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 IN OPPOSITION

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QUESTION PRESENTED

1. Did the Oklahoma Court of Criminal Appeals correctly hold that States lack jurisdiction to prosecute crimes by non-Indians against Indians in Indian country, as this Court has repeatedly affirmed and as lower courts uniformly agree?

2. Should this Court consider overruling its statutory decision in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), and do so in a case concerning a different reservation subject to different statutes and different treaties?

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INTRODUCTION

Below, the Oklahoma Court of Criminal Appeals ("OCCA") applied settled law to vacate Respondent's conviction. First, it held that the Cherokee Nation's reservation endures, in a conclusion that accords with *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), and that Oklahoma never challenged below. Second, the OCCA held that Oklahoma lacks criminal jurisdiction over alleged crimes by non-Indians, like Respondent, against Indians in Indian country. That conclusion accords Oklahoma's repeated concessions that, in Indian country, it has no jurisdiction over "crimes committed against Indians." *McGirt* Arg. Tr. 54.

This decision warrants no further review. Oklahoma first told this Court that it must limit or overrule *McGirt* because "[t]housands" of prisoners were poised to successfully "challeng[e] decades' worth of convictions." Pet. 2, *Oklahoma v. Bosse*, No. 21-186. Events, however, removed that premise. After Oklahoma filed for certiorari in *Bosse*, the OCCA issued *State ex rel. Matloff v. Wallace*, 2021 OK CR 21. *Matloff* stated that the OCCA was "interpret[ing] … state post-conviction statutes [to] hold that *McGirt* … shall not apply retroactively to void a conviction that was final when *McGirt* was decided." *Id.* ¶15. So Oklahoma shifted course. Seeking to salvage review, Oklahoma filed this petition, focusing on *McGirt*'s effects on present and future criminal prosecutions and civil jurisdiction. Pet. 19-26. But the simple facts remain: *McGirt*'s backwards-looking effects are limited, and its going-forward effects are for Congress to weigh. Today, neither of Oklahoma's questions presented warrants review.

Oklahoma's first question asks "[w]hether a State has authority to prosecute non-Indians who commit crimes against Indians in Indian country." Pet. i. The OCCA correctly answered no, in a decision implicating no conflict or disagreement. The Court has long affirmed that "the United States, rather than … [the State], ha[s] jurisdiction over offenses committed" in Indian country "by one who is not an Indian against one who is." *Williams v. United States*, 327 U.S. 711, 714 & n.10 (1946). Lower courts uniformly concur. Meanwhile, Congress has repeatedly embedded this understanding in statute. *Matloff* has reshaped the backdrop against which this Court stayed *Bosse*, and there is now nothing to Oklahoma's invitation to upend this settled law.

This case does not even present Oklahoma's second question presented. To begin, Oklahoma incoherently seeks *McGirt*'s overruling in a case about the *wrong reservation*. More important, Oklahoma has egregiously waived its arguments. Its prior Attorney General accepted *McGirt* as law. So below, Oklahoma took "no position as to … the existence" of the Cherokee reservation and did not argue *McGirt* should be overruled. Pet. 11a. Only in June 2021 did a new Attorney General flip flop. Cherokee Br. 14 n.28. This Court, however, treats as waived arguments "not raise[d] … below," *United States v. Jones*, 565 U.S. 400, 413 (2012), and reviews only questions "pressed or passed on below," *Illinois v. Gates*, 462 U.S. 213, 220, 222 (1983). This Court applies those rules even to requests to modify a "well-settled federal" rule. *Id.* And it does so precisely to avoid requests, like Oklahoma's, to upend precedent based on untested assertions from counsel.

Regardless, Oklahoma's second question would not warrant review even in a case presenting it. Like many of this Court's statutory decisions, *McGirt* was divided. Like many such decisions, *McGirt* has real effects (though Oklahoma vastly overstates them). And like all this Court's statutory decisions, the ball is now where the Constitution places it: With Congress.

Certiorari is not warranted to address Oklahoma's invitation for this Court to elbow Congress aside. It scarcely needs saying that this Court does not overrule statutory decisions based only on changes in personnel. *Stare decisis* exists precisely to protect the "actual and perceived integrity of the judicial process" against such threats. *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 798 (2014). And *stare decisis* applies with "special force" in statutory cases, where "Congress remains free to alter what [this Court has] done." *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 274 (2014).

Here, those principles are no abstractions. Oklahoma seeks certiorari *in order to* preempt active negotiations. In May 2021, its governor opposed H.R. 3091, which would have allowed the State to compact with the Cherokee and Chickasaw to obtain its pre-*McGirt* criminal jurisdiction. In July 2021, Oklahoma opposed federal-law-enforcement funding because it did not desire "a permanent federal fix."[1] And weeks later, it became clear why: It preferred to swing for the fences

[1] Reese Gorman, *Cole Encourages State-Tribal Relations Over State Challenges to McGirt*, Norman Transcript (July 23, 2021), https://yhoo.it/3lYMjD8.

here. This Court's place, however, is not in the middle of legislative negotiations.

Rarely, moreover, will this Court receive so inappropriate a request justified by so little. Despite its overheated rhetoric, Oklahoma identifies few real effects. Again, *McGirt*'s impact on existing convictions is now limited. And again, going forward, Congress can decide whether to modify jurisdictional lines. Meanwhile, Oklahoma's claims of a "criminal-justice crisis," Pet. 4, are largely unburdened by evidence and misstate the facts. In reality, the federal government and Five Tribes are working to fulfill the responsibilities *McGirt* gives them and seeking the resources they need (over Oklahoma's opposition).

Oklahoma's claims about civil effects are even more reality-free. In fact, its position, undisclosed to the Court in its petitions, is that *McGirt* applies *only* to criminal jurisdiction and has *no* civil effects. In all events, moreover, those effects will be vastly less than Oklahoma suggests. And the place to address any such concerns is in civil cases.

Indeed, Oklahoma's petition is a source of, not a solution to, uncertainty. Overruling *McGirt* would invalidate thousands of federal and tribal prosecutions and squander tens of millions spent in reliance on *McGirt*. Meanwhile, granting review would freeze negotiations indefinitely. Oklahoma apparently is happy to impose those costs. But that only underscores why its arguments should be directed to Congress, which the Constitution charges with making such decisions.

The petition should be denied.

STATEMENT OF THE CASE

A. *Murphy* and *McGirt*.

The Muscogee reservation came before this Court after the Tenth Circuit "appl[ied] *Solem* [*v. Bartlett*, 465 U.S. 463 (1984)]" to hold that "Congress has not disestablished the Creek Reservation." *Murphy v. Royal*, 875 F.3d 896, 966 (10th Cir. 2017). In Chief Judge Tymkovich's view, "Supreme Court precedent preclude[d] any other outcome." *Id.* at 966 (Tymkovich, C.J., concurring in denial of rehearing en banc).

In *McGirt*, this Court agreed. The bedrock rule, it explained, is that only "Congress can divest a reservation of its land." 140 S. Ct. at 2462 (quoting *Solem*, 465 U.S. at 470). And while disestablishment does not "require any particular … words," it "does require that Congress clearly express its intent." *Id.*

The Court found no statute disestablishing the Muscogee reservation. *Id.* at 2452, 2463. True, "Congress intruded on the Creek's … self-governance" in other ways, which "represented serious blows." *Id.* at 2465. But these statutes "left the [Muscogee] with significant sovereign functions." *Id.* at 2466. And eventually "Congress changed course" and restored many powers. *Id.* at 2467. Hence, there "arrived no moment when any [statute] dissolved the Creek Tribe or disestablished its reservation." *Id.* at 2468.

