No. 21-429

IN THE

In the Supreme Court of the United States

STATE OF OKLAHOMA

Petitioner,

vs.

VICTOR MANUEL CASTRO-HUERTA,

Respondent.

On Writ of Certiorari to the Oklahoma Court of Criminal Appeals

BRIEF OF *AMICI CURIAE* THE CHEROKEE NATION, CHICKASAW NATION, CHOCTAW NATION OF OKLAHOMA, MUSCOGEE (CREEK) NATION, AND SEMINOLE NATION OF OKLAHOMA IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI*.. 1

SUMMARY OF ARGUMENT................................. 3

ARGUMENT 4

I. The Nations Are Fully Engaged in Cooperation with Willing Partners to Implement *McGirt*..... 4

II. The State's Attack on Tribal Sovereign Interests Would Undermine Years of Progress Relying on Tribal-State Cooperation.................................. 19

III. State Criminal Jurisdiction Has Not Helped Indians in Oklahoma or Elsewhere. 22

IV. Protecting Indians and Tribal Sovereignty are Congress's Responsibilities, and It is Acting to do Both. 29

CONCLUSION... 35

TABLE OF AUTHORITIES

Page(s)

CASES

Alaska v. Native Vill. of Venetie Tribal Gov't,
522 U.S. 520 (1998)... 27

Bosse v. State,
2021 OK CR 30, 499 P.3d 771,
cert. denied, 142 S. Ct. 1136 (2022)...................... 1

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397 U.S. 620 (1970)... 2

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228 U.S. 243 (1913)... 21

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2021 OK CR 8, 485 P.3d 250,
cert. denied, 142 S. Ct. 934 (2022)........................ 1

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1990 OK AG 32, 1991 WL 567868...................... 21

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829 F.2d 967 (10th Cir. 1987)............................ 21

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523 U.S. 751 (1998)... 31

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141 S. Ct. 2011 (2021)... 2

McGirt v. Oklahoma,
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572 U.S. 782 (2014)... 31

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471 U.S. 845 (1985)... 32

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Page(s)

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Pierson v. Ray, 386 U.S. 547 (1967) 31-32

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782 P.2d 401 (Okla. Crim. App. 1989) 21

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No. CF-2018-000213 (Okla. Dist. Ct. guilty plea Sept. 5, 2019).. 23

United States v. Bryant,
579 U.S. 140 (2016)... 25

United States v. Forty-Three Gallons of Whiskey,
93 U.S. 188 (1876)... 30

United States v. Kagama,
118 U.S. 375 (1886)... 30

United States v. Kepler,
No. 4:20-cr-00276-GKF-1 (N.D. Okla. Jan. 10, 2022) 8

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No. 4:20-cr-00237-JFH-1 (N.D. Okla. convicted May 18, 2021).. 23

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968 F.2d 1058 (10th Cir. 1992).......................... 21

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327 U.S. 711, 713 (1946).................................... 21

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31 U.S. (6 Pet.) 515 (1832).................................. 1

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18 U.S.C.

§ 1152 ....2, 13, 30

§ 1153 21

§ 1162 32

TABLE OF AUTHORITIES–Continued

Page(s)

§ 1162(a) 27-28
§ 3624(b)(1) 7
25 U.S.C.
§ 1304 .... 13, 32
§ 1323 32
§ 1326 32
§ 2812 .... 4, 31
§ 2812(b)(1)-(2) 4
§ 2812(d)-(e) 4-5
1832 Treaty of Washington with the Creek, Mar. 24, 1832, 7 Stat. 366 2
1855 Treaty of Washington with the Choctaw and Chickasaw, June 22, 1855, 11 Stat. 611 .... 2, 29-30
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Addendum Approving Cross-Deputization Agreement Between Hughes Cnty. & Muscogee (Creek) Nation (July 27, 2017) 16-17
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§ 804(3)(B) 32-33
§ 813 33
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§ 13.1 7
§ 99 15
§ 99a(D) 15

TABLE OF AUTHORITIES–Continued

Page(s)

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§ 138(A) 7
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§ 150.12A-1(A) to (C) 24
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Sentencing Reform Act of 1984, Pub. L. No. 98-473, tit. II, ch. II, 98 Stat. 1837, 1987-2040 7
Treaty of Dancing Rabbit Creek, Sept. 27, 1830, 7 Stat. 333 .... 2, 29
Treaty of Doaksville, Jan. 17, 1837, 11 Stat. 573 2
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Treaty of New Echota, Dec. 29, 1835, 7 Stat. 478 .... 2, 30
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Page(s)

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INTEREST OF *AMICI*[1]

Amici are the Cherokee Nation, Chickasaw Nation, Choctaw Nation of Oklahoma, Muscogee (Creek) Nation, and Seminole Nation of Oklahoma ("Nations"). The Nations occupy Reservations in Oklahoma,[2] on which they administer criminal justice and coordinate law enforcement efforts, which affords them unique insight into the impact of the State's request for relief in this case.

The Nations' histories are familiar. In the 19th century, they were removed to modern-day Oklahoma after unyielding state attacks on their governments, made in derogation of the decision in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832). But "[o]n the far end of the Trail of Tears was a promise." *McGirt*, 140 S. Ct. at 2459. The Nations and the United States signed treaties establishing Reservations on which the Nations would govern themselves, without state interference, under

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[1] No counsel for a party authored this brief in whole or part. No one other than the Nations made a monetary contribution to fund its preparation or submission. The parties have provided blanket consent to *amicus* briefs.

[2] *See, e.g.*, *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2462 (2020); *Spears v. State*, 2021 OK CR 7, 485 P.3d 873, *cert. denied*, 142 S. Ct. 934 (2022); *Bosse v. State*, 2021 OK CR 30, 499 P.3d 771, *cert. denied*, 142 S. Ct. 1136 (2022); *Sizemore v. State*, 2021 OK CR 6, 485 P.3d 867, *cert. denied*, 142 S. Ct. 935 (2022); *Grayson v. State*, 2021 OK CR 8, 485 P.3d 250, *cert. denied*, 142 S. Ct. 934 (2022); *State ex rel. Matloff v. Wallace*, 2021 OK CR 21, ¶ 15, 497 P.3d 686, 689, *cert denied sub nom. Parish v. Oklahoma*, 142 S. Ct. 757 (2022).

Congress's jurisdiction.[3] *See Choctaw Nation v. Oklahoma*, 397 U.S. 620, 635 (1970). There, the Nations developed sophisticated governments. *See* Duane Champagne, *Social Order and Political Change: Constitutional Governments Among the Cherokee, the Choctaw, the Chickasaw, and the Creek* 138-39, 172, 185-91, 195-98, 204-05 (1992).

As sovereigns, the Nations have "paramount" responsibility to protect their Reservations from crime. *See, e.g.*, *Lange v. California*, 141 S. Ct. 2011, 2031 (2021) (Roberts, C.J., concurring). They do so through extensive inter-governmental cooperation, under the allocation of authority Congress has set forth by statute, including in the General Crimes Act, 18 U.S.C. § 1152 ("GCA").

