SUPREME COURT
OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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OKLAHOMA,   )

             Petitioner,   )

            v.   ) No. 21-429

VICTOR MANUEL CASTRO-HUERTA,   )

            Respondent.   )

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Pages: 1 through 134

Place: Washington, D.C.

Date: April 27, 2022

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10   Washington, D.C.

11   Wednesday, April 27, 2022

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13   The above-entitled matter came on for

14   oral argument before the Supreme Court of the

15   United States at 10:00 a.m.

16

17   APPEARANCES:

18   KANNON K. SHANMUGAM, ESQUIRE, Washington, D.C.; on

19   behalf of the Petitioner.

20   ZACHARY C. SCHAUF, ESQUIRE, Washington, D.C.; on

21   behalf of the Respondent.

22   EDWIN S. KNEEDLER, Deputy Solicitor General,

23   Department of Justice, Washington, D.C.;

24   for the United States, as amicus curiae,

25   supporting the Respondent.

1   C O N T E N T S

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1   P R O C E E D I N G S

2   (10:00 a.m.)

3   CHIEF JUSTICE ROBERTS: We will hear

4   argument this morning in Case 21-429, Oklahoma

5   versus Castro-Huerta.

6   Mr. Shanmugam.

7   ORAL ARGUMENT OF KANNON K. SHANMUGAM

8   ON BEHALF OF THE PETITIONER

9   MR. SHANMUGAM: Thank you, Mr. Chief

10   Justice, and may it please the Court:

11   This case presents a question that has

12   taken on exceptional practical importance in the

13   wake of McGirt. The question is whether a state

14   has authority to prosecute non-Indians who

15   commit crimes in Indian country, regardless of

16   whether the victim is a non-Indian or an Indian.

17   The answer to that question is yes.

18   The state has inherent sovereign authority to

19   punish crimes committed within its borders, and

20   no federal law preempts that authority as to

21   crimes committed by non-Indians.

22   Respondent relies on two statutes, the

23   General Crimes Act and Public Law 280. But

24   neither of those statutes says anything about

25   preemption. As this Court has explained, the

 1   General Crimes Act merely incorporates the

 2   substantive criminal law that applies in federal

 3   enclaves. It does not go further and address

 4   state jurisdiction.

 5   And as this Court has also explained,

 6   Public Law 280 simply expanded the criminal and

 7   civil jurisdiction of qualifying states. It did

 8   not somehow divest all states of preexisting

 9   jurisdiction. The mere fact that some members

10   of Congress may have believed that the states

11   would otherwise have lacked jurisdiction over

12   certain crimes does not give the law preemptive

13   effect.

14   Because this case does not implicate a

15   tribe's right to govern itself and to punish

16   tribal offenders, the Court need not resort to

17   the more flexible balancing approach that it has

18   used elsewhere. But, here, any balancing weighs

19   heavily in the state's favor. The state has a

20   paramount interest in ensuring public safety.

21   And concurrent state and federal jurisdiction

22   would only enhance law enforcement in Indian

23   country, especially because the tribes

24   ordinarily lack jurisdiction over non-Indian

25   offenders.

 1   The federal government now takes the

 2   position that it should have exclusive

 3   jurisdiction. But that position is simply

 4   mind-boggling in light of the situation in

 5   Oklahoma, where, by the government's own

 6   admission, whole categories of crimes are going

 7   unprosecuted in the aftermath of McGirt.

 8   Because no federal law preempts a

 9   state's authority to prosecute crimes committed

10   by non-Indians, the judgment below should be

11   reversed.

12   I welcome the Court's questions.

13   JUSTICE THOMAS: Counsel, the -- these

14   reservations have been around a long time, and

15   why is it now that -- why, after so many years,

16   that we are getting the first case involving

17   jurisdiction over non-Indians committing crimes

18   against Indians?

19   MR. SHANMUGAM: Justice Thomas, only

20   in 2020 did 43 percent of the State of Oklahoma

21   become Indian country. Before that, there was

22   comparatively little Indian country in the State

23   of Oklahoma, and so this was, frankly, not an

24   issue in Oklahoma and not an issue that arose

25   all that frequently in the rest of the country

1   either.

2   That having been said, to be sure,

3   there are reported cases, mostly from state

4   courts, in which the issue arose at various

5   points over the years. And notwithstanding this

6   Court's dicta, this has been an open question.

7   Indeed, as recently as the 1980s, the Justice

8   Department took the contrary position on this

9   question.

10   Certainly, as I said at the outset,

11   this issue has taken on acute importance in

12   light of the situation on the ground in

13   Oklahoma. There are now essentially three times

14   as many people living in Indian country in the

15   United States as a result of this Court's

16   decision in McGirt. There are now 1.8 million

17   more people living in Indian country. And our

18   best estimate is that of the cases affected by

19   McGirt, approximately 20 percent of those cases

20   involve this permutation, namely, crimes

21   committed by non-Indians against Indians.

22   JUSTICE THOMAS: Is there a problem --

23   and this is just a practical -- a question about

24   practice and practical considerations. How do

25   you determine whether or not a victim is an

1   Indian?

2   This case involves a little girl with

3   cerebral palsy. And is there a preliminary

4   jurisdictional question as to whether or not the

5   victim is -- is or is not an Indian?

6   MR. SHANMUGAM: There's no dispute

7   about that here, Justice Thomas, but it's not

8   easy. And I think that one virtue of our

9   position is that it would certainly greatly

10   simplify things for law enforcement because, at

11   least for state law enforcement, the status of

12   the victim would not be the relevant inquiry.

13   The only inquiry would be the status of the

14   offender.

15   But I don't mean to suggest that

16   that's an easy determination. The City of Tulsa

17   has issued a nine-page checklist for its police

18   officers for the officers to make the

19   jurisdictional determination. And the question

20   of how to determine who is an Indian for

21   purposes of these jurisdictional rules is itself

22   unsettled. In fact, it's the subject of a

23   currently pending cert petition by my client,

24   the State of Oklahoma.

25   Courts have looked to factors such as

1   enrollment status, blood quantum, and the like.

2   The Oklahoma courts have applied a totality of

3   circumstances test.

4   And so, certainly, one virtue of our

5   rule is that for state law enforcement, states

6   would have jurisdiction over non-Indian

7   offenders regardless of the status of the

8   victim. And I would submit that that's

9   consistent with the broader framework that this

10   Court has used for preemption purposes.

11   This Court time and again in this area

12   has defined the tribal interest as the interest

13   in self-governance, an interest that, as I

14   indicated in my opening, incorporates an

15   interest in punishing tribal offenders. I would

16   refer this Court to its decision in Nevada

17   versus Hicks, among others.

18   And so, under our approach, when that

19   tribal interest is not implicated, the

20   preemption inquiry is much like any other

21   preemption inquiry. The question is whether, in

22   this Court's words, there is a Congressional

23   prohibition that would limit what is otherwise

24   the state's conceded authority.

25   When one talks about a state's police

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 1      power, the ability to enforce the state's

 2      criminal laws is obviously at the core of that

 3      power.

 4              JUSTICE SOTOMAYOR:  Counsel, the core

 5      of the power of prosecution at its base is the

 6      protection of people, of citizens.  And so the

 7      Indian tribes have an inherent right to protect

 8      members of their tribes and of their community.

 9      The state doesn't have the same right.

10              But putting that aside, we keep

11      talking about preemption.  But the thing that

12      has bothered me as I've read your brief is

13      you're suggesting something much broader than

14      whether this statute preempts state law.

15              You're suggesting that the federal

16      government doesn't have the power to preempt

17      state law at all.  In your reply brief, you say

18      there's no dispute "that a state has sovereign

19      authority to prosecute crimes throughout its

20      territory unless federal law validly preempts

21      that authority."  And, thus, the only question

22      to decide here is whether any federal statute or

23      treaty has such preemptive effect.

24              But your argument doesn't rest on

25      whether there's preemption.  You're saying the
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 1   equal footing doctrine bars the government from

 2   preemption.

 3   Is that the position you're taking?

 4   MR. SHANMUGAM: That is not --

 5   JUSTICE SOTOMAYOR: And --

 6   MR. SHANMUGAM: -- our position,

 7   Justice.

 8   JUSTICE SOTOMAYOR: -- and so, if it

 9   is not your position and for 200 years we've

10   had, you call it dicta, but a lot of dicta,

11   saying that the General Crimes Act is -- is a

12   preemption of state law, what would justify the

13   federal government -- what do you want, words

14   that say state law is preempted?

15   MR. SHANMUGAM: So I think that there

16   --

17   JUSTICE SOTOMAYOR: State prosecution

18   is preempted, only federal prosecution is

19   permitted in Indian territory?

20   MR. SHANMUGAM: So we are not taking

21   the position that the federal government would

22   lack the ability to preempt, with one caveat,

23   and let me address that and then I will address

24   the other component of your question, which is

25   the relevance of the fact that the Indian is a

1   victim.

2   I think, to be clear about our

3   position here, we recognize that the federal

4   government has quite broad authority to preempt.

5   Our submission to this Court is simply that the

6   federal government did not do so either in the

7   General Crimes Act or in Public Law 280.

8   And the core of our position is that

9   there is simply nothing in the language of

10   either of those statutes that divests the states

11   of jurisdiction.

12   But, to address your point directly,

13   Justice Sotomayor, the only limit on the federal

14   government's ability to preempt is any limit

15   that might exist at the outer bounds on the

16   federal government's exercise of its enumerated

17   powers in this area.

18   And I think that there may come a

19   point, for instance, on the facts presented in

20   McBratney, if -- if the federal government, say,

21   passed a law that preempted state authority

22   over, you know, non-Indian-on-non-Indian crime,

23   maybe there comes a point at which you start to

24   wonder what the source of enumerated authority

25   is.

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 1                JUSTICE GORSUCH:  Counsel --
 2                MR. SHANMUGAM:  But this case does not
 3     present that question.
 4                JUSTICE GORSUCH:  -- so, counsel,
 5     you -- you start with the premise, as I -- as I
 6     understand it, that there's inherent state
 7     sovereignty over tribal lands within Oklahoma,
 8     right?
 9                MR. SHANMUGAM:  Yes, that's correct.
10                JUSTICE GORSUCH:  Okay.  But then you
11     say, I think, that there is no authority for the
12     state to prosecute in cases involving Indian
13     defendants.  Is that right?
14                MR. SHANMUGAM:  So our position --
15                JUSTICE GORSUCH:  Do you concede that
16     or not, or -- or is that part of the state's
17     inherent authority too?
18                MR. SHANMUGAM:  We would concede that
19     with regard to the Major Crimes Act, relying on
20     this Court's decisions in John and Negonsott,
21     which have --
22                JUSTICE GORSUCH:  Sure.  Put aside the
23     Major Crimes Act.  I'm talking about under the
24     GCA, is there preemption, or does Oklahoma now
25     take the extraordinary view -- it didn't in its
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1   briefs as I understood it -- that it has

2   inherent sovereign authority even over crimes by

3   Indian defendants within its territory?

4   MR. SHANMUGAM: We didn't take a

5   position on that in our briefs, but I would

6   grant you that I think that that would be a much

7   more challenging argument for preemption --

8   JUSTICE GORSUCH: Why?

9   MR. SHANMUGAM: -- for the simple

10   reason --

11   JUSTICE GORSUCH: Why?

12   MR. SHANMUGAM: -- that --

13   JUSTICE GORSUCH: Because the statute

14   doesn't contain any language about -- no magic

15   words about that either. So you either have to

16   think that the statute does some implicit work

17   there or, what, resort to some sort of Bracker

18   balancing test?

19   Is that -- is that what you would do?

20   MR. SHANMUGAM: I think it's more

21   likely under this Court's precedents to be the

22   latter than the former.

23   JUSTICE GORSUCH: Okay. All right.

24   Let's take that.

25   MR. SHANMUGAM: So we would take the

 1   position --

 2   JUSTICE GORSUCH: Well, no, let's --

 3   let's take that. No, I want to -- I want to

 4   pursue this. Thank you. That's helpful.

 5   So you admit that the statute is

 6   silent with respect to both crimes against

 7   Indian victims and by Indian defendants, and

 8   you'd have us go to a Bracker balancing test,

 9   and you'd say it would be resolved in favor of

10   the tribes when it comes to Indian defendants

11   but not Indian victims.

12   Is that a fair summary?

13   MR. SHANMUGAM: The way under this

14   Court's precedents that I think the analysis

15   would work is that once you have an Indian

16   defendant, that obviously does implicate the

17   right to self-governance, the right to punish

18   tribal offenders.

19   JUSTICE GORSUCH: So it balances --

20   MR. SHANMUGAM: The way that this

21   Court --

22   JUSTICE GORSUCH: -- differently -- it

23   balances differently. Is that fair to say?

24   MR. SHANMUGAM: Correct.

25   JUSTICE GORSUCH: Okay. Then -- then

1   --

2   MR. SHANMUGAM: The tribal interests

3   would be --

4   JUSTICE GORSUCH: I got it.

5   MR. SHANMUGAM: -- stronger in that

6   context.

7   JUSTICE GORSUCH: I got it. Here's my

8   question why, all right?

9   First of all, we've never applied a

10   Bracker balancing test to criminal law so far as

11   I'm aware, so you're asking us to do something

12   new there inconsistent with our precedents so

13   far, right?

14   MR. SHANMUGAM: I -- I think that --

15   the cases on which we rely have applied it in

16   the civil context.

17   JUSTICE GORSUCH: Okay.

18   MR. SHANMUGAM: But they've never

19   drawn a distinction --

20   JUSTICE GORSUCH: I'll take that as a

21   yes. All right. Then who bears the burden of

22   proof in that balancing test?

23   MR. SHANMUGAM: Well, I think that the

24   way it would work is the way that it always

25   works on questions of preemption, which is to

1   say it's a matter of law, and I think that the

2   party seeking preemption would make the

3   arguments --

4   JUSTICE GORSUCH: So the tribes

5   have -- have the burden here, okay.

6   MR. SHANMUGAM: Well, the --

7   JUSTICE GORSUCH: All right. When

8   we're considering --

9   MR. SHANMUGAM: -- the party seeking

10   preemption, Justice Gorsuch --

11   JUSTICE GORSUCH: Okay.

12   MR. SHANMUGAM: -- I think, would --

13   would -- would bear the burden --

14   JUSTICE GORSUCH: It's never going to

15   be -- it's not going to be the state. We can

16   agree on that?

17   MR. SHANMUGAM: Well, it -- that's

18   correct, which is to say that --

19   JUSTICE GORSUCH: All right. So it's

20   going to be the tribes, all right, fine.

21   Then -- then I would ask you, why

22   would we not take into account in that balancing

23   test you'd have us do the identity of the victim

24   as going to tribal sovereignty given the history

25   in this country of states abusing Indian victims

 1   in their courts?

 2   George Washington wrote letters about

 3   this at the outset of the nation's history. In

 4   the 1920s, Oklahoma systematically used its

 5   state courts to deprive Indians of their --

 6   their property when oil was discovered on their

 7   lands. There's a long history of this.

 8   Congress has provided as well a

 9   mechanism for tribes who wish to opt in to state

10   concurrent jurisdiction in Public Law 280, so

11   that's available. We know that. They've chosen

12   not to. Should that be something we consider?

13   And then, finally, two more things.

14   We have the treaties, okay, which have been in

15   existence and promising this tribe since before

16   the Trail of Tears that they would not be

17   subject to state jurisdiction precisely because

18   the states were known to be their enemies. Does

19   that count in -- in your balancing -- your new

20   Bracker balancing test which we've never

21   heretofore applied in criminal law?

22   And then, finally, you say we have to

23   worry about blood quantum when it comes to

24   victims. Well, wouldn't that also be true when

25   we have to deal with defendants? It's

 1   apparently not a worry there. I don't know why

 2   it would be a worry here.

 3   So there's a lot for you to chew on.

 4   MR. SHANMUGAM: I think there were

 5   four things in your question, Justice Gorsuch,

 6   and I'll do my best --

 7   JUSTICE GORSUCH: At least.

 8   MR. SHANMUGAM: Let me start with

 9   those four, and feel free to add others.

10   First, the tribal interest here. I

11   think that this Court consistently has defined

12   the tribal interest as the interest in punishing

13   tribal offenders. When engaging in balancing,

14   the Court has not defined that interest more

15   broadly as an interest in protecting victims.

16   That having been said, obviously, we

17   acknowledge --

18   JUSTICE GORSUCH: The treaties are

19   irrelevant then?

