Preparing Cert Petitions & Oppositions

An overview of the procedures and strategies applicable to the cert process.

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I. INTRODUCTION

Appellate skills and techniques that are effective before lower courts are usually effective before the United States Supreme Court. In either forum, for example, a good merits brief should be well-organized, concise, persuasive but moderate in tone. To be sure there are differences—the Supreme Court, for example, cares more about reasoning and practical consequences and less about precedent than other courts. But the leap from one forum to the other is not great. The most significant exception to this is the certiorari process. Petitions for writs of certiorari and briefs in opposition are unique documents that pose a unique set of strategic challenges. Counsel cannot take his or her lower court brief, place a new caption on it, and submit it as a cert petition or opposition. The objectives are different, as are the means of accomplishing them.

Advocacy at the certiorari stage is not only challenging, it is unusually important. By drafting effective cert petitions, states can help shape the Court’s docket and produce decisions that will benefit them for years to come. Conversely, an effective brief in opposition can stave off review and maintain a favorable rule of law adopted by the lower courts. There is probably no way by which the states can exert a greater influence on the Court than through effective advocacy at the certiorari stage.

Towards that end, this manual provides an overview of the procedures and strategies applicable to the cert process. It is not intended to be an exhaustive discussion of the topic. Anyone about to prepare a cert petition or brief in opposition should carefully study the Supreme Court Rules (particularly Rules 10-16) and review sections of Robert L. Stern, et al., Supreme Court Practice 233-520 (9th ed. 2007) (hereafter “Supreme Court Practice”). Another useful discussion of the topic is Stewart A. Baker, A Practical Guide to Certiorari, 33 Cath. U.L. Rev. 611 (1984) (hereafter “A Practical Guide to Certiorari”). You can obtain copies of excellent cert petitions and oppositions at the web site of the United States Solicitor General (http://www.usdoj.gov/osg/briefs/brieftype.htm). In addition, the NAAG Supreme Court Project is happy to provide editing and technical advice.

You should also not hesitate to call the Supreme Court’s Clerk’s Office with questions. There is probably no court in the nation with a more knowledgeable, helpful, and friendly clerk’s office than the United States Supreme Court. The point person in the Clerk’s office on cert petitions is Chief Deputy Clerk Chris Vasil, who can be reached at (202) 479-3027.

II. THE PROCESS

Almost 40 years ago, Professor Hart estimated that, on average, each Justice had no more than two hours to devote to reading the briefs in each case heard on the merits before casting his vote at the post-argument conference.1 Even if that figure is not precisely accurate today, it illuminates a fundamental reality of Supreme Court practice—

the Justices and their clerks are strapped for time. And, if that is true with respect to cases the Court has already decided to hear, imagine how little time they have to review the 9,000 or so cert petitions filed each year.

To economize their resources, all of the Justices but Justice Stevens participate in what is known as the “cert pool.” These Justices pool their clerks, only one of whom is responsible for reviewing a given petition and drafting a “cert memo” that discusses the case and provides a recommendation. The Justices review the memo and then, depending on the case and the Justice, may delve further into the case by reading some or all of the briefs and the opinion below.

The cert petition, brief in opposition, and reply are distributed to the Justices as a package. The time-line is as follows:

Step 1: The cert petition must be filed within 90 days of the entry of judgment, or denial of rehearing or discretionary review, by a federal court of appeals or highest state court.

Step 2: The brief in opposition and any amicus briefs are due within 30 days after the petition is placed on the docket.

Step 3: The petitioner has 10 days within which to file a reply. (There is no technical time limit. But as described in Step 4, 10 days is the practical time limit.)

Step 4: On the Wednesday (in paid cases) or Thursday (in in forma pauperis cases) after 10 days have passed or the reply is filed or waived (whichever is earlier), the clerk’s office distributes the briefs to the Justices. (If the respondent waives its right to file a brief in opposition, the petition is distributed on the Wednesday or Thursday after the waiver is received or the 30-day period for filing such a brief has expired.)

Step 5: Approximately two weeks later (except during the summer recess), the Justices decide whether to grant or deny the petition at their weekly conference (generally held on Fridays from October through April, and on Thursdays in May and June). Earlier that week, each Justice designates the petitions he or she deems worthy of separate discussion at the conference.2

Step 6: The Court usually issues an order with respect to the petition on the following Monday.