The State, following its loss in *McGirt*, now claims jurisdiction over crimes by and against Indians in Indian country. The State once recognized that it lacks this authority. Implementing the State's new position would not make Indian country safer. Moreover, the State's reversal threatens the Nations' exercise of tribal self-government to improve public safety and well-being on their Reservations, and resurrects the threat of state

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[3] Treaty of Dancing Rabbit Creek, art. 4, Sept. 27, 1830, 7 Stat. 333; 1832 Treaty of Washington with the Creek, art. 14., Mar. 24, 1832, 7 Stat. 366; Treaty of Payne's Landing, art. 7, May 9, 1832, 7 Stat. 368; Treaty of Fort Gibson, arts. 2-3, Feb. 14, 1833, 7 Stat. 417; Treaty of New Echota, art. 5, Dec. 29, 1835, 7 Stat. 478; Treaty of Doaksville, art. 1, Jan. 17, 1837, 11 Stat. 573; 1855 Treaty of Washington with the Choctaw and Chickasaw, arts. 1-2, June 22, 1855, 11 Stat. 611 ("Choctaw-Chickasaw Treaty"); 1856 Treaty of Washington with the Creeks and Seminoles, arts. 2-3, Aug. 7, 1856, 11 Stat. 699 ("Creek-Seminole Treaty").

encroachment on tribal sovereignty that the Nations' new homelands were established to foreclose. The Nations therefore turn again to this Court to stave off that threat.

SUMMARY OF ARGUMENT

The federal government and Nations are committing unprecedented resources to protect the public and secure criminal justice under the rule of law set forth in *McGirt*. Their efforts rely on extensive cooperation between tribal, federal, and local authorities and willing state partners. That is consistent with the recommendations of Congress's advisor on Indian country criminal justice issues—the Indian Law and Order Commission ("ILOC"). And it continues and benefits from the Nations' decades-long, collaborative approach to strengthening tribal self-government in Oklahoma and serving all Oklahomans, in which the State once participated. The Nations are the hub for this effort for simple reasons. They are the closest to, and most interested in, Indians and Indian communities, and they have demonstrated the capability and commitment to collaborate with other governments. The State and its *amici* ignore this effort's success and attack it using recycled anecdotes. The full picture shows remarkable success, as others on the ground in Oklahoma have acknowledged.

Under its current Governor, the State now seeks power that would let it veto tribal self-sufficiency and economic development by allowing it to police non-Indians' interactions with tribes, even on trust and restricted lands on which it long since conceded jurisdiction over crimes by and against Indians. The record of efforts to impose state concurrent criminal

jurisdiction on Indian country shows this would not improve safety for Indians.

The Court should reject the State's broad and novel proposition. The allocation of criminal jurisdiction in Indian country is Congress's domain, and it has already addressed the matter. Further adjustments are properly made through further legislation. To effect a change, the State must convince Congress why its preferred regime for Oklahoma is preferable, rather than asking the Court to upend longstanding doctrine on a national scale.

ARGUMENT

I. The Nations Are Fully Engaged in Cooperation with Willing Partners to Implement *McGirt.*

McGirt and subsequent cases found the Nations' Reservations had never been diminished and conformed the allocation of criminal jurisdiction there with settled federal law. Despite the State's steadfast resistance, the Nations and United States are effectuating that allocation through increased resources and inter-governmental collaboration in which the Nations are crucial links.

1. Congress's chosen advisory body recommended increased resources and collaboration in Indian country law enforcement. In the Tribal Law and Order Act of 2010 ("TLOA"), Congress established the ILOC, *see* 25 U.S.C. § 2812, a panel of experts with "significant experience and expertise in…the Indian country criminal justice system," *id.* § 2812(b)(1)-(2). Congress directed the ILOC to conduct "a comprehensive study of law enforcement

and criminal justice in tribal communities," and "develop recommendations on necessary modifications and improvements to justice systems at the tribal, Federal, and State levels." *Id.* § 2812(d)-(e). After two years of on-the-ground study, the ILOC produced the 500-page-long *A Roadmap for Making Native America Safer* (2013) ("Report"),[4] which represented "the unanimous views of all nine members of the Commission, Republicans and Democrats alike," *id.* at viii.

The Report provides comprehensive, well-reasoned recommendations to improve criminal justice in Indian country. It found one of the most effective means of reducing crime in Indian country is to increase the resources available to federal or tribal police on the Reservation to achieve parity with comparable off-reservation forces. When pilot projects have done so, violent crime has fallen by an average of 35% and as much as 68%. *Id.* at 64-65. The ILOC also emphasized that inter-governmental cooperation in Indian country law enforcement "can make Native nations safer and close the public safety gap with similarly situated communities. Enhanced coordination is also a proven way to combat off-reservation crime." *Id.* at 99. The ILOC thus recommended increased "Tribal-State and Tribal-Federal law enforcement agreements and Memoranda of Understanding, including Special Law Enforcement Commission and local deputization and cross-deputization agreements." *Id.* at xix.

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[4] https://bit.ly/3NIa5ib

The federal government and the Nations are now proceeding consistent with these recommendations by increasing law enforcement resources and cooperation in Oklahoma. As shown below, those efforts are producing demonstrably positive results.

2. The federal government is dedicating the resources necessary to protect Indians from crime in Oklahoma Indian country. Increased responsibility requires increased staffing. In 2021, in response to *McGirt*, the Northern District of Oklahoma nearly doubled its staff of Assistant U.S. Attorneys.[5] Federal prosecutors in the Eastern District increased from eight to forty-one, and at least eight magistrate or district court judges have assisted with handling cases there.[6] The Federal Bureau of Investigation ("FBI") has added eighty new agents and support staff in Oklahoma and continues to partner closely with state, local, and tribal law enforcement.[7]

The resulting federal prosecutions are putting criminals behind bars. The State and its *amici* point to a few examples where federal prosecutions have resulted in sentences facially lower than those defendants' state sentences. Such comparisons are

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[5] Curtis Killman, *Tulsa U.S. Attorney's Office Adds 24 Prosecutors to Help with Surge in Cases Due to McGirt Ruling*, Tulsa World (updated Nov. 7, 2021), https://bit.ly/3iYre9b.

[6] *See* Cameron Langford, *Federal Judiciary Calls on Congress to Add New Judgeships in Oklahoma*, Courthouse News Serv. (Sept. 28, 2021) ("Langford Article"), https://bit.ly/3wVbKLn.

[7] Ashlyn Brothers, *Oklahoma Special Agent Says FBI Faces Challenges in 3 Categories*, Newson6 (Feb. 14, 2022, 9:53 PM) ("Brothers Article"), https://bit.ly/3K8XzWL.

often misleading due to the differences in federal and state credit and parole systems, which can create large differences in the actual lengths of prison terms. First-time offenders in Oklahoma receiving maximum credits can be released after serving approximately 33% of their sentences, and repeat offenders can be released after approximately 40% of their sentences. *See* Okla. Stat. tit. 57, § 138(A), (D)(2), (E). In contrast, the federal credit system requires prisoners to serve at least 85% of their sentences. *See* 18 U.S.C. § 3624(b)(1). Oklahoma prisoners who commit crimes after November 1, 2018 are eligible for parole after serving 25% of their sentences, Okla. Stat. tit. 57 § 332.7(C). There is no parole in the federal system. *See* Sentencing Reform Act of 1984, Pub. L. No. 98-473, tit. II, ch. II, 98 Stat. 1837, 1987-2040.[8] And the federal government has some criminal justice tools the State lacks, like deportation.

