No. 21-485

IN THE

Supreme Court of the United States

STATE OF OKLAHOMA,

Petitioner,

v.

SHAWN LEE MCDANIEL,

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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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. *United States v. Wheeler*, 435 U.S. 313 (1978); *United States v. Lara*, 541 U.S. 193 (2004). Under the Treaty of New Echota, Dec. 29, 1835, 7 Stat. 478, the Nation ceded its lands east of the Mississippi, *id*. art. 1, in exchange for 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; *see* 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 Nation's Reservation in a published decision, *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*—in fact, the State elsewhere has represented that it accepted *Hogner* as settling the Reservation's existence. *See infra* at 3-4.

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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, as established by the 1833 Treaty, the 1835 Treaty, and a December 31, 1838 fee patent to the Nation, were modified by the 1866 Treaty arts. 16, 17, 21, 14 Stat. 799, and the Act of Mar. 3, 1893, ch. 209, § 10, 27 Stat. 612, 640-43. *See* Pet'r's App. 11a-15a.

The Nation has fundamental interests in protecting the treaty promises under which the Nation, as the sole tribal signatory of those treaties, resides on and governs the Reservation. Accordingly, even before *Hogner* was decided, the Nation began a comprehensive enhancement of its criminal justice system, growing its capacity and redoubling coordination with other governments to meet the expanded responsibilities that it anticipated the law would place on it. And that effort continues today, under the rule of law set forth in *Hogner*.

Now, however, Oklahoma seeks reconsideration and reversal of *McGirt*, boldly declaring it is wrong and challenging the OCCA's decisions upholding the United States' treaty promises to the Nation. To protect those rights and to aid the Court in its disposition of this petition, the Nation turns again to this Court—as it did nearly two hundred years ago in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832)—and submits this brief to show that certiorari should be denied, this time to protect the Nation's rights and the rule of law on its new homeland.

SUMMARY OF ARGUMENT

The State's petition should be denied for three reasons.[3] First, the State failed to challenge the Cherokee

[3] To make its argument against *McGirt* in this case, the State primarily relies on its attack on *McGirt* from its petition in *Oklahoma v. Castro-Huerta*, No. 21-429 ("*Castro-Huerta* Pet."), which it seeks to incorporate here, *see* Pet. 6-7. The Nation responds here to that argument, mindful that the Court may not accept the State's practice, which hangs attacks on all Five Tribes' Reservations on a Cherokee Reservation case, diverts attention from the OCCA's analyses of reservation status in its published decisions in *Hogner* and *Spears v. State*, 2021 OK CR

Reservation in the courts below, by attacking *McGirt* or otherwise, and has forfeited its right to raise that issue here. Even after the OCCA remanded for a hearing on the Reservation's status and asked the State to help develop a record on that question, the State chose not to do so, nor did it challenge *McGirt*. When the case returned to the OCCA, the State simply restated the District Court's conclusion that the Reservation exists without calling it into question. By that conduct, the State forfeited the argument it urges now. Second, the OCCA correctly held that under the General Crimes Act ("GCA"), 18 U.S.C. § 1152, federal jurisdiction is exclusive over crimes committed by non-Indians against Indians in Indian country. That conclusion reflects long-settled law confirming that federal jurisdiction over Indian country crimes is exclusive unless Congress explicitly directs otherwise. Third, the State's novel contention that it has jurisdiction over crimes committed by non-Indians against Indians in Indian country unless Congress extinguishes that jurisdiction and that the GCA does not do so, fails because the State does not show any authority supporting that proposition.

REASONS FOR DENYING THE PETITION

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

The State's effort to undo the Cherokee Reservation here is a starkly new position. The State earlier *affirmatively accepted* the Cherokee Reservation below, Suppl. Br. of Appellee after Remand at 3, *McDaniel v. State*, No. F-2017-0357 (Okla. Crim. App.

