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PREVIEW—Oklahoma v. Castro-Huerta: A Test of State and Tribal Sovereignty

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PREVIEW—**Oklahoma v. Castro-Huerta:** ***A Test of State and Tribal Sovereignty***

Genevieve Antonioli Schmit*

The Supreme Court of the United States will hear oral arguments in this matter on April 27, 2022, beginning at 10:00 a.m. EST. The arguments will be presented in the United States Supreme Court Building in the District of Columbia. John M. O'Connor, Attorney General of Oklahoma, likely will argue for Petitioner. Nicollette Brandt of the Oklahoma Indigent Defense System likely will argue for Respondent.

I. INTRODUCTION

Oklahoma v. Castro-Huerta[1] challenges the reach of the United States Supreme Court's landmark ruling in *McGirt v. Oklahoma*[2] and tests the settled criminal jurisdiction scheme within Indian country. On April 27, 2022, the U.S. Supreme Court will hear argument on the sole question of whether a state court has concurrent jurisdiction with a federal court to prosecute non-Indians who commit crimes against Indians in Indian country. The State of Oklahoma ("Petitioner") argues that it has concurrent jurisdiction to prosecute such crimes.[3] Manuel Castro-Huerta ("Respondent") argues that the Court should adopt the current understanding that the federal government has exclusive authority to prosecute prosecute non-Indians who commit crimes against Indians in Indian country.[4]

II. BACKGROUND

A. Legal Background

Criminal jurisdiction in Indian country consists of a complex web of interlocking statutes and case law. Important among those statutes is the General Crimes Act ("GCA").[5] The GCA was enacted in 1817 and has not been substantially amended since 1854.[6] The GCA is firmly rooted in the

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1. 142 S. Ct. 877 (2022) (granting certiorari).
2. 140 S. Ct. 2452 (2020).
3. Petitioner's Brief at 2, *Oklahoma v. Castro-Huerta*, No. 21–429 (Feb. 1, 2022), 2022 WL 628282 at *3.
4. Respondent's Brief at 1–2, *Oklahoma v. Castro-Huerta*, No. 21–429 (Mar. 28, 2022), 2022 WL 972538 at *1.
5. 18 U.S.C. § 1152 (2022).
6. 1 FELIX S. COHEN ET AL., COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 9.02 (2019).

provisions of early treaties related to interracial law enforcement.[7] Important to this case is the statute's provision, "[e]xcept as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country."[8] Specifically, the phrase "sole and exclusive" does not confer jurisdiction over all of Indian country but rather applies federal criminal law to Indian country.[9] The GCA has been commonly understood as Congress extending to Indian country the "general laws" enacted by Congress to govern federal enclaves and therefore establishing federal criminal jurisdiction over crimes that would otherwise be prosecuted by a local authority.[10]

The federal government has criminal jurisdiction over these "general" crimes in Indian country unless: (1) the offense is committed by an Indian against another Indian; (2) the offense is committed by an Indian who is punished by local tribal law; or (3) a tribe has entered into a treaty with the U.S. to retain exclusive jurisdiction over the offense.[11] The Court added a fourth exception in 1882 in *McBratney*:[12] if the offense is committed by non-Indians against other non-Indians and there is no treaty provisions to the contrary, the state has exclusive criminal jurisdiction.[13]

Another important statute to criminal jurisdiction in Indian country is the Major Crimes Act (MCA).[14] Enacted in 1885, Congress passed the original MCA in response to the Court's decision in *Crow Dog*,[15] which held that neither the federal nor territorial courts had jurisdiction when an Indian murdered another Indian in Indian country.[16] The MCA confers jurisdiction to federal courts when an Indian commits one of the offenses enumerated in the MCA against an Indian person or property of another Indian person within Indian country.[17]

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7. *Id*.
8. 18 U.S.C. § 1152.
9. *In re* Wilson, 140 U.S. 575, 578 (1891). *See also*, COHEN, *supra* note 6 § 3.04[1] ("Although the term "Indian country" has been used in many senses, it is most usefully defined as country within which Indian laws and customs and federal laws relating to Indians are generally applicable.").
10. 18 U.S.C. § 1152. For a larger discussion of this statute, see Jordan Gross, *Incorporation by Any Other Name? Comparing Congress' Federalization of Tribal Court Criminal Procedure with the Supreme Court's Regulation of State Courts*, 109 KY. L.J. 299, 311 (2021).
10. Gross, *supra* note 10, at 311–12.
12. United States v. McBratney, 104 U.S. 621 (1882).
11. *Id*. at 624; 18 U.S.C. § 1152. *See also*, Gross, *supra* note 10, at 312.
14. 18 U.S.C. § 1153.
15. *Ex parte* Kan-Gi-Shun-Ca (Crow Dog), 109 U.S. 556 (1883).
16. COHEN, *supra* note 6, § 9.02[2][a].
17. *Id*. at § 9.02[2][b].

