CASES HANDLED BY MAYER BROWN LLP
DURING THE 2008 U.S. SUPREME COURT TERM

July 13, 2009

FINAL

GRANTED CASES

No.	Caption and Status	Attorneys	Description
08-368	*Al Marri v. Spagaone* Dismissed 3/6/09	J. Schroeder G. Isaac H. Donnell	This case involved the question whether the Authorization for Use of Military Force (AUMF) authorizes the President to indefinitely detain Al-Marri, who was arrested and charged with planning to commit terrorist acts while lawfully residing in the U.S. On the eve of his criminal trial, the President designated him an “enemy combatant,” and he has been held without charge or trial for over five years. The Fourth Circuit panel initially held that al-Marri’s military detention was unlawful, but the en banc court subsequently held 5-4 that the AUMF authorizes the President to detain al-Marri indefinitely based on the government’s representations. A different majority of the court held 5-4 that, assuming the President acted lawfully, al-Marri was denied adequate process to challenge the government’s accusations. We filed an amicus brief in support of the petitioner on behalf of former Justice Department Officials. The Court dismissed the case after the government transferred al-Marri to the civilian criminal justice system.
07-562	*Altria Group, Inc. v. Good* Affirmed 12/15/08	K. Geller	This case addressed 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 on behalf of Altria 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 assisted on the merits

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			brief. The Court affirmed the decision below by a 5-4 vote.
07-1122	*Arizona v. Johnson* Reversed and remanded 1/26/09	A. Pincus C. Rothfeld	The question presented was 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 dangerous, but has no reasonable grounds to believe that the passenger is committing, or has committed, a criminal offense. The Court held that the search did not violate the Fourth Amendment. As part of the Yale Law School Supreme Court Advocacy Clinic, we represented the respondent (the defendant). Andy Pincus argued the case.
08-22	*Caperton v. A.T. Massey Coal Co.* Reversed and remanded 6/8/09	A. Frey E. Tager D. Himmelfarb E. Volokh J. Berger M. Rughani B. Steele S. Shapiro	The issue in this case was whether the Due Process Clause required an elected state supreme court justice to recuse himself indefinitely from all cases involving a corporation whose CEO contributed substantial amounts of money to a 527 group that used those funds to attack his opponent in the judicial election. After the Court granted certiorari, we were retained to represent the respondent in contending that recusal is not required by the Due Process Clause. The Court reversed 5-4, ruling that due process required the justice to recuse himself. Andy Frey argued the case.
08-1034	*CSX Transportation, Inc. v. Hensley* Reversed and remanded 6/1/09	E. Tager D. Himmelfarb	The Supreme Court held in *Norfolk & Western Railway Co. v. Ayers*, 538 U.S. 135 (2003) that a plaintiff who has asbestosis may recover for fear of contracting cancer under FELA only if he or she proves that the alleged fear is "genuine and serious." On behalf of CSX, we asked the Court to address whether the jury must be instructed on this requirement for a fear-of-cancer claim. In a highly unusual step, the Court summarily reversed the Tennessee Court of Appeals, without merits-stage briefing or oral argument, and held, in a 7-2 *per curiam* opinion, that upon request a trial court must give a "genuine and serious fear" jury instruction.

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07-1125	*Fitzgerald v. Barnstable School Committee* Reversed and remanded 1/21/09	C. Rothfeld A. Pincus	The case involved 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 Circuit held 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. In conjunction with the Yale Law School Supreme Court Clinic, we persuaded the Court to grant review. A unanimous Court then reversed the First Circuit, holding that Title IX does not preclude a Section 1983 suit alleging gender discrimination in schools. Charles Rothfeld argued the case.
08-304	*Graham County Soil and Water Conservation District* v. *United States ex rel. Wilson* Cert. granted 6/22/09	D. Himmelfarb M. Passaportis M. Glover	A provision of the False Claims Act prohibits *qui tam* suits based on public disclosure of information in various contexts, including in "administrative" hearings, audits, and investigations. 31 U.S.C. § 3730(e)(4)(A). The petition presents the question whether an audit and investigation performed by a State or its political subdivision invokes this provision of the FCA. The Fourth Circuit held that the term "administrative" has an exclusively federal meaning and therefore does not cover state administrative reports, audits, and investigations. The Supreme Court granted certiorari to resolve a widening circuit split on the issue. We filed an amicus brief in support of the petition and expect to file an amicus brief on the merits as well.

