TIPS ON PETITIONING FOR AND OPPOSING CERTIORARI IN THE U.S. SUPREME COURT

Timothy S. Bishop, Jeffrey W. Sarles, and Stephen J. Kane
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For many lawyers, representing a client in a case that is a candidate for review by the Supreme Court of the United States is a once-in-a-lifetime experience. The art of seeking and opposing certiorari in the Supreme Court-- with its focus on conflicts among lower courts and the importance of the case to nonparties--is decidedly foreign to many litigators, who spend their days engaged in the underlying merits of a dispute. We hope to make certiorari practice a little less opaque by providing some tips on the factors the Supreme Court considers in deciding whether to review a case.

For more detail on seeking and opposing certiorari, be sure to consult the standard treatise, Gressman, Shapiro, Geller, Bishop & Hartnett, *Supreme Court Practice* (9th ed. 2007), as well as the Rules of the Supreme Court of the United States (Rules), which the Court significantly revised effective October 1, 2007.

The first question that any prospective Supreme Court petitioner should consider is whether to file a petition at all. Although the number of petitions considered by the Supreme Court more than doubled--from less than 4,000 in the mid-1970s to 8,922 in the 2006 Term--the number of annual grants of certiorari decreased from 172 to only 77 during that same period. "The Supreme Court, 2005 Term--The Statistics," 121 *Harv. L. Rev*. 436, 444 (2007); "The Supreme Court, 1975 Term--The Statistics," 90 *Harv. L. Rev*. 276, 279 (1976). Whatever the cause of the Court's shrinking docket--the theories include repeal of much of the Court's mandatory jurisdiction, changes in the composition of the Court, increased reliance on clerks, homogeneity in the lower courts and a decrease in the passage of major federal legislation--the stark reality for petitioners is that the chances of a grant are slim at best. In fact, the less-than-4-percent rate at which the Court grants certiorari in paid cases (as opposed to petitions filed *in forma pauperis*, which are granted at an even lower rate) is misleadingly high because petitions filed by governmental entities stand a far better chance of success than do petitions filed by private litigants. The Office of the Solicitor General (SG)--the entity that represents the federal government in the Supreme Court--has a particularly impressive track record, with the Court granting about 70 percent of the petitions filed by the SG according to one count. Lazarus, "Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar," 96 *Geo. L.J.* (forthcoming 2008). Moreover, much of the Court's docket is taken up by criminal and habeas cases, leaving few openings if a case involves your business issue.

The justices have frequently commented on the ease with which they are able to dispatch many petitions. Justice Brennan observed that 60 percent of paid petitions are "utterly without merit," while Chief Justice Rehnquist remarked that "several thousand" of the petitions filed each year are so implausible that "no one of the nine [justices] would have the least interest in granting them." Brennan, "The National Court of Appeals, Another Dissent," 40 *U. Chi. L. Rev*. 473, 476-

77 (1973); Rehnquist, *The Supreme Court* 233 (2d ed. 2001). One of the principal reasons so many petitions are poor candidates for review is that they reflect a fundamental misconception about the role of the Supreme Court. As Chief Justice Vinson noted more than 50 years ago: "The Supreme Court is not, and never has been, primarily concerned with the correction of errors in lower court decisions." Vinson, "Work of the Federal Courts," Address Before the ABA (Sept. 7, 1949). Today's Supreme Court Rule 10 confirms that a petition "is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Yet litigants continue to flood the Court with petitions arguing that review is warranted in large part because the lower court erred. To be sure, the merits are not irrelevant at the certiorari stage. The Court affirmed in about 26 percent of the cases it reviewed on a writ of certiorari and decided with a full opinion during the 2006 Term, suggesting that the Court is more likely to issue a grant when it believes that the lower court got it wrong. The Supreme Court, 2006 Term, *supra* at 380. But the fact that the court below erred is generally not nearly enough to merit a spot on the Supreme Court's docket.

