

No. 19-1341

In the Supreme Court of the United States

RICHARD A. VAN AUKEN, TRUSTEE AND
RICHARD A. VAN AUKEN, BENEFICIARY,
PETITIONERS,

v.

FLETCHER R. CATRON, ESQ.;
PETER F. WIRTH, ESQ.; AND
KAREN AUBREY, ESQ.,
RESPONDENTS.

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE NEW MEXICO COURT OF APPEALS*

PETITION FOR REHEARING

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PETITION FOR REHEARING

Pursuant to Rules 44.2 and 14.1(c), Petitioners respectfully petition this Court for rehearing.

References are made herein to the Body and Appendices of the underlying *Petition for a Writ of Certiorari* by Petitioners in this Case (No. 19-1341).

I. New Facts Strengthen Case for Requested Due Process Review

In accordance with the requirement set forth in Rule 44-2, the grounds for this *Petition for Rehearing* are limited to the following three new "intervening circumstances [that have] a substantial or controlling effect" on arguments in the *Petition for Writ of Certiorari* that was entered on June 1, 2020:

- (i) the *Motion for Leave to File Brief of Amici Curiae and Brief for Center for Estate Administration Reform, et al. in Support of Petitioners* that was entered on July 6, 2020;
- (ii) this Court's decision in *McGirt v. Oklahoma* (No. 18-9526) decided on July 9, 2020; and
- (iii) the Confirmation Hearings of the U.S. Senate Judiciary Committee for Nominee Amy Coney Barrett held on October 12, 13, and 14, 2020.

As detailed in the following sections, each of the above "intervening" events develops and strengthens the argument for review of the Due Process Question presented in the underlying *Petition*. The Question addresses the abuse of state court equity powers in failing to enforce a valid trust contract that had been breached by equity theft, the unlawful redirection of estate assets to an outside party. [Pet., p.4, ¶¶ 2-3]

II. *Amici Brief* Documents Broad Relevance of Due Process Question in New Mexico and in Many Other States

Amici including a nonprofit foundation in North Carolina, an informal coalition of people in New Mexico, and several individuals in these two states submitted an *Amici Brief* in support of the June *Petition* in this Case where the *Amici Brief* was considered by this Court prior to denial of the underlying *Petition*. Petitioners call to the attention of this Court that among the individuals are at least two who are currently in active cases in New Mexico that directly involve the Due Process Question presented and two more for whom relevant cases are now closed. Petitioners would also like to note that the foundation and coalition are in contact with large numbers (hundreds) of other individuals who are experiencing or who have experienced such Due Process losses as a result of rulings on law by judges exercising the equity powers of the state courts in New Mexico and approximately twenty other states.

The relevance of these many current and past *amici* cases is further increased by two additional new intervening events presented below.

III. Senate Committee Hearing on Barrett Nomination Provides Contrast Between Equity Powers and Legal Powers of U.S. Courts

The recent public hearings held by the Judiciary Committee of the United States Senate regarding the confirmation of Amy Coney Barrett, a legal scholar and judge (now justice), have provided Petitioners and others with fresh insight into the workings of the

law and the *legal powers* of the courts. The hearings also provided contrast with state court *equity powers* that use fairness and good conscience to resolve matters involving wills, estates, trusts, probate, guardianship, and injunctive relief.

Some of the testimony during Day Two of the hearings, October 13th, provides direct support to the argument for review of the Due Process Question presented in the *Petition*.

***Due Process Affirmation Frames Equity
Loophole Set Forth in Petition and Amici Brief***

In a discussion of U. S. Supreme Court precedent regarding rights (like abortion) "grounded" but "not expressed" in the Constitution, Judge (now Justice) Barrett stated:

So both the Fourteenth and Fifth Amendments protect life or provide that the state cannot take life, liberty, or property without due process of law.¹

The *Petition* and the *Amici Brief* both address a Constitutional right (that the state cannot take property without due process of law) that appears to be widely violated by equity courts in the taking of estate property while willfully ignoring valid contracts that are breached in the process. This creates another, related Question: Has a loophole been carved out of the Constitutional right to Due Process in the taking of property that allows state courts to ignore valid contracts as part of their "equity" powers?

