

## STATUS OF PENDING EN BANC CASES

Today's Date: October 8, 2012

*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). In those cases where the parties have filed petitions for rehearing en banc and oppositions, you can access the pdfs by clicking the case title.

### **Detrich v. Ryan, 08-99001**

**Three-Judge Panel Opinion:** 677 F.3d 958 (9th Cir. 2012)

**Order Taking Case En Banc:** 2012 WL 4513226 (9th Cir. October 3, 2012)

**Date of Order Taking Case En Banc:** October 3, 2012

**Status:** To be calendared the week of December 10, 2012, in Pasadena, California

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

**Subject Matter:** Appeal by Arizona state prisoner of the district court's denial of his 28 U.S.C. § 2254 habeas corpus petition challenging his jury conviction and capital sentence for first degree murder and kidnapping.

**Holding:** Not yet decided

### **Kilgore v. Keybank, National Association, 09-16703+**

**Three-Judge Panel Opinion:** 673 F.3d 947 (9th Cir. 2012)

**Order Taking Case En Banc:** 2012 WL 4327662 (9th Cir. September 21, 2012)

**Date of Order Taking Case En Banc:** September 21, 2012

**Status:** To be calendared the week of December 10, 2012, in Pasadena, California

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

**Subject Matter:** Consolidated appeals in student loan borrowers' putative class action against lenders seeking to enjoin them from collecting loans or reporting loan balances to credit reporting agencies.

**Holding:** Not yet decided

### **Stengel v. Medtronic Inc., 10-17755**

**Three-Judge Panel Opinion:** 676 F.3d 1159 (9th Cir. 2012)

**Order Taking Case En Banc:** 686 F.3d 1121 (9th Cir. 2012)

**Date of Order Taking Case En Banc:** July 25, 2012

**Status:** Argued and submitted September 19, 2012

**Members of En Banc Court:** Kozinski, Thomas, Silverman, Graber, McKeown, W. Fletcher, Gould, Rawlinson, Clifton, N. Smith, Watford

**Subject Matter:** Appeal from the district court's dismissal, as preempted by federal law, of state law claims against the manufacturer of a medical pain pump.

**Holding:** Not yet decided

### **Haskell v. Harris, 10-15152**

**Three-Judge Panel Opinion:** 669 F.3d 1049 (9th Cir. 2012)

**Order Taking Case En Banc:** 686 F.3d 1121 (9th Cir. 2012)

**Date of Order Taking Case En Banc:** July 25, 2012

**Status:** Argued and submitted September 19, 2012

**Members of En Banc Court:** Kozinski, Pregerson, McKeown, Fisher, Gould, Paez, Tallman, Rawlinson, M. Smith, N. Smith, Watford

**Subject Matter:** Appeal from the district court's denial of a preliminary injunction in a class action seeking to stop enforcement of the 2004 Amendment to California's DNA and Forensic Identification Data Base and Data Bank Act of 1998 (DNA Act).

**Holding:** Not yet decided

**Oshodi v. Holder, 08-71478**

**Three-Judge Panel Opinion:** 671 F.3d 1002 (9th Cir. 2012)

**Order Taking Case En Banc:** 678 F.3d 776 (9th Cir. 2012)

**Date of Order Taking Case En Banc:** May 3, 2012

**Status:** To be calendared the week of December 10, 2012, in Pasadena, California

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

**Subject Matter:** Petition for review from the Board of Immigration Appeals' order affirming an Immigration Judge's denial of asylum, withholding of removal and relief under the Convention Against Torture.

**Holding:** Not yet decided

**Cuellar De Osorio v. Mayorkas, 09-56786+**

**Three-Judge Panel Opinion:** 656 F.3d 954 (9th Cir. 2011)

**Order Taking Case En Banc:** 677 F.3d 921 (9th Cir. 2012)

**Date of Order Taking Case En Banc:** April 20, 2012

**En Banc Opinion:** 2012 WL 4373336 (9th Cir. September 26, 2012)

**Date of En Banc Opinion:** September 26, 2012

**Status:** Reversed the district court's grants of summary judgment in favor of the United States Citizen and Immigration Services.

**Members of En Banc Court:** Kozinski, Pregerson, McKeown, Wardlaw, W. Fletcher, Fisher, Gould, Paez, Rawlinson, M. Smith, Murguia

**Subject Matter:** Appeal of the district court's summary judgment upholding the Board of Immigration Appeals' (BIA) determination that appellants' children are not entitled to relief under the Child Status Protection Act (CSPA).

