Alan Morrison

SUPREME COURT
ASSISTANCE PROJECT | 2014 - 2015

PUBLIC CITIZEN LITIGATION GROUP

Alan Morrison

SUPREME COURT
ASSISTANCE PROJECT | 2014 TERM

This report reviews the work of the Alan Morrison Supreme Court Assistance Project and its fellowship program from July 1, 2014 to June 30, 2015. At the certiorari stage, the Project helps respondents keep their cases out of the Court. At the merits stage, the Project helps parties on one side or the other prepare their cases and oral argument. Your support ensures that the Project can continue to offer pro bono legal assistance to litigants at the certiorari and merits stages of Supreme Court litigation.

The Project fellow identifies the cases in which we offer assistance. The fellow reviews all paid petitions for certiorari filed in the Supreme Court and selects those concerning issues of public interest that are possibly "cert-worthy." For these cases, the fellow prepares a memo analyzing the strength of the petition. Working under the supervision of Public Citizen Litigation Group's director, the fellow then offers assistance to counsel in appropriate cases. When a lawyer accepts the fellow's offer, a Public Citizen attorney assumes principal responsibility for the case, with the fellow sometimes assisting with research and writing. We also consider offering assistance or a moot court for all petitions granted by the Court for full review.

Rachel Clattenburg served as the 2014–2015 Supreme Court Assistance Project fellow. Rachel will complete her fellowship in August and then work as a staff attorney with Public Citizen Litigation Group, focusing on government transparency issues. Last year, donations significantly defrayed the cost of her fellowship. Shelby Leighton, a graduate of Georgetown Law School and current judicial law clerk, will succeed Rachel as our fellow.

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THE PROJECT AND THE FELLOWSHIP

Over the past few years, media reports and scholars have highlighted the astonishingly insular nature of the U.S. Supreme Court bar. A recent Reuters study identified an elite cadre of 66 non-government attorneys who were listed as counsel on petitions to the Supreme Court from 2004 through 2012 and whose petitions were at least six times more likely to be granted than those filed by other private attorneys. As the report explained, these attorneys "are the elite of the elite: Although they account for far less than 1 percent of lawyers who filed appeals to the Supreme Court, these attorneys were involved in 43 percent of the cases the high court chose to decide" during that nine-year period.

Most of these specialized Supreme Court attorneys represent corporate interests, a fact that the Justices readily acknowledge. "Business can pay for the best counsel money can buy. The average citizen cannot," Justice Ginsburg remarked. "That's just a reality." This reality has led to what one scholar has described as an "advocacy gap" in the Supreme Court between those who can afford the elite attorneys and those who cannot. Even when money is not a barrier, most of these attorneys work on behalf of corporations and, for that reason, conflicts often prevent them and their law firms from representing the interests of consumers and other individuals.

Notably, among the attorneys identified by Reuters for their Supreme Court work from 2004 to 2012 are just four public-interest attorneys—including two Public Citizen Litigation Group lawyers (one current and one former). Their presence confirms the success of our Supreme Court Assistance Project.

Our Project began in 1990, when Public Citizen Litigation Group's founder Alan Morrison envisioned a public-interest group that could serve as an equalizer in Supreme Court cases, a counterweight to the expertise of the elite private and government lawyers who specialize in Supreme Court practice and often represent clients opposing consumer interests and public interests before the Court. Alan's idea was to mobilize the Litigation Group's Supreme Court experience and expertise in a systematic way to assist lawyers in preventing the Court from taking cases that it should not take and in winning cases that the Court does take. The Supreme Court Assistance Project is the result of his vision.

Since the Project's founding, Public Citizen attorneys have argued sixty-three cases before the Court, participated as co-counsel in scores of others, and filed briefs as amicus curiae in many additional cases. And those accomplishments are just the most visible ones, taking place after the Court has agreed to hear the case. In hundreds of other cases, Public Citizen attorneys have scored much quieter victories at the certiorari stage by helping attorneys keep their cases out of the Supreme Court and thereby protecting public interest wins in the lower courts.

