No. 21-429

In the Supreme Court of the United States

STATE OF OKLAHOMA, PETITIONER

v.

VICTOR MANUEL CASTRO-HUERTA

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

REPLY BRIEF FOR THE PETITIONER

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There is simply no precedent for what this Court did in *McGirt* v. *Oklahoma*. By holding that Congress never disestablished the Creek Reservation, and thereby upending the longstanding framework for assessing the disestablishment of Indian reservations, the decision stripped the State of prosecutorial authority over major crimes committed by Indians in nearly half of Oklahoma, including all of Tulsa.

The Oklahoma Court of Criminal Appeals has now held that, after *McGirt*, the State has no jurisdiction over any crime committed against an Indian in that territory. As a result, despite a century of contrary understanding among all the relevant actors, Oklahoma lacks the full sovereign power of a State to prosecute crimes within an area home to nearly 2 million people.

When all of the rhetoric is stripped away, no one on respondent's side disputes that *McGirt* has caused significant disruption in Oklahoma. While the tribes quibble about the details, their principal submission is that they are expending significant resources to cope with the fallout—confirming the disruption *McGirt* has wrought.

The question whether States have authority to prosecute non-Indians who commit crimes against Indians in Indian country is of overriding practical importance in the wake of *McGirt* and warrants review here. But a favorable ruling on that question would not solve the State's troubles. *McGirt* would continue to have transformational effects on law enforcement. And both the federal government and the tribes are actively pursuing civil applications of the decision. Absent this Court's intervention, many years of litigation will surely be required to settle the consequences of *McGirt* and to reach a new "normal"—if the partitioning of an American State could ever be said to be "normal."

Under these unprecedented circumstances, the Court's intervention is required. After a year and a half, implementation of the decision remains chaotic, and the parties remain at an impasse, with the tribes themselves deeply divided. Nor is action from Congress a realistic possibility. As a practical matter, only this Court can remedy the extraordinary problems it created in *McGirt*. And the only realistic time to do so is now, while any asserted reliance interests are at a minimum. The Court should grant the petition on both questions and set this case for oral argument in the current Term.

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

The Court has never squarely addressed the question whether States have authority to prosecute non-Indians

who commit crimes against Indians in Indian country. In the wake of *McGirt*, there is an overriding practical need for the Court to answer that question. Respondent's contrary arguments lack merit.

1. Respondent treats this as an ordinary case, arguing (Br. in Opp. 9) that review is not warranted because lower courts have "uniformly" decided the first question presented in its favor. Even if that were true, but see, *e.g.*, *State* v. *McAlhaney*, 17 S.E.2d 352, 354 (N.C. 1941), this case is anything but ordinary. *McGirt* resulted in nearly half of Oklahoma becoming Indian country for purposes of federal criminal law, tripling the number of people who live in Indian country nationwide and are thus affected by the first question presented.

By its terms, *McGirt* resolves the allocation of prosecutorial authority only for major crimes committed by Indians. See 140 S. Ct. at 2480. By contrast, the first question presented here concerns *all* crimes—from the heinous to the petty—committed by non-Indians against Indians. If the decision below stands, the federal government will be solely responsible for prosecuting almost all of those crimes in eastern Oklahoma. That may be "only 20% of cases affected by *McGirt*," Br. in Opp. 10, but it is no small number: the State estimates it is 3,600 additional cases per year, now and in perpetuity, for the federal government to prosecute. See p. 8, *infra*. And those cases are already raising difficult questions, such as how to determine the status of the "victim" of certain crimes. See, *e.g.*, *Sims* v. *Oklahoma*, No. F-2017-635 (Okla. Crim. App. Oct. 7, 2021) (reversing the conviction of a non-Indian for the mutilation of an Indian corpse).

2. Respondent next turns to the merits (Br. in Opp. 11-17), focusing mostly on arguments petitioner has already addressed. Respondent relies on decisions that did not squarely confront the issue, see Pet. 14, and attempts

to extend the text of the General Crimes Act well beyond what it can bear, see Pet. 12.

Respondent also contends that the decision below is correct because of a baseline rule that "States have criminal jurisdiction over offenses involving Indians only if Congress has expressly conferred it." Br. in Opp. 12. Any such rule, however, is premised on "platonic notions of Indian sovereignty" that this Court's "modern cases" have "tend[ed] to avoid" in favor of reliance on "federal preemption." *McClanahan* v. *State Tax Commission*, 411 U.S. 164, 172 (1973); see Pet. 11, 15-16. Respondent downplays those decisions on the ground that they "mostly concern tax collection." Br. in Opp. 15. But he offers no valid reason why the rule would differ in the criminal and civil contexts—particularly where, as here, the State is exercising authority only over a non-Indian party.

