Alan Morrison

SUPREME COURT
ASSISTANCE PROJECT | 2015 - 2016

PUBLIC CITIZEN LITIGATION GROUP

Alan Morrison

SUPREME COURT
ASSISTANCE PROJECT | 2015 TERM

This report reviews the work of the Alan Morrison Supreme Court Assistance Project and its fellowship program from July 1, 2015–June 30, 2016. The Project offers pro bono legal assistance at the certiorari stage, helping to oppose petitions for certiorari to protect public interest victories in lower courts, and at the merits stage, helping to draft briefs and conducting moot courts in public interest cases. Your support ensures that the Project can continue to offer this assistance.

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, often with the fellow's substantial input. We also consider offering assistance or a moot court for all petitions granted by the Court for full review.

Shelby Leighton served as the 2015–2016 Supreme Court Assistance Project fellow. Last year, donations significantly defrayed the cost of her fellowship. When Shelby completes her fellowship in August, Nick Sansone, a graduate of Harvard Law School who is currently clerking for a federal appellate court judge, will succeed her.

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THE PROJECT AND THE SUPREME COURT

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.

At the beginning of this term in October 2015, few people would have expected the Supreme Court to be a central political issue heading into the presidential election. The death of Justice Antonin Scalia in February, and the ensuing political battle over the confirmation of his replacement, has thrust the Court and the Justices into the national spotlight.

Often overlooked is the day-to-day impact that an eight-member Court has had on the Supreme Court docket. The media has covered high-profile examples, such as the Court's affirmance of the Ninth Circuit's decision in *Friedrichs v. California Teachers Association* by a 4-4 vote, which kept in place "agency fees" for public sector unions in California. But the eight-member Court has also affected the calculus for litigants at the certiorari stage. Since Justice Scalia's death, the pace of certiorari grants has slowed. As some Supreme Court observers have noted, the cases that the Court has granted since February appear less likely to implicate partisan divides, perhaps reflecting a reluctance to grant certiorari in cases in which the eight-member Court would not be able to provide resolution to the parties.

The slow pace of grants is a reminder of the Justices' enormous discretion to choose which cases to review. With few exceptions, the Court is not required to accept any particular case for consideration on the merits. The difference between a grant and a denial may hinge on the persuasiveness of the arguments in the petition or the opposition, the quality of the writing, or strategic calculations by the Justices, among other things.

The existence of many factors, some outside the parties' control, that determine whether the Court will grant a petition is part of what makes the Project's pro bono assistance so valuable. Since the Project's founding, Public Citizen attorneys have drafted more than one hundred oppositions to petitions for certiorari and advised attorneys on hundreds of additional oppositions, scoring quiet victories by helping attorneys keep their cases out of the Supreme Court. The certiorari process can be daunting even to experienced appellate lawyers. From drafting a brief to providing feedback or answering questions about procedure, we help trial lawyers, public interest attorneys, and others with little Supreme Court experience navigate the cert-stage process.

Public Citizen attorneys have argued 63 cases before the Supreme Court and served as lead or co-counsel in scores more. Bringing decades of Supreme Court experience, the Project often provides 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.

"[T]hanks so much for your help throughout the process—having your input and advice was so valuable to me, and very comforting. You contributed to our success greatly."

— Email from Ruel Walker, thanking us for assistance at the certiorari stage in *BNSF Railway Co. v. Fair*

OUR DOCKET: THE 2015 TERM

In the 2015 Supreme Court Term, which ran from October 2015 through June 2016, Public Citizen Litigation Group provided substantial petition-stage assistance in more than thirty cases, serving as the principal drafter of the brief in opposition in twelve cases. At the merits stage, Public Citizen attorneys served as co-counsel in two cases and held moot courts in nineteen. For a list of cases on which we are currently working, visit our website, www.citizen.org/supremecourt.

