Before the Bench

Unique aspects of Texas Supreme Court practice.

BY SCOTT A. KELLER

Just as there are exclusive procedures and customs at the U.S. Supreme Court, there are unique nuances to Texas Supreme Court practice as well.[1] In light of my experience in both courts (11 U.S. Supreme Court arguments and nine Texas Supreme Court arguments), this article will examine five unique aspects of practicing before the Texas Supreme Court compared to the U.S. Supreme Court.

Pace of Questioning at Oral Argument

One of the most striking differences between oral arguments at the Texas and U.S. Supreme Courts is the pace of questioning from the justices, even though both are nine-member courts. The pace of questioning that I have experienced in the U.S. Supreme Court (a question/answer exchange about every 30 seconds) was essentially twice as frequent as the questioning I received at the Texas Supreme Court (an exchange of about every 60 seconds).[2]

Multiple commentators and advocates have recognized the rapid pace of questioning in the U.S. Supreme Court.[3] One recent study showed that for the 10 advocates who made the most total statements at oral argument throughout an entire term, these advocates made on average about two new statements per minute (that is, they fielded about two questions per minute).[4] The statistics from my arguments at the U.S. Supreme Court confirm this trend.[5]

In contrast, the pace of questioning in my recent arguments at the Texas Supreme Court was about half that of the U.S. Supreme Court.[6] Of course, this statistic from my own experience in the Texas Supreme Court analyzes only a limited set of cases; in other types of disputes, the Texas Supreme Court might give advocates even more time to develop their arguments. But at minimum, this is some empirical evidence that the Texas Supreme Court allows advocates more time to carry on sustained explanation and develop their points in more detail than the U.S. Supreme Court.[7]

Motions for Rehearing

Motions for rehearing—to reconsider actions the courts have already taken—are treated quite differently by the Texas and the U.S. Supreme Courts. As the U.S. solicitor general recently explained in *United States v. Texas*, "[o]rdinarily, it is exceedingly rare for [the U.S. Supreme] Court to grant rehearing."[8]

The Texas Supreme Court, in contrast, grants motions for rehearing a few times each term. The overwhelming majority of rehearing motions are denied: During the court's last term (September 2017 to August 2018), the court granted seven rehearing motions and denied 244—a grant rate of about 2.8%.[9] Over the past four years, the Texas Supreme Court has an annual average of granting about seven motions for rehearing of petitions for review plus one motion for rehearing on causes (that is, after an opinion has issued).[10]

Over the past four years, the Texas Supreme Court granted 27 motions for rehearing at the petition-for-review stage[11]—about seven per year.[12] After reinstating the petition for review, the court then disposed of these 27 cases as follows:

- Ten petitions resulted in overturning the court of appeals;[13]
- Eight petitions resulted in affirming the court of appeals;[14]
- Six petitions resulted in re-denials of the petition for review;[15] and
- Three of these cases remain pending.[16]

What may be most notable about these statistics is that about two or three times per year in this timeframe, the Texas Supreme Court granted a motion for rehearing of an already denied petition for review and subsequently overturned the decision of a court of appeals.

A few patterns emerge when examining the substance of the arguments raised in these granted motions for rehearing. The majority of these motions asserted negative statewide or widespread consequences if the court of appeals decision was left in place[17]—especially in the oil and gas context that the court frequently addresses.[18] Nearly half of the granted motions invoked recent or intervening new authority from the Texas Supreme Court, the 5th Circuit Court of Appeals, state courts of appeals, or statutes.[19] And many asserted either governmental interests or issues implicating the proper scope of governmental power.[20]

Amicus support during the petition-for-review rehearing phase is not necessary for the court to potentially grant this rehearing.[21] And just because the court already has full merits briefing when it initially denies a petition for review that does not foreclose the granting of a rehearing motion.[22]

Motions for Shared Oral Argument Time With Amici Curiae

Both the Texas and U.S. Supreme Courts allow a party to consent to share argument time with an amicus curiae.[23] This practice, though, has been much more prevalent at the U.S. Supreme Court.[24]

The Texas Supreme Court has generously granted motions to share argument time with amici curiae, although these motions recently have only been filed about five times each year. In the past four years, 19 motions for sharing oral argument time with amicus curiae have been filed, and all 19 have been granted.[25] Once the supporting party's consent has been given,[26] the court appears to accept that party's strategic decision and allows supporting amici to present oral argument—even if the opposing party objects.[27] Moreover, the court has granted these argument motions for private parties as amici and not just the state.[28]

The Texas Supreme Court's sustained practice of granting the small number of these motions that actually get filed suggests that sharing oral argument time with amici curiae may be an underused facet of appellate advocacy.

