No. 21-35036

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOHNNY ELLERY SMITH,

Defendant-Appellant.

Appeal from the United States District Court

for the District of Oregon

Portland Division

OPENING BRIEF OF APPELLANT

Conor Huseby
Assistant Federal Public Defender
101 SW Main Street, Suite 1700
Portland, Oregon 97204
(503) 326-2123

Attorney for Defendant-Appellant

TABLE OF CONTENTS

Page

Table of Authorities iii

Statement of Jurisdiction 1

Statement of Issue 1

Statement of the Case 2

Nature of the Case 2

Relevant Factual and Procedural History 3

Custody Status 5

Summary of Argument 5

Standard of Review 8

Argument 8

I. The Supreme Court's Decision In *McGirt v. Oklahoma* Represents A Paradigm Shift In Indian Law Requiring Courts To Strictly Honor Promises Made In Tribal Treaties Without Consideration Of Historical Developments Or Extratextual Sources 8

II. The Promise Of Exclusive Use Made To The Confederated Tribes Of Warm Springs In The Treaty Of 1855 Is Explicit And Has Never Been Revoked By Congress 11

III. This Court's Prior Panel Opinion Applying The Assimilative Crimes Act To The Warm Springs Reservation—Issued Prior To The Supreme Court's Guidance In *McGirt*—Is Irreconcilable With The Reasoning Of *McGirt* Because It Relies On Extratextual Sources To Break A Promise Made By Congress To The Confederated Tribes Of Warm Springs 15

A. Under The Rules Of *Stare Decisis*, The Supreme Court's Reasoning In A Subsequent Case Provides The Precedential Authority, Not An Earlier Panel Opinion With Irreconcilable Reasoning 16

B. The Supreme Court's Reasoning In *McGirt* Constitutes Intervening Precedent That Is Irreconcilable With The *Ratio Decidendi* Of This Court's Earlier Panel Opinion 17

Conclusion 23

Statement of Related Cases 24

Certificate of Service 25

TABLE OF AUTHORITIES

Cases

Duro v. Reina,
495 U.S. 676 (1990) 13

Hart v. Massanari,
266 F.3d 1155 (9th Cir. 2001) 15

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

Miller v. Gammie,
335 F.3d 889 (9th Cir. 2003).. 4, 7, 16

Oneida Nation v. Village of Hobart,
968 F.3d 664 (7th Cir. July 30, 2020) 7, 10

Pigeon River, etc., Co, v. Charles W. Cox, Limited,
291 U.S. 138 (1934) 8

Ramos v. Louisiana,
140 S. Ct. 1390 (2020) 16

SEIU Local 121RN v. Los Robles Regional Medical Center,
976 F.3d 849 (9th Cir. 2020) 17

U.S. Dep't of Labor v. Occupational Safety & Health Review Comm'n,
935 F.2d 182 (9th Cir. 1991) 12

United States v. Aguilera-Rios,
769 F.3d 626 (9th Cir. 2014) 20

United States v. Lindsey,
634 F.3d 541 (9th Cir. 2011) 17

United States v. Smith,
925 F.3d 410 (9th Cir. 2019) .... *passim*

United States v. Walczak,
783 F.2d 852 (9th Cir. 1986) 8

United States v. Wheeler,
435 U.S. 313 (1978) 13

Statutes

18 U.S.C. § 7 .... *passim*

18 U.S.C. § 13 3

18 U.S.C. § 1152 .... 3, 5, 20, 21

18 U.S.C. § 1153 .... 3, 20

18 U.S.C. § 3231 1

28 U.S.C. § 1291 1

28 U.S.C. § 2255 .... 1, 2, 4

Or. Rev. Stat. 811.540 3

Treaty With The Tribes Of Middle Oregon, 12 Stat. 963 (1855).......... 5, 11

Treaty With The Middle Oregon Tribes, 14 Stat. 751 (1865) 11, 21

Warm Springs Tribal Code Section 310.520 14

Other

Const. and Bylaws of the Confederated Tribes of Warm Springs Reservation of Oregon Art. V, sec. 1(i) 14

Barbara L. Creel, The Right To Counsel for Indians Accused of Crime: A Tribal and Congressional Imperative,
18 Mich. J. Race & L. 317 n. 1 (2013) 1

STATEMENT OF JURISDICTION

The district court's lack of federal jurisdiction over an Indian committing minor state crimes in Indian country is the sole issue raised in this appeal.[1] Jurisdiction over federal crimes is conferred on the district court by 18 U.S.C. § 3231. On January 13, 2021, the district court issued an opinion denying Mr. Smith's § 2255 motion challenging the district court's jurisdiction. ER 4-13. That same day, the district court also issued a certificate of appealability for Mr. Smith's challenge to the district court's jurisdiction. ER 3. Mr. Smith timely filed his notice of appeal on January 14, 2021. ER 91. This Court has jurisdiction to review the district court's assertion of jurisdiction and final judgement imposing sentence pursuant to 28 U.S.C. §§ 1291 and 2253.

