No.

In the Supreme Court of the United States

STATE OF OKLAHOMA, PETITIONER

v.

VICTOR MANUEL CASTRO-HUERTA

ON PETITION FOR A WRIT OF CERTIORARI TO THE OKLAHOMA COURT OF CRIMINAL APPEALS

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a State has authority to prosecute non-Indians who commit crimes against Indians in Indian country.

2. Whether *McGirt* v. *Oklahoma*, 140 S. Ct. 2452 (2020), should be overruled.

RELATED PROCEEDINGS

Oklahoma District Court (Tulsa County):

State v. *Castro-Huerta*, No. CF-2015-6478 (Dec. 14, 2017)

State v. *Castro-Huerta*, No. CF-2015-6478 (Dec. 8, 2021)

Oklahoma Court of Criminal Appeals:

Castro-Huerta v. *State*, No. F-2017-1203 (Apr. 29, 2021)

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OPINIONS BELOW

The opinion of the Oklahoma Court of Criminal Appeals (App., *infra*, 1a-7a) is unreported. The opinion of the state trial court (App., *infra*, 8a-18a) is unreported.

JURISDICTION

The judgment of the Oklahoma Court of Criminal Appeals was entered on April 29, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(a).

STATUTORY PROVISIONS INVOLVED

Section 1151 of Title 18 of the United States Code provides:

> Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

Section 1152 of Title 18 of the United States Code provides, in relevant part:

> Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country. * * *

STATEMENT

No recent decision of this Court has had a more immediate and destabilizing effect on life in an American State than *McGirt* v. *Oklahoma*, 140 S. Ct. 2452 (2020). The Court held in *McGirt* that a large area of Oklahoma, which at one time was within the boundaries of the Creek Nation, qualifies as "Indian country" for purposes of the Ma-

jor Crimes Act. That decision deprived the State of authority to prosecute Indians who commit serious crimes there, and the Oklahoma state courts have since held that *McGirt* compels the same conclusion with respect to the remainder of the Five Tribes in Oklahoma. As a result, almost 2 million Oklahoma residents—the vast majority of whom are not Native American—suddenly live in Indian country for purposes of federal criminal jurisdiction.

As the Chief Justice predicted in his dissent, the results of this abrupt shift in sovereignty have been calamitous and are worsening by the day. Before *McGirt*, Oklahoma exercised criminal jurisdiction over the entire State, including the historical Indian territories within its borders, since admission in 1907, without question from the tribes or the federal government. The decision in *McGirt* now drives thousands of crime victims to seek justice from federal and tribal prosecutors whose offices never before handled those demands. Numerous crimes are going uninvestigated and unprosecuted, endangering public safety. Federal district courts in Oklahoma are completely overwhelmed. The retroactive effect of *McGirt* on state collateral review remains subject to challenge, potentially affecting thousands of long-final state convictions. The effects have spilled into the civil realm as well, jeopardizing hundreds of millions of dollars in state tax revenue and calling into question the State's regulatory authority over myriad issues within its own borders.

The Governor did not mince his words earlier this year when he identified the fallout from *McGirt* as the "most pressing issue" for the future of Oklahoma. Simply put, the fundamental sovereignty of an American State is at stake.

This case presents two exceptionally important questions that have arisen in the wake of *McGirt* and that cry out for the Court's immediate attention. Respondent, a

non-Indian, was convicted of severely neglecting his five-year-old stepdaughter, an enrolled member of the Eastern Band of Cherokee Indians. In the decision below, the Oklahoma Court of Criminal Appeals vacated respondent's conviction on the ground that the crime occurred in Indian country. In reaching its decision, the court held that *McGirt* extends beyond the confines of the Major Crimes Act to all crimes committed by non-Indians against Indians in Indian country. That holding was erroneous, and it greatly exacerbates the ongoing criminal-justice crisis in Oklahoma. The Court recently granted a stay in another case that presented the same question (though the Court of Criminal Appeals subsequently vacated the judgment in that case on other grounds). See Order, *Oklahoma* v. *Bosse*, No. 20A161 (May 26, 2021).

This case also presents the question whether *McGirt* should be overruled. *McGirt* was wrongly decided for the reasons stated in the Chief Justice's dissent, and its disruptive effects in Oklahoma are unprecedented. While the Court believed that compromise or congressional action could limit the disruption from its decision, it is now clear that neither is forthcoming. The tribes do not agree among themselves, much less with the State, on the proper path forward, and Congress is unlikely to adopt any proposal not supported by all of the parties involved. Only the Court can remedy the problems it has created, and this case provides it with an opportunity to do so before the damage becomes irreversible. The petition for a writ of certiorari should be granted.[1]

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[1] The State of Oklahoma previously filed a number of petitions presenting either or both of the questions presented here and requested that the Court hold those petitions pending resolution of the petition in *Bosse*, *supra* (No. 21-186). After the Oklahoma Court of Criminal Appeals *sua sponte* vacated the judgment in *Bosse*, the parties agreed

A. Background

1. The authority to prosecute crimes committed in "Indian country," 18 U.S.C. 1151, is governed by a "complex patchwork of federal, state, and tribal law." *Negonsott* v. *Samuels*, 507 U.S. 99, 102 (1993). By virtue of their admission to the Union, States exercise exclusive authority to prosecute crimes committed by non-Indians against non-Indians in Indian country. See, *e.g.*, *United States* v. *McBratney*, 104 U.S. 621, 622 (1882). By contrast, the Major Crimes Act gives the federal government exclusive authority to prosecute certain enumerated felonies committed by Indians in Indian country. See 18 U.S.C. 1153.

