No. 21-429

In The
Supreme Court of the United States

OKLAHOMA,

Petitioner,

v.

CASTRO-HUERTA,

Respondent.

On Writ Of Certiorari To The Oklahoma Court Of Criminal Appeals

BRIEF FOR NATIONAL CONGRESS OF AMERICAN INDIANS AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS CURIAE[1]

Established in 1944, the National Congress of American Indians (NCAI) is the Nation's oldest and largest organization addressing American Indian interests. Since its founding, NCAI has worked with federal, tribal, and state governments to improve public safety in Indian country. The NCAI has a strong interest in both preserving the time-honored principles of Indian law and in ensuring effective responses to crime and violence in Indian country and against Indian people throughout the United States.

SUMMARY OF ARGUMENT

Since the Founding, the United States has asserted federal jurisdiction and excluded state jurisdiction over crimes by non-Indians against Indians. This exclusive authority was crucial to maintaining peace and keeping treaty promises to tribal governments. Even after states gained authority over reservation lands, Congress and this Court affirmed that they lacked jurisdiction over crimes against Indians absent clear congressional intent to the contrary. In the modern era, Congress added to this tradition by limiting existing grants of jurisdiction to states and expanding

[1] No counsel for either party authored this brief in whole or in part, and no person other than amicus curiae or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this amicus brief.

tribal authority over crimes affecting Indian victims. If Oklahoma's unique situation causes problems, Congress is well equipped to address it without undermining the established scheme throughout the United States.

Expanding state jurisdiction over crimes against Indians would not only undermine federal law but also public safety. History shows that expansion of state jurisdiction over Indian reservations dilutes resources and accountability for tribal and federal justice systems. Decades of careful studies, moreover, show that state jurisdiction erodes trust and cooperation with police, generates uneven enforcement and abuses of power, and prevents effective responses to the multilayered causes of violence against Indians. Whatever complaints Oklahoma has about complying with this Court's decision in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), they are no cause to sabotage the safety of Native people throughout the country in response.

ARGUMENT

I. Since the Founding, Federal Statutes Have Excluded State Jurisdiction Over Non-Indian Against Indian Crimes

Beginning with the very first Congress, the United States has asserted jurisdiction over non-Indian against Indian crime. Even after federal jurisdiction expanded to crimes between non-Indians and crimes

by Indians against non-Indians, this original jurisdiction remained at the heart of U.S. statutes and treaties. The language of these federal laws, their exceptions and guarantees, as well as repeated decisions by this Court show that federal jurisdiction was exclusive of state authority. Congress affirmed this exclusivity even as it expanded state jurisdiction in the twentieth century, by repeatedly granting selected states jurisdiction over offences "by *or against* Indians." Congress has underscored this exclusion in the modern era, enacting multiple statutes affirming that tribes, not states, are the institutions best positioned to address crimes against Indian people.

A. The Language, History, and Judicial Interpretation of the Original Statutes Governing Non-Indian Against Indian Crimes Exclude State Jurisdiction

The modern General Crimes Act is a direct descendant of the criminal provisions of the original Trade and Intercourse Acts. The provisions of these statutes "grew bit by bit, until in the law of 1834, the main pieces were finally assembled into a whole." Francis Paul Prucha, The Great Father: The United States Government and the American Indians 102 (1984). The essential provisions of those early statutes remain the law today. *See* Cohen's Handbook of Federal Indian Law § 1.03[2] (Nell J. Newton et al. eds. 2012) ("Cohen") (describing acts as containing "the fundamental elements of federal Indian policy").

Congress enacted the first Trade and Intercourse Act in 1790, 1 Stat. 137, 138 § 5 (1790) ("1790 Act"), in a contemporaneous definition of what it meant to "regulate commerce with the Indian tribes." Cohen, *supra*, § 1.03[2]; U.S. Const. art. I, § 8, cl. 3. The statute was enacted one year after the disastrous 1789 Treaty at Fort Harmar, which appeared to create state jurisdiction over murders between non-Indians and Indians. Treaty with the Wyandots, etc., 7 Stat. 29, art. V (1789). The fraudulent treaty, the first to which the Senate had formally given its advice and consent, immediately led to war and grievous U.S. losses. Prucha, *supra*, at 52-53, 63-64. When Congress drafted the 1790 Act, it was careful to specify that trials under the act would be in the "courts of the United States." 1790 Act at § 6.

Federal punishment of non-Indian crimes was necessary to maintain peace and keep promises to tribal treaty partners. In his 1791 address to Congress, President Washington emphasized the need for "adequate penalties against all those who, by violating [Indian] rights, shall infringe the Treaties, and endanger the peace of the Union." George Washington, Third Annual Message to Congress, Oct. 25, 1791. The following year, the President again urged "more adequate provision for . . . restraining the commission of outrages upon the Indians, without which all pacific plans must prove nugatory." George Washington, Fourth Annual Message to Congress, Nov. 6, 1792. The next month, having learned that "certain lawless and wicked" Georgians had invaded a Cherokee town and killed several Cherokees, the President declared that "it highly

becomes the honor and good faith of the United States to pursue all legal means for the punishment of those atrocious offenders." George Washington, Proclamation Against Crimes Against the Cherokee Nations, Dec. 12, 1792. In response to such entreaties, Congress repeatedly reenacted and strengthened statutes for punishing non-Indian offenses against Indians. Prucha, *supra*, at 102-8.

