No. 21-429

In the Supreme Court of the United States

STATE OF OKLAHOMA, PETITIONER

v.

VICTOR MANUEL CASTRO-HUERTA

ON WRIT OF CERTIORARI
TO THE OKLAHOMA COURT OF CRIMINAL APPEALS

REPLY BRIEF FOR THE PETITIONER

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Respondent and the federal government do not dispute that a State's territory includes Indian country within its borders. Nor do they dispute that a State has sovereign authority to prosecute crimes throughout its territory unless federal law validly preempts that authority. And they do not identify any constitutional provision that would divest a State of that authority with respect to crimes committed by non-Indians against Indians in Indian country. Accordingly, the only question for the Court to decide is whether any federal statute or treaty has such preemptive effect.

The answer to that question is no. Respondent and the government cite two statutes—the General Crimes Act and Public Law 280—that they believe preempt state authority. But the statutes' text says nothing of the sort. Respondent and the government instead focus on what they understand to have been Congress's unexpressed assumption about the scope of state criminal authority in Indian country. But that is not textual interpretation; it is attempted divination of congressional purpose.

The parties agree that the Court need not engage in a balancing of state, tribal, and federal interests in order to resolve this case. But if the Court were to do so, the balance would decisively tilt in petitioner's favor. The federal government does not back away from its long-held view that the exercise of state criminal authority in these circumstances does not interfere with federal or tribal interests. It is also conspicuously silent about its law-enforcement efforts in eastern Oklahoma in the wake of *McGirt* v. *Oklahoma*, 140 S. Ct. 2452 (2020), failing to provide any meaningful assurance that it has the situation under control. It obviously does not, and there can be no serious debate that restoring state authority would promote public safety.

Federal law does not preempt state criminal jurisdiction over non-Indians who commit crimes against Indians in Indian country. The judgment below should be reversed.

A. Absent Federal Preemption, A State Has Authority To Prosecute Non-Indians For Crimes Committed In Indian Country

As petitioner has explained (Br. 15-17), a State has inherent, sovereign authority to punish crimes committed within its territory. And while the Court expressed the view in *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832), that state law "can have no force" in the territory

of an Indian nation, the Court has rejected that position for most of our Nation's history. See Pet. Br. 17-23. Today, it is clear that a State has authority to prosecute non-Indians for crimes committed against Indians in Indian country absent a congressional prohibition. See *County of Yakima* v. *Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 257-258 (1992).

Respondent and the federal government largely accept that framework. They do not dispute that a State's sovereign power is coextensive with its territory. See Resp. Br. 13; U.S. Br. 30. Nor do they identify any constitutional provision that preempts state authority to punish non-Indians within its territory merely because the victim is an Indian. See Pet. Br. 35-40. Instead, they primarily (and correctly) focus on whether the relevant "statutes and treaties" preempt state authority in this area. Resp. Br. 49; see U.S. Br. 30-31.

To be sure, respondent cites the Court's statement from *Williams* v. *Lee*, 358 U.S. 217, 219 (1959), that "the basic policy of *Worcester* has remained." See Br. 39. But any policy against "state action infring[ing] on the right of reservation Indians to make their own laws and be ruled by them," *Lee*, 358 U.S. at 220, is not implicated by a State's prosecution of a non-Indian, see *Nevada* v. *Hicks*, 533 U.S. 353, 360-361 (2001). And respondent recognizes (Br. 29, 37-38) that any limitation on state authority must derive from an affirmative source of federal law, not from a background principle governing the reach of state sovereignty. Accord U.S. Br. 30-31. Respondent provides no justification for any sort of independent presumption *against* state criminal jurisdiction in Indian country.

Respondent's suggestion (Br. 4, 46) that the Court has moved beyond *Worcester* only in the civil context is similarly halfhearted—and incorrect. Both *United States* v. *McBratney*, 104 U.S. (14 Otto) 621 (1882), and *Draper* v.

United States, 164 U.S. 240 (1896), permit the exercise of state prosecutorial authority in Indian country, and *Hicks* permits state officers to enter Indian reservations and arrest Indians in certain circumstances, on the ground that "[s]tate sovereignty does not end at a reservation's border," 533 U.S. at 361. Regardless, respondent's bottom line is simply that the civil and criminal contexts differ in that Congress has enacted statutes governing criminal jurisdiction in Indian country but "largely left civil rules to this Court." Br. 46; but see, *e.g.*, 25 U.S.C. ch. 17, 18 (civil statutes governing Indian economic development and health care).