Like all of its legal assistance, the Project's certiorari stage assistance is pro bono. The Project offers help in opposing petitions for certiorari in cases in which the lower court ruled for the public interest side. Our assistance can range from drafting the opposition to the petition, to editing the lawyer's draft, to providing strategic advice, to simply answering questions about Supreme Court procedure. We often provide assistance in cases concerning access to the civil justice system or claims of government misconduct, and in cases in which employees, civil rights claimants, or tort plaintiffs have won significant awards or established important precedents. In addition, we sometimes assist counsel in preparing petitions for certiorari.

If the Supreme Court agrees to hear a case, the Project may offer to help with brief-writing and preparing for oral argument, including by conducting a moot court. Each Supreme Court Term, the Project assists at the merits stage in approximately one third of the cases in which the Court grants certiorari.

"Thank you all for your help with the cert. [opposition]. I am indebted to you for your efforts."

— Email from Nick Wooten, thanking us for assistance at the certiorari stage in *LVNV Funding v. Crawford*.

OUR DOCKET: THE 2014 TERM

In the 2014 Supreme Court Term, which ran from October 2014 through June 2015, Public Citizen Litigation Group provided substantial petition-stage assistance in thirty cases, serving as the principal drafter of the brief in opposition in thirteen cases. Litigation Group attorneys filed an amicus brief in support of the cert. petition in one case. At the merits stage, Litigation Group attorneys filed amicus briefs in six cases and held moot courts in eighteen cases. For a list of cases on which we are currently working, visit our website at www.citizen.org/supremecourt.

Over the course of the 2014 Term, we assisted in cases involving a broad array of issues. At the petition stage, we successfully defended lower court decisions addressing the ability of workers to proceed through a class action on claims of underpaid wages, a drug company's argument that federal law barred a plaintiff from bringing state-law claims based on injury caused by the drug, the unfairness of a creditor's effort to collect a time-barred debt, and a plaintiff's right to sue police officers who allegedly violated his constitutional rights. We also helped to preserve public-interest victories concerning a plaintiff's choice of forum and employment discrimination claims.

At the merits stage, we held moot courts for lawyers arguing that the Fair Housing Act permits lawsuits based on laws or practices that have a discriminatory effect; that an employer must provide the same work accommodations to pregnant employees as it does to non-pregnant employees with similar work limitations; that a borrower's rescission of a mortgage loan was timely under the Truth in Lending Act; and that a police officer's reasonable mistake of law does not justify a traffic stop under the Fourth Amendment. Below are some examples of our work during the 2014 Term.

"Thanks for your organization's excellent work on the briefing."

— Email from Lennox Emanuel, thanking us for assistance at the certiorari stage in *Kalamazoo County Road Commission v. Deleon.*

BRIEFS IN OPPOSITION

Baltimore City Police Department v. Owens

During James Owens's criminal trial in 1988, the investigating officers failed to disclose to the defense that the state's star witness changed his story five times in speaking with the officers. Owens was convicted and spent more than twenty years in prison before he was granted a retrial based on DNA evidence in 2007. In 2008, the state dropped the charges against him. In 2011, Owens sued the officers and the Baltimore Police Department (among others) for violations of his constitutional rights, including his right not to have exculpatory evidence withheld from his defense. The district court dismissed the case on the grounds that the three-year statute of limitations had expired and, in the alternative, that the officers were immune from suit. In 2014, the court of appeals reversed and reinstated Owens's lawsuit. The officers and the police department petitioned the Supreme Court for review.

Working with Charles Curlett and Sarah F. Lacey of Levin & Curlett LLC, and Joshua Treem and Laura Abelson of Brown, Goldstein & Levy LLP, Scott Michelman of Public Citizen prepared the brief in opposition to the petition. The brief argued that the suit was timely because the three-year statute of limitations began to run when the state dropped all charges in 2008, not when Owens was granted a new trial in 2007. On immunity, the brief argued that it was clearly established that officers violate a criminal defendant's constitutional rights when they withhold exculpatory or impeachment evidence and, in any event, that the violation here was so egregious that any reasonable officer should have realized that the officers' actions were unconstitutional. The Supreme Court denied review.

