No. 21-429

In The Supreme Court of the United States

OKLAHOMA,

Petitioner,

v.

VICTOR MANUEL CASTRO-HUERTA,

Respondent.

On Writ Of Certiorari To The Court Of Criminal Appeals Of Oklahoma

BRIEF FOR THE NAVAJO NATION, UTE MOUNTAIN UTE TRIBE, SOUTHERN UTE TRIBE, THE CROW NATION, AND CHEYENNE RIVER SIOUX TRIBE AS AMICI CURIAE SUPPORTING RESPONDENT

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INTEREST OF AMICI CURIAE

The Navajo Nation, the Ute Mountain Ute Tribe, the Southern Ute Tribe, the Crow Nation, and the Cheyenne River Sioux Tribe submit this amicus brief in support of Respondent Castro-Huerta.[1] The signatory tribes do so to contest the State of Oklahoma's argument that states have inherent criminal jurisdiction over crimes committed by non-Indians against Indians in Indian Country. Amici curiae are signatories to "Peace Commission" treaties with the United States that affirm tribal sovereignty over their territory to the exclusion of the states, with the federal government assuming the responsibility to arrest and prosecute non-Indian "bad men" who commit offenses against Indians.

The principle that Indian Country is presumptively outside state jurisdiction is well-established, arising out of the United States' unique government-to-government relationship with tribal nations, most prominently recognized by this Court in *Worcester v. Georgia*, 31 U.S. 515 (1832). While this arrangement has been subject to change by Congress in specific situations (*see*, *e.g.*, Act of August 15, 1953, Pub. L. No. 83-280; 25 U.S.C. § 1321 *et seq*.; Act of May 21, 1984, Pub. L. No. 98-290, 98 Stat. 201), "[t]he policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history." *Rice v. Olson*, 324 U.S. 786, 789 (1945). The signatory tribes write separately

[1] In accordance with Supreme Court Rule 37.3.(a), the parties in this action have filed blanket consents to the filing of amicus briefs in support of either or neither party.

to illustrate how the Peace Commission treaties generally, and the "bad men" clauses specifically, support these general principles in the context of criminal jurisdiction. The Peace Commission treaties, and the subsequent disclaimer clauses in state enabling acts, reflect Congress's consistent and durable policy of federal jurisdiction over crimes by non-Indians against Indians in Indian Country, to the exclusion of the states.

The signatory tribes have an interest in vindicating their treaty rights to federal prosecution of non-Indians, and in excluding states from exercising authority within their territory absent tribal consent and congressional action. Finally, the signatory tribes write to illustrate how states, despite their lack of inherent authority, can collaborate with the federal government and tribal nations to supplement law enforcement in Indian Country.

SUMMARY OF ARGUMENT

Since the founding of the United States, criminal matters in Indian Country have generally been under tribal and federal jurisdiction, to the exclusion of the states. This principle is reflected in treaties made with tribal nations throughout the United States' history, including in the Peace Commission treaties, most specifically in the "bad men" clauses. Historical context shows these clauses were a response to conflicts between tribes and illegally encroaching settlers, and

that they were designed to resolve those conflicts by recognizing federal responsibility for prosecuting non-Indian crimes against Indians in Indian Country. The text of the congressionally-ratified Peace Commission treaties and their historical background demonstrate that this jurisdiction was to be exercised to the exclusion of the states, as consistent with the overall understanding that states lacked authority over the territory reserved to tribal nations by those treaties. The text and history of the treaties establish the opposite presumption than that which Oklahoma asserts. Further, as the supreme law of the land, the treaties support the general conclusion that state criminal jurisdiction over non-Indian crimes against Indians in Indian Country is preempted, absent congressional action otherwise.

Oklahoma's position is misleading when it suggests that it should be recognized as having the power unilaterally—without the consent of Congress or tribes—to exercise criminal jurisdiction in Indian Country as a needed benefit to tribal members. In reality, there are manifold ways for states and tribal nations to cooperate to provide additional law enforcement resources on reservations, in a way that affords due respect for tribal sovereignty. Congress can legislate in ways that facilitate state cooperation with tribal participation and consent. Tribal nations and the federal government can cooperate with state and local governments through cross-commission, deputation, or other agreements. The Navajo Nation, the Ute Mountain Ute Tribe, and the Southern Ute Tribe have

collaborated with surrounding states and their political subdivisions to increase public safety resources. By working in sovereign collaboration, tribal nations, the federal government, and the states have been able to respect tribal sovereignty while providing supplemental law enforcement to tribal communities. The unilateral exercise of state criminal jurisdiction in Indian Country over crimes involving Indian victims without tribal or federal consent is not only unsupported by federal law, but it is unnecessary for criminal justice in Indian Country.

ARGUMENT

I. THE PEACE COMMISSION TREATIES REFLECT CONGRESS'S LONG-STANDING POLICY OF EXCLUDING STATE JURISDICTION WITHIN INDIAN COUNTRY, INCLUDING CRIMINAL JURISDICTION OVER NON-INDIAN CRIMES AGAINST INDIANS.

A. The Historical Context of the Peace Commission Treaties Demonstrates that the Bad Men Clauses Were Intended to "Keep the Peace" Between the Tribes and Non-Indians by Vesting the United States with Exclusive Jurisdiction Over Crimes By Non-Indians Against the Tribes.