Respondent is thus correct that "the Court need not sift first principles," Br. 13, because those principles are undisputed. Neither respondent nor the federal government meaningfully contests that a State's inherent authority encompasses the power to prosecute non-Indians who commit crimes against Indians in Indian country absent a preemptive federal statute or treaty. Accordingly, the only question for the Court to decide is whether any such law exists.

B. Federal Law Does Not Preempt A State's Authority To Prosecute Non-Indians For Crimes Committed In Indian Country

Respondent and the federal government cite two statutes that purportedly have the requisite preemptive effect: the General Crimes Act and Public Law 280. Neither statute is availing.

1. The General Crimes Act

Respondent primarily relies on the General Crimes Act. See Br. 14-21, 28-43. But nothing in the plain meaning of its text evidences an intention to preempt state law. By its terms, the text refers only to the extension of *federal* law, leaving untouched the underlying principle of

state territorial jurisdiction. See Pet. Br. 24-25. None of the contrary arguments is persuasive.

a. Respondent contends (Br. 14) that the reference in the General Crimes Act to "place[s] within the sole and exclusive jurisdiction of the United States" incorporates the constitutional rule that Congress has exclusive authority over federal enclaves. But the Court has twice explained that the phrase "[does] not apply to the jurisdiction extended over the Indian country, but [is] only used in the description of the laws which are extended to it"—*i.e.*, the laws of those "place[s]." *In re Wilson*, 140 U.S. 575, 578 (1891); see *Donnelly* v. *United States*, 228 U.S. 243, 268 (1913). While the *Wilson* Court "made that statement in discussing what is now the second paragraph" of the statute, U.S. Br. 10 n.2, it was plainly interpreting the text of the first.

Respondent also relies (Br. 14) on the statutory phrase "general laws of the United States." But he ignores the modifier that immediately follows: "as to the punishment of offenses." The statute thus incorporates only the substantive *criminal* law that applies in federal enclaves; it does not contain the sweeping language that would be necessary to impose exclusive federal authority. Cf. *Parker Drilling Management Services, Ltd.* v. *Newton*, 139 S. Ct. 1881, 1889 (2019). It is not enough to speculate that Congress "intended a parallel" between jurisdiction in Indian country and federal enclaves. U.S. Br. 9.

This case is similar to *Askew* v. *American Waterways Operators, Inc.*, 411 U.S. 325 (1973), which rejects the suggestion that a bare extension of federal jurisdiction preempts state authority. Respondent argues that the *Askew* Court was hesitant to interpret a statute impliedly to displace state jurisdiction in an area "historically within States' police power." Br. 18 n.5 (citation and alterations omitted). But that cuts in petitioner's favor: a State has

"primary authority" for "defining and enforcing the criminal law" within its territory. *Brecht* v. *Abrahamson*, 507 U.S. 619, 635 (1993) (citation omitted).

Respondent further contends that petitioner's interpretation of the General Crimes Act would create a "gerrymandered system" under which the statute would preempt state jurisdiction over Indian defendants but not over non-Indians. Br. 16. If a State does lack prosecutorial authority over Indians in Indian country, however, it would not be by virtue of differing interpretations of the General Crimes Act for Indian and non-Indian defendants. Instead, it would result from a treaty or other source of law that prevents state interference with tribal self-governance. See *McClanahan* v. *State Tax Commission*, 411 U.S. 164, 172 (1973).

b. Respondent next argues (Br. 15) that petitioner's interpretation of the General Crimes Act is inconsistent with the Major Crimes Act, 18 U.S.C. 1153, which the Court has interpreted to create exclusive federal jurisdiction over Indians who commit the enumerated crimes in Indian country. But the Major Crimes Act provides a stronger textual basis for federal exclusivity than the General Crimes Act.

