No. 21-429

In the Supreme Court of the United States

STATE OF OKLAHOMA, PETITIONER

v.

VICTOR MANUEL CASTRO-HUERTA

ON WRIT OF CERTIORARI
TO THE OKLAHOMA COURT OF CRIMINAL APPEALS

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

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

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OPINIONS BELOW

The opinion of the Oklahoma Court of Criminal Appeals (Pet. App. 1a-7a) is unreported. The opinion of the state trial court (Pet. App. 8a-18a) is unreported.

JURISDICTION

The judgment of the Oklahoma Court of Criminal Appeals was entered on April 29, 2021. The petition for a writ of certiorari was filed on September 17, 2021, and was granted on January 21, 2022. The jurisdiction of this Court rests on 28 U.S.C. 1257(a).

STATUTORY PROVISION INVOLVED

The Indian General Crimes Act, 18 U.S.C. 1152, provides 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. * * *

STATEMENT

In *McGirt* v. *Oklahoma*, 140 S. Ct. 2452 (2020), this Court held that a large area of eastern Oklahoma, which at one time was within the boundaries of the Creek Nation, qualifies as "Indian country" for purposes of federal criminal law. The Oklahoma state courts have since held that *McGirt* compels the same conclusion with respect to the remainder of Oklahoma's Five Tribes. As a result, almost 2 million Oklahoma residents—the vast majority of whom are not Native American—now live in Indian country for purposes of federal criminal jurisdiction.

This case presents an important question that *McGirt* left unresolved regarding Oklahoma's prosecutorial authority in the eastern half of the State. It is settled that, by virtue of their admission to the Union, States have the inherent and exclusive authority to prosecute non-Indians who commit crimes against other non-Indians in Indian country. At the same time, the General Crimes Act authorizes the federal government to prosecute non-Indians who commit crimes against Indians in Indian country. The question presented here is whether a State has concurrent authority to prosecute the latter crimes.

Respondent, a non-Indian, was convicted in Oklahoma state court of severely neglecting his five-year-old stepdaughter, an enrolled member of the Eastern Band of Cherokee Indians. As it has done in many similar cases, the Oklahoma Court of Criminal Appeals vacated respondent's conviction on the ground that the crime occurred in Indian country and was committed by a non-Indian against an Indian.

The Court of Criminal Appeals' decision was erroneous, and it greatly exacerbates the ongoing criminal-justice crisis in Oklahoma following *McGirt*. As this Court's case law makes clear, a State has inherent authority to prosecute non-Indians who commit crimes in Indian country within its borders, unless Congress preempts that authority. Neither the General Crimes Act nor any other federal law preempts a State's authority to prosecute non-Indians who commit crimes against Indians in Indian country within state borders. Nor does a State's exercise of prosecutorial authority over those crimes interfere with tribal or federal interests. The Court of Criminal Appeals' holding that Oklahoma lacked the authority to prosecute respondent was incorrect, and its judgment should be reversed.

A. Background

1. The authority to prosecute crimes committed in Indian country is governed by a "complex patchwork of federal, state, and tribal law." *Negonsott* v. *Samuels*, 507 U.S. 99, 102 (1993) (citation omitted). By virtue of their admission to the Union, States exercise exclusive authority to prosecute crimes committed by non-Indians against non-Indians in Indian country. See *United States* v. *McBratney*, 104 U.S. (14 Otto.) 621, 624 (1882). By contrast, the Major Crimes Act, 18 U.S.C. 1153, gives the federal government exclusive authority to prosecute certain

enumerated felonies committed by Indians in "Indian country" (as defined in 18 U.S.C. 1151). See *United States* v. *John*, 437 U.S. 634, 651-652 & n.22 (1978).

Another federal statute, the General Crimes Act, governs the reach of other federal criminal laws in Indian country. See 18 U.S.C. 1152. Under the first paragraph of the General Crimes Act, "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 for the District of Columbia) "extend to Indian country." *Ibid.* Under the second paragraph, however, those federal laws do not extend to offenses committed by one Indian against another. See *ibid.* Accordingly, the General Crimes Act provides the federal government with authority to prosecute violations of general federal criminal law where either the defendant or the victim was an Indian and the other party was not. See *ibid.*

This Court has never squarely addressed the question whether States have concurrent authority to prosecute non-Indians for state-law crimes committed against Indians in Indian country. The Court has held, however, that Indian tribes lack inherent authority to prosecute non-Indians for such crimes. See *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191, 212 (1978).

2. In *Murphy* v. *Royal*, 875 F.3d 896 (2017), the United States Court of Appeals for the Tenth Circuit held that the historical territory of the Creek Nation in eastern Oklahoma constituted "Indian country" under 18 U.S.C. 1151. Based on that determination, the court held that the federal government had exclusive authority under the Major Crimes Act to prosecute Indians who commit the enumerated crimes within that territory. See *Murphy*, 875 F.3d at 966. The decision did not address the status of the historical territories of the remaining Five Tribes

of Oklahoma (the Chickasaw, Cherokee, Choctaw, and Seminole Nations).

This Court granted certiorari in *Murphy*. See 138 S. Ct. 2026 (2018). After briefing and oral argument, the Court did not immediately issue a decision in that case. Instead, the Court granted certiorari in *McGirt* v. *Oklahoma*, which presented the same question as *Murphy*. See 140 S. Ct. 659 (2019).

On July 9, 2020, the Court issued its decision in *McGirt*. It held that the historical Creek territory constituted Indian country for purposes of the Major Crimes Act, giving the federal government exclusive authority to prosecute the crimes enumerated in that statute. See 140 S. Ct. 2452, 2459 (2020). The Chief Justice dissented in an opinion joined by Justices Alito and Kavanaugh and in part by Justice Thomas. See *id.* at 2482-2502. Justice Thomas wrote a separate dissenting opinion. See *id.* at 2502-2504. On the same day, the Court issued a per curiam opinion in *Murphy*, affirming for the reasons stated in *McGirt*. See 140 S. Ct. 2412 (2020).

3. By the time the Court issued its decision in *McGirt*, numerous criminal defendants in Oklahoma state court had begun invoking the Tenth Circuit's decision in *Murphy* to challenge their convictions or prosecutions. In some of those cases, the defendants argued that, in addition to the Creek territory, the historical territories of the other Five Tribes constituted Indian country for purposes of the Major Crimes Act. Some defendants also argued that the principle of *Murphy* extended beyond the context of the Major Crimes Act and precluded Oklahoma's exercise of prosecutorial authority over any crime committed by or against an Indian in those territories. Those defendants relied on the General Crimes Act, arguing that it provided the federal government with exclusive authority over such crimes.

After this Court's decision in *McGirt*, the Oklahoma Court of Criminal Appeals proceeded to address those challenges. In a series of cases, the court held that the historical territories of all Five Tribes constituted Indian country for purposes of federal criminal law. See, *e.g.*, *State ex rel. Matloff* v. *Wallace*, 497 P.3d 686, 689 (2021) (Cherokee, Choctaw, and Chickasaw), cert. denied, 142 S. Ct. 757 (2022); *Grayson* v. *State*, 485 P.3d 250, 254 (2021) (Seminole).[1] That territory encompasses approximately 43% of the State of Oklahoma and is home to almost 2 million residents, the vast majority of whom are not Native Americans.

Of particular note here, in *Bosse* v. *State*, No. PCD-2019-124 (Mar. 11, 2021), the Court of Criminal Appeals further held that federal law preempted state prosecutions for crimes committed by non-Indians against Indians in Indian country. Pet. App. 22a-39a. The court reached that conclusion based on its reading of the General Crimes Act. *Id.* at 36a-37a. It also relied on later-enacted statutes that expressly permitted certain States to exercise broad criminal authority in Indian country—which, in the court's view, would have been unnecessary if the General Crimes Act did not otherwise preempt state jurisdiction. *Id.* at 38a-39a.

Four of the court's five judges wrote separate opinions in *Bosse*. Pet. App. 40a-51a. In his opinion concurring in

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[1] The Court of Criminal Appeals has since held that the historical territory of another tribe also constitutes Indian country. See *State* v. *Lawhorn*, 499 P.3d 777, 779 (2021) (Quapaw). Other tribes are seeking affirmation of their reservation status in pending criminal cases. See, *e.g.*, *State* v. *Hull*, No. S-2021-110 (Okla. Crim. App.) (Eastern Shawnee); *State* v. *Lee*, No. S-2021-206 (Okla. Crim. App.) (Peoria and Miami); *State* v. *Dixon*, No. S-2021-205 (Okla. Crim. App.) (Ottawa); *State* v. *Phillips*, No. CF-2019-327 (Okla. Dist. Ct. Osage Cty.) (Osage).

the result, Judge Hudson observed that *McGirt* was a "hugely destabilizing force to public safety," depriving the State of prosecutorial authority over "a large swath of Greater Tulsa and much of eastern Oklahoma." *Id.* at 50a. He noted that some crime victims and their family members "can look forward to a do-over in federal court of the criminal proceedings where *McGirt* applies," and "[s]ome cases may not be prosecuted at all by federal authorities because of issues with the statute of limitations, the loss of evidence, missing witnesses[,] or simply the passage of time." *Ibid.* "*McGirt* must seem like a cruel joke," he concluded, "for those victims and their family members who are forced to endure such extreme consequences in *their* case." *Id.* at 51a.