**Holding:** The BIA's holding in precedential decision *Matter of Wang*, 25 I. & N. Dec. 28 (BIA 2009), that the CSPA does not apply to all derivative beneficiaries, is not entitled to deference. The CSPA grants automatic conversion and priority date retention to aged-out derivative beneficiaries.

**Carrera v. Ayers, 08-99007**

**Three-Judge Panel Opinion:** 670 F.3d 938 (9th Cir. 2011)

**Order Taking Case En Banc:** 676 F.3d 1158 (9th Cir. 2012)

**Date of Order Taking Case En Banc:** April 12, 2012

**Status:** Argued and submitted June 20, 2012

**Members of En Banc Court:** Kozinski, Pregerson, W. Fletcher, Fisher, Berzon, Tallman, Clifton, Ikuta, N. Smith, Murguia, Christen

**Subject Matter:** Appeal of the district court's denial of a 28 U.S.C. § 2254 habeas

corpus petition challenging a conviction for robbery and first degree murder.

**Holding:** Not yet decided

**United States v. Cotterman, 09-10139**

**Three-Judge Panel Opinion:** 637 F.3d 1068 (9th Cir. 2011)

**Order Taking Case En Banc:** 673 F.3d 1206 (9th Cir. 2012)

**Date of Order Taking Case En Banc:** March 19, 2012

**Status:** Argued and submitted June 19, 2012.

**Members of En Banc Court:** Kozinski, B. Fletcher, Thomas, McKeown, Fisher, Gould, Clifton, Callahan, M. Smith, Murguia, Christen

**Subject Matter:** Interlocutory appeal by the United States from the district court's order suppressing evidence found on a laptop computer, in a prosecution for production of child pornography and other charges.

**Holding:** Not yet decided

**Garfias-Rodriguez v. Holder, 09-72603**

**Three-Judge Panel Opinion:** 649 F.3d 942 (9th Cir. 2011)

**Order Taking Case En Banc:** 672 F.3d 1125 (9th Cir. 2012)

**Date of Order Taking Case En Banc:** March 1, 2012

**Status:** Argued and submitted June 20, 2012

**Members of En Banc Court:** Kozinski, Reinhardt, Graber, Fisher, Gould, Paez, Rawlinson, Clifton, Bybee, Ikuta, Murguia

**Subject Matter:** Petition for review from the Board of Immigration Appeals' order finding that aliens inadmissible due to reentry after accruing more than one year of unlawful presence could not apply for adjustment of status.

**Holding:** Not yet decided

**United States v. Yopez, 09-50271**

**United States v. Acosta-Montes, 09-50409**

**Three-Judge Panel Opinion:** 652 F.3d 1182 (9th Cir. 2011)

**Order Taking Case En Banc:** 672 F.3d 1125 (9th Cir. 2012)

**Date of Order Taking Case En Banc:** March 1, 2012

**Status:** Argued and submitted June 21, 2012

**Members of En Banc Court:** Kozinski, Pregerson, Reinhardt, Thomas, Graber, Wardlaw, W. Fletcher, Gould, Rawlinson, Callahan, M. Smith

**Subject Matter:** Sentencing appeals involving issues of criminal-history calculations.

**Holding:** Not yet decided

**Henriquez-Rivas v. Holder, 09-71571**

**Three-Judge Panel Opinion:** Unpublished memorandum disposition: 2011 WL 3915529 (9th Cir. September 7, 2011)

**Order Taking Case En Banc:** 670 F.3d 1033 (9th Cir. 2012)

**Date of Order Taking Case En Banc:** January 31, 2012

**Status:** Argued and submitted March 20, 2012

**Members of En Banc Court:** Kozinski, Reinhardt, Graber, McKeown, Wardlaw, Fisher, Paez, Berzon, Bybee, Bea, N. Smith

**Subject Matter:** Petition for review from the Board of Immigration Appeals' order sustaining the government's appeal of an Immigration Judge's grant of asylum, and denying withholding of removal and protection under the Convention Against Torture.

