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 FOR RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS AND STATUTES

LEGISLATIVE MATERIALS

OTHER AUTHORITIES

INTRODUCTION

Everywhere today, a settled rule governs crimes by non-Indians against Indians in Indian country: Where Congress has authorized States to prosecute, States do. Where not, not. In 21 States, Congress has authorized prosecutions. So they proceed. In 26 States, authorization is absent. So federal jurisdiction is exclusive.

That result is no accident. It reflects a specific statute (the General Crimes Act, or "GCA") that Congress reenacted in 1948 and myriad other statutes allocating Indian-country criminal jurisdiction, all embedding the rule that States may exercise jurisdiction over cases like this one only with Congress's approval. The status quo, by congressional design, reflects choices by three sovereigns: If States lack jurisdiction today, it is because Congress did not confer jurisdiction, States declined to assume jurisdiction under Public Law 280, or Tribes exercised the veto Congress conferred.

Petitioner invites this Court to undo those choices, upend Congress's scheme, and jettison an understanding settled for 75 years or more—all to create by judicial fiat sweeping criminal liability without precedent since the Founding.

The Court should decline. And to do so, it need not excavate ancient history or explicate first principles. Congress's modern statutes settle it. The GCA applies to Indian country the federal enclave laws, under which federal jurisdiction is "sole and exclusive" and States may act only with Congress's approval. This Court's 1946 decision in *Williams v. United States* recognized

that under the GCA, federal jurisdiction is indeed sole and exclusive and that federal "courts …, rather than those of [States], have jurisdiction over offenses … by one who is not an Indian against one who is." 327 U.S. 711, 714 (1946). Then, on the heels of *Williams*, Congress reenacted the GCA. And days later, Congress authorized some but not all States to exercise jurisdiction over crimes "by or against Indians"—via statutory text expressly based on the same rule as *Williams*, using language that otherwise would be superfluous. Shortly after, Public Law 280 created a mechanism for all States to acquire such jurisdiction. Along the way, Congress enacted many statutes fine-tuning jurisdiction, all premised on *Williams*' rule.

Those statutes decide this case. Petitioner does not dispute that the 1948 Congress "believed … States generally lacked prosecutorial authority over crimes committed by non-Indians against Indians in Indian country." Br. 29. Nor can Petitioner deny that near-simultaneous statutes lodged that understanding in the U.S. Code. The GCA thus "carries th[e] settled meaning," *Georgia v. Public.Resource.Org, Inc.*, 140 S. Ct. 1498, 1510 (2020), it was understood to bear "at the time." *Wis. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2074 (2018).

Petitioner asks this Court to pull out the rug. It says this Court was wrong in *Williams* and Congress was benighted to rely on the same rule. Thus, per Petitioner, this Court should discard *Williams* and interpret the 1948 GCA to mean the opposite of what the 1948 Congress understood. But that is not how this Court does statutory interpretation, which aims to identify—

not thwart—Congress's understanding discernable in statutory "text and context." *Va. Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1901 (2019) (plurality op.).

All that would be plenty to reject Petitioner's position. But there is two centuries more. From the start, Congress exercised its "plenary and exclusive" authority over Indian affairs, *United States v. Lara*, 541 U.S. 193, 200 (2004), to oust States from prosecuting crimes involving Indians. Congress immediately "assumed federal jurisdiction over offenses by non-Indians against Indians," *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 201 (1978), via statutes recognizing States lacked jurisdiction. Congress did so against the backdrop of treaties covenanting that the United States alone would protect Tribes from crime. And it acted with *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), as a guide. Congress's "actions and inactions" thus "demonstrated an intent to reserve jurisdiction over non-Indians for the federal courts." *Oliphant*, 435 U.S. at 204.

This Court thus got it exactly right in *Williams*. Indeed, the Court has already held that the GCA's sibling—the Major Crimes Act ("MCA")—"is pre-emptive," based on its "history," *United States v. John*, 437 U.S. 634, 651 & n.22 (1978), and "text," *Negonsott v. Samuels*, 507 U.S. 99, 103 (1993). The GCA's history and text are indistinguishable.

Petitioner builds its contrary position largely on three points. First, it invokes *United States v. McBratney*, 104 U.S. 621 (1881), which held that States have exclusive jurisdiction over non-Indian/non-Indian crimes. But *Donnelly v. United States* held that offenses

"by or against Indians are not within the principle of … *McBratney*." 228 U.S. 243, 271 (1913). Indeed, *McBratney* recognized that States may exercise jurisdiction only if the GCA is "repeal[ed]." 104 U.S. at 623. So *Donnelly*'s holding—that the GCA continues to apply here—decides this case too.

Second, Petitioner relies on civil decisions "depart[ing]" from *Worcester*. Br. 18. Civil jurisdiction, however, is different because Congress by statute treated it as different. That is why this Court rejected the same conflation when Tribes tried it. *Duro v. Reina*, 495 U.S. 676, 687 (1990).

Indeed, this Court cannot properly expand criminal liability in the manner Petitioner urges. "Only … the legislature" may "'make an act a crime.'" *United States v. Davis*, 139 S. Ct. 2319, 2325 (2019) (quoting *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812)). While the Court has some leeway to modify civil rules, it may not—common-law style—proliferate criminal liability.

Third, Petitioner invokes practical concerns based on *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020). But those concerns—which are overstated and based on citation-free figures, *see* Br. in Opp. 27-32; Cherokee Cert. Br. 3-12—do not justify disregarding Congress's statutes and upending settled law even in Oklahoma, much less nationwide. Petitioner is not the first State to have unlawfully exercised jurisdiction. Kansas in 1940 was in the same boat. Like Petitioner, it wished to continue existing practices. Kansas and Congress, however, recognized a statute was required. In 82 years, much has changed. But not our separation of powers.

STATEMENT

A. Early Statutes Establish Exclusive Federal Jurisdiction Over Crimes Involving Indians.

1. With "the adoption of the Constitution, Indian relations" became "the exclusive province of federal law." *Oneida County v. Oneida Indian Nation of N.Y.*, 470 U.S. 226, 234 (1985). "Beginning with the Trade and Intercourse Act of 1790 … Congress assumed federal jurisdiction over offenses by non-Indians against Indians." *Oliphant*, 435 U.S. at 201. Early Congresses revised and reenacted the 1790 Act. Act of July 22, 1790, ch. 33, §5, 1 Stat. 137, ("1790 Act"); *see* Act of Mar. 1, 1793, ch. 19, §4, 1 Stat. 329 ("1793 Act"); Act of May 19, 1796, ch. 30, §4 1 Stat. 469 ("1796 Act"); Act of Mar. 30, 1802, ch. 13, §4, 2 Stat. 139 ("1802 Act"); Act of Mar. 3, 1817, ch. 92, §2, 3 Stat. 383 ("1817 Act").

Even so, some States asserted criminal jurisdiction in Indian country. *Worcester* held that Georgia lacked jurisdiction to prosecute non-Indians for crimes in Cherokee territory. 31 U.S. at 561. Two years later in 1834, Congress enacted the GCA's "direct progenitor." *United States v. Wheeler*, 435 U.S. 313, 324 (1978).

2. Although the Court has since "modified the[] principles" of *Worcester* in some respects, its "basic policy … has remained." *Williams v. Lee*, 358 U.S. 217, 219 (1959). That includes the rule that, for crimes "by or against … Indian[s]," "tribal jurisdiction or that expressly conferred on other courts by Congress has remained exclusive." *Id.* at 220; *see Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 471 (1979); *Solem v. Bartlett*, 465

U.S. 463, 467 & n.8 (1984); *Nevada v. Hicks*, 533 U.S. 353, 365 (2001); *United States v. Bryant*, 579 U.S. 140, 146 (2016); *McGirt*, 140 S. Ct. at 2479.

McBratney held that States have exclusive jurisdiction over non-Indian/non-Indian crimes. It read Colorado's enabling act to "repeal[]… prior statute[s]" vesting jurisdiction in the federal government, including the GCA (then codified at R.S. 2145). 104 U.S. at 621-22. *Draper v. United States* reached the same result. 164 U.S. 240 (1896). The Court reserved the question of crimes "by or against Indians." *McBratney*, 104 U.S. at 624.

Donnelly resolved that question. It explained that *McBratney* and *Draper* held that statehood simultaneously (1) "withdr[e]w[] from the United States … control of" non-Indian/non-Indian offenses; and (2) "conferr[ed] upon" States that jurisdiction. 228 U.S. at 271. But *Donnelly* concluded "[u]pon full consideration" that offenses "by or against Indians are not within the principle of … *McBratney* and *Draper*." *Id.* *Donnelly* thus held the federal government could prosecute a non-Indian who murdered an Indian. *Id.* at 252.

Because *McBratney* and *Draper* rested on theories of transfer, *Donnelly* had a flip side: States lack such jurisdiction where the federal government retains it. In 1946, *Williams* made the point express: Under the GCA, the "laws and courts of the United States, rather than those of [States], have jurisdiction over offenses" by non-Indians against Indians. 327 U.S. at 714.

B. Post-1940 Statutes Identify When States May Prosecute Crimes Involving Indians.

Two years later, Congress reenacted the GCA. Act of June 25, 1948, ch. 645, Pub.L. No. 80-772, §1152, 62 Stat. 683. Meanwhile, Congress enacted many statutes conferring jurisdiction over crimes "by or against Indians," including for Kansas (1940), North Dakota (1946), and Iowa and New York (1948).[1]

Public Law 280 gave additional States "jurisdiction over offenses committed by or against Indians." Act of Aug. 15, 1953, ch. 505, Pub.L. No. 83-280, §2, 67 Stat. 588 (codified as amended at 18 U.S.C. §1162). It also allowed "any other State" to "assume [such] jurisdiction." *Id.* §7.

In 1968, Congress amended Public Law 280 to require tribal consent. Pub.L. No. 90-284, tit. VII, §406, 82 Stat. 77 (codified at 25 U.S.C. §1326). It also permitted States to "retrocede" jurisdiction. 25 U.S.C. §1323(a). Assumptions and retrocessions can be full or "part[ial]." *Id.* §§1321(a)(1), 1323(a).

