No. 21-429

In the Supreme Court of the United States

OKLAHOMA, PETITIONER,

v.

VICTOR MANUEL CASTRO-HUERTA

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

BRIEF FOR THE STATES OF TEXAS, KANSAS, LOUISIANA, AND NEBRASKA AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE

Amici curiae are the States of Texas, Kansas, Louisiana, and Nebraska.[1]

All States have a sovereign interest in prosecuting crimes committed within their borders. *Heath v. Alabama*, 474 U.S. 82, 93 (1985). Indeed, administering a criminal justice system is "among the basic sovereign prerogatives States retain." *Oregon v. Ice*, 555 U.S. 160, 168 (2009).

As Oklahoma's experience in this case shows, that core sovereign function is in jeopardy in States with former Indian reservations.[2] The Court's decision in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), raised the prospect that reservations long regarded by all as diminished or disestablished still qualify as "Indian country" under federal law. Oklahoma state courts have since confirmed that, under *McGirt*, that is the case for the historical territories of the Five Tribes of Oklahoma, which collectively comprise around 43% of the State. The immediate result was to oust Oklahoma's jurisdiction in those areas to prosecute Indians for crimes listed in the Major Crimes Act, including murder, kidnapping, and felony child abuse. 18 U.S.C. § 1153. In the decision below, the Oklahoma Court of Criminal Appeals extended

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[1] No counsel for any party authored this brief, in whole or in part. No person or entity other than amici contributed monetarily to its preparation or submission. On October 5, 2021, counsel of record for all parties received notice of amici's intention to file this brief.

[2] We use the terms "Indian" and "non-Indian" to be consistent with federal statutes and caselaw. And unless context requires otherwise, the term "Indian" in this brief subsumes such terms as "Native American," "American Indian," "Alaska Native," and any combinations of these terms.

McGirt's holding to the General Crimes Act, *id.* § 1152, depriving Oklahoma of authority to prosecute non-Indians for all crimes committed against Indians in the same broad swathe of the State. PetApp. 4a, 36a–38a.

The fallout from *McGirt* and the decision below is a criminal-justice crisis in Oklahoma. As Oklahoma recounts in its petition (at 18–23), thousands of criminal defendants are seeking dismissal of their cases, federal prosecutors and courts are overwhelmed, and an unknown number of crimes are going unprosecuted.

No State wants to reprise Oklahoma's experience, even on a smaller scale. Accordingly, the amici States are interested in seeing *McGirt* overruled and returning to the Court's pre-*McGirt* precedent on disestablishing Indian reservations. That precedent appropriately accounted for contemporaneous and subsequent understandings of a reservation's status—understandings that, among other things, have fixed expectations about the boundaries of federal, state, and tribal criminal jurisdiction, which in turn have shaped States' criminal-justice systems. At a minimum, the Court should reverse the Court of Criminal Appeals' erroneous expansion of *McGirt*, which if followed would deprive States of an important and necessary role in prosecuting non-Indians who victimize Indians.

SUMMARY OF ARGUMENT

I. One attribute of state sovereignty is the States' authority to prosecute non-Indians who commit alleged criminal offenses against Indians in the Indian country that lies within their borders. The decision below incorrectly held that the General Crimes Act deprives them of that authority. Only by reversing that decision and recognizing States' inherent criminal jurisdiction over non-Indians in Indian country can States be

empowered to combat the violent victimization of Indians on tribal lands. Otherwise, the acute problem of non-Indians perpetrating crimes against Indians on tribal lands will only worsen.

II. The Court also should overrule *McGirt*. That decision disregarded the Court's longstanding precedent on determining whether an Indian reservation had been disestablished or diminished. For decades, the Court approached that issue by analyzing not only the relevant statutes but also the contemporaneous understanding of those statutes, the historical context surrounding their passage, and the subsequent understanding of a reservation's status and how its lands were settled. In *McGirt*, the Court held that examining the statutory text is the only proper inquiry and that extratextual sources of meaning may be consulted only to construe an ambiguity in that text.

That revision of the Court's approach to reservation disestablishment should be reconsidered. *McGirt* incorrectly presumed that Congress historically has used a limited array of words to change a reservation's status. In fact, statutes that alienated tribal title around the turn of the century were inherently ambiguous as to their effect on a reservation. That inherent ambiguity is precisely why the Court previously relied on extratextual factors to discern congressional intent in this area. The Court should overrule *McGirt* and return to that regime.

