The Alan Morrison Supreme Court Assistance Project offers pro bono legal assistance in the U.S. Supreme Court, 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. Following her two clerkships, Kaitlin Leary served as the 2019–2020 Supreme Court Assistance Project fellow. Grace Paras, a 2020 graduate of Georgetown University Law Center, will succeed her in August 2020.

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
coverage mandate of the Affordable Care Act—and in cases regarding the limits of other governmental entities’ ability to investigate the President—namely, three cases challenging subpoenas of the President’s accountants issued by two committees of the House of Representatives and one state prosecutor. The Court’s frequent role as the referee of disputes between the Executive and Legislative branches of government led Chief Justice John Roberts to assure the public at the start of the Term that the Court would “continue to decide cases according to the Constitution and laws without fear or favor.” Seeking to hold the Court to that promise, our Project’s mission of protecting public interests before the Court remains crucial.

Despite the apparent uptick in high-profile and newsworthy cases, this Term saw the fewest signed decisions by the Court since the Civil War. This decline reflects a general trend over the last thirty-five years of decreasing numbers of cases heard by the Court. The decrease was more pronounced, however, because of the postponement of ten cases to the 2020 Term due to the COVID-19 pandemic. The public health emergency also forced the Court to break with tradition and conduct arguments remotely for the first time in history, which required some adjustments by both the Justices and the attorneys.

WE CAN HELP

Public Citizen’s ability to offer expert assistance at the certiorari stage is essential because 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 the Supreme Court Historical Society’s annual lecture in 2019, Justice Clarence Thomas responded to a question about the importance of having experienced counsel in the Supreme Court by stating, “If it’s my money on the line, I’d be as risk averse as anybody else. I mean you go with the .400 hitter. That doesn’t mean you’re gonna win but ... go with someone who will increase your odds.” And a recent statistical analysis by Professors Michael Nelson and Lee Epstein shows that Justice Thomas was right: An experienced attorney’s chance of winning a case against the Solicitor General in the Supreme Court is fourteen percentage points higher than a comparable first-timer’s chance. Unfortunately, hiring an experienced Supreme Court advocate is easier said than done for many public interest litigants, who may lack the financial resources of their corporate or governmental adversaries.

Today, we continue to work diligently to realize the Project’s aim of providing quality Supreme Court representation in public interest cases. The Project provides pro bono support from lawyers who have knowledge of Supreme Court practice equal to that of the high-priced experts often aligned against public interest attorneys. Since the Project’s founding, our attorneys have drafted hundreds of oppositions to petitions for certiorari and advised attorneys 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.

“We are truly grateful for your help. You all are really making a difference. Super important work. Thanks again.”

Email from Jason Lohr, thanking us for co-counseling at the petition stage in *Zimmer Biomet Holdings. v. U.S. District Court*
In the 2019 Supreme Court Term, which ran from October 2019 through July 2020, Public Citizen Litigation Group served as the principal drafter of the brief in opposition in twelve cases, provided substantial petition-stage assistance in sixteen others, and served as co-counsel on one petition.

At the merits stage, Public Citizen co-counseled on one case and held moot courts in twenty-four cases. We also submitted amicus briefs in twelve cases.

Below are examples of our work during the 2019 Term.

Among Our Briefs in Opposition

**AT&T Mobility LLC v. McArdle & Comcast Corp. v. Tillage**

In these two cases, the plaintiffs sued seeking injunctions to end false and misleading advertising regarding cell phone roaming charges and cable television fees. The defendants moved to compel arbitration based on provisions in their subscriber agreements that required arbitration of all claims asserted by consumers and purported to waive subscribers’ right to seek public injunctive relief. The agreements also contained a non-severability provision with respect to the waiver. Under California law, any provision that purports to prospectively extinguish a person’s right to seek public injunctive relief is invalid. Applying this principle and the non-severability clause in the subscriber agreements, the district courts in both cases denied the motions to compel arbitration. The Ninth Circuit affirmed. Both defendants then filed petitions for writs of certiorari, asking the Supreme Court to hold that the Federal Arbitration Act (FAA) preempts California law holding prospective waivers of public injunctive relief to be invalid.

Scott Nelson of Public Citizen served as co-counsel in the Supreme Court, along with attorneys at Gutride Safier in *McArdle* and at Lieff Cabraser Heimann & Bernstein and Hattis & Lukacs in *Tillage*. The Court denied the petitions.

