

**ORIGINAL**

Supreme Court, U.S.  
FILED

DEC 01 2022

OFFICE OF THE CLERK

No. 22-6248

IN THE SUPREME COURT OF THE UNITED STATES

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PAUL TAY, PETITIONER,

v.

MICHELLE DIANE TILLEY NICHOLS, et al.

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ON PETITION FOR A WRIT OF CERTIORARI  
TO THE OKLAHOMA SUPREME COURT

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PETITION FOR WRIT OF CERTIORARI

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SUPREME COURT, U.S.

## QUESTIONS PRESENTED

1. Does the Controlled Substances Act preempt State consent to use, possession, cultivation, processing, transportation, and sale of marijuana and any of its byproducts by individuals, under ordinary principles of federal preemption, notwithstanding State claims of anti-commandeering doctrine?
2. Does federal law, implicating Indian treaties, preempt State of Oklahoma jurisdiction to conduct election activities, to include, but not limited to signature-gathering in support of ballot initiative petitions on tribal treaty land, where the State was not a party to treaties, under ordinary principles of federal preemption?

## LIST OF PARTIES

Additional Respondents include Michelle Jones.

## RELATED PROCEEDINGS

Oklahoma Supreme Court:

*Tay v. Nichols, et. al.*, No. 120,657 (16 SEP 2022)

*Tay v. Green*, 508 P.3d 431 (2022)

*Tay v. Kiesel*, 468 P.3d 383 (2020)

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**OPINIONS BELOW**

The opinion of the Oklahoma Supreme Court is unreported. It was decided on  
16SEP2022. Appendix A.

**JURISDICTION**

The Oklahoma Supreme Court entered judgment on 16 SEP 2022. The jurisdiction  
of this Court is invoked under 25 U.S.C. § 1257(a).

## STATUTORY PROVISIONS INVOLVED

Section 71 of Title 25 of the United States Code provides:

“no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 3, 1871, shall be hereby invalidated or impaired.”

Section 841 of Title 21 of the United States Code provides:

“it shall be unlawful for any person knowingly or intentionally to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance. Any person who violates subsection (a) of this section shall be sentenced as follows: In the case of a violation of subsection (a) of this section involving 1000 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 1,000 or more marihuana plants regardless of weight, such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or \$10,000,000 if the defendant is an individual or \$50,000,000 if the defendant is other than an individual, or both.”

## STATEMENT

In *Oklahoma v. Castro-Huerta*, 579 U.S. \_\_\_\_\_ (2022), this Court announced a novel framework in substantive federal Indian law:

“State jurisdiction may be preempted by federal law under ordinary principles of federal preemption.”

In *Gonzales v. Raich*, 545 U.S. 1 (2005), this Court established ordinary principles of federal preemption in federal drug control policy:

“The Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail.”

This case involves intersectional issues of national importance beyond the facts and parties involved because it is about the commitment of the United States

to honor treaties “lawfully made and ratified with any Indian nation or tribe,” and whether “limiting the activity to marijuana possession and cultivation in accordance with state law” is contrary to federal law, Controlled Substances Act, 18 U.S.C. §§ 801-904.

#### **A. Background**

1. Article VI, Clause 2 of the United States Constitution establishes laws and treaties of the United States are the supreme laws of the land. Yet, 47 States grant consent for use, cultivating, processing, transporting, possessing, and sale of marijuana for either recreational or medical purposes by individuals, contrary to federal law, Controlled Substances Act.
2. The State of Oklahoma Medical Marijuana Authority (OMMA) regulates intrastate commerce of marijuana, in accordance with state law, significantly thwarting federal enforcement of federal laws.
3. One of OMMA administrative rules, 442:10-1-3, provides:

“All medical marijuana licenses and rights granted under Oklahoma law and this Chapter shall only be valid in the State of Oklahoma, excluding any tribal trust or tribal restricted land or federal lands in the state.”
4. While the State recognizes Indian sovereignty on paper, in practice, OMMA continues to issue and recognize medical marijuana licenses, and the State continues to exert its civil and criminal jurisdiction on treaty land.
5. The State conducts election activities, including recognizing signatures gathered in support of ballot initiative petitions on treaty land.

