No. 21-429

IN THE

Supreme Court of the United States

STATE OF OKLAHOMA,

Petitioner,

v.

VICTOR MANUEL CASTRO-HUERTA,

Respondent.

On Writ of Certiorari to the Oklahoma Court of Criminal Appeals

BRIEF OF *AMICI CURIAE* THE ENVIRONMENTAL FEDERATION OF OKLAHOMA, INC., OKLAHOMA FARM BUREAU LEGAL FOUNDATION, OKLAHOMA CATTLEMEN'S ASSOCIATION, AND THE PETROLEUM ALLIANCE OF OKLAHOMA IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

INTERESTS OF *AMICI CURIAE*

Amici, the Environmental Federation of Oklahoma, Inc., Oklahoma Farm Bureau Legal Foundation, Oklahoma Cattlemen's Association, and The Petroleum Alliance of Oklahoma, support the State of Oklahoma's Petition seeking reversal of the Oklahoma Court of Criminal Appeals' decision in *Castro-Huerta v. Oklahoma*, No. F-2017-1203 (Ok. Ct. Crim. App. Apr. 29, 2021).[1] Oklahoma persuasively demonstrates that it has authority to prosecute non-Indians who commit crimes against Indians[2] in "Indian country."[3] *See generally* Brief for Petitioner ("Oklahoma Br."). Amici support Oklahoma's position and submit this brief *amicus curiae* because the issue presented affects effective criminal law enforcement in Eastern Oklahoma and raises fundamental questions whether States are presumed to lack authority over non-Indian relationships with Indians in "Indian country." Such a presumption is contrary to this Court's repeated teachings: first, that States are presumed to have jurisdiction over non-Indians and their relationships with Indians, even within reservation boundaries; and second, that Native American Tribal Nations

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[1] Both Parties have filed blanket consents to the filing of *amicus* briefs. Per February 9, 2022, communications, Respondent's Counsel of Record also provided specific consent for this filing. No counsel for a party authored this brief in whole or in part. No person other than Amici, their members, or their counsel made a monetary contribution to its preparation or submission.

[2] Amici use the term "Indian" to describe persons subject directly to 18 U.S.C. § 1151 (*i.e.*, having "some quantum of Indian blood . . . [and] a member of, or affiliated with, a federally recognized tribe," *see United States v. Zepeda*, 792 F.3d 1103, 1114 (9th Cir. 2015)), and refer to all others as "non-Indians."

[3] Amici use the term "Indian country" as that term is defined in 18 U.S.C. § 1151.

("Tribes") are presumed to lack criminal jurisdiction over non-Indians and their relationships with Indians. Under either presumption, any party contending a State lacks authority over non-Indians within its borders bears the burden of rebutting the presumption. The Oklahoma Court of Criminal Appeals, however, misinterpreted federal statutory law and improperly extended *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), to conclude that States are presumed to lack jurisdiction over non-Indians, ousting presumed State jurisdiction, and replacing it entirely with either federal or, in limited statutorily authorized circumstances, tribal jurisdiction. The decision below is in error because, at most, state and federal courts have concurrent jurisdiction over non-Indian crimes against Indians, and tribal courts simply do not have criminal jurisdiction over non-Indians. If left unchecked, the rationale of the decision below threatens to negate this Court's settled presumptions with respect to civil jurisdiction as well.

The impact of the Oklahoma Court of Criminal Appeals' decision, like *McGirt*'s, is not limited to the Creek or Cherokee Reservations. The *McGirt* majority held the Creek Reservation was never disestablished, despite over a hundred years of understandings to the contrary, thereby requiring federal, not state, prosecution of "major"[4] crimes by an Indian. The decision below extends the requirement of federal, not state, prosecution to any crime, whether or not "major," committed by a non-Indian against an Indian within the purported Cherokee Reservation. Other Oklahoma courts have held *McGirt* compels similar

[4] The Indian Major Crimes Act, 18 U.S.C. § 1153, lists enumerated crimes required to be prosecuted exclusively by the United States. This brief addresses the enumerated crimes as "major."

conclusions the historic reservations of the Choctaw, Seminole, and Chickasaw Nations, the historic reservations of all Five Civilized Tribes ("Five Tribes") in Oklahoma purportedly remain extant (the "Five Tribes Area").[5] As a result, since *McGirt* was decided, more than 19 million acres of Oklahoma in which nearly 2 million people reside have been held to be "Indian country," throwing the criminal *and civil* jurisdictional status of nearly the entire eastern half of the State into doubt. The decision below extends that doubt to all crimes, including non-major crimes, by non-Indian against Indians.

McGirt profoundly affects Amici and the Native American and non-Indian members they represent, Oklahoma farmers, ranchers, developers and transporters of oil and natural gas and other energy sources, and business owners, who live, work, own businesses in, and have helped develop Oklahoma. While acknowledging the unique, and sometimes complicated, histories of the Five Tribes and the former Oklahoma Indian Territory, before *McGirt,* none of Amici or their members had ever believed the private, fee lands on which they lived, worked, or built farms or businesses lay within the boundaries of a current Native American reservation. The decision below expands the ouster of state criminal jurisdiction to all crimes by non-Indians against Indians, and is yet a further extension of *McGirt*'s impact on Amici's settled criminal jurisdictional expectations. Moreover,

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[5] *See Sizemore v. State,* 485 P.3d 867 (Okla. Crim. App. 2021), cert. denied, No. 21-326 (Jan. 24, 2022) (Choctaw)*; Grayson v. State*, 485 P.3d 250 (Okla. Crim. App. 2021), cert. denied, No. 21-324 (Jan. 24, 2022) (Seminole); *Bosse v. State*, 499 P.3d 771 (Okla. Crim. App. 2021), cert. denied, No. 21-6443 (Feb. 22, 2022) (Chickasaw).

the decision threatens to affect State civil authorities presumed to apply absent contrary statutory intent.

