When Enough Is Enough!

How to Oppose a Cert Petition

By Lawrence S. Ebner and Megan Kinsey-Smith

Because of the high stakes involved if the Supreme Court grants review, a prevailing party should not consider the filing of the other side's certiorari petition as an afterthought.

You've won your case in the federal court of appeals. Now the only hurdle between you and that long-awaited victory celebration is the cert petition that your opponent is sure to file.

Hurdle? The odds are with you. According to the Supreme Court Clerk's Office, during the Court's October 2010 Term, parties represented by counsel filed 1,558 certiorari petitions. Of those petitions, the Court granted only 76. That's about 5 percent. But this does not mean that the Court pulls cert grants out of a hat. Instead, whether the Court considers an appeal "certworthy" primarily depends on the nature and importance of the issue, the existence of a circuit split, and the procedural posture of the case. And if the Court issues a "CVSG," which stands for "call for the views of the Solicitor General," the Court follows the SG's recommendation about 75 percent of the time. *See* Margaret Meriwether Cordray & Richard Cordray, *The Solicitor General's Changing Role in Supreme Court Litigation*, 51 B.C. L. Rev. 1323, 1333–34 (2010).

When confronted with a petition for a writ of certiorari, some litigators will just play the odds. They will let the Court deal with a petition without even filing a brief in opposition. But unless a petition is truly frivolous, the better approach, at least in the view of most appellate attorneys, is to submit a carefully prepared, high-quality opposition brief that explains why the Court should not hear the case.

In this article we provide some practical advice on preparing and submitting briefs in opposition to certiorari petitions.

The Rules

The Supreme Court's rules regarding oppositions to cert petitions are fairly straightforward. *See* Sup. Ct. R. 15. After a cert petition is added to the docket, a brief in opposition, sometimes colloquially referred to as a "cert opp," must be filed within 30 days. Sup. Ct. R. 15.2. Advance planning is possible since the rules afford a party 90 days within which to file a cert petition. Sup. Ct. R. 13.3. But if necessary, it usually is fairly easy to obtain an addi-

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tional 30 days from the Office of the Clerk for filing a cert opp. *See* Sup. Ct. R. 30.4. The Clerk will distribute case materials—the petition, the respondent's brief, any reply, and any amicus curiae briefs—to the Court no less than 10 days after the respondent files a brief in opposition. Sup. Ct. R. 15.5.

The rules allow up to 9,000 words for a cert opp, the same word limitation governing the cert petition. Sup. Ct. R. 33.1(g)(2). But brevity is a virtue: "A brief in opposition should be briefly stated and in plain terms." Sup. Ct. R. 15.2. A cert opp, which must be printed in booklet form, only needs to include a table of contents, a table of cited authorities, an argument, and a conclusion (cert opps less than five pages can omit the tables of contents and authorities). *See* Sup. Ct. R. 15.3, 24.2. A respondent may include other sections—the questions presented, a jurisdictional statement, and a statement of the case, for instance—if the respondent is dissatisfied with how the petitioner presents them, which is almost always the case. Sup. Ct. R. 24.2. A respondent also has the option to include a summary of the argument in the opposition brief. Sup. Ct. R. 15.3.

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In addition to discussing the reasons why the Court should deny review, the rules require a respondent to address in the brief in opposition, rather than later in a merits brief, "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." Sup. Ct. R. 15.2. Otherwise, unless such defects deal with jurisdictional issues, the Court may deem them waived. *Id.* This does not mean, however, that a cert opp should restate facts of no real significance. Instead, the best approach is to explain in as straightforward a manner as possible why an appeal does not fall into one of the general categories that the Court deems appropriate for discretionary review. *See* Sup. Ct. R. 10.

The rules also allow a respondent to file a supplemental brief "at any time while a petition for a writ of certiorari is pending." Sup. Ct. R. 15.8. Limited to 3,000 words, the purpose of a supplemental brief is to call "attention to new cases, new legislation, or other intervening matter not available at the time of the party's last filing." *Id.* "Other intervening matter" can include an amicus curiae brief filed by the Solicitor General after the Court issues a CVSG. If the Solicitor General files an *amicus* brief on behalf of the United States that supports review, the respondent then can very promptly submit a supplemental brief to address the government's position. Typically, the Office of the Solicitor General will solicit the views of the parties before formulating its position or filing an amicus brief. *See* Lawrence S. Ebner, *The United States as Amicus Curiae: Making Uncle Sam Your New Best Friend*, Certworthy, Vol. 13, Issue No. 2, available at http://clients.criticalimpact.com/newsletter/newslettercontentshow1.cfm?contentid=7340&id=867 (last visited July 2, 2012).

