No. 21-___

IN THE

Supreme Court of the United States

CLIFTON MERRILL PARISH,

Petitioner,

v.

THE STATE OF OKLAHOMA ET AL.,

Respondents.

On Petition for a Writ of Certiorari
to the Oklahoma Court of Criminal Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), applies retroactively to convictions that were final when *McGirt* was announced.

PARTIES TO THE PROCEEDINGS

Petitioner is Clifton Merrill Parish.

Respondents are the State of Oklahoma, by and through Mark A. Matloff, the District Attorney in and for Pushmataha County, Oklahoma, and the Honorable Jana Kay Wallace, Associate District Judge in and for Pushmataha County, Oklahoma. Oklahoma filed a writ of prohibition against Judge Wallace's grant of post-conviction relief to petitioner.

RELATED PROCEEDINGS

State of Oklahoma ex rel. Matloff v. Wallace, No. PR-2021-366 (Okla. Crim. App.)

State of Oklahoma v. Clifton Parish, No. CF-2010-26 (Pushmataha Cnty., Okla. Dist. Ct.)

United States v. Clifton Parish, No. 6:21-cr-140-BMJ (E.D. Okla.)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Clifton Merrill Parish respectfully petitions for a writ of certiorari to review the judgment of the Oklahoma Court of Criminal Appeals in this case.

OPINIONS BELOW

The opinion of the Oklahoma Court of Criminal Appeals denying rehearing is unpublished but available at Pet. App. 46a-48a. That court's opinion granting Oklahoma's writ of prohibition (Pet. App. 1a-25a) is available at 2021 WL 3578089. That court's order staying proceedings pending appeal and ordering supplemental briefing (Pet. App. 26a-29a) is available at 2021 WL 2069659. The trial court's order granting post-conviction relief is unpublished but available at Pet. App. 30a-31a.

JURISDICTION

The Oklahoma Court of Criminal Appeals denied a petition for rehearing on August 31, 2021. Pet. App. 46a. This petition is being filed within 90 days of that denial. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Indian Commerce Clause, the Supremacy Clause, the Due Process Clause, and the relevant provisions of Title 18 of the U.S. Code and Title 22 of the Oklahoma Statutes, are set forth in the appendix (Pet. App. 49a-51a).

INTRODUCTION

In *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020),

this Court held that the federal government must be held to its word. Because the United States promised to reserve certain lands for tribes in the nineteenth century and never rescinded those promises, those lands remain reserved to the tribes today. In particular, these lands remain "Indian country" within the meaning of the Major Crimes Act (MCA), which divests States of jurisdiction to prosecute "[a]ny Indian" who committed one of the offenses enumerated in Section 1153(a) of Title 18 of the U.S. Code while in "Indian country." 18 U.S.C. § 1153(a). Only the federal government may prosecute such crimes.

Oklahoma has, however, prosecuted many Indians for such offenses. Among them is petitioner, Clifton Parish, a registered member of the Choctaw Tribe. In 2012, Oklahoma prosecuted petitioner for a crime that all agree occurred on the Choctaw Nation Reservation. Pet. App. 30a. The Choctaw Reservation continues to exist today and is "Indian country" within the meaning of the MCA. *See Sizemore v. State*, 485 P.3d 867, 871 (Okla. Crim. App. 2021), *pet. for cert. filed*, No. 21-326 (U.S. Aug. 27, 2021). As confirmed by the holding in *McGirt*, Oklahoma therefore lacked jurisdiction to prosecute petitioner for an enumerated major crime. The State never had jurisdiction to prosecute Indians for major crimes committed in Indian Country; that authority belongs exclusively to the United States.

Nevertheless, when petitioner sought post-conviction relief contesting Oklahoma's jurisdiction to try and sentence him under *McGirt*, the Oklahoma Court of Criminal Appeals rejected his claim on the theory that *McGirt* is not retroactive. In its view,

McGirt amounts to a mere "procedural rule" that determined only "*which sovereign* must prosecute major crimes committed by or against Indians within" Indian country. Pet. App. 13a. Despite this Court's emphatic holding that the State lacked power to prosecute Indians for major crimes on tribal land, the Oklahoma court believed that the *McGirt* rule affected "only the *manner of determining* the defendant's culpability," and thus "imposed only *procedural* changes." *Id.* (quoting *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004)). Because it viewed *McGirt* as a new rule of criminal procedure, the Oklahoma court held that this Court's holding did not apply retroactively to convictions that were final when *McGirt* was announced. *See* Pet. App. 5a-8a (citing *Teague v. Lane*, 489 U.S. 288 (1989)).

That decision is wrong: *McGirt*'s rule is a substantive rule with constitutional force, not a procedural rule. It thus applies retroactively on collateral review as a matter of federal law. *McGirt* "place[s] certain criminal laws and punishments altogether beyond the State's power to impose," *Montgomery v. Louisiana*, 577 U.S. 190, 201 (2016), and "alters . . . the class of persons that the law punishes," *Schriro*, 542 U.S. at 353. Because *McGirt* announced a substantive rule enforced by the Supremacy Clause, federal law requires its retroactive application in state-court proceedings. *Montgomery*, 577 U.S. at 205.

The Oklahoma court's ruling also has sweeping implications. It upends the Constitution's structural allocation of authority between the state and federal governments. It allows States to usurp authority that Congress has reserved to the United States.

And the State's refusal to grant relief from its *ultra vires* convictions violates fundamental due process principles that have long been vindicated on habeas corpus, *viz.* that only a court of competent jurisdiction may impose a valid criminal conviction or sentence.

If allowed to stand, the Oklahoma court's decision will leave thousands of individuals with state convictions that the State had no authority to impose. This Court should grant this petition to reaffirm *McGirt*'s jurisdictional holding, protect Congress's authority under the Supremacy Clause, and vindicate the liberty interests of individuals to be free from punishment that the States have no power to impose.

