

Alan Morrison

SUPREME COURT

ASSISTANCE PROJECT | 2023 – 2024

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. Jonathan Dame, a 2023 graduate of Georgetown University Law Center, served as the 2023–2024 Supreme Court Assistance Project Fellow. Zachary Shelley, a 2023 graduate of Yale Law School who is currently clerking for a judge on the Fourth Circuit, will succeed him in September 2024.

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

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 three decades ago, in 1990. Public Citizen Litigation Group founder Alan Morrison envisioned a project to 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 who oppose consumer 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-six 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, including cases that may establish precedents for employees, civil-rights claimants, consumers, or tort plaintiffs.

THE 2023–2024 TERM

During the 2023–2024 Term, the Supreme Court weighed in on issues going to the heart of democracy, the heart of our federal regulatory system, and the heart of civil liberties.

In one of the most significant cases of the 2023 Term, the Court addressed whether Donald Trump is immune from prosecution for allegedly attempting to overturn the results of the 2020 presidential election. In a blockbuster 6-3 decision, the Court immunized Mr. Trump, and any future president, from prosecution for criminal acts in which they used any official power and, furthermore, held, 5-4, that evidence concerning those acts cannot be used in prosecutions of actions for which the president is not immune. A dangerous precedent for a healthy democracy!

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Another series of decisions will impede the ability of federal agencies to function effectively, while shifting power from the executive branch to the judicial branch. In one of the most-watched cases of the term, the Court overturned a 40-year-old legal precedent that directed courts, when considering a challenge to a federal agency's reasonable interpretation of an ambiguous statute, to defer to the agency's reading, out of respect for the agency's expertise and for Congress's choice to delegate authority to subject-matter experts at federal agencies. In combination with the case effectively eliminating the statute of limitations for bringing cases under the Administrative Procedure Act, the decision invites a torrent of lawsuits challenging regulations, old and new, including regulations protecting public health, product safety, and financial security.

The Court this term also decided numerous cases on other hot-button issues: access to abortion medication, voting rights, employment discrimination, and the Second Amendment, among others.



Meanwhile, the docket for next term is taking shape. The cases granted so far concern, among other things, regulation of “ghost” guns, equal treatment of transgender people, a state’s imposition of hurdles on the filing of federal civil rights claims, and a prosecutor’s obligation to disclose exculpatory evidence to criminal defendants. The Court will also be considering questions concerning the Clean Water Act, the National Environmental Policy Act, the Fair Labor Standards Act, and the Americans with Disabilities Act. In short, next term, like this one, is sure to be full of high-impact decisions on a wide range of highly consequential public-interest topics.

WE CAN HELP

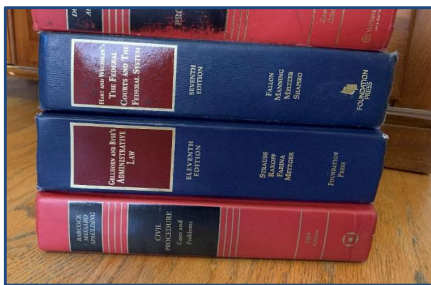
Convincing the Court to grant or deny review often requires specialized expertise. Practitioners and Justices alike agree that experience is an advantage when appearing before the Court, at both the petition and the merits stage. As law professor Richard Lazarus has [explained](#), “[e]xpert Supreme Court counsel and their clients are well aware that often their greatest value is the legal assistance they provide at the jurisdictional stage in persuading the Justices either to grant review, or not to do so.”

Supreme Court expertise, however, is not equally accessible to all litigants. Outside of the government, the majority of lawyers experienced in Supreme Court practice work for law firms that primarily represent business interests. Those lawyers are often unavailable to consumers or workers, either because of conflicts with the interests of the lawyers’ business clients or because of the high cost.

Fortunately, Public Citizen’s litigators have knowledge of Supreme Court practice equal to that of the high-priced attorneys. Since Public Citizen’s founding in 1971, its attorneys have drafted hundreds of oppositions to petitions and advised on many 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 numerous petitions, scores of merits-stage briefs, sixty-six oral arguments, and hundreds of moot courts.

“Thanks for all your work. I don’t want to even think about what I would have done without you.”

Email from attorney Stephen Bruce, thanking us for assistance with the opposition brief in *Hilton Hotels Retirement Plan v. White*



OUR DOCKET: THE 2023 TERM

In the 2023 Supreme Court Term, which ran from September 2023 through July 1, 2024, Public Citizen Litigation Group drafted thirteen briefs in opposition and one petition for certiorari, and provided substantial petition-stage assistance to respondents in more than a dozen other cases.

At the merits stage, we held nineteen moot courts in eighteen cases—accounting for nearly one-third of the Court’s merits arguments.

Below are some examples of our work during the 2023–2024 Term.

