No. 20A161
CAPITAL CASE

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF OKLAHOMA, *Applicant*,

-vs-

SHAUN MICHAEL BOSSE, *Respondent*.

To the Honorable Neil M. Gorsuch,
Associate Justice of the United States Supreme Court and
Circuit Justice for the Tenth Circuit

APPLICANT'S MOTION FOR LEAVE TO FILE SUPPLEMENTAL REPLY AND SUPPLEMENTAL REPLY IN RESPONSE TO MOTION AND BRIEF OF THE UNITED STATES RESPECTING THE APPLICATION FOR A STAY

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APPLICANT'S MOTION FOR LEAVE TO FILE SUPPLEMENTAL REPLY

Several days after Oklahoma filed its reply in support of its application for a stay, the United States has sought leave to file an amicus brief respecting that application. Assuming the Court grants the motion of the United States, Oklahoma respectfully moves for leave to file this supplemental reply to the United States.

SUPPLEMENTAL REPLY IN RESPONSE TO MOTION AND BRIEF OF THE UNITED STATES RESPECTING THE APPLICATION FOR A STAY

The United States does not contest the propriety of a stay respecting the first question presented by Oklahoma's application. *See* U.S. Br. 5-6. Meanwhile, the United States agrees that, after *McGirt*, the practical importance of the second question has "greatly increased." *Id.* at 26; *see also id.* at 7. And the United States acknowledges this Court's prior cases on the scope of federal jurisdiction under the General Crimes Act did not hold states lack jurisdiction over crimes like respondent's, while other cases address that question only in dicta. *Id.* at 10, 14, 17. Combined, this puts the second question squarely within Rule 10(c): certiorari is warranted to review "an important question of federal law that has not been, but should be, settled by this Court." The United States' reasons for opposing a stay pending a certiorari petition largely retread arguments already made and, to the extent they add anything new, do not support—or in fact undermine—the arguments against a stay.

1. Like respondent, the United States does not point to any words in the General Crimes Act, 18 U.S.C. § 1152, that divest the state of jurisdiction over non-Indian crimes like respondent's. *See* Appl. 18-20; Appl. Reply 5. Instead, the United States rests on the "inference" it draws from what it believes the Act "suggests" or

"indicates" based on what it surmises Congress "contemplated" and "no doubt assumed." U.S. Br. 11-14.[1] Perhaps Congress assumed, as the United States speculates, that it did not need to speak to state jurisdiction in Indian country because state laws were thought to lack all force within tribal boundaries. But that thought has long since been rejected, as recognized repeatedly by this Court. *See* Appl. Reply 10. Or perhaps Congress was more concerned with granting federal jurisdiction than addressing state jurisdiction because it sought to rectify the problem of states unwilling to protect Indians within their borders—a reality that also, thankfully, has been overcome. *See, e.g.*, *United States v. Kagama*, 118 U.S. 375, 384 (1886). Either way, we are left with the text of Section 1152, which says nothing to strip state jurisdiction. No less than with respect to tribal sovereignty, it is not this Court's role to divest a state of sovereignty over its own citizens within its borders based on perceived congressional wishes; if it wants to do it, Congress "must say so." *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2462 (2020). Congress hasn't.[2]

Indeed, the United States is forced to admit (at 12) that the idea Congress silently "occupied the entire field" in Section 1152 is contradicted by *U.S. v. McBratney*, which held a state—on equal footing with all other states—has "criminal

[1] Contrary to the position of the United States, nothing in the text of the Indian Trade and Intercourse Act of 1790 excluded states from exercising jurisdiction over crimes committed by non-Indians on tribal land within state borders.

[2] Making the same mistake as the court below, the United States suggests that the Court should ignore the definitive interpretation of the text of the General Crimes Act previously given by the Court because that interpretation was in the context of deciding cases with different facts. U.S. Br. 14 n.4. But no method of statutory interpretation contemplates words changing their meaning depending on application. *See* Appl. 19-20.

jurisdiction over its own citizens and other white persons throughout the whole of the territory within its limits, including the [] Reservation." 104 U.S. 621, 624 (1881). So the United States has causation backwards when it suggests states only have jurisdiction over non-Indians "as a result" of the implicit repeal of federal jurisdiction. Rather *McBratney* held because states inherently possess jurisdiction over non-Indians within their bounds—and no federal law excluded such jurisdiction—statutes that granted federal jurisdiction over crimes involving only non-Indians in territories were no longer applicable in a newly admitted state. *Id*.