The Court declined to find disestablishment based on "historical practices and demographics." *Id.* at 2468. The Court found "no need to consult extratextual sources when the meaning of a statute's terms is clear." *Id.* at 2469. The Court, however, also addressed

Oklahoma's historical arguments on their own terms and found that "none … provide[d]" "'compelling' evidence" of disestablishment. *Id.* at 2470.

Last, the Court considered Oklahoma's "dire warnings" that a "loss" would have "'transform[ative]' effects." *Id.* at 2478, 2481. The Court did not doubt that its decision would have real effects. But it emphasized that many of the problems that Oklahoma warned about would be temporary or mitigated by "other legal doctrines … designed to protect" reliance interests. *Id.* at 2480-81. And despite the "potential for cost and conflict," the Court declined to let "pessimism … rule." *Id.* It emphasized that "[w]ith the passage of time, Oklahoma and its Tribes have proven they can work successfully together," as evident from Oklahoma's "hundreds of intergovernmental agreements with tribes." *Id.* "And, of course, should agreement prove elusive," "Congress remains free to" legislate. *Id.* at 2481-82.

The Chief Justice dissented. He maintained that the Court had misread the relevant statutes and that "Congress disestablished any reservation" before statehood. *Id.* at 2482 (Roberts, C.J., dissenting).

B. This Case.

In *Murphy* and *McGirt*, it was common ground that the Court's holding would apply to all crimes involving Indians. That was because, as Oklahoma explained, "States lack criminal … jurisdiction … if either the defendant or victim is an Indian." *Murphy* Pet. 18. Hence, Oklahoma emphasized that an adverse ruling would invalidate convictions for "crimes committed

against Indians" by non-Indians, "which the state would not have jurisdiction over." *McGirt* Arg. Tr. 54.

Below, Respondent invoked that law. After the Tenth Circuit's *Murphy* decision, he argued that his Oklahoma conviction and sentence were invalid because the alleged crime occurred on the Cherokee reservation and the victim was Indian. Brief of Appellant at 42-44 (Okla. Ct. Crim. App. Aug. 2, 2018).[2]

When *McGirt* issued, the OCCA remanded for an evidentiary hearing, and the parties stipulated that the victim was Indian and that the alleged crime occurred within the historic boundaries of the Cherokee reservation. Pet. App. 3a.

Oklahoma took "no position as to the facts underlying the existence, now or historically, of the … Cherokee Nation Reservation," and "[n]o evidence or argument was presented by the State specifically regarding disestablishment." Pet. App. 17a-18a.

Based on evidence presented by Respondent and the Cherokee Nation, the trial court concluded that Congress established a reservation for the Cherokee Nation via the 1833 Treaty with the Western Cherokee, the 1835 Treaty with the Cherokee, the 1846 Treaty with the Cherokee, and the 1866 Treaty with the Cherokee. Pet. App. 12a-15a. Then, the court canvassed the statutes that might have disestablished the Cherokee reservation and found none did. Pet. App. 15a-17a. During remand, Oklahoma for the first time argued that

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[2] All references to filings in the Oklahoma Court of Criminal Appeals are to Case No. F-2017-1203, available at https://bit.ly/3atOh7G.

it has "concurrent jurisdiction over all crimes committed by non-Indians in Indian country." Pet. App. 4a.

After remand, the OCCA agreed that the alleged crime occurred within the Cherokee Nation's still-extant reservation. Pet. App. 3a. And it rejected Oklahoma's concurrent-jurisdiction argument, citing *Bosse*. Pet. App. 4a. The OCCA thus held that Oklahoma "did not have jurisdiction to prosecute" Respondent. Pet. App. 4a. The trial court then dismissed. Docket Entry (Okla. Dist. Ct. Tulsa Cnty. Sept. 27, 2021).[3]

Although the OCCA subsequently vacated *Bosse* based on *Matloff*, the OCCA again "reject[ed] the State's concurrent jurisdiction argument" in *Roth v. State*, 2021 OK CR 27 ¶ 12.

By the time the OCCA decided Respondent's case, the federal government had indicted Respondent, Indictment at 1 (N.D. Okla. Nov. 2, 2020), ECF No. 2,[4] and it duly took Respondent into custody. Arrest Warrant at 1 (N.D. Okla. Apr. 12, 2021), ECF No. 33. On October 15, 2021, Respondent pled guilty to one count of child neglect in Indian Country. Pet. to Enter Guilty Plea & Order Entering Plea (N.D. Okla. Oct. 15, 2021), ECF No. 50.

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[3] References to district-court filings are to Case No. CF-2015-6478, available at https://bit.ly/2Y49pid.

[4] References to filings in Respondent's federal criminal case are to No. 4:20-cr-255 (N.D. Okla.).

REASONS FOR DENYING THE PETITION

I. This Court Should Not Grant Certiorari On Oklahoma's Concurrent-Jurisdiction Argument.

The OCCA correctly held that States lack jurisdiction to try non-Indians for crimes against Indians in Indian country. That decision accords with this Court's cases (which uniformly affirm this rule), lower-court decisions (which uniformly follow this rule), and Congress's statutes (which uniformly endorse this rule). Further review is not warranted.

A. The OCCA's Holding Does Not Warrant Review.

Oklahoma barely tries to show that its first question presented warrants review. It does not. Oklahoma does not claim lower courts are divided. To the contrary, they uniformly hold that "federal courts have exclusive jurisdiction over an offense committed in Indian country by a non-Indian against … an Indian." *State v. Larson*, 455 N.W.2d 600, 601 (S.D. 1990).[5]

Nor can Oklahoma claim conflict with this Court's cases. For decades and without exception, this Court has affirmed that "the United States, rather than … [the State], ha[s] jurisdiction over offenses committed" in Indian country "by one who is not an Indian against one

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[5] *See State v. Flint*, 756 P.2d 324, 326 (Ariz. Ct. App. 1988), *cert. denied*, 492 U.S. 911 (1989); *State v. Greenwalt*, 663 P.2d 1178, 1182 (Mont. 1983); *State v. Kuntz*, 66 N.W.2d 531, 532 (N.D. 1954); *accord United States v. Bruce*, 394 F.3d 1215, 1221 (9th Cir. 2005); *St. Cloud v. United States*, 702 F. Supp. 1456, 1459 (D.S.D. 1988).

who is." *Williams*, 327 U.S. at 714 & n.10. Its seminal Indian-country jurisdictional decision, *Williams v. Lee*, 358 U.S. 217 (1959), reiterated that "if [a] crime was by or against an Indian, tribal jurisdiction or that expressly conferred on other courts by Congress has remained exclusive." *Id.* at 220. And the Court reaffirmed the same rule in *Washington v. Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463 (1979), which explained that "criminal offenses by or against Indians have been subject only to federal or tribal laws, except where Congress … has 'expressly provided that State laws shall apply.'" *Id.* at 470-71. The list goes on. *See* 20A161 U.S. Br. 16-19 (more examples).

