No. 21-451

IN THE

Supreme Court of the United States

STATE OF OKLAHOMA,

Petitioner,

v.

SHAWN THOMAS JONES,

Respondent.

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

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

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INTEREST OF *AMICUS*[1]

Amicus Chickasaw Nation ("Nation") is a federally-recognized Indian tribe, 86 Fed. Reg. 7,554, 7,557 (Jan. 29, 2021), that resides on and governs the Chickasaw Reservation, its permanent homeland under treaties with the United States, *see* 1837 Treaty of Doaksville, Jan. 17, 1837, 11 Stat. 573 (incorporating Treaty of Dancing Rabbit Creek, art. 2, Sept. 27, 1830, 7 Stat. 333); 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. The Nation exercises inherent authority to protect the public by policing on the Reservation, *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982); *United States v. Cooley*, 141 S. Ct. 1638 (2021), and punishing criminals who commit crimes there, *United States v. Wheeler*, 435 U.S. 313 (1978); *United States v. Lara*, 541 U.S. 193 (2004). Following *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), the Nation comprehensively reviewed and enhanced its criminal justice system, growing its capacity and redoubling coordination with other governments. The Nation has fundamental interests in the success of those efforts and in protecting the treaty promises that established the Reservation. *See* Pet'r's App. 3a (citing *Bosse v. State*, 2021 OK CR 3, 484 P.3d 286, *withdrawn on*

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

other grounds, 2021 OK CR 23, *reservation ruling reaffirmed*, 2021 OK CR 30, ¶ 12).

The State imperils these interests by seeking reconsideration of *McGirt*, despite having forfeited the right to do so below. Its petition disparages tribal and federal successes in implementing *McGirt*, while elsewhere the State undercuts those efforts by opposing additional funding from Congress for that purpose. And it counts on the recent change in the Court's composition to secure a grant of certiorari. Certiorari is unwarranted, in this or any of the other myriad cases in which the State challenges *McGirt*, and would only serve to encourage resistance to the rule of law, further frustrating implementation and jeopardizing the Reservation's very existence. The Nation's unique interests in Oklahoma's petition, as well as its first-hand experience in administering criminal justice on the Reservation, all aid the Court's consideration of this petition.

SUMMARY OF ARGUMENT

The petition should be denied.[2] Regarding the first question presented, the Oklahoma Court of Criminal Appeals ("OCCA") correctly concluded 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 reflects settled law that federal jurisdiction over Indian country crimes involving Indians is exclusive unless Congress

[2] The State incorporates its petition in *Oklahoma v. Castro-Huerta*, No. 21-429 ("*Castro-Huerta* Pet."). *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.

otherwise directs. The State gets it backward by arguing it has always possessed criminal jurisdiction that has never been abrogated by Congress. As to the second question presented, the State forfeited its right to challenge the Chickasaw 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 Over Crimes By Non-Indians Against Indians In Indian Country Is Exclusive Unless Congress Otherwise Provides.

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 alleging 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." 140 S. Ct. at 2459. And as the MCA "allow[s] only the federal government to try Indians" for certain crimes committed within Indian country, *id*., 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. And like the MCA, federal jurisdiction under 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 Congress did not extinguish in the GCA. *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) (cleaned up). Congress later revised and reenacted the 1790 Act, *see* Act of May 19, 1796, ch. 30, §§ 4, 6, 1 Stat. 469, 470-471; Act of Mar. 30, 1802, ch. 13, §§ 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 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. *Worcester* 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. *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 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

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

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

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

The State's related assertion that state prosecution of such crimes will not impair any federal interest, *Castro-Huerta* Pet. 16 (citing *Gamble v. United States*, 139 S. Ct. 1960, 1964 (2019)), is equally wrong. As this Court explained in *Oliphant*, "almost from its beginning," Congress was concerned with providing effective law enforcement for the Indians "from the violences of the lawless part of our frontier inhabitants." 435 U.S. at 201 (citation omitted); *see Donnelly*, 228 U.S. at 271-72. That concern endures, as does the federal obligation to protect Indians from non-Indian offenders. "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] "That leaves the federal government" to protect Indian victims from crimes committed by non-Indians, *id.*, and belies the notion state authority is necessary to "shore up" the response to crimes against Indians, *see* Texas Amicus Br. at 12-13, *Oklahoma v. Castro-Huerta*, No. 21-429.

