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# *How To Write a Successful Brief In Opposition: A Guide For State Lawyers*

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## INTRODUCTION

Briefs opposing cert petitions—known as Briefs in Opposition or BIOs—might be the most important briefs state attorneys file with the U.S. Supreme Court. They are certainly the most numerous. And each one of them is trying to preserve a lower court victory. The Supreme Court reverses far more than it affirms, meaning that if your BIO fails and the Court takes the case, the state will likely lose on the merits—creating a nationwide rule of law on an issue potentially very important to state government operations and your citizens.

Complicating matters is that Briefs in Opposition are very different than a typical appellate brief. Though they may address the case’s legal merits, that is rarely their focus. Rather, their lead arguments are often that a case is not a good “vehicle” and that a claimed “conflict” among the lower courts is “illusory.” But what makes a case a poor vehicle and what makes a conflict among the lower courts illusory or not worthy of the Court’s time? And what other arguments might convince a Court to exercise its discretion by denying review? This manual answers those questions, providing a panoply of arguments your future BIOs can make.

In doing so, it will direct you to Briefs in Opposition, mostly successful ones, filed within the past decade by top Supreme Court practitioners. All are available on SCOTUSblog, the Court’s web site, or a commercial database. Sometimes the manual will provide an excerpt from them; other times just the case name and number. Its reliance on these petitions highlights a key point: This guide is intended to begin your education on writing BIOs, not end it. Reviewing petitions written by Supreme Court regulars is a critical additional component.

The guide will begin with an overview of the statistical odds of a cert grant and the Justices and their clerks’ process for reviewing the 120 or so cert petitions distributed to them each week. It will then address the threshold question whether you should even file a Brief in Opposition or should instead waive a response. The manual will next turn to the Court’s criteria for granting petitions—you can’t tell the Court why it *shouldn’t* take a case unless you know the reasons why it sometimes grants review. The guide next turns to the heart of the matter, carefully laying out the specific arguments you can make for why certiorari should be denied. Finally, the guide will address a few miscellaneous items and some matters of style.

## I. THE NUMBERS AND THE PROCESS

Your goal, of course, is to convince the U.S. Supreme Court *not* to review the lower court ruling. That seems an easy task. The Court receives about 6,200 cert petitions each year and grants only about one percent of them. It shouldn't be too hard to be one of the 99 percent.

Not so fast. Except in capital cases, parties are allowed to waive the filing of a Brief in Opposition, and usually avail themselves of that opportunity. The United States Solicitor General's office, for example, waives at least 90 percent of the time. Most state Attorney General offices also initially waive the opposition most of the time. So most petitions are denied without a response ever being filed.

That means you're only writing a Brief in Opposition in death penalty cases; in response to those cert petitions that seem strong enough on their face to merit an immediate response; and in response to petitions for which the Court called for a response. I don't have an exact percentage of the grant-rate for *those* petitions, but it's far higher than one percent.

Plus, states' cases are far more likely than cases between private parties to involve major constitutional issues or the meaning of important federal laws, such as §1983 and AEDPA. That helps us when we file cert petitions—cert petitions filed by state AG offices are granted around 20 percent of the time. But the flip side is that we have to respond to many cert petitions that present serious federal issues.

Before turning to when you should waive a response and what a response should say, it's worth reviewing the Court's process for deciding whether to grant a petition. The process matters because it tells you who your audience is and how much time they'll spend on your brief.

Who is reading the cert papers? The answer is that three smart kids in their mid to late-20s are conducting the closest and most important reads. To economize their resources, all of the Justices but Justices Alito and Gorsuch participate in what is known as the "cert pool." These seven Justices pool their 28 clerks, one of whom is responsible for reviewing a given petition and drafting a short "cert pool memo" that discusses the case and provides a recommendation. The Justices review the memo and then, depending on the case and the Justice, may take a closer look by reading some or all of the briefs and the opinion below.

So the critical initial assessments of the cert papers are made by the one clerk assigned out of the cert pool and two clerks from Justice Alito and Justice Gorsuch's chambers. They are very bright young people, but they don't have a great deal of experience, particularly in some specialized areas of the law.

What that means is clarity is at a premium. You need to write in a clear, organized, straightforward manner that leaves no doubt as to the legal issues involved, the reasons why Supreme Court review is not warranted, and the factual and procedural background.

Three other things to know:

- Under the Rule of Four, only four Justices have to vote in favor of granting review for the petition to be granted.
- As to timing, the Court will usually take up the petition at the Justices' weekly conference about two months after it is filed, or three months if you obtain an extension for filing your opposition.
- The Justices and their clerks don't receive the cert filings seriatim, *i.e.*, as each document is filed. Rather, the Clerk's office holds onto the submissions, giving the petitioner two weeks after the Brief in Opposition is filed to file its reply. The Clerk's office then delivers the entire batch of documents—petition, Brief in Opposition, reply, and any amicus briefs—to the Justices' chambers.

