

No. 18-9526

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IN THE

**Supreme Court of the United States**

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JIMCY MCGIRT,  
*Petitioner,*

v.

STATE OF OKLAHOMA,  
*Respondent.*

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**On Writ of Certiorari to the  
Court of Criminal Appeals of the  
State of Oklahoma**

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**BRIEF OF AMICI CURIAE TOM COLE, BRAD  
HENRY, GLENN COFFEE, MIKE TURPEN,  
NEAL MCCALED, DANNY HILLIARD,  
MICHAEL STEELE, DANIEL BOREN,  
T.W. SHANNON, LISA JOHNSON BILLY,  
THE CHICKASAW NATION, AND THE  
CHOCTAW NATION OF OKLAHOMA  
IN SUPPORT OF PETITIONER**

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## INTEREST OF AMICI CURIAE<sup>1</sup>

Amici are a former Governor, state Attorney General, cabinet members, and legislators of the State of Oklahoma, and two federally recognized Indian tribes, the Chickasaw Nation and Choctaw Nation of Oklahoma (“amici Nations”), *see* 85 Fed. Reg. 5462, 5465 (Jan. 30, 2020). Amici have hands-on experience in resolving jurisdictional issues that arise in every-day business and social relations and in the delivery of governmental services by state, local, and tribal authorities in eastern Oklahoma. Their practical understanding of such issues, coupled with their commitment to principles of comity, have produced tribal-state agreements that govern a myriad of relationships, such as the taxation of motor fuel and tobacco, the conduct of Indian gaming, the policing of their communities, and the funding of badly-needed transportation projects, among others.

Amici’s leadership experience in this complex area uniquely qualifies them to demonstrate how cooperation between tribal and state officials in the exercise of sovereign authority in eastern Oklahoma has served their citizens well. Charles “Brad” Henry<sup>2</sup> served as Governor of Oklahoma. The Honorable Thomas “Tom”

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<sup>1</sup> Pursuant to Rule 37.6 of the Rules of this Court, counsel for Amici states that no counsel for a party authored this brief in whole or in part, and that no person or entity other than Amici and their counsel made any monetary contribution to the preparation or submission of this brief. Petitioner and Respondent have consented to the filing of this brief.

<sup>2</sup> Mr. Henry was Governor from 2003-2011. He also served in the Oklahoma Senate from 1992-2003, and was chair of the Judiciary Committee and vice-chair of the Economic Development Committee. He is currently an attorney in private practice.

Cole,<sup>3</sup> United States Representative, and Glenn Coffee<sup>4</sup> both served as Oklahoma Secretary of State. Congressman Cole held that position during the administration of Governor Frank Keating, when many of the foundational tribal-state agreements were negotiated. Michael “Mike” Turpen served as Attorney General of Oklahoma and as District Attorney for Muskogee County, Oklahoma.<sup>5</sup> Neal McCaleb served as Oklahoma Secretary of Transportation, and as Director of the Oklahoma Department of Transportation and the Oklahoma Turnpike Authority,<sup>6</sup> and in

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<sup>3</sup> Congressman Cole served as Secretary of State from 1995-1999, after serving in the Oklahoma Senate from 1988-1991. He has represented the fourth congressional district in the United States House of Representatives since 2003. His district covers a portion of the Chickasaw Nation’s Reservation. He is a citizen of the Chickasaw Nation.

<sup>4</sup> Mr. Coffee served as Secretary of State from 2011 to 2013. He served in the Oklahoma Senate from 1999 to 2011 and was President Pro Tempore from 2009-2011. He is currently an attorney in private practice.

<sup>5</sup> Mr. Turpen was Attorney General from 1983 to 1987. Before that, he served in the Office of the District Attorney for Muskogee County, Oklahoma, including as District Attorney from 1977 to 1983, and as Police Legal Advisor in the Muskogee City Police Department. Muskogee City and County are within the boundaries of the Creek Reservation. He also served as a member of the Oklahoma State Regents for Higher Education from 2009 to 2018. He is currently an attorney in private practice.

