No. 21-258

In The Supreme Court of the United States

STATE OF OKLAHOMA,

Petitioner,

v.

DONTA KEITH DAVIS,

Respondent.

On Petition For A Writ Of Certiorari To The Oklahoma Court Of Criminal Appeals

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether *McGirt v. Oklahoma*, 140 S.Ct. 2452 (2020), should be summarily overruled.

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

INTRODUCTION

The *certiorari* petition filed by the State of Oklahoma is but one of a barrage of similar petitions asking this Court to overrule its statutory decision in *McGirt v. Oklahoma*, 140 S.Ct. 2452, 207 L.Ed.2d 985 (2020). The same question has been raised in, inter alia, *Oklahoma v. Jordan Batice Mitchell*, No. 21-274, *Oklahoma v. Johnny Edward Mize*, No. 21-274, *Oklahoma v. Robert William Perry II*, No. 21-320, *Oklahoma v. Arnold Dean Howell*, No. 21-259, *Oklahoma v. Christopher Jason Hathcoat*, No. 21-253 and *Oklahoma v. Castro-Huerta*, No. 21-429. For the reasons stated below, this petition should be consolidated with all other petitions filed by the State of Oklahoma seeking to overturn *McGirt* and summarily denied.

STATEMENT OF THE CASE

In August 2015 Respondent Donta Keith Davis, a citizen of the Muscogee (Creek) Nation,[1] was charged in the Tulsa County District Court with an alleged crime committed within the historic boundaries of the Muscogee reservation. (Okla. Dist. Ct., Tulsa Cnty., May 18th, 2018).[2] (Resp. App. 4a-10a).

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[1] The Tribe has recently chosen to be known simply as the Muscogee Nation.

[2] References to Oklahoma District Court Filings are to Tulsa County Case Number CF-2018-1994, available at http://ocisweb/applications/ocisweb/GetCaseInformation.asp?submitted=true&viewtype=caseGeneral&casemasterID=3153722&db=Tulsa.

In August 2017, the Tenth Circuit applied *Solem v. Bartlett*, 465 U.S. 463 (1984), to hold that the Muscogee Reservation endured, having been established by treaty and having never been disestablished by Congress. *Murphy v. Royal*, 875 F.3d 896, 966 (10th Cir. 2017). Oklahoma nonetheless maintained its prosecution of Respondent, convicting him in April 2019.

While his appeal was pending, Respondent advised the Tulsa County District Court of his tribal status. "Letter from Defendant" (Okla. Dist. Ct., Tulsa Cnty. August 3rd, 2020). (Resp. App. 1-3). In October 2020 the Oklahoma Court of Criminal Appeals ("OCCA") remanded to the district court for an evidentiary hearing as to Respondent's Indian status and whether the alleged crime took place within the Muscogee Reservation. (Okla. Ct. Crim. App. Dec. 7th, 2020).[3] The parties stipulated, and the district court subsequently determined, that Respondent was indeed an enrolled member of the Muscogee Creek Nation and that the alleged crime took place within the Muscogee Reservation. (Okla. Dist. Ct., Tulsa Cnty. Nov. 12, 2020) (Resp. App. 3a-9a). Based on these stipulations, Oklahoma *did not argue that either the District Court or OCCA should deny relief*.

On March 18th, 2021, the OCCA vacated Respondent's Conviction. (Pet.App. a1-a9). On December 8th, 2020, Respondent was indicted in the U.S. District

[3] References to filings in the Oklahoma Court of Criminal appeals are to Case No. F-2018-78, available at http://ocisweb/applications/ocisweb/GetCaseInformation.asp?submitted=true&viewtype=caseGeneral&casemasterID=126410&db=Appellate.

Court for the Northern District of Oklahoma (Tulsa) in case number #: 4:20-cr-00316-CVE, which is still pending with jury trial scheduled for November 15, 2021. (Resp. App. 14-27). On August 16, 2021, more than eight months after the federal indictment, Oklahoma filed its Petition for a Writ of *Certiorari*.[4]

REASONS FOR DENYING THE PETITION

Oklahoma's quest to overturn this Court's statutory interpretation in *McGirt* is unwise, unlawful and unseemly, and does not warrant *certiorari* review.

