No. 22-170

In The

Supreme Court of the United States

DANIEL BECKWITT,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

PETITION FOR REHEARING

DANIEL L. BECKWITT
Petitioner, pro se
660 Quince Orchard Road #1020
Gaithersburg, MD 20878
(301)-337-7252
Beckwitt.v.MD@googlemail.com

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PETITION FOR REHEARING

Pursuant to Supreme Court Rule 44.2, Daniel Beckwitt, *pro se,* ("Petitioner") hereby respectfully petitions for a rehearing of the denial of a writ of certiorari to review the judgment below of the Court of Appeals of Maryland in *Beckwitt v. Maryland*, No. 22-170, October Term 2022, ordered this October 3rd, 2022, and in support thereof states as follows:

REASONS FOR GRANTING THE PETITION

This Court should reconsider addressing the important Due Process and preemption issues presented in the petition. The decision below is an outrageous case of statutorily non-criminal conduct retroactively criminalized at common law, a fair warning violation far exceeding *Bouie v. City of Columbia,* 378 U.S. 347 (1964). Petitioner's case additionally involves the elimination of an offense element and reduction in the burden of proof, a combination representing among the *most flagrant* of *Bouie* violations *in reported judicial history*. The behavior of the Court of Appeals in usurping legislative authority to retroactively concoct a *fake "fire code"* in this case is tantamount to a *judicial bill of attainder*. Reversing this case is not merely "*error correction*" best left to habeas litigation, but a supervisory exercise in preserving some semblance of legitimacy for the American criminal justice system.

Petitioner's case implicates important Due Process reliance interests on a state legislature's decision to preemptively decriminalize conduct, a concern that applies equally to jurisdictional federal preemption in both civil and criminal litigation. Recently, "legislatures in many states began to engage in a new and more aggressive form of intentional and extensive preemption" R. Briffault, "*The New Preemption Reader*", pp. 11 (2019). As discussed *infra*, there is now deepening confusion as to whether jurisdictional preemption is merely a kind of affirmative defense; that threatens the reliance interest on preemption across a vast number of preemptively regulated industries.

THE CIRCUITS HAVE NOW SPLIT ON THE AFFIRMATIVE NATURE OF JURISDICTIONAL PREEMPTION DEFENSES

Illustrating the urgent need for this Court's guidance on the application of preemption to state criminal prosecutions, the Tenth Circuit recently decided *Pacheco v. El Habti*, 48 F.4th 1179 (10th Cir. 2022), in which it declined to retroactively apply this Court's holding in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020) to pending federal habeas petitioners.

In *McGirt*, this Court held that a large portion of Oklahoma had never been disestablished as Indian country, thereby giving exclusive jurisdiction

to federal and tribal authorities over crimes committed by Indians covered by the Major Crimes Act. *See* 140 S. Ct. at 2477. In *Oklahoma v. Castro-Huerta*, 142 S.Ct. 2486 (2022), this Court recognized *McGirt* as an "ordinary" federal preemption issue (*See Id.* at 2494) and held the "Federal Government and the State have concurrent jurisdiction to prosecute crimes committed by non-Indians against Indians in Indian country" *Id.* at 2504-2505.

In *Pacheco*, the Tenth Circuit held that the *McGirt* preemption defense did not implicate actual innocence because it was a type of "legal innocence" rather than "factual innocence". *See Pacheco,* 48 F.4th at 1186-1190. Ms. Pacheco, a Native American convicted in Oklahoma state court for a murder within a reservation covered by the Major Crimes Act, was not allowed to amend her habeas petition to assert the *McGirt* defense.

The Tenth Circuit admitted Pacheco's actual innocence argument "may be literally accurate" *Id.* at 1187. Although the Tenth Circuit did not specifically discuss the substantive or procedural nature of the *McGirt* defense in *Pacheco*, it characterized *McGirt* preemption as an "affirmative defense" (*See Id.* n.7 at 1187) in aligning with *State ex rel. Matloff v. Wallace*, 497 P.3d 686, 688 (Okla. Crim. App. 2021), *cert. denied sub nom. Parish v. Oklahoma*, —— U.S. ——, 142 S. Ct. 757, 211 L.Ed.2d 474 (2022) which

held *McGirt* was a *procedural*, rather than *substantive*, decision.