Respondent's reliance on various statutes is equally unpersuasive. See Br. in Opp. 14-15. Congress's recodification of the General Crimes Act two years after the decision in *Williams* v. *United States*, 327 U.S. 711 (1946), does not signal acquiescence in the dicta in that decision. Cf. *Muniz* v. *Hoffman*, 422 U.S. 454, 467-474 (1975). And the language in the Kansas Act of 1940 and Public Law 280 permitting the exercise of state jurisdiction over non-Indians who commit crimes against Indians is hardly dispositive, because "[r]edundancies are common in statutory drafting." *Barton* v. *Barr*, 140 S. Ct. 1442, 1453 (2020).

3. Respondent finally contends (Br. in Opp. 17) that the State "waived" its argument on the first question presented by raising it below only after *McGirt* was decided. But all that is required is that the court below passed on the question, see, *e.g.*, *Raley* v. *Ohio*, 360 U.S. 423, 436-437 (1959), and it plainly did, without suggesting that the argument was forfeited. See Pet. App. 4a.

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

A decision in the State's favor on the first question presented would alleviate some of *McGirt*'s consequences, but the only way to end the turmoil in Oklahoma is to overrule *McGirt*. Respondent's various arguments ring hollow in light of the unprecedented disruption occurring on the ground in Oklahoma—disruption that respondent and the tribes do not meaningfully dispute.

1. Respondent makes two procedural arguments that are easily dispatched. Respondent first argues (Br. in Opp. 18-19) that the Court cannot reconsider *McGirt* here because *McGirt* involved the Creek Reservation and this case involves the Cherokee Reservation. But *McGirt* did not merely recognize the Creek Reservation; it jettisoned the longstanding approach to analyzing disestablishment and replaced it with an erroneous "magic words" requirement. 140 S. Ct. at 2489 (Roberts, C.J., dissenting); see Texas Br. 14-19. The State has not disputed that *McGirt*'s reasoning extends to the remainder of the Five Tribes; the remaining tribes have obviously argued that *McGirt* is controlling. The Court is thus free to revisit *McGirt* here and to apply the correct approach to the Cherokee Reservation. But if the Court felt it necessary to do so out of an abundance of caution, it could also grant one of the other pending petitions that involve the Creek Reservation. See, *e.g.*, *Oklahoma* v. *Williams*, No. 21-265.

Respondent next argues that the State "waived its request to overrule *McGirt*" by failing to raise it below. Br. in Opp. 19. That makes no sense. It is hardly necessary for a party to engage in the futile act of asking a lower court to overrule a decision of this Court. In any event, if the Court were inclined to apply such a rule, it could simply grant one of the many other pending petitions in which the State expressly informed the lower court of its

position that *McGirt* was wrongly decided. See, *e.g.*, Pet. App. at 28a-29a n.2, *Oklahoma* v. *Miller*, No. 21-643.*

2. Neither respondent nor the tribes dispute that *McGirt* has upended the State's criminal-justice system. See Pet. 19-23; District Attorneys Br. 6-23; Tulsa Br. 3-12. Instead, they contend that the federal and tribal governments have the situation under control. The facts devastate that contention.

a. Federal authorities are struggling in the wake of *McGirt*. See Pet. 19-20. Respondent argues (Br. in Opp. 27-28) that those struggles will be alleviated if Congress provides the Department of Justice with additional resources. But when requesting those resources, the Director of the FBI warned that the "operational and public safety risks" associated with *McGirt* are "long-term." *Hearing on FBI Budget Request for Fiscal Year 2022 Before the Subcomm. on Commerce, Science, and Related Agencies of the S. Comm. on Appropriations*, 117th Cong. 13 (June 23, 2021). The Director further admitted that the FBI has been forced to "prioritiz[e] cases involving the most violent offenders who pose the most serious risk to the public." *Ibid.*

The United States Attorney's Offices in Oklahoma are facing unparalleled challenges. Earlier this year, the Department of Justice issued a nationwide APB for federal prosecutors to transfer to Tulsa. See Amy Slanchik, *Federal Prosecutors Move to Oklahoma, Help with Supreme Court Caseload*, KWTV News 9 (Jan. 21, 2021) <tinyurl.com/slanchikdoj>. And like the FBI, federal prosecutors are resorting to triage by declining to prosecute

