No. 21-429

In the Supreme Court of the United States

STATE OF OKLAHOMA, PETITIONER

v.

VICTOR MANUEL CASTRO-HUERTA

ON WRIT OF CERTIORARI
TO THE OKLAHOMA COURT OF CRIMINAL APPEALS

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether the State of Oklahoma has jurisdiction, concurrent with the United States, to prosecute non-Indians for crimes against Indians committed in Indian country.

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INTEREST OF THE UNITED STATES

This case concerns whether, absent specific statutory authorization by Congress, a State has jurisdiction, concurrent with the United States, over crimes committed by non-Indians against Indians in Indian country. The United States has a substantial interest in the allocation of criminal jurisdiction in Indian country.

STATEMENT

1. Federal law defines "Indian country" to include "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent"; "all dependent Indian communities within the borders of the United States"; and "all Indian allotments, the Indian titles to which have not been extinguished." 18 U.S.C. 1151(a)-(c). "Criminal jurisdiction over offenses committed in 'Indian country' 'is governed by a complex

patchwork of federal, state, and tribal law.'" *Negonsott* v. *Samuels*, 507 U.S. 99, 102 (1993) (citations omitted). Offenses by one Indian against another Indian "typically are subject to the jurisdiction of the concerned Indian tribe," *ibid.*; except that the Indian Major Crimes Act (Major Crimes Act), ch. 341, § 9, 23 Stat. 385 (18 U.S.C. 1153), grants the United States jurisdiction, concurrent with Tribes, over certain serious offenses when an Indian is the perpetrator, even if the victim is an Indian. Federal jurisdiction under the Major Crimes Act is exclusive of state jurisdiction. See, *e.g.*, *Negonsott*, 507 U.S. at 103.

Unless Congress has determined otherwise, the federal government also exercises criminal jurisdiction over crimes committed in Indian county where either the victim or the perpetrator is an Indian. See 18 U.S.C. 1152. The first paragraph of Section 1152 provides:

> Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.

Ibid.

The second paragraph of Section 1152 exempts from that provision's coverage "offenses committed by one Indian against the person or property of another Indian"; offenses committed by an Indian "who has been punished by the local law of the tribe"; and "any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively." 18 U.S.C. 1152.

State jurisdiction within Indian country is generally "limited to crimes by non-Indians against non-Indians,

* * * and victimless crimes by non-Indians." *Solem* v. *Bartlett*, 465 U.S. 463, 465 n.2 (1984) (citation omitted); see, *e.g.*, *Duro* v. *Reina*, 495 U.S. 676, 680 n.1 (1990).

2. In 2017, respondent was convicted in state court of criminal child neglect of his five-year-old stepdaughter. Pet. App. 1a; Pet. Br. 9. On appeal, respondent contended that the State lacked jurisdiction over his crime because he is a non-Indian, his stepdaughter is an Indian, and the crime occurred in Indian country. Pet. App. 9a.

While respondent's appeal was pending, this Court held in *McGirt* v. *Oklahoma*, 140 S. Ct. 2452 (2020), that Congress never disestablished the Muscogee (Creek) Nation's reservation in eastern Oklahoma. *Id.* at 2468. The Oklahoma Court of Criminal Appeals (OCCA) then remanded respondent's case for an evidentiary hearing to determine whether respondent's victim was an Indian and whether the crime occurred in Indian country. Pet. App. 9a-10a. On remand, the parties "stipulated as to the Indian status" of the victim, and the trial court determined that respondent's crime occurred within the historic boundaries of the Cherokee reservation, which Congress had never "explicitly erased or disestablished." *Id.* at 11a, 18a.

The OCCA then vacated respondent's state conviction. Pet. App. 1a-4a. The OCCA agreed that Congress had never disestablished the Cherokee Nation's reservation. *Id.* at 3a. Thus, "[f]or purposes of federal criminal law, the land upon which" respondent committed his crime is "Indian country." *Ibid.*

The OCCA rejected the State's argument that it had jurisdiction, concurrent with the United States' jurisdiction under Section 1152, over crimes by non-Indians against Indians in Indian country. Pet. App. 4a. The

OCCA relied on its decision in *Bosse* v. *State*, 484 P.3d 286 (2021), which had determined that "[a]bsent any law, compact, or treaty" altering the default rules, "federal and tribal governments have jurisdiction over crimes committed by or against Indians in Indian Country, and state jurisdiction over those crimes is preempted by federal law." Pet. App. 39a; see *id.* at 36a-39a.[1] The OCCA later stayed its mandate. *Id.* at 21a.

3. While the state court proceedings were ongoing, a federal grand jury in the Northern District of Oklahoma indicted respondent on, *inter alia*, one count of child neglect in Indian country, in violation of 18 U.S.C. 2, 13, 1151, and 1152, and Okla. Stat. Ann. tit. 21 § 843.5(C) (West Supp. 2015). Indictment at 2, 20-cr-255, D. Ct. Doc. 2 (Nov. 2, 2020). Respondent has agreed to plead guilty to that charge. Plea Agreement, 20-cr-255, D. Ct. Doc. 52 (Oct. 15, 2021).

SUMMARY OF ARGUMENT

Absent specific congressional authorization, the United States' criminal jurisdiction over offenses committed by non-Indians against Indians in Indian country is exclusive of state jurisdiction.

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[1] *Bosse* concerned post-conviction proceedings; the OCCA later determined that *McGirt* does not apply retroactively to cases on post-conviction review and withdrew the *Bosse* decision on that ground, see *Bosse* v. *State*, 499 P.3d 771, 774-775 (2021), cert. denied, 142 S. Ct. 1136 (2022). The OCCA subsequently reaffirmed its holding that the federal government has exclusive jurisdiction over crimes by non-Indians against Indians in Indian country. *Roth* v. *State*, 499 P.3d 23 (2021), petition for cert. pending, No. 21-914 (filed Dec. 15, 2021). The OCCA's withdrawn decision in *Bosse* is included in the petition appendix. Pet. App. 22a-51a.

A. The text of 18 U.S.C. 1152 and the historical context of its enactment make clear that where it applies, Section 1152 provides federal criminal jurisdiction that is exclusive of state jurisdiction. Section 1152, often called the General Crimes Act, "extend[s]" to Indian country "the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States." 18 U.S.C. 1152. Congress thus provided a direct parallel between Indian country and federal enclaves, where federal jurisdiction is exclusive of state jurisdiction. And this Court has interpreted similar language in the Major Crimes Act to confer federal criminal jurisdiction that is exclusive of state jurisdiction.

