No. 21-429

IN THE

Supreme Court of the United States

STATE OF OKLAHOMA,

Petitioner,

v.

VICTOR MANUEL CASTRO-HUERTA,

Respondent.

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

BRIEF OF THE CITIES OF TULSA AND OWASSO, OKLAHOMA AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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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.

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INTEREST OF *AMICI CURIAE*[1]

The City of Tulsa, home to over 400,000 Oklahomans, is the second most populous city in Oklahoma, and the largest city in the geographical area affected by *McGirt* v. *Oklahoma*, 140 S. Ct. 2452 (2020). The City of Owasso, home to another 38,000 Oklahomans, is a northern suburb of Tulsa. Tulsa and Owasso have enjoyed positive relationships with tribal governments in Eastern Oklahoma throughout the cities' history.

The overwhelming majority of Tulsa's landmass lies within the former territory of the Muscogee (Creek) and Cherokee Nations. Owasso sits within the former territory of the Cherokee Nation. Until recently, this did not affect either city's ability to enforce the law and protect its residents from crime. For over a century it had been clear that municipal and state laws applied equally to—and equally protected—all Tulsa and Owasso residents, regardless of tribal membership.

The Court's decision in *McGirt* changed this, and cities like Tulsa and Owasso have borne the brunt of many of *McGirt*'s negative effects. Among other things, *McGirt* renders cities practically powerless to protect crime victims who happen to be Native Americans.

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[1] Mr. O'Meilia is the City of Tulsa's chief legal officer and Ms. Lombardi is the City of Owasso's chief legal officer. This brief is submitted "on behalf of a city" under Supreme Court Rule 37.4, so Supreme Court Rule 37.6 does not apply. All parties have received timely notice of the filing of this brief.

Tulsa and Owasso thus have a significant interest in the outcome of this case. As importantly, Tulsa and Owasso have a unique perspective that may "be of considerable help to the Court" as it considers whether to grant certiorari in this case. *See* Sup. Ct. R. 37.1.

SUMMARY OF ARGUMENT

From the day it was handed down, it was clear that *McGirt* would impact law enforcement in Oklahoma: "At the end of the day, there is no escaping that today's decision will undermine numerous convictions obtained by the State, as well as the State's ability to prosecute serious crimes committed in the future." *McGirt*, 140 S. Ct. at 2501 (Roberts, C.J., dissenting).

The people of Tulsa and Owasso have borne the brunt of *McGirt*'s diminution of the cities' ability to govern. Because of *McGirt*, numerous criminals who victimize Tulsa's and Owasso's citizens have gone unprosecuted. Tulsa and Owasso police officers have referred thousands of cases to federal prosecutors and tribal authorities—but only a tiny fraction of these cases are actually prosecuted. Federal authorities decline to prosecute all but the most serious crimes, and tribal authorities do not have the resources to prosecute many of the cases referred to them.

Many of these cases involve perpetrators of domestic violence, who—after being arrested by Tulsa and Owasso police and referred to tribal authorities—are promptly released, sometimes to attack their victims a second time. To take just one example, after a state domestic violence charge was dismissed because of *McGirt*, the Cherokee Nation failed to prosecute the offender for six months—giving him enough time to murder another victim earlier this month. And this is

not an isolated incident; despite referring more than a *thousand* cases to Muscogee and Cherokee prosecutors, Tulsa and Owasso police have not received a *single* subpoena asking for their testimony, and it appears that the vast majority of these cases have not been pursued.

Although the criminal consequences of *McGirt* are the most serious, the decision has had consequences in the civil arena as well—leading numerous Oklahomans to rely on their tribal status to refuse to pay taxes supporting state and local governments.

In short, *McGirt* has wrought serious, harmful consequences on the cities affected by the ruling; it should be overturned.

ARGUMENT

I. *McGirt* Significantly Impaired Tulsa's And Owasso's Ability To Protect Their Residents.

Tulsa's and Owasso's experience confirms Oklahoma's claim that *McGirt* has complicated law enforcement and strained the resources of federal and tribal prosecutors, resulting in "[n]umerous crimes … going uninvestigated and unprosecuted, endangering public safety." Pet. 3.

A. *McGirt* Has Complicated Law Enforcement.

McGirt has caused a host of problems for law enforcement officers in Tulsa and Owasso, which has frustrated the investigation and prosecution of criminal activity.

