

STATUS OF PENDING EN BANC CASES

Today's Date: August 3, 2009

This report is provided for case identification and background information only and does not reflect the views of the court. When a case is heard or reheard en banc, the en banc court assumes jurisdiction over the entire case, see 28 U.S.C. § 46(c), regardless of the issue or issues that may have caused any member of the Court to vote to hear the case en banc. Summerlin v. Stewart, 309 F.3d 1193 (9th Cir. 2002)

Nordyke v. King, 07-15763

Three-Judge Panel Opinion: 563 F.3d 439 (9th Cir. 2009)

Order Taking Case En Banc: 2009 WL (9th Cir. July 29 2009)

Date of Order Taking Case En Banc: July 29, 2009

Status: To be calendared the week of September 21, 2009, in San Francisco, California

Members of En Banc Court: Not yet available

Subject Matter: Appeal of summary judgment in 42 U.S.C. § 1983 action brought by gun show promoters challenging the constitutionality of county ordinance prohibiting possession of firearms on county property.

Holding: Not yet decided

United States v. Strickland, 08-30091

Three-Judge Panel Opinion: 556 F.3d 1069 (9th Cir. 2009)

Order Taking Case En Banc: 569 F.3d 956 (9th Cir. 2009)

Date of Order Taking Case En Banc: June 19, 2009

Status: To be calendared the week of September 21, 2009, in San Francisco, California

Members of En Banc Court: Not yet available

Subject Matter: Appeal of criminal conviction for the offense of receipt and possession of child pornography.

Holding: Not yet decided

United States v. Nevils, 06-50485

Three-Judge Panel Opinion: 548 F.3d 802 (9th Cir. 2008)

Order Taking Case En Banc: 570 F.3d 1123 (9th Cir. 2009)

Date of Order Taking Case En Banc: June 16, 2009

Status: To be calendared the week of September 21, 2009, in San Francisco, California

Members of En Banc Court: Not yet available

Subject Matter: Appeal of criminal conviction and sentence for the offense of felon in possession of a firearm.

Holding: Not yet decided

Shapiro v. Astrue, 06-55822 / 06-55954 / 06-56284

Three-Judge Panel Opinion: 545 F.3d 854 (9th Cir. 2008)

Order Taking Case En Banc: 567 F.3d 1043 (9th Cir. 2009)

Date of Order Taking Case En Banc: May 27, 2009

Status: Argued and submitted June 22, 2009

Members of En Banc Court: Alex Kozinski, Mary M. Schroeder, Betty Fletcher, Harry Pregerson, Stephen R. Reinhardt, Andrew J. Kleinfeld, Marsha S. Berzon, Johnnie B.

Rawlinson, Richard R. Clifton, Carlos T. Bea, N. Randy Smith

Subject Matter: Appeal of the district court's award of attorneys' fees following successful representation of social security claimants.

Holding: Not yet decided

Doody v. Schriro, 06-17161

Three-Judge Panel Opinion: 548 F.3d 847 (9th Cir. 2008)

Order Taking Case En Banc: 566 F.3d 839 (9th Cir. 2009)

Date of Order Taking Case En Banc: May 12, 2009

Status: Argued and submitted June 23, 2009

Members of En Banc Court: Alex Kozinski, Mary M. Schroeder, Betty Fletcher, Harry Pregerson, Stephen R. Reinhardt, Pamela Ann Rymer, Andrew J. Kleinfeld, Sidney R. Thomas, Kim M. Wardlaw, Richard C. Tallman, Johnnie B. Rawlinson

Subject Matter: Appeal of the district court's denial of petitioner's 28 U.S.C. § 2254 habeas corpus petition challenging his convictions for murder, armed robbery, burglary, and conspiracy.

