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Brief of Amici Curiae Law Professors & Indian Law Experts in Support of Petition for a Writ of Certiorari, Smith v. United States

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SCHOOL OF LAW
SMALL SCHOOL.
BIG VALUE.

No. 22-796

IN THE

Supreme Court of the United States

JOHNNY ELLERY SMITH,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of
Appeals For The Ninth Circuit

**BRIEF OF AMICI CURIAE
LAW PROFESSORS & INDIAN LAW EXPERTS
IN SUPPORT OF PETITION
FOR A WRIT OF CERTIORARI**

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INTEREST OF AMICI CURIAE

Amici are law professors (listed in the Appendix) who teach and write about civil procedure, constitutional law, criminal law and procedure, critical socio-legal theory, federal courts, federal Indian law, legal history, poverty law, and property law, *inter alia*. Amici submit this brief in their individual capacities and not on behalf of their institutional employers.[1]

The decision reached by the United States Court of Appeals for the Ninth Circuit, permitting the application of state criminal law to punish a tribal member whose alleged criminal conduct occurred on an Indian reservation and caused no harm to another person—solely based on the Assimilative Crimes Act (ACA), 18 U.S.C. § 13 is contrary to numerous treaties, acts of Congress, and foundational principles of tribal sovereignty as construed and upheld by this Court's federal Indian law jurisprudence. Allowing the Ninth Circuit decision to stand renders express congressional authorizations and limitations on federal and state criminal jurisdiction over Indians in Indian country meaningless, and subjects tribes and individual Indians to state law, without express authorization by Congress or the express consent of the tribe. Granting this petition is necessary to

[1] Counsel of record received timely notice of the intent to file this brief under Supreme Court Rule 37.2. As required under S. Ct. R. 37.6, Amici state that no counsel for any party authored this brief in whole or in part, and no person or entity, other than Amici, their members, or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Amici law professors received no compensation for offering the views reflected herein.

correct the Ninth Circuit's disregard of the principled jurisdictional balance set forth in numerous treaties and acts of Congress as upheld and interpreted by this Court's jurisprudence since 1832.

SUMMARY OF REASONS TO GRANT PETITION FOR WRIT

Below, the Ninth Circuit wrongly held that the ACA, 18 U.S.C. § 13 confers federal jurisdiction over a "victimless" (i.e., a crime that does not harm any particular natural person) state crime occurring on the Warm Springs Indian Reservation—and throughout Indian country—either by its own terms or through the General Crimes Act (GCA), 18 U.S.C. § 1152, without the authorization or consent of the Indian Tribe.

Under this Court's longstanding, and recent, precedents, this decision cannot stand. It is untenable that state law should control the prosecution of an Indian tribal member for conduct that occurred exclusively within the confines of an Indian reservation, resulted in arrest by that tribe's police, and caused no harm to any particular natural person without the authorization or consent of that tribe.

Congress has not expressly and unequivocally authorized such prosecution. Neither the GCA, Indian Major Crimes Act (MCA), 18 U.S.C. § 1153, nor the ACA expressly and unequivocally authorize the federal government to prosecute an Indian person for "victimless" conduct, defined by state law as a crime, that occurred exclusively within the confines of an Indian reservation—without tribal authorization.

Specifically, the Confederated Tribes of Warm Springs is the only tribe within the state of Oregon that Congress expressly exempted from the original grant of state law and jurisdiction under Public Law 280 (P.L. 280) Pub. L. No. 83-280, 67 Stat. 588 (1953) (codified as amended at 18 U.S.C. § 1162, 25 U.S.C. §§ 1321 to 1325, and 28 U.S.C. § 1360).

As explained below, the proper application of ACA requires consideration of the impact on Indian Tribes' right to make their own laws and be ruled by them. These impacts require this Court to grant certiorari or summarily reverse the Ninth Circuit's opinion below.

