No. 21-1193

IN THE
Supreme Court of the United States

STATE OF OKLAHOMA,
Petitioner,
v.
ROBERT ERIC WADKINS,
Respondent.

On Petition for a Writ of Certiorari
to the Oklahoma Court of Criminal Appeals

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the Oklahoma Court of Criminal Appeals correctly hold that Respondent—an enrolled citizen of the Choctaw Nation with nearly a quarter Choctaw ancestry—is an "Indian" for purposes of federal criminal law because he was eligible for membership at the time of the alleged offenses; because he sought formal enrollment before the alleged offenses occurred; because the Choctaw Nation issued him a Certificate of Degree of Indian Blood ("CDIB") card when he was an infant; because throughout his life he has received free medical care from federally funded Choctaw Nation medical centers on the basis of being an Indian; because his immediate and extended family members, including his now-deceased mother, are or were Choctaw citizens; because he engages in tribal social and cultural activities such as attending powwows; and because he holds himself out as an Indian, including by using his CDIB card as his sole form of identification?

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INTRODUCTION

This case concerns a factbound application of a test that courts nationwide unanimously apply to determine Indian status for purposes of federal criminal jurisdiction. Under the Major Crimes Act ("MCA"), 18 U.S.C. § 1153, and the General Crimes Act ("GCA"), 18 U.S.C. § 1152, federal and state authority to prosecute crimes in Indian country turns on whether the defendant or the victim is an "Indian." This Court first construed the term "Indian" in *United States v. Rogers*, 45 U.S. (4 How.) 567 (1846), where the Court rejected a claim that a white man adopted by the Cherokee Nation was an "Indian" under the GCA. *Id.* at 573. The statute, the Court explained, "does not speak of members of a tribe." *Id.*

Across the country, every court has derived from *Rogers* the same two-part test for determining whether someone is an "Indian" for purposes of federal criminal law: First, does the person have some Indian ancestry? Second, if so, is he or she recognized as an Indian by a tribe or the federal government? To evaluate the second prong, every modern decision nationwide uses the same four factors: "1) enrollment in a tribe; 2) government recognition formally and informally through providing the person assistance reserved only to Indians; 3) enjoying the benefits of tribal affiliation; and 4) social recognition as an Indian through living on a reservation and participating in Indian social life." *St. Cloud v. United States*, 702 F. Supp. 1456, 1461 (D.S.D. 1988). These are known as the "*St. Cloud*" factors.

Oklahoma claims the lower courts are divided on how to apply the *Rogers* test. They are not. More than that:

Every court nationwide would apply that factbound test to reach the same result as the Oklahoma Court of Criminal Appeals ("OCCA") reached here.

On the first prong, Respondent is nearly a quarter Choctaw. And below, Oklahoma *did not dispute* that this ancestry suffices. Indeed, Oklahoma cites no case that has ever found a similar defendant to lack adequate Indian ancestry. Oklahoma's arguments on the first prong are thus both waived and meritless.

On the second prong, Oklahoma fares no better. The OCCA applied the *St. Cloud* factors and found that all four—and other considerations too—confirmed that Respondent is recognized as an Indian. Respondent is an enrolled citizen of the Choctaw Nation who was eligible for enrollment at the time of the alleged offenses. The Nation has issued Respondent a Certificate of Degree of Indian Blood ("CDIB") card and provided him federally funded health care throughout his life because he is an Indian. The Nation also gave Respondent school supplies, books, clothes, and food as a teenager. And it even helped Respondent apply for citizenship. Indeed, the *only* reason Respondent was not an enrolled citizen at the time of the alleged offenses was that when he first applied he was a minor, and thus he was unable to sign his own enrollment application. Every court to have considered similar facts has resolved them the same way the OCCA did below.

Oklahoma says that lower courts have split over whether the *St. Cloud* factors are "exclusive" and how they should be "prioritized." But in fact, every court agrees that the four *St. Cloud* factors are not exclusive. And courts have never reached conflicting outcomes

based on whether the factors carry "an order of priority." Moreover, Oklahoma's nonexistent splits have nothing to do with this case. Here, every factor—the four-factor test, plus others besides—favored "Indian" status. So neither exclusivity, nor any supposed "order of priority," mattered one whit.

Unable to show any disagreement on the test that lower courts unanimously apply, Oklahoma asks the Court to adopt a bright-line rule that the word "Indian" in federal criminal statutes refers only to Native Americans who are enrolled members of federally recognized tribes. That argument, however, is no more worthy of review. Every court to have considered the question has rejected Oklahoma's position. And for good reason. Oklahoma's position rebels against this Court's cases—which for centuries have held that the term "Indian" in federal criminal statutes "does not speak of members of a tribe," *Rogers*, 45 U.S. (4 How.) at 573—as well as statutory text and history. When Congress enacted those statutes, "enrollment" largely did not exist. So it would be bizarre if those statutes embedded a concept that, at their passage, had no meaning for most tribes.

Equally meritless are Oklahoma's claims that the *St. Cloud* test impermissibly classifies based on race. This Court has squarely held that tribal classifications operate based on politics, not race. *Morton v. Mancari*, 417 U.S. 535, 551-55 (1974). So when courts apply *St. Cloud* to determine whether defendants are affiliated with federally recognized tribes, they ask a political—not a racial—question.

Oklahoma provides no sound reason to deviate from this Court's ordinary practice of denying petitions seeking review of factbound, splitless issues. The decision in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), certainly provides no reason to do so. For all of Oklahoma's atmospherics, only *two* petitions have raised questions over a defendant's "Indian status" in the two years since *McGirt* was decided.