After this Court granted a stay of the mandate pending the filing of a petition for a writ of certiorari, see 141 S. Ct. 2696 (2021), the Court of Criminal Appeals vacated the judgment in *Bosse* and withdrew its opinion in that case, based on another decision holding that *McGirt* does not have retroactive effect in state postconviction proceedings. See *Bosse* v. *State*, 499 P.3d 771, 774-775 (2021) (citing *Wallace*, *supra*). In a subsequent decision, however, the Court of Criminal Appeals reiterated its holding from *Bosse* that States lack concurrent criminal jurisdiction with the federal government under the General Crimes Act. See *Roth* v. *State*, 499 P.3d 23, 26-28 (2021), petition for cert. pending, No. 21-914 (filed Dec. 15, 2021). Elaborating on its reasoning in *Bosse*, the court explained that "Congress's authority to regulate Indian affairs" was "exclusive." *Id.* at 26.

4. Based on the drastic decrease in state-court prosecutions in eastern Oklahoma, the State estimates that the combined holdings regarding the status of the historical Indian territories in Oklahoma will transfer prosecutorial responsibility for over 18,000 cases per year to the

federal and tribal governments. Approximately 20% of those—or 3,600 cases—involve the fact pattern at issue here: namely, a non-Indian perpetrator and an Indian victim.

In the wake of *McGirt*, the United States District Court for the Eastern District of Oklahoma experienced an increase in filed criminal cases of over 400% from 2020 to 2021, and the Northern District nearly 200%. See United States Courts, *Judiciary Supplements Judgeship Request, Prioritizes Courthouse Projects* (Sept. 28, 2021) <tinyurl.com/mcgirtsupplement>. The Judicial Conference recently sent an extraordinary request to Congress for five additional judgeships in those districts, which would double the size of the federal bench there. See *ibid.*

In addition, the Department of Justice issued a nationwide request for federal prosecutors to transfer to Tulsa. See Amy Slanchik, *Federal Prosecutors Move to Oklahoma, Help with Supreme Court Caseload*, KWTV News 9 (Jan. 21, 2021) <tinyurl.com/slanchikdoj>. The Director of the Federal Bureau of Investigation has also warned that the "operational and public safety risks" associated with *McGirt* are "long-term," and he admitted that the Bureau has been forced to "prioritiz[e] cases involving the most violent offenders who pose the most serious risk to the public." *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).

When overwhelmed federal authorities do prosecute non-Indians who commit crimes against Indians, the defendant is often able to reach a plea agreement that provides for a substantially lower sentence than the sentence that would be imposed by a state court. As far as the State is aware, in every case since *McGirt* in which a non-Indian's state conviction was reversed on appeal because the

victim was Indian, the ensuing federal plea agreement has recommended a sentence lower than the vacated state sentence.

B. Facts And Procedural History

1. In 2015, respondent's five-year-old stepdaughter, who has cerebral palsy and is legally blind, was rushed to the emergency room at St. Francis Hospital in Tulsa. She was admitted in critical condition; she was dehydrated, emaciated, and covered in lice and excrement, and she weighed only nineteen pounds. Investigators who visited respondent's home later discovered that her crib was filled with bedbugs and cockroaches and contained a single, dirty sippy cup, the top of which was so chewed through that fluid would not come out. Respondent, who is non-Indian, later admitted to officers that, while he knew his stepdaughter required five bottles of nutritional supplement a day, he had provided her between only twelve and eighteen bottles the previous month. 2 Trial Tr. 454, 471, 487, 531-536; 3 Trial Tr. 566-567, 584-586, 589, 604-605; State Ex. 1-5, 14; Court Ex. 1.

2. The State charged respondent in state court with child neglect. After a jury trial, respondent was convicted and sentenced to 35 years of imprisonment. Respondent appealed to the Oklahoma Court of Criminal Appeals. As is relevant here, he argued that the State lacked jurisdiction to prosecute his case, relying on the Tenth Circuit's decision in *Murphy*. During briefing on the appeal, however, this Court granted the petition for a writ of certiorari in *Murphy*. The Court of Criminal Appeals ordered that the appeal be held in abeyance pending the resolution of *Murphy*. See Order (Mar. 25, 2019).

After this Court issued its decisions in *McGirt* and *Murphy*, the Court of Criminal Appeals remanded re-

spondent's case to the trial court in light of those decisions. In particular, the Court of Criminal Appeals directed the trial court to determine whether the respondent's stepdaughter was an Indian and whether respondent's crime occurred in Indian country. See Order (Aug. 19, 2020).

3. On remand, the parties stipulated that the victim had some degree of Indian blood; that she was an enrolled member of the Eastern Band of Cherokee Indians at the time of respondent's crime; and that the Eastern Band of Cherokee Indians was a federally recognized tribe. The parties also stipulated that respondent's crime occurred within the area historically designated to the Cherokee Nation by certain treaties, though the State did not agree that the area constituted Indian country. The trial court accepted the parties' stipulations and, in the wake of *McGirt*, concluded that Congress had never disestablished the Cherokee Reservation. The trial court therefore determined that respondent's crime was committed within Indian country. Pet. App. 10a-18a.

4. After the trial court transmitted its findings of fact and conclusions of law to the Court of Criminal Appeals, the parties filed supplemental briefing on the question whether *McGirt* rendered respondent's conviction invalid. The State argued that respondent's conviction was valid because the State had concurrent jurisdiction with the federal government over crimes committed by non-Indians against Indians in Indian country.

The Court of Criminal Appeals accepted the trial court's findings of fact and conclusions of law and vacated respondent's conviction, holding that "the ruling in *McGirt* governs this case." Pet. App. 4a. The court noted that it had "rejected the State's argument regarding concurrent jurisdiction" in *Bosse*, and it "d[id] so again" in the decision below. *Ibid.*

Judge Lumpkin and Judge Hudson wrote separate opinions concurring only in the result. Pet. App. 4a-7a. Judge Lumpkin stated that he disagreed with the decision in *McGirt* but was nevertheless bound by it. *Ibid.* Judge Hudson reiterated his views set forth in his separate opinion in *Bosse*, noting again the "far-reaching impact" of *McGirt* on "the criminal justice system in Oklahoma." *Id.* at 7a.

5. In the wake of *McGirt*, the United States indicted respondent for the same conduct at issue here. See Dkt. 2, *United States* v. *Calhoun*, Crim. No. 20-255 (N.D. Okla. Nov. 2, 2020). Respondent subsequently accepted a plea agreement with a recommended sentence of seven years. See Dkt. 52, at 15 (Oct. 15, 2021). That sentence is less than a quarter of respondent's original state sentence.

6. The State of Oklahoma filed a petition for a writ of certiorari presenting two questions: first, whether a State has authority to prosecute non-Indians who commit crimes against Indians in Indian country; and second, whether *McGirt* should be overruled. See Pet. i. The Court granted review limited to the first question.

SUMMARY OF ARGUMENT

The question before the Court is whether a State has authority to prosecute non-Indians who commit crimes against Indians in Indian country. The answer is yes. A State presumptively has authority to regulate non-Indians in Indian country within its borders, and federal law does not preempt such authority in the criminal context.

A. The authority to define and punish criminal conduct is inherent in a State's status as a sovereign. That authority rests on two components: a State's authority over its own territory and its authority to prohibit its own citizens from committing certain offenses.

Indian reservations within a State's geographic borders are part of the State's territory (unless carved out at statehood), and state criminal jurisdiction over non-Indians presumptively extends there. Although the Court once took the view that state law had no force in Indian country, the Court has not adhered to that view for over 150 years. In two cases in particular—*United States* v. *McBratney*, 104 U.S. (14 Otto.) 621 (1882), and *Draper* v. *United States*, 164 U.S. 240 (1896)—the Court held that States could exercise criminal jurisdiction over non-Indians in Indian country. While the holdings in those cases were limited to crimes committed against non-Indians, their reasoning sweeps more broadly and supports the exercise of jurisdiction when the defendant is a non-Indian and the victim is an Indian.

Since those decisions, the Court has made even clearer that state sovereignty does not stop merely because Indian country begins. Instead, state law presumptively governs the conduct of non-Indians in Indian country—including in their interactions with Indians—subject only to federal preemption. Accordingly, States have authority to prosecute non-Indians for crimes committed against Indians in Indian country unless federal law preempts that authority.

B. No federal law preempts the States' exercise of prosecutorial authority over non-Indians who commit crimes against Indians in Indian country.

