

PERSPECTIVES ON
STATE COURT LEADERSHIP

OPINIONS AS THE VOICE OF THE COURT:

HOW STATE SUPREME COURTS CAN COMMUNICATE EFFECTIVELY AND PROMOTE PROCEDURAL FAIRNESS

*One in a series from the Executive Session
for State Court Leaders in the 21st Century*

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This is one in a series of papers that will be published as a result of the **Executive Session for State Court Leaders in the 21st Century**.

The Executive Sessions at the Harvard Kennedy School bring together individuals of independent standing who take joint responsibility for rethinking and improving society's responses to an issue.

Members of the Executive Session for State Court Leaders in the 21st Century over the course of three years sought to clarify the distinctive role of state court leaders in our democratic system of government and to develop and answer questions that the state courts will face in the foreseeable future. Themes addressed include principles for effective court governance, the tension between problem solving and decision making, the implications of social media for court legitimacy, how courts defend themselves from political attack, and the notion of chief justices as civic leaders. Many themes were developed by Session members into papers published in a series by the National Center for State Courts.

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INTRODUCTION

The 50 state supreme courts issue more than 5,000 published opinions each year. These opinions are vital to protect the liberties guaranteed by the constitution and laws of the state, impartially uphold and interpret the law, and provide open, just, and timely resolution of all matters. The opinion of the high court is its voice—the means to convey and explain to both legal and general audiences that the court listened, resolved a legal dispute, impartially applied the law, and reached a fair and reasoned judgment. As the highest level of state judiciaries, supreme courts also strive to provide open access to opinions and proceedings.

The challenge for the nation's judges and justices, public information officers, and members of the bar and media is to make sure that the public understands what is expressed in a supreme court opinion, which is written in the language of the law that speaks to the legal profession and academia. In a splintered media landscape with increased means of communication, partners in various media, traditional or new, must engage if they are to inform. Increasingly, many issues before state supreme courts are of high importance to the public, an environment which requires courts to be transparent, accountable, and accessible. There are means of communication that supreme courts can employ to convey to participants and external audiences that the procedures used to decide and render an opinion are fair and foster respect for the law.

This paper discusses the nature of and trends in the formation of state supreme court opinions and the methods by which opinions are communicated to the press, the public, members of the bar, and online communities. It considers current practice in light of a field in social psychology called procedural fairness, a helpful and practical theory that explains what

makes it likely that people are satisfied with and comply with decisions by authorities, such as judges. The paper goes on to highlight current state court trends, including the use of plain language and summarization, the use of websites for improved communication and dissemination of opinions, and the increase in educational opportunities for appellate bench officers to make opinions clearer and more effective. Historical analysis and a state by state comparison demonstrate changes to opinion length over time, and the paper discusses the ramifications that court opinion complexity may have on public and media understanding. A case study on same-sex marriage cases in California, along with findings from a national survey, show that the nation's highest courts use diverse strategies to more effectively communicate opinions and encourage public understanding. Ultimately, opinions serve as the court's voice because rulings communicate not only to lawyers but also to the public and media and explain how courts resolve disputes and determine constitutional rights.

The concepts behind procedural fairness have developed from research showing that the manner in which disputes are handled by the courts has an important influence on peoples' evaluations of their experiences in the court system.¹ Procedural fairness refers to court users' perceptions regarding the fairness and transparency of the processes by which their disputes are considered and resolved, as distinguished from the outcome of a case.² For any court to achieve procedural fairness, individual court players must demonstrate through their actions that the court has listened to all parties and reached a fair conclusion.

The California judiciary has placed an emphasis on implementing procedural fairness in all aspects of its work. In 2005, the Judicial Council of California commissioned a landmark public trust and confidence assessment, *Trust and Confidence in the California Courts*, which identified procedural fairness—court users having a sense that decisions have been reached through processes that are fair—as by far the strongest predictor of whether members of the public approve of or have confidence in California's courts.³ In 2007, in response to these findings and those in a follow-up study involving in-depth focus groups and interviews with court users, administrators,

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bench officers, and attorneys,⁴ Chief Justice Ronald M. George launched a statewide initiative on procedural fairness, the first of its kind in the nation. It is aimed at ensuring fair process, equitable treatment of all court users, and higher public trust and confidence in California's courts. Procedural fairness is most significantly influenced by four key elements interconnected in the work of the courts: respect, voice, neutrality, and trust. People are more likely to accept and respond more positively to court decisions when the importance of facts is emphasized and the reasons for a decision have been clearly explained. Procedural fairness is also significantly affected by the quality of treatment that court users receive during every interaction with the court. This paper urges the adoption of procedural fairness as a guide to enhancing the value of opinions as the voice of the courts.

Supreme and appellate courts face unique challenges regarding achievement of procedural fairness because much of the work of high courts is complex and not in public view. The procedures involved (filing of notices of appeal, writs, briefs, and responses) are often governed by complex rules and proceedings that do not lend themselves to easy explanation. Even oral argument, the most public manifestation of a supreme court's procedures, is not generally understood or covered in the press. By contrast, proceedings in the trial courts often lend themselves to "police-blotter-style" reporting, encompassing simpler explanations of who, what, where, when, or why. Reports from proceedings typically depict two clear sides, issues and distinctions, and a narrative. This is especially true in high-profile cases that draw public interest and are covered intensively, even though these trials are not good representations of how the public actually experiences the courts. Sensational (and national) coverage of murder trials like the O.J. Simpson and Casey Anthony cases often ends up leaving a lasting

impression on the public and may create a perception for many observers that the American justice system is unfair or does not work. Because the work of supreme courts is more complicated and attenuated, there is a higher dependence on an effective media to translate the meaning and importance of high court rulings to the public in ways that promote the goals of procedural fairness.

This paper is organized into five sections that discuss the workings of state supreme courts and effective communication through the lens of procedural fairness.

BACKGROUND AND DISCUSSION

I. HISTORY AND TRENDS REGARDING SUPREME COURT OPINION DELIVERY AND LENGTH

The method of disseminating opinions has changed dramatically in the over 230 years that our state supreme court systems have been in existence.⁵ The increasing length and complexity of state supreme court opinions can present challenges for court audiences that must be able to access, understand, and accept court opinions. This section will discuss the transition from an oral to a written system of law, historical trends regarding the length of opinions, and the ramifications that longer and more complex opinions may have for supreme courts.

