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 STATES OF TEXAS, KANSAS, LOUISIANA, NEBRASKA, AND VIRGINIA AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE

Amici curiae are the States of Texas, Kansas, Louisiana, Nebraska, and Virginia ("Amici States").[1]

All States have a sovereign interest in prosecuting crimes committed within their borders. *Heath v. Alabama*, 474 U.S. 82, 93 (1985). Indeed, administering a criminal-justice system is "among the basic sovereign prerogatives States retain." *Oregon v. Ice*, 555 U.S. 160, 168 (2009).

As Oklahoma's experience in this case shows, that core sovereign function is in jeopardy in States with historic Indian lands.[2] The Court's decision in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), raised the prospect that reservations long regarded by all as diminished or disestablished still qualify as "Indian country" under federal law. Oklahoma state courts have since confirmed that, under *McGirt*, that is the case for the historical territories of the Five Tribes of Oklahoma, which collectively comprise around 43% of the State. The immediate result was to oust Oklahoma's jurisdiction in those areas to prosecute Indians for crimes listed in the Major Crimes Act, including murder, kidnapping, and felony child abuse. 18 U.S.C. § 1153. In the decision below, the Oklahoma Court of Criminal Appeals extended *McGirt*'s

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[1] No counsel for a party authored this brief in whole or in part, and no person other than amici curiae and their counsel made a monetary contribution intended to fund the preparation of submission of this brief. Counsel for all parties have provided blanket consent to the filing of this brief.

[2] We use the terms "Indian" and "non-Indian" to be consistent with federal statutes and caselaw. And unless context requires otherwise, the term "Indian" in this brief subsumes such terms as "Native American," "American Indian," "Alaska Native," and any combinations of these terms.

holding to the General Crimes Act, *id.* § 1152, depriving Oklahoma of authority to prosecute non-Indians for all crimes committed against Indians in the same broad swath of the State. Pet. App. 4a, 36a–38a.

The fallout from *McGirt* and the decision below is a criminal-justice crisis in Oklahoma. Thousands of criminal defendants are seeking dismissal of their cases, federal prosecutors and courts are overwhelmed, and an unknown number of crimes are going unprosecuted. No State wants to reprise Oklahoma's experience, even on a smaller scale.

This Court's grant of certiorari on the first question presented in Oklahoma's petition is thus an important first step in ameliorating the untenable situation occurring in that State since the *McGirt* decision was handed down. The Amici States support Oklahoma's contention that States share concurrent authority with the federal government to prosecute non-Indians who commit crimes against Indians in Indian country under the General Crimes Act. The Court should reverse the Oklahoma Court of Criminal Appeals' erroneous expansion of *McGirt*, which, if followed, would deprive States of an important and necessary role in prosecuting non-Indians who victimize Indians.

SUMMARY OF ARGUMENT

One attribute of state sovereignty is the States' authority to prosecute non-Indians who commit alleged criminal offenses against Indians in the Indian country that lies within their borders. The decision below incorrectly held that the General Crimes Act deprives them of that authority. And it did so absent an express congressional prohibition denying States the right to exercise criminal jurisdiction over non-Indians who perpetrate crimes against Indians in Indian country.

Only by reversing the decision below and recognizing States' inherent criminal jurisdiction over non-Indians in Indian country can States be empowered to combat the violent victimization of Indians on tribal lands. Otherwise, the acute problem of non-Indians committing crimes against Indians on tribal lands will only worsen.

ARGUMENT

I. States Share Concurrent Criminal Jurisdiction with the Federal Government To Prosecute Non-Indians Who Commit Crimes Against Indians in Indian Country.

Amici States agree with Oklahoma that it shares concurrent jurisdiction with the federal government over all crimes committed by non-Indians in Indian country, including Respondent's case. In the state courts below, Respondent, relying on 18 U.S.C. section 1152 and *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), claimed the State had no jurisdiction to prosecute him. Pet. App.2a. Accepting Respondent's jurisdictional challenge, the Oklahoma Court of Criminal Appeals rejected the State's assertion of concurrent jurisdiction, holding that "[t]he ruling in *McGirt* governs this case and requires us to find the District Court of Tulsa County did not have jurisdiction to prosecute [Respondent]." Pet. App.4a. The court's ruling is contrary to clear language in the General Crimes Act and caselaw establishing that the federal and state courts have concurrent criminal jurisdiction over such non-Indian offenders on tribal lands.

A. The General Crimes Act does not prohibit States from exercising their inherent criminal jurisdiction over a non-Indian who commits a crime against an Indian in Indian country.

1. It is constitutional bedrock that "[t]he Federal Government 'is acknowledged by all to be one of enumerated powers,'" *Nat'l Fed'n of Indep. Bus. v. Sebelius (N.F.I.B.)*, 567 U.S. 519, 534 (2012) (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819)), and that "[t]he powers not delegated to the United States by the Constitution . . . are reserved to the States respectively, or to the people." U.S. Const. amend. X. Meaning, the Federal Government must show that a constitutional grant of power authorizes each of its actions. *See, e.g.*, *N.F.I.B.*, 567 U.S. at 535.