The State's only certiorari argument is that eastern Oklahoma contains many non-Indians and *McGirt* makes this issue newly important there. Pet. 14-15. But after *Matloff*, *McGirt* affects only existing criminal convictions on direct review. Respondent knows of only *12* such cases before the OCCA. Going forward, too, this issue is of marginal importance: Oklahoma has estimated that only 20% of cases affected by *McGirt* involve non-Indian defendants. 20A161 Okla. Br. 17. So its claims about *McGirt*'s effects on criminal jurisdiction—overwrought as they are, *infra* 27-32—have little to do with this issue.

More important, Congress is the place to address going-forward jurisdiction. For decades, States, the United States, and Tribes have shared a common understanding: States have jurisdiction over crimes by non-Indians against Indians in Indian country only if Congress expressly confers it. Hence, where Congress has *not* done so, non-Indians are subject to federal

punishments and prosecutorial choices, not the different punishments and choices States might inflict. If Oklahoma believes it needs additional jurisdiction, it can ask Congress. Indeed, H.R. 3091 would allow Oklahoma jurisdiction over crimes "by or against Indians" within the Cherokee and Chickasaw reservations. H.R. 3091 § 6(b)(1), 117th Cong. (introduced May 11, 2021). Certiorari is not warranted so this Court can insert itself into legislative back-and-forth and disrupt settled understandings nationwide.

B. The Decision Below Is Correct.

1. The rule the OCCA applied, which this Court has so often affirmed, is correct: States have criminal jurisdiction over criminal offenses involving Indians only if Congress has expressly conferred it. "Congress has … acted consistently upon the assumption that the States have no power to regulate the affairs of Indians on a reservation." *Williams*, 358 U.S. at 220. Hence, this Court's preemption analysis "gives effect to the plenary and exclusive power of the Federal Government to deal with Indian tribes" and to "regulate and protect the Indians and the property against interference." *Bryan v. Itasca County*, 426 U.S. 373, 376 n.2 (1976).

Congress's criminal-jurisdiction statutes embody that assumption. In 1940, Congress granted Kansas "[j]urisdiction … over offenses committed by or against Indians on Indian reservations." 18 U.S.C. § 3243. This Court and Congress understood the Kansas Act as "the first major grant of jurisdiction to a State over offenses *involving Indians* committed in Indian country." *Negonsott v. Samuels*, 507 U.S. 99, 103 (1993) (emphasis added). But it was not the last. Statutes with near-

identical language quickly followed for North Dakota, Iowa, and New York, all conferring jurisdiction over "offenses by or against Indians."[6] In Public Law 280, Congress conferred the same jurisdiction on more States and gave the option to assume such jurisdiction to any other "State *not having jurisdiction* over criminal offenses committed by or against Indians" in Indian country. 25 U.S.C. § 1321(a)(1) (emphasis added); Act of Aug. 15, 1953, Pub. L. No. 83-280, ch. 505, §§ 2, 7, 67 Stat. 588. Each statute embodies the same rule the OCCA applied below: Absent a statute, States lack jurisdiction over crimes by non-Indians "against Indians."

2. The OCCA correctly rejected Oklahoma's contrary position. Oklahoma seeks a nontextual extension of *United States v. McBratney*, 104 U.S. 621 (1882), which held that States have jurisdiction over crimes by non-Indians against non-Indians in Indian country. *Id.* at 624. In *Draper v. United States*, this Court recognized that *McBratney* was hard to square with Montana's statehood act, which stipulated that "Indian lands shall remain under the absolute jurisdiction and control of … the United States." 164 U.S. 240, 244 (1896) (quoting 25 Stat. 676). *Draper* nonetheless found that the "equality of statehood" principle compelled *McBratney*'s rule. *Id.* But it limited *McBratney* to crimes not committed by "Indians or against Indians." *Id.* at 247. The Court held the same in *Donnelly v. United States*, which reiterated "[u]pon full consideration" that the Court was "satisfied that offenses committed *by or against Indians* are not

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[6] *See* Act of May 31, 1946, ch. 279, 60 Stat. 229; Act of June 30, 1948, ch. 759, 62 Stat. 1161; Act of July 2, 1948, ch. 809, 62 Stat. 1224; Act of Oct. 5, 1949, ch. 604, 63 Stat. 705.

within the principle of … *McBratney*." 228 U.S. 243, 271 (1913) (emphasis added). The OCCA correctly followed this Court's century of cases adhering to that view.

3. The text and context of the General Crimes Act confirm that, outside of *McBratney*'s exception, States lack criminal jurisdiction in Indian country. The Act "extend[s]" federal criminal jurisdiction "to the Indian country" by applying the federal laws that apply "any place within the *sole and exclusive* jurisdiction of the United States." 18 U.S.C. § 1152 (emphasis added). As the Solicitor General has explained, the italicized phrase indicates that Congress understood Indian country to parallel federal enclaves, where the federal government "exercise[s] exclusive" jurisdiction and state criminal laws are inapplicable. 20A161 U.S. Br. 11; *see* U.S. Const. art. I, § 8, cl. 17.[7]

Moreover, Congress first enacted the General Crimes Act in 1834, when *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), was hot off the presses. Intercourse Act, June 30, 1834 § 25, ch. 161, 4 Stat. 729. *Worcester* "reflected the view that Indian Tribes were wholly distinct nations within whose boundaries 'the laws of [a

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[7] Oklahoma invokes *Donnelly*'s statement that "[t]he words 'sole and exclusive'" in the General Crimes Act "do not apply to the jurisdiction extended over the Indian country, but are only used in the description of the laws which are extended to it." 228 U.S. at 268. *Donnelly*, however, made that statement in rejecting the argument that the Major Crimes Act, by vesting jurisdiction in territorial courts, displaced the General Crimes Act by rendering federal jurisdiction no longer "sole and exclusive." *Id.*; *see Ex parte Wilson*, 140 U.S. 575, 578 (1891). That statement did not address whether States have jurisdiction over crimes involving Indians.

State] can have no force.'" *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 331 (1983) (quoting *Worcester*, 31 U.S. (6 Pet.) at 561). This Court construes statutes according to their "original public meaning." *Wis. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2075 (2018). And those who enacted the General Crimes Act understood federal law to provide the exclusive means of punishing Indian-country crimes by non-Indians against Indians.

4. Congress has repeatedly embedded the same understanding in statute. First, after *Draper* limited *McBratney* to crimes not "by … Indians or against Indians," 164 U.S. at 244–45, Congress in 1906 enacted the Oklahoma Enabling Act using language that was near-identical to the Montana act *Draper* construed. *See* Act of June 16, 1906, ch. 3335, § 25, 34 Stat. 267. Second, in 1948, just two years after *Williams* reiterated that States lack jurisdiction over crimes "by one who is not an Indian against one who is," 327 U.S. at 714 & n.10, Congress reenacted the General Crimes Act. Act of June 25, 1948, Pub. L. No. 80-772, ch. 645, § 1152, 62 Stat. 683, 757. And third, shortly after, Congress enacted Public Law 280 and all the many statutes recognizing that, absent a statute, States lack jurisdiction over crimes "by or against" Indians.[8] When this Court's cases

[8] Oklahoma shrugs off Public Law 280 by claiming that it is "at best overinclusive, because" it also confers civil jurisdiction and "States already possess civil jurisdiction in cases involving non-Indian defendants." Pet. 17. But that is no answer to how Oklahoma's position renders *superfluous* Public Law 280's grant of "criminal jurisdiction over criminal offenses committed by *or against* Indians." 25 U.S.C. § 1321(a) (emphasis added). In the civil

have established a provision's meaning and effect, it "presume[s] that when Congress reenact[s] the same language …, it adopt[s] the earlier judicial construction." *Helsinn Healthcare S.A. v. Teva Pharms. USA, Inc.*, 139 S. Ct. 628, 633-34 (2019).