C. Criminal Jurisdiction Today Reflects Sovereign Choices By Congress, States, And Tribes.

Today, 21 States have jurisdiction over crimes "by or against" Indians in some Indian country: Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin ("mandatory" Public Law 280 States); Florida, Idaho,

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[1] 18 U.S.C. §3243; Act of May 31, 1946, ch. 279, Pub.L. No. 79-394, 60 Stat. 229; Act of June 30, 1948, ch. 759, Pub.L. No. 80-846, 62 Stat. 1161; Act of July 2, 1948, ch. 809, Pub.L. No. 80-881, 62 Stat. 1224; Act of Oct. 5, 1949, ch. 604, Pub.L. No. 81-322, 63 Stat. 705.

Montana, and Washington ("optional" States); and Colorado, Connecticut, Kansas, Maine, Massachusetts, New York, North Dakota, Rhode Island, South Carolina, Texas, and Utah (with State-specific statutes).[2]

Fourteen States have Indian country but no such jurisdiction: Alabama, Arizona, Indiana, Iowa, Louisiana, Michigan, Mississippi, Nevada, New Mexico, North Carolina, Oklahoma, South Dakota, Virginia, and Wyoming.[3] Another 12 States have jurisdiction over some Indian country but lack it elsewhere: Colorado, Idaho, Massachusetts, Minnesota, Montana, Nebraska, North Dakota, Oregon, Texas, Utah, Washington, and Wisconsin.[4]

States use Public Law 280 to obtain bespoke jurisdiction. Idaho, for example, asserted jurisdiction over seven substantive areas (including neglected and

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[2] 18 U.S.C. §1162(a), (c), (d); Duane Champagne & Carole Goldberg, *Captured Justice: Native Nations and Public Law 280*, at 18-20 (2d ed. 2020) ("*Captured Justice*"); Pub.L. No. 98-290, §5, 98 Stat. 201 (1984); Pub.L. No. 98-134, §6, 97 Stat. 851 (1983); 18 U.S.C. §3243; Pub.L. No. 96-420, §6, 94 Stat. 1793 (1980); Pub.L. No. 100-95, §6(g), 101 Stat. 704 (1987); 25 U.S.C. §232; Pub.L. No. 95-395, §9, 92 Stat. 813 (1978); Pub.L. No. 103-116, §10, 107 Stat. 1118 (1993); Pub.L. No. 97-429, §6, 96 Stat. 2269 (1983); Pub.L. No. 96-227, §7b, 94 Stat. 317 (1980).

[3] M. Brent Leonhard, *Returning Washington P.L. 280 Jurisdiction to Its Original Consent-Based Grounds*, 47 Gonz. L. Rev. 663, 692 (2012); Pub.L. No. 115-121, 132 Stat. 40 (2018); Pub.L. No. 115-301, 132 Stat. 4395 (2018); 80 Fed. Reg. 39,144 (July 8, 2015).

[4] *Captured Justice* 3, 18-20; Carole Goldberg, *Tribal Jurisdictional Status Analysis*, Tribal Ct. Clearinghouse, https://bit.ly/3iDcXyt (updated Feb. 16, 2010).

abused children). Idaho Code §67-5101. Many States have retroceded some jurisdiction, including (for example) Nebraska and Nevada. *Cohen's Handbook of Federal Indian Law* §6.04(3)(g) (Nell Jessup Newton ed., 2012) ("*Cohen's*").

In States lacking plenary jurisdiction, well-established systems govern law enforcement involving non-Indians. The federal government issues "special law enforcement commissions," which allow designees to "enforce Federal law," including for "crimes perpetrated by non-Indians." 69 Fed. Reg. 6,321, 6,321 (Feb. 10, 2004). Tribal prosecutors acting as special assistant U.S. attorneys prosecute non-Indians. 28 U.S.C. §543; 25 U.S.C. §2810.

Congress remains active in improving this system. In the Tribal Law and Order Act of 2010 ("TLOA"), Congress increased funding and training for federal and tribal law enforcement, mandated information-sharing, and established the Indian Law and Order Commission. Pub.L. No. 111-211, 124 Stat. 2258.

Congress has also expanded tribal jurisdiction. The Violence Against Women Reauthorization Act of 2013 authorized Tribes to prosecute certain non-Indians for domestic-violence offenses. 25 U.S.C. §1304. This March, the Violence Against Women Reauthorization Act of 2022 expanded tribal jurisdiction over non-Indians, including for "child violence." Pub.L. No. 117-103, §804(5)(B), 136 Stat. 48.

By contrast, Congress since 1968 has not regarded state jurisdiction as a panacea. That is because even where States have jurisdiction, they "have not devoted

their limited criminal justice resources to crimes committed in Indian country." *Bryant*, 579 U.S. at 146. States often view jurisdictional grants as "essentially an unfunded Federal mandate." Indian Law & Order Comm'n, *A Roadmap for Making Native America Safer* 69 (Nov. 2013) ("*Roadmap*"). "[C]alls for service go unanswered, victims are left unattended, criminals are undeterred, and Tribal governments are left stranded." *Id.* Meanwhile, inserting States can undermine accountability, to the detriment of effective law enforcement. *Infra* 51.

In 2018, Congress (by request) repealed the grant to Iowa of jurisdiction over crimes "by or against Indians." Act of Dec. 11, 2018, Pub.L. No. 115-301, 132 Stat. 4395.

Congress is considering how to allocate criminal jurisdiction in Oklahoma after *McGirt*. *E.g.*, H.R. 3091 §6(b)(1), 117th Cong. (introduced May 11, 2021) (authorizing compacting over crimes "by or against Indians" within Cherokee and Chickasaw reservations).

D. Oklahoma Courts Reject Petitioner's Unprecedented Theory.

In *Murphy* and *McGirt*, Oklahoma affirmed that "States lack criminal … jurisdiction … if either the defendant or victim is an Indian." *Sharp v. Murphy* Pet. 18 (No. 17-1107); *see McGirt* Arg. Tr. 54 (No. 18-9526).

Below, Respondent invoked that law. After *McGirt*, the Oklahoma Court of Criminal Appeals agreed Oklahoma lacked jurisdiction and rejected Petitioner's new concurrent-jurisdiction argument. Pet. App. 4a. The trial court dismissed.

The federal government indicted Respondent, who pled guilty to child neglect. The plea provides for a seven-year sentence and then Respondent's immediate removal from the United States. It recounts that the "Government has consulted with [the victim's] family," who "consent[ed]." Plea Agreement 16, No. 20-cr-255 (N.D. Okla. Oct. 15, 2021), ECF No. 52.

SUMMARY OF ARGUMENT

I.A. This case should end with the GCA's commonly understood meaning in 1948, when Congress reenacted it. The GCA applies to Indian country the laws governing federal enclaves within "sole and exclusive" federal jurisdiction, where States may act only with permission. This text is materially identical to the MCA's, which this Court has held "is preemptive." *John*, 437 U.S. at 651. Moreover, Congress reenacted the GCA on the heels of *Williams*' affirmation that federal jurisdiction under the GCA is exclusive, enacted near-simultaneous statutes whose text embeds the same understanding, and (as extra icing on the cake) had before it reports confirming that understanding. The GCA thus carries that settled meaning.

B. Based on the same understanding, Congress since 1940 has enacted many statutes, including Public Law 280, giving some—but only some—States the jurisdiction Petitioner seeks. That comprehensive scheme underscores the importance of adhering to the settled understanding that Congress lodged in statute. And it preempts Petitioner's attempt to exercise extra-statutory jurisdiction. Petitioner's position would thwart the choices of 26 States not to acquire the jurisdiction at issue here, frustrate Congress's choice to

give Tribes a veto, and render incoherent retrocessions and repeals.

II.A. *Williams*' rule is also correct as an original matter. The Congress that enacted the 1948 GCA's progenitors regarded crimes involving Indians as a war-and-peace issue of "dominant" "federal interest." *Arizona v. United States*, 567 U.S. 387, 399 (2012). Early Congresses then "pervasive[ly]" regulated this area via statutes and treaties whose text provided that only the federal government, not States, could prosecute crimes involving Indians in Indian country. *Id.* *Worcester* crystalized that understanding in its holding that the federal government alone may regulate "intercourse" with Indians—and Congress enacted the 1834 GCA in *Worcester*'s wake and based on the same understanding. Meanwhile, Congress and this Court recognized that criminal statutes involving Indians or Indian country are preemptive absent repeal or express exception. If Congress, in this context, intended to leave room for States to exercise the jurisdiction Petitioner asserts, it would have said so. But instead, the 1834 GCA applied to Indian country the laws governing places within "sole and exclusive" federal jurisdiction and embedded in its text the understanding that States lacked jurisdiction.

B.1. *McBratney* and *Draper* confirm Petitioner is wrong. They recognized that States can exercise criminal jurisdiction in Indian country only if the GCA is "repeal[ed]." They held that statehood impliedly repealed the GCA as to non-Indian/non-Indian crimes. But *Donnelly* held that "offenses committed by or against Indians are not within the principle of … *McBratney* and *Draper*." 228 U.S. at 271. And by

holding that the GCA has *not* been repealed as to cases like this, *Donnelly* resolved the question presented here.

2. Civil cases cannot help Petitioner. This Court has declined to conflate civil and criminal jurisdiction, precisely because Congress's statutes treat those realms differently. Petitioner's invitation to expand criminal jurisdiction would also violate the principle that only the legislature can create criminal liability.

III. *Bracker* balancing does not apply: Congress's statutes control, and *Bracker* does not govern the criminal realm. Regardless, *Bracker* balancing underscores why Petitioner lacks jurisdiction.

ARGUMENT

I. Congress's Post-1940 Statutes Preempt States From Prosecuting Crimes Against Indians In Indian Country.

To resolve this case, the Court need not sift first principles or weigh Petitioner's claim that it "presumptively" has jurisdiction. Br. 11. Congress enacted today's GCA in 1948. This case thus turns on how the statute was understood then. And that understanding is not disputed or disputable. When Congress in 1948 applied to Indian country the laws governing places of "sole and exclusive" federal jurisdiction, Congress acted against the backdrop of *Williams*, enacted near-simultaneous statutes whose text reflects the same understanding, and wove a web of jurisdictional statutes premised on *Williams*' rule. The GCA thus "carries th[at] settled meaning." *Public.Resource.Org*, 140 S. Ct. at 1510.