#### **B. Facts and Procedural History**



On 26 JUN 2018, Oklahoma voters approved State Question 788. The measure legalized marijuana, also known as cannabis, for medical purposes in Oklahoma. The measure required a state-issued medical marijuana license to have a board-certified physician's signature. The measure required no specific qualifying conditions to receive medical marijuana. The measure allowed people with licenses to possess up to 3 ounces of marijuana on their person and 8 ounces of marijuana in their residence. A 7 percent tax was levied on marijuana sales, with revenue allocated to administrative costs, education, and drug and alcohol rehabilitation. The measure required licenses to operate dispensaries, commercial growing operations, and processing operations. The measure prohibited municipalities from restricting zoning laws to prevent marijuana dispensaries.

Federal enforcement of federal marijuana laws had not been strictly implemented against state-legal medical marijuana. On January 4, 2018, Attorney General Jeff Sessions rescinded the Cole Memo, a 2013 directive that deprioritized the enforcement of federal marijuana laws in states where marijuana had been legalized. This allowed federal prosecutors to make decisions individually concerning enforcement of marijuana.

In December 2014, Congress passed the Rohrabacher-Farr amendment (now called the Rohrabacher-Blumenauer amendment) as part of a budget bill and renewed the amendment each year through 2017. The amendment prohibits federal agents from raiding medical marijuana growers in states where medical marijuana is legal, effectively allowing states to legalize medical marijuana. In May 2017,

Attorney General Jeff Sessions sent a letter to Congress asking legislators to deny recertification to the Rohrabacher-Blumenauer amendment. Following seven temporary continuations of the amendment—including in September 2017, on December 8 and December 22 of 2017, and on January 22, 2018—Congress passed another temporary continuation of the Rohrabacher-Blumenauer amendment on February 9, 2018, that extended it through March 23, 2018.

State Question 788 was put on the ballot through a successful initiative petition effort. Proponents collected 65,987 valid signatures, some on Indian Territory, within 90 days of their petition being cleared for circulation.

As of November 2020, 16 states and the District of Columbia had legalized marijuana for recreational purposes; nine through statewide citizen initiatives, and two through bills approved by state legislatures and signed by governors. Colorado and Washington both opted to legalize recreational marijuana in 2012. In a subsequent Colorado measure, voters enacted a statewide marijuana taxation system. The three ballot measures that passed in 2014 were Oregon's Measure 91, Alaska's Measure 2, and the District of Columbia's Initiative 71. Voters in California, Maine, Massachusetts, and Nevada approved recreational marijuana legalization ballot measures in November 2016. The Vermont State Legislature approved a bill in mid-January 2018 to allow recreational marijuana, and Gov. Phil Scott (R) signed it into law on January 22, 2018. Gov. Scott vetoed a previous bill to legalize marijuana in May 2017. On June 25, 2019, Illinois Gov. J.B. Pritzker signed a bill into law legalizing the use and possession of recreational marijuana.

Initiatives legalizing recreational marijuana were on the ballot in November 2018 in Michigan and North Dakota. The Michigan initiative was approved, and the North Dakota initiative was defeated. Arizona, Montana, and South Dakota approved legalization through initiatives in 2020. New Jersey approved legalization through a legislatively referred constitutional amendment in 2020.

On 27 DEC 2019, Ryan Kiesel and Michelle Tilley Nichols, the current Respondent, filed State Question 807 with the Oklahoma Secretary of State, to prepare the ballot initiative petition for signature gathering. This measure would have added a new article to the Oklahoma Constitution, which would generally legalize, regulate and tax marijuana for persons aged 21+ under state law (but not alter the rights of medical marijuana licensees). Specifically, it protects the personal use of marijuana for those 21+, while establishing quantity limits, safety standards, and other restrictions. It maintains prohibitions on impaired driving and distribution to, or use by, those under 21. It would not affect employers' ability to restrict marijuana use by employees. Property owners generally may restrict marijuana on their property. The Oklahoma Marijuana Authority would license, regulate, and administer the article pursuant to specified requirements. It permits municipalities, upon popular vote, to limit or prohibit retail licenses. It imposes a 15% excise tax on sales (not applicable to medical marijuana) to fund the Authority, localities where sales occur, schools (for programs to prevent substance abuse and improve student retention and performance), and drug-addiction treatment programs, while ensuring such funds must add to, and not replace, existing funding.

