Alan Morrison

SUPREME COURT
ASSISTANCE PROJECT 2009

PUBLIC CITIZEN LITIGATION GROUP

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This report reviews the work of the Alan Morrison Supreme Court Assistance Project (SCAP) and its fellowship program for fiscal year 2009, which ended on September 30, 2009. We believe that our report demonstrates the unique service provided by SCAP, and we hope that it persuades you to contribute this year. Your support will help to ensure that SCAP continues offering pro bono legal assistance to litigants at both the certiorari and merits stages of Supreme Court review.

Leah Nicholls served as the 2008–2009 SCAP Fellow. Last year, donations significantly defrayed the cost of Leah's fellowship. Leah completed her fellowship in August, and she is now working as a clinical teaching fellow at Georgetown University Law Center. Brian Bilford succeeded Leah in August after completing a Ninth Circuit clerkship. During his tenure so far, SCAP has already provided certiorari-stage assistance to several attorneys, co-counseled on several briefs in opposition to certiorari, and coordinated 11 moot courts.

Background on the Project and Fellowship

SCAP was founded in 1990 as a program of Public Citizen Litigation Group to help rectify the imbalance in experience and resources between parties at the Supreme Court level. On one side, business clients are typically represented by one of an elite, expensive group of Supreme Court practitioners, and the government relies on the Office of the Solicitor General or a state Attorney General, all with extensive experience practicing before the highest state and federal courts. On the other side, individuals are often represented by lawyers who specialize in trial-level work, solo practitioners, and public interest or legal services attorneys—excellent in their fields, but with little or no Supreme Court experience and limited resources. Recent studies indicate that this gap is continuing to grow. Reviewing the Supreme Court's 2007 Term, Professor Richard Lazarus reported that, excluding arguments presented by the Solicitor General, twenty-eight percent of oral arguments were presented by advocates who had argued ten or more cases before the Supreme Court—a dramatic increase from the nine percent of arguments in 2000. And reporting on the 2008 Term, journalist Marcia Coyle noted that more than half of the cases would be argued by experienced Supreme Court counsel, with a few law firms dominating the docket.

In light of changes in Supreme Court practice, our goal of equalizing this imbalance is more relevant than ever. Public Citizen attorneys have argued fifty-six cases before the High Court and have appeared as lead counsel, co-counsel, or counsel for an amicus curiae in hundreds of other Supreme Court cases. By lending our Supreme Court expertise to "underdog" lawyers, we help those lawyers preserve or win a public interest victory.

SCAP offers free legal assistance at the certiorari stage by opposing petitions for certiorari to protect public interest victories in lower courts and by filing petitions for certiorari asking the Supreme Court to review decisions when appropriate. Cases on which we provide assistance often involve claims of government misconduct or situations where workers, civil rights claimants, or tort plaintiffs have won significant awards or established important precedents. When trying to preserve public interest victories by keeping cases out of the Court, SCAP focuses not only on the merits of the case, but also on procedural issues (such as whether the Court has jurisdiction or the parties have standing) and the often complex question of what makes a case "cert-worthy." If the Supreme Court agrees to hear a case, SCAP assists attorneys in brief-writing and preparing for oral argument, including by conducting moot courts. Each Supreme Court Term, SCAP is involved in about twenty-five cases in which the Court grants certiorari (out of the approximately seventy-five cases that the Court hears).

The SCAP Fellow focuses on identifying cases that warrant our assistance. He or she spends a substantial portion of time reading all paid petitions for certiorari. Working under the supervision of the Group's Director, the Fellow makes an initial judgment about whether the case concerns the public interest and, in cases that are potentially cert-worthy, prepares a memo on the strength of the petition. The Fellow then offers help in appropriate cases. All petitions granted by the Court for full review are also considered for SCAP assistance.

When a lawyer accepts the Fellow's offer of help, one of Public Citizen's lawyers assumes principal responsibility for each SCAP case. However, the Fellow participates fully in all aspects of the project, including assisting with briefs, conducting research, participating in moot courts, and attending oral arguments.

"Your input was invaluable. Also please convey our heartfelt thanks to … the crew at Public Citizen for their input. I have learned a lot during this process."

— Excerpt from a thank-you email for help drafting a cert. opposition from attorney Glenda Cameron.