Crimes by non-Indians against Indians were the "very heart" of these measures. Prucha, *supra*, at 103. The acts initially covered only crimes by non-Indians against Indians. 1790 Act § 5; Trade and Intercourse Act, 1 Stat. 329, 331 § 4 (1793) ("1793 Act"), and Congress did not extend general criminal jurisdiction in Indian country until 1817. 3 Stat. 383 (1817), codified as amended at 18 U.S.C. § 1152. That statute, today known as the General Crimes Act or Indian Country Crimes Act, explicitly incorporated the criminal law provisions of the Trade and Intercourse Acts. *Id.* at § 3 (declaring the U.S. would "have, and exercise, the same powers, for the punishment of offenses" as under the 1802 Act).

The language of these acts shows that where Congress intended to authorize state authority, it did so directly. For example, when the statutes authorize compensation to citizens for crimes by Indians who "come over or across said boundary line, into any state or territory," they specify that "nothing herein contained shall prevent the legal apprehension or arresting, within the limits of any state or district, of any Indian having so offended." 1802 & 1796 Acts § 14.

Similarly, the statutes expressly authorize "the agent or agents of any state, who may be present at any treaty held with Indians under the authority of the United States . . . to adjust with the Indians, the compensation to be made, for their claims to lands within such state." 1802 Act § 12; 1793 Act § 8.

Elsewhere, the acts made clear that Indian country was not within state jurisdiction. They declare, for example, that a non-Indian charged with violating the act, if found within a state or territorial district, "may be there apprehended and brought to trial, in the same manner, *as if* such crime or offense had been committed within such state or district." 1802 Act § 17 (emphasis added). Similarly the acts declare that they do not "prevent any trade or intercourse with Indians living on lands surrounded by settlements of the citizens of the United States, and *within the ordinary jurisdiction of any of the individual states*." 1802 Act § 19 (emphasis added). Crimes within Indian country, in other words, were neither "committed within such state" nor "within the ordinary jurisdiction of any of the individual states."

In *Worcester v. Georgia*, 31 U.S. 515 (1832), Chief Justice Marshall agreed that the acts excluded state jurisdiction. The Court expressed doubt that it could restrain Georgia's arrest of non-Indians Samuel Worcester and Elizur Butler if the sole complaint was its "extra-territorial operation." 31 U.S. at 561. But regardless of territorial jurisdiction, Georgia's actions were "in equal hostility with the acts of congress for regulating this intercourse. . . ." *Id.* at 561-2. The

state's seizure of Worcester, moreover, was "also a violation of the acts which authorise the chief magistrate to exercise this authority," *id.* at 562, presumably a reference to the intercourse acts that authorized federal magistrates to arrest offenders. 1802 Act § 17, *incorporated by reference* 3 Stat. 383 § 3 (1817).

Two years after *Worcester* interpreted the acts as preempting state criminal jurisdiction, Congress applied their provisions to the Indian Territory. 4 Stat. 729, 733 §§ 24-25 (1834) ("1834 Act"). That statute is now codified at 18 U.S.C. § 1152, and, consistent with its original intent, still preempts state jurisdiction.

B. Even After the United States Asserted General Criminal Jurisdiction, Crimes by Non-Indians Against Indians Remained a Core Concern of Federal Statutes and Treaties

Although statutes authorized general criminal jurisdiction in Indian country after 1817, punishing crimes by non-Indians against Indians remained at the heart of federal policy.

The 1834 Act, for example, implicitly recognizes potential abuse and bias against Indians and seeks to correct it. It provides that "in that all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person" whenever the Indian showed "previous possession or ownership." 1834 Act at § 22. The 1834 Act further provides that

where Indian property is damaged "in the commission, by a white person, of any crime . . . within the Indian country," the person convicted shall pay "a sum equal to the just value of the property." *Id.* at § 16, codified as amended at 18 U.S.C. § 1160. Where the offender was unable to pay or could not be apprehended, the United States would pay compensation itself. *Id.* Concurrent state jurisdiction would interfere with this carefully calculated scheme by preventing federal courts from trying non-Indians according to the prescribed standard and obtaining the mandated compensation from them.

Crimes by non-Indians against Indians also remained central to federal treaties. The United States frequently promised, for example, that U.S. citizens and subjects committing crimes against Indians "shall be arrested and tried, and upon conviction, shall be subject to all the penalties provided by law." *E.g.*, Treaty with the Apache, 10 Stat. 979, art. 6 (1852). Treaty language also shows why federal authority was so important: it was necessary so that "the friendship which is now established between the United States" and the tribal nation "shall not be interrupted by the misconduct of individuals." Treaty with the Utah-Tabeguache Band, 13 Stat. 673, art. 6 (1863); Treaty with the Cow Creek Band, 10 Stat. 1027, art. 6 (1853); Treaty with the Rogue River, 10 Stat. 1018, art. 6 (1853). These treaties often guarantee "full indemnification" for property stolen from Indians of the signing tribe. *Id.* The 1868 treaties, the last signed with many powerful tribes, continue this pattern, promising that

if "bad men among the whites," or others subject to U.S. authority, commit wrongs upon the Indians, the U.S. will "at once" arrest and punish the offender and reimburse the injured person. Treaty with the Navajo, 15 Stat. 687, art. 1 (1868); Treaty with the Sioux, 15 Stat. 635, art. 1 (1868); Treaty with the Northern Cheyenne and Northern Arapaho, 15 Stat. 655, art. 1 (1868). Concurrent state jurisdiction would prevent the United States from making good on these promises.