The transition from an oral to a written system of law

In its beginnings, the American legal system was characterized by oral advocacy and oral opinions. In early state supreme courts, oral argument between parties and before the court lasting several days was not uncommon, and judgments were rendered orally.⁶ "Much of the litigation [during California's early statehood] addressed the legal concerns of the people who flocked to the state during the Gold Rush. Many of their cases involved titles to property, mining, and agricultural issues, and rights to water and minerals on public lands. Often those decisions were not

published. In the early years of statehood, the number of [written] opinions issued by the court filled less than one slim volume of the Official Reports annually.⁷ With the growth of cities and the long distances traveled by parties and attorneys, oral advocacy was replaced by written advocacy and written opinions of the court.⁸

In March 1879, California voters adopted major changes to the state constitution and the state's judicial system, including a requirement that all opinions be in writing. "In the determination of causes, all decisions of the Court in bank or in departments shall be given in writing, and the grounds of the decision shall be stated."⁹ The amendment was a response to public allegations of corruption, and the requirement to put opinions in writing was a way to ensure accountability by the courts and at the same time also give supreme court justices longer terms. As the American legal system moved away from oral advocacy to a writing-centered system of law, state supreme courts also moved away from oral decision making (i.e., judges or justices of the supreme court providing spoken explanations of rulings). The American legal system is now a system in which parties must petition the court in writing, submit written legal briefs, and request brief time for oral argument before a written opinion is issued.

Supreme court opinions are getting longer and more complex

To compare trends regarding opinion length, the California Administrative Office of the Courts Judicial Administration Library has completed a word count analysis of opinions for 16 of the country's court systems (California, Florida, Georgia, Illinois, Indiana, Massachusetts, Michigan, New Hampshire, New Jersey, New York, Ohio, Pennsylvania, Texas,

Utah, Vermont, and Virginia) from 1930–1932 and 2008–2010 and averaged the word counts across case types (see attached summary chart). For 2008–2010, California has by far the longest opinions, averaging 11,820 words over three years. Using an average of 250 words per page, this translates to 47 pages for the average California opinion.¹⁰ Excluding California, the average for the 15 states during the same period was 3,934 words, or roughly 15.75 pages. For 1930–1932, word counts show that the average length of a California opinion was approximately 1,969 words (roughly 8 pages), while the average for the 15 other states during the same period was 2,187 words (about 8.75 pages). So while most states show a 180% increase in opinion length over the past 80 years, the length of California opinions has increased almost 600%.¹¹

Different theories have been attributed to the increased length of opinions, including expanded use of law clerks by individual justices and the advent of word processing; the arcane nature of legal writing including the use of lengthier string citations and footnotes; the necessity of longer writing for audiences that include parties, attorneys, academics, and lower or higher courts; and substantive concurrences and dissents that may build out an already long majority opinion. A separate California study from 1994 helped shed light on why the length of California opinions has so dramatically increased. By measuring the number of headnotes in an opinion, this study found that an average opinion of the court during the six-year period of 1987–1993 analyzed twice as many legal issues as did an average opinion during the previous 16-year period, 1970–1986.¹² Correspondingly, during three periods studied, the average number of pages published in each California opinion increased, from 1970–1976 (13.9 pages per case), to 1977–1986 (16.6 pages per case), to 1987–1993 (30.2 pages per case).¹³

Ramifications of opinion length and complexity

An opinion's scope and length is often determined by the nature and complexity of the case, but the overall trend toward longer opinions may impede audience understanding, comprehension, and compliance. Litigants, especially losing litigants, care less about the length of opinions and more about clarity and

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the scope or soundness of the reasoning.¹⁴ Parties to disputes want to be assured that the courts considered the issues, engaged in a reasoned and fair analysis, and provided clear direction. New York’s former Chief Judge Judith Kaye has noted that opinion readers expect a certain level of scholarliness, but as the length of writings grows, the number of people who actually read them dwindles.¹⁵

Longer and more complex opinions mean that fewer people are able to understand judgments of the court—or the role of the court—without some form of assistance. In theory, more concise explanations would help the public and the media better understand and access opinions. If opinions are too specialized or unnecessarily complex, courts may be in danger of losing their public voice. As will be discussed below, this has significant consequences for members of the media, who must be able to clearly communicate the substance of opinions, and for members of the public (including lawyers) who must understand rulings. If opinions are too brief, however, they may be too conclusory and not demonstrate that all parties have been listened to. Civil and criminal opinions often must contain a range of legal points in order to adequately address every issue on appeal.

This paper does not mean to suggest that opinions of the nation’s state supreme courts should always be short or simple or follow one standardized format. However, given that we know that high court opinions are complex for lay audiences and are getting longer, we speak directly to how the preparation and dissemination of high court opinions (including use of tools like plain language, summarization, and effective communication via the web) may help courts to ensure that each individual opinion—the voice of the court—successfully communicates and demonstrates that the court has listened to parties, fulfilled its unique and important role as an arbiter of justice, and reached a fair outcome.

II. CHALLENGES FOR THE MEDIA AND PUBLIC

Opinions convey dense information, usually in narrative form: an introduction that states what is being appealed, a statement or “story” of the case, discussion

of the issues (with corresponding legal analysis), and an explanation of the outcome. Despite an often traditional structure, opinions must make sense to a general readership in order to make a judgment understandable. Opinions usually speak at a high level to a sophisticated audience (e.g., attorneys or judges) and convey reasoning through legal analysis and argument and references to legal briefs, constitutional or statutory provisions, and case law. Often an opinion will discuss other opinions that, in turn, may each have multiple concurrences or dissents. In combination with the length and the voices of more than one author, relating even the basic components can make the content of opinions difficult for a lay audience to digest and understand.

Written opinions are the court’s most important contact with the public

Supreme court opinions deal with some of the most important and difficult issues of the day, provide guidance to the lower courts, and may ultimately contain outcomes that affect the lives of every state resident. Members of the public may not understand the third branch, or every intricacy of a legal opinion, but they do have overall confidence in the courts.¹⁶ The survey in California found that the public believes that in order to do their job well, courts must protect the constitutional rights of everyone. Opinions provide a window to and explanation of the work of the court for the public:

Although a judge’s role in the courtroom is a critical judicial function, only those in the courtroom witness the judge’s conduct, and most of them are concerned with their case alone. Judicial writing expands the public’s contact with the judge. Writing reflects thinking, proves ability, binds litigants, covers those similarly situated, and might determine the result of an appeal. Judges hope that what they write will enhance confidence in the judiciary and bring justice to the litigants.¹⁷

This observation about judicial writing particularly holds true, if not more so, for appellate-level justices, especially because at the supreme and appellate

courts, as opposed to trial courts, not many witness all the workings of the court. When an opinion is released, only a few people may have observed all of the case proceedings leading up to the decision.