Chase Investment Services Corp. v. Baumann

Joseph Baumann sued Chase Investment Services, his former employer, claiming that Chase had violated California laws by treating him and other employees as "exempt" salaried employees and denying them overtime pay and meal and rest breaks. He sued in state court under California's Private Attorneys General Act (PAGA), which allows

employees to sue on behalf of the state to collect penalties for labor code violations. Most of the penalties go to the state, with some going to the employee who sues, as well as to other employees found to be victims of the violations. Chase tried to remove the case to federal court on the grounds that it was a class action subject to removal under the Class Action Fairness Act or based on conventional diversity jurisdiction. The Ninth Circuit rejected these arguments and sent the case back to state court.

Chase petitioned the Supreme Court for review. Scott Nelson of Public Citizen, working with Glenn Danas and Ryan Wu of Capstone Law APC, wrote the brief opposing the petition. The opposition argued that there is no circuit split for the Supreme Court to resolve because the courts of appeals agree on how to determine whether an action is a class action under the Class Action Fairness Act. As for conventional diversity jurisdiction, the opposition pointed out that in PAGA suits, the state is the real party in interest and the state is not a citizen within the meaning of the diversity jurisdiction statute. The petition was denied.

City of Farmington Hills v. Marshall

When David Marshall, an African-American sergeant in the Detroit Police Department, refused to remove his service weapon after being pulled over for a traffic violation by officers from another police department, they tasered him and arrested him. In state court, the parties entered into a conditional agreement: Marshall would agree not to bring any civil rights claims against the City, and the prosecutor would dismiss all charges against him, as long as two conditions were met. The two conditions were not met, but the state court judge nevertheless found the agreement binding and dismissed the charges against Marshall. Because the conditions for his agreeing not to sue were never met, Marshall sued the City under federal civil rights law. The City countered that the lawsuit was barred by the state court's order. The Sixth Circuit held that the civil rights lawsuit was not barred under Michigan law, and the City petitioned the Supreme Court for review.

Working with Michael Stefani and Frank Rivers of Stefani & Stefani, Katie Einspanier of Public Citizen took the lead in drafting the opposition. The opposition argued that this is not the sort of case the Court should review because the City merely argued that the Sixth Circuit misapplied state law in a fact-specific, unpublished decision. Moreover, the brief pointed out, the court below correctly applied state law. The petition was denied.

Kalamazoo County Road Commission v. Deleon

Robert Deleon's employer transferred him to a new job position that he had no choice but to accept. He was not qualified for the position, and it exposed him to greater health hazards. After he was hospitalized and forced to take medical leave for job-related stress, the employer fired him. Deleon sued his employer for race, national origin, and age discrimination, alleging that the job transfer was a discriminatory adverse employment action because he had been set up to fail in the new position and because of the health hazards of the new position. The Sixth Circuit held that Deleon's involuntary transfer could constitute an adverse employment action sufficient to support his claims. The employer petitioned the Supreme Court for review, arguing that because Deleon had once applied for the job position, the involuntary transfer to that position was not an adverse employment action.

Writing for the respondents, Public Citizen's Julie Murray, assisting Lennox Emanuel of the National Law Group, P.C., explained that the petitioners sought review of a question that was not presented by this case, because the Sixth Circuit had concluded that the Commission did not grant Deleon the transfer he had earlier requested. Although Deleon had applied for the new position long before his transfer, his employer had denied his application, and Deleon no longer wanted the position. The petition was denied.

LVNV Funding, LLC v. Crawford

After Stanley Crawford filed for bankruptcy protection, LVNV Funding tried to collect from Crawford a debt that had become unenforceable under the state's limitations period. Crawford claimed that LVNV Funding's attempt to collect a time-barred debt violated the Fair Debt Collection Practices Act (FDCPA). The court of appeals held that it was misleading under the FDCPA for LVNV Funding to try to use the judicial process to enforce a time-barred debt. LVNV Funding petitioned the Supreme Court for review, asking the Court to determine that a proof of claim filed in a bankruptcy proceeding cannot be the basis for a violation of the FDCPA.

