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How To Write A Successful Cert Petition: A Guide For State Lawyers

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INTRODUCTION

Most guides on writing cert petitions focus on two facts: The Court grants certiorari to resolve conflicts, not to correct errors; and the Court grants an astonishingly small percentage of cert petitions. The guide might then dig a little deeper: The only lower-court conflicts that matter are conflicts between or among federal courts of appeals and/or state courts of last resort—conflicts involving federal district courts and state intermediate courts don't matter. All of this is true, and yet there's so much more to say.

The goal of this manual is to dig *much* deeper, to explore the many layers of crafting a successful cert petition. Good advocacy truly matters at this stage of a case. How you frame the issue, how you describe the conflict, and how you pitch the importance of the question presented can make all the difference between a one-line order saying “certiorari denied” and obtaining Supreme Court review and a Supreme Court victory down the line.

This manual will help you seize the opportunity to write a persuasive petition. It is based on lessons learned from reading thousands of cert petitions and hearing from leading Supreme Court advocates at NAAG's annual Supreme Court Advocacy Seminar.

This manual will direct you to cert petitions, mostly successful ones, filed within the past five or so years by top Supreme Court practitioners. Almost all are available on SCOTUSblog or the Court's web site. 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 cert petitions, 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 petitions distributed to them each week. It will then address the Court's criteria for granting petitions and when *not* to seek Supreme Court review. The guide will next turn to the heart of the matter, carefully laying out the specific arguments successful cert petitions make and how the petition's specific sections should be structured. Finally, the guide will address reply briefs and miscellaneous items such as amicus briefs and calls for the Solicitor General's views.

I. THE NUMBERS AND THE PROCESS

Your goal is to convince the U.S. Supreme Court to review an adverse lower court ruling. This seems a daunting task. The Court receives about 6,200 cert petitions each year, but grants only about 1 percent of them. Why even bother? It seems pointless.

But there is hope. The percentages are better when you knock out the *in forma pauperis* petitions, many of which are hand-written by prisoners. If you look only at petitions in paid cases, the grant rate is closer to 4 percent. And state lawyers are not ordinary litigants. The grant rate for cert petitions filed by state Attorney General offices over the past five Supreme Court Terms is about 20 percent. So our petitions have a real fighting chance.

Before turning to what the cert petition should argue in the hopes of becoming one of those 20 percent, it is 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 it will 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.

And 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's 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 required, and the factual and procedural background. If the petition is leaden, unduly complex, or emphasizes the facts rather than the legal issues, the few clerks who make the initial recommendation may miss why review is necessary.

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 you filed your petition, or three months if the respondent obtains an extension for filing its opposition.
- The Justices and their clerks don't receive the cert filings seriatim, *i.e.*, as they are 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. WHY THE COURT GRANTS CERTIORARI

It's a great job being a Supreme Court Justice because you hear only about 70 cases a year, and (by and large) select which cases those will be. So what criteria does the Court use in selecting those 70? Does it ask which are the 70 most *important* cases? Which cases the lower courts botched up the most? Is it looking for the most *interesting* legal issues? The answers are no, no, and no.

Rather, the cases the Supreme Court chooses to hear reflect the place the Court has in our legal system, sitting atop the nation's judiciary. The Court sees itself as the guardian of our legal system, stepping in when it believes a definitive, nationwide answer to a federal issue is necessary.

Usually, that's because state and federal courts are in conflict over how to answer a particular, federal legal issue. Sometimes it's because a lower court may have wrongly decided a very important legal question or overstepped its authority in some fashion. And so, as reflected in Supreme Court Rule 10, the Court ordinarily grants certiorari because, in descending order of importance:

- There is a conflict among the federal courts of appeals and/or state high courts on a federal question;
- The issue is extremely important;

- The decision below directly conflicts with Supreme Court precedent; and
- The lower court erred

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

III. WHEN NOT TO FILE A CERT PETITION

This means there are many cases you lose in your state appellate courts or federal court of appeals that are very important to the State where you should **not** seek U.S. Supreme Court review. Although this is not the place to walk through all the arguments an effective brief in opposition can hurl at your potential petition, don't seek cert if:

- The case presents only a state-law issue, or there's an independent and adequate state-law ground for the result;
- It's a state-court case that's not yet final under the Court's complicated jurisprudence for what counts as a final state-court decision. See *Florida v. Thomas*, 532 U.S. 774, 777-80 (2001) (containing a very helpful discussion of that jurisprudence);
- The lower court's decision turned on the specific facts of your case;
- The court rejected your position on multiple grounds, which means the really interesting federal question you think would appeal to the Supreme Court wouldn't affect the outcome; or
- Your basic complaint about the lower-court decision is that it misapplied settled precedent. See Supreme Court Rule 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law.").

IV. ARGUING WHY CERT SHOULD BE GRANTED

So when *should* you seek Supreme Court review of a lower-court loss? As I reviewed the cert petitions the Court has granted over the past five or so Terms, it struck me that there are really two quite different types of petitions. One type leads with the contention that there's a conflict among the lower courts. This is the strongest basis for getting cert granted. My review and earlier studies show that around 70 percent of the granted cert petitions highlighted a conflict among the lower courts. And so, as a general rule, if there's a direct conflict among the federal circuits or a direct conflict among state high courts you've got a real chance to get cert granted and you'll likely want to lead with that argument.

But what if you can't argue that there's a genuine circuit split? Do you give up? The answer is "not necessarily": You can still be one of the remaining 30 percent of petitions granted without a conflict or with a relatively weak one that the petition makes a secondary argument. These petitions instead emphasize the *importance* of the legal issue; and dive into the *merits* to a far greater degree.

A. Preliminary Issue: Is There a Conflict Worth Leading With?

As you think about crafting your cert petition, the key preliminary question, therefore, is whether there's a genuine conflict among the lower courts on the question presented. Critically, the only conflict that truly counts, that justifies Supreme Court review, is a *direct* conflict between the "*right*" courts.

By a "direct conflict" I mean at least two courts squarely addressed the same legal issue and issued *holdings* that reached opposite results. Put slightly differently, the conflict is outcome determinative: Our case would have definitely come out the other way had it been heard in the other court(s).

And it must be a conflict among the "right" courts. By the "right" courts I mean the conflict needs to be between or among *federal courts of appeals* and *state high courts*. If the lower court decision in your case conflicts with a federal district court or state intermediate appellate court decision, that doesn't cut it. It's not a conflict that warrants Supreme Court review.

That raises the question: Is every direct conflict between or among federal circuits and state high courts a strong enough ground to justify being your lead argument? How deep does a conflict have to be?

Naturally, the more lower courts that comprise the conflict the better. A 5-3 conflict among the federal courts of appeals is stronger than a 1-1 conflict among them. That said, the Court has granted many a petition asserting a conflict between, say, the Second Circuit and the Ninth Circuit.

And it is especially powerful if you can show a conflict between a state high court and the federal court of appeals for the circuit that includes the state, such as a conflict between the California Supreme Court and the Ninth Circuit. When that occurs, the primary actors—police officers, regulated businesses, what have you—are subject to conflicting rules, and the outcome of a case will depend on the happenstance of which court system hears it.

What's trickier are conflicts among a few state high courts. It comes down to numbers. There are only 12 regional federal courts of appeal versus 50 state high courts. A conflict among two or three of 12 is a bigger deal than a conflict among two or three of 50. So a conflict between the high courts of two small states might not be strong enough to be a lead argument in a cert petition. It's a judgment call you have to make on a case-by-case basis.

