No. 21-429

IN THE
Supreme Court of the United States

OKLAHOMA,

Petitioner,

v.

CASTRO-HUERTA,

Respondent.

ON A WRIT OF CERTIORARI
TO THE OKLAHOMA COURT OF CRIMINAL APPEALS

BRIEF OF *AMICI CURIAE* FORMER UNITED STATES ATTORNEYS MICHAEL COTTER, D. MICHAEL DUNAVANT, HALSEY B. FRANK, TROY A. EID, THOMAS B. HEFFLELFINGER, DAVID IGLESIAS, BRENDAN V. JOHNSON, WENDY OLSON, TIMOTHY Q. PURDON, AND R. TRENT SHORES

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QUESTION PRESENTED

Whether a State has authority to prosecute non-Indians who commit crimes against Indians in Indian country.

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INTERESTS OF THE *AMICI CURIAE*[1]

Amici Curiae, former United States Attorneys appointed by Republican and Democratic Presidents and confirmed by the United States Senate, have extensive direct experience prosecuting Federal crimes arising in Indian country. They are well-versed in the jurisdictional interplay among Federal, State and Tribal authorities responsible for public safety and the administration of justice.[2]

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[1] Pursuant to this Court's Rule 37.6, counsel for *amici curiae* certify that no part of this brief was authored by counsel for any party, and no such counsel or party made a monetary contribution to the preparation or submission of the brief. Counsel of record received timely notice of intent to file this brief and have consented.

[2] *Amici* have variously testified individually before Congress on Indian country law enforcement issues *See e.g.*, *Examining Federal Declinations to Prosecute Crimes in Indian Country: S. Hrg. 110-683 Before the S. Comm. on Indian Affairs*, 110th Cong. 31 (2008)(statement of Thomas B. Heffelfinger); *Hearing on S. 1763, Stand Against Violence and Empower Native Women Act; S. 872, A Bill to Amend the Omnibus Indian Advancement Act to Modify the Date as of which Certain Tribal Land of the Lytton Rancheria of California is Considered to be Held in Trust and to Provide for the Conduct of Certain Activities on The Land; S. 1192, Alaska Safe Families and Villages Act*, S. Hrg. 112-489, 112th Cong. 22 (2011) (statement of Thomas B. Heffelfinger); *Law Enforcement in Indian Country, Hearing Before the S. Comm. On Indian Affairs*, S. Hrg. 110-136, 110th Cong. 62 (2007) (statement of Thomas B. Heffelfinger); *Tribal Law and Order One Year Later: Have We Improved Public Safety and Justice Throughout Indian Country, Oversight Hearing Before the Senate Committee on Indian Affairs*, 112th Cong. 31-32 (Sept. 22, 2011) (statement of Brendan V. Johnson, U.S. Attorney, District

Amici are Former United States Attorneys Michael W. Cotter, District of Montana (2009-2017), D. Michael Dunavant, Western District of Tennessee (2017-2021), Troy A. Eid, District of Colorado (2006-2009), Halsey B. Frank, District of Maine (2017-2012), Thomas B. Hefflelfinger, District of Minnesota (1991-1993, 2001-2006), David Iglesias, District of New Mexico (2002-2006), Brendan V. Johnson, District of South Dakota (2009-2015), Wendy Olson, District of Idaho (2010-2017), Timothy Q. Purdon, District of North Dakota (2010-2015) and R. Trent Shores, District of Oklahoma (2017-2021).

SUMMARY OF THE ARGUMENT

It is black-letter law that the states have no jurisdiction over crimes committed by Indians or against Indians in Indian country. As former United States Attorneys, we have long understood it as such and been trained accordingly, along with our other colleagues in the U.S. Department of Justice responsible for Federal law enforcement and prosecution on Indian reservations.

