No. 21-429

IN THE

Supreme Court of the United States

STATE OF OKLAHOMA,

Petitioner,

v.

VICTOR MANUEL CASTRO-HUERTA,

Respondent.

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

BRIEF OF *AMICUS CURIAE* THE CHEROKEE NATION IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

INTEREST OF *AMICUS*[1]

Amicus Cherokee Nation ("Nation") is a federally-recognized Indian tribe, residing on a reservation in Oklahoma, on which it protects public safety and prosecutes Indian offenders in the exercise of its inherent sovereign authority. Under the Treaty of New Echota, Dec. 29, 1835, 7 Stat. 478, the Nation obtained a new homeland in present-day Oklahoma, *id*. art. 2 (incorporating Treaty with the Western Cherokee, Feb. 14, 1833, 7 Stat. 414), on which it was guaranteed the right to self-government under federal supervision, *id.* art. 5; 1866 Treaty of Washington with the Cherokee, art. 31, July 19, 1866, 14 Stat. 799.[2] The Oklahoma Court of Criminal Appeals ("OCCA") upheld the existence of the Cherokee Reservation, *Hogner v. State*, 2021 OK CR 4, analyzing the Nation's unique history and treaties in light of *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020). The State did not seek certiorari in *Hogner* and elsewhere accepted *Hogner* as settling the Reservation's existence. *See infra* at 13.

Oklahoma and its *amici* now seek reversal of *McGirt* and the OCCA's decisions upholding the United States' treaty promises to the Nation. The Nation has fundamental interests in protecting those promises, under which the Nation, as the sole tribal signatory of those treaties, governs the Reservation.

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[1] No counsel for a party authored this brief in whole or in part. The Chickasaw Nation and Cherokee Nation made monetary contributions to fund preparation of this brief and the Cherokee Nation solely funded its submission. The parties' counsels of record received notice of the Cherokee Nation's intent to file more than ten days before the date for filing and consented thereto.

[2] The boundaries of the Reservation were modified by the 1866 Treaty, arts. 16, 17, 21, and the Act of Mar. 3, 1893, ch. 209, § 10, 27 Stat. 612, 640-43. *See* Pet'r's App. 11a-17a.

To protect those promises, the Nation turns to this Court—as it has before, *see Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832)—to show that certiorari should be denied.

SUMMARY OF ARGUMENT

The State's petition should be denied for three reasons.[3] First, the State and its *amici* give no valid reason to revisit *McGirt*. Second, the case provides no vehicle to consider any legal questions, because the state court's dismissal of criminal charges mooted the case, and the State's attack on the Reservation is otherwise procedurally barred. Third, the OCCA correctly held that federal jurisdiction is exclusive over crimes committed by non-Indians against Indians in Indian country. The State's novel contention that it has jurisdiction over such crimes unless Congress extinguishes that jurisdiction is legally unsupported.

[3] The State has attempted to link all its other *McGirt* challenges to this case. The Nation is mindful that the Court may not accept this practice, which hangs attacks on all Five Tribes' Reservations on a Cherokee Reservation case and diverts attention from the OCCA's recognition of the Reservation in its published decisions, *Hogner*; *Spears v. State*, 2021 OK CR 7, 485 P.3d 873, and from that court's rejection of concurrent state jurisdiction in *Roth v. State*, 2021 OK CR 27, ¶¶ 12-15 & n.2.

REASONS FOR DENYING THE PETITION

I. The Court Should Not Grant Certiorari To Revisit *McGirt*.

The State's second question, Pet. 17-29, does not warrant certiorari for the reasons set forth in Sections I and III of the Nation's *amicus* brief in *Oklahoma v. Spears*, No. 21-323. Nothing the State's *amici*[4] say on the issues addressed there unsettles the Nation's position, but here the Nation addresses two areas of *amici*'s arguments that contain legal or factual errors.

First, some *amici* argue that *McGirt* "requires ignoring, absent unambiguous [sic] text, all surrounding circumstances, contemporaneous understandings, and subsequent history." EFO Br. 9. *McGirt* actually held that consideration of history is necessary when statutory ambiguity emerges but found no ambiguity in the statutes affecting the Creek Reservation. 140 S. Ct. at 2469. The Court nevertheless reviewed the State's arguments regarding context and history and still upheld the Reservation. *Id*. at 2470-74. These *amici* also urge that the Court should have interpreted those statutes by discerning their "ends and means" and undertaking a "detailed contemporaneous and subsequent history analysis," EFO Br. 10, but offer no reason why only tribes should be subjected to these special rules, and *McGirt* correctly refused Oklahoma's request to do just that, 140 S. Ct. at 2474. *Amici* States similarly assert that statutes affecting Indian lands are "inherently ambiguous." States' Br. 14-20. But "Congress knows how to withdraw a reservation

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[4] *See* Br. Of *Amici Curiae* Env't Fed'n Of Okla., Inc., et al. ("EFO Br."); Br. Of *Amici Curiae* Okla. Dist. Att'ys Ass'n, et al. ("D.A. Br."); Br. of Cities of Tulsa & Owasso ("Cities Br."); Br. for Tex., et al. ("States' Br.").

when it" wishes to do so, *McGirt*. 140 S. Ct. at 2462, and "once a reservation is established, it retains that status 'until Congress *explicitly* indicates otherwise.'" *Id.* at 2469 (quoting *Solem v. Bartlett*, 465 U.S. 363, 470 (1984)) (emphasis added).[5]

Second, the Nation responds to the State's *amici*'s flawed and misleading presentation of the situation in eastern Oklahoma as follows.