A. The 1948 GCA Preempts State Jurisdiction.

This Court weighs a statute's "preemptive effect" by "looking to … text and context." *Va. Uranium*, 139 S. Ct. at 1901; *see Coventry Health Care of Mo., Inc. v. Nevils*, 137 S. Ct. 1190, 1197 (2017). Statutes "may preempt state authority by so stating in express terms" or based on "restrictions or rights that are inferred." *Kansas v. Garcia*, 140 S. Ct. 791, 801 (2020).

1. The 1948 GCA's operative text establishes that States lack jurisdiction over crimes it covers. The GCA provides that "*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, … shall extend to the Indian country." 18 U.S.C. §1152 (emphases added). Via this text, Congress applied to Indian country laws governing federal enclaves, where the federal government "exercise[s] exclusive" jurisdiction. U.S. Const. art. I, §8, cl. 17. And enclaves' signal feature is that federal law "bars state regulation without specific congressional action." *Paul v. United States*, 371 U.S. 245, 263-64 (1963) (citing *Pac. Coast Dairy v. Dep't of Agric. of Cal.*, 318 U.S. 285, 296 (1943)). So when Congress applied to Indian country "the general laws of the United States" governing offenses in federal enclaves, those "laws" included the baseline enclave rule. *See Sekhar v. United States*, 570 U.S. 729, 733 (2013) ("[I]f a word is obviously transplanted from another legal source, … it brings the old soil with it.").

This text shows the GCA is preemptive. Petitioner cannot apply its criminal laws to federal enclaves without Congress's approval. Equally, Petitioner may

not—without Congress's approval—apply its criminal laws to subjects that Congress directed be governed by the laws applicable in these areas of "sole and exclusive" federal jurisdiction. *See Parker Drilling Mgmt. Servs., Ltd. v. Newton*, 139 S. Ct. 1881, 1890 (2019) (interpreting statute "extend[ing]" the laws applicable in "area[s] of exclusive Federal jurisdiction located within a State" to incorporate "federal enclave" law, including the rule that "state law presumptively does not apply").

This Court has given the same meaning to the same text in the GCA's sibling. Much like the GCA, the MCA provides that defendants "shall be subject to the same law and penalties as all other persons committing [qualifying] offenses, within the *exclusive jurisdiction* of the United States." 18 U.S.C. §1153(a) (emphasis added). The MCA "is pre-emptive of state jurisdiction when it applies." *John*, 437 U.S. at 65. And this Court has explained that "the text of §1153 … make[s] clear[]" that the MCA is preemptive—pointing to the word "exclusive." *Negonsott*, 507 U.S. at 103.

No relevant text distinguishes the GCA. Under Petitioner's position, materially identical text would mean one thing in the MCA and something else in the GCA, contrary to the canon of consistent usage. *Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 232 (2007). Nor is it an answer to say that the MCA applies to crimes by Indians and different background principles govern. This Court relied on "text." *Negonsott*, 507 U.S. at 103.

Even within the GCA, Petitioner's view would make the same text mean different things at different times. The GCA, via the same text, covers crimes *by Indians*.

Petitioner does not dispute that the GCA preempts state jurisdiction over such crimes. *E.g.*, *Hicks*, 533 U.S. at 365. The GCA also "implicitly pre-empt[s] tribal jurisdiction" over crimes by non-Indians. *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 854 (1985). Nothing in the GCA's text leaves room for Petitioner's gerrymandered system, "which would render [the GCA] a chameleon." *Clark v. Martinez*, 543 U.S. 371, 382 (2005).

The textual evidence is even stronger because the GCA makes express exceptions—and the atextual exception Petitioner proposes would yield results Congress is unlikely to have intended. The GCA excludes crimes "by one Indian against … another" and crimes by Indians "punished by the local law of the tribe." 18 U.S.C. §1152; *see* Act of June 30, 1834, ch. 161, §25, 4 Stat. 729 ("1834 Act"). Thus, the GCA channels prosecutions of Indians through one sovereign (including for crimes against non-Indians). Similarly, just one sovereign punishes non-Indians for crimes against non-Indians. *McBratney*, 104 U.S. at 621-22. But on Petitioner's view, the GCA silently makes non-Indians who commit crimes against Indians uniquely subject to two sovereigns' plenary jurisdiction (plus the federal criminal laws applicable everywhere). *Cf. Lewis v. United States*, 523 U.S. 155, 163 (1998) (rejecting interpretation "leav[ing] residents of federal enclaves randomly subject to three sets of criminal laws").

The better reading is the one that fits the text: Congress understood that because the GCA makes no exception for state prosecutions in cases like this, States may not prosecute. *See Hillman v. Maretta*, 569 U.S.

483, 496 (2013) ("[w]here Congress explicitly enumerates certain exceptions …, additional exceptions are not to be implied"). That explains why, unlike for tribal-court prosecutions, Congress did not address multiple-prosecution issues from state-court prosecutions. *See Oliphant*, 435 U.S. at 203 (GCA precludes tribal prosecutions of non-Indians partly because it does not address "retrial of non-Indians" tried in tribal court).

2. The passages Petitioner cites from *Donnelly* and *Wilson*, Br. 24, are not to the contrary. Those cases rejected the argument that when the MCA vested some jurisdiction in territorial courts, it displaced the GCA by rendering federal jurisdiction no longer "sole and exclusive." *See Donnelly*, 228 U.S. at 268 (phrase "do[es] not mean that the United States must have sole and exclusive jurisdiction … in order that [the GCA] may apply"); *accord Ex parte Wilson*, 140 U.S. 575, 578 (1891). As *Negonsott* recognized, that conclusion does not detract from the significance of Congress's decision to apply to Indian country the laws governing areas of "exclusive" federal jurisdiction.

Petitioner also observes that the GCA does not explicitly say "state jurisdiction is preempted" and that statutes "extend[ing]" federal law do not always preempt state law. Br. 24-25. The GCA, however, extends a particular *type* of federal law: enclave laws governing places of "sole and exclusive" federal jurisdiction, where the default is States legislate only with "specific congressional" approval. *Paul*, 371 U.S. at

263-64; *see Parker*, 139 S. Ct. at 1890.[5] And even if (as is often true) Congress could have spoken yet more clearly, preemption never requires neon lights or even an explicit "congressional statement" (particularly in Indian country). *Three Affiliated Tribes of Fort Berthold Rsrv. v. Wold Eng'g*, 476 U.S. 877, 885 (1986); *infra* 22-23. Here, moreover, the phrase "sole and exclusive" is only the start of the textual and contextual evidence showing States lack jurisdiction.

3. If doubt about the GCA's preemptive force lingered, it would disappear by reading the GCA in "context," *Va. Uranium*, 139 S. Ct. at 1901, and based on how it would have been understood "at the time Congress" acted, *Wis. Cent.*, 138 S. Ct. at 2070. Congress enacted today's GCA in 1948. And the 1948 understanding was clear: Under the GCA, the "courts of the United States, rather than those of [States], have jurisdiction over offenses" like this. *Williams*, 327 U.S. at 714. We know as much not just because *Williams* affirmed that rule but because Congress near-simultaneously enacted related statutes whose text reflects that rule.

Several complementary principles recognize that when Congress acts based on such an understanding, that understanding governs. "Congress is presumed to be aware of an administrative or judicial interpretation

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[5] *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973), declined to interpret federal maritime jurisdiction as exclusive when Congress extended it to areas "historically within … [States'] police power." *Id.* at 343. States have not historically regulated crimes involving Indians. *Infra* 28-39.

… and to adopt that interpretation when it re-enacts a statute." *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 239-40 (2009). Similarly, when a phrase has acquired a "settled … meaning," and "Congress reenacts the same language," "we presume … Congress … adopted the earlier judicial construction." *Helsinn Healthcare S.A. v. Teva Pharms. USA, Inc.*, 139 S. Ct. 628, 633-34 (2019); *see* Antonin Scalia & Bryan A. Garner, *Reading Law* 325 (2011) (applying canon "unquestionably justified" based on "even a single decision" of "jurisdiction's highest court").

These principles stem from the bedrock rule that what "[t]he words of a governing text … convey, *in their context*, is what the text means." Scalia & Garner 64, 248; *see Wis. Cent.*, 138 S. Ct. at 2070. These principles also vindicate the separation of powers. If critics disagree with interpretations Congress took as settled, they "can take their objections across the street." *Public.Resource.Org*, 140 S. Ct. at 1510. But if this Court tinkers, it may derange Congress's work.

4. Here, related statutes enacted days apart confirm that *Williams*' rule reflected the understanding when Congress acted. On June 30, 1948—just five days after reenacting the GCA—Congress gave Iowa jurisdiction over crimes "by or against Indians." *Supra* 7 n.1. Two days later, Congress gave New York the same jurisdiction. *Id.* These statutes built on grants to Kansas (1940) and North Dakota (1946) and presaged Public Law 280's nationwide system (a draft of which was before the 1948 Congress, S. Rep. No. 80-1142 (1948)).

These statutes confirm that *Williams* accorded with contemporary understandings. Otherwise, the phrase "against Indians" would be superfluous. On Petitioner's view, States already had jurisdiction over crimes by non-Indians against Indians. They lacked jurisdiction only over crimes *by Indians*. So per Petitioner, the phrase "against Indians" never did anything. This Court "presume[s] that each word Congress uses is there for a reason" and none is "surplusage." *Advoc. Health Care Network v. Stapleton*, 137 S. Ct. 1652, 1659 (2017). Here, Congress added the phrase "against Indians" because it understood the law the same way as *Williams*.