ARGUMENT

I. The Ninth Circuit Opinion Misunderstands and Threatens Foundational and Essential Principles of Federal Indian Law.

A. Criminal Jurisdiction is Essential to Tribal Sovereignty.

Criminal jurisdiction is a keynote of sovereignty. "After all, the power to punish crimes by or against one's own citizens within one's own territory to the exclusion of other authorities is and has always been among the most essential attributes of sovereignty." *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486, 2511 (2022) (Gorsuch, J. dissenting) (citations omitted). Unfortunately for Petitioner Johnny Ellery Smith, this case threatens to sound a dirge for tribal criminal jurisdiction by imposing state criminal law over a tribal citizen for conduct done

exclusively on an Indian reservation, where the Indian Tribe has reserved its sovereignty under a treaty with the United States and already exercised jurisdiction over the matter in question (i.e., by arresting Petitioner). The decision below cannot stand where there is no express consent by the Tribe and where Congress has expressly and unequivocally exempted the Tribe from state criminal jurisdiction.

Fortunately, this Court has the opportunity to affirm foundational principles of federal Indian law in a clarion call regarding the relationship among tribal, state, and federal sovereigns and harmonize the recent line of cases regarding criminal law and Indian peoples. *See, e.g.*, *Denezpi v. United States*, 119 S. Ct. 1573 (2022); *McGirt v. Oklahoma,* 140 S. Ct. 2452 (2020); *Sharp v. Murphy,* 140 S. Ct. 2412 (2020), affirming*, Murphy v. Royal,* 875 F.3d 896, 907–909, 966 (10th Cir. 2017). *See generally Castro-Huerta*, 142 S. Ct. at 2486.

B. Without the Express and Unequivocal Authorization of Congress, Tribal Jurisdiction Controls Criminal Prosecutions of Indians on Indian Reservations.

As this Court has long recognized, state governments have historically been hostile to recognizing and dealing with Tribes as sovereign governmental entities. *United States v. Kagama*, 118 U.S. 375, 384 (1886) ("[Indian Tribes] owe no allegiance to the states and receive from them no protection. Because of the local ill feeling, the people

of the states where they are found are often their deadliest enemies.").

Notwithstanding this Court's cognizance of that deadly history, the Ninth Circuit fails to apprehend the calamity to tribal sovereignty portended by applying state law to prosecute an Indian person—without tribal authorization—for conduct that causes no harm to another person and which occurs wholly within an Indian reservation. In deciding to apply the ACA to Petitioner, the Ninth Circuit fails to recognize the critical factor distinguishing Indian tribes from federal enclaves—tribal sovereignty—and also fails to cognize the difference between federal enclaves and Indian reservations, and the complex criminal jurisdiction scheme applying to the latter. *Accord Castro-Huerta*, 142 S. Ct. at 2496 ("In short, the General Crimes Act does not treat Indian country as the equivalent of a federal enclave for jurisdictional purposes.") (citing 28 U.S.C. § 1152).

C. The Grant Of State Jurisdiction Must Be Express And With The Consent Of The Tribes.

In the recent cases focused on criminal law and process in Indian country, this Court has taken up critical cases on treaty rights, land recognition, and criminal jurisdiction. Each case has required the Court to delve into the history of the Tribe whose land and sovereignty is at stake in light of the nation-to-nation relationship between all federally recognized Tribes and the United States. Thus, in this case, the Confederated Tribe of Warm Springs deserves this

Court's critical review to ensure that the Ninth Circuit does not erode Indian sovereignty where Congress has not expressly and unequivocally acted to do so.

The government's argument that the ACA allows for application of Oregon law for minor offenses through a federal loophole is contrary to the express grant of state law and authority in P.L. 280. As explained in *McGirt*, "Congress has sometimes expressly expanded state criminal jurisdiction in targeted bills addressing specific States. 140 S. Ct. at 2478. *See, e.g.*, 18 U.S.C. § 3243 (creating jurisdiction for Kansas); Act of May 31, 1946, ch. 279, 60 Stat. 229 (same for a reservation in North Dakota); Act of June 30, 1948, ch. 759, 62 Stat. 1161 (same for certain reservations in Iowa); 18 U.S.C. § 1162 (creating jurisdiction for six additional States)." 140 S. Ct. at 2478. Clearly, Congress knows how to express its intent to confer jurisdiction to a state.

