No. 21-467

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

REPLY BRIEF FOR PETITIONER

Debra K. Hampton
HAMPTON LAW OFFICE
3126 S. Blvd., Ste. 304
Edmond, OK 73013

Keith J. Hilzendeger
Michael W. Lieberman
ASSISTANT FEDERAL PUBLIC DEFENDERS
850 W. Adams St., Ste. 201
Phoenix, AZ 85007

Michael R. Dreeben
Counsel of Record
Kendall Turner
O'MELVENY & MYERS LLP
1625 I St. NW
Washington, DC 20009
(202) 383-5400
mdreeben@omm.com

Melissa C. Cassel
L. Nicole Allan
O'MELVENY & MYERS LLP
2 Embarcadero Ctr., 28th Fl.
San Francisco, CA 94111

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

Statutes

IN THE

Supreme Court of the United States

NO. 21-467

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

REPLY BRIEF FOR PETITIONER

Oklahoma does not dispute the importance of the question presented, nor could it. Whether *McGirt* applies retroactively has significant implications for federal, state, and tribal criminal justice that call for this Court's review.

Oklahoma's lead argument for denying review is its claim that this Court lacks jurisdiction because the decision rests on an adequate and independent state-law ground. That is wrong. The lower court's retroactivity reasoning is neither adequate nor independent. Substantive constitutional rules apply retroactively as a matter of federal law, and a state

court cannot sidestep that rule by claiming that *McGirt* is a procedural decision. And here, the state court's erroneous retroactivity analysis invokes this Court's *Teague* jurisprudence, which this Court has jurisdiction to review. On the merits, Oklahoma contends that *McGirt* did not establish a substantive constitutional rule. But *McGirt* rests on constitutional premises about the allocation of power over Indians in Indian Country. And a decision that a state lacks power to prosecute is quintessentially substantive.

The need for review here is pressing. *McGirt* is a landmark decision about state and federal power. The ruling below perpetuates Oklahoma's unjust and unilateral usurpation of power in Indian Country, and it diminishes respect for this Court's decisions. Oklahoma's appeal to practical concerns is no answer to a decision that vitiates federal law, and those concerns are in any event overstated. This Court should grant review and reverse.

A. This Court Has Jurisdiction

1. Oklahoma contends that this Court lacks jurisdiction to review the decision below because that decision purportedly rests on adequate and independent state-law grounds—Oklahoma's own retroactivity doctrine. BIO 7-9. That argument fails.

First, if *McGirt* is a substantive, constitutional rule, it applies in state collateral proceedings as a matter of *federal* law. *See Montgomery v. Louisiana*, 577 U.S. 190 (2016). A state decision cannot be "adequate" if it defies federal law. Pet. 29. That means that Oklahoma's jurisdictional argument (*viz.*, that state courts are free to find *McGirt* non-

retroactive) depends on its merits position. This Court has authority to resolve that issue. *See United States v. Ruiz*, 536 U.S. 622, 628 (2002) ("a federal court always has jurisdiction to determine its own jurisdiction"; applying that principle where appellate jurisdiction would exist if the defendant was correct on the merits).

Second, while states are free to develop their own retroactivity frameworks, *see Danforth v. Minnesota*, 552 U.S. 264, 278 (2008), Oklahoma has not done so. Rather, the court relied on the federal retroactivity framework established in *Teague v. Lane*, 489 U.S. 288 (1989), to determine the retroactivity of *McGirt*. Each of the state court decisions cited in the decision below relied entirely on *Teague* or other retroactivity decisions of this Court. Pet. App. 4a. And the Tenth Circuit decision it cited (*id.*) expressly noted that "Oklahoma courts appear to have incorporated into state law the Supreme Court's *Teague* approach to analyzing whether a new rule of law should have retroactive effect." *Burleson v. Saffle*, 278 F.3d 1136, 1141 n.5 (10th Cir. 2002).

This Court has jurisdiction to review the court's interpretation of federal law. Where, as here, "a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion," this Court "will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so." *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983).

Oklahoma's responses are incomplete and

unsound. First, Oklahoma notes that the decision below cited state-court precedent. BIO 8. But the cited state court decisions rely on *Teague*. A state court's assertion that retroactivity is a "state law question," App. 7a, does not make it so when the state law decisions it cites rest on federal law.

Second, Oklahoma notes that the decision below asserted that Oklahoma's retroactivity doctrine draws on, but is "independent from, the Supreme Court's non-retroactivity doctrine in federal habeas corpus." BIO 8-9. But where, as here, a state *chooses* to apply *Teague*, application of that federal framework supports this Court's exercise of jurisdiction. *See* Pet. 30 (citing cases); *see also* U.S. Amicus Br. 28-32, *Montgomery v. Louisiana*, No. 14-280 (filed July 2015) (agreeing and explicating those cases). Oklahoma offers no response to those cases.