B. Arguing the Conflict

So you've studied the lower court decisions and believe there's a genuine, direct conflict on the question presented that can be your petition's lead argument. How do you present that argument most effectively?

Terminology

There's a common language used by regular Supreme Court practitioners to describe direct conflicts. Here's a glimpse of it:

“There is a **well-recognized and entrenched conflict** of authority on whether . . .”

“This case squarely presents a question under the Fourth Amendment that has **sharply divided** the federal courts of appeals and likewise the state courts of last resort: . . .”

“This case presents an important question, over which federal courts of appeals and state high courts are openly and **intractably divided**, concerning”

“As the Virginia Court of Appeals recognized—and multiple other courts have acknowledged—there is a **deep and mature conflict** over whether”

“The Ninth Circuit’s decision **deepens a preexisting conflict** among the federal courts of appeals concerning”

“The circuits **have split** on the question whether”

Describing the Conflict

Some points on arguing the conflict are:

Where the conflict consists of many lower court rulings, clearly state the breakdown up front. For example, say that “The Fourth Circuit’s decision creates a 4-3 circuit split on whether federal law X preempts state tort suits.”

The question then arises as to how much detail you should provide about the cases that comprise the conflict. Do you just *cite* the cases? Do you give a detailed description of all of them? Or something in between?

Most of the time, you should provide a summary of (and not merely a cite to) all of the cases that comprise the conflict. That allows you to give the Supreme Court confidence that the conflict is genuine. You certainly want to do that when only a few courts are part of the conflict. So if you’re contending that the lower court decision, out of the Fourth Circuit, conflicts with a Ninth Circuit decision—so it’s a 1-1 conflict—you’re going to want to describe that Ninth Circuit decision at length.

But even when you’re arguing that there’s, say, a 4-3 conflict, you’ll usually want to summarize all seven of the decisions. Some examples of petitions doing that are *Jesinoski v. Countrywide Home Loans, Inc.*, No. 13-684 (5-3 split); *Salt River Project Agric. Improvement and Power Dist. v. Tesla Energy Operations, Inc.*, No. 17-368 (3-2); *Esquivel-Quintana v. Sessions*, No. 16-54 (4-3); and *Henson v. Santander Consumer USA, Inc.*, No. 16-349 (5-3).

On the other hand, if you're contending that four federal circuits and 10 state high courts are on one side of the conflict, and two federal circuits and eight state high courts are on other side, there's no way you're going to want to summarize all 24 of those decisions. So you select a few on each side of the conflict to summarize, and just cite the rest, perhaps with helpful parentheticals. Petitions that did this include *Pena-Rodriguez v. Colorado*, No. 15-606; *Weaver v. Massachusetts*, No. 16-240; *Utah v. Strieff*, No. 14-1373; and *Betterman v. Montana*, No. 14-1457.

Importantly, these summaries allow you to preview your merits arguments. In describing the decisions that conflict with the decision below, you're describing opinions that decided the issue *your* way. And it's perfectly appropriate to provide some of those courts' reasoning. So by the time the reader gets to the merits section of the petition, it should already have a strong sense of what your side's arguments are.

A few other points:

- You can sometimes set up the conflict by explaining that two Supreme Court decisions are in tension and point in different directions. That bolsters your contention that only the Supreme Court can step in and remedy the situation. Two good examples of this are the petitions in *Bravo-Fernandez v. United States*, No. 15-537 (at 1-2), and *Spokeo, Inc. v. Robins*, No. 13-1339 (at 8).
- If the court below acknowledged the conflict, make sure to mention that. Do the same if other courts (or even law review articles) have noted the conflict.
- Conflicts between a district court and a court of appeals, or among intermediate state appellate courts, are generally not very useful. You can mention them—but only as a subsidiary point *after* you've discussed the more important conflict among federal courts of appeals and/or state high courts.
- You never want to argue that there's a conflict *within* your circuit. For example, if the lower court decision in your case is from an Eighth Circuit panel, you *don't* want to argue that it conflicts with a decision by a different Eighth Circuit panel. The solution to that is *en banc* review, not Supreme Court review.

- It is very helpful if you can explain that the conflict isn't going to go away on its own. That might be because some of the decisions comprising the conflict were by en banc federal circuits or state high courts. Relatedly, you may want to explain that further percolation in the lower courts is unnecessary—because, for example, the conflict is already clear cut or the courts that already comprise the conflict cover a large portion of the affected actors.
- It is also helpful to explain why the existence of the circuit split matters in the real world. You can always write that the outcome of a case, or the meaning of a statute, shouldn't depend on whether the case is brought in Connecticut or in Oregon. But it's helpful if you can add something even more concrete. You can assert that the conflict will encourage forum shopping; that national businesses will be subject to conflicting requirements; or that uniformity was a specific congressional objective in enacting the statute at issue. A petition making that last argument is *Advocate Health Care Network v. Stapleton*, No. 16-74 (at 25-26).
- If the case your decision conflicts with is old (say, a 1974 decision), the other side will surely argue that the conflict is “stale.” You can diminish that problem by finding recent unpublished circuit decisions or recent district court decisions within that circuit to show that it's still good law within the circuit.
- A tricky situation is where lower courts have adopted differing multi-factor tests, and you want to ask the Supreme Court to grant cert to decide whose test is correct. That's a special challenge because the respondent can often come back and say that the tests overlap or just use different phrasing or, most critically, that your side would lose even under the tests used by other courts.

So it's important—when you want the Supreme Court to weigh in on which is the right *test*—that you show two related things: One, that the difference in tests was outcome-determinative here; and second, that they will *often* be outcome determinative because they consider different factors or place very different weight on important factors. Some good examples of cert petitions arguing a conflict on the tests lower courts were using are *Pennsylvania Higher Educ. Assistance Agency v. Pele*, No. 15-1044; *Endrew F. v. Douglas County School Dist. RE-1*, No. 15-827; and *Hertz Corp. v. Friend*, No. 08-1107.

C. Arguing that the Issue is Important

If you look at Supreme Court Rule 10, which sets out the “Considerations Governing Review on Certiorari,” you’ll see that it uses the word “important” five times; and when it doesn’t use that word, it uses the word “compelling.” In short, the Court wants to hear cases that are *important*.

Critically, however, importance is a relative concept—what is important to your agency may not be important to the rest of the legal community or, most importantly, to four Justices. What you need to show is that a nationwide answer to your legal question is needed, now.

Attributes that can make an issue important enough to warrant Supreme Court review are that the issue is:

- **Recurring**—*e.g.*, the issue regularly arises in trial court proceedings; police officers regularly engage in the practice; it’s a routine business practice, such as arbitration agreements in employment contracts. One way to show this is to cite the many decisions that have addressed the issue. See, *e.g.*, *Lamar, Archer & Cofrin, LLP v. Appling*, No. 16-1215 (at 17).
- **Causing serious *practical* problems**—*e.g.*, police officers will not be able to operate effectively under a particular construction of the Fourth Amendment; the ruling will have a devastating economic impact on an industry; it will impair government officials’ ability to do their jobs; it will impede technological innovation; and so on.
- **Of fundamental *societal* significance**—*e.g.*, whether a city can ban handguns or a state can prohibit assisted suicide; the case concerns national security or the proper functioning of elections or states’ ability to address child abuse. The list goes on.
- **Of fundamental *legal* significance**—*e.g.*, it involves the balance of state-federal power; a federal statute has been held unconstitutional; non-tribal members are subjected to tribal court jurisdiction; the decision undermines the separation of powers; or it impacts state governance. An example is the cert petition in *Horne v. Flores*, No. 08-294, which said (at 36) that a particular circuit court decision “is an improper intrusion into the prerogatives of Arizona’s officials and a disregard of important principles of federalism.”