<sup>6</sup> Mr. McCaleb served as Secretary of Transportation from 1987-1991, and again from 1995-2001, during which time he concurrently served as Director of the Department of Transportation and as Director of the Turnpike Authority. He served in the Oklahoma House of Representatives from 1975-1983, and was House Minority Leader from 1979-1983. He served as Assistant Secretary of the Interior—Indian Affairs, United States Department of the Interior, from 2001-2002. Mr. McCaleb has been the Chickasaw Nation’s Ambassador-at-Large

those capacities worked extensively on joint state and tribal funding of transportation projects. Other amici served in the Oklahoma legislature, and in that capacity approved a number of agreements negotiated by the State and the Nations to resolve jurisdictional issues. Former Speaker Pro Tempore Danny Hilliard served in the Oklahoma House of Representatives when the Oklahoma tribes and the State developed a legislative solution to the taxation of tobacco and motor fuel sales in Indian country in Oklahoma.<sup>7</sup> Mr. Hilliard, former Speaker Michael “Kris” Steele,<sup>8</sup> and Daniel “Dan” Boren,<sup>9</sup> all served in the Oklahoma House when the State developed its model Indian

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to the United States since 2013 and is the Chairman and Director of Chickasaw Nation Industries, Inc., a Chickasaw Nation-owned corporation that promotes tribal economic development. He is a citizen of the Chickasaw Nation.

<sup>7</sup> Mr. Hilliard served in the Oklahoma House of Representatives from 1990-2004, and was Speaker Pro Tempore from 2003-2004, as well as House Majority Leader and Chairman of the Subcommittee on Appropriations. He served as Executive Officer and Vice President for External Relations and Planning for the University of Oklahoma from 2004-2015. He is currently Vice President of Corporate Development and Tourism for the Chickasaw Nation.

<sup>8</sup> Mr. Steele served in the Oklahoma House of Representatives from 2001-2013. He was Speaker from 2011-2012 and Speaker Pro Tempore from 2009-2011. He served on the Oklahoma Pardon and Parole Board from 2017-2019.

<sup>9</sup> Mr. Boren served in the Oklahoma House of Representatives from 2002-2004. From 2005-2013, he represented Oklahoma’s second congressional district—which includes a significant portion of Eastern Oklahoma and the Five Tribes’ Reservations—in the United States House of Representatives. From 2013-2019, he served as President of Corporate Development for the Chickasaw Nation. He is currently President and Chief Banking Officer – Oklahoma for First United Bank.

gaming compact. Each also served in the Oklahoma House when the State negotiated numerous cross-deputization agreements and motor vehicle licensing compacts with Oklahoma tribes, as did former House Speaker Tahrohon Wayne “T.W.” Shannon<sup>10</sup> and Lisa Johnson Billy.<sup>11</sup>

Amici’s interest is in showing that cooperation and comity in the exercise of tribal and state sovereign authority in Oklahoma have produced agreements that benefit all Oklahomans. For more than two decades, the Nations’ sovereign authority within their Reservations and commitment to the cooperative exercise of that authority have provided the framework for the negotiation of agreements that provide legal certainty, economic stability, and a better quality of life for all Oklahomans. For that record of success to continue, the framework on which it relies must also endure.

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<sup>10</sup> Mr. Shannon served in the Oklahoma House of Representatives from 2007-2015, and was Speaker from 2013-2014, and Chairman of the Transportation Committee. He is currently President of Bank2, a full-service bank owned by the Chickasaw Nation. Mr. Shannon is a citizen of the Chickasaw Nation.

<sup>11</sup> Ms. Billy served as Oklahoma’s first Secretary of Native American Affairs from February to December 2019. She served in the Oklahoma House of Representatives from 2004-2016, and sat on the Joint Committee on State-Tribal Relations, which reviews tribal-state agreements, including cross-deputization agreements, gaming compacts, and motor vehicle licensing compacts. She served in the Chickasaw Nation Tribal Legislature from 1996-2002 and from 2016 to the present. She is a citizen of the Chickasaw Nation.

