

Opposing Cert: A Practitioner's Guide

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INTRODUCTION

It was a tough case, but you pulled it off in the court of appeals. There were some tricky precedents from other circuits that needed distinguishing, and the court had to go out on a limb a little bit to rule your way, but you drew a good panel and won in a split decision. The majority opinion gave you all you could hope for, plus a little more. There was a strong dissent, but as William Rehnquist once said, statements in a dissenting opinion are just that – statements in a dissenting opinion. Sure, the majority might have come up with some better answers to the dissent on a couple of points, but who cares? The bottom line is you won.

Ninety days later, when the petition for certiorari comes in over the transom, things look a little different. Your opponent – now represented by a former Solicitor General of the United States – says that the panel's opinion conflicts with decisions of three other circuits and, if allowed to stand, will significantly distort an important area of federal law. And it looks so convincing, all printed up in that fancy Supreme Court format. Suddenly you're almost wishing you had hit a solid single in the court of appeals instead of a grand slam. You've never had a case in the U.S. Supreme Court before. What do you do now?

For starters, don't panic. Practice before the Supreme Court, though different in a number of ways from practice in the lower courts, needn't be mysterious or intimidating. There are many resources that you can draw on for assistance. And you've probably never had better odds of winning: The Supreme Court gets hundreds of petitions for certiorari each year, and lately has been granting only about 80 of them.

That's not to say you should take the situation lightly. There's really no upside to having the Supreme Court take a case you've won in the lower courts. After all, the Court reverses in a significant majority of the cases it takes. You may think you've got a great argument on the merits, but why take chances? You've got a victory in your hand, and it's secure as long as the Court denies certiorari. Maybe you've always been dying for a chance to argue a case in the Supreme Court, but your client will be a lot better off if your chance comes in some *other* case.

So how do you maximize the odds that the Court will deny certiorari? The keys are getting the help you need, understanding the process, and knowing how to write an effective brief in opposition.

YOUR RESOURCES

Your first thought when you see the petition for certiorari may be: “Help!” Well, plenty of help is available if you know where to look.

To begin with, Supreme Court practitioners have a Bible: *Supreme Court Practice*, now in its Ninth Edition, with coauthors Eugene Gressman, Kenneth Geller, Stephen Shapiro, Timothy Bishop, and Edward Hartnett. Still referred to by longtime practitioners as “Stern and Gressman,” after its original authors, this book is the standard reference work for all aspects of Supreme Court practice. If you ask Supreme Court experts for advice on a difficult question of procedure, chances are they will consult this book before answering. You don’t necessarily need to own your own copy – there are still such things as law libraries – but you can find information on almost anything that will come up in your case from this source. It is a critical resource to anyone practicing before the Court.

I called *Supreme Court Practice* the Bible, but perhaps the better analogy would be the Talmud. And if *Supreme Court Practice* is the Talmud, then the Torah is *The Rules of the Supreme Court of the United States*. They are relatively brief, clearly written, and outline what is required for petitions for certiorari and briefs in opposition as well as briefs on the merits (if it comes to that). Because of the distinctive format of papers filed in the Supreme Court — the famous “booklet form” used in no other court that I am aware of — it’s absolutely essential that you consult these rules and know where to find them. Fortunately, the latter is easy. Not only are they incorporated in the West Federal Rules publications that you probably already have at your desk or on your shelf, but they’re available on the Supreme Court’s website at <http://www.supremecourtus.gov/ctrules/2007rulesofthecourt.pdf>.

Speaking of the Supreme Court’s website, it’s excellent. The home page is www.supremecourtus.gov. In addition to the Rules, the site has useful “case handling guides” at <http://www.supremecourtus.gov/casehand/casehand.html>. The one most relevant to you at the certiorari stage of the case is the *Guide to Filing Paid Cases*, <http://www.supremecourtus.gov/casehand/guidetofilingpaidcases2008.pdf>. In addition, the website has forms, including application forms for membership in the Supreme Court bar (you will need to have at least applied for membership before appearing as counsel of record on a brief in opposition to a petition for certiorari). And it has free access to the Court’s dockets, as well as extensive information about the Court’s calendar and the schedule for consideration of petitions for certiorari.

Even more useful than the website is the Clerk’s Office. I once heard former Solicitor General Paul Clement describe the Supreme Court Clerk’s Office as the most-user friendly clerk’s office in the country. There may be a more helpful clerk’s office somewhere, but I haven’t encountered it. The deputy clerks divide responsibility for various aspects of the Court’s functions, and the deputy who handles matters at the certiorari stage, currently Chris Vasil, is the person to call with questions about the process of opposing a petition for certiorari. Chris, like his longtime predecessor, Frank Lorson, is a font of knowledge, is equally friendly and helpful to longtime practitioners and novices, and will patiently answer any question about practice before the Court that can be answered within bounds of propriety.