Amici submit this brief to draw this Court's attention not only to the severe law and order implications arising from the decision below but also to its effect beyond criminal jurisdiction, including implications for the State's taxing, adjudicatory, and regulatory jurisdiction over non-Indians and their conduct on fee and other lands, authorities now at risk of being supplanted by Tribal law, regulation, and courts.

A. Environmental Federation of Oklahoma, Inc. ("EFO")

EFO is a non-profit corporation providing Oklahoma companies with a voice in the formulation of state and federal environmental laws, regulations, and policies. Its membership includes over eighty members. The decision below undermines EFO members' interests in effective law and order and predictable regulation, consistent with their investments in reliance upon State regulation.

B. Oklahoma Farm Bureau Legal Foundation

Oklahoma Farm Bureau Legal Foundation is a non-profit foundation incorporated in 2001 that supports the rights and freedoms of farmers and ranchers. The Foundation's sole member is Oklahoma Farm Bureau, Inc. ("OKFB"), an independent, nongovernmental, voluntary organization of farm and ranch families created in 1942, with about 84,000 member families statewide, united for the purpose of analyzing their problems and formulating action to achieve educational improvement, economic opportunity and social advancement. OKFB has affiliated county organizations in all 77 Oklahoma counties. OKFB is concerned

about private property rights, potential tribal taxation and regulation, and preserving effective law and order.

C. Oklahoma Cattlemen's Association ("OCA")

OCA, a non-profit association, chartered on March 6, 1950, by a small group of cattle raisers in Seminole County, today includes thousands of cattle raising families in all 77 Oklahoma counties. OCA's primary work on behalf of its members promotes private property rights, natural resource stewardship, and common sense business policy. The decision below divests local law enforcement over non-Indian perpetrators in a broad category of cases and threatens to further destabilize law OCA's members, their families and businesses rely upon to new and unplanned-for jurisdictional burdens and an uncertain law and order regime.

D. The Petroleum Alliance of Oklahoma (the "Alliance")

The Alliance is Oklahoma's largest oil and natural gas trade association and is the only trade association in Oklahoma that represents every segment of the oil and natural gas industry, which is the largest private-sector driver of Oklahoma's economy, allowing the industry to speak with one voice when advocating for the interests of its members, landowner stakeholders, and host communities. Members of the Alliance own or operate oil and gas operations in the counties within the Five Tribes Area. The decision below compounds the effect of *McGirt*, and decisions following it, threatening to impair the Alliance member's interests in effective law enforcement, stable and predictable regulation and taxation, and a business environment subject to comprehensive and effective

law and order, consistent with the expectations supporting their investments.

SUMMARY OF ARGUMENT

The decision below represents a fundamental misreading of a century and a half of federal law. It is simply erroneous in concluding that the General Crimes Act, 18 U.S.C. § 1152, mandates, or that this Court's decisions hold, the State lacks police power authority over non-Indians in Indian country, as to crimes against Indians.

Amici's overriding interest in working and living in an area subject to effective and even-handed law enforcement and judicial process would be profoundly impaired by a decision tying the hands of the State, which has been the primary authority addressing crimes by non-Indians, through state and local law enforcement, in state and municipal courts, and in other appropriate tribunals.

Neither the General Crimes Act, nor decisions of this Court, require disabling State law-based authorities from protecting Amici's Native American members, or the community at large, from non-"major" crimes by non-Indians against Indians. Deep and long-standing Congressional and judicial authority consistently demonstrate the viability of State law and order jurisdiction over the actions of all non-Indians within State borders. *See* Points I.A., I.B., *infra.*

The holding below, ousting State authority over non-Indians' crimes against Indians, deprives Indians in Eastern Oklahoma of law enforcement resources needed for their protection. *See* Point II, *infra*.

From the standpoint of the civil jurisdictional implications of the question presented, this Court's

cases hold states presumptively have police power and related civil jurisdiction over non-Indians on all lands within the State; within Indian country, that presumption may be overcome by only federal statutory command or overriding federal or tribal interests under preemption standards of *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), and related cases. Alternatively, the presumption State law will apply pertains to on-reservation fee lands, *see Montana v. United States*, 450 U.S. 544 (1981), and in certain situations to tribal lands, *see Nevada v. Hicks*, 533 U.S. 353, 374 (2001), though it may be overcome by evidence of a non-Indian's express or implied consent to tribal jurisdiction or by extreme effects of non-Indians' conduct on the Tribal community as a whole, under *Montana's* two recognized "exceptions." *See* Point I.C, III, *infra*. Affirmance of the decision below, ousting State criminal authority over non-Indians without federal statutory command, threatens to upset that fundamental understanding presuming State authority over non-Indians within Indian country. The Court should reverse.

ARGUMENT

I. FEDERAL LAW DOES NOT DIVEST STATES OF CONCURRENT JURISDICTION TO PROSECUTE NON-INDIANS WHO COMMIT CRIMES AGAINST INDIANS IN INDIAN COUNTRY.

A. Concurrent State, Federal, And, As Applicable, Tribal Authority Is Essential To Effective And Efficient Law Enforcement In Eastern Oklahoma.