These statutes also show that when the 1948 Congress wanted to give States broader jurisdiction over crimes against Indians, it "knew how." *Custis v. United States*, 511 U.S. 485, 492 (1994). But Congress chose not to give all States such jurisdiction or to modify the GCA. This Court often draws "a preemptive inference … not from federal inaction alone, but from inaction joined with action." *Arizona*, 567 U.S. at 406-07. Here, a strong "negative implication" arises from "Congress's passage of other related statutes that expressly permit" States to exercise the authority Petitioner claims. *Custis*, 511 U.S. at 492.[6]

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[6] It is thus irrelevant that *Williams* did not apply its rule to reverse a non-Indian's conviction. The reenactment canon is a pragmatic principle that applies beyond holdings from a jurisdiction's highest court and extends to interpretations from lower courts or agencies. *Lamar, Archer & Cofrin, LLP v. Appling*, 138 S. Ct. 1752, 1762 (2018); *cf. Helsinn*, 139 S. Ct. at 633-34 (this Court "suggest[ed]" an interpretation and Federal Circuit "made explicit what was

5. On-point legislative history "is 'extra icing on a cake already frosted.'" *Van Buren v. United States*, 141 S. Ct. 1648, 1661 (2021) (quoting *Yates v. United States*, 574 U.S. 528, 557 (2015) (Kagan, J., dissenting)). The 1948 Congress received multiple reports stating that "States have no jurisdiction to enforce laws designed to protect the Indians from crimes perpetrated by or against Indians." S. Rep. No. 80-1142, at 2 (1948); *see* H.R. Rep. No. 80-1506, at 1 (1948); H.R. Rep. No. 80-2356, at 1 (1948); H.R. Rep. No. 80-2355, at 1 (1948); S. Rep. No. 80-1490 (1948); S. Rep. No. 80-1489 (1948). Shortly before, the Acting Secretary of Interior explained that States' authority over crimes "upon tribal … lands extends in the main only to situations where both the offender and the victim are white." S. Rep. No. 76-1523, at 2 (1940); *see* H.R. Rep. No. 76-1999, at 2 (1940).

Because Congress enacted the 1948 GCA based on this understanding, Petitioner must "take [its] objections across the street." *Public.Resource.Org*, 140 S. Ct. at 1510.

B. Congress's Post-1940 Scheme Confirms States Cannot Exercise Extra-Statutory Jurisdiction.

Since 1940, Congress has enacted many statutes giving some (but only some) States jurisdiction over crimes "against Indians." That includes Public Law 280 and the nationwide procedure it created. Congress expressly premised all those statutes on the same rule

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implicit"). Here, Congress's related statutes confirm that *Williams* reflected settled understandings.

Williams recognized. Now, accepting Petitioner's position would thwart that scheme, render it incoherent, and thrust on States unwanted jurisdiction.

1. These statutes, first, underscore the imperative of adhering to the rule Congress lodged in the 1948 GCA. This Court has emphasized the "paramount importance … that Congress be able to legislate against a background of clear interpretive rules." *Finley v. United States*, 490 U.S. 545, 556 (1989); *see* Scalia & Garner 13. And when Congress *in fact* continues to rely on a rule, adhering to it is especially critical. *Cf. Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 802 (2014) (retaining tribal sovereign immunity "against the backdrop of a congressional choice" to "specifically preserv[e] immunity in some contexts and abrogat[e] it in others, but never adopt[] the change Michigan wants").

2. Second, this comprehensive scheme confirms that Congress preempted extra-statutory prosecutions. Preemption arises where federal "regulation [is] 'so pervasive ... that Congress left no room for the States to supplement it' or where there is a 'federal interest ... so dominant that the federal system will be assumed to preclude … state laws on the same subject.'" *Arizona*, 567 U.S. at 399. State law is also preempted where it "conflict[s] with a federal statute," *Kurns v. R.R. Friction Prods. Corp.*, 565 U.S. 625, 630 (2012), including when it "stands as an obstacle to the accomplishment and execution of [federal law's] full purposes and objectives," *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1415 (2019).

Preemption always flows especially easily where the federal interest has traditionally been paramount. *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 375 (2000). Indian affairs is such a domain. This Court has thus emphasized that in Indian country, displacement of state law is "not limit[ed]" by "familiar principles of preemption." *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334 (1983). State law may recede even without "congressional intent to preempt," *id.*, and it suffices that "a detailed federal regulatory scheme exists" whose "general thrust will be impaired." *Three Affiliated Tribes*, 476 U.S. at 885. This standard "give[s] effect to the plenary and exclusive power of the Federal Government to deal with Indian tribes" and "regulate and protect … Indians … against interference." *Bryan v. Itasca County*, 426 U.S. 373, 376 n.2 (1976).

3. Here, accepting Petitioner's position would upend the scheme Congress built on *Williams*' rule.

Congress enacted Public Law 280 "to replace the ad hoc regulation of state jurisdiction over Indian country with general legislation." *Three Affiliated Tribes*, 476 U.S. at 884. It was the product of "comprehensive and detailed congressional scrutiny" concerning when "to extend [States'] civil or criminal jurisdiction." *Kennerly v. Dist. Ct. of Ninth Jud. Dist. of Mont.*, 400 U.S. 423, 427 (1971). This Court has thus "enforced [Public Law 280's] procedural requirements … stringently." *Three Affiliated Tribes*, 476 U.S. at 877.

After Congress undertook that detailed scrutiny, it built its scheme on the same understanding as *Williams*: States presumptively lack jurisdiction over crimes involving Indians in Indian country. It gave certain

States "jurisdiction over offenses committed *by or against Indians*," and specified that "any other State *not having jurisdiction* with respect to criminal offenses" could "assume [such] jurisdiction." Pub.L. No. 83-280, §§2, 7 (emphases added).

Public Law 280 preempts Petitioner's attempt to expand its criminal jurisdiction beyond what existed in 1953 without complying with Public Law 280. This Court will not "believe that Congress would have required" that States follow Public Law 280's procedures "if the States were free to accomplish the same goal unilaterally." *McClanahan v. State Tax Comm'n of Ariz.*, 411 U.S. 164, 177-78 (1973); *see Mescalero Apache*, 462 U.S. at 340 ("Congress would not have jealously protected" tribal rights had Congress "thought that the States had residual power" to impose concurrent regulations).

Contrary to Petitioner's claims, Public Law 280 and Congress's State-specific statutes are not concerned only with promoting "expand[ed] … state jurisdiction." Br. 13. Like most statutes, they strike a balance: Public Law 280 permits States to expand jurisdiction beyond the 1953 baseline—but also lets them stick with exclusive federal jurisdiction. States choosing expansion may also pick what jurisdiction to accept. And Public Law 280 conditions expansions on tribal consent and allows retrocessions. Meanwhile, Congress sometimes repeals jurisdictional grants.

Precisely because Congress legislated against the backdrop of *Williams*, jettisoning its rule would confound Congress's "balance of interests." *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 495 (1987).

First, Petitioner's position would thwart 26 States' choices *not* to expand criminal jurisdiction (or to elect a limited expansion). States had reasons not to seek the jurisdiction Petitioner would impose, including that they "anticipate[d] that the burdens … might be considerable." *Williams v. Lee*, 358 U.S. at 222-23.

Second, Petitioner's position would frustrate Congress's decision to allow Tribes to withhold consent.

Third, Petitioner's position would render retrocessions and repeals incoherent. Would States like Nebraska or Iowa lack jurisdiction over crimes by non-Indians against Indians—because retrocession or repeal specifically eliminated the jurisdiction at issue? Or would they have jurisdiction—because the jurisdictional grant was superfluous? This Court adheres to "settled meanings," *Public.Resource.Org*, 140 S. Ct. at 1510, precisely to avoid creating such disruptive questions.

C. Petitioner's Arguments Lack Merit.

1. Petitioner does not dispute that the 1948 Congress "believed" States to lack jurisdiction over cases like this, Br. 29, and has no adequate answer to how that concession forecloses its position.

First, Petitioner pleads that "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *Id.* The 1948 Congress, however, is not a "subsequent Congress." The 1948 Congress reenacted the GCA. Likewise, the 1953 Congress did not offer "views." It embedded *Williams*' rule in Public Law 280's text.

Nor is it "psychoanaly[sis]," Br. 29, to read the 1948 GCA in harmony with related statutes and this Court's recent decisions. Such statutes and decisions are "part of the statute's context" and are relevant even for those skeptical of a "presumption of legislative knowledge." Scalia & Garner 323-24. As Justice Scalia explained, considering those sources "rests on two sound principles: (1) that the body of the law should make sense, and (2) that it is the responsibility of the courts … to make it so." *Id.* at 199-200.

Alternatively, Petitioner says the GCA's 1948 reenactment should be read to incorporate a general "retreat from *Worcester*." Br. 26. But that "retreat" never encompassed the issue here. And it is a "commonplace … that the specific governs the general." *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012). *Williams* addressed the specific question at issue two years before, and the Iowa and New York acts lodged that understanding in statute.

Petitioner's most candid argument is that the Court should ignore the 1948 understanding. Yes, the 1948 Congress believed the rule was as *Williams* stated. Br. 29. And yes, the 1948 "Congress may have been 'inspired'" by *Williams*. Br. 32. But per Petitioner, this Court was wrong in *Williams* and Congress was wrong to rely on *Williams*' rule. *Id.* So Petitioner asks this Court to discard *Williams* and make the 1948 GCA mean the opposite of the 1948 understanding.

The short answer is the one given above: Statutory interpretation is not a bait-and-switch. When a statute has acquired a meaning, it "carries this settled meaning" when reenacted. *Public.Resource.Org*, 140 S. Ct. at

1510. Tellingly, Petitioner's sole authority for its Inspiration-Is-Irrelevant canon is *Alden v. Maine*, 527 U.S. 706, 714 (1999). *Alden* was a *constitutional* decision that disregarded recent statutes subjecting States to "suit in their own courts" "inspired" by this Court's now-overruled decisions authorizing such suits. *Id.* at 714.

2. Petitioner gets no help from *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering*, 467 U.S. 138 (1984). There, North Dakota's courts had held that, before Public Law 280, they could hear civil suits by Indians against non-Indians. *Id.* at 144, 150 & n.9. This Court ultimately agreed. *Id.* at 148. North Dakota's courts nonetheless then read Public Law 280 to foreclose jurisdiction. *Id.* at 146. This Court held that Public Law 280 did not "divest States of pre-existing and otherwise lawfully assumed jurisdiction." *Id.* at 150.

