No. 21-1009

IN THE

# Supreme Court of the United States

OKLAHOMA,

*Petitioner*,

v.

ROBERT TAYLOR BRAGG,

*Respondent.*

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

## BRIEF IN OPPOSITION

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## QUESTION PRESENTED

Whether the petition should be denied rather than held for *Oklahoma v. Castro-Huerta*, No. 21-429, because the State's tardy argument—that it possesses concurrent jurisdiction over crimes by non-Indians against Indians in Indian country—was waived as a matter of state law and neither timely pressed nor passed on the merits below.

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

Page(s)

### Cases

**Constitutional Provisions, Statutes, and Rules**



**Other Authorities**

## INTRODUCTION

Below, in state trial and appellate courts, Oklahoma repeatedly failed to raise the argument that it now presses—namely, that it possesses concurrent jurisdiction over crimes by non-Indians against Indians in Indian country. Pet. 6-7. Rather, for several years, the State elected to argue the same position that it was advancing in *Sharp v. Murphy*, 140 S. Ct. 2412 (2020), and *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020): Either the United States or Oklahoma has exclusive jurisdiction depending on the existence *vel non* of an Indian reservation where the charged crimes occurred.

That all-or-nothing position allowed the State to maximize its dire predictions that the sky would fall if the reservations of the Five Tribes were found to exist, while at the same time shunning a shared-jurisdiction claim that courts across the country have rejected. But after losing its big bet, the State tried belatedly to swap out its hand.

In post-*McGirt* supplemental briefing that the Oklahoma Court of Criminal Appeals (OCCA) had strictly limited to the Indian status of the victim and the existence of the Cherokee Reservation, the State instead argued concurrent jurisdiction for the first time in this case. In addition to being off-topic, the argument was by then waived as a matter of state law. Consequently, the OCCA did not pass on its merits.

Furthermore, after the OCCA ruled that Oklahoma lacks jurisdiction, the State acquiesced in the dismissal of this case, which cleared the way for the United States to swiftly take custody of petitioner on previously filed federal charges. As a result, no case

or controversy remains in state court to review on certiorari.

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Events below recap why the petition should be denied rather than held for *Oklahoma v. Castro-Huerta*, No. 21-429.

First, a week after the Tenth Circuit decided *Murphy v. Royal*, 866 F.3d 1164 (10th Cir. 2017), *aff'd sub nom Sharp v. Murphy*, which anticipated this Court's decision in *McGirt*, petitioner filed a motion to dismiss prior to sentencing. He argued that the State lacks jurisdiction because federal or tribal authorities have exclusive jurisdiction to prosecute crimes by non-Indians against Indians in Indian country. The State did not file a written response or argue concurrent jurisdiction at the hearing on petitioner's motion, even though the argument was then available based on the same statutes and authorities on which it now relies in *Castro-Huerta*.

Second, in briefing on direct appeal to the OCCA, petitioner again argued that the State lacks jurisdiction. In response, the State disputed the victim's status as a Cherokee citizen and the existence of the Cherokee Reservation to maintain that it alone has jurisdiction. Oklahoma did not contend that it shares jurisdiction with the United States.

Third, on remand from the OCCA after *McGirt*, petitioner submitted evidence in state district court on the Indian status of the victim and the establishment of the Cherokee Reservation to argue exclusive federal jurisdiction. In response, the State merely indicated

that it was "not taking a position one way or another" on those points.

Afterwards, in post-remand supplemental briefing to the OCCA, the State impermissibly asserted for the first time below that it has concurrent jurisdiction. Hence, in responding to the merits of petitioner's timely exclusive-federal-jurisdiction argument, the OCCA ignored the State's untimely concurrent-jurisdiction contention.

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In sum, the cock crowed three times for the State to press concurrent jurisdiction. Each time, Oklahoma elected not to. Instead, the State either took no position or proceeded on the premise that it or the United States—but not both—has jurisdiction over crimes by or against Indians in much of Oklahoma, consistent with its all-or-nothing position in *Murphy* and *McGirt*. Those choices were the State's litigation prerogative, but they also begat litigation consequences under state and federal law.

