

Alan Morrison

SUPREME COURT

ASSISTANCE PROJECT | 2020 – 2021

PUBLIC CITIZEN LITIGATION GROUP

The [Alan Morrison Supreme Court Assistance Project](#) offers pro bono legal assistance in the U.S. Supreme Court by helping to oppose petitions for certiorari to protect public-interest victories in lower courts, co-counseling at the merits stage, and conducting moot courts in public-interest cases.

The work of identifying cases and coordinating assistance is handled by a fellow—a recent law school graduate working under the close supervision of our experienced attorneys. Grace Paras, a 2020 graduate of Georgetown University Law Center, served as the 2020–2021 Supreme Court Assistance Project Fellow. Anna Dorman, a 2021 graduate of Harvard Law School, will succeed her in August 2021.

Your support ensures that the Project can continue to offer this assistance and to provide the incredible opportunity that the Project fellowship offers to a new lawyer.

We hope that after you read about the Project’s work over the past year, you will agree that it is worthy of [your support](#).



Allison M. Zieve
Director, Public Citizen Litigation Group

PUBLIC CITIZEN LITIGATION GROUP

OUR HISTORY

Public Citizen’s Supreme Court Assistance Project began more than thirty years ago, in 1990. Then, Public Citizen Litigation Group founder Alan Morrison envisioned a public-interest group that served 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 who oppose 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.

Public Citizen Litigation Group has argued sixty-four cases before the Supreme Court and has served as lead or co-counsel in hundreds of others. Bringing decades of Supreme Court experience, the Project offers assistance to attorneys in cases concerning access to the civil justice system and claims of government misconduct, and in cases in which employees, civil-rights claimants, consumers, or tort plaintiffs may establish important precedents.

THE 2020–2021 TERM

The Court dealt with a big adjustment this Term: the passing of Justice Ruth Bader Ginsburg in September 2020. Then-President Donald Trump nominated Amy Coney Barrett to succeed Justice



Ginsburg, and she was confirmed in October 2020 by a 52–48 vote. With Justices Gorsuch, Kavanaugh, and Barrett settling into their third, second, and first terms, respectively, the Court heard arguments in cases involving high-profile issues including the right of same-sex couples to obtain foster-care licenses from religiously affiliated agencies receiving state funding and the constitutionality of the zero-penalty individual mandate of the Affordable Care Act. The Court

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also granted several petitions involving controversial social issues, including the right to seek an abortion and the scope of the Second Amendment.

This Term, the Supreme Court’s “shadow docket,” which has been particularly active over the past few years, garnered increased attention. The term “shadow docket” refers to applications presented to the Court for immediate resolution—primarily, applications for injunctions or for stays of lower-court decisions. When the Court issues an order in response, its decision often contains little or no legal analysis. Several cases adjudicated through the shadow docket in the past year pertained to COVID-19. These cases were generally brought by groups alleging that their First Amendment right to free exercise of religion had been violated by state and local government policies that limited gatherings in light of the pandemic. The Court ruled in favor of the challengers in many of these cases, striking state and local laws meant to curb the spread of COVID-19, without full briefing and argument, via the shadow docket. Also through the shadow docket, the Court allowed thirteen federal executions to move forward between July 2020 and January 2021—the first federal executions to take place since 2003.

Adding to the eventful Term was the presidential election and subsequent change in the presidential administration. The Court declined to expedite consideration of petitions challenging states’ election results, and those petitions became moot once Congress certified the results. In addition, the change in administration resulted in reversal of some of the federal government’s legal positions. For example, the Biden Administration changed course in cases concerning the Trump Administration’s “return to Mexico” program and Medicaid work requirements, and the Court removed these cases from its argument calendar.

WE CAN HELP

Practitioners and Justices alike agree that experience is an advantage when appearing before the Court. At the Supreme Court Historical Society’s [annual lecture](#) in 2019, Justice Clarence Thomas responded to a question about the importance of having experienced counsel by stating, “If it’s my money on the line, I’d be as risk averse as anybody else. ... That doesn’t mean you’re gonna win but ... go with someone who will increase your odds.” Unfortunately, hiring an experienced Supreme Court advocate is easier said than done for many public-interest litigants who lack

the financial resources of their corporate or governmental adversaries. Fortunately, Public Citizen’s litigators have knowledge of Supreme Court practice equal to that of the high-priced experts often aligned against public-interest attorneys.