But "[t]he same does not apply to the States, because the Constitution is not the source of their power." *Id.* "The States thus can and do perform many of the vital functions of modern government . . . even though the Constitution's text does not authorize any government to do so." *Id.* at 535–36. This general power of governing, possessed by the States but not by the Federal Government, is known as a "police power." *Id.* at 536. A clear example of this "traditional state authority is the punishment of local criminal activity." *Bond v. United States*, 572 U.S. 844, 858 (2014) (citing *United States v. Morrison*, 529 U.S. 598, 618 (2000)). "In our federal system," then, "the National Government possesses only limited powers; the States and the people retain the remainder," and "[t]he States have broad authority to enact legislation for the public good"—that is, "a 'police power.'" *Id.* at 854 (quoting *United States v. Lopez*, 514 U.S. 549, 567 (1995)).

"Under the equal-footing doctrine 'the new States since admitted have the same rights, sovereignty and jurisdiction . . . as the original States possess within their respective borders.'" *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 370 (1977) (quoting *Mumford v. Wardwell*, 73 U.S. (6 Wall.) 423, 426 (1867)). States, accordingly, as the presumptive sovereigns within their borders, have the inherent right to exercise their police power over criminal acts within their jurisdiction.

In addition, "[f]ederalism, central to the constitutional design, adopts the principle that both the National and State Governments have elements of sovereignty the other is bound to respect." *Arizona v. United States*, 567 U.S. 387, 398–99 (2012) (citing *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring)). When the laws of the two sovereigns in our federal system are in conflict or at cross-purposes, "[t]he Supremacy Clause provides a clear rule that federal law 'shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.'" *Id.* at 399 (quoting U.S. Const. art. VI, cl. 2). "Under this principle, Congress has the power to preempt state law" and "may withdraw specified powers from the States by enacting a statute containing an express preemption provision." *Id.* (citations omitted). Preemption analysis, though, starts from the assumption "that the historic police powers of the States are not superseded unless that was the clear and manifest purpose of Congress." *Id.* at 400 (cleaned up).

2. These foundational principles remain true with respect to States' criminal jurisdiction over non-Indians

on Indian country within state borders. It is a well-established attribute of state sovereignty that States have the authority to prosecute non-Indians who commit alleged criminal offenses against Indians in the Indian country that lies within a State's borders. *See Nevada v. Hicks*, 533 U.S. 353, 361 (2001) ("State sovereignty does not end at a reservation's border."); *New York ex rel. Ray v. Martin*, 326 U.S. 496, 499–500 (1946) (stating that because of their statehood, "each state ha[s] a right to exercise jurisdiction over Indian reservations within its boundaries"). The Oklahoma Court of Criminal Appeals held that the General Crimes Act confers exclusive federal prosecutorial authority over Indian country and thereby strips Oklahoma of its authority to prosecute crimes committed by non-Indians against Indians in Indian country that lies within the State's boundaries. *See* Pet. App.4a; *see also* Pet. App.36a–39a. But nothing in the language of the General Crimes Act, 18 U.S.C. § 1152, rids States of that authority. The court below misconstrued the Act.

3. Statutory construction, as always, starts with the statutory language. *Rotkiske v. Klemm*, 140 S. Ct. 355, 360 (2019); *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 173 (1994). The Court "determine[s] whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997). The inquiry ceases "if the statutory language is unambiguous and 'the statutory scheme is coherent and consistent.'" *Sebelius v. Cloer*, 569 U.S. 369, 380 (2013) (quoting *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002) (internal quotation marks omitted)); *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992). Statutory terms "generally should be 'interpreted as

taking their ordinary, contemporary, common meaning . . . at the time Congress enacted the statute.'" *Wis. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2074 (2018) (quoting *Perrin v. United States*, 444 U.S. 37, 42 (1979)).

4. The General Crimes Act 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.
>
> This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to 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. The first sentence extends to Indian country "the general laws of the United States" applying to offenses that occur on lands "within the sole and exclusive jurisdiction of the United States" other than the District of Columbia. *Id.*

The second sentence excludes three categories of specified offenses committed by Indians from the Act's coverage. *Id. First*, it does not apply to an Indian committing a crime against another Indian. *Id. Second*, it does not apply to any crime committed by an Indian when the Indian has been punished by a tribe. *Id. Third*, it does not apply where a treaty gives exclusive jurisdiction over the crime to a tribe. *Id.*

5. The critical language regarding the issue here is the first sentence of section 1152. Its words do not

prohibit state criminal jurisdiction over non-Indians in Indian country, as the Oklahoma Court of Criminal Appeals interpreted that provision.

a. The main clause of the sentence is "the general laws of the United States . . . shall extend to the Indian country." The subject of the clause, "general laws," and the prepositional phrase, "of the United States," has been interpreted to mean "laws, commonly known as federal enclave laws, which are criminal statutes enacted by Congress under its admiralty, maritime, and property powers, governing enclaves such as national parks." *United States v. Cowboy*, 694 F.2d 1228, 1234 (10th Cir. 1982) (citing *United States v. White*, 508 F.2d 453, 454–55 (8th Cir. 1974)); *see also United States v. Begay*, 42 F.3d 486, 498–99 (9th Cir. 1994) (same); *United States v. Yannott*, 42 F.3d 999, 1003–04 (6th Cir. 1994) (same).

General enclave laws include the Assimilative Crimes Act. 18 U.S.C. § 13.[3] The plain text of the Assimilative Crimes Act does not refer to Indians or Indian country. *Id.* § 13(a). And it

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[3] The Act states in relevant part:

> Whoever within or upon any of the places now existing or hereafter reserved or acquired as provided in [18 U.S.C. § 7] of this title, or on, above, or below any portion of the territorial sea of the United States not within the jurisdiction of any State, Commonwealth, territory, possession, or district is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.

