No. 22-

IN THE

Supreme Court of the United States

JOHNNY ELLERY SMITH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

STEPHEN R. SADY
Chief Deputy Federal Public Defender
CONOR HUSEBY
Assistant Federal Public Defender
101 SW Main St., Ste. 1700
Portland, OR 97204
(503) 326-2123

SETH P. WAXMAN
Counsel of Record
DANIEL S. VOLCHOK
JOSEPH M. MEYER
WILMER CUTLER PICKERING HALE AND DORR LLP
2100 Pennsylvania Ave. NW
Washington, DC 20037
(202) 663-6000
seth.waxman@wilmerhale.com

QUESTION PRESENTED

Whether the Assimilative Crimes Act, 18 U.S.C. §13, applies to Indian country—either on its own or through the General Crimes Act, 18 U.S.C. §1152—such that the federal government may prosecute Indians for virtually any state-law offense committed in Indian country, including on lands promised by treaty for the "exclusive use" of Indian tribes.

RELATED PROCEEDINGS

United States v. *Smith*, No. 21-35036 (9th Cir.) (judgment issued on August 4, 2022; panel and en banc rehearing denied on October 13, 2022).

United States v. *Smith*, No. 3:20-CV-01951-JO (D. Or.) (judgment issued on January 13, 2021).

United States v. *Smith*, No. 17-30248 (9th Cir.) (judgment issued on May 28, 2019).

United States v. *Smith*, No. 3:16-CR-00436-JO (D. Or.) (motion to dismiss denied on August 15, 2017; judgment issued on December 1, 2017).

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PETITION FOR A WRIT OF CERTIORARI

Johnny Ellery Smith respectfully petitions for a writ of certiorari to review the judgment in this case of the United States Court of Appeals for the Ninth Circuit.

INTRODUCTION

This Court has long recognized that Indian tribes are "separate sovereigns pre-existing the Constitution." *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 56 (1978). As such, they retain "their historic sovereign authority" unless it is expressly abrogated by Congress. *Michigan* v. *Bay Mills Indian Community*, 572 U.S. 782, 788 (2014).

A key aspect of that authority, this Court has explained, is "the right of reservation Indians to make

their own laws and be ruled by them." *Williams* v. *Lee*, 358 U.S. 217, 220 (1959). Accordingly, tribes are generally "not brought under the laws of the Union or of the State within whose limits they reside." *United States* v. *Kagama*, 118 U.S. 375, 381-382 (1886). Indeed, this Court has repeatedly declined "to impose upon [Indians] the restraints of an external" law code, *Ex parte Crow Dog*, 109 U.S. 556, 571 (1883), holding instead that "the relations of the Indians[] among themselves" must "be controlled by the customs and laws of the tribe, save when Congress *expressly or clearly* directs otherwise," *United States* v. *Quiver*, 241 U.S. 602, 605-606 (1916) (emphasis added). Where such an express congressional directive is lacking, the Court has acknowledged, "[f]ederal pre-emption of a tribe's jurisdiction to punish its members for infractions of tribal law would detract substantially from tribal self-government." *United States* v. *Wheeler*, 435 U.S. 313, 332 (1978).

In derogation of these established principles, the Ninth Circuit held in two decisions that the United States could use state law to prosecute a *tribal* member (petitioner) for eluding *tribal* police on *tribal* land, even though that conduct is also prohibited by *tribal* law. This holding—unsupported by the requisite clear direction from Congress—would allow the federal government to prosecute Indians for virtually any state-law offense committed on Indian lands, even minor, victimless offenses that proscribe conduct a tribe has expressly chosen *not* to proscribe, or conduct that (as here) is *already* proscribed by tribal law. Such a regime would constitute a sharp and unjustified departure from what this Court described in *McGirt* v. *Oklahoma,* 140 S.Ct 2452 (2020), as the "policy of leaving Indians free from state jurisdiction and control [that] is deeply rooted in this Nation's history," *id.* at 2476.

The Ninth Circuit's two core holdings here, in addition to being deeply offensive to Indian sovereignty, are each impossible to square with this Court's recent holdings and reasoning in *McGirt* and *Oklahoma* v. *Castro-Huerta*, 142 S.Ct. 2486 (2022).

