

No. 21-608

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IN THE  
*Supreme Court of the United States*

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STATE OF OKLAHOMA,  
*Petitioner,*

v.

LAURIE JEAN MARTIN,  
*Respondent.*

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

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BRIEF IN OPPOSITION

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MICHAEL D. MOOREHEAD  
OKLAHOMA INDIGENT  
DEFENSE SYSTEM  
P.O. Box 926  
Norman, OK 73070  
(405) 801-2601

ZACHARY C. SCHAUF  
*Counsel of Record*  
LEONARD R. POWELL  
ALLISON M. TJEMSLAND  
VICTORIA HALL-PALERM  
KELSEY L. STIMPLE  
JENNER & BLOCK LLP  
1099 New York Ave., NW  
Suite 900  
Washington, DC 20001  
(202) 639-6000  
zschauf@jenner.com

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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 Laurie Jean Martin, a member of the Choctaw Nation, was charged by information in December 2016 for alleged crimes committed within the Chickasaw reservation. Information (Okla. Dist. Ct., Carter Cnty. Dec. 22, 2016).<sup>1</sup> 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). Meanwhile, Oklahoma prosecuted Respondent, who was convicted by a jury on August 11, 2017. Verdict (Okla. Dist. Ct., Carter Cnty. Aug. 11, 2017). After the jury’s verdict, but before the court entered its judgment and sentence, Respondent moved to dismiss for lack of jurisdiction. Motion to Dismiss for Lack of Jurisdiction (Okla. Dist. Ct., Carter Cnty. Sept. 13, 2017). The court denied the motion and sentenced Respondent to 40 years. Court Minute (Okla. Dist. Ct., Carter Cnty. Sept. 14, 2017).

On appeal, Respondent again argued that Oklahoma lacked jurisdiction to prosecute her because she is

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<sup>1</sup> References to district-court filings are to Case No. CF-2016-782A, available at <https://bit.ly/3cBJuSt>.

Indian and the alleged crimes occurred within the Chickasaw reservation. Pet. App. 2a. The Oklahoma Court of Criminal Appeals (“OCCA”) stayed the appeal pending *McGirt*. Order (Okla. Ct. Crim. App. Mar. 29, 2019).<sup>2</sup>

After *McGirt*, the OCCA remanded to the district court for an evidentiary hearing on Respondent’s Indian status and the location of the alleged crimes—in particular, whether Congress established a reservation for the Chickasaw Nation and, if so, whether Congress disestablished that reservation. Pet. App. 26a-28a. The parties stipulated that Respondent was an enrolled member of the Choctaw Nation. Pet. App. 18a. As to the Indian country issue, Oklahoma “set[] forth no fact or law contrary” to Respondent’s evidence. Pet. App. 20a. Based on evidence presented by Respondent and the Chickasaw Nation, the district court concluded that Congress established a reservation for the Chickasaw Nation via the 1830 Treaty of Dancing Rabbit Creek, the 1837 Treaty of Doaksville, the 1855 Treaty of Washington, and the 1866 Treaty of Washington. Pet. App. 20a-22a. On the disestablishment question, “[n]o evidence [was] presented to the Court to establish that Congress has taken any action whatsoever to erase the boundaries or disestablish the Chickasaw Reservation,” and Oklahoma “set[] forth no evidence or argument as to the issue of disestablishment.” Pet. App. 23a. Thus, the district court concluded that the Chickasaw reservation continues to exist. *Id.*

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<sup>2</sup> References to filings in the OCCA are to Case No. F-2017-991, available at <https://bit.ly/3FEZX55>.

On appeal, Oklahoma did not argue that the OCCA should deny relief. *See* Supplemental Brief of Appellee after Remand at 5-6 (Okla. Ct. Crim. App. Dec. 21, 2020). The OCCA upheld the trial court’s determination that the Chickasaw reservation has not been disestablished. Pet. App. 8a. The OCCA specifically noted Oklahoma’s “acquiescence” on remand, admonishing that “the State presented no stipulation, argument or evidence regarding the existence of the Chickasaw Reservation.” *Id.* Therefore, on May 27, 2021, the OCCA vacated Respondent’s conviction. Pet. App. 9a. The district court duly dismissed Respondent’s case on June 16, 2021. Order of Dismissal (Okla. Dist. Ct., Carter Cnty. June 16, 2021).

