No. 21-323

IN THE
Supreme Court of the United States

STATE OF OKLAHOMA,
Petitioner,
v.
MICHAEL EUGENE SPEARS,
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

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). Nonetheless, four months later Oklahoma charged respondent Michael Eugene Spears, a member of the Cherokee Nation, with a crime allegedly committed within the Cherokee Nation's reservation. Information (Okla Dist. Ct., Rogers Cnty. Dec. 13, 2017).[1] Respondent was convicted and sentenced to life without parole. Pet. App. 1a-2a.

On appeal, Respondent argued that Oklahoma lacked jurisdiction to prosecute him because he is Indian and the alleged crimes took place within the Cherokee reservation. Pet. App. 2a. The Oklahoma Court of Criminal Appeals ("OCCA") stayed the appeal pending *McGirt*. Pet. App. 46a & n.2.

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[1] References to district-court filings are to Case No. CF-2017-1013, available at https://bit.ly/3EolwGh.

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 Cherokee Nation and, if so, whether Congress disestablished that reservation. Pet. App. 2a, 47a. The parties stipulated that Respondent is a member of the Cherokee Nation. Pet. App. 4a.

As to the Indian country issue, Oklahoma took "no position as to the facts underlying the existence, now or historically, of the alleged Cherokee Nation Reservation." Pet. App. 43a. And "[n]o evidence or argument was presented by the State specifically regarding disestablishment." *Id.* Based on evidence presented by Respondent and the Cherokee Nation, the trial court concluded that Congress established a reservation for the Cherokee Nation via the 1833 Treaty with the Western Cherokee, the 1835 Treaty with the Cherokee, the 1846 Treaty with the Cherokee, and the 1866 Treaty with the Cherokee. Pet. App. 26a-29a; *see* Pet. App. 5a. Then, the trial court canvassed the statutes around Oklahoma's statehood that might have disestablished the Cherokee reservation—including provisions concerning the Cherokee Nation in the 1898 Curtis Act, the 1902 Cherokee allotment agreement, and the Five Tribes Act. Pet. App. 31a-39a. It concluded that none of these statutes disestablished the Cherokee reservation. *Id.* The trial court also analyzed the "[e]vents [s]urrounding [e]nactment of Cherokee [a]llotment [l]egislation and [l]ater [d]emographic [e]vidence" and found no evidence of disestablishment. Pet. App. 39a-43a.

On appeal, Oklahoma did not argue that the OCCA should deny relief. *See* Supplemental Brief of Appellee after Remand at 3-4 (Okla. Ct. Crim. App. Dec. 2, 2020).[2] The OCCA agreed that the parties' stipulations showed that Respondent was Indian. Pet. App. 4a. It also found that the Cherokee treaties had established a reservation. Pet. App. 5a-6a. 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 Cherokee Nation Reservation, … found that the Cherokee Reservation remains in existence." Pet. App. 7a. The OCCA deemed "[t]his finding … supported by the record." *Id.* It thus held that Respondent's alleged crime had occurred in "Indian country." *Id.* The OCCA therefore vacated Respondent's conviction. The trial court subsequently dismissed the case. Motion to Dismiss and Order (Okla Dist. Ct., Rogers Cnty. Apr. 20, 2021).

By then, the federal government had long since indicted Respondent. Indictment (N.D. Okla. Nov. 18, 2020, ECF No. 2.[3] Federal authorities promptly accepted custody of Respondent from Oklahoma. Arrest Warrant, (N.D. Okla. Apr. 20, 2021), ECF No. 10. Respondent's trial is set for February 2022. Order (N.D. Okla. May 11, 2021), ECF No. 24.

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[2] References to filings in the Oklahoma Court of Criminal Appeals are to Case No. F-2019-330, available at https://bit.ly/3mkZXjR.

[3] References to filings in Respondents's federal criminal case are to Case No. 20-cr-296 (N.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 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 courts." Pet. App. 36a; *cf. McGirt*, 140 S. Ct. at 2484, 2490-91 (Roberts, C.J., dissenting) (emphasizing Congress's abolition of Muscogee courts). This court cannot overrule *McGirt* in a case about the Cherokee reservation. *See* Cherokee Nation Amicus Br. 15-16, *Oklahoma v. Spears*, No. 21-323.

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, even though the OCCA remanded *expressly* to hold a hearing on the Cherokee reservation, Oklahoma presented no evidence on either point and declined even to take a position on the disestablishment of the Cherokee reservation. Meanwhile, in other cases, Oklahoma affirmatively accepted that the Cherokee reservation exists. Cherokee Amicus Br. 13-14 (discussing *McDaniel* and *Foster*). Only with the arrival of a new Attorney General, in June 2021, did Oklahoma reverse course. *Id.* at 19 n.47. 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, thus militate powerfully against granting its petition. *See id.* 16-20; Chickasaw Nation Amicus Br. 15-20,

[4] 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, *Spears* (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* reservation, 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.

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. 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.

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[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.27 (identifying additional procedural obstacles, including mootness and estoppel).

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 [its] problems," *Castro-Huerta* Pet. 4, badly misunderstands this Court's role. *Mize* Opp. 20-24; *see* Cherokee Nation Amicus Br. 5-8; Muscogee (Creek) Nation Amicus Br. 25-28, *Oklahoma v. Mize*, No. 21-274; Chickasaw Nation *Beck* Amicus Br. 6-7, 13-15.

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

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

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; Cherokee Nation Amicus Br. 10-12; Choctaw Nation *Sizemore* Amicus Br. 15-16.

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. 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 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,

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