Helpful as the Clerk’s Office may be, it can only provide objective information about the Court’s procedures and rules. If you want to enlist some expertise on your side, you may wish to turn for assistance from experienced members of the Supreme Court Bar. You will have no shortage of options.

As major law firms have increasingly formed Supreme Court and appellate practice groups, Supreme Court practice has emerged as a specialty, and there has been much talk about the development of a distinctive Supreme Court Bar. If your client has means, retaining a Supreme Court specialist at a

major firm to take the lead in handling the matter in the Supreme Court, including preparation of a brief in opposition to the petition for certiorari, may be an option. But you need not necessarily turn the case over to someone else to obtain expert assistance. Experienced members of the Supreme Court Bar can be retained to consult and assist in handling the case at this stage without taking it over, and having the advice of such an expert can be critically important. Don't hesitate to try to obtain it out of fear of losing control of the case.

Even if your client isn't in a position to pay big-firm hourly rates to obtain the assistance of an experienced Supreme Court practitioner — if, for example, you're a plaintiffs' attorney handling a case on a contingent fee, a criminal defense attorney, a public interest lawyer, or a private practitioner handling a case on a pro bono basis — there are plenty of ways to obtain expert assistance. Nonprofit organizations with Supreme Court litigation experience may be willing to advise you informally or to co-counsel with you; academics interested in your area of law may also be interested in assisting; the Supreme Court clinics that have sprung up at major law schools in recent years can be of help; and experienced Supreme Court advocates in private practice may be willing to assist in some cases on a pro bono basis. If you make the effort to reach out, you will probably be able to find someone with expertise in Supreme Court practice who can give you the level of assistance you need.

THE CERTIORARI PROCESS

In considering how to deal with a petition for certiorari challenging a decision favorable to your client, knowing where to turn for help is important, but it's also important for you to have a basic understanding of the process by which the Court considers petitions for certiorari. That process provides the framework for the strategic and tactical decisions you will have to make about how to respond to the petition.

It's widely known that it takes four Justices to grant a petition for certiorari, which then sets the stage for briefing, argument, and decision of the case on the merits by the Court, but beyond that most practitioners have little knowledge of the process by which the Court considers the many petitions it receives.

Once a petition is filed and docketed by the Court, respondents have 30 days within which they may, if they choose, file a brief in opposition. When the case is docketed, counsel for respondents will receive a notice from counsel for petitioners indicating the docket number, the date the case was docketed, and a form to be used if counsel wishes to "waive" filing a brief in opposition.

It's important to understand that although the form is referred to as a "waiver," that is a misnomer. If you choose to "waive," what you are informing the Court is that you do not intend to file a brief in opposition *unless the Court requests one*. Because the Court's practice is not to grant a petition unless a brief in opposition is filed, submitting a "waiver" does not forgo your opportunity to respond to the petition if the Court has some interest in it; it simply speeds up the process by which the Court may *deny* the petition (more on this later).

If you plan to file a response, you should also be aware that the 30-day period is extendable. The procedure for obtaining an extension is by a letter to the Clerk; extensions of time for filing briefs in opposition are granted by the Clerk rather than by the Justices. Thirty-day extensions are granted fairly routinely and longer ones may be available if there is a good reason. Additional extensions may be requested (indeed, the Solicitor General regularly obtains multiple extensions), but the Clerk's Office expects counsel to seek the consent of petitioner's counsel before requesting an additional extension, and may be less likely to grant it if there is opposition.

From the Court’s standpoint, the first step in its consideration of a petition is the *circulation* of the petition to chambers. Petitions are circulated each week under cover of a list of all circulated petitions; each list is tied to a particular date when the Court will hold a conference to consider the petitions on it. During most of the Court’s “Term,” which begins in early October, conferences are held on Fridays, typically three times a month. During the months when the Court hears arguments, it has a conference to consider petitions for certiorari each Friday during weeks it hears arguments, as well as on the Friday preceding the next argument session. There is typically one “off” week, sometimes two, each month. In late spring, conferences shift to Thursdays, and are held weekly until mid- to late June. Then there is a long hiatus from late June until the end of September, when all petitions circulated are listed for what is referred to as the “long conference,” which precedes the first week of argument in October.

Each week, two conference lists, together with the accompanying petitions, are circulated. One is of paid cases — those for which filing fees are paid and petitions are printed in booklet form. The other is of “in forma pauperis” (IFP) cases filed by indigent petitioners in typewritten form. Paid cases are circulated on Wednesdays during most of the Term, with the IFP cases following the next day. During the late spring when conferences are moved up to Thursdays, circulation dates are similarly moved up to Tuesdays and Wednesdays for paid and IFP cases, respectively.