5. Oklahoma incorrectly claims that "the Court's modern precedents demonstrate that" state jurisdiction broadly extends to "interactions between non-Indians and Indians." Pet. 15-16. Its citations, however, mostly concern tax collection. *See id.* (discussing *Milhelm*, *Yakima*, *Potawatomi*, *Cotton Petroleum*, *Colville*, *Moe*).[9] None was about criminal jurisdiction. Oklahoma also cites *New York ex rel. Cutler v. Dibble*, 62 U.S. (21 How.) 366 (1858). But *Dibble* upheld a *civil* ejectment statute providing for the removal of non-Indians from Indian lands, not a criminal statute. *Id.* at 371; *accord Oneida Indian Nation of N.Y. v. Oneida Cnty.*, 414 U.S. 661, 672 n.7 (1974) (emphasizing *Dibble*'s limits).

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provision, by contrast, no words are superfluous. It bestows jurisdiction "over civil causes of action between Indians or to which Indians are parties," *id.* § 1322(a), and so grants authority over Indian defendants otherwise beyond States' reach. While Congress could have drafted more narrowly, every word does work.

[9] The exception is *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, P.C.*, 467 U.S. 138, 148-49 (1984), which concerns state jurisdiction over suits by Indians against non-Indians. In *Bosse*, Oklahoma analogized this case to such suits. 20A161 Okla. Br. 20-21. But the civil context differs in a critical respect. There, Indians voluntarily enter state courts as private persons. Here, Oklahoma proceeds as the sovereign enforcer of public laws, in derogation of the "plenary and exclusive power of the Federal Government … to regulate and protect the Indians." *Bryan*, 426 U.S. at 376 n.2.

Alternatively, Oklahoma urges application of the *Bracker* balancing test. Pet. 15-16. *Bracker*, however, applies to *civil* jurisdiction. *See White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144-45 (1980). And even where *Bracker* governs, this Court does not undertake the ad hoc weighing of policy arguments that Oklahoma invites. *Id.* It is guided by "the language of the relevant federal treaties and statutes." *Id.* Here, Congress in the General Crimes Act treated Indian country as equivalent to locations "within the sole and exclusive jurisdiction of the United States"; enacted that language on the understanding that it provided the full measure of criminal jurisdiction in Indian country; reenacted it after this Court affirmed that federal jurisdiction is exclusive; and enacted myriad statutes conferring jurisdiction over crimes "by or against Indians"—which become nonsense if States already have such jurisdiction.

Moreover, Oklahoma's core *Bracker* argument—that concurrent jurisdiction would "enhanc[e] the protection of Indians from the crimes of non-Indians," Pet. 16—fails even as a policy argument. Congress has given some States jurisdiction over Indian reservations. And those "States have not devoted their limited criminal justice resources to crimes committed in Indian country." *United States v. Bryant*, 136 S. Ct. 1954, 1960 (2016).

The key point, however, is that the relevant Congresses did not share Oklahoma's policy judgment. Instead, they shared the understanding of *Donnelly*: that "Indian tribes are wards of the Nation"—*i.e.*, the federal government—and that the federal government has responsibility to prosecute "crimes committed by

white men against the[ir] persons or property … while occupying reservations set apart for … segregating them." 228 U.S. at 272. *Donnelly*, in turn, reflected countless treaties embedding the same rule. For example, the federal government promised that it—and no one else—would protect the Cherokee from "interruption and intrusion from [U.S.] citizens," even as it covenanted that Cherokee lands would not "be included within the … jurisdiction of any State" without consent. 1835 Treaty of New Echota, Dec. 29, 1835, Arts. 5-6, 7 Stat. 478; *accord* 1856 Treaty with the Creeks, Aug. 7, 1856, Arts. 4, 18, 11 Stat. 699.

Congress thus vested in the United States responsibility to determine whether, and how, to prosecute crimes by non-Indians against Indians. Oklahoma cannot override that judgment by asserting that state prosecutions are wise. Indeed, the entire *premise* of its pragmatic argument is that if it prosecutes non-Indians, the federal government can shirk its duties. That is not the system Congress's statutes contemplate.

C. Certiorari Is Unwarranted Because This Issue Is Not Outcome-Determinative.

Oklahoma also waived its concurrent-jurisdiction argument by not raising it until after the OCCA's post-*McGirt* remand. Under Oklahoma law, "the State, like defendants, must … preserve errors …, otherwise they are waived." *A.J.B. v. State*, 1999 OK CR 50, ¶ 9. So whatever the answer to Oklahoma's question presented *in general*, the decision below reached the correct result.

II. This Court Should Not Grant Certiorari To Consider Overruling *McGirt*.

A. This Case Does Not Present Oklahoma's Question Presented.

The Court must decline Oklahoma's request to overrule *McGirt* for the threshold reason that this case does not present that question. It is about the wrong reservation. While the Five Tribes share commonalities, "[e]ach tribe's treaties must be considered on their own terms." *McGirt*, 140 S. Ct. at 2479. And the Cherokee Nation's treaties, statutes, and history differ. For example, "[u]nlike the Creek Agreement, the Cherokee Agreement did not describe tribal courts as 'abolished' by the Curtis Act or prohibit revival of tribal courts." Pet. App. 36a, *Oklahoma v. Spears*, No. 21-323; *cf. McGirt*, 140 S. Ct. at 2484, 2490 (Roberts, C.J., dissenting) (emphasizing Congress's abolition of Muscogee courts). Indeed, it is a mystery what granting Oklahoma's second question presented would even *mean*: Would the parties brief the Muscogee treaties, statutes, and history (at issue in *McGirt*)? Or the Cherokee treaties, statutes, and history (which control this case but which this Court has never addressed)?

This case also does not present Oklahoma's second question presented because Oklahoma below waived its request to overrule *McGirt* and declined to present evidence on the Cherokee reservation's disestablishment. This Court treats as waived arguments "not raise[d] … below." *Jones*, 565 U.S. at 413. And in cases from state courts, it considers only claims "pressed or passed on below," even when litigants contend that a "well-settled federal" rule "should be

modified." *Gates*, 462 U.S. at 220, 222. "[C]hief among" the considerations supporting that rule "is [the Court's] own need for a properly developed record." *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 79 (1988).