Extensions of time in which to file cert petitions may be granted “for good cause.” An application for an extension must be made to an individual Justice and, except in extraordinary circumstances, must be made at least 10 days before the petition is due. Most circuit Justices are willing to grant extensions; an exception is Justice Scalia, the circuit Justice for the Fifth Circuit, who rarely grants extensions. See Supreme Court

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2 You can find out the particular conference at which the Court is scheduled to discuss your petition by visiting the Docket page of the Court’s web site (http://www.supremecourtus.gov/docket/docket.html) and typing in the case number.
Practice at 398-409. Extensions of time in which to file briefs in opposition are less difficult to obtain and require only a letter to the Clerk of the Court. Id. at 497-98.

Under what is known as the Rule of Four, four Justices have to vote in favor of granting certiorari for the petition to be granted. This is easier said than done. In the 2006 Term, the Court acted on almost 9,000 cert petitions. The Court granted cert in, or summarily reversed, only 81 of the cases. Even when considering only paid cert petitions, which generally fare better than in forma pauperis petitions, the success rate is less than 4%.3 Looked at another way, in an average week, the Court reviews about 175 cert petitions. Of these, it grants only a handful.

Because you represent states and state officers, you begin with a large advantage over other advocates. Cert petitions filed by state Attorney General Offices are granted more than 20% of the time.4 Nonetheless, even for state attorneys the odds remain heavily against a grant of certiorari. Mastering the art of writing cert petitions is therefore critical.

In some cases, the Court’s initial order with respect to the cert petition is neither a grant nor a denial. Rather, the Court “invites” the Solicitor General to file a brief expressing the views of the United States. (In Supreme Court jargon, this is known as a “CVSG”—“Calls for the Views of the Solicitor General.”). The Solicitor General invariably files an amicus brief several months later that suggests the Court either grant or deny the petition. The Court usually, though not always, follows the Solicitor General’s recommendation.

III. CERT PETITIONS: GENERAL STRATEGIES

Cert petitions are unique documents, whose goal is quite different from that of merits briefs. The sole focus of a merits brief is to demonstrate that your legal position is correct. The sole focus of a cert petition is to convince the Court that it should devote its scarce resources to your particular case. These are very distinct objectives—even where a cert petition properly brings the errors of the court below to the Court’s attention that is merely a means to a different end. The challenge is to make it readily apparent to the Court that review of your case is urgently needed. (Conversely, there are many instances when it is advisable not to file a cert petition even though you do not like the result below. If your case does not present an important federal question, or has procedural obstacles, it is unlikely the Supreme Court will agree to review it.)

**Style.** Style matters in cert petitions. Given the time constraints of the Justices and their clerks, it is essential that you 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 setting. A punchy brief that is inter-

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3 These statistics are derived from Statistical Recap of Supreme Court’s Workload During Last Three Terms, 76 U.S.L.W. 3016 (2007).

4 See Dan Schweitzer, State Attorneys General Offices and the Certiorari Process, 1 NAAGAZETTE No. 1, at 2 (Oct. 22, 2007) (finding that cert petitions filed by state Attorney General Offices were granted 22% of the time in the 2001 to 2006 Terms) (http://www.naag.org/certiorari_process.php)
testing to read is more likely to stand out from its competitors. By contrast, if the petition is leaden or unduly complex, or emphasizes the facts of the case rather than the legal issues it raises, the clerk or two who make the initial recommendation may miss why certiorari review is necessary. Brevity is preferable; try not to be longer than 20 pages. And spend time honing the questions presented—they are very important at this stage of the process.

**Amicus support.** One way to make a cert petition stand out is to obtain amicus support, particularly from other states. Multi-state amicus briefs are often very effective in convincing the Court that a case is sufficiently important to merit its review; indeed, 44% of the cert petitions supported by state amicus briefs were granted in the 1996 through 2007 Terms. To remain effective, however, such briefs must be submitted sparingly—claims that cases are unusually important ring hollow when made too often. An amicus brief supporting a cert petition is due within 30 days after the case is placed on the docket or a response is called for by the Court, whichever is later, and that time will not be extended. See Rule 37.2(a). For further information on amicus briefs, see Dan Schweitzer, *Fundamentals of Preparing a United States Supreme Court Amicus Brief*, 5 J. Appellate Prac. & Process 523 (2003).

**Substance.** As a general rule, the Court does not grant certiorari solely to correct errors by other courts. It ordinarily grants certiorari because, in descending order of importance:

- there is a conflict among the federal courts of appeals and/or state supreme courts;
- the issue is extremely important;
- the decision below conflicts with Supreme Court precedent;
- the Court left the issue open in a prior case;
- there is tension among prior Court decisions;
- the court below erred.