Indeed, Congress enacted P.L. 280 in 1953 to address the absence of tribal and federal law enforcement resources on many reservations by allowing certain states to assume concurrent jurisdiction over Indian country. Specifically, under P.L. 280, Congress unilaterally transferred federal civil and criminal jurisdiction "over offenses committed by or against Indians" to six states, including Alaska, California, Minnesota, Nebraska, Oregon, and Washington. 18 U.S.C. § 1162 (giving state jurisdiction over offenses committed by Indians or against Indians in Indian Country).

However, in enacting P.L. 280 in Oregon, Congress *explicitly* limited Oregon's ability to exercise

jurisdiction over the Confederated Tribe of Warm Springs. 18 U.S.C. § 1162(a). The Tribe was exempted, *inter alia*, because it "ha[d] a tribal law-and-order organization," *see* S. Rep. No. 83-699, at 6-7 (1953), reprinted in 1953 U.S.C.C.A.N. 2409, 2413-14 (citing letter from Assistant Secretary of the Interior Orme Lewis). The Tribe also feared unfair treatment of tribal members in state courts. *See* Carole Goldberg, *Public Law 280: The Limits of State Jurisdiction over Reservation Indians*, 22 U.C.L.A. L. Rev. 535, 540, 546 (1975). Congress's decision to exempt the Confederated Tribe of Warm Springs from P.L. 280 allowed the Tribe to resolve criminal issues without interference from either the state government in their internal affairs.

There is no consistent way to support the application of the ACA as set out in the opinion below without offending the foundational principles of Indian law and creating chaos among the complexity in the field of criminal jurisdiction in Indian country. Indeed, it defies logic and the imagination to think that where Congress has taken such care to limit federal and state authority in this manner, this Court would subject the Petitioner and his Tribe to the law of "their deadliest enemies." *Kagama*, 118 U.S. at 384. Since 1968, P.L. 280 has required consent of the affected tribe before any assumption of jurisdiction by the states is effective. 18 U.S.C. § 1162; 28 U.S.C. § 1360. No tribe to date has consented.

II. Since 1832, This Court Has Held That States Have No Inherent Power To Prosecute Crimes Involving Indian Peoples on Tribal Lands.

Indian Tribes existed as sovereign governments long before the framing of the U.S. Constitution in 1787, *accord Talton v. Mayes*, 163 U.S. 376, 382–83 (1896) (discussing *inter alia Cherokee Nation v. State of Ga.*, 30 U.S. (5 Pet.) 1, 16–17 (1831)), and even before the earliest European explorers and settlers, like the Spanish of the late fifteenth century, arrived in North America. Before contact, Tribes had their own forms of government, some with legal codes, and others with oral stories of law and practice. Treaties signed with European nations and later the United States in exchange for land guaranteed the Tribes continued recognition and treatment as sovereign nations. R. Clinton, Development of Criminal Jurisdiction Over Indian Lands: The Historical Perspective, 17 Ariz. L. Rev. 951, 958–962 (1975).

After the Constitution's ratification, the federal government undertook to protect the Tribes and their citizens, from the states, whose leaders and citizens all too often coveted Indian lands and sought to impose their will on, and dispossess, the Tribes. Numerous treaties express this attempted protection.

As the late federal Indian law scholar, Philip P. Frickey, explained, "[A] treaty usually involved a tribal cession of preexisting rights (especially to land and related rights such as water, fishing, hunting, and gathering) and a reservation of all that had not

been ceded away (again, especially land—hence the term 'Indian reservation'." Philip P. Frickey, *(Native) American Exceptionalism in Federal Public Law*, 119 Harv. L. Rev. 431, 439 (2005). *Accord United States v. Winans*, 198 U.S. 371, 381 (1905).

