

No. 21-429

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In the Supreme Court of the United States

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OKLAHOMA,

*Petitioner,*

*v.*

VICTOR MANUEL CASTRO-HUERTA,

*Respondent.*

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ON PETITION FOR WRIT OF CERTIORARI TO  
THE OKLAHOMA COURT OF CRIMINAL  
APPEALS

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**BRIEF OF *AMICI CURIAE* THE  
OKLAHOMA DISTRICT ATTORNEYS  
ASSOCIATION, THE OKLAHOMA SHERIFFS'  
ASSOCIATION, THE ASSOCIATION OF  
OKLAHOMA NARCOTIC ENFORCERS, AND THE  
27 OKLAHOMA DISTRICT ATTORNEYS  
IN SUPPORT OF PETITIONERS**

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### **Interest of *Amici Curiae***

The Oklahoma District Attorneys Association, the Oklahoma Sheriffs' Association, the Oklahoma Narcotic Enforcers, and the 27 elected Oklahoma District Attorneys respectfully submit this *amici curiae* brief supporting Oklahoma's Petition for Writ of Certiorari.<sup>1</sup> Founded in 1974, the Oklahoma District Attorneys Association supports Oklahoma prosecutors in every aspect of their mission. Founded in 1991, the Oklahoma Sheriffs' Association assists Oklahoma sheriff departments through training, support, and collaboration. Founded in 1989, the Association of Oklahoma Narcotic Enforcers represents over 1,500 federal and state police officers, prosecutors, and intelligence analysts dedicated to achieving a drug-free state through training and intelligence sharing. Finally, the 27 listed District Attorneys comprise every elected District Attorney in the state. They prosecute crimes and pursue justice for *all* Oklahomans.<sup>2</sup>

*Amici* and their members face the ramifications of this Court's decision in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), every day across every aspect of law enforcement. They accordingly have a strong interest in illuminating

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<sup>1</sup> Counsel of record provided timely notice of this brief under Rule 37.2, and all parties have consented to this brief's filing. In accordance with Rule 37.6, no counsel for any party authored this brief in whole or in part, and no person or entity, other than *amici* or their counsel, made a monetary contribution to the preparation or submission of this brief.

<sup>2</sup> Mike Boring, Angela Marsee, David Thomas, Mike Fields, Kyle Cabelka, Jason Hicks, David Prater, Brian Hermanson, Laura Thomas, Mike Fisher, Kevin Buchanan, Matt Ballard, Kenny Wright, Steve Kunzweiler, Orvil Loge, Jeff Smith, Mark Matloff, Chuck Sullivan, Tim Webster, Craig Ladd, Greg Mashburn, Paul Smith, Allan Grubb, Max Cook, Carol Iski, Chris Boring, and Jack Thorp.

*McGirt*'s practical impact. As their experience reveals, things have not “work[ed] out,” *id.* at 2480, to ameliorate the disruptive shift in criminal jurisdiction following *McGirt*.

### Summary of Argument

**I.** This Court's decision in *McGirt* instantly turned 43% of Oklahoma into Indian country. The result has been a dramatic shift in criminal law-enforcement authority away from the State and toward the federal government and Indian tribes for crimes committed by or against a member of any of the 574 federally recognized Indian tribes—not just Oklahoma's Five Tribes. The Petition presents the important questions of (1) whether, although the federal government has currently assumed authority over prosecuting crimes by non-Indians against Indians, Oklahoma nevertheless retains concurrent authority to prosecute as well; and (2) whether *McGirt* was correctly decided.

**II.** *McGirt*'s sudden shift has thrown law enforcement into disarray. The *McGirt* majority assumed that resources would shift, and that compromise and legislation would solve any remaining problems. But the reality has not played out as the majority hoped. Over one year after *McGirt*, the federal government and tribes remain overwhelmed with ballooning caseloads. And state officers' jobs have become more difficult too. Routine investigations, warrants, and arrests are now a jurisdictional minefield. Oklahoma police face a terrible dilemma: risk exceeding their authority, or lose precious time checking tribal membership. From criminal investigation to adjudication, *McGirt* has injected uncertainty throughout the justice system.

**III.** This uncertainty disparately harms Oklahoma's Indian crime victims, many of whom will never receive

justice. In the wake of *McGirt*, crimes have gone unprosecuted, allowing dangerous criminals to reoffend and undermining public confidence in law enforcement.

### Argument

To illuminate *McGirt*'s practical impact on law enforcement and crime victims, this brief includes reports from numerous Oklahoma district attorneys, police officers, investigators, narcotics officials, and sheriffs who work in the affected territory. Counsel for *amici* collected this information through hours of interviews conducted from August to October 2021. These interviews paint a disturbing picture not fully captured by the limited available data.

