ORIGINAL

IN THE OKLAHOMA COURT OF CRIMINAL APPEALS

MARVIN KEITH STITT,
Appellant,

v.

CITY OF TULSA,
Respondent.

Case No. M-2022-984

Tulsa Mun. Ct. No. 7569655

BRIEF OF AMICUS CURIAE UNITED STATES OF AMERICA

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INTRODUCTION

"State courts generally have no jurisdiction to try Indians for conduct committed in Indian country." *McGirt v. Oklahoma*, 591 U.S. __, 140 S. Ct. 2452, 2459 (2020) (citing *Negonsott v. Samuels*, 507 U.S. 99, 102-03 (1993)). That statement by the United States Supreme Court reflects a long line of case law, treaties, and statutes that recognize the plenary power of Congress over Indian affairs as well as the sovereignty of Indian tribes over Indians within their territory, including the authority to define and punish criminal offenses. Conversely, states and their municipalities lack jurisdiction over Indians in Indian country, except as expressly provided by Congress.

The Supreme Court's decision in *Oklahoma v. Castro-Huerta,* 597 U.S. 629 (2022), involved state criminal jurisdiction over non-Indians in Indian country, and did not disturb the body of law requiring congressional authorization in order for states to assert criminal jurisdiction over Indians in Indian country. To the contrary, the Court endorsed the application of its own precedent that "precludes state interference with tribal self-government" and recognizes that state laws are generally not applicable to Indians in Indian country. 597 U.S. at 639 n.2 (2022) (citing *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136,142-43, 145 (1980), and *McClanahan v. State Tax Comm'n of Arizona*, 411 U.S. 164, 171-72 (1973)). Although both cases cited in *Castro-Huerta*'s footnote two recognize this principle, *McClanahan* reflects longstanding precedent and sets forth the governing framework here because the case concerns state jurisdiction over Indians in Indian country, while *Bracker* principally involved state jurisdiction over non-Indians.

McClanahan and cases preceding and following it establish a general rule against state jurisdiction over Indians for on-reservation activities except as authorized by Congress. This

protects "the right of reservation Indians to make their own laws and be ruled by them." *McClanahan*, 411 U.S. at 171-72, 179-80. It also reflects the "plenary and exclusive power of the Federal government to deal with Indian tribes, and to regulate and protect the Indians and their property against interference even by a state." *Bryan v. Itasca Cnty., Minn.*, 426 U.S. 373, 376 n.2 (1976) (citations omitted). Applying these principles to the circumstances presented here, the State of Oklahoma and its municipalities lack criminal jurisdiction over Indian defendants like Mr. Stitt for crimes committed in Indian country.[1] *McClanahan*'s general rule against state jurisdiction remains in full force, and Congress has not authorized Oklahoma to exercise criminal jurisdiction over Indians. *E.g.*, *Oklahoma Tax Comm'n v. Sac and Fox Nation*, 508 U.S. 114, 125 (1993).

STATEMENT OF THE CASE

On February 3, 2021, Appellant Marvin Stitt was cited for speeding by a Tulsa Police Department officer. Both the traffic violation and stop occurred within the corporate limits of the City of Tulsa and also within the boundaries of the Muscogee (Creek) Nation Reservation. Mr. Stitt is a citizen of the Cherokee Nation.

In the Municipal Court of the City of Tulsa, Mr. Stitt challenged the jurisdiction of the City of Tulsa over this citation, arguing that the City had no criminal jurisdiction over an Indian defendant for crimes committed on the Reservation. The Municipal Court found that the City of Tulsa had jurisdiction under the Curtis Act of 1898. Act of June 28, 1898, ch. 517, § 14, 30 Stat.

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[1] The United States does not address the City of Tulsa's argument that it possesses jurisdiction under the Curtis Act. However, this brief assumes for the sake of argument that the Curtis Act does not provide current congressional authorization for the City to exercise jurisdiction over violations committed by Indians. *See Hooper v. City of Tulsa*, 71 F.4th 1270, 1288 (10th Cir. 2023).

495, 499-500. Following a non-jury trial, Mr. Stitt was convicted and assessed a fine of $250. Mr. Stitt appealed to this Court.

While Mr. Stitt's appeal was pending, the Tenth Circuit held in *Hooper v. City of Tulsa*, 71 F.4th 1270 (2023), that Section 14 of the Curtis Act no longer grants Tulsa jurisdiction over municipal violations committed by Indians within its borders. 71 F.4th at 1285-88. The Supreme Court denied Tulsa's application for a stay of the mandate in *Hooper*. 143 S. Ct. 2556 (2023). Tulsa did not file a petition for a writ of certiorari.

Following the Supreme Court's denial of the stay application in *Hooper*, this Court directed the parties (and invited tribal amici) in this case to file supplemental briefs addressing the impact of *Hooper* on the appeal. The Court also directed the parties to brief "the impact of *Castro-Huerta* on the possible preemption of municipal jurisdiction in this case, and whether under *Bracker* the City of Tulsa has concurrent jurisdiction over its municipal offenses." Judges Lewis and Musseman concurred in part and dissented in part, with each writing separately to express concerns about the request for briefing on the impact of *Castro-Huerta*.

This amicus brief addresses only the second question regarding "the impact of *Castro-Huerta*" on the City's jurisdiction over an Indian defendant for a crime committed in Indian country. Because the City of Tulsa "can exercise only those powers expressly or impliedly granted by the State," *Toch, LLC v. City of Tulsa*, 2020 OK 81, ¶ 19, 474 P.3d 859, 866, it possesses jurisdiction over Indians in Indian county only if the State of Oklahoma possesses such jurisdiction. This brief thus addresses the authority of the State of Oklahoma over crimes committed by Indians in Indian country.

ARGUMENT

States and their municipalities lack jurisdiction over crimes committed by Indians in Indian country unless authorized by Congress. This rule has been in place since the earliest days of our Nation, and was not altered by the Supreme Court's decision or statements in *Castro-Huerta*. This brief first states the key foundational principles underlying this conclusion, then explains how *Castro-Huerta* left these authorities intact. It then describes the standard, set forth by the Supreme Court in *McClanahan* and other cases, that establishes that state jurisdiction over Indians in Indian country is preempted unless expressly authorized by Congress. Finally, the brief demonstrates that the application of *McClanahan* and other precedent establishes that the State of Oklahoma lacks jurisdiction over Indian defendants for crimes committed in Indian country.

