No. 21-773

IN THE
Supreme Court of the United States

STATE OF OKLAHOMA,
Petitioner,

v.

HAROLD DENTON MCCURTAIN,
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

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 appealed that decision and the Supreme Court heard arguments in November 2018. Although that that appeal was still under consideration, Oklahoma nonetheless charged Respondent Harold Denton McCurtain, a member of the Choctaw Nation, for alleged crimes committed within the Choctaw Nation's reservation. Information (Okla. Dist. Ct., LeFlore Cnty. Mar. 6, 2019).[1]

Before Respondent's trial, this Court decided *McGirt*. Respondent promptly alerted the district court to the jurisdictional issue and argued that Oklahoma lacked jurisdiction to prosecute him because he is an Indian and the alleged crimes took place within the Choctaw reservation. Motion to Dismiss (Okla. Dist. Ct., LeFlore Cnty. July 24, 2020). After the State filed its

[1] References to district-court filings are to Case No. CF-2019-76, available at https://bit.ly/3GvLglp.

response to the Motion to Dismiss, the district court found that the alleged crime occurred within the Choctaw reservation and that Respondent was a member of the Choctaw Nation. The district court held that Oklahoma lacked jurisdiction to try Respondent. Pet. App. 11a-12a.

Oklahoma appealed this decision to the Oklahoma Court of Criminal Appeals. Notice of Intent to Appeal (Okla. Ct. Crim. App. Aug. 13, 2020).[2] The OCCA affirmed. Pet. App. 6a-7a. Thereafter, the district court dismissed the case. Order Lifting Stay and Dismissing Case (Okla. Dist. Ct., LeFlore Cnty. Sept. 20, 2021).

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 Choctaw 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. The Choctaw, for example, signed a separate agreement—different from the Muscogee—that preserved its tribal courts. *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1441-42 (D.C. Cir. 1988); *cf.*

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[2] References to filings in the Oklahoma Court of Criminal Appeals are to Case No. S-2020-533, available at https://bit.ly/3ElLxWe.

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 Choctaw reservation.

Second, Oklahoma below did not preserve its request to overrule *McGirt* or present the evidence on which its current arguments now rely. 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). Below, however, Oklahoma did not argue that *McGirt* should be overruled; instead, it embraced *McGirt* and argued that, under *McGirt*, the Choctaw reservation had been disestablished. Br. of Appellant at 6-7 (Okla. Ct. Crim. App. Nov. 2, 2020); *accord* Choctaw Amicus Br. 17-22 (detailing this procedural bar, as well as others).

Oklahoma also did not present below the evidence on which its current arguments now rely. Principally, Oklahoma seeks *McGirt*'s overruling based on claims of "disruption." *Castro-Huerta* Pet. 3-4.[3] But below,

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[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* and *Choctaw* reservations, different reservations subject to different treaties and

Oklahoma presented no evidence on that point. Indeed, 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 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*.

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

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statutes. But that oddity should be of no moment. Oklahoma's question presented does not warrant review in any case.

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.[4]

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."[5] 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

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[4] 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 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").

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

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* Cherokee Nation Amicus Br. 5-8, *Oklahoma v. Castro-Huerta*, No. 21-429; Muscogee (Creek) Nation Amicus Br. 25-28, *Oklahoma v. Castro-Huerta*, No. 21-429; Chickasaw Nation & Choctaw Nation Amicus Br. 2, *Oklahoma v. Castro-Huerta*, No. 21-429.

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, *cert. denied*, No. 21-467, 2022 WL 89297 (U.S. Jan. 10, 2022). 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* 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 nearly all of those 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 *Castro-Huerta* Amicus Br. 8-9, 11-12.

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* Choctaw Nation Amicus Br. 8-16, *Oklahoma v. Sizemore*, No. 21-326; Muscogee (Creek) Nation *Castro-Huerta* Amicus Br. 12-19; Chickasaw Nation Amicus Br. 5-7, 9, *Oklahoma v. Beck*, No. 21-373; Cherokee Nation *Castro-Huerta* 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 Oklahoma," *Castro-Huerta* Reply 6-

7—underscore that the logistical challenges are eminently solvable.[6]

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. 12-14, *Oklahoma v. Spears*, No. 21-323.

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[6] 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 were thus needed. General Order No. 21-18 (Sept. 2, 2021). Needing more courtroom space is not an existential threat.

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 *Spears* Amicus Br. 22-23.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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