IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

CASE NO. 23-5056

UNITED STATES OF AMERICA,
Plaintiff/Appellee,

v.

JASON ROBERT HOPSON,
Defendant/Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA,
THE HONORABLE GREGORY K. FRIZZELL, U.S. DISTRICT JUDGE,
PRESIDING
DISTRICT COURT CASE NO. 22-CR-81-GKF

RESPONSE TO PETITION FOR REHEARING EN BANC

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October 24, 2025

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INTRODUCTION AND RESPONSE TO RULE 40(b)(2) STATEMENT

Tribal courts generally retain exclusive jurisdiction over "offenses committed by one Indian against the person or property of another Indian" in Indian country. *Negonsott v. Samuels*, 507 U.S. 99, 102 (1993) (citation omitted). The Major Crimes Act (MCA) creates an exception to that rule for "13 enumerated felonies." *Id.* That list includes "felony assault" but not simple assault, a petty offense. 18 U.S.C. § 1153(a). Accordingly, as the panel unanimously concluded, the plain text of the MCA bars Mr. Hopson's conviction for simple assault because "that offense is not one of the enumerated crimes." (Op. 2).

The Government offers no good answer to the panel's straightforward application of the MCA's text. The Government scarcely engages with the text at all. Nor does the Government otherwise justify rehearing en banc. It primarily asserts that the panel's decision conflicts with an implicit holding in *Keeble v. United States*, 412 U.S. 205 (1973). *Keeble* did not discuss, much less resolve, the question presented here. Instead, the Court emphatically disclaimed the sort of implicit holding the Government posits. The Government also argues that the panel's decision conflicts with decisions by other courts of appeals. The Government exaggerates the weight of out-of-circuit authority. The decisions on which it relies did not meaningfully analyze the MCA's text or the impact that expanding the MCA would have on tribal sovereignty.

Finally, the Government objects to the consequences of the panel's decision, but it does not attempt to argue that this case presents a question of "exceptional public importance." 10th Cir. R. 40.1(B). Nor could it. Defendants like Mr. Hopson remain subject to prosecution in tribal courts, which are fully capable of trying and punishing simple assaults. Preserving tribal courts' exclusive jurisdiction over those minor offenses is not "untenable." (Pet. 4). It is precisely what Congress intended when it limited federal-court jurisdiction to a few major crimes.

STATEMENT OF THE ISSUE

The Supreme Court has "long 'required a clear expression of the intention of Congress' before the state or federal government may try Indians for conduct on their lands." *McGirt v. Oklahoma*, 591 U.S. 894, 929 (2020) (brackets and citation omitted). In *Ex parte Crow Dog*, 109 U.S. 556 (1883), the Court relied on that principle to vacate a federal murder conviction, holding that the district court was "without jurisdiction" because Congress had not clearly departed from the background rule reserving jurisdiction over such offenses to the relevant Tribe. *Id.* at 572. Congress responded by enacting the MCA, which "confer[red] jurisdiction on the federal courts" over certain serious felonies committed by Indians in Indian country. *Keeble*, 412 U.S. at 210. The covered offenses include "murder," "manslaughter," and "felony assault under [18 U.S.C. §] 113." 18 U.S.C. § 1153(a). The question presented here is whether the MCA also allows a district court to convict a defendant of simple assault because it is a lesser-included offense of felony assault.

STATEMENT OF THE CASE

Appellant Jason Robert Hopson was indicted for assault resulting in serious bodily injury—a felony assault under 18 U.S.C. § 113(a)(6)—based on an incident during a protest in February 2022. (Op. 3-5). He was charged under the MCA because he, his co-defendants, and the alleged victim are all Indians and the incident occurred on the Muscogee (Creek) Nation reservation. *Id.* at 5.