20   MR. SHANMUGAM: Well, I -- I was going

21   to --

22   JUSTICE GORSUCH: Our history is

23   irrelevant? Oklahoma's history is irrelevant?

24   MR. SHANMUGAM: I was going to come to

25   the treaties, but let me say one last thing

 1   about the interest, which is that, of course,

 2   the tribes have an interest in protecting their

 3   members from criminal offenses. The State of

 4   Oklahoma likewise has an interest in protecting

 5   all of its citizens, including its tribal

 6   citizens, who in Oklahoma have been citizens of

 7   the state longer than anywhere else in the

 8   nation.

 9   But this Court has never recognized

10   that that is sufficient, for instance, to

11   justify tribal jurisdiction, or else Oliphant

12   and Duro, the decisions that hold that tribes

13   ordinarily lack jurisdiction over offenses

14   committed by non-members, would have come out

15   the other way.

16   Now you also mentioned Public Law 280

17   and the treaties, and I want to come to both of

18   those because those are potential affirmative

19   sources for preemption. And just to be clear so

20   that we're talking about the same framework, I

21   think the way that the Court would consider

22   offenses committed by Indians is under some sort

23   of balancing framework or some sort of framework

24   that looked at whether the state law interfered

25   with the tribal right to self-governance.

1   Here, because that interest is not

2   implicated, we think that the Court should use a

3   familiar approach to preemption because you're

4   talking about --

5   JUSTICE GORSUCH: You say it's not --

6   MR. SHANMUGAM: -- competing state and

7   federal interests.

8   JUSTICE GORSUCH: -- you -- you

9   blithely say it's not implicated, and it's easy

10   to say, but you have 200 years of history

11   suggesting otherwise and you have tribes before

12   us saying otherwise and you have former U.S.

13   attorneys saying otherwise.

14   What do we do about that?

15   MR. SHANMUGAM: Well, I can't speak to

16   why the tribes have taken the position that they

17   have in this Court.

18   JUSTICE GORSUCH: Counsel, it's easy

19   enough to say that standing at the podium in

20   Washington, D.C., but the history and the

21   reality is -- should stare us all in the face.

22   There's a reason why they've resisted

23   jurisdiction over crimes against Indian victims.

24   It's not -- it's not just a matter of being

25   contumacious, is it?

1   MR. SHANMUGAM: No. Of course, I'm

2   not saying that they're being contumacious. But

3   I would say, having spent some time in Oklahoma,

4   that the law enforcement issues are very real.

5   And as recently as earlier this week, you had

6   the principal FBI agent in Oklahoma conceding

7   that there are whole categories of crimes, by

8   our estimation, thousands of crimes, that are

9   going unprosecuted because the federal

10   government, which has sole jurisdiction over

11   this category of cases, simply has been unable

12   to prosecute them.

13   JUSTICE BREYER: Don't they have --

14   MR. SHANMUGAM: So if we're talking --

15   JUSTICE BREYER: -- representatives in

16   Congress? I mean, if there is crime,

17   particularly, in Oklahoma, can't they ask

18   Congress to provide extra prosecutorial and

19   judicial resources?

20   MR. SHANMUGAM: Well --

21   JUSTICE BREYER: They can have,

22   obviously.

23   MR. SHANMUGAM: -- but, Justice --

24   JUSTICE BREYER: So my real question

25   is this: The -- you talk a lot about Oklahoma,

1   and I can understand the problem in Oklahoma

2   because of our previous case, et cetera. But

3   aren't there 49 other states? And my impression

4   is that, in general, in the entire country, the

5   general assumption has been -- and they've acted

6   this way for years, decades -- that states

7   cannot prosecute the specific -- you know, the

8   particular crimes, and they don't prosecute the

9   particular crimes when they take place in Indian

10   country. They're prosecuted in federal court.

11   Now am I right or wrong? I'm not an

12   expert, and you are more of one. So am I right

13   or wrong about that?

14   MR. SHANMUGAM: So states have made

15   efforts from time to time, I'm not going to

16   overstate it, to bring prosecutions of this

17   permutation.

18   JUSTICE BREYER: I didn't say that. I

19   said the general assumption throughout the

20   United States of America has been that the

21   states cannot prosecute these crimes but rather

22   -- I won't say there aren't exceptions -- but

23   rather in federal court.

24   MR. SHANMUGAM: I think I would

25   quibble slightly, Justice Breyer --

1   JUSTICE BREYER: Yeah.

2   MR. SHANMUGAM: -- and say that I

3   don't know that it was a general assumption. I

4   think that this has been an open question. The

5   Justice Department for many years --

6   JUSTICE BREYER: But how many --

7   MR. SHANMUGAM: -- took the contrary

8   position --

9   JUSTICE BREYER: -- if you had to

10   guess? I don't know if you looked it up.

11   MR. SHANMUGAM: Well --

12   JUSTICE BREYER: But, if you had to

13   guess, what percentage of crimes committed on

14   Indian reservations that we're talking about

15   here are prosecuted in state court, the crimes

16   that are listed? Which -- what percentage of

17   all those? Would you guess it's more like 1

18   percent or more like 50 percent?

19   MR. SHANMUGAM: I'm guessing that it

20   has historically been a relatively low

21   percentage, but that --

22   JUSTICE BREYER: Okay. Okay. That's

23   all I wanted to know.

24   MR. SHANMUGAM: -- is in large part

25   because the denominator is not that large --

1   JUSTICE BREYER: Yeah, okay.

2   MR. SHANMUGAM: -- in Indian country

3   --

4   JUSTICE BREYER: Right.

5   MR. SHANMUGAM: -- outside Oklahoma.

6   JUSTICE BREYER: Right. All right.

7   Final part of --

8   MR. SHANMUGAM: But I would say in

9   response --

10   JUSTICE BREYER: -- the question --

11   okay, you're saying there are not that many, but

12   -- but it's been prosecuted in federal court,

13   not state court.

14   Now, if you win, that assumption,

15   almost general, has -- will be changed

16   throughout the country, is that right? And

17   suddenly the Indian tribes will realize that

18   where they thought crimes on their reservation

19   were being prosecuted in federal court, they

20   will discover that suddenly, in these 49 other

21   states, they can go into state court. Is that

22   right or wrong? I want to --

23   MR. SHANMUGAM: That is -- that is --

24   JUSTICE BREYER: -- just get my

25   assumptions right. I'm not making an argument.

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 1              MR. SHANMUGAM:  -- that is correct.
 2    And let me say a little bit about the --
 3              JUSTICE BREYER:  That is right or not
 4    right?
 5              MR. SHANMUGAM:  That is correct.
 6              JUSTICE BREYER:  Okay.
 7              MR. SHANMUGAM:  And let me say a
 8    little bit about that and then about why
 9    Congress is not simply going to be able to fix
10    this, which was where your question started.
11              JUSTICE BREYER:  Well, they could
12    provide more prosecutors, is my point.
13              MR. SHANMUGAM:  And the --
14              JUSTICE BREYER:  They can't --
15              MR. SHANMUGAM:  -- Justice Department
16    has asked them to do that, but the reality is
17    that the gap in Oklahoma right now is yawning.
18    All we are here asking the Court to do is to
19    provide concurrent jurisdiction for the states
20    with the federal government, which, after all,
21    is outside Indian country, the norm in our
22    federal system.
23              Our submission is that this is not
24    likely as a practical matter to be a significant
25    issue outside the State of Oklahoma.  There's no
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1   reason to believe that the federal government is

2   not doing its job of prosecuting crimes in the

3   other 49 states.

4   What we know as representatives of the

5   State of Oklahoma is that that is not happening

6   in the State of Oklahoma. And you don't have to

7   take --

8   JUSTICE SOTOMAYOR: Counsel --

9   MR. SHANMUGAM: -- our word for that.

10   JUSTICE SOTOMAYOR: -- counsel, but --

11   but you have a state-specific problem. At some

12   point, I want you to address where you get your

13   figures from. And I will lay out there's an

14   article in The Atlantic that suggests that your

15   figures are grossly exaggerated, and I want to

16   give you an opportunity to address that. But

17   put that question aside.

18   It may be that you and some -- that

19   you're the only state that wants concurrent

20   jurisdiction to fix a state-specific problem.

21   But why should we assume that every other state

22   wants that responsibility? And doesn't

23   conferring jurisdiction on a state or telling it

24   you have concurrent jurisdiction obligate that

25   state in a way to protect its Indian victims?

 1   I mean, what you're saying is an

 2 unfunded mandate to 49 other states to take on a

 3 responsibility that they had a choice to take on

 4 and most of them didn't want. So we have 11

 5 states for which Congress enacted state-specific

 6 legislation conferring some jurisdiction. In

 7 Public Law 280, again, states were given the

 8 choice, do you want to prosecute these crimes or

 9 not? Three more states added onto the 11, so 15

10 only, given a choice, wanted to do this.

11   We are told by some amici that federal

12 and state authorities have come to agreement in

13 virtually every place outside of Oklahoma as to

14 who's going to do what. But, once we say states

15 have concurrent jurisdiction, we are forcing the

16 state to do something.

17   You're saying, no, no, no, there's

18 always prosecutorial discretion. But is that

19 true? They have an obligation to treat their

20 citizens equally. Having said that, this is not

21 a case -- what you're doing is putting all of

22 those 15 laws conferring different kinds of

23 jurisdiction on those states into question.

24   You're throwing out those 15

25 agreements and you're saying forget what they

1   say about limiting state jurisdiction or not.

2   States had an inherent power to do this. Maybe

3   you'll come back and say, well, those are

4   agreements, so they're still bound by them.

5   But now you're creating chaos across

6   the country, 49 other states. And I am told

7   that the federal government decides whether to

8   put some resources in some places based on what

9   kind of jurisdiction exists with the states and

10   not in others. All of that is up in the air.

11   So please explain to me why 200 years

12   later we are revisiting an assumption that was

13   made. You say it was only dicta, it was never

14   decided. But we have an awful lot of dicta on

15   this issue repeatedly in many, many cases.

16   MR. SHANMUGAM: Justice Sotomayor,

17   there's a lot to that question and let me try to

18   cover all of it.

19   First of all, with regard to the

20   statistics, we believe that the statistics that

21   we have offered to the Court are accurate, but

22   you don't have to just take our word for it.

23   To get back to Justice Breyer's

24   question, let's take a look at what the Justice

25   Department has said in its most recent 2023

1   budget report. It has said, "The United States

2   Attorneys in Oklahoma are prioritizing violent

3   felonies under the Major Crimes Act. In fiscal

4   year 2021, the Eastern District of Oklahoma and

5   the Northern District of Oklahoma are opening

6   only 22 percent and 31 percent of all felony

7   referrals. Enforcement of nonviolent crime is

8   relatively low."

9   And if we want to talk about --

10   JUSTICE SOTOMAYOR: Well --

11   MR. SHANMUGAM: -- what's been said in

12   --

13   JUSTICE SOTOMAYOR: -- most of that is

14   being done by the tribes, isn't it?

15   MR. SHANMUGAM: Well, not with --

16   JUSTICE SOTOMAYOR: I see a short gap

17   of -- the Atlanta article says, at most, there's

18   a short gap of about a thousand cases, if that.

19   MR. SHANMUGAM: We -- we don't agree

20   with that. It's important to keep in mind that

21   the tribes do not have jurisdiction over this

22   category of cases, with narrow exceptions.

23   And if we're going to litigate what's

24   been said in the press, I would refer the Court

25   to The Wall Street Journal article earlier this

1   week to which I alluded, in which the Special

2   Agent in Charge of the FBI's Oklahoma Field

3   Office said, "The United States Attorney's

4   Office doesn't have the capacity to try"

5   nonviolent felony, my words, "or even any

6   misdemeanor cases."

7   Now I do want to cover the other

8   points that were in your question, which I think

9   are really important.

10   First of all, with regard to

11   supposedly foisting this authority on the

12   states, let's keep in mind the fact that the

13   states do enforce the criminal laws already in

14   Indian country by virtue of the rule first

15   established by this Court in McBratney.

16   When non-Indians commit crimes against

17   non-Indians in Indian country, law enforcement

18   is there, state law enforcement is there,

19   because they have exclusive authority in order

20   to enforce the criminal law.

21   JUSTICE GORSUCH: Several states have

22   renounced the very kind of authority you'd

23   thrust upon them, though, haven't they?

24   MR. SHANMUGAM: Well, it -- it -- it

25   is true that a very small number of states have

     1   renounced the additional authority provided

     2   under Public Law 280, but that brings me to the

     3   Public Law 280 regime, Justice Sotomayor, and

     4   there are a couple of things I would say about

     5   that.

     6   First is just the fundamental oddity

     7   of the position on the other side, which is that

     8   a statute that by its terms conferred additional

     9   jurisdiction should be viewed as ousting all

    10   other preexisting jurisdiction.

    11   And the reason that we know that that

    12   is not the law is because this Court said so in

    13   Three Affiliated Tribes I, when in the civil

    14   context, it said, "nothing in the language or

    15   legislative history of Public Law 280 indicates

    16   that it was meant to divest states of

    17   preexisting and otherwise lawfully assumed

    18   jurisdiction." And there's --

    19   JUSTICE SOTOMAYOR: In a civil case.

    20   MR. SHANMUGAM: But --

    21   JUSTICE SOTOMAYOR: We were very clear

    22   in saying criminal cases are different from

    23   civil cases.

    24   MR. SHANMUGAM: But the reasoning,

    25   Justice Sotomayor, is exactly analogous, and let

1   me explain why.

2   Public Law 280 confers on states

3   essentially plenary civil and criminal

4   jurisdiction, either states that are the

5   mandatory states or states that opt in.

6   And you could make exactly the same

7   argument in the civil context with regard to

8   civil actions brought by Indians against

9   non-Indians. And yet this Court made that

10   statement in the context of whether or not

11   Public Law 280 should be used to construe a

12   state law as ousting the state of preexisting

13   jurisdiction.

14   Our submission is that Public Law 280

15   operates perfectly well under our

16   interpretation. What Public Law 280 does is to

17   confer this broad array of additional

18   jurisdiction, not just plenary civil

19   jurisdiction but, of course, criminal

20   jurisdiction, including jurisdiction over

21   offenses committed by Indians, which appears to

22   have been Congress's principal concern when it

23   enacted Public Law 280.

24   Now, to be sure, the text of Public

25   Law 280 also clarifies that states that

1   participate in or opt into the regime will also

2   have jurisdiction over offenses committed

3   against Indians.

4   JUSTICE GORSUCH: Let's -- let's talk

5   about that --

6   MR. SHANMUGAM: But there's nothing

7   odd about that.

8   JUSTICE GORSUCH: -- let's talk about

9   that for a second. I'm not so sure.

10   First of all, you -- you -- you agree,

11   though, that in 1948, when Congress passed the

12   GCA, the text of it is consistent with the

13   conclusion that Congress believed the states

14   generally lacked prosecutorial authority over

15   crimes committed by non-Indians against Indians

16   in Indian country, right?

17   MR. SHANMUGAM: Some members of

18   Congress plainly believed that because there is

19   evidence in the legislative history --

20   JUSTICE GORSUCH: No, more than that.

21   You agree that the text is consistent with an

22   understanding that Congress thought that, right?

23   MR. SHANMUGAM: The text is consistent

24   both with my position and with my friend, Mr.

25   Schauf's position.

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1           JUSTICE GORSUCH:  Okay.  If the text
2    is consistent with the opposing position, then
3    let -- Public Law 280, the Kansas Act, the North
4    Dakota Act, the New York Act, the Iowa Act, all
5    adopted in the years immediately preceding and
6    immediately following the GCA, expressly confer
7    criminal jurisdiction on certain states, it just
8    doesn't happen to be Oklahoma, for the very kind
9    of authority at issue here, expressly, right?
10           MR. SHANMUGAM:  Yes, but at the same
11   time, none of those laws --
12           JUSTICE GORSUCH:  All of that would
13   have been pointless, right?
14           MR. SHANMUGAM:  No, not at all.
15           JUSTICE GORSUCH:  No need -- no need
16   to say you have state criminal jurisdiction in
17   -- in crimes involving Indian victims.
18           MR. SHANMUGAM:  It's perfectly
19   reasonable, particularly in Public Law 280,
20   Justice Gorsuch, for Congress to have wanted to
21   clarify that the states had that preexisting
22   jurisdiction.
23           JUSTICE GORSUCH:  So it's belts and
24   suspenders on your view?
25           MR. SHANMUGAM:  Well, to a certain
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1   extent, but I don't think that there's anything

2   strange about that because Congress often

3   passes statutes that do nothing more than codify

4   preexisting legal principles. Here --

5   JUSTICE GORSUCH: And how --

6   MR. SHANMUGAM: -- Congress was doing

7   --

8   JUSTICE GORSUCH: -- how about --

9   MR. SHANMUGAM: -- so much more.

10   JUSTICE GORSUCH: -- how about the

11   fact that we have, in my count, 10 cases

12   stretching from 1832 to two years ago saying

13   that it's -- it's -- states don't have this kind

14   of jurisdiction?

