

**SUPREME COURT  
OF THE UNITED STATES**

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IN THE SUPREME COURT OF THE UNITED STATES

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OKLAHOMA,	)	
Petitioner,	)	
v.	)	No. 21-429
VICTOR MANUEL CASTRO-HUERTA,	)	
Respondent.	)	

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Pages: 1 through 134  
Place: Washington, D.C.  
Date: April 27, 2022

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5                                     v.                                 ) No. 21-429

6           VICTOR MANUEL CASTRO-HUERTA,             )

7                                     Respondent.                 )

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9  
10                                     Washington, D.C.

11                                     Wednesday, April 27, 2022

12

13                     The above-entitled matter came on for  
14                     oral argument before the Supreme Court of the  
15                     United States at 10:00 a.m.

16

17     APPEARANCES:

18     KANNON K. SHANMUGAM, ESQUIRE, Washington, D.C.; on  
19                     behalf of the Petitioner.

20     ZACHARY C. SCHAUF, ESQUIRE, Washington, D.C.; on  
21                     behalf of the Respondent.

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23                     Department of Justice, Washington, D.C.;  
24                     for the United States, as amicus curiae,  
25                     supporting the Respondent.

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P R O C E E D I N G S

(10:00 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument this morning in Case 21-429, Oklahoma versus Castro-Huerta.

Mr. Shanmugam.

ORAL ARGUMENT OF KANNON K. SHANMUGAM  
ON BEHALF OF THE PETITIONER

MR. SHANMUGAM: Thank you, Mr. Chief Justice, and may it please the Court:

This case presents a question that has taken on exceptional practical importance in the wake of McGirt. The question is whether a state has authority to prosecute non-Indians who commit crimes in Indian country regardless of whether the victim is a non-Indian or an Indian.

The answer to that question is yes. The state has inherent sovereign authority to punish crimes committed within its borders, and no federal law preempts that authority as to crimes committed by non-Indians.

Respondent relies on two statutes, the General Crimes Act and Public Law 280. But neither of those statutes says anything about preemption. As this Court has explained, the

1 General Crimes Act merely incorporates the  
2 substantive criminal law that applies in federal  
3 enclaves. It does not go further and address  
4 state jurisdiction.

5 And as this Court has also explained,  
6 Public Law 280 simply expanded the criminal and  
7 civil jurisdiction of qualifying states. It did  
8 not somehow divest all states of preexisting  
9 jurisdiction. The mere fact that some members  
10 of Congress may have believed that the states  
11 would otherwise have lacked jurisdiction over  
12 certain crimes does not give the law preemptive  
13 effect.

14 Because this case does not implicate a  
15 tribe's right to govern itself and to punish  
16 tribal offenders, the Court need not resort to  
17 the more flexible balancing approach that it has  
18 used elsewhere. But, here, any balancing weighs  
19 heavily in the state's favor. The state has a  
20 paramount interest in ensuring public safety.  
21 And concurrent state and federal jurisdiction  
22 would only enhance law enforcement in Indian  
23 country, especially because the tribes  
24 ordinarily lack jurisdiction over non-Indian  
25 offenders.

1           The federal government now takes the  
2 position that it should have exclusive  
3 jurisdiction. But that position is simply  
4 mind-boggling in light of the situation in  
5 Oklahoma, where, by the government's own  
6 admission, whole categories of crimes are going  
7 unprosecuted in the aftermath of McGirt.

8           Because no federal law preempts a  
9 state's authority to prosecute crimes committed  
10 by non-Indians, the judgment below should be  
11 reversed.

12           I welcome the Court's questions.

13           JUSTICE THOMAS: Counsel, the -- these  
14 reservations have been around a long time, and  
15 why is it now that -- why, after so many years,  
16 that we are getting the first case involving  
17 jurisdiction over non-Indians committing crimes  
18 against Indians?

19           MR. SHANMUGAM: Justice Thomas, only  
20 in 2020 did 43 percent of the State of Oklahoma  
21 become Indian country. Before that, there was  
22 comparatively little Indian country in the State  
23 of Oklahoma, and so this was, frankly, not an  
24 issue in Oklahoma and not an issue that arose  
25 all that frequently in the rest of the country

1 either.

2           That having been said, to be sure,  
3 there are reported cases, mostly from state  
4 courts, in which the issue arose at various  
5 points over the years. And notwithstanding this  
6 court's dicta, this has been an open question.  
7 Indeed, as recently as the 1980s, the Justice  
8 Department took the contrary position on this  
9 question.

10           Certainly, as I said at the outset,  
11 this issue has taken on acute importance in  
12 light of the situation on the ground in  
13 Oklahoma. There are now essentially three times  
14 as many people living in Indian country in the  
15 United States as a result of this Court's  
16 decision in *McGirt*. There are now 1.8 million  
17 more people living in Indian country. And our  
18 best estimate is that of the cases affected by  
19 *McGirt*, approximately 20 percent of those cases  
20 involve this permutation, namely, crimes  
21 committed by non-Indians against Indians.

22           JUSTICE THOMAS: Is there a problem --  
23 and this is just a practical -- a question about  
24 practice and practical considerations. How do  
25 you determine whether or not a victim is an

1 Indian?

2                   This case involves a little girl with  
3 cerebral palsy. And is there a preliminary  
4 jurisdictional question as to whether or not the  
5 victim is -- is or is not an Indian?

6                   MR. SHANMUGAM: There's no dispute  
7 about that here, Justice Thomas, but it's not  
8 easy. And I think that one virtue of our  
9 position is that it would certainly greatly  
10 simplify things for law enforcement because, at  
11 least for state law enforcement, the status of  
12 the victim would not be the relevant inquiry.  
13 The only inquiry would be the status of the  
14 offender.

15                   But I don't mean to suggest that  
16 that's an easy determination. The City of Tulsa  
17 has issued a nine-page checklist for its police  
18 officers for the officers to make the  
19 jurisdictional determination. And the question  
20 of how to determine who is an Indian for  
21 purposes of these jurisdictional rules is itself  
22 unsettled. In fact, it's the subject of a  
23 currently pending cert petition by my client,  
24 the State of Oklahoma.

25                   Courts have looked to factors such as



1 enrollment status, blood quantum, and the like.  
2 The Oklahoma courts have applied a totality of  
3 circumstances test.

4 And so, certainly, one virtue of our  
5 rule is that for state law enforcement, states  
6 would have jurisdiction over non-Indian  
7 offenders regardless of the status of the  
8 victim. And I would submit that that's  
9 consistent with the broader framework that this  
10 Court has used for preemption purposes.

11 This Court time and again in this area  
12 has defined the tribal interest as the interest  
13 in self-governance, an interest that, as I  
14 indicated in my opening, incorporates an  
15 interest in punishing tribal offenders. I would  
16 refer this Court to its decision in Nevada  
17 versus Hicks, among others.

18 And so, under our approach, when that  
19 tribal interest is not implicated, the  
20 preemption inquiry is much like any other  
21 preemption inquiry. The question is whether, in  
22 this Court's words, there is a Congressional  
23 prohibition that would limit what is otherwise  
24 the state's conceded authority.

25 When one talks about a state's police

1 power, the ability to enforce the state's  
2 criminal laws is obviously at the core of that  
3 power.

4 JUSTICE SOTOMAYOR: Counsel, the core  
5 of the power of prosecution at its base is the  
6 protection of people, of citizens. And so  
7 Indian tribes have an inherent right to protect  
8 members of their tribes and of their community.  
9 The state doesn't have the same right.

10 But putting that aside, we keep  
11 talking about preemption. But the thing that  
12 has bothered me as I read your brief is you're  
13 suggesting something much broader than whether  
14 this statute preempts state law.

15 You're suggesting that the federal  
16 government doesn't have the power to preempt  
17 state law at all. In your reply brief, you say  
18 there's no dispute "that a state has sovereign  
19 authority to prosecute crimes throughout its  
20 territory unless federal law validly preempts  
21 that authority." And, thus, the only question  
22 to decide here is whether any federal statute or  
23 treaty has such preemptive effect.

24 But your argument doesn't rest on  
25 whether there's preemption. You're saying the

1 equal footing doctrine bars the government from  
2 preemption.

3 Is that the position you're taking?

4 MR. SHANMUGAM: That is not --

5 JUSTICE SOTOMAYOR: And --

6 MR. SHANMUGAM: -- our position,  
7 Justice.

8 JUSTICE SOTOMAYOR: -- and so, if it  
9 is not your position and for 200 years we've  
10 had, you call it dicta, but a lot of dicta,  
11 saying that the General Crimes Act is preempt --  
12 is a preemption of state law, what would justify  
13 the federal government -- what do you want,  
14 words that say state law is preempted?

15 MR. SHANMUGAM: So I think that the --

16 JUSTICE SOTOMAYOR: State prosecution  
17 is preempted, only federal prosecution is  
18 permitted in Indian territory?

19 MR. SHANMUGAM: So we are not taking  
20 the position that the federal government would  
21 lack the ability to preempt, with one caveat,  
22 and let me address that and then I will address  
23 the other component of your question, which is  
24 the relevance of the fact that the Indian is a  
25 victim.

1           I think, to be clear about our  
2 position here, we recognize that the federal  
3 government has quite broad authority to preempt.  
4 Our submission to this Court is simply that the  
5 federal government did not do so either in the  
6 General Crimes Act or in Public Law 280.

7           And the core of our position is that  
8 there is simply nothing in the language of  
9 either of those statutes that divests the states  
10 of jurisdiction.

11           But, to address your point directly,  
12 Justice Sotomayor, the only limit on the federal  
13 government's ability to preempt is any limit  
14 that might exist at the outer bounds on the  
15 federal government's exercise of its enumerated  
16 powers in this area.

17           And I think that there may come a  
18 point, for instance, on the facts presented in  
19 *McBratney*, if -- if the federal government, say,  
20 passed a law that preempted state authority  
21 over, you know, non-Indian-on-non-Indian crime,  
22 maybe there comes a point at which you start to  
23 wonder what the source of enumerated authority  
24 is.

25           JUSTICE GORSUCH: Counsel --

1           MR. SHANMUGAM: But this case does not  
2 present that question.

3           JUSTICE GORSUCH: -- so, counsel,  
4 you -- you start with the premise, as I -- as I  
5 understand it, that there's inherent state  
6 sovereignty over tribal lands within Oklahoma,  
7 right?

8           MR. SHANMUGAM: Yes, that's correct.

9           JUSTICE GORSUCH: Okay. But then you  
10 say, I think, that there is no authority for the  
11 state to prosecute in cases involving Indian  
12 defendants. Is that right?

13          MR. SHANMUGAM: So our position --

14          JUSTICE GORSUCH: Do you concede that  
15 or not, or -- or is that part of the state's  
16 inherent authority too?

17          MR. SHANMUGAM: We would concede that  
18 with regard to the Major Crimes Act, relying on  
19 this Court's decisions in John and Negonsott,  
20 which have --

21          JUSTICE GORSUCH: Sure. Put aside the  
22 Major Crimes Act. I'm talking about under the  
23 GCA, is there preemption, or does Oklahoma now  
24 take the extraordinary view -- it didn't in its  
25 briefs as I understood it -- that it has

1 inherent sovereign authority even over crimes by  
2 Indian defendants within its territory?

3 MR. SHANMUGAM: We didn't take a  
4 position on that in our briefs, but I would  
5 grant you that I think that that would be a much  
6 more challenging argument for preemption --

7 JUSTICE GORSUCH: Why?

8 MR. SHANMUGAM: -- for the simple  
9 reason --

10 JUSTICE GORSUCH: Why?

11 MR. SHANMUGAM: -- the --

12 JUSTICE GORSUCH: Because the statute  
13 doesn't contain any language about -- no magic  
14 words about that either. So you either have to  
15 think that the statute does some implicit work  
16 there or, what, resort to some sort of Bracker  
17 balancing test?

18 Is that -- is that what you would do?

19 MR. SHANMUGAM: I think it's more  
20 likely under this Court's precedents to be the  
21 latter than the former.

22 JUSTICE GORSUCH: Okay. All right.  
23 Let's take that.

24 MR. SHANMUGAM: So we would take the  
25 position --

1 JUSTICE GORSUCH: Well, no, let's --  
2 let's take that. No, I want to -- I want to  
3 pursue this. Thank you. That's helpful.

4 So you admit that the statute is  
5 silent with respect to both crimes against  
6 Indian victims and by Indian defendants, and  
7 you'd have us go to a Bracker balancing test,  
8 and you'd say it would be resolved in favor of  
9 the tribes when it comes to Indian defendants  
10 but not Indian victims.

11 Is that a fair summary?

12 MR. SHANMUGAM: The way under this  
13 Court's precedents that I think the analysis  
14 would work is that once you have an Indian  
15 defendant, that obviously does implicate the  
16 right to self-governance, the right to punish  
17 tribal offenders.

18 JUSTICE GORSUCH: So it balances --

19 MR. SHANMUGAM: But I think this Court  
20 --

21 JUSTICE GORSUCH: -- differently -- it  
22 balances differently. Is that fair to say?

23 MR. SHANMUGAM: Correct.

24 JUSTICE GORSUCH: Okay. Then -- then  
25 --

1 MR. SHANMUGAM: The tribal interests  
2 would be --

3 JUSTICE GORSUCH: I got it.

4 MR. SHANMUGAM: -- stronger in that  
5 context.

6 JUSTICE GORSUCH: I got it. Here's my  
7 question why, all right?

8 First of all, we've never applied a  
9 Bracker balancing test to criminal law so far as  
10 I'm aware, so you're asking us to do something  
11 new there inconsistent with our precedents so  
12 far, right?

13 MR. SHANMUGAM: I -- I think the --  
14 the cases on which we rely have applied it in  
15 the civil context.

16 JUSTICE GORSUCH: Okay.

17 MR. SHANMUGAM: But they've never  
18 drawn a distinction.

19 JUSTICE GORSUCH: I'll take that as a  
20 yes. All right. Then who bears the burden of  
21 proof in that balancing test?

22 MR. SHANMUGAM: Well, I think that the  
23 way it would work is the way that it always  
24 works on questions of preemption, which is to  
25 say it's a matter of law, and I think that the



1 party seeking preemption would make the  
2 arguments --

3 JUSTICE GORSUCH: So the tribes  
4 have -- have the burden here, okay.

5 MR. SHANMUGAM: Well, yeah. The --

6 JUSTICE GORSUCH: All right. When  
7 we're considering --

8 MR. SHANMUGAM: -- the party seeking  
9 preemption, Justice Gorsuch --

10 JUSTICE GORSUCH: Okay.

11 MR. SHANMUGAM: -- I think, would --  
12 would -- would bear the burden --

13 JUSTICE GORSUCH: It's never going to  
14 be -- it's not going to be the state. We can  
15 agree on that?

16 MR. SHANMUGAM: Well, it -- that's  
17 correct if it's to say that --

18 JUSTICE GORSUCH: All right. So it's  
19 going to be the tribes, all right, fine.

20 Then -- then I would ask you, why  
21 would we not take into account in that balancing  
22 test you'd have us do the identity of the victim  
23 as going to tribal sovereignty given the history  
24 in this country of states abusing Indian victims  
25 in their courts?

1           George Washington wrote letters about  
2 this at the outset of the -- the nation's  
3 history. In the 1920s, Oklahoma systematically  
4 used its state courts to deprive Indians of  
5 their -- their property when oil was discovered  
6 on their lands. There's a long history of this.

7           Congress has provided as well a  
8 mechanism for tribes who wish to opt in to state  
9 concurrent jurisdiction in Public Law 280, so  
10 that's available. We know that. They've chosen  
11 not to. Should that be something we consider?

12           And then, finally, two more things.  
13 We have the treaties, okay, which have been in  
14 existence and promising this tribe since before  
15 the Trail of Tears that they would not be  
16 subject to state jurisdiction precisely because  
17 the states were known to be their enemies. Does  
18 that count in -- in your balancing -- your new  
19 Bracker balancing test which we've never  
20 heretofore applied in criminal law?

21           And then, finally, you say we have to  
22 worry about blood quantum when it comes to  
23 victims. Well, wouldn't that also be true when  
24 we have to deal with defendants? It's  
25 apparently not a worry there. I don't know why

1 it would be a worry here.

2 So there's a lot for you to chew on.

3 MR. SHANMUGAM: I think there were  
4 four things in your question, Justice Gorsuch,  
5 and I'll do my best --

6 JUSTICE GORSUCH: At least.

7 MR. SHANMUGAM: Let me start with  
8 those four, and feel free to add others.

9 First, the tribal interest here. I  
10 think that this Court consistently has defined  
11 the tribal interest as the interest in punishing  
12 tribal offenders. When engaging in balancing,  
13 the Court has not defined that interest more  
14 broadly as an interest in protecting victims.