Stare decisis does not require adherence to *McGirt*. All the factors that the Court considers in deciding whether to overrule past decisions weigh against *McGirt*. And *McGirt* is not due any extra deference as a decision interpreting statutes. *McGirt* ultimately rests on a change in the Court's own rules about resolving the question of reservation disestablishment, making it ripe

for reconsideration under the Court's stare decisis precedent.

ARGUMENT

I. States Exercising Their Inherent Criminal Jurisdiction Will Help Stanch the Victimization of Indians by Non-Indians in Indian Country.

The amici States agree with Oklahoma that an attribute of state sovereignty is the authority to prosecute non-Indians who commit alleged criminal offenses against Indians in the Indian country that lies within a State's borders. Pet. 15–19. And the amici States further agree that nothing in the language of the General Crimes Act, 18 U.S.C. § 1152, strips away that authority. Pet. 16–17.

Recognizing the States' inherent criminal jurisdiction over non-Indians in Indian country will help States combat the appalling problem of the violent victimization of Indians on tribal lands. Not doing so will only worsen the victimization.

A. Overall victimization rates of Indians are high.

1. The high numbers of violent victimization of Indians are striking. Compared to members of other demographic groups, Indians suffer proportionally more violent victimizations and are more likely to report their attackers as belonging to a different demographic group from their own. Steven W. Perry, *American Indians and Crime, 1992-2002*, Bureau of Just. Stats., U.S. Dep't of Just. iii (2004), https://tinyurl.com/7xeaxv44; Dominga Cruz et al., *The Oklahoma Decision Reveals Why Native Americans Have a Hard Time Seeking Justice*, Wash. Post, July 22, 2020, https://tinyurl.com/vshkfw3x. Making matters worse, Indian women across the country are murdered and sexually assaulted on reservations and

nearby towns at far higher rates than other American women. Garet Bleir & Ana Zoledziowski, *Murdered and Missing Native American Women Challenge Police and Courts*, Ctr. for Pub. Integrity (2018), https://tinyurl.com/5fzzwv9n. The Center for Disease Control and Prevention has reported that murder is the third-leading cause of death among Indian women and that rates of violence on reservations can be up to ten times higher than the national average. Urban Indian Health Inst., Seattle Indian Health Bd., *Missing and Murdered Indigenous Women & Girls* 2 (2018), https://tinyurl.com/5e7wem4y.

A statistical study of the years 1992-2002 by the Bureau of Justice Statistics of the Department of Justice reveals several additional disturbing findings. To begin, Indians experienced a per capita rate of violence twice that of the U.S. resident population. Perry, *Indians and Crime*, *supra*, at iv. The violent crime rate in every age group below age 35 was significantly higher for Indians than for all persons. *Id.* Among Indians 25 to 34 years' old, the rate of violent crime victimizations was more than 2½ times the rate for all persons the same age. *Id.*

Rates of violent victimization for both males and females were higher for Indians than for all races. *Id.* at v. The rate of violent victimization among Indian women was more than double that among all women. *Id.* Offenders who were strangers to the victims committed most robberies (71%) against Indians. *Id.* Indians were more likely to be victims of physical assault, rape, and sexual assault committed by a stranger or acquaintance as opposed to an intimate partner or family member. *Id.* Approximately 60% of Indian victims of violence—about the same percentage as of all victims of violence—described the offender as White. *Id.*

2. The National Crime Victimization Survey (NCVS) for 1992 to 2001 indicated that Indians accounted for an average of about 1.3% of all violent victimizations annually. *Id.* at 4. The figure is statistically significant because, in 2000, 0.9% of the U.S. population, or 2.5 million people identified as American Indian or Alaska Native alone, while 1.5% of the U.S. population, or 4.1 million people, identified as American Indian or Alaska Native alone or in combination with another race. *The American Indian Population: 2000*, U.S. Census Bureau, Rep. No. MSO/01-AI/AN (Sept. 2001), https://tinyurl.com/4nfskurd.

The NCVS also reflects that the annual average violent crime rate among Indians from 1992 to 2001 (101 per 1,000 persons ages 12 or older) was about 2½ times the national rate (41 per 1,000 persons). Perry, *Indians and Crime*, *supra*, at 4. The annual average violent crime rate among Indians was twice as high as that of African Americans (50 per 1,000 persons), 2½ times higher than that for Whites (41 per 1,000 persons), and 4½ times that for Asians (22 per 1,000 persons). *Id.* at 5.