I. The U.S. Constitution and principles of inherent tribal sovereignty establish that the United States and tribes, not states, possess authority over Indians within Indian country.

"The policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history." *Rice v. Olson*, 324 U.S. 786, 789 (1945) (citing *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); 1 Stat. 469; 4 Stat. 729); *see also The Kansas Indians*, 72 U.S. (5 Wall.) 737, 755 (1867). This principle follows from several foundational principles of law. First, the Constitution assigns Congress "plenary and exclusive" responsibility over Indian affairs, including the regulation of relationships with Indian tribes and Indian people. *See Haaland v. Brackeen*, 599 U.S. 255, 272-73 (2023) (collecting cases). As the Supreme Court recently stated, its "cases leave little doubt that Congress's power in this field is muscular, superseding both tribal and state authority." *Id.* at 273 (citations omitted); *see also United States v. McGowan*, 302 U.S. 535, 539 (1938) ("Congress alone has the right to determine the manner in which this

country's guardianship over the Indians shall be carried out..."); *cf. U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 801, 806 (1995) (constitutional provisions assigning power to federal government may divest states of that power). Congress's authority over Indian affairs encompasses subjects normally within the purview of the states. *Brackeen*, 599 U.S. at 276-77. This includes criminal law: since the founding of the Nation, Congress has enacted laws addressing criminal jurisdiction over crimes committed by Indians. *See infra* Sections V.A.2 & V.A.3.

Second, Indian tribes are sovereigns, and retain powers of self-government except as "withdrawn by treaty or statute, or by implication as a necessary result of their dependent status." *United States v. Wheeler*, 435 U.S. 313, 323 (1978). Tribes retain "the sovereign power to punish tribal offenders" as a "continued exercise of retained tribal sovereignty." *Id.* at 312, 323; *see also United States v. Lara*, 541 U.S. 193, 204 (2004).

These two principles—Congress's plenary authority over Indian affairs and the tribes' retained sovereignty over Indians within their territories—generally combine to preempt the operation of state law over Indians within Indian country. *See, e.g.*, *McClanahan*, 411 U.S. at 171-72; *Brackeen*, 599 U.S. at 332 (Gorsuch, J., concurring) ("this Court has consistently reaffirmed the Tribes' 'immunity from state and local control'" (citation omitted)); *Ute Indian Tribe v. Lawrence*, 22 F.4th 892, 900 (10th Cir. 2022) (absent congressional authorization, states lack jurisdiction over cases brought against a tribe or its members involving conduct in Indian country). Accordingly, states lack criminal jurisdiction over crimes committed by Indians in Indian country except as authorized by Congress. *See McGirt v. Oklahoma*, 140 S. Ct. at 2477 ("this Court has long 'require[d] a clear expression of the intention of Congress before the state or federal government may try Indians for conduct on their lands" (citation omitted)); *United*

States v. Antelope, 430 U.S. 641, 643 n.2 (1977) ("Except for the offenses enumerated in the Major Crimes Act," which are subject to exclusive federal jurisdiction, "all crimes committed by enrolled Indians against other Indians within Indian country are subject to the jurisdiction of tribal courts."); *Keeble v. United States*, 412 U.S. 205, 209-212 (1973) (discussing understanding that states lacked jurisdiction over crimes by Indians in Indian country). These longstanding principles of law, grounded in the Constitution, apply here.

II. *Castro-Huerta* did not overrule or alter principles of federal law under which states lack criminal jurisdiction over Indians in Indian country absent congressional authorization.

This Court's request for supplemental briefing could be read to imply, incorrectly, that *Castro-Huerta* may have upended this established precedent. *Castro-Huerta* did not alter the principle that states lack criminal jurisdiction over Indian defendants in Indian country absent congressional authorization.

The Supreme Court did not decide that question, which was not presented in *Castro-Huerta*, and thus left untouched the established precedent precluding state jurisdiction over crimes committed by Indians in Indian country except as authorized by Congress. In *Castro-Huerta*, the Supreme Court held that the General Crimes Act, 18 U.S.C. § 1152, and various other laws do not prevent the exercise of Oklahoma's criminal jurisdiction over *non-Indian defendants* who commit crimes in Indian country involving Indian victims. 597 U.S. at 639-40. *Castro-Huerta* did not involve the question of the scope of the State's jurisdiction over Indian defendants who commit crimes in Indian country, and the Court expressly did not opine on this issue. *See, e.g.*, *id.* at 639 n.2 (state prosecutorial authority over Indians is "not before us"); *id.* at 650 n.6 (Court expresses "no view on state jurisdiction" over crime committed by an Indian against a non-Indian in Indian country); *see also id.* at 693 (Gorsuch, J., dissenting) ("Most

significantly, the Court leaves undisturbed the ancient rule that States cannot prosecute crimes by Native Americans on tribal lands without clear congressional authorization—for that would touch the heart of 'tribal self-government.'"). *Castro-Huerta* thus did not change the basic allocation of criminal jurisdiction over Indians in Indian country.

III. *McClanahan* and the longstanding principles on which it rests—not *Bracker*—reflect the framework for assessing state criminal jurisdiction over Indian defendants.

In *Castro-Huerta*, the Supreme Court observed that a state may lack jurisdiction over crimes committed by Indians in Indian country not as a result of a preemption effect of the General Crimes Act, 18 U.S.C. § 1152, but as a "result of a separate principle of federal law that ... precludes state interference with tribal self-government." 597 U.S. at 639 n.2. The Court cited two exemplar cases for this principle—*Bracker*, 448 U.S. at 142-43, 145, and *McClanahan*, 411 U.S. at 171-72. *Id.* This Court's Order Directing Supplemental Briefing referenced only *Bracker*. But *McClanahan*, not *Bracker*, involves the analogous facts and governing legal principles here and therefore provides the applicable framework.

