No. 21-429

In The Supreme Court of the United States

STATE OF OKLAHOMA,
Petitioner,

v.

VICTOR MANUEL CASTRO-HUERTA,
Respondent.

ON WRIT OF CERTIORARI TO THE OKLAHOMA COURT OF CRIMINAL APPEALS

BRIEF OF *AMICI CURIAE* FEDERAL INDIAN LAW SCHOLARS AND HISTORIANS IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE* [1]

Amici curiae listed in the Appendix are professors and scholars who teach and research federal Indian law and its history. They have an interest in the cohesive and correct development of this Court's Indian law jurisprudence and the accurate recitation of the history of relations between Native American tribes, the United States, and the states. *Amici* therefore file this brief to aid the Court in understanding the history of federal and state jurisdiction over crimes committed by non-Indians against Indians in Indian Country.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Petitioner's entire argument rests on the premise that states have inherent, presumptive authority to prosecute non-Indians who commit crimes against Indians in Indian Country. From that premise, Petitioner reasons that states and the federal government must have concurrent criminal jurisdiction over such crimes, unless a federal statute preempts states' exercise of that authority. History and longstanding precepts of federal Indian law reflected in this Court's precedents leave no doubt, however, that Petitioner's reasoning is exactly backward: consistent with the federal government's

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[1] The parties have consented to the filing of this *amici curiae* brief. No counsel for either party authored this brief in whole or in part, and no person or entity other than the *amici* and their counsel made a monetary contribution intended to fund the preparation or submission of this brief. *Amici* file this brief as individuals and not on behalf of the institutions with which they are affiliated.

plenary power over Indian affairs, the federal government has *exclusive* jurisdiction to prosecute non-Indians who commit crimes against Indians in Indian Country, unless Congress affirmatively confers or delegates such authority to states.

Indian affairs have long been a domain of traditional and exclusive federal power. The U.S. Constitution firmly resolved any confusion wrought by the Articles of Confederation as to whether state or federal governments asserted power over Native people, Indian affairs, and the regulation of Indian Country. The Founders understood that the exclusion of state power was necessary to stabilize relations with Native nations, facilitate trade, and avoid wars that the fledgling United States could not afford. The First Congress exercised that exclusive federal power in the early days of the Republic to preserve the peace and protect trade with Native nations—most relevantly here, by enacting criminal jurisdiction provisions of the Trade and Intercourse Act. States original to the Union recognized that Indian Country fell outside of each state's "ordinary jurisdiction" and that these lands were areas of exclusive federal power. Eventually, as governments hungry for power and land are wont to do, states did challenge federal power in the domain of Indian affairs. But these efforts were met with repeated assertions of exclusive federal power by Congress, including in the General Crimes Act, and were ultimately thwarted by this Court in *Worcester v. Georgia*.

Since the Founding, Congress has continued to legislate criminal jurisdiction within Indian Country against the backdrop of exclusive federal power and

the absence of state jurisdiction. Over the nineteenth century, Congress strengthened federal criminal jurisdiction within Indian Country with the Major Crimes Act and the application of the Assimilative Crimes Act to the General Crimes Act. This Court has held that these statutes are "ordinarily" exclusive of state jurisdiction and preemptive, if there is any state jurisdiction in the first instance. Congress also legislated to ensure that newly admitted states to the Union would continue, on equal footing with the original states, to exclude Indian Country from their "ordinary" jurisdiction by reserving exclusive federal power in each state's enabling act, including the enabling act for the State of Oklahoma.

In the late nineteenth century, Congress began experimenting with narrow grants of jurisdiction to state governments, as part of an assimilative policy aimed at "civilizing" Native people during the so-called allotment era. The allotment statutes promised to bestow the "benefit of" state criminal laws over Native peoples who alienated their reservation lands and swore off allegiance to their Native nation. The United States quickly changed course to put off any state criminal jurisdiction "indefinitely," and has since formally repudiated allotment policy. But that policy left unclear which government (state or federal) could extend its criminal laws for the "benefit of" particular Native allottees. Capitalizing on the confusion, state governments began anew their challenge to exclusive federal jurisdiction.

Congress has since resolved the allotment-spawned confusion over criminal jurisdiction and rebuffed state jurisdictional creep with a series of

statutes enacted and refined over the last 80 years. As before, however, Congress legislated against the background presumption that state governments would have no jurisdiction over crimes committed "against Indians," unless affirmatively delegated by federal statute. With each statute, and even in reforms that did not pass, Congress aimed to uphold its treaty and trust responsibilities to keep the peace within Indian Country by tailoring each solution to local and regional circumstances.

Congress began by enacting a handful of statutes in the 1940s conferring concurrent state jurisdiction over particular reservations for crimes committed "by or against Indians." Over time, however, Congress realized that it was preferable to designate a single sovereign—state or federal—to oversee reservation lands. Congress thus strengthened and clarified the definition of "Indian Country" to include all lands, allotted or not, within exclusive federal criminal jurisdiction. Then, in the 1950s, Congress through Public Law 280 created a comprehensive yet nuanced scheme—sensitive to Native nations' individualized experiences—for delegating jurisdiction over crimes committed "by or against Indians" to states.

Exercising federal prerogatives, Congress has since moved away from such delegations in favor of bolstering tribal criminal justice systems and increasing federal recognition of tribal criminal jurisdiction—even for crimes committed by non-Indians against Indians. Just last month, President Biden signed into law an expansion of recognition of tribal criminal jurisdiction over crimes committed by non-Indians against Indians that included, most

notably for this case, the crime of child violence. In doing so, Congress again took care to regulate the metes and bounds of criminal jurisdiction within Indian Country, and made clear that any state jurisdiction over crimes by or against Indians in Indian Country is a matter of federal legislative grace.