#### I. *McGirt* has massively shifted criminal jurisdiction in Oklahoma.

This Court held in *McGirt* that a large swath of land in eastern Oklahoma falls within the boundaries of the Creek Nation. 140 S. Ct. 2452. Oklahoma courts have since extended *McGirt*'s holding to the territories of the remaining four of the Five Tribes in Oklahoma—the Chickasaw, Choctaw, Seminole, and Cherokee. Pet. 18-19 (citing cases). As a result, 43% of the state is now “Indian country” for criminal-law purposes. Pet. 18.

“Criminal jurisdiction over offenses committed in Indian country is governed by a complex patchwork of federal, state, and tribal law.” *Negonsott v. Samuels*, 507 U.S. 99, 102 (1993) (internal quotation marks and citation omitted). Jurisdiction turns on the Indian status of the victim and the defendant, plus the nature of the crime. Pet. 5.

Numerous federal and state courts apply a two-part test to determine who is “Indian” for jurisdictional purposes. *United States v. Prentiss*, 273 F.3d 1277, 1280-1281 (10th Cir. 2001) (collecting cases). To qualify as

Indian, the Tenth Circuit has held, a person must have “some Indian blood”<sup>3</sup> and must be “recognized as an Indian by a tribe or by the federal government.” *Scrivner v. Tansy*, 68 F.3d 1234, 1241 (10th Cir. 1995) (internal citation and quotation marks omitted).

In Indian country—now 43% of Oklahoma—the federal government has significant authority to prosecute crimes committed by or against Indians. The Major Crimes Act grants the United States exclusive authority to prosecute Indians for certain enumerated felonies. 18 U.S.C. § 1153. By contrast, the General Crimes Act grants the United States authority to prosecute violations of general federal criminal law where either the defendant or victim is Indian and the other party is not. § 1152.

Tribes have authority to prosecute crimes committed by Indians against either Indians or non-Indians. But the tribes lack authority where the defendant is non-Indian.<sup>4</sup>

The State may prosecute all crimes committed by non-Indians against other non-Indians. But it remains unresolved whether States retain concurrent authority with the United States to prosecute non-Indians for crimes committed against Indians in Indian country. Pet. 5 (explaining that this Court has yet to answer the question). Thus far, the Oklahoma Court of Criminal Appeals has concluded that the federal government has exclusive jurisdiction over such crimes. Pet. 10. As discussed below, at present, entire categories of crimes and criminals fall completely outside the State’s authority.

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<sup>3</sup> This requirement “leaves unresolved how *much* Indian ancestry is necessary.” American Indian Law Deskbook § 2:6 (emphasis added) (collecting cases).

<sup>4</sup> Except for domestic crimes arising under the Violence Against Women Act. 25 U.S.C. § 1304.

The *McGirt* majority predicted, however, that criminal authority in eastern Oklahoma would remain unchanged for the “majority” of prosecutions because only 10-15% of the 1.8 million people living there are Indian. Pet. 3. But, as the Chief Justice observed in dissent, “[t]he share of serious crimes committed by 10%-15% of the . . . people in eastern Oklahoma . . . is no small number.” *McGirt*, 140 S. Ct. at 2501. And now the area’s Indian population is even greater—20% of 2 million residents, based on the latest census. *2020: DEC Redistricting Data (PL 94-171)*, U.S. Census Bureau, <https://bit.ly/2YXxVI7> (last visited Oct. 18, 2021); Pet. 3.

In truth, the share of crimes *McGirt* affected is much higher still. The Major Crimes Act and the General Crimes Act cover not only crimes by Indians, but also crimes committed in Indian territory by non-Indians against Indian victims. And that includes crimes involving Indians from *any* of the 574 federally recognized tribes,<sup>5</sup> even if the crime occurs on tribal land not belonging to the victim’s or suspect’s tribe.

Moreover, since *McGirt*, Oklahoma law enforcement has observed an increase in Oklahoma citizens asserting tribal membership. For example, one officer reported that a known member of the white-supremacist Universal Aryan Brotherhood, covered in swastika tattoos, invoked *McGirt* on the ground that he is “pursuing” tribal membership. Applications for tribal membership have also reportedly increased due to COVID-19 relief payments. *See, e.g., Hicham Raache, Cherokee Nation Reaches Citizen Enrollment Milestone Following COVID-19 Relief Payments Announcement*, Oklahoma

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<sup>5</sup> Indian Entities Recognized by and Eligible to Receive Services From the United States Bureau of Indian Affairs, 85 Fed. Reg. 5,462, 5,466-67.