Indeed, it is *Oklahoma*'s position here that threatens disruption. Given that courts nationwide have rejected Oklahoma's position for decades, today many individuals are serving federal sentences that are valid only because the individuals are non-enrolled "Indians" or committed crimes against non-enrolled "Indians." Oklahoma's position, if accepted, would invalidate all those convictions. That includes long-final convictions, because Oklahoma's proposed rule would apply retroactively on collateral review under *Teague v. Lane*, 489 U.S. 288 (1989), reset the limitation period on first § 2255 petitions, and likely allow second or successive § 2255 petitions too. This Court is not in the habit of granting certiorari on issues presenting no conflict where the upshot of reversal would be to set aside numerous convictions obtained under settled law. It should not start here.

STATEMENT OF THE CASE

A. Legal Background

Under the MCA and the GCA, federal authority to prosecute crimes in Indian country turns on whether the defendant or the victim is an "Indian." *E.g.*, 18 U.S.C. § 1153(a) ("Any Indian who commits against the person or property of another Indian or other person any of the

following offenses … shall be subject to the same law and penalties as all other persons committing any of [those] offenses, within the exclusive jurisdiction of the United States."). State criminal jurisdiction in Indian country, too, can turn on "Indian" status. *E.g.*, *McGirt*, 140 S. Ct. at 2459.

In *United States v. Rogers*, this Court addressed whether a white man who was "adopted" by the Cherokee Nation was an "Indian" for purposes of the GCA. 45 U.S. (4 How.) at 572. Answering no, the Court explained that while someone who is not Native American "may by … adoption become entitled to certain privileges in the tribe," the statute, by using the term "Indian," "does not speak of members of a tribe." *Id.* at 573. Thus, "Indian" for purposes of federal criminal law "was not intended to … embrace[]" "a white man who at mature age is adopted in an Indian tribe." *Id.* at 572-73.

The lower courts have universally derived a two-pronged test from *Rogers*. First, an "Indian" is a person who has "some degree of Indian blood." *United States v. Dodge*, 538 F.2d 770, 786 (8th Cir. 1976). Second, an "Indian" is a person who is "recognized as an Indian" by a tribe or the federal government. *Id.*

The lower courts agree that the second *Rogers* prong is satisfied when a person with Native American ancestry is an enrolled member of a federally recognized Indian tribe. *E.g.*, *United States v. Nowlin*, 555 F. App'x 820, 823 (10th Cir. 2014); *United States v. Stymiest*, 581 F.3d 759, 764 & n.2 (8th Cir. 2009); *United States v. Keys*, 103 F.3d 758, 761 (9th Cir. 1996).

The lower courts also agree that *lack* of enrollment is not dispositive. As early as 1938, the Seventh Circuit held that a non-enrolled Native American was an "Indian" when he lived on a reservation and "maintained tribal relations with the Indians thereon." *Ex parte Pero*, 99 F.2d 28, 30 (7th Cir. 1938). In 1977, this Court "noted … that enrollment in an official tribe has not been held to be an absolute requirement for federal jurisdiction." *United States v. Antelope*, 430 U.S. 641, 646 n.7 (1977). And today, every lower court to have considered the issue agrees. *E.g.*, *Nowlin*, 555 F. App'x at 823-24; *Stymiest*, 581 F.3d at 764; *United States v. Bruce*, 394 F.3d 1215, 1224-25 (9th Cir. 2005).

To assess whether the second *Rogers* prong is satisfied, lower courts use the factors first articulated by *St. Cloud v. United States*, 702 F. Supp. 1456. The factors are: "1) enrollment in a tribe; 2) government recognition formally and informally through providing the person assistance reserved only to Indians; 3) enjoying the benefits of tribal affiliation; and 4) social recognition as an Indian through living on a reservation and participating in Indian social life." *Id.* at 1461. When a person is an enrolled tribal member, the first factor is dispositive; otherwise, all the factors are considered. *See id.* Ultimately, these factors merely "guide the analysis of whether a person is recognized as an Indian." *Id.* They "are not exclusive." *United States v. LaBuff*, 658 F.3d 873, 877 (9th Cir. 2011).

B. Respondent Robert Eric Wadkins

Respondent Robert Eric Wadkins is an enrolled Choctaw citizen of 3/16 Choctaw ancestry. Pet. App. 4a. His mother (now deceased) was an enrolled member of

the Choctaw Nation, as is Respondent's brother and many of Respondent's aunts, uncles, and cousins. Pet. App. 12a. Respondent first attempted to enroll in the Choctaw Nation twenty years ago. Pet. App. 9a. However, because Respondent was not yet eighteen, he could not sign his own application. *Id.*

When Respondent was an infant, the Choctaw Nation issued Respondent a CDIB card containing a reference number and stating his degree of Indian ancestry. Pet. App. 9a-10a. The CDIB card serves as Respondent's primary identification; he has never had a driver's license or state identification. Pet. App. 12a.