In *Bracker*, *McClanahan*, and other cases, the Supreme Court has recognized that principles of tribal sovereignty and congressional authority over Indian affairs have given rise to "two independent but related barriers to the assertion of state regulatory authority over tribal reservations and members." *Bracker*, 448 U.S. at 142; *see also McClanahan*, 411 U.S. at 179-80. "First, the exercise of such authority may be pre-empted by federal law."[2] *Bracker*, 448 U.S. at 142 (citations omitted). "Second, it may unlawfully infringe on the right of reservation Indians to

[2] The Major Crimes Act, 18 U.S.C. § 1153, provides for exclusive federal jurisdiction over major crimes committed by Indians in Indian country and expressly preempts state jurisdiction. *See McGirt*, 140 S. Ct. at 2459; *Negonsott*, 507 U.S. at 103.

make their own laws and be ruled by them." *Id.* (citations and internal quotations omitted); *McClanahan*, 411 U.S. at 171-72 (quoting *Williams v. Lee*, 358 U.S. 217 (1976)). Either barrier, standing alone, precludes state authority. *Bracker*, 448 U.S. at 143.

Both *Bracker* and *McClanahan* set forth frameworks for evaluating whether these barriers prevent a state from exercising authority in Indian country, but in distinct circumstances. When a state seeks to assert jurisdiction over *non-Indians* in Indian country, *Bracker* allows for a "particularized inquiry into the nature of the state, federal, and tribal interests at stake." 448 U.S. at 145; *Castro-Huerta*, 597 U.S. at 649-50 (citing *Bracker*). The *Bracker* inquiry does not require express statutory language to preempt state law. 448 U.S. at 144 (no "express congressional statement to that effect is required" (citing *Warren Trading Post Co. v. Arizona Tax Comm'n*, 380 U.S. 685 (1965)); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334 (1983). Rather, "State jurisdiction is preempted by the operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the State interests at stake are sufficient to justify the assertion of State authority." *Mescalero Apache Tribe*, 462 U.S. at 334 (citing *Bracker*). In *Castro-Huerta*, which involved Oklahoma's jurisdiction over a non-Indian defendant, the Court relied in part on *Bracker* for its analysis. 597 U.S. at 650.

But where a state seeks to exercise authority over *Indians* on a reservation, the Supreme Court has instead applied an analysis exemplified by *McClanahan*, which addressed state tax jurisdiction over Indians living on a reservation. That inquiry centers on the principles of tribal sovereignty over internal affairs and "plenary" federal authority over Indian affairs. Those principles establish a general rule that state jurisdiction does not reach on-reservation conduct of Indians in the absence of an Act of Congress authorizing that jurisdiction. *See supra* Section I; *see also Bryan*, 426 U.S. at 376 n.2 ("Congress has … acted consistently upon the assumption

that the States have no power to regulate the affairs of Indians on a reservation [] and therefore State laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that State laws shall apply" (citing *Williams*, 358 U.S. at 220, and *McClanahan*, 411 U.S. at 170-71) (cleaned up)); *Sac and Fox Nation*, 508 U.S. at 123. States may exercise jurisdiction over Indians in Indian country only as authorized by Congress, or in "exceptional circumstances"—not present here—where the relevant treaties and statutes show that the subject matter is not "within the sphere which the relevant treaty and statutes leave for the Federal Government and for the Indians themselves." *McClanahan*, 411 U.S. at 179-80; *see Rice v. Rehner*, 463 U.S. 713, 719-20 (1983). Express preemptive language is not required; to the contrary, the inquiry looks for express language *authorizing* state jurisdiction. *See McClanahan*, 411 U.S. at 174-76; *see also* Section IV, *infra*.

The Supreme Court has repeatedly distinguished between the assertion of state authority over Indians and non-Indians and endorsed different analyses for these two situations. The *McClanahan* Court highlighted the distinction when it rejected the application of an "infringement on rights of reservation Indians" test because that analysis originated in cases that "dealt principally with situations involving non-Indians." 411 U.S. at 179. The Court held that the "problem posed by this case is completely different" because it concerned state jurisdiction over Indians. *Id.* at 179-80 (Indian activity is "totally within the sphere which the relevant treaty and statutes leave for the Federal Government and for the Indians themselves" and thus no balancing of interests is required).

Bracker itself likewise recognized a clear demarcation between state jurisdiction over Indians versus non-Indians: "when on-reservation conduct involving only Indians is at issue, state law is generally inapplicable ...." 448 U.S. at 144. In contrast, "more difficult questions

arise where"—as in *Bracker*—"a State asserts authority over the conduct of non-Indians engaging in activity on the reservation." *Id.*; *see also Mescalero Apache Tribe*, 462 U.S. at 324. Similarly, in *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450 (1995), the Court held that state assertions of authority over Indians require "instead of a balancing inquiry, a more categorical approach: absent cession of jurisdiction or other federal statutes permitting it, we have held, a State is without power to tax reservation lands and reservation Indians." *Id.* at 458 (internal quotations omitted) (quoting *Cnty. of Yakima v. Confederated Tribes and Bands of Yakima Nation*, 502 U.S. 251, 258 (1992)); *see also Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 99 (2005) ("the *Bracker* interest-balancing test applies only where 'a State asserts authority over the conduct of non-Indians engaging in activity on the reservation'" (quoting *Bracker*, 448 U.S. at 144)); *Muscogee (Creek) Nation v. Pruitt*, 669 F.3d 1159, 1172 (10th Cir. 2012) (no balancing required where Indian conduct is concerned). And Congress has expressly affirmed inherent tribal jurisdiction over crimes committed by non-member Indians, *see* 25 U.S.C. § 1301(2), placing the subject squarely within the core of *McClanahan*: "on-reservation conduct within the authority of the tribe and federal government." 411 U.S. at 179-80. *See infra* Section V.A.1.

Because this case involves Oklahoma's jurisdiction over an Indian for on-reservation activities, the precedent exemplified by *McClanahan* provides the proper framework for addressing the question presented. The "balancing" inquiry set forth in *Bracker* is not applicable.

IV. *McClanahan* embodies the general rule against state jurisdiction over Indians in Indian country absent congressional authorization.

McClanahan addressed a challenge to the State of Arizona's efforts to impose a personal income tax on a reservation Indian whose entire income derived from reservation sources. 411

U.S. at 165. The Supreme Court in *McClanahan* emphasized background principles critical to the analysis of state jurisdiction over Indians. First, Indian nations are "distinct political communities" with sovereign authority over their people and territory. *Id.* at 168, 173. Second, the federal government has exclusive authority over Indian affairs. *Id.* at 172 n.7. Application of these principles, the Court explained, has resulted in the rule that "State laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that State laws shall apply." *See id.* at 170-71 (citing U.S. Dept. of the Interior, Federal Indian Law 845 (1958); *see also id.* at 168 ("the policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history" (quoting *Rice v. Olson*, 324 U.S. at 789)); *id.* at 169 (quoting *The Kansas Indians*, 72 U.S. at 755).