## II. SHOULD YOU RESPOND OR WAIVE?

Upon receiving a cert petition, the first question to ask is whether you ought to respond to it or should instead waive a response. In favor of waiving in most cases is this core fact: The Court never grants certiorari without asking for a response. If a Justice—and it takes just one—thinks the case *might* be cert-worthy, he or she can call for a response (CFR).

Some offices have the policy of waiving in *every* case (not counting capital cases). That's a mistake. Although it's fine to waive most of the time, because most petitions are clearly not cert-worthy, you should probably respond (even without a CFR) when the petition is obviously a serious one. For example, you ought to respond to a petition that's filed by the United States or by a respected Supreme Court practitioner that contends (plausibly) that the circuits are divided 5-3 on the issue.

You might ask, “what’s the harm in waiving, even if it’s a serious petition?” The answer is that this could create a bad first impression on the cert pool clerk, whose initial memo might recommend “Call for response with a view to a grant.” You’d rather avoid that recommendation.

### **III. WHY THE COURT GRANTS CERTIORARI**

You can only skillfully *oppose* a cert petition if you know why the Court does and does not grant certiorari. As a general rule, the Court does not grant cert to correct errors by lower courts. It is not an error-correction court. It ordinarily grants certiorari because, in descending order of importance:

- There is a conflict among the federal courts of appeals and/or state high courts;
- The issue is extremely important;
- The decision below directly conflicts with Supreme Court precedent;
- The court below erred.

Most effective cert petitions set forth multiple reasons why certiorari should be granted, usually combining some or all of those arguments.

And so the paradigmatic cert petition sets up its Reasons for Granting the Petition section this way:

- I. Federal courts of appeals are divided on the question presented.
- II. The case presents an issue of national importance.
- III. The [let’s say Ninth] Circuit’s decision is incorrect.



## IV. ARGUMENTS THE BRIEF IN OPPOSITION SHOULD MAKE

So you've decided to file a Brief in Opposition or been asked to by the Court. What should the brief argue? Why should certiorari be denied?

There are two basic types of arguments: The *first* is rebutting the cert petition's claims of conflict, importance, error, and so on. The *second* is showing what are known as "vehicle" problems. Let me address them in turn.

### A. Rebutting the cert petition

1. **General responses.** First, it's always helpful to point out the arguments the cert petition is *not* making, or fundamental flaws in the petition. These include:

- **The petition *doesn't* allege a conflict or a profoundly important issue.** Where that's true, say so up front.

- **The petition is objecting only to a misapplication of settled law.** This is a classic Brief in Opposition argument. Many cert petitions claim that the lower court decision conflicts with a Supreme Court decision, but at bottom they're simply arguing that the lower court misapplied a settled rule. Supreme Court Rule 10(a) specifies that that's not a ground for certiorari.

- **The court below did not actually rule on the question presented.** You'd be surprised how often the petition presents a legal question that the lower court didn't actually rule upon. That can happen for a number of reasons:

- Sometimes the petition presents an altogether new argument for why the petitioner should prevail in the case.

- Sometimes the petition presents an argument the petitioner made but which the lower court didn't actually reach.

- Still other times, the losing party is trying to figure out how to convert a loss that seems to have been based on the facts into a loss that presents a cert-worthy legal issue. So it might claim (wrongly) that the lower court announced a new bright-line rule—when in fact it did nothing of the sort.

When any of these happens, you want to point this out in your BIO.

**Example:** In *Kalamazoo County Road Commission v. Deleon*, No. 13-1516, the petition asked whether an employer can be deemed to have taken an “adverse employment action” for purposes of a discrimination claim by *granting* an employee’s *own* request for a job transfer. The successful BIO argued (at 7-8) that the case didn’t actually present that question because the lower court found that the employee was *involuntarily* transferred.

## 2. Attack the conflict

Let’s say the cert petition alleges that the decision below conflicts with decisions by other federal courts of appeal and state high courts. How do you respond?

The primary goal is to demonstrate, if possible, that the petitioner is wrong and that, upon closer inspection, there is no direct conflict among the lower courts. If that isn’t possible, the goal is to provide reasons why the conflict does not need to be resolved at this time, in this case.

Bear in mind that the only conflict that counts, that justifies Supreme Court review, is a direct conflict between the “right” courts—by which I mean it’s an *outcome-dispositive* conflict between or among *federal courts of appeals* and *state high courts*. By outcome dispositive, I mean that our case would have definitely come out the other way had it been heard in the other court(s).