McGirt Was Correctly Decided[5]

Black letter Indian law provides that States have criminal jurisdiction over 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 v. Lee*, 358 U.S. 217, 79 S.Ct. 2693, ___ L.Ed.2d 251 (1959). This Court's historic preemption analysis, "gives effect to the *plenary and exclusive* power of the Federal Government to deal with Indian tribes" and "regulate and protect the Indians and the property against interference." *Bryan v.*

[4] Respondent's federal case is set for trial on November 15, 2021. (Resp. App. 27).

[5] A substantial portion of the arguments herein asserted are incorporated, with gratitude, from the Respondent's Brief in Opposition in *Oklahoma v. Mize*, No. 21-274.

Itasca Cnty., 426 U.S. 373, 376 n.2 (1976) (*emphasis* added); *accord Roth v. State*, 2021 OK CR 27, ¶ 14, ___ P.3d ___.

At the mid-point of the 20th Century, Congress gave Oklahoma and other States the option to assume state-wide criminal 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. Pointedly, Oklahoma took no action and made no effort to comply with Public Law 280, thereby forfeiting its one and only opportunity to assert criminal jurisdiction over Indian country.

Having missed the boat per Public Law 280, Oklahoma continues to lack subject matter jurisdiction over crimes by Indians and against Indians in Indian country. "[T]he Constitution grants Congress broad general power to legislate in respect to Indian tribes, powers that [the Court has] consistently described as '*plenary and exclusive*.'" *United States v. Lara*, 541 U.S. 193, 200, 124 S.Ct. 1628, 158 L.Ed.2d 420 (2004) (quoting *Washington v. Confederated Bands & Tribes of the Yakima Nation*, 439 U.S. 463, 470-71, 99 S.Ct. 740, 58 L.Ed.2d 740 (1979)) (*emphasis* added). Congressionally recognized Indian tribes exist as "domestic dependent nations," with a direct and exclusive relationship to the federal government. *Cherokee Nation v. Georgia*, 30 U.S. 5 Pet. 1, 17, 8 L.Ed. 25 (1831).

Both the text and context of the General Crimes Act confirm that States lack criminal jurisdiction in

Indian country. The Act "extend[s]" federal criminal jurisdiction to "Indian country" by applying the federal laws to "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.

McGirt notwithstanding, Oklahoma now claims that "the Court's modern precedents demonstrate that" state jurisdiction broadly extends to "interactions between non-Indians and Indians." *Castro-Huerta* Pet. 15-16. However, the cited cases mostly concern tax collection. None of the cited cases concern criminal jurisdiction.[6]

Alternatively, Oklahoma urges the application of balancing test to replace *McGirt*'s statutory analysis. *Castro-Huerta* Pet. 15. Respondent maintains that the statutes govern, but that disagreement scarcely matters: When *Bracker* balances "state, federal and tribal interests," it does not undertake an *ad hoc* weighing of policy arguments. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144-45 (1980). Rather, Indian law is guided by "the language of the relevant federal treaties and statutes." *Id*. Here, Congress in the

[6] Oklahoma also cites *New York ex rel. Cutler v. Dibble*, 62 U.S. (21 How.) 366 (1858). But *Dibble* upheld a civil ejectment statute for the removal of non-Indians from Indian lands, clearly not a criminal statute. *Id.* at 371.

General Crimes Act: 1) treated Indian country as "within the sole and exclusive jurisdiction of the United States"; 2) enacted that language with the clear understanding that it provided the full measure of criminal jurisdiction in Indian country; 3) re-enacted it after this Court affirmed that federal jurisdiction is exclusive; and 4) enacted myriad statutes conferring jurisdiction over crimes "by or against Indians." Such actions by the Congress would be pointless if States already have such jurisdiction.