Whereas the General Crimes Act incorporates only the general laws of the United States "as to the punishment of offenses," see p. 5, *supra*, the Major Crimes Act subjects an Indian defendant to "the same law and penalties" as a person who commits an enumerated offense in a federal enclave or territory. 18 U.S.C. 1153. The extension of the same "law," as opposed to merely the same "penalties," more clearly evidences an intent to create federal exclusivity, which comports with the Major Crimes Act's more limited applicability only to Indian defendants. The textual distinction is even clearer when considering the earlier versions of the two laws. Compare

Trade and Intercourse Act of 1834, ch. 161, § 25, 4 Stat. 733 (General Crimes Act) (extending "so much of the laws of the United States as provides for the punishment of crimes" in federal enclaves to Indian country), with Act of Mar. 3, 1885, ch. 341, § 9, 23 Stat. 385 (Major Crimes Act) (stating that defendants shall be "subject to the same laws, tried in the same courts and in the same manner, and subject to the same penalties" as individuals who commit crimes in federal enclaves).

One other aspect of the Major Crimes Act confirms the foregoing analysis. The comma between the qualifying phrase "within the exclusive jurisdiction of the United States" and the antecedent phrase "subject to the same law and penalties as all other persons committing any of the above offenses" indicates that the qualifying phrase applies to the entire antecedent and not simply "other persons committing any of the above offenses." See, *e.g.*, *Facebook, Inc.* v. *Duguid*, 141 S. Ct. 1163, 1170 (2021). An Indian who commits one of the enumerated crimes is thus "subject to" prosecution "within the exclusive jurisdiction of the United States."

c. Having exhausted his textual arguments, respondent turns away from the text (Br. 18-21, 25-27) and invokes the prior-construction canon based on the 1948 recodification of the General Crimes Act. In respondent's view, the 1948 Congress believed that States lack jurisdiction over crimes committed by non-Indians against Indians in Indian country because this Court had said as much in dictum in *Williams* v. *United States*, 327 U.S. 711 (1946). Respondent argues (Br. 18-19) that Congress ratified the dictum in that case through recodification. That argument is deeply flawed, and the government tellingly does not join it.

To begin with, the prior-construction canon does not override "clear statutory language." *BP p.l.c.* v. *Mayor &*

City Council of Baltimore, 141 S. Ct. 1532, 1541 (2021) (citation omitted). The text of the General Crimes Act clearly does not preempt state jurisdiction. See Pet. Br. 23-28.

The inference that Congress intended to ratify *Williams* through recodification is also tenuous. Mere recodification does not involve "legislative reconsideration of the substance of [the] codified statutes." Antonin Scalia & Bryan A. Garner, *Reading Law* 257 (2012) (Scalia & Garner). Indeed, the Court has specifically noted that "the function of the Revisers of the 1948 Code was generally limited to that of consolidation and codification." *Muniz* v. *Hoffman*, 422 U.S. 454, 474 (1975) (citation omitted). More generally, the Court does not infer that Congress, "in revising and consolidating the laws, intend[s] to change their policy, unless such an intention be clearly expressed." *Id.* at 470 (citation omitted). Absent more, it is "impossible to assert with any degree of assurance" that recodification "represents affirmative congressional approval of the Court's statutory interpretation." *Alexander* v. *Sandoval*, 532 U.S. 275, 292 (2001).

In addition, the prior-construction canon applies only where there is a "broad and unquestioned" "judicial consensus." *Jama* v. *Immigration & Customs Enforcement*, 543 U.S. 335, 349 (2005). But as respondent acknowledges (Br. 20 n.6), the statement in *Williams* was dictum. And the Court there did not even cite the language of the General Crimes Act, much less purport to interpret it. See 327 U.S. at 714. A dictum that does not analyze the relevant statutory provision can hardly be said to have "settled [its] meaning." *Lightfoot* v. *Cendant Mortgage Corp.*, 137 S. Ct. 553, 563 (2017). And there were good reasons for Congress to believe that the *Williams* dictum had not "settled" the issue: other statements from this Court, state courts, and federal officials suggested that States

did have authority over non-Indians in Indian country. See Pet. Br. 18-19, 28, 31; States Br. 12-13.

