

ISSUE BRIEF

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Supreme Court 101: A Primer for Non-Lawyers

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A common refrain from lawyers is that they will take a case “all the way to the Supreme Court,” but it is easier said than done to get the Supreme Court to review a case. The Supreme Court of the United States agrees to hear only a small number of cases each term, so the odds are stacked against most litigants. The reasons why the Court declines to hear particular cases range from the merits to procedural matters.

Petitioning the Supreme Court for Review.

The road to the Supreme Court starts with an adverse judgment, typically from a federal appellate court or the highest state court. In some cases, a party may seek review after a trial court decision, but the Supreme Court generally requires litigants to exhaust their appeals in the lower courts before agreeing to review a case.

The litigant may then file a petition for a writ of certiorari with the Supreme Court. The Court receives nearly 10,000 petitions each term, and except for a few very narrow circumstances, it is entirely within the discretion of the Court to determine whether or not to review a case.¹ The Court grants certiorari in roughly 1 percent of the cases filed each term.

In order for the Court to grant certiorari, four of the nine justices must agree that the Court should

consider the merits of a case. Supreme Court Rule 10 provides guidance on the sort of issues that make a case “cert. worthy.” As a general matter, the justices look for cases that involve significant federal questions. With rare exceptions, the Court is slow to take on major legal issues and instead waits for issues to percolate in the lower federal and state courts. Cases with any of these features may have a better chance of being granted review:

- A lower court holds a federal law unconstitutional,²
- A federal law creates an issue that is likely to repeat itself,³
- There is disagreement among the federal appellate or state courts (referred to as a “circuit split”),⁴
- A lower court decides a case in a way that conflicts with the Supreme Court’s previous cases.⁵

Litigants often request the support of interested individuals and organizations in the form of amicus curiae (or “friend of the Court”) briefs. Amicus briefs supplement the petitioning party’s arguments or provide a unique viewpoint that the justices may find persuasive.⁶

When the federal government is not involved in the case, a party may seek to have the Solicitor General of the United States file an amicus brief in support of certiorari.⁷ The Court takes recommendations from the Solicitor General very seriously, and the justices often call for the views of the Solicitor

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General when deciding whether to grant review. In fact, although he does not get to participate in deciding cases, because of the respect that the justices have for the Solicitor General's position, he has sometimes been referred to as the "tenth justice."⁸ Former Solicitor General Drew Days explained that "the Court is not seeking the advice of an advocate or a partisan, but rather as an officer of that court committed to providing his best judgment with respect to the matter at issue."⁹

When the Court grants certiorari—which is as common as winning the lottery—the parties file briefs on the merits of the case and, typically, the Court will hear oral argument and then issue a decision in the case. On occasion, the Court will grant certiorari and then summarily affirm or reverse a lower court decision without oral argument. Even less frequently, the Court may dismiss as improvidently granted ("dig") a petition if it later discovers that the case should not have been granted for procedural reasons.¹⁰

When the Supreme Court Denies Certiorari. For most litigants, the journey ends with a brief order denying certiorari. Throughout its term, the Court routinely releases order lists ranging from a

few pages to nearly 100 pages of denials. But what does it mean when the Court "denies cert.?"

When a petition is denied, the lower court decision stands. A denial of certiorari does *not* affirm the lower court decision *or* imply that the Supreme Court agrees with that ruling. It simply does not speak to the merits of the case. The justices seldom issue a statement explaining why they have denied a case, but in a small percentage of cases, one of the justices will write a dissent arguing why the Court should hear the case. In either event, the fact that the Court declined to review the case has no precedential value.¹¹

The Supreme Court has made that point crystal clear, explaining that the "denial of a writ of certiorari imports no expression of opinion upon the merits of the case."¹² In 1950, Justice Felix Frankfurter stated that a denial "simply means that fewer than four members of the Court deemed it desirable to review the lower court decision.... A variety of considerations underlie denials of the writ."¹³ Indeed, some justices may disagree with a lower court ruling but nevertheless decide for other reasons that a particular case is not suitable for considering the merits of the underlying legal issue.

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1. See 28 U.S. Code §1251 et seq. (granting the Court original and exclusive jurisdiction over certain matters, discretionary review over the federal appellate courts or state courts issuing decisions that implicate the U.S. Constitution or federal laws). Decisions by three-judge courts, convened pursuant to particular statutes, are appealable to the Supreme Court as a matter of right. 28 U.S. Code §1253.
 2. E.g., *United States v. Windsor*, 133 S.Ct. 2675 (2013). The Supreme Court reviewed the constitutionality of Section 3 of the Defense of Marriage Act following a federal appellate court ruling that it was unconstitutional.
 3. E.g., *Vartelas v. Holder*, 132 S.Ct. 1479 (2012). The Court considered whether a provision of the Illegal Immigration Reform and Immigrant Responsibility Act applied retroactively.
 4. E.g., *Riley v. California*, 2013 WL 475242 (Cal.App, 4th Dist. 2013), cert. granted, 134, U.S. 999 (2014) (No. 13-132), and *United States v. Wurie*, 728 F.3d 1 (1st Cir. 2013), cert. granted, 134 U.S. 999 (2014) (No. 13-212). The federal appellate and state courts are divided about whether a police officer may search the contents of an arrestee's cell phone, and the Supreme Court is considering the issue in its current term.
 5. E.g., *Bullcoming v. New Mexico*, 131 U.S. 2705 (2011). The Court evaluated the scope of the Sixth Amendment's Confrontation Clause as it relates to forensic laboratory reports, which it had previously decided. See *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009).
 6. See Joseph D. Kearney and Thomas W. Merrill, "The Influence of Amicus Curiae Briefs on the Supreme Court," *University of Pennsylvania Law Review*, Vol. 148 (2000), p. 743.
 7. Michael E. Solimine, "The Solicitor General Unbound: Amicus Curiae Activism and Deference in the Supreme Court," *Arizona State Law Review*, Vol. 45 (2013), p. 1183.
 8. See Lincoln Caplan, *The Tenth Justice: The Solicitor General and the Rule of Law* (New York: Knopf, 1987).
 9. David C. Thompson and 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," *George Mason Law Review*, Vol. 16 (2009), p. 271.
 10. See Michael E. Solimine and Rafael Gely, "The Supreme Court and the Dig: An Empirical and Institutional Analysis," *Wisconsin Law Review*, Vol. 2005 (2005), p. 1421.
 11. Lower courts are bound by dismissal of a mandatory appeal as opposed to a case that reached the Court through a petition for a writ of certiorari. *Hicks v. Miranda*, 422 U.S. 332, 344-345 (1975).
 12. *Teague v. Lane*, 489 U.S. 288, 296 (1989) (quoting *United States v. Carver*, 260 U.S. 482, 490 (1923) (Holmes, J.)).
 13. *Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912, 917 (1950).
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Likewise, the Court declines to review many cases for procedural reasons, such as if the party bringing the case lacks standing or the Court lacks jurisdiction to consider the case.

Necessary Procedural Hurdles. While these procedural hurdles may seem arcane, they preserve judicial resources and further the proper separation of powers among the branches of government. Article III of the Constitution provides that the judicial power extends only to cases or controversies, and the jurisdictional and standing rules further that requirement.

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