No. 21-429

IN THE

Supreme Court of the United States

STATE OF OKLAHOMA,

Petitioner,

v.

VICTOR MANUEL CASTRO-HUERTA,

Respondent.

On Writ of Certiorari to the Oklahoma Court of Criminal Appeals

BRIEF OF THE CITY OF TULSA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

BLAINE H. EVANSON
Counsel of Record
GIBSON, DUNN & CRUTCHER LLP
3161 Michelson Drive
Irvine, California 92612
(949) 451-3805
bevanson@gibsondunn.com

JEAN ANN HUDSON
CITY OF TULSA, OKLAHOMA
175 East 2nd Street, Suite 1405
Tulsa, Oklahoma 74103

JASON MANION
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036

Counsel for Amicus Curiae
City of Tulsa, Oklahoma

QUESTION PRESENTED

Whether a State has authority to prosecute non-Indians who commit crimes against Indians in Indian country.

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INTEREST OF *AMICUS CURIAE*[1]

The City of Tulsa, home to over 400,000, is the second most populous city in Oklahoma, and the largest in the geographical area affected by *McGirt* v. *Oklahoma*, 140 S. Ct. 2452 (2020). Tulsa has enjoyed positive relationships with tribal governments throughout the city's history.

The overwhelming majority of Tulsa's landmass lies within the former territory of the Muscogee (Creek) and Cherokee Nations. For over a century it had been clear that municipal and state laws applied equally to—and equally protected—all Tulsa residents and visitors, regardless of tribal membership. But the Court's decision in *McGirt* changed this.

Cities like Tulsa have borne the brunt of *McGirt*'s negative effects. Among other things, *McGirt* has significantly constrained Tulsa's ability to protect crime victims who happen to be Indian.[2] Resolving the question on which this Court has granted certiorari will not solve all the problems created by *McGirt*. But confirming that a State has authority to prosecute non-Indians who commit crimes against Indians in Indian Country would at least ensure that non-Indians in Tulsa who victimize Tulsa's Indian residents and visitors are subject to the same state and local laws as all other non-Indians. This would be a meaningful improvement over the status quo.

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[1] Ms. Hudson is the City of Tulsa's interim chief legal officer. This brief is submitted "on behalf of a city" under Supreme Court Rule 37.4, so Supreme Court Rule 37.6 does not apply.

[2] This brief uses the terms "Indian" and "non-Indian" to be consistent with federal statutes and caselaw.

Tulsa thus has a significant interest in the outcome of this case. As importantly, Tulsa has a unique perspective that may "be of considerable help to the Court" as it considers this case. *See* Sup. Ct. R. 37.1.

SUMMARY OF ARGUMENT

From the day it was handed down, it was clear that *McGirt* would significantly impact law enforcement in Oklahoma: "At the end of the day, there is no escaping that today's decision will undermine numerous convictions obtained by the State, as well as the State's ability to prosecute serious crimes committed in the future." *McGirt*, 140 S. Ct. at 2501 (Roberts, C.J., dissenting).

The people of Tulsa have experienced precisely what the Chief Justice predicted, as many criminals who victimize Tulsa's citizens, including its Indian citizens, have gone unprosecuted. Tulsa police officers have referred thousands of cases to federal prosecutors and tribal authorities—but only a tiny fraction of these cases have been meaningfully prosecuted. Federal authorities decline to prosecute all but the most serious crimes, and tribal authorities do not have the resources to prosecute many of the cases referred to them.

McGirt has wrought serious, harmful consequences on the cities affected by the ruling. Absent congressional action, many of these consequences will persist as long as *McGirt* is the law. But by answering the question presented here in the affirmative, the Court would alleviate going forward what has been one of *McGirt*'s most harmful consequences to Tulsa's

Indian residents and visitors: Tulsa's inability to prosecute crimes committed against Indians by non-Indians.

ARGUMENT

I. *McGirt* Significantly Impaired Tulsa's Ability To Protect Its Residents and Visitors.

Tulsa's experience confirms Oklahoma's assertion that *McGirt* has complicated law enforcement and strained the resources of federal and tribal prosecutors, resulting in "[n]umerous crimes … going uninvestigated and unprosecuted, endangering public safety." Pet. 3; *see* Oklahoma Br. at 7–9, 45.