2. A running refrain through Oklahoma's brief is a suggestion that petitioner failed to raise his retroactivity argument timely in state court. BIO 1, 11 & n.4, 12, 13, 16. To the extent that Oklahoma implies that this suggestion bars review here, it is factually and legally wrong. First, in the proceedings below, petitioner and his amici raised the claim that *McGirt* is retroactive. *See* Pet. 26-28. Having properly presented that federal retroactivity claim, petitioner is free to "make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992).

Second, the decision below did not even hint at any failure by petitioner to timely raise *McGirt*'s retroactivity. The state court failed to rely on a forfeiture rationale for good reason: it has long

treated claims like petitioner's as jurisdictional objections that cannot be waived. In this very case, it reiterated that *McGirt* claims are "non-waivable jurisdictional challenges to criminal subject matter jurisdiction," App. 6a, and characterized petitioner's claim as raising a "jurisdictional flaw," *id.* at 10a, because *McGirt* altered "state and federal criminal jurisdiction," *id.* at 13a.

Until this case, Oklahoma itself framed *McGirt* as a jurisdictional rule. *See* Oklahoma Br. 3, *McGirt v. Oklahoma*, No. 18-9526 (filed March 2020) (arguing that a ruling in McGirt's favor would open the door to "[t]housands" of Native American who "wait in the wings" to challenge the State's "jurisdiction" to prosecute them). Now, however, Oklahoma argues that *McGirt* is not actually a jurisdictional ruling because the Major Crimes Act does not speak to the "court's power," BIO 16 (quoting *United States v. Wong*, 575 U.S. 402, 410 (2015)), and some federal courts treat "the federal government's failure to prove the status of the defendant or the victim as an Indian" as a non-jurisdictional "failure to prove an element of the offense," BIO 17. Not only do these arguments contradict the decision below, they are incorrect.

First, the Major Crimes Act *does* speak to a court's power. It provides that certain offenses by Indians within Indian country "shall be . . . within the exclusive jurisdiction of the United States." 18 U.S.C. § 1153(a). *McGirt* itself characterized its rule as jurisdictional dozens of times. *See McGirt*, 140 S. Ct. at 2458-82.

Second, that the federal government's failure to prove Indian status raises a sufficiency-of-the-

evidence issue is not relevant. Federal district courts "have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States." 18 U.S.C. § 3231. This statute gives federal courts subject-matter jurisdiction over cases *charging* federal crimes; they do not lose it even if the evidence fails to prove a "jurisdictional element." *See United States v. Haggerty*, 997 F.3d 292, 297 n.5 (5th Cir. 2021), *petition for cert. pending*, No. 21-516 (filed Oct. 7, 2021). But Oklahoma does not apply that rule in this context. *See* Pet. 28. Rather, Oklahoma courts treat *McGirt* errors as "non-waivable challenges to criminal subject matter jurisdiction." App. 4a; *see* Okla. Stat. tit. 22, § 1080(b). Oklahoma's effort to recharacterize state law thus fails.

B. *McGirt* Is A Constitutional Rule

McGirt is a constitutional rule with roots in the Supremacy Clause, the Indian Commerce Clause, and constitutional structure. Pet. 17, 22-25. Oklahoma would sweep aside *McGirt*'s constitutional underpinnings and instead conceptualize the case as a mere "statutory decision." BIO 10. That analysis is wrong.

1. Although *McGirt* held that the Major Crimes Act precluded Oklahoma from prosecuting major crimes by Indians in Indian country, *see* BIO 10, *McGirt* is not a mere statutory decision. *McGirt* is grounded in the underlying constitutional divestment of state power over Indian affairs. As *McGirt* itself explained: "Under our Constitution, States have no authority to reduce federal reservations lying within their borders." 140 S. Ct. 2452, 2462 (2020). Any other rule "would be at odds with the Constitution, which . . . directs that federal treaties and statutes

are the 'supreme Law of the Land.'" *Id.*

Oklahoma suggests that the Supremacy Clause does not provide a constitutional right to enforce statute-based claims against the states, BIO 12 (citing *Armstrong v. Exceptional Child Center, Inc.*, 575 U.S. 320 (2015)), but that misreads the decision. *Armstrong* holds the Supremacy Clause does not itself confer a private cause of action. *Armstrong*, 575 U.S. at 325. But the unavailability of a private cause of action to enforce the right does not mean that the right is unenforceable. *Armstrong* itself made clear that its holding does not "diminish the significant role that courts play in assuring the supremacy of federal law" by refusing to "give effect to state laws that conflict with federal laws." *Id.* at 326, 324. "For once a case or controversy properly comes before a court, judges are bound by federal law. Thus, a court may not convict a criminal defendant of violating a state law that federal law prohibits." *Id.* at 326. That principle applies here: Oklahoma opens its courts to habeas actions, and once it does, federal law—including *McGirt*—is binding, irrespective of whether the Supremacy Clause alone confers a private right of action.

