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The Art and Science of Seeking Certiorari

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Perhaps the most daunting aspect of deciding whether to seek review in the United States Supreme Court is confronting the sheer odds stacked against you. Those odds were always steep in modern times, and they have only worsened over the past several decades. While the number of petitions for a writ of certiorari filed in the Supreme Court increased from roughly 4,000 in the mid-1970s to nearly 9,000 in 2005—the first term of the Roberts Court—the number of annual grants has decreased by half during that same period, from about 150 to only 80, and has remained at roughly that number ever since. Timothy S. Bishop *et al.*, *Tips on Petitioning for Certiorari in the United States Supreme Court*, The Circuit Rider (May 2007).

Take, for example, the Court's most recent completed term: the Court's October Term 2017 (or "OT 2017"), which ran from 2017-2018. (Each term begins the first Monday of October.) October Term 2018 saw 6,313 petitions filed, but of those only 78 were granted argument—a jaw-droppingly small *0.12* percent grant rate. *Journal of the Supreme Court of the United States, October Term 2017*, at II.

Of course, a large number of those petitions were filed in forma pauperis, and thus likely did not benefit from the help of an expert Supreme Court practitioner—or, often, with help from any lawyer at all. The odds are thus far better for "paid petitions"—those in which the filing party paid the Court's docketing fee, and therefore likely had an expert's assistance. But better only in a relative sense, because the grant rate for paid petitions is still only 4 percent. *Id.* And a civil dispute between two private parties will have to fight for space on the docket among the criminal and habeas petitions that still make up the bulk of the Court's docket, Bator, *What is Wrong with the Supreme Court?*, 51 U. Pitt. L. Rev. 673, 681-684 (1990). Another large chunk is taken by petitions filed by the U.S. Government itself, through the Office of the Solicitor General; those petitions assume a disproportionate percentage of the merits docket because the Court grants nearly half of its petitions—44%—which further skews the statistics to look more optimistic for private litigants than they really are. Bishop *et al.*, *supra*. That means that the vast majority of private litigants who pay counsel to file a cert petition will never have their case heard by the Supreme Court.

The art and science of earning a spot on the Court's docket is thus practiced on a razor-thin margin. Lawyers vying for grants must do everything possible to maximize their chances of success. That task is made all the harder by the fact that the practice of seeking certiorari in the Supreme Court—with its focus on conflicts among lower courts and the importance of the case to non-parties—is decidedly foreign terrain even for most appellate lawyers, who spend their days trying to win the merits of disputes. And it is conducted without virtually any meaningful feedback from the Court itself, which is famously opaque about the considerations that guide the justices' decisions on petitions. The best the private bar can do is to focus on what the best and most successful practitioners do, and to make the most of the minimal feedback we get from the Court. And that is what we hope to do here—by studying the art and science of Supreme Court advocacy by highlighting recent examples of cases that did (and didn't) make the cut.

MAXIMIZING YOUR CASE'S CERTWORTHINESS

One thing that is particularly difficult about assessing the "certworthiness" of your client's case, and highlighting it for the Court, is resisting the temptation to dwell on the underlying merits—which have until now been your *exclusive* focus. The merits take on secondary importance at the certiorari stage, because the Supreme Court is not a court of error and does not see its function as intervening merely to correct injustices or misapplications of the law. This will not be news to those of you who practice before the Texas Supreme Court and other courts of discretionary review. But even the practitioner with experience before other discretionary courts will be surprised at the degree to which what matters in the Supreme Court is not making certain that the lower courts get things exactly right every time, but instead ensuring that the rules developed in the lower courts are both uniform and correct (probably in that order), thus guiding the path of the law for years to come. Accordingly, selecting and framing the issue (or very rarely) issues you take to the Court is of the utmost importance. For the Court to be interested in taking a case, the justices need to see something special and universal about that issue, and you will have to convince the Court that your issue has that special something.

This is hard because even Court members have trouble expressing exactly what matters in deciding whether to take an issue. Chief Justice Rehnquist admitted that the process was "rather subjective" and involves "intuition" as much as "legal judgment." William H. Rehnquist, *The Supreme Court, How It Was, How It Is* 265 (1987). Justice Harlan thought "the question whether a case is 'certworthy'" to be "more a matter of 'feel' than of precisely ascertainable rules." Harlan, *Manning the Dikes*, 13 Rec. of the N.Y.C. Bar Ass'n 541, 549 (1958). And of course, on the modern Court, much of this process is relegated to clerks, who do the initial screening of petitions and make often-dispositive recommendations about whether a case should be granted. So much of this work is done by a cadre of new lawyers who are still feeling their way through the process, and who turnover every year, which adds successive layers of uncertainty and subjectivity.

Yet we are not entirely without guideposts. The Supreme Court's rules provide important guidance for prospective petitioners, setting forth several factors that "indicate the character of reasons that the Court considers" in determining whether to review a case:

1. the decision below conflicts with decisions of one or more federal courts of appeals or state courts of last resort on an important issue of federal law;

2. the court below decided an important federal question in a way that conflicts with rulings of the Supreme Court;

3. the court below decided a question of federal law that is so important that the Supreme Court should pass upon it even absent a conflict; or

4. the court below so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power.

Sup. Ct. R. 10.

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