Cases handled by Mayer Brown LLP During the 2007 U.S. Supreme Court Term

July 28, 2008

FINAL

Granted Cases

No.	Caption and Status	Attorneys	Description
06-1346	*Ali v. Achim* Voluntarily dismissed 12/27/07	D. Gossett S. Sulkowski B. Netter	The Court granted our petition for certiorari to decide (1) whether a non-aggravated felony can constitute a "particularly serious crime" that bars eligibility for withholding of removal under 8 U.S.C. § 1231(b)(3)(B) and (2) the scope of the appellate courts' jurisdiction to review determinations of a "particularly serious crime" made by the Board of Immigration Appeals under 8 U.S.C. § 1252(a)(2)(B)(ii) and (a)(2)(D). After we filed our opening brief, the government agreed to settle the case and stipulate to an order by the Immigration Judge pursuant to which Mr. Ali will likely be permitted to remain in the United States for the foreseeable future. Pursuant to the settlement agreement, Mr. Ali voluntarily dismissed the case.
07-562	*Altria Group, Inc. v. Good* Oral argument scheduled for 10/6/08	K. Geller	This case addresses whether federal law expressly or impliedly preempts a state-law claim that the use of the descriptions "lights" or "low tar" on cigarettes is fraudulent. We worked with other firms to prepare a petition asking the Court to review a First Circuit decision and decide whether state-law claims may proceed where the FTC has approved statements in cigarette advertising that directly pertain to smoking and health. The Supreme Court granted certiorari, and we now will assist on the merits brief. Co-counsel will argue the case.

No.	Caption and Status	Attorneys	Description
07-1122	*Arizona v. Johnson* Cert. granted 6/23/08 Opening brief due 8/7/08	A. Pincus C. Rothfeld	As part of the Yale Law School Supreme Court Advocacy Clinic, we have been asked to represent the respondent (defendant). The question presented is whether in the context of a vehicular stop for a minor traffic infraction, an officer may conduct a pat-down search of a passenger when the officer has an articulable basis to believe that the passenger might be armed and presently dangerous, but has no reasonable grounds to believe that the passenger is committing, or has committed, a criminal offense.
06-1195/ 06-1196	*Boumediene v. Bush/Al Odah v. United States* Reversed and remanded 6/12/08	P. Lacavora J. Schroeder G. Isaac S. Kane C. Bernard J. Berger D. Kirchner H. Lewis	The Court granted certiorari to decide the constitutionality of the Military Commissions Act of 2006 and whether detainees at Guantanamo Bay are entitled to petition the courts for a writ of habeas corpus. We filed an amicus brief on behalf of several retired military officers arguing that indefinite detention does not comport with the U.S.'s leading role in developing international safeguards for captured prisoners, conflicts with basic principles of military law, and increases the risk to U.S. armed forces. The brief further asserted that constitutional protections do apply to detainees at Guantanamo. The Court reversed, holding that detainees at Guantanamo have the constitutional right of habeas corpus and striking down the portion of the Military Commissions Act suspending habeas.
07-290/ 07-335	*District of Columbia v. Heller/Parker v. District of Columbia* Affirmed 6/28/08	A. Frey D. Gossett S. Bray R. Hakim	The Supreme Court granted certiorari on the question of whether the District of Columbia's gun control measures "violate the Second Amendment rights of individuals who are not affiliated with any state-regulated militia, but who wish to keep handguns and other firearms for private use in their home." The D.C. Circuit had declared the District's handgun ban unconstitutional, creating a split among the circuits about whether the Second Amendment right is collective or individual in nature. The Supreme Court's review of the lower court decision represented its first foray into the Second Amendment in nearly 70 years. We filed an amicus brief on behalf

No.	Caption and Status	Attorneys	Description
			of our clients, the City of Chicago and Chicago Board of Education, supporting the District of Columbia. The Supreme Court affirmed the D.C. Circuit's ruling, holding that the Second Amendment right was individual in nature, but was subject to limitation.
07-219	*Exxon Shipping Co. v. Baker* Vacated and remanded 6/25/08	A. Frey E. Tager N. Levin	This case arises out of the grounding of the Exxon Valdez in Alaska's Prince William Sound. In a class action brought by fishermen whose livelihoods were impacted by the spill, a jury imposed a punitive award of $5 billion, which was cut in half by the Ninth Circuit. The Supreme Court granted certiorari to consider whether punitive damages can be imposed at all under the circumstances of this case and, if so, whether the $2.5 billion award is excessive under federal maritime law. We filed amicus briefs at both the certiorari and merits stages in support of the petitioner on behalf of a group of trade associations led by the American Petroleum Institute. The Court divided equally (thus affirming) on whether maritime law permits derivative corporate liability for the acts of agents, but ruled that the $2.5 billion punitive damages award was excessive. Adopting a 1:1 compensatory-to-punitives ratio for maritime law, the Court reduced the punitive damages by 80% to approximately $500 million
07-1125	*Fitzgerald v. Barnstable School Committee* Cert. granted 6/9/08 Opening brief due 8/22/08	C. Rothfeld A. Pincus	The case involves grotesque and repeated peer-on-peer sexual harassment of a kindergarten girl by a third-grade boy while riding the bus to school. When the girl's parents complained to school officials, the principal offered to allow the girl to ride on a different bus or to separate the kindergarteners and older students, but would not place a monitor on the bus or require the boy to use a different bus. The parents objected because they believed that requiring their daughter to use a different bus punished her rather than the abuser. When the school offered no further relief, the parents sued on the girl's behalf under both Title IX and 42 U.S.C. § 1983, alleging statutory and constitutional equal protection violations. The First