For types of violent crimes from 1992 to 2001, Indians aged 12 or older were twice as likely to experience a rape or sexual assault (5 per 1,000) compared to all races (2 per 1,000). *Id.* And Indians (8 per 1,000) experienced robberies at double the rate for Whites (4 per 1,000) but at a more similar rate for African Americans (10 per 1,000). *Id.*

From 1992 to 2001, the yearly average violent crime rates were 49 per 1,000 males aged 12 or older and 35 per 1,000 females. *Id.* at 7. The violent crime rate among Indian males was 118 per 1,000, more than double the overall rate. *Id.* The rate of violent crime victimization among Indian females (86 per 1,000) was 2½ times the rate for

all females. *Id.* The victimization rate among Indian females was much higher than that found among African American females (46 per 1,000 age 12 or older), about 2½ times higher than that among White females, and 5 times that of Asian females. *Id.*

For Indian victims of violence, strangers committed 42% of the violent crimes against Indians during the 1992–2001 period. *Id.* at 8. In 66% of the violent crimes in which the race of the offender was reported, Indian victims indicated the offender was either White or Black. *Id.* at 9. Nearly 4 in 5 Indian victims of rape or sexual assault described the offender as White. About 3 in 5 Indian victims of robbery (57%), aggravated assault (58%), and simple assault (55%) described the offender as White. *Id.* The offender was described as Black for approximately 1 in 10 incidents of rapes or sexual assaults (8%), aggravated assaults (10%), and simple assault (9%), and about 2 in 5 robberies (17%) against Indian victims. *Id.*

3. The Uniform Crime Reporting program of the Federal Bureau of Investigation (FBI) sheds further light on the extent of violent victimizations of Indians. From 1976 to 2001, about 144 Indians on average were murdered each year. *Id.* at 12. Indians represented 0.7% of all murder victims nationwide, similar to their 0.9% share of the population. *Id.* During the same period, in most murder cases involving a White or African American victim, the offender was the same race as the victim. *Id.* at 14. By comparison, Indians were somewhat less likely to be murdered by an offender of their own race. *Id.* Strangers accounted for 17% of Indian murders. *Id.*

Most of the offenses investigated by U.S. attorneys in Indian country in fiscal year 2000 were violent crimes. *Id.* at 19. Just under 75% of suspects investigated in

Indian country involved a violent crime, compared to the national total of 5%. *Id.* An estimated 73% of all charges filed in U.S. district courts for Indian country offenses were for violent crimes, compared to the national total of about 5%. *Id.* at 20.

4. Another study of homicides among Indians from 1999 to 2009 found that, although overall homicide rates had declined in the United States during the previous two decades, homicide rates among males, adolescents, young adults, and non-Hispanic Indians were substantially elevated. Mose A. Herne et al., *Homicide Among American Indians/Alaska Natives, 1999-2009: Implications for Public Health Interventions*, 131 Pub. Health Rep. 597, 598 (2016), https://tinyurl.com/dw2s2yfe. Overall, the U.S. homicide rate decreased by 8% during 2007–2009 (from 6.1 per 100,000 population in 2007 to 5.5 per 100,000 population in 2009). *Id.* In 2009, homicide rates were lower for every racial and ethnic group except for Indians, whose homicide rate increased by 15% (from 7.8 per 100,000 population in 2007 to 9.0 per 100,000 population in 2009). *Id.*

The FBI's supplemental homicide reports (SHR) show 1,856 homicide victims in Alaska reported by law enforcement agencies between 1976 and 2016. Andrew Gonzalez, *Homicide in Alaska: 1976-2016*, Alaska Just. Info. Ctr., Univ. of Alaska Anchorage 8 (2020), http://hdl.handle.net/11122/11067. Indians were overrepresented in the reports. Almost a third of the victims was Indian. *Id.* Moreover, the homicide rates for Indians living on tribal lands are significantly higher than the rates for any other race or ethnic group in the country. Ronet Bachman et al., *Violence Against American Indian and Alaska Native Women and the Criminal Justice Response: What is Known*, U.S. Dep't of Just. 18 (2008)

(unpublished report), https://tinyurl.com/uv5ftvau. And Indian women who live in tribal communities have higher rates of homicide compared to the national average for Indian females. *Id.* at 24.