- **The lower court decision might impede the effectiveness (the proper operation) of a federal statute.** For example, in *Ross v. Blake*, No. 15-339 (at 17-20), Maryland argued that the Fourth Circuit decision undermines the PLRA’s exhaustion requirement.
- **National in scope**—*e.g.*, other states have statutes similar to the one struck down below; other states’ prisons have faced the same problem; and the like. Examples are *Smith v. Doe*, No. 01-729 (at 6-8); and *Ohio v. Clark*, No. 13-1352 (at 23-25).

Here is a good example of an importance section in a cert petition, from *Kansas v. Glover*, No. 18-556, which presented the question “whether, for purposes of an investigative stop under the Fourth Amendment, it is reasonable for an officer to suspect that the registered owner of a vehicle is the one driving the vehicle absent any information to the contrary.”

I. THE QUESTION PRESENTED IS IMPORTANT AND RECURRING[.]

A. This case presents an important and recurring Fourth Amendment issue with significant implications for law enforcement officers’ everyday activities, and in turn, public safety.

Law enforcement officers on routine patrol regularly run registration checks on vehicles they encounter. They do this for a number of reasons, including to determine whether the registered owner is lawfully authorized to drive or has outstanding warrants. Officers rely on this information to make stops to investigate illegal driving by the owner and warrants issued for the owner’s arrest based on the inference that the owner of the vehicle may be the driver. The number of courts that have considered whether a stop based on an officer’s inference that the registered owner of a vehicle may be its driver demonstrates beyond dispute that the question presented regularly confronts state and federal courts across the country.

The danger of preventing law enforcement officers from stopping a vehicle when the owner of the vehicle has outstanding warrants is obvious. A rule like the one the Kansas Supreme Court adopted would make it much easier for wanted criminals to avoid traffic stops that could lead to their arrest. The problem of unlicensed drivers flouting the suspension or revocation of their license also poses a serious threat to public safety. Drivers without licenses or whose licenses are suspended or revoked “are much more hazardous on the road than are validly licensed drivers.” Sukhvir S.

Brar, California Department of Motor Vehicles, *Estimation of Fatal Crash Rates for Suspended/Revoked and Unlicensed Drivers in California*, p. v (2012); see also Simon Shaykhet, *Suspended drivers wreak havoc on roads, causing deadly accidents in metro Detroit*; AAA Foundation for Traffic Safety, *Unlicensed to Kill*, p. 3 (2011) (“[D]rivers whose licenses have been suspended or revoked are significantly more likely to be involved in fatal crashes than are validly-licensed drivers.”).

“One out of every five fatal crashes in the United States involves an unlicensed or invalidly licensed driver.” Brar, *supra*, at 1. Drivers without valid licenses are “much more likely to have caused fatal crashes in which they are involved” than validly licensed drivers. *Id.* The “crashes caused by unlicensed drivers tend to be more severe and more likely to involve a fatality than those caused by licensed drivers.” *Id.* And many drivers whose licenses have been suspended or revoked are repeat offenders, like Glover, whose presence on the road is not just unlawful but dangerous. See, e.g., National Highway Traffic Safety Administration, *Driver License Compliance Status in Fatal Crashes*, p. 5 (Oct. 2014) (reporting that 20% of invalid license holders involved in fatal crashes had three or more license suspensions).

[Citations to web sites omitted.]

* * * * *

Some additional tips on arguing importance are:

- Sometimes the Court had previously granted certiorari on the issue but didn’t reach it for some reason or other. Always point that out—it shows that the Court had already concluded the issue was sufficiently important to merit its review. Some examples of petitions making this point are *Dollar General Corp. v. Mississippi Band of Choctaw Indians*, No. 13-1496 (at 11-13); *Cal. Public Employees’ Retirement Sys. v. ANZ Securities*, No. 16-373 (at 2-3); *Texas Dep’t of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, No. 13-1371 (at 1-2); and *Jesner v. Arab Bank, PLC*, No. 16-499 (at 2). Here’s how the introduction in *Inclusive Communities Project, Inc.* argued the point:

The Fair Housing Act forbids landlords, homeowners, state housing authorities, and others to discriminate against any person “because of” race. 42 U.S.C. §§ 3604(a), 3605(a). Many courts interpret this statute to forbid practices that have a disparate impact, even when there is no evidence that a challenged decision was made because of a person’s race. This Court has twice granted certiorari to resolve whether the Fair Housing Act provides for disparate-impact liability, but each case was dismissed before the Court could resolve the question. *See Twp. of Mount Holly v. Mt. Holly Gardens Citizens in Action, Inc.*, 134 S. Ct. 636 (2013) (mem.); *Magner v. Gallagher*, 132 S. Ct. 1306 (2012) (mem.). This case presents an opportunity for this Court finally to resolve whether disparate-impact claims are cognizable under the Fair Housing Act.

- Other times, a prior decision of the Supreme Court expressly left open (or reserved) the issue. This shows that the Court recognized it as a genuine open issue. You should note this to buttress a claim of importance or to set up a conflicts argument. Some petitions making this point are *City of Hays v. Vogt*, No. 16-1495 (at 5-6); *Bank Markazi v. Peterson*, No. 14-770 (at 19); and *Pena-Rodriguez v. Colorado*, No. 15-606 (at 9). Here’s how the petition in *City of Hays* argued the point:

A. This case deepens an acknowledged and entrenched conflict

The Self-Incrimination Clause provides that “[n]o person * * * shall be compelled in any criminal case to be a witness against himself.” U.S. Const. amend. V. In *Chavez v. Martinez*, 538 U.S. 760 (2003), the plaintiff alleged that his Fifth Amendment rights were violated when a police officer interrogated him, even though no criminal prosecution was ever initiated. *Chavez*, 538 U.S. at 764–765 (opinion of Thomas, J.). The Ninth Circuit found that the officer’s “coercive questioning” of the plaintiff, in and of itself, “violated his Fifth Amendment rights.” *Id.* at 765 (opinion of Thomas, J.). This Court reversed. Although there was no opinion for the Court, a majority of Justices concluded that there had been no violation of the Self-Incrimination Clause under the circumstances of that case. *Id.* at 763 (opinion of Thomas, J.); *id.* at 777 (Souter, J., concurring in the judgment). As a result, the Court found it unnecessary to determine “the precise moment when a ‘criminal case’ commences” for purposes of the Fifth Amendment Self-Incrimination Clause. *Id.* at 767 (opinion of Thomas, J.).

Since *Chavez*, a widely acknowledged split has developed in the lower courts about whether various pretrial uses of allegedly compelled statements implicate the Self-Incrimination Clause.

D. Arguing the Merits (that the Court Below was Wrong)

So you've shown that there's a circuit conflict on your question presented and that the issue is important. The next argument you'll probably want to make is that the decision below is wrong. Although the mere fact that the court below erred is not, standing alone, usually enough to get a cert grant, it is a very helpful supplement to the other arguments you're making. The Court reverses about 70 percent of the time, which shows that it prefers to review decisions it believes are erroneous.

For that reason, even where your lead argument is that there's a circuit split, a strong showing that the lower court got it wrong helps convince the Court to act now, and not allow further percolation. Most cert petitions therefore include a section arguing that the lower court erred. Some tips for that section are:

- It's not a full-length merits argument, especially when the petition's lead argument is that there's a lower court conflict. You're encapsulating what might be a 20 or 30 page argument in a merits brief into a tight four to eight pages.
- Remember that the petition is initially read by the Justices' clerks, who are in their mid-20s and may not have any particular experience with your legal issue. That puts a premium on clarity. You shouldn't dumb it down, but you should make your logic and the flow of your argument easy to follow.