Respondent replies that the state-specific predecessors to Public Law 280 "confirm" that "*Williams*' rule reflected [Congress's] understanding" in 1948. Br. 19. But respondent has not disputed that Congress's primary focus in enacting those statutes was the lack of state jurisdiction over crimes committed *by* Indians. See Pet. Br. 30-32. While the extension of jurisdiction over crimes "by *or against* Indians" was consistent with a congressional concern that state jurisdiction over such cases did not exist, the inclusion of the phrase "or against" may merely have reflected a desire to avoid the negative inference that would have arisen if Congress had conferred jurisdiction over crimes by Indians but said nothing about crimes against Indians. Words that clarify ambiguity are not surplusage, see *Nielsen* v. *Preap*, 139 S. Ct. 954, 969 (2019), and even if they were, "[r]edundancy is not a silver bullet," *Rimini Street, Inc.* v. *Oracle, USA, Inc.*, 139 S. Ct. 873, 881 (2019).

Respondent's recodification argument suffers from an even more fundamental flaw. Respondent contends that, by considering the recodified statute in light of the decision in *Williams* and the predecessors to Public Law 280, he is interpreting the law according to "how it would have been understood 'at the time Congress' acted." Br. 18 (quoting *Wisconsin Central Limited* v. *United States*, 138 S. Ct. 2067, 2070 (2018)).

But respondent is not interpreting any particular *words* or *phrases* in the General Crimes Act "consistent with their ordinary meaning" in 1948. *Wisconsin Central*, 138 S. Ct. at 2070 (internal quotation marks, citation, and alteration omitted). Instead, he is invoking Congress's unexpressed belief *behind* the statutory text. It is not proper to "replace the actual text with speculation as to

Congress' intent." *Magwood* v. *Patterson*, 561 U.S. 320, 334 (2010). Rather, the Court "presume[s] more modestly" that "the legislature says what it means and means what it says." *Henson* v. *Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1725 (2017) (citation and alterations omitted). Here, the text of the General Crimes Act does not purport to preempt state authority.

d. Respondent next pivots (Br. 28-39) to the history leading up to the Trade and Intercourse Act of 1834, the direct predecessor to the General Crimes Act. Here joined by the federal government (Br. 8, 11-16), he contends that the early treaties and statutes, as well as the Court's decision in *Worcester*, demonstrate that the 1834 Congress would have understood the predecessor statute to preempt state law. That contention is mistaken.

In the early days of the Republic, the federal government treated lands belonging to Indians as existing entirely outside state territory, even if those lands were formally included within a State's boundaries. Statutes from that time thus recognized a "boundary line" between Indian country and any State. Resp. Br. 34 (citing early statutes); see U.S. Br. 14; Scholars Br. 10-14. Those statutes codified the geographic "boundary" between the "Indians and the citizens of the United States" that had been agreed upon by treaties. Treaty of Hopewell, art. IV, Nov. 28, 1785, 7 Stat. 19; see, *e.g.*, Treaty with the Wyandots, art. II, Jan. 9, 1789, 7 Stat. 28.

The decision in *Worcester* was rooted in the principle of territorial separation. The Court understood the "actual subject" of the Treaty of Hopewell to be "the dividing line between the two nations." 31 U.S. at 552-553. The Court read the subsequent Treaty of Holston as similarly establishing a "boundary" between "nation and nation." *Id.* at 555. And the Court further noted that the early Trade and Intercourse Acts treated the "several Indian

nations as distinct political communities, having territorial boundaries, within which their authority is exclusive." *Id.* at 557. Based on that principle of territorial separation, the Court concluded that the "treaties and laws of the United States contemplate the Indian territory as completely separated from that of the [S]tates." *Ibid.* States lacked authority over that territory because it was not theirs.

The 1834 Act codified that understanding into positive law. Critically, the Act defined the phrase "Indian country" to mean "all that part of the United States west of the Mississippi, and *not within the states of Missouri and Louisiana*, or the territory of Arkansas, and, also that part of the United States east of the Mississippi river, and *not within any state*[,] to which the Indian title has not been extinguished." § 1, 4 Stat. 733 (emphasis added); see *Bates* v. *Clark*, 95 U.S. (4 Otto) 204, 206-208 (1877). The Act thus "envisioned Indian country existing only outside the [S]tates," *Cohen's Handbook of Federal Indian Law* § 3.04[2][b], at 187 (Nell Jessup Newton ed., 2012 ed.), reflecting the prevailing understanding of "Indian country" as excluding "any territory embraced within the exterior geographical limits of a State." *Ex parte Crow Dog*, 109 U.S. 556, 561 (1883). Even respondent recognizes (Br. 34-35, 41) that many of the 1834 Act's provisions reflect its definition of Indian country as "entirely outside" state borders.