The historical contexts in which Section 1152 and its predecessors were enacted strongly support the conclusion that States lack jurisdiction over crimes by non-Indians against Indians in Indian country. Section 1152 traces its roots to early treaties in which the federal government promised to protect Indians from non-Indian incursions, including through federal criminal jurisdiction. Those promises formed the backdrop for early legislation providing for federal control—including federal criminal jurisdiction—over relations between Indians and non-Indians. And Congress enacted substantially the current language of Section 1152 just two years after this Court held in *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515 (1832), that the State of Georgia lacked authority to punish non-Indians for crimes committed in Indian country. In that historical context, that provision would have been understood to provide for exclusive federal criminal jurisdiction.

While this Court subsequently held that statehood implicitly repealed the General Crimes Act's grant of

federal jurisdiction over crimes between non-Indians, and conferred that jurisdiction on the States, the Court has held that Section 1152 continues to apply to offenses by non-Indians against Indians. Because Section 1152 has not been repealed as to those offenses, Section 1152's federal criminal jurisdiction remains exclusive of state jurisdiction in the absence of specific legislation providing otherwise.

B. Congress has consistently acted on that understanding. Beginning in 1940, Congress enacted several statutes granting particular States the concurrent jurisdiction that Oklahoma argues all States already possessed. Congress's enactment of Public Law 280, Act of Aug. 15, 1953, ch. 505, 67 Stat. 588, which conferred criminal jurisdiction over crimes by or against Indians on certain States and permitted others to "assum[e]" such jurisdiction, *id.* at 590, further indicates that federal jurisdiction is otherwise exclusive.

C. This Court has likewise repeatedly stated that federal jurisdiction over offenses committed by non-Indians against Indians in Indian country is generally exclusive of state jurisdiction. Although those statements were technically dicta, each was well-considered and served an important purpose in the opinion of the Court. And Congress's State-specific conferral of jurisdiction in particular statutes alternated with this Court's statements, further demonstrating the shared understanding that States generally lack jurisdiction over criminal offenses by non-Indians against Indians in Indian country.

D. Oklahoma's contrary arguments cannot overcome the text and history of Section 1152 and the long-held understanding of Congress, this Court, and lower courts. Oklahoma relies on general preemption

principles that govern in other areas, but here a specific statute, Section 1152, makes clear that Congress has provided for exclusive federal jurisdiction over crimes by non-Indians against Indians in Indian country. And this Court has explained that preemption principles applicable in other contexts do not apply to matters affecting Indians in Indian country, particularly where, as in the criminal-law context, Congress has pervasively legislated.

The State also emphasizes the practical consequences of the long-established jurisdictional rule in Oklahoma following this Court's decision in *McGirt* v. *Oklahoma*, 140 S. Ct. 2452 (2020). But federal authorities are working diligently to prosecute offenders who do not fall within state jurisdiction based on that decision. And if Congress views *McGirt* as warranting expanded state or tribal jurisdiction in Oklahoma, it may confer such jurisdiction by statute—just as it has conferred specific criminal jurisdiction on other States before. This Court should not upend the well-established understanding of criminal jurisdiction in Indian country, which governs throughout the Nation.

ARGUMENT

UNLESS CONGRESS PROVIDES OTHERWISE, THE FEDERAL GOVERNMENT'S CRIMINAL JURISDICTION OVER OFFENSES COMMITTED BY NON-INDIANS AGAINST INDIANS IN INDIAN COUNTRY IS EXCLUSIVE OF STATE JURISDICTION

The OCCA correctly held that absent a more specific statutory provision conferring jurisdiction on a State, the United States' jurisdiction under Section 1152 over crimes by non-Indians against Indians in Indian country is exclusive of state jurisdiction.

A. Section 1152's Text And History Demonstrate That The Federal Government Has Exclusive Jurisdiction Over Crimes By Non-Indians Against Indians In Indian Country

Section 1152's text strongly indicates that absent a more specific statutory provision, the federal government's jurisdiction over crimes by non-Indians against Indians in Indian country is exclusive. That is particularly true when understood in historical context. "[A]t the time Congress enacted" the relevant language, it would have been understood to foreclose state jurisdiction. *Wisconsin Cent. Ltd.* v. *United States*, 138 S. Ct. 2067, 2070 (2018) (citation omitted).

1. The first paragraph of Section 1152 states that "[e]xcept as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country." 18 U.S.C. 1152. The second paragraph exempts certain offenses, including those committed by one Indian against the person or property of another Indian, which are left exclusively to tribal jurisdiction, with the exception of "major crimes" by Indians that are subject to federal jurisdiction under Section 1153.

As discussed in more detail below, see pp. 17-19, *infra*, this Court held in *United States* v. *McBratney*, 104 U.S. 621 (1881), that federal jurisdiction under what is now Section 1152 is limited in one further respect. *McBratney* held that an Act of Congress admitting a new State to the Union implicitly repealed federal jurisdiction over crimes by non-Indians against non-Indians in Indian country and conferred that jurisdiction on the State. *Id.* at 623-624. The Court has subsequently

confirmed that notwithstanding *McBratney*, Section 1152 continues to provide federal jurisdiction over crimes by non-Indians against Indians in Indian country. See *Donnelly* v. *United States*, 228 U.S. 243 (1913). And the text of Section 1152 indicates that where Section 1152 applies, federal jurisdiction is exclusive of state jurisdiction.

By its terms, Section 1152 applies to Indian country the federal laws that apply to crimes committed within the "sole and exclusive jurisdiction of the United States." 18 U.S.C. 1152. The quoted phrase indicates that Congress intended a parallel between Indian country and the federal enclaves over which Congress may "exercise exclusive Legislation," U.S. Const. Art. I, § 8, Cl. 17. Because state laws are generally inapplicable in such areas, see, *e.g.*, *Fort Leavenworth R.R.* v. *Lowe*, 114 U.S. 525, 532-533 (1885), the text of Section 1152 indicates that Congress intended state criminal laws to be generally inapplicable in Indian country as well.

This Court's interpretation of the Major Crimes Act's similar text reinforces that conclusion. Section 1153(a) provides that "[a]ny Indian who commits" certain enumerated offenses within Indian country "shall be subject to the same law and penalties as all other persons committing any of the [specified] offenses, *within the exclusive jurisdiction of the United States*." 18 U.S.C. 1153(a) (emphasis added). As this Court explained in *Negonsott* v. *Samuels*, 507 U.S. 99 (1993), "the text of § 1153 * * * and [the Court's] cases make clear [that] federal jurisdiction over the offenses covered by the Indian Major Crimes Act is 'exclusive' of state jurisdiction." *Id.* at 103; see, *e.g.*, *United States* v. *John*, 437 U.S. 634, 651 & nn.21-22 (1978); *Seymour* v.

