NO. 21-35036

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

PLAINTIFF-APPELLEE,

V.

JOHNNY ELLERY SMITH,

DEFENDANT-APPELLANT.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

THE HONORABLE ROBERT E. JONES, SENIOR U.S. DISTRICT JUDGE
D.C. NO. 3:20-CV-01951-JO

ANSWERING BRIEF OF PLAINTIFF-APPELLEE

SCOTT ERIK ASPHAUG
ACTING UNITED STATES ATTORNEY
DISTRICT OF OREGON
JESSIE D. YOUNG
ASSISTANT UNITED STATES ATTORNEY
1000 SW THIRD AVE., SUITE 600
PORTLAND, OREGON 97204
TELEPHONE: (503) 727-1000

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

Federal Statutes

Oregon Statutes

Treaties of the United States

STATEMENT OF JURISDICTION

The district court had subject matter jurisdiction over this criminal habeas proceeding. 18 U.S.C. § 3231; 28 U.S.C. § 2255. The district court entered the original judgment on December 1, 2017. ER-82. Defendant timely appealed. ER-99. This Court affirmed the district court's decision. *United States v. Smith*, 925 F.3d 410 (9th Cir. 2019), ER-101. On November 10, 2020, after the district court revoked his supervised release, defendant filed a petition to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255, challenging the district court's jurisdiction. ER-64. On January 13, 2021, the district court denied defendant's petition, and issued a certificate of appealability "as to the jurisdictional issue." ER-3. Defendant filed a timely appeal. ER-91. This Court has jurisdiction. 18 U.S.C. §§ 1291; 2253.

STATEMENT OF ISSUE

Did the Supreme Court's decision in *McGirt v. Oklahoma* effectively overrule this Court's decision in *Smith*, that the Assimilative Crimes Act and the Indian Country Crimes Act applies on the Warm Springs Indian Reservation?

STATEMENT OF FACTS

A. Defendant, an Indian, pled guilty to two counts of fleeing or attempting to elude a police officer on the Warm Springs Indian Reservation.

In 1855, the Warm Springs and Wasco tribes entered into a treaty ("Warm Springs Treaty") with the United States in which they ceded over ten million acres of their traditional territory to the United States government and reserved approximately

640,000 acres of land in north-central Oregon, referred to as the Warm Springs Indian Reservation ("Warm Springs Reservation"), for their "exclusive use."[1]

In September and again in October of 2016, defendant, an Indian[2] and citizen of the Confederated Tribes of the Warm Springs Reservation of Oregon ("Warm Springs Tribe"), led Warm Springs tribal police officers on two separate and dangerous high-speed chases at night on the Warm Springs Reservation. PSR ¶¶ 2–3. Because the Warm Springs Reservation is considered Indian country[3] and defendant is an Indian, jurisdiction for his fleeing or attempting to elude a police officer rested concurrently with the federal government and the Warm Springs Tribe.[4]

---

[1] Treaty with the Tribes of Middle Oregon, June 25, 1855, 12 Stat. 963.

[2] There is no statutory definition of "Indian" but courts generally define Indian status for purposes of federal criminal jurisdiction using a two-part test derived from *United States v. Rogers*, 45 U.S. 567 (1846), in which the government must prove that (1) the defendant has a sufficient degree of Indian blood and (2) the defendant has tribal or federal governmental recognition as an Indian. *See, e.g.*, *United States v. LaBuff*, 658 F.3d 873 (9th Cir. 2011) (applying the *Rogers* test to determine whether or not a defendant should be considered an Indian for purposes of the Major Crimes Act); *United States v. Bruce*, 394 F.3d 1215 (9th Cir. 2005) (applying the *Rogers* test to determine whether or not a defendant should be considered an Indian for purposes of the ICCA).

[3] 18 U.S.C. § 1151 defines "Indian country" as (1) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, (2) dependent Indian communities, and (3) all Indian allotments, the Indian titles to which have not been extinguished.

[4] Tribes have concurrent jurisdiction over crimes by Indians punishable under the Indian Country Crimes Act ("ICCA"). The language of the ICCA makes clear that Congress was creating concurrent federal and tribal jurisdiction under that statute, not exclusive federal jurisdiction. The ICCA explicitly exempts from its coverage Indians punished by "local law," that is, tribal law. 18 U.S.C. § 1152. This language would

Defendant had numerous state and tribal convictions for traffic offenses, PSR ¶¶ 26–27, 33–34, 36, as well as a prior federal conviction for attempting to elude a police officer, PSR ¶ 28. For the two criminal episodes in 2016, a federal grand jury indicted him for two counts of fleeing or attempting to elude a police officer in violation of Or. Rev. Stat. § 811.540(1), assimilated for federal prosecution under the Assimilative Crimes Act, 18 U.S.C. § 13 ("ACA") and the ICCA, 18 U.S.C. § 1152. ER 89–90. Defendant has never been charged with or convicted of these crimes by the Warm Springs Tribe. *Smith*, 925 F.3d at 413.

Following his indictment, defendant moved to dismiss the charges, claiming that he was not subject to Oregon law via the ACA or the ICCA. ECF No. 12; ER-96. Because defendant was unquestionably an Indian who committed a crime in Indian country, and because no other federal law or exemption applied to his conduct, the district court concluded that defendant was properly charged and convicted in federal district court for fleeing or attempting to elude a police officer. ECF No. 21; ER-97.

Thereafter, defendant pled guilty to both charges in the indictment without the benefit of a plea agreement. ECF No. 23; ER 97–98. The district court sentenced defendant to 19 months and one day imprisonment, followed by a three-year term of supervised release. ECF Nos. 34–35; ER-97–98.

---

have no meaning if Congress intended the ICCA to create exclusive, and not concurrent, federal jurisdiction. Thus, when a crime falls within the ICCA, tribal courts retain concurrent jurisdiction over Indian offenders.

Defendant appealed to this Court, arguing that 18 U.S.C. § 1153 (the "Major Crimes Act" or "MCA"), precludes the federal government from prosecuting any "state crimes" in Indian country that are not listed in the MCA, such as defendant's two offenses of fleeing or attempting to elude a police officer as defined under Oregon law. *Smith*, 925 F.3d at 413.