STATEMENT OF ISSUE

In 1855, the United States government made treaty promises to the Confederated Tribes of Warm Springs, creating a reservation for the Tribes' "exclusive use." In 2019, this Court approved federal prosecution of a Warm Springs tribal member for a minor Oregon state law crime on the Warm Springs reservation under the Assimilative Crimes Act. In doing so, the Court found that the Warm Springs reservation constitutes

[1] While the term "Indian" has never been an accurate term, it is used throughout because "it has become a term of art from historical use in Federal Indian law, history, and statutes." Barbara L. Creel, *The Right To Counsel for Indians Accused of Crime: A Tribal and Congressional Imperative*, 18 Mich. J. Race & L. 317, 318 n. 1 (2013).

land reserved for or acquired "for the use of the United States" under 18 U.S.C. § 7(3), relying on extratextual sources and historical context to overcome the lack of explicit congressional language revoking the exclusive use promise made to the Tribes 165 years ago. *United States v. Smith*, 925 F.3d 410 (9th Cir. 2019), *cert. denied*, 140 S.Ct. 407 (2019). In *McGirt v. Oklahoma*, 140 S.Ct. 2452 (2020), the Court held that, in deciding the scope of jurisdiction in Indian country, courts are not permitted to look to historical context and extratextual sources in determining if Congress broke a promise made in a tribal treaty. The question presented is:

> Is the reasoning of this Court's prior panel opinion that approved prosecutions breaking the "exclusive use" promise in the Treaty of 1855, which relied on extratextual and historical analyses in the absence of express statutory words, irreconcilable with the *McGirt* Court's requirement that treaty promises may only be broken by the explicit words of Congress?

STATEMENT OF THE CASE

Nature of the Case

This is a direct appeal from the judgment of the district court entered on January 13, 2021, by the Honorable Robert E. Jones, Senior United States District Judge for the District of Oregon, denying Mr. Smith's motion filed under 28 U.S.C. § 2255 and issuing a certificate of appealability on the issue of whether the district court has jurisdiction over this case. ER 3.

Relevant Factual and Procedural History

In 2016, Johnny Smith was indicted in federal court for two counts of the state law crime of Attempt to Elude a Police Officer, in violation of Or. Rev. Stat. 811.540(1). ER. 89-90. Mr. Smith is an enrolled member of the Confederated Tribes of Warm Springs, and the two incidents described in the indictment occurred within the tribal boundaries of the Warm Springs reservation. The government asserted jurisdiction to charge a tribal member with a state law violation in federal court through the Assimilative Crimes Act (18 U.S.C. § 13) and the Indian Country Crimes Act (18 U.S.C. § 1152). Pursuant to 18 U.S.C. § 7(3), the Assimilative Crimes Act applies to "lands reserved or acquired for the use of the United States[.]"

On May 23, 2017, Mr. Smith filed a motion to dismiss the indictment for lack of jurisdiction, arguing that the Assimilative Crimes Act and the Indian Country Crimes Act do not provide federal jurisdiction over state law crimes committed on the Warm Springs reservation that are not major crimes as defined by the Major Crimes Act (18 U.S.C. § 1153). On August 15, 2017, the district court issued an opinion denying Mr. Smith's motion to dismiss. *See* ER 97.

Mr. Smith appealed the denial of his motion to dismiss, and, on May 28, 2019, after briefing and argument by the parties, a three-judge panel for this Court affirmed the district court, holding that the prosecution of Mr. Smith was inferentially authorized

by Congress, although one judge concurred, rejecting the Assimilative Crimes Act as a basis on its own for federal jurisdiction over minor state law crimes in Indian country. *United States v. Smith,* 925 F.3d 410 (9th Cir. 2019), *cert. denied*, 140 S.Ct. 407 (2019).

On July 9, 2020, the Supreme Court issued its opinion in *McGirt v. Oklahoma,* 140 S.Ct. 2452 (2020). In holding that much of Oklahoma constitutes Indian country in accordance with a treaty that had never been explicitly abrogated, the Court held that, when Congress makes a promise in a tribal treaty, a court may not rely on extratextual sources or historical context to find that the promise was broken. *McGirt*, 140 S. Ct. at 2469. Rather, "[i]f Congress wishes to withdraw its promises, it must say so." *Id.* at 2482.

