

OPPOSING CERTIORARI IN THE U.S. SUPREME COURT

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For its recipient, a certiorari petition can be an anitclimax. After years of successful litigation, you and your client deserve a break, but do not get one. Ninety-odd days after you celebrated a hard-fought victory in the federal court of appeals or state supreme court you receive an impressively printed petition for writ of certiorari to the United States Supreme Court. After reporting on the petition to your client, who hoped to have heard the last of the case, you reassemble your appellate team and ponder what to do.

The odds are in your favor. The Supreme Court denies the vast majority of requests for review: 1,945 of the 2,130 so called paid (i.e., nonindigent) certiorari petitions or appeals acted on during the Court's 1995 term were turned down. An even higher proportion of the nearly 4,500 in forma pauperis (IFP) cases were unsuccessful. 61 U.S.L.W. 3100 (Aug. 6, 1996). In fact, during the tenure of Chief Justice Rehnquist, as the number of lower court decisions has increased, the number of cases set for argument in the Supreme Court has declined. The drop has not been trivial: down from 167 in the 1987 term to 116 in the 1992 term and 90 in the 1995 term. Many of the cases accepted for argument, moreover, are those in which the federal government has sought or supported review; or they involve constitutional, civil rights, or criminal matters. Few are civil business cases like yours. See Bator, *What is Wrong with the Supreme Court?*, 51 U. Pitt. L. Rev. 673, 681-684 (1990).

So, the odds are with you. But that almost increases the

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pressure. Your client will not be happy if lightning strikes. It will not want to incur the expense of another round of briefing and oral argument just to put at risk a favorable judgment. And what is worse than a lawyer who fumbles a virtual sure thing?

What should you do to maximize the chance that no four justices — enough to grant certiorari — see yours as that rare case deserving the Court's plenary attention?

Start with what the other side must do — that is, with what you want to prevent. A petitioner for certiorari bears a heavy burden to persuade the Court to select its case for review out of the many thousands of petitions filed. Understanding the nature of that burden is crucial to writing a successful brief urging denial of certiorari (called a "brief in opposition").

The major peculiarity of petitioning for certiorari is that the merits of a case are not the main thing. They are not a reliable indicator of whether the Court will grant the writ. True, in the cases it hears, the Court often determines that the judgment below was incorrect. The Court reversed or vacated (at least in part) 57 (68 percent) of the 84 cases reviewed on writ of certiorari and decided with a full opinion during the 1995 term. "The Supreme Court, 1995 Term," 110 Harv. L. Rev. 372 (1996). But, at the petition stage, there is no straightforward relationship between the merits and whatever review will be granted. The reason for this — and it is an awkward concept for many lawyers — is that the Supreme Court does not regard its principal job to be the correction of errors.

What is Not Cert Worthy?

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Instead of seeking merely to correct erroneous decisions, the Court is looking, Chief Justice Rehnquist has written, for cases "involving unsettled questions of federal constitutional or statutory law of general interest." Rehnquist, *The Supreme Court: How it Was, How it Is* 269 (1987). Selecting these is inevitably "rather subjective" and involves "intuition" as well as "legal judgment." *Id.* at 265. Indeed, Justice Harlan thought "the question whether a case is 'certworthy'" to be "more a matter of 'feel' than of precisely ascertainable rules." Harlan, *Manning the Dikes*, 13 *Rec. of the N.Y.C. Bar Ass'n* 541, 549 (1958).

Intuition plays a role, but it is a patterned kind of intuition: Most cases in which certiorari is granted fall into one of three well-established categories (discussed at length and in all their variations in the Supreme Court practitioner's bible, Stern, Gressman, Shapiro and Geller, *Supreme Court Practice* §§ 4.3-4.15 (7th ed. 1993)). These categories are (1) cases raising a federal law question on which a conflict has developed among the federal circuit or state supreme courts; (2) cases in which the lower court reached a decision in conflict with governing Supreme Court precedent; and (3) cases squarely presenting an important issue of federal law with significant practical consequences. See Rule 10.