¹ See: <https://www.rev.com/blog/transcripts/amy-coney-barrett-senate-confirmation-hearing-day-2-transcript> at 46:24

"Government of Laws, Not Men" Does Not Extend to Equity Rulings

In supporting the originalism and textualism philosophy of her mentor Justice Antonin Scalia, Judge (now Justice) Barrett stated:

Got a law, a government of laws, not of men.²

She further detailed her reliance on the law as follows:

Because I think that both statutes and the Constitution are law. They derive their democratic legitimacy from the fact that they have been enacted, in the case of statutes, by the people's representatives, or in the case of the Constitution, through the Constitution making process. And I, as a judge, have an obligation to respect and enforce only that law that the people themselves have embraced.³

This testimony appears to be not about equity rulings or decisions rendered by a court in exercising its equity powers. Since their inception in medieval England, equity powers (as exercised by the Lord Chancellor and the Chancery Courts) were always about "fairness" and rulings made "in good conscience." The powers have always been exercised by a person unconstrained by much in the way of written guidance.⁴ There are several general guidelines or "maxims" of equity such as "one who

² Ibid at 55:31

³ Ibid at 01:31:07

⁴ Loring, A Trustee's Handbook, Chapter One

seeks equity must do equity," but for the most part equity rulings are unappealable decisions of individual judges (persons, both men and women). Equity rulings, thus, do not seem to be part of a "government of laws, not of men."

A relevant maxim of equity states that "equity must follow the law." Accordingly, the *Petition* and the *Amici Brief* create a more granular Due Process Question for this Court: Under the U. S. Constitution, does an equity ruling made by a state court need to respect valid written estate contracts?

Judicial Bias Concerns are of Greater Significance in Equity Courts

Perhaps because of controversy arising from an earlier confirmation hearing involving Judge (now Justice) Barrett, the direct question of judicial bias was addressed right at the beginning of the recent hearing:

Chairman Lindsey Graham: (17:56):
Can you set aside whatever Catholic beliefs you have regarding any issue before you?

Amy Coney Barrett: (18:02):
I can. I have done that in my time on the Seventh Circuit. If I stay on the Seventh Circuit, I'll continue to do that. If I'm confirmed to the Supreme Court, I will do that still.⁵

The earlier confirmation hearing was held on September 6, 2017 on the nomination of then Professor Barrett to the Seventh Circuit Court of

⁵ Ibid

Appeals and the controversy arose from the following statement on judicial bias made by Senator Diane Feinstein regarding Professor Barrett's Catholic beliefs:

I think in your case, professor, when you read your speeches, the conclusion one draws is that the Dogma lives loudly within you.

And that's of concern when you come to big issues that large numbers of people have thought for, for years in this country.⁶

The "government of laws, not of men" philosophy properly responds to this question of judicial bias because judicial rulings are built from and follow the language of the written law that applies.

However, no such written starting point or building blocks exist for equity matters. The judge is to reach a decision on the basis of "fairness" and "good conscience" presumably by "balancing the equities" between the parties. There is no check on any personal bias a judge may have. Petitioner argues that "dogma" every bit as powerful as that of the Catholic beliefs cited by Senator Graham is present in most judges, namely, the set of rules, procedures, standards, relationships, and business structures promulgated by the legal profession in practice, in law schools, and in the legislature.

Accordingly, the *Petition* and the *Amici Brief* create for this Court two key aspects of the Due Process

⁶ See: <https://www.independent.co.uk/news/world/americas/us-politics/amy-coney-barrett-supreme-court-diana-feinstein-ruth-bader-ginsburg-b512741.html>

Question regarding the unlawful redirection of estate assets to outsiders or unintended others:

- (i) Do predatory lawyers have a distinct judicial advantage in equity rulings against non-attorney family members in estate administration?
- (ii) Do cooperating judges usually favor lawyers from their own local bar over non-attorney family members in estate administration?

IV. Decision in *McGirt v. Oklahoma* Provides Legal Rationale for Redressing Violations of the Law by Equity Rulings in Lower Courts

There is a sufficient amount of correlation between key elements in the recent decision in *McGirt v. Oklahoma* and the principal facts in the *Van Auken v. Catron, et al.* (2006) case underlying the *Petition* and the *Amici Brief* to suggest that a review of *Van Auken* might usefully produce a result similar to *McGirt*. The contracts in both cases were created by parties now deceased, the contracts were violated or breached on more than one occasion, someone referenced in the written terms of the contract recently attempted enforcement of contract terms, and an authority in each case had the power to void the contract but didn't exercise that power.