No.	Caption and Status	Attorneys	Description
			Circuit rejected the Title IX claim on the merits because it believed that the school's response was not manifestly unreasonable, and then went on to hold that Title IX occupied the field and precluded use of section 1983 to assert a constitutional equal protection claim growing out of the same facts. The Court will address the split in the circuits on the question whether Title IX precludes use of section 1983 to assert constitutional claims in these circumstances. Charles Rothfeld will argue the case.
06-7949	*Gall v. United States* Reversed 12/10/07	B. Willen	We filed an amicus brief for Families Against Mandatory Minimums (FAMM) in this matter, which presents the question whether a court of appeals may, consistent with 18 U.S.C. 3553(a) and the Supreme Court's decision in *United States v. Booker*, adopt a rule that "extraordinary" deviations from the advisory guidelines range are unreasonable unless they are supported by "extraordinary circumstances." Our amicus brief argued that such a standard violates the Sixth Amendment and Supreme Court precedent, and also conflicts with the command of the "parsimony principle" in sentencing, which mandates reasoned judgment, individualized consideration, and deferential appellate review. The Supreme Court reversed, rejecting an "extraordinary circumstances" test, confirming that district courts have considerable discretion to fashion sentences at variance from the guidelines, and requiring the courts of appeals to give deference to a district court's sentencing decision.
06-989	*Hall Street Assocs., Inc. v. Mattel Corp.* Vacated and remanded 3/25/08	E. Tager D. Gossett A. Parasharami L. Randell	The Court granted certiorari to decide whether parties to an arbitration agreement may contractually provide for judicial review of an arbitral award on grounds broader than those specified in Sections 10 and 11 of the Federal Arbitration Act. We submitted an amicus brief on behalf of CTIA – The Wireless Association® arguing that expanded-judicial-review provisions are enforceable. We explained that striking down such provisions would undermine two overarching policies animating arbitration law—that contractual

No.	Caption and Status	Attorneys	Description
			arbitration agreements should be enforced as written and that private parties should be encouraged to arbitrate. The Supreme Court upheld the Ninth Circuit's ruling that parties cannot contract for forms of judicial review not enumerated in the Federal Arbitration Act, but the Court vacated and remanded for consideration of alternate justifications for enforcing the provisions.
07-343	*Kennedy v. Louisiana* Reversed and remanded 6/25/08	D. Gossett K. Ranlett S. Sulkowski	The Supreme Court reviewed a Louisiana Supreme Court decision rejecting an Eighth Amendment challenge to Patrick Kennedy's death sentence for the rape of a minor. On behalf of several victims' rights groups that believe authorizing the death penalty for child molestation offenses will harm rather than help the victims of such abuse, we filed *amicus* briefs at both the certiorari and merits stages. Repeatedly invoking our brief, the Court held that the Eighth Amendment bars the imposition of the death penalty for the rape of a child if the crime did not result in the child's death.
06-1265	*Klein & Co. Futures Inc. v. Board of Trade of the City of New York* Dismissed 12/28/07	A. Pincus A. Shapiro D. Kirchner	The Commodity Exchange Act establishes a private right of action for commodities traders for damage caused by the failure of a commodities exchange to enforce its rules. The Court granted certiorari in this case to review the Second Circuit's holding that the statute does not apply to suits by exchange members based on activities related to trade-clearing. We were retained after the grant of certiorari to represent the respondent, the New York Board of Trade. Andy Pincus argued the case. Thereafter, the parties entered into a stipulation of dismissal pursuant to Rule 46.
07-499	*Negusie v. Mukasey* Opening brief filed 6/16/08 Respondent's brief due 8/15/08	A. Pincus C. Rothfeld	This case concerns whether an alien who was compelled to act as a military guard in a prison where people were being persecuted on the basis of a protected ground is barred from asylum. The circuits are divided on this issue. As part of the Yale Law School Supreme Court Clinic, we filed a petition on behalf of an Eritrean national who is seeking asylum. We will continue to represent the petitioner

No.	Caption and Status	Attorneys	Description
			on the merits. Andy Pincus will argue the case.
06-766	*New York State Board of Elections* v. *López Torres* Reversed 1/16/08	A. Schapiro S. Chesin	The Court granted certiorari to decide whether New York State's statutory system for selecting its trial court judges violates the First Amendment. The district court and Second Circuit both found that the system was unconstitutional and ordered the state to write a new law. At the request of the Brennan Center for Justice (counsel for respondents), we authored an amicus brief on behalf of John Dunne, a former New York State Senator and Assistant U.S. Attorney General for Civil Rights. The Supreme Court reversed, holding that New York's system of choosing party nominees does not violate the Constitution.
06-937	*Quanta Computer, Inc. v. LG Electronics, Inc.* Reversed 6/9/08	A. Pincus C.J. Summers	The Court granted certiorari to decide whether the Federal Circuit has abandoned the traditional doctrine of patent exhaustion – according to which all patent claims in a patented article are exhausted upon the first authorized sale of the article – by allowing a patent owner to restrict use and enjoyment of a patented article after an authorized sale through a license to manufacture and sell the article that purports not to authorize use of the article by the purchaser. We filed an amicus brief on behalf of several computer manufacturers in support of the certiorari petition and on the merits. The Court reversed, concluding that the sale of components that substantially embodied the patents invoked the patent exhaustion doctrine and prevented the holder from asserting any rights with respect to patents substantially embodied by those products.
06-1463	*Preston v. Ferrer* Reversed and remanded 2/20/08	A. Pincus E. Tager D. Gossett J. Wilson	This case presents the question whether the Federal Arbitration Act (FAA) preempts a provision of the California Talent Agencies Act that permits arbitration of disputes only if the parties' arbitration agreement requires the parties to notify the California Labor Commissioner of the time and place of all arbitration hearings and authorizes the Commissioner to attend all hearings. We filed an

