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ABSTRACT

This Article examines the questions that Supreme Court Justices ask during oral argument. The authors content-coded questions asked in fifty-three cases argued during the October 2009, 2010, and 2011 terms—a total of 5,115 questions. They found that the Justices vary significantly in the extent to which they ask about different aspects of a case, including threshold issues, precedent, facts, external actors, legal argument, and policy. They also found that the Justices were more likely to ask policy-oriented questions in education cases than in constitutional cases that did not arise in a school setting. The authors included a case study of Camreta v. Greene to illustrate with specific examples each current Justice's questioning style. The Study concludes that oral argument plays an important role in the Supreme Court's decision-making process, giving the Justices the opportunity to ask questions that are of concern to them.

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> *"Well, the same, it seems to me, would be true, say, for the market in emergency services: police, fire, ambulance, roadside assistance, whatever. You don't know when you're going to need it; you're not sure that you will. But the same is true for health care. . . . So, can the government require you to buy a cell phone because that would facilitate responding when you need emergency services? You can just dial 911 no matter where you are?" – Chief Justice John G. Roberts* [1]
>
> *"Could you define the market—everybody has to buy food sooner or later. So, you define the market as food; therefore, everybody's in the market; therefore, you can make people buy broccoli." – Justice Antonin Scalia* [2]
>
> *"Assume for the moment that this is unprecedented. This is a step beyond what our cases have allowed, the affirmative duty to act to go into commerce. If that is so, do you not have a heavy burden of justification? I understand that we must presume laws are constitutional, but, even so, when you are changing the relation of the individual to the government in this, what we can stipulate is, I think, a unique way, do you not have a heavy burden of justification to show authorization under the Constitution?" – Justice Anthony Kennedy* [3]
>
> *"Before you move on, could you express your limiting principle as succinctly as you possibly can?" – Justice Samuel Alito* [4]

I. INTRODUCTION

The Justices of the United States Supreme Court asked the foregoing questions during oral argument on March 27, 2012, in *National Federation of Independent Business v. Sebelius*.[5] The issue before the Court that day was whether the individual mandate provision of the Patient Protection and Affordable Care Act[6]—more commonly known as

[1] Transcript of Oral Argument at 5-6, Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/11-398-Tuesday.pdf. March 27, 2012, was the second day of three days of oral argument on the three cases—*National Federation of Independent Business v. Sebelius*; *Dep't of Health and Human Services v. Florida*; and *Florida v. Dep't of Health and Human Services*—the Supreme Court consolidated together to rule on challenges to the Patient Protection and Affordable Care Act.
[2] *Id.* at 13.
[3] *Id.* at 11-12.
[4] *Id.* at 44.
[5] 132 S. Ct. 2566 (2012).
[6] Pub. L. No. 111-148, 124 Stat. 119 (2010). Although the majority of the ACA has been codified under Title 42 of the U.S. Code, Chapter 157, Quality Affordable Health Care for All Americans, 42 U.S.C. §§

the ACA—was within Congress's regulatory powers. As these questions illustrate, oral argument before the Supreme Court provides an opportunity for the Justices to probe any aspect of the case they wish to examine. Justices often express different concerns through their questioning. As University of Minnesota professor and Supreme Court observer Timothy Johnson has noted, oral argument affords the Justices a chance to mine for information on their own terms.[7] During oral argument, attorneys must answer whatever questions the Justices throw at them—there is no place to hide. This process contrasts starkly with the litigants' written briefs, wherein attorneys emphasize (and exclude) what they choose.[8] Oral argument thereby provides a unique window into the Justices' analytical styles.

Against that background, this Article argues that the Justices' questions reflect their thinking, and that the Justices use oral argument to ask questions about topics that concern them. Viewing oral argument as revelatory of the Justices' mindsets spurs many questions: If the Justices *can* ask about any feature of the case before them, what types of questions *do* they ask? Are certain types of information more important to one Justice than to another? Given that the Justices have their own personal policy preferences and political leanings, to what extent do they ask about the implications of their decisions or broader policy concerns?

This Study attempts to answer those questions. Part II of this Article presents an overview of previous research that focused on questions asked during oral argument, including research conducted by Professor Johnson. Inspired by Professor Johnson's research, Part III of this Article provides an expanded quantitative content analysis of oral argument transcripts to identify the types of questions asked by each Justice in fifty-three recent cases.[9] Part IV examines resulting data to provide a greater understanding of both the purpose of oral argument and the approach to questioning taken by individual Justices. The data illustrate how Justices vary in the types of questions they ask and the extent to which they each focus on policy issues during oral argument. Part V includes an in-depth analysis of a recent case, *Camreta v. Greene*.[10] This qualitative analysis includes specific examples of the types of questions most commonly asked by the current Justices. Taken together, information from quantitative and qualitative data provide insight into each Justice's approach to oral argument and allow for a more nuanced understanding of the oral argument process.

II. PREVIOUS RESEARCH ON QUESTIONS ASKED DURING ORAL ARGUMENT

Justices and scholars alike disagree about the importance and function of oral argument. Justice Clarence Thomas claimed that Justices almost always have their minds

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18001-18121 (2012), the individual mandate provision appears in the Internal Revenue Code, 26 U.S.C. § 5000A (2012).

[7] TIMOTHY R. JOHNSON, ORAL ARGUMENTS AND DECISION MAKING ON THE UNITED STATES SUPREME COURT 13 (Robert J. Spitzer ed., 2004).

[8] *See id.* at 12.

[9] Beginning with the October 2006 term, the Court has made the transcripts of oral arguments available to the public on its website, www.supremecourt.gov, on the same day an argument is heard by the Court. See *infra* Part III.A for a description of how these cases were selected.

[10] 131 S. Ct. 2020 (2011).

made up before hearing oral argument,[11] which indicates a limited role for oral argument in the Court's decision-making process. To that end, Justice Samuel Alito, too, has described oral argument as being unimportant.[12] In contrast, Professor Lawrence Wrightsman argued that oral arguments are influential because they allow the Justices to explore the application of arguments set out in written briefs, and also provide a forum in which the Justices can communicate with and attempt to sway their colleagues.[13] Former Justice Harry Blackmun agreed that oral argument is important, explaining, "A good oralist can add a lot to a case and help us in our later analysis of what the case is all about. Many times confusion [in the brief] is clarified by what the lawyers have to say."[14]

In light of that disagreement, this Article examines questions asked at oral argument as a means to explore how Justices use that forum. Professor Timothy Johnson's work underscoring the role of oral argument as an information-gathering tool[15] served as the starting point for this Study. Johnson postulated that oral argument provides a unique opportunity for the Justices to gather information; briefs submitted by the parties by definition present a one-sided view of the case.[16] To examine the types of questions asked during oral argument, Johnson developed a coding scheme of six distinct categories to classify arguments set forth in written briefs and questions asked at oral argument.[17] He applied that scheme to a random sample of seventy-five cases heard between 1972 and 1986.[18] Johnson's scheme included the following content categories: Policy; External Actors; Precedent; Threshold Issues; Legal Arguments; and Facts.[19] Johnson concluded that oral arguments are an important method by which the Justices collect information relevant to policy issues.[20] The quantity of Policy questions (42%) was significantly greater than the number of questions asked about constitutional issues (Legal Arguments) (10%), Precedent (9%), or Threshold Issues (4%).[21]

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[11] *See* LAWRENCE S. WRIGHTSMAN, ORAL ARGUMENTS BEFORE THE SUPREME COURT: AN EMPIRICAL APPROACH 25 (Ronald Roesch, ed., 2008).

[12] Deb Peterson, *Supreme Court Justice Samuel Alito Speaks at St. Louis Law Day*, STL TODAY, May 16, 2011, http://www.stltoday.com/news/local/columns/deb-peterson/article_873af5a6-8008-11e0-8324-001a4bcf6878.html.

[13] WRIGHTSMAN, *supra* note 11, at ix. *See also* James C. Phillips & Edward L. Carter, *Oral Argument in the Early Roberts Court: A Qualitative and Quantitative Analysis of Individual Justice Behavior*, 11 J. APP. PRAC. & PROCESS 325, 329 (2010).

[14] Philippa Strumm, *Change and Continuity on the Supreme Court: Conversations with Justice Harry Blackmun*, 34 U. RICH. L. REV. 285, 298-304 (2000). Similarly, Justice Ginsburg commented, "I have seen few victories snatched at oral argument from a total defeat the judges had anticipated on the basis of the briefs. But I have seen several potential winners become losers in whole or in part because of clarification elicited at argument. Ruth Bader Ginsburg, *Remarks on Appellate Advocacy*, 50 S.C. L. REV. 567, 570 (1999).

[15] *See* JOHNSON, *supra* note 7, at 21-56.

[16] *Id.* at 23-24.

[17] *Id.* at 32-35.

[18] *Id.* at 28-29.

[19] *Id.* at 34-35. Johnson defined "Policy" as "questions about legal principles the Court should adopt, courses of action the Court should take, or a Justice's beliefs about the content of public policy." *Id.* at 34. "External Actors" referred to non-parties' preferences about the outcome of a case, hypothetical questions, and the potential implications of a decision. *Id.* "Precedent" referred to previous Court decisions; "Threshold Issues" included matters such as jurisdiction; "Legal Arguments" included constitutional provisions; and "Facts" were questions about the facts of what occurred in the case. *Id.* at 34-35.