It provides a judicial process for people to seek modification, reversal, redesignation or expungement of certain prior marijuana-related judgments and sentences. The Petitioner filed the constitutional challenge as Application for Original Jurisdiction in the Oklahoma Supreme Court, on grounds the proposed ballot initiative is unconstitutional because it violates the federal Controlled Substances Act, in accordance with the Supremacy Clause. The Oklahoma Supreme Court ruled State Question 807 was constitutional under the 10th Amendment anti-commandeering doctrine. *Tay v. Kiesel*, 468 P.3d 383 (2020). Appendix C.

On 7OCT2021, Oklahomans for Responsible Cannabis Action (ORCA) filed State Question 818 to amend the Oklahoma Constitution. The measure would have created a new State agency, Oklahoma State Cannabis Commission. The agency would audit the current medical marijuana program; delegate powers to the Governor, Legislature and the Commission; established the Commission Board, its membership and meeting requirements, and its relationships with state agencies; pay for itself with taxes on marijuana sales and fees on businesses and individuals; establish those taxes, licenses, license requirements and fees; direct surplus revenue to pay for education, local and military veterans mental health programs, law enforcement, research, marijuana waste clean-up, and agricultural insurance; provide licensed marijuana businesses with tax deductions, and some hemp businesses with limited tax credits; adapt to federal legalization of marijuana; provide guidelines for consumer protection and establishes individual patient, professional, privacy, employment, medical, parental, student, firearm ownership,

state-licensure, and due process rights. On 28OCT2022, ORCA filed State Question 819.

The measure would grant the right to use marijuana to persons 21 years of age and older; establish individual patient, professional, privacy, employment, medical, parental, student, firearm ownership, state-licensure, and due process rights. In the Oklahoma Supreme Court, on Application for Original Jurisdiction, the Petitioner challenged the measure on grounds signatures collected for it in Indian territory would be invalid due to recognition of the 1856 Treaty with Creeks and Seminoles by this Court in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020).

The Gorsuch majority read the Treaty in plain English as written and subsequently forced upon “merciless Indian savages,” referenced by the Declaration of Independence: “No portion of either of the tracts of country defined in the first and second articles of this agreement shall ever be embraced or included within, or annexed to, any Territory or State.” The Treaty restricted the power of the United States to include the land embraced within the reservation in any state or territory then existing or in the future, without State consent.

The Oklahoma Supreme Court ruled “Because Oklahoma has not waived political or police power over activities within its boundaries, the Court need not construe the treaty.” *Tay v. Green*, 508 P.3d 431 (2022). Appendix B. The Petitioner now contends the Oklahoma Supreme Court acted contrary to this Court’s Supremacy Clause rulings. Oklahoma has NO political or police powers to waive over activities within the boundaries established by the treaties, because the State

of Oklahoma was not a party to the treaties. Oklahoma's jurisdiction on land treaty-defined to be Indian Territory is void ab initio. The Muscogee (Creek) Nation and the United States are the real parties of vested interest here.

Finally, Oklahomans for Sensible Marijuana Laws filed State Question 820 to amend the Oklahoma Statutes. The measure would legalize marijuana for adults 21 years old and older. The Oklahoma Medical Marijuana Authority would be responsible for marijuana business licensing and regulations. Individuals would be allowed to possess, transport, and distribute up to one ounce (28.35 grams) of marijuana, eight grams of marijuana in a concentrated form, and/or eight grams or less of concentrated marijuana in marijuana-infused products. Marijuana sales would be taxed at 15%. Under the initiative, individuals could possess up to six mature marijuana plants and up to six seedlings. The initiative would also provide a process for individuals to seek the expungement or modification of certain previous marijuana-related convictions or sentences.

