



**NEBRASKA**  
*State Bar Association*

The NSBA Appellate Practice Section presents  
**Writing and Responding to  
Cert Petitions in the U.S. Supreme Court:  
An Overview**

**Dan Schweitzer**

Director and Chief Counsel of the  
National Association of Attorneys General's Center  
for Supreme Court Advocacy

THURSDAY

NOVEMBER 15, 2018

WEBINAR

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### **Dan Schweitzer**

*Director and Chief Counsel of the National Association of Attorneys General's Center for Supreme Court Advocacy*

Dan Schweitzer is the Director and Chief Counsel of the National Association of Attorneys General's Center for Supreme Court Advocacy. Since joining NAAG in February 1996, his principal responsibility has been to assist state appellate litigators who appear before the United States Supreme Court. Toward this end, Mr. Schweitzer organizes and participates in moot courts, edits about 40 state briefs filed each year in the Court, edits the biweekly *Supreme Court Report*, and provides strategic and technical assistance to state Attorney General offices. Prior to joining NAAG, Mr. Schweitzer was a litigator at a private law firm. He is a graduate of the University of Pennsylvania (B.A. 1986) and Harvard Law School (J.D. 1989).

Among Mr. Schweitzer's publications are *U.S. Supreme Court Brief Writing Style Guide* (NAAG 2017); *The Law of Preemption* (NAGTRI 2011); *Frustrated with Preemption: Why Courts Should Rarely Displace State Law Under the Doctrine of Frustration Preemption*, 65 N.Y.U. Annual Survey of American Law 585 (2010) (with Kevin O. Leske); *Preparing Cert Petitions and Oppositions* (NAGTRI 2008); and *Fundamentals of Preparing a United States Supreme Court Amicus Brief*, 5 Journal of Appellate Practice and Process 523 (2003).

Mr. Schweitzer is a Master in the Edward Coke Appellate Inn of Court and on the Advisory Board of the Georgetown University Law Center's Supreme Court Institute.

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The NSBA Appellate Practice Section presents

# Writing and Responding to Cert Petitions in the U.S. Supreme Court: An Overview Webinar

**Thur., November 15, 2018**  
**12:00 pm - 1:00 pm**

**NE MCLE Accreditation**  
#163919 (Distance learning)  
**1 CLE hour**

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This webinar will provide a broad overview of writing petitions for certiorari in the U.S. Supreme Court and responding to such petitions. Few types of briefs are more challenging for attorneys to write than Petitions for Writs of Certiorari and Briefs in Opposition. Cert petitions and oppositions are unique documents both because of their audience (the Supreme Court Justices and their young clerks) and their goal (obtaining or blocking discretionary review, not winning a case on its merits). As a result, writing a cert petition or opposition presents special challenges, particularly for attorneys without a great deal of experience before the

Court. The presentation will first discuss how to write an effective cert petition — the tactical and strategic considerations; how best to structure the brief; and what the different sections of the brief should look like. The presentation will then discuss how to write an effective opposition — what kinds of arguments will convince the Court to deny review and how to structure the brief to effectively make those arguments.

**Speaker:**

*Dan Schweitzer, Director and Chief Counsel of the National Association of Attorneys General's Center for Supreme Court Advocacy*

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**NSBA WEBINAR:  
PETITIONS FOR WRITS OF  
CERTIORARI AND BRIEFS IN  
OPPOSITION**  
presented by Dan Schweitzer

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I. THE NUMBERS  
II. THE PROCESS  
III. WHY THE COURT GRANTS CERTIORARI  
IV. ARGUMENTS THE CERT PETITION SHOULD MAKE  
V. THE SECTIONS OF THE CERT PETITION  
VI. BRIEFS IN OPPOSITION  
VII. REPLY BRIEFS  
VIII. QUESTIONS AND ANSWERS

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**I. THE NUMBERS**

- 2016 Term: 6,305 Cert Petitions  
74 Granted or 1.2%
- But cert petitions in paid cases were granted 4.4% of the time.
- BIOs only filed where cert petition is strong on its face or the Court calls for a response.

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## II. THE PROCESS

- Know your audience
- The cert pool
- The Rule of Four
- Timing

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## III. WHY THE COURT GRANTS CERTIORARI

Court hears only about 70 cases a Term

Which ones?

