No. 21-772

IN THE

In the Supreme Court of the United States

STATE OF OKLAHOMA

Petitioner,

–vs–

STEWART WAYNE COFFMAN,

Respondent.

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

BRIEF OF *AMICUS CURIAE* THE CHOCTAW NATION OF OKLAHOMA IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS*[1]

Amicus Choctaw Nation of Oklahoma ("Nation") is a federally-recognized Indian tribe, 86 Fed. Reg. 7,554, 7,557 (Jan. 29, 2021), residing on and governing the Choctaw Reservation in Oklahoma, which was secured to it in the Treaty of Dancing Rabbit Creek ("1830 Treaty"), art. 4, Sept. 27, 1830, 7 Stat. 333. The Nation, along with the Cherokee Nation, Chickasaw Nation, Muscogee (Creek) Nation, and Seminole Nation, was "forcibly removed from their native southeast by the federal Government under the Indian Removal Act of 1830," to present-day Oklahoma. *Morris v. Watt*, 640 F.2d 404, 408 n.9 (D.C. Cir. 1981) (citation omitted); *see Choctaw Nation v. Oklahoma*, 397 U.S. 620, 622-27 (1970).

The 1830 Treaty, in exchange for the Choctaws' removal from their ancestral lands, secured to the Nation a new homeland and broad sovereign authority:

> the United States promised to convey the land to the Choctaw Nation in fee simple 'to inure to them while they shall exist as a nation and live on it.' In addition, the United States pledged itself to secure to the Choctaws the 'jurisdiction and government of all the persons and property that may be within their limits west, so that no Territory or State shall

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

> ever have a right to pass laws for the government of the Choctaw Nation * * * and that no part of the land granted them shall ever be embraced in any Territory or State.'

Choctaw Nation, 397 U.S. at 625. The United States reaffirmed the existence of the Reservation, with modified boundaries, in subsequent treaties with the Choctaw and Chickasaw Nations. *See* Treaty of Doaksville, art. 1, Jan. 17, 1837, 11 Stat. 573; 1855 Treaty of Washington with the Choctaw and Chickasaw, June 22, 1855, 11 Stat. 611; 1866 Treaty of Washington with the Choctaw and Chickasaw, Apr. 28, 1866, 14 Stat. 769.

After this Court upheld the continuing existence of the Creek Reservation in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), the state courts in Oklahoma applied that decision to determine, here and elsewhere, whether other reservations in Oklahoma still exist. In each case, the Oklahoma Court of Criminal Appeals ("OCCA") first remanded the case to the state district court for an evidentiary hearing and the development of a record on that question. In this case, the State did not question the existence of the Choctaw Nation until late in the proceedings, at which point it had already waived the issue. It also attempted to preserve an argument that it has concurrent authority with the federal government over crimes committed by non-Indians against Indians on the Choctaw Reservation—but that argument is wrong and provides no basis for a grant of certiorari.

The State now attacks *McGirt* and the Choctaw Reservation in an effort to restore a legal regime that denied federal rights to Indians and Indian nations in Oklahoma for over a century. Were it to

succeed, this Court's decision in *McGirt* would be reduced to an instant in which "the rule of law," not "the rule of the strong," *McGirt*, 140 S. Ct. at 2474, determined the existence of the Creek Reservation in Oklahoma, the state courts' faithful application of the *McGirt* decision would be imperiled, and justice would be denied its opportunity to mend a difficult history by reinstating rights long denied and turning back purposeful resistance to their implementation. *Cf. Cooper v. Aaron*, 358 U.S. 1 (1958). The Nation submits this brief to prevent that result.

SUMMARY OF ARGUMENT

The State's petition should be denied.[2] First, the Oklahoma Court of Criminal Appeals ("OCCA") correctly held that under the General Crimes Act ("GCA"), 18 U.S.C. § 1152, the federal government has exclusive jurisdiction over crimes committed by non-Indians against Indians in Indian country. That conclusion rests on settled law confirming that federal jurisdiction over Indian country crimes involving Indians is exclusive unless Congress otherwise directs. And that law shows that the State's argument that it has always possessed criminal jurisdiction because it has never been abrogated by Congress is exactly backwards. It cannot pull jurisdiction over Indian country from thin air. Second, the State forfeited its right to challenge the Choctaw

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[2] To attack *McGirt* here, the State incorporates its petition in *Oklahoma v. Castro-Huerta*, No. 21-429 ("*Castro-Huerta* Pet."), which challenges the existence of the Cherokee Reservation. *See* Pet. 7-8. Accordingly, the Nation addresses arguments from the State's *Castro-Huerta* petition, while mindful that the Court may not accept the State's practice of relying on a challenge to one reservation to attack another.