Superintendent of Washington State Penitentiary, 368 U.S. 351, 359 (1962); *Williams* v. *Lee*, 358 U.S. 217, 220 n.5 (1959). Indeed, the Major Crimes Act's exclusivity was the premise of this Court's decision in *McGirt* v. *Oklahoma*, 140 S. Ct. 2452 (2020), which invalidated an Indian defendant's state murder conviction on the ground that the crime occurred in Indian country, where the State lacks jurisdiction over such crimes.

As Oklahoma observes, Section 1152's reference to "the sole and exclusive jurisdiction of the United States" could be read to describe only the law to be applied, and not to incorporate the exclusive force of that federal jurisdiction as extended over Indian country. Pet. Br. 24 (citation omitted). But the State does not contest that Section 1152 grants exclusive federal jurisdiction over crimes *by* Indians against non-Indians. And the State's argument could likewise be made regarding the "exclusive jurisdiction" language in Section 1153. Cf. U.S. Supp. Amicus Br. at 20-21, *Sharp* v. *Murphy*, 140 S. Ct. 2412 (2020) (No. 17-1107) (per curiam). It is nonetheless settled that federal jurisdiction under Section 1153 is exclusive of state jurisdiction. Section 1152's parallel text indicates that the same rule should apply to crimes by non-Indians against Indians.[2]

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[2] Oklahoma observes (Pet. Br. 24) that in *In re Wilson*, 140 U.S. 575 (1891), the Court stated that the words "'sole and exclusive'" in the predecessor to Section 1152 "do not apply to the jurisdiction extended over the Indian country, but are only used in the description of the laws which are extended to it." *Id.* at 578. The Court made that statement in discussing what is now the second paragraph of the provision, which then (as now) provided that the first paragraph does not extend to certain offenses within tribal jurisdiction. See 18 U.S.C. 1152; Rev. Stat. § 2145 (1878); *Wilson*, 140 U.S. at 578. Neither *Wilson's* statement, nor *Donnelly's* reference to it, see 228 U.S. at 268, suggests that States may exercise criminal

2. That reading of the text gains significant force from the historical context surrounding the enactment of Section 1152 and its predecessors. "The policy of leaving Indians free from state jurisdiction and control is deeply rooted in this Nation's history." *McGirt*, 140 S. Ct. at 2476 (quoting *Rice* v. *Olson*, 324 U.S. 786, 789 (1945)). That policy reflects that in the early years of the Republic, "local ill feeling" toward Indians meant that "the people of the states where they [we]re found [we]re often their deadliest enemies." *United States* v. *Kagama*, 118 U.S. 375, 384 (1886).

The Articles of Confederation included a compromise between federal and state authority over Indian affairs: article IX conferred on the Continental Congress "the sole and exclusive right and power of * * * regulating the trade and managing all affairs with the [I]ndians, not members of any of the [S]tates, provided that the legislative right of any [S]tate within its own limits be not infringed or violated." Art. IX. That ambiguous language "fueled * * * disagreement over the scope of federal and state powers with respect to Indian affairs." *Cohen's Handbook of Federal Indian Law* § 1.02[3], at 19 (Nell Jessup Newton ed., 2012 ed.) (*Cohen*); see *The Federalist No. 42*, at 267-268 (James Madison) (Clinton Rossiter ed., 1961). The United States entered into treaties stating that the Tribes were "under the protection of the United States of America, *and of no other sovereign whosoever*," and providing for punishment of non-Indians who committed crimes against Indians. Treaty with the Cherokees, art. III, Nov. 28, 1785, 7 Stat. 19 (emphasis added); *id.* art. VII, 7 Stat. 19; see, *e.g.*, Francis Paul Prucha, *American*

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jurisdiction over offenses committed by non-Indians against Indians in Indian country.

Indian Policy in the Formative Years: The Indian Trade and Intercourse Acts, 1790-1834, at 189 (1962) (*Prucha*). States protested that such treaties were "violations of state sovereignty," and at least one State signed its own treaty with a small group of Indians, resulting in uprisings as non-Indians moved onto Indian lands. *Cohen* § 1.02[3], at 22. "By the mid-1780s," state resistance to federal Indian policy and the "resulting encroachment into Indian territory had le[]d the young nation to the brink of Indian warfare on several fronts." *Ibid.*

The Constitution addressed these tensions by eliminating all references to state power over Indian affairs while "grant[ing] Congress broad general powers to legislate in respect to Indian tribes, powers that [this Court] ha[s] consistently described as 'plenary and exclusive.'" *United States* v. *Lara*, 541 U.S. 193, 200 (2004) (citation omitted). Thus, "[w]ith the adoption of the Constitution, Indian relations became the exclusive province of federal law." *County of Oneida* v. *Oneida Indian Nation of New York State*, 470 U.S. 226, 234 (1985); *The Federalist No. 42*, at 268.

Congress exercised that exclusive and plenary authority by entering into treaties that provided for exclusive federal protection of Indians. For example, in the Treaty with the Chippewas, Ottawas, Pottawatimies, Wyandots, and Shawanoese, Nov. 25, 1808 (Treaty at Brownstown), 7 Stat. 112, the Tribes "acknowledge[d] themselves to be under the protection of the United States, and of no other sovereign." Art. V, 7 Stat. 113; see, *e.g.*, Treaty with the Florida Tribes of Indians, art. III, Sept. 18, 1823, 7 Stat. 224; Treaty with the Ioways, art. IV, Aug. 4, 1824, 7 Stat. 231; see also *Cohen* § 1.03[1], at 26 n.25. Other treaties stated that the United States

would "afford" the Indians "protection against all persons whatever." Treaty with the Kickapoos, art. 9, July 30, 1819, 7 Stat. 201. And "[m]any treaties [specifically] provided for federal jurisdiction over crimes committed by non-Indians against Indians, as well as by Indians against non-Indians." *Cohen* § 1.03[1], at 27; see, *e.g.*, Treaty of Perpetual Friendship, Cession and Limits, U.S.-Choctaw Tribe, arts. 6-7, Sept. 27, 1830, 7 Stat. 334; Treaty with the Chayenne Tribe, art. 5, July 6, 1825, 7 Stat. 255. Treaty promises to exercise federal jurisdiction over non-Indian crimes against Indians were particularly significant given the Tribes' inability to try non-Indians. See *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191, 197-199 & n.8 (1978).

3. Early congressional enactments reflected and codified the United States' agreements to protect Indians. Those early enactments, in turn, formed the basis for Section 1152. See *Cohen* § 9.02[1][a], at 738.