Opinions must clearly explain judgments and speak to varied audiences

In written or summarized form, supreme court opinions explain judgments for the parties. The challenge is often that the judgment and the basis to support it must be communicated in one document to diverse audiences: the parties, lower courts, stakeholders, public, and media. The format of judgments varies from court to court, but ideally, opinions guide readers through the legal system, demonstrate to stakeholders that the court has listened and that a proper resolution has been reached, eliminate any appearance of judicial arbitrariness, and legitimize any judicial departure from established law. Clear communication of these concepts is crucial in order to demonstrate fairness, ensure public and media understanding of the role of the court, and encourage acceptance of high court judgments. Effective communication starts with a well-reasoned and well-written opinion, but is still dependent on a media that understands the basis of rulings to provide the public with essential information and enhance trust and confidence.

Supreme court opinions are disseminated to wide audiences: parties and attorneys to the case; government officials who may have to follow or implement rulings; lower courts; courts in other states or jurisdictions; lawyers and court practitioners who will review and cite opinions in research; legal journalists, commentators, scholars, and critics; and the public and citizens at large. But to achieve basic elements of procedural fairness, audiences of opinions need to know that the court understood the context of the controversy, listened carefully and respected both sides, and reached a principled judgment based on the law. They also need to know that the court's role is limited and differs from that of other branches. "Because the judicial opinion is the essential document of the third branch of government, the judge should explain his action in terms that enable the reader to understand precisely what he has done and why he has done it."¹⁸

Opinions must clearly communicate role of the court

Because they are the voice of the court, opinions play a critical role in protecting and promoting fair and impartial courts. Without a full understanding of opinions, misinterpretation of judgments by audiences can lead to public perceptions that the court is insensitive, wrong, or not a legitimate authority. Opinions must reassure the public that the court has deliberated carefully and acted as a neutral body. Therefore, opinions must not only convey the substance of judgments but also demonstrate that the

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court has fulfilled its constitutional role: listened to parties, evenly and fairly interpreted the law, resolved disputes, and upheld and protected public rights under the laws and constitution of the state.

Justices are not available to explain rulings or discuss cases

The current policy of high courts is that the opinion speaks for itself. This policy removes the possibility of a spoken explanation for the public by the person who authored the opinion. A key ingredient of procedural fairness is clear explanations from judges to help litigants and interested parties understand the basis of rulings. Because current practices and the nature, complexity, and length of high court opinions no longer allow justices to deliver them from the bench, how high court opinions are written and communicated affects the understanding of rulings, the overall acceptance of decisions, and perceptions regarding whether the court is transparent and fair. Justices are further constricted by judicial canons that prevent them from discussing cases before an opinion is issued.¹⁹ Although judges often use the bench to explain court procedures and the basis for rulings when

they are able, without the ability to provide clarifying spoken explanations to all audiences regarding published opinions, courts must use other communication methods to provide further insight into opinions and promote procedural fairness.

Media demands must be balanced with accuracy

Supreme court opinions deal with some of the most important and difficult issues of the day on potentially controversial topics that range from the definition of marriage, to limits on free speech or individual rights, to the limits of government's ability to tax and spend, and they deliver outcomes that may ultimately affect the lives of every state resident. Because the general news media are principal agents for informing the public about the courts and opinions, they are vital partners in the provision of accurate and helpful information. Legal publications are vital resources that speak to the profession and can serve as partner resources to general news operations that may not have reporters with legal knowledge or experience. Media demands for access to court proceedings and opinions, however, must be balanced with efforts that encourage accuracy in reporting. This is particularly true for cases of high public interest or controversy.

The length and format of opinions are often also driven by external and environmental factors that may not be easily understood by the public.

Few reporters are trained in the law, and consequently there is a risk that they will misunderstand difficult decisions they are called on to report and interpret, particularly if the opinions are permeated by legal jargon.²⁰ If high courts are to be able to play their proper role in government—i.e., serve as part of the impartial and independent branch of government that interprets the law and resolves disputes—it is imperative that they assist media with access to opinions, information, and tools that encourage accurate coverage of opinions. Understanding court procedure

may facilitate better reporting on the courts and dissemination of opinions.

Judicial performance and accountability

The length and format of opinions are often also driven by external and environmental factors that may not be easily understood by the public. Supreme courts in the United States are of different sizes and compositions and operate under different jurisdictions.²¹ The opinions of supreme courts and individual justices may be evaluated by the press, the local bar, the legislature, or other government entities on the basis of their reasoning, or the frequency with which they are issued in any given year (i.e., opinions may lead to evaluations of judicial performance based on numbers of opinions or frequency of issue, and opinion length or understanding may not be a prescribed consideration or factor). Unpublished opinions—where the case law or ruling is considered routine because the matter is one that has been previously determined by the court—also provide potential confusion for the public and stakeholders regarding transparency and accountability.²² Although remedies exist for a party to request publication of an unpublished opinion, the practice of issuing unpublished opinions may create a tension between efficiency for the courts and public perceptions regarding fairness and transparency (i.e., some parties may believe that their matter has been handled differently by the court if the opinion indicates that it is “not to be published”). However, if the substance or nature of a court ruling is complex because of the language, format, or explanation provided, it behooves courts to take proper steps to ensure that every opinion is generally understood by the public, whether or not the outcome has enormous social impact. Most individuals—whether they are litigants or medical patients—are more comfortable accepting outcomes when adequate explanations are provided, in both routine and complex matters.

III. SOLUTIONS TO CHALLENGES

The needs of the public, the media, and the legal community must be met and balanced by the high court when issuing opinions. The written opinion carries great weight, especially when viewed as the singular source of the court's views. Limitations also exist on the court's ability to expand or explain these views in

a fast-paced media landscape where the public experiences many demands for their attention. However, courts can use a number of low-cost and high-impact procedures to help their partners in the media and legal communities by facilitating the communication of decisions and the analyses of the issues involved. These procedures, techniques, and strategies are described below.

