

# GIBSON DUNN

## Supreme Court Round-Up

September 27, 2018  
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### Overview

The Supreme Court Round-Up previews upcoming cases, summarizes opinions, and tracks the actions of the Office of the Solicitor General. Each entry contains a description of the case, as well as a substantive analysis of the Court's actions.

### October Term 2018

### Cases Scheduled For Argument

1. *Weyerhaeuser Co. v. Fish & Wildlife Serv.*, No. 17-71 (5th Cir., 827 F.3d 452; cert. granted Jan. 22, 2018; argument scheduled Oct. 1, 2018). The Endangered Species Act requires the Secretary of the Interior to designate the “critical habitat” of an endangered species, which may include areas “occupied by the species,” plus “areas outside the geographical area occupied by the species” that are “essential for conservation of the species.” 16 U.S.C. § 1532(5)(A). The Fish and Wildlife Service designated a 1500-acre tract of land as critical habitat for the dusky gopher frog. The Questions Presented are: (1) Whether the Endangered Species Act allows the designation of private land that neither contains nor (absent a radical change in land use) could provide habitat for an endangered species. (2) Whether an agency’s decision not to exclude an area from critical habitat based on the economic impact of the designation is subject to judicial review.
2. *Mount Lemmon Fire Dist. v. Guido*, No. 17-587 (9th Cir., 859 F.3d 1168; cert. granted Feb. 26, 2018; argument scheduled Oct. 1, 2018). The Age Discrimination in Employment Act applies to private entities only if they had “twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year.” 29 U.S.C. § 630(b). Does the twenty-employee minimum apply to political subdivisions of a State, or does the Act apply to State political subdivisions of any size?
3. *Gundy v. United States*, No. 17-6086 (2d Cir., 695 F. App’x 639; cert. granted Mar. 5, 2018, limited to Question 4; argument scheduled Oct. 2, 2018). Whether the Sex Offender Registration and Notification Act’s delegation of authority to the Attorney General to issue regulations under 42 U.S.C. § 16913 violates the nondelegation doctrine.
4. *Madison v. Alabama*, No. 17-7505 (Ala. Cir. Ct., No. CC-1985-001385.80; cert. granted Feb. 26, 2018; argument scheduled Oct. 2, 2018). The Questions



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- Presented are: (1) Whether consistent with the Eighth Amendment, the State may execute a prisoner whose mental disability leaves him with no memory of his commission of the capital offense. (2) Whether the Eighth Amendment prohibits the execution of a prisoner whose competency has been compromised by dementia and multiple strokes.
5. *Knick v. Township of Scott*, No. 17-647 (3d Cir., 862 F.3d 310; cert. granted Mar. 5, 2018, limited to Question 1; argument scheduled Oct. 3, 2018). Whether the Court should reconsider the requirement that property owners exhaust state court remedies before a federal takings claim ripens.
  6. *New Prime Inc. v. Oliveira*, No. 17-340 (1st Cir., 857 F.3d 7; cert. granted Feb. 26, 2018; argument scheduled Oct. 3, 2018). Section 1 of the Federal Arbitration Act says that the Act does not apply “to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.” 9 U.S.C. § 1. The Questions Presented are: (1) Whether a dispute over the applicability of the Section 1 exemption must be resolved in arbitration pursuant to a valid delegation clause. (2) Whether the exemption applies to independent-contractor agreements.
  7. *Stokeling v. United States*, No. 17-5554 (11th Cir., 684 F. App’x 870; cert. granted Apr. 2, 2018; argument scheduled Oct. 9, 2018). Whether a prior conviction for robbery under Florida law—which requires as an element overcoming “victim resistance”—is categorically a “violent felony” under the Armed Career Criminal Act.
  8. *United States v. Stitt*, No. 17-765 (6th Cir., 860 F.3d 854; cert. granted Apr. 23, 2018, consolidated with *United States v. Sims*, No. 17-766 (8th Cir., 854 F.3d 1037); argument scheduled Oct. 9, 2018). Whether burglary of a nonpermanent or mobile structure that is adapted or used for overnight accommodation can qualify as “burglary” under the Armed Career Criminal Act.
  9. *Nielsen v. Preap*, No. 16-1363 (9th Cir., 831 F.3d 1193 & 667 F. App’x 966; cert. granted Mar. 19, 2018; argument scheduled Oct. 10, 2018). Whether a criminal alien becomes exempt from mandatory detention under 8 U.S.C. § 1226(c) if, after the alien is released from criminal custody, the Department of Homeland Security does not take him into immigration custody immediately.
  10. *Air & Liquid Sys. Corp. v. Devries*, No. 17-1104 (3d Cir., 873 F.3d 232; cert. granted May 14, 2018; argument scheduled Oct. 10, 2018). Whether products-liability defendants can be held liable under maritime law for injuries caused by products that they did not make, sell, or distribute.
  11. *Henry Schein, Inc. v. Archer & White Sales, Inc.*, No. 17-1272 (5th Cir., 878 F.3d 488; cert. granted June 25, 2018; argument scheduled Oct. 29, 2018). Whether the Federal Arbitration Act permits a court to decline to enforce an agreement delegating questions of arbitrability to an arbitrator if the court concludes that the claim of arbitrability is “wholly groundless.”