In civil cases, the Court in the 1980s begun to employ a balancing test to determine if the "the "exercise of state authority would violate federal law."[18] Expressed in *White Mountain Apache Tribe v. Bracker*,[19] the Court under this test weighs the "nature of the state, federal, and tribal interests at stake."[20] Previously, in the "modern era" of federal Indian law, spanning from 1959 through the 1970s, the Court applied a foundational principle that tribes were sovereigns.[21] It relied on that principal to promote tribal self-determination.[22] During this period, the Court drew heavily on foundational principles developed in the 1830s that held that tribes retained their powers unless expressly limited through an act of Congress.[23]

In July 2020, the Court decided the landmark Indian law case, *McGirt v. Oklahoma*.[24] In *McGirt*, the Court held that, absent an act of Congress to disestablish the Muscogee[25] Reservation, the Muscogee Reservation remained an Indian reservation for the purposes of federal criminal jurisdiction.[26] *McGirt* simultaneously affirmed a parallel case, *Murphy v. Royal*,[27] in which the Tenth Circuit held that Congress had not disestablished the reservation at issue for the purposes of determining criminal jurisdiction. Both *McGirt* and *Murphy* involved defendants who were Indian and committed crimes enumerated in the MCA; therefore, when the Court confirmed the crime occurred on the Muscogee reservation, the cases fell firmly under the MCA.[28] Since the *McGirt* decision, the State of Oklahoma has launched several attacks on *McGirt*'s ruling, including 13 petitions for writs of certiorari.[29]

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18. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 145 (1980).
19. *Id.*
20. *Id.*
21. Dylan R. Hedden-Nicely & Stacy L. Leeds, *A Familiar Crossroads: McGirt v. Oklahoma and the Future of the Federal Indian Law Canon*, 51 N.M.L. REV. 300, 301 (2021).
22. *Id.*
23. *Id.*
24. 140 S. Ct. 2452 (2020).
25. Although referred to in *McGirt* exclusively as "Creek" nation, the Muscogee Nation has formally dropped the common name (Creek) for their original name. *See* Keegan Williams, *Muscogee Nation Drops Colonial Era Name in Rebranding*, CRONKITE NEWS: ARIZONA PBS, (Apr. 17, 2021), https://perma.cc/PG9V-5JF5.
26. *McGirt*, 140 S. Ct. at 2482.
27. 875 F.3d 896, 966 (10th Cir. 2017), *aff'd sub nom*, Sharp v. Murphy, 140 S. Ct. 2412 (2020).
28. *McGirt*, 140 U.S. at 2459; *Royal*, 875 F.3d at 915.
29. Native American Rights Fund Tribal Supreme Court Project, Petitions Related to McGirt v. Oklahoma, NATIVE AMERICAN RIGHTS FUND (Apr. 17, 2022), https://perma.cc/YJT8-5TY9.

B. Factual and Procedural Background

Following *McGirt*, Respondent, a non-Indian, was among several defendants[30] who successfully appealed their state convictions after successfully arguing to the Oklahoma Court of Criminal Appeals (OCCA) that Oklahoma lacked criminal jurisdiction over their cases.[31] As Respondent's appeal worked its way through the OCCA, Petitioner argued it had concurrent jurisdiction with the federal government to prosecute Respondent's case, and therefore should retain jurisdiction.[32]

Respondent's case stemmed from the hospitalization of his five-year-old stepdaughter, who is legally blind and has cerebral palsy.[33] At the time, Respondent and his stepdaughter lived in Tulsa, Oklahoma, which lies within the geographic area of the Muscogee Reservation, as affirmed by the Court in *McGirt*.[34] The victim is an enrolled citizen of the Eastern Band of Cherokee Indians, which is a federally recognized tribe.[35]

A jury convicted Respondent of child neglect in Tulsa Country District Court and was sentenced to 35 years in prison.[36] Respondent appealed, arguing to the OCCA that his Oklahoma conviction was invalid after the Tenth Circuit's *Murphy* decision because, like Murphy, Respondent's offense had occurred on an Indian reservation that Congress never had disestablished.[37] As such, Petitioner lacked jurisdiction to prosecute his case.[38]

Respondent's appeal was stayed when the Court granted the petition for a writ of certiorari in *Murphy*, and the OCCA ordered the appeal to be held pending the Court's decision.[39] After the Court issued opinions in *Murphy* and *McGirt*, the OCCA remanded Respondent's case to the Tulsa County District Court for an evidentiary hearing on the Indian status of the victim, and whether the crime occurred within the boundaries of the Reservation.[40]

On remand, Petitioner stipulated that the victim was an enrolled citizen of the Cherokee Nation, and that the crime took place within the historic boundaries of the Cherokee Nation.[41] Petitioner then argued that

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30. *See* Bosse v. Oklahoma, 138 S. Ct. 1264 (2018).
31. Petitioner's Brief, *supra* note 3, at 9–10.
32. State's Brief on Concurrent Jurisdiction at 1, *Castro-Huerta v. Oklahoma*, CF-2015-6478 (Okla. Dist. Ct. Oct. 1, 2020), https://perma.cc/W6YL-6E62.
33. Petitioner's Brief, *supra* note 3, at 9.
34. Castro-Huerta v. Oklahoma, No. F-2017-1203, slip op. at 3 (Okla. Crim. App. Apr. 29, 2021), https://perma.cc/7GGW-DC3K [hereinafter OCAA]; McGirt v. Oklahoma, 140 S. Ct. 2452, 2481–82 (2020).
36. *Id*. at 1.
37. *Id*. *See* Murphy v. Royal, 875 F.3d 896, 937 (10th Cir. 2017).
38. Petitioner's Brief, *supra* note 3, at 11.
39. *Id*. at 9.
40. OCCA, *supra* note 34, at 2.
41. *Id*. at 5.

it had concurrent jurisdiction over the crime.[42] The OCCA rejected Petitioner's concurrent jurisdiction argument and held Petitioner lacked jurisdiction to prosecute Respondent.[43] The court vacated the sentence and remanded to the trial court with instructions to dismiss the case.[44]

In September 2021, Petitioner petitioned the Court to grant a writ of certiorari. The petition presented two questions: (1) whether states have authority to prosecute non-Indians who commit crimes against Indians in Indian country, and (2) whether the Court should overrule *McGirt*.[45] On January 21, 2022, the Court granted certiorari on the first question only.[46]