Use of plain language summaries and road maps in an opinion

Guidelines that are applicable to plain-language jury instructions have relevance to the communication of opinions. Traditionally, using “plain language” in court communications means to be clear, be brief, remember who your audience is (lay people, with varying degrees of education and language skills), address the audience directly, and order your points in a logical sequence. For plain-language summaries and introductions, even for lengthy and complex opinions, courts should rely on facts and concrete examples, rather than legal jargon, so that all audiences understand the court’s reasoning in the opinion that follows. Testing the understanding of plain-language summaries with different audiences is an easy and low-cost way to ensure that the court is achieving this goal. Introductions to opinions can be written after the court’s reasoning has been reached to describe the story of the case and to relay any high-level implications for public policy and case law. More extensive use of road maps in opinions, which includes the use of a clear introduction accompanied with explanatory headnotes for ease of reference, accomplishes one of the major goals that this paper discusses: ways to prepare and structure opinions to make them more accessible and available. Spoken broadcasts from the chief justice, whether in video or podcast form, can also provide a voice for the court and provide the public and media with a clear explanation of the role of the court, including neutral explanations regarding rulings. If tools are provided to make even lengthy opinions more understandable (e.g., summaries or press releases), media reporters can be more accurate and the public will be better informed.

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Judicial education

The survey findings below show that most states provide some form of judicial education for appellate justices, including opinion writing. A handful of states send their justices to forums attended by justices from other states and federal appellate judges. An example of this is the state provision of funds for individual justices to attend the Opperman Institute of Judicial Administration at the New York University School of Law.

Opinion writing has been a regular feature of judicial education for justices in California. The California Administrative Office of the Courts Education Division/Center for Judicial Education and Research (CJER) includes courses at its statewide educational conference—the Appellate Justices Institute—designed to explore different approaches, practices, and styles. However, because of the unprecedented budget crisis, alternatives to the live statewide delivery of education are also being implemented. In late 2009, the CJER Governing Committee approved a new model of developing judicial education. Under this approach, justices and appellate judicial attorneys oversee curriculum and course development. Alternative delivery of education has also been implemented with the involvement of stakeholders and branch leaders. For example, a webinar on appellate writing is planned for 2012. In 2011, California had 112 supreme court and court of appeal justices serving more than 37 million people living in a geographic region over 3.79 million square miles, geographically the fourth largest state in the country. The strategic use of online resources, such as webinars or videoconferences, will reduce travel and hotel costs associated with traditional face-to-face education.

Judicial education on opinion writing does not lend itself to a one-size-fits-all model, and judicial educators need to be cognizant of different learning styles. Some forums should be confidential to facilitate frank and candid exchanges of ideas, but individual court leadership has a responsibility to understand and balance the learning objectives underlying education on opinion writing in order to determine when education is most needed, whether a justice is new or experienced, and how to provide access effectively.

Improving communication and collaboration with media and the bench

Effective collaboration between the bench and bar is crucial to both public and judicial branch stakeholder understanding. Many newspaper reporters who were trained as lawyers have left or retired from newspaper jobs, which, if not replaced by often more expensive, law-trained reporters, creates a challenge for media to inform the public so that the average citizen can follow what the court is doing and why. Engaging and encouraging the sophistication and cooperation of each state's bar associations makes a difference; the more creative and engaged that lawyers are with the media, the more they will be able to identify, explain, and raise key issues for reporters. Bar associations and law schools have a responsibility to educate the public. This includes engagement with leaders from diverse communities to ensure that the substance of opinions is properly disseminated to audiences that may need to access information in different languages. California, in addition to large ethnic populations of African Americans, Latinos, and Chinese Americans, has a substantial number of Filipinos, Vietnamese, Korean Americans, and other constituents who may speak English as their second language.

Using the web and social media to provide notice and enhance access, participation, and understanding

Procedural fairness first and foremost concerns individual litigants who appear before a court. The appearance of fairness to the individual litigants, parties, and attorneys involved in a case contributes to a sense of fairness, and this perception carries from those in the courtroom to the public. We know from the trust and confidence studies conducted in California that

procedural fairness is of core concern to the public and is by far the leading determinant of overall trust and confidence in the courts.²³ We also know that Californians rated their courts the lowest on the “participation” (“listen carefully”) element of procedural fairness.²⁴ Web and social media are now the key modern tools to enable and encourage the broadest possible audience to participate regarding appellate opinions, to access, understand, and comment. One of the central tenets of the “Web 2.0” world is that presenters of information have to go to where people are already online, to Facebook, Twitter, and other social media, and courts cannot rely on people or constituents to voluntarily visit a court website. The web enables courts to do more to get plain-language summaries out into the world, and ideally to promote wider understanding and foster public perception that the court has acted fairly to all parties, listened, applied the law, and been accountable.

As will be discussed below in survey findings and in the opinion study on the same-sex marriage cases in California, advance notice for media, along with modern tools like Twitter and increased use of press releases and plain-language summaries, encourages wider dissemination of information and public understanding. These tools help the media do their job and allow the public to see and participate in the court process. The ability to hear all voices is the reason that our society trusts courts and court officials to settle disputes ranging from a neighbor's fence encroachment to a minor traffic ticket to a presidential election, or even the deprivation of liberty or life.²⁵ The web and social media are necessary tools for state supreme courts to demonstrate that the court is a legitimate authority that has listened and has acted in the best interest of all parties.

Improving law-related education and outreach

For years, courts have bemoaned the lack of public understanding of the justice system.²⁶ Many courts state a commitment to law-related education and outreach, but not all courts broadcast oral arguments on television (furthering the concept that “justice must be seen to be done”) and not all courts venture into their communities and conduct oral arguments

at different locations accessible to the public, such as state capitols, colleges, or schools.

The California Supreme Court takes cases out of its traditional venues and chooses to move some arguments into nontraditional locations in the state. The state's six court of appeal districts also engage in this form of community outreach and public education. This model has made a huge difference to the children, youth, education staff, and community members who view oral argument and to participating appellate lawyers and academics from different law schools, who are becoming effective commentators on cases. Like other states, California also uses a teacher training program that brings high school teachers together to learn from one another in order to more effectively teach about civics and the rule of law. To date, through the 2010–2011 school year, the California On My Honor: Civics Institute for Teachers program has engaged 270 primary and secondary education (K–12) teacher participants in 27 superior court jurisdictions, who in turn have reached an estimated 50,450 students with court-centered civics curricula developed at the institutes.