The era of the Peace Commission treaties has been characterized as the last wave of treaty-making with Indian tribes. Francis Paul Prucha, *American Indian*

Treaties (1997). Even so, those treaties exemplify government-to-government relationships and shared sovereignty between the United States and tribal nations. After a robust period of treaty-making with tribes in the 1850s, and the turmoil and confusion of Indian relations brought about by the Civil War, many federal officials were anxious to get out of the business of making treaties with tribal nations. Prucha, *American Indian Treaties* 234–92. Nonetheless, tribes remained an obstacle for westward expansion by resisting the encroachment of non-Indian settlers. *Id.* at 279–85; 1 Francis Paul Prucha, *The Great Father* (1984). Largely rejecting the notion of exterminating Indians, federal officials instead sought to enter into peace treaties designed to create reservations as tribal nations' "permanent homes." Prucha, *American Indian Treaties* 279–85. Prucha, *The Great Father* 488–89.

In order to put an end to the "Indian wars," in the West, Congress established a Peace Commission authorized to negotiate a new series of enforceable treaties with the tribal nations of the Great Plains and the Southwest. *Cong. Globe*, 40th Cong., 1st Sess. 658 (1867). The published Senate debates on the legislation show that Congress was aware, and even adamant, that federal protection of Indians was necessary in order to mitigate the violence committed against them by non-Indian settlers of new states and territories. *Id*. at 686. This need arose after several treaties with tribes on the frontier were broken,

largely due to the actions and inactions of the United States. *Cong. Globe* at 669.

The Colorado territorial militia, as organized by the governor of Colorado, committed the Sand Creek Massacre in 1864. While a camp of Cheyenne and Arapaho were under federal protection at Fort Lyon, during peace negotiations, the cavalry descended upon the encampment, which displayed a white flag of peace, and massacred men, women, and children alike, mutilating their bodies afterwards. H.R. Exec. Doc. No. 97, 40th Cong., 2d Sess. (1868). This unprovoked mass murder, along with other depredations by non-Indian settlers and the unauthorized establishment of new military posts in lands reserved to tribal nations by previous treaties, resulted in years of hostility with the tribes of the Great Plains and Southwest—including the Cheyenne, Arapaho, Ute, Lakota, Sioux, Kiowa, and Navajo. This necessitated new treaties between the United States and tribal nations in order to establish a lasting peace.

Congress discussed at length the Sand Creek Massacre and other conflicts in debates on the Peace Commission legislation, titled "An Act to establish Peace with certain Hostile Indian Tribes." Act of July 20, 1867, § 1, 15 Stat. 17. The Commission's stated purpose was to ascertain the tribes' reasons for hostility and enter into new treaties that would remove the tribes' causes for complaint. *Id*. Congress was already aware of the most pressing problem: the consistent violation of guaranteed treaty rights by the military, territorial

governments, and non-Indians. The chronic issue leading to these violations was the inability of the government to restrain its citizens from trespassing on Indian lands and committing other acts in open violation of treaties with the tribes. *Cong. Globe* at 715.

The unwillingness of states to afford protection to Indians within their borders was readily apparent prior to, and following, the Commission's formation. States and territorial governments were not inclined to provide justice for Indians who had been wronged by non-Indians in violation of binding treaties. In fact, states did not provide for Indian well-being at all. As discussed in the Senate debates, states consistently pressured tribal nations to remove from treaty-guaranteed homelands rather than to mediate a peaceful cohabitation with their citizens within their borders. *Id*. at 679, 685–86.

Congressional leaders specifically raised the example of relations between the States of Ohio and Kansas and tribal nations. *Id*. As noted by Senator Sherman of Ohio, the State had all but forced its Indian population—living peaceably on established reservations—to relocate hundreds of miles west to Kansas.[2] The state of affairs in Kansas, as emphasized

[2] *Id*. at 679. Regarding Indian affairs in his own state, Senator Sherman said that "many Indians lived in Ohio on reservations on which they had churches, schools, and colleges, in which many of them were educated, Christianized; they had preachers of the Gospel and teachers of schools among them; and yet, such was the state of natural hostility between our Indian population and the white people around them that they were driven from their homes. The white people, in violation of treaty, in violation

by Senator Morrill of Missouri, was no different than in Ohio. "The records of the Senate show [that] the policy of Kansas is to eject all these Indian tribes, upon the idea that their existence is incompatible with that of the State, with that high civilization of which we boast." *Id*. at 685. This policy of Kansas reflected "the same irrepressible conflict that has been enacted in all the States. The Indian has no absolute rights conceded to him. The high morality and civilization of this nation have not . . . guaranteed to him any rights of person or property." *Id*. at 686.

Congress thus agreed upon the need for the Commission to negotiate treaty stipulations that the United States could honor. On the last day of debates, Senator Johnson expressed frustration at the apparent difficulties of the federal government in preventing non-Indians from encroaching upon Indian lands: "It is . . . disparaging the power of the Government to assert for a moment that it is not in its power to enforce obedience upon the part of its citizens to all these treaties," Johnson argued, and asked, "Why is it that we cannot protect [the Indians]?" *Id*. at 715.

