

Alan Morrison

# SUPREME COURT

ASSISTANCE PROJECT | 2022 – 2023

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. Michael Migiel-Schwartz, a 2022 graduate of Harvard Law School, served as the 2022–2023 Supreme Court Assistance Project Fellow. Jonathan Dame, a 2023 graduate of Georgetown University Law Center, will succeed him in August 2023.

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

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## OUR HISTORY

Public Citizen’s Supreme Court Assistance Project began more than thirty years 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 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 2022–2023 TERM

The 2022–2023 Term included its fair share of controversy.

The Court came under increased scrutiny this term for the Justices’ outside activities and the Court’s lack of binding ethical rules. Amidst revelations of lavish trips and other hospitality from a conservative activist, as well as polling showing historic lows in public trust of the Supreme Court, lawmakers this term increasingly called on the Supreme Court to adopt a stronger code of conduct.

This term also marked the close of the inquiry into the May 2022 leak of a draft opinion in *Dobbs v. Jackson Women’s Health Organization*. Following an investigation ordered by the Chief Justice, the Court’s marshal issued a report describing the investi-

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gation and stating that it failed to identify a person responsible for the leak. Adding to the scrutiny of the Justices' ethical practices, the investigation faced some criticism for failing to treat the Justices and their spouses similarly to other court employees.



The 2022–2023 Term will be remembered mostly, however, for its decisions. The Court decided many high-profile cases—addressing issues including voting rights, affirmative action, and the interaction between public-accommodations laws and the First Amendment. In one of the most important cases of the term, *Moore v. Harper*, the Court rejected the “independent state legislature theory” and thus preserved a role for state judicial review of state laws regulating federal elections.

In the final days of the term, the Court struck down race-conscious college admissions programs as unlawful, stating that affirmative action at educational institutions nationwide had gone on long enough and that the Equal Protection Clause requires an end. The Court also held that the First Amendment exempts a company that wants to design wedding websites that promote only marriage between men and women from a state public accommodations law to the extent that the law prohibits denying service to same-sex couples.

Looking ahead to next Fall, the Court has granted several petitions in cases involving charged issues, including the constitutionality of the Consumer Financial Protection Bureau's funding structure, the scope of standing to sue to enforce requirements of the Americans with Disabilities Act, and whether the Court should overrule *Chevron v. Natural Resources Defense Council* (1984).

“Thanks for all that you do! Your efforts are enormously appreciated.”

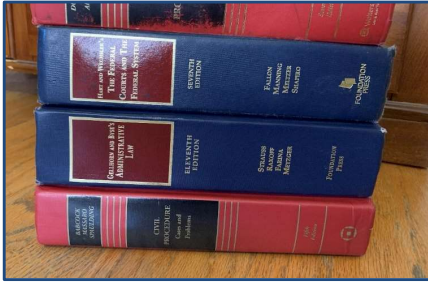
Note from attorney Paul W. Hughes

## 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, and all the more so at the petition 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, depending on their client’s interests.”

The Supreme Court bar, however, is not easily accessible to all. Most prominent Supreme Court advocates work for law firms that primarily represent business interests. Many public-interest litigants lack the financial resources to pay for such expert advocacy and face an early disadvantage against 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 Public Citizen’s founding in 1971, its attorneys have 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 numerous petitions, scores of merits-stage briefs, sixty-five oral arguments, and hundreds of moot courts.



## OUR DOCKET: THE 2022 TERM

In the 2022 Supreme Court Term, which ran from September 2022 through June 30, 2023, Public Citizen Litigation Group served as the principal drafter of the brief in opposition in ten cases and provided substantial petition-stage assistance in ten others.

At the merits stage, we held moot courts for twenty cases—approximately one-third of the cases argued.

Below are some examples of our work during the 2022–2023 Term.

“This looks great. You make this seem all so obvious. Thank you for taking on this matter. We greatly appreciate your time and expertise.”

Email from attorney Andrew Hawley, thanking us for assistance with the opposition brief in *Nevada Irrigation District v. California State Water Resources Control Board*

## Among Our Briefs in Opposition

### *Anderson v. Calder*

Coby Lee Paugh sought help for his alcoholism by turning himself in to the police. The police brought him first to the hospital—where he was given a prescription for Librium and discharged with instructions that he be brought back to the hospital if his condition worsened—and then to the Uintah County Jail. While in jail, Mr. Paugh’s condition deteriorated significantly. The jail officers who were responsible for him, however, did not provide the needed medical assistance. Mr. Paugh died alone in a cell during the night.



Mr. Paugh’s estate sued the officers and the County, alleging that the officers had been deliberately indifferent to his serious medical needs and that their conduct resulted from the County’s policies and customs. The district court denied summary judgment to five of the officers and the County, holding that

the officers were not entitled to qualified immunity and that questions of fact precluded summary judgment for the County. On appeal, the Tenth Circuit affirmed the district court’s denial of qualified immunity to the five officers and dismissed the County’s appeal for lack of jurisdiction. The five officers and County sought review in the Supreme Court, arguing that the officers were entitled to qualified immunity because Mr. Paugh’s constitutional rights were not clearly established.

