

TRIBAL SUPREME COURT PROJECT

MEMORANDUM

UPDATE OF RECENT CASES

OCTOBER 6, 2021

The Tribal Supreme Court Project (Project) is part of the Tribal Sovereignty Protection Initiative and is staffed by the National Congress of American Indians (NCAI) and the Native American Rights Fund (NARF). The Project was formed in 2001 in response to a series of U.S. Supreme Court cases that negatively affected tribal sovereignty. The purpose of the Project is to promote greater coordination and to improve strategy on litigation that may affect the rights of all Indian tribes. We encourage Indian tribes and their attorneys to contact the Project in our effort to coordinate resources, develop strategy, and prepare briefs, especially when considering a petition for a writ of certiorari, prior to the Supreme Court accepting a case for review. You can find copies of briefs and opinions on the major cases we track on the NARF website (<http://sct.narf.org>).

On September 27, 2021, the Court held its “long conference” in which it considered more than 1,000 petitions for review that were pending during the Court’s summer recess. Among those considered were *Denezpi v. United States* (20-7622) (double jeopardy), *Jamul Action Committee v. Simermyer* (20-1559) (tribal sovereign immunity), *Perkins v. Commissioner of Internal Revenue* (20-1388) (federal taxation of individual Indians); *Ysleta del Sur Pueblo v. Texas* (20-493) (Indian gaming). On October 4, 2021, it issued an order list from its long conference and denied review in *Jamul Action Committee* and *Perkins*, and relisted *Denezpi* and *Ysleta del Sur Pueblo* for the October 8, 2021, conference.

October 4, 2021, was also the first day of the October Term 2021. With many high-profile issues on the Court’s docket, court watchers anticipate that this will be a significant Supreme Court term. For Indian law, we are closely watching *Brackeen v. Haaland* (21-380), and related petitions, which raise issues about the Indian Child Welfare Act. In addition, the State of Oklahoma has filed a series of petitions encouraging the Court to reverse its holding in *McGirt v. Oklahoma*. These cases are detailed further below.

PETITIONS FOR A WRIT OF CERTIORARI PENDING

The following petitions for a writ of certiorari have been filed in Indian law and Indian law-related cases and are pending before the Court:

SELF V. CHER-AE HEIGHTS INDIAN COMMUNITY OF THE TRINIDAD RANCHERIA (21-477)

Petitioner: Jason Self and Thomas Lindquist, individual non-Indians

Petition Filed: September 29, 2021

Subject Matter: Tribal Sovereign Immunity

Lower Court Decision: The Ninth Circuit Court of Appeals affirmed the trial court’s dismissal

Recent Activity: Petitions filed

Upcoming Activity: Brief in opposition due October 29, 2021

The Cher-Ae Heights Indian Community of the Trinidad Rancheria (the “Tribe”) owns a parcel of coastal property in fee simple. Two individuals who use the beach for recreation and a kayaking business sued the Tribe in California state court, claiming that the Tribe might illegally block their beach access in the future. The Tribe had formally requested that the Department of the Interior take the land into trust for the benefit of the Tribe. Because it was coastal property, the land-into-trust process required a review under the Coastal Zone Management Act to ensure, among other things, that beach access was preserved consistent with state law. The Bureau of Indian Affairs determined that it was, and California’s Coastal Commission concurred. Based on the Tribe’s sovereign immunity, the state trial court quashed the service of process and dismissed the complaint with prejudice. The California Court of Appeals affirmed, holding that the real property exception to common law sovereign immunity does not apply.

BRACKEEN V. HAALAND (21-380); TEXAS V. HAALAND (21-378); CHEROKEE NATION V. BRACKEEN (21-377); HAALAND V. BRACKEEN (21-376)

Petitioners: Individual non-Indians, State of Texas, United States, and four Indian tribes

Petition Filed: September 3, 2021

Subject Matter: Indian Child Welfare Act

Lower Court Decision: The Fifth Circuit Court of Appeals affirmed in part, and reversed in part, the district court’s conclusions that the Indian Child Welfare Act was unconstitutional

