The Insider's Guide to the Supreme Court of the United States

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Chapter 1

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I. Top Tips for Practitioners

A. Certiorari Petitions. More than 7,000 petitions for a writ of certiorari are filed each year, with fewer than 100 granted. Accordingly, petitions must be carefully drafted to explain not just why the decision below is erroneous but also why the question presented merits further review. Typically, that includes demonstrating a substantial disagreement on the question presented among the federal circuit courts and/or state high courts. SCOTUSblog (http://www.scotusblog.com) is an excellent resource for drafting a certiorari petition, as it stores downloadable PDFs of the certiorari petitions that the Court granted during the last four terms. A filing fee (currently $300) is required for a petition for a writ of certiorari, unless the petitioner qualifies to file in forma pauperis (“IFP”), in which case the fee is waived. See Sup. Ct. R. 12, 38(a), 39.

1. The authors thank William K. Suter, Christopher W. Vasil, and Jeffrey Atkins of the Supreme Court Clerk’s Office for their valuable assistance.
B. Briefs in Opposition. Similarly, because the likelihood of a petition being granted is approximately 1 percent, it often can be both prudent and more efficient to forgo filing a brief in opposition. Any justice interested in a petition will call for a response from the other side. As a general rule, filing a brief in opposition *sua sponte* could elevate the petition’s status in the screening process. Important tactical and strategic considerations accompany the decision whether to file a brief in opposition. A party should consider filing a brief in opposition before the Court has called for a response when the court below has acknowledged a conflict among lower courts, several amicus curiae briefs have been filed in support of a petition, or the Solicitor General or a state is the petitioner. A brief in opposition also is appropriate when the likelihood seems great that a justice will call for a response and the respondent’s counsel wants to avoid creating any momentum internally at the Court for a grant by the law clerk who prepares the memorandum for the justices in the certiorari pool. (As of May 2011, all of the justices except Justice Alito are in the certiorari pool and thus share memoranda prepared by law clerks.) The Solicitor General’s website (http://www.justice.gov/osg) is a rich and often overlooked resource for drafting a brief in opposition, as it contains the responses to paid petitions the federal government has filed since the late 1990s.

C. Merits Briefs. Merits briefs must be filed and served in both electronic and hard copy format, while other documents are filed and served only in hard copy. SCOTUSWiki (http://www.scotuswiki.com) and the Solicitor General’s website are excellent resources in the drafting process as they contain merits briefs filed in recent years.

D. Common Pitfalls in Document Filing. The Clerk will reject a document if it is filed by someone who is not a member of the Supreme Court Bar and does not have a Bar application pending. The Bar application, however, may accompany the document being filed. Certiorari petitions in civil cases are returned by the Clerk’s Office unfiled if submitted out of time, as when the 90-day filing period is miscalculated from the issuance of the appellate court’s mandate rather than from the date of judgment or rehearing denial. See 28 U.S.C. § 2101(c); Sup. Ct. R. 13.

E. Notice to Government. If the proceeding potentially implicates the constitutionality of a federal or state statute yet the federal or state government is not a party, the initial document filed in the Court should indicate the existence of a potential constitutional question and should be served on the U.S. Solicitor General or state attorney general, respectively. See 28 U.S.C. § 2403(a)–(b); Sup. Ct. R. 29.4(b)–(c).

F. SCOTUS Guides. The Clerk’s Office has published case-handling guides, downloadable from the “Case Handling Guides” section of the Court’s website (http://www.supremecourtus.gov), which identify the most common errors committed in filings before the Court. The Clerk’s Office also has published a very helpful guide for those preparing to argue before the Court, which is downloadable from the “Oral Arguments” section of its website.
II. Appellate Resources

A. Court Websites and Dockets. The Supreme Court’s official website is (http://www.supremecourtus.gov). The website includes a searchable electronic docket (under the “Docket” section) for cases docketed during both the current term and the prior term, transcripts for all oral arguments since October Term 2000 (under the “Oral Arguments” section), and all opinions and orders from the current term and the prior four terms (under the “Opinions” and “Orders” sections). The website is simple but very helpful, including downloadable guides for filing different types of briefs (under the “Case Handling Guides” section), as well as links to the Court’s rules, Bar admission form, merits briefs, oral argument transcripts, and other general information.

B. Practice Guides. The most comprehensive guide for Supreme Court practitioners is Supreme Court Practice, which is in its ninth edition and is known commonly as “Stern & Gressman” after its original two authors. A variety of excellent resources are available online. SCOTUSblog (http://www.scotusblog.com) provides daily commentary on the Court, including previews and summaries of merits cases, periodic updates on petitions to watch, real-time posting of orders and opinions, and an excellent “stats pack” for each term. The website also provides links to all of the briefs filed in merits cases (from the October Terms 2007, 2008, 2009, and 2010), as well as helpful summaries of each stage of each merits case. Oyez (http://www.oyez.org) is another helpful multimedia resource for news on the Court, including summaries of cases decided dating back to 1793 and an online clearinghouse (http://www.otd.oyez.org) for news about decisions handed down by the Court. The American Bar Association (http://www.abanet.org/publiced/preview/briefs) also provides links to all merits briefs filed in the current term, as well as timely commentary and analysis. Briefs filed by the federal government since July 1998 and selected briefs from 1982 to 1997—both at the certiorari stage and on the merits—can be downloaded from the Solicitor General’s website (http://www.justice.gov/osg). Free versions of the Court’s opinions are available from the Court’s website under the “Opinions” section, as well as from Cornell’s Legal Information Institute (http://supct.law.cornell.edu/supct), FindLaw (http://www.findlaw.com/casecode/supreme.html), and Google Scholar (http://scholar.google.com).

C. Contacting the Clerk’s Office. The Clerk’s Office is very helpful and can be reached at (202) 479-3011.

D. Electronic Notices. The Court currently does not provide any electronic notices, although opinions and orders are posted on its website the day of their issuance. On the day the Court grants certiorari or decides the case on the merits, the Clerk’s Office will call counsel of record.

III. Admission to Practice and Representation of Counsel

A. General. Unless appointed under federal law, an attorney must be admitted to the Supreme Court Bar to file a document in the Court. See Sup. Ct. R. 9. An application for admission to the Bar may accompany the document being filed. Similarly, an attorney must be a member of the Bar to argue before the Court, unless the Court grants the party’s pro hac vice motion. See Sup. Ct. R. 6. To be admitted to the Bar, the applicant must be admitted to practice in the highest court of a state, territory, or the District of Columbia for at least three years prior to admission and have had no adverse disciplinary action during that time. Two members of the Bar must sponsor the applicant, and there is an admission fee (currently $200). See Sup. Ct. R. 5. The Bar admission form is available on the Court’s website.