STATEMENT

A. Federal Regulation Of Indian Country Crimes

For nearly two centuries, this Court has recognized that "[t]he whole intercourse between the United States and [Indian tribes], is, by our Constitution and laws, vested in the Government of the United States." *Worcester v. Georgia*, 31 U.S. 515, 561 (1832). In the earliest years of our nation, Congress withheld the exercise of its exclusive power to prosecute at least some crimes involving Indians on tribal lands. For example, under a 1796 law, Congress provided that "offenses committed by Indians . . . against each other were left to be dealt with by each tribe for itself according to its local customs." *Ex parte Crow Dog*, 109 U.S. 556, 571-72 (1883). *Crow Dog* set aside a federal conviction of an Indian in a territorial court, based on its conclusion that, despite an agreement with the Sioux tribe to allow federal prosecutions for murder, the treaty had

not repealed Congress's exemption of crimes by Indians against each other. Accordingly, the Court held, the federal territorial court "was without jurisdiction to find or try the indictment against the prisoner," such that "the conviction and sentence are void, and that his imprisonment is illegal." *Id.* at 572.

In part in reaction to *Crow Dog*, *see United States v. Kagama*, 118 U.S. 375, 382-83 (1886), Congress enacted the MCA. *See* Act of Mar. 3, 1885, ch. 341, 23 Stat. 362, codified at 18 U.S.C. § 1153. The MCA gives the federal government exclusive jurisdiction to prosecute certain felonies committed by Indians in "Indian country." 18 U.S.C. § 1153(a); *United States v. John*, 437 U.S. 634, 651 (1978).[1] Accordingly, absent an Act of Congress providing otherwise, States lack jurisdiction to prosecute "offenses covered by the Indian Major Crimes Act." *Negonsott v. Samuels*, 507 U.S. 99, 102-03 (1993); *see McClanahan v. State Tax Comm'n of Ariz.*, 411 U.S. 164, 168 (1973) (similar).

B. The Federal Government's Promise To The Choctaw Nation

Members of the Choctaw Nation once lived in present-day Mississippi. *See John*, 437 U.S. at 638. When Mississippi became a State in 1817, the Choctaws still retained a claim—recognized by the federal government—to more than three-quarters of

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[1] The MCA originally used the term "reservation," but in 1948 Congress replaced the term "reservation" with the broader term "Indian country," which was "used in most of the other special statutes referring to Indians[.]" *See John*, 437 U.S. at 634, 647 n.16, 649 (citing 18 U.S.C. § 1153).

the land within Mississippi's borders. *Id.* at 639.

Throughout the 1820s and 1830s, the federal government pursued a "policy aimed at persuading the Choctaws to give up their lands in Mississippi completely and to remove to new lands in what for many years was known as the Indian Territory, now a part of Oklahoma and Arkansas." *Id.* Mississippi thought the federal government was moving too slowly toward this objective. Having "grown impatient with federal policies," it took "steps to assert jurisdiction over the lands occupied by the Choctaws." *Id.* at 640. Although Members of "Congress debated whether the States had power to assert such jurisdiction," President Andrew Jackson strongly favored the removal of the Choctaws from Mississippi and the Choctaws understood "that the Federal Government no longer would stand between the States and the Indians." *Id.*

In light of that reality, the Choctaws signed a treaty in 1830, agreeing to cede to the United States all lands east of the Mississippi River that they still occupied and to remove to lands west of the River. *See id.* at 641; Treaty at Dancing Rabbit Creek, 7 Stat. 333. The Choctaws insisted that the federal government agree to leave them "free of federal or state control" once they relocated to lands now in Oklahoma. *John*, 437 U.S. at 641. The government made that commitment, and in February 1831, the Senate ratified the treaty. *Id.* (citing 7 Reg. Deb. 347 (1831)).

Under the treaty, "no Territory or State shall ever have a right to pass laws for the government of the Choctaw Nation . . . and their descendants; and that no part of the land granted them shall forever be

embraced in any capital Territory or State." 7 Stat. 333, art. 4. Rather, the federal government agreed to "forever secure said Choctaw Nation from, and against, all laws except such as from time to time may be enacted in their own National Councils" and those that are within Congress's power "to exercise a legislation over Indian Affairs." *Id.*

The Choctaws were the first of the Indian Tribes—later known as the Five Civilized Tribes—to be relocated to the western territories. The relocation was brutal. The Choctaws suffered from floods, blizzards, disease, and starvation, prompting one of the Choctaw Chiefs to say that the removal was a "trail of tears and death."[2]

In the ensuing years, the federal government and the Choctaws signed several treaties that modified the geographical boundaries of the western land under Choctaw control. But each treaty affirmed that the land remained part of the Choctaw Reservation. *Sizemore*, 485 P.3d at 870. "[N]othing in any of those documents showed a congressional intent to erase the boundaries of the Reservation and terminate its existence." *Id.*

Oklahoma did not become a State until nearly 80 years after the Choctaw had established their home there. In 1907, Oklahoma joined the United States after meeting the conditions of the federal Oklahoma Enabling Act. *See* Act of June 16, 1906, ch. 3335, 34

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[2] Len Green, *Trail of Tears from Mississippi Walked by our Choctaw Ancestors* (Nov. 1978), https://web.archive.org/web/20080604005108/http://www.tc.umn.edu/~mboucher/mikebouchweb/choctaw/trtears.htm.

Stat. 267. Under that Act, those living in Oklahoma "forever disclaim[ed] all right and title to any unappropriated public lands lying within the boundaries" of land "owned or held by any Indian, tribe, or nation." *Id.* § 3. Only the federal government could extinguish that title, and unless it did so, those lands "shall be and remain subject to the jurisdiction, disposal, and control of the United States." *Id.* Because the provision "prohibit[ing] state jurisdiction over Indian Country" has never been altered, "the Federal Government still has exclusive jurisdiction over Indian Country." *C.M.G. v. State*, 594 P.2d 798, 799 (Okla. Crim. App. 1979).