Mr. Hopson and his co-defendant Sandy Williams proceeded to trial. (Op. 5-6). Mr. Williams asked the district court to instruct the jury on the lesser-included offense of simple assault under Section 113(a)(5), and the district court gave that instruction as to both defendants. *Id.* at 7-8. The jury acquitted the men of felony assault but found that they had committed simple assault. *Id.* at 8-9. The court convicted Mr. Hopson of that offense and sentenced him to three years of probation. *Id.* at 9.

A unanimous panel of this Court reversed. (Op. 1-65). The panel agreed with the parties that Mr. Hopson's challenge to his conviction implicates the district court's subject-matter jurisdiction. *Id.* at 9-11. The panel explained that a "straightforward" reading of the MCA's text makes clear that Mr. Hopson's conviction must be vacated for lack of jurisdiction. *Id.* at 23. Section 1153(a) allows federal courts to try and punish a discrete list of enumerated crimes. That list includes "felony assault" but "does not mention misdemeanor simple assault." *Id.* at 24. Accordingly, "misdemeanor simple assault under § 113, when committed by an Indian defendant against an Indian victim on Indian land, is a crime within the exclusive jurisdiction of the tribal courts." *Id.*

The panel rejected the Government's assertion that the Supreme Court held otherwise in *Keeble*. (Op. 35-42). *Keeble* held that an MCA defendant charged with felony assault is entitled to an instruction on the lesser-included offense of simple assault. 412 U.S. at 212. The panel emphasized that *Keeble* addressed only "a defendant's statutory right to a lesser-included offense instruction," not "a district court's authority to convict" if the jury finds that the defendant committed only the lesser offense. (Op. 40).

Finally, the panel thoroughly considered the Government's out-of-circuit authority. (Op. 47-65). The panel explained that, to the extent other courts of appeals have reached a different conclusion, they "misread *Keeble*" and relied on reasoning that was "not sufficiently grounded in the text" of the MCA. *Id.* at 59.

ARGUMENT

I. The panel's decision is correct and does not conflict with any decision of the Supreme Court.

The panel correctly held that the MCA does not authorize Mr. Hopson's conviction. The Government offers no persuasive response to the panel's careful textual analysis. Instead, it primarily asserts that the panel's decision conflicts with

Keeble and *Spaziano v. Florida*, 468 U.S. 447 (1984). "The government misreads these precedents," which are "fully consistent" with the panel's decision. Op. 35. The Government's real objection—that a jury should not be instructed on a lesser-included offense that cannot result in a conviction—amounts to a misdirected attempt to relitigate *Keeble*. The Government's disagreement with that decision cannot justify expanding the MCA beyond its plain text.

A. The MCA does not authorize Mr. Hopson's conviction for simple assault.

"Federal courts are courts of limited jurisdiction" and "possess only that power authorized by Constitution and statute." *United States v. Gulley*, 130 F.4th 1178, 1184 (10th Cir. 2025) (citation omitted). Where, as here, the Government seeks to convict an Indian for an offense in Indian country, the Supreme Court demands a "clear expression of the intention of Congress" to allow that incursion on tribal sovereignty. *McGirt*, 591 U.S. at 929 (citation omitted); *accord United States v. Bryant*, 579 U.S. 140, 147 (2016). The MCA contains *no* expression—never mind a clear one—empowering a federal court to convict a defendant of simple assault.

The MCA grants federal courts "jurisdiction over enumerated grave criminal offenses." *Bryant*, 579 U.S. at 147. Those offenses include "felony assault under section 113," but not simple assault. 18 U.S.C. § 1153(a). Under familiar principles of statutory interpretation, Congress's specific "enumeration of certain [offenses]" makes clear that it had "no intent of including [other offenses] not listed." *Navajo Nation v. Dalley*, 896 F.3d 1196, 1213 (10th Cir. 2018) (citation omitted); (*see* Op. 27-28). That inference has special force here. Congress made clear that it knew how to include lesser-included offenses when it wished to do so (by, for example, including "manslaughter," a lesser-included offense of murder). 18 U.S.C. § 1153(a). Congress also specifically addressed Section 113 and restricted the MCA's coverage to "felony" assault. That limiting word reflects a deliberate choice to exclude simple assault.

