No. 21-429

IN THE

Supreme Court of the United States

STATE OF OKLAHOMA,

Petitioner,

v.

VICTOR MANUEL CASTRO-HUERTA,

Respondent.

On Petition for Writ of Certiorari to the Oklahoma Court of Criminal Appeals

BRIEF OF *AMICI CURIAE* ENVIRONMENTAL FEDERATION OF OKLAHOMA, INC., OKLAHOMA FARM BUREAU LEGAL FOUNDATION, OKLAHOMA CATTLEMEN'S ASSOCIATION, OKLAHOMA AGGREGATES ASSOCIATION, AND THE PETROLEUM ALLIANCE OF OKLAHOMA IN SUPPORT OF PETITIONER

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INTERESTS OF *AMICI CURIAE*

Amici, the Environmental Federation of Oklahoma, Inc., Oklahoma Farm Bureau Legal Foundation, Oklahoma Cattlemen's Association, The Petroleum Alliance of Oklahoma, and the Oklahoma Aggregates Association, support Oklahoma's Petition for Writ of Certiorari ("Petition") seeking review of the Oklahoma Court of Criminal Appeals' decision in *Castro-Huerta v. Oklahoma*, No. F-2017-1203 (Okla. Crim. App. Apr. 29, 2021) ("*Castro-Huerta*").[1] The Petition's request that this Court overturn *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020),[2] presents fundamental questions whether not just criminal, but also civil, jurisdiction in areas long considered within terminated reservations may be upset without considering history and understandings upon which all participants, including Amici's members, have long relied. In addition to mechanically perpetuating *McGirt*'s errors, *Castro-Huerta* also purports to divest Oklahoma of criminal jurisdiction over non-Indians' crimes against Indians[3]

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[1] Petitioner has filed a blanket consent to the filing of *amicus* briefs. Per September 28, 2021, communications, Respondent's Counsel of Record also consents. No counsel for a party authored this brief in whole or in part. No person other than Amici, their members, or their counsel made a monetary contribution to its preparation or submission.

[2] Amici, like the State, do not lightly ask this Court to overrule its own precedent. This request, however, is warranted by *McGirt*'s "extraordinary" burdens. *See McGirt*, 140 S. Ct. at 2500 (Roberts, C.J., dissenting). Under the circumstances present here, this Court can and should review and reverse *McGirt*. *See* Pet. 28 and cases cited therein.

[3] Amici use the term "Indian" to describe persons subject directly to 18 U.S.C. § 1151 (*i.e.*, having "some quantum of Indian blood . . . [and] a member of, or affiliated with, a federally recognized tribe," *see United States v. Zepeda*, 792 F.3d 1103, 1114 (9th Cir. 2015)), and refer to all others as "non-Indians."

affecting nearly two million Oklahomans without clear statutory mandate or direction of this Court. These are both questions of tremendous importance, within Oklahoma and beyond.

The *McGirt* majority held the Creek Reservation was never disestablished, despite over a hundred years of understandings to the contrary. *Castro-Huerta* extends *McGirt* to a crime committed by a non-Indian within the purported Cherokee Reservation. Other Oklahoma courts have expressly held *McGirt* compels similar conclusions with respect to the historic reservations of the Choctaw, Seminole, and Chickasaw Nations, meaning that the historic reservations of all Five Civilized Tribes ("Five Tribes") in Oklahoma purportedly remain extant (the "Five Tribes Area").[4] Hence, in the mere thirteen months since *McGirt* was decided, more than 19 million acres have been held to be "Indian country." *McGirt* has thus thrown the criminal *and civil* jurisdictional status of nearly the entire eastern half of the State into doubt.

McGirt profoundly affects Amici and the members they represent, Oklahoma farmers, ranchers, energy, oil and gas developers and transporters, aggregate producers, and business owners, who live, work, own businesses in, and have helped develop, Oklahoma. While acknowledging the unique histories of the Five Tribes and the former Oklahoma Indian Territory, none of Amici or their members have ever believed the private, fee lands on which they lived, worked, or built

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[4] *See Sizemore v. State*, 485 P.3d 867 (Okla. Crim. App. 2021) (Choctaw); *Grayson v. State*, 485 P.3d 250 (Okla. Crim. App. 2021) (Seminole); *Bosse v. State*, 2021 OK CR 30 (Okla. Crim App. 2021) (Chickasaw).

farms or businesses lay within the boundaries of a current Native American reservation—until this Court's opinion in *McGirt*. Unless reversed, *McGirt*'s impact on Amici's jurisdictional expectations, *both* criminal *and* civil, will be profoundly unsettled. Amici submit this brief to draw this Court's attention to *McGirt*'s potential effect on civil jurisdiction including potential assertions the State lacks taxing, adjudicatory, and regulatory jurisdiction over non-Indians and their conduct on fee lands, authorities now at risk of being supplanted by tribal law, regulation, and courts.