Oklahoma attempts to create the misimpression that state jurisdiction is the normal jurisdictional default rule even when crimes arise in Indian country,

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of South Dakota); *Tribal Law and Order One Year Later: Have We Improved Public Safety and Justice Throughout Indian Country, Oversight Hearing Before the Senate Committee on Indian Affairs*, 112th Cong. (Sept. 22, 2011) (testimony of Troy A. Eid, Chairman, Indian Law and Order Commission); *Oversight Hearing on the Law and Order Commission Report: "A Roadmap for Making Native America Safer": Before the S. Comm. on Indian Affairs*, 113th Cong., 2nd Session (2014)(testimony of Timothy Q. Purdon, U.S. Attorney, District of North Dakota).

and that the holding of the Oklahoma Court of Criminal Appeals was an aberration. *See, e.g.*, Opening Brief at 3 ("As this Court's case law makes clear, a State has inherent authority to prosecute non-Indians who commit crimes in Indian country within its borders, unless Congress preempts that authority.")

Oklahoma is incorrect. The rule advocated by the State, if adopted, would be a radical departure from Federal Indian law as it is understood by all United States Attorney's Offices and the Justice Department itself. *See* U.S. DOJ, Crim. Resource Man. § 688, https://www.justice.gov/archives/jm/criminal-resource-manual-688-state-jurisdiction. If Oklahoma wishes to advocate such a sweeping change in established Federal law, it should properly address its reasons for doing so to Congress.

Furthermore, we are dubious that the extreme approach proposed by Oklahoma – expanding state criminal jurisdiction on Indian reservations across much of the United States by what amounts to a judicially fashioned unfunded Federal mandate – will make Indian country safer and more just for all U.S. citizens. Congress already tried that experiment with several states when it enacted Public Law 83-280 ("PL-280"), codified at 18 U.S.C. § 1162, and it has generally been regarded as a failure. Indian Law and Order Commission, A Roadmap for Making Native America Safer: Report to the President & Congress of the United States (November 2013) ("Commission Report") at xi, https://www.aisc.ucla.edu/iloc/report/index.html.

Instead the modern trend has been to recognize and expand tribal jurisdiction and criminal justice capacity. *See, e.g.* Tribal Law and Order Act ("TLOA"), PL 111-21, 124 Stat. 2258, at § 202(a)(1)(B) ("[T]ribal

justice systems are often the most appropriate institutions for maintaining law and order in Indian country. Based on our experience, we believe that strengthening criminal justice will require the tools that are available to Congress but not the judiciary: localized fact-finding, participation by state and tribal officials, predictable public funding, and locally accountable public safety and criminal justice capacity-building.

ARGUMENT

I. It is well established that states do not have jurisdiction over crimes involving Indians in Indian country.

It is the clear understanding of law enforcement officers operating in Indian country that the state would have no jurisdiction over crimes involving Indians that take place on a reservation. As stated in the United States Attorneys' Manual (also known as the "Justice Manual") ("Manual"), "[e]xcept for non-Indian against non-Indian offenses falling under the rule of *McBratney*, 104 U.S. 621 (1882), States have no criminal jurisdiction in the Indian country unless expressly conferred by an act of Congress." U.S. DOJ, Crim. Resource Man. § 688, https://www.justice.gov/archives/jm/criminal-resource-manual-688-state-jurisdiction. This does not, of course, include the states which "have been given criminal jurisdiction over all or some of the reservations within their borders by Public Law 280 (1953), now codified at 18 U.S.C. § 1162(a)." *Id.*

In a section entitled, "Exclusive Federal Jurisdiction over Offenses by Non-Indians against Indians," the Manual further explains that the United States stated this position in an *amicus* brief filed in *Arizona*

v. Flint, 492 U.S. 911 (1989). *Id.* at § 685. In that case, the Solicitor General argued that there was "no compelling reason for the Court to grant review" in a case very similar to the present case because "it is settled that federal jurisdiction under 18 U.S.C. 1152 (or 1153) over crimes committed by Indians is exclusive." Brief for the United States as Amicus Curiae, *Arizona v. Flint*, No. 88-603 (October term 1988), https://www.justice.gov/sites/default/files/osg/briefs/1988/01/01/sg880048.txt.[3]

"The shared assumption of the three Branches … was that federal jurisdiction under 18 U.S.C. 1152 is exclusive and that the States do not have jurisdiction over offenses by non-Indians against Indians." *Id.* "This Court has so stated on several occasions and the Executive and Legislative Branches have acted on that assumption several times, in supporting and enacting legislation concerning state jurisdiction on Indian reservations." *Id.* This "shared assumption" has also formed the basis for the training and practice of Federal law enforcement and prosecution in Indian country, then and now.