“This is fantastic. I cannot thank you enough for this phenomenal work on our behalf.”

Email from attorney Edwin J. Kilpela, Jr., thanking us for assistance with the opposition brief in *Erie Indemnity Co. v. Erie Insurance Exchange*

Among Our Briefs in Opposition

Class Action Standards

In the 2023 Term, we wrote two successful oppositions concerning standards for class certification.

One of the cases, *Brinker International, Inc. v. Steinmetz*,



concerned the predominance standard. In 2018, a hacker stole customers’ debit-card and credit-card information from Chili’s restaurant chain and published the information on the dark web. A group of consumers filed a class action against Chili’s corporate owner, Brinker International, alleging that Brinker had negligently failed to safeguard customer

information. In certifying the case as a class action, the district court held that the issue of class members’ individual monetary damages would not predominate over common questions. After the Eleventh Circuit upheld this aspect of the district court’s decision, Brinker petitioned the Supreme Court for review.

Co-counseling with the law firms Federman & Sherwood and Morgan & Morgan, Public Citizen’s Nicolas Sansone prepared the brief in opposition. The Court denied the petition.

The second case, *Hilton Hotels Retirement Plan v. White*, the plaintiffs in a class-action lawsuit alleged that Hilton failed to pay vested retirement benefits. After the district court denied a third motion for class certification on the ground that the class definition was impermissibly “fail safe,” the plaintiffs filed a petition under Federal Rule of Civil Procedure 23(f) asking the D.C. Circuit to review that denial. The D.C. Circuit granted the petition and reversed. The court rejected Hilton’s argument that the petition was untimely and, on the merits, held that the district court abused its discretion by denying the motion for class certification as “fail safe” without considering whether the proposed class complied with

the requirements of Rule 23. Hilton petitioned the Supreme Court for review.

Co-counseling with attorney Stephen Bruce, Public Citizen's Nicolas Sansone prepared the brief in opposition. The Court denied the petition.

Qualified Immunity

This term, we assisted with several cases in which officers petitioned for review of decisions holding that they had not established a right of immunity from suit.

One case, *Jakob v. Cheeks*, arose from the death of Mikel Neil. After Mr. Neil ran a red light, police chased him and used their car to strike his. The maneuver caused Mr. Neil to spin out of control and crash into a tree. The officers then turned off their police lights and drove away, without calling for or providing help. Mr. Neil died as a result.



Mr. Neil's mother sued the officers, who argued that they had qualified immunity from suit. The district court denied the officers' motion; the Eighth Circuit affirmed, and the officers petitioned the Supreme Court for review. They argued that they could not be held accountable for violating the clearly established duty to aid individuals injured while being apprehended, absent proof that Mr. Neil was still alive after crashing into the tree.

Co-counseling with the Law Offices of Christopher Bent, LLC, Public Citizen's Wendy Liu prepared the brief in opposition. The Court denied the petition.

"Thank you so much for everything—I can't begin to tell you how much I appreciate your help!"

Email from attorney Christopher Bent, thanking us for assistance with the opposition brief in *Jakob v. Cheeks*

Preemption of State-Law Remedies

To avoid accountability under state law, defendants in a variety of cases often argue that federal law bars the pursuit of a state-law claim. This term, we prepared the brief in opposition in two cases that raised preemption issues.

Massachusetts Coastal Railroad LLC v. Marsh concerned the Massachusetts Prevailing Wage Act, which requires contractors that obtain public-works projects to pay laborers on such projects a wage commensurate with the wages paid to similarly situated municipal employees and union workers. The plaintiff had worked as an equipment operator for Massachusetts Coastal Railroad LLC on several public-works projects throughout Massachusetts. Because the company did not pay the prevailing wage, Mr. Marsh sued in Massachusetts state court.

The company moved to dismiss the complaint on the ground that the Massachusetts Prevailing Wage Act is preempted by federal laws that regulate railroads, including the ICC Termination Act. The district court denied the motion to dismiss, and the Supreme Judicial Court of Massachusetts affirmed. The employer then petitioned the Supreme Court for review.

Co-counseling with the Law Office of Nicholas F. Ortiz, PC, Public Citizen's Nandan Joshi and Jonathan Dame prepared the brief in opposition. The Court denied review.

“It was a pleasure. Thank you all again for your incredible work!”

Email from attorney Raven Moeslinger, thanking us for assistance with the opposition brief in *Massachusetts Coastal Railroad LLC v. Marsh*

The petition in *Shire US Inc. v. Blackburn* also presented a preemption issue. That case was brought by a patient who developed serious kidney disease associated with the drug Lialda. He then sued the drug’s manufacturer, Shire US Inc., under Alabama law for failure to warn. His complaint alleged that the Warnings and Precautions section of Shire’s labeling for Lialda failed to provide adequate information about periodic testing needed to protect against renal harm.