First, under the rules and precedents of the OCCA, the State waived its tardy concurrent-jurisdiction argument by not raising it, at latest, on direct appeal in response to petitioner's exclusive-jurisdiction contention. *See* OCCA R. 3.4 & 3.5; *A.J.B. v. State*, 1999 OK CR 50, ¶ 9. Thus, even if this Court decides in *Castro-Huerta* that there is shared jurisdiction for the State to prosecute non-Indians for crimes against Indians in Indian country, such a decision would not alter the outcome in this case.

Second, under the precedents of this Court, Oklahoma's concurrent-jurisdiction question is not

properly presented on certiorari, as it was neither timely pressed nor passed on the merits below. *See Illinois v. Gates*, 462 U.S. 213, 222 (1983).

Third, Oklahoma acquiesced in the dismissal of this case from state court. It opted not to seek a stay of the OCCA's mandate pending *Castro-Huerta* after its previously requested stay pending *Oklahoma v. Bosse*, No. 21-186, was denied following the dismissal of that petition. As a result, no case or controversy remains in state court. *See* U.S. Const. art. III, § 2.

Accordingly, the petition should be denied rather than held for *Castro-Huerta*.

## STATEMENT OF THE CASE

1. This is a vigorously contested "shaken baby" case. Petitioner Mr. Bragg, the non-Indian father of R.B., is on the autism spectrum with a lifelong history of cognitive deficits, compliance to authority, and extreme suggestibility. *See* Br. of Aplt. 9-12, *Bragg v. Oklahoma*, No. F-2017-1028 (OCCA Oct. 5, 2018).[1]

Shortly after petitioner's infant was taken to the emergency room, a police child-abuse investigation team secluded him in an adjacent windowless room, barred his attorney-mother from entering, and extracted a confession during a two-stage interrogation. *Id.* at 4-5, 8-9. In the first stage, without *Miranda* warnings, the lead detective repeatedly leveraged a panoply of techniques that decades of empirical studies have associated with false confessions. Those discredited ploys included scripting

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[1] The OCCA's docket and filings on appeal are available at https://bit.ly/3CY0sa7. *See* S. Ct. R. 12.7.

(e.g., "shaking," "squeezing," "putting a finger in there to clean it"), false evidence (e.g., "vaginal and anal tears"), false promises (e.g., "help"), and moral and legal minimizations (e.g., assurances of a "judgment-free zone" and suggestions of "accident" scenarios). *Id.* at 9-18, 38. Furthermore, the chief interrogator plied the central deception that emergency doctors treating petitioner's daughter urgently "need to know, medically," if he might have shaken or squeezed her, because she might have an undetectable "brain bleed and die." *Id.* at 12.

After petitioner yielded, adopting much of the scripting, he was *Mirandized* rapidly and told to "just refresh everything and we can go back and talk to the doctor." *Id.* at 14, 25-33. Petitioner compliantly refreshed the admissions, after which detectives arrested him without investigating others with recent access to R.B. *See id.* at 8-9.

At trial, the State relied primarily on the extracted confession, which the chief prosecutor urged the jury to listen to "a hundred times," to obtain the convictions. *See id.* at 33-34.

2. In a pre-sentencing motion to dismiss, filed a week after the Tenth Circuit's *Murphy* decision, petitioner argued that the charged crimes occurred on the Cherokee Reservation against a Cherokee citizen, and that crimes "*by or against* Indians within Indian country are subject to exclusive federal and/or tribal jurisdiction."[2] Oklahoma did not file a written

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[2] Verified Mot. to Dismiss Based on Excl. Fed. Jur. ¶ 1, *Oklahoma v. Bragg*, No. CF-204-4641 (Tulsa Cnty. D. Ct. Aug. 15, 2017). The

response or argue concurrent jurisdiction at the hearing on petitioner's motion, which the state district court denied on the ground that *Murphy* was "not effective law" given the possibility of en banc rehearing.[3]

3. On direct appeal to the OCCA, petitioner reasserted in his opening brief that Oklahoma lacks jurisdiction, as the charged crimes occurred on the Cherokee Reservation against a Cherokee citizen. *See* Br. of Aplt. 41-46. Petitioner also argued that his scripted admissions were involuntary and obtained in violation of *Miranda*. *See id.* at 5-34.