Therefore, although the correctness of the judgment below is certainly of some importance — even where there is a clear circuit conflict, the justices may prefer to take a case to reverse rather than affirm — it is rarely controlling. A petitioner for certiorari — your opponent — must thus do more than show the Court that the decision below was wrong. An effective petition for certiorari must also demonstrate that one or more of the established factors making for

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"certworthiness" are present. As a corollary, the job of the brief in opposition is to show not only that the decision below was correct, but (more important), either that certworthiness factors are absent or (if some are present) that the case is not worth the Court's attention.

To talk about the content of a brief in opposition, however, is to get ahead of the game. The first question to ask after studying the petition is whether the Court will really need any further persuasion to deny certiorari — or whether the petitioner has already done that job for you. In short, do you need to file anything at all?

It remains true today, as Justice Harlan complained four decades ago, that "a great many petitions for certiorari reflect a fundamental misconception as to the role of the Supreme Court" and stand no chance of being granted. Harlan, *supra*, at 549. Some petitions from state courts fail to identify any federal issue, even though they bristle with a multiplicity of questions presented (itself a sign of a poor petition). Others argue only that the decision below was wrong, or leave no doubt that the issues raised are of little consequence beyond the particular facts of the case. Petitioners routinely fail to show that the questions presented arise out of a conflict in the courts of appeals or state supreme courts; have previously been settled by the Supreme Court in a way that is contrary to the decision below; or involve issues of general importance that are ripe for Supreme Court review.

Chief Justice Rehnquist estimates that "between one and two thousand" of the petitions filed each year are so "patently without merit" that "no one of the nine [Justices] would have the least interest in granting them." Rehnquist, *supra*, at 264. Justice Brennan has been even harsher. He opined that about

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90 per cent of IFP and 60 per cent of paid petitions are so "utterly without merit" as to require a "minimum of time and effort" to determine that denial was the proper disposition; he, himself, often decided that a case was not certworthy by doing nothing more than reading the questions presented. Brennan, "The National Court of Appeals: Another Dissent," 40 U. Chi. L. Rev. 473, 476-78 (1973).

If you believe that the petition for certiorari in your case will receive this dismissive treatment, compare notes with lawyers who are farther removed from the case and who have had the opportunity to develop a "feel" for certworthiness. Have an experienced Supreme Court practitioner, a past law clerk, or an alum of the Solicitor General's office read the opinion below and the petition. If there is general agreement that the petition is obviously meritless, talk to your client about whether the time and expense of preparing and printing a brief in opposition is warranted. No rule requires that the respondent file a brief in opposition (except cases, see Rule 15.1). If the petition in your case is so plainly meritless that the Court will not need the assistance of a brief in opposition, you may wish to waive your response. The solicitor general and state attorneys general often do this.

One way to waive is simply to allow the period for response to elapse without filing a brief. A much more helpful and courteous course is to write a letter to the clerk (be sure to serve it on opposing counsel). It should say something such as "because this case clearly does not warrant review by the Supreme Court, respondent does not intend to respond to the petition for certiorari unless requested to do so by the Court." Such a letter tells the Clerk that respondent received service and identifies respondent's counsel of record. See Rule 9.

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The Clerk prefers a respondent to file its waiver letter as soon as possible after receipt of the petition. That is because the clerk may circulate the petition to the justices immediately after receiving the waiver letter, instead of waiting until the time for response expires. Rule 15.5. This may be an important factor if you want to move rapidly to enforce a judgment in your favor — especially when a Court recess looms. For example, when a petition is filed close to the long summer recess, quickly filing a waiver can reward you with a June denial of certiorari and avoid the long wait until the first October order list.