See Rule 10 (discussing the first three reasons). Most effective cert petitions set forth multiple reasons why certiorari should be granted, usually combining some or all of the above points. As discussed further below, this includes error by the lower court—just because the Court does not grant certiorari merely to correct lower court errors does not mean that lower court error is irrelevant.

**IV. CERT PETITIONS: SPECIFIC ARGUMENTS**

**1. Conflicts among the federal courts of appeals and/or state supreme courts**

This is by far the most effective argument and should be the lead argument where it is available. Conflicts among federal courts of appeals or between a state supreme court and the federal court of appeals covering the state are optimal.
tween state supreme courts are also good (though less so), especially if you can argue that this type of case predominantly arises in state court. Most helpful is a direct conflict—where two circuits squarely addressed (in their holdings) the same legal issue and reached opposite conclusions. (Put another way, you can say with virtual certainty that, had your case been heard by the other circuit, the result would have been different.) A “conflict in principle”—i.e., a conflict “with the reasoning of (or with dicta in) distinguishable cases” (Supreme Court Practice at 478)—carries less weight but can support a grant of certiorari if the issue is sufficiently important. A word of caution: If you overstate the conflict, the brief in opposition will likely call you on it.

A few other observations:

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

- Summarize (don’t merely cite) at least a couple of the decisions with which the lower court ruling conflicts in order to give the Supreme Court confidence that the conflict is genuine.

- Not all lower court conflicts are considered “intolerable”; show why your conflict is (i.e., show that the conflict is on a matter of great importance that needs prompt resolution).

- Another way of putting the issue, especially where there is not a direct conflict, is that there is confusion among the lower courts, which need guidance.

- If the lower court acknowledged the conflict, make sure to mention that.

- It is helpful if you can explain why further percolation is unlikely (because, for example, the court below is the court that will decide almost all of the cases raising the issue) or unhelpful (because, for example, the conflict is already clear cut).

- Conflicts between a district court and a court of appeals, among intermediate state appellate courts, or within a given federal circuit are rarely useful.

2. Important issue

States are more successful than private parties in convincing the Court to take cases due to their importance. Importance matters, not only because it is an independent ground for granting certiorari but also because it can help convince the Court that a lower court error needs to be fixed, or that a conflict among the lower courts or a question left open by the Court in an earlier decision needs prompt resolution. Among the types of issues that are important enough to warrant Supreme Court review are issues that are:

- recurring (e.g., many pending cases or activities will turn on resolution of the issue)
• causing serious practical problems (e.g., RFRA’s effect on prisons)
• of fundamental societal significance (e.g., whether DC can ban handguns)
• of fundamental legal significance (e.g., the balance of state-federal power; a federal statute has been held unconstitutional)
• of general importance (e.g., large number of people affected)
• national in scope (e.g., other states have statutes similar to the one struck down below)

Among the state interests that the Court has been particularly receptive to are effective law enforcement, prison management, and, lower courts’ adherence to AEDPA.

3. Conflicts with Supreme Court precedent

This is an important ground for granting certiorari, but requires subtlety in execution—you do not want to sound as though you believe the Court’s role is to correct lower court errors. For this reason, you should make the conflict with Supreme Court precedent seem as stark as possible and show why the issue is an important one.

4. Issue was expressly left open by the Supreme Court

This is a helpful point to add to buttress a claim of importance. If the Court expressly left open the question in a prior case, the Court will know it is a genuine issue that probably requires resolution at some time. You will still need to show, of course, that your case is the right one in which to resolve the issue and that this is the right time.

5. Tension between Supreme Court precedents

This is another helpful point to add. It ties in well with the argument that there is a conflict among the lower courts; the reason for the conflict is the tension between the precedents. Likewise, it ties in well with the argument that the decision below conflicts with Court precedent; the court below may have followed one line of precedents but ignored another (better reasoned or more current) line of precedents.

6. The court below erred

Although the mere fact that the court below erred is not, standing alone, generally sufficient for 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 asserted importance of the case. Often what makes a case important from the Court’s perspective is the error by the lower court. (A good example is the assisted suicide
cases where the Court granted certiorari and unanimously reversed two federal court of appeals decisions striking down state bans on assisted suicide. Had the two lower courts found no right to assisted suicide, it is far less likely the Court would have reviewed the decisions.

