No. 21-704

IN THE
Supreme Court of the United States

STATE OF OKLAHOMA,
Petitioner,

v.

SAMANTHA ANN PERALES,
Respondent.

On Petition for a Writ of Certiorari
to the Oklahoma Court of Criminal Appeals

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Should this Court consider overruling its statutory decision in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020)?

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INTRODUCTION

This is one of several near-identical petitions asking this Court to overrule its statutory decision in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020). Its single question presented is identical to the second question presented in *Oklahoma v. Castro-Huerta*, No. 21-429. This petition should be denied for the same reasons explained in the Brief in Opposition in *Castro-Huerta* ("*Castro-Huerta* Opp. __").

STATEMENT OF THE CASE

Respondent Samantha Ann Perales, a member of the Osage Nation, was charged by information in November 2015 for an alleged crime committed within the Cherokee reservation. Information (Okla. Dist. Ct., Delaware Cnty. Nov 13, 2015).[1] In August 2017, the Tenth Circuit applied *Solem v. Bartlett*, 465 U.S. 463 (1984), to hold that the Muscogee reservation endured. *Murphy v. Royal*, 875 F.3d 896, 966 (10th Cir. 2017). Oklahoma nonetheless maintained its prosecution of Respondent, who was convicted in February 2018. Verdict (Okla. Dist. Ct., Delaware Cnty. Feb. 15, 2018).

On appeal, Respondent argued that Oklahoma lacked jurisdiction to prosecute her because she is Indian and the alleged crime took place within the Cherokee reservation. Pet. App. 2a. The Oklahoma Court of

[1] References to district-court filings are to Case No. CF-2015-355, available at https://bit.ly/3DQM9TD.

Criminal Appeals ("OCCA") stayed the appeal pending *McGirt*. Order at 2 (Okla. Ct. Crim. App. Apr. 16, 2019).[2]

After *McGirt*, the OCCA remanded for an evidentiary hearing on Respondent's Indian status and the location of the alleged crime—in particular, whether Congress established a reservation for the Cherokee Nation and, if so, whether Congress disestablished that reservation. Pet. App. 26a-27a. The parties stipulated that Respondent is a member of the Osage Nation. Pet. App. 4a. As to the Indian country issue, Oklahoma stipulated that the alleged crime took place within the historical boundaries of the Cherokee reservation but "announced it held no position as to whether or not the reservation for the Cherokee Nation existed at the time of the crimes." Pet. App. 4a-5a. The District Court held that Oklahoma lacked jurisdiction to prosecute Respondent because the alleged crimes "were committed in Indian Country by an Indian." Pet. App. 23a.

On appeal, Oklahoma did not argue that the OCCA should deny relief. *See* Supplemental Brief of Appellee after Remand at 4 (Okla. Ct. Crim. App. Dec. 7, 2020). The OCCA found that the district court's decision was "supported by the entire record," noting that "[t]his Court has previously held that the Cherokee Nation was granted a reservation in Oklahoma and that reservation has not been disestablished by Congress." Pet. App. 5a-6a (citing *Spears v. State*, 2021 OK CR 7, ¶ 15, 485 P.3d 873, 877; *Hogner v. State*, 2021 OK CR 4, ¶ 18, ___ P.3d

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[2] References to filings in the Oklahoma Court of Criminal Appeals are to Case No. F-2018-383, available at https://bit.ly/3B65tLq.

___). The OCCA thus, on August 12, 2021, reversed Respondent's conviction, with the mandate issuing 20 days after the filing of the decision. Pet. App. 6a.

Long before the OCCA's ruling, on March 9, 2021, the Cherokee Nation charged Respondent and issued an arrest warrant shortly thereafter. Cherokee Amicus Br. at 10-11. Respondent is currently in the Cherokee Nation's custody awaiting trial. *Id.* at 11.

REASONS FOR DENYING THE PETITION

As explained in the *Castro-Huerta* Brief in Opposition, Oklahoma's request to overrule this Court's statutory decision in *McGirt* does not warrant review. The Court must deny this petition, however, for even more mundane reasons.

First, this case does not present Oklahoma's question presented: It concerns not the Muscogee reservation (at issue in *McGirt*) but the Cherokee reservation, which has its own treaties, statutes, and history. While the Five Tribes share commonalities, "[e]ach tribe's treaties must be considered on their own terms." *McGirt*, 140 S. Ct. at 2479. For example, "[u]nlike the Creek Agreement, the Cherokee Agreement did not describe tribal courts as 'abolished' by the Curtis Act or prohibit revival of tribal courts." Pet. App. 36a, *Oklahoma v. Spears*, No. 21-323; *cf. McGirt*, 140 S. Ct. at 2484, 2490 (Roberts, C.J., dissenting) (emphasizing Congress's abolition of Muscogee courts). This court cannot overrule *McGirt* in a case about the Cherokee reservation.