First, the Ninth Circuit held that the Assimilative Crimes Act, 18 U.S.C. §13 (ACA)—which confers federal jurisdiction over state crimes committed in "federal enclaves"—applies by its own terms to Indian lands, i.e., held that such lands are federal enclaves. App. 26a. That holding is foreclosed by *Castro-Huerta*'s conclusion that federal law "does *not* purport to equate Indian country and federal enclaves for jurisdictional purposes," 142 S.Ct. at 2495 (emphasis added). The Ninth Circuit upheld federal jurisdiction on this ground despite recognizing that "the ACA lacks any express reference to Indians or Indian country." App. 20a. That departs not only from the cases cited above but also from this Court's ruling in *McGirt* that "[i]f Congress wishes to break the promise of a reservation, it must say so," 140 S.Ct. at 2462.

Second, the court of appeals alternatively held that even if the ACA does not apply to Indian lands by its own terms, it applies through the General Crimes Act (GCA)—also known as the Indian Country Crimes Act—which extends to Indian lands "the general laws of the United States as to the punishment of offenses" committed in federal enclaves, 18 U.S.C. §1152. This holding is likewise foreclosed by *Castro-Huerta*, which explained that the GCA extends "federal *criminal* laws," 142 S.Ct. at 2496 (emphasis added), not jurisdictional statutes like the ACA, which provides federal jurisdiction to enforce *state* criminal laws. The holding is also wrong because by its terms the GCA does "not extend … to any case where, by treaty stipulations, the exclusive jurisdiction

over [the relevant] offenses is or may be secured to the Indian tribes respectively," 18 U.S.C. §1152. That exception applies here because the Warm Springs Reservation, where Mr. Smith's offenses were alleged to have occurred, was set aside by treaty with the United States for the "exclusive use" of the Warm Springs Tribes.

To be fair, the Ninth Circuit originally upheld federal jurisdiction in Mr. Smith's case before *McGirt* and *Castro-Huerta*. But when Mr. Smith brought those decisions to the Ninth Circuit's attention in seeking habeas relief, the court declined to disturb its prior decision, cementing the severe intrusion on tribal sovereignty that that decision represents. Because the Ninth Circuit has thus "decided an important federal question in a way that conflicts with relevant decisions of this Court," S.Ct. R. 10(c), the Court's review is warranted.

OPINIONS BELOW

The Ninth Circuit's opinion affirming the denial of habeas relief (App. 1a-3a) is unreported but available at 2022 WL 3102454 (*Smith II*). The district court's decision denying habeas relief (App. 5a-14a) is unreported but available at 2021 WL 136126. The Ninth Circuit's order denying panel and en banc rehearing (App. 55a) is unreported.

The Ninth Circuit's earlier decision, affirming the district court's denial of Mr. Smith's motion to dismiss the prosecution for lack of jurisdiction (App. 15a-37a), is reported at 925 F.3d 410 (*Smith I*). The district court's denial of that motion (App. 39a-53a) is unreported.

JURISDICTION

The Ninth Circuit entered judgment on August 4, 2022. It denied Mr. Smith's timely petition for panel

rehearing or rehearing en banc on October 13. On December 19, Justice Kagan extended the time to file a petition for certiorari through February 10, 2023. On January 27, Justice Kagan further extended the time to file the petition through March 10. This Court has jurisdiction under 28 U.S.C. §1254(1).

TREATY AND STATUTORY PROVISIONS

In the Treaty with the Tribes of Middle Oregon, 12 Stat. 963 (1855), the United States committed to the Confederated Tribes of Warm Springs that the Warm Springs Reservation "shall be set apart, and, so far as necessary, surveyed and marked out for their exclusive use."

The Assimilative Crimes Act, 18 U.S.C. §13, provides in relevant part that:

> Whoever within or upon any of the places now existing or hereafter reserved or acquired as provided in [18 U.S.C. §7] … is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.

Section 7 of Title 18 of the U.S. Code, to which the ACA refers, provides in relevant part that "[t]he term 'special maritime and territorial jurisdiction of the United States' … includes … [a]ny lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof."

The General Crimes Act, 18 U.S.C. §1152, provides that:

> Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.
>
> This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.

The Major Crimes Act, 18 U.S.C. §1153, provides in relevant part that:

> Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping, maiming, a felony under chapter 109A, incest, a felony assault under section 113, an assault against an individual who has not attained the age of 16 years, felony child abuse or neglect, arson, burglary, robbery, and a felony under section 661 of this title within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.

Section 811.540(1) of the Oregon Revised Statutes provides that:

> A person commits the crime of fleeing or attempting to elude a police officer if:
>
> (a) The person is operating a motor vehicle; and
>
> (b) A police officer who is in uniform and prominently displaying the police officer's badge of office or operating a vehicle appropriately marked showing it to be an official police vehicle gives a visual or audible signal to bring the vehicle to a stop, including any signal by hand, voice, emergency light or siren, and either:
>
> (A) The person, while still in the vehicle, knowingly flees or attempts to elude a pursuing police officer; or
>
> (B) The person gets out of the vehicle and knowingly flees or attempts to elude the police officer.