Based on *McGirt,* Mr. Smith filed a motion to vacate his convictions pursuant to 28 U.S.C. § 2255, arguing that this Court's panel opinion—relying on extratextual sources to find the Assimilative Crimes Act applied to the Warm Springs reservation—was irreconcilable with the reasoning of *McGirt* and no longer good law under *Miller v. Gammie,* 335 F.3d 889 (9th Cir. 2003) (en banc). ER 25-42. On January 13, 2021, the district court issued an opinion denying Mr. Smith's motion. ER 64-81. That same day, the Court issued a certificate of appealability on the issue of whether the district court has jurisdiction over this case. ER 3. On January 14, 2020, Mr. Smith filed a notice of appeal, and this appeal ensued. ER 91.

Custody Status

Mr. Smith is out of custody and serving the remainder of his supervised release term.

SUMMARY OF ARGUMENT

In 1855, the United States government made a promise to the Confederated Tribes of Warm Springs: in exchange for the Tribes' relinquishment of 10 million acres of disputed land, the government would provide the Tribes with a 640,000 acre reservation, "[a]ll of which shall be set apart, and, so far as necessary, surveyed and marked for their *exclusive use;* nor shall any white person be permitted to reside upon the same without the concurrent permission of the agent and superintendent." Art. 1, para. 5, 12 Stat. 963 (emphasis added). As this Court recognized in its panel opinion, "[t]he plain text of the Assimilative Crimes Act lacks any express reference to Indians or Indian country." *Smith,* 925 F.3d at 415. Thus, Congress has not explicitly broken the promise of exclusive use. Further, the jurisdictional exception in the Indian country Crimes Act precludes prosecution of Indians for "any case where, by treaty stipulations, the *exclusive jurisdiction* over such offenses is or may be secured to the Indian tribes respectively." 18 U.S.C. § 1152 (emphasis added).

This Court's prior panel opinion on this issue determined that Johnny Smith could face federal prosecution for state law violations of eluding the police under the

Assimilative Crimes Act because the Warm Springs reservation constituted "lands reserved or acquired for the use of the United States" pursuant to 18 U.S.C. § 7(3). *Smith,* 925 F.3d 415-16. Despite the concession that the "plain text of the ACA lacks any express reference to Indians or Indian country," this Court reasoned that the Assimilative Crimes Act still applied to the Warm Springs reservation because over time the meaning of '"Indian reservation *emerged*, referring to land set aside under federal protection for the residence or use of tribal Indians.'" *Id.* at 415-16 (emphasis added) (quoting *Cohen's Handbook of Federal Indian Law* § 3.04 at 190 (Nell Jessup Newton ed., 2017)).[2] The panel's reasoning depended on examination of historical context and extratextual considerations, none of which involved any plain meaning statement by Congress that Indian country constituted "lands reserved or acquired for the use of the United States" under the Assimilative Crimes Act. As to the jurisdictional exception contained within the Indian Country Crimes Act, this Court determined the exception did not apply in a single sentence without legal analysis. *Id.* at 420.

The Supreme Court rejected the panel's reasoning the following year in *McGirt v. Oklahoma,* 140 S.Ct. 2452 (2020). Prior to *McGirt*, courts were permitted to look at

---

[2] In a concurring opinion Judge Fisher disagreed that the Warm Springs reservation was among the "lands reserved or acquired for the United States" within the meaning of 18 U.S.C. § 7(3), but nonetheless found that Assimilative Crimes Act applied to the Warm Springs reservation through the Indian Country Crimes Act. *Id.* at 423.

historical context and extratextual sources to determine if Congress had broken a promise made in a tribal treaty, as did the earlier panel in *Smith*. After *McGirt,* "[i]f Congress wishes to withdraw its promises, it must say so." *Id.* at 2482. As the dissent in *McGirt* recognized, the Court's opinion represented "a new approach sharply restricting consideration of contemporaneous and subsequent evidence of congressional intent." *Id.* at 2487 (J. Roberts, dissenting); *See also Oneida Nation v. Village of Hobart,* 968 F.3d 664 (7th Cir. July 30, 2020) (stating that *McGirt* changed Indian law jurisprudence to require a clear statement from Congress to break a treaty promise and forbidding the use of extratextual sources to overcome the absence of clear congressional language).