7, 485 P.3d 873, and distracts from that court's analysis of concurrent jurisdiction in *Roth v. State*, 2021 OK CR 27.

filed Mar. 29, 2021) ("State's Suppl. Br.") ("The State further accepts, in light of this Court's ruling in *Hogner v. State*, . . . that the crimes occurred within the boundaries of the Cherokee Nation Reservation."),[4] and in at least one other case, Suppl. Br. of Appellee after Remand at 6, *Foster v. State*, No. F-2020-149 (Okla. Crim. App. filed Apr. 19, 2021) (noting the State's stipulation that under *Hogner* the Cherokee Reservation exists).[5] Now, under the direction of a new Attorney General, recently appointed by the Governor, the State contends that "[u]nder the correct framework . . . Congress disestablished the Creek territory in Oklahoma, as well as the territories of the rest of the Five Tribes," and that *McGirt* is incorrect. *Castro-Huerta* Pet. 18.[6] That framework, it says, requires "[c]onsideration of history . . . because the effect on reservation status of statutes targeting Indian land ownership is inherently ambiguous." *Id.* Having taken the contrary position below to avoid the burden of further litigating the existence of the Cherokee Reservation, and the OCCA having accepted that position, the State is estopped from raising that argument for the first time here, as it would afford the State an unfair advantage against Respondent. *See New Hampshire v. Maine*, 532 U.S. 742, 750-51, 755-56 (2001).

Even if the State were not estopped from raising its anti-reservation argument under *New Hampshire*, it still waived the argument in the courts below by neither challenging the existence of the Cherokee

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

[5] https://bit.ly/3jjP67S

[6] *McGirt* addressed only the Creek Reservation, not all the Five Tribes' Reservations. 140 S. Ct. at 2479.

Reservation, nor providing the "consideration of history" that it now says was lacking in *McGirt* (but was not, *see* 140 S. Ct. at 2460-78). When a party does not raise an argument below, and the lower court does not rule on it, it is waived. *See Sprietsma v. Mercury Marine*, 537 U.S. 51, 56 n.4 (2002). "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 before this Court, *United States v. Jones*, 565 U.S. 400, 413 (2012). That is exactly what happened here.

After *McGirt* and *Sharp v. Murphy*, 140 S. Ct. 2412 (2020) (per curiam), were decided, the OCCA remanded for an evidentiary hearing and directed the District Court to "follow the analysis set out in *McGirt*" to determine if the Cherokee Reservation had been disestablished. Pet'r's App. 32a. In that order, the OCCA made clear the State should develop evidence below on the question of Reservation status: "Recognizing the historical and specialized nature of this remand for evidentiary hearing, we request the Attorney General and District Attorney work in coordination to effect uniformity and completeness in the hearing process." *Id.* at 31a-32a.

Nevertheless, the State presented no evidence in the District Court on whether the Cherokee Reservation continues to exist. The Nation submitted an *amicus* brief and supporting exhibits showing the establishment and continued existence of the Cherokee Reservation, Cherokee Nation Amicus Br. & App., *State v. McDaniel*, No. CF-2015-249 (Okla. Dist. Ct. filed Sept. 18, 2020),[7] and Respondent also briefed the

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

issue, Def./Appellant's Remanded Hr'g Br. (filed Sept. 29, 2020).[8] Instead of challenging these facts or presenting its own brief, the State stipulated that the crime occurred within the "geographic area set out" in the Cherokee Treaties. Stips. at 1 (filed Sept. 29, 2020).[9] After the evidentiary hearing, the State presented proposed findings of fact asking the Court to accept this stipulation. Okla's Proposed Findings of Fact at 4 (filed Oct. 2, 2020).[10] The District Court then issued its decision, in which it noted that "[t]he State takes no position as to the facts underlying the existence, now or historically, of the alleged Cherokee Nation Reservation," Pet'r's App. 16a, considered the Cherokee treaties "on their own terms," *id.* at 17a (citing *McGirt*), and concluded after thorough review of the facts that "[n]o evidence was presented that to the Court [sic] that Congress erased or disestablished the boundaries of the Cherokee Nation," *id.* at 23a.