Oklahoma's core *Bracker* argument – that concurrent jurisdiction would "enhanc[e] the protection of Indians from the crimes of non-Indians," *Castro-Huerta* Pet. 16 – is flawed, *even as a policy argument*.[7] The critical point, however, is this: The relevant Congresses did not share Oklahoma's policy judgment. Instead, the Congress shared the understanding of *Donnelly v. United States*, 228 U.S. 243, 33 S.Ct. 449, 57 L.Ed. 820 (1913): that "Indian tribes are the wards of the Nation" (*i.e.*, the federal government). *Donnelly* reflected countless treaties embedding the same rule. Apropos, the federal government promised that it and it alone would "protect the Creeks . . . from aggression by . . . white persons, not subject to their jurisdiction," even as it vowed that "no State . . . shall ever pass laws for

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[7] One need not return to the early 20th Century to discover that Oklahoma has been notoriously derelict in protecting Indians in Indian country, *even where they have exercised jurisdiction*. *E.g.*, Matthew L.M. Fletcher, "Addressing the Epidemic of Domestic Violence in Indian Country by Restoring Tribal Sovereignty", *Am. Const. Soc'y* (Mar. 2009), https://bit.ly/2ZyNdwT.

the government of the Creek" reservation. Treaty with the Creeks, Aug. 7, 1856, Arts. 4, 18, 11 Stat. 699.

Oklahoma cannot override this judgment by merely asserting that state prosecutions are wise or good or otherwise desirable. Indeed, the entire premise of its "pragmatic" argument is that if Oklahoma is allowed to prosecute non-Indians committing crimes in Indian country, the federal government can happily shirk its duties under the law. While the Congress has the power to alter the extent of Indian country, it has chosen not to do so, and Oklahoma is left to honor the plenary and exclusive determinations of the Congress as fully, consistently and properly recognized in *McGirt*.

Convenient Anecdotes Are No Substitute for Making A Record For Appellate Review

In the case at bar the State stipulated that: 1) the Respondent is a member of an Indian tribe; and 2) that the offense occurred within the historic boundaries of the Muscogee Reservation. At no point during the litigation below did the State argue that these two stipulated facts were insufficient to invoke exclusive federal jurisdiction over the Respondent's alleged crime. Nor did the State at any time during the litigation in Oklahoma claim that *McGirt* was wrongly decided or subject to "balancing" against evolving circumstances in Oklahoma. (Resp. App. 4-13).

In cases from state courts, this Court reviews only questions "pressed or passed on below." *Illinois v.*

Gates, 462 U.S. 213, 219-20, 222 (1983). This remains true even when litigants argue that a "well-settled federal" rule "should be modified." *Id.* at 222. "[C]hief among" the considerations supporting that practice "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 well illustrates the critical need for such a rule: Oklahoma seeks *McGirt*'s demise based on claims of "disruption," *Castro-Huerta* Pet. 3-4, but because Oklahoma did not raise its argument below, the record contains no evidence to support these bare claims.

Under Oklahoma criminal procedures, the State had the right to appeal the District Court's November 12, 2020, order dismissing the Oklahoma prosecution to the Court of Criminal Appeals with a request for a remanded evidentiary hearing for the purpose of *proving* any adverse consequences of *McGirt*. Rule 3.11(B)(3)(b) *Rules of the Court of Criminal Appeals*, Title 22, Ch. 18, App. (2019). On that record, OCCA would have issued an opinion subject to *certiorari* review in this Court with a proper record for review. Instead, the State sat on its rights and allowed the time for filing such an appeal to lapse. Seven months after defaulting its direct appeal rights the State has opted for a "Hail Mary" to this Court.

In short, the State had the opportunity to dispute the application of *McGirt* to this case and to make a record of any facts it chose. It waived that opportunity and now turns to this Court as a means to cry "foul" after the fact.

