Alan Morrison

# SUPREME COURT

## ASSISTANCE PROJECT | 2021 – 2022

PUBLIC CITIZEN LITIGATION GROUP

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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. Anna Dorman, a 2021 graduate of Harvard Law School, served as the 2021–2022 Supreme Court Assistance Project Fellow. Michael Migiel-Schwartz, a 2022 graduate of Harvard Law School, will succeed her in August 2022.

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



## 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 attorneys have argued sixty-five cases before the Supreme Court and have served as lead or co-counsel in hundreds of others. Bringing decades of Supreme Court experience, the Project aids 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 2021–2022 TERM

This Term promised controversy and drama, and it certainly delivered.

In January, following 28 years of service on the Supreme Court, Justice Stephen Breyer announced his retirement. At a White House retirement ceremony, President Biden praised Justice Breyer for his "practical, sensible, and nuanced" opinions as well as his reputation for unwavering kindness. After a contentious hearing, the Senate confirmed Judge Ketanji Brown Jackson, a former Breyer clerk, as the next Justice. Jackson will be the first Black woman ever to serve on the Court.

An unprecedented leak of a draft opinion added more drama to the term. Following rumors about an unstable majority poised to overturn *Roe v. Wade*, Politico published a complete first draft of an opinion by Justice Alito in *Dobbs v. Jackson Women's Health Organization*. In response to the leak, Chief Justice Roberts ordered the Court's marshal to launch an investigation, which reportedly includes looking at law clerks' cellphone records and requiring the clerks to sign sworn affidavits. It is not clear whether the results of that investigation will be made public.

What the 2021–2022 Term will surely be most remembered for, however, is its decisions. The Court decided many cases involving high-profile issues—including the scope of the Second Amendment, abortion access, campaign finance restrictions, and religious expression—in several cases overturning longstanding precedents. Via the shadow docket, the Court also played a role in redistricting: In February and June, it allowed Alabama and Louisiana, respectively, to reinstate congressional maps that lower courts had held violated the Voting Rights Act; in March, it threw out the congressional maps adopted by the Wisconsin Supreme Court.

On the last day of the term, after brief mentions of the "major questions doctrine" in opinions earlier this year, the Court formally adopted the doctrine in *West Virginia v. EPA*. We expect to see it invoked frequently in future challenges to health, safety, and environmental regulations, although its scope is not yet clear.

Looking ahead to next Fall, the Court has granted several petitions in cases involving hot-button issues, including affirmative action, the rights of native children and families, and whether religious beliefs override laws barring discrimination.



"Thank you for all the invaluable things you do to carry forward the vision established by Alan a half-century ago (!)."

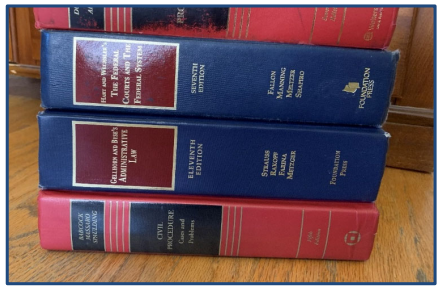
Note from attorney Simon Lazarus

## WE CAN HELP

Public Citizen's ability to offer expert assistance at the certiorari stage can be essential for public interest litigants, particularly at the petition stage. Practitioners and Justices alike agree that experience is an advantage when appearing before the Court. As Empirical SCOTUS's Adam Feldman has explained, "[e]xpert Supreme Court counsel are much more successful in persuading the justices to hear their cases than lawyers with less experience." Because an effective brief in opposition will address the factors most salient in deterring the Court from granting a petition, familiarity with petition-stage briefing is a significant advantage. And as Justice Kagan has stated, arguing before the Court can be "pretty much a nightmare," although not for "repeat players."

Perhaps unsurprisingly, most prominent Supreme Court advocates work for law firms primarily defending business interests. Hiring an experienced Supreme Court advocate is therefore 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. Since 1990, Public Citizen attorneys have drafted numerous petitions, drafted hundreds of oppositions to petitions, and advised on hundreds of others, scoring quiet victories by helping attorneys who prevailed in the lower courts keep their cases out of the Supreme Court. We have also taken the lead on countless merits-stage briefs, sixty-five oral arguments, and hundreds of moot courts.



## OUR DOCKET: THE 2021 TERM

In the 2021 Supreme Court Term, which ran from September 2021 through June 30, 2022, Public Citizen Litigation Group served as the principal drafter of the brief in opposition in eight cases and provided substantial petition-stage assistance in eleven others.