By then, the federal government had long since charged Respondent. Complaint (E.D. Okla. Mar. 18, 2021), ECF No. 1.<sup>3</sup> Federal authorities promptly took Respondent into custody. Warrant of Arrest at 1 (E.D. Okla. Mar. 31, 2021), ECF No. 12. Respondent pled guilty on July 14, 2021, and is awaiting sentencing. Plea Agreement (E.D. Okla. July 14, 2021), ECF No. 58.

### **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.

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<sup>3</sup> References to filings in Respondent’s federal criminal case are to Case No. 21-cr-47 (E.D. Okla.).



First, this case does not present Oklahoma’s question presented: It concerns not the Muscogee reservation (at issue in *McGirt*) but the Chickasaw 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 Chickasaw, for example, signed a separate agreement—different from the Muscogee—that preserved its tribal courts. *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1442 (D.C. Cir. 1988); *Marris v. Sockeye*, 170 F.2d 599, 602 (10th Cir. 1948); *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 Chickasaw reservation.

Second, Oklahoma below did not raise its request to overrule *McGirt* and declined to even present evidence on the Chickasaw reservation’s disestablishment. 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.<sup>4</sup> And it seeks *McGirt*'s overruling based on claims of “disruption.” *Id.* 3-4. But below, Oklahoma presented no evidence on either point and declined even to take a position on the disestablishment of the Chickasaw reservation. Indeed, in another case involving the Chickasaw reservation, Oklahoma *stipulated* that the crimes occurred “within the boundaries of the Chickasaw [r]eservation, *and thus* in Indian Country.” Order Approving Litigants’ Agreed Stipulations at 2, *Ball v. State*, No. CF-2018-157 (Okla. Dist. Ct., McClain Cnty. Mar. 26, 2021), <https://bit.ly/2X4eSoA> (emphasis added); *accord* Chickasaw Nation Amicus Br. 15-16, *Oklahoma v. Beck*, No. 21-373.

All of that is why Oklahoma’s petition is so light on evidence and so heavy on citation-free assertions. This is no way to undertake the grave task of weighing whether to abandon *stare decisis*. Oklahoma’s waiver, and its failure to develop a record, militate powerfully against granting its petition. *See Castro-Huerta* Opp. 18-19; Chickasaw Nation *Beck* Amicus Br. 15-20.<sup>5</sup>

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<sup>4</sup> 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 *Chickasaw* reservations, different reservations 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.

<sup>5</sup> 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 or argument, it would be inappropriate to allow Oklahoma to do so simply because it has sought *certiorari*. *See*

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.

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

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Chickasaw Nation *Beck* Amicus Br. 3-8 (identifying additional procedural obstacles).

not desire “a permanent federal fix.”<sup>6</sup> 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. *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. 2, Oklahoma v. Castro-Huerta*, No. 21-429; *Cherokee Nation Amicus Br. 10-12, 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, *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

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<sup>6</sup> Reese Gorman, *Cole Encourages State-Tribal Relations Over State Challenges to McGirt*, Norman Transcript (July 23, 2021), <https://yhoo.it/3lYmJD8>.

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 *comprehensively* occurring in those cases, or that the federal government has already obtained convictions in several such cases (like this one). *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* Muscogee (Creek) Nation *Castro-Huerta* Amicus Br. 12-19; Chickasaw Nation *Beck* Amicus Br. 5-7, 9; Choctaw Nation Amicus Br. 9-16,

*Oklahoma v. Sizemore*, No. 21-326; Cherokee Nation *Castro-Huerta* Amicus Br. 4-12.

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. 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.

Indeed, 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,

MICHAEL D. MOOREHEAD  
OKLAHOMA INDIGENT  
DEFENSE SYSTEM  
P.O. Box 926  
Norman, OK 73070  
(405) 801-2601

ZACHARY C. SCHAUF  
*Counsel of Record*  
LEONARD R. POWELL  
ALLISON M. TJEMSLAND  
VICTORIA HALL-PALERM  
KELSEY L. STIMPLE  
JENNER & BLOCK LLP  
1099 New York Ave., NW  
Suite 900  
Washington, DC 20001  
(202) 639-6000  
zschauf@jenner.com