A. *Amici*'s Misleading Description of Problems in Implementing *McGirt* Dissolves Upon Examination.

Law enforcement *amici* seek to extinguish the Five Tribes' Reservations through unsourced anecdotes, D.A. Br. 3, 6-23, and the vague assertion that other problems "are easy to imagine," *id.* at 12. Similarly, *amici* Cities say "*McGirt* has caused a host of problems for law enforcement officers in Tulsa and Owasso," Cities Br. 3-6. Problems sometimes arise in Indian country law enforcement, and the Nation is addressing those that do. The Nation's judicial system staff includes a prosecutor and judge who are on-call 24/7 to issue warrants or answer questions about prosecutions, *cf.*

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[5] *Bates v. Clark*, 92 U.S. 204 (1877), *see* States' Br. 17, is not to the contrary. It is concerned with lands to which "Indians retained their original title," and does not apply where "a different rule was made applicable to the case" by treaty or by act of Congress, 92 U.S. at 208. That is the case here, as Congress has defined Indian country to include "all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent," 18 U.S.C. § 1151(a); *see McGirt*, 140 S. Ct. at 2464; *Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351, 357-358 (1962), and given the guarantees in the Muscogee (Creek) Nation's treaties, *see McGirt*, 140 S. Ct. at 2461-62; *Buster v. Wright*, 135 F. 947, 952-53 (8th Cir. 1905)

Cities' Br. 14. State subpoenas can be domesticated in tribal court using a form available on the Nation's website. *See* App. for Foreign Subpoena Duces Tecum & Proposed Order.[6] The Nation shares regularly-updated procedures with all the counties and municipalities with police departments on the Reservation, describing how to process arrests of Indians, issue bail, process bonds, report traffic citations, obtain warrants at any time from Cherokee judges, contact the Cherokee Marshals' 24/7 dispatcher to identify whether a crime involves a Cherokee citizen or obtain tribal police support, and reach the Nation's realty department to identify whether a crime occurred on the Reservation. *See* Memo. from Office of Att'y Gen., Cherokee Nation, to All Law Enforcement Agencies within Cherokee Reservation (updated Aug. 13, 2021) (on file with Nation). This defeats *amici*'s speculative assertions that law enforcement is affected by confusion over tribal procedures. *See* D.A. Br. 12-14. If problems persist, or others arise, they should be resolved though intergovernmental cooperation.

Law enforcement *amici* also hypothesize that the good faith exception to the exclusionary rule for evidence obtained by an invalid warrant might not apply to theorized jurisdictional hurdles, *id.* at 13, but the federal courts have applied that rule to uphold actions by state officers on Oklahoma reservations. *United States v. Bailey*, No. 20-CR-0188-CVE, 2021 WL 3161550, at *3 (N.D. Okla. July 26, 2021); *United States v. Patterson*, No. CR-20-71-RAW, 2021 WL 633022, at *5-6 (E.D. Okla. Feb. 18, 2021) (applying by analogy *Ross v. Neff*, 905 F.2d 1349, 1351 (10th Cir. 1990), concerning police liability on Indian country).

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[6] https://bit.ly/2Zv4LKc

Law enforcement *amici* then proffer incidents they say have not been prosecuted. D.A. Br. at 21-23. They don't mention Oklahoma's track record, a necessary comparator. In 2019, Oklahoma only "cleared" about 36% of reported murders, rapes, robberies, and aggravated assaults—meaning that state officers identified, charged, and apprehended an alleged offender. *See* Off. of Crim. Just. Stats., Okla. State Bureau of Investigation, *Crime in Oklahoma: 2020*, at 4-2 tbl.14 (2021).[7] That percentage fell from 53% in 2000. Info. Servs. Div. & Field Servs. Unit, Okla. State Bureau of Investigation, *State of Oklahoma Uniform Crime Report Annual Report January-December 2002*, at 5-3 (2003).[8]

Nor is *amici*'s cause helped by their reliance on an unpublished paper purporting to analyze prosecution of crimes "referred" by the Tulsa County District Attorney's ("TCDA") office. *See* D.A. Br. at 9 (discussing Jason Pudlo & William Curtis Ellis, *McGirt v. Oklahoma* Victim Impact Report (Aug. 20, 2021) (unpublished manuscript) ("Pudlo Report")).[9]

