

No. 21-502

IN THE
Supreme Court of the United States

STATE OF OKLAHOMA,
Petitioner,

v.

TERRANCE LUCAS COTTINGHAM,
Respondent.

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

BRIEF IN OPPOSITION

CHAD JOHNSON
OKLAHOMA INDIGENT
DEFENSE SYSTEM
P.O. Box 926
Norman, OK 73070
(405) 801-2601

DAVID A. STRAUSS
SARAH M. KONSKY
JENNER & BLOCK
SUPREME COURT AND
APPELLATE CLINIC AT
THE UNIVERSITY OF
CHICAGO LAW SCHOOL
1111 E. 60th St.
Chicago, IL 60637

ZACHARY C. SCHAUF
Counsel of Record
MATTHEW S. HELLMAN
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

QUESTION PRESENTED

Should this Court consider overruling its statutory decision in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020)?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTRODUCTION 1

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE PETITION 3

CONCLUSION 9

TABLE OF AUTHORITIES

CASES

<i>Bankers Life & Casualty Co. v. Crenshaw</i> , 486 U.S. 71 (1988).....	4
<i>Halliburton Co. v. Erica P. John Fund, Inc.</i> , 573 U.S. 258 (2014).....	6
<i>Illinois v. Gates</i> , 462 U.S. 213 (1983)	4
<i>McGirt v. Oklahoma</i> , 140 S. Ct. 2452 (2020)	1, 3
<i>Michigan v. Bay Mills Indian Community</i> , 572 U.S. 782 (2014).....	6
<i>Murphy v. Royal</i> , 875 F.3d 896 (10th Cir. 2017).....	1
<i>Solem v. Bartlett</i> , 465 U.S. 463 (1984).....	1
<i>State ex rel. Matloff v. Wallace</i> , 2021 OK CR 21, petition for cert. filed, No. 21-467 (U.S. Sept. 29, 2021)	7
<i>United States v. Jones</i> , 565 U.S. 400 (2012)	4

OTHER AUTHORITIES

Brief for Amicus Curiae Chickasaw Nation, <i>Oklahoma v. Beck</i> , No. 21-373 (U.S. Oct. 15, 2021).....	5, 7, 8, 9
Brief for Amicus Curiae Choctaw Nation, <i>Oklahoma v. Sizemore</i> , No. 21-326 (U.S. Oct. 28, 2021).....	5, 8, 9
Brief for Amicus Curiae Muscogee (Creek) Nation, <i>Oklahoma v. Mize</i> , No. 21-274 (U.S. Oct. 5, 2021)	7, 8, 9

Brief in Opposition, *Oklahoma v. Mize*, No. 21-274 (U.S. Oct. 5, 2021) 1, 3, 5, 6, 7, 8, 9

Reese Gorman, *Cole Encourages State-Tribal Relations Over State Challenges to McGirt*, Norman Transcript (July 23, 2021), <https://yhoo.it/3lYMjD8>..... 6

Petition for a Writ of Certiorari, *Oklahoma v. Bosse*, No. 21-186 (U.S. Aug. 6, 2021) 7

Petition for a Writ of Certiorari, *Oklahoma v. Castro-Huerta*, No. 21-429 (U.S. Sept. 17, 2021)..... 1, 4, 7, 8

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. Mize*, No. 21-274 (as well as 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 *Mize* (“*Mize* Opp. ___”), and for additional reasons detailed below.

STATEMENT OF THE CASE

Respondent Terrance Lucas Cottingham, a member of the Osage Nation, was charged by information in October 2015 for an alleged crime committed within the Cherokee reservation. Information (Okla. Dist. Ct., Washington Cnty. Oct. 7, 2015).¹ 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 maintained its prosecution of Respondent, who was convicted in September 2017. Verdict (Okla. Dist. Ct., Washington Cnty. Sept. 19, 2017).

On appeal, Respondent argued that Oklahoma lacked jurisdiction to prosecute him because he is Indian and the alleged crime took place within the Cherokee reservation. Pet. App. 2a. The Oklahoma Court of

¹ References to district-court filings are to Case No. CF-2015-350, available at <https://bit.ly/3k1kVCP>.

Criminal Appeals (“OCCA”) stayed the appeal pending *McGirt*. Order at 2 (Okla. Ct. Crim. App. Sept. 27, 2019).²

After *McGirt*, the OCCA remanded for an evidentiary hearing on Respondent’s Indian status and the location of the alleged crime—in particular, whether Congress established a reservation for the Cherokee Nation and, if so, whether Congress disestablished that reservation. Pet. App. 19a-20a. The parties stipulated that Respondent is a member of the Osage Nation. Pet. App. 4a. As to the Indian country issue, Oklahoma stipulated that the alleged crime took place within the historical boundaries of the Cherokee reservation, *id.*, but “did not present any evidence or argument as to whether Congress disestablished the Cherokee Reservation,” Pet. App. 17a. Based on evidence presented by Respondent and the Cherokee Nation—and “having heard no other evidence”—the district court concluded that “the Cherokee Reservation was not disestablished.” *Id.*

On appeal, Oklahoma did not argue that the OCCA should deny relief. *See* Supplemental Brief of Appellee after Remand at 5 (Okla. Ct. Crim. App. Dec. 15, 2020). The OCCA found that the district court appropriately “determine[d] that Congress established a Cherokee Nation reservation and that no evidence was presented showing that Congress explicitly erased or disestablished the boundaries of the Cherokee Nation or that the State of Oklahoma did not have jurisdiction in this matter.” Pet. App. 8a. The OCCA thus, on May 6,

² References to filings in the Oklahoma Court of Criminal Appeals are to Case No. F-2017-1294, available at <https://bit.ly/3B65tLq>.