Holding: Not yet decided

Pinholster v. Ayers, 03-99003 / 03-99008

Three-Judge Panel Opinion: 525 F.3d 742 (9th Cir. 2008)

Order Taking Case En Banc: 560 F.3d 964 (9th Cir. 2009)

Date of Order Taking Case En Banc: March 20, 2009

Status: Argued and submitted June 23, 2009

Members of En Banc Court: Alex Kozinski, Harry Pregerson, Stephen R. Reinhardt, Pamela Ann Rymer, Andrew J. Kleinfeld, Kim M. Wardlaw, William A. Fletcher, Richard A. Paez, Marsha S. Berzon, Jay S. Bybee, Milan D. Smith, Jr

Subject Matter: Appeal following district court's partial grant and partial denial of habeas corpus petition. District court granted relief as to death sentence for conviction on capital murder charge, but otherwise denied petition.

Holding: Not yet decided

Bull v. City and County of San Francisco, 05-17080 / 06-15566

Three-Judge Panel Opinion: 539 F.3d 1193 (9th Cir. 2008)

Order Taking Case En Banc: 558 F.3d 887 (9th Cir. 2009)

Date of Order Taking Case En Banc: February 20, 2009

Status: Argued and submitted March 26, 2009; submission deferred March 27, 2009

Members of En Banc Court: Alex Kozinski, Pamela Ann Rymer, Sidney R. Thomas, Susan P. Graber, Kim M. Wardlaw, Ronald M. Gould, Marsha S. Berzon, Johnnie B. Rawlinson, Richard R. Clifton, Sandra S. Ikuta, N. Randy Smith

Subject Matter: Appeal of the district court's denial of sheriff's summary judgment motion in class action suit challenging strip search policy.

Holding: Not yet decided

Dukes v. Wal-Mart, Inc., 04-16688 / 04-16720

Three-Judge Panel Opinion: 509 F.3d 1168 (9th Cir. 2007)

Order Taking Case En Banc: 556 F.3d 919 (9th Cir. 2009)

Date of Order Taking Case En Banc: February 13, 2009

Status: Argued and submitted March 24, 2009

Members of En Banc Court: Alex Kozinski, Stephen R. Reinhardt, Pamela Ann Rymer, Michael Daly Hawkins, Barry G. Silverman, Susan P. Graber, Raymond C. Fisher, Richard A. Paez, Marsha S. Berzon, Carlos T. Bea, Sandra S. Ikuta

Subject Matter: Appeal of the district court's orders on motion for certification of plaintiff class in employee Title VII action.

Holding: Not yet decided

Richter v. Hickman, 06-15614

Three-Judge Panel Opinion: 521 F.3d 1222 (9th Cir. 2008)

Order Taking Case En Banc: 548 F.3d 1236 (9th Cir. 2008)

Date of Order Taking Case En Banc: November 10, 2008

Status: Argued and submitted December 17, 2008

Members of En Banc Court: Alex Kozinski, Stephen R. Reinhardt, Diarmuid F. O'Scannlain, Andrew J. Kleinfeld, Barry G. Silverman, Kim M. Wardlaw, Raymond C. Fisher, Richard A. Paez, Jay S. Bybee, Milan D. Smith, Jr., Sandra S. Ikuta

Subject Matter: Appeal of the district court's denial of petitioners' 28 U.S.C. § 2254 habeas corpus petitions challenging jury convictions for murder, attempted murder, robbery and burglary.

Holding: Not yet decided

United States v. Hinkson, 05-30303

Three-Judge Panel Opinion: 526 F.3d 1262 (9th Cir. 2008)

Order Taking Case En Banc: 547 F.3d 993 (9th Cir. 2008)

Date of Order Taking Case En Banc: October 20, 2008

Status: Argued and submitted December 16, 2008.

Members of En Banc Court: Alex Kozinski, Harry Pregerson, Diarmuid F. O'Scannlain, Andrew J. Kleinfeld, Kim M. Wardlaw, William A. Fletcher, Richard A. Paez, Consuelo M. Callahan, Carlos T. Bea, Sandra S. Ikuta, N. Randy Smith

Subject Matter: Appeal of criminal conviction for soliciting the murder of federal officials.