[20] *Id.* at 55-56.

[21] *Id.* at 53.

Apart from Johnson's study, there has been limited empirical research on the content of oral argument.[22] One study focused on the role of laughter at the Court.[23] Another analyzed the type of language the Justices use at oral argument.[24] Johnson also examined whether the quality of a lawyer's oral argument affected the final judgment on the merits, finding that it did.[25] Professors James Phillips and Edward Carter examined how talkative the Justices were during oral argument, and found that the more the Justices spoke to one party, the less likely they were to vote for that side.[26] These general empirical studies of oral argument have not specifically addressed the content of questions asked at oral argument. Thus, this Study aims to analyze the content of those questions in order to discern the information Justices seek at oral argument.

III. AN EMPIRICAL STUDY FOCUSED ON POLICY QUESTIONS: METHODOLOGY

This Study expands upon Professor Johnson's research. Johnson was able to analyze only aggregate data about the Court. Since 2004, however, the official transcripts of oral arguments have identified the Justices by name, facilitating examination of each Justice individually, as well as the Court collectively. This Study examines the types of questions asked by each Justice and also focuses on whether the Justices differed in the extent to which they asked questions about policy.

A. Sample Set

The Sample consisted of fifty-three cases argued during the October 2008, 2009, and 2010 terms.[27] The cases shared the following criteria: (1) nine Justices were present for the oral argument; (2) the Court reached a decision in the case (i.e., did not set for re-argument or dismiss as improvidently granted); and (3) each case either raised a

[22] *See, e.g.*, James C. Phillips & Edward L. Carter, *Gender and U.S. Supreme Court Oral Argument on the Roberts Court: An Empirical Examination*, 41 RUTGERS L.J. 613 (2010) (assessing questions on an information-seeking continuum, and focusing on gender influence on the court); Lee Epstein, William M. Landes, & Richard A. Posner, *Inferring the Winning Party in the Supreme Court from the Pattern of Questioning at Oral Argument*, 39 J. LEGAL STUD. 433 (2010) (finding a correlation between the number of questions and number of words per question asked of a party at oral argument and the likelihood that the party will lose the case).

[23] *See* Ryan A. Malphurs, *"People Did Sometimes Stick Things in my Underwear" The Function of Laughter at the U.S. Supreme Court*, 10 COMM. L. REV. 48, 48-75 (2011). *See also* Adam Liptak, *A Taxonomy of Supreme Court Humor*, N.Y. TIMES, Jan. 24, 2011, http://www.nytimes.com/2011/01/25/us/25bar.html?_r=1&scp=1&sq=funniest%20supreme%20court%20Justice&st=cse.

[24] *See* Sarah A. Treul, Ryan C. Black & Timothy R. Johnson, *Jekyll and Hyde Questions from the Bench: Does the Emotional Nature of Supreme Court Justices' Questions Affect Their Votes on the Merits?* 1-28 (May 20, 2009) (unpublished working paper) (previous version of paper was presented at the 2009 meetings of the Midwest Political Science Association in Chicago, Illinois), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1407518.

[25] *See* Timothy R. Johnson, Paul J. Wahlbeck & James F. Spriggs, II, *The Influence of Oral Arguments on the U.S. Supreme Court*, 100 AM. POL. SCI. REV. 99, 99-113 (2006).

[26] Phillips & Carter, *supra* note 13, at 388. *See also id*. at 329-30 (noting other studies that have found the same correlation). In their study, Phillips and Carter categorized questions as "genuine," "counterfeit or pseudo-questions," and "non-questions." *Id*. at 331.

[27] A complete list of cases by term is found *infra* Appendix A.

constitutional issue, was an education case, or both.[28] The sample included a total of nine education cases, six of which addressed constitutional issues and three of which addressed statutory questions.[29]

Although the majority of cases the Court decides each year do not involve a constitutional issue,[30] this Study used cases raising constitutional issues for two reasons. First, although the Court explores the policy implications of every case, cases requiring constitutional interpretation allow the Court to map out the law in the first instance. Thus, constitutional cases are particularly ripe for discussion of the policy implications of the Court's decision. In contrast, in cases demanding statutory interpretation, the Court's task is to apply the policy that the legislature has already developed. As Supreme Court journalist Dahlia Lithwick noted, "In many, many ways, this is a policy-setting institution. They're not simply common law judges who decide the case in front of them."[31] Second, the cases answering constitutional questions are often the cases that raise the most controversial social issues with the farthest-reaching policy implications. Education cases were included in this study as an example of a type of case that often implicates important policy issues that affect a majority of the country. School officials must make complex judgments about issues such as search and seizure, free speech, and religious activities at school, and they often make the argument that the Justices should defer to their (the school officials') judgments in making school policies.[32] Given this recurring policy argument, the authors wondered whether the Justices would be more or less likely to ask policy questions in this category of cases as compared to constitutional cases.

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[28] "Education case" was defined as either arising from a dispute in a school setting or concerning an educational issue.

[29] The education cases were the following:

2008 Term

- Ysursa v. Pocatello Educ. Ass'n, 555 U.S. 353 (2009) (First Amendment issue).
- Fitzgerald v. Barnstable Sch. Comm., 555 U.S. 246 (2009) (Title IX issue in K-12 school setting).
- Horne v. Flores, 557 U.S. 433 (2009) (funding for English Language Learner programs under Equal Educational Opportunities Act).
- Safford Unified Sch. Dist. No. 1 v. Redding, 557 U.S. 364 (2009) (Fourth Amendment issue).
- Forest Grove v. T.A., 557 U.S. 230 (2009) (issue under the Individuals with Disabilities Education Act).

2009 Term

- Christian Legal Soc'y Chapter of Univ. of Cal., Hastings Coll. of Law v. Martinez, 130 S. Ct. 2971 (2010) (First Amendment issue).

2010 Term

- J.D.B. v. North Carolina, 131 S. Ct. 2394 (2011) (application of *Miranda* rights in school setting).
- Ariz. Christian Sch. Tuition Org. v. Winn, 131 S. Ct. 1436 (2011) (Establishment Clause issue).
- Camreta v. Greene, 131 S. Ct. 2020 (2011) (Fourth Amendment issue).

[30] In 2007, for example, Baum reports that 73% of the cases had no constitutional issue decided. LAWRENCE BAUM, THE SUPREME COURT 157 (10th ed. 2010).

[31] Digital recording: Bob Edwards Weekend, Sirius XM Satellite Radio (May 29, 2010) (on file with author).

[32] *See, e.g.*, Brief for National School Boards Association and American Association of School Administrators as Amici Curiae Supporting Petitioners at 18-19, *Safford*, 557 U.S. 364 (No. 08-479), 2009 WL 641332, at *18-19.

B. Expanding the Policy Question Category

In this Study, every question asked during oral argument was coded using a modified version of Johnson's categories.[33] This Study also looked more closely at different types of policy questions, whereas Johnson employed one general Policy category. To provide additional insight into the Justices' concerns, this Study divided the Policy category into four sub-categories. When a Justice asked a hypothetical question or a question about an extension or application of the decision, the question was considered a policy question and was labeled Policy A. Johnson included these questions in his "External Actors" category, but not every such question actually referred to the impact on or preference of external actors; in this Study, only questions that directly asked about such an impact were coded as "External Actors."

This Study further divided Johnson's Policy category into three other parts: questions about legal principles that the Court should adopt were coded Policy B; questions about courses of action that the Court should take were coded Policy C; and questions that revealed a Justice's beliefs about the content of public policy were coded Policy D. Finally, in this Study, questions were not double coded into two separate categories (as they were in Johnson's study).

An example of each type of question is set out below:

Code	Example
Threshold Questions that ask about whether the Court should hear the case (e.g., whether the case is moot)	"It takes two to tango, and a case or controversy requires somebody on the other side who cares a fig about the outcome. And here, S.G., . . . the young woman affected in the case, has moved to another state . . . making it virtually certain that she'll never confront this situation again."[34]
Precedent Questions that ask specifically about a prior case	"But in *Flast*—I've looked at it again briefly, and it seemed to use that wonderfully precise word 'nexus.'"[35]
Facts Questions about what happened leading to the case being argued	"Was there prior experience in this particular school? Were there prior occasions on which students had been strip-searched and contraband found?"[36]

[33] A copy of the coding guidelines is included *infra* Appendix B. Three independent coders coded each question. If there was any disagreement among the three coders, a fourth coder made the final decision about the appropriate category for that question.

[34] Transcript of Oral Argument at 6-7, *Camreta*, 131 S. Ct. 2020 (No. 09-1454) [hereinafter *Camreta* Oral Argument].

[35] Transcript of Oral Argument at 55-56, *Ariz. Christian Sch. Tuition Org.*, 131 S. Ct. 1436 (No. 09-987).

[36] Transcript of Oral Argument at 5, *Safford*, 557 U.S. 364 (No. 08-479).