You may be wondering, "What if my best argument is that the lower court decision conflicts with Supreme Court precedent?" That *sounds* like a great argument. What can be worse for a lower court than to flout a Supreme Court ruling? The hitch is that it's rare for a lower court to blatantly disregard a Supreme Court precedent, to rule in a way diametrically contrary to what the Supreme Court has said.

Most of the time, when you argue that the lower court decision conflicts with Supreme Court precedent what you're really saying is you think the court misapplied the Court's precedent. In other words, you're just arguing that the lower court erred. And because, as noted, the Supreme Court isn't an error-correction court, you're better off leading with a circuit conflict (if you've got one) than a claim that there's a conflict with Supreme Court precedent.

That’s why this argument is often part of a more general section arguing that the lower court erred, with a heading that roughly reads, “The State Supreme Court Decision Is Wrong” or “The State Supreme Court Decision is Wrong and Conflicts with this Court’s Decisions.” Examples of petitions that included sections with those types of headings are *Heien v. North Carolina*, No. 13-604; *Coventry Health Care of Missouri, Inc. v. Nevils*, No. 16-149; and *Mims v. Arrow Financial Services, LLC*, No. 10-1195.

But if you really think you can credibly argue that the lower court decision directly conflicts with a Supreme Court precedent or line of decisions, you can have a separate section with the heading “The State Supreme Court Decision Conflicts With This Court’s Decision In *X v. Y* [or Decisions on Topic Z].” A few recent petitions doing this were *North Carolina State Bd. of Dental Examiners v. FTC*, No. 13-534; *Bravo-Fernandez v. United States*, No. 15-537; and *Lewis v. Clarke*, No. 15-1500.

E. Arguing that the Case is a Good Vehicle

Your job isn’t simply to convince the Court that it should address the issue you’re presenting. You also have to convince the Court that your case is the right case in which to do so—in Supreme Court parlance, that your case is a good “vehicle.” That means there are no factual or procedural impediments to the Court reaching the legal issue you’re presenting. And it means that your case is representative; that it doesn’t raise the issue in an unusual context that could distort the analysis.

It is common for cert petitions to expressly assert that they are good (or “excellent” or “perfect”) vehicles for deciding the question presented. Indeed, more and more cert petitions include a separate section to that effect. For example, a recent petition by Jeff Fisher of Stanford Law School had a section titled, “Petitioner’s case presents an ideal vehicle for resolving the conflict.” Examples of recent cert petitions with separate “vehicle” sections are *Lozman v. City of Riviera Beach*, No. 17-21; *City of Hays v. Vogt*, No. 16-1495; *Expressions Hair Design v. Schneiderman*, 15-1391; and *Cal. Public Employees’ Retirement Syst. v. ANZ Securities, Inc.*, No. 16-373.

Whether you make it a separate section or not, it is advisable to say why the case is a good vehicle. That means saying, when you can, that:

- The facts are undisputed, or the district court made detailed findings of fact, and plainly present the legal issue raised.
- Petitioner presented, and the lower court expressly decided, the question presented.
- Resolution of the question presented was outcome-dispositive.
- There is a complete record.
- The decision below was published.
- The case is not interlocutory.
- The facts are emblematic of how this legal issue generally arises.

Relatedly, in some cases, you have to explain why the Court should grant certiorari here even though it has denied one or more prior cert petitions that presented the same question. You can do that by showing how, in contrast to your case, the prior petitions raising the issue were *not* good vehicles. A few successful petitions which did that recently are *Byrd v. United States*, No. 16-1371 (at 25-26); *Weaver v. Massachusetts*, No. 16-240 (at 23 n.6); and *Hughes v. United States*, No. 17-155 (at 27-31).

Here's how *Weaver* dealt with that concern when asking the Court to resolve “whether a defendant asserting ineffective assistance that results in a structural error must, in addition to demonstrating deficient performance, show that he was prejudiced by counsel’s ineffectiveness”:

We are mindful that the Court has denied review of the question presented in several recent cases. But this case—which involves clearly deficient performance resulting in a clear structural error—includes none of the substantial obstacles to review that were present in those other cases. See, e.g., *Commw. v. Jackson*, 28 N.E.3d 437 (Mass. 2015), cert. denied, 136 S. Ct. 1158 (2016) (no Sixth Amendment violation or ineffective assistance); *Commw. v. Penn*, 36 N.E.3d 552 (Mass. 2015), cert. denied, 136 S. Ct. 1656 (2016) (no determination of waiver or ineffective assistance); *Wilder v. United States*, 806 F.3d 653, 660 (1st Cir. 2015), cert. denied, 136 S. Ct. 2031 (2016) (assistance not deficient); *LaChance, supra*, cert. denied 136 S. Ct. 317 (2015) (no determination of waiver or ineffective assistance); *Commw. v. Alebord*, 4 N.E.3d 248 (Mass. 2014), cert. denied, 134 S. Ct. 2830 (2014) (assistance not deficient); *Commw. v. Morganti*, 4 N.E.3d 241 (Mass. 2014), cert. denied, 135 S. Ct. 356 (2014) (no Sixth Amendment violation or ineffective assistance).

* * * * *

So far, my discussion has assumed a cert petition that leads with a circuit conflict and then makes the other arguments to supplement the conflict. Those petitions will usually be structured in one of the following ways:

Example #1: *City of Hays v. Vogt*, No. 16-1495

- A. This case deepens an acknowledged and entrenched conflict
- B. The decision below is wrong
- C. This issue is important and recurring
- D. This case presents a clean vehicle

Example #2: *Ernst & Young LLP v. Morris*, No. 16-300

- A. The decision below deepens a conflict among the courts of appeals
- B. The decision below was incorrect
- C. The question presented is exceptionally important and warrants review in this case

Example #3: *Class v. United States*, No. 16-424

- I. The circuit courts are deeply divided on the question presented
- II. This case is worthy of this Court's review
 - A. This issue is recurring and important
 - B. This case is an excellent vehicle
- III. The D.C. Circuit's decision is wrong

[some subheadings omitted; capitalization changed]

F. Arguing When You Can't Rely on a Lower Court Conflict

Not every case, however, allows you to lead with a conflict. Sometimes, despite your thorough research, you can't find any federal court of appeals or state high court decision that directly conflicts with the decision in your case. Yet given the importance of the issue, you still believe it is worth seeking Supreme Court review.

Now you're facing a real challenge. As stated earlier, only about 30 percent of cert grants come in cases without a circuit conflict. And a chunk of those are cases arising out of the Federal Circuit; cases brought by death-row inmates; and petitions filed by the U.S. Solicitor General. Once you knock out those cases, we're left with about a dozen additional petitions a year that are granted without a direct conflict.

Which cases are those? As one astute observer of the Court has said, "[i]t is difficult to generalize about such cases, except to say that there is something about the alleged error that makes it stand out in the Court's eyes. . . . [P]erhaps the most important factor that may serve to elevate a claim of error into an issue that the Court will find merits its review is the impact of the decision below." Scott L. Nelson, *Getting Your Foot in the Door: The Petition for Certiorari*, at 4 (2010).

In short, these petitions will necessarily lean heavily on importance, on any conflict with Supreme Court decisions, and (relatedly) on the lower court's error. It is one of the great challenges of Supreme Court advocacy to find the right angle for your petition in a conflict-free case, to find the optimal way of making the lower court decision seem in need of Supreme Court review.

