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P R O C E E D I N G S

(10:00 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument this morning in Case 21-429, Oklahoma versus Castro-Huerta.

Mr. Shanmugam.

ORAL ARGUMENT OF KANNON K. SHANMUGAM

ON BEHALF OF THE PETITIONER

MR. SHANMUGAM: Thank you, Mr. Chief Justice, and may it please the Court:

This case presents a question that has taken on exceptional practical importance in the wake of McGirt. The question is whether a state has authority to prosecute non-Indians who commit crimes in Indian country regardless of whether the victim is a non-Indian or an Indian.

The answer to that question is yes. The state has inherent sovereign authority to punish crimes committed within its borders, and no federal law preempts that authority as to crimes committed by non-Indians.

Respondent relies on two statutes, the General Crimes Act and Public Law 280. But neither of those statutes says anything about preemption. As this Court has explained, the

1 General Crimes Act merely incorporates the
2 substantive criminal law that applies in federal
3 enclaves. It does not go further and address
4 state jurisdiction.

5 And as this Court has also explained,
6 Public Law 280 simply expanded the criminal and
7 civil jurisdiction of qualifying states. It did
8 not somehow divest all states of preexisting
9 jurisdiction. The mere fact that some members
10 of Congress may have believed that the states
11 would otherwise have lacked jurisdiction over
12 certain crimes does not give the law preemptive
13 effect.

14 Because this case does not implicate a
15 tribe's right to govern itself and to punish
16 tribal offenders, the Court need not resort to
17 the more flexible balancing approach that it has
18 used elsewhere. But, here, any balancing weighs
19 heavily in the state's favor. The state has a
20 paramount interest in ensuring public safety.
21 And concurrent state and federal jurisdiction
22 would only enhance law enforcement in Indian
23 country, especially because the tribes
24 ordinarily lack jurisdiction over non-Indian
25 offenders.

1 The federal government now takes the
2 position that it should have exclusive
3 jurisdiction. But that position is simply
4 mind-boggling in light of the situation in
5 Oklahoma, where, by the government's own
6 admission, whole categories of crimes are going
7 unprosecuted in the aftermath of McGirt.

8 Because no federal law preempts a
9 state's authority to prosecute crimes committed
10 by non-Indians, the judgment below should be
11 reversed.

12 I welcome the Court's questions.

13 JUSTICE THOMAS: Counsel, the -- these
14 reservations have been around a long time, and
15 why is it now that -- why, after so many years,
16 that we are getting the first case involving
17 jurisdiction over non-Indians committing crimes
18 against Indians?

19 MR. SHANMUGAM: Justice Thomas, only
20 in 2020 did 43 percent of the State of Oklahoma
21 become Indian country. Before that, there was
22 comparatively little Indian country in the State
23 of Oklahoma, and so this was, frankly, not an
24 issue in Oklahoma and not an issue that arose
25 all that frequently in the rest of the country

1 either.

2 That having been said, to be sure,
3 there are reported cases, mostly from state
4 courts, in which the issue arose at various
5 points over the years. And notwithstanding this
6 court's dicta, this has been an open question.
7 Indeed, as recently as the 1980s, the Justice
8 Department took the contrary position on this
9 question.

10 Certainly, as I said at the outset,
11 this issue has taken on acute importance in
12 light of the situation on the ground in
13 Oklahoma. There are now essentially three times
14 as many people living in Indian country in the
15 United States as a result of this Court's
16 decision in McGirt. There are now 1.8 million
17 more people living in Indian country. And our
18 best estimate is that of the cases affected by
19 McGirt, approximately 20 percent of those cases
20 involve this permutation, namely, crimes
21 committed by non-Indians against Indians.

22 JUSTICE THOMAS: Is there a problem --
23 and this is just a practical -- a question about
24 practice and practical considerations. How do
25 you determine whether or not the victim is an

1 Indian?

2 This case involves a little girl with
3 cerebral palsy. And is there a preliminary
4 jurisdictional question as to whether or not the
5 victim is -- is or is not an Indian?

6 MR. SHANMUGAM: There's no dispute
7 about that here, Justice Thomas, but it's not
8 easy. And I think that one virtue of our
9 position is that it would certainly greatly
10 simplify things for law enforcement because, at
11 least for state law enforcement, the status of
12 the victim would not be the relevant inquiry.
13 The only inquiry would be the status of the
14 offender.

15 But I don't mean to suggest that
16 that's an easy determination. The City of Tulsa
17 has issued a nine-page checklist for its police
18 officers for the officers to make the
19 jurisdictional determination. And the question
20 of how to determine who is an Indian for
21 purposes of these jurisdictional rules is itself
22 unsettled. In fact, it's the subject of a
23 currently pending cert petition by my client,
24 the State of Oklahoma.

25 Courts have looked to factors such as

1 enrollment status, blood quantum, and the like.
2 The Oklahoma courts have applied a totality of
3 circumstances test.

4 And so, certainly, one virtue of our
5 rule is that for state law enforcement, states
6 would have jurisdiction over non-Indian
7 offenders regardless of the status of the
8 victim. And I would submit that that's
9 consistent with the broader framework that this
10 Court has used for preemption purposes.

11 This Court time and again in this area
12 has defined the tribal interest as the interest
13 in self-governance, an interest that, as I
14 indicated in my opening, incorporates an
15 interest in punishing tribal offenders. I would
16 refer this Court to its decision in Nevada
17 versus Hicks, among others.

18 And so, under our approach, when that
19 tribal interest is not implicated, the
20 preemption inquiry is much like any other
21 preemption inquiry. The question is whether in
22 this Court's words there is a Congressional
23 prohibition that would limit what is otherwise
24 the state's conceded authority.

25 When one talks about a state's police

1 power, the ability to enforce the state's
2 criminal laws is obviously at the core of that
3 power.

4 JUSTICE SOTOMAYOR: Counsel, the core
5 of the power of prosecution at its base is the
6 protection of people, of citizens. And so
7 Indian tribes have an inherent right to protect
8 members of their tribes and of their community.
9 The state doesn't have the same right.

10 But putting that aside, we keep
11 talking about preemption. But the thing that
12 has bothered me as I've read your brief is
13 you're suggesting something much broader than
14 whether this statute preempts state law.

15 You're suggesting that the federal
16 government doesn't have the power to preempt
17 state law at all. In your reply brief, you say
18 there's no dispute "that a state has sovereign
19 authority to prosecute crimes throughout its
20 territory unless federal law validly preempts
21 that authority." And, thus, the only question
22 to decide here is whether any federal statute or
23 treaty has such preemptive effect.

24 But your argument doesn't rest on
25 whether there's preemption. You're saying the

1 equal footing doctrine bars the government from
2 preemption.

3 Is that the position you're taking?

4 MR. SHANMUGAM: That is not --

5 JUSTICE SOTOMAYOR: And --

6 MR. SHANMUGAM: -- our position,
7 Justice.

8 JUSTICE SOTOMAYOR: -- and so, if it
9 is not your position and for 200 years we've
10 had, you call it dicta, but a lot of dicta,
11 saying that the General Crimes Act is preempt --
12 is a preemption of state law, what would justify
13 the federal government -- what do you want,
14 words that say state law is preempted?

15 MR. SHANMUGAM: So I think that the --

16 JUSTICE SOTOMAYOR: State prosecution
17 is preempted, only federal prosecution is
18 permitted in Indian territory?

19 MR. SHANMUGAM: So we are not taking
20 the position that the federal government would
21 lack the ability to preempt with one caveat, and
22 let me address that and then I will address the
23 other component of your question, which is the
24 relevance of the fact that the Indian is a
25 victim.

1 I think, to be clear about our
2 position here, we recognize that the federal
3 government has quite broad authority to preempt.
4 Our submission to this Court is simply that the
5 federal government did not do so either in the
6 General Crimes Act or in Public Law 280.

7 And the core of our position is that
8 there is simply nothing in the language of
9 either of those statutes that divests the states
10 of jurisdiction.

11 But, to address your point directly,
12 Justice Sotomayor, the only limit on the federal
13 government's ability to preempt is any limit
14 that might exist at the outer bounds on the
15 federal government's exercise of its enumerated
16 powers in this area.

17 And I think that there may come a
18 point, for instance, on the facts presented in
19 *McBratney*, if -- if the federal government, say,
20 passed a law that preempted state authority
21 over, you know, non-Indian-on-non-Indian crime,
22 maybe there comes a point at which you start to
23 wonder what the source of enumerated authority
24 is.

25 JUSTICE GORSUCH: Counsel --

1 MR. SHANMUGAM: But this case does not
2 present that question.

3 JUSTICE GORSUCH: -- so, counsel,
4 you -- you start with the premise, as I -- as I
5 understand it, that there's inherent state
6 sovereignty over tribal lands within Oklahoma,
7 right?

8 MR. SHANMUGAM: Yes, that's correct.

9 JUSTICE GORSUCH: Okay. But then you
10 say, I think, that there is no authority for the
11 state to prosecute in cases involving Indian
12 defendants. Is that right?

13 MR. SHANMUGAM: So our position --

14 JUSTICE GORSUCH: Do you concede that
15 or not, or -- or is that part of the state's
16 inherent authority too?

17 MR. SHANMUGAM: We would concede that
18 with regard to the Major Crimes Act, relying on
19 this Court's decisions in John and Negonsott,
20 which have --

21 JUSTICE GORSUCH: Sure. Put aside the
22 Major Crimes Act. I'm talking about under the
23 GCA, is there preemption, or does Oklahoma now
24 take the extraordinary view -- it didn't in its
25 briefs as I understood it -- that it has

1 inherent sovereign authority even over crimes by
2 Indian defendants within its territory?

3 MR. SHANMUGAM: We didn't take a
4 position on that in our briefs, but I would
5 grant you that I think that that would be a much
6 more challenging argument for preemption --

7 JUSTICE GORSUCH: Why?

8 MR. SHANMUGAM: -- for the simple
9 reason --

10 JUSTICE GORSUCH: Why?

11 MR. SHANMUGAM: -- the --

12 JUSTICE GORSUCH: Because the statute
13 doesn't contain any language about -- no magic
14 words about that either. So you either have to
15 think that the statute does some implicit work
16 there or, what, resort to some sort of Bracker
17 balancing test.

18 Is that -- is that what you would do?

19 MR. SHANMUGAM: I think it's more
20 likely under this Court's precedents to be the
21 latter than the former.

22 JUSTICE GORSUCH: Okay. All right.
23 Let's take that.

24 MR. SHANMUGAM: So we would take the
25 position --

1 JUSTICE GORSUCH: Well, no, let's --
2 let's take that. No, I want to -- I want to
3 pursue this. Thank you. That's helpful.

4 So you admit that the statute is
5 silent with respect to both crimes against
6 Indian victims and by Indian defendants, and
7 you'd have us go to a Bracker balancing test,
8 and you'd say it would be resolved in favor of
9 the tribes when it comes to Indian defendants
10 but not Indian victims.

11 Is that a fair summary?

12 MR. SHANMUGAM: The way under this
13 Court's precedents that I think the analysis
14 would work is that once you have an Indian
15 defendant, that obviously does implicate the
16 right to self-governance, the right to punish
17 tribal offenders.

18 JUSTICE GORSUCH: So it balances --

19 MR. SHANMUGAM: But I think that this
20 Court --

21 JUSTICE GORSUCH: -- differently -- it
22 balances differently. Is that fair to say?

23 MR. SHANMUGAM: Correct.

24 JUSTICE GORSUCH: Okay. Then -- then
25 --

1 MR. SHANMUGAM: The tribal interests
2 would be --

3 JUSTICE GORSUCH: I got it.

4 MR. SHANMUGAM: -- stronger in that
5 context.

6 JUSTICE GORSUCH: I got it. Here's my
7 question why, all right?

8 First of all, we've never applied a
9 Bracker balancing test to criminal law so far as
10 I'm aware, so you're asking us to do something
11 new there inconsistent with our precedents so
12 far, right?

13 MR. SHANMUGAM: I -- I think the --
14 the cases on which we rely have applied it in
15 the civil context.

16 JUSTICE GORSUCH: Okay.

17 MR. SHANMUGAM: But they've never
18 drawn a distinction.

19 JUSTICE GORSUCH: I'll take that as a
20 yes. All right. Then who bears the burden of
21 proof in that balancing test?

22 MR. SHANMUGAM: Well, I think that the
23 way it would work is the way that it always
24 works on questions of preemption, which is to
25 say it's a matter of law, and I think that the

1 party seeking preemption would make the
2 arguments --

3 JUSTICE GORSUCH: So the tribes
4 have -- have the burden here, okay.

5 MR. SHANMUGAM: Well, yeah.

6 JUSTICE GORSUCH: All right. When
7 we're considering --

8 MR. SHANMUGAM: The party seeking
9 preemption, Justice Gorsuch --

10 JUSTICE GORSUCH: Okay.

11 MR. SHANMUGAM: -- I think, would --
12 would -- would bear the burden --

13 JUSTICE GORSUCH: It's never going to
14 be -- it's not going to be the state. We can
15 agree on that?

16 MR. SHANMUGAM: Well, it -- that's
17 correct if it's to say that --

18 JUSTICE GORSUCH: All right. So it's
19 going to be the tribes, all right, fine.

20 Then -- then I would ask you, why
21 would we not take into account in that balancing
22 test you'd have us do the identity of the victim
23 as going to tribal sovereignty given the history
24 in this country of states abusing Indian victims
25 in their courts?

1 George Washington wrote letters about
2 this at the outset of the -- the nation's
3 history. In the 1920s, Oklahoma systematically
4 used its state courts to deprive Indians of
5 their -- their property when oil was discovered
6 on their lands. There's a long history of this.

7 Congress has provided as well a
8 mechanism for tribes who wish to opt in to state
9 concurrent jurisdiction in Public Law 280, so
10 that's available. We know that. They've chosen
11 not to. Should that be something we consider?

12 And then, finally, two more things:
13 We have the treaties, okay, which have been in
14 existence and promising this tribe since before
15 the Trail of Tears that they would not be
16 subject to state jurisdiction precisely because
17 the states were known to be their enemies. Does
18 that count in -- in your balancing -- your new
19 Bracker balancing test which we've never
20 heretofore applied in criminal law?

21 And then, finally, you say we have to
22 worry about blood quantum when it comes to
23 victims. Well, wouldn't that also be true when
24 we have to deal with defendants? It's
25 apparently not a worry there. I don't know why

1 it would be a worry here.

2 So there's a lot for you to chew on.

3 MR. SHANMUGAM: I think there were
4 four things in your question, Justice Gorsuch.
5 I'll do my best --

6 JUSTICE GORSUCH: At least.

7 MR. SHANMUGAM: Let me start with
8 those four, and feel free to add others.

9 First, the tribal interest here. I
10 think that this Court consistently has defined
11 the tribal interest as the interest in punishing
12 tribal offenders. When engaging in balancing,
13 the Court has not defined that interest more
14 broadly as an interest in protecting victims.

15 That having been said, obviously, we
16 acknowledge --

17 JUSTICE GORSUCH: The treaties are
18 irrelevant then?

19 MR. SHANMUGAM: Well, I -- I was going
20 to --

21 JUSTICE GORSUCH: Our history is
22 irrelevant? Oklahoma's history is irrelevant?

23 MR. SHANMUGAM: I was going to come to
24 the treaties, but let me say one last thing
25 about the interest, which is that, of course,

1 the tribes have an interest in protecting their
2 members from criminal offenses. The State of
3 Oklahoma likewise has an interest in protecting
4 all of its citizens, including its tribal
5 citizens, who in Oklahoma have been citizens of
6 the state longer than anywhere else in the
7 nation.

8 But this Court has never recognized
9 that that is sufficient, for instance, to
10 justify tribal jurisdiction, or else *Oliphant*
11 and *Duro*, the decisions that hold that tribes
12 ordinarily lack jurisdiction over offenses
13 committed by non-members, would have come out
14 the other way.

15 Now you also mentioned Public Law 280
16 and the treaties, and I want to come to both of
17 those because those are potential affirmative
18 sources for preemption. And just to be clear so
19 that we're talking about the same framework, I
20 think the way that the Court would consider
21 offenses committed by Indians is under some sort
22 of balancing framework or some sort of framework
23 that looked at whether the state law interfered
24 with the tribal right to self-governance.