External Actors Questions about how a decision in the case being argued affects outside parties, such as school officials or Congress	"Okay. But I think we've got to assume that Congress had some concern for the parents who correctly say, this IEP is no good, it just can't be done in the school system and the kid needs a special school. In that case . . . your answer may be that's the exceptional case and it shouldn't drive [the] inferences to be drawn about congressional intent. But in that case, if the district and the parents are at good faith loggerheads, it can go on for a long, long time, can't it?"[37]
Legal Argument Questions about petitioner/respondent's argument in the case before the Court	"In other words, you agree with Justice Kagan's criticism of those cases, and you said, yes, she's right; those cases were wrongly decided."[38]
Policy A Hypothetical questions or questions about extension or application of the decision	"But . . . if we hold in your favor in this case and the next school district says, all right, we're going to have classes in body cavity searches, then there would be no legal basis, if we accept your principle, for saying that's out of bounds as a matter of the Fourth Amendment, isn't that correct?"[39]
Policy B Questions about legal principles that the Court should adopt	"And there are differences. Some 15-year-olds know a lot more than some 17-year-olds, and so on. And . . . the facts that you're concerned about all go into the voluntariness inquiry, which is still pertinent after *Miranda*. Why don't we just put those facts into that inquiry and say, look, we've got one strict rule; everybody knows it, you hear it on TV all the time, people are given *Miranda* warnings; that part of it is done?"[40]
Policy C Questions about the course of action the Court should take	"There certainly, I would think, would be a problem if the right-to-work people can get there. And you are not going to let the unions get there. But I don't know the facts. So shouldn't we just send this case back and say: Please look at what the situation is?"[41]
Policy D Questions that reveal a Justice's beliefs about the content of public policy	"We don't want *Miranda* warnings to be given where they are unnecessary because they are only necessary to prevent coercion, and where there's no coercion, we want confessions, don't we? And the *Miranda* warnings deter confessions."[42]

[37] Transcript of Oral Argument at 11-12, *Forest Grove*, 557 U.S. 230 (No. 08-305) (finding that under the Individuals with Disabilities Education Act (IDEA), Forest Grove School District was required to reimburse T.A. for private special education services, in spite of the fact that T.A. had not previously received special education services at the public school, because the public school failed to provide free appropriate public education (FAPE) and the private school placement was appropriate).
[38] Transcript of Oral Argument at 12, *Ariz. Christian*, 131 S. Ct. 1436 (No. 09-987).
[39] Transcript of Oral Argument at 18, *Safford*, 557 U.S. 364 (No. 08-479).
[40] *Id.* at 14.
[41] Transcript of Oral Argument at 10-11, *Ysursa*, 555 U.S. 353 (No. 07-869) (finding for the state in a First Amendment challenge to an Idaho state law banning public employee payroll deductions for political activities).
[42] Transcript of Oral Argument at 51-52, *J.D.B.*, 131 S. Ct. 2394 (09-11121).

IV. FINDINGS

A. Frequency Data

The fifty-three cases included a total of 5115 questions. Questions asked in education cases (1084) constituted 21.2% of the total, while questions asked in non-education cases (4031) constituted 78.8%. The data regarding individual Justices set out below include statistics for retired Justices Stevens and Souter. The remainder of this Analysis, however, will focus only on the current members of the Court.

Table 1

Justice	Number of Questions Asked (% of total in Sample)[43]	Number of Cases in which Justice participated	Average Number of Questions Per Case
Antonin Scalia	1003 (19.6%)	53	18.9
John G. Roberts	798 (15.6%)	53	15.1
Ruth Bader Ginsburg	634 (12.4%)	53	12.0
Stephen Breyer	627 (12.3%)	53	11.8
Anthony Kennedy	520 (10.2%)	53	9.8
Samuel Alito	409 (8.0%)	53	7.7
John Paul Stevens	345 (6.7%)	40	8.6
Sonia Sotomayor	322 (6.3%)	29	11.1
David Souter	342 (6.7%)	24	14.25
Elena Kagan	115 (2.2%)	13	8.8
Clarence Thomas	0	53	0.0

These findings are consistent with previous research that found Justice Antonin Scalia to be a very active questioner,[44] and the widely reported fact that Justice Clarence Thomas has not asked a question during oral argument since February 22, 2006.[45]

[43] All percentages from this Study have been rounded to the nearest tenth of one percent.

[44] *See* Phillips & Carter, *supra* note 13, at 353-54; Joan Biskupic, *Roberts, Scalia Strike Similar Chords on Court*, USA TODAY, Apr. 10, 2007, http://www.usatoday.com/news/washington/2007-04-09-roberts-scalia_N.htm; SCOTUSBLOG, STAT PACK FOR OCTOBER TERM 2010 FINAL 15 (2011), *available at* http://sblog.s3.amazonaws.com/wp-content/uploads/2011/06/SB_OT10_stat_pack_final.pdf [hereinafter SCOTUSBLOG STAT PACK OT2010]. SCOTUSblog reports the following average number of questions per Justice per case for the October 2010 term:

Scalia: 25.8
Breyer: 20.3
Sotomayor: 19.2
Roberts: 18.2
Ginsburg: 14.0
Alito: 12.1
Kennedy: 11.0

B. Justices' Concern with Policy

Consistent with Johnson's findings,[46] 36.1% of the Justices' questions in this Study were about Policy. Of the 5115 total questions, 1848 questions concerned Policy, while the remaining 3267 questions fell under the other five content categories. Additionally, Justices varied in their focus on Policy. As a percentage of the Justice's total number of questions asked, Justice Alito asked the highest number of Policy questions of any current Justice (46.4% of his questions concerned Policy). Justice Ginsburg asked the lowest number of Policy questions (20% of her questions).[47] This difference is statistically significant.[48] Data regarding all of the current Justices' Policy questions are set out below:

Table 2

Justice	Percentage of Justice's Questions That Concerned Policy
Samuel Alito	46.4%
Stephen Breyer	42.8%
Anthony Kennedy	41.6%
Elena Kagan	36.6%
John G. Roberts	35.9%
Antonin Scalia	34.3%
Sonia Sotomayor	27.0%
Ruth Bader Ginsburg	20.0%
Clarence Thomas	0.0%

Kagan: 10.6
Thomas: 0

Id. These data also show that this bench is extremely "hot," with the Justices actively engaged in questioning and with Justice Sotomayor especially becoming a more active questioner over the past two terms. SCOTUSblog's Stat Pack for the October 2011 Term lists Justice Sotomayor as the second most active questioner in terms of average number of questions per case, behind only Justice Scalia. SCOTUSBLOG, STAT PACK FOR OCTOBER TERM 2011 FINAL 18 (2012), *available at* http://dailywrit.com/blog/uploads/2012/06/SCOTUSblog_Stat_Pack_OT11_final.pdf. According to SCOTUSblog, she asked an average of 21.3 questions per case in OT 2011, *id.*, and 19.2 questions per case in OT 2010. In our Sample, in contrast, Justice Sotomayor asked an average of 11.1 questions per case. *See supra* Table 1.

[45] *See, e.g.*, Adam Liptak, *No Argument: Thomas Keeps 5-Year Silence*, N.Y. TIMES, Feb. 12, 2011, http://www.nytimes.com/2011/02/13/us/13thomas.html.

[46] *See supra* note 21 and accompanying text.

[47] Excluding Justice Thomas, who did not ask any questions in the entirety of this sample.

[48] $c^2(9, N=5115)=117.22$, $p = .00$. Statistical significance levels indicate how likely it is that a reported result is due to chance. Here, with a significance level (p) of less than .01, there is a greater than 99% probability that the results are true and not the result of chance.

C. Individual Justices' Concerns[49]

1. Chief Justice John G. Roberts

Content Category	Percentage of Justice's Total Questions	
Threshold	0.1%	
Precedent	1.0%	
Facts	7.0%	
External Actors	0.5%	
Legal	55.5%	
Policy (Total)	35.9%	
Policy A (hypothetical)		20.2%
Policy B (legal principle)		4.3%
Policy C (action)		3.1%
Policy D (belief)		8.3%

The Chief Justice was the second most active questioner in this Study, positing 15.6% of the total questions.[50] Like his colleagues, the Chief Justice was more likely to ask about Legal Arguments than about any other topic. When questioning about Policy, the Chief Justice most often focused on hypothetical applications of the case at hand (Policy A); 20.2% of his questions fell into that sub-category. He asked more Policy A questions than any of the Associate Justices.[51]

2. Justice Antonin Scalia

Content Category	Percentage of Justice's Total Questions	
Threshold	0.3%	
Precedent	0.0%	
Facts	8.5%	
External Actors	0.4%	
Legal	56.6%	
Policy (Total)	34.3%	
Policy A (hypothetical)		14.8%
Policy B (legal principle)		3.1%
Policy C (action)		3.3%
Policy D (belief)		13.1%

Justice Scalia was the most active questioner at oral arguments in the Sample, posing 19.6% of the total questions asked.[52] He asked far more questions about advocates' Legal Arguments than any other type of question. Among his colleagues, Justice Scalia was the Justice most likely to ask a Policy D question, contributing 27.8% of the Court's total

[49] Justices listed in order of seniority.
[50] *See supra* Table 1.
[51] *See supra* Appendix C, Table 6.
[52] *See supra* Table 1.

questions that reveal the questioner's views about public policy issues (amounting to just over 13% of his own questions).[53] As the longest-serving Justice currently on the Court, Justice Scalia is well known for his aggressive and active style on the bench.[54] His willingness to reveal his policy opinions through his questions may be a function of his years of experience as a member of the Court as well as of his personality.

