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FREQUENTLY ASKED QUESTIONS – PETITIONING FOR A WRIT OF CERTIORARI

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1. Q. ***What are the main factors the Supreme Court will consider when deciding whether to grant my petition for a writ of certiorari?***

   A. The main factor is whether the decision below conflicts with a decision by another federal or state appellate court on a matter of federal law. Sometimes, the decision below will expressly acknowledge the conflict. Often, however, the conflict is implicit. In that situation, the key question to ask is whether the decision below would have come out differently in the court where the conflict is alleged.

   Conflict is such an important factor because it undermines uniformity of federal law. A basic principle of our legal system is that an outcome should not depend on the court a party finds itself in. The Supreme Court is in the unique position to enforce uniformity by resolving the conflict through a decision applicable to all of the courts below it.

   Another key factor is national importance. A petition is more likely to be granted if it can demonstrate that the decision below affects a large number of non-parties, a substantial portion of the economy, or a particular group of individuals the law traditionally seeks to protect (*e.g.*, veterans). A primary indicator of an issue's importance is whether it regularly recurs.

2. Q. ***What if there is no split because the issue usually only arises in litigation before one federal court of appeals, like the D.C. Circuit or the Federal Circuit?***

   A. Often, the D.C. Circuit will be the only appellate court to address a legal issue that arises in a federal agency. And the Federal Circuit, which has specialized jurisdiction over certain subject matters such as patent law, may be the only appellate court to address an issue involving those subjects. When that happens, it might be impossible to argue that the decision below conflicts with a decision from another court of appeals. But the lack of a conflict doesn't mean the decision below has no national importance. On the contrary, issues arising out of agency law and patent law often have profound consequences that would benefit from an authoritative Supreme Court decision. For that reason, the Supreme Court routinely takes cases from those circuits even in the absence of a circuit conflict.

3. Q. ***What if I don't have an inter-circuit conflict, but I do have an intra-circuit conflict?***

A. Generally, the Supreme Court is not interested in resolving intra-circuit conflicts. *See Wisniewski v. United States*, 353 U.S. 901, 902 (1957) (per curiam). Those conflicts can be "cured" by an en banc decision of that circuit, and if the issue is sufficiently important, it could arise in a different circuit at a later date.

4. Q. ***What if the state-court decision for which I'm seeking review includes both federal- and state-law issues?***

A. The Supreme Court will not "review judgments of state courts that rest on adequate and independent state grounds." *Michigan v. Long*, 463 U.S. 1032, 1038-42 (1983). So a petition must demonstrate that the question presented in the petition turns on a federal issue, or the Supreme Court will not hear the case.

5. Q. ***Do the merits matter?***

A. A party seeking certiorari believes that the decision below got it wrong. But a petition should not focus exclusively or even extensively on the merits of the decision below. That is because the Supreme Court does not view itself as an institution designed merely to correct errors. Rather, it tends to limit its resources to cases where conflicts are present or cases of national importance. While most petitions should contain sections discussing why the court below decided the case incorrectly, many successful petitions spend only a page or two late in the petition addressing the merits.

6. Q. ***Do the facts matter?***

A. The facts matter to the extent that they can demonstrate factors favoring Supreme Court review, like conflict and national importance. But a petitioner should be careful not to file a petition focusing on "erroneous factual findings," which will be "rarely granted." Sup. Ct. R. 10.

7. Q. ***What is the "vehicle" problem and why should I care about it?***

A. If the Supreme Court decides to take a case to resolve an inter-circuit conflict on an important issue, it wants to make sure that there are no factors that might impede the square resolution of the issue. So, for example, if the issue was not properly preserved below, if there is a question about whether the lower courts had jurisdiction over the case, or if the parties stipulated to a fact that might prevent the Court from squarely resolving the question presented, expect to see the brief in opposition emphasize those points.