25 Here, because that interest is not

1 implicated, we think that the Court should use a
2 familiar approach to preemption because you're
3 talking about --

4 JUSTICE GORSUCH: You say it's not --

5 MR. SHANMUGAM: -- competing state and
6 federal interests.

7 JUSTICE GORSUCH: -- you -- you
8 blithely say its not implicated. And it's easy
9 to say, but you have 200 years of history
10 suggesting otherwise and you have tribes before
11 us saying otherwise and you have former U.S.
12 attorneys saying otherwise. What do we do about
13 that?

14 MR. SHANMUGAM: Well, I can't speak to
15 why the tribes have taken the position that they
16 have in this Court.

17 JUSTICE GORSUCH: Counsel, it's easy
18 enough to say that standing at the podium in
19 Washington, D.C., but the history and the
20 reality is -- should stare us all in the face.
21 There's a reason why they've resisted
22 jurisdiction over crimes against Indian victims.
23 It's not -- it's not just a matter of being
24 contumacious, is it?

25 MR. SHANMUGAM: No. Of course, I'm

1 not saying that they're being contumacious. But
2 I would say, having spent some time in Oklahoma,
3 that the law enforcement issues are very real.
4 And as recently as earlier this week, you had
5 the principal FBI agent in Oklahoma conceding
6 that there are whole categories of crimes, by
7 our estimation, thousands of crimes, that are
8 going unprosecuted because the federal
9 government, which has sole jurisdiction over
10 this category of cases, simply has been unable
11 to prosecute them.

12 JUSTICE BREYER: Don't they have --

13 MR. SHANMUGAM: So if we're talking --

14 JUSTICE BREYER: -- representatives in
15 Congress? I mean, if there is crime,
16 particularly, in Oklahoma, can't they ask
17 Congress to provide extraprosecutorial and
18 judicial resources?

19 MR. SHANMUGAM: Well --

20 JUSTICE BREYER: They can have,
21 obviously.

22 MR. SHANMUGAM: But, Justice --

23 JUSTICE BREYER: So my real question
24 is this: The -- you talk a lot about Oklahoma,
25 and I can understand the problem in Oklahoma

1 because of our previous case, et cetera. But
2 aren't there 49 other states? And my impression
3 is that, in general, in the entire country, the
4 general assumption has been -- and they've acted
5 this way for years, decades -- that states
6 cannot prosecute the specific -- you know, the
7 particular crimes, and they don't prosecute the
8 particular crimes when they take place in Indian
9 country. They're prosecuted in federal court.

10 Now am I right or wrong? I'm not an
11 expert, and you are more of one. So am I right
12 or wrong about that?

13 MR. SHANMUGAM: So states have made
14 efforts from time to time, I'm not going to
15 overstate it, to bring prosecutions of this
16 permutation.

17 JUSTICE BREYER: I didn't say that. I
18 said the general assumption throughout the
19 United States of America has been that the
20 states cannot prosecute these crimes but rather
21 -- I won't say there aren't exceptions -- but
22 rather in federal court.

23 MR. SHANMUGAM: I think I would
24 quibble slightly, Justice Breyer --

25 JUSTICE BREYER: Yeah.

1 MR. SHANMUGAM: -- and say that I
2 don't know that it was a general assumption. I
3 think that this has been an open question. The
4 Justice Department for many years --

5 JUSTICE BREYER: How many --

6 MR. SHANMUGAM: -- contrary to the
7 position --

8 JUSTICE BREYER: -- if you had to
9 guess? I don't know if you looked it up. But,
10 if you had to guess, what percentage of crimes
11 committed on Indian reservations that we're
12 talking about here are prosecuted in state
13 court, the crimes that are listed? Which --
14 what percentage of all those? Would you guess
15 it's more like 1 percent or more like 50
16 percent?

17 MR. SHANMUGAM: I'm guessing that it
18 has historically been a relatively low
19 percentage, but that --

20 JUSTICE BREYER: Okay. Okay. That's
21 all I wanted to know.

22 MR. SHANMUGAM: -- is in large part
23 because the denominator is not that large --

24 JUSTICE BREYER: Yeah, okay.

25 MR. SHANMUGAM: -- in Indian country

1 --

2 JUSTICE BREYER: Right.

3 MR. SHANMUGAM: -- outside Oklahoma.

4 JUSTICE BREYER: Right. All right.

5 Final part of --

6 MR. SHANMUGAM: But I would say in
7 response --

8 JUSTICE BREYER: -- the question --
9 okay, you're saying there are not that many, but
10 it's been prosecuted in federal court, not state
11 court.

12 Now, if you win, that assumption,
13 almost general, has -- will be changed
14 throughout the country, is that right? And
15 suddenly the Indian tribes will realize that
16 where they thought crimes on their reservation
17 were being prosecuted in federal court, they
18 will discover that suddenly, in these 49 other
19 states, they can go into state court. Is that
20 right or wrong? I want to --

21 MR. SHANMUGAM: That is -- that is --

22 JUSTICE BREYER: -- just get my
23 assumptions right. I'm not making an argument.

24 MR. SHANMUGAM: -- that is correct.

25 And let me say a little bit about the --

1 JUSTICE BREYER: That is right or not
2 right?

3 MR. SHANMUGAM: That is correct.

4 JUSTICE BREYER: Okay.

5 MR. SHANMUGAM: And let me say a
6 little bit about that and then about why
7 Congress is not simply going to be able to fix
8 this, which was where your question started.

9 JUSTICE BREYER: Well, they could
10 provide more prosecutors, is my point.

11 MR. SHANMUGAM: And the --

12 JUSTICE BREYER: They can't --

13 MR. SHANMUGAM: -- Justice Department
14 has asked them to do that, but the reality is
15 that the gap in Oklahoma right now is yawning.
16 All we are here asking the Court to do is to
17 provide concurrent jurisdiction for the states
18 with the federal government, which, after all,
19 is outside Indian country, the norm in our
20 federal system.

21 Our submission is that this is not
22 likely as a practical matter to be a significant
23 issue outside the State of Oklahoma. There's no
24 reason to believe that the federal government is
25 not doing its job of prosecuting crimes in the

1 other 49 states.

2 What we know as representatives of the
3 State of Oklahoma is that that is not happening
4 in the State of Oklahoma. And you don't have to
5 take --

6 JUSTICE SOTOMAYOR: Counsel --

7 MR. SHANMUGAM: -- our word for that.

8 JUSTICE SOTOMAYOR: -- counsel, but --
9 but you have a state-specific problem. At some
10 point, I want you to address where you get your
11 figures from. And I will lay out there's an
12 article in The Atlantic that suggests that your
13 figures are grossly exaggerated, and I want to
14 give you an opportunity to address that. But
15 put that question aside.

16 It may be that you and some -- that
17 you're the only state that wants concurrent
18 jurisdiction to fix a state-specific problem.
19 But why should we assume that every other state
20 wants that responsibility? And doesn't
21 conferring jurisdiction on a state or telling it
22 you have concurrent jurisdiction obligate that
23 state in a way to protect its Indian victims?

24 I mean, what you're saying is an
25 unfunded mandate to 49 other states to take on a

1 responsibility that they had a choice to take on
2 and most of them didn't want. So we have 11
3 states for which Congress enacted state-specific
4 legislation conferring some jurisdiction. In
5 Public Law 280, again, states were given the
6 choice, do you want to prosecute these crimes or
7 not? Three more states added onto the 11, so 15
8 only, given a choice, wanted to do this.

9 We are told by some amici that federal
10 and state authorities have come to agreement in
11 virtually every place outside of Oklahoma as to
12 who's going to do what. But, once we say states
13 have concurrent jurisdiction, we are forcing the
14 state to do something.

15 You're saying, no, no, no, there's
16 always prosecutorial discretion. But is that
17 true? They have an obligation to treat their
18 citizens equally. Having said that, this is not
19 a case -- what you're doing is putting all of
20 those 15 laws conferring different kinds of
21 jurisdiction on those states into question.

22 You're throwing out those 15
23 agreements and you're saying forget what they
24 say about limiting state jurisdiction or not.
25 States had an inherent power to do this. Maybe

1 you'll come back and say, well, those are
2 agreements, so they're still bound by them.

3 But now you're creating chaos across
4 the country, 49 other states. And I am told
5 that the federal government decides whether to
6 put some resources in some places based on what
7 kind of jurisdiction exists with the states and
8 not in others. All of that is up in the air.

9 So please explain to me why 200 years
10 later we are revisiting an assumption that was
11 made. You say it was only dicta. It was never
12 decided. But we have an awful lot of dicta on
13 this issue repeatedly in many, many cases.

14 MR. SHANMUGAM: Justice Sotomayor,
15 there's a lot to that question and let me try to
16 cover all of it.

17 First of all, with regard to the
18 statistics, we believe that the statistics that
19 we have offered to the Court are accurate, but
20 you don't have to just take our word for it.

21 To get back to Justice Breyer's
22 question, let's take a look at what the Justice
23 Department has said in its most recent 2023
24 budget report.

25 It has said, "The United States

1 Attorneys in Oklahoma are prioritizing violent
2 felonies under the Major Crimes Act. In fiscal
3 year 2021, the Eastern District of Oklahoma and
4 the Northern District of Oklahoma are opening
5 only 22 percent and 31 percent of all felony
6 referrals. Enforcement of nonviolent crime is
7 relatively low."

8 And if we want to talk about --

9 JUSTICE SOTOMAYOR: Well --

10 MR. SHANMUGAM: -- what's been said in
11 --

12 JUSTICE SOTOMAYOR: -- most of that is
13 being done by the tribes, isn't it?

14 MR. SHANMUGAM: Well, not with --

15 JUSTICE SOTOMAYOR: I see a short gap
16 of -- the Atlanta article says, at most, there's
17 a short gap of about a thousand cases, if that.

18 MR. SHANMUGAM: We -- we don't agree
19 with that. It's important to keep in mind that
20 the tribes do not have jurisdiction over this
21 category of cases, with narrow exceptions.

22 And if we're going to litigate what's
23 been said in the press, I would refer the Court
24 to The Wall Street Journal article earlier this
25 week to which I alluded in which the special

1 agent in charge of the FBI's Oklahoma Field
2 Office said "The United States Attorney's Office
3 doesn't have the capacity to try nonviolent
4 felony," my words, "or even any misdemeanor
5 cases."

6 Now I do want to cover the other
7 points that were in your question which I think
8 are really important.

9 First of all, with regard to
10 supposedly foisting this authority on the
11 states, let's keep in mind the fact that the
12 states do enforce the criminal laws already in
13 Indian country by virtue of the rule first
14 established by this Court in McBratney.

15 When non-Indians commit crimes against
16 non-Indians in Indian country, law enforcement
17 is there, state law enforcement is there because
18 they have exclusive authority in order to
19 enforce the criminal law.

20 JUSTICE KAVANAUGH: Several states
21 have renounced the very kind of authority you'd
22 thrust upon them, though, haven't they?

23 MR. SHANMUGAM: Well, it -- it -- it
24 is true that a very small number of states have
25 renounced the additional authority provided

1 under Public Law 280, but that brings me to the
2 Public Law 280 regime, Justice Sotomayor, and
3 there are a couple of things I would say about
4 that.

5 First is just the fundamental oddity
6 of the position on the other side, which is that
7 a statute that by its terms conferred additional
8 jurisdiction should be viewed as ousting all
9 other preexisting jurisdiction.

10 And the reason that we know that that
11 is not the law is because this Court said so in
12 three affiliated tribes. One, in the civil
13 context, it said, "nothing in the language or
14 legislative history of Public Law 280 indicates
15 that it was meant to divest states of
16 preexisting and otherwise lawfully assumed
17 jurisdiction." And there's --

18 JUSTICE SOTOMAYOR: In a civil case.

19 MR. SHANMUGAM: But --

20 JUSTICE SOTOMAYOR: They were very
21 clear in saying criminal cases are different
22 from civil cases.

23 MR. SHANMUGAM: But the reasoning,
24 Justice Sotomayor, is exactly analogous, and let
25 me explain why.

1 Public Law 280 confers on states
2 essentially plenary civil and criminal
3 jurisdiction, either states that are the
4 mandatory states or states that opt in.

5 And you could make exactly the same
6 argument in the civil context with regard to
7 civil actions brought by Indians against
8 non-Indians, and yet this Court made that
9 statement in the context of whether or not
10 Public Law 280 should be used to construe a
11 state law as ousting the state of preexisting
12 jurisdiction.

13 Our submission is that Public Law 280
14 operates perfectly well under our
15 interpretation. What Public Law 280 does is to
16 confer this broad array of additional
17 jurisdiction, not just a plenary civil
18 jurisdiction but, of course, criminal
19 jurisdiction, including jurisdiction over
20 offenses committed by Indians, which appears to
21 have been Congress's principal concern when it
22 enacted Public Law 280.

23 Now, to be sure, the text of Public
24 Law 280 also clarifies that states that
25 participate in or opt into the regime will also

1 have jurisdiction over offenses committed
2 against Indians.

3 JUSTICE GORSUCH: Let's -- let's talk
4 about that --

5 MR. SHANMUGAM: But there's nothing
6 odd about that.

7 JUSTICE GORSUCH: -- let's talk about
8 for a second. I'm not so sure.

9 First of all, you -- you -- you agree,
10 though, that in 1948, when Congress passed the
11 GCA, the text of it is consistent with the
12 conclusion that Congress believed the states
13 generally lacked prosecutorial authority over
14 crimes committed by non-Indians against Indians
15 in Indian country, right?

16 MR. SHANMUGAM: Some members of
17 Congress plainly believed that because there is
18 evidence of the legislative --

19 JUSTICE GORSUCH: No, more than that.
20 You agree that the text is consistent with an
21 understanding that Congress thought that, right?

22 MR. SHANMUGAM: The text is consistent
23 both with my position and with my friend, Mr.
24 Schauf's position.

25 JUSTICE GORSUCH: Okay. If the text

1 is consistent with the opposing position, then
2 let -- Public Law 280, the Kansas Act, the North
3 Dakota Act, the New York Act, the Iowa Act, all
4 adopted in the years immediately preceding and
5 immediately following the GCA, expressly confer
6 criminal jurisdiction on certain states, it just
7 doesn't happen to be Oklahoma, for the very kind
8 of authority at issue here, expressly, right?

9 MR. SHANMUGAM: Yes, but at the same
10 time, none of those laws --

11 JUSTICE GORSUCH: All of that would
12 have been pointless, right?

13 MR. SHANMUGAM: No, not at all.

14 JUSTICE GORSUCH: No need -- no need
15 to say you have state criminal jurisdiction in
16 -- in crimes involving Indian victims.

17 MR. SHANMUGAM: It's perfectly
18 reasonable, particularly in Public Law 280,
19 Justice Gorsuch, for Congress to have wanted to
20 clarify that the states had that preexisting
21 jurisdiction.

22 JUSTICE GORSUCH: So it's belts and
23 suspenders on your view?

24 MR. SHANMUGAM: Well, to a certain
25 extent, but I don't think that there's anything

1 strange about that because Congress often
2 passes statutes that do nothing more than codify
3 preexisting legal principles. Here --

4 JUSTICE GORSUCH: And how --

5 MR. SHANMUGAM: -- Congress was doing
6 --

7 JUSTICE GORSUCH: -- how about --

8 MR. SHANMUGAM: -- so much more.

9 JUSTICE GORSUCH: -- how about the
10 fact that we have in my count 10 cases
11 stretching from 1832 to two years ago saying
12 that it's -- it's -- states don't have this kind
13 of jurisdiction?

14 You call it dicta. All right. But
15 even in your very best case, *McBratney*, *Draper*,
16 cases you cite and rely on, the Court reiterates
17 that it is not talking about and is not
18 extending jurisdiction over these kinds of
19 cases. What do we do about that?

20 MR. SHANMUGAM: I -- I -- I don't
21 think that's quite correct. I would recognize,
22 Justice Gorsuch, that by my count, there are six
23 cases, starting with *Williams versus United*
24 *States*, in which this Court --

25 JUSTICE GORSUCH: I don't know. Mine

1 go back to Worcester. I think you might be
2 missing a couple.