The "Parade Of Horribles" Conjured By The State In The Wake Of *McGirt* Are Nowhere To Be Found[8]

Oklahoma, without proffering any evidence, makes outlandish, alarmist, and unsubstantiated claims that the state has reverted to the "Wild West" of the silver screen: devoid of law and order, with "chaos affecting every corner of daily life in Oklahoma." Pet. 6. This is nothing more or less than fear mongering. With the advent of the decision in *State ex rel. Matloff v. Wallace*, 2021 OK CR 21 (Aug. 12, 2021), the Oklahoma Court of Criminal Appeals is "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. Nonetheless, although *Matloff v. Wallace* drastically reduced the potential number of cases affected by the *McGirt* decision, Oklahoma engages in an Olympian leap of logic to assert that the "immediate and disruptive" effect of the decision has "rippled through every aspect of life in Oklahoma." Pet. 6-7. Yet when the layers of hyperbole are stripped away, the only "harm" being done to the citizens of Oklahoma is that presently pending and future crimes that fall under the Major Crimes Act, 18 U.S.C.A. § 1153, will be prosecuted in a court with actual subject matter jurisdiction. There has been no sweeping (or even localized) pandemonium, nor has

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[8] A substantial portion of facts asserted is incorporated, with gratitude, from the Brief for *Amicus Curiae* Muscogee (Creek) Nation in Support of Respondent, in *Oklahoma v. Mize*, No. 2021-274.

there been a mass exodus of criminal defendants from custody and/or prosecution.

Without missing a beat, the federal government has secured indictments in hundreds of new cases.[9] Oklahoma's unsupported claims to the contrary, *Castro-Huerta* Pet. 20, these prosecutions are not limited to cases involving serious bodily injury.[10] Rather, to ensure that new cases are fully investigated and prosecuted, the Tribes generally, and the Muscogee Nation in particular, have poured resources into their court systems so as to meet the need.

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[9] *See, e.g.*, *Federal Grand Jury Indictments Announced*, U.S. Attorney's Office (Sept. 10, 2021), https://www.justice.gov/usao-ndok/pr/federal-grand-jury-indictments-announced-september; *United States Attorney's Office For The Eastern District Of Oklahoma Obtains Eighty-Two Indictments From Federal Grand Jury*, U.S. Attorney's Office (May 17, 2021), https://www.justice.gov/usao-edok/pr/united-states-attorneys-office-eastern-district-oklahoma-obtains-eighty-two-indictments ("*Eighty-Two Indictments*"); *Eastern District Of Oklahoma Federal Grand Jury Hands Down Record Number Of Indictments*, U.S. Attorney's Office (Apr. 22, 2021), https://www.justice.gov/usao-edok/pr/united-states-attorneys-office-eastern-district-oklahoma-obtains-eighty-two-indictments.

[10] *See, e.g.*, *Eighty-Two Indictments*, *supra* note 19 (arson, burglary); *Tulsa Resident Pleads Guilty To Robbery In Indian Country*, U.S. Attorney's Office (Sept. 9, 2021), https://www.justice.gov/usao-edok/pr/tulsa-resident-pleads-guilty-robbery-indian-country; *Federal Grand Jury Indictments Announced*, U.S. Attorney's Office (Oct. 8, 2020), https://www.justice.gov/usao-ndok/pr/federal-grand-jury-indictments-announced-5 (possession of stolen vehicle, burglary, stalking, robbery).

At the same time, the federal government has surged criminal justice resources into eastern Oklahoma. The FBI has sent "140 Special Agents, Investigative Analysts, Victims Specialists and other professional staff to the Muskogee and Tulsa RAs" and "expanded State, local, and tribal participation on task forces . . . from 32 agencies to assist with initial response and investigative efforts." Hearing on Federal Bureau of Investigation Budget Request for Fiscal Year 2022 Before the Subcomm. on Commerce, Justice, Science and Related Agencies of the S. Comm. on Appropriations, 117th Cong. 13-14 (2021) (statement of FBI Director Wray). The United States Attorney's Offices for the Eastern and Northern Districts have hired additional prosecutors, with plans for more. *Id.* at 14. Additional Assistant United States Attorneys have been detailed from across the country to supplement this expanded staffing.[11]

