No. 21-429

In the Supreme Court of the United States

OKLAHOMA,

Petitioner,

v.

VICTOR MANUEL CASTRO-HUERTA,

Respondent.

ON WRIT OF CERTIORARI TO THE OKLAHOMA COURT OF CRIMINAL APPEALS

BRIEF OF *AMICI CURIAE* THE OKLAHOMA DISTRICT ATTORNEYS ASSOCIATION, THE OKLAHOMA SHERIFFS' ASSOCIATION, THE ASSOCIATION OF OKLAHOMA NARCOTIC ENFORCERS, AND THE 27 OKLAHOMA DISTRICT ATTORNEYS IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases:

Statutes and Other Authorities:

Interest of *Amici Curiae*

The Oklahoma District Attorneys Association, the Oklahoma Sheriffs' Association, the Oklahoma Narcotic Enforcers, and the 27 elected Oklahoma District Attorneys respectfully submit this *amici curiae* brief supporting Oklahoma.[1] Founded in 1974, the Oklahoma District Attorneys Association supports Oklahoma prosecutors in every aspect of their mission. Founded in 1991, the Oklahoma Sheriffs' Association assists Oklahoma sheriff departments through training, support, and collaboration. Founded in 1989, the Association of Oklahoma Narcotic Enforcers represents over 1,500 federal and state police officers, prosecutors, and intelligence analysts dedicated to achieving a drug-free state through training and intelligence sharing. Finally, the 27 listed District Attorneys comprise every elected District Attorney in the State.[2] They prosecute crimes and pursue justice for *all* Oklahomans.

Amici and their members face the ramifications of this Court's decision in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), every day across every aspect of law enforcement.

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[1] Pursuant to Supreme Court Rule 37.3, counsel of record for both parties have consented to this filing. In accordance with Rule 37.6, no counsel for any party authored this brief in whole or in part, and no person or entity, other than *amici* or their counsel, made a monetary contribution to the preparation or submission of this brief. Counsel for all parties have provided blanket consent to the filing of this brief.

[2] George "Buddy" Leach, Angela Marsee, David Thomas, Mike Fields, Kyle Cabelka, Jason Hicks, David Prater, Brian Hermanson, Laura Thomas, Mike Fisher, Kevin Buchanan, Matt Ballard, Kenny Wright, Steve Kunzweiler, Larry Edwards, Jeff Smith, Mark Matloff, Chuck Sullivan, Tim Webster, Craig Ladd, Greg Mashburn, Paul Smith, Allan Grubb, Max Cook, Carol Iski, Chris Boring, and Jack Thorp.

They accordingly have a strong interest in the State's concurrent jurisdiction over crimes committed by non-Indians against Indians in Indian country, particularly in the wake of *McGirt*.

Summary of Argument

I. Oklahoma retains concurrent jurisdiction to prosecute non-Indians who commit crimes against Indians in Indian country. This authority is inherent in statehood and nothing in this Court's precedents or federal law has altered that authority.

A. States have inherent authority over their territories, including authority over Indian country within their boundaries. This Court's precedents have acknowledged that this authority derives from statehood itself. For general crimes committed by non-Indians against Indians in Indian country, the State's authority has not been disturbed. The plain text of the General Crimes Act does not remove the State's jurisdiction, nor does it confer exclusive jurisdiction on the federal government.

B. Other federal statutes support Oklahoma's jurisdiction over crimes committed by non-Indians against Indians. Those statutes affirm the jurisdiction the State asserts here, and, in some instances, even confer additional authority. Shared federal and state authority also serves all interests, especially the interests of Indian victims who, under the present circumstances, are often deprived justice.

II. Concurrent state jurisdiction over crimes committed by non-Indians against Indians will improve the law enforcement challenges created by *McGirt*. *McGirt* created a cloud of confusion over federal, state, and tribal jurisdiction in the State of Oklahoma. And the Oklahoma Court of Criminal Appeals' interpretation of the General Crimes Act in the wake of *McGirt* is wrong and places an

unnecessary burden on federal law enforcement. Even with the additional resources that have been requested, many crimes are going unprosecuted.