That paper offers no valid or reliable conclusions. Among the reasons why are these. First, while it states that *McGirt* "applies retroactively," *id*. 3, the OCCA ruled *McGirt* does not apply retroactively, *State ex rel. Matloff v. Wallace*, 2021 OK CR 21, ¶¶ 14-40. Thus, the paper's "referrals" include cases in which relief was unavailable under *McGirt*. Even after acknowledging that *McGirt* is not retroactive, Pudlo Report 15, the authors do not adjust their analysis or conclusions. Second, while the study period ran from July 2020 through May 2021, *id.* at 4,

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[7] https://bit.ly/3b7SFtm

[8] https://bit.ly/3Cc4ASK

[9] https://bit.ly/3B4aGTQ

Hogner was not decided until March 11, 2021. The Nation has reviewed the data on which the authors relied and found that they did not review *a single* Cherokee Nation prosecution post-*Hogner*. The Nation did file charges pre-*Hogner* in anticipation of a favorable ruling, but it did so by searching state court dockets for cases involving Indian defendants who raised *McGirt*-based challenges, not through "referrals." Third, there is no evidence that Tulsa is representative of the entire Reservation or that findings regarding Tulsa could be generalized to the whole Reservation. Fourth, the authors assumed that all cases "referred" presented a simple choice: indict or decline. They did not consider the time needed for investigation or to make a prosecutorial decision. Finally, the authors' analysis is highly suspect because they employed no control group, they are not experts in criminal justice or Indian country law enforcement,[10] their report was not peer reviewed, and it appears the research design of the study was dictated by TCDA, not the authors themselves. Were this report proffered in court it would be rejected. *See Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999). It should be here, too.[11]

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[10] Nevertheless they speculate that *McGirt* could be reversed "given the passing of Justice Ginsburg and her replacement with Justice Barrett." *Id.* at 15.

[11] *Amici* States' reliance on statistics to show that "[o]verall victimization rates of Indians are high," States' Br. 4-12, doesn't help the State either. Those statistics pre-date *McGirt*, *id.* at 4, and the article they reference recommends that to improve law enforcement on Indian country "policymakers" "could restore tribal authority and revoke sentencing limits over all crimes committed in Indian country. . . ." Dominga Cruz, et al., *The Oklahoma Decision Reveals Why Native Americans Have a Hard*

Amici Cities complain about the lack of a comprehensive database of tribal court cases, Cities' Br. 10 n.6, and make the broad and incorrect assertion that "[e]ven when tribal authorities pursue prosecution, defendants are regularly released with relatively little bond—or given nominal fines." Cities Br. 11. However, the Tribal Law and Order Act of 2010 ("TLOA"), Pub. L. No. 111-211, tit. II, 124 Stat. 2258, 2261-2301, addresses the former concern by requiring the federal government to develop and implement a comprehensive tribal crime data collection system in consultation with tribes, 34 U.S.C. § 10132. It also authorizes the Cities to seek the assistance of the Attorney General "to (1) improv[e] law enforcement effectiveness; (2) reduc[e] crime in Indian country and nearby communities; and (3) develop[] successful cooperative relationships that effectively combat crime in Indian country and nearby communities." 25 U.S.C. § 2815. They recently embraced such a collaborative approach and could again. *See* Addendum to Law Enforcement Agreement Between U.S., Cherokee Nation, and City of Tulsa (Apr. 9, 2014);[12] Memo. of Agreement Between Cherokee Nation & City of Owasso (Oct. 5, 2021).[13]

Amici Cities also complain about cases referred to the Muscogee (Creek) and Cherokee Nations "either because they involve an Indian perpetrator or because they involved an Indian victim," Cities' Br. 9, but the Nation only has jurisdiction over crimes committed by Indians (with some exceptions for domestic violence

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Time Seeking Justice, Wash. Post (July 22, 2020), https://wapo.st/3vEJwBZ.

[12] https://bit.ly/3DsYnSv

[13] https://bit.ly/3m3zpmU

crimes, 25 U.S.C. § 1304). Furthermore, since *Hogner* was decided, the Nation has been informed by the TCDA of 395 cases raising *McGirt* challenges.[14] The Nation has filed charges in 261 (a 66% rate), is reviewing 49, and has declined 85, in part because some do not involve crimes on the Cherokee Reservation or Indian offenders, or have been taken by federal prosecutors. *Amici* Cities also say they are aware of no cases in which the Nation has subpoenaed their officers. Cities' Br. 9-10. Subpoenas are only necessary when testimony must be presented at trial (there are no grand juries or preliminary hearings in the Nation's criminal courts), and approximately 90-95% of criminal cases plead out, Bureau of Just. Assistance, U.S. Dep't of Just., *Plea and Charge Bargaining* 1 (2011).[15]

Amici Cities' reference to Tyler Tait's crimes, Cities Br. 10-11, notably omits that state prosecutors repeatedly dismissed charges against Tait for serious domestic violence crimes. Grant D. Crawford, *Tahlequah Doctor Accused of Murder Has History of Domestic Violence*, Muskogee Phoenix (Oct. 13, 2021).[16] State prosecution could have broken his cycle of violence. Angel Watashe's case, *see* Cities Br. 10, is similar. He was convicted in 2020 of assault with a

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[14] The District Attorney has not agreed to a formal process, but periodically sends the Nation dockets of cases in which defendants have raised *McGirt*-based objections to state jurisdiction.