In 1790, the First Congress enacted the Indian Trade and Intercourse Act, ch. 33, 1 Stat. 137, which established that the United States, rather than the States, would exercise basic police and regulatory powers over interactions between Indians and non-Indians. Most relevant here, that Act provided for federal punishment of non-Indians who committed crimes against Indians. Ch. 33, §§ 5-6, 1 Stat. 138. Those provisions reflected that "punishment of non-Indian offenders under federal laws was promised in most treaties in force when the first Trade and Intercourse Act was adopted," *Cohen* § 1.03[2], at 36, and Congress "assumed federal jurisdiction over offenses by non-Indians against Indians" to provide "effective protection for the Indians," *Oliphant*, 435 U.S. at 201. Similar provisions were included in the temporary Trade and Intercourse Acts of 1793, 1796,

and 1799, as well as the permanent Trade and Intercourse Act of 1802. See Act of Mar. 1, 1793, ch. 19, §§ 4, 10, 1 Stat. 329-330; Act of May 19, 1796, ch. 30, §§ 4, 15, 1 Stat. 470, 473; Act of Mar. 3, 1799, ch. 46, §§ 4, 15, 1 Stat. 744-745, 747; Act of Mar. 30, 1802 (1802 Act), §§ 4, 6, 15, 2 Stat. 141-142, 144; see generally *Cohen* § 1.03[2], at 36-38.

Congress expanded upon the Trade and Intercourse Acts in 1817, extending the criminal provisions to include a preliminary version of what later became the General Crimes Act. See Act of Mar. 3, 1817 (1817 Act), ch. 92, § 1, 3 Stat. 383. The 1817 Act provided that "if any Indian, or other person" committed within Indian country

> any crime, offence, or misdemeanor, which, if committed in any place or district of country under the sole and exclusive jurisdiction of the United States, would, by the laws of the United States, be punished with death, or any other punishment, every such offender, on being thereof convicted, shall suffer the like punishment as is provided by the laws of the United States for the like offences, if committed within any place or district of country under the sole and exclusive jurisdiction of the United States.

Ibid. The 1817 Act provided for trial and punishment in the federal or territorial courts. § 2, 3 Stat. 383. And it contained two exceptions that carried forward to Section 1152: federal jurisdiction would not "extend" to offenses between Indians, or if it conflicted with "any treaty" between the United States and a Tribe. *Ibid.*

As this Court has recognized, Section 1152 was enacted in its near-modern form in 1834, as Section 25 of the Trade and Intercourse Act of 1834 (1834 Act), ch.

161, 4 Stat. 733. See *New York ex rel. Ray* v. *Martin*, 326 U.S. 496, 500 n.6 (1946). Section 25 stated:

> 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.

4 Stat. 733; see Act of Mar. 27, 1854, ch. 26, § 3, 10 Stat. 270 (providing additional exceptions). Materially similar language was included in Sections 2145 and 2146 of the Revised Statutes of 1875. And when Congress codified Title 18 in 1948, that language became present-day Section 1152. Act of June 25, 1948, ch. 645, § 1152, 62 Stat. 757.

Because Section 1152 traces its roots to treaties and enactments guaranteeing that the United States would protect Indians to the exclusion of all other sovereigns—and because Section 1152 extends to Indian country laws that themselves grant the United States exclusive jurisdiction—it is properly understood to grant the United States exclusive criminal jurisdiction over crimes by non-Indians against Indians. The Trade and Intercourse Acts sought to give the federal government responsibility regarding interactions between Tribes, non-Indians, and States, in order to avoid tensions that might spark "a long drawn-out Indian war" that could jeopardize the new Nation. *Prucha* 44; see *id.* at 48. Congress thus would have understood those Acts' criminal provisions, and the subsequent statutes that derived from them, to exclude state jurisdiction.

4. The 1834 Act's immediate historical context confirms that understanding. The Act followed just two

years after this Court's seminal decision in *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515 (1832), which rejected Georgia's efforts to assert jurisdiction over the Cherokee Nation's original homelands.

In *Worcester*, the State indicted two non-Indian missionaries for entering the Cherokee Nation in violation of a Georgia statute. 31 U.S. (6 Pet.) at 529. This Court held that the State's "assertion of jurisdiction over the Cherokee nation"—and, in particular, its attempt to assert jurisdiction over non-Indians living in Indian country—was "void" because the "Cherokee nation * * * is a distinct community occupying its own territory * * * in which the laws of Georgia can have no force." *Id.* at 542, 561. Instead, "the whole intercourse between the United States and this nation, is, by our constitution and laws, vested in the government of the United States." *Id.* at 561. The Court thus determined that the State could not exert criminal jurisdiction over non-Indians for crimes committed within Indian country because relations between the United States and the Cherokee Nation "are committed exclusively to the government of the union." *Ibid.* Coming just two years after *Worcester*, the federal criminal jurisdiction conferred by the 1834 Act would have been understood as exclusive of state jurisdiction.[3]

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[3] Oklahoma suggests (Pet. Br. 18) that "contemporaneous authorities [did not] understand *Worcester* to preclude all assertions of state power in Indian country." But the decision it cites found the 1802 Act inapplicable to one Tribe based on its status. See *United States* v. *Cisna*, 25 F. Cas. 422 (C.C.D. Ohio 1835); see also Resp. Br. 40-41. And the Opinion of the Attorney General on which Oklahoma relies concerned a *tribal* court's *civil* jurisdiction over non-Indians—not a state court's criminal jurisdiction over non-Indians who commit crimes against Indians. 7 Op. Atty. Gen. 174 (1855). Similarly, while Oklahoma invokes (Pet. Br. 18-19) dictum from this

5. This Court subsequently held that the classes of offenses to which Section 1152 applies are limited in a further respect. But none of this Court's decisions suggests that where, as here, Section 1152 continues to confer federal criminal jurisdiction, States possess concurrent jurisdiction.

In *McBratney*, the Court held that crimes committed by non-Indians against other non-Indians were implicitly excluded from the federal jurisdiction created by the General Crimes Act in Indian country within a State. 104 U.S. at 623-624. The Court acknowledged that such crimes were subject to federal jurisdiction prior to statehood, but it held that the Act admitting Colorado to the Union implicitly repealed any prior statute insofar as it applied to offenses by non-Indians against non-Indians and vested such jurisdiction in the State. *Ibid.*; see *Martin*, 326 U.S. at 500 & n.5; *United States* v. *Ramsey*, 271 U.S. 467, 469 (1926). The Court emphasized, however, that *McBratney* presented no question "as to the punishment of crimes committed by or against Indians." 104 U.S. at 624; accord *Draper* v. *United States*, 164 U.S. 240, 247 (1896); see *United States* v. *Wheeler*, 435 U.S. 313, 325 n.21 (1978); *United States* v. *Antelope*, 430 U.S. 641, 643 n.2 (1977).