- Most important?
- Most wrong?
- Most interesting?

No. Under Supreme Court Rule 10, the Court grants certiorari because:

- 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 conflicts with Supreme Court precedent;
- The court below erred.

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## IV. ARGUING WHY CERTIORARI SHOULD BE GRANTED

A. IS THERE A CONFLICT WORTH LEADING WITH?

- Must be a “direct” conflict between the “right” courts.
- Direct conflict: At least two courts squarely addressed the same legal issue and issued *holdings* that reached opposite results — i.e., outcome determinative.
- Right courts: Needs to be between or among *federal courts of appeals* and *state high courts* — a conflict with a federal district court or state intermediate appellate court doesn’t count.
- Great to show a conflict between your state high court and the federal court of appeals that covers the state

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B. ARGUING THE CONFLICT

• Terminology

"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 courts are **squarely divided** over this important and recurring question."

"This case concerns an **expressly acknowledged and now entrenched circuit conflict** over the meaning of . . ."

"The circuits **have split** on the question whether . . ."

Horizontal lines for notes.

• Clearly state the breakdown up front.

*E.g.*, "The Eighth Circuit's decision creates a 4-3 circuit split on whether federal law X preempts state tort suits."

• How much detail to provide about the cases that comprise the conflict?

→ Usually summarize all the cases

- Exs. *Jesinoski v. Countrywide Home Loans* (5-3 split)
*Salt River Project v. SolarCity Corp.* (3-2)
*Esquivel-Quintana v. Holder* (4-3)
*Henson v. Santander Consumer USA* (5-3)

→ Where large number of courts are part of the conflict, summarize some and cite to others

- Exs. *Pena-Rodriguez v. Colorado*
*Weaver v. Massachusetts*
*Utah v. Strieff*
*Betterman v. Montana*

Horizontal lines for notes.

• Other Tips

→ You can sometimes set up the conflict by explaining that two Supreme Court decisions are in tension and point in different directions.

- Exs. *Bravo-Fernandez v. United States* (at 1-2)
*Spokeo v. Robins* (at 8)

→ If the court below acknowledged the conflict make sure to mention that.

→ You can mention conflicts between a district court and a court of appeals, or among intermediate state appellate courts — but only as a subsidiary point.

→ Never argue that there's a conflict within your circuit.

→ Helpful to explain why the existence of the circuit split matters in the real world.

- Meaning of statute/constitution shouldn't depend on state you're in
— Conflict will encourage forum shopping
— National businesses will be subject to conflicting requirements
— Uniformity was a specific congressional objective
Ex. *Advocate Health Care Network v. Stapleton* (at 25-26)

Horizontal lines for notes.

C. ARGUING IMPORTANCE

- Supreme Court Rule 10
- What makes a case “important” for these purposes?
  - Recurring
    - e.g., the issue regularly arises in trial court proceedings; police officers regularly engage in the practice; it’s a routine business practice
  - One way to show this is to cite the many decisions that have addressed the issue. Ex. *Lamar, Archer & Cofrin v. Appling* (at 17).
  - Causing serious *practical* problems
    - e.g., police officers will not be able to effectively do their jobs; 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

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- Of fundamental *societal* significance
  - e.g., whether a city can ban handguns; whether a state can prohibit assisted suicide; a large number of people or industries are affected; the case concerns national security;
- Of fundamental *legal* significance
  - e.g., it involves the balance of state-federal power; a federal statute has been held unconstitutional; the decision undermines the separation of powers.
- Issue is national in scope
  - e.g., other states have statutes similar to the one struck down below; other states’ prisons have faced the same problem.
  - Ex. *Otte v. Doe* (at 6-8)  
*Ohio v. Clark* (at 23-25)

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- Other Tips
  - Point out if the Court had previously granted certiorari on the issue but didn’t reach it for some reason or other.
    - Exs. *Dollar General Corp. v. Mississippi Band of Choctaw Indians*  
*CalPERS v. ANZ Securities*  
*Texas DHCA v. Inclusive Communities Project, Inc.*  
*Jesner v. Arab Bank, PLC*
  - Point out if a prior decision of the Supreme Court expressly left open (or reserved) the issue.
    - Exs. *City of Hays v. Vogt* (at 5-6)  
*Bank Markazi v. Peterson* (at 19)  
*Pena-Rodriguez v. Colorado* (at 9)