News 4 (Sept. 29, 2021), <https://bit.ly/3vglKfv>. Whatever the reason, since relief payments were announced, the Cherokee Nation has received 10 times the number of applications typically received. *Id.*

In much of eastern Oklahoma there is now an incentive for known criminals and criminal suspects to assert tribal status and for victims to disclaim it.

## **II. *McGirt* has thrown law enforcement in Oklahoma into disarray.**

Following *McGirt*, “[t]he state’s ability to prosecute serious crimes” has not just been “hobbled,” as the Chief Justice predicted, 140 S. Ct. at 2482 (dissenting), it has been thrown into disarray.

Despite the dissent’s warnings about the impact of *McGirt*, the majority claimed that “while the federal prosecutors might be initially understaffed and Oklahoma prosecutors initially overstaffed, it doesn’t take a lot of imagination to see how things could work out in the end.” *Id.* at 2480. Put simply, things have not “worked out,” and crime victims may not wish to wait until “the end.” One full year following this Court’s decision, the situation in Oklahoma is as dire as ever—despite the fact that the Federal Bureau of Investigation, the Oklahoma United States Attorneys’ Offices, and the Five Tribes have all scrambled to increase staffing, in some instances by as much as 50%. *See, e.g.,* Austin Breasette, *Tribal Attorneys Discuss Changes Within Tribes 13 Months After McGirt Ruling*, Oklahoma’s News 4 (Aug. 17, 2021), <https://bit.ly/3FzQ9tI>.

This recalibration of resources, however, has not ameliorated *McGirt*’s worst effects. As one District Attorney explained, “We have seen a complete dismantling of the criminal-justice system in Oklahoma.”

### **A. Effect on the tribes and the federal government**

To illustrate, consider the experience of one Oklahoma District Attorney. He noted that one county in his district went from handling 350 felonies per year to 17 as cases were instead referred to either the federal or relevant tribal government. His office has 14 district attorneys available to prosecute cases, while the Cherokee Nation reportedly has just 6. In that same region, over a two-month period, the Northern District of Oklahoma's Acting U.S. Attorney reported that the office referred 530 cases to the Cherokee Nation. And that's not counting cases that the State referred, or cases already under investigation by the tribe. Information regarding the outcome of these cases, however, remains elusive.

Two academics—Dr. Jason Pudlo and Dr. William Curtis Ellis—prepared a report for the Tulsa County District Attorney's Office, funded by the Department of Justice, Bureau of Justice Assistance, National Training and Technical Assistance Center, that tracked cases in Tulsa County from July 2020 to May 2021. <https://bit.ly/3pfsOYO>. Per the report, Tulsa County assistant district attorneys referred 780 cases to the U.S. Attorney's Office, 417 to the Creek, and 298 to the Cherokee. Of those 1,495 total cases, only 191 have been charged—76 by the U.S. Attorney and 115 by the Cherokee. The Creek have provided no further data. And no data is available regarding how many of the cases charged by the Cherokee have resulted in prosecutions or imprisonment. In fact, one Tulsa official reported that, despite hundreds of cases referred to the tribes, tribes have hardly reached out to follow up with state investigators or to subpoena officers for testimony. This is surprising because local officers and investigators are often critical frontline witnesses.

The Cherokee Nation reported over 30 times its typical caseload during a 5-month span in 2021. Breasette, *supra*, at 6, <https://bit.ly/3FzQ9tI>. One source reported that as of August 2021, the Cherokee Nation had 1,300 pending criminal cases. Ray Carter, *Abuse of Tribal Police Alleged in Cherokee Nation*, OCPA (Aug. 30, 2021), <https://bit.ly/3pk2kp3>. To account for *McGirt*, the Cherokee Nation's overall budget has nearly tripled to \$3 billion. About 40% of that money, however, comes from the American Rescue Plan stimulus bill addressing the COVID-19 pandemic. Michael Overall, *The Cherokee Nation's Budget Will Hit a Record \$3 Billion as the Tribe Responds to COVID and McGirt*, Tulsa World (Sept. 15, 2021), <https://bit.ly/3BDVSMZ>. The tribe will not necessarily receive these federal funds in future years. *Id.* While the tribes are trying to adapt, it's unclear how they'll obtain the needed resources long-term. In fact, the U.S. House recently rejected an amendment to an appropriations bill that would have moved \$154 million to tribal courts. Randy Krehbiel, *D.C. Digest: U.S. House Rejects \$154 Million for Tribal Judicial Systems*, Tulsa World (Aug. 1, 2021), <https://bit.ly/3j3O9QS>.