Recent Activity: Petitions filed

Upcoming Activity: Briefs in opposition due November 8, 2021

A Texas couple wishing to adopt an Indian child, and the State of Texas, filed suit against the United States and several of its agencies and officers in federal district court claiming that the Indian Child Welfare Act (“ICWA”) was unconstitutional. They were joined by additional individual plaintiffs and the States of Louisiana and Indiana. Cherokee Nation, Oneida Nation, Quinault Indian Nation, and Morongo Band of Mission Indians (collectively the “Tribes”) intervened as defendants, and Navajo Nation intervened at the appellate stage. The district court held that much of ICWA was unconstitutional, but the Fifth Circuit, sitting en banc, reversed much of that decision. However, the Fifth Circuit did affirm the district court on some of its holdings that specific sections of ICWA violated the Fifth Amendment’s equal protection guarantee and the Tenth Amendment’s anti-commandeering principle. Specifically, the Fifth Circuit concluded that ICWA’s preference for placing Indian children with “other Indian families” (ICWA’s third adoptive preference, after family placement and placement with the child’s tribe) and the foster care preference for licensed Indian foster homes violated equal protection. The Fifth Circuit also concluded that the Tenth Amendment’s anti-commandeering principle was violated by ICWA’s “active efforts,” “qualified expert witness,” and record keeping requirements.

The non-Indian individuals, Texas, the Tribes, and the United States each filed petitions for review at the U.S. Supreme Court. The United States and the Tribes seek review of the Fifth Circuit’s finding of unconstitutionality based on Equal Protection and anti-commandeering, and assert that the individual plaintiffs lack standing. In its petition, Texas asserts that Congress acted beyond its Indian Commerce Clause power in enacting ICWA and that it creates a race-based child custody system in violation of the Equal Protection clause. Texas claims that ICWA violates the anti-commandeering principle and its implementing regulations violate the nondelegation doctrine by allowing individual tribes to alter the

placement preferences enacted by Congress. The individual plaintiffs focus their petition more narrowly on equal protection and anti-commandeering claims.

CLAY V. COMMISSIONER OF INTERNAL REVENUE (21-237)

Petitioners: James Clay and Audrey Osceola

Petition Filed: August 13, 2021

Subject Matter: Federal income tax

Lower Court Decision: The Eleventh Circuit Court of Appeals affirmed the United States Tax Court's decision upholding tax deficiency notices.

Recent Activity: Waiver of right to respond filed on September 24, 2021

Upcoming Activity: Scheduled for October 8, 2021, conference

Petitioners are citizens of the Miccosukee Tribe of Indians of Florida. They received per capita payments from the tribe and did not include the amounts of those payments in their gross income for federal income tax purposes. The Internal Revenue Service audited Petitioners and issued notices of deficiency for several tax years. Petitioners challenged the notices in tax court, claiming that the Miccosukee Settlement Act exempted the payments from their gross income, or, alternatively, that income derived from tribal lands are tax exempt. In affirming the Tax Court's rejection of these arguments, the Eleventh Circuit concluded that the income at issue was derived from the tribe's gaming revenue and not from land leases. It held that the Settlement Act did not exempt income derived from gaming revenue, but only income derived from the specific transactions addressed by the Settlement Act.

GRAND RIVER ENTERPRISES SIX NATIONS V. BOUGHTON (21-279)

Petitioner: Canadian corporation owned by Canadian First Nations members

Petition Filed: August 23, 2021

Subject Matter: Constitutional law

Lower Court Decision: The Second Circuit affirmed the trial court's motion to dismiss.

Recent Activity: Petition filed

Upcoming Activity: Brief in opposition due November 23, 2021

Grand River Enterprises Six Nations ("GRE") is a Canadian corporation owned by Canadian First Nations members. GRE sued the Commissioner of the Connecticut Department of Revenue Services, claiming that the reporting requirements it imposes on certain tobacco manufacturers violates the commerce clause, the supremacy clause, and the Fourteenth Amendment's due process clause. The district court granted the state's motion to dismiss, and the Second Circuit affirmed.

DENEZPI V. UNITED STATES (20-7622)

Petitioner: Merle Denezpi, an individual Indian

Petition Filed: March 31, 2021

Subject Matter: Double jeopardy

Lower Court Decision: The Tenth Circuit affirmed the district court's criminal conviction.

Recent Activity: Listed for September 27, 2021, conference and relisted

Upcoming Activity: Scheduled for October 8, 2021, conference

Petitioner Merle Denezpi is a Navajo Nation citizen and was convicted of a tribal law assault-and-battery charge by the Court of Indian Offenses of the Ute Mountain Ute Agency and served 140 days of imprisonment. Six months later, a federal grand jury indicted him on one count of aggravated sexual abuse in Indian country. He moved to dismiss the indictment, claiming that it violated the Double Jeopardy Clause because he was convicted of the same offense in the Court of Indian Offenses. The district court denied the motion to dismiss and he was convicted after a trial. The Tenth Circuit affirmed, holding that the Double Jeopardy Clause was not violated because the “ultimate source” of Mr. Denezpi’s prosecution in the Court of Indian Offenses was the tribe’s inherent sovereignty. The court reasoned that Congress’s creation of the court provided a forum through which the tribe could exercise its power of self-governance.

