

Alan Morrison

SUPREME COURT

ASSISTANCE PROJECT | 2010 TERM

PUBLIC CITIZEN LITIGATION GROUP

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This report reviews the work of the Alan Morrison Supreme Court Assistance Project (SCAP) and its fellowship program for the Supreme Court's 2010 Term, which ended on June 30, 2011. SCAP provides a unique service to respondents trying to keep their cases out of the Court and to parties on both sides preparing their cases on the merits. Your support will help to ensure that SCAP can continue to offer pro bono legal assistance to litigants at both the certiorari and merits stages of Supreme Court litigation.

The SCAP fellow focuses on identifying cases in which we might offer assistance. He or she spends a substantial portion of time reviewing all paid petitions for certiorari. The fellow makes an initial judgment about whether the issue raised in a petition concerns the public interest and, in cases that are potentially cert-worthy, prepares a memo on the

strength of the petition. Working under the supervision of Public Citizen Litigation Group's director, the fellow then offers help in appropriate cases. When a lawyer accepts the fellow's offer, a Public Citizen attorney assumes principal responsibility, while the fellow assists with brief-writing and research, participates in moot courts, and attends oral arguments. We also consider offering assistance or a moot court for all petitions granted by the Court for full review.

Brian Frazelle served as the 2010–2011 SCAP fellow. Brian will complete his fellowship year in August, when he begins clerking for a federal district court judge in Washington, DC. David Muraskin, a Stanford Law School graduate who is currently clerking on the Fifth Circuit Court of Appeals, will succeed Brian as our next SCAP fellow.

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THE PROJECT AND THE FELLOWSHIP

GROWTH OF THE SUPREME COURT BAR

In the past year, scholars and media observers have drawn attention to the increasing success of corporate interests before the Supreme Court. *The New York Times* reported that the Roberts Court “is hearing a larger share of cases about economic activities that matter to big business than the Rehnquist court before it.” And according to a study by scholars at Northwestern University and the University of Chicago, such cases are most often resolved against individuals, in favor of business. Looking at cases decided since 1953, the study concluded that “the Roberts Court [is] significantly more likely to produce a conservative decision.”

The trend is often attributed to changes in the Court’s make-up, but it is due as well to the growing ability of corporations to secure highly experienced advocates from an increasingly specialized Supreme Court bar. As described by *New York Times* reporter Adam Liptak: “The Roberts court’s engagement with business issues has risen along with the emergence of a breed of lawyers specializing in Supreme Court advocacy, many of them veterans of the United States solicitor general’s office, which represents the federal government in the court. These specialists have been extraordinarily successful, both in persuading the court to hear business cases and to rule in favor of their clients.” Indeed, whereas in the past former solicitors general typically became professors, judges, or other public servants, today they frequently migrate to corporate law firms to head Supreme Court practices. According to *The New York Times*, all but two of the former solicitors general of the past fifteen years went on to represent business clients at large firms.

Advantages in funding and experience of counsel help to shape not only the outcome of cases but also which cases the Court selects for review. A representative of the Chamber of Commerce’s litigation group explained to the media that a key part of the group’s role is to keep its agenda before the Court, largely by filing briefs exhorting the Court to accept particular cases. Despite the generally low odds of obtaining Supreme Court review, the Chamber reported that the Court has accepted thirty percent of the cases in which the Chamber urged review. As a result of this trend, the lower-court decisions accepted by the Court for review are now more likely to be those favoring consumers, employees, and other plaintiffs. According to the Northwestern/Chicago study, “the Roberts Court grants cert to a larger fraction of liberal lower court decisions than the Rehnquist Court.” And when the Court agrees to review a

“liberal lower court decision,” it now reverses about seventy percent of the time.

SUPREME COURT ASSISTANCE PROJECT

SCAP was founded to help rectify the imbalance in experience and resources between parties at the Supreme Court level. On one side, business clients are typically represented by one of an elite, expensive group of Supreme Court practitioners; the federal government relies on the Office of the Solicitor General, which has an unparalleled track record before the Court, and state governments have state attorneys or solicitors general, who often have extensive experience practicing before the highest state and federal courts. On the other side, individuals are often represented by attorneys specializing in trial-level work, who frequently have limited resources and little or no Supreme Court experience.

This imbalance, which inspired Alan Morrison to start the Supreme Court Assistance Project in 1990, has continued to grow. Accordingly, the need for SCAP is greater than ever. Public Citizen attorneys have argued fifty-eight cases before the Court, have participated as co-counsel in scores of others, and have filed briefs as amicus curiae in many other Supreme Court cases. Lending our Supreme Court expertise, we help attorneys representing individual clients or public-interest groups to preserve or win public-interest victories.