Almost two-hundred years ago, Chief Justice Marshall, in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), "articulated powerful canons of interpretation to protect tribes from inadvertent cessions of important rights." Frickey, *supra* at 439 (citing 31 U.S. (6 Pet.) at 552-53). "The fundamental rule is that a treaty should be interpreted as the tribe would have understood it." Frickey, *supra* at 440. "This canon follows from the reserved-rights theory, for it asks what rights the Indians intended to cede, not what allocation of interests federal negotiators intended or treaty language suggested." *Id.* "The reserved-rights theory and the canons associated with it have profound implications for the nature as well as the scope of tribal authority." *Id.*

Since *Worcester*, this Court has held that the states have no inherent power to prosecute crimes involving tribal citizens on tribal land. 31 U.S. at 516 ("The extraterritorial power of every legislature being limited in its action to its own citizens or subjects, the very passage of this [state] act is an assertion of jurisdiction over the Cherokee nation, and of the rights and powers consequent thereto.") The conduct of the nation's first President recognized the protection over Tribal people and ability to purchase their lands, but not to interfere with their intra-tribal affairs. *Id.* at 517. ("The [U.S.] receive[d] the Cherokee nation into their favour and protection. The

Cherokees acknowledge themselves to be under the protection of the United States, and of no other power. Protection does not imply the destruction of the protected. The manner in which this stipulation was understood by the American government, is explained by the language and acts of our first president."). Moreover, "[t]o construe the expression "managing all their affairs" into a surrender of self-government would be a perversion of their necessary meaning, and a departure from the construction which has been uniformly put on them." *Id.* at 518. *See also Williams v. Lee*, 358 U.S. 217, 221-222 (1959) ("Implicit in these treaty terms, as it was in the treaties with the Cherokees involved in *Worcester v. Georgia*, was the understanding that the internal affairs of the Indians remained exclusively within the jurisdiction of whatever tribal government existed.").

Over time, as federal policy evolved and the federal branches began to view Congress as having plenary power over Indian affairs, the Court exercised some restraint. It "brought the Indian law canons into the realm of statutory, as well as treaty, interpretation." *Id.* at 445. "Illustratively, after the termination era had effectively ended, the Court interpreted a termination statute so narrowly as to defang it of some assimilative features." *Id.* (citing *Menominee Tribe v. United States*, 391 U.S. 404, 410-12 (1968) (holding that a termination statute did not abrogate preexisting treaty rights)). "So, too, after federal policy abandoned assimilation and returned to Indian sovereignty, the Court interpreted Public Law 280 narrowly, as failing to authorize states to apply civil laws, like tax laws, to Indians in Indian country." Frickey, *supra*, at 445 (citing *Bryan v. Itasca County*,

426 U.S. 373, 383-93 (1976)). "The decisions in both cases run against the ordinary meaning of statutory text and likely original congressional intent, illuminating just how much difference the canons made." *Id.* (citation omitted).

Frickey goes on to explain, "[t]he Court sometimes explicitly justifies its narrow interpretation of federal statutes invading tribal prerogatives as reflecting the appropriate judicial role in light of both the plenary power of Congress and the contemporary federal policy of tribal sovereignty." 119 Harv. L. Rev. at 445. *See, e.g.*, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 (1978) ("As we have repeatedly emphasized, Congress' authority over Indian matters is extraordinarily broad, and the role of courts in adjusting relations between and among tribes and their members correspondingly restrained. Congress retains authority expressly to authorize civil actions for injunctive or other relief to redress violations of [the Indian Civil Rights Act (ICRA)], in the event that the tribes themselves prove deficient in applying and enforcing its substantive provisions. But unless and until Congress makes clear its intention to permit the additional intrusion on tribal sovereignty that adjudication of such actions in a federal forum would represent, we are constrained to find that [ICRA] does not impliedly authorize actions for declaratory or injunctive relief against either the tribe or its officers."). In reviewing congressional action, however, the Court preserved Indian law's exceptionalism by crafting standards in light of the unique aspects of tribal status. *Frickey,* 119 Harv. L. Rev. at 445 (citing examples).