A. Environmental Federation of Oklahoma, Inc. ("EFO")

EFO is a non-profit corporation providing Oklahoma companies with a voice in the formulation of state and federal environmental laws, regulations, and policies. Its membership includes over eighty members. *McGirt* undermines EFO members' interests in predictable regulation, consistent with their investments in reliance upon State regulation.

B. Oklahoma Farm Bureau Legal Foundation

Oklahoma Farm Bureau Legal Foundation is a non-profit foundation incorporated in 2001 that supports the rights and freedoms of farmers and ranchers. The Foundation's sole member is Oklahoma Farm Bureau, Inc. ("OKFB"), an independent, nongovernmental, voluntary organization of farm and ranch families created in 1942, with 83,985 member families statewide, united for the purpose of analyzing their problems and formulating action to achieve educational improvement, economic opportunity and social advancement. OKFB has affiliated county

organizations in all 77 Oklahoma counties. OKFB is concerned about private property rights and potential Tribal taxation and regulation.

C. Oklahoma Cattlemen's Association ("OCA")

OCA, a non-profit association, chartered on March 6, 1950, by a small group of cattle raisers in Seminole County, today includes thousands of cattle raising families in all 77 Oklahoma counties. OCA's primary work on behalf of its members promotes private property rights, natural resource stewardship, and common sense business policy. *McGirt* and decisions applying it threaten to subject members' families and businesses to new and unplanned-for jurisdictional burdens.

D. Oklahoma Aggregates Association ("OKAA")

OKAA represents the producers of the rock, sand, and gravel (aggregates) that are the starting point of all infrastructure, housing development, and more as well as representing a broad network of service and equipment providers who service these producers. OKAA engages in political advocacy, regulatory streamlining, and business and community activism in support of a broad and inclusive economy. Regulatory predictability, threatened by *McGirt*, is essential for producers to supply the source material that powers our economy.

E. The Petroleum Alliance of Oklahoma (the "Alliance")

The Alliance is Oklahoma's largest oil and natural gas trade association and is the only trade association in Oklahoma that represents every segment of the oil and natural gas industry, that is the largest private-sector driver of Oklahoma's economy, allowing

the industry to speak with one voice when advocating for the interests of its members, landowner stakeholders, and host communities. Members of the Alliance own or operate oil and gas operations in the counties within the Five Tribes Area. *McGirt*, and decisions following it, impair their interests in stable and predictable regulation and taxation, consistent with the expectations supporting their investments.

SUMMARY OF ARGUMENT

The Petition's second question presented, which Amici address first, affords this Court an important, and necessary, opportunity to re-visit *McGirt*, which presents questions of federal Indian law of national importance. Amici advance two arguments for taking the opportunity presented by *Castro-Huerta* to overrule *McGirt*.

First, *McGirt* improperly limited the standards articulated in *Solem v. Bartlett*, 465 U.S. 463 (1984), which sanctioned, to inform statutory interpretation, consideration of surrounding circumstances, contemporaneous understandings of the intended effect of Congressional acts, and later understandings and jurisdictional history reflected in statutes, judicial decisions, and governmental authority, matters relied upon by Oklahoma and its residents, without resistance from the Five Tribes for over a century. Prior to this Court's decision in *McGirt*, Amici's justifiable reliance on contemporaneous and post-enactment understandings was entitled to weight in the disestablishment analysis. No longer. *See* Point I.

Second, overruling *McGirt* is imperative to eliminate the civil jurisdictional disruption that *McGirt* has engendered and will broaden in future in Eastern Oklahoma, and elsewhere. Whether meritorious or

not, attempts to apply or expand *McGirt* will burden Amici's members with litigation, risk, delay, and expense. *See* Point II. The *McGirt* majority's hope for compromise or congressional action have not materialized and afford no reasonable prospect to address the current criminal chaos and civil disruption. *See* Point III.

With respect to the first question presented, whether a State has authority to prosecute non-Indians who commit crimes against Indians in "Indian country," *Castro-Huerta* presents a fundamental misreading of federal law. *See* Point IV. It is simply erroneous to conclude that this Court's decisions hold States lack police power authority over non-Indians in "Indian country," including on fee lands within reservation boundaries, and neither the General Crimes Act nor decisions of this Court so direct. To the contrary, this Court's cases hold Tribes[5] presumptively lack jurisdiction over non-Indians on fee lands, even within a reservation's boundaries, but that presumption must be overcome by evidence under *Montana v. United States*, 450 U.S. 544 (1981). Meanwhile, States presumptively have jurisdiction over non-Indians on Indian country unless specifically preempted under *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980). Amici's overriding interest in working and living in an area subject to effective and even-handed law enforcement and judicial process demands reversal on this ground also.