The American Lawyer named Gibson Dunn a Finalist in its 2018 Litigation Department of the Year competition, noting that, over the past decade, “Gibson Dunn’s army kept on overpowering, outmaneuvering, and plain old clobbering its opponents in court.” This award followed our unprecedented three wins in this biennial competition – as the 2016, 2012, and 2010 Litigation Department of the Year – and 2014 Finalist honors.

12. ***Lamps Plus, Inc. v. Varela***, No. 17-988 (9th Cir., 701 F. App’x 670; cert. granted Apr. 30, 2018; argument scheduled Oct. 29, 2018). Whether the Federal Arbitration Act forecloses a state-law interpretation of an arbitration agreement that would authorize class arbitration based solely on general language commonly used in arbitration agreements.
13. ***Wash. State Dep’t of Licensing v. Cougar Den, Inc.***, No. 16-1498 (Wash., 392 P.3d 1014; CVSG Oct. 2, 2017; cert. supported May 15, 2018; cert. granted June 25, 2018; argument scheduled Oct. 30, 2018). An 1855 treaty between the United States and the Yakama Indian Nation provides tribal members with “the right, in common with citizens of the United States, to travel upon all public highways.” Can Washington enforce a state tax upon a tribal member for importing fuel into Washington on the public highways?
14. ***Garza v. Idaho***, No. 17-1026 (Idaho, 405 P.3d 576; cert. granted June 18, 2018; argument scheduled Oct. 30, 2018). For purposes of ineffective assistance of counsel, does a presumption of prejudice apply where a criminal defendant instructs his trial counsel to file a notice of appeal, but trial counsel decides not to do so because the defendant’s plea agreement included an appeal waiver?
15. ***Jam v. Int’l Fin. Corp.***, No. 17-1011 (D.C. Cir., 860 F.3d 703; cert. granted May 21, 2018, limited to Question 1; argument scheduled Oct. 31, 2018). The Questions Presented are: (1) Whether the International Organizations Immunities Act—which affords international organizations the “same immunity” from suit that foreign governments have—confers the same immunity on those organizations as foreign governments have under the Foreign Sovereign Immunities Act. (2) If not, what rules govern the immunity to which international organizations are entitled?
16. ***Frank v. Gaos***, No. 17-961 (9th Cir., 869 F.3d 737; cert. granted Apr. 30, 2018; argument scheduled Oct. 31, 2018). Whether, or in what circumstances, a *cy pres* award of class action proceeds that provides no direct relief to class members supports class certification and comports with Federal Rule of Civil Procedure 23’s requirement that a class settlement be “fair, reasonable, and adequate.”
17. ***Sturgeon v. Frost***, No. 17-949 (9th Cir., 872 F.3d 927; cert. granted June 18, 2018; argument scheduled Nov. 5, 2018). Does the Alaska National Interest Lands Conservation Act prohibit the National Park Service from exercising regulatory control over State, Native Corporation, and private land physically located within the boundaries of the National Park System in Alaska?
18. ***Va. Uranium, Inc. v. Warren***, No. 16-1275 (4th Cir., 848 F.3d 590; CVSG Oct. 2, 2017; cert. supported Apr. 9, 2018; cert. granted May 21, 2018; argument scheduled Nov. 5, 2018). Whether the Atomic Energy Act of 1954 preempts Virginia’s moratorium on uranium mining on nonfederal lands.