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); 25

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[5] To help stem the tide of "domestic violence experienced by Native American women," *Bryant*, 136 S. Ct. at 1960, 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.

U.S.C. § 232 (New York); Act of Aug. 15, 1953, Pub. L. No. 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) (citing *Indian Country, U.S.A., Inc. v. Oklahoma ex rel. Okla. Tax Comm'n*, 829 F.2d 967, 980 n.6 (10th Cir. 1987)).

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 it 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

contrasted that 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 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 ignores the Court's subsequent discussion of the GCA, which rejects the State's position. The State also quotes the Court's statement that "state sovereignty does not end at a reservation's border," *Castro-Huerta* Pet. 11 (cleaned up) (quoting *Hicks*, 533 U.S. at 361), but that simply confirms that tribal sovereign authority "does not exclude all state regulatory authority on the reservation," *Hicks*, 533 U.S. at 361. In sum, *Hicks* hurts, not helps, the State.

The State also quotes *County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 257-58 (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.[6] But immediately following

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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. Neither concerned 25 U.S.C. § 1152, and 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

that statement, *Yakima* cites to *Martin*, which only recognizes state criminal jurisdiction "to punish a murder of one non-Indian committed by another non-Indian upon [a] Reservation." *Martin*, 326 U.S. at 498; *see Yakima*, 502 U.S. at 258[7] Accordingly, *Yakima's* reference to a state's authority to exercise criminal jurisdiction cannot be read more broadly than that.[8]

The State also offers a statement from *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.'"

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

See Castro-Huerta Pet. 11, 13 (alteration in petition) (quoting *Dibble*, 62 U.S. at 370). In *Oneida*, the Court qualified that statement, which it identified as dictum 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 12, 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* precludes the State's position by stating that "[w]hen on-reservation conduct involving only Indians is at issue, state law is generally inapplicable, for the State's regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest." 533 U.S. at 362 (quoting *Bracker*, 448 U.S. at 144). *Bracker*, for its part, describes a balancing test used to determine state civil jurisdiction, "which examines not only the congressional plan, but also 'the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law.'" *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g* ("*Wold II*"), 476 U.S. 877, 884 (1986) (quoting *Bracker*, 448 U.S. at 145). And *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 inquiries to determine criminal jurisdiction, and it *has never been done*. The State's petition gives no reason to start now.

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). 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.[9] *Yakima* and *Bracker* are irrelevant for reasons earlier shown, *see supra* at 11-13,[10] 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

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[9] Notably, the State responded to *Citizen Potawatomi* by entering into agreements with Indian tribes, including the Nation, that allow the State and tribes to share revenue from Indian country tobacco sales. *See, e.g.*, Tribal/State Tobacco Tax Compact between Chickasaw Nation & Okla. (June 8, 1992), https://bit.ly/3pf5Pgd, *as amended* (July 7, 2003), https://bit.ly/3G1mWZ5, *as amended* (Oct. 1, 2013), https://bit.ly/2Z4haVe.

[10] 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.

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. The State never had jurisdiction 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 Chickasaw Reservation Here.