For the reasons set forth in Respondent's brief, the prosecution at issue in this case was undertaken outside the carefully circumscribed limits that Congress has set for state criminal jurisdiction over crimes committed by non-Indians against Indians in Indian Country. As elaborated by *amici* here, it would flout the two-hundred-year-old historical and legal record for this Court to bestow on states blanket jurisdiction over such crimes. The Court should reject Petitioner's far-reaching effort to rewrite foundational Indian law principles.

ARGUMENT

I. THE CONSTITUTION VESTED THE FEDERAL GOVERNMENT WITH *EXCLUSIVE* JURISDICTION OVER CRIMES "AGAINST INDIANS" IN INDIAN COUNTRY

A. The Constitution Sought To Remedy The Problem Of State Interference In Indian Affairs

The Articles of Confederation contained what James Madison rightly labeled an "obscure and contradictory" compromise on federal authority over Indian affairs. THE FEDERALIST NO. 42, at 217 (Ian Shapiro ed., 2009). Article IX granted the Continental Congress the power of "regulating the trade and

managing all affairs with the Indians"—but only so long as the Indians were "not members of any of the States" and "provided that the legislative right of any State within its own limits be not infringed or violated." ARTICLES OF CONFEDERATION of 1781, art. IX, para. 4. States seized on those ambiguities to challenge federal authority. Indeed, New York even attempted to arrest federal officials negotiating with Native nations. Gregory Ablavsky, *The Savage Constitution*, 63 DUKE L.J. 999, 1018-1038 (2014).

The Constitution's drafters sought to remedy state interference in Indian affairs. *See, e.g.*, James Madison, *Vices of the Political System of the United States*, *in* 9 THE PAPERS OF JAMES MADISON 345, 348 (Robert A. Rutland & William M.E. Rachal eds., 1975) (enumerating "Encroachments by the States on the federal authority"—the very first of which was "the wars and Treaties of Georgia with the Indians"). They gave the federal government broad power over Indian affairs, and, just as importantly, foreclosed state authority. Federal treaties would now be the "Supreme Law of the Land," binding on state as well as federal courts. U.S. CONST. art. VI, cl. 2. States were specifically prohibited from making treaties, *id.* art. I, § 10, cl. 1, and declaring war, *id.* art. I, § 10, cl. 3. And the Indian Commerce Clause, *id.* art. I, § 8, cl. 3, was, in Madison's words, "very properly unfettered" from the preservation of state authority over Indian affairs in the Articles of Confederation. THE FEDERALIST NO. 42, *supra*, at 217.

Ratification and immediate post-ratification history reinforce that understanding of plenary and exclusive federal authority. Anti-Federalist Abraham

Yates warned New Yorkers "that this state, by adopting the new government, will enervate their legislative rights, and totally surrender into the hands of Congress the management and regulation of the Indian affairs." Abraham Yates, Jr., *To the Citizens of the State of New York* (June 13-14, 1788), *reprinted in* 20 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1153, 1156-1167 (John P. Kaminski et al. eds., 2004).

Federal *and* state officials agreed with Yates's assessment. Secretary of War Henry Knox, charged with overseeing Indian relations, observed that "the United States have, under the constitution, the sole regulation of Indian affairs, in all matters whatsoever." *Letter from Henry Knox to Israel Chapin* (Apr. 28, 1792), *in* 1 AMERICAN STATE PAPERS: INDIAN AFFAIRS 231-232 (Walter Lowrie & Matthew St. Clair Clarke eds., 1832). And soon after ratification, South Carolina Governor Charles Pinckney wrote to President George Washington that "with great propriety the sole management of India[n] affairs is now committed" to "the general Government." *Letter from Charles Pinckney to George Washington* (Dec. 14, 1789), *in* 4 THE PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES 401, 404 (Dorothy Twohig ed., 1993) (alteration in original).

Petitioner's contrary historical argument relies on a single law review article. Pet. Br. 39 & n.3 (citing Robert G. Natelson, *The Original Understanding of the Indian Commerce Clause*, 85 DENV. U. L. REV. 201, 211-212, 214-250 (2007)). Not only does that article quote a spurious version of Yates's remarks that omitted the language quoted above, but historians

have challenged its arguments and methodology as well. *See* Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 YALE L.J. 1012 (2015).

B. The Trade And Intercourse Act Established Exclusive Federal Jurisdiction Over Crimes Committed By "Citizens Or Inhabitants Of The United States" Against "Indians"

1. Criminal jurisdiction within Indian Country was one of the principal concerns for the new federal government. Under the Articles of Confederation, jurisdictional uncertainty and state weakness had allowed state citizens to cross routinely onto Native lands and commit crimes against peaceful Indians. In response to such "Outrages," state governments had issued empty proclamations "strictly enjoin[ing]" state citizens from crossing onto Indian lands without authorization, but did not attempt to prosecute crimes committed there. *E.g.*, 21 STATE RECORDS OF NORTH CAROLINA 487-488 (Walter Clark ed., 1903).

Many Founders also feared that widespread racial bias among juries would leave such crimes unpunished. *See, e.g.*, 4 Annals of Cong. 1254 (1795) ("There never had been one instance of a white man condemned and hanged by white men, on the frontier, for the murder of an Indian, since the first landing in America. *** No jury would bring the criminal in guilty."); *Letter from George Washington to Edmund Pendleton* (Jan. 22, 1795), *in* 17 THE PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES 424 (David Hoth & Carol S. Ebel eds., 2013) (lamenting inability to achieve "peace & amity" "when, for the most atrocious murders [of Indians by U.S. citizens]

*** a Jury on the frontiers, can hardly be got to listen to a charge, much less to convict a culprit").

These were not abstract concerns. Crimes against Indians by non-Indians committed outside Indian Country and within states routinely went unpunished. *See, e.g.*, ALEXANDER ADDISON, REPORTS OF CASES IN THE COUNTY COURTS OF THE FIFTH CIRCUIT, AND IN THE HIGH COURT OF ERRORS & APPEALS OF THE STATE OF PENNSYLVANIA 246-247 (2d ed. 1883) (recording state-jury acquittal of non-Indian for killing Indian after court charged victim as "a *savage*, a *drunken* savage, a savage naturally *ill-disposed*") (emphases added).