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07-8521	*Harbison v. Bell* Reversed and remanded 4/1/09	C. Rothfeld A. Pincus	This case involved the question of whether Section 3559, which authorizes funding to provide counsel for indigent death row inmates and state defendants pursuing federal habeas relief, also authorizes funding for counsel in state law clemency proceedings where state law does not provide indigent inmates with counsel. In a 7-2 decision, the Supreme Court reversed a Sixth Circuit decision holding that federally funded habeas counsel could not represent petitioner in a clemency proceeding. The Court held that Section 3559's plain language indicated that appointed counsel's authorized representation included state clemency proceedings. We served as co-counsel for petitioner.
07-1312	*Hawaii v. Office of Hawaiian Affairs* Reversed and remanded 3/31/09	C. Rothfeld A. Pincus	This case involved litigation between native Hawaiians and the State of Hawaii over the State's right to permanently dispose of land that the State holds in trust for, among other purposes, the benefit of native Hawaiians. In conjunction with the Yale Supreme Court Clinic, we filed an amicus brief on behalf of several organizations that represent native Hawaiian interests, arguing that a state supreme court judgment, in which the court blocked the sale of land from the trust, is supported by state law grounds. The Court reversed and remanded but rejected arguments by the State and the United States that judgment should be entered for the State, allowing our state-law arguments to proceed on remand.
08-586	*Jones v. Harris Associates* Opening brief filed 6/10/09 Response brief due 8/27/09 Amicus brief due 9/3/09	S. Shapiro T. Bishop	The Supreme Court granted certiorari to resolve a circuit split about the standards for determining whether a mutual fund adviser's fees violate fiduciary duties under Investment Company Act section 36(b). On behalf of Fidelity, we will be filing an amicus in support of the respondents.

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07-499	*Negusie v. Mukasey* Reversed and remanded 3/3/09	A. Pincus C. Rothfeld	This case concerned 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. As part of the Yale Law School Supreme Court Clinic, we represented the petitioner, an Eritrean national who is seeking asylum. The Fifth Circuit upheld an agency decision that rendered the petitioner ineligible for asylum because he supposedly engaged in persecution, even though the petitioner never willingly participated in any such behavior. In an 8-1 decision, the Court reversed the Fifth Circuit, remanding the case to the agency for consideration of whether the immigration laws require the agency to consider the voluntariness of the persecution in applying the persecutor bar to asylum. Andy Pincus argued the case.
07-1216	*Philip Morris USA Inc. v. Williams* Dismissed as Improvidently Granted 3/31/09	A. Frey K. Geller S. Shapiro A. Schapiro L. Goldman S. Chesin	In 2007, 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 our petition to address whether the Oregon Supreme Court violated the mandate and/or whether that court's post hoc rationale for refusing to afford Philip Morris any relief is an "independent and adequate" state-law ground. In a per curiam order and without explanation, the Court dismissed the writ of certiorari as improvidently granted. Steve Shapiro argued the case.