A. After *McGirt*, cross-deputization agreements between state and local law enforcement officers with the federal government and tribes became an important tool to bridge the jurisdictional gaps. However, these agreements have limitations. On the ground, officers still face challenges in their regular investigations, and suspects have attempted to capitalize on the State's lack of criminal enforcement authority. Not only that, but the cross-deputization agreements themselves are so fraught that some are even being terminated.

B. Indian victims disproportionately bear the consequences of the disorder in the criminal justice system in eastern Oklahoma. For example, many of the state cases that have been vacated following *McGirt* have either been resolved through a significantly lower plea agreement or are not subject to prosecution at all because the statute of limitations on the equivalent federal crime has run. For new crimes committed by non-Indians against Indians that don't rise to the level of serious bodily injury, many have gone unprosecuted simply because of limited resources.

III. Affirming the State's concurrent jurisdiction would help ameliorate some, but not all, of these issues. *McGirt* has created many new challenges outside of the criminal arena. For example, Oklahoma's jurisdiction to regulate surface mining in Indian country has been revoked following *McGirt*. And the Environmental Protection Agency has announced that it may withdraw the State's authority to oversee land, air, and water environmental programs. The jurisdictional challenges also extend to Oklahoma's taxing authority. But concurrent

jurisdiction here may serve to affirm Oklahoma's authority in other spheres at well.

Importantly, affirming the State's concurrent jurisdiction over general crimes committed by non-Indians against Indians in Indian country, would reestablish the prospect of justice for Indian victims.

The Court of Criminal Appeals' decision should be reversed.

Argument

I. Oklahoma retains concurrent jurisdiction to prosecute non-Indians who commit crimes against Indians in Indian country.

The state's prosecutorial authority does not stop at the boundaries of Indian country. *Nevada v. Hicks*, 533 U.S. 353, 361 (2001) ("State sovereignty does not end at a reservation's border."). Longstanding precedent has recognized state authority over Indian country within its territory, and this precedent has not been disturbed. *Id.* Moreover, states indisputably have authority over crimes by non-Indians against non-Indians in Indian country, and even over crimes committed by Indians within the state, while not in Indian country. *United States v. McBratney*, 104 U.S. 621 (1881) (acknowledging state authority over crimes committed by non-Indians against non-Indians); *Hicks*, 533 U.S. at 362 ("It is also well established in our precedent that States have criminal jurisdiction over . . . Indians for crimes committed . . . off the reservation."). The question presented here then operates at the intersection of the state's undisputed authority over Indian country and its undisputed authority over crimes committed by non-Indians and asks whether the Indian blood and tribal membership of the victim wrests away the state's

historical police power and prosecutorial authority. The answer is that it does not.

Furthermore, affirming concurrent jurisdiction here does not diminish the power or authority of the tribes as it is well-established that the tribes in general do *not* have jurisdiction over non-Indians in Indian country. *See Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978). On the other side of the balance, the state does have a paramount interest in the safety and security of *all* of its citizens including Indians. *See, e.g.*, *New York ex rel. Cutler v. Dibble*, 62 U.S. 366 (1859). After all, Indians born in the United States are citizens of the United States and citizens of the states in which they reside. *See* U.S. Const. Amend. XIV, §1, cl. 1; 8 U.S.C. §1401(b). Nor does concurrent jurisdiction preclude federal jurisdiction over the same categories of crimes. *See Donnelly v. United States*, 228 U.S. 243 (1913).

A. The state has inherent authority, within Indian country, over actions affecting non-Indians and Indians alike.

As Petitioner explains, states have maintained power over the entirety of their territories, including Indian country, and plenary police power over the criminal conduct of their citizens within those boundaries. Petitioner's Br. 15-23. Over the years, this Court's precedents have acknowledged and reinforced this principle.