While the Tenth Circuit was patently correct in noting Ms. Pacheco's conduct was morally culpable, its preemption analysis has greatly deepened the confusion over the nature of jurisdictional preemption defenses. It erroneously viewed "actual innocence" as applying only to morally non-culpable conduct, which is inconsistent with this Court's holding in *Bousley v. United States*, 523 U.S. 614, 623-24 (1998).

In *Pacheco*, the Tenth Circuit relied heavily on this Court's decision in *Gosa v. Mayden*, 413 U.S. 665 (1973), which declined to retroactively vacate a court martial conviction for non-service connected conduct. Crucially, however, this Court noted the conviction was not "void *ab initio*" *Id.* at 675. "Far from being a minor procedural matter, a lack of subject matter jurisdiction goes to the very power of a court to hear a controversy; and thus, any "decision" by a court lacking subject matter jurisdiction is a nullity, *void ab initio*." *Alabama Hospital Ass'n v. United States*, 656 F.2d 606, 610 (Fed. Cir. 1981). As the Tenth Circuit had previously recognized, "Absence of jurisdiction in the convicting court is indeed a basis for federal habeas corpus relief cognizable under the due process clause." *Yellowbear v. Wyoming Attorney General*, 525 F.3d 921, 924 (10th Cir. 2008).

The *Pacheco* and *Matloff* decisions misapprehend the kind of preemption defense that *McGirt* created. "[C]omplete preemption is jurisdictional in nature rather than an affirmative defense to a claim under state law. As such, it authorizes removal to federal court even if the complaint is artfully pleaded to include solely state law claims for relief or if the federal issue is initially raised solely as a defense." *Johnson v. Baylor University*, 214 F.3d 630, 632 (5th Cir. 2000). *McGirt* is actually a type of *complete preemption* that "place[s] certain criminal laws and punishments altogether beyond the State's power to impose," *Montgomery v. Louisiana*, 577 U.S. 190, 201 (2016) by displacing substantive state law overlapping with the Major Crimes Act and thereby making the exclusive forum federal or tribal.

The decisions refusing to apply *McGirt* retroactively have created serious confusion by focusing on the *accuracy* of the factfinding process *rather than the trial court's authority to conduct that process*. Historically, "A habeas court could grant relief if the court of conviction lacked jurisdiction over the defendant or his offense." *Edwards v. Vannoy*, 141 S. Ct. 1547, 1567 (2021).

By treating the *McGirt* defense as merely affirmative and subject to waiver, rather than rendering the conviction *void ab initio*, the Tenth

Circuit in *Pacheco* has effectively suspended the writ of habeas corpus *for the very kind of claim it was originally understood to encompass*. "Still, [this] Court has not squarely addressed whether these procedural bars applied specifically to claims based on subject matter jurisdiction—the very types of claims that habeas corpus was intended to protect—would constitute a suspension of the writ. Thus, to disallow certain claims based on subject matter jurisdiction because they are untimely, unexhausted, or successive *may* constitute an unlawful suspension of the writ of habeas corpus." B. Gibson, "*Lessons from McGirt v. Oklahoma's Habeas Aftermath*", 99 Denv. L. Rev. 253, 285 (2022) citing *Felker v. Turpin*, 518 U.S. 651, 664 (1996). This Court has previously held, in the context of *Garmon* preemption, that a state court's "holding that the [petitioner] had waived its pre-emption claim by noncompliance with state procedural rules governing affirmative defenses did not present an independent and adequate state ground supporting the judgment" *Longshoremen v. Davis*, 476 U.S. 380, 399 (1986).

PETITIONER'S CASE INVOLVES JURISDICTIONAL PREEMPTION DEFENSES THAT ARE NOT MERELY AFFIRMATIVE

Petitioner's case provides this Court with an exceptional opportunity to better characterize the nature of jurisdictional preemption defenses by

holding that states cannot prosecute conduct at common law when it has been preemptively deregulated by statute. This is a legally straightforward issue with nationally important Due Process consequences, implicating the reliance interest on a state's legislative and administrative determination that conduct is non-criminal. *Accord Fiore v. White*, 531 U.S. 225, 228 (2001) (a state cannot "convict [a defendant] for conduct that its criminal statute, as properly interpreted, does not prohibit."). Petitioner's case involves conduct within the scope of *unambiguous* comprehensive preemptive statutes that had been specifically decriminalized by administrative regulations at the time of the occurrence of the accidental fire, yet was retroactively criminalized at common law.