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08-310	*Polar Tankers, Inc. v. City of Valdez* Reversed and remanded 6/15/09	A. Frey C. Rothfeld E. Tager B. Netter K. Akowuah	This case concerned the constitutionality of a property tax imposed principally on out-of-state oil tankers that use the port at Valdez, Alaska in the course of interstate commerce. These vessels were taxed not only on the basis of time spent in Alaska, but also on the basis of time spent on the high seas. Polar Tankers challenged the tax in Alaska state court, contending that the tax (1) violated the Tonnage Clause of the Constitution because it discriminates against vessels used in interstate commerce; and (2) violated the Commerce Clause because it improperly apportioned tax revenues for time the vessels spend outside the state. The Alaska Supreme Court upheld the tax, and we successfully petitioned for certiorari. The Supreme Court reversed and remanded in a 7-2 decision, holding that the Valdez tax was unconstitutional because it lay at the heart of what the Tonnage Clause forbids. Charles Rothfeld argued the case.
08-1065	*Pottawattamie County, Iowa v. McGhee* Cert. granted 4/20/09 Opening brief filed 7/13/09 Response brief due 9/4/09	S. Shapiro J. Sarles S. Sanders	The Court granted our petition and will decide whether the Eighth Circuit erroneously denied immunity to prosecutors where civil rights plaintiffs alleged that the prosecutors (1) procured false testimony during the investigative phase of a criminal proceeding, then (2) introduced the same evidence in judicial proceedings.
08-328/ 07-1478	*Ricci v. DeStefano* Reversed and remanded 6/29/09	A. Pincus C. Rothfeld	In conjunction with the Yale Supreme Court Clinic, we filed an amicus brief for the National League of Cities and the International Municipal Lawyers Association supporting respondent City of New Haven. The case involved the application of Title VII to a reverse discrimination claim brought by white firefighters. A competitive examination used to make promotion decisions for firefighters produced results that, under EEOC guidelines, had a presumptive disparate impact on minority applicants. New Haven chose not to use the examination results, and firefighters who would have been

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			eligible for promotions under the discarded examination sued, claiming that the decision not to use the exam results constituted intentional discrimination in violation of Title VII and the Constitution. The Second Circuit affirmed a grant of summary judgment in New Haven's favor. The Supreme Court, in a 5-4 decision, reversed the Second Circuit's decision on Title VIII grounds.
07-1090/ 08-539	*Republic of Iraq v. Beaty* Reversed 6/8/09	L. Chelbi A. Diana N. Cerullo V. Meyers	This case addressed whether Iraq possesses sovereign immunity from the jurisdiction of the courts of the United States in cases involving alleged misdeeds of Saddam Hussein that are predicated on the now-repealed state-sponsor-of-terrorism exception to immunity. The lower courts declined to dismiss suits against Iraq on jurisdictional grounds. On behalf of a linguistics professor, we filed an amicus brief in support of the respondents that discussed the use of empirical linguistics and the philosophy of language in interpreting the Foreign Sovereign Immunities Act. The Supreme Court reversed, holding that Iraq is no longer subject to suit in the United States due to the repeal of the exception to immunity.
08-294	*Speaker of the Arizona House of Representatives v. Flores* Reversed and remanded 6/25/09	S. Shapiro D. Himmelfarb S. Claffee	We filed an amicus brief on behalf of a group of education-policy scholars in support of petitioners, who sought the vacatur of an injunction (issued by the federal district court in Arizona) ordering the State of Arizona to increase funding for English Language Learner programs statewide. In a 5-4 decision, the Court reversed the Ninth Circuit and remanded, holding that the lower courts failed to perform the proper inquiry into whether changed circumstances warranted relief from an injunction under F.R.C.P. 60(b)(5). Citing a leading scholar who joined our amicus brief, the Court identified the shift in federal education policy towards outcome accountability and the ineffectiveness of court-ordered funding remedies among the factors that called into question the necessity of continued enforcement of the injunction.

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07–773	*Vaden v. Discover Bank* Reversed 3/9/09	E. Tager D. Gossett A. Parasharami J. Wilson	Pursuant to Section 4 of the Federal Arbitration Act, Discover Bank compelled arbitration of a state-court lawsuit in which a plaintiff asserted a counterclaim raising issues of federal law. The court granted cert to address whether a district court's jurisdiction over a Section 4 petition may be based on a federal question in the underlying dispute between the parties and, more specifically, whether jurisdiction may be based on a federal question in a counterclaim. On behalf of the Chamber of Commerce, we filed an amicus brief in support of Discover Bank. We argued that, because of state-court hostility to arbitration agreements, a narrow interpretation of Section 4 jurisdiction would undermine the FAA. In a 5-4 decision, the Court reversed, holding that while a district court may "look through" a Section 4 petition to determine whether the underlying dispute arises under federal law, the court may not resolve a federal question raised only in a counterclaim.
06-1249	*Wyeth v. Levine* Affirmed 3/4/09	K. Geller A. Tauber	This case addressed 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. In a 6-3 decision, the Supreme Court affirmed the decision below.