Id. § 13(a).

> contains no limitation based on the status of the defendant, to include whether he is Indian or non-Indian. Instead, it begins with the all-encompassing term "[w]hoever" in regards to whom it might apply—so long as this person commits the offense "within or upon any of the places now existing or hereafter reserved or acquired as provided in [18 U.S.C. § 7]."

United States v. Smith, 925 F.3d 410, 415 (9th Cir.), *cert. denied*, 140 S. Ct. 407 (2019). The "special maritime and territorial jurisdiction of the United States," 18 U.S.C. § 7(3), includes Indian reservations, *Smith*, 925 F.3d at 416.

If an offense is committed in a federal enclave and there is no federal statute defining that offense (*i.e.*, an offense "not made punishable by any enactment of Congress"), the federal government may nonetheless prosecute the offense through the Assimilative Crimes Act by assimilating a "like offense" and "like punishment" from the law of the State in which the federal enclave is situated. *See Lewis v. United States*, 523 U.S. 155, 160 (1998) ("The ACA's basic purpose is one of borrowing state law to fill gaps in the federal criminal law that applies on federal enclaves.").

b. The adjectival prepositional phrase "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" further modifies "general laws." This language incorporates into Indian country the federal criminal law that applies in areas under exclusive federal jurisdiction. The words "sole and exclusive" "are used in order 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). (Which of course suggests, Indian country is not within the sole and exclusive jurisdiction of the United States, because why else enact the General Crimes Act to extend the laws that apply to that territory to the Indian country.) So, considering federal enclave laws and the Assimilative Crimes Act, the plain language of the General Crimes Act (subject to the limitations in its second sentence) borrows the rules of decision from state law to supply the content of federal law, plus those federal crimes applicable where federal jurisdiction is exclusive. But it does not express whether federal jurisdiction is exclusive or concurrent for prosecuting non-Indians for alleged crimes against Indians in Indian country under the federal enclave laws and the Assimilative Crimes Act. It has nothing to say on that subject.

c. In addition, the introductory phrase of the first sentence, "[e]xcept as otherwise expressly provided by law," expresses an exception to the main idea in the rest of the sentence. By its terms, section 1152 applies "the general laws" unless "otherwise expressly provided by law." "The purpose of the proviso is to make it clear that other, more specific Indian country criminal laws prevail over section 1152." *Cowboy*, 694 F.2d at 1234. So, for example, the liquor-sales statute, 18 U.S.C. § 1154, is a criminal law expressly applicable to Indian country and, thus, applies in lieu of similar laws that would otherwise extend to Indian country under the General Crimes Act, *id.* § 1152. But this phrase gives no indication about, much less a prohibition of, States and the federal government exercising concurrent jurisdiction to prosecute crimes in Indian country that lies within a State's boundaries.

d. In sum, the plain language of the General Crimes Act, 18 U.S.C. § 1152, taken at face value, does not

answer the question whether States and the federal government may have concurrent criminal jurisdiction in Indian country. Nothing in the text expressly preempts a State from prosecuting a non-Indian who commits a crime against an Indian in Indian country within the State's borders. The Oklahoma Court of Criminal Appeals' decision reaching that result is unwarranted under the statutory language and should be overturned.

B. There is no express congressional prohibition against States' inherent criminal jurisdiction and concurrent federal-state jurisdiction under 18 U.S.C. § 1152.

Of course, Congress may strip States of their inherent jurisdiction over non-Indians who commit crimes against Indians in Indian country. *Hicks*, 533 U.S. at 365. But "absent a congressional prohibition," a State may "exercise criminal . . . 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 also United States v. McGowan*, 302 U.S. 535, 539 (1938) (applying federal law prohibiting the introduction of liquor into Indian country, but noting that the federal prohibition did not deprive the State of Nevada "of its sovereignty over the area in question" absent the federal government's assertion of "exclusive jurisdiction within the [Indian] colony"); *Surplus Trading Co. v. Cook*, 281 U.S. 647, 651 (1930) (stating that "unless there be a later and affirmative cession of jurisdiction by the state, the reservation is a part of her territory and within the field of operation of her laws, save that they can have no operation which would impair the effective use of the reservation for the purposes for which it is maintained"). There is no such prohibition here, *see supra* Part.I.A, and therefore,

States should be allowed to exercise their inherent criminal jurisdiction over non-Indians in Indian country concurrently with the federal government.

1. There is no apparent justification for preempting States' jurisdiction in this situation. To the contrary, allowing States and the federal government to exercise concurrent criminal jurisdiction over non-Indians furthers tribal interests. And no tribal interest is adversely affected by state prosecution of non-Indians for Indian-country crimes because tribes lack criminal jurisdiction over non-Indians, *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 195 (1978)—except of course, to the extent tribes may prosecute non-Indians for domestic-violence crimes under the Violence Against Women Reauthorization Act of 2013, 25 U.S.C. § 1304. Nor does a state prosecution of a non-Indian committing a crime against an Indian in Indian country bar a subsequent federal prosecution of the same person for the same conduct. *See Abbate v. United States*, 359 U.S. 187 (1959).