Accordingly, the Government has conceded that it could not have charged Mr. Hopson with simple assault alone. (Op. 21-22).

There is no textual basis for a different result when the Government seeks a conviction for simple assault as a lesser-included offense. (Op. 23-34). The presence of one MCA-authorized charge does not expand Section 1153(a)'s list of enumerated offenses. Although the MCA specifies that a defendant charged with a covered offense must be "tried" in "the same manner" as other defendants, 18 U.S.C. § 3242, "[t]he words 'tried' and 'manner' are terms of *procedure*." *Id.* at 34 (citing contemporary dictionaries). Section 3242 thus addresses *how* defendants are prosecuted for major crimes, not *which* offenses *are* major crimes. *Cf. Morgan v. Sundance, Inc.*, 596 U.S. 411, 419 (2022) (holding that a statutory reference to "manner" is "a command to apply the usual federal procedural rules"). Put simply, Section 3242 grants "procedural protections to Indian defendants," but does not "expand[] the adjudicatory authority of the court"—and certainly does not do so clearly. (Op. at 34).

The Government acknowledges that under "well-established" precedent, the MCA authorizes a conviction for simple assault only if it contains a "'clear expression'" supporting that result. (Pet. 13) (citation omitted). The Government makes no real effort to satisfy that clear-statement rule. To the contrary, it devotes barely a page to the MCA's text. *Id.* at 8-9.

The Government first emphasizes that Section 3242 specifies that an MCA defendant must be "tried" in "the same manner" as other defendants. (Pet. 8). The Government correctly observes that under Federal Rule of Criminal Procedure 31(c)(1), other defendants charged with felony assault may be convicted of simple assault as a lesser-included offense. But again, Section 3242 does not expand the MCA's list of covered offenses. Under Federal Rule of Criminal Procedure 8(a), for example, a non-MCA defendant charged with felony assault can also be charged with any other crime arising from "the same act or transaction." Yet no one would suggest

that Rule 8(a) allows an MCA defendant to be indicted for non-MCA offenses merely because they happen to arise out of the same transaction. That confirms that the procedures incorporated by Section 3242 apply only to the discrete set of substantive offenses enumerated in the MCA.

The Government also asserts that Section 1153(a) authorizes district courts to convict an MCA defendant of simple assault because it specifies "that Indian defendants are subject to 'the same law'" as other defendants—including, on the Government's reading, the law authorizing conviction for lesser-included offenses. (Pet. 8). That is not what the statute says. Instead, it provides that an "Indian who *commits*" one of the enumerated offenses "shall be subject to the same law and penalties as all other persons *committing*" that offense. 18 U.S.C. § 1153(a) (emphases added). That language ensures that a defendant who commits an enumerated MCA offense is subject to the same law and penalties as anyone else. The quoted language has no application to defendants like Mr. Hopson, who did *not* commit any MCA-enumerated offense.

B. The panel's decision is consistent with *Keeble* and *Spaziano*.

Lacking any footing in the text, the Government primarily argues that the panel's decision conflicts with *Keeble* and *Spaziano*. Pet. 1, 5-10. It does not.

In *Keeble*, the Supreme Court held that an MCA defendant charged with felony assault has a "procedural right[]" to an instruction on the lesser-included offense of simple assault. 412 U.S. at 212. The Court explained that other federal defendants are entitled to such an instruction because if "the elements of the offense charged remain[] in doubt, but the defendant is plainly guilty of *some* offense, the jury is likely to resolve its doubts in favor of conviction"—even if the evidence does not support it. *Id.* at 213. Section 3242 directs that Indian defendants charged under the MCA must be "tried" in "the same manner" as other defendants. Given that direction, the

Court could "hardly conclude that Congress intended to disqualify Indians from the benefits of a lesser offense instruction." *Id.* at 212.