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[5] This Brief refers to any federally recognized Native Nation, Tribe, Pueblo, or Indian Community by other title as a "Tribe," consistent with the prevailing reference in Title 25 of the United States Code.

ARGUMENT

I. *MCGIRT* FUNDAMENTALLY ALTERS THIS COURT'S RESERVATION DISESTABLISHMENT JURISPRUDENCE.

A. The *McGirt* Majority Discarded this Court's Well-Settled Disestablishment Analytical Approach and Should Be Overruled.

Amici's concerns over civil consequences strike at the core of *McGirt*'s fundamental error. Prior to *McGirt*, *Solem* required courts considering whether a reservation had been disestablished/diminished to address "widely-held, contemporaneous understanding that the affected reservation would shrink as a result of" the operative statutes and consider the "subsequent demographic history of opened lands as one additional clue as to what Congress expected would happen once land on a particular reservation was opened to non-Indian settlers." 465 U.S. at 471-72. Amici's members relied on precisely such understandings in their decisions to live, work, and invest in Eastern Oklahoma. Now, the continued applicability of the law on which they relied, and the fiscal and regulatory foundations of the State and county governments they have entrusted, are unsettled. Consequently, *McGirt*'s doctrinal divergence from this Court's longstanding jurisprudence governing disestablishment/diminishment presents a question of tremendous importance requiring reconsideration through review on certiorari.

The *McGirt* majority departed from this Court's "appropriate methodology" for analyzing diminishment and disestablishment set forth in *Solem*. *See McGirt*, 140 S. Ct. at 2485 (Roberts, C.J., dissenting).

Indeed, this Court has described its precedents as "establish[ing] a fairly clean analytical structure" for determining whether a reservation has been disestablished or diminished, directing courts to analyze three factors: *Solem*, 465 U.S. at 470:

- Statutory text: "The most probative evidence of congressional intent is the statutory language used to open the Indian lands[,]" though "explicit language of cession and unconditional compensation are not prerequisites for a finding of diminishment." *Id.* at 470-71.
- Surrounding circumstance and contemporaneous understandings: "When events surrounding the passage of a surplus land act—particularly the manner in which the transaction was negotiated with the tribes involved and the tenor of legislative reports presented to Congress—unequivocally reveal a widely-held, contemporaneous understanding that the affected reservation would shrink . . . ." *Id.* at 471.
- Subsequent jurisdictional history: "To a lesser extent, we have also looked to events that occurred after the passage of a surplus land act to decipher Congress's intentions. Congress's own treatment of the affected areas, particularly in the years immediately following the opening, has some evidentiary value, as does the manner in which the Bureau of Indian Affairs and local judicial authorities dealt with unalloted open lands." *Id.* "On a more pragmatic level, we have recognized that who actually moved onto opened

> reservation lands is also relevant to deciding whether a surplus land act diminished a reservation." *Id.*

This statutory and historical analysis provides context, as this Court has consistently reaffirmed. In *Hagen v. Utah*, 510 U.S. 399, 411 (1994), the Court explicitly rejected the Solicitor General's contention that its precedent had established a "clear-statement rule," requiring explicit language of cession and an unconditional Congressional compensation commitment. In rejecting that reading of prior precedent, Justice O'Connor observed, "we have never required any particular form of words before finding diminishment." *Id.* The Court there "decline[d] to abandon [its] traditional approach to diminishment cases" and instead confirmed this Court's approach "requires [the Court] to examine all the circumstances surrounding the opening of a reservation." *Id.* at 412.

Rather than hewing to the Court's textually and historically grounded analysis, the *McGirt* majority requires ignoring, absent unambiguous text, all surrounding circumstances, contemporaneous understandings, and subsequent history, prescribing an analysis that begins and ends with decontextualized statutory text. *See* 140 S. Ct. at 2469 ("There is no need to consult extratextual sources when the meaning of a statute's terms is clear. Nor may extratextual sources overcome those terms."). The majority, however, ignored its own purported proviso, "[t]he only role such materials can properly play is to help 'clear up . . . not create' ambiguity about a statute's original meaning[,]" *id.*, declining to examine such history and understanding having found the "statute" did not unambiguously terminate reservation status for lack of words used in strikingly different historic circum-

stances. The *McGirt* majority overlooks the need to construe 120-plus year old enactments against the backdrop of the ends and means intended for those statutes *then*, ignoring that every case it relies upon to support continued reservation status reached its conclusion following the detailed contemporaneous and subsequent historic analysis *McGirt* discounts. *McGirt's* departure from historical reality is evident from the leading study of federal policy regarding Tribes,[6] as well as a statement of the Creek Nation, itself.[7]

Until *McGirt*, no diminishment/disestablishment case of this Court vested the limited statutory precepts *McGirt* prescribes with talismanic significance. Neither *Solem* nor any other decision of this Court has required specific language of a single statute *alone* to determine Congressional diminishment/disestablishment intent. Consequently, finding no previously dispositive language present in any *single* statute Oklahoma advanced, the majority completely bypassed the second and third *Solem* factors—and declined to address whether the succession of statutes applicable to the Creek Reservation leading to and immediately following 1906 reflected clearly the intent to disestablish.