15 That having been said, obviously, we  
16 acknowledge --

17 JUSTICE GORSUCH: The treaties are  
18 irrelevant then?

19 MR. SHANMUGAM: Well, I -- I was going  
20 to --

21 JUSTICE GORSUCH: Our history is  
22 irrelevant? Oklahoma's history is irrelevant?

23 MR. SHANMUGAM: I was going to come to  
24 the treaties, but let me say one last thing  
25 about the interest, which is that, of course,

1 the tribes have an interest in protecting their  
2 members from criminal offenses. The State of  
3 Oklahoma likewise has an interest in protecting  
4 all of its citizens, including its tribal  
5 citizens, who in Oklahoma have been citizens of  
6 the state longer than anywhere else in the  
7 nation.

8 But this Court has never recognized  
9 that that is sufficient, for instance, to  
10 justify tribal jurisdiction, or else *Oliphant*  
11 and *Duro*, the decisions that hold that tribes  
12 ordinarily lack jurisdiction over offenses  
13 committed by non-members, would have come out  
14 the other way.

15 Now you also mentioned Public Law 280  
16 and the treaties, and I want to come to both of  
17 those because those are potential affirmative  
18 sources for preemption. And just to be clear so  
19 that we're talking about the same framework, I  
20 think the way that the Court would consider  
21 offenses committed by Indians is under some sort  
22 of balancing framework or some sort of framework  
23 that looked at whether the state law interfered  
24 with the tribal right to self-governance.

25 Here, because that interest is not

1       implicated, we think that the Court should use a  
2       familiar approach to preemption because you're  
3       talking about --

4                 JUSTICE GORSUCH:  You say it's not --

5                 MR. SHANMUGAM:  -- competing state and  
6       federal interests.

7                 JUSTICE GORSUCH:  -- you -- you  
8       blithely say it's not implicated, and it's easy  
9       to say, but you have 200 years of history  
10      suggesting otherwise and you have tribes before  
11      us saying otherwise and you have former U.S.  
12      attorneys saying otherwise.

13                What do we do about that?

14                MR. SHANMUGAM:  Well, I can't speak to  
15      why the tribes have taken the position that they  
16      have in this Court.

17                JUSTICE GORSUCH:  Counsel, it's easy  
18      enough to say that standing at the podium in  
19      Washington, D.C., but the history and the  
20      reality is -- should stare us all in the face.  
21      There's a reason why they've resisted  
22      jurisdiction over crimes against Indian victims.  
23      It's not -- it's not just a matter of being  
24      contumacious, is it?

25                MR. SHANMUGAM:  No.  Of course, I'm

1 not saying that they're being contumacious. But  
2 I would say, having spent some time in Oklahoma,  
3 that the law enforcement issues are very real.  
4 And as recently as earlier this week, you had  
5 the principal FBI agent in Oklahoma conceding  
6 that there are whole categories of crimes, by  
7 our estimation, thousands of crimes, that are  
8 going unprosecuted because the federal  
9 government, which has sole jurisdiction over  
10 this category of cases, simply has been unable  
11 to prosecute them.

12 JUSTICE BREYER: Don't they have --

13 MR. SHANMUGAM: So if we're talking --

14 JUSTICE BREYER: -- representatives in  
15 Congress? I mean, if there is crime,  
16 particularly, in Oklahoma, can't they ask  
17 Congress to provide extra prosecutorial and  
18 judicial resources?

19 MR. SHANMUGAM: Well --

20 JUSTICE BREYER: They can have,  
21 obviously.

22 MR. SHANMUGAM: -- but, Justice --

23 JUSTICE BREYER: So my real question  
24 is this: The -- you talk a lot about Oklahoma,  
25 and I can understand the problem in Oklahoma

1 because of our previous case, et cetera. But  
2 aren't there 49 other states? And my impression  
3 is that, in general, in the entire country, the  
4 general assumption has been -- and they've acted  
5 this way for years, decades -- that states  
6 cannot prosecute the specific -- you know, the  
7 particular crimes, and they don't prosecute the  
8 particular crimes when they take place in Indian  
9 country. They're prosecuted in federal court.

10 Now am I right or wrong? I'm not an  
11 expert, and you are more of one. So am I right  
12 or wrong about that?

13 MR. SHANMUGAM: So states have made  
14 efforts from time to time, I'm not going to  
15 overstate it, to bring prosecutions of this  
16 permutation.

17 JUSTICE BREYER: I didn't say that. I  
18 said the general assumption throughout the  
19 United States of America has been that the  
20 states cannot prosecute these crimes but rather  
21 -- I won't say there aren't exceptions -- but  
22 rather in federal court.

23 MR. SHANMUGAM: I think I would  
24 quibble slightly, Justice Breyer --

25 JUSTICE BREYER: Yeah.

1           MR. SHANMUGAM: -- and say that I  
2           don't know that it was a general assumption. I  
3           think that this has been an open question. The  
4           Justice Department for many years --

5           JUSTICE BREYER: But how many --

6           MR. SHANMUGAM: -- contrary to the  
7           position --

8           JUSTICE BREYER: -- if you had to  
9           guess? I don't know if you looked it up.

10          MR. SHANMUGAM: Well --

11          JUSTICE BREYER: But, if you had to  
12          guess, what percentage of crimes committed on  
13          Indian reservations that we're talking about  
14          here are prosecuted in state court, the crimes  
15          that are listed? Which -- what percentage of  
16          all those? Would you guess it's more like 1  
17          percent or more like 50 percent?

18          MR. SHANMUGAM: I'm guessing that it  
19          has historically been a relatively low  
20          percentage, but that --

21          JUSTICE BREYER: Okay. Okay. That's  
22          all I wanted to know.

23          MR. SHANMUGAM: -- is in large part  
24          because the denominator is not that large --

25          JUSTICE BREYER: Yeah, okay.



1 MR. SHANMUGAM: -- in Indian country

2 --

3 JUSTICE BREYER: Right.

4 MR. SHANMUGAM: -- outside Oklahoma.

5 JUSTICE BREYER: Right. All right.

6 Final part of --

7 MR. SHANMUGAM: But I would say in  
8 response --

9 JUSTICE BREYER: -- the question --  
10 okay, you're saying there are not that many, but  
11 it's been prosecuted in federal court, not state  
12 court.

13 Now, if you win, that assumption,  
14 almost general, has -- will be changed  
15 throughout the country, is that right? And  
16 suddenly the Indian tribes will realize that  
17 where they thought crimes on their reservation  
18 were being prosecuted in federal court, they  
19 will discover that suddenly, in these 49 other  
20 states, they can go into state court. Is that  
21 right or wrong? I want to --

22 MR. SHANMUGAM: That is -- that is --

23 JUSTICE BREYER: -- just get my  
24 assumptions right. I'm not making an argument.

25 MR. SHANMUGAM: -- that is correct.

1 And let me say a little bit about the --

2 JUSTICE BREYER: That is right or not  
3 right?

4 MR. SHANMUGAM: That is correct.

5 JUSTICE BREYER: Okay.

6 MR. SHANMUGAM: And let me say a  
7 little bit about that and then about why  
8 Congress is not simply going to be able to fix  
9 this, which was where your question started.

10 JUSTICE BREYER: Well, they could  
11 provide more prosecutors, is my point.

12 MR. SHANMUGAM: And the --

13 JUSTICE BREYER: They can't --

14 MR. SHANMUGAM: -- Justice Department  
15 has asked them to do that, but the reality is  
16 that the gap in Oklahoma right now is yawning.  
17 All we are here asking the Court to do is to  
18 provide concurrent jurisdiction for the states  
19 with the federal government, which, after all,  
20 is outside Indian country, the norm in our  
21 federal system.

22 Our submission is that this is not  
23 likely as a practical matter to be a significant  
24 issue outside the State of Oklahoma. There's no  
25 reason to believe that the federal government is

1 not doing its job of prosecuting crimes in the  
2 other 49 states.

3 What we know as representatives of the  
4 State of Oklahoma is that that is not happening  
5 in the State of Oklahoma. And you don't have to  
6 take --

7 JUSTICE SOTOMAYOR: Counsel --

8 MR. SHANMUGAM: -- our word for that.

9 JUSTICE SOTOMAYOR: -- counsel, but --  
10 but you have a state-specific problem. At some  
11 point, I want you to address where you get your  
12 figures from. And I will lay out there's an  
13 article in The Atlantic that suggests that your  
14 figures are grossly exaggerated, and I want to  
15 give you an opportunity to address that. But  
16 put that question aside.

17 It may be that you and some -- that  
18 you're the only state that wants concurrent  
19 jurisdiction to fix a state-specific problem.  
20 But why should we assume that every other state  
21 wants that responsibility? And doesn't  
22 conferring jurisdiction on a state or telling it  
23 you have concurrent jurisdiction obligate that  
24 state in a way to protect its Indian victims?

25 I mean, what you're saying is an

1 unfunded mandate to 49 other states to take on a  
2 responsibility that they had a choice to take on  
3 and most of them didn't want. So we have 11  
4 states for which Congress enacted state-specific  
5 legislation conferring some jurisdiction. In  
6 Public Law 280, again, states were given the  
7 choice, do you want to prosecute these crimes or  
8 not? Three more states added onto the 11, so 15  
9 only, given a choice, wanted to do this.

10 We are told by some amici that federal  
11 and state authorities have come to agreement in  
12 virtually every place outside of Oklahoma as to  
13 who's going to do what. But, once we say states  
14 have concurrent jurisdiction, we are forcing the  
15 state to do something.

16 You're saying, no, no, no, there's  
17 always prosecutorial discretion. But is that  
18 true? They have an obligation to treat their  
19 citizens equally. Having said that, this is not  
20 a case -- what you're doing is putting all of  
21 those 15 laws conferring different kinds of  
22 jurisdiction on those states into question.

23 You're throwing out those 15  
24 agreements and you're saying forget what they  
25 say about limiting state jurisdiction or not.

1 States had an inherent power to do this. Maybe  
2 you'll come back and say, well, those are  
3 agreements, so they're still bound by them.

4 But now you're creating chaos across  
5 the country, 49 other states. And I am told  
6 that the federal government decides whether to  
7 put some resources in some places based on what  
8 kind of jurisdiction exists with the states and  
9 not in others. All of that is up in the air.

10 So please explain to me why 200 years  
11 later we are revisiting an assumption that was  
12 made. You say it was only dicta, it was never  
13 decided. But we have an awful lot of dicta on  
14 this issue repeatedly in many, many cases.

15 MR. SHANMUGAM: Justice Sotomayor,  
16 there's a lot to that question and let me try to  
17 cover all of it.

18 First of all, with regard to the  
19 statistics, we believe that the statistics that  
20 we have offered to the Court are accurate, but  
21 you don't have to just take our word for it.

22 To get back to Justice Breyer's  
23 question, let's take a look at what the Justice  
24 Department has said in its most recent 2023  
25 budget report. It has said, "The United States

1 Attorneys in Oklahoma are prioritizing violent  
2 felonies under the Major Crimes Act. In fiscal  
3 year 2021, the Eastern District of Oklahoma and  
4 the Northern District of Oklahoma are opening  
5 only 22 percent and 31 percent of all felony  
6 referrals. Enforcement of nonviolent crime is  
7 relatively low."

8 And if we want to talk about --

9 JUSTICE SOTOMAYOR: Well --

10 MR. SHANMUGAM: -- what's been said in  
11 --

12 JUSTICE SOTOMAYOR: -- most of that is  
13 being done by the tribes, isn't it?

14 MR. SHANMUGAM: Well, not with --

15 JUSTICE SOTOMAYOR: I see a short gap  
16 of -- the Atlanta article says, at most, there's  
17 a short gap of about a thousand cases, if that.

18 MR. SHANMUGAM: We -- we don't agree  
19 with that. It's important to keep in mind that  
20 the tribes do not have jurisdiction over this  
21 category of cases, with narrow exceptions.

22 And if we're going to litigate what's  
23 been said in the press, I would refer the Court  
24 to The Wall Street Journal article earlier this  
25 week to which I alluded in which the Special

1 Agent in Charge of the FBI's Oklahoma Field  
2 Office said, "The United States Attorney's  
3 Office doesn't have the capacity to try  
4 nonviolent felony" -- my words -- "or even any  
5 misdemeanor cases."

6 Now I do want to cover the other  
7 points that were in your question which I think  
8 are really important.

9 First of all, with regard to  
10 supposedly foisting this authority on the  
11 states, let's keep in mind the fact that the  
12 states do enforce the criminal laws already in  
13 Indian country by virtue of the rule first  
14 established by this Court in McBratney.

15 When non-Indians commit crimes against  
16 non-Indians in Indian country, law enforcement  
17 is there, state law enforcement is there,  
18 because they have exclusive authority in order  
19 to enforce the criminal law.

20 JUSTICE KAVANAUGH: Several states  
21 have renounced the very kind of authority you'd  
22 thrust upon them, though, haven't they?

23 MR. SHANMUGAM: Well, it -- it -- it  
24 is true that a very small number of states have  
25 renounced the additional authority provided

1 under Public Law 280, but that brings me to the  
2 Public Law 280 regime, Justice Sotomayor, and  
3 there are a couple of things I would say about  
4 that.

5 First is just the fundamental oddity  
6 of the position on the other side, which is that  
7 a statute that by its terms conferred additional  
8 jurisdiction should be viewed as ousting all  
9 other preexisting jurisdiction.

10 And the reason that we know that that  
11 is not the law is because this Court said so in  
12 Three Affiliated Tribes. One, in the civil  
13 context, it said, "nothing in the language or  
14 legislative history of Public Law 280 indicates  
15 that it was meant to" -- "to divest states of  
16 preexisting and otherwise lawfully assumed  
17 jurisdiction." And there's --

18 JUSTICE SOTOMAYOR: In a civil case.

19 MR. SHANMUGAM: But --

20 JUSTICE SOTOMAYOR: They were very  
21 clear in saying criminal cases are different  
22 from civil cases.

23 MR. SHANMUGAM: But the reasoning,  
24 Justice Sotomayor, is exactly analogous, and let  
25 me explain why.



1                   Public Law 280 confers on states  
2 essentially plenary civil and criminal  
3 jurisdiction, either states that are the  
4 mandatory states or states that opt in.

5                   And you could make exactly the same  
6 argument in the civil context with regard to  
7 civil actions brought by Indians against  
8 non-Indians. And yet this Court made that  
9 statement in the context of whether or not  
10 Public Law 280 should be used to construe a  
11 state law as ousting the state of preexisting  
12 jurisdiction.

13                   Our submission is that Public Law 280  
14 operates perfectly well under our  
15 interpretation. What Public Law 280 does is to  
16 confer this broad array of additional  
17 jurisdiction, not just a plenary civil  
18 jurisdiction but, of course, criminal  
19 jurisdiction, including jurisdiction over  
20 offenses committed by Indians, which appears to  
21 have been Congress's principal concern when it  
22 enacted Public Law 280.

23                   Now, to be sure, the text of Public  
24 Law 280 also clarifies that states that  
25 participate in or opt into the regime will also

1 have jurisdiction over offenses committed  
2 against Indians.

3 JUSTICE GORSUCH: Let's -- let's talk  
4 about that --

5 MR. SHANMUGAM: But there's nothing  
6 odd about that.

7 JUSTICE GORSUCH: -- let's talk about  
8 for a second. I'm not so sure.

9 First of all, you -- you -- you agree,  
10 though, that in 1948, when Congress passed the  
11 GCA, the text of it is consistent with the  
12 conclusion that Congress believed the states  
13 generally lacked prosecutorial authority over  
14 crimes committed by non-Indians against Indians  
15 in Indian country, right?

16 MR. SHANMUGAM: Some members of  
17 Congress plainly believed that because there is  
18 evidence in the legislative --

19 JUSTICE GORSUCH: No, more than that.  
20 You agree that the text is consistent with an  
21 understanding that Congress thought that, right?

22 MR. SHANMUGAM: The text is consistent  
23 both with my position and with my friend, Mr.  
24 Schauf's position.

25 JUSTICE GORSUCH: Okay. If the text

1 is consistent with the opposing position, then  
2 let -- Public Law 280, the Kansas Act, the North  
3 Dakota Act, the New York Act, the Iowa Act, all  
4 adopted in the years immediately preceding and  
5 immediately following the GCA, expressly confer  
6 criminal jurisdiction on certain states, it just  
7 doesn't happen to be Oklahoma, for the very kind  
8 of authority at issue here, expressly, right?

9 MR. SHANMUGAM: Yes, but at the same  
10 time, none of those laws --

11 JUSTICE GORSUCH: All of that would  
12 have been pointless, right?

13 MR. SHANMUGAM: No, not at all.

14 JUSTICE GORSUCH: No need -- no need  
15 to say you have state criminal jurisdiction in  
16 -- in crimes involving Indian victims.

17 MR. SHANMUGAM: It's perfectly  
18 reasonable, particularly in Public Law 280,  
19 Justice Gorsuch, for Congress to have wanted to  
20 clarify that the states had that preexisting  
21 jurisdiction.

22 JUSTICE GORSUCH: So it's belts and  
23 suspenders on your view?

24 MR. SHANMUGAM: Well, to a certain  
25 extent, but I don't think that there's anything

1 strange about that because Congress often  
2 passes statutes that do nothing more than codify  
3 preexisting legal principles. Here --

4 JUSTICE GORSUCH: And how --

5 MR. SHANMUGAM: -- Congress was doing  
6 --

7 JUSTICE GORSUCH: -- how about --

8 MR. SHANMUGAM: -- so much more.

9 JUSTICE GORSUCH: -- how about the  
10 fact that we have, in my count, 10 cases  
11 stretching from 1832 to two years ago saying  
12 that it's -- it's -- states don't have this kind  
13 of jurisdiction?