Second, Oklahoma below did not preserve its request to overrule *McGirt* or present any evidence to support

its current arguments. In cases from state courts, this Court considers only claims "pressed or passed on below"—even when litigants claim that a "well-settled federal" rule "should be modified." *Illinois v. Gates*, 462 U.S. 213, 219-20, 222 (1983). "[C]hief among" the considerations supporting that rule "is [the Court's] own need for a properly developed record." *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 79 (1988). Likewise, this Court treats as waived arguments "not raise[d] … below." *United States v. Jones*, 565 U.S. 400, 413 (2012).

This case illustrates why this Court does so. Oklahoma says *McGirt* should have placed more weight on "contemporaneous understanding" and "histor[y]." *Castro-Huerta* Pet. 17. And it seeks *McGirt*'s overruling based on claims of "disruption." *Castro-Huerta* Pet. 3-4.[3] But below, Oklahoma presented no evidence on either point and declined even to take a position on the disestablishment of the Cherokee reservation. Pet. App. 5a. And in other cases, Oklahoma affirmatively accepted that the Cherokee reservation exists. Cherokee Nation Amicus Br. 15-16 (discussing *McDaniel* and *Foster*). Only with the arrival of a new Attorney General, in June 2021, did Oklahoma reverse course. *Id.* at 8. All of that is why Oklahoma's petition is so light on evidence and so heavy on citation-free assertions. *Cf.*, *e.g.*, *Castro-Huerta* Reply 8 (uncited assertions about how many

[3] Because Oklahoma has asked that this petition be held for *Castro-Huerta*, Respondent addresses that petition. Again, it is bizarre for Oklahoma to ask the Court to weigh overruling *McGirt* in cases (like *Castro-Huerta* and this one) concerning the *Cherokee* reservation, a different reservation subject to different treaties and statutes. But that oddity should be of no moment. Oklahoma's question presented does not warrant review in any case.

crimes "the State estimates that the federal and tribal governments should be prosecuting" and how many "defendants … are seeking dismissal under *McGirt*" (quotation marks omitted)).

This is no way to undertake the grave task of weighing whether to abandon *stare decisis*. To the contrary, "[w]here difficult issues of great public importance are involved, there are strong reasons to adhere scrupulously to the customary limitations on [this Court's] discretion." *Gates*, 462 U.S. at 224. Hence, Oklahoma's waiver, and its failure to develop a record, militate powerfully against granting its petition. *See* Chickasaw Nation Amicus Br. 18-20, *Oklahoma v. Beck*, No. 21-373; Choctaw Nation Amicus Br. 17-21, *Oklahoma v. Sizemore*, No. 21-326; Cherokee Nation *Castro-Huerta* Amicus Br. 13-14.[4]

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[4] This Court has already rejected Oklahoma's argument that it would have been "futile" to "ask[] a lower court to overrule a decision of this Court." *Castro-Huerta* Reply 5. In *Gates*, Justice White, like Oklahoma here, argued that "present[ing] … to the lower courts" requests to modify the Court's precedent is a "futile gesture" and thus unnecessary. 462 U.S. at 251 (White, J, concurring in the judgment). The Court disagreed—precisely because it is *not* futile to require litigants to develop a "factual record" in the lower courts. *Id.* at 224 (majority opinion). Indeed, to Respondent's knowledge, in none of Oklahoma's pending petitions did it develop evidence to support the claims it now presses. And given Oklahoma's tactical choice below to decline to present evidence or argument on disestablishment, it would be inappropriate to allow Oklahoma to present such evidence or argument simply because it has sought *certiorari*. *See* Cherokee Nation Amicus Br. 15-20 & n.40 (identifying additional procedural obstacles, including mootness and estoppel).

Regardless, Oklahoma's request to overrule *McGirt* does not warrant review even in a case, unlike this one, presenting that question—as the *Castro-Huerta* Brief in Opposition explains. *Castro-Huerta* Opp. 2-4, 18-38. Like many of this Court's statutory decisions, *McGirt* was divided. Like many such decisions, *McGirt* had real effects (though Oklahoma vastly overstates them). And like all of this Court's statutory decisions, the ball is now where the Constitution has placed it: With Congress.