Because the reasoning, or mode of analysis, of the earlier panel is irreconcilable with *McGirt*, this Court must follow the reasoning required by the Supreme Court and dismiss Mr. Smith's conviction for lack of federal jurisdiction. *Gammie,* 335 F.3d at 900. This Court should reverse the district court, as well as its own prior opinion, because the application of Assimilative Crimes Act to the Warm Springs reservation breaks the "exclusive use" promise made in the Treaty of 1855, and—as required by *McGirt*—treaty promises may only be broken by the explicit words of Congress and not by reliance on extratextual sources or historical context and developments. No other legitimate basis remains for the federal government to intrude on the Tribes' rights

under Treaty over the regulation of tribal members charged with minor state law crimes.

STANDARD OF REVIEW

A district court's jurisdiction over a criminal offense is a question of law that is reviewed *de novo*. *United States v. Walczak,* 783 F.2d 852, 854 (9th Cir. 1986).

ARGUMENT

I. The Supreme Court's Decision In *McGirt v. Oklahoma* Represents A Paradigm Shift In Indian Law Requiring Courts To Strictly Honor Promises Made In Tribal Treaties Without Consideration Of Historical Context Or Extratextual Sources.

Prior to *McGirt*, courts permitted intrusions into Tribal sovereignty through inferences and the accretion of historical practices. The Supreme Court recognized abrogation or modification of Treaties was "not to be lightly imputed to Congress." *Pigeon River, etc., Co, v. Charles W. Cox, Limited,* 291 U.S. 138, 160 (1934). In 2020, the Supreme Court modified the Indian law rules of construction in *McGirt.* Where previously, congressional intent to break promises made in treaties was not to be "lightly imputed," now congressional intent to break promises made in treaties may not be imputed at all. Rather, "[i]f Congress wishes to withdraw its promises, it must say so." *McGirt,* 140 S.Ct. at 2482.

The issue in *McGirt* was whether the Creek Indian Nation in Oklahoma remained a reservation for the purposes of federal criminal jurisdiction. *Id.* at 2459. After

carefully reviewing Treaty language and the history of legislation pertinent to the reservation, the Court ruled that the Creek Indian Nation constituted a reservation for criminal jurisdiction purposes because no clear and definitive legislation had said otherwise: "Today we are asked whether the land these treaties promises remains an Indian reservation for purposes of federal criminal law. Because Congress has not said otherwise, we hold the government to its word." *Id.*

To establish the continued existence of the Creek reservation, the Court relied on the language contained in the original treaties made between the Tribe and the federal government. *Id.* at 2461. In response, the State of Oklahoma argued that, while Congress may not have explicitly revoked the treaty promises it made to the Creek Indian Nation, the promises had been revoked when Congress allowed large portions of the reservation to be sold, limited the Creek Indian Nation's promised right to self-government in other ways, and because historical practices and demographics indicated that the promised reservation no longer existed. *Id.* at 2463, 2465-66, 2468.

The Court rejected Oklahoma's arguments, determining that despite the many promises broken by Congress, and despite historical practice and developments, the treaty promises remained valid because, "[i]f Congress wishes to withdraw its promises, it must say so." *Id.* at 2482. This shift towards determinative emphasis on the language of treaties and statutes represented "a new approach sharply restricting

consideration of contemporaneous and subsequent evidence of congressional intent." *Id.* at 2487 (J. Roberts, dissenting).

After *McGirt*, the Seventh Circuit addressed *McGirt's* impact on Indian law jurisprudence in *Oneida Nation v. Village of Hobart*, 968 F.3d 664 (7th Cir. 2020). Tracking Justice Gorsuch's approach in *McGirt*, the court read "*McGirt* as adjusting" Indian law jurisprudence "to place a greater focus on statutory text, *making it even more difficult to establish the requisite congressional intent*" to break promises made in treaties. *Id.* at 668 (emphasis added). The court clarified that, after *McGirt*, "extratextual sources" cannot be used to manufacture ambiguity where none existed on the face of the statutory text. *Id.* at 685. *Oneida Nation* also held that *McGirt* upset its prior circuit authority on this issue, finding its prior reasoning "in tension" with the adjustments made by Justice Gorsuch, showcasing how *McGirt* represents a reorientation of Indian law jurisprudence: the government must now be held to promises made to Indian tribes absent express congressional revocation of the promises. *Id.* at 682 n. 13.

Prior to *McGirt* courts could infer congressional intent to break promises made in treaties from extratextual sources and historical context and developments. The previous panel opinion in *Smith* did just that. After *McGirt,* Congress must explicitly

express its intent to revoke a promise, and no amount extratextual authority or historical context will suffice for the explicit words of Congress.

II. The Promise Of Exclusive Use Made To The Confederated Tribes Of Warm Springs In The Treaty Of 1855 Is Explicit And Has Never Been Revoked By Congress.

