No. 21-772

IN THE
Supreme Court of the United States

STATE OF OKLAHOMA,
Petitioner,

v.

STEWART WAYNE COFFMAN,
Respondent.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the Oklahoma Court of Criminal Appeals correctly hold that States lack jurisdiction to prosecute crimes by non-Indians against Indians in Indian country, as this Court has repeatedly affirmed and as lower courts uniformly agree?

2. 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 two questions presented are identical to the questions 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. __"), and for additional reasons detailed below.

STATEMENT OF THE CASE

In *Sharp v. Murphy*, 140 S. Ct. 2412 (2020), and *McGirt*, it was common ground that the Court's holding would apply to all crimes involving Indians, whether as defendants or victims. That was because, as Oklahoma explained, "States lack criminal … jurisdiction … if either the defendant or victim is an Indian." *Murphy* Pet. 18, No. 17-1107. Hence, Oklahoma emphasized that an adverse ruling would invalidate convictions for "crimes committed against Indians" by Indians or non-Indians, "which the state would not have jurisdiction over." *McGirt* Arg. Tr. 54, No. 18-9526.

Respondent invoked that law below. Respondent Stewart Wayne Coffman was charged by information in October 2017 for an alleged crime committed within the Choctaw reservation. Information (Okla. Dist. Ct., McCurtain Cnty. Oct. 11, 2017).[1] Two months earlier, in August 2017, the Tenth Circuit had applied *Solem v. Bartlett*, 465 U.S. 463 (1984), to hold that the Muscogee reservation endured. *Murphy v. Royal*, 875 F.3d 896,

[1] References to district-court filings are to Case No. CF-2017-0301, available at https://bit.ly/3KneMMP.

966 (10th Cir. 2017). Oklahoma nevertheless prosecuted Respondent, who was convicted after a jury trial in October 2018. Verdict (Okla. Dist. Ct., McCurtain Cnty. Oct. 25, 2018).

On appeal, Respondent argued that Oklahoma lacked jurisdiction to prosecute him because the victim was an Indian and the alleged crime occurred within the Choctaw reservation. Pet. App. 2a. While Respondent's appeal was pending, this Court decided *McGirt*. Hence, the OCCA remanded to the district court for an evidentiary hearing on the victim's Indian status and the location of the alleged crime. Pet. App. 18a-19a.

On remand, the parties stipulated that the victim was an enrolled member of the Choctaw Nation. Pet. App. 14a. As to the Indian country issue, the parties stipulated that the alleged crime took place "within the historical boundaries of the Choctaw Nation." *Id.* Oklahoma presented "no evidence … to the Court that Congress has ever explicitly erased [the Choctaw reservation] boundaries and disestablished that reservation." Pet. App. 12a.

At the remanded evidentiary hearing, Oklahoma maintained—contrary to its representations in *Murphy* and *McGirt*—that it had concurrent jurisdiction over crimes committed by non-Indians, even in Indian Country. Motion to Strike Supplemental Brief of Appellee or, in the Alternative, to File a Response to Appellee's Argument Regarding Concurrent Jurisdiction at 2-3 (Okla. Ct. Crim. App. Nov. 6, 2020).[2]

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[2] References to filings in the Oklahoma Court of Criminal Appeals are to Case No. F-2018-1268, available at https://bit.ly/3H3hCE9.

Oklahoma, however, merely stated that it wished to "preserve" the issue and did not present any argument to the district court in support of its position. *Id.*

After remand, the case returned to the OCCA. Oklahoma asked the OCCA to deny relief based on its argument that it has concurrent jurisdiction over crimes committed by non-Indians within the Choctaw reservation. Pet. App. 5a. The OCCA rejected that argument, citing its decision in *Bosse v. Oklahoma*, 2021 OK CR 3, 484 P.3d 286, *withdrawn on other grounds by* 2021 OK CR 23, 495 P.3d 669. Pet. App. 6a.[3] It further found that the victim was an Indian under federal law and "that no evidence ha[d] been presented that Congress has ever explicitly erased those boundaries and disestablished the Choctaw reservation." Pet. App. 6a. Thus, the OCCA vacated Respondent's conviction for lack of jurisdiction. Pet. App. 6a-7a. The mandate issued in the district court on September 20, 2021. Mandate (Okla. Dist. Ct., McCurtain Cnty. Sept. 20, 2021).

By then, the federal government had charged Respondent and taken him into custody. Complaint at 1

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[3] The OCCA had first rejected Oklahoma's concurrent-jurisdiction argument in *Bosse*. Although the OCCA subsequently vacated *Bosse* on other grounds, the OCCA again "reject[ed] the State's concurrent jurisdiction argument" in *Roth v. Oklahoma*. 2021 OK CR 27 ¶ 12, __ P.3d __. *Roth* observed that the rule of "exclusive" federal jurisdiction "is well-established." *Id.* ¶ 13. And it explained that "Congress has authorized States to assume criminal jurisdiction over Indian Country in limited circumstances" but that Oklahoma never received such jurisdiction. *Id.* ¶ 14.