1. Nothing in the text or history of the General Crimes Act suggests that it preempts state jurisdiction. The General Crimes Act "extends" to Indian country the criminal law that already exists in areas of "sole and exclusive" federal jurisdiction. While the court below posited that the statute's use of the words "sole and exclusive" demonstrates federal preemption, the plain text of the statute belies that interpretation. As the Court has

repeatedly explained, the phrase "sole and exclusive" identifies only the body of criminal law borrowed and applied to Indian country; it does not describe federal jurisdiction in Indian country itself.

None of this Court's precedents requires a different result. In particular, the Court's decision in *Donnelly* v. *United States*, 228 U.S. 243 (1913), addressed only the question whether, in light of the reasoning in *McBratney* and *Draper*, the *federal* government retained jurisdiction to prosecute non-Indians who commit crimes against Indians in Indian country. The decision did not address the distinct question at issue here: namely, whether the States have *concurrent* jurisdiction over such crimes. To the extent that subsequent decisions from this Court have interpreted *Donnelly* as establishing exclusive federal jurisdiction over crimes committed against Indians in Indian country, those statements were dicta and rest on a misreading of *Donnelly*.

2. Public Law 280 and its state-specific predecessors—which authorize States to prosecute all offenses committed by or against Indians—do not implicitly preempt state power to prosecute non-Indians for crimes against Indians in Indian country. By their plain terms, those laws expand rather than limit state jurisdiction. To the extent that any inference might be drawn about what some legislators believed to be the limits of state criminal authority at the time, those beliefs are not part of the law itself. The history surrounding the passage of those laws also makes clear that Congress was reacting to the lack of prosecution of *Indians* who committed crimes in Indian country. While Congress may also have been aware of challenges to state power to prosecute non-Indians for crimes against Indians in Indian country, legislation to foreclose those challenges can hardly be read as ratifying them. Indeed, the Court's precedents confirm that a

State's assumption of expanded criminal jurisdiction under Public Law 280 should not be interpreted as implying that such jurisdiction was previously absent.

3. Nor can various provisions of the Constitution be cobbled together to invent a novel theory of implied constitutional preemption. Any such theory is belied by the long line of the Court's precedents blessing state regulation of conduct by non-Indians in Indian country. While those cases arose primarily in the civil context, there is no valid basis to treat the criminal context differently. The Court has also specifically rejected the notion that the Indian Commerce Clause is necessarily exclusive of state power, drawing a sharp distinction between that clause and the "dormant" component of the Interstate Commerce Clause. And the Treaty Clause has no inherent dormant aspect of its own accord.

C. In some cases in the civil context, the Court has assessed whether state law extends to Indian country by balancing the state, tribal, and federal interests implicated. If the Court were to employ a similar approach here, it would clearly favor a State's ability to prosecute non-Indians who commit crimes against Indians in Indian country. No serious issues of tribal sovereignty are involved, because tribes lack the power to prosecute non-Indians. And as the federal government has recognized, States have a strong interest in prosecuting non-Indians who victimize Indians within their borders, and the exercise of that authority is unlikely to interfere with federal interests.

Under any approach, therefore, the Court should conclude that a State has authority to prosecute non-Indians who commit crimes against Indians in Indian country. The judgment of the Oklahoma Court of Criminal Appeals should be reversed.

ARGUMENT

A STATE HAS AUTHORITY TO PROSECUTE NON-INDIANS WHO COMMIT CRIMES AGAINST INDIANS IN INDIAN COUNTRY

This Court's precedents demonstrate that, absent federal preemption, the sovereign power of a State to define and punish criminal conduct extends to non-Indians who commit crimes against Indians in Indian country. Because no federal law preempts a State's criminal jurisdiction over non-Indians in Indian country, Oklahoma has the authority to prosecute respondent. Even if the Court were to employ the balancing test used in the civil context to determine the reach of state law in Indian country, the balance of state, tribal, and federal interests would strongly support the exercise of state criminal authority over non-Indians in Indian country. The decision of the Oklahoma Court of Appeals is therefore erroneous, and its judgment should be reversed.

A. Absent Federal Preemption, A State Has Authority To Prosecute Non-Indians For Crimes Committed In Indian Country

A State has inherent, sovereign authority to punish crimes committed within its borders and by its citizens. And as this Court has made clear, a State's sovereign power does not end simply because Indian country begins. Those principles, and the Court's precedents implementing them, demonstrate that a State has authority to prosecute non-Indians who commit crimes in Indian country within state borders, unless Congress validly acts to preempt that authority.

1. "From the beginning of our country, criminal law enforcement has been primarily a responsibility of the States, and that remains true today." *Kansas* v. *Garcia*, 140 S. Ct. 791, 806 (2020). The plenary police power to

define and punish criminal conduct, "which the Founders denied the National Government and reposed in the States," is rooted in the status of States as sovereigns. *United States* v. *Morrison*, 529 U.S. 598, 618 (2000); see *United States* v. *Lopez*, 514 U.S. 549, 564 (1995).

State sovereignty predated the Constitution and survived its ratification. See *Franchise Tax Board* v. *Hyatt*, 139 S. Ct. 1485, 1493, 1494-1495 (2019). The Constitution itself reserves to the States a "substantial portion of the Nation's primary sovereignty." *Alden* v. *Maine*, 527 U.S. 706, 714 (1999); see U.S. Const. Amend. X. And States admitted to the Union after the Founding enter on "equal footing with the original States," with the result that the States are "equal to each other in power, dignity[,] and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself." *Skiriotes* v. *Florida*, 313 U.S. 69, 77 (1941) (citation omitted).

Two centuries ago, this Court held, "without hesitation," that "the jurisdiction of a [S]tate is co-extensive with its territory" and thus its "legislative power." *United States* v. *Bevans*, 16 U.S. (3 Wheat.) 336, 386-387 (1818). That is, a State's police power—"a portion of sovereignty"—"adheres to the territory." *Id.* at 389. Any place that is "within the original territory" of a State is thus "within the jurisdiction" of the State, "unless that jurisdiction has been ceded." *Id.* at 387; see U.S. Const. Art. I, § 8, cl. 17; *Paul* v. *United States*, 371 U.S. 245, 264 (1963).

Under the foregoing principle of territorial sovereignty, "every person who is found within the limits of a [g]overnment, whether for temporary purposes or as a resident, is bound by its laws." *Brown* v. *Duchesne*, 60 U.S. (19 How.) 183, 194 (1857). A State thus has authority to proscribe criminal conduct and to enforce its criminal

laws not just against its own citizens, but also against citizens of other States (and other nations) who commit crimes within the State's borders. See, *e.g.*, *Manchester* v. *Massachusetts*, 139 U.S. 240, 256, 266 (1891); *McCready* v. *Virginia*, 94 U.S. 391, 394-397 (1876); *People* v. *McLeod*, 25 Wend. 483, 574 (N.Y. Sup. Ct. 1841).

2. The foregoing principles apply with equal force to state regulation of non-Indians in Indian country.

a. The Court's once-held view regarding the reach of state law in Indian country—expressed by Chief Justice Marshall in his opinion for the Court in *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515 (1832)—was that state law "can have no force" in the territory of an Indian nation. *Id.* at 561. The Court reached that conclusion because, although Indian tribes were not considered foreign nations, see *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1, 20 (1831), they were considered "distinct, independent political communities," with which the federal government interacted primarily by treaty. *Worcester*, 31 U.S. at 559-560. The Court thus viewed Indian territory as "completely separated from that of the [S]tates." *Id.* at 557.

Even then, however, the Court recognized the presumptive power of a State over its own citizens in Indian country. See *Worcester*, 31 U.S. at 542. The state law invalidated in *Worcester* exceeded the State's extraterritorial power because it sought to regulate "all white persons," including non-citizens such as the petitioner there. *Ibid.* In addition, the law constituted an "assertion of power over the Cherokee [N]ation" in that it created a state guard authorized to enforce state law in the Nation's territory. *Id.* at 542. As was "said at the bar," the Georgia legislature was attempting to "seize on the whole Cherokee country, parcel it out among the neighbouring counties of the state, extend her code over the whole country,

abolish its institutions and its laws, and annihilate its political existence." *Ibid.*; see generally Joseph C. Burke, *The Cherokee Cases: A Study in Law, Politics, and Morality*, 21 Stan. L. Rev. 500, 503 (1969) (describing Georgia's efforts to force the Cherokee and Creek Nations to emigrate west).

Nor did contemporaneous authorities understand *Worcester* to preclude all assertions of state power in Indian country. Shortly after the decision, in a case reported by Justice McLean, a federal circuit court recognized that, "[e]ver since [a] state government has been organized, it has had power to punish its own citizens for offences committed within its limits[,] whether within an Indian territory or not." *United States* v. *Cisna*, 25 F. Cas. 422, 425 (C.C.D. Ohio 1835) (No. 14,795). The court noted that both Georgia and New York had punished their citizens for offenses committed in Indian territory within state borders (as Ohio was seeking to do), and the court reasoned that the exercise of such power "would not be incompatible with the exercise of the power vested in the federal government." *Id.* at 422, 425. "There are many offenses," the court explained, "which are punishable as well under the laws of the state as those of the Union." *Id.* at 425. For its part, the federal government also understood States to have jurisdiction over "any controversy within state borders to which one of their citizens is a party." 7 Op. Atty. Gen. 174, 178 (1855).