No.	Caption and Status	Attorneys	Description
			amicus brief on behalf of CTIA—The Wireless Association® arguing that the FAA preempts all state laws that preclude arbitration of certain claims or condition the enforceability of arbitration agreements on compliance with special requirements that are not applicable to contracts generally. The Court agreed with our contentions.
07-1216	*Philip Morris USA Inc. v. Williams* Cert. petition granted 6/9/08 Opening brief due 8/13/08	A. Frey K. Geller S. Shapiro A. Schapiro L. Goldman C. Houpt	Last Term, the Supreme Court vacated a $79.5 million punitive damages award against Philip Morris, holding that, when the evidence and argument in a case present a risk that the jury may seek to punish the defendant for the impact of its conduct on non-parties, the trial court, upon request, must provide safeguards against that risk. On remand, the Oregon Supreme Court held that the trial court was not required to give a proposed jury instruction that would have done just that because the instruction also contained some language that inaccurately characterized state law—even though that was not the basis on which the trial court had declined to give the instruction. The Court granted the petition in order to address whether the Oregon court on remand could interpose a procedural bar that was neither firmly established nor regularly employed.
06-1204	*Republic of the Philippines v. Pimentel* Reversed and remanded 6/12/08	K. Geller C. Rothfeld D. Gossett E. Oyer S. Bray B. Netter	This case involves the disposition of $35 million, alleged to have been unlawfully acquired by Ferdinand Marcos during his tenure as President of the Republic of the Philippines. The money is claimed by several parties, including the Republic, and also is the subject of ongoing litigation in the Philippine courts. The Ninth Circuit held that the Republic appropriately could assert sovereign immunity in this litigation, and also held that it is a "necessary" party to the case (as that term is used in Federal Rule of Civil Procedure 19(a)). It thereafter held that the Republic was not an "indispensable" party under Rule 19(b), however, largely on the ground that the Republic's claim would fail on the merits. We petitioned for certiorari (on behalf of the Republic, its Presidential Commission for

No.	Caption and Status	Attorneys	Description
			Good Government, and our client, the Philippine National Bank), arguing that the Ninth Circuit erred in looking to the merits of the Republic's claim to the Arelma assets, thus in effect negating its valid claim to sovereign immunity. The Court agreed, holding that the Ninth Circuit had given insufficient weight to the Republic's sovereign status and incorrectly applied Rule 19(b) in concluding that the Republic was not an "indispensable" party. Charles Rothfeld argued the case.
06-179	*Riegel v. Medtronic, Inc.* Affirmed 2/20/08	K. Geller D. Gossett A. Tauber	On behalf of Medtronic, Inc., a manufacturer of medical devices, we opposed review of the Second Circuit's decision holding that petitioner's state-law tort claims are preempted by federal law under the Medical Device Amendments to the Food, Drug and Cosmetics Act. The Court invited the Solicitor General to file a brief expressing the views of the United States. The Solicitor General recommended that the Court deny certiorari, yet the Court nonetheless granted certiorari and set the case for argument. Co-counsel argued the case. The Court affirmed the ruling of the Second Circuit, holding that the preemption clause of the federal statute barred common-law claims challenging the safety of a medical device marketed in a form that received pre-market approval from the FDA.
06-457	*Rowe v. New Hampshire Motor Transport Association* Affirmed 2/20/08	E. Tager J. Wilson	The Federal Aviation Administration Authorization Act (FAAAA) provides that states may not enact laws that regulate the prices, routes, or services of any motor carrier of property. In an effort to keep tobacco products out of the hands of children under the age of 18, Maine has imposed certain requirements on motor carriers that deliver tobacco products direct to consumers. The question presented by this case is whether those laws are preempted by the FAAAA. We filed an amicus brief for the American Trucking Associations and the Chamber of Commerce arguing that they are. The Court agreed, affirming the ruling of the First Circuit and

No.	Caption and Status	Attorneys	Description
			holding that the FAAAA preempts the two provisions of Maine law at issue.
06-1221	*Sprint/United Management Co. v. Mendelsohn* Vacated and remanded 2/26/08	E. Tager A. Parasharami	We filed an amicus brief on behalf of AT&T Mobility LLC (formerly known as Cingular Wireless LLC) and Honeywell International Inc. in support of Sprint's petition for a writ of certiorari, which raises the question whether a district court must admit "me, too" evidence – *i.e.*, testimony by nonparties who allege discrimination at the hands of persons who played no role in the adverse employment decision challenged by the plaintiff. The Court granted the petition, and we filed an amicus brief on the merits on behalf of the Chamber of Commerce of the United States. The Court vacated and remanded, holding that district courts' rulings on whether such evidence is admissible are owed considerable deference.
06-43	*Stoneridge Investment Partners v. Motorola, Inc.* Affirmed 1/15/08	S. Shapiro A. Pincus T. Bishop J. Schmitz C. Rothfeld J.B. Busby J. Gaston D. Staroselsky S. Bray	In this landmark case with far reaching ramifications for the business community, the Supreme Court affirmed the decision of the Eighth Circuit and rejected "scheme" liability in private securities fraud actions. Plaintiffs had sought to hold suppliers of cable boxes to Charter Communications liable for a fraud perpetrated by Charter through the misstatement of its contracts with the suppliers. The Court held that the Section 10(b) private right of action did not reach the suppliers, who had made no representations upon which the plaintiffs could have relied. The assertion of "scheme liability" could not compensate for the lack of reliance, as any other rule would extend the reach of Section 10(b) private actions into the realm of ordinary business operations. Mayer Brown represented defendants Motorola and Cisco, and Chicago partner Steve Shapiro argued the case.
06-1646	*United States v. Rodriguez*	A. Pincus C. Rothfeld	Under the Armed Career Criminal Act, a defendant may be sentenced to a mandatory 15-year sentence if he or she has three