3. Justice Anthony Kennedy

Content Category	**Percentage of Justice's Total Questions**	
Threshold	0.0%	
Precedent	1.0%	
Facts	4.8%	
External Actors	0.8%	
Legal	51.9%	
Policy (Total)	41.6%	
Policy A (hypothetical)		18.7%
Policy B (legal principle)		6.0%
Policy C (action)		3.8%
Policy D (belief)		13.1%

Compared to the other Justices, Justice Kennedy asked the second highest percentage of Policy D questions (after Justice Scalia), those expressing his own views about Policy.[55] He was most interested in asking questions about the Legal Argument, then asking hypothetical questions (Policy A), but also concerned about Precedent (he ranked third among all Justices in that category).[56] Justice Kennedy is often described as the swing vote on the Court,[57] and interestingly, these data show Justice Kennedy in the middle of the Justices on almost every measure, both in terms of frequency of questions and in percentage of questions asked. Justice Kennedy ranked fifth in the frequency of questions, and fifth in asking about each of these topics: Facts, Legal Arguments, hypothetical questions (Policy A), and legal principles that the Court should adopt (Policy B).[58] This indicates that Justice Kennedy may be using oral argument as an opportunity to assess his colleagues' positions, listening more than questioning, but still willing to reveal his policy preferences on occasion.

[53] *See infra* Appendix C, Table 9.
[54] *See, e.g.*, JEFFREY ROSEN, THE SUPREME COURT 199-200 (2006) (describing Justice Scalia's "tendency to dominate oral argument with aggressive questions and showy put-downs").
[55] *See infra* Appendix C, Table 9.
[56] *See infra* Appendix C, Table 2.
[57] *See, e.g.*, Massimo Calabrese & David Von Drehle, *What Will Justice Kennedy Do?*, TIME, June 18, 2012, at 28, 31; Phillips & Carter, *supra* note 13, at 361-62; ROSEN, *supra* note 54, at 235; SCOTUSBLOG STAT PACK OT2010, *supra* note 44, at 10, 12 (reporting Justice Kennedy in the majority in 94% of cases and 88% of the time in cases decided by a five-to-four vote).
[58] *See infra* Appendix C, Table 3 (Facts), Table 5 (Legal Arguments), Table 6 (Policy A) & Table 7 (Policy B).

4. Justice Ruth Bader Ginsburg

Content Category	Percentage of Justice's Total Questions	
Threshold	0.6%	
Precedent	1.4%	
Facts	16.7%	
External Actors	0.6%	
Legal	60.7%	
Policy (Total)	20.0%	
Policy A (hypothetical)		11.7%
Policy B (legal principle)		3.2%
Policy C (action)		2.1%
Policy D (belief)		3.0%

Justice Ginsburg is unusual in that she asked more questions than any other Justice in three different question categories: Threshold, Precedent, and Facts.[59] In the Policy category, however, she asked the lowest percentage of questions of all her colleagues (not including Justice Thomas).[60]

As shown in the table above, the majority of Justice Ginsburg's questions concerned Legal Arguments. Her second most prevalent area of interest was clarifying the Facts in each particular case. Justice Ginsburg seems to approach questioning during oral argument in a traditional, lawyer-like fashion: she is most likely to ask about the predicate issues and then probe for additional facts. She will challenge the lawyers to clarify and justify their legal arguments but is less likely to examine the policy implications of the case.

5. Justice Stephen Breyer

Content Category	Percentage of Justice's Total Questions	
Threshold	0.0%	
Precedent	0.5%	
Facts	6.2%	
External Actors	0.3%	
Legal	50.1%	
Policy (Total)	42.8%	
Policy A (hypothetical)		22.3%
Policy B (legal principle)		6.2%
Policy C (action)		4.6%
Policy D (belief)		9.7%

Justice Breyer was most concerned with questions regarding Legal Arguments, dedicating half of his questions to that topic. He was the second most likely Justice to ask

[59] *See infra* Appendix C, Table 1 (Threshold), Table 2 (Precedent), & Table 3 (Facts).
[60] *See supra* Table 2.

about Policy, asking 42.8% of the Court's total Policy questions in the Sample.[61] When doing so, Justice Breyer focused first on Policy A questions (hypothetical situations and the application of the Court's decision to future cases). Of all the Justices, he asked the most Policy B questions, probing for answers about legal principles that the Court should adopt.[62] Justice Breyer seems to use oral argument as an opportunity to work through both the legal arguments and policy issues of a case, asking the attorneys to help him clarify his ideas while also examining the many policy implications of a decision.

6. Justice Samuel Alito

Content Category	**Percentage of Justice's Total Questions**	
Threshold	0.0%	
Precedent	0.2%	
Facts	3.7%	
External Actors	0.0%	
Legal	49.6%	
Policy (Total)	46.4%	
Policy A (hypothetical)		33.5%
Policy B (legal principle)		4.9%
Policy C (action)		2.4%
Policy D (belief)		5.6%

With the exception of Justice Thomas, Justice Alito was the least active questioner during oral argument.[63] When he did ask a question, however, he was most likely to focus on Legal Arguments. Justice Alito was the Justice most concerned with Policy.[64] The data show that about one-third of Justice Alito's questions posited a hypothetical or inquired about the extension or application of the Court's decision (Policy A). Justice Alito, though, was not likely to explore the other policy implications of a case (e.g., only 4.9% of his questions focused on principles that the Court should adopt (Policy B) and only 2.4% explored courses of action that the court should take (Policy C)). He was very unlikely to ask a Threshold question or a question about Precedent.

[61] *See id.*
[62] *See infra* Appendix C, Table 7.
[63] *See supra* Table 1.
[64] *See supra* Table 2.

7. Justice Sonia Sotomayor

Content Category	Percentage of Justice's Total Questions	
Threshold	0.3%	
Precedent	0.3%	
Facts	2.5%	
External Actors	0.3%	
Legal	69.6%	
Policy (Total)	27.0%	
Policy A (hypothetical)		14.6%
Policy B (legal principle)		4.7%
Policy C (action)		3.7%
Policy D (belief)		4.0%

Compared with the other Justices, Justice Sotomayor was unlikely to ask any questions about Facts or External Actors, or to express her own view on Policy (Policy D).[65] The vast majority of her questions concerned Legal Arguments.

Justice Sotomayor participated in only twenty-nine of the fifty-three cases in this Sample, reflecting her role as the second most junior Justice. Only Justice Kagan asked a smaller percentage of Policy D questions (expressing her own views), a finding that is unsurprising given the fact that these two Justices have the least experience on the Court.

8. Justice Elena Kagan

Content Category	Percentage of Justice's Total Questions	
Threshold	0.9%	
Precedent	0.0%	
Facts	0.9%	
External Actors	0.0%	
Legal	61.7%	
Policy (Total)	36.6%	
Policy A (hypothetical)		23.5%
Policy B (legal principle)		9.6%
Policy C (action)		0.0%
Policy D (belief)		3.5%

Legal questions were Justice Kagan's primary focus, constituting over 60% of her total questions. Almost none of her questions concerned Threshold, Precedent, Facts, or External Actors (which together equaled only 1.8% of her total). When she did ask questions about Policy, Justice Kagan concentrated on exploring how the decision might be extended (Policy A). It is important to note that Justice Kagan participated in just thirteen cases in this Sample, so these results have less reliability than those of her more

[65] *See infra* Appendix C, Table 3 (Facts), Table 4 (External Actors), & Table 9 (Policy D).

experienced colleagues. It is too early in her tenure on the Court to know whether Justice Kagan's questioning style will remain in this pattern or will evolve as she gains more experience on the bench.

D. Policy Questions in Education Cases

The Justices in this Study, as demonstrated by the data, ask more Policy questions in education cases than in non-education constitutional cases. This difference is statistically significant.[66] Further research must be conducted to determine if this pattern holds for other predictably policy-heavy types of cases (e.g., criminal cases, immigration proceedings, or redistricting laws) but it does show that the Justices are especially focused on the policy implications of their decisions in cases involving public schools. The Court clearly does not automatically defer to the judgment of school administrators. In fact, in the three K-12 education cases in the Sample in which a school district was a party, the Court ruled against the district in each case.[67]

Table 3: Policy Questions in Education Cases

Type of Case	Number of Questions	Percentage of Questions Concerned with Policy
Education	1084	41.1%
Non-Education	4031	34.8%

V. CASE STUDY: QUESTIONS DURING ORAL ARGUMENT IN *CAMRETA V. GREENE*[68]

Taken together, the data from this Study illustrate what happens at oral argument. The data show that the Justices each ask different types of questions, that they focus on policy questions to different degrees, and that collectively they ask more questions about policy in education cases than in non-education constitutional cases. How, though, do these differences translate into describing the Justices' individual behavior during oral argument? A qualitative analysis of *Camreta v. Greene*,[69] a recent education case, provides a detailed and concrete example of how the Justices actually use oral argument to gather information and communicate their concerns with the parties and their colleagues. This case study also shows how these different approaches allow the Justices to collectively clarify facts, examine the legal issues at hand, and explore the implications of a given decision for public policy.