Section 310.520 of the Warm Springs Tribal Code provides that "[a] driver of a motor vehicle commits the crime of fleeing or attempting to elude a police officer if, when given visual or audible signal to bring the vehicle to a stop, he knowingly flees or attempts to elude a pursuing police officer."

STATEMENT

1. Congress has enacted various statutes creating federal jurisdiction over criminal offenses that occur on lands beyond the reach of state criminal jurisdiction. For example, the ACA, 18 U.S.C. §13, applies to offenses that occur on federal enclaves—that is, "lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof," *id.*

§7(3), such as national parks and military bases. The ACA confers federal jurisdiction to enforce state criminal laws on such lands with respect to conduct not otherwise made punishable by an act of Congress.

The GCA, meanwhile, makes applicable to Indian lands "the general laws of the United States as to the punishment of offenses committed" in federal enclaves. 18 U.S.C. §1152. The "laws" thereby extended to Indian country are commonly known as "federal enclave laws," including laws proscribing arson, *id.* §81; assault, *id.* §113; theft, *id.* §661; receipt of stolen property, *id.* §662; murder, *id.* §1111; manslaughter, *id.* §1112, and sexual offenses, *id.* §2241 *et seq.* But to "ensure that the federal government does not meddle in cases most likely to implicate tribal sovereignty," *Castro-Huerta*, 142 S.Ct. at 2514 (Gorsuch, J., dissenting), the GCA carves out three exceptions to the application of federal enclave laws on Indian lands: The statute withholds federal jurisdiction over "offenses committed by one Indian against the person or property of another Indian," offenses committed by Indians where the perpetrator "has been punished by the local law of the tribe," and—of particular relevance here—offenses over which, "by treaty stipulations, … exclusive jurisdiction … is or may be secured to the Indian tribes." 18 U.S.C. §1152.

In "direct response" to this Court's enforcement of the GCA's first exception in *Ex parte Crow Dog*—which held "that a federal court lacked jurisdiction to try an Indian for the murder of another Indian … in Indian country," *Keeble* v. *United States*, 412 U.S. 205, 209 (1973)—Congress enacted the Major Crimes Act, 18 U.S.C. §1153. That statute creates federal-court jurisdiction over Indians who commit any of thirteen enumerated offenses, regardless of whether the victim is an Indian. *See id.* §1153(a). Most of the listed offenses are

defined by distinct federal statutes. Those offenses that are "not defined and punished by Federal law" are to be "defined and punished in accordance with the laws of the State" where the crime was committed. *Id.* §1153(b).

2. Petitioner Johnny Ellery Smith is an enrolled member of the Confederated Tribes of Warm Springs. On November 1, 2016, the federal government indicted Mr. Smith for the Oregon crime of eluding an officer, Or. Rev. Stat. §811.540(1), charging that Mr. Smith twice eluded tribal officers on the reservation. Eluding police is also an offense under the Warm Springs Tribal Code (§310.520), but it is not one of the thirteen offenses over which the Major Crimes Act establishes federal jurisdiction for offenses committed on Indian lands. The government instead asserted jurisdiction to prosecute Mr. Smith under the ACA and the GCA.

Mr. Smith moved to dismiss the indictment, contending that the ACA and GCA do not confer federal jurisdiction over minor state-law crimes allegedly committed by tribal members on Indian lands. The district court denied the motion. App. 39a-53a. Mr. Smith appealed after entering a conditional guilty plea, arguing that federal prosecution of minor state-law crimes committed by Indians on Indian lands broke treaty promises and was impermissible in the absence of express statutory language creating federal jurisdiction.

The Ninth Circuit affirmed in a published opinion (*Smith I*). The panel first upheld federal jurisdiction under the ACA alone, holding that Indian reservations qualify as "'lands reserved or acquired for the use of the United States,'" App. 21a (quoting 18 U.S.C. §7(3)). That holding was based not on any express statutory reference to Indians or Indian lands but rather on (1) what the panel deemed a "meaning of Indian reservation" that

"emerged" through historical practice, App. 23a, and (2) dicta in *Williams* v. *United States*, 327 U.S. 711 (1946), which the Ninth Circuit described as "readily accept[ing] that Indian reservations are 'reserved or acquired for the use of the United States' within the meaning of 18 U.S.C. § 7(3) without much discussion," App. 22a. The panel alternatively upheld federal jurisdiction under the ACA through operation of the GCA, reasoning that the ACA is among the "'general laws of the United States'" that the GCA extends to Indian lands. App. 26a (quoting 18 U.S.C. §1152). Finally, the panel concluded that "none of the [GCA]'s exceptions apply in this case." App. 33a.