Other provisions of the Oklahoma Enabling Act underscore the exclusive jurisdiction of the United States over Indian lands. Section 16 required any then-pending cases "arising under the Constitution, laws, or treaties of the United States," 34 Stat. 267, 276—which would include cases arising under the MCA—to be transferred to *federal* court.[3] Section 1 prohibited Oklahoma from limiting federal authority "to make any law or regulation respecting such Indians, their lands, property, or other rights," *id.* at 267—which this Court has interpreted to preserve "established [federal] laws and regulations" concerning Indians, *Ex parte Webb*, 225 U.S. 663,

[3] In 1907, Congress amended the Oklahoma Enabling Act to confirm that the transfer to federal court was required for "[p]rosecutions for all crimes and offenses . . . pending . . . upon . . . admission" to statehood "which, had they been committed within a State, would have been cognizable in the Federal courts." Act of Mar. 4, 1907, ch. 2911, § 3, 34 Stat. 1286, 1287.

682-83 (1912). And Section 21 confirmed that federal laws, such as the MCA, that are "not locally inapplicable shall have the same force and effect . . . as elsewhere." 34 Stat. 267, 278.

Although federal law unequivocally established exclusive federal jurisdiction to prosecute tribal members for crimes committed in Indian country, many States nevertheless asserted civil and criminal jurisdiction in those lands. *See* App. 7a, U.S. Amicus Br., *Sharp v. Murphy*, No. 17-1107 (filed July 30, 2018). As the U.S. Department of Interior explained in a 1963 memorandum, this practice was widespread even though "no Federal statutes of relinquishment and transfer" authorized these States to prosecute Indians who committed crimes in Indian country. *Id.* 7a-8a. Rather, perhaps because of the absence or ineffectiveness of tribal courts, "many States joined Oklahoma in prosecuting Indians without proper jurisdiction." *McGirt*, 140 S. Ct. at 2478. Yet "[o]nly the federal government, not the State, may prosecute Indians for major crimes committed in Indian country." *Id.*

C. This Court's Decision In *McGirt*

In *McGirt*, this Court held that Oklahoma's "longstanding practice of asserting jurisdiction over Native Americans" for crimes covered by the MCA was unlawful. 140 S. Ct. at 2470-71. Oklahoma had prosecuted and convicted McGirt, an enrolled member of the Seminole Nation of Oklahoma, for three sexual offenses, all of which were committed on the Creek Reservation. *Id.* at 2459. McGirt argued in post-conviction proceedings that the State lacked jurisdiction to prosecute him and that any new trial must take place in federal court. *Id.* Oklahoma

disputed that the Creek Reservation remained "Indian country" within the meaning of the MCA, contending instead that land given to the Creeks in an 1866 treaty and federal statute became property of Oklahoma in the intervening years. *Id.* at 2460.

The Court rejected Oklahoma's position. The Court explained that "Congress established a reservation for the Creeks[i]n a series of treaties." *Id.* at 2460-62; *see id.* at 2472-76. No "Acts of Congress," the Court concluded, had rescinded that reservation. *Id.* at 2462-68. And courts and "States have no authority to reduce federal reservations." *Id.* at 2462. Nor, the Court reasoned, can "historical practices and demographics . . . around the time of and long after the enactment of all the relevant legislation . . . prove disestablishment." *Id.* at 2468. Finally, the Court rejected the State's argument that the MCA was inapplicable to Oklahoma or some subsection of it. *Id.* at 2476-78. Instead, the Court reaffirmed, "Congress allowed only the federal government, not the States, to try tribal members for major crimes." *Id.* at 2480.

The Court acknowledged that its holding might affect "perhaps as much as half [Oklahoma's] land and roughly 1.8 million of its residents." *Id.* at 2479. But it declined to allow fears about the fallout, including the possibility that "'[t]housands' of Native Americans" might "challenge the jurisdictional basis of their state-court convictions," to stand in the way of the Court's holding. *Id.* The Court raised the possibility that "well-known state and federal limitations on postconviction review in criminal proceedings" might impose "significant procedural obstacles" to relief. *Id.*; *see also id.* at 2479 n.15

(noting state rule that claims not raised on direct appeal are waived on collateral attack); *but see id.* at 2501 n.9 (Roberts, C.J., dissenting) ("[U]nder Oklahoma law, it appears that there may be little bar to state habeas relief because 'issues of subject matter jurisdiction are never waived and can therefore be raised on a collateral appeal.'" (quoting *Murphy v. Royal*, 875 F.3d 896, 907 n.5 (10th Cir. 2017), *aff'd sub nom. Sharp v. Murphy*, 140 S. Ct. 2412 (2020))). But the Court did not embrace any such defenses, instead concluding that "the magnitude of a legal wrong is no reason to perpetuate it." *Id.* at 2480. "[D]ire warnings are just that, and not a license for us to disregard the law." *Id.* at 2481.

D. The Current Controversy

1. On April 9, 2010, Oklahoma charged petitioner with one count of first-degree murder, *see* Okla. Stat. tit. 21, § 701.7, in Pushmataha County District Court. A jury found petitioner guilty of the lesser-included offense of second-degree murder, *see* Okla. Stat. tit. 21, § 701.8, and sentenced him to 25 years in Oklahoma state prison. Pet. App. 1a.

The Oklahoma Court of Criminal Appeals affirmed his conviction and sentence on direct appeal. Petitioner's conviction and sentence became final on June 4, 2014. Pet. App. 2a.