[66] $c^2(1, N=5115)=14.44$, $p = .00$.
[67] The nine education cases can be grouped as follows: (a) Cases in which a K-12 school district was a party (three cases: *Fitzgerald*, 555 U.S. at 246; *Safford*, 557 U.S. at 364; and *Forest Grove*, 557 U.S. at 230); (b) Cases involving an institution of higher education (one case: *Christian Legal Soc'y*, 130 S. Ct. at 2971); (c) Cases that involved an education issue but in which a school district was not a party (five cases: *Ysursa*, 555 U.S. at 353; *Horne*, 557 U.S. at 433; *Arizona Christian*, 131 S. Ct. at 1436; *J.D.B.*, 131 S. Ct. at 2394; and *Camreta*, 131 S. Ct. at 2020).
[68] 131 S. Ct. 2020 (2011).
[69] *Id.*

A. Background on Camreta v. Greene

Camreta v. Greene (with *Alford v. Greene*) was argued on March 1, 2011. The case involved allegations that a man, Nimrod Greene, sexually abused his young daughter, referred to as S.G.[70] Petitioners Bob Camreta, an investigator with the Oregon Department of Human Services, and Deputy Sheriff James Alford went to 9-year-old S.G.'s elementary school to interview her about the allegations of abuse.[71] When they arrived at the school, a guidance counselor took S.G. out of class, explaining that some people needed to talk to her, and left S.G. with Camreta and Alford for a period of up to two hours.[72]

S.G.'s mother, Sarah Greene, filed a Section 1983[73] lawsuit alleging that petitioners Camreta and Alford violated S.G.'s Fourth Amendment rights when they seized and interviewed her without a warrant and without her mother's consent or presence.[74] A federal district court granted summary judgment to the petitioners.[75] On appeal, the Ninth Circuit held that S.G.'s Fourth Amendment rights were violated when she was seized and interrogated in the absence of a warrant, a court order, exigent circumstances, or probable cause.[76] The Ninth Circuit also held, however, that the law concerning in-school seizures was not "clearly established," and thus held that the petitioners were entitled to the protection of qualified immunity.[77]

The Supreme Court granted certiorari to address two questions: (1) whether the Ninth Circuit's ruling was reviewable given that the petitioners had prevailed on grounds of qualified immunity; and (2) whether the Ninth Circuit correctly determined that the interview violated S.G.'s Fourth Amendment rights.[78]

Although the school district was not a party to this case, the case as a whole raised significant policy issues for schools in general. The National School Boards Association (NSBA) filed an amicus brief addressing its concerns.[79] First, the NSBA argued that the concept of a "seizure" under Fourth Amendment law had developed in the law enforcement context and should not apply in the school setting, where children already lack the right to come and go at will.[80] Second, it urged that requiring school personnel to be the gatekeepers in such situations would put them in the untenable position of having

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[70] *Id.* at 2027.
[71] *Id.*
[72] Greene v. Camreta, 588 F.3d 1011, 1017 (9th Cir. 2009). The parties disagreed about the length of time and the interview was not recorded. *Id.*
[73] *See* 42 U.S.C. § 1983 (2012).
[74] *Camreta*, 131 S. Ct. at 2027.
[75] *Id.*
[76] *Greene*, 588 F.3d at 1030.
[77] *Id.* at 1031-33.
[78] *Camreta*, 131 S. Ct. at 2026. The case was decided on May 26, 2011. *Id.* at 2020. Justice Kagan delivered the opinion for the seven-member majority, with Justices Kennedy and Thomas dissenting. *Id.* The Court ruled only on the first question posed. *Id.* at 2026. Justice Kagan wrote, "We conclude that this Court generally may review a lower court's constitutional ruling at the behest of a government official granted immunity. But we may not do so in this case for reasons peculiar to it." *Id.* According to the Court, the case was moot because the child involved (S.G.) grew up and moved away from Oregon; therefore, it could not reach the merits of the Fourth Amendment question. *Id.*
[79] *See* Brief for National School Boards Association et al. as Amici Curiae Supporting Petitioners at 2, *Camreta*, 131 S. Ct. 2020 (Nos. 09-1454, 09-1478), 2010 WL 5168881, at *2.
[80] *Id.* at 5-8.

to evaluate whether law enforcement officials and caseworkers had the legal justification to question students.[81] School personnel, the NSBA argued, do not have the training to make such judgments and even if training could be provided, doing so might place them in direct conflict with the law in every state that requires them to report evidence of sexual abuse.[82]

B. Questions During Oral Argument

With the exception of Justice Thomas, every current Justice asked questions during the oral argument (reaching a cumulative total of 125 questions). The vast majority of Chief Justice Roberts's questions fell into the Legal Argument category (17 of 22 total), probing the basis of each party's position about the Court's decision to accept the case. For instance, he inquired of the respondent, "I'm sorry. Again, I get to the question, why do you care? Why do you care whether we vacate [the] order or not? Your position is your client has no continuing interest in the case."[83] This was consistent with the overall Sample data, which showed that more than half of the Chief Justice's questions were about Legal Arguments.[84]

Also, consistent with the overall findings,[85] Chief Justice Roberts's Policy questions focused on the effects of the outcome in *Camreta* and hypothetical future cases (4 of his 22 total questions during the argument). Chief Justice Roberts asked the petitioner (Camreta) several Policy A questions. For example, the Chief Justice asked:

> [Y]ou think it would be a different rule if we're talking about some other criminal activity? The father's selling drugs, and you think the child might have some evidence or at least be willing to talk about that. Do you need anything other than reasonableness in that case?[86]

It is possible that the Chief Justice considered it his responsibility to guide the direction of oral argument, and for that reason he focused primarily on Legal Argument questions. Although the Chief Justice is not generally overly concerned with exploring policy issues, he was even less so in this case. In *Camreta*, 22.7% of his questions were about Policy, whereas, overall, 35.9% of his questions fell into that category.[87]

The data from the overall Sample show that Justice Scalia was the most active questioner (asking 19.6% of all questions in the Sample),[88] but he was even more active than average here, asking 25% of the 125 questions in the case. In the aggregate, Justice Scalia was by far the most vocal about his opinions regarding the content of public policy, asking nearly 28% of the Policy D questions in the Sample.[89] This was exemplified in *Camreta*, where he commented to the respondent:

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[81] *Id.* at 11-12.
[82] *Id.* at 12-14.
[83] *Camreta* Oral Argument, *supra* note 34, at 29.
[84] *See infra* Appendix C, Table 5.
[85] *See infra* Appendix C, Table 6.
[86] *Camreta* Oral Argument, *supra* note 34, at 15.
[87] *See supra* Table 2.
[88] *See supra* Table 1.
[89] *See infra* Appendix C, Table 9.

> I don't understand. It seems like a very strange rule to me. You mean it's okay for a child protection worker to just ask the child passing in the hall . . . or not passing in the hall . . . [c]ome into this room, I have a question for you: Has your father been abusing you? And if the child says yes, thank you, and the child goes, then that's okay?[90]

Justice Scalia most often asked questions seeking clarification about the attorneys' Legal Arguments.[91] Many of Justice Scalia's legal inquiries disclosed his opinions of those arguments, in a fashion similar to his Policy D questions. In *Camreta* he told the respondent's lawyer:

> It will be something that could be replicated again in the future for some other reason. [It] isn't true that it will just eliminate the whole purpose of our . . . jurisprudence in this area. In many cases [the] decision below can be appealed, [and] we will rule [on the] constitutional question.[92]

Justice Scalia did not hold back at oral argument, which made it seem as though he viewed the argument as an opportunity to make his colleagues and the attorneys aware of his thinking. He made it clear when he agreed or disagreed with an attorney, and was candid about his opinions on the policy implications of the Court's decisions.

Consistent with the overall data,[93] Justice Kennedy did not ask a Threshold or Precedent question in *Camreta*. Instead, he asked questions that required the lawyers to define or even concede weaknesses of their positions on the legal issues. The following question was typical: "[W]e're getting to the merits. Do you agree that . . . the seizure under the Fourth Amendment is the relevant category here?"[94]

Justice Kennedy asked the third highest percentage of Policy questions,[95] focusing especially on the implications of the Court's decision (Policy A) or expressing his own views (Policy D).[96] His questions in *Camreta*, three out of fourteen of which concerned Policy, illustrated this approach. Justice Kennedy explored the implications of a Supreme Court decision to vacate the ruling below asking, "Well, but Justice Alito's question[97] was addressed to the Ninth Circuit. In the Ninth Circuit, it's not going to come up again if we assume that our public employees are going to be law-abiding. They're bound by this in the Ninth Circuit."[98] He also expressed his concern that a Supreme Court decision that vacated the Ninth Circuit ruling below would cause problems for law enforcement officers, stating:

> It seems to me that it would affect Camreta's behavior and that of other child protective officers. The lawyer would explain: Now, legally this is

[90] *Camreta* Oral Argument, *supra* note 34, at 34.
[91] *See infra* Appendix C, Table 5.
[92] *Camreta* Oral Argument, *supra* note 34, at 48.
[93] *See infra* Appendix C, Table 1 (Threshold) & Table 2 (Precedent).
[94] *Camreta* Oral Argument, *supra* note 34, at 16.
[95] *See supra* Table 2.
[96] *See supra* Part IV.C.3.
[97] Justice Alito's question was addressed to the Respondent's attorney, asking why the Ninth Circuit's decision should not be reviewed on the merits. *See Camreta* Oral Argument, *supra* note 34, at 29-30.
[98] *Id.* at 31.

> not binding; it just never happened. But three judges of the court of appeals in a reasoned decision have explained why this is contrary to the Constitution, and it would seem to me that any conscientious law enforcement officer [would] take that seriously into account.[99]

The data suggest that Justice Kennedy regards oral argument as a dynamic process. He was actively engaged with the lawyers in defining the foundation and limits of their arguments. He was very willing to consider policy arguments, and willing to express his own views about policy.