Back before the OCCA, the State conceded "in light of this Court's ruling in *Hogner v. State*, . . . that the crimes occurred within the boundaries of the Cherokee Nation Reservation." State's Suppl. Br. at 3,[11] and then argued it had concurrent jurisdiction on the Reservation, *id.* at 4-14. The OCCA granted relief to Respond-

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[8] https://bit.ly/3vun52b

[9] https://bit.ly/3mMfNmF (see page 14 of PDF).

[10] https://bit.ly/3DXmSYx

[11] The State's decision to allow *Hogner* to become final also bars its challenge to the Reservation under non-mutual collateral estoppel. *See* Restatement (Second) of Judgments § 29 (1980); *B & B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. 138, 148 (2015) (quoting Restatement (Second) for collateral estoppel principles); *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).

ent, concluding that "[a]lthough the case now before us involves the lands of the Cherokee Nation, *McGirt*'s reasoning is nevertheless controlling," Pet'r's App. 2a, that "[b]ased on the parties' stipulation and the materials submitted by McDaniel and the Cherokee Nation at the evidentiary hearing," the District Court had concluded the Cherokee Reservation exists, *id.* at 4a, and that the District Court's findings were consistent with its own reported decision in *Spears*, 2021 OK CR 7, *see id.* at 4a-5a. The OCCA also expressly noted the State's acceptance of the existence of the Reservation. *Id.* at 5a n.2.

By this conduct, the State expressly forfeited its right to challenge the Cherokee Reservation here, by attacking *McGirt* or otherwise. The OCCA ordered a hearing on the existence of Indian country and requested the State to help develop a record on that question. The State chose not to do so, nor did it challenge *McGirt*.[12] Instead, it decided to make other arguments that it acknowledged the District Court could not consider. Then, in its post-remand briefing to the OCCA, the State clearly and unequivocally accepted the existence of the Cherokee Reservation, based on the decision in *Hogner*. In its decision, the OCCA noted that the State had accepted the Reservation's existence. The State's effort to reverse its earlier decision to accept the existence of the Cherokee Reservation "comes too late in the day" to be consid-

[12] The State only attempted to reserve its right to challenge *McGirt* after the former Attorney General left office, thereby implicitly acknowledging its earlier waivers. *See, e.g.*, 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. Of course, an attempt to preserve an argument fails if the argument is estopped or *already* waived.

ered here. *See Sorrell v. IMS Health Inc.*, 564 U.S. 552, 563 (2011).

II. 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 v. State*, 2021 OK CR 27, ¶¶ 12-15.[13] In alleging that is an "erroneous expansion of *McGirt*," *Castro-Huerta* Pet. 10, the State ignores the "key question" on which the applicability of the Major Crimes Act ("MCA"), 18 U.S.C. § 1153, turned in *McGirt*: namely, whether the Petitioner "commit[ed] his crimes in Indian country," *McGirt*, 140 S. Ct. at 2459. And as the MCA "allow[s] only the federal government to try Indians" for certain crimes committed within Indian country, *id*. at 2459, federal jurisdiction over such crimes is exclusive. The applicability of the GCA turns on the same "key question." It "provides that federal law applies to a broader range of crimes by or against Indians in Indian country." *Id.* at 2479 (citing 18 U.S.C. § 1152). As with the MCA, 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.

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[13] 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 its ruling below, the OCCA has withdrawn *Bosse* on other grounds, 2021 OK CR 23, ¶ 1 (citing *State ex rel. Matloff v. Wallace*, 2021 OK CR 21), and again rejected the State's concurrent jurisdiction argument in a published decision in *Roth*. *See* 2021 OK CR 27, ¶ 12 & n.2.