So if an error by the lower court is insufficient to merit certiorari, what does the Court look for? Unfortunately, the justices have themselves been less than clear on this score. Justice Harlan said that "the question whether a case is 'certworthy' is more a matter of 'feel' than of precisely ascertainable rules." Harlan, "Manning the Dikes," 13 *Rec. Ass'n B. N.Y. City* 541, 549 (1958). Chief Justice Rehnquist similarly thought that the question whether to grant certiorari is "a rather subjective decision, made up in part of intuition and in part of legal judgment." Rehnquist, *supra*, at 234. To make its decision-making process even more difficult to decipher, the Court almost never publicizes the reasons for denying certiorari, and the explanations in its merit opinions for granting the writ rarely go beyond the perfunctory.

The rules do, however, provide guidance for prospective petitioners concerning the types of cases that may warrant certiorari. Rule 10 sets forth several factors that "indicate the character of the reasons the Court considers," though it notes that these factors are not "controlling" nor do they "fully measur[e] the Court's discretion." These factors can be broken down into four categories: (1) the decision below conflicts with the decision of a federal court of appeals or a state court of last resort on "an important federal question"; (2) the lower court decided "an important question of federal law" in a way that conflicts with a Supreme Court decision; (3) the court below "decided an important question of federal law that has not been, but should be, settled" by the Supreme Court; and (4) the lower court "has so far departed from the accepted and usual course of proceedings" as to require the Court's "supervisory power"--a power rarely exercised. The rule recognizes the obstacles that petitioners face, noting that "[r]eview on a writ of certiorari is not a matter of right, but of judicial discretion," and that the Court will grant a petition "only for compelling reasons."

Justice Clark once said that conflicts among the lower courts are "the safest vehicle for a grant," and that statement remains true today. Clark, "Some Thoughts on Supreme Court Practice," Address before Univ. of Minn. Law Sch. Alumni Ass'n (1959). During the 2003 to 2005 Terms, for example, nearly 70 percent of the cases in which the Court granted certiorari presented a conflict among the lower courts. Stras, "The Supreme Court's Gatekeepers: The Role of Law

Clerks in the Certiorari Process," 85 *Tex. L. Rev*. 947, 981 (2007). But not just any conflict will do. Rather, as Rule 10 suggests, the conflict must concern an issue of federal law and must be at the level of the federal courts of appeals or state courts of last resort. Conflicts with decisions issued by federal district courts or lower state courts are generally insufficient to merit certiorari because the court of appeals or the highest state court may clear up the conflict and eliminate the need for Supreme Court intervention. Intra-circuit conflicts are likewise poor candidates for review because, as Justice Harlan explained, "such differences of view are deemed an intramural matter to be resolved by the Court of Appeals itself." Harlan, *supra*, at 552. Moreover, the petitioner generally must show that the conflict is such that lower courts faced with the same or very similar facts would decide the cases differently. Inconsistencies in dicta or in general principles will not suffice. The deeper the split among the lower courts, the better the chances that the Court will issue a grant. As a general rule, the Court prefers to wait to resolve important issues of federal law until the issues have "percolated" sufficiently in the lower courts.

A direct conflict with a decision of the Supreme Court provides another basis for certiorari. For obvious reasons, a lower court is unlikely to reject a Supreme Court decision expressly. But the chances of a grant improve if the petitioner can show that the lower court's decision is in tension with a decision of the Supreme Court, if the Court's precedents in the area are confused, or if the Court has expressly "left open" the issue for future resolution. Occasionally a petitioner succeeds in obtaining a grant where the lower court based its decision on a Supreme Court precedent that is considered ripe for reexamination and possible overruling or limitation. *E.g., Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28, 53 (2006).

Even a case that involves a direct conflict among the lower courts or with a decision of the Supreme Court provides no guarantee that the Court will grant certiorari. A study of the 1989 Term estimated that the Court denied review of more than 200 petitions that presented inter-circuit conflicts. Hellman, "Unresolved Intercircuit Conflicts: The Nature and Scope of the Problem" 34-64 Fed. Judicial Ctr. (1991). The 1995 amendments to Rule 10 confirmed that the Court does not consider all conflicts to be equal by adding the word "important" to the reference to conflicts that warrant certiorari. Thus, petitions generally must present issues of great importance to merit the Supreme Court's review, with the burden of demonstrating importance even higher where there is no conflict in the lower courts.