2. In August 2020, petitioner filed a petition for post-conviction relief. He stated that he was an enrolled member of the Choctaw Nation and that his crime occurred within the historical boundaries of the Choctaw Nation. He argued that, under *McGirt*, the Choctaw Nation remained "Indian country" within the meaning of the MCA. As a result, petitioner

contended, the federal government had exclusive jurisdiction to prosecute him and his Oklahoma conviction was void for lack of subject-matter jurisdiction. He accordingly asked the court to vacate his conviction. Pet. App. 30a.

The State did not file a formal response.[4] But it did stipulate that petitioner "has a degree of Indian blood and . . . is an enrolled member of the Choctaw Nation" and that "the crime happened within the historical boundaries of the Choctaw Nation." *See* Pet. App. 34a.

While petitioner's petition was pending, the Oklahoma Court of Criminal Appeals held that the Choctaw Nation had never been disestablished by Congress, such that *McGirt* divested state courts of jurisdiction to try major crimes committed by Indians on the Choctaw Nation. *See Sizemore*, 485 P.3d 867.

3. The trial court granted post-conviction relief. It explained that, because all agreed that petitioner is a member of the Choctaw Nation and the crimes occurred within the historical boundaries of the Choctaw Nation, the Oklahoma courts "ha[d] no jurisdiction." Pet. App. 30a-31a. Referencing *McGirt*, the trial court accordingly held that jurisdiction to prosecute petitioner "lies solely with the federal or tribal governments . . . ." *Id.* 31a. It therefore dismissed the charges against petitioner and vacated his second-degree murder conviction. *Id.* 1a, 31a. The court temporarily stayed its order to allow the

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[4] *See* Dkt., *Oklahoma v. Parish*, No. CF-2010-26 (Okla. Dist. Ct., Pushmataha Cnty.).

State to appeal. *Id.* 27a, 31a.[5]

4. a. The district attorney of Pushmataha County filed a petition for a writ of prohibition with the Oklahoma Court of Criminal Appeals to vacate the trial court's order granting post-conviction relief. The district attorney also asked the appellate court for a "stay of all trial court proceedings," which the court granted. Pet. App. 27a.

b. On its own motion, the Oklahoma Court of Criminal Appeals directed the parties to brief whether "the recent judicial recognition of federal criminal jurisdiction in the Creek and Choctaw Reservations announced in *McGirt* and *Sizemore* [should] be applied retroactively to void a state conviction that was final when *McGirt* and *Sizemore* were announced?" Pet. App. 28a.[6] After receiving briefing on that issue, the court granted the writ of prohibition and reversed the trial court's order granting post-conviction relief to petitioner. *Id.* 1a-25a.

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[5] Shortly after the trial court's ruling, the federal government charged petitioner with one count of first-degree murder in the Eastern District of Oklahoma. *See* Compl., *United States v. Parish*, No. 6:21-cr-140 (E.D. Okla. Apr. 20, 2021), Dkt. No. 1. After a magistrate judge issued a warrant for petitioner's arrest, a special agent of the FBI arrested petitioner. The magistrate judge then ordered petitioner detained pending his federal trial. He is presently in the custody of the U.S. Marshals Service.

[6] The court framed this directive "[i]n light of *Ferrell v. State*, 1995 OK CR 54, 902 P.2d 1113, *United States v. Cuch*, 79 F.3d 987 (10th Cir. 1996), *Edwards v. Vannoy* (No. 19-5807), 593 U.S. ___ (May 17, 2021), cases cited therein, and related authorities." Pet. App. 3a.

The court explained that whether petitioner was entitled to post-conviction relief turned on Oklahoma's doctrine governing when new rules apply to convictions that were final when the rule was announced. That doctrine, the court stated, "draw[s] on, but" is "independent from, the Supreme Court's non-retroactivity doctrine in federal habeas corpus," as developed in *Teague v. Lane*, 489 U.S. 288 (1989), and its progeny. Pet. App. 4a.

Under that doctrine, the court stated, "new rules" of "criminal procedure" "generally do *not* apply retroactively to convictions that are final, with a few narrow exceptions." Pet. App. 4a. In contrast, "a new *substantive* rule" applies "to final convictions if it placed certain primary (private) conduct beyond the power of the Legislature to punish, or categorically barred certain punishments for classes of persons because of their status (capital punishment of persons with insanity or intellectual disability, or juveniles, for example)." *Id.* 5a.

The court then held that *McGirt* does "not apply retroactively to void a conviction that was final when *McGirt* was decided" because it "announced a rule of criminal *procedure*." Pet. App. 8a, 12a. In the Oklahoma court's view, "*McGirt* did not 'alter[] the range of conduct or the class of persons that the law punishes,'" but merely "decided *which sovereign* must prosecute major crimes committed by or against Indians within its boundaries." *Id.* 13a (quoting *Schriro*, 542 U.S. at 353). Because it believed that "the extent of state and federal criminal jurisdiction affected 'only the *manner of determining* the defendant's culpability,'" the court held that *McGirt* announced a procedural rather than substantive rule.

Id. (quoting *Schriro*, 542 U.S. at 353).[7]

The court acknowledged that it had previously "granted post-conviction relief and vacated several capital murder convictions, and at least one non-capital conviction (Jimcy McGirt's), that were final when *McGirt* was announced." Pet. App. 6a. Those cases had all treated objections to the State's "criminal subject matter jurisdiction" as "non-waivable." *Id.* But, the court contended, it "acted in those post-conviction cases without our attention ever having been drawn to the potential non-retroactivity of *McGirt*." *Id.* 7a.

c. Two judges concurred separately. Vice Presiding Judge Hudson urged "the leaders of the State of Oklahoma, the Tribes and the federal government to address the jurisdictional fallout from the *McGirt* decision." Pet. App. 21a. Judge Lumpkin believed that the criminal judgments entered by courts without "jurisdiction to render them" should be deemed "void" *ab initio*, rather than analyzed under the framework of retroactivity doctrine. *Id.* 22a. For that reason, Judge Lumpkin disagreed with the court's conclusion that *McGirt* announced a "procedural" rule. *Id.* Nevertheless, Judge Lumpkin concurred for "pragmatic" reasons: to avoid "retroactive application of cases based on the chaos,

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[7] The Oklahoma court also rejected the argument that *McGirt*'s rule applied retroactively because it was not "new." Pet. App. 13a. *McGirt*, the court opined, "imposed new and different obligations on the state and federal governments." *Id.* 14a. The court also thought that *McGirt* was new because "it was not dictated by, and indeed, arguably involved controversial innovations upon, Supreme Court precedent." *Id.*

confusion, harm to victims, *etc.*, if retroactive application occurred." *Id.* 24a-25a.