There's no cookie-cutter way of writing these petitions. I hope, though, that by seeing how some of them are outlined, you can gain a feel for ways in which you can write an effective petition arguing, in essence, that the court below was *importantly wrong*. So here are the Table of Contents of some successful State cert petitions of this sort.

The first three began with a claimed conflict with Supreme Court precedents or doctrine and then turn to importance.

Example #1: *Gobeille v. Liberty Mutual Ins. Co.*, No. 14-181

- I. The decision below is an unprecedented expansion of ERISA preemption that conflicts with this Court's decisions in *Travelers*, *Dillingham*, and *De Buono*
- II. The Second Circuit's unduly broad preemption holding treads on state and federal interests and is an important issue worthy of this Court's immediate review

[subheadings omitted]

Example #2: *Comptroller of Treasury of Md. v. Wynne*, No. 13-485

- I. The Decision Below Is Directly Contrary to Numerous Decisions of this Court
- II. The Decision Below Conflicts with the Decisions of Other State High Courts Affirming the Authority of a State to Tax its Residents on Income Earned in and Taxed by Other States
- III. The Question Presented Is of Exceptional Importance

Example #3: *Murphy v. NCAA*, No. 16-476

- I. The Third Circuit's Decision Flouts This Court's Anti-Commandeering Precedents, Diminishes Accountability Of State Officials, And Infringes States' Sovereign Rights
 - A. The Third Circuit's Opinion Departs From This Court's Anti-Commandeering Precedents
 - B. The Third Circuit's Opinion Diminishes The Accountability of State Officials
 - C. The Third Circuit's Construction Of PASPA Infringes State Sovereignty By Perpetuating Uncertainty As To How States May Exercise Their Sovereign Rights

[capitalization changed]

The next three examples argued importance first and only then argued there was a conflict with Supreme Court decisions or error.

Example #1: *Michigan v. EPA*, No. 14-46

- I. This case presents a question of great importance to the States and to consumers of electricity.
- II. EPA’s interpretation of “appropriate” conflicts with the Clean Air Act

[subheadings omitted]

Example #2: *Sturgeon v. Frost*, No. 14-1209

- I. The Petition Raises A Question of Exceptional Importance To The State of Alaska, Native Corporations, and Private Citizens
- II. The Ninth Circuit’s Interpretation of Section 103(c) of ANILCA Is Unsustainable Under This Court’s Decisions

Example #3: *South Dakota v. Wayfair, Inc.*, No. 17-494

- I. This Issue Is Exceptionally Important
- II. *Quill* Should Be Overruled
- III. The Question Presented Requires Immediate Review

[subheadings omitted]

The key is that in this type of cert petition—where you don’t have a lower-court conflict, or it’s a very weak one, and so your pitch is that the lower court decision was “importantly wrong”—you shouldn’t frame the argument for certiorari as “the court of appeals erred” or “the state supreme court misapplied supreme court precedent.” Cast the issue in more precise and starker terms.

One other tip: Sometimes it's helpful to explain that there's no conflict because a conflict is unlikely to have a *chance* to arise given the nature of the case and the issue. There are a few reasons that could be so.

First, certain issues are directed to specific appellate courts. For example, only the Federal Circuit addresses certain patent issues.

Second, some issues arise only in certain places, limiting which federal courts of appeals might ever address it. A good example is *Sturgeon v. Frost*, No. 14-1209, which explained (at 19) that the Alaska-specific issue it presented is unlikely to arise outside the Ninth Circuit.

Third, for procedural reasons, certain issues rarely make it to appellate courts. Two recent petitions making that argument are *Cyan, Inc. v. Beaver Cty. Empl. Retirement Fund*, No. 15-1439 (at 13-16); and *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Manning*, No. 14-1132 (at 27).

G. Petitions Seeking Summary Reversal

We'll now discuss one final type of cert petition that has become especially important to state attorneys: cert petitions that ask the Court to summarily reverse a federal court of appeals decision.

About five to 10 times a Term, the Supreme Court will reverse a lower court decision on the cert papers alone, *i.e.*, without even asking for full merits briefing. That's known as a summary reversal. This small part of the Court's docket serves an error-correction function, but the Court doesn't just randomly choose cases where it thinks the lower court really blew it. The Court has focused on certain issues on which it's been concerned the lower courts haven't been following its guidance.

Two of those areas are of particular concern to state lawyers: habeas corpus law (AEDPA, specifically) and qualified immunity. By my count, about half of the Roberts Court's summary reversals have reversed federal court of appeals decisions that granted habeas relief in defiance of AEDPA and that wrongly denied qualified immunity to state and local officers.

We're not talking about a large number of cases here—roughly three AEDPA summary reversals a Term and one qualified immunity summary reversal a Term, since the 2010 Term. But those are nice wins when you get them.

Of course, you're obviously not going to file a cert petition every time you lose a habeas case or fail to obtain qualified immunity, in the hope that you'll hit the lottery and obtain a summary reversal. Even though this small part of the Supreme Court's docket is for error correction, you still need to be selective in choosing cases where the lower court error was (in your view) glaring.

Once you've decided to write a cert petition seeking review of a decision that's a good candidate for summary reversal, the question is how best to make your case.

Habeas cases. In habeas cases, the pitch is generally that the federal court of appeals has defied AEDPA and defied the Supreme Court's repeated admonition about how the courts of appeals should apply AEDPA.

If the courts of appeals are in conflict on the underlying criminal procedure issue, the petition should point that out as well—to explain why the law is not “clearly established” for AEDPA purposes and because the Court might want to resolve the underlying conflict.

Some good examples of cert petitions in habeas cases seeking summary reversal are *Nevada v. Jackson*, No. 12-694; *Woods v. Etherton*, No. 15-723; *Woods v. Donald*, No. 14-618; *Virginia v. LeBlanc*, No. 16-1177; *Hardy v. Cross*, No. 11-74; *Smith v. Vasquez*, No. 09-1328 (cert denied); and *Eppinger v. McCarley*, No. 15-1026 (cert denied).

To give you a flavor of them, here are the Table of Contents in two of those petitions:

Example #1: *Woods v. Donald*, No. 14-618

- I. No clearly established federal law requires a state court to apply *Cronic*, rather than *Strickland*, to a claim concerning defense counsel's brief absence from the courtroom in a multi-defendant trial.
 - A. The majority below erred in holding that the state court unreasonably applied clearly established federal law.

- B. The state court’s decision was not contrary to any clearly established federal law.
- II. The state court reasonably concluded that Donald had failed to show prejudice flowing from his counsel’s brief absence.

Example #2: *Nevada v. Jackson*, No. 12-694

- I. The Ninth Circuit Exceeded the Congressionally Imposed Limits in 28 U.S.C. §2254(d) When it Granted Habeas Relief Based on its View that the Nevada Supreme Court’s Adjudication Unreasonably Applied “Clearly Established Federal Law, as Determined by [this Court].”
 - A. This Court has not “clearly established” that a state rule excluding extrinsic evidence on collateral matters violates the right to present a defense.
 - B. Even assuming that the federal law at issue was clearly established, the Nevada Supreme Court did not unreasonably apply it.
- II. By Relying on Facts Contrary to Those Found by the Nevada State Courts, the Ninth Circuit Violated the Congressionally Imposed Limits Found in 28 U.S.C. §2254(e)(1).

Qualified immunity cases. Cert petitions in qualified immunity cases are a bit different in that the court below ruled against you on two issues—it held that your client violated the constitution *and* it held that your client isn’t entitled to qualified immunity. Most cert petitions seeking review of those decisions seek review of both issues, but often do so in the hope that they’ll obtain a summary reversal on the qualified immunity ruling.