A case may be sufficiently important to merit Supreme Court review if the impact of the lower court's decision extends beyond the narrow interests of the litigants to affect an entire industry or a large segment of the population. For example, decisions that invalidate federal or state statutes on constitutional grounds are ordinarily of sufficient importance to warrant review. Other earmarks of importance include issues that recur frequently and consume substantial judicial resources, as well as lower court decisions that involve enormous financial liabilities.

In addition to conflicts, the importance of the issue presented and, to a lesser extent, the merits of the dispute, numerous other factors affect whether the Court grants certiorari. The Court prefers cases that provide good "vehicles" for resolving the issue presented, i.e., cases that do not involve messy factual disputes or jurisdictional defects that may affect the Court's ability to

reach the issue it granted certiorari to resolve. The identity of the court below may affect the likelihood of intervention--witness the disproportionate number of cases the Court has taken in recent years from the Ninth Circuit--while a dissent from a well-respected judge improves the chances of a grant. Cases that the lower court thought sufficiently important to review en banc present more attractive candidates for review, with one study finding that the Court is nearly three times as likely to grant petitions challenging en banc decisions as it is to grant petitions involving panel decisions. George & Solimine, "Supreme Court Monitoring of the United States Courts of Appeals En Banc," 9 *Sup. Ct. Econ. Rev*. 171, 195-96 (2001). Amicus curiae briefs supporting a paid petition can also help to show that the issue presented is of widespread importance. According to an upcoming study of the 2005 Term, the filing of at least one amicus brief in support of a paid petition increased the likelihood that the Court would grant certiorari by almost 20 percent, and the filing of at least four amicus briefs increased the likelihood of a grant to 56 percent. In addition, the Court is somewhat more likely to grant review of a case that presents issues arising in a "hot" area of the law. For example, the Court has recently shown great interest in reviewing cases that involve large punitive damages awards. Good timing may also help. One study found that the Court is about twice as likely to grant certiorari in petitions decided in October, November, or January (when the Court is trying to fill its argument calendar for the remainder of the Term) as it is in petitions decided in February, March, or the summer recess. Cordray & Cordray, "The Calendar of the Justices: How the Supreme Court's Timing Affects Its Decisionmaking," 36 *Ariz. St. L.J*. 183, 204 (2004). Finally, petitioners represented by experienced Supreme Court practitioners are more likely to obtain review. Professor Lazarus reports that a small group of specialist Supreme Court advocates is "disproportionately successful" at the certiorari stage, filing 44 percent of granted petitions (excluding petitions filed by the Solicitor General) in the 2006 Term.

If you decide to face the long odds and file a petition for certiorari in the Supreme Court, there are three initial steps you should take. First, if you are not already a member of the Supreme Court Bar, you should apply for admission. The requirements are not onerous. Rules 5, 9. Second, you should determine the due date for your petition. A petition must be filed within 90 days after entry of the judgment below or the denial of rehearing. Rule 13. The petition is timely if you file it with the clerk within 90 days; send it to the clerk on the 90th day via U.S. mail with a postmark (not a commercial postage meter label); or deliver it on the 90th day "to a third-party commercial carrier for delivery to the Clerk within 3 calendar days." Rule 29.2. Although requests for an extension of time are "not favored," you may obtain an extension of up to 60 days "[f]or good cause" by filing an application with the clerk at least ten days before the date the petition is due. Rule 13.5. Regardless of whether you obtain an extension, make sure that you calculate your due date correctly because the clerk will not file an untimely petition. Rule 13. Third, you should begin the critical process of identifying and contacting potential amici early in the game. An amicus must file its brief 30 days after the petition is docketed (with no extension available) and give notice to the parties of its intent to do so at least ten days in advance. Rule 37.2(a).