**Holding:** Not yet decided

**Sessoms v. Runnels, 08-17790**

**Three-Judge Panel Opinion:** 650 F.3d 1276 (9th Cir. 2011)

**Order Taking Case En Banc:** 665 F.3d 1104 (9th Cir. 2011)

**Date of Order Taking Case En Banc:** December 15, 2011

**En Banc Opinion:** 691 F.3d 1054 (9th Cir. 2012)

**Date of En Banc Opinion:** August 16, 2012

**Status:** Reversed the district court's denial of petitioner's habeas corpus petition.

**Members of En Banc Court:** Kozinski, Schroeder, B. Fletcher, Silverman, Wardlaw, Fisher, Paez, Callahan, M. Smith, Ikuta, Murguia

**Subject Matter:** Appeal of district court's denial of habeas corpus petition challenging a felony murder conviction.

**Holding:** The California Court of Appeal unreasonably applied clearly established Supreme Court precedent in concluding that petitioner was required under *Davis v. United States*, 512 U.S. 452, 459 (1994), to unambiguously invoke his right to counsel.

**Lacey v. Maricopa County, 09-15703 / 09-15806**

**Three-Judge Panel Opinion:** 649 F.3d 1118 (9th Cir. 2011)

**Order Taking Case En Banc:** 663 F.3d 1032 (9th Cir. 2011)

**Date of Order Taking Case En Banc:** November 10, 2011

**En Banc Opinion:** 2012 WL 3711591 (9th Cir. August 29, 2012)

**Date of En Banc Opinion:** August 29, 2012

**Status:** Affirmed in part and reversed in part the district court's Fed. R. Civ. P. 12(b)(6) dismissal of plaintiffs' claims brought under 42 U.S.C. § 1983. Mandate issued September 21, 2012.

**Members of En Banc Court:** Kozinski, Schroeder, Pregerson, Reinhardt, W. Fletcher, Fisher, Tallman, Rawlinson, Bybee, Bea, Ikuta

**Subject Matter:** Cross-appeals in 42 U.S.C. § 1983 action brought by the Phoenix New Times newspaper, its writers, and its editor, alleging that defendants Sheriff Joseph Arpaio and the County Prosecutor and Special Prosecutor retaliated against them for publishing stories critical of defendants.

**Holding:** Special Prosecutor Dennis Wilenchik was not entitled to absolute immunity for claims arising from plaintiffs' arrests and for issuing purported grand jury subpoenas, and Sheriff Arpaio was not entitled to qualified immunity on plaintiffs' retaliation, false arrest and selective enforcement claims. Both were entitled to qualified immunity on plaintiffs' malicious prosecution claims. Maricopa County Attorney Andrew Thomas was entitled to absolute immunity for selecting and supervising Wilenchik as a special prosecutor because the appointment was a prosecutorial function. The en banc court overruled in part the rule in *Forsyth v. Humana, Inc.*, 114 F.3d 1467, 1474 (9th Cir. 1997), holding that "a plaintiff waives all claims alleged in a dismissed complaint which are not realleged in an amended complaint." The en banc court also held that plaintiffs adequately alleged the existence of a conspiracy between Wilenchik and Arpaio, and

reversed and remanded the dismissal of the conspiracy claim against Thomas.

**Movsesian, et al v. Versicherung AG, 07-56722**

**Three-Judge Panel Opinion:** 629 F.3d 901 (9th Cir. 2010)

**Order Taking Case En Banc:** 2011 WL 5336269 (9th Cir. November 7, 2011)

**Date of Order Taking Case En Banc:** November 7, 2011

**En Banc Opinion:** 670 F.3d 1067 (9th Cir. 2012)

**Date of En Banc Opinion:** February 23, 2012

**Status:** Reversed district court's order in class action.

**Members of En Banc Court:** Kozinski, Schroeder, Reinhardt, Thomas, Silverman, Graber, McKeown, Fisher, Paez, Rawlinson, Ilkuta

**Subject Matter:** Appeal of district court's order granting in part and denying in part insurer's motion to dismiss complaint by plaintiff class alleging breach of contract and other claims arising from insurance policies issued to Armenian Genocide victims.

**Holding:** California Code of Civil Procedure § 354.4, vesting California courts with jurisdiction over certain insurance claims brought by Armenian Genocide victims and extending the statute of limitations, is preempted under the foreign affairs doctrine.