2. *McGirt* also rests on the Constitution's Indian Commerce Clause. 140 S. Ct. at 2462. As this Court has explained, that Clause "entrusts Congress with the authority to regulate commerce with Native Americans," *id.*, and divests States of that same authority, *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 62 (1996). "If anything, the Indian Commerce Clause accomplishes a greater transfer of power from the States to the Federal Government than does the Interstate Commerce Clause. This is

clear enough from the fact that the States still exercise some authority over interstate trade but have been divested of virtually all authority over Indian commerce and Indian tribes." *Id.* Indian-Commerce-Clause-based claims, like Interstate-Commerce-Clause-based claims, *see Dennis v. Higgins,* 498 U.S. 439, 450 (1991), rest on individually enforceable constitutional rights, *see Seminole Tribe of Florida*, 517 U.S. at 62; *Worcester v. Georgia,* 31 U.S. 515, 561 (1832).

3. Oklahoma claims that this Court has retreated from *Worcester* and that *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 147-49 (1973), makes state jurisdiction in Indian country solely a matter of federal preemption, not broader constitutional principles. BIO 14. But *Mescalero* said only that states may apply civil law on Indian reservations "unless such application would interfere with the reservation [of tribal] self-government or would impair a right granted or reserved by federal law." *Id.* at 148. That ruling does not retreat from the longstanding principle that the States are constitutionally divested from exercising criminal jurisdiction over Indians in Indian country absent congressional authorization. Pet. 22-23.

Nor do Oklahoma's other citations (BIO 14-15) help it. *Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 481 & n.17 (1976), *People of the State of New York ex rel. Ray v. Martin*, 326 U.S. 496, 499 (1946), *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 176-77 (1989), and *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144-45 (1980), have nothing to do with States' authority to exercise criminal jurisdiction over

Indians in Indian Country. Rather, they dealt with States' taxation power over non-Indians on reservations. *See Cotton Petroleum*, 490 U.S. at 166; *Bracker*, 448 U.S. at 144; *Moe*, 425 U.S. at 483. They also *affirmed* that States cannot impose certain taxes and fees on Indians in Indian country because "federal statutes 'which define the limits of state power' . . . against the 'backdrop' of the Indian sovereignty doctrine" precluded those taxes and fees. *Moe*, 425 U.S. at 475 & n.17; *see Cotton Petroleum*, 490 U.S. at 176 (similar). *Nevada v. Hicks*, 533 U.S. 353 (2001), is likewise inapposite. It held only that tribal courts lack jurisdiction to adjudicate alleged off-reservation torts and Section 1983 claims, *id.* at 366, 369, while affirming that, "[w]hen on-reservation conduct involving only Indians is at issue, state law is generally inapplicable," *id.* at 362.

None of these cases undermines *Worcester*'s core holding that States lack inherent power to prosecute Indians for Indian Country crimes and may not do so absent an affirmative grant of federal power. To the contrary, even Oklahoma's chosen authority (BIO 14) embraces that central holding: "[I]f the crime was by or against an Indian, tribal jurisdiction or that expressly conferred on other courts by Congress has remained exclusive." *McClanahan v. State Tax Comm'n of Az.*, 411 U.S. 164, 171 (1973) (quoting *Williams v. Lee*, 358 U.S. 217, 219-20 (1959)).

C. *McGirt* Is A Substantive Rule

Oklahoma also contends that *McGirt*'s rule is not substantive. In Oklahoma's view, *McGirt*'s holding does not fit into the "few narrow categories of 'substantive' rules" delineated by this Court. BIO 19. That argument, however, hinges on Oklahoma's

mistaken characterization of "the proscribed conduct in the instant case [a]s capital murder." *Id.* (quoting *Butler v. McKellar*, 494 U.S. 407, 415 (1990). Petitioner agrees that capital murder is a crime before and after *McGirt*. What *McGirt* ruled illegal are *state prosecutions* of certain major crimes, including capital murder, "committed in Indian country by Indian defendants." *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2479 (2020).

This aspect of *McGirt*'s rule is substantive and thus "not subject to the [*Teague*] bar." *Schriro v. Summerlin*, 542 U.S. 348, 352 n.4 (2004). By excluding a certain class of defendants from state prosecution for certain crimes, *McGirt* both "place[s] particular . . . persons . . . beyond the State's power to punish," *id.* at 352, and "place[s] certain criminal laws and punishments altogether beyond the State's power to impose," *Montgomery v. Louisiana*, 577 U.S. 190, 201 (2016). That makes *McGirt*'s rule a substantive one that applies retroactively. A rule is substantive when a state cannot prosecute a defendant's conduct even if the law could be amended to allow it. *See Bousley v. United States*, 523 U.S. 614, 620-21 (1998). Because the State "lacked the power to proscribe . . . petitioner's conduct, 'it [can]not constitutionally insist that he remain in jail.'" *Montgomery*, 577 U.S. at 204 (quoting *Desist v. United States*, 394 U.S. 244, 261 n.2 (1969) (Harlan, J., dissenting)).