At the certiorari stage, SCAP offers free legal assistance in opposing petitions for certiorari to protect public-interest victories in the lower courts. Our assistance can range from drafting the opposition to the petition, to editing the lawyer’s draft, to simply providing advice or answering questions about Supreme Court procedure. In addition, we sometimes assist counsel in preparing petitions for certiorari, asking the Supreme Court to review decisions when appropriate. Cases in which we provide assistance often present issues involving access to the civil justice system, claims of government misconduct, or situations where workers, civil rights claimants, or tort plaintiffs have won significant awards or established important precedents.

If the Supreme Court agrees to hear a case in which we are assisting, SCAP may offer to help with brief-writing and oral argument preparation, including by conducting moot courts. Each Supreme Court Term, SCAP is involved in some way in about twenty-five cases in which the Court grants certiorari (out of the approximately seventy-five to eighty cases that the Court hears).

OUR DOCKET: THE 2010 TERM

In the 2010 Supreme Court Term, which stretched from July 2010 through June 2011, Public Citizen Litigation Group provided substantial cert-stage assistance in eighteen cases. Litigation Group attorneys served as the principal drafters of the brief in opposition in six of those cases (plus one of our own cases), and drafted petitions for certiorari in two (plus two of our own cases). We also filed one amicus brief in support of a petition. At the merits stage, Litigation Group lawyers argued two cases before the Court, served as co-counsel in three other cases, and assisted lawyers by giving advice and editing in several more. We also filed amicus briefs in eight cases and provided moot courts in twenty-five cases. For a complete list of cases on which we are currently working, visit our website at www.citizen.org/supremecourt.

SCAP cases span a broad array of issues. At the cert stage this Term, we successfully defended lower court decisions

protecting the ability of consumers to bring class actions, the civil rights of prisoners and victims of constitutional violations, and the capacity of workers to obtain redress for labor and employment violations. We also helped to preserve public-interest victories in areas ranging from election law and environmental law to disability law and the First Amendment. At the merits stage, we participated as lead counsel, co-counsel, or amicus in three of four cases heard by the Court involving class actions, all three cases involving the Freedom of Information Act, and all three cases involving federal preemption of state tort law. We also participated in cases heard by the Court addressing consumer lending protections, employee retirement benefits, the First Amendment, ethics standards for government officials, and the liability of foreign manufacturers for unsafe products. The following pages discuss some examples of our work during the 2010 Term.

“I hardly know how to thank you for all of your assistance in *Williamson*. I could not possibly have done it without you. All of your masterful editing, the moot court you set up for me before the argument, and your support and patience during the week before oral argument really made a big difference. Thanks a million!”

— Letter from attorney Martin N. Buchanan, thanking us for SCAP assistance at the merits stage in *Williamson v. Mazda*.

BRIEFS IN OPPOSITION

Arizona Cattle Growers Association v. Salazar

In this case, the petitioner sought review of the U.S. Fish and Wildlife Service's approach to analyzing the economic impact of a "critical habitat" designation rule under the Endangered Species Act, which precludes consideration of economic impact when listing species, but requires it for critical habitat designations. Petitioner also asked for review of the Fish and Wildlife Service's designation of the boundaries of "critical habitat" for the Mexican spotted owl.

Working with attorneys Matt Kenna of the Western Environmental Law Center and Mark Fink of the Center for Biological Diversity, Public Citizen's Scott Nelson assisted in preparing a brief in opposition. The Court denied the petition.

Pella Corporation v. Saltzman

Pella Corporation, a manufacturer of windows and doors, allegedly concealed from its customers a design defect making its windows highly susceptible to wood rot. Plaintiffs filed a consumer-fraud action, seeking to recover the cost of window replacement and to obtain an order that Pella notify its customers and extend its warranty. The district court and Seventh Circuit ruled that the case could proceed as a class action to adjudicate whether Pella fraudulently concealed a known defect.

Pella petitioned the Supreme Court, arguing that class certification was improper because the class proceeding would not resolve whether Pella injured each individual plaintiff — a question that would have to be addressed in subsequent individual proceedings. Acceptance of Pella's theory would virtually eliminate consumer-fraud class actions. Working with lawyers at Freed & Weiss, SCAP fellow Brian Frazelle and Public Citizen Litigation Group director Allison Zieve successfully opposed the cert petition.