Calling for the Views of the Solicitor General, or CVSG

Both the Texas and U.S. Supreme Courts have a procedure for asking a particular solicitor general to submit an amicus brief—that is, "call for the views of the solicitor general."

The Texas Supreme Court has used its CVSG procedure[29] far less than the U.S. Supreme Court.[30] Before 2016, the Texas Supreme Court had gone a few years without a CVSG request. But the court has returned to this practice, issuing a CVSG in each of the last three terms.[31]

Given the limited number of cases in which the Texas Supreme Court has issued a CVSG, it is hard to extrapolate how the practice will affect any given case. But at the U.S. Supreme Court, a CVSG exponentially increases the chances that the court grants the certiorari petition and hears the case.[32]

Petition-for-Review Versus Merits-Briefing Phase

Finally, a significant difference between the Texas and U.S. Supreme Courts is in their procedures to persuade the court to review a case in the first place. In deciding whether to review a case, the Texas Supreme Court, as a practical matter, considers two rounds of briefing—both the petition- and merits-stage briefs.[33] That is because the Texas Supreme Court generally orders merits briefing *before* it decides whether to grant a petition for review and hear oral argument.[34]

In contrast, the U.S. Supreme Court only considers the petition-stage briefs in deciding whether to review a case.[35] This occurs because the court only orders merits briefs if it grants the certiorari petition, which also generally sets the case for oral argument.[36]

According to the Texas Supreme Court's internal operating procedures, only about 1 in 3 cases where merits briefing has been ordered will result in a granted petition for review or per curiam opinion.[37] So advocates must gear their arguments in a Texas Supreme Court merits brief to both the underlying merits as well as continuing to persuade the court to grant the petition for review and resolve the case—which creates its own set of strategic issues that do not arise in U.S. Supreme Court merits briefs.[38]

Conclusion

Appellate advocacy before the Texas Supreme Court—like practice before the U.S. Supreme Court—has its own unique aspects. This article has briefly outlined five aspects that stood out to me when comparing Texas and U.S. Supreme Court practice. I hope these observations will help advocates serve their clients well in litigating at the Texas Supreme Court. **TBJ**