On average, attorneys with prior experience arguing before the Court are significantly more likely to win their cases than first timers.

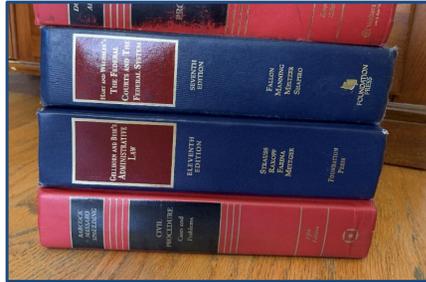
At the petition stage, experience is just as important. Petitions for certiorari and briefs in opposition are different than other briefs, and expertise drafting them can be essential to convincing the Court to grant or deny review. Since 1990, Public Citizen attorneys have drafted a great many petitions. We have also drafted hundreds of oppositions to petitions and advised on hundreds of additional oppositions, scoring quiet victories by helping attorneys who prevailed in the lower courts keep their cases out of the Supreme Court.

With experience in hundreds of Supreme Court cases, Public Citizen litigators can stand toe to toe with the well-resourced lawyers who represent corporations and governments.

OUR DOCKET: THE 2020 TERM

In the 2020 Supreme Court Term, which ran from October 2020 through July 2, 2021, Public Citizen Litigation Group served as the principal drafter of the brief in opposition in six cases, provided substantial petition-stage assistance in twelve others, and served as co-counsel on one (successful) petition.

At the merits stage, we co-counseled on two cases. Public Citizen also submitted nine amicus briefs, tying as the sixth-most prominent writer of amicus briefs this Term, according to a [study](#) by the Juris Lab. Public Citizen also held moot courts for twenty-nine cases.



Below are examples of our work during the 2020 Term.

“While your good works are always necessary, it seems that as each year passes, they become more necessary than ever and more vital to our Constitution and democracy. Keep up the amazing and vital work!”

Letter from Lawrence Katz of Coffey, Kaye, Myers & Olley

Among Our Briefs in Opposition

[C.H. Robinson Worldwide v. Miller](#)

C.H. Robinson is a freight broker that connects shippers in possession of goods with truckers to move the goods. In 2016, C.H. Robinson retained trucking service RT Service. The RT Service trucker drove too fast in poor road conditions, crossed a median, and flipped over. Allen Miller, who had been driving in another lane, was pinned under the truck, suffered extensive injuries, and was rendered a quadriplegic.

Mr. Miller filed suit against C.H. Robinson, alleging that it was negligent in hiring RT Service, which had a history of safety violations. In response, C.H. Robinson argued that Mr. Miller’s claim was preempted by the Federal Aviation Administration Authorization Act. Mr. Miller countered that his claim did not fall within the scope of the Act’s preemption provision, but that if it did, it would fall within a provision that excepts safety matters from the scope of preemption. After the Ninth Circuit ruled in favor of Mr. Miller, C.H. Robinson petitioned the Supreme Court for review. Opposing the petition, the respondent’s brief explained that the decision below is the first federal court of appeals decision to address the question presented and that the court of appeals correctly held that the safety exception applied to Mr. Miller’s claim.

The Court will consider the petition at its first conference in September. Adina Rosenbaum and Allison Zieve of Public Citizen joined as co-counsel with Rena M. Leizerman and Michael Jay Leizerman of The Law Firm for Truck Safety in Toledo, Ohio, to oppose the petition.