15   You call it dicta. All right. But

16   even in your very best case, McBratney, Draper,

17   cases you cite and rely on, the Court reiterates

18   that it is not talking about and is not

19   extending jurisdiction over these kinds of

20   cases. What do we do about that?

21   MR. SHANMUGAM: I -- I -- I don't

22   think that's quite correct. I would recognize,

23   Justice Gorsuch, that by my count, there are six

24   cases, starting with Williams versus United

25   States, in which this Court --

1   JUSTICE GORSUCH: I don't know. Mine

2   go back to Worcester. I think you might be

3   missing a couple.

4   MR. SHANMUGAM: I don't think that

5   that's a fair characterization of Worcester

6   because Worcester was simply stating the

7   principle then in effect --

8   JUSTICE GORSUCH: All right. We

9   can -- we can quibble over the number, all

10   right? I think your count's a little

11   parsimonious. But whatever number it is, it's a

12   large number. And even the cases you rely on

13   most heavily carve this out.

14   MR. SHANMUGAM: I don't think that --

15   JUSTICE GORSUCH: What do we do about

16   that?

17   MR. SHANMUGAM: -- I don't think

18   that's correct, and let's go directly to

19   McBratney. I think that all that the Court said

20   in McBratney was that it was not deciding any

21   question under the provisions of the applicable

22   treaty with regard to crimes committed by or --

23   JUSTICE GORSUCH: All right.

24   MR. SHANMUGAM: -- against Indians.

25   I think the reasoning of McBratney

1   strongly supports our position because McBratney

2   speaks broadly --

3   JUSTICE GORSUCH: But it carved that

4   question out -- it carved this question out and

5   said it wasn't -- it wasn't going there.

6   MR. SHANMUGAM: I don't believe that

7   that is correct.

8   JUSTICE GORSUCH: All right. All

9   right.

10   MR. SHANMUGAM: I would say that the

11   Court only started to carve out the question in

12   Donnelly. And I think what happened is --

13   JUSTICE GORSUCH: Then -- then how

14   about this? How about Oklahoma's own position

15   for the last 30 years, which has taken the

16   position since I understand at least 1990 that

17   that is the correct understanding of the law?

18   That has been the Justice Department's

19   understanding of the law.

20   Don't we normally, when we're thinking

21   about an old statute, give respect to how it's

22   been liquidated and understanded by all three

23   branches of government consistently, maybe the

24   state itself who might have had an admission

25   against interest back when nothing was at stake

1   but now changes its view?

2   MR. SHANMUGAM: I think what I would

3   say about the federal government, Justice

4   Gorsuch, is that their position by their own

5   recognition has certainly not been consistent.

6   And I would refer the Court to the

7   1979 OLC opinion and the government's subsequent

8   statements where the government has suggested

9   that when it comes to the sort of interest

10   balancing that we were discussing earlier,

11   Justice Gorsuch, that that interest weighs in

12   the state's favor.

13   JUSTICE GORSUCH: Do you care to

14   address your own client's position?

15   MR. SHANMUGAM: I'm very happy to

16   address Oklahoma's position. The practical

17   reality, of course, was that this was not a

18   significant issue --

19   JUSTICE GORSUCH: Exactly.

20   MR. SHANMUGAM: -- before this Court's

21   opinion in McGirt.

22   JUSTICE GORSUCH: Exactly. And

23   shouldn't that count for something?

24   MR. SHANMUGAM: Well, no, I think that

25   what it should count for is that this has

1   suddenly become a major problem in Oklahoma.

2   And to be clear, the reason that we are here

3   today is because of McGirt. This was not a

4   significant law enforcement issue in the State

5   of Oklahoma for the reason that the government

6   acknowledged in its earlier briefing in the

7   McGirt line of cases, which is that in Oklahoma

8   there is very little trust or reserved land.

9   Most of the land is fee land, like the land in

10   downtown Tulsa and the other cities in the

11   eastern half of Oklahoma, and, therefore, would

12   not have been thought of as Indian country.

13   Now I think, with regard to Oklahoma,

14   the history, as you are well aware, is somewhat

15   complicated in this regard, because there was a

16   lengthy period of time when the Oklahoma Court

17   of Criminal Appeals, in fact, said that the

18   state had plenary criminal jurisdiction even

19   over Indian country in the state, and the

20   Oklahoma Court of Criminal Appeals eventually

21   reversed that position.

22   And so I think it's very hard to say

23   that there's a lot of data about what the State

24   of Oklahoma was doing. But I will grant you

25   that I can't point to a prosecution by the State

1   of Oklahoma after 1990. I would just say that

2   that's consistent with the fact that this was

3   not a significant issue because of the

4   relatively small amount of Indian country.

5   And I do want to --

6   JUSTICE KAGAN: Mr. Shanmugam --

7   JUSTICE GORSUCH: Please.

8   CHIEF JUSTICE ROBERTS: Why don't you

9   wrap up quickly. And, Justice Kagan, we'll --

10   Justice Kagan, we'll have your question, and

11   then we'll move on to the next stage.

12   JUSTICE KAGAN: I'm happy to take my

13   turn in order.

14   CHIEF JUSTICE ROBERTS: No, go ahead.

15   MR. SHANMUGAM: Great. Go -- go

16   ahead, Justice Kagan. I wanted to say one more

17   thing in response to Justice Gorsuch, but --

18   JUSTICE KAGAN: Okay. You'll find a

19   way to fit it in, I'm sure.

20   (Laughter.)

21   JUSTICE KAGAN: I want to talk about

22   the text of the statute for a few minutes and

23   just start with this question: Is there

24   concurrent jurisdiction on federal enclaves?

25   MR. SHANMUGAM: No.

1   JUSTICE KAGAN: Yeah. And, I mean, I

2   look at this text, and, you know, it's not the

3   clearest statute for either side of the table

4   here, but if I ask myself, like, what does this

5   text really mean, and "mean" back when it was

6   written, not today, given the history in

7   which -- from which it emerged, I mean, the idea

8   that this statute did anything other than

9   analogize to federal enclaves in the entire

10   sense, meaning it's the law that -- in which --

11   in -- in -- in federal enclaves and it's the

12   exclusive law of the federal government, I mean,

13   it just seems to me the more natural reading of

14   the statute in its historical context.

15   MR. SHANMUGAM: I don't agree with

16   that, Justice Kagan, and I don't think that the

17   statute is ambiguous, and I assume that we're

18   talking about the General Crimes Act, and I will

19   come to Public Law 280 in a minute.

20   But I think, with regard to the

21   General Crimes Act, what I would say is what

22   this Court said in In re Wilson. With regard to

23   this phrase, "places within the sole and

24   exclusive jurisdiction of the United States,"

25   what the Court said was that phrase does not

 1   apply to the jurisdiction extended over the

 2   Indian country but is only used in the

 3   description of the laws which are extended --

 4   JUSTICE KAGAN: Yeah, I don't think

 5   I'm really talking about this as a -- as a

 6   matter of parsing the sentence and -- and

 7   applying rules of grammar to it. I think what

 8   I'm talking about is the -- the sense of the

 9   provision is to say -- the only thing the

10   provision does is to analogize to federal

11   enclaves. And then the question becomes, what's

12   the law in federal enclaves? And the law in

13   federal enclaves is exclusive federal law.

14   I mean, it's a kind of bizarre thing

15   that Congress would have done, isn't it, to say,

16   well, we're going to have federal enclave law

17   applying and then we're also going to have state

18   law applying? This is not like federal and

19   state law apply in the State of New York or

20   something, right? Because federal enclave law

21   is essentially law that duplicates the kind of

22   subjects in which state law is concerned. And

23   so you have two bodies of general law operating

24   in the same geographic area.

25   Now that now and that then is -- is

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 1    kind of odd.  And -- and, like, why would we
 2    think that that's what Congress did when it said
 3    in this statute "look to federal enclaves?"
 4              MR. SHANMUGAM:  I -- I don't think
 5    that that's odd, Justice Kagan, either as a
 6    matter of text or as a matter of history.
 7              So, as to the text, our fundamental
 8    submission here is that when you look at the
 9    structure of that sentence in Section 1152, it
10    provides simply that the general laws of the
11    United States as to the punishment of offenses
12    committed within federal enclaves shall extend
13    to the Indian country.
14              And I think that, as a matter of
15    structure and plain language, that suggests that
16    what you're talking about is the substantive
17    criminal laws of an area that is within the sole
18    and exclusive jurisdiction of the United States,
19    federal enclaves.
20              JUSTICE KAGAN:  I -- I mean, I --
21              MR. SHANMUGAM:  But if you don't --
22              JUSTICE KAGAN:  Go ahead.
23              MR. SHANMUGAM:  If you don't agree
24    with me on that, I would point to the history
25    here.  And this goes really to, I think,
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1   Respondent's core argument. Respondent sets

2   great store by the 1834 enactment of the

3   predecessor to the General Crimes Act.

4   But, of course, in 1834, to the extent

5   that -- that Congress was thinking about the

6   principle of territorial separation from

7   Worcester, the first of the cases to which

8   Justice Gorsuch referred, Congress incorporated

9   that in its definition of Indian country, which

10   is, after all, the trigger for what is now the

11   General Crimes Act, by defining Indian country

12   to exclude territory within the borders of

13   states.

14   So Congress didn't have any occasion

15   to think about the preemption question that's

16   presented here. That question was effectively

17   moot because the statute only applied to

18   territories outside state borders. And when you

19   think about our country in 1834, obviously, that

20   was most of the territory west of the

21   Mississippi River for starters.

22   And I would parenthetically note that

23   that is -- that -- that both the text and the

24   history are reasons to distinguish the General

25   Crimes Act from the Major Crimes Act, though I

1   think the right way to think about the Major

2   Crimes Act as a matter of first principles would

3   be to think about it in preemption terms like

4   the way that Justice Gorsuch and I were

5   discussing earlier, and not so much in terms of

6   the text.

7   JUSTICE KAGAN: I mean, I wonder if

8   all of that cuts for you or against you. I kind

9   of think the latter. I mean, here you are in

10   the 1830s coming after Worcester with a -- with

11   a sense of the history of states operating

12   against tribes and tribes needing federal

13   protection. And, you know, to -- to -- to -- as

14   I said, I think that this -- this statute is not

15   grammatically pristine, and Mr. Schauf has an

16   argument and you have an argument.

17   But -- but, given two alternatives,

18   given that history, why we shouldn't read it as

19   essentially saying "go do the same thing in

20   Indian country as you do in federal enclaves,"

21   rather than "go do this completely weird thing

22   where reservations or -- or -- or Indian country

23   is going to have two bodies of general law,

24   including state law of the states that tribes

25   needed protection from the federal government

 1   against," I -- I don't know why you would pick

 2   your version.

 3   MR. SHANMUGAM: Well, my first line

 4   response, Justice Kagan, is that this Court has

 5   already construed this language in Wilson and

 6   again in Donnelly.

 7   JUSTICE KAGAN: Well, I don't know if

 8   you get to talk about precedent, you know,

 9   because you're up here and six times we have

10   said the exact opposite of your position. And

11   you say, well, it's dicta. But it's not normal

12   dicta. It's -- it's in six cases this Court has

13   laid down the jurisdictional rules and has

14   specifically rejected your position.

15   So, you know, in terms of what this

16   Court has said, I'm sorry, but this Court has --

17   has indicated six times that you're wrong.

18   Congress has indicated that you're wrong given

19   its consistent enactment of statutes that make

20   no sense in light of your position, Public Law

21   280 and the state-specific ones. The executive

22   branch has said that you're wrong in all but one

23   decade.

24   You know, you're asking us to do a big

25   lift on the basis of language that, as I say,

 1   seems to me more naturally read against you.

 2   MR. SHANMUGAM: I respectfully

 3   disagree with that, Justice Kagan. And just a

 4   couple of additional points.

 5   I think, with regard to the issue of

 6   dicta, I would say that the -- the statements on

 7   this issue, starting with Williams versus United

 8   States, are, for lack of a better way of putting

 9   it, on the dicta end of the dicta spectrum.

10   You're talking about no more than two sentences

11   in any of those decisions. Those statements

12   were really not essential in any way to the

13   holdings.

14   I would submit that the statements in

15   Wilson and Donnelly were much more to the core

16   of the questions that the Court was considering.

17   We're talking about cases like Solem and Bryant

18   on the other side, where the Court is simply

19   stating the principle that Respondent is

20   advocating in passing on its way to dealing with

21   very discrete questions, such as diminishment of

22   reservations and the validity of the federal

23   recidivist statute that takes tribal convictions

24   into account.

25   So I do think that, with respect,

 1   we're entitled to point to this Court's

 2   precedent, not least because this Court's

 3   precedent involves interpretation of the two

 4   statutes on which Respondent relies.

 5   And with regard to Public Law 280, the

 6   one thing that I wanted to say in response to

 7   Justice Gorsuch, because that is, after all, the

 8   other statute on which the other side relies, is

 9   that when you start to frame the argument in

10   terms of Public Law 280 occupying the field and

11   the like, that starts to feel like a field

12   preemption argument.

13   And I think Respondent almost goes

14   there in his brief because he relies on cases

15   like Virginia Uranium and Hines, but he doesn't

16   use the words "field preemption," and I would

17   submit that that's for good reason, because

18   Public Law 280 would fall -- fall short -- far

19   short of the standard for field preemption, not

20   least because, as this Court indicated in Three

21   Affiliated Tribes, there's no indication in

22   Public Law 280 that Congress intended to oust

23   the states of preexisting jurisdiction.

24   CHIEF JUSTICE ROBERTS: Thank you,

25   counsel. I have just one question.

1   We've heard a lot about McGirt this

2   morning, and I understand your point that it has

3   sort of upped the ante on the question before us

4   today. But is there any way in which the

5   analysis in McGirt affects the point you're

6   trying to make, or is it just kind of a

7   background fact?

8   MR. SHANMUGAM: The practical

9   realities of McGirt are relevant, Mr. Chief

10   Justice, on this question presented primarily if

11   this Court decides to engage in a balancing of

12   interests, because, in weighing the state's

13   interest and the propriety of concurrent

14   jurisdiction, I think it's entirely appropriate

15   for the Court to take into account what is going

16   on in what is now the largest piece of Indian

17   country by area and population in the United

18   States.

19   CHIEF JUSTICE ROBERTS: I mean, in

20   terms of how we analyze the General Crimes Act,

21   how we analyze Worcester against Georgia, the

22   other sort of legal authorities at issue here,

23   McGirt doesn't offer any guidance in that

24   analysis, does it?

25   MR. SHANMUGAM: No, these are

 1   fundamental familiar preemption questions, and

 2   particularly because this case does not

 3   implicate the tribal interest in punishing

 4   tribal offenders, this is really a case that

 5   pits state interests against federal interests.

 6   And just to be clear, what the federal

 7   government is here saying, and my friend,

 8   Mr. Kneedler, will be at the podium shortly to

 9   say this, is that the federal government should

10   have exclusive jurisdiction here.

11   And I guess I'm at a loss as to why

12   the federal government would take that position

13   when federal officials, both in statements to

14   the public but also in statements to Congress,

15   is acknowledging this massive prosecutorial gap,

16   thousands of crimes, however you do the

17   statistics, that are going unprosecuted by the

18   federal government in the State of Oklahoma.

19   CHIEF JUSTICE ROBERTS: Well, I

20   mean -- so, really, at the end of the day, when

21   you're talking about McGirt, you're really just

22   waving -- waving a bloody shirt. It doesn't

23   have any direct pertinence on the legal analysis

24   here.

25   MR. SHANMUGAM: This is an

1   extraordinary situation, I think, unlike any

2   situation in recent history, where what's going

3   on right now in Oklahoma is a giant law

4   enforcement experiment.

5   You have half -- almost half of an

6   American state now, at least as to this category

7   of crimes, under the exclusive criminal

8   jurisdiction of the federal government, and the

9   federal government is failing in that task. And

10   I don't think that the Court should blind itself

11   to that.

12   Now, to be sure, the question that is

13   presented here will affect only by the federal

14   government's own estimation around 20 to 25

15   percent of the crimes affected by this Court's

16   holding in McGirt.