In *Donnelly* v. *United States*, 228 U.S. 243 (1913), the Court rejected an attempt to exclude from Section 1152 crimes by non-Indians against Indians—the class of crimes at issue here. The defendant argued that under *McBratney*'s rationale, California's admission to

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Court's decision in *New York ex rel. Cutler* v. *Dibble*, 62 U.S. (21 How.) 366 (1859), the Court later explained that *Dibble*'s dictum is not "applicable" outside its context, which involved civil ejectment from tribal lands. *Oneida Indian Nation of New York* v. *County of Oneida*, 414 U.S. 661, 672 n.7 (1974).

the Union conferred on the State the "undivided authority to punish crimes committed upon * * * an Indian reservation, excepting crimes committed by the Indians." *Id.* at 271. The Court in *Donnelly* described *McBratney* as holding, in effect, that the "admission of States qualified the former Federal jurisdiction over Indian country included therein by withdrawing from the United States and conferring upon the States the control of offenses committed by white people against whites, in the absence of some law or treaty to the contrary." *Ibid.* The Court thus viewed the *McBratney* principle as having two aspects: the withdrawal of federal jurisdiction and the conferral of jurisdiction on the State over crimes by non-Indians against non-Indians.

The Court held, however, that "offenses committed *by or against Indians* are not within the principle of * * * *McBratney*," but rather remain within federal jurisdiction. *Donnelly*, 228 U.S. at 271 (emphasis added). The Court observed that "[t]his was in effect held[] as to crimes committed by the Indians" in *Kagama*, 118 U.S. at 383-384, which sustained federal jurisdiction under the Major Crimes Act over crimes by Indians in Indian country on the ground that the Indians are "wards of the [N]ation" and in need of its protection. *Donnelly*, 228 U.S. at 271-272 (emphasis omitted). The Court in *Donnelly* concluded that "[t]his same reason applies—perhaps *a fortiori*—with respect to crimes committed by [non-Indians] against the persons or property of the Indian tribes while occupying reservations set apart for the very purpose of segregating them from the whites and others not of Indian blood." *Id.* at 272.

As *Donnelly* makes clear, *McBratney* does not support the contention that where Section 1152 applies,

federal jurisdiction is not exclusive. But see Pet. Br. 19. The basis of the holding in *McBratney* was not that the predecessor to Section 1152 remained applicable to crimes between non-Indians, but that the State nonetheless had acquired concurrent jurisdiction over those crimes. Rather, the Court held that the Act admitting Colorado to the Union implicitly *repealed* any federal statute that would have applied to crimes involving only non-Indians, and that the State acquired jurisdiction, exclusive of the federal government, as a result of that repeal. *McBratney*, 104 U.S. at 623-624; see *Donnelly*, 228 U.S. at 271-272.

McBratney and *Donnelly* thus confirm that where, as here, Section 1152 has *not* been repealed, federal jurisdiction remains exclusive of state jurisdiction. As *McBratney* demonstrates, Congress could reasonably determine that offenses between non-Indians in Indian country within a State did not directly involve relations with the Indians, and thus jurisdiction over such crimes could be transferred to the States without undermining the historic principle that the federal government maintains the exclusive power and duty to protect Indians. By contrast, criminal offenses by or against Indians in Indian country directly implicate relations between Indians and non-Indians—as Congress understood when enacting the Trade and Intercourse Acts and subsequent legislation. Federal authority over such offenses therefore "continued after" statehood "as it was before, * * * in virtue of the long-settled rule that such Indians are wards of the nation, in respect of whom there is devolved upon the Federal Government 'the duty of protection and with it the power.'" *Ramsey*, 271 U.S. at 469 (quoting *Kagama*, 118 U.S. at 384).

B. Congress Has Consistently Acted On And Confirmed The Understanding That States Lack Jurisdiction Over Offenses Committed By Non-Indians Against Indians In Indian Country

In the last century, Congress has enacted a number of statutes granting particular States criminal jurisdiction over crimes by or against Indians in Indian country. Those statutes confirm that, in the absence of affirmative authorization, States lack jurisdiction over offenses committed by non-Indians against Indians in Indian country.

1. Congress passed the first of these Acts, the Kansas Act, in 1940. Act of June 8, 1940, ch. 276, 54 Stat. 249 (18 U.S.C. 3243). The Kansas Act provides that "[j]urisdiction is conferred on the State of Kansas over offenses committed by or against Indians on Indian reservations," but it expressly retains federal jurisdiction over such offenses. 18 U.S.C. 3243; see *Negonsott*, 507 U.S. at 105. If Section 1152 *already* provided concurrent jurisdiction over crimes by non-Indians against Indians in Indian country, as Oklahoma contends, then the Kansas Act's express conferral of that jurisdiction on the State would have been unnecessary.

Congress viewed the Kansas Act as providing jurisdiction to Kansas in the first instance. The Act is entitled "An Act to *confer* jurisdiction on the State of Kansas over offenses committed by or against Indians on Indian reservations." 54 Stat. 249 (emphasis added; capitalization altered). A congressional report stated that under existing law, the States' authority in Indian country "extend[ed] in the main only to situations where both the offender and the victim are white men." H.R. Rep. No. 1999, 76th Cong., 3d Sess. 2 (1940). The report further explained that the creation of tribal courts

would not fill the resulting jurisdictional gap because those courts "may not punish white men for offenses committed upon Indians." *Id.* at 4. Congress thus clearly understood that Kansas did not already have concurrent jurisdiction over crimes by non-Indians against Indians. This Court later took the same view, describing the Kansas Act as "the first major grant of jurisdiction to a State over offenses involving Indians committed in Indian country." *Negonsott*, 507 U.S. at 103.

Congress acted on the same understanding in 1946 and 1948, when it passed special statutes providing North Dakota, New York, and Iowa with certain criminal jurisdiction. Once again, the Acts described themselves as "confer[ring] jurisdiction" on the States over "offenses committed by or against Indians." Act of July 2, 1948, ch. 809, 62 Stat. 1224 (25 U.S.C. 232) (New York); see Act of June 30, 1948, ch. 759, 62 Stat. 1161 (conferring jurisdiction on Iowa with regard to one reservation), *repealed*, Act of Dec. 11, 2018, Pub. L. No. 115-301, 132 Stat. 4395; Act of May 31, 1946, ch. 279, 60 Stat. 229 (same for North Dakota). Congress acted with respect to New York and Iowa the same year that it recodified the General Crimes Act as 18 U.S.C. 1152. The legislative reports on those Acts again reflect the view that without special legislation, the affected States would lack criminal jurisdiction over crimes against Indians. See, *e.g.*, H.R. Rep. No. 2345, 80th Cong., 2d Sess. 1 (1948); H.R. Rep. No. 2355, 80th Cong., 2d Sess. 1 (1948).