*McGirt* has also stretched thin tribal law enforcement. Simply transporting prisoners newly under the Cherokee Nation's jurisdiction has "taken up a lion's share of the [Cherokee] marshals' time." Chad Hunter, *Cherokee Nation Marshals, Attorneys Dealing with McGirt Fallout*, Cherokee Phoenix (July 19, 2021), <https://bit.ly/3Bkunrr>. And because many tribes lack local detention facilities, one official explained that they have contracted with county jails to house tribal members for a daily fee. To avoid this fee, many tribes release tribal suspects pending further criminal proceedings.

*McGirt* has also imposed a dramatically increased law-enforcement burden on the federal government. One

Oklahoma district attorney kept track of how many of his former cases the Northern District U.S. Attorney’s Office accepted for prosecution following referral. As of July 2021, of the 2,304 cases referred, only 4.6% had been accepted.

To “address[] implications of the *McGirt* ruling,” the Department of Justice requested a one-time \$70 million expenditure in fiscal year 2022 for the DEA, FBI, U.S. Attorneys Offices, and U.S. Marshall Service. U.S. Dept. of Justice, FY 2022 Budget Request, <https://bit.ly/3FsXYkO> (last visited Oct. 18, 2021). Addressing the impact of *McGirt*, however, will require continuous federal funding.

And because criminal cases filed in the Eastern and Northern Districts of Oklahoma have increased 400% and 200%, respectively, in the year after *McGirt*, the Federal Judicial Conference recommended five new federal judgeships—three in the Eastern District and two in the Northern District. U.S. Courts, Judiciary Supplements Judgeship Request (Sept. 28, 2021), <https://bit.ly/2YpMzBn>. This would double the number of federal judges in the two districts.

### **B. Effect on the State**

*McGirt* has also made the job of Oklahoma law enforcement much more difficult, causing inefficiency and fear as officers attempt to navigate their new, uncertain jurisdictional boundaries. Although the tribes and federal government have “cross-commissioned” or “cross-deputized” many (but hardly all) Oklahoma police officers and investigators as tribal officers and federal officials, this has not removed jurisdictional uncertainty. And cross-deputization comes with problems of its own.

### 1. Jurisdictional uncertainty

Oklahoma law enforcement faces serious uncertainty about the scope of their criminal authority. State officers do not have the luxury of waiting for this Court, or any other for that matter, to resolve the ambiguities that *McGirt* left unresolved. Everyone from the 911 operator all the way to the District Attorney has been affected. One officer quipped that before he takes any law-enforcement action, he first pulls out his “*McGirt* decoder ring”—a laminated, wallet-sized card with a chart summarizing the (presumed) division of criminal jurisdiction within Indian country—to ensure that he does not exceed his authority:

Jurisdiction for Crimes in Indian Country		
Defendant	Victim	Jurisdiction
Indian	Indian	Federal for Felonies Tribal for misdemeanors
Indian	Non-Indian	Federal for Felonies Tribal for misdemeanors
Non-Indian	Non-Indian	State jurisdiction only
Non-Indian	Indian	Federal for both felonies and misdemeanors Tribal Law and Order Act Exception
Indian	Victimless	Tribal jurisdiction
Non-Indian	Victimless	State jurisdiction

Crimes of “general applicability” do not require use of this chart  
(i.e., drugs and guns)

Many Oklahoma officers and others in law enforcement rely on cards like this one to help them determine the scope of their authority. *But cf.* Pet. 10-17 (arguing that States retain concurrent jurisdiction over crimes committed by non-Indians against Indians). The current division of criminal authority between the tribes, the State, and the federal government summarized on the above card implicates all aspects of the criminal-justice system—from warrants and subpoenas, to investigative

authority and detentions, to juror oaths and officer affidavits, to the prosecutions themselves. The list goes on.

But the “*McGirt* decoder ring” cannot put Oklahoma state officers at ease. For starters, the jurisdictional lines remain blurry. *See supra* at 3-4 (noting that States’ concurrent authority over certain crimes remains unresolved, as does even the test for determining who is “Indian”). But regardless, merely knowing those lines does not resolve uncertainty about the relevant jurisdictional *facts* in a particular situation. Oklahoma officers face this uncertainty every day before taking any law-enforcement action within Indian country. At the very outset of an investigation, officers must attempt to determine the tribal status of the suspect and any victims. Their status ultimately determines the course of the investigation and prosecution—with often dramatically different results depending on the Indian status of the suspect and the victim, as explained further below.