17   And as the Court is well aware, the

18   State of Oklahoma has asked this Court to

19   revisit its earlier decision in McGirt. That's

20   an extraordinary step, but these are

21   extraordinary circumstances.

22   And I would submit that if the Court

23   decides this question presented against the

24   State of Oklahoma, it's only going to exacerbate

25   what is already an extraordinary situation. And

 1   at that point, the Court may want to revisit its

 2   judgment not to reconsider McGirt at this time.

 3   CHIEF JUSTICE ROBERTS: Thank you.

 4   Justice Thomas, anything further?

 5   Justice Breyer?

 6   JUSTICE BREYER: I think tell me if

 7   you have general thoughts on this. I mean, the

 8   sort of philosophical thing that is occurring to

 9   me is that you're sort of winning the game once

10   you -- or not winning it but strengthening your

11   argument once you use this word "preemption."

12   But Indian tribes on Indian land are

13   not states and they are sovereign -- what is it,

14   what's the phrase, sovereign dependent nations?

15   So I don't know quite how that pans out.

16   But the other thing which is more

17   important which I'd love any comments you have

18   on it given your whole experience in many areas

19   of law, can you give me a phrase or a word or a

20   view in your mind of what weight this Court

21   should give to such a fact as virtually

22   unanimous across the country assumption that the

23   law was X?

24   Is it totally irrelevant or is it a

25   little relevant or a lot relevant? How do you

 1   think about that in general?

 2   MR. SHANMUGAM: There are familiar

 3   doctrinal frameworks, Justice Breyer, and --

 4   and, by definition, your experience is --

 5   JUSTICE BREYER: I'm asking for your

 6   --

 7   MR. SHANMUGAM: -- broader than mine,

 8   but --

 9   JUSTICE BREYER: -- view because you

10   have many cases. You have much experience in

11   the area. And -- and I think that's a -- I

12   guess you don't have to answer it, but -- but I

13   would be curious.

14   MR. SHANMUGAM: No, I -- I'm happy to

15   answer it directly. There is a word for it,

16   Justice Breyer, and that word is ordinarily

17   "ratification." In other words, that is the

18   doctrine that this Court ordinarily uses to

19   embed in statutes that might otherwise be silent

20   preexisting understandings from interpretation.

21   But, again, that's another word that

22   you can search Respondent's brief for in vain,

23   and I think that that's for good reason, because

24   if the argument here is ratification --

25   JUSTICE BREYER: No, I'm not

1   interested in ratification --

2   MR. SHANMUGAM: Well, but that is --

3   JUSTICE BREYER: -- because we have

4   cases where the law in many, many areas, even

5   with leaving Congress out of it, we might think,

6   some might think has been X, but it's argued in

7   front of us, no, even though everyone thought it

8   was X, everyone was wrong. It was not X.

9   Now, assuming that's the situation, my

10   same question, what weight do we give to the

11   view that everybody did think it was X --

12   MR. SHANMUGAM: I'm --

13   JUSTICE BREYER: -- or nearly

14   everyone?

15   MR. SHANMUGAM: -- I'm -- I'm happy to

16   confront that directly. So the one thing I

17   think everyone agrees on before this Court is

18   that this is a question of preemption.

19   And I would note that nobody is here

20   arguing that in this context the balancing

21   approach from Bracker or other cases should

22   apply. I think everyone recognizes that this

23   case involves the familiar approach to

24   preemption where you look to whether or not

25   federal law displaces state authority.

 1   Everyone also agrees before this Court

 2   that the only relevant source of federal law is

 3   statutes because, Justice Sotomayor, there's no

 4   argument here that there's any treaty by its

 5   terms that has preemptive effect.

 6   And so then the question becomes what

 7   is there in the statute that preempts, and

 8   there's a statutory interpretation component to

 9   that.

10   Now we would say that the first and

11   last place you look is to the text of the

12   statutes, and everyone agrees that there's

13   nothing on the face of the statutes with the

14   exception of this potential argument with regard

15   to the phrase "sole and exclusive jurisdiction,"

16   that preempts.

17   And if you don't accept that argument,

18   then what you're left arguing is making

19   arguments based on background understandings,

20   and we really have two of those arguments in

21   this case: an argument with regard to the 1834

22   predecessor to the General Crimes Act that it

23   embedded the principle of territorial separation

24   from Worcester, or an argument that the 1948

25   recodification, which after all was just the

 1   recodification in the United States Code without

 2   substantive change, somehow ratified this

 3   Court's interpretation in a single sentence of

 4   text in its dicta in Williams at a time when the

 5   law was unsettled.

 6   That would come nowhere near this

 7   Court's standard for ratification, which is why

 8   I suspect Respondent doesn't affirmatively

 9   invoke that doctrine.

10   And I think, with regard to Worcester

11   and the background understanding, this Court has

12   long retreated, as has Congress, from the

13   hard-line view of territorial separation.

14   And if that were not true, then this

15   Court would have to revisit decisions like

16   McBratney, Draper, and, more recently, Nevada

17   versus Hicks, all of which have given the states

18   broad law enforcement authority in Indian

19   country in the criminal context.

20   And so, with respect, I think what

21   you're really left with on the other side is

22   some sort of mosaic theory. If you take a look

23   at page 28 of the government's brief, the

24   government says, well, there's a pattern of

25   Congressional enactments.

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 1              But, with all due respect, I think

 2      that that's a lot like Justice Gorsuch's steak

 3      rub.  It's not entirely clear exactly what the

 4      government and Respondent is relying on here in

 5      the absence of any --

 6              JUSTICE KAGAN:  But that's

 7      because there's so much.

 8              CHIEF JUSTICE ROBERTS:  Mr. Shanmugam

 9      --

10              MR. SHANMUGAM:  I --

11              CHIEF JUSTICE ROBERTS:  -- if you --

12      continue.

13              MR. SHANMUGAM:  I don't agree with

14      that, Justice Kagan, for the simple reason that

15      when we're talking about Congressional

16      enactments, which, after all, again, is the

17      touchstone because we're talking about a

18      question of preemption, there are really only

19      two options here.  There's either the General

20      Crimes Act itself, or there is Public Law 280

21      and the accompanying state enactments.

22              And I think that Public Law 280 is the

23      harder of the two for the other side for the

24      simple reason that not only has this Court

25      addressed a nearly identical issue in the civil
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1   context in Three Affiliated Tribes, but that is

2   a statute that by its terms only gives states

3   additional jurisdiction, and I think it would be

4   passing strange to construe it as divesting all

5   of the other states of their preexisting

6   jurisdiction.

7   CHIEF JUSTICE ROBERTS: Thank you.

8   Justice Alito, anything further?

9   JUSTICE ALITO: Well, the -- the Chief

10   Justice asked you about the -- the relevance of

11   the Court's reasoning in McGirt, and there have

12   been questions raising the possibility that

13   dispositive weight should be given here to what

14   some people may have assumed was the answer to

15   the question presented in this case.

16   What weight did the Court give in

17   McGirt to what had been assumed for a period of

18   time about the status of the territory in

19   question in that case?

20   MR. SHANMUGAM: Well, I do think that

21   it is slightly ironic that the history of

22   non-prosecution has been cited against the State

23   of Oklahoma when the Court in McGirt didn't

24   attach any weight to the settled understanding

25   for that period of a hundred years about the

1   status of the eastern half of Oklahoma.

2   And just to be clear, I'm not here

3   today to relitigate McGirt. Our submission is

4   simply that the problems created by McGirt are

5   extraordinary, as this Court -- as some members

6   of this Court predicted at the time of McGirt,

7   and as the federal government in its brief in

8   McGirt said was going to be the case with regard

9   to criminal jurisdiction in particular.

10   And, with respect, I do find it

11   slightly astonishing that in its entire brief

12   the government says nothing about the current

13   state of affairs on the ground in Oklahoma in

14   this area in which it has exclusive

15   jurisdiction. Perhaps my friend, Mr. Kneedler,

16   will speak to that today. But, again, it seems

17   to me that that is very relevant context as this

18   Court is deciding the question that's before it.

19   CHIEF JUSTICE ROBERTS: Justice

20   Sotomayor, anything further?

21   Justice Kagan?

22   Justice Gorsuch, anything further?

23   JUSTICE GORSUCH: Just to pick up on

24   Justice Kagan's remark, there is so much. You

25   conceded that the original understanding is

1   consistent -- the language is consistent with an

2   original understanding of the statute, to

3   preempt. The MCA has very similar, different

4   language that does preempt, this Court's held.

5   We have an entire class of contemporaneous

6   statutes, from the Kansas Act to Public Law 280,

7   that are understood only in light of a

8   preemption view. We have six to 10 -- we can

9   argue over how many cases -- saying this. We

10   have all three branches of the federal

11   government contemporaneously understanding it.

12   We have the state's understanding for 30 years.

13   And in -- on the other side of the

14   balance, you're asking us to extend a balancing

15   test from the civil context into the criminal

16   context, which we've never done before.

17   Now I can't think of another statutory

18   case this Court would take up, no matter how

19   much a state might complain about the cost and

20   the expense, and we get those all the time, and

21   reconsider a settled statutory interpretation

22   with that much evidence against you. This Court

23   stood firm in Worcester and -- with respect to

24   the original meaning of the Constitution and the

25   promises made in treaties to the Cherokee in the

 1   1830s. Are we -- are we to wilt today because

 2   of a social media campaign?

 3   MR. SHANMUGAM: No, Justice Gorsuch,

 4   and let me say two additional things.

 5   First of all, with regard to my

 6   purported concession, I was simply making the

 7   point with regard to Public Law 280 that, to the

 8   extent that some members of Congress may have

 9   believed that states lacked the jurisdiction

10   over these -- this category of cases, that our

11   interpretation of the -- the statute can be

12   interpreted consistently with that understanding

13   or not but that there's nothing problematic with

14   construing the statute in the way that we

15   suggest.

16   We're not rendering any of the

17   language superfluous. All we're saying is that

18   Congress reinforced that states that

19   participated in Public Law 280 would have that

20   jurisdiction, a very important thing because, if

21   Congress had not done that, there might have

22   been a negative inference that states in Public

23   Law 280 would lack that jurisdiction, which

24   would have created a jurisdictional gap.

25   We certainly do not think the General

1 -- that the General Crimes Act is ambiguous, and

2 I would refer to my answers to Justice Kagan on

3 that score. We think that this Court has

4 construed that statute and that it is

5 unambiguous.

6 And then, finally, in response to your

7 question with regard to the history, I think

8 what I would say, without simply rehearsing

9 ground that we've already covered in our brief,

10 is that throughout our history there have been

11 countervailing data points on all of the issues

12 to which you referred. We've talked about the

13 district court decision in Cisna that came

14 immediately after Worcester; this Court's

15 decision in Dibble, which conferred jurisdiction

16 on states in Indian country as early as 1859;

17 this Court's decision in Martin, which

18 reinforced the principle of McBratney and Draper

19 right around the same time as this Court started

20 suggesting in dicta that the answer to this

21 question might be Respondent's; opinions from

22 the Attorney General as early as the mid-19th

23 Century.

24 And to the extent that the other side

25 points to the original understanding, there is

1   no doubt in the early years of our history that

2   there was a problem, a problem with incursions

3   by non-Indians on Indian country and a raft of

4   treaties that conferred authority on the federal

5   government.

6   But what you don't have is evidence

7   that the federal government -- that the treaties

8   were thereby ousting the states of jurisdiction.

9   The problem might very well have been

10   nonenforcement, but there is no reason to

11   believe, either from the treaties nationwide or

12   the treaties specific to Oklahoma, that those

13   treaties by their terms ousted the state of

14   jurisdiction.

15   And to the extent that the treaties

16   refer to the jurisdiction or even the absolute

17   jurisdiction of the United States, I would point

18   the Court to its decision in Draper and its

19   decision in Egan that have made clear that those

20   provisions should not be construed as ousting

21   states of any or all jurisdiction. At most,

22   they made clear that title resided in the

23   federal government.

24   CHIEF JUSTICE ROBERTS: Justice

25   Kavanaugh?

1   JUSTICE KAVANAUGH: I understand your

2   argument about the statutory text controlling,

3   which is a very forceful argument. There's also

4   been some discussion of victims and the policy

5   concerns with victims, so I want to focus on

6   that for a second. We're talking about

7   non-Indian-on-Indian crime in Indian country,

8   correct?

9   MR. SHANMUGAM: Yes.

10   JUSTICE KAVANAUGH: Everyone agrees

11   the tribes don't have jurisdiction to prosecute

12   those crimes, correct?

13   MR. SHANMUGAM: Yes, with the very

14   narrow exception of certain domestic violence

15   crimes, where Congress has conferred that

16   authority.

17   JUSTICE KAVANAUGH: Everyone agrees

18   the federal government does have jurisdiction to

19   prosecute those crimes covered by the GCA,

20   correct?

21   MR. SHANMUGAM: Yes.

22   JUSTICE KAVANAUGH: Okay. So the only

23   question here is additional jurisdiction to

24   prosecute those crimes for the states,

25   additional concurrent jurisdiction, correct?

          1   MR. SHANMUGAM: Yes, that is correct,

          2   and we simply do not agree with the submission

          3   of the National Congress, NCAI, that state

          4   jurisdiction affirmatively undermines public

          5   safety. We think quite to the contrary --

          6   JUSTICE KAVANAUGH: Right.

          7   MR. SHANMUGAM: -- that concurrent

          8   jurisdiction --

          9   JUSTICE KAVANAUGH: Because Indian

         10   victims right now are not being protected

         11   because the federal government doesn't have the

         12   resources to prosecute all these crimes. And

         13   this would not be displacing the federal

         14   government. It's additional prosecutors to

         15   protect Indian victims against non-Indians,

         16   correct?

         17   MR. SHANMUGAM: That is correct, and

         18   notwithstanding this frankly cynical effort to

         19   disparage the state's estimates, which are the

         20   state's best good-faith estimates as to the

         21   prosecutorial gap left by McGirt, the federal

         22   government itself recognizes that there is a gap

         23   both in terms of the volume of cases and whole

         24   categories of nonviolent crimes and even less

         25   serious violent crimes that are not being

 1   prosecuted.

 2   JUSTICE KAVANAUGH: And that's not a

 3   reason to read the text differently than it

 4   reads, but my point in bringing that up is that

 5   we also shouldn't think that somehow ruling

 6   against you would -- would -- I don't see how it

 7   would help Indian victims. It's going to hurt

 8   Indian victims.

 9   MR. SHANMUGAM: Well, I think that

10   that's correct, and I do think that that is a

11   reason why this is a much easier case than a

12   case involving Indian defendants because I do

13   think that if you have a case involving Indian

14   defendants, the tribal interest suddenly becomes

15   more significant. And I think, when it comes to

16   non-Indian perpetrators, it's really hard to see

17   why a bright line should be drawn as to state

18   authority between non-Indian victims and Indian

19   victims. The state's authority here is at its

20   broadest because we're talking about the state's

21   police power.

22   The federal government has authority,

23   but it's somewhat narrower because that

24   authority requires a relationship with the tribe

25   in order to implicate the federal government's

 1   enumerated powers.

 2   And I would respectfully submit that

 3   the tribe's authority in this area is at its

 4   narrowest because it is what the tribe has by

 5   means of reserved authority in this context,

 6   which has to implicate the right to

 7   self-governance, or any authority which has been

 8   conferred on the tribes by Congress.

 9   And I would submit that one reason why

10   the tribes may be opposing our position is

11   because the tribes themselves would like for

12   Congress to confer this law enforcement

13   authority on them.

14   CHIEF JUSTICE ROBERTS: Justice

15   Barrett.

16   JUSTICE BARRETT: I want to give you a

17   chance to answer a question that Justice Gorsuch

18   posed to you earlier, which is about the

19   difficulty of discerning whether the

20   perpetrators are Indians or non-Indians.

21   You pointed out the practical

22   difficulties of discerning whether a victim has

23   been an Indian or a non-Indian and the checklist

24   that the Tulsa police have.

25   Could you address Justice Gorsuch's

1   point?

2   MR. SHANMUGAM: Yes. It's basically

3   the same test, Justice Gorsuch, so there's no

4   reason why the test would be any different.

5   And, again, the way that the Oklahoma

6   courts have approached this is to have it be a

7   sort of totality of circumstances test that

8   looks not only at more objective factors, such

9   as enrollment in the tribe and blood quantum,

10   but also the individual's relationship with the

11   tribe and participation in tribal affairs.