McClanahan recognized that, at least with respect to matters involving *non-Indians*, the strict bar against state jurisdiction within Indian country established in cases like *Worcester v. Georgia*, 31 U.S. (6 Pet.) at 561, had been relaxed somewhat, and that the prevailing standard now considered "whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them.'" 411 U.S. at 172 (quoting *Williams v. Lee*, 358 U.S. at 219-20). But in response to Arizona's argument that state taxation of individual Indians did not infringe on tribal governance, the Court held that requiring direct evidence of infringement on tribal authority would be too high a bar where a state sought to exercise jurisdiction over *Indians* on the reservation. *Id.* at 179. Instead, *McClanahan* set forth a "preemption" framework that prohibits state jurisdiction over Indians for on-reservation activity if the relevant treaty and statutes indicate that the authority is held by the tribes or the federal government, and not the state. *Id.* at 172-73. In this circumstance, there is no balancing of interests, and no direct indicia of "infringement" are needed. *Id.* at 179-80. And treaties and statutes should be read against a

"backdrop" of Indian sovereignty, keeping in mind that tribes retain authorities that include "the power of regulating their internal and social relations." *Id.* at 173 (quoting *United States v. Kagama*, 118 U.S. 375, 381-82 (1886)).

Subsequent Supreme Court decisions have further elaborated upon the principles set forth in *McClanahan*, and have acknowledged that the principles of tribal sovereignty and federal authority over Indian affairs that animate its reasoning result in a nearly universal rule against state jurisdiction over the conduct of Indians on-reservation.[3] *E.g.*, *Mescalero Apache Tribe*, 462 U.S. at 332-33; *Rice*, 463 U.S. at 719-20; *Bryan*, 426 U.S. at 376 n.2. Thus, Congress need not "explicitly pre-empt assertion of state authority insofar as Indians on reservations are concerned." *Rice*, 463 U.S. at 719 (citing *Bracker*); *see also McClanahan*, 411 U.S. at 172. Instead, the inquiry is flipped, and there is a "presumption of preemption," *Rice*, 463 U.S. at 726, such that "State laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that State laws shall apply." *Bryan*, 426 U.S. at 376 n. 2; *Rice*, 463 U.S. at 719-20 ("we are reluctant to infer that Congress has authorized the assertion of state authority in that respect except where Congress has expressly provided that State laws shall apply" (quotations and citations omitted)). This is consistent with the Supreme Court's statement in *McGirt* that "this Court has long 'require[d] a clear expression of the intention of Congress before the state or federal government may try Indians for conduct on their lands." 140 S. Ct. at 2477 (citing *Ex parte Kan-gi-shun-ca (Crow Dog)*, 109 U.S. 556, 572 (1883)).

[3] In the taxation context, the Court has treated *McClanahan* as a categorical bar to state authority over tribes and Indians in Indian country. *E.g.*, *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. at 458 (citing *County of Yakima*, 502 U.S. at 258).

These authorities comprise more than five decades of Supreme Court precedent since *McClanahan* but rest on principles going back to the Founding and rooted in the Constitution. That precedent governing state attempts to assert jurisdiction over Indians within Indian country has not been overruled and remains binding on federal and state courts. *See Bosse v. Oklahoma*, 580 U.S. 1, 4 (2016) ("It is [the Supreme] Court's prerogative alone to overrule one of its precedents." (citing *United States v. Hatter*, 532 U.S. 557, 567 (2001))). The City of Tulsa's assertions that this Court must find express preemptive statutory language that precludes State jurisdiction (Tulsa Supp. Br. at 7-10) or must weigh the harms to the various sovereign interests implicated (*id.* at 10-20) cannot be reconciled with this well-established precedent, and should be rejected.

V. The State of Oklahoma lacks jurisdiction over Indian defendants for crimes committed in Indian country.

Applying these principles of federal law, including *McClanahan* and other cases discussed above, the State of Oklahoma lacks jurisdiction over crimes committed by Indians within Indian country. The general rule against state jurisdiction over Indians for on-reservation activities applies with full force here. While Congress has authorized some states to exercise criminal jurisdiction over Indian defendants for crimes committed in Indian country under certain circumstances, Oklahoma has not taken the necessary steps to fit within that grant of authority. *See State v. Klindt*, 1989 OK CR 75, ¶ 3, 782 P.2d 401, 403 (Oklahoma has not assumed jurisdiction over Indian country under Public Law 280). The State therefore cannot overcome the longstanding general rule that bars state jurisdiction in the central context of state criminal prosecution of Indians for on-reservation conduct.

The relevant treaties, statutes, and case law, *see McClanahan*, 411 U.S. at 173-180, confirm that the State of Oklahoma lacks criminal jurisdiction over Indians in Indian country.

A. Federal law preempts state criminal jurisdiction over Indians for crimes committed in Indian country.

In *McClanahan*, the Supreme Court outlined, drawing on earlier precedent, a preemption analysis that considers "the applicable treaties and statutes which define the limits of state power" against a "backdrop" of Indian sovereignty. 411 U.S. at 172 (citations omitted); *Bryan*, 426 U.S. at 376 n.2; *cf. Bracker*, 448 U.S. at 143 (recognizing that the "unique historical origins of tribal sovereignty make it generally unhelpful to apply to federal enactments regulating Indian tribes those standards of pre-emption that have emerged in other areas of the law"). This section first describes some of the elements of Indian sovereignty implicated here, then describes how federal statutes establish that state jurisdiction is preempted.

1. Tribes, including the Muscogee (Creek) Nation, possess inherent sovereignty to regulate their internal affairs, including to punish Indian offenders on their reservations.

McClanahan instructs that principles of inherent tribal sovereignty form a critical "backdrop" to the consideration of state jurisdiction over the subject matter in question. 411 U.S. at 172; *see also Bracker*, 448 U.S. at 144; *Bryan*, 426 U.S. at 376 n.2. As described above, tribes possess "inherent sovereign authority over their members and territories." *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 509 (1991). That authority includes "the inherent power to prescribe laws for their members," and "to punish infractions of those laws." *Wheeler*, 435 U.S. at 323-27; *see also Lara*, 541 U.S. 193 (affirming inherent tribal jurisdiction over non-member Indians).