Waiving response displays the proper disdain for a frivolous petition. And it is not the risk one might imagine: A respondent can be sure of an opportunity to file a brief in opposition if the justices surprisingly do find something of interest in the case. A summary of the Court's current procedures for handling certiorari petitions shows why, but it also shows that a waiver must be approached with care.

Once a week throughout the year the Clerk circulates papers to the justices for paid cases in which a brief in opposition or waiver letter has been received or the time for response has expired. See Rule 15.5. There is another weekly circulation of IFP cases. The circulated cases are divided among the law clerks to the eight justices who currently combine their clerks' efforts at the petition stage into what is called the "cert pool." A single law clerk from the cert pool is assigned to each case and writes a memorandum, known as a "pool memo," to guide the justices who participate in this arrangement. The pool memo discusses the certworthiness of the petition and makes a recommendation as to its disposition. (Justice Stevens is the only justice who currently does not participate in the pool. His clerks read all the petitions themselves.

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The cert pool ensures that each set of certiorari-stage submissions receives more detailed attention than would occur if clerks or justices in every chambers had to read the papers in each of the more than 100 cases circulated each week. The pool clerk has time to study cases alleged by petitioner to be in conflict and even to do research independent of the briefs. On the debit side, the pool arrangement means that the most careful attention to the petition (and to your brief in opposition, if you file one) comes from a single law clerk, who will recommend to the Justices in the pool whether to grant the writ.

After the pool memos are distributed to participating chambers, clerks annotate the memos, paying special attention to anything in the case that might interest their own justice. The justices then review the annotated memos themselves prior to conference. Pool memos have become an important element in the Court's review of certiorari petitions. The chief justice has said that "with a large majority of the petitions" he does not "go any further than the pool memo." Rehnquist, *supra*, at 264-65. The Justices are most likely to go beyond the pool memo to read the briefs where the certiorari decision appears close or where the pool memo has recommended a grant.

On the basis of the pool memo, their clerks' annotations, and (where necessary) their own review of the briefs, the justices decide whether a petition should be discussed and voted on at conference. The chief justice compiles a list of cases he believes should be set for a conference discussion — called the "discuss list" — and circulates it to other members of the Court, any one of whom may add a case to the list. Any case not appearing on the discuss list is "dead listed" for denial without a conference vote. Only 15percent to 30 percent of

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circulated petitions appear on the discuss list. See Rehnquist, supra, at 265-66; Caldeira & Wright, *The Discuss List: Agenda Building in the Supreme Court*, 24 *Law & Soc. Rev.* 807, 808 (1990).

What is the "Discuss List"?

The Court's current handling of the "discuss list" has great importance for a respondent considering whether to waive its brief in opposition. At present, the Court does not include any petition on the "discuss list" until a response has been filed. Thus, if the pool memo writer (or, after reading the pool memo, one of the justices) believes that, despite a waiver of a brief in opposition, the petition should be included on a discuss list for a conference vote, he or she will ask the Clerk to "call for a response."

A request for a response obviously must be taken seriously. It is not necessarily bad news, however. It does not mean that a grant is imminent, or even that it is under consideration. After all, the origin of the request will usually be some concern of a single law clerk or, less often, a single justice. It may be perfectly clear to most justices that there is nothing to the petition. Even the requester may only want some clarification. In fact, a response sometimes may be sought because the petition is so unclear that the law clerk writing the pool memo simply cannot understand the case. In such circumstances, the Court may need the respondent's help to identify the issues and determine a proper disposition.

You will know neither the source of the request for a response nor the reason for it. Such a request can therefore be unnerving. If you were careful in deciding to waive a brief in

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opposition, there is little reason to fear that you have prejudiced your case by waiver itself. Chances are that the Court is looking for clarification rather than weighing a grant.

There is a modest danger to waive. If you waived a case that was not frivolous, there may be a remote risk of prejudice. The pool memo writer or even some justices may already have developed a bent towards a grant, based on reading the petition alone, that you will now have to counteract. This possibility cautions care in your initial determination whether to waive and counsels filing a brief in opposition when in doubt.