(E.D. Okla. Sept. 16, 2021), ECF No. 1[4]; Arrest Warrant at 1 (E.D. Okla. Sept. 17, 2021), ECF No. 3. Trial is set for April 5, 2022. Order at 2 (E.D. Okla. Nov. 9, 2021), ECF No. 30.

REASONS FOR DENYING THE PETITION

The OCCA's application of settled law in the decision below does not warrant review, for the reasons explained in the *Castro-Huerta* Brief in Opposition. *Castro-Huerta* Opp. 9-37. 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. 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. denied*, No. 21-467 (U.S. Jan. 10, 2022). *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. So Oklahoma shifted course. Seeking to salvage review, Oklahoma filed a new petition, focusing on *McGirt*'s consequences for present and future criminal prosecutions and for civil jurisdiction. *Oklahoma v. Castro-Huerta*, No. 21-429. But try as Oklahoma might, the simple facts remain: *McGirt*'s backwards-looking effects are now limited—and its going-forward effects

[4] References to filings in Respondent's federal criminal case are to Case No. 21-cr-324 (E.D. Okla.).

are for Congress to weigh. Today, neither of Oklahoma's questions presented warrants review.

Oklahoma's first question presented asks "[w]hether a State has authority to prosecute non-Indians who commit crimes against Indians in Indian country." Pet. i. The OCCA correctly answered no, in a decision implicating no conflict or disagreement. *Castro-Huerta* Opp. 9-17. This Court has long affirmed that "the United States, rather than … [the State], ha[s] jurisdiction over offenses committed" in Indian country "by one who is not an Indian against one who is." *Williams v. United States*, 327 U.S. 711, 714 & n.10 (1946); *see Castro-Huerta* Opp. 9-10. Lower courts uniformly concur. *Castro-Huerta* Opp. 9 & n.5; Cherokee Nation Amicus Br. 15-22, *Oklahoma v. Castro-Huerta*, No. 21-429. Meanwhile, Congress has repeatedly embedded this understanding in statute. *Castro-Huerta* Opp. 11-12, 14-15.[5] Oklahoma previously asked this Court to upend that consensus based on *McGirt*'s effects on existing Oklahoma convictions. But again, those effects are now limited—and *Matloff* has reshaped the backdrop against

[5] Oklahoma has vaguely suggested a conflict based on *State v. McAlhaney*, 17 S.E.2d 352, 354 (N.C. 1941); *see Castro-Huetra* Reply 3. As the United States has explained, however, North Carolina courts no longer treat that decision as controlling. U.S. Br. 24 n.8, *Oklahoma v. Bosse*, No. 20A161 (quoting *State v. Nobles*, 818 S.E.2d 129, 135 & n.2 (N.C. Ct. App. 2018), which rejected an argument based on *McAlhaney* that "North Carolina at least has concurrent criminal jurisdiction"). That is no surprise given that *McAlhaney* predated many of this Court's relevant cases and many of Congress's relevant statutes.

which this Court stayed *Bosse*. *Castro-Huerta* Opp. 10-11.[6]

Oklahoma's request to overrule *McGirt* is no more certworthy. *Castro-Huerta* Opp. 2-4, 18-37. The Court must deny this petition, however, for even more mundane reasons. First, this case does not present Oklahoma's second 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's—that preserved its tribal courts. *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1442 (D.C. Cir. 1988); *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 Choctaw reservation. *Castro-Huerta* Opp. 18-19.

Second, Oklahoma below did not raise its request to overrule *McGirt* and declined to even present evidence on the Choctaw reservation's disestablishment. In cases from state courts, this Court considers only claims "pressed or passed on below"—even when litigants

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[6] Oklahoma also waived its concurrent-jurisdiction argument by not raising until the appeal from the OCCA's post-*McGirt* remand. Under Oklahoma law, "the State, like defendants, must … preserve errors …, otherwise they are waived." *A.J.B. v. State*, 1999 OK CR 50, ¶ 9, 992 P.2d 911, 912-13. So whatever the answer to Oklahoma's question presented *in general*, the decision below reached the correct result.

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.[7] 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 Choctaw reservation.

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 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*. Oklahoma's waiver, and its

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

failure to develop a record, militate powerfully against granting its petition. *See Castro-Huerta* Opp. 18-19; Choctaw Nation Amicus Br. 17-22; *accord* Chickasaw Nation Amicus Br. 18-20, *Oklahoma v. Beck*, No. 21-373; Cherokee Nation *Castro-Huerta* Amicus Br. 13-14.[8]

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

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[8] 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 such evidence, it would be inappropriate to allow Oklahoma to do so simply because it has sought *certiorari*. *See* Chickasaw Nation *Beck* Amicus Br. 20 & n.13 (identifying additional procedural obstacles, including mootness). Moreover, the OCCA in Respondent's case ordered that the its mandate be "spread of record," Mandate at 1 (Okla. Dist. Ct., McCurtain Cnty. Sept. 20, 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, 72 P.3d 1.

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.[9]

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[9] 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").

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."[10] 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; 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.

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. Again, *McGirt*'s impact on existing convictions is now limited and affects only the modest

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

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* 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. 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.[11]

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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[11] 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.

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