**Beeman v. Anthem Prescription, 07-56692+**

**Three-Judge Panel Opinion:** 652 F.3d 1085 (9th Cir. 2011)

**Order Taking Case En Banc:** 661 F.3d 1199 (9th Cir. 2011)

**Date of Order Taking Case En Banc:** October 31, 2011

**En Banc Order:** 682 F.3d 779 (9th Cir. 2012); 682 F.3d 779 (9th Cir. 2012)

**Date of En Banc Order:** June 6, 2012

**Status:** The en banc court certified the following question to the California Supreme Court: Does California Civil Code § 2527 compel speech in violation of article I, section 2 of the California Constitution?

**Members of En Banc Court:** Kozinski, Pregerson, O'Scannlain, Thomas, Wardlaw, W. Fletcher, Gould, Berzon, Rawlinson, Clifton, N. Smith

**Subject Matter:** Appeal by defendants, pharmacy benefit managers, in action brought by plaintiffs, independent retail pharmacies, to enforce California Civil Code §§ 2527 and 2528.

**Holding:** Not yet decided.

**United States v. Milovanovic, 08-30381**

**Three-Judge Panel Opinion:** 627 F.3d 405 (9th Cir. 2010)

**Order Taking Case En Banc:** 655 F.3d 1106 (9th Cir. 2011)

**Date of Order Taking Case En Banc:** August 24, 2011

**En Banc Opinion:** 678 F.3d 713 (9th Cir. 2012)

**Date of En Banc Opinion:** April 24, 2012; amended May 22, 2012

**Status:** Reversed and remanded the district court's dismissal of a superseding indictment charging six defendants with honest services fraud.

**Members of En Banc Court:** Kozinski, Graber, Wardlaw, Gould, Paez, Tallman, Rawlinson, Clifton, Bea, M. Smith, Murguia

**Subject Matter:** Appeal by the United States of the district court's dismissal of an

indictment before trial for honest services mail fraud.

**Holding:** A fiduciary relationship is an element of honest services fraud under 18 U.S.C. §§ 1341 and 1346, but the relationship need not be a formal, or classic, fiduciary relationship. Foreseeable risk of economic harm is not a necessary element when evaluating breach of a fiduciary duty in violation of §§ 1341 and 1346, adopting instead a materiality test.

**Young v. Holder, 07-70949**

**Three-Judge Panel Opinion:** 634 F.3d 1014 (9th Cir. 2011)

**Order Taking Case En Banc:** 653 F.3d 897 (9th Cir. 2011)

**Date of Order Taking Case En Banc:** July 29, 2011

**En Banc Opinion:** 2012 WL 4074668 (9th Cir. Sept. 17, 2012)

**Date of En Banc Opinion:** September 17, 2012

**Status:** Petition for review dismissed in part and denied in part.

**Members of En Banc Court:** Kozinski, Schroeder, B. Fletcher, Pregerson, Kleinfeld, Graber, Fisher, Paez, Clifton, Bea, Ikuta

**Subject Matter:** Petition for review from the Board of Immigration Appeals' decision finding petitioner removable based on his conviction for violating California Health & Safety Code § 11352(a).

**Holding:** *Shepard v. United States* evidentiary limitations apply when determining under modified categorical approach whether a prior conviction renders an alien ineligible for cancellation. Guilty plea to conjunctively phrased charging document establishes conviction under at least one but not necessarily all theories. An alien cannot demonstrate eligibility for cancellation by showing that the record is inconclusive as to whether conviction is for an aggravated felony.

**Native Village of Eyak v. Locke, 09-35881**

**Prior En Banc Court Order:** *Eyak Native Village v. Daley*, 02-36155, 375 F.3d 1218 (9th Cir. 2004) (en banc)

**Date of Order Taking Case En Banc:** June 21, 2011

**En Banc Opinion:** 688 F.3d 619 (9th Cir. 2012)

**Date of En Banc Opinion:** July 31, 2012

**Status:** Affirmed the district court's post-trial dismissal of the Alaskan Native Villages' complaint. Mandate issued September 25, 2012.

**Members of En Banc Court:** Kozinski, Schroeder, Pregerson, Kleinfeld, Hawkins, Thomas, W. Fletcher, Paez, Tallman, Rawlinson, Clifton

**Subject Matter:** Appeal by Native Villages on remand from this court in prior en banc appeal, from district court's judgment in favor of the Secretary of Commerce in plaintiffs' action challenging fishing regulations and alleging nonexclusive aboriginal hunting and fishing rights in the Outer Continental Shelf off the southern coast of Alaska.