REASONS FOR GRANTING THE PETITION

McGirt gave effect to a fundamental structural principle governing criminal jurisdiction over Indian-country crimes: States have no authority to prosecute crimes covered by the Major Crimes Act. The decision below flouts that principle. By holding that *McGirt* is a mere procedural rule that is not retroactive to cases on collateral review, the Oklahoma court has sought to preserve legally void convictions that the State never had authority to impose. Such a regime violates the Supremacy Clause by treating an exclusive allocation of power to the federal government as a mere regulation of the State's "manner" of trying a case. The decision also violates bedrock principles of due process and centuries-old understandings of habeas corpus. A conviction cannot stand where a State lacks authority to criminalize the conduct, and habeas courts have long set aside judgments by a court that lacks jurisdiction.

Beyond the Oklahoma court's legal errors, its decision has enormous practical importance. If left unreviewed, the decision would condemn many Native American defendants to bear state convictions and serve state sentences for crimes the State had no power to prosecute. Because the State has no authority to preserve convictions that are inherently void, and because of the legal and practical importance of the issue in this case, this Court's review of the decision below is warranted.

A. The Decision Below Is Incorrect

Federal law requires that *McGirt* be applied retroactively in state post-conviction proceedings. Under *McGirt*, the federal government has—and always had—exclusive jurisdiction to prosecute major crimes committed by Indians on the Choctaw Reservation. The State has no power to do so, and never has. *McGirt* did not create that rule; rather, the Court's interpretation of federal treaties and statutes is inherently retroactive to the date of their ratification and enactment. *See Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 313 n.12 (1994) ("[W]hen this Court construes a statute, it is explaining its understanding of what the statute has meant continuously since the date when it became law."). That allocation of authority is not a mere procedural rule. Rather, it goes to the heart of the Constitution's divestment of state authority (absent a contrary provision by Congress) to proscribe and prosecute major crimes by Indians on federally recognized reservations. *See Worcester v. Georgia*, 31 U.S. 515, 561 (1832). Under the Supremacy Clause, the federal divestiture of state jurisdiction is the "supreme Law of the land." U.S. Const., art. VI, cl. 2. Because Oklahoma has no jurisdiction to proscribe and punish petitioner's conduct, the State is holding petitioner without any valid authority to do so. A jurisdictional ruling of that character is necessarily retroactive as a matter of federal law, and the Oklahoma court's incorrect decision to the contrary merits this Court's review.

1. "New *substantive* rules generally apply retroactively" while "[n]ew rules of procedure . . . generally do not." *Schriro v.*

Summerlin, 542 U.S. 348, 351-52 (2004). The rule announced in *McGirt* is substantive. Substantive rules include those that "alter[] the range of conduct or the class of persons that the law punishes." *Id.* at 352. "Such rules apply retroactively because they 'necessarily carry a significant risk that a defendant' . . . faces a punishment that the law cannot impose upon him." *Id.* (quoting *Bousley v. United States*, 523 U.S. 614, 620 (1998)). In these cases, "when a State enforces a proscription or penalty barred by the Constitution, the resulting conviction or sentence is, by definition, unlawful" and "void." *Montgomery v. Louisiana*, 577 U.S. 190, 200-03 (2016).

McGirt's jurisdictional ruling satisfies the standards for a substantive rule. By excluding a certain class of defendants from state prosecution for certain crimes, the *McGirt* rule both "place[s] certain criminal laws and punishments altogether beyond the State's power to impose," *id.* at 201, and "alters . . . the class of persons that the law punishes," *Schriro*, 542 U.S. at 352. Where a State has no authority to prosecute a defendant for a crime, no "possibility of a valid result" can exist. *Montgomery*, 577 U.S. at 201. All convictions by a court that lacks jurisdiction are, "by definition, unlawful" and "void." *Id.* at 201, 203; *see Waley v. Johnston*, 316 U.S. 101, 104-05 (1942) (per curiam) ("[J]udgment of conviction is void for want of jurisdiction of the trial court to render it.").

Here, the lack of jurisdiction is not solely a want of judicial power; Oklahoma lacks authority to criminalize major crimes by Indians in Indian country. Because Congress has given no authority to

Oklahoma to extend its laws to petitioner's conduct, the State's regulatory effort is "repugnant to the Constitution, laws, and treaties of the United States" and an interference with powers that, "according to the settled principles of our Constitution, are committed exclusively to the government of the Union." *Worcester*, 31 U.S. at 561. *McGirt* thus means that Oklahoma is holding petitioner for an offense that, as to him, it lacked legislative power to enact, executive power to prosecute, and judicial power to enforce. His conduct cannot constitute an offense because Oklahoma cannot apply its law to him at all.

2. The Oklahoma Court of Criminal Appeals refused to apply *McGirt* retroactively because, it asserted, the rule is procedural. That conclusion is wrong. Procedural rules "are designed to enhance the accuracy of a conviction or sentence by regulating 'the manner of determining the defendant's culpability.'" *Montgomery*, 577 U.S. at 201 (quoting *Schriro*, 542 U.S. at 353) (emphasis omitted). "Those rules 'merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise.'" *Id.* (quoting *Schriro*, 542 U.S. at 352). But that reasoning cannot apply when *no* state procedures could lead to a valid result. As this Court has explained, "[t]he same possibility of a valid result does not exist where a substantive rule has eliminated a State's power to proscribe the defendant's conduct or impose a given punishment." *Id.* That is the case here.

