

No. 25-1039

IN THE
Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

JASON ROBERT HOPSON AND
ROBERT MARCUS JOHNSTON,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Tenth Circuit

**BRIEF IN OPPOSITION FOR
RESPONDENT JASON ROBERT HOPSON**

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QUESTION PRESENTED

The Major Crimes Act (MCA) gives federal district courts jurisdiction over a discrete set of serious crimes committed by Indians against Indians in Indian country. The enumerated offenses include “felony assault,” but not simple assault. 18 U.S.C. § 1153(a). The question presented is whether a district court nonetheless has jurisdiction to convict an MCA defendant of simple assault merely because it is a lesser-included offense of felony assault.

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Judicial Branch of the Navajo Nation, *Courts & Peacemaking in the Navajo Nation: A Public Guide* (Feb. 23, 2021), <https://perma.cc/LX3Q-BQGJ>11

Reese, Elizabeth A., *The Other American Law*, 73 *Stan. L. Rev.* 555 (2021).....11, 12

U.S. Department of Justice, *Justice Manual*, <https://perma.cc/6VXA-DF65>9

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INTRODUCTION

Indian Tribes generally retain exclusive jurisdiction over Indian-on-Indian crimes in Indian country. The Major Crimes Act (MCA) creates a narrow exception to that background principle of tribal sovereignty by extending federal jurisdiction to a discrete set of serious offenses enumerated in 18 U.S.C. § 1153(a). That list includes “felony assault” but not simple assault, a lesser-included offense. *Id.* In this case, the Tenth Circuit recognized that the MCA bars a conviction for simple assault because “it is not one of the enumerated crimes.” Pet. App. 2a. There is no reason for this Court to review that “straightforward” application of the MCA’s “plain text.” *Id.* 21a.

To start, the question presented seldom arises and has little practical significance when it does. The MCA applies to a limited set of people in a limited set of places and covers a limited set of crimes. Only a few of those crimes have unenumerated lesser-included offenses. In practice, the question presented appears to arise almost exclusively in cases of misdemeanor assault. And where, as here, the MCA prevents a federal court from convicting a defendant of simple assault, tribal courts stand ready to step in: Tribes routinely prosecute such minor crimes, and they can do so even after an acquittal in federal court. The question thus is not whether simple assaults will be punished; instead, it is merely which courts—federal or tribal—will impose punishment.

The Tenth Circuit correctly recognized that these simple assault prosecutions belong in tribal court. Everyone agrees that the Government could not indict an MCA defendant for simple assault because Indian-on-Indian simple assault in Indian country is

not a federal crime. But on the Government's telling, giving a lesser-included offense instruction causes a new crime to spring into existence, creating a backdoor path to a conviction it could not have pursued directly. That bizarre result flouts the MCA's plain text. And it has no basis in *Keeble v. United States*, 412 U.S. 205 (1973), which held "only" that MCA defendants are entitled to "the protection afforded by an instruction on a lesser included offense." *Id.* at 214. Indeed, *Keeble* specifically "emphasize[d]" that it did not "expand[] the reach of the [MCA]." *Id.*

The Government also overstates the extent of any conflict in the circuits. The Tenth Circuit is the first court of appeals to meaningfully engage with the MCA's text. The decades-old decisions the Government cites applied a methodology this Court has long since repudiated, relying on policy instead of text. Even if those policy concerns were valid at the time, they have been overtaken by increases in tribal prosecutorial capacity. Those legal and factual developments should compel other circuits to reconsider the issue if it arises again. And particularly given the limited significance of the question presented, there is no reason for this Court to wade in before they do so.

Finally, this case would be a very poor vehicle. The Government urges this Court to revisit *Keeble* if it agrees with the Tenth Circuit. But overruling *Keeble* would have no effect on this case—it would be a purely advisory opinion. The Government has also flip-flopped on a key threshold issue: It urged the Tenth Circuit to hold that the question presented is jurisdictional; now, it argues exactly the opposite. No court has considered that novel position, and this Court should not be the first.

STATEMENT OF THE CASE

A. Legal background

1. Indian Tribes are “self-governing sovereign political communities” with “the inherent power to prescribe laws for their members and to punish infractions.” *Denezpi v. United States*, 596 U.S. 591, 598 (2022) (citation omitted). Consistent with that principle, this Court has “long ‘required a clear expression of the intention of Congress’ before the state or federal government may try Indians for conduct on their lands.” *McGirt v. Oklahoma*, 591 U.S. 894, 929 (2020) (brackets and citation omitted).

In *Ex parte Crow Dog*, 109 U.S. 556 (1883), this Court relied on that clear-statement rule to vacate a federal conviction for the murder of an Indian committed by an Indian on a reservation. *Id.* at 557, 572. The Court based its decision on a statute now known as the General Crimes Act (GCA), 18 U.S.C. § 1152. The GCA provides that the criminal laws governing federal enclaves (such as military bases and national parks) generally extend to Indian country but do not apply to “offenses committed by one Indian against the person or property of another Indian.” *Id.* Because no law clearly departed from the GCA’s reservation of jurisdiction over Indian-on-Indian offenses to the relevant Tribe, the Court held that the district court in *Crow Dog* was “without jurisdiction.” 109 U.S. at 572.