2. Granted, some state courts have interpreted the General Crimes Act to be a congressional prohibition against state criminal jurisdiction. *E.g.*, *State v. Larson*, 455 N.W.2d 600, 601 (S.D. 1990); *State v. Greenwalt*, 663 P.2d 1178, 1183 (Mont. 1983); *State v. Kuntz*, 66 N.W.2d 531, 532 (N.D. 1954); *State v. Flint*, 756 P.2d 324, 325 (Ariz. Ct. App. 1988). *But see State v. McAlhaney*, 17 S.E.2d 352, 354 (N.C. 1941) ("Unless expressly excepted, our laws apply equally to all persons, irrespective of race, and all persons within the State are subject to its criminal laws and are within the jurisdiction of its courts. Particularly is this so as to [the Cherokee Indians in North Carolina who are] citizens of the State."); *Greenwalt*, 663 P.2d at 1184 (Harrison, J., dissenting) (finding jurisdiction in this matter relating to a theft by a non-Indian of

a calf of a Indian citizen and noting "Indians, resident in Montana, . . . are citizens of the State of Montana," and accordingly "[t]hey are entitled to the protection of our laws and are responsible to our laws").

But these cases should be rejected. Each of them cited *Williams v. United States*, 327 U.S. 711 (1946). *Williams*, which involved the Assimilative Crimes Act, stated that "courts of the United States, rather than those of Arizona, have jurisdiction over offenses committed [within the Colorado River Indian Reservation], as in this case, by one who is not an Indian against one who is an Indian." *Id.* at 714 & n.10 But this language is dicta. The Court there had to consider only its own jurisdiction, but it did not have to consider whether Arizona and the federal courts had concurrent jurisdiction. *See id.* at 713–14. Thus, these state courts were apparently relying on the dicta in *Williams*, rather than adhering to the text of the laws Congress enacted. *See Larson*, 455 N.W.2d at 601; *Greenwalt*, 663 P.2d at 1182; *Flint*, 756 P.2d at 325.

The only state court that squarely addressed the issue before Williams—*McAlhaney*, *supra*—came out the other way. To be sure, a couple of state courts pre-*Williams* had suggested that States lack jurisdiction over these crimes. *See State v. Jackson*, 16 N.W.2d 752, 754 (Minn. 1944); *State v. Youpee*, 61 P.2d 832, 835 (Mont. 1936). *But see Goodson v. United States*, 54 P. 423, 426 (Okla. Terr. 1898) ("Prior to [the Major Crimes Act], as we have before stated, it was the universal practice to prosecute offenses committed on an Indian reservation within the borders of a state in the state courts, and to prosecute all crimes committed on a reservation in a territory in the United States courts."). But as shown in Part I.A *supra*, nothing in the statutory language prohibits a State from exercising concurrent criminal

jurisdiction with the federal government in cases where a non-Indian perpetrates a crime against an Indian in Indian country within the boundaries of the State.

3. The lack of such a congressional prohibition is unsurprising. Indians who reside in Indian country within a State, whether they live on a reservation or off one, are citizens of that State. As citizens of a State, they are entitled to the protection of the State's criminal (and civil) laws, just as they are responsible under those laws. And they are entitled to the equal protection guaranteed to all citizens, Indian and non-Indian alike, under their State's constitutions. *See State v. Schaefer*, 781 P.2d 264, 266 (Mont. 1989) (holding that a state court had jurisdiction to criminally prosecute a non-Indian defendant for violations of pawnbroker statutes by charging excessive interest rates, even though the alleged offenses occurred within the boundaries of an Indian reservation and involved transactions with Indians). Absent any congressional prohibition against it, the States' exercise of inherent criminal jurisdiction over non-Indian perpetrators of crimes in Indian country is appropriate.

II. States Exercising Their Inherent Criminal Jurisdiction Will Help Stanch the Victimization of Indians by Non-Indians in Indian Country.

The lower court's reading of the General Crimes Act should also be rejected because it would have significant negative consequences that Congress could not have intended—and in fact that "no sensible person could have intended." *Gobeille v. Liberty Mut. Ins. Co.*, 577 U.S. 312, 319 (2016). Not recognizing the States' inherent criminal jurisdiction over non-Indians in Indian country will inhibit efforts to combat the appalling problem of the violent victimization of Indians on tribal lands. If

undisturbed, the decision below will only worsen the victimization.

A. Overall victimization rates of Indians are atrociously high.

1. The high numbers of violent victimization of Indians are striking. Compared to members of other demographic groups, Indians suffer proportionally more violent victimizations and are more likely to report their attackers as belonging to a different demographic group than their own. Exec. Order No. 14,053, 86 Fed. Reg. 64,337 (Nov. 15, 2021); André B. Rosay, *National Survey Estimates of Violence Against American Indian and Alaska Native People*, 69 Dep't of Just. J. of Fed. L. & Prac. 91, 94, 96 (Jan. 2021); Steven W. Perry, *American Indians and Crime, 1992-2002*, Bureau of Just. Stats., U.S. Dep't of Just. iii (2004), https://tinyurl.com/7xeaxv44. Three prominent surveys provide national data on the victimization experiences of Indians—the National Crime Victimization Survey (NCVS), the National Violence Against Women Survey (NVAWS), and the National Intimate Partner and Sexual Violence Survey (NISVS). Rosay, *Survey Estimates*, 69 Dep't of Just. J. of Fed. L. & Prac. at 91. All three of these surveys provide national estimates on the prevalence and incidence of violence against Indians. *Id.*

> The results from the NCVS, the NVAWS, and the NISVS reveal two key, consistent findings. First, violent victimizations are more common for people who identify themselves as American Indian or Alaska Native than for people who do not. Second, interracial victimizations are also more common for people who identify themselves as American Indian or Alaska Native than for people who do not.

