No. 21-1009

IN THE

In the Supreme Court of the United States

STATE OF OKLAHOMA

Petitioner,

–vs–

ROBERT TAYLOR BRAGG,

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. In later treaties, the United States repeatedly recognized and reaffirmed the Nation's authority to govern the Reservation. *See* 1846 Treaty of Washington with the Cherokee, art. 1, Aug. 6, 1846, 9 Stat. 871; 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, 500 P.3d 629,

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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' counsel have consented to the filing of this brief.

[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, and the Act of Mar. 3, 1893, ch. 209, § 10, 27 Stat. 612, 640-43. *See* Pet'r's App. 11a-15a.

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 4.

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 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

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[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 7, 485 P.3d 873, and distracts from that court's analysis of concurrent jurisdiction in *Roth v. State*, 2021 OK CR 27, 499 P.3d 23.

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 should be rejected, as the Nation explained in its *amicus* brief in *Oklahoma v. Shriver*, No. 21-985. It is also a starkly new position. The State earlier *affirmatively accepted* the Cherokee Reservation in other cases, Suppl. Br. of Appellee after Remand at 3, *McDaniel v. State*, No. F-2017-0357 (Okla. Crim. App. filed Mar. 29, 2021) ("The State further accepts, in light of this Court's ruling in *Hogner* . . . that the crimes occurred within the boundaries of the Cherokee Nation Reservation.");[4] 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, appointed by the Governor since its earlier admissions, 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*

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

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

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 elsewhere 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 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, it still waived the argument below by neither challenging the existence of the 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

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

had been disestablished, Pet'r's App. 28a, and made clear the State should develop evidence below on the question of Reservation status by "request[ing] the Attorney General and District Attorney work in coordination to effect uniformity and completeness in the hearing process," *id.* at 27a-28a

The State presented no evidence in the District Court on whether the Cherokee Reservation continues to exist. The Nation submitted an *amicus* brief and exhibits showing the establishment and continued existence of the Cherokee Reservation, Cherokee Nation *Amicus* Br. & App., *State v. Bragg*, No. CF-2014-4641 (Okla. Dist. Ct. filed Sept. 22, 2020).[7] Respondent also briefed the issue, Br. of Def. on Indian Status Reservation Establishment & Jurisdiction (filed Oct. 29, 2020), and provided twenty-five supporting exhibits, all but one of which were entered without objection from the State, Pet'r's App. 15a.[8] Instead of challenging these facts, the State stipulated that the crime occurred within the "geographic area reserved for the Cherokee Nation" in the Cherokee Treaties. *Id.*

The District Court then issued its decision, in which it noted that the State took no position on Reservation existence, *id.* at 24a, made extensive findings of fact on the establishment and continued

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[7] The District Court provided the Nation's *amicus* brief and Respondent's evidentiary hearing brief to the OCCA along with its decision. *See* https://bit.ly/3FKOsIO.

[8] The State only objected to the District Court accepting as a *fact* the *legal* conclusion that the Reservation still exists, *id.*, but otherwise "the State advised the Court that it is not taking a position one way or another" on whether the Cherokee Reservation exists, *id.* at 18a.

existence of the Reservation, *id.* at 18a-25a, and concluded that "no evidence was presented to this Court to establish Congress explicitly erased or disestablished the boundaries of the Cherokee Nation or that the State of Oklahoma has jurisdiction in this matter," *id.* at 24a-25a.

Back before the OCCA, the State informed the Court that it "takes no position as to the existence, or absence, of a Cherokee Reservation." Suppl. Br. of Appellee After Remand at 14 n.5, *Bragg v. State*, No. F-2017-1028 (Okla. Crim. App. filed Jan. 11, 2021).[9] Instead, it asserted that under "the principles firmly established by *McGirt*—where the [statutory] analysis begins and ends with the text," the State has concurrent criminal jurisdiction over crimes by non-Indians against Indians in Indian country. *Id.* at 6.