Once the legislation passed, the Commission agreed that the conflict with tribal nations was of non-Indians' making. The Commission admitted in its first report that were the "white man" to be encroached upon in the same manner the Indians had been, the

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of law, continually encroached upon the Indians, provoked quarrels which finally led to the interposition of military power, and the last vestige of the Indians were at last driven from their cultivated homes into Kansas." *Id.*

only dignified reaction would be to drive out the invader: "If the lands of the white man are taken, civilization justifies him in resisting the invader. Civilization does more than this: it brands him as a coward and a slave if he submits to the wrong." H.R. Exec. Doc. No. 97 at 36. The Commission further acknowledged that the United States had broken treaty promises, and that the conflicts on the frontier were attributable to such injustice:

> Among civilized men war usually springs from a sense of injustice. The best possible way then to avoid war is to do no act of injustice. When we learn that the same rule holds good with Indians, the chief difficulty is removed. But it is said our wars with them have been almost constant. Have we been uniformly unjust? We answer unhesitatingly, yes.

Id. at 79.

An issue of paramount importance to the tribal nations that negotiated with the Commission was peace with non-Indian settlers, as well as justice for crimes against the tribes.[3] But for peace to exist,

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[3] One tribal leader, Satanta, Chief of the Kiowas, said: "The white Chief seems not to be able to govern his braves. The great Father seems powerless in the face of his children. He sometimes becomes angry, when he sees the wrongs of his people committed on the red men, and his voice becomes as loud as the wind. But like the wind it soon dies away and leaves the sullen calm of unheeded oppression." The Institute for the Development of Indian Law, *Proceedings of the Great Peace Commission of 1867-1868* (1975).

non-Indians could no longer enjoy impunity for crimes against Indians. The Commission had to guarantee protection against non-Indian depredations and encroachment.[4] The Commission's report confirmed that this was necessary, noting that it was frequent for non-Indians to trespass and commit violent offenses on tribal lands, and to go unpunished. *Id.* at 34–36.

It was well-known that non-Indians enjoyed virtual immunity for crimes against Indians. As expressed in 1869 by E.O.C. Ord, Brigadier and Major General Commanding at the Headquarters Department of California, regarding the unprovoked murder of an Indian:

> The State or Territorial authorities in these Indian districts are either powerless or indifferent to the killing of Indians by whites, so that the murderer almost always escapes. But if an Indian shoots a white man, it is immediately demanded by the white man of

[4] In the Commission's November 12, 1867 meeting with representatives from the Crow Tribe, tribal leaders Bear's Tooth and Black Foot recounted a series of violent assaults and killings of Crow Indians by white settlers, as well as ongoing incursions onto the tribe's lands, and driving off of game. In response, Commissioner Taylor stated, "You spoke of several injuries you received at the hands of white people. If you had not been true to us, you might have gone to war with us, but because your hearts were warm, you forgot those injuries. When the Great Father hears of your injuries, he will be sorry. He has some bad children who commit those things without his knowledge, but he is always willing to make you amends. . . . When you have any grievance to complain of, always go to your agent. He will inform your Great Father, and he will have you righted." *Id*. 89-90

> the district that the whole tribe shall be held responsible, and war against them commenced. I think further legislation of Congress might meet the difficulty; it would act as a preventative, if in such cases the murderers could be arrested by the military and held or turned over for trial by the nearest United States court, and it would give the Indians some little show of equal justice.

In the same correspondence, General William Sherman echoed the sentiment: "On our frontier a citizen may murder an Indian with impunity." H.R. Exec. Doc. No. 16, 41st Cong., 2d Sess. (1869).

Thus, a necessary purpose of the Peace Commission treaties was to negotiate an end to the violence between tribes and non-Indians by providing justice to Indians, assuring that such "bad men" would be held accountable, and specifically by punishing them in the courts of the United States. Nine treaties, with a total of thirteen tribes as signatories, were negotiated by the Peace Commission, and each of them contained a "bad men" clause.[5] The treaty with the Navajo Nation is illustrative:

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[5] *See* Treaty with the Cheyenne and Arapaho, art. I, Oct. 28, 1867, 15 Stat. 593, 593; Treaty with the Crows, art. I, May 7, 1868, 15 Stat. 649, 649; Treaty with the Eastern Band of Shoshoni and Bannock, art. I, July 3, 1868, 15 Stat. 673, 673; Treaty with the Kiowa and Comanche, art. I, Oct. 21, 1867, 15 Stat. 581, 581; Treaty with the Navajo, art. I, June 1, 1868, 15 Stat. 667, 667; Treaty with the Northern Cheyenne and Northern Arapaho, art. I, May 10, 1868, 15 Stat. 655, 655; Treaty with the Sioux, art. I, Apr. 29, 1868, 15 Stat. 635, 635; Treaty with the Tabeguache

> [i]f bad men among the whites, or among other people subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians, the United States will . . . cause the offender to be arrested and punished according to the laws of the United States, and also reimburse the injured person for the loss sustained.

Treaty of June 1, art. I, 15 Stat. 667.