This Court has long acknowledged state control over conduct occurring in Indian country within the territorial boundary of the state. In *McBratney*, the question was whether the *federal* court had jurisdiction over the murder of a non-Indian by a non-Indian within the Ute Reservation. 104 U.S. at 621. The Court looked to Colorado's admission to the Union and determined that the State was admitted on "equal footing with the original

States in all respects whatsoever," without any "exception [for] the Ute Reservation, or of jurisdiction over it." *Id.* at 623. So, by virtue of its admission into the Union, and absent any exception, Colorado "acquired criminal jurisdiction over its own citizens and other white persons throughout the whole of the territory within its limits, including the Ute Reservation." *Id.* at 624. The Court then turned the case, which had been initially decided in federal court, over to state authorities. *Id.*

The Court revisited this principle in *New York ex rel. Ray v. Martin*, 326 U.S. 496, 500 (1946). Like *McBratney*, the case involved the murder of a non-Indian by a non-Indian in Indian country. The question, however, was whether New York, as an "original state," likewise had jurisdiction over this category of crimes. *Id.* at 498. The Court held that the "the rule announced in the *McBratney* case" controlled. *Id.* at 499. It reasoned that "in the absence of a limiting treaty obligation or Congressional enactment, each state [has] a right to exercise jurisdiction over Indian reservations within its boundaries." *Id.* at 499. In both of these cases, the Court attributed the state's prosecutorial authority over conduct occurring on Indian lands to the very quality of statehood itself, regardless of how statehood came about.

Even when faced with a state enabling act, which declared that "Indian lands shall remain under the *absolute jurisdiction and control of the Congress of the United States*," the Court still found that the state had criminal jurisdiction over a murder committed on Indian lands. *Draper v. United States*, 164 U.S. 240, 244 (1896) (emphasis added). There, the Court reasoned that to divest the state of jurisdiction in light of that language would undermine "the very nature of the equality conferred on the state by virtue of its admission into the Union." *Id.* at 243. In so doing, the Court may have applied an early

version of the canon of constitutional avoidance, seeking to protect "equality of statehood." *Id.* at 244-45. So, rather than allow the enabling act to strip the state of criminal jurisdiction, the Court held that the United States' reservation of "jurisdiction and control" over "Indian lands" did not deprive the "state of power to punish for crimes committed on . . . Indian lands by other than Indians or against Indians." *Id.* at 245, 247.

The principal thread through these cases—that a state's authority does not "end at a reservation's border"—has been affirmed even as recently as 2001. In *Hicks*, the Court considered the propriety of state jurisdiction where a state official allegedly violated tribal law in executing a search warrant on a tribal member in Indian country. 533 U.S. at 356-57. The Court concluded that state officials executing a warrant on a tribal member in Indian country, could be "held accountable" in state (or federal) court. *Id.* at 374. In so deciding, the Court affirmed three key principles. First, an Indian tribe's full sovereign powers do not extend to the activities of nonmembers of the tribe, *id.* at 358-60; therefore, the state officials could *not* be held accountable in tribal court. Second, and of particular relevance here, an Indian tribe's sovereign powers do not preclude state authority on the reservation, *id.* at 361-63, which the Court relied on to conclude that the state could validly execute its search warrant on Indian lands. And third, the Court called it "well established" that a state's criminal jurisdiction also extends to Indians who commit crimes off of Indian lands. *Id.* at 362.

This Court has also affirmed the state's power to legislate with regard to conduct by non-Indians that affects Indians in Indian country. *Dibble*, 62 U.S. at 366. In that case, New York passed a law making it unlawful for non-Indians to "settle and reside upon lands belonging to or

occupied by any tribe of Indians." *Id.* at 368. Plaintiffs relied on various treaties between the United States and the tribes to argue that the federal government had *exclusive* authority over Indian affairs. *Id.* at 367. The Court rejected this argument. Instead, the Court saw this as a "police regulation" within the sovereign powers of the state aimed at protecting people—Indians included—within its boundaries. *Id.* at 370. This sovereignty extended "so far as it was necessary to preserve the peace of the Commonwealth." *Id.* And the Court held that the power of the state "to preserve the peace of the community is absolute, and has never been surrendered." *Id. Dibble* acknowledged the state's interest in protecting the whole of its territory and promoting the interests of *all* of its residents, including Indians. *Id.* at 370. *Dibble* thus stands for the proposition that a state's interest in promoting peace and protecting Indians within the state, extends to exercising authority over non-Indians whose conduct affects Indians in Indian lands. *Id.*