Justice Ginsburg asked the highest percentages of Threshold, Precedent, and Fact questions (just as she did in the overall Sample),[100] and in this case 33% of her fifteen questions fell into one of these three categories. In *Camreta*, her first question was a Threshold question about mootness: "Why would he face liability?"[101] Her second question explored this issue further, examining whether the merits would be best addressed in a case of this procedural posture: "Because in this case, we have a plaintiff who is not going to be confronted with this situation again and who has put herself out of the running for damages because she didn't . . . challenge the qualified immunity ruling."[102]

Justice Ginsburg did not ask any Precedent questions in *Camreta*, but she did clarify facts, inquiring:

> [W]hat has Oregon done in response to this Ninth Circuit decision? Before it said that the caseworkers could have this kind of interview with [the] child where there was a suspicion of abuse. Was there any change in practice in Oregon in response to the Ninth Circuit's decision?[103]

She also intervened near the end of the Deputy Solicitor General's argument on behalf of the petitioner to ask that she address the legal issues: "You have very limited time. Could you . . . go to the merits of the Fourth Amendment question and give us the Government's position on that?"[104] Justice Ginsburg asked very few Policy questions, but when she did so, the question was a Policy A inquiry, posing a hypothetical about the limits of the decision: "Suppose we take the sheriff, the deputy sheriff, out. The only one who comes to the school and asks to talk to this child is the caseworker from the department of health?"[105]

As noted above, Justice Ginsburg approached oral argument in a very "lawyerly" fashion.[106] She asked four Threshold questions, to ensure that the underlying legal requirements were met, and then gathered facts that may not have been included in the briefs. She was not likely to directly challenge the arguing attorneys about their legal arguments, but, rather, asked them to clarify their points. For example, she asked the

[99] *Id.* at 23-24.
[100] *See infra* Appendix C, Table 1 (Threshold), Table 2 (Precedent) & Table 3 (Facts).
[101] *Camreta* Oral Argument, *supra* note 34, at 6.
[102] *Id.* at 8.
[103] *Id.* at 14.
[104] *Id.* at 24.
[105] *Id.* at 39.
[106] *See supra* Part IV.C.4.

respondent, "Where are you reading in the holding of the court of appeals? Because I was under the impression that they did say there's only three ways: One is you get a warrant; another is you get parental consent; and a third is exigent circumstances. I thought that was [the] ruling of law by the Ninth Circuit."[107] She did not explore policy concerns in any detail and did not express her opinions or views about policy.

Justice Breyer was the fourth most-active questioner at oral argument in the Study.[108] He was atypically quiet in *Camreta*, asking only thirteen questions in total, not asking the petitioner any questions, and speaking for the first time on page 41 of the 58-page transcript.[109] Justice Breyer asked the second highest number of Policy questions in the overall Sample,[110] and when doing so he focused first on Policy A questions regarding the impact of the case's outcome.[111] In *Camreta*, eight of his thirteen questions fell into this category, such as, "Suppose that we dismiss the case as improvidently granted, while indicating in an opinion some of the questions that we find difficult such, for example, as the seizure question, et cetera; what kind of impact would that have in your opinion?"[112]

Justice Breyer's questions frequently revealed frustration about the lack of lucidity in the parties' positions, in that he often asked a series of questions pushing for clarity. In *Camreta*, for example, he probed, "Same circumstance. Was there a seizure? No—no professor—no policeman? . . . School nurse? . . . Seizure? . . . And so, it's not a seizure if exactly the same thing happens but there is no outside person there, but it is a seizure if there's an outside person?" [113] Justice Breyer's questions often probed the policy implications of a decision. That was true in *Camreta*, when he asked the attorney for the respondent, "Yes, if—while indicating the reasons being in part that there are difficult questions here, suggesting what they are. What . . . impact would that have?"[114]

The data in this Study showed that Justice Alito asked the fewest questions after Justice Thomas,[115] and in *Camreta* he asked only ten of the Court's 125. While the bulk of Justice Alito's questions usually concerned Legal Arguments,[116] in this case six out of ten questions he asked related to Policy. Justice Alito generally asked Policy A questions, exploring the implications of the case at hand,[117] and here four of his ten questions fell into that category. He asked four Legal Argument questions, including the following: "Well, could you have cross-petitioned in an effort to get damages, so if you had wanted to preserve the issue, you surely could have done that, couldn't you?"[118] Justice Alito's Policy A questions explored the limiting principle of the case, such as, "Well, on the issue of consent, do you read the Ninth Circuit's opinion as having an age limit? Suppose

[107] *Camreta* Oral Argument, *supra* note 34, at 32.
[108] *See supra* Table 1.
[109] *See Camreta* Oral Argument, *supra* note 34, at 41.
[110] *See supra* Table 2.
[111] *See supra* Part IV.C.5.
[112] *Camreta* Oral Argument, *supra* note 34, at 50-51.
[113] *Id.* at 41.
[114] *Id.* at 51.
[115] *See supra* Table 1.
[116] *See supra* Part IV.C.6.
[117] *See id.*
[118] *Camreta* Oral Argument, *supra* note 34, at 48.

that the child is, let's say, 16 years old. Is the child at 16 incapable of consenting to questioning?"[119]

Justice Alito also asked a Policy B question about the legal principle that the Court should adopt:

> If you were designing what you would regard as an ideal system, and you're very knowledgeable in this . . . area, and you concluded that some kind of approval by a detached individual should be required before something like this is allowed, would you set the standard at probable cause?[120]

Justice Alito was not a very active questioner during oral arguments in the Sample,[121] but he seemed to use the argument in *Camreta* as an opportunity to think through the legal issues as well as to consider hypothetical situations. In general, he did not usually express his own views about a case, which makes it difficult for arguing attorneys to anticipate or address his concerns about their arguments.

Justice Sotomayor emerged as an active questioner during oral argument, and was especially talkative in *Camreta*, asking sixteen questions instead of her average 11.1 questions per case (12.8% of the total questions asked in this case).[122] She rarely asked Fact or Precedent questions,[123] and did not do so here. The vast majority of her questions concerned Legal Arguments, and she was quite willing to challenge the advocates on their positions.[124] She did so in *Camreta*, asking, "Doesn't that go to the question of the reasonableness of the scope of the seizure? Don't we have . . . other jurisprudence that basically addresses this question and says is this type of seizure or stop detention reasonable?"[125]

Justice Sotomayor's other questions in *Camreta* deviated from her norm as measured by the rest of the Sample, however. Ten of the sixteen questions she asked concerned Policy (62.5% of her questions in the case). She asked several Policy A questions, primarily focusing on the implications of the decision for law enforcement, such as, "law enforcement is never going to know where the line of reasonableness or unreasonableness is, is that correct?"[126] She then asked, "They can't speak to the child endlessly, can they?"[127]

Justice Sotomayor's concern for developing clear legal standards that can assist law enforcement officers could be a function of her past experience as a prosecutor,[128] and may not extend to other policy issues (in schools or otherwise). However, in *Camreta* she

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[119] *Id.* at 36.
[120] *Id.* at 52.
[121] *See supra* Table 1.
[122] This is in contrast to Justice Sotomayor's average of 6.3% of questions asked in the 29 cases in which she participated that were included in this Study. *See id.*
[123] *See supra* Part IV.C.7.
[124] *See id.*
[125] *Camreta* Oral Argument, *supra* note 34, at 44.
[126] *Id.* at 56.
[127] *Id.* at 57.
[128] Justice Sotomayor served as an assistant district attorney in New York from 1979-1984. *See Biographies of Current Justices of the Supreme Court*, SUPREME COURT OF THE UNITED STATES, http://www.supremecourt.gov/about/biographies.aspx (last visited Sept. 23, 2012).

was certainly interested in drawing a practical line. Her active involvement during oral argument also gives advocates insights into her views, and the opportunity to address her concerns directly. Brief writers and oral advocates can use those insights to anticipate Justice Sotomayor's questions or sticking points in petitions for writs of certiorari, written briefs, and in preparation for oral argument.

Justice Kagan participated in just thirteen of the fifty-three cases in this Sample, so it will be interesting to assess whether her questioning style evolves as she gains bench experience over the coming terms. Because Justice Kagan served as Solicitor General of the United States,[129] her familiarity with and experience in oral argument prior to joining the Court may affect how she questions advocates and how active a questioner she becomes.

The data gathered on Justice Kagan in this Study show that she was most likely to ask questions to clarify Legal Arguments, but also dedicated about a quarter of her questions to inquiries about the implications of the Court's decision (Policy A).[130] She asked only four questions in *Camreta*, but three questions concerned Legal Arguments, and one concerned Policy A. The Policy A question that she asked was:

> But, General, I take it that that problem disappears—tell me if I'm wrong—if we find there's no jurisdiction. If we *Munsingwear* this case, the decision is wiped off the case, you return to status quo ante, and you tell all your people that they can do what they would have done beforehand; is that right?[131]

Justice Kagan's limited participation in *Camreta* as well as in the entire Sample examined in this Study warrants tentative conclusions about her overall approach to oral argument.