This case shows why this Court enforces those rules. Oklahoma says *McGirt* should have given more "[c]onsideration [to] history" and seeks *McGirt*'s overruling based on claims of "disruption." Pet. 3-4, 17-18. But even though the OCCA remanded *expressly* to hold a hearing on the Cherokee reservation, Oklahoma did not present any evidence or raise any of its current arguments. And in other cases, Oklahoma affirmatively accepted that the Cherokee reservation exists. Cherokee Br. 13 (discussing *McDaniel*, *Foster*). Hence, in no case does the record contain any *evidence* to support Oklahoma's arguments.[10] Instead, Oklahoma fills its petition with citation-free assertions from counsel. That is no way to weigh abandoning *stare decisis*. If Oklahoma wants this Court to entertain that request, it should develop a record. Better, it should go to Congress, which has the institutional capacity to gather evidence and the institutional responsibility to make legislative judgments.

B. Oklahoma's Request To Overrule *McGirt* Does Not Warrant Certiorari.

Oklahoma's second question presented would not warrant certiorari even in a case presenting it. If Oklahoma objects to *McGirt*'s statutory holding,

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[10] To Respondent's knowledge, the same is true of all of Oklahoma's pending petitions. *See* Cherokee Br. 12-14 & n.26 (identifying additional procedural obstacles, including mootness and estoppel).

Congress is its forum. It may wish Congress were speedier, or more pliant. But under our separation of powers, whether and how to respond to *McGirt* is for Congress to decide.

1. Oklahoma's Petition Asks This Court To Usurp Congress's Role.

1. Respondent will not dwell on the point that *McGirt* was correct. *McGirt* canvassed the governing treaties and statutes, assessed whether any disestablished the Muscogee reservation, and—finding none did—held that the reservation endured. 140 S. Ct. at 2463-68. Oklahoma maintains that *McGirt* should have given greater "[c]onsideration [to] history." Pet. 17-18. But the majority addressed Oklahoma's historical arguments and found that "even taken on [their] own terms," they did not show disestablishment. 140 S. Ct. at 2470. And while Oklahoma avers that *McGirt* "did not itself adhere to the Court's prior precedents," Pet. 28, the result *McGirt* reached accords with this Court's normal approach to statutory interpretation (where text is the lodestar of meaning, *e.g.*, *Van Buren v. United States*, 141 S. Ct. 1648, 1654 (2021)), its recent unanimous decision in *Nebraska v. Parker*, 577 U.S. 481, 490 (2016) (which declined to allow "mixed historical evidence" to overcome lack of clear text), and the rule that disestablishment "will not be lightly inferred" and that treaties and statutes must be construed in favor of tribal rights. *Solem v. Bartlett*, 465 U.S. 463, 470 (1984).

2. Today the key point is *stare decisis*. *Stare decisis* "is a foundation stone to the rule of law." *Bay Mills*, 572 U.S. at 798. It "promotes the evenhanded, predictable, and consistent development of legal principles, fosters

reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). It also provides the "means by which we ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion." *Vasquez v. Hillery*, 474 U.S. 254, 265 (1986). And *stare decisis* carries "special force" in statutory cases, where "Congress remains free to alter what [this Court has] done." *Erica P. John Fund*, 573 U.S. at 274.

In statutory cases, *stare decisis* protects not just this Court's "actual and perceived integrity," *Bay Mills*, 572 U.S. at 798, but the separation of powers. This Court does not always speak with one voice about what statutes mean. But once the Court speaks, it is for Congress to decide whether to act. In this realm above all, the "question … is not whether [a prior decision] was right or wrong." *June Med. Servs. L. L. C. v. Russo*, 140 S. Ct. 2103, 2133 (2020) (Roberts, C.J., concurring in the judgment).[11]

3. Few petitions so disdain these values. Oklahoma

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[11] Respondent recognizes that the *McGirt* majority and dissent disagreed over which result better accorded with this Court's precedents. But if such good-faith disagreement rendered *stare decisis* inapplicable in a statutory case, the doctrine would lose all meaning. True, in *constitutional* cases, "[r]emaining true to an 'intrinsically sounder' doctrine established in prior cases" sometimes "better serves the values of *stare decisis* than would following' [a] recent departure." *June Med.*, 140 S. Ct. at 2134 (Roberts, C.J., concurring in the judgment). That is because only the Court can change constitutional decisions. In statutory cases, however, *stare decisis* leaves to Congress the decision whether to amend its statutes. *Erica P. John Fund*, 573 U.S. at 274.

asks this Court to discard statutory precedent, based on a change in personnel, *so that* it can avoid negotiating over legislation. Oklahoma complains that, one year after *McGirt*, it has not yet reached global agreements with the Five Tribes and Congress has not yet acted. Pet. 26-28. That, however, is neither surprising nor any reason to abandon *stare decisis*. Inter-sovereign negotiations always take time. Legislation does too. When that process does not immediately yield one side's desired outcome, it often blames the other. This Court does not respond by taking up the legislative pen and succumbing to calls that "[o]nly the Court can remedy [the] problem[]." Pet. 4.

Oklahoma's one-sided account certainly provides no reason for this Court to substitute itself for Congress. Oklahoma suggests, for example, that the Five Tribes have opposed negotiations. Pet. 27. But it cites just one statement from the Choctaw Nation, which simply maintained that it should "be the federal government that we … talk[] to."[12] Meanwhile, the Cherokee and Chickasaw Nations have both agreed to federal legislation that would allow Oklahoma to reacquire its pre-*McGirt* criminal jurisdiction—which Oklahoma has *opposed*. *Supra* 11. And the Muscogee Nation reports that it has extended to Oklahoma "an open invitation to … partner … to address criminal jurisdiction … but that [the governor]" has refused.[13]

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

[13] Kolby Kickingwoman, *Oklahoma Tribes, Governor Still at Odds*

That may have something to do with Oklahoma's negotiating position—which is that "we need to overturn *McGirt* completely."[14] With that position, it is small wonder that Oklahoma has found agreements elusive. Indeed, Oklahoma appears to be more interested in furthering its litigating positions than in reaching accommodations:

- Oklahoma opposed "a permanent federal fix" from Congress. *Supra* 3. Weeks later, it filed petitions seeking *McGirt*'s overruling.
- Oklahoma opposed additional funding for federal and tribal law enforcement.[15] Today, it tells this Court that *McGirt* must be limited or overruled because federal and tribal governments "lack[] [adequate] capacity and resources." Pet. 16.
- Oklahoma has proclaimed it will not "engag[e] in discussions" on agreements on civil matters and will not "negotiate its sovereignty away" by compromising its position that *McGirt* has *no* civil effects.[16] Now, Oklahoma invokes potential civil effects as a reason *McGirt* must be overruled and

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Over McGirt, Indian Country Today (Sept. 5, 2021), https://bit.ly/3D0Pj7f.

[14] Joe Tomlinson & Tres Savage, *Forum Ends Early, Stitt Aims To Overturn* McGirt *Ruling*, Non Doc (July 14, 2021), https://bit.ly/3F5OHiB.

[15] Gorman, *supra* note 1; *see* Chickasaw *Beck* Br. 6-7.

[16] Ray Carter, McGirt *Called Threat to State's Economic Future*, Okla. Council of Pub. Affs. (Aug. 16, 2021), https://bit.ly/3omQ8U2.

tells this Court that "there is no realistic likelihood of" negotiated resolution. Pet. 24, 26.

The Court should not be fooled by Oklahoma's attempt to launder its hardline positions into evidence that agreements are unobtainable.

