No. 20A161
CAPITAL CASE

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF OKLAHOMA, *Applicant*,

-vs-

SHAUN MICHAEL BOSSE, *Respondent.*

To the Honorable Neil M. Gorsuch,
Associate Justice of the United States Supreme Court and
Circuit Justice for the Tenth Circuit

BRIEF OF *AMICUS CURIAE* THE CHICKASAW NATION

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INTRODUCTION

McGirt v. Oklahoma, 140 S. Ct. 2452 (2020), is the law of the land. Oklahoma's courts are applying it. And the Chickasaw Nation ("Nation"), the State of Oklahoma ("State"), and the United States are implementing it with a shared commitment to public safety and effective law enforcement. Substantial work already has been done and substantial progress already has been made. As expected, implementation has posed challenges, but resolution to those challenges must be found in moving forward in accord with the law, not backward. The Chickasaw Nation respectfully submits this brief as *amicus curiae* based on its principled concern that the State's motion risks taking us backwards by seeking to stay the mandate of a decision we are working to implement.

The Nation opposes that motion because the State has failed to show, as it must to prevail, irreparable harm, a reasonable probability of a grant of certiorari, and a fair prospect of reversal. Neither of the substantive issues the State would have this Court review are worthy of certiorari. As to the first issue, we defer to the argument Respondent makes, but as to the second—whether the State has concurrent criminal jurisdiction with the federal government in Indian country under the General Crimes Act—we must weigh in as the Court could not rule in the State's favor without disregarding more than one hundred years of the Court's precedent in federal Indian law. Finally, as a general matter, the State's policy-based predictions of dire results are insufficient to show harm. In fact, the State describes the

implementation of law, not a legal injury, which is grounds enough to deny the motion.

If adjustment is needed to meet the challenges involved in implementing the law, Congress is the appropriate forum. Rather than seek to avoid those challenges through continued litigation, the Nation—joined by the Cherokee Nation, at least, as well as the Oklahoma Attorney General and leadership in the Oklahoma Legislature—has instead advocated for narrow congressional action to empower the Nation and State to negotiate the allocation of criminal jurisdiction on the reservation. *See infra* at 10 n.3. The work toward that solution is far from finished. Such approach may not solve all challenges that arise from a faithful adherence to the law, but Congress remains the appropriate forum for such matters and extending the Oklahoma Court of Criminal Appeals' limited stay will not aid in their resolution. With these considerations in mind and given the State's failure to meet its burden on this motion, the Nation respectfully submits the State's motion should be denied.

BACKGROUND

Shaun Michael Bosse ("Bosse"), a non-Indian, was convicted in Oklahoma state court of three counts of first-degree murder and one count of first-degree arson. His victims were Chickasaw Nation ("Nation") citizens, and his crimes were committed on the Chickasaw Reservation. Bosse was sentenced to death for his crimes. A direct appeal of his conviction and his first state court petition for post-conviction relief both failed. On February 20, 2019, while this Court was considering *Sharp v. Murphy*, 140 S. Ct. 2412 (2020) (per curiam), Bosse filed a successive petition for post-

conviction relief in state court. *See* Successive Appl. for Post-Conviction Relief – Death Penalty.[1] He argued that the State lacked jurisdiction to try him under the General Crimes Act, 18 U.S.C. § 1152 ("GCA"). *See id.* at 15-16.

After this Court decided *McGirt*, the State argued in an August 4, 2020 brief to the Oklahoma Court of Criminal Appeals ("OCCA"), the State's highest court in criminal cases, that the OCCA should consider procedural defenses before remanding to the state district court for further proceedings. *See* Resp. to Pet.'s Proposition I. The State contended that Oklahoma law limits the basis on which a petitioner may challenge the State's jurisdiction in successive petitions for post-conviction relief, which foreclosed Bosse from raising jurisdictional arguments in his successive petition. *Id.* at 23-41.

The OCCA rejected this argument in its August 12, 2020 remand order to the Oklahoma district court, holding that under state law Bosse's jurisdictional argument was not foreclosed because it could not have been raised earlier: "The issue could not have been previously presented because the legal basis for the claim was unavailable. 22 O.S. §§ 1089(D)(8)(a), 1089(D)(9)(a); *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020)." *See* Order Remanding for Evidentiary Hr'g at 2.[2]

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[1] All briefs filed with the OCCA referenced in this section can be found on the Oklahoma State Courts Network docket for the case, which is available at https://bit.ly/2QPDqP6. Some of the documents' titles have been shortened in this brief.

[2] *See* Okla. Stat. tit. 22, § 1089(D)(8) ("If . . . a subsequent application for post-conviction relief is filed after filing an original application, the Court of Criminal Appeals may not consider the merits of or grant relief based on the subsequent . . . application unless: a. the application contains claims and issues that have not been and could not have been presented previously . . . because the legal basis for the claim was unavailable . . . ."); *id.* § 1089(D)(9) ("For purposes of this act, a legal basis of a claim is unavailable on or before a date described by this subsection if the legal basis: a. was not recognized by

On October 13, 2020, the district court determined on remand that Bosse's crime occurred on the Chickasaw Reservation, that the Chickasaw Reservation had never been disestablished, and that his victims were Chickasaw Indians. *See Bosse v. Oklahoma*, 2021 OK CR 3 at ¶¶ 6, 8-12. Relying on this factual determination, the OCCA concluded on March 11, 2021 that under the GCA the State lacked jurisdiction to try Bosse. The OCCA also acknowledged that "[b]oth the Attorney General and the District Court ask this Court to consider this case barred for a variety of procedural reasons" including "waiver under the successive capital post-conviction statute, 22 O.S. 2011, § 1089(D), and waiver of the jurisdictional challenge . . . ." *Id.* ¶ 20. The court declined to do so. *Id.* The OCCA stayed issuance of its mandate for 20 days—until March 31, 2021. *Id.* ¶ 30.

In anticipation of the OCCA's application of the *McGirt* analysis to the Chickasaw Nation's reservation, the Chickasaw Nation Tribal Legislature enacted a resolution, stating the Nation's full support for federal criminal charges against Bosse, expressing the Nation's "desire[] to ensure justice for these Chickasaw victims of crimes" and calling on the United States to prosecute him "to the fullest extent of the law." Chickasaw Tribal Legislature, Gen. Res. No. 38-0910 (Feb. 21, 2021). And on March 30, 2021 the United States Attorney for the Western District of Oklahoma filed a four-count complaint, including three counts of murder, and issued a federal warrant for Bosse's arrest.

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or could not have been reasonably formulated from a final decision of the United States Supreme Court, a court of appeals of the United States, or a court of appellate jurisdiction of this state on or before that date . . . .").

On March 31, 2021, the State filed a motion for leave to file a petition for rehearing, a petition for rehearing, and a motion to stay issuance of the mandate pending the disposition of the petition for rehearing. In support of its motion for leave to file, the State re-asserted its position that the OCCA should address its procedural arguments against hearing Bosse's successive post-conviction relief petition. Br. in Supp. of Mot. for Leave to File Pet. for Rehr'g, at 5 (quoting Resp. to Pet.'s Proposition I, at 1-2). In its accompanying March 31, 2021 motion to stay, the State requested a stay "based on its petition for rehearing and its planned filing, if necessary, of a Petition for Writ of Certiorari in the United States Supreme Court." Mot. for Further Stay of Mandate, at 1. On the same day, the OCCA stayed issuance of the mandate until it could consider the State's petition for rehearing. *See* State's Appendix 2.