Take Alaska for example. Alaska residents who are American Indian or Alaska Native are killed far more often than would be expected given their overall representation in Alaska's population. *Id.* at 51. Indian victims were over-represented in Alaska homicides (30.5%) compared to their population (16.3%). *Id.* at 9, 29. Although the data shows that homicide victimization in Alaska, as it is in general, is predominantly a male phenomenon, Indian women comprise 10.2% of homicide victims and 8.1% of the population in Alaska—a 25% larger proportion of victims compared to population. *Id.* at 32, 48. For all homicide victims in Alaska, the homicide suspect was most likely of the same race. *Id.* at 9. Still, Indian female victims were killed by a White suspect 18.4% of the time. *Id.* at 9, 43.

5. Indian women, as noted, experience violent victimization at disproportionate rates. Kaci A. Clement, *The Victimization of Native American Women in the United States: The Impact and Potential Underlying Factors*, at 1 (2020) (Honors thesis, Univ. of S. Dakota), https://tinyurl.com/mc8pp2j4; *see also* Proclamation No. 10026, 85 Fed. Reg. 27,633 (May 5, 2020) (establishing Missing and Murdered American Indians and Alaska Natives Awareness Day, 2020). The National Intimate Partner and Sexual Violence Survey (NISVS) in 2010 showed that more than 4 in 5 American Indian and Alaska Native women (84.3 %) have experienced violence in their lifetime, including 56.1% who have experienced sexual violence and 48.8% who have experienced stalking. André B. Rosay, *Violence Against American Indian*

and Alaska Native Women and Men, Nat'l Inst. of Just., U.S. Dep't of Just. 2 (2016), https://tinyurl.com/bvrxyzvc. Indian women were more likely than any other racial group to report being a victim of sexual violence or stalking. Clement, *Victimization of Native American Women*, *supra*, at 7.

Overall, the NISVS showed more than 1 million Indian women experienced sexual violence in their lifetime. Rosay, *Violence Against American Indians*, *supra*, at 14. Amnesty International has found that 86% of survivors in reported sexual-violence cases involving Indian women reported that their attackers were non-Indian men. Clement, *The Victimization of Native American Women*, *supra*, at 8. According to the NISVS, Indian female victims were three times as likely to have experienced sexual violence by an interracial perpetrator as non-Hispanic White-only female victims (96% versus 32%). Rosay, *Violence Against American Indians*, *supra*, at 18.

In addition, the number of Indian women officially reported missing to authorities or that are missing but not recorded is troubling. According to the FBI, there were 85,459 active missing person's reports at the end of 2018. Clement, *Victimization of Native American Women*, *supra*, at 8. That year, 9,914 individuals who were classified as Indian were reported as missing. *Id.*; *see also Missing and Murdered Indigenous Women & Girls*, *supra*, at 2 (noting that, in 2016, there were 5,712 reports of missing Indian women and girls).

Furthermore, almost half of Indian women (48.8 percent) surveyed in the NISVS experienced stalking in their lifetime. Rosay, *Violence Against American Indians*, *supra*, at 33. They were 1.8 times more likely to have

experienced stalking in their lifetime than non-Hispanic White-only women. *Id.*

In sum, the NISVS found that more than 1.5 million Indian women had experienced violence in their lifetime. *Id.* at 2. Relative to non-Hispanic White-only women, Indian women were 1.2 times as likely to have experienced violence in their lifetime. *Id.* And relative to non-Hispanic White-only women, Indian women were also significantly more likely to have experienced violence by an interracial perpetrator and significantly less likely to have experienced violence by a perpetrator of the same race. *Id.*

6. Hate crimes are another type of victimization of Indians. Although hate crimes against Indians do not often make headlines, recent infamies have raised concerns about a possible upsurge in hate crimes against Indian communities. *See* Cecily Hilleary, *Rise in Hate Crimes Alarms Native American Communities*, Voice of Am. (June 5, 2017), https://tinyurl.com/tme972er; Bleir & Zoledziowski, *Murdered and Missing Native American Women*, *supra*. "Hate crimes" are those "that manifest evidence of prejudice based on race, gender or gender identity, religion, disability, sexual orientation, or ethnicity." Madeline Masucci & Lynn Langton, *Hate Crime Victimization, 2004-2015*, Bureau of Just. Stats., U.S. Dep't of Just. (June 2017) (quoting Hate Crimes Statistics Act of 1990, Pub. Law 101-275, 104 Stat. 140 (codified at 28 U.S.C. § 534 (note))), https://tinyurl.com/2sazst8b.