VI. CONCLUSION

These findings show that the types of questions the Justices ask vary, and that they differ in the extent to which they examine policy issues. Some members of the Court, such as Justice Ginsburg, tend to probe the legal arguments, make certain to address threshold issues and clarify facts, but are not policy-oriented. Others, such as Justice Breyer, focus on the broad policy implications of a decision. Still others, such as Justice Scalia, use the argument as a time to challenge the oral advocates, allowing the lawyers to respond directly to the Justice's own policy concerns.

Our data suggest that oral argument does serve an important purpose. With the exception of Justice Thomas, all of the Justices took advantage of this opportunity to actively question the arguing attorneys about a variety of aspects of the case. Such exchanges between the attorneys and the Justices include consideration of the most relevant precedents, a clarification of facts, an in-depth examination of legal arguments and, most importantly, the opportunity for the Justices to explore the policy implications

[129] Justice Kagan was confirmed as the 45th Solicitor General of the United States on March 19, 2009. *See id.*
[130] *See supra* Part IV.C.8.
[131] *Camreta* Oral Argument, *supra* note 34, at 56.

of their decisions. Oral argument also gives each Justice the chance to focus on the element or elements of the case that troubles him or her the most, and gives the arguing attorney the opportunity to address that Justice's concerns and perhaps win that vote. One negative aspect of this process seems to be the time constraint of only thirty minutes of argument per side. Given this very limited time period, not every Justice has the opportunity to ask many questions, and Justices often interrupt one another, making it extremely difficult for the arguing attorney to give thoughtful or expansive responses to questions.

The extent to which the Justices are policy-oriented may differ depending on the type of case before the Court. We found, for example, that the Justices asked more policy questions in education cases than in non-education constitutional cases. In one recent education case, *Camreta v. Greene*, 42.4% of the Justices' questions concerned policy (compared to the average of 34.8% of questions in the Sample as a whole). Each of the eight active questioners asked questions about policy, and two Justices were especially focused on this area: all of Justice Breyer's questions in *Camreta* asked about policy, and, though not in line with her questioning style in the rest of the Sample, Justice Sotomayor concentrated the majority of her questions on policy. It would be beneficial to repeat this Study with a larger sample of education cases as well as a sample of other types of cases for purposes of comparison. For example, it may well be that the Court is more concerned with policy in areas such as health care, where its decision in *National Federation of Independent Business v. Sebelius* will have significant and immediate effects on the lives of the majority of citizens, or in other areas of heightened political salience such as free speech. While each of the Court's decisions affects the primary conduct of the litigants outside the bounds of the case, education and health care (especially in terms of the scope of Congress's commerce and taxing powers) are examples of policy matters that necessarily impact nearly all Americans.

Oral argument plays a significant and unique role in the Supreme Court's decision-making process, giving Justices the opportunity to ask questions about issues that are of particular concern to them and that may not have been fully developed in the parties' briefs. Examining the questions that the Justices ask during this process provides insight into their thinking and their concern for the ramifications of their decisions. These findings show that the Justices use oral argument to gather information about the policy implications of their decisions by raising questions regarding the legal principles that the Court should adopt, the courses of action the Court should take, or that reveal a Justice's beliefs about the content of public policy. The data also show that the Justices differ in the extent that they explore these policy issues during oral argument, and the extent to which they are willing to identify their own policy preferences. Critics of "judicial activism" might argue that the policy focus at oral arguments demonstrates that the Supreme Court is outside its constitutional power and inappropriately legislating from the bench. But "policy" as defined in this Study encompasses questions that reflect the Justices' awareness of the fact that the Court does not make decisions in a vacuum, and is carefully considering the impact of its decisions.

This Study does, of course, have limitations. First, the Sample of cases was not randomly selected, thus limiting the ability to generalize the findings. Second, the cases selected for study (those raising constitutional issues and those concerning education) may be types of cases that are more likely to inspire a policy focus, given that they raise

issues that are often of elevated societal interest and concern. In addition, Justices Sotomayor and Kagan participated in far fewer oral arguments in the Sample than the other seven Justices currently on the Court, so their results may be less reliable in a broader context.

Future research should be conducted to include a larger sample of cases, ideally all cases decided across a number of terms. In addition, it would be interesting to examine each Justice's questioning style over time. For example, do any of the Justices become more policy-oriented as they gain experience and confidence in their role on the Court? It would also be helpful to study the behavior of lower court judges, both state and federal, to see if their questioning styles display a similar focus on policy concerns.

With these limitations in mind, this Study still has practical implications. Attorneys who argue before the Court can use these results to better prepare for their arguments by being able to anticipate which aspects of the case will likely be of most significance to each Justice. Attorneys who argue before the Court on a regular basis are certainly aware of the Justices' patterns of questioning, and may even have gathered their own data to better prepare for argument, but this Study gives attorneys making their first or only argument insight into what to expect, and more seasoned arguers a broader perspective. First-time arguing attorneys might well be surprised to know that much of their time in argument will be devoted to examining the policy implications of the case, and, given that fact, they should spend a considerable amount of time trying to formulate hypothetical questions about the extension or application of the decision as well as questions about the legal principles the Court should adopt, and the course of action the Court should take in deciding the case. In preparing such hypothetical questions, practitioners will want to consult the people who may be most affected by such a decision; in the field of education, for example, they would want to prepare with people such as school administrators. Finally, these data make clear that the Justices care about the policy implications of their decisions, and that they use oral argument as a time to explore those concerns.

Appendix A: Oral Arguments Sample

October Term 2010 Cases Examined in this Study:
Ariz. Christian Sch. Tuition Org. v. Winn, 131 S. Ct. 1436 (2011) (argued Nov. 3, 2010)
Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806 (2011) (argued Mar. 28, 2011)
Bond v. United States, 131 S. Ct. 2355 (2011) (argued Feb. 22, 2011)
Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729 (2011) (argued Nov. 2, 2010)
Camreta v. Greene, 131 S. Ct 2020 (2011) (argued Mar. 1, 2011)
Connick v. Thompson, 131 S. Ct. 1350 (2011) (argued Oct. 6, 2010)
Davis v. United States, 131 S. Ct. 2419 (2011) (argued Mar. 21, 2011)
Borough of Duryea, Pa. v. Guarnieri, 131 S. Ct. 2488 (2011) (argued Mar. 22, 2011)
Kentucky v. King, 131 S. Ct. 1849 (2011) (argued Jan. 12, 2011)
J.D.B. v. North Carolina, 131 S. Ct. 2394 (2011) (argued Mar. 23, 2011)
Skinner v. Switzer, 131 S. Ct. 1289 (2011) (argued Oct. 13, 2010)
Snyder v. Phelps, 131 S. Ct. 1207 (2011) (argued Oct. 6, 2010)
Walker v. Martin, 131 S. Ct. 1120 (2011) (argued Nov. 29, 2010)

October Term 2009 Cases Examined in this Study:
Berghuis v. Smith, 130 S. Ct. 1382 (2010) (argued Jan. 20, 2010)
Berghuis v. Thompkins, 130 S. Ct. 2250 (2010) (argued Mar. 1, 2010)
Briscoe v. Virginia, 130 S. Ct. 1316 (2010) (argued Jan. 11, 2010)
Christian Legal Soc'y Chapter of Univ. of Cal., Hastings Coll. of Law v. Martinez, 130 S. Ct. 2971 (2010) (argued Apr. 19, 2010)
Doe v. Reed, 130 S. Ct. 2811 (2010) (argued Apr. 28, 2010)
Florida v. Powell, 130 S. Ct. 1195 (2010) (argued Dec. 7, 2009)
Graham v. Florida, 130 S. Ct. 2011 (2010) (argued Nov. 9, 2009)
McDonald v. City of Chicago, 130 S. Ct. 3020 (2010) (argued Mar. 2, 2010)
City of Ontario v. Quon, 130 S. Ct. 2619 (2010) (argued Apr. 19, 2010)
Padilla v. Kentucky, 130 S. Ct. 1473 (2010) (argued Oct. 13, 2009)
Smith v. Spisak, 130 S. Ct. 676 (2010) (argued Oct. 13, 2009)
Union Pac. R.R. Co. v. Bhd. of Locomotive Eng'rs and Trainmen Gen. Comm. of Adjustment, Cent. Region, 130 S. Ct. 584 (2009) (argued Oct. 7, 2009)
United States v. Comstock, 130 S. Ct. 1949 (2010) (argued Jan. 12, 2010)
United States v. Stevens, 130 S. Ct. 1577 (2010) (argued Oct. 6, 2009)

October Term 2008 Cases Examined in this Study:
Arizona v. Gant, 556 U.S. 332 (2009) (argued Oct. 7, 2008)
Ashcroft v. Iqbal, 556 U.S. 662 (2009) (argued Dec. 10, 2008)
Bobby v. Bies, 556 U.S. 825 (2009) (argued Apr. 27, 2009)
Caperton v. A.T. Massey Coal Co., 556 U.S. 868 (2009) (argued March 3, 2009)
Citizens United v. FEC, 558 U.S. 310 (2010) (argued March 24, 2009)
Cone v. Bell, 556 U.S. 449 (2009) (argued Dec. 9, 2008)
Dist. Attorney's Office for the Third Judicial Dist. v. Osborne, 557 U.S. 52 (2009) (argued March 2, 2009)
Fitzgerald v. Barnstable Sch. Comm., 555 U.S. 246 (2009), (argued Dec. 2, 2008)