Also on the same day, the Nation filed a motion for leave to file an *amicus* brief, requesting that to facilitate "ongoing intergovernmental efforts to coordinate implementation of the reallocation of subject matter prosecutorial jurisdiction within the Chickasaw Nation's Reservation" the OCCA stay the mandate for an additional sixty days. Chickasaw Nation's Mot. for Leave to File *Amicus* Br., at 5. The Nation did not, however, support the legal grounds the State offered in support of a stay.

On April 7, 2021, the OCCA denied the petition for rehearing, ruling that it was not permitted under the OCCA's rules, and issued the mandate in the case. *See* State's Appendices 3 and 4. The same day, the State filed a petition to recall the mandate and brief in support arguing that the petition should be granted because it intended to file a petition for a writ of certiorari in this Court posing two questions:

whether under the GCA, states have jurisdiction concurrent with the federal government over on-Reservation offenses committed by non-Indians against Indians, and whether Indian country jurisdictional claims are non-waivable. Br. in Supp. of Mot. to Recall Mandate, at 2-4. The State asked the OCCA to recall and stay the mandate "through the pendency of the State's Certiorari Petition to the United States Supreme Court." *Id.* at 6.

The next day, April 8, 2021, the OCCA ordered oral argument to be held April 15, 2021 and permitted *amici curiae* to file briefs. Order Setting Oral Argument. That same day, the State filed a motion for an emergency, temporary recall of the mandate pending the oral argument. In its brief in support, the State argued that a temporary emergency recall of mandate was necessary "to prevent the vacatur of Petitioner's murder convictions and death sentences unless and until the Supreme Court has, assuming it grants certiorari review, rendered a final decision on the State's defenses to Petitioner's jurisdictional claim." Br. in Supp. of Emergency Mot. to Temporarily Recall Mandate, at 4. On April 9, the OCCA granted the State's motion pending oral argument. *See* State's Appendix 5.

On April 12, 2021, the Nation filed an *amicus* brief on the State's stay petition. The Nation again requested only a sixty day stay to permit intergovernmental cooperation to productively continue, explaining:

> The Court's stays have provided valuable time for local, Tribal, State, and Federal law enforcement to continue to develop and implement tools appropriate to protect the public during the transition period and thereafter. Likewise, case-specific stays issued by district courts have also provided opportunity for this work. . . . Unlike the stay requested by Oklahoma, each of the prior stays have had a set end date, which has

> provided structure and timeline for our work. Criminal defendants are entitled to timely resolution of charges, but these stays have provided room for intergovernmental cooperation in implementing the Court's Opinion, which has served the public interest.

See Chickasaw Nation's Br. as *Amicus Curiae*, at 5-6.

On April 15, the OCCA heard oral argument. The same day, the OCCA stayed issuance of the mandate for forty-five days, and provided that the mandate would issue automatically at the end of that period. *See* State's Appendix 6. The OCCA thus denied the indefinite stay that the State had requested, after having considered the State's asserted certiorari grounds and its asserted fear that the Interstate Agreement on Detainers, 18 U.S.C. App. 2, could prevent the federal government from transferring Bosse back into state custody. The State's instant motion followed.

REASONS FOR DENYING THE APPLICATION

A stay of the mandate is an extraordinary remedy. To obtain such a stay

> an applicant must show (1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay. In close cases the Circuit Justice or the Court will balance the equities and weigh the relative harms to the applicant and to the respondent.

Hollingsworth v. Perry, 558 U.S. 183, 190 (2010) (per curiam) (citations omitted). Additionally, the lower court's prior decision on whether to stay the mandate, and on what terms, is "presumptively correct," *Whalen v. Roe*, 423 U.S. 1313, 1316 (1975) (Marshall, J., in chambers), entitled to "great weight," *Holtzman v. Schlesinger*, 414 U.S. 1304, 1314 (1973) (Marshall, J., in chambers), and an applicant carries the burden of showing that the lower court's stay decision was wrong, *Conforte v. C.I.R.*,

459 U.S. 1309, 1311 n.1 (1983) (Rehnquist, J., in chambers). *See also Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 571 U.S. 1061, 1063 (2013) (Scalia, J., concurring) (movant bears "heavy burden" to show that a lower court's stay decision "was a clear violation of accepted legal standards" and should be vacated).

The State's application fails each part of that test, the OCCA's decision to issue only a limited, and not indefinite, stay of the mandate is plainly correct and entitled to deference, and the State's application should therefore be denied.

I. APPLICANT HAS SHOWN NEITHER THAT CERTIORARI IS LIKELY TO BE GRANTED, NOR A "FAIR PROSPECT" OF REVERSAL WERE IT GRANTED

A. There Is No Reasonable Probability That Certiorari Will Be Granted.

To obtain a stay, the State must show a "'reasonable probability' that this Court will grant certiorari." *Maryland v. King*, 567 U.S. 1301, 1302 (2012) (Roberts, C.J., in chambers) (quoting *Conkright v. Frommert*, 556 U.S. 1401, 1402 (2009) (Ginsburg, J., in chambers)). That is generally shown by the existence of a conflict in the lower courts on a question of federal law, that the question is important, and that the posture of the case is appropriate for certiorari review. *See Conkright*, 556 U.S. 1402-03; *Kenyeres v. Ashcroft*, 538 U.S. 1301, 1303-06 (2003) (Kennedy, J., in chambers). The State says it will seek certiorari on two questions: Whether a petitioner can be procedurally barred from raising the existence of Indian country in a petition for post-conviction relief; and whether the State has criminal jurisdiction in Indian country under the GCA. *See* Br. at 2. The State has not shown a reasonable probability of a certiorari grant on either question.

The first question was decided below on state law grounds: namely, the interpretation of Oklahoma's statute governing petitions for post-conviction review, which the State had formerly urged as the basis of its motion. *See supra* at 3-5. The Nation joins in the argument made by Respondent on this issue. If more were needed, the OCCA has subsequently expressly confirmed in another post-*McGirt* case arising on the Chickasaw Reservation, in which the State urged procedural bars, that "subject matter jurisdiction is never waived *under Oklahoma law*." *Bench v. State*, 2021 OK CR 12, ¶ 15 n.3 (emphasis added). Simply put, this Court does not grant certiorari to decide cases "where there is an adequate and independent state ground" for the lower court's decision. *Michigan v. Long*, 463 U.S. 1032, 1040 (1983); *cf. Beard v. Kindler*, 568 U.S. 17, 19-20 (2012) (per curiam) (quoting *Howell v. Mississippi*, 543 U.S. 440, 443 (2005) (per curiam)). Therefore, there is no reasonable probability the Court will grant certiorari on that question, and lacking any grounds for certiorari, there is no fair prospect of reversal.

The State's second question deals with the OCCA's decision on a question of federal law but presents no split of authority in the lower courts. *See* Br. at 15-23. Furthermore, the OCCA's decision is consistent with over a hundred years of precedent holding that federal jurisdiction under the GCA is exclusive of state jurisdiction. *See infra* at 20-23.