B. Admission Pro Hac Vice. An attorney may be permitted to argue pro hac vice if (1) the attorney is not admitted to practice in the highest court of a state, commonwealth, territory or possession, or the District of Columbia for the requisite three years but is otherwise eligible for admission or (2) the attorney is qualified to practice in the highest court of a foreign state. See Sup. Ct. R. 6.1–2. Counsel of record for the party must file a pro hac vice motion, stating concisely the attorney’s qualifications, no later than the date on which the respondent’s brief on the merits is due to be filed. See Sup. Ct. R. 6.3.

C. Appearance of Counsel. The attorney whose name and contact information appears on the cover of the document being filed is considered counsel of record, and no separate notice of appearance is required. See Sup. Ct. R. 9.1. Additional counsel—even if they are not members of the Supreme Court Bar—may be listed on the cover of the document as well, but the attorney who is counsel of record must be clearly identified as such. See id. An attorney representing a party who will not be filing a document may enter with the Court a separate waiver form, see Sup. Ct. R. 9.2, which can be found on the Court’s website.

D. Withdrawal and Substitution of Counsel. An attorney substituting as counsel of record in a particular case must enter a notice of appearance with the Court, see Sup. Ct. R. 9.2, which can be in the form of a letter to the Clerk.

E. Ethical Rules and Standards. An attorney who has been disbarred or suspended from practice in any court of record may not practice before the Supreme Court. See Sup. Ct. R. 8.1. The Court has not articulated unique ethical rules or standards other than a prohibition of “conduct unbecoming a member of the Bar.” Id.

IV. The Appellate Court System

A. Structure. The Court reviews cases from both federal and state courts. Except in rare instances, the Court has discretion whether to review a case, and review “will be
granted only for compelling reasons” and “is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.” Sup. Ct. R. 10. In October Term 2009, for instance, the Court granted certiorari review in only 77 of 8,131 (0.9%) cases it considered. The vast majority of petitions are filed IFP, which are less likely to be granted. Of the 8,131 petitions considered last term, 6,524 were filed by IFP petitioners, as opposed to 1,607 by paying petitioners. The Court granted only 8 IFP petitions (0.12%), whereas it granted 69 paid petitions (4.3%). See The Supreme Court 2009 Term—The Statistics, 124 Harv. L. Rev. 411, 418 (2010).

B. Jurisdiction. The Court has jurisdiction to review lower court decisions under various federal statutes. The most common is certiorari jurisdiction, which gives the Court discretion to review decisions from federal courts of appeals (and, in some instances, district courts) and the highest courts of a state (if the case implicates a federal question). See 28 U.S.C. §§ 1254, 1257. As discussed in part V.D., Congress has granted the Court non-discretionary appellate jurisdiction over certain cases, and the Court also has original jurisdiction under Article III, § 2 of the Constitution, to, among other things, settle controversies between States. See id. § 1251. Because review by writ of certiorari is the most common form of jurisdiction, this chapter will deal primarily with that type. The subject matter of the cases reviewed by the Court varies considerably. In October Term 2009, for instance, the Court issued 87 full opinions in the following subjects: 17 federal or state criminal actions; 11 civil actions involving state or local governments; 23 private civil actions; 6 federal administrative actions; 15 civil actions otherwise involving the federal government; 18 federal habeas corpus actions; and 2 original jurisdiction cases. In addition to the two original jurisdiction cases, 77 of those cases came from federal court while eight originated in state court. See 124 Harv. L. Rev. at 416, 420, 422–26.

C. Certification to or from Other Courts. The Supreme Court has on occasion certified a question to the highest court of a state where the question is “dispositive of the case and is purely a matter of state law.” Elkins v. Moreno, 435 U.S. 647, 668 (1978). The Court also has the power to accept certified questions from the federal courts of appeals under 28 U.S.C. § 1254, the procedures for which are set forth in Rule 19. This mechanism, however, has been used sparingly in the modern era, although former Justice Stevens recently had called for its more frequent use: “The certification process has all but disappeared in recent decades. The Court has accepted only a handful of certified cases since the 1940s and none since 1981; it is a newsworthy event these days when a lower court even tries for certification. Section 1254(2) and this Court’s Rule 19 remain part of our law because the certification process serves a valuable, if limited, function. We ought to avail ourselves of it in an appropriate case.” United States v. Seale, 130 S. Ct. 12, 13 (2009) (statement of Stevens, J., joined by Scalia, J., respecting the dismissal of the certified question).
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V. Commencing the Appeal/Certiorari Process

A. Certiorari Petition. Unless otherwise provided by law, a certiorari petition must be filed with the Clerk of the Court within 90 days after entry of judgment or denial of a petition for rehearing (not 90 days after the lower court issues its mandate). See Sup. Ct. R. 13.1, 13.3. In civil cases, that deadline is jurisdictional. See 28 U.S.C. § 2101(c). A party may file an application to extend this time for good cause, and a justice may extend the deadline for a period not exceeding 60 days. See id.; Sup. Ct. R. 13.5. If there are multiple petitioners, perhaps contemplating the filing of multiple petitions, all petitioners seeking the benefit of an extension must join the application for extension or file one independently. As set forth more fully in Rule 14, the petition must include, among other things, a statement of the question(s) presented; a jurisdictional statement; a statement of the case and facts; and an argument section “amplifying the reasons relied on for allowance of the writ.” The Court stresses that the petition should be concise: “The failure of a petitioner to present with accuracy, brevity, and clarity whatever is essential to ready and adequate understanding of the points requiring consideration is sufficient reason for the Court to deny the petition.” Sup. Ct. R. 14.4. A check for the docket fee (currently $300), a certificate of service, and a certificate of compliance (regarding word limitations and font style) must accompany the petition. See Sup. Ct. R. 29.5, 33.1(h), 38(a). A party also may proceed IFP pursuant to the guidelines set forth in Rule 39. As noted above, however, eight in ten petitions filed are by IFP petitioners, and the Court granted only 0.12 percent of the IFP petitions considered in October Term 2009 (as opposed to 4.3 percent of the paid petitions). See 124 Harv. L. Rev. at 418. The Court has proscribed specific rules regarding the format of the petition, which varies based on whether it is a paid or IFP petition. See Sup. Ct. R. 33–34; see also infra part XI (discussing brief format and citations). The Court also has published helpful guides to filing documents in paid and IFP cases, which can be downloaded from the Court’s website.

B. Cross-Petitions. The rules and deadlines that govern a petition also govern cross-petitions. See Sup. Ct. R. 13.4. A respondent, however, may file a conditional cross-petition (i.e., a cross-petition that will not be considered unless the Court grants the original petition) no more than 30 days after a case has been placed on the docket. See id.; Sup. Ct. R. 12.5. The petition’s cover should clearly state that it is a conditional cross-petition, and the time to file a conditional cross-petition will not be extended. See Sup. Ct. R. 12.5. The other rules for petitions govern conditional cross-petitions. See id.