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[6] Following review of Five Tribes, including Creek, history, Francis Paul Prucha, *The Great Father*, Vol. II at 746-756 (1984), Prucha concludes, "[t]he Indians of Oklahoma were an anomaly in Indian-white relations . . . . There are no reservations in Oklahoma, however, and the reservation experience . . . was not part of Oklahoma Indian history." *Id*. at 757.

[7] The inscription in the granite monument at the Creek Council House erected in 1930 summarizing Creek Nation history states "The tribal government was dissolved in 1906." https://www.waymarking.com/waymarks/WMBPCG_Creek_Council_House_Okmulgee OK

But this Court has recognized Congress may express unambiguous intent in multiple statutes affecting a specific Tribe over the period of deliberations and negotiations leading to a reservation's disestablishment. In *Rosebud Sioux Tribe v. Kneip*, the Court analyzed three pertinent acts and their interplay to ascertain Congressional intent to diminish: "[W]e conclude that the Acts of 1904, 1907, and 1910 did clearly evidence Congressional intent to diminish the boundaries of the [reservation]." 430 U.S. 584, 587 (1977); *id.* at 592 (stating the 1904 Act "cannot, and should not, be read as if it were the first time Congress had addressed itself to the diminution of the [reservation]"); *see also Hagen*, 510 U.S. at 415 (1902 and 1905 legislation about the Uintah Reservation "must . . . be read together"). Thus, Congress' evolving decision to disestablish the former Creek Reservation at issue in *McGirt* in a series of laws, rather than a single act, does not deprive its action of otherwise plainly expressed intent.

The *McGirt* majority declined to address that the enactments affecting the Five Tribes are unique among the Court's disestablishment cases, as they *both* divested Tribal government of all communal lands *and* also stripped away substantially all governmental authorities, while leaving only a shell of a government intact, and transferred the divested powers to the newly created State. *See McGirt*, 140 S. Ct. at 2484 (Roberts, C.J., dissenting). The historically unique combined effects of divestitures of tribal power *and* lands do not fall short of, but rather more emphatically stress, the intent reflected in leading disestablishment cases. *Compare*, *Seymour v. Superintendent of Washington State Penitentiary*, 368 U.S. 351, 356 (1962) ("The Act did no more than open the way for non-Indian settlers to own land on the reserva-

tion in a manner which the Federal Government . . . regarded as beneficial to the development of its wards.").

Finally, the majority's refusal to consider widely held understandings of people in the area turns a blind eye to the practical, on the ground, reality—important not just in this Court's diminishment/disestablishment jurisprudence, but in undergirding settled jurisdictional expectations of Amici's members. They shared the widely held understanding that the Five Tribes' jurisdictions extended only to any remaining Tribal or allotted trust or restricted land, and not to non-Indian conduct on fee lands. Amici's members have lived, invested, entered commercial arrangements, and structured their conduct in the belief they did so in an area where Oklahoma law, taxation, and dispute resolution unqualifiedly applied. Over a century of uncontested reliance by predominately non-Indian residents and businesses in the Five Tribes' former territories reflects the intractable "impracticability of returning to Indian control land that generations earlier passed into numerous private hands." *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 219 (2005). The reasonable understandings of people in the area, government officials, and later Congresses, are entitled to a place in reservation diminishment and disestablishment jurisprudence.

This Court has long held that treaties and legislation dealing with Tribes "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." *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 206 (1978). But, contrary to these fundamental precepts, *McGirt* prescribes an analysis ungrounded in history, focusing narrowly on its *present* reading of isolated statutory text, rather than

how all parties read it as the time of enactment. The Court should revisit this conclusion now.

B. *McGirt*'s Progeny Compound *McGirt*'s Errors and Foretell Future Havoc.

McGirt's myopic insistence on reading statutory language divorced from historical context opens the door to widespread overturning of longstanding jurisdictional understandings without the detailed review of surrounding circumstances and contemporaneous and post-enactment understandings. Oklahoma criminal case decisions following *McGirt* have extended *McGirt* to the other four of the Five Tribes, including the Cherokee Nation at issue here, mechanically adopting *McGirt*'s incorrect interpretative analysis without the detailed historic records present in each of this Court's predecessor disestablishment or diminishment cases

McGirt's destabilizing effects extends beyond the Five Tribes and beyond Oklahoma. In *Oneida Indian Nation v. Village of Hobart,* 968 F.3d 664, 669 (7th Cir. 2020), the Seventh Circuit held:

> *McGirt* adjusted the *Solem* framework—in which congressional intent could be inferred from unequivocal contextual sources even in the absence of textual support—to a more textual approach consistent with statutory interpretation more generally. *Only if the text of a specific statute were ambiguous would consideration of context ant subsequent history be appropriate*.