Certiorari is not warranted to address Oklahoma's invitation for this Court to elbow Congress aside. It scarcely needs saying that this Court does not overrule statutory decisions based solely on changes in personnel. *Stare decisis* exists precisely to protect the "actual and perceived integrity of the judicial process" against such threats. *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 798 (2014) (quotation marks omitted). And *stare decisis* applies with "special force" in statutory cases, where "Congress remains free to alter what [this Court has] done." *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 274 (2014) (quotation marks omitted); *see Castro-Huerta* Opp. 20-22.[5]

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[5] Oklahoma has tried to dodge the overwhelming force of *stare decisis* by characterizing *McGirt* as about a "judge-made rule," which it says is "'particularly appropriate' for reconsideration." *Castro-Huerta* Reply 11 (quoting *Pearson v. Callahan*, 555 U.S. 223, 233 (2009)). *Pearson*, however, involved a "mandatory procedure," 555 U.S. at 227, this Court invented for processing § 1983 claims. *McGirt* is a normal statutory case about what *statutes mean*. Nor did *McGirt* "dramatically alter[] the legal framework for analyzing disestablishment." *Castro-Huerta* Reply 11. True, the majority and the dissent disagreed over which result better accorded with this Court's precedents. But if such good-faith

Here, those principles are no mere abstractions. Oklahoma seeks certiorari *in order to* preempt active negotiations. In May 2021, its governor opposed H.R. 3091, which would have allowed the State to compact with two of the Five Tribes over criminal jurisdiction. *Castro-Huerta* Opp. 3, 10-11. In July 2021, the State opposed federal-law-enforcement funding because it did not desire "a permanent federal fix."[6] And weeks later, it became clear why: It preferred to swing for the fences in this Court. This Court's place, however, is not in the middle of legislative negotiations. And Oklahoma's siren song that "[o]nly the Court can remedy [its] problems," *Castro-Huerta* Pet. 4, badly misunderstands this Court's role. That high-stakes negotiations in Congress have not yet yielded the "ameliorative legislation" that Oklahoma prefers, *Castro-Huerta* Reply 10, provides no cause for this Court to take up the legislative pen itself. *Castro-Huerta* Opp. 20-24; *see* Muscogee (Creek) Nation Amicus Br. 25-28, *Oklahoma v. Castro-Huerta*, No. 21-429; Chickasaw Nation & Choctaw Nation Amicus Br. 6-7, 13-15, *Oklahoma v. Castro-Huerta*, No. 21-429; Cherokee Nation *Castro-Huerta* Amicus Br. 10-12.

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disagreement rendered *stare decisis* inapplicable in a statutory case, the doctrine would lose all meaning. *Castro-Huerta* Opp. 21 n.11; *cf. Murphy*, 875 F.3d at 966 (Tymkovich, C.J., concurring in the denial of rehearing en banc) (explaining that "faithful[]" and "strict[]" application of "*Solem*'s three-part framework" "necessarily" leads to the conclusion that the Muscogee reservation was not disestablished and "precludes any other outcome").

[6] Reese Gorman, *Cole Encourages State-Tribal Relations Over State Challenges to McGirt*, Norman Transcript (July 23, 2021), https://yhoo.it/3lYMjD8.

Rarely, moreover, will this Court receive so inappropriate a request justified by so little. Despite claiming "unprecedented disruption," *Castro-Huerta* Pet. 10, Oklahoma points to few real effects—and none that could justify this Court substituting itself for Congress.

Oklahoma first told this Court that it must limit or overrule *McGirt* because "[t]housands" of prisoners were poised to successfully "challeng[e] decades' worth of convictions." Pet. 2, *Oklahoma v. Bosse*, No. 21-186. Subsequent events, however, removed that premise. After Oklahoma filed for certiorari in *Bosse*, the OCCA issued *State ex rel. Matloff v. Wallace*, 2021 OK CR 21, 497 P.3d 686, *petition for cert. filed*, No. 21-467 (U.S. Sept. 29, 2021). *Matloff* stated that the OCCA was "interpret[ing] … state post-conviction statutes [to] hold that *McGirt* … shall not apply retroactively to void a conviction that was final when *McGirt* was decided." *Id.* ¶15. So Oklahoma shifted course. Seeking to salvage review, it filed a new petition, focusing on *McGirt*'s consequences for present and future criminal prosecutions and for civil jurisdiction. *Castro-Huerta* Pet. 18-22, 23-29. But try as Oklahoma might, the simple fact remains: *McGirt* today affects only the modest set of criminal cases still on direct review. Many of those cases (like this case) proceeded when Oklahoma knew its prosecutions might be invalid—and in such cases, retrial is easiest and least likely to face obstacles from time bars or stale evidence. Indeed, Oklahoma's many petitions fail to mention the federal and tribal prosecutions that are occurring in virtually all such cases, or that the federal government has already obtained convictions in several such cases. *Castro-Huerta* Opp. 24-27; *see*