Another federal statute, the General Crimes Act, governs the reach of other federal criminal laws in Indian country. See 18 U.S.C. 1152. Under the first paragraph of the General Crimes Act, "the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States" (except for the District of Columbia) extend to Indian country. *Ibid.* Under the second paragraph, however, those federal laws do not extend to offenses committed by one Indian against another. See *ibid.* Accordingly, the General Crimes Act provides the federal government with authority to prosecute violations of general federal criminal law where either the defendant or the victim was an Indian and the other party was not. See *ibid.* But this Court has never squarely held that States do not have concurrent authority to prosecute non-Indians for state-law crimes committed against Indians in Indian country.

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to dismiss the petition in that case. The State requests that the Court hold all previously filed petitions, as well as similar forthcoming petitions, pending the resolution of this petition. Simultaneous with filing, the State is providing copies of this petition to the respondents in all of those cases.

2. In 2018, the Court granted certiorari in *Sharp* v. *Murphy*, which presented the question whether the historical territory of the Creek Nation—one of the Five Tribes of Oklahoma—constitutes "Indian country" for purposes of the Major Crimes Act. After receiving briefing, hearing argument, and receiving additional briefing, the Court did not issue a decision in that case. In 2019, the Court granted certiorari in *McGirt* v. *Oklahoma*, which presented the same question as *Murphy*.

On July 9, 2020, the Court issued its decision in *McGirt*. It held that the historical Creek territory constituted Indian country for purposes of the Major Crimes Act, giving the federal government exclusive authority to prosecute the crimes enumerated in that statute. See 140 S. Ct. 2452, 2459 (2020). The Chief Justice dissented in an opinion joined in full by Justices Alito and Kavanaugh and in part by Justice Thomas. See *id.* at 2482-2502. Justice Thomas wrote a separate dissenting opinion. See *id.* at 2502-2504. On the same day, the Court issued a per curiam opinion in *Murphy*, affirming for the reasons stated in *McGirt*. See 140 S. Ct. 2412 (2020).

B. Facts And Procedural History

1. In 2015, respondent's five-year-old stepdaughter, who has cerebral palsy and is legally blind, was rushed to the emergency room at St. Francis Hospital in Tulsa, Oklahoma. She was admitted in critical condition; she was dehydrated, emaciated, and covered in lice and excrement, and she weighed only nineteen pounds. Investigators who visited respondent's home later discovered that her crib was filled with bedbugs and cockroaches and contained a single, dry sippy cup, the top of which was chewed through. Respondent, who is non-Indian, later admitted to officers that, while he knew his stepdaughter required

five bottles of nutritional supplement a day, he had provided her between only twelve and eighteen bottles the previous month. 2 Trial Tr. 454, 471, 487, 531-536, 566-567, 589, 604-605, 674; 3 Trial Tr. 515, 566-567, 604, 673; State Ex. 1-5, 14; Court Ex. 1, 7-8, 43-44.

2. The State charged respondent in state court with child neglect. After a jury trial, respondent was convicted and sentenced to 35 years of imprisonment. Respondent appealed to the Oklahoma Court of Criminal Appeals. As is relevant here, he argued that the State lacked jurisdiction to prosecute his case, relying on the Tenth Circuit's decision in *Murphy*. During briefing on the appeal, however, this Court granted the petition for certiorari in *Murphy*. The Court of Criminal Appeals ordered that the appeal be held in abeyance pending the resolution of *Murphy*. See Order (Mar. 25, 2019).

After this Court issued its decisions in *McGirt* and *Murphy*, the Court of Criminal Appeals remanded respondent's case to the trial court in light of those decisions. In particular, the Court of Criminal Appeals directed the trial court to determine whether the respondent's stepdaughter was an Indian and whether respondent's crime occurred in Indian country. See Order (Aug. 19, 2020).

3. On remand, the parties agreed by stipulation that the victim had some degree of Indian blood; that she was an enrolled member of the Eastern Band of Cherokee Indians at the time of respondent's crime; and that the Eastern Band of Cherokee Indians was a federally recognized tribe based in North Carolina. The parties also agreed that respondent's crime occurred within the area historically designated to the Cherokee Nation by certain treaties, though the State did not stipulate that the area constitutes Indian country. The trial court accepted the parties' stipulations and, in the wake of *McGirt*, concluded

that Congress never disestablished the Cherokee Reservation. The trial court therefore determined that respondent's crime was committed within Indian country. App., *infra*, 10a-18a.

During the remand proceedings, the State argued that it retained concurrent jurisdiction over all crimes committed by non-Indians within the State, regardless of whether the crime occurred in Indian country. The trial court declined to hear argument or reach a conclusion on that issue, but it allowed the State to preserve the argument. App., *infra*, 4a.

4. After the trial court transmitted its findings of fact and conclusions of law to the Court of Criminal Appeals, the parties filed supplementary briefing on the question whether *McGirt* rendered respondent's conviction invalid. The State renewed its argument that respondent's conviction was valid because the State had concurrent jurisdiction with the federal government over crimes committed by non-Indians against Indians in Indian country.

The Court of Criminal Appeals affirmed, holding that "the ruling in *McGirt* governs this case." App., *infra*, 4a. The court noted that it had "rejected the State's argument regarding concurrent jurisdiction" in *Bosse* v. *State*, No. PCD-2019-124 (Mar. 11, 2021), vacated and withdrawn, 2021 OK CR 23 (Aug. 31, 2021).[2] App., *infra*, 4a. There, the court had reached that conclusion based on its reading of the text of the General Crimes Act and also on later-enacted statutes that expressly permitted certain States to exercise broad criminal authority in Indian country—which, in the court's view, would have been unnecessary if the General Crimes Act did not otherwise preempt state jurisdiction. See *id.* at 36a-38a. The Court of Criminal

[2] For the Court's convenience, the withdrawn opinion in *Bosse* is reproduced in the appendix to the petition. See App., *infra*, 22a-51a.

Appeals thus had held in *Bosse* that the General Crimes Act preempted state prosecutions for crimes committed by non-Indians against Indians in Indian country, *id.* at 8a, and it "d[id] so again" in the decision below, *id.* at 4a.