In response, the State argued that petitioner had failed to present sufficient evidence that R.B. was an Indian and that the crimes occurred in Indian country. *See* Br. of Aple. 36-41, *Bragg v. Oklahoma*, No. F-2017-1028 (OCCA Jan. 28, 2019). The State also argued that reliance on *Murphy* was premature, as it was then pending before this Court. Glaringly absent from the response brief was the concurrent-jurisdiction argument that the State now presses. *See id.* at 1-50.

4. While the appeal was pending below, this Court decided *McGirt*. The OCCA then remanded for an evidentiary hearing to determine "*only* the following issues": (1) whether R.B. has some Indian blood and was recognized as Indian by a tribe or the federal government, and (2) whether Congress had established a Cherokee reservation, and if so, whether

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Tulsa County District Court's docket is available at https://bit.ly/3JkOaed.

[3] Tr. of Post-Trial Hearing 4, *Oklahoma v. Bragg*, No. CF-204-4641 (Tulsa Cnty. D. Ct. Aug. 23, 2017).

it had been disestablished. Pet. App. 28a (emphasis added).

On remand, petitioner briefed and presented evidence and argument at the hearing that R.B. was a Cherokee citizen, the Cherokee Reservation was established by Congress in the nineteenth century and never disestablished, and the charged crimes occurred within its boundaries. Pet. App. 14a-25a. Petitioner maintained that the State lacks jurisdiction.[4]

For its part, Oklahoma failed to file briefing on remand, and at the evidentiary hearing only indicated that it was "not taking a position one way or another" on R.B.'s Indian status or the existence of the Cherokee Reservation. Tr. of Evid. Hearing 30-32; Pet. App. 18a, 24a. The State did not make a concurrent-jurisdiction argument. *See* Tr. of Evid. Hearing 30-33.

Based on petitioner's unrebutted evidence and argument, the state district court issued findings of fact and conclusions of law determining that R.B. was an Indian, the Cherokee Reservation was established and never disestablished, and the charged crimes occurred therein. Pet. App. 17a, 22a, 24a-25a. The court noted that "no evidence was presented … that the State of Oklahoma has jurisdiction in this matter." Pet. App. 25a.

5. The OCCA's remand order expressly limited post-remand supplemental briefing to that court to "*only* those issues pertinent to the evidentiary

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[4] *See* Br. of Def. on Indian Status Reservation Establishment and Jurisdiction 11-13, *Oklahoma v. Bragg*, No. CF-204-4641 (Tulsa Cnty. D. Ct. Oct. 29, 2020); Tr. of Evid. Hearing 4-20, *Oklahoma v. Bragg*, No. CF-204-4641 (Tulsa Cnty. D. Ct. Oct. 15, 2020).

hearing." Pet. App. 29a (emphasis added). Nevertheless, rather than addressing R.B.'s Indian status or the existence of the Cherokee Reservation, the State went off-topic in its supplemental brief to argue (and only argue) that it has concurrent jurisdiction.[5] Anticipating Oklahoma's belated attempt to improperly raise for the first time in this case the argument that it was now making in other cases, petitioner documented how "[t]he State many times over waived its ability to argue concurrent jurisdiction."[6]

Consistent with Oklahoma's clear waiver and impermissible argument, the OCCA did not pass on the merits of the State's concurrent-jurisdiction theory in the entire body of its opinion vacating the judgment and sentence for lack of jurisdiction. Pet. App. 1a-5a. As the OCCA explained, its vacatur was based on the state district court's "findings and conclusions" that R.B. was an Indian, the Cherokee Reservation was established and never disestablished, and the charged crimes occurred therein. Pet. App. 3a-4a. Given those determinations, the OCCA concluded that "[t]he ruling in *McGirt* governs this case," and so the court "grant[ed] relief based upon the argument raised in Proposition 4" of petitioner's opening brief on direct appeal. Pet. App. 4a-5a. That proposition was petitioner's exclusive-federal-jurisdiction argument. *See supra* at 6.

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[5] Supp. Br. of Aple. after Remand 4-15, *Bragg v. Oklahoma*, No. F-2017-1028 (OCCA Jan. 11, 2021).