The Oklahoma court's treatment of *McGirt* as shifting the prosecution of a crime from one sovereign to another reflects a basic misunderstanding of our

federal system. Under the Constitution's recognition of separate state and federal sovereignty, a state crime is not the same offense as a federal crime. Rather, as the Double Jeopardy Clause's dual-sovereignty doctrine recognizes, the States and the federal government are separate sovereigns invested with independent powers to proscribe conduct and punish crimes. "[A] crime under one sovereign's laws is not 'the same offence' as a crime under the laws of another sovereign." *Gamble v. United States*, 139 S. Ct. 1960, 1964 (2019); *see Heath v. Alabama*, 474 U.S. 82, 92 (1985); *Abbate v. United States*, 359 U.S. 187, 195 (1959); *United States v. Wheeler*, 435 U.S. 313 (1978).

In ordinary circumstances, the dual-sovereignty doctrine means that both the state and federal governments can prosecute a defendant for the same conduct. *Gamble*, 139 S. Ct. at 1964. But here, the State has been ousted altogether from prosecuting a crime covered by the Major Crimes Act. That means that it has prosecuted petitioner for no offense at all. "[A]n 'offence' is defined by a law, and each law is defined by a sovereign. So where there are two sovereigns, there are two laws, and two 'offences.'" *Id.* at 1965. But where only one sovereign has the power to prosecute, only one law and one offense can exist—and here, it is not the law of Oklahoma.

3. As this Court recently held in *Montgomery*, federal law requires retroactive application of new substantive rules in state post-conviction proceedings. Whatever latitude exists for state courts to devise procedural rules to limit claims in state post-conviction proceedings, it does not extend to nullifying federal substantive rules backed by

constitutional guarantees. As *Montgomery* explained: "[W]hen a new substantive rule of constitutional law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule." 577 U.S. at 200.

In *McGirt*, this Court determined that the Creek lands qualified as a reservation under duly ratified treaties and that Congress had not disestablished the reservation. That principle applies equally to the Choctaw Reservation, for the same reasons. *See Sizemore v. State*, 485 P.3d 867 (Okla. Crim. App. 2021), *pet. for cert. filed*, No. 21-326 (U.S. Aug. 27, 2021). *McGirt* thus means, as in *Worcester* itself, that Oklahoma's prosecution is "repugnant to the Constitution, laws, and treaties of the United States," *Worcester*, 31 U.S. at 561. And that federal-law determination is "binding on state courts," *Montgomery*, 577 U.S. at 200. Accordingly, because *McGirt* is a "substantive" rule with constitutional force, federal law requires that state courts apply it on collateral review. *Id.* at 205 ("Where state collateral review proceedings permit prisoners to challenge the lawfulness of their confinement, States cannot refuse to give retroactive effect to a substantive constitutional right that determines the outcome of that challenge.").[8]

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[8] Substantive rules are not an exception to *Teague*; such rules are "not subject to the bar" at all. *Schriro*, 542 U.S. at 352 n.4. But even if *Teague* were deemed applicable, it would not bar application of *McGirt* on collateral review. As the Tenth Circuit explained in announcing the rule later affirmed by *McGirt*, a rule is not a "new" rule "under *Teague* 'when it is merely an application of the principle that governed a prior decision to a

B. The Decision Below Implicates Vitally Important Interests

The Court's intervention is warranted not only to correct a fundamental legal error by the court below, but also because the Oklahoma court's decision undermines this Court's decision in *McGirt*, diminishes federal authority, disregards individual rights, and threatens to leave in place a significant number of state convictions that never had any valid legal basis.

1. The Oklahoma Court of Criminal Appeals' ruling transgresses the constitutional allocation of authority over Indian tribes. As *McGirt* explained, the Constitution "entrusts Congress with the authority to regulate commerce with Native Americans, and directs that federal treaties and statutes are the 'supreme Law of the Land.'" 140 S. Ct. at 2462 (quoting U.S. Const., art. VI, cl. 2). The paramount federal role over Indian affairs has been recognized since the nation's early years. *See Worcester v. Georgia*, 31 U.S. 515, 561 (1832). Absent congressional authorization, the State had no power to act. *See Rice v. Olson*, 324 U.S. 786, 789 (1945)

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different set of facts.'" *Murphy v. Royal*, 875 F.3d 896, 929 n.36 (10th Cir. 2017) (quoting *Chaidez v. United States*, 568 U.S. 342, 347-48 (2013)), *aff'd sub nom. Sharp v. Murphy*, 140 S. Ct. 2412 (2020). That is the case with *McGirt*. *See* 141 S. Ct. at 2462, 2465, 2468-70 (applying the framework announced in *Solem v. Bartlett*, 465 U.S. 463 (1984)); *Murphy*, 875 F.3d at 929 n.36 (same); *see also* Cap. Habeas Unit of the Fed. Pub. Def. for the W. Dist. of Okla. Amicus Br. 2-7, *State v. Hon. Jana Wallace*, No. PR-2021-366 (Okla. Crim. App. July 2, 2021); Cherokee Nation et al. Amici Br. 7-9, *State v. Hon. Jana Wallace*, No. PR-2021-366 (Okla. Crim. App. July 2, 2021).