Located near Mt. Hood National Forest, the Warm Springs reservation is home to the Confederated Tribes of Warm Springs, a consolidated group of three different groups of Native Americans: the Wasco, Warm Springs, and Paiute Tribes. The Warm Springs reservation was created by the Treaty of 1855. In exchange for their agreement to "cede to the United Sates all their right, title, and claim to all and every part of" 10 million acres of land claimed by the tribes, the United States agreed to create a 640,000 acre reservation "[a]ll of which shall be set apart, and, so far as necessary, surveyed and marked out for *their exclusive use*; nor shall any white person be permitted to reside upon the same without the concurrent permission of the agent and superintendent." Art. 1, paras. 1-5, 12 Stat. 963 (emphasis added).

In 1865, the United States negotiated a Supplemental Treaty with the Confederated Tribes of Warm Springs, 14 Stat. 751, whereby the Tribes expressly relinquished off-reservation subsistence rights. However, in 2019 and 2020 Congress and the House of Representatives voted to pass the 1865 Treaty Nullification Act. On October 20, 2020, President Trump signed the bill (known as S. 832) into law, calling

the 1865 treaty "unenforced" and "unfair."[3] The passage of the 1865 Treaty Nullification Act is both an example of how Congress can explicitly nullify a treaty, and a reinforcement that the Treaty of 1855, with its promise of a reservation set aside for the "exclusive use" of Warm Springs tribal members, remains a promise Congress intends to keep.

This Court analyzed the parameters of the exclusive use provision of the Treaty of 1855 once before in *U.S. Dep't of Labor v. Occupational Safety & Health Review Comm'n*, 935 F.2d 182, 184 (9th Cir. 1991). In that case, this Court interpreted the exclusive use provision of the Treaty of 1855 in the context of an attempt by the Occupational Safety & Health Review Commission to exempt a tribal sawmill from Occupational Safety and Health Act (OSHA) regulations. This Court concluded that limited entry of OSHA inspectors onto the reservation did not violate the exclusive use provision of the Treaty of 1855 because the mill employed a significant number of non-tribal members and sold virtually all of its product to non-tribal members through the channels of interstate commerce. *Id.* at 184. Therefore, there was no intrusion into tribal governance. *Id.* at 184.

---

[3] *See Statement by the President,* The White House (Oct. 20, 2020), https://www.whitehouse.gov/briefings-statements/statement-by-the-president-102020/?fbclid=IwAR3sl0mKz4XDxsZyVCOkLwunmCoufJhMcL4gpvqlOEsOQvobV4sZkk_JA9M

By contrast, tribal criminal jurisdiction over tribal members has long been recognized as integral to tribal sovereignty and self-governance. Federally recognized tribes continue to retain those aspects of sovereignty that are "needed to control their own relations, and to preserve their own unique customs and social order." *Duro v. Reina,* 495 U.S. 676, 685-686 (1990). "The power of a tribe to prescribe and enforce rules of conduct for its own members does not fall within that part of sovereignty which the Indian implicitly lost by virtue of their dependent status." *Id.* at 686 (citations and internal quotation marks omitted).

Not once in the last 165 years has Congress done anything to explicitly revoke the promise of exclusive use made to the Confederated Tribes of Warm Springs in 1855. In fact, the one attempt Congress made to change the treaty in 1865 has since been invalidated with the 1865 Treaty Nullification Act, reaffirming the federal government's commitment to the full text of the Treaty of 1855.

If "exclusive use" means anything, it means the Tribes retain the fundamental aspects of tribal sovereignty promised to them by Congress in the absence of explicit abrogation. A tribe's ability to regulate and punish the conduct of its members is at the core of tribal sovereignty. *See United States v. Wheeler*, 435 U.S. 313, 323 (1978) ("It is undisputed that Indian tribes have power to enforce their criminal laws against tribe members . . . with the power of regulating their internal and social relations." (citing

United States v. Kagama, 118 U.S. 375, 381-82 (1978) (internal quotation marks omitted).

Indeed, since the Treaty of 1855, tribal sovereignty over criminal jurisdiction on the Warm Springs reservation has only grown stronger. In 1934, Congress passed the Indian Reorganization Act. 48 Stat. 984 (1934). The Indian Reorganization Act empowered Tribes to create their own constitutions and bylaws. *McGirt,* 140 S. Ct. at 2467. The Confederated Tribes of Warm Springs took Congress up on its invitation and, in 1938, organized a governing body and adopted a constitution. Const. and Bylaws of the Confederated Tribes of Warm Springs Reservation of Oregon (1938). Among other things, Art. V, sec. 1(i) of the Warm Springs constitution empowered the Confederated Tribes of Warm Springs to create criminal ordinances, tribal courts, and a tribal police force for the prosecution of its tribal members.