12   And there is disagreement in the lower

13   courts on exactly what that test should be for

14   who is an Indian for purposes of criminal

15   jurisdiction. Again, this is the subject of a

16   currently pending cert petition by the State

17   of -- of Oklahoma.

18   And so our submission today is simply

19   that that is not an easy inquiry, and it has

20   immediate on-the-ground consequences because, if

21   you are a police officer arriving on the scene

22   in Tulsa -- and I have talked to the Mayor of

23   Tulsa and the chief of police in Tulsa about

24   this very subject -- those officers have to make

25   a jurisdictional determination.

1   And once they make that jurisdictional

2   determination, if they're making it in the

3   course of an investigation, it may determine who

4   responds to the scene of a crime.

5   JUSTICE BARRETT: They would have to

6   make a jurisdictional determination the other

7   way too when they're identifying the status of

8   the perpetrator.

9   MR. SHANMUGAM: That's right, but it

10   just makes it all the more complicated for them

11   to have to make both of those determinations.

12   But I certainly don't mean to suggest that even

13   if the Court resolves the question presented in

14   our favor, that's going to make it objectively

15   easy for law enforcement.

16   It may make it easier, but these are

17   very difficult questions that often have to be

18   resolved after perpetrators are taken into

19   custody to determine who's going to prosecute.

20   And the fundamental problem with

21   regard to the question presented today is that

22   when cases are referred to the federal

23   government, the federal government simply

24   doesn't have the resources to prosecute.

25   JUSTICE BARRETT: Well, I guess the --

 1   the deeper reason for my question is I'm

 2   wondering whether that jurisdictional inquiry --

 3   I mean, part of your point on the balancing is

 4   that the tribal interests are not implicated

 5   when we're talking about non-Indian perpetrators

 6   and Indian victims in the same way they are for

 7   Indian perpetrators.

 8   And I'm wondering if there's any

 9   possibility for a conflict with those tribal

10   sovereign interests by virtue of the fact that

11   you have to figure out the status of the

12   perpetrator and there might be some dispute

13   about it.

14   MR. SHANMUGAM: I -- I -- I -- I

15   suppose that one could make that argument,

16   namely, that tribes should have some degree of

17   ability to define who are their members. They

18   do that, obviously, to some extent through the

19   enrollment process.

20   I think our submission is that if this

21   Court, rather than using the traditional

22   preemption framework, resorts to balancing, that

23   the unquestioned concern the tribes have about

24   protecting tribal victims shouldn't really tilt

25   the balance in a particular direction on the

1   question presented because, of course, it goes

2   without saying that the State of Oklahoma has

3   the same interest in protecting its own

4   citizens, which include tribal citizens.

5   JUSTICE BARRETT: I -- I'm talking

6   about the tribe's interest in not having the

7   State of Oklahoma prosecute members of the tribe

8   and the difficulty of figuring out the status of

9   the perpetrator. Does that come into account if

10   we look to balancing?

11   MR. SHANMUGAM: Yeah, I -- I mean,

12   I -- I take the point, Justice Barrett, which is

13   that in some sense, whenever the state is making

14   that determination, it is obviously of interest

15   to the tribes how the state makes that

16   determination. But, you know, I think that the

17   state in good faith attempts to make that

18   determination taking into account enrollment in

19   the tribe as one of the factors.

20   JUSTICE BARRETT: And I -- I want to

21   follow up on a point that Justice Sotomayor

22   made. She was pointing out that Public Law

23   280 -- well, that -- that the -- if we rule in

24   your favor, it might mean that states are

25   assuming responsibilities that they didn't sign

 1   up for because they didn't opt into Public Law

 2   280 in the days before tribal consent was

 3   required.

 4   Is there any relationship between

 5   states that chose to opt in and population

 6   density or size of tribal land within those

 7   states, do you happen to know?

 8   MR. SHANMUGAM: I think it's, frankly,

 9   a little bit hard to sort of detect a pattern,

10   and it's complicated by the fact that in many of

11   the states that have opted in, because there

12   were issues with the way in which the states did

13   so, there are some states that simply don't

14   exercise that authority. There are at least a

15   couple of states that have retroceded that

16   authority.

17   But I think my fundamental point would

18   be that opting into Public Law 280 is a major

19   assumption of jurisdiction because, again, the

20   criminal jurisdiction and the civil

21   jurisdiction, with the caveat of the Cabazon

22   Band limitation, is plenary. It covers criminal

23   cases where the offenders were Indians as well

24   as cases where the victims were Indians, and, of

25   course, the grant of civil jurisdiction covers

1 any civil action between Indians or to which

2 Indians are parties.

3   So it's a major step for a state to do

4 so, and at least since tribal consent was

5 required, there are no states that have been

6 able to do so, and I think it's a fair inference

7 that Oklahoma would be unable to do so in light

8 of the position of the tribes today.

9   JUSTICE BARRETT: Thank you.

10   CHIEF JUSTICE ROBERTS: Justice Alito?

11   JUSTICE ALITO: In a case where the

12 accused claims to be an Indian, I assume that

13 the accused is in a position to explain why he

14 or she believes that that is the appropriate

15 categorization.

16   But what happens in the case where the

17 accused is indisputably not a victim and the --

18 I'm sorry, indisputably not an Indian and the

19 victim says, I don't consider myself to be an

20 Indian? What happens there?

21   MR. SHANMUGAM: I think that a court

22 would still have to apply the totality of the

23 circumstances test and to take into account

24 enrollment and blood quantum and any other

25 relevant factors. And so I don't think that the

1   victim's wishes would be dispositive of what is,

2   after all, a jurisdictional question.

3   And the other thing I would note is

4   that, you know, there are victimless crimes.

5   And when there are victimless crimes, it has

6   long been the view of the lower courts that

7   where the perpetrator is a non-Indian, the state

8   would have jurisdiction.

9   I think it is fair to say, as the OLC

10   opinions from the 1970s made clear, that the

11   line between crimes with a victim and victimless

12   crimes is itself a fuzzy one.

13   JUSTICE ALITO: What -- what happens

14   when the crime is the -- a conspiracy involving

15   Indians and non-Indians?

16   MR. SHANMUGAM: I -- I -- that's a --

17   that's a good question to which I actually don't

18   know the answer.

19   CHIEF JUSTICE ROBERTS: Thank you,

20   counsel.

21   Mr. Schauf.

22   ORAL ARGUMENT OF ZACHARY C. SCHAUF

23   ON BEHALF OF THE RESPONDENT

24   MR. SCHAUF: Thank you, Mr. Chief

25   Justice, and may it please the Court:

           1   Oklahoma lacks jurisdiction because

           2   Congress exercised its exclusive power over

           3   Indian affairs to provide for exclusively

           4   federal jurisdiction. That conclusion follows

           5   from statutory text, context, and structure.

           6   The General Crimes Act applies to

           7   Indian country, where federal statutes

           8   presumptively exclude state laws, and it imports

           9   the law of federal enclaves, where, likewise,

          10   states may prosecute only with Congress's

          11   approval.

          12   The resulting jurisdiction is

          13   exclusive, and one way we know that is that John

          14   and Negonsott held as much as the parallel text

          15   under the Major Crimes Act. And that conclusion

          16   would have been especially obvious to the

          17   Congresses that enacted and reenacted the

          18   General Crimes Act.

          19   First, Congress in 1834 acted to

          20   implement treaties covenanting that tribes would

          21   be under the protection of the federal

          22   government and "no other sovereign."

          23   Second, Congress legislated against

          24   the backdrop of Worcester and its holding that

          25   Congress -- when Congress has regulated

         1   relations with Indian -- Indian tribes, states

         2   can't. It could never have fathomed a more

         3   express statement would be required to keep its

         4   promises.

         5   Third, this Court has recognized a

         6   single basis for state criminal jurisdiction in

         7   Indian country in McBratney and Draper. And

         8   Donnelly held that those cases do not apply to

         9   crimes by or against Indians. That means

        10   federal jurisdiction is exclusive, as this Court

        11   has affirmed somewhere between six and 10 times.

        12   Fourth, Congress in 1948 embedded in

        13   law -- embedded that -- that law in statute

        14   when, in the wake of Donnelly and Williams, it

        15   reenacted the General Crimes Act while

        16   conferring on some states jurisdiction over

        17   crimes by or against Indians. You don't confer

        18   jurisdiction that already exists. And the only

        19   way to read all relevant text in harmony is

        20   ours.

        21   More than that, Congress built on that

        22   structure through Public Law 280 and many

        23   similar statutes. And now Oklahoma's position

        24   would thwart the choice of 25 states not to

        25   assume its jurisdiction and nullify consent

1   rights of, by my count, 190 Indian tribes and

2   for no sound reason.

3   Indeed, Washington State used Public

4   Law 280 to obtain exactly the jurisdiction at

5   issue here. And Oklahoma could do so too by

6   obtaining signatures from 20 percent of enrolled

7   tribal members and winning an election.

8   I welcome the Court's questions.

9   JUSTICE THOMAS: Counsel, just to go

10   back to the beginning of your argument, you said

11   that the -- I think you did -- you said that the

12   federal government had plenary authority in this

13   area. And we've said it too. What's the source

14   of that?

15   MR. SCHAUF: So I think this Court has

16   said that it arises from the Indian Commerce

17   Clause, the Treaty Clause, pre-constitutional

18   powers, war powers. But I agree that it was

19   quite subtle.

20   And, you know, for our purposes, I

21   think the -- the important point is that when

22   Congress acted in 1834, it did so against the

23   backdrop of Worcester, which interpreted the

24   federal government's powers in this area to be

25   exclusive when exercised. So, when Congress had

1   regulated intercourse with Indians, that meant

2   states could not. And, you know, that really

3   has been carried forward, I think, to the

4   present. Obviously, you know, a bunch changed

5   in the late 19th Century with Indian country

6   coming within states.

7   But I think the important point is

8   we're not writing on a blank slate here. This

9   Court addressed that issue in McBratney and

10   Draper and Donnelly, and the sort of sum total

11   of the holding of those cases is that the only

12   basis for state criminal jurisdiction in Indian

13   country doesn't apply to cases like this one.

14   And then, in 1940 and on, Congress

15   created the entire modern statutory scheme

16   against the backdrop of that understanding. So

17   the Kansas Act, for example, in 1940 understood

18   the law the same way we do, conferred

19   jurisdiction on states over crimes by or against

20   Indians because it regarded that as necessary.

21   Then this Court in the Williams case

22   sort of put a cherry on top and said, yeah, we

23   read things the same way. States lack

24   jurisdiction unless --

25   JUSTICE THOMAS: Well, yeah, I think

 1   you've answered my question. I don't want to

 2   interrupt you, but I don't want to take up all

 3   your time.

 4   One other question. Would you take a

 5   minute or so to elaborate on your preemption

 6   argument? And my difficulty is that we -- when

 7   we normally have a preemption case, there is a

 8   conflict of some sort that you cannot regulate,

 9   for example, a drug the same -- by two different

10   -- in two different governments when they are in

11   conflict with each other, the regulations.

12   But, here, we're talking about

13   concurrent authority. And you can look at our

14   dual sovereignty double jeopardy cases and see

15   that there's not necessarily a conflict. There

16   may be an overlap or an overlay.

17   But -- so, with that in mind, I would

18   just like you to sort of tease out your

19   preemption argument focusing on this concurrent

20   jurisdiction as opposed to conflict.

21   MR. SCHAUF: Sure, Justice Thomas.

22   So, first, we think the text of this statute is

23   best read to provide that state law shall not

24   apply as to these criminal issues, though I do

25   want to take issue with my friend on the other

 1   side's premise that what we're doing here is

 2   just familiar principles of preemption.

 3   What this Court said in Mescalero

 4   Apache is exactly the opposite. Those familiar

 5   principles don't apply, and it's because we are

 6   in Indian country, which is the -- the sort of

 7   quintessential locus where federal law applies

 8   and state doesn't -- and state law doesn't.

 9   But, on the conflict point, I think

10   the conflict would have been patent in 1834.

11   So, you know, this is a statute, as we read it,

12   that ensures peace on the frontiers, and it does

13   so by centralizing redress in the federal

14   government.

15   So, if you imagine a state prosecution

16   that goes first in the early 19th Century and,

17   you know, they do a bad job, they don't give an

18   adequate sentence, then, you know, what the

19   other side is sort of relying on is that they

20   can -- that the federal government is going to

21   be able to explain to the Indian tribes, "you

22   know, we know that this was not a good trial,

23   but, you know, trust us. We're going to come in

24   after. We're going to fix it. Yes, you know,

25   at this point, the dual sovereignty doctrine, as

1   this Court noted in Gamble, is unsettled, but we

2   hope that this is all going to work out."

3   And, you know, those just aren't the

4   kind of chances you take on matters of war and

5   peace. But, you know, I think maybe even the

6   more fundamental point is it would have never

7   occurred to Congress in this era that states

8   would be the one to protect Indians from crimes.

9   I mean, after all, as this Court said

10   in the Kagama case, Indian -- states at this

11   point were Indians' deadliest enemies, and I

12   don't think you put, you know, the fox in charge

13   of the hen house even if the fox only has

14   concurrent jurisdiction.

15   And, you know, I think there are other

16   ways too that states could use this authority to

17   really thwart tribal interests. You could, say,

18   for example, criminalize intercourse by

19   non-Indians with Indians and say that's a crime

20   against the Indian, which could be -- basically

21   get you the same regime this Court invalidated

22   in Worcester. And I actually think the same

23   thing is true today. So you can look at the

24   issue in the Williams versus United States case.

25   JUSTICE THOMAS: Well, let's look at

1   the -- let's look at the issue here with the fox

2   and the chicken house. Actually, I think it's

3   the hen house. But the -- let's look at that

4   here. What did the defendant here get for the

5   child abuse in the state case? What was the

6   sentence?

7   MR. SCHAUF: So he received a 35-year

8   sentence in --

9   JUSTICE THOMAS: And -- and what was

10   the reduced -- what was the sentence after

11   McGirt?

12   MR. SCHAUF: It was -- the federal

13   sentence -- his sentence has not been imposed,

14   but what the plea agreement provides for is

15   seven years.

16   JUSTICE THOMAS: Okay. So --

17   MR. SCHAUF: The key difference --

18   JUSTICE THOMAS: -- the -- you can't

19   make that fox in the -- in the chicken house or

20   hen house argument there. So I understand your

21   point about -- your 19th Century point, but

22   we're looking at today, and what I'm really

23   interested in is this conflict for -- because

24   you're making a sort of a preemption argument,

25   and I don't know if you -- if it's a good

 1   argument or an answer -- good answer to keep

 2   resorting to the 1830s or 1840s and not be able

 3   to show the conflict that we have today. Maybe

 4   it is. Maybe for some of my colleagues it is.

 5   But I'd like you to tease out again,

 6   what is the conflict if you're making a

 7   preemption argument? If you're not making it,

 8   then you can say that.

 9   MR. SCHAUF: Sure. So I just want to

10   footnote that actually our primary argument is

11   that the text here ousts states from

12   jurisdiction, and so, you know, that is the end

13   of the story, particularly under the preemption

14   standard that applies in this Court's Indian

15   cases.

16   But, on the conflict, let me -- let me

17   sort of take another run at it. I think there

18   are two. So one is just making law enforcement

19   worse based on diminished accountability. You

20   can see this from the brief of the former U.S.

21   Attorneys submitted in this case. These were

22   the U.S. Attorneys for many Indian country

23   areas, and what they say is that when you have

24   concurrent jurisdiction, you can create a "pass

25   the buck" dynamic that makes law enforcement

1   worse. And, indeed, we know, you know, this is

2   the view of the tribes in this case.

3   And the second point, and this is

4   where I was going with this Court's decision in

5   Williams, is you can have states prosecute in a

6   manner -- in a manner that isn't consistent with

7   tribal interests. So, in that case, the issue

8   was, what is the age of consent? Is it 16 or is

9   it 18? You can have -- you could have a

10   circumstance where, for example, you have the

11   intimate partner of a tribal member who goes to

12   prison under a state prosecution when the

13   federal law or the tribal law would allow that

14   person to remain in the community, maybe raise

15   their child.

16   And the reason why, you know, these

17   issues have never arisen is because the rule

18   that we're advocating has been the law since,

19   you know, 1940 at least and, you know, I think

20   probably far earlier than that.

21   So I guess the place I would go back

22   to is the statutes that Congress has enacted

23   that really do embed this understanding in their

24   text --

25   JUSTICE KAVANAUGH: But you're here --

1   MR. SCHAUF: -- in dialogue.

2   JUSTICE KAVANAUGH: I'm sorry. Go

3 ahead.