[Davis v. Ermold](#)

In 2015, the Supreme Court held in *Obergefell v. Hodges* that the United States Constitution prohibits the states from banning same-sex marriage. Following that decision, the Governor of Kentucky directed all county clerks in the state to comply with the law and issue marriage licenses to all legally eligible couples, regardless of sex. Kim Davis, the County Clerk of Rowan County, Kentucky, refused to do so. Based solely on her personal opposition to same-sex marriage, Ms. Davis instituted a policy by which her office would not issue any marriage licenses at all. The plaintiffs in this case are two couples who were repeatedly denied a marriage license from Ms. Davis. After they eventually received their licenses from other members of Ms. Davis's staff who defied her orders by issuing licenses while she was in jail for contempt, the plaintiffs sought damages from Ms. Davis based on her violation of their constitutional right to marry. Ms. Davis moved to dismiss the case, arguing that she was entitled to qualified immunity. The district court denied the motion, and Ms. Davis appealed.



The Sixth Circuit affirmed, holding that *Obergefell* clearly established the unlawfulness of Ms. Davis's conduct. Ms. Davis petitioned the Supreme Court for review. On behalf of the same-sex couples, Public Citizen prepared the brief in opposition to the petition, arguing that Ms. Davis's refusal to issue marriage licenses was unconstitutional in light of *Obergefell*, and also that qualified immunity would not protect Ms.

Davis for knowingly refusing to perform a ministerial duty.

The Court denied the petition. Adam Pulver and Kaitlin Leary of Public Citizen joined as co-counsel with Kentucky attorneys Michael Gartland, Kash Stiliz, and Rene Heinrich to write the brief in opposition.

[Hedger v. Graves](#)

Police officers entered Ronnie Graves's home after a call from his grandmother, who reported that he was mentally unstable and had attacked her. The officers found Mr. Graves sitting motionless in a bathtub, his legs dangling over the edge of the tub and his eyes staring straight ahead. They knew that Mr. Graves no longer possessed the blade of a knife that he had forty minutes prior because they had already recovered it. Nonetheless, when Mr. Graves raised his arm, one officer shot at Mr. Graves with a handgun and another with an AR-15, hitting him in the face. After observing that Mr. Graves's "face was hanging off," thinking that Mr. Graves was most likely in shock, and noting that his colleagues were unharmed, another officer tased Mr. Graves.

Mr. Graves sued the officers for violating his Fourth Amendment rights by using excessive force. The district court granted the officers' motion for summary judgment, holding that they were entitled to qualified immunity. The Sixth Circuit reversed, ruling in favor of Mr. Graves that a genuine dispute of material fact regarding the reasonableness of the officers' decisions to shoot and tase Mr. Graves should have precluded summary judgment. The officers petitioned for certiorari. Representing Mr. Graves, Public Citizen argued that the Sixth Circuit was correct in holding that disputed issues of material fact precluded summary judgment on the reasonableness of the officers' deployment of lethal force and a taser.

The Court denied the petition. Allison Zieve of Public Citizen served as co-counsel with Robert Palmer, Beth Rivers, and Robin Wagner of Pitt, McGehee, Palmer, Bonanni & Rivers of Royal Oak, Michigan, to prepare the brief in opposition.

[Lloyd Industries v. Watson](#)

A jury determined that Lloyd Industries had terminated Ronald Watson's employment based on his race and awarded him compensatory and punitive damages. Considering the reprehensibility of Lloyd Industries' conduct, the ratio between the compensatory and punitive damages, and the statutory cap on damages under Title VII, the district court rejected Lloyd Industries' argument that a punitive damages award was improper but reduced the award to an amount five times the compensatory damages. Lloyd Industries appealed, and the Third Circuit affirmed, holding that the reduced punitive damages award was constitutional. Lloyd Industries then petitioned for certiorari. Serving as respondent's co-counsel on the brief in opposition to the petition, Public Citizen argued that the punitive-damages award was not grossly excessive, was consistent with Supreme Court precedent, and did not violate Lloyd Industries' due process rights.

The Court denied the petition. Adina Rosenbaum of Public Citizen served as co-counsel with Samuel Dion of Dion & Goldberger in Philadelphia, Pennsylvania, to prepare the brief in opposition.

"Thanks again for all your help with the brief and all your hard work."