Before the OCCA ruled, the elected Attorney General resigned. Melissa Scavelli, *Oklahoma Attorney General Mike Hunter Resigns Due to 'Personal Matters'*, KOKH (May 26, 2021), https://bit.ly/3n1ShmX. The State then scrambled to reverse field. Soon after, the State filed a brief in which it asked the OCCA to stay proceedings while this Court considered its concurrent jurisdiction argument made in its petition for certiorari in *Oklahoma v. Bosse*, No. 21-186. Appellee's Br. in Supp. of Mot. to Stay & Abate Proceedings at 3-4 (filed June 11, 2021).[10] It stated in a footnote that it disagreed with *McGirt* and the OCCA's rulings in *Hogner* and *Spears* acknowledging the Cherokee Reservation, that it

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[9] https://bit.ly/3GH7QYH

[10] https://bit.ly/32ftAM5

agreed with the *McGirt* dissent's statement that all Five Tribes' reservations were disestablished, and that it might challenge *McGirt*, *Hogner*, and *Spears* in this Court. *Id.* at 2 n.1. Although the OCCA decided *Hogner* and *Spears*, the State did not ask it to revisit those cases or argue why they were wrong—and it never challenged *Hogner* in this Court.

After the State withdrew its petition for certiorari in *Bosse*, the OCCA granted relief to Respondent, finding that the District Court's conclusion that the Cherokee Reservation exists was supported by the record and was consistent with *Spears*. Pet'r's App. at 4a. The OCCA also noted that it had already rejected the State's concurrent jurisdiction argument. *Id.* at 5a n.1.

By this conduct, the State expressly forfeited its right to challenge the Reservation here, by attacking *McGirt* or otherwise. Before the District Court, the State chose not to contest the existence of the Cherokee Reservation nor did it challenge *McGirt*. Then, in briefing to the OCCA, the State expressly disclaimed any challenge to the Cherokee Reservation and *relied on McGirt* to argue for concurrent state jurisdiction over Respondent's crimes. It only attempted to attack the Reservation when its opportunity to make that challenge had passed and did so only by asserting that it might later challenge *McGirt* and other decisions of the OCCA.[11] The State's effort to attack the Reservation therefore "comes too late in the day" to be considered here. *See Sorrell v. IMS Health Inc.*, 564 U.S. 552, 563 (2011).

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[11] Of course, an attempt to preserve an argument fails if the argument is estopped or was already waived.

Then, on November 9, 2021, the District Court dismissed the charges against Respondent. *See* Minute Order, *State v. Bragg*, No. CF-2014-4641 (Okla. Dist. Ct. Nov. 9, 2021).[12] Dismissal mooted the case, as the State acquiesced to the Reservation's existence by not litigating that issue and failed to object to dismissal in the District Court. *See United States v. Babbitt*, 104 U.S. 767, 768 (1881); *Microsoft Corp. v. Baker*, 137 S. Ct. 1702, 1717 (2017) (Thomas, J., concurring in judgment); *Chafin v. Chafin*, 568 U.S. 165, 172 (2013); *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101 (1998).

II. Under Settled Law Federal Jurisdiction Is Exclusive Over Crimes by Non-Indians Against Indians in Indian Country.

The OCCA correctly applied *McGirt* to hold that under the GCA federal jurisdiction is exclusive over crimes committed by non-Indians against Indians in Indian country. Pet'r's App. 5a n.1 (citing *Roth*); *see Roth*, 2021 OK CR 27, ¶¶ 12-15, 499 P.3d at 26-27. In labeling that to be 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[ted] his crimes in Indian country." *McGirt*, 140 S. Ct. at 2459. As the MCA "allow[s] only the federal government to try Indians" for certain crimes committed within Indian country, *id.*, federal jurisdiction over such crimes is exclusive. The applicability of the GCA—"[a] neighboring statute"—turns on the

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[12] https://bit.ly/3GGlco0. The State failed to include this order in its appendix. *See* Rule 14.1(*i*)(i)-(ii).