In response, Shire argued that federal law preempted Mr. Blackburn’s failure-to-warn claim. The company noted that the Highlights section of the labeling also contained information about testing and argued that it could not revise the Highlights without FDA approval. Because Mr. Blackburn’s claim was based on the Warnings and Precautions section, not the Highlights section, both the district court and the Eleventh Circuit rejected Shire’s argument. Shire then petitioned the Supreme Court for review.



Co-counseling with Waller Law Office, PC and Riley & Jackson, PC, Public Citizen’s Allison Zieve prepared the brief in opposition. The Court denied the petition.

Workers’ Rights

Another area in which we often assist is workers’ rights. This term, we worked on several oppositions in that area.

In *Precision Drilling Co. v. Tyger*, employees of Precision Drilling Co. brought a lawsuit under the Fair Labor Standards Act (FLSA), on behalf of themselves and others similarly situated, seeking to recover back wages for time spent putting on and taking off required protective gear at their worksite. The district court granted summary judgment to the defendants, holding that the employees had not established that the gear protected them from a “transcendent risk” of harm. The Third Circuit reversed, holding that the validity of plaintiffs’ claims does not depend on transcendent risk, and instead should be assessed based on consideration of multiple factors relating to whether the gear is integral and indispensable to plaintiffs’ principal job duties. Precision then petitioned the Supreme Court for review.

Working with Swartz Swidler LLC, Public Citizen’s Adam Pulver prepared the brief in opposition. The Court denied the petition.

“[My colleagues] and I are very impressed with your ability to take an extremely complicated case and distill it into a very accessible and understandable brief in only a few weeks’ time. Suffice to say, we feel much more confident about SCOTUS not taking up the case after having read your brief.”

Email from attorney Nick George, thanking us for assistance in *Precision Drilling Co. v. Tyger*

Two other cases on behalf of workers, *Uber Technologies v. Gregg* and *Lyft v. Seifu*, arose from claims under California’s Private Attorneys General Act (PAGA), which authorizes an “aggrieved” employee whose employer has violated the state’s Labor Code to sue the employer to enforce the Labor Code on behalf of the state. A PAGA plaintiff may bring both individual claims based on violations that the employer has committed against the plaintiff and non-individual claims based on violations that the employer has committed against other employees. Under a state-law contract rule, an employee’s right to bring PAGA claims cannot be prospectively waived. The Federal Arbitration Act, however, requires a court to enforce an employee’s agreement to submit individual PAGA claims to arbitration while retaining the ability to bring non-individual claims in court.



In these two cases, plaintiffs filed PAGA lawsuits in California state court, alleging that Uber and Lyft, respectively, had violated the Labor Code by misclassifying drivers as independent contractors rather than employees. The defendant in each case successfully moved to compel arbitration of the individual claims. The California court of appeal, though, held that the plaintiffs had standing to pursue the non-individual claims in court. The companies then each petitioned the Supreme Court to review the state court’s ruling on standing.

Co-counseling with lawyers at Outten & Golden LLP in *Gregg* and at Lichten & Liss-Riordan, PC in *Seifu*, Public Citizen’s Nicolas Sansone prepared the briefs in opposition in both cases. The Court denied the petitions.

Victory on the Merits

Department of Agriculture Rural Development Rural Housing Service v. Kirtz

Reginald Kirtz alleged that the U.S. Department of Agriculture Rural Development Rural Housing Service, a federal agency, violated the Fair Credit Reporting Act (FCRA) by failing to investigate and correct erroneous information that it submitted to the credit reporting agency TransUnion. FCRA gives consumers a right to file suit against any “person” who negligently or willfully violates the statute, and it defines “person” to include any “government or governmental subdivision or agency.” The agency moved to dismiss for lack of subject-matter jurisdiction, arguing that FCRA does not waive the government’s sovereign immunity from suit. The district court agreed with the agency and dismissed the case against it.

Co-counseling with Matthew Weisberg of Weisberg Law in Pennsylvania, Public Citizen’s Nandan Joshi argued the case for Mr. Kirtz in the Third Circuit. After the court of appeals reversed the district court’s dismissal, however, the Supreme Court granted the agency’s petition for certiorari. Mr. Joshi prepared the respondent’s brief and argued the case before the Supreme Court in November 2023.

In a unanimous decision, the Supreme Court affirmed the Third Circuit’s decision, allowing Mr. Kirtz’s claims against the Department to proceed. In an opinion that mirrors the arguments in our brief, the Court held that FCRA’s plain text clearly and unambiguously authorizes suits for civil damages against the federal government.

“I cannot thank enough our co-counsel Nandan Joshi of Public Citizen, whose expertise and collegiality have been both necessary and an absolute pleasure.”

Email from attorney Matthew Weisberg, acknowledging our work in *USDA v. Kirtz*

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 term, we held moots both in person and remotely, depending on the advocate's preference.