Id. at 99.

a. Additionally, Indian women across the country are murdered and sexually assaulted on reservations and nearby towns at far higher rates than other American women. Melissa Tehee, Royleen J. Ross, & Iva Grey-Wolf, *Relevant Psychological Responses in Cases of Missing or Murdered Indigenous Peoples*, 69 Dep't of Just. J. of Fed. L. & Prac. 251, 251 (Mar. 2021); Garet Bleir & Ana Zoledziowski, *Murdered and Missing Native American Women Challenge Police and Courts*, Ctr. for Pub. Integrity (2018), https://tinyurl.com/5fzzwv9n. Estimates suggest Indian women "are 2.5 times more likely than the national average to experience certain violent crimes, such as nonfatal strangulation." Leslie A. Hagen, *Violent Crime in Indian Country and the Federal Response*, 69 Dep't of Just. J. of Fed. L. & Prac. 79, 79 (Mar. 2021) (citing *United States v. Lamott*, 831 F.3d 1153, 1154 (9th Cir. 2016)). The Center for Disease Control and Prevention has reported that murder is the third-leading cause of death among Indian women and that rates of violence on reservations can be up to ten times higher than the national average. Urban Indian Health Inst., Seattle Indian Health Bd., *Missing and Murdered Indigenous Women & Girls* 2 (2018), https://tinyurl.com/5e7wem4y.

Murdered and missing indigenous people is "a long-standing crisis." Tehee et al., *Missing or Murdered Indigenous Peoples*, 69 Dep't of Just. J. of Fed. L. & Prac. at 251; *see also* Exec. Order No. 14,053, 86 Fed. Reg. at 64338 ("[M]ore work is needed to address the crisis of ongoing violence against Native Americans—and of missing or murdered indigenous people."); U.S. Gov't Accountability Off., GAO-22-104045, *Murdered or Missing Indigenous Women: New Efforts Are Underway but*

Opportunities Exist to Improve the Federal Response 1 (2022) ("[T]he incidence of violence committed against American Indian and Alaska Native (AI/AN) women in the U.S. constitutes a crisis.").

b. A statistical study of the years 1992–2002 by the Bureau of Justice Statistics of the Department of Justice reveals several additional disturbing findings. To begin, Indians experienced a per capita rate of violence twice that of the U.S. resident population. Perry, *Indians and Crime*, *supra*, at iv. The violent crime rate in every age group below age 35 was significantly higher for Indians than for all persons. *Id.* Among Indians 25 to 34 years' old, the rate of violent crime victimizations was more than 2½ times the rate for all persons the same age. *Id.*

Rates of violent victimization for both males and females were higher for Indians than for all races. *Id.* at v. The rate of violent victimization among Indian women was more than double that among all women. *Id.* Offenders who were strangers to the victims committed most robberies (71%) against Indians. *Id.* Indians were more likely to be victims of physical assault, rape, and sexual assault committed by a stranger or acquaintance as opposed to an intimate partner or family member. *Id.* Approximately 60% of Indian victims of violence—about the same percentage as of all victims of violence—described the offender as White. *Id.*

c. Proffered explanations for the high rates of murdered and missing Indians include:

- jurisdictional barriers[,]
- indifference from government officials[,]
- the lack of cross-jurisdictional communication and planning[,]
- failure to adequately fund tribal justice systems, and

- the problem of sex traffickers and other predators targeting Native women specifically.

Unmasking the Hidden Crisis of Murdered and Missing Indigenous Women: Exploring Solutions to End the Cycle of Violence: Hearing Before the Subcomm. for Indigenous Peoples of the United States of the H. Comm. on Natural Resources, 116th Cong. 2 (2019) (written testimony of Prof. Sarah Deer, Univ. of Kan.). Two recent laws aimed at ameliorating the crisis of murdered and missing Indians are Savanna's Act, Pub. L. No. 116-165, 134 Stat. 760 (2020) (codified at 25 U.S.C.§§ 5701-5705, 34 U.S.C. §§ 10452(a)(11)-(12), 10461(b)(23)-(24), 20126(b)(2), (4)), and the Not Invisible Act of 2019, Pub. L. No. 116-166, 134 Stat. 766 (2020) (codified, in part, at 25 U.S.C. §§ 2801 note, 2802 note). These laws were enacted to require the Department of Justice and the Department of the Interior "to take various actions to increase intergovernmental coordination and the collection of data relevant to missing or murdered Indians, including Indian women." GAO-22-104045 Rep., *supra*, at 2–3. But so far, "executive action has not achieved changes sufficient to reverse the epidemic of missing or murdered indigenous people and violence against Native Americans." Exec. Order No. 14,053, 86 Fed. Reg. at 64338.