No.	Caption and Status	Attorneys	Description
	Reversed and remanded 5/19/08		previous convictions for a state offense where the state prescribes "a maximum term of imprisonment of ten years or more." The Ninth Circuit held that, for purposes of deciding whether a prior conviction was for an offense carrying a penalty of imprisonment of "ten years or more," a court should disregard possible sentence enhancements for recidivism. The Solicitor General sought a writ of certiorari to challenge that holding. As part of the Yale Supreme Court Clinic, we filed a brief in opposition to the petition, and we represented respondent on the merits. Charles Rothfeld argued the case. The Supreme Court reversed and remanded the Ninth Circuit's decision, with three Justices dissenting.
06-1498	*Warner-Lambert v. Kent* Affirmed 3/3/08	K. Geller D. Gossett	A Michigan statute immunizes drug manufacturers from product liability suits if the allegedly defective drug has been approved by the FDA, except when the plaintiff can demonstrate that the FDA approval was obtained through fraud. The Second Circuit upheld the Michigan law, and the Supreme Court has granted certiorari to determine whether federal law preempts the Michigan fraud-on-the-FDA immunity exception. On behalf of the Chamber of Commerce, we filed an amicus curiae brief in support of petitioner, arguing that Michigan law is preempted. An equally divided court affirmed without opinion the Second Circuit's ruling.
06-1249	*Wyeth v. Levine* Opening brief filed 5/26/08 Amicus brief filed 5/30/08 Respondent's brief due 8/1/08	K. Geller A. Tauber	This case addresses whether a plaintiff may recover on a failure-to-warn claim if the FDA approved the drug label at issue. The Vermont Supreme Court ruled that federal law does not preempt the state-law claim because the manufacturer could have complied with the approved label while providing additional warnings. On behalf of the Product Liability Advisory Council and the U.S. Chamber of Commerce, we filed an amicus brief in support of the manufacturer's petition for certiorari and in support of the brief on the merits.

CERT. PETITIONS AND APPEALS

No.	Caption and Status	Attorneys	Description
07-1116	*Aguilar v. Mukasey* Cert. denied 6/23/08	A. Pincus C. Rothfeld	In conjunction with the Yale Supreme Court Clinic, we filed a reply brief in support of the petition (we did not file the petition itself). The case involves a recurring question of immigration law. Petitioner was a lawful permanent resident of the United States convicted of a criminal offense. Rather than appeal, he agreed to an order withholding judgment because, at the time, such a resolution would not render him deportable, and even if deportable he would be eligible for administrative relief. After he abandoned the appeal, however, Congress retroactively changed the law (1) to provide for deportation after entry of an order withholding judgment and (2) to eliminate the possibility of administrative relief. The court of appeals rejected petitioner's challenge to the retroactive application of the new law. There is circuit split regarding the level of reliance that must be demonstrated by a permanent resident to seek administrative relief from deportation.
06-1346	*Ali v. Achim* Cert. granted 9/25/07	D. Gossett S. Sulkowski B. Netter	We successfully petitioned the Court to consider (1) whether a non-aggravated felony can constitute a "particularly serious crime" that bars eligibility for withholding of removal under 8 U.S.C. § 1231(b)(3)(B) and (2) the scope of the appellate courts' jurisdiction to review determinations of a "particularly serious crime" made by the Board of Immigration Appeals under 8 U.S.C. § 1252(a)(2)(B)(ii) and (a)(2)(D).
07-562	*Altria Group, Inc. v. Good* Cert. granted 1/18/08	K. Geller	This case addresses whether federal law expressly or impliedly preempts a state-law claim that the use of the descriptions "lights" or "low tar" on cigarettes is fraudulent. We worked with other firms to prepare a petition asking the Court to review a First Circuit decision and decide whether state-law claims may proceed where the FTC has approved statements in cigarette advertising that directly pertain to

No.	Caption and Status	Attorneys	Description
			smoking and health. The Court granted the petition.
07-919	*American Isuzu Motors, Inc. v. Ntsebeza* Judgment affirmed 5/12/08	K. Geller M. Cohen A. Pincus C. Rothfeld	The Second Circuit reversed a dismissal of several lawsuits brought on behalf of all individuals living in South Africa who claimed to have suffered injury as a result of apartheid and sought relief under the Alien Tort Statute. The plaintiffs named as defendants more than 50 major corporations, which along with the governments of the U.S. and South Africa sought dismissal. Along with co-counsel, we have filed a petition asking this Court to review whether the case should be dismissed on political question and deference grounds in light of the potential interference of the suit with South Africa's policy of reconciliation. We have also asked the Court to consider whether (1) a corporation may be held liable under the Alien Tort Statute for conduct that supposedly aids and abets an international law violation committed by a foreign government in its own territory; and (2) whether a corporation may be held liable for allegedly violating a treaty that creates no enforceable rights. The United States filed an amicus brief urging the Court to grant the petition and reverse the court of appeals. Unable to obtain a quorum because of recusals, the Court entered a judgment affirming the Second Circuit's decision pursuant to 28 U.S.C. § 2109.
07-956	*Biomedical Patent Mgmt. Corp. v. State of California, Dep't of Health Services* Cert. petition filed 1/22/08 Opposition filed 3/21/08 Reply brief filed 4/9/08	A. Pincus D. Himmelfarb B. Netter	The State of California operates a sizable portfolio of patents through the University of California system and routinely invokes federal jurisdiction to enforce its patent rights. California's Department of Health Services waived immunity by intervening voluntarily in an action seeking a declaration of non-infringement as to a patent owned by Biomedical Patent Management Corporation ("BPMC"). This action was dismissed for improper venue, and, thereafter, BPMC filed a mirror-image action, against which California successfully invoked sovereign immunity. The Federal Circuit affirmed the use of sovereign immunity. We filed a petition for certiorari that presents two questions: (1) whether a state's waiver of Eleventh Amendment