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19. *Bucklew v. Precythe*, No. 17-8151 (8th Cir., 883 F.3d 1087; cert. granted Apr. 30, 2018, with Question 4 directed by the Court; argument scheduled Nov. 6, 2018). The Questions Presented are: (1) Whether a court evaluating an as-applied challenge to a State’s method of execution based on an inmate’s rare and severe medical condition may assume that medical personnel are competent to manage his condition and that the procedure will go as intended. (2) Must evidence comparing a State’s method of execution to an alternative proposed by the inmate be offered by a single witness, or should a court on a motion for summary judgment look to the record as a whole to determine whether a factfinder could conclude that the methods significantly differ in the risks they pose to the defendant? (3) Does the Eighth Amendment require an inmate to prove an adequate alternative method of execution when raising an as-applied challenge to the State’s proposed method of execution based on his rare and severe medical condition? (4) Whether the petitioner met his burden to prove what procedures would be used to administer his proposed alternative method of execution, the severity and duration of pain likely to be produced, and how they compare to the State’s method of execution.
20. *BNSF Railway Co. v. Loos*, No. 17-1042 (8th Cir., 865 F.3d 1106; cert. granted May 14, 2018; argument scheduled Nov. 6, 2018). Whether a railroad’s payment to an employee for time lost from work is taxable under the Railroad Retirement Tax Act.
21. *Republic of Sudan v. Harrison*, No. 16-1094 (2d Cir., 802 F.3d 399; CVSG Oct. 2, 2017; cert. petition should be held in abeyance May 22, 2018; cert. granted June 25, 2018; argument scheduled Nov. 7, 2018). Whether a plaintiff suing a foreign state under the Foreign Sovereign Immunities Act may serve the foreign state under 28 U.S.C. § 1608(a)(3) by mail addressed and dispatched to the head of the foreign state’s ministry of foreign affairs via the foreign state’s diplomatic mission in the United States.
22. *Culbertson v. Berryhill*, No. 17-773 (11th Cir., 861 F.3d 1197; cert. granted May 21, 2018; argument scheduled Nov. 7, 2018). Under 42 U.S.C. § 406(b), when a “court renders a judgment favorable” to a Social Security claimant “who was represented before the court by an attorney, the court may determine and allow as part of its judgment a reasonable fee for such representation, not in excess of 25 percent of the total of the past-due benefits to which the claimant is entitled by reason of such judgment.” The Question Presented is whether the 25-percent cap applies only to fees for representation in court, or also to fees for representation at the administrative level.



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## Cases Awaiting An Argument Date