Our Docket: The 2008 Term

In the 2008 Supreme Court Term, which stretched from July 2008 through June 2009, Public Citizen Litigation Group provided substantial cert-stage assistance in thirty-two cases. A Litigation Group attorney served as the principal drafter of the cert opposition in fifteen of those cases. We also filed one amicus brief in support of a petition. At the merits stage, Litigation Group lawyers served as co-counsel in two cases, filed one amicus brief, and provided moot courts in twenty-four cases. For a complete list of cases on which we are currently working, visit our website at www.citizen.org/supremecourt.

Although our SCAP work spans a broad range of issues, many of our cases last Term focused on access-to-courts issues. Unfortunately, it is becoming increasingly difficult for individuals and organizations to get in the courthouse door. For example, expansive federal preemption eliminates traditional state-law causes of action; a narrowed concept of standing means that fewer individuals and organizations can challenge illegal action; and deference to mandatory consumer arbitration clauses deprives consumers of the right to have their cases heard in court. Below are some representative examples of our SCAP work in this area during the 2008 Term.

Briefs In Opposition

Best Western Encina Lodge & Suites v. D'Lil.

In 2001, Hollyn D'Lil, who uses a wheelchair for mobility, stayed at the Best Western Encina Lodge & Suites in Santa Barbara, California. The hotel had told her that the facility was accessible, but she arrived to find that she was unable to park near her room, access the heating and lighting controls, or get into the bathroom using her wheelchair. D'Lil brought suit under the Americans with Disabilities Act (ADA), and the parties agreed to a settlement under which the hotel would conform to the ADA's accessibility guidelines. The district court, however, rejected the settlement on the ground that D'Lil lacked standing. The Ninth Circuit reversed, and the hotel sought Supreme Court review, arguing that the Ninth Circuit misapplied standing law and that D'Lil lacked standing because she had brought other ADA suits in the past. Assisting D'Lil's attorneys, Gene Farber and Timothy Thimesch, Litigation Group attorneys Michael Kirkpatrick and Adina Rosenbaum drafted the brief in opposition, arguing that the Ninth Circuit correctly applied standing law and explaining that the hotel's policy disagreement with the ADA's private enforcement mechanism is not grounds for granting cert. The Court denied the petition.

E.I. DuPont de Nemours & Co. v. Stanton.

Residents of eastern Washington state brought a class-action suit under the Price-Anderson Act (PAA) against DuPont after suffering injuries from radioactive iodine emitted from DuPont's local plutonium processing plant. DuPont contended that the PAA incorporates the government-contractor defense, which would have shielded it from liability, and that the PAA preempts state-law strict liability for radioactive emissions. The Ninth Circuit held for the class on these issues, and DuPont sought cert. Litigation Group attorneys Bonnie Robin-Vergeer and Brian Wolfman, working with attorney Peter Nordberg, argued in opposition to the petition that there was no circuit split on either issue and that the Ninth Circuit had decided the issues correctly. The Court denied the petition.

Flipping v. Reilly.

Robert Reilly was a long-time Atlantic City police officer forced into early retirement on trumped-up disciplinary charges after testifying in court about police department corruption. Reilly's § 1983 action alleged that he had been forced to retire in retaliation for his First Amendment-protected speech. The police chief argued that Reilly's courtroom testimony was not protected speech and that he was entitled to qualified immunity. The Third Circuit disagreed, and in its cert petition, the police chief argued that there was a circuit split on whether courtroom testimony was protected by the First Amendment under *Garcetti v. Ceballos*, 547 U.S. 410 (2006) (argued by the Litigation Group's Bonnie Robin-Vergeer). Assisting Reilly's attorneys, Frank Corrado and Joseph Grassi, Litigation Group attorneys Michael Kirkpatrick and Leah Nicholls successfully opposed cert, arguing that there was no circuit split and that the police chief was not entitled to qualified immunity.

Franklin County Power of Illinois v. Sierra Club.