From 2011 to 2015, victims surveyed suspected that nearly half (48%) of hate-crime victimizations were motivated by racial bias. *Id.* at 2. And nearly half (46%) of violent hate-crime victimizations were committed by a stranger. *Id.* at 7. The FBI, in 2015, catalogued 4,029

single-bias hate-crime offenses[3] that were motivated by race, ethnicity, or ancestry. *Hate Crime Statistics, 2015,* Fed. Bureau of Investigation, U.S. Dep't of Just. 2 (2016), https://tinyurl.com/54a5tkzd. Of these offenses, 3.4% were motivated by anti-Indian bias, a statistically significant figure given that Indians are about 1% of the total U.S. population. *Id.* One scholar in global hate crime believes that number is too low; her studies show that only about 10% of victims report hate crimes to tribal or local police. Hilleary, *Rise in Hate Crimes*, *supra*.

B. State prosecutorial authority is needed to shore up the federal government's insufficient response to Indian victimization.

The overall picture that these statistics paint of the victimization of Indians is no doubt complicated by the jurisdictional issues that Oklahoma raises in its petition. Barring Oklahoma from prosecuting crimes committed by non-Indians against Indians on tribal lands will only make it more difficult for Indians who have been victimized to receive justice. Because non-Indians are exempt from tribal courts' criminal jurisdiction, *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 212 (1978), that leaves the federal government to prosecute non-Indians who commit crimes against Indians on tribal lands within Oklahoma, 18 U.S.C. § 1152.

The federal government generally has a poor record of prosecuting violent crimes against Indians. Federal prosecutors decline to prosecute violent crimes at high rates. A 2014 study found an overall federal declination rate of 7%. Brian D. Johnson, *The Missing Link:*

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[3] "A single-bias incident" is "an incident in which one or more offense types are motivated by the same bias." *Hate Crime Statistics, 2015*, Fed. Bureau of Investigation, U.S. Dep't of Just. 1 (2016), https://tinyurl.com/54a5tkzd.

Examining Prosecutorial Decision-Making Across Federal District Courts, Nat'l Inst. of Just., U.S. Dep't of Just. xii (2014), https://tinyurl.com/95kpba66. By contrast, in Indian country, the 2019 declination rate was 32%, excluding cases transferred to another jurisdiction for prosecution. *Indian Country Investigations and Prosecutions*, U.S. Dep't of Just. 3 (2019), https://tinyurl.com/3vcca79y. Adjusted to account for cases referred to another jurisdiction, the 2019 declination rate is like the declination rates for prior years: 39% in 2018; 37% in 2017; and 34% in 2016. *Id.*

While declination rates alone do not reflect federal officers' commitment to combating crime in Indian country and likely reflect additional systemic difficulties in Indian country regarding the criminal justice system, *id.* at 3, the disparity between the overall federal declination rate and the declination rates in Indian country is stark. Even the Department of Justice calls the relatively high declination rate for violent offenses in Indian country "troubling." *Id.* at 33.

Consequently, non-Indians who perpetrate violent crimes against Indians in Indian country may go unprosecuted and unpunished. Barring Oklahoma from prosecuting non-Indians who commit crimes against Indians on tribal lands within the State's boundaries will likely only worsen Indian victimization. This is a compelling reason for the Court to grant review of the first question presented in the petition.

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

The amici States also agree with Oklahoma that *McGirt v. Oklahoma* was incorrectly decided and should be overruled. Pet. 17. The amici States further agree that stare decisis does not bar that result. Pet. 28.

A. *McGirt* incorrectly presumed that statutes alienating Indian lands unambiguously do not disestablish reservations unless they use certain language.