Respondent may thus be correct that the 1834 Congress would have believed that States did not have jurisdiction over non-Indians in Indian country. But he is wrong to infer that the 1834 Congress would have believed that the lack of jurisdiction arose from preemption by the General Crimes Act. The baseline principle has always been that a State's sovereign authority is coextensive with its territory. See *United States* v. *Bevans*, 16

U.S. (3 Wheat.) 336, 386-387 (1818). The 1834 Congress, however, defined Indian country as existing only beyond the territory of any State. At most, Congress was concerned about the inability or unwillingness of States to prosecute, but it addressed the issue by conferring federal jurisdiction without suggesting that it was preempting state authority.

Federal law has not endorsed the principle of territorial separation since the late nineteenth century, see Pet. Br. 21, and the 1834 definition was omitted from the Revised Statutes in 1874, see *Crow Dog*, 109 U.S. at 560-561. Indian country is now "considered part of the territory of the State." *Hicks*, 533 U.S. at 361-362 (citation omitted). Because Congress operated under a different paradigm in 1834, it had no reason to consider the question here: namely, whether the General Crimes Act preempts state authority over non-Indians in Indian lands that *are* part of a State's territory.

As the Court has explained, it will not "rewrite a constitutionally valid statutory text under the banner of speculation about what Congress might have done had it faced a question that * * * it never faced." *Henson*, 137 S. Ct. at 1725. The text of the General Crimes Act does not evidence, and has never evidenced, an intent to preempt state law.

Oliphant v. *Suquamish Indian Tribe*, 435 U.S. 191 (1978), is not to the contrary. See Resp. Br. 30. There, the Court considered the historical "shared presumption of Congress, the Executive Branch, and lower federal courts" when deciding whether an Indian tribe's "retained inherent power of government" included the right to prosecute non-Indians. 435 U.S. at 196, 206 (citation omitted). But unlike the question of statutory preemption of state authority over its own citizens, the scope of an Indian

tribe's "quasi-sovereign" power as a "diminished" sovereign involves questions of federal common law, especially as that power relates to nonmembers of the tribe. *Id.* at 208, 209 (citations omitted); *United States* v. *Cooley*, 141 S. Ct. 1638, 1642-1644 (2021); *Duro* v. *Reina*, 495 U.S. 676, 685-688 (1990). And even then, the Court declined to treat the historical considerations as "conclusive." *Oliphant*, 435 U.S. at 206. The decision in no way suggests that historical considerations override text in interpreting a statute governing Indian country, particularly in the context of the far more robust sovereignty enjoyed by the States. See Pet. Br. 15-17.

Respondent also invokes the provisions in Cherokee treaties stating that the tribe would be under the "protection" of the United States and "no other sovereign," but those provisions do not establish a "promise of exclusive * * * protection from crimes." Resp. Br. 36. Rather, they concern relations between the tribe and foreign nations. See *Worcester*, 31 U.S. at 551-552, 555. Other provisions of those treaties concerning the prosecution of crimes by non-Indians against Indians contain no mention of exclusive federal jurisdiction. See, *e.g.*, Treaty of Hopewell, art. VII, 7 Stat. 19. Later treaties concerning lands in present-day Oklahoma also do nothing to oust state jurisdiction in this case. See Pet. Br. 40 n.4. And the promise that those lands would not be "included within the territorial limits" of a State without consent, Treaty of New Echota, art. V, Dec. 29, 1835, 7 Stat. 481, was abrogated by the Oklahoma Enabling Act. Those treaties thus do not affect petitioner's authority over non-Indians in the former Cherokee territory.

e. In *McBratney* and *Draper*, the Court addressed the scope of state criminal jurisdiction over Indian reservations that are made part of a State's territory. See Pet.

Br. 19-21. In *McBratney*, the Court held that, upon admission to the Union, a State gains "criminal jurisdiction over its own citizens and other white persons throughout the whole of the territory within its limits," including reservations not excepted from the State's territory at statehood. 104 U.S. at 624; see *Draper*, 164 U.S. at 242-243, 245, 247.

Respondent contends that *McBratney* supports his position because it concluded that Colorado's statehood act impliedly repealed the General Crimes Act. In his view, the Court relied on implied repeal because the General Crimes Act would have preempted state jurisdiction if it had remained in force. See Br. 44-46.