Congress responded by enacting the MCA, 18 U.S.C. §§ 1153 and 3242. *See United States v. Kagama*, 118 U.S. 375, 382-83 (1886). The MCA grants federal courts “jurisdiction over enumerated grave criminal offenses” committed by Indians against Indians in Indian country. *United States v. Bryant*, 579 U.S.

140, 147 (2016). Over the years—and as recently as 2013—Congress has revised the list of crimes it deems sufficiently serious to warrant a federal intrusion on tribal sovereignty. Today, the MCA covers 13 offenses, including “murder,” “manslaughter,” and “felony assault under [18 U.S.C. §] 113.” 18 U.S.C. § 1153(a). Congress has also included one misdemeanor: “assault against an individual who has not attained the age of 16 years.” *Id.*; see 18 U.S.C. § 113(a)(5).

2. The MCA no longer applies in large swaths of Indian country. In Public Law 280, passed in 1953, Congress gave certain States jurisdiction to prosecute most crimes committed by Indians in Indian country and specified that the MCA “shall not be applicable” in those States. 18 U.S.C. § 1162(c). Public Law 280 now displaces the MCA in whole or in part in more than a dozen States, including Alaska, Arizona, California, Florida, Idaho, Iowa, Minnesota, Montana, Nebraska, Nevada, Oregon, South Dakota, Washington, and Wisconsin. See U.S. Dep’t of Justice, *Tribal Law Enforcement in the United States, 2018*, at 3 (July 2023), <https://perma.cc/A4H3-LJSP>.

3. MCA defendants found to have “commit[ted]” an enumerated offense are punished according to “the same law and penalties” as defendants who commit that offense in federal enclaves. 18 U.S.C. § 1153(a). They are also granted the same procedural protections. Under 18 U.S.C. § 3242, MCA defendants “shall be tried in the same courts and in the same manner” as federal-enclave defendants.

In *Keeble v. United States*, 412 U.S. 205 (1973), this Court recognized one such procedural protection by holding that Section 3242 entitles an MCA defendant to request a lesser-included offense

instruction even if the lesser-included offense is not listed in the MCA. *Id.* at 214. The Court reasoned that because MCA defendants must be tried “*in the same manner*” as federal-enclave defendants, they have the same right to request a lesser-included offense instruction under Federal Rule of Criminal Procedure 31(c). *Id.* at 212 (citation omitted); *see id.* at 208. The Court explained that such instructions are an important “procedural right[]” because they discourage the jury from “resolv[ing] its doubts in favor of conviction” when “one of the elements of the offense charged remains in doubt.” *Id.* at 212-13.

The *Keeble* Court underscored the limits of its decision, “hold[ing] only” that MCA defendants are entitled to “the protection afforded by an instruction on a lesser included offense.” 412 U.S. at 214. The Court “emphasize[d]” that its decision “neither expand[ed] the reach of the Major Crimes Act nor permit[ted] the Government to infringe the residual jurisdiction of a tribe by bringing prosecutions in federal court that are not authorized by statute.” *Id.*

B. The present controversy

1. This case arises from a February 2022 incident on the Muscogee (Creek) Nation reservation. Pet. App. 3a-4a. During a rally to support the release of an imprisoned Indian activist, rallygoers surrounded police officer Ronald Neal. *Id.* 3a. A scuffle ensued, and Officer Neal “eventually fell backwards” while respondent Jason Robert Hopson “fell forwards—landing directly next to Officer Neal.” *Id.* 3a-4a. Officer Neal “stood up and took a few steps forward before falling down again,” tearing his ACL. *Id.* 4a.

2. The Government indicted Mr. Hopson for felony assault in violation of 18 U.S.C. § 113(a)(6), an offense enumerated in the MCA. Pet. App. 4a. The MCA was the only basis for federal jurisdiction because Mr. Hopson is a member of the Muscogee (Creek) Nation, Officer Neal is Indian, and the incident occurred in Indian country. *Id.*

Mr. Hopson and a co-defendant proceeded to trial. Pet. App. 5a. The co-defendant, but not Mr. Hopson, asked the district court to instruct the jury on the lesser-included offense of simple assault under 18 U.S.C. § 113(a)(5). *Id.* 6a-7a. The district court gave that instruction as to both defendants. *Id.* The jury acquitted the men of felony assault but found that they had committed simple assault. *Id.* 7a-8a. The court convicted Mr. Hopson of simple assault and sentenced him to three years of probation. *Id.* 8a.

3. The Tenth Circuit unanimously reversed for lack of subject-matter jurisdiction. Pet. App. 2a.

In court-ordered supplemental briefing, both parties argued that the question whether the MCA authorized Mr. Hopson's conviction is one of subject-matter jurisdiction. Pet. App. 8a-9a n.5. The court agreed. It held that Mr. Hopson's appeal "squarely challenges the district court's adjudicatory authority over the offense of conviction—a quintessential question of subject matter jurisdiction." *Id.* 9a-10a.