14 You call it dicta. All right. But  
15 even in your very best case, *McBratney*, *Draper*,  
16 cases you cite and rely on, the Court reiterates  
17 that it is not talking about and is not  
18 extending jurisdiction over these kinds of  
19 cases. What do we do about that?

20 MR. SHANMUGAM: I -- I -- I don't  
21 think that's quite correct. I would recognize,  
22 Justice Gorsuch, that by my count, there are six  
23 cases, starting with *Williams versus United*  
24 *States*, in which this Court --

25 JUSTICE GORSUCH: I don't know. Mine

1 go back to Worcester. I think you might be  
2 missing a couple.

3 MR. SHANMUGAM: I don't think that  
4 that's a fair characterization of Worcester  
5 because Worcester was simply stating the  
6 principle that in effect --

7 JUSTICE GORSUCH: All right. We  
8 can -- we can quibble over the number, all  
9 right? I think your count's a little  
10 parsimonious. But whatever number it is, it's a  
11 large number. And even the cases you rely on  
12 most heavily carve this out.

13 MR. SHANMUGAM: I don't think that --

14 JUSTICE GORSUCH: What do we do about  
15 that?

16 MR. SHANMUGAM: -- I don't think  
17 that's correct, and let's go directly to  
18 McBratney. I think that all that the Court said  
19 in McBratney was that it was not deciding any  
20 question under the provisions of the applicable  
21 treaty with regard to crimes committed by or --

22 JUSTICE GORSUCH: All right.

23 MR. SHANMUGAM: -- against Indians.

24 I think the reasoning of McBratney  
25 strongly supports our position because McBratney

1 speaks broadly --

2 JUSTICE GORSUCH: But it carved that  
3 question out -- it carved this question out and  
4 said it wasn't -- it wasn't going there.

5 MR. SHANMUGAM: I don't believe that  
6 that is correct.

7 JUSTICE GORSUCH: All right. All  
8 right.

9 MR. SHANMUGAM: I would say that the  
10 Court only started to carve out the question in  
11 Donnelly. And I think what happened is --

12 JUSTICE GORSUCH: Then -- then how  
13 about this? How about Oklahoma's own position  
14 for the last 30 years, which has taken the  
15 position since I understand at least 1990 that  
16 that is the correct understanding of the law?  
17 That has been the Justice Department's  
18 understanding of the law.

19 Don't we normally, when we're thinking  
20 about an old statute, give respect to how it's  
21 been liquidated and understood by all three  
22 branches of government consistently, maybe the  
23 state itself who might have had an admission  
24 against interest back when nothing was at stake  
25 but now changes its view?

1           MR. SHANMUGAM: I think what I would  
2 say about the federal government, Justice  
3 Gorsuch, is that their position by their own  
4 recognition has certainly not been consistent.

5           And I would refer the Court to the  
6 1979 OLC opinion and the government's subsequent  
7 statements where the government has suggested  
8 that when it comes to the sort of interest  
9 balancing that we were discussing earlier,  
10 Justice Gorsuch, that that interest weighs in  
11 the state's favor.

12           JUSTICE GORSUCH: Do you care to  
13 address your own client's position?

14           MR. SHANMUGAM: I'm very happy to  
15 address Oklahoma's position. The practical  
16 reality, of course, was that this was not a  
17 significant issue --

18           JUSTICE GORSUCH: Exactly.

19           MR. SHANMUGAM: -- before this Court's  
20 opinion in McGirt.

21           JUSTICE GORSUCH: Exactly. And  
22 shouldn't that count for something?

23           MR. SHANMUGAM: Well, no, I think that  
24 what it should count for is that this has  
25 suddenly become a major problem in Oklahoma.

1 And to be clear, the reason that we are here  
2 today is because of McGirt. This was not a  
3 significant law enforcement issue in the State  
4 of Oklahoma for the reason that the government  
5 acknowledged in its earlier briefing in the  
6 McGirt line of cases, which is that in Oklahoma  
7 there is very little trust or reserved land.  
8 Most of the land is fee land, like the land in  
9 downtown Tulsa and the other cities in the  
10 eastern half of Oklahoma, and, therefore, would  
11 not have been thought of as Indian country.

12 Now I think, with regard to Oklahoma,  
13 the history, as you are well aware, is somewhat  
14 complicated in this regard because there was a  
15 lengthy period of time when the Oklahoma Court  
16 of Criminal Appeals, in fact, said that the  
17 state had plenary criminal jurisdiction even  
18 over Indian country and the state, and the  
19 Oklahoma Court of Criminal Appeals eventually  
20 reversed that position.

21 And so I think it's very hard to say  
22 that there's a lot of data about what the State  
23 of Oklahoma was doing. But I will grant you  
24 that I can't point to a prosecution by the State  
25 of Oklahoma after 1990. I would just say that



1 that's consistent with the fact that this was  
2 not a significant issue because of the  
3 relatively small amount of Indian country.

4 And I do want to --

5 JUSTICE KAGAN: Mr. Shanmugam --

6 JUSTICE GORSUCH: Please.

7 CHIEF JUSTICE ROBERTS: Why don't you  
8 wrap up quickly. And, Justice Kagan, we'll --  
9 Justice Kagan, we'll have your question, and  
10 then we'll move on to the next stage.

11 JUSTICE KAGAN: I'm happy to take my  
12 turn in order.

13 CHIEF JUSTICE ROBERTS: No, go ahead.

14 MR. SHANMUGAM: Great. Go -- go  
15 ahead, Justice Kagan. I wanted to say one more  
16 thing in response to Justice Gorsuch, but --

17 JUSTICE KAGAN: Okay. You'll find a  
18 way to fit it in, I'm sure.

19 (Laughter.)

20 JUSTICE KAGAN: I want to talk about  
21 the text of the statute for a few minutes and  
22 just start with this question: Is there  
23 concurrent jurisdiction on federal enclaves?

24 MR. SHANMUGAM: No.

25 JUSTICE KAGAN: Yeah. And, I mean, I

1 look at this text, and, you know, it's not the  
2 clearest statute for either side of the table  
3 here, but if I ask myself, like, what does this  
4 text really mean, and "mean" back when it was  
5 written, not today, given the history in  
6 which -- from which it emerged, I mean, the idea  
7 that this statute did anything other than  
8 analogize to federal enclaves in the entire  
9 sense, meaning it's the law that -- in which --  
10 in -- in -- in federal enclaves and it's the  
11 exclusive law of the federal government, I mean,  
12 it just seems to me the more natural reading of  
13 the statute in its historical context.

14 MR. SHANMUGAM: I don't agree with  
15 that, Justice Kagan, and I don't think that the  
16 statute is ambiguous, and I assume that we're  
17 talking about the General Crimes Act, and I will  
18 come to Public Law 280 in a minute.

19 But I think, with regard to the  
20 General Crimes Act, what I would say is what  
21 this Court said in *In re Wilson*. With regard to  
22 this phrase, "places within the sole and  
23 exclusive jurisdiction of the United States,"  
24 what the Court said was that phrase does not  
25 apply to the jurisdiction extended over the

1 Indian country but is only used in the  
2 description of the laws which are extended to --  
3 JUSTICE KAGAN: Yeah, I don't think  
4 I'm really talking about this as a -- as a  
5 matter of parsing the sentence and -- and  
6 applying rules of grammar to it. I think what  
7 I'm talking about is the -- the sense of the  
8 provision is to say -- the only thing the  
9 provision does is to analogize to federal  
10 enclaves. And then the question becomes, what's  
11 the law in federal enclaves? And the law in  
12 federal enclaves is exclusive federal law.

13 I mean, it's a kind of bizarre thing  
14 that Congress would have done, isn't it, to say,  
15 well, we're going to have federal enclave law  
16 applying and then we're also going to have state  
17 law applying? This is not like federal and  
18 state law apply in the State of New York or  
19 something, right? Because federal enclave law  
20 is essentially law that duplicates the kind of  
21 subjects in which state law is concerned. And  
22 so you have two bodies of general law operating  
23 in the same geographic area.

24 Now that now and that then is -- is  
25 kind of odd. And -- and, like, why would we

1 think that that's what Congress did when it said  
2 in this statute look to federal enclaves?

3 MR. SHANMUGAM: I -- I don't think  
4 that that's odd, Justice Kagan, either as a  
5 matter of text or as a matter of history.

6 So, as to the text, our fundamental  
7 submission here is that when you look at the  
8 structure of that sentence in Section 1152, it  
9 provides simply that the general laws of the  
10 United States as to the punishment of offenses  
11 committed within federal enclaves shall extend  
12 to the Indian country.

13 And I think that, as a matter of  
14 structure and plain language, that suggests that  
15 what you're talking about is the substantive  
16 criminal laws of an area that is within the sole  
17 and exclusive jurisdiction of the United States,  
18 federal enclaves.

19 JUSTICE KAGAN: I -- I mean, I suppose  
20 --

21 MR. SHANMUGAM: But if you don't --

22 JUSTICE KAGAN: Go ahead.

23 MR. SHANMUGAM: If you don't agree  
24 with me on that, I would point to the history  
25 here. And this goes really to, I think,

1 Respondent's core argument. Respondent sets  
2 great store by the 1834 enactment of the  
3 predecessor to the General Crimes Act.

4 But, of course, in 1834, to the extent  
5 that -- that Congress was thinking about the  
6 principle of territorial separation from  
7 Worcester, the first of the cases to which  
8 Justice Gorsuch referred, Congress incorporated  
9 that in its definition of Indian country, which  
10 is, after all, the trigger for what is now the  
11 General Crimes Act, by defining Indian country  
12 to exclude territory within the borders of  
13 states.

14 So Congress didn't have any occasion  
15 to think about the preemption question that's  
16 presented here. That question was effectively  
17 moot because the statute only applied to  
18 territories outside state borders. And when you  
19 think about our country in 1834, obviously, that  
20 was most of the territory west of the  
21 Mississippi River for starters.

22 And I would parenthetically note that  
23 that is -- that -- that both the text and the  
24 history are reasons to distinguish the General  
25 Crimes Act from the Major Crimes Act, though I

1 think the right way to think about the Major  
2 Crimes Act as a matter of first principles would  
3 be to think about it in preemption terms like  
4 the way that Justice Gorsuch and I were  
5 discussing earlier and not so much in terms of  
6 the text.

7 JUSTICE KAGAN: I mean, I wonder if  
8 all of that cuts for you or against you. I kind  
9 of think the latter. I mean, here you are in  
10 the 1830s coming after Worcester with a -- with  
11 a sense of the history of states operating  
12 against tribes and tribes needing federal  
13 protection. And, you know, to -- to -- to -- as  
14 I said, I think that this -- this statute is not  
15 grammatically pristine, and Mr. Schauf has an  
16 argument and you have an argument.

17 But -- but, given two alternatives,  
18 given that history, why we shouldn't read it as  
19 essentially saying go do the same thing in  
20 Indian country as you do in federal enclaves,  
21 rather than go do this completely weird thing  
22 where reservations or -- or -- or Indian country  
23 is going to have two bodies of general law,  
24 including state law of the states that tribes  
25 needed protection from the federal government

1 against, I -- I don't know why you would pick  
2 your version.

3 MR. SHANMUGAM: Well, my first line of  
4 response, Justice Kagan, is that this Court has  
5 already construed this language in Wilson and  
6 again in Donnelly.

7 JUSTICE KAGAN: Well, I don't know if  
8 you get to talk about precedent, you know,  
9 because you're up here and six times we have  
10 said the exact opposite of your position. And  
11 you say, well, it's dicta. But it's not normal  
12 dicta. It's -- it's in six cases this Court has  
13 laid down the jurisdictional rules and has  
14 specifically rejected your position.

15 So, you know, in terms of what this  
16 Court has said, I'm sorry, but this Court has --  
17 has indicated six times that you're wrong.  
18 Congress has indicated that you're wrong given  
19 the -- its consistent enactment of statutes that  
20 make no sense in light of your position, Public  
21 Law 280 and the state-specific ones. The  
22 executive branch has said that you're wrong in  
23 all but one decade.

24 You know, you're asking us to do a big  
25 lift on the basis of language that, as I say,

1 seems to me more naturally read against you.

2 MR. SHANMUGAM: I respectfully  
3 disagree with that, Justice Kagan. And just a  
4 couple of additional points.

5 I think, with regard to the issue of  
6 dicta, I would say that the -- the statements on  
7 this issue, starting with Williams versus United  
8 States, are, for lack of a better way of putting  
9 it, on the dicta end of the dicta spectrum.  
10 You're talking about no more than two sentences  
11 in any of those decisions. Those statements  
12 were really not essential in any way to the  
13 holdings.

14 I would submit that the statements in  
15 Wilson and Donnelly were much more to the core  
16 of the questions that the Court was considering.  
17 We're talking about cases like Solem and Bryant  
18 on the other side, where the Court is simply  
19 stating the principle that Respondent is  
20 advocating in passing on its way to dealing with  
21 very discrete questions, such as diminishment of  
22 reservations and the validity of the federal  
23 recidivist statute that takes tribal convictions  
24 into account.

25 So I do think that, with respect,



1 we're entitled to point to this Court's  
2 precedent, not least because this Court's  
3 precedent involves interpretation of the two  
4 statutes on which Respondent relies.

5           And with regard to Public Law 280, the  
6 one thing that I wanted to say in response to  
7 Justice Gorsuch, because that is, after all, the  
8 other statute on which the other side relies, is  
9 that when you start to frame the argument in  
10 terms of Public Law 280 occupying the field and  
11 the like, that starts to feel like a field  
12 preemption argument.

13           And I think Respondent almost goes  
14 there in his brief because he relies on cases  
15 like Virginia Uranium and Hines, but he doesn't  
16 use the words "field preemption," and I would  
17 submit that that's for good reason, because  
18 Public Law 280 would fall -- fall short -- far  
19 short of the standard for field preemption, not  
20 least because, as this Court indicated in Three  
21 Affiliated Tribes, there's no indication in  
22 Public Law 280 that Congress intended to oust  
23 the states of preexisting jurisdiction.

24           CHIEF JUSTICE ROBERTS: Thank you,  
25 counsel. I have just just one question.

1                   We've heard a lot about McGirt this  
2 morning, and I understand your point that it has  
3 sort of upped the ante on the question before us  
4 today. But is there any way in which the  
5 analysis in McGirt affects the point you're  
6 trying to make, or is it just kind of a  
7 background fact?

8                   MR. SHANMUGAM: The practical  
9 realities of McGirt are relevant, Mr. Chief  
10 Justice, on this question presented primarily if  
11 this Court decides to engage in a balancing of  
12 interests, because, in weighing the state's  
13 interest and the propriety of concurrent  
14 jurisdiction, I think it's entirely appropriate  
15 for the Court to take into account what is going  
16 on in what is now the largest piece of Indian  
17 country by area and population in the United  
18 States.

19                   CHIEF JUSTICE ROBERTS: I mean, in  
20 terms of how we analyze the General Crimes Act,  
21 how we analyze Worcester against Georgia, the  
22 other sort of legal authorities at issue here,  
23 McGirt doesn't offer any guidance in that  
24 analysis, does it?

25                   MR. SHANMUGAM: No, these are

1 fundamental familiar preemption questions, and  
2 particularly because this case does not  
3 implicate the tribal interest in punishing  
4 tribal offenders, this is really a case that  
5 pits state interests against federal interests.

6 And just to be clear, what the federal  
7 government is here saying, and my friend,  
8 Mr. Kneedler, will be at the podium shortly to  
9 say this, is that the federal government should  
10 have exclusive jurisdiction here.

11 And I guess I'm at a loss as to why  
12 the federal government would take that position  
13 when federal officials, both in statements to  
14 the public but also in statements to Congress,  
15 is acknowledging this massive prosecutorial gap,  
16 thousands of crimes, however you do the  
17 statistics, that are going unprosecuted by the  
18 federal government in the State of Oklahoma.

19 CHIEF JUSTICE ROBERTS: Well, I  
20 mean -- so, really, at the end of the day, when  
21 you're talking about McGirt, you're really just  
22 waving -- waving a bloody shirt. It doesn't  
23 have any direct pertinence on the legal analysis  
24 here.

25 MR. SHANMUGAM: This is an

1 extraordinary situation, I think, unlike any  
2 situation in recent history where what's going  
3 on right now in Oklahoma is a giant law  
4 enforcement experiment.

5           You have half -- almost half of an  
6 American state now, at least as to this category  
7 of crimes, under the exclusive criminal  
8 jurisdiction of the federal government, and the  
9 federal government is failing in that task. And  
10 I don't think that the Court should bind itself  
11 to that.

12           Now, to be sure, the question that is  
13 presented here will affect only by the federal  
14 government's own estimation around 20 to 25  
15 percent of the crimes affected by this Court's  
16 holding in McGirt.