At the merits stage, we co-counseled on three cases and held moot courts for twenty-five cases.

Below are some examples of our work during the 2021–2022 Term.

"Public Citizen's help through the process was invaluable—from our initial conversation to providing the basic formatting template to excellent edits to the draft—thank you so much!!!"

Note from attorney Jason Pikler, thanking us for assistance with the opposition brief in *Portfolio Recovery Assocs. v. Pounds*



## Among Our Briefs in Opposition

### *AMN Services v. Clarke*

A healthcare staffing company that employs nurses to work at hospitals across the country paid the nurses both an hourly wage and an amount characterized as a per diem. For nurses who worked near home, the company characterized that amount as wages and included it in the calculation of the regular rate of pay for purposes of overtime. For nurses who worked more than 50 miles away from home, the company characterized that amount as reimbursement of travel expenses and excluded it from their regular rate of pay, thereby decreasing their wage rate for purpose of calculating overtime.

Nurses who worked away from their homes filed a lawsuit under the Fair Labor Standards Act and California state law, alleging that the company improperly excluded the per diem payments from the calculation of their regular rate. Reversing the district court, the Ninth Circuit held that the per diem benefits functioned as compensation and that the benefits were therefore improperly excluded from the regular rate of pay for purposes of calculating overtime pay. The company then petitioned the Supreme Court for review and obtained six amicus briefs supporting its petition.

Public Citizen's Allison Zieve served as co-counsel with California attorneys Matthew Hayes and Kye Pawlenko to prepare the brief in opposition—which was successful. The Court denied the petition.

### *C.H. Robinson Worldwide v. Miller*

C.H. Robinson, a freight broker, hired a motor carrier with a history of safety violations to transport some goods. That carrier's driver drove over a median, and the truck overturned. Allen Miller, who was driving in the opposite direction, was unable to avoid the truck after it crossed into his lane, crashed into it, and was rendered a quadriplegic.

When Mr. Miller sued C.H. Robinson for negligently hiring the motor carrier, C.H. Robinson argued that his claim is barred by the Federal Aviation Administration Authorization Act. That Act preempts state laws related to a price, route, or service of a motor carrier or broker, but contains an exception for the safety regulation authority of a State with respect to motor vehicles. After the Ninth Circuit held that the claim is not preempted because it falls within the exception for the safety regulatory authority of the state, C.H. Robinson filed a petition for certiorari.

Adina Rosenbaum of Public Citizen, working with Rena Leizerman of the Law Firm for Truck Safety, served as co-counsel on the brief in opposition to the petition—which was successful. The Court called for the views of the Solicitor General, who filed a brief agreeing with our position and recommending denial of the petition. The Court denied the petition.

"We are jumping up and down over here! Thank you is not even close to sufficient and, still, thank you!!!"

Email from attorney Rena Leizerman, thanking us for assistance with the opposition brief in *C.H. Robinson Worldwide v. Miller*.

### ***Russell v. Educational Commission for Foreign Medical Graduates***

A class of plaintiffs injured when they were treated by an unqualified, purportedly foreign-trained doctor filed an action against the Educational Commission for Foreign Medical Graduates, which is responsible for confirming the credentials of foreign-trained doctors. The district court certified an "issue class" on liability issues relating to whether the defendant violated a duty of care. The defendant then appealed to the Third Circuit, which held that an issue class may be certified even when the plaintiffs' claim as a whole does not meet the standard for certification under Rule 23(b)(3). The defendant filed a petition for certiorari.

Public Citizen attorney Scott Nelson served as co-counsel with Patrick Thronson and Brenda Harkavy of Janet, Janet & Suggs in Maryland on appeal and to oppose the petition for certiorari. The Court denied the petition.

### ***SNH SE Ashley River Tenant, LLC v. Arredondo***

Thayer Arredondo sued the owners of an assisted-living facility where her father had lived, alleging that the facility's negligence caused his death. The facility moved to compel arbitration based on an agreement that the daughter had signed when her father was admitted to the facility. Opposing the motion, she argued that the powers of attorney granted to her by her father did not give her authority to execute an arbitration agreement on his behalf. The South Carolina Supreme Court agreed with Ms. Arredondo and held that the arbitration agreement was not enforceable. The nursing home then sought review in the Supreme Court, arguing that the South Carolina Supreme Court's interpretation of the powers of attorney was preempted by the Federal Arbitration Act.