8. Q. ***How do I know if my case is final for purposes of Supreme Court review?***

A. When reviewing judgments of a state court of last resort, the Supreme Court only has jurisdiction to review "final" judgments. In general terms, this means that the state court's decision must dispose of all issues in the litigation so that no further proceedings would occur in the absence of Supreme Court review. There are a number of judge-made exceptions to that finality rule, however. See *Cox Broad. Corp. v. Cohn*, 420 U.S. 469 (1975); Gressman *et al., Supreme Court Practice* 152-75 (9th ed. 2007).

When reviewing judgments of a federal court of appeals, there is no jurisdictional requirement that the federal court's judgment finally dispose of all issues in the case, although the fact that a judgment is interlocutory is still a factor that weighs against review (on the theory that the Supreme Court could review the case if necessary once the litigation finally ended). Gressman *et al.*, *supra*, at 280-83. In practice, however, the Supreme Court regularly reviews interlocutory decisions of federal courts of appeals where the criteria for certiorari are otherwise met. In fact, the Supreme Court even has authority to review a case pending in the court of appeals before the court of appeals decides the case, although it very rarely does so.

9. Q. ***What is the primary goal of the reply?***

   A. A reply should rebut the arguments made in the brief in opposition as to why the case is not cert-worthy; reinforce the arguments made in the petition as to why the case is cert-worthy; and correct any misstatements about the facts or procedural history made in the brief in opposition.

10. Q. ***Should I bring in new counsel to write the petition when my current counsel does not regularly practice before the Supreme Court?***

    A. There are at least three good reasons to hire counsel with significant Supreme Court experience. First, a Supreme Court specialist should be able to provide a fair and accurate appraisal of the likelihood that the Court will grant the petition. The potential petitioner can then decide whether to go forward. Second, the specialist should be able to focus on the issues—like conflict and importance—that matter most to getting a petition granted. Third, the specialist can provide a fresh set of eyes to the case.

11. Q. ***Do amici matter at the certiorari stage?***

    A. Yes. It has long been thought that the presence of *amicus* briefs at the certiorari stage increases the likelihood that the petition will be granted. *See, e.g.*, Gregory A. Caldeira & John R. Wright, *Organized Interests and Agenda Setting in the U.S. Supreme Court*, 82 Am. Pol. Sci. Rev. 1109 (1988). *Amici* are particularly effective when they can bring something new to the table. For example, a well-written amicus brief that discusses the impact of the decision below on nonparties or provides valuable historical research is likely to be taken seriously. But *amici* are largely ineffective when they simply repeat arguments made by the petitioner.

12. Q. ***What is the Office of the Solicitor General's role in the certiorari process if the United States is not a party?***

    A. If the United States is not a party and has not filed an *amicus* brief, but the Court wishes to hear its views, the Court will call for the views of the Solicitor General (CVSG). When that happens, the petitioner should contact and try to meet with the Office of the Solicitor General to explain why the United States should side with the petitioner and argue that the petition should be granted.

13. Q. ***What are the basic timelines for filing a petition and a reply?***

A. A petition for a writ of certiorari must be filed within 90 days after judgment is entered. *See* Sup. Ct. R. 13.1. Note that the 90-day deadline begins to run "from the date of entry of the judgment or order sought to be reviewed, and not from the issuance date of the mandate (or its equivalent under local practice)," although if a party seeks rehearing in the court below, then the deadline "runs from the date of the denial of rehearing or, if rehearing is granted, the subsequent entry of judgment." Sup. Ct. R. 13.3.

The 90-day deadline may be extended. The Supreme Court Rules provide that, "[f]or good cause, a Justice may extend the time to file a petition for a writ of certiorari for a period not exceeding 60 days." Sup. Ct. R. 13.5. Any extension application "must be filed with the Clerk at least 10 days before the date the petition is due, except in extraordinary circumstances." *Ibid*.

After a brief in opposition is timely filed, "the Clerk will distribute the petition, brief in opposition, and any reply brief to the Court for its consideration no less than 10 days after the brief in opposition is filed." Sup. Ct. R. 15.5. The Supreme Court publishes its distribution schedule here. In order for the reply to be distributed, it should be filed—at the very latest—with the Court the morning of distribution. Depending on the distribution schedule, a petitioner may have more than 10 days to file a reply and still have it distributed in time for the Justices to consider it.