Federal law enforcement officials also rely on a Memorandum of Understanding ("MOU") between the Justice Department United States Department of Interior ("DOI") pursuant to the Indian Law Enforcement Reform Act, 25 U.S.C. § 2801 *et seq.* U.S. DOJ, Crim. Resource Man. § 676. Although this MOU does not address state jurisdiction directly, it illustrates the comparatively limited role of state authorities to

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[3] There was a brief window, from 1979 to 1989, in which the United States took the position that there was concurrent jurisdiction. U.S. DOJ, Crim. Resource Man. § 685. The Solicitor's Office ultimately abandoned this position. *See id.*

criminal prosecutions in Indian Country. It provides for federal coordination for "the enforcement of federal law and, with the consent of the Indian tribe, Tribal law; and in cooperation with appropriate federal and Tribal law enforcement agencies, the investigation and presentation for prosecution of cases involving violations of 18 U.S.C. 1152 and 1153 within Indian country (and other federal offenses for which the parties have jurisdiction)." *Id.* There is no mention of the enforcement of state law, and state officials play no role in the allocation of responsibilities in the MOU between various federal agencies and tribal authorities, except where it provides that "[a]ny other agreements that the DOI, DOJ, and Indian Tribes may enter into with or without reimbursement of personnel or facilities of another federal, Tribal, state, or other government agency to aid in the enforcement of criminal laws of the United States shall be in accord with this MOU and applicable federal laws and regulations." *Id.*

This has also, until now, been the clear understanding of Oklahoma law enforcement. For example, in 2011 a non-Indian named Steven Keeling shot an Indian and a non-Indian in a single incident on a restricted Indian allotment, and the State and the United States Attorney's Office separately prosecuted the two shootings, one of which fell under Federal jurisdiction and the other under State jurisdiction. Press Release, U.S. Att'y Off., N.D. Okla., Hominy Man Pleads Guilty to Second Degree Murder in Indian Country (June 16, 2011), https://www.justice.gov/archive/usao/okn/news/2011/Keeling06162011.html.

Oklahoma law enforcement receive regular training on these principles. *Amicus* R. Trent Shores, who

served as United States Attorney for the Northern District of Oklahoma from 2017 to 2021, routinely taught classes on the limits of state jurisdiction in Indian country as part of the State's training program at the Tulsa Police Academy and other law enforcement programs.

Standard secondary sources provide that there is no state jurisdiction over crimes committed against Indians in Indian country. Cohen's Handbook of Federal Indian Law, the principal treatise in this field, opens its section on state criminal jurisdiction by stating "[a]s a general rule, states lack jurisdiction in Indian country absent a special grant of jurisdiction." COHEN'S HANDBOOK OF FEDERAL INDIAN LAW (2005 ed.) at § 9.03. The Cohen treatise characterizes state jurisdiction even over crimes between two non-Indians as resting on a "rationale" "as dubious now as it was then." *Id.*, discussing *United States v. McBratney*, 104 U.S. 621 (1882).

Other secondary sources agree. "Generally, states do not have criminal jurisdiction in Indian country unless the offender and victim, if any, are non-Indian or the state has been granted jurisdiction pursuant to Public Law 280." CONF. OF W. ATT'N'S GENERAL, AMERICAN INDIAN LAW DESKBOOK (2020 ed.), § 4:2. "When a non-Indian commits a crime in Indian country and the victim is an Indian, state courts have jurisdiction only in Public Law 280 states." *Id.* at § 4:4.

A flow chart of Indian country jurisdiction, as it is generally understood by law enforcement officials, prosecutors, and defense attorneys, is included in the report prepared by a Presidential Commission on law and order in Indian country (complete with a warning that "[d]etails vary by Tribe and State"). Commission Report, *supra*, at 7.