A. Requiring State Law Enforcement Officers to Ascertain a Victim's Status Has Complicated Law Enforcement.

McGirt's restriction on state law enforcement's ability to prosecute a crime depending on whether the perpetrator and/or victim are Indians under the governing law has caused a host of problems for law enforcement officers in Tulsa, which has frustrated the investigation and prosecution of criminal activity.

There is no comprehensive law enforcement database for determining whether criminal suspects or their victims are considered Indian. False claims of tribal membership or claims of changed Indian status based on a defendant's enrollment in a tribe after committing the crime are not uncommon. *See*, *e.g.*, Acee Agoyo, *'Shame on you': Authorities Warn Criminals Not to Make False Claims About Indian Status*, Indi-

anz.com (Aug. 12, 2020), https://tinyurl.com/2p98y73y; *Wadkins*, 2022 WL 189569, at *3–5 (vacating first-degree rape and kidnapping convictions and 45-year prison sentence for lack of jurisdiction where defendant who was not a member of a tribe when he committed his crimes later enrolled in the Choctaw Nation). As a result, it sometimes takes police officers several hours or even days to determine a suspect's tribal status.

Hours-long delays keep police officers from responding to other emergency calls or providing backup to other officers, straining law-enforcement resources and putting the safety of the public and of police officers at risk. Days-long delays can cause a prosecution to be improperly filed in the state system, which strains prosecutorial resources.

Even once an individual's tribal status is determined, that is not always the end of the matter. "[A] person may be Indian for purposes of federal criminal jurisdiction even if he or she is not formally enrolled in any tribe." *Parker* v. *State*, 495 P.3d 653, 665 (Okla. Crim. App. 2021). And there is no clear or uniform standard for determining when a person with Indian blood is recognized as an Indian who is outside the reach of state law enforcement and prosecutors.

Federal courts in related contexts have developed several factors to be considered (*see Parker*, 495 P.3d at 666), which some Oklahoma state courts have "cited with approval" (*Wadkins* v. *State*, __ P.3d __, 2022 WL 189569, at *2 (Okla. Crim. App. Jan. 20, 2022), *pet. for cert. filed*, No. 21-1193 (U.S. Feb. 25, 2022)). But federal courts are inconsistent in the standards they use to decide the ultimate question

(*see Parker*, 495 P.3d at 667 n.15 (detailing four approaches)), and state courts have developed a patchwork of multi-factor tests with no clear lines. For instance, the Oklahoma Court of Criminal Appeals recently instructed that where the crime victim is a child with Indian blood, a court should consider a host of additional factors, including the types of contacts the child or her parents had with a tribe, whether a child was born in a tribal hospital or has received benefits from a tribe, "whether the parents have taken steps in rearing the child consistent with tribal affiliation," and "any future plans of the parents to avail themselves of healthcare, daycare, or educational assistance or benefits on behalf of the child." Order Remanding for Evidentiary Hearing on Indian Status of Child Victim, *Benjamin Josiah Ricker* v. *State*, No. C-2019-893, at 4–5 (Okla. Crim. App. June 22, 2021).

Whichever test is applied, it can take multiple "days of hearings and substantial briefing to determine the Indian status of one defendant" or victim. *United States* v. *Loera*, 952 F. Supp. 2d 862, 873 n.10 (D. Ariz. 2013). Requiring officers to conduct this same analysis in the field is impossible. It imposes burdens on law enforcement and risks subjecting defendants to prosecution in the incorrect system, all while liberty and justice for the perpetrators and victims remain in limbo. This system is worlds away from this Court's stated preference for "clear" and "readily understood" rules for police officers in the field. *Thornton* v. *United States*, 541 U.S. 615, 622–23 (2004).

In short, limiting Tulsa's law enforcement authority depending on an individual's Indian status has dramatically complicated Tulsa's ability to enforce its

laws and protect its residents and visitors. Answering the question presented in the affirmative would not fully eliminate these complications, as the Indian status of the criminal *suspect* would remain relevant under *McGirt*. But it would at least eliminate the need for law enforcement to additionally ascertain the Indian status of the *victim*.

B. MANY CRIMES ARE GOING UNPUNISHED OR UNDERPUNISHED.

Preventing the state from prosecuting a substantial number of serious crimes has caused a significant prosecution gap, as federal prosecutors have declined to prosecute all but the most serious crimes.

