No. 21-429

IN THE
Supreme Court of the United States

OKLAHOMA,

Petitioner,

v.

VICTOR MANUEL CASTRO-HUERTA,

Respondent.

On Writ of Certiorari to the Court of Criminal Appeals of Oklahoma

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

BARBARA E. BERGMAN
Co-Chair, Amicus Curiae Committee
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
1201 Speedway Blvd.
Tucson, AZ 85721
bbergman@email.arizona.edu

MELISSA C. CASSEL
O'MELVENY & MYERS LLP
Two Embarcadero Center
28th Floor
San Francisco, CA 94111

MICHAEL R. DREEBEN
Counsel of Record
ELENA ZARABOZO
O'MELVENY & MYERS LLP
1625 Eye Street, NW
Washington, DC 20036
(202) 383-5300
mdreeben@omm.com

BRANTON NESTOR
O'MELVENY & MYERS LLP
610 Newport Center Drive
17th Floor
Newport Beach, CA 92660

BRUCE PETTIG
O'MELVENY & MYERS LLP
7 Times Square
New York, NY 10036

Attorneys for Amicus Curiae

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INTEREST OF *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, and up to 40,000 affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous amicus briefs each year in this Court, and other federal and state courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole. Accordingly, NACDL is keenly interested in ensuring that both Indian and non-Indian criminal defendants are afforded all of the rights and protections to which they are entitled—including protection from prosecution by States that lack criminal jurisdiction over crimes by non-Indians against Indians in Indian country.

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

SUMMARY OF ARGUMENT

Oklahoma asserts authority to prosecute crimes committed by non-Indians against Indians in Indian country concurrently with the federal government's authority under the General Crimes Act, 18 U.S.C. § 1152. ("GCA"). Pet. Br. 2-3. That post-*McGirt v. Oklahoma*, 140 S. Ct. 2452, 2463 (2020), power grab contradicts a century of history, precedent, and policy that allocates to the federal government and the tribes exclusive jurisdiction—to the exclusion of the States—over Indian country crimes involving Indians absent clear congressional authorization to the contrary. Respondent and his *amici* demonstrate those points. This brief shows that basic principles of criminal liability rooted in the separation of powers, due process, and traditional restraint in construing criminal laws corroborate that conclusion.

A foundational principle of our system of government is that the boundaries of criminal law must be clearly defined by legislatures, not courts. Constitutional considerations support this longstanding rule. All "legislative Powers," including the power to define crimes, is vested in Congress. U.S. Const. Art. I, § 1. Due process requires that the law give fair warning of the conduct proscribed and punishment meted out—warning that demands clear enactments of Congress. And the serious implications of criminal conviction for liberty and the definition of social norms require that every prosecution must be firmly rooted in the unambiguous pronouncements of the legislature. No other approach can adequately protect the life and liberty of presumptively innocent criminal defendants.

Oklahoma seeks to circumvent the legislative process, requesting that this Court grant to it a vast expansion of criminal jurisdiction in Indian country never authorized by Congress. As respondent and other *amici* explain, States do not possess inherent jurisdiction over crimes involving Indians in Indian country. Only Congress, which has plenary and exclusive authority to regulate Indian affairs and to safeguard Indian interests, can confer such jurisdiction on Oklahoma. Yet, despite having actively adjusted the roles of federal, state, and tribal authorities in enforcing criminal law in Indian country for more than a century, Congress has never granted Oklahoma the authority it seeks here. The absence of clear congressional authorization ends this case.

Oklahoma's contention that *United States v. McBratney*, 104 U.S. 621 (1882), effectively establishes its jurisdiction is misplaced. As Oklahoma concedes, *McBratney* recognized state jurisdiction over crimes in which neither perpetrator nor victim is Indian. This case is critically different because the alleged offense was committed against an Indian victim. It is for Congress, not the common law, to decide whether state jurisdiction should be extended to crimes in Indian country involving Indians. Similarly inapt is Oklahoma's reliance on *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), which established a balancing test for application of state *civil* law in Indian country. The same separation-of-powers and due process principles that require Congress to speak clearly in defining the boundaries of criminal law preclude *Bracker*'s application here. The limits of criminal jurisdiction cannot be determined by judicial balancing tests.