This case is the opposite: Unlike in *Three Affiliated Tribes*, States in 1953 did not have "pre-existing" jurisdiction over prosecutions like this. Congress enacted Public Law 280 against the backdrop of *Williams* (a case with no counterpart in *Three Affiliated Tribes*) and State-specific statutes reflecting the same understanding (nonexistent in *Three Affiliated Tribes*). Then, Congress in Public Law 280 enacted text again reflecting that understanding and conferring jurisdiction over crimes "against Indians." The civil provisions, by contrast, are agnostic about the issue *Three Affiliated Tribes* decided: Those provisions authorize assumptions of jurisdiction over "causes of action … to which Indians are parties." 25 U.S.C. §1322(a). That grant was necessary for States to obtain

jurisdiction over civil claims against Indians, and every word does work under *Three Affiliated Tribes*' rule.

3. Petitioner tries to solve its surplusage problem by asserting that, had the phrase "against Indians" "not been included" in Public Law 280 "and courts were to adhere to … *Williams*," no court would have had jurisdiction to prosecute "non-Indians who committed crimes against Indians." Br. 34. But first, that argument proves Respondent's point. Congress expected courts would "adhere to … *Williams*," *id.*, and rather than abrogating *Williams*, enacted text premised on *Williams*' rule.

Second, this argument does not even apply to the State-specific statutes Congress enacted alongside the GCA. Those statutes granted *concurrent* jurisdiction. *E.g.*, *Negonsott*, 507 U.S. at 108; *United States v. Cook*, 922 F.2d 1026, 1033 (2d Cir. 1991); *Sac & Fox Tribe of Miss. in Iowa v. Licklider*, 576 F.2d 145, 148 (8th Cir. 1978). On Petitioner's view, the phrase "against Indians" never did anything. That textual point underscores that the 1948 GCA was understood to preempt state jurisdiction.

II. The Rule That *Williams* Affirmed Was Always Correct.

The rule *Williams* affirmed is correct as an original matter too. The 1834 Act—the 1948 GCA's "direct progenitor," *Wheeler*, 435 U.S. at 324—contained the same preemptive text. 1834 Act §25; *supra* 14-18. And its context powerfully points to preemption, with Congress's early statutes and treaties bearing the hallmarks of a preemptive scheme. Congress and this

Court have long understood those statutes that way, which is why crimes "against Indians have been subject only to federal or tribal laws, except where Congress … has 'expressly provided that State laws shall apply.'" *Yakima*, 439 U.S. at 470-71. Petitioner cites no case approving a prosecution on its theory.[7]

All this renders irrelevant Petitioner's claims about States' "inherent authority" (based largely on cases about neither Indians nor reservations). Br. 3, 12, 15-17. As this Court has observed, the question of "residual … sovereignty in the total absence of federal treaty obligations or legislation" is often "of little more than theoretical importance." *McClanahan*, 411 U.S. at 172. So, too, here: Given the "treaties and statutes" that govern, *id.*, the answer to the question presented is that if States wish to prosecute crimes involving Indians in Indian country, a statute is required.[8]

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[7] Some States have unlawfully exercised jurisdiction over Indian country generally. *McGirt*, 140 S. Ct. at 2470-71. Petitioner, however, cites no case adopting its theory that States lack jurisdiction over crimes by Indians but have jurisdiction over crimes by non-Indians against Indians. *E.g.*, *State v. McAlhaney*, 17 S.E.2d 352, 353-54 (N.C. 1941) (approving prosecution of non-Indian because "all persons" are subject to state law, including "Cherokee"); *cf. State v. Nobles*, 818 S.E.2d 129, 135 & n.2 (N.C. Ct. App. 2020) (rejecting *McAlhaney*). Petitioner's *amici* also cite no such cases: *United States v. Barnhart*, 22 F. 285, 289 (C.C.D. Or. 1884), "assum[ed]" without deciding that the State had jurisdiction, and *Territory v. Coleman*, 1 Or. 191 (1855), just decided a double-jeopardy issue.

[8] If Petitioner asserts a presumption *against* preemption, Br. 12, none applies in areas "of significant federal presence," *United States v. Locke*, 529 U.S. 89, 108 (2000).

A. States Never Had Jurisdiction To Prosecute Crimes Covered By The GCA.

This Court always interprets statutes with a view toward "the circumstances in which the[y] … w[ere] adopted," *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 542 (2001), and "contemporary legal context," *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 381 (1982). That is because "[p]art of a fair reading of statutory text is recognizing that 'Congress legislates against the backdrop' of certain unexpressed presumptions." *Bond v. United States*, 572 U.S. 844, 857 (2014).

That approach is especially critical in preemption cases involving statutes dating to the early Republic. In preemption cases, "the entire scheme of the statute must … be considered." *Crosby*, 530 U.S. at 373. So context is more-than-usually important. Thus, when *Oliphant* considered whether federal law precludes Tribes from exercising "criminal jurisdiction over non-Indians," it gave "considerable weight" to "commonly shared presumption[s]" reflected in early statutes and treaties. 435 U.S. at 206, 208. *Oliphant* concluded that "[w]hile Congress never expressly forbade" Tribes from exercising jurisdiction, Congress "believed this to be the necessary result of its … actions." *Id.* at 204. Other decisions are of a piece.[9] Here, that approach confirms

[9] *E.g.*, *Locke*, 529 U.S. at 99 (statute applied in "area where the federal interest has been manifest since the beginning of our Republic"); *Hines v. Davidowitz*, 312 U.S. 52, 67-68 (1941) ("it is of importance" that immigration "from the first has been most generally conceded imperatively to demand broad national authority").

this Court's long-ago conclusion: Congress's "actions and inactions in regulating criminal jurisdiction on Indian reservations demonstrated an intent to reserve jurisdiction over non-Indians for the federal courts." *Id.* (citing *Ex parte Mayfield*, 141 U.S. 107, 115-16 (1891)).

1. Congress Understood The GCA To Leave No Room For State Prosecutions.

When the 1834 Congress applied to Indian country the laws governing areas within "sole and exclusive" federal jurisdiction, it understood the statute to "le[ave] no room" for States to prosecute crimes involving Indians. *Arizona*, 567 U.S. at 399. Congress in 1834 regarded the area the GCA covers as one of "dominant" "federal interest" (the war-and-peace issue of crimes against Indians). *Id.* Congress then enacted the GCA as part of a web of statutes and treaties "pervasively" regulating that area (while lodging in their text Congress's understanding that States had no role). *Id.* And Congress legislated against the backdrop of *Worcester* (barring States from prosecuting non-Indians based on "intercourse" with Indians). Meanwhile, Congress and this Court "consistently believed" statutes like the 1834 Act yielded preemption. *Oliphant*, 435 U.S. at 204. States thus may not prosecute crimes involving Indians falling within the GCA's scope.

i. The "protection [of] aliens" is quintessentially a matter for the "Federal Government … entrusted with full and exclusive responsibility for the conduct of affairs with foreign sovereignties," especially given the risks of "war, or … suspension of intercourse" crimes can yield. *Hines v. Davidowitz*, 312 U.S. 52, 62-65 (1941).

"[I]nternational controversies of the gravest moment, sometimes even leading to war, may arise from real or imagined wrongs to another's subjects." *Id.* at 64. Thus, "[o]ur system … requires that federal power" over such matters "be left entirely free from local interference." *Id.* at 63.

The Framers viewed crimes against Indians just that way. Under the Articles of Confederation, "hostilities ha[d] been provoked by the improper conduct of … States, who, either unable or unwilling to restrain or punish offenses, ha[d] given occasion to the slaughter of many innocent inhabitants." *The Federalist No. 3*, at 44 (James Madison) (Clinton Rossiter ed., 1961). Those provocations resulted partly from how the Articles limited federal Indian-affairs powers. Articles of Confederation of 1781, art. IX, para. 4. The Constitution removed these "shackles," *Worcester*, 31 U.S. at 559, and "with [its] adoption …, Indian relations" became "the exclusive province of federal law." *Oneida County*, 470 U.S. at 235.

After ratification, crime against Indians remained a war-and-peace matter. Early Congresses focused on "providing effective protection for the Indians 'from the violences of the lawless part of our frontier inhabitants'" because they believed that "[w]ithout such protection," "all the exertions of the Government to prevent destructive retaliations by the Indians will prove fruitless and all our present agreeable prospects illusory.'" *Oliphant*, 435 U.S. at 201 (quoting Seventh Annual Address of President George Washington, 1 Messages and Papers of the Presidents, 1789-1897, pp. 181, 185 (J. Richardson ed., 1897)).

ii. That type of "dominant" "federal interest," *Arizona*, 567 U.S. at 399, in a "uniquely federal area[]," *Chamber of Commerce of U.S. v. Whiting*, 563 U.S. 582, 604 (2011), always weighs heavily toward preemption. Here, moreover, Congress from the start exercised its "exclusive constitutional authority to deal with Indian tribes," *United States v. Mazurie*, 419 U.S. 544, 554 n.11 (1975), to enact a comprehensive set of statutes and treaties governing crimes involving Indians.

a. "Beginning with the Trade and Intercourse Act of 1790," Congress "assumed federal jurisdiction over offenses by non-Indians against Indians" and created a system for their punishment. *Oliphant*, 435 U.S. at 201. Via statutes in 1790, 1793, 1796, and 1802, Congress imposed liability for crimes by a U.S. "citizen … against the person or property of any peaceable and friendly Indian." 1790 Act §5; *see* 1793 Act §4; 1796 Act §4; 1802 Act §4. Congress first extended the enclave laws to Indian country in 1817, before enacting the 1834 Act as a "comprehensive statute[]." *Williams v. Lee*, 358 U.S. at 220. The 1834 Act "extended" to Indian country "the laws of the United States" punishing crimes "committed … within the sole and exclusive jurisdiction of the United States." 1834 Act §25. It declined to apply these laws to crimes "by one Indian against … another" but made no exception to permit state jurisdiction. *Id.*

These statutes, consistent with the war-and-peace imperatives behind them, treated crimes involving Indians as an inter-sovereign issue within the domain of the "Federal Government … entrusted with full and exclusive responsibility for the conduct of affairs with" Tribes. *Hines*, 312 U.S. at 63. They prescribed specific

punishments for specific offenses, like death for murder. 1796 Act §6; 1802 Act §6.[10] And starting in 1796, these statutes specified that criminal punishments went hand-in-hand with compensation to Indians. 1796 Act §4; 1802 Act §4. The 1834 Act, for example, directed that when a "white person" "in the commission … of any crime" "injured or destroyed" "property of any friendly Indian," and "a conviction is had for such crime," the non-Indian "so convicted shall be sentenced to pay to such friendly Indian … twice the just value." 1834 Act §16. Then, the 1834 Act provided that if non-Indians could not pay "the just value," the shortfall "shall be paid out of the [U.S.] treasury"—but only if Indians refrained from "private revenge." *Id.* By thus centralizing redress, these statutes sought to keep the peace.