Holding: Not yet decided

Murdoch v. Castro, 05-55665

Three-Judge Panel Opinion: 489 F.3d 1063 (9th Cir. 2007)

Order Taking Case En Banc: 546 F.3d 1051 (9th Cir. 2008)

Date of Order Taking Case En Banc: October 9, 2008

Status: Argued and submitted March 24, 2009

Members of En Banc Court: Alex Kozinski, Andrew J. Kleinfeld, A. Wallace Tashima, Sidney R. Thomas, Barry G. Silverman, M. Margaret McKeown, Kim M. Wardlaw, William A. Fletcher, Consuelo M. Callahan, Sandra S. Ikuta, N. Randy Smith

Subject Matter: Appeal of the district court's denial of petitioner's 28 U.S.C. § 2254 habeas corpus petition challenging his jury conviction for murder, following remand by this court.

Holding: Not yet decided

United States v. Comprehensive Drug Testing, Inc., 05-10067 +

Three-Judge Panel Opinion: 513 F.3d 1085 (9th Cir. 2008)

Order Taking Case En Banc: 545 F.3d 1106 (9th Cir. September 30, 2008)

Date of Order Taking Case En Banc: September 30, 2008

Status: Argued and submitted December 18, 2008

Members of En Banc Court: Alex Kozinski, Andrew J. Kleinfeld, Susan P. Graber, Kim M. Wardlaw, William A. Fletcher, Richard A. Paez, Marsha S. Berzon, Consuelo M. Callahan, Carlos T. Bea, Milan D. Smith, Jr., Sandra S. Ikuta

Subject Matter: Consolidated appeals from orders issued by district judges in cases arising from the federal investigation into illegal steroid use by professional baseball athletes.

Holding: Not yet decided.

United States v. Smith, 05-50375

Three-Judge Panel Opinion: 520 F.3d 1097 (9th Cir. 2008)

Order Taking Case En Banc: 545 F.3d 1105 (9th Cir. 2008)

Date of Order Taking Case En Banc: September 30, 2008

Status: Affirmed jury trial conviction, vacated sentence and remanded for resentencing. Opinion amended 4/9/09. Mandate issued 7/6/09.

En Banc Order: 561 F.3d 934 (9th Cir. 2009)

Date of En Banc Order: March 24, 2009

Members of En Banc Court: Alex Kozinski, Mary M. Schroeder, Stephen R. Reinhardt, Andrew J. Kleinfeld, Michael D. Hawkins, Susan P. Graber, Kim M. Wardlaw, Ronald M. Gould, Richard A. Paez, Marsha S. Berzon, Sandra S. Ikuta

Subject Matter: Appeal of criminal conviction for assault with a dangerous weapon.

Holding: There is a reasonable likelihood that the district court's instructions misled the jury to believe that they did not have to determine beyond a reasonable doubt that the prison-made knife used by the defendant was a dangerous weapon. Conviction affirmed because overwhelming and uncontradicted evidence at trial satisfied both definitions of "dangerous weapon" under 18 U.S.C. § 113(a)(3). "Great bodily harm" means (a) substantial risk of death; (b) extreme physical pain; (c) protracted and obvious disfigurement; or (d) protracted loss or impairment of the function of a bodily member, organ, or mental faculty.

Berger v. City of Seattle, 05-35752

Three-Judge Panel Opinion: 512 F.3d 582 (9th Cir. 2008)

Order Taking Case En Banc: 533 F.3d 1030 (9th Cir. 2008)

Date of Order Taking Case En Banc: July 14, 2008

Status: Summary judgment affirmed in part and remanded in part. Mandate issued 7/16/09.

En Banc Order: 569 F.3d 1029 (9th Cir. 2009)

Date of En Banc Order: June 24, 2009

Members of En Banc Court: Alex Kozinski, Harry Pregerson, Stephen R. Reinhardt, Michael D. Hawkins, Kim M. Wardlaw, Ronald M. Gould, Richard A. Paez, Marsha S. Berzon, Richard C. Tallman, Milan D. Smith, Jr., N. Randy Smith

Subject Matter: Appeal of the district court's summary judgment finding that provisions

of the Campus Rules restricting speech activities at the Seattle Center were unconstitutional on their face, in a 42 U.S.C. § 1983 action brought by a street performer.

Holding: The City of Seattle's requirement that street performers at the Seattle Center obtain permits before performing was not a reasonable time, place, or manner restriction. The provision allowing only passive solicitation of funds was an unconstitutional content-based limitation on speech. Because the record was insufficient to establish whether the City's provision setting out specified locations for street performances provided adequate access to the intended audience, the en banc court remanded in part.