Accordingly, although this Court has not expressly answered the question presented in this case, the rationale underlying its precedents provide the grounds for doing so. These precedents establish that a state has authority over its territory and the right to exercise its police power to protect all of the people living within it, unless validly preempted. And the historical source for the state's authority—statehood—does not supply a basis for preventing the state from protecting Indians in the same manner it protects non-Indians. Thus "in the absence of a limiting treaty obligation or Congressional enactment"—and there is none here, as discussed in more detail below—"each state [has] a right to exercise jurisdiction over Indian reservations within its boundaries." *Martin*, 326 U.S. at 499. This right extends to the

prosecution of non-Indians for crimes committed against Indians in Indian country.

B. Federal law does not preempt the state's inherent authority.

The General Crimes Act, 18 U.S.C. § 1152, does not preempt the state's authority to prosecute non-Indians who commit crimes against Indians in Indian country nor does any other case or statute. It follows that the state has retained its inherent authority over crimes committed by non-Indians against Indians in Indian country. The General Crimes Act states in relevant part:

> Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.

Id. The Court of Criminal Appeals read the phrase "sole and exclusive jurisdiction of the United States" to mean that the federal government has "exclusive" jurisdiction over these general crimes. *Castro-Huerta v. Oklahoma*, No. F-2017-1203 (Okla. Crim. App. 2021), Pet. App. 4a; *see also Roth v. State*, 499 P.3d 23, 26-28 (Okla. 2021), *petition for cert. pending*, No. 21-914 (filed Dec. 15, 2021). But the phrase "sole and exclusive jurisdiction of the United States," does not mean "that the United States must have sole and exclusive jurisdiction over the Indian country[;]" rather "the words are used in order to describe the laws of the United States, which, by that section, are extended to the Indian country." *Donnelly v. United States*, 228 U.S. 243, 268 (1913); *see also Ex parte Wilson*, 140 U.S. 575, 578 (1891). Stated differently, the General Crimes Act provides that the general criminal laws of the United States that apply to federal territory

(except the District of Columbia) apply equally to Indian country. This extension of the "laws of the United States" into Indian country does nothing to strip the state of its authority over crimes committed by non-Indians against Indians in Indian country.

The Court's decision in *Donnelly*, supports this interpretation. 228 U.S. at 268. After *McBratney* and *Draper* acknowledged state authority over crimes committed by non-Indians against non-Indians in Indian country within the state's boundaries, the Court was asked whether statehood "conferred . . . undivided authority"—meaning exclusive authority on the state—"to punish crimes committed upon those lands," or whether the federal government shared jurisdiction. *Id.* at 271, 255. To determine the extent of *federal* jurisdiction, the Court looked to *United States v. Kagama*, 118 U.S. 375 (1886), which upheld the constitutionality of the Major Crimes Act (conferring federal jurisdiction over certain crimes committed by Indians against Indians). The Court in *Kagama* noted that the federal government's authority was sustained on the ground that the "Indian tribes are wards of the nation." *Id.* at 372 (emphasis omitted). And it observed that the Act also does not "interfere with the process of state courts within the reservation, nor with the operation of state laws upon white people found there." *Id.* at 383. Importantly, the Court did not view the states' or the federal government's jurisdiction as mutually exclusive, nor did the Court view the source of their respective authority to be the same—a state's authority, as explained in *McBratney* and *Draper*, is inherent in its sovereignty, and the federal government's authority is particular to its relationship with the Indian tribes.

C. Neither the Kansas Act, nor Public Law 280, nor any state-specific predecessors proves that the General Crimes Act precludes concurrent state jurisdiction.