[6] Supp. Br. of Aplt. on Indian Status Reservation Establishment and Juris. 14, *Bragg v. Oklahoma*, No. F-2017-1028 (OCCA Jan. 11, 2021).

6. Nearly half a year after filing its supplemental brief, the State moved the OCCA to "stay and abate proceedings" pending this Court's disposition of *Bosse*, the main petition in which the State was making its post-*McGirt* concurrent-jurisdiction push. The State's motion incorrectly represented that it had "argued to the district court and in the State's post-evidentiary hearing brief below [that] the State has concurrent jurisdiction over crimes committed by non-Indians in Indian Country."[7] As petitioner fact-checked in response, Oklahoma had made no such argument at the evidentiary hearing, nor did it file any post-hearing brief on remand.[8]

Before the OCCA ruled on the State's motion for a stay, this Court dismissed the petition in *Bosse*. *See* No. 21-186 (Sept. 10, 2021). Accordingly, in a footnote at the end of its opinion, the OCCA denied the now-moot stay request. It was solely in the limited context of denying this stay request, rather than in passing on the merits of the appeal, that the OCCA observed that it "continue[s] to reject the State's concurrent jurisdiction argument." Pet. App. 5a.

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[7] Mot. to Stay and Abate Proc. 1, *Bragg v. Oklahoma*, No. F-2017-1028 (OCCA June 11, 2021).

[8] *See supra* at 8; Aplts. Resp. to Aple's. Mot. to Stay and Abate Proc. 2, *Bragg v. Oklahoma*, No. F-2017-1028 (OCCA June 30, 2021). The State seemed to acknowledge as much in its brief in support of its motion for a stay. There the State contended instead that it had "preserved" the concurrent-jurisdiction argument by belatedly raising it for the first time in its post-remand supplemental brief that the OCCA had restricted to other issues. Br. in Supp. of Mot. to Stay and Abate Proc. 2, *Bragg v. Oklahoma*, No. F-2017-1028 (OCCA June 11, 2021).

7. Oklahoma did not seek to stay the OCCA's mandate or otherwise oppose the dismissal for lack of jurisdiction. *See supra* n. 2 (docket); *cf. Oklahoma v. Bosse*, 141 S. Ct. 2696 (2021) (State application for stay of OCCA mandate pending disposition on certiorari granted). Consequently, based on a previously filed indictment, federal authorities took custody of petitioner two weeks before his state case was dismissed in November 2021.[9]

8. On January 12, 2022, after its *Castro-Huerta* petition was relisted, Oklahoma filed its petition for certiorari in this case.

## REASONS FOR DENYING THE WRIT

### I. Oklahoma Waived Its Tardy Concurrent-Jurisdiction Argument As A Matter Of State Law.

1. As detailed above, Oklahoma passed up three opportunities to argue that it has concurrent jurisdiction over crimes by non-Indians against Indians in Indian country: (1) in state district court prior to sentencing, when petitioner moved to dismiss for lack of jurisdiction in light of the Tenth Circuit's *Murphy* decision; (2) in the OCCA on direct appeal, in response to petitioner's reiterated argument that the United States alone has jurisdiction; and (3) on remand from the OCCA to the state district court after *McGirt*, wherein petitioner submitted unrebutted evidence of R.B.'s Indian status, the existence of the Cherokee Reservation, and the location of the charged crimes within it, to press his exclusive-federal-

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[9] ECF Nos. 2-4, 11, *United States v. Bragg*, No. 4:21-cf-00088-JFH (N.D. Okla. Oct. 26, 2021) (hereinafter "ECF").

jurisdiction argument for the third time. *See supra* at 1-3, 5-7.

Up to this point, Oklahoma's limited response to petitioner's jurisdictional argument—made in its appellee's brief on direct appeal—consisted of disputing the Cherokee citizenship of R.B. and the existence of the Cherokee Reservation, as well as noting the lack of finality of *Murphy* given this Court's intervening grant of certiorari. Br. of Aple. 36-40. The State's consistent avoidance of the concurrent-jurisdiction claim aligned with its all-or-nothing position in *Murphy* and *McGirt*.