Lacking any evidence of a split, the State advances policy arguments on tenuous grounds, asserting that state jurisdiction "minimizes the chances abusers and murderers of Indians will escape punishment and maximizes the protection from

violence perpetrated on Native Americans," Br. at 15. While the Nation may sympathize with this view as a matter of policy, that is an argument properly made to Congress, not here.[3] The State also urges the "practical importance" of addressing its second question, claiming that "federal authorities frequently decline to prosecute crimes against Indians on reservations" and that "less major crimes will go unprosecuted as federal prosecutors are busy with the most serious offenses." *See* Br. at 15-17. These assertions too, are properly directed to Congress. Categorically, these arguments do not bear on whether the OCCA properly held as a matter of state law that the procedural bars relied on by the State are inapplicable here, nor do they affect the interpretation of the GCA.

The State offers scant support for these speculative policy arguments, citing only an opinion column which urges an expansion of tribal jurisdiction as the proper response to improve public safety. *See* David Heska Wanbli Weiden, Opinion, *This 19th-Century Law Helps Shape Criminal Justice in Indian Country* N.Y. Times (July 19, 2020), https://nyti.ms/3vOdIt2. In fact, the Department of Justice data show that in 2018, federal prosecutors in Oklahoma declined jurisdiction in 27 out of 117 Indian country jurisdiction cases. *See* U.S. Dep't of Justice, *Indian Country Investigations and Prosecutions: 2018* at 36 tbl. 13 (2018), https://bit.ly/3epI4MN. Only *seven* of those declinations resulted from the federal government's prioritization of

[3] Indeed, the Attorney General, with the support of the Nation and Cherokee Nation, announced his support last year for an effort by which Congress could authorize Indian tribes and Oklahoma to enter into voluntary compacting for the allocation of criminal jurisdiction in Indian country to the State. *See* Letter from Mike Hunter, Att'y Gen., Okla., to Senator Jim Inhofe, et al. (Oct. 21, 2020), https://bit.ly/3uqMwjY. The Nation continues to work with members of Congress to develop proposed legislation that would create a framework for such compacting.

prosecutorial resources, as opposed to jurisdictional bars, insufficient evidence, the unavailability of the defendant, referral to a different jurisdiction, or alternatives to prosecution, all of which would have been to some extent applicable had the State been prosecuting those defendants. *Id.* at 27 tbl. 10. And it is far from certain that Oklahoma prosecutors will more vigorously prosecute crimes against Indians than the federal government, given years of budget shortfalls and extreme disparities in charging and sentencing in Oklahoma district attorneys' offices. *See, e.g.*, Steve Metzer, *Lawmakers Warned of Effects of State Budget Cuts*, Journal Record (Apr. 16, 2020), https://bit.ly/3eXk7LT; Ryan Gentzler, *'Prosecutorial Discretion' Makes Oklahoma's Justice System a Roll of the Dice*, Okla. Policy Inst. (May 2, 2019), https://bit.ly/3h7fUYx.

Reversing course, the State then asserts that federal prosecutors in Oklahoma are overwhelmed with Indian country cases, which further justifies certiorari review. *See* Br. at 16-18. This is, again, an argument to be made to Congress, and again the State's argument is weakly supported. The State cites a set of media reports, which report with varying degrees of speculation on the impacts of this Court's ruling in *McGirt* on federal prosecutors. *See id.* at 16-17 & nn.8-10. However, most substantively, these and other sources show that the federal government and tribes simply have been working diligently to address the increases in their workloads resulting from *McGirt* and associated rulings, which suggests these are short-term

challenges.[4] The State also makes assertions about the number of GCA cases it thinks are or could be pending in Oklahoma. *Id.* at 17. Its rough extrapolation from a small, unrepresentative sample of cases is not statistically sound or otherwise reliable. Furthermore, perhaps more to the point, even this estimate shows that most new cases falling under federal or tribal jurisdiction are *not* GCA cases. *Id.* at 17. None of these arguments show the existence of a problem of such importance to justify certiorari review in *this case*.

Finally, the State complains that in some cases, when a non-Indian defendant commits a crime against a non-Indian and an Indian, two trials may be necessary: a state court trial of the offense committed by the non-Indian against a non-Indian; and a federal court trial of the offense committed by the non-Indian against an Indian. *Id.* at 17-18. But criminal cases with multiple defendants are not uncommon, and reliance on the Indian or non-Indian identity of a defendant to determine which sovereign has criminal jurisdiction over a defendant is the norm in federal Indian

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[4] *See, e.g.*, Alanna Durkin Richer, et al., *Tribal Cases Swamp US Prosecutors*, AP (Mar. 18, 2021), https://bit.ly/2RuwNBU ("The Justice Department acknowledges the increased workload, saying officials are 'carefully assessing the impact of recent court decisions affecting the work' of federal prosecutors in Oklahoma, along with the impact the riot prosecutions are having on the U.S. attorney's office in Washington. 'We have realigned existing resources to assist these districts and will continue to monitor the situation,' the department said in a statement."); Curtis Killman, *Former Principal Chief Isn't Happy as McGirt Decision Hits Home*, Tulsa World (Apr. 13, 2021), https://bit.ly/3tsa0Uz ("Muscogee (Creek) Nation spokesman Jason Salsman said Lighthorse Police are doing their due diligence on cases that come before them. 'I think it is a little bit unfair to place cases falling through the cracks at McGirt's feet,' Salsman said. 'We are taking those cases. We're working the cases. We're moving them through. We're certainly not going to simply turn people loose like we've seen happen (in other jurisdictions). It may take a little time while we build capacity and get things in order, but nothing's falling through the cracks.'"); Press Release, N. Dist. of Okla. U.S. Att'y's Office, U.S. Dep't of Justice, Acting U.S. Attorney Clint Johnson's Statement Regarding the Oklahoma Court of Criminal Appeals' Ruling in Hogner v. Oklahoma (Mar. 11, 2021), https://bit.ly/3tzmWbn; Amy Slanchik, *Federal Prosecutors Move to Oklahoma, Help with Supreme Court Caseload*, News9 (Jan. 21, 2021, 10:26 PM), https://bit.ly/2QRKJpH.

law. *See, e.g.*, 18 U.S.C. § 1153 (federal jurisdiction over major crimes committed by an Indian against an Indian or other person); *United States v. McBratney*, 104 U.S. 621, 624 (1881) (state jurisdiction over a crime committed by a non-Indian against a non-Indian in Indian country); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 208 (1978) (Indian tribes "do not have criminal jurisdiction over non-Indians absent affirmative delegation of such power by Congress."). If a different jurisdictional paradigm is to be proposed, that would be a matter for Congress to decide, in the exercise of its "power . . . to provide for the punishment of all offenses committed [on Indian reservations], by whomsoever committed[.]" *Ex parte Wilson*, 140 U.S. 575, 577 (1891).[5]

B. There Is No "Fair Prospect" That The Judgment Below Will Be Reversed If Certiorari Is Granted.

The State argues that there is a significant possibility of reversal because "while the General Crimes Act grants the federal government jurisdiction over certain crimes in Indian Country, nothing in that Act explicitly preempts the State's jurisdiction." Br. at 18. That argument rests on a false premise – that the State had such jurisdiction prior to the enactment of the GCA. It did not. Only Congress can grant jurisdiction to the State over crimes by non-Indians against Indians in Indian country, which Congress did not do in the GCA. Nor has the State any other basis for asserting that Congress has granted it such jurisdiction.