In any event, "it was long ago that the Court departed from Chief Justice Marshall's view"—indeed, within just a few decades of his decision in *Worcester*. *Hicks*, 533 U.S. at 361 (citation omitted). In *New York ex rel. Cuter* v. *Dibble*, 62 U.S. (21 How.) 366 (1859), the Court considered the validity of a New York law that prohibited non-Indians from trespassing on Indian lands. The Court held that the

law was a valid exercise of state police power and was enforceable because it did not conflict with any federal law. See *id.* at 370-371. The power of a State to "make such regulations to preserve the peace of the community," the Court explained, "is absolute" and "has never been surrendered." *Id.* at 370. The State of New York thus "had the power of a sovereign over [the Indian nations'] persons and property, so far as it was necessary to preserve the peace of the Commonwealth, and protect [them] from imposition and intrusion"—"[n]otwithstanding the peculiar relation which the[] Indian nations hold to the Government of the United States." *Ibid.*

The Court soon permitted the exercise of state criminal authority in Indian country as well. In *United States* v. *McBratney*, 104 U.S. (14 Otto.) 621 (1882), the Court held that, by virtue of its admission to the Union, the State of Colorado possessed exclusive authority to prosecute crimes committed by non-Indians against non-Indians in Indian country within state borders. Before statehood, the Court reasoned, the boundaries of the Colorado Territory did not include the Ute Reservation, which was under the "jurisdiction of the United States." *Id.* at 623; see *United States* v. *Rogers*, 45 U.S. (4 How.) 567, 572 (1846). But Colorado's admission into the Union, absent any "express" statement in its enabling act that excluded Indian reservations from state boundaries, placed the Ute reservation within the State's territory and "no longer within the sole and exclusive jurisdiction of the United States." *McBratney*, 104 U.S. at 624. And because the enabling act provided that the State was to be admitted "upon an equal footing with the original States in all respects whatsoever," the State "acquired criminal jurisdiction over its own citizens and other white persons throughout the whole of the territory within its limits, including the Ute Reservation." *Ibid.*

The Court reached a similar conclusion in *Draper* v. *United States*, 164 U.S. 240 (1896). Montana's enabling act provided that certain "Indian lands" within the State's borders "shall remain under the absolute jurisdiction and control of the congress of the United States." *Id.* at 245 (citation omitted); see generally *Organized Village of Kake* v. *Egan*, 369 U.S. 60, 67-71 (1962) (discussing variations on such provisions in other statehood acts, including Oklahoma's). The Court nevertheless concluded that the "mere reservation of jurisdiction and control by the United States of 'Indian lands' does not of necessity signify a retention of jurisdiction in the United States to punish all offenses committed on such lands by others than Indians or against Indians." *Draper*, 164 U.S. at 245.

To divest Montana of jurisdiction over Indian country "wholly situated within [its] geographical boundaries," the Court reasoned, would undermine "the very nature of the equality conferred on the State by virtue of its admission into the Union." *Draper*, 164 U.S. at 243. It would also lead to what the Court viewed as a self-evident "fallacy": namely, that the State of Montana would lack authority over "offenses committed by [its] own citizens"—"usually enjoyed by the other [S]tates of the Union"—not just on Indian reservations, but even on lands that had lost their reservation status after being allotted and patented in fee. *Id.* at 242, 246-247; cf. *United States* v. *Pelican*, 232 U.S. 442, 449-451 (1914); Act of Feb. 8, 1887, ch. 119, § 6, 24 Stat. 390.

While both *McBratney* and *Draper* presented only the question whether States had exclusive jurisdiction over crimes committed in Indian country by non-Indians *against non-Indians*, the Court's reasoning was not so limited. As the Court stated in *Draper*, "where a [S]tate was admitted into the Union, and the enabling act contained no exclusion of jurisdiction as to crimes committed

on an Indian reservation by others than Indians or against Indians, the state courts were vested with jurisdiction to try and punish such crimes." 164 U.S. at 242-243. Notably, in neither case did the Court identify a treaty or statute expressly granting such jurisdiction. Rather, the Court reasoned that state authority existed by virtue of statehood and the equal-footing principle, and it noted that any preexisting jurisdictional treaties or statutes that were "clearly inconsistent" with that authority were "necessarily repeal[ed]." *McBratney*, 104 U.S. at 623; see *New York ex rel. Ray* v. *Martin*, 326 U.S. 496, 499-500 (1946).

b. By the time of *McBratney*, the Court "no longer viewed reservations as distinct nations" but instead viewed them "in many cases a part of the surrounding State or Territory, and subject to its jurisdiction except as forbidden by federal law." *Egan*, 369 U.S. at 72. The "general notion drawn from Chief Justice Marshall's opinion in *Worcester*" that "an Indian reservation is a distinct nation within whose boundaries state law cannot penetrate" thus "yielded to closer analysis when confronted, in the course of subsequent developments, with diverse concrete situations." *Ibid.*

The Court's modern cases have continued in the same vein. As the Court has explained, the "usual Indian reservation set apart within a State" presumptively "remain[s] part of [the State's] territory," and "her laws, civil and criminal, have the same force therein as elsewhere within her limits, save that they can have only restricted application to the Indian wards." *Surplus Trading Co.* v. *Cook*, 281 U.S. 647, 650-651 (1930). As a result, "[e]nactments of the federal government passed to protect and guard its Indian wards" affect only "the operation, within the colony, of such state laws as conflict with the federal

enactments." *United States* v. *McGowan*, 302 U.S. 535, 539 (1938).

In case after case, the Court has upheld the exercise of state jurisdiction over non-Indians in Indian country in various contexts—including in their interactions with Indians. See, *e.g.*, *Department of Taxation & Finance* v. *Milhelm Attea & Brothers, Inc.*, 512 U.S. 61, 73-75 (1994); *County of Yakima* v. *Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 257-258 (1992); *Oklahoma Tax Commission* v. *Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 512 (1991); *Cotton Petroleum Corp.* v. *New Mexico*, 490 U.S. 163, 187 (1989); *Three Affiliated Tribes of Fort Berthold Reservation* v. *Wold Engineering, P.C.*, 467 U.S. 138, 148-149 (1984); *Washington* v. *Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 159 (1980); *Moe* v. *Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 483 (1976). Indeed, the Court has indicated that, "even on reservations, state laws may be applied to *Indians* unless such application would interfere with reservation self-government or impair a right granted or reserved by federal law." *Egan*, 369 U.S. at 75 (emphasis added).

Accordingly, the trend since the mid-nineteenth century has been "away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal pre-emption." *McClanahan* v. *State Tax Commission*, 411 U.S. 164, 172 (1973). "The modern cases thus tend to avoid reliance on platonic notions of Indian sovereignty and to look instead to the applicable treaties and statutes which define the limits of state power." *Ibid.* The view from *Worcester* has accordingly "given way to more individualized treatment of particular treaties and

specific federal statutes, including statehood enabling legislation." *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 148 (1973).

Today, it is clear that "[s]tate sovereignty does not end at a reservation's border." *Nevada* v. *Hicks*, 533 U.S. 353, 361 (2001). A State, "by virtue of [its] statehood," has the "right to exercise jurisdiction over Indian reservations within its boundaries." *Martin*, 326 U.S. at 499-500. "The States' inherent jurisdiction on reservations can of course be stripped by Congress." *Hicks*, 533 U.S. at 365. But "absent a congressional prohibition," a State has the right to "exercise criminal (and, implicitly, civil) jurisdiction over non-Indians located on reservation lands." *County of Yakima*, 502 U.S. at 257-258.

B. Federal Law Does Not Preempt A State's Authority To Prosecute Non-Indians For Crimes Committed In Indian Country

No provision of federal law preempts the States' presumptive authority to prosecute crimes committed by non-Indians against Indians in Indian country within state borders. The Oklahoma Court of Criminal Appeals' contrary holding was erroneous.

1. The General Crimes Act

In the decision below, the Oklahoma Court of Criminal Appeals concluded that the General Crimes Act, 18 U.S.C. 1152, preempted the States' prosecutorial authority over crimes committed by non-Indians against Indians in Indian country. See Pet. App. 4a, 36a-38a. That conclusion lacks merit.

a. The General Crimes Act provides that, "[e]xcept 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." 18 U.S.C. 1152. In the decision below, the Oklahoma Court of Criminal Appeals relied on the phrase "sole and exclusive jurisdiction of the United States" to conclude that federal jurisdiction under the General Crimes Act must exclude state jurisdiction. Pet. App. 36a. That is incorrect.

