

STATUS OF PENDING EN BANC CASES

Today's Date: September 15, 2008

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)

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: Calendared September 23, 2008, 2:00 p.m., San Francisco, California

Members of En Banc Court: Not yet available

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: Not yet decided.

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

Status: Calendared September 24, 2008, 10:00 a.m., San Francisco, California

Members of En Banc Court: Not yet available

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: Not yet decided.

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.

Sprint Telephony PCS v. County of San Diego, 05-56076

Three-Judge Panel Opinion: 479 F.3d 1061 (9th Cir. 2007)

Order Taking Case En Banc: 527 F.3d 791 (9th Cir. 2008)

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

En Banc Order: 2008 WL 4166657 (9th Cir. September 11, 2008)

Date of En Banc Order: September 11, 2008

Status: Affirmed in part and reversed in part the district court's summary judgment.

Members of En Banc Court: Alex Kozinski, Andrew J. Kleinfeld, Michael Daly Hawkins, A. Wallace Tashima, Sidney R. Thomas, Barry G. Silverman, Susan P. Graber, Ronald M. Gould, Marsha S. Berzon, Richard C. Tallman, Jay S. Bybee

Subject Matter: Appeal of the district court's grant of a permanent injunction against enforcement of a zoning ordinance regulating wireless telecommunications facility placement.

Holding: The ordinance did not prohibit the provision of wireless telecommunications services and therefore did not violate the Telecommunications Act. Overruling *Auburn v. Qwest Corp.*, 260 F.3d 1160 (9th Cir. 2001), the en banc court held that a plaintiff suing a municipality under 47 U.S.C. § 253(a) must show actual or effective prohibition, rather than the mere possibility of prohibition. The en banc court also held that 42 U.S.C. § 1983 claims cannot be brought for violations of 47 U.S.C. § 253.

Estrada-Espinoza v. Mukasey, 05-75850

Three-Judge Panel Opinion: 498 F.3d 933 (9th Cir. 2007)

Order Taking Case En Banc: 525 F.3d 821 (9th Cir. 2008)

Date of Order Taking Case En Banc: May 6, 2008

Status: Argued and submitted June 25, 2008

Members of En Banc Court: Alex Kozinski, Harry Pregerson, Stephen R. Reinhardt, Andrew J. Kleinfeld, Michael Daly Hawkins, Sidney R. Thomas, Barry G. Silverman, Ronald M. Gould, Richard A. Paez, Richard C. Tallman, Richard R. Clifton

Subject Matter: Petition for review from the Board of Immigration Appeals' decision finding petitioner removable as an aggravated felon based upon his

conviction for statutory rape, in violation of California Penal Code § 261.5(c).

Holding: Not yet decided.

United States v. Snellenberger, 06-50169

Three-Judge Panel Opinion: 493 F.3d 1015 (9th Cir. 2007)

Order Taking Case En Banc: 519 F.3d 908 (9th Cir. 2008)

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

Status: Argued and submitted June 25, 2008

Members of En Banc Court: Alex Kozinski, Stephen R. Reinhardt, Pamela Ann Rymer, Andrew J. Kleinfeld, Michael Daly Hawkins, Sidney R. Thomas, Susan P. Graber, William A. Fletcher, Ronald M. Gould, Richard C. Tallman, Milan D. Smith, Jr.

Subject Matter: Appeal of criminal conviction for bank robbery and career offender sentence.

Holding: Not yet decided.

Fisher v. City of San Jose Police Dept., 04-16095

Three-Judge Panel Opinion: 509 F.3d 952 (9th Cir. 2007)

Order Taking Case En Banc: 519 F.3d 908 (9th Cir. 2008)

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

Status: Argued and submitted June 26, 2008

Members of En Banc Court: Alex Kozinski, Harry Pregerson, Stephen R. Reinhardt, Diarmuid F. O'Scannlain, Pamela Ann Rymer, Sidney R. Thomas, Ronald M. Gould, Richard A. Paez, Richard C. Tallman, Jay S. Bybee, N. Randy Smith

Subject Matter: Appeal of district court's entry of judgment as a matter of law in a warrantless arrest 42 U.S.C. § 1983 action.

Holding: Not yet decided.