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[5] The State points to a specific case in which a former state inmate killed several people after the State commuted his sentence and released him early from prison. *See* Josh Dulaney, *Oklahoma Commutation Process Like Starting Over for Victims' Families*, Oklahoman (Mar. 7, 2021 1:37 AM), https://bit.ly/33mk9HJ. There appears to be no question that the defendant in that case will be prosecuted. The State's complaints are only that he will be prosecuted twice and that this "does nothing to further tribal sovereignty," *see* Br. at 18. Neither justifies certiorari or a stay.

1. As Congress's Constitutional power in Indian affairs is exclusive, the State has no jurisdiction over crimes by non-Indians against Indians in Indian country absent express congressional authorization.

The State argues that Oklahoma's Constitution and statutory law are alone sufficient to establish subject matter jurisdiction over criminal cases arising within its borders, regardless of whether federal law preempts that jurisdiction. Br. at 10-11. That argument is exactly backwards with respect to state court jurisdiction over crimes in Indian country. Under the Constitution, Congress's power in Indian affairs is exclusive, it extends to all intercourse between Indians and non-Indians in Indian country, including the allocation of criminal jurisdiction over Indian country, and therefore the State has no jurisdiction over crimes by non-Indians against Indians in Indian country unless Congress has authorized it. This was established long ago by this Court's decision in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832). And it remains the law today. Congress has exercised its power "to provide for the punishment of all offenses committed [on Indian reservations], by whomsoever committed," *Wilson*, 140 U.S. at 577, by providing 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, *see New York ex rel. Ray v. Martin*, 326 U.S. 496 (1946), and victimless crimes by non-Indians." *Id.* at 465 n.2.

In *Worcester*, the Court considered whether a state criminal law that prohibited white men from living in Cherokee territory without a state license was "consistent with, or repugnant to, the Constitution, laws and treaties of the United

States." *Id.* at 541-42. To answer that question, the Court first examined treaties with the Cherokee and the congressional acts passed to regulate trade and intercourse with the Indians, including "especially that of 1802." *Id.* at 556-57. The Act of Mar. 30, 1802 ("1802 Act"), ch. 13, 2 Stat. 139, to which the Court referred, *see Worcester*, 31 U.S. at 540-41, provided for federal jurisdiction over crimes committed by United States citizens or other persons against Indians on Indian land, listed the prosecutable offenses, namely "robbery, larceny, trespass or other crime, against the person or property of any friendly Indian or Indians, which would be punishable, *if committed within the jurisdiction of any state*, against a citizen of the United States," and expressly included the crime of murder of an Indian by a United States citizen or other person. 1802 Act, §§ 4, 6, 15 (emphasis added). The 1802 Act thus made clear that the federal government, not the states, had jurisdiction over crimes committed by non-Indians against Indians in Indian country.

Chief Justice Marshall held for the Court that the states have no such authority absent congressional authorization because "[t]he treaties and laws of the United States contemplate the Indian territory as completely separated from that of the States; and provide that all intercourse with them shall be carried on exclusively by the government of the union," *Worcester*, 31 U.S. at 557. The Chief Justice then turned to the more fundamental question: "[i]s this the rightful exercise of power, or is it usurpation?" *Id.* at 558. In answering this question, the Court compared federal power over Indian affairs under the Articles of Confederation with the text of the Constitution. The Articles had imposed two limitations on the power of Congress

over Indian affairs: that "the Indians not [be] members of any of the States" and "the legislative power of any State within its own limits be not infringed or violated." *Id.* at 558-59. As the Court explained, the limitations set forth in the Articles led to disagreement, as they "were so construed by the states of North Carolina and Georgia as to annul the power itself." *Id.* at 559. The Court held that the

> correct exposition of this article [from which the dispute arose] is rendered unnecessary by the adoption of our existing constitution. That instrument confers on congress the powers of war and peace; of making treaties, and of regulating commerce with foreign nations, and among the several states, and with the Indian tribes. These powers comprehend all that is required for the regulation of our intercourse with the Indians.

Id. As "[t]he whole intercourse between the United States and this nation is, by our Constitution and laws, vested in the government of the United States[,]" *id.* at 561, the Georgia law was void, "as being repugnant to the constitution, treaties, and laws of the United States," *id.* at 562.

As we show next, Congress has consistently exercised this power by making federal jurisdiction exclusive over crimes by non-Indians against Indians on Indian lands, and this Court has consistently recognized and confirmed that federal jurisdiction over such crimes is exclusive.

2. Congress has consistently exercised its Constitutional authority in Indian affairs by enacting statutes under which federal jurisdiction is exclusive over crimes by non-Indians against Indians in Indian country.

Since 1790, Congress has exercised its Constitutional authority in Indian affairs by enacting statutes under which federal jurisdiction is exclusive over crimes by non-Indians against Indians on Indian lands. This Court reviewed several of these

laws in *United States v. Wheeler*, 435 U.S. 313, 324 (1978), beginning with "[t]he first Indian Trade and Intercourse Act, Act of July 22, 1790, § 5, 1 Stat. 138, [which] provided only that the Federal Government would punish offenses committed *against* Indians by 'any citizen or inhabitant of the United States'; it did not mention crimes committed *by* Indians." The 1790 Act also incorporated state or territorial law to define such offenses, and provided that the offender "shall be proceeded against in the same manner *as if the offence had been committed within the jurisdiction of the state or district to which he or they may belong*." *Id.* § 5, 1 Stat. at 138. These terms made clear that the state had no jurisdiction over such offenses. In 1796, the Fourth Congress revised these provisions, listing prosecutable offenses, which expressly included the murder of an Indian by a United States citizen or other person, Act of May 19, 1796, ch. 30, §§ 4, 6, 1 Stat. 469, 470-71, and provided that these offenses were to be prosecuted in federal or territorial courts, *id.* § 15.[6] Those provisions were reenacted in the 1802 Act. 1802 Act, §§ 4, 6, 15. And "[i]n 1817 federal criminal jurisdiction was extended to crimes committed within the Indian country by 'any Indian, or other person or persons,' but 'any offence committed by one Indian against another, within any Indian boundary' was excluded." *Wheeler*, 435 U.S. at 324 (citing Act of Mar. 3, 1817, ch. 92, 3 Stat. 383).

As the *Wheeler* Court explained, in 1834, "Congress enacted the direct progenitor of the [GCA], now 18 U.S.C. § 1152 (1976 ed.), which makes federal enclave

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[6] "When a territorial government enacts and enforces criminal laws to govern its inhabitants, it is not acting as an independent political community like a State, but as 'an agency of the federal government.'" *Wheeler*, 435 U.S. at 321 (quoting *Domenech v. Nat'l City Bank*, 294 U.S. 199, 204-05 (1935)).

criminal law generally applicable to crimes in 'Indian country,'" and in which "Congress carried forward the intra-Indian offense exception." *Id.* at 324-25.[7] "And in 1854 Congress expressly recognized the jurisdiction of tribal courts when it added another exception to the [GCA], providing that federal courts would not try an Indian 'who has been punished by the local law of the tribe.'" *Id.* at 324-25 (quoting Act of Mar. 27, 1854, § 3, 10 Stat. 270). Since the 1854 Act, the GCA has not been substantively amended. And as nothing in its terms confers jurisdiction on the State over crimes by non-Indians against Indians, federal jurisdiction over such crimes is exclusive under the GCA.