## SUMMARY OF ARGUMENT

The amici Nations’ exercise of sovereignty on their respective Reservations, like that of the Muscogee (Creek) Nation (“Creek Nation”), has been good for Oklahoma. In one area after another—taxation, gaming, motor vehicle registration, law enforcement, and water rights—the Nations’ sovereignty within their Reservations and the State’s recognition of that sovereignty have provided the framework for the negotiation of inter-governmental agreements that benefit all Oklahomans. That success will continue if the Tenth Circuit’s carefully considered conclusion in *Murphy v. Royal*, 875 F.3d 896 (10th Cir. 2017) (as amended), is sustained by the Court in this case. Conversely, if Petitioner’s conviction is reversed on grounds that could lead to the conclusion that the Creek Reservation, and even that other Reservations in Oklahoma, no longer exist, it will unravel the decades-in-the-making fabric of inter-governmental agreements that have served Oklahoma and its economy well and that have enhanced meaningful tribal self-determination. We call on the Court to protect the on-the-ground success of state-tribal relations in Oklahoma.

## ARGUMENT

### **I. OKLAHOMA’S AND THE NATIONS’ NEGOTIATED APPROACH TO SETTLING JURISDICTIONAL ISSUES ON THEIR RESERVATIONS BENEFITS ALL OKLAHOMANS.**

This case need not be resolved in a manner that would disrupt the settled relations between the State, Tribes, and local governments that are governed today by state-tribal agreements in civil matters. The only question raised by the proceedings in the Oklahoma courts below concerns the continued legal significance

of the Creek Nation’s Reservation boundaries for purposes of enforcing criminal law. That issue is properly resolved by deciding whether the crimes for which Petitioner was prosecuted occurred in “Indian country,” as defined in 18 U.S.C. § 1151(a), which turns on whether the Creek Reservation has been diminished, and if so, to what extent. Petitioner and the Creek Nation have comprehensively addressed these questions. These questions submit no issue to this Court concerning the civil regulatory or adjudicatory jurisdiction of the Creek Nation, or of any other of the so-called “Five Civilized Tribes;”<sup>12</sup> nor do they call on the Court to consider any question specific to any other of the Five Tribes’ legal histories, sovereign rights, and boundaries, or Congress’s actions in their regard.<sup>13</sup> As

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<sup>12</sup> The “Five Civilized Tribes” are the Creek, Cherokee, Seminole, Choctaw, and Chickasaw Nations. *Morris v. Watt*, 640 F.2d 404, 408 n.9 (D.C. Cir. 1981) (citing *Harjo v. Kleppe*, 420 F. Supp. 1110, 1119 (D.D.C. 1976)). We refer to these tribes collectively as the “Five Tribes.”

<sup>13</sup> The Court has recognized that the amici Nations’ treaties reserved to them governmental power over their Reservations. *Morris v. Hitchcock*, 194 U.S. 384, 389, 393 (1904) (holding that Chickasaw Nation’s legislative power – reserved by the same treaties that reserved Choctaw Nation legislative power – survived allotment and the Curtis Act). This case contains no record of the Chickasaw and Choctaw Nations’ treaties that would justify a review of that conclusion or the principles on which it relied. See *Solem v. Bartlett*, 465 U.S. 463, 470 (1984) (“it is settled law that some surplus land acts diminished reservations, and other surplus land acts did not” and “[t]he effect of any given surplus land act depends on the language of the act and the circumstances underlying its passage”); *Nebraska v. Parker*, 136 S. Ct. 1072, 1079-82 (2016) (looking to the unique and specific

these legal and historical components are integral to the success of state-tribal relations today, the future of those relations depends on their continuing vitality.