2. Public Law 280, enacted in 1953, rests on that same understanding. Section 2 of Public Law 280 enacted 18 U.S.C. 1162, which is entitled "State jurisdiction over offenses committed by or against Indians in the Indian country." *Ibid.* (emphasis omitted).

Subsection (a) of Section 1162 now provides that the listed States (which do not include Oklahoma) "shall have jurisdiction over offenses committed *by or against Indians*" in particular areas of Indian country "to the same extent that such State * * * has jurisdiction over offenses committed elsewhere within the State," and "the criminal laws of such State * * * shall have the same force and effect within such Indian country as they have elsewhere within the State." 18 U.S.C. 1162(a) (emphasis added). The title and text of Section 1162(a) indicate that it establishes the sole and complete basis for regulation of state "jurisdiction over offenses committed by or against Indians in the Indian country" in the listed States. *Ibid.*; see *Three Affiliated Tribes of the Fort Berthold Reservation* v. *Wold Engineering, P. C.*, 476 U.S. 877, 884 (1986). If the States already had jurisdiction over crimes by non-Indians against Indians, as Oklahoma contends, then Section 1162(a)'s conferral of jurisdiction on the listed States over offenses "against Indians" would be superfluous: that phrase is not necessary to confer jurisdiction over offenses committed against Indians by other Indians, which are covered by the reference to offenses committed "by * * * Indians." 18 U.S.C. 1162(a).[4]

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[4] Oklahoma observes (Pet. Br. 33-34) that this Court has held that state courts may entertain civil suits by Indians against non-Indians arising in Indian country regardless of a State's assumption of jurisdiction under Public Law 280, which provides for the assumption of jurisdiction "over civil causes of actions between Indians *or to which Indians are parties*." 25 U.S.C. 1322 (emphasis added); see *Three Affiliated Tribes,* 467 U.S. at 148-149. The italicized language, however, provides jurisdiction over suits by non-Indians against Indians. Although it could have been drafted more narrowly, the phrase is not superfluous.

The conclusion that the listed States did not already have jurisdiction over offenses by non-Indians "against Indians" is reinforced by Section 6 of Public Law 280, which authorized non-listed States to amend their constitutions or statutes to remove any legal impediments to the "assumption" of jurisdiction that Section 1162(a) conferred on listed States—*i.e.*, offenses "by or against Indians" in Indian country. 67 Stat. 590; see *McGirt*, 140 S. Ct. at 2478 (noting that Oklahoma has not obtained jurisdiction under this provision). And it is likewise supported by Section 7 of Public Law 280, which granted the consent of the United States to any State "not having jurisdiction" to "assume" jurisdiction by legislative action. 67 Stat. 590; see Civil Rights Act of 1968, Pub. L. No. 90-284, §§ 401(a), 403(b), 82 Stat. 78, 79 (25 U.S.C. 1321(a), 1323(b)) (repealing Section 7 and providing instead that States "not having jurisdiction" over offenses committed "by or against Indians" may "assume" such jurisdiction only with the consent of the Tribe concerned); see also U.S. Br. at 15-17, *Arizona* v. *Flint*, 492 U.S. 911 (1989) (No. 88-603) (*Flint* Br.) (discussing legislative history of these provisions). Accepting Oklahoma's argument that States *already* had such jurisdiction would negate these specific enactments and the requirement of tribal consent, as well as certain States' decisions not to seek (or to retrocede) that jurisdiction. See Resp. Br. 23-25, 50.

C. This Court Has Long Recognized That States Do Not Generally Have Jurisdiction Over Offenses By Non-Indians Against Indians In Indian Country

This Court has likewise stated on multiple occasions, albeit in dicta, that federal jurisdiction over offenses committed by non-Indians against Indians in Indian country is generally exclusive of state jurisdiction.

1. In the first of those cases, *Williams* v. *United States*, 327 U.S. 711 (1946), a non-Indian man was convicted in federal district court of having sexual intercourse with an underage Indian girl on a reservation. Although no jurisdictional claim was raised, the Court, in describing the statutory regime under which the non-Indian was prosecuted, stated:

> While the laws and courts of the State of Arizona may have jurisdiction over offenses committed on th[e] reservation between persons who are not Indians, the laws and courts of the United States, *rather than those of Arizona*, have jurisdiction over offenses committed there, as in this case, by one who is not an Indian against one who is an Indian.

Id. at 714 (emphasis added; footnote omitted).

Subsequently in *Williams* v. *Lee*, the Court held that an Arizona court did not have jurisdiction over a civil suit brought by a non-Indian against an Indian arising out of a transaction occurring on the Navajo Reservation, because the exercise of state jurisdiction would undermine the authority of the tribal courts. 358 U.S. at 223. After discussing jurisdictional principles governing Indian reservations generally and observing that "state courts have been allowed to try non-Indians who committed crimes against each other on a reservation," the Court stated that "if the crime was by or against an Indian, tribal jurisdiction or that expressly conferred on other courts by Congress has remained exclusive." *Id.* at 220; see *id.* at 218-221. As a result, "non-Indians committing crimes against Indians are now generally tried in federal courts." *Id.* at 220 n.5.

The Court similarly described the governing jurisdictional principles in *Washington* v. *Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S.

463 (1979) (*Yakima Indian Nation*), where it upheld the manner in which Washington assumed jurisdiction over Indians and Indian territory pursuant to Public Law 280. The Court observed that before the State assumed jurisdiction, its law reached into Indian reservations only if it did not infringe on tribal self-government. "As a practical matter," the Court explained, this "meant that criminal offenses by or against Indians ha[d] been subject only to federal or tribal laws * * * except where Congress * * * 'expressly provided that State laws shall apply.'" *Id.* at 470-471 (quoting *McClanahan* v. *Arizona State Tax Comm'n*, 411 U.S. 164, 170-171 (1973)); see*, e.g., Solem*, 465 U.S. at 465 n.2, 467 n.8.

In the past two decades, this Court has continued to discuss the allocation of jurisdiction in Indian country in similar terms. In *Nevada* v. *Hicks*, 533 U.S. 353 (2001), the Court described "Sections 1152 and 1153 of Title 18" as "giv[ing] United States and tribal criminal law generally exclusive application" over "crimes committed in Indian country." *Id.* at 365 (emphasis omitted). And in *United States* v. *Bryant*, 579 U.S. 140 (2016), the Court observed that "[m]ost States lack jurisdiction over crimes committed in Indian country against Indian victims," identifying as the exception the States granted criminal jurisdiction under Public Law 280. *Id.* at 146.

