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Practice Made Perfect:
Seeking and Opposing Certiorari

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Being involved in a case before the Supreme Court has been compared to being struck by lightning. And because it is unusual for most attorneys to be involved in a case at the Court, the process of seeking and opposing review can be unknown as well. This paper will cover many of the relevant considerations for both types of filings. It is not intended to substitute for a careful review of the Supreme Court's Rules or the exercise of discretion on the particular facts of the case.

In the Court's most recent Term, more than 9,000 petitions for certiorari were filed, and only 90 (less than 1%) were selected for oral argument. Even among the so-called "paid cases" (those in which the petitioner can pay the docket fee and the cost of printing the petition), the rate was only about 3.8%.[1] The good news is that, with those odds, if you prevailed below, you will likely succeed in opposing review. The bad news is that, with those odds, if you lost below, you will likely not succeed in obtaining review. Despite the odds, there are still many ways to influence the decision for both ventures. To a great extent, the considerations for the one are the mirror image of the considerations on the other side. At the outset, however, is the decision whether to seek certiorari if you have lost in the court of appeals or the highest court of the state in which review can be had as of right.[2]

Simply having lost a case is not remotely a good reason to seek further review. Every time the matter is studied, the results confirm that petitions in at least 40-60% of the paid cases should never have been filed because they have zero chance of being granted. These estimates frequently come from the Justices themselves. They reflect not only that the Court requires a minimum of four of the nine Justices to agree to grant a petition, but at times that "no one of the nine [Justices] would have the least interest in" it.[3] You do no one a favor by filing a

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[1] These are contrasted with the *in forma pauperis* ("IFP") cases, in which less than ½ of 1% were granted.

[2] This is also called the state court of "last resort," and the concept reflects that the Court has no jurisdiction over a non-final decision of a state court, *see* 28 U.S.C. § 1257, but also that in most States, the highest court usually has a discretionary docket. Thus, in state-court cases, the loser must obtain a final decision from the last state appellate court to which there is an appeal as of right and seek review in the highest court if it is available in that court. If that court denies review, the Court has jurisdiction to consider the petition. It is not necessary that the State's highest court have decided the case on the merits.

[3] Rehnquist, *The Supreme Court* 233 (2d ed. 2001). *See also* Brennan, *The National Court of Appeals: Another Dissent*, 40 U. Chi. L. Rev. 473, 476-77 (1973).

petition in such cases. It costs money, prolongs the litigation, runs up the fees on the other side if it is a case in which fees may be awarded, burdens the Court, and puts a mark against you and your office in the Court's institutional memory. The main criteria are set forth in the Court's Rule 10, although that Rule also cautions that the factors are not "controlling" and that they do not "fully measur[e] the Court's discretion." Nonetheless, it is important to start with these, which are indicative of "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;
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> (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;
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> (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.

Sup. Ct. R. 10. These are frequently described as a decision that 1) conflicts with that of one or more federal courts of appeals or state courts of last resort on an important issue of federal law; 2) conflicts with a decision of the Supreme Court on an important issue of federal law; 3) decides an important issue of federal law that should be resolved by the Supreme Court; and 4) so far departs from established law that an exercise of the Court's supervisory power is warranted. It is common to see the first three, or at least two of the three, in a petition, usually in the order listed here; the fourth is rare.

Absent from this list is whether the decision below is incorrect (except to the extent that it is so palpably incorrect that it falls in the last category). That is because the Court "is not, and never has been, primarily concerned with the correction of errors in lower court decisions."[4] Indeed, Rule 10 states expressly that "[a] petition for a writ of certiorari will be granted only for compelling reasons," and "is rarely granted when the asserted error consists of erroneous

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[4] Vinson, *Work of the Federal Courts*, Address Before the ABA (Sept. 7, 1949).

factual findings or the misapplication of a properly stated rule of law." That does not mean the Court is indifferent to whether the decision seems right or wrong. Given the same conflict or other considerations, the Court is more likely to grant review in a case that it believes was incorrectly decided and routinely reverses in something like 2/3 or 3/4 of the argued cases. That makes an error below a nice plus but not a compelling reason in and of itself. It nearly always goes last among the reasons why certiorari should be granted.