As for the petition itself, the 2007 amendments to the Rules replace the former 30-page limitation with a 9,000-word limit; you should aim to use significantly fewer words if at all

possible. Rule 14 sets forth the petition's required content, which we need not detail here. There are three critical components to any petition. The Question Presented--which appears on the first page--may well be the most important part of the petition. Justice Brennan frequently decided that a case was not "cert-worthy" simply by looking at the question presented. To avoid that type of reaction, your question should briefly describe the essential features of the case while conveying the necessity of Supreme Court intervention. A short introductory paragraph is sometimes helpful to place the question in context. To determine whether your question is effective, try inserting the words "we hold that" before the question to make it an affirmative statement. If that statement reflects a clear and important ruling in your favor that would have an impact beyond your case, then you are well on your way. *See* Shapiro, "Certiorari Practice: The Supreme Court's Shrinking Docket," Vol. 24, No. 3 LITIGATION 25 (Spring 1998). Finally, a cautionary note about the number of questions presented: Try to limit yourself to one or two questions. Few cases present a single question that merits the Court's review; it is unlikely that your case presents three or more, and you may lose credibility suggesting otherwise. *See O'Sullivan v. Boerckel*, 526 U.S. 838, 852 (1999) (Stevens, J., dissenting).

The second key component is the Statement, which provides a brief recitation of the factual background and a description of the decisions below. A punchy introductory paragraph that orients the reader about what is to follow is often useful. Make sure to keep the description of the facts to a minimum. A lengthy factual summary, loaded with references to the types of background controversies that are the focus of trial counsel, may only serve to show that your case is convoluted and fact-dependent--defects that usually result in a denial. If your case revolves around the interpretation of a statute or regulatory scheme, it may be helpful to write a brief section detailing that framework. Finally, in your description of the decisions below, be sure to emphasize any dissent or votes in favor of rehearing en banc and to note the identity of any judge(s) who saw things your way, particularly if they are well respected.

The Reasons for Granting the Petition forms the heart of the petition. An introductory paragraph or two often helps to highlight why your case is certworthy. As in any brief, subheadings are useful to direct the reader to your key points and provide a roadmap of the argument. If your case presents conflicts among the lower courts, you might begin with a section captioned "The First Circuit Joined the Second Circuit in Expressly Rejecting Decisions from the Third and Fourth Circuits." In this section, prove that the lower courts are deeply divided on an issue of federal law by quoting from the leading cases. If you are lucky enough that the lower courts have acknowledged the split, emphasize that fact. Regardless of whether there are conflicts, the petition must show that the issue presented is of great importance beyond the narrow interests of the litigants, and that Supreme Court intervention is therefore imperative. This section might argue, for example, that the lower court's decision threatens to open the floodgates to a dramatic increase in litigation, or makes it impossible for litigants to comply with discrepant rulings from across the country. Finally, the petitioner should almost always include a short section at the end arguing that the court below erred, both because the merits play a minor role in the certiorari decision and because the Court on rare occasions simultaneously grants certiorari and summarily affirms. In writing this section, focus on the Supreme Court's own precedents, as well as any relevant constitutional or statutory language. Reliance on respected scholars in the field and public policy arguments may bolster your position. Above all else, keep this section short; there

will be plenty of time to argue the merits if the Court grants your petition.

Be sure to comply with the Rules in putting your petition together. The Rules require that paid petitions be filed in booklet format, so you will need to finish your brief with enough time to spare for a printing company to produce the petition. The Rules set forth specific requirements, including typeface, margins, bindings, covers, appendices, and service. *E.g.*, Rules 29, 33-34. Take care to note that the 2007 amendments require the use of a font in the Century family (replacing the formerly required Roman font) and require 12-point type in the text and 10-point type in footnotes (replacing 11-point and 9-point). Rule 33.1(b). You also should study a helpful memorandum authored by the Supreme Court Clerk's Office that highlights the most common procedural mistakes made by petitioners. *See* www.supremecourtus.gov/casehand/guidetofilingpaidcases2007.pdf. The clerk's office is very helpful in responding to inquiries from counsel about such matters, as are the leading printers of Supreme Court briefs.