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* Contrary to the quixotic suggestion of some amici, see Chickasaw & Choctaw Br. 11-16, the dismissal of a criminal case after an intermediate appellate court issues its mandate does not "moot" the case for purposes of further appellate review. See, *e.g.*, *Kentucky* v. *King*, 563 U.S. 452, 458 n.2 (2011).

certain lesser crimes. See Pet. 20; Tulsa Br. 7. While respondent disputes that assertion (Br. in Opp. 29 & n.26), the vast majority of the actual prosecutions he cites involve violent crimes and sex offenses—the very crimes the FBI Director has said he is prioritizing.

The federal judiciary is faring no better. See Pet. 21. Indeed, since this petition was filed, the Judicial Conference sent an extraordinary supplementary request to Congress for five additional judgeships in the Northern and Eastern Districts of Oklahoma—which would double the size of the federal bench there. See U.S. Courts, *Judiciary Supplements Judgeship Request, Prioritizes Courthouse Projects* (Sept. 28, 2021) <tinyurl.com/mcgirtsupplement> (U.S. Courts Release). Meanwhile, the existing judges in those districts have issued a plea for visiting judges to come to Oklahoma. See Todd Ruger, *Federal Courts Boost Request for Judicial Reinforcements*, Roll Call (Sept. 28, 2021) <tinyurl.com/rugerjudges>.

Respondent claims that any problems caused by *McGirt* "merely present[] an extra challenge" on top of the problems created by the COVID-19 pandemic. Br. in Opp. 28-29. Seriously? The chief judge of the Eastern District of Oklahoma recently warned that, "absent a permanent solution to the *McGirt* fallout, the emergency conditions will continue unabated." General Order No. 21-18 (Sept. 2, 2021). The data bear that out: in the last year, the Eastern District experienced an increase in filed criminal cases of over 400%, and the Northern District nearly 200%. See U.S. Courts Release, *supra*.

b. Respondent also emphasizes the tribes' recent efforts to bolster their law-enforcement infrastructure. See Br. in Opp. 29-31. Those efforts, while commendable, are woefully insufficient. The tribes recently announced that they had filed charges in almost 7,000 criminal cases in the preceding 14 months. See Inter-Tribal Council of Five

Civilized Tribes, Res. No. 21-34 (Oct. 8, 2021) <tinyurl.com/tribalres2134>. The federal government has filed charges in approximately 1,000 cases since *McGirt*. Based on the drastic decrease in state-court prosecutions, however, the State estimates that the federal and tribal governments should be prosecuting over 18,000 crimes per year—leaving an alarming gap.

Respondent cites the tribes' cross-deputization agreements with certain jurisdictions (Br. in Opp. 29-30), but that is no panacea. The tribes have not signed such agreements with all the jurisdictions that overlap with their historical reservations. Even where agreements have been reached, cross-deputization creates a host of legal and practical dilemmas. See District Attorneys Br. 16-17. And cross-deputization addresses only policing, not the disturbing lack of prosecutions.

c. The forward-looking consequences of *McGirt* on Oklahoma's criminal-justice system are extraordinary enough. But the effects of the decision on pending and completed criminal cases should not be overlooked. When the State says that "defendants in approximately 6,000 pending criminal cases are seeking dismissal under *McGirt*," Pet. 19, that figure *excludes* applications for postconviction relief; adding postconviction applications increases the figure by 3,000. See Pet. at 23, *Bosse* v. *Oklahoma*, No. 21-186. The effects of *McGirt* on cases in the system are thus enormous, even if the decision ultimately does not have retroactive effect in either the federal or state courts. See Br. in Opp. at 18-23, *Parish* v. *Oklahoma*, No. 21-467.

Reprosecution may also be impossible because of the statute of limitations; it is at best uncertain whether the "timely filing of the charges in state court" would have a tolling effect. Br. in Opp. 26 (citation omitted); see Editorial, *How to Get Away With Manslaughter*, Wall St. J.,

Dec. 3, 2021, at A12 (citing examples). And where reprosecution has occurred, the new sentence has often been far lower. For example, respondent was sentenced in state court to 35 years of imprisonment for his heinous conduct in severely neglecting his five-year-old stepdaughter, yet he accepted a federal plea of seven years (plus time served). See Dkt. 52, at 15, *United States* v. *Calhoun*, Crim. No. 20-255 (N.D. Okla.).