(Emphasis added); *see also Cayuga Nation v. Tanner*, 6 F.4th 361 (2d Cir. 2021) (relying on *McGirt* and the Major Crimes Act definition of Indian lands to conclude that the Indian Gaming Regulatory Act

applied to the Cayuga Reservation and to reject an argument that the Cayuga Reservation had been disestablished); *United States v. Smith*, 482 F. Supp. 3d 1164, 1175-76 (D.N.M. 2020) (characterizing *McGirt* as "casting doubt on reliability of using historical practices of State entities to determine congressional intent given numerous States that have overstepped their authority in Indian country, perhaps in good faith, perhaps sometimes not").

II. *MCGIRT* GIVES RISE TO FUNDAMENTAL AND INTRACTABLE CIVIL JURISDICTIONAL CONSEQUENCES.

Chief Justice's Roberts' prediction is apt: The *McGirt* majority decision "creates significant uncertainty for the State's continuing authority over any area that touches Indian affairs, ranging from zoning and taxation to family and environmental law." 140 S. Ct. at 2482 (Roberts, C.J., dissenting). In his dissent from the denial of certiorari in *Rogers County Board of Tax Roll Corrections v. Video Gaming Technologies, Inc.*, 141 S. Ct. 24, 24 (2020), Chief Justice Thomas also called upon this Court to "mitigate some of [the] uncertainty" *McGirt* created. The Court has before it the opportunity to do just that—reverse *McGirt* and put an end to the "outsized role" that "geographical happenstance" may now play in determining regulatory and adjudicatory jurisdiction, taxation, dispute resolution, and federal assertions and delegations of authority within recently determined Eastern Oklahoma "Indian country." *Rogers Cnty*., 141 S. Ct. at 25 (Thomas, J., dissenting).

Beyond the chaos in Eastern Oklahoma criminal law enforcement and adjudications, jurisdictional upheaval is threatened in a wide range of civil circumstances impacting Oklahoma and Amici: Briefly,

and as elaborated below: (1) federal preemption of state regulation within "Indian country," subject to a subjective and unpredictable balancing-based test, *see Bracker*, 448 U.S. at 145, threatens state regulation and taxation over a range of activities and property interests, with a concomitant threat of shifting taxing burdens, and undermining funding for long-standing state, county and municipal services; (2) uncertainty over whether Tribal authorities will have regulatory or judicial jurisdiction over non-Indians on fee lands depending on two multi-factored and unpredictably applied "exceptions" identified in this Court's decision in *Montana*, 450 U.S. 544 ("*Montana* exceptions")[8]; and (3) many federal statutes expressly prescribe federal or Tribal authority over specified matters in "Indian country."

Oklahoma's Petition begins to catalog what may be the "tip of the iceberg" in terms of civil jurisdictional upheaval and controversies potentially resulting from *McGirt*. *See* Pet. 24 (discussing tax protests, refund proceedings, etc.). The Court should address now, before debilitating disruption, the significant consequences of newly determined reservation status threatening, case-by-case, to substantially enlarge tribal civil jurisdiction and diminish State jurisdiction over members of the Five Tribes and other Indians and non-Indians on fee lands in Eastern Oklahoma.

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[8] *Montana*'s exceptions address whether agreements between non-Indians and a Tribe or Indians established a "consensual relationship" or the non-Indian's conduct affects the applicable Tribe's health, welfare, or political integrity. *Montana*, 450 U.S. at 565-66.

A. Taxation.

McGirt should be reversed because it threatens settled taxing jurisdiction by potentially divesting the State of taxing authority over 43% of lands within the State's boundaries, while at the same time potentially vesting the Tribes with such authority. Income taxes make up around 40% of the state's total revenue from year to year, depending on revenue from oil from gas production. The Oklahoma Tax Commission's report demonstrates *McGirt*'s very real consequences, and contradicts attempts to downplay the fiscal impacts on Oklahoma. *See* Oklahoma Tax Comm'n, *Report of Potential Impact of* McGirt v. Oklahoma (Sept. 30, 2020) ("OTC Report"). The OTC Report "anticipates a significant immediate and ongoing fiscal impact" from *McGirt,* OTC Report Cover Letter, and, while acknowledging its estimates may be high, estimates an on-going, per year approximate $72 million loss of income tax revenue and approximate $132 million loss of sales tax revenue (total over $200 million annual revenue loss) if *McGirt* is applied to all Five Tribes. *Id.* at 16-17. The OTC Report identifies an additional potential loss of $218 million for refund claims for the 2017-2019 tax years. *Id.* at 16. This revenue loss should not be trivialized—a loss of revenue means Oklahoma will have to make decisions about what programs and services to fund, and what to cut, potentially harming Indians and non-Indians alike. Alternatively, the $200 million annual revenue loss would be borne by those still subject to taxation, increasing the tax burden on Amici's members.