McGirt departed from the Court's settled precedent on disestablishing and diminishing Indian reservations. As the Chief Justice explained in his dissent, that precedent required the Court to assess three categories of evidence to determine a reservation's status: "the relevant Acts passed by Congress; the contemporaneous understanding of those Acts and the historical context surrounding their passage; and the subsequent understanding of the status of the reservation and the pattern of settlement there." 140 S. Ct. at 2485. In *McGirt*, the Court reconfigured that inquiry. It held that Congress must "clearly express its intent" to disestablish or diminish in statutory text. *Id.* at 2463. It further held that the extratextual sources of meaning referenced in the Court's prior decisions may be consulted only to construe "an ambiguous statutory term or phrase" in that text. *Id.* at 2468.

That change in approach should be reconsidered. *McGirt* rests on the incorrect presumption that because Congress at times drew from a certain set of words "to withdraw a reservation," the absence of that language in a statute unambiguously means that Congress did not intend to change a reservation's status. *See id.* at 2462–63. As discussed below, statutes that alienated tribal title around the turn of the century without explicit disestablishment language were nonetheless inherently ambiguous as to their effect on a reservation. That inherent ambiguity is what led the Court to incorporate extratextual factors into the analysis in the first place. The Court can

return to that considered and previously settled regime by overruling *McGirt*.

1. "[O]nly Congress" can disestablish an Indian reservation or diminish its boundaries. *Solem v. Bartlett*, 465 U.S. 463, 470 (1984). The "touchstone" for determining whether Congress did so in a given case is "congressional purpose." *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998); *see also Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 615 (1977) (concluding that "[t]he intent of Congress" was to change a reservation's boundaries).

To ascertain whether Congress intended to disestablish or diminish a reservation, the Court developed a "fairly clean analytical structure." *Solem*, 465 U.S. at 470. That methodology starts with the principle that Congress must "clearly evince" its intent to change a reservation's status. *Id.* The "most probative evidence" of that intent is the "statutory language" Congress used. *Id.* But "explicit language" is "not [a] prerequisite[]" to finding disestablishment or diminishment. *Id.* at 471. The Court also considers the context in which the relevant statutes were enacted and the "contemporaneous understanding" of their effect. *Id.* That sort of evidence may support an inference that Congress intended to disestablish or diminish a reservation—even where the statutory language would suggest otherwise. *Id.* Finally, "[t]o a lesser extent," the Court looks to subsequent events such as federal and local authorities' treatment of the affected areas and the settlement that occurred there. *Id.* In short, the Court "examine[s] all the circumstances surrounding the opening of a reservation." *Hagen v. Utah*, 510 U.S. 399, 412 (1994).

Before *McGirt*, the Court repeatedly applied this analytical framework to questions regarding a

reservation's status. *See, e.g.*, *Nebraska v. Parker*, 577 U.S 481, 488–94 (2016); *Yankton Sioux*, 522 U.S. at 344–57; *Hagen*, 510 U.S. at 412–21; *Solem*, 465 U.S. at 472–80. Indeed, just five years ago, the Court unanimously described this approach as "well settled." *Parker*, 577 U.S. at 487.

2. In *McGirt*, the Court altered this framework. "To determine whether a tribe continues to hold a reservation," the Court held, "there is only one place we may look: the Acts of Congress." 140 S. Ct. at 2462. And to find that a particular statute disestablished or diminished a reservation, "it must say so." *Id.* As examples, the Court recounted a series of words and phrases that had historically satisfied the requirement that "Congress clearly express its intent" to change a reservation's status. *Id.* at 2462–63.

This strict focus on statutory text means the Court will no longer consider extratextual evidence of congressional intent "as a matter of course." *Id.* at 2469–70. Invoking "normal interpretive rules," *id.* at 2470, the Court explained that "[t]he only role such materials can properly play is to help 'clear up . . . not create' ambiguity about a statute's original meaning." *Id.* at 2469 (quoting *Milner v. Dep't of Navy*, 562 U.S. 562, 574 (2011)). And any such ambiguity must appear in a "statutory term or phrase" in the relevant act. *Id.* at 2468.

3. The flaw in *McGirt*'s new approach is that it presumes Congress intended to disestablish or diminish a reservation only when it used certain statutory language, such as "cession," "restored to the public domain," "discontinued," or "abolished." *Id.* at 2462–63 (internal quotation marks omitted). The absence of such language, in the Court's view, signifies that Congress could not "muster the will" to change a reservation's status. *Id.* at 2462.