4   MR. SCHAUF: No. Please.

5   JUSTICE KAVANAUGH: You're here

6 representing a non-Indian criminal defendant,

7 correct?

8   MR. SCHAUF: That's -- that's correct.

9   JUSTICE KAVANAUGH: And the victim,

10 the five-year-old, was an Indian, correct?

11   MR. SCHAUF: That's correct.

12   JUSTICE KAVANAUGH: We don't have --

13   MR. SCHAUF: She was an enrolled

14 member of the Eastern Band --

15   JUSTICE KAVANAUGH: -- we don't have

16 anyone here representing her, but how are her

17 interests served by not having concurrent

18 authority to prosecute your client for the child

19 abuse that was inflicted on her if we're going

20 to look at the interests of Indian victims?

21   MR. SCHAUF: Sure. So I want to make

22 a point about this case and then -- then a sort

23 of broader point.

24   So, on this case, one thing we know

25 from the plea agreement is that the victim's

 1   family consented to the federal sentence that

 2   was imposed in this case. And the reason, I

 3   would hazard, or something that has a lot to do

 4   with that is that when we talk about the 35-year

 5   Oklahoma sentence, you can get parole in

 6   Oklahoma after, you know, 33 percent of the

 7   time. In the federal system, no parole or

 8   you've got to serve 85 percent.

 9   And my client also agreed to not

10   contest removal proceedings thereafter. So

11   that's a pretty significant interest. And --

12   JUSTICE KAVANAUGH: But, from the

13   perspective not of non-Indian criminal

14   defendants, which you're representing one of

15   and representing well, from the perspective of

16   Indian victims, I guess I'm not sure how Indian

17   victims can be harmed by having more

18   prosecutorial authority to fill a gap in

19   Oklahoma where crimes are not being prosecuted

20   against Indian victims, at least now.

21   Now maybe someday the federal

22   government will get the resources to do the job,

23   but even then, the state resources would be

24   additional protection for Indian victims. So

25   I'm not understanding the -- the -- the argument

 1   that somehow Indian victims would be benefitted

 2   by ruling for you.

 3   MR. SCHAUF: So I think the key point

 4   I would make is that Congress has created a

 5   process for those Indian interests to be

 6   protected and it's done that in Public Law 280.

 7   And I want to be specific about how it works

 8   because I think it's important.

 9   So the optional assumptions under

10   Public Law 280 are assumptions of concurrent

11   jurisdiction, just like we're talking about

12   here. They can be completely bespoke. So, if

13   you just want to get jurisdiction over crimes

14   against Indians, you can do that.

15   And the tribes themselves actually

16   can't -- they don't have a right to veto -- or

17   at least the tribal governments don't have a

18   right to veto those assumptions. What you can

19   see -- and this is 25 U.S.C. 1326 -- is you have

20   a special election that can be called with the

21   consent of 20 percent of enrolled tribal

22   members, and that can be in any given area, so

23   Tulsa County, for example.

24   And then, if a majority vote in that

25   special election favors the assumption of

1   jurisdiction, then it can go forward. And so,

2   you know, if people in Tulsa believe what my

3   friend on the other side says about what is

4   going to be the best thing to protect them from

5   crime, then, you know, they can have it and the

6   tribal governments actually can't stop that

7   because that's, you know, the system that

8   Congress created in order to balance the tribal

9   and federal and state interests in this area.

10   JUSTICE SOTOMAYOR: Am I understanding

11   you correctly that each tribe -- that each

12   tribe, 20 percent of their members, presumably,

13   20 percent being whoever is potential victims,

14   could choose concurrent jurisdiction?

15   MR. SCHAUF: So the way I read the

16   statute is that it's actually the enrolled

17   tribal members in a particular geographic area,

18   and I -- I don't think the statute is completely

19   clear on, you know, how you would figure out the

20   exact denominator. But it is available for

21   Oklahoma, as it's been available for, you know,

22   any other state.

23   And, you know, my friend said there

24   have been no assumptions under Public Law 280,

25   but -- or at least once the 1968 provision made

 1   tribal consent required.

 2   But there were a number of assumptions

 3   before then, at least 12 by my count in Montana

 4   and Washington, where the tribes affirmatively

 5   said, we consent to this jurisdiction. And so

 6   this is not something, I think, that's

 7   unobtainable.

 8   And I think the more important point

 9   is that it is something that Congress has taken

10   into account in this statutory scheme. And, you

11   know, it -- it is a scheme --

12   JUSTICE SOTOMAYOR: I think you

13   started to answer a question, and I'd like you

14   to expand on it.

15   There's an assumption in Justice

16   Kavanaugh's question that Indian victims can

17   only be helped by concurrent jurisdiction. Is

18   that assumption correct, that there's additional

19   resources to protect them against crimes?

20   That's the bottom line of his question. And is

21   that -- do you agree with that assumption?

22   MR. SCHAUF: No, I -- I don't think

23   that's right. I mean, I think, in particular,

24   as a practical matter, you know, the upshot of

25   Oklahoma's position here is, you know, they're

1   saying that if you adopt their position, then

2   you can go back to more like what the situation

3   was before McGirt, where, basically, the federal

4   government wasn't involved in, you know, these

5   sorts of cases involving Indians.

6   And that, I think, is profoundly

7   contrary to the -- the bargain, the agreement

8   that Indian tribes made with the United States

9   where the United States said "we are going to be

10   your protector and make sure that you are taken

11   care of."

12   Now it is true that as a formal

13   matter, as the law stands today, you can have,

14   you know, concurrent federal prosecutions, but,

15   as a practical matter, the entire upshot of my

16   friend on the other side's position is that the

17   federal government can go back and wash its

18   hands of these sorts of offenses and, you know,

19   not invest the resources.

20   And, you know, our fundamental

21   position is that the federal government actually

22   has an obligation to invest those resources to

23   make sure this is being done right unless and

24   until either Congress passes a statute or tribal

25   citizens decide under Public Law 280 that they

 1   would like a different system to help protect

 2   themselves from crime.

 3   JUSTICE BARRETT: Well, if --

 4   CHIEF JUSTICE ROBERTS: Counsel, if I

 5   could just -- I don't think we've gotten to the

 6   critical language in the statute yet, and, of

 7   course, in the General Crimes Act, this is what

 8   the language says: "Except as otherwise

 9   provided by law, the general laws of the United

10   States as to the punishment of offenses

11   committed in any place within the sole and

12   exclusive jurisdiction of the United States,

13   except D.C., shall extend to the Indian

14   country."

15   Now, as I read that, that's taking a

16   body of law, the laws that apply in places

17   within the sole and exclusive jurisdiction, and

18   say that that extends to Indian country.

19   Now where do you get any notion of the

20   preemption of state jurisdiction in that?

21   MR. SCHAUF: So I -- I think the Major

22   Crimes Act says much the same thing, which this

23   Court has held is preemptive. And I think

24   that's for good reason. And it's because when

25   --

1   CHIEF JUSTICE ROBERTS: Where -- where

2 do you get it in the language of that statute,

3 not in what the Court may have said about the

4 Major Crimes Act?

5   MR. SCHAUF: Sure, Mr. Chief Justice.

6   So I think the answer is that when you

7 extend the general laws of the United States as

8 to crimes, that is a reference to the enclave

9 laws. And one of the background principles in

10 federal enclaves is that states can prosecute

11 only if Congress expressly allows it.

12   So I think, you know --

13   CHIEF JUSTICE ROBERTS: Well, okay,

14 but you're -- in other words, you're saying that

15 a background principle.

16   They're -- they're taking a particular

17 reference point, right, the general laws that

18 apply in this particular area, and doesn't say

19 that all of the legal issues or jurisdictional

20 questions in enclaves apply in Indian country,

21 which they could have easily said. They simply

22 say that body of general laws applies.

23   MR. SCHAUF: Well, so, you know, we

24 think that when you take the principle from the

25 sort of soil of federal enclaves, it brings with

 1   it this idea of federal exclusivity,

 2   particularly when you look at the body of law

 3   that's being applied. You know, this is the

 4   general federal laws plus the Assimilative

 5   Crimes Act. It is designed to replace the --

 6   CHIEF JUSTICE ROBERTS: Okay. So it's

 7   the soil that comes, it's not the language

 8   itself?

 9   MR. SCHAUF: Well, so I -- I think

10   it's -- it's the language that brings the soil

11   with it, but it's also not only the language of

12   this statute because, remember, we have -- you

13   know, just imagine you're sitting there and it's

14   June 25, 1948. Congress is reenacting the

15   General Crimes Act, this language. And at the

16   same time, it's --

17   CHIEF JUSTICE ROBERTS: Well, but

18   that's just the general -- general codification,

19   right? I mean, we've said over and over again

20   that we shouldn't draw any inferences from the

21   recodification in 1948, which is all the -- all

22   the provisions in the U.S. Code, right?

23   MR. SCHAUF: So, as to Indian country

24   criminal jurisdiction, this is the very opposite

25   of a general codification. So the -- the term

1   that governs the General Crimes Act's geographic

2   scope is Indian country.

3   And in 1948, Congress codifies that

4   definition in 1151, immediately prior section,

5   for the first time since 1934. It does so

6   expressly recognizing that Indian country is

7   going to include land within states.

8   It looks at this Court's cases in

9   doing that, including -- and you can see this in

10   the revisor's notes -- this Court's decision in

11   Donnelly, which says that the single basis for

12   state criminal jurisdiction in Indian country,

13   McBratney and Draper, does not apply to cases

14   like this one.

15   And then, simultaneously, you have the

16   reauthorization of the Kansas Act saying we are

17   going to give just Kansas, and then also Iowa

18   and New York around a week later, jurisdiction

19   over crimes by or against Indians.

20   JUSTICE BREYER: That's Congress's

21   intent. Now I thought -- I had the same

22   question. And -- and I thought, but I -- don't

23   make me -- don't just agree with this if --

24   if -- if -- if I'm wrong -- that the federal

25   enclaves are -- are exclusive of state

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 1    prosecutorial powers.  The state can't prosecute

 2    crimes in federal enclaves.

 3            Why not?  Well, it was constitutional

 4    in origin, I think so, and those constitutional

 5    principles about federal enclaves as applied

 6    were prosecutions in federal enclaves are

 7    federal, period, not state.  And that was the

 8    principle based on a constitutional reference

 9    which meant the words "general laws" pick up

10    that jurisdictional principle.

11            Am I right or wrong?

12            MR. SCHAUF:  I -- I think you are

13    right, Justice Breyer, and I think it's

14    particularly significant that you are taking

15    those principles and you are applying them to

16    Indian country, which is another area which

17    historically and presumptively is one where

18    federal law is preeminent and state law gives

19    way particularly easily.

20            You know, as this Court emphasized in

21    Williams versus Lee, the basic policy of

22    Worcester endures.

23            JUSTICE BREYER:  Are you raising --

24            CHIEF JUSTICE ROBERTS:  Well, I think

25    --
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 1   JUSTICE BREYER: Yeah. Go ahead.

 2   CHIEF JUSTICE ROBERTS: No, I was just

 3   going to say, I hesitate to say it, but I think

 4   you may be wrong in -- in that they could have

 5   said that the exclusive jurisdiction extends to

 6   Indian country, and that would have been a

 7   pretty big deal. Instead, they say these laws

 8   extend to Indian country. Pretty much.

 9   JUSTICE BREYER: Yeah, you know,

10   that's right, that's the other way to read it.

11   The other way to read it is general laws mean

12   substantive laws. And that's -- or your way to

13   read it would be it includes principles, at

14   least those derived from the Constitution.

15   Have I got it right? Is that right?

16   CHIEF JUSTICE ROBERTS: Yeah.

17   JUSTICE BREYER: All right.

18   MR. SCHAUF: So I -- I do think those

19   are the two readings that are on the table. I

20   think one reason to pick ours is that it's the

21   only one that is consistent with 82 years of

22   statutes Congress has enacted using the phrase

23   "by or against Indians." And I think it's

24   significant that it's really done that in

25   dialogue with this Court's cases.

1   So two years after this Court in

2   Williams says, you know, what Donnelly means is

3   no state jurisdiction, you have the reenactment

4   of the General Crimes Act and the -- you know,

5   these several state-specific statutes. Then you

6   get Public Law 280 a few years later. In 1958,

7   Williams versus Lee reaffirms the rule here is

8   exclusive federal jurisdiction.

9   And then, in 1968, Congress amends

10 Public Law 280 based on all that, and -- and it

11 does a couple of significant things. So, number

12 one, it creates this tribal consent right. That

13 consent right, as a matter of text, applies to

14 assumptions of jurisdiction over crimes by or

15 against Indians. My friend's position would

16 read that text out of what Congress provided in

17 1968, which was a hard-won victory that tribes

18 earned. And our fundamental submission is that

19 if Oklahoma wants to do that, then it needs to

20 do what the tribes did and go back to Congress.

21   And it also allowed states to

22 retrocede, again, that specific jurisdiction,

23 crimes against Indians. And many, many states

24 have decided to do so. And they would nullify

25 that choice as well.

1   CHIEF JUSTICE ROBERTS: You -- you

2   rely heavily on Worcester against Georgia. What

3   do you do -- I think it was Frankfurter, his

4   language in Village of Kake, that "the general

5   notion" -- I'm quoting -- "drawn from Chief

6   Justice Marshall's opinion in Worcester that an

7   Indian reservation is a distinct nation within

8   whose boundaries state law cannot penetrate

9   yielded to closer analysis when confronted in

10   the course of subsequent developments with

11   diverse concrete situations."

12   I mean, I understand that if Worcester

13   against Georgia were the law that we were

14   dealing with today, that I think your friend's

15   argument on the other side to try to change the

16   parameters of the argument to a strict

17   preemption analysis might be pretty difficult.

18   But, I mean, is Frankfurter wrong?

19   MR. SCHAUF: So I think there are

20   three answers --

21   CHIEF JUSTICE ROBERTS: We might be

22   too.

23   MR. SCHAUF: -- three answers to that,

24   Mr. Chief Justice.

25   Number one, in 1834, Congress's

 1   backdrop was Worcester, so that was the

 2   understanding that Congress had when it enacted

 3   the, you know, forerunner to the General Crimes

 4   Act.

 5   Second, you know, those same cases

 6   like Williams versus Lee that say we have

 7   departed in some respects from Worcester

 8   emphasized that the rule in this case is that

 9   state courts lack jurisdiction.

10   And, third, I don't think we have to

11   guess about sort of how to translate, you know,

12   Worcester into, you know, an era where you have

13   reservations existing within state boundaries

14   because we have everything that happened in

15   1940, 1948, and thereafter, where you see

16   Congress itself grappling with what should be

17   the rule against the backdrop of this Court's

18   cases saying, you know, we have recognized this

19   one ground for state criminal jurisdiction in

20   Indian country and it doesn't apply to crimes by

21   or against Indians.

22   So I think the core point is that as

23   the -- as to the question presented here, you

24   know, this is something that Congress really has

25   resolved.

1   CHIEF JUSTICE ROBERTS: Justice

2   Thomas?

3   Justice Breyer, anything further?

4   Justice Alito?

5   JUSTICE ALITO: You said that the

6   regular rules of preemption do not apply in a

7   case like this. What is your test for

8   preemption in a situation like this?

9   MR. SCHAUF: So I -- I think the --

10   the easy way to approach this is what this Court

11   said in John and Negonsott was sufficient under

12   the Major Crimes Act, is that the Major Crimes

13   Act uses the word "exclusive" and so sort of

14   assimilates Indian country to federal enclaves.

15   And it was passed on the understanding that that

16   federal jurisdiction would be exclusive.

17   And I think that is consistent with

18   the general approach to preemption in Indian

19   country, where -- you know, what this Court has

20   said is that Worcester remains the starting

21   point and it's departed only when there is no

22   governing statute.

23   And so, here, where you've got a

24   governing statute --

25   JUSTICE ALITO: Well -- well, that

 1   seems to me to be an argument about the

 2   interpretation of the General Crimes Act rather

 3   than an argument about the applicable test for

 4   preemption.

 5   What if I thought that the language of

 6   the General Crimes Act is quite clear and that

 7   it means that the law that applies in federal

 8   enclaves applies in Indian country and goes no

 9   further than that? Is that the end of the case?

10   MR. SCHAUF: No. I mean, I think,

11   again, you know, what this Court has said

12   in Mescalero Apache -- what I hear, you know,

13   your question to be saying, Justice Alito, is

14   that there is no express statement of

15   preemption. And what this Court has said in

16   Mescalero Apache is that you do not need an

17   express statement of preemption. And, you know,

18   if you --

19   JUSTICE ALITO: Yeah, and that's my

20   question.