Keeble did not suggest, much less hold, that the MCA allows a district court to *convict* an Indian defendant of simple assault if a jury finds that he committed only that lesser offense. The issue was not presented in *Keeble*, where no lesser-included offense instruction was given. 412 U.S. at 206-07. As the panel explained, *Keeble* underscored that it was *not* resolving that separate question. (Op. 37-39). The Court declared that its decision did not "expand[] the reach of the Major Crimes Act" or "infringe the residual jurisdiction of a tribe" over non-MCA offenses. *Keeble*, 412 U.S. at 214. Instead, the Court "h[e]ld only that where an Indian is prosecuted in federal court under the provisions of the Act, the Act does not require depriving him of the protection afforded by an instruction on a lesser included offense." *Id.*

Undaunted, the Government maintains that although *Keeble* explicitly stated that it did not "expand[] the reach of the Major Crimes Act," 412 U.S. at 214, the Court implicitly did just that. (Pet. 6-7, 15 n.2). The Government relies on Justice Stewart's dissent, which argued that the Court's holding "would be correct" only if the district court had jurisdiction to convict the defendant for simple assault. *Keeble*, 412 U.S. at 215. But "dissents are just that—dissents. Their glosses do not speak for the Court." *National Pork Producers Council v. Ross*, 598 U.S. 356, 389 n.4 (2023) (plurality opinion). And in *Keeble*, the Court could not have been clearer in disclaiming the sort of "implicit" holding the Government seeks to read into its opinion: Again, the Court emphasized that it "h[e]ld *only*" that the defendant was entitled to a lesser-included offense instruction. 412 U.S. at 214 (emphasis added).

The Government also invokes *Spaziano*. (Pet. 6-7). There, the Supreme Court addressed *Beck v. Alabama*, 447 U.S. 625 (1980), which recognized a capital defendant's due-process right to an instruction on a non-capital lesser-included offense. In *Spaziano*, the Court held that *Beck* does not apply if the statute of

limitations would preclude a conviction on the lesser-included offense. 468 U.S. at 455-57. *Spaziano*'s holding about the limits of *Beck*'s constitutional rule has no bearing on the statutory question presented here, which turns solely on the meaning of the MCA—a subject *Spaziano* had no occasion to address.

The Government quotes a footnote in *Spaziano* stating in dicta that *Keeble* "assumed that if a defendant is constitutionally entitled to a lesser included offense instruction, the trial court has authority to convict him of the lesser included offense." 468 U.S. at 454 n.5. Even taken on its own terms, that characterization confirms that *Keeble* did *not* resolve the question presented here, but only "assumed" an answer. More fundamentally, "throwaway footnotes about jurisdictional issues neither raised in nor conceivably relevant to a case" have "'no precedential effect.'" *Royal Canin U.S.A., Inc. v. Wullschleger*, 604 U.S. 22, 42-43 (2025) (citation omitted).

The Government also emphasizes that *Spaziano* declined to read the Fourteenth Amendment to require an instruction that the Court believed would risk "trick[ing]" the jury "into believing that it has a choice of crimes for which to find the defendant guilty, if in reality there is no choice." 468 U.S. at 456. But unlike in *Spaziano*, a district court's inability to convict an MCA defendant of simple assault does not allow the defendant to escape punishment. Instead, there is "a second sovereign—the Tribe—that may prosecute." (Op. 46). Indeed, in practice, most assault cases prosecuted under the MCA are investigated by tribal or local authorities and many are initially charged in tribal court. In any event, the Court's reasons for declining to extend the judge-made *Beck* rule provide no basis for departing from the MCA's plain text. When interpreting an Act of Congress, the role of the courts "is to apply the statute as it is written—even if [they] think some other approach might 'accord with good policy.'" *Burrage v. United States*, 571 U.S. 204, 218 (2014) (citation omitted).