Tribal authority is at its peak with respect to internal relations, and "a tribe's power to prescribe the conduct of tribal members has never been doubted." *Mescalero Apache Tribe*, 462 U.S. at 332-33; *see also McClanahan*, 411 U.S. at 171-72; *Williams*, 358 U.S. at 223. As reaffirmed by the Supreme Court just two terms ago, tribes possess the power to define criminal offenses and punish their members within Indian country. *See, e.g.*, *Denezpi v. United States*, 142 S. Ct. 1838, 1845 (2022) (tribes possess "inherent power to prescribe laws for their members and to punish infractions of those laws" (quoting *Wheeler*, 435 U.S. at 322-23)); *see also Talton v. Mayes*, 163 U.S. 376, 380 (1896); *United States v. Thomas*, 151 U.S. 577, 585 (1894); *Ex parte Kan-gi-shun-ca (Crow Dog)*, 109 U.S. at 571-72. This inherent authority has not been divested. *See Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014) ("[U]nless and until Congress acts, the tribes retain their historic sovereign authority." (quoting *Wheeler*, 435 U.S. at 323) (cleaned up)); *Rice*, 463 U.S. at 720. Nor did the decision in *Castro-Huerta* undermine in any way the inherent powers of Indian tribes to exercise criminal jurisdiction in Indian country.

Furthermore, federal law confirms that tribal inherent authority includes criminal jurisdiction over *all Indians* in that tribe's Indian country. This is not a new principle. It is reflected in historic statutes, such as the Act of Mar. 3, 1817, Ch. 92, 23 Stat. 383, which expressly disclaimed federal jurisdiction over "any offense committed by one Indian against another" in Indian territory, without regard to tribal affiliation, on the understanding that tribes possessed such jurisdiction. *See also* Act of June 30, 1834, Ch. 161, 4 Stat. 729, 733 (continuing exception for "crimes committed by one Indian against the person or property of another Indian"); *Kagama*, 118 U.S. at 383 (term "Indian" in Major Crimes Act meant simply a member of some tribe, not necessarily of the tribe occupying the reservation where the crime occurred).

Nevertheless, in *Duro v. Reina*, 495 U.S. 676, 679 (1990), the Supreme Court held that tribes lack inherent authority to prosecute offenses committed by non-member Indians because, the Court concluded, that authority had been implicitly divested by treaties and Congress. Recognizing that states lack criminal jurisdiction over Indians in Indian country, the Court acknowledged its holding in *Duro* may result in no sovereign possessing authority to prosecute a crime (e.g., a misdemeanor crime by a non-member Indian), though it noted that "Congress has provided a mechanism by which the States now without jurisdiction in Indian country may assume criminal jurisdiction through Pub. L. 280." 495 U.S. at 697.

Congress quickly reversed the Court's conclusion, and affirmed by statute that tribes' inherent powers of self-government include the authority "to exercise criminal jurisdiction over all Indians." *See* Act of Nov. 5, 1990, § 8077(b)-(d), 104 Stat. 1892-98 (temporary legislation); Act of Oct. 28, 1991, 105 Stat. 646 (permanent legislation) (codified at 25 U.S.C. § 1301(2)). This was in part to fill the "jurisdictional void" created by *Duro*, which would not have existed if states possessed that jurisdiction. H.R. Rep. No. 102-261, at 5 (Oct. 22, 1991). The statute defines Indian tribes' "powers of self-government" to mean "the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians." 25 U.S.C. § 1301(2). In *Lara*, the Supreme Court held that in so doing, Congress confirmed inherent tribal authority, rather than delegated federal authority. 541 U.S. at 199-200. The Court upheld Congress's authority to enact this legislation, observing that the statute "involves no interference with the power or authority of any State," thus demonstrating the Court's understanding that states lacked jurisdiction over such offenses. *Id.* at 204-05 (citation omitted).

Finally, as relevant to this case, the Muscogee (Creek) Nation has not surrendered its sovereign authority over its lands and members. In a series of treaties, Congress "solemnly

guarantied" the Reservation and promised the Nation a "permanent home" and the continued right of occupancy. *See* Treaty with the Creeks, Art. XIV, Mar. 24, 1832, 7 Stat. 366, 368; Treaty with the Creeks, preamble, Art. III, Feb. 14, 1833, 7 Stat. 418-19; *see also McGirt*, 140 S. Ct. at 2460-61. By Treaty of 1856, Congress promised that "no portion" of the Reservation "shall ever be embraced or included within, or annexed to, any Territory or State," and that the Tribe was to be "secured in the unrestricted right of self-government" with "full jurisdiction over persons and property" of Indians within the Reservation. Arts. IV & XV, Aug. 16, 1856, 11 Stat. 699, 700; *McGirt*, 140 S. Ct. at 2461. Although its reservation is now within the State of Oklahoma, the Muscogee (Creek) Nation never surrendered its sovereign authority over crimes by Indians within Indian country. To the contrary, the treaties demonstrate an understanding by both the Tribe and the federal government that the Muscogee Nation would possess sovereign authority over its lands, free from state criminal jurisdiction. *See McGirt*, 140 S. Ct. at 2461-62. The treaty language is more explicit and forceful than that found sufficient to exclude state authority in *McClanahan*. 411 U.S. at 174-75 (even though the Navajo treaty "nowhere explicitly states that the Navajos were to be free from state law," it nonetheless "was meant to establish the lands as within the exclusive sovereignty" of the Tribe under general federal supervision). Tribal power in this area thus falls squarely within *McClanahan*'s general rule against state jurisdiction, and "may be repealed only by an explicit directive from Congress." *Rice*, 463 U.S. at 719-20; *see also McClanahan*, 411 U.S. at 171.

2. Public Law 280 reflects preemption of state jurisdiction over Indians.

Public Law 280 and similar statutes reflect Congress's understanding and intent that states lack criminal jurisdiction over Indians on a reservation absent congressional authorization.