Working from that premise, the Tenth Circuit held that a "straightforward" reading of the MCA's "plain text" makes clear that Mr. Hopson's conviction must be vacated for lack of jurisdiction. Pet. App. 21a-22a. Section 1153(a) allows federal courts to convict Indian defendants of a discrete list of enumerated crimes. That list includes "felony assault" but

“does not mention misdemeanor simple assault.” *Id.* 21a. Accordingly, “misdemeanor simple assault,” when “committed by an Indian defendant against an Indian victim on Indian land, is a crime within the exclusive jurisdiction of the tribal courts—it is not an offense against the United States.” *Id.*

The Tenth Circuit rejected the Government’s assertion that this Court’s decision in *Keeble* dictated otherwise. Pet. App. 33a-34a. The court explained that *Keeble* addressed only “a defendant’s statutory right to a lesser-included offense instruction,” not “a district court’s authority to convict” if the jury finds that the defendant committed only the lesser offense. *Id.* 35a.

4. The Tenth Circuit denied the Government’s petition for rehearing en banc; no judge dissented or requested a vote. Pet. App. 58a.

5. The Government filed a petition seeking review of the Tenth Circuit’s decisions in this case and in a separate prosecution of respondent Robert Marcus Johnston. The Government now insists that the question presented is not one of subject-matter jurisdiction after all, but instead involves only “the power of the federal government . . . to prosecute.” Pet. 19 n.* (citation omitted).

REASONS FOR DENYING THE WRIT

I. The question presented is not important enough to warrant this Court’s review.

This case concerns federal courts’ authority to convict MCA defendants of unenumerated lesser-included offenses. That question arises only in rare cases resulting from an unusual combination of circumstances. By definition, those cases involve crimes Congress deemed too minor to warrant a

federal intrusion on tribal courts' exclusive jurisdiction—virtually always misdemeanor assaults. Tribes are fully capable of prosecuting those crimes if a federal jury acquits on an MCA-enumerated offense. And a question about the proper forum for a handful of misdemeanor assault prosecutions does not warrant this Court's review.

1. In the last 20 years, we have found only 15 other cases available on Westlaw where an MCA defendant was convicted of an unenumerated lesser-included offense.¹ Even accounting for gaps in Westlaw's coverage, a question that has arisen so infrequently is hardly one of "immense importance." Pet. 18 (citation omitted).

That infrequency is no surprise. The MCA applies in a limited set of cases and is the Government's sole basis for prosecution in an even more limited subset:

¹ See *United States v. Eagle Bear*, 507 F.3d 688, 690 (8th Cir. 2007); *United States v. Robe*, 333 Fed. Appx. 160, 161 (8th Cir. 2009); *United States v. Erickson*, 610 F.3d 1049, 1052 (8th Cir. 2010); *United States v. Lavender*, 526 Fed. Appx. 719, 720 (9th Cir. 2013); *United States v. Johnson*, 860 F.3d 1133, 1138 (8th Cir. 2017); *United States v. Long*, 870 F.3d 741, 743 (8th Cir. 2017); *United States v. Yazzie*, 816 Fed. Appx. 230, 231 (9th Cir. 2020); *United States v. Scott*, 83 F.4th 796, 799 (9th Cir. 2023); *United States v. Blackshire*, 98 F.4th 1146, 1151 (9th Cir. 2024); *United States v. One Star*, 575 F. Supp. 2d 1104, 1110 (D.S.D. 2008); *United States v. Iron Teeth*, 2013 WL 38970, at *5 (D.S.D. Jan. 3, 2013); *Morgan v. United States*, 2014 WL 1871861, at *7 (D.S.D. May 8, 2014); *United States v. Clifford*, 2014 WL 2615734, at *1 (D.S.D. June 12, 2014); *United States v. Matheson*, 2015 WL 12866995, at *3 (D. Idaho Sept. 29, 2015); *Deel v. United States*, 2018 WL 7288493, at *1 (D. Ariz. July 2, 2018).

- First, the perpetrator of an alleged offense must be Indian.
- Second, the alleged offense must have occurred in Indian country.
- Third, that Indian country must not be in an area where Public Law 280 has displaced the MCA. *See supra* at 4.
- Fourth, the alleged offense must be one of the 13 offenses enumerated in the MCA.
- Finally, the victim must be Indian. Otherwise, the Government could prosecute under the GCA, 18 U.S.C. § 1152, rather than the MCA.

Even when the MCA applies, the question presented requires an unusual confluence of circumstances:

- First, the Government must conclude that a prosecution would “serve a substantial federal interest.” U.S. Dep’t of Just., *Justice Manual* § 9-27.220, <https://perma.cc/6VXA-DF65>.
- Second, the evidence must support, and the jury must be given, a lesser-included offense instruction.
- Third, the lesser-included offense must not itself be enumerated—a significant limitation, because the MCA lists serious crimes such as manslaughter (a lesser-included offense of murder) and felony theft (a lesser-included offense of robbery). 18 U.S.C. § 1153(a).
- Fourth, the jury must find the defendant not guilty of the MCA offense but guilty of the unenumerated lesser-included offense.

The rare cases where all of those circumstances coincide are almost always misdemeanor assaults.