But that is not a fair reading of *McBratney*. The decision states that it is admission to the Union on an equal footing with other States that confers state criminal jurisdiction over non-Indians. See 104 U.S. at 624. And that same doctrine is what precluded federal jurisdiction. Congress's power to enact general criminal law for Indian country was understood to derive from its power over federal territories. See *United States* v. *Kagama*, 118 U.S. 375, 379-381 (1886); *United States* v. *Rogers*, 45 U.S. (4 How.) 567, 572 (1846). But when a federal territory becomes a State, the equal-footing doctrine precludes the federal government from continuing to exercise "general jurisdiction" over that territory. *Mayor of New Orleans* v. *United States*, 35 U.S. (10 Pet.) 662, 737 (1836). If general federal criminal jurisdiction remained over an Indian reservation not excepted from a new State's territory, the new State would stand on a lesser footing than the original States. See *McBratney*, 104 U.S. at 623-624; *Brown* v. *United States*, 146 F. 975, 977 (8th Cir. 1906).

Respondent suggests that *McBratney* generally reserved the question of jurisdiction over crimes committed "by or against Indians." See Resp. Br. 44; U.S. Br. 17.

But the Court did not reserve any question with respect to state authority; it reserved only the question whether "the provisions of the [applicable] treaty" conferred federal jurisdiction over such crimes. 104 U.S. at 624. The Court's focus on a treaty, and not on any portion of the General Crimes Act that remained in force, confirms that the Court understood plenary federal criminal power to cease after an Indian territory was made part of a State. See also H.R. Rep. No. 2704, 57th Cong., 1st Sess. 1-2 (1902).

To be sure, in *Donnelly*, the Court stated that "offenses committed by or against Indians are not within the principle of * * * *McBratney* and *Draper*." 228 U.S. at 271; see Resp. Br. 6; U.S. Br. 18. But the Court was plainly speaking in terms of the withdrawal of federal jurisdiction, concluding only that the State did not have "*undivided* authority" over crimes committed by non-Indians. 228 U.S. at 271 (emphasis added). That conclusion followed from the Court's post-*McBratney* decision in *Kagama*, which adopted an expansive conception of federal power over Indian affairs untethered from authority over federal territories and instead based on the status of Indians as "wards of the nation." See *Donnelly*, 228 U.S. at 271-272. Notably, the Court did not purport to alter the scope of state authority articulated in *McBratney*.

2. Public Law 280

In the alternative, respondent contends that Public Law 280 preempts a State's exercise of criminal authority over non-Indians in Indian country. See Resp. Br. 23-25. It does not. See Pet. Br. 32-35.

a. As the Court has explained, "[n]othing in the language or legislative history of [Public Law] 280 indicates that it was meant to divest States of pre-existing and otherwise lawfully assumed jurisdiction." *Three Affiliated*

Tribes of Fort Berthold Reservation v. *Wold Engineering, P.C.*, 467 U.S. 138, 150 (1984) (*Three Affiliated Tribes I*). The only response respondent can muster is to insist, citing the *Williams* dictum, that States have no "'pre-existing' jurisdiction over prosecutions" of the type at issue here. Br. 27. That is an effective concession that Public Law 280 "left * * * room" for States to exercise inherent criminal authority that earlier law did not preempt, and it forecloses any argument that Public Law 280 somehow preempted the field of criminal jurisdiction in Indian country. Br. 22 (citation omitted).

In any event, respondent is incorrect that state prosecution of non-Indians outside the framework of Public Law 280 would "impair[]" the "general thrust" of the law, such that field preemption should result, and the federal government does not join that argument. Resp. Br. 23 (citation omitted). The case respondent cites to support his expansive view of preemption held only that federal law would preempt "incompatible" state law. *Three Affiliated Tribes of Fort Berthold Reservation* v. *Wold Engineering, P.C.*, 476 U.S. 877, 885 (1986) (*Three Affiliated Tribes II*). But as the same case recognized, Public Law 280 was "generally intended to *authorize* the assumption * * * of state jurisdiction over Indian country." *Ibid.* (emphasis added). To the extent that Public Law 280 represents a "comprehensive scheme," Resp. Br. 22, it is thus a scheme for determining when state criminal jurisdiction should "be extended"—not for ousting preexisting jurisdiction. *Kennerly* v. *District Court*, 400 U.S. 423, 427 (1971).