IV. NATIONAL SURVEY FINDINGS

Through a national survey conducted by the Conference of Chief Justices, National Center for State Courts, and the Administrative Office of the Courts in California, information has been collected from state courts regarding the methods by which state supreme courts communicate to the press, public, and online communities.²⁷ Forty-two states responded and indicated that courts use a variety of means to disseminate opinions and related case information for public and media to enhance access and understanding and to engage audiences and communities. In high-profile cases, the California Supreme Court occasionally issues news releases on behalf of the court to assist in public understanding of complex legal issues, such as the court's rulings on same-sex marriage, discussed more fully below. The Supreme Court of Texas webcasts all arguments, posts all briefs, and provides summaries of oral arguments alongside the video webcast. This section highlights survey findings regarding effective communication practices currently used by various state supreme courts.

Use of plain language and summary

To address concerns regarding opinion length, complexity, and difficulty in understanding, more courts are using simpler opinion formats, plain-language summaries, or case syllabi to help people access and understand opinions. While 29 out of 42 states responded that there is no prescribed format for opinions and a number of states indicated that it is up to an individual justice to decide how his or her opinion will be written, most states responded that opinions tend to follow similar formats. As a matter of practice, opinions have a defined and repeated structure, such as introduction, statement of jurisdiction and ruling, statement of facts, analysis, conclusion, and any instructions to a lower court. Several courts indicated that an explanatory introduction summarizes and states the court's ruling. For example: "Every opinion starts with a brief introductory paragraph which indicates whether the Court is affirming or denying the judgment of the lower court" [Rhode Island], or "[o]pinions often include a brief, plain-language summary of the holding near the beginning" [Florida].

A number of public information officers or partnering organizations (e.g., law schools) provide a plain-language summary on the web in addition to the full opinion (see, for example, Georgia, Kentucky, Massachusetts [for particularly difficult opinions], Missouri, Rhode Island, and South Carolina). A number of states responded that opinions are written in plain language for wide audiences ("With the exception of occasional jargon, the intent of opinion writing is for lay and legal reader alike" [Texas]). In addition, several states indicated that they issue and post summaries of cases on the web prior to oral argument.

The California Commission for Impartial Courts was a blue ribbon group charged with studying and providing recommendations to the Judicial Council on ways to strengthen the court system, increase public trust and confidence in the judiciary, and ensure judicial impartiality and accountability for the benefit of all Californians. It found that "many judicial opinions are not written in a manner that is easily digestible by nonattorneys. Introductory remarks or paragraphs could summarize a case and the court's decision in a way that can enhance media accuracy."²⁸ Greater use

of plain-language summarization and more accessible formats will help all audiences understand opinions and have greater access to them.

Judicial education

The California Commission for Impartial Courts also recommended that “[education] should be developed for judges and justices on how to present clearly the meaning or substance of court decisions in a way that can be easily understood by litigants, their attorneys, and the public.”²⁹ Because opinions are the voice of the court, education for judges and justices regarding the effective communication of opinions will help promote a broader and clearer understanding of the role of the court.

A majority of state supreme courts reported that new judges and justices receive education on opinion writing (i.e., appellate justices receive some form of education in-state or attend out-of-state programs). For example, several courts identified in-house training or courses offered by their state judicial colleges (California, Connecticut, Florida, Kentucky, Maryland, Massachusetts, Michigan, Mississippi, Nebraska, Tennessee, and Wisconsin). Six states responded that new justices attend the New Appellate Judges Seminar of the Dwight D. Opperman Institute of Judicial Administration at the New York University School of Law, which includes courses on appellate opinion writing. Five states mentioned attending courses or partnerships with the National Judicial College in Reno. The most commonly cited trainer was Bryan Garner of LawProse.org.

Improving communication and collaboration with media

Coalitions and efforts aimed at improving working relationships and communication among judges, attorneys, and the press are being promoted by courts to assist stakeholders keenly interested in the accurate dissemination of opinions. States are focusing on strategies to work closely with bench, bar, and media representatives to increase legal understanding. Courts must recognize the business needs of media and other stakeholders who are impacted by opinions. For example, reporters operate under the demands of deadlines and news cycles, and other

branches of government often must understand and implement changes in statute and rules according to what is stated in high court opinions.

Most states (35) indicated that they have a designated public information officer (PIO) or communications counsel. The PIO may answer procedural questions about the court or opinions but does not comment on the substance of rulings. As noted above, many courts stated that a policy of the court is that “the opinion speaks for itself.” Justices do not give interviews regarding specific opinions, and judicial canons in a number of states prevent justices from specifically commenting on proceedings or opinions. However, 28 states indicated that justices are available to speak with media representatives and may comment on opinions in a general way to help describe the work of the court. Twenty-two states indicated that they distribute opinions directly to media representatives or to subscribers who have signed up to be notified immediately when an opinion has been released.

Providing advance notice regarding opinions to the media is less common, but some states provide advance notice to interested audiences via the web or an e-mail notification that an opinion will be released, for example, advising on a Friday that a specific case opinion will be released on the following Monday. Press releases are rare but do accompany high-profile or complicated cases and may include plain-language summaries. Seventeen states indicated that they have a bench-bar committee to discuss media access and appropriate interaction with the media, and 21 states stated that they offer or participate in programs to educate the media about the judicial branch (for example, “law schools” for the media) and vice versa. These kinds of partnerships, including engagement with media representatives to develop press release protocols, may help to facilitate understanding and recognition of the constraints under which reporters or stakeholders operate (for example, meeting print deadlines or understanding rulings that impact state-wide policy).

Using the web to enhance access, participation, and understanding

States are focusing on using the web to address procedural fairness concerns regarding opinions in a variety of ways. For example, some use a standardized process for publishing court opinions where opinions are simultaneously released to the parties and the public via the web or schedule a time of the week when opinions are posted and released. Opinions are most commonly posted as PDF files.³⁰ Courts are enhancing search mechanisms, and 34 states indicated that opinions are searchable on their court web page.