Contracts Are Created by Ancestors

The contract in *McGirt* is a 1833 treaty between the U. S. Congress and the Creek Nation of Indians as reaffirmed in 1866. [*McGirt*; pp.1-2, § (a); pp.3-6]

The contract in *Van Auken* is a 1978 family trust agreement between Petitioners' parents (mother and

step-father) and a trustee (that was initially themselves, jointly) as amended in 1992.

All parties involved in the creation and execution of these contracts are currently deceased.

Ancestral Contracts Are Violated with Impunity

Promises made by the U. S. Congress to the Creek Nation of Indians were broken on numerous occasions since 1833. [McGirt; p.2, §(b)(2); pp.8-13 and p.2, §(b)(3); pp.13-17]

Following the death of Petitioners' mother in 1992, terms of the trust agreement were breached on two separate occasions by the first successor trustee (Petitioners' step-father) with the legal assistance of, in the first breach, Respondent Peter F. Wirth, Esq. and, in the second breach, Respondent Fletcher R. Catron, Esq. Both breaches redirected family property held by the trustee under the terms of the family trust contract to an outsider (a hospice nurse) not named as a beneficiary in the contract. [Pet: pp.34a-38a]

Notwithstanding evident violation of the contract terms, both contracts still exist today.

Ancestral Contracts Can Be Enforced

Jimmy McGirt, an enrolled member of the Seminole Nation covered by the Creek treaty, petitioned to enforce the terms of the treaty in connection with his rights to a criminal trial by the U. S. Courts instead of the state courts of Oklahoma. [McGirt; p.1, lines 10-12]

Petitioner Richard A. Van Auken, a beneficiary named in the family trust contract of 1978 [Pet: p.57a, §ii] and, since 2005, its third successor trustee in accordance with a 1992 contract amendment, has

sought to enforce the terms of the family trust contract against (i) predatory attorneys responsible for the redirection of valuable family property to an outsider and (ii) cooperating judges in the New Mexico State Courts responsible for a failure to recognize the validity and to determine the meaning of the trust contract in a long series of equity decisions. [Pet: pp.36a-38a]

Ancestral Contracts Can Be Voided

The U. S. Congress has the power to "disestablish" the federal reservation created by the 1833 treaty. [McGirt; p.2, § (b)(1); pp.6-8]

The New Mexico State Courts have the power to abrogate Petitioners' family trust contract of 1978.

Neither the U.S. Congress or the New Mexico State Courts ever exercised their respective power to void the treaty or family trust contract.

Summarizing the substantial and controlling facts that the decision in *McGirt* has provided to the arguments presented in the *Petition* and in the *Amici Brief*, the reversal of state court rulings on jurisdiction is based on the validity of an 1833 contract that, in spite of numerus violations of the contract terms by one party (the U. S. Congress), Jimmy McGirt's attempt to enforce the contract terms succeeds as the contract is still in force because the only party with the power to void the contract (the U. S. Congress) failed to do so in an explicit manner as required.

Accordingly, the *Petition* and the *Amici Brief* create for this Court two more key aspects of the Due Process Question regarding the unlawful redirection

of estate assets to outsiders or unintended others in this Case:

- (i) Should the claims brought against the Respondents in 2006 based on the terms of a family trust contract be reinstated because the contract, though being breached and ignored by the state courts of New Mexico, is still valid because these same courts have failed to explicitly void the contract?
- (ii) Should this standard requiring explicit action by state courts if the terms of a valid contract are to be voided or breached, be applied to litigation in all equity court cases nationwide?