The Court of Criminal Appeals erred in concluding either the General Crimes Act or this Court's decisions

have divested States of jurisdiction over all crimes committed by non-Indians within "Indian country." This issue, and its nationwide implications, warrant this Court's immediate attention, and reversal. Amici, as community members, business owners, and proponents of economic development within the State, share the State's fundamental concerns arising from implications of the decision below given *McGirt*'s already extreme effects on criminal jurisdiction, affecting thousands of cases and leaving federal prosecutors "overwhelmed." *See* Oklahoma Br. 7-9. Before *McGirt*, Oklahoma state courts exercised criminal jurisdiction over crimes by non-Indians, specifically including crimes occurring in the Five Tribes Area. *Id.* Now however, "[n]umerous crimes are going uninvestigated and unprosecuted, endangering public safety." *Id.*

In the decision below, the Oklahoma Court of Criminal Appeals rejected Oklahoma's position that "Oklahoma and the federal government have concurrent jurisdiction over all crimes committed by non-Indians in Indian country, including Castro-Huerta's case." Pet. App. 4a. The lower court's conclusion, that the State lacks concurrent jurisdiction over Mr. Castro-Huerta's criminal conduct, exacerbates the jurisdictional divestiture *McGirt* imposed. If its conclusion on this issue stands, only the federal government would have authority to prosecute, not just Major Crimes Act-defined crimes, but essentially all current state law crimes committed by non-Indians against Indians in "Indian country."[6] By virtue of *McGirt* and Oklahoma cases extending its holding to all Five Tribes Areas, "Indian country" now encom-

[6] *See Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 195 (1978) (Indian tribes generally do not have criminal jurisdiction over non-Indians).

passes nearly 43% of the State and nearly 2 million non-Indian Oklahomans. *See* Oklahoma Br. 6.

As the State's brief demonstrates, the decision below is unsupportable either as an interpretation of the General Crimes Act or under this Court's decisions recognizing a presumption States retain authority over non-Indians within "Indian country" absent matter-specific federal preemption under *Bracker* and related cases or the narrow exceptions of *Montana*, 450 U.S. at 540-41, and its progeny, *see, e.g.*, *Hicks,* 533 U.S. at 374 (tribal court lacks authority over Tribal member's tort claims arising from state officials' investigation of Indian's off-reservation violations of state law on tribal lands); *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 186-87 (1989) (State can impose oil and gas severance tax on oil and gas produced from on-reservation Tribal oil and gas leases). As this Court has acknowledged: "State sovereignty does not end at a reservation's border," unless "stripped by Congress." *Hicks*, 533 U.S. at 361, 365.

B. The General Crimes Act Does Not Divest States Of Concurrent Jurisdiction Over Non-Indian Perpetrators.

This Court has acknowledged that authority to prosecute crimes in "Indian country," as defined by 18 U.S.C. § 1151, is governed by a "complex patchwork of federal, state, and tribal law." *Negonsott v. Samuels*, 507 U.S. 99, 102 (1993). Background underlying General Crimes Act jurisdiction begins with the concepts outlined in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 195 (1978). After an extensive review of federal common law and statutory history, *Oliphant* concluded Congress and federal courts from the early Nineteenth Century to present have understood

Tribes generally lack criminal jurisdiction over non-Indians. *Id.* at 196-97 ("The effort by Indian tribal courts to exercise criminal jurisdiction over non-Indians, however, is a relatively new phenomenon. And where the effort has been made in the past, it has been held that the jurisdiction did not exist."). Conversely, this Court has long held, through admission to the Union under the Equal Footing provision of the Constitution,[7] States have the power to prosecute crimes committed by non-Indians against non-Indians in Indian country. *See, e.g., United States v. McBratney*, 104 U.S. 621, 622 (1882). Importantly and in stark contrast, the Major Crimes Act has been held to provide the federal government has exclusive authority to prosecute certain enumerated felonies committed *by Indians* in Indian country. *See* 18 U.S.C. § 1153. This Court has never held States generally lack authority to prosecute non-Indians as to crimes within Indian country.

The conclusion State criminal authority over non-Indians is unaffected by the General Crimes Act[8] is evident from, and fully supported by, a straightforward textual analysis of the key statutory provisions of the General Crimes Act, especially in contrast with the text of the subsequently enacted Major Crimes Act. The operative text of the General Crimes Act, 18 U.S.C. § 1152, provides only:

> Except as otherwise expressly provided by law, the general laws of the United States

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[7] U.S. Const., Art. IV, § 3, cl. 1.

[8] *See* Act of March 3, 1817, 3 Stat. 383; Act of June 30, 1834, 4 Stat. 733, as amended by Act of March 27, 1854, 10 Stat. 269; *see also* Trade and Intercourse Act of 1790, 1 Stat. 137 (offenses by non-Indians against Indians).

> as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, ***shall extend to*** the Indian country.

(Emphasis added).[9] This language demonstrates that the General Crimes Act does not divest the State of jurisdiction to prosecute Mr. Castro-Huerta.

As the Court explained in *Donnelly*, the only words suggesting any form of exclusivity, "sole and exclusive jurisdiction of the United States" as "employed in § 2145, Rev. Stat., [the General Crimes Act predecessor] . . . are used to describe the laws of the United States which, by that section, are extended to the Indian country." *Donnelly v. United States*, 228 U.S. 243, 268 (1913). The phrase does not concern the separate question of who has prosecutorial authority within Indian country, much less imply any exclusive authority, or rebut concurrent State and federal jurisdiction, to prosecute non-Indians. *See also Ex Parte Wilson*, 140 U.S. 575, 578 (1891).

