

STATUS OF PENDING EN BANC CASES

Today's Date: November 5, 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: 695 F.3d 1003 (9th Cir. 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

En Banc Opinion: 2012 WL 5077137 (9th Cir. October 19, 2012)

Date of En Banc Opinion: October 19, 2012

Status: Denied petition for review from the Board of Immigration Appeals' decision finding petitioner ineligible for adjustment of status.

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: The BIA's holding in *In re Briones*, 24 I. & N. Dec. 355 (BIA 2007), that inadmissible recidivist aliens may not seek adjustment of status, is entitled to *Chevron* deference. The contrary holding in *Acosta v. Gonzales*, 439 F.3d 550 (9th Cir. 2006) is overruled, and *Briones* applies retroactively. It was within the Attorney General's authority to enact regulation 8 C.F.R. § 1240.26(i), which automatically terminates voluntary departure upon the filing of a petition for review, abrogating *El Himri v. Ashcroft*, 344 F.3d 1261 (9th Cir. 2003).

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.

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, Ikuta

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.

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. Mandate issued October 31, 2012.

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.