There is no comprehensive database that law enforcement can access to determine whether criminal suspects or their victims are considered "Indian" under the governing law. As a result, police officers must often wait several hours or days to determine a suspect's status. Hours-long delays keep police officers from responding to other emergency calls or providing back-up to other officers, straining law-enforcement resources and putting the safety of the public and of police officers at risk. Days-long delays can cause a prosecution to be improperly filed in the state system, straining prosecutorial resources.

Determining tribal status, however, is not always the end of the matter. "[A] person may be Indian for purposes of federal criminal jurisdiction even if he or she is not formally enrolled in any tribe." *Parker* v. *State*, __ P.3d __, 2021 WL 3009985, at *9 (Okla. Crim. App. July 15, 2021).

Although the Oklahoma state courts have not yet formally "adopt[ed] factors" for determining when a person with Indian blood is recognized as an Indian for *McGirt* purposes, federal courts in related contexts have developed several factors to be considered (*see id.* at *10), yet are not unanimous on how to decide the ultimate question (*see id.* at *10 n.15 (detailing four approaches)). And the Oklahoma Court of Criminal Appeals recently suggested that a non-exhaustive list of six additional factors may be relevant where the crime victim is a child with Indian blood, including the types of contacts the child or her parents had with a tribe, whether a child was born in a tribal hospital or has received benefits from a tribe, "whether the parents have taken steps in rearing the child consistent with tribal affiliation," and "any future plans of the

parents to avail themselves of healthcare, daycare, or educational assistance or benefits on behalf of the child." *See* Order Remanding for Evidentiary Hearing on Indian Status of Child Victim, *Benjamin Josiah Ricker* v. *State*, No. C-2019-893, at 4–5 (Okla. Crim. App. June 22, 2021).

Correctly applying a multi-factor test like this, which can consist of as many as ten or more factors, is no easy feat, sometimes requiring multiple "days of hearings and substantial briefing to determine the Indian status of one defendant" or victim. *United States* v. *Loera*, 952 F. Supp. 2d 862, 873 n.10 (D. Ariz. 2013). Requiring officers to conduct this same multi-factored analysis in the field imposes burdens on law enforcement and risks subjecting defendants to prosecution in the incorrect system, in addition to departing from this Court's normal preference for "clear" and "readily understood" rules for police officers in the field. *Thornton* v. *United States*, 541 U.S. 615, 622–23 (2004).

Law enforcement also must grapple with false claims of tribal membership. *See*, *e.g.*, Acee Agoyo, *'Shame on you': Authorities Warn Criminals Not to Make False Claims About Indian Status*, Indianz.com (Aug. 12, 2020), https://www.indianz.com/News/2020/08/12/shame-on-you-authorities-warn-criminals.asp. Indeed, several cases referred to tribal authorities have been dismissed because the defendants' tribal identification cards were faked.

In addition, neither the USAO nor the Muscogee Nation's prosecuting agency allows officers to go directly to a magistrate to obtain a search or arrest warrant. Rather, each requires officers to submit their

warrant requests to prosecutors first, which has resulted in significant delays. In Tulsa's experience, federal and tribal prosecutors are often unavailable to assist with warrants outside of regular working hours; in contrast, the state system has an on-call judge available to issue search warrants day or night, as need arises. Other delays result from the lack of electronically transmissible warrants from the Muscogee Nation—requiring officers to drive forty miles or more, one-way, to pick-up a warrant.

In short, *McGirt* has made it much more difficult for Tulsa and Owasso to enforce their laws.

B. MANY CRIMES ARE GOING UNPUNISHED.

The inescapable result of the complications brought on by *McGirt* has been thousands of crimes and numerous criminals going completely unpunished. *McGirt*'s transfer of the responsibility to prosecute a substantial number of serious crimes from Oklahoma to the federal government has caused a significant prosecution gap, as federal prosecutors decline to prosecute all but the most serious crimes.

1. Post-*McGirt* and the decisions from the Oklahoma Court of Criminal Appeals applying it, almost *all* crimes committed against Indian victims by non-Indians in Eastern Oklahoma must be prosecuted by the federal government. *See United States* v. *Cooley*, 141 S. Ct. 1638, 1643 (2021) ("Tribes [] lack inherent sovereign power to exercise criminal jurisdiction over non-Indians.").[2] Yet, in Tulsa's and Owasso's experi-

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[2] The only exception is for domestic violence crimes committed by non-Indian perpetrators against Indian victims, which can be

ence, the federal government has declined to prosecute many of the crimes referred to it, meaning that many Indian victims have no way of obtaining justice against non-Indian perpetrators.