Judge Lumpkin and Judge Hudson wrote separate opinions concurring only in the result. App., *infra*, 4a-7a. Judge Lumpkin explained that, while he was "[b]ound by [his] oath and the Federal-State relationships dictated by the U.S. Constitution" to follow Supreme Court precedent, he believed that *McGirt* "contravened not only the history leading to the disestablishment of the Indian reservations in Oklahoma, but also willfully disregarded and failed to apply the Court's own precedents." *Id.* at 4a-5a. For his part, Judge Hudson concluded that the court's decision was dictated by *McGirt* and "as a matter of *stare decisis*." *Id.* at 7a. But he reiterated his views, also set forth in his separate opinion in *Bosse*, on "the significance of *McGirt*, its far-reaching impact on the criminal justice system in Oklahoma[,] and the need for a practical solution by Congress." *Ibid.*[3]

5. On August 31, 2021, the Court of Criminal Appeals *sua sponte* vacated the judgment in *Bosse* and withdrew its opinion in that case, based on a decision in a separate case holding that *McGirt* does not have retroactive effect in state postconviction proceedings. See *Bosse* v. *State*, 2021 OK CR 32 (citing *State ex rel. Matloff* v. *Wallace*, 2021 OK CR 15, 2021 WL 3578089 (Aug. 12, 2021)). On September 16, 2021, the Court of Criminal Appeals reiterated, this time in a case on direct appeal, that States lack concurrent criminal jurisdiction with the federal government under the General Crimes Act. See *Roth* v.

[3] The United States has indicted respondent for the same conduct at issue here. See Indictment, *United States* v. *Calhoun*, Crim. No. 20-255 (N.D. Okla. Nov. 2, 2020) (Dkt. 2).

State, 2021 OK CR 27, slip op. 7. The court elaborated on the basis for its holding in *Bosse*, reasoning that "Congress's authority to regulate Indian affairs" was "exclusive" and that, under *McGirt*, "federal law applie[s] in Oklahoma according to its usual terms." *Id.* at 8, 10 (internal quotation marks and citation omitted).

REASONS FOR GRANTING THE PETITION

In the decision below, the Oklahoma Court of Criminal Appeals expanded the holding of *McGirt*—as it previously had in *Bosse* v. *State*, App., *infra*, 22a-51a—to cover all crimes committed by non-Indians against Indians in Indian country. That ruling was erroneous and greatly exacerbates the ongoing crisis in the criminal-justice system in Oklahoma. The question is extraordinarily important and warrants the Court's review.

At the same time, the Court of Criminal Appeals' erroneous expansion of *McGirt* is merely a symptom of a deeper problem. That problem is *McGirt* itself, and the reconsideration of that decision is the only realistic avenue for ending the ongoing turmoil affecting every corner of daily life in Oklahoma. The State of Oklahoma respectfully requests that the Court overrule its decision in *McGirt*, which was profoundly flawed and is causing unprecedented disruption. The petition for a writ of certiorari should be granted.

A. Review Is Warranted Regarding The Authority Of A State To Prosecute Non-Indians Who Commit Crimes Against Indians In Indian Country

The first question presented is whether a State has authority to prosecute non-Indians who commit crimes against Indians in Indian country. The Oklahoma Court of Criminal Appeals held that the answer is no, extending *McGirt* beyond the confines of the Major Crimes Act.

That holding is incorrect, and it is of paramount importance given the overwhelmingly non-Indian population of eastern Oklahoma and the federal government's evident inability to prosecute all of those crimes itself. The Court's review is urgently needed.

1. As the Court has explained, "[s]tate sovereignty does not end at a reservation's border." *Nevada* v. *Hicks*, 533 U.S. 353, 361 (2001). "[B]y virtue of [its] statehood," a State has the "right to exercise jurisdiction over Indian reservations within its boundaries." *New York ex rel. Ray* v. *Martin*, 326 U.S. 496, 499-500 (1946).

A State's authority does not recede when a non-Indian commits a crime against an Indian. A State's Indian citizens are entitled to equal protection under the law, including equal access to the resources, protection, and benefits of the State's criminal-justice system. As the Court has instructed, a State has "the power of a sovereign over their persons and property" in Indian territory within state borders as necessary to "preserve the peace" and "protect [Indians] from imposition and intrusion." *New York ex rel. Cutler* v. *Dibble*, 62 U.S. (21 How.) 366, 370 (1859).

"The States' inherent jurisdiction on reservations can of course be stripped by Congress." *Hicks*, 533 U.S. at 365. But "absent a congressional prohibition," a State has the right to "exercise criminal (and, implicitly, civil) jurisdiction over non-Indians located on reservation lands." *County of Yakima* v. *Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 257-258 (1992); see *United States* v. *McGowan*, 302 U.S. 535, 539 (1938); *Surplus Trading Co.* v. *Cook*, 281 U.S. 647, 651 (1930).

2. In the decision below, the Court of Criminal Appeals rejected the State's argument asserting "concurrent jurisdiction over all crimes committed by non-Indians in Indian country." App., *infra*, 4a. In so holding, the Court

of Criminal Appeals relied on the reasoning from its previous decision in *Bosse* that the "clear language" of the General Crimes Act confers exclusive federal prosecutorial authority over Indian country, thereby stripping Oklahoma and other States of their authority to prosecute crimes committed by non-Indians against Indians in Indian country. See *id.* at 4a, 37a. That holding—which the Oklahoma Court of Appeals has since reaffirmed in *Roth* v. *State*, 2021 OK CR 27 (Sept. 16, 2021)—is erroneous and badly needs correction.

a. The General Crimes Act states that, "[e]xcept as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country." 18 U.S.C. 1152. Nothing in that text acts to relieve a State of its prosecutorial authority over non-Indians in Indian country. As the Court has explained, the phrase "sole and exclusive jurisdiction" is used to "describe the laws of the United States" that extend to Indian country; it does not concern the discrete question of who has prosecutorial authority within Indian country. *Donnelly* v. *United States*, 228 U.S. 243, 268 (1913); accord *Ex parte Wilson*, 140 U.S. 575, 578 (1891).