C. Reasons for Granting Certiorari Review. The Court has set forth three non-exhaustive circumstances it considers important when determining whether to exercise its certiorari jurisdiction:

(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has 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;

(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Sup. Ct. R. 10. The Court further emphasizes that “certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.” Id. Stern & Gressman explores at length these factors and others that motivate the exercise of the Court’s certiorari jurisdiction, and that discussion should be consulted before filing a certiorari petition. See Stern & Gressman, ch. 4.

In a nutshell, unless the court below “has so far departed from the accepted and usual course of judicial proceedings,” the Supreme Court generally will not exercise its certiorari jurisdiction merely to correct errors. The Court has been most willing to engage in error correction when a government entity is the petitioner, when a death sentence is involved, when the petition involves an issue of national importance (e.g., a law has been declared unconstitutional), or an extraordinarily large amount of money is at stake. In most cases, however, the critical factor motivating the Court’s exercise of discretion is whether the decision below conflicts with the decision(s) of other federal courts of appeals or of the highest state courts on an important issue of federal or constitutional law. The deeper the split, the more likely it is the Court will take the case. Accordingly, while the petition should outline the errors in the lower court’s opinion, it should focus primarily on how the question presented has created a genuine division among the lower courts and how that split has nationwide implications for the uniform application of the law. Perhaps the best way to approach this task is to demonstrate, using published decisions from other courts, how the outcome of the case at issue would have been different had the case been brought in another circuit (or state). Counsel should be scrupulous not to overstate the conflict, as poor or disingenuous lawyering alone can be reason to deny certiorari. See Sup. Ct. R. 14.4. If the split of authority is not square, a petition can describe confusion among lower courts and contend that the lower court here “has decided an important question of federal law that has not been, but should be, settled by this Court.” Sup. Ct. R. 10(c). On questions where a particular court, such as the Federal or D.C. Circuit, has exclusive jurisdiction over a subject matter, the likelihood of a circuit split is low or nonexistent. In such cases, the Court will take that factor into consideration and focus on the national importance of the question(s) presented and the likelihood that the court below reached the wrong conclusion.

D. Appellate Jurisdiction. In a few circumstances, the Court still engages in plenary review through non-discretionary appellate jurisdiction conferred in specific situations by Congress. One example is the Voting Rights Act of 1965, in which Congress has provided for direct review from a three-judge court directly to the Supreme Court. See 42 U.S.C.
Another example arises in cases in which Congress seeks to have the constitutionality of an act of Congress decided quickly by the Supreme Court. See, e.g., Clinton v. City of New York, 524 U.S. 417 (1998) (reviewing constitutionality of the Line Item Veto Act of 1996 under 2 U.S.C. § 692 (Supp. II 1996)); Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622 (1994) (same for Cable Television Consumer Protection and Competition Act of 1992 under 47 U.S.C. § 555(c)(1)); United States v. Eichman, 496 U.S. 310 (1990) (same for Flag Protection Act under 18 U.S.C. § 700(d)). Although those circumstances are now quite rare, counsel should be mindful of them, as the time for filing a notice of appeal is jurisdictional and may not be extended. See Sup. Ct. R. 18.1. (The filing of a jurisdictional statement, however, may be extended. See Sup. Ct. R. 18.3.) Notwithstanding the seeming “mandatory” nature of the Court’s jurisdiction, counsel for the aggrieved party must still file a jurisdictional statement—no more than 60 days after filing the notice of appeal—asking the Court to “note” its jurisdiction. See Sup. Ct. R. 18.3. In such filings, counsel must explain why jurisdiction is proper, in addition to the reasons why the case is important for the Court to review and the decision below deviates from the decisions of other courts and the Supreme Court. The procedures for seeking review in these circumstances are set forth in Rule 18. See generally Stern & Gressman §§ 2.9–2.11 & ch. 7.

E. Alternative Forms of Relief. In addition to seeking plenary certiorari review, a party may request several alternative forms of relief. First, a common practice at the Court is to grant, vacate, and remand (“GVR”) a petition in light of an intervening decision. Typically, this relief is granted in cases decided before an intervening Supreme Court precedent, but it also may be utilized if the intervening decision came down shortly before the lower court’s decision and thus the court below did not have an opportunity to consider it. See, e.g., Webster v. Cooper, 130 S. Ct. 456, 456-57 (2009) (Scalia, J., dissenting from GVR order) (explaining the Court’s GVR practice). The Court also has used its GVR power to allow for further consideration in the court below based on a position asserted by the Solicitor General in response to a certiorari petition. See, e.g., Watts v. United States, 130 S. Ct. 1134 (2010) (mem.). Second, a party can request that the Court summarily reverse (or affirm, if the party seeking such relief is the respondent) the decision below under Rule 16.1. As Stern & Gressman notes, “[i]f the Supreme Court considers the decision below to be clearly wrong but not worthy of oral argument, it may summarily dispose of the case as suggested.” Stern & Gressman § 5.12(c)(7)(d). In other words, if the opinion below does not create a circuit split but is nevertheless clearly incorrect on an important issue (in particular, one that the Court has addressed recently), a request for summary reversal might be appropriate. A summary decision is not a common occurrence, however. By May 2010, the Court had summarily reversed in three cases in October Term 2010, whereas in the previous two terms the Court summarily reversed in only eight and four cases, respectively.

F. Docketing Statement. No separate docketing statement is required or issued.
**G. Bonds and Stays.** A party seeking review of a judgment may file an application to stay the judgment pending review under Rule 23. “A judge, court, or Justice granting an application for a stay pending review by this Court may condition the stay on the filing of a supersedeas bond having an approved surety or sureties.” Sup. Ct. R. 23.4. The standard is exacting: “To obtain a stay pending the filing and disposition of a petition for a writ of certiorari, an applicant must show (1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay. In close cases the Circuit Justice or the Court will balance the equities and weigh the relative harms to the applicant and to the respondent.” *Hollingsworth v. Perry*, 130 S. Ct. 705, 709-10 (2010) (per curiam). Except in extraordinary circumstances, the Court will not grant a stay unless such relief was first requested in the appropriate lower court. *See* Sup. Ct. R. 23.3.

**H. Other Initial Documents.** Along with its petition, the party seeking review must submit a certificate of service, *see* Sup. Ct. R. 29.5; a certificate of compliance, *see* Sup. Ct. R. 33.1(h); and an appendix that includes the decisions under review and “any other material the petitioner believes essential to understand the petition,” Sup. Ct. R. 14.1(i).

