No. 23-5056

In the United States Court of Appeals for the Tenth Circuit

UNITED STATES OF AMERICA,
PETITIONER-APPELLEE,

v.

JASON ROBERT HOPSON,
RESPONDENT-APPELLANT.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA, NO. 4:22-CR-00081
THE HON. GREGORY K. FRIZZELL, DISTRICT JUDGE

PETITION FOR REHEARING EN BANC

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STATEMENT REQUIRED BY RULE 40(b)(2)

Rehearing *en banc* is warranted when a "panel decision conflicts with a decision of the United States Supreme Court" or "an authoritative decision of another United States court of appeals." Fed. R. App. P. 40(b)(2). The panel decision here does both, several times over. It conflicts with multiple Supreme Court decisions, including *Keeble v. United States*, 412 U.S. 205 (1973), and *Spaziano v. Florida*, 468 U.S. 447 (1984). And by its own recognition, it creates a 4-1 conflict among the courts of appeals, becoming the first circuit to hold that federal courts lack authority to convict Indian defendants of simple assault as a lesser-included offense under the Major Crimes Act.

STATEMENT OF THE ISSUE

Indians who assault others in Indian country may be charged with felony assault under the Major Crimes Act. In *Keeble*, the Supreme Court held that, when an Indian defendant is charged with felony assault under the Major Crimes Act, he is entitled to a jury instruction on the lesser-included offense of simple assault. The question in this appeal is whether the same district courts that *Keeble* requires to instruct juries on the lesser-included offense of simple assault have authority to enter judgments of conviction on that offense.

STATEMENT OF THE CASE

1. Jason Hopson assaulted police officer Ronald Neal during a protest outside the federal courthouse in Tulsa, Oklahoma. ROA Vol. I 209-210. Hopson was joined in his efforts by fellow protestors, including Sandy Williams, who punched Officer Neal several times. ROA Vol. II 120, 127. In attempting to retreat from Hopson and Williams, Officer Neal collapsed and tore the anterior cruciate ligament (ACL) and meniscus in his knee and a ligament in his elbow. ROA Vol. II 112, 127-128, 167.

2. A grand jury indicted Hopson and Williams for one count of assault resulting in serious bodily injury, in violation of 18 U.S.C. § 113(a)(6). Because Hopson and Williams are Indians and the offense occurred in Indian country, *see* ROA Vol. II 75, the charges were brought under the Major Crimes Act, 18 U.S.C. § 1153.

At the defendants' joint trial, Williams requested a jury instruction on the lesser-included offense of simple assault under 18 U.S.C. § 113(a)(5). ROA Vol. I 143. Pursuant to the Supreme Court's decision in *Keeble*, the district court granted the request and so instructed the jury. ROA Vol. II 366. The jury thereafter found Hopson and Williams not guilty of assault resulting in serious bodily injury, but guilty of simple assault. ROA Vol. II 393. The

district court sentenced Hopson and Williams to three years of probation each. ROA Vol. II 439, 464.

3. Hopson appealed and asked this Court to vacate his simple assault conviction on the basis that the district court had lacked subject matter jurisdiction to impose it. The panel agreed with Hopson and vacated his conviction.

In so doing, the panel declared first that all crimes committed by Indians in Indian country fall under the jurisdiction of tribal courts unless they are specifically enumerated by the Major Crimes Act. Thus, because the Major Crimes Act does not list simple assault under § 113(a)(5), the panel concluded that only tribal courts, and not federal courts, have jurisdiction over that offense. Opinion at 18, 23-24.

Next, the panel addressed 18 U.S.C. § 3242 and the Supreme Court's interpretation of that statute in *Keeble*. In relevant part, section 3242 requires Indians charged under the Major Crimes Act to be "tried … in the same manner as are all other persons" charged with the same crime. 18 U.S.C. § 3242. In *Keeble*, the Supreme Court clarified that, because non-Indian defendants charged with felony assault are entitled to jury instructions on the

lesser-included offense of simple assault, so too are Indian defendants charged with felony assault under the Major Crimes Act.

Although it acknowledged *Keeble*'s application here, the panel interpreted the decision as "deal[ing] only with the right to a jury instruction" and "not" the "jurisdictional question" at issue in this appeal. Opinion at 41. The panel recognized that such an understanding of *Keeble* differed from that adopted by every other circuit to have considered the question. *See id.* at 47-58 (discussing contrary opinions of the Fourth, Fifth, Eighth, and Ninth Circuits). Nevertheless, because it deemed the other circuits to have uniformly "misread *Keeble*," the panel dismissed their decisions as "[un]persua[sive]" and "diverge[d]" "from" their "consensus." *Id.* at 58-59.