The phrase "except as otherwise expressly provided by law," in turn, refers to federal laws that exempt Indian country from the reach of federal criminal law in certain circumstances. It does not mean, as the Court of Criminal Appeals concluded in *Bosse*, that state criminal law does not apply in Indian country unless Congress expressly provides for that result. See App., *infra*, 36a-37a. The Court of Criminal Appeals erred by resting its decision on that flawed premise.

b. This Court's precedents also do not prohibit States from prosecuting crimes committed by non-Indians against Indians in Indian country. To the contrary, in *Dibble*, *supra*, the Court upheld a state law prohibiting non-Indians from trespassing on Indian lands. The Court reasoned that "a police regulation for the protection of the Indians from intrusion of the white people" was valid because the State had never "surrendered" its sovereign power "over their persons and property" for the purposes of "preserv[ing] the peace" and "protect[ing]" Indians. 62 U.S. (21 How.) at 370. In the absence of any contrary federal legislation, the Court explained, state law extended to protect "Indians and their possessions." *Id.* at 371.

In addition, in *United States* v. *McBratney*, 104 U.S. 621 (1882), the Court held that, under the predecessor statute to the General Crimes Act, States have exclusive jurisdiction to prosecute crimes committed by non-Indians against non-Indians in Indian country. The Court reasoned that, "by its admission into the Union by Congress[] upon an equal footing with the original States," a State "acquire[s] criminal jurisdiction over its own citizens and other white persons throughout the whole of the territory within its limits," including Indian country. *Id.* at 624; see *Draper* v. *United States*, 164 U.S. 240, 242-243, 247 (1896). The Court has explained that the prosecutorial authority of States recognized in *McBratney* exists "by virtue of their statehood"—in other words, the authority is inherent in States' power as sovereigns. *Martin*, 326 U.S. at 500.

Because the *McBratney* line of decisions involved crimes committed by non-Indians against non-Indians, they left open the question presented here: whether States have authority to prosecute crimes committed by non-Indians against Indians in Indian country. In *Donnelly*, *supra*, the Court addressed this type of crime—the

murder of an Indian by a non-Indian in Indian country—and held that the federal government could prosecute such crimes. See 288 U.S. at 271-272. But the Court stopped there; it did not hold that federal jurisdiction was exclusive or that the predecessor statute to the General Crimes Act deprived States of their own authority to prosecute such crimes.

To be sure, the Court has suggested in dicta that States lack such jurisdiction. See *Williams* v. *United States*, 327 U.S. 711, 714 & n.10 (1946). But in those cases, the Court never squarely confronted the issue, examined the text of the General Crimes Act, or explained why States would lack jurisdiction despite the holding in *Dibble* and the reasoning in *McBratney*. Accordingly, several decades ago, the Office of Legal Counsel concluded that States likely have jurisdiction over non-Indian offenders who commit crimes against Indians in Indian country. 3 Op. Off. Legal Counsel 111, 117-120 (1979); accord U.S. Br. at 15 n.8, *Martin*, *supra* (No. 45-158) (noting the possibility of "concurrent federal and state jurisdiction of some offenses committed by a white against an Indian"). A decade after the OLC opinion, the Justice Department took the contrary position in a brief before this Court, but it recognized that the question was close and that, "[i]f the Court were writing on a clean slate," it might permit the exercise of state prosecutorial authority. U.S. Br. at 3, *Arizona* v. *Flint*, 492 U.S. 911 (1989) (No. 88-603).

In the wake of *McGirt*, determining the answer to that question is now more important than ever. The vast majority of the almost 2 million Oklahomans who suddenly live in Indian country are not Indians; under the decision below, only the federal government has jurisdiction to prosecute most crimes committed by those individuals against Indians. The question presented here is whether

the State also has prosecutorial authority over those individuals. There could hardly be a more compelling basis for the Court's review.

3. The Court of Criminal Appeals' decision also cannot be defended based on a purported presumption that States lack authority to regulate activities involving Indians in Indian country. See *Roth*, slip op. 8-10. In fact, this Court has roundly and repeatedly rejected such a position. See *Hicks*, 533 U.S. at 361-362; *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136, 141 (1980); *Organized Village of Kake* v. *Egan*, 369 U.S. 60, 72 (1962). Instead, the Court's modern precedents demonstrate that, in the absence of a congressional prohibition, a State's sovereign authority extends to non-Indians in Indian country—including in interactions between non-Indians and Indians. See, *e.g.*, *Department of Taxation & Finance* v. *Milhelm Attea & Brothers, Inc.*, 512 U.S. 61, 73-75 (1994); *County of Yakima*, 502 U.S. at 257-258; *Oklahoma Tax Commission* v. *Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 512 (1991); *Cotton Petroleum Corp.* v. *New Mexico*, 490 U.S. 163, 187 (1989); *Three Affiliated Tribes of Fort Berthold Reservation* v. *Wold Engineering, P.C.*, 467 U.S. 138, 148-149 (1984); *Washington* v. *Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 159 (1980); *Moe* v. *Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 483 (1976).

Even when the Court has held that federal law impliedly preempts state law in Indian country, it has done so only after examining "the language of the relevant federal treaties and statutes" to determine whether, in light of "the state, federal, and tribal interests at stake," the exercise of state authority would violate federal law. *Bracker*, 448 U.S. at 144-145; see *Cotton Petroleum*, 490 U.S. at 176-177. But as discussed above, the plain text of

the General Crimes Act does not reveal any congressional intent to divest States of their authority to prosecute crimes committed by non-Indians against Indians in Indian country. What is more, no tribal interest is impaired by the exercise of state jurisdiction over crimes committed by non-Indians: Indian tribes generally do not have criminal jurisdiction over non-Indians, see *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191, 195 (1978), and the "exercise of state jurisdiction is particularly compatible with tribal autonomy" when "the tribal court lack[s] jurisdiction over the claim." *Three Affiliated Tribes*, 467 U.S. at 149.