Since then, the Tribes have done just that. In fact, Warm Springs Tribal Code § 310.520—making it a crime to flee or attempt to flee the police—punishes the *identical* conduct charged in federal court in this case.[4] Thus, instead of diminishing tribal sovereignty with respect to criminal jurisdiction, Congress has since authorized

[4] Section 310.520 reads: "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."

the expansion of the "exclusive use" promised to the Confederated Tribes of Warm Springs in the Treaty of 1855.

In summary, the "exclusive use" promise made in the Treaty of 1855 was explicit and has never been revoked by Congress. To the contrary, Congress has recognized and authorized expansion of the "exclusive use" provision of the Treaty of 1855 and, as recently as 2020, indicated its intention to honor the promises it made in the Treaty of 1855.

III. This Court's Prior Panel Opinion Applying The Assimilative Crimes Act To The Warm Springs Reservation—Issued Prior To The Supreme Court's Guidance In *McGirt*—Is Irreconcilable With The Reasoning Of *McGirt* Because It Relies On Extratextual Sources To Break A Congressional Treaty Promise.

The reasoning of this Court's 2019 panel opinion is irreconcilable with the reasoning of *McGirt.* The panel determined that—despite the "exclusive use" promise in the Treaty of 1855—the Assimilative Crimes Act applied to the Warm Springs reservation because it was "reserved or acquired for the use of the United States" as required by 18 U.S.C. § 7(3). *Smith,* 925 F.3d. at 418. Because the intervening decision in *McGirt* does not permit abrogation of a Treaty obligation in the absence of express congressional language, the earlier panel opinion is no longer binding authority. *See Hart v. Massanari*, 266 F.3d 1155, 1171 (9th Cir. 2001) ("A decision of the Supreme Court will control that corner of the law unless and until the Supreme Court itself

overrules or modifies it. Judges of the inferior courts may voice their criticisms, but follow it they must.”).

A. Under The Rules Of *Stare Decisis*, The Supreme Court’s Reasoning In A Subsequent Case Provides The Precedential Authority, Not An Earlier Panel Opinion With Irreconcilable Reasoning.

“It is usually a judicial decision's reasoning—its *ratio decidendi*—that allows it to have life and effect in the disposition of future cases.” *Ramos v. Louisiana*, 140 S. Ct. 1390, 1404 (2020); *see also Ramos*, 140 S. Ct. at 1416 n.6 (Kavanaugh, J., concurring in part) (“In the American system of *stare decisis*, the result and the reasoning each independently have precedential force.”). This Court has long recognized that the narrow holdings of its decisions are not the limit of their precedential effect, which extends to their reasoning or “mode of analysis.” *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc) (“[T]he principle of stare decisis directs us to adhere not only to the holdings of our prior cases, but also to their explications of the governing rules of law.”).

In *Gammie,* this Court held that a three-judge panel is free to reexamine the holding of a prior circuit decision when the decision of a higher court on a “closely related, but not identical issue . . . undercut[s] the theory or reasoning of underling the prior circuit precedent[.]” 335 F.3d at 899-900. The focus of the inquiry is whether the prior authority’s reasoning and theory is inconsistent with the intervening authority. *Id.*

at 900. Because the focus is on the consistency of reasoning or theory rather than the specific facts, the "issues decided by the higher court need not be identical in order to be controlling." *Id.* In this way, lower courts are "bound not only by the holdings of higher courts' decisions but also by their 'mode of analysis.'" *Id.* (citing Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L.Rev. 1175, 1177 (1989)).

This Court has rejected its own prior decisions in deference to intervening Supreme Court reasoning that is irreconcilable with its prior authority. *See, e.g., United States v. Lindsey*, 634 F.3d 541, 549 (9th Cir. 2011) (refusing to apply inconsistent precedent because the Supreme Court found that the erroneous denial of a peremptory challenge may be subject to harmless-error review and adhered to a structural error analysis that the Ninth Circuit previously declined to apply); *SEIU Local 121RN v. Los Robles Regional Medical Center*, 976 F.3d 849, 851-52 (9th Cir. 2020) (finding that the Supreme Court superseded precedent when it expressly rejected the notion that labor arbitration disputes should be analyzed differently than commercial arbitration disputes).

B. The Supreme Court's Reasoning In *McGirt* Constitutes Intervening Precedent That Is Irreconcilable With The *Ratio Decidendi* Of This Court's Earlier Panel Opinion.