With that background, you might argue:

### (a) *The conflict isn’t genuine*

In other words, it’s simply not true that the lower courts have adopted different outcome-dispositive rules. You could show that a number of ways. For example, you can argue that:

- **The courts have simply phrased their tests differently, but there’s no true inconsistency between them.**

**Example:** This was the argument well made by the Brief in Opposition in *Pennsylvania Higher Education Assistance Agency v. Pele*, No. 15-1044. The cert petition argued that the circuits were divided over the proper test for determining when an entity is an “arm of the state” for sovereign immunity purposes. The BIO argued (at 10) that petition-

er’s “contention that the circuits apply different tests to the arm-of-the-state question is based on the circuits’ differing wording, not the substance of the analysis. In fact, all circuits consider the same four factors when determining whether an entity is an arm of the state.”

- **The *holdings* of the courts aren’t in conflict; the conflicting statement by the other court was just *dicta* or an assumption made for the sake of argument.**

- **The difference in outcomes was based on the different *facts* in the cases.**

**Example:** In *Matalonis v. Wisconsin*, No. 16-34, the petition argued that the circuits are divided on whether the community caretaking exception to the Fourth Amendment permits a warrantless search of a home. Wisconsin’s BIO explained that the division among the courts reflected different facts in the cases. “[T]he cases holding that the community caretaker exception *did not* apply to a search of a home . . . considered facts showing no real need for urgency[.]”

- **The difference in outcomes was based on the different *laws* at issue in the cases.**

**Example:** In *Davis v. Montana*, No. 16-123, the cert petition alleged that Montana is one of only a handful of states that allow a criminal defendant to be tried by a non-lawyer judge without having an opportunity for a *de novo* trial before a judge who is a lawyer. And it pointed to some state court decisions holding that this violated due process. Montana pointed out its in Brief in Opposition that “the variety of state court systems makes discerning any definitive conflict among state supreme courts challenging. As the Florida Supreme Court noted, ‘while the language of other state appellate court decisions in this area can provide us with some guidance . . . , the wide variety in state court systems render such determinations mildly persuasive at best.’”

- **The supposed conflict involves abstract tension between the *general principles* stated by the courts; there’s no conflict over precise *legal rules* and no showing that the courts have reached different results when addressing the very same issue.**

Please note that all of these arguments are bolstered if the court below did not cite the cases in alleged conflict with it.

**(b) *The conflict doesn’t matter***

- **This case would come out the same way even under the test adopted by the other courts.** That is, even if the courts have adopted different tests, the difference in tests wasn’t outcome-dispositive in this case.

**Example:** This was another argument made in the Brief in Opposition in *Pennsylvania Higher Education Assistance Agency v. Pele*, No. 15-1044. The BIO said (at 20) that the petitioner “contends that four circuits—the First, Sixth, Eleventh, and D.C. Circuits—would rule differently on [its] arm-of-the-state status if they had the chance. [Petitioner’s] speculation is ill-founded.” The brief then walked through the tests used by those four circuits and explained why there’s every reason to believe that those circuits, too, would have ruled for respondent.

- **The conflict is between the wrong courts (*e.g.*, it’s merely a conflict among district courts or state intermediate appellate courts; or it’s a conflict *within* a circuit).**

**(c) *The conflict might go away***

How might that happen?

- ***En banc* review of the conflicting holding has been sought.**
- **Cases decided *after* the ones cited by the cert petition indicate that the other circuit might be moving away from the conflicting rule.**
- **It’s a lopsided conflict, and the one outlier circuit may well reconsider its position now that many other courts have gone the other way. This argument can be especially powerful if the outlier circuit issued its opinion decades ago.**

- **Intervening U.S. Supreme Court decisions or laws have weakened the underpinning of the rule adopted by the other circuits, which might now reconsider their rule.**

**Example:** In *Wilson v. Johnson*, No. 09-1143, the petition asked whether a district court’s denial of the appointment of counsel to a *pro se* civil litigant is an immediately appealable order. And it pointed to a conflict among the circuits. Virginia’s Brief in Opposition acknowledged the conflict but argued that it’s a “historical artifact” because the three circuits that hold such an order is immediately appealable issued their rulings *before* Congress enacted a 1990 law which the Supreme Court has interpreted as narrowing the types of orders that are immediately appealable.

**(d) *The conflict is “tolerable”***

Why would that be? For many possible reasons.

- **The issue should “percolate” more because only a couple of courts of appeal or state high courts have addressed it or only a couple have done so since a recent Supreme Court decision that changed the landscape.**

**Example:** The cert petition in *Nguyen v. North Dakota*, No. 14-973, asked whether police officers conduct a Fourth Amendment search when they walk a drug detection dog down an apartment building hallway. The successful Brief in Opposition couldn’t deny that the lower courts were in conflict on the issue. But it explained (at 8) that the Supreme Court issued a key precedent, *Florida v. Jardines*, just two years earlier and that only one lower court has addressed the issue since *Jardines*. So we don’t know if the conflict will persist after the lower courts have had the chance to take into account *Jardines*’ reasoning.