In a concurring opinion, Judge Fisher expressed concern about the panel's primary holding, i.e., that the ACA covers Indians lands by its own terms. App. 36a-37a. According to Judge Fisher, that holding was "'inconsistent with the policy of leaving tribes free of general federal criminal laws, except as expressly provided.'" App. 37a (quoting 1 *Cohen's Handbook of Federal Indian Law* §9.02[1][c][ii] n.19 (2017)). Judge Fisher also noted that the Ninth Circuit was the only court that had concluded "'that the ACA applied of its own force within Indian country,'" and that before *Smith I*, the court had done so only "'in a case in which the point was not in issue.'" *Id.* (quoting 1 *Cohen's Handbook* §9.02[1][c][ii] n.19). Judge Fisher agreed, however, that the ACA applied to Indian lands as part of the "general laws of the United States" referred to in the GCA. App. 36a.

After this Court decided *McGirt*, Mr. Smith moved the district court for relief under 28 U.S.C. §2255, again asserting lack of federal jurisdiction. He argued that *Smith I*'s analysis—which as noted did not rest on any express statutory reference to Indians or Indian lands—

was irreconcilable with *McGirt*'s central holding that "[i]f Congress wishes to withdraw its promises, it must say so," 140 S.Ct. at 2482. The district court denied relief. App. 5a-14a.

Mr. Smith appealed, and after the Ninth Circuit heard oral argument but before it issued a decision, this Court decided *Castro-Huerta*. Mr. Smith then submitted a letter to the court of appeals explaining that *Castro-Huerta* further undermined *Smith I* by confirming that Indian lands are not the jurisdictional equivalent of a "federal enclave" and by disavowing the dicta from *Williams* v. *United States* upon which *Smith I* relied.

The court of appeals affirmed in an unpublished opinion (*Smith II*). App. 1a-3a. The panel declined to address whether *Smith I*'s primary holding (that the ACA applies in Indian county by its own terms because Indian reservations are federal enclaves) was superseded by *McGirt* and *Castro-Huerta*. App. 3a n.1. It thereby left that published holding intact as law of the circuit. The panel instead reaffirmed *Smith I*'s alternative holding, i.e., that "the ACA applies to Indian country via the" GCA. App. 2a. The panel reasoned that *Castro-Huerta* was irrelevant to that holding because this Court's opinion "made no mention of the ACA" and focused merely on "whether the text of the [GCA] rendered Indian country the equivalent of a federal enclave such that the federal government had exclusive jurisdiction to prosecute criminal offenses committed there." App. 3a. The panel also reaffirmed *Smith I*'s holding that Mr. Smith's prosecution "was not prohibited by the ['treaty stipulation'] exception" to the GCA, reasoning that "*McGirt* does not address the [GCA] exceptions" and thus "does not undermine [*Smith I*]'s analysis of them." *Id.*

The Ninth Circuit denied Mr. Smith's subsequent petition for panel rehearing or rehearing en banc. App. 55a.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's decisions here vastly expand the power of federal officials to use state criminal law to prosecute Indians for conduct occurring on Indian land, even when that conduct is also proscribed by tribal law. Those decisions misread federal statutes in ways that depart from this Court's recent decisions in *McGirt* and *Castro-Huerta*, as well as from other decisions of this Court that properly respect—as Congress has directed—the right of Native American people to govern themselves and not to have the criminal laws of other sovereigns imposed on them and their lands unless Congress "expressly or clearly directs otherwise," *Quiver*, 241 U.S. at 605-606. Because the Ninth Circuit's decisions conflict with both congressional intent and this Court's precedent, and because those decisions have far-reaching deleterious implications, this Court's review is warranted.

I. THE DECISIONS BELOW ARE WRONG UNDER *MCGIRT* AND *CASTRO-HUERTA*

A. The ACA Does Not Apply By Its Own Terms To The Warm Springs Reservation

The Assimilative Crimes Act, 18 U.S.C. §13, makes state criminal law applicable to conduct not punishable under federal law when the conduct occurs on a federal enclave, defined in relevant part as "lands reserved or acquired for the use of the United States," *id.* §7. The Warm Springs Reservation, where the conduct for which Mr. Smith was prosecuted allegedly occurred, was

not "reserved or acquired for the use of the United States." To the contrary, it was promised by treaty for the "exclusive use" of the Confederated Tribes of Warm Springs. Treaty with the Tribes of Middle Oregon, 12 Stat. 963 (1855).