3 MR. SHANMUGAM: I don't think that
4 that's a fair characterization of Worcester
5 because Worcester was simply stating the
6 principle that in effect --

7 JUSTICE GORSUCH: All right. We
8 can -- we can quibble over the number, all
9 right? I think your count's a little
10 parsimonious, but whatever number it is, it's a
11 large number. And even the cases you rely on
12 most heavily carve this out.

13 MR. SHANMUGAM: I don't think that --

14 JUSTICE GORSUCH: What do we do about
15 that?

16 MR. SHANMUGAM: -- I don't think
17 that's correct, and let's go directly to
18 McBratney. I think that all that the Court said
19 in McBratney was that it was not deciding any
20 question under the provisions of the applicable
21 treaty with regard to crimes committed by or --

22 JUSTICE GORSUCH: All right.

23 MR. SHANMUGAM: -- against Indians.

24 I think the reasoning of McBratney
25 strongly supports our position because McBratney

1 speaks broadly --

2 JUSTICE GORSUCH: But it carved that
3 question out -- it carved this question out and
4 said it wasn't -- it wasn't going there.

5 MR. SHANMUGAM: I don't believe that
6 that is correct.

7 JUSTICE GORSUCH: All right. All
8 right.

9 MR. SHANMUGAM: I would say that the
10 Court only started to carve out the question in
11 Donnelly. And I think what happened is
12 regarding --

13 JUSTICE GORSUCH: Then -- then how
14 about this? How about Oklahoma's own position
15 for the last 30 years, which has taken the
16 position since I understand at least 1990 that
17 that is the correct understanding of the law?
18 That has been the Justice Department's
19 understanding of the law.

20 Don't we normally, when we're thinking
21 about an old statute, give respect to how it's
22 been liquidated and understood by all three
23 branches of government consistently, maybe the
24 state itself who might have had an admission
25 against interest back when nothing was at stake

1 but now changes its view?

2 MR. SHANMUGAM: I think what I would
3 say about the federal government, Justice
4 Gorsuch, is that their position by their own
5 recognition has certainly not been consistent.

6 And I would refer the Court to the
7 1979 OLC opinion and the government's subsequent
8 statements where the government has suggested
9 that when it comes to the sort of interest
10 balancing that we were discussing earlier,
11 Justice Gorsuch, that that interest weighs in
12 the state's favor.

13 JUSTICE GORSUCH: Do you care to
14 address your own client's position?

15 MR. SHANMUGAM: I'm very happy to
16 address Oklahoma's position. The practical
17 reality, of course, was that this was not a
18 significant issue --

19 JUSTICE GORSUCH: Exactly.

20 MR. SHANMUGAM: -- before this Court's
21 opinion in McGirt.

22 JUSTICE GORSUCH: Exactly. And
23 shouldn't that count for something?

24 MR. SHANMUGAM: Well, no, I think that
25 what it should count for is that this has

1 suddenly become a major problem in Oklahoma.
2 And to be clear, the reason that we are here
3 today is because of McGirt. This was not a
4 significant law enforcement issue in the State
5 of Oklahoma for the reason that the government
6 acknowledged in its earlier briefing in the
7 McGirt line of cases, which is that in Oklahoma
8 there is very little trust or reserved land.
9 Most of the land is fee land like the land in
10 downtown Tulsa and the other cities in the
11 eastern half of Oklahoma and, therefore, would
12 not have been thought of as Indian country.

13 Now I think, with regard to Oklahoma,
14 the history, as you are well aware, is somewhat
15 complicated in this regard because there was a
16 lengthy period of time when the Oklahoma Court
17 of Criminal Appeals, in fact, said that the
18 state had plenary criminal jurisdiction even
19 over Indian country and the state, and the
20 Oklahoma Court of Criminal Appeals eventually
21 reversed that position.

22 And so I think it's very hard to say
23 that there's a lot of data about what the State
24 of Oklahoma was doing. But I will grant you
25 that I can't point to a prosecution by the State

1 of Oklahoma after 1990. I would just say that
2 that's consistent with the fact that this was
3 not a significant issue because of the
4 relatively small amount of Indian country.

5 And I do want to --

6 JUSTICE KAGAN: Mr. Shanmugam --

7 JUSTICE GORSUCH: Please.

8 CHIEF JUSTICE ROBERTS: Why don't you
9 wrap up quickly. And, Justice Kagan, we'll --
10 Justice Kagan, we'll have your question, and
11 then we'll move on to the next stage.

12 JUSTICE KAGAN: I'm happy to take my
13 turn in order.

14 CHIEF JUSTICE ROBERTS: No, go ahead.

15 MR. SHANMUGAM: Great. Go -- go
16 ahead, Justice Kagan. I wanted to say one more
17 thing in response to Justice Gorsuch, but --

18 JUSTICE KAGAN: Okay. You'll find a
19 way to fit it in, I'm sure.

20 (Laughter.)

21 JUSTICE KAGAN: I want to talk about
22 the text of the statute for a few minutes and
23 just start with this question: Is there
24 concurrent jurisdiction on federal enclaves?

25 MR. SHANMUGAM: No.

1 JUSTICE KAGAN: Yeah. And, I mean, I
2 look at this text, and, you know, it's not the
3 clearest statute for either side of the table
4 here, but if I ask myself, like, what does this
5 text really mean, and "mean" back when it was
6 written, not today, given the history in
7 which -- from which it emerged, I mean, the idea
8 that this statute did anything other than
9 analogize to federal enclaves in the entire
10 sense, meaning it's the law that -- in which --
11 in -- in -- in federal enclaves and it's the
12 exclusive law of the federal government, I mean,
13 it just seems to me the more natural reading of
14 the statute in its historical context.

15 MR. SHANMUGAM: I don't agree with
16 that, Justice Kagan, and I don't think that the
17 statute is ambiguous, and I assume that we're
18 talking about the General Crimes Act, and I will
19 come to Public Law 280 in a minute.

20 But I think, with regard to the
21 General Crimes Act, what I would say is what
22 this Court said in *In re Wilson*. With regard to
23 this phrase, "places within the sole and
24 exclusive jurisdiction of the United States,"
25 what the Court said was that phrase does not

1 apply to the jurisdiction extended over the
2 Indian country but is only used in the
3 description of the laws which are extended to --

4 JUSTICE KAGAN: Yeah, I don't think
5 I'm really talking about this as a -- as a
6 matter of parsing the sentence and -- and
7 applying rules of grammar to it. I think what
8 I'm talking about is the -- the sense of the
9 provision is to say -- the only thing the
10 provision does is to analogize to federal
11 enclaves. And then the question becomes, what's
12 the law in federal enclaves? And the law in
13 federal enclaves is exclusive federal law.

14 I mean, it's a kind of bizarre thing
15 that Congress would have done, isn't it, to say,
16 well, we're going to have federal enclave law
17 applying and then we're also going to have state
18 law applying? This is not like federal and
19 state law apply in the State of New York or
20 something, right? Because federal enclave law
21 is essentially law that duplicates the kind of
22 subjects in which state law is concerned. And
23 so you have two bodies of general law operating
24 in the same geographic area.

25 Now that now and that then is -- is

1 kind of odd. And -- and, like, why would we
2 think that that's what Congress did when it said
3 in this statute look to federal enclaves?

4 MR. SHANMUGAM: I -- I don't think
5 that that's odd, Justice Kagan, either as a
6 matter of text or as a matter of history.

7 So, as to the text, our fundamental
8 submission here is that when you look at the
9 structure of that sentence in Section 1152, it
10 provides simply that the general laws of the
11 United States as to the punishment of offenses
12 committed within federal enclaves shall extend
13 to the Indian country.

14 And I think that, as a matter of
15 structure and plain language, that suggests that
16 what you're talking about is the substantive
17 criminal laws of an area that is within the sole
18 and exclusive jurisdiction of the United States,
19 federal enclaves.

20 JUSTICE KAGAN: I -- I mean, I suppose
21 --

22 MR. SHANMUGAM: If you don't --

23 JUSTICE KAGAN: Go ahead.

24 MR. SHANMUGAM: If you don't agree
25 with me on that, I would point to the history

1 here. And this goes really to, I think,
2 Respondent's core argument. Respondent sets
3 great store by the 1834 enactment of the
4 predecessor to the General Crimes Act.

5 But, of course, in 1834, to the extent
6 that -- that Congress was thinking about the
7 principle of territorial separation from
8 Worcester, the first of the cases to which
9 Justice Gorsuch referred, Congress incorporated
10 that in its definition of Indian country, which
11 is, after all, the trigger for what is now the
12 General Crimes Act, by defining Indian country
13 to exclude territory within the borders of
14 states.

15 So Congress didn't have any occasion
16 to think about the preemption question that's
17 presented here. That question was effectively
18 moot because the statute only applied to
19 territories outside state borders. And when you
20 think about our country in 1834, obviously, that
21 was most of the territory west of the
22 Mississippi River for starters.

23 And I would parenthetically note that
24 that is -- that -- that both the text and the
25 history are reasons to distinguish the General

1 Crimes Act from the Major Crimes Act, though I
2 think the right way to think about the Major
3 Crimes Act as a matter of first principles would
4 be to think about it in preemption terms like
5 the way that Justice Gorsuch and I were
6 discussing earlier and not so much in terms of
7 the text.

8 JUSTICE KAGAN: I mean, I wonder if
9 all of that cuts for you or against you. I kind
10 of think the latter. I mean, here you are in
11 the 1830s coming after Worcester with a -- with
12 a sense of the history of states operating
13 against tribes and tribes needing federal
14 protection. And, you know, to -- to -- to -- as
15 I said, I think that this -- this statute is not
16 grammatically pristine, and Mr. Schauf has an
17 argument and you have an argument.

18 But -- but, given two alternatives,
19 given that history, why we shouldn't read it as
20 essentially saying go do the same thing in
21 Indian country as you do in federal enclaves,
22 rather than go do this completely weird thing
23 where reservations or -- or -- or Indian country
24 is going to have two bodies of general law,
25 including state law of the states that tribes

1 needed protection from the federal government
2 against, I -- I don't know why you would pick
3 your version.

4 MR. SHANMUGAM: Well, my first line of
5 response, Justice Kagan, is that this Court has
6 already construed this language in Wilson and
7 again in Donnelly.

8 JUSTICE KAGAN: Well, I don't know if
9 you get to talk about precedent, you know,
10 because you're up here and six times we have
11 said the exact opposite of your position. And
12 you say, well, it's dicta. But it's not normal
13 dicta. It's -- it's in six cases this Court has
14 laid down the jurisdictional rules and has
15 specifically rejected your position.

16 So, you know, in terms of what this
17 Court has said, I'm sorry, but this Court has --
18 has indicated six times that you are wrong.
19 Congress has indicated that you are wrong given
20 its -- its consistent enactment of statutes that
21 make no sense in light of your position, Public
22 Law 280 and the state-specific ones. The
23 executive branch has said that you are wrong in
24 all but one decade.

25 You know, you're asking us to do a big

1 lift on the basis of language that, as I say,
2 seems to me more naturally read against you.

3 MR. SHANMUGAM: I respectfully
4 disagree with that, Justice Kagan. And just a
5 couple of additional points. I think, with
6 regard to the issue of dicta, I would say that
7 the -- the statements on this issue, starting
8 with Williams versus United States, are, for
9 lack of a better way of putting it, on the dicta
10 end of the dicta spectrum. You're talking about
11 no more than two sentences in any of those
12 decisions. Those statements were really not
13 essential in any way to the holdings.

14 I would submit that the statements in
15 Wilson and Donnelly were much more to the core
16 of the questions that the Court was considering.
17 We're talking about cases like Solem and Bryant
18 on the other side, where the Court is simply
19 stating the principle that Respondent is
20 advocating in passing on its way to dealing with
21 very discrete questions, such as diminishment of
22 reservations and the validity of the federal
23 recidivist statute that takes tribal convictions
24 into account.

25 So I do think that, with respect,

1 we're entitled to point to this Court's
2 precedent, not least because this Court's
3 precedent involves interpretation of the two
4 statutes on which Respondent relies.

5 And with regard to Public Law 280, the
6 one thing that I wanted to say in response to
7 Justice Gorsuch, because that is, after all, the
8 other statute on which the other side relies, is
9 that when you start to frame the argument in
10 terms of Public Law 280 occupying the field and
11 the like, that starts to feel like a field
12 preemption argument.

13 And I think Respondent almost goes
14 there in his brief because he relies on cases
15 like Virginia Uranium and Hines, but he doesn't
16 use the words "field preemption," and I would
17 submit that that's for good reason, because
18 Public Law 280 would fall -- fall short -- far
19 short of the standard for field preemption, not
20 least because, as this Court indicated in Three
21 Affiliated Tribes, there's no indication in
22 Public Law 280 that Congress intended to oust
23 the states of preexisting jurisdiction.

24 CHIEF JUSTICE ROBERTS: Thank you,
25 counsel. I have just just one question.

1 We've heard a lot about McGirt this
2 morning, and I understand your point that it has
3 sort of upped the ante on the question before us
4 today. But is there any way in which the
5 analysis in McGirt affects the point you're
6 trying to make, or is it just kind of a
7 background fact?

8 MR. SHANMUGAM: The practical
9 realities of McGirt are relevant, Mr. Chief
10 Justice, on this question presented primarily if
11 this Court decides to engage in a balancing of
12 interests, because, in weighing the state's
13 interests and the propriety of concurrent
14 jurisdiction, I think it's entirely appropriate
15 for the Court to take into account what is going
16 on in what is now the largest piece of Indian
17 country by area and population in the United
18 States.

19 CHIEF JUSTICE ROBERTS: I mean, in
20 terms of how we analyze the General Crimes Act,
21 how we analyze Worcester against Georgia, the
22 other sort of legal authorities at issue here,
23 McGirt doesn't offer any guidance in that
24 analysis, does it?

25 MR. SHANMUGAM: No, these are

1 fundamental familiar preemption questions, and
2 particularly because this case does not
3 implicate the tribal interest in punishing
4 tribal offenders, this is really a case that
5 pits state interests against federal interests.

6 And just to be clear, what the federal
7 government is here saying and my friend,
8 Mr. Kneedler, will be at the podium shortly to
9 say this, is that the federal government should
10 have exclusive jurisdiction here.

11 And I guess I'm at a loss as to why
12 the federal government would take that position
13 when federal officials, both in statements to
14 the public but also in statements to Congress,
15 is acknowledging this massive prosecutorial gap,
16 thousands of crimes, however you do the
17 statistics, that are going unprosecuted by the
18 federal government in the State of Oklahoma.

19 CHIEF JUSTICE ROBERTS: Well, I
20 mean -- so really, at the end of the day, when
21 you're talking about McGirt, you're really just
22 waving -- waving a bloody shirt. It doesn't
23 have any direct pertinence on the legal analysis
24 here.

25 MR. SHANMUGAM: This is an

1 extraordinary situation, I think, unlike any
2 situation in recent history where what's going
3 on right now in Oklahoma is a giant law
4 enforcement experiment.

5 You have half -- almost half of an
6 American state now, at least as to this category
7 of crimes, under the exclusive criminal
8 jurisdiction of the federal government, and the
9 federal government is failing in that task. And
10 I don't think that the Court should bind itself
11 to that.

12 Now, to be sure, the question that is
13 presented here will affect only by the federal
14 government's own estimation around 20 to 25
15 percent of the crimes affected by this Court's
16 holding in McGirt.

17 And as the Court is well aware, the
18 State of Oklahoma has asked this Court to
19 revisit its earlier decision in McGirt. That's
20 an extraordinary step, but these are
21 extraordinary circumstances.

22 And I would submit that if the Court
23 decides this question presented against the
24 State of Oklahoma, it's only going to exacerbate
25 what is already an extraordinary situation. And

1 at that point, the Court may want to revisit its
2 judgment not to reconsider McGirt at this time.