McGirt and its progeny threaten to divest the State of its taxing authority over Indians and non-Indians alike for property and activities within newly declared Indian country under case-by-case and parcel-by-

parcel, fact-based analyses. The extension of reservation status to fee lands within the asserted reservation boundaries could divest the State of taxing authority over Indians living or doing business on fee lands within the area. *See Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463 (1976) (invalidating property taxes, vendor license fees, and cigarette sales taxes applied to actions and goods on the reservation); *Oklahoma Tax Comm'n v. Chickasaw Nation,* 515 U.S. 450, 458-59 (1995) (voiding state taxes imposed on Tribes or Indians working and living in "Indian country"). Federal preemption could bar state and county taxes. *See Bracker*, 448 U.S. at 145; *see also Video Gaming Technologies, Inc. v. Rogers Cnty. Bd. of Tax Roll Corr.*, 475 P.3d 824 (Okla. Sup. Ct. 2019), *cert. denied*, 141 S. Ct. 24 (2020) (county tax preempted by federal law). These concerns are not merely speculative. A power plant in Eastern Oklahoma is attempting to leverage *McGirt* to evade paying county property taxes over a plant with assessed value exceeding $400 million. *See Oneta Power, LLC v. Wagoner Cnty. Assessor*, CJ-2020-0193 (Okla. Dist. Ct. filed 08/21/2020); *Oneta Power, LLC v. Wagoner Cnty. Assessor*, CJ-2020-0193 (Okla. Dist. Ct. filed 08/10/2021).

McGirt and its progeny also could lead to tribal taxation of non-Indians' fee land property and activities in certain circumstances. *See Burlington N. Santa Fe R.R. Co. v. Assiniboine & Sioux Tribes of Fort Peck Reservation*, 323 F.3d 767, 775 (9th Cir. 2003) (whether Tribe could impose *ad valorem* property tax under the *Montana* exceptions on federally-granted right-of-way, the equivalent of fee lands, on reservation.

McGirt and its progeny also could subject Amici's members to "dual" state and tribal taxation, or to Tribal taxation of items exempt from state tax. *See Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 186-87 (1989) (approving dual state and tribal severance tax). For example, OKFB's and OCA's members are subject to Oklahoma taxation of their agricultural lands and operations, but their livestock feed, machinery to operate a farm or ranch, and other items are exempt from State sales tax. *See* 68 Okla. Stat. Ann. § 1358. Under *McGirt*, a Tribe could seek to tax items which have heretofore been exempt from taxation.

While a court could ultimately reject specific attempts to impose or avoid taxes, unpredictability of resolution of the issue, in and of itself, creates uncertainty, risk, and can result in costly, lengthy litigation.

B. Dispute Resolution.

McGirt potentially subjects fee lands and non-Indian activities to tribal adjudicatory jurisdiction or to divest state courts' jurisdiction. *See Dollar Gen. Corp. v. Mississippi Band of Choctaw Indians*, 136 S. Ct. 2159 (2016), *aff'g*, *Dolgencorp, Inc. v. Mississippi Band of Choctaw Indians*, 746 F.3d 167 (5th Cir. 2014). Determining whether federal law permits Tribes or Indians to assert tribal court jurisdiction over non-Indian activities on reservation fee lands requires analysis of the two fact-based and highly subjective *Montana* exceptions, which frequently must first be addressed in tribal court under the "exhaustion of tribal remedies" doctrine this Court established. *See Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 17 (1987); *FMC Corp. v. Shoshone-Bannock Tribes*, 942 F.3d 916 (9th Cir. 2019) (tribal court jurisdiction under *Montana* first and second excep-

tions to enforce environmental fee agreement against nonmember company on fee lands within reservation).

If dispute resolution shifts to tribal forums, though Amici imply no disrespect for Tribal judiciaries, federal law provides no right to federal court review, even on federal questions pertaining to the merits, including for deprivations of due process or other civil rights. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 (1978). If *McGirt* stands, Amici's members and other non-Indians may have to exhaust their remedies in tribal courts or litigate without the right of federal or state court review.