By contrast, a State has paramount interests in public safety and criminal justice within its borders. See, *e.g.*, *Kelly* v. *Robinson*, 479 U.S. 36, 49 (1986). Specifically, a State has legitimate interests both in protecting its Indian citizens and in enforcing its criminal laws against non-Indian citizens. And the exercise of state jurisdiction does not impair any federal interest, because a state prosecution will not bar a subsequent federal prosecution of the same defendant for the same conduct. See *Gamble* v. *United States*, 139 S. Ct. 1960, 1964 (2019). To the contrary, concurrent federal and state jurisdiction would further federal and tribal interests by enhancing the protection of Indians from the crimes of non-Indians—particularly here, where Oklahoma has protected such interests for over a century and the federal government demonstrably lacks the capacity and resources to take over that responsibility.

4. Nor do certain statutes enacted over a century after the predecessor statute to the General Crimes Act demonstrate the lack of state authority to prosecute non-Indians for crimes committed against Indians in Indian country. See App., *infra*, 38a-39a. Those statutes, which purport to vest specific States with authority to try civil

and criminal cases involving Indians, see, *e.g.*, 25 U.S.C. 1321, 1322, are at best overinclusive, because States already possess civil jurisdiction in cases involving non-Indian defendants. See *Three Affiliated Tribes*, 467 U.S. at 149-151. In any event, "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *Marvin M. Brandt Revocable Trust* v. *United States*, 572 U.S. 93, 109 (2014) (citation omitted).

In the end, there is no compelling justification for claiming that federal law deprives States of their ability to protect their Indian citizens by prosecuting crimes committed against Indians by non-Indians. This Court should grant review on the first question presented and reverse the Court of Criminal Appeals' erroneous holding.

B. *McGirt* v. *Oklahoma* Should Be Overruled

Aside from presenting the question of concurrent state jurisdiction, this case also provides the Court with an opportunity to reconsider its decision in *McGirt*. The State urges the Court to take that opportunity. *McGirt* was wrongly decided, and no recent decision has spurred such instant and sweeping turmoil in an American State. *McGirt* has called into question the fundamental sovereignty of Oklahoma. While the Court identified compromise and congressional action as potential solutions, it has become clear there is no realistic prospect of either. Only this Court can stop the havoc that *McGirt* is wreaking, and these exceptional circumstances call for the exceptional step of overruling that decision.

1. The decision in *McGirt* was incorrect. As the Chief Justice explained in his dissent, longstanding precedent on the disestablishment of Indian territory required the Court to consider "the relevant Acts passed by Congress; the contemporaneous understanding of those Acts and the historical context surrounding their passage; and the

subsequent understanding of the status of the reservation and the pattern of settlement there." 140 S. Ct. at 2485. But those precedents were "not followed by the Court." *Ibid.* Instead, the Court reasoned that "extratextual sources" may be considered in the disestablishment inquiry "only" to "clear up" statutory ambiguity. *Id.* at 2469 (majority opinion).

Consideration of history is necessary, however, precisely because the effect on reservation status of statutes targeting Indian land ownership is inherently ambiguous. As this Court has explained, historical statutes that carved out allotments and opened up Indian reservations "seldom detail[ed] whether opened lands retained reservation status or were divested of all Indian interests." *Solem* v. *Bartlett*, 465 U.S. 463, 468 (1984). That is so because the "notion that reservation status of Indian lands might not be coextensive with tribal ownership was unfamiliar" before the mid-20th century. *Ibid.* By discounting historical evidence of the original public meaning of the statutes Congress enacted, the Court not only defied precedent; it also blinded itself to the actual import of Congress' legislation. Under the correct framework prescribed by this Court's precedent, it is clear that Congress disestablished the Creek territory in Oklahoma, as well as the territories of the rest of the Five Tribes.

2. As the Chief Justice predicted, the "burdens" of the *McGirt* decision on the State of Oklahoma have already proven to be "extraordinary." 140 S. Ct. at 2500. That decision vastly expanded the number of people living in Indian country for purposes of criminal jurisdiction, and the Oklahoma courts have since extended the decision to the historical territories of the rest of the Five Tribes. The decision in *McGirt* now applies to approximately 43% of the territory in the State—home to almost 2 million

Oklahomans. See App., *infra*, 28a-29a (Chickasaw);[4] *Sizemore* v. *State*, 485 P.3d 867 (Okla. Crim. App. 2021) (Choctaw); *Grayson* v. *State*, 485 P.3d 250 (Okla. Crim. App. 2021) (Seminole); *Hogner* v. *State*, No. F-2018-138, 2021 WL 958412 (Okla. Crim. App. Mar. 11, 2021) (Cherokee). Beyond the Five Tribes, other tribes in Oklahoma are seeking affirmation of their reservation status in state criminal cases. See, *e.g.*, *Young* v. *State*, No. PC-2020-954 (Okla. Crim. App.) (Osage); *State* v. *Lee*, No. S-2021-206 (Okla. Crim. App. (Peoria and Miami); *State* v. *Dixon*, No. S-2021-205 (Okla. Crim. App.) (Ottawa); *State* v. *Lawhorn*, No. S-2020-858 (Okla. Crim. App.) (Quapaw).