17           And as the Court is well aware, the  
18 State of Oklahoma has asked this Court to  
19 revisit its earlier decision in McGirt. That's  
20 an extraordinary step, but these are  
21 extraordinary circumstances.

22           And I would submit that if the Court  
23 decides this question presented against the  
24 State of Oklahoma, it's only going to exacerbate  
25 what is already an extraordinary situation. And

1 at that point, the Court may want to revisit its  
2 judgment not to reconsider McGirt at this time.

3 CHIEF JUSTICE ROBERTS: Thank you.

4 Justice Thomas, anything further?

5 Justice Breyer?

6 JUSTICE BREYER: I think tell me if  
7 you have general thoughts on this. I mean, the  
8 sort of philosophical thing that is occurring to  
9 me is that you're sort of winning the game once  
10 you -- or not winning it but strengthening your  
11 argument once you use this word "preemption."

12 But Indian tribes on Indian land are  
13 not states and they are sovereign -- what is it,  
14 what's the phrase, sovereign dependent nations?  
15 So I don't know quite how that pans out.

16 But the other thing which is more  
17 important which I'd love any comments you have  
18 on it given your whole experience in many areas  
19 of law, can you give me a phrase or a word or a  
20 view in your mind of what weight this Court  
21 should give to such a fact as virtually  
22 unanimous across the country assumption that the  
23 law was X?

24 Is it totally irrelevant or is it a  
25 little relevant or a lot relevant? How do you

1 think about that in general?

2 MR. SHANMUGAM: There are familiar  
3 doctrinal frameworks, Justice Breyer, and --  
4 and, by definition, your experience is --

5 JUSTICE BREYER: I'm asking for your  
6 --

7 MR. SHANMUGAM: -- broader than mine,  
8 but --

9 JUSTICE BREYER: -- view because you  
10 have many cases. You have much experience in  
11 the area. And -- and I think that's a -- I  
12 guess you don't have to answer it, but -- but I  
13 would be curious.

14 MR. SHANMUGAM: No, I -- I'm happy to  
15 answer it directly. There is a word for it,  
16 Justice Breyer, and that word is ordinarily  
17 ratification. In other words, that is the  
18 doctrine that this Court ordinarily uses to  
19 embed in statutes that might otherwise be silent  
20 preexisting understandings from interpretation.

21 But, again, that's another word that  
22 you can search Respondent's brief for in vein,  
23 and I think that that's for good reason, because  
24 if the argument here is ratification --

25 JUSTICE BREYER: No, I'm not

1 interested in ratification --

2 MR. SHANMUGAM: Well, but that is the  
3 --

4 JUSTICE BREYER: -- because we have  
5 cases where the law in many, many areas, even  
6 leaving Congress out of it, we might think, some  
7 might think has been X, but it's argued in front  
8 of us, no, even though everyone thought it was  
9 X, everyone was wrong. It was not X.

10 Now, assuming that's the situation, my  
11 same question, what weight do we give to the  
12 view that everybody did think it was X --

13 MR. SHANMUGAM: I'm --

14 JUSTICE BREYER: -- or nearly  
15 everyone?

16 MR. SHANMUGAM: -- I'm happy to  
17 confront that directly. The one thing I think  
18 everyone agrees on before this Court is that  
19 this is a question of preemption.

20 And I would note that nobody is here  
21 arguing that in this context the balancing  
22 approach from Bracker or other cases should  
23 apply. I think everyone recognizes that this  
24 case involves the familiar approach to  
25 preemption where you look to whether or not

1 federal law displaces state authority.

2 Everyone also agrees before this Court  
3 that the only relevant source of federal law is  
4 statutes because, Justice Sotomayor, there's no  
5 argument here that there's any treaty by its  
6 terms that has preemptive effect.

7 And so then the question becomes what  
8 is there in the statute that preempts, and  
9 there's a statutory interpretation component to  
10 that.

11 Now we would say that the first and  
12 last place you look is to the text of the  
13 statutes, and everyone agrees that there's  
14 nothing on the face of the statutes with the  
15 exception of this potential argument with regard  
16 to the phrase "sole and exclusive jurisdiction"  
17 that preempts.

18 And if you don't accept that argument,  
19 then what you're left arguing is making  
20 arguments based on background understandings,  
21 and we really have two of those arguments in  
22 this case: an argument with regard to the 1834  
23 predecessor to the General Crimes Act that it  
24 embedded the principle of territorial separation  
25 from Worcester, or an argument that the 1948



1 recodification, which after all was just the  
2 recodification in the United States Code without  
3 substantive change, somehow ratified this  
4 Court's interpretation in a single sentence of  
5 text in its dicta in Williams at a time when the  
6 law was unsettled.

7           That would come nowhere near this  
8 Court's standard for ratification, which is why  
9 I suspect Respondent doesn't affirmatively  
10 invoke that doctrine.

11           And I think, with regard to Worcester  
12 and the background understanding, this Court has  
13 long retreated, as has Congress, from the  
14 hard-line view of territorial separation.

15           And if that were not true, then this  
16 Court would have to revisit decisions like  
17 *McBratney*, *Draper*, and, more recently, *Nevada*  
18 *versus Hicks*, all of which have given the states  
19 broad law enforcement authority in Indian  
20 country in the criminal context.

21           And so, with respect, I think what  
22 you're really left with on the other side is  
23 some sort of mosaic theory. If you take a look  
24 at page 28 of the government's brief, the  
25 government says, well, there's a pattern of

1 Congressional enactments.

2 But, with all due respect, I think  
3 that that's a lot like Justice Gorsuch's steak  
4 rub. It's not entirely clear exactly what the  
5 government and Respondent is relying on here in  
6 the absence of any --

7 JUSTICE KAGAN: But that's  
8 because there's so much.

9 CHIEF JUSTICE ROBERTS: Mr. Shanmugam  
10 --

11 MR. SHANMUGAM: I --

12 CHIEF JUSTICE ROBERTS: -- if you --  
13 continue.

14 MR. SHANMUGAM: I don't agree with  
15 that, Justice Kagan, for the simple reason that  
16 when we're talking about Congressional  
17 enactments, which, after all, again, is the  
18 touchstone because we're talking about a  
19 question of preemption, there are really only  
20 two options here. There's either the General  
21 Crimes Act itself, or there is Public Law 280  
22 and the accompanying state enactments.

23 And I think that Public Law 280 is the  
24 harder of the two for the other side for the  
25 simple reason that not only has this Court

1 addressed a nearly identical issue in the civil  
2 context in *Three Affiliated Tribes*, but that is  
3 a statute that by its terms only gives states  
4 additional jurisdiction, and I think it would be  
5 passing strange to construe it as divesting all  
6 of the other states of their preexisting  
7 jurisdiction.

8 CHIEF JUSTICE ROBERTS: Thank you.

9 Justice Alito, anything further?

10 JUSTICE ALITO: Well, the -- the Chief  
11 Justice asked you about the relevance of the  
12 Court's reasoning in *McGirt*, and there have been  
13 questions raising the possibility that  
14 dispositive weight should be given here to what  
15 some people may have assumed was the answer to  
16 the question presented in this case.

17 What weight did the Court give in  
18 *McGirt* to what had been assumed for a period of  
19 time about the status of the territory in  
20 question in that case?

21 MR. SHANMUGAM: Well, I do think that  
22 it is slightly ironic that the history of  
23 non-prosecution has been cited against the State  
24 of Oklahoma when the Court in *McGirt* didn't  
25 attach any weight to the settled understanding

1 for that period of a hundred years about the  
2 status of the eastern half of Oklahoma.

3 And just to be clear, I'm not here  
4 today to relitigate McGirt. Our submission is  
5 simply that the problems created by McGirt are  
6 extraordinary, as this Court -- as some members  
7 of this Court predicted at the time of McGirt,  
8 and as the federal government in its brief in  
9 McGirt said was going to be the case with regard  
10 to criminal jurisdiction in particular.

11 And, with respect, I do find it  
12 slightly astonishing that in its entire brief  
13 the government says nothing about the current  
14 state of affairs on the ground in Oklahoma in  
15 this area in which it has exclusive  
16 jurisdiction. Perhaps my friend, Mr. Kneedler,  
17 will speak to that today. But, again, it seems  
18 to me that is very relevant context as this  
19 Court is deciding the question that's before it.

20 CHIEF JUSTICE ROBERTS: Justice  
21 Sotomayor, anything further?

22 Justice Kagan?

23 Justice Gorsuch, anything further?

24 JUSTICE GORSUCH: Just to pick up on  
25 Justice Kagan's remark, there is so much. You

1       conceded that the original understanding is  
2       consistent -- the language is consistent with an  
3       original understanding of the statute, to  
4       preempt. The MCA has very similar, different  
5       language that does preempt, this Court's held.  
6       We have an entire class of contemporaneous  
7       statutes, from the Kansas Act to Public Law 280,  
8       that are understood only in light of a  
9       preemption view. We have six to 10 -- we can  
10      argue over how many cases -- saying this. We  
11      have all three branches of the federal  
12      government contemporaneously understanding it.  
13      We have the state's understanding for 30 years.

14               And in -- on the other side of the  
15      balance, you're asking us to extend a balancing  
16      test from the civil context into the criminal  
17      context, which we've never done before.

18               Now I can't think of another statutory  
19      case this Court would take up, no matter how  
20      much a state might complain about the cost and  
21      the expense, and we get those all the time, and  
22      reconsider a settled statutory interpretation  
23      with that much evidence against you. This Court  
24      stood firm in Worcester and -- with respect to  
25      the original meaning of the Constitution and the

1 promises made in treaties to the Cherokee in the  
2 1830s. Are we -- are we to wilt today because  
3 of a social media campaign?

4 MR. SHANMUGAM: No, Justice Gorsuch,  
5 and let me say two additional things.

6 First of all, with regard to my  
7 purported concession, I was simply making the  
8 point with regard to Public Law 280 that, to the  
9 extent that some members of Congress may have  
10 believed that states lacked the jurisdiction  
11 over these -- this category of cases, that our  
12 interpretation of the statute -- that the  
13 statute can be interpreted consistently with  
14 that understanding or not but that there's  
15 nothing problematic with construing the statute  
16 in the way that we suggest.

17 We're not rendering any of the  
18 language superfluous. All we're saying is that  
19 Congress reinforced that states that  
20 participated in Public Law 280 would have that  
21 jurisdiction, a very important thing because, if  
22 Congress had not done that, there might have  
23 been a negative inference that states in Public  
24 Law 280 would lack that jurisdiction, which  
25 would have created a jurisdictional gap.

1           We certainly do not think the General  
2 -- the General Crimes Act is ambiguous, and I  
3 would refer to my answers to Justice Kagan on  
4 that score. We think that this Court has  
5 construed that statute and that it is  
6 unambiguous.

7           And then, finally, in response to your  
8 question with regard to the history, I think  
9 what I would say, without simply rehearsing  
10 ground that we've already covered in our brief,  
11 is that throughout our history there have been  
12 countervailing data points on all of the issues  
13 to which you referred. We've talked about the  
14 district court decision in *Cisna* that came  
15 immediately after *Worcester*; this Court's  
16 decision in *Dibble*, which conferred jurisdiction  
17 on states in Indian country as early as 1859;  
18 this Court's decision in *Martin*, which  
19 reinforced the principle of *McBratney* and *Draper*  
20 right around the same time as this Court started  
21 suggesting in dicta that the answer to this  
22 question might be *Respondent's*; opinions from  
23 the Attorney General as early as the mid-19th  
24 Century.

25           And to the extent that the other side

1 points to the original understanding, there is  
2 no doubt in the early years of our history that  
3 there was a problem, a problem with incursions  
4 by non-Indians on Indian country and a raft of  
5 treaties that conferred authority on the federal  
6 government.

7 But what you don't have is evidence  
8 that the federal government -- that the treaties  
9 were thereby ousting the states of jurisdiction.  
10 The problem might very well have been  
11 nonenforcement, but there is no reason to  
12 believe, either from the treaties nationwide or  
13 the treaties specific to Oklahoma, that those  
14 treaties by their terms ousted the state of  
15 jurisdiction.

16 And to the extent that the treaties  
17 refer to the jurisdiction or even the absolute  
18 jurisdiction of the United States, I would point  
19 the Court to its decision in Draper and its  
20 decision in Egan that have made clear that those  
21 provisions should not be construed as ousting  
22 states of any or all jurisdiction. At most,  
23 they made clear that title resided in the  
24 federal government.

25 CHIEF JUSTICE ROBERTS: Justice



1 Kavanaugh?

2 JUSTICE KAVANAUGH: I understand your  
3 argument about the statutory text controlling,  
4 which is a very forceful argument. There's also  
5 been some discussion of victims and the policy  
6 concerns with victims, so I want to focus on  
7 that for a second. We're talking about  
8 non-Indian-on-Indian crime in Indian country,  
9 correct?

10 MR. SHANMUGAM: Yes.

11 JUSTICE KAVANAUGH: Everyone agrees  
12 the tribes don't have jurisdiction to prosecute  
13 those crimes, correct?

14 MR. SHANMUGAM: Yes, with the very  
15 narrow exception of certain domestic violence  
16 crimes, where Congress has conferred that  
17 authority.

18 JUSTICE KAVANAUGH: Everyone agrees  
19 the federal government does have jurisdiction to  
20 prosecute those crimes covered by the GCA,  
21 correct?

22 MR. SHANMUGAM: Yes.

23 JUSTICE KAVANAUGH: Okay. So the only  
24 question here is additional jurisdiction to  
25 prosecute those crimes for the states,

1 additional concurrent jurisdiction, correct?

2 MR. SHANMUGAM: Yes, that is correct,  
3 and we simply do not agree with the submission  
4 of the National Congress -- NCAI that state  
5 jurisdiction affirmatively undermines public  
6 safety. We think quite to the contrary --

7 JUSTICE KAVANAUGH: Right.

8 MR. SHANMUGAM: -- that concurrent  
9 jurisdiction --

10 JUSTICE KAVANAUGH: Because Indian  
11 victims right now are not being protected  
12 because the federal government doesn't have the  
13 resources to prosecute all these crimes. And  
14 this would not be displacing the federal  
15 government. It's additional prosecutors to  
16 protect Indian victims against non-Indians,  
17 correct?

18 MR. SHANMUGAM: That is correct, and  
19 notwithstanding this, frankly, cynical effort to  
20 disparage the state's estimates, which are the  
21 state's best good-faith estimates as to the  
22 prosecutorial gap left by McGirt, the federal  
23 government itself recognizes that there is a gap  
24 both in terms of the volume of cases and whole  
25 categories of nonviolent crimes and even less

1 serious violent crimes that are not being  
2 prosecuted.

3 JUSTICE KAVANAUGH: And that's not a  
4 reason to read the text differently than it  
5 reads, but my point in bringing that up is that  
6 we also shouldn't think that somehow ruling  
7 against you would -- would help -- I don't see  
8 how it would help Indian victims. It's going to  
9 hurt Indian victims.

10 MR. SHANMUGAM: Well, I think that  
11 that's correct, and I do think that that is a  
12 reason why this is a much easier case than a  
13 case involving Indian defendants because I do  
14 think that if you have a case involving Indian  
15 defendants, the tribal interest suddenly becomes  
16 more significant. And I think, when it comes to  
17 non-Indian perpetrators, it's really hard to see  
18 why a bright line should be drawn as to state  
19 authority between non-Indian victims and Indian  
20 victims. The state's authority here is at its  
21 broadest because we're talking about the state's  
22 police power.

23 The federal government has authority,  
24 but it's somewhat narrower because that  
25 authority requires a relationship with the tribe

1 in order to implicate the federal government's  
2 enumerated powers.

3 And I would respectfully submit that  
4 the tribe's authority in this area is at its  
5 narrowest because it is what the tribe has by  
6 means of reserved authority in this context,  
7 which has to implicate the right to  
8 self-governance, or any authority which has been  
9 conferred on the tribes by Congress.

10 And I would submit that one reason why  
11 the tribes may be opposing our position is  
12 because the tribes themselves would like for  
13 Congress to confer this law enforcement  
14 authority on them.

15 CHIEF JUSTICE ROBERTS: Justice  
16 Barrett.

17 JUSTICE BARRETT: I want to give you a  
18 chance to answer a question that Justice Gorsuch  
19 posed to you earlier, which is about the  
20 difficulty of discerning whether the  
21 perpetrators are Indians or non-Indians.

22 You pointed out the practical  
23 difficulties of discerning whether a victim has  
24 been an Indian or a non-Indian and the checklist  
25 that the Tulsa police have.

1                   Could you address Justice Gorsuch's  
2 point?

3                   MR. SHANMUGAM: Yes. It's basically  
4 the same test, Justice Gorsuch, so there's no  
5 reason why the test would be any different.

6                   And, again, the way that the Oklahoma  
7 courts have approached this is to have it be a  
8 sort of totality of circumstances test that  
9 looks not only at more objective factors, such  
10 as enrollment in the tribe and blood quantum,  
11 but also the individual's relationship with the  
12 tribe and participation in tribal affairs.

