No. 21-320

IN THE

Supreme Court of the United States

STATE OF OKLAHOMA,

Petitioner,

vs.

ROBERT WILLIAM PERRY II,

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 decision in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), simply because the Membership of the Court has changed since it decided that case?

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INTRODUCTION

This is one of dozens of nearly identical petitions for review that ask this Court to overrule *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020). The single question presented is identical to the 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 Court should deny the petition for the same reasons explained in the Brief in Opposition in *Mize*. The Court should not allow Oklahoma to use a change in Membership on the Court as a vehicle for destabilizing the law.

STATEMENT OF THE CASE

On August 24, 2018, Mr. Perry was charged by criminal information in Tulsa County District Court with three counts of sexual abuse of a child under 12, in violation of Okla. Stat. tit. 21, § 843.5. (Information, Okla. Dist. Ct. Tulsa Co., Aug. 24, 2018)[1] Two months later, he was charged with three additional counts of sexual abuse of a child. After a three-day jury trial held in November 2019, he was convicted on five of those counts; as to the sixth, the court granted a judgment of acquittal. He was sentenced to life imprisonment plus 40 years.

Mr. Perry appealed his convictions and sentence. While that appeal was pending, this Court decided *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020). In the wake of *McGirt*, Mr. Perry challenged the subject-matter jurisdiction of the trial court. (Mot. for Supplementation

[1] References to filings in the state trial court are to Case No. CF-2018-3720, available at <https://bit.ly/3FVMYgf>.

of Record, Okla. Crim. App., Aug. 24, 2020)[2] The Oklahoma Court of Criminal Appeals remanded his case for a hearing on whether Mr. Perry was an Indian for purposes of the Major Crimes Act, 18 U.S.C. § 1153, *see generally United States v. Zepeda*, 792 F.3d 1103, 1110 (9th Cir. 2015) (en banc), and whether the crimes of which he was convicted took place in Indian country, as defined by 18 U.S.C. § 1151 and *McGirt*.

Before the trial court, the parties stipulated that Mr. Perry was an enrolled member of the Muscogee (Creek) Nation, that he had a 1/128 quantum of Creek blood, and that the crimes took place within the historical boundaries of the Muscogee (Creek) Nation, which is a federally recognized Indian tribe. Based on these stipulations, the Oklahoma Court of Criminal Appeals ruled that the trial court lacked jurisdiction to convict him of the charges, reversed his convictions, and remanded the case with instructions to dismiss the information.

Oklahoma timely sought this Court's review.

While Mr. Perry's state case was before the trial court on remand for *McGirt*-related proceedings, a grand jury in the Northern District of Oklahoma indicted him on one count of aggravated sexual abuse of a child under the age of 12, in violation of 18 U.S.C. §§ 1153 and 2241(c), and one count of abusive sexual contact with a child under the age of 12, in violation of 18 U.S.C. §§ 1153 and 2244(a)(5).[3] After the trial court ruled in Mr. Perry's favor under *McGirt*, a federal magistrate judge issued a writ of habeas corpus *ad prosequendum*, and he was ultimately brought

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[2] References to filings in the Oklahoma Court of Criminal Appeals are to Case No. F-2020-46, available at <https://bit.ly/2Z24w9y>.

[3] References to filings in Mr. Perry's federal criminal case are to Case No. 4:20-cr-218-GKF (N.D. Okla. filed Oct. 6, 2020).

into federal custody after the court below ruled that his state-court conviction should be vacated. A jury trial is presently scheduled for December 20, 2021.

REASONS FOR DENYING THE WRIT

Ten days before this Court issued its decision in *McGirt*, it clearly explained that it will not revisit recent rulings based solely on a change in its Membership. This aspect of the rule of *stare decisis* is sufficient for this Court to deny Oklahoma's petition here.

"The Court has said often and with great emphasis that the doctrine of *stare decisis* is of fundamental importance to the rule of law." *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989). The Court relies on the "important doctrine of *stare decisis*" to "ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion. That doctrine permits society to presume that bedrock principles are founded in the laws rather than in the proclivities of individuals." *Vasquez v. Hillery*, 474 U.S. 254, 265 (1986). Adherence to principles of *stare decisis* is the "preferred course because it promotes the even-handed, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Kimble v. Marvel Entertainment, LLC*, 576 U.S. 446, 455 (2015) (quoting *Payne v. Tennessee*, 501 U.S. 808, 827 (1991)).