At the urging of Washington and Knox, Congress sought to address jurisdictional uncertainty and potential state-court bias the same way it addressed these concerns more generally: by providing for federal criminal jurisdiction. *Cf.* THE FEDERALIST NO. 80, at 401 (Alexander Hamilton) (Ian Shapiro ed., 2009) (noting federal judicial power extended "to all those [cases] in which the State tribunals cannot be supposed to be impartial and unbiased"). The Founders believed that federal courts, unlike state courts, would do justice to Native peoples. When confronted with complaints from the Seneca Nation about New York's land transactions, for instance, Washington told the Native leaders that, with ratification, "the federal Courts" were "open to you for redress." *Letter from George Washington to the Seneca Chiefs* (Dec. 29, 1790), *in* 7 THE PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES 146-150 (Jack D. Warren, Jr. ed., 1998).

Federal criminal jurisdiction was effectuated through a series of statutes known as the Trade and Intercourse Acts. Enacted by the First Congress, the original Act defined a jurisdictional space known as "Indian country," and criminalized certain actions committed there by "any citizen or inhabitant of the United States *** against[] the person or property of any peaceable and friendly Indian or Indians."[2] Act of July 22, 1790, §§ 3, 5, 1 Stat. 137, 137-138. The Act also clarified that such violations were "crimes or offences against the United States" to be tried in the "courts of the United States." *Id.* § 6, 1 Stat. at 138; Act of Mar. 1, 1793, § 10, 1 Stat. 329, 331.

Consistent with those provisions, in its first treaties with Native nations, the federal government made it clear that it—and not individual states—would punish crimes committed by U.S. citizens against Indians in Indian Country. *E.g.*, A Treaty of Peace and Friendship, Creek Nation-U.S., art. IX, Aug. 7, 1790, 7 Stat. 35; A Treaty of Peace and Friendship, Cherokee Nation-U.S., art. XI, July 2, 1791, 7 Stat. 39.

2. Initially, the Trade and Intercourse Act did not explicitly prohibit state jurisdiction in Indian Country. But that is because Congress legislated against the bedrock principle that Indian Country lay outside of states' "ordinary jurisdiction"—that is, the part of the state under state control.

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[2] Petitioner suggests that this Act by the First Congress, repeatedly reenacted and expanded, exceeded federal constitutional authority. Pet. Br. 39 n.3.

A host of evidence supports that conclusion. Clearest is the text of the Trade and Intercourse Acts. Much of what the Acts decreed "Indian country" lay *within* state borders. Nonetheless, the Acts described "Indian country" as a space outside state jurisdiction and control. *See, e.g.*, Act of July 22, 1790, § 5, 1 Stat. at 138 (criminalizing acts against Indians "which, *if committed within the jurisdiction of any state* *** would be punishable by the laws of such state") (emphasis added); *see also* Act of May 19, 1796, § 14, 1 Stat. 469, 472 (subjecting to federal criminal jurisdiction "any Indian or Indians" who "come over or across the said boundary line [out of Indian Country], *into any state*" and commit a crime) (emphasis added).

Conversely, subsequent amendments made explicit that states possessed jurisdiction over offenses *outside* of Indian Country, as well as within territory that was no longer legally Indian Country. *See, e.g.*, Act of May 19, 1796, § 19, 1 Stat. at 474 (noting that lands that lost their Indian character might fall "within the ordinary jurisdiction of any of the individual states"); *id.* § 14, 1 Stat. at 472-473 (affirming "legal apprehension or arresting, *within the limits of any state or [territorial] district*" of Indians who had committed crimes outside of Indian Country) (emphasis added). Those provisions show that if Congress had wanted to affirm the existence of state criminal jurisdiction *within* Indian Country, it knew how to do so.

Congressional debates provide confirmation. In 1792, for instance, some congressmembers objected to federal criminal jurisdiction over Indian Country,

arguing that it duplicated treaty provisions. But proponents prevailed by reasoning:

> [T]he power of the General Government to legislate in all the territory belonging to the Union, not within the limits of any particular State, cannot be doubted; if the Government cannot make laws to restrain persons from going *out of the limits of any of the States*, and commit murders and depredations, it would be in vain to expect any peace with the Indian tribes.

2 Annals of Cong. 751 (1792) (emphasis added). That makes sense only if Indian Country was definitionally outside the "limits of any of the States."

A similar understanding appears in the debates concerning Tennessee's statehood in 1796. Two-thirds of Tennessee, which sought to become the first state admitted from federal territorial status, was legally Indian Country. GREGORY ABLAVSKY, FEDERAL GROUND: GOVERNING PROPERTY AND VIOLENCE IN THE FIRST U.S. TERRITORIES 203 (Paul Brand et al. eds., 2021). Multiple congressmembers proposed expressly excluding *all* of Indian Country from the new state, arguing that they wanted to avoid "incorporating lands within this State to which we had no right." 5 Annals of Cong. 1312 (1796). But proponents of Tennessean statehood responded that doing so was unnecessary because the "boundary was well ascertained *** in the act passed this session relative to trade and intercourse with the Indian tribes." *Id.* In other words, they recognized that the Trade and Intercourse Act had the same jurisdictional effect as literally excising Indian Country from state borders.

Indeed, Tennessee—like most states—could not have exercised jurisdiction over crimes in Indian Country under its own law at the time. Like many state constitutions, Tennessee's constitution required that criminal prosecutions occur in the county where the crime was committed. TENN. CONST. of 1796, art. XI, § 9; *see also* GA. CONST. of 1777, art. XXXIX ("All matters of breach of the peace, felony, murder, and treason against the State to be tried in the county where the same was committed[.]"). Yet Tennessee in 1796 had not organized Indian Country into counties. Other states encompassing Indian Country, like Georgia, also stopped their counties at the treaty line. In short, at the time the First Congress enacted the Trade and Intercourse Act, there were no state courts that could have tried *any* crime committed in Indian Country.