This includes *violent* crimes. For example, although the federal government has jurisdiction to prosecute assaults and batteries on Indians by non-Indians, the United States Attorney's Office ("USAO") has advised Tulsa that it will not prosecute simple assaults or batteries by non-Indians on Indians. Some of Tulsa's police officers happen to be Indian, but the USAO advised that it would not prosecute assaults and batteries against Indian Tulsa police officers either, because they did not have a federal commission. Thus, in order to provide some basic protection to its police officers, Tulsa has been sending its Indian officers to a two-day school, the completion of which qualifies those officers to obtain a Bureau of Indian Affairs commission. Still, the USAO has advised Tulsa that if BIA-commissioned police officers who are Indian are attacked while acting outside their federal capacity, the USAO will still not prosecute the attacker—with the apparent result that non-Indians may be able to attack Indian officers with impunity.

The federal government also has declined to prosecute serious property-related crimes. For example, the USAO initially planned to prosecute residential burglaries regardless of degree. Later, the USAO

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prosecuted by the tribes. *See United States* v. *Bryant*, 136 S. Ct. 1954, 1960 n.4 (2016). But, as explained below, tribal authorities have failed to prosecute the domestic violence cases referred to them. *Infra* 10–11.

changed course and agreed to prosecute only first-degree burglaries (*see* Okla. Stat. tit. 21, § 1431 (2016)), but would not prosecute second- and third-degree burglaries, such as thefts from vehicles (*see* Okla. Stat. tit. 21, § 1435 (2016)). Although the USAO's offer to prosecute at least *some* burglaries was promising, it has proved to be a hollow victory; since *McGirt*, the USAO has not filed any indictments in the first-degree burglary cases from Tulsa involving Indians.

In at least one instance in which the USAO declined to prosecute a first-degree burglary, the suspect reoffended within the same month. According to a Tulsa police report, on June 10, 2021, a non-Indian suspect entered the apartment of two Indians—while they were present—and took some of their belongings, including items of clothing. Tulsa police officers located the suspect later that day, and found him wearing some of the stolen items. Because the victims were Indians, Tulsa police officers contacted the FBI, which, according to the police report, declined to prosecute because "this wasn't a violent crime or one that involved a gun."[3] Just over two weeks later, according to another Tulsa police report, the same suspect broke into a locked apartment and tried to force his way into the bedroom—where two terrified residents were hiding—while armed with a knife.[4]

Many other crimes also go unpunished because the USAO does not consider them sufficiently serious to warrant federal prosecution. For example, on May

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[3] Tulsa Police Department Incident Report, No. 2021-032626 (June 11, 2021).

[4] Tulsa Police Department Incident Report, No. 2021-035007 (June 27, 2021).

31, 2021, a member of the Choctaw Nation showed his genitalia to, and masturbated in the presence of, two women in a commercial area of Tulsa, asking one of them if she wanted "to f***."[5] Despite the danger posed to the public by this sexual predator, the USAO declined to prosecute him—and it does not appear that tribal authorities have either.

In sum, the result of *McGirt* in Tulsa and Owasso has been a significant "prosecution gap" of serious crimes that the federal government has declined to prosecute.

2. The tribes cannot fill this gap. As noted, the tribes have no power to prosecute crimes against Indians that are perpetrated by non-Indians. But even when the tribes *can* prosecute, they have proven unable to do so.

Since *McGirt* was decided, the Tulsa police department has referred at least 1,156 cases to the Muscogee and Cherokee Nations either because they involve an Indian perpetrator or because they involved an Indian victim. Yet these tribes have not issued a *single* subpoena asking a Tulsa police officer to testify in a *single* criminal case. Owasso police officers have similarly not received any subpoenas to testify in any criminal cases. Thus, as far as Tulsa and Owasso can tell, criminal cases from those cities are not going to

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[5] Tulsa Police Department Incident Report, No. 2021-031068 (May 31, 2021); Tulsa Police Department Incident Report, No. 2021-031029 (May 31, 2021); Tulsa Police Department Supplemental Offense Report, No. 2021-031068 (June 15, 2021).

trial in the Indian criminal justice system.[6]

One area where non-prosecution by tribal authorities has been particularly pernicious is domestic violence. Tulsa detectives have referred dozens of such cases to the tribes, but are not aware of any referred case being prosecuted—and are aware of multiple instances where domestic abusers were quickly released by tribal authorities and promptly attacked their victims again.