In its pre-*McGirt* opinion, the panel began by acknowledging that "[t]he plain text of the ACA lacks any express reference to Indians or Indian country." *Id.* at 415.

This concession alone demonstrates that *McGirt* superseded the reasoning of the prior case. The core holding of *McGirt* centered around the required respect for Treaties that forecloses abrogation in the absence explicit congressional language stating its intention to do so. *McGirt,* 140 S.Ct. at 2482.

The panel continued its construction in the absence of express language of abrogation when it turned to whether the Warm Springs reservation is a place "reserved or acquired for use by the United States" as required by 18 U.S.C. § 7(3). The Court acknowledged that 18 U.S.C. § 7(3) also lacks any explicit reference to Indian country or Indian reservations. *Smith,* 410 F.3d at 415. The Court determined that, despite the lack of explicit language within § 7(3), and despite the explicit "exclusive use" promise made in the Treaty of 1855, the Warm Springs reservation was still land acquired for the use of the United States. *Id.* at 416.

The Court asserted that "courts have readily accepted that Indian reservations are 'reserved or acquired for the use of the United States.'" *Id.* at 416. In fact, the Court noted that prior caselaw had skipped over the words of § 7(3) "without explication." *Id.* First, after *McGirt,* no amount of prior case law—particularly prior case law without reasoning or explication—can replace the requirement that Congress can only break promises made to Indian tribes by explicitly saying so.

Second, even if caselaw could substitute for the actual words of Congress, prior caselaw has not "readily accepted" that Indian country—to say nothing of the Warm Springs reservation with its "exclusive use" promise—constitutes lands acquired for the use of the United States. Rather, as Judge Fisher noted in his concurrence: '"Only one court stated that the ACA applied of its own force within Indian country, in a case which the point was not in issue." *Id.* at 423 (quoting *Cohen's Handbook of Federal Indian Law* § 9.02 n. 19 (Nell Jessup Newton ed. 2017)).

Next, this Court turned to historical developments to find that the Warm Springs reservation constitutes land acquired for use by the United States. The Court reasoned that, although § 7(3) contains no references to Indians, Indian country, or Indian reservations, over time "the meaning of Indian reservation *emerged*" to include "lands set aside . . . for the residence or use of tribal Indians." *Id.* at 416 (quoting *Cohen's Handbook of Federal Indian Law* § 3.04 at 190 (Nell Jessup Newton ed. 2017)) (emphasis added). Later, the Court reasoned that "*the history* of 18 U.S.C. § 7 *and other* statutes by which Congress defined Indian country and asserted federal criminal jurisdiction over newly acquired territories, to include tribal lands, also *support*[]" the view that § 7 applies to Indian county and the Warm Springs reservation. *Id*. at 417 (emphasis added). Yet, as *McGirt* held, no amount of historical context or practice can

replace the requirement that "[i]f Congress wishes to withdraw its promises, it must say so." *McGirt,* 140 S. Ct. at 2482.

Additionally, the notion that, despite the absence of any language about Indians, Indian country, or Indian reservations within the Assimilative Crimes Act or § 7, Congress relied on a definition of Indian country that "emerged" over time is contrary to basic principles of statutory construction. *See United States v. Aguilera-Rios*, 769 F.3d 626, 631 (9th Cir. 2014) ("Decisions of statutory interpretation are fully retroactive because they do not change the law, but rather explain what the law has always meant.") (quoting *United States v. Rivera-Nevarez*, 418 F.3d 1104, 1107 (10th Cir. 2005) (citing *Rivers v. Roadway Express Inc.*, 511 U.S. 298, 312-13 (1994)).

Further, when Congress wants to intrude into Indian country or void a treaty, it knows how to do so explicitly. After all, both the Major Crimes Act (extending federal jurisdiction over enumerated major state law crimes committed in Indian country) and the Indian Country Crimes Act (extending federal jurisdiction to federal crimes committed in Indian country) *both* explicitly refer to "Indian country." 18 U.S.C. § § 1152 and 1153(a). When Congress uses certain language to convey meaning in these other contexts, the absence of such language in the text of the Assimilative Crimes Act and its definitional provisions reflects an intentional choice by Congress not to include that language. *See Gozlon-Peretz v. United States*, 498 U.S. 395, 404

(1991) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (citing *Russello v. United States*, 464 U.S. 16, 23 (1983)).