In sum, this Court's decision in *Worcester* established that, under the Constitution, Congress has exclusive authority over Indian affairs. In ratifying the Constitution, the states "conferred on [Congress] the exclusive right to regulate commerce or intercourse with the Indians." *Worcester*, 31 U.S. at 590. That remains the law. Congress's authority "to legislate in respect to Indian tribes" is "plenary and exclusive." *United States v. Lara*, 541 U.S. 193, 200 (2004); *Montana v. Blackfeet Tribe*, 471 U.S. 759, 764 (1985) ("The Constitution vests the Federal Government with

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[7] In *Ex Parte Crow Dog*, 109 U.S. 556, 571-72 (1883), this Court construed that exception to be a limitation on federal authority and held that federal jurisdiction did not exist over the murder of an Indian by another Indian in Indian country. Congress reacted, enacting the Major Crimes Act, 18 U.S.C. § 1153, which provides that "within 'the Indian country,' '[a]ny Indian who commits' certain enumerated offenses 'against the person or property of another Indian or any other person' 'shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.'" *McGirt*, 140 S. Ct. at 2459 (alteration in original) (quoting 18 U.S.C. § 1153(a)). The constitutionality of the Major Crimes Act was upheld by this Court in *United States v. Kagama*, 118 U.S. 375 (1886), in which the Court ruled that: "These Indian tribes *are* the wards of the nation. . . . They owe no allegiance to the states, and receive from them no protection. . . . This has always been recognized by the executive, and by congress, and by this court, whenever the question has arisen." *Id.* at 383-84.

exclusive authority over relations with Indian tribes." (first citing U.S. Const. art. I, § 8, cl. 3; then citing *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 670 (1974); and then citing *Worcester*, 31 U.S. at 561)). And under the Constitution, the states are "divested of virtually all authority over Indian commerce and Indian tribes." *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 62 (1996). Furthermore, from the time that the First Congress enacted the 1790 Act up to and including the enactment of the GCA, Congress has made federal jurisdiction exclusive over crimes committed by non-Indians against Indians in Indian country.[8] While the principles of *Worcester* have been modified "[o]ver the years," the

> basic policy of *Worcester* has remained. Thus, suits by Indians against outsiders in state courts have been sanctioned. And state courts have been allowed to try non-Indians who committed crimes against each other on a reservation. *But if the crime was by or against an Indian, tribal jurisdiction or that expressly conferred on other courts by Congress has remained exclusive.*

Williams v. Lee, 358 U.S. 217, 219-20 (1959) (emphasis added) (citations omitted).

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[8] The State argues that "a strong presumption against preemption of state law" applies here, relying on *Wyeth v. Levine*, 555 U.S. 555 (2009), and *Gulf Offshore v. Mobil Oil Corp.*, 453 U.S. 473 (1981). Br. at 20-21. These cases have no application here because, as shown *supra* at 14-16, under the Constitution, Congress has exclusive authority in Indian affairs, the states have been divested of all such authority, and in the absence of express congressional authorization, the State has no jurisdiction over crimes by or against Indians in Indian country. By contrast, the presumption against pre-emption is a "rule of construction that rests on an assumption about congressional intent: that "Congress does not exercise lightly" the "extraordinary power" to "legislate in areas traditionally regulated by the States." *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 14 (2103) (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991)); *see United States v. Locke*, 529 U.S. 89, 108 (2000) ("[A]n 'assumption' of nonpre-emption is not triggered when the State regulates in an area where there has been a history of significant federal presence."). The State also seeks to rely on cases concerning the existence of state civil jurisdiction over non-Indians on Indian reservations. Br. at 21 & 23 n.13. But the rules that apply to determinations of civil jurisdiction, *see Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980); *Montana v. United States*, 450 U.S. 544 (1981), are distinctly different from those that control here. *See supra* at 14-16.

3. This Court's decisions confirm that federal jurisdiction is exclusive over crimes by non-Indians against Indians in Indian country.

The State is also wrong in asserting that "this Court has never squarely confronted the question of whether states lack jurisdiction to prosecute non-Indians who commit their crimes against Indians because of the General Crimes Act." Br. at 15. As just shown, the GCA grants the State no jurisdiction at all. And for over a century, this Court's decisions have consistently recognized and confirmed that federal jurisdiction over crimes committed by non-Indians against Indians in Indian country is exclusive.

In *Donnelly v. United States*, 228 U.S. 243 (1913), the Court rejected the claim that the state acquired such jurisdiction upon statehood. There, a non-Indian was charged with the murder of an Indian within the Hoopa Valley Reservation in California. Relying on *McBratney* and *Draper v. United States*, 164 U.S. 240 (1896), the non-Indian defendant "contended that the admission of California into the Union 'on an equal footing with the original states,' without any express reservation by Congress of governmental jurisdiction over the public lands contained within her borders, conferred upon the state undivided authority to punish crimes committed upon those lands, even when set apart for an Indian reservation, excepting crimes committed by the Indians," *Donnelly*, 228 U.S. at 271. The Court explained that *McBratney* and *Draper* "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." *Id.* At the same time, the Court emphasized that "[i]n 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.* (first citing *McBratney*, 104 U.S. at 624; and then citing *Draper*, 164 U.S. at 247). Turning to that question, the Court held "[u]pon full consideration, we are satisfied that offenses committed by or against Indians are not within the principle of the *McBratney* and *Draper* Cases." *Id.* Thus, *McBratney* offers no support for the State's argument, *see* Br. at 22, that if certiorari is granted, reversal is likely. And, as nothing in the GCA confers jurisdiction on the states, federal jurisdiction over such crimes is exclusive.

In *United States v. Ramsey*, 271 U.S. 467 (1926), the Court confirmed that conclusion. There, two non-Indians were charged under section 2145 of the GCA with murdering an Osage Indian on an Indian allotment. Before turning to consider whether the allotment was Indian country within the meaning of section 2145, the Court made clear that while the authority of the United States to punish crimes not committed by a non-Indian against a non-Indian "was ended by the grant of statehood[,]" *id.* at 559-60 (citing *McBratney* and *Draper*), the United States' "authority in respect of crimes committed by or against Indians continued after the admission of the state as it was before," *id.* at 560 (citing *Donnelly*, 228 U.S. at 271). That was so, the Court explained, "in virtue of the long-settled rule that such Indians are wards of the nation, in respect of whom there is devolved upon the federal government 'the duty of protection and with the power.'" *Id.* (quoting *Kagama*, 118

U.S. at 384). Accordingly, the law remained, "as it was before," that federal jurisdiction over crimes by non-Indians against Indians in Indian country is exclusive.