Oklahoma errs in relying on *Gosa v. Mayden*, 413 U.S. 665 (1973), as precedent for non-retroactivity of a decision like *McGirt*. BIO 20; *see* App. 8a-9a. *Gosa* is a fractured, pre-*Teague* opinion that established no binding holding. Four Justices believed that

O'Callahan v. Parker, 395 U.S. 258 (1969)—which limited court-martial jurisdiction over servicemembers to service-connected crimes—was a procedural decision "to protect the rights [of service members] to indictment and jury trial," and thus applied prospectively only. *Gosa*, 413 U.S. at 677, 685 (opinion of Blackmun, J.). Four Justices, in contrast, saw *O'Callahan* as a jurisdictional ruling that applied retroactively. As these Justices explained, because *O'Callahan* dealt with "the constitutional limits of the military's adjudicatory power over offenses committed by servicemen," "[n]o decision could more plainly involve the limits of a tribunal's power to exercise jurisdiction over particular offenses and thus more clearly demand retroactive application." *Id.* at 694 (Marshall, J., dissenting); *see id.* at 692 (Rehnquist, J., concurring in the judgments) (stating that "prior decisions mandate that *O'Callahan* be applied retroactively," but concurring in the judgment on the theory that *O'Callahan* should be overruled). Justice Douglas concurred in the judgment only because he thought *res judicata* barred the servicemember's collateral attack; he took "no position on the merits." *Id.* at 691 (Douglas, J., concurring in the result in part). Accordingly, *Gosa* does not establish the non-retroactivity of a jurisdictional ruling like *McGirt*.[1]

Oklahoma fares no better in citing *United States v. Cuch*, 79 F.3d 987 (10th Cir. 1996). *Cuch* declined

[1] *McSparran v. Weist*, 402 F.2d 867 (3d Cir. 1968) (en banc), is likewise inapposite because it conducted a statutory, pre-*Teague* retroactivity analysis that has no bearing here. *Contra* BIO 21-22.

to apply this Court's decision in *Hagen v. Utah*, 510 U.S. 399 (1994), retroactively based on a mistaken understanding of *Gosa* as a holding on retroactivity, *see* 79 F.3d at 990, 993, 994 n.15. *Cuch* also involved a different issue: whether this Court's decision that Congress had diminished a reservation, and thus left territory to state prosecution, retroactively invalidated federal convictions. Such an assertion of *federal* authority over an Indian outside of Indian country raises distinct issues from the situation here: a *State's* unlawful assertion of power over Indians based on their alleged crimes in Indian country. As discussed above, a *McGirt* error implicates constitutional concerns that are not present in the *Cuch* context.[2]

* * *

Oklahoma's final plea is to leave the error below unreviewed because granting relief will harm important interests in criminal justice. BIO 22. Oklahoma overlooks that petitioner has been recharged federally, Pet. 13 n.5, and that state, tribal, and federal prosecutors have engaged in a cooperative and effective response to *McGirt*, *see* OCDLA Amicus Br. 10-13. More fundamentally, enforcing this Court's decisions can have costs. But allowing state courts to invoke pragmatic concerns to negate this Court's decisions runs counter to the

---

[2] *Toy Toy v. Hopkins*, 212 U.S. 542 (1909), and *Davis v. Johnston*, 144 F.2d 862 (9th Cir. 1944), BIO 21-22, are inapposite for the same reason. There, the courts denied habeas corpus to Native Americans who argued that the federal government lacked authority to prosecute them.

supremacy of federal law and bedrock constitutional principles. The decision below walks down that dangerous path. This Court should intervene to correct it.

CONCLUSION

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

Respectfully submitted,

Debra K. Hampton
HAMPTON LAW OFFICE
3126 S. Blvd., Ste. 304
Edmond, OK 73013

Keith J. Hilzendeger
Michael W. Lieberman
ASSISTANT FEDERAL PUBLIC DEFENDERS
850 W. Adams St., Ste. 201
Phoenix, AZ 85007

Michael R. Dreeben
Counsel of Record
Kendall Turner
O'MELVENY & MYERS LLP
1625 I St. NW
Washington, DC 20009
(202) 383-5400
mdreeben@omm.com

Melissa C. Cassel
L. Nicole Allan
O'MELVENY & MYERS LLP
2 Embarcadero Ctr., 28th Fl.
San Francisco, CA 94111

December 8, 2021