Marmolejo-Campos v. Mukasey, 04-76644

Three-Judge Panel Opinion: 503 F.3d 922 (9th Cir. 2007)

Order Taking Case En Banc: 519 F.3d 907 (9th Cir. 2008)

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

Status: Argued and submitted June 23, 2008.

Members of En Banc Court: Alex Kozinski, Harry Pregerson, Diarmuid F. O'Scannlain, Andrew J. Kleinfeld, Barry G. Silverman, Raymond C. Fisher, Richard A. Paez, Marsha S. Berzon, Richard C. Tallman, Richard R. Clifton, Jay S. Bybee

Subject Matter: Petition for review from the Board of Immigration Appeals' decision finding that petitioner's state court conviction for aggravated driving

under the influence constituted a crime involving moral turpitude.

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.

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: Argued and submitted March 25, 2008.

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: Not yet decided.

The Lands Council v. McNair, 07-35000

Three-Judge Panel Opinion: 494 F.3d 771 (9th Cir. 2007)

Order Taking Case En Banc: 512 F.3d 1204 (9th Cir. 2008)

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

En Banc Order: 494 F.3d 771 (9th Cir. 2008)

Date of En Banc Order: July 2, 2008

Status: Affirmed the district court's denial of a preliminary injunction. Petition for rehearing en banc by the full court denied.

Members of En Banc Court: Alex Kozinski, Pamela A. Rymer, Andrew J. Kleinfeld, Michael D. Hawkins, Barry G. Silverman, M.M. McKeown, Raymond C. Fisher, Marsha S. Berzon, Richard R. Clifton, Milan D. Smith, Jr., N. Randy Smith

Subject Matter: Appeal of the district court's order denying a preliminary injunction to halt the United States Forest Service's Mission Brush Project, which would allow selective logging in the Idaho Panhandle National Forests.

Holding: Environmental groups were not likely to succeed on their National Environmental Policy Act or National Forest Management Act claims, and did not show that the balance of hardships would tip sharply in their favor if the Mission Brush Project proceeded.

United States v. Seljan, 05-50236

Three-Judge Panel Opinion: 497 F.3d 1035 (9th Cir. 2006)

Order Taking Case En Banc: 512 F.3d 1203 (9th Cir. 2008)

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

Status: Argued and submitted March 27, 2008

Members of En Banc Court: Alex Kozinski, Pamela A. Rymer, Barry G. Silverman, M.M. McKeown, Raymond C. Fisher, Johnnie B. Rawlinson, Richard R. Clifton, Consuelo M. Callahan, Carlos T. Bea, Milan D. Smith, Jr., Sandra Ikuta

Subject Matter: Appeal of criminal conviction and sentence for attempting to travel in interstate commerce to engage in illicit sexual conduct, using interstate facilities to entice a minor into engaging in criminal sexual activity, and possessing and producing child pornography.

Holding: Not yet decided.

Garcia v. Brockway, 05-35647

Thompson v. Gohres Construction, 06-15042

Three-Judge Panel Opinion: 503 F.3d 1092 (9th Cir. 2007)

Order Taking Case En Banc: 512 F.3d 1089 (9th Cir. 2008)

Date of Order Taking Case En Banc: January 7, 2008

En Banc Order: 526 F.3d 456 (9th Cir. 2008)

Date of En Banc Order: May 13, 2008

Status: The three-judge panel decision, *Garcia v. Brockway*, 503 F.3d 1092 (9th

Cir. 2007), as amended, is adopted as the opinion of the en banc court. Summary judgment and dismissal affirmed. Mandate issued in 05-35647 June 4, 2008.

Members of En Banc Court: Alex Kozinski, Harry Pregerson, Stephen R. Reinhardt, Andrew J. Kleinfeld, Barry G. Silverman, M.M. McKeown, Kim M. Wardlaw, Johnnie B. Rawlinson, Richard R. Clifton, Carlos T. Bea, N. Randy Smith

Subject Matter: Appeals of district courts' dismissals of Federal Housing Act suits as time-barred.

Holding: The two-year statute of limitations begins to run on a design-and-construction claim regarding accessibility features in multifamily dwellings at the conclusion of the design and construction phase, which is the date the last certificate of occupancy is issued.

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.

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.