Unless cross-deputized by the federal government and the relevant tribe, state officers lack jurisdiction within Indian country to arrest Indian suspects.<sup>6</sup> Non-deputized officers must rely on either tribal officers or the FBI. Numerous Oklahoma officers report that the tribes and the FBI have responded extremely slowly—if at all—to the State’s exigent law-enforcement needs. In one example, an Oklahoma officer explained that, lacking jurisdiction, his team secured a crime scene for six hours while waiting for federal agents to arrive. The task diverted significant law-enforcement resources

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<sup>6</sup> Any such arrest may be unlawful unless a valid citizen’s arrest. *See* Okla. Stat. tit. 22, § 202; *State v. Kieffer-Roden*, 208 P.3d 471, 473 (Okla. Crim. App. 2009) (holding that arrest by tribal officer outside his jurisdiction was lawful citizen’s arrest under state statute).

away from criminal activity within the State's jurisdiction. And sometimes tribal and federal officials do not respond at all. Oklahoma officers report dropping numerous criminal investigations involving tribal suspects or victims because state law enforcement received no response from officers with authority over the cases.

## 2. Issues with warrants and arrests

*McGirt* has created tremendous legal uncertainty surrounding warrants and arrests. Under the Fourth Amendment, warrants must emanate from "magistrates empowered to issue" them. *United States v. Lefkowitz*, 285 U.S. 452, 464 (1932). According to the Tenth Circuit, state courts lack authority to issue state officers search warrants for Indian property on tribal land to investigate suspected on-reservation crimes. *See United States v. Baker*, 894 F.2d 1144, 1146-47 (10th Cir. 1990) (per curiam); *cf. Nevada v. Hicks*, 533 U.S. 353, 366 (2001) (holding that state officers may search the on-reservation home of an Indian suspected of committing an off-reservation crime). *Baker* explained that such state-court warrants are "essentially void ab initio" because of "the issuing court's lack of jurisdiction to authorize the search in the first instance." 894 F.2d at 1147; *see also United States v. Krueger*, 809 F.3d 1109, 1123-25 (10th Cir. 2015) (Gorsuch, J., concurring).

Uncertainties arise frequently and are easy to imagine. Say Oklahoma officers get a tip about child pornography on the Internet. Using an IP address, they trace the suspect to an address within Indian country. Officers have probable cause to search the location, but they have no idea if the suspect is Indian. Where do they go for a warrant? State or tribal court? Some officers have obtained warrants from *both*. But what if the two judges disagree about the warrant? Or imagine

Oklahoma officers execute a state search warrant for a residence owned by a non-Indian. But at the residence the officers find Indians committing crimes. Or they find that an Indian is renting a portion of the house. How do officers handle these situations? They are fraught with legal risk. In the moment, however, officers must make tough calls that a court may later deem unlawful.

The exclusionary rule's good-faith exception should allow the admission of any evidence seized pursuant to an invalid warrant if the state officer executing it reasonably believed that the target person or property fell within the Oklahoma state court's authority. *See United States v. Leon*, 468 U.S. 897, 913 (1984) (recognizing exception); *United States v. Bailey*, 2021 WL 3161550, at \*3 (N.D. Okla. July 26, 2021). But it remains "unclear" whether the good-faith rule protects reasonable reliance on warrants later deemed void for lack of the issuing court's jurisdiction. Wayne R. LaFare, *Search and Seizure: A Treatise on the Fourth Amendment*, § 1.3(f) n.62 (6th ed.) (Sept. 2020 update).

Even assuming the good-faith exception applies, a search or arrest "made outside of the arresting officer's jurisdiction violates the Fourth Amendment to the Constitution and is therefore actionable pursuant to 42 U.S.C. § 1983 under the appropriate circumstances." *Ross v. Neff*, 905 F.2d 1349, 1353-54 (10th Cir. 1990). Qualified immunity may protect officers from liability if "the law regarding the jurisdiction of local police officers on [tribal] land in Oklahoma was not clearly established" at the time of a search or arrest. *Id.* at 1354. But "the qualified immunity defense is not available to" the officers' municipalities. *Id.* at 1355 (citing *Owen v. City of Independence*, 445 U.S. 622, 638 (1980)).

According to one District Attorney, Oklahoma state-court judges are even afraid to issue warrants for

searches or arrests on tribal land out of fear that they will lose their judicial immunity for acting “in the complete absence of all jurisdiction.” *Mireles v. Waco*, 502 U.S. 9, 12 (1991) (per curiam); *see also Bradley v. Fisher*, 80 U.S. 335, 352 (1871) (judge may be personally liable for orders issued without subject-matter jurisdiction). To avoid potential liability, some Oklahoma judges refuse to issue warrants until officers check the target’s possible tribal membership with all Five Tribes.