"As an aspect of the plenary power/canonical interpretation model, the Court generally maintained the *Worcester* approach of keeping state authority out of Indian country unless Congress had plainly decided to the contrary." *Id.* at 448. In one example, *Williams v. Lee*, 358 U.S. 217 (1959), the Court held:

> It is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there. The cases in this Court have consistently guarded the authority of Indian governments over their reservations. Congress recognized this authority in the Navajos in the Treaty of 1868, and has done so ever since. If this power is to be taken away from them, it is for Congress to do it.

Williams, 358 U.S. at 233 (citing *Lone Wolf v. Hitchcock*, 187 U.S. 553, 564-66 (1903)). That approach was affirmed by this Court seventy-three years later. *See United States v. Mazurie*. 419 U.S. 544, 556-58 (1975) (concluding that "[b]ecause tribes possess "attributes of sovereignty over both their members and their territory," they have "independent authority over the subject matter" and therefore are acceptable recipients of a delegation of federal authority."). Application of the ACA here is inconsistent with tribal sovereignty and unique aspects of tribal status.

III. The ACA's Original Purpose was to Address Lawlessness on Federal Enclaves—Not Within Indian Country

The ACA does not permit the federal government to borrow Oregon law to prosecute Mr. Smith in this case. Application of state law is preempted by federal Indian law, in general, and the trust responsibility via treaty, specifically in this case. In *United States v. Wheeler*, the Court affirmed: "It is undisputed that Indian tribes have power to enforce their criminal laws against tribe members. Although physically within the territory of the United States and subject to ultimate federal control, they nonetheless remain 'a separate people, with the power of regulating their internal and social relations.'" 435 U.S. 313, 322 (1978) (citing *Kagama*, 118 U.S. at 381-382; *Cherokee* Nation, 5 Pet. at 16.). "Their right of internal self-government includes the right to prescribe laws applicable to tribe members and to enforce those laws by criminal sanctions." *Id.* (citing *United States v. Antelope*, 430 U.S. 641, 643 n. 2 (1977); *Talton*, 163 U.S. at 380; *Ex parte Crow Dog*, 109 U.S. 556, 571-572 (1883); 18 U.S.C. § 1152 (1976 ed.)). "Moreover, the sovereign power of a tribe to prosecute its members for tribal offenses clearly does not fall within that part of sovereignty which the Indians implicitly lost by virtue of their dependent status." *Id.* at 326.

Any limitations on sovereignty, "rest on the fact that the dependent status of Indian tribes within our territorial jurisdiction is necessarily inconsistent with their freedom independently to determine their external relations." *Id.* The Court made clear that

"powers of self-government, including the power to prescribe and enforce internal criminal laws, are of a different type" because they involve only the relations among members of a tribe. *Id.* Tribes are not like federal enclaves such as national parks or military bases, which do not enjoy the same sovereign status. As such, these inherent powers "are not such powers as would necessarily be lost by virtue of a tribe's dependent status." *Id.* "[T]he settled doctrine of the law of nations is, that a weaker power does not surrender its independence —its right to self-government, by associating with a stronger, and taking its protection." *Id.* (citing *Worcester*, 31 U.S. at 560-561).

In *Wheeler,* the Court goes on to hold that the "Indian tribe's power to punish tribal offenders is part of its own retained sovereignty is clearly reflected in a case decided by this Court more than 80 years ago." *Id.* at 328-29 (citing *Talton*, 163 U.S. 376). The Court recognizes that "[t]his problem would, of course, be solved if Congress, in the exercise of its plenary power over the tribes, chose to deprive them of criminal jurisdiction altogether." *Id.* at 331-332. But they have not.

The ACA is a jurisdictional statute. The ACA does not apply to Indian Country under its own terms. The Act does not expressly or otherwise authorize the federal government to exercise jurisdiction on reservation lands of Indian Country, but rather only in federal enclaves.[2] The original purpose of the ACA

[2] 18 U.S.C. § 13 ("Whoever within or upon any of the places . . . as provided in section 7 of this title is guilty of any act or omission which, although not made punishable by any

was to address a need for dealing with criminal offenses in federal enclaves where there was not a comprehensive criminal code, such as national parks, military installations. 1 Cohen's Handbook of Federal Indian Law § 9.02[1][c][ii]. The first effort of Congress to establish criminal offenses to be punishable by the new federal government resulted in The Crimes Act of 1790. Ch. 9, 1 Stat. 112. The Act created twenty-three federal crimes and set forth their respective punishments. The Act also addressed criminal procedures for the Article III courts and amended the recently adopted Judiciary Act of 1789.