Richardson v. Dodds

Dodds was arrested in Oklahoma, but when family members attempted to post bail for him, jail officials said he could not be released until he was arraigned. All the charges against him were later dismissed. Dodds filed a civil rights lawsuit against Richardson, the county sheriff, alleging an unconstitutional denial of bail that forced him to spend nearly a week in jail. Richardson moved to dismiss the case, arguing that he could not be held liable because he was not personally involved in denying Dodds's bail. The court disagreed, explaining that Oklahoma law required Richardson to ensure that arrestees could timely post bail.

The Tenth Circuit affirmed, and Richardson sought Supreme Court review, arguing that under *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), supervisors cannot be held liable for mere acquiescence in unconstitutional policies carried out by subordinates. Assisting Dodds's counsel Jim McClure in opposing certiorari, Public Citizen attorney Adina Rosenbaum explained that the lower court did not find that Richardson merely "acquiesced" in the unconstitutional policy. Rather, the facts suggested that he was responsible for the policy. Thus, any uncertainty about supervisory liability after *Iqbal* was not implicated. The Court denied review.

Sprint Spectrum L.P. v. Heese

Plaintiffs in this class action alleged that Sprint violated federal law by passing Washington state taxes on to consumers. The Ninth Circuit held that the plaintiffs were not bound by a settlement of different claims against Sprint in a Kansas state-court class action because, under Kansas law, the settlement would not preclude other claims based on different facts. The court also stated that if Kansas state law did permit preclusion in these circumstances, it would violate due process, because the class representative in the Kansas case did not adequately represent the interests of the Washington consumers who had different claims against Sprint.

The company petitioned the Supreme Court, arguing that by allowing a "collateral attack" on the Kansas judgment based on due process grounds, the Ninth Circuit had created a conflict with decisions of other circuits. Public Citizen's Scott Nelson assisted the plaintiffs' attorney Dan Johnson in preparing a brief in opposition, pointing out (among other things) that the Ninth Circuit's decision rested on state-law grounds that the petitioners did not even challenge. The Court denied certiorari.

“Your advice throughout was right on. I am sure we will be contacting you again.”

— Email from attorney Richard J. Burke, thanking us for SCAP assistance at the certiorari stage in *Pella Corp. v. Saltzman*.

MERITS BRIEFS

Federal Communications Commission v. AT&T Inc.

COMPTEL, a national trade association that represents the interests of communications service providers and their supplier partners, filed a Freedom of Information Act (FOIA) request with the FCC for records concerning the FCC’s investigation into AT&T for possible violations of the law. AT&T sued the FCC to prevent the release of the records, claiming the records’ release would violate FOIA Exemption 7(C), which exempts from mandatory disclosure law-enforcement records the release of which could reasonably be expected to constitute an unwarranted invasion of “personal privacy.” Although Exemption 7(C) has always been understood to apply only to human privacy interests, the Third Circuit adopted AT&T’s position that this personal privacy exemption should extend to corporations.

The government petitioned the Supreme Court to hear the case, and Public Citizen filed an amicus brief in support of that petition. The Court granted review, and at the merits stage Public Citizen attorneys Adina Rosenbaum and Michael Page were co-counsel for COMPTEL, in support of the government. In March 2011, the Court unanimously held that corporations do not have “personal privacy” rights under FOIA.

Smith v. Bayer Corp.

West Virginia consumers brought a proposed class action in state court, seeking to recover money they spent buying the prescription drug Baycol, which was withdrawn from the market after it proved unsafe. Bayer, however, persuaded a federal court in Minnesota to issue an injunction halting the West Virginia class action because the federal court had previously refused to certify a class in a similar case brought by a different plaintiff. The court held that its ruling bound the West Virginia plaintiffs even though they were not parties to the federal case, never had notice or an opportunity to be heard, and were never given the chance to opt out. Moreover, the federal court’s earlier decision had addressed

whether a class should be certified under federal rules, while this case was governed by West Virginia law.

After the Eighth Circuit affirmed, the plaintiffs obtained Supreme Court review. The issue before the Court was whether a federal court’s decision not to certify a class action is binding on would-be members of the never-certified class who later seek to bring a class action in state court under different procedural rules. Working with the plaintiffs’ attorney, Richard Monahan, Public Citizen attorney Scott Nelson and Litigation Group director Allison Zieve served as co-counsel, collaborating on briefing and preparation for oral argument. In a unanimous decision, the Court agreed with us and reversed the court of appeals.

Williamson v. Mazda Motor of America

Thanh Williamson was killed while riding in the second-row aisle seat of a Mazda minivan when it was struck head-on by another vehicle. Her seat was equipped with a lap-only seatbelt, which caused fatal internal injuries when the impact of the collision caused her body to jackknife over the belt. After her death, Mrs. Williamson’s family brought suit against Mazda, alleging that the van was defective because it lacked a lap/shoulder belt. When the minivan was manufactured and sold, the relevant federal safety standard allowed but did not require a lap/shoulder belt.