Franklin County Power sought to build a heavily polluting coal-fired power plant on the basis of a Clean Air Act permit that expired in 2003. Sierra Club, on behalf of its members who use a park near the proposed plant, sought to enjoin the construction of the plant under the Clean Air Act's citizen-suit provision. Franklin County Power contested Sierra Club's standing to sue, but the Seventh Circuit held that Sierra Club had standing and affirmed the district court's order enjoining construction of the plant. In its cert petition, the company did not challenge the Seventh Circuit's holding that it lacked a valid permit, but sought review of the standing issue. Litigation Group attorney Greg Beck, assisting lawyers Lester Pines and Kira Loehr, prepared the opposition to the petition, highlighting Franklin County Power's failure to articulate a reason for granting cert and explaining why the Seventh Circuit's standing decision was correct. The Court denied the petition.

Sociedad Española de Auxilio Mutuo y Beneficencia v. Morales.

Carolina Morales was suffering from severe pain and acute blood loss resulting from an ectopic pregnancy when an ambulance transporting Morales to the hospital requested emergency treatment for her. The hospital turned the ambulance away because Morales lacked health insurance. Morales sued the hospital under the Emergency Medical Treatment and Active Labor Act (EMTALA), which prohibits hospitals from turning away any patient who "comes to" an emergency room because the patient lacks health insurance. The hospital did not dispute that it turned Morales away because she lacked insurance, but it argued that she was not protected by EMTALA because she had not made it inside the emergency room. Reversing the district court, the First Circuit held that a patient en route to the hospital was protected by EMTALA. When the hospital sought Supreme Court review, Litigation Group attorney Greg Beck, assisting attorneys Pedro Soler-Muñoz and José Ortiz Vélez, argued that there was no circuit split and that the First Circuit had interpreted the statute correctly. The Court denied the petition.

Moot Courts

This Term, we provided two dozen moot courts for attorneys with oral arguments before the Supreme Court. Cases we mooted included *AT&T v. Hulteen, Altria Group v. Good, Arthur Andersen v. Carlisle, Ashcroft v. Iqbal, Bobby v. Bies, Coeur Alaska v. Southeast Alaska Conservation Council, Cone v. Bell, Fitzgerald v. Barnstable School Committee, Flores-Figueroa v. United States, 14 Penn Plaza v. Pyett, Herring v. United States, Iraq v. Beaty/ Iraq v. Simon, Jimenez v. Quarterman, Locke v. Karass, Oregon v. Ice, Nijhawan v. Holder, Nken v. Holder, Safford Unified School Dist. #1 v. Redding, Shinseki v. Sanders, Summer v. Earth Island Institute, Vaden v. Discover Bank, Vermont v. Brillon, Wyeth v. Levine,* and *Ysursa v. Pocatello Education Association.*

"I sincerely appreciated your offer to host a moot at Public Citizen. It was an excellent (and rigorous) final run before arguing."

— Excerpt from a thank-you note from Oregon Public Defender Earnest Lannet.

Litigation Group Completes 56th Supreme Court Argument

On November 2, 2009, the Litigation Group's Scott Nelson argued S*hady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.* in the Supreme Court on behalf of the petitioners. Sonia Galvez was injured in a car accident and received medical care for her injuries from Shady Grove. Her car, which was registered in New York, was insured by Allstate, and Galvez assigned her insurance claim to Shady Grove. Allstate failed to make timely payments or pay interest on its late payments in violation of New York law, which requires insurers to pay interest on claims paid after 30 days.

Galvez and Shady Grove brought a class action in federal court, alleging that Allstate routinely makes late payments without paying the required interest. They invoked federal jurisdiction based on diversity of citizenship under the Class Action Fairness Act (CAFA). CAFA provides federal jurisdiction over class actions when at least one class member and one defendant are citizens of different states, the class has at least 100 members, and the damages total at least $5 million. Plaintiffs Galvez and Shady Grove are both citizens of Maryland, and Allstate is a citizen of Illinois, and the plaintiffs assert that the class has more than 1000 members and that total damages exceed $5 million. They claim that class

members are entitled to 2% monthly interest on late-paid claims, as provided by New York's insurance law. Allstate argues, however, that New York state procedural law does not permit class actions when the plaintiff class seeks a statutory "penalty" and that the interest sought in the lawsuit is a "penalty." Allstate maintains that New York's class-action prohibition applies in federal court, that a class therefore cannot be certified, and that federal jurisdiction is lacking because Shady Grove, on its own, cannot meet the minimum amount in controversy requirement. The district court and circuit court of appeals held for Allstate.