Other federal statutes authorizing state jurisdiction over crimes in Indian country provide further points of comparison. The authority conferred by those acts extends *beyond* the authority claimed by Oklahoma here. To give one example, the Kansas Act of 1940 conferred jurisdiction over crimes committed *by* Indians in Indian country. 18 U.S.C. §3243 (providing Kansas jurisdiction over "offenses committed *by* . . . Indians" on Indian land (emphasis added)); *see* Pub. L. No. 76-565, 54 Stat. 249 (1940). To be sure, in addition to authorizing jurisdiction over crimes committed *by* Indians, the act also authorized the jurisdictional authority Oklahoma contends it has here over crimes committed by non-Indians *against* Indians. 18 U.S.C. § 3243 (providing Kansas jurisdiction over "offenses committed . . . *against* Indians" on Indian land (emphasis added)); *see* Pub. L. No. 76-565, 54 Stat. 249 (1940). But this Court has already held that "[n]othing in the language or legislative history of [Public Law] 280 [and by extension its predecessors] . . . indicates that it was meant to divest States of *pre-existing and otherwise lawfully assumed jurisdiction*." *Three Affiliate Tribes of Fort Berthold Reservation v. Wold Eng'g, P.C.*, 467 U.S. 138, 150 (1984) (emphasis added). In other words, certain categories of state authority over Indian lands attend statehood and may be removed only by an express act of Congress. The relevant question then is whether there is any act *removing* jurisdiction from Oklahoma. There is none.

When considering preemption, the Court also considers whether there is some aspect of tribal self-

government at issue. *Rice v. Rehner*, 463 U.S. 713, 726 (1983). If, as in this case, there is none (since tribal courts do not have jurisdiction over non-Indians), the question is whether the state authority would "'impair a right granted or reserved by federal law.'" *Id.* at 718 (quoting *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973) (internal quotation marks omitted)). State jurisdiction is preempted if "it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the State interests at stake are sufficient to justify the assertion of State authority." *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334 (1983). Here, the State's exercise of concurrent jurisdiction not only does not interfere, but actually furthers federal and tribal interests, and the State's interests at stake are substantial.

Federal and tribal interests are aligned with the state's concurrent jurisdiction over non-Indians committing crimes against Indians in Indian country. As explained above, tribal courts do not have jurisdiction over non-Indians. *See Oliphant*, 435 U.S. at 191. Nothing in federal law removes the state's jurisdiction. And, since state and federal authority is *concurrent*, the state's exercise of authority also does nothing to remove federal jurisdiction. Instead, what follows is a cooperative relationship between the states and the federal government to help protect state residents, especially Indians victimized by non-Indians.

II. Concurrent jurisdiction would ameliorate some of the law enforcement challenges created by *McGirt*.

As relevant here, *McGirt*, and the Oklahoma cases applying it, dramatically increased the law-enforcement burden placed on the federal government. The Eastern

District of Oklahoma and Northern District of Oklahoma have seen a 400% and 200% *increase*, respectively, in criminal case filings since *McGirt*. *See* United States Courts, *Judiciary Supplements Judgeship Request, Prioritizes Courthouse Projects* (Sept. 28, 2021), https://bit.ly/3Mh3RoU. But even the requests for additional judges and prosecutors have not changed the reality that federal prosecutors must prioritize violent offenders to the exclusion of others. Br. of the Okla. Dist. Att'ys Assoc. as *Amici Curiae* in support of Oklahoma's Petition, *Oklahoma v. Castro-Huerta*, No. 21-429, at 20-23; *see also* The Editorial Board, *The Supreme Court's McGirt Cleanup*, The Wall Street Journal, Jan. 21, 2022, https://on.wsj.com/3hzBG6u; *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).