Throughout the treaty period, the word of the United States and the peace of the nation rested on timely federal punishment of non-Indian against Indian crimes, and often on reimbursing Indians for their losses. State jurisdiction would have interfered with both pillars of federal law.

C. Even As States Gained Authority Over Crimes Between Non-Indians, Congress And This Court Repeatedly Rejected Efforts To Increase State Authority Over Crimes Involving Indians

As federal policy turned toward forcible assimilation at the end of the nineteenth century, some sought to extend state authority over tribal lands and tribal people. With respect to crimes by or against Indians, however, Congress, and ultimately this Court, rejected these attempts.

Congress and this Court first rejected efforts to assert state criminal jurisdiction over Indian people directly. As the Indian Department sought to assert

broader authority over reservations, it pursued state as well as federal jurisdiction over Indian against Indian crime. *See* Sidney Harring, *Crow Dog's Case: A Chapter in the Legal History of Tribal Sovereignty*, 14 Am. Ind. L. Rev. 191, 28-9 (1989). Congress, however, rejected a bill that would have subjected Indians to state or territorial law in 1884, 16 Cong. Rec. 935 (1885) (describing bill), instead extending federal jurisdiction with the Major Crimes Act. 23 Stat. 385 (1885), codified as amended at 18 U.S.C. § 1153.

In upholding the Major Crimes Act, *United States v. Kagama*, 118 U.S. 375 (1886) described why the federal government, not the states, must have jurisdiction over Indian affairs. The federal government, the Court found, had a "duty of protection" to the Indians. *Id.* at 384. But Indian people "owe no allegiance to the states, and receive from them no protection. Because of the local ill feeling, the people of the states where they are found are often their deadliest enemies." *Id.* It is unimaginable that this "duty of protection" would allow states to exercise jurisdiction over crimes against Indians by their "deadliest enemies."

Implementation of the Major Crimes Act also provided evidence that state and county governments could not be trusted to prosecute crimes against Indians. Federal courts and prosecutors implemented the act within state boundaries, but counties did so within federal territories. Ann. Rept. Comm'r Indian Affairs xx (1885). The counties, however, did not see law and order on reservations as their responsibility and resented its costs. In 1886, the Commissioner of Indian

Affairs reported that "the county authorities refuse to prosecute Indians guilty of the most serious offenses, on the ground of the expense incident to such prosecution." Ann. Rept. Comm'r Indian Affairs xxviii (1886). The Commissioner urged that "a change of jurisdiction from the Territorial to the United States side of the district courts in the Territories, as in the case of crimes committed on a reservation in the States, would be advisable." Ann. Rept. Comm'r Indian Affairs xx (1885).

The Major Crimes Act also undermined tribal governmental capacity, even though that was not Congress's intent. The initial bill provided that Indians committing felonies should be tried in federal and territorial courts "and not otherwise." 16 Cong. Rec. 935 (1885). These words, however, were deleted to permit "concurrent jurisdiction with the Indian courts in the Indian country." *Id.* Despite this, courts for many years held that the statute preempted tribal authority over felonies, leading tribes to invest only in misdemeanor prosecution. Addie Rolnick, *Recentering Tribal Criminal Jurisdiction*, 63 UCLA L. Rev. 1638, 1649-50 (2016). Tribal felony jurisdiction is now accepted, *see Wetsit v. Stafne*, 44 F.3d 823, 825-6 (9th Cir. 1995); *see also* 25 U.S.C. § 1302(b) (authorizing tribes to impose multiyear sentences for crimes punishable by more than one-year sentences in the states), but extending federal jurisdiction long stymied tribal legal development.

With respect to crimes between non-Indians, of course, *United States v. McBratney*, 104 U.S. 621 (1881) and *Draper v. United States*, 164 U.S. 240 (1896), held

that the federal government lacked all jurisdiction in Indian country located within states. *McBratney* held that statehood "necessarily repeals" the General Crimes Act with respect to crimes between non-Indians, relying on a discredited interpretation of the equal footing doctrine. *Compare McBratney*, 104 U.S. at 622 with *Herrera v. Wyoming*, 139 S. Ct. 1686, 1695 (2019) (recognizing repudiation of the idea that federal protection of tribal rights was inconsistent with the equal footing doctrine). Although *McBratney* and *Draper* expressly reserved the question of federal jurisdiction over crimes "by or against Indians," *McBratney*, 104 U.S. at 624; *Draper*, 164 U.S. at 247, they created significant confusion about federal criminal jurisdiction within Indian country generally, including in cases where Indians were defendants. *See*, *e.g.*, *Ex Parte Nowabbi*, 61 P.2d 1139, 1151 (Okla. Ct. Crim. App. 1936) (overruled in *State v. Klindt*, 782 P.2d 401, 403-4 (Okla. Crim. App. 1989) (relying in part on *McBratney* and *Draper* to hold federal government lacked jurisdiction over crimes by Indians after Oklahoma statehood).