Email from Samuel Dion, thanking us for assistance writing the brief in opposition in *Lloyd Industries v. Watson*

[McKinney v. Dean](#)

While on a routine assignment, an officer engaged in reckless, high-speed, night-time driving, although he knew that there was no emergency. He hit a young woman, Felicia Harkness, causing her life-altering injuries and saddling her with almost \$500,000 in medical bills. The Fourth Circuit held that the officer acted with deliberate indifference to Ms. Harkness's safety because he had ample opportunity for deliberation about the extreme risk his behavior posed to the public, and thus that Ms. Harkness stated a substantive due process claim against the officer. The court also held that the officer was not entitled to qualified immunity. The officer petitioned for certiorari, principally arguing that the doctrine of *Parratt v. Taylor* and *Hudson v. Palmer*, which holds that post-deprivation common-law remedies are sufficient to satisfy procedural due process in some circumstances, should apply. Opposing the petition, the respondent's brief countered that no court of appeals has expanded the *Parratt-Hudson* doctrine to substantive due process claims. Additionally, the brief argued that the officer was not entitled to qualified immunity because he had time to deliberate on the consequences of his reckless driving, and because it was clearly established that an officer violates substantive due process rights when he misuses a police vehicle in a non-emergency circumstance and is deliberately indifferent to human life.

The Court denied the petition. Scott Nelson of Public Citizen served as co-counsel with South Carolina attorneys Jordan Calloway, Robert Phillips, and Daniel Draisen to prepare the brief in opposition.



Merits Briefs, This Term and Next

[Gallardo v. Marsteller](#)

The Medicaid Act provides that, when a person recovers damages in a tort action and some portion is compensation for medical expenses, a state can assert a lien over the portion of the tort recovery that is properly allocated to medical expenses paid by Medicaid. In this case, the Florida Medicaid program paid for medical expenses incurred by a child who was hit by a truck after exiting her school bus, leaving her in a persistent vegetative state. She later received a tort settlement that covered a variety of categories of damages, including both past and future medical expenses. To recover for past Medicaid expenses, the State of Florida then asserted a lien over both the part of the settlement that reflected compensation for past medical expenses and the part that compensated for future medical expenses.

The Eleventh Circuit held that the State could recover its past expenditures from the portion of the settlement intended to cover future medical expenses—expenses that the State had not paid. The court of appeals’ decision conflicts with several state supreme court decisions on the meaning of the relevant provision of the Medicaid Act.

Public Citizen’s Scott Nelson, serving as co-counsel for the plaintiff in the U.S. Supreme Court alongside Bryan Gowdy and Meredith Ross of Creed & Gowdy and Floyd Faglie of Staunton & Faglie PL, filed a petition for certiorari asking the U.S. Supreme Court to resolve the conflict.

The Court granted the petition, and the case will be argued this coming Fall.

[Facebook v. Duguid](#)

Facebook used autodialing equipment to text consumers’ cellphones. Noah Duguid brought a class action against Facebook for violating the Telephone Consumer Protection Act (TCPA), which prohibits the use of an “automated telephone dialing system” to call



cellphones without the subscriber’s consent. Facebook moved to dismiss, arguing, among other things, that its equipment did not meet the TCPA’s definition of an autodialer. The district court granted the motion, and the Ninth Circuit reversed. Facebook then petitioned for certiorari, arguing that “an automated telephone dialing system” must be able to generate numbers randomly or sequentially.

The Court granted the petition. Co-counseling for Mr. Duguid, Public Citizen argued that the TCPA’s robocalling prohibition is best read to cover calls from autodialers that store numbers to be called, regardless of whether they use random or sequential number generators. The Supreme Court ruled in favor of Facebook, however, holding that the TCPA’s robocalling prohibition applies only to devices that use random or sequential number generators.

Scott Nelson of Public Citizen served as co-counsel with Sergei Lemberg and Stephen Taylor of Lemberg Law LLC and Bryan Garner and Karolyne Garner of Garner & Garner LLP.

“I want to take this opportunity to thank you again for your incredible work on this case. This has been an incredibly challenging, rewarding, and successful project. Whatever the outcome, the process has been amazing. However this comes out, I feel like we have all given it our absolute best.”