same "key question." *Id.* at 2459, 2479. It provides that "federal law applies to a broader range of crimes by or against Indians *in Indian country*." *Id.* at 2479 (emphasis added). And like the MCA, federal jurisdiction over conduct made criminal by the GCA is exclusive. *Williams v. Lee*, 358 U.S. 217, 219-20 (1959); *Williams v. United States*, 327 U.S. 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 that it has inherent jurisdiction over offenses committed by non-Indians against Indians in Indian country, which the GCA did not extinguish. *Castro-Huerta* Pet. 11-12. That 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 (1978) (second and third alteration in original). 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, §§ 4, 6, 15, 2 Stat. 139, 141-42, 144, 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," § 4, 2 Stat. at 141. These statutes very clearly made federal jurisdiction exclusive over crimes committed by non-Indians against Indians in Indian territory.

Worcester v. Georgia confirmed that conclusion and fortified it with the Constitution. The *Worcester* 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 562-63. The Court explained that the Constitution conferred *on Congress* all the powers "required for the regulation of [United States] intercourse with the Indian[s]." *Id.* at 559.[13] Two years

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[13] That 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 (1974).

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 324-25. 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. States never had such jurisdiction in the first place, as the Constitution made clear.

As this Court explained in *Williams v. Lee*, "[o]ver the years this Court has modified the[] principles" of *Worcester*, "[a]nd state courts have been allowed to try non-Indians who committed crimes 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 by non-Indians against non-Indians in Indian territory was established by this Court in *United States v. McBratney*, 104 U.S. 621 (1881). Acknowledging that federal jurisdiction existed over such crimes prior to Colorado statehood, *id.* at 622, the Court held that 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.* at 624; *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

> 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 the question that *McBratney* and *Draper* reserved, the Court held that "offenses committed by or against Indians" were not "within the principle of" either of those cases. *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 established that the State may not assert jurisdiction over crimes committed by non-Indians against Indians in Indian country by relying on *McBratney* and *Draper*. And 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 after *Donnelly*, this Court readily confirmed that conclusion. In *Williams v. United States*, a non-Indian had committed a sex crime against an Indian on a reservation. There, the Court reaffirmed that:

> While the laws and courts of the State of Arizona may have jurisdiction over offenses committed on this reservation between persons who are not Indians, the laws and courts of the United States, rather than those of Arizona, 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. 17, is flatly wrong. In fact, federal jurisdiction has always been exclusive over such crimes, unless Congress otherwise provides. Since 1790, *see supra* at 10-12, 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 against Indians by non-Indians." *Castro-Huerta* Pet. 17.[14]

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 persists, and the federal obligation to protect Indians from non-Indian offenders therefore endures. "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,

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[14] The State incorrectly contends that the OCCA's holding in *Bosse v. State*, 2021 OK CR 3, 484 P.3d 286, that federal jurisdiction is exclusive over crimes committed by a non-Indian against an Indian rests on the phrase "exclusive jurisdiction of the United States" that appears in the GCA. *Castro-Huerta* Pet. 12. The OCCA's currently binding ruling on concurrent jurisdiction is found in *Roth*. In both *Roth* and *Bosse*, the OCCA held that the GCA "brings crimes committed in Indian country" within the jurisdiction provided by that statute for crimes in locations "within the sole and exclusive jurisdiction of the United States." *Bosse*, 2021 OK CR 3, ¶ 23, 484 P.3d at 294; *see Roth*, 2021 OK CR 27, ¶¶ 12-15, 499 P.3d at 26-27. That comports with settled law. *See Donnelly*, 228 U.S. at 268; *In re Wilson*, 140 U.S. 575, 578 (1891).