III. SUMMARY OF ARGUMENTS

Petitioner asks the Court to base its analysis on the State's inherent rights as a sovereign, while Respondent asks the Court to root its decision in the federal trust responsibility owed to Indian tribes. The parties disagree on whether Congress preempted Petitioner's criminal jurisdiction over crimes committed by non-Indians against Indians in Indian country. Specifically on this issue, the parties disagree on whether federal statutes establish exclusive federal criminal jurisdiction when the statutes explicitly give some states jurisdiction while other states lack jurisdiction.[47] Further, the parties disagree on whether the limited case law favors state jurisdiction or preemption.[48] Finally, the parties reach separate conclusions on the outcome of a balancing test between federal, state, and tribal interests.[49]

A. Petitioner's Arguments

Petitioner argues the following: (1) the State of Oklahoma, as sovereign, has authority over its own territory and to prohibit non-Indians from committing certain offenses unless preempted by federal law;[50] (2) no federal law, including the GCA, preempts the State's authority to prosecute non-Indians who commit crimes against Indians in Indian country;[51] and (3) under a balancing test between federal, state, and tribal interests,

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42. State's Brief on Concurrent Jurisdiction, *supra* note 32, at 1.
43. OCCA, *supra* note 34, at 4–5.
44. *Id*. at 5.
45. Petition for a Writ of Certiorari to the Oklahoma Court of Criminal Appeals, *Oklahoma v. Castro-Huerta*, No. 21-429 (2022), 2021 WL 4296002.
46. Oklahoma v. Castro-Huerta, 142 S. Ct. 877 (2022) (granting certiorari).
47. Petitioner's Brief, *supra* note 3, at 11–13; Respondent's Brief, *supra* note 4, at 5, 13.
48. Respondent's Brief, *supra* note 4, at 31; Petitioner's Brief, *supra* note 3, at 19–21.
49. Petitioner's Brief, *supra* note 3, at 14; Respondent's Brief, *supra* note 4, at 49–51.
50. Petitioner's Brief, *supra* note 3, at 11–12.
51. *Id*. at 13.

the State's interests in exercising criminal jurisdiction outweigh the other interests.[52]

1. States' Authority to Prosecute Absent Federal Preemption

Petitioner asserts that, absent federal preemption, states have criminal jurisdiction over crimes committed by non-Indians within the state's territorial boarders.[53] Petitioner relies on historical examples of states exercising this territorial sovereignty.[54] Petitioner then supports its claim with precedential case law that it argues confirms that the Court has long recognized State's inherent prosecutorial authority over non-Indians.[55]

First, Petitioner asserts a historic basis for the State to have jurisdiction over crimes committed within the State's borders.[56] Petitioner roots its argument in the status of states as sovereigns,[57] arguing that state territorial sovereignty predates and is embedded in the Constitution.[58] Additionally, Petitioner asserts that courts have recognized states' power to proscribe criminal conduct and enforce their own criminal laws against citizens of other states and nations within the states' borders.[59]

Next, Petitioner argues that the states' territorial sovereignty equally applies to state regulation and criminal prosecution of non-Indians within Indian country.[60] Petitioner argues that *Worcester v. Georgia*,[61] in which the Court concluded that state law "can have no force" within Indian Country, is not applicable here.[62] Petitioner frames *Worcester* as outdated because Indian territory is no longer "completely separated from that of the states."[63] Petitioner argues *Worcester* itself recognized the preemptive power of states over its citizens in Indian country because state law at issue was invalidated since it sought to regulate non-citizens.[64] This case, though, deals with a federal law concerning non-Indian citizens of the State. Finally, Petitioner notes several *Worcester*-era federal circuit court

52. *Id.* at 14.
53. *Id*. at 17.
54 . *Id*. at 15–17.
55. *Id*. at 19–23.
56. *Id*. at 15–17.
57. *Id*.
58. *Id*. at 16.
59. *Id*. at 16–17 (citing to Manchester v. Massachusetts, 139 U.S. 240, 256, 266 (1891)).
60. *Id*. at 17.
61. 31 U.S. § 515 (1832)
62. Petitioner's Brief, *supra* note 3, at 17 (citing *Worcester*, 31 U.S. at 561).
63. *Id*. (citing *Worcester*, 31 U.S. at 557).
64. *Id*.

decisions that affirmed the longstanding state power to exercise criminal jurisdiction over its own citizens within state boundaries.[65]

Finally, Petitioner argues that since *Worcester*, the Court has permitted states to exercise criminal authority within Indian country when the defendant and victims are both non-Indians.[66] Petitioner relies first on *United States v. McBratney*, in which the Court found that the State of Colorado had exclusive authority to prosecute crimes committed by non-Indians against non-Indians in Indian country within state boundaries.[67] Similarly, Petitioner cites *Draper v. United States*,[68] in which the Court concluded in 1896 that the State of Montana could exercise criminal authority in Indian country, despite the provision in Montana's enabling act that provided that Indian lands within the State's borders "shall remain under the absolute jurisdiction and control of the United States."[69] While Petitioner admits both *McBratney* and *Draper* only considered crimes committed by non-Indians against non-Indians, it argues that the facts of the case do not constrain the reasoning to non-Indians and could similarly apply to crimes against Indians.[70]

2. No Federal Law Preempts the State's Authority to Prosecute Non-Indians Who Commit Crimes Against Indians in Indian Country

Petitioner next argues that federal law does not, as the OCCA concluded, preempt the State's prosecutorial authority in this case.[71] Petitioner's argument focuses on ambiguity within the GCA.[72] Principally, Petitioner asserts that the OCCA incorrectly relied on the GCA phrase "sole and exclusive jurisdiction of the United States" when it concluded the GCA conferred exclusive federal jurisdictions to crimes committed in Indian country.[73]