The phrase "except as otherwise expressly provided by law," in turn, refers to federal laws that exempt Indian country from the reach of federal criminal law in certain circumstances. It does not mean that state criminal law does not apply in Indian country unless a treaty or act of Congress expressly provides for that result. *See, e.g.*, *New York ex rel. Ray v. Martin*, 326

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[9] The 1834 predecessor to the General Crimes Act provided: "That so much of the laws of the United States as provides for the punishment of crimes committed within any place within the sole and exclusive jurisdiction of the United States, shall be in force in the Indian country: *Provided*, The same shall not extend to crimes committed by one Indian against the person or property of another Indian." Act of June 30, 1834, § 25, 4 Stat. 733.

U.S. 496, 498-501 (1946). There is simply no suggestion in the text of the General Crimes Act that Congress intended to divest States of all jurisdiction over non-Indian "offenses" against Indians in Indian country–or render any such jurisdiction exclusively federal.

In contrast, the Major Crimes Act, 18 U.S.C. § 1153, provides for exclusive federal jurisdiction over the serious crimes ***by Indians*** against the person or property of an Indian "or other person," as evidenced by the crime at issue in *McGirt*:

> (a) Any ***Indian*** who commits against the person or property of another Indian ***or other person*** any of the following offenses, namely, murder, manslaughter, kidnapping, maiming, a felony under chapter 109A, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury (as defined in section 1365 of this title), an assault against an individual who has not attained the age of 16 years, felony child abuse or neglect, arson, burglary, robbery, and a felony under section 661 of this title within the Indian country, ***shall be subject to the same law and penalties*** as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.

(Emphasis added.) *See Keeble v. United States,* 412 U.S. 205, 209 (1973) (The Major Crimes Act is "a carefully limited intrusion of federal power into the otherwise exclusive jurisdiction of Indian tribes to punish Indians for crimes committed on Indian land."). The General Crimes Act, by comparison, reflects no intrusion on the State's recognized authority to prosecute crimes committed by non-Indians.

In *Surplus Trading Co. v. Cook*, 281 U.S. 647, 651 (1930), the Court noted "[Indian] reservations are part of the State within which they lie and her laws, civil and criminal, have the same force therein as elsewhere within her limits, save that they can have only restricted application to Indian wards." Moreover, in *New York ex rel. Ray*, 326 U.S. at 500, the Court described its prior decisions as standing for "the proposition that States, by virtue of their statehood, have jurisdiction over such crimes [by non-Indian against a non-Indian in Indian country] notwithstanding [the General Crimes Act]."

Neither the General Crimes Act, nor the Major Crimes Act, nor any other federal statute specifically addresses prosecution of non-Indians for crimes against Indians within Indian country, much less expressly or impliedly forecloses such state prosecutions.[10]

Interpreting the General Crimes Act must take into account *Oliphant*'s holding, 435 U.S. at 197-201, that federal common law and statutory history reflect that Congress and the federal courts have at all times understood Tribes generally lack criminal jurisdiction over non-Indians. This Court subsequently extended *Oliphant* to exclude tribal criminal jurisdiction over non-member Indians, again taking into account

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[10] The State's brief addresses thoroughly that statutes, like Public Law 280, Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588, and predecessor State-specific statutes, intended to provide a state may assume broad authority over crimes "by or against Indians," Oklahoma Br. 29-33, do not expressly or impliedly negate pre-existing State authority over such crimes. Similarly, neither the Indian Commerce Clause nor the Treaty Clause support ouster of State original criminal authority. Oklahoma Br. 35-36.

historic treatment. *See Duro v. Reina*, 495 U.S. 676, 697-98 (1990). Though Congress later enacted legislation that extended Tribal jurisdiction to non-member Indians by specific statute, *see* Public L. 101-511, § 8077(b) (amending 25 U.S.C. § 1301 (2) to authorize tribal "criminal jurisdiction over all Indians"), it ***did not*** extend tribal authority to crimes by non-Indians against Indians. These decisions and Congress' limited legislation following *Duro* reinforce that the conclusion State and federal authorities may have concurrent jurisdiction would not undermine recognized tribal criminal jurisdiction.

These authorities require the conclusion the General Crimes Act did not divest States of prosecutorial authority over crimes by non-Indians against Indians, leaving concurrent State and federal authority to prosecute such crimes. Otherwise, gaping holes would have existed, and will continue to exist, in the fabric of criminal jurisdiction in Indian country. That said, even within the scope covered by the Major Crimes Act, facts on the ground reflect the federal government lacks the resources to prosecute (or even exercise reasonable prosecutorial discretion as to) the cases over which *McGirt* foreclosed State jurisdiction over "major" crimes. The decision below would further overtax federal resources.

The archived United States Department of Justice's Criminal Resource Manual Section No. 679 (1974) confirms the textual analysis that State jurisdiction over non-Indian crimes committed in Indian country remains in place following adoption of the General Crimes and Major Crimes Acts:

> Because of substantial non-Indian populations on many reservations crimes wholly between non-Indians are left to state prosecu-

> tion. It is, moreover, significant that historical practice has been to regard *United States v. McBratney*, 104 U.S. 621 (1882), as authority for the states' assertion of jurisdiction with regard to a variety of "victimless" crimes commitment by non-Indians on Indian reservations.

See U.S. Dept. of Justice Criminal Reserve Manual Section No. 679 (1974), available at https://www.justice.gov/archives/jm/criminal-resource-manual-679-major-crimes-act-18-usc-1153; citing Manual Section 683); *see also* U.S. Department of Justice Office of Legal Counsel Memorandum, 3 Op. Off. Legal Counsel, 111, 117-120 (1979) ("DOJ Memorandum").

