No. 25-1039

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

JASON ROBERT HOPSON AND
ROBERT MARCUS JOHNSTON

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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Permitting the decisions below to stand would untether this Court's decision in *Keeble* v. *United States*, 412 U.S. 205 (1973), from any legal moorings. Relying on the directive in the Major Crimes Act (Act), ch. 341, 23 Stat. 385, that covered Indian defendants be "tried * * * in the same manner" as federal-enclave defendants, 18 U.S.C. 1153(a) and 3242, *Keeble* allowed Indian defendants charged with felony assault to request the same jury instruction on the lesser included offense of simple assault that a federal-enclave defendant could request. Under the decisions below, however, that "same" instruction has a different meaning for Indian defendants in the populous Indian country of the Tenth Circuit than it has for federal-enclave defendants or for Indian defendants in four other circuits. Rather than

providing an offramp for conviction of the lesser included offense, it is instead a mislabeled road to complete acquittal. Respondents provide no sound reason for this Court to accept that aberrant and unjustified approach.

A. The Decisions Below Are Wrong

As the petition explains (at 11-16), the Tenth Circuit's approach cannot be squared with statutory text, *Keeble*, or the normal and logical operation of a lesser-included-offense instruction at a criminal trial. Respondents mount efforts (Hopson Br. in Opp. 13-20; Johnston Br. in Opp. 14-17) to defend that approach but fail to uncover any sound justification for it.

1. Hopson principally contends (Br. in Opp. 15) that "simple assault committed by one Indian against another in Indian country is not a federal crime." But if that were so, a court would have no basis for issuing a lesser-included-offense instruction on that offense in the first place. Courts issue lesser-included-offense instructions only on actual offenses, not phantom ones. See Pet. 13. Hopson provides no sound reason to treat simple assault by one Indian against another as a crime when issuing a lesser-included-offense instruction but not when entering judgment.

While the Major Crimes Act does not specifically list simple assault, it does require that an Indian defendant be subject to the "same law," be "tried" "in the same manner," and be punished with the "same" "penalties" as a similarly situated federal-enclave defendant. 18 U.S.C. 1153(a), 3242. If a jury's guilty verdict on a lesser included offense leads to conviction and punishment for the enclave defendant, but acquittal for the Indian defendant, then the two defendants have not been

subjected to the same law, the same manner of trial, or the same penalties.

To the extent that Hopson is suggesting that the same-treatment directive applies only when a defendant actually "commits" a listed offense rather than a lesser included offense, Br. in Opp. 15 (quoting 18 U.S.C. 1153(a)), he disregards that the Act also refers to "Indians committing any [listed] offense" when describing trial procedure, 18 U.S.C. 3242. The same-treatment principle accordingly applies from the indictment stage onward and cannot be limited to defendants who are ultimately found guilty of a listed offense. Nor is Hopson correct in suggesting (Br. in Opp. 14) that the Act's listing of both murder and manslaughter implies that, "[w]hen Congress wanted to reach lesser-included offenses, it did so expressly." Had Congress excluded manslaughter from the list, then a defendant could not be indicted for that crime. The listing of manslaughter allows for indictment in cases where there is probable cause of manslaughter but not murder.

2. Respondents' position is also irreconcilable with *Keeble*, which rested on the understanding that "the trial court has authority to convict [the defendant] of the lesser included offense." *Spaziano* v. *Florida*, 468 U.S. 447, 454 n.5 (1984). Underscoring the irreconcilability, Hopson invokes (Br. in Opp. 10, 16) arguments that the government raised but that the Court *rejected* in *Keeble*. That simultaneous reliance on *Keeble* for the right to a lesser-included-offense instruction, but rejection of *Keeble*'s reasoning as to the meaning of that instruction, is the precise flaw in respondents' position and the decisions below.

Hopson cites (Br. in Opp. 18) the Court's statement in *Keeble* that the decision "neither expands the reach of the Major Crimes Act nor permits the Government

to infringe the residual jurisdiction of a tribe by bringing prosecutions in federal court that are not authorized by statute." 412 U.S. at 214. But where, as in these cases, the government is "bringing prosecutions" for felony assault that *are* "authorized by statute," *ibid.*, conviction on a defense-requested lesser-included-offense instruction is nothing more than what *Keeble* implicitly interprets the Act to require, see *Spaziano*, 468 U.S. at 454 n.5.

