No. 21-643

IN THE

Supreme Court of the United States

STATE OF OKLAHOMA,

Petitioner,

v.

BRYCE MILLER,

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 ever have a right to pass laws for the government of the Choctaw Nation * * * and

[1] No counsel for a party authored this brief in whole or part. The Chickasaw Nation and Choctaw Nation of Oklahoma 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.

> 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, in this case and others, whether other reservations in Oklahoma continue to 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 Nation shows here.

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 a brief moment 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] 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 confirming that federal jurisdiction over Indian country crimes involving Indians is exclusive unless Congress otherwise directs, which the State attempts to turn upside down by arguing it has always possessed criminal jurisdiction because it has never been abrogated by Congress. As to the second question presented, the State forfeited its right to challenge the Choctaw Reservation, through an attack on *McGirt* or otherwise, by its knowing failure to make any such argument in proceedings below.

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[2] To attack *McGirt* in the present petition, 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 challenge to one reservation to attack another.

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." *McGirt*, 140 S. Ct. at 2459. And as the MCA "allow[s] only the federal government to try Indians" for certain crimes committed within Indian country, *id*., 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 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) (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

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. 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 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 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

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[3] That basic principle—that under the Constitution, 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).

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, federal jurisdiction has been exclusive over such crimes, unless Congress otherwise provides. Since 1790, *see supra* at 5-7, 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]

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

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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 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).

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] And "[t]hat leaves the federal government" to protect Indian victims from crimes committed by non-Indians. *Id.*

Granted, Congress can grant states jurisdiction over crimes by non-Indians against Indians in Indian country. But when it does so, it does so expressly. *See* 18 U.S.C. § 3243 (granting Kansas jurisdiction in Indian country); 25 U.S.C. § 232 (New York); Act of Aug. 15, 1953, Pub. L. No. 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)).

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[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," *id*, at 1960-61.

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 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 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 "[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 confirms that tribal sovereign authority "does not exclude all state regulatory authority on the reservation," *Hicks*, 533 U.S. at 361. In sum, *Hicks* hurts, not helps, the State.

The State also quotes *County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251 (1992), as saying that "'absent a congressional prohibition,' a State has the right to 'exercise criminal (and, implicitly, civil) jurisdiction over non-Indians located on reservation lands,'" *see Castro-Huerta* Pet. 11 (quoting *Yakima*, 502 U.S. at 257-58).[6] But immediately following that statement, the *Yakima* Court cites to *Martin*, which only recognizes state criminal jurisdiction "to punish a murder of one non-

[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 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.

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.[8]

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 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 12-13, 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).

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[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 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 12-13, 14,[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.

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 its 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.

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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.

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

The State's conduct in this case bars its attack on the Choctaw 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.* In the courts below, however, the State did not preserve that argument, nor did it provide 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. Moreover, as the State has acknowledged in another post-*McGirt* case, "[s]trict refusal to 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)).

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

In the proceedings below, Respondent raised *McGirt* on direct appeal as a basis to reverse his conviction, arguing that under its framework his crimes occurred on the Choctaw Reservation, Br. of Appellant at 7-21, *Miller v. State*, No. F-2020-406 (Okla. Crim. App. filed Jan. 15, 2021), https://bit.ly/3qr5Uy4, and sought to introduce evidence showing that, Notice of Extra-Record Evid. (filed Jan. 15, 2021), https://bit.ly/2YBw6dJ. In response, the State agreed that the crime occurred within the Choctaw Nation's treaty boundaries and "acknowledge[d] that this Court recently held in *Sizemore v. State*, 2021 OK CR 6[,] [485 P.3d 867] . . . that Congress established a reservation for the Choctaw Nation in said treaties, and never erased the boundaries and disestablished the Choctaw Nation Reservation." Resp. to Appellant's Appl. to Suppl. Appeal Record at 5 (filed Apr. 7, 2021), https://bit.ly/3quPm8g.[11] The State then asked for a remand but noted it "believes the parties can agree that the record in this case should be supplemented by agreement . . . and the Indian Country evidence discussed above can be incorporated into the appellate record." *Id.*