Villegas v. City of Gilroy, 05-15725

Three-Judge Panel Opinion: 484 F.3d 1136 (9th Cir. 2007)

Order Taking Case En Banc: 503 F.3d 974 (9th Cir. 2007)

Date of Order Taking Case En Banc: September 14, 2007

Status: Affirmed district court's judgment in favor of the City of Gilroy and the Gilroy Garlic Festival Association (GGFA).

En Banc Order: 2008 WL 4058566 (9th Cir. August 3, 2008)

Date of En Banc Order: September 3, 2008

Members of En Banc Court: Alex Kozinski, Diarmuid F. O'Scannlain, Pamela A. Rymer, Sidney R. Thomas, M.M. McKeown, Kim M. Wardlaw, Raymond C. Fisher, Ronald M. Gould, Richard A. Paez, Consuelo M. Callahan, N. Randy Smith

Subject Matter: Appeal of the district court's summary judgment in a 42 U.S.C. § 1983 action brought by motorcycle club members alleging First Amendment violations arising from their exclusion from a festival in a city park.

Holding: Guests at the Gilroy Garlic Festival could not hold the City and the GGFA liable for escorting them from the Festival for violating the dress code. The en banc court held that GGFA was not a state actor for purposes of § 1983 liability and the City of Gilroy was not liable under *Monell v. Department of Social Services*, 436 U.S. 658, 691 (1978), for violating the First Amendment by enforcing the GGFA dress code.

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

Status: Argued and submitted October 11, 2007

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: Not yet decided.

Anderson v. Terhune, 04-17237

Three-Judge Panel Opinion: 467 F.3d 1208 (9th Cir. 2006)

Order Taking Case En Banc: 486 F.3d 1155 (9th Cir. 2007)

Date of Order Taking Case En Banc: May 14, 2007

Status: Reversed district court's denial of a habeas corpus petition.

En Banc Order: 516 F.3d 781 (9th Cir. 2008)

Date of En Banc Order: February 15, 2008

Members of En Banc Court: Mary M. Schroeder, Stephen R. Reinhardt, Sidney

R. Thomas, Barry G. Silverman, M.M. McKeown, Kim M. Wardlaw, William A. Fletcher, Ronald M. Gould, Richard A. Paez, Richard C. Tallman, Johnnie B. Rawlinson, Richard R. Clifton, Consuelo M. Callahan, Carlos T. Bea, Sandra S. Ikuta

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.

Holding: Petitioner was denied his constitutional right to remain silent and the admission of his involuntary confession into evidence violated his right to due process, where he invoked his Fifth Amendment right to terminate police interrogation by saying, "I plead the Fifth," and a police officer's continued questioning violated the right. The state court's conclusion that the petitioner's invocation was ambiguous was an unreasonable application of *Miranda v. Arizona* and based on an unreasonable determination of the facts.

Chamber of Commerce v. Lockyer, 03-55166 / 03-55169

Three-Judge Panel Opinion: 422 F.3d 973 (9th Cir. 2005)

Order Taking Case En Banc: 435 F.3d 999 (9th Cir. 2006)

Date of Order Taking Case En Banc: January 17, 2006

Status: Reversed the district court's summary judgment and vacated its injunction prohibiting enforcement of California Assembly Bill 1889 (AB 1889). On June 19, 2008, the Supreme Court, in *Chamber of Commerce v. Brown*, 06-939, reversed the en banc court's decision. The Supreme Court held that provisions of the statute were preempted by federal law mandating that certain zones of labor activity be unregulated.

En Banc Order: 463 F.3d 1076 (9th Cir. 2006)

Date of En Banc Order: September 21, 2006

Members of En Banc Court: Mary M. Schroeder, Stephen R. Reinhardt, Robert R. Beezer, Alex Kozinski, Andrew J. Kleinfeld, Michael D. Hawkins, Sidney R. Thomas, Barry G. Silverman, M.M. McKeown, Kim M. Wardlaw, Raymond C. Fisher, Richard A. Paez, Johnnie B. Rawlinson, Richard R. Clifton, Consuelo M. Callahan

Subject Matter: Whether AB 1889, which bars employers from spending "state funds" on union-related speech, is preempted by the National Labor Relations Act.

Holding: The Bill does not undermine federal labor policy, is not preempted by the National Labor Relations Act, and does not violate the First Amendment.