Throughout his life, Respondent has used his CDIB card to access free medical care at Choctaw medical facilities "as an eligible Native American." Pet. App. 10a-11a. The medical care provided by Choctaw medical services is funded at least in part by the federal Indian Health Service ("IHS"). *See* Choctaw Nation Health Services Authority, https://www.choctawnation.com/tribal-services/health-services-authority (last visited May 6, 2022). Respondent most recently received medical treatment from Choctaw medical centers "approximately six weeks before and six weeks after the charged offenses." Pet. App. 10a. When he was a teenager, Respondent also received school supplies, books, clothes, and food from the Choctaw Nation. Pet. App. 12a. Respondent has been unable to seek other tribal benefits as an adult because he has spent most of his adult life incarcerated and many such benefits—such as tribal employment and hunting and fishing rights—cannot, as a practical matter, be provided to an incarcerated individual. *See id.*

Despite lengthy periods of incarceration, Respondent has maintained social and cultural ties to the Choctaw Nation and held himself out as an Indian. *Id.* He attended multiple powwows outside of prison. *Id.* He created Native American art. *Id.* He knows various Choctaw language phrases and alphabet letters, which he learned from his enrolled mother. *Id.* And at the time of his arrest, Respondent had a red-tail hawk feather in his possession, which he said signified guidance and protection for him. *Id.*

Respondent chose during one of his periods of incarceration to join a prison gang. Respondent could not join the only Indian gang in existence at the time, the Indian Brotherhood, because he did not meet the Indian Brotherhood's length-of-incarceration requirement. Pet. App. 13a. So, Respondent chose instead to join the Universal Aryan Brotherhood ("UAB"). *Id.* Respondent did not view his UAB membership as inconsistent with his Indian identity because he is both white and Indian. *Id.* Indeed, the UAB and the Indian Brotherhood were aligned when Respondent was in the UAB. *Id.* While a UAB member, Respondent was given an Oklahoma Department of Corrections ("DOC") tag that identified him as Native American. *Id.* Respondent also attended at least one sweat lodge ceremony while in prison. Pet. App. 12a. Respondent left the UAB approximately eight years before the alleged offenses. Pet. App. 13a. When Respondent was most recently arrested, he was identified as Native American on his DOC custody assessment form at intake and on his subsequently issued DOC badge. *Id.*

Respondent was eligible for enrollment in the Choctaw Nation at the time of the alleged offenses, though he was not formally enrolled. Pet. App. 4a, 6a. In 2020, Respondent officially became an enrolled Choctaw citizen. Pet. App. 9a. The Choctaw Nation provided Respondent a tribal case manager to help him enroll. Pet. App. 12a. Respondent's tribal membership card contains the same reference number as his CDIB card. Pet. App. 9a n.7.

C. This Case

Oklahoma charged Respondent for alleged offenses committed within the boundaries of the Choctaw Reservation. Pet. App. 3a. Respondent was convicted. Pet. App. 26a. On appeal, Respondent challenged Oklahoma's jurisdiction on the ground that he is an Indian and the alleged offenses occurred in Indian country. Pet. App. 2a. The OCCA remanded for an evidentiary hearing on Respondent's Indian status. Pet. App. 29a.

In a two-and-a-half-page order containing little reasoning, the district court determined that Respondent is not an "Indian." Pet. App. 23a-25a. The district court made four findings of fact. Pet. App. 24a. Notably, it found that "[t]he parties entered into a stipulation that [Respondent] has a [CDIB]." *Id.* But it also found that Respondent "did not possess a CDIB Card, nor had he applied for one." *Id.*

The OCCA unanimously reversed. Oklahoma agreed that the first prong of the *Rogers* test was satisfied. Pet. App. 3a. The OCCA accordingly focused on the second prong. *See id.* It first rejected Oklahoma's "plea to adopt a 'bright line' test basing recognition solely on

tribal enrollment at the time of the offense." Pet. App. 6a. The OCCA explained that in *Parker v. State*, 2021 OK CR 17, it had recently accepted that it is "settled that a person may be Indian for purposes of federal criminal jurisdiction whether or not the person is formally enrolled in any tribe." Pet. App. 6a-7a. The OCCA followed *Parker*. *Id.*

The OCCA then applied the *St. Cloud* factors to determine whether the second *Rogers* prong was met. Pet. App. 7a. The OCCA reversed the district court's conclusion that Respondent did not possess a CDIB card. Pet. App. 10a. And taking the other facts into account, it held that "[w]hile eligibility for tribal membership alone is insufficient to prove recognition, [Respondent's] subsequent enrollment coupled with the other factors, specifically his possession of a CDIB card since childhood and receipt of Indian health services, showed he was recognized as Indian by the Choctaw Nation." Pet. App. 14a.

The OCCA thus concluded that Oklahoma lacked jurisdiction to prosecute Respondent. *Id.* On October 28, 2021, the OCCA ordered Respondent's case dismissed. Pet. App. 1a, 14a. On November 29, 2021, the OCCA's mandate issued. Mandate, *Wadkins v. Oklahoma*, No. F-2018-790 (Okla. Ct. Crim. App. Nov. 29, 2021).

By then, the federal government had charged Respondent and taken him into custody. Complaint at 1 (E.D. Okla. Nov. 16, 2021), ECF No. 1; Writ of Habeas Corpus Ad Prosequendum at 1 (E.D. Okla. Nov. 17,

2021), ECF No. 3.[1] Trial is set for July 6, 2022. Opinion and Order at 3 (E.D. Okla. Mar. 31, 2022), ECF No. 46.

REASONS FOR DENYING THE PETITION

I. This Case Implicates No Split Of Authority.

The Court should deny the petition because it implicates no split. First, Oklahoma identifies no split on whether 3/16 Indian ancestry satisfies the first *Rogers* prong. Indeed, Oklahoma below conceded that the first *Rogers* prong is met. Second, all courts agree on the *St. Cloud* factors and that they are non-exclusive. Nor did Oklahoma's nonexistent "*St. Cloud*" splits have any bearing on the outcome in this case: The OCCA would have reached the same result even if the factors were exclusive and no matter what weight they received.