That was true in all 15 of the cases cited above. *See supra* at 8 n.1. And the Government has not identified any other scenario where the issue has arisen.

The available data on federal misdemeanor assault convictions writ large further underscores just how infrequently the question presented could arise. Sentencing Commission statistics show that, over the last five years, federal courts nationwide have sentenced an average of just 54 defendants annually under the Guideline encompassing misdemeanor assault. *See* U.S. Sent’g Guidelines Manual § 2A2.3 (2025); U.S. Sent’g Comm’n, *Judiciary Sentencing Information*, <http://jsin.uscourts.gov/>. And even that meager total dramatically overstates the potential prevalence of the question presented, both because it covers crimes other than misdemeanor assault and because it includes all defendants, not just MCA defendants.

2. In the rare cases where it applies, the Tenth Circuit’s decision simply prevents federal courts from convicting MCA defendants of unenumerated lesser-included offenses. The Government is thus wrong to worry that the Tenth Circuit’s holding will create an “escape hatch” for those who commit enumerated offenses such as “murder, kidnapping, maiming, felony assault, arson, burglary, and robbery.” Pet. 18. When juries find MCA defendants guilty of those serious crimes, federal courts retain full authority to convict. And most of those crimes don’t even have unenumerated lesser-included offenses, so the question presented couldn’t arise in the first place.

The lesser-included offenses that remain outside of Section 1153 are crimes that Congress deemed insufficiently “grave,” *United States v. Bryant*, 579 U.S. 140, 147 (2016), to warrant an “intrusion of

federal power” into the “exclusive jurisdiction of the Indian tribes to punish Indians for crimes committed on Indian land.” *United States v. Antelope*, 430 U.S. 641, 643 n.1 (1977) (citation omitted). Simple assault, for example, is a petty offense with a maximum sentence of just six months’ imprisonment. 18 U.S.C. § 113(a)(5). That is hardly the sort of “serious” crime for which the interest of the United States “is at its peak.” Pet. 18.

3. When the MCA prevents federal courts from convicting defendants of unenumerated lesser-included offenses, tribal courts stand ready to try and punish those minor crimes. Double jeopardy poses no bar to a subsequent prosecution by a Tribe. *See Denezpi v. United States*, 596 U.S. 591, 598-99 (2022); Pet. App. 40a-41a. Accordingly, the question here isn’t whether lesser-included offenses will be punished; it is merely which court will impose the punishment.

“[M]ost tribes have established their own judicial systems.” *Denezpi*, 596 U.S. at 595. The Navajo Nation’s courts, for example, handle more than 50,000 cases a year. *Courts & Peacemaking in the Navajo Nation: A Public Guide* (Feb. 23, 2021), <https://perma.cc/LX3Q-BQGJ>. And tribal courts are fully equipped to punish minor crimes. They are authorized to imprison a defendant for one year per offense—twice as long as the maximum federal sentence for simple assault. 25 U.S.C. § 1302(a)(7); *cf. id.* § 1302(b) (authorizing greater penalties in some circumstances). “Tribal courts across the country” have also made their communities safer through “programs that integrate tribal culture.” Elizabeth A. Reese, *The Other American Law*, 73 *Stan. L. Rev.* 555, 572 n.89 (2021). “The Muscogee (Creek) Nation,”

for example, “created a criminal-reentry initiative for its citizens that has kept recidivism among participants at approximately 5%.” *Id.*

Congress has recognized that those “tribal justice systems are often the most appropriate institutions for maintaining law and order in Indian country.” Pub. L. No. 111-211, Title II, § 202(a)(2), 124 Stat. 2262 (2010). Acting on that judgment, Congress in 2010 legislated to “empower tribal governments” to “provide public safety in Indian country.” *Id.* § 202(b)(3), 124 Stat. 2263. It did so again in 2013, and again in 2022, each time expanding tribal criminal jurisdiction. Pub. L. No. 113-4, 127 Stat. 54 (2013); Pub. L. No. 117-103, div. W, 136 Stat. 49 (2022).

In practice, moreover, federal prosecutors work closely with their tribal counterparts. Since 2010, Congress has required that if a federal prosecution is terminated in a case that could be charged in tribal court, “the United States Attorney shall coordinate with the appropriate tribal justice officials regarding the status of the investigation and the use of evidence relevant to the case in a tribal court.” 25 U.S.C. § 2809(a)(3). And such a handoff will be particularly easy if a federal prosecutor has already tried the case and a jury has found that the MCA defendant committed a lesser-included offense. For proof, look no further than Mr. Johnston’s case: As his brief explains, he is currently being prosecuted in tribal court for the same simple assault at issue here.

4. The Government attempts to suggest that the question presented will become more common and more consequential in Oklahoma because of this Court’s decision in *McGirt v. Oklahoma*, 591 U.S. 894 (2020). Pet. 18. Experience shows otherwise.

We are aware of only two cases in Oklahoma presenting this question over the six years since *McGirt* was decided—the two at issue here. And Mr. Johnston’s case hardly counts: The Government could have prosecuted him without relying on the MCA at all because the alleged victim was not Indian. Pet. 9.