Over the course of the 2015 Term, we assisted in cases involving a broad array of issues. At the petition stage, we helped to successfully defend lower court decisions holding that an injured employee could challenge the denial of disability benefits under an ERISA plan, that police officers could be held liable for shooting a suicidal man in his home, that a railroad employee could bring a claim for an injury caused by his employer's ongoing negligence, and that an arbitration agreement could not waive employees' rights to bring claims on behalf of other employees under California law.

At the merits stage, we served as co-counsel in a case defending workers' victory in a class action for underpayment of wages and a case defending against the notion that a company's unaccepted offer of judgment to a named plaintiff can moot a class action. We also held moot courts for lawyers arguing a wide range of issues, including a death penalty case in which the jury selection had been infected with egregious racism, a case that raised the issue whether an employer violated the First Amendment when it fired an employee for participating in perceived political activity, and a case that posed the question whether certain workers at car dealerships are covered by minimum wage and overtime laws.

Below are some examples of our work during the 2015 Term.

BRIEFS IN OPPOSITION

Bolin v. Milan

Although they had no evidence suggesting that a dangerous individual was inside, law enforcement officers executed a search warrant at the home of 68-year-old Louise Milan and her teenaged daughter by hurling flash bang grenades through the door and window and entering with an eleven-person SWAT team. Milan filed suit under 42 U.S.C. § 1983, alleging that the officers used unconstitutionally excessive force in violation of her Fourth Amendment rights. The district court denied the officers' motion to dismiss on the basis of qualified immunity, and the Seventh Circuit affirmed, holding that any reasonable officer would have known that the actions violated Milan's constitutional rights. The officers then filed a petition for certiorari in the Supreme Court.

Working as co-counsel with Kyle Biesecker and Andrew Dutkanych of Biesecker, Dutkanych & Macer, LLC, in Evansville, IN, Shelby Leighton of Public Citizen drafted the opposition. The opposition argued that all of the courts of appeals are in agreement that flash bang grenades should only be used as a last resort and under very certain circumstances, and that it was clearly established in the Seventh Circuit and other jurisdictions that the use of flash bang grenades in the circumstances presented here violated Milan's Fourth Amendment rights. The petition was denied.

Jacobs Engineering Group v. Adkisson

In December 2008, a containment dike at a coal plant in Tennessee failed, spilling coal-ash sludge onto adjacent lands. The Tennessee Valley Authority, which owns and operates the plant, entered into a contract with Jacobs Engineering Group to oversee cleanup and remediation efforts. Despite contract requirements related to safe working conditions, Jacobs exposed workers at the site to hazardous materials in an unsafe manner, requiring them to work long hours in close proximity to toxic fly ash, allegedly without disclosing the fly ash's toxic nature, properly monitoring the fly ash, adequately training workers, adequately monitoring workers' medical conditions, or properly disposing of toxic substances. Individuals who worked on the cleanup filed suit against Jacobs under state law, alleging that, due to their exposure to fly ash constituents and other toxic substances, they suffered an array of health problems. Jacobs moved to dismiss, contending that it had "derivative sovereign immunity" under a 1946 Supreme Court case, *Yearsley v. W.A. Ross Construction Co.*, because it was working under a contract with the government. The district court granted the motion, but the court of appeals reversed, holding that *Yearsley* did not deprive the court of jurisdiction. Jacobs filed a petition for certiorari.

BRIEFS IN OPPOSITION (CONTINUED)

Adina Rosenbaum of Public Citizen assisted James K. Scott of Stokes Williams Sharp, PC, in Knoxville, TN, by writing the brief in opposition. The opposition argued that no federal court of appeals had ever dismissed a case for lack of subject matter jurisdiction because of *Yearsley* and that nothing about *Yearsley* suggests that the immunity it recognizes is jurisdictional. The petition was denied.