If you don't waive, what does drafting a brief in opposition involve? The brief is limited to 30 printed pages and is due 30 days after receipt of the petition or of the Court's request for a response. Rule 15.

Your brief in opposition should be low key, befitting the trivial issue the petitioner has tried to foist on the Court. A tone of bemusement, of a patient adult dealing with a confused child, is about right. You will rarely need the full 30 pages (although a long brief showing in nauseating detail why a petition is uncertworthy may sometimes be thought effective to deaden any spark of interest in the case). "A brief in opposition should be briefly stated and in plain terms" (Rule 15.2), and focused on the precise problem at hand. This is not a place for an extended disquisition on the governing legal principles. As E. Barrett Prettyman, Jr., has warned, if the justices and their clerks finish reading your brief "more impressed with the importance of the case than they were when they finished the petition," you have made a mistake. Prettyman, *Opposing Certiorari in the United States Supreme Court*, 61 Va. L. Rev. 197, 198 (1975).

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Take pains to deter any would-be amici. You don't need their help right now. Their participation at this stage would only serve to suggest that the petition raises an issue with broad impact, and would be self-defeating. Amicus support for a respondent — the opponent of certiorari — has been shown actually to increase the likelihood of a grant. Caldeira & Wright, *supra*, at 824, 828.

The parts that may be included in a brief in opposition are, in order: (1) questions presented, which may either track the petitioner's formulation or, more usefully, restate the issues for clarity and in less loaded language; (2) a Rule 29.6 statement of a corporate respondent's parent and non-wholly-owned subsidiaries; (3) tables of contents and authorities; (4) a formal description of the opinions below; (5) a jurisdictional statement; (6) any statutes or other relevant provisions not set out in the petition; (7) a statement of facts; (8) an argument section, often headed "Reasons for Denying the Petition"; and (9) a formal conclusion requesting denial of the writ. Some of these sections may be omitted if the respondent has nothing to add to the petition. Rules 15.3, 24.2.

If you are lucky, you may not need to do more than explain why the Court lacks jurisdiction. There is nothing more to say if there is a decisive jurisdictional defect. In particular, check whether the petition was timely filed; in civil cases, this is a jurisdictional requirement, and no excuses are accepted. See Rule 13.2. An untimely petition is not always caught by the clerk, who may assume that a petition filed more than 90 days after entry of judgment is proper because a petition for rehearing was filed in the lower court. See Rule 13.3.

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Are Any Issues Moot?

In addition to the timeliness of the petition, consider whether the issues presented have become moot. In a case coming from a state court, examine too whether the judgment rests on an independent and adequate state law ground — one over which the Supreme Court lacks jurisdiction. A substantial number of petitions are filed each year that raise only state law issues or seek review of a decision based in the alternative on a state law ground. They can be knocked out quickly.

In most cases, more will be required — starting with a factual statement. In rare cases, when you are satisfied with petitioner's treatment of the facts, you can omit the statement from the brief in opposition. See Rule 24.2. Even if the petitioner's statement is faulty, some recommend keeping the brief in opposition short by simply referring the Court to a satisfactory summary of the facts in an opinion below. Baker, "A Practical Guide to Certiorari," 33 Cath. U.L. Rev. 611, 627 (1984).

Almost always, however, something can be made of the facts. Perhaps they are complex (the Court prefers factually straightforward cases); your statement should convey that. Perhaps the petition is interlocutory and key facts remain unresolved so that the Court's decision on the merits might not affect the outcome of the litigation. Perhaps you can emphasize facts that distinguish your case from others said to be in conflict. Perhaps a full account of the facts will show that the case is unusual and the issues are not of general importance. In any event, you almost certainly will want to present the facts to the Court with your own nuances and free of the petitioner's inevitable slant.

