Alan Morrison

SUPREME COURT
ASSISTANCE PROJECT | 2013 - 2014

PUBLIC CITIZEN LITIGATION GROUP

Alan Morrison

SUPREME COURT
ASSISTANCE PROJECT | 2013 TERM

This report reviews the work of the Alan Morrison Supreme Court Assistance Project and its fellowship program for the Supreme Court's 2013 Term, which ran from July 1, 2013, to June 30, 2014. The Project provides a unique service, helping respondents to keep their cases out of the Court and helping parties on either side to prepare their cases on the merits and present oral argument. Your support helps to ensure that the Project can continue to offer pro bono legal assistance to litigants at both the certiorari and merits stages of Supreme Court litigation.

The Project fellow focuses on identifying cases in which we might offer assistance. The fellow spends a substantial amount of time reviewing all paid petitions for certiorari to make an initial judgment about whether the question raised in a petition implicates a matter of public interest. In cases that are potentially cert-worthy, 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, while the fellow assists with brief-writing and research and participates in moot courts. We also consider offering assistance or a moot court for all petitions granted by the Court for full review.

Andrew Selbst served as the 2013-2014 Supreme Court Assistance Project fellow. Andrew will complete his fellowship in August and then begin a clerkship on the U.S. Court of Appeals for the Third Circuit. Last year, donations significantly defrayed the cost of his fellowship. Rachel Clattenburg, an Albany Law School graduate now clerking on the U.S. Bankruptcy Court for the District of Columbia, will succeed Andrew as our fellow.

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THE PROJECT AND THE FELLOWSHIP

In the past several years, reporters, scholars, and politicians have drawn attention to the heightened success rate of corporate interests before the Supreme Court. *The New York Times* reported in 2011 that the Roberts Court was hearing a larger share of cases about economic activities that matter to big business than had the Rehnquist Court. Senator Elizabeth Warren noted in a speech late last year that "[t]he Chamber of Commerce is now a major player in the Supreme Court, and its win rate has risen to 70% of all cases it supports." At the end of the last Term, *The New York Times* reported that "the business docket reflects something truly distinctive about the court led by Chief Justice John G. Roberts Jr." And a study published in the *Minnesota Law Review* by scholars at the University of Southern California and University of Chicago and Judge Posner of the Seventh Circuit found that "five of the ten Justices who, [between] the 1946 through 2011 Terms, have been the most favorable to business are currently serving, with two of them ranking at the very top among the thirty-six Justices" in that span.

Business interests seeking representation before the Supreme Court have their choice from any number of elite and expensive attorneys that make up the increasingly specialized Supreme Court bar. In 1990, 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 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.

Since 1990, the specialization of the Supreme Court bar has become significantly more pronounced and, accordingly, the imbalance between private and public interests more significant. An analysis of this past Supreme Court term at SCOTUSblog found that lawyers who have argued at least five times before the Court or work in offices in which lawyers have argued at least ten times argued more than seventy percent of the cases heard this Term. Corporate and government clients are almost always able to access this legal expertise. Accordingly, the value of the Project in assisting other lawyers on behalf of individuals and the public interest is greater than ever.

Public Citizen attorneys have argued sixty-three cases before the Court, participated as co-counsel in scores of others, and filed briefs as amicus curiae in many others. Lending our Supreme Court expertise, we help attorneys representing individual clients and nonprofit organizations to preserve or win public-interest victories. Over its twenty-four years, our Project has assisted hundreds of lawyers in opposing (or, in some cases, filing) petitions for certiorari, in briefing the merits in cases where the Supreme Court grants review, and in preparing for Supreme Court arguments. Without our Project, some of those lawyers might have been significantly outgunned. Instead, they had the pro bono support and counsel of lawyers with knowledge of Supreme Court practice equal to that of the high-priced experts arrayed against them.

At the certiorari stage, the Project offers pro bono legal assistance to parties opposing petitions for certiorari, to preserve public-interest victories in the lower courts. Our assistance can range from drafting the opposition to the petition, to editing the lawyer's draft, to providing strategic advice, to simply answering questions about Supreme Court procedure. In addition, we sometimes assist counsel in preparing petitions for certiorari. We often provide assistance in cases that raise issues concerning access to the civil justice system or claims of government misconduct, and in cases where employees, civil rights claimants, or tort plaintiffs have won significant awards or established important precedents.