13                   And there is disagreement in the lower  
14 courts on exactly what that test should be for  
15 who is an Indian for purposes of criminal  
16 jurisdiction. Again, this is the subject of a  
17 currently pending cert petition by the State  
18 of -- of Oklahoma.

19                   And so our submission today is simply  
20 that that is not an easy inquiry, and it has  
21 immediate on-the-ground consequences because, if  
22 you are a police officer arriving on the scene  
23 in Tulsa -- and I have talked to the Mayor of  
24 Tulsa and the chief of police in Tulsa about  
25 this very subject -- those officers have to make

1 a jurisdictional determination.

2 And once they make that jurisdictional  
3 determination, if they're making it in the  
4 course of an investigation, it may determine who  
5 responds to the scene of a crime.

6 JUSTICE BARRETT: They would have to  
7 make a jurisdictional determination the other  
8 way too when they're identifying the status of  
9 the perpetrator.

10 MR. SHANMUGAM: That's right, but it  
11 just makes it all the more complicated for them  
12 to have to make both of those determinations.  
13 But I certainly don't mean to suggest that even  
14 if the Court resolves the question presented in  
15 our favor, that's going to make it objectively  
16 easy for law enforcement.

17 It may make it easier, but these are  
18 very difficult questions that often have to be  
19 resolved after perpetrators are taken into  
20 custody to determine who's going to prosecute.

21 And the fundamental problem with  
22 regard to the question presented today is that  
23 when cases are referred to the federal  
24 government, the federal government simply  
25 doesn't have the resources to prosecute.

1                   JUSTICE BARRETT: Well, I guess the --  
2                   the deeper reason for my question is I'm  
3                   wondering whether that jurisdictional inquiry --  
4                   I mean, part of your point on the balancing is  
5                   that the tribal interests are not implicated  
6                   when we're talking about non-Indian perpetrators  
7                   and Indian victims in the same way they are for  
8                   Indian perpetrators.

9                   And I'm wondering if there's any  
10                  possibility for a conflict with those tribal  
11                  sovereign interests by virtue of the fact that  
12                  you have to figure out the status of the  
13                  perpetrator and there might be some dispute  
14                  about it.

15                 MR. SHANMUGAM: I -- I -- I -- I  
16                 suppose that one could make that argument,  
17                 namely, that tribes should have some degree of  
18                 ability to define who are their members. They  
19                 do that, obviously, to some extent through the  
20                 enrollment process.

21                 I think our submission is that if this  
22                 Court, rather than using the traditional  
23                 preemption framework, resorts to balancing, that  
24                 the unquestioned concern the tribes have about  
25                 protecting tribal victims shouldn't really tilt

1 the balance in a particular direction on the  
2 question presented because, of course, it goes  
3 without saying that the State of Oklahoma has  
4 the same interest in protecting its own  
5 citizens, which include tribal citizens.

6 JUSTICE BARRETT: I -- I'm talking  
7 about the tribe's interest in not having the  
8 State of Oklahoma prosecute members of the tribe  
9 and the difficulty of figuring out the status of  
10 the perpetrator. Does that come into account if  
11 we look to balancing?

12 MR. SHANMUGAM: Yeah, I -- I mean,  
13 I -- I take the point, Justice Barrett, which is  
14 that in some sense, whenever the state is making  
15 that determination, it is obviously of interest  
16 to the tribes how the state makes that  
17 determination. But, you know, I think that the  
18 state in good faith attempts to make that  
19 determination taking into account enrollment in  
20 the tribe as one of the factors.

21 JUSTICE BARRETT: And I -- I want to  
22 follow up on a point that Justice Sotomayor  
23 made. She was pointing out that Public Law  
24 280 -- well, that -- that the -- if we rule in  
25 your favor, it might mean that states are



1 assuming responsibilities that they didn't sign  
2 up for because they didn't opt into Public Law  
3 280 in the days before tribal consent was  
4 required.

5           Is there any relationship between  
6 states that chose to opt in and population  
7 density or size of tribal land within those  
8 states, do you happen to know?

9           MR. SHANMUGAM: I think it's, frankly,  
10 a little bit hard to sort of detect a pattern,  
11 and it's complicated by the fact that in many of  
12 the states that have opted in, because there  
13 were issues with the way in which the states did  
14 so, there are some states that simply don't  
15 exercise that authority. There are at least a  
16 couple of states that have retroceded that  
17 authority.

18           But I think my fundamental point would  
19 be that opting into Public Law 280 is a major  
20 assumption of jurisdiction because, again, the  
21 criminal jurisdiction and the civil  
22 jurisdiction, with the caveat of the Cabazon  
23 Band limitation, is plenary. It covers criminal  
24 cases where the offenders were Indians as well  
25 as cases where the victims were Indians, and, of

1 course, the grant of civil jurisdiction covers  
2 any civil action between Indians or to which  
3 Indians are a party.

4 So it's a major step for a state to do  
5 so, and at least since tribal consent was  
6 required, there are no states that have been  
7 able to do so, and I think it's a fair inference  
8 that Oklahoma would be unable to do so in light  
9 of the position of the tribes today.

10 JUSTICE BARRETT: Thank you.

11 CHIEF JUSTICE ROBERTS: Justice Alito?

12 JUSTICE ALITO: In a case where the  
13 accused claims to be an Indian, I assume that  
14 the accused is in a position to explain why he  
15 or she believes that that is the appropriate  
16 categorization.

17 But what happens in the case where the  
18 accused is indisputably not a victim and the --  
19 I'm sorry, indisputably not an Indian and the  
20 victim says, I don't consider myself to be an  
21 Indian? What happens there?

22 MR. SHANMUGAM: I think that a court  
23 would still have to apply the totality of the  
24 circumstances test and to take into account  
25 enrollment and blood quantum and any other

1 relevant factors. And so I don't think that the  
2 victim's wishes would be dispositive of what is,  
3 after all, a jurisdictional question.

4 And the other thing I would note is  
5 that, you know, there are victimless crimes.  
6 And when there are victimless crimes, it has  
7 long been the view of the lower courts that  
8 where the perpetrator is a non-Indian, the state  
9 would have jurisdiction.

10 I think it is fair to say, as the OLC  
11 opinions from the 1970s made clear, that the  
12 line between crimes with a victim and victimless  
13 crimes is itself a fuzzy one.

14 JUSTICE ALITO: What -- what happens  
15 when the crime is the -- a conspiracy involving  
16 Indians and non-Indians?

17 MR. SHANMUGAM: I -- I -- that's a --  
18 that's a good question to which I actually don't  
19 know the answer.

20 CHIEF JUSTICE ROBERTS: Thank you,  
21 counsel.

22 Mr. Schauf.

23 ORAL ARGUMENT OF ZACHARY C. SCHAUF

24 ON BEHALF OF THE RESPONDENT

25 MR. SCHAUF: Thank you, Mr. Chief

1 Justice, and may it please the Court:

2 Oklahoma lacks jurisdiction because  
3 Congress exercised its exclusive power over  
4 Indian affairs to provide for exclusively  
5 federal jurisdiction. That conclusion follows  
6 from statutory text, context, and structure.

7 The General Crimes Act applies to  
8 Indian country, where federal statutes  
9 presumptively exclude state laws, and it imports  
10 the law of federal enclaves, where, likewise,  
11 states may prosecute only with Congress's  
12 approval.

13 The resulting jurisdiction is  
14 exclusive, and one way we know that is that John  
15 and Negonsott held as much as the parallel text  
16 under the Major Crimes Act. And that conclusion  
17 would have been especially obvious to the  
18 Congresses that enacted and reenacted the  
19 General Crimes Act.

20 First, Congress in 1834 acted to  
21 implement treaties covenanting the tribes would  
22 be under the protection of the federal  
23 government and "no other sovereign."

24 Second, Congress legislated against  
25 the backdrop of Worcester and its holding that

1 Congress -- when Congress has regulated  
2 relations with Indian -- Indian tribes, states  
3 can't. It could never have fathomed a more  
4 express statement would be required to keep its  
5 promises.

6 Third, this Court has recognized a  
7 single basis for state criminal jurisdiction in  
8 Indian country in McBratney and Draper. And  
9 Donnelly held that those cases do not apply to  
10 crimes by or against Indians. That means  
11 federal jurisdiction is exclusive, as this Court  
12 has affirmed somewhere between six and 10 times.

13 Fourth, Congress in 1948 embedded in  
14 law -- embedded that -- that law in statute  
15 when, in the wake of Donnelly and Williams, it  
16 reenacted the General Crimes Act while  
17 conferring on some states jurisdiction over  
18 crimes by or against Indians. You don't confer  
19 jurisdiction that already exists. And the only  
20 way to read all relevant text in harmony is  
21 ours.

22 More than that, Congress built on that  
23 structure through Public Law 280 and many  
24 similar statutes. And now Oklahoma's position  
25 would thwart the choice of 25 states not to

1 assume its jurisdiction and nullify consent  
2 rights of, by my count, 190 Indian tribes and  
3 for no sound reason.

4 Indeed, Washington State used Public  
5 Law 280 to obtain exactly the jurisdiction at  
6 issue here. And Oklahoma could do so too by  
7 obtaining signatures from 20 percent of enrolled  
8 tribal members and winning an election.

9 I welcome the Court's questions.

10 JUSTICE THOMAS: Counsel, just to go  
11 back to the beginning of your argument, you said  
12 that the -- I think you did -- you said that the  
13 federal government had plenary authority in this  
14 area. And we've said it too. What's the source  
15 of that?

16 MR. SCHAUF: So I think this Court has  
17 said that it arises from the Indian Commerce  
18 Clause, the Treaty Clause, pre-constitutional  
19 powers, war powers. But I agree that it was  
20 quite subtle.

21 And, you know, for our purposes, I  
22 think the -- the important point is that when  
23 Congress acted in 1834, it did so against the  
24 backdrop of Worcester, which interpreted the  
25 federal government's powers in this area to be

1 exclusive when exercised. So, when Congress had  
2 regulated intercourse with Indians, that meant  
3 states could not. And, you know, that really  
4 has been carried forward, I think, to the  
5 present. Obviously, you know, a bunch changed  
6 in the late 19th Century with Indian country  
7 coming within states.

8 But I think the important point is  
9 we're not writing on a blank slate here. This  
10 Court addressed that issue in McBratney and  
11 Draper and Donnelly, and the sort of sum total  
12 of the holding of those cases is that the only  
13 basis for state criminal jurisdiction in Indian  
14 country doesn't apply to cases like this one.

15 And then, in 1940 and on, Congress  
16 created the entire modern statutory scheme  
17 against the backdrop of that understanding. So  
18 the Kansas Act, for example, in 1940 understood  
19 the law the same way we do, conferred  
20 jurisdiction on states over crimes by or against  
21 Indians because it regarded that as necessary.

22 Then this Court in the Williams case  
23 sort of put a cherry on top and said, yeah, we  
24 read things the same way. States lack  
25 jurisdiction unless --

1 JUSTICE THOMAS: Well, yeah, I think  
2 you've answered my question. I don't want to  
3 interrupt you, but I don't want to take up all  
4 your time.

5 One other question. Would you take a  
6 minute or so to elaborate on your preemption  
7 argument? And my difficulty is that we -- when  
8 we normally have a preemption case, there is a  
9 conflict of some sort that you cannot regulate,  
10 for example, a drug the same -- by two different  
11 -- in two different governments when they are in  
12 conflict with each other, the regulations.

13 But, here, we're talking about  
14 concurrent authority. And you can look at our  
15 dual sovereignty double jeopardy cases and see  
16 that there's not necessarily a conflict. There  
17 may be an overlap or an overlay.

18 But -- so, with that in mind, I would  
19 just like you to sort of tease out your  
20 preemption argument focusing on this concurrent  
21 jurisdiction as opposed to conflict.

22 MR. SCHAUF: Sure, Justice Thomas.  
23 So, first, we think the text of the statute is  
24 best read to provide that state law shall not  
25 apply as to these criminal issues, though I do



1 want to take issue with my friend on the other  
2 side's premise that what we're doing here is  
3 just familiar principles of preemption.

4           What this Court said in Mescalero  
5 Apache is exactly the opposite. Those familiar  
6 principles don't apply, and it's because we are  
7 in Indian country, which is the -- the sort of  
8 quintessential locus where federal law applies  
9 and state doesn't -- and state law doesn't.

10           But, on the conflict point, I think  
11 the conflict would have been patent in 1834.  
12 So, you know, this is a statute, as we read it,  
13 that ensures peace on the frontiers, and it does  
14 so by centralizing redress in the federal  
15 government.

16           So, if you imagine a state prosecution  
17 that goes first in the early 19th Century and,  
18 you know, they do a bad job, they don't give an  
19 adequate sentence, then, you know, what the  
20 other side is sort of relying on is that they  
21 can -- that the federal government is going to  
22 be able to explain to the Indian tribes, you  
23 know, we know that this was not a good trial,  
24 but, you know, trust us. We're going to come in  
25 after. We're going to fix it. Yes, you know,

1 at this point, the dual sovereignty doctrine, as  
2 this Court noted in *Gamble*, is unsettled, but we  
3 hope that this is all going to work out.

4 And, you know, those just aren't the  
5 kind of chances you take on matters of war and  
6 peace. But, you know, I think maybe even the  
7 more fundamental point is it would have never  
8 occurred to Congress in this era that states  
9 would be the one to protect Indians from crimes.

10 I mean, after all, as this Court said  
11 in the *Kagama* case, Indian -- states at this  
12 point were Indians' deadliest enemies, and I  
13 don't think you put, you know, the fox in charge  
14 of the hen house even if the fox only has  
15 concurrent jurisdiction.

16 And, you know, I think there are other  
17 ways too that states could use this authority to  
18 really thwart tribal interests. You could, say,  
19 for example, criminalize intercourse by  
20 non-Indians with Indians and say that's a crime  
21 against the Indian, which could be -- basically  
22 get you the same regime this Court invalidated  
23 in *Worcester*. And I actually think the same  
24 thing is true today. So you can look at the  
25 issue in the *Williams versus United States* case.

1 JUSTICE THOMAS: Well, let's look at  
2 the -- let's look at the issue here with the fox  
3 and the chicken house. Actually, I think it's  
4 the hen house. But the -- let's look at that  
5 here. What did the defendant here get for the  
6 child abuse in the state case? What was the  
7 sentence?

8 MR. SCHAUF: So he received a 35-year  
9 sentence in --

10 JUSTICE THOMAS: And -- and what was  
11 the reduced -- what was the sentence after  
12 McGirt?

13 MR. SCHAUF: It was -- the federal  
14 sentence -- his sentence has not been imposed,  
15 but what the plea agreement provides for is  
16 seven years.

17 JUSTICE THOMAS: Okay. So --

18 MR. SCHAUF: The key difference --

19 JUSTICE THOMAS: -- the -- you can't  
20 make that fox in the -- in the chicken house or  
21 hen house argument there. So I understand your  
22 point about -- your 19th Century point, but  
23 we're looking at today, and what I'm really  
24 interested in is this conflict for -- because  
25 you're making sort of a preemption argument, and

1 I don't know if you -- if it's a good argument  
2 or an answer -- good answer to keep resorting to  
3 the 1830s or 1840s and not be able to show the  
4 conflict that we have today. Maybe it is.  
5 Maybe for some of my colleagues it is.

6 But I'd like you to tease out again,  
7 what is the conflict if you're making a  
8 preemption argument? If you're not making it,  
9 then you can say that.

10 MR. SCHAUF: Sure. So I just want to  
11 footnote that actually our primary argument is  
12 that the text here ousts states from  
13 jurisdiction, and so, you know, that is the end  
14 of the story, particularly under the preemption  
15 standard that applies in this Court's Indian  
16 cases.

17 But, on the conflict, let me -- let me  
18 sort of take another run at it. I think there  
19 are two. So one is just making law enforcement  
20 worse based on diminished accountability. You  
21 can see this from the brief of the former U.S.  
22 Attorneys submitted in this case. These were  
23 the U.S. Attorneys for many Indian country  
24 areas, and what they say is that when you have  
25 concurrent jurisdiction, you can create a "pass

1 the buck" dynamic that makes law enforcement  
2 worse. And, indeed, we know, you know, this is  
3 the view of the tribes in this case.

4 And the second point, and this is  
5 where I was going with this Court's decision in  
6 Williams, is you can have states prosecute in a  
7 manner -- in a manner that isn't consistent with  
8 tribal interests. So, in that case, the issue  
9 was, what is the age of consent? Is it 16 or is  
10 it 18? You can have -- you could have a  
11 circumstance where, for example, you have the  
12 intimate partner of a tribal member who goes to  
13 prison under a state prosecution when the  
14 federal law or the tribal law would allow that  
15 person to remain in the community, maybe raise  
16 their child.

17 And the reason why, you know, these  
18 issues have never arisen is because the rule  
19 that we're advocating has been the law since,  
20 you know, 1940 at least and, you know, I think  
21 probably far earlier than that.