2. The NCVS for 1992 to 2001 indicated that Indians accounted for an average of about 1.3% of all violent victimizations annually. GAO-22-104045 Rep., *supra*, at 4. The figure is statistically significant because, in 2000, 0.9% of the U.S. population, or 2.5 million people identified as American Indian or Alaska Native alone, while 1.5% of the U.S. population, or 4.1 million people, identified as American Indian or Alaska Native alone or in combination with another race. *The American Indian Population: 2000*, U.S. Census Bureau, Rep. No.

MSO/01-AI/AN (Sept. 2001), https://tinyurl.com/4nfskurd.

The NCVS also reflects that the annual average violent crime rate among Indians from 1992 to 2001 (101 per 1,000 persons ages 12 or older) was about 2½ times the national rate (41 per 1,000 persons). Perry, *Indians and Crime*, *supra*, at 4. The annual average violent crime rate among Indians was twice as high as that of African Americans (50 per 1,000 persons), 2½ times higher than that for Whites (41 per 1,000 persons), and 4½ times that for Asians (22 per 1,000 persons). *Id.* at 5.

For types of violent crimes from 1992 to 2001, Indians aged 12 or older were twice as likely to experience a rape or sexual assault (5 per 1,000) compared to all races (2 per 1,000). *Id.* And Indians (8 per 1,000) experienced robberies at double the rate for Whites (4 per 1,000) but at a more similar rate for African Americans (10 per 1,000). *Id.*

From 1992 to 2001, the yearly average violent crime rates were 49 per 1,000 males aged 12 or older and 35 per 1,000 females. *Id.* at 7. The violent crime rate among Indian males was 118 per 1,000, more than double the overall rate. *Id.* The rate of violent crime victimization among Indian females (86 per 1,000) was 2½ times the rate for all females. *Id.* The victimization rate among Indian females was much higher than that found among African American females (46 per 1,000 age 12 or older), about 2½ times higher than that among White females, and 5 times that of Asian females. *Id.*

For Indian victims of violence, strangers committed 42% of the violent crimes against Indians during the 1992–2001 period. *Id.* at 8. In 66% of the violent crimes in which the race of the offender was reported, Indian victims indicated the offender was either White or Black.

Id. at 9. Nearly 4 in 5 Indian victims of rape or sexual assault described the offender as White. About 3 in 5 Indian victims of robbery (57%), aggravated assault (58%), and simple assault (55%) described the offender as White. *Id.* The offender was described as Black for approximately 1 in 10 incidents of rapes or sexual assaults (8%), aggravated assaults (10%), and simple assault (9%), and about 2 in 5 robberies (17%) against Indian victims. *Id.*

3. The Uniform Crime Reporting program of the Federal Bureau of Investigation (FBI) sheds further light on the extent of violent victimizations of Indians. From 1976 to 2001, about 144 Indians on average were murdered each year. *Id.* at 12. Indians represented 0.7% of all murder victims nationwide, similar to their 0.9% share of the population. *Id.* During the same period, in most murder cases involving a White or African American victim, the offender was the same race as the victim. *Id.* at 14. By comparison, Indians were somewhat less likely to be murdered by an offender of their own race. *Id.* Strangers accounted for 17% of Indian murders. *Id.*

Most of the offenses investigated by U.S. attorneys in Indian country in fiscal year 2000 were violent crimes. *Id.* at 19. Just under 75% of suspects investigated in Indian country involved a violent crime, compared to the national total of 5%. *Id.* An estimated 73% of all charges filed in U.S. district courts for Indian country offenses were for violent crimes, compared to the national total of about 5%. *Id.* at 20.

4. Another study of homicides among Indians from 1999 to 2009 found that, although overall homicide rates had declined in the United States during the previous two decades, homicide rates among males, adolescents, young adults, and non-Hispanic Indians were

substantially elevated. Mose A. Herne et al., *Homicide Among American Indians/Alaska Natives, 1999-2009: Implications for Public Health Interventions*, 131 Pub. Health Rep. 597, 598 (2016), https://tinyurl.com/dw2s2yfe. Overall, the U.S. homicide rate decreased by 8% during 2007–2009 (from 6.1 per 100,000 population in 2007 to 5.5 per 100,000 population in 2009). *Id.* In 2009, homicide rates were lower for every racial and ethnic group except for Indians, whose homicide rate increased by 15% (from 7.8 per 100,000 population in 2007 to 9.0 per 100,000 population in 2009). *Id.*

The FBI's supplemental homicide reports showed 1,856 homicide victims in Alaska reported by law enforcement agencies between 1976 and 2016. Andrew Gonzalez, *Homicide in Alaska: 1976-2016*, Alaska Just. Info. Ctr., Univ. of Alaska Anchorage 8 (2020), http://hdl.handle.net/11122/11067. Indians were overrepresented in the reports. Almost a third of the victims was Indian. *Id.* Moreover, the homicide rates for Indians living on tribal lands are significantly higher than the rates for any other race or ethnic group in the country. Ronet Bachman et al., *Violence Against American Indian and Alaska Native Women and the Criminal Justice Response: What is Known*, U.S. Dep't of Just. 18 (2008) (unpublished report), https://tinyurl.com/uv5ftvau. And Indian women who live in tribal communities have higher rates of homicide compared to the national average for Indian females. *Id.* at 24.