C. Regulatory Jurisdiction.

McGirt also threatens to subject non-Indian residents and businesses to other forms of tribal regulatory jurisdiction. *See Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408, 444 (1989) (plurality opinion) (Tribe may zone non-Indian fee land in portion of reservation); *FMC Corp.*, 942 F.3d at 941; *FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311, 1314-15 (9th Cir. 1990) (jurisdiction to enforce tribal employment ordinance on non-Indian employer on non-Indian fee land); *Cardin v. De La Cruz*, 671 F.2d 363, 366 (9th Cir. 1982) (tribe has authority to enforce health regulations against non-Indian-owned store on fee lands within reservation). Any such transfer of regulatory authority would dramatically controvert Amici's long-held understandings that Oklahoma law governed their lands and businesses.

For example, the Creek Nation involved in *McGirt* requires any "person desiring to engage in the business of selling goods or items of value within the Muscogee (Creek) Nation territorial jurisdiction" to secure a vendor's sales license, 36 M(C)N Code § 4-107(A), and to pay sales tax, *id.* § 4-103, and cigarette and tobacco taxes, *id.* §§ 5-107-108, and obtain a Tribal retail license, *id.* § 5-112. Failure to collect and pay such taxes subjects the vendor to penalties. *Id.* § 4-110(A-E). While the assertion of any such authority would be fact-dependent, tribal jurisdiction over non-Indians under tribal law may increase significantly.

In the economically important arena of regulation of oil and gas development, *McGirt* has been asserted to divest the State of regulation. In *Canaan Resources X, LLC v. Calyx Energy III, LLC*, No. CO-119245 (Okla. Corp. Comm'n Nov. 25, 2020), Canaan advanced *McGirt* in arguing, so far unsuccessfully, the Oklahoma Corporation Commission ("OCC") lacked authority to regulate oil and gas development within the entire Five Tribes Area. *See* Order Denying Protestant's Motion to Dismiss for Lack of Jurisdiction, Order No. 715548 (Nov. 25, 2020). Although the OCC rejected Canaan's arguments, Canaan's appeal to the Oklahoma Supreme Court is pending. Irrespective of that court's decision, this case, and the others cited herein, demonstrate the uncertainty and additional burdens, both in terms of time and expense, *McGirt* creates.

D. Threatened Federal Statutory Regulation of Activities, or Potential Delegations to Tribes, within "Indian country."

Numerous federal statutes expressly specify a federal or tribal role in regulation of activities in "Indian country." For example, federal law allows Tribes to regulate the sale of alcohol within "Indian country." *See United States v. Mazurie*, 419 U.S. 544, 558 (1975) (interpreting 18 U.S.C. § 1161). *McGirt* could have the effect of replicating the Omaha Tribe ordinance in *Nebraska v. Parker*, 577 U.S. 481 (2016), but with a much broader scope, for establishments across major portions of Eastern Oklahoma, including most of Tulsa, Oklahoma's second largest city. Tribes with federally approved programs may advance *McGirt* to require tribal liquor licensing and accompanying regulation.

Federal assertions of jurisdictional authority and delegations of authority to Tribes based on *McGirt* also threaten to shift regulatory jurisdiction to applicable Tribes. For example, after *McGirt*, the Department of the Interior already has sought to shift jurisdictional authority over surface coal mining on all "Indian lands" within the Creek Reservation from Oklahoma to the Office of Surface Mining Reclamation and Enforcement under the Surface Mining Control and Reclamation Act, 30 U.S.C. §§ 1201-1328.[9]

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[9] Loss of State Jurisdiction to Administer the Surface Mining Control and Reclamation Act of 1977 Within the Exterior Boundaries of the Muscogee (Creek) Nation Reservation in the State of Oklahoma, 86 Fed. Reg. 26941-01 (May 18, 2021) (*McGirt* "necessarily forecloses the State of Oklahoma's authority to implement the Surface Mining Control and Reclamation Act of

For businesses that now may find themselves within Areas newly declared "reservation," obtaining federal authorizations may require government-to-government consultation between tribes and the federal government. *See, e.g.*, National Historic Preservation Act § 106, 54 U.S.C. § 300319 (requires consultation with tribes for any federal approval potentially affecting historic properties on "tribal land," defined, in relevant part, as "all land within the exterior boundaries of any Indian reservation"). Amici do not dispute that government-to-government consultation is appropriate for actions directly affecting tribes and their lands, but *McGirt* threatens to expand that requirement to non-Indian activities requiring federal approvals across Eastern Oklahoma. With the consultation requirement comes expense, delay, and possible imposition of conditions on any needed federal approval for development projects.