For all the foregoing reasons, the judgment of the Oklahoma Court of Criminal Appeals should be affirmed.

ARGUMENT

I. STATES DO NOT HAVE JURISDICTION OVER CRIMES INVOLVING INDIANS IN INDIAN COUNTRY UNLESS CONGRESS CLEARLY SAYS OTHERWISE

A longstanding principle of Indian law holds that a State lacks jurisdiction over crimes involving Indians in Indian country unless Congress clearly says otherwise. *See, e.g.*, *Williams v. United States*, 327 U.S. 711, 714 (1946) ("[T]he United States, rather than … [the State], ha[s] jurisdiction over offenses committed" in Indian country "by one who is not an Indian against one who is."); *Washington v. Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 470-71 (1979) ("[C]riminal offenses by or against Indians have been subject only to federal or tribal laws, except where Congress … has expressly provided that State laws shall apply." (citations and internal quotation marks omitted)); *see also* RESTATEMENT OF THE LAW OF AMERICAN INDIANS Chap. 5 (2021).[2]

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[2] The RESTATEMENT explains that:

> Absent express authorization by federal legislation, the criminal jurisdiction of states over crimes committed in Indian country is preempted by federal law, excepting:
>
> > (a) non-Indian crimes with non-Indian victims; and
> > (b) victimless crimes committed by non-Indians.

This principle of federal primacy stems from Congress's "plenary and exclusive" role in Indian affairs. *Bryan v. Itasca County*, 426 U.S. 373, 376 n.2 (1976); *Williams v. Lee*, 358 U.S. 217, 220 (1959); *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 234-35 & n.4 (1985); *see generally Worcester v. Georgia*, 31 U.S. 515, 561 (1832). This Court's cases, lower court decisions, and statutory provisions uniformly reflect the principle that States may not assume jurisdiction over crimes involving Indians in Indian country without congressional authorization. *See* Resp. Br. at 5-10, 13-43; *see generally* Amicus Br. of Federal Indian Law Scholars and Historians. Only in limited and distinguishable contexts has this Court recognized state authority in Indian country absent an explicit congressional grant. *See United States v. McBratney*, 104 U.S. 621 (1882) (permitting state criminal jurisdiction over crimes by non-Indians against non-Indians in Indian country); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980) (opening the door to state civil jurisdiction in limited contexts); section II.C., *infra.* That is because a bedrock understanding is that state jurisdiction over crimes involving Indians in Indian country may be conferred only by Congress. *See, e.g.*, Resp. Br. 44-53.

Id. § 71. The commentary reinforces this rule: "In the criminal-jurisdiction context, federal statutes have preempted most aspects of state criminal jurisdiction in Indian country since 1790, though the federal government can reauthorize states to assert jurisdiction." *Id.* cmt. *a.* "Except to the extent that Congress has provided otherwise, the Indian Country Crimes Act [18 U.S.C. § 1152] preempts state criminal jurisdiction over offenses committed by a non-Indian against an Indian in Indian country." *Id.* cmt. *d.*

Petitioner's reliance on the ordinary police powers of States over conduct in their territory, *see* Pet. Br. 15-23, is of no help: relations with Indians in Indian country are different. Except where Congress has "expressly provided" that a State has jurisdiction, "criminal offenses by or against Indians are subject only to federal or tribal laws." *Yakima Indian Nation*, 439 U.S. at 470-71.

II. FEDERAL CRIMINAL LAW PRINCIPLES REINFORCE THE HEIGHTENED NEED FOR CONGRESS TO SPEAK CLEARLY TO AUTHORIZE STATE PROSECUTION

Deeply rooted principles of criminal law and separation of powers confirm that only the clear directive of Congress can authorize the jurisdiction that Oklahoma seeks to exercise over crimes against Indians in Indian country.