The federal courts sitting in Oklahoma are likewise adding capacity. The Eastern District has designated seven judges from other districts to hear cases through at least the end of this year, General Order 21-10 (May 21, 2021), as well as additional magistrate judges, General Order 21-9 (Apr. 30, 2021). In

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[11] *See* U.S. Dep't of Justice, FY 2022 Budget Request 1-2, https://www.justice.gov/jmd/page/file/1398851/download; Acting United States Attorney For The Eastern District Of Oklahoma Issues Statement Regarding OCCA Decisions Of Hogner And Bosse, U.S. Attorney's Office (Mar. 11, 2021), https://www.justice.gov/usao-edok/pr/acting-united-states-attorney-eastern-district-oklahoma-issues-statement-regarding-occa.

the longer term, the Judicial Conference has recommended that Congress "authorize three new judgeships in the Eastern District of Oklahoma and two in the Northern District of Oklahoma." Judiciary Supplements Judgeship Request, Prioritizes Courthouse Projects, U.S. Courts (Sept. 28, 2021).[12]

The State ignores these developments, instead raising the alarm that civil trials are delayed in the Northern District due to the combined impact of COVID-19 and *McGirt*, and that the Eastern District may require some "parties in the Eastern District . . . to travel to the Western District[!]" *Castro-Huerta* Pet. 21. In context, the delay in civil trials is no different from that occurring in courthouses across the country during the pandemic, and parties can elect to proceed before a magistrate judge in the meantime. And while some parties may need to travel to Oklahoma City instead of Muskogee, the cities are just two hours apart, and for many Eastern District residents, the former is actually closer. Again, this is hardly the stuff of crisis.

Going forward, Congress has already taken steps to ensure that federal agencies have ample resources to handle post-*McGirt* caseloads. Oklahoma cites testimony from FBI Director Wray about new demands

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[12] https://www.uscourts.gov/news/2021/09/28/judiciary-supplements-judgeship-request-prioritizes-courthouse-projects; *see also 2021 Judicial Conference Recommendations*, https://www.uscourts.gov/sites/default/files/2021 judicial conference recommendations 0.pdf (recommending increases for other districts).

on the agency, *Castro-Huerta* Pet. 19-20, but does not note that in response the House Appropriations Committee voted to fully fund the Justice Department's request for additional funding for *McGirt* implementation, including for the Bureau, H.R. Rep. No. 117-97, at 63 (2021);[13] *see also* U.S. Dep't of Justice, FY 2022 Budget Request 1-2.[14] House Bill 4505, now before the full House, provides $70 million "to implement public safety measures required to comply with the *McGirt* decision," H.R. Rep. No. 117-97, at 63, including $33 million for Oklahoma's U.S. Attorney's Offices, DOJ FY 2022 Budget Request 2, and $25.5 million for the FBI, which the FBI reports "will allow [it] to effectively address the increased operational need," FBI, FY 2022 Budget Request 122.26. The Committee further directed the Department of Justice "to closely monitor the *McGirt*-related enforcement programs and provide the Committee as soon as possible an estimate of [the] long-term costs of sustaining those programs." H.R. Rep. No. 117-97, at 63.

Ignoring all of these positive actions, Oklahoma resorts to anecdotes to portray the State's supposed state of chaos. It cites a claim by an emergency response dispatcher that "callers to 911 are now asked if they are members of a federally recognized tribe," and that if so, they "are transferred to the Creek Nation," where they are purportedly sometimes put on hold! *Castro-Huerta* Pet. 21-22. Nothing in *McGirt* sanctions

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[13] https://www.congress.gov/117/crpt/hrpt97/CRPT-117hrpt97.pdf.