The DOJ Memorandum followed an earlier 1978 opinion regarding the question whether state courts had jurisdiction over "victimless" crimes committed by non-Indians on Indian reservations. *Id*. at 111. The earlier opinion concluded that "States have exclusive jurisdiction with regard to victimless offenses committee by non-Indians." *Id*. The DOJ Memorandum "carefully reexamined that opinion," addressed the legal issue with representatives of the Departments of Justice and Interior, and considered the "thoughtful submission prepared by the Native American Rights Fund on behalf of the Litigation Committee of the National Congress of American Indians." *Id*. Based on that considered re-examination of the issue, the Office of Legal Counsel "conclude[d] that our earlier advice fairly summarizes the essential principles." *Id*.

In its analysis, the Office of Legal Counsel also concluded there was a "good argument" that States "may nevertheless be regarded as retaining the power as independent sovereigns" to punish those victimless crimes committed by non-Indians that "pose[] a direct

and immediate threat to Indian persons, property or specific tribal interests." *Id*. at 113. Although the DOJ Memorandum concluded "a concrete and particularized threat to the person or property of an Indian or to specific tribal interests (beyond preserving the peace of the reservation) is necessary before Federal jurisdiction can be said to attach . . . ," *id*. at 116, while distinguishing Major Crimes Act jurisdiction, it declined to conclude attaching federal jurisdiction meant State jurisdiction is ousted.[11]

But, as an historical matter, the weight of authority suggests that, with regard to non-major crimes, States "have a continuing interest in the prosecution of offenders against state law even while Federal prosecution may at the same time be warranted." *Id*. (citing *State v. McAlheny*, 17 S.E. 2d 352 (1941); *Oregon v. Coleman*, 1 Ore. 191 (1855); *United States v. Barnhart*, 22 F. 285, 291 (D. Ore. 1884)). These cases span the historical period from 1855 to 1940.

Importantly,

> Although it would mean that § 1152 could not be uniformly applied to provide for exclusive Federal jurisdiction in all cases of interracial crimes, ***a conclusion that both Federal and State jurisdiction may lie***, where conduct on a reservation by a non-Indian presenting a direct and immediate threat to an Indian person or property constitutes and offense against the laws of each sovereign,

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[11] "[W]e believe that, despite Supreme Court *dicta* to the contrary, it does not necessarily follow that, where an offense is stated against a non-Indian defendant under Federal law, State jurisdiction must be ousted." *Id*. at 117.

could not be criticized as inconsistent or anomalous.

DOJ Memorandum at 118-19 (emphasis added).[12]

The briefs in opposition to the Petition for Certiorari here, while advancing certain authority affirming federal jurisdiction over non-Indian crimes against Indians, sometimes containing dicta suggesting States may lack such jurisdiction, identify no holdings invalidating such State jurisdiction. *See Donnelly*, 228 U.S. at 268 (affirming federal jurisdiction over crimes by non-Indian against Indian, but not addressing State authority); *Williams v. United States*, 327 U.S. 711, 714 (1946) (application of Assimilated Crimes Act in prosecution by United States); *United States v. Wheeler*, 435 U.S. 313, 324-25 (1978) (addressing double jeopardy standards in successive tribal and federal prosecution, while observing the General Crimes Act "made federal enclave criminal law generally applicable to crimes in 'Indian country'"); *Williams v. Lee*, 358 U.S. 217, 220, n.5 (1959) (addressing whether suit for debt should proceed in State or Tribal court, while referencing the Major Crimes Act). The foregoing cases were cited in opposition to the Petition here in the Brief of the Cherokee Nation in Support of Respondent, 17-18. None of those cases, nor any other case Amici's research disclosed,

[12] The United States has subsequently revised the position stated in the Office of Legal Counsel memorandum, U.S. Br. at 6*, Arizona v. Flint,* 492 U.S. 911 (1989) (No. 88-603), though still recognizing concurrent federal and State jurisdiction could "further the federal and tribal interests in protecting Indians and their property against the actions of non-Indians." It has taken a similar position in related post-*McGirt* litigation. *See* U.S. Br. at 26 n.9*, Oklahoma v. Bosse,* 141 S. Ct. 2696 (2021) (No. 20A161). Those briefs rely on dictum in this Court's cases, lacking square holdings ousting State jurisdiction.

identified decisions after General Crimes Act enactment that contradict the Office of Legal Council's conclusion that a decision affirming federal and state concurrent jurisdiction over non-Indians' crimes against Indians "***could not be criticized as inconsistent or anomalous***." DOJ Memorandum at 118-19 (emphasis added). This case affords the Court the opportunity to address that important question, now critical nationally and requiring prompt decision in Eastern Oklahoma.

C. Federal Common Law Does Not Divest States Of Concurrent Jurisdiction Over Non-Indian Crimes Against Indians.

In the absence of an unambiguous statutory command, the Court should adhere to its clear holdings in numerous cases: States have jurisdiction over non-Indians, even in Indian country, and even when interacting with Indians. That presumption applies to both criminal and civil matters.

"[A]bsent a congressional prohibition," the Court has acknowledged that States can "exercise criminal (and, implicitly, civil) jurisdiction over non-Indians located on reservation lands." *County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 257-58 (1992); *see United States v. McGowan*, 302 U.S. 535, 539 (1938); *Surplus Trading Co.*, 281 U.S. at 651.