Tribal parties to these treaties understood that the United States would follow through in providing this justice; as stated by Kiowa Chief Satanta to the Peace Commissioners: "If wrong comes, we shall look to you for the right." The Institute for the Development of Indian Law, *Proceedings of the Great Peace Commission of 1867-1868* (1975).

Soon after the treaties, the United States Court of Claims reiterated the purpose of the bad men clauses, interpreting the intent to be to "keep the peace," by making the "[federal] Government . . . responsible for what white men do within the Indian territory." *Janis v. United States*, 32 Ct. Cl. 407, 410 (1897). These clauses thus negotiated clear terms for handling criminal actors between the respective sovereigns party to the treaties.[6]

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bands of Ute Indians, (Ute Treaty) art. VI, Mar. 2, 1868, 15 Stat. 619, 620.

[6] The bad men clauses include a parallel clause addressing "bad men" among the Indians, which affirms tribal sovereignty over their lands and specifies that tribes shall "deliver up the wrongdoer to the United States, to be tried and punished

The bad men clause in the 1868 treaty with the Navajo reflects the same intent to address wrongful conduct in an effective way and to mitigate future aggressions. In June of 1868, after the brutal forced march known as the "Long Walk," and four years of exile at Bosque Redondo in eastern New Mexico, the Navajo Nation entered into a treaty with the United States with a bad men clause. The proffered justification for removing the Navajos to Bosque Redondo was, in part, that the Navajos had allegedly been raiding encroaching non-Indians, including "Mexican" communities near the Rio Grande. Prucha, *American Indian Treaties* 283. Under the treaty, the Navajo Nation agreed to return to a reservation of land in their home territory, and the United States promised to deal with "bad men" non-Indians who may come onto that reservation and do harm to the Navajos by "proceed[ing] at once to cause the offender to be arrested and punished according to the laws of the United States." Treaty with the Navajo, *supra* note 5. The provision further guaranteed that the United States would reimburse Navajos

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according to its laws." *See* Treaty with the Cheyenne and Arapaho, art. I, 15 Stat. at 593; Treaty with the Crows, art. I, 15 Stat. at 649; Treaty with the Eastern Band of Shoshoni and Bannock, art. I, 15 Stat. at 673; Treaty with the Kiowa and Comanche, art. I, 15 Stat. at 581, 582; Treaty with the Navajo, art. I, 15 Stat. at 667; Treaty with the Northern Cheyenne and Northern Arapaho, art. I, 15 Stat. at 655; Treaty with the Sioux, art. I, 15 Stat. at 635; Ute Treaty, art. VI, 15 Stat. at 620. The Navajo Nation has implemented that provision in its Extradition and Federal Detainer statute, requiring the transfer of Navajo offenders held in Navajo custody to federal law enforcement upon written request with notice and proof of the alleged federal offense. 17 N.N.C. §§ 1951(B); 1963 (2014).

whose person or property were harmed by any such bad men. *Id*. By entering into this agreement, the United States promised, and the Navajo People accepted, that the United States—not states—would address the crime.[7]

B. The Peace Commission treaties exclude state authority generally, and criminal jurisdiction over non-Indian crimes against Indians specifically.

Treaties with Indian nations are the "supreme law of the land" recognized by the United States Constitution. U.S Const. art. VI, cl. 2. Treaties, including those made with American Indian nations, must be ratified by the United States Senate to be binding. U.S. Const. art. II, § 2, cl. 2 (providing that treaties must be made "by and with the Advice and Consent of the Senate"). A treaty is not a grant of rights to an Indian nation, but a grant of rights from that nation to the United States, and therefore all rights not surrendered are preserved. *United States v. Winans*, 198 U.S. 371, 381 (1905); *see also United States v.*

[7] Similar treatment was afforded in the Ute Treaty. Under the Ute Treaty of 1868, the Utes held lands in the western third of what would later become the State of Colorado. Under Article VI, the United States agreed that "If bad men among the whites or among other people, subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians, the United States will, upon proof," arrest and punish such offender "according to the laws of the United States, and also reimburse" for any losses. Ute Treaty, 1868, art. VI, para. 1.

Wheeler, 435 U.S. 313, 327 n.24 (1978) (applying rule to Navajo treaty). A treaty must be interpreted as tribal leaders would have understood them. *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999); *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 630–31 (1970). Further, any ambiguities must be resolved in favor of the tribal nation, as consistent with promoting Indian self-government and independence from states. *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985); *McClanahan v. Ariz. State Tax Comm'n*, 411 U.S. 164, 174 (1973) (stating in context of Navajo treaty that "any doubtful expressions . . . should be resolved in the Indians' favor.").

A fundamental premise of the Peace Commission treaties is that signatory tribal nations govern their territory with federal assistance and free of state authority. Each treaty includes several common provisions that 1) create a reservation for the exclusive use and occupancy of that tribal nation outside of the state's jurisdiction, 2) recognize and affirm the tribal nation's right to exclude non-Indians from that reservation, and 3) confirm the federal government's responsibility to arrest and prosecute non-Indians who enter the reservation and commit crimes against Indians.[8]

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[8] In addition to the "bad men" clauses, the Peace Commission treaties explicitly set apart a reservation for the use and occupancy of the tribes, to the exclusion of all persons, except those authorized to enter by treaty. *See* Treaty with the Cheyenne and Arapaho, art. II, 15 Stat. at 594; Treaty with the Crows, art. II, 15 Stat. at 650; Treaty with the Eastern Band of Shoshoni and Bannock, art. II, 15 Stat. at 674; Treaty with the Kiowa and Comanche, art. II, 15 Stat. at 582; Treaty with the Navajo, art. II,

These interlocking agreements between the United States and the tribal nations define the rights and responsibilities of those governments in regulating non-Indian conduct, and necessarily bar states from asserting their own "inherent" authority within that territory.