Maryland *usually* recognizes field preemption as an issue of subject matter jurisdiction. *See Bd. of Cnty. Comm'rs of Wash. Cnty. v. Perennial Solar, LLC,* 464 Md. 610, 612 (2019). *Accord Williams v. Caterpillar Tractor Co.,* 786 F.2d 928, 933 n.2 (9th Cir. 1986) (federal field preemption *may* be jurisdictional, even without complete preemption). In Petitioner's case, the State Fire Prevention Commission, an administrative instrumentality, had exclusive jurisdiction to set the state-level standard of care required for fire safety conduct, pursuant to Maryland's *expressly comprehensive* State Fire Prevention Code (*See* Pet. 28-30). Despite the

Commission's preemptive decision to deregulate dwelling house fire safety, the Court of Appeals *refused to interpret* the State Fire Prevention Code, instead concocting its own common law "*fire code*" retroactively requiring the exercise of reasonable care for dwelling house fire safety (*See* Pet. 31-37). This is a clear example of field preemption amounting to something more than an a mere affirmative defense; it was a jurisdictional limitation on the state courts' power to regulate fire safety that was disregarded in an "unexpected and indefensible" manner. *Bouie*, 378 U.S. at 354.

Petitioner's case squarely presents a situation where preemption is a type of "factual innocence" involving a substantive jurisdictional deficiency in prior state law. Prior to Petitioner's prosecution, Maryland's fire safety common law was found exclusively in "parallel claims" to its statutory Fire Code. *See Riegel v. Medtronic, Inc.,* 552 U.S. 312, 330 (2008). Consequently, the overruling of Petitioner's field preemption defenses was not merely a "choice of law" issue, but created retroactive criminalization problems. Here, federal preemption issues only arose *ex-post facto* from the judgment of conviction conflicting with the Due Process clause, because the state legislature had preempted *its own courts* from making new fire safety law. This is *not* merely a type of affirmative defense arising from one sovereign preempting another sovereign's jurisdiction, but *a*

sovereign preempting the jurisdiction of its own courts, and those courts unforeseeably refusing to comply with the statutes.

The Tenth Circuit's anomalous holding in *Pacheco* on *McGirt* retroactivity, along with Petitioner's case, reflects serious confusion over the nature of jurisdictional preemption defenses in general that threatens to erode their Constitutional significance and flout Due Process. Petitioner's case presents this Court the opportunity to hold that jurisdictional preemption defenses are not merely affirmative defenses.

PETITIONER'S CASE PRESENTS A UNIQUE OPPORTUNITY TO EXAMINE RETROACTIVE IMPOSITION OF ABSOLUTE LIABILITY

In Petitioner's case, the Court of Appeals abrogated the element of legal duty from the common law offense of grossly negligent involuntary manslaughter (*See* Pet. 17-25). This Court has only addressed absolute liability regimes in one prior opinion. *See Mut. Pharm. Co. v. Bartlett*, 570 U.S. 472, 481 (2013). Petitioner's case is likely this Court's *only opportunity* to examine a criminal negligence offense retroactively transforming into an absolute liability offense.

This irregularity presents this Court with a unique opportunity to decide the nature of common

law liability by applying *Bouie* to hold that *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 522 (1992) applies equally to both civil and criminal common law actions. The legal theory surrounding the legal duty element is critical to applying this Court's regulatory preemption precedents, and Petitioner's case presents the perfect vehicle to expound upon it, *namely a truncated version of the Clapham Omnibus.*

THE PETITION SHOULD BE HELD PENDING THIS COURT'S DECISION IN *TURKIYE HALK BANKASI A.S. V. UNITED STATES*

The same day that this Court denied Petitioner's petition, it granted review in *Turkiye Halk Bankasi A.S. aka Halkbank v. United States*, No. 21-1450, October Term 2022. In that case, this Court will be deciding "Whether U.S. district courts may exercise subject matter jurisdiction over criminal prosecutions against foreign sovereigns and their instrumentalities under 18 U.S.C. § 3231 and in light of the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1441(d), 1602-1611."