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Certainly, if there is any factual misstatement in the petition, correct it in your brief in opposition. If you try to bring the misrepresentation to the Court's attention at the merits stage, you may find that the point is deemed waived. Rule 15.2 says that "Counsel . . . have an obligation . . . to point out in the brief in opposition and not later, any perceived misstatement made in the petition."

Infrequently, facts outside the record may show lack of certworthiness. You may have found statistics that demonstrate the practical insignificance of the question presented. The petitioner may have made statements to the press that contradict its submissions to the Court about the importance of the issue. Refer to these in the argument section of your brief rather than in the statement of facts — but exercise this option with discretion.

The heart of the brief in opposition is the "Reasons for Denying the Petition" section — the argument. A demonstration that the decision below was absolutely right is one, through subsidiary, reason why the Court may not wish to review the case. The brief in opposition should therefore include a concise defense of the judgment below, either under a separate heading (usually at the end, befitting its secondary status) or possibly incorporated into your explanation that certworthiness is absent. If the opinion below is the work of a respected jurist or strong appellate panel, it doesn't hurt subtly to remind the Court of its provenance. If you were less fortunate, do not limit yourself to defending the decision below on its own terms. If the lower court's reasoning is indefensible, argue that the judgment is nevertheless correct on other grounds. Remember also to point out any absurd consequences that would follow from the rule urged by petitioner.

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But, for reasons mentioned before, your focus usually should not be the merits of the underlying decision. A more compelling reason for the Court to deny review is that there is some barrier to reaching the merits at all. The issues raised in the petition may be beside the point because the lower court gave alternate grounds of decision that are sufficient to support its judgment. If so, point that out early in the brief in opposition. If the lower court did not pass on the merits of the question presented because petitioner did not raise (or failed to preserve) the issue, make that point early too. A crisp procedural defect of this sort is worth pages of argument defending the correctness of the decision below, and you must raise it in the brief in opposition or risk waiving it. See Rule 15.2.

The main job of a brief in opposition is to show that the petition fails to satisfy the criteria for certworthiness. Where possible, directly refute any claim that the questions presented have split the federal circuits or state supreme courts; are issues of great practical importance; or have already been addressed by the Supreme Court and decided contrary to the judgment below.

Are the Conflicts Real?

Frequently, you will be able to show that the petitioner is wrong to say that one or more of these certworthiness criteria is present. One study concluded that although about 60 percent of petitions for certiorari allege a split in the courts as to the question presented, the conflict is real in only 6 percent of those cases. Caldeira & Wright, *supra* at 820. Ask whether the alleged conflict is a "square" one — would the other court have decided your case differently? Maybe the different

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outcomes are attributable to different facts and not legal disagreement. Often cases alleged to be in conflict are actually distinguishable on the facts or the law. Sometimes only dicta are inconsistent.

Even where there is a square conflict, it must be at a sufficiently authoritative level of the legal system to warrant review. Some petitioners rely on conflicts among federal district court decisions, but the Court very rarely intervenes in such situations because the courts of appeals can iron out inconsistencies.

A claim that the questions presented is "important" enough for Supreme Court review is likewise susceptible to disproof. You can point out in the brief in opposition that the issue has never (or only rarely) arisen in the courts; that the lower courts are consistent in their approach to the question; or that the facts of the case are unusual. Sometimes, by citing past denials of certiorari on precisely the same issue, you can remind the Court that it has previously found the questions presented unworthy of review.

Do not despair if there is a clear split among the circuits or state supreme courts or the petition raises a question of obvious practical importance. Even in such cases, review is discretionary, and it is often denied. In fact, Justice White has complained that the court is failing to maintain federal law in a "satisfactory, uniform condition" because it "regularly" denies certiorari despite a conflict. *Beaulieu v. United States*, 497 U.S. 1038, 1039 (1990). This occurred in 56 cases during the 1989 term, according to Justice White, who also noted that the court refused review in 11 cases that term that he believed sufficiently important for the Court's attention.