The Government's reliance on *Spaziano*'s practical concerns also reveals that its objection is not to the panel's reading of the MCA. After all, the panel adopted the

same interpretation of the text that the Government itself had advocated in *Keeble*. (*See* Op. 40-41 n.12). The Government's real objection is that *Keeble* requires a lesser-included offense instruction when the MCA does not authorize conviction. The Government's objections to the lesser-included offense instruction mandated by *Keeble* cannot justify reading into the MCA a grant of jurisdiction that Congress did not provide.[1]

II. The decisions of other circuits do not warrant rehearing en banc.

The Government argues at length that the panel's decision conflicts with decisions of other circuits. (Pet. 10-15). This Court's en banc procedure is intended for issues of "exceptional public importance" or panel decisions that "conflict[] with a decision of the United States Supreme Court or of this court"—not decisions that may conflict with precedent in other circuits. 10th Cir. R. 40.1(B). The Government's out-of-circuit decisions provide an especially weak basis for rehearing en banc.

First, none of those decisions conducted a traditional textual analysis—perhaps because they were decided "during an era when statutory text was less central to statutory interpretation." *Morley v. CIA*, 719 F.3d 689, 693 (D.C. Cir. 2013) (Kavanaugh, J., concurring). The Fourth, Fifth, and Ninth Circuits "did not

[1] The Government now asserts (Pet. 7 n.1) that Mr. Hopson's appeal "does not implicate the [district] court's jurisdiction." The Government waived that argument by taking exactly the opposite position before the panel. (Op. 9-10 & n.5). The Government had it right the first time. Before the MCA, the Supreme Court held that federal courts lacked "jurisdiction" to convict Indian defendants for serious crimes in Indian country. *Crow Dog*, 109 U.S. at 572. The Court has long recognized that the MCA filled that gap by "conferring jurisdiction" over the covered offenses. *Keeble*, 412 U.S. at 210; *see McGirt*, 591 U.S. at 930-31; *Bryant*, 579 U.S. at 147; *Negonsott*, 507 U.S. at 102-03. In any event, the Government concedes that its new position "makes little difference" Pet. 7 n.1. Whether or not the MCA is jurisdictional, the Government must identify a "clear expression of the intention of Congress" to authorize Mr. Hopson's conviction for simple assault. *McGirt*, 591 U.S. at 929 (citation omitted). It has not done so.

meaningfully address the text." (Op. 63); *see United States v. Walkingeagle*, 974 F.2d 551, 553-54 (4th Cir. 1992); *United States v. John*, 587 F.2d 683, 686 (5th Cir. 1979); *United States v. Bowman*, 679 F.2d 798, 800 (9th Cir. 1982). The Eighth Circuit briefly referenced Section 1153(a)'s direction that MCA defendants are subject to "the same law and penalties" as other defendants. *See Felicia v. United States*, 495 F.2d 353, 355 (8th Cir. 1974). But the *Felicia* court failed to recognize that the direction applies only to defendants *convicted* of an offense listed in the MCA. It provides no basis for expanding that list. *See* p. 6, *supra*.

In addition, the Fourth, Fifth, and Eighth Circuits were not squarely confronted with the question presented here. In *Walkingeagle*, the jurisdictional issue was not briefed or argued because the defendant "concede[d] that the district court ha[d] jurisdiction over the lesser-included offense if the greater offense is also submitted to the jury." 974 F.2d at 553. In *John*, the victim was not an Indian, so the Fifth Circuit principally held that the district court had jurisdiction under 18 U.S.C. § 1152. 587 F.2d at 686-88. The court addressed the question presented here only in a terse alternative holding. *Id.* at 688. And in *Felicia*, the Eighth Circuit relied in part on state law because it was applying an earlier version of the MCA specifying that felony assault "shall be defined and punished in accordance with the laws of the State in which such offense was committed." 495 F.2d at 355 (citation omitted).