If the Supreme Court agrees to hear a case, the Project may offer to help with brief-writing and preparing for oral argument, including by conducting a moot court. Each Supreme Court Term, the Project assists at the merits stage in approximately one third of the cases in which the Court grants certiorari.

"I owe you big time. Thank you so much for your help and hard work on this!"

— Email from Leslie O'Leary, thanking us for assistance at the certiorari stage in *Lukas-Werner v. Novo-Nordisk.*

OUR DOCKET: THE 2013 TERM

In the 2013 Supreme Court Term, Public Citizen Litigation Group provided substantial petition-stage assistance in thirty-one cases, serving as the principal drafter of the brief in opposition in eleven cases. Litigation Group attorneys assisted in two other cases by drafting a petition for certiorari and filed two amicus briefs in support of cert. petitions. At the merits stage, Litigation Group attorneys argued one case before the Court, served as co-counsel for the respondent in another, filed amicus briefs in three cases, and held moot courts in sixteen cases. For a list of cases on which we are currently working, visit our website at www.citizen.org/supremecourt.

The cases on which we assisted spanned a broad array of issues. At the petition stage this Term, we successfully defended lower court decisions addressing the ability of consumers to resist forced arbitration, plaintiffs' rights to punitive damages awards where appropriate, and the right of government employees to report misconduct without retaliation. We also helped to preserve public-interest victories concerning environmental law, class action procedures, and wage and hour laws.

At the merits stage, we addressed the right of residents of polluted land to sue the polluters even when the environmental hazard was not discovered until many years later. We represented a plaintiff whose participation in a frequent flyer program was abruptly cancelled, leading to a lawsuit for violation of the covenant of good faith and fair dealing. And we filed amicus briefs in cases involving campaign finance, jurisdiction under the Class Action Fairness Act, and the operation of the statute of repose in securities litigation. Below are some examples of our work during the 2013 Term.

"Just to confirm—you really are a rock star."

— Email from Dan Morse, thanking us for assistance at the certiorari stage in *Federal National Mortgage Association v. Sundquist.*

BRIEFS IN OPPOSITION

Bowers v. Franks

Donna Franks brought a medical malpractice suit after her husband died of injuries that occurred during surgery. The physician-defendant moved to compel arbitration under a mandatory arbitration agreement that included a damages cap. Franks argued that this agreement was contrary to Florida's public policy because state law established a voluntary arbitration scheme to determine damages in medical malpractice cases. The voluntary scheme included the same damages cap but required the defendant to admit liability in order to invoke it. The Florida Supreme Court held that by mandating arbitration and importing the damages cap but not the admission of liability, the arbitration agreement was void as contrary to public policy. The physician petitioned for Supreme Court review.

Scott Nelson of Public Citizen assisted Tom Edwards of Edwards & Ragatz, P.A., in opposing the petition. The opposition argued that the case presented no compelling issues of federal law and that the Supreme Court of Florida did not refuse to enforce the arbitration agreement on the ground that it was an arbitration agreement, but rather on the ground that the agreement contradicted substantive statutory rights, which is a ground to void any type of contract. The U.S. Supreme Court denied the petition.

CFS Enterprise v. Heckadon

When the plaintiffs purchased a vehicle from CFS Enterprise, they were caught in a scam involving falsified loan applications, leaving them on the hook for more money than they could afford to pay. After trial, a jury awarded $2,144.87 in economic damages against each defendant, as well as $100,000 in punitive damages against CFS Enterprise and $400,000 in punitive damages against its owner. The defendants appealed, arguing that the ratio of punitive to actual damages made the award excessive, in violation of due process. The Missouri Court of Appeals affirmed the punitive damages award, and the defendants sought review in the U.S. Supreme Court.

BRIEFS IN OPPOSITION (CONTINUED)

Allison Zieve of Public Citizen assisted Douglass Noland of Noland Law Firm LLC in opposing the petition. The opposition explained that no conflict among the lower courts justified review and that the decision evaluated the punitive damages award based on the particular facts of the case, as the Supreme Court has instructed. The Supreme Court denied the petition.