Further, a State's authority remains extant even when a non-Indian commits a crime against an Indian. A State's Indian citizens are entitled to equal protection under the law, including equal access to the resources, protection, and benefits of the State's criminal-justice system. A State has "the power of a sovereign over [the] persons and property" in Indian country within its borders, to "preserve the peace" and

"protect [Indians] from imposition and intrusion." *New York ex rel. Cutler v. Dibble*, 62 U.S. (21 How.) 366, 370 (1859). In *Dibble*, this Court upheld a New York law prohibiting non-Indians from trespassing on Indian lands, and the Court validated the "police regulation for the protection of the Indians from intrusion of the white people," as New York never "surrendered" its sovereign power "over their persons and property" for the purposes of "preserv[ing] the peace" and "protect[ing]" Indians. *Id*. at 370.

In. *McBratney*, 104 U.S. at 624, decided under the predecessor statute to the General Crimes Act, the Court ruled that States have exclusive jurisdiction to prosecute crimes committed by non-Indians against non-Indians in Indian country: "by its admission into the Union by Congress upon an equal footing with the original States," a State "acquire[s] criminal jurisdiction over its own citizens and other white persons throughout the whole of the territory within its limits," including Indian country. *See also Draper v. United States*, 164 U.S. 240, 244-45, 247 (1896) ("As equality of statehood is the rule, the words relied on here to create an exception cannot be construed as doing so, if, by any reasonable meaning, they can be otherwise treated. The mere reservation of jurisdiction and control by the United States of 'Indian lands' does not of necessity signify a retention of jurisdiction in the United States to punish all offenses committed on such lands by others than Indians or against Indians.").

No "general law of the United States as to the punishment of offenses" subject to the "exclusive jurisdiction of the United States" within the scope of the General Crimes Act, *see* 18 U.S.C. § 1152, divests Oklahoma of the authority to prosecute a non-Indian

for a crime against an Indian. The General Crimes Act does not refer to the Indian or non-Indian status of any person, and the Major Crimes Act refers only to crimes committed by "Indians." *See* 18 U.S.C. § 1153. Accordingly, there is simply no statutory text divesting Oklahoma of the authority to prosecute Mr. Castro-Huerta, a non-Indian. Consequently, the "Equal Footing Clause" presumption of State authority over all persons within State boundaries stands statutorily undisturbed, even as to the Indian country, though generally shared concurrently with the United States.

The same presumption applies in civil matters, in two ways. This Court has defined the preemption inquiry in this context as intended to "reconcile the ***plenary power of the States over residents within their borders*** with the semi-autonomous status of Indians living on tribal reservations." *Dep't of Tax'n & Fin. of New York v. Milhelm Attea & Bros*., 512 U.S. 61, 73 (1994) (emphasis added) (quotations omitted). Specifically, "[r]esolution of conflicts of this kind does not depend on 'rigid rule[s]' or on 'mechanical or absolute conceptions of state or tribal sovereignty,' but instead on 'a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law."). *Id*. (Quoting *Bracker*, 448 U.S. at 142). The Court's modern precedents demonstrate that, in the absence of a congressional prohibition, a State's sovereign authority extends to non-Indians in Indian country—including in interactions between non-Indians and Indians. Accordingly, the burden is on a Tribe or other opponent of State authority, to show federal law preempts State authority. *See Washington v. Confederated Tribes of Colville Indian Reservation*,

447 U.S. 134, 159-60 (1980) ("Applying the correct burden of proof to the District Court's finding, we hold that the Tribes have failed to demonstrate that the State's recordkeeping requirements for exempt sales are not reasonably necessary as a means of preventing fraudulent transactions."; *County of Yakima*, 502 U.S. at 258 ("[S]tate jurisdiction over the relations between reservation Indians and non-Indians may be permitted unless the application of state laws 'would interfere with reservation self-government or impair a right granted or reserved by federal law.'" (quoted authority omitted)).

There is an alternative and long established presumption, reflected most significantly in *Montana*, 450 U.S. at 565-66, absent factors not present here, State law is presumed to apply to the activities of non-Indians on private fee land and in certain circumstances on Indian lands. *See Hicks*, 533 U.S. at 360-62 (applying *Montana* to non-Indian law enforcement activity on Tribal lands); *see also United States v. Cooley,* 141 S. Ct. 1638, 1641, 1643-44 (2021) (In addressing whether "an Indian tribe's police officer has authority to detain temporarily and to search a non-Indian on a public right-of-way that runs through an Indian reservation," "*Montana* is "highly relevant . . . ."). Under *Montana*, this Court's guidance is clear: when dealing with Indians, non-Indians within reservation boundaries are subject to State, not Tribal, law, unless one of two "*Montana* exceptions" applies. *Montana* requires the proponent of Tribal authority to show either a "consensual relationship" between the non-Indian and the Tribe or its members ("first exception") or substantial effects on tribal health, welfare, or economic security ("second excep-

tion").[13] *See, e.g.*, *Strate v. A-1 Contractors*, 520 U.S. 438, 451-52 (1997); *Cotton Petroleum Corp.*, 490 U.S. at 187 (state tax upheld on severance of tribal minerals under tribal oil and gas lease on reservation).

Nothing in the General Crimes Act's text indicates an intent to reverse the presumption State authority remains applicable to non-Indians in Indian country reflected in this Court's numerous cases. The statutorily unsupported holding below that federal law generally ousts State authority in Indian country over non-Indians' actions affecting Indians threatens widespread implications beyond Eastern Oklahoma. This Court should swiftly correct this erroneous conclusion for both Eastern Oklahoma, and "Indian country" nationally.

