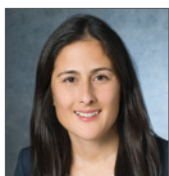




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Expert Q&A on Seeking or Opposing *Certiorari* in the US Supreme Court

No party likes to be on the losing side of an appeal. Often, when faced with a loss in a federal court of appeals or a state supreme court, a client may ask whether relief is available in the US Supreme Court. If the client wants the Supreme Court to review the decision of the court below, it usually must seek permission to appeal by filing a petition for a writ of *certiorari* (commonly called a cert petition). Given the rarity of Supreme Court review, however, filing a cert petition might not be worth the effort and expense, even in cases where the decision below is unequivocally wrong. Practical Law asked *Diane L. McGimsey* and *Judson O. Littleton* of *Sullivan & Cromwell LLP* to discuss key considerations for companies and their counsel when deciding whether to file (or oppose) a cert petition in the Supreme Court.



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How likely is it that the Supreme Court will grant *certiorari* in a given case?

It is not very likely. According to the Harvard Law Review, roughly 6,200 cert petitions were filed during the 2016 Term, and the Supreme Court granted only 75 of those, or 1.2%. Of course, this does not mean that any given petition has a 1.2% chance of being granted. That overall total includes a number of petitions that have little chance of being granted, such as *pro se* habeas petitions. By contrast, the chances are likely much better than 1.2% if the petition presents an important legal issue that has squarely divided multiple federal courts of appeals. The vast majority of petitions fall somewhere between those two extremes.

Notably, the odds that the Court will grant *certiorari* are even lower in cases that do not involve a government entity party on either side. Of the 1.2% of petitions that were granted during the 2016 Term, only 30% (or 0.3% of all petitions filed) were in private litigation arising out of either federal or state court. (See *The Supreme Court 2016 Term, The Statistics*, 131 Harv. L. Rev. 403, 410, 414 (2017).)

What does the Supreme Court look for when deciding whether to grant *certiorari*?

Supreme Court Rule 10 provides a list of criteria that the Court considers when deciding whether to grant *certiorari*. Important factors include whether the case involves:

- **Conflicting lower court decisions.** Most often, the Supreme Court looks for disagreements between lower federal courts of appeals, state supreme courts, or both on questions of federal law (see, for example, *Hillman v. Maretta*, 569 U.S. 483, 489 (2013) (stating that the Court granted *certiorari* “to resolve a conflict among the state and federal courts”). The clearest example is a case involving a federal statute that courts have interpreted differently, creating a situation where, for example, the same statutory language is given one meaning in the Tenth Circuit and another meaning in the Eighth Circuit. It is well within the Supreme Court’s role to resolve such circuit splits by providing an authoritative interpretation of the disputed statute. The existence of a conflict is not necessarily enough, though. If possible, counsel should attempt to show that the issue is an important one where nationwide uniformity matters.
- **An issue of nationwide importance.** The Supreme Court may grant *certiorari* even without a split among the lower courts if the case presents an issue of nationwide importance. These cases typically involve:
 - substantial constitutional challenges to federal statutes, particularly if a lower court has held that an Act of Congress is unconstitutional; or
 - issues that are sufficiently important in terms of their nationwide relevance or impact that the Supreme Court should have the final word on the issue.

(See, for example, *Massachusetts v. Env’t Prot. Agency*, 549 U.S. 497, 505-06 (2007) (stating that notwithstanding the absence of any conflicting decisions, “the unusual importance of the underlying issue” persuaded the Court to grant *certiorari*).)

- **A misapplication of Supreme Court precedent.** Although this is a much smaller set of granted cert petitions, the Supreme Court occasionally looks for cases in which it believes that lower courts misapplied (perhaps intentionally) Supreme Court precedent. Recent cases falling into this category have involved the application of the Federal Arbitration Act and qualified immunity doctrine (see, for example, *Kindred Nursing Ctrs. Ltd. P’ship v. Clark*, 137 S. Ct. 1421, 1427 (2017) (reviewing a state supreme court’s application of the Federal Arbitration Act, and explaining that “the court did exactly what [*AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011)] barred” by “singling out [arbitration] contracts for disfavored treatment”).

It should also be noted that although the Supreme Court’s role is not to correct lower-court errors, that does not mean that the merits of a particular case have no impact on the Court’s decision to grant *certiorari*. In recent years, the Court has regularly affirmed far fewer cases than it has reversed or vacated. For example, in the 2016 Term, the Court affirmed less than 22% of cases that resulted in full opinions on the merits (see *The Supreme Court 2016 Term, The Statistics*, 131 Harv. L. Rev. at 411). Therefore, although an error below is generally not sufficient to make a case certworthy, the Court may be more inclined to grant *certiorari* in a case meeting the above criteria where it also believes the lower court erred on the merits.

How can a party and its counsel demonstrate that a case is certworthy?