[15] https://bit.ly/3EiSeJf

[16] https://bit.ly/2ZkwFJw. *See State v. Tait*, No. CF-2017-0431 (Okla. Dist. Ct. dismissed Aug. 30, 2017) (assault and battery with dangerous weapon, domestic assault, threat); *State v. Tait*, No. CM-2017-00470 (Okla. Dist. Ct. dismissed Aug. 30, 2017) (violations of protective order); *State v. Tait*, No. CM-2017-00167 (Okla. Dist. Ct. dismissed Aug. 31, 2017) (violation of protective order).

dangerous weapon for trying to run people down with his car but served only forty-five days in jail before the State released him on a suspended sentence.[17] Afterward, he attacked his partner, and the Nation is now responsible for handling his on-reservation offenses.

Compare these cases with that of Carl Gene Ortner, a non-Indian who was charged in state court with second-degree rape of an Indian child, yet pleaded out to a mere $1,000 fine, two years in prison, and a thirteen-year suspended sentence. *State v. Ortner*, No. CF-2018-000213 (Okla. Dist. Ct. guilty plea Sept. 5, 2019). After *McGirt*, the federal government charged Ortner with sex crimes in Indian county. He was convicted and sentenced to life in prison and a $100,000 fine. *United States v. Ortner*, No. 4:20-cr-00237-JFH-1 (N.D. Okla. convicted May 18, 2021).

Finally, *amici* complain that "federal prosecutors decline to prosecute all but the most serious crimes." Cities Br. at 6; D.A. Br. 9, 20; States Br. 12-13. They treat any case not prosecuted by the time they filed their briefs as one that should be filed but will not. That overlooks the realities that: final state court convictions are not subject to challenge under *McGirt*, so need not be re-prosecuted; many cases require investigation and evaluation to make a prosecutorial decision; and federal prosecutors need additional resources, which the State opposes. Reese Gorman, *Cole Encourages State-Tribe Relations Over State Challenges to McGirt*, Norman Transcript (July 23, 2021).[18] The Nations also need more resources, which

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[17] *See State v. Watashe*, No. CF-2020-1937 (Okla. Dist. Ct. guilty plea May 28, 2020).

[18] https://bit.ly/3GkmkO8

the State also opposes. *Id.* But help is coming: Congress is providing funding to develop the federal government's and Nations' capacities. H.R. Rep. No. 117-97 at 63 (2021); H.R. Rep. No. 117-83 at 55-56 (2021).

Ultimately, *amici* show nothing to warrant revisiting *the law*, which is clear and has not been undermined or changed since *McGirt*. *Amici*'s concerns should instead be channeled into inter-governmental discussions under the authority of the TLOA or presented to Congress and policymakers in an effort to build on successes in implementing *McGirt*.

B. The Nation is Successfully Implementing *McGirt* and *Hogner*.

Before *McGirt* and *Hogner* were decided, the Nation undertook a wide-ranging effort to prepare for expanded criminal justice responsibilities on its Reservation including cooperation with local governments. Although the State's *amici* allege problems with the implementation of inter-governmental agreements and assert that local governments do not want to enter into them, that has not been the Nation's experience. In fact, since *McGirt*, the Nation has entered into fifty-seven cross-deputization agreements.[19] Indeed, shortly after *McGirt*, the Oklahoma Sheriffs' Association recommended that county sheriffs enter into them as quickly as possible. *See* Okla. Sheriffs' Ass'n, *Guidance for Oklahoma Law Enforcement Following McGirt v. Oklahoma* (July 14, 2020).[20] This does not require

[19] All agreements are on file in the Oklahoma Secretary of State's office. *See Tribal Compacts and Agreements*, Okla. Sec'y of State, https://bit.ly/3FRTqoq (last accessed Oct. 17, 2021) (enter "Cherokee" into "Doc Type" searchbar, press "Submit").