This Court has recognized the general exclusion of state authority under these treaties. In *McClanahan*, the Court interpreted Article II of the Navajo Treaty, which created a reservation "set aside for the use and occupation" of the Navajo Nation under its exclusive sovereign control. *McClanahan*, 411 U.S. at 175. The Court concluded the same provision bars state jurisdiction over those lands without the Nation's consent. *Id.* (treaty bars Arizona state income tax on Navajo tribal member on reservation); *see also Williams v. Lee*, 358 U.S. 217, 221–22 (1959) (state court jurisdiction over contract claim against Navajo citizen would infringe on right of self-government recognized in the treaty). The Court reiterated this effect in *Nevada v. Hicks*, identifying the Navajo treaty as an exception to a general proposition that state sovereignty does not end at a reservation boundary. 533 U.S. 353, 361 n.4 (2001) (citing *Williams*).

Importantly, the Court has interpreted disclaimer clauses in state enabling acts, in light of such treaty promises, to further bar state jurisdiction. Congress required a number of western states, including

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15 Stat. at 668; Treaty with the Sioux, art. II, 15 Stat. at 636; Ute Treaty, art. II, 15 Stat. at 619, 620.

Oklahoma, to include in their constitution provisions disclaiming jurisdiction over tribal lands, leaving all Indian Country within their borders under the "absolute jurisdiction and control" of Congress. Utah Enabling Act, ch. 138, 28 Stat. 107, § 3 (1894); Utah Const. art. 3; New Mexico-Arizona Enabling Act, ch. 310, 36 Stat. 557, §§ 2, 20 (1910); Arizona Const. art. 20, Par. 4; New Mexico Const. art. 21, § 2; North Dakota, South Dakota, Montana, and Washington Enabling Act, Ch. 180, 25 Stat. 676, § 4 (1889); Mont. Const. art. 1; Oklahoma Statehood Enabling Act, Pub. L. No. 59-234, 34 Stat. 267 (1906); Oklahoma Const. art. 1, § 3.[9] The Court interpreted the equivalent Alaska disclaimer provision as only barring state assertion of "proprietary" interest in Indian land. *See Organized Village of Kake v. Egan*, 369 U.S. 60, 69 (1962) (interpreting Alaska disclaimer provision as "disclaimer of proprietary rather than governmental interest"). However, in the context of the Peace Commission treaties, the disclaimer clause precludes *any* assertion of state governmental authority within those reservations without tribal consent.[10]

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[9] The Oklahoma provision is worded slightly differently, but expresses the same idea, stating that, until Congress extinguishes Indian lands, they "shall be and remain subject to the jurisdiction, disposal, and control of the United States." Oklahoma Const. art. 1, § 3.

[10] After signing the Ute Treaty, Congress did not nullify the bad men clause in approving Colorado's statehood. Colorado's Enabling Act provides that "the constitution shall be republican in form, and make no distinction in civil or political rights on account of race or color, except Indians not taxed, and not be repugnant to the Constitution of the United States, and the principles of the Declaration of Independence . . . " Colorado Enabling Act, ch. 139, 18 Stat. 474 (1875).

McClanahan, 411 U.S. at 174–75, 176 n.15 (distinguishing *Kake*'s construction of state disclaimers because the treaty recognizes the Nation's exclusive occupancy of Reservation); *see also Three Affiliated Tribes v. Wold Eng'g, P.C.*, 467 U.S. 138, 149, n.8 (1984) (recognizing distinction under Navajo treaty).

This Court has recognized the tribal right to exclude non-Indians in the context of the Crow Nation's Peace Commission treaty. In *Montana v. United States*, the Court interpreted a provision in the Crow Nation's treaty to authorize a tribal nation's right to exclude non-Indians from tribal lands, and therefore regulate their conduct. *See Montana v. United States*, 450 U.S. 544, 558–59 (1981) (affirming that the Crow Nation may regulate non-Indian hunting and fishing on lands used or occupied by the tribe, including lands held in trust for the tribe by the United States, based on treaty right to exclude). The Court reiterated this interpretation in several later cases applying *Montana*. *See Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645, 650 (2001) (reiterating treaty authority to regulate nonmembers on tribal trust land); *South Dakota v. Bourland*, U.S. 508 U.S. 679, 687–88 (1993) (recognizing right to exclude from identical provision in Sioux treaty). Notably, Congress included this right to exclude provision in its statutory directive to the Peace Commission, underscoring that the reservations:

> shall be and remain permanent homes for said Indians to be located thereon, and no person[s] not members of said tribes shall ever be permitted to enter thereon without the

> permission of the tribes interested, except officers and employees of the United States.