To be successful, a cert petition should focus on several important areas, including:

- **The principal factor weighing in favor of review.** First and foremost, the petition must focus on the Rule 10 considerations discussed above. Unlike in the lower courts, the merits of the case should no longer be the principal focus of a cert petition. For example, if the case presents a split of authority among the federal courts of appeals or the state supreme courts, counsel should state that in the first paragraph of the introduction and make it the first argument in the petition.
- **Why the case matters beyond this case.** The petition should explain why the case matters to those beyond the actual litigants. For example, if the outcome may have a devastating impact on a certain industry or group, counsel should clearly explain how and why as early as possible in the petition. Or, if the legal question at issue arises frequently among litigants and is a source of confusion among the lower courts, identifying those different outcomes on the same question may help highlight why the issue is important enough for Supreme Court review.
- **Why the issue is dispositive in this case.** Counsel should make clear in the petition that the legal issue to be decided is case-dispositive in the party’s favor. Even in the face of a clear split among the courts of appeals on an important legal issue, if other issues may impact the ultimate outcome of the case, the Supreme Court will often deny *certiorari* and wait for a case where the issue is case-dispositive.



Search [US Supreme Court Practice: Petitioning for a Writ of Certiorari](#) and [US Supreme Court Practice: Cert Petition Checklist](#) for a detailed explanation of the process for petitioning the Supreme Court for a writ of *certiorari*, including more on demonstrating certworthiness.

What types of cases or questions are ill-suited for Supreme Court review?

Cases that are ill-suited for Supreme Court review include those involving:

- **Questions of state law.** Even if a state court of last resort issues the worst imaginable interpretation of a state statute, the Supreme Court does not have jurisdiction over the case unless a party can identify a question of federal law (28 U.S.C. § 1257). Further, even if the lower court did consider a question of federal law, the Supreme Court still lacks jurisdiction where there is an “adequate and independent state ground” that supports the outcome in the lower court, regardless of how the federal question was resolved (see *Michigan v. Long*, 463 U.S. 1032, 1038 (1983)).
- **Conflicts among federal district courts or lower-level state courts.** These conflicts may ripen into certworthy issues, but they can be resolved in the first instance by the federal courts of appeals or the state supreme courts.
- **Challenges to erroneous (or even completely unreasonable) factual findings.** The Supreme Court, like other appellate courts, is not a fact-finding body and does not grant *certiorari* to resolve factual disputes.
- **“Factbound” questions that involve an asserted misapplication of a properly stated rule of law.** One of the most common reasons for denying a cert petition is because the petitioner contends that the lower court interpreted the law incorrectly, but that the court simply applied the law wrongly to the facts of that case. Even if the petitioner is right, these cases usually do not present issues of nationwide importance suitable for Supreme Court review.

What steps can a party and its counsel take during the course of litigation to potentially increase the likelihood of eventual Supreme Court review?

At the outset, a party always should be militant about making and protecting the record in a way that carefully and squarely presents potentially certworthy issues. One common reason the Supreme Court denies petitions involving otherwise certworthy issues is because of so-called “vehicle problems,” which can include a lack of clarity about whether the certworthy issue actually was dispositive in a case. To avoid any potential vehicle problems, counsel should ensure that:

- They adequately preserved the legal argument they wish to make before the Supreme Court at every appropriate level of the litigation below.
- The lower courts considered and rejected the argument.
- If appropriate, there is no doubt that the lower court’s resolution of the question directly conflicts with the decisions of other courts.

This often requires parties and their counsel to think several steps ahead, even when in the trial court, about what issues in their case might attract the Supreme Court’s interest. This is one reason that it has become increasingly common for parties to retain experienced Supreme Court practitioners to consult and advise on these matters from the outset of highly consequential litigation.



Search [Issue Preservation Toolkit](#) for a collection of resources to assist counsel with raising and preserving issues and arguments for appellate review at the pretrial, trial, and post-trial stages of civil litigation in federal court.

What are the hallmarks of an effective cert petition?

Effective cert petitions generally accomplish three objectives:

- They persuasively explain why the case fits into one of the traditional categories of cases for which the Supreme Court typically grants *certiorari*. This is the most important factor.
- They give the Court comfort that there are no looming vehicle problems that will complicate its consideration of the questions presented for review (such as jurisdictional problems or alternative grounds supporting the decision below).
- They provide a reason for the Court to believe the decision below may have been incorrectly decided. Although not technically a factor in the decision to grant *certiorari*, as noted above, the statistics reveal that the Supreme Court more often reverses the decision below than affirms it.

Another hallmark is a well-crafted statement of the questions presented. The questions presented appear on the first page of a cert petition and typically are the first part of the petition that the Court reviews. For this reason, experienced Supreme Court advocates often revise this section dozens of times. In preparing the questions presented, counsel should:

- Limit the number of questions presented (typically to no more than one or two).
- Use concise and clear language.
- State the issue and convey its importance in no more than a quarter of a page.
- Avoid one-sided or argumentative questions.



Search [US Supreme Court Practice: Petitioning for a Writ of Certiorari](#) for more on drafting an effective cert petition.