This Court, however, clarified that *McBratney* and *Draper* did not affect jurisdiction over crimes involving Indians. *Kagama* did so implicitly by noting the hostility of states to Indian people and federal duty to protect them. 118 U.S. at 384. *Donnelly v. United States*, 228 U.S. 243 (1913), made this explicit, stating that the federal obligation of *Kagama* applied "perhaps *a fortiori*—with respect to crimes committed by white men against the persons or property of the Indian tribes." *Id.* at 272. Later *Williams v. Arizona*, 327 U.S. 711

(1946), reconciled the *McBratney* and *Donnelly* lines of cases, declaring that although states had jurisdiction over crimes between non-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. This reconciliation has not been challenged in the modern era—until now.

D. Between 1940 and 1994, Congress Repeatedly Legislated Its Understanding That States Lacked Jurisdiction Over Non-Indian Against Indian Crime Without Express Congressional Consent

Even before *Williams v. Arizona*, Congress showed that it too understood that states lacked jurisdiction over crimes by non-Indians against Indians absent explicit congressional consent.

In Public Law 280 and every one of the state-specific statutes that preceded it, Congress authorized states to exercise jurisdiction over "offenses committed by *or against* Indians." *See* Pub. L. No. 83-280, 67 Stat. 588 (1953) (codified as amended at 18 U.S.C. § 1162; 25 U.S.C. § 1321) ("P.L. 280") (emphasis added); 60 Stat. 229 (1946) (granting North Dakota jurisdiction over the Spirit Lake Reservation); 54 Stat. 249 (1940) (Kansas). In particular, it used this language in three grants between June 25, and July 2, 1948, 62 Stat. 1224 (July 2, 1948) (New York); 62 Stat. 1161 (June 30, 1948) (granting Iowa jurisdiction over the Sac and Fox

Reservation); 62 Stat. 827 (June 25, 1948) (reenacting Kansas authorization). June 25, significantly, was also the date Congress reenacted the General Crimes Act. 62 Stat. 757 (June 25, 1948).

Congress used the same language in several statutes granting states jurisdiction over newly recognized reservations in the 1980s and 1990s. *See*, *e.g.*, Mohegan Nation of Connecticut Land Claims Settlement Act, 108 Stat. 3501 § 6(a) (1994); Seminole Indian Land Claims Settlement Act, 101 Stat. 1556 § 6(d)(1) (1987); Florida Land Claims Settlement Act, 96 Stat. 2012 § 8(b)(2)(A) (1982). If, as Petitioners claim, states already had jurisdiction over non-Indian against Indian crime, the words "or against," appearing in multiple statutes over half a century, including one enacted on the very same day Congress reenacted the General Crimes Act, mean nothing at all.

Congress's words were not mere surplusage. As *Williams v. Lee*, 358 U.S. 217 (1959), stated, despite the incursions of state law since *Worcester*, "if [a] crime was by or against an Indian, tribal jurisdiction or that expressly conferred on other courts by Congress has remained exclusive." *Id.* at 220. Indeed, the Court held, P.L. 280 showed that "when Congress has wished the States to exercise this power it has expressly granted them the jurisdiction which *Worcester v. State of Georgia* had denied." *Williams*, 358 U.S. at 221. P.L. 280 and other modern grants of jurisdiction over crimes against Indians confirm that the General Crimes Act otherwise preempts such authority.

E. Modern Statutes Underscore this Historic Exclusion by Limiting State Jurisdiction and Enhancing Tribal Jurisdiction over Crimes against Indians

The modern Congress has not changed this established rule. Instead, recent federal statutes underscore it by limiting grants of jurisdiction to states and expanding tribal jurisdiction throughout Indian country.

This trend began as early as 1968, when Congress amended P.L. 280 to permit states to retrocede jurisdiction and prohibit future extensions of jurisdiction without tribal consent. Pub. L. No. 90-284, Title IV, § 401, Apr. 11, 1968, 82 Stat. 78 (codified at 28 U.S.C. § 1321). Since then, there have been over thirty retrocessions of state statutory jurisdiction. Cohen at § 6.04[3][g] n.298 (listing 31 retrocessions); 132 Stat. 4395 (2018) (repealing Iowa's jurisdiction over the Sac and Fox Reservation); *see also State v. Cungtion*, 969 N.W.2d 501 (Iowa 2022) (noting that Iowa could not exercise jurisdiction over crimes committed after retrocession by non-Indians against Indians). Ironically Nebraska, which participated in an amicus brief for Petitioner, itself retroceded jurisdiction over several reservations in the state. *See* 71 Fed. Reg. 7994 (2006) (Santee Sioux); 51 Fed. Reg. 24,234 (1986) (Winnebago); 35 Fed. Reg. 16,598 (1970) (Omaha Reservation).