In *Williams v. United States*, 327 U.S. 711 (1946), this Court also made clear that under the GCA, federal jurisdiction over crimes committed by a non-Indian against an Indian is exclusive. There, a non-Indian was convicted of rape of a female Indian minor on the Colorado River Indian Reservation in Arizona. A federal statute defined the offense to require proof that the victim was under 16 years of age, while Arizona law defined statutory rape as intercourse with a girl under the age of 18. *Id.* at 715-16. Thus, the Court had to decide whether the Assimilative Crimes Act, 18 U.S.C. § 13, incorporated the more lenient Arizona statute into the federal criminal code, making it applicable to the federal prosecution under the GCA. 327 U.S. at 717.[9] Before turning to that question, the Court expressly confirmed that federal jurisdiction over the offense charged was exclusive, holding 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.

[9] The Assimilative Crimes Act incorporates into the federal criminal code offenses defined by the law of the state in which the federal land on which the crime alleged to have occurred is located when no federal statute defines the crime. 18 U.S.C. § 13. In deciding the case, the Court interpreted the federal laws made applicable to Indian country by the GCA to include the Assimilative Crimes Act but did so with little explanation. *See* 327 U.S. at 713-14.

Id. at 714 (footnote omitted).[10] The Court then turned to the question whether the Assimilative Crimes Act made the Arizona statute applicable to the case, holding that it did not because Congress had specifically defined the offense that applied to the acts alleged, and having done so, that offense could not be redefined and enlarged by applying the Assimilative Crimes Act. *Id.* at 717-18.

Accordingly, the State is simply wrong in asserting that "this Court has never squarely confronted the question of whether states lack jurisdiction to prosecute non-Indians who commit their crimes against Indians because of the [GCA]." Br. at 15. "[T]he exclusive criminal jurisdiction of federal and tribal courts under 18 U.S.C. §§ 1152, 1153," *Solem*, 465 U.S. at 467 n.8, is well-recognized, 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 *Martin*, 326 U.S. 496).

Finally, Congress can of course grant states jurisdiction over crimes by non-Indians against Indians in Indian country in the exercise of its plenary authority. It did so in the Kansas Act, which "conferred" on Kansas jurisdiction "over offenses committed by or against Indians on Indian reservations, including trust or restricted

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[10] In arguing otherwise, the State ascribes to the OCCA a position it did not take, namely that the exclusivity of federal jurisdiction over crimes committed by a non-Indian against an Indian under the GCA entirely rests on the words "exclusive jurisdiction of the United States" in the statute. Br. at 18-20. The OCCA said no such thing. It held, rather, that § 1152 "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*, ¶ 23. And that holding comports with settled law. *See Donnelly*, 228 U.S. at 268 ("[T]he words 'sole and exclusive jurisdiction,' as employed in § 2145, Rev. Stat., do not mean that the United States must have sole and exclusive jurisdiction over the Indian country in order that that section may apply to it; the words are used in order to describe the laws of the United States, which, by that section, are extended to the Indian country."); *Wilson*, 140 U.S. at 578 ("The words 'sole and exclusive,' in section 2145 do not apply to the jurisdiction extended over the Indian country, but are only used in the description of the laws which are extended to it.").

allotments, within the State of Kansas, to the same extent as its courts have jurisdiction over offenses committed elsewhere within the State in accordance with the laws of the State." Act of June 8, 1940, ch. 276, 54 Stat. 249 (codified at 18 U.S.C. § 3243). *See Negonsett v. Samuels*, 507 U.S. 99, 103 (1993). But in the absence of an express Congressional grant of jurisdiction over such cases, the State has none. The Kansas Act's conferral of jurisdiction would have served no purpose if Kansas had already possessed concurrent jurisdiction over crimes committed by non-Indians against Indians in Indian country.

Congress has not granted such jurisdiction to Oklahoma. In 1953, Congress enacted Public Law 83-280 ("Pub. L. 280"), the landmark federal statute that authorizes states to exercise civil and criminal jurisdiction in Indian country. *See* Act of Aug. 15, 1953, 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). But Oklahoma has never been authorized to exercise state civil or criminal jurisdiction over the activities of Indians or Indian tribes in Indian country under Pub. L. 280. *Okla. Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114, 125 (1993) (holding that "Oklahoma did not assume jurisdiction pursuant to Pub. L. 280 prior to the law's amendment in 1968," which "added a requirement that the tribes involved consent before a State can assume jurisdiction over Indian country" (which Oklahoma has not obtained either)). In the absence of such a grant, Oklahoma lacks jurisdiction in Indian country, so there is no presumption that state jurisdiction exists.

II. THE STATE WILL NOT SUFFER IRREPARABLE HARM IF A STAY IS NOT ISSUED.

A. The State Will Not Suffer Irreparable Harm Absent A Stay.

The State argues that it may face irreparable harm in two forms. Neither establishes the likelihood of irreparable injury, which is an independently sufficient reason to deny the State's stay request. *See Nken v. Holder*, 556 U.S. 418, 438-39 (2009) (Kennedy, J., concurring); *Ruckelshaus v. Monsanto Co.*, 463 U.S. 1315, 1317 (1983) (Blackmun, J., in chambers); *Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers) (all citing *Whalen*, 423 U.S. at 1316). Nor can the State overcome the great weight which this Court should afford to the OCCA's decision *not* to stay the mandate indefinitely while this Court considers a possible petition for certiorari. *See Holtzman*, 414 U.S. at 1314; *accord Whalen*, 423 U.S. at 1316. Indeed, the OCCA's "intimate familiarity" with the post-conviction proceedings initiated after *McGirt* was decided, as well as the state law governing criminal appeals in Oklahoma, weighs heavily in favor of deferring to its decision and denying the State's instant motion. *See Krause v. Rhodes*, 434 U.S. 1335, 1335 (1977) (Stewart, J., in chambers).

The Nation emphasizes the importance that Bosse must face justice for his crimes, and it will do everything in its power to ensure he does. The Nation has worked steadfastly to this end, *see supra* at 4, and the federal government stands ready to take Bosse into custody and prosecute him once the mandate issues.

That being the case, the State's first basis of alleged injury is not, and cannot be, that Bosse will go free. Rather, the State postulates that if Bosse is transferred to federal custody before this Court rules on the merits, the federal government *may* not transfer him back and he *may* not be executed by the State. *See* Br. at 23-24.

That chain of speculation is patently insufficient to establish irreparable harm justifying a stay; even assuming this speculation constituted cognizable injury: "[S]imply showing some 'possibility of irreparable injury' fails to satisfy the [irreparable harm] factor. . . . [T]he possibility standard is too lenient." *Nken*, 556 U.S. at 434-35 (cleaned up); *accord Certain Named & Unnamed Non-Citizen Children & Their Parents v. Texas*, 448 U.S. 1327, 1333 (1980) (Powell, J., in chambers) (denying motion for stay based on speculation about possible injury contingent on other possible future events).