Circulation of a petition is triggered by any one of a number of events. If respondent’s counsel files a waiver of response, the petition will be circulated on the next date when a conference list goes out. Similarly, if 30 days pass without a response being filed (or an extension being obtained), the petition will be circulated on the next list. If a response is filed, the Court will wait at least 10 days to allow the filing of a reply by the petitioner, and then will circulate the petition, response, and reply on the next list to go out.

The circulation of the petition and response begins the consideration of the case by the law clerks and Justices. Seven of the Justices — all but Justices Stevens and Alito — currently participate in what is commonly referred to as the “cert pool,” an arrangement by which the participating Justices share law clerk memoranda analyzing each petition for certiorari. Each petition on each conference list is assigned to the chambers of one of the Justices participating in the cert pool, and a law clerk from those chambers prepares a short memorandum analyzing the case, presenting the arguments of the petitioner (and the respondent, if a response has been filed), and recommending what action the Court should take on the petition.

Conference lists go out at least two weeks before the conference to which they apply, and the first week of that time is usually allotted to the preparation of the pool memoranda. Once the memoranda are circulated, the Justices and law clerks spend the remaining time before the conference reviewing the memoranda and petitions sufficiently to allow each Justice to form a view on the disposition of each one. The two non-participating Justices and their law clerks use the same period of time to review each petition on the conference list.

In preparation for the conference, each Justice may request that any petition be placed on what is referred to as the “discuss list,” encompassing those cases that will be specifically discussed at the conference. If any Justice is potentially interested in voting to grant a petition, he or she will place it on the discuss list. Petitions that no Justice includes on the discuss list are denied without discussion at the conference, as the failure of any Justice to designate them for discussion is equivalent to a unanimous vote to deny them. The majority of petitions filed with the Court are denied without ever having been placed on a discuss list.

If, upon review of the pool memorandum (or, in the case of Justices Stevens and Alito, their own chambers' independent review of a petition), a Justice sees some potential interest in a petition for which no brief in opposition has been filed (either because respondent's counsel "waived" response or simply because no brief in opposition was filed within 30 days of the docketing of a petition), that Justice may "call for a response," or CFR. When that occurs, the Clerk of the Court will write a letter to respondent's counsel stating that the Court has directed that a brief in opposition be prepared, and giving respondent 30 days to file the brief. (The 30 days is extendable in the same manner as the initial 30-day period for filing a response — i.e., through a letter to the Clerk requesting an extension of time.) Note that cases for which no response has been filed are generally not placed on the discuss list for a conference, because it is the practice of the Court not to consider granting a petition (and hence not to discuss it) until a response has been filed. Moreover, although the Clerk's letter will state that the Court has requested a response, the practice of the Court is that the request of a single Justice for a response is sufficient to require the Clerk to issue such a letter. Given the schedule of the cert pool, it is usually predictable that CFRs are most likely between a week and two weeks after a petition is circulated, though it can take longer, particularly in the summer months.

When a case is discussed at a conference, the vote of four Justices will result in an order granting the petition and setting the case for briefing and oral argument. Otherwise, the petition will generally be denied. There are, however, a number of other possibilities:

- If the proper outcome of the case may be affected by a recently decided opinion of the Court, the Court may "GVR" the case — that is, grant the petition, vacate the opinion below, and remand for further consideration in light of the intervening decision.
- When a case involves an important issue of federal law upon which the views of the executive branch may be desirable, but for one reason or another the federal government is not a party to the case, the Court may "CVSG," or call for the views of the Solicitor General, in which case an order will be issued requesting that the Solicitor General file an amicus curiae brief expressing the views of the federal government on whether certiorari should be granted.
- If there is a case already pending on the merits that may affect the proper disposition of the petition, the Court may "hold" the petition until the case is decided (and then consider whether to grant it, deny it, or GVR). When the Court "holds" a petition, no order is entered, but it is possible to tell this has happened because the docket will indicate no activity — not even relisting for a subsequent conference — until the case for which the petition is being held has been decided. Court-watchers familiar with the Court's docket can usually make a well-informed guess about what case any given petition is being "held" for.
- A petition may also be "relisted" until the next conference. When this occurs (unlike in a "hold" situation), the docket will be updated regularly to indicate that the petition has been recirculated for the next conference. Petitions may be "relisted" repeatedly. The reasons the Court may "relist" a petition include the desire of one of more Justices for further time to consider whether to vote to grant, in a case where there is a potential for four votes to grant; the desire of a Justice to prepare a dissent from denial of certiorari; and consideration by the Court of the possibility of summary reversal.
- Summary reversal is the dispositional equivalent of the atom bomb. It occurs when at least five members of the Court believe, based solely on the petition, the response, and the reply in support of the petition (together with any amicus briefs that may have been filed at the certiorari stage), that the decision below is so obviously incorrect that the case does not require briefing and oral argument. Summary reversal is usually accomplished through a per curiam opinion for the Court.