The respondent has 30 days after the petition is docketed in which to file a brief opposing certiorari, called a "brief in opposition." Rule 15.3. The respondent can often obtain an extension of up to 30 days from the clerk. Indeed, by requiring amici to provide notice of their intention to file briefs at least ten days before the due date of those briefs and the opposition, the 2007 amendments contemplate that a respondent may wish to seek an extension of time for the purpose of responding to amicus briefs in the opposition. Rule 37.2(a). The petitioner may file a reply brief and should usually do so to answer the respondent's key points. Keep in mind that the clerk will distribute the certiorari papers to the Court "no less than 10 days after the brief in opposition is filed." Rule 15.5. Thus, although the clerk will provide the justices with a reply brief filed after distribution of the petition and the brief in opposition, the petitioner should aim to file a reply within ten days after the brief in opposition is filed so that the respondent's arguments do not go (even temporarily) unchallenged.

It may surprise some litigants to learn that Chief Justice Roberts and the rest of the Court will not pore over your certiorari petition and brief in opposition. Instead, eight of the justices participate in a "cert pool" in which one of the justice's clerks--usually a recent law school graduate with a year's experience as a clerk in one of the courts of appeals--writes a memorandum about each petition. (Justice Stevens is the lone holdout from the pool; one of his clerks drafts a memorandum about each case.) The pool memo identifies the judges below and the questions presented; describes the facts and decisions; summarizes the parties' positions; and recommends a grant or denial. Clerks have estimated that they spend from 30 minutes to (in rare cases) one day preparing pool memos, which typically run less than 10 pages in length. Clerks in the other chambers annotate the pool memo or draft a supplemental memo to highlight any issues that might interest their own justice. Chief Justice Rehnquist said that "with a large majority of the petitions" he did not "go any further than the pool memo." Rehnquist, *supra*, at 233-34. To see what an actual pool memo looks like, you can search a new database that collects pool memos from Justice Blackmun's papers. Digital Archive, Papers of Justice Harry A. Blackmun (2007), http:// epstein.law.northwestern.edu/research/BlackmunArchive.html.

After the clerk circulates the pool memo, the Chief Justice compiles the "discuss list"--a list of petitions that the justice will consider at conference--which is composed of cases in which the pool memo recommends a grant and any other case that a justice chooses to add. Somewhere between 10 percent and 30 percent of petitions make it to the discuss list, with the remaining petitions "dead listed" for denial without further consideration. At a conference held every week while the Court is sitting, usually on Fridays, the justices vote whether to grant certiorari in each case on the discuss list. Under the "Rule of Four," if four justices vote to grant certiorari, the Court will review the case. Alternatively, the justices may vote to call for the SG to file a brief expressing the views of the United States. If the Court asks for the SG's views, then counsel for both parties should contact the SG's office and any federal agencies that may have an interest in the case, usually by letter, with follow-up conference calls and meetings. The litigants should work hard to convince the SG that the government's interests are best served by coming out on their side because the Court gives great weight to the SG's views. A 1992 study found that the Court granted 88 percent of petitions where the SG filed a brief in support of the petitioner, and denied 60 percent of petitions where the SG supported the respondent. Salokar, *The Solicitor General* 27 (1992). Because the Court does not always heed the SG's position, a litigant faced with a brief filed by the SG in support of its adversary should quickly file a supplemental brief that responds to the government's views. *See* Rule 15.8.

If you are the respondent, congratulations are in order. The court below gave you a well-deserved victory, and the odds overwhelmingly suggest that your victory will not be disturbed. The first question you should consider is whether to file a brief in opposition at all. You may waive your right to file a brief, and that may be the appropriate course if your opponent has filed a frivolous petition. In fact, some commentators suggest that respondents should waive a response in all cases because the clerk will "call for a response" if one of the justices votes to include the petition on the discuss list. That could be a mistake. If a clerk bases the pool memo solely on the petition, the justices could form an opinion about the certiorari decision without the benefit of your views. In any event, consider consulting an experienced Supreme Court practitioner before deciding to waive.

If you decide to file a brief in opposition, do not feel compelled to use the 9,000 words allotted to you. A short brief that points out the two or three principal reasons why certiorari is unwarranted often suffices. Be sure to deter would-be amici from filing briefs in support of your position. Studies have shown that amicus briefs filed in support of the respondent actually increase the likelihood of a grant, probably because such briefs highlight the importance of the issue to parties not before the Court. Caldeira & Wright, "The Discuss List: Agenda Building in the Supreme Court," 24 *Law & Soc. Rev*. 807, 828 (1990).