Lockheed Martin v. Abbott

A class of participants in retirement plans sued Lockheed Martin, the plans' sponsor, for breach of fiduciary duty under ERISA. They alleged that two mismanaged plans underperformed relative to a known index, and they defined subclasses of plaintiffs who invested in each fund and suffered damages. Lockheed Martin moved to dismiss the case and prevent certification, arguing that a named plaintiff lacked standing to sue or represent one subclass because he had beaten the index. The Seventh Circuit disagreed, finding that the plaintiff had invested in the fund and had alleged injury, and that the use of the index to define the class was merely provisional, as damages would be proved later at trial. Lockheed Martin petitioned for review.

Allison Zieve and Andrew Selbst of Public Citizen assisted Michael Wolff and Sean Soyars of Schlichter, Bogard & Denton, LLP, in opposing the petition. The opposition argued that the question stated in the petition—whether a plaintiff has standing to represent a class where the misconduct did not cause him harm—was not presented because the named plaintiff did not represent the subclass petitioners sought to challenge and the question of his harm was a disputed fact that had not been resolved at that stage. The Supreme Court denied review.

Casasola v. Greene

Gary Greene went to a Bank of America branch to cash two checks that he had received from his automobile insurer. When the teller refused to cash the checks, Greene grew frustrated and angry. In response, the bank's manager falsely reported to the police that Greene had threatened to blow up the bank, a threat for which Greene was subsequently arrested, tried, and acquitted. Greene sued the bank manager and the bank for malicious prosecution, and the defendants moved to dismiss, arguing that they were immune under the Annuzio-Wylie Anti-Money Laundering Act, which immunizes banks for disclosing illegal activity to law enforcement. The trial court granted the motion, but the court of appeals reversed, finding that the immunity was meant to curb money-laundering and only applied to disclosures of suspicious transactions and financial information, not to threats of physical violence. The defendants petitioned for review.

Adina Rosenbaum of Public Citizen assisted Greene's counsel, Emmanuel Akudinobi and Chijioke Ikonte of Akudinobi & Ikonte in opposing the petition. The opposition argued that the lower courts were not in conflict on the question presented and that the decision below was correct. The Supreme Court denied the petition.

Jerusalem Café v. Lucas

Six undocumented employees sued their employer under the Fair Labor Standards Act (FLSA) for failure to pay minimum wage and overtime. After the plaintiffs won at trial, the employer moved for judgment as a matter of law, arguing that because the employees could not legally be employed, they lacked standing to bring a FLSA claim. The trial court denied the motion, and the Eighth Circuit affirmed, holding that the immigration law did not affect the employees' rights under FLSA. The court also observed that enforcing FLSA serves, rather than defeats, the purpose of the immigration law in discouraging employers from hiring undocumented workers for below-minimum wages. The employer petitioned for review.

Allison Zieve of Public Citizen assisted Heather Schlozman of Dugan Schlozman LLC in opposing the petition. The opposition argued that the lower courts were not split on the issue presented, the ruling was consistent with Supreme Court precedent, and the defendant waived the issue by not raising it until after trial. The Supreme Court denied the petition.

"[T]hank you again for all of your help. The response we filed was simply greatly improved by your edits, comments and suggestions."

— Email from Jack Jacks, thanking us for assistance at the certiorari stage in *Montano v. Wilson*.

BRIEFS IN OPPOSITION (CONTINUED)

City of Burbank v. Dahlia

Burbank police officer Angelo Dahlia told an outside agency and his union president that his fellow officers abused suspects and subsequently threatened Dahlia himself to keep him quiet. As a result, Dahlia was placed on administrative leave, with the consequence that he forfeited holiday and on-call pay and lost the opportunity to take a promotion examination. Dahlia sued the officers who threatened him, the police chief, and the City of Burbank for retaliation based on his speech. The district court found that Dahlia's speech was unprotected by the First Amendment, holding that his speech was within the scope of his job duty to report crime. An eleven-judge panel of the Ninth Circuit reversed, holding that Dahlia's reports outside the regular chain of command might be protected by the First Amendment. The City of Burbank then sought review in the Supreme Court.

Scott Michelman of Public Citizen, working with Michael Morguess of Fullerton, California, prepared the brief in opposition, arguing that the petition sought review of an application of state, rather than federal, law and that lower courts did not disagree on the application of the law, but came to differing conclusions solely based on different facts. The Supreme Court denied the petition.