- **The conflict is tolerable because the issue is not “important.”**

If the issue hardly ever arises, for example, our legal system can tolerate that different courts answer the legal question differently. So let’s turn to importance.

### 3. Attack the alleged importance

Importance is a relative concept: What is important to the petitioner may not be important to the rest of the legal community. You will, of course, try to rebut the specific claims of importance set forth in the petition. If the petition says that the decision will lead to rampant police misconduct, the Brief in Opposition should explain why it will not. If the petition says that the decision below will wreak havoc in a major industry, your BIO should show why it won't.

**Example:** The Brief in Opposition in *EPA v. New York*, No. 06-736, was the rare one that succeeded in getting a cert petition filed by the United States denied. The headings in the third section of the brief were:

- A. The Decision of the Court Below Does Not Prevent EPA From Administering the [New Source Review] Program in a Way That Promotes Its Policy Goals.
- B. The Rule Vacated by the Court of Appeals Would Not Benefit the Environment.
- C. The Utility Industry's Equitable Arguments Are Legally Irrelevant and Factually Incorrect.

But beyond rebutting a petitioner's specific claims of importance, there are common arguments you can make to show why this case lacks practical, real-world importance or importance from a legal or jurisprudential perspective. Among them are:

- **The legal issue arises only rarely.** This can sometimes be shown by the fact that there are few court decisions on the issue.
- **The legal issue rarely matters to the *outcome* of cases. It's an interesting academic question, but cases rarely turn on its disposition.**

**Example:** The cert petition in *Town of Chester v. Laroe Estates, Inc.*, No. 16-605, asked the Court to resolve whether intervenors participating in a lawsuit as of right must have their own Article III standing or whether Article III is satisfied so long as there is a valid case or controversy between the named parties. The Brief in Opposition didn't deny that the courts were divided on the issue; and it couldn't deny that intervention is common. But it maintained (at 1, 9) that the answer to the question presented is seldom dispositive of whether a party could intervene because (among other reasons) the showing a party makes to enable it to intervene as of right will also demonstrate that it has its own Article III standing.

- **The state law at issue is unusual; few other states have a similar law.**
- **Legislative changes or administrative actions mean the legal issue may go away or the case will not have any prospective impact (even if it doesn't technically moot the case).**

**Example:** In *Overstock.com, Inc. v. New York State Department of Taxation and Finance*, No. 13-252, the petition alleged that a New York tax on out-of-state retailers that solicit business in the state violates the dormant Commerce Clause. Among New York's arguments in response (at 20-21) was that Congress was just then considering a law that would authorize states to collect sales and use taxes from large out-of-state retailers.

- **Congress can fix the problem** and is the appropriate body to do so because the legal issue involves, at bottom, policy considerations that a legislature is better situated to study and assess.
- **It's too early to know the practical impact of the decision/rule/statute.** We should wait longer to see what lessons we learn from experience under the contested legal rule or challenged statute.
- **The vast consequences that petitioner claims the opinion will have depend on future extensions of the lower court ruling, which may not transpire.**
- **Point out prior cert denials of petitions presenting the same issue.** They show that the Court had previously concluded that the issue wasn't cert-worthy. Where you have this argument, you usually want to present it early in your Reasons for Denying the Petition section.

The final way to rebut petitioner's arguments is to:

#### **4. Argue that the court below was right**

Although the mere fact that the court below erred is not, standing alone, usually enough to obtain a cert grant, it is often a relevant factor. The Court reverses far more often than it affirms, which shows that it prefers to review decisions it believes are erroneous. This is particularly true where the basis for review is the supposed importance of the case.



As a consequence, most cert petitions include a section arguing that the lower court erred. Briefs in Opposition should therefore usually devote some space to defending the decision below and presenting it in its strongest light. The weight you should give the merits varies, of course, from case to case. If there is a realistic chance the Court will summarily reverse the decision below (that is, reverse based on the cert papers alone, without even asking for briefing on the merits), you may want to defend the decision below in more depth.

## **B. Show There Are Vehicle Problems**

The next basic type of argument your BIO can make is that there are “vehicle” problems—*i.e.*, factual or procedural problems with the case that would prevent the Court from reaching the legal issue presented. There is nothing the Court likes less than granting certiorari and then, after full briefing and oral argument, being forced to dismiss the petition as improvidently granted. The Court is similarly displeased when it grants certiorari only to find out that factual and procedural complexities prevent it from fully resolving the issue it had intended to tackle.