As a result, many crimes that currently fall outside the jurisdiction of the State—which right now means both crimes committed by and *against* Indians in Indian country—but within the jurisdiction of the federal government remain unprosecuted. Br. of the Okla. Dist. Att'ys Assoc. as Amici Curiae in support of Oklahoma's Petition at 20-23. This reality undermines the reliability of law enforcement protections for the roughly two million residents who now live in Indian country in eastern Oklahoma. The temporary fixes applied in the wake of *McGirt* are failing, and the situation continues to deteriorate. By affirming the State's concurrent jurisdiction to prosecute general crimes committed by non-Indians against Indians, this Court will ameliorate some of the worst effects of *McGirt* by allowing the State to fill the current jurisdictional gap that too often deprives *Indian* victims of justice.

A. The limitations of cross-deputization.

Following *McGirt*, suspects have attempted to capitalize on the gap in jurisdictional authority of Oklahoma officers investigating crimes involving an Indian suspect or victim. For example, a man ordered officers investigating dog attacks off of his property, claiming his tribal heritage. Curtis Killman, *Bizarre Dog Killing Exposes Limits to Cross-Deputization Agreements in Wake of McGirt Ruling*, Tulsa World, Feb. 27, 2022, https://bit.ly/3vv33GV. In another example, officers pulled over a car because it was associated with an attempted robbery. *Id.* The driver insisted that the Tulsa Police did not have jurisdiction over her because she was Indian. *Id.* In that instance, however, the claim was unavailing because the officers were cross-deputized. *Id.*

Cross-deputization agreements between Oklahoma officers and the federal government or the relevant tribe are an important tool to bridge the jurisdictional gaps. They empower Oklahoma officers to continue to conduct law enforcement activities, regardless of the Indian status of the suspect or the victim. Tulsa County District Attorney Steve Kunzweiler observed that "the risk to public safety is enormous if officers do not have the authority to make [] public safety decisions." *Id.*

But even those agreements are becoming increasingly strained: Just this month, Hughes County Sheriff Marcia Maxwell announced that her department's cross-deputization agreement with the Muscogee Creek Nation's Lighthorse Police would be terminated. In her public letter, she noted the "the tribe's inability or refusal to assist on tribal calls," and the fact that cross-commissioning strains deputies who must provide "all of the paperwork required for tribal court" and even transport "arrestee[s] to another county." Storme Jones, *Hughes Co. Sheriff*

Says Law Enforcement with Muscogee Nation is Failing, Withdraws Cross Deputization, News On 6, Feb. 9, 2022, https://bit.ly/3C4EqSJ. She warned that "[p]eople know lighthorse isn't going to do anything and now they're kind of taking matters into their own hands and that scares me." *Id.* Returning to the example above: without a cross-deputization agreement, the driver would have been right. State officers would not have had authority over her, and they would have had to either contact tribal police to respond or let her go.

B. Continued disorder in the criminal justice system.

Just since *amici* filed their brief in support of Oklahoma's Petition, there have been a slate of publicly reported instances where the Indian status of the victim dictated the law enforcement or judicial outcome—and for the worse.

- An angry wife attended the funeral of her husband's lover and then brutally mutilated the corpse. The Editorial Board, *How to Get Away with Manslaughter*. The Wall Street Journal, Dec. 3, 2021, https://on.wsj.com/3tl02X6. The State prosecuted her, and she received a 16-year sentence. *Id.* But following *McGirt*, the court concluded on direct appeal, that the prosecution was unlawful because the victim was "1/64 Creek, an amount consistent with having one Native American great-great-great-great-great grandparent." *Id.* Because the defendant is not Indian, the Creek can't prosecute, and because the federal statute of limitations ran, the federal government can't prosecute either. *Id.* On November 8, 2021, she was released from custody. *Id.*
- In March 2019, Crystal Jensen caught her

neighbor peeping in a window as she got out of the shower. Ray Carter, *McGirt Leaves Indian Victims Feeling 'Defenseless'*, Oklahoma Council of Public Affairs, Dec. 15, 2021, https://bit.ly/3MsX3Vl. Because Jensen is Cherokee and lives within the boundaries of the Creek/Cherokee Nation, the defendant, a non-Indian, was able to rely on *McGirt* to avoid state prosecution. *Id.* Again, the tribes can't prosecute because the defendant is non-Indian and federal officials declined to press charges. In a statement, Jensen said, "Basically unless I'm murdered or raped, there's nothing . . . there's no law and order for me, or for anyone that's on an Indian roll in northeast Oklahoma. And it's ridiculous." *Id.*