Notably, Oklahoma briefed in *Murphy* that "States lack criminal enforcement jurisdiction over offenses in Indian Country if *either* the defendant *or* victim is an Indian." Pet. 18, *Sharp v. Murphy*, No. 17-1107 (U.S. Feb. 6, 2018) (emphasis added). Thus, Oklahoma ominously warned in *McGirt* that recognizing the Creek Reservation—and thereby paving the way for recognition of other reservations in Oklahoma—would invalidate over a thousand convictions for "crimes committed against Indians" by non-Indians, "which the state would *not* have jurisdiction over." *McGirt* Arg. Tr. 54 (emphasis added).

2. Only after losing its all-or-nothing bet in *Murphy* and *McGirt* did Oklahoma attempt to claw back this case by switching to arguing concurrent jurisdiction in its post-remand supplemental briefing to the OCCA. *See supra* at 7-8. But by then, the tardy argument was already waived as a matter of state law.

Specifically, OCCA Rule 3.5 admonishes that an appellant's brief on direct appeal must set forth "all

assignments of error," with each "set out separately in the brief." OCCA R. 3.5(A)(5). Furthermore, "[f]ailure to list an issue pursuant to these requirements constitutes waiver." *Id.* While the OCCA's rules do not contain a separate waiver provision for appellees, its caselaw makes clear that what is required of the goose is required of the gander, including specifically the State. *See A.J.B. v. State*, 1999 OK 50, ¶ 9 (holding that "the State, like defendants, must raise proper objections and preserve errors and/or opportunities, otherwise they are waived").

Here, Oklahoma elected not to raise concurrent jurisdiction at all in its response brief on direct appeal, even though petitioner had argued exclusive jurisdiction in his opening brief, and the statutes and authorities on which the State now relies were then available.[10] Whether the State intentionally avoided the argument to maximize its sky-will-fall prognostications were it to lose jurisdiction entirely, or whether the State took heed of repeated judicial rejections of the concurrent-jurisdiction claim, *see infra* at 17, its strategic choice resulted in an irrevocable waiver.

3. The OCCA's remand order and rules also shut the door on the State's late attempt to slip in its concurrent-jurisdiction argument.

Foremost, the remand order expressly limited the post-*McGirt* evidentiary hearing to "only" the jurisdictional facts relevant to petitioner's timely exclusive-jurisdiction argument: RB's status as an

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[10] *See* Br. for Pet. 11-45, *Oklahoma v. Castro-Huerta*, No. 21-429 (U.S. Feb. 28, 2022).

Indian and the existence of the Cherokee Reservation. Pet. App. 28a; *see supra* at 6-7. And on remand, at least, Oklahoma adhered to that strict limitation, electing only to inform the state district court that it was "not taking a position one way or another" on those jurisdictional facts. Tr. of Evid. Hearing 30-32.[11]

But in its post-remand supplemental brief to the OCCA, rather than contest the jurisdictional facts found by the state district court, Oklahoma for the first time in this case argued concurrent jurisdiction. This flouted the OCCA's remand order, which constrained supplemental briefing to "*only* those issues pertinent to the evidentiary hearing." Pet. App. 29a (emphasis added); *see supra* at 7-8. It also flouted the OCCA's rules, which decree that issues "advanced for the first time in *any* supplemental brief will be deemed forfeited for consideration." OCCA R. 3.4(F)(2) (emphasis added).

Consequently, Oklahoma's belated concurrent-jurisdiction argument was waived on direct appeal and barred from supplemental briefing under the rules, precedents, and remand order of the OCCA. This Court's decision either way in *Castro-Huerta* would not alter the outcome in this case.

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[11] As the amicus brief of the Cherokee Nation notes, Oklahoma in other OCCA cases affirmatively accepted the existence of the Cherokee Reservation. *See* Br. of Amicus Curiae the Cherokee Nation in support of Resp. 4, *Oklahoma v. Bragg*, No. 21-1009 (U.S. Jan. 20, 2022).