A. Criminal Liability's Distinct Characteristics Confirm Why Congress Must Speak Clearly To Broaden Oklahoma's Prosecutorial Authority

The authority to define criminal law must be exercised with clarity by legislatures, not by courts exercising common law powers. Petitioner's inversion of this principle and invitation to the Court to extend state power over Indian country crimes involving Indians without congressional consent runs counter to those principles.

1. Democratic principles justify a clear-statement rule for all extensions of criminal authority. Criminal prosecution and punishment represents the apex of governmental power over an individual. Criminal prosecution is "the means by which the [S]tate assumes the power to remove liberty and even life." Ra-

chel E. Barkow, *Separation of Powers and the Criminal Law*, 58 Stan. L. Rev. 989, 995 (2006). The criminal process involves a "direct intrusion on personal liberties." *Duro v. Reina*, 495 U.S. 676, 688 (1990). Not only does the State assert, and through conviction acquire, the power to deprive an individual of freedom, but the criminal law has the power to impose a lifelong "stigma" of social opprobrium. *Breed v. Jones*, 421 U.S. 519, 530 (1975). These dramatic consequences necessitate heightened protections against arbitrary action.

In our form of government, the decision about whether a government may impose these consequences must flow from the people's representatives—not the executive or the courts. Prosecutors decide to bring charges and courts and juries adjudicate them. But the legal authority to impose the criminal process must come from legislatures. *See United States v. Bass*, 404 U.S. 336, 348 (1971) ("[B]ecause of the seriousness of criminal penalties," "legislatures and not courts should define criminal activity."). And the same principles explain why Congress must speak clearly to empower states to exercise jurisdiction over crimes involving Indians in Indian country. The intrusion on personal liberty by exposure to the criminal process of separate sovereigns demands that Congress speak clearly to authorize that result.

2. Fundamental principles of notice protected by due process further underscore Congress's obligation to speak clearly to alter the balance of prosecutorial power over Indian country crimes. Due process principles dictate that only through clear legislative pronouncements may the federal-state-tribal division of prosecutorial power in Indian country be altered. Any

other approach would deprive individuals in Indian country interacting with Indians of the notice to which they are constitutionally entitled before they are subject to state criminal law.

This Court has long held that people should not "be held criminally responsible for conduct" that they "could not reasonably understand to be proscribed." *United States v. Lanier*, 520 U.S. 259, 265 (1997) (quotation omitted); *see Bouie v. City of Columbia*, 378 U.S. 347, 350-51 (1964) ("The basic principle that a criminal statute must give fair warning of the conduct that makes it a crime has often been recognized by this Court."). That notice principle should extend to cases in which a different sovereign seeks to impose its laws on an individual. "[A] crime under one sovereign's laws is not 'the same offence' as a crime under the laws of another sovereign." *Gamble v. United States*, 139 S. Ct. 1960, 1964 (2019); *see Heath v. Alabama*, 474 U.S. 82, 92 (1985); *United States v. Wheeler*, 435 U.S. 313 (1978). Fair notice that a State may apply its law is particularly vital where, as here, an individual could potentially be exposed to the penal provisions of multiple jurisdictions with different laws, punishments, and procedures.

Notice principles reinforce Congress's obligation to speak clearly here. If the Court were to act alone to enlarge Oklahoma's prosecutorial authority over crimes involving Indians in Indian country, that would severely undercut the fair warning guaranteed by the Due Process Clause. Thousands of individuals would suddenly be vulnerable to criminal liability nowhere authorized by federal statutes governing Indian country.

3. Principles of statutory construction governing penal laws lead to the same conclusion: Oklahoma's claim of jurisdiction requires clear congressional authorization. This Court follows the "common-law tradition" and "general injunction" that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 437 (1978) (quotation omitted). Under that tradition, "when choice has to be made between two readings" of a criminal law, this Court requires Congress to speak "in language that is clear and definite" before it "choose[s] the harsher alternative." *Jones v. United States*, 529 U.S. 848, 858 (2000) (quotation omitted). In other words, the rule of lenity "teach[es] that ambiguities about the breadth of a criminal statute should be resolved in the defendant's favor." *United States v. Davis*, 139 S. Ct. 2319, 2333 (2019).