Should You File a Cert Opp?

The rules do not require a respondent to file a brief in opposition or other response to a cert petition unless the Court otherwise directs. *See* Sup. Ct. R. 15.1 ("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… or when ordered by the Court.").

If a respondent decides to forgo its right to file a brief in opposition, the Court's waiver form, which also serves as an entry of appearance for the respondent's counsel of record, should be submitted within the time allowed for filing a brief in opposition. Although filing a waiver is not mandatory, a respondent who does not plan to submit a cert opp should file the waiver form, which is available on the Court's website. *See* Waiver, Supreme Court of the United States, http://www.supremecourt.gov/casehand/waiver.pdf (last visited July 2, 2012). Filing the form not only notifies the Clerk and the petitioner regarding the respondent's intentions, but also may hasten distribution of the case to the Court. *See* Sup. Ct. R. 15.5 ("The Clerk will distribute the petition to the Court for its consideration upon receiving an express waiver of the right to file a brief in opposition….").

Statistically, because the Court grants such a small percentage of certiorari petitions, a respondent doesn't risk much in refraining from filing a response to a cert petition. In other words, all things being equal, chances are that the Court will deny the petition whether or not you file an opposition brief. Further, as a matter of practice, the Court normally will not grant review without first issuing a "CFR," a for "call for response," which the Clerk will issue upon the request of even a single Justice. *See* David C. Thompson & Melanie F. Wachtell, *An Empirical Analysis of Supreme Court Certiorari Petition Procedures: The Call for Response and the Call for the Views of the Solicitor General*, Geo. Mason. L. Rev. 237, 242, 247–48, Vol. 16:2 (2009). And of course, voluntarily refraining from filing a brief in opposition may save a client some legal fees.

According to the Clerk's Office, respondents currently refrain from filing oppositions to cert petitions in about 30 percent of the paid cases. Some analysts assert that the percentage was significantly higher a decade ago. *See id.* at 253–54. But regardless of the statistics, we believe that respondents should file briefs in opposition in virtually every non-frivolous case. Our reason is simple: The nation's highest court is entitled to hear, directly from the party that prevailed below, why the case doesn't warrant further review. We believe that in most cases, a cogent brief in opposition speaks more loudly than silence. The only exception may involve a frivolous petition. And contrary to the view held by some attorneys, we do not think that filing an opposition brief automatically lends credibility to or increases the visibility of a non-frivolous cert petition. Instead, it usually is in a respondent's best interests to weigh in on a cert petition. And if one or more amici have filed briefs in support of a petition, thereby elevating the petition's profile within the Court, filing an opposition brief seems essential.

Filing an opposition brief also may have some tactical advantages. Doing so ensures

that the Court will consider the opposition brief when the Court initially reviews the petition. The alternative—waiting to see whether, based on review of the petition and any supporting amicus briefs, one or more Justices are interested enough to require a response—may place a respondent at a disadvantage. *See id.* at 256. By opposing a petition at the outset, a respondent eliminates the risk that one or more members of the Court may form a subjective opinion leaning toward granting certiorari before considering the respondent's point of view. Chief Justice Rehnquist once said that "[w]hether or not to vote to grant certiorari strikes me as a rather subjective decision, made up in part of intuition and in part of legal judgment." William H. Rehnquist, *The Supreme Court, How It Was, How It Is*, 265 (1987). It is clearly better to have an early influence on that decision. Needless to say, most lawyers would prefer to avoid having to advise their client that the Supreme Court has just agreed to hear a case after you voluntarily waived the right to file a brief in opposition to the cert petition.