Most of the time there is another case raising the same legal issue waiting around the corner. You want to convince the Court to wait for that case. Note that you don’t have to convince the Court that you’re absolutely correct as to the vehicle problems. As long as you present a serious argument on this score, the Court may conclude that the better course is to pass on the case.

And bear in mind that Rule 15.2 of the Supreme Court Rules states that “Any objection to consideration of the 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.” So you make your vehicle arguments or you waive them, unless they’re jurisdictional.

Common “vehicle” arguments are:

- **The Court lacks jurisdiction over the case because the petitioner lacks standing, the case is moot, or the issue is not ripe.** Note that you can make this argument if there’s a serious jurisdictional issue in the case, even if *you* think there’s jurisdiction.



**Example:** Here’s what Texas wrote in its Brief in Opposition in *Kickapoo Traditional Tribe of Texas v. Texas*, No. 07-1109: “Although the State maintains that its challenge to the Secretary’s 1999 gaming regulations is ripe and otherwise justiciable, both the Tribe and the United States vigorously asserted that the State’s claim was not ripe and that the State lacked standing to challenge the regulations. If the Tribe and the United States were correct, this Court would have no jurisdiction to reach either of the issues presented. This potential jurisdictional barrier militates against granting the petition.” (Citations omitted.)

- **The Court lacks jurisdiction over the case because there is an independent and adequate *state* ground for the lower court ruling.**
- **The Court lacks jurisdiction over the case because certiorari is sought from a *non-final* state court decision.**

**Example:** New York’s recent Brief in Opposition in *Greenberg v. New York*, No. 16-284, has an entire section (at 8-14) making this argument.

- **Petitioner waived the issue by not presenting it in the lower courts.**
- **Petitioner made a different argument in the lower courts (*i.e.*, even if petitioner preserved the legal *issue*, it made different *arguments* in support of its position in the lower courts). The Supreme Court never wants to be the first court to have grappled with a particular argument.**
- **The court of appeals ruled for respondent on alternative grounds, and so the outcome of the case wouldn’t change even if the Court granted certiorari and reversed on the question presented.**

**Example:** A Brief in Opposition filed by Oklahoma in *Cripps v. Oklahoma*, No. 16-423, began by explaining that the Oklahoma Court of Criminal Appeals rejected petitioner’s Fourth Amendment argument through “alternative holdings. It found that under the totality of the circumstances, exigent circumstances justified the warrantless blood draw. It separately found that an Oklahoma statute allowed warrantless blood draws

of motorists whenever a motorist violates a traffic law and is involved in an accident resulting in a fatality or other serious injury.

Cripps challenges only the latter holding, arguing that the Oklahoma statute is unconstitutional. Because he does not challenge the separate finding of exigency based on the totality of the circumstances in his individual case, an independent and unchallenged basis for the judgment exists. Certiorari is thus not warranted and the Petition should be denied.”

- **Your side would prevail on alternative grounds not yet reached by the court of appeals even if the Court granted certiorari and reversed on the question presented.** This isn't a very powerful argument against certiorari, but it can have some punch if the district court reached that ground and ruled for your side in a well-reasoned opinion.

- **The petition seeks review of an interlocutory order or preliminary grant of relief.**

- **To squarely rule on the question presented, the Court would have to resolve disputed factual issues or reject facts found by the lower courts.**

**Example:** In *Alvis v. Espinosa*, No. 11-84, the cert petition argued that the Ninth Circuit erred in denying qualified immunity to police officers who shot respondent after respondent “defied repeated orders to show his hands, threatened to kill the officers, and suddenly raised his right arm as if to point a gun at an officer.” The successful Brief in Opposition explained (at 1), however, that there’s another plausible view of the facts: that respondent “did not threaten” the officers, “or make the sudden movements the officers later claimed . . . justified the shooting.” The Supreme Court could only answer the question presented if it first found the facts to be as the petition said they were. And the Court generally doesn’t like to engage in its own fact-finding.

- **To reach the question presented, the Court would have to resolve antecedent legal issues.**

**Example:** *United Student Aid Funds, Inc. v. Bible*, No. 15-861, was one of a slew of cert petitions that asked the Court to overrule the *Auer* doctrine, under which courts defer to agencies’ reasonable interpretations of their own regulations. The Brief in Opposition noted (at 7-8) that *Auer* deference comes into play only if the court first concludes that

the regulation is ambiguous. And so to reach the question presented, the Court would have to resolve an antecedent legal issue: Was the regulation at issue ambiguous, or did it clearly answer the legal issue one way or the other? The lower court judges were divided on the issue.