Adina Rosenbaum of Public Citizen, serving as co-counsel for Mr. Paugh, prepared the brief in opposition. The Court denied the petition.

### ***Daimler Trucks v. Superior Court of California***

This case arose from a single-vehicle crash during a trip in which long-haul trucker Yongquan Hu and a co-worker first drove from California to New Jersey and then transported goods from New Jersey to California in a 2016 Freightliner Cascadia truck originally sold by Daimler Trucks. The crash occurred on the return leg of the trip, while the co-worker was driving and Mr. Hu was asleep in the sleeping compartment of the vehicle. Although he was using a bunk restraint, the collision caused Mr. Hu to move laterally, striking his head and rendering him quadriplegic.

Mr. Hu subsequently sued Daimler Trucks and other defendants in California state court. Daimler Trucks moved to dismiss the case, arguing that the court lacked specific personal jurisdiction over it. The court denied the motion, agreeing that the trial court had jurisdiction because Daimler's Freightliner trucks were manufactured and marketed for precisely this type of intercontinental long-haul trip emanating from California to other states and back. The California Supreme Court denied review. Daimler Trucks then petitioned the U.S. Supreme Court for review, arguing that the "related to" element of specific personal jurisdiction was lacking because the accident did not occur in California.



Public Citizen's Allison Zieve, serving as co-counsel in the Supreme Court, prepared the brief in opposition. The Supreme Court denied the petition.

### ***Transamerica Retirement Solutions, LLC v. Addison***

In 2014, a retirement plan operated by a medical services provider in Mississippi suffered catastrophic losses, ultimately resulting in a substantial cut to benefits and the elimination of cost-of-living increases. Beneficiaries filed several lawsuits in a Mississippi state court against Transamerica, which provided actuarial and administrative services to the plan and was allegedly responsible for its underfunding. This suit was brought by 272 individually named beneficiaries. Transamerica removed to federal court under the Class Action Fairness Act (CAFA), arguing that the case fell within CAFA's conferral of federal jurisdiction over certain "mass actions," defined as cases in which 100 or more individuals jointly bring claims.

The plaintiffs moved to remand on the grounds that the case falls within CAFA's jurisdictional exception for cases in which all of the



claims in an action arise from "an event or occurrence" in the state in which the action was filed and that allegedly resulted in injuries in that state or in states contiguous to that state. The district court granted the motion to remand, and Transamerica applied for leave to

appeal. The Fifth Circuit, without opinion, denied leave to appeal. Transamerica filed a petition for certiorari, arguing that the courts of appeals are split over whether claims arising out of a defendant's course of conduct carried out over time involve "an event or occurrence" within the meaning of the exception.

Public Citizen's Scott Nelson served as co-counsel to prepare the brief in opposition. The Court denied the petition.

### *Troy University v. Farmer*

Troy University, an Alabama-affiliated university, operates an online education program. To aid in its recruitment of members of the military, the school opened an office in North Carolina, near Fort Bragg, and applied for a “certificate of authority” from the North Carolina Secretary of State, which grants out-of-state non-profit corporations like Troy the same “rights and duties” of similar in-state corporations, including the right “to sue and be sued.”

Sharrell Farmer was hired by Troy to work as a recruiter in its Fayetteville office. Farmer later sued Troy and two of its employees, alleging that he experienced and witnessed sexual harassment and that, after he reported the harassment, he was subjected to a vicious smear campaign and fired. Troy, on behalf of itself and the individuals, successfully moved to dismiss the case on the grounds that all three defendants were entitled to Alabama’s sovereign immunity from suit in North Carolina state courts. The North Carolina Supreme Court disagreed and held that, by applying for a certificate of authority to conduct its commercial activities in North Carolina and agreeing to be subject to the same rights and duties as North Carolina entities, including the right to sue and be sued, Troy consented to suit in North Carolina.

Troy and the individual defendants petitioned the Supreme Court for review. Public Citizen’s Adam Pulver served as co-counsel with North Carolina attorneys Harvey Kennedy and Harold Kennedy, III, on the brief in opposition to the petition. The Court denied the petition.

“The brief is outstanding!”

Note from attorney Harvey L. Kennedy, thanking us for assistance with the brief in opposition in *Troy University v. Farmer*

### Merits Briefs — Looking Ahead

#### *U.S. 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. The 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 Department moved to dismiss for lack of subject-matter jurisdiction, arguing that the FCRA does not waive the government’s sovereign immunity from suit. The district court agreed with the Department 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 on appeal. In a unanimous opinion, the Third Circuit held that the 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 both been necessary as well as an absolute pleasure.”

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

In March 2023, the government filed a petition for certiorari asking the Supreme Court to review the Third Circuit’s decision. Public Citizen’s Joshi continued to serve as co-counsel, drafting the brief in opposition.