711, 714 (1946); *Donnelly v. United States*, 228 U.S. 243, 271-72 (1913). In sum, Congress has provided for "the exclusive criminal jurisdiction of federal and tribal courts under 18 U.S.C. §§ 1152, 1153," *Solem v. Bartlett*, 465 U.S. 463, 467 n.8 (1984), and "[w]ithin Indian country, State jurisdiction is limited to crimes by non-Indians against non-Indians, and victimless crimes by non-Indians," *id.* at 465 n.2 (citing *New York ex rel. Ray v. Martin*, 326 U.S. 496 (1946)).

Opposing this settled law, the State contends it has inherent jurisdiction over offenses committed by non-Indians against Indians in Indian country, which Congress did not extinguish in the GCA. *Castro-Huerta* Pet. 11-12. This argument fails, as the State does not and cannot show it ever had such jurisdiction over such offenses in the first instance, 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. The Court held that 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.[14] 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. *Wheeler*, 435 U.S. at 324, 325. 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 this Court 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

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[14] The basic principle that federal power in Indian affairs is exclusive remains the law. *Lara*, 541 U.S. at 200; *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 62 (1996); *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 764 (1985); *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 670-71 (1974).

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 that federal jurisdiction had existed over such crimes prior to Colorado statehood, *id.* at 623, *McBratney* held the Act admitting Colorado had "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 (expressly reserving the question).

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

> held, in effect, that the organization and admission of states qualified the former Federal jurisdiction over Indian country included therein by withdrawing from the United States and conferring upon the states the control of offenses committed by white people against whites, in the absence of some

> law or treaty to the contrary. In both cases, however, the question was reserved as to the effect of the admission of the state into the Union upon the Federal jurisdiction over crimes committed by or against the Indians themselves.

Id. (citing *McBratney*, 104 U.S. at 624; *Draper*, 164 U.S. at 247). Turning to that question, the Court held that "offenses committed by or against Indians" were "not within the principle of" *McBratney* or *Draper*. *Id.* The Court explained that, just as the constitutionality of the MCA as to crimes committed by Indians against Indians had been "sustained upon the ground that the Indian tribes are the wards of the nation [, t]his same reason applies—perhaps *a fortiori*—with respect to crimes committed by white men against the persons or property of the Indian tribes while occupying reservations." *Id.* at 271-72 (citing *United States v. Kagama*, 118 U.S. 375, 383 (1886)).

Donnelly establishes that the State may not rely on *McBratney* and *Draper* to assert jurisdiction over crimes committed by non-Indians against Indians in Indian country. As those decisions and *Martin* provide the only exception to the exclusivity of federal jurisdiction under the GCA, federal jurisdiction is exclusive over crimes committed by non-Indians against Indians in Indian country. Three decades later, this Court made that even clearer. In *Williams v. United States*, a non-Indian had committed a sex crime against an Indian victim on a reservation. There, the Court reaffirmed that while a state

> may have jurisdiction over offenses committed on [a] reservation between persons who are not Indians, the laws and courts of the United States, rather than those of [the

> state], have jurisdiction over offenses committed there, as in this case, 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," *Castro-Huerta* Pet. 13, is flatly wrong. In fact, federal jurisdiction is 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." *Castro-Huerta* Pet. 17.[15]

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[15] The State contends that the OCCA's holding in *Bosse*, that federal jurisdiction is exclusive over crimes committed by a non-Indian against an Indian, rests on an incorrect interpretation of the phrase "exclusive jurisdiction of the United States" that appears in the GCA. Pet. 12. The OCCA withdrew the decision in *Bosse*, 2021 OK CR 3, and its interpretation of the GCA is now stated in *Roth*, 2021 OK CR 27, ¶¶ 12-15 & n.2. The State says that *Roth* "reaffirmed" the State's understanding of *Bosse*, Pet. 12, but in fact *Roth* relied on settled law to hold that the GCA "extends the general criminal laws of federal maritime and enclave jurisdiction to Indian country, except for those offenses committed by one Indian against the person or property of another Indian." 2021 OK CR 27, ¶ 12 (quoting *Negonsott v. Samuels*, 507 U.S. 99, 102 (1993)). *Roth*'s holding was not, therefore, that the GCA itself confers exclusive federal jurisdiction, but that the GCA brings crimes committed in Indian country within the jurisdiction provided for by statutes that govern crimes committed within the exclusive jurisdiction of the United States. *See Donnelly*, 228 U.S. at 268; *Ex parte Wilson*, 140 U.S. 575, 578 (1891).