Notwithstanding this treaty promise, the Ninth Circuit held in *Smith I* that the ACA applies to the Warm Springs Reservation because a "meaning of Indian reservation" that "emerged" through historical practice renders the Warm Springs Reservation "reserved or acquired for the use of the United States." App. 22a-23a. That holding is impossible to square with *McGirt*, which rejects such reliance on "historical practices" and other "extratextual considerations," 140 S.Ct. at 2468-2469. Rather, this Court held, "[i]f Congress wishes to break the promise of a reservation," it must "clearly express its intent to do so," *id.* at 2462-2463. As the dissent in *McGirt* confirmed, the decision "sharply restrict[s] consideration of contemporaneous and subsequent evidence of congressional intent," *id.* at 2487 (Roberts, C.J., dissenting), instead requiring close attention to the express terms of treaties and statutes.

Under *McGirt*, the United States' "exclusive use" promise to the Warm Springs Tribes has never been abrogated so as to render the Warm Springs Reservation "reserved or acquired for the use of the United States" and thus a federal enclave for purposes of the ACA. The ACA itself effects no such abrogation; as even *Smith I* recognized, "[t]he plain text of the ACA lacks any express reference to Indians or Indian country." App. 20a. *Smith I* likewise acknowledged "the absence of the term 'Indian'" in 18 U.S.C. §7(3), the federal-enclave statute referred to in the ACA. App. 21a. Indeed, the Ninth Circuit provided *no* textual basis for disregarding the United States' treaty promise of "exclusive use." And

certainly Congress has never expressly stated that Indian lands—much less lands promised for the "exclusive use" of Indian tribes—constitute "lands reserved or acquired for the use of the United States."

Castro-Huerta further undermines *Smith I*'s holding that the ACA applies by its own terms to the Warm Springs Reservation, in three ways. First, *Castro-Huerta* reaffirmed *McGirt*'s rejection of extra-textual intrusions on tribal sovereignty, explaining that "the text of a law controls over purported legislative intentions unmoored from any statutory text," 142 S.Ct. at 2496. Second, *Castro-Huerta* confirms that Indian reservations are not "federal enclaves," expressly rejecting an argument that "equate[d] federal enclaves and Indian country." *Id.* at 2495. And third, *Castro-Huerta* undercuts *Smith I*'s reliance on *Williams* v. *United States* and its progeny, *see* App. 18a-19a, explaining that the relevant passage in *Williams* is "pure dicta" that, "even if repeated, does not constitute precedent," 142 S.Ct. at 2498.

Although it was not the basis on which the Ninth Circuit upheld federal jurisdiction in *Smith II*, *Smith I*'s holding that Indian land constitutes a "federal enclave," such that the ACA applies by its own terms to the Warm Springs Reservation, remains binding circuit law. *See Chambers* v. *United States*, 22 F.3d 939, 942 n.3 (9th Cir. 1994) ("In this circuit, once a published opinion is filed, it becomes the law of the circuit until withdrawn or reversed by the Supreme Court or an en banc court.") (subsequent history omitted). That holding will go uncorrected absent this Court's intervention, as the Ninth Circuit declined in this case—in the face of *McGirt* and *Castro-Huerta*—to revisit the holding en banc.

B. The ACA Does Not Apply Through The GCA To The Warm Springs Reservation

1. The ACA is not among the "general laws" extended by the GCA to Indian country

In both *Smith I* and *Smith II*, the Ninth Circuit held that the Assimilative Crimes Act applies to Indian lands through the General Crimes Act, which extends to Indian country "the general laws of the United States as to the punishment of offenses" committed on federal enclaves, 18 U.S.C. §1152. That holding is irreconcilable with *Castro-Huerta*, in which the Court took its "first hard look at the text and structure of the General Crimes Act," 142 S.Ct. at 2499.

Castro-Huerta confirms that what the GCA extends to Indian country are "federal criminal laws," 142 S.Ct. at 2496, what this Court also called the "body of federal criminal law," *id.* at 2495. That interpretation is supported by the GCA's reference to "the general laws of the United States as to the punishment of offenses," 18 U.S.C. §1152, because that language mirrors the common legal definition of "criminal law," i.e., "[t]he body of law defining offenses … and establishing punishments for convicted offenders," *Black's Law Dictionary*, "Criminal Law" (11th ed. 2019).