This does not mean the focus of the brief should be the error of the Court below. “But it does mean that if counsel believe that the case is an appropriate one for certiorari under Rule 10, they should not fail to indicate in the petition why the decision below is thought to be wrong.” Supreme Court Practice at 481. Any such argument should be concise, but in a persuasive, narrative form. “Such a discussion of the merits of the questions can often—and, if possible, should—be integrated into other sections of the Reasons for Granting the Petition.” Id. at 483.

OTHER POINTS:

- If the lower court decision blatantly conflicts with a Supreme Court decision or is manifestly wrong, you might want to suggest that the Court “summarily reverse” the lower court decision, i.e., reverse the lower court decision based on the cert papers alone.

- In some cases, the best strategy is impliedly to encourage a CVSG by emphasizing how the lower court decision conflicts with the views of federal agencies or undermines federal policies in some fashion.

- Be aware of pending cases. If your cert petition raises a question that is presented in an earlier-filed petition or in a case already granted review, you probably will want to suggest that your case be “held” pending the outcome of the other case or that it be heard together with the other case. Conversely, if you are the respondent, you may need to show why the petition should not be held.

V. CERT PETITIONS: SPECIFIC SECTIONS

1. Questions presented

These are very important in cert petitions for two reasons: they are often the first thing a particular Justice or clerk reads; and, if certiorari is granted, they set a boundary on the issues you can raise in your merits brief. Practitioners have varying approaches to the questions. Some prefer non-argumentative questions that have no immediately obvious answer; others prefer questions that at least imply the answer you support. If at all possible, the question should make clear to the reader that the issue merits Supreme Court review. Try not to present more than two or three questions; presenting more than that detracts from the clarity and simplicity for which you are striving. Also, few cases have more than a couple of cert-worthy issues.

Try not to start the questions with: “Did the court below err in holding...?” Doing so implies that you view the Court’s role as being a corrector of errors. An exception to that rule is where the question presented points out a conflict among the lower
courts (e.g., “Did the Tenth Circuit err in holding—in conflict with Second, Fourth and Eighth Circuits—that ... ?”).

Sometimes an issue is so complex that it is virtually impossible to craft concise and clear questions presented. In such cases, you should consider prefacing the questions with a brief description of the pertinent facts or statutory scheme. Such a preface should ordinarily be no longer than one paragraph.

2. Boilerplate Sections

All cert petitions must include a list of all parties to the proceeding in the court below; citations to the opinions and orders entered in the case; a statement of the basis for jurisdiction; and the constitutional provisions, treaties, statutes, ordinances, and regulations involved in the case. Do not leave out relevant statutes; the respondent can use that to its advantage in the opposition brief. As to the jurisdictional statement, it should be short and to the point, listing the information required by Rule 14.1(e). If the case presents a real jurisdictional problem, that should be addressed in the Statement of the Case or Reasons for Granting the Petition.

3. Statement of the Case

This section serves several functions. Its primary goal is to show the Court that your case is a good vehicle to decide the questions presented. This means making the factual and procedural background appear as clear and simple as possible, and confirming that the questions presented were expressly decided. Do not distract the Court by describing more facts than necessary; but do not understate the facts so that the Court is left unsure of the true posture of the case. See E. Barrett Prettyman, Jr., Petitioning the United States Supreme Court—A Primer for Hopeful Neophytes, 51 Va. L. Rev. 582, 596 (1965).

Moderation is likewise required in describing the decision under review. Without giving a “belabored exposition of what the court held below” (id.), summarize enough of the opinion so that the Court can understand its rationale without having to turn immediately to it. Subtly hint at flaws in the lower court’s reasoning by quoting passages that underscore its weak points. Briefly summarize any dissenting opinions that bear on the questions presented (since they presumably support your position).

The Statement can also be a tool to show why the case is deserving of the Court’s attention. Without editorializing or argument, give a flavor of the issues involved and their implications. By the time the Justice or clerk has completed the Statement, he or she should be 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, previously thought to be state land, has been found to be Indian country.” You still need a persuasive “Reasons for Granting the Petition” section; but the Statement can be a very positive first step.
OTHER POINTS:

- Do not gloss over bad facts or misstate the record. And, at least with respect to critical or disputed factual assertions, provide citations wherever possible—preferably to the lower court opinions included in the Appendix; otherwise, to the record below. This enhances the Court’s confidence in your assertions.5

- Some Supreme Court practitioners believe in beginning the petition with an Introduction—at the outset of the Statement or in a stand-alone section just before it—that quickly summarizes what the case is about and why it merits the Court’s review.