Act of July 20, 1867, § 1, 15 Stat. 17. Under these provisions, the Peace Commission tribes can authorize, or not, non-Indian presence on their lands, including state and local law enforcement, and regulate their conduct.

Parallel with these provisions, the bad men clauses recognize federal jurisdiction, and oust any assertion of conflicting state authority over non-Indian crimes against Indians. The plain language of the clauses unmistakably vests the United States with responsibility for apprehending bad men who may come onto the reservation and cause harm to persons or property. For example, under the Navajo Nation's treaty, the United States is to "arrest and punish" bad men who come among the Indians—the archetypal functions of exercising criminal jurisdiction. Treaty with the Navajo, *supra* note 5. The provision specifically notes the punishment is to be "according to the laws of the United States." *Id.* Thus, the bad men clauses obligate the United States to prosecute non-Indians who enter those reservations and commit crimes against Indians.[11] To further incentivize the

[11] The Ninth Circuit Court of Appeals confirmed this reading in *Merrill v. Turtle*, holding that the bad men clause precluded the exercise of jurisdiction by the State of Arizona to extradite a fugitive wanted by the State of Oklahoma. 431 F.2d 683, 684 (1969). The court noted that tribal nations are political communities free from state law and subject only to the plenary power of Congress. *Id*. The court invoked the bad men clause as additional support for its conclusion that Arizona lacked criminal

United States, the provisions create a civil cause of action against the federal government for tribal persons and property harmed. *See*, *e.g.*, *Richard v. U.S.*, 677 F.3d 1141 (Fed. Cir. 2012); *see also Elk v. U.S.*, 87 Fed. Cl. 70 (2009).

The "bad men" clauses then complement the right to exclude. Tribal nations can allow non-Indians to enter, upon condition of being subject to the civil authority of the Nation, but if they commit crimes against tribal members, the federal government has the responsibility to criminally prosecute them and to reimburse tribal members for the harm they cause.

The Arizona Court of Appeals has answered the direct question raised in this case through an application of the Navajo treaty. *See State of Arizona v. Flint*, 157 Ariz. 227, 228, 232 (Ct. App. 1988). That court applied the Arizona disclaimer clause in concert with the treaty to conclude that the United States, and not the state, had jurisdiction over non-Indian crimes against Indians. Importantly, the court highlighted the bad men clause of the treaty, along with the strong

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jurisdiction to unilaterally extradite the offender, despite Arizona's argument that it had a duty under Article IV, section 2 of the Constitution to do so. *Id.* at 686. That constitutional mandate "to deliver up fugitives charged with a crime in a sister state," the court instructed, "must be interpreted in light of the Treaty of 1868 and the long history of the principle of retained tribal sovereignty." *Id.* at 685. Under the authority of the bad men clause, the Navajo Nation honors extradition requests for wanted fugitives when states submit a written request with supporting documentation, and the President of the Nation issues an arrest order. *See* 17 N.N.C. §§ 1951(B); 1953(A) (2014).

interests of the federal government in fulfilling its trust responsibility and of the Nation in ensuring federal jurisdiction over crimes by non-Indians against Indians in its territory. *Id.* at 230–31, n.3.

The negotiations with the Navajo Nation also support the exclusive authority of the federal government. Lieutenant General Sherman gave the Navajo negotiators assurances that "[t]he [federal] government will stand" between the Navajo Nation and outsiders who might attack them. Council Proceedings, the Navajo Treaty of 1868 (1968), at 4. Sherman further told the tribal negotiators that if outsiders "trouble [the Navajos]" that they "must go to the nearest military post and report to the Commanding Officer who will punish those who trouble you." *Id.* at 5. Those specified as posing potential "trouble" to the Navajos included Mexicans, who were the Navajos' main antagonists in New Mexico. *Id.* Sherman's words track the ultimate design of the bad men clause. Thus, Navajo negotiators understood that the United States, and not any future state, assumed the responsibility to arrest and prosecute non-Indian offenders.

C. In light of these treaty provisions, States have no inherent authority over non-Indian crimes against Indians, whether under "equal footing" or any other theory.

In the face of these treaty provisions, Oklahoma's arguments fail. It contends that the equal footing doctrine and its "inherent jurisdiction by virtue of statehood" authorize state criminal jurisdiction over all non-Indians, including within Indian Country. Okla. Op. Br. at 16, 23. However, this presumptive, boundless state jurisdiction would interfere with the federal government's treaty obligations to tribal nations, and is therefore invalid.

Significantly, Oklahoma fails to cite to a single case actually holding that the equal footing doctrine abrogates federal treaty responsibilities to apprehend non-Indian criminals in Indian Country. To the contrary, it is firmly-established that "treaty rights are not impliedly terminated upon statehood." *Mille Lacs*, 526 U.S. at 207; *see also Herrera v. Wyoming*, 139 S. Ct. 1686 (2019) (affirming that *Mille Lacs* repudiated prior decisions that the equal footing doctrine can oust treaty rights). Indeed, the Court in *Donnelly v. United States* suggested the opposite—a tribal treaty right can supersede a state's claim to criminal jurisdiction based on equal footing. *See* 228 U.S. 243, 271 (1913). Subsequently, the Court in *Williams v. United States* unequivocally concluded that non-Indian crime against Indians in Indian Country is the prerogative

of the United States, not states. *Williams v. United States*, 327 U.S. 711, 714 (1946).