2021, vacated Respondent's conviction, with the mandate issuing 20 days after the filing of the decision. Pet. App. 8a-9a.

Long before the OCCA's ruling, on October 5, 2020, the federal government charged Respondent. Indictment at 1 (N.D. Okla. Oct. 5, 2020), ECF No. 2.³ Before the OCCA's order, federal authorities took custody of Respondent from Oklahoma. Warrant at 1 (N.D. Okla. May 11, 2021), ECF No. 17. On June 10, 2021, Respondent pled guilty. Petition to Enter Plea of Guilty and Order Entering Plea at 7 (N.D. Okla. June 10, 2021), ECF No. 31. Sentencing is set for November 29, 2021. Minutes of Proceedings at 1 (N.D. Okla. Sept. 16, 2021), ECF No. 40.

REASONS FOR DENYING THE PETITION

As explained in the *Mize* 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 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

³ References to filings in Respondent's federal criminal case are to Case No. 20-cr-209 (N.D. Okla.).

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 raise its request to overrule *McGirt* and declined to even present evidence on the Cherokee 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. And it seeks *McGirt*’s overruling based on claims of “disruption.” *Castro-Huerta* Pet. 3-4.⁴ But below, Oklahoma presented no evidence on either point and declined even to take a position on the

⁴ 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* 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.

disestablishment of the Cherokee reservation. Pet. App. 7a. And in other cases, Oklahoma affirmatively accepted that the Cherokee reservation exists. Cherokee Nation Amicus Br. 15-16 (discussing *McDaniel* and *Foster*). Only with the arrival of a new Attorney General, in June 2021, did Oklahoma reverse course. *Id.* at 19 n.48.

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* Pet. App. 7a (OCCA decision) (explaining that “[Oklahoma’s] tactic of passivity has created a legal void in [the] ability to adjudicate properly the facts underlying” the existence of the Cherokee reservation); *accord* Cherokee Nation Amicus Br. 15-20; Chickasaw Nation Amicus Br. 15-20, *Oklahoma v. Beck*, No. 21-373; Choctaw Nation Amicus Br. 17-21, *Oklahoma v. Sizemore*, No. 21-326.⁵

Regardless, Oklahoma’s request to overrule *McGirt* does not warrant review even in a case, unlike this one, presenting that question—as the *Mize* Brief in Opposition explains. *Mize* Opp. 2-4, 19-38. Like many of this Court’s statutory decisions, *McGirt* was divided.

⁵ 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 evidence or argument on disestablishment, it would be inappropriate to allow Oklahoma to present such evidence or argument simply because it has sought *certiorari*. *See* Cherokee Nation Amicus Br. 15-19 & n.40 (identifying additional procedural obstacles, including mootness and estoppel).

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 *Mize* Opp. 20-21.

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 to obtain its pre-*McGirt* criminal jurisdiction. *Mize* Opp. 3, 12. In July 2021, the State opposed federal-law-enforcement funding because it did not desire “a permanent federal fix.”⁶ 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

⁶ Reese Gorman, *Cole Encourages State-Tribal Relations Over State Challenges to McGirt*, Norman Transcript (July 23, 2021), <https://yhoo.it/3IYMjD8>.

[its] problems,” *Castro-Huerta* Pet. 4, badly misunderstands this Court’s role. *Mize* Opp. 20-24; see Muscogee (Creek) Nation Amicus Br. 25-28, *Oklahoma v. Mize*, No. 21-274; Chickasaw Nation *Beck* Amicus Br. 6-7, 13-15; Cherokee Nation Amicus Br. 4-8.

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 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, including Respondent's case. *Mize* Opp. 24-27; *see* Muscogee (Creek) Nation *Mize* Amicus Br. 8-11; Chickasaw Nation *Beck* Amicus Br. 4-5, 7-9; Choctaw Nation *Sizemore* Amicus Br. 15-16; 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 *McGirt* gives them and seeking the resources they need to do so (often over Oklahoma's opposition). *Mize* Opp. 27-32; *see* Muscogee (Creek) Nation *Mize* Amicus Br. 12-18; Chickasaw Nation *Beck* Amicus Br. 5-7, 9; Choctaw Nation *Sizemore* Amicus Br. 9-16; Cherokee Nation Amicus Br. 3-12.

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. *Mize* Opp. 32-37; *see* Muscogee (Creek) Nation *Mize* Amicus Br. 19-24; Chickasaw Nation *Beck* Amicus Br. 9-12; Choctaw Nation *Sizemore* Amicus Br. 10; Cherokee Nation Amicus Br. 12-14.

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. *Mize* Opp. 31-32; *see* Muscogee (Creek) Nation *Mize* Amicus Br. 25-28; Chickasaw Nation *Beck* Amicus Br. 20-22; Choctaw Nation *Sizemore* Amicus Br. 10-12; Cherokee Nation Amicus Br. 22-23.

CONCLUSION

The petition should be denied.

Respectfully submitted,

CHAD JOHNSON
OKLAHOMA INDIGENT
DEFENSE SYSTEM
P.O. Box 926
Norman, OK 73070
(405) 801-2601

DAVID A. STRAUSS
SARAH M. KONSKY
JENNER & BLOCK
SUPREME COURT AND
APPELLATE CLINIC AT
THE UNIVERSITY OF
CHICAGO LAW SCHOOL
1111 E. 60th St.
Chicago, IL 60637

ZACHARY C. SCHAUF
Counsel of Record
MATTHEW S. HELLMAN
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