22 So I guess the place I would go back  
23 to is the statutes that Congress has enacted  
24 that really do embed this understanding in their  
25 text --

1 JUSTICE KAVANAUGH: But you're here --

2 MR. SCHAUF: -- in dialogue.

3 JUSTICE KAVANAUGH: I'm sorry. Go  
4 ahead.

5 MR. SCHAUF: No. Please.

6 JUSTICE KAVANAUGH: You're here  
7 representing a non-Indian criminal defendant,  
8 correct?

9 MR. SCHAUF: That's -- that's correct.

10 JUSTICE KAVANAUGH: And the victim,  
11 the five-year-old, was an Indian, correct?

12 MR. SCHAUF: That's correct.

13 JUSTICE KAVANAUGH: We don't have --

14 MR. SCHAUF: She was an enrolled  
15 member of the Eastern Band --

16 JUSTICE KAVANAUGH: -- we don't have  
17 anyone here representing her, but how are her  
18 interests served by not having concurrent  
19 authority to prosecute your client for the child  
20 abuse that was inflicted on her if we're going  
21 to look at the interests of Indian victims?

22 MR. SCHAUF: Sure. So I want to make  
23 a point about this case and then -- then a sort  
24 of broader point.

25 So, on this case, one thing we know

1 from the plea agreement is that the victim's  
2 family consented to the federal sentence that  
3 was imposed in this case. And the reason, I  
4 would hazard, or something that has a lot to do  
5 with that is that when we talk about the 35-year  
6 Oklahoma sentence, you can get parole in  
7 Oklahoma after, you know, 33 percent of the  
8 time. In the federal system, no parole or  
9 you've got to serve 85 percent.

10 And my client also agreed to not  
11 contest removal proceedings thereafter. So  
12 that's a pretty significant interest. And --

13 JUSTICE KAVANAUGH: But, from the  
14 perspective not of non-Indian criminal  
15 defendants, which you're representing one of  
16 and representing well, from the perspective of  
17 Indian victims, I guess I'm not sure how Indian  
18 victims can be harmed by having more  
19 prosecutorial authority to fill a gap in  
20 Oklahoma where crimes are not being prosecuted  
21 against Indian victims, at least now.

22 Now maybe someday the federal  
23 government will get the resources to do the job,  
24 but even then, the state resources would be  
25 additional protection for Indian victims. So

1 I'm not understanding the -- the -- the argument  
2 that somehow Indian victims would be benefitted  
3 by ruling for you.

4 MR. SCHAUF: So I think the key point  
5 I would make is that Congress has created a  
6 process for those Indian interests to be  
7 protected and it's done that in Public Law 280.  
8 And I want to be specific about how it works  
9 because I think it's important.

10 So the optional assumptions under  
11 Public Law 280 are assumptions of concurrent  
12 jurisdiction, just like we're talking about  
13 here. They can be completely bespoke. So, if  
14 you just want to get jurisdiction over crimes  
15 against Indians, you can do that.

16 And the tribes themselves actually  
17 can't -- they don't have a right to veto -- or  
18 at least the tribal governments don't have a  
19 right to veto those assumptions. What you can  
20 see -- and this is 25 U.S.C. 1326 -- is you have  
21 a special election that can be called with the  
22 consent of 20 percent of enrolled tribal  
23 members, and that can be in any given area, so  
24 Tulsa County, for example.

25 And then, if a majority vote in that



1 special election favors the assumption of  
2 jurisdiction, then it can go forward. And so,  
3 you know, if people in Tulsa believe what my  
4 friend on the other side says about what is  
5 going to be the best thing to protect them from  
6 crime, then, you know, they can have it and the  
7 tribal governments actually can't stop that  
8 because that's, you know, the system that  
9 Congress created in order to balance the tribal  
10 and federal and state interests in this area.

11 JUSTICE SOTOMAYOR: Am I understanding  
12 you correctly that each tribe -- that each  
13 tribe, 20 percent of their members, presumably,  
14 20 percent being whoever is potential victims,  
15 could choose concurrent jurisdiction?

16 MR. SCHAUF: So the way I read the  
17 statute is that it's actually the enrolled  
18 tribal members in a particular geographic area,  
19 and I -- I don't think the statute is completely  
20 clear on, you know, how you would figure out the  
21 exact denominator. But it is available for  
22 Oklahoma, as it's been available for, you know,  
23 any other state.

24 And, you know, my friend said there  
25 have been no assumptions under Public Law 280,

1 but -- or at least once the 1968 provision made  
2 tribal consent required.

3 But there were a number of assumptions  
4 before then, at least 12 by my count in Montana  
5 and Washington, where the tribes affirmatively  
6 said, we consent to this jurisdiction. And so  
7 this is not something, I think, that's  
8 unobtainable.

9 And I think the more important point  
10 is that it is something that Congress has taken  
11 into account in this statutory scheme. And, you  
12 know, it -- it is a scheme --

13 JUSTICE SOTOMAYOR: I think you  
14 started to answer a question, and I'd like you  
15 to expand on it.

16 There's an assumption in Justice  
17 Kavanaugh's question that Indian victims can  
18 only be helped by concurrent jurisdiction. Is  
19 that assumption correct, that there's additional  
20 resources to protect them against crimes?  
21 That's the bottom line of his question. And is  
22 that -- do you agree with that assumption?

23 MR. SCHAUF: No, I -- I don't think  
24 that's right. I mean, I think, in particular,  
25 as a practical matter, you know, the upshot of

1 Oklahoma's position here is, you know, they're  
2 saying that if you adopt their position, then  
3 you can go back to more like what the situation  
4 was before McGirt, where, basically, the federal  
5 government wasn't involved in, you know, these  
6 sorts of cases involving Indians.

7           And that, I think, is profoundly  
8 contrary to the -- the bargain, the agreement  
9 that Indian tribes made with the United States  
10 where the United States said we are going to be  
11 your protector and make sure that you are taken  
12 care of.

13           Now it is true that as a formal  
14 matter, as the law stands today, you can have,  
15 you know, concurrent federal prosecutions, but,  
16 as a practical matter, the entire upshot of my  
17 friend on the other side's position is that the  
18 federal government can go back and wash its  
19 hands of these sorts of offenses and, you know,  
20 not invest the resources.

21           And, you know, our fundamental  
22 position is that the federal government actually  
23 has an obligation to invest those resources to  
24 make sure this is being done right unless and  
25 until either Congress passes a statute or tribal

1 citizens decide under Public Law 280 that they  
2 would like a different system to help protect  
3 themselves from crime.

4 JUSTICE BARRETT: Well, if --

5 CHIEF JUSTICE ROBERTS: Counsel, if I  
6 could just -- I don't think we've gotten to the  
7 critical language in the statute yet, and, of  
8 course, in the General Crimes Act, this is what  
9 the language says: "Except as otherwise  
10 provided by law, the general laws of the United  
11 States as to the punishment of offenses  
12 committed in any place within the sole and  
13 exclusive jurisdiction of the United States,  
14 except D.C., shall extend to the Indian  
15 country."

16 Now, as I read that, that's taking a  
17 body of law, the laws that apply in places  
18 within the sole and exclusive jurisdiction, and  
19 say that that extends to Indian country.

20 Now where do you get any notion of the  
21 preemption of state jurisdiction in that?

22 MR. SCHAUF: So I -- I think the Major  
23 Crimes Act says much the same thing, which this  
24 Court has held is preemptive. And I think  
25 that's for good reason. And I think that when

1 --

2 CHIEF JUSTICE ROBERTS: Where -- where  
3 do you get it in the language of that statute,  
4 not in what the Court may have said about the  
5 Major Crimes Act?

6 MR. SCHAUF: Sure, Mr. Chief Justice.

7 So I think the answer is that when you  
8 extend the general laws of the United States as  
9 to crimes, that is a reference to the enclave  
10 laws. And one of the background principles in  
11 federal enclaves is that states can prosecute  
12 only if Congress expressly allows it.

13 So I think, you know --

14 CHIEF JUSTICE ROBERTS: Well, okay,  
15 but you're -- in other words, you're saying that  
16 a background principle.

17 They're -- they're taking a particular  
18 reference point, right, the general laws that  
19 apply in this particular area, and doesn't say  
20 that all of the legal issues or jurisdictional  
21 questions in enclaves apply in Indian country,  
22 which they could have easily said. They simply  
23 say that body of general laws applies.

24 MR. SCHAUF: Well, so, you know, we  
25 think that when you take the principle from the

1 sort of soil of the federal enclaves, it brings  
2 with it this idea of federal exclusivity,  
3 particularly when you look at the body of law  
4 that's being applied. You know, this is the  
5 general federal laws plus the Assimilative  
6 Crimes Act. It is designed to replace the --

7 CHIEF JUSTICE ROBERTS: Okay. So it's  
8 the soil that comes, it's not the language  
9 itself?

10 MR. SCHAUF: Well, so I -- I think  
11 it's -- it's the language that brings the soil  
12 with it, but it's also not only the language of  
13 this statute because, remember, we have -- you  
14 know, just imagine you're sitting there and it's  
15 June 25, 1948. Congress is reenacting the  
16 General Crimes Act, this language. And at the  
17 same time, it's re- --

18 CHIEF JUSTICE ROBERTS: Well, but  
19 that's just a general -- general codification,  
20 right? I mean, you've said over and over again  
21 that we shouldn't draw any inferences from the  
22 recodification in 1948, which is all the -- all  
23 the provisions in the U.S. Code, right?

24 MR. SCHAUF: So, as to Indian country  
25 criminal jurisdiction, this is the very opposite

1 of a general codification. So the -- the term  
2 that governs the General Crimes Act's geographic  
3 scope is Indian country.

4 And in 1948, Congress codifies that  
5 definition in 1151, immediately prior section,  
6 for the first time since 1934. It does so  
7 expressly recognizing that Indian country is  
8 going to include land within states.

9 It looks at this Court's cases in  
10 doing that, including -- and you can see this in  
11 the revisor's notes -- this Court's decision in  
12 Donnelly, which says that the single basis for  
13 state criminal jurisdiction in Indian country,  
14 McBratney and Draper, does not apply to cases  
15 like this one.

16 And then, simultaneously, you have the  
17 reauthorization of the Kansas Act saying we are  
18 going to give just Kansas and then also Iowa and  
19 New York around a week later jurisdiction over  
20 crimes by or against Indians.

21 JUSTICE BREYER: That's Congress's  
22 intent. Now I thought -- I had the same  
23 question. And -- and I thought, but I -- don't  
24 make me -- don't just agree with this if --  
25 if -- if -- if I'm wrong -- that the federal

1 enclaves are -- are exclusive of state  
2 prosecutorial powers. The state can't prosecute  
3 crimes in federal enclaves.

4           Why not? Well, it was constitutional  
5 in origin, I think so, and those constitutional  
6 principles about federal enclaves as applied  
7 were prosecutions in federal enclaves are  
8 federal, period, not state. And that was the  
9 principle based on a constitutional reference  
10 which meant the words "general laws" pick up  
11 that jurisdictional principle.

12           Am I right or wrong?

13           MR. SCHAUF: I -- I think you are  
14 right, Justice Breyer, and I think it's  
15 particularly significant that you are taking  
16 those principles and you are applying them to  
17 Indian country, which is another area which  
18 historically and presumptively is one where  
19 federal law is preeminent and state law gives  
20 way particularly easily.

21           You know, as this Court emphasized in  
22 Williams versus Lee, the basic policy of  
23 Worcester endures.

24           JUSTICE BREYER: Are you being --

25           CHIEF JUSTICE ROBERTS: Well, I think



1 --

2 JUSTICE BREYER: Yeah. Go ahead.

3 CHIEF JUSTICE ROBERTS: No, I was just  
4 going to say, I hesitate to say it, but I think  
5 you may be wrong in -- in that they could have  
6 said that the exclusive jurisdiction extends to  
7 Indian country, and that would have been a  
8 pretty big deal. Instead, they say these laws  
9 extend to Indian country.

10 JUSTICE BREYER: Yeah, you know,  
11 that's right, that's the other way to read it.  
12 The other way to read it is general laws mean  
13 substantive laws. And that's -- or your way to  
14 read it would be it includes principles, at  
15 least those derived from the Constitution.

16 Have I got it right? Is that right?

17 CHIEF JUSTICE ROBERTS: Yeah.

18 JUSTICE BREYER: All right.

19 MR. SCHAUF: So I -- I do think those  
20 are the two readings that are on the table. I  
21 think one reason to pick ours is that it's the  
22 only one that is consistent with 82 years of  
23 statutes Congress has enacted using the phrase  
24 "by or against Indians." And I think it's  
25 significant that it's really done that in

1 dialogue with this Court's cases.

2           So two years after this Court in  
3 Williams says, you know, what Donnelly means is  
4 no state jurisdiction, you have the reenactment  
5 of the General Crimes Act and the -- you know,  
6 these several state-specific statutes. Then you  
7 get Public Law 280 a few years later. In 1958,  
8 Williams versus Lee reaffirms the rule here is  
9 exclusive federal jurisdiction.

10           And then, in 1968, Congress amends  
11 Public Law 280 based on all that, and -- and it  
12 does a couple of significant things. So, number  
13 one, it creates this tribal consent right. That  
14 consent right, as a matter of text, applies to  
15 assumptions of jurisdiction over crimes by or  
16 against Indians. My friend's position would  
17 read that text out of what Congress provided in  
18 1968, which was a hard-won victory that tribes  
19 earned. And our fundamental submission is that  
20 if Oklahoma wants to do that, then it needs to  
21 do what the tribes did and go back to Congress.

22           And it also allowed states to  
23 retrocede, again, that specific jurisdiction,  
24 crimes against Indians. And many, many states  
25 have decided to do so. And they would nullify

1 that choice as well.

2 CHIEF JUSTICE ROBERTS: You -- you  
3 rely heavily on Worcester against Georgia. What  
4 do you do -- I think it was Frankfurter, his  
5 language in Village of Kake, that "the general  
6 notion" -- I'm quoting -- "drawn from Chief  
7 Justice Marshall's opinion in Worcester that an  
8 Indian reservation is a distinct nation within  
9 whose boundaries state law cannot penetrate  
10 yielded to closer analysis when confronted in  
11 the course of subsequent developments with  
12 diverse concrete situations."

13 I mean, I understand that if Worcester  
14 against Georgia were the law that we were  
15 dealing with today, that I think your friend's  
16 argument on the other side to try to change the  
17 parameters of the argument to a strict  
18 preemption analysis might be pretty difficult.  
19 But, I mean, is Frankfurter wrong?

20 MR. SCHAUF: So I think there are  
21 three answers --

22 CHIEF JUSTICE ROBERTS: We might be  
23 too.

24 MR. SCHAUF: -- three answers to that,  
25 Mr. Chief Justice.

1                   Number one, in 1834, Congress's  
2 backdrop was Worcester, so that was the  
3 understanding that Congress had when it enacted  
4 the, you know, forerunner to the General Crimes  
5 Act.

6                   Second, you know, those same cases  
7 like Williams versus Lee that say we have  
8 departed in some respects from Worcester  
9 emphasized that the rule in this case is that  
10 state courts lack jurisdiction.

11                   And, third, I don't think we have to  
12 guess about sort of how to translate, you know,  
13 Worcester into, you know, an era where you have  
14 reservations existing within state boundaries  
15 because we have everything that happened in  
16 1940, 1948, and thereafter, where you see  
17 Congress itself grappling with what should be  
18 the rule against the backdrop of this Court's  
19 cases saying, you know, we have recognized this  
20 one ground for state criminal jurisdiction in  
21 Indian country and it doesn't apply to crimes by  
22 or against Indians.

23                   So I think the core point is that as  
24 the -- as to the question presented here, you  
25 know, this is something that Congress really has

1 resolved.

2 CHIEF JUSTICE ROBERTS: Justice  
3 Thomas?

4 Justice Breyer, anything further?  
5 Justice Alito?

6 JUSTICE ALITO: You said that the  
7 regular rules of preemption do not apply in a  
8 case like this. What is your test for  
9 preemption in a situation like this?

10 MR. SCHAUF: So I -- I think the --  
11 the easy way to approach this is what this Court  
12 said in John and Negonsott was sufficient under  
13 the Major Crimes Act, is that the Major Crimes  
14 Act uses the word "exclusive" and so sort of  
15 assimilates Indian country to federal enclaves.  
16 And it was passed on the understanding that that  
17 federal jurisdiction would be exclusive.

18 And I think that is consistent with  
19 the general approach to preemption in Indian  
20 country, where -- you know, what this Court has  
21 said is that Worcester remains the starting  
22 point and it's departed only when there is no  
23 governing statute.

24 And so, here, where you've got a  
25 governing statute --

1 JUSTICE ALITO: Well -- well, that  
2 seems to me to be an argument about the  
3 interpretation of the General Crimes Act rather  
4 than an argument about the applicable test for  
5 preemption.

6 What if I thought that the language of  
7 the General Crimes Act is quite clear and that  
8 it means that the law that applies in federal  
9 enclaves applies in Indian country and goes no  
10 further than that? Is that the end of the case?