These "settled" principles and "shared assumptions," Brief of the United States, *supra*, date all the way back to the Marshall Court, which held that "[t]he Cherokee nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress." *Worcester v. the State of Georgia*, 31 U.S. 515, 520 (1832). This principle derives from the fact that "[t]he Indian nations had always been considered as considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial." *Id.* at 519.

"Over the years this Court has modified these principles in cases where essential tribal relations were not involved and where the rights of Indians would not be jeopardized, but the basic policy of *Worcester* has remained." *Williams v. Lee*, 358 U.S. 217, 219 (1959). This policy is that "[s]tates have no power to regulate the affairs of Indians on a reservation," and Congress has "acted consistently upon [that] assumption." *Id.* at 220. The Court listed several examples, one of which was criminal jurisdiction: "And state courts have been allowed to try non-Indians who committed crimes against each other on a reservation, [b]ut if the crime was by or against an Indian, tribal jurisdiction or that expressly conferred on other courts by Congress has remained exclusive." *Id.*

Similarly, in the course of interpreting the Assimilative Crimes Act, this Court observed that "[w]hile 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." *Williams v. United States*, 327 U.S. 711, 714 (1946). This was stated as an uncontroversial principle, part of the background necessary to understand the relevance of the Assimilative Crimes Act, 18 U.S.C. § 13.

The *Williams* Court went into detail regarding the recent history of the doctrine, which underwent a period of confusion after *United States v. McBratney*, 104 U.S. 621 (1881) and *Draper v. United States*, 164 U.S. 240 (1896). *Williams v. United States*, 327 U.S. at 715 n.10 (1946). Although these cases did not extend jurisdiction to crimes against Indians, they led to a reduction in federal prosecutions and resulting increases in crime:

> The effect of this went so far that, in 1902, the Committee on the Judiciary of the House of Representatives reported that, 'As the law now stands . . . offenses committed by half-breeds or white persons, whether upon an Indian or other person, are not cognizable by the Federal courts and generally go unpunished. This state of the law is causing serious conditions of disorder within these Indian reservations.' H.R. Rep. No. 2704, 57th Cong., 1st Sess., p. 1.

Id. This continued until *Donnelly v. United States*, 228 U.S. 243, 271 (1913) clarified that "offenses committed by or against Indians are not within the principle of the *McBratney* and *Draper* Cases." *Id.* The late 19th century was the height of the assimilationist era and a low ebb respecting for tribal sovereignty,

and it is noteworthy that Oklahoma cites so many cases from that period.[4]

This Court also reviewed "the general jurisdictional principles that apply in Indian country in the absence of federal legislation to the contrary" in *Washington v. Yakima Indian Nation*, 439 U.S. 463, 470 (1979). "Under those principles, which received their first and fullest expression in *Worcester v. Georgia*, 6 Pet. 515, 517, state law reaches within the exterior boundaries of an Indian reservation only if it would not infringe 'on the right of reservation Indians to make their own laws and be ruled by them.'" *Id.*, quoting *Williams v. Lee*, 358 U.S. at 219-20. "As a practical matter, this has meant that criminal offenses by or against Indians have been subject only to federal or tribal laws, except where Congress in the exercise of its plenary and exclusive power over Indian affairs has expressly provided that State laws shall apply." *Id.* at 470-71 (quotations and citations omitted).

These statements "cannot be dismissed as mere casual asides." Brief of the United States, *supra*, discussing *Williams v. United States*, *Williams v. Lee*, and *Yakima Indian Nation*. Instead, they were "the product of a thorough and considered review of jurisdictional principles in Indian country." *Id.*

It is the practice of United States Attorneys and United States Attorneys' Offices to treat exclusive federal jurisdiction over these crimes as settled law, and that practice is well supported by the relevant

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[4] "Toward the end of the nineteenth century, due to increasing western settlement by whites, federal Indian policy underwent a shift toward assimilating the Indian tribes into the mainstream culture." *Hackford v. Babbitt*, 14 F.3d 1457, 1459 (10th Cir. 1994)

authorities from this Court. These same authorities make it abundantly clear that Congress has been entrusted with the authority to make changes to the law in this area. *See, e.g.*, *Yakima Indian Nation*, 439 U.S. at 471.