The petitions denied at a conference, as well as those where the Court has GVR'd or CVSG'd, are announced in a lengthy order list released by the Court on the following Monday. Petitions granted at

a conference may be announced on the afternoon of the conference (which often occurs early in the Court's Term if the Court is trying to fill spots in its argument calendar and the time available for briefing is limited), or included on the order list issued the following Monday. If you know your case was on a conference list but it does not show up on the Monday order list, that is a sign that it has been either relisted or held, and a check on the docket later in the week may give you a clue as to which it is.

The process described above works in essentially the same way during the summer months leading up to the long conference in late September, with weekly circulation of conference lists and weekly deadlines for preparation of cert pool memos. The only difference is that for many weeks, all the petitions are being circulated for the same conference, and the Justices have up until the eve of the conference to place cases on the discuss list or call for responses. Of course, the discuss list for the long conference is typically much more extensive than for any other single conference, and the number of cases granted (and denied) is larger in proportion to the greater number of filings encompassed by that conference as compared to the thrice-monthly conferences during the Court's Term.

An understanding of the Court's process, together with the information available on the Court's website, can allow you to make a fairly precise prediction very early in the process about when the Court is likely to act on the petition in your case. The website provides a calendar with the date of each conference (http://www.supremecourtus.gov/oral_arguments/oral_arguments.html), as well as a list of the circulation dates for each conference scheduled for the Term (found under "case distribution schedule" at <http://www.supremecourtus.gov/casedistribution/casedistributionschedule.html>). As mentioned above, when the petition in your case is actually circulated on a conference list, the docket will so indicate.

THE BRIEF IN OPPOSITION

Understanding how the Court's process functions and what resources are available to help you is, of course, only the beginning. That understanding informs, but does not itself answer, the bottom-line question — what should you do in response to the petition?

It's worth reiterating at this point that if you are a respondent, your objective is almost always to have the Court deny certiorari. A grant of certiorari turns a victory in your hand into a possibility (and a statistical likelihood) of defeat, so it is extremely unlikely to be in your client's interest. It is also worth remembering, however, that undesirable as a grant may be, there is one possibility that is much worse: summary reversal.

Whether to File a Brief in Opposition

Perhaps paradoxically, the fact that your objective is to have certiorari denied does not necessarily mean that it is in your client's interest to file a brief opposing certiorari. The Court receives thousands of petitions for certiorari each year, most of which have no chance of being granted. Statistically, the chances that the Court will grant a particular petition for certiorari are probably less than 5% even if IFP cases are excluded, but most petitions realistically have a far lower probability of being granted than even a figure like 5% would suggest. Only a small minority of the petitions filed present the kinds of circumstances — disagreements among the courts of appeals on important issues of federal law, or other legal issues of national significance — that are of potential interest to the Court. Most are what the Court and its practitioners refer to as "factbound" cases in which the real complaint of the

losing party below is that on the facts, the outcome should have been different. Such claims of error are generally of little interest to the Court.

Moreover, the Court's review of petitions is aimed at weeding out the many, many petitions that should be denied, and the Court (and, in particular, the law clerks who analyze the cases for the cert pool) are adept at identifying reasons for denial — indeed, if anything, they are perhaps overly biased toward denial, as indicated by the progressive shrinking of the Court's merits docket over the past 25 years from about 150 cases a year set for full briefing and argument in the early 1980s to around 75-80 today. The Court and its law clerks are not likely to be fooled by completely spurious claims of a conflict among the circuits or an attempt to dress up a fact dispute as a legal issue, and they can think of most of the standard reasons for denying certiorari as readily as you can.

Moreover, deciding not to respond in the first instance does not mean that you won't have the opportunity to respond if it turns out that some member of the Court has some potential interest in granting a petition. In that instance, if you initially "waive" response, you will still get to file a brief in opposition if some Justice has enough interest to call for a response. On the other hand, if no Justice is so inclined, the petition will wind up with the dozens each week that are routinely denied by the Court without even having made the discuss list. And "waiving" response can lead to a much speedier denial of certiorari, as it generally will result in the petition being circulated more than a month earlier than if there were a response and a reply. Depending on the time of year, that can result in even larger differences in the timing of the Court's ultimate disposition: If you "waive" response in the spring you may get a denial in May or June in a case where the petition would wind up on the September conference list if you filed a brief in opposition, and thus wouldn't be denied until the first of October.

Self-evidently meritless petitions for certiorari are not hard to spot. Many make no attempt even to identify a conflict among the lower courts on an important legal issue and are thinly veiled (or not-at-all veiled) requests for error-correction by the Supreme Court — and they are often not particularly persuasive even as claims that the lower court erred. Many are also poorly written and incoherent (which is sometimes overlooked by the Court if the petitioner is a pro se IFP litigant who has stumbled upon a legitimate issue, but is generally the kiss of death in a petition filed by counsel).