2. Although the United States rehashes many of the arguments already briefed, perhaps most notably the federal government stops short of respondent's and the tribe's outdated position that states lack all authority on reservations unless explicitly granted by Congress. *See* Appl. Reply 9-12. Instead, the United States quotes this Court's recognition of "[t]he States' inherent jurisdiction on reservations" unless "stripped by Congress." U.S. Br. 18 (quoting *Nevada v. Hicks*, 533 U.S. 353, 365 (2001)). Then the United States cites cases analyzing whether state jurisdiction is preempted by federal statute either explicitly (under normal preemption rules) or implicitly (under a balancing of federal, state, and tribal interests). U.S. Br. 25 (citing *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 176-77 (1989); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 333-34 (1983); *Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue of New Mexico*, 458 U.S. 832, 837-38 (1982)).

After all this, the United States sidesteps that preemption analysis and contrarily asks whether federal statutes "permit" state jurisdiction. U.S. Br. 25.

Precedent does not support this transmogrification. Notwithstanding the United States' fudging of the analysis used in this Court's caselaw, the text of the General Crimes Act does not explicitly preempt state jurisdiction and the United States recognizes that federal, state, and tribal interests do not counsel in favor of implicit preemption. *See* U.S. Br. 26 n.9; *see also id.* at 6.[3]

3. Rejoining respondent and the tribe, the United States next points to laws enacted a century after the General Crimes Act that grant some states jurisdiction over crimes by or against Indians. U.S. Br. 19-22. But "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *Marvin M. Brandt Revocable Tr. v. United States*, 572 U.S. 93, 109 (2014) (quoting *United States v. Price*, 361 U.S. 304, 313 (1960)). As explained, congressional actions that may have overinclusively presumed what earlier Congresses did does not substitute for clear congressional text. *See* Appl. 23; Appl. Reply 9. Again, if Congress wishes to adjust sovereign jurisdiction "it must say so." *McGirt*, 140 S. Ct. at 2462.

Even more hazardously, the United States argues the recent introduction of a bill that would permit state-tribal jurisdictional compacts in Oklahoma counsels against certiorari. U.S. Br. 26-27. The existence of pending legislation tells little

[3] In the United States' view, the implied preemption analysis does not apply if a federal statute "address[es] the subject." U.S. Br. 25. Such a test, broadly looking to the "subject" of federal legislation rather than inquiring whether the statute explicitly answers the precise question at issue, is nowhere present in case law. In *Cotton Petroleum*, for example, the Court applied its implicit preemption analysis to state oil and gas taxes on non-Indians operating under leases pursuant to the Indian Mineral Leasing Act of 1938. It did so because "[t]he 1938 Act neither expressly permits state taxation nor expressly precludes it." 490 U.S. at 177. The same is true here on the question of state jurisdiction in the General Crimes Act.

"[a]side from the very pertinent fact that the legislation is still unadopted." *United States v. Am. Trucking Ass'ns*, 310 U.S. 534, 550 (1940). That Congress has "has no shortage of tools at its disposal" to answer vexing questions of Indian law does not suffice to allow those questions to remain unanswered—otherwise, certiorari might never be granted in an Indian law case. *McGirt*, 140 S. Ct. at 2482. All the more so here where the United States has conspicuously declined to support the proposal thus far, U.S. Br. 27, and at least one tribe is strongly opposing it.[4] These are but a few of the structural and political difficulties of enacting such legislation. Relying on just-introduced bills as a reason to deny certiorari is a perilous endeavor.

4. Finally, on irreparable harm, the United States makes explicit what respondent implies by claiming the Interstate Agreement on Detainers will not apply to respondent if released from state custody and held by the federal government. U.S. Br. 28-29. Under its view, then, the United States has *no duty* to return respondent to state death row even if this Court grants certiorari and reverses. *See* Appl. Reply 14. Tellingly, the United States only hints at returning respondent *if* the Agreement applies, leaving uncertain what might happen otherwise. Oklahoma is thereby justified in seeking a stay to avoid this likely irreparable harm.

CONCLUSION

For the foregoing reasons, this Court should grant the application to stay.

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[4] *See* Clifton Adcock, *Federal legislation would allow state and tribes to strike deals to prosecute crimes in Indian Country*, THE FRONTIER (May 10, 2021), https://www.readfrontier.org/stories/federal-legislation-would-allow-state-and-tribes-to-strike-deals-to-prosecute-crimes-in-indian-country/.

Respectfully submitted,

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