**I. Docketing of the Petition.** The petition will be placed on the Court’s docket after a fully compliant petition is received by the Clerk of the Court. *See* Sup. Ct. R. 12.3. It is then “the petitioner’s duty to notify all respondents promptly, on a form supplied by the Clerk, of the date of filing, the date the case was placed on the docket, and the docket number of the case. The notice shall be served as required by Rule 29.” *Id.*

**J. Response in Opposition to the Petition.** A respondent may file a brief in opposition, although it is not required to do so except in a capital case. *See* Sup. Ct. R. 15.1. The brief must be filed within 30 days after the case is docketed, and that time may be extended upon request. *See* Sup. Ct. R. 15.3. The brief should address the reasons for denying the petition, such as the lack of a deep conflict among lower courts or the fact that the petition is not a suitable vehicle to resolve the question(s) presented. The Court has underscored that “[a]ny objection to consideration of a 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.” Sup. Ct. R. 15.2. The brief need not include a summary of the argument section, or many of the other sections required in the petition “unless the respondent . . . is dissatisfied with their presentation by the opposing party.” Sup. Ct. R. 15.3, 24.2. The petitioner may file a reply to “address[] new points raised in the brief in opposition.” Sup. Ct. R. 15.6. There is no due date *per se* for a reply brief at the certiorari stage, but reply briefs are generally filed on or before the date the petition and brief in opposition are distributed to the Court, which typically occurs the first Wednesday no fewer than 10 days after the brief in opposition is filed. *See* Sup. Ct. R. 15.5. The Court’s website has a link to its “Case Distribution Schedule” (under the “Docket” section), which lists the dates of distribution and corresponding conferences dates.
A respondent need not file a brief in opposition and, indeed, can expressly waive the right to file a brief on a form available on the Court’s website. Such waiver expedites consideration of the petition. See Sup. Ct. R. 15.5. Because the Court typically requests a response if a member of the Court has interest in the petition, see Stern & Gressman § 6.37(k), it often is prudent and more cost-effective to forgo filing a response unless requested to do so by the Court. Indeed, the respondent’s counsel should weigh carefully whether the filing of a response (except to identify a jurisdictional defect or other serious vehicle problem) signals to the Court that the petition should receive a closer look than one where the respondent has waived or otherwise not submitted a brief in opposition. Considerations that counsel in favor of filing a brief in opposition without being first requested to do so include the court below acknowledged a conflict with another federal circuit or another court of last resort; the decision below has been cited by other courts as in conflict with other courts; several amicus curiae briefs have been filed supporting the certiorari petition; and the Solicitor General or a state is the petitioning party.

K. Reasons for Denying Certiorari Review. If the Court does order a response or a party otherwise decides to file a brief in opposition *sua sponte*, the brief should be short and focus on why the case does not warrant review by the Court. In addition to arguing that the decision below is correct, an effective response should emphasize, where applicable, the absence of a real conflict among lower courts and that the petition amounts to a request for error correction of a highly fact-bound decision. It is helpful if the Court has recently and repeatedly denied review in other cases where the question was presented, and the response should cite those denials. Similarly, the response should explain why the alleged circuit split does not warrant plenary review by the Court at the present time. A number of well-established reasons are proffered for why the Court should deny certiorari. First, the alleged split may be illusory or otherwise not implicated by the petition. Second, a split may involve a “shallow” conflict among a limited number of courts, in which case the Court might wait for additional lower courts to consider and weigh in on the question. Third, the split may entail a “lopsided” conflict with a large number of circuits on one side and only one or two on the other, in which case the minority circuit(s) could reverse course en banc. Fourth, the conflict may be “stale,” meaning that the lower courts have not applied the opposing view in a long time and thus may not do so again. Finally, the split may otherwise concern a question of limited or diminishing importance that would not merit the Court’s time and resources.

Moreover, the response should identify the reasons why the particular petition is not a suitable vehicle to address the question presented even if there is a legitimate and cert-worthy conflict. Such vehicle problems may include potential jurisdictional defects, alternative grounds for affirmance (such as an alternative holding by the lower court), the interlocutory posture of the case, the case’s unique facts that would inhibit the Court from resolving the conflict, the lack of a well-reasoned (or published) opinion on the question presented, the failure to raise the question presented below, and the fact that the petitioner would not prevail on the merits even if the Court ruled in its favor on the question presented. In cases on review from state courts, the Court also will be inclined to deny certiorari when there is an independent and adequate state ground for the decision or where there is no substantial
federal question. See Stern & Gressman ch. 3. When drafting a brief in opposition, the Solicitor General’s website (http://www.justice.gov/osg) is a terrific resource, as it contains the responses the federal government has filed in paid cases over the last decade.

L. Intervention in Pending Cases. The Attorney General (on behalf of the United States) has a statutory right to intervene in any case “wherein the constitutionality of any Act of Congress affecting the public interest is drawn into question.” 28 U.S.C. § 2403(a). The same rule applies for the Attorney General of any state where “the constitutionality of any statute of that State affecting the public interest is drawn into question.” Id. § 2403(b). Intervention by other interested parties in a case pending before the Court is not provided explicitly by statute or the Court’s rules. Interested parties, however, may file amicus curiae briefs at both the certiorari and the merits stages. See Sup. Ct. R. 37; infra part XIV. Such briefs that further explain the far-reaching implications of the lower court’s decision, the exceptional importance of the issue, or the effects of the resulting confusion among lower courts can be helpful in getting a petition granted.

M. Calling for the Views of the Solicitor General. When a petition presents a question of federal or constitutional law or otherwise affects the federal government—yet the federal government is not a party—the Court may issue an order inviting the Solicitor General to provide views on the case before the Court finalizes its determination whether to grant or deny the petition. Such an order, referred to colloquially as a “CVSG” for “Call for the Views of the Solicitor General,” occurs several dozen times per term. See, e.g., AT&T Pension Benefit Plan v. Call, 552 U.S. 805 (2007) (CVSG order). SCOTUSblog (http://www.scotusblog.com) tracks all CVSG orders for the current term. In the Solicitor General’s Office, a CVSG order is referred to as an “invitation,” because the Court styles its order as “inviting” the views of the Solicitor General. By custom, the Court does not impose a time limit, but the Solicitor General traditionally has filed invitation briefs at three critical times during the term: in the August/September time frame when the Court is acting on a large number of petitions that have built up over the summer for decision in the order lists at the beginning of the Court’s term; in December, so that the Court can decide whether to grant those cases for briefing and argument by the last argument session in April; and in May, when the Court can act on the petitions in June before it recesses for the summer.