Email from Sergei Lemberg, thanking us for co-counseling in *Facebook v. Duguid*

[United States Fish & Wildlife v. Sierra Club](#)

The U.S. Fish and Wildlife Service and the National Marine Fisheries Service evaluated a regulation proposed by the Environmental Protection Agency (EPA) to determine the regulation's effects on threatened and endangered species and whether the regulation was permissible under the Endangered Species Act. The Sierra Club submitted Freedom of Information Act (FOIA) requests seeking certain documents that the Services prepared as part of the interagency consultation process. The Services refused to disclose several documents, claiming that they were protected by the deliberative-process privilege. On appeal, the Ninth Circuit held that FOIA's exemption for deliberative materials does not exempt from disclosure the agencies' final conclusions about the effects of the EPA's proposed rule, because those documents are not both predecisional and deliberative. The Services petitioned the Supreme Court for a writ of certiorari, arguing that the opinions must be predecisional and deliberative because they were unsigned and labeled "drafts." The Court granted the petition.

Public Citizen served as co-counsel for the Sierra Club in the Supreme Court. In a 7–2 opinion, however, the Court ruled for the agencies. The Court held that in-house drafts of biological opinions that are both predecisional and deliberative, even if they reflect the agency's final views about a proposal, are covered by the deliberative-process privilege and protected from disclosure by exemption 5 of FOIA.

Public Citizen's Scott Nelson served as co-counsel in the Supreme Court, assisting Sanjay Narayan of the Sierra Club Environmental Law Program and New York-based attorney Reed Super.

Moot Courts

Moot courts give counsel a valuable opportunity to sharpen their arguments and identify potential vulnerabilities so that they can effectively respond to the Justices' questions. Undeterred by the pandemic, Public Citizen Litigation Group did a full season of "virtual" moots this term.



Helping attorneys from around the country to prepare for oral arguments before the Court, we held moot courts in twenty-nine cases—*more than forty percent of the cases argued this Term*. 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, described below.

BP P.L.C. v. Mayor & City Council of Baltimore – whether 28 U.S.C. § 1447(d) permits a court of appeals to review any issue encompassed in a district court’s order remanding a removed case to state court where the removal was premised in part on the federal-officer or civil-rights removal statutes.

Brownback v. King – whether a final judgment in favor of the United States in an action brought under the Federal Tort Claims Act on the ground that a private person would not be liable to the claimant under state tort law for the injuries alleged bars a *Bivens* claim brought by the same claimant based on the same injuries.

“It was a fantastic moot!”

Email from Patrick Jaicomo, thanking us for a moot court in *Brownback v. King*

Caniglia v. Strom – whether the community-caretaking exception to the Fourth Amendment warrant requirement extends to the home.

City of San Antonio v. Hotels.com – whether district courts have discretion to deny or reduce appellate costs deemed taxable in district court under Federal Rule of Appellate Procedure 39(e).

Facebook v. Duguid – whether the Telephone Consumer Protection Act definition of “automatic telephone dialing system” includes a device that can store and automatically dial telephone numbers without using a random or sequential number generator.

Federal Communications Commission v. Prometheus Radio Project and *National Ass’n of Broadcasters v. Prometheus Radio Project* – whether the court of appeals erred in holding that FCC orders relaxing the agency’s media-ownership restrictions were arbitrary and capricious.

Federal Republic of Germany v. Philipp – whether the expropriation exception of the Foreign Sovereign Immunities Act provides jurisdiction over claims that a foreign sovereign has violated international human-rights law by taking property from its own national and within its own borders.

Ford Motor Co. v. Montana Eighth Judicial District and *Ford Motor Co. v. Bandemer* – whether the “arise out of or relate to” requirement for specific personal jurisdiction is met when the defendant’s forum contacts did not cause the plaintiff’s injury.

Garland v. Dai and *Garland v. Alcaraz-Enriquez* – whether a court of appeals may conclusively presume that an asylum applicant’s testimony is credible whenever an immigration judge or the Board of Immigration Appeals adjudicates an application without making an explicit adverse credibility determination.