**American Eagle Express, Inc. v. Bedoya**

Delivery drivers brought a class action lawsuit against their employer, American Eagle Express (AEX), alleging that AEX improperly classified them as independent contractors under New Jersey law and deprived them of various wage rights that they were due as employees under those laws. AEX moved for judgment on the pleadings, arguing that the drivers’ claims were preempted by a provision of the Federal Aviation Administration Authorization Act that prohibits states from enacting or enforcing laws “related to a price, route, or service of any motor carrier … with respect to the transportation of property.” The district court held that the Act does not preempt the state wage laws and denied the motion. The Third Circuit affirmed, and AEX petitioned the Supreme Court for review.

Adina Rosenbaum of Public Citizen served as co-counsel with Harold Lichten and Matthew Thomson of Lichten & Liss-Riordan, PC to prepare the brief in opposition. The Court denied the petition.

**City of St. Louis v. Meier**

The St. Louis Metropolitan Police Department caused the warrantless seizure of a vehicle suspected of involvement in a hit-and-run accident and, with the cooperation of a private towing company, held the vehicle for six weeks to try to leverage an interview with a suspect. The owner of the vehicle sued the City and the towing company under 42 U.S.C. § 1983, alleging that the prolonged seizure of her vehicle without a warrant violated her rights under the Fourth and Fourteenth Amendments. The district court ruled for the defendants, finding that the City was not responsible for the initial seizure of the vehicle and that the towing company had not acted in concert with the City when it retained the vehicle. The Eighth Circuit reversed, holding that the vehicle owner had offered sufficient evidence for a reasonable jury to find in her favor. The defendants then filed a petition for a writ of certiorari.
Public Citizen’s Michael Kirkpatrick, acting as Supreme Court co-counsel with Missouri attorney Gregory Fenlon, prepared the brief in opposition. The Court denied the petition.

*Rodriguez-Garcia v. Pichardo de Veloz*

In 2013, Ms. Fior Pichardo de Veloz was arrested and placed in a women’s jail. As part of the booking process, a female officer conducted a strip search; another officer did a medical assessment and noted on her form that she had a history of high blood pressure, was taking hormone replacement therapy (HRT), and was suffering from “Menopause Medical.” Because of her history of high blood pressure, Ms. Pichardo was sent for a medical evaluation. There, Dr. Rodriguez-Garcia decided to reevaluate her sex based solely on the notation that she was taking HRT, although he knew that HRT is prescribed to treat symptoms of menopause. Without conducting an exam or asking her gender, he assumed that she was transgender and redesignated her as male. She was therefore transferred to a male correctional facility, where she was sexually harassed and tormented. Ms. Pichardo later sued Dr. Rodriguez-Garcia and other jail staff, alleging that they were deliberately indifferent to her life and safety, in violation of the Fourteenth Amendment. The Eleventh Circuit held that the unconstitutionality of the doctor’s actions would have been obvious to any reasonable medical provider and, therefore, that he was not entitled to qualified immunity. He then petitioned for Supreme Court review.

Adam Pulver of Public Citizen served as Supreme Court co-counsel for Ms. Pichardo, working with Florida attorneys Gary Kollin, Gonzalo Barr, and David Kubiliun. The Court denied the petition.

“Thank you once again for taking the time to provide such helpful suggestions. The clerk who draws this one will benefit greatly from your efforts!”

Email from Charles Orr, thanking us for assistance at the petition stage in *Pfizer, Inc. v. Adamyan*

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*Zimmer Biomet Holdings v. U.S. District Court*

James Karl filed a class and collective action against his employer Zimmer Biomet Holdings. Karl alleged that Zimmer had violated the Fair Labor Standards Act by failing to compensate him and other sales representatives for overtime hours and had violated the California Labor Code by misclassifying him and other sales representatives as independent contractors rather than employees. Relying on a forum-selection clause in its sales-associate agreement, Zimmer moved to transfer the case to Indiana. The district court held that the forum-selection clause was not enforceable under California law and denied Zimmer’s motion. Zimmer then filed a petition for a writ of mandamus in the Ninth Circuit, seeking an order requiring the district court to transfer the case to Indiana. After the Ninth Circuit denied the petition, Zimmer filed a petition for certiorari in the Supreme Court.