[14] *Supra*, note 12.

such behavior, and the Mayor of Okmulgee (the town that serves as the capital of the Muscogee Nation, and which lies in the heart of the Reservation) has rightly denounced it.[15] Moreover, the Muscogee Nation has and continues to substantially increase its emergency response capabilities. There is no cognizable basis for the State's suggestion that calls to the Nation's dispatch center are answered other than immediately. The State's fervor to overturn *McGirt* does not justify arguments grounded in lawlessness.[16]

In *McGirt*, as now, "Oklahoma warn[ed] of the burdens" the federal government and Tribes "will experience with a wider jurisdiction and increased caseload." But as this Court observed,

> . . . for every jurisdictional reaction there seems to be an opposite reaction: recognizing that cases like Mr. McGirt's belong in federal court simultaneously takes them out of state court. So, while the federal prosecutors might be initially understaffed and Oklahoma prosecutors initially overstaffed, it doesn't take a lot of imagination to see how things could work out in the end.

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[15] Tres Savage, *Okmulgee Mayor Richard Larabee emphasizes cooperation with Muscogee Nation*, NONDOC (Aug. 24, 2021), https://nondoc.com/2021/08/24/okmulgee-mayor-richard-larabee/.

[16] If emergency response dispatchers are being directed (either by State or county dispatchers) to decline emergency assistance based on tribal citizenship, that is patent discrimination in violation of the law. Title 21, Oklahoma Statutes, Section 21-1211.1(2014).

McGirt, 140 S.Ct. at 2480. And indeed things are working out. In the words of Choctaw Nation Chief Gary Batton, "The sky is not falling. There's not a person who has been released who has not gone through our court system or who has not been prosecuted for the crime that has been done. We are responsible. We are stepping up."[17]

The State's parade of horribles is nothing new, and was in fact a feature of the State's *McGirt* briefing. *McGirt*, No. 18-9526, Brief of the Respondent, at pages 43-45. *McGirt* specifically rejected Oklahoma's substitution of "stories for statutes." *Id*. at 2470. Oklahoma is now recycling the same stories as if they were facts. And even if Oklahoma could establish even a fraction of the falling skies it touts, this Court has repeatedly and properly required that justice, not convenience, will rule the day.[18]

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[17] FIVE TRIBES DISCUSS *MCGIRT* IMPACTS, COVID VACCINATION EFFORTS. 2021, http://chickasawtimes.net/Online-Articles/Five-Tribes-discuss-McGirt-impacts,-COVID-vaccination-efforts.aspx.

[18] "After *Booker v. United States* held that the Federal Sentencing Guidelines must be advisory rather than mandatory, this Court vacated and remanded nearly 800 decisions to the courts of appeals. Similar consequences likely followed when *Crawford v. Washington* overturned prior interpretations of the Confrontation Clause or *Arizona v. Gant* changed the law for searches incident to arrests." *Ramos v. Louisiana*, 140 S.Ct. 1390, 1406, 206 L.Ed.2d 583 (2020), *citing United States v. Booker*, 543 U.S. 220, 239, 125 S.Ct. 738, 753, 160 L.Ed.2d 621 (2005); *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004); *Arizona v. Gant*, 556 U.S. 332, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009).

If Oklahoma believes it needs additional jurisdiction, Congress can act. For example, H.R. 3091 would allow it jurisdiction over crimes "by or against Indians" within two of the Five Tribes' reservations. H.R. 3091 § 6(b)(1), 117th Cong. (introduced May 11, 2021). But it is worth noting that in May 2021, Oklahoma's governor opposed H.R. 3091, which would have allowed the State to compact with two Tribes to obtain its pre-*McGirt* criminal jurisdiction, and in July 2021, the State opposed federal-law enforcement funding because it did not desire "a permanent federal fix."[19] Any "criminal-justice crisis" will be because of a self-fulfilling prophecy, not the *McGirt* decision.