Where a bad men clause applies, the equal footing doctrine has even less justification, under the very cases Oklahoma cites for its main proposition. The State relies on three main cases: *United States v. McBratney* 104 U.S. (14 Otto) 621 (1882); *Draper v. United States*, 164 U.S. 240 (1896); and *New York ex rel. Ray v. Martin*, 326 U.S. 496 (1946). It alleges that they stand for the proposition that any pre-existing treaties or statutes inconsistent with the states' inherent criminal jurisdiction over all lands within their borders are impliedly repealed. Okla. Op. Br. at 20–21. However, all three cases concerned state jurisdiction over non-Indian crimes against other non-Indians, which were not covered by the relevant treaties, and each noted that a treaty provision that covered the specific crime potentially would oust the state.

The *McBratney* Court was unequivocal that a treaty provision can reserve criminal jurisdiction to the United States, and that the status of the parties is critical when it comes to determining the effect of a treaty. *McBratney*, 104 U.S. at 624. The Court found the "bad men" clause in the Ute Peace Commission Treaty did not apply because it "contains no stipulation for the punishment of offences *by white men against white men*." *Id*. (emphasis added). It specifically reserved the question of whether the bad men clause barred state jurisdiction over non-Indian crimes against Indians. *Id.*

The *Draper* Court, likewise, began and concluded by explicitly stating its analysis was limited to non-Indian crimes against non-Indians. *Draper*, 164 U.S. at 241, 247. As in *McBratney*, it reserved the further question of whether states had jurisdiction over non-Indian crimes against Indians. *Id.* at 247. The Court did not consider the corollary bad men clause in the Crow Nation's treaty, as the case did not concern a crime by or against an Indian. *See id.*

Again, the Court in *New York ex rel. Ray* considered a crime by a non-Indian against another non-Indian, this time on the Seneca Reservation within the State of New York. *New York ex rel. Ray*, 326 U.S. at 498. It restated the caveat of *McBratney* that state jurisdiction may be curbed by "a limiting treaty obligation or Congressional enactment." *Id*. at 499. But the Court found the Seneca Treaty did not do so, because it did not specify whether New York or the United States should exercise jurisdiction over on-reservation crime by non-Indians against non-Indians. *Id*. at 501.

In line with that well-established axiom of Indian law, abrogation of the bad men clauses would require, at the very least, a clear expression by an act of Congress. *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903); *United States v. Dion*, 476 U.S. 734 (1986); *Mille Lacs*, 526 U.S. 172; *Herrera*, 139 S. Ct. 1686. There has been no such clear act of Congress. To the contrary, courts have found Congress has not abrogated the clauses, and have continued to enforce them against the United States. *Tsosie v. United States*, 825 F.2d 393, 394 (Fed. Cir. 1987) (noting bad men clauses "ha[ve] not become

obsolete," and Congress has not abrogated them); *Jones v. United States*, 846 F.3d 1343, 1359 (Fed. Cir. 2017); *Richard*, 677 F.3d at 1143–53; *Elk*, 87 Fed. Cl. at 72–73.

This case then answers the question reserved by those prior cases. Even assuming the equal footing doctrine remains generally viable for state criminal jurisdiction in Indian Country, it has no force when the United States has assumed responsibility to prosecute non-Indians in a treaty. As it has done so in the bad men clauses of the Peace Commission treaties, state criminal jurisdiction is barred.

Citing *Hicks*, Oklahoma further asserts that state sovereignty generally does not end at the reservation's border, and therefore it has criminal jurisdiction over the Respondent. Okla. Op. Br. at 23. But even that premise, whatever it may mean, does not apply to this case. As noted above, *Hicks* actually suggests the opposite, noting that in *Worcester* the exclusion of state jurisdiction over the Cherokee Nation was embedded in its treaty, which "guaranteed the Indians their lands would never be subjected to the jurisdiction of any State or Territory." *Hicks*, 533 U.S. at 353, n.4 (internal citations and quotations marks omitted). The *Hicks* Court further noted the Navajo treaty (and, by extension the other Peace Commission treaties that contain the same language) similarly precludes state jurisdiction on the reservation. *Id*.

Thus, Oklahoma has no actual support from the primary authorities it cites, and its theory of inherent state sovereignty should be rejected. The text and history of the bad men clauses of the Peace Commission treaties reflect the United States' long-standing policy of allocating sovereignty over criminal matters involving Indians between the federal government and tribes. Accepting Oklahoma's theory of equal footing or inherent state sovereignty abrogates *sub silentio* federal promises in those treaties.

As such, contrary to Oklahoma's assertion, the Peace Commission tribes do have a sovereign interest in enforcing the federal government's responsibility to prosecute non-Indians assumed in the treaties, whether or not those tribes have the authority to do so themselves. *See* Okla. Op. Br. at 42–43 (arguing there are no "serious issues of tribal sovereignty" involved in the question whether states have criminal jurisdiction over non-Indians crimes against Indians on reservations). Oklahoma's theory would upset the long-established expectations of the Peace Commission tribes, based on negotiations with the United States prior to the existence of states around them. Absent any explicit direction otherwise from Congress, the United States retains criminal jurisdiction over non-Indian crime against Indians in Indian Country, to the exclusion of the states.