II. UNLESS REVERSED, THE DECISION BELOW THREATENS TO DEPRIVE STATES OF AUTHORITIES CRITICAL TO PROTECTING MIXED INDIAN AND NON-INDIAN COMMUNITIES.

A. Demographic And Geographic Conditions In Eastern Oklahoma Require Concurrent State /Federal Authority.

McGirt, and Oklahoma appellate decisions, decree that almost 2 million Oklahoma residents—approximately, according to the 2020 census, eighty percent of whom are not Native American—live in "Indian country," within the Five Tribes Area, covering 19

[13] *See Brendale v. Confederated Tribes and Bands of Yakima Nation,* 492 U.S. 408, 440 (1989) (opinion of White, J.) (the impact of the nonmember's conduct "must be demonstrably serious and must imperil the political integrity, the economic security, or the health and welfare of the tribe").

million acres of lands, for purposes of federal criminal jurisdiction under the Major Crimes Act, applicable only to acts of "Indians." Given *Oliphant*, non-Major Crimes Act criminal law enforcement involving non-Indian defendants in the Five Tribes Area has been administered primarily in Five Tribes Area towns and cities by local County Sheriffs and their staffs, municipal and county courts, and Oklahoma state district courts in Area towns and cities. Admittedly, there has been support to varying degrees from Tribal police and other personnel and Tribal courts with respect to Indian perpetrators, and cooperative agreements have been in place unevenly. However, with respect to non-Indian perpetrators, both Indian and non-Indian citizens have looked primarily to local State law-based resources to address the challenges of maintaining law and order, apprehending and processing violators of non-major criminal laws, and conducting proceedings to charge, retain, and prosecute offenders. Locally situated State law facilities assist to facilitate testimony or attendance of witnesses or interested persons at necessary proceedings.

McGirt renders this local and efficient system distant and intractable, not just due to the gross shortage of law enforcement, prosecutorial, and court personnel and facilities, but also by displacing conveniently dispersed State and local law enforcement resources, while replacing them with few and distant federal prosecutorial offices and distant federal court facilities, and still fewer Tribal resources. The Oklahoma Court of Appeals decision further strains law enforcement because it shifts non-"Major Crime" responsibilities entirely to federal, or *Oliphant*-barred tribal systems and facilities.

B. The Decision Below Will Cripple Law Enforcement In *McGirt*-Declared "Indian country."

The practical effect of the decision below, if affirmed, would be to exacerbate the resource deficiencies and logistical barriers arising from *McGirt* by divesting States of criminal authority over non-Indian defendants accused of crimes against Indians or their property, further straining law enforcement and case-load management responsibilities. Given that the law enforcement personnel most likely to know, identify, and apprehend non-Indian perpetrators are local, State or County law enforcement personnel, and that the population of the Five Tribes Area is 80 percent non-Indian, the potential effects will be to handicap effective law enforcement and substantially increase caseloads already overburdened by *McGirt*. As an example, Amici Farm Bureau and Cattlemen's Native American and non-Indian members face cattle or livestock "rustling" (stealing cattle or other livestock) crimes, for which investigative support of the Oklahoma Department of Agriculture, Food and Forestry's Agriculture Investigative Services Unit is frequently critical. The decision below, disabling State criminal enforcement, and debarring State prosecutions, against non-Indians, reduces crime-combatting State machinery ***protecting Indians*** far beyond merely the local Sherriff or police. No one is served by foreclosing concurrent State/federal criminal enforcement against non-Indians.

Intergovernmental cross-deputization agreements between State, County, federal, and/or Tribal law enforcement officials do not effectively substitute for original State criminal authority. Such agreements can address only initial stages of what should be a

coordinated process, at most arrest and short-term detention of perpetrators: they cannot extend to arraignments or to other judicial proceedings, thus requiring the non-Indian accused be turned over to federal officials, who may not have interest or resources to address "non-Major" crimes. The result frequently is the offender is released back on to the street, with cross-deputization not solving any problems. In addition, experience under such agreements has been mixed, while some Tribes have cooperated reasonably with State or County officials, not all have. Press reports state, though the Choctaw Nation has performed satisfactorily, the Hughes-County Sherriff asserts the Muscogee Creek Nation has not complied with an existing cross-deputization agreement, leading the County to withdraw cross deputization with that Nation.[14] Cross-deputization, though at best an inefficient and limited structure, may suffer from poor coordination. Amici's and their members' interests in solid law enforcement will be prejudiced because cross-deputization is an inherently inadequate substitute for State/federal concurrent original jurisdiction over crimes by non-Indians against Indians.

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[14] *See* https://www.news9.com/story/62045ac72f6686071fe86c9c/hughes-co-sheriff-says-law-enforcement-with-muscogee-nation-is-failing-withdraws-cross-deputization; *see also* Wall Street Journal, Feb. 21, 2022, "More *McGirt* Mayhem in Oklahoma." Feb. 21, 2022. https://www.wsj.com/articles/mcgirt-decision-oklahoma-native-american-reservation-jurisdiction-muscogee-creek-hughes-county-crime-racial-injustice-systemic-racism-11644772881

III. AFFIRMANCE OF THE DECISION BELOW THREATENS CIVIL EFFECTS THAT WOULD FURTHER CONFOUND AMICI'S LONGSTANDING EXPECTATIONS.

As Point II, *supra* demonstrates, federal law presumes that State jurisdiction remains applicable within Indian country unless divested by clear statutory provisions or rebutted by evidence of specific facts and federal interests that outweigh State interests. A decision affirming the decision below in the absence of statutory divestiture of State authority or overriding federal and tribal interests, threatens to undermine the presumption that state law applies to non-Indians' activities in "Indian country," as currently reflected in *Bracker*, *Montana*, and their progeny.