Notes

1. Both courts have nine justices, and both courts largely have discretionary dockets allowing them to unilaterally choose which cases to hear. Each of these features makes practicing before these high courts noticeably different than practicing before most appellate courts.
2. There are several possibilities that could account for this difference. One could be that the Texas Supreme Court's distinct practices could cause its members to have more developed thinking about a case at earlier phases than the U.S. Supreme Court. For instance, the Texas Supreme Court generally gets full merits briefing before deciding to hear a case, and the court makes opinion-writing assignments before the oral argument. *See* Blake A. Hawthorne, Supreme Court of Texas Internal Operating Procedures 13, 19, http://www.txcourts.gov/media/1438423/supreme-court-of-texas-internal-operating-procedures.pdf. This diverges from the U.S. Supreme Court's practices. *See* Stephen M. Shapiro, et al., *Supreme Court Practice* 15 (10th ed. 2013).
3. Adam Feldman, *The Hottest Bench in Town*, Empirical SCOTUS (Sept. 25, 2018), https://empiricalscotus.com/2018/09/25/hottest-bench/ (As former U.S. Solicitor General Paul Clement put it, "I think the Supreme Court right now is about the hottest bench that the Supreme Court has ever been.").
4. Jack Metzler, *Top Ten Supreme Court Oral Advocates* 6-7, https://ssrn.com/abstract=2643794.
5. I have made about 1.75 new statements per minute or roughly a question-statement exchange every 34 seconds: In just under 300 minutes of total oral argument time at the U.S. Supreme Court, I made over 500 new statements. This data was compiled by examining the official argument transcripts from the U.S. Supreme Court's website, and it showed 519 total statements during 297 total minutes of oral argument time. Here is the individual argument breakdown by total statements and minutes of argument time at the lectern: *Texas Dep't of Housing and Community Affairs v. Inclusive Communities Project* (52 statements, 30 minutes); *Walker v. Texas Division, Sons of Confederate Veterans, Inc.* (65, 30); *Evenwel v. Abbott* (20, 17); *Whole Woman's Health v. Hellerstedt* (81, 42); *United States v. Texas* (55, 30); *Buck v. Davis* (39, 27); *Moore v. Texas* (43, 30); *Davila v. Davis* (57, 28); *Ayestas v. Davis* (49, 30); *Texas v. New Mexico* (14, 8); and *Abbott v. Perez* (44, 25).
6. In my five oral arguments at the Texas Supreme Court between September 2017 and August 2018, during 54 total minutes of argument time I made 49 new statements—amounting to a question/statement exchange every 66 seconds. This data was compiled by examining the argument transcripts posted on the Texas Supreme Court's website. Here is the individual argument breakdown by total statements and minutes of argument time at the lectern: *Graphic Packaging v. Glenn Hegar and Ken Paxton* (12 statements, 20 minutes); *Nazari v. State* (17, 20); *Harris County v. Annab* (6, 4); *City of Laredo* (6, 5); and *Hill* (8, 5). This result is roughly consistent, although a bit faster-paced, than the same measure for the other oral arguments I have presented at the Texas Supreme Court: *Tex. Mut. Ins. Co. v. Chicas* (20, 20); *Morath v. Tex. Taxpayer & Student Fairness Coal.* (7, 10); *King Street Patriots v. Democratic Party* (4, 5); and *In re Nestle* (0, 4).
7. By no means does this ascribe any normative judgment that one court or the other is asking the "right" amount of questions. It simply reflects the reality that advocates before the Texas Supreme Court should expect a pace of questioning that is steady but noticeably less than the U.S. Supreme Court.
8. Pet. for Reh'g, *United States v. Texas*, No. 15-674, at 2, http://www.scotusblog.com/wp-content/uploads/2016/08/15-674-Petition-for-Rehearing.pdf (collecting a few examples from decades ago where the U.S. Supreme Court granted rehearing); *see Supreme Court Practice* 836 (10th ed. 2013) ("[T]he plain fact is that the Supreme Court seldom grants a rehearing of any kind of order, judgment, or decision.").