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D. ARGUING THE MERITS (INCLUDING CONFLICT WITH SUPREME COURT PRECEDENTS)

- A helpful supplemental argument
  - the Court reverses two-thirds of the time
- Not a full-length merits argument (4 to 8 pages)
- Conflicts with Supreme Court precedent
  - Usually another way of saying the lower court erred

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E. ARGUING THE CASE IS A GOOD "VEHICLE"

- Need to show this is the right case in which to resolve the issue
- Sometimes a separate section titled "Petitioner's case presents an ideal vehicle for resolving the conflict."
  - Exs. *Lozman v. City of Riviera Beach, FL*  
*City of Hays v. Vogt*  
*Expressions Hair Design v. Schneiderman*  
*Cal. Public Employees' Retirement Syst. v. Moody*  
*Investors Serv.*
- Specific reasons the case might be a good vehicle:
  - The facts are undisputed, or the district court made detailed findings of fact, and those facts plainly present the legal issue raised.
  - The question presented was expressly presented and decided.
  - Resolution of the question presented was outcome-dispositive.
  - There is a complete record.

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- The decision below was published.
- The case is not interlocutory.
- The facts are emblematic of how this legal issue generally arises.

- Explaining prior cert denials
  - Exs. *Byrd v. United States* (at 25-26)  
*Weaver v. Massachusetts* (at 23 n.6)  
*Hughes v. United States* (at 27-31)

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Summary: Petitions that rely on a circuit conflict

Example #1: *City of Hays v. Vogt*

- 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*

- 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*

- 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

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F. PETITIONS THAT DON'T RELY ON A CIRCUIT CONFLICT

Petitions that *don't* rely on a circuit conflict present a greater challenge

- Only about a dozen a year once we exclude types of conflict-free cases inapplicable to the States
- No cookie-cutter way of writing these petitions
- The key is to show that the lower-court decision was *importantly wrong*

First few examples are petitions that first argued a conflict with the Court's precedents or doctrine and then argued importance.

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Example #1: *Gobeille v. Liberty Mutual Ins. Co.*

- 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  
[subheading omitted]

Example #2: *Comptroller of the Maryland State Treasury v. Wynne*

- 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*

- A. The Third Circuit's Opinion Departs From This Court's Anti-Commandeering Precedents
- B. The Third Circuit's Ruling Diminishes the Accountability of State Officials
- C. The Third Circuit's Construction Infringes State Sovereignty By Perpetuating Uncertainty As To How States May Exercise Their Sovereign Rights  
[heading omitted]

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The next examples are petitions that first argued importance and only then argued a conflict with the Court's precedents or error.

**Example #1: Michigan v. EPA**

- 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**

- 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.**

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

The key: Don't cast argument merely as "The Court of Appeals Erred" or "The State Supreme Court Misapplied Supreme Court Precedent"

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## V. THE SECTIONS OF THE CERT PETITION

### A. THE QUESTION(S) PRESENTED

- Very important
  - First impression
  - Can expand or limit what issue(s) the Court is addressing
  - Frames the issue you claim is "cert worthy"
- How many?
  - Usually 1 or 2
  - Never more than 3
- Prefatory paragraphs
  - 2/3 of petitions included them
  - Clear away the clutter
  - Can help begin making your case
  - But they're *not* Summaries of Argument

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**Example: Henson v. Santander Consumer USA, Inc.**

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?

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- **Questions Presented without prefatory paragraphs**
  - Many issues don't need to be set up
  - Don't provide prefatory paragraph(s) if not needed

**Example #1: *Utah v. Strieff***  
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: *City of Hays v. Vogt***  
Whether the Fifth Amendment is violated when statements are used at a probable cause hearing but not at a criminal trial.

**Example #3: *Lozman v. City of Riviera Beach, FL***  
Does the existence of probable cause defeat a First Amendment retaliatory-arrest claim as a matter of law?

**Example #4: *Comptroller of the Maryland State Treasury v. Wynne***  
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?