In what circumstances should a petitioner consider soliciting the participation of an *amicus curiae*?

Getting support from an *amicus curiae* (or “friend of the court”) is generally beneficial. Although nearly every merits case in the Supreme Court has at least a few *amicus* briefs filed in support of one party or the other, *amicus* support is much rarer at the *certiorari* stage. The mere fact that a cert petition has *amicus* support may help set the petition apart from the vast majority of other petitions that will be considered at a given conference.

However, any initial benefit will immediately be lost if the *amicus* brief merely rehashes the same arguments as the petition. *Amicus* briefs are much more effective and persuasive when they provide the Court with a perspective on the importance of a question presented for review that the petitioner may not have the space to fully convey in the cert petition.

For example, associations representing specialized or highly regulated industries can be especially effective in helping the Court understand the particular economic or social effect that a lower court's decision will have in the real world. This may help convince the Court to take a case it might otherwise have passed on. Similarly, *amicus* briefs submitted by well-respected organizations or interest groups (such as the Chamber of Commerce or the American Civil Liberties Union) can be persuasive, particularly because those organizations infrequently submit *amicus* briefs at the *certiorari* stage.

In addition to identifying the right organization to provide *amicus* support, a petitioner should seek the appropriate counsel to represent the organization and author and sign the brief. Unsurprisingly, *amicus* briefs submitted by counsel who are well-regarded within the Supreme Court and appellate bar may be read more closely by the Court.



Search [Amicus Briefs: What Are They and When Should a Company File One?](#) and [Expert Q&A on Best Practices for Amicus Briefing](#) for a discussion of key issues counsel should consider when filing an *amicus* brief.

What common pitfalls should counsel avoid when preparing a cert petition?

The most common pitfall is simply rearguing the merits of why the lower courts got it wrong. Particularly when counsel have been living and breathing a case since the trial court, the tendency is to explain all the ways the lower courts erred and all the reasons their client should have won. Such arguments will not persuade the Supreme Court to grant *certiorari*, however, because the Court does not engage in error correction. Instead, as a general matter, counsel should focus primarily on what makes the case certworthy and only then explain why the lower court's resolution of the independently important question was wrong.

Another common (and related) pitfall is not carefully choosing the issues that are the subject of the cert petition. Given the relative rarity of truly certworthy issues, only the most exceptional cases will present two certworthy issues (and those presenting more than two are nearly unheard of). Even if counsel believes the lower court erred in many ways, counsel should choose the one (or possibly two) issues that have the best chance of drawing the Court's interest. The Supreme Court is not the place to be concerned about preserving every error.

Should a respondent always file a brief opposing *certiorari*?

The Supreme Court Rules do not require parties to file briefs in opposition to a cert petition, and there are different schools of thought about when a respondent should file an opposition

or waive response. As with most strategic questions, the best answer is that it depends.

Certain cert petitions will appear meritless on their face and the respondent usually can safely waive a response, such as those where the petitioner either:

- Contests factual findings.
- Seeks *certiorari* from a summary affirmance by a federal court of appeals of a short order by the district court that did not require much analysis.

In these situations, if the Supreme Court nonetheless identifies an issue in the petition that it deems potentially certworthy, it will request a response before granting *certiorari*. The risk of this wait-and-see approach is that the Court will make a preliminary assessment of the case based solely on the petitioner's arguments and already be biased against the arguments the respondent makes in the opposition the Court has requested. Still, there are certain categories of cases that are so obviously unworthy of *certiorari* that the respondent may easily decide it is worth accepting this risk to avoid the additional time and expense associated with filing a brief in opposition.

If, on the other hand, the petition seeks review on a difficult question of law that was the subject of precedential opinions in both the district court and the court of appeals — and especially if there was a dissent at the court of appeals — the best practice is to file an opposition brief at the outset rather than waive response. This ensures that the law clerk or Justice reading the petition will do so with the respondent's counterarguments at hand, rather than allowing the petition alone to create the first impression of the case until the Court calls for a response. Additionally, waiving a response in a case involving a substantial question of law may be seen by the Court as somewhat lacking in candor or not reflecting an honest assessment of the merits of the underlying case.

When opposing *certiorari*, how can a respondent and its counsel most effectively avoid Supreme Court review?

The respondent and its counsel should take the opposite approach from that discussed above, and clearly demonstrate why the case is not certworthy. Specifically, their opposition brief should:

- Point out any underlying vehicle problems that will distract or complicate the Supreme Court's review of the question presented.
- Explain that any asserted circuit split is illusory because, for example:
 - the lower courts did not actually address the same legal question; or
 - the lower courts' apparently conflicting answers to the legal question at issue simply turned on the different facts presented in each case.
- Highlight how the petitioner's assertions about the importance of the legal question at issue are exaggerated or will be mitigated by other factors.
- Demonstrate why the decision of the court below was correct, so that the Justices will have no concerns about leaving that decision in place.