Scott Michelman of Public Citizen assisted Nick Wooten of Nick Wooten, LLC by drafting the brief in opposition to the petition. The opposition argued that the court of appeals never addressed the question raised in the petition of whether the Bankruptcy Code displaces the FDCPA and that the Supreme Court should not address it in the first instance. The opposition went on to argue that LVNV Funding had waived the arguments in its petition because it had not raised them in the lower courts. The petition was denied.

BRIEFS IN OPPOSITION (CONTINUED)

Teva Pharmaceuticals USA, Inc. v. Superior Court of California

Olga Pikerie, the plaintiff in this case, was taking generic sodium alendronate drug products manufactured by petitioners. Unbeknownst to her, long-term treatment with these drugs had caused her bones to become so brittle that one day, when she stood up from a park bench, her femur bone snapped in half. It turned out that the label on the brand-name version of the drugs had been changed before Pikerie's injury to warn about the risk of femur fracture and to provide the warning signs of an impending fracture. Pikerie alleged that the generic drug labels did not have the same warnings. She sued the drug manufacturers in state court for claims based on the inadequate labeling. The manufacturers contended that Pikerie's claims were precluded by federal law. The state appellate court disagreed and allowed Pikerie's suit to proceed. The manufacturers petitioned the Supreme Court for review, arguing that federal law preempts state tort claims based on allegations that the generic drug label should have been the same as the label on the brand-name equivalent.

Allison Zieve of Public Citizen assisted Mark Crawford of Skikos, Crawford, Skikos & Joseph LLP in opposing the petition. The opposition argued that the Supreme Court did not have jurisdiction to review the state appellate court's decision because it was not a final determination and the case was still proceeding at the trial court level. In arguing that the case did not warrant review by the Court, the brief highlighted that the decision below only applies to such a small subset of current cases that the case would not have much impact on generic drug litigation. The Court called for the views of the Solicitor General and later denied the petition.

SOLICITING THE SOLICITOR GENERAL

An aspect of Supreme Court practice that is unfamiliar to many lawyers arises when the Court calls for the views of the Solicitor General, known as the CVSG. The Court issues many CVSGs each term, usually to learn whether the federal government is concerned about the impact of the decision below on a federal interest. In such cases, upon request, lawyers in the Solicitor General's office will meet with counsel for the parties to discuss the case. In addition to lawyers from the Solicitor General's office, lawyers from other parts of the Department of Justice and other agencies interested in the issue will listen to arguments about both the merits and the "cert worthiness" of the case. There is no manual to guide outside counsel in these meetings or in preparing letters to explain their positions to the Solicitor General's office.

Through the Supreme Court Assistance Project, Litigation Group lawyers have assisted attorneys by providing advice about how to approach the Solicitor General's office or attorneys in other agencies with a potential interest in a case, working with counsel to prepare letters to the Solicitor General's office, and attending meetings to help persuade the Solicitor General to adopt a position favorable to the public interest. In the 2014 Term, Allison Zieve and Scott Nelson of Public Citizen assisted an attorney in *Federal National Mortgage Association v. Sundquist*, a case addressing whether the National Bank Act preempts Utah law in connection with the validity of a foreclosure sale. Allison Zieve also assisted in *Teva Pharmaceuticals USA, Inc. v. Superior Court*, discussed above, which addressed the extent to which federal law preempts state tort claims premised on the inadequate labeling of a generic drug. In both cases, the Solicitor General filed a brief recommending denial. The Supreme Court denied both petitions.

"I really don't believe we could have pulled it off without your help. Thanks for your wise mentoring and all of the hard work you put into it."

— Email from Douglas Short, thanking us for assistance at the certiorari stage in *Federal National Mortgage Association v. Sundquist.*

MOOT COURTS

"I wanted to thank you, Public Citizen, and the really great panel of moot court judges yesterday for a terrific moot court in the *Bullard* case. The extraordinary time and attention that all the judges gave to preparing for the moot court, asking great questions, and offering thoughtful and sage advice afterwards is invaluable."

— Email from Jim Feldman, counsel for the petitioner in *Bullard v. Blue Hills Bank*, thanking us for a moot court.

