Alan Morrison

SUPREME COURT
ASSISTANCE PROJECT | 2017–2018

PUBLIC CITIZEN LITIGATION GROUP

"Wow! I am breathless...Thank you so much for the invaluable assistance."

Email from Michael Malakoff, thanking us for assistance at the petition stage in *Todd v. U.S. Bank*

Alan Morrison

SUPREME COURT ASSISTANCE PROJECT | 2017 – 2018

This report reviews the work of the Alan Morrison Supreme Court Assistance Project and its fellowship program from July 1, 2017 – June 30, 2018. The Project offers pro bono legal assistance at the certiorari stage, helping to oppose petitions for certiorari to protect public interest victories in lower courts, and at the merits stage, helping to draft briefs and conducting moot courts in public interest cases. Your support ensures that the Project can continue to offer this assistance.

The Project fellow identifies the cases in which we offer assistance. The fellow reviews all paid petitions for certiorari filed in the Supreme Court and selects those concerning issues of public interest that are possibly cert-worthy. For these cases, the fellow prepares a memo analyzing the strength of the petition. Working under the supervision of Public Citizen Litigation Group's director, the fellow then offers assistance to counsel in appropriate cases. When a lawyer accepts the fellow's offer, a Public Citizen attorney assumes principal responsibility, often with the fellow's substantial input. We also consider offering assistance or a moot court for all petitions granted by the Court for full review.

Tahir Duckett served as the 2017 – 2018 Supreme Court Assistance Project fellow. Last year, donations significantly defrayed the cost of his fellowship. When Tahir completes his fellowship in August, Rylee Sommers-Flanagan, a graduate of Stanford Law School who is currently completing the second of two federal-court clerkships, will succeed him.

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THE PROJECT AND THE SUPREME COURT

Public Citizen's Supreme Court Assistance Project began in 1990, when Public Citizen Litigation Group's founder Alan Morrison envisioned a public interest group that could 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 opposing 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.

After a lengthy period with only eight members on the Court following the February 2016 death of Justice Antonin Scalia, the Court returned to its full complement of nine justices in April 2017, with the confirmation of Justice Neil Gorsuch. In its first full term since then, the Court heard argument in a long list of controversial cases, raising issues involving political gerrymandering, corporations' potential liability under the Alien Tort Statute, and the enforceability of arbitration agreements barring collective actions by employees. Four major cases implicate First Amendment questions: the legality of President Trump's "travel ban," the constitutionality of forced disclosures in so-called "crisis pregnancy centers," the extent to which states may bar a baker from refusing to supply a cake for a same-sex wedding, and the constitutionality of requiring public employees to pay agency fees to unions as a condition of their employment.

Empirical SCOTUS blogger Adam Feldman recently observed that Justice Gorsuch's first year on the Court has proven him to be "a worthy conservative successor to Scalia," scoring him as the second-most conservative justice on the Court. Justice Gorsuch's presence has been felt most notably in multiple 5-4 decisions siding with corporate interests.

In the current environment, Public Citizen's pro bono assistance to public interest litigants seeking to avoid Supreme Court review of favorable lower-court decisions remains critical.

Public Citizen's ability to offer expert assistance at the certiorari stage is particularly essential given the level of specialization involved in convincing the Court to grant or deny review. The Supreme Court Justices have enormous discretion in which cases to accept for certiorari review. And a 2016 empirical study published in the Villanova Law Review confirms that "repeat players" before the Court hold a considerable advantage at the certiorari stage as a result of their "ability to bear greater costs, focus on gains in the aggregate through repeat litigation, and shift the course of the law over time," as well as their "institutional standing and developed skill in the unique area of bringing cases to the Supreme Court." Many of these "repeat players" regularly represent corporate interests and are either unaffordable for most people or have conflicts of interest that prevent them from representing the public interest on certain issues.