[20] https://bit.ly/3lMaRyK

difficult negotiations. *See* D.A. Br. at 7. As Tulsa well-knows, a law enforcement entity may enter into a *uniform* master cross-deputation agreement approved by the Department of the Interior and the Nation in 2006, simply by executing an addendum page and filing it with the Oklahoma Secretary of State. *See* Tribal Addendum: Addition of Tribe to Deputation Agreement for Law Enforcement in Cherokee Nation (Apr. 27, 2006).[21]

The Nation's commitment to implementing *McGirt* and *Hogner* continues. It is always difficult to read anecdotes describing crimes, especially by repeat offenders. But the Nation is also heartened by *thousands* of successes since *Hogner*: As of September 30, the Nation has brought 2,031 felony and misdemeanor cases in its courts. Inter-Tribal Council of Five Civilized Tribes, Res. No. 21-34 (Oct. 8, 2021).[22] That number increases daily.

II. The State Cannot Challenge the Existence of the Cherokee Reservation in this Moot Case.

That the State's and *amici*'s arguments are best presented to Congress, not to a court, is further shown by the fact that the State's petition is procedurally barred for three reasons.

First, this case is moot. The District Court has dismissed the charges against Respondent. *See* Docket Entry, *State v. Castro-Huerta*, No. CF-2015-6478 (Okla. Dist. Ct. Sept. 27, 2021).[23] Any decision on the validity of those charges would be advisory. *See*

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[21] https://bit.ly/3jKkYm6

[22] https://bit.ly/3m5lixr

[23] https://bit.ly/3jdj7pX.

Chafin v. Chafin, 568 U.S. 165, 172 (2013); *Steel Co. v. Citizens for a Better Envt.*, 523 U.S. 83, 101 (1998).[24]

Second, the State earlier *affirmatively accepted* the Reservation in other cases, and the courts accepted that position. *See* Suppl. Br. of Appellee after Remand at 3, *McDaniel v. State*, No. F-2017-0357 (Okla. Crim. App. filed Mar. 29, 2021)[25]; Suppl. Br. of Appellee after Remand at 6, *Foster v. State*, No. F-2020-149 (Okla. Crim. App. filed Apr. 19, 2021).[26] The State is therefore barred from raising this argument here in an unfair appellate ambush. *See New Hampshire v. Maine*, 532 U.S. 742, 750-51, 755-56 (2001).

Third, the State did not challenge the Reservation in the proceedings below and thus waived its challenge to *McGirt*. "Waiver is the intentional relinquishment or abandonment of a known right," *Wood v. Milyard*, 566 U.S. 463, 474 (2012) (cleaned up), and an argument waived below is forfeited here, *United States v. Jones*, 565 U.S. 400, 413 (2012). That is exactly what happened below. The OCCA remanded for a hearing on the existence of the Reservation.[27]

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[24] This case does not deal with injuries too fleeting to be litigated but likely to recur. *See Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1976 (2016).

[25] https://bit.ly/3lM1Wgz

[26] https://bit.ly/3jjP67S. The State's decision to allow *Hogner* to become final suggests its challenge to the Reservation is barred by non-mutual collateral estoppel. *See* Restatement (Second) of Judgments § 29 (1980); *see also State v. United Cook Inlet Drift Ass'n*, 895 P.2d 947, 951-52 (Alaska 1995); *Benjamin v. Coughlin*, 905 F.2d 571, 576 (2d Cir. 1990).

[27] Order Remanding for Evidentiary Hr'g at 4, *Castro-Huerta v. State*, No. F-2017-1203 (Oka. Crim. App. filed Aug. 19, 2020), https://bit.ly/3aL99r0.

The State neither challenged *McGirt*,[28] nor the Nation's and Respondent's arguments that the Reservation still exists.[29] After remand, the State repeated without objection the District Court's conclusion that the Reservation exists.[30] The State's effort to reverse its decisions not to challenge the existence of the Reservation "comes too late in the day." *See Sorrell v. IMS Health Inc.*, 564 U.S. 552, 563 (2011).

If more were needed to show this petition is a poor vehicle, Respondent has pleaded guilty to federal charges for his crime. *United States v. Castro-Huerta*, No. 4:20-cr-00255-CVE (N.D. Okla. guilty plea Nov. 2, 2020).

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[28] State's Br. on Concurrent Jurisdiction at 1 & n.1, *State v. Castro-Huerta*, No. CF-2015-6478 (Okla. Dist. Ct. filed Oct. 1, 2020), https://bit.ly/3lRXKMt; Agreed Stip. at 1 (filed Oct. 8, 2020). The Agreed Stipulations are available from the District Court as part of the record. The State only attempted to reserve challenges to *McGirt* after the Governor appointed a new Attorney General who is implacably opposed to *McGirt*. *See* Chris Casteel, *American Bar Association Questioned New Oklahoma AG's Experience, Judgment*, Oklahoman (July 23, 2021), https://bit.ly/3Gdx9S3; Br. in Supp. of Mot. to Stay & Abate Proceedings at 5 n.3, *Russell v. Oklahoma*, No. F-2019-892 (Okla. Crim. App. filed June 24, 2021), https://bit.ly/3jbOhOh. But an attempt to preserve an argument that is estopped or already waived must fail.