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**B. INTRODUCTIONS**

- Very common
- Usually a stand-alone section
  - Exs. *Michigan v. EPA*
  - Schuette v. Coalition to Defend Affirmative Action*
  - New York v. EPA*
  - Cook v. Barton*
  - Hickenlooper v. Kerr*
- Sometimes in the opening paragraph(s) of the Statement of the Case
  - Exs. *Lucia v. SEC*
  - Lamar, Archer & Cofrin v. Appling*
  - Ernst & Young LLP v. Morris*
  - District of Columbia v. Wesby.*
- Purpose: Get the reader on your side early
- Length: A wide range; shoot for 1-2 pages
- Subtly different from Summary of Argument

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**C. STATEMENT OF THE CASE**

- Don't follow the practice required by many lower courts and begin with a "Statement of the Case" that summarizes the procedural history of the case, followed by a "Statement of the Facts" that sets out the facts of the case.
- Describe the facts and procedural background as clearly as possible.
- Make your position sympathetic, without being argumentative about it.
- Usually tell the story of the case in chronological order.
- Don't block-quote a lower court's summary of the facts or the appellate court's summary of the trial court decision.
- Provide supporting citations from the petition's Appendix or the lower court record.
- Summarize the reasoning of the federal court of appeals or state high court decision; don't leave that to the Reasons for Granting section.

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D. SUMMARY OF ARGUMENT

- Don't include one
- Summarize in an Introduction, at the beginning of the Statement of the Case, and/or at the beginning of the Reasons for Granting the Petition section.

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E. REASONS FOR GRANTING THE PETITION

F. CONCLUSION

- "The petition for a writ of certiorari should be granted."
- Not a closing peroration

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VI. BRIEFS IN OPPOSITION

A. SHOULD YOU RESPOND OR WAIVE

- No risk of a grant
- But: There are still reasons to respond without waiting for the Court to call for a response

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**B. ARGUMENTS THE BRIEF IN OPPOSITION SHOULD MAKE**

**1. REBUTTING THE CERT PETITION'S ARGUMENTS**

**a. General Responses**

- The petition *doesn't* allege a conflict or a profoundly important issue.
- The petition is objecting only to a misapplication of settled law.
- The court below did not actually rule on the question presented.

Ex. *Kalamazoo County Road Commission v. DeLeon*

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**b. Attack the Conflict**

**i. The conflict isn't genuine**

- The courts have simply phrased their tests differently, but there's no true inconsistency between them.  
Ex. *Pennsylvania Higher Education Assistance Agency v. Pele*
- The *holdings* of the courts aren't in conflict; the conflicting statement by the other court was just *dicta* or an assumption made for the sake of argument.
- The difference in outcomes was based on the different facts in the cases.  
Ex. *Matalonis v. Wisconsin*
- The difference in outcomes was based on the different laws at issue in the cases.  
Ex. *Davis v. Montana*
- The supposed conflict involves abstract tension between the *general principles* stated by the courts; there's no conflict over precise legal *rules* and no showing that the courts reached different results when addressing the very same issue. It's therefore possible this case would have come out the same way even in those other courts.

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**ii. The conflict doesn't matter**

- This case would come out the same way even under the test adopted by the other courts.  
Ex. *Pennsylvania Higher Education Assistance Agency v. Pele*
- The conflict is between the wrong courts (*e.g.*, it's merely a conflict among district courts or state intermediate appellate courts; or it's a conflict *within* a circuit).

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iii. *The conflict might go away*

- *En banc* review of the conflicting holding has been sought.
- Cases decided *after* the ones cited by the cert petition indicate that the other circuit (or state high court) might be moving away from the conflicting rule.
- It's a lopsided conflict, and the one outlier circuit (or state high court) may well reconsider its position now that many other courts have gone the other way — especially if the outlier circuit issued its opinion decades ago.
- Intervening U.S. Supreme Court decisions have weakened the underpinning of the rule adopted by the other circuits, which might now reconsider their rule.

Ex. *Wilson v. Johnson*

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iv. *The conflict is "tolerable"*

- The issue should "percolate" more because only a couple of courts of appeals have addressed the issue (or only a couple have addressed the issue since a recent Supreme Court decision that changes the landscape).

Ex. *Nguyen v. North Dakota*

- The conflict is tolerable because the issue is not "important."