Public Citizen Litigation Group director Allison Zieve served as co-counsel for the Williamsons in the Supreme Court, assisting the Williamsons’ appellate counsel Martin Buchanan and trial counsel David Lira in writing the merits brief and preparing for argument. The question before the Court was whether the Williamsons’ damages claims were barred by implied conflict preemption, on the theory that holding Mazda accountable for failing to install a lap/shoulder belt would pose an obstacle to the federal safety standard in effect at the time. In another unanimous decision, the Court held that the claims were not preempted. The case returned to the trial court, where the Williamsons may now litigate their case on the merits.

MOOT COURTS

Moot courts offer a valuable opportunity for counsel to hone their arguments, identify potential vulnerabilities, and develop compelling responses to the most likely concerns of the Justices. This Term, we provided moot courts for attorneys with oral arguments before the Supreme Court in twenty-five cases — nearly a third of the cases heard by the Court. The attorneys we mooted included individuals preparing for their first Supreme Court arguments as well as experienced Supreme Court litigators.

The cases for which we provided moot courts involved a wide range of public interest issues. Cases we mooted included:

- *Actavis Elizabeth, LLC v. Mensing* (preemption of tort lawsuits against generic drug manufacturers)
- *Arizona Free Enterprise Club v. Bennett* (public financing of election campaigns)
- *Ashcroft v. Al-Kidd* (liability of high-level government officials for constitutional violations)
- *Astra v. County of Santa Clara* (ability of community health providers to sue drug companies for overcharging)
- *Bruesewitz v. Wyeth* (preemption of tort lawsuits against vaccine manufacturers)
- *Borough of Duryea v. Guarnieri* (ability of public employees to bring retaliation claims under the First Amendment)
- *CIGNA Corp. v. Amara* (ability of employees to recover retirement benefits promised in ERISA plan descriptions)
- *Connick v. Thompson* (liability of district attorneys for failure to train prosecutors on constitutional safeguards)
- *Costco v. Omega* (copyright control over imported goods)
- *CSX Transportation, Inc. v. McBride* (causation standards for lawsuits against railroads by injured employees)
- *Fox v. Vice* (awards of attorney fees against civil rights plaintiffs)
- *Goodyear Tires v. Brown* (general jurisdiction over foreign manufacturers sued for injury claims)
- *Henderson v. Shinseki* (filing deadlines in veterans benefits cases)
- *J. McIntyre Machinery v. Nicastro* (specific jurisdiction over foreign manufacturers sued for injury claims)
- *Kasten v. Saint-Gobain* (anti-retaliation protection for workers under the Fair Labor Standards Act)
- *Matrixx v. Siracusano* (securities fraud liability of drug companies for failure to disclose adverse safety information)
- *Milner v. Department of the Navy* (scope of the exemption for “personnel records” under the Freedom of Information Act)
- *NASA v. Nelson* (constitutional privacy rights of employees of government contractors)
- *Ortiz v. Jordan* (ability of civil rights defendants to obtain immunity after guilty verdicts by appealing pre-trial motions)
- *Ransom v. FIA Card Services* (bankruptcy debtors’ ability to deduct the costs of automobile ownership)
- *Schindler Elevator Corp. v. U.S. ex rel. Kirk* (ability to bring qui tam actions based on information obtained through the Freedom of Information Act)
- *Smith v. Bayer* (ability of plaintiffs to bring state-court class actions similar to rejected federal class actions brought by other plaintiffs)
- *Sorrell v. IMS Health Inc.* (constitutionality of regulations on the sale of individual doctors’ prescribing histories for use in marketing)
- *Sossamon v. Texas* (ability of plaintiffs to seek money damages from states under the Religious Land Use and Institutionalized Persons Act)
- *Williamson v. Mazda Motor of America, Inc.* (preemption of tort lawsuits against automobile manufacturers)

“Please accept my thanks for the invaluable help you and the panel at Public Citizen afforded me in preparing for oral argument in *Goodyear v. Brown*. I think virtually every question asked by the Court was asked in the moot court.”

— Letter from attorney Collyn Peddie, thanking us for SCAP assistance at the merits stage in *Goodyear Dunlop Tires Operations, S.A. v. Brown*.