[29] Cherokee Nation *Amicus* Br. & App. (filed Sept. 22, 2020), https://bit.ly/3jcyrDf; Br. of Def. (filed Oct. 6, 2020), https://bit.ly/3aL9biC.

[30] Suppl. Br. of Resp't after Remand at 2-3 (Okla. Crim. App. filed Dec. 31, 2020), https://bit.ly/3G7uBFg.

III. Under Settled Law, Federal Jurisdiction Over Crimes By Non-Indians Against Indians In Indian Country Is Exclusive Unless Congress Otherwise Provides.

The OCCA correctly applied *McGirt* to hold that federal jurisdiction is exclusive over crimes committed by non-Indians against Indians in Indian country. Pet'r's App. 4a; *Roth*, 2021 OK CR 27, ¶¶ 12-15.[31] The State alleges this was an "erroneous expansion of *McGirt*," Pet. 10, but as the Nation explained in its *amicus* brief in *Oklahoma v. McDaniel*, No. 21-485, this is wrong. The General Crimes Act ("GCA"), 18 U.S.C. § 1152, "provides that federal law applies to a broader range of crimes by or against Indians in Indian country." *McGirt*, 140 S. Ct. at 2479 (citing 18 U.S.C. § 1152). As with the Major Crimes Act ("MCA"), 18 U.S.C. § 1153, federal jurisdiction over criminal conduct under the GCA is exclusive, *Williams v. Lee*, 358 U.S. 217, 219-220 & n.5 (1959); *Williams v. United States*, 327 U.S. 711, 714 (1946); *Donnelly v. United States*, 228 U.S. 243, 271-72 (1913); *Solem v. Bartlett*, 465 U.S. 463, 467 n.8 (1984), such that "[w]ithin Indian country, State jurisdiction is limited to crimes by non-Indians against non-Indians, and victimless crimes by non-Indians," *Solem*, 465 U.S. at 465 n.2 (citing *New York ex rel. Ray v. Martin*, 326 U.S. 496 (1946)). Congress can *grant* states jurisdiction over crimes by non-Indians against Indians in Indian

[31] Below, the OCCA ruled that it "rejected the State's argument regarding concurrent jurisdiction in *Bosse v. State*, 2021 OK CR 3 ¶¶ 23-28 . . . . We do so again in the present case." Pet'r's App. 4a. Since then, the OCCA has withdrawn *Bosse* on other grounds, 2021 OK CR 23, ¶ 1 (citing *Wallace*), and again rejected the State's concurrent jurisdiction argument in a published decision in *Roth*, 2021 OK CR 27, ¶ 12 & n.2.

country, *see* 18 U.S.C. § 3243 (Kansas); 25 U.S.C. § 232 (New York), but it has never done so for Oklahoma, *see Murphy v. Royal*, 866 F.3d 1164 (10th Cir. 2017), *as amended*, 875 F.3d 896, 936-37 (10th Cir. 2017).

Opposing the law, the State contends it has inherent jurisdiction over such cases, which Congress did not extinguish in the GCA. Pet. 11-12. This argument fails, as the State does not cite a single case that so holds and makes no attempt to demonstrate a split of authority. Its petition should accordingly be denied.

A. Federal Jurisdiction Is Exclusive Over Crimes Committed By Non-Indians Against Indians In Indian Country.

Since 1790, federal jurisdiction has been exclusive over crimes committed by non-Indians against Indians in Indian country, except as Congress otherwise provides. "Beginning with the Trade and Intercourse Act of 1790, 1 Stat. 137, . . . Congress assumed federal jurisdiction over offenses by non-Indians against Indians which 'would be punishable by the laws of the state or district if the offense had been committed against a citizen or white inhabitant thereof.'" *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 201-03 (1978) (cleaned up). Congress later revised and reenacted the 1790 Act, *see* Act of May 19, 1796, ch. 30, §§ 4, 6, 1 Stat. 469, 470-471; Act of Mar. 30, 1802, ch. 13, 2 Stat. 139, to extend federal jurisdiction over crimes committed by citizens or others against Indians on Indian land "which would be punishable, if committed within the jurisdiction of any state, against a citizen of the United States," 2 Stat. 139, § 4; *see also* §§ 6, 15. These statutes made federal jurisdiction exclusive over crimes committed by non-Indians against Indians in Indian territory.