9. These statistics were compiled from the "Orders & Opinions" section of the Texas Supreme Court's website: http://www.txcourts.gov/supreme/orders-opinions/. During this time, the court granted six rehearing motions regarding petitions for review, while denying 186 such motions. It granted one motion to rehear a cause, while denying 31 such motions. And the court denied 25 motions to rehear mandamus petitions and two motions to rehear habeas petitions.
10. It is very difficult to completely turn around a case through a motion for rehearing on causes—that is, after the Texas Supreme Court has issued an opinion. In the past four years, the court has granted only four motions for rehearing on causes. In only a single case did the new opinion change the disposition (from affirming to reversing and rendering judgment)—and in that case, 14 amicus briefs were filed while the motion to rehear the cause was pending. *Harris County Flood Control Dist. v. Kerr*, No. 13-0303 (Tex. Dec. 4, 2014). The other three cases resulted in a new opinion whose disposition essentially did not change from the previous opinion. *USAA Tex. Lloyds Co. v. Menchaca*, No. 14-0721 (Tex. Apr. 13, 2018); *Wasson Interests, Ltd. v. City of Jacksonville*, No. 17-0198, (Tex. June 1, 2018); *Ford Motor Co. v. Castillo*, No. 13-0158 (Tex. June 20, 2014). The court also recently granted a motion for rehearing of a mandamus petition. *In re Comaneche Turner*, No. 18-0102 (Tex. 2018).
11. These are cases where the court denied the petitions for review but then, on reconsideration, allowed the petition for review to proceed.
12. These statistics were compiled from the Texas Supreme Court's searchable website: http://www.txcourts.gov/supreme. Case-specific information discussed below can be found by going to this website and searching with the case number.
13. Eight resulted in granting the petition and a post-submission opinion reversing the court of appeals. *R.R. Comm'n of Tex. v. Gulf Energy Exploration Corp.*, No. 14-0534 (Tex. Sept. 22, 2015); *Shields Ltd. P'ship v. Bradberry*, No. 15-0803 (Tex. May 12, 2017); *Greater Houston P'ship v. Paxton*, No. 13-0745 (Mar. 25, 2015); *Cmty. Health Sys. Prof'l Servs. Corp. v. Hansen*, No. 14-1033, (Tex. June 16, 2017); *Pidgeon v. Turner*, No. 15-0688 (June 30, 2017); and *Tex. State Bd. of Examiners of Marriage & Family Therapists v. Tex. Med. Ass'n*, No. 15-0299 (Tex. Feb. 24, 2017); *Exxon Mobil Corp. v. Insurance Co. of the State of Pa.*, No. 17-0200 (Tex. Feb. 15, 2019); *Tex. Dep't of Criminal Justice v. Levin*, No. 17-0552 (Tex. Apr. 12, 2019). One resulted in granting the petition and granting mandamus relief. *In re RSR Corp.*, No. 13-0499 (Tex. Dec. 4, 2015). One resulted in a per curiam opinion reversing the court of appeals. *Allways Auto Group. Ltd. v. Walters*, No. 16-0134 (Tex. Sept. 29, 2017).
14. Seven resulted in granting the petition and a post-submission opinion affirming the court of appeals. *XOG Operating, LLC v. Chesapeake Exploration Ltd. P'ship*, No. 15-0935 (Tex. Apr. 13, 2018); *Kachina Pipeline Co. v. Lillis*, No. 13-0596 (Tex. June 12, 2015); *Endeavor Energy Resources, L.P. v. Discovery Operating, Inc.*, No. 15-0155 (Tex. Apr. 13, 2018); *Forest Oil Corp. v. El Rucio Land & Cattle Co.*, No. 14-0979 (Tex. Apr. 28, 2017); *Abutahoun v. Dow Chem. Co.*, No. 13-0175 (Tex. May 8, 2015); *Engelman Irrigation Dist. V. Shield Bros., Inc.*, No. 15-0188 (Tex. Mar. 17, 2017); *Scripps NP Operating, LLC v. Carter*, No. 17-0046 (Date TK). One resulted in a per curiam opinion affirming the court of appeals. *North Shore Energy, L.L.C. v. Harkins*, No. 14-0552 (Tex. Oct. 28, 2016).
15. One resulted in denying the petition again through a short per curiam opinion directing the court of appeals to consider a recent Texas Supreme Court decision. *Gulf Chem. & Metallurgical Corp. v. Miner Dederick Construction, LLP*, No. 13-0355 (Tex. Jan. 30, 2015). One resulted in denying the petition again after ordering merits briefing. *Allstate Insurance Co. v. Rehab Alliance of Tex., Inc.*, No. 15-0426. Two resulted in denying the petition again without other actions. *Ad Villarai, LLC v. Pak*, No. 16-0381; *In the Interest of C.S., G.M.S., J.C.S., J.S., and R.S.*, No. 17-0837. One resulted in denying the petition, while the court has previously dismissed the