2. Oklahoma's Claims About *McGirt*'s Consequences Wither Upon Scrutiny.

To tempt the Court to substitute itself for Congress, Oklahoma fills its brief with overwrought claims about consequences. That *McGirt* has created *some* "disruption," Pet. 4, is neither surprising nor any basis to abandon *stare decisis*. Every Justice recognized that *McGirt* would have effects. And regardless, Oklahoma's claims rest on makeweight and misdirection.

i. The OCCA Has Limited McGirt*'s Backwards-Looking Effects.*

In *Bosse*, Oklahoma invited the Court to abandon *stare decisis* largely because of *McGirt*'s effects on existing convictions. *Bosse* Pet. 3. Today, however, those effects are limited to the minimum everyone understood would inevitably occur. The Chief Justice feared *McGirt* would invalidate many long-final convictions. 140 S. Ct. at 2500-01 & n.9 (Roberts, C.J., dissenting). The majority acknowledged the possibility. *Id.* at 2481. And Oklahoma warned (without evidence) that an adverse result would free "over 3,000 inmates." *McGirt* Arg. Tr. 54.

Reality came in at the bottom end. Even before

Matloff, Oklahoma's warnings proved as untrue as they were unsupported: A year after *McGirt*, just "150 prisoners" had obtained relief. *Bosse* Pet. 23.[17] And now, *McGirt* affects only the cases that it always *had* to affect: direct-review cases. To Respondent's knowledge, only about 60 such cases have been decided by, or are pending before, the OCCA—far less than this Court's decisions regularly affect. *Ramos v. Louisiana*, 140 S. Ct. 1390, 1406 (2020). This modest set, moreover, includes many that Oklahoma prosecuted after the Tenth Circuit's *Murphy* decision, which Oklahoma understood might be invalid. In such cases, too, retrial is easiest and least likely to face obstacles from time bars or stale evidence. Indeed, Oklahoma fails to mention the federal and tribal prosecutions that are *comprehensively* occurring in those cases—or that the federal government has obtained convictions in many such cases (including Respondent's case). *E.g.*, Cherokee *Spears* Br. 9-10; Muscogee Br. 9-11, *Oklahoma v. Mize*, No. 21-274; Chickasaw Br. 4-5, 7-9, *Oklahoma v. Beck*, No. 21-373; Choctaw Br. 15-16, *Oklahoma v. Sizemore*, No. 21-326.

There is nothing to Oklahoma's attempts to paper over how *Matloff* removed its premise for seeking review. First, it says that "defendants in approximately 6,000 pending criminal cases are seeking dismissal under *McGirt*." Pet. 19. That citation-free number, however, is the same one it offered in *Bosse*, which included post-conviction cases. *Bosse* Pet. 25. Second, Oklahoma avers

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[17] *Accord* Cecily Hilleary, *Native Americans, State Leaders Grapple With Legal Uncertainty in Oklahoma*, VOA News (July 31, 2021), https://bit.ly/3F8X0tO.

that the *Matloff* defendant may seek certiorari (and indeed, such a petition has now been filed). Pet. 22; *see* Pet. for Writ of Certiorari, *Parish v. Oklahoma*, No. 21-467 (U.S. Sept. 27, 2021). But that just spotlights the speculation filling Oklahoma's petition: *Matloff* will remain the law unless this Court both grants that petition and reverses. Oklahoma surely will vigorously oppose attempts to set aside *Matloff*—and regardless, the place to consider *McGirt*'s effects on state post-conviction cases is post-conviction cases *actually raising* that issue. Third, Oklahoma says prisoners may "seek relief in federal habeas." Pet. 22. But again, it hides the ball: It previously told this Court that "the Tenth Circuit has … specifically held … that prisoners seeking postconviction relief under … *McGirt* are subject to … procedural bars." *Bosse* Pet. 11-12 (citing cases); *see* Chickasaw *Beck* Br. 5.

Last, Oklahoma claims "some" direct-review cases may face federal limitations issues. Pet. 23. But it cites just one example, where the OCCA averred that "the timely filing of the charges in state court tolled … any statute of limitations." *Roth*, 2021 OK CR 27, ¶ 17 n.5; *see United States v. Midgley*, 142 F.3d 174, 178-79 (3d Cir. 1998). Indeed, it is no wonder Oklahoma struggled to find examples: The general federal statute of limitations is five years, and many crimes have longer (or no) limitations periods.[18] Meanwhile, if a few cases face obstacles, it will be because Oklahoma failed to take reasonable steps. *Roth*, for example, unquestionably

[18] Charles Doyle, Cong. Rsch. Serv., RL31253, *Statute of Limitation in Federal Criminal Cases: An Overview* 2-3 (Nov. 14, 2017).

remained timely in November 2018, more than a year after the Tenth Circuit's *Murphy* decision. Oklahoma could have worked with the United States to address the obvious risk *Murphy* posed.

ii. There Is No Crisis On Going-Forward Criminal Jurisdiction, Which Congress Can Address.

Going forward, criminal jurisdiction in Oklahoma is for Congress to address. And regardless, Oklahoma's claims of "crisis," Pet. 4, are unsupported.

The federal government is fulfilling the responsibilities *McGirt* conferred and diligently prosecuting crimes involving Indians. The Court need not take Respondent's word for it: After U.S. Attorney Trent Shores left following the change in administrations, he explained that he had heard many "'Chicken Little' comments" but that "we see in actuality that the sky isn't falling" thanks to the "great partnerships among state, tribal and federal law enforcement entities."[19] Yes, the federal government requires greater resources. But the Department of Justice is seeking from Congress the resources it needs to "support … effective prosecution" and "an enhanced

[19] Allison Herrera, *Trent Shores Reflects on His Time As U.S. Attorney, Remains Committed To Justice For Indian Country*, NPR (Feb. 24, 2021), https://bit.ly/3D1PbUW.

presence."[20] So is the judiciary.[21] H.R. Rep. No. 117-97 at 63 (2021); H.R. Rep. No. 117-83 at 55-56 (2021); *see* Muscogee *Mize* Br. 15.

When the federal government completes the transition, the result will be different but not unusual. Eastern Oklahoma used to be among the smallest districts.[22] Now, the FBI projects that, by 2023, the Eastern District will see 2,500 criminal filings annually.[23] That is a significant change. But it will leave the Eastern District's criminal docket smaller than the Western District of Texas (7,352), Southern District of California (4,427), or the District of Arizona (4,643)—another district with a large Indian population.[24]

Although change does not happen overnight, Oklahoma's claims of an "emergency" today, Pet. 21, are pure atmospherics. Many U.S. judicial districts have declared an emergency due to the COVID-19 pandemic,

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[20] *Federal Bureau of Investigation Budget Request for Fiscal Year 2022: Hearing Before the Subcomm. on Commerce, Justice, Science, and Related Agencies of the S. Comm. on Appropriations*, 117th Cong. 14 (June 23, 2021) (statement of Christopher A. Wray, FBI Director), https://bit.ly/3iut2H4.

[21] U.S. Judicial Conference, Judiciary Supplements Judgeship Request, Prioritizes Courthouse Projects (Sept. 28, 2021), https://bit.ly/3mgiEno.

[22] Federal Court Management Statistics, *U.S. District Court – Judicial Caseload Profile* at 83 (June 2020), https://bit.ly/2Wo2q2w.