REASONS FOR GRANTING THE PETITION

The panel's decision leaves this Court's law in an untenable position: In all trials where felony assault is charged under the Major Crimes Act and the evidence supports it, the district court must instruct the jury on the lesser-included offense of simple assault, but the court cannot enter a judgment of conviction if the jury returns a guilty verdict on the lesser offense. That rule disregards controlling Supreme Court precedent and diverges from the understanding of every other circuit to consider the question. It also leads to

anomalous results, requiring district courts to turn a jury's verdict into a nullity when the jury finds the defendant guilty of the very lesser-included offense about which the jury was just instructed. For each of those reasons, rehearing en banc is warranted, and the petition should be granted.

I. THE PANEL'S DECISION CONFLICTS WITH SUPREME COURT PRECEDENT.

In *Keeble*, an Indian defendant was charged with felony assault under the Major Crimes Act. At the defendant's trial, the district court denied his request to instruct the jury on the lesser-included offense of simple assault. The Eighth Circuit affirmed, concluding that the instruction was not warranted because simple assault was "not an offense enumerated in the Act." *Keeble v. United States*, 412 U.S. 205, 206 (1973).

The Supreme Court granted certiorari and reversed. The Court's opinion began by clarifying two undisputed premises: (1) that non-Indian defendants are entitled to jury instructions on lesser-included offenses, 412 U.S. at 208; and (2) that 18 U.S.C. § 3242 requires Indian defendants charged under the Major Crimes Act to be tried "in the same manner[] as are all other persons" charged with the same offense, *id.* at 212. Reading those principles in tandem, the Court concluded that Indian defendants charged with felony

assault under the Major Crimes Act are entitled to a jury instruction on the lesser-included offense of simple assault. *Id.*

Justice Stewart—joined by Justices Powell and Rehnquist—dissented based on his understanding that "the trial court did not have jurisdiction over the 'lesser included offense'" of simple assault. 412 U.S. at 215 (Stewart, J., dissenting). In his view, the majority's "holding would be correct only if" the "court had jurisdiction" "over" "the lesser included offense." *Id.* And "until the Court's decision today," Justice Stewart would have "supposed" that, were a jury to render a guilty verdict on the lesser-included offense of simple assault, "the conviction could have been set aside for want of jurisdiction." *Id.* at 217.

Because the dissent specifically flagged the jurisdictional issue, the *Keeble* majority clearly understood federal courts to have jurisdiction to enter judgment for the offense of simple assault pursuant to the Major Crimes Act. And if there were any doubt, the Supreme Court's later decision in *Spaziano v. Florida*, 468 U.S. 447 (1984), removed it. There, the Court described *Keeble*'s majority opinion as having "assumed" that "the trial court ha[d] authority to convict [the defendant] of the lesser included offense," and *Keeble*'s dissent as having been premised "on the ground that the [majority's]

decision improperly conferred" such "jurisdiction." *Id.* at 454 n.5. Moreover, *Spaziano* explained, it "would do a serious disservice to the goal of rationality" in jury deliberations, and "would undermine the public's confidence in the criminal justice system," if courts could "trick[]" juries "into believing that [they] ha[d] a choice of crimes for which to find the defendant guilty, if in reality there [was] no choice." *Id.* at 456.

By treating *Keeble* as having "dealt only with the right to a jury instruction," and "not" the "question" of "jurisdiction[]," Opinion at 41, the panel here diverged from how the Supreme Court understood its own decision.[1] Worse yet, through its mistaken reading of *Keeble*, the panel has

[1] The government argued before the panel that the question presented here was one of "subject matter jurisdiction." *See* Opinion at 10 n.5. Upon further consideration, this case does not implicate the federal court's jurisdiction over the case, which is granted by 18 U.S.C. §§ 3231 and 1153(a), but rather the power of the federal government (vis-à-vis the tribe) to prosecute the defendant. *See United States v. Williams*, 341 U.S. 58, 68-69 (1951) (even where a court "may conclude that … the facts stated in the indictment do not constitute a crime or are not proven, it has proceeded with jurisdiction"); *United States v. Cotton*, 535 U.S. 625, 631 (2002) ("[T]he objection that the indictment does not charge a crime against the United States goes only to the merits of the case.") (internal quotation marks omitted). Ultimately, the fact that this case involves a question of "federal jurisdiction" to prosecute certain crimes rather than the district court's subject-matter jurisdiction, *Keeble*, 412 U.S. at 211, makes little difference to the case's resolution.