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c. *Attack the alleged importance*

- The legal issue arises only rarely.
- The legal issue rarely matters to the *outcome* of cases.  
Ex. *Town of Chester v. Laroe Estates*
- The state law at issue is unusual; few other states have a similar law.
- Legislative changes or administrative actions mean the case will not have any prospective impact (even if it doesn't technically moot the case).

Ex. *Overstock.com v. New York State Department of Taxation and Finance*

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c. Attack the alleged importance (cont.)

- It's too early to know the practical impact of the decision/rule/statute.
- Point out a prior cert denials of petitions presenting the same issue.

d. Argue that the court below was right

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2. SHOWING THERE ARE VEHICLE PROBLEMS

- The Court lacks jurisdiction over the case because the petitioner lacks standing, the case is moot, or the issue is not ripe.

Ex. *Kichapoo Traditional Tribe of Texas v. Texas*

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

Ex. *Greenberg v. New York*

- Petitioner waived the issue by not presenting it in the lower courts.

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- Petitioner made a different argument in the lower courts (i.e., even if petitioner preserved the legal *issue*, it made different *arguments* in support of its position in the lower courts). The Supreme Court never wants to be the first court to have grappled with a particular argument.

- The court of appeals ruled for respondent on alternative grounds, and so the outcome of the case wouldn't change even if the Court granted certiorari and reversed on the question presented.

Ex. *Cripps v. Oklahoma*

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- Your side would prevail on alternative grounds not yet reached by the court of appeals even if the Court granted certiorari and reversed on the question presented.
- The petition seeks review of an interlocutory order or preliminary grant of relief.
- To squarely rule on the question presented, the Court would have to resolve disputed factual issues or reject facts found by the lower courts.  
*Ex. Alvis v. Espinosa*
- This record in this case is spare; wait for a case with a better record.

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- The lower court ruling is unpublished and therefore will not have any precedential value within the circuit or state.
- To reach the question presented, the Court would have to resolve antecedent legal issues.  
*Ex. United Student Aid Funds v. Bible*
- The answer to the question presented depends on a predicate, unresolved state-law issue, such as the meaning of a state statute.  
*Ex. Cline v. Oklahoma Coalition for Reproductive Justice*
- The legal issue arose in this case in an atypical context — the Court should wait for a more typical (paradigmatic) case to address the issue.  
*Ex. Stroud v. Alabama Board of Pardon & Paroles*

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**C. THE SECTIONS OF THE BRIEF IN OPPOSITION**

The Question(s) Presented

- Rephrase the question
- Caption: Simply “Question(s) Presented”

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Rephrasing the Question Presented

Example #1: *Expressions Hair Design v. Schneiderman*

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

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

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Example #2: *Kalamazoo County Road Commission v. DeLeon*

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

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

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Statement of the Case

Some don'ts:

- Don't incorporate by reference the cert petition's Statement of the Case.
- Don't make point-by-point rebuttals to factual assertions in the petition's Statement.

Some do's:

- Write a strong, stand-alone, independent Statement that presents your case, and the legal issue presented, in the strongest light.
- Supreme Court Rule 15.2
- Caption: Simply, "Statement of the Case" or "Statement."

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**Reasons for Denying the Petition**

**Outlines of the Reasons for Denying the Petition**

**Example #1: *Kalamazoo County Road Commission v. Deleon* (Public Citizen)**

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

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**Example #2: *Alvis v. Espinosa* (Tom Goldstein)**

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

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**Example #3: *Gause v. Haile* (Pennsylvania AGO)**

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

**Example #4: *Wilson v. Johnson* (Virginia AGO)**

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

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**Example #5: *Oliver v. Quarterman* (Texas AGO)**

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

**Example #6: *Stahl v. Hialeah Hosp. & Sedgwick Claims Mgmt.***

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

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## VII. REPLY BRIEFS

- Almost always file one
- A chance to reframe the case
- The opening of the Reply should generally do the following:
  - Begin by reminding the reader why certiorari is warranted
  - Point out arguments the respondent conceded or didn't dispute
  - Quickly summarize Brief in Opposition's arguments
  - Then either summarize why those arguments are wrong or say that, "as explained below, they are wrong."

Exs. *Salinas v. Texas*  
*Husted v. A. Philip Randolph Institute*  
*Maryland v. King*

- Mention your supporting amicus briefs

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## Questions?

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