3 CHIEF JUSTICE ROBERTS: Thank you.

4 Justice Thomas, anything further?

5 Justice Breyer?

6 JUSTICE BREYER: I think tell me if
7 you have general thoughts on this. I mean, the
8 sort of philosophical thing that is occurring to
9 me is that you're sort of winning the game once
10 you -- or not winning it but strengthening your
11 argument once you use this word "preemption."

12 But Indian tribes on Indian land are
13 not states and they are sovereign -- what is it,
14 what's the phrase, sovereign dependent nations?
15 So I don't know quite how that pans out.

16 But the other thing which is more
17 important which I'd love any comments you have
18 on it given your whole experience in many areas
19 of law, can you give me a phrase or a word or a
20 view in your mind of what weight this Court
21 should give to such a fact as virtually
22 unanimous across the country assumption that the
23 law was X?

24 Is it totally irrelevant or is it a
25 little relevant or a lot relevant? How do you

1 think about that in general?

2 MR. SHANMUGAM: There are familiar
3 doctrinal frameworks, Justice Breyer, and --
4 and, by definition, your experience is --

5 JUSTICE BREYER: I'm asking for your
6 --

7 MR. SHANMUGAM: -- broader than mine.

8 JUSTICE BREYER: -- view because you
9 have many cases. You have much experience in
10 the area. And -- and I think that's a -- I
11 guess you don't have to answer it, but -- but I
12 would be curious.

13 MR. SHANMUGAM: No, I -- I'm happy to
14 answer it directly. There is a word for it,
15 Justice Breyer, and that word is ordinarily
16 ratification. In other words, that is the
17 doctrine that this Court ordinarily uses to
18 embed in statutes that might otherwise be silent
19 preexisting understandings from interpretation.

20 But, again, that's another word that
21 you can search Respondent's brief for in vein
22 and I think that that's for good reason, because
23 if the argument here is ratification --

24 JUSTICE BREYER: No, I'm not
25 interested in ratification --

1 MR. SHANMUGAM: Well, but that is the

2 --

3 JUSTICE BREYER: -- because we have
4 cases where the law in many, many areas, even
5 with leaving Congress out of it, we might think,
6 some might think has been X, but it's argued in
7 front of us, no, even though everyone thought it
8 was X, everyone was wrong. It was not X.

9 Now, assuming that's the situation, my
10 same question, what weight do we give to the
11 view that everybody did think it was X --

12 MR. SHANMUGAM: I'm --

13 JUSTICE BREYER: -- or nearly
14 everyone?

15 MR. SHANMUGAM: -- I'm happy to
16 confront that directly. So the one thing I
17 think everyone agrees on before this Court is
18 that this is a question of preemption.

19 And I would note that nobody is here
20 arguing that in this context the balancing
21 approach from Bracker or other cases should
22 apply. I think everyone recognizes that this
23 case involves the familiar approach to
24 preemption where you look to whether or not
25 federal law displaces state authority.

1 Everyone also agrees before this Court
2 that the only relevant source of federal law is
3 statutes because, Justice Sotomayor, there's no
4 argument here that there's any treaty by its
5 terms that has preemptive effect.

6 And so then the question becomes what
7 is there in the statute that preempts, and
8 there's a statutory interpretation component to
9 that.

10 Now we would say that the first and
11 last place you look is to the text of the
12 statutes, and everyone agrees that there's
13 nothing on the face of the statutes with the
14 exception of this potential argument with regard
15 to the phrase "sole and exclusive jurisdiction"
16 that preempts.

17 And if you don't accept that argument,
18 then what you're left arguing is making
19 arguments based on background understandings,
20 and we really have two of those arguments in
21 this case: an argument with regard to the 1834
22 predecessor to the General Crimes Act that it
23 embedded the principle of territorial separation
24 from Worcester, or an argument that the 1948
25 recodification, which after all was just the

1 recodification in the United States Code without
2 substantive change, somehow ratified this
3 Court's interpretation in a single sentence of
4 text in its dicta in Williams at a time when the
5 law was unsettled.

6 That would come nowhere near this
7 Court's standard for ratification, which is why
8 I suspect Respondent doesn't affirmatively
9 invoke that doctrine.

10 And I think, with regard to Worcester
11 and the background understanding, this Court has
12 long retreated, as has Congress, from the
13 hard-line view of territorial separation.

14 And if that were not true, then this
15 Court would have to revisit decisions like
16 *McBratney*, *Draper*, and more recently, *Nevada*
17 *versus Hicks*, all of which have given the states
18 broad law enforcement authority in Indian
19 country in the criminal context.

20 And so, with respect, I think what
21 you're really left with on the other side is
22 some sort of mosaic theory. If you take a look
23 at page 28 of the government's brief, the
24 government says, well, there's a pattern of
25 Congressional enactments.

1 But, with all due respect, I think
2 that that's a lot like Justice Gorsuch steak
3 rub. It's not entirely clear exactly what the
4 government and Respondent is relying on here in
5 the absence of any --

6 JUSTICE KAGAN: But that's
7 because there's so much.

8 CHIEF JUSTICE ROBERTS: Mr. Shanmugam
9 --

10 MR. SHANMUGAM: I --

11 CHIEF JUSTICE ROBERTS: -- if you --
12 continue.

13 MR. SHANMUGAM: I don't agree with
14 that, Justice Kagan, for the simple reason that
15 when we're talking about Congressional
16 enactments, which after all again is the
17 touchstone because we're talking about a
18 question of preemption, there are really only
19 two options here. There's either the General
20 Crimes Act itself or there is Public Law 280 and
21 the accompanying state enactments.

22 And I think that Public Law 280 is the
23 harder of the two for the other side for the
24 simple reason that not only has this Court
25 addressed a nearly identical issue in the civil

1 context in Three Affiliated Tribes, but that is
2 a statute that by its terms only gives states
3 additional jurisdiction, and I think it would be
4 passing strange to construe it as divesting all
5 of the other states of their preexisting
6 jurisdiction.

7 CHIEF JUSTICE ROBERTS: Thank you.

8 Justice Alito, anything further?

9 JUSTICE ALITO: Well, the -- the Chief
10 Justice asked you about the relevance of the
11 Court's reasoning in McGirt, and there have been
12 questions raising the possibility that
13 dispositive weight should be given here to what
14 some people may have assumed was the answer to
15 the question presented in this case.

16 What weight did the Court give in
17 McGirt to what had been assumed for a period of
18 time about the status of the territory in
19 question in that case?

20 MR. SHANMUGAM: Well, I do think that
21 it is slightly ironic that the history of
22 non-prosecution has been cited against the State
23 of Oklahoma when the Court in McGirt didn't
24 attach any weight to the settled understanding
25 for that period of 100 years about the status of

1 the eastern half of Oklahoma.

2 And just to be clear, I'm not here
3 today to relitigate McGirt. Our submission is
4 simply that the problems created by McGirt are
5 extraordinary, as this Court -- as some members
6 of this Court predicted at the time of McGirt,
7 and as the federal government in its brief in
8 McGirt said was going to be the case with regard
9 to criminal jurisdiction in particular.

10 And, with respect, I do find it
11 slightly astonishing that in its entire brief
12 the government says nothing about the current
13 state of affairs on the ground in Oklahoma in
14 this area in which it has exclusive
15 jurisdiction. Perhaps my friend Mr. Kneedler
16 will speak to that today. But, again, it seems
17 to me that is very relevant context as this
18 Court is deciding the question that's before it.

19 CHIEF JUSTICE ROBERTS: Justice
20 Sotomayor, anything further?

21 Justice Kagan?

22 Justice Gorsuch, anything further?

23 JUSTICE GORSUCH: Just to pick up on
24 Justice Kagan's remark, there is so much. You
25 conceded that the original understanding is

1 consistent, the language is consistent with an
2 original understanding of the statute, to
3 preempt. The MCA has very similar, different
4 language that does preempt, this Court's held.
5 We have an entire class of contemporaneous
6 statutes, from the Kansas Act to Public Law 280,
7 that are understood only in light of a
8 preemption view. We have 6 to 10 -- we can
9 argue over how many cases -- saying this. We
10 have all three branches of the federal
11 government contemporaneously understanding it.
12 We have the state's understanding for 30 years.

13 And in -- on the other side of the
14 balance, you're asking us to extend a balancing
15 test from the civil context in^ to? the criminal
16 context, which we've never done before.

17 Now, I can't think of another
18 statutory case this Court would take up, no
19 matter how much a state might complain about the
20 cost and the expense, and we get those all the
21 time, and reconsider a settled statutory
22 interpretation with that much evidence against
23 you. This Court stood firm in Worcester and --
24 with respect to the original meaning of the
25 Constitution and the promises made in treaties

1 to the Cherokee in the 1830s. Are we -- are we
2 to wilt today because of a social media
3 campaign?

4 MR. SHANMUGAM: No, Justice Gorsuch,
5 and let me say two additional things. First of
6 all, with regard to my purported concession, I
7 was simply making the point with regard to
8 Public Law 280 that, to the extent that some
9 members of Congress may have believed that
10 states lacked the jurisdiction over these --
11 this category of cases, that our interpretation
12 of the statute -- that the statute can be
13 interpreted consistently with that understanding
14 or not, but that there's nothing problematic
15 with construing the statute in the way that we
16 suggest.

17 We're not rendering any of the
18 language superfluous. All we're saying is that
19 Congress reinforced that states that
20 participated in Public Law 280 would have that
21 jurisdiction. A very important thing because if
22 Congress had not done that, there might have
23 been a negative inference that states in Public
24 Law 280 would lack that jurisdiction, which
25 would have created a jurisdictional gap.

1 We certainly do not think the General
2 -- the General Crimes Act is ambiguous, and I
3 would refer to my answers to Justice Kagan on
4 that score. We think that this Court has
5 construed that statute and that it is
6 unambiguous.

7 And then, finally, in response to your
8 question with regard to the history, I think
9 what I would say, without simply rehearsing
10 ground that we've already covered in our brief,
11 is that throughout our history there have been
12 countervailing data points on all of the issues
13 to which you referred. We've talked about the
14 district court decision in *Cisna* that came
15 immediately after *Worcester*; this court's
16 decision in *Dibble*, which conferred jurisdiction
17 on states in Indian country as early as 1859;
18 this court's decision in *Martin*, which
19 reinforced the principle of *McBratney* and *Draper*
20 right around the same time as this Court started
21 suggesting in dicta that the answer to this
22 question might be *Respondent's*; opinions from
23 the Attorney General as early as the mid-19th
24 century.

25 And to the extent that the other side

1 points to the original understanding, there is
2 no doubt in the early years of our history that
3 there was a problem, a problem with incursions
4 by non-Indians on Indian country and a raft of
5 treaties that conferred authority on the federal
6 government. But what you don't have is evidence
7 that the federal government -- that the treaties
8 were thereby ousting the states of jurisdiction.
9 The problem might very well have been
10 nonenforcement, but there is no reason to
11 believe, either from the treaties nationwide or
12 the treaties specific to Oklahoma, that those
13 treaties by their terms ousted the state of
14 jurisdiction.

15 And to the extent that the treaties
16 refer to the jurisdiction or even the absolute
17 jurisdiction of the United States, I would point
18 the Court to its decision in Draper and its
19 decision in Egan that have made clear that those
20 provisions should not be construed as ousting
21 states of any or all jurisdiction. At most,
22 they made clear that title resided in the
23 federal government.

24 CHIEF JUSTICE ROBERTS: Justice
25 Kavanaugh?

1 JUSTICE KAVANAUGH: I understand your
2 argument about the statutory text controlling,
3 which is a very forceful argument. There's also
4 been some discussion of victims and the policy
5 concerns with victims. I want to focus on that
6 for a second. We're talking about
7 non-Indian-on-Indian crime in Indian country,
8 correct?

9 MR. SHANMUGAM: Yes.

10 JUSTICE KAVANAUGH: Everyone agrees
11 the tribes don't have jurisdiction to prosecute
12 those crimes, correct?

13 MR. SHANMUGAM: Yes, with the very
14 narrow exception of certain domestic violence
15 crimes, where Congress has conferred that
16 authority.

17 JUSTICE KAVANAUGH: Everyone agrees
18 the federal government does have jurisdiction to
19 prosecute those crimes covered by the GCA,
20 correct?

21 MR. SHANMUGAM: Yes.

22 JUSTICE KAVANAUGH: Okay. So the only
23 question here is additional jurisdiction to
24 prosecute those crimes for the states,
25 additional concurrent jurisdiction, correct?

1 MR. SHANMUGAM: Yes. That is correct,
2 and we simply do not agree with the submission
3 of the National Congress -- NCAI that state
4 jurisdiction affirmatively undermines public
5 safety. We think quite to the contrary --

6 JUSTICE KAVANAUGH: Right. Because
7 Indian victims right now are not being protected
8 because the federal government doesn't have the
9 resources to prosecute all these crimes. And
10 this would not be displacing the federal
11 government. It's additional prosecutor to
12 protect Indian victims against non-Indians,
13 correct?

14 MR. SHANMUGAM: That is correct, and
15 notwithstanding this frankly cynical effort to
16 disparage the state's estimates, which are the
17 state's best good faith estimates as to the
18 prosecutorial gap left by McGirt, the federal
19 government itself recognizes that there is a
20 gap, both in terms of the volume of cases and
21 whole categories of nonviolent crimes and even
22 less serious violent crimes that are not being
23 prosecuted.

24 JUSTICE KAVANAUGH: And that's not a
25 reason to read the text differently than it

1 reads, but my point in bringing that up is that
2 we also shouldn't think that somehow ruling
3 against you would -- would help -- I don't see
4 how it would help Indian victims. It's going to
5 hurt Indian victims.

6 MR. SHANMUGAM: Well, I think that
7 that's correct, and I do think that that is a
8 reason why this is a much easier case than a
9 case involving Indian defendants because I do
10 think if you have a case involving Indian
11 defendants, the tribal interest suddenly becomes
12 more significant. And I think when it comes to
13 non-Indian perpetrators, it's really hard to see
14 why a bright line should be drawn as to state
15 authority between non-Indian victims and Indian
16 victims. The state's authority here is at its
17 broadest because we're talking about the state's
18 police power.

19 The federal government has authority,
20 but it's somewhat narrower because that
21 authority requires a relationship with the tribe
22 in order to implicate the federal government's
23 enumerated powers.

24 And I would respectfully submit that
25 the tribe's authority in this area is at its

1 narrowest because it is what the tribe has by
2 means of reserved authority in this context,
3 which has to implicate the right to
4 self-governance, or any authority which has been
5 conferred on the tribes by Congress.

6 And I would submit that one reason why
7 the tribes may be opposing our position is
8 because the tribes themselves would like for
9 Congress to confer this law enforcement
10 authority on them.

11 CHIEF JUSTICE ROBERTS: Justice
12 Barrett.

13 JUSTICE BARRETT: I want to give you a
14 chance to answer a question that Justice Gorsuch
15 posed to you earlier, which is about the
16 difficulty of discerning whether the
17 perpetrators are Indians or non-Indians.

18 You pointed out the practical
19 difficulties of discerning whether a victim has
20 been an Indian or a non-Indian and the checklist
21 that the Tulsa police have.

22 Could you address Justice Gorsuch's
23 point?

24 MR. SHANMUGAM: Yes. It's basically
25 the same test, Justice Gorsuch. So there's no

1 reason why the test would be any different.

2 And, again, the way that the Oklahoma
3 courts have approached this is to have it be a
4 sort of totality of circumstances test that
5 looks not only at more objective factors, such
6 as enrollment in the tribe and blood quantum,
7 but also the individual's relationship with the
8 tribe and participation in tribal affairs.

9 And there is disagreement in the lower
10 courts on exactly what that test should be for
11 who is an Indian for purposes of criminal
12 jurisdiction. Again, this is the subject of a
13 currently pending cert petition by the State
14 of -- of Oklahoma.

15 And so our submission today is simply
16 that that is not an easy inquiry, and it has
17 immediate on-the-ground consequences because, if
18 you are a police officer arriving on the scene
19 in Tulsa -- and I have talked to the Mayor of
20 Tulsa and the chief of police in Tulsa about
21 this very subject -- those officers have to make
22 a jurisdictional determination.