PNC Bank v. Kessler

A class of borrowers sued PNC Bank over a mortgage lending scheme operated by its corporate predecessor, Community Bank of Northern Virginia. The scheme involved inaccurate disclosures of the annual percentage rate and the bank's payment of kickbacks to undisclosed third parties that did not provide any services to the borrower. The district court certified a class action, and the court of appeals affirmed, finding that the claims turned on the existence of uniform practices applied to all borrowers. PNC sought Supreme Court review, arguing that issues common to the class did not predominate over individual ones.

Public Citizen's Scott Michelman, serving as co-counsel with R. Bruce Carlson of Carlson, Lynch, Sweet & Kilpela, LLP and R. Frederick Walters and David M. Skeens of Walters Bender Strohbehn & Vaughan, PC, wrote the brief in opposition. The opposition argued that the uniform practices alleged ensured that issues common to all class members would predominate, and it pointed out that PNC's proposed standard would require plaintiffs to prove that the common issues will be resolved in their favor – a standard that the Supreme Court previously rejected. The petition was denied.

Udren Law Offices, P.C. v. Kaymark

When Dale Kaymark fell behind on his mortgage payment, Bank of America initiated foreclosure proceedings, and Udren Law Offices, a law firm specializing in debt collection, filed a foreclosure complaint on behalf of the bank. The complaint stated that Kaymark owed attorney's fees and other costs that had not in fact been incurred. Kaymark then sued Udren under the Fair Debt Collection Practices Act (FDCPA), asserting that the law firm's false statement about fees and costs violated provisions of the FDCPA that prohibit debt collectors from using false representations and unfair and unconscionable means to collect a debt. The district court dismissed Kaymark's claims, but the court of appeals reversed the dismissal of some of the FDCPA claims. Udren then filed a petition for a writ of certiorari in the Supreme Court, arguing that the FDCPA does not apply to legal pleadings and that the Tenth Amendment bars the FDCPA's application to statements made during state court litigation.

Julie Murray of Public Citizen, working with Michael Malakoff of Pittsburgh, PA, drafted the brief in opposition. The opposition explained that the courts of appeals agreed on the question presented and that the court's opinion in this case did not impinge on state interests. The petition was denied.

Wal-Mart Stores, Inc. v. Phipps

A nationwide class of female employees sued Wal-Mart, alleging that the company had engaged in sex discrimination by allowing local managers to exercise discretion over pay and promotions disproportionately in favor of men. In 2011, the Supreme Court rejected the nationwide class action on the grounds that the plaintiffs could not prove a general policy of discrimination at all Wal-Mart stores. A few employees then filed smaller regional class actions to address the Supreme Court's ruling. Although the Supreme Court held in *American Pipe & Construction Co. v. Utah* (1974) that a pending class action tolls the statute of limitations for unnamed class members until class certification is denied, Wal-Mart argued that the nationwide class action tolled the statute of limitations only for the filing of individual claims, not for filing subsequent class actions. Rejecting Wal-Mart's argument, the Court of Appeals for the Sixth Circuit ruled that the plaintiffs could pursue a class action. Wal-Mart petitioned the Supreme Court.

Allison Zieve and Scott Nelson of Public Citizen worked with Joseph Sellers and Christine Webber of Cohen Milstein of Washington, DC, to draft the brief in opposition. The opposition argued that Wal-Mart overstated the breadth of the Sixth Circuit's ruling and that the Sixth Circuit's decision was consistent with the prevailing view among courts of appeals and was compelled by Supreme Court precedent. The petition was denied.

"It's a beautiful brief.... Thank you."