CERT. PETITIONS AND APPEALS

No.	Caption and Status	Attorneys	Description
08-368	*Al Marri v. Pucciarelli* Cert. granted 12/5/08	J. Schroeder G. Isaacs H. Donnell	This case involved the question whether the Authorization for Use of Military Force (AUMF) authorizes the President to indefinitely detain Al-Marri, who was arrested and charged with planning to commit terrorist acts while lawfully residing in the U.S. On the eve of his criminal trial, the President designated him an "enemy combatant," and he has been held without charge or trial for over five years. The Fourth Circuit panel initially held that al-Marri's military detention was unlawful, but the en banc court subsequently held 5-4 that the AUMF authorizes the President to detain al-Marri indefinitely based on the government's representations. A different majority of the court held 5-4 that, assuming the President acted lawfully, al-Marri was denied adequate process to challenge the government's accusations. On behalf of former Justice Department Officials, we filed an amicus brief in support of al Marri's petition for certiorari that focuses on the criminal justice system's capabilities to handle terrorism prosecutions.
08-1206	*Andrews v. Chevy Chase Bank* Cert. denied 6/29/09	J. Sarles M. Odorizzi	The petition in this case sought review of a decision of the Seventh Circuit reversing the district court's certification of a class and holding that the rescission remedy available under the Truth-in-Lending Act may not be awarded on a class-wide basis. We successfully opposed the petition for certiorari.
08-446	*Aristocrat Technologies, Inc. v. International Game Technology* Cert. denied 12/8/08	J. Sarles M. Anyetei A. Hutchison	We successfully opposed a petition that sought reversal of a decision of the Federal Circuit in which the court affirmed a grant of summary judgment dismissing a patent infringement claim brought against our client, International Game Technology. The issue presented concerned the scope of structure that must be disclosed in a means-plus-function claim for a computerized gaming machine.

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No. 08-1156	*AT&T Mobility LLC v. Shorts* Cert. denied 6/22/09	E. Tager C. Rothfeld D. Himmelfarb J. Wilson	This case presented the question whether the Class Action Fairness Act, which permits removal to federal court of certain class actions filed in state court, authorizes a third-party defendant to remove on the basis of a class-action counterclaim. A divided panel of the Fourth Circuit held that CAFA does not authorize removal, and a dissent from the denial of rehearing en banc called on the Supreme Court to address what it labeled as an "unfortunate loophole" in CAFA. We filed a petition for certiorari on behalf of AT&T Mobility.
07-956	*Biomedical Patent Mgmt. Corp. v. State of California, Dep't of Health Services* Cert. denied 1/12/09	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 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. After the Court invited the Solicitor General to express the views of the United States, the Solicitor General recommended that the Court deny the petition.

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08-987	*Campa v. United States* Cert. denied 6/15/09	J. Sarles A. Hine M. Paik	We filed an amicus brief on behalf of the National Association of Criminal Defense Lawyers in support of the petitioners, who are Cuban intelligence officers convicted of espionage and other crimes. The Eleventh Circuit divided over whether their motion to transfer venue out of Miami due to pervasive anti-Castro sentiment should have been granted. The amicus brief traced the historical evolution and importance of the right to transfer venue in situations where there is a risk of community prejudice.
08-1301	*Carr v. United States* Cert. petition filed 4/22/09 Response due 7/24/09	C. Rothfeld A. Pincus	We filed a cert petition on behalf of the defendant in conjunction with the Yale Supreme Court Clinic, arguing that retroactive application of the Sex Offender Registration and Notification Act is inconsistent with the statute and violates the Ex Post Facto Clause. In particular, SORNA requires registration by a person convicted of specified sex offenses who "travels" in interstate commerce, and this case presents the question whether travel occurring before enactment of the statute triggers the registration requirement. The courts of appeals and district courts are divided on the question.
08-1375	*Cassens Transport Co. v. Brown* Cert. petition filed 5/6/09 Response due 6/29/09	C. Rothfeld B. Wong	This case concerns whether the McCarran-Ferguson Act precludes application of a federal statute (RICO) that would impair a state insurance law. The Sixth Circuit held that employees could sustain a civil RICO claim against employers that self-insured their liability for worker's compensation claims and then allegedly fraudulently denied them benefits. On behalf of Cassens, we filed a petition for writ of certiorari challenging, *inter alia*, the Sixth Circuit's categorical holding that self-insurance is never insurance under the McCarran-Ferguson Act.
08-673	*Clark v. United States* Cert. denied 3/23/09	A. Frey J. Berger S. Manohar	This case addressed whether a judge may make a drug quantity finding by a preponderance of the evidence consistent with *Apprendi v. New Jersey* when that finding results in the imposition of an increased sentencing range and a statutory mandatory minimum. On behalf of