These statutes did not authorize States to interfere and, instead, identified States as lacking jurisdiction. Several early statutes penalized misconduct "which, *if committed within the jurisdiction of any state* … would be punishable by [state] laws." 1790 Act §5 (emphasis added); 1796 Act §4; 1802 Act §4. The statutes also punished crimes by Indians who "come over or across the said boundary line, *into any state*." 1796 Act §14 (emphasis added); 1802 Act §10. And the 1834 Act provided remedies against Indians who "pass[ed] from Indian country *into any state*" and did damage, while setting rules for apprehending fugitives who "commit[ted] crimes … *within any state* … and … fled

[10] The 1834 Act imposed the same penalty by incorporating federal enclave laws. *See* Act of Mar. 5, 1825, ch. 65, §4, 4 Stat. 115.

into the Indian country." 1834 Act §§17, 19 (emphases added).

These statutes left no room for States to prosecute crimes involving Indians: When Congress exercises its "plenary and exclusive" authority, *Lara*, 541 U.S. at 200, to apply to Indian country the laws governing areas where federal jurisdiction is "sole and exclusive," alongside text excluding Indian country from state jurisdiction, then federal jurisdiction is exclusive.[11]

b. These statutes accorded with early treaties affirming that only the federal government had the power and duty to protect Indians—including, specifically, the Cherokee.

The Treaty of Hopewell affirmed that the Nation was "under the protection of the United States of America, and of no other sovereign whosoever." Art. III, Nov. 28, 1785, 7 Stat. 18. Subsequent treaties restated and "re-affirmed" this commitment. Treaty with Cherokee, art. II, July 2, 1791, 7 Stat. 39; Treaty with Cherokee, July 19, 1866, 14 Stat. 1799.

This promise of exclusive protection included protection from crimes. The Treaty of Hopewell

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[11] Petitioner "suggests" Congress lacks plenary and exclusive power over Indian affairs or crime involving Indians. Br. 39 n.3. Settled law, however, forecloses that suggestion. *E.g.*, *Lara*, 541 U.S. at 200. Petitioner has not preserved any argument that preemption here would exceed Congress's constitutional authority. Indeed, since the 1790 Act, crime involving Indians in Indian country has been a federal domain (and State criminal jurisdiction historically provided Indians "no protection," *United States v. Kagama*, 118 U.S. 375, 383-84 (1886)). *Supra* 28-35.

promised that the United States would punish non-Indians who "commit[ted] a robbery or murder, or other capital crime, on any Indian … in the same manner as if … committed on a [U.S.] citizen." Treaty of Hopewell, art. VII. Especially relevant here, the United States later reaffirmed that it would protect Cherokees from "interruption and intrusion from [U.S.] citizens," even as it covenanted that Cherokee lands would not "be included within the … jurisdiction of any State." 1835 Treaty of New Echota, Arts. 5-6, Dec. 29, 1835, 7 Stat. 478.

These provisions "would naturally be understood by the Indians" as promising that the federal government, and only the federal government, would protect Cherokees from non-Indians. *Herrera v. Wyoming*, 139 S. Ct. 1686, 1701 (2019). Petitioner's contrary argument—that the promise to protect Indians from "interruption" "no more precludes state jurisdiction than does any other federal law," Br. 40 n.4—ignores the context in which this promise appears, including the promises of *exclusive* protection and that Cherokee lands would remain *free from* state jurisdiction. No Indian would have understood those promises to leave room for States to seize power to "protect" Indians on Cherokee lands. *See Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999). Congress may "abrogate [these] treaty rights," but only if it "clearly express[es] its intent." *Herrera*, 139 S. Ct. at 1698. Instead, Congress vindicated these promises via statutes applying to Indian country the laws governing areas of "sole and exclusive" federal jurisdiction and treating Indian country as outside state jurisdiction.

Non-Cherokee treaties spoke near-identically. Countless treaties provided for sole U.S. protection,[12] called for the federal government to prosecute crimes against Indians,[13] and required Tribes to hand over non-Indians to the United States.[14] *See Oliphant*, 435 U.S. at 208 (emphasizing that such provisions contemplated exclusive federal jurisdiction).

These treaties embodied the "general trust relationship" the federal government from the start had with "the Indian people." *United States v. Mitchell*, 463 U.S. 206, 225 (1983). States never "enjoy[ed] this … relationship." *Yakima*, 439 U.S. at 501. More than that: 19th-century Congresses understood States as often Indians' "deadliest enemies" and recognized that Indians would "receive [from States] no protection." *United States v. Kagama*, 118 U.S. 375, 384 (1886). With that backdrop, it is small wonder that the governing

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[12] *E.g.*, Treaty of Brownstone, art. V, Nov. 25, 1808, 7 Stat. 112; Treaty with Menominies, art. 5, Mar. 30, 1817, 7 Stat. 153; Treaty with Chickasaws, art. II, Jan. 1, 1786, 7 Stat. 24; *Sac & Fox Tribe of Indians of Okla. v. United States*, 179 Ct. Cl. 8, 24 n.8 (1967); *Logan v. Andrus*, 457 F. Supp. 1318, 1321 (N.D. Okla. 1978).

[13] *E.g.*, Treaty with Navajo, art. I, June 1, 1868, 15 Stat. 667; Treaty with Sioux Tribe, art. 1, Apr. 29, 1868, 15 Stat. 635; Treaty with Rogue River, art. 6, Sept. 10, 1853, 10 Stat. 1018; Treaty with Apache, art. VI, July 1, 1852, 10 Stat. 979.

[14] *E.g.*, Treaty with Cow Creek Band, art. VI, Sept. 19, 1853, 10 Stat. 1027; Treaty with Mandan Tribe, art. 6, July 30, 1825, 7 Stat. 264; Treaty with Crow Tribe, art. 1, May 7, 1868, 15 Stat. 649.

statutes and treaties made no room for state jurisdiction.[15]

iii. These statutes and treaties are all the more significant given *Worcester*. There, a missionary traveled to spread Christianity among the Cherokee. 31 U.S. at 538. Georgia prosecuted him based on a statute prohibiting non-Indians from living in Cherokee territory without a license. *Id.* at 537-38. This Court—relying on many of the statutes and treaties cited above—held the prosecution "void." *Id.* at 562. It explained that the Cherokee Nation was a "distinct community … in which the laws of Georgia can have no force" and that the "whole intercourse" with the Nation is "vested in the [federal] government." *Id.* at 561-63.[16]

Just as the 1948 Congress enacted the 1948 GCA two years after *Williams*, the 1834 Congress enacted the 1834 Act two years after *Worcester*. Had the 1834 Congress intended to leave room for States to prosecute non-Indians for crimes against Indians, it would have said so. Instead, Congress enacted text embodying the same understanding as *Worcester*. The GCA thus bears the meaning it was understood to have "at th[at] time." *Wis. Cent.*, 138 S. Ct. at 2074; *see Exxon Corp. v.*

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[15] Even were the statutes and treaties ambiguous, the Indian canon would require rejecting Petitioner's position. *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 269 (1992).

[16] Contrary to Petitioner's claim, *Worcester* did not say Georgia could always prosecute "its own citizens." It said States' power extends no *farther* than their territory or citizens. 31 U.S. at 542. *Worcester* then held that Georgia's *law* was "void," *id.* at 562, precluding its application to anyone.

Eagerton, 462 U.S. 176, 184 (1983) (Natural Gas Act preemptive because Congress enacted it on understanding that interstate wholesale gas sales are "not subject to state regulation").

Petitioner cannot gain by observing that this Court has since "modified the[] principles" of *Worcester*. *Williams v. Lee*, 358 U.S. at 219. Even leaving aside that *Worcester*'s "basic policy … has remained," or that this Court has affirmed that *Worcester* still governs the question here, *id.*, this Court certainly made no modifications *before 1834*. So *Worcester* remained "the contemporary legal context" for the 1834 Act. *Merrill Lynch*, 456 U.S. at 381.

iv. Finally, Congress and this Court understood that criminal statutes involving Indians or Indian country ousted prosecutions by other sovereigns, absent repeal or express exception.

First, *Oliphant* held that because the GCA did not exclude crimes by non-Indians against Indians, the GCA implicitly precluded tribal-court jurisdiction. 435 U.S. at 203. Nineteenth-century Congresses, *Oliphant* explained, "consistently believed this to be the necessary result of its repeated legislative actions." *Id.* at 204.

Second, *McBratney* held that Colorado had jurisdiction over non-Indian/non-Indian crimes in Indian country only because "prior statute[s]" vesting jurisdiction in the federal government—including the GCA—had been impliedly "repeal[ed]." 104 U.S. at 621-22; *supra* 6.

Third, *John* explained that Congress enacted the MCA on the same understanding. An early draft would have extended federal jurisdiction beyond reservations to crimes by Indians in States. 437 U.S. at 651 n.22. But Congress understood that this expansion, if adopted, would "tak[e] away from State courts, whether there be a reservation … or not" jurisdiction over the listed crimes when committed by an Indian. *Id.* So Congress narrowed the MCA to apply only on reservations. *Id.*

These decisions accorded with broadly shared 19th-century views. States and the federal government of course struggled over jurisdiction in Indian country (with some States continuing "defiance" even after *Worcester*). *Williams v. Lee*, 358 U.S. at 219. They struggled, however, from a common all-or-nothing understanding: If lawful federal statutes or treaties addressed a subject, they controlled absolutely. That was the theory of not just *McBratney* and the MCA but myriad lower-court decisions that were near-contemporaneous with the 1834 Act. *E.g.*, *State v. Foreman*, 16 Tenn. 256, 324, 331 (1835) ("I know of no half-way doctrine …. We either have an exclusive jurisdiction … or we have no jurisdiction."); *see Caldwell v. State*, 1 Stew. & P. 327, 418 (Ala. 1832) (similar).