II. THE FEDERAL GOVERNMENT ASSERTS EXCLUSIVE JURISDICTION OVER CRIMES COMMITTED AGAINST INDIANS IN "INDIAN COUNTRY"

A. States Resisted Federal Jurisdiction Over Indian Country

After initially accepting exclusive federal authority over Indian affairs, some states reversed course. In particular, Georgia, New York, and Tennessee all attacked (and even outright violated) the Trade and Intercourse Act, claiming an unconstitutional infringement on state authority. ABLAVSKY, FEDERAL GROUND, *supra*, at 204-205.

Significantly, at the time, the idea that states and the federal government could enjoy concurrent

jurisdiction was not well established and remained controversial. "Unlike modern preemption doctrine, *** the earlier doctrine operated automatically whenever Congress entered a field of regulation; thus, *any* federal regulation of a given area automatically preempted *all* state regulation in the same area." Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767, 786 (1994) (emphasis added); *see, e.g.*, *Houston v. Moore*, 18 U.S. (5 Wheat.) 1, 30-31 (1820) (attacking "novel and unconstitutional doctrine" that, "where the State governments have a concurrent power of legislation with the national government, they may legislate upon any subject on which Congress has acted, provided the two laws are not *** contradictory and repugnant to each other.").

Antebellum states, therefore, did not assert concurrent jurisdiction with the United States over non-Indians. Rather, they claimed exclusive jurisdiction over Indian Country by virtue of their territorial sovereignty over *all* territory within their borders. *See* DEBORAH A. ROSEN, AMERICAN INDIANS AND STATE LAW: SOVEREIGNTY, RACE, AND CITIZENSHIP, 1790-1880, at 20 (2007) ("New York and Georgia *** argued that a state must have authority over all the land and people within its territorial limits."). States aggressively prosecuted even Indian-on-Indian crime, in clear defiance of federal policy. *Id.* at 23-50.

State courts took different positions on the issue. Some concluded that states lacked jurisdiction over Indian Country, even in disputes between non-Indians. *See, e.g.*, *Holland v. Pack*, 7 Tenn. (1 Peck) 151, 154 (1823). Others endorsed exclusive state

sovereignty. *See, e.g.*, *Jackson, ex dem. Smith v. Goodell*, 20 Johns. 188 (N.Y. Sup. Ct. 1822) ("I know of no half-way doctrine on this subject. We either have an exclusive jurisdiction, pervading every part of the State, including the territory held by the Indians, or we have no jurisdiction over their lands."), *overruled by Goodell v. Jackson, ex dem. Smith*, 20 Johns. 693 (N.Y. Sup. Ct. 1823).

Of course, in *Worcester v. Georgia,* 31 U.S. (6 Pet.) 515 (1832), Chief Justice Marshall held that Georgia lacked jurisdiction over Cherokee territory, even over non-Indians like Samuel Worcester.[3] Applying straightforward principles of "federal pre-emption," *McClanahan v. State Tax Comm'n of Ariz.*, 411 U.S. 164, 172 (1973), Chief Justice Marshall reasoned that Georgia's attempt to exercise jurisdiction "interfere[d] forcibly with the relations established between the United States and the Cherokee nation, the regulation of which, according to the settled principles of our constitution, are committed exclusively to the government of the union," 31 U.S. at 561. Georgia's actions were not only "in direct hostility with treaties" but "in equal hostility with the acts of congress for regulating this intercourse, and giving effect to the treaties." *Id.* at 561-562.

[3] The cases' original indictment described the defendants as "persons of [Gwinnett] county" and "Citizens thereof." Case File for *Worcester v. Georgia*, *U.S. National Archives*, https://catalog.archives.gov/id/38995510 (last visited Mar. 31, 2022).

B. States Attempt To Avoid Exclusive Federal Jurisdiction By Contesting The Scope Of "Indian Country"

Two years after *Worcester*, Congress enacted the final version of the Trade and Intercourse Act, which remains the basis for the present-day General Crimes Act. In doing so, Congress did not contemplate state jurisdiction. On the contrary, the 1834 Act echoed earlier versions by extending federal enclave law to Indian Country. Indian Trade and Intercourse Act of 1834, ch. 161, § 26, 4 Stat. 729, 733.

Unfortunately, neither Chief Justice Marshall's pronouncement in *Worcester* nor congressional action ended states' challenges to federal authority over Indian affairs. *See, e.g.*, *Williams v. Lee*, 358 U.S. 217, 219 (1959) (noting "bitter criticism and the defiance of Georgia" in response to *Worcester*). Indeed, states openly disregarded the Court's ruling. *See, e.g.*, *Tennessee v. Forman*, 16 Tenn. (8 Yer.) 256, 287 (1835) (flouting *Worcester* "with all due deference to the highest judicial tribunal in the Union" and affirming Tennessee's jurisdiction over Cherokee territory). And while riding circuit, Justice McLean reiterated his dissenting view in *Worcester* by siding with states' efforts to limit federal authority. *United States v. Bailey*, 24 F. Cas. 937 (C.C. Tenn. 1834); *United States v. Cisna*, 25 F. Cas. 422 (C.C. Ohio 1835).

Ironically, the 1834 Act confused the situation by defining "Indian country" as most land west of the Mississippi, as well as any land east of the Mississippi "*not within any state* to which the Indian title has not been extinguished." Indian Trade and Intercourse Act of 1834, § 1, 4 Stat. at 729 (emphasis added). As a

result, this Court took the position that there was *no* Indian Country within any state borders east of the Mississippi. *See Bates v. Clark*, 95 U.S. 204, 208 (1877). For that reason—and without adopting the limited-federal-preemption gloss on the Act proffered by Petitioner—this Court concluded that New York's exercise of jurisdiction over non-Indians was not "in conflict with any act of Congress." *New York ex rel. Cutler v. Dibble*, 62 U.S. (21 How.) 366, 370 (1858).