A. This Case Implicates No Split On The Ancestry Requirement, Which Oklahoma Below Conceded Was Met.

Oklahoma first says that review is warranted because of a split on "how much" Indian ancestry suffices under the first *Rogers* prong. Pet. 13-14. The OCCA, however, did not independently resolve that federal issue. Instead, it accepted the parties' agreement that the first prong was satisfied. Pet. App. 3a. This Court lacks jurisdiction over claims not "pressed or passed upon in the state court." *Heath v. Alabama*, 474 U.S. 82, 87 (1985); *see* Sup. Ct. R. 14(1)(g)(i). Moreover, under Oklahoma law, "the State, like defendants, must … preserve errors …, otherwise they are waived." *A.J.B.*

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[1] References to filings in Respondent's federal criminal case are to Case No. 6:21-cr-370 (E.D. Okla.).

v. State, 1999 OK CR 50, ¶ 9. Indeed, even now, Oklahoma does not claim that Respondent's degree of Indian ancestry was insufficient under *Rogers*.

Regardless, this case does not implicate Oklahoma's purported split on "how much" Indian ancestry is enough. Oklahoma cites four decisions that purportedly divide on whether 1/8 or less degree of ancestry suffices. *See* Pet. 14 (citing *Bruce*, 394 F.3d at 1227 (1/8 enough); *Perry v. State*, No. F-2020-46 (Okla. Ct. Crim. App. Apr. 1, 2021) (unpublished) (1/128 enough); *Vialpando v. State*, 640 P.2d 77, 80 (Wyo. 1982) (1/8 not enough); *State v. Reber*, 171 P.3d 406, 410 (Utah 2007) (1/16 not enough)). But that question is irrelevant here, where Respondent has *3/16* degree of Choctaw ancestry. Pet. App. 4a. Oklahoma cites no case that has deemed 3/16 degree of ancestry insufficient to render someone an "Indian" for purposes of federal criminal law.

Even the "1/8" question that is *not* implicated is unworthy of review. One of Oklahoma's four decisions (*Perry*) is an intermediate, unpublished Oklahoma state court decision that is not even binding in Oklahoma. *See* Okla. Ct. Crim. App. R. 3.5(C)(3). Another (*Reber*) is dicta. 171 P.3d at 410. All that leaves is one Ninth Circuit case—which held that ancestry *even less* than Respondent's suffices under *Rogers*—and a 1982 Wyoming decision that has been cited only twice by state or federal courts and never been followed.

B. This Case Implicates No Split Over The *St. Cloud* Factors.

1. No conflict exists as to the second *Rogers* prong either. Every modern decision uses the *St. Cloud*

factors. *Supra* 6.[2] Every court agrees that the test is satisfied by enrollment in a federally recognized tribe. *Supra* 5-6. And every court agrees that enrollment is not necessary to establish recognition as an Indian. *E.g.*, *St. Cloud*, 702 F. Supp. at 1461; *Ex parte Pero*, 99 F.2d at 30; *Stymiest*, 581 F.3d at 764; *State v. Salazar*, 461 P.3d 946, 949-50 (N.M. Ct. App. 2020); *State v. George*, 422 P.3d 1142, 1144-45 (Idaho 2018); *United States v. Flores*, No. 1:18-cr-00102, 2018 WL 6528475, at *2 (W.D.N.C. Dec. 12, 2018); *United States v. Zepeda*, 792 F.3d 1103, 1113-14 (9th Cir. 2015) (en banc); *United States v. Prentiss*, 273 F.3d 1277, 1283 (10th Cir. 2001). Oklahoma cites no case that disagrees on any of these points.

Oklahoma tries to show division on two issues: (1) whether the *St. Cloud* factors are exclusive and (2) whether they have an order of priority. Pet. 15-18. But Oklahoma's supposed splits are a mirage, and this case implicates no disagreement.

2.a. There is no split over whether the *St. Cloud* factors are exclusive. Pet. 15-16. *St. Cloud* itself treated the factors as merely a "guide." 702 F. Supp. at 1461. And no court has held that they are exclusive. Indeed, Oklahoma does not even point to a decision that *in dicta* has said the factors are "exclusive" or "exhaustive."

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[2] Oklahoma's claim that two district court decisions have created "new" tests, Pet. 17, mischaracterizes those decision. *United States v. Delacruz-Slavik*, No. 10-CR-20017, 2010 WL 4038758 (E.D. Mich. Oct. 1, 2010), followed the Ninth Circuit. *Id.* at *3. *Perkins v. Lake County Department of Utilities*, 860 F. Supp. 1262 (N.D. Ohio 1994), was a Title VII case, not a criminal one. *Id.* at 1263.

The Ninth Circuit, in particular, is not an "exclusive" jurisdiction. Pet. 15. At least three times, the Ninth Circuit has affirmed that the *St. Cloud* factors "should not be deemed exclusive." *United States v. Maggi*, 598 F.3d 1073, 1081 (9th Cir. 2010), *overruled in part on other grounds by Zepeda*, 792 F.3d 1103; *see LaBuff*, 658 F.3d at 877; *United States v. Juvenile Male*, 666 F.3d 1212, 1215 (9th Cir. 2012). And Oklahoma's own Ninth Circuit cases are in accord. *Bruce* (Pet. 15) turned primarily on the fact that the defendant had been previously subjected to the criminal jurisdiction of the relevant tribe, 394 F.3d at 1226-27—a consideration the *St. Cloud* factors do not contemplate. *See Stymiest*, 581 F.3d at 764 (explaining that exercise of tribal jurisdiction is not a *St. Cloud* factor).[3] And *Zepeda* (Pet. 15) held that *Maggi*—one of the three aforementioned non-exclusive cases—"appropriately clarified the second prong of the [*Rogers*] test." *Zepeda*, 792 F.3d at 1106 (emphasis omitted).[4]

Oklahoma's other purported "exclusive" cases are cut from the same cloth. Pet. 17. One expressly stated that it used the factors only as a "guide"—which is the

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[3] Being prosecuted by a tribe is certainly not a tribal "benefit," *St. Cloud*, 702 F. Supp. at 1461, nor is it (or the underlying crime) "participati[on] in Indian social life," *id.*; *cf. United States v. Feola*, 420 U.S. 671, 694 (1975) ("[T]he law generally makes criminal only antisocial conduct….").