1. *Carpenter v. Murphy*, No. 17-1107 (10th Cir., 875 F.3d 896; cert. granted May 21, 2018). Whether the 1866 territorial boundaries of the Creek Nation within the former Indian Territory of eastern Oklahoma constitute an “Indian reservation” today under 18 U.S.C. § 1151(a).
2. *Lorenzo v. SEC*, No. 17-1077 (D.C. Cir., 872 F.3d 578; cert. granted June 18, 2018). Whether a misstatement, without more, can serve as the basis for a fraudulent-scheme claim under SEC Rule 10b-5(a).
3. *Timbs v. Indiana*, No. 17-1091 (Ind., 84 N.E.3d 1179; cert. granted June 18, 2018). Whether the Eighth Amendment’s Excessive Fines Clause is incorporated against the States under the Fourteenth Amendment.
4. *Apple Inc. v. Pepper*, No. 17-204 (9th Cir., 846 F.3d 313; CVSG Oct. 10, 2017; cert. supported May 8, 2018; cert. granted June 18, 2018). iPhone apps are available only through the App Store, and Apple charges independent software developers an annual fee to submit apps to be sold in the App Store. Do consumers have standing to seek antitrust damages based on that fee, or are they “indirect purchasers” who lack standing to assert antitrust claims under *Illinois Brick Co. v. Illinois*?
5. *Dawson v. Steager*, No. 17-419 (W. Va., 2017 WL 2172006; CVSG Jan. 8, 2018; cert. supported May 15, 2018; cert. granted June 25, 2018, limited to Question Presented by SG). Whether the doctrine of intergovernmental tax immunity, as codified by 4 U.S.C. § 111, prohibits the State of West Virginia from exempting from state taxation the retirement benefits of retired state law enforcement officers without providing the same exemption for retired employees of the U.S. Marshals Service.
6. *Nutraceutical Corp. v. Lambert*, No. 17-1094 (9th Cir., 870 F.3d 1170; cert. granted June 25, 2018). Federal Rule of Procedure 23(f) sets a 14-day deadline to file a petition for permission to appeal an order granting or denying class certification. Is that deadline subject to equitable exceptions that would excuse a party’s failure to timely file a petition for permission to appeal or a motion for reconsideration?
7. *Biestek v. Berryhill*, No. 17-1184 (6th Cir., 880 F.3d 778; cert. granted June 25, 2018). To determine whether an applicant is eligible for Social Security benefits, an administrative-law judge must determine whether the applicant “can make an adjustment to other work,” 20 C.F.R. § 404.1520(a)(4)(v), and that determination must be supported by substantial evidence, 42 U.S.C. § 405(g). Does a vocational expert’s testimony constitute substantial evidence of “other work” available to an applicant, when the expert does not provide the data underlying the testimony?



The preeminence of the group is underscored by its placement on *The National Law Journal's* 2017 Appellate Hot List, which recognized 20 firms that “posted hard-fought wins at the U.S. Supreme Court or in federal circuit courts.”



Benchmark Litigation in 2018 recognized Gibson Dunn as the Appellate Firm of the Year.



Law360 named Gibson Dunn a 2017 Appellate Practice Group of the Year.



U.S. News - Best Lawyers® “Best Law Firms” recognized Gibson Dunn as the 2018 Appellate Law Firm of the Year.