As the Court recognized in *Bracker*, over 40 years ago, "[l]ong ago, the Court departed from Mr. Chief Justice Marshall's view that 'laws of [a State] can have no force' within reservation boundaries.." 448 U.S. at 141 (citation omitted). Should the Court affirm the lower court here, not only will adverse consequences arise in the criminal jurisdiction and law and order environments, but affirmance deepens the destabilizing uncertainty *McGirt* is inflicting on the scope of Oklahoma's civil regulatory, judicial, and taxing authority over non-Indian activities within newly declared reservation boundaries, a threat extending potentially to similar consequences in other States.

In *Bracker*, the Court described two barriers to what would otherwise be the authority of States to exercise civil regulatory and taxing jurisdiction within reservation boundaries:

> First, the exercise of [State] authority may be preempted by federal law. *See, e.g., Warren Trading Post Co. v. Arizona Tax Comm'n*, 380 U.S. 685 (1965)*; McClanahan v. Arizona Tax Comm'n*, [411 U.S. 164 (1973)]. Second, [State jurisdiction] may unlawfully infringe "on the right of reservation Indians to make their own laws and be ruled by them." *Williams v. Lee*, 358 U.S. 217, (1959).

448 U.S. at 142. Barring these barriers, States have jurisdiction to regulate and tax activities on Indian reservations. Of course,

> When on-reservation conduct involving only Indian is at issue, state law is generally inapplicable, for the State's regulatory interest is likely to be minimal, and the federal interest in encouraging tribal self-government is at its strongest. More difficult questions arise where . . . a State asserts authority over the conduct of non-Indians engaging in activity on the reservation.

Id. at 144 (citations omitted). When considering federal preemption of non-Indian activities, the Court has embraced the need for a "particularized inquiry into the nature of the state, federal and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law." *Id*. at 145.

In light of the on-the-ground upheaval already created by *McGirt*, the Court should consider the implications of any decision it reaches in this case as it may affect civil regulatory, judicial, and taxing jurisdiction in Eastern Oklahoma. Affirmance may further disturb Oklahoma's civil jurisdictional author-

ity recognized in the presumption of State authority and balancing of interests the Court called for in *Bracker*. Unless the Court determines, contrary to the arguments in Points I.A and I.B, *supra,* unambiguous statutory command, alone, requires affirmance, an affirmance will undermine this Court's repeated recognition of the presumption State law applies to non-Indians within Indian country. Given the investment-backed expectations of the Eastern Oklahoma business community, the Court should take into account effects on the clarity and certainty of Oklahoma's (and federal and Five Tribes') civil jurisdictional authority that may arise from a decision divesting the State of criminal authority over non-Indians without considering presumed State authority.

Similarly, non-Indians' recourse to State law, taxation, and courts, and to avoid Tribal counterparts, is a function of the presumption embodied in *Montana*, as interpreted in *Hicks*, 533 U.S. at 361-62 (State law enforcement activity on Tribal lands); *Strate*, 520 U.S. at 451-52 (court jurisdiction), *Cotton Petroleum*, 490 U.S. at 186-87 (taxation), and related authorities. In each regulatory sphere, the presumption of State law and jurisdiction is critical to continued reliance on and access to State authority. The burden to demonstrate that an exception to the *Montana* rule applies is on the Tribe or other proponent of divesting State jurisdiction. *See, e.g.*, *Plains Commerce Bank v. Long Family Land & Cattle Co*., 554 U.S. 316, 330 (2008) ("[E]fforts by a tribe to regulate nonmembers, especially on non-Indian fee land, are 'presumptively invalid.' The burden rests on the tribe to establish one of the exceptions to *Montana*'s general rule that would allow an extension of tribal authority to regulate nonmembers on non-Indian fee land.") (quoted authority omitted)). This Court has recognized that a

State's interest in enforcing its laws is not susceptible to a challenge under *Montana*. *See Hicks*, 533 U.S. at 361-62.

Though this Court noted in *McGirt* that *Bracker* and *Montana* may provide bases for continuing State authority over non-Indians notwithstanding their lands are thrown into reservation status, *McGirt*, 140 S. Ct. at 2501, the decision below completely ignores, and indeed controverts, the notion of a presumption of State authority. Amici submit neither statutory authority, nor any federal or tribal interest supports preemption under *Bracker,* given the absence of Tribal criminal jurisdiction over non-Indians, the importance to Native communities of effective law enforcement, and the longstanding State primacy over such prosecutions. Similarly, no consensual relationship or substantial Tribal health or welfare interest is advanced by foreclosing State prosecution of non-Indians. Concurrent State and federal authority over non-Indians victimizing Tribal members can only serve to bring more, and more effective, law enforcement and judicial machinery to bear to protect Native communities. If there were any concern State prosecutions were insufficiently rigorous, a concern not reflected in the record here, because the State and federal governments are "separate sovereigns," *see Gamble v. United States*, 139 S. Ct. 1960, 1964 (2019), double jeopardy would not bar federal prosecutors stepping in in such circumstances.

Because the decision below cannot be reconciled with the presumption of State authority, either in the criminal or civil context, affirmance threatens to undermine the civil law protections the Court identified in *McGirt.* The Court should reverse the decision below and hold neither the General Crimes Act nor

any other federal statute divests the State of the authority it acquired under the Equal Footing doctrine to prosecute non-Indians for crimes against Indians in Indian country.

CONCLUSION

For the foregoing reasons, the decision below should be reversed.

Respectfully submitted,

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