The challenges from that seismic shift in jurisdiction have rippled through every aspect of life in Oklahoma. As the Governor reported in his State of the State Address earlier this year, the "most pressing issue" for the future of Oklahoma is how to deal with the fallout from *McGirt*. Governor Kevin Stitt, *Press Release: Governor Stitt Delivers 2021 State of the State Address* (Feb. 1, 2021).

a. Most immediately, *McGirt* has pitched Oklahoma's criminal-justice system into a state of emergency.

i. The State estimates that defendants in approximately 6,000 pending criminal cases are seeking dismissal under *McGirt*. For its part, the Federal Bureau of Investigation estimates that it will have up to 7,500 additional cases in 2022 alone because of the decision in *McGirt*. See *Hearing on Federal Bureau of Investigation Budget Request for Fiscal Year 2022 Before the Subcomm. on Commerce, Science, and Related Agencies of the S. Comm. on*

[4] Although the Court of Criminal Appeals withdrew its decision in *Bosse* in light of its later ruling in *State ex rel. Matloff* v. *Wallace*, 2021 OK CR 15, 2021 WL 3578089 (Aug. 12, 2021), the court in *Wallace* "reaffirm[ed] [its] recognition of the Cherokee, Choctaw, and Chickasaw Reservations in [its] earlier cases." *Id.* at *3.

Appropriations, 117th Cong. 13 (June 23, 2021) (statement of FBI Director Wray). And the trend is likely to continue with new cases arising every day: Oklahoma district attorneys have determined that, since 2005, at least 76,000 of the non-traffic criminal cases filed in Oklahoma state court have involved an Indian perpetrator or victim. Yet the Bureau has stated that it is already in a "constant scramble" in Oklahoma, with the "staggering volume" of new cases creating a "daunting" task at "every federal level" that "poses significant and long-term operational and public safety risks." *Ibid.*; see *Oklahoma FBI Case Volume Unprecedented*, FBI News (July 8, 2021) <tinyurl.com/fbioklahoma>.

The tragic consequence is that some crimes are going unprosecuted, with a significant share committed by non-Indians against Indians. After all, "most of those who live on Indian reservations are non-Indians," *United States* v. *Cooley*, 141 S. Ct. 1638, 1645 (2021), and that is overwhelmingly true of the residents of the newly recognized Indian country in eastern Oklahoma. The United States Attorneys' Offices in Oklahoma are resorting to unprecedented triage: for example, the Eastern District of Oklahoma has prioritized prosecuting crimes involving serious bodily injury, leaving almost all other crimes unindicted. The State understands that, of the thousands of felonies referred to that office in the year since *McGirt* was decided, only approximately 10% have thus far resulted in federal indictment. As a result, essentially every non-Indian who victimizes an Indian in the Eastern District—unless the crime involves death or serious bodily injury—remains free and uncharged.

As to non-major crimes committed by Indians in newly recognized Indian country, the State does not know how many of the thousands of cases where Indian defendants are seeking dismissal from state court in light of *McGirt*

will be reprosecuted by tribal authorities. The Creek Nation has declined the State's repeated requests to share a list of criminal cases it is prosecuting. And newly committed crimes are being referred directly to tribal prosecutors; the State similarly does not know how many such crimes exist. The full effect of *McGirt* on criminal justice in Oklahoma could therefore be even greater than the current data show. After he was himself the victim of a car theft, a former Principal Chief of the Creek Nation expressed concern that the sheer volume of crimes shifting jurisdictions will mean that non-major crimes will go unaddressed. See Curtis Killman, *Former Principal Chief Isn't Happy as McGirt Decision Hits Home*, Tulsa World (Mar. 7, 2021) <tinyurl.com/killmanmcgirt>.

Meanwhile, the United States District Court for the Eastern District of Oklahoma has declared a judicial emergency due to the "unprecedented increase in criminal filings" after *McGirt*, invoking the same provision ordinarily used by federal courts in the wake of hurricanes and other natural disasters. See General Order No. 21-10 (invoking 28 U.S.C. 141). As a result, trials have been delayed, and parties in the Eastern District are having to travel to the Western District to litigate their cases, putting significant burdens on victims and witnesses. See *ibid.* Similarly, in the Northern District, the combined impact of the COVID-19 pandemic and *McGirt* on criminal trials has meant that "civil cases will most likely not be tried before a district judge in the foreseeable future." *Feenstra* v. *Sigler*, Civ. No. 19-234 (N.D. Okla. July 28, 2021) (minute order).

McGirt is also affecting first responders. As one emergency-response dispatcher in the Creek territory has explained, callers to 911 are now asked if they are members of a federally recognized tribe; if they are, callers are transferred to the Creek Nation, where they are

"sometimes met with a hold tone and music because the call volume is so high." Annie Gowen & Robert Barnes, *'Complete, Dysfunctional Chaos': Oklahoma Reels After Supreme Court Ruling on Indian Tribes*, Wash. Post, July 24, 2021, at A1. The Creek Nation includes much of the Tulsa metropolitan area, including downtown.

ii. While federal and tribal prosecutors are struggling to deal with the onslaught of new cases, the decision in *McGirt* is threatening convictions in old ones. After *McGirt*, Oklahoma prisoners filed thousands of applications for postconviction relief based on that decision. While Oklahoma courts have begun denying postconviction relief on the ground that *McGirt* does not have retroactive effect in state postconviction proceedings, see *State ex rel. Matloff* v. *Wallace*, 2021 OK CR 15, 2021 WL 3578089, at *2 (Aug. 12, 2021), the matter is not finally settled. A petition for certiorari seeking review of that holding is forthcoming, see Ex. A to Stay Motion, *Bosse*, No. PCD-2019-124 (Okla. Crim. App. Sept. 2, 2021), and prisoners may attempt to seek relief in federal habeas proceedings despite that holding, see 28 U.S.C. 2254.

Even if postconviction relief is ultimately unavailable, hundreds of additional convictions—like the conviction here—are likely to be vacated on direct appeal if the decision below is allowed to stand. Conducting retrials in those cases will "inflict[] substantial pain on crime victims who must testify again and endure new trials." *Edwards* v. *Vannoy*, 141 S. Ct. 1547, 1554-1555 (2021). Matters will be far worse if postconviction relief becomes available, especially in light of the limitations period for potential federal reprosecutions. See 18 U.S.C. 3282(a) (establishing a five-year limitations period for most federal crimes). By the State's estimate, as many as a quarter of the postconviction challenges seeking relief under *McGirt* involve crimes that are now beyond the applicable time period for

federal reprosecution. If any individuals are ultimately released and then reoffend, the cost to society will be great and the trauma to the victims incalculable. See *Edwards*, 141 S. Ct. at 1554-1555.