GenOn Power Midwest v. Bell

The plaintiffs live near a power plant that releases chemicals, odors, and particulates onto their properties, which lowered their property values and interferes with their enjoyment of their land. They sued the power plant's operator, GenOn Power Midwest, under state common law, alleging nuisance, negligence, and trespass. The district court dismissed the lawsuit, finding that the Clean Air Act's regulation of emission standards preempts state tort claims. The Third Circuit reversed, holding that the Clean Air Act sets a floor emission standard, not a ceiling, and allows states to regulate in-state emissions more stringently. GenOn sought review by the Supreme Court.

Adina Rosenbaum of Public Citizen worked with Peter Macuga of Macuga, Liddle & Dubin, P.C. and Sean Donahue of Donahue & Goldberg LLP to oppose the petition to the Supreme Court. The opposition argued that there was no split in the lower courts and that the decision below specifically tracked established Supreme Court precedent. The petition was denied.

SOLICITING THE SOLICITOR GENERAL

An aspect of Supreme Court practice that is unfamiliar to many lawyers arises when the Court calls for the views of the Solicitor General, known as the CVSG. The Court issues many CVSGs each term, usually to learn whether the federal government is concerned about the impact of the decision below on a federal interest. In such cases, upon request, lawyers in the Solicitor General's office will meet with counsel for the parties to discuss the case. In addition to lawyers from the Solicitor General's office, lawyers from other parts of the Department of Justice and other agencies interested in the issue will listen to arguments about both the merits and the "cert. worthiness" of the case. No manual exists to guide outside counsel in preparing for these meetings or in preparing letters to explain one's position to the Solicitor General's office.

Through the Supreme Court Assistance Project, Litigation Group lawyers have assisted attorneys by providing advice about how to approach the Solicitor General's office or attorneys in other agencies with a potential interest in a case, working with counsel to prepare letters to the Solicitor General's office, and attending the meetings to help persuade the Solicitor General to adopt a position favorable to the public interest. This year, Allison Zieve of Public Citizen served as co-counsel in one case CVSG'd by the Court, and she and Scott Nelson currently are assisting an attorney in another. Those cases are *Medtronic v. Stengel* and *Federal National Mortgage Association v. Sundquist.*

MERITS BRIEFS

Northwest v. Ginsberg

Rabbi S. Binyomin Ginsberg was a long-standing Northwest Airlines customer who earned the highest level of benefits in the airline's frequent flyer program before Northwest abruptly revoked his membership. Ginsberg sued Northwest for, among other claims, breach of contract and breach of the duty of good faith and fair dealing. The district court dismissed the express contract claim on the merits and held that the remaining claims were preempted by the Airline Deregulation Act (ADA). Ginsberg appealed the dismissal of the good faith claim, and the Ninth Circuit reversed, finding that the purpose of the ADA was to unleash the market forces of competition, not to immunize the airlines from common-law contract claims.

Adina Rosenbaum of Public Citizen represented Rabbi Ginsberg at the certiorari and merits stages. The merits brief argued that the case was a straightforward application of prior Supreme Court precedent, which held the ADA's preemption provision does not apply to contract claims, because Ginsberg's claim sought to enforce the parties' bargain. In its decision, the Court disagreed. It held that, because the applicable state law does not allow parties to contract out of the covenant of good faith and fair dealing, it reflects state policy that seeks to enlarge the obligations of the contract.

CTS Corp. v. Waldburger

CTS Corporation is the successor to a corporation that manufactured electronic components in North Carolina using various toxic solvents. In 1987, CTS sold the North Carolina property, representing that the site was in environmentally clean condition. The plaintiffs in the case are people who live on or near the property. In 2009, the Environmental Protection Agency notified the plaintiffs that their well water was contaminated by toxins left behind by CTS, and in 2011, the plaintiffs sued CTS for nuisance under North Carolina law.

CTS argued that North Carolina's repose period, which bars claims filed more than ten years after the last act or omission of the defendant, barred the plaintiffs' lawsuit. The district court, finding that the last act or omission of CTS occurred in 1987, dismissed the suit. The Fourth Circuit reversed, holding that a provision of the federal Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) that states a commencement date for state statutes of limitations preempts the repose period.

Allison Zieve of Public Citizen, working with John Korzen of Wake Forest University Law School, served as Supreme Court co-counsel for the plaintiffs at the merits stage of the case. The merits brief argued that the repose period in the North Carolina statute of limitations is preempted by CERCLA's plain language and purpose. In a 7 to 2 decision, the Court, however, held that CERCLA does not preempt state statutes of repose and that the plaintiffs' claims are therefore banned.