The State waived any claim in this Court that *McGirt* was wrong or improperly applied in the court below by failing to make that argument until now. Before the current Oklahoma Attorney General took office, the State did not oppose the existence of the Nation's Reservation, and even stipulated in another case that the Reservation is Indian country, which stipulation the OCCA accepted as consistent with the law, and on that basis, relieved the State of the burden of further litigating the facts and law. *See State v. Ball*, No. CF-2018-157 (Okla. Dist. Ct. Mar. 26, 2021), https://bit.ly/2X4eSoA; Suppl. Br. of Appellee After Remand at 4, *Ball v. State*, No. F-2020-54 (Okla. Crim. App. Apr. 26, 2021), https://bit.ly/3oXHjQG ("the parties agreed that the locations of the crimes charged 'were within the boundaries of the Chickasaw

Reservation,' and thus were within 'Indian Country'"); *Ball v. State*, No. F-2020-54, slip op. at 5-6 (Okla. Crim. App. June 3, 2021).

Under the direction of a new Attorney General, recently appointed by the Governor, the State has now taken a markedly different course. It now 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, accordingly, incorrect and should be overturned. *Castro-Huerta* Pet. 18.[11] The proper legal 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 stipulated to the contrary in *Ball* to avoid the burden of an evidentiary hearing and having convinced the state courts to accept this stipulation, the State is barred from raising its frontal assault on *McGirt* here; to hold otherwise would be to reward the State's litigation by unfair appellate ambush. *See New Hampshire v. Maine*, 532 U.S. 742, 750-51, 755-56 (2001).

The State's argument is also plainly barred by its conduct in *this* case. Below, the State neither challenged the existence of the Chickasaw Reservation, nor did it provide the "consideration of history" it now says was lacking in *McGirt* (it was not, *see* 140 S. Ct. at 2460-78). That conduct forfeited the argument the State seeks to make from scratch on certiorari. *United States v. Jones*, 565 U.S. 400, 413 (2012) ("consider[ing] the argument forfeited" because "[t]he Government did not raise it below"); *Sprietsma v. Mercury*

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

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 that is exactly what the State did here.

In the proceedings below, after *McGirt* and *Sharp v. Murphy*, 140 S. Ct. 2412 (2020) (per curiam), were decided, the State informed the OCCA that it

> Need[ed] time to review the record and pleadings in the case and determine what impact *McGirt* has on this case under the specific circumstances involved; what, if any findings have been made by the district court with regard to the *McGirt* issue; and whether any additional findings may be necessary,

and also requested supplemental briefing "to address *McGirt*'s impact on the Appellant's jurisdictional claim and whether any further findings are necessary." Req. to File Resp. to Appellant's Jurisdictional Claim at 1-2, *Jones v. State*, No. F-2017-1309 (Okla. Crim. App. July 16, 2020), https://bit.ly/3jdJDzn.

The OCCA then remanded for an evidentiary hearing, directing the District Court "to follow the analysis set out in *McGirt*" to determine if the Chickasaw Reservation had been disestablished. Pet'r's App. 21a-22a. The OCCA also made clear the State should develop evidence on Reservation status: "Recognizing the historical and specialized nature of this remand for evidentiary hearing, we request the Attorney General and District Attorney work in coordination to effect uniformity and completeness in the hearing process." *Id*. at 21a.

Nevertheless, the State presented no evidence on whether the Chickasaw Reservation exists. Instead,

it stipulated that "[i]f the [District] Court determines that [the Chickasaw Treaties] established a reservation, and if the Court further concludes that Congress never explicitly erased those boundaries and disestablished that reservation, then the crime occurred within Indian Count[r]y as defined by 18 U.S.C. § 1151(a)." Stips. at 2, *State v. Jones*, No. CF-2016-591 (Okla. Dist. Ct. Oct. 8, 2020), https://bit.ly/30FtKLG. The Respondent and the Nation then submitted briefs, and 500 pages of evidence, showing the establishment and continued existence of the Chickasaw. Def./Appellant's Remanded Hr'g Br. (Oct. 13, 2020); Amicus Curiae Chickasaw Nation's Br. (Oct. 14, 2020); App. of Chickasaw Nation (Oct. 14, 2020).[12] At the hearing, the State reiterated that "the State takes no position on the ultimate question of disestablishment," while "reserv[ing] the right to make argument for the [OCCA] regarding concurrent jurisdiction." Tr. of Evidentiary Hr'g at 7:7-8, 11-13 (Oct. 19, 2020). After reviewing the facts, the District Court concluded that it "must follow the analysis in *McGirt*," Pet'r's App. 12a, and that, since there was no evidence that Congress "erased or disestablished" the Chickasaw Reservation's boundaries, "the Court cannot find the Chickasaw reservation was disestablished." *Id.* at 18a.