- **The record in this case is sparse; wait for a case with a better record.**
- **The lower court ruling is unpublished and therefore will not have any precedential value within the circuit or state.**
- **The answer to the question presented depends on a predicate, unresolved *state-law* issue, such as the meaning of a state statute.**

**Example:** In *Cline v. Oklahoma Coalition for Reproductive Justice*, No. 12-1094, the state sought review of an Oklahoma Supreme Court decision striking down a state law requiring that medical abortions be administered according to the instructions on the drugs' FDA-approved labels. The Brief in Opposition pointed out (at 10-13) that the state statute could be read far more broadly, as effectively *banning* all medical abortions. And so the U.S. Supreme Court would have to resolve this state-law statutory interpretation issue before it could reach the federal constitutional issue in the case. In an unusual move, the Court granted the petition and immediately certified the state-law question to the Oklahoma Supreme Court. That court adopted the broader reading, leading the U.S. Supreme Court to dismiss the writ as improvidently granted.

- **The legal issue arose in this case in an atypical context. The Court should wait for a more typical (a more paradigmatic) case to address the issue.**

**Example:** In *Stroud v. Alabama Board of Pardon & Paroles*, No. 13-635, the cert petition presented an important issue: Whether a state waives its sovereign immunity by removing a case to federal court, where the state would have had immunity in its own courts. Alabama's Brief in Opposition made a devastating point. The State was asserting its immunity to a federal Age Discrimination in Employment Act claim—a claim the petitioner didn't raise until *after* the state agency removed the case to federal court. The question whether a state waives its immunity by removing a case typically arises with respect to claims that were part of the original complaint and were before the state court initially. Alabama's BIO made a persuasive showing that this atypical context was the wrong one through which to address the issue.

## V. THE SECTIONS OF THE BRIEF IN OPPOSITION

So you know what arguments you want to make. Now you want to begin drafting the Brief in Opposition. Let's now turn to the various sections of the BIO.

### A. Question(s) Presented

- **Rephrase the question.** Most cert petitions phrase the question(s) in a way that subtly (or not-so-subtly) supports their position. A Brief in Opposition doesn't have to accept that slanting of the questions; you will therefore usually want to rephrase them.

- **Caption.** You don't need to title it "Restated Question Presented" or something to that effect. It's simply "Question(s) Presented."

- **Prefatory paragraph.** Many cert petitions set the stage for their Question(s) Presented by including a prefatory paragraph that provides the statutory, factual, or procedural context for the question(s). You should feel free to include a paragraph of that sort in the BIO if you think it would be helpful. Again, you can write a very different paragraph than the one the petition used.

Here are two examples of rephrased Questions Presented:

**Example #1: *Expressions Hair Design v. Schneiderman*, No. 15-1391**

**Cert petition:** Ten states have enacted laws that allow merchants to charge higher prices to consumers who pay with a credit card instead of cash, but require the merchant to communicate that price difference as a cash "discount" and not as a credit-card "surcharge." The question presented is: Do these state no-surcharge laws unconstitutionally restrict speech conveying price information (as the Eleventh Circuit has held), or do they regulate economic conduct (as the Second and Fifth Circuits have held)?

**New York BIO:** Whether a New York law that prohibits sellers from charging consumers additional fees above the regular, posted price when they use a credit card implicates the First Amendment.

**Example #2: *Kalamazoo County Road Comm’n v. Deleon*, No. 13-1516**

**Cert petition:** Whether it is an “adverse employment action” for a discrimination claim . . . when an employer grants an employee’s request for a job transfer.

**BIO:** Was the court of appeals correct in holding that an employee’s involuntary transfer to a new position may constitute an adverse employment action for the purpose of discrimination claims under Title VII, the Age Discrimination in Employment Act, and the Equal Protection Clause, where a reasonable jury could conclude that the transfer effected a material change in the employee’s terms or conditions of work?

## **B. Statement of the Case**

This isn’t the place to review the craft of writing an effective Statement of the Case. For now, let me just provide a few do’s and don’ts for your Briefs in Opposition.

### ***Some don’ts:***

1. Don’t incorporate by reference the cert petition’s Statement of the Case.
2. Don’t block-quote long passages of the lower court’s summary of the facts, to serve as your summary of the facts.
3. Don’t make point-by-point rebuttals to factual assertions in the petition’s Statement.
4. Don’t follow the practice required by many lower courts and begin with a “Statement of the Case” that summarizes the procedural history of the case, followed by a “Statement of the Facts” that sets out the facts of the case.

### ***Some do’s:***

1. The right approach is to write a strong, stand-alone, independent Statement that presents your case, and the legal issue presented, in the strongest light.

2. Most Statements have at least two subsections: one providing the factual background and one providing the procedural background. When the principal issue in a case is the meaning of a specific statute, Statements usually include a subsection that discusses the statute’s background and lays out its core provisions.