No.	Caption and Status	Attorneys	Description
	CVSG 4/21/08		immunity in one action extends to a subsequent action involving the same parties and the same underlying transaction; and (2) whether a state waives its immunity in patent actions by regularly and voluntarily invoking federal jurisdiction to enforce its patent rights. The Court invited the Solicitor General to file a brief expressing the views of the United States.
07-402	*Bostain v. Food Express, Inc.* Cert. denied 11/26/07	E. Tager J. Wilson	The Washington Supreme Court held that the state's overtime statute applies to hours worked outside of the state by interstate truck drivers. The petition for certiorari questions whether that interpretation of the statute (i) is an impermissible extraterritorial regulation of interstate commerce and a per se violation of the dormant Commerce Clause, (2) violates the dormant Commerce Clause under the *Pike* balancing test, or (3) is preempted by the Federal Aviation Administration Authorization Act because it relates to a price, route, or service of a motor carrier (49 U.S.C. § 14501(c)). We will file an *amicus* brief in support of the petition on behalf of the American Trucking Associations that addresses these issues and also argues that, as it applies to interstate truck drivers, the statute is preempted by the Motor Carrier Act and the federal Hours-of-Service rules. 49 U.S.C. § 31502(b); 49 C.F.R. § 395.3.
06-1575	*City of Bridgeport v. Russo* Cert. denied 10/1/07	A. Pincus C. Rothfeld	Our client was mistakenly arrested for a robbery and was incarcerated for 217 days before police acknowledged the mistake and released him. The Second Circuit held that our client is entitled to a trial on his claim that the incarceration, accompanied by officers' concealment of exculpatory information, violated his constitutional rights. As part of the Yale Supreme Court Clinic, we successfully opposed the City of Bridgeport's petition for certiorari.

No.	Caption and Status	Attorneys	Description
07-257	*Continental Carbon Co. v. Action Marine, Inc.* Cert. denied 6/27/08	E. Tager B. Busby N. Levin	In this case, the Eleventh Circuit upheld a $17.5 million punitive award against our client Continental Carbon Company for failure to prevent periodic releases of carbon black from the company's manufacturing plant. We filed a petition for certiorari seeking review of the Eleventh Circuit's holding that the punitive award was not unconstitutionally excessive.
07-1180	*Defenders of Wildlife v. Chertoff* Cert. denied 6/23/08	A. Pincus C. Rothfeld	Section 102(c) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") gives the Secretary of Homeland Security "the authority to waive all legal requirements" he or she deems "necessary to ensure expeditious construction of" a fence designed to exclude illegal aliens from the United States. The statute expressly precludes actions seeking judicial review of such a waiver, permitting only suits alleging constitutional violations. It also mandates that review is available only by writ of certiorari in the Supreme Court. Several environmental groups challenged the constitutionality of the Secretary's decision to waive nineteen federal laws, and all state and local legal requirements related to them, in connection with the construction of a border fence along the Mexican border. When the district court rejected the challenge, we filed a petition for certiorari, in conjunction with the Yale Supreme Court Clinic, presenting the questions (1) whether the preclusion of judicial review renders Section 102(c)'s expansive waiver authority an unconstitutional delegation of legislative power, and (2) whether Section 102(c) violates Article I's requirement that a duly-enacted law can be repealed only by legislation approved by both Houses of Congress and presented to the President.
06-1613	*El-Masri v. United States* Cert. denied 10/9/07	D. Gossett B. Willen	We submitted an amicus brief on behalf of the Constitution Project in support of a petition for certiorari filed by Khaled El-Masri, a foreign national allegedly kidnapped, detained, and tortured by American agents who suspected him, wrongly, of being involved in terrorist activities. El-Masri's suit for damages was dismissed at the pleading

No.	Caption and Status	Attorneys	Description
			stage by the Fourth Circuit, after the Government invoked the "state secrets" privilege, an evidentiary privilege that the Supreme Court has recognized as a means to protect classified national security information from disclosure in civil litigation. Our brief argued that the Fourth Circuit's decision improperly expands the state secrets privilege into a broad rule of non-justiciablity for any claim challenging activities that Government undertakes in the name of national security. Certiorari is warranted because such an expansion is contrary to Supreme Court precedent, undermines our system of checks and balances, and threatens the rule of law. We also argued that the Supreme Court should revisit one aspect of its 1953 decision recognizing the state secrets privilege: the dangerous (and now-anachronistic) holding that a court may resolve a privilege dispute without examining, even *in camera* and *ex parte*, the material that the Government claims is privileged.
07-1287	*Eschenbach v. United States* Cert. denied 6/23/08	D. Krakoff G. Winters D. Gossett J. Parkinson	This interlocutory petition for review of an interlocutory Ninth Circuit decision raised two questions. First, it addressed whether a criminal defendant's presumed subjective knowledge is a relevant factor for assessing a criminal statute's provision of fair warning about the prohibited conduct and whether statutory ambiguity requires application of the rule of lenity. Second, it discussed whether 18 U.S.C. § 3288, which specifically precludes re-indictment following a dismissal on statute-of-limitations grounds, prohibits the government from seeking a new indictment that attempts to rectify the statute-of-limitations violation.
07-1125	*Fitzgerald v. Barnstable School Committee* Cert. granted 6/9/08	C. Rothfeld A. Pincus	This case involves grotesque and repeated peer-on-peer sexual harassment of a kindergarten girl by a third-grade boy while riding the bus to school. When the girl's parents complained to school officials, the principal offered to allow the girl to ride on a different bus or to separate the kindergarteners and older students, but would not place a monitor on the bus or require the boy to use a different bus. The

No.	Caption and Status	Attorneys	Description
			parents objected because they believed that requiring their daughter to use a different bus punished her rather than the abuser. When the school offered no further relief, the parents sued on the girl's behalf under both Title IX and 42 U.S.C. § 1983, alleging statutory and constitutional equal protection violations. The First Circuit rejected the Title IX claim on the merits because it believed that the school's response was not manifestly unreasonable, and then went on to hold that Title IX occupied the field and precluded use of section 1983 to assert a constitutional equal protection claim growing out of the same facts. There is a split in the circuits on the question whether Title IX precludes use of section 1983 to assert constitutional claims in these circumstances. We filed a cert. petition on behalf of the girl's parents seeking review on the section 1983 question, which the Court granted.
06-1251	*Golphin v. Florida* Cert. denied 10/1/07	A. Pincus C. Rothfeld	This case is about whether (1) a pedestrian is "seized" within the meaning of the Fourth Amendment when a police officer retains possession of the pedestrian's identification in order to conduct a warrants check and (2) the officer's discovery of an outstanding warrant is not an "intervening circumstance" that removes the taint of an illegal detention. As part of the Yale Law School Supreme Court Clinic, we filed a petition for certiorari on behalf of a man arrested for possession of a controlled substance after the police took possession of his identification as part of a "field interview" and then learned he had an open warrant.
07-618	*Goss International Corp. v. Tokyo Kikai Seisakusho Ltd.* Cert. denied 6/23/08	S. Shapiro T. Bishop M. Redish	The Eighth Circuit held that it lacked jurisdiction to enjoin a Japanese defendant from recouping a $30 million judgment in a claw-back action in a Japanese court once the defendant paid the judgment entered by the U.S. court in an anti-dumping suit. We serve as co-counsel on behalf of the petitioner, who asked the Court to review the court of appeals decision. At the Court's invitation, the Solicitor General filed a brief expressing the views of the United States, which recommended denial of the petition.