21   MR. SCHAUF: -- if you want a test, I

22   think --

23   JUSTICE ALITO: I mean, that's my

24   question. What more -- what do you need more?

25   What -- what do you need in this situation that

 1   is insufficient, would be insufficient in an

 2   ordinary preemption case?

 3   MR. SCHAUF: So, you know, I think

 4   what -- really, what this Court has said is that

 5   it is a more lenient standard. And so, when you

 6   have text that I think we can all agree contains

 7   some indicia of federal jurisdiction, then, you

 8   know, that really is it, and the state must show

 9   an affirmative authorization to --

10   JUSTICE ALITO: You mean that the

11   language has to be ambiguous? It has to be

12   possible to read the language to mean something

13   different?

14   MR. SCHAUF: So I actually think this

15   Court's --

16   JUSTICE ALITO: Is that enough?

17   MR. SCHAUF: -- this Court's cases

18   have gone much further than that. It has found

19   preemption under the Indian country preemption

20   standard even where there is no preemptive

21   language at all. You can look at cases like

22   Warren Trading or Central Machine. These are

23   cases about the Indian trader statutes. And the

24   only text at issue in those statutes were --

25   were provisions that, for example, let the

1   federal government prohibit entirely commerce

2   with Indians.

3   So I think we have a much easier case

4   because we have a statute that directly

5   addresses this question and does so while saying

6   "treat Indian country like federal enclaves"

7   where federal jurisdiction is sole and

8   exclusive. And, you know, we think it goes much

9   further than that, but I think that is enough

10   under this Court's preemption cases in Indian

11   country.

12   CHIEF JUSTICE ROBERTS: Justice

13   Sotomayor?

14   Justice Kagan?

15   Justice Gorsuch?

16   JUSTICE GORSUCH: Do you think the

17   preemption analysis is affected by treaty

18   promises?

19   MR. SCHAUF: I do think the preemption

20   analysis is affected by treaty promises. And,

21   you know, one other place you could start this

22   case is the treaty promise to the Cherokee

23   Nation that it would be under the protection of

24   the federal government and no other sovereign

25   whatsoever. You could add the promise that the

 1 federal government is going to be the one to

 2 protect Indians from crimes by non-Indians. And

 3 you could take the promise that Cherokee lands

 4 would not be included within state jurisdiction

 5 without Cherokee consent.

 6   And I think, when you put that set of

 7 treaty promises together, the only understanding

 8 you can have is that they expected the federal

 9 government alone to prosecute these types of

10 crimes. And so, if you've got an available

11 reading of the statute that vindicates rather

12 than breaks those treaty promises, I think you

13 take that reading of the statute.

14   CHIEF JUSTICE ROBERTS: Justice

15 Kavanaugh?

16   Justice Barrett?

17   JUSTICE BARRETT: I want to give you a

18 chance to respond to this argument with respect

19 to the General Crimes Act and the Major Crimes

20 Act and the potential similarities or

21 differences between the two.

22   So you say that the language is quite

23 similar, and I agree they both use the phrase

24 "exclusive jurisdiction." But I'm wondering if

25 the language actually cuts against your argument

1   in this way: So your friend on the other side

2   says that this is taking one body of law and

3   extending it to Indian country in the General

4   Crimes Act.

5   The Major Crimes Act is phrased

6   differently, so it doesn't use this language of

7   "extend." It says an Indian who commits certain

8   crimes against another Indian "shall be subject

9   to the same law and penalties as all other

10   persons committing any of the above offenses

11   within the exclusive jurisdiction of the United

12   States."

13   Well, a person who commits any of

14   those offenses within the exclusive jurisdiction

15   of the United States is subject to only one law,

16   and it's the law of the United States. I think

17   that phrasing is quite different when you set it

18   in contrast to the General Crimes Act. So I

19   wondered what your reaction is to that.

20   MR. SCHAUF: So I think the first

21   answer is that those nuances have nothing to do

22   with why this Court said in John and Negonsott

23   that the Major Crimes Act was preemptive, which

24   really was just about, you know, the comparison

25   between Indian country and exclusive -- you

 1 know, areas of exclusive federal jurisdiction.

 2   But I think the text fundamentally

 3 does the same thing. You know, what it says is

 4 that individuals are subject to the same law and

 5 penalties as all other persons committing these

 6 enumerated offenses, which I think sweeps in a

 7 set of criminal but not civil principles, which

 8 I think is exactly what the phrase "as to the

 9 punishment of offenses" does in the General

10 Crimes Act. So I think they do fundamentally

11 the same thing.

12   And I guess another -- another point I

13 would make on that is that, you know, if that

14 argument were right, I think that would cut in

15 our favor. I mean, if you look, for example, at

16 the 1817 statute that was the precursor to the

17 General Crimes Act, it uses actually language

18 that's pretty similar to what's now in the Major

19 Crimes Act. It says that defendants shall be

20 subject to like punishment as others within

21 areas of exclusive federal jurisdiction. So,

22 you know, that -- their argument, I think, would

23 make the 1817 General Crimes Act preemptive.

24 And I don't think there's any story in which the

25 General Crimes Act, you know, was preemptive in

1   1817 and stopped being that after.

2   But I think the more fundamental point

3   is that none of these nuances really have

4   anything to do with why this Court in John and

5   Negonsott held that the Major Crimes Act was

6   preemptive under the Indian country preemption

7   standard.

8   JUSTICE BARRETT: Thank you.

9   CHIEF JUSTICE ROBERTS: Thank you,

10   counsel.

11   Mr. Kneedler.

12   ORAL ARGUMENT OF EDWIN S. KNEEDLER

13   FOR THE UNITED STATES, AS AMICUS CURIAE,

14   SUPPORTING THE RESPONDENT

15   MR. KNEEDLER: Mr. Chief Justice, and

16   may it please the court:

17   The text, the statutory context, and

18   the history of 1152 firmly establish that it

19   provides for exclusive federal jurisdiction over

20   crimes by non-Indians against Indians in Indian

21   country.

22   For over 100 years, starting with this

23   Court's decision in Donnelly, the Court has

24   construed Section 1152 in exactly that manner.

25   And beginning more than 80 years ago, Congress

 1   has repeatedly enacted laws that made clear that

 2   an act of Congress is necessary to authorize a

 3   state to authorize -- to conduct such

 4   prosecutions.

 5   The roots of exclusive federal

 6   jurisdiction under the statute, in fact, go much

 7   deeper, though, to the founding, when the

 8   framers rejected the divided authority under the

 9   Articles of Confederation and invested plenary

10   and exclusive power over Indian affairs in the

11   national government.

12   And the early Congresses invoked those

13   powers by enacting Section 1152's predecessors

14   to prevent violence that could lead to war and

15   to further the nation's commitments to protect

16   the Indians and their -- the Indians and their

17   territories from federal encroachment --

18   encroachment by often hostile states and their

19   citizens.

20   This Court should reject the

21   proposition that it should overturn 100 years of

22   settled understanding of this statute in this

23   Court, in Congress, by the executive branch, and

24   in the states to solve a problem following this

25   Court's decision in McGirt because the result

 1   would be to unsettle established jurisdictional

 2   understandings and jurisdictional arrangements

 3   in many other states and, in fact, would

 4   unsettle jurisdictional understandings in the

 5   State of Oklahoma beyond what was -- that were

 6   in existence at the time of this decisions in

 7   McGirt.

 8   Oklahoma has much trust and restricted

 9   allotment land in both the western part of the

10   state and the eastern part of the state, which

11   for more than 30 years has been understood to be

12   subject to exclusive jurisdiction, and the

13   states have not been able to apply their laws

14   there.

15   So what the state is asking for here

16   is not just to go back to what the situation was

17   before McGirt but to undo the settled

18   understanding in Oklahoma itself about the --

19   the application of state law to --

20   CHIEF JUSTICE ROBERTS: What --

21   MR. KNEEDLER: -- Indian country.

22   CHIEF JUSTICE ROBERTS: -- what is

23   your answer to the language, Frankfurter's

24   language I read from Kake concerning what weight

25   we should give to Worcester against Georgia?

1   MR. KNEEDLER: I think that

2   proposition has to do with things where there is

3   not a governing act of Congress.

4   It -- it often comes up that there may

5   be a question of just inherent tribal

6   sovereignty and does state law interfere with

7   that. And there have been some adjustments of

8   that, largely because non-Indians have moved on

9   a reservation, and often state law will apply to

10   the non-Indians in that situation. They --

11   CHIEF JUSTICE ROBERTS: But I'm -- I'm

12   sorry, go ahead.

13   MR. KNEEDLER: No, but, here, we have

14   an act of Congress that -- that is deeply rooted

15   in exclusive jurisdiction over -- over crimes by

16   or against Indians back to the founding. And

17   changes --

18   CHIEF JUSTICE ROBERTS: Well -- well,

19   but, I mean, I think what Frankfurter was

20   addressing is the overall theory of what

21   Marshall's approach was, that the -- the

22   boundary theory, that this is the state and this

23   is the Indian country and -- and, you know, they

24   don't -- don't overlap at all.

25   And Frankfurter's point is, well, it

 1   turns out that they have to overlap quite a bit

 2   if you're going to deal with all these different

 3   factual situations that come up.

 4   So the notion, which certainly has a

 5   lot to play in the arguments that -- that you

 6   have chosen to support, I think, is undermined

 7   quite a bit. I mean, I -- to the -- to the

 8   extent, I guess, you -- you agree that this is a

 9   preemption case, don't you?

10   MR. KNEEDLER: Well, of a -- of a

11   sort, but that's not the way, you know, this

12   Court has understood it. And I -- and I -- I --

13   I -- it -- it hasn't used that terminology. And

14   I -- I -- I want to take a moment to explain the

15   origins of the modern understanding of this,

16   which is this -- this Court's decision in

17   Donnelly, which was a watershed on this point.

18   The argument was made there that

19   the -- that the result in Draper and McBratney

20   should control and that the state should have

21   jurisdiction and not the federal government.

22   The argument -- or the -- the result

23   in -- in McBratney and Draper was not concurrent

24   jurisdiction. The theory of those cases was

25   that by admitting -- the act admitting those

 1   states to the union had repealed 1152 and

 2   therefore allowed state jurisdiction to come

 3   into play.

 4   And the Court said that expressly in

 5   Donnelly. It said that Draper and McBratney

 6   understood that the statehood acts had the --

 7   qualified the prior jurisdiction of 1152 by

 8   withdrawing from the federal government and then

 9   conferring on the state the jurisdiction to

10   prosecute crimes by non-Indians against

11   non-Indians.

12   The whole understanding of that case

13   was it's one or the other. It's either

14   exclusive jurisdiction or it's not exclusive

15   jurisdiction. It's state jurisdiction.

16   And to your point, Justice Gorsuch,

17   the Court in Donnelly made the very point that

18   you made. It -- it said that in the Court's

19   prior decision in -- in Kagama, which involved

20   prosecution of Indians, the Court said that that

21   was exclusively -- that was subject to federal

22   jurisdiction because the states are often the --

23   the hostile enemies of the Indians and also of

24   the need to protect the Indians as the wards of

25   the nation.

1   JUSTICE ALITO: Could you explain --

2   MR. KNEEDLER: The Court in

3   Donnelly --

4   JUSTICE ALITO: No, go ahead.

5   MR. KNEEDLER: If I could just finish

6   for a moment?

7   JUSTICE ALITO: Sure, yeah.

8   MR. KNEEDLER: The Court in Donnelly

9   said that same principle applies perhaps a

10   fortiori to a situation where you have a

11   non-Indian committing a crime against an Indian

12   because of the need to protect the wards of the

13   nation. So, as Donnelly, I think, settled this

14   question, and it -- it isn't just dicta. It was

15   --

16   JUSTICE ALITO: Well, Mr. Kneedler,

17   that's --

18   MR. KNEEDLER: -- the very reasoning

19   that --

20   JUSTICE ALITO: -- that's all very

21   abstract, but could you explain why exclusive

22   federal jurisdiction is better for Indian

23   victims of crimes by non-Indians than concurrent

24   jurisdiction?

25   MR. KNEEDLER: It may or may not be.

1   And I think a lot of it has to do with the

2   perception. There are three sovereigns involved

3   here. There's the federal government, the

4   state, and the tribes and the tribal members.

5   And they may not all see the same -- see the

6   same on that. And that was the -- that was the

7   purpose for Congress enacting Public Law 280, is

8   it would allow the states --

9   JUSTICE ALITO: All right. Well --

10   MR. KNEEDLER: -- now the tribes --

11   JUSTICE ALITO: -- in -- in --

12   MR. KNEEDLER: -- to decide that.

13   JUSTICE ALITO: -- in more concrete

14   terms, you have a crime -- alleged crime

15   committed by a non-Indian against an Indian.

16   Why is it better for the Indian victim

17   that the only recourse is federal prosecution

18   with the limited resources that federal -- that

19   federal law enforcement has rather than

20   concurrent jurisdiction? Concretely, why is

21   that worse?

22   MR. KNEEDLER: I --

23   JUSTICE ALITO: If -- if the state

24   goes first and the Indian victim or the tribe is

25   not satisfied with the way that played out, we

 1   have the dual sovereign doctrine, which we

 2   reaffirmed in Gamble, and the federal government

 3   can step in and prosecute.

 4   Why -- why does that disadvantage an

 5   Indian victim? I don't really understand that.

 6   MR. KNEEDLER: I -- I -- I'm not here

 7   arguing that it necessarily disadvantages any

 8   particular Indian victim. The United States

 9   prosecutes crimes in some states that have

10   concurrent jurisdiction, but that concurrent

11   jurisdiction exists because the relevant

12   sovereigns have agreed to that regime.

13   JUSTICE ALITO: Well, this sounds

14   awfully abstract. Now I think the most valuable

15   information you could provide for me at least is

16   an assessment of the situation right now in

17   Oklahoma and whether -- whether the criminal

18   laws are being adequately enforced right now and

19   whether the current situation in the judgment of

20   the United States is sustainable.

21   Suppose there Congress does nothing.

22   MR. KNEEDLER: Well, I --

23   JUSTICE ALITO: Is it -- is it a

24   sustainable situation? Is the federal

25   government going to be able to provide enough

1   federal agents, enough federal prosecutors,

2   enough federal judges, enough federal

3   courtrooms, enough federal probation officers,

4   to handle the caseload that was previously

5   handled by state law enforcement?

6   MR. KNEEDLER: Yeah, I'm -- I'm not

7   here to minimize the challenge that has resulted

8   from the decision in -- in McGirt. And the --

9   the Justice Department has responded to that by

10   providing resources to Oklahoma, 110 additional

11   AUSA positions. Federal district court judges

12   have been designated to serve in -- in the

13   districts, magistrates have been brought in, FBI

14   agents have been brought in.

15   JUSTICE ALITO: I mean, I --

16   MR. KNEEDLER: Those are -- those are

17   temporary.

18   JUSTICE ALITO: Yeah, I appreciate all

19   that, but I did have two questions. Is the

20   situation right now adequate from the

21   perspective of the United States --

22   MR. KNEEDLER: Not --

23   JUSTICE ALITO: -- and, if it is not,

24   is it sustainable?

25   MR. KNEEDLER: The -- the situation

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 1    with respect to funding, there are -- there are

 2    two points, is there adequate funding and will

 3    that funding be permanent.

 4              The Administration has requested an

 5    additional $40 million for AUSAs and an

 6    additional 76 slots for FBI agents, additional

 7    federal marshals, addition -- additional money

 8    for the prisons.

 9              It -- and Congress, in its political

10    responsibility, we trust, will appropriate that

11    money --

12              JUSTICE ALITO:  Well, are you counting

13    --

14              MR. KNEEDLER:  -- to carry out the --

15              JUSTICE ALITO:  -- are you -- are you

16    counting on that?  Are you counting on this

17    being the permanent situation, or are you

18    counting on an agreement between the state and

19    the tribes?  And, if it is the latter, what is

20    the universe of agenda items in the negotiations

21    between Oklahoma and the tribes?  What are they

22    --

23              MR. KNEEDLER:  We -- we are not --

24              JUSTICE ALITO:  -- negotiating about?

25              MR. KNEEDLER:  -- we are not counting
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 1   on an agreement between the tribes and the

 2   states. If they agreed, that would be great.

 3   And, in fact, that's what Public Law 280

 4   contemplates. That's the statutory framework

 5   that -- that has been put in place.