- In 2013, Richard Roth was convicted in the death of 12-year-old Billy Jack Chuculate Lord. Grant D. Crawford, *Webinar: Statute of Limitations in Wake of McGirt Sparks Confusion*, Tahlequah Daily Press, Oct. 27, 2021, https://bit.ly/3HB29Lr. Lord, a member of the Cherokee Nation, was hit by a car as he either rode or walked his bike in Indian country. *Id.* The Oklahoma Court of Criminal Appeals rejected the State's claim of concurrent jurisdiction, and Roth's case was dismissed on direct appeal. *Id.* Since Roth is not an Indian, the tribal court can't prosecute, and the applicable federal statute of limitations expired, so the federal government can't prosecute either. *Id.*

III. Affirming concurrent state jurisdiction addresses many, but not all, of the issues created by *McGirt*.

It goes without saying that affirming the State's concurrent jurisdiction here goes some, but not all, of the way to addressing the fallout from *McGirt*. Numerous issues under both criminal and civil law remain.

Historically the Oklahoma district attorneys in eastern Oklahoma had authority to prosecute not only the category of crimes at issue here—that is crimes committed by non-Indians against Indians—but also crimes committed by Indians against non-Indians and by Indians against Indians because the vast majority of their jurisdictional territory was not "Indian country." That, of course, has all changed since *McGirt*. So, in addition to the burden imposed on the federal government in having to take up general crimes committed by non-Indians against Indians, both the federal government and the tribes have had to absorb a much larger volume of other categories of crimes as well—namely crimes by Indians. In its brief in support of Oklahoma's Petition, *amici* detailed the drain on resources and the operational challenges for both the federal government and the tribes in the wake of *McGirt*. Br. of the Okla. Dist. Att'ys Assoc. as Amici Curiae in support of Oklahoma's Petition at 7-9. This brief will not repeat that information here.

Briefly though, it is worth noting that many of the same problems persist and the stories illuminating the impact of *McGirt* on law enforcement and the criminal justice system in eastern Oklahoma are numerous. To give just one example, a few months ago, Oklahoma police had sufficient evidence to arrest a juvenile suspected in the death of a two-year-old. Daisy Creager, *Suspect in Infant Death Released in McGirt-Related Dispute*,

Bartlesville Examiner-Enterprise, Nov. 4, 2021, https://bit.ly/3py1y6V. But because the suspect was Cherokee, the Oklahoma officers did not take him into custody. Federal authorities do not have a system set up to process juvenile offenders, so they asked the tribe to hold him. *Id.* But the tribe similarly lacks a juvenile holding facility, though it does have contract beds at other facilities. *Id.* The suspect was released, and that night he violated the protective order filed by the child's mother, posing a grave danger to her given his history of domestic violence. *Id.* The Washington County District Attorney, Kevin Buchanan said in response that "the clear effect of the McGirt decision is to create two separate systems in which Oklahomans are treated, charged and punished by two different sets of rules." *Id.*

In addition to the criminal justice challenges that have arisen since *McGirt*, the State is seeing the impact of *McGirt* in entirely new arenas. Just this December, a federal district court judge addressed whether Oklahoma was entitled to a preliminary injunction to stop the Department of Interior from "enforcing their decision to strip Oklahoma of its regulatory authority over surface mining on the Creek Reservation." *Oklahoma v. U.S. Dep't of Interior*, 2021 WL 6064000, at *1 (W.D. Okla. Dec. 22, 2021).

Following *McGirt*, the agency told Oklahoma it could no longer operate its federally authorized regulatory program, on the new post-*McGirt* Indian lands. *Id.* at *3. The court found that, in light of *McGirt*, Oklahoma could not show a likelihood of success on the merits because the plain language of the Surface Mining Control and Reclamation Act, 30 U.S.C. §§ 1201, *et seq.*, "precludes a state from administering [its program] on Indian land." *Id.* at *3. The court noted that the result it reached is a "prime

example of the havoc flowing from the *McGirt* decision." *Id.* at *1.