In the 1940s, concerned about perceived "lawlessness" in certain areas, Congress chose to authorize certain states to prosecute Indians for crimes committed in Indian country or on specified reservations. *E.g.*, Act of July 2, 1948, Ch. 809, 62 Stat. 1224 (codified at 25 U.S.C. § 232) (New York); Act of June 25, 1948, Ch. 645, 62 Stat. 827 (codified at 18 U.S.C. § 3243) (Kansas). In 1953, Congress enacted Public Law 280, "to confer jurisdiction" on California, Minnesota, Nebraska, Oregon, and Wisconsin (and subsequently adding Alaska) "with respect to criminal offenses and civil causes of action committed or arising on Indian reservations within such States..." Pub. L. 83-280 (1953), 67 Stat. 588 (codified in part at 18 U.S.C. § 1162 and 28 U.S.C. § 1360). Public Law 280 permitted other states to choose to assume criminal and civil jurisdiction, now known as "optional" Public Law 280 states. *Id.* §§ 6, 7. The statute provides:

> The consent of the United States is hereby given to any other State *not having jurisdiction with respect to criminal offenses* or civil causes of action, or with respect to both, as provided for in this Act, to assume jurisdiction at such time and in such manner as the people of the State shall, by affirmative legislative Action, obligate and bind the State to assumption thereof.

Id. § 7 (emphasis added). This provision was controversial because a state could assume jurisdiction without tribal (or federal) consent and without any showing of necessity. *See, e.g.*, Signing Statement of President Eisenhower (Aug. 15, 1953) (noting concerns that sections 6 and 7 of the bill permit states to impose state jurisdiction without tribal consultation or federal approval) (available at https://www.presidency.ucsb.edu/documents/statement-the-president-upon-signing-bill-relating-state-jurisdiction-over-cases-arising). In the 1968 Indian Civil Rights Act, Congress amended the statute to require tribal consent before a state could assume "optional" jurisdiction. *See* Pub. L. 90-284, Tit. IV, 82 Stat. 73. The revised statute maintained the language establishing that states otherwise lacked such jurisdiction. *Id.* § 401. The 1968 amendments also provided a process by which states that had assumed jurisdiction under Public

Law 280 could retrocede some or all of that jurisdiction back to the federal government. *Id.* § 403(a).

These statutes establish Congress's understanding and intent that state criminal jurisdiction over Indian defendants exists only as expressly authorized by Congress. If states already possessed criminal jurisdiction over Indian defendants, the only purpose of Public Law 280 would be to confirm existing jurisdiction. But this interpretation is contradicted by the plain language of the statute, which "confer[s] jurisdiction" on states "not having jurisdiction." *See* Pub. L. 280 ("To confer jurisdiction..."); *id.* § 7; *see also* Act of June 30, 1948, Pub. L. No. 80-846, 62 Stat. 1161 ("An Act to confer jurisdiction on the State of Iowa..."). "Confer" means to "grant," "bestow," or "add,"—all terms naturally read as providing something new to the recipient. *See* Webster's New International Dictionary of the English Language, at 559 (2d Ed. 1958).

This understanding is confirmed by the legislative history of Public Law 280. The Senate Report (which incorporates the House Report) stated that the legislation was needed because "these States lack jurisdiction to prosecute Indians for most offenses committed on Indian reservations or other Indian country, with limited exceptions." S. Rep. 83-699, at 5 (1953), *as reprinted in* 1953 U.S.C.C.A.N. 2409, 2411; *see also* Signing Statement of President Eisenhower (Aug. 15, 1953) (describing bill as "confer[ring] jurisdiction" on the specified states and noting objections to provisions that would "permit other states to impose on Indian tribes ... the criminal and civil jurisdiction of the state").

The Supreme Court has also repeatedly affirmed that Public Law 280 provided states with jurisdiction over Indians that they otherwise lacked. For example, in *Bryan*, the Court recognized that the main purpose of the statute was to provide for state criminal jurisdiction

because states otherwise "lack jurisdiction to prosecute Indians for most offenses committed on Indian reservations." 426 U.S. at 379 (citing H. R. Rep. No. 848, 83rd Cong. 1st Sess., 5-6 (1953)). And in *Washington v. Confederated Bands and Tribes of Yakima Indian Nation*, the Court observed that on reservations "whose tribes have not requested the coverage of state law, jurisdiction over crimes by Indians is, as it was when Public Law 280 was enacted, shared by the tribal and Federal Governments." 439 U.S. 463, 498-99 (1979); *see also Mescalero Apache Tribe*, 462 U.S. at 337 n.21; *Williams*, 358 U.S. at 221. And this Court recognized in *Klindt* that Public Law 280 "provided the states permission to assume criminal jurisdiction" but that if the statute's procedures were not followed, such jurisdiction does not exist. 1989 OK CR 75, ¶ 3, 782 P.2d at 403.

If states already possessed criminal jurisdiction over Indian defendants, it would make the statute's conferral of that jurisdiction superfluous. Similarly, the 1968 amendments conditioning state assumption of jurisdiction on tribal consent also would have been unnecessary if states possessed this jurisdiction in any event. *See McClanahan*, 411 U.S. at 178 ("[W]e cannot believe that Congress would have required the consent of the Indians affected and the amendment of those state constitutions which prohibit the assumption of jurisdiction if the States were free to accomplish the same goal unilaterally by simple legislative enactment."); *Kennerly v. Dist. Court of Ninth Jud. Dist. of Mont.*, 400 U.S. 423, 428-29 (1971).

In *Castro-Huerta*, the Court rejected the "surplusage" argument as to state jurisdiction over non-Indian defendants, but it did so in part by noting that Public Law 280 "also grants States jurisdiction over crimes committed *by Indians*." 142 S. Ct. at 2500 (emphasis in original). "Absent Public Law 280, state jurisdiction over those Indian-defendant crimes could implicate principles of tribal self-government." *Id.* (citing *Bracker*, 448 U.S. at 142-43). Thus, the Court

reasoned that its "resolution of the narrow jurisdictional issue in this case does not negate the significance of Public Law 280 in affording States broad criminal jurisdiction over other crimes committed in Indian country, such as crimes committed by Indians." *Id.* The *Castro-Huerta* Court thus recognized that Public Law 280 retains significance for crimes committed by Indians.

The Court's reasoning was also based on the finding that Public Law 280 "contains no language that preempts States' civil or criminal jurisdiction." 142 S. Ct. at 2500. However, *Castro-Huerta* did not involve state authority over *Indians*. In that circumstance, express preemptive language in a federal statute is not required to find that a state does not have jurisdiction over *Indians*, given the general rule against such jurisdiction. *McClanahan,* 411 U.S. at 174; *Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue of New Mexico*, 458 U.S. 832, 838 (1982). Nor is there any credible argument that the states as a general matter had, prior to Public Law 280, preexisting jurisdiction over Indians in Indian country that Congress was required to divest through particular statutory language.