8. *Helsinn Healthcare S.A. v. Teva Pharm. USA, Inc.*, No. 17-1229 (Fed. Cir., 855 F.3d 1356; cert. granted June 25, 2018). Whether, under the Leahy-Smith America Invents Act, an inventor’s sale of an invention to a third party that is obligated to keep the invention confidential qualifies as prior art for purposes of determining the patentability of the invention.
9. *Herrera v. Wyoming*, No. 17-532 (Wyo. Dist. Ct., No. 2016-242; CVSG Jan. 8, 2018; cert. supported May 22, 2018; cert. granted June 28, 2018). Whether Wyoming’s admission to the Union or the establishment of the Bighorn National Forest abrogated the Crow Tribe of Indians’ federal treaty rights to hunt such that those rights could not serve as a bar to criminal prosecution for unlawful hunting under state law.
10. *Fourth Estate Pub. Benefit Corp. v. Wall-Street.com, LLC*, No. 17-571 (11th Cir., 856 F.3d 1338; CVSG Jan. 8, 2018; cert. supported May 16, 2018; cert. granted June 28, 2018). Section 411(a) of the Copyright Act says that no civil action for infringement of a copyright shall be instituted until preregistration or registration of the copyright claim has been made. 17 U.S.C. § 411(a). Does “registration of [a] copyright claim” occur when the copyright holder delivers the required application, deposit, and fee to the Copyright Office, or when the Copyright Office acts on the application?
11. *Gamble v. United States*, No. 17-646 (11th Cir., 694 F. App’x 750; cert. granted June 28, 2018). Whether the Court should overrule the “separate sovereigns” exception to the Double Jeopardy Clause.
12. *Nieves v. Bartlett*, No. 17-1174 (9th Cir., 712 F. App’x 613; cert. granted June 28, 2018). Does the existence of probable cause defeat a First Amendment retaliatory arrest claim under 42 U.S.C. § 1983?
13. *Franchise Tax Bd. of Cal. v. Hyatt*, No. 17-1299 (Nev., 407 P.3d 717; cert. granted June 28, 2018). Whether *Nevada v. Hall*, 440 U.S. 410 (1979), which permits a sovereign State to be haled into another State’s courts without its consent, should be overruled?
14. *Obduskey v. McCarthy & Holthus LLP*, No. 17-1307 (10th Cir., 879 F.3d 1216; cert. granted June 28, 2018). Whether the Fair Debt Collection Practices Act applies to non-judicial foreclosure proceedings.
15. *Merck Sharp & Dohme Corp. v. Albrecht*, No. 17-290 (3d Cir., 852 F.3d 268; CVSG Dec. 4, 2017; cert. supported May 22, 2018; cert. granted June 28, 2018). Does the FDA’s rejection of a drug-label warning preempt a state-law failure-to-warn claim based on the absence of that warning?
16. *Thacker v. Tenn. Valley Auth.*, No. 17-1201 (11th Cir., 868 F.3d 979; cert. granted Sept. 27, 2018). The Questions Presented are: (1) May the Tennessee Valley Authority invoke immunity for its performance of governmental, discretionary functions? (2) If so, did the court of appeals correctly apply the discretionary-function test?



17. *Home Depot U.S.A., Inc. v. Jackson*, No. 17-1471 (4th Cir., 880 F.3d 165; cert. granted Sept. 27, 2018, with Question 2 directed by the Court). The Questions Presented are: (1) Whether an original defendant to a class-action claim can remove the class action if it otherwise satisfies the jurisdictional requirements of the Class Action Fairness Act when the class action was originally asserted as a counterclaim against a co-defendant. (2) Should this Court's holding in *Shamrock Oil & Gas Co. v. Sheets*, 313 U.S. 100 (1941)—that an original plaintiff may not remove a counterclaim against it—extend to third-party counterclaim defendants?
18. *Azar v. Allina Health Servs.*, No. 17-1484 (D.C. Cir., 863 F.3d 937; cert. granted Sept. 27, 2018, with the Question Presented limited by the Court). Whether 42 U.S.C. § 1395hh(a)(2) or § 1395hh(a)(4) required the Department of Health and Human Services to conduct notice-and-comment rulemaking before providing the challenged instructions to a Medicare Administrator Contractor making initial determinations of payments due under Medicare.
19. *Rimini Street, Inc. v. Oracle USA, Inc.*, No. 17-1625 (9th Cir., 879 F.3d 948; cert. granted Sept. 27, 2018). Whether the Copyright Act's allowance of "full costs" (17 U.S.C. § 505) to a prevailing party is limited to taxable costs under 28 U.S.C. §§ 1920 and 1821 or also authorizes non-taxable costs.
20. *Tenn. Wine & Spirits Retailers Ass'n v. Byrd*, No. 18-96 (6th Cir., 883 F.3d 608; cert. granted Sept. 27, 2018). Whether the Twenty-first Amendment empowers States, consistent with the dormant Commerce Clause, to regulate liquor sales by granting retail or wholesale licenses only to individuals or entities that have resided in-state for a specified time.

