

Appeal Dismissed: SCOTUS Delivers Tough Lesson to Be Careful What You Ask For

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Traditionally, when litigants think of preservation, they think about advancing an argument in a lower court in order to be able to present it to a higher court on appeal if necessary. But the strict requirements for preservation are by no means so limited. As the United States Supreme Court recently demonstrated in a painful way, preservation requirements also can apply to proceedings within the same court, and

can result in severe consequences if not observed. This lesson is implicated at all levels of litigation, including arising any time a party must obtain leave of court to be heard on an issue. Last week, despite having previously granted petitions for review and setting the cases for oral argument, the high court dismissed two related appeals in *Visa, Inc., v. Osborn*, No. 15-961, 580 U.S. ___ (Nov. 17, 2016), and *Visa, Inc. v. Stoumbos*, No. 15-962, 580 U.S. ___ (Nov. 17, 2016). It did so because the argument ultimately advanced in the merits briefing was different than the one made in the petitions. In a brief order, the Court observed that although the petitioners had “persuaded [it] to grant certiorari” on a specific issue as framed in their petition for review, petitioners then “chose to rely on a different argument” in their merits briefing. Consequently, the Court dismissed review as having been improvidently granted, thereby foreclosing any relief. **Preservation Issue:**

- Any time review is discretionary, litigants risk waiver of the opportunity to present argument to the court where the merits argument does not align with the petition or request to be heard.

Tip: When drafting a pleading seeking review, be especially careful to appropriately frame the issue you want to argue if review is ultimately granted. Resist the temptation to present a narrow version of the issue in your pleading, out of hopes that, if review is granted, you can later argue a different basis for relief. The *Visa* case provides a harsh reminder, where the stakes were the highest, that it is necessary at the petition stage to develop and accurately describe your specific merits arguments. Although this tough lesson arose here in an appeal to the United States Supreme Court, the

preservation principle applies much more broadly. For example, many state supreme courts employ similar two-tiered procedures for discretionary review, and may be equally reluctant to consider arguments beyond the scope of the issues raised by the petition. Likewise, in lower courts, it is implicated as an amicus, in supplemental briefing, or in seeking rehearing or reconsideration that is not a matter of right. Of course, the local rules of your jurisdiction will establish the proper procedures for your circumstances, but remember this principle any time you must seek leave to be heard. Keep in mind that a discretionary review often is not transformed into one of right once the court grants leave to be heard. So even after your foot is in the door, nothing prevents the court from slamming it closed if your arguments go beyond those the court agreed to hear. Do not allow the court's interest in the issue as framed in your request to be heard to give you a false sense of security about making other, independent arguments—as the Supreme Court just demonstrated, you may well be stuck with what you asked for.

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