Accordingly, Public Citizen has worked diligently to realize the Project's aim of providing experienced Supreme Court representation in public interest cases. Since the Project's founding, our attorneys have drafted more than one hundred oppositions to petitions for certiorari and advised attorneys on hundreds of additional oppositions, scoring quiet victories by helping attorneys who prevailed below to keep their cases out of the Supreme Court. The certiorari process can be daunting even to experienced appellate lawyers. From drafting a brief to providing feedback or answering questions about procedure, we help trial lawyers, public interest attorneys, and others with little Supreme Court experience navigate the cert-stage process.

Public Citizen attorneys have argued 64 cases before the Supreme Court and served as lead or co-counsel in scores more. Bringing decades of Supreme Court experience, the Project often provides assistance in cases concerning access to the civil justice system or claims of government misconduct, and in cases in which employees, civil rights claimants, or tort plaintiffs have won significant awards or established important precedents.

"It was really helpful to get your perspective and benefit from your experience. I hope our paths cross again soon."

Note from David Zimmer, thanking us for holding a moot court in *Pereira v. Sessions*

OUR DOCKET: THE 2017 – 2018

In the 2017 Supreme Court Term, which ran from October 2017 through June 2018, Public Citizen Litigation Group provided substantial petition-stage assistance in more than thirty cases and served as the principal drafter of the brief in opposition in thirteen cases. At the merits stage, Public Citizen held moot courts in twenty cases, and submitted or joined merits-stage amicus briefs in ten cases. For a list of cases on which we are currently working, visit our website, https://www.citizen.org/our-work/litigation/scap.

Over the course of the 2017 Term, we assisted in cases involving a broad array of issues. At the petition stage, we helped to successfully defend lower court decisions holding that commercial-disclosure statutes requiring financial institutions to disclose in solicitation letters that the solicitations are not authorized by the borrowers' lenders are constitutional; that attempts to collect time-barred debts were deceptive under the Fair Debt Collection Practices Act; that a challenge to the validity of a delegation provision of an arbitration clause was consistent with the Federal Arbitration Act; that ERISA does not preempt state-law causes of action for fraud and unjust enrichment based on an insurer's violation of a state anti-subrogation law; that a school district violated the Individuals with Disabilities Education Act by unilaterally revising a disabled student's individualized education program; and that the statute of limitations on a wage-and-hour claim was tolled between the filing of the action, an initial denial of class certification, and the vacatur of that denial on appeal. We also assisted in the denial of certiorari in multiple cases finding law enforcement officers were not entitled to qualified immunity for violating the constitutional rights of civilians.

At the merits stage, we held moot courts for lawyers arguing a wide range of issues, including cases considering whether the warrantless seizure and search of historical cell phone records revealing the location and movements of a cell phone user over the course of 127 days is permitted by the Fourth Amendment, whether the *American Pipe* tolling rule permits a previously absent class member to bring a subsequent class action outside the applicable limitations period, whether the disclosures required by the California Reproductive FACT Act violate the First Amendment, whether the existence of probable cause defeats a First Amendment retaliatory-arrest claim as a matter of law, whether a state can use registered voter inactivity as a basis for unregistering the voter under the National Voter Registration Act of 1993 and the Help America Vote Act of 2002, and whether applying Colorado's anti-discrimination law to compel a baker to sell a cake for a same-sex wedding violates the free speech or free exercise clauses of the First Amendment.

Below are some examples of our work during the 2017 Term.

BRIEFS IN OPPOSITION

DirecTV v. Hall

DirecTV, the nation's largest provider of satellite television services, engages individual technicians to install and repair DirecTV's equipment in customers' homes and businesses. Some of the technicians are controlled and managed with intermediaries, but DirecTV retains the authority to direct, control, and supervise nearly every aspect of the technicians' day-to-day job duties. Seven technicians filed a lawsuit alleging that they were not paid for all of the hours they worked and that they worked in excess of forty hours a week without receiving overtime pay, in violation of the overtime and minimum wage requirements of the Fair Labor Standards Act (FLSA). The technicians alleged that DirecTV was their joint employer under the FLSA and thus jointly and severally liable for the violations of the statute. The district court disagreed, finding the facts alleged were insufficient to establish joint employment and dismissing the case. The Fourth Circuit reversed, and DirecTV petitioned the Supreme Court for review.