Following *McGirt* and the decisions from the Oklahoma Court of Criminal Appeals applying it, almost *all* crimes committed against Indian victims by non-Indians in Eastern Oklahoma must be prosecuted by the federal government. *See United States* v. *Cooley*, 141 S. Ct. 1638, 1643 (2021) ("Tribes [] lack inherent sovereign power to exercise criminal jurisdiction over non-Indians.").[3] Yet, in Tulsa's experience, the federal government has declined to prosecute many of the

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[3] The only exception is for domestic violence crimes committed by non-Indian perpetrators against Indian victims, which can be prosecuted by the tribes. *See United States* v. *Bryant*, 136 S. Ct. 1954, 1960 n.4 (2016). But, as explained in Tulsa's certiorari-stage briefing, tribal authorities have failed to prosecute many of the domestic violence cases referred to them. Br. for *Amici Curiae* Cities of Tulsa and Owasso, Oklahoma, *Oklahoma v. Castro-Huerta*, No. 21-429, at 10–11 (Oct. 21, 2021).

crimes referred to it.[4]

This includes many *serious* property-related crimes. In Tulsa's experience, nearly all of the second- and third-degree burglaries that Tulsa has referred to the United States Attorney's Offices ("USAOs"), such as thefts from vehicles (*see* Okla. Stat. tit. 21, § 1435 (2016)), have gone unprosecuted altogether. And although the USAOs have agreed to prosecute first-degree burglaries, which involve breaking into and entering a currently occupied dwelling (*see* Okla. Stat. tit. 21, § 1431 (2016)), the USAOs have declined to prosecute many first-degree burglary cases from Tulsa involving Indians.[5]

To take one example, consider a January 3, 2021

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[4] Even the Cherokee Nation acknowledges that the federal government would "need additional resources" to effectively handle their dramatically increased caseload. Br. for *Amicus Curiae* The Cherokee Nation, *Oklahoma* v. *Castro-Huerta*, No. 21-429, at 10 (Oct. 29, 2021). The federal government has explained that it has been forced to "prioritize[e] cases involving the most violent offenders who pose the most serious risk to the public." Oklahoma Br. at 8 (quoting *Hearing on FBI Budget Request for Fiscal Year 2022 Before the Subcomm. On Commerce, Science, and Related Agencies of the S. Comm. On Appropriations*, 117th Cong. 13 (June 23, 2021) (statement of Christopher Wray, Director, Federal Bureau of Investigation)).

[5] The Muscogee (Creek) Nation cited in its certiorari-stage amicus brief press releases indicating that the USAOs are prosecuting some first-degree burglaries in Indian country. Br. for *Amicus Curiae* Muscogee (Creek) Nation, *Oklahoma v. Castro-Huerta*, No. 21-429, at 12 n.22 (Nov. 16, 2021). But the majority of the cited examples are not from Tulsa, and the fact that the USAOs are prosecuting some portion of the first-degree burglaries in Eastern Oklahoma does not negate the fact that they are declining to prosecute many others that Tulsa County would prosecute if permitted.

burglary and assault on an Indian Tulsan in his apartment. According to a Tulsa police report, on January 3, 2021, the victim heard a knock on his door and a male voice saying "Tulsa Fire Department, smoke alarm check." Standing at the door was a former tenant of the victim's, who was banned from the property and had assaulted the victim in the past. The suspect forced his way inside, punched the victim in the face, and kicked him in the chest.[6] The USAO nevertheless declined to prosecute this violent burglary.

In at least one instance in which the USAOs declined to prosecute a first-degree burglary, the suspect reoffended within the same month. According to a Tulsa police report, on June 10, 2021, a non-Indian suspect entered the apartment of two Indians—while they were present—and took some of their belongings, including items of clothing. Tulsa police officers located the suspect later that day, and found him wearing some of the stolen items. Because the victims were Indians, Tulsa police officers contacted the FBI, which, according to the police report, declined to prosecute because "this wasn't a violent crime or one that involved a gun."[7] Just over two weeks later, the same suspect broke into a locked apartment and tried to force his way into the bedroom—where two terrified residents were hiding—while armed with a knife.[8]

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[6] Tulsa Police Department Incident Report, No. 2021-000624 (Jan. 3, 2021).

[7] Tulsa Police Department Incident Report, No. 2021-032626 (June 11, 2021).

[8] Tulsa Police Department Incident Report, No. 2021-035007 (June 27, 2021).