That process can take significant time, as some tribes’ membership departments are slow to respond. Officers report waiting up to 10 days to hear back from all the major Oklahoma tribes. To be 100% safe, officers may even want to check a warrant target’s membership with the other 574 federally recognized tribes. Imagine, for example, an Indian from a Kansas or Colorado tribe commits a crime on Oklahoma tribal land—even if Oklahoma officers confirm that the suspect or victim does not belong to any of Oklahoma’s Five Tribes, an arrest warrant may still be unlawful. That is hardly farfetched: The victim *in this very case* is a member of the Eastern Band of Cherokee Indians, a tribe headquartered in North Carolina. Pet. 7. Officers thus face a serious dilemma: chance it (making the arrest or executing the warrant) or lose time checking tribal membership.

Obtaining a warrant from federal district court is not necessarily a viable alternative because of the procedures, which similarly cost precious time and may ultimately go nowhere. A federal warrant first requires approval from a U.S. Attorney interested in prosecuting the case. Many federal warrant requests would thus be futile because, as reported by a District Attorney, the U.S. Attorney is (or was until just recently) only pursuing serious crimes. *See infra* at 20. And even if the office decides to pursue the case, state officers still must walk

through the entire warrant process with an attorney before submitting the request to federal court. According to Oklahoma officers, a warrant request submitted during the midafternoon would likely not be granted by a federal judge until the following day.

This delay drains state resources and causes law enforcement to miss narrow windows for obtaining critical evidence. For example, officers investigating the co-sleeping death of an Indian baby had ample probable cause to suspect that the infant's parent or parents had been drinking or using illegal drugs. The suspected parent was non-Indian, requiring a federal warrant for a blood draw to confirm intoxication. The warrant took so long, however, that any alcohol or drugs would have already dissipated from the bloodstream.

Narcotics officers likewise report that they have missed opportunities to make drug busts because of the delay getting federal warrants.

Nor can seeking warrants from tribal courts solve these issues. For starters, tribal courts lack criminal jurisdiction over non-Indian defendants. What's more, Oklahoma state-court warrants may not be recognized by tribal courts as applied to Indian defendants. Consider one example of a state-court wiretap order for a device owned and used by a non-Indian. According to one County Sheriff, the non-Indian wiretap target communicated with Indians, revealing that the Indians were also criminally liable. A tribal court refused to issue arrest warrants for these Indians, however, because, in its view, the initial state-court wiretap order was invalid as applied to the Indian participants in the non-Indian target's recorded conversations. The tribal court refused to consider those recordings, treating them as fruit of the poisonous tree. An Oklahoma District Attorney likewise reports that, for the same reason, another tribal court

denied a search warrant targeting Indians found on tribal land after officers executed an initial state-court search warrant targeting non-Indians. While these warrant denials are legally dubious, they illustrate the tremendous legal uncertainty that law enforcement and judges face in the wake of *McGirt*.

The jurisdictional fallout after *McGirt* has also hampered Oklahoma law enforcement's ability to obtain electronic information. Such information is often stored on out-of-state computers. A large proportion of warrants for electronic information are thus issued under the federal Stored Communications Act (SCA), which expressly authorizes "a court of competent jurisdiction" to issue warrants for such information stored across state lines. 18 U.S.C. §§ 2703(a), (b)(1)(A), (c)(1)(A), (d). The SCA defines "court of competent jurisdiction," however, as certain federal and military courts and "a court of general criminal jurisdiction of a State authorized by the law of that State to issue search warrants." § 2711(3)(B). This definition does not mention tribal courts, which are not state courts of general criminal jurisdiction. Oklahoma law-enforcement officers report that, as a result, some companies are refusing to honor warrants for electronic information issued by tribal courts.

### **3. Cross deputization cannot solve these problems**

To be sure, Oklahoma officers properly cross-deputized by either (or both) the federal government or relevant tribe may arrest suspects in Indian country. But cross-deputization does not solve all the above problems. Despite the dramatic reduction of the State's criminal jurisdiction following *McGirt*, because of cross-deputization, the workload for many Oklahoma officers and investigators has not changed much or has

even increased. The processes now have more steps and are often difficult to navigate.

Cross-deputization also brings its own host of risks and uncertainties. For starters, not all departments have entered cross-deputization agreements with the relevant tribes. “[C]ross-deputization agreements are difficult to reach, and they often require negotiation . . . over such matters as training, reciprocal authority to arrest, the geographical reach of the agreements, the jurisdiction of the parties, liability of officers performing under the agreements, and sovereign immunity.” *United States v. Cooley*, 141 S. Ct. 1638, 1646 (2021) (internal quotation marks and citation omitted).