But even west of the Mississippi, where the 1834 Act's definition explicitly applied, courts found creative ways to conclude that land was *not* "Indian country" and therefore not subject to the Act. *See, e.g.*, *United States v. Leathers*, 26 F. Cas. 897 (D. Nev. 1879) (concluding Nevada was not Indian Country); *United States v. Seveloff*, 27 F. Cas. 1021 (D. Or. 1872) (same for Alaska). In *United States v. Tom*, a territorial supreme court held that Oregon was not Indian Country because "[w]hatever militates against the true interests of a white population is inapplicable." 1 Or. 26, 27 (1853). Even this Court concluded that the Pueblo peoples of New Mexico were too "civilized" for their lands to be subject to the Act. *United States v. Joseph*, 94 U.S. 614, 617 (1876) (concluding that Act did not apply to Seneca land at issue in *Dibble*).

The political branches of the federal government resisted these atextual readings of the Act. Attorney General Caleb Cushing flatly rejected *Tom*, noting that the statute's text applied to Oregon "with mathematical precision of certainty." Indians in Oregon, 7 Op. Att'y Gen. 293, 296 (1856). He continued: "To decide that laws are applicable when

they please the fancy of those against whom they are passed *** would be to abolish *law*." *Id.* Similarly, Congress statutorily overruled *Seveloff*. Act of Mar. 3, 1873, ch. 227, 17 Stat. 510, 530; Alaska, 14 Op. Att'y Gen. 327 (1873). (And this Court itself later effectively reversed *Joseph*. *See United States v. Sandoval*, 231 U.S. 28, 48-49 (1913)).

In sum, a proper understanding of the term "Indian country," as defined in the 1834 Act, makes clear that post-*Worcester* debates did *not* call into doubt the preemptive scope of federal jurisdiction. If anything, the exclusive nature of federal authority caused states and settlers to argue that lands were not "Indian country."

C. Congress Consistently Preserved Exclusive Jurisdiction Over Crimes "Against Indians" Within Indian Country

During the nineteenth century, Congress also preserved exclusive federal jurisdiction over Indian Country in other ways.

First, Congress aimed to ensure that states newly admitted to the Union would continue to exclude Indian Country from their "ordinary jurisdiction"—as had the original states—by explicitly affirming Indian Country borders set by treaty and reserving exclusive federal jurisdiction over those lands in enabling acts. Beginning with the admission of Kansas in 1860, Congress made explicit that entering the Union on equal footing with the original states would not dissolve the borders of Indian lands set by treaty, nor would it bring those lands under state jurisdiction.

The enabling act providing the terms "for the admission of Kansas into the Union," for example, set the territorial borders of the state to exclude Indian Country unless and until the Native nation governing those lands consented to state jurisdiction: "all such [Indian lands reserved by treaty] shall be excepted out of the boundaries, and constitute no part of the State of Kansas, until said tribe shall signify their assent to the President of the United States to be included within said State." H.R. 23, 36th Cong. (1st Sess. 1860); S. 194, 36th Cong. (1st Sess. 1860). To make clear that state jurisdiction did not extend into Indian lands, the legislation went on to affirm explicitly federal jurisdiction over the excluded lands. *Id.* The Kansas enabling act served as a model for later enabling acts, including the Oklahoma enabling act, which includes nearly identical language preserving federal jurisdiction. Act of June 16, 1906, ch. 3335, 34 Stat. 267.

Second, Congress continued to expand its comprehensive scheme of federal jurisdiction over crimes committed within Indian Country. After this Court held in *Ex Parte Crow Dog* that the exception in the General Crimes Act for crimes committed by Indians against Indians provided for exclusive tribal jurisdiction, 109 U.S. 556 (1883), Congress expanded federal jurisdiction over certain "major crimes" committed by Indians against Indians, *see* Major Crimes Act of 1885, ch. 341, § 9, 23 Stat. 385 (codified at 18 U.S.C. § 1153). Through the Assimilative Crimes Act, Congress incorporated state criminal law into its application of the General Crimes Act when no federal law defines a particular crime. *See Williams v. United States*, 327 U.S. 711 (1946).

Whenever this Court has been called on to determine whether the comprehensive federal scheme to regulate criminal jurisdiction within Indian Country is exclusive of state jurisdiction, this Court has consistently held that Congress's purview "ordinarily is pre-emptive of state jurisdiction," if any exists. *United States v. John*, 437 U.S. 634, 651 (1978); *see Williams*, 327 U.S. at 780 ("While the laws and courts of the State of Arizona may have jurisdiction over offenses committed on this reservation between persons who are not Indians, the laws and courts of the United States, rather than those of Arizona, have jurisdiction over offenses committed there, as in this case, by one who is not an Indian against one who is an Indian."). The sole exception—which is inapposite for the reasons explained by Respondent—concerns crimes committed by non-Indians against non-Indians. *See United States v. McBratney*, 104 U.S. 621 (1882).

III. CONGRESS EXPERIMENTED WITH—AND REPUDIATED AS FAILED POLICY—CONFERRING JURISDICTION OVER CRIMES "AGAINST INDIANS" TO THE STATES IN THE ALLOTMENT ERA

1. In the late nineteenth century, Congress began to experiment with conferring criminal jurisdiction on the states to incentivize the assimilation and "civilization" of Native people. The primary aim of the General Allotment Act of 1887, commonly known as the Dawes Act, was to solve the supposed "Indian Problem" by breaking up reservation lands, forcing Native people to swear off tribal citizenship, and integrating Native people into the

several states. *See* Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, 132 HARV. L. REV. 1787, 1831-1832 (2019). In addition to offering citizenship, section 6 of the Act extended the "benefit of" state civil and criminal law over any Native allottee who had been issued a patent for their allotted lands after 25 years of the federal government holding the land in trust. General Allotment Act of 1887, ch. 119, § 6, 24 Stat. 388, 390.