23 And once they make that jurisdictional
24 determination, if they're making it in the
25 course of an investigation, it may determine who

1 responds to the scene of a crime.

2 JUSTICE BARRETT: They would have to
3 make a jurisdictional determination the other
4 way too when they're identifying the status of
5 the perpetrator.

6 MR. SHANMUGAM: That's right, but it
7 just makes it all the more complicated for them
8 to have to make both of those determinations.
9 But I certainly don't mean to suggest that even
10 if the Court resolves the question presented in
11 our favor, that's going to make it objectively
12 easy for law enforcement.

13 It may make it easier, but these are
14 very difficult questions that often have to be
15 resolved after perpetrators are taken into
16 custody to determine who's going to prosecute.

17 And the fundamental problem with
18 regard to the question presented today is that
19 when cases are referred to the federal
20 government, the federal government simply
21 doesn't have the resources to prosecute.

22 JUSTICE BARRETT: Well, I guess the --
23 the deeper reason for my question is I'm
24 wondering whether that jurisdictional inquiry --
25 I mean, part of your point on the balancing is

1 that the tribal interests are not implicated
2 when we're talking about non-Indian perpetrators
3 and Indian victims in the same way they are for
4 Indian perpetrators.

5 And I'm wondering if there's any
6 possibility for a conflict with those tribal
7 sovereign interests by virtue of the fact that
8 you have to figure out the status of the
9 perpetrator and there might be some dispute
10 about it.

11 MR. SHANMUGAM: I -- I -- I -- I
12 suppose that one could make that argument,
13 namely, that tribes should have some degree of
14 ability to define who are their members. They
15 do that, obviously, to some extent through the
16 enrollment process.

17 I think our submission is that if this
18 Court, rather than using the traditional
19 preemption framework, resorts to balancing, that
20 the unquestioned concern the tribes have about
21 protecting tribal victims shouldn't really tilt
22 the balance in a particular direction on the
23 question presented because, of course, it goes
24 without saying that the State of Oklahoma has
25 the same interest in protecting its own

1 citizens, which include tribal citizens.

2 JUSTICE BARRETT: I -- I'm talking
3 about the tribe's interest in not having the
4 State of Oklahoma prosecute members of the tribe
5 and the difficulty of figuring out the status of
6 the perpetrator. Does that come into account if
7 we look to balancing?

8 MR. SHANMUGAM: Yeah, I -- I mean,
9 I -- I take the point, Justice Barrett, which is
10 that in some sense, whenever the state is making
11 that determination, it is obviously of interest
12 to the tribes how the state makes that
13 determination. But, you know, I think that the
14 state in good faith attempts to make that
15 determination taking into account enrollment in
16 the tribe as one of the factors.

17 JUSTICE BARRETT: And I -- I want to
18 follow up on a point that Justice Sotomayor
19 made. She was pointing out that Public Law
20 280 -- well, that -- that the -- if we rule in
21 your favor, it might mean that states are
22 assuming responsibilities that they didn't sign
23 up for because they didn't opt into Public Law
24 280 in the days before tribal consent was
25 required.

1 Is there any relationship between
2 states that chose to opt in and population
3 density or size of tribal land within those
4 states, do you happen to know?

5 MR. SHANMUGAM: I think it's, frankly,
6 a little bit hard to sort of detect a pattern,
7 and it's complicated by the fact that in many of
8 the states that have opted in, because there
9 were issues with the way in which the states did
10 so, there are some states that simply don't
11 exercise that authority. There are at least a
12 couple of states that have retroceded that
13 authority.

14 But I think my fundamental point would
15 be that opting into Public Law 280 is a major
16 assumption of jurisdiction because, again, the
17 criminal jurisdiction and the civil
18 jurisdiction, with the caveat of the Cabazon
19 Band limitation, is plenary. It covers criminal
20 cases where the offenders were Indians as well
21 as cases where the victims were Indians, and, of
22 course, the grant of civil jurisdiction covers
23 any civil action between Indians or to which
24 Indians are a party.

25 So it's a major step for a state to do

1 so, and at least since tribal consent was
2 required, there are no states that have been
3 able to do so, and I think it's a fair inference
4 that Oklahoma would be unable to do so in light
5 of the position of the tribes today.

6 JUSTICE BARRETT: Thank you.

7 CHIEF JUSTICE ROBERTS: Justice Alito?

8 JUSTICE ALITO: In a case where the
9 accused claims to be an Indian, I assume that
10 the accused is in a position to explain why he
11 or she believes that that is the appropriate
12 categorization.

13 But what happens in the case where the
14 accused is indisputably not a victim and the --
15 I'm sorry, indisputably not an Indian and the
16 victim says, I don't consider myself to be an
17 Indian? What happens there?

18 MR. SHANMUGAM: I think that a court
19 would still have to apply the totality of the
20 circumstances test and to take into account
21 enrollment and blood quantum and any other
22 relevant factors. And so I don't think that the
23 victim's wishes would be dispositive of what is,
24 after all, a jurisdictional question.

25 And the other thing I would note is

1 that, you know, there are victimless crimes.
2 And when there are victimless crimes, it has
3 long been the view of the lower courts that
4 where the perpetrator is a non-Indian, the state
5 would have jurisdiction.

6 I think it is fair to say, as the OLC
7 opinions from the 1970s made clear, that the
8 line between crimes with a victim and victimless
9 crimes is itself a fuzzy one.

10 JUSTICE ALITO: What -- what happens
11 when the crime is the -- a conspiracy involving
12 Indians and non-Indians?

13 MR. SHANMUGAM: I -- I -- that's a --
14 that's a good question to which I actually don't
15 know the answer.

16 CHIEF JUSTICE ROBERTS: Thank you,
17 counsel.

18 Mr. Schauf.

19 ORAL ARGUMENT OF ZACHARY C. SCHAUF

20 ON BEHALF OF THE RESPONDENT

21 MR. SCHAUF: Thank you, Mr. Chief
22 Justice, and may it please the Court:

23 Oklahoma lacks jurisdiction because
24 Congress exercised its exclusive power over
25 Indian affairs to provide for exclusively

1 federal jurisdiction. That conclusion follows
2 from statutory text, context, and structure.

3 The General Crimes Act applies to
4 Indian country, where federal statutes
5 presumptively exclude state laws, and it imports
6 the law of federal enclaves, where, likewise,
7 states may prosecute only with Congress's
8 approval.

9 The resulting jurisdiction is
10 exclusive, and one way we know that is that John
11 and Negonsott held as much as the parallel text
12 under the Major Crimes Act. And that conclusion
13 would have been especially obvious to the
14 Congresses that enacted and reenacted the
15 General Crimes Act.

16 First, Congress in 1834 acted to
17 implement treaties covenanting the tribes would
18 be under the protection of the federal
19 government and "no other sovereign."

20 Second, Congress legislated against
21 the backdrop of Worcester and its holding that
22 Congress -- when Congress has regulated
23 relations with Indian -- Indian tribes, states
24 can't. It could never have fathomed a more
25 express statement would be required to keep its

1 promises.

2 Third, this Court has recognized a
3 single basis for state criminal jurisdiction in
4 Indian country in McBratney and Draper. And
5 Donnelly held that those cases do not apply to
6 crimes by or against Indians. That means
7 federal jurisdiction is exclusive, as this Court
8 has affirmed somewhere between six and 10 times.

9 Fourth, Congress in 1948 embedded in
10 law -- embedded that -- that law in statute
11 when, in the wake of Donnelly and Williams, it
12 reenacted the General Crimes Act while
13 conferring on some states jurisdiction over
14 crimes by or against Indians. You don't confer
15 jurisdiction that already exists. And the only
16 way to read all relevant text in harmony is
17 ours.

18 More than that, Congress built on that
19 structure through Public Law 280 and many
20 similar statutes. And now Oklahoma's position
21 would thwart the choice of 25 states not to
22 assume its jurisdiction and nullify consent
23 rights of, by my count, 190 Indian tribes and
24 for no sound reason.

25 Indeed, Washington State used Public

1 Law 280 to obtain exactly the jurisdiction at
2 issue here. And Oklahoma could do so too by
3 obtaining signatures from 20 percent of enrolled
4 tribal members and winning an election.

5 I welcome the Court's questions.

6 JUSTICE THOMAS: Counsel, just to go
7 back to the beginning of your argument, you said
8 that the -- I think you did -- you said that the
9 federal government had plenary authority in this
10 area. And we've said it too. What's the source
11 of that?

12 MR. SCHAUF: So I think this Court has
13 said that it arises from the Indian Commerce
14 Clause, the Treaty Clause, pre-constitutional
15 powers, war powers. But I agree that it was
16 quite subtle.

17 And, you know, for our purposes, I
18 think the -- the important point is that when
19 Congress acted in 1834, it did so against the
20 backdrop of Worcester, which interpreted the
21 federal government's powers in this area to be
22 exclusive when exercised. So, when Congress had
23 regulated intercourse with Indians, that meant
24 states could not. And, you know, that really
25 has been carried forward, I think, to the

1 present. Obviously, you know, a bunch changed
2 in the late 19th Century with Indian country
3 coming within states.

4 But I think the important point is
5 we're not writing on a blank slate here. This
6 Court addressed that issue in McBratney and
7 Draper and Donnelly, and the sort of sum total
8 of the holding of those cases is that the only
9 basis for state criminal jurisdiction in Indian
10 country doesn't apply to cases like this one.

11 And then, in 1940 and on, Congress
12 created the entire modern statutory scheme
13 against the backdrop of that understanding. So
14 the Kansas Act, for example, in 1940 understood
15 the law the same way we do, conferred
16 jurisdiction on states over crimes by or against
17 Indians because it regarded that as necessary.

18 Then this Court, in the Williams case,
19 sort of put a cherry on top and said, yeah, we
20 read things the same way. States lack
21 jurisdiction unless --

22 JUSTICE THOMAS: Well, yeah, I think
23 you've answered my question. I don't want to
24 interrupt you, but I don't want to take up all
25 your time.

1 One other question. Would you take a
2 minute or so to elaborate on your preemption
3 argument? And my difficulty is that we -- when
4 we normally have a preemption case, there is a
5 conflict of some sort that you cannot regulate,
6 for example, a drug the same -- by two different
7 -- in two different governments when they are in
8 conflict with each other, the regulations.

9 But, here, we're talking about
10 concurrent authority. And you can look at our
11 dual sovereignty double jeopardy cases and see
12 that there's not necessarily a conflict. There
13 may be an overlap or an overlay.

14 But -- so, with that in mind, I would
15 just like you to sort of tease out your
16 preemption argument focusing on this concurrent
17 jurisdiction as opposed to conflict.

18 MR. SCHAUF: Sure, Justice Thomas.
19 So, first, we think the text of this statute is
20 best read to provide that state law shall not
21 apply as to these criminal issues, though I do
22 want to take issue with my friend on the other
23 side's premise that what we're doing here is
24 just familiar principles of preemption.

25 What this Court said in *Mescalero*

1 Apache is exactly the opposite. Those familiar
2 principles don't apply, and it's because we are
3 in Indian country, which is the -- the sort of
4 quintessential locus where federal law applies
5 and state doesn't -- and state law doesn't.

6 But, on the conflict point, I think
7 the conflict would have been patent in 1834.
8 So, you know, this is a statute, as we read it,
9 that ensures peace on the frontiers, and it does
10 so by centralizing redress in the federal
11 government.

12 So, if you imagine a state prosecution
13 that goes first in the early 19th Century and,
14 you know, they do a bad job, they don't give an
15 adequate sentence, then, you know, what the
16 other side is sort of relying on is that they
17 can -- that the federal government is going to
18 be able to explain to the Indian tribes, you
19 know, we know that this was not a good trial,
20 but, you know, trust us. We're going to come in
21 after. We're going to fix it. Yes, you know,
22 at this point, the dual sovereignty doctrine, as
23 this Court noted in *Gamble*, is unsettled, but we
24 hope that this is all going to work out.

25 And, you know, those just aren't the

1 kind of chances you take on matters of war and
2 peace. But, you know, I think maybe even the
3 more fundamental point is it would have never
4 occurred to Congress in this era that states
5 would be the one to protect Indians from crimes.
6 I mean, after all, as this Court said in the
7 Kagama case, Indian -- states at this point were
8 Indians' deadliest enemies, and I don't think
9 you put, you know, the fox in charge of the hen
10 house even if the fox only has concurrent
11 jurisdiction.

12 And, you know, I think there are other
13 ways too that states could use this authority to
14 really thwart tribal interests. You could, say,
15 for example, criminalize intercourse by
16 non-Indians with Indians and say that's a crime
17 against the Indian, which could be -- basically
18 get you the same regime this Court invalidated
19 in Worcester. And I actually think the same
20 thing is true today. So you can look at the
21 issue in the Williams versus United States case.

22 JUSTICE THOMAS: Well, let's look at
23 the -- let's look at the issue here with the fox
24 and the chicken house. Actually, I think it's
25 the hen house. But the -- let's look at that

1 here. What did the defendant here get for the
2 child abuse in the state case? What was the
3 sentence?

4 MR. SCHAUF: So he received a 35-year
5 sentence in --

6 JUSTICE THOMAS: And -- and what was
7 the reduced -- what was the sentence after
8 McGirt?

9 MR. SCHAUF: It was -- the federal
10 sentence -- his sentence has not been imposed,
11 but what the plea agreement provides for is
12 seven years.

13 JUSTICE THOMAS: Okay. So --

14 MR. SCHAUF: The key difference --

15 JUSTICE THOMAS: -- the -- you can't
16 make that fox in the -- in the chicken house or
17 hen house argument there. So I understand your
18 point about -- your 19th Century point, but
19 we're looking at today and what I'm really
20 interested in is this conflict for -- because
21 you're making sort of a preemption argument, and
22 I don't know if you -- if it's a good argument
23 or an answer -- good answer to keep resorting to
24 the 1830s or 1840s and not be able to show the
25 conflict that we have today. Maybe it is.

1 Maybe for some of my colleagues it is.

2 But I'd like you to tease out again,
3 what is the conflict if you're making a
4 preemption argument? If you're not making it,
5 then you can say that.

6 MR. SCHAUF: Sure. So I just want to
7 footnote that actually our primary argument is
8 that the text here ousts states from
9 jurisdiction, and so, you know, that is the end
10 of the story, particularly under the preemption
11 standard that applies in this Court's Indian
12 cases.

13 But, on the conflict, let me -- let me
14 sort of take another run at it. I think there
15 are two. So one is just making law enforcement
16 worse based on diminished accountability. You
17 can see this from the brief of the former U.S.
18 Attorneys submitted in this case. These were
19 the U.S. Attorneys for many Indian country
20 areas, and what they say is that when you have
21 concurrent jurisdiction, you can create a "pass
22 the buck" dynamic that makes law enforcement
23 worse. And, indeed, we know, you know, this is
24 the view of the tribes in this case.

25 And the second point, and this is

1 where I was going with this Court's decision in
2 Williams, is you can have states prosecute in a
3 manner -- in a manner that isn't consistent with
4 tribal interests. So, in that case, the issue
5 was, what is the age of consent? Is it 16 or is
6 it 18? You can have -- you could have a
7 circumstance where, for example, you have the
8 intimate partner of a tribal member who goes to
9 prison under a state prosecution when the
10 federal law or the tribal law would allow that
11 person to remain in the community, maybe raise
12 their child.

13 And the reason why, you know, these
14 issues have never arisen is because the rule
15 that we're advocating has been the law since,
16 you know, 1940 at least and, you know, I think
17 probably far earlier than that.

18 So I guess the place I would go back
19 to is the statutes that Congress has enacted
20 that really do embed this understanding in their
21 text --

22 JUSTICE KAVANAUGH: But you're here --

23 MR. SCHAUF: -- in dialogue.

24 JUSTICE KAVANAUGH: I'm sorry. Go
25 ahead.

1 MR. SCHAUF: No. Please.

2 JUSTICE KAVANAUGH: You're here
3 representing a non-Indian criminal defendant,
4 correct?

5 MR. SCHAUF: That's -- that's correct.

6 JUSTICE KAVANAUGH: And the victim,
7 the five-year-old, was an Indian, correct?

8 MR. SCHAUF: That's correct.

9 JUSTICE KAVANAUGH: We don't have --

10 MR. SCHAUF: She was an enrolled
11 member of the Eastern Band --

12 JUSTICE KAVANAUGH: -- we don't have
13 anyone here representing her, but how are her
14 interests served by not having concurrent
15 authority to prosecute your client for the child
16 abuse that was inflicted on her if we're going
17 to look at the interests of Indian victims?