## II. Oklahoma's Concurrent-Jurisdiction Argument Was Neither Timely Pressed Nor Passed On The Merits Below.

1. In addition to having waived the concurrent-jurisdiction argument as a matter of state law, Oklahoma's failure to timely press it below resulted in the OCCA refusing to pass on its merits. Hence, the question of concurrent jurisdiction is not properly before this Court as a matter of well-established federal law. *See Illinois v. Gates*, 462 U.S. 213, 222 (1983) (reviewing the "sounds justifications" for and reaffirming the rule against this Court considering questions "not pressed or passed upon below" (internal quotation marks omitted)).

Contrary to the State's suggestion (Pet. 4), its untimely and improper introduction of the concurrent-jurisdiction argument—to which petitioner objected, *see supra* at 8—does not count as pressing it. *Cf. United States v. Jones*, 565 U.S. 400, 413 (2012) (deeming alternative argument that the government "did not raise below" to be "forfeited").

The State's additional suggestion (Pet. 4) that the OCCA passed on the merits of its waived concurrent-jurisdiction argument is also incorrect. The entire body of the OCCA's opinion was devoted to addressing petitioner's timely exclusive-jurisdiction-argument. Pet. App. 1a-5a. After reciting and adopting the factual findings on remand that R.B. was an Indian, the Cherokee Reservation was established and never disestablished, and the charged crimes occurred therein, the OCCA concluded that "*McGirt* governs this case and requires us to find that the District Court of Tulsa County did not have jurisdiction." Pet. App.

4a-5a. The OCCA then vacated petitioner's judgment and sentence based on his exclusive-jurisdiction argument without recognizing or responding to the State's concurrent-jurisdiction claim. Pet. App. 5a.

2. The thin reed to which the State fastens its suggestion that the OCCA passed on concurrent jurisdiction is an end-of-opinion footnote. There, the OCCA merely tied up a loose end, addressing the State's separate Motion to Stay and Abate Proceedings pending this Court's disposition of the *Bosse* petition, in which the State also argued concurrent jurisdiction. Pet. App. 5a; *see supra* at 9. Briefly noting that the *Bosse* opinion had been vacated and withdrawn, and that other OCCA decisions "continue to reject the State's concurrent jurisdiction argument," the court denied the stay. Pet. 5a.

This terse housekeeping denial is the *only* place the OCCA acknowledged the State's concurrent-jurisdiction argument. And the court did so, it pointedly noted, in response to the State's request for a stay rather than to its argument on the merits in its supplemental brief, which the OCCA did not deign to mention.

In any case, *even if* the OCCA's footnoted explanation for its denial of the stay request could be construed as a merits ruling against the waived concurrent-jurisdiction argument, this Court has made clear that "the routine restatement and application of settled law by an appellate court [does] not satisfy the 'not pressed or passed upon below' rule." *Gates*, 462 U.S. at 222-23.

## III. Oklahoma's Acquiescence In The Dismissal Of This Case Renders Review Moot.

Though the OCCA withheld its mandate for twenty days from the filing of its decision, Pet. App. 5a, Oklahoma did not take advantage of the delay to move for a stay of the mandate, like it did when the *Bosse* petition was pending. *See supra* at 9-10. Instead, the State stepped aside, clearing the way for the United States to take custody of petitioner on federal charges two weeks before the state district court dismissed the case pursuant to the mandate. *See supra* n. 2 (docket entry of Nov. 9, 2021); ECF No. 11.

As a result of the State's acquiescence in the dismissal, there is no longer a case or controversy to review. *See* U.S. Const. art. III, § 2. Oklahoma's apparent about-face, petitioning for certiorari after this Court relisted *Castro-Huerta*, does not undo the unopposed dismissal of the state-court case. *Cf. Microsoft Corp. v. Baker*, 137 S. Ct. 1702, 1716-17 (2017) (Thomas, J., concurring in judgment) (concluding, after voluntary dismissal by plaintiffs, that no case or controversy exists under Article III).

## IV. Oklahoma Lacks Concurrent Jurisdiction.

1. Before its flip-flop on the merits, Oklahoma got it right: "States lack criminal enforcement jurisdiction over offenses in Indian Country if *either* the defendant *or* victim is an Indian." *Murphy* Pet. 18 (emphasis added); *see also McGirt* Arg. Tr. 54 (arguing that Oklahoma "would not have jurisdiction" over "crimes committed *against* Indians" by non-Indians in Indian country (emphasis added)).