Allison Zieve of Public Citizen served as co-counsel in the Supreme Court, working with Jason Lohr and Alec Segarich of Lohr Ripamonti & Segarich and Denis Kenny of Scherer Smith & Kenny. The Court denied the petition.

*Merits Briefs, This Term and Next*

*County of Maui v. Hawai‘i Wildlife Fund*

The Clean Water Act (CWA) regulates pollution added to navigable waters from point sources by requiring National Pollutant Discharge Elimination System (NPDES) permits for discharges. In violation of this requirement, Maui County discharges millions of gallons of treated sewage per day into the Pacific Ocean from injection wells at its Lahaina Wastewater Reclamation Facility. The discharges are injected into groundwater that is directly connected to the ocean. The Ninth Circuit held that disposing of these pollutants directly into the ocean without an NPDES permit would violate the CWA and that the County could not avoid liability by doing so indirectly, noting that “[t]o hold otherwise would make a mockery of the CWA’s prohibitions.” The County filed a petition.
for certiorari, arguing that it had not discharged pollutants into navigable waters through a point source because runoff and groundwater are “nonpoint sources.”

Public Citizen’s Scott Nelson worked as Supreme Court co-counsel, drafting the brief on the merits and assisting David Henkin of Earthjustice in preparing for oral argument.

On April 23, 2020, in a 6-3 decision, the Supreme Court held that the CWA requires a permit either when there is a direct discharge from a point source into navigable waters or when there is the “functional equivalent” of a direct discharge. The Court noted that while the statutory phrase “from any point source” is more limited than the Ninth Circuit’s interpretation, it is significantly broader than the County’s and the Solicitor General’s suggested approach, which would dispense with the permit requirement whenever a discharged pollutant must travel through any groundwater before reaching navigable waters. Because the Ninth Circuit applied a different standard, the Court vacated the judgment and remanded for the Ninth Circuit to apply the “functional equivalent” test.

U.S. Fish & Wildlife Service 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 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 a Freedom of Information Act (FOIA) request seeking certain documents that the Services prepared as part of this 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, which the Court granted.

Facebook, Inc. v. Duguid

Facebook used autodialing equipment to contact consumers’ cell phones without consent. Noah Duguid, who had not consented to receive such messages, brought a class action against Facebook for violating the Telephone Consumer Protection Act (TCPA), which prohibits the use of autodialers to call cell phones without the subscriber’s consent. Facebook moved to dismiss the case arguing, among other things that its equipment did not meet the TCPA’s definition of an autodialer. The district court granted the motion, but the Ninth Circuit reversed. Facebook then filed a cert. petition challenging the holding that the definition of an automated telephone dialing system does not require the capability of generating numbers randomly or sequentially.

After the briefing was completed, a conflict developed among the circuits, and the Court granted the petition on the last day of the Term. Scott Nelson of Public Citizen is serving as co-counsel with Sergei Lemberg and Stephen Taylor of Lemberg Law LLC.
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, Public Citizen Litigation Group hosted moot courts for attorneys with oral arguments before the Court in twenty-four cases—more than forty percent of the cases argued this Term—including our first all-remote moot. We mooted both attorneys preparing for their first Supreme Court arguments and attorneys with significant Supreme Court experience.

“I just wanted to say thank you for all the incredible help with the moot—it was so enormously useful. Thank you very, very much.”

Email from Paul Hughes, thanking us for the moot court in Nasrallah v. Barr

The cases involved a wide range of public interest issues:

**Atlantic Richfield Co. v. Christian** (whether CERCLA preempts state common-law claims for restoration that seek cleanup remedies beyond cleanup remedies ordered by the EPA)

**Babb v. Wilkie** (whether the federal-sector provision of the Age Discrimination in Employment Act prohibits any personnel actions where consideration of the employee’s age is a factor, or only those actions where discrimination based on age is the but-for cause)

**Barton v. Barr** (whether the stop-time rule, which governs the calculation of an alien’s period of continuous residence in the United States for purposes of eligibility for cancellation of removal, may be triggered by an offense that “renders the alien inadmissible” when the alien is a lawful permanent resident who is not seeking admission)

**Bostock v. Clayton County and Altitude Express, Inc. v. Zarda** (whether discrimination against an employee because of sexual orientation constitutes prohibited discrimination “because of ... sex” within the meaning of Title VII)