Some tribes have agreed to cross-deputize local police only if their tribal police receive reciprocal authority. Many local officials, however, fear the attendant liability risk. Tribes have absolute immunity from monetary judgments. *Romero v. Peterson*, 930 F.2d 1502, 1505 (10th Cir. 1991). Local governments do not, but they lack the resources to train or oversee cross-deputized tribal police, placing municipalities at risk of liability for the conduct of tribal officers. One District Attorney described this predicament as a “Hobson’s choice given the need to advance public safety.”

And even if cross-deputized, officers must monitor, recall, and apply multiple agreements with different (potentially uncertain) terms and conditions. *See generally* Oklahoma Secretary of State, “Tribal Compacts and Agreements,” <https://bit.ly/3FJuBe8> (last visited Oct. 18, 2021).

#### **4. Other collateral issues**

*McGirt* also created uncertainty surrounding various other collateral issues within Oklahoma’s justice system.

One state law-enforcement official quickly listed a few examples:

- ***Use-of-force investigations.*** If both Indian and non-Indian state officers use force against a suspect in Indian country, which government handles the use-of-force investigation given potential criminal liability? Is it the United States, because one officer is Indian? Or would it be Oklahoma? Or some combination of both? What if the officers hit both Indian and non-Indian suspects?
- ***Contempt of court.*** State courts may not be able to hold Indian witnesses in contempt of court. This affects everything from outbursts in the courtroom, to discovery responses, to child support and visitation. *See Okla. Stat. tit. 21, § 566.*
- ***State subpoenas.*** State subpoenas of Indians likewise might not be enforceable. *See Okla. Stat. tit. 12, § 2004.1.*
- ***Juror oaths.*** Oklahoma requires jurors to take their oath “under the penalties of perjury.” Okla. Unif. Jury Instr. CR 1-7 (emphasis removed). But it remains unclear whether Oklahoma can prosecute Indians for perjury committed in a state court within Indian country.
- ***Affidavits.*** Without the threat of perjury prosecution, ostensibly sworn affidavits might also be invalid. *See Okla. Stat. tit. 12, § 426.*
- ***Protective Orders.*** Under Oklahoma law, violation of a protective order against stalking, harassment, or abuse is a misdemeanor and sometimes a felony. *E.g.,*

Okla. Stat. tit. 22, § 60.6. But if the violation occurs in Indian territory and either the violator or victim is Indian, criminal enforcement falls to the federal government or the tribes. Enforcement of protective orders has reportedly declined since *McGirt*. The consequences may be deadly. Grant D. Crawford, *Tahlequah Doctor Accused of Murder Has History of Domestic Violence*, Muskogee Phoenix (Oct. 13, 2021), <https://bit.ly/30DuQYL>.

**III. After *McGirt*, victims in eastern Oklahoma are often denied justice, undermining public confidence in law enforcement and disparately harming Indians.**

These myriad uncertainties have real-world consequences, mostly to the detriment of Oklahoma’s Indians. As Petitioner correctly notes, there is a particularly egregious donut hole neglecting Indian victims. *See, e.g.*, Pet. 16. *Cf. McGirt*, 140 S. Ct. at 2490 (emphasis added) (Roberts, C.J., dissenting) (observing that “Congress supplanted the Creek legal system with a legal code and court system that applied *equally* to Indians and non-Indians” (emphasis added)). Attempts to repair the “disruption inflicted by [*McGirt*],” and specifically the unequal treatment of citizens in Oklahoma, as the Chief Justice foreshadowed, has strained federal, state, and tribal governments, harming all Oklahomans. *Id.* at 2502 (dissenting). And all this ignores *McGirt*’s potential fallout for areas beyond criminal law, such as Oklahoma’s taxing, zoning, and regulatory authority. Pet. 23-26.

Nevertheless, the *McGirt* majority assured Oklahomans that “the vast majority of its prosecutions will be unaffected.” 140 S. Ct. at 2479. As explained more fully below, this is cold comfort for the victims who *are* affected and never receive justice. And even if the “vast

majority” of cases remain unaffected, the total number remains shockingly large, with a disproportionate share of Indian victims.

**A. After *McGirt*, many crimes in eastern Oklahoma go unprosecuted.**

The tribes and the federal government face several obstacles in filling the role that Oklahoma’s state and local law enforcement and prosecutors occupied before *McGirt*. Statistics tell only part of that story.