Nandan Joshi of Public Citizen joined as co-counsel with South Carolina attorney Kenneth Luke Connor of Connor & Connor LLC to write the brief in opposition—which was successful. The Supreme Court denied the petition.



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## At the Merits Stage

### *CVS Pharmacy v. Doe*

CVS Pharmacy instituted a program under which medications for HIV treatment are available only by mail and patients who need those medications are denied direct access to pharmacists for consultation. A class of HIV-positive individuals sued CVS under section 1557 of the Affordable Care Act, which prohibits disability discrimination by healthcare providers. Section 1557's terms track those of section 504 of the Rehabilitation Act, which prohibits disability discrimination by federally funded programs. The Ninth Circuit allowed the suit to go forward based on a 1985 Supreme Court decision holding that section 504 prohibits both intentional discrimination and actions that have the effect of denying meaningful access to individuals with disabilities. CVS successfully petitioned the Supreme Court for review, arguing that section 504 and section 1557 prohibit only intentional discrimination.

Public Citizen's Scott Nelson joined Consumer Watchdog and the law firm Whatley Kallas as co-counsel for the plaintiffs in the Supreme Court. After our brief was filed, CVS withdrew its petition—leaving intact the decision below.

### *Gallardo v. Marstiller*

The plaintiff in this case was a child who was hit by a truck after exiting her school bus, leaving her in a persistent vegetative state. The Florida Medicaid program paid her medical expenses. She later received a tort settlement covering past and future medical expenses and other damages. To recover for *past* Medicaid expenses, the State of Florida asserted a lien over the part of the settlement that compensated for *future* medical expenses. The Eleventh Circuit held that the Medicaid Act allowed the lien.



Public Citizen joined as co-counsel with Bryan Gowdy and Meredith Ross of Creed & Gowdy and Floyd Faglie of Staunton & Faglie to file a petition for certiorari asking the Court to resolve a conflict among lower courts over the relevant Medicaid Act provisions. The Court granted the petition. In June 2022, however, the Court affirmed the Eleventh's Circuit's decision in a 7-2 opinion.

### *Viking River Cruises v. Moriana*

Under California's Private Attorneys General Act (PAGA), employees may sue as representatives of the State to recover penalties from employers who violate California's Labor Code. In *Iskanian v. CLS Transportation*, the California Supreme Court held that arbitration agreements cannot waive the right to bring PAGA claims.

A former employee of Viking River Cruises sued under PAGA claiming widespread violations of California wage and hour laws. The company sought to enforce an arbitration clause in its employment contract that forbids employees from bringing any PAGA action. The California courts applied *Iskanian* to hold the clause unenforceable. Viking filed a petition for certiorari, which the Supreme Court granted.

Public Citizen's Scott Nelson, working with Michael Rubin of Altshuler Berzon LLP and Kevin Barnes and Gregg Lander of the Law Offices of Kevin T. Barnes, drafted the respondent's brief and argued the case. The Court held that the Federal Arbitration Act does not preempt the *Iskanian* rule insofar as it holds that arbitration agreements may not waive the right to bring PAGA representative actions but that it requires that courts enforce agreements requiring arbitration of the "individual" part of a PAGA claim (the claim for civil penalties attributable to violations personally suffered by the named plaintiff) while excluding from arbitration claims for penalties for violations suffered by other employees and leaving them for resolution in court.

## 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. This year, the Court returned to in-person argument but adopted a new format that includes both unstructured questioning time and time for each Justice to ask questions seriatim. We adopted this same format for our moot courts.

This term, we held twenty-five moot courts in twenty-three cases—more than one-third of the 63 cases argued. We mooted attorneys preparing for their first Supreme Court arguments and attorneys with significant Supreme Court experience and everything in between.

We are grateful for the generous contribution of time and expertise of the more than 75 individuals who served as Justices on our panels this term, providing thoughtful questioning and insightful feedback, and often staying late to discuss the nuances of a particularly tough doctrinal or tactical issue.

"I wanted to take the chance to properly thank you and everyone at Public Citizen for your tremendous help in this case — I cannot overstate how useful it was to participate in your moot and get all that incredibly thoughtful feedback. I am grateful to have had you in our corner, and I know that Mr. Wooden feels the same way."

Email from Allon Kedem thanking us for a moot court in *Wooden v. United States*

The cases that we mooted involved a wide range of public-interest issues including arbitration, immigration, and the First Amendment, as well as important issues of civil and criminal procedure.



*Babcock v. Kijakazi* – whether a civil-service pension payment based on dual-status military technician service in the National Guard is a payment based wholly on service as a member of a uniformed service.