Moot courts offer a valuable opportunity for counsel to hone their arguments and to identify potential vulnerabilities so that they can effectively address the concerns of the Justices. This Term, we provided moot courts for attorneys with oral arguments before the Court in eighteen cases—about one quarter of the seventy cases argued. The attorneys whom we mooted included both individuals preparing for their first Supreme Court arguments and experienced Supreme Court litigators.

The cases for which we provided moot courts involved a wide range of public-interest issues. The cases were:

- *Armstrong v. Exceptional Child Center* (whether Medicaid providers have a cause of action to challenge a state's reimbursement rates)
- *Bank of America, N.A. v. Caulkett and Bank of America, N.A. v. Toledo-Cardona* (consolidated for argument) (whether a Chapter 7 debtor may "strip off" a junior mortgage lien when outstanding debt owed to the senior lienholder is more than the value of the house)
- *Bullard v. Blue Hills Bank* (whether an order denying confirmation of a bankruptcy plan is appealable)
- *City and County of San Francisco v. Sheehan* (whether Title II of the Americans with Disabilities Act applies to the arrest of an armed, violent person with mental disabilities)
- *City of Los Angeles v. Patel* (on the constitutionality of a city ordinance allowing warrantless inspections of hotel guest registers)
- *Department of Homeland Security v. MacLean* (whether the federal whistleblower statute protects an air marshal who publicly disclosed that the TSA had plans to cut costs by removing air marshals from certain flights)
- *Gelboim v. Bank of America Corp.* (whether a district court's order dismissing the only claim in a case that has been consolidated with other actions in multidistrict litigation is an appealable order if claims remained in other actions in the MDL)
- *Heien v. North Carolina* (whether a police officer's reasonable mistake of law gives rise to reasonable suspicion that justifies a traffic stop under the Fourth Amendment)
- *Integrity Staffing Solutions, Inc. v. Busk* (whether the time spent by warehouse workers waiting for, and going through, security screenings is compensable under the Fair Labor Standards Act)
- *Jesinoski v. Countrywide Home Loans* (on what action a borrower must take to exercise his right to rescind the loan transaction within the three-year limitations period under the Truth in Lending Act)
- *Kellogg Brown & Root Services, Inc. v. United States ex rel. Carter* (whether the False Claims Act's "first-to-file" provision bars a new *qui tam* suit when a *qui tam* action raising similar allegations was filed but subsequently dismissed on non-merits grounds)
- *McFadden v. United States* (on the mens rea required to convict a defendant of distribution of a controlled substance analogue)
- *Mellouli v. Holder* (whether a state misdemeanor conviction for possession of "drug paraphernalia"—here, a sock—triggers deportation of a lawful permanent resident)
- *Omnicare, Inc. v. Laborers District Council Construction Industry Pension Fund* (whether a statement of opinion is actionable as an "untrue statement of fact" under Section 11 of the Securities Act of 1933)
- *Oneok Inc. v. Learjet, Inc.* (whether state law antitrust claims may proceed against gas pipeline companies for alleged manipulation of prices)
- *Texas Department of Housing and Community Affairs v. The Inclusive Communities Project* (whether disparate-impact claims are cognizable under the Fair Housing Act)
- *Tibble v. Edison International* (on the duty of ERISA plan fiduciaries to periodically reassess investments)
- *Young v. United Parcel Services, Inc.* (whether the Pregnancy Discrimination Act requires an employer that provides work accommodations to non-pregnant employees must also provide work accommodations to pregnant employees)

2014 TERM — ACCESS TO THE CIVIL JUSTICE SYSTEM

This Term, assisting with cases at the petition stage, Public Citizen Litigation Group attorneys continued with their longstanding efforts to safeguard individuals' access to the civil justice system. In several cases, we worked to preserve the right of individuals to bring a class action—an important tool for holding corporations or the government accountable for wrongdoing that affects a large group of people, particularly when pursuing a remedy on an individual basis would be economically impossible. We also helped in cases raising the question whether federal law preempts the operation of state-law claims and cases raising issues about the validity of forced arbitration clauses. The Court granted the petitions in two of the cases involving class action issues, and we will be assisting the respondents at the merits stage of those cases, both of which will be argued in the fall.