Without denying the serious problems that the complexities of Federal, state and tribal jurisdiction have created, it is long established that the federal government has exclusive federal jurisdiction over crimes committed by a non-Indian against an Indian, except when Congress takes action to adopt a different rule.

II. A new rule establishing concurrent state jurisdiction will not resolve the well-documented problems with criminal justice in Indian country; instead it requires a more tailored solution that only Congress is equipped to provide.

As a practical matter, Congress is the branch of government not only empowered, but best equipped to develop solutions for the criminal justice problems in Indian country. Unlike this Court, Congress has the authority to make case by case determinations that take into account the very different situations in different parts of the country, to consult with current state and tribal officials and to consider their views when developing legislation, and to accompany technical solutions with the financial support that will be necessary to make them function in practice. And, contrary to Oklahoma's request to this Court, the general trend has been toward recognizing and expanding the criminal jurisdiction of tribes, not states.

A. Concurrent state jurisdiction, where applied, has not improved the problems of criminal justice in Indian country.

A nationwide rule establishing concurrent jurisdiction by the states over crimes committed against Indians in Indian country is unlikely to enhance public safety. We know this because Congress already expanded criminal jurisdiction to several states in PL-280, and this expansion of state jurisdiction has tended to exacerbate rather than solve the problem of providing criminal justice services in Indian country.

This statute originally extended state jurisdiction on Indian reservations to Alaska, California, Minnesota, Nebraska, Oregon and Wisconsin, 18 U.S.C. § 1162(a), and nine additional states eventually joined as well. This expansion of jurisdiction was highly controversial at the time, with many state officials viewing it as an unfunded Federal mandate and many tribes seeing it as a violation of their sovereignty. Carole E. Goldberg, *Public Law 280: The Limits of State Jurisdiction over Reservation Indians*, 22 U.C.L.A. L. REV. 535, 538 (1975). This controversy resulted in extensive litigation and hard-fought political battles at the state level, mostly driven by states seeking to expand jurisdiction – but also corresponding taxing authority – and tribes resisting. *Id.* at 544-48. However, there were also a number of instances when the states and tribes reached mutual agreements expanding state jurisdiction to particular reservations or in specific fields of regulation and enforcement. *Id.* When the states and tribes had room to bargain over these provisions they did so, although the degree of cooperation varied greatly from place to place. *Id.* A decision in favor of Oklahoma here would raise many

of the same problems, but with little potential for compromise and negotiation.

A fundamental challenge is that although everyone wants to improve law and order in Indian country, nobody wants to pay for it, and the transfer of jurisdiction to the states often resulted in large cuts to federal spending without any matching increases in state expenditutes. *Id.* at 552. In Nebraska, for example, two reservations were left with no law enforcement officials whatsoever after the federal officers withdrew. *Id.* For states where PL-280 was optional, there were experiments with various approaches including conditioning the expansion of jurisdiction on Federal funding, requiring consent on a county-by-county basis, and only expanding jurisdiction for specific subject matters. *Id.* at 553-54.

In 1968, Congress amended PL-280 to require tribal consent to future expansions of state jurisdiction. *Id.* at 549. Such consent provisions would be vitiated by the new rule proposed by Oklahoma.

These problems remain today. "While problems associated with institutional illegitimacy and jurisdictional complexities occur across the board in Indian country, the Commission found them to be especially prevalent among Tribes subject to P.L. 83-280 or similar types of State jurisdiction." Commission Report, *supra*, at xi. It creates a pass-the-buck dynamic where the Federal government thinks that funding law enforcement on reservations is the responsibility of the state governments and the states think it is the responsibility of the Federal government, with the end result being fewer police and more crime. *Id.* at xiv; 11-15.