— Email from Rachel Higgins, thanking us for assistance at the certiorari stage in *Pitzer v. Tenorio*

MERITS BRIEFS

Campbell-Ewald v. Gomez

Jose Gomez filed a class action under the Telephone Consumer Protection Act against Campbell-Ewald, a marketing company that caused texts with recruiting messages for the Navy to be sent to his cell phone and the cell phones of thousands of other people, even though they had not consented to receive them. Campbell-Ewald attempted to derail the case by making an offer of settlement to Gomez, and Gomez refused. Campbell-Ewald argued that the case was nonetheless mooted by the offer. The district court rejected that argument, but ultimately granted summary judgment for the defendant on the ground that the company had "derivative sovereign immunity" because it was working under a contract with the Navy. The Court of Appeals for the Ninth Circuit vacated the district court's decision. The court of appeals held that Campbell-Ewald was not immune, and also rejected its argument that the case was moot. With regard to mootness, the court held that an offer of judgment that a plaintiff rejects cannot moot his individual claims and that, even if the individual claims were moot, the class claims would remain justiciable. Campbell-Ewald filed a petition for certiorari, and Scott Nelson of Public Citizen assisted in drafting the brief in opposition to the petition. The Supreme Court granted review, and Scott continued as co-counsel for Gomez, assisting with drafting the merits brief.

In January 2016, in a 6-3 decision, the Supreme Court affirmed the court of appeals. The Court held that an offer of judgment does not moot a plaintiff's individual claim even if it would grant complete relief on that claim, and therefore does not bar the plaintiff from seeking to certify a class. The Court also held that Campbell-Ewald was not entitled to "derivative sovereign immunity." A government contractor, the Court held, does not acquire the government's expansive sovereign immunity.

Tyson Foods v. Bouaphakeo

Workers at a Tyson Foods meat-processing plant in Iowa sued Tyson for undercompensating them for time spent walking to their worksites and donning and doffing protective equipment necessary to perform their dangerous jobs. The workers' lawsuit was certified as a class action. The case was tried to a jury, and because no records had been kept of the workers' time, the plaintiffs used a combination of individual timesheets and expert testimony based on an observational study of workers' donning, doffing, and walking time (using observations of 744 workers) to prove their claims. The jury returned a verdict in favor of the class and awarded damages. The court of appeals affirmed. In March 2015, Tyson petitioned the Supreme Court to review the case. Tyson argued that the use of sampling was unfair and that a class cannot be certified if any of its members did not have compensable damages. Scott Michelman of Public Citizen then joined plaintiffs' counsel Robert Wiggins, Jr. of Wiggins, Childs, Quinn & Pantazis, as co-counsel to prepare the brief in opposition defending the judgment in favor of the workers and their right to proceed as a class. After the Supreme Court granted the petition, Scott Michelman, Scott Nelson, and Allison Zieve played principal roles in merits briefing.

In March 2016, in a 6-2 decision, the Supreme Court affirmed the court of appeals' decision in favor of the workers. The Court held that the workers' reliance on representative proof did not defeat class certification because representative proof is allowed in individual wage-and-hour cases, and it would shrink plaintiffs' rights to deny them the opportunity to use such evidence when proceeding as a class. In general, if a method of proof is permissible for individuals' claims, it remains permissible when those individuals band together into a class. The Court declined to reach Tyson's claim that a class may not be certified if it contains "uninjured" members because Tyson abandoned that argument.

"I want to thank all three of you for all the hard work you devoted to the brief and the letters to the SG over the last three months. You brought immense talent and wisdom to bear on behalf of persons who haven't had much chance in life and can never repay you. I appreciate that very much, as do they."

— Email from Robert Wiggins, thanking us for our work as co-counsel at the merits stage in *Tyson Foods v. Bouaphakeo*

MOOT COURTS

Moot courts give counsel a valuable opportunity to sharpen their arguments and identify potential vulnerabilities so that they can effectively address the concerns of the Justices. This Term, we hosted moot courts for attorneys with oral arguments before the Court in nineteen cases—more than one quarter of the sixty-nine cases argued. We mooted both attorneys preparing for their first Supreme Court arguments and attorneys with significant Supreme Court experience. The cases involved a wide range of public interest issues.