First, Petitioner argues that the Court's previous textual interpretations of the GCA support concurrent jurisdiction.[74] Petitioner contends that the Court's decisions *In re Wilson*[75] and *Donnelly v. United States*[76] clarified that the words "sole and exclusive jurisdiction" do not mean that the federal government must have sole and exclusive jurisdiction over the Indian country; rather, the words are used to describe the laws of the

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65. *Id*. at 18 (citing United States. v. Cisna, 25 F. Cas. 422 (C.C.D. Ohio 1835)).
66. *Id*. at 19.
67. *Id*. at 19 (citing United States v. McBratney, 104 U.S. 621, 621 (1881)).
68. 164 U.S. 240 (1896).
69. Petitioner's Brief, *supra* note 3, at 20.
70. *Id*. at 20–21.
71. *Id*. at 23.
72. *Id*.; 18 U.S.C. § 1152
73. Petitioner's Brief, *supra* note 3, at 23–24.
74. *Id*. at 24.
75. 140 U.S. 575 (1891).
76. 228 U.S. 243 (1913).

United States.[77] Therefore, Petitioner argues, the GCA does not give the federal government sole and exclusive jurisdiction over Indian country, but rather only "extends" the "general laws" that apply in federal enclaves to Indian country.[78] Further, Petitioner contends that when interpreting the verb "extends," the Court in other cases has found its use harmonious with concurrent state jurisdiction.[79] Petitioner notes that the Court has never held that the GCA created exclusive federal criminal jurisdiction in Indian country and that *Donnelly* did not squarely address the possibility of the states holding concurrent jurisdiction.[80]

Next, Petitioner asserts that Congress did not intend the GCA to preempt state jurisdiction.[81] Petitioner considers the history of the GCA from the origins of federal enclave jurisdiction in 1817,[82] to its reenactment in 1948.[83] At each enactment and revision, Petitioner argues there is no explicit evidence that Congress intended to preempt state jurisdiction.[84]

Finally, Petitioner argues that other federal laws, including Public Law 280 ("PL 280")[85] and the Kansas Act of 1940[86], do not preempt state jurisdiction over non-Indians whose victims are Indians in Indian Country.[87] Petitioner fundamentally disagrees with the OCCA and Respondent's argument that these statutes, which give certain states the authority to prosecute crimes perpetrated against Indians in Indian country, should be taken as evidence that Congress preempted other states' power to prosecute such crimes.[88] Petitioner admits that the text of the Kansas Act, PL 280, and similar statutes indicate Congress believed the states lacked prosecutorial authority over these types of crimes.[89] Despite those laws, though, states retained jurisdiction because Congress has not explicitly conditioned the states' authority to prosecute on whether Congress authorized it in legislation.[90] Petitioner further argues that, when it enacted those statutes, Congress was more focused on the lack of jurisdiction over crimes committed by Indians in Indian country.[91] Petitioner contends, therefore, that Congress intended the statutes to clarify jurisdictional questions by affirming that states always had jurisdiction in Indian country.[92]

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77. Petitioner's Brief, *supra* note 3, at 24; In re *Wilson*, 140 U.S. at 578.
78. Petitioner's Brief, *supra* note 3, at 24.
79. *Id*. at 24–25 (citing Tafflin v. Levitt, 493 U.S. 455 (1990)).
80. *Id*. at 26–27.
81. *Id*. at 25–26.
82. *Id*. at 25.
83. *Id*.
84. *Id*. at 25–26.
85. 18 U.S.C. § 1162
86. Pub. L. No. 76-565, 54 Stat. 249 (1940).
87. Petitioner's Brief, *supra* note 3, at 28–40.
88. *Id*. at 28–29; Respondent's Brief, *supra* note 4, at 27.
89. Petitioner's Brief, *supra* note 3, at 29.
90. *Id*.
91. *Id*. at 30–31.
92. *Id*. at 40.

3. Using a Bracker Balancing Test, the State's Interests Outweigh Tribal and Federal Interests

Petitioner argues the Court should apply a balancing test to find that the State has a superior interest in exercising prosecutorial authority.[93] Petitioner concedes that the Court has not applied this test as expressed in *White Mountain Apache Tribe v. Bracker*[94] to the issue of state criminal law in Indian country, but argues that the Court has never discounted the possibility of its use in criminal law cases.[95] If the Court adopts and applies the balancing test here, Petitioner argues it would find that the State's exercise of prosecutorial authority neither interferes, nor is it incompatible with federal or tribal interests. [96]

First, considering the tribe's interest, Petitioner asserts the State's prosecution of non-Indians for crimes committed against Indians raises no serious issues of tribal sovereignty involved in the State's prosecution of non-Indians for crimes committed against Indians.[97] As such, the tribe's interests are low. Here, Petitioner hinges its logic on "[t]he principle from *Oliphant*" that "Indian tribes do not have inherent jurisdiction to try and to punish non-Indians."[98] Therefore, Petitioner argues, since tribes have not retained their power to prosecute non-Indians who commit crimes against Indians in Indian country, the exercise of prosecutorial power by the State does not affect tribal sovereignty.[99]

Next, Petitioner claims that the State's interests are substantial and legitimate.[100] Petitioner compares the interests of an Indian tribe "despite its diminished sovereignty" in prosecuting its own members who commit crimes against non-Indians within Indian country with the State's parallel interest to prosecute non-Indians for crimes against Indians within the state's borders.[101] Petitioner draws on briefs from the 1980s that, it argues, demonstrate the federal government has recognized that states have a "strong interest in enforcing [their] criminal laws against non-Indians.[102] Petitioner also notes that the State has a legitimate interest in the protection of its Indian citizens, as they are citizens of the state in which they reside in addition to being citizens of their tribes.[103]

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93. *Id*.
94. 448 U.S. 136 (1980); *see also*, Hedden-Nicely & Leeds, *supra* note 21, at 301.
95. Petitioner's Brief, *supra* note 3, at 40.
96. *Id*.
97. *Id*. at 42.
98. *Id*. (quoting Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 212 (1978)).
99. *Id*.
100. *Id*. at 43.
101. *Id*.
102. *Id*. at 44 (quoting U.S. Amicus Curiae Brief on Petition for a Writ of Certiorari to the Arizona Court of Appeals, *Arizona v. Flint*, No. 88-603 (1988), https://perma.cc/2LLX-P8CQ).
103. *Id*. at 43.