In less than a decade, however, the failure of allotment policy became apparent. Rather than result in protection for Native people under state law, the run on Native lands inspired corruption and even mass violence against Natives. *See* Matthew Fletcher, *Failed Protectors: The Indian Trust and Killers of the Flower Moon*, 117 MICH. L. REV. 1253 (2019) (describing mass killings of Osage people in early twentieth century). State governments offered no protection and often failed to investigate or prosecute even the most egregious crimes. *Id.* at 1260-1261. As this Court recognized contemporaneously, "[b]ecause of the local ill feeling, the people of the states where [Native people] are found are often their deadliest enemies." *United States v. Kagama*, 118 U.S. 375, 384 (1886).

Consequently, in 1906, Congress extended the period before Native lands could be alienated and before allottees could reap the "benefit of" state law. The Indian Reorganization Act of 1934 extended that period indefinitely. These efforts effectively halted the short-lived federal experiment of delegated state criminal jurisdiction through allotment. Yet confusion

remained over how to approach the patchwork of muddled jurisdiction left in the wake of the Dawes Act.

2. In a series of cases, this Court clarified that the federal government retained exclusive jurisdiction on allotted lands that had not yet been alienated, even for crimes committed by non-Indians against Indian allottees. The Court cited Congress's straightforward statement that "all allottees to whom trust patents shall hereafter be issued shall be subject to the *exclusive* jurisdiction of the United States." *United States v. Pelican*, 232 U.S. 442, 451 (1914) (emphasis added) (quoting Act of May 8, 1906, ch. 2348, 34 Stat. 182).

Still, as a practical matter, officials on the ground struggled to administer a functional criminal justice system across a complex checkerboard of land plots—some under delegated exclusive state jurisdiction (*i.e.*, if alienated) and others under inherent exclusive federal jurisdiction (*i.e.*, if allotted but not yet alienated). As the seminal 1928 "Meriam Report" on the state of Indian affairs observed, the administration of justice was "unsatisfactory" in Indian Country because the Allotment Act had created "government in spots." MERIAM REPORT: THE PROBLEM OF INDIAN ADMINISTRATION 743 (1928).

Indeed, criminal justice administration was left in such a disarray that state governments once again began overreaching into areas of exclusive federal jurisdiction. According to the Meriam Report, "state courts, in order to provide some semblance of law and order, have enforced their authority on the reservations without legal warrant, but eventually the jurisdictional question has been raised by attorneys

appearing in [sic] behalf of Indian clients, and thereafter such courts have declined to take cognizance of the cases." MERIAM REPORT, *supra*, at 768. Because the federal judiciary had no power to simply mandate a national solution, the Report stressed "that some legislation is needed to correct the present uncertain and unsatisfactory state of affairs." *Id.* at 762.

IV. REFLECTING PLENARY FEDERAL AUTHORITY, CONGRESS TAKES VARYING APPROACHES TO CRIMINAL JURISDICTION OVER CRIMES BY OR AGAINST INDIANS IN INDIAN COUNTRY

Congress answered the Meriam Report's call to resolve the jurisdictional muddle created by allotment with a series of statutes passed and refined over the last 80 years. At each step, Congress has exercised its plenary authority to tailor solutions to a variety of local and regional circumstances—increasingly taking the approach that designating a single government (state or federal) was best practice for criminal justice in Indian Country, before more recently focusing on bolstering tribal criminal justice systems. As it did when enacting the Trade and Intercourse Acts and other nineteenth century legislation, Congress proceeded on the foundational understanding that states have no jurisdiction over crimes committed "against Indians" unless a federal statute affirmatively delegates such authority.

A. Congress First Addressed Reservations Heavily Affected By Allotment By Delegating Concurrent Jurisdiction To States

Beginning with a handful of statutes from the 1940s, Congress responded piecemeal to concerns about jurisdictional confusion over crimes committed against Indians within Indian Country. The first statute, the Kansas Act of 1940, was born of a controversy that arose when a local sheriff requested federal assistance in such a case. The request brought the overreach of state criminal jurisdiction within Indian Country to the attention of the U.S. Attorney, which investigated "the question of prosecuting in Federal courts all crimes committed by or against the person or property of Indians," *Letter from Summerfield S. Alexander, U.S. Att'y for Kan., to Warden L. Noe, Cnty. Att'y for Jackson Cnty.* (Nov. 12, 1937) (on file with National Archives at Kansas City), and concluded that the "prosecutions of this nature properly belonged in Federal Court rather than State Court," *Letter from H.E. Bruce, Superintendent, Potawatomi Agency to W.L. Noe, Cnty. Att'y for Jackson Cnty*. (Nov. 19, 1937) (on file with National Archives at Kansas City).

In response, local officials lobbied Congress to "confer" concurrent jurisdiction on Kansas. *Letter from H.E. Bruce, Superintendent, Potawatomi Agency, to Hon. Wm. P. Lambertson, Member of Cong.* (Mar. 9, 1938) (on file with National Archives at Kansas City). In a report to the Committee on Indian Affairs on the Kansas Act, the Secretary of the Interior rooted the need for the narrow conferral of state jurisdiction in

the aftereffects of allotment. At that time, 34,937 acres of reservation parcels held in trust were commingled with "approximately 80,963 acres of unrestricted holdings." S. Rep. No. 76-1523, at 4 (1940). The Secretary further explained that state criminal jurisdiction was currently limited "only to situations where both the offender and the victim" are non-Indians (*i.e.*, under *McBratney*), and that, although the majority of crimes would be ideally located within tribal courts, the particular reservation at issue had lacked tribal courts for some time. *Id.* at 2. Rather than attempt to support the rebuilding of tribal courts on the reservation, Congress took the approach of narrowly conferring state criminal jurisdiction over crimes committed "by or against Indians." *Id.*

Building upon the approach of the Kansas Act, Congress proceeded during the 1940s to enact four similar state-specific "conferr[als]" of concurrent jurisdiction over crimes "by or against Indians" on particular reservations.[4] Each of those statutes adopted the approach, recommended in the Meriam Report, of offering an individualized solution for particular tribes. And all dealt with reservations and jurisdictions that had been heavily impacted by allotment.