This Court disagreed and affirmed the conviction, concluding that "the ACA applies to Indian County" by operation of both 18 U.S.C. § 7 (concerning land "reserved or acquired for the use of the United States" and "under the exclusive or concurrent jurisdiction thereof") and the ICCA (concerning "federal enclave" laws). *Id.* Because defendant, an Indian, committed his crime in Indian country, and because his crime did not meet any of the exceptions in the ICCA, defendant's crimes were properly assimilated. *Id.* at 415. In October 2019, the Supreme Court denied certiorari. ECF No. 70; ER-102.

B. Defendant's Collateral Challenge to His Conviction Based on *McGirt.*

In July 2020, the Supreme Court decided *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020). The key question in the case was whether a crime committed by Jimcy McGirt, an Indian, was committed in Indian country. *Id.* at 2459. To answer this question, the Court had to decide whether the Creek Nation's treaty reservation was either diminished or disestablished by Congress. *Id.* at 2460. The Court ultimately concluded that it was not because the disestablishment of a reservation, like diminishment, "require[s] that Congress clearly express its intent to do so," typically with

"reference[s] to cession or other language evidencing the present and total surrender of all tribal interests" *Id.* at 2463 (quoting *Nebraska v. Parker*, 577 U.S. 481, 488 (2016)).

On October 30, 2020, defendant was arrested for violating the terms of his supervised release. ECF No. 76; ER-102. Two weeks later, on November 10, 2020, defendant filed a § 2255 petition seeking to vacate his conviction or, in the alternative, to terminate his supervised release. ECF No. 78; ER-103. His § 2255 petition, which was filed within one year of the decision in *McGirt*, argued that the decision in *McGirt* effectively overrules *Smith*. The United States disagreed and argued *Smith* remained good law. ER-56.

After hearing argument, the district court denied defendant's § 2255 petition, concluding "*Smith* remains good law after *McGirt*" because (1) *McGirt* questioned whether federal jurisdiction existed under the MCA and had no reason to address the ICCA and (2) "[n]othing in *McGirt* casts doubt on the ICCA's validity or its application to Indian country… although the ICCA may…be a breach of government promises to give tribes complete sovereignty over their members, Congress has expressly authorized federal jurisdiction over certain crimes committed by Indians in Indian county." ER-12. The district court issued defendant a certificate of appealability "as to the jurisdictional issue." ER-3. This appeal followed.

SUMMARY OF ARGUMENT

McGirt is unquestionably a landmark decision for cases involving the diminishment or disestablishment of a reservation. In *McGirt*, the Supreme Court clarified the test for determining the boundaries of a reservation, which is *the* essential component of determining if the land is Indian country under 18 U.S.C. § 1151(a). But this is not a case about whether Warm Springs—where defendant Johnny Smith committed his crimes—is a reservation. There is no dispute that it is. The only question is whether defendant Johnny Smith could be prosecuted in federal court for the crimes he committed on that reservation. This Court previously held that he could, and nothing in *McGirt* undermines that decision. Defendant's conviction (and his subsequent supervised release violation sentence) must be affirmed.

ARGUMENT

A. Standard of Review

A district court's denial of a petition to vacate under § 2255 is reviewed *de novo*. *United States v. Reves*, 774 F.3d 562, 564 (9th Cir. 2014). A district court's assumption of jurisdiction is also reviewed *de novo*. *United States v. Webb*, 219 F.3d 1127 (9th Cir. 2000).

B. Indian Law Canons of Construction

1. Courts apply the Indian law cannons of construction in cases involving Indian treaty rights and federal statutes relating to tribes.

The Supreme Court created rules of construction applicable in Indian law cases, rules which are "rooted in the unique trust relationship between the United States and the Indians." *Oneida County v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985). The Supreme Court is clear: "The standard principles of statutory interpretation do not have their usual force in cases involving Indian law." *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985).

While there are many Indian law canons of construction, the oldest and most relevant canon "dates back to the earliest years of our Nation's history." *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 795 (1991) (Blackmun, J., dissenting). This canon requires that courts liberally construe treaties, statutes, agreements, and executive orders in favor of the tribal rights. *See e.g.*, *Oneida County*, 470 U.S. at 247 ("it is well established that treaties should be construed liberally in favor of the Indians with ambiguous provisions interpreted for their benefit"). Any doubtful expressions or ambiguities are to be resolved in favor of tribal rights. *See, e.g.*, *Herrera v. Wyoming*, 139 S. Ct. 1686, 1699 (2019) ("Indian treaties must be interpreted in light of the parties' intentions, with any ambiguities resolved in favor of the Indians") (internal quotations omitted). Yet, if the language of a treaty or statute is clear, this canon will not apply and courts must apply the plain language whether or not the outcome is

favorable to tribal rights. *See Carcieri v. Salazar*, 555 U.S. 379, 387 (2009) (when statutory language is "plain and unambiguous," it must be applied "according to its terms"); *South Carolina v. Catawba Indian Tribe*, 476 U.S. 498, 506 (1986) ("The canon of construction regarding the resolution of ambiguities in favor of Indians, however, does not permit reliance on ambiguities that do not exist; nor does it permit disregard of the clearly expressed intent of Congress."); *Or. Dep't of Fish & Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 774 (1985) ("even though 'legal ambiguities are resolved to the benefit of the Indians,' courts cannot ignore plain language that, viewed in historical context and given a 'fair appraisal,' clearly runs counter to a tribe's later claims.") (citations omitted).

2. Through its "plenary and exclusive" power, Congress can abrogate treaty rights.

In many cases, the canon of liberal interpretation with ambiguities resolved in favor of tribal interests retains its firepower. However, the U.S. Constitution grants Congress broad general powers to legislate with respect to Indian tribes, powers that the Supreme Court has consistently described as "plenary and exclusive." *See e.g.*, *Washington v. Confederated Bands and Tribes of Yakima Nation*, 439 U.S. 463, 470–71 (1979).

This "plenary and exclusive" power allows Congress to not only "enact legislation that both restricts and, in turn, relaxes those restrictions on tribal sovereign

authority," *United States v. Lara*, 541 U.S. 193, 202 (2004), but also to abrogate treaty rights or entire treaties, *Lone Wolf v. Hitchcock*, 187 U.S. 553, 566–68 (1903).