In another high-profile context, the Court has recently refused to overrule a prior decision simply because of an intervening change in Membership on the Court. In *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), the Court considered a Texas law that required abortion providers to hold "active admitting privileges at

a hospital within 30 miles of the place where they perform abortions." *Id.* at 2300 (quoting Tex. Health & Safety Code § 171.0031(a)). The Court held that this requirement placed an undue burden on the constitutionally-protected right to obtain an abortion, in violation of *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 878 (1992). *See* 136 S. Ct. at 2313.

Ten days before this Court decided *McGirt*, this Court opined on the constitutionality of a Louisiana admitting-privileges law that was "almost word for word identical to Texas' admitting-privileges law." *June Medical Services, LLC v. Russo*, 140 S. Ct. 2103, 2112 (2020). In the four years between the decisions in *Whole Woman's Health* and in that case, Justice Kennedy had retired, and Justice Kavanaugh had filled his seat. The Court held that the Louisiana law violates *Casey*, just as the Texas law did. *See* 140 S. Ct. at 2113. Concurring in the judgment, the Chief Justice framed the question presented in *June Medical Services* not as whether "*Whole Woman's Health* was right or wrong, but whether to adhere to it in deciding the present case." 140 S. Ct. at 2133. Following the well-established principles underlying the rule of *stare decisis*, the Chief Justice concurred in the judgment to strike down Louisiana's law.

This Court should view Oklahoma's request here to overrule *McGirt* with the same skepticism with which it viewed Louisiana's request in *June Medical Services*. If *stare decisis* means anything, it surely means that this Court will not undo last year's decision in *McGirt* simply because one Member of the five-Justice majority in that case, Justice Ginsburg, has died and been replaced by someone else, Justice Barrett.

To be sure, *stare decisis* is not an inexorable command. *Payne*, 501 U.S. at 828. But in order to depart

from settled decisions, this Court has consistently required some "special justification over and above the belief that the precedent was wrongly decided." *Kimble*, 576 U.S. at 456 (quoting *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 266 (2014)). In *June Medical Services*, the Court made plain that a change in this Court's Membership does not amount to such a "special justification." *See* 141 S. Ct. at 2134 (Roberts, C.J., concurring) ("The Louisiana law imposes a burden on access to abortion just as severe as that imposed by the Texas law, and for the same reason. Therefore Louisiana's law cannot stand under our precedents."). Here, Oklahoma is offering this Court nothing more than that.

Oklahoma primarily relies on the dissent in *McGirt* for its assertion that that case was "incorrect" (*Castro-Huerta* Pet'n at 17)[4] because it "contravened longstanding precedent on the disestablishment of Indian reservations" (Pet'n at 6). Mr. Perry counters that *McGirt* was correctly decided, and will not belabor that point. The result that *McGirt* reached is consistent with this Court's normal approach to statutory interpretation (where the text is the lodestar of meaning, *e.g. Van Buren v. United States*, 141 S. Ct. 1648, 1654 (2021)); with its recent unanimous decision in *Nebraska v. Parker*, 577 U.S. 481, 490 (2016), which declined to allow "mixed historical evidence" to

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[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—Mr. Perry addresses that petition as well as the petition actually filed in this case. *See also Mize* Opp. at 1–2, 3 n.2; Letter to the Court from Oklahoma's Counsel at 1 (Sept. 22, 2021). Although it is odd for Oklahoma to ask this Court to consider overruling *McGirt* in a case (like *Castro-Huerta*) concerning the *Cherokee* reservation, a different reservation subject to different statutes and treaties, this oddity is of no moment. The question presented here does not warrant review in any of Oklahoma's pending cases.

overcome a lack of clear text; and the rule that disestablishment "will not be lightly inferred" and that treaties and statutes must be construed in favor of tribal rights, *Solem v. Bartlett*, 465 U.S. 463, 470 (1984).