Although the State points to the Respondent's plea agreement in this case, State Br. 11, it neglects to mention the effect of these state laws on his prior state sentence or that he agreed to cooperate in his deportation proceedings. Plea Agreement at 11, *United States v. Castro-Huerta*, No. 4:20-cr-00255-CVE-2 (N.D. Okla. plea filed Oct. 15, 2021), ECF No. 52. And his prison sentence is consistent with those in comparable federal cases. *See, e.g.*, Am. J. at 2,

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[8] In the state system, some serious violent or sexual offenders are only eligible for early release using credits or parole after serving 85% of their sentence. Okla. Stat. tit. 21, § 13.1. So, for most prisoners, state law has more lenient release rules.

United States v. Clark, No. 6:18-cr-00070-RAW (E.D. Okla. Apr. 29, 2021), ECF No. 114.

Even on their face, federal sentences can be comparable to, or longer than, state sentences. Consider the prompt federal re-prosecutions of Jimcy McGirt and Patrick Murphy. McGirt is now serving three concurrent life sentences, and Murphy faces a life sentence.[9] Then there is Shannon Kepler, who shot someone on the Muscogee (Creek) Reservation in 2014. After three hung juries on homicide charges, the State finally convicted him of manslaughter in 2017 and sentenced him to fifteen years' imprisonment. *See State v. Kepler*, No. CF-2014-3952 (Okla. Dist. Ct. July 20, 2021), *pet. for cert. denied*, 142 S. Ct. 932 (2022). After *McGirt*, the federal government indicted Kepler on November 5, 2020. It convicted him on the first try, and on January 7, 2022, he was sentenced to twenty-five years imprisonment. *See United States v. Kepler*, No. 4:20-cr-00276-GKF-1 (N.D. Okla. Jan. 10, 2022).

According to the Special Agent in charge of Oklahoma, violent crimes "are being pursued as heavily as they were in the past, and in some cases, maybe even stronger."[10] Almost immediately after *McGirt*, the average number of federal Indian country criminal cases for violent crime increased by

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[9] Press Release, U.S. Att'y, E. Dist. Okla., Jimcy McGirt Sentenced to Life Imprisonment (Aug. 25, 2021), https://bit.ly/3J1y5JI; Press Release, U.S. Att'y, E. Dist. Okla., Patrick Dwayne Murphy Found Guilty By Federal Jury (Aug. 5, 2021), https://bit.ly/3DyVvVy.

[10] Brothers Article.

163 percent over the pre-*McGirt* average, driven by referrals from Oklahoma prosecutors.[11]

Contrary to the State's and its *amici*'s claims, the federal government is prosecuting both violent *and* non-violent crimes, as shown by U.S. Attorneys' announcements of grand jury indictments. *See* Br. for Amicus Curiae Muscogee (Creek) Nation in Supp. of Resp't 12 ("MCN Cert. Br."). As Congress continues to appropriate resources for the Department of Justice and the Bureau of Indian Affairs ("BIA") to implement *McGirt*, *see infra* 33-34, these numbers will continue to rise.

In sum, the federal government is vigorously pursuing criminal justice in Oklahoma Indian country. And so are the Nations.

3. The Nations are vastly increasing their law enforcement resources and capabilities. Last fiscal year, the Cherokee Nation spent $10 million to expand its justice system; this fiscal year, the budgets for the Nation's court system, Attorney General's office, and Marshal Service more than doubled.[12] In 2020, anticipating that its Reservation would be affirmed, the Choctaw Nation allocated $2 million to hire new police and study how to exercise jurisdiction on the Reservation, and has spent over

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[11] *See Recent Spike in Federal Criminal Prosecutions on Indian Lands*, Transactional Records Access Clearinghouse, Syracuse Univ. (July 1, 2021), https://bit.ly/3J0JDwv.

[12] Press Release, Cherokee Nation, Cherokee Nation Files 1000th Case in Tribal Court Following McGirt Ruling (June 7, 2021), https://bit.ly/3v1g6NX; Michael Overall, *The Cherokee Nation's Budget Will Hit a Record $3 Billion as the Tribe Responds to COVID and McGirt*, Tulsa World (updated Oct. 22, 2021), https://bit.ly/3apJHaj.

$24.8 million in response to the affirmation of its Reservation.[13] From 2020 to 2022, the Muscogee (Creek) Nation more than doubled its Lighthorse police budget.[14] And the Seminole Nation has increased its court funding by over 117 percent, with a particular focus on prosecuting domestic violence cases.[15]

That increased funding is resulting in new hiring. The Cherokee Nation has seated two new district court judges, appointed eight new prosecutors, hired additional victim advocates, and opened a new juvenile justice department.[16] The Chickasaw Nation hired more than thirty new personnel in its Lighthorse Police Department, more than doubled its prosecutorial staff, hired a new criminal investigator and a supervisory probation officer, and established a new Office of Detention Administration to oversee housing its growing

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[13] Press Release, Choctaw Nation Pub. Rels., Choctaw Nation Chief Announces Formation of Sovereignty Committee (Sept. 2, 2020), https://bit.ly/2YWFxVx; *McGirt v. Oklahoma Supreme Court Decision*, Choctaw Nation of Okla., https://bit.ly/3DB7G45 (last visited Apr. 3, 2022) ("Choctaw Report").

[14] Affidavit of Richard Phillips ¶8 (Oct. 1, 2021), https://bit.ly/3u0c1up ("Phillips Aff.").

[15] Affidavit of Valerie Devol (Apr. 4, 2022), https://bit.ly/3LDfRzH ("Devol Aff.").

[16] Press Release, Cherokee Nation, Cherokee Nation Expands Criminal Justice Capabilities (n.d.), https://bit.ly/3uSh3bB ("Cherokee Report").

prisoner population.[17] The Choctaw Nation hired a total of 133 new staff directly in response to the affirmation of its Reservation, including two new judges, forty-seven new police and criminal investigators, and six new prosecutors, and established a public defenders' office.[18] The Muscogee (Creek) Nation has hired twenty new police officers, ten investigators, two Sexual Offender Registration officers, and six dispatchers.[19] It has also appointed a new District Court judge and is soon appointing another, and established a public defender system with twelve contracted attorneys.[20] It has also hired six new prosecutors.[21]

The Nations are also increasing the physical infrastructure of their criminal justice systems. The Muscogee (Creek) Nation is planning three new police substations[22] and a new 23,000 square-foot courthouse.[23] The Cherokee Nation is opening two new courts and has added two new facilities to its victim services program, which provides services to hundreds of Indian and non-Indian crime victims a

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[17] Press Release, Chickasaw Nation Pub. Rels. Off., Chickasaw Nation Expands Criminal Justice Capabilities (Mar. 11, 2022), https://bit.ly/3K6QtSB ("Chickasaw Report").

[18] Choctaw Report.