The question presented is generally less important in a brief in opposition than it is in a petition for certiorari. In fact, simply adopting the petitioner's question presented may be to your benefit if the question is so confused as to make it unclear what issue the petitioner wants the Court to review. More commonly, however, you will want to reformulate the question to make it clear that the case is not certworthy. For example, your question may indicate that the case is highly fact-bound or that the lower court's decision is no more than a routine application of settled law.

In rare cases, you may find it beneficial to adopt the petitioner's statement or to direct the Court to a comprehensive statement of the facts in an opinion below. That is usually a mistake. Perhaps your case is rife with messy factual disputes that the Court would have to resolve to address the question presented. Perhaps the court below based its decision on the unique facts presented by your case. A good statement can bring these points to light and cause a clerk drafting the pool memo to conclude that your case is a poor vehicle to resolve the question presented. In any event, be careful to correct any misstatement in the petitioner's statement. If you fail to do so, the Court may decide that you have waived the point. Rule 15.2 ("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.").

The heart of the brief in opposition is the argument section, Reasons for Denying the Petition. The good news is that the clerk who drafts the pool memo will be eager to seize upon any infirmity in the petition. Clerks tend to be risk-averse. They know that a truly important issue will resurface, while a grant recommendation could lead to embarrassment should an overlooked defect in the case lead the Court to dismiss a case as improvidently granted ("DIG" in Court parlance). Your job is to play upon the pool clerk's "just-say-no" predisposition by providing reasons to doubt that the petition presents a certworthy issue. In this task, there is a lengthy catalog of potential arguments from which you may choose.

If you are lucky, you will be able to knock out the petition before even addressing any conflicts that allegedly exist in the lower courts. *See generally* Frey, Geller & Harris, "Opposing Review: The Art of Finding 'Uncertworthiness,"' I *Inside Litigation* 27 (Mar. 1987). Consider the following questions:

• Was the petition timely filed? In civil cases, the Supreme Court lacks jurisdiction to review an untimely petition. Rule 13.2.

• Does the petition present an issue of state law? The Supreme Court does not sit to review questions of state law. Indeed, you should raise any plausible argument that the court below relied on state law. A risk-adverse clerk is unlikely to recommend a grant in a case that requires the Court to expend resources resolving a close question concerning the applicable law before deciding whether it even can reach the issue presented.

• If the petition presents an issue of federal law, did the court below include an adequate and independent state law ground to support the judgment? Such decisions are generally immune from Supreme Court review. *E.g., Michigan v. Long*, 463 U.S. 1032 (1983).

• Did the court below provide an alternative federal law basis for its judgment that is clearly not certworthy? The Court is sensitive to the need to avoid advisory opinions and is thus unlikely to grant certiorari in a case where a decision in favor of the petitioner would have no effect on the judgment below.

• Did the petitioner preserve the issue presented in the lower courts? The Court usually will deny

review where the lower courts had no opportunity to pass on the issue presented.

• Is the decision below interlocutory? The Court does not have jurisdiction to review interlocutory decisions issued by state courts. 28 U.S.C. § 1257. Although the Court may review interlocutory decisions issued by federal courts, you should nevertheless highlight the interlocutory nature of a federal court decision. Absent a compelling reason why immediate intervention is necessary, the Court will likely deny review of an interlocutory decision because the petitioner may well ultimately win the case on another ground, thereby obviating the need for review. If the respondent ultimately prevails, the petitioner may seek certiorari again upon entry of a final judgment.

• Is there a problem with ripeness, mootness, or standing? The Court has been increasingly strict about the case-or-controversy requirement in recent years and is unlikely to grant review where there is a plausible argument that the issue is moot or the petitioner lacks standing.