That interpretive canon operates to assuage "the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should." *Bass*, 404 U.S. at 348 (quotation omitted). It vindicates the fundamental principle that no one should be subject to "criminal liability" without "fair warning." *Crandon v. United States*, 494 U.S. 152, 158 (1990). And it reinforces the separation of powers: lenity "safeguard[s]" the legislature's "power to punish" by "preventing judges from intentionally or inadvertently exploiting 'doubtful' statutory 'expressions' to enforce their own sensibilities." *Wooden v. United States*, 142 S. Ct. 1063, 1083 (2022) (Gorsuch, J., concurring in judgment); *see also* section II.B., *infra*.

The rule of lenity thus "places the weight of inertia upon the party that can best induce Congress to speak

more clearly," which forces "the government to seek any clarifying changes to the law rather than impose the costs of ambiguity on presumptively free persons." *Wooden*, 142 S. Ct. at 1083 (Gorsuch, J., concurring). And that keeps the power of punishment firmly "in the legislative, not in the judicial department." *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820).

The rule of lenity, like the other principles discussed above, requires that Congress speak clearly to expand state jurisdiction over crimes involving Indians in Indian country. Oklahoma is hardly powerless to request congressional action to expand its authority in the wake of *McGirt*. The States are well situated to present their policy arguments for expanded authority to Congress. Thus, even if judicial reluctance to "enlarge" Oklahoma's criminal jurisdiction in the present context "carries its costs," the solution is that "the legislature's cumbersome processes will have to be reengaged." *Wooden*, 142 S. Ct. at 1083 (Gorsuch, J., concurring). That is as it should be in a democracy, where the boundaries of criminal punishment should be clearly delineated by law, not judicial interpretation.

B. Separation Of Powers Principles Underscore Why Congress Must Speak Clearly In Order To Alter Criminal Jurisdiction Within Indian Country

Requiring that Congress speak clearly in conferring state criminal jurisdiction over crimes involving Indians in Indian country also accords with separation-of-powers principles. Defining crime and regulating Indian country are the exclusive prerogatives of the legislative branch, and this case lies at the intersection of those fonts of congressional power.

1. The allocation of "powers among three independent branches … serves not only to make Government accountable but also to secure individual liberty." *Boumediene v. Bush*, 553 U.S. 723, 742 (2008). The "Court consistently has given voice to, and has reaffirmed, the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty." *Mistretta v. United States*, 488 U.S. 361, 380 (1989) (collecting cases); *see id.* ("No political truth is certainly of greater intrinsic value or is stamped with the authority of more enlightened patrons of liberty." (quoting Federalist No. 47, p. 324 (Madison) (J. Cooke ed. 1961))).

This design preserves liberty because, among other things, it vests the power to make criminal law solely in Congress. By reserving all "legislative Powers" to Congress, U.S. Const. Art. I, § 1, the Constitution ensures that "national laws restricting liberty" are not enacted without "the assent of the people's representatives and thus input from the country's 'many parts, interests and classes.'" *Wooden*, 142 S. Ct. at 1083 (Gorsuch, J., concurring) (quoting Federalist No. 51, at 324 (Madison)); *see also Davis*, 139 S. Ct. at 2325 ("Only the people's elected representatives in the legislature are authorized to 'make an act a crime.'" (quoting *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812))). When a "court exceeds its own authority by imposing … punishments not authorized by Congress, it violates … the constitutional principle of separation of powers in a manner that trenches particularly harshly on individual liberty." *Whalen v. United States*, 445 U.S. 684, 689 (1980). In

sum "[f]ederal crimes are defined by Congress, not the courts." *Lanier*, 520 U.S. at 267 n.6.