**Holding:** The Alaskan Native Villages failed to establish an entitlement to non-exclusive aboriginal hunting and fishing rights in the areas of the Outer Continental Shelf in the Gulf of Alaska. The court did not need to consider whether there was a conflict with the federal paramountcy doctrine, or whether the Secretary of Commerce's actions violated the Indian Non-Intercourse Act.

**Price v. Stevedoring Services of America, 08-71719**

**Three-Judge Panel Opinion:** 627 F.3d 1145 (9th Cir. 2010)

**Order Taking Case En Banc:** 653 F.3d 928 (9th Cir. 2011)

**Date of Order Taking Case En Banc:** August 1, 2011

**En Banc Opinion:** 2012 WL 3799775 (9th Cir. September 4, 2012)

**Date of En Banc Opinion:** September 4, 2012

**Status:** Affirmed in part and reversed in part the Benefits Review Board's decision affirming an Administrative Law Judge's order in claimant's action under the Longshore and Harbor Workers' Compensation Act.

**Members of En Banc Court:** Kozinski, Schroeder, Reinhardt, O'Scannlain, Thomas, Silverman, W. Fletcher, Gould, Berzon, Bea, Murguia

**Subject Matter:** Petition for review from a decision of the Benefits Review Board determining petitioner's average weekly wage and maximum compensation rate.

**Holding:** Overruling this court's prior precedent, the en banc court held that the Director of the Office of Workers' Compensation Programs' litigating position interpreting the Longshore Act did not merit *Chevron* deference. The Director's interpretations of the Longshore Act is entitled to *Skidmore* respect as to the proper rate of interest, but the Director is not entitled to *Skidmore* respect as to whether the interest should be simple or compound. The en banc court also held that 28 U.S.C. § 1961, not 26 U.S.C. § 6621, is to be used to calculate interest on past due payments under the Longshore Act.

**Garcia v. Benov, 09-56999**

**Three-Judge Panel Opinion:** Unpublished memorandum disposition: 395 Fed.Appx. 329 (9th Cir. 2010)

**Order Taking Case En Banc:** 636 F.3d 1174 (9th Cir. 2011)

**Date of Order Taking Case En Banc:** February 28, 2011

**En Banc Opinion:** 683 F.3d 952 (9th Cir. 2012)

**Date of En Banc Opinion:** June 8, 2012

**Status:** Vacated the district court's order granting a 28 U.S.C. § 2241 habeas petition challenging extradition to the Philippines, and remanded.

**Members of En Banc Court:** Kozinski, Pregerson, Thomas, Graber, Wardlaw, W. Fletcher, Berzon, Tallman, Clifton, M. Smith, Ikuta

**Subject Matter:** Appeal by an alien from the district court's denial of his petition for writ of habeas corpus challenging the Secretary of State's extradition decision.

**Holding:** The district court had jurisdiction under 28 U.S.C. § 2241 and the federal Constitution, and neither the REAL ID Act nor the Foreign Affairs Reform and Restructuring Act of 1998, which implemented the Convention Against Torture, repealed federal habeas jurisdiction. CAT and FARRA and their regulations generate a liberty interest under the Due Process Clause, which require the Secretary of State before extradition to determine whether it is "more likely than not" that an extraditee asserting a CAT claim will face torture. The doctrine of separation of powers and the rule of non-inquiry block any inquiry into the substance of the Secretary's declaration.

**Comite de Jornaleros v. City of Redondo, 06-55750**

**Three-Judge Panel Opinion:** 607 F.3d 1178 (9th Cir. 2010)

**Order Taking Case En Banc:** 623 F.3d 1054 (9th Cir. 2010)

**Date of Order Taking Case En Banc:** October 15, 2010

**En Banc Opinion:** 657 F.3d 936 (9th Cir. 2011)

**Date of En Banc Opinion:** September 16, 2011

**Status:** Affirmed the district court's summary judgment

**Members of En Banc Court:** Kozinski, Thomas, Graber, Gould, Berzon, Bybee, Callahan, Bea, M. Smith, Ikuta, N.R. Smith

**Subject Matter:** Appeal of district court's summary judgment in day laborers' First Amendment challenge to ordinance prohibiting solicitation of business on streets and highways.

**Holding:** The ordinance is a facially unconstitutional restriction on speech which failed to satisfy the narrow tailoring element of the Supreme Court's "time, place, and manner" test. Solicitation of business or employment constitutes protected expression under the First Amendment.