case on jurisdictional grounds. *Venkatraman v. Masurekar,* No. 17-0188. One resulted in denying the petition, and the party filed another rehearing motion—which was also denied. *Lakota Energy Ltd. P'ship v. Merit Mgmt. Partners I, L.P.* (No. 17-0072).

16. Three petitions remain pending. *Pike v. Tex. EMC Mgmt., LLC,* No. 17-0557; *Orozco v. County of El Paso,* No. 17-0381; *Chicago Title Ins. Co. v. Cochran Investments, Inc., No. 18-0676.*
17. *Greater Houston P'ship v. Paxton,* No. 13-0745 (Tex. June 26, 2015); *Cmty. Health Sys. Prof'l Servs. Corp. v. Hansen,* 525 S.W.3d 671 (Tex. 2017); *Tex. State Bd. of Examiners of Marriage & Family Therapists v. Tex. Med. Ass'n,* 511 S.W.3d 28 (Tex. 2017); *Allways Auto Group. Ltd. v. Walters,* No. 16-0134 (Tex. Sept. 29, 2017); *Allstate Insurance Co. v. Rehab Alliance of Tex., Inc.,* No. 15-0426 (Tex. Oct. 21, 2016); *Exxon Mobil Corp. v. Insurance Co. of the State of Pa.,* No. 17-0200 (Tex. Feb. 15, 2019).
18. *R.R. Comm'n of Tex. v. Gulf Energy Exploration Corp.,* No. 14-0534 (Tex. Jan. 29, 2016); *XOG Operating, LLC v. Chesapeake Exploration Ltd. P'ship,* No. 15-0935 (Tex. Apr. 13, 2018); *Kachina Pipeline Co. v. Lillis,* No. 13-0596 (Tex. June 12, 2015); *Endeavor Energy Resources, L.P. v. Discovery Operating, Inc.,* No. 15-0155 (Tex. Apr. 13, 2018); *Forest Oil Corp. v. El Rucio Land & Cattle Co.,* No. 14-0979 (Tex. Apr. 28, 2017); *North Shore Energy, L.L.C. v. Harkins,* 501 S.W.3d 598 (Tex. 2016).
19. *Shields Ltd. P'ship v. Bradberry,* 526 S.W.3d 471 (Tex. 2017); *Forest Oil Corp. v. El Rucio Land & Cattle Co.,* No. 14-0979 (Tex. Apr. 28, 2017); *Abutahoun v. Dow Chem. Co.,* No. 13-0175 (Tex. May. 8, 2015); *Engelman Irrigation Dist. v. Shield Bros., Inc.,* No. 15-0188 (Tex. Mar. 17, 2017); *Gulf Chem. & Metallurgical Corp. v. Miner Dederick Construction, LLP,* No. 13-0355 (Tex. Jan. 30, 2015); *Allstate Insurance Co. v. Rehab Alliance of Tex., Inc.,* No. 15-0426; *Ad Villarai, LLC v. Pak,* No. 16-0381; *Venkatraman v. Masurekar,* No. 17-0188; *Exxon Mobil Corp. v. Insurance Co. of the State of Pa.,* No. 17-0200 (Tex. Feb. 15, 2019); *Lakota Energy Ltd. P'ship v. Merit Mgmt. Partners I, L.P.,* No. 17-0072.
20. *R.R. Comm'n of Tex. v. Gulf Energy Exploration Corp.,* No. 14-0534 (Tex. Jan. 29, 2016); *Greater Houston P'ship v. Paxton,* No. 13-0745 (Tex. June 26, 2015); *Pidgeon v. Turner,* No. 15-0688 (June 30, 2017); *Tex. State Bd. of Examiners of Marriage & Family Therapists v. Tex. Med. Ass'n,* No. 15-0299 (Tex. Feb. 24, 2017); *Forest Oil Corp. v. El Rucio Land & Cattle Co.,* No. 14-0979 (Tex. Apr. 28, 2017); *Engelman Irrigation Dist. v. Shield Bros., Inc.,* No. 15-0188 (Tex. Mar. 17, 2017); *Tex. Dep't of Criminal Justice v. Levin,* No. 17-0552 (Tex. Apr. 12, 2019).
21. Of these 27 granted rehearing motions at the petition phase, 18 of them did not have any amicus filings at the rehearing stage (after the motion for rehearing was filed and before the court disposed of the motion).
22. Of these 27 granted rehearing motions at the petition phase, 20 of them already had merits briefing when the rehearing motion was filed (five had a response to the petition but no merits briefing, and two did not yet even have a response to the petition).
23. Amici curiae are given wide latitude to file briefs at the Texas Supreme Court. Briefs for amicus curiae in the U.S. Supreme Court must adhere to rigid deadlines. Sup. Ct. R. 37.2(a); Sup. Ct. R. 37.3(a). But there is no deadline for amicus briefs in the Texas Supreme Court. *See generally* Tex. R. App. P. 11. Amici (as well as petitioners and respondents) can therefore file briefs at various stages of the case—including after a petition for review has been granted but before oral argument, after oral argument, or while a motion for rehearing is pending. *See, e.g., Morath v. Tex. Taxpayer & Student Fairness Coal.,* No. 14-0776 (Tex. Sept. 1, 2015) (seven post-submission briefs, including five amicus briefs); *Cadena Comercial USA Corp. v. Tex. Alcoholic Beverage Comm'n,* No. 14-0819 (Tex. Apr. 28, 2017) (seven post submission briefs, including two amicus briefs); *Nazari v. State,* No. 16-0549 (Tex June 22, 2018) (post submission amicus brief and party response to that amicus brief). However, the court's internal operating procedures recommend, "[a]s a general matter, it is better to line up amicus support at the petition stage rather than wait until the merits stage." *See* Blake A. Hawthorne, Supreme Court of Texas Internal Operating Procedures 15, http://www.txcourts.gov/media/1438423/supreme-court-of-texas-internal-operating-procedures.pdf.