What’s more, Tribes in Oklahoma are especially well-equipped to prosecute misdemeanors such as simple assault. One Tribe, for example, handled more than 4,000 criminal cases in 2024. *See* Gary Batton, *Chief Reflects on the Impact of McGirt Ruling, Five Years Later* (July 7, 2025), <https://perma.cc/L8XG-26VG>. And since *McGirt*, DOJ and Tribes in Oklahoma are coordinating even more closely: Federal prosecutions often grow out of tribal law-enforcement activity, and MCA defendants in Oklahoma routinely have pending charges in tribal court.

All told, the Government imagines a ruinous “escape hatch,” Pet. 18, where none exists.

II. The Tenth Circuit’s decision is correct.

The Tenth Circuit correctly held that the MCA does not authorize Mr. Hopson’s conviction. The plain text of the Act makes clear that federal courts have jurisdiction over only the offenses enumerated in Section 1153(a). The Government has no good answer to the Tenth Circuit’s careful textual analysis; instead, it tries to rewrite the statute. The Government also “misreads” *Keeble v. United States*, 412 U.S. 205 (1973), and *Spaziano v. Florida*, 468 U.S. 447 (1984), which are “fully consistent” with the Tenth Circuit’s decision. Pet. App. 31a.

A. The decision below faithfully applies the MCA’s plain text.

1. When the Government seeks to convict an Indian for an offense committed in Indian country, this Court demands a “clear expression of the intention of Congress” to allow that incursion on tribal sovereignty. *McGirt*, 591 U.S. at 929 (citation omitted); *accord Bryant*, 579 U.S. at 147. The MCA contains no expression—never mind a clear one—empowering a federal court to convict a defendant of simple assault.

The MCA applies “only to certain enumerated crimes.” *McGirt*, 591 U.S. at 898. It provides that an Indian who “commits” one of 13 specified offenses—including “murder,” “manslaughter,” “kidnapping,” “maiming,” and “felony assault”—“shall be subject to the same law and penalties” as a person who commits that offense in a federal enclave. 18 U.S.C. § 1153(a). By enumerating those specific offenses, Congress necessarily “exclude[d]” others “left unmentioned.” *Esteras v. United States*, 606 U.S. 185, 195 (2025) (citation omitted).

It is especially clear that Congress drafted the MCA to exclude simple assault from the Act’s scope. When Congress wanted to reach lesser-included offenses, it did so expressly. Manslaughter, a lesser-included offense of murder, is enumerated. 18 U.S.C. § 1153(a). So is felony theft, a lesser-included offense of burglary. *Id.* Section 1153(a) also includes one form of misdemeanor assault—assault against an individual under sixteen—confirming that Congress made a deliberate judgment that other forms of misdemeanor assault should be left to tribal courts. *Id.*

2. The Government has conceded that it “could not have indicted Mr. Hopson under the Act for misdemeanor simple assault.” Pet. App. 18a-19a. That concession is unavoidable: Because it is not enumerated in the MCA, simple assault committed by one Indian against another in Indian country is not a federal crime.

The Government nonetheless attempts to use a lesser-included offense instruction to create a backdoor to a conviction it could not have secured directly. According to the Government, as soon as such an instruction is given—whether at the request of either side or *sua sponte*—a new federal crime somehow springs into existence. That defies logic and has no basis in the MCA’s text.

The Government relies on Section 1153(a)’s direction that an Indian who “commits” one of the enumerated offenses “shall be subject to the same law and penalties” as a defendant who commits that crime in a federal enclave. Pet. 4-5. The Government insists that because an enclave defendant could be convicted of the lesser-included offense of simple assault, an MCA defendant can be convicted of that offense too. But by its terms, Section 1153(a)’s mandate to apply the “same law and penalties” refers to the law and penalties governing the enumerated offenses. It does not expand the list of federal crimes in Indian country. An enclave defendant can be convicted of simple assault because simple assault in a federal enclave is a federal crime; an MCA defendant cannot be convicted because simple assault by an Indian against an Indian in Indian country is not.

The Government errs in asserting that 18 U.S.C. § 3242 calls for a different result. Pet. 4, 12. Section

3242 provides that MCA defendants must be “tried in the same courts and in the same manner” as enclave defendants. That reference to “manner” is simply “a command to apply the usual federal procedural rules.” *Morgan v. Sundance, Inc.*, 596 U.S. 411, 419 (2022). Those “terms of procedure” do not “expand[] the adjudicatory authority of the court” beyond the boundaries carefully set by Congress. Pet. App. 30a.

3. When the Government itself conducted a more careful analysis of the MCA’s text, it agreed wholeheartedly with Mr. Hopson’s position. In *Keeble*, the Government argued that “since Congress has chosen not to make the offense of simple assault a matter for trial in the federal courts, but has instead left this minor offense to the courts of a separate sovereign—the Indian tribes—the lesser included offense doctrine cannot be utilized to bring that offense into the federal court.” U.S. Br. at 15, *Keeble, supra* (No. 72-5323). The Government had it right the first time.

