# IN THE Supreme Court of the United States

STATE OF OKLAHOMA,

Petitioner,

v.

DAKOTA SHAY FOX,

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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### 1 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). Months later, Respondent Dakota Shay Fox, a member of the Choctaw Nation, was nonetheless charged by information for alleged crimes committed within the Choctaw reservation. Information (Okla. Dist. Ct., McCurtain Cnty. Jan. 9, 2018). Respondent was convicted in January 2019. Verdict (Okla. Dist. Ct., McCurtain Cnty. Jan. 16, 2019).

On appeal, Respondent argued that Oklahoma lacked jurisdiction to prosecute him because he is Indian and the alleged crimes occurred within the Choctaw reservation. Brief of Appellant at 18-21 (Okla. Ct. Crim.

<sup>&</sup>lt;sup>1</sup> References to district-court filings are to Case No. CF-2018-7, available at https://bit.ly/3BFbhfG.

App. Dec. 2, 2019).<sup>2</sup> Respondent also noted that this Court had granted certiorari in *Murphy* and requested that the Oklahoma Court of Criminal Appeals ("OCCA") stay his case pending this Court's final decision. *Id.* at 21.

Before the OCCA reached a decision, this Court decided McGirt. The OCCA remanded to the district court 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. 21a-22a. The parties stipulated that Respondent was an enrolled member of the Choctaw Nation and that the alleged crime took place within the historical boundaries of the Choctaw Nation "as set forth in, and adjusted by, the 1855 and 1866 treaties between the Chickasaw and Choctaw Nations and the United States." Pet. App. 3a-Oklahoma, however, "neither advocated it had jurisdictional authority to prosecute [Respondent] nor conceded its lack thereof." Pet. App. 5a; see Choctaw Nation Amicus Br. 16-20. The district court concluded that "no evidence [was] presented to the Court that Congress has ever explicitly erased those boundaries and disestablished [the Choctaw] reservation." App. 18a.

On appeal, Oklahoma did not argue that the OCCA should deny relief. *See* Supplemental Brief of Appellee after Remand (Okla. Ct. Crim. App. Nov. 12, 2020). On

<sup>&</sup>lt;sup>2</sup> References to filings in the Oklahoma Court of Criminal Appeals are to Case No. F-2019-196, available at https://bit.ly/2X7wz6T.

April 29, 2021, the OCCA upheld the trial court's determination that the Choctaw reservation has not been disestablished and duly vacated Respondent's conviction. Pet. App. 7a-8a. The trial court then dismissed the case. Order (Okla. Dist. Ct., McCurtain Cnty. Aug. 18, 2021).

Before the mandate vacating Respondent's conviction issued, the federal government charged Respondent. Complaint at 1 (E.D. Okla. May 17, 2021), ECF No. 1.<sup>3</sup> Federal authorities promptly took Respondent into custody. Warrant (E.D. Okla. May 17, 2021), ECF No. 2.

#### 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 Muscogee-that from the 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.,

 $<sup>^3</sup>$  References to filings in Respondent's federal criminal case are to Case No. 21-mj-251 (E.D. Okla.).

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. 3-4.4 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. 5a; see Chocktaw Nation Amicus Br. 16-20.

<sup>&</sup>lt;sup>4</sup> 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 *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.

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 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* Cherokee Nation Amicus Br. 15-20, *Oklahoma v. Spears*, No. 21-323; Chickasaw Nation Amicus Br. 15-20, *Oklahoma v. Beck*, No. 21-373; Choctaw Nation Amicus Br. 16-20.<sup>5</sup>

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

<sup>&</sup>lt;sup>5</sup> 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*.

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." 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. 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; Cherokee Nation Spears Amicus Br. 5-8; Chickasaw Nation Beck Amicus Br. 6-7, 13-15.

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

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. 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 Cherokee Nation Spears Amicus Br. 10-12; Chickasaw Nation *Beck* Amicus Br. 4-5, 7-9; Choctaw Nation Amicus Br. 14-16; 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 Cherokee Nation *Spears* Amicus Br. 4-12; Chickasaw Nation *Beck* Amicus Br. 5-7, 9; Choctaw Nation Amicus Br. 8-16; 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 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 Cherokee Nation Spears Amicus Br. 12-14; Chickasaw Nation Beck Amicus Br. 9-12; Choctaw Nation Amicus Br. 10; 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 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* Cherokee Nation *Spears* Amicus Br. 22-23; Chickasaw Nation *Beck* Amicus Br. 20-22; Choctaw Nation Amicus Br. 9-12; Muscogee (Creek) Nation *Mize* Amicus Br. 25-28.

#### CONCLUSION

The petition should be denied.

Respectfully submitted,

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