3. Finally, respondents err in contending (Hopson Br. in Opp. 19-20; Johnston Br. in Opp. 14-17) that providing a lesser-included-offense instruction while precluding the court from convicting the defendant of that offense would promote the purposes of lesser-included-offense instructions. "The principle that juries are not to consider the consequences of their verdicts" refers to a jury's ignorance of "'what *sentence* might be imposed,'" in cases where the "jury has no sentencing function." *Shannon* v. *United States*, 512 U.S. 573, 579 (1994) (quoting *Rogers* v. *United States*, 422 U.S. 35, 40 (1975)) (emphasis added). But while the jury typically does not have a sentencing function, it *does* have the function of finding guilt. See *ibid.* And that function is perverted when the jury is "tricked into believing that it has a choice of crimes for which to find the defendant guilty" when "in reality there is no choice." *Spaziano*, 468 U.S. at 456.

B. The Question Presented Warrants Review

1. As a leading treatise on Indian law observes, since *Keeble*, "four circuits" have "sustained convictions based on lesser included offenses." *Cohen's Handbook of Federal Indian Law* § 11.02(3)(g), at 767 (Nell Jessup Newton et al. eds., 2024). That is precisely what the Tenth Circuit refused to do here. Accordingly, as rec-

ognized by the Tenth Circuit itself (Pet. App. 42a-51a), and described in the petition (at 16-18), the decisions below create a 1-4 circuit conflict between the Tenth Circuit and the Fourth, Fifth, Eighth, and Ninth Circuits. Respondents do not dispute the existence of a conflict with the Ninth Circuit. But Hopson denies (Br. in Opp. 20-21) any conflict with the other circuits. He errs in doing so.

Hopson notes that the defendant in *United States* v. *Walkingeagle*, 974 F.2d 551 (4th Cir. 1992), cert. denied, 507 U.S. 1019 (1993), "conceded that the district court had jurisdiction over the lesser-included offense if the greater offense is also submitted to the jury." Hopson Br. in Opp. 21 (quoting *Walkingeagle*, 974 F.2d at 553) (brackets omitted). But as made clear in the second half of the sentence that Hopson quotes, the defendant nonetheless "argue[d] that the court has no jurisdiction over the lesser offense if"—as in that case and respondents' cases—"it enters a judgment of acquittal on the charged felony counts." *Walkingeagle*, 974 F.2d at 553. Although the decisions below accepted that argument, Pet. App. 20a-23a, the Fourth Circuit's decision in *Walkingeagle* rejected it and affirmed the lesser-included-offense conviction, 974 F.2d at 554.

Hopson's effort (Br. in Opp. 21) to distinguish the Fifth Circuit's decision in *United States* v. *John*, 587 F.2d 683, cert. denied, 441 U.S. 925 (1979), is likewise misplaced. Hopson asserts (Br. in Opp. 21) that the Fifth Circuit's application of the Major Crimes Act and *Keeble* provided only an "alternative basis for its decision." But the Fifth Circuit explicitly described that alternative determination as a "hold[ing]." *John*, 587 F.2d at 688. And the Fifth Circuit has made clear that "alternative holdings * * * 'are binding precedent.'" *United States* v. *Wallace*, 964 F.3d 386, 390, cert. de-

nied, 141 S. Ct. 910 (2020); see *United States* v. *Title Insurance & Trust Co.*, 265 U.S. 472, 486 (1924).

Hopson similarly errs in suggesting that the Eighth Circuit's approach is confined to "an earlier version of the [Major Crimes Act] specifying that felony assault 'shall be defined and punished in accordance with the laws of the State in which such offense was committed.'" Hopson Br. in Opp. 20-21 (quoting *Felicia* v. *United States*, 495 F.2d 353, 355, cert. denied, 419 U.S. 849 (1974). Although that provision was a factor in the Eighth Circuit's decision in *Felicia* v. *United States*, the "most importan[t]" basis for *Felicia*'s holding was its recognition that *Keeble* "could not have intended * * * an exercise in futility, leaving the federal courts without the power to sentence after a conviction of the lesser included offense is returned." 495 F.2d at 355. Moreover, the Eighth Circuit later reached the same result in *United States* v. *Demarrias*, 876 F.2d 674 (1989), a case that did not involve the same state-law wrinkle as *Felicia*. See *id.* at 675-676.