State courts are also using the web to highlight cases of interest and related case documents, and some states, such as Texas and Florida, broadcast all oral arguments live on the web or public television. Courts use the web to provide more intuitive navigation to reach and educate specific court audiences—for example, web pages directed to attorneys, educators, and members of the public. Social media is also emerging as a tool to alert audiences regarding opinions or activities of the court. Fifteen states currently use or are considering RSS feeds to communicate court news, including opinions; eight states use Twitter; and two states use Facebook or YouTube.

Improving law-related education and outreach

Courts also use various methods to improve law-related education and outreach to the public. Although these efforts do not exclusively focus on opinions, they do relate to perceptions of procedural fairness because they teach about the courts, enhance understanding regarding the role of the court, and engage communities on a local level. Thirty-nine states offer some form of public education programs, such as educational web content or direct outreach to students by local judges and attorneys visiting classrooms. Thirty-three states routinely conduct oral argument in high schools or venues other than court buildings.

In 2010, The Supreme Court of California hosted its annual special off-site educational session to improve public understanding of the courts and to provide local students with a rare view of how the appellate

courts work. An expanded background summary of the case is prepared, which contains a plain-language description of the case and issues to be decided. Hundreds of students from all nine counties in the Fifth Appellate District headquartered in Fresno, California, were able to see the Supreme Court argue cases of statewide importance. The session was broadcast live by Valley Public Television and the California Channel, a statewide cable network with 5.6 million viewers. Additional educational materials for the special session were placed on the public television station's special website in order to reach interested audiences and provide resources in multiple forums. All appellate courts in California conduct oral argument outreach in their communities and involve local judges, teachers, students, media, and lawyers.

Several states responded that they are focusing on law-related education efforts, including professional development programs that are offered to teachers with an emphasis on civics related to the judicial branch. In these programs, teacher and student participants interact with judges and attorneys and increase their knowledge about the role and operations of the courts, specifically in Arkansas, California, Colorado, Florida, Kansas, Massachusetts, Michigan, North Dakota, Pennsylvania, Rhode Island, South Carolina, Tennessee, West Virginia, and Wisconsin.

V. OPINION STUDY REGARDING THE SAME-SEX MARRIAGE CASES IN CALIFORNIA

This section will use a case study to illustrate the California Supreme Court's communications strategy with regard to a particularly high-profile issue. Despite a number of legal actions that involved challenges to the executive, legislative, and public's power to determine policy, one result of the communications strategy was that the media was well informed and public confusion was minimized.

Deciding who has the right to marry

Over the past two decades, whether same-sex couples have the right to marry has been an evolving state issue determined by public vote, state legislatures, and the courts. The history of the same-sex marriage cases in California, where a high court was asked

to decide who is allowed to marry in the midst of a highly charged emotional and political environment, provides a case study regarding the role of the courts and the evolution of the law, the balancing of public and media demands for access, and efforts by the court to provide respectful and clear communication.³¹ In 2000, California voters approved an initiative statute, the Defense of Marriage Act (Proposition 22), which recognized marriage only between a man and a woman. On May 15, 2008, California's highest court voted 4-3 to overturn the statutory ban on the grounds that it was unconstitutional (*In re Marriage Cases*, S147999). After the court's ruling and before the passage of Proposition 8 (a constitutional amendment passed by voters in November 2008 that added language to the constitution to only recognize marriage between a man and a woman), California followed Massachusetts to become the second state in the nation to allow same-sex marriage.³² The court not only legalized same-sex marriage but also extended to sexual orientation the same broad protections against bias previously saved for race, gender, and religion.

High public interest and accommodating public and media demands

To accommodate high public interest in the California Supreme Court proceedings—media requests were received from all over the world and numerous parties and advocacy groups filed extensive legal briefs—the California Supreme Court took the following steps:

- The court dedicated a “high-profile case” web page to provide online access to case documents and to increase public access to court information. The web page provided online access to all briefs filed in the marriage cases and ultimately archived all related case information (for example, case calendars, documents, and history; links for the public to watch hearing broadcasts; press releases; and information about the Supreme Court of California). A media advisory was also released to the press and public to

alert them regarding the web page and its contents.

- The court notified the public and media one month in advance (on February 6, 2008) that the California Supreme Court would hear oral arguments in the marriage cases on March 4, 2008. The advisory provided the history of the cases and their consolidation and also explained in plain language that “in these cases, the challengers contend that the current California marriage statutes are unconstitutional in limiting marriage to opposite-sex couples and denying same-sex couples access to the designation of marriage.” It also included California Supreme Court procedure and timelines for a decision: “Under the applicable court rules, the Supreme Court generally issues a decision, through a written opinion, within 90 days of oral argument.”
- To increase public access to the court session, the California Supreme Court designated a public affairs cable network to provide a live TV broadcast of the oral argument session (a public and media advisory provided a link to find cable companies that carried the network). Oral arguments were also broadcast live for interested audiences in an overflow viewing auditorium within the California Supreme Court building and on a large television screen for crowds gathered in the square outside San Francisco City Hall.
- When the California Supreme Court's 121-page opinion was released on May 15, 2008, the court provided notice of a specific time of day in the morning when the opinion would be issued, and at that specific time simultaneously issued hard copies and posted

the opinion on a public website. At the same time, the court issued a 7-page news release that summarized previous court action and the instant case history, the majority opinion, and the concurring and dissenting opinions. This news release had been developed in consultation with supreme court attorneys and communications staff to ensure that the content was accurate and appropriately stated the issues and holdings. The news summary also provided a web link to access the full opinion as a PDF file.

CONCLUSION

By paying critical attention to the key elements of procedural fairness (voice, neutrality, respect, and trust), justices and court staff can alleviate public confusion or dissatisfaction with the courts through the clear communication of court opinions. By focusing on how opinions are delivered and ensuring that the public understands the substance of rulings and that all voices have been heard, the legitimacy of the courts is reinforced.

Application of this policy will have positive implications regarding support for supreme courts by other branches of government and by the public at large, audiences that are impacted both by opinions that address narrowly focused, particular issues of law and by wide-ranging opinions that affect social policy statewide. Because the policy of a high court is often that “the opinion speaks for itself,” and justices are prevented from discussing specific rulings, courts are helping audiences with tools to better understand sometimes complex and lengthy rulings. As information moves faster and faster through social media and instantaneous notification, audiences expect more clarity and helpfulness when they are directed to review and digest a particular outcome.