Michael Kirkpatrick of Public Citizen, serving as co-counsel with Kansas City, MO, attorneys George Hanson and J. Toji Calabro of Stueve Siegel Hanson LLP, wrote the brief in opposition. The brief argued that the Fourth Circuit's analysis fit comfortably within the standard applied by all of the other Circuits and that, under any Circuit's framework, DirecTV would be considered a joint employer of the technicians. The Court denied the petition.

"Thank you for authoring the cert opposition brief. It's a great read and we are very grateful for your work."

Email from Harvey Rosenfield, thanking us for assistance at the petition stage in *Mercury Casualty Co. v. Jones*

BRIEFS IN OPPOSITION (CONTINUED)

ITT Corp. v. Lee

ITT Corporation employed hundreds of American workers in performing a contract to provide services to the U.S. military in Kuwait. Workers claiming that ITT failed to comply with Kuwaiti wage-and-hour laws filed a class action in a federal district court in Washington State. The district court initially denied class certification on the ground that the plaintiffs had not shown that common issues predominated, then certified it based in part on its conclusion that Kuwaiti substantive law and Washington's statute of limitations would govern the claims of all members of the class. On an interlocutory appeal, the Ninth Circuit held that a one-year Kuwaiti statute of limitations was applicable, vacated the certification order, and remanded for consideration of whether the class was still certifiable in light of the applicability of the Kuwaiti limitations period. The district court again certified a narrower class, and ITT again appealed.

On appeal, ITT argued that the class could not be certified because the limitations period had run out for all members of the class between the filing of the action and the district court's second order granting certification. The Ninth Circuit held that under the Supreme Court's longstanding *American Pipe* rule, the limitations period was tolled between the filing of the action and the initial denial of certification; ran again between that order and the first order granting certification; was tolled again between that order and the effective date of the decision in the first appeal vacating it; and then ran again until the second order granting certification. Because the amount of time during which the limitations period ran following the filing of the action was not more than a year, the court rejected ITT's contention that the class could not be certified because all members' claims were time-barred. ITT filed a petition for a writ of certiorari, arguing that the Ninth Circuit's application of *American Pipe* principles conflicts with decisions of other circuits.

Public Citizen's Scott Nelson, serving as co-counsel with Daniel Williams and William Thomas of Thomas, Williams & Park, LLP, of Boise, ID, prepared the brief in opposition. The Supreme Court denied the petition.

Mayor and City Council of Baltimore v. Humbert

In 2008, Marlow Humbert was arrested for rape and detained in solitary confinement for more than fifteen months, even though the sole witness repeatedly told officers she could not identify him as the attacker and no physical evidence connected him to the crime. The police officers who led the investigation based their arrest warrant solely on his generic resemblance to a sketch and a tentative identification tainted by the fact that one of the officers showed the victim a picture of him before asking her to view a photo array. The officers withheld exculpatory DNA evidence from the prosecutors for nearly a year; after they finally turned it over, Mr. Humbert was released. In 2011, Mr. Humbert sued the City of Baltimore and the officers for violating his rights under the Fourth Amendment and Maryland law. In 2015, a jury agreed with him, finding that no reasonable officer would have believed that he was the perpetrator of the crime. The district court, however, set aside the jury's finding, based on its view of the evidence and the doctrine of qualified immunity. In 2017, a unanimous panel of the Fourth Circuit Court of Appeals reversed and reinstated the verdict in Mr. Humbert's favor. The city and the officers petitioned the Supreme Court for review.

Tahir Duckett and Adam Pulver served as co-counsel in the Supreme Court alongside Charles H. Edwards IV of the Law Office of Barry Glazer, LLP, in Baltimore, MD. The brief in opposition argued that the Fourth Circuit was correct in determining that there was sufficient evidence to support the jury's factual findings and that those factual findings demonstrated a violation of a clearly established constitutional right. The Court denied the petition.