3. As a general rule, the story of the case—the facts and then the case’s trip through the courts—should be told in chronological order.

4. The “story” the Statement tells culminates with the decision by the federal court of appeals or state appellate court. Your Statement should therefore end with a summary of that court’s reasoning. It is almost never a good idea simply to say, “the [State] Supreme Court affirmed,” and then leave it to the Reasons for Denying the Petition section to lay out the court’s reasoning.

5. Note that Supreme Court Rule 15.2 says that “Counsel are admonished that they have an obligation to the Court to point out in the brief in opposition, and not later, any perceived misstatements made in the petition.” So although you shouldn’t do it in a point-by-point rebuttal, you do need to correct the facts as needed.

A word on the caption. As with the Question(s) Presented, don’t call the BIO’s Statement a “Counter-Statement of the Case.” It’s simply, “Statement of the Case.”

### **C. Summary of Argument**

There isn’t one. Supreme Court custom is that neither cert petitions nor Briefs in Opposition contain a Summary of Argument. Instead, what’s common in both is to summarize your argument in an Introduction at the beginning of the brief, at the outset of the Statement, and/or in the first couple of paragraphs of the Reasons (for Granting or Denying).

### **D. Reasons for Denying the Petition**

This is where you make all the arguments for denying certiorari that we discussed earlier, and I won’t go over them again. Instead, here are some thoughts on the order of presentation.

- There isn't one, correct way to structure the Reasons for Denying section. In some cases, you want the first section to show that the supposed conflict among the circuits is illusory. In another, the first section should explain that there's an adequate and independent state ground.

- Not surprisingly, you usually want to open up with the weakness in the other side's case. If they haven't alleged a circuit conflict, and are instead merely arguing that the lower court got it wrong, say that up front.

Here are some examples of how top practitioners structured the Reasons for Denying section.

**Example #1: *Kalamazoo County Road Comm' v. Deleon*, No. 13-1516**

- I. The Commission Seeks Review on a Question Not Presented by This Case.
- II. There Is No Conflict Among the Circuits on the Question Presented by the Commission.
- III. The Interlocutory Nature of the Sixth Circuit's Decision Warrants Denial of the Petition.

**Example #2: *Alvis v. Espinosa*, No. 11-84**

- I. Certiorari Should Be Denied On The First Question Presented.
  - A. This Case Is Not An Appropriate Vehicle To Decide The First Question Presented.
  - B. Petitioners Overstate The Degree, And Practical Significance, Of Any Difference Among The Circuits' Approaches.
  - C. The Ninth Circuit's *Billington* Rule Is Correct.
  - D. Further Percolation Is Warranted In Light Of Recent Decisions From This Court.
- II. Certiorari Is Unwarranted To Review The Ninth Circuit's Application Of Settled Qualified Immunity Principles To This Case.
  - A. The Ninth Circuit Properly Applied The Second Step Of The *Saucier* Test.
  - B. Petitioners' Qualified Immunity Claims In This Court Are Premised On A Mischaracterization Of The Summary Judgment Record.
  - C. The Procedural Posture Of This Case Makes It A Particularly Poor Vehicle For Review.



**Example #3: *Gause v. Haile*, No. 13-1518**

- I. The Court Of Appeals' Decision Does Not Conflict With That Of Any Other Circuit.
- II. The Issue In This Case Arises Only Infrequently.
- III. The Resolution of The *Heck* Issue Is Academic In This Case, Since It Will Make No Difference To The Outcome.
- IV. This Issue Should Receive Further Consideration From The Lower Courts.

**Example #4: *Wilson v. Johnson*, No. 09-1143**

- I. Recent Statutory and Jurisprudential Developments Make it Likely that the Minority Circuits Will Revisit Earlier Holdings Decided Before These Changes.
- II. The Facts of this Case Make It a Poor Vehicle to Resolve the Question Presented.

**Example #5: *Oliver v. Quarterman*, 08-833**

- I. This Case Is Not a Proper Vehicle for Resolving the First Question Presented.
- II. The Second Question Presented Fails to Implicate Any Circuit Split and Is Otherwise Unworthy of Review.
- III. The Third Question Presented Only Seeks to Revisit a Fact-bound Dispute Unworthy of Review.

**Example #6: *Stahl v. Hialeah Hosp. & Sedgwick Claims Mgmt.*, No. 16-98**

- I. This Case Is An Exceptionally Poor Vehicle For Addressing the Questions Presented.
  - A. Petitioner Did Not Press, And The Florida Courts Did Not Pass Upon, The Federal Issues He Presents For Review.
  - B. Petitioner Lacks Article III Standing To Challenge The Repeal Of Permanent Partial Disability Benefits.
  - C. Petitioner Failed To Develop An Adequate Record On Which To Assess His Facial Challenges.
- II. The Decision Below Is Correct And Does Not Even Arguably Conflict With A Decision Of This Court Or Any Other Court.