B. The decision below does not conflict with any decision of this Court.

1. Lacking any footing in the MCA’s text, the Government primarily argues that this Court’s decision in *Keeble* “necessarily implies that [a] defendant can be convicted” of a lesser-included offense. Pet. 12. But *Keeble* did not expand federal jurisdiction under the MCA; it expressly disclaimed doing so. Regardless, an implication from a judicial opinion is miles from a “clear expression of the intention of Congress.” *McGirt*, 591 U.S. at 929 (citation omitted).

In *Keeble*, this Court held that an MCA defendant charged with felony assault has a “procedural right[]” to an instruction on the lesser-included

offense of simple assault. 412 U.S. at 212. As *Keeble* explained, such instructions guard against the “substantial risk” that a jury presented with only the more serious offense will “resolve its doubts in favor of conviction”—even where the evidence does not support it. *Id.* at 212-13. The instructions required by *Keeble* thus ensure that the jury accurately determines whether the defendant committed the MCA-enumerated crime. That function is served regardless of the federal court’s power to enter a conviction on the lesser-included offense.

The Government asserts that *Keeble* “necessarily implies” that the defendant can be convicted of the lesser-included offense. Pet. 12. But *Keeble* did not suggest, much less hold, that the MCA allows such a conviction. The issue was not presented in *Keeble*, where no lesser-included offense instruction was given and the defendant was not convicted of any such offense. 412 U.S. at 206-07.

Rather than grounding its position in this Court’s opinion, the Government echoes the *Keeble* dissent. Both the Government and Justice Stewart insist that the Court “in effect [held] that Fed. Rule Crim. Proc. 31(c) implicitly operates to confer federal jurisdiction over simple assault.” 412 U.S. at 216 (Stewart, J., dissenting); *see* Pet. 13. But “dissents are just that—dissents. Their glosses do not speak for the Court.” *Nat’l Pork Producers Council v. Ross*, 598 U.S. 356, 389 n.4 (2023) (plurality opinion).²

² The Government also misunderstands Rule 31(c). On its view, Rule 31(c) dictates that if a defendant is entitled to a lesser-included offense instruction, the court must be able to

In fact, this Court went out of its way to disclaim the implicit holding the Government posits. The Court declared that its decision did not “expand[] the reach of the Major Crimes Act” or “infringe the residual jurisdiction of a tribe.” *Keeble*, 412 U.S. at 214. Instead, *Keeble* “h[e]ld only that where an Indian is prosecuted in federal court under the provisions of the Act, the Act does not require that he be deprived of the protection afforded by an instruction on a lesser included offense.” *Id.*

There is every reason to think the *Keeble* Court meant what it said. This Court has emphasized that, although “Congress’ authority over Indian matters is extraordinarily broad,” “the role of courts” is “correspondingly restrained.” *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 (1978). The Government’s attempt to read an implied expansion of jurisdiction into *Keeble* contradicts fundamental principles of federal Indian law.

2. The Government also invokes *Spaziano*, again to no avail. Pet. 14-15. *Spaziano* considered a capital defendant’s due process right to an instruction on a non-capital lesser-included offense. 468 U.S. at 449. This case, in contrast, is purely statutory. *Spaziano*’s constitutional holding has no bearing on the question

convict him of that offense. Pet. 13. But Rule 31(c) simply provides that “a defendant may be found guilty” of a lesser-included offense; it says nothing about the court’s power to convict. And reading Rule 31(c) to create a crime would violate the Rules Enabling Act, which “requires that Federal Rules be procedural rather than substantive.” *Berk v. Choy*, 607 U.S. 187, 198 (2026); *see* 28 U.S.C. § 2072(b).

presented, which turns solely on the meaning of the MCA—a subject *Spaziano* had no occasion to address.

The Government primarily relies on a sentence in a *Spaziano* footnote stating that *Keeble* “assumed that if a defendant is constitutionally entitled to a lesser included offense instruction, the trial court has authority to convict him of the lesser included offense.” *Spaziano*, 468 U.S. at 454 n.5; *see* Pet. 14. But that passing dicta rested on a citation to the *Keeble* dissent—the wrong place to look, since “[a] dissenting opinion is generally not the best source of legal advice” on the meaning of “the majority opinion.” *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 230 (2023). In contexts where *Keeble* was more relevant, this Court has interpreted the decision as simply affording MCA defendants “the same *procedural* benefits and privileges as all other persons within federal jurisdiction,” not as enlarging that jurisdiction. *Antelope*, 430 U.S. at 647-48 (emphasis added).

The Government also borrows from *Spaziano* to suggest that the Tenth Circuit’s decision risks “trick[ing]” a jury “into believing that it has a choice of crimes for which to find the defendant guilty, if in reality there is no choice.” 468 U.S. at 456; *see* Pet. 15. That fear is misplaced for three reasons.

First, the purpose of lesser-included offense instructions under *Keeble* is to provide procedural protections for MCA defendants. *See Keeble*, 412 U.S. at 213. So long as an instruction ensures that the jury accurately determines guilt on the enumerated crime, it has served its purpose. *See supra* at 17.