[19] Phillips Aff. ¶¶3-6.

[20] Affidavit of Shannon Prescott ¶4 (Oct. 4, 2021), https://bit.ly/3DCERoa ("Prescott Aff.").

[21] MCN Cert. Br. 17; Affidavit of Roger Wiley ¶13 (Nov. 16, 2021), https://bit.ly/3LAXQCa ("Wiley Aff.").

[22] Phillips Aff. ¶10.

[23] Prescott Aff. ¶4.

year.[24] The Seminole Nation plans to build a new court.[25] And all the Nations have agreements with counties in their Reservations, under which inmates are housed in county detention facilities at the Nations' expense.[26]

These investments are paying off in arrests, charges, and successful prosecutions. Since *McGirt* was decided, the Muscogee (Creek) Nation has filed 4,987 cases in its courts, including 1,055 traffic offenses.[27] In the year since their Reservations were affirmed: the Cherokee Nation has filed more than 3,700 cases in its courts, including 533 domestic violence cases, the majority of which were referred by non-tribal law enforcement;[28] the Chickasaw Nation has filed over 2,200 criminal cases in its courts, which includes over 500 traffic offenses;[29] and the Choctaw Nation has filed 1,742 felony and misdemeanor cases in its courts, including 329 domestic violence cases.[30] In the three months before the Seminole Reservation was affirmed, that

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[24] Cherokee Report.

[25] Devol Aff.

[26] Cherokee Report; Chickasaw Report; Phillips Aff.; *BOCC Approves New Jail Contract with Seminole Nation*, Seminole Producer (Dec. 29, 2021), https://bit.ly/3uNsRMA; Derrick James, *Choctaw Nation's Top Prosecutor Outlines McGirt Process*, McAlester News-Capital (Apr. 10, 2021), https://bit.ly/2Xm6Vvf.

[27] Affidavit of Kevin Dellinger ¶4 (Apr. 4, 2022), https://bit.ly/3Dzuvp0.

[28] Cherokee Report.

[29] Chickasaw Report.

[30] Choctaw Report.

Nation's prosecutors filed thirteen criminal and misdemeanor cases in tribal court, including eleven domestic violence cases. In the year since, the Nation has filed 326 criminal cases, including twenty-three domestic violence cases.[31]

The Nations exercise criminal jurisdiction over Indians and non-Indians who commit certain crimes related to domestic violence against Indians or tribal officers. *See* 25 U.S.C. § 1304. The expansion of tribal capacity also benefits other jurisdictions—such as the State, whose prosecutors the President of the Oklahoma District Attorneys' Association admits are persistently underfunded.[32] Through the collaboration and jurisdiction sharing which the Nations coordinate and implement, their expansion of capacity leads to the arrest and prosecution of non-Indians who commit crimes on the Reservations and tribal prosecution of Indians arrested by state law enforcement.

4. Continued Strengthening of Cooperation with Other Jurisdictions. As the Nations explained as merits-stage *amici* in *Sharp v. Murphy*, 140 S. Ct. 2412 (2020) (per curiam), and *McGirt*, they have long cooperated with other governments in Oklahoma on law enforcement matters. The Nations are the hub of this cooperation because of their paramount concern for public safety on the Reservations, their central role in social and economic activity there—which depends on public

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[31] Devol Aff.

[32] Matt Ballard, Opinion, *Oklahoma Will Lose Its Prosecutors if We Do Not Fund Them*, Oklahoman (Apr. 3, 2022), https://bit.ly/3Kdqhpt.

safety—and because they have demonstrated the capability and commitment to collaborate with other governments across a broad range of issues affecting the Reservations.

Inter-governmental cooperation has long been a hallmark of law enforcement in eastern Oklahoma, and it has expanded considerably since *McGirt*, with jurisdictions systematically coordinating their efforts to increase the depth and breadth of their coverage. The Nations have encouraged and enhanced cooperation with federal law enforcement, which is critical to the implementation of the GCA. Since *McGirt*, many state law enforcement officers, including county sheriffs, have undertaken special law enforcement commission training, which allows them to exercise federal law enforcement jurisdiction in Indian country and refer cases to federal prosecutors.[33] The Cherokee Nation has continued its long-standing cooperation with U.S. Attorneys' Offices to commission Special U.S. Attorneys who can prosecute cases in federal and tribal courts.[34] The Chickasaw and Choctaw Nations have both arranged for one of their tribal

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[33] *See* Press Release, Love Cnty. Sheriff's Office, Sheriff's Office Swears in As Federal Officers (Aug. 5, 2021), https://bit.ly/3JXmNax.

[34] *See* Press Release, U.S. Att'y, N. Dist. Okla., Tribal Special Assistant U.S. Attorneys Join U.S. Attorney's Office to Prosecute Crimes in Indian Country (Dec. 10, 2014), https://bit.ly/3NM5Thh; Max Bryan, *DOJ Funds Special Attorneys in Cherokee Territory*, Sw. Times Record (Oct. 1, 2020, 5:18 PM), https://bit.ly/3iWHVld.

prosecutors to be so commissioned.[35] The Eastern District is also working with the Muscogee (Creek) Nation to provide a Special Assistant U.S. Attorney for the Creek Reservation.[36] And generally, the Nations cooperate closely with federal prosecutors, referring cases and accepting referrals from them.[37]

The Nations also cooperate with local and state law enforcement. Pursuant to state law that allows qualified tribal officers to arrest non-Indians for violations of state law in Indian country, the Nations' law enforcement officers are acting as state law enforcement officers. Okla. Stat. tit. 21 §§ 99, 99a(D). And under cross-deputization agreements between the Nations and state and local agencies—including multiple district attorneys' offices and county sheriffs' departments—the Nations and United States have cross-deputized or cross-commissioned qualifying officers to enforce federal and tribal law. These "force multiplier" agreements are critical tools that allow each governments' officers to exercise the jurisdiction necessary to arrest suspects without delay and then transfer them for prosecution.[38] The Nations have signed hundreds of these agreements with state and local authorities on their Reservations, which collectively

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[35] Choctaw Nation Sovereignty for Strong Communities Comm'n, *Commission Report April 2021*, at 3 (2021), https://bit.ly/3qWXyhg ("Choctaw Commission").

[36] Liz Gray, *U.S. DOJ Seeks to Work with MCN*, Mvskoke Media (Dec. 2, 2021), https://bit.ly/3JXmSLn.

[37] *See* Langford Article.