11 MR. SCHAUF: No. I mean, I think,  
12 again, you know, what this Court has said  
13 in Mescalero Apache -- what I hear, you know,  
14 your question to be saying, Justice Alito, is  
15 that there is no express statement of  
16 preemption. And what this Court had said in  
17 Mescalero Apache is that you do not need an  
18 express statement of preemption. And, you know,  
19 if you --

20 JUSTICE ALITO: Yeah, and that's my  
21 question.

22 MR. SCHAUF: -- if you want a test, I  
23 think --

24 JUSTICE ALITO: I mean, that's my  
25 question. What more -- what do you need more?

1     What -- what do you need in this situation that  
2     is insufficient, would be insufficient in an  
3     ordinary preemption case?

4             MR. SCHAUF:  So, you know, I think  
5     what -- really, what this Court has said is that  
6     it is a more lenient standard.  And so, when you  
7     have text that I think we can all agree contains  
8     some indicia of federal jurisdiction, then, you  
9     know, that really is it, and the state must show  
10    an affirmative authorization to --

11            JUSTICE ALITO:  You mean that the  
12    language has to be ambiguous?  It has to be  
13    possible to read the language to mean something  
14    different?

15            MR. SCHAUF:  So I think that this  
16    Court's --

17            JUSTICE ALITO:  Is that enough?

18            MR. SCHAUF:  -- this Court's cases  
19    have gone much further than that.  It has found  
20    preemption under the Indian country preemption  
21    standard even where there is no preemptive  
22    language at all.  You can look at cases like  
23    Warren Trading or Central Machine.  These are  
24    cases about the Indian trader statutes.  And the  
25    only text at issue in those statutes were --

1 were provisions that, for example, let the  
2 federal government prohibit entirely commerce  
3 with Indians.

4 So I think we have a much easier case  
5 because we have a statute that directly  
6 addresses this question and does so while saying  
7 treat Indian country like federal enclaves where  
8 federal jurisdiction is sole and exclusive.  
9 And, you know, we think it goes much further  
10 than that, but I think that is enough under this  
11 Court's preemption cases in Indian country.

12 CHIEF JUSTICE ROBERTS: Justice  
13 Sotomayor?

14 Justice Kagan?

15 Justice Gorsuch?

16 JUSTICE GORSUCH: Do you think the  
17 preemption analysis is affected by treaty  
18 promises?

19 MR. SCHAUF: I do think the preemption  
20 analysis is affected by treaty promises. And,  
21 you know, one other place you could start this  
22 case is the treaty promise to the Cherokee  
23 Nation that it would be under the protection of  
24 the federal government and no other sovereign  
25 whatsoever. You could add the promise that the



1 federal government is going to be the one to  
2 protect Indians from crimes by non-Indians. And  
3 you could take the promise that Cherokee lands  
4 would not be included within state jurisdiction  
5 without Cherokee consent.

6 And I think, when you put that set of  
7 treaty promises together, the only understanding  
8 you can have is that they expected the federal  
9 government alone to prosecute these types of  
10 crimes. And so, if you've got an available  
11 reading of the statute that vindicates rather  
12 than breaks those treaty promises, I think you  
13 take that reading of the statute.

14 CHIEF JUSTICE ROBERTS: Justice  
15 Kavanaugh?

16 Justice Barrett?

17 JUSTICE BARRETT: I want to give you a  
18 chance to respond to this argument with respect  
19 to the General Crimes Act and the Major Crimes  
20 Act and the potential similarities or  
21 differences between the two.

22 So you say that the language is quite  
23 similar, and I agree they both use the phrase  
24 "exclusive jurisdiction." But I'm wondering if  
25 the language actually cuts against your argument

1 in this way: So your friend on the other side  
2 says that this is taking one body of law and  
3 extending it to Indian country in the General  
4 Crimes Act.

5 The Major Crimes Act is phrased  
6 differently, so it doesn't use this language of  
7 "extend." It says an Indian who commits certain  
8 crimes against another Indian "shall be subject  
9 to the same law and penalties as all other  
10 persons committing any of the above offenses  
11 within the exclusive jurisdiction of the United  
12 States."

13 Well, a person who commits any of  
14 those offenses within the exclusive jurisdiction  
15 of the United States is subject to only one law,  
16 and it's the law of the United States. I think  
17 that phrasing is quite different when you set it  
18 in contrast to the General Crimes Act. So I  
19 wondered what your reaction is to that.

20 MR. SCHAUF: So I think the first  
21 answer is that those nuances have nothing to do  
22 with why this Court said in John and Negonsott  
23 that the Major Crimes Act was preemptive, which  
24 really was just about, you know, the comparison  
25 between Indian country and exclusive -- you

1 know, areas of exclusive federal jurisdiction.

2 But I think the text fundamentally  
3 does the same thing. You know, what it says is  
4 that individuals are subject to the same law and  
5 penalties as all other persons committing these  
6 enumerated offenses, which I think sweeps in a  
7 set of criminal but not civil principles, which  
8 I think is exactly what the phrase "as to the  
9 punishment of offenses" does in the General  
10 Crimes Act. So I think they do fundamentally  
11 the same thing.

12 And I guess another -- another point I  
13 would make on that is that, you know, if that  
14 argument were right, I think that would cut in  
15 our favor. I mean, if you look, for example, at  
16 the 1817 statute that was the precursor to the  
17 General Crimes Act, it uses actually language  
18 that's pretty similar to what's now in the Major  
19 Crimes Act. It says that defendants shall be  
20 subject to like punishment as others within  
21 areas of exclusive federal jurisdiction. So,  
22 you know, that -- their argument, I think, would  
23 make the 1817 General Crimes Act preemptive.  
24 And I don't think there's any story in which the  
25 General Crimes Act, you know, was preemptive in

1 1817 and stopped being that after.

2 But I think the more fundamental point  
3 is that none of these nuances really have  
4 anything to do with why this Court in John and  
5 Negonsott held that the Major Crimes Act was  
6 preemptive under the Indian country preemption  
7 standard.

8 JUSTICE BARRETT: Thank you.

9 CHIEF JUSTICE ROBERTS: Thank you,  
10 counsel.

11 Mr. Kneedler.

12 ORAL ARGUMENT OF EDWIN S. KNEEDLER  
13 FOR THE UNITED STATES, AS AMICUS CURIAE,  
14 SUPPORTING THE RESPONDENT

15 MR. KNEEDLER: Mr. Chief Justice, and  
16 may it please the court:

17 The text, the statutory context, and  
18 the history of 1152 firmly establish that it  
19 provides for exclusive federal jurisdiction over  
20 crimes by non-Indians against Indians in Indian  
21 country.

22 For over 100 years, starting with this  
23 Court's decision in Donnelly, the Court has  
24 construed Section 1152 in exactly that manner.  
25 And beginning more than 80 years ago, Congress

1 has repeatedly enacted laws that made clear that  
2 an act of Congress is necessary to authorize a  
3 state to authorize -- to conduct such  
4 prosecutions.

5           The roots of exclusive federal  
6 jurisdiction under the statute, in fact, go much  
7 deeper, though, to the founding, when the  
8 framers rejected the divided authority under the  
9 Articles of Confederation and invested plenary  
10 and exclusive power over Indian affairs in the  
11 national government.

12           And the early Congresses invoked those  
13 powers by enacting Section 1152's predecessors  
14 to prevent violence that could lead to war and  
15 to further the nation's commitments to protect  
16 the Indians and their -- the Indians and their  
17 territories from federal encroachment --  
18 encroachment by often hostile states and their  
19 citizens.

20           This Court should reject the  
21 proposition that it should overturn 100 years of  
22 settled understanding of this statute in this  
23 Court and Congress, by the executive branch, and  
24 in the states to solve a problem following this  
25 Court's decision in *McGirt* because the result

1 would be to unsettle established jurisdictional  
2 understandings and jurisdictional arrangements  
3 in many other states and, in fact, would  
4 unsettle jurisdictional understandings in the  
5 State of Oklahoma beyond what was -- that were  
6 in existence at the time of the decision in  
7 McGirt.

8 Oklahoma has much trust and restricted  
9 allotment land in both the western part of the  
10 state and the eastern part of the state, which  
11 for more than 30 years has been understood to be  
12 subject to exclusive jurisdiction, and the  
13 states have not been able to apply their laws  
14 there.

15 So what the state is asking for here  
16 is not just to go back to what the situation was  
17 before McGirt but to undo the settled  
18 understanding in Oklahoma itself about the --  
19 the application of state law to --

20 CHIEF JUSTICE ROBERTS: What --

21 MR. KNEEDLER: -- Indian country.

22 CHIEF JUSTICE ROBERTS: -- what is  
23 your answer to the language, Frankfurter's  
24 language I read from Kake concerning what weight  
25 we should give to Worcester against Georgia?

1                   MR. KNEEDLER: I think that  
2 proposition has to do with things where there is  
3 not a governing act of Congress.

4                   It -- it often comes up that there may  
5 be a question of just inherent tribal  
6 sovereignty and does state law interfere with  
7 that. And there have been some adjustments of  
8 that, largely because non-Indians have moved on  
9 a reservation, and often state law will apply to  
10 the non-Indians in that situation. They --

11                  CHIEF JUSTICE ROBERTS: But I'm -- I'm  
12 sorry, go ahead.

13                  MR. KNEEDLER: No, but, here, we have  
14 an act of Congress that -- that is deeply rooted  
15 in exclusive jurisdiction over -- over crimes by  
16 or against Indians back to the founding. And  
17 changes --

18                  CHIEF JUSTICE ROBERTS: Well -- well,  
19 but, I mean, I think what Frankfurter was  
20 addressing is the overall theory of what  
21 Marshall's approach was, that the -- the  
22 boundary theory, that this is the state and this  
23 is the Indian country and -- and, you know, they  
24 don't -- don't overlap at all.

25                  And Frankfurter's point is, well, it

1 turns out that they have to overlap quite a bit  
2 if you're going to deal with all these different  
3 factual situations that come up.

4 So the notion, which certainly has a  
5 lot to play in the arguments that -- that you  
6 have chosen to support, I think, is undermined  
7 quite a bit. I mean, I -- to the -- to the  
8 extent, I guess, you -- you agree that this is a  
9 preemption case, don't you?

10 MR. KNEEDLER: Well, of a -- of a  
11 sort, but that's not the way, you know, this  
12 Court has understood it. And I -- and I -- I --  
13 I -- it hasn't used that terminology. And I --  
14 I -- I want to take a moment to explain the  
15 origins of the modern understanding of this,  
16 which is this -- this Court's decision in  
17 Donnelly, which was a watershed on this point.

18 The argument was made there that  
19 the -- that the result in Draper and McBratney  
20 should control and that the state should have  
21 jurisdiction and not the federal government.

22 The argument -- or the result in -- in  
23 McBratney and Draper was not concurrent  
24 jurisdiction. The theory of those cases was  
25 that by admitting -- the act admitting those



1 states to the union had repealed 1152 and  
2 therefore allowed state jurisdiction to come  
3 into play.

4 And the Court said that expressly in  
5 Donnelly. It said that Draper and McBratney  
6 understood that the statehood acts had the --  
7 qualified the prior jurisdiction of 1152 by  
8 withdrawing from the federal government and then  
9 conferring on the state the jurisdiction to  
10 prosecute crimes by non-Indians against  
11 non-Indians.

12 The whole understanding of that case  
13 was it's one or the other. It's either  
14 exclusive jurisdiction or it's not exclusive  
15 jurisdiction. It's state jurisdiction.

16 And to your point, Justice Gorsuch,  
17 the Court in Donnelly made the very point that  
18 you made. It -- it said that in the Court's  
19 prior decision in -- in Kagama, which involved  
20 prosecution of Indians, the Court said that that  
21 was exclusively -- that was subject to federal  
22 jurisdiction because the states are often the --  
23 the hostile enemies of the Indians and also of  
24 the need to protect the Indians as the wards of  
25 the nation.

1 JUSTICE ALITO: Could you explain --

2 MR. KNEEDLER: The Court in

3 Donnelly --

4 JUSTICE ALITO: No, go ahead.

5 MR. KNEEDLER: May I just finish for a  
6 moment?

7 JUSTICE ALITO: Sure, yeah.

8 MR. KNEEDLER: The Court in Donnelly  
9 said that same principle applies perhaps a  
10 fortiori to a situation where you have a  
11 non-Indian committing a crime against an Indian  
12 because of the need to protect the wards of the  
13 nation. So, as Donnelly, I think, settled this  
14 question, and it -- it isn't just dicta. It was  
15 --

16 JUSTICE ALITO: Well, Mr. Kneedler,  
17 that's --

18 MR. KNEEDLER: -- the very reasoning  
19 that --

20 JUSTICE ALITO: -- that's all very  
21 abstract, but could you explain why exclusive  
22 federal jurisdiction is better for Indian  
23 victims of crimes by non-Indians than concurrent  
24 jurisdiction?

25 MR. KNEEDLER: It may or may not be.

1 And I think a lot of it has to do with  
2 perception. There are three sovereigns involved  
3 here. There's the federal government, the  
4 state, and the tribes and the tribal members.  
5 And they may not all see the same -- see the  
6 same on that. And that was the -- that was the  
7 purpose for Congress enacting Public Law 280, is  
8 it would allow the states --

9 JUSTICE ALITO: All right. Well --

10 MR. KNEEDLER: -- not the tribes --

11 JUSTICE ALITO: -- in -- in --

12 MR. KNEEDLER: -- to decide that.

13 JUSTICE ALITO: -- in more concrete  
14 terms, you have a crime -- alleged crime  
15 committed by a non-Indian against an Indian.

16 Why is it better for the Indian victim  
17 that the only recourse is federal prosecution  
18 with the limited resources that federal -- that  
19 federal law enforcement has rather than  
20 concurrent jurisdiction? Concretely, why is  
21 that worse?

22 MR. KNEEDLER: I --

23 JUSTICE ALITO: If the state goes  
24 first and the Indian victim or the tribe is not  
25 satisfied with the way that played out, we have

1 the dual sovereign doctrine, which we reaffirmed  
2 in Gamble, and the federal government can step  
3 in and prosecute.

4 Why -- why does that disadvantage an  
5 Indian victim? I don't really understand that.

6 MR. KNEEDLER: I -- I -- I'm not here  
7 arguing that it necessarily disadvantages any  
8 particular Indian victim. The United States  
9 prosecutes crimes in some states that have  
10 concurrent jurisdiction, but that concurrent  
11 jurisdiction exists because the relevant  
12 sovereigns have agreed to that regime.

13 JUSTICE ALITO: Well, this sounds  
14 awfully abstract. Now I think the most valuable  
15 information you can provide for me at least is  
16 an assessment of the situation right now in  
17 Oklahoma and whether -- whether the criminal  
18 laws are being adequately enforced right now and  
19 whether the current situation in the judgment of  
20 the United States is sustainable.

21 Suppose there Congress does nothing.

22 MR. KNEEDLER: Well, I --

23 JUSTICE ALITO: Is it -- is it a  
24 sustainable situation? Is the federal  
25 government going to be able to provide enough

1 federal agents, enough federal prosecutors,  
2 enough federal judges, enough federal  
3 courtrooms, enough federal probation officers,  
4 to handle the caseload that was previously  
5 handled by state law enforcement?

6 MR. KNEEDLER: Yeah, I'm -- I'm not  
7 here to minimize the challenge that has resulted  
8 from the decision in -- in McGirt. And the --  
9 the Justice Department has responded to that by  
10 providing resources to Oklahoma, 110 additional  
11 AUSA positions. Federal district court judges  
12 have been designated to serve in -- in the  
13 districts, magistrates have been brought in, FBI  
14 agents have been brought in.

15 JUSTICE ALITO: I mean, I --

16 MR. KNEEDLER: Those are -- those are  
17 temporary.

18 JUSTICE ALITO: Yeah, I appreciate all  
19 that, but I did have two questions. Is the  
20 situation right now adequate from the  
21 perspective of the United States --

22 MR. KNEEDLER: Not --

23 JUSTICE ALITO: -- and, if it is not,  
24 is it sustainable?

25 MR. KNEEDLER: The -- the situation

1 with respect to funding, there are -- there are  
2 two points, is there adequate funding and will  
3 that funding be permanent.

4 The Administration has requested an  
5 additional \$40 million for AUSAs and an  
6 additional 76 slots for FBI agents, additional  
7 federal marshals, addition -- additional money  
8 for the prisons.

9 It -- and Congress, in its political  
10 responsibility, we trust, will appropriate that  
11 money --

12 JUSTICE ALITO: Well, are you counting  
13 --

14 MR. KNEEDLER: -- to carry out the --

15 JUSTICE ALITO: -- are you -- are you  
16 counting on that? Are you counting on this  
17 being the permanent situation, or are you  
18 counting on an agreement between the state and  
19 the tribes? And, if it is the latter, what is  
20 the universe of agenda items in the negotiations  
21 between Oklahoma and the tribes? What are they  
22 --

23 MR. KNEEDLER: We -- we are not --

24 JUSTICE ALITO: -- negotiating about?

25 MR. KNEEDLER: -- we are not counting

1 on an agreement between the tribes and the  
2 states. If they agreed, that would be great.  
3 And, in fact, that's what Public Law 280  
4 contemplates. That's the statutory framework  
5 that -- that has been put in place.