"I cannot imagine handling my first merits stage case at the Supreme Court without having had Public Citizen's support. Allison Zieve and others on the litigation team were a godsend. ... Public Citizen provided strategic and logistical help with every aspect of the merits stage, such as lining up amicus support, editing multiple drafts of our brief, choosing and working with a printer, setting up two of my moots, and joining me at counsel table. A big defense firm and the United States may have been opposite us, but with Public Citizen on my side I know we have a fighting chance."

— John Korzen, thanking us for assistance at the merits stage in *CTS Corp. v. Waldburger*.

MOOT COURTS

"You, your entire organization and especially those who participated in the moots were fantastic. Believe me, I was questioned by the Justices on most of the very same areas we discussed in the moots. Thanks again!"

— Email from Ed Theobald, counsel for respondent in *Madigan v. Levin*, thanking us for the moot court in *Madigan v. Levin*.

Moot courts offer a valuable opportunity for counsel to hone their arguments and to identify potential vulnerabilities so that they can effectively address the concerns of the Justices. This Term, we provided moot courts for attorneys with oral arguments before the Court in sixteen cases—about one quarter of the seventy cases argued. The attorneys whom we mooted included both individuals preparing for their first Supreme Court arguments and experienced Supreme Court litigators.

The cases for which we provided moot courts involved a wide range of public-interest issues. The cases were:

- *Madigan v. Levin (*whether state and local government employees may bring age discrimination claims under section 1983 and the Equal Protection Clause)
- *Chadbourne Parke LLC v. Troice, Willis of Colorado v. Troice*, and *Proskauer Rose LLP v. Troice* (whether the Securities Litigation Uniform Standards Act precludes a state-law class action alleging a scheme of fraud that involves misrepresentations about transactions in SLUSA-covered securities)
- *Burt v. Titlow* (whether a federal court may find ineffective assistance of counsel based on rejection of a plea in a habeas case where the state court found that the defendant maintained his innocence)
- *DaimlerChrysler AG v. Bauman* (whether a court may exercise personal jurisdiction over a foreign corporation based on the activities of a corporate subsidiary in the forum state)
- *Schuette v. Coalition to Defend Affirmative Action* (whether a state violates the guarantee of equal protection by amending its constitution to prohibit consideration of race in public university admissions)
- *Heimeshoff v. Hartford Life & Accident Insurance Co.* (whether an ERISA claim for wrongful denial of benefits may accrue and the statute of limitations begin to run before the mandatory pre-suit exhaustion of internal review)
- *Town of Greece v. Galloway* (whether opening prayers at town meetings violate the Establishment Clause where the prayer-givers are almost entirely Christians leading sectarian prayers)
- *Walden v. Fiore* (whether a court may exercise personal jurisdiction over a defendant whose sole contact with the forum is knowledge that the plaintiff has connections to the forum)
- *Mississippi ex rel. Hood v. AU Optronics Corp.* (whether a state's parens patriae action is removable as a "mass action" under the Class Action Fairness Act)
- *Mayorkas v. Cuellar de Osorio* (whether child immigrants who qualify for visas as derivative beneficiaries of a sponsored family member at the time of a visa application can age out of qualification by the time the family member receives a visa)
- *Northwest v. Ginsberg* (whether a claim that an airline breached the implied covenant of good faith and fair dealing by terminating a customer's frequent flyer membership is preempted by the Airline Deregulation Act)
- *Executive Benefits Insurance Agency v. Arkison* (whether Article III permits bankruptcy courts to exercise the judicial power of the United States by litigant consent and, if so, whether consent may be implied)
- *Plumhoff v. Rickard* (whether police officers' use of deadly force after a car chase was entitled to qualified immunity)
- *Wood v. Moss* (whether Secret Service agents who relocated anti-Bush protesters further from the President and did not move pro-Bush protesters were entitled to qualified immunity)
- *Lane v. Franks* (whether the First Amendment permits the government to retaliate against a public employee for truthful testimony compelled by subpoena)
- *CTS Corp. v. Waldburger* (whether CERCLA preempts state statutes of repose)

Your contribution is vital to our continued success.

In its twenty-four 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 attorneys in public-interest cases.

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.

Alan Morrison **SUPREME COURT ASSISTANCE PROJECT**

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