The ACA falls outside this definition because it is a jurisdictional statute rather than a "federal criminal law," *Castro-Huerta*, 142 S.Ct. at 2495. It does not "defin[e] offenses" or "establish[] punishments," *Black's Law Dictionary*, "Criminal Law." It instead creates federal jurisdiction to prosecute offenses defined by, and to impose punishments established by, *state* law.

Castro-Huerta's holding that "the General Crimes Act does not treat Indian country as the equivalent of a

federal enclave for jurisdictional purposes," 142 S.Ct. at 2496, reenforces this distinction between "federal criminal laws," *id.*, and laws providing federal jurisdiction over violations of *state* criminal laws. Because the GCA, as this Court held, does not "make[] Indian country the jurisdictional equivalent of a federal enclave," *id.* at 2495; *see also id.* (holding the contrary argument "wrong as a textual matter"), the statute does not extend jurisdictional laws applicable on federal enclaves—such as the ACA—to Indian country.

By contrasting the text of the GCA with that of its statutory neighbor, the Major Crimes Act, 18 U.S.C. §1153, *Castro-Huerta* further confirmed that the GCA's reference to "the general laws of the United States as to the punishment of offenses" means something narrower than all federal-enclave laws having anything to do with criminal punishment. As *Castro-Huerta* explained, "[u]nlike the General Crimes Act, the Major Crimes Act says that defendants in Indian country 'shall be subject to the *same law*' as defendants in federal enclaves." 142 S. Ct. at 2496 (emphasis added). If Congress had intended to extend *all* federal-enclave laws to Indian country through the GCA, it would have used the broad and simple "same law" language employed in the Major Crimes Act, which as noted appears in the federal code directly after the GCA. Because instead "the legislature use[d] certain language in one part of the statute and different language in another, the court assumes different meanings were intended." *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 712 n.9 (2004); *accord Dean* v. *United States*, 556 U.S. 568, 573 (2009) (citing *Russello* v. *United States*, 464 U.S. 16, 23 (1983)).

Smith II was therefore wrong in holding that "*Castro-Huerta* is not clearly irreconcilable" with *Smith I*'s holding that the ACA applies to Indian country through

the GCA. App. 2a. *Smith II*'s holding—based merely on the observation that *Castro-Huerta* "made no mention of the ACA," App. 3a—is flatly inconsistent with (1) *Castro-Huerta*'s "hard look" at the GCA's text, 142 S.Ct. at 2499; (2) its distinction between laws defining offenses and laws regarding jurisdiction; and (3) its comparison of the GCA to the Major Crimes Act. Those aspects of *Castro-Huerta* together make clear that the ACA is *not* among "the general laws of the United States" referred to in the GCA.

2. Smith's prosecution was barred by the GCA's "treaty stipulations" exception

Even if the ACA were among "the general laws of the United States" referenced in the GCA, it still would not govern here because one of the GCA's express textual exceptions applies.

By its terms, the GCA does "not extend … to any case where, by treaty stipulations, the exclusive jurisdiction over [the relevant] offenses is or may be secured to the Indian tribes respectively." 18 U.S.C. §1152. That exception applies here because of the United States' 1855 treaty stipulation that the Warm Springs Reservation is for the "exclusive use" of the Confederated Tribes of Warm Springs. Treaty with the Tribes of Middle Oregon, 12 Stat. 963. As explained, Congress has never abrogated this promise of "exclusive use" so as to permit the broad application of state criminal law to Indians on the Warm Springs Reservation. To the contrary, Congress has expressly *exempted* the reservation from Oregon's criminal jurisdiction on Indian lands, providing that Oregon has "jurisdiction over offenses committed by or against Indians in … [a]ll Indian country within the State, except the Warm Springs Reservation." 18 U.S.C. §1162(a).

While the foregoing leaves no doubt about the exception's applicability, if there were any doubt it would have to be resolved in favor of applying the exception. In *United States* v. *Quiver*, this Court held that another exception under the GCA—for "offenses committed by one Indian against the person … of another Indian," 18 U.S.C. §1152—applied to "adultery committed by one Indian with another Indian," even though "adultery is a voluntary act on the part of both participants, and, strictly speaking, not an offense against the person of either," 241 U.S. at 603, 605. In so holding, the Court reasoned that "the words of the exception" should not "be taken so strictly" as to preclude its application. *Id.* at 605. That instruction to broadly construe the GCA's exceptions is consistent with "a principle deeply rooted in this Court's Indian jurisprudence," namely, that "[s]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit," *County of Yakima* v. *Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 269 (1992).