Goldman Sachs Group v. Arkansas Teacher Retirement System – whether a defendant in a securities class action may rebut the presumption of class-wide reliance by pointing to the generic nature of alleged misstatements to show that the statements had no impact on the price of the security.

“You always put together such terrific panels! Again, I really can’t tell you how much I appreciate it.”

Email from Dan Geysler, thanking us for a moot court in *City of San Antonio v. Hotels.com*

Google LLC v. Oracle America, Inc. – whether copyright protection extends to a software interface and whether use of a software interface to create a new computer program constitutes fair use.

Henry Schein, Inc. v. Archer & White Sales, Inc. – whether a provision in an arbitration agreement that exempts certain claims from arbitration negates an otherwise clear delegation of questions of arbitrability to an arbitrator.

Jones v. Mississippi – whether the Eighth Amendment requires a sentencing authority to make a finding that a juvenile is permanently incorrigible before imposing a sentence of life without parole.

Mahanoy Area School District v. B.L. – whether *Tinker v. Des Moines Independent Community School District*, which holds that public-school officials may regulate speech that would substantially disrupt the school’s work and discipline, applies to student speech occurring off campus.

National Collegiate Athletic Ass’n v. Alston and *American Athletic Conference v. Alston* – whether NCAA eligibility rules regarding compensation for student athletes violate federal antitrust law.

Nestlé USA, Inc. v. Doe I and *Cargill, Inc. v. Doe I* – whether the aiding-and-abetting claim alleged in the case brought under

the Alien Tort Statute overcame the extra-territoriality bar.

Pham v. Chavez – whether the detention of an immigrant who is subject to a reinstated removal order and is pursuing withholding or deferral of removal is governed by 8 U.S.C. § 1231 or 8 U.S.C. § 1226.

PennEast Pipeline Co. v. New Jersey – whether the Natural Gas Act delegates to Federal Energy Regulatory Commission certificate holders the authority to exercise the federal government’s eminent domain power to condemn land in which a state claims an interest.

Republic of Hungary v. Simon – whether a district court can abstain from exercising jurisdiction under the Foreign Sovereign Immunities Act based on international comity.

Tanzin v. Tanvir – whether the Religious Freedom Restoration Act permits claims seeking money damages against federal officials, agents, and employees sued in their individual capacities for violations of the law’s substantive protections of religious belief.

Trans Union LLC v. Ramirez – whether the district court properly certified a damages class action and whether the class included members who did not suffer injury.

United States v. Palomar-Santiago – whether a respondent satisfies the three prerequisites of 8 U.S.C. § 1326(d) by showing that he was removed for a crime that would not be considered a removable offense under current law if he cannot show administrative exhaustion or deprivation of an opportunity for judicial review.

United States Fish & Wildlife Service v. Sierra Club – whether exemption 5 of the

Freedom of Information Act protects against compelled disclosure of a federal agency’s draft documents, where no further deliberation over the decision occurred after the preparation of the documents.

Uzuegbunam v. Preczewski – whether a government’s post-filing change of an unconstitutional policy moots a claim for nominal damages for the government’s past violation of the plaintiff’s rights.

“Now that I have survived the real thing, I wanted to send a note of thanks to all of you for mooted me for the *B.L.* case. The moots were absolutely critical in preparing me, and your questions and feedback helped our team reshape and reframe our arguments right up to the day before argument. I know it’s a significant investment of time and energy to do these moots, and I just wanted to say how much I appreciated your help.”

Email from David Cole, thanking us for a moot court in *Mahanoy Area School District v. B.L.*

YOUR ROLE

Your contribution is vital to our success. In its thirty years, the Supreme Court Assistance Project has assisted hundreds of lawyers in opposing or filing petitions for certiorari, in briefing the merits of cases after the Supreme Court grants review, and in preparing for Supreme Court arguments.

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.

Please donate by sending a check to

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1600 20th Street NW, Washington, DC 20009

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<https://publiccitizen.salsalabs.org/supreme-court-assistance-project/index.html>.



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