created precisely the danger that *Spaziano* warned of—requiring district courts to effectively trick juries into believing that they can convict defendants of the lesser-included offense of simple assault, when in reality they cannot. *See, e.g.*, *United States v. Johnston*, No. 25-cr-169, Dkt. No. 61 (N.D. Okla. Aug. 19, 2025) (order vacating jury's simple assault verdict based on the panel's decision in this case).

The panel decision is also wrong as a textual matter. The Major Crimes Act provides that Indian defendants are subject to "the same law" and must be "tried in the same courts and in the same manner" as defendants who commit the same crimes in federal enclaves. 18 U.S.C. §§ 1153, 3242. It is undisputed that where a jury finds a federal-enclave defendant guilty of simple assault pursuant to a lesser-offense instruction, the district court has authority to enter a judgment of conviction. Thus, the Major Crimes Act's directive that defendants be subject to "the same law" and tried "in the same manner" similarly requires the district court to enter judgment on a lesser-included offense for which the jury has found a defendant guilty. The panel's contrary conclusion flies in the face of that statutory text.

The panel tried to get around this "explicit statutory direction," *Keeble*, 412 U.S. at 212, by saying that "[t]he term 'same law and penalties' cannot

properly be read to incorporate unlisted offenses or other bodies of federal law *sub silentio*," Opinion at 64. *Keeble*, however, rejected essentially that same argument. In *Keeble*, the government conceded that "any non-Indian who had committed this same act on this same reservation and requested this same [lesser-included-offense] instruction would have been entitled to the jury charge." *Keeble*, 412 U.S. at 208-209. But it argued that giving such an instruction would "infringe the tribe's residual jurisdiction in a manner inconsistent with the Act." *Id.* at 209; *see* Brief for the United States, *Keeble v. United States*, 1973 WL 172344, at *14 (arguing that "the Major Crimes Act cannot be extended by implication to offenses not enumerated"). The Supreme Court rejected that argument, holding that Congress did not "disqualify Indians from the benefits of a lesser offense instruction, when those benefits are made available to any non-Indian charged with the same offense." 412 U.S. at 212. Whatever the merits of *Keeble* in the first instance, only the Supreme Court can overrule it. And *Keeble* teaches that the Major Crimes Act's "explicit statutory direction" that Indian defendants be tried "'in the same manner'" as non-Indian defendants, *id.*, overcomes any concerns about incorporating "unlisted" lesser-included offenses into the Act. Opinion at 64.

The panel failed to give sufficient deference to *Keeble*'s interpretation of that statutory text.

II. THE PANEL'S DECISION CREATES A CONFLICT WITH EVERY OTHER COURT OF APPEALS TO HAVE CONSIDERED THE ISSUE.

Rehearing en banc is also warranted because the panel's decision expressly diverges from that of every other circuit to have considered the question. *See* Opinion at 47-58.

One year after *Keeble*'s publication, the Eighth Circuit interpreted the decision as having implicitly held that federal courts have jurisdiction over the lesser included offense of simple assault in Major Crimes Act prosecutions for felony assault. *Felicia v. United States*, 495 F.2d 353 (8th Cir. 1974). The Eighth Circuit based its interpretation on two primary grounds. First, the court explained, the "clear language of 18 U.S.C. § 1153" required that Indian defendants be subject to "the same laws and penalties" applicable to non-Indian defendants, and "[c]onvictions for lesser included offenses are cognizable at federal law." *Id.* at 355. Second, if "federal courts" were left "without the power to sentence after a conviction of the lesser included offense," *Keeble*'s mandate that such courts provide lesser-included-offense instructions would have been "an exercise in futility," something the Supreme

Court "could not have intended." *Id.* The court stated that Justice Stewart's dissent "recognized" this point "specifically." *Id.*

Five years after *Felicia*, the Fifth Circuit reached the same result in *United States v. John*, 587 F.2d 683, 688 (5th Cir. 1979), determining that "the Supreme Court in *Keeble* implicitly recognized that federal courts have jurisdiction to convict and punish for a lesser offense included within the enumerated crimes of [18 U.S.C. §] 1153." Like the Eighth Circuit, the Fifth Circuit relied on "Justice Stewart's" "specific[] state[ment]" in "dissent" that the *Keeble* majority "implicitly recognized that federal courts have jurisdiction to convict and punish for a lesser offense included within the enumerated crimes in § 1153." *Id.*