For usufructuary treaty rights (*e.g.*, treaty-reserved hunting, fishing, and gathering rights), courts generally require Congress to make its intent to abrogate clear and unambiguous, either through the use of "explicit statutory language" or "clear and plain" intent. *See, e.g.*, *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202 (1999)("Congress may abrogate Indian treaty rights, but it must clearly express its intent to do so."); *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 690 (1979) ("[a]bsent explicit statutory language, we have been extremely reluctant to find congressional abrogation of treaty rights."). Under either approach, the Court provides that "the intention to abrogate or modify a treaty is not to be lightly imputed to the Congress." *United States v. Dion*, 476 U.S. 734, 739 (1986); *Menominee Tribe v. United States*, 391 U.S. 404, 413 (1968). The "essential" factor is "clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty." *Dion*, 476 U.S. at 739–40.

For rights to a reservation, however, courts use a different standard. Prior to *McGirt*, when asked to determine whether Congress broke its promise of a reservation to a tribe, courts believed that a less stringent, three-part test applied. However, *McGirt* clarified that this approach was a "mistake[]," *McGirt* 140 S. Ct. at 2468,

holding "[i]f Congress wishes to break the promise of a reservation, it must say so" explicitly, *id.* at 2462.

3. *McGirt* clarified the legal standard courts must use in determining whether Congress diminished or disestablished a reservation.

In *McGirt*, the question before the Court was whether defendant McGirt, an enrolled member of the Seminole Nation of Oklahoma, could be prosecuted in state court for sexual assault. *Id.* at 2459. McGirt argued that his crime was committed in Indian County, and as such, the federal government had exclusive jurisdiction over his crime under the MCA. The state of Oklahoma argued that although the Creek Reservation was created pursuant to a treaty, subsequent acts of Congress and extratextual factors, such as subsequent demographic change following passage of a statute, disestablished the reservation, and thus the land was not "Indian country," as that term is defined by 18 U.S.C. § 1151. This meant that Oklahoma, not the federal government, had jurisdiction over McGirt's crime.

The *McGirt* Court began its analysis by looking to the text of the Creek Nation's treaties. Much like the Warm Springs Reservation, Congress established the Creek Reservation as part of a treaty in which Congress promised the Creek Nation certain lands in exchange for an agreement by the Creek Indians to cede other land to the United States. *Id.* at 2460. While it was not specifically called a reservation, the Court found the treaty was clear: "Congress established a reservation for the Creeks." *Id.* at 2461. As part of the treaty, the Creeks "were to be 'secured in the unrestricted

right of self-government,' with 'full jurisdiction' over enrolled Tribe members and their property." *Id.* at 2461. But, of course, as the Court recognized, Congress—through its plenary and exclusive power—broke many of the promises made in the treaty because the land, once held for the exclusive use of the tribe, now belongs to people not affiliated with the Tribe. *Id.* at 2462.

After walking through the history of the encroachment onto Creek land as well as the Creek Nation's self-governance, the Court found that there was no Act of Congress that "dissolved the Creek Tribe or disestablished its reservation." *Id.* at 2463–68. And once created, the Court held that the Creek reservation retained its reservation status "until Congress explicitly indicates otherwise." *Id.* at 2468.

To reach its holding, the Court needed to review its prior precedents to determine if they—as the state of Oklahoma argued—created three "steps" that courts must consider when faced with whether Congress diminished or disestablished a reservation. Only the three steps allowed for consideration of extratextual factors. *See id.* at 2468 ("Oklahoma even classifies and categorizes how we should approach the question of disestablishment into three 'steps.'").

The Court began by reviewing *Solem v. Bartlett*, 465 U.S. 463 (1984), where the Court held that the State of South Dakota lacked jurisdiction to prosecute the Indian defendant because he committed his crime within the boundaries of the Cheyenne River Sioux Reservation. *Id.* at 480. The Court determined that the reservation was "Indian country" for purposes of the MCA because Congress never disestablished the

reservation. *Id.* at 481. The Court reasoned that because there was no "substantial and compelling evidence of a congressional intention to diminish," Congress simply intended to open the Cheyenne River Sioux Reservation to non-Indian settlement and not to diminish the boundaries of the reservation. *Id.* at 472, 480.

The *McGirt* Court then reviewed subsequent disestablishment and diminishment cases, in which the Court followed the *Solem* framework and found the requisite intent to diminish the size of reservations in *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998) (Yankton Sioux Indian Reservation), and in *Hagen v. Utah,* 510 U.S. 399 (1994) (Uintah Indian Reservation). In both cases, the Court found that "unalloted, ceded lands were severed from the reservation," such that the reservation was diminished. *Yankton Sioux Tribe*, 522 U.S. at 358; *see also Hagen*, 510 U.S. at 421.

Some courts, including this Court, understood *Solem* as creating a "three-tiered test to assess congressional intent" to diminish or disestablish a reservation. *See Webb*, 219 F.3d at 1132. According to *Webb*, courts first look at the statutory language used to open the Indian lands, which is considered "the most probative evidence of congressional intent." *Id.* (citation omitted). Second, courts look to legislative history and the surrounding circumstances of a surplus land act to determine the "contemporaneous understanding" of the act's purpose and effect. *Id.* Finally, although far less probative, events after the passage of a surplus land act may be examined "to decipher Congress's intentions." *Id.* (looking to Congress's treatment of the affected areas, the manner of treatment by Bureau of Indian Affairs and local

judicial authorities, as well as who settled in the area and subsequent demographic history).

The *McGirt* court dismissed this approach. It found that reading *Solem*, *Yankton Sioux*, and *Hagen* as creating a "three-tiered test" or "steps" for reservation diminishment and disestablishment cases was a "mistake[]." *McGirt*, 140 S. Ct. at 2468. Rather, the Court clarified that *Solem*, *Yankton Sioux*, and *Hagen* all support the rule that "[t]o determine whether a tribe continues to hold a reservation, there is only one place we may look: the Acts of Congress." *Id.* at 2462. That is the only "step" proper for a court of law to consider unless "an ambiguous statutory term or phrase emerges," in which case courts "will sometimes consult contemporaneous usages, customs, and practices to the extent they shed light on the meaning of the language in question at the time of enactment." *Id.* at 2468. The Court also noted that *Solem*'s review of the "extratextual sources" did not create additional steps, rather it "only confirmed what the relevant statute already suggested—that the reservation in question was not diminished or disestablished." *Id.* (citations omitted).