[23] Statement of Christopher A. Wray, *supra* note 20, at 13.

[24] Federal Court Management Statistics, *supra* note 22.

with *McGirt* merely presenting an extra challenge.[25] Oklahoma and its amici also claim—again, bereft of citation—that unidentified U.S. Attorneys' offices are prosecuting only crimes involving "serious bodily injury." Pet. 20. Federal authorities, however, have announced indictments for offenses *not* involving serious injury—including "burglary," "firearm violations," "robbery," stalking, "larceny of a motor vehicle," "possession of stolen vehicle," and evading arrest.[26] And if Oklahoma wants more federal charges, it should stop *opposing* federal funding. Indeed, even now, federal prosecutions are already filling gaps Oklahoma left—like in *Ortner*, where Oklahoma gave a non-Indian two years for raping an Indian child but federal prosecutors secured a life sentence. Cherokee Br. 10.

The Five Tribes are also doing their part. Cross-deputization agreements—which law-enforcement agencies can enter by executing and filing a simple addendum—are ensuring that on-the-ground policing continues uninterrupted, regardless of the tribal status of suspected perpetrators or victims. Cherokee Br. 11-12. The Muscogee Nation has doubled both the size of its police force and its number of its cross-deputization

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[25] United States Courts, *Court Orders & Updates During COVID-19 Pandemic*, https://bit.ly/3zZZ43I (last updated Sept. 16, 2021).

[26] Press Release, U.S. Attorneys, Eastern District of Oklahoma, *United States Attorney's Office For The Eastern District Of Oklahoma Obtains Twenty-Eight Indictments From Federal Grand Juries* (Aug. 2, 2021), https://bit.ly/3B0k63m; Press Release, U.S. Attorneys, Northern District of Oklahoma, *Federal Grand Jury A Indictments Announced* (Oct. 8, 2020), https://bit.ly/3AYMlzp; *accord* Muscogee *Mize* Br. 12.

agreements.[27] The Cherokee Nation has entered 57 such agreements since *McGirt*. Cherokee Br. 11.[28] The Chickasaw Nation has 70 such agreements. Chickasaw *Beck* Br. 14. The Choctaw Nation has 54. Choctaw *Sizemore* Br. 12. Meanwhile, the Five Tribes are ensuring that state officers get the help they need by, for example, staffing 24/7 prosecutors and judges to issue warrants and answer questions. Cherokee Br. 4-5; *see* Choctaw *Sizemore* Br. 11. Thanks to those efforts, and their experience "working together" with tribal police "for numerous years," local police chiefs have found that policing largely remains "business as usual" and that "for the most part, all [their] guys got this down." Choctaw *Sizemore* Br. 13-14.[29]

The Five Tribes are also fulfilling their prosecutorial responsibilities—by prosecuting crimes by Indians carrying up to nine years' cumulative imprisonment, 25 U.S.C § 1302(a)(7)(D), as well as by non-Indians under the Violence Against Women Act, *id.* § 1304. Indeed, since *McGirt*, the Five Tribes have collectively filed nearly *7,000* criminal cases and issued 2,700 traffic

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[27] Naomi Keitt, *Lighthorse Police Budget Increased as Their Caseload Expands*, FOX23 News (Apr. 15, 2021), https://bit.ly/2Wph5KW.

[28] Austin Breasette, *Tribal Attorneys Discuss Changes Within Tribes 13 Months After* McGirt *Ruling*, KFOR (Aug. 17, 2021), https://bit.ly/2Wq7wvh.

[29] When "honest mistake[s]" occur, Choctaw *Sizemore* Br. 13, courts have applied the good-faith exception to the exclusionary rule even to jurisdictional defects. Cherokee Br. 5.

citations.[30] The Cherokee Nation alone has spent $10 million to improve its criminal-justice system, including adding two judges, six prosecutors, and two *entirely new* courts—while doubling its budgets for its court system and Marshal Service. Cherokee *Spears* Br. 5; *see* Muscogee *Mize* Br. 16 (adding 20 police officers, 10 investigators, 6 prosecutors, and 2 judges while "significantly expand[ing] its courthouse and detention facility capacity"); *accord* Choctaw *Sizemore* Br. 10-11; *cf.* Cherokee Br. 9 (Nation filed charges in 66% of cases referred by Tulsa County District Attorney's Office). The Five Tribes are even amending their own laws to better coordinate with Oklahoma's. Cherokee *Spears* Br. 8-9; Muscogee *Mize* Br. 17.

All of this also underscores how much disruption overruling *McGirt* would inflict. *McGirt* invited—indeed, demanded—reliance by the federal government and the Five Tribes, which had to restructure their budgets, governments, and laws. Overruling *McGirt* would pull the rug out from those efforts, squander tens of millions of dollars that the federal government and Five Tribes have invested,[31] and invalidate thousands of prosecutions in tribal and federal court.

Oklahoma is thus badly wrong when it claims that *stare decisis* should carry less weight because *McGirt* has engendered few "reliance interests." Pet. 28. And

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[30] Inter-Tribal Council of the Five Civilized Tribes, Res. 21-34 (Oct. 8, 2021), https://bit.ly/3m5lixr.

[31] Curtis Killman, *Here's How Cherokee Tribal Courts Are Handling the Surge in Cases Due to the McGirt Ruling*, Tulsa World (May 17, 2021), https://bit.ly/2ZBb92G.

its fallback suggestion that those reliance interests "pale in comparison" with its own, *id.*, only underscores why Congress is the forum for Oklahoma's complaints. If Congress concludes that *McGirt* warrants changes to jurisdictional lines, then Congress—unlike this Court—can accommodate the reliance interests on all sides.

iii. *Oklahoma's Claims About Civil Consequences Are Filled With Misdirection And Have No Place In This Criminal Case.*

Oklahoma fares even worse with its claim that *McGirt*'s consequences for "civil authority," Pet. 23-24, justify jettisoning *stare decisis*. This criminal case does not present those consequences—which remain hypothetical and will be far less than Oklahoma suggests.

a. Oklahoma's position is that *McGirt* "does not extend outside of th[e] limited federal criminal context." Compl. at 3, *Oklahoma v. Dep't of Interior*, No. CIV-21-719 (W.D. Okla. July 16, 2021), ECF No. 1. No lower court has addressed that argument. And so long as that question remains open, Oklahoma's claims about civil consequences are premature. Nor will it take long for that issue to percolate. Oklahoma has sought a preliminary injunction based on that argument, which will generate an as-of-right appeal. *E.g.*, Order for Hearing, *Oklahoma v. Dep't of Interior*, No. CIV-21-719 (W.D. Okla. Nov. 1, 2021), ECF No. 62.

b. Even aside from that unresolved threshold issue, Oklahoma builds its petition on misdirection. It tries to

bluff the Court by reciting every argument any litigant has made based on *McGirt*, no matter how meritless. But again, the Court should not be fooled.