- *Betterman v. Montana* (whether the Speedy Trial Clause applies to the sentening phase of a prosecution)
- *CPV Maryland, LLC v. Talen Energy Marketing* and *Hughes v. Talen Energy Marketing* (whether state laws that subsidize electricity generating plants to encourage them to build capacity are preempted by federal laws regulating energy markets)
- *DirecTV v. Imburgia* (whether a reference to state law in an arbitration agreement requires application of state law to the extent it is not preempted by the Federal Arbitration Act or application of state law apart from the Act's preemptive effect)
- *Encino Motor Cars, LLC v. Navarro* (whether "service advisors" at car dealerships are exempt from the minimum wage and overtime requirements of federal law)
- *Foster v. Chatman* (whether lower courts failed to recognize that a prosecutor's conduct constituted prohibited race discrimination in jury selection)
- *Gobeille v. Liberty Mutual Insurance Co.* (whether ERISA preempts a Vermont law requiring health insurers to report certain data about payments and services provided to a state database)
- *Green v. Brennan* (whether under federal employment discrimination law, the filing period for a constructive discharge claim begins to run when an employee resigns or at the time of an employer's last allegedly discriminatory act giving rise to the resignation)
- *Hawkins v. Community Bank of Raymore* (whether spousal guarantors are considered "applicants" for the purposes of the Equal Credit Opportunity Act)
- *Heffernan v. City of Paterson* (when an employer retaliates against an employee to prevent him from engaging in political activity, whether the employee can challenge the retaliation under the First Amendment if he was not actually engaging in political activity)
- *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Manning* (whether a suit alleging conduct that would violate federal securities laws may be brought in state court)
- *Montanile v. Board of Trustees of the National Elevator Industry Health Benefit Plan* (whether an employee benefit plan may seek reimbursement from the proceeds of an injured employee's settlement if the employee has already spent the funds)
- *Montgomery v. Louisiana* (whether the Supreme Court's decision in *Miller v. Alabama*, which prohibited mandatory sentences of life without the possibility of parole for juveniles, retroactively applies in state collateral review cases)
- *Puerto Rico v. Sanchez Valle* (whether Puerto Rico and the federal government are separate sovereigns for purposes of the Double Jeopardy Clause)
- *Simmons v. Himmelreich* (whether a judgment dismissing a claim under one of the Federal Tort Claims Act's exceptions to liability bars a subsequent action against the individual federal employees whose actions gave rise to the FTCA claim)
- *Torres v. Lynch* (whether for purposes of immigration law, a state offense is "described in" a specified federal statute if the federal statute includes an interstate commerce element that the state offense lacks)
- *Tyson Foods v. Bouaphakeo* (whether a case for underpayment of wages can be maintained as a class action where the plaintiffs used statistical proof of injuries and not every worker had compensable damages)
- *Universal Health Services v. United States ex rel. Escobar* (whether "implied certification" is a valid theory of liability under the False Claims Act)
- *Utah v. Strieff* (whether evidence seized incident to a lawful arrest on an outstanding warrant should be suppressed because the warrant was discovered during an investigatory stop later found to be unlawful)

"I am most grateful to you and your colleagues for the moot in *Foster*. I know that it takes a lot of time for preparation as well as for the moot itself. It was most beneficial."

— Email from Stephen Bright, thanking us for the moot court in *Foster v. Chatman*

2015 TERM — VICTORIES FOR CLASS-ACTION PLAINTIFFS

This Term, the Court heard several cases that challenged the ability of individuals to join together in a class action to vindicate their rights. The prospect of major decisions on class-action issues from a Court with a reputation for being pro-business caused observers to make dire predictions about the future of class-action cases: "The Death of the Class-Action Lawsuit?" asked a headline in *The Nation* magazine in September 2015; "By this time next year, class action lawyers could be looking back with nostalgia and regret at the good old days," predicted Alison Frankel of *Reuters* in June 2015. Fortunately, those predictions have fallen short, with Public Citizen Litigation Group attorneys contributing to two major wins for class-action plaintiffs this term.