Here, unlike in *Quiver*, no textual leap is required to conclude that a GCA exception applies. The treaty promise of "exclusive use" naturally encompasses a promise of "exclusive jurisdiction" over minor offenses, 18 U.S.C. §1152. And in exercising their right of "exclusive use," the Warm Springs Tribes have enacted criminal ordinances, including one that covers the offense charged in this case. *See* Warm Springs Tribal Code §310.520. Prosecutions for that offense should thus be left to tribal authorities "unless and until Congress makes clear its intention to permit the … intrusion on tribal sovereignty that adjudication of such actions in a federal forum would represent," *Santa Clara*, 436 U.S. at 72.

In sum, *Smith I* was wrong in holding that "none of the [GCA]'s exceptions apply in this case," App. 33a, and *Smith II* was wrong in "reject[ing] as unpersuasive Smith's contention that *McGirt* is clearly irreconcilable with [that] prior holding," App. 3a.

II. THE QUESTION PRESENTED IS EXCEPTIONALLY IMPORTANT

Certiorari is warranted to correct the Ninth Circuit's departures from this Court's precedent because the court of appeals' decisions allowing the United States to punish Indians for allegedly violating state law while on Indian lands would severely undermine the autonomy and sovereignty of every Indian tribe, band, and nation located in that circuit, and perhaps those located elsewhere.

This Court's longstanding role as a guardian of tribal sovereignty flows in large part from the Court's recognition that Indian tribes are "'distinct political communities' with their own mores and laws," *Wheeler*, 435 U.S. at 331 (quoting *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515, 557 (1832)); *see also Kagama*, 118 U.S. at 381-382 (acknowledging that Indians have "the power of regulating their internal and social relations"). Indeed, this Court has identified "the right to prescribe laws applicable to tribe members and to enforce those laws by criminal sanctions" as a key element of "inherent tribal sovereignty" and a lynchpin of Native peoples' "right of internal self-government." *Wheeler*, 435 U.S. at 322. The Court has accordingly explained, as noted at the outset, that "[f]ederal pre-emption of a tribe's jurisdiction to punish its members for infractions of tribal law would detract substantially from tribal self-government." *Id.* at 332.

Tribal sovereignty is likewise threatened when Indians on Indian lands are subjected to the laws of another sovereign, be it the United States, a state, another tribe, or a foreign country. That is why this Court has repeatedly emphasized that Indians on Indian lands generally are "not brought under the laws of the Union or of the State within whose limits they reside," *Kagama*, 118 U.S. at 381-382; *see also United States* v. *Joseph*, 94 U.S. 614, 617 (1877) (recognizing tribes as "exempt from our laws, whether within or without the limits of an organized State"). The leading treatise on the subject likewise recognizes that "[t]he policy in favor of tribal self-government … counsel[s] against extending the scope of the [GCA] to Indians committing so-called victimless crimes," which "should be subject to tribal, not federal, jurisdiction." 1 *Cohen's Handbook* §9.02[1][c][iii].

Consistent with these principles, this Court has long been a bulwark against efforts "to impose upon [Indians] the restraints of an external" law code, "which judges them by a standard made by others[] and not for them." *Ex parte Crow Dog*, 109 U.S. at 571. Perhaps most famously, Chief Justice Marshall explained in *Worcester* v. *Georgia* that the Cherokee Nation "is a distinct community occupying its own territory … in which the laws of Georgia can have no force." 31 U.S. at 561; *see also Kagama*, 118 U.S. at 384 (recounting *Worcester*'s holding that "the State could not … extend its laws, criminal and civil, over the tribes"). While this Court has since recognized that Indian lands are in fact "part of the State," *Castro-Huerta*, 142 S.Ct. at 2493, "the basic policy of *Worcester* has remained" a throughline in this Court's jurisprudence, *Williams*, 358 U.S. at 219, including as recently as last Term, *see Ysleta Del Sur Pueblo* v. *Texas*, 142 S.Ct. 1929, 1944 (2022) (holding that only a limited set of state gaming laws apply on tribal land). To

depart from that policy, this Court has recognized, would unjustly "undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves," *Williams*, 358 U.S. at 223.