And now the Environmental Protection Agency has announced that it is considering withdrawing a post-*McGirt* decision to allow the State to continue overseeing land, air, and water environmental programs. Press Release, EPA Press Office, *EPA Proposes to Withdraw and Reconsider 2020 Decision on State of Oklahoma's Regulatory Authority Within Indian Country* (Dec. 22, 2021), https://bit.ly/3tr67B6. This will directly affect the regulation of oil and gas—and other significant economic activity—in eastern Oklahoma.

Taxing authority is another major issue for Oklahoma post-*McGirt*. Because there are already certain exemptions from Oklahoma's authority to tax in Indian country, the Oklahoma Tax Commission's report estimates that the expansion of those lands in the wake of *McGirt* will reduce state income tax collections by $72.7 million *per year*. Jay Doyle, Oklahoma Tax Commission, *Report of Potential Impact of McGirt v. Oklahoma*, Sept. 30, 2020, at 2, https://bit.ly/3C7rk73. This is in contrast to the lost tax collection due to the same exclusions pre-*McGirt*, which totaled $1.3 million per year. Curtis Killman, *Federal Lawsuit Challenges Oklahoma's Right to Tax Native Americans Under* McGirt *Ruling*, Tulsa World, Feb. 22, 2022, https://bit.ly/3vJtLM8. Additionally, the Commission predicted that tribal citizens will be eligible for income tax refunds for the past three years totaling $218.1 million. Jay Doyle, Oklahoma Tax Commission, *Report of Potential Impact of McGirt v. Oklahoma*, Sept. 30, 2020, at 2, https://bit.ly/3C7rk73. And the estimated loss to state and local sales taxes is $132.2 million. *Id.*

Consistent with the Commission's predictions, a Choctaw Nation couple has now sued in federal court arguing that *McGirt* applies to civil tax matters and that they are

exempt from state income tax. Chris Killman, *Federal Lawsuit Challenges Oklahoma's Right to Tax Native Americans Under* McGirt *Ruling*, Tulsa World, Feb. 22, 2022, https://bit.ly/3to61u5. The couple relies on judicial decisions holding that a state may not subject a tribal member, living in Indian country, whose income comes from reservation sources to state income tax. *Id.*

A finding of concurrent jurisdiction here, however, may affirm the State's authority in other spheres as well, depending on the nature of the federal statute or area of authority at issue.

* * *

If the defendant is non-Indian, the victim is Indian, and the crime is a general crime, the federal government likely will not prosecute because it has been forced to prioritize major crimes. *See supra* Section II.B.; Petitioner's Br. at 8; *see also* Br. of the Okla. Dist. Att'ys Assoc. as Amici Curiae in support of Oklahoma's Petition at *passim*. And the tribes generally do not have jurisdiction to prosecute non-Indians. *See Oliphant*, 435 U.S. 191. Where the federal government does indict, plea agreements have become commonplace. But that solution provides little comfort as pleas, by their nature, result in lesser sentences than would be achieved through successful prosecution. To illustrate, in those cases where the federal government has re-charged a non-Indian defendant whose conviction for victimizing an Indian was overturned on direct appeal due to *McGirt*, each defendant who has pled has been offered a sentence lower than what was imposed in the state proceeding. Petitioner's Br. at 8-9.

These outcomes for Indian victims in eastern Oklahoma are the direct result of that classification and its intersection with this Court's holding in *McGirt*, federal statutes, and the Oklahoma courts' interpretative

rulings. Were this Court to affirm the State's concurrent jurisdiction in cases involving general crimes where the defendant is non-Indian and the victim is Indian, it would reestablish the prospect of justice for Indian victims.

Conclusion

The Court of Criminal Appeals' decision should be reversed.

Respectfully submitted,

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March 7, 2022