In such a case it may well be in your client's interest not to spend the time and money necessary to put together a brief in opposition and instead to hasten the process of bringing about a speedy denial of certiorari by "waiving" response. In the unlikely event that the petition attracts some interest from a member of the Court, you will still have the ability to file a brief in opposition, but more likely you will benefit from the Court's doing its job of separating the wheat from the chaff without expenditure of your time or your client's money.

The prevailing view among Supreme Court advocates, however, is that "waiving" opposition is not appropriate in every case, even though you will have a later opportunity to file a brief in opposition if you misjudge the likelihood that the Court will be interested in the case. The reason goes back to the process used by the Court in evaluating petitions for certiorari. When a "waiver" is filed and a petition is circulated on a conference list without a brief in opposition, the law clerk who writes the cert pool memorandum will prepare it without the benefit of input from the party opposing certiorari. Based on having heard only one side of the case, the author of the pool memo may conclude that there is a strong likelihood that the case will merit a grant of certiorari on account of, for example, a claimed conflict among the circuits or a perception that the legal issue presented is particularly important. The Justices who participate in the cert pool may pick up on this perspective, as may the non-participating Justices based on their own chambers' independent review of the petition.

In such circumstances, the recommendation of the pool memorandum is likely to be something along the lines of “call for a response with a view to a possible grant.” When a Justice calls for a response, the petition is removed from the conference list it is on, and is recirculated on the next conference list after the brief in opposition has been filed and 10 days during which a reply may be filed have gone by. (There is no actual “deadline” for the filing of a reply, but it is most effective if it is filed at a time that allows it to be circulated along with the petition and response, which usually means it should be filed within 10 to 14 days after the brief in opposition, depending on how the filing date of the opposition fits with the Court’s schedule for circulating conference lists.) When the case is recirculated, the pool memorandum is annotated by the clerks in each chambers to reflect the arguments made in the opposition. However, given that perceptions of the case may have already been formed and incorporated into both the original pool memo and the Justices’ own attitudes toward the case, the points made in the opposition may be less effective at this stage than if they were made when the Justices and law clerks were first studying the issue.

For this reason, if a petition is one that appears to be a serious candidate for a grant of certiorari — or is well enough crafted that it might fool a busy law clerk or Justice into thinking it is a serious candidate — it will probably be desirable to file a brief in opposition without waiting to see if the Court calls for a response. Hallmarks of such a petition are: a credible-sounding claim that the federal courts of appeals and/or state supreme courts are divided on an important question of federal law (especially if the lower court explicitly said it was disagreeing with another court of appeals); a serious argument that the decision below significantly departs from a controlling decision of the Supreme Court in a way that poses a legal question of potential broad applicability (as opposed to a narrow, fact-specific issue); or some other plausible argument that the decision below implicates an important question of federal law that should be resolved by the Supreme Court. A particularly well-written and polished petition, and/or one presented by a lawyer who has a significant track-record of success before the Court, is also more likely to be one that it will be worth responding to without being asked to do so by the Court, especially if the subject-matter is one that recent decisions show is of significant interest to the Court. Needless to say, petitions for certiorari filed by the Solicitor General of the United States on behalf of the United States or one of its agencies or officers almost always fit into this category. (It’s also worth mentioning that briefs in opposition are required by the Court’s rules in any capital case — that is, a case where the validity of an actual death sentence imposed on the petitioner or respondent is at issue.)

Contents of the Brief in Opposition

Assuming you’ve either chosen or been directed to file a brief in opposition, the contents of the brief are obviously the heart of the matter. Briefs in opposition to certiorari in the U.S. Supreme Court are *sui generis*, and if you haven’t done one before it’s safe to say that it will be different from any legal document you’ve ever written. Both because of its distinctive format, which is unique to the Supreme Court, and because of the nature of the issue you are arguing, you will need to put aside some of your notions of what an appellate brief normally looks like when writing this one.

The fundamental feature that differentiates the Supreme Court brief in opposition from most other legal documents is that the central issue is not whether the lower court was right or wrong, but whether the Supreme Court should bother to *decide* whether the lower court was right or wrong. A brief in opposition that spends most of its time addressing the merits is missing the main point and probably wasting a lot of time.

Of course, to write a brief to persuade the Supreme Court, or any court, not to hear a case, you have to have some idea of what criteria the Court uses to decide what sorts of cases it is interested in. Because

this is a short article, it can't comprehensively discuss that subject, to which *Supreme Court Practice*, for example, devotes many pages. But some basic points can be usefully made.