18 MR. SCHAUF: Sure. So I want to make
19 a point about this case and then -- then a sort
20 of broader point.

21 So, on this case, one thing we know
22 from the plea agreement is that the victim's
23 family consented to the federal sentence that
24 was imposed in this case. And the reason, I
25 would hazard, or something that has a lot to do

1 with that is that when we talk about the 35-year
2 Oklahoma sentence, you can get parole in
3 Oklahoma after, you know, 33 percent of the
4 time. In the federal system, no parole or
5 you've got to serve 85 percent.

6 And my client also agreed to not
7 contest removal proceedings thereafter. So
8 that's a pretty significant interest. And --

9 JUSTICE KAVANAUGH: But, from the
10 perspective not of non-Indian criminal
11 defendants, which you're representing one of
12 and representing well, from the perspective of
13 Indian victims, I guess I'm not sure how Indian
14 victims can be harmed by having more
15 prosecutorial authority to fill a gap in
16 Oklahoma where crimes are not being prosecuted
17 against Indian victims, at least now.

18 Now maybe someday the federal
19 government will get the resources to do the job,
20 but even then, the state resources would be
21 additional protection for Indian victims. So
22 I'm not understanding the -- the -- the argument
23 that somehow Indian victims would be benefitted
24 by ruling for you.

25 MR. SCHAUF: So I think the key point

1 I would make is that Congress has created a
2 process for those Indian interests to be
3 protected and it's done that in Public Law 280.
4 And I want to be specific about how it works
5 because I think it's important.

6 So the optional assumptions under
7 Public Law 280 are assumptions of concurrent
8 jurisdiction, just like we're talking about
9 here. They can be completely bespoke. So, if
10 you just want to get jurisdiction over crimes
11 against Indians, you can do that.

12 And the tribes themselves actually
13 can't -- they don't have a right to veto -- or
14 at least the tribal governments don't have a
15 right to veto those assumptions. What you can
16 see, and this is 25 U.S.C. 1326, is you have a
17 special election that can be called with the
18 consent of 20 percent of enrolled tribal
19 members, and that can be in any given area, so
20 Tulsa County, for example.

21 And then, if a majority vote in that
22 special election favors the assumption of
23 jurisdiction, then it can go forward. And so,
24 you know, if people in Tulsa believe what my
25 friend on the other side says about what is

1 going to be the best thing to protect them from
2 crime, then, you know, they can have it and the
3 tribal governments actually can't stop that
4 because that's, you know, the system that
5 Congress created in order to balance the tribal
6 and federal and state interests in this area.

7 JUSTICE SOTOMAYOR: Am I understanding
8 you correctly that each tribe -- that each
9 tribe, 20 percent of their members, presumably,
10 20 percent being whoever is potential victims,
11 could choose concurrent jurisdiction?

12 MR. SCHAUF: So the way I read the
13 statute is that it's actually the enrolled
14 tribal members in a particular geographic area,
15 and I -- I don't think the statute is completely
16 clear on, you know, how you would figure out the
17 exact denominator. But it is available for
18 Oklahoma, as it's been available for, you know,
19 any other state.

20 And, you know, my friend said there
21 have been no assumptions under Public Law 280,
22 but -- or at least once the 1968 provision made
23 tribal consent required.

24 But there were a number of assumptions
25 before then, at least 12 by my count in Montana

1 and Washington, where the tribes affirmatively
2 said, we consent to this jurisdiction. And so
3 this is not something, I think, that's
4 unobtainable.

5 And I think the more important point
6 is that it is something that Congress has taken
7 into account in this statutory scheme. And, you
8 know, it -- it is a scheme --

9 JUSTICE SOTOMAYOR: I think you
10 started to answer a question, and I'd like you
11 to expand on it.

12 There's an assumption in Justice
13 Kavanaugh's question that Indian victims can
14 only be helped by concurrent jurisdiction. Is
15 that assumption correct, that there's additional
16 resources to protect them against crimes?
17 That's the bottom line of his question. And is
18 that -- do you agree with that assumption?

19 MR. SCHAUF: No, I -- I don't think
20 that's right. I mean, I think, in particular,
21 as a practical matter, you know, the upshot of
22 Oklahoma's position here is, you know, they're
23 saying that if you adopt their position, then
24 you can go back to more like what the situation
25 was before McGirt, where, basically, the federal

1 government wasn't involved in, you know, these
2 sorts of cases involving Indians.

3 And that, I think, is profoundly
4 contrary to the -- the bargain, the agreement
5 that Indian tribes made with the United States
6 where the United States said we are going to be
7 your protector and make sure that you are taken
8 care of.

9 Now it is true that as a formal
10 matter, as the law stands today, you can have,
11 you know, concurrent federal prosecutions, but,
12 as a practical matter, the entire upshot of my
13 friend on the other side's position is that the
14 federal government can go back and wash its
15 hands of these sorts of offenses and, you know,
16 not invest the resources.

17 And, you know, our fundamental
18 position is that the federal government actually
19 has an obligation to invest those resources to
20 make sure this is being done right unless and
21 until either Congress passes a statute or tribal
22 citizens decide under Public Law 280 that they
23 would like a different system to help protect
24 themselves from crime.

25 JUSTICE BARRETT: Well, if --

1 CHIEF JUSTICE ROBERTS: Counsel, if I
2 could just -- I don't think we've gotten to the
3 critical language in the statute yet, and, of
4 course, in the General Crimes Act, this is what
5 the language says: "Except as otherwise
6 provided by law, the general laws of the United
7 States as to the punishment of offenses
8 committed in any place within the sole and
9 exclusive jurisdiction of the United States,
10 except D.C., shall extend to the Indian
11 country."

12 Now, as I read that, that's taking a
13 body of law, the laws that apply in places
14 within the sole and exclusive jurisdiction, and
15 say that that extends to Indian country.

16 Now where do you get any notion of the
17 preemption of state jurisdiction in that?

18 MR. SCHAUF: So I -- I think the Major
19 Crimes Act says much the same thing, which this
20 Court has held is preemptive. And I think
21 that's for good reason. And I think that when
22 --

23 CHIEF JUSTICE ROBERTS: Where -- where
24 do you get it in the language of that statute,
25 not in what the Court may have said about the

1 Major Crimes Act?

2 MR. SCHAUF: Sure, Mr. Chief Justice.

3 So I think the answer is that when you
4 extend the general laws of the United States as
5 to crimes, that is a reference to the enclave
6 laws. And one of the background principles in
7 federal enclaves is that states can prosecute
8 only if Congress expressly allows it.

9 So I think, you know --

10 CHIEF JUSTICE ROBERTS: Well, okay,
11 but you're -- in other words, you're saying that
12 a background principle.

13 They're -- they're taking a particular
14 reference point, right, the general laws that
15 apply in this particular area and doesn't say
16 that all of the legal issues or jurisdictional
17 questions in enclaves apply in Indian country,
18 which they could have easily said. They simply
19 say that body of general laws applies.

20 MR. SCHAUF: Well, so, you know, we
21 think that when you take the principle from the
22 sort of soil of the federal enclaves, it brings
23 with it this idea of federal exclusivity,
24 particularly when you look at the body of law
25 that's being applied. You know, this is the

1 general federal laws plus the Assimilative
2 Crimes Act. It is designed to replace the --

3 CHIEF JUSTICE ROBERTS: Okay. So it's
4 the soil that comes, it's not the language
5 itself?

6 MR. SCHAUF: Well, so I -- I think
7 it's -- it's the language that brings the soil
8 with it, but it's also not only the language of
9 this statute because, remember, we have -- you
10 know, just imagine you're sitting there and it's
11 June 25, 1948. Congress is reenacting the
12 General Crimes Act, this language. And at the
13 same time, it's re- --

14 CHIEF JUSTICE ROBERTS: Well, but
15 that's just a general -- general codification,
16 right? I mean, you've said over and over again
17 that we shouldn't draw any inferences from the
18 recodification in 1948, which is all the -- all
19 the provisions in the U.S. Code, right?

20 MR. SCHAUF: So, as to Indian country
21 criminal jurisdiction, this is the very opposite
22 of a general codification. So the -- the term
23 that governs the General Crimes Act's geographic
24 scope is Indian country.

25 And in 1948, Congress codifies that

1 definition in 1151, immediately prior section,
2 for the first time since 1934. It does so
3 expressly recognizing that Indian country is
4 going to include land within states.

5 It looks at this Court's cases in
6 doing that, including, and you can see this in
7 the revisor's notes, this Court's decision in
8 Donnelly, which says that the single basis for
9 state criminal jurisdiction in Indian country,
10 McBratney and Draper, does not apply to cases
11 like this one.

12 And then simultaneously you have the
13 reauthorization of the Kansas Act saying we are
14 going to give just Kansas and then also Iowa and
15 New York around week later jurisdiction over
16 crimes by or against Indians.

17 JUSTICE BREYER: That's Congress's
18 intent. Now I thought -- I had the same
19 question. And -- and I thought, but I -- don't
20 make me -- don't just agree with this if --
21 if -- if -- if I'm wrong -- that the federal
22 enclaves are -- are exclusive of state
23 prosecutorial powers. The state can't prosecute
24 crimes in federal enclaves.

25 Why not? Well, it was constitutional

1 in origin, I think so, and those constitutional
2 principles about federal enclaves as applied
3 were prosecutions in federal enclaves are
4 federal, period, not state. And that was the
5 principle based on a constitutional reference
6 which meant the words "general laws" pick up
7 that jurisdictional principle.

8 Am I right or wrong?

9 MR. SCHAUF: I -- I think you are
10 right, Justice Breyer, and I think it's
11 particularly significant that you are taking
12 those principles and you are applying them to
13 Indian country, which is another area which
14 historically and presumptively is one where
15 federal law is preeminent and state law gives
16 way particularly easily.

17 You know, as this Court emphasized in
18 Williams versus Lee, the basic policy of
19 Worcester endures.

20 JUSTICE BREYER: Are you being --

21 CHIEF JUSTICE ROBERTS: Well, I think
22 --

23 JUSTICE BREYER: Yeah. Go ahead.

24 CHIEF JUSTICE ROBERTS: No, I was just
25 going to say, I hesitate to say it, but I think

1 you may be wrong in -- in that they could have
2 said that the exclusive jurisdiction extends to
3 Indian country and that would have been a pretty
4 big deal. Instead, they say these laws extend
5 to Indian country.

6 JUSTICE BREYER: Yeah, you know,
7 that's right, that's the other way to read it.
8 The other way to read it is general laws mean
9 substantive laws. And that's -- or your way to
10 read it would be it includes principles, at
11 least those derived from the Constitution.

12 Have I got it right? Is that right?

13 CHIEF JUSTICE ROBERTS: Yeah.

14 JUSTICE BREYER: All right.

15 MR. SCHAUF: So I -- I do think those
16 are the two readings that are on the table. I
17 think one reason to pick ours is that it's the
18 only one that is consistent with 82 years of
19 statutes Congress has enacted using the phrase
20 "by or against Indians." And I think it's
21 significant that it's really done that in
22 dialogue with this Court's cases.

23 So two years after this Court in
24 Williams says, you know, what Donnelly means is
25 no state jurisdiction, you have the reenactment

1 of the General Crimes Act and the -- you know,
2 these several state-specific statutes. Then you
3 get Public Law 280 a few years later. In 1958,
4 Williams versus Lee reaffirms the rule here is
5 exclusive federal jurisdiction.

6 And then, in 1968, Congress amends
7 Public Law 280 based on all that, and -- and it
8 does a couple of significant things. So, number
9 one, it creates this tribal consent right. That
10 consent right, as a matter of text, applies to
11 assumptions of jurisdiction over crimes by or
12 against Indians. My friend's position would
13 read that text out of what Congress provided in
14 1968, which was a hard-won victory that tribes
15 earned. And our fundamental submission is that
16 if Oklahoma wants to do that, then it needs to
17 do what the tribes did and go back to Congress.
18 And it also allowed states to retrocede, again,
19 that specific jurisdiction, crimes against
20 Indians. And many, many states have decided to
21 do so. And they would nullify that choice as
22 well.

23 CHIEF JUSTICE ROBERTS: You -- you
24 rely heavily on Worcester against Georgia. What
25 do you do -- I think it was Frankfurter, his

1 language in Village of Kake, that "the general
2 notion" -- I'm quoting -- "drawn from Chief
3 Justice Marshall's opinion in Worcester that an
4 Indian reservation is a distinct nation within
5 whose boundaries state law cannot penetrate
6 yielded to closer analysis when confronted in
7 the course of subsequent developments with
8 diverse concrete situations."

9 I mean, I understand that if Worcester
10 against Georgia were the law that we were
11 dealing with today, that I think your friend's
12 argument on the other side to try to changes the
13 parameters of the argument to a strict
14 preemption analysis might be pretty difficult.
15 But, I mean, is Frankfurter wrong?

16 MR. SCHAUF: So I think there are
17 three answers --

18 CHIEF JUSTICE ROBERTS: We might be
19 too.

20 MR. SCHAUF: -- three answers to that,
21 Mr. Chief Justice.

22 Number one, in 1834, Congress's
23 backdrop was Worcester, so that was the
24 understanding that Congress had when it enacted
25 the, you know, forerunner to the General Crimes

1 Act.

2 Second, you know, those same cases
3 like Williams versus Lee that say we have
4 departed in some respects from Worcester
5 emphasized that the rule in this case is that
6 state courts lack jurisdiction.

7 And, third, I don't think we have to
8 guess about sort of how to translate, you know,
9 Worcester into, you know, an era where you have
10 reservations existing within state boundaries,
11 because we have everything that happened in
12 1940, 1948, and thereafter, where you see
13 Congress itself grappling with what should be
14 the rule against the backdrop of this Court's
15 cases saying, you know, we have recognized this
16 one ground for state criminal jurisdiction in
17 Indian country and it doesn't apply to crimes by
18 or against Indians.

19 So I think the core point is that as
20 the -- as to the question presented here, you
21 know, this is something that Congress really has
22 resolved.

23 CHIEF JUSTICE ROBERTS: Justice
24 Thomas?

25 Justice Breyer, anything further?

1 Justice Alito?

2 JUSTICE ALITO: You said that the
3 regular rules of preemption do not apply in a
4 case like this. What is your test for
5 preemption in a situation like this?

6 MR. SCHAUF: So I -- I think the --
7 the easy way to approach this is what this Court
8 said in John and Negonsott was sufficient under
9 the Major Crimes Act, is that the Major Crimes
10 Act uses the word "exclusive" and so sort of
11 assimilates Indian country to federal enclaves.
12 And it was passed on the understanding that that
13 federal jurisdiction would be exclusive.

14 And I think that is consistent with
15 the general approach to preemption in Indian
16 country, where -- you know, what this Court has
17 said is that Worcester remains the starting
18 point and it's departed only when there is no
19 governing statute.

20 And so, here, where you've got s
21 governing statute --

22 JUSTICE ALITO: Well -- well, that
23 seems to me to be an argument about the
24 interpretation of the General Crimes Act rather
25 than an argument about the applicable test for

1 preemption.

2 What if I thought that the language of
3 the General Crimes Act is quite clear and that
4 it means that the law that applies in federal
5 enclaves applies in Indian country and goes no
6 further than that? Is that the end of the case?

7 MR. SCHAUF: No. I mean, I think,
8 again, you know, what this Court said
9 in Mescalero Apache -- what I hear, you know,
10 your question to be saying, Justice Alito, is
11 that there is no express statement of
12 preemption. And what this Court had said in
13 Mescalero Apache is that you do not need an
14 express statement of preemption. And, you know,
15 if you --

16 JUSTICE ALITO: Yeah, and that's my
17 question.

18 MR. SCHAUF: -- if you want a test, I
19 think --

20 JUSTICE ALITO: I mean, that's my
21 question. What more -- what do you need more?
22 What -- what do you need in this situation that
23 is insufficient, would be insufficient in an
24 ordinary preemption case?