Counsel must take a CVSG order seriously, as such an order requires the vote of four justices. See Medellin v. Texas, 554 U.S. 759, 765 (2008) (Breyer, J., dissenting). And the Court follows the Solicitor General’s recommendation a high percentage (but by no means all) of the time. See Conkright v. Frommert, 129 S. Ct. 1861, 1862 (2009) (mem.) (Ginsburg, J., denying renewed request for stay) (“CVSG’d petitions, it is true, are granted at a far higher rate than other petitions.”); see also David C. Thompson & Melanie F. Wachtell, An Empirical Analysis of Supreme Court Certiorari Petition Procedures: The Call for Response and the Call for the Views of the Solicitor General, 16 Geo. Mason L. Rev. 237, 273–74 (2009) (analyzing CVSG orders from 1998 to 2004 and finding that a petition is 37 times more likely to be granted following a CVSG and that the Court grants more petitions following a CVSG than the Solicitor General recommends should be
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granted). After the Court issues a CVSG order, the Solicitor General will notify interested governmental components to seek their views. A process of informal lobbying ensues, in which counsel for both sides have an opportunity to meet with agency counsel or the relevant appellate staff of the Department of Justice component handling the case, and then to meet with lawyers in the Office of the Solicitor General. Typically, a Deputy Solicitor General will chair such a meeting, and it will include an Assistant to the Solicitor General and other counsel from the government. In preparing the government’s invitation brief, the Solicitor General assesses whether the decision below was correct, whether the judgment is in conflict with other courts, whether federal interests are at stake and are affected by the decision below, and whether the case presents a suitable vehicle for the Court’s resolution of the question(s) presented.

VI. Record Composition and Transmittal

A. Form of Record. “If the record, or stipulated portions, have been printed for the use of the court below, that printed record, plus the proceedings in the court below, may be certified as the record unless one of the parties or the Clerk of this Court requests otherwise.” Sup. Ct. R. 12.7. The record typically consists of certified copies, but the court below also may transmit original documents if it determines that the Court should review the originals. Id.

B. Requesting, Selecting, Compiling, and Transmitting the Record. The parties should not request that the record be transmitted. Instead, the Clerk of the Court will make that request directly to the court below either during the certiorari stage, see Sup. Ct. R. 12.7, or once certiorari is granted, see Sup. Ct. R. 16.2.

C. Transcripts and Trial Exhibits. The parties may and should include relevant exhibits and transcripts in the joint appendix. See Sup. Ct. R. 26.6; see also infra part XIII.

D. Lodging Non-Record Material. Rule 32.3 requires that “[a]ny party or amicus curiae desiring to lodge non-record material with the Clerk must set out in a letter, served on all parties, a description of the material proposed for lodging and the reasons why the non-record material may be properly considered by the Court. The material proposed for lodging may not be submitted until and unless requested by the Clerk.” Lodged materials generally consist of official documents—e.g., agency or legislative materials—that can be deemed useful as background and of which the justices could take judicial notice.

VII. Appellate Mediation or Conference Programs

The Supreme Court does not offer a mediation or conference program, although it is not uncommon for the parties to settle the case at various stages of the proceeding and thus seek dismissal pursuant to Rule 46.1. See, e.g., Health Care Serv. Corp. v. Pollitt, 130 S.
Ct. 1574 (2010) (dismissing petition pursuant to Rule 46.1 on the day the petitioner’s merits reply brief was due); Doe v. Kamehameha Sch., 550 U.S. 931 (2007) (dismissing petition pursuant to Rule 46.1 prior to the Court’s consideration of the certiorari petition); Altadis USA, Inc. v. Sea Star Line, LLC, 549 U.S. 1189 (2007) (dismissing petition pursuant to Rule 46.1 on the day the petitioner’s opening merits brief was due); Lewis v. Brunswick Corp., 523 U.S. 1113 (1998) (dismissing petition pursuant to Rule 46.1 after argument on the merits).

VIII. Filing and Service Requirements

A. Filing and Electronic Submission. A document is deemed filed on the date it is received by the Clerk. If mailed through the U.S. Postal Service via first-class mail, a document is deemed filed based on the date on the USPS postmark (a commercial meter postmark is not acceptable). See Sup. Ct. R. 29.2. That postmark rule, however, has certain exceptions. See, e.g., Sup. Ct. R. 33.1(d) (same for applications for leave to exceed word limits); Sup. Ct. R. 28.3–4 (motions for additional argument time or divided argument must be received by the Clerk within a specified timeframe). Merits briefs (including amicus curiae briefs on the merits) also must be sent to the Clerk via e-mail in text-searchable PDF format to meritsbriefs@supremecourt.gov, pursuant to the guidelines set forth in Electronic Submission of Briefs on the Merits, which can be downloaded from the “Court Rules” section of the Court’s website. See Sup. Ct. R. 25.8, 37.3(a).

B. Service. A document required to be served under the Court’s rules may be served personally, by mail, or by third-party commercial carrier for delivery within three days after being filed on each party to the proceeding at the time of the filing. See Sup. Ct. R. 29.3. Moreover, if the federal government or any of its agencies, officers, or employees is party to the suit, the filing party must serve the Solicitor General in addition to the agency, officer, or employee. See Sup. Ct. R. 29.4(a). Similarly, if the proceeding implicates the constitutionality of a federal or state statute yet the federal or state government is not a party, the initial document filed in the Court should indicate this potential constitutional question and should be served on the U.S. Solicitor General or state attorney general, respectively. See Sup. Ct. R. 29.4(b)–(c). Merits briefs (including amicus curiae briefs on the merits) also must be sent via e-mail in text-searchable PDF format to counsel of record for the parties. See Sup. Ct. R. 25.8, 37.3(a).

IX. Motions

A. Motions in General. A motion or application must be concise, clearly state its purpose, and include all relevant facts and legal argument. No separate brief may be filed. See Sup. Ct. R. 21.1. The number of copies varies based on the relief sought. A response, if any, should be filed as promptly as possible considering the nature of the relief sought and no later than 10 days after receipt of the motion. See Sup. Ct. R. 21.4. Applications
or motions arising in cases from state or federal courts within a particular circuit should be addressed to the appropriate circuit justice. See Sup. Ct. R. 22. The Clerk of the Court has provided additional guidance (and listed the circuits assigned to each justice) in A Reporter’s Guide to Applications Pending Before the Supreme Court of the United States, a publication downloadable from the “Public Information” section of the Court’s website.

B. Application for Extension of Time. A party may file an application for an extension of time within which to file a certiorari petition under Rule 13.5. The application “shall set out the basis for jurisdiction in this Court, identify the judgment sought to be reviewed, include a copy of the opinion and any order respecting rehearing, and set out specific reasons why an extension of time is justified.” Sup. Ct. R. 13.5. Except in extraordinary circumstances, the application must be filed with the Clerk at least 10 days before the petition is due. See id. While “[a]n application to extend the time to file a petition for a writ of certiorari is not favored,” the circuit justice has discretion to extend the deadline for a period not exceeding 60 days. Id.; see also 28 U.S.C. § 2101(c). Requests for an initial 30-day extension often are granted when good cause is demonstrated, although grant rates and the number of additional days permitted vary depending on which justice considers the request. Similar rules apply to applications for extension of time as to other filings. See Sup. Ct. R. 30.2-4.

C. Application for Extension of Length. “For good cause, the Court or a Justice may grant leave to file a document in excess of the word limits, but application for such leave is not favored.” Sup. Ct. R. 33.1(d). Except in extraordinary circumstances, such applications must be received by the Clerk at least 15 days before the filing date of the document. See id.