The Court also dismissed attempts by the dissent and Oklahoma to "stitch[] together quotes" from *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977), and *Yankton Sioux* "in an effort to support its very different course." *McGirt*, 140 S. Ct. at 2469, n 9. The Court found that "both cases emphasize that '[t]he focus of our inquiry is congressional intent,' and merely acknowledge that extratextual sources may help resolve ambiguity about Congress's directions." *Id.* (citations omitted).

By clearly rejecting *Solem* as creating three "steps" to determine whether Congress disestablished or diminished a reservation, the *McGirt* court made clear that treaty rights in a reservation are as important as other treaty rights, and as such, if Congress wants to break the promise of a reservation contained in a treaty, "it must say so" explicitly. *McGirt*, 140 S. Ct. at 2462.

There is no question that *McGirt* is a landmark decision when it comes to the question of whether Congress broke a treaty promise of a reservation to a tribe. But *McGirt* did not, as defendant argues, create a "paradigm shift," Def. Op. Br. at 8, when it comes to statutory interpretation of the ICCA, the ACA, or the MCA. *McGirt's* focus was on the Indian country status of the land. *McGirt*, 140 S. Ct. at 2459–60. And since there is no question that defendant Johnny Smith, an Indian, committed his crimes in Indian country—facts defendant does not challenge—the reverberations of the *McGirt* decision cannot, as a matter of law, reach Johnny Smith.

C. *McGirt*'s Holding Does Not Effectively Overrule *Smith.*

McGirt does not effectively overrule *Smith* because (1) *Smith* was neither a reservation diminishment nor reservation disestablishment case, (2) the "exclusive use" provision does not preclude federal jurisdiction, (3) reading *McGirt* as a fundamental change to all of the Indian law canons of construction is wrong, and (4) the *Smith* court properly applied the Indian law canons of construction—and not a

misapplication of the *Solem* factors—in finding that the ACA and ICCA applied on the Warm Springs Reservation.

McGirt and *Smith* can easily coexist because they both operate under the same Indian law canons of construction. Therefore, *Smith* remains good law.

1. *Smith* was neither a reservation diminishment nor reservation disestablishment case and thus *McGirt* does not apply.

Applying *McGirt* to a case where there is no question of reservation diminishment or disestablishment would be inappropriate and unsupported by this Court's recent ruling in *Confederated Tribes & Bands of the Yakama Nation v. Klickitat Cnty.*, Nos. 19-35807, 19-35821, 2021 U.S. App. LEXIS 17471 (9th Cir. June 11, 2021). In that case, the Confederated Tribes and Bands of the Yakama Nation argued that this Court "should apply the 'diminishment' framework to determine the effect of the 1904 Act on the Yakama Reservation's boundaries." *Id.* at *25. Yet, even though the Yakama case dealt with the boundary of a reservation, this Court made clear that the *McGirt* and *Solem* framework is *only used* to "resolve disputes over whether Congress 'diminished' reservations by opening unallotted reservation lands to non-Indian settlement." *Id.* (citing *Solem*, 465 U.S. at 467). This Court declined to apply the *McGirt* and *Solem* framework because the Act at issue did not open the land up for settlement.

Smith, like *Yakama Nation,* did not deal with a dispute over whether Congress diminished the Warm Springs Reservation by opening unallotted reservation lands to

non-Indian settlement. In fact, *Smith* did not deal with a reservation boundary issue at all; *Smith* dealt with the application of federal criminal statutes in Indian country. Therefore, this court should similarly find that the *Solem* framework, as clarified by *McGirt*, did not overrule *Smith*.

2. The "exclusive use" provision does not preclude federal jurisdiction.

a. Defendant is barred from raising the "exclusive use" argument.

Defendant's argument—that the "exclusive use" provision of the Warm Springs Treaty precludes his prosecution under the ICCA and ACA—is barred as he failed to raise this issue in his prior appeal. Failure to raise these claims on appeal precludes him from raising them in a § 2255 petition. *See Massaro v. United States*, 538 U.S. 500, 503 (2003) (holding that as a general rule claims not raised on direct appeal cannot be raised in § 2255 petition); *see also Bousley v. United States,* 523 U.S. 614, 621 (1998) (same). In fact, the United States in its answering brief in *Smith* pointed this out to the defendant: "defendant [failed to] raise or preserve the argument that this offense was reserved to the tribe by treaty stipulation." 2018 WL 1706033 at *6.

Citing *Smith*, defendant claims that "the panel determined that—despite the 'exclusive use' promise in the Treaty of 1855—the [ACA] applied to the Warm Springs reservation." Def. Op. Br. at 15. However, a review of the defendant's briefs submitted to this Court make clear that defendant did not raise the exclusive use provision argument in his appeal. *See* 2018 WL 1224643 (Opening Brief); 2018 WL 2066083 (Reply Brief). Allowing him to do so here would not be appropriate.

McGirt only clarified the legal standard courts use for determining whether Congress abrogated a tribe's treaty right to a reservation, and did not change the legal analysis for abrogation of other treaty rights. *See Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. at 658; *Dion*, 476 U.S. at 738–40. As such, defendant could have, but did not, assert that the "exclusive use" provision in the Warm Springs Treaty precluded his prosecution under the ACA and ICCA.

b. The "exclusive use" provision in the Warm Springs Treaty does not mean "exclusive jurisdiction."

Even if defendant could raise this claim, his argument fails. In order for defendant to get the relief he seeks, this Court would need to read the term "exclusive use" in the Warm Springs Treaty to mean "exclusive jurisdiction." In other words, only the Warm Springs Tribe has any jurisdiction over crimes committed on the Warm Springs Reservation by Indians. And Warm Springs' power to punish crimes is limited; at most the Tribe can impose up to one year in tribal custody. If defendant's argument was successful, every crime on Warm Springs—from theft to sexual assault to murder would be subject to the same maximum sentence—one year imprisonment. Neither the state nor the federal government would have the ability to assist Warm Springs in punishing serious crimes that are committed on the reservation. This is not what Congress intended.