Structure and Style of a Brief in Opposition

Supreme Court Rule 15 affords a respondent considerable latitude in structuring a brief in opposition to a cert petition. In our experience, respondents, or at least their appellate counsel, rarely will accept a petitioner's portrayal of the questions presented or the relevant case background. As a result, many cert opps begin on the first page after the cover by articulating the "Questions Presented" from the *respondent's* perspective. This is an extremely important part of the brief, and you should undertake it with great forethought and care. *See* Sup. Ct. R. 14.1(a) (describing requirements for the questions presented). For example, if the legal issues arise in a factual context that would favor the respondent, the cert opp should articulate the "Questions Presented" in a way that expressly incorporates and narrows the circumstances rather than accepting the cert petition's broader, more abstract formulation of the issues. But the "Questions Presented" section should not overtly argue positions or include excessive details. *See id.* (requiring a cert petition to include the "questions presented for review, expressed concisely in relation to the circumstances of the case, without unnecessary detail"). *See also* Bryan A. Garner, *The Winning Brief*: Tip 9 (Oxford Univ. Press 2d ed. 2004).

Cert opps also often include a Statement of the Case that is substantially different from the statement in the cert petition. *See* Sup. Ct. R. 14.1(g). An opposition brief's Statement of the Case also is critical because it lets the Court know what the underlying case and appeal are really about and focuses only on the facts that the respondent considers to be material to the questions presented. The main part of the brief, of course, is a section entitled something similar to "Reasons for Denying the Petition." Although not required, a concise Summary of Argument preceding the Reasons section is highly desirable in all but the shortest of opposition briefs. And the Conclusion typically should straight to the point: "The petition for a writ of certiorari should be denied."

Style also is important. Well-organized and well-written appellate briefs help the Court focus quickly on the critical legal issues and key case law precedents and place facts or allegations in proper perspective. They often use language and employ a tone that compared to trial court briefs, reflects a certain level of restraint. And they are concise. A respondent has a particularly compelling need to file a cert opp that brings clarity and perspective to the questions presented when the cert petition confuses the petitioner's criticism of the lower court's opinion with the reasons why the case may not warrant a Supreme Court review. In those circumstances, reading the respondent's brief in opposition should feel like taking a deep breath of fresh air. We advise trial counsel to work with appellate specialists who have the knowledge, skills, and experience to write the type of brief that the Supreme Court will find most useful and persuasive.

Approaches to Opposing Review

Supreme Court Rule 10 (Considerations Governing Review on Certiorari) provides some general guidance on "the character of the reasons that the Court considers" when reviewing a cert petition. For example, Rule 10 states that "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." So if a certiorari petition seeks review on the ground that the lower court misapplied the law to the facts, or misperceived the facts, that would be a solid basis for opposing review. *See*, *e.g.*, *Ross v. Moffitt*, 417 U.S. 600, 617 (1974) ("This Court's review… is discretionary and depends on numerous factors other than the perceived correctness of the judgment we are asked to review."); *N.L.R.B. v. Pittsburgh S.S. Co.*, 340 U.S. 498, 502 (1951) (explaining that the Supreme Court "is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other, though fair-minded judges could find it tilting either way.").

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But probably the most important and common ground for opposing review is that a split of authority does not exist among federal courts of appeals, or with or among state supreme courts, on the federal questions presented for review. *See* Sup. Ct. R. 10. When preparing a brief in opposition, the first question that you want to ask yourself is whether a split of authority truly exists. Cert petitions frequently will state the issues broadly in an effort to create the appearance of a split. In response, a cert opp should indicate, if possible, that the issues actually presented by the appeal are considerably narrower than the petitioner indicates, and either do not involve a split of authority, or at least don't involve *widespread* disagreement among the circuits on

the issues actually involved in the appeal. If there is a split of authority involving only two or three circuits, the best argument to make may be that permitting the issues to percolate further in the lower courts would be desirable, especially if the split emerged relatively recently. The cert opp could argue that percolation would allow an expanded body of lower court case law to develop that may obviate any future need for Supreme Court review, or that may shed additional light on or otherwise refine the legal issues, their significance, and their application to different factual situations. This is an argument that the Solicitor General often uses when recommending against granting certiorari.

The Supreme Court …

Justices often prefer to wait for a case that represents the perfect vehicle, both procedurally and factually, before addressing an important legal issue.