3. While the most immediate effects of *McGirt* involve criminal justice, the decision has raised questions regarding the State's civil authority in areas ranging from taxation to environmental regulation. See Pet. 23-26. Respondent does not seriously argue otherwise, again quibbling about the details but acknowledging that *McGirt* "may ultimately have some real civil effects." Br. in Opp. 36.

The federal government is already seeking to extend *McGirt* into the civil realm. See Pet. 25. Federal courts, too, have applied *McGirt* beyond the confines of criminal law. See *Cayuga Nation* v. *Tanner*, 6 F.4th 361, 379-380 (2d Cir. 2021); *Oneida Nation* v. *Village of Hobart*, 968 F.3d 664, 684-685 (7th Cir. 2020). The Creek Nation "firmly believes" that *McGirt* has "civil application[s]," Creek Br. at 24, *Oklahoma* v. *Mize*, No. 19-274, forthrightly arguing here that "reservation status does have consequences for Oklahoma's taxing authority." Br. 22.

Respondent contends that this Court's decision in *City of Sherrill* v. *Oneida Indian Nation of New York*, 544 U.S. 197 (2005), "could eliminate * * * many potential civil consequences from *McGirt*." Br. in Opp. 34. But the federal government has argued that *City of Sherrill* has limited application, see Dkt. 34, at 24, *Oklahoma* v. *Department of Interior*, Civ. No. 21-719 (W.D. Okla.), and the tribes unsurprisingly express no support for respondent's position on this score.

Respondent also argues (Br. in Opp. 32) that the State cannot complain about the potential civil implications of *McGirt* because it has argued against those implications in other cases. But the fact that the State is working to mitigate the damage from *McGirt* does not cast doubt on the magnitude of damage that could result if *McGirt* is held not to be so limited.

4. Respondent next contends that the Court should not reconsider *McGirt* now because "[i]nter-sovereign negotiations" and "legislation" "take time." Br. in Opp. 22. Yet none of the tribes disputes the basic arc of the negotiations: namely, that three tribes repudiated an initial agreement with the State reached before *McGirt*, and no progress has been made since. See Pet. 26-27. Nor do the tribes have any real incentive to compromise: in their view (loudly expressed everywhere except in their briefs here), they are now sovereign for all legal purposes in eastern Oklahoma. Nor can the State simply agree to cede sovereignty over half of its territory containing nearly 2 million of its citizens.

The prospects for ameliorative legislation in Congress are nonexistent. Respondent cites H.R. 3091 as evidence to the contrary. See Br. in Opp. 3. But three tribes have declined to endorse it, and the bill has languished for months. See, *e.g.*, Creek Br. 28. And that bill would merely allow the State and the two assenting tribes to compact—thus requiring negotiations.

Respondent's contention that the State "seeks certiorari in order to preempt active negotiations" is therefore false. Br. in Opp. 3. No solution to the massive disruption caused by *McGirt* is in sight. It is that reality that led to the State's current position—a position the State took before any change in state leadership. See Pet. at 5, *Oklahoma* v. *Foster*, No. 21-___ (filed Dec. 3, 2021) (citing brief filed Apr. 19, 2021). No State in the Union would sit idly

by in light of the unprecedented consequences of this Court's decision.

5. Respondent ultimately rests on principles of statutory stare decisis. See Br. in Opp. 20-21. But *McGirt* is no ordinary statutory case, given that the Court dramatically altered the legal framework for analyzing disestablishment. See Texas Br. 20-22. Such a decision on a judge-made rule is "particularly appropriate" for reconsideration. *Pearson* v. *Callahan*, 555 U.S. 223, 233 (2009). In any event, principles of stare decisis demonstrate why now is the only realistic time to reconsider *McGirt*. As time passes, claims of reliance on the decision will only increase; in fact, respondent goes so far as to suggest that reliance interests already counsel against reconsidering the decision. See Br. in Opp. 31.

In short, if the Court is going to revisit *McGirt*, it should do so now to provide urgently needed relief to those who are dealing with the effects of the decision on the front lines. The 4 million people of Oklahoma cannot afford to wait another day to have clarity and certainty on the status of their State.

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The petition for a writ of certiorari should be granted.

Respectfully submitted.

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