In 1825, Congressman James Buchanan initiated the assimilative crimes act out of a concern for lawlessness in federal enclaves. Without a comprehensive criminal code, he opined that certain serious crimes "to which a high degree of moral guilt is attached…may be committed with impunity." *Lewis v. United States*, 523 U.S. 155, 160 (1998) (citing 40 Annals of Cong. 930 (1823)). That statute entitled "An Act more Effectually to Provide for the Punishment of Certain crimes Against the United States, and for Other Purposes," imported state law, providing:

> That, if any offense shall be committed in any of the places aforesaid, the punishment of which offense is not specially provided for by any law of the

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enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.").

> United States, such offense shall, upon a conviction in any court of the United States having cognizance thereof, be liable to, and receive, the same punishment as the laws of the state in which such fort, dockyard, navy yard, arsenal, armory, or magazine, or other place, ceded as aforesaid, is situated provide for the like offense when committed within the body of any county of such state.

Act of March 3, 1825 § 3 (4 Stat. at L. 115, chap. 65, U. S. Comp. Stat. 1901, p. 3651). *See Franklin v. United States*, 216 U.S. 559, 568 (1910).

Thus, to address the legal gaps, it was the express policy of Congress to conform the law of federal enclaves to the laws of the state in which the enclave was located. *United States v. Sharpnack*, 355 U.S. 286, 289 (1958). Congress repeatedly confirmed this policy by enacting an unbroken series of Assimilative Crimes Acts over the next one hundred fifty years, enacting comparable Assimilative Crimes Acts from 1866 to 1949,[3] and finally, the ACA as it stands today was adopted during the revision of the United States Criminal Code in 1948 Revised Criminal Code as 18 U.S.C. § 13; *Sharpnack,* 355 U.S. at 292.

The series of re-enactments demonstrates a consistent congressional purpose to apply the

[3] 14 Stat. 13; in 1874 as R.S. s 5391; in 1898, 30 Stat. 717; in 1909 as 289 of the Criminal Code, 35 Stat. 1145; in 1933, 48 Stat. 152; in 1935, 49 Stat. 394; in 1940, 54 Stat. 234.

principle of conformity to state criminal laws in punishing most minor offenses committed within federal enclaves. This Court has never specifically examined whether the ACA applies to Indian Country. Unlike federal enclaves, Tribes are separate sovereigns with a unique place and relationship with the United States, and distinct from the states.

While the United States was determining the length and breadth of limited federal criminal jurisdiction in the federal enclaves, the issue was being examined in Indian country, with this critical distinction—Tribes were and are separate sovereigns. Thus, the fundamental principles of Federal Indian Law evolved.

When examining the limited applicability of the ACA against the backdrop of historical interactions between tribes and federal and state governments, as well as the canons of construction used when interpreting the impact of federal policies on tribes, it is clear that the ACA does not apply in Indian country.

IV. Application of the ACA Interferes with the Intra-Tribal Affairs and Rights of the Indian Tribes.

Federal jurisdiction to prosecute under the GCA fails, providing for and recognizing the tribal preemption based upon "the right of reservation Indians to make their own laws and be ruled by them." *Williams v. Lee*, 358 U.S. 217, 220 (1959); 18 U.S.C. § 1152.