As this Court has explained, the phrase "sole and exclusive" in the General Crimes Act "[does] not apply to the jurisdiction extended over the Indian country, but [is] only used in the description of the laws which are extended to it." *In re Wilson*, 140 U.S. 575, 578 (1891); see *Donnelly* v. *United States*, 228 U.S. 243, 268 (1913). That conclusion is compelled by the statutory text. The General Crimes Act "extend[s]" to Indian country 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." 18 U.S.C. 1152 (emphasis added). The phrase "sole and exclusive" thus does not refer to Indian country at all; it refers instead to a set of locations *outside Indian country* from which the "general laws * * * as to the punishment of offenses" are borrowed. *Ibid.* Those laws—the ones that apply in federal enclaves "within the sole and exclusive jurisdiction of the United States"—thereby "extend" to Indian country.

The use of the verb "extend" confirms the foregoing understanding. Both the Constitution and federal jurisdictional statutes use that verb in a manner fully compatible with concurrent state jurisdiction. For example, Article III provides that the federal judicial power "shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties." U.S. Const. Art. III, § 2. But it is an "axiom" of our constitutional system that state courts are "presumptively competent[] to adjudicate claims arising under the laws of

the United States." *Tafflin* v. *Levitt*, 493 U.S. 455, 458 (1990). In similar fashion, the Admiralty Extension Act provides that "the admiralty and maritime jurisdiction of the United States shall extend to" certain injuries on land. 46 U.S.C. 740. But this Court has held that the Act does not preempt state jurisdiction over sea-to-shore pollution. *Askew* v. *American Waterways Operators, Inc.*, 411 U.S. 325, 341-343 (1973).

It thus follows that, even if the text of the General Crimes Act suggests that "Congress contemplated a parallel between Indian country and the federal enclaves over which Congress may 'exercise exclusive jurisdiction,'" U.S. Br. at 11, *Oklahoma* v. *Bosse*, 141 S. Ct. 2696 (2021) (No. 20A161) (quoting U.S. Const. Art. I, § 8, cl. 17), the parallel is in the *substance* of the law to be applied in those areas. There is no textual basis to interpret the General Crimes Act to *displace* state law.

b. The history of the General Crimes Act is consistent with the plain-text interpretation. Congress first extended the law of federal enclaves to Indian country in 1817, providing that "any Indian, or other person" in Indian country who commits a crime "which, if committed in any place or district of country under the sole and exclusive jurisdiction of the United States, would, by the laws of the United States, be punished with death, or any other punishment, * * * shall suffer the like punishment as is provided by the laws of the United States for the like offences." Act of Mar. 3, 1817, ch. 92, 3 Stat. 383. By providing for "like punishment" to the punishment imposed "in any place or district of country under the sole and exclusive jurisdiction of the United States," the original version of the Act makes clear that it was borrowing a body of criminal law from one context for another, not creating exclusive federal authority over crimes by or against Indians in Indian country.

Congress then revised that law and incorporated it into the Indian Trade and Intercourse Act of 1834, ch. 161, 4 Stat. 733, enacted two years after this Court's decision in *Worcester*. But nothing in the text of those revisions demonstrates that Congress viewed the law as preempting state jurisdiction. And by the time Congress reenacted and codified the 1834 Act in the Revised Statutes in 1874, see Rev. Stat. § 2145, this Court had already begun to retreat from *Worcester*. See *Dibble*, 62 U.S. at 370-371. That trend had only further solidified by the time Congress recodified the law in Title 18 of the United States Code in 1948. See 18 U.S.C. 1152; pp. 21-23, *supra*. Any inference that Congress has always intended to preempt state jurisdiction, without mentioning that intention in the text of the statute, is thus extraordinarily weak.

c. This Court's precedents do not hold that the General Crimes Act creates exclusive federal criminal jurisdiction in Indian country.

i. In *Donnelly*, *supra*, the Court addressed the question whether the "principle of the *McBratney* and *Draper* cases" acted to deprive the federal government of authority to prosecute non-Indians who commit crimes against Indians in Indian country. 228 U.S. at 271. That principle, according to the Court, was that the "admission of States qualified the former [f]ederal jurisdiction over Indian country included therein by withdrawing from the United States and conferring upon the States the control of offenses committed by white people against whites, in the absence of some law or treaty to the contrary." *Ibid.*

The Court concluded that "offenses committed by or against Indians are not within the principle of the *McBratney* and *Draper* cases," such that States do not have "*undivided* authority" over crimes committed by non-Indians against Indians in Indian country. 228 U.S.

at 271 (emphasis added). The Court reasoned that the admission of the States did not deprive the federal government of prosecutorial authority that Congress had otherwise conferred under the General Crimes Act, because "Indian tribes are the wards of the nation." *Id.* at 272.

The Court stated that "[t]his was in effect held[] as to crimes committed by the Indians" in *United States* v. *Kagama*, 118 U.S. 375 (1886), which sustained federal jurisdiction under the Major Crimes Act over crimes committed by Indians in Indian country on the ground that Indians are wards of the nation. *Donnelly*, 228 U.S. at 271 (emphasis omitted). The *Donnelly* Court concluded that "[t]his same reason applies—perhaps *a fortiori*—with respect to crimes committed by [non-Indians] against the persons or property of the Indian tribes while occupying reservations set apart for the very purpose of segregating them from the whites and others not of Indian blood." *Id.* at 272.

In *Donnelly*, therefore, the Court did not decide the distinct question presented here: namely, whether the States have *concurrent* jurisdiction over non-Indians who commit crimes against Indians in Indian country. Nor did the Court disturb the principle, established in *McBratney* and *Draper*, that the admission of States to the Union on an equal footing with other States confers prosecutorial authority over non-Indians in Indian country.

ii. In *Williams* v. *United States*, 327 U.S. 711 (1946), the Court suggested, for the first time, that States might generally lack jurisdiction over "offenses committed [on reservations] * * * by one who is not an Indian against one who is an Indian." *Id.* at 714. The Court recognized that, before *Donnelly*, some had interpreted *McBratney* and *Draper* as permitting state prosecution while precluding federal prosecution of non-Indians for crimes

committed against Indians in Indian country. See *Williams*, 327 U.S. at 714 n.10. But the Court understood *Donnelly* to have reversed that rule, recognizing federal prosecutorial authority and precluding state prosecutorial authority over crimes committed by non-Indians against Indians in Indian country. See *ibid.*

As the federal government has acknowledged, that statement was dictum. See U.S. Br. at 14, *Bosse*, *supra*. It is also incorrect for the reason just explained: *Donnelly* concerned only the federal government's power under the General Crimes Act and not the power of the States. While the Court repeated the same point from *Williams* in subsequent cases, those statements were also dicta, made in passing without any serious consideration of the issue. See, *e.g.*, *Washington* v. *Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 470 (1979); *Williams* v. *Lee*, 358 U.S. 217, 220 (1959).

The Office of Legal Counsel thus concluded that, "despite Supreme Court dicta to the contrary," the issue "should not be regarded as settled before it has been fully explored by the courts." 3 Op. Off. Legal Counsel 111, 117 (1979). The issue is now squarely before the Court, and it is clear that the General Crimes Act does not preempt a State's authority to prosecute non-Indians who commit crimes against Indians in Indian country.

2. Public Law 280 And Its Predecessors

The Oklahoma Court of Criminal Appeals also cited a series of statutes—beginning with the Kansas Act of 1940 and culminating with Public Law 280 in 1953—as evidence that Congress had preempted state authority to prosecute crimes committed by non-Indians against Indians in Indian country. See Pet. App. 38-39a. The court reasoned that, because those statutes authorize certain States to prosecute crimes committed "against Indians" in Indian

country, Congress must have previously preempted the States' power to prosecute such crimes. See *ibid.* That reasoning is flawed.

a. In 1940, Congress enacted the Kansas Act, which "conferred on the State of Kansas" jurisdiction over "offenses committed by or against Indians on Indian reservations, including trust or restricted allotments, within the State of Kansas, to the same extent as its courts have jurisdiction over offenses committed elsewhere within the State in accordance with the laws of the State." 18 U.S.C. 3243; see Pub. L. No. 76-565, 54 Stat. 249 (1940). The act further provided that "the courts of the United States" would continue to have "jurisdiction over offenses defined by the laws of the United States committed by or against Indians on Indian reservations." 18 U.S.C. 3243. Later in the same decade, Congress enacted legislation with materially identical language for three other States. See Act of May 31, 1946, Pub. L. No. 79-394, 60 Stat. 229 (North Dakota); Act of June 30, 1948, Pub. L. No. 80-846, 62 Stat. 1161 (Iowa); Act of July 2, 1948, Pub. L. No. 80-881, 62 Stat. 1224 (New York).

To be sure, the text of those statutes is consistent with the conclusion that Congress believed the States generally lacked prosecutorial authority over crimes committed by non-Indians against Indians in Indian country. But when interpreting statutes, the Court "begins by examining the text, not by psychoanalyzing those who enacted it." *Carter* v. *United States*, 530 U.S. 255, 271 (2000) (citation omitted). The text of those statutes does not provide that state prosecutorial authority over non-Indians in Indian country is preempted unless Congress affirmatively authorizes it. Nor do those statutes support interpreting the General Crimes Act in that manner, because "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *Marvin M.*

Brandt Revocable Trust v. *United States*, 572 U.S. 93, 109 (2014) (citation omitted).