First, although federal courts hear cases involving both state and federal law, the Supreme Court is virtually exclusively interested in deciding questions of federal law. Indeed, in cases originating in the state court systems, the Supreme Court lacks the authority to reverse a lower court decision on the basis of state law. In cases coming from the federal system, where state law issues are decided (as in diversity jurisdiction cases), the Court has the theoretical authority to reverse a lower federal court on a state-law question, but it has no reason to or interest in doing so, since it cannot definitively decide a question of state law — only state courts have that authority.

Second, the Court has very little interest in resolving factual issues, which it views as more properly the realm of trial courts, and secondarily of appellate courts that have mandatory appellate jurisdiction and are tasked with review of lower court decisions to determine if factual findings are unsupported by substantial evidence or are clearly erroneous (depending on whether a jury verdict or judicial finding of fact is at issue).

Third, it is not enough that an issue be one of federal law and that it be legal rather than factual in nature: The question must be important enough to merit resolution by the Supreme Court. The Court's Rule 10, "Considerations Governing Review on Certiorari," sets forth the basic standards the Court uses to assess whether an issue deserves its consideration, and it is worth quoting in full:

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

The essential task of the brief in opposition is to demonstrate to the Court that the petition fails to meet these criteria.

In carrying out that task, one of the first things to determine is whether the case even presents the legal question or questions the petitioner says it does. It is surprising how often the answer to that question is no. For example, the decision below may just not have decided the legal issue identified by the petitioner — that is to say, the petition may mischaracterize the issues that the lower court actually

decided. Or the lower court may have issued alternative holdings, such that deciding the question the petitioner wants the Court to address would not change the outcome. The court may have decided a question on state-law rather than federal-law grounds, or there may otherwise be what are known as “adequate and independent state-law grounds” for upholding the lower court’s judgment. Or the court’s statements about the issue in question may have been dicta. The court may have made factual findings that render the legal issue irrelevant. There may also be Article III jurisdictional impediments to the consideration of the issue (lack of standing or mootness). The possibilities are virtually endless. The bottom line is that if the issue the petitioner wants the Court to decide isn’t squarely presented or should properly be avoided, the Court should deny certiorari.

In this respect, it’s critically important to make sure that any legitimate arguments you have as to why the Court can’t, or shouldn’t, reach the question presented are set forth in your brief in opposition, because if you do not make them there, the Court is likely to find that you waived those arguments and cannot later present them in your brief on the merits (should it come to that). The Court’s rules are explicit on this point. Rule 15.2 provides:

In addition to presenting other arguments for denying the petition, the brief in opposition should address any perceived misstatement of fact or law in the petition that bears on what issues properly would be before the Court if certiorari were granted. Counsel are admonished that they have an obligation to the Court to point out in the brief in opposition, and not later, any perceived misstatement made in the petition. Any objection to consideration of a question presented based on what occurred in the proceedings below, if the objection does not go to jurisdiction, may be deemed waived unless called to the Court’s attention in the brief in opposition.

Beyond arguments that go to whether a question is properly presented, the brief in opposition should also concentrate on countering the petitioner’s argument that the issue is important enough to merit the Court’s attention. In many cases, this will involve contesting whether there is a genuine conflict among the federal courts of appeals (and/or state supreme courts) over the issue. If the petitioner doesn’t even claim that there is a conflict, the absence of a conflict should be prominently mentioned. If, as is more common, the petitioner does assert that there is a conflict, it’s up to you to debunk that claim if possible.

To begin with, you should make any credible argument that the allegedly conflicting decisions can be reconciled based on relevant factual differences between the cases and/or common principles that the courts agree upon. Often, apparent conflicts turn out to be disagreements in dicta or merely semantical differences that do not reflect substantially different views of the law. Cases decided subsequently to those mentioned in the petition may also help resolve or minimize any conflict. In addition, it is surprising how often petitioners claim a conflict in principle among decisions even when the circuits actually say they are in agreement. If your case falls into that category, make sure the Court is aware that what the lower courts actually say is in harmony. Moreover, even when there is overt disagreement among courts over an issue that is present in your case, that does not necessarily mean that the case is an appropriate one for resolving the conflict; if the case would come out the same way under each of the different views of the law, it may not properly “present” the conflict for resolution. Indeed, it often turns out to be the case that it is much easier to identify a theoretical conflict than a case where the conflict makes an actual difference to the outcome.

You should also make sure that the petitioner is not overstating a conflict by relying on differences in views of courts within a single circuit (intra-circuit conflicts are generally not grounds for certiorari, but should be dealt with by the courts of appeals en banc if they reflect genuine disagreements among panels), or courts below the federal appellate/state supreme court level, which are of less concern to

the Supreme Court. If a conflict is of very recent vintage and very few courts have weighed in on it, be sure to point that out; the Court is often persuaded by arguments that it should let newly arisen issues “percolate” through the lower courts to see if they arrive at a consensus after more careful consideration. On the other hand, if the petition rests on a claim of conflict with a decision issued a generation ago and not followed since then even in the originating circuit, that, too, may be a reason for the Court not to address the issue. If a circuit-split is lopsided, with a consensus among most of the circuits and perhaps one outlier circuit, the Court may be less likely to feel the need to address it, especially in a case arising from the circuits that are part of the consensus. And if a case involves an issue that arises only very rarely and in unusual circumstances, the Court may consider a disagreement among the circuits over that issue not worth resolving.