In one such case, according to a Tulsa police report, Tulsa police officers on September 24, 2021 arrested a Muskogee man who had allegedly punched his girlfriend in the face, and turned him over to Cherokee authorities because the domestic assault and battery occurred in the former Cherokee territory.[7] But the man was evidently promptly released, because eight days later, according to another Tulsa police report, he allegedly assaulted the same woman a second time, this time in front of her children. Among other things, he choked her, dragged her around the room by her hair, and tried to gouge her eyes out.[8]

In another, particularly egregious, example, a

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[6] It is very difficult for Tulsa and Owasso to track criminal referrals to the Muscogee and Cherokee Nations; unlike in the federal or state system, there is no easy means of searching for a tribal criminal docket and checking the progress of a case. Tulsa police officers who have contacted the Muscogee Nation about whether referred cases are being prosecuted have been told that tribal prosecutors do not have time to give status reports.

[7] Tulsa Police Department Incident Report, No. 2021-049492 (Sept. 24, 2021).

[8] Tulsa Police Department Incident Report, No. 2021-050965 (Oct. 2, 2021).

state domestic assault and battery case against a doctor with a history of alleged domestic violence was dismissed because of *McGirt* in April 2021,[9] and the case referred to the Cherokee Nation. But the Nation failed to press charges, and, just two weeks ago, the doctor was arrested in Arkansas for murdering another woman who worked with him and with whom he was traveling.[10] Absent *McGirt*, this serial abuser may have been behind bars—and his victim may not have died.

McGirt has thus exposed vulnerable community members to revictimization, as their abusers are not prosecuted and continue to harm their victims—even after Tulsa police or other law enforcement officers have investigated the abusers' crimes.

Even when tribal authorities pursue prosecution, defendants are regularly released with relatively little bond—or given nominal fines. The tribes have almost no jail space, and although tribal authorities pay to house Indian suspects in city or county jails, costs can mount as cases languish in the tribal justice system.

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[9] *See State* v. *Tyler Edward Tait*, No. CM-2021-00003 (Cherokee Cnty., Okla. Dist. Ct. Apr. 8, 2021), https://www.oscn.net/dockets/GetCaseInformation.aspx?db=cherokee&number=CM-2021-00003&cmid=275866.

[10] *See* Darren Thompson, *Cherokee Nation Physician Charged with First Degree Murder, Victim Also Employed by Tribe*, Native News Online (Oct. 13, 2021), https://nativenewsonline.net/currents/cherokee-nation-physician-charged-with-first-degree-murder-victim-also-employed-by-tribe; Grant D. Crawford, Alleged Killer Had History of Domestic Violence, Tahlequah Daily Press (Oct. 13, 2021), https://www.tahlequahdailypress.com/news/alleged-killer-had-history-of-domestic-violence/article_b6db5840-1d8b-5a4c-8133-598c1d08be74.html.

It is Tulsa's understanding that, in the face of these circumstances, tribal authorities have resorted to requiring little or no bond from tribal offenders. In one homicide case that Tulsa is aware of, the Muscogee Nation set a bond of only $20,000.[11] By contrast, a homicide bond in the state system would typically be around $1 million.[12]

Tulsa's and Owasso's law enforcement continue to do all they can to protect Indian and non-Indian citizens from crime, but the barriers imposed by *McGirt* are overwhelming. And tribal authorities simply do not have the capacity to carry the load. The result is hundreds, or even thousands, of criminals walking free.[13]

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[11] *Muscogee (Creek) Nation* v. *Johnny Little Cook*, No. CF-2021-132 (Muscogee (Creek) Nation Dist. Ct. Mar. 1, 2021).

[12] *E.g.*, *State* v. *Tony Ray Baldwin*, No. CF-2021-3725 (Tulsa Cnty., Okla. Dist. Ct. Sept. 27, 2021), *available at* https://www.oscn.net/dockets/GetCaseInformation.aspx?db=tulsa&number=CF-2021-3725&cmid=3468412.

[13] In addition to *McGirt*'s disruption of the criminal justice system, *McGirt* has created obstacles to Tulsa's and Owasso's efforts to raise revenue, as numerous taxpayers invoke *McGirt* as a basis for avoiding state and municipal taxation. During the tax-preparation season earlier this year, Tulsa was made aware of accountants in the Tulsa area who were advising Indian Tulsa citizens that they did not have to pay state income tax, and who were applying for three years' worth of back taxes for their clients. *Cf.* Carmen Forman, *Some Oklahomans Seek Tax Exemptions in Light of McGirt Decision*, The Oklahoman (Apr. 4, 2021), https://www.oklahoman.com/story/news/politics/2021/04/04/supreme-court-mcgirt-decision-results-tax-protests-oklahoma/4699712001/. Tulsa's understanding is that some of these individuals were successful and received refund checks as high as

II. THE COURT SHOULD REMEDY *MCGIRT*'S DISRUPTIVE EFFECTS BY RETURNING PROSECUTION AUTHORITY, IN WHOLE OR IN PART, TO THE STATE.