The panel gave careful and respectful consideration to the decisions on which the Government now relies. (Op. 47-65). The panel also accounted for this Court's reluctance to create "unnecessary circuit splits." *Id.* at 59 (citation omitted); *cf.* (Pet. 12-13). But the panel declined to follow reasoning that was not "sufficiently grounded in the text of the Act." (Op. 59). The Government offers no good reason for the en banc Court to revisit that conclusion.

III. This case does not present an issue of exceptional public importance.

The Government errs in asserting that the panel's decision will yield "anomalous results." (Pet. 15). The panel's decision means simply that a defendant acquitted of felony assault cannot be convicted of simple assault in federal court and must instead be tried in tribal court. That is exactly what Congress intended when it limited federal jurisdiction to a few major crimes. And the question presented here affects only a small subset of MCA cases, consisting largely or entirely of simple assaults that the Government overcharged as felonies.

The Government insists that it is "anomalous" for a district court to decline to enter a conviction after a jury finds that an MCA defendant committed simple assault. (Pet. 15-17). Such a result does not "nullify" the jury's verdict. *Id.* at 14; *see* Pet. 4-5. The verdict reflects the jury's finding that the Government did *not* prove that the defendant committed any offense covered by the MCA. It naturally follows that he cannot be convicted and sentenced under that statute. Instead, any punishment for a simple assault must come in the tribal courts, which retain exclusive jurisdiction over such minor crimes.

Tribal courts regularly exercise that jurisdiction. Tribal Nations in Oklahoma, in particular, have greatly expanded their capacity to handle criminal prosecutions since the Supreme Court's decision in *McGirt*. *See, e.g.*, Gary Batton, *Chief Reflects on the Impact of McGirt Ruling, Five Years Later* (July 7, 2025), https://perma.cc/L8XG-26VG (explaining that Choctaw courts handled more than 4,000 cases in 2024). And federal prosecutors can facilitate tribal prosecutions by sharing evidence with their tribal counterparts. *Cf.* 25 U.S.C. § 2809(a)(3) (requiring evidence-sharing when federal prosecutors "terminate prosecution" in a case that could be charged in tribal court).

The Government's real complaint, then, cannot be that the jury's verdict is rendered a nullity. Instead, it is that the jury is not fully *informed* about the consequences of a finding that the defendant committed only a lesser-included

offense. That is not "anomalous." (Pet. 15). The general rule is that "jurors are *not* to be informed of the consequences of their verdicts" precisely because that information is "irrelevant to the jury's task" of finding facts. *Shannon v. United States*, 512 U.S. 573, 579-80 (1994) (emphasis added). This rule applies even if jurors may well harbor "mistaken belief[s]" about the consequences of their verdict. *Id.* at 584-85. In any event, the Government's desire to avoid what it deems anomalous results does not authorize a court to "rewrite [a] statute to the Government's liking." *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 583 U.S. 109, 123 (2018).

In addition, the question presented is relevant in only a small subset of MCA cases: those where the Government charges the defendant with an MCA-covered offense that has an uncovered lesser-included offense; where the jury acquits the defendant of the MCA-covered charge; and where the jury finds that the defendant committed the lesser-included offense. The Government has not identified, and we have not found, any case where the issue has arisen with respect to an offense other than simple assault. And the Government has cited only a single assault conviction that has had to be set aside because of the panel's decision. (Pet. 16). A decision that requires some simple assaults to be prosecuted in tribal rather than federal courts does not present any issue of "exceptional public importance." 10th Cir. R. 40.1(B).

CONCLUSION

This Court should deny the petition for rehearing en banc.

Respectfully submitted,

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s/*Neil D. Van Dalsem*

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s/*Neil D. Van Dalsem*

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I hereby certify that on the 24th day of October, 2025, I electronically filed this brief, with attachments, in the Tenth Circuit using the ECF System, which transmitted a Notice of Docket Activity to the following ECF registrants:

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