The Ninth Circuit joined the fold three years later. *See United States v. Bowman*, 679 F.2d 798 (9th Cir. 1982). In *Bowman*, the Ninth Circuit rejected the same argument that Hopson made here, concluding that the Supreme Court had "resolved the jurisdictional question against appellant's position when it decided *Keeble*." *Id.* at 799. Recognizing that the *Keeble* majority had not "expressly state[d] that the [district] court would … have jurisdiction to enter judgment … on the lesser included offense," the court of appeals nonetheless "f[ou]nd nothing in the opinion that would permit … any

other conclusion." *Id.* Moreover, the defendant's contrary position "would lead to the result that a defendant convicted by the jury on a lesser included offense must be released by the court for lack of jurisdiction, notwithstanding the propriety of its instruction to the jury that [the] defendant could be convicted of that offense." *Id.* This would mean that *Keeble*'s mandated "instruction" would have "misled" the jury, something "the Supreme Court" could not have "consider[ed] … appropriate." *Id.*

A decade after *Bowman*, the Fourth Circuit became the fourth court of appeals to read *Keeble* as recognizing that federal courts have jurisdiction over lesser-included offenses. *United States v. Walkingeagle*, 974 F.2d 551, 553 (4th Cir. 1992) (explaining that "*Keeble* settled the threshold" jurisdictional issue and citing *Felicia*, *John*, and *Bowman* for the same).

For the next thirty-three years—until the panel's decision in this case—the consensus remained. Accordingly, under longstanding precedent, the panel here was required to abide by "that uniform judgment" unless presented with a "sound reason to go against the tide." *United States v. Thomas*, 939 F.3d 1121, 1131 (10th Cir. 2019) (internal quotation marks omitted); *see also id.* at 1130 (explaining that a court of appeals should not create a circuit split simply because it finds the "contrary argument[]" to be

"marginally better"); *United States v. Games-Perez*, 695 F.3d 1104, 1115 (10th Cir. 2012) (Murphy, J., concurring in the denial of rehearing en banc) ("[T]he circuits have historically been loath to create a split where none exists" because uniformity in federal law "reduces friction flowing from the application of different rules to similarly situated individuals based solely on their geographic location."). But the panel here did not adhere to that teaching; instead, it became the first court to diverge from the accepted understanding of *Keeble* based on two reasons, neither of which is sound.

First, the panel concluded that the other circuits erred by reading *Keeble* as "implicitly" holding that district courts have jurisdiction over lesser-included offenses. Opinion at 59. In the panel's view, federal jurisdiction over lesser-included offenses can arise from only a "clear … Congressional act," or "an express interpretation of such an act by the Supreme Court." *Id.* at 60 (emphases removed). But although the first half of that rule is well-established by precedent, the second half is not: while the Supreme Court has long required *Congress* to provide a "clear expression of … intention" when it seeks to enact legislation conferring federal jurisdiction over Indian land, *Ex parte Crow Dog*, 109 U.S. 556, 572 (1883), there is no analogous requirement that *the Supreme Court* interpret such legislation

explicitly rather than implicitly. Indeed, the panel offers nothing to support the rule aside from the dissenting opinion in *Bowman*, which itself appears to have created the rule out of whole cloth. The panel's first reason for diverging from the consensus reading of *Keeble* is thus really no reason at all.

Second, the panel criticizes the other circuits' opinions—and *Felicia* in particular—for treating "the procedural right to a lesser-included offense instruction recognized in *Keeble*" as "futile." Opinion at 61-62. But the panel miscomprehends what *Felicia* (and *Bowman*) say on this front. The Eighth and Ninth Circuits do not portray *Keeble* as "futile" because they view the lesser-included offense instruction it guarantees to be meaningless. Instead, their point is that reading *Keeble* as a purely procedural decision forces district courts to engage in a futile exercise. *Felicia* and *Bowman* warn that, under the panel's interpretation of *Keeble*, district courts will be required to (a) instruct juries that they may find the defendant guilty of the lesser-included offense; and then (b), once the jury has followed that instruction, nullify the jury's resulting guilty verdict on the lesser-included offense and release the defendant for lack of jurisdiction. It is that "result"—in which *Keeble* is understood as effectively requiring district courts to "misle[a]d" juries—that the Eighth and Ninth Circuits view as futile and one that the

Supreme Court could not have "consider[ed] … appropriate." *Bowman*, 679 F.2d at 799. And to this point, the panel provided no response.[2]

Accordingly, neither of the two grounds the panel provides for departing from the accepted reading of *Keeble* qualify as "sound reason[s] [for] go[ing] against the tide." *Thomas*, 939 F.3d at 1131 (internal quotation marks omitted). The panel should not have adopted this confused and novel reading of *Keeble*, and the full court's attention is necessary to correct the panel's mistake.