No.	Caption and Status	Attorneys	Description
07-734	*Illinois Bell Tel. Co. v. IBEW Local 21* Cert. denied 3/17/08	J. Sarles J. Wilson D. Andsager	After the Seventh Circuit denied rehearing en banc by an equally divided court, we filed a petition for certiorari seeking to reverse the panel's ruling that our client was required to arbitrate its implementation of work performance standards based solely on the recognition clause in the collective bargaining agreement. The Supreme Court denied the petition. en banc by a 4-4 vote.
07-259	*Iouri v. Mukasey* Cert. denied 6/23/08	A. Pincus C. Rothfeld	Aliens who are ordered deported may receive "voluntary departure," which allows them to leave the country voluntarily by a given date. Aliens who overstay the voluntary departure deadline are subject to the forfeiture of any possibility of an adjustment to lawful status for a period of ten years. Our clients, an elderly Ukrainian couple, were given a voluntary departure deadline. Before the expiration of the deadline they moved to stay deportation, but did not expressly ask the court to stay the voluntary departure. After the voluntary departure period expired, the couple's daughter, a U.S. citizen, received approval of her petition to allow them to remain in the United States. Immigration authorities, however, ruled that they were ineligible for adjustment of status because they had overstayed their voluntary departure period, and that they therefore must return to the Ukraine for ten years before they may reenter the United States, even though they have no home, relatives, or means of support in the Ukraine. On their appeal, the Second Circuit held that the couple's motion to stay deportation was not sufficient to stay voluntary departure and that they accordingly are not eligible for adjustment of status. Because the circuits are divided on whether a motion to stay deportation also may stay voluntary departure, we filed a petition for certiorari as part of the Yale Supreme Court Clinic.
07-380 07-381 07-385	*In re: David Leon Lewis* Petitions denied 1/14/08	B. Busby L. Kovarsky R. Stewart K. Akowuah	Under 28 U.S.C. § 2244(b)(3), a state prisoner must obtain authorization from the court of appeals before he can file a successive federal habeas petition in district court. David Leon Lewis asked a three-judge panel of the Fifth Circuit to authorize a successive petition

No.	Caption and Status	Attorneys	Description
			arguing that he is ineligible to be executed under *Atkins v. Virginia*, 536 U.S. 304 (2002). The panel denied the petition because it was untimely by a single day. Lewis petitioned for rehearing en banc, challenging the panel's jurisdiction to decide the timeliness of his successive petition. The panel ordered the en banc rehearing petition "unfiled" and denied Lewis's subsequent request for mandamus relief. Our petitions for certiorari and mandamus relief ask the Court to address (1) whether a court of appeals may deny authorization to file a successive habeas corpus petition on a non-statutory ground and (2) assuming the panel had jurisdiction to decide the timeliness question, whether the panel erred in barring Lewis's petition.
07-1234	*The Long Island Bank Savings Bank v. United States of America* Cert. petition filed 3/27/08 Opposition filed 6/25/08 Reply brief filed 7/8/08	A. Frey E. Tager C. Rothfeld K. Akowuah	This is a "*Winstar*" case in which Long Island Savings Bank was awarded $ 435 million arising out of the government's breach of its agreement to permit the bank to use a certain set of accounting principles for goodwill in exchange for its takeover of an insolvent thrift. The Federal Circuit vacated the judgment on the ground that a bank official had an undisclosed conflict of interest, which "tainted the contract," rendering it void *ab initio* under federal common law. The court held in the alternative that the official's certification during the contracting process that the bank was in compliance with all applicable laws constituted a prior material breach of the contract, thereby excusing the government's breach. We have filed a petition for certiorari challenging the Federal Circuit's construction of the federal common law governing the contract obligations of the federal government.
07-1370	*Long John Silver's, Inc. v. Cole* Cert. petition filed 4/28/08 Response due 7/28/08	D. Himmelfarb B. Davis D. Gossett T. Killion	The central issue in this case is whether a federal court, when reviewing an arbitration award that determines rights under a federal statute, should permit the award to stand notwithstanding the arbitrator's misinterpretation of the statute if the misinterpretation materially affects a party's substantive rights. Mayer Brown and co-counsel have asked the Court to review a Fourth Circuit decision

No.	Caption and Status	Attorneys	Description
			upholding an arbitrator's certification of an "opt-out" Fair Labor Standards Act ("FLSA") class, despite the FLSA's unambiguous requirement that individuals must affirmatively "opt-in" to become a party in any FLSA action.
08-2	*Martin v. Kansas* Cert. petition filed 6/26/08	A. Pincus C. Rothfeld	In conjunction with the Yale Supreme Court Clinic, we filed a petition for a writ of certiorari in this Fourth Amendment case, which presents the question whether discovery of an outstanding warrant in the course of an illegal detention dissipates the "taint" of the illegality, permitting entry into evidence of contraband. In what is a recurring factual situation, the police approached a pedestrian in an initially "voluntary" encounter. They asked for his identification and, although they did not take possession of his ID, they detained him for a warrant check. Upon discovering an outstanding warrant, the police arrested the petitioner, and discovered a quantity of marijuana. The trial court denied the motion to suppress the marijuana, and petitioner was convicted. The Kansas Supreme Court allowed use of the marijuana, holding that the discovery of the warrant overcome the taint of the initial stop. The state supreme courts are widely divided on whether suppression is required in these circumstances.
08-17	*Mercier v. Ohio* Cert. petition filed 7/1/08 Response due 8/12/08	A. Pincus C. Rothfeld	In conjunction with the Yale Supreme Court Clinic, we filed a petition for certiorari on behalf of a passenger in a car driven by an individual engaged in a drug transaction. Police officers stopped the car, arrested the driver, and ordered petitioner to exit the vehicle, telling her to leave her purse behind. They searched the purse, which contained contraband. The question presented, which has split state supreme courts, will be whether the search of the purse, in the absence of particularized probable cause either to search the purse or to arrest petitioner, violated the Fourth Amendment.