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			the National Association of Criminal Defense Lawyers, we filed an amicus brief arguing that under such circumstances the Constitution required drug quantity to be proven to a jury beyond a reasonable doubt.
08-751	*County of El Paso v. Napolitano* Cert. denied 6/15/09	A. Pincus C. Rothfeld	Through several pieces of legislation, Congress gave the Department of Homeland Security the power to waive the protections of, *inter alia*, the Endangered Species Act and the National Environmental Policy Act when deemed necessary to facilitate the construction of barriers that may deter illegal immigration and protect national security. In 2008, the Secretary of DHS waived several federal statutes with respect to the construction of a fence on the Mexico border. In conjunction with the Yale Supreme Court clinic and on behalf of the county, we filed a cert petition challenging the waiver legislation as an unconstitutional delegation of legislative power.
08-1034	*CSX Transportation, Inc. v. Hensley* Cert. granted; reversed and remanded 6/1/09	E. Tager D. Himmelfarb	The Supreme Court held in *Norfolk & Western Railway Co. v. Ayers*, 538 U.S. 135 (2003) that a plaintiff who has asbestosis may recover for fear of contracting cancer under FELA only if he or she proves that the alleged fear is "genuine and serious." We filed a petition on behalf of CSX asking the Court to address whether the jury must be instructed on this requirement for a fear-of-cancer claim. The Court granted certiorari and summarily reversed the lower court without merits-stage briefing or oral argument.
08-269	*CSX Transportation, Inc. v. Rivenburgh* Cert. denied 11/3/08	E. Tager D. Himmelfarb	We filed a petition for certiorari on behalf of CSX arising from a Second Circuit decision upholding a jury verdict in the plaintiff's favor. In affirming the judgment, the court applied relaxed standards of causation and negligence. Our petition asked the Court to review whether there are relaxed standards of causation and negligence under the Federal Employers' Liability Act ("FELA").
08-542	*Ellis v. Grant Thornton LLP*	S. Parzen M. Ryan	In the Fourth Circuit, Grant Thornton obtained the reversal of a $3 million verdict premised upon the novel theory that an accountant

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	Cert. denied 12/01/08	J. Berger	owes a duty to a potential employees of a company it is auditing. Interpreting West Virginia law, the court of appeals rejected this theory and struck down the verdict. On behalf of Grant Thornton, we opposed the petition, which was denied.
08-945	*Empress Casino v. Giannoulias* Cert. denied 6/15/09	M. Odorizzi C. Rothfeld E. Tager E. Volokh J. Berger A. Hine	In 2006, the Illinois legislature required four of the nine casinos operating in the state to pay 3% of their revenues to a fund that benefited the five horse racing tracks operating in the state. The four casinos challenged the statute under the Takings Clause. The Illinois Supreme Court ruled that the Takings Clause does not apply to exactions of money. We filed a petition on behalf of the casinos that presents the question whether a monetary obligation can be the basis of a Takings Clause claim.
08-1042	*Ernst & Young v. Bankruptcy Services, Inc.* Cert. denied 4/20/09	A. Frey B. Willen D. Crowley	This case concerned the scope of the Seventh Amendment in bankruptcy cases. After Ernst & Young (our client) filed a proof of claim for approximately $200,000 in unpaid fees, the estate's disbursing agent asserted state-law fraud and negligence counterclaims on behalf of the debtor and of a third-party creditor. The bankruptcy court struck Ernst & Young's demand for a jury trial and, after a bench trial, awarded a judgment of $70 million to the estate. The first issue was whether Ernst & Young's filing of a proof of claim forfeited its right to a jury trial on the debtor's legal, state-law claims. If that question was answered in the affirmative, the second issue was whether the bankruptcy court was required to first hold a jury trial on the third-party creditor's factually-similar claims (as to which it is conceded that the bankruptcy court erred in denying a jury trial) in order to avoid the issue-preclusive effect of the bench trial that resolved the debtor's claims.
08-304	*Graham County Soil and Water Conservation District* v. *United States ex rel. Wilson*	D. Himmelfarb M. Passaportis	A provision of the False Claims Act prohibits *qui tam* suits based on public disclosure of information in various contexts, including in "administrative" hearings, audits, and investigations. 31 U.S.C. §