24. Many times each term, the U.S. Supreme Court will grant motions for the U.S. Solicitor General's Office to present oral argument for 10 minutes (of a particular side's 30 allotted minutes) when that office has filed an amicus brief supporting that side. While rarer, the U.S. Supreme Court occasionally allows other amici to take 10 minutes of a party's argument time. *See, e.g.*, Stephen M. Shapiro et al., *Supreme Court Practice* 777 (10th ed. 2013) ("Notwithstanding the language of Rule 28.4, the Court in recent years has permitted some arguments to be divided. For example, in the 2010 and 2011 Terms, the Court has allowed divided argument for parties other than the Solicitor General on several occasions . . . .").
25. *Zorilla v. Aypco Constr. II, LLC,* (No. 14-0067; Texas OSG and Texas Trial Lawyers Association); *King Street Patriots v. Tex. Democratic Party,* (No. 15-0320; Texas OSG); *Dallas Morning News, Inc. v. Tatum,* (No. 16-0098; Reporters Committee for Freedom of the Press); *In re N. Cypress Med. Ctr. Operating Co.,* (No. 16-0851; Christus Health and Texas Health Resources); *City of Laredo v. Laredo Merchants Ass'n,* (No. 16-0748; Texas OSG); *Hill v. Shamoun & Norman, LLP,* (No. 16-0107; Texas OSG); *Hillman v. Nueces Cty.,* (No. 17-0588; Texas OSG and The Innocence Project); *Cadena Comercial USA Corp. v. Tex. Alcoholic Beverage Comm'n,* (No. 14-0819; Texas Association of Business and McLane Co.); *Harris County v. Annab,* (No. 17-0329; Texas OSG); *Tex. Dep't of Ins. v. Jones,* (No. 15-0025; Texas Workers' Advocates); *State v. T.S.N.,* (No. 17-0323; Texas OSG); *Tarrant Reg'l Water Dist. v. Johnson,* (No. 17-0095; Texas OSG); *Tex. Outfitters Ltd. v. Nicholson,* (No. 17-0509; Texas OSG); *Garcia v. City of Willis,* (No. 17-0713; Texas OSG); *Tarrant Cty. v. Bonner,* (No. 18-0431; Texas OSG); *Worsdale v. City of Killeen,* (No. 18-0329; Texas OSG); *In re Geomet Recycling, LLC,* (No. 18-0443; Texas OSG).
26. Under Tex. R. of App. Proc. 59.6, amicus may only present oral argument with leave of the court and with the consent of the party they are supporting. The rules also provide that a party may have two different counsel argue for that same party—although one counsel is preferred, and a motion must be filed to have more than two counsel argue for a particular party. Tex. R. App. P. 59.5. The Texas school finance case (*Morath v. Tex. Taxpayer & Student Fairness Coal.,* No. 14-0776, (Tex. Aug. 14, 2015)) is an example where the court granted leave for three counsel to argue for the same party.
27. The shared argument motion was granted in *Harris County v. Annab* over opposing counsel's objection. Almost all of these motions involved requests for amicus to take five minutes of argument time (out of a party's typical 20-minute allotment). *King Street Patriots v. Texas Democratic Party* is an example of a case in which the court suspended the rules to expand the amount of time allotted for oral argument, giving the state five minutes of argument time while allowing petitioner and respondent each to retain their 20 minutes—because the state in that case was not fully aligned with either side.
28. Six of the 19 shared-argument motions were filed by amici other than the Texas Solicitor General's Office.
29. Blake A. Hawthorne, Supreme Court of Texas Internal Operating Procedures 15, http://www.txcourts.gov/media/1438423/supreme-court-of-texas-internal-operating-procedures.pdf. This practice was formally started in 2008, but it existed on an ad hoc basis before then. Don Cruse, *The CVSG Comes to Texas*, SCOTXblog.com (Dec. 19, 2008), https://www.scotxblog.com/practice-notes/cvsg-in-texas-supreme-court/.