6 But I think we have to assume Congress  
7 will live up to the responsibilities that -- to  
8 enable the Justice Department to do everything  
9 that is necessary. It -- it is prosecuting  
10 major crimes and violent crimes. It is  
11 prioritizing that, as it necessarily must. And  
12 as they -- as things hit their stride, then some  
13 of the less serious crimes will be prosecuted.  
14 It's not like they've been dropped. They're in  
15 the queue to be prosecuted as time comes along.

16 But my basic point is the Court should  
17 not rearrange this established jurisdictional  
18 regime because of -- of this moment in time in  
19 Oklahoma because it would unsettle  
20 jurisdictional arrangements throughout the  
21 country. And I -- one point I think hasn't  
22 gotten enough emphasis on that, there are a  
23 number of states that have chosen not to assume  
24 jurisdiction under Public Law 280 before 1968,  
25 and that would involve tribal consent.

1                   But the 1968 amendments to Public Law  
2 280 also provided for the retrocession of  
3 jurisdiction by a state to the federal  
4 government. And -- and I understand there have  
5 been 30 retrocessions of jurisdiction. But the  
6 statutory retrocession provision only provides  
7 for retrocession of jurisdiction that was  
8 acquired under Public Law 280 itself.

9                   And that -- two -- there are two  
10 lessens from that. One is it shows that it was  
11 necessary for Congress to do something to enable  
12 a state to acquire jurisdiction under Public Law  
13 280 in the first place over crimes by or against  
14 Indians. But it also shows that if the states  
15 were -- were now found to have inherent  
16 concurrent jurisdiction notwithstanding the  
17 statutory framework, the corpus juris of Public  
18 Law 280 and all those other statutes, it  
19 couldn't retrocede that because it would not  
20 have been jurisdiction acquired under Public Law  
21 280. And that would -- that would perhaps call  
22 into question the retrocessions that those  
23 states have already made --

24                   JUSTICE SOTOMAYOR: Counsel --

25                   MR. KNEEDLER: -- states that have



1 decided they didn't want the jurisdiction that  
2 had been offered to them under Public Law 280,  
3 which just reinforces the idea that Congress has  
4 made the allocation of jurisdiction in Indian  
5 country against the backdrop of Donnelly, where  
6 it's exclusive, to be the subject by sovereign  
7 choices by the United States, which can --  
8 Congress could pass a law conferring  
9 jurisdiction, taking into account the concerns  
10 we have, by the tribes and the states. That's  
11 fundamentally a political judgment about how  
12 that jurisdiction should be allocated.

13 JUSTICE ALITO: Well, if a state  
14 doesn't want concurrent jurisdiction, is there  
15 anything to prevent the state legislature from  
16 forswearing that?

17 MR. KNEEDLER: No, but that's not  
18 the -- I don't -- I don't think so, but I -- but  
19 -- but if the state has -- if the state has this  
20 jurisdiction by virtue of its statehood, then I  
21 don't know whether it would be responsible for  
22 the state to disavow it. It has jurisdiction.  
23 Doesn't it have to do something about it?

24 But what -- but what Congress enacted,  
25 again, a framework in which it's up to the

1       respective sovereigns to decide how Indian  
2       country should be governed and, therefore, with  
3       -- from the tribal perspective, it's not a  
4       question whether a particular Indian victim in a  
5       particular case would be better protected or  
6       not. There is a collective judgment to be made  
7       on behalf of the tribe with respect to its  
8       territory about how the sovereign authorities  
9       will be allocated.

10                I -- I mentioned --

11                JUSTICE SOTOMAYOR: Isn't that the  
12       point --

13                MR. KNEEDLER: I'm sorry.

14                JUSTICE SOTOMAYOR: -- which is  
15       Indians have their rights vis-à-vis their own  
16       government, their own Indian government, and  
17       they have expectations of what that reservation  
18       will do for them or not do for them, that --  
19       correct?

20                MR. KNEEDLER: Yes.

21                JUSTICE SOTOMAYOR: And that's the  
22       same view when you were saying, in treaties, the  
23       Cherokee Treaty here, says that the federal  
24       government will protect them, correct?

25                MR. KNEEDLER: Yes.

1                   JUSTICE SOTOMAYOR: And so, to the  
2 extent that a victim has expectations, that's  
3 the expectation, correct?

4                   MR. KNEEDLER: Yeah. So, as -- as a  
5 member of the tribe. And, yes, an important  
6 difference between the United States and the  
7 state, it's not just two -- two entities, both  
8 can prosecute. There is a trust relationship  
9 between the United States and a state -- excuse  
10 me, and a tribe and the tribal members. There  
11 is not a trust relationship between a state and  
12 the tribal members.

13                   And it's understandable, particularly  
14 given the history -- as -- as this Court said in  
15 *McGirt* itself, there is a long history of  
16 separating tribes and tribal members from the  
17 states because of the hostility. It's  
18 understandable that a tribe and its members  
19 would think it would be best to look to the  
20 trustee for protection and not necessarily the  
21 state.

22                   Now a tribe might make a different  
23 conclusion and consent to state jurisdiction  
24 because it thinks it's better for its tribal  
25 members, but that -- but that is the essence of

1 tribal self-government, to allow the people of  
2 the tribe to decide whether they want to consent  
3 to state jurisdiction or not.

4 JUSTICE SOTOMAYOR: Is there any  
5 source that I can look at that would tell me --  
6 everyone assumes that Oklahoma has been fully  
7 prosecuting over time -- well, we don't have a  
8 history, correct?

9 MR. KNEEDLER: Not -- not in the --  
10 not in these -- in the fee lands and -- and the  
11 reservation, no.

12 JUSTICE SOTOMAYOR: Right. So there  
13 -- there is an assumption that Oklahoma will  
14 actually expend the resources in doing this,  
15 correct?

16 MR. KNEEDLER: Well, I -- I --

17 JUSTICE SOTOMAYOR: It did before, and  
18 --

19 MR. KNEEDLER: Yes, and -- and I'm not  
20 in a position to assess how well Oklahoma did  
21 that --

22 JUSTICE SOTOMAYOR: No. No, but --

23 MR. KNEEDLER: -- before.

24 JUSTICE SOTOMAYOR: -- is there a  
25 source I can look at that would tell me that, in

1 fact, Oklahoma -- we know they prosecuted some  
2 of the people who are getting out now, although  
3 many of them have been prosecuted by the federal  
4 government. Do you have an idea of how many  
5 people have been let out without prosecution by  
6 the federal government?

7 MR. KNEEDLER: I -- I -- I don't  
8 recall, frankly, the precise number. It's, I  
9 think, not that great. I can supply the -- the  
10 figure that was given. I think it may be a  
11 hundred, a couple hundred, but I -- please don't  
12 hold me to that because I -- I'm not -- I don't  
13 --

14 JUSTICE SOTOMAYOR: That's what I've  
15 been given to understand.

16 MR. KNEEDLER: Right.

17 JUSTICE SOTOMAYOR: So there's nothing  
18 to suggest that the number is going to be as  
19 large as -- as is being thrown around by the  
20 Petitioner?

21 MR. KNEEDLER: Right. I also wanted  
22 to mention a couple of the other Court's  
23 decisions. It's not just Donnelly where --  
24 where the reasoning depended on this  
25 understanding that the -- that the statute is

1 exclusive. It was also true in Williams versus  
2 United States, where the Court specifically said  
3 that the United States, rather than the State of  
4 Arizona, has jurisdiction. That's not  
5 concurrent. That's exclusive. And there was a  
6 long footnote recounting what the Court held in  
7 Donnelly and said there may have been some  
8 confusion about that. But, in Donnelly itself,  
9 the Court said we have now given a full  
10 evaluation of this and this is our conclusion,  
11 that the principle of McBratney and Draper does  
12 not apply and, therefore, the -- the federal  
13 government has the exclusive jurisdiction.

14 And that was particularly relevant in  
15 that case because the question in -- in Williams  
16 versus United States was the application of the  
17 Assimilative Crimes Act to the particular crime.  
18 And the Assimilative Crimes Act, of course,  
19 brings state law in not of its own force but  
20 because it's assimilated. And the Court was --  
21 that passage in the Court's opinion was  
22 explaining why the -- why state law was relevant  
23 there, because it was assimilated into exclusive  
24 federal jurisdiction.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel.

2 Justice Thomas, anything further?

3 Justice Breyer? Nothing?

4 Justice Sotomayor?

5 Justice Kagan?

6 Justice Gorsuch? No?

7 Justice Kavanaugh?

8 JUSTICE KAVANAUGH: Just one. On the  
9 -- on the statutory text, if we just took the  
10 statutory text and nothing else and your  
11 position on how to interpret the statutory text  
12 were correct, why would a state have  
13 jurisdiction over non-Indian-on-non-Indian crime  
14 in Indian country?

15 MR. KNEEDLER: Well, what -- what the  
16 Court held in -- in *McBratney* and *Draper* was  
17 that the Statehood Act had repealed that. Not  
18 -- it's not that the text itself doesn't --  
19 doesn't reach it. It's that *Draper* and  
20 *McBratney* held that it -- it had been -- it had  
21 been repealed with respect to that category.

22 So there is a symmetry in the statute  
23 as a result. Indian-on-Indian crimes are  
24 excluded by the second paragraph.  
25 Non-Indian-by-non -- upon-non-Indian crimes are

1 excluded by virtue of Draper and McBratney.

2           And in the middle, where you have  
3 crimes by non-Indians against Indians or the  
4 other way around, the very core of the  
5 relationship between Indians and non-Indians  
6 that Congress was given exclusive responsibility  
7 for from the founding forward, that remains  
8 exclusive federal jurisdiction.

9           And this Court's decision in *Negonsott*  
10 said that it's the text and the Court's  
11 decisions that had rendered the Major Crimes Act  
12 jurisdiction exclusive, and it relied only on  
13 the word "exclusive." We had that -- we have  
14 that same point here.

15           And if I could make one other textual  
16 point because I think this is important. My  
17 friend on the other side has several times  
18 relied on language in *Wilson* and also in  
19 *Donnelly* as -- as saying the word "exclusive"  
20 refers not to the nature of the jurisdiction but  
21 to the laws imported, and I -- I -- I think he's  
22 misreading that language.

23           The argument in both *Donnelly* and  
24 *Wilson*, it was a somewhat convoluted argument,  
25 but it was that the federal government as a



1 whole does not have exclusive jurisdiction over  
2 those particular reservations, like in Donnelly,  
3 it was the state has created a school district,  
4 therefore, the federal government doesn't have  
5 exclusive jurisdiction.

6           Therefore, the argument was the  
7 federal criminal statute can't apply because  
8 it's being applied in an area where there is not  
9 exclusive jurisdiction. And the Court said no,  
10 the -- the -- the phrase you're talking about is  
11 not talking about the -- the -- the general  
12 nature of the jurisdiction of -- of an Indian  
13 reservation. It's talking about the laws that  
14 will be applied in -- in that area.

15           And -- and, here, that's exactly what  
16 we're saying. The law that will be applied in  
17 Indian country, whether or not it's exclusive  
18 for other purposes, is --

19           JUSTICE KAVANAUGH: Thank -- thank  
20 you.

21           MR. KNEEDLER: -- the enclave law,  
22 which is itself exclusive.

23           CHIEF JUSTICE ROBERTS: Justice  
24 Barrett?

25           Thank you, Mr. Kneedler.

1                   Rebuttal, Mr. Shanmugam.

2                   REBUTTAL ARGUMENT OF KANNON K. SHANMUGAM  
3                   ON BEHALF OF THE PETITIONER

4                   MR. SHANMUGAM: Thank you, Mr. Chief  
5 Justice. I'd like to cover the relevant  
6 preemption principles, talk a little bit about  
7 the cases, and then finally talk about the  
8 practical consequences.

9                   My friend, Mr. Kneedler, says that  
10 this is "preemption of a sort." Well, it can't  
11 be that. It has to be some form of preemption  
12 that this Court has recognized, and it seems to  
13 us that there are three possibilities.

14                   The first is obviously conflict  
15 preemption. And my friend, Mr. Schauf, talked  
16 only about the General Crimes Act. With respect  
17 to my friend, Mr. Kneedler, we do think that  
18 this Court's decision in Wilson resolves this  
19 issue for the simple reason that it says in the  
20 second half of the relevant sentence that the  
21 phrase "within the sole and exclusive  
22 jurisdiction of the United States" is only used  
23 in the description of the laws which are  
24 extended to it.

25                   We think that that's correct as a

1 matter of statutory interpretation because the  
2 statute talks only about the general laws of the  
3 United States extending to Indian country. And  
4 to the extent that my friend, Mr. Schauf, talks  
5 about a background principle in the soil, the  
6 principle at issue is a constitutional  
7 principle. It's the principle from the enclaves  
8 clause in Article I, Section 8.

9           And I think it would be quite strange,  
10 given the structure of that provision, to say  
11 that it incorporates that principle as well.  
12 And if it did, it would suggest that McBratney  
13 itself was incorrectly decided.

14           And to the extent that finding no  
15 footing in the text of the General Crimes Act my  
16 friends turn to the Major Crimes Act, we think  
17 that the proper way to construe the Major Crimes  
18 Act is as indicating that an Indian who commits  
19 a crime -- a crime that is enumerated is subject  
20 to prosecution within the exclusive jurisdiction  
21 of the United States, not simply that such an  
22 individual is subjected to the same punishment  
23 as an individual who commits a crime within  
24 federal enclaves.

25           This Court's decisions in John and

1 Negonsott relied on the text of the statute,  
2 albeit without much explanation, and that's even  
3 clearer when you look at the earlier versions of  
4 the two statutes, which we cite in our reply  
5 brief.

6 As to Public Law 280, the argument  
7 that my friend, Mr. Schauf, is making today  
8 really does sound in field preemption. And I  
9 would respectfully submit that Public Law 280  
10 comes nowhere near the standard for field  
11 preemption, which requires a framework of  
12 regulations so comprehensive that Congress left  
13 no room for the states to supplement it and a  
14 federal interest that is so dominant that the  
15 federal system can be assumed to preclude state  
16 laws. That's the Arizona versus United States  
17 test. And that would be a very odd test to say  
18 is satisfied in an area where the state has  
19 presumptive predominant police power.

20 Finally, with regard to balancing, the  
21 language on which Mr. Schauf relied from  
22 Mescalero talks about how the ordinary  
23 preemption framework often doesn't operate where  
24 there's a tribal interest.

25 But what Mr. Schauf omits is that the

1 Court says that when that is true, the Court  
2 resorts to balancing. And we haven't heard a  
3 lot today about how Respondent could prevail  
4 under that balancing test, and I would  
5 respectfully submit that that is because he  
6 cannot.

7           With regard to the cases, I would just  
8 say with regard to Donnelly that my friend, Mr.  
9 Kneedler, said that Donnelly settled this  
10 question. If that's true, I'm a little bit  
11 perplexed as to how the federal government could  
12 have taken the opposite view on the question  
13 presented in the OLC opinion and thereafter for  
14 a time and characterized the language in earlier  
15 cases as dicta.

16           But the one thing we can be certain  
17 about about Donnelly is that it did not say that  
18 the states lacked jurisdiction. Donnelly simply  
19 said that the federal government had  
20 jurisdiction. It said that the question was  
21 whether or not the states had "undivided  
22 authority" over that category of offenses. And  
23 in doing so, the Court repeated and endorsed the  
24 language from Wilson to which I referred  
25 earlier.

1           Finally, with regard to the practical  
2 consequences here, my friend, Mr. Kneedler, said  
3 that he was not here to minimize the problem on  
4 the ground in Oklahoma, but he was not exactly  
5 eager to tell you about the problem.

6           And I think that the problem with  
7 respect is greater than he suggested. He  
8 referred to a number for the number of cases  
9 where convictions have been overturned in the  
10 wake of McGirt, but the far bigger problem is  
11 the ongoing prospective law enforcement problem  
12 in the State of Oklahoma.

13           And contrary to Mr. Kneedler's  
14 suggestion that cases are simply being held in  
15 the queue, I would refer the Court to DOJ's  
16 fiscal year 2023 budget request where DOJ said,  
17 and I'm quoting, "As enforcement of nonviolent  
18 crime is relatively low, Oklahoma communities  
19 may see a surge in such crimes, and many people  
20 may not be held accountable for their criminal  
21 conduct due to resource constraints."

22           So, to answer your question, Justice  
23 Alito, is this a sustainable situation, I would  
24 respectfully submit that it is not a sustainable  
25 situation, and it would be a cruel irony if the

1 consequence of this Court's decision in McGirt  
2 is less protection for the tribal victims of  
3 serious crimes.

4 We would submit that the judgment of  
5 the Oklahoma Court of Criminal Appeals should be  
6 reversed. Thank you.

7 CHIEF JUSTICE ROBERTS: Thank you,  
8 counsel.

9 Mr. Kneedler, I note for the record  
10 that this is the 150th case in which you have  
11 presented oral argument before the Court, and on  
12 behalf of the Court, I thank you for your  
13 skilled advocacy over the years.

14 (Whereupon, at 12:11 p.m., the case  
15 was submitted.)

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