Worcester confirmed that conclusion. *Worcester* held a Georgia law prohibiting white men from living in Cherokee territory without a state license was "void, as being repugnant to the constitution, treaties, and laws of the United States." 31 U.S. (6 Pet.) at 562. The Court explained that the Constitution conferred *on Congress* all the powers "required for the regulation of [the United States'] intercourse with the Indians." *Id.* at 559. *Accord United States v. Lara*, 541 U.S. 193, 200 (2004); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 62 (1996); *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 670-71 (1974). Two years later, Congress enacted "the direct progenitor of the [GCA]" in the Indian Trade and Intercourse Act of 1834, ch. 161, § 25, 4 Stat. 729, 733, "which ma[de] federal enclave criminal law generally applicable to crimes in 'Indian country'" while exempting crimes between Indians. *United States v. Wheeler*, 435 U.S. 313, 324-325 (1978). As *Worcester* established the exclusivity of federal jurisdiction over the crimes to which the 1834 Act applied, it was not necessary for Congress to explicitly bar states from exercising jurisdiction to achieve that result.

As explained in *Williams v. Lee*, "[o]ver the years this Court has modified the[] principles" of *Worcester*, "and state courts have been allowed to try non-Indians who committed a crime against each other on a reservation." 358 U.S. at 219-20. "But if the crime was by or against an Indian, tribal jurisdiction or that expressly conferred on other courts by Congress has remained exclusive." *Id.* at 220.

The exception for crimes between non-Indians in Indian territory was established in *United States v. McBratney*, 104 U.S. 621 (1881). Acknowledging federal jurisdiction existed over such crimes prior to Colorado statehood, *id.* at 623, *McBratney* held the

Act admitting Colorado "necessarily repeal[ed]" any prior statute "inconsistent therewith" with respect to crimes by non-Indians against non-Indians, which permitted Colorado to exercise jurisdiction over such crimes, *id.*; *accord Martin*, 326 U.S. at 500; *Draper v. United States*, 164 U.S. 240, 242-43 (1896). In so holding, *McBratney* emphasized that the case presented "no question" with regard to "the punishment of crimes committed by or against Indians." 104 U.S. at 624; *see Draper*, 164 U.S. at 247.

That question was decided in *Donnelly*, where a non-Indian convicted under the GCA of murdering an Indian on an Indian reservation relied on *McBratney* and *Draper* to argue that California's admission as a state gave it "undivided authority" to punish crimes committed by non-Indians on Indian reservations. 228 U.S. at 271. The Court explained that those cases' holdings concerned "offenses committed by white people against whites." *Id.* (citing *McBratney*, 104 U.S. at 624; *Draper*, 164 U.S. at 247). Turning to the question of jurisdiction over crimes commited by or against Indians, the Court held that "offenses committed by or against Indians" were "not within the principle of" *McBratney* or *Draper* because such cases implicate the Nation's special responsibility to Indians. *Id.* at 271-72 (citing *United States v. Kagama*, 118 U.S. 375, 383 (1886)). Three decades later, the Court made that even clearer in *Williams v. United States*, where it reaffirmed that "the laws and courts of the United States, rather than those of [the state], have jurisdiction over offenses committed . . . by one who is not an Indian against one who is an Indian." 327 U.S. at 714 (footnote omitted).

In sum, the State's assertion that "[t]his Court's precedents . . . do not prohibit States from prosecuting

crimes committed by non-Indians against Indians in Indian country," Pet. 13, is flatly wrong. In fact, federal jurisdiction has long been, and remains, exclusive over such crimes unless Congress otherwise provides. The State never had jurisdiction over such crimes, and it was therefore not necessary for the GCA to "deprive[] States of their ability to protect their Indian citizens by prosecuting crimes committed by non-Indians against Indians." Pet. 17.[32]

The State's related assertion that state prosecution of such crimes "will not impair any federal interest," Pet. 16 (citing *Gamble v. United States*, 139 S. Ct. 1960, 1964 (2019)), is equally wrong, "in virtue of the long-settled rule that such Indians are wards of the nation, in respect of whom there is devolved upon the federal government 'the duty of protection and with [it] the power.'" *United States v. Ramsey*, 271 U.S. 467, 469 (1926) (quoting *Kagama*, 118 U.S. at 384).

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[32] Promoting the idea that it has criminal jurisdiction in Indian country absent an express statutory *limitation* on state authority, the State misleadingly suggests that *Roth* "reaffirmed" the State's "understanding" of *Bosse*, 2021 OK CR 3, Pet. 12, but fails to note that the OCCA adjusted its concurrent jurisdiction analysis in *Roth*, 2021 OK CR 27, ¶¶ 12-15 & n.2, after withdrawing *Bosse*. *Roth* recognized that criminal offenses by or against Indians "have been subject only to federal or tribal laws . . . except where Congress in the exercise of its plenary and exclusive power over Indian affairs *has expressly provided* that State laws shall apply," *Roth*, 2021 OK CR 27, ¶ 13 (quotation omitted) (emphasis added), and acknowledged that "Congress has authorized States to assume criminal jurisdiction over Indian Country in limited circumstances," noting that "*McGirt* specifically held" that federal law applied in Oklahoma "according to its usual terms" because the State had never complied with the requirements to assume jurisdiction over the Creek Reservation and Congress had never expressly conferred jurisdiction on Oklahoma." *Id.* ¶ 14 (citing *McGirt*, 140 S. Ct. at 2478).