No.	Caption and Status	Attorneys	Description
07-1159	*Metz* v. *CSX Transportation, Inc.* Cert. petition filed 3/10/08 Opposition filed 6/4/08 Reply brief filed 7/3/08	E. Tager D. Himmelfarb	On behalf of our client, CSX Transportation, Inc., we will oppose a certiorari petition arguing that a Florida Court of Appeals erred in affirming summary judgment for CSX on the ground that the petitioner's lawsuit is time-barred under the Federal Employers' Liability Act's three-year statute of limitations.
07-1284	*Morales v. Jett* Voluntarily dismissed 7/2/08	D. Himmelfarb	There currently exists a circuit split on the issue of whether the term "proceeds" in the principal federal money-laundering statute, 18 U.S.C. § 1956(a)(1), means gross proceeds or net proceeds. This split most likely will be resolved in a pending case involving Mr. Morales's co-defendants, *United States v. Santos*, No. 06-1005 (argued Oct. 3, 2007). We have asked the Court to hold Mr. Morales's petition from a decision of the Seventh Circuit for disposition as appropriate in light of its decision in *Santos*. After the Supreme Court ruled in favor of *Santos*, we filed a motion for writ of habeas corpus in the trial court with the consent of the government. The court granted the writ, and we then dismissed our cert. petition.
07-94	*Middleton v. Trustees of the Southern California Bakery Drivers Security Fund* Cert. denied 10/9/07	K. Geller D. Gossett L. Shore S. Bray	This case involves a dispute between two ERISA multiemployer employee welfare plans. For many years, one plan contracted with the other to purchase death benefits for its members. The purchasing plan thereafter sued our client, the plan that had provided the death benefits, to recover the difference between what the purchasing plan had paid for the benefits and the amount it had cost our client to provide those benefits. The Ninth Circuit held that the purchasing plan was entitled to recovery on the ground that the fees paid for the benefits remained "plan assets" of the purchasing plan. Our petition for certiorari presented two questions: (1) whether the Ninth Circuit correctly held that plan assets used to purchase a product or service from an independent third party may retain their characterization as plan assets after being paid to that third party pursuant to a contract; (2) whether

No.	Caption and Status	Attorneys	Description
			the Ninth Circuit correctly held that contributions made to a multiemployer employee welfare plan on behalf of a particular group of plan participants may not be used for the benefit of other plan participants.
06-1345	*MiPro Homes, LLC v. Mount Laurel Township* Cert. denied 10/1/07	K. Geller T. Bishop J. Sarles	We filed a petition for certiorari to the Supreme Court of New Jersey challenging as a violation of the public use requirement of the Takings Clause an ad hoc and pretextual exercise of eminent domain power that was not based on comprehensive planning.
07-499	*Negusie v. Keislers* Cert. granted 3/17/08	A. Pincus C. Rothfeld	This case concerns whether an alien who was compelled to act as a military guard in a prison where people were being persecuted on the basis of a protected ground is barred from asylum. The circuits are divided on this issue. As part of the Yale Law School Supreme Court Clinic, we filed a petition on behalf of an Eritrean national who is seeking asylum. The Court granted the petition.
06-1380	*Parker v. Sedona Golf Resort* Cert. denied 10/1/07	K. Geller D. Gossett	This case involves a circuit split over when a party should be judicially estopped from changing a position it has previously taken in litigation. The underlying dispute is over the ownership of a private road connecting the main highway to various real estate developments in Sedona, Arizona. The plaintiff, a golf resort abutting the road, sought to quiet title in the road against the claims of the defendant, our client. The bankruptcy court initially ruled in favor of the plaintiff, but that ruling was thereafter reversed on appeal to the district court. On remand, the bankruptcy court again quieted title in favor of the plaintiff, this time based on factual and legal arguments inconsistent with those the plaintiff had previously asserted. The bankruptcy court, as well as the district court and Ninth Circuit, rejected the defendant's argument that the plaintiff should have been judicially estopped from asserting that inconsistent position. We petitioned for certiorari on the ground that the Ninth Circuit erred in holding that judicial estoppel does not apply to bar the assertion of a later inconsistent position solely

No.	Caption and Status	Attorneys	Description
			because a judgment based on that prior position was thereafter reversed on appeal.
07-635	*Peters v. Village of Clifton* Cert. denied 3/3/08	T. Bishop J. Grewell	We filed an amicus brief on behalf of the American Farm Bureau Federation asking the Court to grant certiorari to overrule the exhaustion requirement for takings claims articulated in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985).
07-806	*Phillip Morris USA Inc. v. Accord* Cert. denied 2/25/08	A. Frey A. Schapiro L. Goldman K. Akowuah	The West Virginia Supreme Court of Appeals denied the defendants' application for a writ of prohibition barring the trial court from employing a "reverse bifurcation" trial plan in this consolidated mass tort case. The trial plan calls for the defendants' liability for punitive damages to hundreds of disparately-situated plaintiffs to be adjudicated in one joint proceeding prior to any finding of compensatory liability as to even a single plaintiff. We filed a petition for certiorari challenging this denial on the ground that the Due Process Clause bars West Virginia from assessing the defendants' liability for punitive damages in this manner.
07-1216	*Philip Morris USA Inc. v. Williams* Cert. granted 6/9/08	A. Frey K. Geller A. Schapiro L. Goldman C. Houpt	Last Term, the Supreme Court vacated a $79.5 million punitive damages award against Philip Morris, holding that, when the evidence and argument in a case present a risk that the jury may seek to punish the defendant for the impact of its conduct on non-parties, the trial court, upon request, must provide safeguards against that risk. On remand, the Oregon Supreme Court held that the trial court was not required to give a proposed jury instruction that would have done just that because the instruction also contained some language that inaccurately characterized state law—even though that was not the basis on which the trial court had declined to give the instruction. We filed a petition for certiorari asking the Court to summarily reverse this pretextual refusal to comply with its mandate. The petition argues in the alternative that the Court should grant plenary review to determine