("The policy of leaving Indians free from state jurisdiction and control is deeply rooted in this Nation's history."). The decision below cannot be reconciled with these central structural features of the Constitution. Nor can it be reconciled with *McGirt*'s enforcement of the nation's promises to the tribes when they were relocated to the Oklahoma territory. As the Court recognized, "[o]n the far end of the Trail of Tears was a promise," and the Court's decision "h[e]ld the government to its word." *McGirt*, 140 S. Ct. at 2459. The decision below, treating *McGirt* as a mere procedural rule and allowing the State to maintain convictions that it never had authority to impose, diminishes *McGirt's* significance and undermines the Court's holding as well as the predominant congressional authority over Indian country crimes.

2. The Oklahoma Court's ruling also warrants review because of its intrusion on a core feature of individual liberty that has for centuries been protected by the writ of habeas corpus. More than a century ago, this Court deemed it "perfectly well settled" that, to accord with "'due process' in the constitutional sense," "a criminal prosecution in the courts of a state" must be in "a court of *competent jurisdiction*." *Frank v. Mangum*, 237 U.S. 309, 326 (1915) (emphasis added). The holding below violates that basic principle. Under the reasoning of *McGirt*, the Oklahoma courts lacked jurisdiction to convict or sentence petitioner. And the Oklahoma legislature lacked power to confer that jurisdiction on the Oklahoma courts. As a result, petitioner's conviction violates a fundamental feature of due process that has prevailed for centuries—that a court without

jurisdiction cannot impose a valid criminal judgment.

The writ of habeas corpus was originally created for situations like petitioner's. Originating in England, the Great Writ allowed courts "to enforce the King's prerogative to inquire into the authority of a jailer to hold a prisoner." *Boumediene v. Bush*, 553 U.S. 723, 741 (2008). That is, the writ protected any defendant who had been "restrained of his liberty by order or decree of any illegal court," including a court lacking jurisdiction to impose the conviction or punishment. 1 William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 135 (1765).

Time and again, this Court has confirmed that a court's lack of jurisdiction is a quintessential basis for invoking the writ of habeas corpus. In *Ex parte Lange*, 85 U.S. 163 (1873), this Court held that the defendant was entitled to the writ because the trial court lacked jurisdiction to impose his sentence. In *Ex parte Wilson*, 114 U.S. 417 (1885), the Court held that the defendant was entitled to a writ of habeas corpus because the trial court had exceeded its jurisdiction in trying, convicting, and sentencing him. In *The Ku Klux Cases*, 110 U.S. 651 (1884), the Court found it "well settled that when a prisoner is held under the sentence of any court of the United States in regard to a matter wholly beyond or without the jurisdiction of that court, it is not only within the authority of the supreme court, but it is its duty, to inquire into the cause of commitment when the matter is properly brought to its attention, and if found to be as charged, a matter of which such court had no jurisdiction, to discharge the prisoner from confinement." *Id.* at 653. And in *Crow Dog*, the Court applied that principle to vacate a federal

conviction on habeas corpus as "void" where a federal territorial court lacked "jurisdiction" over Indian-on-Indian crime. 109 U.S. at 557, 572. The same established principles apply here.

In sum, granting post-conviction relief to petitioner because the Oklahoma courts lacked jurisdiction to convict him effectuates the original purpose of habeas corpus and reaffirms the fundamental due process principle that only courts of competent jurisdiction may impose criminal penalties. The Oklahoma court's decision casts those principles aside. Certiorari is warranted to reinstate them.

3. The number of convictions at stake underscores the need for this Court's review. Oklahoma itself has stressed the importance of the question presented in this petition. It has filed multiple petitions with this Court, asking it to address the grant of post-conviction relief to certain of those defendants.[9] By its own calculations, the Oklahoma Department of Corrections has already released more than 150 prisoners who succeeded in such challenges. *See* Pet. for Cert. 23, *Oklahoma v. Bosse*, No. 21-186 (U.S. Aug. 6, 2021), *cert. dismissed* (Sept. 3, 2021). And

[9] *See, e.g.*, Pet., *Oklahoma v. Spears*, No. 21-323 (filed Aug. 28, 2021); Pet., *Oklahoma v. Bain*, No. 21-319 (filed Aug. 27, 2021); Pet., *Oklahoma v. Perry*, No. 21-320 (filed Aug. 27, 2021); Pet., *Oklahoma v. Johnson*, No. 21-321 (filed Aug. 27, 2021); Pet., *Oklahoma v. Harjo*, No. 21-322 (filed Aug. 27, 2021); Pet., *Oklahoma v. Grayson*, No. 21-324 (filed Aug. 27, 2021); Pet., *Oklahoma v. Janson*, No. 21-325 (filed Aug. 27, 2021); Pet., *Oklahoma v. Sizemore*, No. 21-326 (filed Aug. 27, 2021); Pet., *Oklahoma v. Ball*, No. 21-327 (filed Aug. 27, 2021).

more than 3,000 applications for post-conviction relief have been filed by prisoners seeking to overturn their state convictions based on *McGirt*. *Id.*

McGirt recognized the monumental implications of its decision. As the Court acknowledged, "'[t]housands' of Native Americans like Mr. McGirt" may "'wait in the wings' to challenge the jurisdictional basis of their state-court convictions." 140 S. Ct. at 2479. The dissenting opinion recognized that the Court's decision "draws into question thousands of convictions obtained by the State" as "now subject to jurisdictional challenges." *Id.* at 2500 (Roberts, C.J., dissenting); *see also id.* at 2501 ("At the end of the day, there is no escaping that today's decision will undermine numerous convictions obtained by the State."). Of course, some of these individuals "may choose to finish their state sentences rather than risk reprosecution in federal court where sentences can be graver." *Id.* at 2479; *see also supra* at 13 n.5 (noting that petitioner himself faces federal prosecution). But by any measure, the sheer number of convictions at stake gives the issue in this case the degree of practical significance that warrants this Court's review.