Finally, Petitioner argues the interests of the federal government are furthered because concurrent jurisdiction would be the most beneficial and efficient method of law enforcement.[104] Petitioner describes the practical benefits of concurrent jurisdiction, including sharing caseloads, availability of local witnesses in state courts, and the normalcy of state and federal concurrent jurisdiction.[105] Petitioner also notes that, as separate sovereigns, double jeopardy is not a concern and the federal government would be free to prosecute after a state conviction.[106] Petitioner finally argues the federal judiciary has been "overwhelmed" in the wake of *McGirt*, leading to constrained resources and decreased sentencing.[107] Petitioner implies that concurrent jurisdiction would address this problem.[108]

B. Respondent's Arguments

Respondent argues the following: (1) statutes firmly establish federal criminal jurisdiction over crimes involving Indians;[109] (2) states generally lack jurisdiction in cases like these;[110] and (3) the Court should not apply *Bracker* balancing test, but if it does, the State's interests are inferior to the those of the tribe.[111]

1. Congress's Post-1940 Statutes Preempt States from Prosecuting Crimes Against Indians in Indian Country

Respondent argues that the reenactment of the GCA in 1948 clearly preempts state criminal authority over crimes involving Indians on Indian land.[112] Respondent, in part, focuses its argument on this reenactment because it occurred after the *McBratney* and *Draper* decisions, on which Petitioner relied.[113] Respondent rebuts Petitioner's interpretation of the GCA's text and then draws on the similarities between the MCA and GCA to provide support for his argument for preemption by the GCA.[114] Finally, Respondent focuses on the congressional intent surrounding the 1948 amendment and points to several other statutes enacted at the time that explicitly grant criminal jurisdiction to certain states.[115]

First, Respondent argues that the text of the GCA supports preemption. Respondent does not dispute that Congress applied laws to

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104. *Id*. at 44–45.
105. *Id*.
106. *Id*. at 45.
107. *Id*. at 8.
108. *Id*. at 8.
109. Respondent's Brief, *supra* note 4, at 5, 13.
110. *Id*. at 31.
111. *Id*. at 49–50.
112. *Id*. at 14.
113. *Id*. at 6.
114. *Id*. at 15.
115. *Id*. at 18.

Indian country governing federal enclaves.[116] Instead, Respondent argues that because the federal government exercises exclusive jurisdiction within those enclaves, Petitioner would need congressional approval to apply the state's criminal laws to an enclave.[117] Respondent then argues that the textual parallels between the MCA and GCA support his argument.[118] Respondent reasons that if the Court clearly held that MCA preempts state law, the Court in considering the "materially identical text" within the MCA should likewise find the GCA preemptive.[119]

Next, Respondent argues that the case law used by Petitioner does not run contrary to the GCA's preemption of state jurisdiction.[120] Considering the passages Petitioner cites from *Donnelly* and *Wilson*, Respondent argues the conclusion that "sole and exclusive" applies to which criminal law applies, not federal jurisdiction itself, does not "detract from the significance of Congress's decision to apply to Indian country the laws governing areas of 'exclusive' federal jurisdiction."[121] Instead, Respondent claims, Indian affairs are a domain where federal interest has been dominant, and the Court has enforced a standard that state law may be defeated when the federal government aims to regulate and protect Indians against interference.[122]

Further, Respondent argues that the regulatory context in which Congress passed the 1940 amendments to the GCA confirms the Act's preemptive force. Notably, Respondent points to other statutes enacted in the late 1940s that explicitly grant criminal jurisdictions to states based on the GCA's preemption.[123] Respondent's examples include a statute enacted five days after the 1948 reenactment of the GCA, which gave Iowa jurisdiction over crimes "by or against Indians," and a similar statute enacted two days later, giving the same jurisdiction to New York.[124] Respondent argues that Congress recognized states lacked jurisdiction at the time, otherwise they would not have explicitly given it to them.[125]Additionally, Respondent points to PL 280, which was enacted in 1953 and provided some states with "jurisdiction over offenses committed by or against Indians" that had previously fallen under federal jurisdiction.[126] Respondent notes that Congress, when enacting PL 280, relied on the 1948 GCA jurisdictional scheme that effectively preempts Petitioner's proposed extra-statutory prosecutions.[127]

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116. *Id*. at 14.
117. *Id*. at 14, 15.
118. *Id*. at 15.
119. *Id*. (citing Negonsott v. Samuels, 507 U.S. 99, 103 (1993)).
120. *Id*. at 17.
121. *Id*. at 17.
122. *Id*. at 23 (quoting Bryan v. Itasca County, 426 U.S. 373, 376 (1976)).
123. *Id*. at 18.
124. *Id*.
125. *Id*. at 18, 19.
126. *Id*. at 7.
127. *Id*. at 21, 22.