For several decades, Congress has also addressed crime against Indians by enhancing tribal, rather than state, authority. When, for example, *Duro v. Reina*, 495 U.S. 676 (1990), suggested that states could assume

jurisdiction to address crimes by non-member Indians against Indians, *id.* at 697, Congress responded by instead affirming that tribes had inherent jurisdiction over such crimes. Pub. L. No. 101-511, Title VIII, § 8077(b), (c), Nov. 5, 1990, 104 Stat. 1892 (codified as amended at 25 U.S.C. § 1301(4)). In the 2010 Tribal Law and Order Act, Congress recognized that tribal governments were often the "first responders" and "most appropriate institutions" for maintaining law and order in Indian country. Pub. L. No. 111-211, Title II, § 202, July 29, 2010, 124 Stat. 2262. It therefore expanded tribal sentencing authority, mandated greater federal cooperation with tribal governments, and authorized tribal attorneys to act as Special Assistant United States Attorneys to federally prosecute misdemeanors against Indian people. 25 U.S.C. § 1302(a)(7)(C). In the 2013 Violence Against Women Reauthorization Act, Congress added to this trend, affirmed tribal authority over non-Indians committing crimes against their intimate partners in Indian country. Violence Against Women Act Amendments of 2013, Pub. L. No. 113-4, § 904, 127 Stat. 54 (codified as amended at 25 U.S.C. § 1304).

As this case was pending, Congress passed the 2022 Violence Against Women Reauthorization Act. Pub. L. No. 117-103, 136 Stat. 49 (March 15, 2022). The Act is a resounding affirmation of the importance of tribal governments in addressing crimes against Indians. It declares that "restoring and enhancing Tribal capacity to address violence against women provides for greater local control, safety, accountability, and transparency," *id.* at § 801(a)(13), and that "[t]he vast

majority of American Indian and Alaska Native victims of violence—96 percent of women victims and 89 percent of male victims—have experience sexual violence by a non-Indian perpetrator," *Id.* at § 801(a)(3). The Act affirms tribal jurisdiction over non-Indians committing domestic violence, dating violence, sexual violence, sex trafficking, stalking, or violence against children. *Id.* at § 804. Acknowledging the importance of tribal institutions, it also affirms tribal jurisdiction over crimes by non-Indians against tribal officials—Indian or non-Indian—implementing tribal criminal justice systems. *Id.*

The Act also explicitly recognizes that state jurisdiction poses obstacles to tribal law enforcement. It declares that "Indian Tribes with restrictive settlement acts, such as Indian Tribes in the State of Maine, and Indian Tribes located in States with concurrent authority to prosecute crimes in Indian country under the amendments made by [Public Law 280] face unique public safety challenges." *Id.* at § 801(a)(14). It further recognizes the distinct sufferings of Alaska Native people, subjected to state jurisdiction and prevented from exercising jurisdiction themselves, and recognizes and affirms the authority of Alaska Native governments to exercise criminal and civil jurisdiction over all Indians in their Villages. *Id.* at §§ 812 & 813.

Congress has actively legislated in response to crimes against Indians in recent decades. Its actions show that tribal and federal—not state—governments are the appropriate responders to such crimes.

F. Conclusion

For over two centuries, the United States has asserted federal jurisdiction and excluded state jurisdiction over non-Indian against Indian crime. It did so to prevent violence, protect tribal communities, and fulfill its treaty promises. Current statutes add to this policy by expanding tribal jurisdiction and reducing state jurisdiction in Indian country. Whatever Petitioner's complaints about jurisdiction in Oklahoma, they provide no cause to violate this long-established statutory scheme.

II. State Jurisdiction Over Non-Indian Against Indian Crime Would Undermine Safety Throughout the United States

Ruling for the Petitioner would affect not just Oklahoma, but Indian country throughout the United States. The results will undermine safety for Indians and everyone whose lives they touch. First, although Indians do suffer deplorable rates of violence, most of this violence occurs either outside Indian country or on reservations where states already have full criminal jurisdiction. Within Indian country, state jurisdiction undermines resources and accountability for federal as well as tribal governments, which Congress agrees "are often the most appropriate institutions for maintaining law and order." Tribal Law and Order Act, *supra*, at § 202(a)(2)(b). State jurisdiction also affirmatively undermines public safety, contributing to mistrust by victims, unresponsive enforcement, and

high rates of fatal police encounters. If the existing jurisdictional scheme causes problems in Oklahoma, Congress can address them. But they do not justify imposing a scheme—one that overwhelming evidence shows does not work—on Indian country throughout the nation.

A. The Public Safety Crisis Facing Indian People Developed Largely under State Jurisdiction

Although Petitioner's amici cite the unconscionable violence against Indian people, this violence actually proves the failure of states to address non-Indian against Indian crime.

Federal statistics do not reflect where crimes against Native people occur and states often fail to track such crimes at all, but the overwhelming majority of cases likely occur within state jurisdiction. Seventy-eight percent of American Indian and Alaska Native people live outside Indian country, by definition outside the reach of both tribal and federal jurisdiction. U.S. Census Bureau, 2010 Census Briefs: The American Indian and Alaska Native Population 12 (2012) ("2010 Census Brief"). Seventy-one percent, moreover, live in cities. Urban Indian Health Institute, Missing and Murdered Indigenous Women & Girls: A Snapshot of Data from 71 Urban Cities in the United States 3 (2018) ("UBI").

Residence figures may actually understate the percentage of crimes occurring under state jurisdiction. A

recent study of missing and murdered Indigenous persons cases in California, for example, found that 97% of the cases they identified occurred outside tribal jurisdiction. Sovereign Bodies Institute, To' Kee Skuy' Soo Ney-Wo-Chek'—I Will See You Again in a Good Way, Progress Report 27 (July 2020) https://www.sovereign-bodies.org/_files/ugd/6b33f7_d7e4c0de2a434f6e9d4b1608a0648495.pdf ("SBI"). Even when crimes do occur in Indian country, states often have full jurisdiction over the crimes, because the states with the largest Native populations are mostly covered by P.L. 280 or its equivalent. 2010 Census Brief at 7, Table 2.[2] States, in other words, have jurisdiction, and often sole jurisdiction, over most crimes against Native people.