Audiences today for state supreme court opinions represent a diverse body—members of the public, government stakeholders, media and lawyers, and

By focusing on how opinions are delivered and ensuring that the public understands the substance of rulings and that all voices have been heard, the legitimacy of the courts is reinforced.

interested parties from all around the world—that needs to understand the work of the courts. Opinions must reassure the public that the court has deliberated carefully and acted as a neutral body. Plain-language summarization, transparency, instant notification and access via the web, as well as improved collaboration with media and education partners, are all helping to make high court opinions less difficult to comprehend and the workings of the court more accessible and understandable to wider audiences.

AVERAGE LENGTH OF 16 STATE SUPREME COURT OPINIONS, 1930 – 1932

STATE	OPINION LENGTH 1932	OPINION LENGTH 1931	OPINION LENGTH 1930	POPULATION 1930	NUMBER OF JUDGES OR JUSTICES ON BENCH (1930 Supreme Court)
<i>California</i>	1,973 words	1,989 words	1,945 words	5,677,251	7
<i>Florida</i>	2,212	2,310	1,872	1,468,211	6
<i>Georgia</i>	2,571	2,294	2,703	2,908,506	6
<i>Illinois</i>	2,240	2,265	2,194	7,630,654	7
<i>Indiana</i>	1,751	1,573	2,428	3,238,503	5
<i>Massachusetts</i>	1,822	2,372	1,976	4,249,614	7
<i>Michigan</i>	1,588	1,437	1,563	4,842,325	8
<i>New Jersey</i>	1,552	1,475	1,778	4,041,334	9
<i>New Hampshire</i>	1,760	2,134	1,817	465,293	5
<i>New York</i>	1,941	2,270	1,728	12,588,066	7
<i>Ohio</i>	1,609	1,756	1,947	6,646,697	7
<i>Pennsylvania</i>	2,218	1,692	1,660	9,631,350	7
<i>Texas</i>	2,488	2,244	2,463	5,824,715	3
<i>Utah</i>	3,700	4,345	3,979	507,847	5
<i>Vermont</i>	1,525	1,481	1,896	359,611	5
<i>Virginia</i>	2,651	3,121	3,811	2,421,851	8

AVERAGE LENGTH OF 16 STATE SUPREME COURT OPINIONS, 2008 – 2010

STATE	OPINION LENGTH 2010 (Jan–June)	OPINION LENGTH 2009	OPINION LENGTH 2008	POPULATION 2010	NUMBER OF JUDGES OR JUSTICES ON BENCH (2010)	CONSTITUTIONAL REQUIREMENTS REGARDING OPINIONS
<i>California</i>	11,221 words	11,537 words	12,702 words	37,253,956	7	Cal. Const. art. VI, §§ 11a, 14 Cal. Pen. Code § 1239
<i>Florida</i>	5,101	7,250	7,057	18,801,310	7	Fla. Const. art. V, § 3
<i>Georgia</i>	2,091	2,095	1,922	9,687,653	7	Ga. Const. art. VI, § 6, Para. II
<i>Illinois</i>	6,401	7,108	6,674	12,830,632	7	Ill. Const. art. VI, § 4
<i>Indiana</i>	3,407	3,823	3,754	6,483,802	5	Ind. Const. art. VII, § 4
<i>Massachusetts</i>	3,507	3,756	3,593	6,547,629	7	Mass. Const. art. CI § 3
<i>Michigan</i>	5,985	8,455	7,375	9,883,640	7	Mich. Const. art. VI § 4, 6
<i>New Jersey</i>	5,490	6,864	6,363	8,791,894	7	N.J. Const. art. 6 § 2
<i>New Hampshire</i>	3,385	2,788	3,123	1,316,470	5	N.H. Sup. Ct. Rule 7
<i>New York</i>	2,474	2,592	2,402	19,378,102	7	N.Y. Const. art. VI § 7
<i>Ohio</i>	3,472	3,450	3,770	11,536,504	7	Ohio Const. art. IV § 4.02
<i>Pennsylvania</i>	3,821	4,413	3,671	12,702,379	7	Pa. Courts (42 Pa.C.S. §§721-726)
<i>Texas</i>	1,104	3,699	3,689	25,145,561	9	Tex. Const. art. V, § 3,5 Tex. R. App. P. Rule 47
<i>Utah</i>	6,168	4,804	4,388	2,763,885	5	Utah Const. art. VIII, § 3
<i>Vermont</i>	3,356	3,468	3,447	625,741	5	Vt. Const. § 30
<i>Virginia</i>	2,720	2,880	2,831	8,001,024	7	Va. Const. art. VI, § 1

NUMBER AND AVERAGE LENGTH OF CALIFORNIA DEATH PENALTY APPEALS, 2008 – 2010

	OPINION LENGTH 2010 (Jan–June)	OPINION LENGTH 2009	OPINION LENGTH 2008
<i>Death Penalty Appeal</i>	26,672 words	23,027 words	25,112 words
<i>Ordinary Appeal</i>	11,221 words	11,537 words	12,702 words