Finally, Respondent argues that Petitioner's interpretation of the GCA and surrounding case law lack merit because Congress did not intend for or believe that states had jurisdiction over this type of criminal case.[128] First, Respondent takes issue with Petitioner's argument that the "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one."[129] The 1948 Congress, though, is not a "subsequent Congress" because it reenacted the GCA.[130] Respondent additionally notes that the parties do not dispute that the 1948 Congress believed states lacked jurisdiction over cases in which a non-Indian harmed an Indian on Indian land.[131] Respondent then turns to PL 280 and argues that the 1953 Congress embedded into PL 280 the 1946 U.S. Supreme Court's holding in *Williams v. United States*,[132] which articulated that states generally lack jurisdiction over crimes against Indians in Indian country unless a statute explicitly provides states with the authority to prosecute crimes "against Indians."[133]

2. States Generally Lack Jurisdiction Over These Crimes

Respondent argues that states generally lack jurisdiction over crimes committed in Indian country involving Indians. Respondent relies on *Williams*, in which the Court held that, because tribes generally retain their sovereignty, states generally lacked jurisdiction absent an act of Congress. [134] Respondent expands on this principal by arguing that Congress itself has recognized this principal and has reflected it in its construction of statutory scheme around criminal authority in Indian country.[135] Finally, Respondent dismisses Petitioner's arguments against preemption based on *McBratney*, *Draper*, and other civil cases based on their inapplicability to criminal law.[136]

First, Respondent asks the Court to apply the logic presented in *Williams*, which builds on the foundational principal that tribes retain their sovereign powers unless expressly limited through an act of Congress.[137] In *Williams*, the Court held that when an offense is committed on a reservation by "one who is not an Indian against one who is an Indian," states generally lack jurisdiction.[138] As such, Respondent argues, crimes against Indians only have been subject to federal or tribal jurisdiction, except

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128. *Id*. at 25.

129. Petitioner's Brief, *supra* note 3, at 29 (quoting Marvin M. Brandt Revocable Trust v. United States, 572 U.S. 93, 109 (2014)).

130. Respondent's Brief, *supra* note 4, at 25.

131. *Id*. at 26.

132. *See* Williams v. United States, 327 U.S. 711, 721 (1946).

133. Respondent's Brief, *supra* note 4, at 25–27.

134. *Williams*, 327 U.S. at 714. *See also*, Hedden-Nicely & Leeds, *supra* note 21, at 301.

135. Respondent's Brief, *supra* note 4, at 31– 42.

136. *Id*. at 44.

137. Hedden-Nicely & Leeds, *supra* note 21, at 301.

138. Respondent's Brief, *supra* note 4, at 27.

when Congress has expressed explicitly, through statue, that state laws apply.[139] Respondent asserts that because Petitioner does not cite to an act of Congress conferring state jurisdiction, Petitioner's argument is without merit.[140]

Next, Respondent argues that because Congress "by statute and treaty provided that the federal government—and only the federal government—would protect Indians from crime," Congress understood the states generally lacked jurisdiction in Indian country when Indians were involved. [141] Respondent contextualizes this assertion by first pointing to the long-lasting trust relationship between Indian tribes and the federal government.[142] Respondent then provides background on Congress' exercise of its exclusive constitutional authority to deal with Indian tribes through the enaction of statutes[143] and treaties[144] governing crimes involving Indians.[145] The resulting "comprehensive scheme" created by Congress is thus evidence that "when Congress wished to leave space for other sovereigns, it made express exceptions."[146]

Respondent argues that, considering the wider statutory scheme developed by Congress, the State lacks jurisdiction over Respondent because Congress in the 1834 GCA "made no exception for state prosecutions and instead applied to Indian country laws governing areas of 'sole and exclusive' federal jurisdiction."[147] Respondent further argues that the 19th century Congresses understood the federal trust responsibility[148] and had concerns that states, given the chance to prosecute non-Indians for crimes against Indians in Indian country, would not equally carry out justice.[149]

Finally, Respondent dismisses Petitioner's arguments based on *McBratney*, *Draper*, and other civil cases.[150] First, Respondent argues that the Court in both *McBratney* and *Draper* did not address crimes "by or against Indians" and recognized in *Donnelly* that "offenses committed by or against Indians are not within the Principle of…*McBratney* and

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139. *Id*. at 29 (citing Washington v. Confederated Bands and Tribes of Yakima Indian Nation Yakima, 439 U.S. 463, 470–71 (1979)).

140. *Id*.

141. *Id*. at 42.

142. *Id*. at 31–33.

143. *Id*. at 33. Respondent specifically draws on the Trade and Intercourse Act of 1790 as the first instance where Congress assumed federal jurisdiction over offences against Indians by non-Indians.

144. *Id*. at 35.

145. *Id*. at 31–33.

146. *Id*. at 42.

147. *Id*.

148. *Id*. (quoting Donnelly v. United States, 228 U.S. 243, 272 (1913)).

149. *Id*. at 42–43. Respondent points to evidence of the State opposition to federal policies aimed at promoting "civilization and improvement of the Indians" and State's use of anti-miscegenation laws which were enforced on non-Indians.

150. *Id*. at 44.