A conflict among either the federal courts of appeals or the state courts of last resort is the most common basis for certiorari, but even on this most likely track, the case must, in general, concern an important issue of federal law and have consequences that extend beyond the particular case – the more widespread the better. Before you conclude that you have a conflict, test it against what the Court regards as a "true" conflict. It is limited to a case in which the same exact legal issue was decided on the same exact facts and the courts reached inconsistent results. Sometimes this is stated as whether it can be said with confidence that another court would have decided the precise case differently. Even this is does not ensure that the Court will grant certiorari. There are many issues on which the Court seems to think that uniformity is not essential, the conflict not that sharp, or the issue simply not that important; the Court may deny certiorari in 200 cases each Term in which there is an actual conflict. On this score, note that the Court cares not at all about a conflict among district court decisions or intermediate state courts. The Court's assumption is that the federal courts of appeals and state supreme courts can straighten this out. If the issue is important enough, the Court will take a case before waiting for a conflict, or if no conflict will develop (*Bush v. Gore*). And on rare occasions, the Court will take a case because of the amount of money involved (*In re Chicago Flood Litigation*). Many times, if there is a significant amount of money at stake, it will also be true that litigating the issue will also require substantial judicial resources; if you can say that, it can be a nice enhancement. But remember, if neither the Office of the President of the United States or $800 million is at issue, even a petition on a monumental and recurring issue of federal law that has thrown the lower federal courts and the state courts into disarray *and* generated a dissent from a respected judge has only a small chance of being granted. On less important issues, with less widespread consequences, and fewer courts that have passed on the issue, there is an even smaller chance.

There are some very informative steps that you can easily take to assess the chance that certiorari will be granted. You should check out the track record of other efforts to take similar cases to the Court. You can consult with Court-watchers, including academics, bloggers (www.scotusblog.com), and practitioners. Be prepared for at least the latter group to try to take the case over, but leaving aside that you've always dreamed of arguing before the Supreme Court, that may not be entirely bad. In recent years, nearly half the granted

petitions other than those filed by the Solicitor General were filed by a small group of experienced Supreme Court advocates.

If you're determined to go ahead, you can download a copy of the current Rules (http://www.supremecourt.gov/ctrules/2010RulesoftheCourt.pdf) and the Guide to Filing Paid Cases (http://www.supremecourt.gov/casehand/guidetofilingpaidcases2010.pdf) from the Court's website and, if necessary, apply to admit counsel of record to the bar. Remember that in civil cases, the 90-day deadline for filing a petition is jurisdictional and requires a motion filed 10 days or more before the due date to extend it.

Specific pointers on the techniques of an effective petition are outside the scope of this paper, but many articles will turn up in a simple Web search on what to do and what to avoid. On this stage of the process, my best advice is to leave yourself plenty of time to identify and coax one or more organizations to file a brief amicus curiae ("friend of the Court") in support of the petition. Nothing conveys impact outside the particular parties to the case better than an amicus brief. Several surveys have found that a brief in support of a petition can significantly increase the possibility that the Court will grant certiorari.[5] And some Justices have remarked publicly that amicus support is an important factor in whether they would vote to hear a case. All amici are not equal. The absolute best one to have on your side is the Solicitor General of the United States. Studies show that the Court follows the SG's recommendation to grant up to 88% of the time, and the recommendation to deny up to 60% of the time. Usually it is not possible to obtain the SG's support in the way that one can ask others. The SG rarely, if ever, files except in response to the request from the Supreme Court itself. The Court commonly asks in cases that present a question of federal law to which the federal government is not a party. Such requests are made public on the order list issued after every one of the Court's conferences. When such a request is made, you should contact the SG's office and any federal agency that might be interested or affected. You can also suggest in your petition that if the Court is not prepared to grant certiorari, it should call for the views of the SG. Conversely, if you do not want the Court to call for the SG's views (because of the delay or because you doubt the SG will side with you), you can discuss what you think will be the SG's likely position, based on other filings by the federal government or better yet from the SG himself.

Be sure to examine whether the Court has already granted review in a case in which the decision might bear on your case. If you do not think you can

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[5] *E.g.*, Caldeira & Wright, *Organized Interests and Agenda Setting in the U.S. Supreme Court*, 82 Am. Pol. Sci. Rev. 1109 (1988)

persuade the Court to grant, or as a fallback, you should ask the Court to "hold" your case. When the related case is decided, the Court might then grant, deny, or send your case back to the court from which it came, depending on the result in the related case.