[4] District courts in the Ninth Circuit likewise understand the *St. Cloud* factors to be non-exclusive under Ninth Circuit precedent. *E.g.*, *United States v. Clous*, No. 1:19-cr-02032-SMJ-1, 2022 WL 585677, at *1 (E.D. Wash. Jan. 24, 2022); *United States v. Loera*, 190 F. Supp. 3d 873, 880 (D. Ariz. 2016), *aff'd*, 697 F. App'x 572 (9th Cir. 2017).

same as *St. Cloud* itself. *State v. LaPier*, 790 P.2d 983, 986, 988 (Mont. 1990). Another, like *Bruce*, factored in the non-*St. Cloud* consideration that the defendant had previously been prosecuted in tribal court. *State v. Perank*, 858 P.2d 927, 933 (Utah 1992). A third also considered a factor not found in *St. Cloud*: that the defendant's adoptive parents were tribal members. *George*, 422 P.3d at 1146. Oklahoma's last two cases, meanwhile, said nothing about exclusivity and did not even turn on application of the factors. *See State v. Sebastian*, 701 A.2d 13, 24, 26 (Conn. 1997) (holding tribe's lack of federal recognition dispositive of "Indian" question without considering *St. Cloud* factors); *Flores*, 2018 WL 6528475, at *2-3 (concluding only that government could introduce evidence of Indian status of victim at trial).[5]

b. This case does not even implicate Oklahoma's nonexistent "exclusivity" split. Oklahoma makes no effort to show that the result *in this case* would have been different had the OCCA limited its consideration to the *St. Cloud* factors. Nor could it. The OCCA concluded that the *St. Cloud* factors alone were sufficient to resolve the Indian-recognition question: Respondent's "subsequent enrollment coupled with the other factors, specifically his possession of a CDIB card since childhood and receipt of Indian health services, showed he was recognized as Indian by the Choctaw Nation." Pet. App. 14a.

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[5] Oklahoma is thus wrong that a split exists between the state and federal courts in North Carolina. Pet. 17, 29.

Indeed, the OCCA discussed non-*St. Cloud* factors only to rebut *Oklahoma's* claim that this case should turn on a consideration not found within *St. Cloud*—namely, Respondent's prior membership in the UAB. Pet. App. 13a; *see* Suppl. Br. of Appellee After Remand at 18-19 & n.14, *Wadkin*, No. F-2018-790 (Okla. Ct. Crim. App. June 14, 2021). So while Oklahoma now maintains that the OCCA's inquiry should have been narrow, Oklahoma is the one that advocated for a wide-ranging examination of Respondent's Indian status below.

Illustrating that that this case does not implicate Oklahoma's supposed "exclusivity" split, Oklahoma never tries to show that the decision below would have come out differently in any court anywhere in the country. Nor can it. Other courts agree that subsequent enrollment can corroborate Indian status. *Perank*, 858 P.2d at 933 (deeming defendant an Indian when "the Tribe formally recognized [him] as an Indian and as a member of the Tribe by his enrollment in the Tribe at a later date"). Courts likewise consistently hold that defendants with CDIB cards are "Indians." *E.g.*, *Parker*, 2021 OK CR 17, ¶ 36; *United States v. Diaz*, 679 F.3d 1183, 1187 (10th Cir. 2012); *Bruce*, 394 F.3d at 1224; *United States v. Buckles*, 804 F. App'x 785, 787 (9th Cir.), *cert. denied*, 141 S. Ct. 435 (2020). And courts have found Indian status for purposes of federal criminal law where the defendants or victims received medical services from federally funded tribal health services. *E.g.*, *Stymiest*, 581 F.3d at 766; *LaBuff*, 658 F.3d at 878; *cf. United States v. Loera*, 952 F. Supp. 2d 862, 872 (D. Ariz. 2013) (defendant *not* an Indian for purposes of federal criminal

law when he "did not receive free healthcare available only to Indians" (emphasis omitted)).[6]

3. Oklahoma also claims a split over whether the *St. Cloud* factors have an order of importance. Pet. 16. But again, this case does not even implicate that issue. The OCCA held that every *St. Cloud* factor favored Indian status. Pet. App. 9a-14a. Any question about order of importance is thus entirely irrelevant.

Nor, moreover, is there any actual conflict. Oklahoma points to no two cases in which the claimed disagreement over priority has resulted in different outcomes, and indeed it has not. While Oklahoma says the Eighth Circuit has "questioned" the Ninth Circuit's reliance on tribal court convictions and health services, Pet. 16 (citing *Stymiest*, 581 F.3d at 764-65), in fact the Eighth Circuit has found Indian status when those factors are present, just like the Ninth. *See Stymiest*, 581 F.3d at 766; *Bruce*, 394 F.3d at 1226-27.[7]

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[6] One court has held that childhood visits to an Indian hospital are insufficient to establish Indian recognition when other *St. Cloud* factors also weigh against Indian recognition. *State v. Nobles*, 838 S.E.2d 373, 380 (N.C.), *cert. denied*, 141 S. Ct. 365 (2020). Here, however, Respondent's receipt of tribal medical services began when he was a child and *continued* until at least "six weeks before and six weeks after the charged offenses." Pet. App. 10a.