1960 (2016) (citations omitted).[15] And "[t]hat leaves the federal government" to protect Indian victims from crimes committed by non-Indians. *Id.*

Granted, Congress can grant states jurisdiction over crimes by non-Indians against Indians in Indian country. But when it does so, it does so expressly. *See* 18 U.S.C. § 3243 (granting Kansas jurisdiction in Indian country); 25 U.S.C. § 232 (New York); Act of Aug. 15, 1953, Pub. L. No. 83-280, ch. 505, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162; 25 U.S.C. §§ 1321-1326; 28 U.S.C. § 1360) (expressly granting some states criminal jurisdiction over Indians in Indian country and creating procedure for other states to obtain jurisdiction). Congress has never granted that authority to Oklahoma. *See Murphy v. Royal*, 875 F.3d 896, 936-37 (10th Cir. 2017).

B. The State Fails to Show That It Ever Had 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 for the separate reason that it offers no case holding that the State ever had jurisdiction over crimes by non-Indians against Indians in Indian

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[15] 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 because "tribal courts have limited sentencing authority and because States are unable or unwilling to fill the enforcement gap," 136 S. Ct. at 1960-61.

country. Instead, the State relies on snippets from cases concerning *civil* jurisdiction, cases that show States have jurisdiction over crimes *by non-Indians against non-Indians* in Indian country, and 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 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, *id.* The Court then contrasted that conclusion 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.* The State quotes the first statement, but omits the Court's citation to *Draper*, *Castro-Huerta* Pet. 11, which only upheld state jurisdiction over crimes committed *by non-Indians against non-Indians*, *see* 164 U.S. at 242-43, and then completely ignores the Court's subsequent discussion of the GCA, which rejects its argument. The State also quotes the Court's statement that "[s]tate sovereignty does not end at a reservation's border," *Castro-Huerta* Pet. 11 (alteration in original) (quoting *Hicks*, 533 U.S. at 361), but that simply confirmed 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).[16] 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.[17] Accordingly, the *Yakima*

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[16] 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. Both are inapposite. *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 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.

[17] 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-*

Court's reference to the State's authority to exercise criminal jurisdiction cannot be read more broadly than that—doing so would rewrite the decision.[18]

The State also quotes from a statement in *New York ex rel. Cutler v. Dibble*, 62 U.S. (21 How.) 366 (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 also identified as dictum, as extending no further than the 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 18, 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 failed argument in attacking "a purported presumption that States lack

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Huerta Pet. 11 (quoting *Martin*, 326 U.S. at 499-500 (second alteration by Petitioner)), fails for the same reason.

[18] 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, ch. 645, 62 Stat. 757, 757-58, *as amended*, 18 U.S.C. §§ 1151-1153; and *Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351 (1962)).

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* contradicts that assertion 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). 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). It would plainly be unworkable to use such circumstantial civil jurisdictional inquiries to determine criminal jurisdiction, and it *has never been done*. The State's petition gives no reason to start now.

Finally, the State takes a third run at the same point and hits a wall yet again. It cites a number of civil cases to urge that "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 irrelevant. *See Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 854 & n.16 (1985) (citation omitted) (distinguishing principles governing civil jurisdiction in Indian country from rules governing criminal jurisdiction.). And, 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 a 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 Oklahoma from attempting to enforce tobacco product sales taxes through 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 17-20,[19] 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.

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 (citations omitted), while making clear state courts lack jurisdiction in those cases in which a non-Indian sues an Indian on claims arising 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* were relevant to the State's argument, it would cut against any claim to concurrent jurisdiction.

In sum, the State's assertion that it has jurisdiction over non-Indian offenders who victimize Indians in Indian country because the GCA never took such jurisdiction away utterly fails, because the State never had jurisdiction for Congress to take away. The State finds no support for its novel argument in this Court's decisions other than by inappropriate analogy to civil jurisdiction cases and points

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[19] As the *Bracker* balancing test is inapplicable here, 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 be relied upon to establish jurisdiction over crimes committed by non-Indians against Indians in Indian country. If that argument is to be made, it should be made in Congress.

to no lower court split on the matter. As such, the argument does not support the Court's granting certiorari on the State's first question.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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