Muscogee (Creek) Nation *Castro-Huerta* Amicus Br. 8-11; Chickasaw Nation & Choctaw Nation *Castro-Huerta* Amicus Br. 4-5, 7-9; Cherokee Nation Amicus Br. 9-12.[7]

Going forward, the proper allocation of jurisdiction among the federal government, the State, and Tribes is a question for Congress, which can decide whether to modify jurisdictional lines. Meanwhile, Oklahoma's claims of a "criminal-justice crisis" today, *Castro-Huerta* Pet. 4, are largely unburdened by evidence and badly misstate the facts. In reality, the federal government and Five Tribes are working to fulfill the responsibilities *McGirt* gives them and seeking the resources they need to do so (often over Oklahoma's opposition). *Castro-Huerta* Opp. 27-32; *see* Muscogee (Creek) Nation *Castro-Huerta* Amicus Br. 12-19; Chickasaw Nation Amicus Br. 5-7, 9, *Oklahoma v. Beck*, No. 21-373; Choctaw Nation Amicus Br. 9-16, *Oklahoma v. Sizemore*, No. 21-326; Cherokee Nation Amicus Br. 4-12. Indeed, for all of Oklahoma's dire rhetoric, the concrete evidence it cites—like "federal prosecutors" "transfer[ring] to Tulsa" and the creation of "five additional federal judgeships in the Northern and Eastern Districts of

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[7] Oklahoma avers that the federal statute of limitations may have run on April 12, 2020. Pet. 5-6. *But see Roth v. State*, 2021 OK CR 27 ¶ 17 n.5, __ P.3d __ (the OCCA stating that "the timely filing of the charges in state court tolled … any statute of limitations"). But even if that claim were true, it would have no effect on the timeliness of the Cherokee Nation's ongoing prosecution. Indeed, Oklahoma's argument spotlights that even after this Court set *Murphy* for reargument and granted *McGirt*, Oklahoma failed to work with the federal government to address the contingency that it might *lose* those cases.

Oklahoma," *Castro-Huerta* Reply 6-7—underscore that the logistical challenges are eminently solvable.[8]

Oklahoma's claims about civil consequences are even more reality-free. In fact, its position, undisclosed to the Court in its petitions, is that *McGirt* applies *only* to criminal jurisdiction and has *no* civil effects. In all events, moreover, those effects will be vastly less than Oklahoma suggests. And the place to address such concerns is in civil cases—which will make concrete *McGirt*'s (limited) actual consequences. Indeed, Oklahoma's *Castro-Huerta* reply betrays that its civil concerns are entirely hypothetical and conditional. *See Castro-Huerta* Reply 10 (referring to "damage that could result if *McGirt* is held not to be … limited" in its "civil implications," contrary to Oklahoma's "argu[ments] … in other cases"). That admission only underscores that Oklahoma's overwrought claims have no place in this criminal case. *Castro-Huerta* Opp. 32-37; *see* Muscogee (Creek) Nation *Castro-Huerta* Amicus Br. 20-25; Chickasaw Nation *Beck* Amicus Br. 9-12; Choctaw Nation *Sizemore* Amicus Br. 10; Cherokee Nation Amicus Br. 12-15.

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[8] Oklahoma's response is to exclaim "Seriously?" and point to a statement in the Eastern District's General Order 21-18 stating that "absent a permanent solution to the *McGirt* fallout, the emergency conditions will continue unabated." *Castro-Huerta* Reply 7 (quoting General Order No. 21-18 (Sept. 2, 2021)). That order, however, discussed a shortfall in *physical space*—that the "Eastern District's available trial courtrooms … are simply insufficient" and that special sessions in the Western District are thus needed. General Order No. 21-18 (Sept. 2, 2021). Needing more courtroom space is not an existential threat, much less one Congress is unable to solve.

In fact, Oklahoma's petitions are a source of, not a solution to, uncertainty. Overruling *McGirt* would invalidate thousands of federal and tribal prosecutions and squander tens of millions of dollars spent in reliance on *McGirt*. Meanwhile, granting review would freeze negotiations indefinitely. Oklahoma apparently is happy to impose those costs. But that only underscores why its arguments should be directed to Congress, which the Constitution charges with making such decisions. *Castro-Huerta* Opp. 31-32; *see* Muscogee (Creek) Nation *Castro-Huerta* Amicus Br. 25-28; Chickasaw Nation & Choctaw Nation *Castro-Huerta* Amicus Br. 2; Cherokee Nation Amicus Br. 23-24.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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