Most recently, in *McGirt*, this Court stated that while the Major Crimes Act "applies only to certain crimes committed in Indian country by Indian defendants," Section 1152 "provides that federal law applies to a broader range of crimes by or against Indians in Indian country." 140 S. Ct. at 2479. The Court implied that such jurisdiction was exclusive, explaining that

"States are otherwise free to apply their criminal laws in cases of *non-Indian victims and defendants*, including within Indian country." *Ibid.* (emphasis added); cf. U.S. Amicus Br. at 38, *McGirt*, *supra* (No. 18-9526) (taking the position that if the Court held that the territory in question constituted a reservation over which the federal government had jurisdiction, federal jurisdiction over crimes by non-Indians against Indians would be exclusive).

The statements in those decisions were dicta, insofar as the Court did not have before it a non-Indian defendant who was charged or convicted in state court. But contrary to Oklahoma's suggestion (Pet. Br. 28), those repeated statements of the governing rule cannot be dismissed as mere casual asides.

In *Williams* v. *United States* and *Williams* v. *Lee*, the statements were part of a thorough and considered review of jurisdictional principles in Indian country. *Williams*, 327 U.S. at 714-715 n.10; *Lee*, 358 U.S. at 219-222. Indeed, because the former case involved the federal prosecution of a non-Indian for a crime against an Indian, its discussion of the jurisdictional framework was pertinent to establish the statutory context for the prosecution. In *Yakima Indian Nation*, the Court's observation set the stage for a discussion of Public Law 280—an enactment that rests on the understanding that States lack criminal jurisdiction over crimes by or against Indians in the absence of express statutory authorization. See pp. 21-23, *supra*. And in *Solem*, the Court's statements of the rule of exclusive federal jurisdiction over crimes by or against Indians explained the consequences of a holding that a tract of land has reservation status.

This Court's more recent discussions of jurisdiction over crimes against Indians in Indian country likewise reflect careful consideration. In *Hicks*, the Court's discussion provided the backdrop for its holding that while "[t]he States' inherent jurisdiction on reservations can of course be stripped by Congress"—as it had been under Sections 1152 and 1153—Congress had not proscribed the particular action at issue (state officers' entering a reservation "to investigate or prosecute violations of state law occurring off reservation"). 533 U.S. at 365-366. In *Bryant*, the Court described the "complex patchwork of federal, state, and tribal law governing Indian country," which "made it difficult to stem the tide of domestic violence experienced by Native American women" and thus formed the impetus for enactment of the statute at issue. 579 U.S. at 145 (citation and internal quotation marks omitted). Finally, in *McGirt*, the Court addressed the scope of state jurisdiction in considering Oklahoma's and the United States' contention that recognizing a present-day Creek reservation would "unsettle an untold number of convictions and frustrate the State's ability to prosecute crimes in the future." 140 S. Ct. at 2479. Those contentions were featured prominently in the briefing and at argument, see, *e.g.*, U.S. Amicus Br. at 37-39; Tr. 54-55, 64, and the Court's opinion gave them significant attention, 140 S. Ct. at 2479-2480.[5]

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[5] Oklahoma observes (Pet. Br. 23) that in *County of Yakima* v. *Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251 (1992), the Court recognized "the rights of States, absent a congressional prohibition, to exercise criminal (and, implicitly, civil) jurisdiction over non-Indians located on reservation lands." *Id.* at 257-258. In support of that statement, the Court cited *Martin*, *supra*—which held that, under *McBratney*, New York had

2. It is significant that Congress's enactment of the modern statutory provisions discussed above built on, and indeed alternated with, this Court's repeated statements that the States lack jurisdiction over offenses "by or against Indians" in the absence of express congressional authorization. Thus: (1) Congress enacted the Kansas Act in 1940, conferring jurisdiction on Kansas on the understanding that the State was otherwise without jurisdiction over such offenses; (2) this Court expressed the same view in *Williams* v. *United States*, in 1946; (3) Congress then acted on that premise when it provided for certain criminal jurisdiction for North Dakota in 1946 and New York and Iowa in 1948, recodified the General Crimes Act in 1948, and enacted Public Law 280 in 1953; (4) this Court reiterated the rule of *Williams* v. *United States* in *Williams* v. *Lee* in 1959; (5) Congress amended Public Law 280 in 1968; and (6) this Court again reiterated that view in *Yakima Indian Nation* in 1979, and on several occasions thereafter. This pattern of congressional enactments and this Court's reiterations of the rule of exclusive federal jurisdiction confirms that States lack jurisdiction over offenses committed by non-Indians against Indians within Indian country absent affirmative statutory authorization. See Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 252 (2012) (statutes addressing the same subject should be interpreted "harmoniously" as "part of an entire *corpus*

"jurisdiction to punish a murder of one non-Indian committed by another non-Indian" on a reservation. *Martin*, 326 U.S. at 498. *County of Yakima's* reference to "criminal * * * jurisdiction," 502 U.S. at 257, does not address jurisdiction over crimes committed by non-Indians against Indians.

juris"). The Executive Branch, in its briefs over the years, has taken the same position. See p. 32 n.8, *infra*.

D. The State's Remaining Arguments Lack Merit

All three Branches of the federal government have long acted on the understanding that absent specific congressional action, States lack jurisdiction over crimes committed by non-Indians against Indians in Indian country. A number of state courts have reached the same result,[6] or expressed that view in dicta.[7] And multiple federal courts of appeals have agreed. See, *e.g., United States* v. *Langford*, 641 F.3d 1195, 1199 (10th Cir. 2011); *United States* v. *Bruce*, 394 F.3d 1215, 1221 (9th Cir. 2005); see also Felix S. Cohen, *Handbook of Federal Indian Law* 146 (1942) ("The principle that a state has no criminal jurisdiction over offenses involving Indians committed on an Indian reservation is too well established to require argument."). The State's

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[6] See *State* v. *Cungtion*, 969 N.W.2d 501 (Iowa 2022); *State* v. *Larson*, 455 N.W.2d 600 (S.D. 1990); *State* v. *Flint*, 756 P.2d 324 (Ariz. App. 1988), cert. denied, 492 U.S. 911 (1989); *State* v. *Greenwalt*, 663 P.2d 1178 (Mont. 1983); *State* v. *Kuntz*, 66 N.W.2d 531 (N.D. 1954).