State of Alaska v. EEOC, 07-70174

Three-Judge Panel Opinion: 508 F.3d 476 (9th Cir. 2007)

Order Taking Case En Banc: 531 F.3d 1002 (9th Cir. 2008)

Date of Order Taking Case En Banc: July 3, 2008

En Banc Order: 564 F.3d 1062 (9th Cir. 2009)

Date of En Banc Order: May 1, 2009

Status: Denial of petition for review of EEOC's decision regarding Alaska's sovereign immunity, and remand for further proceedings.

Members of En Banc Court: Alex Kozinski, Mary M. Schroeder, Diarmuid F. O'Scannlain, Sidney R. Thomas, Barry G. Silverman, Kim M. Wardlaw, Marsha S. Berzon, Richard C. Tallman, Consuelo M. Callahan, Milan D. Smith, Jr., Sandra S. Ikuta

Subject Matter: Petitions for review from the United States Equal Employment Opportunity Commission's denial of the State of Alaska's appeal from an administrative law judge's orders regarding discrimination complaints against the State under the Government Employees Rights Act of 1991.

Holding: Former employees' claims alleged violations of the Fourteenth Amendment. The GERA abrogated Alaska's sovereign immunity on employees' claims.

Hayward v. Marshall, 06-55392

Three-Judge Panel Opinion: 512 F.3d 536 (9th Cir. 2008)

Order Taking Case En Banc: 527 F.3d 797 (9th Cir. 2008)

Date of Order Taking Case En Banc: May 16, 2008

Status: Argued and submitted June 24, 2008. Supplemental briefing ordered.

Members of En Banc Court: Alex Kozinski, Diarmuid F. O'Scannlain, Andrew J. Kleinfeld, Sidney R. Thomas, Barry G. Silverman, Raymond C. Fisher, Richard A. Paez, Marsha S. Berzon, Richard C. Tallman, Richard R. Clifton, N. Randy Smith

Subject Matter: Appeal of the district court's denial of a habeas corpus petition challenging the Governor of California's reversal of the California Board of Prison Terms' decision to grant parole.

Holding: Not yet decided.

Redding v. Safford Unified School Dist. No. 1, 05-15759

Three-Judge Panel Opinion: 504 F.3d 828 (9th Cir. 2007)

Order Taking Case En Banc: 514 F.3d 1383 (9th Cir. 2008)

Date of Order Taking Case En Banc: January 31, 2008

Status: Reversed district court's summary judgment. Mandate stayed 7/31/08. Petition for cert granted 1/16/09. Supreme Court opinion 6/25/09, affirmed in part and reversed in part, remanded for consideration of *Monell* claim.

En Banc Order: 531 F.3d 1071 (9th Cir. 2008)

Date of En Banc Order: July 11, 2008

Members of En Banc Court: Alex Kozinski, Harry Pregerson, Michael D. Hawkins, Barry G. Silverman, Kim M. Wardlaw, Raymond C. Fisher, Ronald M. Gould, Richard A. Paez, Carlos T. Bea, Milan D. Smith, Jr., N. Randy Smith

Subject Matter: Appeal of the district court's summary judgment in favor of School District and officials, in a middle school student's 42 U.S.C. § 1983 action alleging that a strip search violated her Fourth Amendment rights.

Holding: School officials violated a thirteen-year-old student's Fourth Amendment right to be free of unreasonable search and seizure in strip-searching her for prescription-strength ibuprofen. The strip search was neither "justified at its inception" nor "reasonably related in scope to the circumstances" giving rise to its initiation. The school official in charge was not entitled to qualified immunity because these constitutional principles were clearly established at the time.

Abebe v. Mukasey, 05-76201

Three-Judge Panel Opinion: 493 F.3d 1092 (9th Cir. 2007)

Order Taking Case En Banc: 514 F.3d 909 (9th Cir. 2008)

Date of Order Taking Case En Banc: January 25, 2008

Status: Denied in part and dismissed in part a petition for review of the Board of Immigration Appeals' decision denying Immigration and Naturalization Act § 212(c) relief.