"Even when capable of exercising jurisdiction" over offenses committed by or against Indians in Indian country under federal statutes giving them such authority, "States have not devoted their limited criminal justice resources to crimes committed in Indian country." *United States v. Bryant*, 136 S. Ct. 1954, 1960 (2016) (citations omitted). "That leaves the Federal Government" to protect Indian victims from crimes committed by non-Indians, *id.*, and belies the argument that States should fill the gap, States' Br. at 4.

B. The State Lacks Jurisdiction Over Crimes By Non-Indians Against Indians In Indian Country.

The State's argument that the GCA did not "relieve a State of its prosecutorial authority over non-Indians in Indian country," Pet. 12, also fails because the cases it cites defeat its position.

Oklahoma relies heavily on *Nevada v. Hicks*, 533 U.S. 353 (2001), which said that the GCA and MCA "give United States and tribal criminal law generally exclusive application" over "crimes committed in Indian country," *id.* at 365 (emphasis omitted). It also quotes the Court's statement that "state sovereignty does not end at a reservation's border," Pet. 11 (alteration omitted) (quoting *Hicks*, 533 U.S. at 361), but that simply confirms that tribal sovereign authority "does not exclude all state regulatory authority on the reservation," *Hicks*, 533 U.S. at 361. The State then quotes *County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251 (1992), as saying that "'absent a congressional prohibition,' a State has the right to 'exercise criminal (and, implicitly, civil) jurisdiction over non-Indians located on reservation lands,'" *see* Pet. 11 (quoting *Yakima*,

502 U.S. at 257-58).[33] But immediately following, *Yakima* cites to *Martin*, which only recognizes state criminal jurisdiction "to punish a murder of one non-Indian committed by another non-Indian, upon [a] Reservation." *Martin* 326 U.S. at 498. The State's reliance on *New York ex rel. Cutler v. Dibble*, 62 U.S. (21 How.) 366 (1859), *see* Pet. 11, 13, is mistaken because *Dibble* applies only to preventing non-Indian possession of Indian lands. *Oneida*, 414 U.S. at 672 n.7 (quoting *Dibble*, 62 U.S. at 370). If *Dibble* extended further, it would have been unnecessary for Congress to have "ceded to the State" "criminal jurisdiction over New York Indian reservations" in 1948. *Oneida*, 414 U.S. at 679 (citing 25 U.S.C. § 232).

The State attacks "a purported presumption that States lack authority to regulate activity involving Indians in Indian country." Pet. 15 (citing *Hicks*, 533 U.S. at 361-62; *Bracker*, 448 U.S. at 141; *Organized Village of Kake v. Egan*, 369 U.S. 60, 72 (1962)). It

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[33] The State also cites *United States v. McGowan*, 302 U.S. 535, 539 (1938), and *Surplus Trading Co. v. Cook*, 281 U.S. 647, 651 (1930). Pet. 11. Neither concerned 18 U.S.C. § 1152. *McGowan* concerned regulation of liquor in Indian country, 302 U.S. at 538-39, and the Court has noted that "in th[at] narrow context . . . [,] [i]n addition to the congressional divestment of tribal self-government . . . States have also been permitted, and even required, to impose regulations related to liquor transactions." *Rice v. Rehner*, 463 U.S. 713, 723 (1983). *Cook* held that under the Enclaves Clause, U.S. Const. art. 1, § 8, cl. 17, state taxes were inapplicable to property stored by a non-Indian on a military base, 281 U.S. at 650-52, and observed that federal "ownership and use without more" of land did not render state taxes inapplicable, as illustrated by the applicability of such taxes to non-Indian private property on Indian reservations, *id.* at 650-51. That issue would now be decided by the balancing test of *White Mountain Apache Tribe v. Bracker*, 448 US. 136, 145 (1980).

cites cases dealing with *civil* jurisdiction on the Reservation, which is determined by balancing federal, state, and tribal interests. *See Bracker*, 448 U.S. at 145. That inquiry is unworkable in the criminal jurisdiction context but would likely always favor tribal and federal jurisdiction if applied to crimes involving Indians, *see Ramsey*, 271 U.S. at 469. And *Egan* only applies "outside Indian country." *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 755 (1998) (citing *Egan*, 369 U.S. at 75). The State also cites several civil cases to urge "in the absence of a congressional prohibition, a State's sovereign authority extends to non-Indians in Indian country—including in interactions between non-Indians and Indians. Pet. 15. As with *Bracker*, these cases are all irrelevant. *See Nat'l Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 854 & n.16 (1985) (distinguishing rules of civil and criminal jurisdiction in Indian country).

In sum, the State's assertion that it has always had jurisdiction over crimes committed by non-Indians against Indians in Indian country is unsupported and certiorari should be denied on the first question.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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