A survey found that "reservation residents in PL-280 jurisdictions typically rated the availability and quality of law enforcement and criminal justice lower than reservation residents in non-PL-280 jurisdictions." Carole Goldberg, Heather Valdez Singleton, Duane Champagne, *Final Report Law Enforcement and Criminal Justice Under Public Law 280*, Nat'l Inst. of Just., NCJ Number 222585 (Nov. 2007) at 1, https://nij.ojp.gov/library/publications/final-report-law-enforcement-and-criminal-justice-under-public-law-280. Furthermore, when asked why there was limited police availability, residents usually attributed the absence of federal law enforcement to lack of money but the absence of state law enforcement to selective enforcement and lack of interest. *Id.* at 87. When asked whether the police responded to calls in a timely manner, "71.4% of non-Public Law 280 reservation-resident respondents believed that federal-BIA police on non-Public Law 280 reservations were responsive to calls for police," but on PL-280 reservations only "44.4%, affirmed that state/county police responded to calls in a timely manner." *Id.* at 89-90.

In Alaska, in particular, the state criminal jurisdiction authorized by PL-280 has been especially dire. "Problems with safety in Tribal communities are severe across the United States—but they are systematically the worst in Alaska." Commission Report, *supra*, at 35. Alaska "covers 586,412 square miles, an area greater than the next three largest states combined (Texas, California, and Montana)," and "[m]any of the 229 federally recognized tribes are villages located off the road system." *Id.* When a community is several hours by bush plane from the nearest road, there is no practical alternative to local self-government, but Alaska has very little official Indian country

and a highly centralized state police system. *Id.* at 44. At least 75 villages have no law enforcement presence at all, and others have only safety officers who are forbidden under state law from carrying firearms (and not because firearms are rare in those communities). *Id.* at 39.

Congress has found that "tribal justice systems are often the most appropriate institutions for maintaining law and order in Indian" TLOA § 202(a)(1)(B). As the disappointing legacy of PL-280 demonstrates, the expansion of state criminal jurisdiction in Indian country is unlikely to be successful unless it is carried out consensually, with the active cooperation and support of state and tribal officials and funding from the Federal government.

Similar problems were created by this Court's decision in *Nevada v. Hicks*, 533 U.S. 353 (2001), which held that state highways passing through a reservation came under state criminal jurisdiction. This decision had the incidental effect of invalidating many of the pre-existing cooperative agreements on law enforcement issues that had been reached between tribes and state and county officials, who - granted much of the authority that they had sought - were reluctant to go back to the bargaining table and accept compromise. *See Impact of Supreme Court Rulings on Law Enforcement in Indian Country, Hearing Before the S. Comm. on Indian Affairs* (2002), https://www.govinfo.gov/content/pkg/CHRG-107shrg81151/html/CHRG-107shrg81151.htm). In that hearing, several tribal officials testified to increased tension and jurisdictional disputes between state and tribal police in the wake of *Nevada v. Hicks* and that it was harder to obtain state cooperation when the tribe needed it, for example, to domesticate

and enforce a warrant issued by a tribal court to apprehend a suspect hiding off-reservation. *Id.*

B. Congress has been actively legislating in this area and exercising its authority, and has options open to it that the judicial branch does not.

We recognize that it can sometimes ring hollow to say that Congress can legislate if it disagrees, given the difficulty of enacting major legislation. Here, however, Congress has in fact recently passed significant legislation that deals with criminal jurisdiction in Indian country, and it remains an area where there is extensive bipartisan legislative activity.

For example, the Tribal Law and Order Act was enacted "to clarify the responsibilities of Federal, State, tribal, and local governments with respect to crimes committed in Indian country; . . . (3) to empower tribal governments with the authority, resources, and information necessary to safely and effectively provide public safety in Indian country; (4) to reduce the prevalence of violent crime in Indian country and to combat sexual and domestic violence against American Indian and Alaska Native women." TLOA § 202.

TLOA expanded the sentencing authority of tribal courts from one year to three years, if they "provide to the defendant the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution; and at the expense of the tribal government, provide an indigent defendant the assistance of a defense attorney licensed to practice law by any jurisdiction." *Id.* at § 234(c)(2). Tribes must also provide a judge who is law trained and a licensed attorney, publish their criminal codes, and maintain a

record of the proceeding. *Id.* at § 234(c)(3)-(5). Other key TLOA provisions include training requirements so that tribal law enforcement may be Federally deputized to enforce Federal criminal law within Indian country.