[7] *Cohen's Handbook* similarly errs in suggesting that *Stymiest* and *United States v. Cruz*, 554 F.3d 840 (9th Cir. 2009), conflict with one another. *Cohen's Handbook of Federal Indian Law* § 3.03[4], at 178 (Newton et al. eds., 2012). What mattered in *Cruz* was that the defendant, while *eligible* for federal and tribal services, had never received them. 554 F.3d at 848. In *Stymiest*, by contrast, the

4. Finally, Oklahoma's Hail Mary attempt to show conflict over whether Indian status is a jury question is just that. The question presented turns on the substance of the "Indian" determination, not the procedural question of who decides it. Moreover, Oklahoma did not request a jury determination below, which is a waiver under state law. *See A.J.B.*, 1999 OK CR 50, ¶ 9.

II. This Case Does Not Warrant Review In The Absence Of A Split.

1. Oklahoma provides no reason for this Court to depart from its normal practice and grant absent a split. Oklahoma invokes *McGirt*, Pet. 26-27, but this case starkly contrasts with Oklahoma's post-*McGirt* petition in *Oklahoma v. Castro-Huerta*, No. 21-429. There, Oklahoma attempted—albeit without citation—to quantify the number of cases affected. Cert. Reply at 3, *Castro Huerta*, No. 21-429 (U.S. Dec. 8, 2021). Here, Oklahoma makes no such efforts. And what we know is that just *two* petitions have raised this issue in the nearly two years since *McGirt*. The other case—*Oklahoma v. Sam*, No. 21-1214—concerns a minor—a class of offender for whom Oklahoma concedes enrollment likely "cannot be the only factor." Pet. 23. So the *only* post-*McGirt* case where Oklahoma's position actually matters is this one.

Indeed, while Oklahoma maintains defendants can now "pick and choose Indian status," Pet. 28, the cases show the opposite. The OCCA easily rejected the only

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defendant had obtained such services. 581 F.3d at 766. Tellingly, Oklahoma does not rely on *Cruz* to show conflict.

other post-*McGirt* "Indian" claim made by a person who was not enrolled. *Parker*, 2021 OK CR 17, ¶¶ 40-42. And recently, a defendant who applied for Cherokee citizenship after his offense *conceded* he could not satisfy the *St. Cloud* test. Summary Opinion at 3, *Hemphill v. Oklahoma*, No. F-2020-798 (Okla. Ct. Crim. App. Apr. 7, 2022).

Oklahoma's claims of "on the ground" law-enforcement problems, Pet. 27, are invented. Cross-deputization agreements already "cover almost all of the Reservations' area" in Eastern Oklahoma. Brief of *Amici Curiae* Cherokee Nation et al. at 16, *Castro Huerta*, No. 21-429 (U.S. Apr. 4, 2022). And Oklahoma likely has inherent authority to detain an offender for as long as necessary to determine his Indian status—given that tribes possess such power. *See United States v. Cooley*, 141 S. Ct. 1638, 1644 (2021) (tribal authority); *Nevada v. Hicks*, 533 U.S. 353, 363-64 (2001) (explaining that "'process of state courts may run into an Indian reservation'" as "necessary to 'prevent such areas from becoming an asylum for fugitives from justice'" (brackets omitted) (first quoting *Utah & N. Ry. Co. v. Fisher*, 116 U.S. 28, 31 (1885), and then quoting *Fort Leavenworth R.R. Co. v. Lowe*, 114 U.S. 525, 533 (1885))).

Equally unfounded is Oklahoma's speculation that defendants will take advantage of competing standards of evidence between state and federal prosecutions. Pet. 28. Oklahoma cites no instance, ever, of a defendant escaping federal prosecution after successfully establishing his Indian status in a state proceeding. Indeed, a defendant would likely be estopped from doing

so. *See New Hampshire v. Maine*, 532 U.S. 742, 749-51 (2001).

2. The truth is that granting certiorari would undermine, not improve, sound law enforcement. Oklahoma's theory, if accepted, would invalidate every federal prosecution involving a non-enrolled "Indian" obtained under the MCA or the GCA. And it would do so as to long-final convictions. Oklahoma's rule would have retroactive effect under *Teague*, because it "alters … the class of persons that the law punishes." *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004). It would in turn reset the one-year period of limitation for those who have never filed § 2255 habeas petitions. 28 U.S.C. § 2255(f)(3). And it would likely also allow second or successive § 2255 petitions. *Id.* § 2255(h)(2). In all likelihood, some of the individuals released from federal custody would then go unprosecuted at the state level. State statutes of limitations would foreclose some prosecutions. And stale evidence would pose a serious obstacle. Oklahoma provides no sound reason to invite such consequences.

III. The Decision Below Is Correct.

1. The decision below correctly and straightforwardly applied the settled nationwide test to hold that Respondent is an "Indian" for purposes of federal criminal law.

On ancestry, Respondent is 3/16 Choctaw, which Oklahoma correctly agreed suffices. *Supra* 11-12.

On recognition, all four of the *St. Cloud* factors—and other factors besides—confirmed that Respondent was

recognized as an Indian by the Choctaw Nation and the federal government.

