10/2002, judgment 02/11/2003), *Mason v. Principi* (Fed. Cir. 02–7331, filed 05/10/2002, judgment 02/11/2003), *Snyder v. Principi* (Fed. Cir. 02–7332, filed 05/10/2002, judgment 02/11/2003), *Snyder v. Principi* (Fed. Cir. 02–7333, filed 05/10/2002, judgment 02/11/2003), *Clark v. Principi* (Fed. Cir. 02–7334, filed 05/13/2002, judgment 02/11/2003), and *Potter v. Principi* (Fed. Cir. 02–7336, filed 05/13/2002, judgment 02/11/2003).

*Opinion:* (2) The court's unpublished 53-word signed order, *Snyder v. Principi*, 56 Fed. Appx. 499, 2003 WL 681577 (Fed. Cir. 2003) (no headnotes), cites one published Federal Circuit opinion. According to Westlaw (05/03/2005), the order has been cited in three unpublished opinions by the Court of Appeals for Veterans Claims.

***Simmonds v. Principi* (Fed. Cir. 02–7400, filed 08/07/2002, judgment 06/15/2004).**

*Appeal from:* Court of Appeals for Veterans Claims.

*What happened:* Veterans appeal voluntarily dismissed.

*Opinion:* (1) The court's 31-word order, *Simmonds v. Principi*, 102 Fed. Appx. 716, 2004 WL 1531920 (Fed. Cir. 2004), cites no opinions. According to Westlaw (05/03/2005), the court's order has not been cited elsewhere.

***Smith v. Principi* (Fed. Cir. 02–7409, filed 09/13/2002, judgment 09/15/2003).**

*Appeal from:* Court of Appeals for Veterans Claims.

*What happened:* Unsuccessful appeal by veteran of the denial of her application for an award of attorney fees.

*Appellant's brief:* The veteran's 2,354-word appellant brief cites 21 published opinions (four by the U.S. Supreme Court; seven by the Federal Circuit; two by other circuits; and eight by the Court of Appeals for Veterans Claims, including two in this case) and one treatise.



*Appellee's brief:* The government's 3,787-word appellee brief cites 30 published opinions (six by the U.S. Supreme Court, 19 by the Federal Circuit, two by other circuits, and three by the Court of Appeals for Veterans Claims).

*Appellant's reply brief:* The veteran's 956-word reply brief cites five published opinions (two by the U.S. Supreme Court, two by the Federal Circuit, and one by the Court of Appeals for Veterans Claims).

*Opinion:* (3) The court's published 2,867-word signed opinion, *Smith v. Principi*, 343 F.3d 1358 (Fed. Cir. 2003) (two headnotes), cites 24 published opinions (seven by the Federal Circuit and 17 by the Court of Appeals for Veterans Claims). According to Westlaw (04/25/2005), the court's opinion has been cited in one published Federal Circuit opinion, four opinions by the Court of Appeals for Veterans Claims (1 published and three unpublished), and five secondary sources.

***Research Corp. Technologies, Inc. v. Pharmachemie B.V. (Fed. Cir. 02-M712, filed 08/01/2002, judgment 10/02/2002).***

*Appeal from:* District of New Jersey.

*What happened:* Denial of a patent defendant's petition for an interlocutory appeal, certified by the district court, of the district court's determination that an earlier patent could not be used as a reference against a later patent. The court of appeals determined that the legal issues were too tightly connected to the unique facts of the case.

*Opinion:* (2) The court's unpublished 552-word signed order, *Research Corp. Technologies, Inc. v. Pharmachemie, B.V.*, 49 Fed. Appx. 298, 2002 WL 31370455 (Fed. Cir. 2002) (no headnotes), cites one published Federal Circuit opinion. According to Westlaw (05/03/2005), the court's order has not been cited elsewhere.

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