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[4] 18 U.S.C. § 3243; Act of May 31, 1946, ch. 279, Pub. L. No. 79-394, 60 Stat. 229; Act of June 30, 1948, ch. 759, Pub. L. No. 80-846, 62 Stat. 1161; Act of July 2, 1948, ch. 809, Pub. L. No. 80-881, 62 Stat. 1224; Act of Oct. 5, 1949, ch. 604, Pub. L. No. 81-322, 63 Stat. 705.

B. Congress Then Offered A National Solution In PL-280

1. In the late 1940s, while continuing to enact some piecemeal legislation conferring concurrent criminal jurisdiction on states, Congress began trending towards a more complete, nationwide approach to criminal justice in Indian Country. Congress first considered, but rejected, a bill proposing a national conferral of concurrent state criminal jurisdiction over crimes "by or against Indians" within Indian Country. H.R. 4725, 80th Cong. (2d Sess. 1948); *see* H.R. Rep. No. 80-1506 (1948); S. Rep. No. 80-1142 (1948). Instead, Congress codified and strengthened its definition of "Indian country" to include all lands within reservations regardless of land status. Act of June 25, 1948, ch. 645, 62 Stat. 757 (codified at 18 U.S.C. § 1151). Congress also enacted today's General Crimes Act, once again reaffirming exclusive federal jurisdiction over the full range of crimes committed by Indians and non-Indians alike within Indian Country. 18 U.S.C. § 1152.

In 1953, following years of deliberation over the proper scope of state jurisdiction over crimes "by or against Indians" within Indian Country, Congress enacted Public Law 280 ("PL-280"). DAVID ACKERMAN, BACKGROUND REPORT ON PUBLIC LAW 280: PREPARED AT THE REQUEST OF HENRY M. JACKSON, CHAIRMAN, COMMITTEE ON INTERIOR AND INSULAR AFFAIRS, UNITED STATES SENATE 12 (Comm. Print 1975). PL-280 moved away from the prior piecemeal approach by providing for a comprehensive scheme to deal with the deleterious policies of allotment, while remaining

sensitive to extensive regional and local variation in Indian Country.[5]

Congress also shifted its approach in another key respect: Rather than confer *concurrent* jurisdiction on states over crimes "against Indians," Congress opted to delegate *exclusive* jurisdiction to states. It did so out of the recognition that concurrent jurisdiction had always resulted in confusion and moral hazard—with both governments expecting the other to take the lead in investigation and prosecution.

2. PL-280 thus delegates exclusive jurisdiction for crimes "by or against Indians" within Indian Country on six states—Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin. Such jurisdiction is mandatory for those states, the majority of which had reservations heavily impacted by allotment. Those were also states where Native nations had *already consented* to earlier drafts of congressional legislation conferring state jurisdiction. That said, certain reservations that had successfully resisted allotment and demonstrated strong tribal

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[5] For example, Montana had initially requested conferral of state jurisdiction over crimes "by or against Indians" because it had long been exercising criminal jurisdiction over Indian Country under its own (erroneous) interpretation of state jurisdiction following allotment. *State Legal Jurisdiction in Indian Country: Hearing on H.R. 459, H.R. 3235 and H.R. 3634 Before the H. Subcomm. on Indian Affairs,* 82d Cong. (1952). Like many states, following Congress's section 1151 clarification of longstanding exclusive federal power over Indian Country regardless of land status, Montana's power to continue overreaching was called into question by its state supreme court. *Id.* at 8-9. Initially offered a piecemeal conferral statute, Montana was consolidated with other states into PL-280.

court systems, like the Red Lake reservation in Minnesota and the Warm Springs reservation in Oregon, were explicitly excepted from PL-280's mandatory statewide grant.

For the remaining states, PL-280 provided the option to "opt-in" to a delegation of jurisdiction for crimes "by or against Indians" by passing affirmative legislation. Nine states—Arizona, Florida, Iowa, Idaho, Montana, Nevada, North Dakota, Utah, and Washington—took steps toward that end. And certain states accepted delegated jurisdiction for limited subject matter areas; Arizona, for example, limited its PL-280 jurisdiction to air- and water-pollution-related crimes.

The line between "mandatory" and "opt-in" states was drawn, in large part, between states that had obtained Native nation consent and those that had not. States like Montana, which had come to exercise criminal jurisdiction in Indian Country during the allotment era, had not yet obtained consent from Native nations within their borders. *See* note 5, *supra*. In a similar vein, even under PL-280, some states (like North Dakota) made their opt-in contingent upon tribal government consent (which was not granted). About 15 years later, as part of the Indian Civil Rights Act of 1968 (ICRA), Congress formalized that practice and required that states opting in to PL-280 jurisdiction must obtain the consent of the affected tribal governments.

At the same time, in response to requests by state governments unable to take on the (unfunded) financial burden of PL-280 jurisdiction, ICRA also included a reticulated process by which states could

retrocede their previously assumed PL-280 jurisdiction back to the federal government. For example, states may request retrocession over particular reservations, subject matter areas, and types of lands (*e.g.*, allotted or off-reservation lands). Following an affirmative statute or resolution by a state requesting retrocession, the Secretary of the Interior must consult first with the U.S. Attorney General before granting or denying the request. The Secretary can reject the request for retrocession or accept it only in part.