## E. Conclusion

The Conclusion in a Supreme Court brief should do no more than state the relief being sought. That can usually be done in one sentence: “The petition for a writ of certiorari should be denied.” If you want to add “For the foregoing reasons, . . .,” that’s fine.

The key is that the Conclusion is *not* the place for a closing peroration, a dramatic summation of your position.

## VI. MISCELLANEOUS

- As with cert petitions, brevity is preferred. You really don’t want a 35-page BIO if you can at all help it.
- Do not solicit amicus briefs to oppose a cert petition. Such briefs only highlight the importance of the case.
- Because *in forma pauperis* petitions are written on regular 8½ x 11 paper—and not printed in the booklet format—so should your BIO be written on regular paper and not printed. See Supreme Court Rule 15.3.
- Do you respond to the other side’s amici? It depends. You rarely want to spend much time responding to them. But sometimes they make important points that are worth quick rebuttals.
- **Cross Petitions:** Sometimes you’ll receive the other side’s cert petition and conclude that, *if* the Court is going to grant that petition, there’s a part of the lower court’s decision that *you’d* like reviewed as well. In that circumstance, you might want to file a cross-petition presenting that additional issue.

So, let’s say you want to defend the lower court judgment on an alternative ground—a ground that the lower court rejected or didn’t reach. Do you have to file a cross petition? The answer is that you only have to file a cross-petition when the alternative ground, if adopted by the Supreme Court, would require that the judgment below be changed. If it wouldn’t change the judgment—it’s still, “judgment rejecting constitutional challenge to state statute affirmed”—you don’t technically need to file a cross petition to defend the lower court judgment on that alternative ground should cert be granted.

Still, the Court typically does not address alternative legal issues in the case unless it grants a cross-petition. So it's a tough tactical call, sometimes, whether simply to raise the alternative ground in the BIO or file a cross-petition, which might have the negative affect of making the case look more interesting as a whole—and therefore increasing the chances of the *other side's* petition getting granted.

## VII. STYLE

The Court's rules mandate what font to use (Century Expanded, New Century Schoolbook, or Century Schoolbook), how many words a Brief in Opposition may contain (9000), and so on. But there are also some unwritten style rules, and if you know them you'll make your Brief in Opposition look like it's written by a Supreme Court pro. My "U.S. Supreme Court Brief Writing Style Guide" (republished in 19 J. App. Prac. & Process 129 (Spring 2018)) sets most of them out and I commend it to you. For now, let me highlight a few of them.

- Some courts have adopted legal-writing guru Bryan Garner's suggestion that all citations be placed in footnotes. The U.S. Supreme Court has not.
- Don't use local idiosyncrasies. For example, I have read many briefs from Louisiana attorneys that refer to the Court as "this Honorable Court"—as in, "This Honorable Court held in *Smith v. Jones* that . . ." Maybe Louisiana courts like to hear themselves referred to as "honorable," but that's out of place in the U.S. Supreme Court.
- Citations to U.S. Supreme Court opinions should be to the official U.S. Reporter, without parallel citations to the unofficial (Supreme Court and Lawyers' Edition) reporters. If the decision isn't yet included in the official reporter, use the Supreme Court Reporter cite (and only that cite).
- When citing the lower court decisions in your case, cite only to the cert petition appendix—which, of course, contains those lower court decisions. The proper abbreviation of the cert petition appendix is "Pet. App." Thus, the proper cite in your BIO is, for example, "Pet. App. 17a," not "*Smith v. Jones*, 473 F.3d 1234 (9th Cir. 2008); Pet. App. 17a."

- Don't refer to the U.S. Supreme Court as "the Supreme Court," as in "the Supreme Court has held that . . ." It's "the Court held"; "this Court held"; or "*Atkins v. Virginia* held . . ."
- Don't refer to the lower court decisions in your case by the case name. So if the petition seeks cert from the Ninth Circuit's decision in *Smith v. Jones*, your brief should not say, "The Ninth Circuit held in *Smith v. Jones* that . . ." The proper style is to say, "The Ninth Circuit held below that . . .," or simply "The Ninth Circuit held . . ."
- The Court expects case names to be italicized, not underlined.

## CONCLUSION

Briefs in Opposition are gratifying to write because they usually produce a clear-cut win: a one-line order denying the other side's petition. That said, the stakes are high and many petitions to which you're responding have a reasonable chance of succeeding. You therefore need to know the myriad ways by which you can attack a petition and convince the Court that this is the wrong case, the wrong time, or the wrong issue. We hope this manual has shown you many of them and will give you a head start on your next BIO.



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