Contrary to Hopson's contention (Br. in Opp. 21-22), there is little prospect that the circuit conflict will dissipate on its own. The Fourth, Fifth, Eighth, and Ninth Circuits have all read *Keeble* as implicitly resolving the question presented here. See *Walkingeagle*, 974 F.2d at 553 ("*Keeble* settled the threshold question of whether federal courts can *ever* have jurisdiction over non-enumerated offenses in prosecutions under the Act."); *John*, 587 F.2d at 688 ("The implicit holding of *Keeble* is that * * * the Indian offender * * * may be punished for violations of lesser offenses."); *Felicia*, 495 F.2d at 355 ("*Keeble* implicitly recognized that federal courts have jurisdiction to convict and punish for a lesser offense."); *United States* v. *Bowman*, 679 F.2d 798, 799 (9th Cir. 1982) ("[T]he Supreme Court implic-

itly resolved the jurisdictional question * * * when it decided *Keeble*."), cert. denied, 459 U.S. 1210 (1983). It is unlikely that the Tenth Circuit's analysis would prompt any of those courts—let alone all of them—to revisit an issue that, in those courts' views, this Court has already settled.

2. In any event, in the absence of any dispute that the decisions below conflict with at least the Ninth Circuit's decision in *United States* v. *Bowman*, *supra*, see Pet. 17, Hopson's arguments concern only the circuit conflict's scope, not its existence. And respondents' other arguments for denying certiorari (Hopson Br. in Opp. 7-13, 21-23; Johnston Br. in Opp. 13-14) lack merit.

Hopson errs in contending (Br. in Opp. 7-10) that the question presented arises too infrequently to warrant this Court's review. The question presented has generated a 1-4 circuit conflict and has come up in two Tenth Circuit cases (Hopson's and Johnston's) in quick succession. Hopson emphasizes (*id.* at 23) the age of the decisions that have rejected respondents' position, but Hopson's own citations (*id.* at 8 n.1) show that courts continue to apply those precedents and to convict Major Crimes Act defendants of lesser included offenses. Though Hopson asserts (Br. in Opp. 8) that he has found only 15 cases (other than respondents') in Westlaw from "the last 20 years" that present the issue, cases presenting the issue (long settled in other circuits) will not necessarily generate reported decisions.

Respondents also have little to say about how the question presented has taken on added significance after *McGirt* v. *Oklahoma*, 591 U.S. 894 (2020), under which "about 43% of Oklahoma—including Tulsa—is now considered Indian country." *Oklahoma* v. *Castro-Huerta*, 597 U.S. 629, 647 (2022). They would force tribes to shoulder the burden of a second, tribal, prose-

cution of a defendant who has already been found guilty by a federal jury under the procedure dictated by *Keeble*. Hopson Br. in Opp. 10-13, 22-23; Johnston Br. in Opp. 13-14. But that burden on the tribes is unjustified, wastes resources, and forces vulnerable victims to relive their traumatic experiences. Respondents' position also overlooks the risk that the statute of limitations for a tribal prosecution may run by the time the federal prosecution concludes. And it ignores the reality that the Tenth Circuit's approach will often prompt the federal government to forgo prosecution altogether, lest it result in a compromise verdict that (unbeknownst to the jury) leads nowhere.

C. These Cases Would Be Suitable Vehicles For Resolving The Question Presented

Respondents object (Hopson Br. in Opp. 23-26; Johnston Br. in Opp. 7-13) that these cases would be poor vehicles for resolving the question presented. Those objections lack merit.

1. Contrary to Hopson's contention (Br. in Opp. 23-24), it makes no difference that the government has changed its position on whether respondents' argument concerns subject-matter jurisdiction. See Pet. 19 n.*. Nothing in the government's or respondents' arguments turns on whether the question presented—whether a Major Crimes Act defendant is entitled both to a lesser-included-offense instruction and to complete acquittal if the jury finds him guilty of that offense—is classified as a question of subject-matter jurisdiction.