*Badgerow v. Walters* – whether federal courts have subject-matter jurisdiction to confirm or vacate an arbitration award under sections 9 and 10 of the Federal Arbitration Act on the basis that the underlying dispute involves a federal question.

*Cameron v. EMW Women's Surgical Center* – whether a state attorney general vested with the power to defend state law may intervene after a federal court of appeals invalidates a state statute when no other state actor will defend the law.

*City of Austin v. Reagan National Advertising of Austin* – whether a distinction in Austin's city code between on- and off-premises signs is a facially unconstitutional content-based regulation.

*Cummings v. Premier Rehab Keller* – whether compensatory damages available under Title VI and the statutes that incorporate its remedies include compensation for emotional distress.

*Denezpi v. United States* – whether the double jeopardy clause bars prosecution in a United States district court after a conviction in the Court of Indian Offenses of Ute Mountain for a crime arising out of the same incident.

*Egbert v. Boule* – whether a *Bivens* cause of action exists for First Amendment retaliation claims and whether a *Bivens* cause of action exists against federal officers engaged in immigration-related functions for violations of Fourth Amendment rights.

"The panel's feedback was tremendously helpful, and I'm very grateful for all the thought that went into it."

Email from Michael Kimberly thanking us for a moot court in *Denezpi v. United States*

*Gallardo v. Marstiller* – whether a state Medicaid program may recover reimbursement for Medicaid's payment of a beneficiary's *past* medical expenses by taking funds from the portion of the beneficiary's tort recovery that compensates for *future* medical expenses.

*Garland v. Gonzalez* – whether an individual detained under 8 U.S.C. 1231 is entitled to a bond hearing after six months of detention and whether 8 U.S.C. § 1252(f)(1) bars class-wide injunctive relief.

*Houston Community College System v. Wilson* – whether the First Amendment restricts the authority of an elected body to issue a censure resolution in response to a member's speech.

*Hughes v. Northwestern University* – whether allegations that a defined-contribution retirement plan paid or charged participants fees that substantially exceeded fees for available alternative products state a claim against plan fiduciaries for breach of the duty of prudence.

*Kemp v. United States* – whether Federal Rule of Civil Procedure 60(b)(1) authorizes relief based on a court's error of law.

*Kennedy v. Bremerton* – whether a public-school employee has a First Amendment right to say a private prayer at school while visible to students and whether the Establishment Clause compels public schools to prohibit that activity.

*Morgan v. Sundance* – whether an arbitration-specific requirement that the proponent of a contractual waiver defense prove prejudice violates the Court's instruction that lower courts place arbitration agreements on an equal footing with other contracts.

*Patel v. Garland* – whether 8 U.S.C. § 1252(a)(2)(B)(i) preserves federal courts' jurisdiction to review a nondiscretionary determination that a noncitizen is ineligible for certain types of discretionary relief, among other questions.

*Shurtleff v. City of Boston* – whether the City's refusal to display the flag of a private religious organization on a city flagpole is viewpoint or content-based discrimination in violation of the First Amendment or whether the flagpole is government speech.

*Southwest Airlines v. Saxon* – whether workers who load or unload goods from vehicles that travel in interstate commerce, but who do not transport the goods themselves, are interstate "transportation workers" exemption from the Federal Arbitration Act.

*Thompson v. Clark* – on the showing of favorable termination required to bring a Section 1983 action alleging unreasonable seizure pursuant to legal process.

*Unicolors v. H&M Hennes & Mauritz* – whether 17 U.S.C. § 411 requires referral to the Copyright Office where absent indicia of fraud or material error as to the work at issue in the copyright registration.

*United States v. Husayn* – whether the court of appeals erred in allowing discovery against former CIA contractors on matters concerning clandestine activities, where the government asserted a state secrets privilege.

*Vega v. Tekoh* – whether a plaintiff may state a claim for relief against a law enforcement officer under Section 1983 based on an officer's failure to provide a *Miranda* warning.

*Viking River Cruises v. Moriana* – whether the Federal Arbitration Act requires enforcement of a bilateral arbitration agreement providing that an employee cannot raise claims under the California Private Attorneys General Act.

*Wooden v. United States* – whether offenses committed as part of one criminal spree but sequentially in time are "committed on occasions different from one another" for purposes of sentencing enhancement under the Armed Career Criminal Act.



## YOUR ROLE

Your contribution is vital to our success. In its thirty-two 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.

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