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	Cert. granted 6/22/09		3730(e)(4)(A). The petition presents the question whether an audit and investigation performed by a State or its political subdivision invokes this provision of the FCA. The Fourth Circuit held that the term "administrative" has an exclusively federal meaning and therefore does not cover state administrative reports, audits, and investigations. In reaching this holding, the Fourth Circuit further widened an existing circuit split. We filed an amicus brief in support of the petitioners on behalf of the National League of Cities. The United States filed a brief arguing that the Fourth Circuit did not err, but nonetheless recommending that the Court grant the petition to resolve a deepening circuit split. The Court then granted the petition.
08-1328	*Greenwell v. Parsley* Cert. petition filed 4/27/09 Opposition filed 6/26/09 Reply filed 7/7/09	A. Tauber K. Akowuah R. Caldarone E. Volokh	On behalf of a former deputy sheriff who was fired when he announced his candidacy for the office of sheriff, we filed a cert petition presenting the question whether, contrary to the Sixth Circuit's holding below, the First Amendment is implicated when a public employee is fired after he announces his candidacy for elected office.
08-1202	*IMS Health v. Ayotte* Cert. denied 6/29/09	G. Tzanetopolous S. Sanders	The New Hampshire legislature enacted a statute that outlaws the transfer of information about prescriptions written by doctors. The petition presents the question whether the First Amendment protects the acquisition, analysis, and publication of factual data that is used by third parties for a commercial purpose. We assisted with an amicus brief filed on behalf of academic research scientists.
08-1051	*International Game Technology v. Aristocrat Tech. Australia Pty Ltd* Cert. denied 6/15/09	J. Sarles	In this case, we petitioned the Court on International Game Technology's behalf and asked it to review the Federal Circuit's ruling that a statutorily improper revival of an abandoned patent application is not an available defense to a patent infringement claim.
08-460 08-461	*Isaacson v. Dow Chemical Co.*	A. Frey C. Rothfeld	Both cases concern claims brought by Vietnam veterans against manufacturers of Agent Orange and other defoliants used during the

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	Stephenson v. Dow Chemical Co. Cert. denied 3/2/09	L. Goldman C. Houpt	Vietnam War. Petitioners (plaintiffs below) alleged injuries resulting from a product defect, and argued that the Second Circuit erred in affirming removal of some of the cases to federal court based on 28 U.S.C. § 1442, the Federal Officer Removal Statute. Petitioners further contended that the lower court incorrectly granted summary judgment for the respondents on the basis of an asserted government contractor defense. Mayer Brown represented the respondents (Dow Chemical entities) and successfully opposed the petitions.
08-1356	*Kim v. Holder* Cert. petition filed 5/4/09 Amicus brief filed 6/4/09 Response due 8/5/09	A. Nicely S. Manohar	In this case, the government seeks to remove an alien, who received a green card seventeen years ago after his employer, without his knowledge, bribed an INS officer. Federal law provides a five-year limitations period for rescinding adjustments to immigration status, and some courts have concluded that this period also applies to removal proceedings. Deepening a lower court split, the Eighth Circuit held that the five-year limitations period applies only to rescission proceedings, not removal proceedings, and affirmed an order of removal against Mr. Kim. On behalf of CASA de Maryland and the CAIR Coalition, we filed an amicus brief in support of the petition for certiorari, arguing that the Eighth Circuit should not have given *Chevron* deference to the Attorney General's interpretation of the statute of limitations.
08-626	*Level 3 Communications LLC v. City of St. Louis* Cert. denied 6/29/09	T. Livingston J. Muench J. Berger	This case involved the proper construction of 47 U.S.C. § 253, a provision in the Telecommunications Act of 1996 limiting state and local regulation that has "the effect of prohibiting the ability of any entity" to provide telecommunications services to consumers. At issue was the extent to which state and local governments can limit entities' access to and use of the public rights-of-way. On behalf of AT&T, we submitted an amicus brief in support of the petition. After the Court invited the Solicitor General to express the views of the United States, the Solicitor General recommended that the Court deny the petition, which it then did.