Here are the Table of Contents of three successful cert petitions in qualified immunity cases. Two obtained summary reversals; one obtained full plenary review. As you will see, the sections addressing the underlying constitutional issue can make some or all of the usual cert petition arguments, such as there being a circuit conflict. The section on qualified immunity is usually just an argument that the court of appeals failed to follow the Supreme Court’s teachings on when to grant qualified immunity.

Example #1: *District of Columbia v. Wesby*, No. 15-1485

- I. The District Of Columbia Circuit’s Heightened Probable Cause Standard Conflicts With The Standard Employed By Other Courts, And This Court’s Fourth Amendment Jurisprudence Generally, On An Important And Recurring Issue
 - A. The court of appeals’ heightened probable cause standard deviates markedly from that employed by its sister circuits and state courts
 - B. The court of appeals’ heightened probable cause standard is contrary to this Court’s established Fourth Amendment jurisprudence
 - C. Whether the probable cause standard allows officers to make reasonable credibility judgments is an important question that officers routinely face
- II. Even Assuming That Probable Cause Was Lacking, The Court Of Appeals’ Decision Contravenes This Court’s Precedent On Qualified Immunity Requiring That The Law Be Clearly Established In A Particularized Sense

[some subheadings omitted]

Example #2: *Mullenix v. Luna*, No. 14-1143

- I. The Fifth Circuit Contravened This Court’s Recent Precedents In Erroneously Denying Qualified Immunity.
- II. The Fifth Circuit’s Decision Creates Two Separate Circuit Splits.
- III. This Is An Ideal Vehicle to Address the Questions Presented and Provide Guidance on the Application of *Plumhoff*

[subheadings omitted]

Example #3: *Carroll v. Carman*, No. 14-212

- I. The Court Should Review The Court Of Appeals’ Categorical [Fourth Amendment] “Front Door” Rule
- II. The Court Should Review The Court Of Appeals’ Misapplication Of The “Clearly Established” Doctrine

[subheadings omitted]

V. THE SECTIONS OF THE CERT PETITION

You now know what arguments you want to make; it's time to begin drafting the petition. Let's turn to its various sections.

A. The Question Presented

The question presented is *very* important in cert petitions. It is usually the first thing the Justice or clerk reads; it therefore creates that all-important first impression. And it sets the bounds of what the Court is reviewing. If the question is too narrow, it might prevent the Court from reaching an issue you want the Court to reach. At many an oral argument the Justices pressed counsel for petitioner on whether an argument she was making was fairly included within the question presented.

More fundamentally, the question frames all that follows. The entire function of the cert petition is to convince the Court that it needs to answer that particular question or questions. If you ask the wrong question, you jeopardize the entire enterprise.

What's the wrong question? Entire articles and chapters have been written on how to write effective questions presented. For now, some of the most important considerations are as follows:

How many should there be? You almost always want to present only one or two questions; never more than three. This is confirmed by my review of all the cert petitions filed in the cases argued the 2017 Supreme Court Term. Of the 61 petitions, 46 had one question; nine had two questions; and six had three questions. None had more. There are very few cases that present more than a couple of truly cert-worthy issues.

Should your question have a prefatory paragraph or two? Many cert petitions set the stage for their question presented by including a prefatory paragraph or two that provides the context for it. Of the 2017 Term's argued cases, two-thirds contained a prefatory statement. These statements serve two functions. First, they enable you to ask a concise, comprehensible question, without having to muck it up with descriptions of the statute or the facts. Second, they can begin making your case for a cert grant. Although a prefatory statement is *not* a Summary of Argument, it can set up your arguments for a cert grant.

An example of a good question presented written that way is from *Henson v. Santander Consumer USA, Inc.*, No. 16-349:

The Fair Debt Collection Practices Act, 15 U.S.C. § 1692 *et seq.*, regulates the conduct of “debt collector[s].” Respondent Santander Consumer USA, Inc., is in the business of purchasing defaulted debt for pennies on the dollar then attempting to collect on that debt from the defaulting consumer. The Question Presented, upon which the circuits are deeply divided, is:

Whether a company that regularly attempts to collect debts it purchased after the debts had fallen into default is a “debt collector” subject to the Fair Debt Collection Practices Act?

Try very hard to keep the Question Presented, including its prefatory paragraphs, to one page. Although some excellent Supreme Court practitioners allow their questions to extend to a second page, you should steer clear of that practice if you can help it.

Having said all that, not every case requires a prefatory statement. For example, straightforward criminal procedure issues don’t need much of a set-up. If you don’t need one, don’t include one. In the Supreme Court, as in all courts, less is usually more.

Here are four excellent Questions Presented that don’t include a prefatory paragraph.

Example #1: *Utah v. Strieff*, No. 14-1373

Should evidence seized incident to a lawful arrest on an outstanding warrant be suppressed because the warrant was discovered during an investigatory stop later found to be unlawful?

Example #2: *Comptroller of Treasury of Md. v. Wynne*, No. 13-485

Does the United States Constitution prohibit a state from taxing all the income of its residents—wherever earned—by mandating a credit for taxes paid on income earned in other states?

Example #3: *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, No. 14-144

Do the messages and symbols on state-issued specialty license plates qualify as government speech immune from any requirement of viewpoint neutrality?

Example #4: *Carpenter v. Murphy*, No. 17-1107

Whether the 1866 territorial boundaries of the Creek Nation within the former Indian Territory of eastern Oklahoma constitute an “Indian reservation” today under 18 U.S.C. § 1151(a).

Two final thoughts on the Question Presented:

- Many cert petitions include a reference to a circuit split in the question. For example, it might read. “Is the rule X, as the First and Second Circuits have held, or is the rule Y, as the Ninth and Tenth Circuits have held?” Some practitioners prefer including circuit-split language of that sort; others do not. Both ways are acceptable.
- Finally, try not to begin the question with phrases such as, “Should this Court grant certiorari to . . .” or “Should this Court resolve a conflict between . . .” It’s just not considered proper form.

B. Introduction

Most leading Supreme Court practitioners begin their cert petitions with an introduction. The typical approach is to have a formal stand-alone section, called Introduction. Some good examples are the Introductions in the following cert petitions: *Michigan v. EPA*, No. 14-46; *Schuette v. Coalition to Defend Affirmative Action*, No. 12-682; *New York v. EPA*, No. 17-418; *Cook v. Barton*, No. 15-580; and *Hickenlooper v. Kerr*, No. 14-460.

Another approach is to open the Statement of the Case with a few paragraphs that serve as a de facto introduction. Some examples are *Lucia v. SEC*, No. 17-130; *Lamar, Archer & Cofrin, LLP v. Appling*, No. 16-1215; *Ernst & Young LLP v. Morris*, No. 16-300; and *District of Columbia v. Wesby*, No. 15-1485.

An Introduction is a chance to set out your core themes in a direct, punchy way that will, you hope, make the reader inclined to your view of the case as it reads the remainder of the petition. Some Introductions are about a page; others go five pages. One to two pages is the sweet spot, but it obviously depends on the case.

Introductions are subtly different from a Summary of Argument. Although you may point to all the core reasons why cert should be granted—a conflict, importance, error—you’re not dryly walking through all the specific arguments you’ll be making, one by one. An Introduction should be an easier read than a Summary of Argument, framing your case in an easily-relatable way.

C. The Prefatory Sections

By Court rule, each cert petition must include The Parties to the Proceeding; a Table of Contents; a Table of Authorities; the Opinions Below; Jurisdiction; and Constitutional and Statutory Provisions Involved. With one important exception, these sections are not as important as the others discussed here. They won’t convince a Justice to vote your way.