In any event, this Court's *stare decisis* rules make plain that Oklahoma's belief about the correctness of *McGirt* is an insufficient basis for departing from settled precedent. "Respecting *stare decisis* means sticking to some wrong decisions." *Kimble*, 576 U.S. at 455. This is especially true where, as here, the decision asserted to be wrong is one that interprets a statute. *See id.* at 456. "Congress exercises primary authority" in the area of Indian country jurisdiction and so "remains free to alter" what this Court has done—"another factor that gives special force to *stare decisis*." *Michigan v. Bay Mills Indian Community*, 572 U.S. 782, 799 (2014) (quoting *Patterson*, 491 U.S. at 172–73). Critics of the "ruling can take their objections across the street, and Congress can correct any mistake it sees." *Kimble*, 576 U.S. at 456 (citing *Patterson*, 491 U.S. at 172–73). Indeed, the "primary reason for overruling statutory precedent," this Court has said, is that either "the growth of judicial doctrine or further action taken by Congress" has "removed the basis for a decision." *Id.* at 458 (citing *Patterson*, 491 U.S. at 173). This Court applies "statutory *stare decisis* even when a decision has announced a judicially created doctrine designed to implement a federal statute." *Id.* (citing *Halliburton*, 573 U.S. at 274). Oklahoma's request that this Court overrule *McGirt* scarcely more than a year after the ink has dried on that opinion asks this Court to short-circuit future judicial and legislative developments that might minimize the impact of the Court's decision.

Indeed, Oklahoma seems to prefer asking this Court to reverse itself (based on nothing more than a change in

Membership) over participating in intergovernmental negotiations. Oklahoma complains that, one year after *McGirt*, it has not reached an agreement with any of the Five Tribes and that Congress has not acted. (*Castro-Huerta* Pet'n at 26–28) But this is unsurprising—intergovernmental negotiations take time, as does legislation. And it appears that Oklahoma is dragging its feet. Oklahoma suggests, for example, that the Five Tribes have opposed negotiations in all forms. (*Castro-Huerta* Pet'n at 27) But it cites just one statement from the Choctaw Nation, which did not oppose negotiations *generally* but maintained that it should "be the federal government that we… talk[] to."[5] Meanwhile, the Cherokee and Chickasaw Nations have both agreed to federal legislation that would allow Oklahoma to reacquire its pre-*McGirt* jurisdiction—legislation that Oklahoma has opposed.[6] And the Muscogee Nation

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[5] Kylee Dedmon, *Choctaw Nation Chief Opposes Oklahoma Governor on Tribal Negotiations*, News12 (Jan. 29, 2021), available at <https://bit.ly/3kY3pAh>.

[6] In May 2021, Representative Tom Cole introduced a bill that would allow Oklahoma to "exercise its criminal jurisdiction in accord with its laws over offenses committed by or against Indians within the reservation of" either the Cherokee or Chickasaw Nations, provided those Nations entered into an intergovernmental agreement with Oklahoma. Cherokee Nation and Chickasaw Nation Criminal Justice Compacting Act of 2021, H.R. 3091, § 6(b)(1), 117th Cong. (2021). In a press release, the sponsor said, "[T]his legislation does not mandate how Oklahoma, the Chickasaw Nation, and the Cherokee Nation should come to agreement. Instead, the legislation would give them an avenue to decide independently, rightly ensuring that any decision directly affecting Oklahoma or these tribes is made at the state and local level." Press Release, Rep. Tom Cole, *Cole Introduces Legislation in Response to* McGirt v. Oklahoma (May 11, 2021), available at <https://bit.ly/3AUXbFM>. Oklahoma Governor Kevin Stitt responded to this proposal by saying that he has "deep concerns about the bill in its current form." Kimberly Querry-Thompson, *Gov. Stitt expresses 'deep concerns' about bill related to court ruling*

reports that it has extended to Oklahoma “an open invitation to… partner… to address criminal jurisdiction… but that” the governor has refused.[7]