Draper."[151] Because of this express limitation to the holdings, Respondent dismisses Petitioner's claim[152] that the reasoning of both cases can apply to crimes against Indians.[153] Next, Respondent attacks Petitioner's argument that this Court has repeatedly "upheld the exercise of state jurisdiction over non-Indians" by asserting that those cases were civil, not criminal.[154] Respondent argues that this difference between civil and criminal matters greatly in how Congress has contended with jurisdiction in the past, and that the Court has in the past refused to conflate civil and criminal jurisdiction.[155]

3. The Court Should Not Apply the Bracker *Balancing Test, but if It Was to, the Test Confirms States Lack Jurisdiction.*

Respondent argues, contrary to Petitioner's contention, that the *Bracker* balancing test should not apply.[156] Respondent argues that a *Bracker* balancing test only should apply absent an act of Congress; here, statutes and treaties exist and thus govern.[157] Additionally, Respondent argues that this Court has never applied *Bracker* in a criminal jurisdiction case.[158]

Even if the Court applies *Bracker*, though, the test only confirms the states lack jurisdiction, according to Respondent.[159] First, Respondent argues that a state like Oklahoma has no cognizable interest when, despite Congress' invitation, it declined to obtain jurisdiction under PL 280.[160] Next, Respondent argues that tribes have enormous interests in protecting tribal citizens, and the federal government has a similar interest in upholding the treaty promises to serve as tribes' sole protector.[161]Additionally, Respondent argues that Petitioner's proposed expansion undermines tribal authority by projecting its sovereign power directly into tribal communities.[162] Petitioner also notes that even when tribes generally lack authority to prosecute non-Indians, tribes have "weighty interests in *how* those prosecutions occur."[163] For these reasons, Respondent argues that the court should refuse Petitioner's request to grant the state concurrent jurisdiction.

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151. *Id*. (citing United States v. McBratney, 104 U.S. 621, 621 (1882))
152. *Id*. at 20–21.
153. *Id*. at 44–45.
154. *Id*. at 46 (citing Petitioner's Brief, *supra* note 3, at 22).
155. *Id*. at 46–47.
156. *Id*. at 49.
157. *Id*.
158. *Id*.
159. *Id*. at 49–50.
160. *Id*. at 50.
161. *Id*.
162. *Id*. at 51.
163. *Id*.

IV. ANALYSIS

Petitioner asks the Court to fundamentally change the jurisdictional scheme in Indian Country, which has been long considered settled. While the Court is not interested in revisiting the central holding of *McGirt*, its grant of certiorari on the first question presented by Petitioner is concerning to many proponents of tribal sovereignty.

Based on the Amicus Briefs filed with the Court and the recent questions asked by the Court in other cases involving federal Indian law, the Court is likely to have several topics in mind going into arguments. First, the Court likely will address whether state jurisdiction is preempted in this case. This question will be largely determined by the Court's consideration of the historical context surrounding the GCA. Next, the Court likely will consider the policy arguments presented by Petitioner, Respondent, and Amici concerned with the broader ramifications of *McGirt*. Finally, several justices have expressed unique concerns and questions about the foundations of federal Indian law and may use this opportunity to explore them with an eye to future cases.

1. Background of the General Crimes Act and Criminal Jurisdiction in Indian Country

Based on congressional intent and case precedent, the Court is likely to accept Respondent's argument that there is clear and well established exclusive federal jurisdiction in this case where a non-Indian committed a GCA crime against an Indian in Indian country. While Petitioner's argument on historical state territorial sovereignty[164] may be intriguing to some members of the Court, ultimately tribal sovereignty and the federal trust relationship with tribes pre-dates state territorial sovereignty. It is more likely that the Court will follow its reasoning in cases as recent as *McGirt* and look to explicit acts of Congress.

For instance, in *McGirt*, the majority drew on the long history of the MCA, reasoning:

> "By subjecting Indians to federal trials for crimes committed on tribal lands, Congress may have breached its promises to tribes like the Creek that they would be free to govern themselves. But this particular incursion has its limits—applying only to certain enumerated crimes and allowing only the federal government to try Indians. State courts generally have no jurisdiction to try Indians for conduct committed in "Indian country."[165]

164. Petitioner's Brief, *supra* note 3, at 15–17.
165. McGirt v. Oklahoma, 140 S. Ct. 2452, 2459 (2020).

Applying parallel logic to the GCA, the Court is likely to accept Respondent's argument that, absent an explicit act of Congress, the federal government alone has jurisdiction over the GCA crime in this case. Because Petitioners do not cite compelling case law, legislation, or contemporary congressional understanding, the Court likely will follow the holding of *Wilson* and rule in favor of Respondent.

2. Policy Considerations and Impacts

Even if the Court does not apply a formal balancing test, the Court will likely favor the policy ramifications of exclusive federal jurisdiction asserted by Respondent. If Petitioner successfully argues that it should have concurrent jurisdiction, nationwide criminal jurisdiction in Indian Country will be dramatically affected.

Many Amici support the policy position that, following the "Court's ruling in *McGirt*, Oklahoma's criminal justice system has been hobbled."[166] For example, City of Tulsa's amicus brief highlighted the difficulties imposed on law enforcement to ascertain a victim's Indian or non-Indian status post-*McGirt*.[167] Similarly, the Oklahoma District Attorney and Sheriff's Association's brief point out serious limitations in cross-deputization and street-level enforcement.[168]

While members of the court may be interested in the post-*McGirt* effects in Tulsa and the rest of Oklahoma, dividing jurisdiction this way is far from unique to Oklahoma. The current jurisdictional framework is deployed nationwide, so the Court is unlikely to elevate Oklahoma's issues above the potential to disrupt the nationwide approach to criminal jurisdiction.

Finally, it is worth mentioning the ongoing concerns about civil jurisdiction in Indian country that have lingered in the background of many of the Indian law cases currently pending in front of the Court and in the circuit courts. The amicus briefs from, among others, the Oklahoma Farm Bureau, Cattlemen's Association and Petroleum Alliance, are evidence of this concern.[169] After *McGirt*, a slew of property law questions concerning

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166. Brief of Amicus Curiae Oklahoma Association Of Chiefs Of Police In Support Of Petitioner at 4, *Oklahoma v. Castro-Huerta*, No. 21-429 (Mar. 7, 2022), 2022 WL 729157 at *4.