Second, there is nothing improper about juries being unaware of the legal consequences of their

verdicts. Just the opposite: “Information regarding the consequences of a verdict” is “irrelevant to the jury’s task.” *Shannon v. United States*, 512 U.S. 573, 579 (1994). That rule applies even if jurors may well harbor “mistaken belief[s]” about the results of a verdict. *Id.* at 584-85.

Third, unlike in *Spaziano*, a district court’s inability to convict an MCA defendant of simple assault does not allow the defendant to escape punishment. Instead, there is “a second sovereign—the Tribe—that may prosecute.” Pet. App. 40a; *see supra* at 11. An MCA jury’s “choice,” *Spaziano*, 468 U.S. at 456, is thus a real one: A guilty verdict on the lesser-included offense precludes a federal conviction but signals to tribal prosecutors that there is a strong misdemeanor case to pursue in tribal court.

III. There is no circuit split warranting review.

The Government emphasizes that the Tenth Circuit disagreed with decisions of the Fourth, Fifth, Eighth, and Ninth Circuits. Pet. 16-18. But the Government overstates the extent of any conflict. In any event, the decades-old decisions on which the Government relies are obsolete: They made little or no effort to address the MCA’s text and instead relied on policy concerns that have been mitigated by substantial increases in tribal prosecutorial capacity. There is no reason for this Court to intervene unless and until those circuits have a chance to reconsider the issue.

1. As an initial matter, three of the cases the Government invokes were materially different.

First, in *Felicia v. United States*, 495 F.2d 353 (8th Cir. 1974), the Eighth Circuit applied an earlier version of the MCA specifying that felony assault

“shall be defined and punished in accordance with the laws of the State in which such offense was committed.” *Id.* at 355 (citation omitted). Because “the laws of South Dakota” authorized “a conviction for the lesser included offense of assault,” the court reasoned in part that the same should be true under the MCA. *Id.* That state-law reasoning no longer applies because the MCA’s text has changed.

Second, in *United States v. John*, 587 F.2d 683 (5th Cir. 1979), the Fifth Circuit principally held that the district court had jurisdiction under the GCA because the victim was not Indian. *Id.* at 686-88. The court addressed the MCA only in providing a cursory alternative basis for its decision. *Id.* at 688.

Finally, in *United States v. Walkingeagle*, 974 F.2d 551 (4th Cir. 1992), the defendant “concede[d] that the district court ha[d] jurisdiction over the lesser-included offense if the greater offense is also submitted to the jury.” *Id.* at 553. The Fourth Circuit thus assumed an answer to the question presented here but was never squarely asked to decide it.

2. To the extent that a split exists, circuits on the other side would have powerful reasons to revisit their decisions if the issue arises again.

a. First and foremost, the Tenth Circuit grounded its decision in the MCA’s “plain text.” Pet. App. 20a-23a. No other court of appeals even tried to do so.

The Eighth Circuit—the first court of appeals to address the issue—held that “jurisdiction over a lesser included offense is implicit” in the MCA. *Felicia*, 495 F.2d at 355. In so doing, the court devoted only two sentences to Section 1153(a)’s text. *See id.* The “most important[]” consideration for the court was a policy concern drawn from the “dissent of Justice Stewart”

in *Keeble*—a (mistaken) belief that a lesser-included offense instruction would be “an exercise in futility” if the federal court could not convict the defendant for the lesser offense. *Id.*

Subsequent circuit court decisions strayed even further from statutory text. In *John*, the Fifth Circuit never analyzed the plain meaning of the MCA. Instead, it “adopt[ed] the reasoning of the Eighth Circuit in *Felicia*.” 587 F.2d at 688. In *United States v. Bowman*, 679 F.2d 798 (9th Cir. 1982), the Ninth Circuit reasoned based on policy concerns and the *Keeble* dissent that *Keeble* “implicitly resolved the jurisdictional question.” *Id.* at 799. The court acknowledged that if it were “writing on a cleaner slate, [it] might reach a different result.” *Id.* at 800. And in *Walkingeagle*, the Fourth Circuit merely cited *Keeble*, *Felicia*, *John*, and *Bowman* without examining the MCA’s text. *Walkingeagle*, 974 F.2d at 553.

That atextual methodology is a “relic of a bygone era.” *Food Mktg. Inst. v. Argus Leader Media*, 588 U.S. 427, 437 (2019). Today, this Court insists that courts “always . . . start with the statutory text.” *Garland v. Cargill*, 602 U.S. 406, 415 (2024). And where, as here, the “plain language” of the statute is unambiguous, a court’s inquiry “ends there as well.” *Nat’l Ass’n of Mfrs. v. Dep’t of Def.*, 583 U.S. 109, 127 (2018) (citation omitted). Further percolation would allow other circuits to reevaluate the issue in light of the Tenth Circuit’s analysis and the Court’s modern approach to statutory interpretation.

b. Second, further percolation would allow other circuits to account for legal and factual changes in tribal prosecutorial capacity. Those circuits appeared to worry that if federal courts lacked jurisdiction to

convict MCA defendants for lesser-included offenses, those defendants “will not be punished,” *Bowman*, 679 F.2d at 802 (Henderson, J., dissenting). But intervening legal and factual developments have better equipped Tribes to “prosecute and convict [an MCA defendant] for the lesser-included offense after any federal court acquittal.” Pet. App. 40a.

