

## STATUS OF PENDING EN BANC CASES

Today's Date: May 11, 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)*

### **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:** To be calendared the week of June 22, 2009. Date and time to be determined

**Members of En Banc Court:** Not yet available

**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

### **Sanchez v. Mukasey, 04-75584**

**Three-Judge Panel Opinion:** 521 F.3d 1106 (9th Cir. 2008)

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

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

**Status:** Denial of a petition for review of the Board of Immigration Appeals' denial of cancellation of removal.

**En Banc Order:** 560 F.3d 1028 (9th Cir. 2009)

**Date of En Banc Order:** March 26, 2009

**Members of En Banc Court:** Alex Kozinski, Harry Pregerson, Diarmuid F. O'Scannlain, Pamela Ann Rymer, Andrew J. Kleinfeld, Barry G. Silverman, M. Margaret McKeown, Raymond C. Fisher, Richard A. Paez, Consuelo M. Callahan, N. Randy Smith

**Subject Matter:** Petition for review from the Board of Immigration Appeals' denial of cancellation of removal to petitioner based on lack of good moral character due to alien smuggling.

**Holding:** The family unity waiver of inadmissibility contained in 8 U.S.C. § 1182(d)(11) does not apply to an application for cancellation of removal. Overruling *Moran v. Ashcroft*, 395 F.3d 1089 (9th Cir. 2005), a cancellation applicant may not demonstrate good moral character notwithstanding his participation in family-only smuggling.

**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.

**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:** Argued and submitted September 23, 2008

**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:** 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

**En Banc Order:** 2009 WL 1163863 (May 1, 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.

#### **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

**En Banc Order:** 548 F.3d 699 (9th Cir. 2008)

**Date of En Banc Order:** October 28, 2008

**Status:** Affirmed district court's determination that prior conviction for burglary, in violation of California Penal Code § 459, qualified as a "crime of violence" under career offender provisions of Sentencing Guidelines. Mandate issued 3/31/09.

**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:** In applying the *Taylor* modified categorical approach, a district court may rely on a minute order prepared by a neutral officer of the court and whose content the defendant had the right to examine and challenge. The en banc court overruled *United States v. Diaz-Argueta*, 447 F.3d 1167, 1169 (9th Cir. 2006), to the extent it suggested the contrary.

**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

**En Banc Order:** 558 F.3d 1069 (9th Cir. 2009)

**Date of En Banc Order:** March 11, 2009

**Status:** Reversed district court's judgment as a matter of law. Mandate issued April 2, 2009.

**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:** Plaintiff's civil rights were not violated when police arrested him without a warrant.

**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:** Denied petition for review. Mandate issued 4/27/09.

**En Banc Order:** 558 F.3d 903 (9th Cir. 2009)

**Date of En Banc Order:** March 4, 2009

**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:** Chevron deference afforded to BIA precedential decision *In re Lopez-Meza*; Arizona state conviction constitutes a crime involving moral turpitude.

**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.

**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.

**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.