Forest Grove Sch. Dist. v. T.A., 557 U.S. 230 (2009) (argued Apr. 28, 2009)
Haywood v. Drown, 556 U.S. 729 (2009) (argued Dec. 3, 2008)
Hedgpeth v. Pulido, 555 U.S. 57 (2008) (argued Oct. 15, 2008)
Herring v. United States, 555 U.S. 135 (2009) (argued Oct. 7, 2008)
Horne v. Flores, 557 U.S. 433 (2009) (argued April 20, 2009)
Kansas v. Ventris, 556 U.S. 586 (2009) (argued Jan. 21, 2009)
Locke v. Karass, 555 U.S. 207 (2009) (argued Oct. 6, 2008)
Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009) (argued Nov. 10, 2008)
Montejo v. Louisiana, 556 U.S. 778 (2009), (argued Jan. 13, 2009)
Oregon v. Ice, 555 U.S. 160 (2009) (argued Oct. 14, 2008)
Pearson v. Callahan, 555 U.S. 223 (2009) (argued Oct. 14, 2008)
Pleasant Grove City v. Summum, 555 U.S. 460 (2009) (argued Nov. 12, 2008)
Polar Tankers, Inc. v. City of Valdez, 557 U.S. 1 (2009) (argued April 1, 2009)
Safford Unified Sch. Dist. No. 1 v. Redding, 557 U.S. 364 (2009) (argued Apr. 21, 2009)
Van de Kamp v. Goldstein, 555 U.S. 335 (2009) (argued Nov. 5, 2008)
Waddington v. Sarausad, 555 U.S. 179 (2009) (argued Oct. 15, 2008)
Yeager v. United States, 557 U.S. 110 (2009) (argued Mar. 23, 2009)
Ysursa v. Pocatello Educ. Ass'n, 555 U.S. 353 (2009) (argued Nov. 3, 2008)

Appendix B: Coding Guidelines

F: Facts
- Questions about the facts of the case: What happened? When?
- Page numbers: Where in the brief do you make that argument?
- Does not include questions about the case's legal history

T: Threshold
- Questions about threshold issues
- Jurisdiction: Which court has the right to decide this issue?

P: Precedent
- Questions about whether a specified precedent applies
- Are you asking us to revisit that?

E: External Actors
- Questions about how outside parties would like the Court to decide
- Common examples of outside parties: Congress, state legislatures, police

L: Legal Argument
- Questions about petitioner's/respondent's argument
- Legal posture/history of the case at hand
- Underlying rationale of cases decided in the past
- Questions that reveal the Justice's opinion on law (not policy)

Policy:
- A: Hypothetical questions and applications/extensions of the case at hand
    - Questions about how this decision will be applied in the future
    - Hypothetical fact patterns that would fall under this ruling
- B: Questions about legal principles that the Court should adopt
    - The "nitty-gritty" description of a proposed rule
    - Questions about the logistics of a potential test
- C: Questions about courses of action the Court should take
    - Should the Court make a rule?
    - Questions about what specifically the Court should do (not just rule in favor of one party or another)
- D: Questions that reveal a Justice's opinion on policy
    - Must be very obvious that it's an opinion
    - "It seems to me…" is a good clue

Appendix C: Content Variation

Table 1: Threshold (10 questions, 0.2% of total questions)

Justice	% of Threshold Questions Asked (% of Individual Justice's Total Questions)
Ruth Bader Ginsburg	40.0% (0.6%)
Antonin Scalia	30.0% (0.3%)
John G. Roberts	10.0% (0.1%)
Sonia Sotomayor	10.0% (0.3%)
Elena Kagan	10.0% (0.9%)
John Paul Stevens	0.0% (0.0%)
Anthony Kennedy	0.0% (0.0%)
David Souter	0.0% (0.0%)
Clarence Thomas	0.0% (0.0%)
Stephen Breyer	0.0% (0.0%)
Samuel Alito	0.0% (0.0%)

Table 2: Precedent (31 questions, 0.6% of total questions)

Justice	% of Precedent Questions Asked (% of Individual Justice's Total Questions)
Ruth Bader Ginsburg	29.0% (1.4%)
John G. Roberts	25.8% (1.0%)
Anthony Kennedy	16.1% (1.0%)
Stephen Breyer	9.7% (0.5%)
John Paul Stevens	6.5% (0.6%)
David Souter	6.5% (0.6%)
Samuel Alito	3.2% (0.2%)
Sonia Sotomayor	3.2% (0.3%)
Antonin Scalia	0.0% (0.0%)
Clarence Thomas	0.0% (0.0%)
Elena Kagan	0.0% (0.0%)

Table 3: Facts (369 questions, 7.2% of total questions)

Justice	% of Fact Questions Asked (% of Individual Justice's Total Questions)
Ruther Bader Ginsburg	28.7% (16.7%)
Antonin Scalia	23.0% (8.5%)
John G. Roberts	15.2% (7.0%)
Stephen Breyer	10.6% (6.2%)
Anthony Kennedy	6.8% (4.8%)
John Paul Stevens	5.7% (6.1%)
Samuel Alito	4.1% (3.7%)
David Souter	3.5% (3.8%)
Sonia Sotomayor	2.2% (2.5%)
Elena Kagan	0.3% (0.9%)
Clarence Thomas	0.0% (0.0%)

Table 4: External Actors' Preferences (25 questions, 0.5% of total questions)

Justice	% of External Actors' Preferences Questions Asked (% of Individual Justice's Total Questions)
Antonin Scalia	16.0% (0.4%)
Anthony Kennedy	16.0% (0.8%)
David Souter	16.0% (1.2%)
Ruth Bader Ginsburg	16.0% (0.6%)
John G. Roberts	16.0% (0.5%)
John Paul Stevens	8.0% (0.6%)
Stephen Breyer	8.0% (0.3%)
Sonia Sotomayor	4.0% (0.3%)
Clarence Thomas	0.0% (0.0%)
Samuel Alito	0.0% (0.0%)
Elena Kagan	0.0% (0.0%)

Table 5: Legal Argument (2873 questions, 56.2% of total questions)

Justice	% of Legal Argument Questions Asked (% of Individual Justice's Total Questions)
Antonin Scalia	19.8% (56.6%)
John G. Roberts	15.4% (55.5%)
Ruth Bader Ginsburg	13.4% (60.7%)
Stephen Breyer	10.9% (50.1%)
Anthony Kennedy	9.4% (51.9%)
Sonia Sotomayor	7.8% (69.6%)
John Paul Stevens	7.4% (61.4%)
Samuel Alito	7.1% (49.6%)
David Souter	6.4% (53.5%)
Elena Kagan	2.5% (61.7%)
Clarence Thomas	0.0% (0.0%)

Table 6: Policy A (923 questions, 18.0% of total questions)

Justice	% of Policy A Questions Asked (% of Individual Justice's Total Questions)
John G. Roberts	17.4% (20.2%)
Antonin Scalia	16.0% (14.8%)
Stephen Breyer	15.2% (22.3%)
Samuel Alito	14.8% (33.5%)
Anthony Kennedy	10.5% (18.7%)
Ruth Bader Ginsburg	8.0% (11.7%)
John Paul Stevens	6.1% (16.2%)
Sonia Sotomayor	5.1% (14.6%)
David Souter	3.9% (10.5%)
Elena Kagan	2.9% (23.5%)
Clarence Thomas	0.0% (0.0%)

Table 7: Policy B (248 questions, 4.8% of total questions)

Justice	% of Policy B Questions Asked (% of Individual Justice's Total Questions)
Stephen Breyer	15.7% (6.2%)
John G. Roberts	13.7% (4.3%)
David Souter	13.3% (9.6%)
Antonin Scalia	12.5% (3.1%)
Anthony Kennedy	12.5% (6.0%)
Ruth Bader Ginsburg	8.1% (3.2%)
Samuel Alito	8.1% (4.9%)
Sonia Sotomayor	6.0% (4.7%)
John Paul Stevens	5.6% (4.1%)
Elena Kagan	4.4% (9.6%)
Clarence Thomas	0.0% (0.0%)

Table 8: Policy C (165 questions, 3.2% of total questions)

Justice	% of Policy C Questions Asked (% of Individual Justice's Total Questions)
Antonin Scalia	20.0% (3.3%)
Stephen Breyer	17.6% (4.6%)
John G. Roberts	15.0% (3.1%)
Anthony Kennedy	12.1% (3.8%)
David Souter	8.5% (4.1%)
Ruth Bader Ginsburg	7.9% (2.1%)
Sonia Sotomayor	7.3% (3.7%)
Samuel Alito	6.1% (2.4%)
John Paul Stevens	5.5% (2.6%)
Clarence Thomas	0.0% (0.0%)
Elena Kagan	0.0% (0.0%)

Table 9: Policy D (471 questions, 9.2% of total questions)

Justice	% of Policy D Questions Asked (% of Individual Justice's Total Questions)
Antonin Scalia	27.8% (13.1%)
Anthony Kennedy	14.4% (13.1%)
John G. Roberts	14.0% (8.3%)
Stephen Breyer	13.0% (9.7%)
David Souter	12.1% (16.7%)
John Paul Stevens	6.2% (8.4%)
Samuel Alito	4.9% (5.6%)
Ruth Bader Ginsburg	4.0% (3.0%)
Sonia Sotomayor	2.8% (4.0%)
Elena Kagan	0.8% (3.5%)
Clarence Thomas	0.0% (0.0%)