The ACA does operate not to apply state law for misdemeanors on Warm Springs to be prosecuted in federal court. Federal powers are proscribed to "major crimes," by 18 U.S.C. § 1153 and "general" laws or laws of general applicability against the United States by 18 U.S.C. § 1152. The ACA is not a criminal statute identifying state offenses applicable to Native American tribes and thus has no blanket application to Indian Country under the GCA.[4] The ACA did not "override competing federal interests." Cohen's Handbook of Federal Indian Law, § 9.02[1][c], at 744. *Id.* (citing *Johnson v. Yellow Cab Transit Co.*, 321 U.S. 383, 389-91 (1944)). "[S]tate law definitions should give way to the strong federal interest in tribal self-determination in cases in which an Indian defendant is charged with violating a state-defined victimless crime." *Id.*

The examination requires knowledge of Indian law and the resulting limited and proscribed criminal

[4] The GCA provides:

> Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.
>
> This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.

jurisdictional scheme applicable to tribes and the federal trust responsibility to uphold tribal sovereignty. Mr. Smith's case meets not one, but all three, exemptions in the statute.

First, Mr. Smith is exempt from prosecution under the GCA, as the criminal episode involving eluding tribal police is a case of "one Indian against the person or property of another Indian," namely the Tribe itself. 18 U.S.C. § 1152. Charging tribal members with violations of state-defined victimless crimes such as traffic or public decency laws, would give 'assimilative' an unintended double meaning. Under the analysis in *Quiver v. United States*, 241 U.S. 602 (1916), these crimes should be subject to tribal, not federal, jurisdiction. *Id*.

Quiver posits that the GCA's first exception bars federal jurisdiction over victimless crimes. 241 U.S. at 603 ("[T]he policy reflected by the legislation of Congress and its administration for many years, that the relations of the Indians among themselves—the conduct of one toward another—is to be controlled by the customs and laws of the tribe, save when Congress expressly or clearly directs otherwise[.]"). *Quiver*'s analysis extended beyond the specific offense at issue, adultery, because a contrary approach would subject Indians to many other [statutes] which it seems most reasonable to believe were not intended by Congress to be applied to them." *Id*. at 606 (emphasis added).

The second exemption also applies as Mr. Smith is a tribal citizen "Indian committing an[ ] offense in the Indian country who has been punished by the local law of the tribe." 18 U.S.C. § 1152. The

question of whether an Indian defendant has been "punished by the local law of the tribe" is to be interpreted broadly. 18 U.S.C. § 1152. The Tribe arrested and prosecuted Mr. Smith for this conduct solely involving tribal interests. The second exemption defers to a sovereign decision whether to prosecute and which offenses to charge bring and the appropriate disposition.

Finally, the ACA under the third exemption. Rights reserved to the Tribe via treaty stipulation is the very issue before the Court in Mr. Smith's petition. Before the United States was even formed, and for many years since, treaties have governed the relationship between the Indian nations and colonial powers. *See* Robert Odawi Porter, *The Inapplicability of American Law to the Indian Nations*, 89 Iowa L. Rev. 1595, 1600 (2004). Here, no explicit statutory language abrogated the Warm Springs Treaty obligations of "exclusive use" for the Tribe. Cohen's Handbook of Federal Indian Law, § 9.02[1][c], at 744.

The third GCA exception is implicated because the absence of explicit congressional language means that the "exclusive use" provision of the Warm Springs Treaty has not been abrogated as required by *McGirt v. Oklahoma,* 140 S. Ct. 2452 (2020), which would be necessary to subject tribal members to state law. "Because Congress has not said otherwise, we hold the government to its word." *McGirt*, 140 S. Ct. at 2459. Tribal self-determination is paramount.

CONCLUSION

When examining the limited applicability of the ACA consistent with tribal sovereignty, treaty reservations, and federal Indian law principles, it is clear that the ACA only applies when it fits within the carefully proscribed rules of criminal law in Indian Country. Federal Indian law principles require an analysis of the applicable treaty or treaties, federal criminal jurisdiction under the Major Crimes Act, the exceptions under the General Crimes Act, § 1152 and the application of tribal law and tribal sovereignty. Tribal citizens deserve and require clarity from this Court on what criminal laws they are subject to on the Indian Reservations.

The Petition for Writ of Certiorari should be granted, or in the alternative, the Ninth Circuit Judgment below should be summarily reversed.

Respectfully submitted,

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APPENDIX

Amicus Curiae Signatories in Support

Note: The institutional affiliations are noted below for informational purposes only. No signatories speak on behalf of their respective institutions.

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