YSLETA DEL SUR PUEBLO V. TEXAS (20-493)

Petitioner: Ysleta del Sur Pueblo

Petition Filed: October 9, 2020

Subject Matter: Indian gaming

Lower Court Decision: The Fifth Circuit affirmed the district court’s grant of summary judgment in favor of Texas.

Recent Activity: Scheduled for September 27, 2021, conference and relisted

Upcoming Activity: Scheduled for October 8, 2021, conference

The State of Texas sued the Ysleta del Sur Pueblo (“Pueblo”), seeking to enjoin it from operating slot machines in its gaming facility as a violation of Texas law. In 1987, Congress passed an act restoring federal recognition of the Pueblo, which provided that the Pueblo’s gaming operations must comply with Texas law. Congress subsequently passed the Indian Gaming Regulatory Act (“IGRA”), which is more permissive of tribal gaming operations than the Pueblo’s restoration act. Texas and the Pueblo have disagreed ever since about whether the restoration act or IGRA control the Pueblo’s gaming operations. In 1993, the Fifth Circuit sided with Texas and held that the restoration act controlled. In the instant lawsuit, Texas argued that the Pueblo’s slot machines violated Texas law. Relying on its 1993 case, the Fifth Circuit agreed and held that “the Restoration Act ‘govern[s] the determination of whether gaming activities proposed by the [] Pueblo are allowed under Texas law, which functions as surrogate federal law.’”

PETITIONS RELATED TO MCGIRT V. OKLAHOMA

Petitioner: State of Oklahoma

Petitions Filed: Beginning August 6, 2021; ongoing.

Subject Matter: Criminal Jurisdiction in Indian Country

Lower Court Decisions: The Oklahoma Court of Criminal Appeals applied *McGirt* to vacate all of the respondents’ criminal convictions.

Recent Activity: Additional petitions filed September 21 and September 23, 2021.

Oklahoma has filed 26 petitions seeking review of Oklahoma Court of Criminal Appeals decisions vacating convictions of people convicted of crimes in state court that were subject to federal jurisdiction under either the Major Crimes Act or the Indian Country Crimes Act. All the petitions urge the court to reverse *McGirt*.

The first of these petitions was *Oklahoma v. Bosse*, in which Oklahoma challenged the Court of Criminal Appeals's grant of post-conviction relief to a non-Indian defendant convicted of a crime against an Indian victim. In addition to asking that *McGirt* be overruled, Oklahoma argued (1) the State had concurrent criminal jurisdiction over the defendant, and (2) *McGirt* should not be available to vacate a conviction already final at the time it was decided.

Oklahoma followed *Bosse* with 23 similar petitions, all explicitly relying on *Bosse* and falling into one of four categories: (1) those involving only Indian defendants pursuant to the Major Crimes Act ("MCA"), (2) those involving Indian defendants under the General Crimes Act ("GCA"), (3) those involving Indian defendants under both the MCA and GCA, and (4) those involving non-Indian defendants and an Indian victim under the GCA. The petitions involving convictions under the General Crimes Act not only urge the Court to overrule *McGirt*, but also assert that the state retains concurrent jurisdiction with the federal government over General Crimes Act crimes. These petitions are listed and categorized below.

Oklahoma voluntarily withdrew its petition in *Bosse* after the Court of Criminal Appeals held in *State ex rel. Matloff v. Wallace* that *McGirt* cannot be applied retroactively in state post-conviction relief proceedings to invalidate convictions. Following *Matloff*, the retroactivity arguments in *Bosse* and several of the supporting petitions filed after *Bosse* are moot for the state, but have been raised by a defendant in *Parish v. Oklahoma* (21-467).

After withdrawing *Bosse*, Oklahoma filed a similar petition involving a non-Indian defendant and Indian victim in *Oklahoma v. Castro-Huerta* (21-429). That petition asks that *McGirt* be overruled and asserts concurrent state jurisdiction, but does not ask the court to rule on the retroactivity issue presented in *Bosse*.