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Another method of avoiding certiorari is to suggest that the Court's intervention would be untimely. Certiorari in your case may seem unnecessary, for example, because a conflict has only recently developed. If so, you can argue that it may still be corrected without the Court's intervention. Conversely, you might point out that the conflict is old and has proven tolerable.

Is It the Right Time to Decide?

Other timeliness considerations abound. The Court may decline to review a case in apparent conflict with one of its own decisions if the case seems unlikely to spawn recurring problems or does not provide an occasion to reconsider a particularly dubious decision. The Court often bypasses even federal constitutional or statutory questions of large consequence until they have "percolated" in the lower courts long enough to define the problem and air competing views. Impending legislative attention to an important issue may also lead the Court to take a wait-and-see approach. See generally H. Perry, *Deciding to Decide: Agenda Setting in the United States Supreme Court* 216-70 (1991).

Where a petition accurately identifies a conflict or an important issue, you also may want to argue that your particular case is not a good vehicle for settling the problem. In potentially certworthy cases, demonstrate (if you can) that the case is factually or procedurally murky; the Court has a distinct preference for "clean" cases. If the Petition mischaracterizes the facts, say so; the Court wants to deal with settled facts, not ongoing factual disputes. Point out ambiguities in the opinions below that may complicate the Court's job. If the case is an interlocutory appeal, emphasize

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that fact, and point out that the issue presented may take on a different aspect as the case proceeds in the trial court. See Stern, Gressman, et al., supra § 4.18. Remember, the presumption is against a grant, and the court is looking for reasons to deny the petition.

Studies have shown that the filing of amicus briefs in support of a petition increases the likelihood that the petition will be granted. See Caldeira & Wright, supra at 826. Amicus briefs urging a grant need not be filed at the same time as the petition. Rather, they may be "submitted within the time allowed for filing a brief in opposition." Rule 37.2. A savvy petitioner will therefore ask amici to file their briefs the day your opposition is due. This prevents you from responding to amici in your brief.

If an amicus brief makes a point that requires response, you may file a supplemental memorandum to address this "intervening matter not available at the time your [your] last filing." Rule 15.8. Such a supplemental brief may not exceed 10 printed pages. Generally, it should be much shorter, so as not to suggest the amicus brief is important. To be of any use, your memorandum usually must be prepared quickly. You should determine from the clerk when the petition for certiorari will be set for conference; and ensure that your supplemental brief arrives in ample time to be circulated to the justices before the conference vote is taken. If you can get your brief on file before the papers in the case are circulated to the justices (Rule 15.5), so much the better. If printing the brief would cause too much delay, the clerk may grant permission to file initially in typescript. A printed brief can be substituted a few days later.

Your suit may involve only private parties, but if the issue

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raised in the petition is of consequence to the federal government and appears potentially certworthy, the Court may postpone action until it has heard from the solicitor general. If three justices vote for this at the conference, the Court will issue an invitation to the solicitor general to file a brief "expressing the views of the United States." This is quite common, for example, where a plausible petition raises a question about the implementation of a federal program (such as Medicaid) or the interpretation of a statute enforceable by the United States (such as the antitrust laws.)

If it serves your interest, it is sometimes possible to forestall a call for the SG's views by persuading the Court that the government's position — at least on the merits — already is well known. To do this, summarize the government's views in your brief in opposition and lodge with the clerk any supporting documentation, such as government briefs filed in the lower court or in other cases, government reports, or congressional testimony. See L. Caplan, *The Tenth Justice* 21-22 (1987).

The solicitor general's view on whether a case merits review carries great weight with the Court. See R. Salokar, *The Solicitor General* 27 (1992) (reporting that the Court grants 88 percent of petitions where the SG has filed an amicus brief in support of petitioner and denies 60 percent of petitions when the SG supports the respondent). In addition, when drafting an invited certiorari brief, the SG likely will develop a merits position that will persist in any later filings. Therefore, if the Court has issued an invitation, the respondent should work hard to convince the SG that the petition is not certworthy and that the merits favor respondent. This may be done by letter or sometimes through a meeting with the solicitor general's staff assigned to the case.