Oklahoma has not been granted or assumed criminal jurisdiction over Indian country under Public Law 280. *See Sac & Fox Nation*, 508 U.S. at 125 ("Oklahoma did not assume jurisdiction pursuant to Pub.L. 280" and thus lacks "either civil or criminal jurisdiction"); *Klindt*, 1989 OK CR 75, ¶ 3, 782 P.2d at 403 (citing cases).

3. Other federal statutes confirm the preemption of state authority.

Congress's long-held understanding that states lack criminal jurisdiction over Indians in Indian country is also reflected in other federal laws, which reflect the premise that absent congressional action, *only* tribes have jurisdiction over crimes by Indians. *Cf. McClanahan*, 411 U.S. at 175 ("Congress has consistently acted upon the assumption that the States lacked"

jurisdiction over Indians on the reservation). For example, in 1796, Congress passed the third Trade and Intercourse Act, which extended federal jurisdiction over Indians who committed crimes after crossing state or territorial lines. Act of May 19, 1796, Ch. 30, 1 Stat. 469, § 14. However, the Act applied only to crimes committed outside the tribes' territory, evidencing Congress's understanding that tribes had exclusive authority to punish Indians within their territory. *Id.* And as to Indians who committed crimes outside of Indian lands, the Act required the federal government to first "make application to the nation or tribe, to which such Indian or Indians shall belong, for satisfaction"; only if that failed could federal jurisdiction be exercised. *Id.* Thus, Congress understood and accepted that tribes possessed the sovereign right to punish Indians within their jurisdiction.

Crimes involving only Indians were left to the sole jurisdiction of the tribes until the late 1880s. In *Ex parte Kan-gi-shun-ca (Crow Dog)*, the Court affirmed that Indian tribes retained the right to make and enforce their own criminal laws, and because Congress had authorized no encroachment on this sovereignty, the federal courts lacked jurisdiction to prosecute the murder of a Sioux chief by another Sioux Indian. 109 U.S. at 557, 571-72. Dissatisfied with this situation, two years later Congress extended federal jurisdiction to enumerated felonies committed by Indians in Indian country. Ch. 341, 23 Stat. 385 (1885) (codified at 18 U.S.C. § 1153). This statute, now known as the Major Crimes Act, was premised on Congress's understanding—confirmed in *Ex parte Kan-gi-shun-ca*—that otherwise *only the tribe* possessed authority to try crimes by Indians against Indians in Indian country. *See, e.g.*, 16 Cong. Rec. 934 (1885) (Statement of Rep. Cutcheon, sponsor of the Act) ("If … an Indian commits a crime against an Indian on an Indian reservation, there is now no law to punish the offense except … the law of the tribe….").

The Supreme Court upheld the constitutionality of this statute and found that it was within Congress's "plenary" power over Indian affairs, notwithstanding both tribal and state sovereignty. *Kagama*, 118 U.S. 375. The *Kagama* Court specifically observed that the Indians "owe no allegiance to the states, and receive from them no protection" and that the law "does not interfere with the process of the state courts." 118 U.S. at 383-84. Because states lack jurisdiction over Indians, and were often opposed to their interests, the Court held that both the duty and power of their protection lies with the federal government. *Id.*

When Oklahoma was admitted to statehood in 1907, the United States specifically preserved federal authority with regard to Indians. Section 1 of the Oklahoma Enabling Act, ch. 3335, 34 Stat. 267 (1906), provides that nothing in the new State Constitution shall

> be construed to limit or impair the rights of person or property pertaining to the Indians of said Territories (so long as such rights shall remain unextinguished) or to limit or affect the authority of the Government of the United States to make any law or regulation respecting such Indians, their lands, property, or other rights by treaties, agreement, law, or otherwise, which it would have been competent to make if this Act had never been passed.

The Supreme Court and Tenth Circuit have recognized that this provision maintained federal authority over Indian affairs within the State, retained tribal authority, and did not permit the assertion of jurisdiction by the State over Indians. *United States v. Ramsey*, 271 U.S. 467, 469 (1926) (federal authority retained); *Tiger v. Western Inv. Co.*, 221 U.S. 286, 309 (1911) (same); *Indian Country, U.S.A., Inc. v. State of Okl.*, 829 F.2d 967, 978-81 (10th Cir. 1987) (federal and tribal jurisdiction retained); *see also Seneca-Cayuga Tribe of Oklahoma v. State*, 874 F.2d 709, 712 (10th Cir. 1989) ("Oklahoma, like many other states, was required to disclaim jurisdiction over Indians at statehood."). Although the *Castro-Huerta* Court determined that the Oklahoma Enabling Act does not divest the State of jurisdiction over its territory, including in Indian

country, 597 U.S. at 654, the Court did not address the separate question of whether the Act supports the lack of State authority over Indians within Indian country. *Id.* at 655 n.9.

More recently, Congress has continued to demonstrate its support for tribal criminal authority by affirming and expanding it. Congress's actions have been motivated in part by its understanding that, except in states with authority under Public Law 280, only the federal government and tribes may exercise certain criminal authorities over Indians in Indian country, and that Congress therefore must bolster tribal and federal authorities and resources to address enforcement gaps. For example, the 2010 Tribal Law and Order Act relaxed somewhat prior statutory limitations on the sentencing authority of tribal courts and also bolstered federal resources. Pub. L. No. 111-211, 124 Stat. 2258 (codified at 25 U.S.C. § 1302); *see also* S. Rep. 111-93, at 3 (2009) (describing tribal communities' reliance on federal government to investigate and prosecute most reservation crimes, and indicating state authority in Indian country is as authorized in Public Law 280). The federal government also provides substantial funding for tribal public safety and justice programs.[4]

These statutes provide further evidence that Congress has consistently acted on the understanding that states lack criminal jurisdiction over on-reservation Indians, *McClanahan*,

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[4] *See, e.g.*, Fiscal Year 2022 Consolidated Appropriations Act, Pub. L. 117-103, Joint Explanatory Statement Division G at 36 (providing Bureau of Indian Affairs an additional $62 million to implement public safety changes in response to *McGirt*); Bureau of Indian Affairs, Report to the Congress on Spending, Staffing, and Estimated Funding Costs for Public Safety and Justice Programs in Indian Country, 2019 ($238.7 million for law enforcement programs, $116.8 million for detention programs, and $54.4 million for tribal courts) (available at https://www.bia.gov/sites/default/files/dup/assets/bia/ojs/ojs/pdf/2019%20TLOA%20Report%20Final.pdf); Department of Justice, *Justice Department Announces More than $246 Million in Grants for Tribal Nations* (Sept. 21, 2022) (describing $246 million in grants to enhance tribal justice systems and strengthen law enforcement responses, and fund services for crime victims) (available at: https://www.justice.gov/opa/pr/justice-department-announces-more-246-million-grants-tribal-nations).