As the Indian law canons of construction require, we begin with the text of the treaty. The Warm Springs Treaty specifies the boundaries of the Warm Spring

Reservation and provides, in pertinent part, that: "[a]ll of which tract 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." Treaty, 12 Stat. 963, Art. I, para. 3 (emphasis added). This Court has consistently held that an "exclusive use" provision in a treaty clearly does not contemplate ousting federal jurisdiction on a reservation. *United States v. Farris*, 624 F.2d 890 (9th Cir. 1980).

In *Farris,* this Court reviewed the application of the Organized Crime Control Act of 1970, 18 U.S.C. § 1955, to Indian and non-Indian defendants for crimes that occurred on the Puyallup Indian Reservation. In holding that § 1955 applied to the Indian defendants, this Court began with the general presumption "that Congress does not intend to abrogate rights guaranteed by Indian treaties when it passes general laws, unless it makes specific reference to Indians." *Id.* at 893 (citing *Antoine v. Washington*, 420 U.S. 194 (1975)); *Menominee Tribe*, 391 U.S. 404. Yet, "*this rule applies only to subjects specifically covered in treaties*, such as hunting rights; usually, general federal laws apply to Indians…A different norm would only necessitate a huge quantity of statutory boilerplate." *Farris*, 624 F.2d at 893 (emphasis added).

This Court concluded that "general treaty language such as that devoting land to a tribe's 'exclusive use' is not sufficient" to oust federal criminal jurisdiction in Indian country; "there would have to be specific language permitting" the illegal conduct or "purporting to exempt Indians from the laws of general applicability

throughout the United States regardless of situs of the act." *Id.* And since the United States' treaty with the Puyallups contained no such specific language, this Court found that § 1955 applied.

The Puyallups' Treaty, like the Warm Springs Treaty, contains an "exclusive use" provision. *See* 10 Stat. 1132 (1854) (Article II of the Treaty of Medicine Creek says that reservation land shall be "marked out for their exclusive use"). And although this type of language in other Indian treaties has been held to preserve Indian self-government as against state regulation, *see e.g.*, *Williams v. Lee*, 358 U.S. 217, 221–22 (1959), *Farris* is clear that the general language of "exclusive use" is insufficient to oust federal criminal jurisdiction. *Farris*, 624 F.2d at 893.

Two years after *Farris*, this Court again addressed the "exclusive use" provision, but this time in the Warm Springs Treaty in *Confederated Tribes of Warm Springs v. Kurtz*, 691 F.2d 878 (9th Cir. 1982). In considering the "exclusive use" provision in the Warm Springs Treaty, this Court found that this provision was not sufficient to bar federal tax laws to the Warm Springs Tribe because the Warm Springs Treaty did not contain a specific provision exempting the Warm Springs Tribe from the tax laws.

This Court returned to interpreting the "exclusive use" provision in the Warm Springs Treaty in *United States Dept. of Labor v. Occupational Safety & Health Review Com'n*, 935 F.2d 182 (9th Cir. 1991). In line with *Farris* and *Kurtz*, this Court held that the general "exclusive use" provision of the Warm Springs Treaty does not bar

application of the Occupational Safety and Health Act to the Warm Springs Forest Products Industries' sawmill located on the reservation. *Id.* at 187.

Certainly, the "exclusive use" provision in the Warm Springs Treaty preserves Indian self-government as against state regulation, *see e.g.*, *Williams v. Lee*, 358 U.S. at 221–22, but it does not—by its very terms—exclude federal criminal jurisdiction on the Warm Springs Reservation. Nothing in the "exclusive use" provision provides defendant a means to vacate his conviction under the ACA and ICCA or erase the federal government's ability to assist the Warm Springs Tribe in prosecuting serious crimes on its lands.

c. Even if "exclusive use" meant "exclusive jurisdiction," Congress can abrogate this right through its plenary and exclusive power.

Assuming, *arguendo*, that "exclusive use" meant "exclusive jurisdiction"—which it does not—this usufructuary treaty right would still be subject to the "plenary and exclusive" power of Congress to abrogate a treaty right. *See Lone Wolf*, 187 U.S. at 566–68.

As *McGirt* made clear, Congress can break treaty promises, even promises to a reservation. 140 S. Ct. at 2462. Yet, the *McGirt* and *Solem* framework apply only to questions of whether Congress diminished or disestablished a reservation "by opening unallotted reservation lands to non-Indian settlement." *Yakama Nation*, 2021 U.S. App. LEXIS 17471, *25 n.11.

Thus, even if the Warm Springs Treaty reserved exclusive jurisdiction, as defendant argues, this provision would be subject to abrogation if Congress made its intent to abrogate clear and unambiguous through the use of "explicit statutory language," *see Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. at 658, or "clear and plain" intent, *Dion*, 476 U.S. at 738–40.

In *Smith*, this Court found that the "express language" of the definition of "Indian country,"—enacted along with the ACA and the ICCA by Congress in 1948 as part of the revised and consolidated federal criminal code—which includes "all land within the limits of any Indian reservation *under the jurisdiction of the United States Government*," 18 U.S.C. § 1151, is a "direct indicator" that the "jurisdiction of the United States" in the ACA includes Indian country, *Smith*, 925 F.3d at 417–18 (emphasis in original).

Because the definition of Indian country includes "all land within the limits of any Indian reservation under the jurisdiction of the United States Government," and this term was codified at the same time as the ACA and ICCA, this Court found that Congress's language and intent was clear and plain: that the "jurisdiction of the United States" includes Indian country. *Id.*

3. Reading *McGirt* as a fundamental change to all of the Indian law canons of construction is wrong.

Relying on Chief Justice Roberts's dissent, defendant's main argument on appeal is that *McGirt* changed the Indian law canons of construction so much so that

this Court's decision in *Smith* is effectively overruled. Def. Op. Br. at 8. He asserts, without citing to any authority, that prior to *McGirt* "courts could infer congressional intent to break promises made in treaties from extratextual sources and historical context and developments," and now "congressional intent to break promises made in treaties may not be imputed at all." *Id.* at 8, 10. This framing of *McGirt* is misplaced.