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08-227	*Liddell v. United States* Cert. denied 12/01/08	A. Pincus C. Rothfeld	In conjunction with the Yale Supreme Court Clinic, we filed a petition for certiorari on behalf of an individual stopped by the police and arrested for driving "while barred." The petitioner was removed from the car and handcuffed. The arresting officers, without giving Miranda warnings, then asked whether there was anything in the car they should know about. Petitioner replied that there was a gun in the car, adding that it was not his. The police charged petitioner with possession of a firearm, and his statement was introduced into evidence against him under the "exigent circumstances" exception, even though petitioner was in custody when he made the statement. The courts of appeals are divided on whether the exigent circumstances exception applies in such circumstances.
07-1234	*The Long Island Bank Savings Bank v. United States of America* Cert. denied 10/6/08	A. Frey E. Tager C. Rothfeld K. Akowuah	This was 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. Our petition, filed on the bank's behalf, challenged 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. denied 10/6/08	D. Himmelfarb B. Davis D. Gossett T. Killion	The central issue in this case was 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. We filed a petition on

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			Long John Silver's behalf asking the Court to review a Fourth Circuit decision 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. denied 10/6/08	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 presented 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.
08-217/ 08-218	*Massey Energy Co. v. Wheeling Pittsburgh Steel Corp.* Cert. denied 12/01/08	A. Frey E. Tager D. Himmelfarb L. Goldman J. Berger C. Houpt	In a breach of contract action against Massey, a West Virginia jury awarded the plaintiffs $219 million in damages, including a $100 million punitive damages award that was (at the time) the second largest such award in West Virginia history. West Virginia does not have an intermediate appellate court, and its Supreme Court of Appeals does not hear civil appeals as a matter of right. Massey sought, and the Supreme Court summarily denied, review of the judgment. Participating in the decision to deny review was a Justice who had publicly disparaged Massey and its CEO. The Justice refused Massey's requests that he recuse himself. On behalf of Massey, we filed two petitions challenging the punitive award itself, West Virginia's lack of appellate review as a matter of right, and the

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			participation of a Justice with open hostility to Massey in denying leave to appeal.
08-17	*Mercier v. Ohio* Cert. denied 4/27/09	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 was 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.
07-1159	*Metz* v. *CSX Transportation, Inc.* Cert. denied 10/6/08	E. Tager D. Himmelfarb	On behalf of our client, CSX Transportation, Inc., we successfully opposed a 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.
08-1172	*Nacchio v. United States* Cert. petition filed 3/20/09 Amicus brief filed 4/22/09 Opposition filed 5/29/09 Reply brief filed 6/9/09 Record requested 6/23/09	A. Schapiro S. Claffee	We filed an amicus brief, *pro bono*, on behalf of the National Association of Criminal Defense Lawyers in support of the petitioner, who was convicted of insider trading. The petition addresses whether the district court improperly excluded expert opinion testimony about analyst reports, stock transactions, and trading patterns. The amicus brief argues that this ruling negatively impacts complex criminal cases, especially those involving securities fraud and insider trading, and that defendants have the right to help juries understand complicated issues through expert testimony.
08-125	*Nat'l Institute of Military Justice v. Department of Defense*	A. Pincus C. Rothfeld	This petition, filed in conjunction with the Yale Supreme Court clinic, concerned the "intra-agency" exemption to the Freedom of Information Act. The D.C. Circuit held that comments on proposed rules for