[38] *See* Arvo Mikkanen, Ass't U.S. Att'y, W. Dist. Okla., *Federal Cross Deputization Of Law Enforcement in Indian Country* (Sept. 2020), https://bit.ly/3JXmwo1.

cover almost all of the Reservations' area.[39] This cooperation is effective: for instance, the majority of cases filed in Cherokee and Chickasaw courts were referred by non-tribal law enforcement.[40] Recently, the Cherokee Nation has worked with the Oklahoma Department of Wildlife to ensure tribal hunting and animal cruelty laws are enforced throughout the Reservation, resulting in a recent high-profile criminal case against two men who were charged with over sixty wildlife crimes.[41] Inter-governmental cooperation flows both ways—76% of the cases developed by the Chickasaw Lighthorse were referred to non-tribal prosecutors who have jurisdiction over non-Indian offenders.[42]

The State's *amici* acknowledge the importance of cross-deputization agreements, which they call "an important tool to bridge the jurisdictional gaps," DA Br. 14, but seek to discredit them all with one anecdote: the Hughes County Sheriff's purported withdrawal from the County's agreement with the Muscogee (Creek) Nation. That agreement remains in force, however, as the County Commission—which signed it and holds sole authority to enter into it—has indicated no intent to withdraw. *See* Okla. Stat. tit. 74, § 1221(D)(1); Addendum Approving Cross-Deputization Agreement Between Hughes

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[39] *See Tribal Compacts and Agreements*, Okla. Sec'y of State (last visited Mar. 31, 2022), https://bit.ly/3u1PZYv.

[40] Cherokee Report; Chickasaw Report.

[41] Ryan Love, *Two Men Charged with 60 Counts of Wildlife Crimes in Cherokee Nation*, 2News Okla. (updated Jan. 28, 2022), https://bit.ly/3J491lc.

[42] Chickasaw Report.

Cnty. & Muscogee (Creek) Nation (July 27, 2017).[43] The Nation promptly responded to the Sheriff's announcement and offered to discuss her concerns but has received no response.[44] The unauthorized announcement of one sheriff regarding one agreement cannot diminish the success of hundreds of agreements entered over the past three decades. Isolated, shaky anecdotes are no basis for a nationwide revision of federal Indian law.

The Nations also enhance law enforcement by focusing on the specific needs of other jurisdictions' officers in the Reservations. In the past year, the Chickasaw Nation has hosted six sessions to train cross-commissioned officers on the process to refer cases for tribal prosecution and hosted a public safety summit to overview the Chickasaw criminal justice system and encourage ongoing cooperation, which was attended by all five state district attorneys and both acting U.S. attorneys with jurisdiction in the Reservation, and the then-Attorney General of Oklahoma.[45] After *McGirt*, the Choctaw Nation developed training materials for law enforcement within the Reservation to deal with jurisdictional issues and established a 24-hour hotline so that officers can verify whether suspects or victims have Choctaw citizenship.[46] The Seminole Lighthorse Police are helping upgrade the

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[43] https://bit.ly/3x5itCr

[44] *See* Letter from Kyle B. Haskins, Interim Att'y Gen., Muscogee (Creek) Nation, to Marcia Maxwell, Sheriff, Hughes Cnty. (Feb. 15, 2022), https://bit.ly/3J3oNfW.

[45] Chickasaw Report.

[46] Choctaw Commission at 3, 5.

911 system in Seminole County, which serves the entire Reservation.[47]

Rather than acknowledge the Nations' impressive and effective work, the State's *amici* advance debunked claims. Tulsa, for example, repeats its certiorari-stage argument that the Nations have failed to prosecute domestic violence cases out of Tulsa. Tulsa Br. 6 n.3. Not so. The Cherokee Nation's record of prosecuting such cases is clear, *supra* 12, and as of November 2021 the Muscogee (Creek) Nation had secured convictions in over a dozen domestic violence cases referred by the Tulsa Police Department and filed charges in 119 more.[48] The two specific examples that Tulsa recycles are in fact being prosecuted by the Muscogee (Creek) Nation.[49]

The State's tale of a criminal dystopia in eastern Oklahoma is just that: A tale. Others in Oklahoma dispute it, like the editorial board of the *Tulsa World*, which says "[t]he tribes and U.S. attorneys have done a stellar job ramping up to adjust to [*McGirt*]; dangerous criminals are not walking free…. The infrastructure has shifted; for every

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[47] *See* Bob Melton, *Seminole Lighthorse Contributes $100,000 to 911 System Upgrade*, Seminole Producer (Feb. 11, 2022), https://bit.ly/37aL91S.

[48] MCN Cert. Br. 18-19; Wiley Aff. ¶¶6-7.

[49] Wiley Aff. ¶¶15-18; Compl., *Muscogee (Creek) Nation v. Dillard*, No. CF-2021-0849 (Muscogee (Creek) Dist. Ct. filed Aug. 18, 2021), https://bit.ly/3wZQLXC; Compl., *Muscogee (Creek) Nation v. Watashe*, No. CF-2021-1241 (Muscogee (Creek) Dist. Ct. filed Nov. 10, 2021), https://bit.ly/3J2rAGg.

crime, there is a jurisdiction."[50] So do law enforcement officials who work with the Nations, like the Garvin County Sheriff, who agrees that his office's agreement with the Chickasaw Nation "bridges the gap and allows us to take care of our citizens. That's really what this is all about—taking care of the citizens."[51] The State's slanted telling provides no warrant for upsetting the law in Oklahoma—much less nationwide—regarding the allocation of criminal jurisdiction in Indian country.

II. The State's Attack on Tribal Sovereign Interests Would Undermine Years of Progress Relying on Tribal-State Cooperation.

The State badly misses the mark when it argues that the Nations lack a significant interest in the outcome of this case. Br. for Pet'r at 40-45. The Nations have core sovereign interests in their and their citizens' relationships with non-Indians in Indian country. Non-Indians' participation in the robust, growing social and economic activity on tribal land on the Reservations has been key to the Nations' success in implementing the tribal self-determination policy and ensuring that necessary economic and financial support is provided to reservation communities.

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[50] Editorial, *McGirt Not Causing Sky to Fall as State Leaders, Law Enforcement Claim*, Tulsa World (Feb. 22, 2022), https://bit.ly/3ud7TaV.

[51] Barry Porterfield, *Tribal Pact Good for Sheriff*, Pauls Valley Democrat (Dec. 1, 2021), https://bit.ly/3dcUJkJ; *accord* Br. of Amicus Curiae Choctaw Nation of Okla. at 12-14, *Oklahoma v. McCurtain*, 142 S. Ct. 1222 (2022) (No. 21-773).

In 2019, tribal governments and businesses accounted for approximately $15.6 billion of goods and services and $5.4 billion in wages and benefits.[52] These operations range from governmental functions to gaming, manufacturing, retail, healthcare, and professional services, a large portion of which relies on patronage by and employment of non-Indians.[53] These activities primarily take place on tribal trust and restricted lands under federal and tribal jurisdiction.

This productivity has also relied on comity in tribal-state relations. Since 1988, Oklahoma's codified policy has been to "work in a spirit of cooperation with all federally recognized Indian tribes in furtherance of federal policy for the benefit of both the State of Oklahoma and tribal governments," Okla. Stat. tit. 74, § 1221(B), including negotiating compacts with Indian tribes to "address areas of mutual interest," *id.* § 1221(C)(1). Until 2021, the State negotiated many tribal-state agreements under these and other authorities, such as revenue sharing agreements for the sale of motor fuels and tobacco by tribes on Indian land, *id.* tit. 68, §§ 346, 500.63.

During this era of cooperation, it was clear and uncontested that the State lacked criminal jurisdiction over crimes against Indians in Indian country. Indeed, in 1991 the Oklahoma Attorney General affirmed that in an opinion that relied on

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[52] Kyle D. Dean, *The Economic Impact of Tribal Nations in Oklahoma Fiscal Year 2019*, at 4 (2022), https://bit.ly/38spRxH.