b. More modestly, respondent contends (Br. 22) that Public Law 280 "confirms" Congress's earlier understanding of state criminal authority in Indian country. But "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *Marvin M. Brandt Revocable Trust* v. *United States*, 572

U.S. 93, 109 (2014) (citation omitted). And while the General Crimes Act and Public Law 280 may be "related statutes," Resp. Br. 26, the directive to read related statutes harmoniously allows a court to consider only "permissible meanings of the text." Scalia & Garner 252, 254. Respondent's interpretation of the General Crimes Act departs from the text altogether. See pp. 5-6, *supra*.

c. Interpreting Public Law 280 not to disturb a State's inherent criminal authority is unlikely to produce the consequences respondent fears.

Respondent speculates (Br. 25) that States might prefer to avoid the "burdens" of additional jurisdiction. The States that have participated as amici in this case do not agree. See States Br. 14-28. Recognizing state jurisdiction over crimes committed by non-Indians regardless of the victim's status would result in a less burdensome, more easily administrable rule for law enforcement, particularly in those portions of Oklahoma that are now "Indian country" in the wake of *McGirt*. See Tulsa Br. 3-6.

Nor would the recognition of States' preexisting jurisdiction "frustrate Congress's decision to allow Tribes to withhold consent." Resp. Br. 25. Congress gave tribes a veto over only further expansions of state jurisdiction, not recognition of preexisting jurisdiction. See 25 U.S.C. 1321(a)(1).

A decision in petitioner's favor would also not render "incoherent" the law authorizing retrocessions or repeals of jurisdiction assumed under Public Law 280. Resp. Br. 25. Every word of that law would continue to have legal effect, permitting States to cede jurisdiction over crimes committed *by* Indians, see 25 U.S.C. 1323(a), while leaving preexisting jurisdiction unchanged, see *Three Affiliated Tribes I*, 467 U.S. at 150-151.

d. Unlike respondent, the federal government places significant weight (Br. 23-29) on decisions that postdate

Public Law 280 and contain statements suggesting that States lack authority to prosecute non-Indians who commit crimes against Indians in Indian country. But as the government candidly admits, all of those statements were dicta, because the Court has not (until now) considered a case involving "a non-Indian defendant who was charged or convicted in state court." Br. 26. Of course, dicta are not binding, see *Central Virginia Community College* v. *Katz*, 546 U.S. 356, 363 (2006), and there are especially compelling reasons not to follow those dicta here.

To begin with, the statements at issue are the very definition of "casual asides," U.S. Br. 26; none of them exceeds two sentences in length. See *Lee*, 358 U.S. at 220; *McClanahan*, 411 U.S. at 170-171; *Washington* v. *Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 470-471 (1979); *Solem* v. *Bartlett*, 465 U.S. 463, 465 nn.2 & 8 (1984); *Hicks*, 533 U.S. at 365; *United States* v. *Bryant*, 579 U.S. 140, 146 (2016). In addition, "the point now at issue was not fully debated" in those cases. *Katz*, 546 U.S. at 363. The statements in those cases thus hardly settle the issue—as the government previously recognized. See 3 Op. Off. Legal Counsel 111, 117 (1979).

C. A State's Exercise Of Prosecutorial Authority Over Non-Indians Within Indian Country Does Not Interfere With Tribal Or Federal Interests

Principles of state sovereignty and the text of the relevant statutes are sufficient to resolve this case. Respondent and the federal government assert that questions of preemption in Indian country are "not resolved by reference to standards of pre-emption that have developed in other areas of the law." U.S. Br. 30 (citation omitted); see Resp. Br. 23. The cases they cite in support of that assertion endorse the more "flexible" preemption

test from the civil context, see Pet. Br. 40-41, which requires the Court to balance the "particular state, federal, and tribal interests involved." *Cotton Petroleum Corp.* v. *New Mexico*, 490 U.S. 163, 184 (1989); see *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136, 144-145 (1980). In the same breath, however, they forswear reliance on that test, ultimately agreeing with petitioner that the relevant statutes and treaties "govern" the analysis. Resp. Br. 49; see U.S. Br. 31.