V. *Petition* Presents Unique Opportunity to Curb Current Equity Theft Abuses by Predatory Attorneys and Cooperating Judges in Lower Courts

The *Amici Brief* documents the broad national crisis in estate trafficking or probate abuse - or equity theft as this situation is presented in the *Petition*. The trillion-dollar-per-year wealth transfer market is a prime opportunity for estate planners and attorneys. And it is growing. Also growing is the amount of illicit activity to redirect assets built up over a lifetime to individuals other than those named in wealth transfer plans and contracts. Property is being stolen from estates and a growing number of family member beneficiaries are being stripped of assets while a growing number of predatory attorneys backed up by cooperating judges in the state courts are getting rich in this racket involving redirected estate property.

This *Petition for Rehearing* is a final attempt to convince this Court that this equity theft racket is worth addressing and that a timely opportunity to do so exists right now. As Judge (now Justice) Barrett stated during Day Two of her confirmation hearing in the U.S. Senate:

[C]ourts, because they are reactive, can't reach out to right wrongs that don't come to them in the situation of a case or controversy.⁷

So a judge can't walk in one day and say, "I feel like visiting the question of healthcare and telling people what I think." We can't even think about the law or how it would apply until litigants bring a real live case with real live parties and a real life dispute before us.⁸

Van Auken v. Catron, et al. (2006) represents fourteen years of state court litigation over the redirection from the Seton Family Trust of property in Santa Fe formerly owned by naturalist Ernest Thompson Seton. Respondents include Fletcher R. Catron, Esq., great-grandson of Thomas B. Catron, Esq., one of the first U.S. Senators for New Mexico, and Peter F. Wirth, Esq., the current Majority Leader of the New Mexico State Senate.

This is a real live Case that involves real live parties and a real life dispute. Moreover, this Case contains a five generation, ninety-year sweep of time that is not uncommon in large equity theft cases.

⁷ Op. Cit. rev.com/transcripts at 04:27:23

⁸ Ibid at 04:22:23

A case like this one does not come along very often. Petitioners have done their best in bringing a significant case to this Court for its review. [Pet: pp. iii-vii]

Moreover, time is of the essence as the equity theft racket appears to be growing. The money being made from redirected estate assets is substantial while enforcement is virtually non-existent. And the flow of money has been spread to a variety of related businesses and professionals that have come to depend on this income. One suspects financial ties between predatory attorneys and cooperating judges.

While the underlying Case in the *Petition* and the *Amici Brief* is a civil matter, equity theft is really a criminal act and the organized equity theft racketeers qualify as a criminal enterprise. One thing seems certain: the predatory attorneys and cooperating judges at the center of these various equity theft schemes are not going to stop their illicit practices on their own. Some sort of serious legal and/or enforcement activity must be brought to bear to force them to stop.

This Court should come to see the illicit redirection of estate assets to outsiders or unintended others by predatory attorneys and cooperative state court judges as a significant priority in allocating its calendar time.

CONCLUSION

In the above five sections, significant new information pertaining to the June 1, 2020 *Petition for a Writ of Ceriorari* has been presented that provides this Court with (i) notice of a national crisis in state court abuse of equity powers that affects

millions of people, redirects tens of billions of dollars in estate assets annually, and threatens more than a trillion dollars in inter-generational wealth transfer each year; (ii) an understanding of how the arbitrary judge-based nature of these equity powers that the state courts are abusing is quite different from the better known encoded-law-based operation of judicial legal powers; (iii) the creation of additional support for the Due Process Question of the *Petition* through six more detailed Questions⁹ about how valid estate contracts might be handled in an equity proceeding; (iv) a fourteen-year old case (Petitioners' Case) that is ready to be used to **begin** to curb the growth of equity abuse and equity theft; and (v) a legal framework from *McGirt* that could be used to enhance enforcement of estate contracts.

For all of these five reasons, this *Petition for Rehearing* should be granted and the Due Process Question presented in the June 1st *Petition for a Writ of Certiorari* should be re-considered for review by this Court.

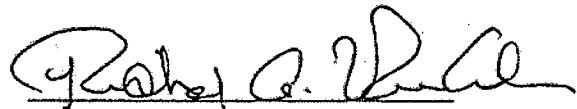
Respectfully submitted

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⁹ Find these six new Questions on pages 3, 5, 7, 7, 10, and 10 above

CERTIFICATE OF PETITIONER

I hereby certify that this *Petition for Rehearing* is presented in good faith and not for delay and is restricted to the grounds specified in Rule 44.2.



Richard A. Van Auken, Trustee