

Hello. This is Leslie Gielow Jacobs. I'm a Professor at University of the Pacific, McGeorge School of Law, and I direct our Capital Center for Law & Policy. The topic of this In Brief is Certiorari.

Certiorari is a long word to describe a simple process, somewhat, which is the process through for Supreme Court of the United States to decide to hear a case - to hear oral argument and decide the case at all.

A petition for certiorari is what the people who want their case to be heard have to file before the Supreme Court. They file a written document and they say, "Please hear our case." And then the other side files an alternative written document saying either "Please don't" or "Sure, go ahead and hear it," and then the Court ultimately decides whether to go ahead and hear it.

How does certiorari work? Well, first of all, it's interesting to note that the United States Supreme Court's docket - or the cases it decides - are almost all cases that it chooses to hear. That is, there are very few cases that the court **MUST** hear by appeal. That's in contrast to the appellate courts, either at the state or the federal level. They have to hear lots and lots of cases because litigants have a right to go up and get another hearing. Not so at the United States Supreme Court. There's only very few types of cases, ones that are decided by special 3-judge district courts, that the Court must hear.

So otherwise, the decision to hear it is discretionary. So it's important to understand how the Court exercises its discretion about the cases it's going to hear. As I said, the parties file a certiorari petition, and in that petition they're going to try to follow the rules that the court has issues about how it's going to exercise its discretion to hear a case.

So when's the court going to hear a case? Well, a very common circumstance is when the decisions of different circuit courts below conflict. That is, they've decided the same question but in different ways. And that is a major job of the United States Supreme Court, to be a harmonizer of law and to decide which one is correct. So if you have what is called a "circuit split" - different decisions by two circuits, or even more - the Court is more likely to grant certiorari in the case.

Another instance where the court is likely to grant certiorari, or it may, is when there's a very important federal question that's been decided below. So even if the circuits aren't conflicting on a decision, if there's a statute that's applied all across the United States, or an interpretation of a Constitutional provision, for example, the Supreme Court may take the case and decide it because it's so important that the whole nation know what the answer is and have one rule.

And then the Court can also decide that a lower court decision deviates dramatically from what the lower court was supposed to do. And so it says, sometimes it will take cases for that reason, but very, very rarely. That is, the Court says it's not there to correct errors. That's what appellate courts are for. The Supreme Court is there to harmonize the law and issue standards for the nation. So it will let lots of errors that it thinks may have happened at the lower courts go uncorrected.

So those are the standards by which the Court will decide to take a case. Then again, let's go a little but more into the procedure. The petitions get filed and then the way that the justices operate, there are nine justices on the Supreme Court, a number of them have their clerks write memos about the cases and they participate in what is called a cert pool. So one clerk will write a memo and then circulate it to a number of different justices. They'll read the memo and decide

whether or not they should grant certiorari, or even have a discussion about it in their conference that occurs every Friday. A couple of other justices do it all on their own. But in either of these ways, they decide whether they're going to put it on what's called the "Discuss List." And any justice can decide, "Let's discuss it, let's put it on the Discuss List." And then it goes to the conference for all the justices get together and look at the petitions on the discuss list, and they vote on whether to grant certiorari.

So certiorari is granted by a vote of four, and that is different from the decision in the case, which has to be a vote of five justices. Okay, so that shows there's a limit to what a vote of certiorari says. It says that four justices are interested in hearing the case, but it doesn't say that there are five who are interested in, for example, reaching a different result than the lower court. Nevertheless, it often gives a signal that the Supreme Court more often reverses lower courts than affirms them. So with those four votes, you know that there are four justices. And sometimes you can look at who those justices are, and get a pretty good feeling for whether they're going to want to reverse the decision below.

And so, at the conference, what they can do is they can either grant the petition for certiorari, or they can deny it, or they can also do what's called "Grant, vacate, and remand." So then they actually then grant it, they don't say anything else, but they vacate the decision below, and they remand it down to the lower court to follow the instructions of the court. Okay, but more often we're going to see either a grant or a deny.

If the certiorari is granted, then it gets placed on the oral argument list. There'll be an argument, there'll be a decision, and that will happen during the course of a year. But most of the petitions get denied. The Court hears under 100 cases a year. There are over 7,000 that are filed. So it's very low odds that you're going to get granted. And so most will be denied, either with a conference or after a conference. And usually, the litigants, the people who filed the case, don't get a reason why, in fact, it's denied.

Occasionally, however, you'll have justices write dissents from denial of certiorari. And those can be interesting because you'll have one, or sometimes one or two justices actually write an opinion saying, "We would've granted certiorari in this case, and here's why." Usually it's because there's a lot of confusion, the lower case was wrong," but it gives a clue about an interest, high interest by some justices in in fact granting certiorari in the case.

So, certiorari, once again, is the way that a case gets before the United States Supreme Court, and is the way that we ultimately get decisions that are going to change the law of the land.

This concludes this In Brief on the topic of certiorari. This is Leslie Gielow Jacobs of McGeorge School of Law in Sacramento. Thanks so much for listening.