411 U.S. at 175, and that this authority lies exclusively in the federal and tribal governments except as specifically authorized by Congress.

B. State criminal jurisdiction over Indian defendants is also prohibited because it would infringe on tribal rights and sovereignty.

State jurisdiction is also prohibited over Indian defendants in Indian country because it would "infringe[] on the right of reservation Indians to make their own laws and be ruled by them." *Bracker*, 448 U.S. at 143 (preemption and infringement analysis are independent barriers to state jurisdiction over Indians); *McClanahan*, 411 U.S. at 171-72, 179-80; *Mescalero Apache Tribe*, 462 U.S. at 334 n.16. The *McClanahan* Court made clear that it is not necessary to establish infringement on tribal self-government where state jurisdiction over Indians is at issue. 411 U.S. at 179-180. But here that basis for preemption is also present.

As discussed above, tribal authority to define criminal offenses and punish Indian offenders within Indian country is a core sovereign power. *See, e.g.*, *Denezpi*, 142 S. Ct. at 1845 (2022); *Lara*, 541 U.S. at 199-200; *Wheeler*, 435 U.S. at 324-25. Absent congressional action, tribes have a right to make their own criminal laws and be governed by them, in accordance with their own communities' needs, cultural standards, and priorities. The exercise of state jurisdiction over Indians would directly infringe on the Tribes' self-government rights. The imposition of state criminal law would effectively supplant the Tribe's decisions on these issues, and would interfere with tribal self-government. *See Ute Tribe of the Uintah and Ouray Reservation v. Utah*, 790 F.3d 1000, 1006 (10th Cir. 2015) (Gorsuch, J.) ("[T]here's just no room to debate" that state prosecution of Indian defendant "create[s] the prospect of significant interference with [tribal] self-government." (citation omitted)); *cf. Mescalero Apache Tribe*, 462 U.S. at 338 (concurrent state jurisdiction over hunting and fishing by nonmembers would

"effectively nullify" tribal authority and allow tribe to exercise authority "only at the sufferance of the State."). For example, offenses that the Muscogee (Creek) Nation elected not to punish criminally could still be subject to State penalties, undermining the tribal decision regarding the criminal laws that govern their own communities. And such a regime would subject some Indian defendants to the risk of dual prosecutions, which in turn could undermine the choices the Muscogee (Creek) Nation has made with respect to which offenses should be punished and how. In 18 U.S.C. § 1152, Congress expressed its intent to avoid this potential conflict with tribal sovereignty in the context of federal prosecutions by excluding from that statute's coverage offenses by an Indian "who has been punished by the local law of the tribe."

And State jurisdiction would subject Indians "to a forum other than the one they have established for themselves." *Fisher v. Dist. Court*, 424 U.S. 382, 387-88 (1976); *see also County of Yakima*, 502 U.S. at 265 (*in personam* jurisdiction over reservation Indians for tax purposes "would have been significantly disruptive of tribal self-government"). This "plainly would interfere with the powers of [tribal] self-government," *Fisher*, 424 U.S. at 387-88, even where nonmembers are involved. *See* 25 U.S.C. § 1301(2) (tribal powers of self-government include criminal jurisdiction over "all Indians"); 25 U.S.C. § 1304(b) (recognizing tribal power to exercise special Tribal criminal jurisdiction over "all persons"). For these reasons, state criminal jurisdiction over Indians on the reservation is also prohibited because it would infringe on tribes' right to self-government.

VI. If the Court elects to apply a *Bracker* balancing analysis, it should not do so without a developed record on the relevant factors.

As explained above, a *Bracker* balancing analysis is inapplicable to questions of state jurisdiction over Indians in Indian country. *Supra* Section III. Use of the *Bracker* analysis is

inappropriate in this case for two additional reasons. That analysis calls "for a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law." 448 U.S. at 145. But in this case, the City of Tulsa did not advocate for the application of the *Bracker* balancing analysis in the trial court. There is thus no factual record from the trial court regarding the interests of each sovereign, and thus no basis to conduct a "particularized inquiry." *Compare Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 185 (1989) (noting district court conducted a trial and made findings of facts related to sovereign interests). Moreover, none of the sovereigns whose interests must be considered are parties to this case. *Cf. Ute Mountain Ute Tribe v. Rodriguez*, 660 F.3d 1177 (10th Cir. 2011) (considering *Bracker* analysis for state taxation of non-Indians where tribe and state are parties). It would be particularly concerning to upend the longstanding principle of law that the State lacks criminal jurisdiction over Indians for crimes committed in Indian country in these circumstances. For these reasons, it would be especially inappropriate for the Court to conduct a *Bracker* balancing analysis.[5]

CONCLUSION

For the foregoing reasons, the State of Oklahoma lacks jurisdiction to prosecute this case.

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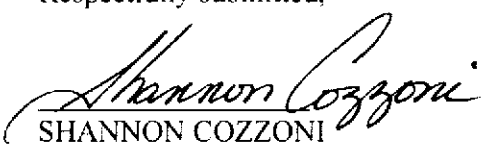
[5] If this Court were to do so, however, the result would be the same. Not only does the Tribe possess compelling sovereign interests in making and enforcing its own criminal laws on its Reservation, but the federal government's own extensive involvement in addressing crimes by Indians within Indian country would far outweigh any asserted State interest. *Cf. Champion Int'l Co. v. Brown*, 731 F.2d 1406, 1409 (9th Cir. 1984) (state has "no cognizable state interest in enforcing [state] laws preempted by federal law" (cleaned up)). As discussed above, the strong federal interest is evidenced by statutes providing for federal jurisdiction over certain crimes by Indians, a comprehensive scheme governing state assumption of such jurisdiction, and extensive federal support for tribal law enforcement and judicial mechanisms, among other things.

Respectfully submitted,



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