No. 21-255

IN THE
Supreme Court of the United States

STATE OF OKLAHOMA,
Petitioner,
v.
GRANT N. JACKSON, IV,
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. __").

STATEMENT OF THE CASE

Respondent Grant N. Jackson, IV, a member of the Muscogee Nation, was charged by information on November 26, 2014 for an alleged crime committed within the Muscogee reservation. Information (Okla. Dist. Ct., Tulsa Cnty. Nov. 26, 2014).[1] Respondent was convicted after a jury trial. Verdict (Okla. Dist. Ct., Tulsa Cnty. May 16, 2016); Pet. App. 20a.

On appeal, Respondent argued that Oklahoma lacked jurisdiction to try him because he is an Indian and the alleged crimes took place within the Muscogee reservation. Supplemental *Pro Se* Brief of Appellant, at 1-8 (Okla. Ct. Crim. App. Apr. 6, 2017).[2] 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).

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[1] References to district-court filings are to Case No. CF-2014-5892, available at https://bit.ly/3lF6TrD.

[2] References to filings in the Oklahoma Court of Criminal Appeals are to Case No. F-2016-453, available at https://bit.ly/3ve9agB.

Shortly thereafter, Respondent filed a supplemental brief, asserting that the district court did not have subject matter jurisdiction over his case. Supplemental Brief of Appellant, at 1-8 (Okla. Ct. Crim. App. Aug. 19, 2020). The Oklahoma Court of Criminal Appeals ("OCCA") stayed the appeal pending the resolution of *Murphy*. Order at 1-2 (Okla. Ct. Crim. App. Sept. 26, 2017).

After *McGirt* and the resolution of *Murphy* in *Sharp v. Murphy*, 140 S. Ct. 2412 (2020), the OCCA remanded to the district court for an evidentiary hearing on Respondent's Indian status and whether the alleged crime took place within the Muscogee reservation. Pet. App. 21a-22a. The parties stipulated that Respondent was an enrolled member of the Muscogee Nation and that the alleged crime occurred within the Muscogee reservation. Pet. App. 17a-18a. Oklahoma did not argue, based on these stipulations, that the OCCA should deny relief. *See* Supplemental Brief of Respondent After Remand (Okla. Ct. Crim. App. Dec. 7, 2020). On March 18, 2021, the OCCA duly vacated Respondent's conviction. Pet. App. 4a.

The federal government indicted Respondent for child abuse on the same day. Indictment (N.D. Okla. Dec. 7, 2020), ECF No. 2.[3] Respondent's federal trial is scheduled for November 15, 2021. Minute Order (N.D. Okla. Oct. 4, 2021), ECF No. 55.

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[3] References to filings in Respondent's federal criminal case are to Case No. 4:20-cr-00310 (N.D. Okla.).

REASONS FOR DENYING THE PETITION

Oklahoma's request to overrule this Court's statutory decision in *McGirt* does not warrant review, for the reasons explained in the *Mize* Brief in Opposition. *Mize* Opp. 2-4, 19-38. Like many of this Court's statutory decisions, *McGirt* was divided. Like many such decisions, *McGirt* has real effects (though Oklahoma vastly overstates them). And like all 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. In July 2021, the State opposed federal-law-enforcement funding because 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 ongoing 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 *Mize* Amicus Br. 25-28.

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.

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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, *Jackson* (Sept. 22, 2021). True, it is bizarre for Oklahoma to ask the Court to weigh overruling *McGirt* in a case (like *Castro-Huerta*) 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.

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 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.

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.

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 those 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.

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 relief 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.

The Court should also deny review because Oklahoma did not preserve its request to overrule *McGirt*. In cases from state courts, this Court reviews only questions "pressed or passed on below." *Illinois v. Gates*, 462 U.S. 213, 219-20, 222 (1983). And that remains true even when litigants argue that a "well-settled federal" rule "should be modified." *Id.* at 222. "[C]hief among" the considerations supporting that practice "is

[the Court's] own need for a properly developed record." *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 79 (1988). This case illustrates why that is the rule. Oklahoma seeks *McGirt*'s overruling based on claims of "disruption." *Castro-Huerta* Pet. 3-4. But because Oklahoma did not raise its argument below, the record contains no evidence to support these claims.[6] Instead, Oklahoma fills its petition with citation-free assertions from counsel. That is no way to undertake the grave task of weighing whether to abandon *stare decisis*. If Oklahoma wants this Court to entertain that request, it should develop a record in the lower courts. Even better, it should take its claims to Congress, which has the institutional capacity to gather evidence and the institutional responsibility to make legislative judgments based on that evidence.

CONCLUSION

The petition should be denied.

[6] To Respondent's knowledge, the same is true of all Oklahoma's pending petitions.

Respectfully submitted,

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