Here, the same principle dictates that this Court reject Oklahoma's common law claim of authority to define, prosecute, and punish crimes involving Indians in Indian country. Ordinarily, the rule requiring Congress to define crimes applies when the federal government itself is proscribing and punishing conduct. But here, the consequences of Oklahoma's position—inviting judicial recognition of criminal proscriptions that Congress has not authorized—would visit the same consequences on individuals as if the federal courts themselves created criminal liability. While the agency of punishment would be the State (rather than the federal government), the courts' usurpation of Congress's prerogative to determine whether criminal punishment is appropriate would be no less.

2. Congress has an equally strong prerogative in managing Indian affairs. "[T]he Constitution grants Congress broad general powers to legislate in respect to Indian tribes, powers that" this Court has "consistently described as plenary and exclusive." *United States v. Lara*, 541 U.S. 193, 200 (2004) (internal quotation marks omitted); *accord United States v. Cooley*, 141 S. Ct. 1638, 1643 (2021) ("In all cases, tribal authority remains subject to the plenary authority of Congress."); *Negonsott v. Samuels*, 507 U.S. 99, 103 (1993) ("Congress has plenary authority to alter these [criminal] jurisdictional guideposts."); *United States v. Mazurie*, 419 U.S. 544, 554 n.11 (1975) (referring to "Congress' exclusive constitutional authority to deal with Indian tribes."). Subject to constitutional limits, those powers include the authority to define which

sovereign has jurisdiction over Indian matters, whether the sovereign is the federal government, *see Blackfeather v. United States*, 190 U.S. 368, 372 (1903), the States, *see Yakima Indian Nation*, 439 U.S. at 470-71, or the tribes, *see Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 212 (1978). And because "[t]he moral obligations of the government toward the Indians . . . are for Congress alone to recognize, … the courts can exercise only such jurisdiction over the subject as Congress may confer upon them." *Blackfeather*, 190 U.S. at 372.

In construing statutes that govern Indian affairs, as with those that define criminal law, this Court looks to "clear indications of legislative intent." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 60 (1978). Legislative clarity is particularly critical where the law at issue threatens to "impair[]" longstanding "tribal sovereignty." *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987). As a general matter, this Court has said, tribes lack "inherent jurisdiction" to prosecute non-Indians even when the crimes are committed in Indian Country against Indians. *See Oliphant*, 435 U.S. at 212. But Congress may provide otherwise. *See* 25 U.S.C. § 1304(b)(1) ("recogniz[ing] and affirm[ing]" "inherent powers of [a participating] tribe … to exercise special domestic violence criminal jurisdiction over all persons"); *see also, e.g.*, Consolidated Appropriations Act (Mar. 15, 2022) (recognizing Tribes' criminal jurisdiction over non-Indians in Indian country). Thus, in considering the boundaries of state authority, strong tribal and congressional interests are at stake. *See Martinez*, 436 U.S. at 60. "To justify … a departure" from "the general policy of the govern-

ment towards the Indians, as declared in many statutes and treaties … requires a clear expression of the intention of Congress." *Ex parte Crow Dog*, 109 U.S. 556, 572 (1883); *see also LaPlante*, 480 U.S. at 18.

3. For more than a century, this Court has faithfully construed statutes defining criminal jurisdiction in Indian country by looking to clear indications of legislative intent—even when doing so arguably deepens the jurisdictional complexity inherent in this area of the law. *See Negonsott*, 507 U.S. at 102. This case warrants the same restraint.