An opposition to certiorari is a far more rewarding aspect of the process. No matter what you say, and even if you say nothing, you are almost certainly going to be successful. Accordingly, the first decision is whether to file a brief in opposition at all. It is completely legitimate to waive response (except in capital cases).[6] Experienced practitioners, including the SG, do it all the time. The waiver form is right on the Court's website (http://www.supremecourt.gov/casehand/waiver.pdf). The Court will not grant certiorari without calling for a response. So there is no significant downside, except in cases where time is of the essence (but in assessing this, be sure to take into account whether you might miss the cut-off toward the end of each Term; if so, you will not have a ruling until the new Term begins). As a courtesy to the Court, and to avoid giving the impression that you are not a good judge of whether the case is cert-worthy, you should nonetheless file in cases where you think the Court will call for a response if you do not. You should also consider filing if you do not want to have to play catch-up; many experienced attorneys prefer to file without a Court request so that the brief in opposition will be read together with the petition because of concerns that the delay in filing only in response to a request by the Court might make it harder to dispel any strong appeal of the petition.

The brief in opposition can, and should, be short. If you need all 9,000 words to explain why the Court should not grant the petition, you should think about acquiescing (*Wallace v. Kato*, Fourth Amendment question). There are a host of reasons to urge on the Court as a basis to deny certiorari. You should always begin by checking whether the petition was timely filed. In civil cases, a petition filed more than 90 days from the judgment sought to be reviewed is jurisdictionally out of time. If you can say this, it's all you need to say. Almost as useful, and certainly more likely to happen: the petition does not present an issue of federal law (presents only state law or factual issues). Pay particular attention to the precise basis on which certiorari has been sought. If it's a conflict, explain why there isn't one, or not one that counts. If it's the importance of the issue, explain that it's not important. With so many cases competing for so few spots, almost anything counts as a good reason to deny certiorari. The more

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[6] "A brief in opposition to a petition for a writ of certiorari may be filed by the respondent in any case, but is not mandatory except in a capital case, see Rule 14.1(a), or when ordered by the Court." Sup. Ct. R. 15.1.

useful ones are listed here:

* The conflict is not real, clean, deep, recurring, important, or is unlikely to last, or too premature to be reviewed now. A related idea is that the conflict exists on an issue that was dicta in the case. You can add that the case was correctly decided, and the Court should wait for an erroneous ruling to address the issue; but this is no more likely to deter the Court from granting certiorari than it is to persuade the Court to do so.

* The federal-law issue was only one of two or more alternative grounds. If another is "an adequate and independent state ground," the Court will lack jurisdiction. *See, e.g.*, *Michigan v. Long*, 463 U.S. 1032 (1983). If it is another, unimportant issue of federal law, a decision on the controversial one pressed by the petition may look like an advisory opinion. These objections can be useful even if the opinion is unclear which ground or grounds the decision rests on, since the clerks who review the petitions first are known to be risk-adverse.

* The decision below is interlocutory. This is not a jurisdictional bar to review of a decision of a federal court but still worth noting. For state court decisions, it is likely to be jurisdictional.

* The issue was not properly preserved below. While waiver is not jurisdictional, and some defaults might not even constitute waiver, this is so important that the Court's rules require the respondent to note this in the brief in opposition or risk losing the defense. *See* Sup. Ct. R. 15.2.[7]

* The issue or even the case is fact-bound. This concept conveys a number of useful ideas under the general idea that the case is a "poor vehicle" to address the issue. One is that the fact pattern is so unusual that it, and therefore the precise question presented, is not likely to recur. But it can also be used to suggest that to decide the issue, the Court will have to consider findings of fact that were made in the district court. Especially where the court of appeals has

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[7] "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."

upheld the facts on review, the Court is extremely unlikely to reconsider them (this is one of several of the Court's "two-court" rules – when the two lower federal courts are in agreement on the facts, the reading of state law, and certain other things, the Court will generally defer to those courts). A variant on this is that the facts are very complicated and must be understood to understand or decide the issue. Be sure you do not explain or simplify them in your statement of facts.

* The case is moot or unripe or the petitioner lacks standing. These are the same arguments you would include, if applicable, in a merits brief in the lower courts. Depending on how strong an argument like this actually is, you should consider putting it first.

* The decision is unpublished.

Never, ever, solicit or permit, and try very, very hard to dissuade any misguided amicus that wants to file a brief in support of the brief in opposition. This conveys exactly the wrong message. It's hard to maintain your position that the case does not matter to anyone else when someone has gone to the trouble to file a brief urging the Court to deny review.