25 MR. SCHAUF: So, you know, I think

1 what -- really, what this Court has said is that
2 it is a more lenient standard. And so, when you
3 have text that I think we can all agree contains
4 some indicia of federal jurisdiction, then, you
5 know, that really is it, and the state must show
6 an affirmative authorization to --

7 JUSTICE ALITO: You mean that the
8 language has to be ambiguous? It has to be
9 possible to read the language to mean something
10 different?

11 MR. SCHAUF: So I think that this
12 Court's --

13 JUSTICE ALITO: Is that enough?

14 MR. SCHAUF: -- this Court's cases
15 have gone much further than that. It has found
16 preemption under the Indian country preemption
17 standard even where there is no preemptive
18 language at all. You can look at cases like
19 Warren Trading or Central Machine. These are
20 cases about the Indian trader statutes. And the
21 only text at issue in those statutes were --
22 were provisions that, for example, let the
23 federal government prohibit entirely commerce
24 with Indians.

25 So I think we have a much easier case

1 because we have a statute that directly
2 addresses this question and does so while saying
3 treat Indian country like federal enclaves where
4 federal jurisdiction is sole and exclusive.
5 And, you know, we think it goes much further
6 than that, but I think that is enough under this
7 Court's preemption cases in Indian country.

8 CHIEF JUSTICE ROBERTS: Justice
9 Sotomayor?

10 Justice Kagan?

11 Justice Gorsuch?

12 JUSTICE GORSUCH: Do you think the
13 preemption analysis is affected by treaty
14 promises?

15 MR. SCHAUF: I do think the preemption
16 analysis is affected by treaty promises. And,
17 you know, one other place you could start this
18 case is the treaty promise to the Cherokee
19 Nation that it would be under the protection of
20 the federal government and no other sovereign
21 whatsoever. You could add the promise that the
22 federal government is going to be the one to
23 protect Indians from crimes by non-Indians. And
24 you could take the promise that Cherokee lands
25 would not be included within state jurisdiction

1 without Cherokee consent.

2 And I think, when you put that set of
3 set of treaty promises together, the only
4 understanding you can have is that they expected
5 the federal government alone to prosecute these
6 types of crimes. And so, if you've got an
7 available reading of the statute that vindicates
8 rather than breaks those treaty promises, I
9 think you take that reading of the statute.

10 CHIEF JUSTICE ROBERTS: Justice
11 Kavanaugh?

12 Justice Barrett?

13 JUSTICE BARRETT: I want to give you a
14 chance to respond to this argument with respect
15 to the General Crimes Act and the Major Crimes
16 Act and the potential similarities or
17 differences between the two.

18 So you say that the language is quite
19 similar, and I agree they both use the phrase
20 "exclusive jurisdiction." But I'm wondering if
21 the language actually cuts against your argument
22 in this way: So your friend on the other side
23 says that this is taking one body of law and
24 extending it to Indian country in the General
25 Crimes Act.

1 The Major Crimes Act is phrased
2 differently, so it doesn't use this language of
3 "extend." It says an Indian who commits certain
4 crimes against another Indian "shall be subject
5 to the same law and penalties as all other
6 persons committing any of the above offenses
7 within the exclusive jurisdiction of the United
8 States."

9 Well, a person who commits any of
10 those offenses within the exclusive jurisdiction
11 of the United States is subject to only one law,
12 and it's the law of the United States. I think
13 that phrasing is quite different when you set it
14 in contrast to the General Crimes Act. So I
15 wondered what your reaction is to that.

16 MR. SCHAUF: So I think the first
17 answer is that those nuances have nothing to do
18 with why this Court said in John and Negonsott
19 that the Major Crimes Act was preemptive, which
20 really was just about, you know, the comparison
21 between Indian country and exclusive -- you
22 know, areas of exclusive federal jurisdiction.

23 But I think the text fundamentally
24 does the same thing. You know, what it says is
25 that individuals are subject to the same law and

1 penalties as all other persons committing these
2 enumerated offenses, which I think sweeps in a
3 set of criminal but not civil principles, which
4 I think is exactly what the phrase "as to the
5 punishment of offenses" does in the General
6 Crimes Act. So I think they do fundamentally
7 the same thing.

8 And I guess another -- another point I
9 would make on that is that, you know, if that
10 argument were right, I think that would cut in
11 our favor. I mean, if you look, for example, at
12 the 1817 statute that was the precursor to the
13 General Crimes Act, it uses actually language
14 that's pretty similar to what's now in the Major
15 Crimes Act. It says that defendants shall be
16 subject to like punishment as others within
17 areas of exclusive federal jurisdiction. So,
18 you know, that -- their argument, I think, would
19 make the 1817 General Crimes Act preemptive.
20 And I don't think there's any story in which the
21 General Crimes Act, you know, was preemptive in
22 1817 and stopped being that after.

23 But I think the more fundamental point
24 is that none of these nuances really have
25 anything to do with why this Court in John and

1 Negonsott held that the Major Crimes Act was
2 preemptive under the Indian country preemption
3 standard.

4 JUSTICE BARRETT: Thank you.

5 CHIEF JUSTICE ROBERTS: Thank you,
6 counsel.

7 ORAL ARGUMENT OF EDWIN S. KNEEDLER
8 FOR THE UNITED STATES, AS AMICUS CURIAE,
9 SUPPORTING THE RESPONDENT

10 MR. KNEEDLER: Mr. Chief Justice and
11 may it please the court:

12 The text, the statutory context and
13 history of 1152 firmly established that it
14 provides for exclusive federal jurisdiction over
15 crimes by non-Indians against Indians in Indian
16 country.

17 For over 100 years, starting with this
18 Court's decision in *Donnelly*, the Court has
19 construed Section 1152 in exactly that manner.
20 And beginning more than 80 years ago, Congress
21 has repeatedly enacted laws that made clear that
22 an act of Congress is necessary to authorize a
23 state to authorize -- to conduct such
24 prosecutions.

25 The roots of exclusive federal

1 jurisdiction under the statute, in fact, go much
2 deeper, though, to the founding, when the
3 framers rejected the divided authority under the
4 Articles of Confederation and invested plenary
5 and exclusive power over Indian affairs in the
6 national government.

7 And the early Congresses invoked those
8 powers by enacting Section 1152's predecessors
9 to prevent violence that could lead to war and
10 to further the nation's commitments to protect
11 the Indians and their -- the Indians and
12 territories from federal encroachment --
13 encroachment by often hostile states and their
14 citizens.

15 This Court should reject the
16 proposition that it should overturn 100 years of
17 settled understanding of this statute in this
18 Court and Congress, by the executive branch and
19 in the states to solve a problem following this
20 Court's decision in *McGirt* because the result
21 would be to unsettle established jurisdictional
22 understandings and jurisdictional arrangements
23 in many other states and, in fact, would
24 unsettle jurisdictional understandings in the
25 State of Oklahoma beyond what was -- that were

1 in existence at the time of this decision in
2 McGirt.

3 Oklahoma has much trust and restricted
4 allotment land in both the western part of the
5 state and the eastern part of the state which
6 for more than 30 years, has been understood to
7 be subject to exclusive jurisdiction and the
8 states have not been able to apply their laws
9 there.

10 So what the state is asking for here
11 is not just to go back to what the situation was
12 before McGirt but to undo the settled
13 understanding in Oklahoma itself about the --
14 the application of state law to --

15 CHIEF JUSTICE ROBERTS: What --

16 MR. KNEEDLER: -- Indian country.

17 CHIEF JUSTICE ROBERTS: -- what is
18 your answer to the language, Frankfurter's
19 language I read from Kake concerning what weight
20 we should give to Worcester against Georgia?

21 MR. KNEEDLER: I think that
22 proposition has to do with things where there is
23 not a governing act of Congress.

24 It -- it often comes up that there may
25 be a question of just inherent tribal

1 sovereignty and does state law interfere with
2 that. And there have been some adjustments of
3 that, largely because non-Indians have moved on
4 a reservation, and often state law will apply to
5 the non-Indians in that situation. They --

6 CHIEF JUSTICE ROBERTS: But I'm -- I'm
7 sorry, go ahead.

8 MR. KNEEDLER: No, but, here, we have
9 an act of Congress that -- that is deeply rooted
10 in exclusive jurisdiction over -- over crimes by
11 or against Indians back to the founding. And
12 changes --

13 CHIEF JUSTICE ROBERTS: Well -- well,
14 but, I mean, I think what Frankfurter was
15 addressing is the overall theory of what
16 Marshall's approach was, that the -- the
17 boundary theory, that this is the state and this
18 is the Indian country and -- and, you know, they
19 don't -- don't overlap at all.

20 And Frankfurter's point is, well, it
21 turns out that they have to overlap quite a bit
22 if you're going to deal with all these different
23 factual situations that come up.

24 So the notion, which certainly has a
25 lot to play in the arguments that -- that you

1 have chosen to support, I think, is undermined
2 quite a bit. I mean, I -- to the -- to the
3 extent, I guess, you -- you agree that this is a
4 preemption case, don't you?

5 MR. KNEEDLER: Well, of a -- of a
6 sort, but that's not the way, you know, this
7 Court has understood it. And I -- and I -- I --
8 I -- it hasn't used that terminology. And I --
9 I -- I want to take a moment to explain the
10 origins of the modern understanding of this,
11 which is this -- this Court's decision in
12 Donnelly, which was a watershed on this point.

13 The argument was made there that
14 the -- that the result in Draper and McBratney
15 should control and that the state should have
16 jurisdiction and not the federal government.

17 The argument -- or the result in -- in
18 McBratney and Draper was not concurrent
19 jurisdiction. The theory of those cases was
20 that by admitting -- the act admitting those
21 states to the union had repealed 1152 and
22 therefore allowed state jurisdiction to come
23 into play.

24 And the Court said that expressly in
25 Donnelly. It said that Draper and McBratney

1 understood that the statehood acts had the --
2 qualified the prior jurisdiction of 1152 by
3 withdrawing from the federal government and then
4 conferring on the state the jurisdiction to
5 prosecute crimes by non-Indians against
6 non-Indians.

7 The whole understanding of that case
8 was it's one or the other. It's either
9 exclusive jurisdiction or it's not exclusive
10 jurisdiction. It's state jurisdiction.

11 And to your point, Justice Gorsuch,
12 the Court in Donnelly made the very point that
13 you made. It -- it said that in the Court's
14 prior decision in -- in Kagama, which involved
15 prosecution of Indians, the Court said that that
16 was exclusively -- that was subject to federal
17 jurisdiction because the states are often the --
18 the hostile enemies of the Indians and also of
19 the need to protect the Indians as the wards of
20 the nation.

21 JUSTICE ALITO: Could you explain --

22 MR. KNEEDLER: The Court in
23 Donnelly --

24 JUSTICE ALITO: No, go ahead.

25 MR. KNEEDLER: May I just finish for a

1 moment?

2 JUSTICE ALITO: Sure, yeah.

3 MR. KNEEDLER: The Court in Donnelly
4 said that same principle applies perhaps a
5 fortiori to a situation where you have a
6 non-Indian committing a crime against an Indian
7 because of the need to protect the words of the
8 nation. So, as Donnelly, I think, settled this
9 question, and it -- it isn't just dicta. It was
10 --

11 JUSTICE ALITO: Well, Mr. Kneedler,
12 that's --

13 MR. KNEEDLER: -- the very reasoning
14 that --

15 JUSTICE ALITO: -- that's all very
16 abstract, but could you explain why exclusive
17 federal jurisdiction is better for Indian
18 victims of crimes by non-Indians than concurrent
19 jurisdiction?

20 MR. KNEEDLER: It may or may not be.
21 And I think a lot of it has to do with
22 perception. There are three sovereigns involved
23 here. There's the federal government, the
24 state, and the tribes and the tribal members,
25 and they may not all see the same -- see the

1 same on that. And that was the -- that was the
2 purpose for Congress enacting Public Law 280, is
3 it would allow the states --

4 JUSTICE ALITO: All right. Well --

5 MR. KNEEDLER: -- not the tribes --

6 JUSTICE ALITO: -- in -- in --

7 MR. KNEEDLER: -- to decide that.

8 JUSTICE ALITO: -- in more concrete
9 terms, you have a crime -- alleged crime
10 committed by a non-Indian against an Indian.

11 Why is it better for the Indian victim
12 that the only recourse is federal prosecution
13 with the limited resources that federal -- that
14 federal law enforcement has rather than
15 concurrent jurisdiction? Concretely, why is
16 that worse?

17 MR. KNEEDLER: I --

18 JUSTICE ALITO: If the state goes
19 first and the Indian victim or the tribe is not
20 satisfied with the way that played out, we have
21 the dual sovereign doctrine, which we reaffirmed
22 in Gamble, and the federal government can step
23 in and prosecute.

24 Why -- why does that disadvantage an
25 Indian victim? I don't really understand that.

1 MR. KNEEDLER: I -- I -- I'm not here
2 arguing that it necessarily disadvantages any
3 particular Indian victim. The United States
4 prosecutes crimes in some states that have
5 concurrent jurisdiction, but that concurrent
6 jurisdiction exists because the relevant
7 sovereigns have agreed to that regime.

8 JUSTICE ALITO: Well, this sounds
9 awfully abstract. Now I think the most valuable
10 information you can provide for me at least is
11 an assessment of the situation right now in
12 Oklahoma and whether -- whether the criminal
13 laws are being adequately enforced right now and
14 whether the current situation in the judgment of
15 the United States is sustainable.

16 Suppose there Congress does nothing.

17 MR. KNEEDLER: Well, I --

18 JUSTICE ALITO: Is it -- is it a
19 sustainable situation? Is the federal
20 government going to be able to provide enough
21 federal agents, enough federal prosecutors,
22 enough federal judges, enough federal
23 courtrooms, enough federal probation officers,
24 to handle the caseload that was previously
25 handled by state law enforcement?

1 MR. KNEEDLER: Yeah, I'm -- I'm not
2 here to minimize the challenge that has resulted
3 from the decision in -- in McGirt. And the --
4 the Justice Department has responded to that by
5 providing resources to Oklahoma, 110 additional
6 AUSA positions. Federal district court judges
7 have been designated to serve in -- in the
8 districts, magistrates have been brought in, FBI
9 agents have been brought in.

10 JUSTICE ALITO: I mean, I --

11 MR. KNEEDLER: Those are -- those are
12 temporary.

13 JUSTICE ALITO: Yeah, I appreciate all
14 that, but I did have two questions. Is the
15 situation right now adequate from the
16 perspective of the United States --

17 MR. KNEEDLER: Not --

18 JUSTICE ALITO: -- and, if it is not,
19 is it sustainable?

20 MR. KNEEDLER: The -- the situation
21 with respect to funding, there are -- there are
22 two points, is there adequate funding and will
23 that funding be permanent.

24 The Administration has requested an
25 additional \$40 million for AUSAs and an

1 additional 76 slots for FBI agents, additional
2 federal marshals, addition -- additional money
3 for the prisons.

4 It -- and Congress in its political
5 responsibility, we trust, will appropriate that
6 money --

7 JUSTICE ALITO: Well, are you counting
8 --

9 MR. KNEEDLER: -- to carry out the --

10 JUSTICE ALITO: -- are you -- are you
11 counting on that? Are you counting on this
12 being the permanent situation, or are you
13 counting on an agreement between the state and
14 the tribes? And, if it is the latter, what is
15 the universe of agenda items in the negotiations
16 between Oklahoma and the tribes? What are they
17 --

18 MR. KNEEDLER: We -- we are not --

19 JUSTICE ALITO: -- negotiating about?

20 MR. KNEEDLER: -- we are not counting
21 on an agreement between the tribes and the
22 states. If they agreed, that would be great.
23 And, in fact, that's what Public Law 280
24 contemplates. That's the statutory framework
25 that -- that has been put in place.