In *United States v. Pelican*, for instance, the Court confronted whether the federal government had jurisdiction to prosecute a non-Indian for murder of an Indian on an Indian allotment. 232 U.S. 442, 444 (1914). The question arose as a result of the Dawes Act and subsequent legislation that enacted the now-repudiated policy of parceling native lands "into smaller lots owned by individual tribe members," *McGirt*, 140 S. Ct. at 2463, then extending to those members "the laws, both civil and criminal, of the State or Territory in which they may reside," General Allotment Act of 1887, Pub. L. No. 49-105, § 6, 24 Stat. 388, 390. In upholding the challenged prosecution, the Court recognized that it was thereby sanctioning "Federal jurisdiction over hundreds of allotments scattered through territory other portions of which were open to white settlement." *Pelican*, 232 U.S. at 449-50. But it found that result to be compelled because "Congress expressly so provided." *Id.* The Court reaffirmed this reasoning several years later in *United States v. Ramsey*, 271 U.S. 467, 471-72 (1926), when it upheld federal jurisdiction over a non-Indian-on-Indian murder on a different type of

allotment. Echoing *Pelican*, the Court explained that "[s]ince Congress possesses the broad power of legislating for the protection of the Indians wherever they may be within the territory of the United States, the question presented is not one of power but wholly one of statutory construction." *Id.* at 471.

Cases analyzing the Kansas Act and Public Law 280 evidence the same fidelity to clear congressional design—and underscore the striking absence of clear congressional support for petitioner's position. *See* Kansas Act of 1940, Pub. L. No. 76-565, 54 Stat. 249; Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588. In construing the Kansas Act, which was "the first major grant of jurisdiction to a State over offenses involving Indians committed in Indian country," the Court emphasized that "Congress has plenary authority to alter these jurisdictional guideposts." *Negonsott*, 507 U.S. at 103. As for Public Law 280, this Court has so often had occasion to review the preconditions for state assumption of criminal and civil jurisdiction (which Oklahoma has never satisfied) that it has developed a "principle that the procedural requirements of Pub.L. 280 must be strictly followed." *Yakima Indian Nation*, 439 U.S. at 484 (citing *Kennerly v. District Court of Montana*, 400 U.S. 423, 427 (1971); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 180 (1973)); *cf. Bryan*, 426 U.S. at 390 (rejecting assertion of state power, in civil context, on basis that, had Congress "intended to confer upon the States" specified powers through Public Law 280, "it would have expressly said so").

In sum, this Court has consistently recognized that the boundaries of criminal jurisdiction in Indian country must be set by clear directives of Congress.

Where express direction is lacking, as it is here, it is for Congress—not courts—to decide what authority "should … be authorized to try non-Indians" for "non-Indian crime on today's reservations." *Oliphant*, 435 U.S. at 212. Oklahoma's attempt to upend "the careful balance of interests struck by the lawmakers," *Hernandez v. Mesa*, 140 S. Ct. 735, 742 (2020), should be rejected.

C. These Principles Make The Extension Of *McBratney* And *Bracker* Particularly Inappropriate In This Context

Oklahoma relies on two lines of case law—both arising in starkly different contexts—in an attempt to expand its jurisdiction in the absence of clear statutory support. Neither of these lines of cases helps it.

1. First, Oklahoma cites *United States v. McBratney*, 104 U.S. 621 (1882), and *Draper v. United States*, 164 U.S. 240 (1896), for the proposition that States may "exercise criminal jurisdiction over non-Indians in Indian country." Pet. Br. 12. But as the State acknowledges, the Court's holdings in *McBratney* and *Draper* were "limited to crimes committed against *non-Indians*," *id.* (emphasis added), making them inapplicable here. Oklahoma attempts to work around this fact by suggesting that the "reasoning" of the cases "sweeps more broadly and supports the exercise of jurisdiction" over crimes committed by non-Indians against Indians, too. *Id.* But the State overreads the *McBratney* and *Draper* decisions. As this Court has concluded, those decisions do not authorize jurisdiction over crimes that involve Indians.