Reservation, through an attack on *McGirt* or otherwise, by its knowing failure to make any such argument in proceedings below.

REASONS FOR DENYING THE PETITION

I. 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. 4a; *see also Roth v. State*, 2021 OK CR 27, ¶¶ 12-15. 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 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, 31 U.S. (6 Pet.) 515 (1832), 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." *Id.* 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.[3] Two years later, "Congress enacted the direct progenitor of the [GCA]" in the Indian Trade and Intercourse Act of 1834, ch. 161, § 25, 4 Stat. 729, 733, which "ma[de] federal enclave criminal law generally applicable to crimes in 'Indian country'" while exempting crimes between Indians. *United States v. Wheeler*, 435 U.S. 313, 324-25 (1978). As *Worcester* established the exclusivity of federal jurisdiction over the crimes to which the 1834 Act applied, it was not necessary for Congress to explicitly bar states from exercising jurisdiction. States never had such

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[3] That basic principle—that federal power in Indian affairs is exclusive—remains the law. *United States v. Lara*, 541 U.S. 193, 200 (2004); *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).

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 5-6, 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.[4]

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[4] 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*, 2021 OK CR 27. In both *Roth* and *Bosse*, the OCCA held that the GCA "brings crimes committed in Indian country" within the jurisdiction provided by that

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, 1960 (2016) (citations omitted).[5] 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

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statute for crimes in locations "within the sole and exclusive jurisdiction of the United States." *Bosse*, 2021 OK CR 3, ¶ 23, 484 P.3d 286, 294; *see Roth*, 2021 OK CR 27, ¶¶ 12-15. That comports with settled law. *See Donnelly*, 228 U.S. at 268; *In re Wilson*, 140 U.S. 575, 578 (1891).

[5] 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.

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 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).[6] But immediately following that statement, the

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[6] 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

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.[7] Accordingly, the *Yakima* 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.[8]

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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.

[7] 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 *Martin*, 326 U.S. at 499-500 (second alteration by Petitioner)), fails for the same reason.

[8] 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)).

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 13, 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 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 12-15,[9] 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.

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[9] 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.

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 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.

II. The State Cannot Challenge The Existence Of The Choctaw Reservation Here.

The State is estopped from claiming that *McGirt* was wrong or improperly applied to the Choctaw Reservation. Before it filed any certiorari petition seeking the overthrow of the Choctaw Reservation, the State, through its Attorney General, elsewhere filed stipulations and briefing accepting that the Reservation exists in order to avoid the burden of litigating that issue. *See* Br. of *Amicus Curiae* Choctaw Nation of Okla. at 18-20, *Oklahoma v. Sizemore*,

No. 21-326. Additionally, the State stipulated that the Reservation exists, to avoid the burden of re-trying, after mistrial, a non-Indian who killed a Choctaw citizen on the Reservation. *See State v. Savage*, slip op. ¶ 5 No. CF-2019-51 (Okla. Dist. Ct. Apr. 23, 2021), https://bit.ly/3efrmP7. The State's belated effort to challenge the Reservation is therefore barred, because it is an unfair reversal and appears to be part of an effort to game the courts for litigation advantage. *See New Hampshire v. Maine*, 532 U.S. 742, 750-51, 755-56 (2001).

The State's conduct in this case also bars its attack on the Reservation. Now, 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.[10] 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.* Below, however, the State did not preserve that argument, nor did it offer any "consideration of history." 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), which the State did here by failing to present properly an argument against the existence of the Choctaw Reservation. As the State has acknowledged elsewhere, "[s]trict refusal to

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[10] *McGirt* and its dissent addressed only the Creek Reservation. 140 S. Ct. at 2479.

consider claims not raised and addressed below furthers the interests of comity by allowing the states the first opportunity to address federal law concerns and resolve any potential questions on state-law grounds." Br. in Opp. to Pet. for Writ of Cert. at 5, *Christian v. Oklahoma*, No. 20-8335, https://bit.ly/3q8en94 (citing *Adams v. Robertson*, 520 U.S. 83, 90 (1997) (per curiam)).

Below, the OCCA remanded for an evidentiary hearing after this Court decided *McGirt*. Pet'r's App. 17a. At the hearing before the District Court, the Nation as *amicus curiae* and Respondent filed briefs explaining that the Reservation was established by Congress and never disestablished. *Amicus Curiae* Choctaw Nation's Br., *State v. Coffman*, No. CF-2017-301 (Okla. Dist. Ct. filed Oct. 5, 2020);[11] Def./Appellant's Remanded Hr'g Br. (filed Oct. 5, 2020).[12] The State filed stipulations, in which it agreed that the crime occurred "within the historical boundaries of the Choctaw Nation" established in treaties with the Choctaw and Chickasaw Nations. Pet'r's App. 14a. And the District Court correctly concluded "there is no evidence presented to the Court that Congress has ever explicitly erased" the Reservation boundaries nor disestablished the Reservation. *Id.* at 12a.