Even if none of the factors described above applies to your case and the petition alleges a conflict among the lower courts, the petition may be unworthy of Supreme Court review. For example, the conflicting decisions cited by the petitioner may have been issued by the wrong type of court. As we noted, intra-circuit conflicts and conflicts among district courts or lower state courts are generally insufficient to merit certiorari. Moreover, the conflict alleged by the petitioner may not be "real." One study concluded that although about 60 percent of petitions allege a conflict among the lower courts concerning the question presented, the conflict is real in only 6 percent of those cases. Caldeira & Wright, *supra*, at 820. Perhaps the language that the petitioner cites as creating the conflict is mere dicta not essential to the lower court's decision. Or perhaps the allegedly conflicting cases are distinguishable on their facts. If possible, the respondent should try to reconcile the conflicting decisions and argue that the conflicts alleged by the petitioner do not prove that the lower courts would reach different decisions if faced with the same or very similar facts. Justice Breyer has explained that "attorneys often present cases that involve not actual divides among the lower courts, but merely different verbal formulations of the same underlying legal rule. And we are not particularly interested in ironing out minor linguistic discrepancies among the lower courts because those discrepancies are not outcome determinative." Breyer, "Reflections on the Role of Appellate Courts: A View from the Supreme Court," 8 *J. App. Prac. & Process* 91, 96 (2006).

To the extent the petition presents a square conflict among the federal courts of appeal or state courts of last resort, there remain a number of reasons why the Court may decline review. For instance, the conflict may be tolerable because the issue arises infrequently or involves a question on which national uniformity is not essential. You may want to cite past denials of certiorari on the same issue to remind the Court that it previously found the issue to be unworthy of review. The conflict cited by the petitioner may be of recent vintage, requiring further percolation among the lower courts to assist the Court when it ultimately resolves the issue. As Justice Stevens has noted, "experience with conflicting interpretations of federal rules may help to illuminate an issue before it is finally resolved and thus may play a constructive role in the lawmaking process." Stevens, "Some Thoughts on Judicial Restraint," 66 *Judicature* 177, 183

(1982). Conversely, the conflict may be based on a decades-old decision that has been discredited due to an intervening Supreme Court decision. The Court is unlikely to grant review if there is reason to believe that the lower court would no longer adhere to an old decision of dubious continuing vitality. Along the same lines, the conflict may be too narrow--i.e., every circuit but one has adopted the same rule, holding open the possibility that the dissenting circuit will ultimately fall in line.

Even a petition that presents a deep conflict among the lower courts on an important issue of federal law may not warrant review if the case is a poor vehicle to resolve the issue. The Court shies away from cases involving messy or convoluted facts that may prevent the Court from reaching the issue presented. You should inform the Court if there is another case in the pipeline that presents the same issue without the knotty factual problems that predominate in your case. Perhaps Congress or an administrative agency has amended or is considering amendments to the statute or regulation at issue in your case. If so, the Court may allow the conflict to persist in the hope that legislative changes will enable the lower courts to harmonize their decisions.
Like the petition, a brief in opposition should conclude with a short section addressing the merits of the dispute. In this section, you should show that the lower court's decision is consistent with both the Supreme Court's precedents in the area and common sense. If, however, the lower court's reasoning is indefensible, you should try to identify an alternative basis to support the judgment. A justification that is at least plausible will likely stave off a simultaneous grant and summary reversal.

Respondents should also be aware of the possibility of a “hold” and subsequent “GVR” (grant, vacate, and remand). If the justices believe that the Court's resolution of a case awaiting argument or decision may affect the issues raised in a petition, the Court often will hold the petition until the pending case is decided. Once the pending case is decided, the Court may dispose of the petition through a GVR and order the lower court to reconsider the case in light of the Supreme Court's intervening decision. Although a GVR does not spell automatic defeat for the respondent in the court below, respondents should be alert for cases on the Court's docket that could affect the petition and should try to distinguish those cases (if at all possible) in the brief in opposition.

Writing a petition for certiorari or a brief in opposition presents unusual challenges for litigators. It is crucial to temper the natural instinct to focus on defending or attacking the lower court's decision on the merits. By focusing instead on the factors that we have identified, you will be well on the road to a successful certiorari practice in the Supreme Court.