Police officers, investigators, and district attorneys report that many crimes remain uninvestigated and uncharged. These unprosecuted cases, front-line officials report, often involve non-Indian suspects and Indian victims. The federal government has authority over such cases, but whether Oklahoma retains concurrent authority remains uncertain. Pet. 4. One U.S. Attorney informed Oklahoma officials that they only have the resources to prosecute crimes involving property damage above \$150,000 or at least serious bodily injury as defined in 18 U.S.C. § 1365(h)(3). According to interviewed Oklahoma law enforcement, neither “a stabbing in a limb without loss of function” nor “a strangulation not causing death,” for example, meet this threshold, at least as applied by federal prosecutors. Discussing hypotheticals, one U.S. Attorney even told an Oklahoma District Attorney that the United States would not prosecute a non-Indian teacher for having sex with an Indian student over the age of consent—considered rape under Oklahoma law. *See* Okla. Stat. tit. 21, § 1111.8; *see also* Okla. Stat. tit. 21, § 1111.7 (criminalizing sex with someone in government custody). This nonenforcement policy amounts to a “get-out-of-jail-free card” for any non-Indian suspect accused of certain crimes against Indians falling below the U.S. Attorneys’ thresholds.

Although cases may be referred to a tribe, information regarding their ultimate resolution after referral remains largely unavailable. And even where the tribe has prosecutorial authority, federal law limits tribal-court sentences to a maximum of three years for *any* offense, with a nine-year maximum for sentences that may run consecutively. 25 U.S.C. § 1302(a)(7)(C)-(D).

**B. Examples of serious, yet unprosecuted, crimes.**

What little evidence is available suggests that the tribes and the federal government are not prosecuting crimes that Oklahoma would have prosecuted before *McGirt*. Here are just a handful of examples from recent months:

- ***Child sexual abuse.*** A non-Indian man confessed to Oklahoma police that he molested his nine-year-old Indian stepdaughter. The State referred the case to the federal government. After almost a year, the man still hasn't been charged. He remains free and is reportedly trying to reconnect with his victim.
- ***Child endangerment.*** A non-Indian mother became heavily intoxicated and passed out. Her two Indian toddlers left the house. The responding Oklahoma officers could do nothing more than secure the children with a safe adult and report the incident to Indian child welfare. The federal government will not pursue the case, and the mother will not receive the help she needs.
- ***Child neglect.*** Oklahoma police found a non-Indian woman living in a single squalid motel room with her five children (4 months to 13 years) and two dogs. Covered in trash, the room reeked of human and animal

urine and feces. Two of the children were completely naked. An unsecured firearm was accessible to the children, as was a plainly visible container of medical marijuana. The District Attorney was prepared to charge the mother with child neglect but subsequently learned that the children are Indian. The case was referred to the U.S. Attorney, but to date no charges have been filed.

- **Gun offense.** An Indian suspect with a series of prior felony convictions was recently involved in a shootout. Oklahoma police arrested him and, under a contract with the Cherokee, held him in county jail for a fee. The U.S. Attorneys declined the case despite sufficient evidence to indict on felony gun charges. After the Cherokee also declined to prosecute, he was released. During Fourth of July weekend, he savagely beat an 18-year-old boy interested in dating his daughter and set the boy's car on fire. The boy later died. The U.S. Attorney is now pursuing murder charges. The State would have prosecuted him on the gun charges.
- **Stabbing.** After committing a stabbing at a motel, the suspect fled across the street toward a junior high school and local library. Oklahoma police locked down the school and library and quickly evacuated the field. Officers secured the scene and, upon realizing that the suspect and victim are both Indian, called federal officials to complete the investigation. The federal officials instructed the officers to refer the case to the relevant tribe, likely because the crime did not fall under the Major Crimes Act, and the federal government lacks jurisdiction over crimes between Indians under the General Crimes Act. *See supra* at 4. The Oklahoma

officers had little motivation to continue the investigation given their experience that such a case will never be prosecuted.

- ***Home invasion.*** Brandishing a screwdriver, a non-Indian assailant invaded an elderly Indian woman's home, stealing cash and pain medication. The U.S. Attorney refused to prosecute. Before *McGirt*, this would have been a routine state prosecution resulting in jail time.
- ***Assault while impersonating police.*** Following a road-rage incident, two non-Indians driving a vehicle impersonated police officers, convincing the driver of the other vehicle—an Indian mother—to step out of her car. One assailant held the mother while the other beat her in front of her children. The crime remains unindicted and unprosecuted.

\* \* \*

*McGirt* has weakened the morale of those working at every level of law enforcement in eastern Oklahoma—those who now repeatedly witness crimes go unprosecuted, learn of the suspects' release, and fear that many dangerous criminals remain free to offend again. *McGirt* has thus also undermined Oklahomans' confidence in law enforcement. As an officer lamented, "I am the face of *McGirt*—I often have to explain to victims why the individual who harmed them will never go to jail."

### **Conclusion**

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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