But the history of Congress's and the Court's conception of Indian country belies that simple dichotomy.

a. In the nineteenth century, Congress enacted "a large body of laws" "whose operation was confined to the Indian country." *Bates v. Clark*, 95 U.S. 204, 207 (1877). In doing so, Congress did not continually clarify or redefine what "Indian country" was, despite widespread political and demographic changes in the affected territory. *Id.* To construe these laws, then, the Court considered the definition that Congress had most recently supplied, an 1834 act defining "Indian country" to be lands "to which the Indian title has not been extinguished." *Id.* Presuming that Congress intended this definition to remain in effect even as circumstances changed, *id.*, the Court concluded that the Indian country of 1834 "remains Indian country so long as the Indians retain their original title to the soil, and ceases to be Indian country whenever they lose that title, in the absence of any different provision by treaty or by act of Congress," *id.* at 209. Indian lands were thus "judicially defined to include only those lands in which the Indians held some form of property interests." *Solem*, 465 U.S. at 468 (citing *Bates*).

Because of this title-oriented definition, "[t]he notion that reservation status of Indian lands might not be coextensive with tribal ownership was unfamiliar at the turn of the century." *Id.* At that time, "Congress did not view the distinction between acquiring Indian property and assuming jurisdiction over Indian territory as a critical one." *Yankton Sioux*, 522 U.S. at 343; *see also Rosebud Sioux*, 430 U.S. at 613 n.47 (recounting statements by members of Congress that allotted lands "are no longer an Indian reservation"). Likewise, "distinguished commentators on Indian law" supposed that a

reservation's limits "would be diminished by the actual purchase of land within it by non-Indians because land owned in fee by non-Indians cannot be said to be reserved for Indians." *Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351, 357 (1962). Not until 1948 did "Congress uncouple reservation status from Indian ownership, and statutorily define[d] Indian country to include lands held in fee by non-Indians within reservation boundaries." *Solem*, 465 U.S. at 468 (citing 18 U.S.C. § 1151).

Congress would not have focused on distinguishing reservation status at the turn of the century for a second reason. It was then widely assumed that "Indian reservations were a thing of the past" and would "cease to exist" "within a generation at most." *Id.* Congress shared that assumption. *Yankton Sioux*, 522 U.S. at 343 (observing that "Congress then assumed that the reservation system would fade over time"). Therefore, Congress "naturally failed to be meticulous in clarifying whether a particular piece of legislation formally sliced a certain parcel of land off one reservation." *Solem*, 465 U.S. at 468; *see also id.* at 472 n.13 (noting that "various factors kept Congress from focusing on the diminishment issue").

b. The Court confronted the pre-1948 understanding of Indian country in a series of cases about "surplus land acts," which were federal laws enacted at the turn of the century "to force Indians onto individual allotments carved out of reservations and to open up unallotted lands for non-Indian settlement." *Id.* at 466–67. While these acts extinguished Indian title, they "seldom detail[ed] whether opened lands retained reservation status or were divested of all Indian interests" because, as discussed above, "the distinction seemed unimportant."

Id. at 468. Moreover, the acts did not follow a uniform template. Rather, Congress addressed the issue "on a reservation-by-reservation basis, with each surplus land act employing its own statutory language, the product of a unique set of tribal negotiation and legislative compromise." *Id.* at 467.

If the Court had strictly applied the principle that Indian country was coextensive with Indian title, it might have concluded that Congress intended to dissolve or diminish any reservation subject to any surplus land act. *See Seymour*, 368 U.S. at 357 (acknowledging that this premise is "not entirely implausible"). Instead, the Court took a more nuanced view, concluding that "some surplus land acts diminished reservations," whereas "other surplus land acts did not." *Solem*, 465 U.S. at 469.

c. Those divergent outcomes reflect a broader truth about statutes that alienated tribal title in this era (either through allotment or surplus land sales): they are inherently ambiguous. Between the historic equivalency of Indian title and Indian country, the then-vanishing relevance of reservations in legislating Indian affairs, and Congress's failure to settle on any consistent terminology, it cannot be said that, in this area of law, the statutory text alone reliably tells us what Congress actually did regarding a reservation's status. *See id.* at 469 (observing that the effect of a particular statute on a reservation depends not only on "the language of the act" but also "the circumstances underlying its passage"); *see also Yankton Sioux*, 522 U.S. at 343–44 ("'As a result of the patina history has placed on the allotment Acts, the Court is presented with questions that their architects could not have foreseen.'" (quoting *Hagen*, 510 U.S. at 426 (Blackmun, J., dissenting)).