It is particularly ironic that Petitioner's amici raise violence against Native people in Alaska in support of their arguments. Although, as the Indian Law

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[2] The ten states with the largest Indigenous populations include Alaska and California, both mandatory Public Law 280 states, New York, which has criminal jurisdiction under Pub. L. No. 80-881 (1948), North Carolina, where the Indigenous population is dominated by the Lumbee Tribe which lacks federal recognition, Florida and Washington, which assumed voluntary 280 jurisdiction, *see* Fla. Stat. Ann. § 285.16, Rev. Code Wash. Ann. § 37.12.010, and Texas, which has jurisdiction under reservation specific acts. Ysleta del Sur Pueblo and Alabama and Coushatta Indian Tribes of Texas Restoration Act, Pub. L. No. 100-89 § 105(f) (1987); Texas Band of Kickapoo Act, Pub. L. No. 97-429 § 6 (1983). The top ten also include Oklahoma and Michigan, which until recently acknowledged no reservations within the state. The only states in the top ten where jurisdiction follows the traditional pattern are Arizona and New Mexico. *See* 2010 Census Brief, *supra*, at 6.

and Order Commission found, criminal justice issues facing Native people are "systemically the worst in Alaska," the "responsibility lies primarily with the State's justice system." Indian Law & Order Comm'n, *A Roadmap for Making Native America Safer: Report to the President & Congress of the United States* 35, 43 (2013) ("Roadmap"). Alaska is a mandatory P.L. 280 state, 18 U.S.C. § 1162, and out of the 229 Alaska Native governments, only one has territory considered Indian country. *See Alaska v. Native Village of Venetie*, 522 U.S. 520 (1998). Therefore, until the 2022 Violence Against Women Reauthorization, the state insisted its jurisdiction was exclusive. Roadmap, *supra*, at 45. This "led to a dramatic under-provision of criminal justice services in rural and Native regions of the State." *Id.* at 45. Congress also historically excluded Alaska from programs to develop tribal legal capacity. Alaska Native governments, for example, were excluded from both the 2010 Tribal Law and Order Act and the enhanced tribal authority affirmed by the 2013 Violence Against Women Reauthorization Act. *Id.* at 33.

The results of Alaska's jurisdiction are shocking. Compared to non-Natives, Alaska Native women are seven times more likely to experience sexual violence and ten times more likely to be raped, while Alaska Native people are four times more likely to commit suicide. *Id.* at 41-3. Alaska provides brutal evidence that states should not assume authority over crimes against Indians.

Mr. Castro-Huerta's case may underscore the failure of state officials to protect Indian children. As early

as 2012, there had been referrals about possible neglect of another child in the home, and an investigation in 2013 when that child died. 2 Trial Tr. 519. The Oklahoma Department of Human Services received referrals of failure to care for Mr. Castro-Huerta's stepdaughter in 2014, and several more referrals in January or February 2015. *Id.* The little girl had serious medical needs—cerebral palsy, blindness, and difficulty swallowing—the family had four other children. *Id.* at 280. The little girl actually lost weight over the two years after the initial referral. *Id.* at 283. In November 2015, Mr. Castro-Huerta and his wife brought the little girl to the emergency room, and, doctors realized, she was starving. *Id.* at 276, 283. Petitioner's late and punitive response to the long-term suffering of this Indian child is no endorsement of state jurisdiction here.

B. State Jurisdiction Undermines Support and Accountability for Tribal and Federal Legal Systems

State jurisdiction in Indian country often reduces accountability and resources for tribal and federal institutions—the institutions best positioned to address crimes against Indians.

As the Indian Law & Order Commission found, tribal governments are the "best positioned to provide trusted, accountable, accessible, and cost-effective justice in Tribal communities." Roadmap, *supra*, at v. The effects of adequately funded and supported tribal law

enforcement are striking. In one pilot program, the U.S. raised funding levels for tribal law enforcement on four reservations to permit staffing comparable to off-reservation communities. *Id.* at 64. Increasing tribal capacity resulted in initial increases in offenses as local citizens "gained the confidence to report more crimes," but within two years, crime had dropped across the board, by an average of 35% across the four reservations. *Id.* at 64-5.