One of the two granted cases is *Tyson Foods v. Bouaphakeo*. In that case, workers at a Tyson Foods meat processing plant in Iowa alleged that Tyson had underpaid them for the time they spent walking to their worksite and putting on and taking off protective gear. The workers brought a class action against Tyson, and after trial, the jury returned a verdict for the class and awarded damages. After the court of appeals affirmed, Tyson Foods petitioned the Supreme Court for review, arguing that a class cannot be certified if any of its members may not have been injured.

The issue raised by Tyson Foods is one currently being pushed by defendants in a variety of class action cases. Working with Robert Wiggins, Jr. of Wiggins, Childs, Quinn & Pantazis, LLC, we took the lead in opposing the petition. Among other things, the opposition argued that ample evidence supported the verdict and that Tyson's own requested jury instruction had invited the purported error. We are getting to work drafting the respondents' brief on the merits.

Two other cases on which we worked involve an increasingly common tactic to try to thwart class actions: A corporate defendant offers to settle the named plaintiff's individual claim in a case pleaded as a class action and, if the plaintiff rejects the offer, then argues that the unaccepted offer moots the case. In the past two years, Public Citizen lawyers have briefed this issue several times in the federal courts of appeals. This Supreme Court Term, we prepared the oppositions to certiorari in two cases that raised this issue: *Campbell-Ewald Co. v. Gomez* and *Harvard Drug Group, LLC v. Barr*.

Campbell-Ewald is a class action against a marketing company that caused thousands of text messages recruiting for the Navy to be sent to cell phones of people who had not consented to receive them, in violation of the Telephone Consumer Protection Act. After the court of appeals held that the unaccepted offer did not moot the case, the company petitioned the Supreme Court for review. Public Citizen's Scott Nelson, working with lawyers at McGuire Law, PC, McMorrow Law, PC, and Parisi & Havens LLP, argued in the opposition that the circuits are not split on the mootness issue, the decision below does not conflict with Supreme Court precedent, and, at any rate, the offer of judgment did not offer complete relief. The Court nonetheless granted the petition and will hear argument next fall.

In several cases this Term, Public Citizen attorneys successfully worked to preserve appellate court decisions holding that federal law does not bar plaintiffs from pursuing state-law remedies. Two of those cases, *CLS Transportation of Los Angeles v. Iskanian* and *Bridgestone Retail Operations v. Brown*, involved an employee's right to seek relief under California's Private Attorneys General Act (PAGA). That law permits an employee to bring a representative action on behalf of the state and other similarly wronged employees for civil penalties against the employer for labor law violations. Most of the proceeds of the litigation go to the state, but some go to the employee and affected co-workers.

In these two cases, the employer sought to enforce a provision in the plaintiffs' employment contracts requiring all disputes to be handled through arbitration and purporting to waive the employees' right to bring a representative action under PAGA in any forum. Under California law, agreements requiring employees to waive the entitlement to bring PAGA representative actions as a condition of employment are unenforceable, and the Supreme Court of California agreed with the plaintiffs in *Iskanian* that the Federal Arbitration Act does not preempt this aspect of state law. In each case, the company petitioned the Supreme Court to review the question whether the Federal Arbitration Act preempts the state-law rule. We drafted the briefs in opposition, and the Supreme Court denied the petitions in both cases.

In these and other cases during the 2014 Term, the Supreme Court Assistance Project focused on preserving appellate-court victories upholding individuals' right of access to the civil justice system. As defendants continue to come up with new arguments for denying individuals an avenue for seeking a remedy for wrongdoing, we expect that this aspect of our work will also continue to represent a significant portion of our work.

Your contribution is vital to our continued success.

In its twenty-five years, the Supreme Court Assistance Project 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. The Project provides pro bono support and counsel from lawyers who have knowledge of Supreme Court practice equal to that of the high-priced experts often aligned against attorneys in public-interest cases.

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 are grateful for your support. You may donate 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.

Alan Morrison **SUPREME COURT ASSISTANCE PROJECT**

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