That position accords with the text and history of the General Crimes Act, 18 U.S.C. § 1152; the longstanding view of this Court,[12] most recently reaffirmed in *McGirt*, *see* 140 S. Ct. at 2479; the consistent view of lower state and federal courts;[13] and the many enactments of Congress embedding that understanding.[14]

2. Lacking law, Oklahoma revives the specter that the sky will fall and pleads for this Court to "limit the damage." Pet. 5. But the State's dire prognostications in *McGirt* have not come to pass, nor is there "ongoing chaos affecting every corner of daily life in Oklahoma" either from *McGirt* generally or from the absence of concurrent state jurisdiction. *Id.*

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[12] *See, e.g.*, *Draper v. United States*, 164 U.S. 240, 247 (1896); *Donnelly v. United States*, 228 U.S, 243, 271 (1913); *Williams v. United States*, 327 U.S. 711, 714 (1946); *Williams v. Lee*, 358 U.S. 217, 220 n. 5 (1959); *Washington v. Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 470-71 (1979); *Solem v. Bartlett*, 465 U.S. 463, 465 n. 2 (1985); *Nevada v. Hicks*, 533 U.S. 353, 365 (2001); *United States v. Bryant*, 136 S. Ct. 1954, 1960 (2016).

[13] *See, e.g.*, *State v. Larson*, 455 N.W.2d 600, 601 (S.D. 1990); *State v. Flint*, 756 P.2d 324, 326 (Ariz. App. 1988), *cert. denied*, 492 U.S. 911 (1989); *State v. Greenwalt*, 663 P.2d 1178, 1182 (Mont. 1983); *State v. Kuntz*, 66 N.W.2d 531, 532 (N.D. 1954); *accord United States v. Langford*, 641 F.3d 1195, 1199 (10th Cir. 2011); *United States v. Bruce*, 394 F.3d 1215, 1221 (9th Cir. 2005); *St. Cloud v. United States*, 702 F. Supp. 1456, 1459 (D.S.D. 1988).

[14] *See* Br. in Opp. 11-17, *Castro-Huerta*, No. 21-429 (U.S. Nov. 15, 2021); Br. of Cherokee Nation 9-23.

For one, the OCCA virtually eliminated the retroactive effect of *McGirt*—the main bogeyman Oklahoma had invoked in that case[15]–by barring its application to convictions that were already final. *See Matloff v. Wallace*, 2021 OK CR 21, ¶ 15.

Furthermore, as this case and *Castro-Huerta* illustrate, the United States is making good on its "commit[ment] to prosecuting crimes that fall within its jurisdiction under 18 U.S.C. 1152."[16] The Five Tribes too are fulfilling their public safety responsibilities as sovereigns, having significantly expanded their law enforcement capabilities, entered hundreds of cross-deputization agreements, and brought nearly 7,000 criminal cases since *McGirt*. *See* Br. in Opp. 27-31, *Castro-Huerta*.

Perversely, it is the State's own attempt to claw back jurisdiction through belated litigation that threatens to upend the orderly settlement of public safety in Oklahoma. As the Tulsa County District Attorney recently fretted, the State prevailing "would be whiplash" that produces "chaos" and "disruption."[17]

3. Because the merits of the State's concurrent-jurisdiction argument is not properly presented here

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[15] *See* Br. for Resp. 43, *McGirt v. Oklahoma*, No. 18-9526 (U.S. Mar. 13, 2020).

[16] Br. of United States as Amicus Curiae Respecting an Application for a Stay 29, *Oklahoma v. Bosse*, No. 20A161 (U.S. May 17, 2021).

[17] *See* Sadie Gurman, *Supreme Court Upended the Legal System in Oklahoma and Could Do It Again*, Wall St. J. (Mar. 12, 2022), https://on.wsj.com/3qfhawp.

and will be thoroughly developed in *Castro-Huerta*, petitioner refers this Court there for further briefing and argument as to why the State lacks power to prosecute crimes by non-Indians against Indians in Indian country.

## CONCLUSION

The petition should be denied.

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March 21, 2022