The Congress Passed These Laws And It Falls To Congress, Not The Supreme Court, To Make Changes

McGirt affirms that decisions to disestablish reservations "belong to Congress alone," and in particular that "courts have no proper role in the adjustment of reservation borders." 140 S.Ct. at 2462. Rather than accepting this separation of federal powers, Oklahoma is attempting to stiff-arm the duly elected Congressional representatives in order to prevent the Congress from doing that which the Constitution empowers them alone to do. Adherence to precedent is "a foundation stone of the rule of law." *Michigan v. Bay Mills*

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[19] Gorman, Reese, *NormanTranscript.Com*, 2021, https://www.normantranscript.com/news/cole-encourages-state-tribal-relations-over-state-challenges-to-mcgirt/article_e15e2378-eb4b-11eb-80f4-c39595196dbb.html.

Indian Community, 572 U.S. 782, 798, 134 S.Ct. 2024, 188 L.Ed.2d 1071 (2014). "[I]t promotes the even-handed, 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, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991). Though *stare decisis* is "not an inexorable command." *Id.*, at 828, 111 S.Ct. 2597, any departure from the doctrine demands "special justification" – something more than "an argument that the precedent was wrongly decided." *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 266, 134 S.Ct. 2398, 189 L.Ed.2d 339 (2014).

"[*S*]*tare decisis* has 'special force' 'in respect to statutory interpretation' because 'Congress remains free to alter what [this Court has] done.' " *Halliburton*, 573 U.S. 258, 274 (2014) (quoting *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 139 (2008)). This is particularly so given the primacy accorded Congress in Indian affairs. *See Michigan v. Bay Mills Indian Cmty.*, *supra*, 572 U.S. 782, 799 (2014) ("Congress exercises primary authority in this area and 'remains free to alter what we have done' – another factor that gives 'special force' to *stare decisis*.").

The proper allocation of jurisdiction for these cases (which, again, are those that were not decided pre-*McGirt*) between the federal government, the State, and Tribes is the responsibility of Congress, not this Court, and certainly not the State of Oklahoma. This Court declines to overrule matters based on principles of *stare decisis* when the relief is meant to come "not

from this Court but from Congress." *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 449, 135 S.Ct. 2401, 2405, 192 L.Ed.2d 463 (2015). ("In a constitutional case, only we can correct our error. But that is not so here. Our deference decisions are 'balls tossed into Congress's court, for acceptance or not as that branch elects.'" *Id.* 576 U.S., at 456, 135 S.Ct., at 2409, *cited in Kisor v. Wilkie*, 139 S.Ct. 2400, 2422-23, 204 L.Ed.2d 841 (2019).

"[T]ribes retain all aspects of sovereignty they enjoyed as independent nations . . . with three exceptions." *Las Vegas Tribe of Paiute Indians v. Phebus*, 5 F. Supp. 3d 1221, 1227-28 (D. Nev. 2014). The third of these is that "Congress may strip a tribe of any other aspect of sovereignty at its pleasure." *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 208, 98 S.Ct. 1011, 55 L.Ed.2d 209 (1978), superseded on other grounds by 25 U.S.C. § 1301(2), (4) (1990). "[A]ll aspects of sovereignty consistent with the tribes' dependent status, and which have not been taken away by Congress, *remain with the tribes*." *Las Vegas Tribe of Paiute Indian*s, 5 F. Supp. 3d at 1227-28 (*emphasis* added).

In short, Oklahoma should take its meager "criminal-justice-crisis" argument[s] to the Congress which is in a much better position than this Court to evaluate the true effect[s] of the *McGirt* decision on Oklahoma's criminal justice system. Even assuming *arguendo* that Oklahoma's protestations have some basis in fact, it is the Congress, not this Court, that is empowered to provide relief. To proceed otherwise

violates the fundamental *raison d'etre* for our system of checks and balances.

CONCLUSION

Oklahoma has a proper remedy, just not in this Court. It is the United States Congress that is vested with responsibility for assessing the State's overblown and nonexistent hardships and crafting any appropriate remedy. *McGirt* is sound, and this Court should refuse to usurp the role of Congress and deny *certiorari*.

Respectfully submitted as
of October 21, 2021

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