Tax revenue generated from marijuana sales would be used to finance the Oklahoma Medical Marijuana Authority's implementation of the initiative with remaining funds to be appropriated as follows: 30% to the state general fund; 30% to grants for public school programs to support student retention and performance, after-school and enrichment programs, and substance abuse prevention programs; 20% to grants for government agencies and not-for-profit organizations to fund drug addiction treatment and overdose prevention programs;

10% to the state judicial revolving fund; and 10% to the municipalities or counties where the marijuana was sold.

The Petitioner again challenged the validity of signatures collected on treaty land. On 16SEP2022, the Oklahoma Supreme Court again rejected the jurisdiction challenge, timely triggering this culminating Petition for Writ of Certiorari.

## **REASONS FOR GRANTING WRIT**

**A. A State court of last resort decided on an important federal question contrary to relevant decisions of the United States Supreme Court.**

Pursuant to 28 U.S.C. 1257(a), the Supreme Court may review decisions of a State court of last resort, the Oklahoma Supreme Court, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States. The Supremacy Clause is clear:

“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”

Section 1 of Article I of the Oklahoma Constitution is clear: “The State of Oklahoma is an inseparable part of the Federal Union, and the Constitution of the United States is the supreme law of the land.”

The statutory provisions involved here are 18 U.S.C. §§ 801-904, Controlled Substances Act, and 25 U.S.C. § 71, expressed Congressional intent to recognize all

treaties lawfully made and ratified with Indian tribes and nations prior to March 3, 1871. Congress has never moved to invalidate or impair solemn guarantees made at the far end of the Promised Land. This Court has never disturbed Indian treaties and should impose on Congress to remedy the calls of millions of Americans across 47 Confederate Cannabis States of America with some form of State consent to violate federal law.

Upon passage of the Controlled Substances Act, Congress completely occupies the field of national drug policy, by expressing intent to preempt any conflicting State consent to violate federal law. The federal law in question acts on persons, not State sovereigns. Any arguments claiming anti-commandeering doctrine are without merit.

In *Tay v. Green*, the Oklahoma Supreme Court is clearly in error. The Supremacy Clause requires every court to construe treaties when presented.

**B. Review is warranted on issues of national importance beyond the particular facts and parties involved.**

This Court has a long history of speaking on the Supremacy Clause. The supremacy of treaties over state law has been described as an "unquestioned axiom of the founding" of the United States. Under the Supremacy Clause, treaties and federal statutes are equally regarded as "supreme law of the land" with "no superior efficacy ... given to either over the other". Thus, international agreements made pursuant to the Treaty Clause—namely, ratified with the advice and consent of a two-thirds supermajority of the Senate—are treaties in the constitutional sense and thereby incorporated into U.S. federal law no differently than an act of Congress.



Treaties are likewise subject to judicial interpretation and review just as any federal statute, and courts have consistently recognized them as legally binding under the Constitution.

*Ware v. Hylton*, 3 U.S. 1999, held treaties preempt conflicting State law. In *Herrera v. Wyoming*, 139 S. Ct. 1686 (2019), this Court ruled equal footings doctrine cannot serve as a proxy to impair Indian treaty rights.

In *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), the Supreme Court reviewed a tax levied by Maryland on the federally incorporated Bank of the United States. The Court found that if a state had the power to tax a federally incorporated institution, then the State effectively had the power to destroy the federal institution, thereby thwarting the intent and purpose of Congress. In this instance, if a State had the power to consent to violation of the Controlled Substances Act, the State effectively has the power of seditious conspiracy to destroy the Federal Union.

## CONCLUSION

This Court should grant Petition to serve notice to millions of marijuana users across 47 seditious Confederate Cannabis States of America: “Federal law, Controlled Substances Act, preempts State consent to violate federal law, 21 U.S.C. §§ 801-904, under ordinary principles of federal preemption. Federal law, 25 U.S.C. § 71, implicating Indian treaties, in full force and effect, preempts State jurisdiction to conduct election activities, to include, but not limited to signature-gathering in support of ballot initiative petitions on Indian treaty land, where the treaty in question restricts the power of the United States to embrace treaty land into any Territory or State, under ordinary principles of federal preemption.”

Respectfully submitted,

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