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[11] Although the State did not acknowledge this in its briefing, the ruling in *Sizemore* came after the State stipulated that if the District Court found that the Nation's treaties "established a reservation" and "that Congress never explicitly erased those boundaries and disestablished that [Choctaw] reservation, then" the crime in that case "occurred within Indian Country as defined by 18 U.S.C. § 1151(a)." Stip. of Parties at 2, *State v. Sizemore*, No. CF-2016-593 (Okla. Dist. Ct. filed Oct. 14, 2020), https://bit.ly/3awX6gM. The District Court made those findings, which the OCCA then affirmed in a published opinion, *Sizemore*, 2021 OK CR 6, ¶¶ 9-16, 485 P.3d at 869-71. *See Christian Legal Soc'y v. Martinez*, 561 U.S. 661, 677 (2010) (a party who enters into a stipulation undertakes "to be bound by the factual stipulations it submits").

The OCCA then remanded for an evidentiary hearing and directed the District Court "to consider any evidence the parties provide, including but not limited to treaties, statutes, maps, and/or testimony." Pet'r's App. 24a. Before the District Court, the State filed a pre-hearing brief in which it again acknowledged the OCCA's decision in *Sizemore*. *Id.* at 37a. The State then asserted that it disagreed with the result in *McGirt* but said nothing about whether it disagreed with *Sizemore* or how an alternate analysis might change the result in this case or *Sizemore*. *Id.* at 37a-38a. It then stipulated to the District Court that "the crime at issue was committed . . . within the historical boundaries of the Choctaw Nation" as described in the Choctaw Treaties. *Id.* at 15a-16a. After reviewing the briefing and stipulation, the District Court "adopt[ed] the stipulation" and found "the crime occurred on the Choctaw Nation Reservation." *Id.* at 13a.

Before the case returned to the OCCA, the Attorney General resigned. *See* Melissa Scavelli, *Oklahoma Attorney General Mike Hunter Resigns Due to 'Personal Matters'*, KOKH (May 26, 2021), https://bit.ly/3n1ShmX. Under the direction of a new Acting Attorney General, the State belatedly attempted to change course, asserting in a post-remand brief to the OCCA that "the State strenuously disagrees with the holdings in *McGirt* and *Sizemore*, and preserves the right to ask the Supreme Court to review those holdings." Pet'r's App. 29a n.2. But it again presented no argument about how an alternative analysis would change the outcome, instead making the cursory statement that Congress disestablished all Five Tribes' Reservations. *Id.* It did not ask the OCCA to revisit its ruling in *Sizemore*, did not address the effect of its stipulations in *Sizemore* and this case, and only asked for reversal

on the basis that the State has concurrent jurisdiction over crimes committed by non-Indians against Indians in Indian country, *id.* at 31a, and that the OCCA stay its mandate while the Supreme Court considered the concurrent jurisdiction question, *id.* at 33a. Having been presented with no request to overrule *Sizemore* or revisit the existence of the Choctaw Reservation, the OCCA made no mention of the State's late attempt at preserving its attack on the Reservation and upheld the District Court's ruling under *Sizemore* and *McGirt*. *Id.* at 3a.

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, the State acknowledged the existence of the Reservation and stipulated that the crimes occurred within the Nation's treaty boundaries. It made no argument that the OCCA should revisit *Sizemore*, nor did it explain why the Reservation would not exist under its preferred analysis. Thus, under both 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 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 place their fingers upon the place that hurts, and 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."). Moreover, allowing the State to evade its stipulation in *Sizemore* and its acknowledgment of the *Sizemore* decision below, both made to avoid the burden of litigating evidentiary hearings, would give the State an unfair litigation advantage, which is apparently based on strategically misleading the courts. *See New Hampshire v. Maine*, 532 U.S. 742, 750-51, 755-56 (2001).

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 the Nation's *amicus curiae* brief in support of respondent in *Oklahoma v. Sizemore*, No. 21-326.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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