Take Alaska for example. Alaska residents who are American Indian or Alaska Native are killed far more often than would be expected given their overall representation in Alaska's population. *Id.* at 51. Indian victims were over-represented in Alaska homicides (30.5%) compared to their population (16.3%). *Id.* at 9, 29. Although

the data shows that homicide victimization in Alaska, as it is in general, is predominantly a male phenomenon, Indian women comprise 10.2% of homicide victims and 8.1% of the population in Alaska—a 25% larger proportion of victims compared to population. *Id.* at 32, 48. For all homicide victims in Alaska, the homicide suspect was most likely of the same race. *Id.* at 9. Still, Indian female victims were killed by a White suspect 18.4% of the time. *Id.* at 9, 43.

5. Indian women, as noted, experience violent victimization at disproportionate rates. Kaci A. Clement, *The Victimization of Native American Women in the United States: The Impact and Potential Underlying Factors*, at 1 (2020) (Honors thesis, Univ. of S. Dakota), https://tinyurl.com/mc8pp2j4; *see also* Proclamation No. 10026, 85 Fed. Reg. 27,633 (May 5, 2020) (establishing Missing and Murdered American Indians and Alaska Natives Awareness Day, 2020). The NISVS in 2010 showed that more than 4 in 5 American Indian and Alaska Native women (84.3 %) have experienced violence in their lifetime, including 56.1% who have experienced sexual violence and 48.8% who have experienced stalking. André B. Rosay, *Violence Against American Indian and Alaska Native Women and Men*, Nat'l Inst. of Just., U.S. Dep't of Just. 2 (2016), https://tinyurl.com/bvrxyzvc. Indian women were more likely than any other racial group to report being a victim of sexual violence or stalking. Clement, *Victimization of Native American Women*, *supra*, at 7.

Overall, the NISVS showed more than 1 million Indian women experienced sexual violence in their lifetime. Rosay, *Violence Against American Indians*, *supra*, at 14. Amnesty International has found that 86% of survivors in reported sexual-violence cases involving Indian

women reported that their attackers were non-Indian men. Clement, *The Victimization of Native American Women*, *supra*, at 8. According to the NISVS, Indian female victims were 3.0 times as likely to have experienced sexual violence by an interracial perpetrator as non-Hispanic White-only female victims (96% versus 32%). Rosay, *Violence Against American Indians*, *supra*, at 18.

In addition, the number of Indian women officially reported missing to authorities or that are missing but not recorded is troubling. According to the FBI, there were 85,459 active missing person's reports at the end of 2018. Clement, *Victimization of Native American Women*, *supra*, at 8. That year, 9,914 individuals who were classified as Indian were reported as missing. *Id.*; *see also Missing and Murdered Indigenous Women & Girls*, *supra*, at 2 (noting that, in 2016, there were 5,712 reports of missing Indian women and girls).

Furthermore, almost half of Indian women (48.8 percent) surveyed in the NISVS experienced stalking in their lifetime. Rosay, *Violence Against American Indians*, *supra*, at 33. They were 1.8 times more likely to have experienced stalking in their lifetime than non-Hispanic White-only women. *Id.*

In sum, the NISVS found that more than 1.5 million Indian women had experienced violence in their lifetime. *Id.* at 2. Relative to non-Hispanic White-only women, Indian women were 1.2 times as likely to have experienced violence in their lifetime. *Id.* And relative to non-Hispanic White-only women, Indian women were also significantly more likely to have experienced violence by an interracial perpetrator and significantly less likely to have experienced violence by a perpetrator of the same race. *Id.*

6. The NVAWS was conducted in 1995 and 1996. Rosay, *Survey Estimates*, 69 Dep't of Just. J. of Fed. L. & Prac. at 95. Its purpose was "to provide lifetime and past-year prevalence and incidence estimates of emotional abuse, physical assault, forcible rape, and stalking experienced by adult women and men in the United States." *Id.* "Because of low sample sizes, few analyses were possible to describe the violence experienced by [Indians]. The only estimates available from the NVAWS for [Indians] are lifetime prevalence estimates." *Id.* The NVAWS results showed that adult women and men who identify as Indian are more likely to be victimized than adult women and men in the United States who do not identify as Indian. *Id.* at 96. Information about the perpetrator's race was not available from the NVAWS. *Id.*

7. Hate crimes are another type of victimization of Indians. Although hate crimes against Indians do not often make headlines, recent infamies have raised concerns about a possible upsurge in hate crimes against Indian communities. *See* Cecily Hilleary, *Rise in Hate Crimes Alarms Native American Communities*, Voice of Am. (June 5, 2017), https://tinyurl.com/tme972er; Bleir & Zoledziowski, *Murdered and Missing Native American Women*, *supra*. "Hate crimes" are those "that manifest evidence of prejudice based on race, gender or gender identity, religion, disability, sexual orientation, or ethnicity." Madeline Masucci & Lynn Langton, *Hate Crime Victimization, 2004-2015*, Bureau of Just. Stats., U.S. Dep't of Just. (June 2017) (quoting Hate Crimes Statistics Act of 1990, Pub. Law 101-275, 104 Stat. 140 (codified at 28 U.S.C. § 534 (note))), https://tinyurl.com/2sazst8b.