A study of P.L. 280 reported similar effects for tribes that took over law enforcement after states retroceded their jurisdiction. Many interviewees reported that crime decreased after retrocession. Carole Goldberg et al., Final Report: Law Enforcement and Criminal Justice under Public Law 280 at 456 (2007), https://www.ncjrs.gov/pdffiles1/nij/grants/222585.pdf. According to one respondent, "a lot of this stuff weren't turned in. A lot of them—rapes and child molesting, things like that. . . . But now, if anything happens, it's reported. We're there." *Id.* at 457. Others attributed lower crime rates to the more visible presence of tribal law enforcement and to the impact of the public commitment of tribal governments in discouraging criminal behavior. *Id.*

Tribal governments also have distinct advantages in responding to the complex and intersecting causes of crimes affecting Indians. Many crimes, for example, are related to substance abuse, an area where culturally tailored interventions are important to success. *See* Substance Abuse & Mental Health Serv., U.S. Dept. Human Serv., Culturally-Informed Programs to

Reduce Substance Misuse and Promote Mental Health in American Indian and Alaska Native Populations (2018). Murders and trafficking of Indigenous women have been tied to foster placements and child removals, *see* SBI at 55, another area where tribal governments have unique interests and roles. Indian Child Welfare Act, 25 U.S.C. §§ 1901 et seq. Congress has recognized the need for culturally specific responses to victims of sexual and intimate partner violence, *see* 34 U.S.C. § 20124, also an area of particular concern for Indian communities. Mr. Castro-Huerta's crime as well—criminal neglect of a child with significant medical needs—similarly appears tied to community and economic factors.

Tribal and federal police also receive far higher marks than state and county police for both responsiveness and understanding of tribal cultures. In P.L. 280 jurisdictions, for example, 82.9% of respondents said tribal police responded promptly to calls, while only 42% said the same of state and county police. Duane Champagne et al., Captured Justice: Native Nations and Public Law 82 (2d ed. 2020). In non-P.L. 280 jurisdictions, about 70% of respondents said the same of both tribal and BIA police. *Id.* In P.L. 280 jurisdictions, 84% of respondents said tribal police had a good understanding of tribal cultures, but only 20% said the same of state and county police. Goldberg, *supra*, at 157. In non-P.L. 280 jurisdictions, meanwhile, respondents rated 74% of tribal police and 56% of BIA police as having a good understanding of tribal cultures. *Id.* at 158.

State jurisdiction, however, undermines support and accountability for tribal and federal criminal justice institutions. As Justice Brandeis recognized long ago, "Responsibility is the great developer," and dividing responsibility tends to "emasculate and demoralize." *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 92 (1936) (Brandeis, J., concurring). In Indian country, dividing authority among many governments may lead to none accepting full authority. *See* Regina Branton, Kimi King & Justin Walsh, Criminal Justice in Indian Country: Examining Declination Rates of Tribal Cases, 103 Soc. Sci. Q. 69, 73 (2022) (noting that in Indian country there is "greater risk for policy fragmentation because there are more authorities that are 'in the mix'"). Respondents interviewed regarding missing and murdered Indigenous women in California confirmed this, describing P.L. 280 as "a chance to scapegoat and pass the buck indefinitely on unsolved cases." SBI, *supra*, at 62.

State jurisdiction clearly reduces funding for federal and tribal institutions. Although P.L. 280 did not preempt tribal jurisdiction, for many years the U.S. denied tribes covered by P.L. 280 any federal funding for criminal justice. One study found such tribes received less than 20% per capita for law enforcement than non-P.L. 280 tribes received. Champagne, *supra*, at 127. Recent decisions uphold federal refusals to enter into self-determination contracts for law enforcement with tribes in P.L. 280 states. *See Hopland Band of Pomo Indians v. Jewell*, 624 Fed.Appx. 562 (9th Cir. 2015);

Los Coyotes Band of Cahuilla & Cupeno Indians v. Jewell, 729 F.3d 1025 (9th Cir. 2013).

Although federal law is beginning to recognize the deficits of state jurisdiction, tribal governments are still struggling to overcome years of divided responsibility. Granting states jurisdiction in this case would extend this debilitating dilution of funding and accountability.

C. State Jurisdiction Contributes to Mistrust and Ineffective Responses to Crimes Against Indians

Numerous studies show that state criminal jurisdiction in fact undermines effective responses to crimes against Indians. Indian people suffer from simultaneous over- and under-policing. Barbara Perry, *Impacts of Disparate Policing in Indian Country*, 19 Policing & Society 263, 263 (2009). Although crimes against Indians go unaddressed, Indian people are disproportionately stopped, arrested, and even brutalized by police. Sociologist Barbara Perry, for example, reported that in 274 interviews with Native people from across the United States, "a key theme running throughout the interviews" is that "police appear to need little provocation to intervene *against* Native Americans" but the heightened "surveillance is for the purpose of responding to Native American offenders, rather than Native American victims." *Id.* at 267-8. As the Indian Law and Order Commission found, the resulting inequities "actually encourage crime,"

because "Tribal citizens and local groups tend to avoid the criminal justice system by nonparticipation," and creating "greater and longer disruptions within the communities." Roadmap, *supra*, at 5.

The inadequate response to crimes against Indians is well documented. In its groundbreaking report on violence against Native women, Amnesty International found that "in a considerable number of instances the authorities decide not to prosecute reported cases of sexual violence against Native women" and "there is little accountability for failure to investigate or prosecute." Amnesty Int'l, Maze of Injustice: The Failure to Protect Indigenous Women from Sexual Violence in the USA 9 (2007). Congress responded to federal failures to prosecute by mandating additional recordkeeping, reporting, and coordination with tribal governments, 25 U.S.C. § 2809, but it lacks equal authority over state agencies, and recent reports confirm continuing state failures. In P.L. 280 jurisdictions, for example, the Indian Law and Order Commission found, "[p]articularly in remote, rural areas, calls for service go unanswered, victims are left unattended, criminals are undeterred, and Tribal governments are left stranded. . . ." Roadmap, *supra*, at 69. Many crimes against Native people do not even get properly recorded. UBI, *supra*, at 4. In 2016, for example, the National Crime Information Center reported that there were 5,712 missing American Indian and Alaska Native women and girls in its system, but NamUS, the federal missing persons database, had logged only 116 cases. *Id.* at 2.