My “U.S. Supreme Court Brief Writing Style Guide” (republished in 19 J. App. Prac. & Process 129 (Spring 2018)) goes through these sections, what form they should take, and provides some examples. No need to repeat that here. The three general take-aways on these sections are:

- Don’t make them a distraction. They should be short and sweet, following tried and true ways of doing them. Look at the examples in my Style Guide or how they’re done in petitions by the U.S. Solicitor General’s Office or experienced Supreme Court practitioners.
- The prefatory section that *matters* is the Table of Contents. It serves as a de facto summary of argument, telling the reader up front why you think cert should be granted. Are you claiming a circuit conflict? Do you have a different pitch?

Any discussion of what a Table of Contents should look like is really a discussion of how to craft the headings of the sections in the Reasons for Granting the Petition section, of which you’ve seen many examples.

- A quick word on the Jurisdiction section. The section generally begins with the key dates relevant to jurisdiction, followed by the statutory basis for jurisdiction. So it looks something like this:

The District of Columbia Court of Appeals issued its opinion on April 7, 2016. Petitioner’s timely petition for panel and en banc rehearing was denied on July 20, 2016. The jurisdiction of this Court is properly invoked pursuant to 28 U.S.C. § 1257.

Every so often, though, you may want to do something more with this section. In particular, when a petition seeks review of a state-court judgment, the question often arises whether that judgment is final—which is required for Supreme Court jurisdiction. Some practitioners prefer to tackle the issue head-on in the Jurisdiction section. If that’s your approach, make it short and sweet. An example you can look to for that is Ohio’s petition in *Ohio v. Clark*, No. 13-1352.

D. Statement of the Case

The Statement of the Case in a U.S. Supreme Court brief describes the facts and the case’s procedural history, culminating in a summary of the decision you’re asking the Supreme Court to review. It might also contain a subsection describing the statute whose meaning is at issue; and a few petitions even contain a subsection summarizing the legal doctrine at issue. Here are some pointers about the Statement.

- Critically, this all appears in one section, called the Statement of the Case. You should **not** follow the practice required by many lower courts and begin with a “Statement of the Case” that summarizes the case’s procedural history, followed by a “Statement of the Facts” that sets out the facts. That’s just not how it’s done in the Supreme Court, and you should be glad, because combining all the background into one section allows you to tell the story of the case the way you want to.
- So what should your one section, your Statement of the Case, accomplish? One important goal is to show the Court that your case is a good vehicle

through which to decide the questions presented. This means making the factual and procedural background appear as clear and straightforward as possible, and confirming that the questions presented were expressly decided. Don't distract the Court by describing more facts than necessary.

- Beyond that, you want to accomplish what all good Statements do, which is to make your position sympathetic, without being argumentative about it. By the time the Justice or clerk has completed the Statement, you want him or her thinking: “a murderer is going free because of an expansive new application of *Miranda*”; “a federal court is micro-managing a state prison system”; “a large swath of territory, long thought to be state land, has been found to be Indian country.”

Going a bit more into the weeds:

- As a general rule, you should tell the story of the case—the facts and then the case's trip through the courts—in chronological order.
- Don't block-quote long passages of the lower court's summary of the facts to serve as *your* summary of the facts. And don't block-quote the appellate court's summary of the trial court decision to serve as *your* summary of it.
- When setting out the facts, include supporting citations. Ideally, you can cite a lower court's opinion in the case, which is in your petition's Appendix. If you need to cite the record, make the citation as concise as possible. But a several page description of the facts with no supporting citations is not acceptable.
- 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 Granting the Petition section to lay out the court's reasoning.

Summarize enough of the opinion so that the Court can understand its rationale without having to turn immediately to it. If you can, you want to subtly hint at flaws in the lower court's reasoning by quoting passages that underscore its weak points. And be sure to summarize any dissenting opinions that bear on the questions presented (since they presumably support your position).

- As noted earlier, most Statements have at least two subsections, one providing the factual background and one providing the procedural background. Many also have a subsection providing the statutory background. Here is an example of the headings in a typical Statement.

Example: *Advocate Health Care Network v. Stapleton*, No. 16-74

- A. Statutory Background
- B. Factual Background
- C. Proceedings Below

Some writers like to be more descriptive in their headings, which is fine as long as you don't go over the top. Here is an example of a more descriptive Statement heading.

Example: *Ohio v. Clark*, No. 13-1352

- A. Darius Clark Physically Assaulted His Girlfriend's Minor Children
- B. Jury Convicts Clark, But The Ohio Supreme Court Affirms The Reversal Of His Conviction On Confrontation Clause Grounds

E. Summary of Argument

Supreme Court custom is that cert petitions do *not* contain a Summary of Argument. What's common instead is to summarize your argument in one of three places: in an Introduction, at the beginning of the Statement of the Case, and/or in the first couple of paragraphs of the Reasons for Granting the Petition.

F. Reasons for Granting the Petition

This is where you make all the arguments for granting certiorari. If you're presenting two distinct questions, the usual approach is to have a heading numbered Roman I that says cert should be granted on the first Question; subheadings that go through the specific reasons why, such as conflicts; and then a heading numbered Roman II that does the same for the second Question.

Here is the Table of Contents of the successful cert petition in *McDonnell v. United States*, No. 15-474, which did that:

- I. The Meaning Of “Official Action” Merits This Court’s Review
 - A. The Opinion Below Conflicts With Multiple Decisions From This Court
 - B. The Opinion Below Conflicts With Three Other Circuits
 - C. The Opinion Below Criminalizes Ordinary Politics, Turning Nearly Every Elected Official Into A Felon
- II. The Pretrial Publicity Issue Also Merits This Court’s Review
 - A. The Panel Endorsed Inadequate Voir Dire Of Publicity-Exposed Jurors
 - B. The Decision Below Conflicts With Decisions Of This Court And Multiple Other Circuits
 - C. This Is An Increasingly Important Issue Worthy Of The Court’s Review

G. 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 granted.” If you want to add “For the foregoing reasons, . . .,” that’s fine. But that’s it.

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

H. Appendix

A cert petition must have an Appendix that, at the very least, includes the lower court opinions in the case and any order on a motion for rehearing. In addition, in statutory cases the petition should include the statutes and regulations at issue. It’s a judgment call how *much* of a statute to include—that is, the extent to which you should include provisions that surround the specific provision at issue. And it’s a judgment call whether to include other materials, such as the transcript of a suppression hearing.

Naturally, complications will arise. What if the case is on remand? Do you include the lower court opinions from before the remand? What if the trial court issued a 300-page opinion, only 5 pages of which addressed your issue? Do you

have to include all 300 pages? What if no trial court opinion actually addressed your issue?

This guide does not address all the possible issues that might arise. Just call me or the Clerk’s office and we can answer your questions. I do, though, want to mention one important, common issue. If your petition is in a federal habeas case, you should include the state court decision that the federal habeas courts are assessing under AEDPA. The state-court decision might not be technically required, but it’s usually essential to anyone trying to analyze the issue you’re presenting.

VI. REPLY BRIEFS

Except where the respondent filed an *utterly*—and I mean *utterly*—ineffectual brief in opposition (which usually happens only if it was filed by a *pro se* prisoner), you will want to file a reply brief. A good brief in opposition will try to explain why the conflict you alleged is not genuine; why your claims of importance are overstated; and why the lower court reached the correct conclusion. And it will often assert that the case has “vehicle” problems that would prevent the Court from reaching the questions you present.

