No. 21-326

IN THE
Supreme Court of the United States

STATE OF OKLAHOMA,
Petitioner,

v.

DEVIN WARREN SIZEMORE,
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. 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 Devin Warren Sizemore, a member of the Chocktaw Nation, was charged by information in July 2016 for alleged crimes committed within the Choctaw reservation. Information at 1 (Okla. Dist. Ct., Pittsburg Cnty. July 15, 2016).[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). After the *Murphy* decision, Respondent filed a motion to dismiss in his pending criminal case, arguing that Oklahoma lacked jurisdiction to prosecute him because he is Indian and the alleged crime occurred within the Choctaw reservation. Motion to Dismiss (Okla. Dist. Ct. Pittsburg Cnty. Oct. 19, 2017). After briefing, the trial court denied the motion. Ruling (Okla. Dist. Ct. Pittsburg Cnty. Dec. 20, 2017). Respondent was

[1] References to district-court filings are to Case No. CF-2016-00593, available at https://bit.ly/3El34yi.

convicted in September 2018. Verdict (Okla. Dist. Ct. Pittsburg Cnty. Sept. 17, 2018).

On appeal, Respondent again argued that Oklahoma lacked jurisdiction to prosecute him. Pet. App. 34a-35a. The Oklahoma Court of Criminal Appeals ("OCCA") stayed the appeal pending *McGirt*. Pet. App. 34a n.2.

After *McGirt*, the OCCA remanded 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 Choctaw Nation and, if so, whether Congress disestablished that reservation. Pet. App. 34a-36a. The parties stipulated that Respondent is a member of the Choctaw Nation. Pet. App. 21a-22a. As to the Indian country issue, Oklahoma took "no position as to the facts underlying the existence, historically or now, of the Choctaw Nation Reservation." Pet App. 28a. And Oklahoma "offered no evidence or argument as to whether a reservation was ever established or disestablished for the Choctaw Nation." *Id.*; *see* Choctaw Nation Amicus Br. 17-21. Based on the evidence presented by the Respondent and the Choctaw Nation, the trial court concluded that Congress established a reservation for the Choctaw Nation via the Treaty Dancing Rabbit Creek in 1830, as reaffirmed and modified by the Treaty of Washington in 1855, and further modified by the post-civil war Treaty of Washington in 1866. Pet. App. 23a-26a; *see* Pet. App. 6a. Then the trial court canvassed the statutes around Oklahoma's statehood that might have disestablished the Choctaw reservation—including the 1898 Curtis Act and the 1902 Choctaw/Chickasaw Supplemental

Allotment Agreement. Pet. App. 26a-28a, 31a. It concluded that none of these statutes disestablished the Choctaw reservation. Pet App. 31a-32a.

The OCCA agreed that the parties' stipulations showed that Respondent was Indian. Pet App. 5a-6a. It also found that the Choctaw treaties had established a reservation. Pet App. 6a-7a. And it agreed that Oklahoma had not carried its burden to show disestablishment. The OCCA explained that the trial court, "[n]oting that the State of Oklahoma presented no evidence to show that Congress erased or disestablished the boundaries of the Choctaw Nation Reservation, … found that the Choctaw Reservation remains in existence." Pet. App. 8a. The OCCA deemed "[t]his finding … supported by the record." *Id.* It therefore held that Respondent's alleged crime had occurred in "Indian country." Pet. App. 8a-9a. The OCCA thus, on April 1, 2021, vacated Respondent's conviction, with the mandated issuing 20 days after the filing of the decision. Pet. App. 9a.

Shortly after the OCCA's ruling, on April 19, 2021, the federal government charged Respondent. Complaint at 1 (E.D. Okla. Apr. 19, 2021), ECF No. 1.[2] Federal authorities promptly took Respondent into custody. Warrant (E.D. Okla. Apr. 28, 2021), ECF No. 9. Trial is set for January 4, 2022. Order (E.D. Okla. Aug. 5, 2021), ECF No. 38.

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[2] References to filings in Respondents's federal criminal case are to Case No. 21-cr-138 (E.D. Okla.).

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 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—that preserved its tribal courts. *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1441-42 (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 Chocktaw reservation.

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 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. But below, Oklahoma presented no evidence on either point and declined even to take a position on the disestablishment of the Choctaw reservation. Pet. App. 28a; *see* Choctaw Nation Amicus Br. 17-21.

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. 16a (OCCA decision) (Hudson, J., concurring in results) (explaining that this case should not be used as "binding precedent" whether the Choctaw reservation was disestablished because "[Oklahoma's] tactic of passivity has created a legal void in [the] ability to adjudicate properly the facts underlying" the issue); *accord* Choctaw Nation Amicus Br. 17-21; Chickasaw Nation Amicus Br. 15-20, *Oklahoma v. Beck*, No. 21-373; Cherokee Nation Amicus Br. 15-20, *Oklahoma v. Spears*, No. 21-323.[3]

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[3] 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

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. 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

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inappropriate to allow Oklahoma to present such evidence or argument simply because it has sought *certiorari*.

it did not desire "a permanent federal fix."[4] 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.[5] *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 *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.

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.

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

[5] Because *Castro-Huerta* is Oklahoma's most recent version of its certiorari arguments—which it originally made in *Oklahoma v. Bosse*, No. 21-186—Respondent addresses that petition. *See Mize* Opp. 1-2, 3 n.2; Letter to the Court of Okla. at 1, *Sizemore* (Sept. 22, 2021). 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.

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. *Mize* Opp. 24-27; *see* Muscogee (Creek) Nation *Mize* Amicus Br. 8-11; Chickasaw Nation *Beck* Amicus Br. 4-5, 7-9; Choctaw Nation 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 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 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 Amicus Br. 10-12; Cherokee Nation *Spears* Amicus Br. 22-23.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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