This legislation addressed, at least in part, the problems caused by the very limited authority of tribal courts to impose appropriate penalties for serious felony offenses, but balanced expanded tribal sentencing authority with additional protections for criminal defendants. It is the type of political comprise that cannot be fashioned in the courtroom.

Another key recent development is in the Violence Against Women Act Reauthorization Act of 2013 ("VAWA '13"), 25 U.S.C. § 1304, and recently enacted Violence Against Women Act Reauthorization Act of 2022, PL 117-103, March 15, 2022, 136 Stat 49, ("VAWA '22"). VAWA '13 recognized Tribes' inherent jurisdiction over non-Indians in certain domestic violence cases. 25 U.S.C. § 1304. Pursuant to this legislation, Tribes electing to do so may assume jurisdiction over non-Indians on tribal lands to prosecute several specific domestic violence offenses under tribal law. *Id.* It partially repealed this Court's decision in *Oliphant v. Suquamish Tribe of Indians,* 435 U.S. 191 (1978), which held that Indian tribes lack criminal jurisdiction over non-Indians. As with TLOA, VAWA '13 requires participating tribes to respect all constitutional rights of the defendants including the provisions of counsel for indigent defendants and to have a judge licensed in the practice of law. *Id.* at § 1304(d); 25 U.S.C. § 1302(c). VAWA '22, enacted and signed while this case was pending, expands this extension of jurisdiction to a wider range of criminal offenses.

These are just the most recent in a long string of legislation dealing with criminal jurisdiction in Indian country. *See, for example*, General Crimes Act of 1817, 18 U.S.C. § 1152; Major Crimes Act (1883), 18 U.S.C. § 1153, Public Law 83-280 (1953, amended 1968), 18 U.S.C. § 1162; 25 U.S.C. § 1360, Indian Civil Rights Act (1968), 25 U.S.C. § 1301.

Congress can do what the judiciary cannot: hold hearings on the present capacity of tribes to provide criminal justice services, take testimony from both state and tribal officials regarding how they would prefer to distribute responsibility and jurisdiction, tie expansions of jurisdiction to protections for the civil liberties of the accused (as it did in 25 U.S.C. § 1304), and appropriate funds for police, courts and detention centers.

Congress can work with tribes and state officials to reach a result that is tailored to their specific needs and requests. For example, PL-98-290, 98 Stat. 201 (May 21, 1984), demarcated the boundaries of the highly allotted Southern Ute Indian Tribe's reservation in southwestern Colorado and clarified the allocation of criminal jurisdiction within those boundaries. Notably the largest community on that reservation, the Town of Ignacio, was specifically placed under state criminal and civil jurisdiction at the request of the Tribe.

Congress also has the ability, which this Court lacks, to allocate funding for any programs that it creates. In the year 2018, Bureau of Indian Affairs funding for law enforcement programs was $236.1 million, with an additional $114.5 million for detention and corrections, and $52.7 million for tribal courts,

including court assessments and technical assistance.[5] Other programs are run out the Department of Justice, including the Tribal Courts Assistance Program, which provides grants to support tribal justice systems, authorized by 25 U.S.C. § 3689(a) (Public Law 106-559) (25 U.S.C. 3689(a)) and the Tribal Civil and Criminal Legal Assistance Program, authorized by 25 U.S.C. § 3651, *et seq*. (Public Law 106-559).

* * *

CONCLUSION

The Court should affirm the decision below.

Respectfully submitted.

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[5] Bureau of Indian Affairs – Office of Justice Services, Report to the Congress on Spending, Staffing, and Estimated Funding Costs for Public Safety and Justice Programs in Indian Country (Sept. 2018) at 2, available at https://www.bia.gov/sites/bia.gov/files/assets/bia/ojs/ojs/pdf/2018_TLOA_Report_Final.pdf.