No. 21-646

IN THE
Supreme Court of the United States

STATE OF OKLAHOMA,
Petitioner,

v.

DAMEON LAMAR LEATHERS,
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). The next year, Oklahoma nonetheless charged Respondent Dameon Lamar Leathers, a member of the Muscogee Nation, for alleged crimes committed within the Cherokee Nation's reservation. Information (Okla. Dist. Ct., Tulsa Cnty. Apr. 10, 2018).[1] Respondent was convicted of the alleged crime on December 3, 2019. Verdict (Okla. Dist. Ct., Tulsa Cnty. Dec. 3, 2019).

Before briefs were filed on appeal, this Court decided *McGirt*. Respondent promptly alerted the Oklahoma Court of Criminal Appeals ("OCCA") 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 Cherokee reservation. Notice of Indian Country Jurisdictional

[1] References to district-court filings are to Case No. CF-2018-1340, available at https://bit.ly/30crZFj.

Issue at 1 (Okla. Ct. Crim. App. Sept. 14, 2020).[2] The OCCA stayed the case pending its resolution of other, further-advanced cases concerning the existence of the Cherokee reservation. Pet. App. 3a, 25a.

In April 2021, the OCCA held that Congress established a reservation for the Cherokee Nation and that the Cherokee reservation continues to exist. *Spears v. Oklahoma*, 2021 OK CR 7, ¶¶11-16, 485 P.3d 873, 876-77, *petition for cert. filed*, No. 21-323 (U.S. Sept. 1, 2021). The OCCA subsequently remanded Respondent's case to the district court for an evidentiary hearing on Respondent's Indian status and whether the alleged crimes occurred within the Cherokee reservation. Pet. App. 4a.

On remand, the parties stipulated that Respondent was an enrolled member of the Muscogee Nation and that the alleged crimes were committed within the historical boundaries of the Cherokee Nation. Pet. App. 18a-19a. Oklahoma did not argue, based on these stipulations, that the district court should deny relief. *See id.* The district court concluded that the alleged crimes took place within the Cherokee reservation and that the Cherokee reservation was never disestablished. Pet. App. 12a-16a.

After remand, the case returned to the OCCA. Oklahoma did not request that the OCCA deny relief based on any claim that the crime did not occur in Indian country. It did—for the first time—drop a footnote purporting to "preserve[] the right to ask the Supreme

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[2] References to filings in the Oklahoma Court of Criminal Appeals are to Case No. F-2019-962, available at https://bit.ly/3kpBVCP.

Court to review" *McGirt*, *Spears*, and *Hogner v. State*, 2021 OK CR 4, __ P.3d __ (recognizing the Cherokee reservation). Pet. App. 39a n.2. But Oklahoma did not ask the OCCA itself to reconsider *Spears* and *Hogner* or present any evidence pertaining to the existence of the Cherokee reservation. The OCCA did not address that footnote. Instead, it decided the issues it had directed the trial court to address on remand. It upheld the trial court's findings that the victim was an Indian under federal law and that the charged crime occurred within the boundaries of the Cherokee Nation Reservation and, on August 5, 2021, it duly vacated Respondent's conviction for lack of jurisdiction. Pet. App. 4a-6a.

By then, the federal government had long since charged Respondent and taken him into custody. Complaint at 1 (N.D. Okla. Mar. 19, 2021), ECF No. 1; Arrest Warrant at 1 (N.D. Okla. Apr. 2, 2021), ECF No. 18.[3] Trial is set for January 18, 2022. Order at 3 (N.D. Okla. Oct. 1, 2021), ECF No. 55.

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

[3] References to filings in Respondent's federal criminal case are to Case No. 21-cr-163 (N.D. Okla.).

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).

Oklahoma has argued that in cases like this one, unlike in *Castro-Huerta* and other pending petitions, it preserved "its position that *McGirt* was wrongly decided." *Castro-Huerta* Reply 5-6.[4] That is incorrect.

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[4] Oklahoma's *Castro-Huerta* Reply cites *Oklahoma v. Miller*, No. 21-643, which included a belated footnote similar to the one in this case. *Infra* 5. Because Oklahoma has asked that this petition be held for *Castro-Huerta*, Respondent addresses that petition. Again,

In a June 11, 2021 supplemental brief, Oklahoma appended a footnote in which it purported to "preserve[] the right to ask the Supreme Court to review" *McGirt*. Pet. App. 39a n.2. But to begin, that footnote—filed after a new Attorney General had taken office—was too little, too late. In Oklahoma, arguments raised for the first time on appeal are generally waived, *Hunter v. State*, 1992 OK CR 1, 825 P.2d 1353, 1355,[5] and Oklahoma raised this point only in a cursory footnote.

That is particularly true given how thoroughly Oklahoma had previously conceded the Cherokee Reservation's existence. Indeed, in other cases, Oklahoma affirmatively *accepted* that the Cherokee reservation exists. Cherokee Nation Amicus Br. 15-16 (discussing *McDaniel* and *Foster*). Then, in this case, Oklahoma emphasized that it "wish[ed] to see th[is] matter resolved with judicial efficiency and economy" and thus stipulated that "the crimes at issue in this case were committed … within the historical boundaries of the Cherokee Nation." Pet. App. 18a-19a. The trial court duly found that "the crime in this case occurred within the Cherokee Nation reservation boundaries."

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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.

[5] Oklahoma law recognizes an exception to this waiver rule for arguments that would *divest* the court of jurisdiction but not for arguments, like the one here, that seek to *establish* jurisdiction.

Pet. App. 15a. Dropping a footnote, after all this, did not preserve Oklahoma's current arguments.

That is even more true because Oklahoma never presented any *evidence* to support its current arguments. Those arguments do not raise pure legal questions; they are fundamentally factual. 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." *Id.* 3-4. But below, Oklahoma presented no evidence on either point. *Castro-Huerta* Opp. 18-19. 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*. 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 Castro-Huerta* Opp. 18-19; Cherokee Nation Amicus Br. 15-20.[6]

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[6] 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

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*

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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 such evidence, it would be inappropriate to allow Oklahoma to do so simply because it has sought *certiorari*. *See* Cherokee Nation Amicus Br. 15-19 & n.38 (identifying additional procedural obstacles, including mootness and estoppel). Moreover, the OCCA in Respondent's case ordered that its mandate be "spread of record," Mandate at 1 (Okla. Dist. Ct., Tulsa Cnty. Sept. 15, 2021), meaning that "there is nothing further to litigate" and all appeals are moot, *see C & L Enters., Inc. v. Citizen Band Potawatomi Tribe of Okla.*, 2002 OK 99 ¶ 19.

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.[7]

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."[8] And weeks later, it became clear why: It preferred to swing for the fences

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[7] 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").

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

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* Cherokee Nation Amicus Br. 5-8; 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, *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, 497 P.3d at 689.[9] 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 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 Amicus Br. 10-12.

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

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[9] While the *Matloff* defendant has filed a petition for writ of certiorari, Oklahoma has vigorously defended *Matloff*—and indeed, argued that this Court does not even have jurisdiction to *review* that decision because it was "based on independent and adequate state law." Br. in Opp. 1, *Parish v. Oklahoma*, No. 21-467.

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. 3-12. 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.[10]

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*

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[10] 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.

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.

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. 22-23.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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