Taylor Farms Pacific, Inc. v. Pena

This class action was brought by hourly workers in California food production and processing plants who allege that they were not paid in compliance with California wage and hour law. In particular, they claim they were denied the meal and rest breaks that California law requires: breaks were not offered at the times they were required, and those breaks that were offered were too short. The workers initially filed their case in state court, but their employer, Taylor Farms,

removed the case to federal court under the Class Action Fairness Act. After several years of litigation, the district court granted in part and denied in part the motion for class certification, and certified subclasses relating to the workers' meal break claims. Taylor Farms appealed the grant of class certification, and the Ninth Circuit Court of Appeals affirmed the district court's decision in a brief unpublished decision. Taylor Farms then sought review in the Supreme Court, arguing that the district court should not have considered a spreadsheet summarizing noncompliant meal breaks identified in Taylor Farms' time records produced in discovery. Taylor Farms asked the Supreme Court to use this case to address the question whether the same admissibility standard applicable to evidence at trial applies at the class certification stage.

Adam Pulver of Public Citizen served as co-counsel for the workers in the Supreme Court alongside John M. Bickford and R. Rex Parris of the Parris Law Firm in Lancaster, CA. The opposition to the petition argued that the question raised by Taylor Farms was not actually present in this case and that, in any event, there was no conflict among courts of appeals on the question it presented. The Court denied the petition.

Victaulic Co. v. United States ex rel. Customs Fraud Investigations, LLC

Federal law requires that importers mark certain imported pipe fittings with their country of origin; failure to do so, under certain circumstances, triggers a mandatory ten percent "marking duty" levied against the importer. Customs Fraud Investigations, LLC (CFI) filed a qui tam action under the False Claims Act against Victaulic Co., a manufacturer and importer of pipe fittings, alleging that Victaulic knowingly imported unmarked pipe fittings and then violated the False Claims Act by evading the marking duties that subsequently accrued. The district court dismissed the complaint for failure to state a claim, but the Third Circuit reversed. The court of appeals held that CFI's complaint satisfied Federal Rule of Civil Procedure 9(b)'s requirement that a complaint alleging fraud "state with particularity the circumstances constituting fraud" because the complaint identified over one thousand specific import shipments in connection with which Victaulic allegedly evaded marking duties. Additionally, the court rejected Victaulic's argument that marking duties are not "obligations" within the meaning of the False Claims Act and that the knowing concealment of marking duties therefore does not create False Claims Act liability. Victaulic filed a petition for certiorari seeking review of both the court of appeals' holding that the complaint pleaded fraud with particularity and its holding that evasion of marking duties violates the False Claims Act.

Scott Nelson of Public Citizen, acting as co-counsel for respondent alongside Jonathan Tycko and Anna Haac of Tycko & Zavareei in Washington, DC, and Suzanne Ilene Schiller of Manko, Gold, Katcher & Fox LLP in Bala Cynwyd, PA, prepared and filed a brief opposing the petition. The Court denied the petition.

"Thank you so much for taking the time to [provide feedback on the draft]. It has been a great help to have a seasoned veteran share her expertise and critique our brief for us."

Email from Sarah Furey Crandall, thanking us for assistance at the petition stage in *Walker v. Clark*

MOOT COURTS

Moot courts give counsel a valuable opportunity to sharpen their arguments and identify potential vulnerabilities so that they can effectively address the concerns of the Justices. This Term, we hosted twenty moot courts for attorneys with oral arguments before the Court—nearly one-third of the sixty-four arguments heard this Term. We mooted both attorneys preparing for their first Supreme Court arguments and attorneys with significant Supreme Court experience. The cases involved a wide range of public interest issues:

Abbott v. Perez (whether Texas state house and Congressional districts were the product of unlawful racial gerrymanders)

Artis v. District of Columbia (whether the tolling provision in 28 U.S.C. § 1367(d) suspends the limitations period for a pendent state-law claim while the claim is pending and for thirty days after the federal case in which it is asserted is dismissed, or whether the provision merely provides 30 days beyond the dismissal for the plaintiff to refile)

Benisek v. Lamone (whether the 6th Congressional district in Maryland is the product of an unlawful partisan gerrymander)

Carpenter v. United States (whether the warrantless seizure and search of historical cellphone records revealing the location and movements of a cellphone user over the course of 127 days is permitted by the Fourth Amendment)