The reply brief is your chance to reframe the case and show why the arguments made in your petition hold up. You generally want to begin by reminding the Court of your petition’s key arguments for a cert grant, highlighting the arguments the other side conceded or didn’t dispute. Then quickly summarize the other side’s arguments and either summarize why they’re wrong or say that, “as explained below,” they’re wrong. Some cert-replies whose openings do this well are: *Salinas v. Texas*, No. 12-246; *Husted v. A. Philip Randolph Institute*, No. 16-980; and *Maryland v. King*, No. 12-207.

A difficult tactical call is whether your first argument should respond to the brief in opposition’s vehicle arguments or whether you should instead save those for the end, after you’ve resuscitated your conflict and importance arguments. Most cert-replies save vehicle issues till the end, but there are definitely cases where vehicle issues are the key obstacle to a cert grant and you want to deal with them immediately. Two good examples of cert-replies that effectively began with vehicle issues are *South Dakota v. Wayfair, Inc.*, No. 17-494; and *Ross v. Blake*, No. 15-339.

A few more points:

- If your petition was supported by amicus briefs, be sure to mention that in your reply.
- Briefs in opposition will often point out that even if the Court were to grant cert and reverse, the respondent might still win based on alternative arguments it has made that aren't yet decided. That's a weak argument. The Court routinely grants cert even when the respondent might end up winning the case on a different ground that the lower court hasn't yet reached. Some cert-replies pointing that out are *Collins v. Virginia*, No. 16-1027 (at 11); *Byrd v. United States*, No. 16-1371 (at 6-7); *Bailey v. United States*, No. 11-770 (at 6-7); and *Town of Chester v. Laroe Estates, Inc.*, No. 16-605 (at 11). Here's how *Collins* put it:

B. Alternative bases for affirmance ignored by the Virginia Supreme Court do not cut against review.

This case warrants review because of what the Supreme Court of Virginia *did* say about the Fourth Amendment and the automobile exception, not because of what it *might have said* if it had properly addressed those concepts.

At most, the arguments about exigency could warrant a remand for “further proceedings not inconsistent with this opinion” after this Court determines the scope of the automobile exception. This is a common occurrence and not a meaningful vehicle problem. See, e.g., *Skinner v. Switzer*, 562 U.S. 521, 537 (2011) (remanding for lower court to decide appellee's alternative arguments that were not addressed below).

- Briefs in opposition also will often argue that the case is on interlocutory review. When review is sought from a federal court of appeals ruling, that's usually not a powerful argument. The Court commonly grants cases on interlocutory review. For that proposition, cite Stephen M. Shapiro et al., *Supreme Court Practice* § 4.18, at 285 (10th ed. 2013), as is done in the reply brief in *Husted v. A. Philip Randolph Institute*, No. 16-980 (at 12). You might also want to cite recent petitions that were granted in a similar interlocutory posture. Examples of reply briefs doing that are *Azar v. Garza*, No. 17-654 (at 5); *Bohannon v. United States*, No. 16-449 (at 2); *Embarq Corp. v. Fulghum*, No. 15-244 (at 10).

- If the brief in opposition emphasizes the merits more than the petition, your reply should point that out. The cert-reply in *Salt River Project Agric. Improvement and Power Dist. v. Tesla Energy Operations, Inc.*, No. 17-368, did this nicely when it wrote (at 9-10):

SolarCity asserts that review is unwarranted because the decision below is correct. That would not justify denying certiorari even if true, given the acknowledged circuit conflict and the undisputed importance of the question presented. But it is not true.

The brief then proceeded to reply briefly to the brief in opposition’s merits arguments.

VII. MISCELLANEOUS

A. Amicus Briefs

Cert petitions supported by amicus briefs are granted at a far higher rate than cert petitions lacking amicus support. More specifically, State cert petitions that don’t have amicus support are granted about 20 percent of the time; cert petitions supported by state amicus briefs are granted about 45 percent of the time. You should therefore consider actively seeking amicus support, from both fellow States and other interested entities.

B. Calls for the Views of the Solicitor General

About 20 times a Term, the Court doesn’t immediately grant or deny a petition, but instead “invites” the U.S. Solicitor General “to file a brief in this case expressing the views of the United States.” This is known as a “CVSG,” short for “calls for the views of the Solicitor General.” The Court typically calls for the Solicitor General’s views when “the question presented for review involves the interpretation and application of a federal statutory or regulatory scheme that a federal agency administers,” and the Court wants an “objective view” of “the impact of the court of appeals’ ruling” on that scheme. Patricia A. Millett, “We’re

Your Government and We're Here to Help": Obtaining Amicus Support from the Federal Government in Supreme Court Cases, 10 J. App. Prac. & Process 209, 213 (2009).

Between three and six months after the CVSG, the Solicitor General files an amicus brief recommending that cert either be granted or denied. The Court almost always grants petitions when the CVSG brief recommends a grant; and it usually denies petitions that the SG says should be denied. If you are interested in the CVSG process, see Judge Millett's article.

Many cert petitions expressly or implicitly encourage the Justices to seek the Solicitor General's views. They tend to do so in cases that do not present a genuine conflict among the circuits, but which present potentially important federal statutory issues. These petitions' best bet for a cert grant is a CVSG followed by a favorable recommendation from the Solicitor General. Examples of petitions expressly suggesting CVSGs (as a fallback to a grant) are *Bank Markazi v. Peterson*, No. 17-1534 (at 24); and *Tibbs v. Bunnell*, No. 14-1140 (at 4, 15, 34).

C. Seeking Review of State Intermediate Court Losses

Can you obtain certiorari if you lost in a state intermediate appellate court and your state high court denied discretionary review? If the case is final, you can *seek* Supreme Court review. The practical question is whether the Supreme Court ever hears cases in that posture. The answer is yes, it does, though not very often. Note that your state intermediate court decision is not even state-wide precedent. So the Court will hear a case out of a state intermediate court in three primary situations.

First is where the Supreme Court uses your case as an opportunity to resolve a conflict among the federal circuits and/or state high courts—what I had earlier said were the “right” courts for conflict purposes. An example of this is the Fourth Amendment case of *Fernandez v. California*, No. 12-7822.

Second is where the state intermediate court relied on established state high court precedent. So the Supreme Court would use your case as a vehicle through which to review a rule announced by the state high court. An example of this is the Fourth Amendment case of *Navarette v. California*, No. 12-9490.

Third is where the Supreme Court (or at least four Justices) are deeply troubled by the state intermediate court's holding and by the state high court's decision to let it stand unreviewed. One example is *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, No. 16-111, which the Court heard last Term. There, the Colorado Court of Appeals held that a baker must make a custom wedding cake for a same-sex couple despite the baker's religious objection. Other examples include *Dep't of Revenue of Ky. v. Davis*, No. 06-666; and *DIRECTV, Inc. v. Imburgia*, No. 14-462.

D. Style

The Court's rules mandate what font to use, how many words a petition may contain, and so on. But there are also some unwritten style rules, and if you know them you'll make your cert petition look like it's written by a Supreme Court pro. As mentioned previously, please consult my Style Guide for a detailed review of U.S. Supreme Court brief writing style.

A final suggestion: Although the rules allow petitions to contain up to 9,000 words, which amount to 35-40 pages, you'll only rarely want your petition to be that long. Try to stay under 30 pages if you can.

CONCLUSION

Writing cert petitions is a challenge, in no small part because they are so different from ordinary appellate briefs that focus on the merits. We are fortunate today, however, to have ready access to petitions written by experienced Supreme Court practitioners. Between those petitions, many of which this Guide has cited, and the Guide itself, you should be well situated to prepare a first-rate petition.



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