The limitations problem is not exclusive to postconviction matters; some cases on direct appeal when *McGirt* was decided are now beyond the federal limitations period as well. For example, just the day before this petition was filed, the Oklahoma Court of Criminal Appeals relied on *McGirt* to vacate a manslaughter conviction obtained against a non-Indian defendant who killed a 12-year-old Indian boy while driving with a blood alcohol content of 0.291—nearly four times the legal limit. See *Roth*, slip op. 1-2. In so doing, the court recognized that "there is a serious question whether th[e] case will be prosecuted in federal court" in light of the expiration of the federal limitations period. *Id.* at 13. The court further acknowledged the victim impact statement from the boy's mother, who expressed "bewilderment" that a non-Indian could "benefit" from *McGirt* in that way and wondered who was going to "sit [her] kids down and tell them, 'look, this is why' and hold [their] hands and bring them some kind of peace and comfort." *Id.* at 12-13. The court found the mother's "outrage" to be "understandable," but it concluded that the "matter [was] simply out of [its] hands after *McGirt*." *Id.* at 13.

b. The effects of *McGirt* on Oklahoma's criminal-justice system are cataclysmic enough. But they sweep far more broadly than that. As predicted, the decision has "create[d] significant uncertainty for the State's continuing authority over any area that touches Indian affairs, ranging from zoning and taxation to family and environmental law" in eastern Oklahoma. *McGirt*, 140 S. Ct. at 2482 (Roberts, C.J., dissenting). Questions involving the

effect of *McGirt* on the State's civil authority have already arisen in a range of contexts.

One example is that some businesses and individuals in Indian country in Oklahoma are now refusing to pay income and sales taxes—and seeking refunds of prior payments of those taxes within the three-year appeal period. See Okla. Stat., tit. 68, § 2373. Thousands of tribal citizens have filed tax protests or exemption applications. The State estimates that those protests and applications, if successful, could require the payment of hundreds of millions of dollars in refunds. See Oklahoma Tax Commission, *Report of Potential Impact of McGirt v. Oklahoma* 2 (Sept. 30, 2020). And that does not include future lost revenue—potentially amounting to billions of dollars—on which state agencies and programs rely. State property taxes have been challenged as well. See, *e.g.*, *Oneta Power, LLC* v. *Hodges*, No. CJ-2020-193 (Okla. Dist. Ct. Wagoner Cty.).

Other issues potentially affecting the State's civil authority abound. The State's power to regulate oil and gas matters has been challenged. See *Canaan Resources X* v. *Calyx Energy III, LLC*, No. 119,245 (Okla.). Even simple matters such as title insurance and underwriting have been cast into uncertainty. See Sarah Roubidoux Lawson & Megan Powell, *Unsettled Consequences of the McGirt Decision*, The Regulatory Review (Apr. 1, 2021) <tinyurl.com/lawsonandpowell>; American Land Title Association, *How U.S. Supreme Court Tribal Ruling in Oklahoma Impacts Title Industry, Property Rights*, Title-News Online (Sept. 1, 2020) <tinyurl.com/altamcgirt>. Title disclaimers are now routinely being placed on title policies in real-estate transactions throughout eastern Oklahoma. See Letter from Oklahoma Council of Public Affairs to Oklahoma Congressional Delegation, *United States Supreme Court Decision in 'McGirt v. Oklahoma'*

4 (Oct. 8, 2020) <tinyurl.com/ocpaletter>; see also First American Insurance Company, Annual Report (Form 10-K) 22 (Feb. 16, 2021) (noting risk to existing title-insurance policies from *McGirt*).

The State's authority under cooperative-federalism programs is also under attack. Citing *McGirt*, the Department of the Interior has moved to seize control over surface coal mining and reclamation in the State. See 86 Fed. Reg. 26,941 (May 18, 2021); *Oklahoma* v. *Department of Interior*, Civ. No. 21-719 (W.D. Okla.). And despite the tribes' assurance that the State could retain regulatory primacy over environmental matters, see Boren Br. at 23-24, *Murphy*, *supra* (joined by the Chickasaw and Choctaw Nations); Creek Br. at 33-34, *Murphy*, *supra*, the Environmental Protection Agency appears to be reconsidering the State's authority under pressure from tribal leaders. See, *e.g.*, EPA, *Press Release: EPA Announces Renewed Consultation and Coordination with Oklahoma Tribal Nations* (June 30, 2021); Allison Herrera, *Tribes Sharply Criticize EPA Granting Stitt Environmental Oversight of Tribal Lands*, KOSU (Oct. 7, 2020) <tinyurl.com/herreratribes>.

Questions involving the local court systems are looming too. Some involve the civil jurisdiction of non-Indian municipal courts in eastern Oklahoma under the Curtis Act, ch. 504, § 14, 30 Stat. 499-500 (1898), and the new exercise of long-dormant tribal jurisdiction over civil matters. See *Hooper* v. *City of Tulsa*, Civ. No. 21-165 (N.D. Okla.); cf. *City of Sherrill* v. *Oneida Indian Nation of New York*, 544 U.S. 197, 214 (2005). Others involve the authority of tribal courts to adjudicate civil claims against nonmembers—a question that remains unresolved by this Court. See *Dollar General Corp.* v. *Mississippi Band of Choctaw Indians*, 136 S. Ct. 2159 (2016) (per curiam opinion affirming by an equally divided Court).

Civil litigation regarding the collateral consequences of criminal activity has arisen as well. Former prisoners have filed class actions seeking return of the criminal fines, court fees, and restitution paid to victims as a result of conviction, threatening the financial health of the state-court system. See *Pickup* v. *District Court of Nowata County*, Civ. No. 20-346 (N.D. Okla.); *Nicholson* v. *Stitt*, No. 119,270 (Okla.). Individuals convicted of driving while impaired are seeking to recover their driving privileges, and individuals stripped of their professional licenses are seeking to restore their privilege to practice.