Another reason for arguing against granting certiorari may be that the case is less than an ideal vehicle for Supreme Court review. For example, an appeal's posture may not squarely or finally present the legal issue. Thus, when a cert petition follows the petitioner's unsuccessful interlocutory appeal under 28 U.S.C. §1292(b), it may be possible to argue that the issue may become moot if the petitioner prevails in a final judgment. The Supreme Court is incredibly patient. The Justices often prefer to wait for a case that represents the perfect vehicle, both procedurally and factually, before addressing an important legal issue, and they deny petitions in cases that are "flawed" in some way. If the question presented by a cert petition recurs, chances are that if the present case's posture is less than perfect, another cert petition presenting the same issue will come along in the future.

A petitioner will argue, of course, that the question presented is exceptionally important, and the Supreme Court needs to decide it now. Although demonstrating that a particular legal issue is "unimportant" can be a challenge, just because a case involves an important legal issue does not necessarily make it certworthy. For example, sometimes a brief in opposition can explain that no matter how pivotal a legal issue is to the present appeal, it probably will not recur in other cases. Further, if a cert petition presents policy reasons to explain why review is needed, the cert opp should attempt to tackle those head-on.

Considerations governing the granting of certiorari are different, at least in theory, from the merits of an appeal. Nevertheless, a respondent's brief in opposition should not shy away from arguing that the court of appeals ruled correctly. A well-reasoned court of appeals or state supreme court decision is certainly a less tempting target for review than one that is visibly flawed. Indeed, the most powerful combination of reasons for denying review is that the courts of appeals are not split on the specific questions presented, and that the lower court decided those questions correctly. As a matter of structure, however, it typically is better to save the "merits" argument for the final part of the Reasons section. In discussing a lower court's opinion, you should take full advantage of its favorable language by quoting it.

Amicus Briefs

A respondent confronted with a certiorari petition should keep several things in mind about amicus briefs.

First, a respondent normally has little if any reason to withhold consent if an amicus curiae wants to file a brief in support of the cert petition. The rules now provide that amici curiae must file amicus briefs supporting a cert petition within 30 days of the date that the case is added to the Supreme Court docket. Sup. Ct. R. 37.2. Further, each amicus curiae must provide notice of its intention to file a brief at least 10 days before the due date. Thus, the filing of an amicus brief supporting the cert petition will not come as a surprise to the respondent, who can seek an extension if needed to review the amicus brief prior to filing the brief in opposition. Assuming that an amicus brief conforms to the rules and is filed timely, the Court will accept the brief even if the respondent opposes the filing. And it is not okay to insist on having an opportunity to review a proposed opposing amicus brief as a precondition for deciding whether to consent.

Second, amicus briefs at the petition stage urging the Court to grant review have become common. Most cert opps try to diminish their significance by acknowledging them only in passing, or ignoring them altogether. The best approach is probably to respond to a point made in an amicus brief supporting a petition only if it is particularly important and the petition itself does not address it. Amicus briefs filed by the Solicitor General are a prominent exception. When the Court invites the views of the United States, and the Solicitor General then files an amicus brief supporting review, it is important for the respondent to reply. Because the Supreme Court normally issues a CVSG after the parties have submitted petition-stage briefs, the respondent must file a supplemental brief under Supreme Court Rule 15.8 to respond to the government's amicus brief.

Third, the conventional wisdom is that a respondent should not seek amicus support at the cert petition stage because that would only call attention to the cert petition. This is true even if a respondent had amicus support in the court of appeals. There is no reason why a respondent cannot, with up to 9,000 words, persuasively present to the Court all of the reasons why the Court should deny review. But again, seeking the Solicitor General's support after the court has issued a CVSG is a crucial exception.

Conclusion

A party that has prevailed in the court of appeals or in a state supreme court should not view the filing of the other side's certiorari petition as an afterthought. All things being equal, the chances that the Supreme Court will deny the petition are good. But if the Court grants review, the stakes will be high. This means that a respondent's appellate counsel should prepare and submit a brief in opposition in all but the most frivolous appeals. A respondent does not need to submit a lengthy opposition brief, but it does need to submit a well-crafted and convincing one. FD