These failures reflect lesser concern for crimes against Indians. In a 2020 study of missing and murdered women in California, one interviewee reported that "the thing that is so frustrating, is that people, the police, are willing to just write our women off, we're disposable." SBI, *supra*, at 73. The study found that 75% of alleged white male perpetrators were never charged, and neither were 66% of alleged Indigenous male perpetrators. *Id.* at 76. Interviewees also reported that state officials seemed to discount crimes, assuming that women were targeted because they had a "high risk lifestyle." *Id.* at 79. In one case, for example, state law enforcement assumed a victim was a prostitute because she was often seen walking by the side of the road, when in fact she walked because she didn't have a car. *Id.*

Although states often fail to adequately protect Indians from crime, Indians are disproportionately subject to state control. The California study, for example, found that Yurok tribal members were eleven times more likely to be incarcerated than the general population, that Indigenous girls were 3.7 times more likely to be suspended in grades K-3, and that 9.1% of all Indigenous girls were suspended in middle school. SBI, *supra*, at 66-7. The Indian Law and Order Commission found similar disproportionality in Alaska, noting that although Alaska Native people are 19% of the population, they represent 36% of the prison population and 60% of the children removed from their homes. Roadmap, *supra*, at 41, 43. Moreover, the Commission reported, Alaska Native youth in Fairbanks who "come

into contact with the juvenile justice system are four times more likely . . . to be referred to juvenile court and three times more likely to be sentenced to confinement." *Id.* at 43.

Native people are also far more likely to be injured by police or while in police custody. Between 1995 and 2015, Native Americans were the group most likely to be shot by police—12% more likely than Black Americans, and three times more likely than White Americans. Elisa Hansen, The forgotten minority in police shootings, CNN, Nov. 13, 2017. A 2020 study of seven Midwestern states found that Native women were 38 times more likely to suffer fatal encounters with police than White women, and Native men were 14 times more likely than White men. Matthew Harvey, Center for Indian Country Development, Fatal Encounters Between Native Americans and the Police 2 (2020), https://www.minneapolisfed.org/article/2020/fatal-encounters-between-native-americans-and-the-police. Fatal encounters were more than ten times higher per capita outside "tribal statistical areas" (a rough proxy for Indian country) than within them. *Id.* at 18. They were also about 70% higher in tribal statistical areas subject to P.L. 280 than they were in tribal areas in non-P.L. 280 states. *Id.*

Interviews back up these statistics. The California study noted that "[t]he most common theme among all our interviews," both with tribal people and state law enforcement, "was the deeply entrenched mistrust and broken relationships between law enforcement agencies and Indigenous communities." SBI, *supra*, at 64. A

national study found that in Public Law 280 jurisdictions, almost half (48.6%) of respondents felt that state/county police "overstepped their authority" (for example by repeatedly tailing and pulling over their cars or arresting them without cause) and 29.9% of tribal police did. Champagne, *supra*, at 76. In non-Public Law 280 jurisdictions, in contrast, only 19.6% of respondents felt that tribal police overstepped their authority. *Id.* Majorities of respondents in both PL 280 (53.7%) and non-PL 280 (63.9%) felt that state/county and federal courts were biased against Indian victims or defendants. *Id.* at 103.

As a result, Indigenous people are often unwilling to report crimes or work with state law enforcement. As one Native woman from Wisconsin reported, "I don't want that to happen to me, for them to hit me, or kick me. I won't go to the police. I won't talk to 'em, cause ya' just don't know where that's gonna go." Perry, *supra*, at 273. Or, as a Riverside County Lieutenant Sheriff testified before the Indian Law and Order Commission, "State law enforcement in Indian country, as we learned, was viewed as an occupying force, invaders, and the presence wasn't welcome. . . . The common belief was that a deputy sheriff could come onto the reservation for whatever reason" and "use whatever the level of force necessary and then just drive away with no documentation, no justification, no accountability, and the Tribal community just had to take it." Roadmap, *supra*, at 6. State authority, in short, led to "deep distrust between local non-Indian law enforcement and these Tribal communities, which is

evidenced by frequent conflicts, communication failures, and disrespectful actions." *Id.* at 69.

Of course there is a way that states can play a beneficial role: by working with tribal governments. In fact this cooperation is already occurring, in Oklahoma and throughout the country. This cooperation is founded on mutual respect for each government's distinctive role and authority. Oklahoma insists instead on the power to go it alone, without regard to the choices of tribal governments or Congress. And the results of such disregard are clear.

Creating unilateral state jurisdiction over crimes against Indians will not address the crisis of violence facing Indian communities, it will make it worse. It will add to disparate surveillance and abuse of Indian people without improving effective policing and punishment. It will add to the distrust that deters victims from seeking assistance and fail to provide the services necessary for communities as well as victims to heal. If this Court is concerned about crimes against Native people, it must reject Oklahoma's appeal.

CONCLUSION

Wherefore, the decision of the court below should be affirmed.

Respectfully submitted,

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