More specific to the Warm Springs reservation itself, Congress demonstrated in 2020 with the 1865 Treaty Nullification Act that it knows well how to void the terms of a treaty made with the Confederated Tribes of Warm Springs. The Treaty of 1865 restricted the ability of tribal members to fish and hunt outside the boundaries of the Warm Springs reservation and required tribal members to “remain upon said reservation, subject to the laws of the United States, the regulations of the Indian Department, and control of the officers thereof[.]” Art. 2, 14 Stat. 751 (1865). In voiding the Treaty of 1865 Congress demonstrated that it knows how to void treaties made with the Confederated Tribes of Warm Springs and reasserted its intention to keep the exclusive use promise made to the Tribes in 1855.

Next, this Court addressed the exception for federal criminal jurisdiction in Indian county contained within the Indian Country Crimes Act for “any case where, by treaty stipulations, the exclusive jurisdiction over such offense is or may be secured by the Indian tribes respectively.” *Id.* at 418; 18 U.S.C. § 1152. This Court found the exception applied to prosecutions under the Assimilative Crimes Act, but rejected that

the exception applied to the Warm Springs reservation despite the "exclusive use" promise made in the Treaty of 1855 and despite the robust criminal justice system created in Warm Springs in the wake of Indian Reorganization Act. *Id.* at 420. Whereas the Court reached its conclusion regarding the Assimilative Crimes Act by relying on historical practice and precedent, the Court reached its conclusion that the Indian Country Crimes Act did not exempt Mr. Smith from prosecution without reliance on any source at all. Rather, the Court simply stated without explanation that "these limitations did not prohibit the federal government's prosecution of Smith." *Id.* at 420.

In summary, this Court allowed the government to break the "exclusive use" promise of the Treaty of 1855, first, by relying on a supposed definition of Indian country that "emerged" over time and, then, without any explanation at all. While the Court's approach may have been permissible prior to *McGirt,* it is now in conflict with *McGirt's* "new approach sharply restricting consideration of contemporaneous and subsequent evidence of congressional intent." *McGirt* 140 S.Ct. at 2487 (J. Roberts, dissenting). After *McGirt,* only the explicit words of Congress suffice to break promises made to Indian tribes in treaties.

As the Court in *McGirt* stated, "[e]ach tribe's treaties must be considered on their on terms[.]" *McGirt,* 140 S.Ct. 2479. The Confederated Tribes of Warm Springs were promised "exclusive use" of their reservation in the Treaty of 1855. That promise has

never been revoked by any explicit language from Congress. To the contrary, the "exclusive use" promise made in 1855 has only been strengthened and reaffirmed since it was made 165 years ago. This Court, following prior Indian law jurisprudence, allowed the government to break the promise of exclusive use based on an analysis of historical developments and extratextual sources. This approach is in direct conflict with *McGirt*. Based on controlling Supreme Court precedent, the district court erred in failing to dismiss the indictment.

Conclusion

For the foregoing reasons, this Court should reverse the district court, reverse its prior opinion in this case, and dismiss the indictment against Mr. Smith.

Respectfully submitted this April 26, 2021.

/s/ Conor Huseby
Conor Huseby
Attorney for Defendant-Appellant

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	**)**	
	)	
Plaintiff-Appellee,	**)**	**CA No. 21-35036**
	)	
v.	**)**	
	)	
JOHNNY ELLERY SMITH,	**)**	
	)	
Defendant-Appellant.	**)**	

STATEMENT OF RELATED CASES

I, Conor Huseby, undersigned counsel of record for defendant-appellant, Johnny Ellery Smith, state pursuant to the Ninth Circuit Court of Appeals Rule 28-2.6, that I know of no other cases that should be deemed related.

Dated this April 26, 2021.

/s/ Conor Huseby
Conor Huseby
Attorney for Defendant-Appellant

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

Instructions for this form: http://www.ca9.uscourts.gov/forms/form08instructions.pdf

9th Cir. Case Number(s) 21-35036

I am the attorney or self-represented party.

This brief contains 5,390 **words**, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief *(select only one)*:

- (●) complies with the word limit of Cir. R. 32-1.
- ( ) is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.
- ( ) is an **amicus** brief and complies with the word limit of Fed. R. App. P. 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).
- ( ) is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.
- ( ) complies with the longer length limit permitted by Cir. R. 32-2(b) because *(select only one)*:
  - ( ) it is a joint brief submitted by separately represented parties;
  - ( ) a party or parties are filing a single brief in response to multiple briefs; or
  - ( ) a party or parties are filing a single brief in response to a longer joint brief.
- ( ) complies with the length limit designated by court order dated ______.
- ( ) is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature s/ Conor Huseby **Date** Apr 26, 2021

(use "s/[typed name]" to sign electronically-filed documents)

Feedback or questions about this form? Email us at forms@ca9.uscourts.gov