30. In recent years, the U.S. Supreme Court has called for the views of the U.S. solicitor general frequently—about a couple dozen times each term. *See Calls for the View of the Solicitor General (CVSG),* CertPool.com, https://certpool.com/cvsg (cataloging pending CVSGs). The U.S. Supreme Court even called for the views of the solicitor general of Texas about a decade ago, although it is rare for the U.S. Supreme Court to invoke the CVSG process to request briefs from anyone besides the U.S. solicitor general. *See Rhine v. Deaton,* No. 08-1596 (Oct. 5, 2009, order from U.S. Supreme Court); Amy Howe, *New invitation brief from Texas Solicitor General,* SCOTUSBlog.com (Dec. 23, 2009, 6:25 PM), http://www.scotusblog.com/2009/12/new-invitation-brief-from-texas-solicitor-general.
31. *King Street Patriots v. Tex. Democratic Party,* No. 15-0320, (Tex. Feb. 7, 2017); *In the Matter of A.F.,* No. 16-0861, (Tex. Oct. 16, 2017); *San Antonio River Auth. v. Austin Bridge & Road, L.P.,* No. 17-0905, (Tex. Oct. 19, 2018).
32. *See, e.g.*, David C. Thompson & Melanie F. Wachtell, *An Empirical Analysis of Supreme Court Certiorari Procedures: The Call for Response and The Call for the Views of the Solicitor General,* 16:2 Geo. Mason L. Rev. 237, 295 (2009) ("For a litigant, seeing the Court call for the views of the SG in a particular case is a sign that the likelihood of certiorari being granted is quite high; the court granted briefing on the merits in 34% of cases in which it called for the views of the SG, a 36-time increase above the overall grant rate.").
33. Both courts have two phases of briefing: petition-stage (Tex. R. App. P. 53; Sup. Ct. R. 10-16), and merit-stage (Tex. R. App. P. 55; Sup. Ct. R. 24-26). At the Texas Supreme Court, this is a petition for review (with a 4,500-word limit). Tex. R. App. P. 9.4(i)(2)(D). At the U.S. Supreme Court it is a petition for a writ of certiorari (with a 9,000-word limit). Sup. Ct. R. 33.1(g)(i). If either court chooses, it can subsequently order another round of briefing designed to focus on the merits of the case—as opposed to whether the court should choose to exercise its discretion to hear the case.
34. *See* Blake A. Hawthorne, Supreme Court of Texas Internal Operating Procedures 13, http://www.txcourts.gov/media/1438423/supreme-court-of-texas-internal-operating-procedures.pdf ("Nothing in the rules, however, precludes the court from granting the petition before requesting a study memo or full briefing on the merits. As a practical matter, however, the court tries to avoid this and it rarely occurs."). In the Texas Supreme Court, the votes of three of the nine justices are required to order merits briefing. *See id.* at 12. Four votes are required to grant a petition for review. *See id.* at 13.
35. *See generally* H.W. Perry Jr., Deciding to Decide: Agenda Setting in the United States Supreme Court (1994).
36. In the U.S. Supreme Court, four votes are required to order merits briefing by granting the certiorari petition to hear argument in the case. *See* Stephen M. Shapiro et al., *Supreme Court Practice* 325 (10th ed. 2013) ("The Supreme Court has long followed the practice of granting plenary review of a certiorari case if a minimum of four Justices favor granting the petition. This is known as the Rule of Four. The same Rule of Four is followed in determining whether an appeal should be fully briefed and argued orally.") (footnotes and internal quotation marks omitted).
37. *See* Blake A. Hawthorne, Supreme Court of Texas Internal Operating Procedures 13, http://www.txcourts.gov/media/1438423/supreme-court-of-texas-internal-operating-procedures.pdf ("The Court requests the parties to file full briefing on the merits in only about 1 in 4 cases. The request for full briefing increases the odds of a grant or *per curiam* opinion from about 1 in 10 to 1 in 3.").
38. This two-step preliminary practice can present a quandary for advocates. Emphasizing how confusing the law is can militate for granting the petition for review, while possibly weakening the case on the merits. And arguing that a decision below is so wrong that no other court has ever taken such an approach can be a great merits argument, but it cuts against the existence of an entrenched conflict among the lower courts that would cause the court to grant the petition for review. That is all to say strategic decisions typically need to be made on how to balance these competing interests in a merits brief at the Texas Supreme Court.

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