En Banc Order: 548 F.3d 787 (9th Cir. 2008); corrected en banc order: 554 F.3d 1203 (9th Cir. 2009)

Date of En Banc Order: November 20, 2008; January 5, 2009

Members of En Banc Court: Alex Kozinski, Harry Pregerson, Andrew J. Kleinfeld, Sidney R. Thomas, Barry G. Silverman, Ronald M. Gould, Richard C. Tallman, Richard R. Clifton, Consuelo M. Callahan, Carlos T. Bea, N. Randy Smith

Subject Matter: Petition for review of the Board of Immigration Appeals' decision finding petitioner ineligible to apply for discretionary relief under former Immigration and Naturalization Act § 212(c), under *Matter of Blake*, 23 I. & N. Dec. 722 (BIA 2005), and 8 C.F.R. § 1212.3(f)(5).

Holding: Immigration and Nationality Act § 212(c) only gives the Attorney General discretion to grant lawful permanent residents relief from inadmissibility, not deportation. The holding in *Tapia-Acuna v. INS*, 640 F.2d 223 (9th Cir. 1981) that there is no rational basis for providing § 212(c) relief from inadmissibility but not deportation is overruled.

Navajo Nation v. United States Forest Service, 06-15371 / 06-15436 / 06-15455

Three-Judge Panel Opinion: 479 F.3d 1024 (9th Cir. 2007)

Order Taking Case En Banc: 506 F.3d 717 (9th Cir. 2007)

Date of Order Taking Case En Banc: October 17, 2007

Status: Affirmed district court's judgment in favor of the United States Forest Service. Mandate issued 6/24/09.

En Banc Order: 535 F.3d 1058 (9th Cir. 2008)

Date of En Banc Order: August 8, 2008

Members of En Banc Court: Alex Kozinski, Harry Pregerson, Diarmuid F. O'Scannlain, Pamela A. Rymer, Andrew J. Kleinfeld, Barry G. Silverman, William A. Fletcher, Raymond C. Fisher, Richard R. Clifton, Carlos T. Bea, Sandra S. Ikuta

Subject Matter: Appeal of the district court's summary judgment and judgment following a bench trial, in an action brought by Indian tribes and environmental groups under the Religious Freedom Restoration Act, the National Environmental Protection Act, and the National Historic Preservation Act, challenging the Forest Service's approval of a proposed expansion of the Arizona Snowbowl ski area on Humphrey's Peak.

Holding: The Tribes failed to establish a RFRA violation, because the presence of recycled wastewater on the ski area would not coerce the Tribes to act contrary to their religious beliefs, nor would it condition a benefit upon conduct that would violate their religious beliefs. The Religious Land Use and Institutionalized Persons Act of 2000 is inapplicable to this case.

Sarei v. Rio Tinto, PLC, 02-56256 / 02-56390

Three-Judge Panel Opinion: 487 F.3d 1193 (9th Cir. 2007)

Order Taking Case En Banc: 499 F.3d 923 (9th Cir. 2007)

Date of Order Taking Case En Banc: August 20, 2007

En Banc Order: 550 F.3d 822 (9th Cir. 2008)

Date of En Banc Order: December 16, 2008

Status: Remand for consideration, in the first instance, of whether exhaustion of local remedies was required, in dismissal of Alien Tort Statute ("ATS") action.

Members of En Banc Court: Mary M. Schroeder, Harry Pregerson, Stephen R. Reinhardt, Andrew J. Kleinfeld, Barry G. Silverman, M.M. McKeown, Marsha S. Berzon, Johnnie B. Rawlinson, Consuelo M. Callahan, Carlos T. Bea, Sandra S. Ikuta

Subject Matter: Appeal of the district court's dismissal of a class action complaint brought by current and former residents of the island of Bougainville in Papua New Guinea against a mining company under the Alien Tort Claims Act.

Holding: Certain ATS claims are appropriately considered for exhaustion under both domestic prudential standards and core principles of international law. Defendant bears the burden to plead and justify an exhaustion requirement, including the availability of local remedies.