Of course, retrocession of state jurisdiction would prove nonsensical if states held inherent, presumptive jurisdiction over crimes "against Indians"—*even following retrocession*. Accordingly, absent PL-280 (or a state's opt-in pursuant to its strictures), jurisdiction over non-Indians committing crimes against Indians in Indian Country must remain exclusively federal.

C. Since Enacting PL-280, Congress Has Continued To Presume That State Jurisdiction Over Crimes Against Indians Must Be Affirmatively Delegated

Following enactment of PL-280, Congress undertook a series of reform efforts, both successful and unsuccessful, around criminal justice in Indian Country. In keeping with centuries of practice, all of those reform efforts approach state jurisdiction over crimes against Indians as jurisdiction that must be affirmatively delegated by Congress. In addition, all of those reform efforts reflect the tailored approach offered by PL-280, which allows the federal government to account for the unique relationship

between a tribe, the federal government, and one or more states. At no point has Congress considered a blanket solution to the problems caused by the allotment act within Indian Country as the ideal resolution—essentially the result that Petitioner here seeks to impose by judicial fiat.

In the late 1970s and early 1980s, for example, Congress considered the Criminal Code Reform Act of 1979. Aside from a few small reforms, the bill explicitly disclaimed any intent "to diminish, expand, or otherwise alter in any manner or to any extent State or tribal jurisdiction over offenses within Indian country, as such jurisdiction existed on the date immediately preceding the effective date of this Act." *Reform of the Federal Criminal Laws: Hearing on S. 1723 Before the S. Comm. on the Judiciary*, 96th Cong. (1979), at App. 11402. In short, the bill aimed to codify Congress's current understanding of the law on the books at the time of the bill's drafting. On that score, the text of the bill allowed for state jurisdiction over crimes "by or against Indians" in two general circumstances only: first, where the state had been mandatorily delegated jurisdiction by PL-280 or by one of the five piecemeal statutes from the 1940s conferring jurisdiction; or, second, where a state had opted-in to PL-280 jurisdiction with the consent of the tribe. Otherwise, Congress presumed it would require an affirmative statutory delegation of jurisdiction for states to prosecute crimes against Indians.

During the same Congress, the Senate considered another such delegation in the Tribal State Compact Act of 1980. Senator DeConcini (AZ) introduced the bill to allow for compacts between state and tribal

governments over civil and criminal jurisdiction within Indian Country. By contrast to the unfunded mandate of PL-280, the bill also included a provision that guaranteed federal funding for any jurisdiction conferred onto the state governments, including 100% of the "costs for personnel or administrative expenses" for any compact, and set forth criteria for the Secretary of the Interior to determine funding.

Those reform efforts stalled. Tribal governments and Native advocates instead aimed to guide congressional reform efforts toward strengthening tribal self-determination and jurisdiction.

D. Congress Has Recently Looked To Strengthen Tribal Jurisdiction Over Crimes—Including Those Committed By Non-Indians Against Indians

Most recently, Congress has trended away from delegating jurisdiction over crimes committed within Indian Country to states. Instead, the last 15 years have seen Congress better uphold its treaty and trust responsibilities to Native nations by strengthening their infrastructures for prosecuting crimes within Indian Country—including by recognizing the power of tribal governments to prosecute crimes committed by non-Indians against Indians. Several examples demonstrate how Congress has offered additional funding, training, and data-sharing support to tribal governments in further developing their criminal legal systems, and expanded federal recognition of tribal criminal jurisdiction.

1. The Tribal Law and Order Act of 2010 (TLOA), Pub. L. No. 111-211, tit. II, 124 Stat. 2258, sought to

strengthen the relationship between the federal and tribal criminal justice systems, and to leverage that relationship to build tribal government infrastructure around criminal justice. Among other things, the TLOA created national training programs run by the U.S. Departments of Justice and the Interior for tribal officials engaged in criminal justice. The TLOA also created mandatory access for tribal governments to federal criminal databases.

With this strengthened tribal-federal relationship, the TLOA also began to pull back on earlier policies delegating jurisdiction exclusively to the states. Section 221 of the TLOA offered tribal governments the option of requesting the reassertion of federal jurisdiction on reservations within mandatory PL-280 states.

2. The reauthorizations of the Violence Against Women Act in 2013, *see* Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54 ("VAWA 2013"), and in 2022, *see* Violence Against Women Act Reauthorization Act of 2022, Pub. L. No. 117-103, div. W, 136 Stat. 49 ("VAWA 2022"), are also instructive. The tribal provisions of VAWA 2013 strengthen tribal jurisdiction over crimes committed by non-Indians against Indians within Indian Country. Continuing a tailored approach to jurisdiction over crimes "against Indians," the Act initially expanded tribal criminal jurisdiction for five tribal governments that applied for and were accepted into a "Pilot Project." At the conclusion of the pilot program, each tribe could choose to make that expansion permanent.

VAWA 2013 has since been lauded as one of the most successful criminal justice reforms Indian Country has seen. In fact, just last month, President Biden signed into law VAWA 2022, which preserves and builds on VAWA 2013's strengthening of tribal criminal justice jurisdiction. Importantly, VAWA 2022 expands recognition of tribal criminal jurisdiction over crimes committed by non-Indians against Indians within Indian Country beyond crimes of domestic violence to cover non-Native perpetrators of sexual assault, child abuse, stalking, sex trafficking, and assaults on tribal officers on tribal lands. It bears mention that VAWA 2022 would cover the crime of child abuse charged against Respondent.

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All of the foregoing makes crystal clear that, when Congress wants to designate a particular government with jurisdiction over crimes within Indian Country—be it a state or tribal government—it certainly knows how to do so. Congress has legislated the metes and bounds of criminal justice within Indian Country since this Nation's birth. To hold otherwise, as Petitioner urges this Court to do unilaterally, would contravene 200 years of history and bedrock Indian law principles.

CONCLUSION

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

Respectfully submitted,

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APPENDIX

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