It is true that extratextual sources cannot be used as an "alternative means of proving disestablishment or diminishment." *McGirt*, 140 S. Ct. at 2469. This evidence "can only be interpretative—evidence that, at best, might be used to the extent it sheds light on what the terms found in a statute meant at the time of the law's adoption." *Id.* This material can help "'clear up . . . not create' ambiguity about a statute's original meaning." *Id.* (citations omitted).

But it is untrue that, prior to *McGirt*, courts could infer Congressional intent from extratextual sources as an alternative means of proving disestablishment or diminishment. Defendant's arguments, unsupported by any precedent, should be dismissed.

Additionally, *McGirt* did not overrule any prior precedent. Rather, *McGirt* clarified that its prior precedents were clear on this issue: "once a reservation is established, it retains that status 'until Congress explicitly indicates otherwise.'" *McGirt*, 140 S. Ct. at 2469 (quoting *Solem*, 465 U.S., at 470); *see also Yankton Sioux*, 522 U.S. at 343 ("[O]nly Congress can alter the terms of an Indian treaty by diminishing a reservation, and its intent to do so must be clear and plain") (citation and internal

quotation marks omitted).

The *McGirt* court concluded that its holding was far from novel because all prior Supreme Court precedent including *Solem*, *Yankton Sioux*, and *Hagen* was already clear: "disestablishment may not be *lightly inferred* and treaty rights are to be construed in favor, not against, tribal rights." *McGirt*, 140 S. Ct at 2470 (emphasis added). Rather than overrule its prior precedent in *Solem*, the Court merely *clarified* that treating the *Solem* framework as "steps" was not consistent with *Solem*, *Yankton Sioux*, *Hagen*, or the Indian law canons of construction.

Again, without citing to any authority, defendant argues that "[p]rior to *McGirt*, courts permitted intrusions into Tribal sovereignty through inferences and the accretion of historical practices." Def. Op. Br. at 8. But again, defendant's unsupported framing of *McGirt* should be dismissed by this Court.

The *McGirt* court found nothing in *Solem*, *Rosebud*, or *Yankton Sioux* that would permit the use of extratextual sources to create ambiguity where none exists. The *McGirt* court reviewed those cases and concluded that reading *Solem* as creating a "three-tiered test" was inconsistent with the Court's reasoning in all of those cases because these cases "merely acknowledge that extratextual sources may help resolve ambiguity about Congress's directions" and can "confirm[] what the relevant statute already suggested." All of the cases affirm, rather than change, that "[t]he focus of [the court's] inquiry is congressional intent." *McGirt*, 140 S. Ct. at 2470 n.9.

To further support his broad interpretation of *McGirt*, defendant argues that the Seventh Circuit "addressed *McGirt*'s impact in Indian law jurisprudence" in *Oneida Nation v. Village of Hobart*, 968 F.3d 664 (7th Cir. 2020) and, he claims, adopted his theory. Def. Op. Br. at 10. But the brief passage relied on by defendant is taken out of context. The Seventh Circuit in *Oneida Nation* left little doubt that it viewed *McGirt* as limited to reservation diminishment and disestablishment cases. That court explained that "[u]nder *Solem v. Bartlett*, we look[ed]—from most important factor to least—to statutory text, the circumstances surrounding a statute's passage, and subsequent events for evidence of a "clear congressional purpose to diminish the reservation." *Oneida Nation*, 968 F.3d at 668. The Seventh Circuit then explained that, post-*McGirt* the *Solem* framework was adjusted "*to place a greater focus on statutory text, making it even more difficult to establish the requisite congressional intent to disestablish or diminish a reservation*." *Id.* (emphasis added).

Defendant also cites *Oneida Nation* as "clarif[ying] that, after *McGirt*, 'extratextual sources' cannot be used to manufacture ambiguity where none existed on the face of the statutory text." Def. Op. Br. at 10. While it is true that extratextual sources cannot be used to create ambiguity where none exists, this was true prior to *McGirt*, prior to *Oneida Nation*, and at the time of this Court's decision in *Smith*. *See McGirt*, 140 S. Ct. at 2469 (quoting *Milner v. Dep't of the Navy*, 562 U.S. 562, 574 (2011) ("The only role such materials can properly play is to help 'clear up . . . not create' ambiguity about a statute's original meaning.")). No court, including *Solem*, has held

that courts can manufacture ambiguity where none exists, and defendant has cited none.

Under defendant's tortured reading of *McGirt*, "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." Def. Op. Br. at 2. This interpretation is unquestionably irreconcilable with the language in *McGirt* and with recent Supreme Court precedent.

As to the first part of defendant's argument, *McGirt* dealt only with a small portion of the scope of jurisdiction in Indian country; specifically, whether the location of McGirt's crime was committed in Indian country, as that term is defined in 18 U.S.C. § 1151, for purposes of the MCA. *McGirt*, 140 S. Ct. at 2460 ("Mr. McGirt's appeal rests on the federal Major Crimes Act"; "The key question Mr. McGirt faces [is]: Did he commit his crimes in Indian country?"). However, to answer that question the Court had to determine whether the Creek Reservation, created by a treaty, was diminished or disestablished. *Id.* at 2459–60.

If *McGirt* did what defendant claims it did—redefine the whole scope of jurisdiction in Indian country—then it would make little sense that the Supreme Court did not cite *McGirt* in its ruling this term in *United States v. Cooley*, 141 S. Ct. 1638 (2021). *Cooley* addressed the scope of a tribe's civil jurisdiction over non-members on a reservation. The only logical explanation as to why *Cooley*—a case about jurisdiction

in Indian country—did not cite *McGirt* is because *McGirt*'s effects are not as wide-reaching as defendant argues.