China Agritech v. Resh (whether the rule of *American Pipe and Construction Co. v. Utah* tolls statutes of limitations to permit a previously absent class member to bring a subsequent class action outside the otherwise applicable limitations period)

Cyan, Inc. v. Beaver County Employees Retirement Fund (whether state courts lack subject matter jurisdiction over covered class actions that allege only Securities Act of 1933 claims)

Dalmazzi v. United States, *Cox v. United States*, and *Ortiz v. United States* (whether judges are disqualified from simultaneous service on both the U.S. Court of Military Commission Review and either the U.S. Army or Air Force Courts of Criminal Appeals)

Digital Realty Trust, Inc. v. Somers (whether the anti-retaliation provision of the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act extends to an individual who has not reported a violation of the securities laws to the Securities and Exchange Commission)

District of Columbia v. Wesby (whether police officers had probable cause to arrest invited partiers at a vacant home for trespassing)

Encino Motorcars v. Navarro (whether service advisors at car dealerships are exempt from the Fair Labor Standards Act's overtime-pay requirements)

Epic Systems Corp. v. Lewis (whether arbitration agreements between employers and employees providing for individualized proceedings are enforceable under the Federal Arbitration Act, notwithstanding the provisions of the National Labor Relations Act protecting the right of employees to engage in concerted activity)

Hamer v. Neighborhood Housing Services of Chicago (whether Federal Rule of Appellate Procedure 4(a)(5)(C) is jurisdictional or a nonjurisdictional claim-processing rule)

Husted v. A. Philip Randolph Institute (whether Ohio's list-maintenance process, which uses a registered voter's inactivity as a factor in whether to unregister the voter, complies with federal law)

Jesner v. Arab Bank, PLC (whether the Alien Tort Statute allows for corporate liability)

Lozman v. City of Riviera Beach, FL (whether the existence of probable cause defeats a First Amendment retaliatory-arrest claim as a matter of law)

Masterpiece Cakeshop v. Colorado Civil Rights Commission (whether applying Colorado's public accommodations law to compel a baker to make a custom wedding cake for a same-sex wedding violates the free speech or free exercise clauses of the First Amendment)

Minnesota Voters Alliance v. Mansky (whether a state statute that bans all political apparel at the polling place is facially overbroad under the First Amendment)

Murphy v. Smith (whether the parenthetical phrase "not to exceed 25 percent" as used in 42 U.S.C. § 1997e(d)(2) means any amount up to 25 percent, or whether it means exactly 25 percent)

National Institute of Family and Life Advocates v. Becerra (whether the disclosures required by the California Reproductive FACT Act violate the protections set forth in the free speech clause of the First Amendment)

Pereira v. Sessions (whether, to trigger the stop-time rule by serving a "notice to appear," the government must "specify" the items listed in the definition of a "notice to appear," including "[t]he time and place at which the proceedings will be held")

ARBITRATION ISSUES — LOOKING BACK, LOOKING AHEAD

Cases involving arbitration continue to be a major preoccupation of the Supreme Court and, as a result, a staple of the work of Public Citizen Litigation Group's Supreme Court Assistance Project. Because of the Court's precedents favoring enforcement of arbitration agreements under the Federal Arbitration Act (FAA), virtually any decision of a federal or state appellate court that applies contract law principles to invalidate or limit enforcement of an arbitration agreement is a potential target for a petition for certiorari.

The Court's penchant for granting certiorari in cases involving arbitration often leads it to disregard its normal practice of not taking up cases that involve fact-bound and unimportant claims that a lower court did not properly apply settled principles. As a result, petitions for certiorari in arbitration cases require vigorous and well-thought-out briefs in opposition. And the frequency with which the Court grants review even in the face of such opposition means that few Terms pass without the need for merits briefing and argument of one or more arbitration cases.

To help meet these needs, we engage in all aspects and phases of arbitration cases before the Supreme Court, from preparing briefs in opposition to petitions for certiorari, to filing amicus briefs on the merits, to representing parties at the merits stage. The recently concluded 2017 Term and the upcoming 2018 Term feature us in all these roles.