To be sure, Congress may grant states jurisdiction over crimes by or against Indians in Indian country, but it only does so expressly. *See* Pub. L. No. 83-280, 67 Stat. 588 (1953) (codified as amended at 18 U.S.C. § 1162; 25 U.S.C. §§ 1321-1326; 28 U.S.C. § 1360) ("Pub. L. 280") (expressly granting six states criminal jurisdiction over crimes by or Indians in Indian country and creating procedure for other states to obtain such jurisdiction); 18 U.S.C. § 3243 (Kansas); 25 U.S.C. § 232 (New York). And Congress has never granted such authority to Oklahoma. *See Murphy v. Royal*, 866 F.3d 1164 (10th Cir. 2017), *as amended*, 875 F.3d 896, 936-37 (10th Cir. 2017) (citing *inter alia*, *Indian Country, U.S.A., Inc. v. Oklahoma ex rel. Okla. Tax Comm'n*, 829 F.2d 967, 980 n.6 (10th Cir. 1987)).

The State's related assertion that state prosecution of such crimes "will not impair any federal interest," *Castro-Huerta* Pet. 16 (citing *Gamble v. United States*, 139 S. Ct. 1960, 1964 (2019)), is equally wrong. As this Court explained in *Oliphant*, "almost from its beginning," Congress was concerned with providing effective law enforcement for the Indians "from the violences of the lawless part of our frontier inhabitants." 435 U.S. at 201 (citation omitted); *see Donnelly*, 228 U.S. at 271-72. That concern endures, "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). Most recently, this Court has recognized that "[e]ven when capable of exercising jurisdiction" over offenses committed by or against Indians in Indian country under Pub. L. 280, "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);[16] *Los Coyotes Band of Cahuilla Indians v. Jewell*, 729 F.3d 1025, 1032 (9th Cir. 2013) ("American Indians in Public Law 280 states consistently report that state law enforcement is unavailable or slow to respond.") (citing Carole Goldberg & Duane Champagne, *Is Public Law 280 Fit for the Twenty-First Century? Some Data at Last*, 38 Conn. L. Rev. 697, 711-14 (2006)). And "[t]hat leaves the Federal Government" to protect Indian victims from crimes committed by non-Indians. *Bryant*, 136 S. Ct. at 1960.

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," *Castro-Huerta* Pet. 12, also fails because the State only relies on snippets from cases concerning civil jurisdiction on Indian reservations, cases that show States have jurisdiction over crimes by non-Indians against non-Indians in Indian country, and a dictum that this Court has since expressly limited to circumstances absent here. Certiorari should therefore be denied for this reason as well.

The State relies heavily on *Nevada v. Hicks*, 533 U.S. 353 (2001), which backfires. There the Court stated that while "'[t]he States' inherent jurisdiction on reservations can of course be stripped by

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[16] To help "stem the tide of domestic violence experienced by Native American women," *id.*, Congress enacted 18 U.S.C. § 117(a), which established federal criminal jurisdiction over "serial domestic violence offenders" in Indian country, which was necessary in part because "States are unable or unwilling to fill the enforcement gap," 136 S. Ct. at 1960-61.