The threat to tribal sovereignty from subjecting Indians to the law of another sovereign exists whether or not a tribe's own law proscribes the same conduct as the external law sought to be imposed. As this Court has explained, "providing a federal forum" for the enforcement of laws on an Indian reservation by itself "constitutes an interference with tribal autonomy and self-government beyond that created by the … substantive law itself," because the use of "a forum other than the one [tribes] have established for themselves … may undermine the authority of the tribal cour[t]." *Santa Clara*, 436 U.S. at 59 (second alteration in original) (quotation marks omitted). Indeed, this Court has recognized that even the adjudication of *civil* claims involving Indians in a federal forum "cannot help but unsettle a tribal government's ability to maintain authority." *Id.* at 60. But the application to Indians of state or federal criminal laws that proscribe conduct also prohibited by tribal law—which the decision below permits without any clear congressional authorization—constitutes a particular affront to tribal self-government, as it effectively divests tribes of prosecutorial discretion. That improperly ignores both the fact that "[t]ribal law enforcement authorities have the power to restrain those who disturb public order on the reservation," *Duro* v. *Reina*, 495 U.S. 676, 697 (1990), and the fact that tribes have "a significant interest in maintaining orderly relations among their members," *Wheeler*, 435 U.S. at 331. Put simply, applying "the full panoply of state law governing victimless crimes" to Indians on Indian land would result in "an

enormous intrusion on tribal authority over Indian affairs." Canby, *American Indian Law in a Nutshell* 191 (7th ed. 2019); *see also id.* at 193 (it is "difficult to see … why punishment of Indians for [victimless] crimes should be covered by federal law when they fall within the tribe's power of self-government").

This Court's historic respect for tribal self-government in the context of criminal jurisdiction reflects "the settled policy of Congress to permit the personal and domestic relations of the Indians with each other to be regulated … according to their tribal customs and laws." *Quiver*, 241 U.S. at 603-604. As the Senate Judiciary Committee reported over 150 years ago, "the [U.S.] Government has carefully abstained from attempting to regulate [Indians'] domestic affairs." S. Rep. No. 41-268, at 10 (1870). The committee further noted that "[v]olumes of treaties, acts of Congress almost without number, … and the universal opinion of our statesmen and people, have united to exempt the Indian … from the operation of our laws, and the jurisdiction of our courts." *Id.* In the century and a half since, Congress has repeatedly reaffirmed its commitment to this principle, including by providing exceptions to the GCA; by enacting the Indian Reorganization Act, 25 U.S.C. §§5101 *et seq.*, which "encouraged tribal governments and courts to become stronger and more highly organized," *Williams*, 358 U.S. at 220; and by amending the Indian Civil Rights Act to affirm that "the inherent power of Indian tribes" includes the power to "exercise criminal jurisdiction over all Indians," 25 U.S.C. §1301(2).[*]

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[*] Even when Congress has permitted the application of state criminal laws to Indians in Indian country—as in the Major Crimes Act—it has done so sparingly and with special solicitude for tribal sovereignty. For instance, a proponent of that statute agreed that

The regime the Ninth Circuit's decisions here establish—under which state criminal laws apply wholesale to conduct by Indians on Indian lands—clashes with Congress's longstanding policy and this Court's many cases reflecting and honoring that policy. Permitting federal prosecution of Indians in Indian country for virtually any minor, victimless state-law offense is exceedingly hard to reconcile with the "policy of leaving Indians free from state jurisdiction and control [that] is deeply rooted in this Nation's history," *McGirt*, 140 S.Ct at 2476. The Ninth Circuit's infringement on tribal sovereignty is especially egregious in light of the United States' express promise to set aside the Warm Springs Reservation for the "exclusive use" of the Confederated Tribes of Warm Springs. Once again, this Court's intervention is needed to "hold the government to its word," *Id.* at 2459.

"aggravated assault and battery" could be stricken from the legislation because "[w]e already have among the Indians the court of Indian offenses for the punishment of trivial violations of law." 15 Cong. Rec. 934 (1885) (statement of Rep. Cutcheon).

CONCLUSION

The petition for a writ of certiorari should be granted. Alternatively, given the clarity of the Ninth Circuit's errors, the Court may wish to consider summary reversal.

Respectfully submitted.

STEPHEN R. SADY
Chief Deputy Federal Public Defender
CONOR HUSEBY
Assistant Federal Public Defender
101 SW Main St., Ste. 1700
Portland, OR 97204
(503) 326-2123

SETH P. WAXMAN
Counsel of Record
DANIEL S. VOLCHOK
JOSEPH M. MEYER
WILMER CUTLER PICKERING HALE AND DORR LLP
2100 Pennsylvania Ave. NW
Washington, DC 20037
(202) 663-6000
seth.waxman@wilmerhale.com

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