14. Q. ***How long will it take for the Supreme Court to decide if it will hear my case?***

A. Typically 3-6 weeks after the reply is filed, unless you are on the "summers list." As previously mentioned, once the 10-day deadline for filing a reply has expired, the petition materials are distributed to the cert pool on the next weekly "distribution date." Sup. Ct. R. 15.5. The case will then go to the Justices' conference according to a predetermined schedule, typically within 2-4 weeks. At the conference, the Justices decide whether to hear the case. The results are typically announced at the next sitting (normally, the following Monday), although grants are sometimes announced later on the same day as the conference.

15. Q. ***What is the "summers list"?***

A. During the summer, the Justices are on vacation, so petitions simply accumulate and then are considered at one giant "long conference" at the end of the summer. Conventional wisdom is that being on the summers list decreases your chances of review slightly, both because of the number of petitions up for consideration, and because the summers list petitions are initially reviewed in the cert pool by incoming clerks who have less experience and therefore may be more reluctant to recommend a grant. But this effect is probably pretty minor.

16. Q. ***What is the word limit for a petition and a reply?***

A. A petition may not exceed 9,000 words, although "[t]he word limits do not include the questions presented, the list of parties and the corporate disclosure statement, the table of contents, the table of cited authorities, the listing of counsel at the end of the document, or any appendix." Sup. Ct. R. 33.1(d), (g)(i). A reply may not exceed 3,000 words. Sup. Ct. R. 33.1(g)(iii).

17. Q. ***Where can I find good examples of petitions and replies?***

A. There is no easily available online repository for every petition that gets filed in the Supreme Court. But some of the best Supreme Court briefing routinely comes out of the Office of the Solicitor General, which posts many of its briefs here.

18. Q. ***What do I need to know about printing my petition?***

A. The Supreme Court has very specific rules about how a petition must look in order to be filed with the Court. For example, a petition (and most other filings) must be prepared in a $6^{1/8}$-by $9^{1/4}$-inch booklet, and must be typeset in a Century-family font. *See* Sup. Ct. R. 33.1(a)-(b). The cover to a petition must be white. Sup. Ct. R. 33.1(g)(i). The Supreme Court requires 40 copies of a petition to be filed with the Court, Sup. Ct. R. 12.1, along with three service copies to each of the other parties, Sup. Ct. R. 29.3. Your counsel should be well aware of these (and other) requirements and follow them to the letter.

19. Q. ***How helpful is the Supreme Court Clerk's Office?***

A. The Clerk's Office is extraordinarily helpful. Among its numerous tasks, the Office controls the Court's dockets and accompanying flow of paperwork. The Clerk's Office also provides useful advice to advocates navigating through the Supreme Court's rules. The Clerk's Office also maintains a "Clerk's Office Automated Response System" that provides docket information. CARS may be reached by phone at (202) 479-3034. The Clerk's Office may be reached by phone at (202) 479-3011.

The Clerk of the Court has also prepared a memorandum (provided here) that is intended to help a litigant avoid procedural mistakes when preparing and filing a petition.

Before calling the Clerk's Office, it would be useful to look at the Supreme Court's website (http://www.supremecourt.gov/), which contains a substantial amount of information about the Court, the Court's rules, and pending and recent cases, as well as the Rules of the Supreme Court (provided here).

20. Q. ***What are the odds that my petition will be granted?***

A. Very low. For example, in October Term 2007, the Court granted review in 87 cases out of nearly 8000 petitions considered, for a grant rate of just over one percent. *The Supreme Court, 2007 Term—The Statistics*, 123 Harv. L. Rev. 382, 389 (2009). For cases in which the petitioner paid the docketing fee, the grant rate was 4.7%; for cases in which the petitioner filed *in forma pauperis*, the grant rate fell to 0.1%. *Ibid*.

Of course, the odds go up significantly if the decision below conflicts with another appellate decision and/or is of national importance—and able counsel fairly and competently argue these points in the petition.