What is more, the history of those statutes demonstrates that Congress was primarily focused on the lack of jurisdiction over crimes committed *by Indians* in Indian country. Leading up to the Kansas Act, legislative reports had indicated that Congress was concerned about "the nonexistence of jurisdiction in any court to try certain lesser crimes and misdemeanors committed by Indians on their reservations." S. Rep. No. 1365, 72nd Cong., 2d Sess. 15 (1932). The reports thus warned of a "no man's land in the field of Indian offenses." *Id.* at 16.

In the preceding years, moreover, several state supreme courts had held that States lacked authority to subject Indians who remained under federal protection to state criminal prosecutions for conduct in Indian country. See *State* v. *Big Sheep*, 243 P. 1067, 1072 (Mont. 1926); *State* v. *Columbia George*, 65 P. 604, 607, 610-611 (Or. 1901); *State* v. *Campbell*, 55 N.W. 553, 555 (Minn. 1893). Law enforcement in Indian country had also become complicated because, in some circumstances, Indians who received a patent in fee from the federal government through allotment had thereby become subject to state jurisdiction. See, *e.g.*, *Louie* v. *United States*, 274 F. 47, 51 (9th Cir. 1921); Felix Cohen, Dep't of Interior, *Handbook on Indian Law* 359 (3d prtg. 1942) (Cohen); H.R. Rep. No. 1999, 76th Cong., 3d Sess. 2 (1940).

In fact, the immediate impetus for the Kansas Act appears to have been a jurisdictional dispute over a particular Indian fugitive. See John J. Francis, et al., *Reassessing Concurrent Tribal-State-Federal Criminal Jurisdiction in Kansas*, 59 Kan. L. Rev. 949, 956-958 (2011) (Francis); Federal Bureau of Investigation, Law Enforcement Bulletin, Dec. 1, 1937, at 50 (Louis Wezo). When the

Attorney General expressed the belief that criminal prosecutions against Indians should proceed in federal court, local officials from the Bureau of Indian Affairs contacted a member of the Kansas congressional delegation, proposing legislation to abolish federal criminal jurisdiction in Indian country and establish exclusive state jurisdiction. See Francis 956-958.

In a letter to the House Committee on Indian Affairs, the Acting Secretary of the Interior explained that the "[s]tate courts of Kansas have in the past undertaken the trial and punishment of offenses committed on these reservations," but that the "legality of this practice [had been] questioned recently." H.R. Rep. No. 1999, at 2. The Acting Secretary focused on "injuries inflicted by one Indian upon the person or property of another," though he did express the view that state authority over crimes committed on "tribal or restricted Indian lands extends in the main only to situations where both the offender and the victim are white men." *Ibid.*; but see U.S. Br. at 15 n.8, *Martin*, *supra* (No. 45-158) (noting the possibility of "concurrent federal and state jurisdiction of some offenses committed by a white against an Indian"); Cohen 120 n.53 (similar). The Acting Secretary also noted the "practical difficulties" arising from the jurisdictional "checkerboard" created by allotment. H.R. Rep. No. 1999, at 2.

The subsequent Iowa and North Dakota Acts addressed similar uncertainty that had arisen concerning jurisdiction over Indians in Indian country. In North Dakota, the history of allotment in the reservation had rendered the state courts' traditional exercise of jurisdiction over crimes committed by Indians on the reservation "somewhat confused." H.R. Rep. No. 2032, 79th Cong., 2d Sess. 2 (1946). In Iowa, the "old tribal laws and customs for the discipline of [one tribe's] members ha[d] broken down completely," and a federal court had held that the

State lacked authority to prosecute Indians for crimes committed against other Indians on that tribe's reservation. H.R. Rep. No. 2356, 80th Cong., 2d Sess. 3 (1948); see *id.* at 2 (citing *Peters* v. *Malin*, 111 F. 244 (C.C.N.D. Iowa 1901)). In response to those problems with the prosecution of crimes committed by Indians, Congress passed versions of the Kansas Act for those two States. See Act of May 31, 1946, 60 Stat. 229 (North Dakota); Act of June 30, 1948, 62 Stat. 1161 (Iowa).[2]

To be sure, the legislative history for the Iowa Act (and the subsequent New York Act) contained suggestions that States lacked authority to prosecute crimes "against Indians" committed on reservations. See H.R. Rep. No. 2356, at 1; H.R. Rep. No. 2355, 80th Cong., 2d Sess. 1 (1948). But those acts followed the Court's decision in *Williams* v. *United States*, *supra*. That Congress may have been "inspired" by the "erroneous view" in *Williams* is not a controlling consideration. *Alden*, 527 U.S. at 745; cf. *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 344 n.7 (1979).

b. In 1953, Congress enacted Public Law 280. See Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588. That law mandates that six States assume plenary civil and criminal jurisdiction in Indian country within their borders and also provided federal consent for any other State voluntarily to assume such jurisdiction. See 18 U.S.C.

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[2] In connection with the New York Act, the Senate Report observed that "the time has come for the Indians to be brought into conformity with the penal standards" of New York, particularly because the State had long "dealt directly with Indian tribes." S. Rep. No. 1489, 80th Cong., 2d Sess. 1-2 (1948). For its part, the House Report stated that the Act was motivated by the fact that Indian tribes were "not enforc[ing] the laws covering offenses committed by Indians" within reservations. H.R. Rep. No. 2355, 80th Cong., 2d Sess. 1 (1948).

1162; 25 U.S.C. 1321, 1322; 28 U.S.C. 1360. While Congress did not originally require tribal consent for such an assumption of jurisdiction, it did so in subsequent legislation. See 25 U.S.C. 1321, 1322, 1326.

The provisions of Public Law 280 governing criminal matters give a State the ability to assume "jurisdiction over criminal offenses committed by or against Indians" in Indian country within its borders. 25 U.S.C. 1321; see 18 U.S.C. 1162. As with the Kansas Act, the inclusion of the phrase "or against" could be consistent with a belief that States generally lacked prosecutorial authority over crimes committed by non-Indians against Indians in Indian country. Notably, however, this Court has already rejected the inference that the conferral of jurisdiction by Public Law 280 necessarily proves that there would be no jurisdiction in the absence of the law.

In *Three Affiliated Tribes*, *supra*, the Court addressed the question whether North Dakota state courts could adjudicate a civil action filed by an Indian tribe against a non-Indian company arising from conduct that took place wholly in Indian country. See 467 U.S. at 141-142. Pursuant to Public Law 280, the State had acted to assume civil jurisdiction over Indian country within its borders "upon acceptance by Indian citizens." *Id.* at 144 (citation omitted). The defendant argued that the State had thereby disclaimed all civil jurisdiction over Indian country in the absence of tribal consent. See *id.* at 145, 150.

The Court rejected that argument. "Nothing in the language or legislative history of [Public Law] 280," the Court explained, "indicates that it was meant to divest States of pre-existing and otherwise lawfully assumed jurisdiction." *Three Affiliated Tribes*, 467 U.S. at 150. Instead, Public Law 280 was "designed to eliminate obstacles to the assumption of jurisdiction," and its require-

ments "simply have no bearing on jurisdiction lawfully assumed prior to its enactment." *Id.* at 150, 151 n.11. Accordingly, the Court held that a State's acceptance of authority under Public Law 280 did not constitute a disclaimer of preexisting authority in Indian country. See *id.* at 151. The Court's reasoning in *Three Affiliated Tribes* demonstrates that no inference can be drawn from the terms of Public Law 280 about a State's preexisting jurisdiction.

In addition, the inclusion of the phrase "or against" in Public Law 280 is unsurprising given the context. As enacted, Public Law 280 provided requesting States with *exclusive* criminal jurisdiction; the law rendered the Major Crimes Act and the General Crimes Act entirely inapplicable upon the assumption of state jurisdiction. See §§ 2(c), 7, 67 Stat. 589, 590; cf. 18 U.S.C. 1162(d) (current version of Public Law 280, permitting the exercise of concurrent federal criminal jurisdiction upon request by a tribe and approval by the Attorney General); 25 U.S.C. 1321(a)(2) (same). It is thus natural that the statute would specify not only those categories of offenses over which the State would assume jurisdiction, but also the categories over which the federal government would *relinquish* jurisdiction. And of course, this Court had already suggested in *Williams*, albeit in dicta, that States lacked criminal jurisdiction over crimes committed by non-Indians against Indians in Indian country. See pp. 27-28, *supra*.

If the phrase "or against" had not been included in Public Law 280 and courts were to adhere to the dicta from *Williams*, non-Indians who committed crimes against Indians in Indian country in Public Law 280 States would have been entirely immune from prosecution. See *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S.

191, 199 & n.9 (1978) (citing the 1941 version of Felix Cohen's treatise). The inclusion of the phrase "or against" thus does not evidence Congress's agreement with the dicta in *Williams*, but at most only Congress's reaction to it. For that reason, Public Law 280 does not provide any support for depriving States of their inherent authority to prosecute non-Indians for crimes committed in Indian country within state borders.