In *Campbell-Ewald v. Gomez*, the defendant argued that its *unaccepted* offer of settlement to the named plaintiff in a class action rendered the plaintiff's claim moot and, thus, the class action moot. That tactic had become increasingly common among defendants in cases where the damages of individual class members were small, but the damages for the class as a whole were large. Contrary to the dire predictions, the Supreme Court agreed with us that an unaccepted offer of relief does not moot a case because the offer is not binding and does not provide the plaintiff with a judgment in his favor. Public Citizen attorneys had served as appellate counsel for several plaintiffs fighting this tactic in cases across the country, and we served as co-counsel for Gomez in the Supreme Court.

Although we had hoped that the Court's decision would put an end to this tactic of trying to eliminate class actions by forcing a resolution of the named plaintiffs' claims, corporate defendants quickly reacted to the decision by changing their approach. Now, defendants in several cases have delivered checks to the plaintiffs' lawyers or deposited money in escrow, and then argued that the cases should be dismissed because the named plaintiff has all the relief to which he or she would be individually entitled. Public Citizen attorneys are serving as appellate counsel for plaintiffs or filing amicus briefs in several of these cases to explain why the courts should reject this effort to force early dismissal of cases before consideration of class certification.

In *Tyson Foods v. Bouaphakeo*, Public Citizen attorneys again served as co-counsel for the plaintiffs in the Supreme Court. Tyson advanced two arguments for reversing a jury verdict for the plaintiff class—either of which, if accepted, would have had a significant negative impact on individuals' ability to pursue class actions. First, Tyson argued that the class should not have been certified, or the class should have been decertified, because the plaintiffs used representative proof to show liability and damages. This argument challenged the viability of a 70-year-old Supreme Court precedent allowing use of representative proof of damages where the defendant failed to keep records that would have enabled individualized proof. The Court's decision strongly confirms that representative proof can be used to demonstrate both damages and liability.

Second, Tyson argued that a class cannot be certified if *any* member of the defined class was not injured. This argument, also raised in three other petitions pending before the Court last fall, would, if accepted, have created practical conundrums at odds with Rule 23's structure and purpose, because assessing class members' injuries at certification is often infeasible because their identities are unknown. Tyson, however, stepped back from this argument in its merits brief. The Court therefore did not address it and subsequently denied the other petitions that raised it.

A third class-action case, *DirecTV, Inc. v. Imburgia*, did not end as well. In *Imburgia*, the Supreme Court considered whether a one-of-a-kind arbitration clause, no longer used by the defendant in current contracts, barred class actions. The Court conceded that the meaning of the contract was a state-law question of contract interpretation and that the Court has no authority to overrule a state court on a state-law question. Nonetheless, the Court reversed the state court, concluding that the court's reading of the contract was so wrong that it had to be based on hostility to arbitration. Public Citizen had filed an amicus brief and held a moot court for the respondents' counsel.

It is tempting to dismiss *Imburgia* as a case involving unique contract language. As Justice Ginsburg pointed out in her dissent, however, the decision reflects the Court's approach to arbitration, under which state laws protecting consumers' rights seem as alien to the majority as "the law of Tibet" or "the law of pre-revolutionary Russia." The 6-to-3 decision is a reminder that the Supreme Court's arbitration jurisprudence—which has allowed some companies to opt out of the civil justice system—is not likely to change soon.

In these and other cases during the 2015 Term, the Supreme Court Assistance Project focused on upholding individuals' right of access to the civil justice system by preserving the ability for victims of widespread wrongdoing to join together when their individual claims are small. As defendants continue to develop new arguments to try to stymie class actions, our Project will likewise continue working to prove wrong predictions of the demise of class actions.

Your contribution is vital to our continued success.

In its twenty-six 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 public-interest attorneys.

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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