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- 1 E. Allan Lind & Tom Tyler, *The Social Psychology of Procedural Justice* (1988); Tom R. Tyler, *Social Justice: Outcome and Procedure*, 35 *Int'l J. Psychol.* 117 (2000).
- 2 Douglas Denton, *Procedural Fairness in the California Courts*, 44 *Ct. Rev.* 44 (2007).
- 3 David B. Rottman, *Trust and Confidence in the California Courts*, Judicial Council of California (2005).
- 4 Public Agenda & Doble Research Associates, *Trust and Confidence in the California Courts: Public Court Users and Judicial Branch Members Talk About the California Courts*, Judicial Council of California (2006).
- 5 After the adoption of the Massachusetts Constitution in 1780, the Superior Court of Judicature (established in 1692) was changed to the Supreme Judicial Court. The court operates under the oldest, still functioning written constitution in the world.
- 6 Gerald Lebovits, Alifya V. Curtin & Lisa Solomon, *Ethical Judicial Opinion Writing*, 21 *Geo. J. Legal Ethics* 237 (2008).
- 7 *The Supreme Court of California: Containing the Internal Operating Practices and Procedures of the California Supreme Court* (2007 edition).
- 8 Lebovits, et al., *Ethical Judicial Opinion Writing* (2008), *supra*.
- 9 Cal. Const. 1879, art. VI, § 2. The Texas Rules of Appellate procedure currently states that “The court of appeals must hand down a written opinion that is as brief as practicable but that addresses every issue raised and necessary to final disposition of the appeal.” *Tex. R. App. P.* 47.
- 10 Word count: based on an average of 25 lines per page in *Courier New* 12 pt., approximately 250 words per page.
- 11 See the attached summary chart, *infra*. Information regarding the numbers of opinions issued by the various state supreme courts is included in the appendices of findings from a national survey conducted by the Conference of Chief Justices, the Administrative Office of the Courts of California, and the National Center for State Courts.
- 12 William C. Vickrey, *Opinion Filings and Appellate Court Productivity*, 78 *Judicature* 47 (1994).
- 13 The 1994 California study found that the court’s capital opinion case load (the percentage of all opinions that were capital cases) increased almost eight times from 1970 to 1993 (Vickrey, *supra*). Capital cases generally, and capital affirmances in particular, consume a far greater amount of the court’s time and typically require the court to analyze and resolve numerous complex and fact-specific issues. The attached chart shows that for the period 2008–2010, the average word count for a California death penalty appeal opinion was 24,937 words, or approximately 99.75 pages (excluding death penalty appeals, the average California opinion was 7,332 words, or approximately 29 pages). An area for further research may be to identify the impact that death penalty cases may be having on the growth and complexity of state Supreme Court opinions, along with overall national trends regarding rates of opinion concurrences and dissents.
- 14 Steve Leben, *Thoughts on Some Potential Appellate and Trial Court Applications of Therapeutic Jurisprudence*, 24 *Seattle U. L. Rev.* 467 (2000).
- 15 Judith S. Kaye, *Judges as Wordsmiths*, 69 *N.Y.St.B.J.* 10, 11 (Nov. 1997).
- 16 Rottman, *Trust and Confidence in the California Courts*, *supra* note 3.
- 17 Lebovits et al., *Ethical Judicial Opinion Writing*, *supra* note 6.
- 18 Irving R. Kaufman, *Helping the Public Understand and Accept Judicial Decisions*, 63 *A.B.A.J.* 1567 (1977).
- 19 See, for example, California Code of Judicial Ethics, Judicial Canon 3B(9) [“A judge shall not make any public comment about a pending or impending proceeding in any court, and shall not make any nonpublic comment that might substantially interfere with a fair trial or hearing.”]
- 20 Kaufman, *Helping the Public Understand and Accept Judicial Decisions*, *supra* note 18.
- 21 See the attached summary chart. For example, the Supreme Court of Texas is the court of last resort for noncriminal matters, including juvenile delinquency, which the law considers to be a civil matter and not criminal, in the state of Texas. A different court, the Texas Court of Criminal Appeals, is the court of last resort for criminal matters. In California, the Supreme Court of California decides every death penalty appeal in a written opinion. See Cal. Pen. Code, § 1239; Cal. Const., art. VI, § 11(a), § 14. A petition for a writ of habeas corpus in a California death penalty case may be decided without an opinion by a brief order

stating simply that the petition is denied, but opinions in death penalty appeal cases must communicate substantial fact- and legal-intensive arguments and describe issues that are complex, numerous, and often repetitious.

22 California Court of Appeal unpublished opinions are posted on the California courts website for 60 days solely as public information about actions taken by the Court of Appeal. California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published.

23 Rottman, Trust and Confidence in the California Courts, *supra* note 3.

24 *Id.* See also Nathalie Des Rosiers, From Telling to Listening: A Therapeutic Analysis of the Role of Courts in Minority-Majority Conflicts, 54 Ct. Rev. (2000); Amy D. Ronner, Therapeutic Jurisprudence on Appeal, 54 Ct. Rev. (2000) (“the court must make the parties know that they have a voice, one that is not being silenced”).

25 See Garrett M. Graff, Courts Are Conversations: An Argument for New Ways of Listening by Court Leaders, Harvard Executive Session for State Court Leaders in the 21st Century (forthcoming 2012).

26 The 2005 Trust and Confidence study found that self-rated familiarity with the California courts is low for the public, unchanged since 1992. However, knowledge of the courts increases with exposure to court information in newspapers, the web, televised trials, and, most importantly, the court itself. Rottman, Trust and Confidence in the California Courts, *supra* note 3.

27 An appendix is provided with this paper that contains all findings from the 2010–2011 survey. Throughout this section, references to individual states and court practices are derived from survey findings.

28 Judicial Council of California, Commission for Impartial Courts: Final Report, Recommendations for Safeguarding Judicial Quality, Impartiality, and Accountability in California (December 2009), at 64

29 *Id.*

30 PDFs are a common format but are uniquely unfriendly to the web, since the files are difficult for search engines to locate and for others to link to. California is beginning to look at posting more material on the California courts website as plain text in order to enhance access and readability.

31 In 2004, Mayor Gavin Newsom gained national attention when he directed the San Francisco city-county clerk to issue marriage licenses to same-sex couples, in violation of the current state law. Subsequently, a combination of individual court cases (in the California superior court, Court of Appeal, and Supreme Court) and a statewide ballot initiative (Proposition 8) have decided the rights of gays and lesbians to marry. Extensive public and media awareness in these matters has helped to explain and demonstrate how a supreme court settles important questions of law and significantly impacted development of national policy regarding same-sex marriage.

32 On May 26, 2009, the California Supreme Court voted 6–1 to uphold Proposition 8 but also ruled that those same-sex couples who married between June and November 2008 might remain married. In August 2010, in a separate federal challenge, U.S. District Chief Judge Vaughn R. Walker overturned Proposition 8 but also stayed his ruling pending appeal. The U.S. Court of Appeals for the Ninth Circuit indefinitely extended the District Court’s stay, stopping any new same-sex marriages in the state of California. The federal Court of Appeals heard oral argument in December 2010, and on February 7, 2012, in a 2–1 decision, affirmed Judge Walker’s decision declaring the Proposition 8 ban on same-sex marriage to be unconstitutional. *Perry v. Brown*, Nos. 10-16696, 11-16577 (9th Cir. opinion filed Feb 7, 2012). The court of appeal decision continued the stay on Judge Walker’s ruling pending further appeal. The marriages of more than 18,000 same-sex couples that took place between the time of the *In re Marriages* opinion and before Proposition 8 was passed remain valid.

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