When the case returned to the OCCA, the State again took no position on Reservation status. *See* Suppl. Br. of Appellee after Remand at 4, *Jones v. State*, No. F-2017-1309 (Okla. Crim. App. Dec. 29, 2020), https://bit.ly/3j9OIZx. Instead, it repeated the District Court's finding that the Reservation was not

[12] These documents and the Transcript of Evidentiary Hearing are on file with the District Court as parts of the record but are not available online.

disestablished, *id.* at 4-5, argued that the State had concurrent jurisdiction over the Respondent, *id.* at 5-17, and asked the OCCA to stay any reversal so the United States Attorney could secure custody of Respondent, *id.* at 17. The OCCA then granted relief to Respondent, concluding that the District Court's ruling on Reservation status was "supported by the record" and the case was controlled by the OCCA's ruling in *Bosse* that the Chickasaw Reservation was never disestablished. Pet'r's App. 3a. Consistent with that order, on August 10, the District Court dismissed the state criminal case against Respondent. *State v. Jones*, No. CF-2016-591 (Okla. Dist. Ct. Aug. 10, 2021), https://bit.ly/3aNNtKT.[13]

The record in this case shows the State waived its challenge to the Reservation's existence below and has forfeited that argument in this Court, including its recycled contention that the Court overlooked history in *McGirt*. After the OCCA remanded this case for a hearing on the Reservation's existence and requested the State to help develop a record on that question, the State chose to instead stipulate that if the court concluded the Reservation exists, it is Indian country. Nor did the State raise any challenge to *McGirt* below,[14] instead taking no position on the

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[13] In light of this dismissal, this case is also moot. Without pending charges below, a decision on this petition or the merits could not give anyone any relief, *see Chafin v. Chafin*, 568 U.S. 165, 172 (2013), and would only be advisory, *see Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101 (1998). Notably, the State did not include this order in the Appendix, despite its connection to the judgment and relevance to this Court's jurisdiction. *See* Rule 14.1(*i*)(i)-(ii).

[14] The State began attempting to reserve its right to challenge *McGirt* after the former Attorney General left office, implicitly acknowledging its waivers. *See, e.g.*, Br. in Supp. of Mot. to Stay

question other than to defer to the lower court's consideration of the facts and arguments presented by the Nation and Respondent. By knowingly waiving its opportunity to challenge the existence of the Reservation in the proceedings below, the State forfeited its right to do so here. Its effort to attack the Reservation and *McGirt*'s application to the Chickasaw Nation's treaties simply "comes too late in the day." *See Sorrell v. IMS Health Inc.*, 564 U.S. 552, 563 (2011).

To rule otherwise would also deprive Respondent of his rights both "to have [his] case tried upon the assumption that facts, stipulated into the record, were established" and that the State would be "bound by the factual stipulations it submits." *Christian Legal Soc'y v. Martinez*, 561 U.S. 661, 676-77 (2010) (cleaned up); *accord id.* at 715 (Alito, J., dissenting). "This Court has accordingly refused to consider a party's argument that contradicted a joint stipulation entered at the outset of the litigation." *Id.* at 677 (majority) (cleaned up).

Finally, with respect to the State's 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 its *amicus curiae* brief in support of respondent in *Oklahoma v. Beck*, No. 21-373.

& Abate Proceedings at 5 n.3, *Russell v. Oklahoma*, No. F-2019-892 (Okla. Crim. App. June 24, 2021), https://bit.ly/3jbOhOh. Of course, attempts to preserve an argument, regardless of whether they could otherwise succeed, fail if the argument is estopped or has *already* been waived.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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