As a legal matter, it was not even clear that Tribes *could* prosecute after a federal acquittal when the Eighth Circuit decided *Felicia*. It would be another three years before the Eighth Circuit confirmed that double jeopardy poses no bar to such a prosecution. *See United States v. Walking Crow*, 560 F.2d 386, 388 (8th Cir. 1977).

As a factual matter, in the three decades since *Walkingeagle*—the Government’s most recent case—tribal criminal justice systems have substantially expanded their capacity with Congress’s active support. *See supra* at 11-12. Those developments would give other circuits all the more reason to reconsider the issue.

IV. This case is an inappropriate vehicle.

Even if this Court wanted to address the question presented without awaiting further percolation, this case would be the wrong vehicle for three reasons.

1. First, the Government has reversed its position on an important threshold issue. The Government urged the Tenth Circuit to hold that this case presents a “question of subject matter jurisdiction.” U.S. C.A. Supp. Br. 1; *see* Pet. App. 8a-9a n.5. But in a conspicuous footnote on the last page of its petition, the Government now insists that this case concerns “the power of the federal government . . . to

prosecute,” not “the district court’s subject-matter jurisdiction.” Pet. 19 n.* (citation omitted). As the Government acknowledges, it first adopted that position in its petition for rehearing en banc. *Id.* But that was too late. *See Wills v. Texas*, 511 U.S. 1097, 1097 (1994) (O’Connor, J., concurring in denial of certiorari).³

Granting certiorari here would thus require the Court to either (a) overlook the Government’s waiver to consider its new position in the first instance or (b) disregard that new position and decide the case without considering the antecedent question whether the MCA is jurisdictional. Either option would seriously “impede this Court’s review.” Pet. 19 n.*.

Taking up the Government’s new position would require this Court to deviate from its typical process by deciding an important issue on which “the parties did not cross swords” below. *Wilkins v. United States*, 598 U.S. 152, 163 n.5 (2023) (citation omitted).

That would be especially unwise given the novelty of the Government’s position. For 140 years, this Court has recognized that the MCA confers “jurisdiction” on “[t]he courts of the United States.” *United States v. Kagama*, 118 U.S. 375, 377-78 (1886); *see, e.g., Keeble*, 412 U.S. at 210 (the MCA “confer[s] jurisdiction on the federal courts”). Every circuit that has discussed the question presented has likewise understood it as one of subject-matter “jurisdiction.” *John*, 587 F.2d at 685; *accord Felicia*, 495 F.2d at 355; *Bowman*, 679 F.2d at 799;

³ As Mr. Johnston’s brief shows, the Government’s merging of this case with *Johnston* does not cure its waiver problem.

Walkingeagle, 974 F.2d at 553. Given that settled understanding, the implications of the Government’s novel position are unknown—and this Court should not be the first to explore them.

Nor could the Court properly review the Tenth Circuit’s decision without addressing the MCA’s jurisdictional status. That issue was so significant to the Tenth Circuit that it requested supplemental briefing before deciding the question presented. Pet. App. 8a-9a n.5. The court then began its opinion by holding that Mr. Hopson’s appeal raises “a quintessential question of subject matter jurisdiction.” *Id.* 10a. That understanding permeated the court’s opinion. The court referenced “subject matter jurisdiction” more than 40 times, anchoring its reasoning to “background principles and statutes governing subject matter jurisdiction in federal prosecutions.” *Id.* 11a; *see id.* 2a, 11a-13a. This Court could not properly review the Tenth Circuit’s decision while assuming away such a foundational aspect of its analysis.

2. This case is also a bad vehicle because it does not present the Government’s central concern: that the Tenth Circuit’s decision allows MCA defendants to “invite a finding of guilt from the jury” on a lesser-included offense without facing a conviction “if the jury accepts that invitation.” Pet. 15. Mr. Hopson never requested a lesser-included offense instruction; only his co-defendant did. Pet. App. 6a. Mr. Hopson did not object—but passive acquiescence is not the sort of affirmative request that triggers the Government’s concern.

3. Finally, the Government argues in the alternative that this Court should revisit *Keeble*,

asserting that, if the Tenth Circuit's decision is correct, *Keeble* "can no longer stand." Pet. 15-16. But the Government does not even attempt to establish the sort of "superspecial justification" required to overcome statutory *stare decisis*. *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 458 (2015). Indeed, it does not address *stare decisis* at all.

Besides, the Court could not overrule *Keeble* here because it would result in an advisory opinion. Even if the Court were to hold that Mr. Hopson's jury never should have received a lesser-included offense instruction, it would make no difference to the outcome of this case. Mr. Hopson has already been acquitted of felony assault, Pet. App. 2a, and he thus cannot be retried for that offense in federal court, *see McElrath v. Georgia*, 601 U.S. 87, 93-94 (2024). This Court has "disapproved" of advisory opinions "from the beginning." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101 (1998). Given the current posture of this case, the Government does not explain how the Court could "reconsider[]" *Keeble*, Pet. 15, without violating that bedrock principle.

CONCLUSION

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

Respectfully submitted,

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