3. As the Court urged in *McGirt*, see 140 S. Ct. at 2481, the State has attempted to reach an agreement with the Five Tribes regarding a solution to the myriad problems discussed above. But negotiations have not borne fruit, and there is no realistic likelihood of success in the foreseeable future. In the absence of any agreement or ameliorative legislation, the problems created by *McGirt* are multiplying by the day.

A week after the decision in *McGirt*, then-Attorney General Hunter and the Five Tribes released an agreement in principle providing recommendations to Oklahoma's congressional delegation for federal legislation to clarify state and tribal prosecutorial authority in the Five Tribes' territories. See Murphy/McGirt Agreement in Principle (July 15, 2020) <tinyurl.com/mcgirtagreement>; Derrick James, *Oklahoma Tribes and AG Reach Agreement in Principle*, McAlester News-Capital (July 16, 2020) <tinyurl.com/mcgirtagmtrelease>. The following day, however, two of the tribes reversed course and announced their opposition to the agreement. See Chris Casteel, *Creek, Seminole Nations Disavow Agreement on Jurisdiction*, Oklahoman (July 18, 2020) <tinyurl.com/tribesdisavowagreement>. A third tribe then declared that "there is no reason to rush" into legislation to resolve

the issues created by *McGirt*. Chief Gary Batton, *Choctaw Nation Special Report 7-29*, YouTube (July 29, 2020) <tinyurl.com/choctawreport>. None of those tribes has changed its position since then.

In January 2021, the Governor called on the Five Tribes to enter into formal negotiations to address *McGirt*. See Governor Kevin Stitt, *Press Release: Governor Stitt Calls for Tribes to Enter Into Formal Negotiations With the State Regarding McGirt Ruling* (Jan. 22, 2021). But one tribe quickly announced its opposition to such negotiations, and no progress has been made since. See Kylee Dedmon, *Choctaw Nation Chief Opposes Oklahoma Governor on Tribal Negotiations*, KXII News 12 (Jan. 29, 2021) <tinyurl.com/choctawopposition>.

In May 2021, Representative Tom Cole introduced a bill in the House to clarify the exercise of criminal jurisdiction in the wake of the *McGirt* decision. See H.R. 3091, 117th Cong., 1st Sess. (2021). But that too has stalled: the tribes are deeply divided over the legislation, and Representative Cole has conceded that "a consensus inside of Oklahoma" is necessary for any legislation to proceed. See Chris Casteel, *With Oklahoma Tribes Deeply Divided, Rep. Tom Cole's McGirt Bill Faces Long Road*, Oklahoman (May 16, 2021) <tinyurl.com/mcgirtbill>; Molly Young, *Tribes, State at Odds Over McGirt; SCOTUS Ruling Leaves Chasm Between Them*, Oklahoman, July 18, 2021, at A1. Earlier this month, the Principal Chief of the Cherokee Nation stated that his administration seeks to ensure that the Cherokee Reservation "remains exclusively within the jurisdiction of the Cherokee Nation," and "will resist any effort in the Congress of the United States to erode *McGirt*" or "undermine [the Nation's] jurisdiction anywhere across [its] reservation." Cherokee Nation, *Principal Chief Hoskin – State of the*

Nation Address, YouTube (Sept. 4, 2021) <tinyurl.com/cherokeeaddress>.

4. As a practical matter, therefore, only this Court has the power to bring an end to the chaos in Oklahoma by overruling *McGirt*. It should do so in this case.

As the Court is well aware, stare decisis is "not an inexorable command." *Franchise Tax Board* v. *Hyatt*, 139 S. Ct. 1485, 1499 (2019) (citation omitted). And the situation created by *McGirt* is a paradigmatic example of when stare decisis must yield to the better interpretation of the law. The majority opinion in *McGirt* did not itself adhere to the Court's prior precedents on congressional disestablishment of Indian reservations. See 140 S. Ct. at 2485-2489 (Roberts, C.J., dissenting); cf. *Ramos* v. *Louisiana*, 140 S. Ct. 1390, 1405 (2020). Developments since *McGirt* have proven the decision fundamentally unworkable. See *Ramos*, 140 S. Ct. at 1405. Any reliance interests that have developed in the short time since *McGirt* pale in comparison to the century of reliance interests that *McGirt* upset. See *ibid.*; *Janus* v. *State, County & Municipal Employees*, 138 S. Ct. 2448, 2485-2486 (2018). The case was decided by "the narrowest of margins," over a "spirited dissent[] challenging the basic underpinnings" of the majority opinion. *Payne* v. *Tennessee*, 501 U.S. 808, 829 (1991). And the recent nature of the decision entitles it to less stare decisis weight. See *Montejo* v. *Louisiana*, 556 U.S. 778, 793 (2009); cf., *e.g.*, *Payne*, 501 U.S. at 829-830 (overruling, in 1991, *South Carolina* v. *Gathers*, 490 U.S. 805 (1989), and *Booth* v. *Maryland*, 482 U.S. 496 (1987)); *United States* v. *Dixon*, 509 U.S. 688, 704 (1993) (overruling *Grady* v. *Corbin*, 495 U.S. 508 (1990)).

To stop the ongoing disruption and save the people of Oklahoma from years of hardship to come, the Court should consider overruling *McGirt* in this case. The

stakes are simply too high to leave that option off the table. For that reason, the Court should grant review on the second question presented, in addition to the independently important question regarding the State's authority to prosecute non-Indians who commit crimes against Indians in Indian country.

* * * * *

It is hard to imagine a case in which this Court's review is more desperately needed. The State of Oklahoma respectfully requests that the Court grant certiorari and set this case for oral argument as soon as possible.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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