That inherent ambiguity is precisely what led the Court to adopt the broader inquiry into congressional intent that governed these issues until *McGirt*. In *Solem*, for example, after explaining at length the historical reasons why statutes alienating tribal land failed to "detail" and "clarify[]" reservation status, the Court explained that it had developed the three-pronged evidentiary analysis to "distinguish[]" acts that affected reservation boundaries from those that did not. 465 U.S. at 468–70. More recently, when the Solicitor General invited the Court to adopt a "clear statement" rule that would require "explicit language" to find disestablishment or diminishment, the Court refused. *Hagen*, 510 U.S. at 411. Citing the divergent outcomes in some cases, the Court "decline[d] to abandon our traditional approach," which "requires us to examine all the circumstances surrounding the opening of a reservation." *Id.* at 412. And just five years ago, the Court explained that, because many statutes "did not clearly convey" their effect on reservation status, the Court also examines evidence of "the contemporaneous and subsequent understanding" of that status. *Parker*, 577 U.S. at 488.

Nothing has happened in the last five years to undo the ambiguities baked into statutes enacted over a century ago. Accordingly, *McGirt*'s departure from the Court's traditional approach to assessing reservation status was unwarranted. To return stability to this area of the law, the amici States respectfully request that *McGirt* be overruled.

B. Stare decisis does not require adherence to *McGirt*.

Overruling *McGirt* would not offend the principle of stare decisis. As the Court has demonstrated several times in the past few Terms, stare decisis "is 'not an

inexorable command.'" *Franchise Tax Bd. of Cal. v. Hyatt*, 139 S. Ct. 1485, 1499 (2019) (quoting *Pearson v. Callahan*, 555 U.S. 223, 233 (2009)). Indeed, the Court recently has overruled several longstanding precedents notwithstanding its careful consideration of stare decisis.[4] In those decisions, the Court has identified several "factors that should be taken into account in deciding whether to overrule a past decision." *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2478 (2018). These factors include "the workability of the rule it established, its consistency with other related decisions, developments since the decision was handed down, and reliance on the decision." *Id.* at 2478-79. The amici States agree with Oklahoma that each factor weighs against *McGirt*. Pet. 28.

These factors do not deserve less weight, and *McGirt* is not owed more deference, on the premise that *McGirt* construed acts of Congress. Stare decisis may carry "enhanced force" when a decision "interprets a statute." *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 456 (2015). But as discussed above, the core decision in *McGirt* was to change the Court's analytical approach to reservation disestablishment, from a "highly contextual inquiry" to one that looks only to "a statute's terms." *Compare McGirt*, 140 S. Ct. at 2469, *with id.* at 2485 (Roberts, C.J., dissenting). The Court explained that it was following its "normal interpretative rules," whereas the dissent urged that the Court's "precedents" in "this specialized area"

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[4] *See Knick v. Township of Scott*, 139 S. Ct. 2162, 2179 (2019) (overruling *Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985)); *Franchise Tax Bd.*, 139 S. Ct. at 1499 (overruling *Nevada v. Hall*, 440 U.S. 410 (1979)); *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2478–79 (2018) (overruling *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977)).

require a different analysis. *Compare id.* at 2470, *with id.* at 2485 (Roberts, C.J., dissenting). At bottom, then, *McGirt* was about which "judge-made rule" should apply to a question of reservation disestablishment, and therefore, a decision for which "[r]evisiting precedent is particularly appropriate." *Pearson*, 555 U.S. at 233.

Regardless, even if *McGirt* could be framed narrowly as a statutory-interpretation case, no "enhanced" stare decisis should attach to it. The rationale for a heightened "statutory stare decisis" is that "Congress can correct any mistake it sees." *Kimble*, 576 U.S. at 456. And if Congress doesn't act, it is presumed to have acquiesced in the Court's reading. *Watson v. United States*, 552 U.S. 74, 82–83 (2007). But those reasons and presumptions do not align with reality here. As Oklahoma explains, in the short time since *McGirt* was decided, it has become clear that Congress will not respond to the decision in the face of entrenched disagreement between Oklahoma and the tribes within its borders. Pet. 27–28. Under such circumstances, congressional inaction should invite, not impede, the Court's reconsideration of *McGirt*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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