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THE WRIT OF *CERTIORARI* IN THE SUPREME COURT OF THE UNITED STATES

One of the peculiarities of the U.S. judicial system when compared with most other legal systems is the discretionary nature of the jurisdiction of the Supreme Court of the United States. Almost all of the cases that are decided by the Supreme Court of the United States come to the Court under its discretionary jurisdiction. The mechanism by which the Supreme Court agrees to hear such cases is the writ of *certiorari*. The writ of *certiorari* technically is an order to a lower court to deliver the record to the Supreme Court so that the Court may review the lower court's decision. A writ of *certiorari* can be sent to a federal court of appeals or to a state court of last resort.

Other than a small area of original jurisdiction and a small area of mandatory appellate jurisdiction, the Court's docket is comprised of cases that it agrees to hear under its discretionary appellate—or *certiorari*—jurisdiction. This past term of the Supreme Court, all of the 78 cases decided by the Supreme Court arrived at the Court by means of its *certiorari* jurisdiction.

The Supreme Court's discretionary appellate jurisdiction extends to cases in a federal court of appeals and to some cases from the court of last resort of a U.S. state. Cases from the federal courts of appeal typically come to the Supreme Court only after there has been a merits decision by the appellate court. The Supreme Court technically may grant the writ once an appeal has been filed in the appellate court but this is a very rare occurrence. In order to seek the writ of *certiorari* to review a state court decision, the decision under review must have been based on federal law. If the decision was based on “adequate and independent” state law grounds, then it will not be eligible for Supreme Court review; this is because the state courts of last resort are the ultimate judicial arbiters of the interpretation of their state laws; the federal court, including the Supreme Court of the United States, have no special expertise or power over *state* (as opposed to *federal*) law.

The decision whether or not to grant the writ of *certiorari* rests exclusively in the discretion of the Court. The discretionary nature of the Court's *certiorari* jurisdiction reflects the fundamental and limited role of the Supreme Court of the United States. It is not an ordinary appellate court concerned with achieving justice in individual cases; instead, the Court is focused more on the general public importance of issues and with achieving uniformity of federal law. At the end of the day, the Court's extraordinary level of control over its own docket gives the Court the power to define its own institutional role.

Rule 10 of the Rules of the Supreme Court sets forth some of the reasons justifying grant of the writ of *certiorari*. Among them are: when there is a split of authority on an important federal question among the courts of appeals and/or state courts of last resort; and when a lower court decision deals with an important question of federal law that has not been but should be settled by the Supreme Court. Rule 10 affirms that the stated bases for granting the writ are “neither controlling nor fully measuring the Court's discretion”, thus reinforcing the discretionary nature of the writ.

Technically, the denial of the writ of *certiorari* is not to be construed as an expression by the Court of its view as to the merits of the case. Denial of the writ cannot be used to support the proposition that any number of the Justices believes that the case was properly decided below.

Supreme Court rules limit the length of a petition for a writ of *certiorari* to 9,000 words, and the Court admonishes petitioners to be as concise as possible. The time for petitioning for the writ of *certiorari* is 90 days after entry of the judgment below. The rules provide that the respondent may file a brief in opposition within 30 days after the case is docketed. The brief in opposition is also limited to 9,000 words. The petitioner then has the option of filing a reply brief, limited to 3,000 words in length. Any party may file a supplemental brief at any time while the petition is pending to draw the Court's attention to information that was not available at the time of the party's last submission.

The method by which the Justices have reviewed the petitions for a writ of *certiorari* has changed over time. Originally, the Chief Justice provided summaries of the facts and the issues raised in each case, which were then discussed at a conference among the Justices. In 1935, Chief Justice Hughes introduced what was called the “dead list” —a list of cases that would not be discussed by the Justices in conference—. Because not every case would be reviewed in conference, the Justices began to rely more on their clerks to write memoranda on *certiorari* petitions.

Today, most Justices review *certiorari* requests by means of the “*certiorari* pool”. The *certiorari* pool was first suggested by Justice Powell in 1972 to ease the burden on the Justices and their staff. Under the *certiorari* pool, the Justices divide the petitions among all of their law clerks. Each clerk prepares a brief memorandum summarizing the petition and making a recommendation as to whether the writ should be granted. These memos, in turn, are circulated to all of the Justices. Based on these memoranda, the Chief Justice circulates to the Associate Justices a “discussion list” of cases to be discussed at conference. Other Justices may add additional cases to the discussion list.

The decision whether to grant the writ of *certiorari* is made under what is known as “the rule of four” —the writ will be granted if four of the nine justices agree—. Although an informal rule, it is firmly entrenched in Supreme Court procedure.

The announcement of both the grant and the denial of the writ of *certiorari* are technical, concise affairs; the Court simply issues an order stating that the writ is granted or denied. A denial is not accompanied by any explanation or justification, although in extremely rare cases one or more of the Justices may issue an opinion dissenting from the denial of the writ. The petitioner may file a motion for rehearing of the denial of a writ of *certiorari*. However, such motions are virtually never granted.

There is some criticism of what has been termed the Supreme Court's “shrinking plenary docket”. Scholars have attributed the decline in the number of cases decided by the Supreme Court to a number of factors – including a drastic reduction in the Court's mandatory appellate jurisdiction, the

certiorari pool, and the ideological makeup of the Justices. Nevertheless, unless Congress were to act to restore some of the Court's mandatory appellate jurisdiction, the writ of *certiorari* remains the primary mechanism by which the Supreme Court reviews decisions, and its discretion remains virtually absolute.

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