Although the court of appeals concluded that district courts' authority to enter convictions for simple assault under the Major Crimes Act and *Keeble* should be classified that way, see Pet. App. 11a-13a, the substance of its analysis of the Act and *Keeble* did not rely in any way

on that conclusion, see *id.* at 20a-23a. Whether the issue is jurisdictional would affect whether it is subject to waiver and forfeiture, see *Wilkins* v. *United States*, 598 U.S. 152, 157 (2023), but the government does not contend that respondents have waived or forfeited their claims that they may not be convicted of simple assault. In "situations like this," where "nothing in the analysis" turns on the classification of an issue as jurisdictional, the Court may "proceed to address" the issue on its merits. *Morrison* v. *National Australia Bank Ltd.*, 561 U.S. 247, 254 (2010).

At a minimum, the jurisdictional character of the issue does not affect Johnston's case. By the time the Tenth Circuit considered Johnston's case, the government had already made clear—in a rehearing petition in Hopson's case—that, in its view, respondents' arguments do not concern subject-matter jurisdiction. See Pet. 19 n.*. Johnston faults (Br. in Opp. 11) the government for not renewing that point in his case. But because the Tenth Circuit had already decided the issue in Hopson's case, Pet. App. 11a, and the government's rehearing petition had notified the court of the government's position, renewing the point would have been purposeless and was not required for preservation. See, *e.g.*, *United States* v. *Williams*, 504 U.S. 36, 44 (1992)

2. Respondents also err in suggesting that slight differences between their cases make one or the other a poor vehicle for review. At most, any differences counsel in favor of granting both together. For example, contrary to Hopson's suggestion (Br. in Opp. 25), the fact that he simply took advantage of a codefendant's request for a lesser-included-offense instruction, while Johnston asked for one himself, is not a reason to grant Hopson special leniency. Even assuming *arguendo* that the two scenarios were materially different, granting

review of both cases would allow the Court to resolve both at once.

Similarly, contrary to Johnston's suggestion (Br. in Opp. 7-13), it makes no difference that Johnston's case involves a non-Indian victim while Hopson's involves an Indian victim. The Major Crimes Act requires that the defendant be an "Indian," but the target of the crime may be "the person or property of another Indian *or* other person." 18 U.S.C. 1153 (emphasis added). Johnston does not deny that a conviction for simple assault in his case would have been entered under the Major Crimes Act, rather than the General Crimes Act; if he thought otherwise, he would have had no basis to oppose his conviction for that crime. The possibility that he could have been (but was not) charged and tried under the General Crimes Act, 18 U.S.C. 1152, is accordingly irrelevant to the resolution of his case.

3. Finally, Hopson errs in arguing (Br. in Opp. 26) that the government's suggestion that the Court could revisit *Keeble* (Pet. 15-16) invites this Court to issue an advisory opinion. These cases present the question whether a Major Crimes Act defendant is simultaneously entitled both to a lesser-included-offense instruction and to complete acquittal if the jury finds him guilty of that offense. Pet. I. The Court could answer that question by holding that the defendant is not entitled to acquittal and reversing the Tenth Circuit's judgments. But it could also answer that question by overruling *Keeble*, holding that the defendant is not entitled to the lesser-included-offense instruction in the first place, and affirming the Tenth Circuit's judgments on a rationale different from the Tenth Circuit's. Because overruling *Keeble* would be part of that rationale for affirmance, it would not be advisory, even though the government would lack the ability to retry respondents.

Moreover, taken to its logical conclusion, Hopson's argument would mean that this Court could *never* revisit *Keeble*. He identifies no procedural posture in which the Court could do so, and none is apparent. *Keeble*'s correctness is a moot point in any case where a defendant is convicted of the greater offense. And in any case where he is found guilty of the lesser offense, whether or not a conviction is entered in accordance with that verdict, the defendant could argue, as Hopson does here, that overruling *Keeble* would be advisory. A vehicle argument that, in effect, forever insulates a precedent from reexamination is no vehicle argument at all.

* * * * *

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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