That includes *United States v. Cisna*, 25 F. Cas. 422 (C.C.D. Ohio 1835), which Petitioner cites. Justice McLean believed Ohio could exercise jurisdiction because federal trade and intercourse statutes had been "rendered inoperative" by "nonenforcement." *Id.* at 424-25. And he believed States could punish their "own citizens" because (in his view) the Constitution "limited" federal "power … to the mere purposes of trade." *Id.* at

425. Many aspects of Justice McLean's idiosyncratic views render him an unreliable guide, including his separate opinion in *Worcester*, 31 U.S. at 563; his limited view of federal criminal authority, *see United States v. Bailey*, 24 F. Cas. 937, 940 (C.C.D. Tenn. 1834); and his approval of New York's "exten[sion of] jurisdiction in criminal cases … over … Indians," *Cisna*, 25 F. Cas. at 425. But in regarding federal jurisdiction as all-or-nothing, he was typical.[17]

In this context, it is anachronistic for Petitioner to demand from the 1834 Act an *even clearer* statement of preemption. The 1834 Congress applied to Indian country the laws governing areas of "sole and exclusive" federal jurisdiction; treated Indian country as entirely outside state jurisdiction; and understood that laws like the 1834 Act displaced state jurisdiction. To complain that the 1834 Act did not expressly say "the GCA preempts state law," Br. 24-25, is to fault Congress for not including text it would have regarded as surplusage.

2. Modern Preemption Principles Confirm The GCA Was Always Preemptive.

Congress's 19th-century understanding accords with today's preemption principles. Where the "federal government, in the exercise of its superior authority …, has enacted a complete scheme" to address issues of paramount federal concern, States cannot "conflict or interfere with, curtail or complement, the federal law, or

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[17] The Attorney General opinion Petitioner cites, Br. 18, contains just one offhand remark and focuses on Choctaw courts' jurisdiction. 7 Op. Atty. Gen. 174, 175 (1855).

enforce additional or auxiliary regulations." *Hines*, 312 U.S. at 66-67. That is what Congress did here, where its "various actions and inactions"—culminating in the 1834 Act—"demonstrated an intent to reserve [criminal] jurisdiction over non-Indians for the federal courts." *Oliphant*, 435 U.S. at 204.

To recap: Congress by statute and treaty provided that the federal government—and only the federal government—would protect Indians from crime. *Supra* 33-38. Congress created a comprehensive scheme that set particular punishments and established compensation mechanisms. *Supra* 33-35. And when Congress wished to leave space for other sovereigns, it made express exceptions. *Supra* 16-17. But Congress made no exception for state prosecutions and instead applied to Indian country laws governing areas of "sole and exclusive" federal jurisdiction.

Congress declined to make such an exception because it did not agree with Petitioner's claim that state jurisdiction furthers federal and tribal interests. Br. 41-44. That claim is wrong today, *infra* Part III, and certainly did not accord with the understanding of 19th-century Congresses that viewed States as often Indians' "deadliest enemies." *Kagama*, 118 U.S. at 384. Instead, 19th-century Congresses understood that Indians were "wards of the nation"—the federal government—and the federal government was alone responsible for punishing "crimes committed by white men against the persons or property of the Indian tribes while occupying reservations set apart for the very purpose of segregating them from" non-Indians. *Donnelly*, 228 U.S. at 272.

Indeed, had States' jurisdiction extended to such crimes, there was every reason to fear States could thwart federal policy. Congress doubted States would execute their own citizens for murdering Indians, as federal law required. 4 Annals of Cong. 1254 (1795). Congress also had cause to question whether state prosecutions imposing lesser punishments might bar retrial (given that early 19th-century "courts were divided" on the dual-sovereignty doctrine, *Gamble v. United States*, 139 S. Ct. 1960, 1976 (2019)). And even if state prosecutions were not formally preclusive, Congress might fear that overlapping prosecutions could undermine accountability and yield confusion that could interfere with closure on war-and-peace issues. *Cf.* Treaty with Cherokee, art. IX, Oct. 2, 1798, 7 Stat. 62.

That is just the start. Many States had anti-miscegenation laws, which they could enforce against non-Indians for the "crime" of marrying Indians. James Thomas Tucker et al., *Voting Rights in Arizona: 1982-2006*, 17 S. Cal. Rev. L. & Soc. Just. 283, 283 & n.3 (2008). Many States also opposed federal policy promoting "civilization and improvement of the Indians"—which they could frustrate by prosecuting non-Indian missionaries, teachers, and others based on "crimes" against Indians. Gregory Ablavsky, *The Savage Constitution*, 63 Duke L.J. 999, 1018-38 (2014); *cf. Worcester*, 31 U.S. at 538. Congress had no need to address those concerns precisely because it understood States to lack jurisdiction.

B. Petitioner's Arguments Lack Merit.

Petitioner builds its position on (1) *McBratney* and *Draper*, and (2) civil cases. Neither helps it.

1. *McBratney* And *Draper* Confirm Petitioner Is Wrong.

McBratney and *Draper* confirm States could not exercise the power Petitioner claims. Those decisions held that States have exclusive jurisdiction to prosecute non-Indian/non-Indian crimes—reading statehood to "necessarily repeal[]" any "prior statute, or … treaty" creating federal jurisdiction. *McBratney*, 104 U.S. at 621, 623; *Draper*, 164 U.S. at 244. Both decisions emphasized that they did not address crimes "by or against Indians." *McBratney*, 104 U.S. at 624; *see Draper*, 164 U.S. at 247. Still, Petitioner says "their reasoning" supports its position. Br. 12.

They do the opposite. First, this Court has rejected the extension Petitioner seeks. *Donnelly* held "[u]pon [f]ull consideration" that "offenses committed by or against Indians are not within the principle of … *McBratney* and *Draper*." *Donnelly*, 228 U.S. at 271. And it did so precisely because crimes against Indians—"wards of the nation"—differ from crimes against non-Indians. *Id.* at 272; *see United States v. Sutton*, 215 U.S. 291, 295 (1909) (*McBratney*/*Draper* not applicable to "any other jurisdiction than that named in" those decisions).

Second, *McBratney* and *Draper*'s reasoning cannot be squared with Petitioner's position. As *Donnelly* explains, their theory is that statehood acts (1) impliedly "withdr[e]w[] [federal] control of" non-Indian/non-

Indian offenses (including under the GCA); and (2) simultaneously "conferr[ed] upon the states" that same jurisdiction. *Donnelly*, 228 U.S. at 271. And under that theory, *Donnelly*'s holding—that the federal government has jurisdiction—means States do not.

That is why *Williams* so easily concluded that federal jurisdiction here is exclusive. *Williams* treated that proposition as self-evident because, under *McBratney*, *Draper*, and *Donnelly*, it is. By contrast, Petitioner's concurrent-jurisdiction theory cannot be squared with these decisions. *Accord United States v. Pelican*, 232 U.S. 442, 451 (1914) (upholding federal conviction of non-Indian for murdering Indian allottee based on provision affirming federal government's "exclusive jurisdiction" over allottees).[18]

Indeed, Petitioner *cannot* avail itself of the novel concurrent jurisdiction it seeks to create. Oklahoma's enabling act disclaims jurisdiction over Indian lands and provides that they "remain subject to [federal] jurisdiction, disposal, and control." Okla. Const. art. I, §3. Consistent with *McBratney*, *Draper*, and *Donnelly*,

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[18] Petitioner argues that *Donnelly* rejected only the argument that States had "undivided authority." Br. 26. It did so, however, by holding that *McBratney*'s "principle" does not apply to cases like this. Given *Donnelly*, Petitioner also gets no help from 1902 legislative history cited in *Williams* suggesting that, before *Donnelly*, some regarded *McBratney*'s reach as unclear. Br. 28 (citing *Williams*, 327 U.S. at 714 n.10). And contra Petitioner, this committee report did not say that, even before *Donnelly*, state courts prosecuted crimes by non-Indians against Indians; it said that in South Dakota, offenses by non-Indians "go unpunished," including offenses "upon an … other [non-Indian] person." H.R. Rep. No. 57-2704 at 1-2 (1902).

Oklahoma courts construe this disclaimer to permit only exclusive state jurisdiction or exclusive federal jurisdiction: It "disclaim[s] jurisdiction over Indian lands … to the extent that the federal government claim[s] jurisdiction." *Goforth v. State*, 1982 OK CR 48 ¶4.

2. Petitioner's Civil Cases Are Irrelevant.

i. Petitioner says this Court has repeatedly "upheld the exercise of state jurisdiction over non-Indians." Br. 22. But *McBratney* and *Draper* aside, the Court has done so only in civil cases. And civil cases are different because Congress has by statute treated them as different.

Congress "has legislated, in so far as it saw fit, by taking jurisdiction in criminal matters." *Nat'l Farmers*, 471 U.S. at 855 (similar). By contrast, Congress has largely "omit[ted] to take jurisdiction in civil matters." *Id.* So the web of criminal statutes detailed above has no civil counterpart. In particular, Congress never enacted statutes applying to Indian country *civil* laws governing areas of "sole and exclusive" federal jurisdiction. Instead, Congress has largely left civil rules to this Court. *Id.*; *see Cohen's* §6.03 ("Congress has provided a nearly comprehensive set of statutes allocating criminal jurisdiction in Indian country. In contrast, Congress has rarely been specific about the allocation of civil jurisdiction.").

This Court thus rejected the mirror image of Petitioner's argument when Tribes made it. Tribes observed that "[t]ribal courts … resolve civil disputes involving nonmembers, including non-Indians." *Duro*,

495 U.S. at 687. And Tribes invited this Court to conclude that Tribes therefore may invoke "retained tribal powers" to prosecute non-members. *Id.* This Court, however, declined to conflate civil and criminal jurisdiction—precisely because the "development of principles governing civil jurisdiction in Indian country has been markedly different from the development of rules dealing with criminal jurisdiction." *Id.* at 687-88; *accord Nat'l Farmers*, 471 U.S. at 854.