While Petitioner is not a foreign sovereign (or a domestic one for that matter), his case does present a *nearly identical immunity issue* regarding the jurisdictional interplay of a specific immunity statute superseding a general grant of subject matter jurisdiction, and a favorable ruling for Halkbank can

be case dispositive for Petitioner.

In the Second Circuit below, Halkbank raised its immunity defense under the FSIA, but it was rejected because Title 18 U.S.C. § 3231 confers general subject matter jurisdiction over "*all* offenses against the laws of the United States" with "no carve-out that supports an exemption for federal offenses committed by foreign sovereigns". *See United States v. Turkiye Halk Bankasi A.S.*, 16 F.4th 336, 347 (2nd Cir. 2021).

Exactly like *Halkbank*, Petitioner also had a specific immunity defense overruled by a general jurisdictional statute for trial courts.

In Petitioner's case, he first raised a statutory immunity defense in the Court of Appeals of Maryland, which provided in relevant part "That no Action... shall be... prosecuted... against any Person in whose House... any Fire shall... accidentally begin... any Law, Usage, or Custom to the contrary notwithstanding" (*See* Pet. 38-45). The Court of Appeals admitted that Petitioner's case *did indeed* involve an *accidental* fire in a house (*See* 477 Md. at 428; App.26a; 477 Md. at 453; App.57a). But the Court of Appeals interpreted the statutes in an entirely *countertextual* manner to *veto the defense* by adding an imaginary geographic restriction (*See* 477 Md. at 426; App.23a-25a), finding it did not apply to any surrounding circumstances of the fire (*See* 477

Md. at 426-27; App.25a-26a), and only being a type of affirmative defense not implicating subject matter jurisdiction, which was granted to Maryland's Circuit Courts by a general statute (*See* 477 Md. at 421-22; App.19a-20a).

Depending upon the holding reached by this Court in *Halkbank*, the Court of Appeals' analysis of subject matter jurisdiction in Petitioner's case may be determined as similarly erroneous for analyzing a general jurisdictional statute rather than a specific immunity statute.

If this Court holds that the specific provisions of the FSIA *do* override the general statutory grant of subject matter jurisdiction, then it should consider whether the Court of Appeals committed a *Bouie* violation in refusing to literally interpret Petitioner's statutory immunity defense as a type of jurisdictional express preemption of the prosecution, overriding the general grant of subject matter jurisdiction to Maryland's Circuit Courts. *Accord Magwood v. Warden*, 664 F.3d 1340, 1349 (11th Cir. 2011) (finding *Bouie* violation where "Magwood did not have fair warning that a court, when faced with an unambiguous statute, would reject the literal interpretation").

This Court should therefore hold Petitioner's petition for a possible GVR depending upon the holding reached in *Halkbank*.

SUMMATION

Petitioner recognizes that this Court is not a court of errors. This is, however, a Court of *Constitutionally significant errors*, which Petitioner has presented. When a state's highest court simply makes up its substantive law on an *ad hoc* basis, the legitimacy of the rule of law is called into question. As the "*last responder*" in the American criminal justice system, this Court should not let a decision stand that has so far departed from the accepted and usual course of judicial proceedings.

CONCLUSION

For the foregoing reasons, and those stated in the petition for a writ of certiorari, this Honorable Court should grant rehearing, hold the petition pending this Court's decision in *Turkiye Halk Bankasi A.S. aka Halkbank*, and then grant the petition and review the judgment below.

Respectfully submitted,

DANIEL L. BECKWITT
Petitioner, pro se
660 Quince Orchard Road #1020
Gaithersburg, MD 20878
(301)-337-7252
Beckwitt.v.MD@googlemail.com

CERTIFICATE OF PETITIONER

Pursuant to Rule 44.2, I, Daniel Beckwitt, Petitioner *pro se*, hereby certify that the petition for rehearing is restricted to the grounds specified in Rule 44.2. I further certify that the petition for rehearing is presented in good faith and not for delay.

Respectfully submitted,

DANIEL L. BECKWITT
Petitioner, pro se
660 Quince Orchard Road #1020
Gaithersburg, MD 20878
(301)-337-7252
Beckwitt.v.MD@googlemail.com

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