167. Brief of the City Of Tulsa As Amicus Curiae In Support Of Petitioner at 3, *Oklahoma v. Castro-Huerta*, No. 21-429 (Mar. 7, 2022), 2022 WL 879229 at *3–6.

168. Brief of Amici Curiae the Oklahoma District Attorneys Association, the Oklahoma Sheriffs' Association, the Association of Oklahoma Narcotic Enforcers, and the 27 Oklahoma District Attorneys in Support of Petitioner at 14, *Oklahoma v. Castro-Huerta*, No. 21-429 (Mar. 7, 2022), 2022 WL 729178 at *14–15.

169. Brief Of Amici Curiae The Environmental Federation Of Oklahoma, Inc., Oklahoma Farm Bureau Legal Foundation, Oklahoma Cattlemen's Association, & The Petroleum Alliance Of Oklahoma In Support Of Petitioner, *Oklahoma v. Castro-Huerta*, No. 21-429 (Mar. 7, 2022), 2022 WL 729135. *See also*, Allen Brown,

transferring title and leasing Indian lands erupted in Oklahoma.[170] The oil and gas industry in Oklahoma, which operates approximately a quarter of its wells and 60% of its refineries within Indian country, also has voiced constant concerns post-*McGirt* about the potential effects on leasing and restrictions.[171] As in *McGirt*, the policy statements made by the Court in this case will likely expand beyond the facts of the case and criminal jurisdiction.

3. Justice's Larger Views on Federal Indian Law

The majority of justices likely will accept Respondent's argument that there is a clear and established exclusive federal jurisdiction in this case where a non-Indian commits a GCA crime on a non-Indian in Indian country. Several justices, though, may use this as an opportunity to advance dicta concerning their unique views on federal Indian law, and prepare for *Brackeen v. Haaland*[172] and other hot-button pending Indian law cases.

Recently, several members of the Court have expressed interest in whether and how to apply the Indian canons of construction. In February 2022, during the *Ysleta del Sur Pueblo v. Texas* oral arguments, Justice Alito led a robust discussion about the canons, with Justices Kagan, Gorsuch, Barrett, and Kavanagh joining.[173] Justice Kagan apologized for taking the conversation outside the scope of the case at hand, but said that she had been thinking "a good deal about these substantive canons," how they "reconcile our views on all these different kinds of canons," and if the Court should "just toss them all out."[174] The justices likely will pose similar questions and prompt similar discussions on the applicability of the Indian canons of construction in the future.

Some justices have questioned the fundamental constitutionality of federal Indian law as it applies differently to Indians versus non-Indians. Federal distinctions of "Indian" have long been deemed a political, rather

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Inside the Oil Industry's Fight to Roll Back Tribal Sovereignty After Supreme Court Decision, THE INTERCEPT (Mar. 10, 2021), https://perma.cc/LW9R-ELMN.

170. Casey Rockwell & Izehi Oriaghan, *The Dirt and McGirt: Exploring the Real Estate Issues Surrounding the Landmark Decision of McGirt v. Oklahoma*, 50 REAL EST. L.J. 502, 516–18 (2021).

171. Dino Grandoni, *Now that Half of Oklahoma is Officially Indian Land, Oil Industry Could Face New Costs and Environmental Hurdles*, WASHINGTON POST (July 17, 2020), https://perma.cc/8CWB-7KLC.

172. 142 S. Ct. 1205 (2022), *cert. granted sub nom*; Cherokee Nation v. Brackeen, 142 S. Ct. 1204 (2022) (granting petition for writ of certiorari); Texas v. Haaland, 142 S. Ct. 1205 (2022) (granting petition for writ of certiorari). *Breckeen*, *Cherokee Nation*, and *Texas v. Haaland* were consolidated into *Brackeen v. Haaland*.

173. Transcript of Oral Argument at 55, *Ysleta del Sur Pueblo v. Texas*, No. 20-493 (Feb. 22, 2022), https://perma.cc/H97Y-3AZ8.

174. *Id*. at 59–60.

than racial classification.[175] Justice Alito, though, during oral argument for *Denezpi v. United States* earlier this term, asked about how a federal criminal statute can include a "racial classification."[176] Here, Justice Alito may follow a similar vein, and question whether a possible equal protection issue arises when a federal law hinges on the Indian status of a victim.

Justice Thomas has long proposed that the foundation of our current understanding of Indian law may be incorrect. In *Baby Girl*, writing in a separate concurrence, Justice Thomas took issue with, "Congress' assertion of 'plenary power' over Indian affairs."[177] Justice Thomas has returned to similar questions often. In his separate concurrence in *Bryant*, Thomas found "Congress's purported plenary power over Indian tribes rests on …shak[y] foundations."[178] Here, Justice Thomas may see an opportunity to take up this argument in dicta once again.

V. CONCLUSION

Ultimately, Petitioner likely does not have enough evidence of congressional action to persuade the Court that concurrent criminal jurisdiction between the federal government and states exists. Additionally, if the Petitioner's argument were to succeed, the nationwide ramifications to criminal jurisdiction will throw many more states into a conundrum. While the Court may be sympathetic to Oklahoma's rough transition after *McGirt*, this is likely not the case to rework the foundational understandings of criminal jurisdiction in Indian country.

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175. COHEN, *supra* note 6, § 3.03 (citing to Morton v. Mancari, 417 U.S. 535, 551–55 (1974))

176. Transcript of Oral Argument at 16, *Denezpi v United States*, No. 20-7622 (Feb. 22, 2022), https://perma.cc/V29B-V5WU.

177. Adoptive Couple v. Baby Girl, 570 U.S. 637, 660 (2013) (Thomas, J. concurring).

178. United States v. Bryant, 579 U.S. 140, 160 (2016) (Thomas, J. concurring).