McBratney—on which *Draper* relied—was rooted in part in the belief that a crime committed by a non-Indian against a non-Indian does not affect Indians

and that Congress therefore would not have intended to provide for exclusive federal jurisdiction over such crimes when they occur in Indian country. *McBratney*, 104 U.S. at 621, 624 (emphasizing that both the perpetrator and victim were non-Indians, and that the case "present[ed] no question … as to … the protection of the Indians in their improvements"); *see also* Cohen's Handbook of Federal Indian Law § 9.03(1). This reasoning in no way extends to cases involving crimes committed *against* Indians—which inherently affect Indians. Indeed, in *Donnelly v. United States*, 228 U.S. 243 (1913)—in a passage the State quotes—this Court reiterated that "offenses committed by or against Indians are not within the principle of the *McBratney* and *Draper* cases." Pet. Br. 26 (citing *Donnelly*, 228 U.S. at 271). In light of the federal criminal law and separation-of-powers principles that animate Congress's need to speak clearly to expand criminal exposure, no good reason exists for the Court to broaden Oklahoma's criminal jurisdiction by extending *McBratney* to a context that does not implicate its concerns about inherent state authority over non-Indians.

2. Second, these same animating principles make it particularly inappropriate for the Court to extend the *Bracker* test to this context. In an alternative argument to its claim of inherent territorial authority, Oklahoma relies on *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), and related cases for the proposition that the Court has "bless[ed] state regulation of conduct by non-Indians in Indian country" based on a judicial balancing test. Pet. Br. 14. *Bracker* involved Arizona's asserted imposition of

state taxes on a non-Indian contractor. *Bracker* determined that a "particularized inquiry into the nature of the state, federal, and tribal interests at stake" is necessary to decide whether a State may exercise that type of authority in Indian country. *Bracker*, 448 U.S. at 145. But again, Oklahoma itself acknowledges that this line of cases arises in an entirely different context—that governing civil liability. Pet. Br. 41. And, once again, the State's attempt to import what works in the civil context to the criminal context falls short.

The State asserts that "there is no valid basis to treat the criminal context differently" from the civil context, Pet. Br. 14, but of course there is. Criminal liability implicates unique liberty, notice, and lenity concerns, and the extension of criminal liability is a distinctly legislative prerogative. *See* sections II.A-B., *supra*. Those bedrock principles cut against importing a judicial balancing test that allows courts to define the scope of state regulatory authority in Indian country.

Nor would applying a *Bracker*-like balancing test make any sense here. In *Bracker*, the Court applied the balancing test in the context of an "examin[ation of] the language of the relevant federal treaties and statutes." *Bracker*, 448 U.S. at 144. At its core, then, the *Bracker* balancing test is meant to assess *Congress's intent* with respect to the bounds of federal, tribal, and state jurisdiction. Indeed, "[t]he right of tribal self-government is ultimately dependent on and subject to the broad power of Congress." *Id.* at 143. But a balancing test is neither necessary nor appropriate in the *criminal* context, where Congress has

never evinced intent to confer on Oklahoma jurisdiction over crimes against Indians in Indian country. This Court should not supply that jurisdiction by a judicial weighing of conflicting policies to ascertain the scope of federal preemption. Rather, it should adhere to the background principles of both Indian-country criminal jurisdiction and criminal law itself that a clear statement from Congress is required before a State may assert criminal authority over crimes involving Indians in Indian country.

CONCLUSION

For the foregoing reasons, the Court should adhere to the longstanding rule that only the clear pronouncement of Congress may expand the reach of criminal law. Because Congress has never authorized the jurisdiction Oklahoma seeks, the judgment of the Oklahoma Court of Criminal Appeals should be affirmed.

Respectfully submitted.

BARBARA E. BERGMAN
Co-Chair, Amicus Curiae Committee
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
1201 Speedway Blvd.
Tucson, AZ 85721
bbergman@email.arizona.edu

MELISSA C. CASSEL
O'MELVENY & MYERS LLP
Two Embarcadero Center
28th Floor
San Francisco, CA 94111

MICHAEL R. DREEBEN
ELENA ZARABOZO
O'MELVENY & MYERS LLP
1625 Eye Street, NW
Washington, DC 20036
(202) 383-5300
mdreeben@omm.com

BRANTON NESTOR
O'MELVENY & MYERS LLP
610 Newport Center Drive
17th Floor
Newport Beach, CA 92660

BRUCE PETTIG
O'MELVENY & MYERS LLP
7 Times Square
New York, NY 10036

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