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	Cert. denied 12/15/08		military tribunals submitted by private individuals in response to a request by a government official qualify as documents exempt from release under FOIA. We filed a petition on behalf of the National Institute of Military Justice challenging that ruling and asking the Court to clarify the test for determining whether a document falls within the intra-agency exemption.
08-310	*Polar Tankers, Inc. v. City of Valdez* Cert. granted 12/12/08	A. Frey C. Rothfeld E. Tager B. Netter	This case concerned the constitutionality of a property tax imposed principally on out-of-state oil tankers that use the port at Valdez, Alaska in the course of interstate commerce. These vessels are taxed not only on the basis of time spent in Alaska, but also on the basis of time spent on the high seas. Polar Tankers challenged the tax in Alaska state court, contending that the tax (1) violates the Tonnage Clause of the Constitution because it discriminates against vessels used in interstate commerce; and (2) violates the Commerce Clause because it improperly apportions tax revenues for time the vessels spend outside the state. We filed a petition challenging the Alaska Supreme Court's ruling that the tax is constitutional, and the Court granted cert.
08-1065	*Pottawattamie County, Iowa v. Harrington* Cert. granted 4/20/09	J. Sarles S. Sanders S. Shapiro	The petition, filed on behalf of the county and its former attorneys, addresses whether the Eighth Circuit erroneously denied immunity to prosecutors where civil rights plaintiffs alleged that the prosecutors (1) procured false testimony during the investigative phase of a criminal proceeding, then (2) introduced the same evidence in judicial proceedings. Upon our application, Justice Alito took the rare action of staying the proceedings in the district court pending the disposition of the petition. The Court later agreed to review the case.
07-1318	*Powers v. Hamilton County Public Defender Commission* Cert. denied 10/6/08	A. Pincus C. Rothfeld	This case involved the scope of *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

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			plaintiff served his sentence and no longer could challenge the validity of the conviction or sentence in a habeas proceeding. In conjunction with the Yale Supreme Court Clinic and on behalf of a section 1983 plaintiff, we successfully opposed a petition for certiorari.
08-1853	*Quinn v. United States* Cert. petition filed 6/25/09	A. Pincus C. Rothfeld	We filed a petition in conjunction with the Yale Supreme Court Clinic, that presents the question whether the rule articulated in *Booker v. United States*, which held that the federal Sentencing Guidelines have only an advisory impact in criminal sentencing, also applies to resentencings after the Sentencing Commission retroactively reduces the permissible sentence for certain offenses, including those involving powder and crack cocaine. The Ninth Circuit has held that *Booker* does apply, but several other courts, including the Eleventh Circuit in this case, have held the opposite, creating a circuit split.
08-622	*United States v. Villanueva-Sotelo* Cert. denied 5/20/09	C. Rothfeld A. Pincus	The question presented in this case was whether the government, to establish aggravated identity theft, must prove that a defendant charged with using a false identity knew that the identity actually belonged to someone else (as opposed to being fictitious). In conjunction with the Yale Supreme Court Clinic, we successfully opposed the government's petition for rehearing en banc in the D.C. Circuit. We then filed a brief in opposition to the government's petition for certiorari, which the Court denied.
08-439	*Windt v. Qwest Communications, Inc.* Cert. denied 1/12/09	J. Sarles M. Frisch M. Paik	The question presented by the petition concerned the relevant domestic forum to be considered in an international forum non conveniens challenge. The circuits have divided on the issue of whether, in the international context, the domestic forum is the entire United States, or rather the state in which the court sits. On behalf of our client, INSOLAD Europe, an association of European bankruptcy practitioners, we filed an amicus brief that urged the Court to reverse the Third Circuit's affirmance of the dismissal, on forum non conveniens grounds, of a suit brought by Dutch bankruptcy trustees.