Amici's members and other non-Indians have made substantial investments, through the design, construction, and operation of facilities, in reliance on regulation under State law before *McGirt*-spawned declarations of reservation status. Changes in regulatory regimes are fraught and threaten existing investment; uncertainty in such regimes also serve to stifle further economic development. *Oklahoma Dep't of Env't Quality v. E.P.A.*, 740 F.3d 185, 190 (D.C. Cir. 2014) ("[T]he EPA might attach a condition to its approval of Oklahoma's SIP [air quality State Implementation Plan] as applied to Indian country that is inconsistent with Oklahoma's current SIP

1977 (SMCRA) on Indian Lands within the exterior boundaries of the Muscogee (Creek) Nation Reservation.").

authority." (quotation marks and quoted authority omitted).

In sum, reviewing *Castro-Huerta* will enable the Court to address potential civil jurisdictional consequences arising from *McGirt*'s disregard for history and understandings underpinning livelihoods and properties of many residents and businesses in Eastern Oklahoma.

III. COMPROMISE AND CONGRESSIONAL ACTION ARE NEITHER FEASIBLE NOR ADEQUATE TO ADDRESS THE JURISDICTIONAL DISRUPTIONS *MCGIRT* ENGENDERS.

Congressional action has been proposed but has not gained traction, and a Congressional resolution of such a complex issue is unlikely. *See* Pet. 26-27 (discussing attempts at compromise). However, overruling *McGirt* would not foreclose negotiated resolution or further Congressional action. Restoring the *Solem* disestablishment and diminishment standards would allow consideration of different statutes and histories of each of the Five Tribes, and of Tribes elsewhere in Oklahoma and in other States, under *Solem* standards. The Court should restore *Solem* and cases preceding and following it.

Nor does the Petition violate separation of powers principles. If Congressional action occurs, it would only potentially resolve issues within the Five Tribes Area; yet *McGirt*'s influence is already much broader. *See, e.g., Big Horn Cnty. Elec. Coop., Inc. v. Big Man,* 526 F. Supp. 3d 756 (D. Mont. 2021) (citing *McGirt* for the proposition "express Congressional intent is required to divest a tribe of jurisdiction over tribal lands"); *Shoshone-Bannock Tribes of Fort Hall*

Reservation v. Bernhard, 486 F. Supp. 3d 61, 68 (D.D.C. 2020) (quoting *McGirt* as reiterating that once "a reservation is established, it retains that status until Congress explicitly indicates otherwise"); *Confederated Tribes & Bands of Yakama Nation v. Klickitat County,* 1 F.4th 673, 686 (9th Cir. 2021) (characterizing the post-*McGirt* diminishment framework as "requir[ing] . . . a clear congressional intent"). This Court can and should overturn *McGirt.*

IV. FEDERAL LAW DOES NOT DIVEST STATES OF CONCURRENT JURISDICTION TO PROSECUTE NON-INDIANS WHO COMMIT CRIMES AGAINST INDIANS IN INDIAN COUNTRY.

The Court of Criminal Appeals erred in concluding either the General Crimes Act or this Court's decisions have divested States of jurisdiction over all crimes committed by non-Indians against Indians within "Indian country." This is a nationally important question warranting this Court's immediate attention. Amici, as community members, business owners, and proponents of economic development within the State, share the State's concerns arising from *McGirt*'s "calamitous" effects on criminal jurisdiction. *See* Pet. 3. Before *McGirt*, Oklahoma state courts exercised criminal jurisdiction over crimes by non-Indians, specifically including crimes occurring in the Five Tribes Area. *Id.*

Castro-Huerta's conclusion that the State lacks concurrent jurisdiction under the General Crimes Act exacerbates the jurisdictional issues *McGirt* created. If *Castro-Heurta*'s conclusion on this issue stands, only the federal government would have authority to prosecute most current state law crimes committed by non-

Indians against Indians in "Indian county,"[10] which, by virtue of *McGirt* and Oklahoma cases extending its holding to other Five Tribes Area, now encompasses nearly 43% of the State and over 1.5 million non-Indian Oklahomans. *See* Pet. 18-19. As the Petition demonstrates, *Castro-Huerta* is unsupportable both as an interpretation of the General Crimes Act and under the Court's decisions recognizing State authority over non-Indians, within "Indian country" absent matter-specific preemption. *See, e.g.*, *Cotton Petroleum Corp.*, 490 U.S. at 186-87 (State can impose oil and gas severance tax on oil and gas produced by non-Indians from on-reservation tribal oil and gas leases). *Castro-Huerta*'s holding that federal law provides a general ouster of State authority in Indian country over matters involving Indians will have widespread implications beyond Eastern Oklahoma. This Court should swiftly correct this erroneous conclusion in the interest of law enforcement in Eastern Oklahoma, and in Indian country more generally.

[10] *See Oliphant*, 435 U.S. at 195 (Indian Tribes generally do not have criminal jurisdiction over non-Indians).

CONCLUSION

For the foregoing reasons, the Petition should be granted as to both questions presented.

Respectfully submitted,

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