Back before the OCCA, the State informed the Court that it "takes no position as to the existence, or absence, of a Choctaw Reservation." Suppl. Br. of Appellee After Remand at 14 n.6, *Coffman v. State*,

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[11] https://bit.ly/3E2w5Ox.

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

No. F-2018-1268 (Okla. Crim. App. Nov. 2, 2020).[13] 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.[14]

Then, 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. Less than a week later, the State filed a brief in which it asked the OCCA to stay proceedings while this Court considered its concurrent jurisdiction argument. Appellee's Br. in Supp. of Mot. to Stay & Abate Proceedings at 5-6 (filed June 8, 2021).[15] It stated in a footnote that it disagreed with *McGirt* and the OCCA's conclusion in *Sizemore v. State*, 2021 OK CR 6, 485 P.3d 867, and *Ryder v. State*, 2021 OK CR 11, 489 P.3d 528, *withdrawn on other grounds* 2021 OK CR 25, that the Choctaw Reservation exists, that it agreed with the *McGirt* dissent's statement that all Five Tribes' reservations were disestablished, and that it might challenge *McGirt* and *Sizemore* in this Court. *Id.* at 2 n.1. Although the OCCA had decided *Sizemore* and *Ryder*, the State did not ask it to revisit those cases or argue why they were wrong.

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[13] https://bit.ly/3DXp7KS.

[14] https://bit.ly/3DXp7KS.

[15] https://bit.ly/3ysvR2d.

The OCCA then affirmed the District Court. *See* Pet'r's App. 6a. The State sought a stay of mandate on the basis that it was seeking certiorari on the concurrent jurisdiction question, *see* Appellee's Br. in Supp. of Mot. to Stay Mandate (filed Sept 9, 2021),[16] which the OCCA denied, *see* Order (filed Sept. 15, 2021).[17] After the mandate returned to the District Court, the State made no further objection, and the District Court dismissed the case. *See* Am. Order of Dismissal, *State v. Coffman*, No. CF-2017-301 (filed Sept. 17, 2021).[18]

The State waived its challenge to the Reservation's existence and has therefore forfeited that argument, including its attack on *McGirt*. Below, the State did not take the opportunity to contest the existence of the Reservation or ask the OCCA to revisit its prior rulings that the Choctaw Reservation exists. It only attempted to litigate its concurrent jurisdiction claim, *relying* on *McGirt*. Thus, under state law and this Court's precedents, the State's effort to attack the Reservation and *McGirt*'s application to the Choctaw Nation's treaties simply "comes too late in the day." *Sorrell v. IMS Health Inc.*, 564

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[16] https://bit.ly/30sLWs3. The State noted that it was challenging *McGirt* in the Supreme Court, *id.* at 1 n.2, but did not seek a stay on that basis or challenge *Sizemore* and *Ryder*.

[17] https://bit.ly/3pWXNrb.

[18] https://bit.ly/3Jb3RVS. 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); *see 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).

U.S. 552, 563 (2011); *accord TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2210 n.6 (2021); *Bench v. State*, 2018 OK CR 31, ¶ 96, 431 P.3d 929, 958 ("As Appellant has not provided any argument or authority supporting this claim, we find that he has forfeited appellate review of the issue."); *Stewart v. Territory*, 102 P. 649, 649 (Okla. Crim. App. 1909) (per curiam) ("[I]t is the duty of counsel, in presenting their cases upon appeal, to . . . clearly point out the special error complained of, and show that it was prejudicial to their clients. Unless this is done, the alleged errors will be treated as waived.").[19]

Finally, with respect to the State's misguided and misinformed contentions that *McGirt* is "wrong" and that its implementation is causing problems in eastern Oklahoma, the Nation refers the Court to Sections I and III of the Nation's *amicus curiae* brief in support of respondent in *Oklahoma v. Sizemore*, No. 21-326.

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[19] The State's position that it did not need to preserve its anti-*McGirt* argument, *see* Br. in Reply at 5-6, *Oklahoma v. Castro-Huerta*, No. 21-429, is belied by its own rushed effort to reverse its position on the Reservation's existence, and its position that it could have preserved its argument simply by noting its disagreement with *McGirt*, *see id.*, is also clearly wrong under the precedents of the OCCA and this Court.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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