From 2011 to 2015, victims surveyed suspected that nearly half (48%) of hate-crime victimizations were

motivated by racial bias. *Id.* at 2. And nearly half (46%) of violent hate crime victimizations were committed by a stranger. *Id.* at 7. The FBI, in 2015, catalogued 4,029 single-bias hate crime offenses[4] that were motivated by race, ethnicity, or ancestry. *Hate Crime Statistics, 2015,* Fed. Bureau of Investigation, U.S. Dep't of Just. 2 (2016), https://tinyurl.com/54a5tkzd. Of these offenses, 3.4% were motivated by anti-Indian bias, a statistically significant figure given that Indians are about 1% of the total U.S. population. *Id.* One scholar in global hate crime believes that number is too low; her studies show that only about 10% of victims report hate crimes to tribal or local police. Hilleary, *Rise in Hate Crimes*, *supra.*

B. State prosecutorial authority is needed to shore up the federal government's insufficient response to Indian victimization.

The overall picture that these statistics paint of the victimization of Indians is no doubt complicated by the jurisdictional issues arising in this case. Barring Oklahoma from prosecuting crimes committed by non-Indians against Indians on tribal lands will only make it more difficult for Indians who have been victimized to receive justice.

1. The Cherokee Nation in their petition-stage Amicus Curiae Brief supporting Respondent note that policymakers might improve law enforcement in Indian country by granting tribal prosecutorial authority over non-Indians and revoking sentencing limits over all crimes committed in Indian country. Br. of the Cherokee Nation I/S/O Resp. 7 n.11 (quoting Dominga Cruz et al.,

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[4] "A single-bias incident" is "an incident in which one or more offense types are motivated by the same bias." *Hate Crime Statistics, 2015*, Fed. Bureau of Investigation, U.S. Dep't of Just. 1 (2016), https://tinyurl.com/54a5tkzd.

The Oklahoma Decision Reveals Why Native Americans Have a Hard Time Seeking Justice, Wash. Post, July 22, 2020). Of course, that suggestion is a nonstarter under current law because non-Indians are exempt from tribal courts' criminal jurisdiction, *see Oliphant*, 435 U.S. at 212, leaving the federal government to prosecute non-Indians who commit crimes against Indians on tribal lands within Oklahoma, 18 U.S.C. § 1152.

And non-Indian criminals know it. Reportedly, "non-Indians may be more likely to commit crimes in Indian country because they are aware that tribes lack criminal jurisdiction over non-Indians and that their criminal activity may not draw the attention of federal prosecutors." GAO-22-104045 Rep., *supra*, at 14. Other systemic barriers to tribal justice exist as well, including a lack of detention space, concerns over judicial independence, and various resource challenges. *Id.* at 18–24; *see also Unmasking the Hidden Crisis of Murdered and Missing Indigenous Women*, HNRC–SCIP Hrg. Compilation, *supra*, at 4 (written test. of Prof. Deer) (stating that "tribal justice systems are chronically underfunded, making it difficult to have necessary staffing, training, and resources to adequately address high crime rates on Indian reservations").

The federal government generally has a poor record of prosecuting violent crimes against Indians. Federal prosecutors decline to prosecute violent crimes at high rates. A study in 2014 found an overall federal declination rate of 7%. Brian D. Johnson, *The Missing Link: Examining Prosecutorial Decision-Making Across Federal District Courts*, Nat'l Inst. of Just., U.S. Dep't of Just. xii (2014), https://tinyurl.com/95kpba66. By contrast, in Indian country, the 2019 declination rate was 32%, excluding cases transferred to another jurisdiction

for prosecution. *Indian Country Investigations and Prosecutions*, U.S. Dep't of Just. 3 (2019), https://tinyurl.com/3vcca79y. Adjusted to account for cases referred to another jurisdiction, the 2019 declination rate is like the declination rates for prior years: 39% in 2018; 37% in 2017; and 34% in 2016. *Id.*

While declination rates alone do not reflect federal officers' commitment to combating crime in Indian country and likely reflect additional systemic difficulties in Indian country regarding the criminal justice system, *id.* at 3, the disparity between the overall federal declination rate and the declination rates in Indian country is stark. Even the Department of Justice calls the relatively high declination rate for violent offenses in Indian country "troubling." *Id.* at 33. Tribes have "expressed concerns about the rate at which USAOs decline to prosecute Indian country crimes and noted that a high number of declinations sends a signal to crime victims and criminals that there is no justice or accountability." GAO-22-104045 Rep., *supra*, at 16.

2. The Cherokee Nation in its cert-stage amicus brief was also dismissive of Amici States' "reliance on statistics" regarding high victimization rates of Indians that "pre-date *McGirt*." Br. of the Cherokee Nation I/S/O Resp. 7 n.11. Notably, though, they take no issue with the veracity of the statistics the Amici States cited or the magnitude of the problem. And just because some of the statistics cited were gathered before *McGirt* was handed down in no way diminishes their relevance here. It is not as though once *McGirt* was decided Indian victimizations ceased or were ameliorated because of that decision. If anything, it stands to reason that the Oklahoma Court of Criminal Appeals' reliance on *McGirt* to restrict States' inherent criminal jurisdiction over non-

Indians in Indian country will only exacerbate the problem of Indian victimizations at the hands of non-Indians.

In sum, non-Indians who perpetrate violent crimes against Indians in Indian country may go unprosecuted and unpunished. Barring Oklahoma from prosecuting non-Indians who commit crimes against Indians on tribal lands within the State's boundaries will likely only worsen Indian victimization.

CONCLUSION

This Court should reverse the Oklahoma Court of Criminal Appeals' decision vacating Respondent's conviction and sentence and remand for further proceedings.

Respectfully submitted.

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