Additional Oklahoma Petitions:

(1) Petitions involving Indian defendants whose offense(s) could be prosecuted under the Major Crimes Act:

OKLAHOMA V. BECK (21-373)

Petition Filed: September 8, 2021

Recent Activity: Petition filed

Upcoming Activity: Brief in opposition due October 8, 2021

OKLAHOMA V. BALL (21-327)

Petition Filed: September 1, 2021

Recent Activity: Request for extension of time to November 1, 2021, for filing brief in opposition

Upcoming Activity: Brief in opposition to be filed

OKLAHOMA V. BROWN (21-251)

Petition Filed: August 20, 2021

Recent Activity: Waiver of right to respond filed and response requested

Upcoming Activity: Brief in opposition due October 29, 2021

OKLAHOMA V. COOPER (21-372)

Petition Filed: September 8, 2021

Recent Activity: Petition filed

Upcoming Activity: Brief in opposition due October 8, 2021

OKLAHOMA V. DAVIS (21-258)

Petition Filed: August 23, 2021

Recent Activity: Waiver of right to respond filed and response requested

Upcoming Activity: Brief in opposition due October 21, 2021

OKLAHOMA V. HARJO (21-322)

Petition Filed: September 1, 2021

Recent Activity: Request for extension of time to November 1, 2021, for filing brief in opposition

Upcoming Activity: Brief in opposition to be filed

OKLAHOMA V. HATHCOAT (21-253)

Petition Filed: August 20, 2021

Recent Activity: Petition filed

Upcoming Activity: Brief in opposition due October 20, 2021

OKLAHOMA V. HOWELL (21-259)

Petition Filed: August 23, 2021

Recent Activity: Petition filed

Upcoming Activity: Brief in opposition due October 22, 2021

OKLAHOMA V. JACKSON (21-255)

Petition Filed: August 20, 2021

Recent Activity: Petition filed

Upcoming Activity: Brief in opposition due October 20, 2021

OKLAHOMA V. JOHNSON (21-321)

Petition Filed: August 20, 2021

Recent Activity: Request to extend time to November 1, 2021, for filing brief in opposition filed

Upcoming Activity: Brief in opposition to be filed

OKLAHOMA V. JONES (21-371)

Petition Filed: September 4, 2021

Recent Activity: Petition filed

Upcoming Activity: Brief in opposition due October 8, 2021

OKLAHOMA V. KEPLER (21-252)

Petition Filed: September 20, 2021

Recent Activity: Petition filed

Upcoming Activity: Brief in opposition due October 20, 2021

OKLAHOMA V. MITCHELL (21-254)

Petition Filed: September 20, 2021

Recent Activity: Petition filed

Upcoming Activity: Brief in opposition due October 20, 2021

Oklahoma v. Perry (21-320)

Petition Filed: September 1, 2021

Recent Activity: Petition filed

Upcoming Activity: Brief in opposition due November 1, 2021

OKLAHOMA V. SPEARS (21-323)

Petition Filed: September 1, 2021

Recent Activity: Request to extend time to November 1, 2021, for filing brief in opposition filed

Upcoming Activity: Brief in opposition to be filed

OKLAHOMA V. STEWART (21-370)

Petition Filed: September 8, 2021

Recent Activity: Petition filed

Upcoming Activity: Brief in opposition due October 8, 2021

(2) Petitions involving an Indian whose offense(s) could be prosecuted under the General Crimes Act:

OKLAHOMA V. EPPERSON (21-369)

Petition Filed: September 8, 2021

Recent Activity: Petition filed

Upcoming Activity: Brief in opposition due October 8, 2021

OKLAHOMA V. JANSON (21-325)

Petition Filed: September 1, 2021

Recent Activity: Petition filed

Upcoming Activity: Brief in opposition due November 1, 2021

OKLAHOMA V. JONES (21-451)

Petition Filed: September 23, 2021

Recent Activity: Petition filed

Upcoming Activity: Brief in opposition due October 25, 2021

OKLAHOMA V. STARR (21-257)

Petition Filed: August 23, 2021

Recent Activity: Petition filed

Upcoming Activity: Brief in opposition due October 22, 2021

(3) Petitions involving an Indian defendant whose offense(s) could be prosecuted under the Major Crimes Act or the General Crimes Act:

OKLAHOMA V. BAIN (21-319)

Petition Filed: September 1, 2021

Recent Activity: Request to extend time to November 1, 2021, for filing brief in opposition filed

Upcoming Activity: Brief in opposition to be filed

OKLAHOMA V. GRAYSON (21-324)

Petition Filed: August 23, 2021

Recent Activity: Request to extend time to November 1, 2021, for filing brief in opposition filed

Upcoming Activity: Brief in opposition to be filed

OKLAHOMA V. SIZEMORE (21-326)

Petition Filed: September 1, 2021

Recent Activity: Request to extend time to November 1, 2021, for filing brief in opposition filed

Upcoming Activity: Brief in opposition to be filed

(4) Petitions involving an Indian victim and non-Indian defendant whose offense(s) could be prosecuted under the General Crimes Act:

OKLAHOMA V. CASTRO-HUERTA (21-429)

Petition Filed: September 21, 2021

Recent Activity: Petition filed

Upcoming Activity: Brief in opposition due October 21, 2021

OKLAHOMA V. MIZE (21-274)

Petition Filed: August 25, 2021

Recent Activity: Petition filed

Upcoming Activity: Brief in opposition due October 25, 2021

OKLAHOMA V. WILLIAMS (21-265)

Petition Filed: August 24, 2021

Recent Activity: Petition filed

Upcoming Activity: Brief in opposition due October 25, 2021

Petitions by Defendants:

PARISH V. OKLAHOMA (21-467)

Petition Filed: September 29, 2021

Recent Activity: Petition filed

Upcoming Activity: Brief in opposition due October 29, 2021

PETITIONS FOR A WRIT OF CERTIORARI DENIED

JAMUL ACTION COMMITTEE V. SIMERMEYER (20-1559)

Petitioner: Jamul Action Committee, a non-Indian community group

Petition Filed: May 11, 2021

Subject Matter: Tribal sovereign immunity

Lower Court Decision: The Ninth Circuit held that tribal sovereign immunity barred suit against the tribe.

Recent Activity: Petition denied on September 27, 2021

A non-Indian citizens group sued to enjoin the construction of a casino by Jamul Indian Village (“JAV”), asserting that the tribe was not federally recognized and that the site was not “Indian land” eligible for gaming under the Indian Gaming Regulatory Act. The district court dismissed the suit based on failure to join a required party and tribal sovereign immunity. The Ninth Circuit affirmed, holding that JAV possessed sovereign immunity from suit, it was the real party in interest, and it was a required party that could not be joined due to its immunity from suit.

PERKINS V. COMMISSIONER OF INTERNAL REVENUE (20-1388)

Petitioner: Alice Perkins, an individual Indian

Petition Filed: March 31, 2021

Subject Matter: Federal taxation

Lower Court Decision: The Second Circuit affirmed the United States Tax Court’s issuance of summary judgment in favor of the Commissioner of Internal Revenue.

Recent Activity: Petition denied on October 4, 2021

Alice Perkins, a member of the Seneca Nation, and her husband mined gravel on land owned by the Seneca Nation and allotted by the tribe to another tribal member. They did not pay federal income taxes on revenues from the gravel mining operation, asserting that the 1794 Treaty of Canandaigua and the 1842 Treaty with the Seneca exempted from federal taxation income derived directly from land owned by the Seneca Nation. The Second Circuit concluded that provisions in the Treaty of Canandaigua guaranteeing “free use and enjoyment” of certain lands did not prevent the United States from imposing taxes on individual income derived directly from those lands. And while the court acknowledged that 1842 Treaty with the Seneca contained an agreement “to protect such of the lands of the Seneca ... from all taxes,” the court concluded that the broader purpose and context of that provision was to prevent specific taxes by the State of New York, not the United States.

OKLAHOMA V. BOSSE (21-186)

Petitioner: State of Oklahoma

Petition Filed: August 10 2021

Subject Matter: State Criminal Jurisdiction

Lower Court Decision: Oklahoma Court of Criminal Appeals granted post-conviction relief based on *McGirt v. Oklahoma*.

Recent Activity: Petition voluntarily dismissed September 10, 2021.

Oklahoma challenged the Oklahoma Court of Criminal Appeals's grant of post-conviction relief to a non-Indian defendant convicted of a crime against an Indian victim. Oklahoma urged the Court to overrule *McGirt v. Oklahoma* and claimed that it had concurrent criminal jurisdiction over the defendant. It also argued that *McGirt* should not be available to vacate a conviction already final at the time of the U.S. Supreme Court's *McGirt* decision. After the cert petition was filed, the Oklahoma Court of Criminal Appeals reversed its previous holding and ruled that *McGirt* could not be retroactively applied in state post-conviction relief proceedings, which, in turn, prompted Oklahoma to voluntarily dismiss this petition.

CONTRIBUTIONS TO THE TRIBAL SUPREME COURT PROJECT

As always, the NCAI and NARF welcome general contributions to the Tribal Supreme Court Project. Please send any general contributions to NCAI, attn: Accounting, 1516 P Street, NW, Washington, DC 20005. **Please contact us if you have any questions or if we can be of assistance: Joel West Williams, NARF Senior Staff Attorney, 202-785-4166 (williams@narf.org) or Esther Labrado, NCAI Legal Manager, 202-466-7767 x. 201 (elabrado@ncai.org).**