Well-settled principles, unmentioned by Oklahoma, limit *McGirt*'s civil effects. Tribal civil jurisdiction over non-Indians on fee land—the only type of land affected by reservation status—is "presumptively invalid." *Plains Com. Bank v. Long Fam. Land & Cattle Co.*, 554 U.S. 316, 330, 341 (2008); *Montana v. United States*, 450 U.S. 544, 565 (1981). "[W]ith one minor exception," this Court has "never upheld under *Montana* the extension of tribal civil authority over nonmembers on non-Indian land." *Nevada v. Hicks*, 533 U.S. 353, 360 (2001). While Oklahoma hypothesizes that the Five Tribes might nonetheless assert such jurisdiction, it cites no examples of the Five Tribes *actually* asserting new jurisdiction over non-Indians after *McGirt*—because they are not. *E.g.*, Cherokee *Spears* Br. 14; Muscogee *Mize* Br. 20; *cf. Bay Mills*, 572 U.S. at 811 (Sotomayor, J., concurring) (explaining that Tribes cannot feasibly impose "double taxation" of revenues taxed by States). Meanwhile, States retain jurisdiction over non-Indians absent preemption under *Bracker*—which this Court has *never* applied to find preemption of state regulation on fee lands.

Oklahoma gestures vaguely toward "looming" questions about civil authority. Pet. 25. Several of these questions, however, concern disputes that could only *limit McGirt*'s effects. For example, the Curtis Act conferred on municipalities "the same jurisdiction in all civil and criminal cases … as … United States commissioners in the Indian Territory." June 28, 1898,

ch. 517, § 14, 30 Stat. 495. Tulsa has argued—and its municipal court has held—that this provision continues to provide "Tulsa subject matter jurisdiction over all persons, without regard to race, including Native Americans." *City of Tulsa v. Shaffer*, No. 6108204, slip op. at 10 (Tulsa Mun. Crim. Ct., Tulsa Cnty., Feb. 2, 2021), https://bit.ly/2WfaodW; *see* Tulsa Mot. to Dismiss, *Hooper v. City of Tulsa*, No. 21-cv-165 (N.D. Okla. May 26, 2021), ECF No. 6.

Oklahoma also points to "[q]uestions involving … exercise of long-dormant tribal jurisdiction over civil matters." Pet. 25. Those "questions," however, refer to *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197, 214 (2005). *Sherrill* holds that even on undiminished reservation lands, "equitable considerations of laches and acquiescence" may limit tribal authorities and immunities. *Parker*, 577 U.S. at 494. *Sherrill* could eliminate, at one stroke, many potential civil consequences from *McGirt*. And *Sherrill* is just one of many doctrines—including "procedural bars, res judicata, statutes of repose, and laches, to name a few"—that are "designed to protect those who have reasonably labored under a mistaken understanding of the law," all of which may further limit the consequences Oklahoma hypothesizes. *McGirt*, 140 S. Ct. at 2481.

Many of Oklahoma's other supposed civil consequences are just bogeymen that clearly will not happen. The challenge to Oklahoma's "power to regulate oil and gas matters," Pet. 24, concerns a suit by a non-Indian oil company operating on fee land. Again, this Court has *never* found preemption of state law regulating non-Indians on fee land. *Supra* 33; *see* Okla.

Corp. Comm'n's Resp. to Petition in Error, Ex. A, *Canaan Resources X v. Calyx Energy III, LLC*, No. 119245 (Okla. Dec. 23, 2020); *cf.* Chickasaw *Beck* Br. 10, 12 (addressing additional issues cited by Oklahoma concerning civil fines and title insurance).

As to "property taxes," Pet. 24, Oklahoma's Tax Commission has given its verdict: It "does not anticipate an impact" because reservation fee lands are "subject to ad valorem taxation." Oklahoma Tax Commission, *Report of Potential Impact of* McGirt v. Oklahoma 12-13 (Sept. 30, 2020), https://bit.ly/2Yc1YW5. It saw no need to hedge, and for good reason: This Court has "held that [fee] land … [i]s subject to [state] ad valorem taxes even though it [i]s within a reservation and held by either individual Indians or a tribe." *Cass Cnty. v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 111 (1998). Certainly, Oklahoma did not feel that *McGirt* had imperiled its budget when it passed a $500 million tax cut. Muscogee *Mize* Br. 22-23.

Similarly hyperbolic are Oklahoma's claims of threats to its "regulatory primacy over environmental matters." Pet. 25. The "Inhofe Rider" provides that "[n]otwithstanding any other provision of law," the EPA "shall approve [Oklahoma] to administer" federal environmental laws "in Indian country"—provided only that Oklahoma's program "meets applicable legal requirements." SAFETEA-LU, Pub. L. No. 109-59, § 10211(a), 199 Stat. 1144, 1937 (2005). On October 1, 2020, EPA approved Oklahoma's request to assume that authority and found that the "statute provides EPA no discretion." Letter from Andrew R. Wheeler, EPA Administrator, to the Honorable J. Kevin Stitt, at 2 (Oct.

1, 2020), https://bit.ly/3z88E4J. Today, the EPA is not "reconsidering" that decision; it has just opened a "consultation and coordination process" with Tribes. Press Release, EPA, *EPA Announces Renewed Consultation and Coordination with Oklahoma Tribal Nations* (June 30, 2021), https://bit.ly/3kLyOWq. Unless Oklahoma explains how that process could yield a conclusion at odds with the Inhofe Rider's text, the Court should recognize its claims as makeweight.

Oklahoma's petition descends into the bizarre with its claim that local "emergency-response dispatcher[s]" are "now ask[ing]" "callers to 911 … if they are members of a federally recognized tribe"—and if so, "transfer[ring] [them] to" tribal authorities. Pet. 21. To be clear: If that is happening, it is the fault of Oklahoma and its subdivisions. Nothing in *McGirt* requires (or authorizes) Oklahoma's emergency dispatchers to turn their backs on tribal citizens.

c. *McGirt* may ultimately have some real civil effects. And it is understandable that Oklahoma prefers to avoid litigating challenges, even if most lack merit. But the proper response to those concerns is the one the Oklahoma Tax Commission has given. "Congress may explicitly authorize [the] state to exercise" contested powers, and Oklahoma "has the ability to enter into compacts with the tribes which would benefit both the State and tribal governments"—and which "[h]istorically … have been a powerful tool for facilitating cooperation." *Tax Commission Report* 3. Indeed, before Oklahoma's new Attorney General went all-in on litigation, Oklahoma found that the Tribes were willing partners in entering agreements concerning (for

example) child custody, mental-health treatment, hunting and fishing, and juvenile justice. Cherokee *Spears* Br. 8; *see* Muscogee *Mize* Br. 19-20; Chickasaw *Beck* Br. 13; Choctaw *Sizemore* Br. 14-15.

At minimum, the speculation and inaccuracies filling Oklahoma's petition underscore that civil consequences should be addressed in civil cases *actually presenting* them. In such cases, courts can consider whether *McGirt* in fact yields those consequences and whether other doctrines avoid them. Oklahoma's supposed consequences will often disappear without needing to weigh the extreme step of shoving Congress aside to overrule statutory precedent.

CONCLUSION

By the time this petition goes to Conference, the Court will have been deluged with amicus briefs making conflicting claims about *McGirt*'s effects. Respondent maintains that the claims of Oklahoma and its amici are baseless, for reasons explained above. One thing, however, should be beyond doubt: These dueling submissions are tailor-made for congressional hearings—and are badly out of place here. The Court should leave those disputes where the Constitution places them and deny the petition.

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