Moreover, that speculation assumes that, without a stay, a grant of certiorari on a petition not yet filed may result in the federal government subsequently ignoring the Court's order and refusing to transfer him back to state custody. There is no legal basis for that assumption. The longstanding rule is exactly the opposite: This Court presumes that government agents have complied with the law and will continue to do so. *See Cincinnati, New Orleans, & Tex. Pac. Ry. Co. v. Rankin*, 241 U.S. 319, 327 (1916); *Brush v. Ware*, 40 U.S. (15 Pet.) 93, 98 (1841); *Bank of U.S. v. Dandridge*, 25 U.S. (12 Wheat.) 64, 69-70 (1827); *see also Baker v. Carr*, 369 U.S. 186, 250 n.5 (1962) (quoting *Magraw v. Donovan*, 163 F. Supp. 184, 187 (D. Minn. 1958) (three-judge panel)).

The State also speculates about the impacts of *McGirt* on other cases, which it claims constitute irreparable harm. *See* Br. at 11-13, 24-25. Even if the other cases to which it refers were relevant here, this Court earlier rejected the use of such cases to shield the State from the legal consequences of the existence of Indian Reservations

within Oklahoma. *See McGirt*, 140 S. Ct. at 2478-81. The *McGirt* Court considered the potential impacts of its decision and found that "the magnitude of a legal wrong is no reason to perpetuate it." *Id.* at 2480. The same conclusion adheres to the instant motion, which supposes a parade of horribles that reprises those offered by the State in *McGirt*. Moreover, these supposed impacts are too vaguely described to merit a stay. The State's assertion that it is "still attempting to gather more comprehensive data," Br. at 12, does not excuse its failure to show convincing evidence of irreparable harm now.

The State vaguely asserts there are "more than 200 *McGirt*-related claims, of which 50 are post-conviction claims" in one county, but that description does not provide enough detail to analyze the nature, basis, or likelihood of success of the relief sought. Br. at 12. It cites a local media report that "some 400 cases were recently dismissed" in another county, but it is again unclear how the facts, posture, and decisions in those cases relate to this one. *Id.* The hedging language the State uses to offer its rough estimate of the total number of pending post-conviction applications in Eastern Oklahoma raising "*McGirt*-related claims" belies its claim of irreparable harm. *Id.* Its loosely phrased claim that "hundreds of more cases raising these issues are pending" and that the disposition of those cases will be affected if the Court stays the mandate, provides no more cogent explanation to support that claim. *Id.* at 24-25. Even if all those claims were true, they appear to describe the methodical implementation of this Court's *McGirt* ruling, wherein the Court recognized "a decision for *either* party today risks upsetting some convictions," explaining that

"[a]ccepting the State's argument that the [Major Crimes Act] never applied in Oklahoma would preserve the state-court convictions of people like Mr. McGirt, but simultaneously call into question every *federal* conviction obtained for crimes committed on trust lands and restricted Indian allotments since Oklahoma recognized its jurisdictional error more than 30 years ago." 140 S. Ct. at 2480. None of this plausibly rises to the Court's standard for issuing a stay.

Nor does the State provide plausible evidentiary support for its assertion that in "many other" cases, statutes of limitations may preclude federal retrial. Br. at 13. The State only points to nine cases, *see id.* at 13-14 & nn.5-6, where it asserts that the federal government may not attempt to re-convict because of statutes of limitations. Although the State extrapolates from this small number to claim that the statute of limitations problem is widespread, *see id.* at 14, that claim has no sound statistical basis.[11] Also unsupported is the claim that federal and tribal prosecutors will be too overwhelmed to prosecute new offenses. *Id.* at 25. In fact, one of the very sources the State cites indicates the opposite—that federal prosecutors are handling the unusual workload and referring cases to tribal prosecutors who are also doing

[11] And two of the cases cited—*Worthington v. State*, No. PC-2020-744 (Okla. Ct. Crim. App. filed Oct. 22, 2020), and *Mitchell v. State*, No. PC-2020-675 (Okla. Ct. Crim. App. filed Oct. 1, 2020)—are not subject to a federal statute of limitations at all. The petitioner in *Worthington*, the State's prime example, was convicted of, *inter alia*, first-degree rape, and there is no federal statute of limitations for rape. *See* 18 U.S.C. §§ 2241-2242, 3299. The petitioner in *Mitchell* was convicted of first-degree murder. The State acknowledges that there is no federal statute of limitations for murder but only baselessly speculates that the federal government would not re-convict him. Br. at 14 n.5. Additionally, the petitioners in these cases are all Indians who were convicted of and imprisoned for *Major Crimes Act* offenses. *See* 18 U.S.C. § 1153. (The petitioner in *Doak v. State*, No. PC-2020-698 (Okla. Ct. Crim. App. filed Oct. 9, 2020), was also convicted of assault with intent to kill and robbery, and he is currently serving sentences for those offenses. *See* https://bit.ly/3ubJD6v.) So, even if the Court were to grant certiorari on the question of state jurisdiction under the *GCA*—which is unlikely—this case would not affect those nine cases.

their jobs. *See* Br. at 16 (citing Curtis Killman, *Supreme Court Ruling Affects More Than 800 'Indian Country' Criminal Cases in Oklahoma So Far*, Tulsa World (Oct. 29, 2020), https://bit.ly/2Sczh87).

Notably, the OCCA has already found that arguments like these do not justify a stay, both in this case, and another GCA case arising in the Chickasaw Nation. *Jones v. State*, No. F-2017-1309 (Okla. Ct. Crim. App. Apr. 22, 2021). The OCCA decided *Jones* on April 22, 2021, vacating the state conviction of a non-Indian for crimes committed against Indians. On April 23, 2021, the State sought a stay in *Jones*, relying on the temporary stay of mandate in *Bosse*, the State's intention of filing a petition for certiorari in *Jones*, and the assertion that this Court is likely to grant certiorari in *Bosse* or *Jones* because "there are likely thousands of [GCA] convictions at stake" in Oklahoma that could be affected by the disposition of the questions on which the State will seek certiorari. Br. in Supp. of Mot. to Stay Mandate for Good Cause Pending Cert. Review at 5, https://bit.ly/3xP9Rhi. On April 30, 2021, the OCCA denied a stay, reasoning that "a stay is unnecessary in this case" because "[s]hould the State's claim result in a favorable decision at the United States Supreme Court . . . . [w]e anticipate that . . . Appellant's State convictions will be reinstated pending further appeals." Order Denying Mot. to Stay Mandate at 3, https://bit.ly/3uroMfE. The OCCA's stay decision in *Jones* provides yet another reason not to issue an indefinite stay in this case. *See Holtzman*, 414 U.S. at 1314; *Whalen*, 423 U.S. at 1317; *Krause*, 434 U.S. at 1335.

Aside from the lack of sufficient evidentiary support for these claims, and the rejection of similar claims by the OCCA, the State's assertions all depend on the incorrect premise that a stay of the mandate in this case would control the disposition of other cases. However, the stay the State seeks will only affect this case. The Court's stay authority is limited to "any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari," in which case the Court may stay "the execution and enforcement of *such judgment*." 28 U.S.C. § 2101(f) (emphasis added). *Accord* Supreme Court Rule 23.2 ("A party to a judgment sought to be reviewed may present to a Justice an application to stay the enforcement of that judgment."). And since other cases in Oklahoma are governed by this Court's decision in *McGirt*, not the OCCA's decision here, staying the OCCA's mandate could not affect the outcome of other cases.