D. Application to Stay Pending Appeal. See supra part V.G.

E. Emergency Applications. Emergency applications—including applications for a stay—are governed by the normal application and stay rules. See supra parts V.G, IX.A. The moving party should detail the “asserted need for emergency action” in its application, Sup. Ct. R. 21.4, and the Clerk will coordinate the Court’s expedient review of the application.

F. Application for Reconsideration. If a justice denies an application (except for an application for an extension of time), the party may renew that application with another justice by sending a letter to the Clerk of the Court accompanied by 10 copies of the original application. See Sup. Ct. R. 22.4.

X. Briefing Schedule

A. Rules and Scheduling Orders. As a general matter, and except as provided by order in expedited cases, the deadlines for briefing at the merits stage are set by Rule
25: The petitioner’s opening brief is due within 45 days after entry of the order granting certiorari review; the respondent’s brief is due within 30 days after the petitioner’s brief is filed; and the petitioner’s reply brief, if any, is due within 30 days after the respondent’s brief is filed, but in no event may be filed later than 2:00 p.m. 7 days before the date of oral argument. See Sup. Ct. R. 25.1-.3.

B. Cross-Petitions. If cross-petitions are consolidated for argument, the Clerk will coordinate a joint-briefing plan with the parties. See Sup. Ct. R. 25.4.

C. Briefing with Deferred Records or Appendixes. “Deferral of the joint appendix is not favored.” Sup. Ct. R. 26.4. If the parties request, the Court may allow preparation of a deferred joint appendix under Rule 26. Under a deferred joint appendix arrangement, the petitioner must file the joint appendix no later than 14 days after receiving the respondent’s brief. The parties must then file updated briefs that include references to the joint appendix within 10 days after the joint appendix is filed. See id.

XI. Brief Format and Citations

A. Physical Requirements. Certiorari petitions and merits briefs must comply with the requirements set forth in Rules 24, 33, and 34. In particular, briefs in paid cases must be filed in 6 1/8 x 9 1/4-inch booklet format using a standard typesetting format, with a 4 1/8 x 7 1/8-inch text field. See Sup. Ct. R. 33.1(a)–(c). The Court is quite particular on font type and size, paper quality and color, and binding, and those rules are spelled out in detail in Rule 33. Rule 33.1(g) provides a table that details the word limits and cover color for each type of brief. The word limits include only the substance of the brief—i.e., all of the text, including footnotes, following the tables of contents and cited authorities through the “Conclusion” paragraph, excluding the preliminary sections of the brief. See Sup. Ct. R. 33.1(d). Regardless of the type of brief in paid cases, 40 copies of a booklet-format brief must be filed. See Sup. Ct. R. 33.1(f). In IFP cases, only the original and 10 copies of the certiorari petition (along with the original and 10 copies of the motion for leave to proceed IFP) must be filed, see Sup. Ct. R. 12.2; “the briefs on the merits submitted by [appointed] counsel, unless otherwise requested, shall be prepared under the Clerk’s supervision,” Sup. Ct. R. 39.6.

B. Citation Form Rules and Conventions. The Court does not prescribe any particular rules for citations, although the Court’s opinions generally follow the conventions set forth in The Bluebook with some exceptions. Stern & Gressman provides some additional guidance. See Stern & Gressman § 13.6.

C. Citable Authorities. The Court has not instituted a rule that prohibits the citation of any source.
XII. Merits Brief Contents

A. Brief for the Petitioner. “A brief shall be concise, logically arranged with proper headings, and free of irrelevant, immaterial, or scandalous matter. The Court may disregard or strike a brief that does not comply with this paragraph.” Sup. Ct. R. 24.6. As discussed supra in part II.B, merits briefs from the last four terms are available in PDF format on SCOTUSblog (http://www.scotusblog.com). Those briefs can provide useful guidance as to the form, format, and, to some degree, substance of the merits briefs. The following sections must be included in the petitioner’s opening brief on the merits:

1. Question(s) Presented. The question(s) presented for review in the certiorari petition must be set out on the first page following the cover. Each question need not be identical to the one presented at the certiorari stage, but the parties may not add questions or change a question’s substance unless the Court so orders. See Sup. Ct. R. 24.1(a).

2. List of Parties. If the caption of the case does not include all of the parties, the parties must be listed on the page following the question(s) presented, along with an amended corporate disclosure statement, if necessary, under Rule 29.6. See Sup. Ct. R. 24.1(b).

3. Tables. A table of contents and a table of cited authorities must be included in any brief that exceeds five pages. See Sup. Ct. R. 24.1(c).


5. Jurisdictional Statement. This section must state concisely the basis for the Court’s jurisdiction, including the relevant statutory provisions and timeliness considerations. See Sup. Ct. R. 24.1(e).

6. Constitutional, Statutory, and Regulatory Provisions. This section must set forth verbatim, with appropriate citations, the constitutional provisions, statutes, treaties, ordinances, and regulations at issue in the case. If these authorities are long (i.e., spanning several pages), they should be set forth in an appendix. If they were already included with the certiorari petition or an appendix thereto, they need not be repeated here. See Sup. Ct. R. 24.1(f).

7. Statement of the Case. This section should “set[] out the facts material to the consideration of the question presented, with appropriate references to the joint appendix.” Sup. Ct. R. 24.1(g).

8. Summary of the Argument. This section should provide “a clear and concise condensation of the argument made in the body of the brief.” Sup. Ct. R. 24.1(h). It should not be a mere repetition of the topical headings of the argument section. See id.


10. **Conclusion.** The conclusion should articulate concisely the relief requested. *See* Sup. Ct. R. 24.2(j).

**B. Response and Reply Briefs.** The respondent’s brief follows a similar format, but need not include the Question(s) Presented; List of Parties; Opinions Below; Jurisdictional Statement; Constitutional, Statutory, and Regulatory Provisions; or Statement of the Case “unless the respondent or appellee is dissatisfied with their presentation by the opposing party.” Sup. Ct. R. 24.2. The petitioner’s reply brief must follow the same rules as the respondent’s brief, except that it need not include a summary of the argument “if appropriately divided by topical headings.” Sup. Ct. R. 24.4.

**C. Cross-Petitions.** If cross-petitions are consolidated for argument, the Clerk may coordinate a joint-briefing plan with the parties. *See* Sup. Ct. R. 25.4.

**XIII. Joint Appendix and Designations of Record**

**A. Process for Compiling.** “The parties are encouraged to agree on the contents of the joint appendix.” Sup. Ct. R. 26.2. If the parties cannot agree, the petitioner must serve on the respondent its designated parts of the record within 10 days after entry of the order granting certiorari. The respondent then has 10 days to designate additional parts of the record. The petitioner is responsible for preparing the joint appendix and must include all designated parts. *See* id.