**County of Maui v. Hawai’i Wildlife Fund** (whether the Clean Water Act requires a permit when pollutants originate from a point source but are conveyed to navigable waters by a nonpoint source, such as groundwater)

**Department of Homeland Security v. Tharaissigiam** (whether, as applied to a noncitizen who was apprehended immediately after illegally entering into the United States, 8 U.S.C. § 1252(e)(2)’s limitations on habeas corpus challenges to expedited removal orders violates the Suspension Clause)

**Espinoza v. Montana Department of Revenue** (whether the Montana Supreme Court’s invalidation of a Montana statute that would allow taxpayers to receive credits for donations to private schools, including religious schools, violated the Free Exercise Clause, the Establishment Clause, or the Equal Protection Clause)

**Georgia v. Public.Resource.Org Inc.** (whether the government edicts doctrine bars copyright of works authored by lawmakers but that lack the force of law, such as the annotations in the Official Code of Georgia Annotated)

**Guerrero-Lasprilla v. Barr and Ovalles v. Barr** (whether the phrase “questions of law” in the Immigration and Nationality Act’s Limited Review Provision includes the application of a legal standard to undisputed or established facts, such that the courts of appeals have jurisdiction to consider petitioners’ due diligence claims for equitable tolling purposes)

**Hernandez v. Mesa** (whether plaintiffs can pursue a Bivens claim against a federal law enforcement officer for injury caused by a cross-border shooting)

**Intel Corp. Investment Policy Committee v. Sulyma** (whether for purposes of ERISA’s three-year limitations period, which runs from “the earliest date on which the plaintiff had actual knowledge” of the violation, a plaintiff had “actual knowledge” of information that he received but did not read or does not recall reading)

**Kansas v. Garcia** (whether the Immigration Reform and Control Act preempts a Kansas statute that criminalizes fraudulent use of a Social Security number on tax-withholding forms submitted to one’s employer)

“I wanted to thank you again for organizing such a great moot court. I found it tremendously helpful.”

Email from Joseph Palmore, thanking us for the moot court in Atlantic Richfield Co. v. Christian

**Kansas v. Glover** (for purposes of an investigative stop under the Fourth Amendment, whether it is reasonable for a police officer to suspect that the registered vehicle’s owner, whose license has been revoked, is the driver)

**Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania and Trump v. Pennsylvania** (whether the Departments of Health and Human Services, Labor, and the Treasury had authority under the Affordable Care Act (ACA) and the Religious Freedom Restoration Act to expand the conscience exemption to the ACA’s contraceptive-coverage mandate)

**Lucky Brands Dungarees v. Marcel Fashion Group** (whether, in a trademark infringement case, federal preclusion principles can bar the defendant from...
asserting defenses that it raised but did not pursue in a prior case between the same parties)

Mathena v. Malvo (whether the Court’s prior holding that sentencing a juvenile to life without parole violates the Eighth Amendment unless he is “the rare juvenile offender whose crime reflects irreparable corruption” applies regardless of whether a state’s sentencing scheme is mandatory or discretionary)

Nasrallah v. Barr (whether 8 U.S.C. § 1252(a)(2)(C) divests the courts of appeals of jurisdiction to review an agency’s factual findings underlying a denial of withholding of removal relief)

R.G. & G.R. Harris Funeral Homes v. Equal Employment Opportunity Commission (whether Title VII prohibits discrimination against transgender people based on their status as transgender)

Retirement Plans Committee of IBM v. Jander (whether ERISA’s “more harm than good” pleading standard can be satisfied by alleging that the harm of an inevitable disclosure of an alleged fraud increases over time)

Seila Law LLC v. Consumer Financial Protection Bureau (whether the vesting of substantial executive authority in an independent agency led by a single director violates the separation of powers)

Thole v. U.S. Bank, N.A. (whether an ERISA plan participant or beneficiary may seek injunctive relief against fiduciary misconduct without showing individual financial loss or an imminent risk thereof)

“Thanks for the great joint moot at Public Citizen! It was hugely helpful.
   Email from David Cole, thanking us for the moot courts in Bostock, Zarda, and R.G.

“Indeed, it was, as always. We owe you big time.”
   Email from Pam Karlan, replying to David Cole’s email and thanking us for the same moot courts

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 (and in some cases filing) petitions for certiorari, in briefing the merits of cases after the Supreme Court grants review, and in preparing for Supreme Court arguments.

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.

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