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It is equally important to contact the agency with primary responsibility for subject matter of the case (including the responsible division of the Justice Department). The agency's position will be influential with the SG, and agency staff may produce the first draft of the government's brief. See R. Salokar, *supra* at 78-80; E. Griswold, *Ould Fields, New Corne* 260 (1992). Think too about contacting other government agencies that may support your position with the SG, especially if the primary agency is against you, urging the SG to recommend a grant.

The Court does not always heed the solicitor general's invited views. If the SG comes down against you, you should file a Rule 15.8 supplemental memorandum responding to the government's brief. The guidelines for responding to petitioner's amici, discussed above, apply equally here, including the need for speed in getting your memorandum on file.

Having the petition granted is not the only bad outcome you want to ward off by filing a brief in opposition. Besides the petitions the Court grants to decide on the merits after full briefing, another 50 to 80 cases a term are disposed of summarily on the basis of the submissions at the petition state. Sometimes the Court will summarily reverse, but, in most of its summary decisions, the Court grants the petition, vacates the judgment below, and then remands the case for reconsideration in the light of a recent Supreme court decision. This disposition is referred to as a "GVR." A GVR is certainly not equivalent to a reversal on the merits — after remand the lower courts often adhere to their earlier views — but it does put your judgment at risk and can rekindle the litigation.

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If three justices believe that the Court's resolution of a case awaiting argument or decision may settle (or affect) the issues raised in a petition, their votes suffice to "hold" the petition — delay acting upon it — until that case is decided. *Watson v. Butler* 483 U.S. 1037, 1037-1038 (1987) (Brennan & Marshall, JJ., dissenting). If the anticipated decision materially changes the law applied by the lower court in the "held" case, the Court will then dispose of the petition by GVR. See Hellman, "Granted, Vacated, and Remanded," 67 *Judicature* 389 (1984). A petition may also be held so it can be discussed in conference along with other petitions raising similar issues. If one of the petitions is granted, the others will then be held pending the outcome of the granted case. The Court does not announce that it is holding a petition. However, you will know that your case is being held if it is not disposed of on the order list following the conference at which it was considered.

Granted, Vacated, Remanded

The Court often holds cases and then hands down GVRs; it prefers to let the lower courts determine the impact of any new precedent. See *Henry v. City of Rock Hill*, 376 U.S. 776 (1964). For example, it GVR's no fewer than ten cases for reconsideration in light of its reassessment of RICO's "pattern" requirement in *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229 (1989).

Sometimes a petition will signal the potential relevance of a pending decision or similarities with other petitions, but you cannot rely upon this. If there are similar cases pending, it is likely that the justices and their clerks will be aware of them, even if the petition your case has not drawn the connection.

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The only sure means of tracking down such connections is to search the Court's docket (which is detailed in U.S. Law Week) to identify petitions or cases set for argument that might cause your case to be held. You should deal with the supposed relationship explicitly in your brief in opposition; explain why your case is different from, and cannot conceivably be affected by, the outcome in other pending matters.

If you discover that there are a lot of similar petitions pending in circumstances that suggest one will be granted and the others held, discuss another option with your client. Rather than letting others who may have different interests control the supreme Court litigation, consider filing a brief urging the court to hear your case to affirm on the merits. And, if you nonetheless still want to argue that the petition should be denied, remember that if it is instead held, you can file an amicus brief in the granted case.

Opposing certiorari is an unusual process, with its own rules for success. With more than 7,000 petitions filed annually, most litigators will at some point need to master its peculiarities. For the respondent, the costs of misunderstanding the supreme Court's case selection principles can be high. The good news is that this is one area in which the Supreme Court is not especially secretive. The grounds for a denial of certiorari are well understood. The road map is there. Follow it.

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