[53] *Id.* at 9, 12-18, 25.

Williams v. United States, 327 U.S. 711 (1946), and *Donnelly v. United States*, 228 U.S. 243 (1913), to explain that "[c]rimes committed by *or against Indians* which fall into the category of major crimes under [18 U.S.C. § 1153], *or are elsewhere specifically included under the auspices of the federal government by statute, are under the exclusive province of the United States of America*." *In re Haney*, 1990 OK AG 32, ¶ 11, 1991 WL 567868 at *3 (emphasis added). That opinion has stood for decades, and under state law the Attorney General and Governor have a "duty to follow" it "until they are judicially relieved of compliance," *State ex rel. Fent v. State ex rel. Okla. Water Res. Bd.*, 2003 OK 29, ¶ 16, 66 P.3d 432, 441.

For many years, they did so. Since the early 1990s, the State has not asserted criminal jurisdiction over crimes by or against Indians on restricted allotments, trust allotments, and tribal trust lands within the Nations' boundaries, after those lands were recognized by state and federal courts as Indian country. *Indian Country, U.S.A., Inc. v. Oklahoma ex rel. Okla. Tax Comm'n*, 829 F.2d 967, 978 (10th Cir. 1987); *State v. Klindt*, 782 P.2d 401, 402-03 (Okla. Crim. App. 1989); *Ross v. Neff*, 905 F.2d 1349 (10th Cir. 1990); *United States v. Sands*, 968 F.2d 1058 (10th Cir. 1992). But now the State says it has always had jurisdiction over crimes by non-Indians against Indians in Indian country.

This reversal threatens to interpose the State between the Nations and their non-Indian employees, contractors, and patrons. If the State had the power to police interactions between Indians and non-Indians in Indian country by the threatened exercise of criminal jurisdiction, it could chill non-

Indian interactions with tribes by requiring state licensure of participants and criminalizing non-compliance. For instance, the State might criminalize hunting or fishing on tribal land without a state license and seek to punish non-Indians who rely on tribal licensing or permission. Or it might make it a crime to engage in artistic performances or sporting events at the Nations' facilities without a state license. This authority would give Oklahoma unprecedented power to dominate tribal activities and police the terms on which tribes could pursue self-determination and undermine Congress's "overriding goal of encouraging tribal self-sufficiency and economic development." *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 510 (1991) (cleaned up). That would not improve the position of the Nations or the lives of their citizens.

III. State Criminal Jurisdiction Has Not Helped Indians in Oklahoma or Elsewhere.

The success of the Nations' engagement with willing intergovernmental partners to serve and protect the people of their Reservations stands in stark contrast to Oklahoma's own record in this area. Simply stated, the State's professed concern for the welfare of Indian crime victims is belied by the poor results of the State's exercise of criminal jurisdiction pre-*McGirt*.

In early statehood, non-Indian desire to obtain tribal wealth caused massive corruption by state and local officials who assisted in the appropriation of Indian property: "[T]he entire Five Tribes area was dominated by a vast criminal conspiracy to

wrest a great and rich domain from its owners." Angie Debo, *And Still the Waters Run* 196-97 (1940). The perpetrators were sometimes politically well-connected, and in some cases federal attorneys recognized it was "not only useless but positively dangerous" to attempt to prosecute crimes by such offenders against Indians in the state system—and federal law enforcement often filled the gap. *See, e.g.*, David Grann, *Killers of the Flower Moon* 214 (2017).

Disparities in criminal justice outcomes endure, both in particular cases and in aggregate. Take the case of Carl Gene Ortner, a non-Indian who was charged in state court with raping an Indian child. He pleaded to a $1,000 fine, two years imprisonment, and a thirteen-year suspended sentence. *State v. Ortner*, No. CF-2018-000213 (Okla. Dist. Ct. guilty plea Sept. 5, 2019). After *McGirt*, the federal government charged Ortner with sex crimes in Indian country. He was convicted and sentenced to life in prison and $100,000 fine. *United States v. Ortner*, No. 4:20-cr-00237-JFH-1 (N.D. Okla. convicted May 18, 2021).

Taking a wider view, in 2019 the State only "cleared" about 36% of reported murders, rapes, robberies, and aggravated assaults in the State—in 64% of reported cases, *the State did not successfully prosecute anyone*.[54] That number was even lower for burglary, larceny, and auto theft—a 12.1% clearance rate, *with 87.9% of reported cases never being*

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[54] Office of Crim. Just. Stats., Okla. State Bureau of Investigation, *Crime in Oklahoma 2020*, at 4-2 tbl.14 (2021), https://bit.ly/35wZKEq.

punished.[55] Indians are disproportionately victimized by these unpunished crimes. From 1994-98, the average annual homicide rate in the United States was 7.54 per 100,000 people.[56] During that period the murder rate for Indian women in Oklahoma County was more than double—16.7 per 100,000.[57] On Reservations, where the State long exercised criminal jurisdiction before *McGirt*, it was often worse: in Craig County on the Cherokee Reservation, 17.29 per 100,000 Indian women; in Okmulgee County on the Creek Reservation, 24.09 per 100,000; and in Latimer County on the Choctaw Reservation, a horrifying 80.97 per 100,000.[58] A study of low-income Indian women in western Oklahoma in 1999 found that 82.7% reported being victims of physical or sexual violence by an intimate partner, concluding "[t]he lifetime rates of intimate partner violence in this sample are among the highest reported in the literature."[59]

The State's failings extend to the crisis of missing indigenous people. Oklahoma is home to about 6.5% of people in the United States who identify as Native

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[55] *Id.*

[56] *See Crime in the United States 2013*, FBI (last visited Apr. 1, 2022), https://bit.ly/36Ok1WM.

[57] Ronet Bachman, et al., *Violence Against American Indian and Alaska Native Women and the Criminal Justice System* 26 tbl.1 (2008), https://bit.ly/3Dx35zU.

[58] *Id.*

[59] Lorraine Halinka Malcoe & Bonnie M. Duran, *Intimate Partner Violence and Injury in the Lives of Low-Income Native American Women*, at I-2-9 Ex. 2, I-2-12 (2004), https://bit.ly/3iVTZ6o.

American,[60] but accounts for one in ten reported missing indigenous people and nearly 15% of reported missing indigenous women in the entire country.[61] The Oklahoma Legislature recently passed legislation to provide interagency information sharing on the crisis, Okla. Stat. tit. 74, § 150.12A-1(A) to (C), but declined to fund its implementation.[62]

Oklahoma's record of poor protection of Indians is not unique. "Even when capable of exercising jurisdiction…States have not devoted their limited criminal justice resources to crimes committed in Indian country." *United States v. Bryant*, 579 U.S. 140, 146 (2016). The ILOC's Report found that, when Congress vests states with broad criminal jurisdiction unaccountable to tribal governments, the consequences are negative. Law enforcement challenges in Indian country are "especially prevalent" in such states in part because the presence of state jurisdiction leads to a decrease of

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[60] *See* Adriana Rezal, *Where Most Native Americans Live*, U.S. News & World Report (Nov. 26, 2021, 7:30 AM), https://bit.ly/3wVcQqt (9.7 million people nationwide and 16.01% of Oklahoma identify as Native American); Chris Casteel, *Oklahoma Population Falls Just Short of 4 Million in the 2020 US Census Count*, Oklahoman (Apr. 26, 2021, 3:27 PM), https://bit.ly/3uPm2Kh (3,959,353 people live in Oklahoma).