The 2017 Term began with denials of certiorari in two cases in which we provided significant assistance in preparing briefs in opposition: *Bryant v. King*, involving whether a state may require doctors and other fiduciaries to obtain informed consent before foisting an arbitration agreement on a client; and *Bloomingdale's v. Tanguilig*, concerning whether the FAA preempts California state-law principles that prevent companies from requiring employees to waive the right to bring representative actions under California's Private Attorneys General Act (PAGA). In both cases, the petitioners accused state courts of "hostility" to arbitration when they required arbitration agreements to conform to the same standards other contracts must meet. Strong briefs in opposition helped dissuade the Court from accepting those dubious arguments.

Meanwhile, the first argument of the 2017 Term was an important arbitration case: *Epic Systems Corp. v. Lewis*. The issue in *Epic* was whether class-action bans in employer-employee arbitration agreements violate the federal labor laws' prohibition on contracts that infringe the right of workers to engage in concerted action for mutual protection. Public Citizen filed an amicus brief explaining that the FAA and the federal labor laws are best read together to prohibit agreements that prevent employees from pursuing legal claims collectively.

Unfortunately, the Supreme Court ruled that the FAA's pro-arbitration policy prevails over workers' entitlement to take concerted legal action to protect their rights. In so holding, the Court again employed broad language condemning "hostility" toward arbitration—language that will undoubtedly embolden more companies to seek review by the Court if their arbitration agreements are not enforced to their liking.

As if to illustrate the point, the day after *Epic* came down, Public Citizen Litigation Group filed a brief in opposition in *Five Star Senior Living v. Mandviwala*—yet another case involving whether the FAA requires state and federal courts in California to enforce arbitration agreements that purport to waive employees' rights to pursue representative claims under PAGA. By our count, the petition in this case is the eighth raising the issue, and we have written or assisted with the oppositions to seven of them. This time, we had to be especially light on our feet: The timing of the *Epic* decision required eleventh-hour revisions to explain that California's rule against waiver of PAGA claims is fully consistent with *Epic*'s condemnation of "hostility" toward arbitration.

The upcoming 2018 Term will undoubtedly bring yet more petitions for certiorari raising arbitration issues. Already, the Court's lineup of cases to be argued in the fall includes two involving arbitration.

The first, *New Prime v. Oliveira*, involves an FAA provision that makes the statute inapplicable to contracts of employment of transportation workers. The workers in the case are truck drivers claiming they were misclassified as independent contractors and deprived of rights under the Fair Labor Standards Act. The employer argues that the FAA requires the courts to order arbitration without even determining whether the FAA applies in the first place. We intend to file an amicus brief taking on the through-the-looking-glass argument that the FAA requires arbitration in a case to which it does not even apply.

In the second case, *Lamps Plus v. Varela*, the issue is whether the language of a contract requiring arbitration of employer-employee disputes allows classwide arbitration, as the lower courts held. The employer convinced the Supreme Court to take up the question whether that reading of the agreement reflects impermissible "hostility" to arbitration. To even reach that issue, the Court will have to leapfrog the problem that there was no appellate jurisdiction over the case to begin with. We serve as co-counsel for the respondent and will be preparing her brief on the merits.

Consumer and worker advocates have their work cut out for them in any Supreme Court case involving arbitration. We remain committed to providing representation in those cases and evening the odds as much as possible.

Your contribution is vital to our continued success.

In its twenty-eight 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. The Project provides pro bono support and counsel from lawyers who have knowledge of Supreme Court practice equal to that of the high-priced experts often aligned against public interest attorneys.

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.

We are grateful for your support. You may donate by sending a check in the enclosed envelope or via credit card at https://secure.citizen.org/scap.

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

"Thank you and your colleagues at Public Citizen for all your help with the Clinic's cases. From the very first clinic case I argued back in 2004, your help has been invaluable."

Note from Pam Karlan, thanking us for holding moot courts for co-counsel in *Lozman v. City of Riviera Beach* and *Abbott v. Perez*

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