That is unsurprising, because it cannot seriously be argued that the balancing of interests would weigh against permitting a State to protect Indian victims from crimes committed by non-Indians within its borders. See Pet. Br. 42-45. The federal government does not retreat from its long-held position that a "strong argument could be made for permitting [States] to exercise jurisdiction" under the balancing framework. U.S. Br. at 6, *Arizona* v. *Flint*, 492 U.S. 911 (1989) (No. 88-603); see Pet. Br. 44.

Unlike the federal government, respondent contends that "States have no cognizable interest" in prosecuting non-Indians who commit crimes against Indians. Br. 50. That is an astounding position. A State has a sovereign interest in public safety and criminal justice within its territory, including with respect to its Indian citizens. See Pet. Br. 15-17, 43-44. That interest is nowhere more compelling than in Oklahoma, where nearly half of the State is now Indian country, and where criminals have already become so wise to the effects of *McGirt* that they are targeting tribal members based on their tribal license plates. See Tulsa Br. 10-11.

Respondent suggests that "all 26 [S]tates" that did not obtain jurisdiction under Public Law 280 could have done so but "made choices not to." Br. 50. At least as to Oklahoma, of course, the prevailing view before 2020 was that there were "no reservations in [the State]." *McGirt*, 140

S. Ct. at 2499 (Roberts, C.J., dissenting) (citation omitted). In any event, respondent's argument assumes (incorrectly) that States lack inherent authority to prosecute the crimes at issue here.

Respondent also contends that the exercise of state criminal jurisdiction over non-Indians in Indian country will "undermine tribal sovereignty." Br. 50. But state authority over non-Indians on reservations is commonplace. See *Hicks*, 533 U.S. at 361-364. After all, "most of those who live on Indian reservations are non-Indian"—especially in the newly recognized Indian country in eastern Oklahoma, which includes Tulsa. *Cooley*, 141 S. Ct. at 1645. And coming from a non-Indian convicted of abusing a tribal member, the claim that the real harm to tribal interests is the State's protection of Indian victims rings hollow.

In addition, the relevant tribal interest for purposes of the balancing analysis is "tribal self-government," *Three Affiliated Tribes I*, 467 U.S. at 148—that is, the "tribe's ability to exercise its sovereign functions." *Ramah Navajo School Board, Inc.* v. *Bureau of Revenue*, 458 U.S. 832, 837 (1982). But a tribe has no such sovereign interest here, because it cannot prosecute non-Indians without congressional authorization. See Pet. Br. 42-43. To the extent that tribes have a philosophical preference for "the exclusivity of federal and tribal jurisdiction over non-Indians in Indian country," U.S. Br. 31—even though concurrent state jurisdiction would serve only to protect Indian victims—that preference does not factor into the analysis.

Respondent expresses concerns (Br. 51-52) about the effects on public safety in Indian country of a decision returning him to state custody. Not surprisingly, the federal government does not agree that it will abandon any of its prosecutorial responsibilities. The ability of the

State to arrest and prosecute non-Indians regardless of the victim's status will greatly simplify law enforcement. See p. 17, *supra*. And while respondent worries about excessively harsh sentences for non-Indian offenders in the state system, the Five Tribes do not share that concern. See Resp. Br. 52; Five Tribes Br. 6-8.

If any lingering doubt remained, the overriding need for the State to supplement federal law enforcement in Oklahoma tips the balance decisively in petitioner's favor. One might have expected the federal government to say something about the thousands of crimes that are going unprosecuted in eastern Oklahoma in the wake of *McGirt*—a situation that the FBI Director has described as presenting "long-term" "public safety risks." Pet. Br. 7-9; see Chiefs of Police Br. 5-9; District Attorneys Br. 12-21; Tulsa Br. 2-11. For example, the criminal docket in the Eastern District of Oklahoma does not appear to reveal a single federal prosecution against a non-Indian for auto theft or larceny since *McGirt*. Yet the government is almost completely silent on the situation in Oklahoma, stating only that it is "working diligently" to handle the "increased caseload occasioned by *McGirt*." Br. 32.

Given the situation on the ground in Oklahoma right now, the Solicitor General's decision to side with the criminal defendant here is not just inexplicable. It is an abdication.

* * * * *

For the reasons given above and in our opening brief, a State has concurrent authority to prosecute non-Indians who commit crimes against Indians in Indian country. The judgment of the Oklahoma Court of Criminal Appeals should be reversed.

Respectfully submitted.

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