## Pending Original Cases

1. *Mississippi v. Tennessee*, No. 22O143 (Original Jurisdiction; CVSG Oct. 20, 2014; leave to file bill of complaint opposed May 12, 2015; leave to file bill of complaint granted June 29, 2015). The Questions Presented are: (1) Whether the Court will grant Mississippi leave to file an original action to seek relief from respondents' use of a pumping operation to take approximately 252 billion gallons of high quality groundwater. (2) Whether Mississippi has sole sovereign authority over and control of groundwater naturally stored within its borders, including in sandstone within Mississippi's border. (3) Whether Mississippi is entitled to damages, injunctive, and other equitable relief for the Mississippi intrastate groundwater intentionally and forcibly taken by respondents.
2. *Delaware v. Pennsylvania & Wisconsin*, No. 22O145 (Original Jurisdiction; leave to file a bill of complaint granted Oct. 3, 2016; consolidated with *Arkansas v. Delaware*, No. 22O146). Whether check-like instruments that function like a money order or traveler's check, issued in relatively large amounts by a bank or other financial institution, are governed by the Disposition of Abandoned Money Orders and Traveler's Checks Act of 1974,



12 U.S.C. § 2501 *et seq.*, and which State has authority to claim ownership of such instruments that go unclaimed.

## Pending Cases Calling For The Views Of The Solicitor General

1. *Missouri v. California*, No. 22O148 (Original Jurisdiction; CVSG Apr. 16, 2018). Whether a California law requiring farms raising egg-laying hens to let those hens move around freely violates the Commerce Clause.
2. *Indiana v. Massachusetts*, No. 22O149 (Original Jurisdiction; CVSG Apr. 16, 2018). Whether a Massachusetts law barring sales of eggs, pork, and veal from animals confined in a cruel manner violates the Commerce Clause.
3. *Kansas v. Garcia*, No. 17-834 (Kan., 401 P.3d 588; CVSG Apr. 16, 2018). Under regulations implementing the Immigration Reform and Control Act, all prospective employees, whether citizens or aliens, must fill out a so-called Form I-9. Although employers face civil and criminal penalties for violations of the Act, the statute’s express preemption provision says that States are prohibited from imposing penalties on employers of unauthorized aliens. The Questions Presented are: (1) Whether a State may use information entered on a Form I-9 in a prosecution when the same information appears in other documents. (2) If the Act preempts any use of that information, whether Congress has the constitutional authority to preempt State authority so broadly.
4. *Gilead Sciences, Inc. v. United States ex rel. Campie*, No. 17-936 (9th Cir., 862 F.3d 890; CVSG Apr. 16, 2018). The False Claims Act creates a cause of action, which private parties may invoke on the Government’s behalf, based on the submission of false claims to the Government for payment. A plaintiff must show that any misrepresentation was material to the Government’s payment decision. The Question Presented is whether a misrepresentation is material if the Government pays a claim in full despite knowledge of the alleged misrepresentation and the pleadings do not otherwise suggest the misrepresentation was material.
5. *Osage Wind, LLC v. Osage Minerals Council*, No. 17-1237 (10th Cir., 871 F.3d 1078; CVSG May 14, 2018). The Questions Presented are: (1) Whether the court of appeals had jurisdiction over an appeal filed by a nonparty that did not participate in any capacity in the district court, but where the suit was filed by the United States as trustee for that nonparty. (2) Whether the court of appeals erred in applying the Indian canon of construction to interpret the term “mining” under the Osage Act to include the removal of dirt and rocks in order to construct a structure on the surface.
6. *City of Cibolo v. Green Valley Special Util. Dist.*, No. 17-938 (5th Cir., 866 F.3d 339; CVSG May 21, 2018). Under 7 U.S.C. § 1926(b), a rural utility association that receives a federal loan for water or wastewater infrastructure enjoys monopoly protection for “[t]he service provided or



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made available” by the association during the term of the loan. The Questions Presented are: (1) Whether the term “service” refers to the service funded by the loan or all services provided by the loan recipient. (2) Whether an association, to show it has “provided or made available” the service, must show that the service is or can promptly be furnished or whether the association must show that it had a legal duty under state law to provide the service.