[61] Jacob Factor, *Missing and Murdered Indigenous People Movement Gains State and Federal Recognition*, Tulsa World (Jan. 30, 2022), https://bit.ly/3LTuBLd.

[62] *See* Rebecca Najera & Whitney Bryen, *Ida's Law: The Promise, Limitations of Oklahoma's Pursuit of Justice for Indigenous People*, Okla. Watch (Jan. 16, 2022), https://bit.ly/3LAFfWP.

federal investment in tribal justice systems, Report at ix, 12-13, 69, while the states find it "difficult to satisfy the demands of what is essentially an unfunded Federal mandate," *id.* at xiv. The consequences

> pose[] significant challenges to maintaining law and order on the ground in Tribal communities…. Particularly in remote, rural areas, calls for service go unanswered, victims are left unattended, criminals are undeterred, and Tribal governments are left stranded with high-crime environments that they must somehow manage on their own.

Id. at 69.

The ILOC also found that where state and federal jurisdiction is concurrent, "States often have proven to be less cooperative and predictable than the Federal government in their exercise of authority," and relations between tribal citizens and state authorities "can be strained to the point of dangerous dysfunction," including by states "actively prevent[ing] Tribal governments from exercising or developing their own capacities. This less-than-cooperative intergovernmental stance can be devastating…." *Id.* at 11. Unsurprisingly, the ILOC found this engenders distrust of state law enforcement, further eroding its effectiveness. *Id.* at xiv, 4, 13, 69. Those challenges would be exacerbated, not resolved, by imposing concurrent state criminal jurisdiction throughout all Indian country nationwide.

Grim data underscore that conclusion. From 1999-2009, the rate of death by homicide for Indians and Alaska Natives across the United States was 9.9

per population of 100,000, approximately 3.5 times the rate for white people during that period.[63] That is a searing indictment of the states, since during that time, more than 78% of Indians lived *outside* of Section 1151 Indian country,[64] under state criminal jurisdiction.

State level data also show that imposing state jurisdiction often has deleterious effects. For instance, from 1976-96 in Minnesota, where the state has full criminal jurisdiction over almost all Indian country in the state under Public Law 280, 18 U.S.C. § 1162(a), Indians were 1.2% of the population but 7.4% of murder victims.[65] In contrast, in Arizona, a state without jurisdiction over crimes against Indians in Indian country, Indians were 5.8% of the population but 4.1% of murder victims.[66]

Or look to Alaska. It has almost no Indian country, *see Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 523-24, 532-34 (1998), and exercises criminal jurisdiction over crimes against Indians almost everywhere in its borders, *see* 18

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[63] *See* Mose A. Herne, et al., *Homicide Among American Indians/Alaska Natives, 1999-2009*, 131 Pub. Health Reps. 597, 600 tbl.1 (2016), https://bit.ly/3j10G76 (cited in Texas Br. at 8).

[64] Tina Norris, et al., U.S. Census Bureau, *The American Indian and Native Alaska Population: 2010*, at 12 fig.6 (2012), https://bit.ly/3Kg8cqE.

[65] Lawrence A. Greenfield & Steven K. Smith, Bureau of Justice Stats., U.S. Dep't of Justice, *American Indians and Crime*, at 20 tbl.26 (1999), https://bit.ly/3u1RbuX.

[66] *Id.*

U.S.C. § 1162(a); Report at xiii, 44 & App. F. But "[m]any far-flung Native villages go unprotected while mostly higher-income, and mostly non-Native, communities on the road system receive the lion's share of state-funded law enforcement,"[67] "more than 29% of all homicide victims in the state are Alaska Native, yet Alaska Natives make up just 16% of the population,"[68] and as of 2013, Native Alaskan women experienced domestic violence at ten times the national rate.[69]

History shows that Oklahoma is unlikely to buck this trend. *McGirt*, however, offers a once-in-a-generation opportunity to establish a different model with better results, by unleashing a surge in resources and inter-governmental cooperation matched with the Nations' immediate response. Rather than collaborate in this effort, the current Governor and Attorney General oppose even recognizing that Indian reservations exist in Oklahoma.[70] The State also opposes more appropriations for tribal and federal law enforcement, even though that would fund the investigation and prosecution of people who

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[67] Kyle Hopkins, *Looking for Alaska's 'Rural' State Police Force?*, Anchorage Daily News (Dec. 31, 2019), https://bit.ly/3LGq12J.

[68] Kyle Hopkins, *A 'Blight' of Domestic Violence Deaths Strikes Alaska Villages*, Anchorage Daily News (updated Feb. 5, 2021), https://bit.ly/3NEX4pA.

[69] Report at 41.

[70] *See, e.g.*, Joe Tomlinson, *Promised Land Recap*, NonDoc (Sept. 17, 2021), https://bit.ly/3FOnJMG.

victimize Indians in Oklahoma.[71] Instead of supporting funding requests, engaging with Congress, or negotiating with the Nations, the Governor and his counsel tout litigation to circumvent and undermine *McGirt* as the State's primary effort.[72]

This political gambit complicates and sometimes even disables effective intergovernmental work. But history counsels that a return to tribal-state cooperation in Oklahoma is not only highly desirable, but eminently possible. Rejection of the State's request here would further that process and help re-focus efforts on the proper goal: implementing Congress's policies for Indian country.

IV. Protecting Indians and Tribal Sovereignty are Congress's Responsibilities, and It is Acting to do Both.

The federal government has long taken responsibility to prosecute crimes by non-Indians against the Nations' citizens. Before statehood, the Treaty of Dancing Rabbit Creek, art. 7, referred to the President for review and punishment "[a]ll acts of violence committed upon persons and property of the people of the Choctaw Nation...by citizens of the [United States]." In the Choctaw-Chickasaw Treaty,

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[71] *See* Reese Gorman, *Cole Encourages State-Tribal Relations Over State Challenges to McGirt*, Norman Transcript (July 23, 2021), https://bit.ly/3mNaftI.

[72] Gov. J. Kevin Stitt, State of the State Address at 3 (Feb. 7, 2022), https://bit.ly/3jgiM5v; Cynthia L. Cooper, *Judging Jurisdiction*, ABA J. (Apr. 1, 2022, 3:45 AM), https://bit.ly/3iUPuJr.

art. 14, and the Creek-Seminole Treaty, art. 18, the United States agreed to protect and indemnify those Nations from "aggression by...white persons not subject to their jurisdiction and laws." *See also* Treaty of New Echota art. 6 (United States protects Cherokee from "interruption and intrusion from citizens of the United States, who may attempt to settle in the country without [the Nation's] consent"). This reflected the federal interest, which existed "almost from its beginning," in "providing effective protection for the Indians from the violences of the lawless part of our frontier inhabitants." *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 201 (1978) (quotation omitted). Indeed, the United States, as the tribes' trustee, is uniquely responsible for protecting Indians and for safeguarding tribal self-governance. *See United States v. Kagama*, 118 U.S. 375, 384 (1886) (federal government holds as to tribes "the duty of protection, and with it the power"); *United States v. Forty-Three Gallons of Whiskey*, 93 U.S. 188, 194 (1876) (noting, in the criminal context, "Congress now has the exclusive and absolute power to regulate commerce with the Indian tribes").