The second part of defendant's argument is similarly misplaced. *McGirt* made clear, citing both *Nebraska v. Parker* and *Yankton Sioux*, that "extratextual considerations" can be "*interpretive*—evidence that, at best, might be used to the extent it sheds light on what the terms found in a statute meant at the time of the law's adoption, not as an alternative means of proving disestablishment or diminishment." *McGirt*, 140 S. Ct at 2469 (emphasis in original). Rather than completely disregard extratextual considerations, *McGirt* made clear that these considerations have a limited time and place—when the statute is ambiguous.

To accept defendant's reading of *McGirt*, this Court would need to disregard the plain language in *McGirt* at every turn. But this is not all; defendant also asks this court to substitute his own broader terms in place of the Supreme Court's.

For example, defendant wants this Court to read the word "reservation" in *McGirt* as "treaty promise." While he admits repeatedly that *McGirt* is a case dealing with the scope of the Creek Nation's reservation—"The issue in *McGirt* was whether the Creek Indian Nation in Oklahoma remained a reservation for the purposes of federal criminal jurisdiction . . . the Court ruled that the Creek Indian Nation constituted a reservation for criminal jurisdiction purposes because no clear and definitive legislation had said otherwise," Def. Op. Br at 8–9—he continues to cite

McGirt as applying not to a reservation but to a "treaty promise." *Id.* at 2, 7, 9, 15. And while *McGirt* is a case dealing with a treaty promise *to a reservation*, reading it as applying to every case involving a treaty promise would require this Court to disregard decades of Supreme Court precedent. *See e.g.*, *Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658.

This word swap is no mistake. Defendant cannot get his desired relief from this Court if *McGirt*'s holding only applies in reservation diminishment and disestablishment cases because *Smith* was not a reservation diminishment or disestablishment case—it was a statutory interpretation case. The reason why defendant fails to cite to any cases that read *McGirt* as changing the Indian canons of construction so profoundly is because there are none. The only case he cites, *Oneida Nation*, is, like *McGirt*, a reservation diminishment case. So, as a way to avoid accepting responsibility for violating his supervised release, he chooses instead to ask this Court to hold that *McGirt* requires it to apply the canon of liberal interpretation to any case involving Indian Country and in this case, resolve ambiguities in favor of *his interest*—that he cannot be prosecuted by the federal (or state) government for his crimes. Neither stare decisis nor the Indian law canons of construction support such an approach.

4. The *Smith* court properly applied the Indian law canons of construction—and not a misapplication of the *Solem* factors—in finding that the ACA and ICCA applied on the Warm Springs Reservation.

The question in *Smith* was whether the ACA applied to crimes committed by an Indian on the Warm Spring Indian Reservation. This Court concluded the ACA applied for two reasons: (1) based on the plain language of 18 U.S.C. § 7, which defines special maritime and territorial jurisdiction of the United States, and (2) by operation of the ICCA, 18 U.S.C. § 1152. *Smith*, 925 F.3d at 418. The Court's decision in *McGirt* does not undermine either holding.

In *Smith*, this Court began by reviewing the text of the ACA and 18 U.S.C. § 7, specifically referenced in the ACA. *Id.* at 415. This Court looked specifically at 18 U.S.C. § 7(3), which defines federal territorial jurisdiction to include "[a]ny lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof." This Court stated that "[b]ased on a plain reading of this text, any Indian reservation or land that is (1) 'reserved or acquired for the use of the United States,' and (2) 'under the exclusive or concurrent jurisdiction thereof' falls within the ambit of 18 U.S.C. § 7." *Smith*, 925 F.3d at 415–16. And it found that Warm Springs clearly fell within that ambit. In doing so, it rejected the argument that two treaties referenced by defendant in Oregon and Washington which included "exclusive use" provisions precluded those reservations from being "reserved or acquired for the use of the United States." *Id.*

Rather, this Court found that those treaties "provide specific examples of how Indian reservations were 'reserved or acquired' by the United States for the federal purpose of protecting Indian tribes, which traditionally were considered 'wards of the nation' under federal law." *Id.* at 416 (citations omitted). In other words, Congress made clear an intention to include Indian country as part of the exclusive or concurrent jurisdiction in § 7. *Id.* at 416–18. And the treaties supported the application of the ACA to the Warm Springs Reservation.

Second, this Court concluded that the phrase "'general laws of the United States' in the ICCA [] refer[ed] to 'federal enclave laws,' meaning those laws passed by the federal government in exercise of its police powers in areas of exclusive or concurrent federal jurisdiction as defined in 18 U.S.C. § 7." *Id.* at 416 (citations omitted). Thus, "[t]he ACA, as a federal enclave law, thus also applies to Indian country by operation of the ICCA." *Id.* at 418 (citing cases).

a. Courts may review extratextual sources to confirm what the relevant statute already suggested or may use extratextual sources to help resolve ambiguity about Congress's direction.

Defendant wants this court to find that *McGirt* overruled *Smith* because this Court reviewed extratextual sources in reaching its conclusion. Def. Op. Br. at 15, 23. Yet, this Court was very clear that although the plain text of the ACA lacks any express reference to Indians or Indian country, the fact that Congress codified the definition of Indian country at the same time it codified the ACA and the ICCA and the "express language" in the definition of Indian country includes "all land within the

limits of any Indian reservation *under the jurisdiction of the United States Government*," is a "direct indicator" that the "jurisdiction of the United States" in the ACA includes Indian country. *Smith*, 925 F.3d at 417–18. This Court did not *rely* on extratextual sources to reach its conclusion because this Court found that the ACA unambiguously includes Indian country, and thus it unquestionably applied on the Warm Springs Reservation.

This Court, as the *Solem* court did, concluded that the extratextual sources "confirmed what the relevant statute already suggested." *McGirt*, 140 S. Ct. at 2470, n.9. Yet, even if this Court found that the ACA was ambiguous, the *McGirt* court made clear that "extratextual sources may help resolve ambiguity about Congress's directions," and thus this Court could have relied on extratextual sources to resolve ambiguities.

This Court, like *McGirt* directs in reservation diminishment cases, looked first at the text of the statute and concluded that the "express language" of the ACA includes Indian country. *Smith*, 925 F.3d at 418. This Court did not, as defendant claims, use any external sources to come to an alternative meaning or result; rather, when this Court looked at prior court decisions, history around the enactment of § 7, and Felix Cohen's Handbook of Federal Indian Law it did so to "shed[] light on what the terms found in a statute meant at the time of the law's adoption." *McGirt*, 140 S. Ct. at 2468.