7. *Airline Serv. Providers v. L.A. World Airports*, No. 17-1183 (9th Cir., 873 F.3d 1074; CVSG June 4, 2018). Although federal labor law and the Airline Deregulation Act generally preempt state and local regulations concerning labor-management relations and airline prices, an exception applies where the state or local government does not exercise its sovereign power to regulate, but instead purchases goods or services in the marketplace. The City of Los Angeles enacted a licensing rule barring companies from providing services to airlines at Los Angeles International Airport unless they enter into a “labor peace” agreement with any union that demands one. Does the “market participant” exception apply given that the City owns and operates the Airport?
8. *Republic of Sudan v. Owens*, No. 17-1236 (D.C. Cir., 864 F.3d 751; CVSG June 11, 2018). The Questions Presented are: (1) Whether plaintiffs suing a foreign state bear a lighter burden in establishing the facts necessary for jurisdiction than in proving a case on the merits. (2) Whether plaintiffs suing a foreign state can establish facts necessary for jurisdiction based solely on the opinion testimony of terrorism experts. (3) Whether a plaintiff’s failure to prove that a foreign state specifically intended or directly advanced a terrorist attack is relevant to proximate cause and jurisdictional causation under the Foreign Sovereign Immunities Act’s terrorism exception.
9. *Opati v. Republic of Sudan*, No. 17-1268 (D.C. Cir., 864 F.3d 751; CVSG June 11, 2018). The Questions Presented are: (1) Whether a party who does not contest a nonjurisdictional legal issue before judgment may demonstrate extraordinary and exceptional circumstances warranting appellate review of the issue post-judgment. (2) Whether the Foreign Sovereign Immunities Act applies retroactively to permit punitive damages under 28 U.S.C. § 1605A(c) against foreign states for terrorist activities occurring before the current version of the statute was enacted.
10. *Republic of Sudan v. Opati*, No. 17-1406 (D.C. Cir., 864 F.3d 751; CVSG June 11, 2018). The Questions Presented are: (1) Whether the term “extrajudicial killing” under the Foreign Sovereign Immunities Act means a summary execution by state actors. (2) Whether foreign sovereign immunity may be withdrawn for emotional distress claims brought by family members of victims under the Act. (3) Whether 28 U.S.C. § 1605A(c) provides the exclusive remedy for actions brought under § 1605A(a), and thus forecloses state causes of action previously asserted through the “pass through” provision of 28 U.S.C. § 1606. (4) Whether the statute of limitations contained in § 1605A(b) is jurisdictional in nature, and if not, whether the D.C. Circuit should have heard Sudan’s limitations defense asserted through



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a timely, direct appeal. (5) Whether the undisputed fact of civil war, internal strife, and partitioning of Sudan into two countries constitutes excusable neglect or extraordinary circumstances for vacatur under Federal Rule of Civil Procedure 60(b).

11. *Ass'n des Eleveurs de Canards et d'Oies du Quebec v. Becerra*, No. 17-1285 (9th Cir., 870 F.3d 1140; CVSG June 18, 2018). The Questions Presented are: (1) Whether a State's ban on the sale of federally approved poultry products based on the State's disapproval of the way in which the poultry product was produced imposes an "ingredient requirement" in addition to or different than those in the Poultry Products Inspection Act. (2) Whether Congress has preempted the field of poultry products regulation.
12. *Harvey v. Ute Indian Tribe of Uintah & Ouray Reservation*, No. 17-1301 (Utah, 2017 UT 75; CVSG June 25, 2018). The Questions Presented are: (1) Whether the tribal remedies exhaustion doctrine, which requires federal courts to stay cases challenging tribal jurisdiction until the parties have exhausted parallel tribal court proceedings, applies to state courts as well. (2) Whether the tribal remedies exhaustion doctrine requires that nontribal courts yield to tribal courts when the parties have not invoked the tribal court's jurisdiction.
13. *de Csepel v. Republic of Hungary*, No. 17-1165 (D.C. Cir., 859 F.3d 1094; CVSG June 25, 2018). Whether, under the Foreign Sovereign Immunities Act, a foreign state itself is immune from suit in the United States in a case in which rights in property taken in violation of international law are in issue, the property is located outside the United States, the property is owned or operated by an agency or instrumentality of the foreign state, and that agency or instrumentality is engaged in commercial activity in the United States.