III. THE PANEL'S DECISION HAS CAUSED, AND WILL CONTINUE TO CAUSE, ANOMALOUS RESULTS.

The panel's reading of *Keeble* threatens peculiar outcomes in future Major Crimes Act prosecutions for felony assault. Indeed, the panel's decision has already forced a district court in the Tenth Circuit to vacate a jury's guilty

[2] The panel also acknowledged that the Fourth, Fifth, Eighth, and Ninth Circuits had relied on Justice Stewart's dissenting opinion in *Keeble* to conclude that *Keeble*'s majority found federal jurisdiction over lesser-included offenses. Yet, the panel dismissed those courts' reliance because, in its words, it was "not sure" that they undertook "a correct reading of the dissent." Opinion at 60 n.20. But the panel does not provide any reason for its uncertainty, nor could any uncertainty result from any fair reading of Justice Stewart's dissent. *See Keeble*, 412 U.S. at 215-216 (Stewart, J., dissenting) (the majority's "holding would be correct only if" the district "court had jurisdiction" "over" "the lesser included offense"); *see also Bowman*, 679 F.2d at 799 ("the dissenters in *Keeble expressly interpreted* the majority opinion as holding that the federal courts had jurisdiction") (emphasis added).

verdict on a lesser-included offense of simple assault. *See United States v. Johnston*, No. 25-cr-169, Dkt. No. 61 (N.D. Okla. Aug. 19, 2025). The defendant there was tried for felony assault based on his strangling his former dating partner, and the district court "properly instructed" the jury on the lesser-included offense of simple assault. *Id.* at 2. When the jury returned a verdict finding the defendant guilty of simple assault, however, the court vacated the conviction and released the defendant from custody in reliance on the panel's decision here. *Id.* at 2-3. The strangeness of that outcome needs little explanation. The jury instructions "misled," *Bowman*, 679 F.2d at 799, or "tricked," *Spaziano*, 468 U.S. at 456, the jury into believing it had a real choice between convicting for felony assault or simple assault, when in fact the defendant could not be convicted of simple assault.

Without the full Court's intervention, these peculiar results will almost certainly continue. Prosecutions under the Major Crimes Act are quite common in this circuit, particularly after *McGirt v. Oklahoma*, 591 U.S. 894 (2020). And, even when grand juries find probable cause to indict for felony assault, petit juries not infrequently convict on the lesser-included offense of simple assault, as evidenced by *Johnston*, which occurred within a month of the panel's decision here. Requiring district courts to invalidate verdicts

rendered by properly instructed verdicts will thus not only conflict with the Major Crimes Act's text but will also "do a serious disservice to the goal of rationality" and "undermine the public's confidence in the criminal justice system" in this circuit. *Spaziano*, 468 U.S. at 456. The *en banc* Court should intervene and align this Court's precedent with *Keeble* and the decisions of other circuits.

CONCLUSION

For the foregoing reasons, this Court should grant the government's petition for rehearing *en banc*.

Respectfully submitted,

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CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P. 25(d), the undersigned counsel of record certifies that the foregoing Petition for Rehearing En Banc was this day served via notice of electronic filing with the Tenth Circuit CM/ECF on counsel for appellant.

/s/ Ethan A. Sachs
ETHAN A. SACHS

DATED: SEPTEMBER 12, 2025

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

1. This petition complies with the word limit of Fed. R. App. P. 40(d)(3)(A) because it contains 3,597 words, not including items excluded in accordance with Fed. R. App. P. 32(f).

2. This petition complies with the typeface and type-style requirements of Fed. R. App. P. 32(a)(5) & (a)(6) because it has been prepared in a proportionally spaced, 14-point font in text and footnotes using Microsoft Word.

/s/ Ethan A. Sachs
ETHAN A. SACHS