Aside from its belief that *McGirt* was wrong, and quite apart from its decision not to participate in intergovernmental negotiations, Oklahoma points to the “state of emergency” in its criminal-justice system that, it says, *McGirt* wrought. (*Castro-Huerta* Pet’n at 19) But the sky is not falling on Oklahoma. The Oklahoma state courts are applying *McGirt* to cases on direct review, as they must, and allowing an opportunity for state and federal prosecutors to coordinate their actions in an effort to ensure that dangerous people are not released from custody without warrant. Oklahoma conspicuously fails to mention in its many petitions that federal and tribal prosecutions are being brought to replace the state prosecutions that *McGirt* has forbidden. Indeed, that has happened for Mr. Perry. Further, federal juries have been returning convictions in these cases.[8]

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impacting thousands of criminal cases in Oklahoma, KFOR (May 21, 2021), available at <https://bit.ly/3lRGFlE>. And in July 2021, Oklahoma opposed federal law-enforcement funding because it did not want “a permanent federal fix.” *See* Reese Gorman, *Cole Encourages State–Tribal Relations over State Challenges to* McGirt, Norman Transcript (Jul. 23, 2021), available at <https://yhoo.it/3lYMjD8>.

[7] Kolby Kickingwoman, *Oklahoma Tribes, Governor Stitt Still at Odds over* McGirt, Indian Country Today (Sept. 5, 2021), available at <https://bit.ly/3D0Pj7f>.

[8] Foremost among these convictions is that of Patrick Murphy. This Court affirmed the Tenth Circuit’s grant of his § 2254 habeas petition because the Oklahoma state courts lacked jurisdiction to try him. *See Murphy v. Royal*, 875 F.3d 896 (10th Cir. 2017), *aff’d sub nom. Sharp v. Murphy*, 140 S. Ct. 2412 (2020). The government obtained an indictment in the Eastern District of Oklahoma, tried him there, and then convicted him. *See* Press Release, U.S. Attorney’s

Looking backward to cases on collateral review, the Oklahoma Court of Criminal Appeals initially applied *McGirt* to void convictions in that case (as this Court did in *McGirt* itself), consistent with a previously settled understanding of state law. *See, e.g.*, *Bosse v. State*, 484 P.3d 286, 293–94 (Okla. Crim. App. 2021) ("This Court has repeatedly held that the limitations of post-conviction or subsequent post-conviction statutes do not apply to claims of lack of jurisdiction.") (citing *Wackerly v. State*, 237 P.3d 795, 797 (Okla. Crim. App. 2010); *Murphy v. State*, 124 P.3d 1198, 1200 (Okla. Crim. App. 2005); *Wallace v. State*, 935 P.2d 366, 372 (Okla. Crim. App. 1997)); *see also* Brief of Nat'l Ass'n of Criminal Defense Lawyers at 3–4, *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020) (No. 18-9526). But earlier this year, the court changed its mind about following this settled understanding about postconviction challenges to the jurisdiction of a trial court, and ruled that *McGirt* could not be applied to disturb convictions that are on collateral review. *State ex rel. Matloff v. Wallace*, 2021 OK CR 21. Whether that sudden reversal is consistent with long-settled understandings of post-conviction review is the question presented in *Parish v. Oklahoma*, No. 21-467.

Going forward, the proper allocation of jurisdiction among the federal, state, and tribal governments is a question for Congress, which has the power to adjust the jurisdictional lines. Oklahoma's claims of a "criminal-justice crisis" (*Castro-Huerta* Pet'n at 4) are largely unburdened by evidence and badly misstate the facts. In reality the federal government and the tribes affected by *McGirt* are working to fulfill the responsibilities *McGirt* gives them and seeking the resources they need to do so—

Office, E.D. Okla., *Patrick Dwayne Murphy Found Guilty by Federal Jury* (Aug. 5, 2021), *available at* <https://bit.ly/3lL3GqB>.

often over Oklahoma's opposition. *See Mize* Opp. at 27–32; *Mize* Amicus Br. of Muscogee (Creek) Nation at 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. *See Mize* Opp. at 32–37; Muscogee (Creek) Nation *Mize* Amicus Br. at 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. at 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'n at 3–4) But because Oklahoma did not raise its argument below, the record contains no evidence to support these claims.[9] 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 for a writ of certiorari should be denied.

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[9] To Mr. Perry's knowledge, the same is true of all of Oklahoma's pending petitions.