The “importance” of an issue, of course, involves more than the issue of whether there is a conflict. In writing a brief in opposition, you should — to the extent the case allows for this type of argument — do your best to present the case as a factbound dispute whose resolution is of little broad importance to anyone other than the immediate parties. A petition for certiorari often argues that an issue is important because of its significant consequences for litigants, courts, and the public at large. Counter these policy arguments with any considerations that suggest that the real-world impact of the decision below is not as great as petitioners would have the Court believe, or involves benefits that the petitioners have avoided mentioning.

Somewhat related to the importance of the issue generally is whether it is important to resolve it *now*, and in this case. In this regard, if the decision below is interlocutory, point that out. The Supreme Court’s jurisdiction in matters coming out of the state courts is generally limited to “final” decisions under 28 U.S.C. § 1257, so in such cases, the Court may lack jurisdiction if the case is in an interlocutory posture. Even in cases coming up from the federal courts of appeals, where the Supreme Court’s jurisdiction does not depend on whether a decision is “final,” the Court generally prefers to address issues when a case has been finally resolved, because of the possibility that an issue that appears likely to be decisive before the case is fully resolved may turn out not to be necessary to the ultimate resolution of a case. *See Virginia Military Institute v. United States*, 508 U.S. 946 (1993) (opinion of Scalia, J., respecting the denial of certiorari). Thus, pointing out that a case is in an interlocutory posture (where that is so) is a standard argument in a brief in opposition.

Beyond the posture of the case, there may be many other reasons why this is not the right time to address the issue posed by the petition for certiorari. These include, but are by no means limited to, the need to let the law develop in a novel area, as discussed above. At the other end of the spectrum, there may be reasons why the issue raised in the petition can be expected *not* to develop further, but to wither away on the vine. Statutes or regulations may have changed or be in the process of changing; technological change or developments in a particular field of business may be such that certain types of issues are unlikely to recur. There may be reason to think that either the court that issued the opinion or some relevant governmental body, or even a private party, is rethinking an issue in a way that will make it less likely for the issue to come up in the future. (For example, if in your case the court of appeals issued a decision disagreeing with another circuit, but it has already taken the same issue en banc in another case that may resolve the circuit split, that would be a powerful reason for the Supreme Court not to take up the issue.) All these are sound reasons why the Supreme Court should deny the petition.

Finally, there are the merits of the decision below. I’ve already said that whether the decision is right or wrong is not the main point, but that doesn’t mean it shouldn’t be *a* point. Other things being equal, the Court is generally believed to be somewhat more likely to grant certiorari in a case where significant numbers of Justices believe the decision was wrongly decided than in one where they think

the decision below was correct. It is therefore helpful to offer some crisp, briefly stated, yet persuasive defenses of the correctness of the decision below in a brief in opposition, stressing (if possible) the consistency of the decision below with the Supreme Court's own leading pronouncements in the relevant area of law. Whatever you do, however, don't let it appear to the reader that you don't know the difference between a brief in opposition and a full-dress merits argument. And be sure that whatever attention you devote to the merits does not come at the expense of taking on a substantial argument that the case presents a major conflict among the circuits over an important question of federal law. If the most you can do in response to that type of argument is say that the lower court was correct, the petitioner is likely to have a field day in its reply.

The merits discussion may take on particular urgency if your case falls into that small category of cases where summary reversal seems like a serious possibility. These are typically cases where it appears that a court of appeals has gone far out on a limb to rule in your favor. In that case, you may need to do more work on the merits to show that the decision is not as outlandish as the petitioner has made it appear to be. On the other hand, you probably don't want to argue the merits in such a way that suggests to the Court that you are worried about summary reversal, and indeed if it appears you have made all the arguments you have on the merits, that may perversely make the Court feel more comfortable about issuing a summary disposition on the merits. You should not, in any event, let fears of summary reversal cause you to overlook available arguments as to why a case does not meet the Court's normal criteria for granting plenary disposition of a case.

Thus far, I've talked principally about the types of arguments to make in a brief in opposition, but you should also not neglect the need, in most cases, to start out with a brief statement of the case that (1) highlights any factual misstatements or mischaracterizations the petition has made; (2) presents whatever information is necessary to support arguments that the case is too fact-specific and idiosyncratic to merit the Court's attention, and/or that the questions the petitioner presents are not properly before the Court; and (3) presents the underlying facts and the lower court proceedings in the most favorable possible light for your position. The statement should do all these while at the same time avoiding tedious and unnecessary detail, which creates the impression that you doesn't understand what factors are important to the Court in assessing the petition. You may also, at the very outset, wish to reframe the questions presented in ways that underscore your position about what the case is truly about.