All of this disruption is the direct result of *McGirt*—and there is no reason to refrain from overruling that decision. But if the Court is unwilling to do so, it should at least alleviate some of the harm by holding that States may prosecute non-Indians who commit crimes against Indians in Indian country.

1. "The doctrine of *stare decisis* does not mean … that the Court should never overrule erroneous precedents." *Ramos* v. *Louisiana*, 140 S. Ct. 1390, 1411 (2020) (Kavanaugh, J., concurring in part). Indeed, overruling erroneous precedents is not particularly unusual (*see id.* at 1411–12 (collecting a non-exhaustive list of 30 cases)), and some of the Court's most important decisions have come when it has corrected its past mistakes (*see id.* at 1412; Bryan A. Garner et al., The Law of Judicial Precedent 353–54 (2016) (same)).

The Court has identified several factors that help it decide "when to overrule" an erroneous precedent "and when to stand pat[.]" *Ramos*, 140 S. Ct. at 1414 (Kavanaugh, J., concurring in part) (listing factors); *see*, *e.g.*, *Knick* v. *Twp. of Scott*, 139 S. Ct. 2162, 2178 (2019) (same); *Janus* v. *Am. Fed'n of State, Cnty., &*

$30,000. Similarly, in Oklahoma, municipal operations are supported almost exclusively by sales tax, yet the Muskogee Nation has taken the position that businesses on Muskogee Nation territory should collect tribal sales tax instead and that "[t]here is no obligation to pay taxes to any city" on Muskogee Nation territory. Ray Carter, *Court Case May Highlight McGirt Challenges for Retailers*, Okla. Council on Pub. Affairs (Dec. 1, 2020), https://www.ocpathink.org/post/court-case-may-highlight-mcgirt-challenges-for-retailers.

Mun. Emps., 138 S. Ct. 2448, 2478–79 (2018) (same); Garner et al., *supra*, at 396, 404 (same). Among these factors is whether the "prior decision caused significant ... real-world consequences[.]" *Ramos*, 140 S. Ct. at 1415 (Kavanaugh, J., concurring in part); *see Janus*, 138 S. Ct. at 2482 (assessing real-world effects of previous rule); *South Dakota* v. *Wayfair*, 138 S. Ct. 2080, 2097 (2018) (analyzing the "real world implementation" of prior doctrine). These "real-world effects on the citizenry" must be taken into account (*Ramos*, 140 S. Ct. at 1415 (Kavanaugh, J., concurring in part) (citing, *e.g.*, *Brown* v. *Bd. of Educ.*, 347 U.S. 483, 494–95 (1954))), and decisions should be reconsidered when they "cause[] significant negative consequences" (*id.* at 1417).

McGirt has had—and continues to have—harmful consequences. Criminals are going unpunished, and their victims are being revictimized—even resulting in their death. And given the USAO's practice of declining to prosecute most crimes perpetrated by non-Indians against Indians, many Indian crime victims have no recourse at all in the criminal justice system—effectively giving Tulsa's and Owasso's Indian citizens second-class status when it comes to criminal justice. This should weigh heavily against allowing *McGirt* to continue to harm Oklahoma and Oklahomans—particularly Indian Oklahomans.

2. Even if the Court is unwilling to overrule *McGirt*, it should still grant review on the first question presented and hold that a State has authority to prosecute non-Indians who commit crimes against Indians in Indian country. As Oklahoma explains, nothing in the General Crimes Act "relieve[s] a State of its prosecutorial authority over non-Indians in Indian

country." Pet. 12. And this Court has never held that States may not prosecute these crimes. Pet. 13–14.

To be sure, resolving this case on this basis would not come close to alleviating all of *McGirt*'s harmful consequences. But it would at least ensure that non-Indians who victimize Indians are subject to the same state and local laws to which all other non-Indians are subject, and that Indians are subject to the same protection of the law that non-Indians are. This would be a meaningful improvement over where things stand today.

Therefore, if the Court is unwilling to overrule *McGirt*, it should grant review of the first question presented and answer it in the affirmative.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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