No. 21-451

IN THE
Supreme Court of the United States

STATE OF OKLAHOMA,
Petitioner,

v.

SHAWN THOMAS JONES,
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. Mize*, No. 21-274 (as well as 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 *Mize* ("*Mize* 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 Shawn Thomas Jones was charged by information in October 2016 for alleged crimes committed within the Chickasaw reservation. Information (Okla. Dist. Ct., Pontotoc Cnty. Oct. 14, 2016).[1] In August 2017, the Tenth Circuit applied *Solem v. Bartlett*, 465 U.S. 463 (1984), to hold that the Muscogee reservation endured.

[1] References to district-court filings are to Case No. CF-2016-00591, available at https://bit.ly/3C3Yrry.

Murphy v. Royal, 875 F.3d 896, 966 (10th Cir. 2017). Oklahoma maintained its prosecution of Respondent, who was convicted after a jury trial in December 2017. Issue Judgment & Sentence (Okla. Dist. Ct., Pontotoc Cnty. Dec. 22, 2017).

On appeal, Respondent argued that Oklahoma lacked jurisdiction to prosecute him because the victims were Indians and the alleged crimes occurred within the Chickasaw reservation. Pet. App. 2a. The Oklahoma Court of Criminal Appeals ("OCCA") stayed the appeal pending this Court's review of *Murphy*. Order Holding Case in Abeyance and Directing Attorney General to Provide Status Update (Okla. Ct. Crim. App. Apr. 5, 2019).[2]

After *McGirt*, the OCCA remanded to the district court for an evidentiary hearing on the victims' 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. 22a. The OCCA expressly instructed the State to develop evidence on the status of the Chickasaw reservation. Pet. App. 21a-22a.

On remand, the parties stipulated that the victims were enrolled members of the Chickasaw Nation. Pet. App. 2a-3a. As to the Indian country issue, the parties stipulated that the alleged crimes took place "within the historical geographic area of the Chickasaw Nation." Pet. App. 14a. Despite the OCCA's request, at the

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[2] References to filings in the Oklahoma Court of Criminal Appeals are to Case No. F-2017-1309, available at https://bit.ly/3aV55V9.

evidentiary hearing, Oklahoma "took no position on the ultimate question of disestablishment or on the Indian status of the victims," and presented no evidence on disestablishment. Supplemental Brief of Appellee after Remand at 4 (Okla. Ct. Crim. App. Dec. 29, 2020).

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. 16a-18a. On the disestablishment question, "[n]o evidence [was] presented that these treaties ha[d] been formally nullified or modified in any way." Pet. App. 15a. Thus, the district court concluded that the Chickasaw reservation continues to exist.

At that evidentiary hearing, Oklahoma for the first time sought "to reserve the right to make an argument for the Court of Criminal Appeals regarding concurrent jurisdiction." Supplemental Brief of Appellee after Remand at 5 (Okla. Ct. Crim. App. Dec. 29, 2020). In its post-remand supplemental briefing, Oklahoma for the first time argued—contrary to its representations in *Murphy* and *McGirt*—that it has "concurrent jurisdiction over crimes committed by non-Indian defendants against Indian victims in Indian Country." *Id.* Respondent argued that this claim was waived and meritless. Appellant's Supplemental Brief at 7-9 (Okla. Ct. Crim. App. Dec. 29, 2020). Before the OCCA, Oklahoma again took no position on reservation status. *Id.* at 4.

The OCCA did not accept Oklahoma's concurrent jurisdiction argument and, relying on *Bosse v. Oklahoma*, 484 P.3d 286 (Okla. Ct. Crim. App. 2021), *withdrawn on other grounds by* 2021 OK CR 23, upheld the trial court's determination that the Chickasaw reservation had not been disestablished. Pet. App. 3a. Therefore, on April 22, 2021, the OCCA duly vacated Respondent's conviction for lack of jurisdiction. Pet. App. 4a. The district court dismissed Respondent's case. Order Dismissing Case and Costs (Okla. Dist. Ct., Pontotoc Cnty. Aug. 10, 2021).

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. State*. 2021 OK CR 27 ¶ 12. *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.

By the time the OCCA decided Respondent's case, the federal government had already charged Respondent, Complaint at 1 (Mar. 22, 2021), ECF No. 1,[3] and had taken Respondent into custody, Warrant at 1 (Apr. 7, 2021), ECF No. 9. Respondent's trial is scheduled for April 5, 2022. Order at 3 (Oct. 6, 2021), ECF No. 53.

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[3] References to filings in Respondent's federal criminal case are to No. 21-cr-118 (E.D. Okla.).

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 *Mize* Brief in Opposition. *Mize* Opp. 10-38. 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. *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, 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 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. *Mize* Opp. 10-19. 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 Mize* Opp. 10-11. Lower courts uniformly concur. *Mize* Opp. 10 & n.6; Chickasaw Nation Amicus Br. 3-10. Meanwhile, Congress has repeatedly embedded this understanding in statute. *Mize* Opp. 13, 15-16. 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 which this Court stayed *Bosse*. *Mize* Opp. 11-12.[4]

Oklahoma's request to overrule *McGirt* is no more certworthy. *Mize* Opp. 2-4, 19-38. 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 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's—that preserved its tribal courts. *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1442 (D.C. Cir. 1988); *Marris v. Sockey*, 170 F.2d 599, 602 (10th Cir. 1948); *cf. McGirt*, 140 S. Ct. at 2484, 2490

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[4] Oklahoma also waived its concurrent-jurisdiction argument by not raising until after 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. So whatever the answer to Oklahoma's question presented *in general*, the decision below reached the correct result.

(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.[5] 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,

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[5] 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.

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 and Striking Evidentiary Hearing at 2, *Ball v. State*, No. CF-2018-157 (Okla. Dist. Ct., McClain Cnty. Mar. 26, 2021) (emphasis added), https://bit.ly/2X4eSoA; *accord* Chickasaw Nation Amicus Br. 16-17.

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. 9a (OCCA decision) (Hudson, J., concurring in result) (explaining that this case should not be used to reach a "definitive conclusion" as to whether the Chickasaw reservation was disestablished because of the dearth of evidence Oklahoma put in the record); *accord* Chickasaw Nation Amicus Br. 17-21; Choctaw Nation Amicus Br. 17-21, *Oklahoma v. Sizemore*, No. 21-326; Cherokee Nation Amicus Br. 15-20, *Oklahoma v. Spears*, No. 21-323.[6]

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

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[6] 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* Chickasaw Nation Amicus Br. 20 & n.13 (identifying additional procedural obstacles, including mootness).

Opposition explains. *Mize* Opp. 2-4, 19-38. 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 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."[7] And weeks later, it became clear why: It preferred to swing for the fences in this Court. This Court's place, however, is not

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

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. *Mize* Opp. 20-24; *see* Muscogee (Creek) Nation Amicus Br. 25-28, *Oklahoma v. Mize*, No. 21-274; Chickasaw Nation Amicus Br. 6-7, 13-15, *Oklahoma v. Beck*, No. 21-373; Cherokee Nation *Spears* Amicus Br. 5-8.

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. Again, *McGirt*'s impact on existing convictions is now limited and 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. *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 *Spears* 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 *Spears* 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. *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 *Spears* 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 *Spears* Amicus Br. 22-23.

CONCLUSION

The petition should be denied.

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