This is shown by recent developments before the OCCA. As discussed, in the *Jones* case, the OCCA did not stay the mandate to issue despite the recall and stay of mandate in this case. Since staying the mandate here, the OCCA has vacated convictions in cases arising on other Reservations where the State lacked jurisdiction under the GCA, without staying mandates beyond the twenty-day period required by the OCCA's Rules. *See, e.g.*, *Cole v. State*, 2021 OK CR 10; *Ryder v. State*, 2021 OK CR 11; *McDaniel v. State*, No. F-2017-357 (Okla. Ct. Crim. App. Apr. 29, 2021) (unpublished). The OCCA has done so on the basis that *McGirt*, not *Bosse*, compels the outcome in those cases. *See, e.g.*, *Ryder*, ¶¶ 7, 21-22, 29; *Cole*, ¶¶ 4, 9, 19. And

the State has separately sought a stay in each of those individual cases.[12] So it is simply not true that a stay of the mandate in this case will also freeze other post-*McGirt* Indian country jurisdiction cases. Since the status quo in those cases will not be affected by the issuance of the mandate in this case, the pendency of those cases provides no basis on which to issue a stay in this one. *See June Med. Servs., L.L.C. v. Gee*, 139 S. Ct. 663, 663 (2019) (Kavanaugh, J., dissenting).

Finally, modifying the OCCA's limited stay below would have adverse impacts on the Nation's ongoing efforts to implement *McGirt* through intergovernmental negotiations. Those negotiations, which we discuss in more depth below, are best served by limited timelines that provide clarity, certainty, and incentive to complete agreements. That also counsels against issuing the stay the State has requested here.

B. Inter-Sovereign Cooperation Is Best Served By The OCCA's Limited Stay.

The *McGirt* opinion rejected reliance on the State's speculative parade of horribles—of the very sort it has again assembled here—by concluding that, although there was a "potential for cost and conflict around jurisdictional boundaries . . . Oklahoma and its Tribes have proven they can work successfully together as partners" by negotiating intergovernmental agreements to resolve jurisdictional questions in a "spirit of good faith, 'comity and cooperative sovereignty.'" 140 S. Ct.

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[12] *See* Mot. to Stay Mandate for Good Cause Pending Cert. Review, *Cole v. State*, 2021 OK CR 10 (filed Apr. 29, 2021) (No. PCD-2020-529), https://bit.ly/3tq0fpY; Mot. to Stay Mandate for Good Cause Pending Cert. Review, *Ryder v. State*, 2021 OK CR 11 (filed Apr. 29, 2021) (No. PCD-2020-613), https://bit.ly/3ervlsS; Mot. to Stay Mandate for Good Cause Pending Cert. Review, *McDaniel v. State*, No. F-2017-357 (Okla. Ct. Crim. App. filed Apr. 29, 2021), https://bit.ly/2SzMsAj.

at 2481; *see id.* at 2481 n.16. That is precisely what the Nation has sought to do, both before and since the OCCA issued its decision.

The Nation began work months ago in anticipation of its Reservation's affirmation, in accord with this Court's ruling in *McGirt*. As part of that work, we have completed extensive reforms of our criminal code and increased our investments in police, prosecutors, and our court system. This ongoing work builds not only on our existing governmental capacities but also on the existing network of intergovernmental agreements we have entered for purposes of providing for public safety and effective law enforcement.

The Nation, with other tribal and former state official amici, discussed much of this pre-*Bosse* work in amicus briefs to the Court in *McGirt* and *Sharp*. *See* Br. of *Amicus Curiae* David Boren, et al., in Supp. of Resp't at 13-23, *Sharp v. Murphy*, 140 S. Ct. 2412 (2020) (per curiam) (17-1107); Br. of *Amicus Curiae* Tom Cole, et al., in Supp. of Pet'r at 13-23, *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020) (18-9526). Among those efforts specific to criminal jurisdiction, the Nation is party to a master cross-deputation agreement providing for the commissioning of State and Tribal officers as Federal law enforcement within Indian country. *See* Deputation Agreement (filed with Oklahoma Secretary of State on Jan. 23, 2006), https://bit.ly/3eSvapm; Tribal Addendum, Addition of Tribe to Deputation Agreement for Law Enforcement in the Chickasaw Nation (Apr. 24, 2006), https://bit.ly/2St8nZP. Similarly, Oklahoma statute authorizes Chickasaw Nation Lighthorse to act as Oklahoma law enforcement, as necessary, throughout our reservation, Okla. Stat. tit. 21, § 99a(D),

and the Nation issues Tribal commissions to non-Tribal police operating within our reservation, allowing them to enforce Tribal law when needed. This intergovernmental network of complementary cross-commissioning arrangements helps to ensure that front-line law enforcement have the jurisdictional authorizations needed to timely act in the interest of public safety.

The same day the OCCA issued the opinion below, Chickasaw Nation Governor Bill Anoatubby issued a formal Proclamation, which declared, *inter alia*, that *McGirt* and the State court rulings that followed have "affirm[ed] what we have always known: The Chickasaw people continue, and so too does our treaty homeland." Proclamation from the Office of the Governor of the Chickasaw Nation (Mar. 11, 2021), https://bit.ly/3vQGyJc. The Proclamation directed Chickasaw Nation Executive Department officials "to conduct the Nation's affairs relating to criminal law enforcement in accord with our having a recognized reservation and a sovereign interest in public safety throughout our treaty homeland," *id.* at 2, and ever since, we have redoubled our intergovernmental law enforcement work.

Our police are now coordinating closely with other area agencies. Since the OCCA's opinion and the Governor's Proclamation, our prosecutors have filed charges against nearly 250 persons, against whom State charges had to be dismissed or dropped. Federal prosecutors have likewise brought charges against numerous other such persons, and we are presently working with the State to co-host a plenary law enforcement and prosecution meeting to further foster effective communication and cooperation in this multi-jurisdictional context.

Implementation of the *McGirt* decision's correction of earlier jurisdictional errors requires serious, concerted, and collaborative work among *all* governments within our Reservation. Our ongoing efforts notwithstanding, the reallocation of subject matter prosecutorial jurisdiction has of course presented short-term challenges. This first wave of transitional challenges relates to the handling of cases already in the system, i.e., arrests or charges previously made within the State's criminal justice system that should have been brought in federal and/or Tribal systems. But these hurdles are best overcome by the sort of work the Nation and other *amici* described in our filings in *Murphy* and *McGirt*—i.e., robust and respectful intergovernmental work. The best environment for this work is not an indefinite stay, leading to a meritless certiorari petition. Rather, as the Nation explained to the OCCA, this work is facilitated by a reasonable and predictable schedule for the issuance of mandates in individual criminal cases. That was facilitated by the OCCA's decision to issue a limited stay in light of the application of the state law factors for the issuance of stays of mandate. That course of action has imposed no harm on the State and will not going forward, either. This work provides a further reason to defer to the OCCA's decision to issue a limited stay. *See Holtzman*, 414 U.S. at 1314; *Whalen*, 423 U.S. at 1316.

No daylight separates the Chickasaw Nation, the State of Oklahoma, and the United States in our commitment to the public's safety and to effective law enforcement. We are acting on that commitment in robust and respectful coordination with willing state and federal partners and will continue to do so.

CONCLUSION

The State's application for a stay should be denied.

Respectfully submitted,

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