C. This Case Provides An Excellent Vehicle To Address The Retroactivity Of *McGirt*

This case affords a perfect vehicle for resolving the question presented. The issue of *McGirt*'s retroactivity was preserved throughout the trial court and appellate proceedings, was thoroughly considered by the court below, and is outcome-determinative here.

1. In the proceedings below, petitioner preserved

his claim that *McGirt* applies retroactively under federal law. *See* Parish Br. 10-12, *State v. Hon. Jana Wallace*, No. PR-2021-366 (Okla. Crim. App. June 24, 2021). As he explained, federal law controls whether petitioner may be prosecuted in state court. *Id.* at 10. Petitioner contended that a conviction rendered by a court that lacks jurisdiction must be set aside at any time, even in post-conviction proceedings. *See id.* at 11-12. And petitioner's amici argued that *McGirt* "is plainly a substantive rule of constitutional law which must be given retroactive effect" under *Teague* principles, relying on this Court's holding in *Montgomery* and Congress's exclusive power to prosecute major crimes by Indians in Indian country. Cherokee Nation et al. Amici Br. 9 n.12, *State v. Hon. Jana Wallace*, No. PR-2021-366 (Okla. Crim. App. July 2, 2021) (citing *Montgomery*, 577 U.S. at 199-200).

Oklahoma equally clearly took the opposite position. An entire section of its brief argued that "*McGirt v. Oklahoma* is not retroactive in its application." Appellant Br. 6, *State v. Hon. Jana Wallace*, No. PR-2021-366 (Okla. Crim. App. June 25, 2021). The State set forth its view at length, *see id.* at 7-10, that *McGirt* is non-retroactive under this Court's decisions in *Teague* and *Edwards v. Vannoy*, 141 S. Ct. 1547 (2021).

The Oklahoma Court of Criminal Appeals directly passed on the retroactivity of *McGirt*. In the lower court's view, *McGirt* announced a new rule that was merely procedural, and thus did not apply retroactively. Its decision necessarily rejected petitioner's federal-law claim—that *McGirt* of its own force must be applied in state collateral-review

proceedings. Accordingly, the question presented was both "pressed" and "passed upon," *United States v. Williams*, 504 U.S. 36, 41 (1992) (noting that either is sufficient to warrant certiorari), and is squarely presented for this Court's review.

2. The question presented also determines the outcome of petitioner's request for post-conviction relief. The Oklahoma Court of Criminal Appeals relied only on retroactivity as a bar to applying *McGirt* to petitioner's conviction, not on any waiver principle. And the State cannot now invoke a waiver rationale to shield its decision, because no such principle would be "consistently or regularly applied." *Johnson v. Mississippi*, 486 U.S. 578, 588-89 (1988); *see McGirt*, 140 S. Ct. at 1501 n.9 (Roberts, C.J., dissenting) (noting that under Oklahoma law, jurisdictional objections are "never waived and can therefore be raised on a collateral appeal") (internal quotation marks omitted); Pet. App. 6a-7a (Oklahoma Court of Criminal Appeals acknowledged that "[a]fter *McGirt* was decided, relying on this theory of non-waivability, this Court initially granted post-conviction relief and vacated several . . . convictions . . . that were final when *McGirt* was announced"); *see also* Nat'l Ass'n of Crim. Def. Laws. Amicus Br. 3-5, *McGirt v. Oklahoma*, No. 18-9526 (U.S. Feb. 11, 2020) (describing Oklahoma's longstanding rule that subject matter jurisdiction is never waived). As a result, if *McGirt* is held to apply retroactively to state convictions that were final when it was decided because it announced a substantive rule, petitioner will be entitled to post-conviction relief.

3. Although the Oklahoma court asserted that

state-law retroactivity rules barred relief for petitioner, that is not an adequate and independent barrier to this Court's review, for at least two reasons.

First, if *McGirt* is a substantive, constitutional rule—as petitioner contends—under *Montgomery v. Louisiana*, it is retroactive as a matter of federal law. As *Montgomery* explained, "[i]f . . . the Constitution establishes a rule and requires that the rule have retroactive application, then a state court's refusal to give the rule retroactive effect is reviewable by this Court." 577 U.S. at 197. The State cannot evade a federal requirement that a rule applies retroactively by relying on a state-law holding that it does not. No state-law principles can obstruct the preemptive operation of federal law. *See Nitro-Lift Techs., LLC v. Howard*, 568 U.S. 17, 19-20 (2012) (per curiam); *Int'l Longshoremen's Ass'n v. Davis*, 476 U.S. 380, 387-88 (1986).

Second, even taking the Oklahoma court's *Teague* ruling on its own terms, that decision "fairly appears to rest primarily on federal law, or to be interwoven with the federal law," and thus falls within this Court's jurisdiction. *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983); *see McGirt*, 140 S. Ct. at 2479 n.15 (applying *Long* to determine that this Court had jurisdiction to review the Oklahoma Court of Criminal Appeals' decision on the effect of the MCA on McGirt's conviction). The decision below took its retroactivity standards directly from this Court's retroactivity jurisprudence. *See* Pet. App. 5a-6a, 8a-10a, 13a (citing *Teague*, *Gosa v. Mayden*, 413 U.S. 665 (1973), and *Schriro*). Thus, "the adequacy and independence of any possible state law ground is not

clear from the face of the opinion." *Long*, 463 U.S. at 1040-41. To the contrary, "the most reasonable explanation" of the Oklahoma court's decision is "that the state court decided the case the way it did because it believed that federal law required it to do so." *Id.* at 1041. In that situation, this Court has jurisdiction to review the state court's application of federal standards. *See*, *e.g.*, *Merrell Dow Pharms. Inc. v. Thompson*, 478 U.S. 804 (1986); *Three Affiliated Tribes of the Fort Berthold Rsrv. v. Wold Eng'g, P.C.*, 467 U.S. 138 (1984); *Standard Oil Co. v. Johnson*, 316 U.S. 481 (1942).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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