3. The Constitution

In *Roth* v. *State*, 499 P.3d 23 (2021), petition for cert. pending, No. 21-914 (filed Dec. 15, 2021), the Oklahoma Court of Criminal Appeals stated an additional reason why States might lack authority to prosecute non-Indians for crimes committed against Indians in Indian country: namely, that "Congress's authority to regulate Indian affairs in this manner is * * * exclusive." *Id.* at 26. In so doing, the court cited precedent from this Court for the proposition that "[t]he Constitution grants Congress broad general powers to legislate in respect to Indian tribes, power that [this Court has] consistently described as 'plenary and exclusive.'" *Ibid.* (quoting *United States* v. *Lara*, 541 U.S. 193, 200 (2004)). To the extent the Court of Criminal Appeals was suggesting that the Constitution itself preempts the States' exercise of prosecutorial authority in this area, that suggestion was incorrect.

a. This Court has "traditionally identified" the Indian Commerce Clause, Art. I, § 8, cl. 3, and the Treaty Clause, Art. II, § 2, cl. 2, as the sources of the federal government's "broad general powers to legislate in respect to Indian tribes." *Lara*, 541 U.S. at 200. The Court has also suggested that the federal government may have certain "preconstitutional powers necessarily inherent in any [f]ederal [g]overnment" that allow it to regulate relations with the Indian tribes. *Id.* at 201.

Whatever the scope of those powers with respect to the direct regulation of Indians, the Court's precedents make clear that the Constitution does not deprive States of authority to regulate non-Indians in Indian country. As explained above, pp. 21-23, the Court long ago abandoned the notion that state power "end[s] at a reservation's border." *Hicks*, 533 U.S. at 361. The Court has upheld state regulation of non-Indians in Indian country in a variety of contexts. See p. 22, *supra*. Those precedents approve not only the regulation of interactions between non-Indians in Indian country, see, *e.g.*, *Draper*, 164 U.S. at 247; *McBratney*, 104 U.S. at 624, but also interactions between non-Indians and Indians, see, *e.g.*, *Milhelm Attea & Brothers*, 512 U.S. at 73-75; *Citizen Band Potawatomi Indian Tribe*, 498 U.S. at 512; *Three Affiliated Tribes*, 467 U.S. at 148-149; *Dibble*, 62 U.S. at 370-371.

The cases cited by the Oklahoma Court of Criminal Appeals in *Roth* are not to the contrary. While this Court has stated that "[t]he policy of leaving *Indians* free from state jurisdiction and control is deeply rooted in this Nation's history," *McGirt* v. *Oklahoma*, 140 S. Ct. 2452, 2462 (2020) (emphasis added; citation omitted), that says nothing about state power over non-Indians. So too when the Court described the federal government's power over Indian affairs as "plenary and exclusive": it was referring to Congress's power to regulate "the *tribes'* criminal jurisdiction." *Lara*, 541 U.S. at 200 (emphasis added). And as discussed above, see pp. 21-23, the Court has long since retreated from the absolutist position that "Indian territory [is] completely separated from that of the [S]tates," such that "all intercourse with [Indians] shall be carried on exclusively by the government of the union." *Worcester*, 31 U.S. at 519.

To be sure, this Court's precedents approving of the exercise of state regulatory authority over non-Indians in

their interactions with Indians have come primarily in the civil context. But there is no principled reason why the Indian Commerce Clause or the Treaty Clause would operate differently in the criminal context.

To begin with, neither the text of the Indian Commerce Clause nor that of the Treaty Clause draws any distinction between the civil and criminal contexts, and, as with other constitutional powers, it is "impossible to see why" the two contexts would differ. *Tennessee* v. *Davis*, 100 U.S. 257, 265 (1880). After all, the Framers surely knew how to distinguish between the two contexts: the Constitution refers to "punishment" or the power to "punish" in several places. See Art. I, § 3, cl. 7; Art. I, § 8, cl. 6; see also Amend. V, VI, VII.

Nor should any extratextual constitutional powers, to the extent they exist, operate differently in the civil and criminal contexts. While the Court held in *Kagama*, *supra*, that the federal government had certain inherent authority to regulate Indian tribes based on their status as "wards of the nation," 118 U.S. at 383, the Court did not suggest that such power operated differently across the civil and criminal contexts. To the contrary, the Court cited one of its earlier civil decisions to support its conclusion that Congress had the authority to enact the Major Crimes Act. See *id.* at 384 (citing *Fellows* v. *Blacksmith*, 60 U.S. (19 How.) 366 (1857)).

What is more, this Court has recently extended principles of Indian law first developed in the civil context to the criminal context. In *United States* v. *Cooley*, 141 S. Ct. 1638 (2021), the Court addressed the question whether "an Indian tribe's police officer has authority to detain temporarily and to search a non-Indian on a public right-of-way that runs through an Indian reservation." *Id.* at 1641. To decide that question, the Court turned to its earlier decision in *Montana* v. *United States*, 450 U.S.

544 (1981), in which it addressed the civil authority of an Indian tribe to regulate the conduct of non-Indians on its reservation. See *id.* at 547. Although *Montana* arose in the civil context, the Court in *Cooley* viewed it as "highly relevant" to the question of tribes' criminal jurisdiction over non-Indians in Indian country, and it applied the *Montana* framework to resolve the question at issue. *Cooley*, 141 S. Ct. at 1643-1644.

It thus makes little sense to distinguish between the civil and criminal contexts with respect to state power in Indian country. This Court's precedents demonstrating that States have civil regulatory authority over non-Indians in Indian country equally support the proposition that the States have prosecutorial authority over non-Indians who commit crimes in Indian country.

b. Beyond this Court's precedents, there are additional reasons to doubt that either the Indian Commerce Clause or the Treaty Clause have dormant aspects that preempt state authority of their own accord.

Indian Commerce Clause. — While the Interstate Commerce Clause has a familiar dormant component that precludes state discrimination against interstate commerce, it is "well established" that the Indian Commerce Clause has a "very different application[]." *Cotton Petroleum*, 490 U.S. at 192. The "central function" of the Indian Commerce Clause, the Court has said, is to "provide Congress with plenary power to legislate in the field of Indian affairs," whereas the Interstate Commerce Clause is concerned with "maintaining free trade among the States even in the absence of implementing federal legislation." *Ibid.*

In addition, the dormant aspect of the Interstate Commerce Clause is "premised on a structural understanding of the unique role of the States in our constitutional sys-

tem that is not readily imported to cases involving the Indian Commerce Clause." *Cotton Petroleum*, 490 U.S. at 192-193 (citation omitted). For that reason, it is "treacherous" to "import" the notion of constitutional preemption from the context of the Interstate Commerce Clause to the context of the Indian Commerce Clause. See *ibid.*; see also *Ramah Navajo School Board, Inc.* v. *Bureau of Revenue*, 458 U.S. 832, 845-846 (1982); *Moe*, 425 U.S. at 481 n.17.[3]

Treaty Clause. — This Court has never held that the Treaty Clause has any negative effect of its own accord. See Art. I, § 10, cl. 1; cf. Jack Goldsmith, *Statutory Foreign Affairs Preemption*, 2000 Sup. Ct. Rev. 175, 202-205 (analyzing the Court's cases on foreign-affairs preemption). In any event, Congress passed legislation in 1871 providing that domestic Indian tribes are no longer "acknowledged or recognized" as "independent nation[s], tribe[s], or power[s]" with whom the United States may contract by treaty. 25 U.S.C. 71. If the Treaty Clause is no longer operative with respect to Indian tribes, see

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[3] Evidence from the time of the Founding suggests that the Indian Commerce Clause was not intended to create exclusive federal jurisdiction. See Robert G. Natelson, *The Original Understanding of the Indian Commerce Clause*, 85 Denv. U. L. Rev. 201, 211-212, 214-250 (2007). In addition, "the term 'commerce with Indian tribes' was invariably used during the time of the founding to mean 'trade with Indians.'" *Adoptive Couple* v. *Baby Girl*, 570 U.S. 637, 659 (2013) (Thomas, J., concurring). Crime does not inherently affect trade between non-Indians and Indians; to the contrary, crime often involves noneconomic conduct that cannot be said to affect commerce at all. See, *e.g.*, *Morrison*, 529 U.S. at 613; *Lopez*, 514 U.S. at 561. The Court has thus long "expressed skepticism" that the Indian Commerce Clause alone could support Congress's "assertion of authority in derogation of state jurisdiction" in the Major Crimes Act. *Hicks*, 533 U.S. at 363 (citing *Kagama*, 118 U.S. at 383).

Lara, 541 U.S. at 201, it would be passing strange to say that it can nevertheless preempt the exercise of state jurisdiction in Indian country.