As to the first *St. Cloud* factor (enrollment), Respondent was eligible for membership at the time of the alleged offenses and indeed would have been enrolled had he not been a minor when he first applied. Pet. App. 9a-10a. On the second and third factors (federal and tribal benefits), the Choctaw Nation provided Respondent federally funded medical treatment throughout his life at Choctaw medical centers as an eligible Native American. Pet. App. 10a-12a. And on the fourth factor (social recognition), myriad facts confirmed that Respondent was recognized as an Indian, including Respondent's use of his Choctaw-Nation issued CDIB card as his sole form of identification. Pet. App. 12a; *supra* 8. Oklahoma's contrary factual quibbles (Pet. 24-26) are meritless and certainly are not the stuff of certiorari.

2. The OCCA also correctly rejected Oklahoma's unprecedented position that the word "Indian" in the MCA and GCA is limited to enrolled tribal members. Pet. 21-24. That position contradicts statutory text, history, and precedent. And that position, if accepted, could throw into chaos the administration of numerous federal programs tied to Indian status.

First, the text of the MCA and the GCA forecloses Oklahoma's position. Congress could have limited those statutes' coverage to enrolled members of federally recognized tribes. And indeed, Congress *did* craft similar limits in other statutes, where it expressly defined "Indian" to mean "tribal member." *E.g.*, 25 U.S.C. § 3103 ("'Indian' means a member of an Indian

tribe."); *id.* § 5304(d) (similar). But Congress enacted no such limit in the MCA and the GCA. Instead, it chose just the word "Indian." That term, in the nineteenth century, meant simply "a native of the American continent." Noah Webster, *An American Dictionary of the English Language* at 445 (13th ed. 1834). Lower courts have thus properly refused to blue pencil the MCA and the GCA with limits that Congress declined to enact. *E.g.*, *Russello v. United States*, 464 U.S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (alteration and quotation marks omitted) (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972))).

Second, history confirms what the text provides. The limit Oklahoma seeks to craft would have made no sense to the Congresses that enacted the federal criminal statutes governing "Indians." That is because, when Congress enacted the relevant statutes, most tribes did not have delineated citizenship criteria or keep lists of their members. That was so in 1790 (when Congress first inserted the word "Indian" into a criminal statute, Act of July 22, 1790, ch. 33, § 5, 1 Stat. 137), in 1834 (when the GCA took its near-current form, Act of June 30, 1834, ch. 161, § 25, 4 Stat. 729), and as late as 1885 (when the MCA was adopted, Act of Mar. 3, 1885, ch. 341, § 9, 23 Stat. 385). *See Cohen's Handbook* § 3.03[2], at 173-74. Only in 1934 did formal "enrollment" take off. *Id.* at 174.

Third, for just these reasons, this Court has repeatedly recognized that the word "Indian" in the MCA and the GCA is not limited to tribal members. In *Rogers*, the Court explained that the term Indian "does not speak of members of a tribe." 45 U.S. (4 How.) at 573. In *Westmoreland v. United States*, 155 U.S. 545 (1895), the Court reiterated the word's broad meaning. *Id.* at 548 (construing the GCA). And in *Duro v. Reina*, the Court observed that it "ha[s] long [been] held that the term 'Indian' in [the federal criminal] statutes does not differentiate between members and nonmembers of a tribe." 495 U.S. 676, 703 (1990) (citing *Rogers*, 45 U.S. (4 How.) at 573), *superseded by statute on other grounds as stated in United States v. Lara*, 541 U.S. 193 (2004).

Fourth, that settled law is especially significant because Congress enacted the MCA, and reenacted the GCA (in 1948), following *Rogers*. *See Helsinn Healthcare S.A. v. Teva Pharms. USA, Inc.*, 139 S. Ct. 628, 633-34 (2019) ("[W]e presume that when Congress reenacted the same language …, it adopted the earlier judicial construction of that phrase."). Oklahoma's position would thus make the term "Indian" mean the opposite of what the Congresses that enacted and reenacted those statutes understood that term to mean.

3. Unable to muster any argument based on statutory text or history, Oklahoma claims equal protection compels its position. It is wrong again. In *Morton v. Mancari*, this Court squarely held that classifications based on tribal status are political—because tribes are political entities with a political relationship with the United States. 417 U.S. at 551-55. And in *Antelope*, this Court applied *Mancari* to reject an

equal-protection challenge to the MCA, explaining that the MCA is valid despite "relating to Indians as such." *Antelope*, 430 U.S. at 645. Oklahoma offers no sound reason to deviate from *Antelope*.

Start with what Oklahoma does not challenge: the *Rogers* requirement that an "Indian" have some Native American ancestry. Oklahoma never asks this Court to overrule *Rogers*. In fact, the first *Rogers* prong serves Oklahoma's interests, because it limits the universe of individuals who can claim "Indian" status. But even if Oklahoma did challenge *Rogers*, its challenge would fail—because *Rogers* is consistent with this Court's modern caselaw. *Mancari* itself upheld against equal-protection challenge an "Indian" classification that included an ancestry requirement. 417 U.S. at 553 n.24.

What Oklahoma *does* challenge is the lower courts' application of the second *Rogers* prong. But that component of the *Rogers* test has nothing to do with ancestry or race. Indeed, the *St. Cloud* factors uniformly employed by the lower courts ask a political question: is the individual "affiliated with a federally recognized tribe." *Zepeda*, 792 F.3d at 1111. That is the very opposite of a racial classification. It excludes "many individuals who are racially to be classified as Indians," *Mancari*, 417 U.S. at 553 n.24, but lack tribal ties. And it excludes individuals who are racially Indian but whose tribes lack a government-to-government relationship with the United States. *Antelope*, 430 U.S. at 646 n.7.