Congress has repeatedly acted to establish jurisdiction over crimes in Indian country on terms that, while complex, it has consistently adjusted as needs change or circumstances showed prior adjustments to have been missteps. The complexity of this scheme requires that, whenever changes are made, all stakeholders carefully consider how the federal and tribal roles in policing reservations will be affected. History teaches that imposing concurrent state criminal jurisdiction without

properly considering those roles can have tragic results. *See supra* 25-28.

Compared to the Court, Congress "has the greater capacity 'to weigh and accommodate the competing policy concerns and reliance interests'" that have developed around Indian country jurisdiction and adjust them as necessary. *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 801 (2014) (quoting *Kiowa Tribe v. Mfg. Techs., Inc.*, 523 U.S. 751, 759 (1998)). As in other areas related to tribal sovereignty, the Court should "defer to the role Congress may wish to exercise in this important judgment." *Id.* at 800 (quoting *Kiowa*, 523 U.S. at 758). Congress is making those judgments, adjusting them as experience shows is necessary, giving careful attention to how to avoid the problems caused by past mistakes.

From 1790 to 1948, Congress repeatedly re-enacted the GCA against the consistent legal backdrop that the federal government has exclusive authority over crimes by non-Indians against Indians in Indian country. *See* Br. of Resp't at 5-6, 13. It thereby incorporated that principle into the statute. *See Oliphant*, 435 U.S. at 206 (federal statutes affecting Indians "cannot be interpreted in isolation but must be read in light of the common notions of the day and the assumptions of those who drafted them"); *Pierson v. Ray*, 386 U.S. 547, 555 (1967) (Congress "would have specifically so

provided" if it wished to abolish well-settled legal doctrine).[73]

In 1953, Congress changed course and *expressly* tried imposing general state criminal jurisdiction in select states—not including Oklahoma—in Public Law 280. 18 U.S.C. § 1162. When that proved ineffective, Congress's altered course again. It first amended Public Law 280 to allow States to retrocede jurisdiction back to the tribes and federal government and require tribal consent to state jurisdiction in the future. 25 U.S.C. §§ 1323, 1326. Later, in the TLOA, Congress established the ILOC to advise it on the state of criminal justice in Indian country and how to improve it. *Id.* § 2812. Today, the Nations are at the vanguard of implementing the ILOC's recommendations.

Congress is now committed to *enhancing* tribal criminal jurisdiction. In 2013, Congress authorized some tribes to exercise criminal jurisdiction over certain domestic violence crimes by non-Indians against Indians in Indian country. 25 U.S.C. § 1304. The *amici* Nations all exercise this jurisdiction. Congress recently extended those provisions, recognizing tribal jurisdiction over certain non-Indians for crimes of violence against children, sexual violence, sex trafficking, stalking, obstruction

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[73] The State and its *amici* muddy the waters by comparing civil and criminal jurisdiction. They fail to recognize that, unlike in the criminal realm, Congress has declined to legislate civil jurisdiction over relations between Indians and non-Indians, and those rules are largely judicially constructed. *See Plains Com. Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 328-30 (2008); *Nat'l Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 854-56 & nn.16-18 (1985).

of justice, and assault of tribal justice personnel in Indian country, Consolidated Appropriations Act, 2022, Pub. L. No. 117-103, div. W, § 804(3)(B), and authorizing a pilot program to allow Alaska tribes to exercise some jurisdiction over non-Indians in Native villages, *id.* § 813.

In that same legislation, Congress also spoke directly to *McGirt*'s implementation by increasing funding for U.S. Attorneys' Offices, the U.S. Marshals, Drug Enforcement Agency, and FBI, specifically to address "workload increases resulting from" *McGirt* and to "allow Federal, Tribal, State, and local stakeholders to further enable cooperation, collaboration, and sharing of pertinent information to protect all victims and bring all those who commit a crime to justice."[74] Congress further appropriated $62 million to be allocated to the Nations "to implement public safety changes" resulting from *McGirt*[75] and more funds to add federal court staff and public defenders in Oklahoma.[76] The

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[74] House Comm. on Appropriations, Explanatory Statement Regarding H.R. 2471 Consolidated Appropriations Act, 2022, Division B, at 65 (Mar. 9, 2022), https://bit.ly/3u2uVRw.

[75] House Comm. on Appropriations, Explanatory Statement Regarding H.R. 2471 Consolidated Appropriations Act, 2022, Division G, at 36 (Mar. 9, 2022), https://bit.ly/3qZHwmB.

[76] *See* House Comm. on Appropriations, Explanatory Statement Regarding H.R. 2471 Consolidated Appropriations Act, 2022, Division E, at 24 (Mar. 9, 2022), https://bit.ly/3LAAYCW; Admin. Office of U.S. Cts., *The Judiciary Fiscal Year 2022 Congressional Budget Summary*, at 6-8 (2022), https://bit.ly/3K5BmZA. In addition to measures

Administration proposes further *McGirt*-related increases next fiscal year.[77]

In short, Congress is acting—nationwide and in Oklahoma—to address criminal justice in Indian country by providing for additional tribal authority and substantially supplementing funding and resources to both federal law enforcement and the Nations. With this support, the federal government and the Nations are fulfilling their public safety responsibilities by exercising their sovereign rights to engage in robust, voluntary intergovernmental collaboration, as the ILOC recommended. The State

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Congress has enacted, other proposals have been made, including one bill that would, among other things, authorize the Cherokee and Chickasaw Nations to negotiate intergovernmental agreements with Oklahoma to allocate criminal jurisdiction within their respective Reservations. H.R. 3091, 117th Cong. (2021). Of course, "pass[ing] new legislation is a deliberately hard business under our Constitution," *McGirt*, 140 S. Ct. at 2462, and involves addressing the interests and concerns of multiple sovereigns, including the Choctaw, Muscogee (Creek), and Seminole Nations, who do not support allocating criminal jurisdiction on these terms but agree that any approach to criminal justice in Indian country requires careful consideration of the views of all tribes with an interest in the subject matter. The State asserts that legislative efforts are unworthy of consideration because there is no universal agreement on what further measures Congress should take, if any. That is a feature of the legislative and political processes. Those processes are playing out in Congress, and Congress has enacted legislative measures it has found appropriate. That is no reason for the judiciary to make policy in lieu of the legislature—in fact, quite the opposite.

[77] *See, e.g.*, OMB, *Appendix: Budget of the U.S. Government Fiscal Year 2023*, at 726, 737, 740, 744 (2022), https://bit.ly/35xodth.

should address any quarrel with that approach to Congress, not the Court.

CONCLUSION

For the foregoing reasons, the Court should affirm the lower court's judgment.

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