ORAL ARGUMENTS — LOOKING BACK, LOOKING AHEAD

In the almost forty years since Public Citizen Litigation Group's founding, the Group's lawyers have argued fifty-eight cases before the U.S. Supreme Court — a mark that any law practice would envy. And unlike many law firms, the Litigation Group does not limit its Supreme Court arguments to just one or two featured lawyers. Over the years, twenty-one different Litigation Group lawyers have presented argument in the Supreme Court.

In the Court's 2010 Term, Litigation Group lawyers argued two cases, marking the fifth time in a decade that the Group's lawyers argued more than one case in a single Term. Two more Litigation Group attorneys, Greg Beck and Deepak Gupta (arguing *Chase Bank v. McCoy* and *AT&T Mobility v. Concepcion*, respectively), joined the rolls of those who have appeared before the Court. Although in many SCAP cases we assist lawyers preparing to argue on their own, in each of these cases the lawyers whom we were assisting asked us to take the lead with briefing and oral argument.

Concepcion, one of the Term's most significant cases, posed the question whether defendants can avoid class actions by putting language in consumer contracts that provides for mandatory arbitration of all claims and stipulates that no claim may be brought as a class action, either in court or in arbitration. Defendant AT&T argued that because the Federal Arbitration Act (FAA) provides that arbitration agreements are enforceable, class-action bans contained in arbitration agreements must likewise be enforced, even in the face of state contract-law principles that condemn class-action bans as unconscionable because they prevent the effective enforcement of consumers' rights.

In the Supreme Court, we countered that the FAA says arbitration clauses are enforceable except when they run afoul of generally applicable state-law contract principles that do not discriminate against arbitration. Unconscionability is one such generally applicable contract-law principle, and rulings that contracts containing class-action bans are unconscionable do not discriminate against arbitration when they apply to class-action bans regardless of whether they are contained in arbitration agreements.

In light of the Court's recent track-record of ruling in favor of proponents of arbitration, we expected *Concepcion* to be

a tough case. But Deepak's impressive argument gave many observers hope that the Court would agree with us and hold that the FAA does not preempt state laws protecting consumers against signing away their class-action remedies.

In the end, those hopes were disappointed. In a 5-to-4 decision, the Court held that the FAA preempts California contract law's prohibition on class-action bans that effectively insulate defendants from liability. The decision threatens to leave consumers whose claims are too small to be worth arbitrating individually with no viable remedies, and to allow defendants to retain ill-gotten gains without fear of liability.

In the upcoming Term, Public Citizen Litigation Group will argue another case about whether arbitration agreements trump consumer remedies. The issue in *CompuCredit v. Greenwood*, to be argued by Litigation Group attorney Scott Nelson, is whether the Credit Repair Organizations Act (CROA) creates a remedy that is not subject to arbitration. CROA provides debt-ridden consumers with important remedies against companies that prey on them by claiming to help them rebuild their credit ratings but in fact provide services of dubious or no value.

CROA provides that the "rights" that it affords consumers cannot be waived, and that a consumer's rights under the law include "the right to sue." An arbitration agreement, in its essence, is a waiver of the right to sue. We will argue that CROA's unusual combination of a provision protecting all rights against waiver with another provision recognizing that the ability to sue falls within the scope of the term "rights" under the statute renders an agreement to arbitrate CROA disputes invalid.

The case promises to be challenging in light of the Supreme Court's general receptivity to arbitration, but the statutory language sets this case apart from any other that the Court has considered. In any event, we did not put together our long list of Supreme Court arguments by avoiding tough cases.

As our total number of argued cases pushes sixty, we continue to pursue justice in the Supreme Court for consumers, workers, and the general public.

Your contribution is vital to our continued success.

In its twenty years, SCAP has assisted hundreds of lawyers in opposing (and in some cases filing) petitions for certiorari, in briefing the merits of cases after the Supreme Court grants review, and in preparing for Supreme Court arguments. Without SCAP, some of those lawyers might have been significantly outgunned. With SCAP, they had the pro bono support and counsel of lawyers with knowledge of Supreme Court practice equal to that of the high-priced experts arrayed against them.

We look forward to continuing our efforts for many years but we need your help. Although we operate on a shoestring, providing the assistance that we offer requires financial support.

We would be grateful for your contribution. You may donate to SCAP by sending a check in the enclosed envelope or via credit card at <https://secure.citizen.org/scap>.

Thank you for supporting the Alan Morrison Supreme Court Assistance Project.

“Thanks ... for all of your help and support!!! You both definitely share in this victory! You were a huge help and source of knowledge, advice, and information! The importance of your assistance with the briefs and moot courts cannot be overstated!”

— From an email from attorney Richard Monahan, thanking us for merits-stage assistance in *Smith v. Bayer*.

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