Because this Count found that the ACA and ICCA unambiguously applied to Indian country, this Court could not apply the Indian law canons of construction. *See*

e.g., Carcieri, 555 U.S. at 387 (when statutory language is "plain and unambiguous," it should be applied "according to its terms").

b. *Smith* properly applied the Indian law canons of construction to address the scope of the ACA in Indian country.

After finding that the ACA applied to Indian country either through the ICCA or through 18 U.S.C. § 7, this Court turned to the scope of that application. This Court recognized that if the ACA extends to Indian country through 18 U.S.C. § 7 alone, "a provision independent of the ICCA," it may reasonably follow that the ACA would not be subject to the exceptions in the ICCA. *Smith*, 925 F.3d at 419. Yet, if the ACA extends to Indian country through the ICCA, it would unquestionably be subject to the ICCA's exceptions. *Id.*

Thus, to resolve this ambiguity of scope, this Court turned to the Indian law canons of construction for resolution. Specifically, this Court recognized that "'the standard principles of statutory construction do not have their usual force in cases involving Indian law.'" *Id.* at 419 (quoting *Montana v. Blackfeet Tribe*, 471 U.S. at 766). This Court acknowledged that the Supreme Court consistently directed courts to "liberally construe[]" "statutes passed for the benefit of dependent Indian tribes" with any doubtful expressions being resolved" in their favor. *Smith*, 925 F.3d at 419 (quoting *Bryan v. Itasca Cty.*, 426 U.S. 373, 392 (1976)).

Guided by the Indian law canons of construction, this Court found that the federal government may not invoke the ACA to prosecute Indian country cases that

the ICCA specifically excepts because the ICCA is one of the primary laws enacted by Congress to "balance the sovereignty interest of Indian tribes and the United States' interest in punishing offenses committed in Indian country," and that Congress intended to impose its express limitations on all federal enclave laws in Indian country, including the ACA. *Smith*, 925 F.3d at 419–20 (quoting *United States v. Begay*, 42 F.3d 486, 498 (9th Cir. 1994).

Because *Smith* applied the appropriate Indian law canons of construction, and *McGirt* did not change the Indian law canons of construction in cases outside of reservation diminishment and disestablishment cases, *Smith* remains good law.

c. The principals in *McGirt* affirm this Court's decision in *Smith*.

In *McGirt*, the question was whether the state of Oklahoma overstepped its authority in Indian country, not whether federal jurisdiction existed either under the MCA or, as was the case in *Smith*, the ICCA. But, *McGirt* does, by default, answer that question in the affirmative. The federal government, not the state of Oklahoma, had jurisdiction to try McGirt. *McGirt*, 140 S. Ct. at 2478. And it did; McGirt was found guilty of aggravated sexual abuse and abusive sexual contact in federal court.[5]

This is true despite the treaty promise that the Creek Nation would have "full jurisdiction" over enrolled Tribe members and their property. *Id.* at 2461.

[5] https://www.justice.gov/usao-edok/pr/jimcy-mcgirt-found-guilty-aggravated-sexual-abuse-abusive-sexual-contact-indian-country (last visited July 27, 2021).

Even though Congress had reauthorized the Creek Nation tribal courts, the federal government retained the right to prosecute Indians for major crimes committed in Indian country. *Id.* at 2478. And while defendant relies on *McGirt* as the sole reason *Smith* should be overruled, the dictum in *McGirt* made clear not only that the MCA applies to certain crimes committed by Indians in Indian country, but also that the ICCA "*provides that federal law applies to a broader range of crimes by or against Indians in Indian country*." *Id.* (citing 18 U.S.C. § 1152) (emphasis added).

D. Affirming *Smith* is an Affirmation of Tribal Sovereignty and Self-Determination.

Defendant argues that the application of the ACA through the ICCA in some way intrudes on the Warm Springs Tribe's sovereignty. Nothing could be further from the truth. One need only look to the plain language of the ICCA to see that it affirms tribal sovereignty and "the right of reservation Indians to make their own laws and be ruled by them." *Williams v. Lee*, 358 U.S. at 219–20.

The ICCA provides "[e]xcept as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country." 18 U.S.C. § 1152. Yet, the statute provides three exceptions: (1) "offenses committed by one Indian against the person or property of another Indian," (2) when the "Indian committing any offense in the Indian country…has been punished by the local law of the tribe," or (3) in "any

case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively." *Id.*

A simple example illustrates this point. Had defendant, Johnny Smith, been prosecuted by the Warm Springs Tribe for the two instances of fleeing or attempting to allude a police officer, the federal court would have lacked jurisdiction pursuant to the second exemption in the ICCA. But the Warm Springs Tribe, in an exercise of its sovereignty, did not charge defendant. So, rather than allow defendant to go unpunished for his criminal behavior, the federal government exercised its concurrent jurisdiction under the ACA and ICCA to prosecute defendant. This is precisely what both the Warm Springs Tribe and Congress intended. Defendant's conviction and his subsequent supervised release violation should be affirmed.

CONCLUSION

This Court should affirm the district court's decision and order.

DATED this 30th day of July 2021.

SCOTT ERIK ASPHAUG
Acting United States Attorney
District of Oregon

s/ Jessie D. Young
JESSIE D. YOUNG
Assistant United States Attorney

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 17. Statement of Related Cases Pursuant to Circuit Rule 28-2.6

Instructions for this form: http://www.ca9.uscourts.gov/forms/form17instructions.pdf

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

The undersigned attorney or self-represented party states the following:

- (•) I am unaware of any related cases currently pending in this court.
- ( ) I am unaware of any related cases currently pending in this court other than the case(s) identified in the initial brief(s) filed by the other party or parties.
- ( ) I am aware of one or more related cases currently pending in this court. The case number and name of each related case and its relationship to this case are:

Signature s/Jessie D. Young **Date** Jul 30, 2021

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

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 8,873 **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)*:

- [x] 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/Jessie D. Young **Date** Jul 30, 2021

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

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