Finally, the brief in opposition should be as short and readable as you can make it. The Court's Rule 15.2 emphasizes the point: "A brief in opposition should be stated briefly and in plain terms and may not exceed the word or page limitations specified in Rule 33." The relevant word limitation — which is more likely to be applicable than the page limit unless you are responding to an IFP petition or your own client qualifies for IFP status — is that a brief in opposition may not exceed 9,000 words (not including questions presented and tables). See S. Ct. R. 33.1(g)(ii). That equates to a little more than 30 pages in the booklet format you're required to use in paid cases.

Conventional wisdom, however, is that the most effective petitions for certiorari are shorter than the word limit, and the most effective briefs in opposition are shorter still. After all, it's *supposed to be* harder to explain why a case *should* be heard by the Court than why it *shouldn't*, so if it's taking too many pages to tell the Court why it should deny certiorari, that is not a very good sign. Moreover, your audience consists of law clerks and Justices who are considering dozens of petitions for certiorari each week. You need to be respectful of their time and aware that brevity may maximize the impact of your arguments.

Even so, some cases are complicated, and sometimes explaining why an issue isn't presented or an apparent conflict among the circuits isn't a real one requires some detail. It's important, therefore, to

make sure that your readers have a very clear idea from the outset about where your brief is headed and what the key reasons are for denial of certiorari in your case. Thus, although the Court's rules don't specifically provide for it, it is extremely helpful to start the brief in opposition with an introduction, preferably no more than about a page long, that sums up in a few succinct and punchy paragraphs the critical reasons why this case is not one in those few in which the Court should grant certiorari.

If that seems like a daunting task, think of it this way: The pool memorandum by the law clerk will, after describing the facts, procedural background, and holding of the case, and the competing arguments of the petition and the brief in opposition, probably spend no more than a page or two stating the law clerk's essential reasons for recommending whatever disposition he or she proposes. Your introduction should telegraph precisely those reasons to the law clerk.

Format of the Brief in Opposition

I've mentioned the Court's distinctive booklet format on a number of occasions. As you prepare the brief in opposition, you'll need to familiarize yourself not only with all the particular parts it is supposed to have under the Court's rules and conventional practices (cover, questions presented, corporate disclosure statement if applicable, tables of contents and authorities, statement of the case, argument section generally headed "Reasons for Denying the Writ," and conclusion), but also the margin, typeface and printing requirements described in the Court's Rule 33.

The end result should be a bound booklet with an orange cover, pages 6 1/8 inches wide by 9 1/4 inches high, and printed matter 4 1/8 inches wide by 7 1/8 inches high (not including page numbers but including footnotes). The brief should appear to be professionally typeset in a 12-point font from the Century family (Times New Roman need not apply).

You'll almost inevitably send the brief to a printer to be reproduced and bound, and a printer can handle the typesetting, too. Far more economical, however, if you have any expertise with word processing programs (or have someone in your office who has), is to format the brief yourself using Word, WordPerfect, or whatever word processing program you use, and deliver "camera-ready" copy to the printer, who will then only need to do the printing and binding, which is much less expensive and allows you to maintain control over the appearance of the final product. Delivering camera-ready copy rather than relying on the printer to typeset your brief also allows you to minimize the amount of time you need to set aside at the end of the process for production of the brief. A good printer can receive a camera-ready brief in opposition, print and bind it, and file and serve it by mail in the space of a single day. Typesetting by the printer and the attendant proofreading of page proofs adds considerable time to the process.

However you choose to handle printing, you'll be best off if you select a printer that has a lot of Supreme Court experience. An experienced printer can serve as a backstop to ensure that you comply with the Court's rules and will be able to alert you if there is some nonconformity in your document that you have overlooked. A good printer can make the difference between a product that looks professional and one that looks sloppy and amateurish.

CONCLUSION

Once you've availed yourself of whatever expert assistance you can, familiarized yourself with the Court's procedures, and, if necessary, prepared a brief in opposition, you've done what you can do to maximize the likelihood that your victory in the lower courts will stand. Now it's a matter of waiting

for the Court's process to run its course, hopefully with the result that your case will appear buried in a long list of "cert. denials" on a Monday morning order list. Unfortunately, some cases are "certworthy" despite your best efforts. Given the large number of petitions and the small number that are granted, being one of those chosen is a little like being struck by lightning: It's not very likely, but sometimes it happens even though you've taken all the precautions you can. Still, it's worth doing all you can to keep it from happening to you.