## CVSG Cases In Which The Solicitor General Supported Certiorari

1. *Va. Uranium, Inc. v. Warren*, No. 16-1275 (4th Cir., 848 F.3d 590; CVSG Oct. 2, 2017; cert. supported Apr. 9, 2018; cert. granted May 21, 2018; argument scheduled Nov. 5, 2018). Whether the Atomic Energy Act of 1954 preempts Virginia's moratorium on uranium mining on nonfederal lands.
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3. *Dawson v. Steager*, No. 17-419 (W. Va., 2017 WL 2172006; CVSG Jan. 8, 2018; cert. supported May 15, 2018; cert. granted June 25, 2018, limited to



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Question Presented by SG). Whether the doctrine of intergovernmental tax immunity, as codified by 4 U.S.C. § 111, prohibits the State of West Virginia from exempting from state taxation the retirement benefits of retired state law enforcement officers without providing the same exemption for retired employees of the U.S. Marshals Service.

4. *Wash. State Dep't of Licensing v. Cougar Den, Inc.*, No. 16-1498 (Wash., 392 P.3d 1014; CVSG Oct. 2, 2017; cert. supported May 15, 2018; cert. granted June 25, 2018; argument scheduled Oct. 30, 2018). An 1855 treaty between the United States and the Yakama Indian Nation provides tribal members with “the right, in common with citizens of the United States, to travel upon all public highways.” Can Washington enforce a state tax upon a tribal member for importing fuel into Washington on the public highways?
5. *Fourth Estate Pub. Benefit Corp. v. Wall-Street.com, LLC*, No. 17-571 (11th Cir., 856 F.3d 1338; CVSG Jan. 8, 2018; cert. supported May 16, 2018; cert. granted June 28, 2018). Section 411(a) of the Copyright Act says that no civil action for infringement of a copyright shall be instituted until preregistration or registration of the copyright claim has been made. 17 U.S.C. § 411(a). Does “registration of [a] copyright claim” occur when the copyright holder delivers the required application, deposit, and fee to the Copyright Office, or when the Copyright Office acts on the application?
6. *Merck Sharp & Dohme Corp. v. Albrecht*, No. 17-290 (3d Cir., 852 F.3d 268; CVSG Dec. 4, 2017; cert. supported May 22, 2018; cert. granted June 28, 2018). Does the FDA’s rejection of a drug-label warning preempt a state-law failure-to-warn claim based on the absence of that warning?
7. *Herrera v. Wyoming*, No. 17-532 (Wyo. Dist. Ct., No. 2016-242; CVSG Jan. 8, 2018; cert. supported May 22, 2018; cert. granted June 28, 2018). Whether Wyoming’s admission to the Union or the establishment of the Bighorn National Forest abrogated the Crow Tribe of Indians’ federal treaty rights to hunt such that those rights could not serve as a bar to criminal prosecution for unlawful hunting under state law.

## CVSG Cases In Which The Solicitor General Opposed Certiorari

1. *Republic of Sudan v. Harrison*, No. 16-1094 (2d Cir., 802 F.3d 399; CVSG Oct. 2, 2017; cert. petition should be held in abeyance May 22, 2018; cert. granted June 25, 2018; argument scheduled Nov. 7, 2018). Whether a plaintiff suing a foreign state under the Foreign Sovereign Immunities Act may serve the foreign state under 28 U.S.C. § 1608(a)(3) by mail addressed and dispatched to the head of the foreign state’s ministry of foreign affairs via the foreign state’s diplomatic mission in the United States.



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