Another recent Tulsa police report describes a routine registration check that revealed a vehicle had been reported stolen. The driver was not Indian, but Tulsa police learned that the owner was a member of the Osage Nation, thus depriving Tulsa County of jurisdiction over the charge. Upon contacting the FBI, however, the Tulsa police officer was informed that the USAO "would not currently pick up charges for possession of a stolen vehicle."[9]

Even when the USAOs *are* able to prosecute non-Indians who commit crimes against Indians, "the defendant is often able to reach a plea agreement that provides for a substantially lower sentence than the sentence that would be imposed by a state court." Oklahoma Br. at 8. Tulsa's experience bears this out.

In 2014, Christian Shockley, a 24-year-old member of the Muscogee (Creek) Nation, broke up with her 37-year-old non-Indian boyfriend, Erik Sherney Williams. Shortly afterwards, Williams shot and killed Shockley in the parking lot of a Tulsa apartment complex, his second time shooting someone in ten days.[10] The State successfully prosecuted Williams for first-degree murder, resulting in a sentence of life in prison

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[9] Tulsa Police Department Incident Report, No. 2022-006392 (Feb. 10, 2022). This particular suspect also had methamphetamines- and marijuana-related paraphernalia in his possession at the time, and was charged in state court for that offense. *See id.*

[10] *See* Samantha Vincent, *Suspect in Fatal Shooting of Tulsa Woman Arrested at Nevada Casino*, Tulsa World (Oct. 22, 2014), https://tinyurl.com/3t4xwdp7; Arianna Pickard, *Tulsa Man Bound for Separate Trials in Killing of Ex-Girlfriend and Shooting of Stranger*, Tulsa World (Feb. 4, 2016), https://tinyurl.com/yc3raeuu.

without parole. Williams appealed, and the Oklahoma Court of Criminal Appeals (applying *McGirt*) vacated Williams's conviction and sentence. *See Erik Sherney Williams* v. *Oklahoma*, No. F-2016-937 (Okla. Crim. App. Mar. 25, 2021), *pet. for cert. filed*, No. 21-265 (U.S. Aug. 21, 2021). The USAO promptly charged Williams with first-degree murder in Indian Country (18 U.S.C. §§ 1151, 1152, and 1111), a crime with a minimum sentence of life imprisonment. *See United States* v. *Erik Sherney Williams*, No. 21-cr-104, Dkt. 2 (N.D. Okla. Mar. 24, 2021). Recently, however, the USAO allowed Williams to instead plead guilty to *second*-degree murder. *See* Dkt. 49 (Jan. 19, 2022). As part of this plea deal, the USAO recommended a sentence of only 25 years for the same conduct for which Williams previously received a life sentence in state court. *See id.*

These few examples illustrate the massive prosecution gap that Tulsa has experienced now that state prosecutors are unable to file charges on behalf of Indians victimized by non-Indians in Tulsa. Tulsa's law enforcement continues to do all it can to protect Indian and non-Indian citizens alike, but the barriers imposed by *McGirt* are overwhelming. Many Indian crime victims simply have no recourse in the criminal justice system after *McGirt*.

It is harmful enough for the law to treat Indian victims as second-class citizens when it comes to obtaining justice. *See*, *e.g.*, *Heckler* v. *Mathews*, 465 U.S. 728, 739–40 (1984). But there is also a real risk of increased physical injury and property harm to Indian residents and visitors in Tulsa when criminals know they are unlikely to be prosecuted if they target Indians. Indeed, many Indians in Oklahoma display

tribal tags on their vehicles, making them easy targets. The Court should remove this serious, harmful consequence that *McGirt* continues to inflict on Tulsa and the rest of Eastern Oklahoma.

CONCLUSION

The Court should hold that a State has authority to prosecute non-Indians who commit crimes against Indians in Indian country.

Respectfully submitted,

JEAN ANN HUDSON
CITY OF TULSA, OKLAHOMA
175 East 2nd Street, Suite 1405
Tulsa, Oklahoma 74103

BLAINE H. EVANSON
Counsel of Record
GIBSON, DUNN & CRUTCHER LLP
3161 Michelson Drive
Irvine, California 92612
(949) 451-3805
bevanson@gibsondunn.com

JASON MANION
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036

Counsel for Amicus Curiae,
City of Tulsa, Oklahoma

March 7, 2022