Congress,'" *id.* at 365 (citing *Draper*, 164 U.S. at 242-43), Congress had not done so with regard to the civil jurisdiction issue before the Court, which it then contrasted with "Sections 1152 and 1153 of Title 18, which give United States and tribal criminal law generally exclusive application" over "crimes committed in Indian country," *id.* (emphasis omitted). The State quotes the former statement, but omits the citation to *Draper*, *Castro-Huerta* Pet. 11, which only upholds state jurisdiction over crimes committed *by non-Indians against non-Indians*, *see* 164 U.S. at 242-243, and ignores *Hicks*'s explicit statement contrasting the GCA to the issue before it, which rejects the State's position here. The State also quotes the Court's statement that "state sovereignty does not end at a reservation's border," *Castro-Huerta* 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. In sum, *Hicks* hurts, not helps, the State.

The State also 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 Castro-Huerta* Pet. 11 (quoting *Yakima*, 502 U.S. at 257-58).[17]

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[17] 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). *Castro-Huerta* Pet. 11. Neither concerned 25 U.S.C. § 1152. *McGowan* concerned federal regulation of intoxicants in Indian country. 302 U.S. at 538-39. In its holding, the Court observed that "[t]he federal prohibition against taking intoxicants into [Indian country] does not deprive the State of Nevada of its sovereignty over the area in question." *Id.* at 539. In *Rice*

But immediately following that statement, the *Yakima* Court 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; *see Yakima*, 502 U.S. at 258.[18] Accordingly, the *Yakima* Court's reference to a state's authority to exercise criminal jurisdiction cannot be read more broadly than that.[19]

The State also quotes from a statement from *New York ex rel. Cutler v. Dibble*, 62 U.S. (21 How.) 366

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v. Rehner, 463 U.S. 713 (1983), the Court qualified that statement, explaining that "in the narrow context of the regulation of liquor [, i]n addition to the congressional divestment of tribal self-government . . . , the States have also been permitted, and even required, to impose regulations related to liquor transactions." *Id.* at 723; *see also id.* at 723-24 (quoting *McGowan*, 302 U.S. at 539). And *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. In so holding, the Court observed that federal "ownership and use without more" of lands within a state did not render state taxes inapplicable, as illustrated by the applicability of such taxes to private property on an Indian reservation belonging to a non-Indian. *Id.* at 650-51. Neither issue is present here.

[18] The State's reliance on *Martin* to show that "'[b]y virtue of [its] statehood,' a State has the 'right to exercise jurisdiction over Indian reservations within its boundaries,'" *Castro-Huerta* Pet. 11 (quoting 326 U.S. at 499-500 (second alteration by Petitioner)), fails for the same reason.

[19] Indeed, the *Yakima* Court acknowledged that "[i]n 1948, . . . Congress defined 'Indian country' to include all fee land within the boundaries of an existing reservation, whether or not held by an Indian, and pre-empted state criminal laws within 'Indian country' insofar as offenses by and against Indians were concerned." *Id.* at 260 (citing Act of June 25, 1948, 62 Stat. 757–58, codified as amended, 18 U.S.C. §§ 1151–1153; and *Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351 (1962)).

(1859), that "a State has 'the power of a sovereign over their persons and property' in Indian territory within state borders as necessary to 'preserve the peace' and 'protect [Indians] from imposition and intrusion.'" *See Castro-Huerta* Pet. 11, 13 (alteration in petition) (quoting *Dibble*, 62 U.S. at 370). In *Oneida*, the Court qualified that statement, which it identified as dictum, as extending no further than context of preventing non-Indian settlement or possession of Indian lands. *See* 414 U.S. at 672 n.7 (quoting *Dibble*, 62 U.S. at 370). If *Dibble* had a broader meaning, the question *Martin* decided would not have arisen, *see supra* at 17, and 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 recycles the same argument, with the same lack of success, in attacking "a purported presumption that States lack authority to regulate activity involving Indians in Indian country." *Castro-Huerta* Pet. 15 (citing *Hicks*, 533 U.S. at 361-62; *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 141 (1980); *Organized Village of Kake v. Egan*, 369 U.S. 60, 72 (1962)). *Hicks* precludes the State's position by stating that "[w]hen on-reservation conduct involving only Indians is at issue, state law is generally inapplicable, for the State's regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest." 533 U.S. at 362 (quoting *Bracker*, 448 U.S. at 144). *Bracker*, for its part, describes a balancing test used to determine state civil jurisdiction, "which examines not only the congressional plan, but also 'the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific

context, the exercise of state authority would violate federal law.'" *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g* ("*Wold II*"), 476 U.S. 877, 884 (1986) (quoting *Bracker*, 448 U.S. at 145). That case-by-case inquiry is plainly unworkable in the criminal jurisdiction context and has never been applied for that purpose. And as this Court has made clear, *Egan* simply "recognized that a State may have authority to . . . regulate tribal activities occurring within the State *but outside Indian country*." *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 755 (1998) (citing *inter alia*, *Egan*, 369 U.S. at 75) (emphasis added).

The State then takes yet another abortive run at the same point. It cites some 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. *Castro-Huerta* Pet. 15 (citing *Dep't of Taxation & Fin. v. Milhelm Attea & Bros.*, 512 U.S. 61, 73-75 (1994); *Yakima*, 502 U.S. at 257-258; *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 512 (1991); *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 187 (1989); *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g, P.C.* ("*Wold I*"), 467 U.S. 138, 148-49 (1984); *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 159 (1980); *Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 483 (1976)). These civil cases are all irrelevant. *See Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 854 & n.16 (1985) (distinguishing principles governing civil jurisdiction in Indian country from rules governing criminal jurisdiction). In any event, they offer no support for the State's position.

All but one concern state taxes—mainly tobacco taxes. *Moe* and *Colville* "held that a State could require tribal smokeshops on Indian reservations to collect state sales tax from their non-Indian customers," *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 215-16 (1987), and *Milhelm Attea* held that State could require cigarette wholesalers to prepay taxes on cigarettes to be sold by Indian retailers to non-Indians, 512 U.S. at 74. Next, *Citizen Potawatomi* held tribal sovereign immunity bars the State from attempting to enforce its tobacco taxes through a legal action directed at the tribe itself, 498 U.S. at 507-11, while noting that the State had "adequate alternatives," including entering into tribal-state tax collection agreements. *Id.* at 514. *Yakima* and *Bracker* are irrelevant for reasons earlier shown, *see supra* at 16-19,[20] and as *Cotton Petroleum* applied *Bracker* to uphold imposition of state oil and gas severance taxes on non-Indian lessees of on-reservation wells, 490 U.S. at 185-87, it too is irrelevant to the point the State attempts to make.

Finally, in the one non-tax case, *Wold I*, the Court relied on settled law to "approve[] the exercise of jurisdiction by state courts over claims by Indians against non-Indians" in Indian country, 467 U.S. at 148, while making clear state courts lack jurisdiction when a non-Indian sues an Indian on claims arising

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[20] The State's interest "in public safety and criminal justice within its borders," *Castro-Huerta* Pet. 16 (citing *Kelly v. Robinson*, 479 U.S. 36, 49 (1986)), cannot establish its jurisdiction over crimes committed by non-Indians against Indians in Indian country because § 1152 controls that question, *see supra* at 9-10, and would do so even if the *Bracker* balancing test were applicable. If such an argument is to be made, it should be made in Congress.

on the reservation, *id.* at 147-49 (citing *Williams v. Lee*; 358 U.S. 217; *Fisher v. Dist. Ct.*, 424 U.S. 382 (1976)). Even if *Wold I*'s analysis were relevant to the State's argument, it would cut against concurrent jurisdiction.

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 therefore be denied on the first question.

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

The State also requests that this Court revisit and overturn *McGirt*. *Castro-Huerta* Pet. 17-29. The Court should reject that request for the reasons that the Nation gave in Sections I and III of its *amicus* brief in *Oklahoma v. Spears*, No. 21-323.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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