The limited nature of the criminal jurisdiction question presented notwithstanding, Amici are cognizant that Respondant may seek to exaggerate the impact on civil jurisdiction in eastern Oklahoma of a decision acknowledging the Indian country status of the land where the offense occurred. Respondent, then Petitioner, did so in *Sharp v. Murphy*, No. 17-1107, as did its supporting amici. Such concerns would be misplaced for two reasons. First, the framework for deciding the extent of tribal civil jurisdiction is starkly different from that which determines criminal jurisdiction in Indian country,<sup>14</sup> and speculation about the results of its application offers no insight into the question presented here. Second, the ground-level facts that exist today show that the Creek and the amici Nations have long exercised their sovereignty in a manner that accommodates state and local government interests, enhances economic and social stability, and protects the rights of non-tribal citizens. On

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statutory text, historical evidence, and subsequent treatment of reservation to determine diminishment); *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202 (1999) (rights secured by a particular treaty understood with reference to the specific negotiations that produced the treaty).

<sup>14</sup> While the Indian country status of land is relevant to tribal civil jurisdiction, see *DeCoteau v. Dist. Cty. Ct.*, 420 U.S. 425, 427 n.2 (1975), the existence of tribal civil jurisdiction over non-Indians is determined under a different framework that cannot be applied in the abstract because its application depends on the facts on the ground, see *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 330 (2008); *Montana v. United States*, 450 U.S. 544, 565-66 (1981); *Williams v. Lee*, 358 U.S. 217, 219-21 (1959).



a virtually daily basis, tribal-state inter-governmental agreements produce positive results in numerous areas for Indians and non-Indians throughout Oklahoma. As the Court weighs its decision in this case, the existence and effect of those agreements – and the importance of the framework on which they rely – should be considered as well.

**A. The Nations Provide Governmental Programs and Services Throughout their Reservations.**

Like the Creek Nation, the amici Nations provide governmental services throughout their Reservations that benefit Indians and non-Indians. To do so, the amici Nations rely on their treaty rights and inherent sovereign authority, which they exercise under their respective constitutions. Both amici Nations hold their Reservations under treaty with the United States, *see* Treaty of Dancing Rabbit Creek, Sept. 27, 1830, 7 Stat. 333 (“1830 Treaty”), which secured “a tract of country west of the Mississippi River” to the Choctaw Nation to “exist as a nation and live on it,” *id.* art. 2, and the “jurisdiction and government” over “all the persons and property” within that Reservation, *id.* art. 4. The Chickasaw Nation secured rights to a portion of that Reservation “on the same terms that the Choctaws now hold it, except the right of disposing of it, (which is held in common with the Choctaws and Chickasaws)” under the Treaty of Doaksville, art. 1, Jan. 17, 1837, 11 Stat. 573. *See Okla. Tax Comm’n v. Chickasaw Nation*, 515 U.S. 450, 465 n.15 (1995). The 1830 Treaty “provide[s] for the [Nations’] sovereignty within Indian country.” *Id.* at 466.<sup>15</sup>

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<sup>15</sup> The Nations’ 1830 Treaty rights were reaffirmed in the 1855 Treaty of Washington, arts. 1, 7 June 22, 1855, 11 Stat. 611

The amici Nations exercise their inherent and retained sovereignty under constitutions approved by the Secretary of the Interior that describe each Nation's territory by reference to treaty-defined boundaries. Chickasaw Const. pmb.;<sup>16</sup> Choctaw Const. art. I, § 2.<sup>17</sup> The Chickasaw Nation governs within the boundaries described in the 1855 and 1866 Treaties. Chickasaw Const. pmb. Legislative authority is vested in a Tribal Legislature, elected from districts that are also defined with reference to the Reservation's boundaries. *Id.* art. VI, §§ 1, 3. Adjudicatory authority is held by the Tribal Justice System. *Id.* amend. V, § 1. The Tribal District Court has territorial jurisdiction over "all territory described as Indian Country within the meaning of Section 1151 of Title 18 of the United States Code over which the Chickasaw Nation has authority." Chickasaw Nation Code tit. 5, § 5-201.3.<sup>18</sup> And the Chickasaw Supreme Court has appellate jurisdiction "coextensive with the Chickasaw Nation." Chickasaw Const. amend. V, § 4.