II. STATES CAN AND HAVE COLLABORATED WITH TRIBES AND THE FEDERAL GOVERNMENT ON A GOVERNMENT-TO-GOVERNMENT BASIS TO ASSIST IN PROVIDING CRIMINAL JUSTICE.

Oklahoma asserts that it cannot supplement law enforcement in Indian Country absent inherent concurrent jurisdiction, and federal and tribal law enforcement will be overwhelmed by a deluge of criminal cases they are responsible for post-*McGirt*. Okla. Op. Br. at 42-43. Ultimately, such concerns are appropriately for Congress to consider, which can alter the landscape by recognizing a state role in criminal jurisdiction over non-Indian crimes against Indians, as it has done for other states when deemed appropriate. *See*, *e.g.*, Act of May 21, 1984, Pub. L. No. 98-290, 98 Stat. 201 (confirming the exterior boundaries of the Southern Ute Indian Reservation and defining the scope of Indian Country jurisdiction within the Reservation); Kansas Act, 18 U.S.C. § 3243 (1940); *see also* Act of May 31, 1946, 60 Stat. 229 (North Dakota); *see also* Act of June 30, 1948, ch. 759, 62 Stat. 1161 (Iowa); *see also* Act of July 2, 1948, 62 Stat. 1224 (New York).

For example, with the support of the leaders of the Southern Ute Indian Tribe and the State of Colorado, Congress adopted legislation unique to the checkerboarded Southern Ute Indian Reservation. Under Sec. 4(b) of the Act of May 21, 1984, Congress provided that the United States has Indian Country jurisdiction over non-Indians "only on Indian trust land" within the Southern Ute Indian Reservation. *Id.* Thus, on the

Southern Ute Indian Reservation, Colorado has jurisdiction over non-Indians on fee land within the Reservation.

Tribal nations can participate in that legislative process, assuring that new authority is with tribal consent on terms acceptable to those sovereign nations. *Cf.* 25 U.S.C. § 1321 (granting state criminal jurisdiction in Indian Country with consent of affected tribes); 25 U.S.C. § 1326 (requiring special elections to show tribal consent to state jurisdiction under Pub. L. 83-280); 25 U.S.C. § 1323 (providing that "the United States is authorized to accept a retrocession by any State of all or any measure of the criminal jurisdiction" assumed under Pub. L. 83-280.).

However, even if Congress chooses not to extend direct state jurisdiction, Oklahoma and other states seeking to supplement federal and tribal law enforcement have the ability to collaborate with tribal nations and the United States, and by all accounts are doing just that. *See* Brief of Amici Curiae Cherokee Nation, *et al.*, 13-18.

The Navajo Nation and the signatory tribes have worked with neighboring states and their political subdivisions to supplement criminal justice resources in Indian Country in a way that respects tribal sovereignty. For many years the Navajo Nation has entered into cross-commission agreements and other arrangements in all three states across which its territory extends. These agreements allow state or county officers to enter the reservation and act as tribal law

enforcement, and for tribal officers to act as state officers both off and on the Nation. As such, the agreements allow each sovereign to set conditions on the other's exercise of criminal jurisdiction within their respective territories.

For example, in the Nation's most recent agreement with the State of Utah, the Parties specify such things as the qualifications for an officer to become cross-commissioned, what circumstances authorize cross-commissioned officers to exercise their authority, supervision and accountability of cross-commissioned officers, and the laws applicable to an officer when acting in a cross-commission capacity. Mutual Aid Agreement Between The Navajo Nation, Department of Public Safety And The State of Utah, Department of Public Safety (2022).

Further, the Navajo Nation and the Southern Ute Tribe have entered into deputation agreements with the United States to enforce federal criminal laws through Special Law Enforcement Commissions (SLECs) under the Indian Law Enforcement Reform Act. *See* 25 U.S.C. § 2804(B); 25 C.F.R. § 12.21. This allows the Nation and the Southern Ute Tribe to arrest non-Indians who commit federal crimes, including against Indians, and cite them into federal magistrate courts. *See id.*; 25 U.S.C. § 2804(a)(1). State and local law enforcement can also enter into such agreements and be able to arrest non-Indian offenders who commit crimes against Indians—however, importantly, under federal law, and only with the consent of the tribal nation. 28 U.S.C. § 2804(c).

In contrast to the alternative reality Oklahoma proposes—where the state asserts unilateral criminal authority without tribal consent—these agreements acknowledge the sovereignty of tribal nations while authorizing state or county law enforcement presence according to terms that serve the interests of the respective governments. The Navajo Nation and other signatory tribes have, as a result, embraced such agreements and defined the role of outside law enforcement and the terms of their entry onto sovereign tribal lands.

Oklahoma and other states have the opportunity to provide support to law enforcement in Indian Country, but by means other than asking the Court to upend well-established principles of federal Indian law: through Congress, with the full participation and consent of the affected tribes, or through respectful collaboration with their sovereign neighbors.

CONCLUSION

For the foregoing reasons, the judgment of the Oklahoma Court of Criminal Appeals should be upheld.

Respectfully submitted,

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