**B. Content and Format.** “The joint appendix shall contain: (1) the relevant docket entries in all the courts below; (2) any relevant pleadings, jury instructions, findings, conclusions, or opinions; (3) the judgment, order, or decision under review; and (4) any other parts of the record that the parties particularly wish to bring to the Court’s attention.” Sup. Ct. R. 26.1. The appendix need not include anything that already has been reproduced in prior filings in the Court. *Id.* “The record is on file with the Clerk and available to the Justices, and counsel may refer in briefs and in oral argument to relevant portions of the record not included in the joint appendix.” Sup. Ct. R. 26.2.

**C. Filing Procedures.** The petitioner must file 40 copies of the joint appendix and serve three copies on each of the other parties within 45 days after entry of the order granting certiorari review. *See* Sup. Ct. R. 26.1. Part X.C *supra* discusses the procedures for filing a deferred joint appendix. The petitioner also must file with the Clerk and serve on each of the other parties a statement of the cost of printing 50 copies of the joint appendix. *See* Sup. Ct. R. 26.3.
XIV. Amicus curiae Practice

A. Participation as of Right or by Motion. An amicus curiae brief may be filed at both the certiorari and the merits stages—either if accompanied by the written consent of all parties or by a motion for leave to file. See Sup. Ct. R. 37.2(a), 37.3(a). It is not uncommon, at either the certiorari stage or more frequently the merits stage, for the parties to submit a letter to the Clerk granting consent to the filing of amicus briefs from any person or entity. That practice does not, however, obviate the need for the amicus curiae at the certiorari stage to provide notice of their intention to file a brief 10 days before it is due. See Sup. Ct. R. 37.2(a). A motion for leave to file an amicus brief is to be filed and bound together with the brief itself, see Sup. Ct. R. 37.2(b), 37.3(b), and may not exceed 1,500 words, see Sup. Ct. R. 37.5. No motion for leave (or consent of the parties) is required if the amicus brief is presented on behalf of the United States by the Solicitor General, on behalf of a federal agency by the agency’s legal representative, on behalf of a state by its Attorney General, or on behalf of a city, county, or similar governmental entity when submitted by its authorized legal representative. See Sup. Ct. R. 37.4. The amicus curiae may not file either a reply brief or a brief in support of rehearing. See Sup. Ct. R. 37.3(a).

B. Timing. At the certiorari stage, counsel for amicus curiae must notify all parties in writing of an intention to file at least 10 days before the brief’s due date unless the amicus brief is filed earlier than 10 days before it is due. See Sup. Ct. R. 37.2(a). An amicus brief in support of the petitioner at the certiorari stage must be filed within 30 days after the case is docketed or the Court calls for a response, whichever is later. See id. An amicus brief in support of the respondent at the certiorari stage is due on the same day as the respondent’s brief in opposition. See id. At the merits stage, an amicus brief must be filed within seven days after the brief for the party supported is filed or, if the amicus brief supports neither party, within seven days after the petitioner’s brief is filed. See Sup. Ct. R. 37.3(a).

C. Content and Format. “An amicus curiae brief that brings to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help to the Court. An amicus curiae brief that does not serve this purpose burdens the Court, and its filing is not favored.” Sup. Ct. R. 37.1. The brief should follow the rules for briefs filed by the parties discussed supra in parts XI and XII—e.g., filed in booklet format—“except that it suffices to set out in the brief the interest of the amicus curiae, the summary of the argument, the argument, and the conclusion.” Sup. Ct. R. 37.5. The amicus curiae must file a proof of service, see id., and must disclose in the first footnote on the first page of text whether the parties have consented to the filing of the brief, see Sup. Ct. R. 37.2(a), 37.3(a), and “whether counsel for a party authored the brief in whole or in part and whether such counsel or a party made a monetary contribution intended to fund the preparation or submission of the brief, and shall identify every person other than the amicus curiae, its members, or its counsel, who made such a monetary contribution.” Sup. Ct. R. 37.6. For an amicus brief at the certiorari stage, the footnote disclosure also must confirm that the parties were given notice of the amicus curiae’s intention to file a brief. See Sup. Ct. R. 37.2(a). As is the rule for all merits briefs, an amicus brief on the
merits must be submitted and served electronically. See Sup. Ct. R. 37.3(a); supra part VIII.A–B.

D. Responses to Amicus curiae Briefs. If a party opposes the filing of the amicus brief, it may file an objection, “stating concisely the reasons for withholding consent.” Sup. Ct. R. 37.5. Otherwise, the party’s only opportunity to respond to the amicus brief is in its own brief.

E. Oral Argument. Amicus curiae who have filed a brief may, with leave of the Court and consent of the party supported, argue orally on the side of a party. See Sup. Ct. R. 28.7. Typically, counsel for amicus curiae will share the allotted time provided to the party supported. If the party does not consent, amicus curiae may move for leave to argue, although “[s]uch a motion will be granted only in the most extraordinary circumstances.” Id.

XV. Supplemental Authorities

A. Submission as of Right or by Motion. Any party may file a supplemental brief at any time while the certiorari petition is pending or, for merits cases, at any time before the case is called for oral argument. See Sup. Ct. R. 15.8, 25.6. After a case is called for argument, however, supplemental briefs may be submitted only by leave of the Court. See Sup. Ct. R. 25.6–7.

B. Content and Format. The supplemental brief’s purpose is to “call[] attention to new cases, new legislation, or other intervening matter not available at the time of the party’s last filing.” Sup. Ct. R. 15.8 (certiorari stage); see Sup. Ct. R. 25.6 (same, merits stage). Accordingly, the brief must be “restricted to new matter and shall follow, insofar as applicable, the form for a brief in opposition.” Sup. Ct. R. 15.8 (certiorari stage); see Sup. Ct. R. 25.6 (similar, merits stage). Forty copies must be filed, and, if it is a supplemental brief on the merits, it also must be filed and served electronically. See Sup. Ct. R. 26.9; supra part VIII.A–B.

XVI. Oral Argument

A. Argument as of Right or by Motion; Waiver. Unless a petition is disposed of summarily, the Clerk will calendar a granted petition for oral argument and notify the parties when they are required to appear for argument. See Sup. Ct. R. 27. Only one attorney will be heard from each side, except by leave of Court, and argument will not be allowed on behalf of a party that did not file a brief in the case. See Sup. Ct. R. 28.4–6. The Court has no rules regarding waiver of argument, although it is difficult to imagine an attorney passing up the opportunity to argue in the Supreme Court.
B. The Day of Argument. The Court begins its term in October of each year, and it holds several argument sittings per term. During a sitting, the Court typically hears two cases per day starting at 10:00 a.m. Argument in each case is generally slotted for one hour, divided equally between the parties. A party may seek additional time, but “[a]dditional time is rarely accorded.” Sup. Ct. R. 28.3. Unless a justice is recused or otherwise unavailable, all nine justices will participate in the argument. The Clerk’s Office has published a 20-page handbook entitled Guide for Counsel in Cases To Be Argued Before the Supreme Court of the United States, which can be downloaded from the “Oral Arguments” section of the Court’s website and provides extensive guidance for attorneys preparing to argue before the Court. Additional helpful guides to preparing for oral argument are Stern & Gressman, ch. 14; David C. Frederick, Supreme Court and Appellate Advocacy: Mastering Oral Argument (West, 2d ed. 2010).