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("1855 Treaty"). By that treaty, a Chickasaw district was established within the Choctaw Reservation, although the Nations' common ownership of the Reservations remained in force. *Id.* arts. 2, 3. The Nations later entered into the 1866 Treaty of Washington, Apr. 28, 1866, 14 Stat. 769 ("1866 Treaty"), in which they "cede[d] to the United States the territory west of the 98[th meridian]," *id.* art. 3, modifying only the Reservations' western boundary, and their rights of self-government were reaffirmed, *id.* art. 7, as were their rights under prior treaties, *id.* arts. 10, 45.

<sup>16</sup> Available at [https://chickasaw.net/getattachment/Our-Nation/Government/Chickasaw-Constitution/CN\\_Constituion\\_Amended\\_2002.pdf.aspx?lang=en-US](https://chickasaw.net/getattachment/Our-Nation/Government/Chickasaw-Constitution/CN_Constituion_Amended_2002.pdf.aspx?lang=en-US).

<sup>17</sup> Available at [https://www.choctawnation.com/sites/default/files/import/Constitution\\_1983.pdf](https://www.choctawnation.com/sites/default/files/import/Constitution_1983.pdf).

<sup>18</sup> Available at <https://code.chickasaw.net/Title-05.aspx>.

Likewise, the Choctaw Nation exercises its Treaty right of self-government within the boundaries set forth in the 1855 Treaty. Choctaw Const. art. I, § 2. Legislative authority is vested in a Tribal Council elected from districts that are also defined by reference to the Reservation boundaries. *Id.* art. VIII, §§ 1, 2. Judicial authority is vested in the Judicial Department, *id.* arts. XII, XIII, and the Choctaw Nation’s courts have “general civil and criminal jurisdiction over all tribal Indian Country as described in Article I, Section 2” of the Choctaw Constitution, *see* Choctaw Nation, Res. CB-65-2009, § 1.101 (Apr. 11, 2009).<sup>19</sup>

The amici Nations provide governmental services throughout their Reservations that ensure a civil society and on which Indians and non-Indians rely in their daily lives in numerous ways. Public safety throughout the Reservations is protected by the police department that each Nation maintains.<sup>20</sup> Healthcare services are provided to the public – both Indian and non-Indian – through a network of tribally-run hospitals, clinics, and health centers.<sup>21</sup> Each Nation provides educational services and programs that meet

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<sup>19</sup> Available at <https://www.choctawnation.com/sites/default/files/Court%20of%20General%20Jurisdiction%20Establishment.pdf>

<sup>20</sup> *See, e.g., Lighthorse Police*, Chickasaw Nation, <https://www.chickasaw.net/Our-Nation/Government/Lighthorse-Police.aspx> (last accessed Feb. 5, 2020).

<sup>21</sup> *Health Facilities*, Choctaw Nation, <https://www.choctawnation.com/tribal-services/health-services/health-facilities> (last accessed Feb. 5, 2020); *Chickasaw Nation Medical Center*, Chickasaw Nation, <https://www.chickasaw.net/Our-Nation/Locations/Chickasaw-Nation-Medical-Center.aspx> (last accessed Feb. 5, 2020).

a variety of needs and that include childcare and early childhood programs,<sup>22</sup> family support services,<sup>23</sup> summer programs, adult education, High School Equivalency certification,<sup>24</sup> vocational rehabilitation programs,<sup>25</sup> a residential learning center for Native American students,<sup>26</sup> and a Choctaw language school.<sup>27</sup> The Nations also provide services that focus on the problems that demand priority in today's world, such as substance abuse recovery, family violence prevention and family preservation,<sup>28</sup> and the operation and

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<sup>22</sup> *Chickasaw Nation Early Childhood and Head Start Program*, Chickasaw Nation, <https://www.chickasaw.net/Services/Chickasaw-Nation-Early-Childhood-and-Head-Start-Program.aspx> (last accessed Feb. 5, 2020); *Early Childhood*, Choctaw Nation, <https://www.choctawnation.com/tribal-services/education/early-childhood> (last accessed Feb. 5, 2020).