4. Reasons for Granting the Petition

Most of the key points are set forth in the discussion above on the specific arguments that are effective in cert petitions. Difficult strategic decisions often need to be made as to the order in which the reasons for granting the petition should be set forth. When there is a direct conflict among the appropriate lower courts, that should generally go first. Likewise, a clear conflict with a Supreme Court decision should be asserted up front. Supreme Court Practice states (at 483) that a trickier issue is whether “a discussion of importance or conflict in principle should precede a treatment of the merits (if they cannot be integrated).” The authors suggest that the answer “may depend upon whether the question will appear important apart from the correctness of the decision below. If not, the merits should be argued ahead of the showing of importance.” There is obviously no universally right answer; each case needs to be judged independently.

The Court rules do not require the petition to include a summary of argument. It is often effective, nevertheless, to open the Reasons for Granting the Petition section with a one or two paragraph overview of the issues and the importance of the case. (This is especially true if you do not begin the petition with an Introduction.)

5. Conclusion

This section should be one line: “The petition for a writ of certiorari should be granted.”

This is not the place for another summary of the argument.

VI. BRIEFS IN OPPOSITION TO A CERT PETITION

Effective arguments in briefs in opposition are the flip-side of the effective arguments in a good cert petition—they demonstrate why there is no pressing need for the Court to review the matter, at least not at this time or not with this particular case as a vehicle. In particular, you should try to:

5 Note that the lower court record is not sent to the Justices except at their request. See Rule 12.7. Counsel should therefore assume that the Justices do not have the full record before them. If you believe that portions of the record are critical to disposition of the petition, you should incorporate them in the petition or include them in the Appendix.
1. **Attack the conflict**

The primary goal is to demonstrate, if possible, that the petitioner is wrong in asserting that there is a direct conflict among the courts of appeals. If that is not possible, the goal is to provide reasons why the conflict does not need to be immediately resolved. The following is a list of questions you can raise:

- Are the **holdings** in conflict, or does just **dicta** conflict?
- Are the facts of the various circuit court opinions different enough to explain the different outcomes? Do the facts muddle the issue?
- Did the court below cite the case in alleged conflict with it? (If not, this may bolster the argument that there is not a direct conflict.)
- Is it a well-developed conflict or does it need more “percolation” because only a couple of courts of appeals have addressed the issue?
- Has **en banc** review of the conflicting holding been sought (which raises the possibility that the conflict will be eliminated without Supreme Court intervention)?
- Is it a lopsided conflict as to which the courts generally are not confused (or where the only case on the other side is an old one weakened by intervening Court decisions)?
- Is the conflict between the right courts (**e.g.**, is it merely a conflict among district courts)?
- Has the statute in controversy been amended or repealed?
- Is resolution of the conflict irrelevant to the ultimate outcome of the controversy?
- Is the conflict “tolerable” because, for the reasons set forth immediately below, the case is not “important”?

2. **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. Give the Court reasons for minimizing the importance of the case from either a practical or legal perspective.

- Try to show that the issue is not recurring.
- Show legislative changes or administrative actions (**e.g.**, the habeas petitioner was released) that moot the issue or undermine the importance of the case.
- Argue that the petition is objecting only to a misapplication of settled law.
- Argue that Congress can fix the problem (and is the appropriate body to do so).
3. **Show that the case is not a good vehicle**

There is nothing the Court hates more than granting certiorari and then, after full briefing and oral argument, being forced to dismiss a 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 intended to tackle. In most instances, there is another case raising the same legal issue around the corner. Convince the Court to wait for that case. Any time you receive a cert petition you should ask:

- Is there a jurisdictional problem (e.g., was the issue waived; is there a standing, mootness, ripeness problem)?
- Is there an independent and adequate state ground?
- Would respondent prevail on other grounds, so that even if the Court took the case its review would not affect the case’s outcome?
- Is the order final? (The Court does not usually review interlocutory orders—and may not in cases coming from state courts.)
- Are there complexities which the Court must address before it could reach the real issue?
- Are there factual problems such that the asserted issue is not clearly or cleanly presented?
- Is the order unpublished? (If so, it may not have precedential value.)