4. There is nothing to Oklahoma's argument that *Mancari*'s application is restricted to enrolled members of federally recognized tribes. Pet. 21. True, the law at issue in *Mancari* concerned tribal members. 417 U.S. at

553 n.24. But *Mancari* did not turn on that fact. And neither *Mancari* nor any subsequent case has limited its holding in that way. To the contrary, *Mancari* held that "[a]s long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the *Indians*, such legislative judgments will not be disturbed." *Id.* at 555 (emphasis added).

History also rebels against Oklahoma's position. That position would have been inconceivable to those who ratified the Fourteenth Amendment (and those who ratified the Fifth Amendment), given the rarity of tribal enrollment at the time. *Supra* 22; *see* Bethany R. Berger, *Reconciling Equal Protection and Federal Indian Law*, 98 Calif. L. Rev. 1165, 1171-79 (2010) (summarizing reconstruction-era views on the Fourteenth Amendment's applicability to Indians).

Today, meanwhile, adopting Oklahoma's position would unleash chaos. As this Court observed in *Mancari*, if laws addressed to "Indians" were "deemed invidious racial discrimination, an entire Title of the United States Code (25 U.S.C.) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized." *Mancari*, 417 U.S. at 552. Indeed, Oklahoma's theory would, as discussed, invalidate every federal conviction involving a non-enrolled Indian. *Supra* 20. It would deprive countless non-enrolled Indians of federally-funded healthcare (even where, as here, a tribe has deemed the person eligible for treatment as an Indian). Pet. App. 10a-11a; *see IHS Profile*, Indian Health Service, https://www.ihs.gov/newsroom/factsheets/ihsprofile/ (last updated Aug. 2020) (noting that IHS serves 2.56 million

American Indians and Alaska Natives). It would invalidate numerous provisions of the U.S. Code applying to statutorily defined "Indians" who are not enrolled tribal members. *E.g.*, 25 U.S.C. § 5129 (Indian Reorganization Act definition of "Indian"); 20 U.S.C. § 7491(3) (eligibility for educational benefits); 18 U.S.C. § 1159(c)(1) (tribal designation of non-enrolled "Indian artisans"). And it would endanger the United States' ability to fulfill its obligations to Indians belonging to the many tribes—perhaps 40% of all tribes—that do not formally enroll members.[8]

5. Oklahoma's reliance on *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), and *Rice v. Cayetano*, 528 U.S. 495 (2000), is misplaced. Pet. 21-22. The *Adarand* plurality reached its result because context made clear the preference for "Native Americans" could *only* refer to a racial group—same as the preferences for "Black Americans, Hispanic Americans, … Asian Pacific Americans, and other minorities" that the plurality also invalidated. 515 U.S. at 205. *Rice*, similarly, was a 15th Amendment challenge to a state classification that, again, was expressly racial—*i.e.*, that singled out individuals "solely because of their ancestry or ethnic characteristics." 528 U.S. at 515 (quotation mark omitted). And then, the *Rice* statute used that racial classification to "fence out" part of the electorate from elections for statewide office. *Id.* at 522.

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[8] *See* Letter from Manuel Lujan, Jr., Secretary, U.S. Dep't of the Interior to U.S. Att'y Gen. (Mar. 16, 1990), *as reprinted in* Kirsty Gover, *Tribal Constitutionalism* 139 (2010).

6. Finally, Oklahoma's claim that its test is administrable, Pet. 23-24, is no reason to rewrite the statutes Congress enacted. And in fact, that claim collapses under scrutiny. To start, adopting Oklahoma's rule would not eliminate the need to assess Indian ancestry under the first *Rogers* prong. And on the second prong, even Oklahoma concedes that exceptions will likely still be necessary for "cases involving young minors" and cases "such as the situation in [*Ex parte*] *Pero*." Pet. 23-24.

But it is much worse than that. Oklahoma pretends that tribal membership is an on/off switch by which "the tribe affirmatively grant[s] the individual [either] all rights and privileges of tribal citizenship, such as the right to vote in tribal elections and run for tribal office," or none whatsoever. Pet. 23. But the very opposite is true. *E.g.*, *Buckles*, 804 F. App'x at 787 (noting "evidence that [defendant] received fewer benefits of tribal affiliation than [other tribal members]"). Many tribes have different classes of citizenship, with some tribal members holding greater rights or receiving more benefits.[9] Tribes also tie core political rights to statuses that have nothing to do with tribal affiliation (for example, forbidding felons from voting or running for office).[10] And tribes often punish tribal members who

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[9] *E.g.*, Muscogee Const. art. III, § 4 (permitting only "full" citizens to hold office); *Nobles*, 838 S.E.2d at 473-74 ("first descendant" was not tribal member but status conferred some tribal benefits); *Cruz*, 554 F.3d at 847 (similar).

[10] *E.g.*, Const. of the Choctaw Nation art. VI, § 5. *See generally* Andrew Novak, *Tribal Pardons: A Comparative Study* at 9-13 (May 20, 2021) (draft paper cited with permission) (cataloguing

commit offenses by suspending some rights and benefits of citizenship in lieu of incarceration.[11] So questions about who qualifies as an "Indian" will persist even under Oklahoma's test—but courts would be writing on a blank slate, without the benefit of the decades of settled law that Oklahoma seeks to upend.

CONCLUSION

The petition should be denied.

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tribal collateral consequences of conviction), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3850435.

[11] *E.g.*, *Chegup v. Ute Indian Tribe of Uintah & Ouray Rsrv.*, 28 F.4th 1051, 1058 (10th Cir. 2022) (temporary banishment, garnishment of tribal dividends, and termination of rights to tribal employment and housing); *Welmas v. Sacramento Area Director*, 24 IBIA 264, 268-71 (1993) (temporary revocation of citizenship, which was deemed not to be "disenrollment").