In short, there is no valid basis to conclude that the Constitution impliedly preempts state authority to prosecute crimes committed by non-Indians against Indians in Indian country. And because no other source of federal law preempts that authority, the Oklahoma Court of Appeals erred by holding that the State lacked authority to prosecute respondent.[4]

C. A State's Exercise Of Prosecutorial Authority Over Non-Indians Within Indian Country Does Not Interfere With Tribal Or Federal Interests

In modern cases governing the application of state civil regulations to Indian tribes, the Court has stated that there is no "rigid rule by which to resolve the question whether a particular state law may be applied to an Indian reservation." *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136, 142 (1980). Instead, the Court has engaged in a "particularized inquiry into the nature of the state, federal, and tribal interests at stake" in order to "determine whether, in the specific context, the exercise of state authority would violate federal law." *Id.* at 144-145.

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[4] No treaty specific to the Cherokee Nation precludes the prosecution of non-Indians in the Cherokee territory in Oklahoma. For example, the 1835 Treaty of New Echota provided only that the tribe shall "be protected against interruption and instruction from citizens of the United States, who may attempt to settle in the country without their consent; and all such persons shall be removed from the same" by the United States. Art. 6, 7 Stat. 481. Even assuming that those provisions have any force after Congress permitted the sale of the tribe's lands to non-Indians and included those lands within the State of Oklahoma, the text no more precludes state jurisdiction than does any other federal law.

Even under that approach, the preemption inquiry is still "primarily an exercise in examining congressional intent." *Cotton Petroleum*, 490 U.S. at 176. But "the history of tribal sovereignty serves as a necessary 'backdrop' to that process." *Ibid.* (citation omitted). Accordingly, where a matter implicates an "aspect of exclusive tribal self-government," the Court will apply a "presumption of preemption" and require that "Congress expressly provide for the application of state law." *Rice* v. *Rehner*, 463 U.S. 713, 720 (1983). By contrast, where no issue of tribal sovereignty is involved, the Court has "only to determine whether application" of state law would "impair a right granted or reserved by federal law." *Id.* at 726 (citation omitted). In the end, the operation of state law 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).

The Court has yet to apply that framework to the availability of state criminal law in Indian country. But if the Court were to apply it here, it would plainly support the States' ability to prosecute crimes committed by non-Indians against Indians in Indian country. To begin with, the analysis focuses on the text of statutes enacted by Congress, and no federal statute preempts a State's exercise of jurisdiction here. See pp. 23-35, *supra*. In addition, the federal government itself has recognized that, "[i]f the Court were to weigh the respective tribal, federal, and state interests," a "strong argument could be made for permitting [States] to exercise jurisdiction." U.S. Br. at 6, *Arizona* v. *Flint*, 492 U.S. 911 (1989) (No. 88-603); see U.S. Br. at 26 n.9, *Bosse*, *supra*.

1. There are no serious issues of tribal sovereignty involved in the prosecution of non-Indians for crimes committed against Indians. In *Oliphant*, *supra*, the Court held that "Indian tribes do not have inherent jurisdiction to try and to punish non-Indians." 435 U.S. at 212. And as this Court has explained, the "exercise of state jurisdiction is particularly compatible with tribal autonomy" when "the tribal court lack[s] jurisdiction over the claim." *Three Affiliated Tribes*, 467 U.S. at 149. The Court has thus similarly concluded that the exercise of jurisdiction by state courts over civil actions filed by Indians against non-Indians does not "interfere with the right of tribal Indians to govern themselves under their own laws." *Id.* at 148.

The principle from *Oliphant* is consistent with broader principles of tribal sovereignty. As this Court has explained, Indian tribes are "no longer 'possessed of the full attributes of sovereignty.'" *United States* v. *Wheeler*, 435 U.S. 313, 323 (1978) (quoting *Kagama*, 118 U.S. at 381). "Their incorporation within the territory of the United States, and their acceptance of its protection, necessarily divested them of some aspects of the sovereignty which they had previously exercised." *Ibid.*

Instead, the sovereignty tribes have retained is "that needed to control their own internal relations, and to preserve their own unique customs and social order." *Duro* v. *Reina*, 495 U.S. 676, 685-686 (1990). While tribes thus have the power "to prescribe and enforce rules of conduct for [their] own members," they have been "divest[ed]" of their authority to regulate "relations between [a] tribe and nonmembers of the tribe." *Id.* at 686 (citation omitted). Because tribes have no authority to prosecute non-Indians who commit crimes against Indians in Indian country, the exercise of that power by the States does not implicate tribal sovereignty.

Nor does a State exercise authority over an Indian by prosecuting such a crime. The only parties to the case are the State and the non-Indian defendant. The State, moreover, is not representing the victim; it is seeking to punish an "offense against the sovereignty of the government." *Heath* v. *Alabama*, 474 U.S. 82, 88 (1985); cf. *Robertson* v. *United States ex rel. Watson*, 560 U.S. 272, 278 (2010) (Roberts, C.J., dissenting from dismissal of writ of certiorari).

2. By contrast, a State has paramount interests in public safety and criminal justice within its borders. See, *e.g.*, *Kelly* v. *Robinson*, 479 U.S. 36, 49 (1986). To begin with, a State has a legitimate interest in enforcing its criminal laws against non-Indians within its borders, and particularly its own citizens. If an Indian tribe, despite its diminished sovereignty, has the power to "enforce rules of conduct for its own members," *Duro*, 495 U.S. at 685-686—including when its members commit crimes against non-Indians, see 18 U.S.C. 1152—the same can be said for a State.

A State also has legitimate interests in protecting its Indian citizens. All Indians born in the United States are citizens of the United States and, by virtue of the Fourteenth Amendment, are citizens of the States in which they reside. See U.S. Const. Amend. XIV, § 1, cl. 1; 8 U.S.C. 1401(b). Indians therefore have the right to vote in state elections and can hold state office. See *Moe*, 425 U.S. at 476. Just as a State has an interest in providing various other services to Indians living within its borders, see, *e.g.*, *Oklahoma Tax Commission* v. *United States*, 319 U.S. 598, 608-609 (1943), the State has an interest in providing its Indian citizens with the services of a functioning criminal-justice system. If States are powerless

to punish non-Indians who commit crimes against Indians, they will effectively be required to "turn their backs on tribal citizens." Br. in Opp. 36.

For its part, the federal government recognizes the paramount state interests at issue. In its 1979 opinion on state criminal jurisdiction in Indian country, the Office of Legal Counsel (OLC) asserted that States have a "strong" interest in cases involving a "direct and immediate threat by a non-Indian defendant against an Indian person or property." 3 Op. Off. Legal Counsel 119. Although "[f]ederal prosecution may at the same time be warranted," OLC concluded, "States have a continuing interest in the prosecution of offenders against state law." *Id.* at 118.

Even when the federal government later abandoned the view that the States have concurrent criminal jurisdiction over non-Indian offenders for crimes in Indian country, it continued to recognize that States have a "strong interest in enforcing [their] criminal laws against non-Indians." U.S. Br. at 3, *Flint*, *supra*. The federal government further acknowledged that States have a "legitimate interest in furnishing protection to [their] Indian citizens, just as it furnishes them with other benefits, such as access to state courts in civil cases." *Id.* at 6. States have an additional interest in ensuring that non-Indian offenders do not go on to harm other non-Indians, either on or off the reservation. Cf. *Hicks*, 533 U.S. at 362.

3. As the federal government has also recognized, "state jurisdiction would not necessarily interfere with federal * * * interests." U.S. Br. at 3, *Flint*, *supra*. To the contrary, concurrent federal and state jurisdiction could "facilitate effective law enforcement" in Indian country and thereby "further the federal and tribal interests in protecting Indians and their property against the actions of non-Indians." *Id.* at 6. For example, federal agents, prosecutors, and courts "often are much farther

from the scene of an on-reservation crime than are their state and local counterparts." *Id.* at 6-7. That distance "imposes a burden on victims and witnesses." *Id.* at 7.

Nor would a state conviction preclude a subsequent federal prosecution. Because the federal government and the States are separate sovereigns, double-jeopardy concerns do not arise. See *Gamble* v. *United States*, 139 S. Ct. 1960, 1964 (2019). In fact, concurrent federal and state jurisdiction is the norm, not the exception. See *Atlantic Richfield Co.* v. *Christian*, 140 S. Ct. 1335, 1351 (2020). Accordingly, if there were some reason to believe that the state criminal-justice system would not adequately serve the interests of Indian victims, the federal government "would be free to bring charges based on the same conduct to vindicate the distinct federal interest in protecting the Indians." U.S. Br. at 7, *Flint*, *supra*.

Finally, the need for state jurisdiction to supplement federal law enforcement in Indian country is particularly acute in light of the effects of *McGirt* in Oklahoma. As federal judges, prosecutors, and investigative agents scramble to keep up with caseloads many times larger than ever experienced or expected, see pp. 7-9, *supra*, the ability of the State of Oklahoma to prosecute non-Indians in Indian country is vital to maintaining public safety. Because no federal law preempts that authority, the Court should hold that a State may prosecute non-Indians who commit crimes against Indians in Indian country. And on that basis, it should reverse the judgment below.

CONCLUSION

The judgment of the Oklahoma Court of Criminal Appeals should be reversed.

Respectfully submitted.

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