 6   But I think we have to assume Congress

 7   will live up to the responsibilities that -- to

 8   enable the Justice Department to do everything

 9   that is necessary. It -- it is prosecuting

10   major crimes and violent crimes. It is

11   prioritizing that, as it necessarily must. And

12   as they -- as things hit their stride, then some

13   of the less serious crimes will be prosecuted.

14   It's not like they've been dropped. They're in

15   the queue to be prosecuted as time comes along.

16   But my basic point is the Court should

17   not rearrange this established jurisdictional

18   regime because of -- of this moment in time in

19   Oklahoma because it would unsettle

20   jurisdictional arrangements throughout the

21   country. And I -- one point I think hasn't

22   gotten enough emphasis on that, there are a

23   number of states that have chosen not to assume

24   jurisdiction under Public Law 280 before 1968,

25   and that would involve tribal consent.

 1   But the 1968 amendments to Public Law

 2   280 also provided for the retrocession of

 3   jurisdiction by a state to the federal

 4   government. And -- and I understand there have

 5   been 30 retrocessions of jurisdiction. But the

 6   statutory retrocession provision only provides

 7   for retrocession of jurisdiction that was

 8   acquired under Public Law 280 itself.

 9   And that -- two -- there are two

10   lessons from that. One is it shows that it was

11   necessary for Congress to do something to enable

12   a state to acquire jurisdiction under Public Law

13   280 in the first place over crimes by or against

14   Indians. But it also shows that if the states

15   were -- were now found to have inherent

16   concurrent jurisdiction notwithstanding the

17   statutory framework, the corpus juris of Public

18   Law 280 and all those other statutes, it

19   couldn't retrocede that because it would not

20   have been jurisdiction acquired under Public Law

21   280. And that would -- that would perhaps call

22   into question the retrocessions that those

23   states have already made --

24   JUSTICE SOTOMAYOR: Counsel --

25   MR. KNEEDLER: -- states that have

1   decided they didn't want the jurisdiction that

2   had been offered to them under Public Law 280,

3   which just reinforces the idea that Congress has

4   made the allocation of jurisdiction in Indian

5   country against the backdrop of Donnelly, where

6   it's exclusive, to be the subject by sovereign

7   choices by the United States, which can --

8   Congress could pass a law conferring

9   jurisdiction, taking into account the concerns

10   we have, by the tribes and the states. That's

11   fundamentally a political judgment about how

12   that jurisdiction should be allocated.

13   JUSTICE ALITO: Well, if a state

14   doesn't want concurrent jurisdiction, is there

15   anything to prevent the state legislature from

16   forswearing that?

17   MR. KNEEDLER: No, but that's not

18   the -- I don't -- I don't think so, but I -- but

19   -- but if the state has -- if the state has this

20   jurisdiction by virtue of its statehood, then I

21   don't know whether it would be responsible for

22   the state to disavow it. It has jurisdiction.

23   Doesn't it have to do something about it?

24   But what -- but what Congress enacted,

25   again, a framework in which it's up to the

1   respective sovereigns to decide how Indian

2   country should be governed and, therefore, with

3   -- from the tribal perspective, it's not a

4   question whether a particular Indian victim in a

5   particular case would be better protected or

6   not. There is a collective judgment to be made

7   on behalf of the tribe with respect to its

8   territory about how the sovereign authorities

9   will be allocated.

10   I -- I mentioned --

11   JUSTICE SOTOMAYOR: Isn't that the

12   point --

13   MR. KNEEDLER: I'm sorry.

14   JUSTICE SOTOMAYOR: -- which is

15   Indians have their rights vis-à-vis their own

16   government, their own Indian government, and

17   they have expectations of what that reservation

18   will do for them or not do for them, that --

19   correct?

20   MR. KNEEDLER: Yes.

21   JUSTICE SOTOMAYOR: And that's the

22   same view when you were saying, in treaties, the

23   Cherokee Treaty here, says that the federal

24   government will protect them, correct?

25   MR. KNEEDLER: Yes.

 1   JUSTICE SOTOMAYOR: And so, to the

 2   extent that a victim has expectations, that's

 3   the expectation, correct?

 4   MR. KNEEDLER: Yeah. As -- as a

 5   member of the tribe. And, yes, an important

 6   difference between the United States and the

 7   state, it's not just two -- two entities, both

 8   can prosecute. There is a trust relationship

 9   between the United States and a state -- excuse

10   me, and a tribe and the tribal members. There

11   is not a trust relationship between a state and

12   the tribal members.

13   And it's understandable, particularly

14   given the history -- as -- as this Court said in

15   McGirt itself, there is a long history of

16   separating tribes and tribal members from the

17   states because of the hostility. It's

18   understandable that a tribe and its members

19   would think it would be best to look to the

20   trustee for protection and not necessarily the

21   state.

22   Now a tribe might make a different

23   conclusion and consent to state jurisdiction

24   because it thinks it's better for its tribal

25   members, but that -- but that is the essence of

1   tribal self-government, to allow the people of

2   the tribe to decide whether they want to consent

3   to state jurisdiction or not.

4   JUSTICE SOTOMAYOR: Is there any

5   source that I can look at that would tell me --

6   everyone assumes that Oklahoma has been fully

7   prosecuting over time -- well, we don't have a

8   history, correct?

9   MR. KNEEDLER: Not -- not in the --

10   not in these -- in the fee lands and -- and the

11   reservation, no.

12   JUSTICE SOTOMAYOR: Right. So there

13   -- there is an assumption that Oklahoma will

14   actually expend the resources in doing this,

15   correct?

16   MR. KNEEDLER: Well, I -- I --

17   JUSTICE SOTOMAYOR: It did before, and

18   --

19   MR. KNEEDLER: Yes, and -- and I'm not

20   in a position to assess how well Oklahoma did

21   that --

22   JUSTICE SOTOMAYOR: No. No, but --

23   MR. KNEEDLER: -- before.

24   JUSTICE SOTOMAYOR: -- is there a

25   source I can look at that would tell me that, in

1   fact, Oklahoma -- we know they prosecuted some

2   of the people who are getting out now, although

3   many of them have been prosecuted by the federal

4   government. Do you have an idea of how many

5   people have been let out without prosecution by

6   the federal government?

7   MR. KNEEDLER: I -- I -- I don't

8   recall, frankly, the precise number. It's, I

9   think, not that great. I can supply the -- the

10   figure that was given. I think it may be a

11   hundred, a couple hundred, but I -- please don't

12   hold me to that because I -- I'm not -- I don't

13   --

14   JUSTICE SOTOMAYOR: That's what I've

15   been given to understand.

16   MR. KNEEDLER: Right.

17   JUSTICE SOTOMAYOR: So there's nothing

18   to suggest that the number is going to be as

19   large as -- as is being thrown around by the

20   Petitioner?

21   MR. KNEEDLER: Right. I also wanted

22   to mention a couple of the other Court's

23   decisions. It's not just Donnelly where --

24   where the reasoning depended on this

25   understanding that the -- that the statute is

 1   exclusive. It was also true in Williams versus

 2   United States, where the Court specifically said

 3   that the United States, rather than the State of

 4   Arizona, has jurisdiction. That's not

 5   concurrent. That's exclusive. And there was a

 6   long footnote recounting what the Court held in

 7   Donnelly and said there may have been some

 8   confusion about that. But, in Donnelly itself,

 9   the Court said we have now given a full

10   evaluation of this and this is our conclusion,

11   that the principle of McBratney and Draper does

12   not apply and, therefore, the -- the federal

13   government has the exclusive jurisdiction.

14   And that was particularly relevant in

15   that case because the question in -- in Williams

16   versus United States was the application of the

17   Assimilative Crimes Act to the particular crime.

18   And the Assimilative Crimes Act, of course,

19   brings state law in not of its own force but

20   because it's assimilated. And the Court was --

21   that passage in the Court's opinion was

22   explaining why the -- why state law was relevant

23   there, because it was assimilated into exclusive

24   federal jurisdiction.

25   CHIEF JUSTICE ROBERTS: Thank you,

1   counsel.

2   Justice Thomas, anything further?

3   Justice Breyer? Nothing?

4   Justice Sotomayor?

5   Justice Kagan?

6   Justice Gorsuch? No?

7   Justice Kavanaugh?

8   JUSTICE KAVANAUGH: Just one. On the

9   -- on the statutory text, if we just took the

10   statutory text and nothing else and your

11   position on how to interpret the statutory text

12   were correct, why would a state have

13   jurisdiction over non-Indian-on-non-Indian crime

14   in Indian country?

15   MR. KNEEDLER: Well, what -- what the

16   Court held in -- in McBratney and Draper was

17   that the Statehood Act had repealed that. Not

18   -- it's not that the text itself doesn't --

19   doesn't reach it. It's that Draper and

20   McBratney held that it -- it had been -- it had

21   been repealed with respect to that category.

22   So there is a symmetry in the statute

23   as a result. Indian-on-Indian crimes are

24   excluded by the second paragraph.

25   Non-Indian-by-non -- upon-non-Indian crimes are

1 excluded by virtue of Draper and McBratney.

2 And in the middle, where you have

3 crimes by non-Indians against Indians or the

4 other way around, the very core of the

5 relationship between Indians and non-Indians

6 that Congress was given exclusive responsibility

7 for from the founding forward, that remains

8 exclusive federal jurisdiction.

9 And this Court's decision in Negonsott

10 said that it's the text and the Court's

11 decisions that had rendered the Major Crimes Act

12 jurisdiction exclusive, and it relied only on

13 the word "exclusive." We have that -- we have

14 that same point here.

15 And if I could make one other textual

16 point because I think this is important. My

17 friend on the other side has several times

18 relied on language in Wilson and also in

19 Donnelly as -- as saying the word "exclusive"

20 refers not to the nature of the jurisdiction but

21 to the laws imported, and I -- I -- I think he's

22 misreading that language.

23 The argument in both Donnelly and

24 Wilson, it was a somewhat convoluted argument,

25 but it was that the federal government as a

1   whole does not have exclusive jurisdiction over

2   those particular reservations, like in Donnelly,

3   it was the state has created a school district,

4   therefore, the federal government doesn't have

5   exclusive jurisdiction.

6   Therefore, the argument was the -- the

7   federal criminal statute can't apply because

8   it's being applied in an area where there is not

9   exclusive jurisdiction. And the Court said no,

10   the -- the -- the phrase you're talking about is

11   not talking about the -- the -- the general

12   nature of the jurisdiction of -- of an Indian

13   reservation. It's talking about the laws that

14   will be applied in -- in that area.

15   And -- and, here, that's exactly what

16   we're saying. The law that will be applied in

17   Indian country, whether or not it's exclusive

18   for other purposes, is --

19   JUSTICE KAVANAUGH: Thank -- thank

20   you.

21   MR. KNEEDLER: -- the enclave law,

22   which is itself exclusive.

23   CHIEF JUSTICE ROBERTS: Justice

24   Barrett?

25   Thank you, Mr. Kneedler.

 1   Rebuttal, Mr. Shanmugam.

 2   REBUTTAL ARGUMENT OF KANNON K. SHANMUGAM

 3   ON BEHALF OF THE PETITIONER

 4   MR. SHANMUGAM: Thank you, Mr. Chief

 5 Justice. I'd like to cover the relevant

 6 preemption principles, talk a little bit about

 7 the cases, and then finally talk about the

 8 practical consequences.

 9   My friend, Mr. Kneedler, says that

10 this is "preemption of a sort." Well, it can't

11 be that. It has to be some form of preemption

12 that this Court has recognized, and it seems to

13 us that there are three possibilities.

14   The first is obviously conflict

15 preemption. And my friend, Mr. Schauf, talked

16 only about the General Crimes Act. With respect

17 to my friend, Mr. Kneedler, we do think that

18 this Court's decision in Wilson resolves this

19 issue for the simple reason that it says, in the

20 second half of the relevant sentence, that the

21 phrase "within the sole and exclusive

22 jurisdiction of the United States" is only used

23 in the description of the laws which are

24 extended to it.

25   We think that that's correct as a

1   matter of statutory interpretation because the

2   statute talks only about the general laws of the

3   United States extending to Indian country. And

4   to the extent that my friend, Mr. Schauf, talks

5   about a background principle in the soil, the

6   principle at issue is a constitutional

7   principle. It's the principle from the enclaves

8   clause in Article I, Section 8.

9   And I think it would be quite strange,

10   given the structure of that provision, to say

11   that it incorporates that principle as well.

12   And if it did, it would suggest that McBratney

13   itself was incorrectly decided.

14   And to the extent that finding no

15   footing in the text of the General Crimes Act,

16   my friends turn to the Major Crimes Act, we

17   think that the proper way to construe the Major

18   Crimes Act is as indicating that an Indian who

19   commits a crime -- a crime that is enumerated is

20   subject to prosecution within the exclusive

21   jurisdiction of the United States, not simply

22   that such an individual is subjected to the same

23   punishment as an individual who commits a crime

24   within federal enclaves.

25   This Court's decisions in John and

 1   Negonsott relied on the text of the statute,

 2   albeit without much explanation, and that's even

 3   clearer when you look at the earlier versions of

 4   the two statutes, which we cite in our reply

 5   brief.

 6   As to Public Law 280, the argument

 7   that my friend, Mr. Schauf, is making today

 8   really does sound in field preemption. And I

 9   would respectfully submit that Public Law 280

10   comes nowhere near the standard for field

11   preemption, which requires a framework of

12   regulations so comprehensive that Congress left

13   no room for the states to supplement it and a

14   federal interest that is so dominant that the

15   federal system can be assumed to preclude state

16   law. That's the Arizona versus United States

17   test. And that would be a very odd test to say

18   is satisfied in an area where the state has

19   presumptive predominant police power.

20   Finally, with regard to balancing, the

21   language on which Mr. Schauf relied from

22   Mescalero talks about how the ordinary

23   preemption framework often doesn't operate where

24   there's a tribal interest.

25   But what Mr. Schauf omits is that the

 1   Court says that when that is true, the Court

 2   resorts to balancing. And we haven't heard a

 3   lot today about how Respondent could prevail

 4   under that balancing test, and I would

 5   respectfully submit that that is because he

 6   cannot.

 7   With regard to the cases, I would just

 8   say with regard to Donnelly that my friend, Mr.

 9   Kneedler, said that Donnelly settled this

10   question. If that's true, I'm a little bit

11   perplexed as to how the federal government could

12   have taken the opposite view on the question

13   presented in the OLC opinion and thereafter for

14   a time and characterized the language in earlier

15   cases as dicta.

16   But the one thing we can be certain

17   about about Donnelly is that it did not say that

18   the states lacked jurisdiction. Donnelly simply

19   said that the federal government had

20   jurisdiction. It said that the question was

21   whether or not the states had "undivided

22   authority" over that category of offenses. And

23   in doing so, the Court repeated and endorsed the

24   language from Wilson to which I referred

25   earlier.

 1   Finally, with regard to the practical

 2 consequences here, my friend, Mr. Kneedler, said

 3 that he was not here to minimize the problem on

 4 the ground in Oklahoma, but he was not exactly

 5 eager to tell you about the problem.

 6   And I think that the problem with

 7 respect is greater than he suggested. He

 8 referred to a number for the number of cases

 9 where convictions have been overturned in the

10 wake of McGirt, but the far bigger problem is

11 the ongoing prospective law enforcement problem

12 in the State of Oklahoma.

13   And contrary to Mr. Kneedler's

14 suggestion that cases are simply being held in

15 the queue, I would refer the Court to DOJ's

16 fiscal year 2023 budget request where DOJ said,

17 and I'm quoting, "As enforcement of nonviolent

18 crime is relatively low, Oklahoma communities

19 may see a surge in such crimes, and many people

20 may not be held accountable for their criminal

21 conduct due to resource constraints."

22   So, to answer your question, Justice

23 Alito, is this a sustainable situation, I would

24 respectfully submit that it is not a sustainable

25 situation, and it would be a cruel irony if the

1   consequence of this Court's decision in McGirt

2   is less protection for the tribal victims of

3   serious crimes.

4   We would submit that the judgment of

5   the Oklahoma Court of Criminal Appeals should be

6   reversed. Thank you.

7   CHIEF JUSTICE ROBERTS: Thank you,

8   counsel.

9   Mr. Kneedler, I note for the record

10   that this is the 150th case in which you have

11   presented oral argument before the Court, and on

12   behalf of the Court, I thank you for your

13   skilled advocacy over the years.

14   (Whereupon, at 12:11 p.m., the case

15   was submitted.)

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