In total, we held nineteen moot courts in eighteen cases, accounting for nearly one-third of the Court's merits arguments. We mooted attorneys with a broad range of experience—from attorneys preparing for their first Supreme Court arguments to attorneys with significant Supreme Court experience.

We are grateful for the generous contributions of time and expertise of the nearly sixty 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.

“We truly cannot thank Public Citizen enough for its phenomenal work. Our moot panel in *Spizzirri* was simply superb—which is an evergreen statement when it comes to Public Citizen moots. The group's insight is always brilliant, and the obvious care that goes into the panel's preparation is palpable. We are so grateful to have an organization dedicated to advancing the public interest, and we're always thrilled (and lucky!) whenever Public Citizen is involved in any capacity in our cases.”

Email from attorney Daniel Geyser, thanking us for a moot court in *Smith v. Spizzirri*

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

Acheson Hotels v. Laufer – whether a plaintiff has standing to challenge the failure of a public accommodation to provide disability-accessibility information on its website if she does not intend to visit that establishment.

Alexander v. S.C. Conference of the NAACP – whether a South Carolina congressional district violated the Equal Protection Clause because it was an unlawful racial gerrymander.

Bissonnette v. LePage Bakeries – whether, to be exempt from the Federal Arbitration Act, a class of workers that is actively engaged in interstate transportation must also be employed in the transportation industry.

Cantero v. Bank of America – whether the National Bank Act preempts application of state escrow-interest laws to national banks.

Culley v. Marshall – whether the Due Process Clause requires that the government provide the innocent owner of a vehicle seized in connection with criminal activity a post-seizure probable cause hearing before continuing to detain the vehicle pending forfeiture proceedings.

Danco Laboratories, LLC v. Alliance for Hippocratic Medicine – whether the plaintiffs had standing to challenge the FDA's regulation of the drug mifepristone and, if so, whether recent FDA decisions regarding regulation of mifepristone were lawful under the Administrative Procedure Act.

Department of Agriculture v. Kirtz – whether the civil-liability provisions of the Fair Credit Reporting Act waive the United States' sovereign immunity.

Gonzalez v. Trevino – whether a plaintiff allegedly arrested in retaliation for protected speech can prove that she was arrested when others would not have been only by providing specific examples of other people who were not arrested for similar conduct.

“Thank you so much for putting together [the] moot. It was extremely useful. And the mooters were absolutely fantastic.”

Email from attorney Anya Bidwell, thanking us for a moot court in *Gonzalez v. Trevino*

Harrow v. Department of Defense – whether the 60-day deadline for filing a petition for review of certain Merits Systems Protection Board orders is jurisdictional.

Macquarie Infrastructure Corp. v. Moab Partners – whether a company's failure to disclose information required by Item 303 of Securities and Exchange Commission Regulation S-K can support a private action under SEC Rule 10b-5(b), if the omission does not render any statements made by the company misleading.

McElrath v. Georgia – whether the Double Jeopardy Clause permits retrial of a defendant on a charge for which he was previously acquitted on the theory that such acquittal is irreconcilable with the jury’s conviction of the defendant on a different charge.

Muldrow v. City of St. Louis – whether Title VII prohibits discrimination in job-transfer decisions if the court does not determine that the transfer caused a significant disadvantage to the employee.

Murray v. IBS Securities – whether a plaintiff who claims he was fired in retaliation for protected whistleblowing under the Sarbanes-Oxley Act must prove that his employer acted with retaliatory intent.

National Rifle Ass’n v. Vullo – whether the National Rifle Association adequately pleaded that a state regulator violated the First Amendment by encouraging banks and insurers to consider the reputational risks of continued association with the NRA and similar groups.

O’Connor-Ratcliff v. Garnier – whether local elected officials engaged in state action when they blocked two constituents from social media accounts that the officials used primarily to communicate with the public about local government matters.

Smith v. Arizona – whether, consistent with the Confrontation Clause, an expert witness who did not himself test the chemical properties of a substance found in the defendant’s possession may convey the testimonial statements of the lab analyst who performed the testing.

Smith v. Spizzirri – whether section 3 of the Federal Arbitration Act requires or merely allows a district court to stay a lawsuit when all claims have been submitted to arbitration and one party requests a stay.

“I want to thank all of the panelists, as well as Public Citizen, for the moot court in this case. The opportunity to respond to panelists’ questions during the moot and to get the benefit of their insights afterward was extremely helpful.”

Email from attorney Richard Simpson, thanking us for a moot court in *McElrath v. Georgia*

Thornell v. Jones – whether the Ninth Circuit correctly held that the defendant was prejudiced by his lawyer’s deficient performance during sentencing proceedings that resulted in his death sentence.

YOUR ROLE

Your contribution is vital to our success. In its thirty-four 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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or via credit card, [here](#).



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