In *State* v. *McAlhaney*, 17 S.E.2d 352 (1941), the Supreme Court of North Carolina held that the State had jurisdiction over an offense by a non-Indian against an Indian on the Eastern Cherokee Reservation. That decision predates much of this Court's relevant jurisprudence and most of the congressional enactments conferring jurisdiction on particular States, and it has been called into question, albeit in a different context. See *State* v. *Nobles*, 818 S.E. 2d 129, 135 & n.2 (N.C. Ct. App. 2018); see also *Flint* Br. at 18-19 n.16.

[7] See, *e.g.*, *State* v. *Reber*, 171 P.3d 406, 407-408 (Utah 2007); *State* v. *Sebastian*, 701 A.2d 13, 22 & n.21 (Conn. 1997), cert. denied, 522 U.S. 1077 (1998); *State* v. *Warner*, 379 P.2d 66, 68-69 (N.M. 1963); *State* v. *Jackson*, 16 N.W.2d 752, 754 (Minn. 1944); *State* v. *Youpee*, 61 P.2d 832, 835 (Mont. 1936).

remaining arguments provide a wholly insufficient basis for altering the well-established statutory allocation of jurisdiction in Indian country, which governs not just in Oklahoma but throughout the United States.

1. Oklahoma primarily contends that "a State has inherent authority to prosecute non-Indians who commit crimes in Indian country within its borders, unless Congress preempts that authority." Pet. Br. 3; see *id.* at 15-23. But given "the history of tribal sovereignty" and the federal government's plenary authority over Indian affairs, "questions of pre-emption in this area are not resolved by reference to standards of pre-emption that have developed in other areas of the law." *Cotton Petroleum Corp.* v. *New Mexico*, 490 U.S. 163, 176 (1989); see, *e.g.*, *New Mexico* v. *Mescalero Apache Tribe*, 462 U.S. 324, 333-334 (1983); *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136, 143, 150-151 (1980). "[F]ederal statutes, treaties, and executive orders set[] aside reservation and trust lands for purposes of tribal self-government [and] establish a baseline of federal law disfavoring state jurisdiction." *Cohen* § 6.03[2][a], at 519. In the case of criminal jurisdiction, that baseline has long been established by 18 U.S.C. 1152 and 1153, which confer exclusive jurisdiction on the federal government in the absence of an express statutory exception.

Thus, while it is true to an extent today that "[s]tate sovereignty does not end at a reservation's border," Pet. Br. 23 (brackets in original) (quoting *Hicks*, 533 U.S. at 361), the "basic policy of *Worcester* has remained," and the Court has recognized that "when Congress has wished the States to exercise" jurisdiction in cases involving Indians, "it has expressly granted them * * * jurisdiction." *Lee*, 358 U.S. at 219, 221; cf.

Kennerly v. *District Court of the Ninth Judicial Dist.*, 400 U.S. 423, 424 n.1, 427 (1971) (per curiam). Here, Congress has not granted Oklahoma jurisdiction over offenses committed by non-Indians against Indians in Indian country; to the contrary, Congress has enacted statutes specifically addressing such jurisdiction, which make clear that Oklahoma may not exercise it.

2. Oklahoma observes that the Court's more "modern cases" have sometimes held that a State's civil laws may apply to certain on-reservation conduct based on a "'particularized inquiry into the nature of the state, federal, and tribal interests at stake.'" Pet. Br. 40 (quoting *Bracker*, 448 U.S. at 144-145); see *id.* at 22 (relying on decisions upholding the application of state civil laws, largely relating to taxation, to non-Indians in Indian country). But there is no basis to undertake any such "particularized inquiry" here in light of the longstanding statutory framework and historic understandings discussed above.

To the extent any such balancing were relevant, Oklahoma errs in contending (Pet. Br. 42) that the question presented raises "no serious issues of tribal sovereignty." While tribal courts generally lack authority to try non-Indians for crimes against Indians, see *Oliphant*, 435 U.S. at 204, 212, Congress historically regarded exclusive federal jurisdiction over such crimes as one aspect of the federal government's duty to protect Indians, which stems in part from early treaties that themselves reflect the unique nature of Indian nations as domestic dependent sovereigns. This Court likewise understood the exclusivity of federal and tribal jurisdiction over non-Indians in Indian country as key to tribal sovereignty in *Worcester*. Those historic understandings provide key guidance in determining how

Congress, the Tribes, and the public would have understood Section 1152 and its predecessors—and they would likewise be relevant to any assessment of state, tribal, and federal interests.[8]

3. Finally, although this Court's decision in *McGirt* increased the practical consequences of the question presented in Oklahoma, that change does not warrant a reversal of principles long governing criminal jurisdiction in Indian country throughout the Nation. Federal law enforcement agencies in Oklahoma are working diligently with tribal and State partners to address the increased caseload occasioned by *McGirt*, including by indicting respondent here. While Oklahoma contends (Pet. Br. 8-9) that those efforts may result in shorter federal sentences, it ignores the differences between

[8] The United States explained in *Flint* that—putting to one side the origins and history of Indian law and criminal jurisdiction in Indian country in particular—a strong policy argument could be made in more modern times that concurrent state jurisdiction over crimes committed by non-Indians against Indians would be consistent with state, federal, and tribal interests. See *Flint* Br. at 15-17. Largely for that reason, the Office of Legal Counsel concluded in 1979 that, although the question was "exceedingly difficult," a "substantial case" could be made that States should not be deprived of jurisdiction over offenses committed by non-Indians against Indians. *Memorandum Opinion for the Deputy Attorney General*, 3 Op. O.L.C. 111, 117, 120. The United States Attorneys' Manual took a similar position. U.S. Dep't of Justice, *United States Attorneys' Manual* § 9-20.215 (1985). As the United States explained in *Flint*, however, the government subsequently came to a different view upon a thorough reexamination of the issue in light of the statutory text, history, and case law discussed above. The current Justice Manual thus explains that absent a contrary Act of Congress, federal jurisdiction over crimes committed by non-Indians against Indians in Indian country is exclusive. See U.S. Dep't of Justice, *Criminal Resource Manual* 685 (updated Jan. 22, 2020).

the availability of parole in the state and federal systems. Compare Okla. Stat. Ann. tit. 57, § 332.7 (West 2015) (providing for parole), with *United States* v. *Haymond*, 139 S. Ct. 2369, 2382 (2019) (explaining that Congress has "abolish[ed]" federal parole).

More fundamentally, to the extent that Congress views post-*McGirt* challenges as warranting the conferral of state or tribal jurisdiction over crimes by non-Indians against Indians in Indian country in Oklahoma, it may provide for such jurisdiction through targeted legislation. See Resp. Br. 9, 53. This Court should reject Oklahoma's invitation to upend the well-established jurisdictional regime in Indian country—including not only fee lands within a reservation, but also tribal trust and restricted lands—throughout the country.

CONCLUSION

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

Respectfully submitted.

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