1 But I think we have to assume Congress
2 will live up to the responsibilities that -- to
3 enable the Justice Department to do everything
4 that is necessary. It -- it is prosecuting
5 major crimes and violent crimes. It is
6 prioritizing that, as it necessarily must. And
7 as they -- as things hit their stride, then some
8 of the less serious crimes will be prosecuted.
9 It's not like they've been dropped. They're in
10 the queue to be prosecuted as time comes along.

11 But my basic point is the Court should
12 not rearrange this established jurisdictional
13 regime because of -- of this moment in time in
14 Oklahoma, because it would unsettle
15 jurisdictional arrangements throughout the
16 country. And I -- one point I think hasn't
17 gotten enough emphasis on that, there are a
18 number of states that have chosen not to assume
19 jurisdiction under Public Law 280 before 1968,
20 and that would involve tribal consent.

21 But the 1968 amendments to Public Law
22 280 also provided for the retrocession of
23 jurisdiction by a state to the federal
24 government. And -- and I understand there have
25 been 30 retrocessions of jurisdiction. But the

1 statutory retrocession provision only provides
2 for retrocession of jurisdiction that was
3 acquired under Public Law 280 itself.

4 And that -- two -- there are two
5 lessens from that. One is it shows that it was
6 necessary for Congress to do something to enable
7 a state to acquire jurisdiction under Public Law
8 280 in the first place over crimes by or against
9 Indians. But it also shows that if the states
10 were -- were now found to have inherent
11 concurrent jurisdiction notwithstanding the
12 statutory framework, the corpus juris of Public
13 Law 280 and all those other statutes, it
14 couldn't retrocede that because it would not
15 have been jurisdiction acquired under Public Law
16 280. And that would -- that would perhaps call
17 into question the retrocessions that those
18 states have already made --

19 JUSTICE SOTOMAYOR: Counsel --

20 MR. KNEEDLER: -- states that have
21 decided they didn't want the jurisdiction that
22 had been offered to them under Public Law 280,
23 which just reinforces the idea that Congress has
24 made the allocation of jurisdiction in Indian
25 country against the backdrop of Donnelly, where

1 it's exclusive, to be the subject by sovereign
2 choices by the United States, which can --
3 Congress could pass a law conferring
4 jurisdiction, taking into account the concerns
5 we have, by the tribes and the states. That's
6 fundamentally a political judgment about how
7 that jurisdiction should be allocated.

8 JUSTICE ALITO: Well, if a state
9 doesn't want concurrent jurisdiction, is there
10 anything to prevent the state legislature from
11 forswearing that?

12 MR. KNEEDLER: No, but that's not
13 the -- I don't -- I don't think so, but I -- but
14 -- but if the state has -- if the state has this
15 jurisdiction by virtue of its statehood, then I
16 don't know whether it would be responsible for
17 the state to disavow it. It has jurisdiction.
18 Doesn't it have to do something about it?

19 But what -- but what Congress enacted,
20 again, a framework in which it's up to the
21 respective sovereigns to decide how Indian
22 country should be governed and, therefore, with
23 -- from the tribal perspective, it's not a
24 question whether a particular Indian victim in a
25 particular case would be better protected or

1 not. There is a collective judgment to be made
2 on behalf of the tribe with respect to its
3 territory about how the sovereign authorities
4 will be allocated.

5 I -- I mentioned --

6 JUSTICE SOTOMAYOR: Isn't that the
7 point --

8 MR. KNEEDLER: I'm sorry.

9 JUSTICE SOTOMAYOR: -- which is
10 Indians have their rights vis-à-vis their own
11 government, their own Indian government, and
12 they have expectations of what that reservation
13 will do for them or not do for them, that --
14 correct?

15 MR. KNEEDLER: Yes.

16 JUSTICE SOTOMAYOR: And that's the
17 same view when you were saying, in treaties, the
18 Cherokee Treaty here, says that the federal
19 government will protect them, correct?

20 MR. KNEEDLER: Yes.

21 JUSTICE SOTOMAYOR: And so, to the
22 extent that a victim has expectations, that's
23 the expectation, correct?

24 MR. KNEEDLER: Yeah. So, as -- as a
25 member of the tribe. And, yes, an important

1 difference between the United States and the
2 state, it's not just two -- two entities, both
3 can prosecute. There is a trust relationship
4 between the United States and a state -- excuse
5 me, and a tribe and the tribal members. There
6 is not a trust relationship between a state and
7 the tribal members.

8 And it's understandable, particularly
9 given the history -- as -- as this Court said in
10 McGirt itself, there is a long history of
11 separating tribes and tribal members from the
12 states because of the hostility. It's
13 understandable that a tribe and its members
14 would think it would be best to look to the
15 trustee for protection and not necessarily the
16 state.

17 Now a tribe might make a different
18 conclusion and consent to state jurisdiction
19 because it thinks it's better for its tribal
20 members, but that -- but that is the essence of
21 tribal self-government, to allow the people of
22 the tribe to decide whether they want to consent
23 to state jurisdiction or not.

24 JUSTICE SOTOMAYOR: Is there any
25 source that I can look at that would tell me --

1 everyone assumes that Oklahoma has been fully
2 prosecuting over time -- well, we don't have a
3 history, correct?

4 MR. KNEEDLER: Not -- not in the --
5 not in these -- in the fee lands and -- and the
6 reservation, no.

7 JUSTICE SOTOMAYOR: Right. So there
8 -- there is an assumption that Oklahoma will
9 actually expend the resources in doing this,
10 correct?

11 MR. KNEEDLER: Well, I -- I --

12 JUSTICE SOTOMAYOR: It did before, and
13 --

14 MR. KNEEDLER: Yes, and -- and I'm not
15 in a position to assess how well Oklahoma did
16 that --

17 JUSTICE SOTOMAYOR: No. No, but --

18 MR. KNEEDLER: -- before.

19 JUSTICE SOTOMAYOR: -- is there a
20 source I can look at that would tell me that, in
21 fact, Oklahoma -- we know they prosecuted some
22 of the people who are getting out now, although
23 many of them have been prosecuted by the federal
24 government. Do you have an idea of how many
25 people have been let out without prosecution by

1 the federal government?

2 MR. KNEEDLER: I -- I -- I don't
3 recall, frankly, the precise number. It's, I
4 think, not that great. I can supply the -- the
5 figure that was given. I think it may be a
6 hundred, a couple hundred, but I -- please don't
7 hold me to that because I -- I'm not -- I don't
8 --

9 JUSTICE SOTOMAYOR: That's what I've
10 been given to understand.

11 MR. KNEEDLER: Right.

12 JUSTICE SOTOMAYOR: So there's nothing
13 to suggest that the number is going to be as
14 large as -- as is being thrown around by the
15 Petitioner?

16 MR. KNEEDLER: Right. I also wanted
17 to mention a couple of the other Court's
18 decisions. It's not just Donnelly, where --
19 where the reasoning depended on this reasoning
20 that the -- that the statute is exclusive. It
21 was also true in Williams versus United States,
22 where the Court specifically said that the
23 United States, rather than the State of Arizona,
24 has jurisdiction. That's not concurrent.
25 That's exclusive. And there was a long footnote

1 recounting what the Court held in Donnelly and
2 said there may have been some confusion about
3 that. But, in Donnelly itself, the Court said
4 we have now given a full evaluation of this and
5 this is our conclusion, that the principle of
6 McBratney and Draper does not apply and,
7 therefore, the -- the federal government has the
8 exclusive jurisdiction.

9 And that was particularly relevant in
10 that case because the question in -- in Williams
11 versus United States was the application of the
12 Assimilative Crimes Act to the particular crime.
13 And the Assimilative Crimes Act, of course,
14 brings state law in not of its own force but
15 because it's assimilated. And the Court was --
16 that passage in the Court's opinion was
17 explaining why the -- why state law was relevant
18 there, because it was assimilated into exclusive
19 federal jurisdiction.

20 CHIEF JUSTICE ROBERTS: Thank you,
21 counsel.

22 Justice Thomas, anything further?

23 Justice Breyer? Nothing?

24 Justice Sotomayor?

25 Justice Kagan?

1 Justice Gorsuch? No?

2 Justice Kavanaugh?

3 JUSTICE KAVANAUGH: Just one. On the
4 -- on the statutory text, if we just took the
5 statutory text and nothing else and your
6 position on how to interpret the statutory text
7 were correct, why would a state have
8 jurisdiction over non-Indian-on-non-Indian crime
9 in Indian country?

10 MR. KNEEDLER: Well, what -- what the
11 Court held in -- in McBratney and Draper was
12 that the Statehood Act had repealed that. Not
13 -- it's not that the text itself doesn't --
14 doesn't reach it. It's that Draper and
15 McBratney held that it -- it had been -- it had
16 been repealed with respect to that category.

17 So there is asymmetry in the statute
18 as a result. Indian on Indian crimes are
19 excluded by the second paragraph.
20 Non-Indian-by-non -- upon-non-Indian crimes are
21 excluded by virtue of Draper and McBratney.

22 And in the middle, where you have
23 crimes by non-Indians against Indians or the
24 other way around, the very core of the
25 relationship between Indians and non-Indians

1 that Congress was given exclusive responsibility
2 for from the founding forward, that remains
3 exclusive federal jurisdiction.

4 And this Court's decision in *Negonsott*
5 said that it's the text and the Court's
6 decisions that had rendered the Major Crimes Act
7 jurisdiction exclusive, and it relied only on
8 the word "exclusive." We had that -- same point
9 here. And if I could make one other textual
10 point because I think this is important.

11 My friend on the other side has
12 several times relied on language in *Wilson* and
13 also in *Donnelly* as saying the word exclusive
14 refers not to the nature of the jurisdiction but
15 to the laws imported. And I -- I -- I think he
16 is misreading that language.

17 The argument in both *Donnelly* and
18 *Wilson*, it was a somewhat convoluted argument,
19 but it was that the federal government as a
20 whole does not have exclusive jurisdiction over
21 those particular reservations, like in *Donnelly*,
22 it was the state has created a school district,
23 therefore, the federal government doesn't have
24 exclusive jurisdiction.

25 Therefore, the argument was the

1 federal criminal statute can't apply because
2 it's being applied in an area where there is not
3 exclusive jurisdiction. And the court said no,
4 the -- the -- the phrase you're talking about is
5 not talking about the general nature of the
6 jurisdiction of an Indian reservation. It's
7 talking about the laws that will be applied
8 in -- in that area.

9 And -- and here, that's exactly what
10 we're saying. The law that will be applied in
11 Indian country, whether or not it's exclusive
12 for other purposes, is --

13 JUSTICE KAVANAUGH: Thank -- thank
14 you.

15 MR. KNEEDLER: -- the enclaves law,
16 which is itself exclusive.

17 CHIEF JUSTICE ROBERTS: Justice
18 Barrett?

19 Thank you, Mr. Kneedler.

20 Rebuttal, Mr. Shanmugam.

21 REBUTTAL ARGUMENT OF KANNON K. SHANMUGAM

22 ON BEHALF OF THE PETITIONER

23 MR. SHANMUGAM: Thank you, Mr. Chief
24 Justice. I'd like to cover the relevant
25 preemption principles, talk a little bit about

1 the cases, and then finally talk about the
2 practical consequences.

3 My friend Mr. Kneedler says that this
4 is "preemption of a sort." Well, it can't be
5 that. It has to be some form of preemption that
6 this Court has recognized, and it seems to us
7 that there are three possibilities.

8 The first is obviously conflict
9 preemption. And my friend, Mr. Schauf, talked
10 only about the General Crimes Act. With respect
11 to my friend, Mr. Kneedler, we do think that
12 this Court's decision in Wilson resolves this
13 issue for the simple reason that it says in the
14 second half of the relevant sentence that the
15 phrase "within the sole and exclusive
16 jurisdiction of the United States" is only used
17 in the description of the laws which are
18 extended to it.

19 We think that that's correct as a
20 matter of statutory interpretation because the
21 statute talks only about the general laws of the
22 United States extending to Indian country. And
23 to the extent that my friend, Mr. Schauf, talks
24 about a background principle in the soil, the
25 principle at issue is a constitutional

1 principle. It's the principle from the enclaves
2 clause in Article I, section 8.

3 And I think it would be quite strange,
4 given the structure of that provision, to say
5 that it incorporates that principle as well.
6 And if it did, it would suggest that McBratney
7 itself was incorrectly decided.

8 And to the extent that finding no
9 footing in the text of the General Crimes Act my
10 friends turn to the Major Crimes Act, we think
11 that the proper way to construe the Major Crimes
12 Act is as indicating that an Indian who commits
13 a crime that is enumerated is subject to
14 prosecution within the exclusive jurisdiction of
15 the United States, not simply that such an
16 individual is subjected to the same punishment
17 as an individual who commits a crime within
18 federal enclaves.

19 This court's decisions in John and
20 Negonsott relied on the text of the statute,
21 albeit without much explanation, and that's even
22 clearer when you look at the earlier versions of
23 the two statutes, which we cite in our reply
24 brief.

25 As to Public Law 280, the argument

1 that my friend, Mr. Schauf, is making today
2 really does sound in field preemption. And I
3 would respectfully submit that Public Law 280
4 comes nowhere near the standard for field
5 preemption, which requires a framework of
6 regulations so comprehensive that Congress left
7 no room for the states to supplement it, and a
8 federal interest that is so dominant that the
9 federal system can be assumed to preclude state
10 laws. That's the Arizona versus United States
11 test. And that would be a very odd test to say
12 is satisfied in an area where the state has
13 presumptive predominant police power.

14 Finally, with regard to balancing, the
15 language on which Mr. Schauf relied on from
16 Mescalero talks about how the ordinary
17 preemption framework often doesn't operate where
18 there's a tribal interest.

19 But what Mr. Schauf omits is that the
20 court says that when that is true, the court
21 resorts to balancing. And we haven't heard a
22 lot today about how Respondent could prevail
23 under that balancing test. And I would
24 respectfully submit that that is because he
25 cannot.

1 With regard to the cases, I would just
2 say with regard to Donnelly that my friend, Mr.
3 Kneedler, said that Donnelly settled this
4 question. If that's true, I'm a little bit
5 perplexed as to how the federal government could
6 have taken the opposite view on the question
7 presented in the OLC opinion and thereafter for
8 a time, and characterized the language in
9 earlier cases as dicta.

10 But the one thing we can be certain
11 about about Donnelly is that it did not say that
12 the states lacked jurisdiction. Donnelly simply
13 said that the federal government had
14 jurisdiction. It said that the question was
15 whether or not the states had "undivided
16 authority" over that category of offenses. And
17 in doing so, the court repeated and endorsed the
18 language from Wilson, to which I referred
19 earlier.

20 Finally, with regard to the practical
21 consequences here, my friend, Mr. Kneedler, said
22 that he was not here to minimize the problem on
23 the ground in Oklahoma, but he was not exactly
24 eager to tell you about the problem.

25 And I think that the problem with

1 respect is greater than he suggested. He
2 referred to a number, for the number of cases
3 where convictions have been overturned in the
4 wake of McGirt, but the far bigger problem is
5 the ongoing perspective law enforcement problem
6 in the State of Oklahoma.

7 And contrary to Mr. Kneedler's
8 suggestion that cases are simply being held in
9 the queue, I would refer the court to DOJ's
10 fiscal year 2023 budget request where DOJ said,
11 and I'm quoting, "as enforcement of nonviolent
12 crime is relatively low, Oklahoma communities
13 may see a surge in such crimes, and many people
14 may not be held accountable for their criminal
15 conduct due to resource constraints."

16 So to answer your question, Justice
17 Alito, is this a sustainable situation, I would
18 respectfully submit that it is not a sustainable
19 situation, and it would be a cruel irony if the
20 consequence of this Court's decision in McGirt
21 is less protection for the tribal victims of
22 serious crimes.

23 We would submit that the judgment of
24 the Oklahoma Court of Criminal Appeals should be
25 reversed. Thank you.

1 CHIEF JUSTICE ROBERTS: Thank you,
2 counsel.

3 Mr. Kneedler, I note for the record
4 that this is the 150th case in which you have
5 presented oral argument before the Court. And
6 on behalf of the Court, I thank you for your
7 skilled advocacy over the years.

8 (Whereupon, at 12:11 p.m., the case
9 was submitted.)

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