That same point renders irrelevant Petitioner's miscellaneous civil cases, including cases concerning "interactions between non-Indians and Indians." Br. 36. Two of them concerned taxes on non-Indians. *Dep't of Tax'n & Fin. of N.Y. v. Milhelm Attea & Brothers, Inc.*, 512 U.S. 61, 73-75 (1994); *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 512 (1991). *Three Affiliated Tribes* concerned state-court civil suits where Indians voluntarily appear as plaintiffs. Such suits starkly differ from criminal cases—where States seek to vindicate "the sovereignty of the government," Br. 43 (quoting *Heath v. Alabama*, 474 U.S. 82, 88 (1985)), and which impose a far "more direct intrusion" into reservations, *Duro*, 495 U.S. at 677.

Finally, *New York ex rel. Cutler v. Dibble*, 62 U.S. (21 How.) 366 (1858), merely authorized state courts to use summary procedures to exclude non-Indian trespassers. Such boundary-policing ejections are nothing like full-blown prosecutions. Tribes, for example, may "exclude" non-Indians even though Tribes generally "do not … possess authority over non-Indians." *Plains Com. Bank v. Long Fam. Land & Cattle Co.*, 554 U.S. 316, 328 (2008).

ii. Petitioner's civil cases are also irrelevant because the rules governing criminal lawmaking differ. This Court has some leeway to adjust civil jurisdictional rules, subject to *stare decisis* and Congress's statutes and treaties. *Williams v. Lee*, 358 U.S. at 220. Indeed, Petitioner characterizes its civil cases as "depart[ing]" from *Worcester*. Br. 18 (quoting *Hicks*, 533 U.S. at 361). But the Court has no similar freedom to expand criminal liability in common-law fashion. "Only the people's elected representatives" can "'make an act a crime.'" *Davis*, 139 S. Ct. at 2325. To keep faith with that principle, the Court must reject Petitioner's request to impose new liability on non-Indians across 26 States.[19]

It does not help Petitioner that *United States v. Cooley*, 141 S. Ct. 1638 (2021), applied the *Montana* framework to hold that tribal police have "authority to detain temporarily and to search a non-Indian on a public right-of-way." *Id.* at 1641. First, *Cooley* did not expand criminal jurisdiction; it reversed a Ninth Circuit decision limiting law-enforcement powers Tribes long exercised and this Court had approved. *Id.* at 1644. Second, *Cooley* concerned temporary stops, not prosecution and punishment. *Id.*

iii. Context shows why Petitioner gets no help from *County of Yakima*'s statement that "'absent a congressional prohibition,' a State has the right to

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[19] *McBratney* is not to the contrary. *McBratney* rested its holding on a state enabling act, and Congress had not yet authorized large-scale non-Indian populations in Indian country (which Congress only did six years later). Dawes Act of 1887, Pub.L. No. 49-105, 24 Stat. 388. It would be very different to expand state jurisdiction 109 years after *Donnelly* held that *McBratney* does not apply here.

'exercise criminal (and, implicitly, civil) jurisdiction over non-Indians.'" Br. 23. For that proposition, *County of Yakima* cited *New York ex rel. Ray v. Martin*, 326 U.S. 496 (1946). *Martin* was a *McBratney*/*Draper*-type case about non-Indian/non-Indian crime. As to the question here, this Court continues to affirm that "States lack jurisdiction over crimes committed in Indian country against Indian victims." *Bryant*, 579 U.S. at 146.

III. *Bracker* Does Not Apply But Confirms States Lack Jurisdiction Here.

A. *Bracker* balancing should not apply. First, *Bracker* applies only "[a]bsent governing acts of Congress." *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 14 (1987). Here, statutes and treaties govern.

Second, this Court has never applied *Bracker* to criminal jurisdiction and should not start. Multi-factor balancing is no way to expand criminal liability. *Supra* 48; *see Hydro Res., Inc. v. U.S. EPA*, 608 F.3d 1131, 1160 (10th Cir. 2010) (en banc) (Gorsuch, J.). And expanding *Bracker* would yield a morass: It calls for a "flexible pre-emption analysis sensitive to the particular facts and legislation." *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 176 (1989). That balancing could mean results that differ based on particular state criminal statutes and individual facts. *Id.*

B. Regardless, *Bracker* underscores why Petitioner is wrong. *Bracker* looks to "interests reflected in federal law," and "[s]tate jurisdiction is preempted … if it interferes or is incompatible with federal and tribal interests …, unless the State interests at stake are

sufficient to justify the assertion of State authority." *Mescalero Apache*, 462 U.S. at 334.

1. States have no cognizable interest in the jurisdiction Petitioner asserts. Congress created a procedure for States to obtain this jurisdiction, and all 26 States lacking it made choices not to obtain it. Indeed, States have an interest in *avoiding* having "the burdens accompanying such power" thrust upon them. *Williams v. Lee*, 358 U.S. at 222-23. Prosecutors in (say) rural Nevada won't be able to just ignore cases within the jurisdiction Petitioner would impose. They will have to expend limited resources. Prosecutors have long criticized Public Law 280 as an unfunded mandate—and Petitioner would burden dozens more States. *Supra* 10.

2. The jurisdiction Petitioner asserts also interferes with "federal and tribal interests reflected in federal law." *Mescalero Apache*, 462 U.S. at 334. Tribes have overpowering interests in the protection of tribal citizens. *E.g.*, *Cooley*, 141 S. Ct. at 1643; 25 U.S.C. §2801 note (a)(2)(B). Federal law, in turn, vests in Congress responsibility for determining how best to protect tribal citizens, consistent with the federal government's treaty promises to serve as Tribes' sole protector. *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 173-74 (2011). Those interests may not be inherently incompatible with expanding state jurisdiction (as evident from statutes authorizing such jurisdiction). But they are incompatible with States *unilaterally* doing so.

Here, Petitioner's unilateral expansion will undermine tribal sovereignty. When States prosecute crimes against Indians, they project sovereign power

into the heart of tribal communities. Even the non-Indian defendants in cases like this are often deeply embedded in tribal communities, as spouses, partners, parents, and the like. Petitioner thus badly misses the point when it says Tribes have no interest because they generally lack "authority to prosecute non-Indians." Br. 42. Tribes have weighty interests in *how* those prosecutions occur.

Unilateral expansions of state jurisdiction will also undermine law enforcement. No one has a stronger interest in protecting tribal citizens than Tribes. And Tribes do not believe state jurisdiction is the answer. Tribes see that "States have not devoted their limited criminal justice resources to crimes committed in Indian country." *Bryant*, 579 U.S. at 146. Likewise, Tribes know that adding concurrent state jurisdiction often exacerbates law-enforcement challenges. As Congress's Indian Law and Order Commission explained, an "oft-used justification … is that the overlay of Federal and State law will make Indian country safer." *Roadmap* 3. But "in practice, the opposite has occurred," which "contributes to … an institutionalized public safety crisis." *Id.* That is because inserting States into well-established systems hinders accountability and proliferates confusion. "[E]ach … component[]" becomes "uncertain as to the extent of its authority." Doris Meissner, *Report of the Task Force on Indian Matters*, U.S. Dep't of Justice, at 54 (1975); *accord Cohen's* §6.03(2)(c).

When state jurisdiction expands, moreover, the federal government often reduces its commitment. In Kansas, a study found no "reported federal cases … and

the authors [we]re unaware of a single federal charge being brought in the last decade." John J. Francis, et al., *Reassessing Concurrent Tribal-State-Federal Jurisdiction in Kansas*, 59 U. Kan. L. Rev. 949, 985 (2011). The federal government also reduces funding for Indian-country law enforcement in Public Law 280 states (including where jurisdiction is concurrent).[20]

Concurrent jurisdiction can also create opportunities for mischief. It may result in sentences that are unequally lenient. That is because federal sentences are typically harsher than state sentences[21] and under Petitioner's rule, non-Indians—but not Indians—may be prosecuted in state court. Where that is so, non-Indians are "likelier to end up in state courts" because federal prosecutors leave non-Indians to States but cannot do so for Indians. Emily Tredeau, *Tribal Control in Federal Sentencing*, 99 Calif. L. Rev. 1409, 1413 (2011).

Concurrent jurisdiction can also yield sentences that are too harsh. More prosecution is not always better. And the federal government, as Indians' trustee and guardian, may decide a lower sentence best vindicates the interests of the victim and the community. *E.g.*, Dep't of Justice, *Justice Manual* §9-27.420(12) & cmt.

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[20] *Roadmap* 69; *Los Coyotes Band of Cuahilla & Cupeno Indians v. Jewell*, 729 F.3d 1025, 1031 (9th Cir. 2013).

[21] Contrary to Petitioner's suggestion, federal defendants generally serve longer sentences. Bureau of Justice Stats., *Felony Sentences in State Courts, 2006—Statistical Tables* 9 tbl.1.6 (Dec. 2009). While some Oklahoma sentences are longer on paper, defendants are parole-eligible after serving just 25% or 33%. Okla. Stat. Ann. tit. 57 §332.7(B)-(C).

(Feb. 2018). Under Petitioner's rule, States can thwart that choice.

The Court need not take Respondent's word for it: Congress since 1968 has recognized that state jurisdiction is no panacea. And Tribes and the federal government have strong interests in addressing law-enforcement issues via the mechanisms Congress has favored instead—which are more effective and more respectful of tribal sovereignty. In 2013 and in March 2022, Congress expanded Tribes' jurisdiction to prosecute non-Indians. *Supra* 9. Via TLOA, Congress increased the federal government's resources and accountability for carrying out its responsibilities. *Id.*

Petitioner suggests a different approach should prevail "in Oklahoma" "in light of … *McGirt*." Br. 45. But those arguments are irrelevant to the nationwide rule Petitioner urges and, regardless, do not belong in this Court. Just as Kansas in 1940 obtained a statute to bless its Indian-country prosecutions, Petitioner under our separation of powers must direct its request to Congress (such as via the legislation already before Congress).

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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