The Litigation Group become involved after Shady Grove filed a petition for certiorari, which the Supreme Court granted. Representing Shady Grove along with the attorney who filed the case, John Spadaro, the Litigation Group argues in its brief on the merits that Federal Rule of Civil Procedure 23, not New York procedural law, governs class-action certification in federal court in diversity as well as federal-question cases. Under *Hanna v. Plumer*, 380 U.S. 460 (1965), federal rules of procedure apply in federal court, even in the face of contrary state law. Thus, Rule 23—which permits the court to certify a class if the Rule's criteria are satisfied—governs. Similarly, under the *Erie* doctrine, the state law does not apply in federal court because it is a procedural rule, not a substantive one.

The Litigation Group was excited to handle this case in the Supreme Court and believes it has a strong argument for application of federal class-action rules in federal court. A decision in favor of Shady Grove would ensure that individual states could not adopt broad anti-class-action legislation that would govern in federal courts.

"Now that the Redding *opinion has issued, I just wanted to pause and thank you for your assistance mooting me for the argument. The moots were remarkably helpful to me, and I am quite indebted to your organizations, your fellow mooters, and you.*

— Excerpt from a thank-you email from ACLU lawyer Adam Wolf.

SCAP Releases its First End-Of-Term Statistical Report

Although statistical analyses of the Supreme Court's Term are plentiful, the Litigation Group noticed that there was no systematic analysis of how the Court and the individual Justices approached key categories of public interest cases. To fill this gap, SCAP fellow Leah Nicholls, in collaboration with other Litigation Group attorneys, created and published the Litigation Group's end-of-term report on the Court's public interest docket.

The report identifies forty-three of the Court's seventy-four 2008 Term cases as implicating the public interest, then breaks down those cases into four categories: Access to Courts and Remedies, Civil Rights, Constitutional Rights, and Environmental Claims. The report analyzes the Court's and the Justices' voting patterns across each of these categories and several subcategories. The votes are then rated on a simple binary scale: Was the vote or decision in favor of expanding rights or contracting rights?

Overall, the Court decided in favor of contracting rights approximately two-thirds of the time. That rate did not vary much across the categories, except in the category of Environmental Claims, in which the Court held in favor of contracting rights in all five of five cases. Unsurprisingly, Justice Ginsburg was the most likely to vote in favor of preserving or expanding rights—she did so in 76% of cases—and was the only Justice to vote in favor of expanding rights in each of the Court's five cases involving Environmental Claims. Meanwhile, Justice Alito voted most often to contract rights (91%) and voted to do so in 100% of Access to Courts and Remedies cases. Justice Kennedy, often considered the Court's "swing" vote, was much more likely to vote to contract rather than to expand rights and did so 76% of the time. The Court's "conservative" justices were each more likely to vote to contract rights than each of the Court's "liberal" justices was likely to vote to expand rights.

The full 2008 Term report, complete with tables and graphs, is available on the Litigation Group website at www.citizen.org/documents/2008SCtTermStats.pdf. We plan to publish similar reports annually. If you have any suggestions for improvements to the report, please email Brian Bilford at bbilford@citizen.org.

Thank You

Thank you for reviewing this Annual Report and supporting the Supreme Court Assistance Project, a tradition begun by Alan Morrison in 1990. Many thanks also to those lawyers and law professors who referred cases to SCAP, participated in our moot courts, and worked with us on cases.

Our "satisfied customers" include skilled and dedicated attorneys working daily in the trenches to vindicate their clients' constitutional and statutory rights. We consider it an honor to assist these lawyers as they prepare to litigate for the underdog before the Supreme Court. However, we cannot continue this important work without the help of the many people who agree with our mission.

We would be grateful for any contribution you could make toward our efforts in the coming year. Please feel free to contact us if you have any questions or would like further information.

Allison Zieve
Director, Public Citizen Litigation Group
(202) 588-1000, e-mail: azieve@citizen.org

Brian Bilford
Fellow, Alan Morrison Supreme Court Assistance Project
(202) 588-7727, e-mail: bbilford@citizen.org

The Litigation Group's Supreme Court work is as vital and important as ever. We are counting on you to help us continue our fight for the rights of consumers and other public interest litigants well into the future.

PUBLIC CITIZEN LITIGATION GROUP

1600 20th Street NW, Washington, DC 20009
Phone: (202) 588-1000; Fax: (202) 588-7795
www.citizen.org/supremecourt