4. **The court below was right**

For the same reasons why cert petitions should generally include at least some discussion of why the decision below was wrong, briefs in opposition should generally devote some space to defending the decision below and presenting it in its strongest light. The weight properly given to this issue varies, of course, from case to case. If there is a realistic chance that the Court will summarily reverse the decision below, you may want to defend the decision below in more depth.

**OTHER POINTS:**

- Remember Rule 15.2 of the Rules of the Supreme Court — “the brief in opposition should address any perceived misstatements of fact or law in the petition that
bears on what issues properly would be before the Court if certiorari were granted. 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.”

- As with cert petitions, brevity is preferred.

- Do not solicit amicus briefs to oppose a cert petition. Such briefs only highlight the importance of the case.

- Briefs in opposition can be waived (except in capital cases) and should be in frivolous or weak cases. The Court will request a response if it thinks the case merits closer inspection. If you wish to waive an opposition, do so by letter or waiver form so that the Clerk’s office is not left guessing and the petition is more quickly distributed. (On the other hand, you should not waive a response when the petition is clearly a serious one, e.g., the petition was filed by the federal government or it credibly asserts that the lower court opinion conflicts with several other circuit court decisions.)

- The respondent may rephrase the question presented, and should do so to put the legal issue in its proper light.

- A Statement of the Case is not required, but it is rare that a respondent will wish to accept the petitioner’s Statement. The respondent may provide a full Statement of its own, merely correct “any perceived misstatement of fact” in the petition (see Rule 15.2), or incorporate by reference the statement of the facts in the opinion below. The first option is usually the preferred one.

- If, although you oppose certiorari, you would want the Court to modify the judgment below in the event certiorari is granted, you may want to file a cross-petition. The rules regarding cross-petitions are set forth in Rules 12.5, 13.4 and 14.1(e)(iii). Generally, a cross-petition is not necessary to defend a judgment on any ground raised below, regardless of whether that ground was relied on by the courts below. Moreover, the filing of a cross-petition may be at cross purposes with your overriding objective—showing that the Court should not review the case at all.

- Responses to in forma pauperis petitions must be typewritten. Rule 15.3.

- If there are multiple respondents, try to file one brief.

VII. REPLY AND SUPPLEMENTAL BRIEFS

REPLY BRIEFS

Rule 15.6 permits a petitioner to “file a reply brief addressed to new points raised in the brief in opposition.” These are short documents, quickly prepared. The Rules limit them to 3,000 words, and the Court gives petitioners only 10 days to file them. Rule 15.5. Reply briefs are certainly not needed in every case; but they can be effective in
removing lingering doubts raised by the brief in opposition.

The reply is not a place to quibble over small matters. If you file one at all, focus on the essentials: namely, the respondent’s efforts to minimize your conflict and the importance of the case. Where the respondent has attempted to muddy the water by raising factual and procedural problems with the case, your reply should be simple, direct, and with supporting citations. “The Court has no time to check the record and decide who is right about a factual dispute; it may deny cert simply because of the dispute unless your reply contains conclusive proof that you are right. So if the respondent says that you did not properly raise an issue below and you did, attach the relevant pleadings in the appendix.” *A Practical Guide to Certiorari* at 632.6

If you do not wish to file a Reply brief and wish to expedite the Justices’ consideration of the case, you should notify the Clerk’s office as soon as possible that you are waiving the reply.

**SUPPLEMENTAL BRIEFS**

Rule 15.8 provides that “[a]ny party may file a supplemental brief at any time while a petition for a writ of certiorari is pending, calling attention to new cases, new legislation, or other intervening matter not available at the time of the party’s last filing.” Such a supplemental brief should deal exclusively with the new matter and should follow the form for a brief in opposition.

**VIII. CONCLUSION**

Given the enormous impact of Supreme Court decisions, Attorney General offices should think long and hard before deciding to seek Supreme Court review. Once the decision has been made to petition for a writ of certiorari, the state’s challenge begins: convincing the Court that your case is one of the 70–80 cases worthy of the Court’s time this Term. We hope the advice provided in this manual will assist the states in meeting that challenge, and producing decisions that will prove useful for years to come.

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6 *A Practical Guide to Certiorari*, published in 1984, is outdated as to one aspect of reply briefs. The article states the practice of the Court as being to distribute the cert petition and brief in opposition to the Justices’ chambers as soon as the brief in opposition is filed. As discussed above, the current practice is to give the petitioner 10 days to file a reply brief and then to distribute the papers. Thus, contrary to the advice in the article, one can assume that the Justice or clerk reading the reply has recently read the other briefs.