XVII. Decisions

A. Internal Procedures for Disposing of Cases. After oral argument in a case, the justices confer to discuss their views and to cast a preliminary vote. The most senior justice in the majority designates one of the justices in the majority to author the opinion. The assigned justice will circulate a draft of the opinion to the Court, and each justice will indicate whether he or she joins the opinion, has any suggested revisions, or intends to write separately. Separate dissenting and concurring opinions circulate in due time, and changes are made to the opinions in response. Once each justice has joined one of the opinions and the opinions are finalized, the case will be announced in open court at one of the Court’s sittings. Traditionally, the author of the controlling opinion will read the Court’s decision (in summary fashion). On occasion, a justice will express the views of the dissenting or concurring opinion in open court. Except in rare circumstances, opinions in all cases argued during a particular term are issued before the Court recesses for that term in June. But see Citizens United v. FEC, 130 S. Ct. 876, 888 (2010) (noting that the case was reargued after additional briefing in September and decided the following term). The Clerk releases the written bench opinion immediately after its announcement in open court. See Sup. Ct. R. 41. The opinion is posted on the Court’s website shortly thereafter.

B. Published or Unpublished Decisions. All opinions are published, first as slip opinions by the Court’s Reporter of Decisions, then in the Supreme Court preliminary prints, and finally in the United States Reports. West publishes Supreme Court opinions in the Supreme Court Reporter after they are first published by the Court as slip opinions.

XVIII. Motions for Rehearing

A. Grounds. “A petition for rehearing is not subject to oral argument and will not be granted except by a majority of the Court, at the instance of a Justice who concurred in the judgment or decision.” Sup. Ct. R. 44.1. Rehearing is seldom granted. For instance,
not one of the 580 and 577 rehearing petitions filed in the October 2002 and 2003 Terms, respectively, was granted, and all 710 rehearing petitions filed in the October 2005 Term were denied, with only a single call for a response. See Stern & Gressman § 15.5. When rehearing has been granted, it is usually to vacate a denial of certiorari and remand in light of an intervening decision. See id. One of the rare circumstances in which rehearing has been granted for plenary certiorari review was Boumediene v. Bush, 551 U.S. 1160 (2007).

B. Briefing. A rehearing petition must be filed within 25 days after the date of the Court’s judgment on the merits or denial of certiorari, see Sup. Ct. R. 44.1, 44.2, and accompanied by a filing fee (currently $200), see Sup. Ct. R. 38(b). It “shall state its grounds briefly and distinctly” and shall be accompanied by a certification from counsel that it is being filed “in good faith and not for delay.” Sup. Ct. R. 44.1. With respect to rehearing of an order denying certiorari, the rehearing petition’s “grounds shall be limited to intervening circumstances of a substantial or controlling effect or to other substantial grounds not previously presented.” Sup. Ct. R. 44.2. No response may be filed unless the Court requests one, see Sup. Ct. R. 44.3, and no amicus briefs may be filed, see Sup. Ct. R. 44.5. “In the absence of extraordinary circumstances, the Court will not grant a petition for rehearing without first requesting a response.” Sup. Ct. R. 44.3; see, e.g., Kennedy v. Louisiana, 129 S. Ct. 27 (2008) (inviting the parties and the Solicitor General to file supplemental briefing on whether rehearing should be granted).

XIX. Costs and Attorneys’ Fees

A. Taxable costs. The only taxable costs in the Supreme Court are the Clerk’s fees and the cost of printing the joint appendix. Expenses for printing documents filed in the Court are not taxable. The cost of the transcript of the record below is taxable in the lower court as costs in the case. See Sup. Ct. R. 43.3. “In extraordinary circumstances the Court may adjudge double costs.” Sup. Ct. R. 43.7.

B. Other Recoverable Expenses. There are no other expenses that are recoverable in the Supreme Court except for certain expenses of counsel appointed in IFP cases under Rule 39.

C. Attorneys’ Fees. When provided by law, attorneys’ fees may be recovered by the prevailing party; typically, that request is made to the court below on remand from the Supreme Court. The Court, however, does have the power under 28 U.S.C. § 1927 to award fees incurred as a result of unreasonable and vexatious delay or multiplication of proceedings before it, but the Court has yet to exercise that power. See Stern & Gressman § 15.10.
XX. Further Appellate Review in Multi-Level Systems

There is no further review in the United States beyond the Supreme Court.

XXI. Mandate

A. Issuance. In cases on review from state court, the mandate issues 25 days after entry of judgment, unless shortened or lengthened by the Court or a justice. See Sup. Ct. R. 45.2. In cases on review from a lower federal court, a formal mandate does not issue unless specifically directed. Instead, the Clerk of the Court will send the clerk of the lower court a copy of the opinion and a certified copy of the judgment, which includes any costs awarded. See Sup. Ct. R. 45.3.

B. Stay or Recall of Mandate. A petition for rehearing stays the mandate. Once the rehearing petition is denied, the mandate will issue forthwith. See Sup. Ct. R. 45.2.

C. Post-Mandate Issues. The Clerk of the Court will handle entering judgment and issuing the mandate, and the parties need not take any further action after the Court issues its opinion or order. See Sup. Ct. R. 45.

XXII. Interlocutory and Discretionary Review

A. Interlocutory Appeals. “A petition for a writ of certiorari to review a case pending in a United States court of appeals, before judgment is entered in that court, will be granted only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court.” Sup. Ct. R. 11 (citing 28 U.S.C. § 2101(e)). In other words, such petitions are rarely granted and only in cases of great constitutional importance or otherwise extraordinary national importance. See Stern & Gressman § 4.20 (citing and discussing cases). As discussed supra in part IV.C, the lower court also may certify a question for review to the Supreme Court, but the Court rarely grants such certification requests.

B. Extraordinary Writs. “Issuance by the Court of an extraordinary writ authorized by 28 U.S.C. § 1651(a) is not a matter of right, but of discretion sparingly exercised.” Sup. Ct. R. 20.1. The moving party must establish that “the writ will be in aid of the Court’s appellate jurisdiction, that exceptional circumstances warrant the exercise of the Court’s discretionary powers, and that adequate relief cannot be obtained in any other form or from any other court.” Id. As demonstrated by the exacting nature of this standard, such petitions are rarely granted. The procedures for filing a petition for an extraordinary writ are set forth in Rule 20.