The Supreme Court, however, granted the petition to resolve the 3-2 circuit split on whether the FCRA waives the government’s sovereign immunity from suit. The case will be argued in the Fall.

## 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. After two years of fully remote moot courts, we began hosting moot courts in-person again in 2023, though we continue to offer attorneys the option of online moot courts.

This term, we held moot courts in 20 cases (including one in a case dismissed before argument)—more than one-third of the 58 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 contributions of time and expertise of the nearly 70 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.

“A Public Citizen moot is always a fantastic moot. Its panels are first-rate, and it provides an invaluable service to parties and the community. We are forever grateful for its contribution to so many important cases, including ours.”

Email from Daniel L. Geyser thanking us for a moot court in *U.S., ex rel. Polansky v. Executive Health Resources, Inc.*

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

*303 Creative v. Elenis* – “whether applying a public-accommodation law to compel an artist to speak or stay silent violates the First Amendment’s free speech clause.”

*Allen v. Milligan* – whether Alabama’s 2021 redistricting plan violated Section 2 of the Voting Rights Act.

*Arellano v. McDonough* – whether a rebuttable presumption of equitable tolling applies to the one-year statutory deadline in 38 U.S.C. § 5110(b)(1) for seeking retroactive disability benefits.

*Arizona v. Mayorkas* – whether state attorneys general may intervene to appeal a summary judgment order enjoining and vacating a Title 42 policy.

*Coinbase, Inc. v. Bielski* – whether a non-frivolous appeal of the denial of a motion to compel arbitration ousts a district court of jurisdiction to proceed with litigation pending appeal.

*Glacier Northwest, Inc. v. International Brotherhood of Teamsters* – whether the National Labor Relations Act impliedly preempts a state tort claim against a union for destruction of an employer’s property in the course of a labor dispute.

*Health and Hospital Corp. v. Talevski* – whether Spending Clause legislation gives rise to privately enforceable rights under section 1983 and whether the Federal Nursing Home Amendments Act does so.

*Jones v. Hendrix* – whether federal inmates who did not—because established circuit precedent stood against them—challenge their convictions on the ground that the statute of conviction did not criminalize their activity may apply for habeas relief under 28 U.S.C § 2241 after the Supreme Court makes clear in a retroactively applicable decision that the circuit precedent was wrong and that they are legally innocent.

“Public Citizen’s moot was invaluable. The committed judges and their thoughtful feedback helped us refine our strategy. We’re tremendously grateful to Public Citizen for recruiting such brilliant, experienced moot judges to help those of us representing parties on the less-resourced side of the ‘v.’”

Email from Easha Anand thanking us for a moot court in *Glacier Northwest, Inc. v. International Brotherhood of Teamsters*

*Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin* – whether the Bankruptcy Code abrogates the sovereign immunity of Indian tribes.

*Mallory v. Norfolk Southern Railway Co.* – whether a state may require a corporation to consent to personal jurisdiction as a condition of doing business in the state.

*Moore v. Harper* – whether the Elections Clause bars a state court from exercising judicial review of a state legislature’s regulations governing the manner of holding congressional elections.

*National Pork Producers Council v. Ross* – whether a state law that has significant economic effects outside the state or imposes substantial costs outside the state violates the dormant Commerce Clause.

*The Ohio Adjutant General’s Department v. Federal Labor Relations Authority* – whether the Civil Service Reform Act of 1978 empowers the Federal Labor Relations Authority to regulate the labor practices of state militias.

*Perez v. Sturgis Public Schools* – whether, in a case alleging claims under the Americans with Disabilities Act, the plaintiff must exhaust administrative remedies under the Individuals with Disabilities Education Act (IDEA), where the claim seeks damages that are not available under the IDEA.

*Reed v. Goertz* – whether the statute of limitations for a § 1983 claim seeking DNA testing of crime-scene evidence begins to

run at the end of state-court litigation denying DNA testing or begins to run when the state trial court denies DNA testing, despite any subsequent appeal.

*Santos-Zacaria v. Garland* – whether the exhaustion requirement for a petition for review of decisions of the Board of Immigration Appeals is jurisdictional.

*Slack Technologies v. Pirani* – whether sections 11 and 12(a)(2) of the Securities Act of 1933 require plaintiffs to plead and prove that they bought shares registered under the registration statement that they claim is misleading.

*Students for Fair Admissions v. University of North Carolina* – whether the Supreme Court should overrule *Grutter v. Bollinger* and hold that institutions of higher education cannot use race as a factor in admissions.

*U.S., ex rel. Polansky v. Executive Health Resources* – whether the government can move to dismiss a False Claims Act suit after initially declining to proceed with the action and, if so, what standard applies.

*U.S., ex rel. Schutte v. Supervalu Inc.* – in a case under the False Claims Act, whether a defendant’s subjective understanding about the lawfulness of its conduct is relevant to whether it knowingly submitted a false claim.

## YOUR ROLE

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