No.	Caption and Status	Attorneys	Description
			whether the punitive award is unconstitutionally excessive, a question that it agreed to consider, but did not need to reach, when it granted Philip Morris's prior petition. The Court granted the petition, limited to the first question presented.
07-1318	*Powers v. Hamilton County Public Defender Commission* Cert. petition filed 4/16/08 Opposition filed 6/20/08	A. Pincus C. Rothfeld	This case relates to the decision in *Heck v. Humphrey*, 512 U.S. 477 (1994), which held that a section 1983 action that calls into question the validity of the plaintiff's criminal conviction or sentence may not proceed unless the conviction or sentence has been invalidated. The Sixth Circuit ruled that *Heck* was inapplicable where the section 1983 plaintiff served his sentence and no longer could challenge the validity of the conviction or sentence in a habeas proceeding. The courts of appeals have reached varying outcomes. In conjunction with the Yale Supreme Court Clinic, we will file a brief in opposition to the petition.
06-1545	*R. J. Reynolds Tobacco Co. v. Howard A. Engle* Cert. denied 10/1/07	A. Frey K. Geller A. Schapiro B. Willen	In this class action involving 700,000 Florida smokers, the Florida Supreme Court held that certain highly general findings made by the jury relating to the conduct of various cigarette manufacturers over a 50-year period would have *res judicata* effect in each of the potentially thousands of cases yet to be brought by individual class members. The Court also upheld compensatory damages awards on behalf of two individual plaintiffs, ignoring the defendants' arguments that plaintiffs' claims were expressly preempted by the Federal Cigarette Labeling and Advertising Act, as construed by the Supreme Court in *Cipollone v. Liggett Group*, 505 U.S. 504 (1992). We filed a petition for certiorari on behalf of Philip Morris challenging the Florida Supreme Court's ruling. We argued, first, that the court's *res judicata* holding violates the long-standing rule—incorporated into the Due Process Clause—that a court may not give preclusive effect to findings whose generality make it impossible to determine precisely what facts the jury found. Second, we argued that the Florida courts misapplied express preemption in allowing plaintiffs' failure-to-warn and label-neutralization claims.

No.	Caption and Status	Attorneys	Description
06-1204	*Republic of the Philippines v. Pimentel* Cert. granted 12/3/07	K. Geller C. Rothfeld D. Gossett S. Bray	This case involves the appropriate disposition of $35 million—the so-called "Arelma assets"—that is alleged to be money Ferdinand Marcos unlawfully acquired while President of the Republic of the Philippines. The money is claimed by several parties, including the Republic, and also is the subject of ongoing litigation in the Philippine courts. The Ninth Circuit held that the Republic appropriately could assert sovereign immunity in this litigation, and also held that it is a "necessary" party to the case (as that term is used in Federal Rule of Civil Procedure 19(a)). It thereafter held that the Republic was not an "indispensable" party under Rule 19(b), however, largely on the ground that the Republic's claim to the Arelma assets would fail on the merits. We successfully petitioned for certiorari (on behalf of the Republic, its Presidential Commission for Good Government, and our client, the Philippine National Bank), arguing that the Ninth Circuit erred in looking to the merits of the Republic's claim to the Arelma assets, thus in effect negating its valid claim to sovereign immunity.
07-976	*T-Mobile USA, Inc. v. Laster* Cert. denied 5/27/08	A. Pincus E. Tager A. Parasharami J. Wilson	The Ninth Circuit held that a provision in a T-Mobile contract, which requires arbitration on an individual basis, was unconscionable under California law. T-Mobile argued in its petition for certiorari that the Federal Arbitration Act ("FAA") preempted the Ninth Circuit's application of California law. We filed an amicus brief on behalf of AT&T Mobility in support of neither party. Our brief agrees with T-Mobile that the FAA would preempt any per se rule of unconscionability, but we urge the Court to deny the petition because a more consumer-friendly arbitration agreements, such as AT&T Mobility's, will either be upheld under state law, thereby mooting the preemption issue, or forcing courts to clarify the preemption issue raised in the petition.
07-853	*United Arab Emirates v. El-Hadad*	A. Pincus C. Rothfeld	We represent an Egyptian national who is seeking damages in a breach of contract and defamation case against his employer, the U.A.E. Embassy in Washington, D.C. The U.A.E. moved to dismiss, asserting

No.	Caption and Status	Attorneys	Description
	Cert. denied 4/14/08		immunity under the Foreign Sovereign Immunities Act. Both the district court and D.C. Circuit ruled against the U.A.E., denying immunity on grounds that the FSIA's "commercial activity" exception applied. The U.A.E. sought certiorari on that issue, and we successfully opposed the petition.
07-756	*Yang v. Mukasey* Cert. denied 5/12/08	A. Pincus C. Rothfeld	Federal law provides refugee protection to anyone who has been forced to terminate a pregnancy; the Board of Immigration Appeals has read the section to extend to the husbands of the women forced to terminate pregnancies, but withholds that treatment from husbands whose marriages were not recognized by the law of the country where the forced abortion took place (*e.g.*, on grounds of age). The circuits are divided on this issue. We are challenging that exclusion as part of the Yale Law School Supreme Court Clinic, representing a Chinese national who is seeking asylum in the United States.