<sup>23</sup> *Chokka Chaffa' (One Family)*, Chickasaw Nation, [https://www.chickasaw.net/Services/Chokka-Chaffa%EA%9E%8C-\(One-Family\).aspx](https://www.chickasaw.net/Services/Chokka-Chaffa%EA%9E%8C-(One-Family).aspx) (last accessed Feb. 5, 2020).

<sup>24</sup> *Adult Learning Program*, Chickasaw Nation, <https://www.chickasaw.net/Services/Adult-Learning-Program.aspx> (last accessed Feb. 5, 2020).

<sup>25</sup> *Vocational Rehabilitation*, Chickasaw Nation, <https://www.chickasaw.net/Services/Vocational-rehabilitation.aspx> (last accessed Feb. 5, 2020).

<sup>26</sup> *About Jones Academy*, Choctaw Nation, <https://www.choctawnation.com/about-jones-academy> (last accessed Feb. 5, 2020); Jones Academy, <https://jonesacademy.org/> (last accessed Feb. 5, 2020).

<sup>27</sup> *School of Choctaw Language*, Choctaw Nation, <https://www.choctawnation.com/tribal-services/education/school-choctaw-language> (last accessed Feb. 5, 2020).

<sup>28</sup> *Children & Family Services*, Choctaw Nation, <https://www.choctawnation.com/tribal-services/member-services/children-family-services> (last accessed Feb. 5, 2020); *Family Preservation*, Choctaw Nation, <https://www.choctawnation.com/family-preservation> (last accessed Feb. 5, 2020).

staffing of domestic violence shelters and a group home for Native American children in need.<sup>29</sup>

Amici Nations also exercise sovereign authority under various federal statutes that target specific problems. The Chickasaw Nation maintains a sex offender registry under the Adam Walsh Child Protection and Safety Act, 34 U.S.C. § 20912(a).<sup>30</sup> See Chickasaw Code tit. 17, § 17-201.6.<sup>31</sup> The amici Nations and the Creek Nation also participate in the Tribal Access Program for National Crime Information, which gives tribes “the ability to access and exchange data with national crime information databases for both criminal and non-criminal justice purposes.”<sup>32</sup> More broadly, under Coordinated Tribal Assistance Solicitation grants awarded to the amici Nations and the Creek Nation by the United States Department of Justice in 2018, the Nations fund law enforcement programs to expand community policing, prevent and prosecute violence against Native women, combat

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<sup>29</sup> *Chickasaw Children’s Village*, Chickasaw Nation, <https://www.chickasaw.net/Services/Chickasaw-Children-s-Village.aspx> (last accessed Feb. 5, 2020).

<sup>30</sup> Indian tribes are “jurisdictions” under the Act, *see id.* § 20911(10)(H), if, like the Chickasaw Nation, they elect to maintain a sex offender registry, *id.* § 20929(a)(1)(A).

<sup>31</sup> Available at <https://code.chickasaw.net/Title-17.aspx>.

<sup>32</sup> Press Release, Office of Pub. Affairs, Dep’t of Justice, Thirty Tribes Selected for Expansion of Program Enhancing Tribal Access to National Crime Information Databases (Dec. 16, 2019), available at <https://www.justice.gov/opa/pr/thirty-tribes-selected-expansion-program-enhancing-tribal-access-national-crime-information>; U.S. Dep’t of Justice, TAP-FULL and TAP-LIGHT Tribes, available at <https://www.justice.gov/file/1001376/download>; *see* Tribal Access Program (TAP), U.S. Dep’t of Justice, [https://www.justice.gov/tribal/tribal-access-program-tap?utm\\_medium=email&utm\\_source=govdelivery](https://www.justice.gov/tribal/tribal-access-program-tap?utm_medium=email&utm_source=govdelivery) (last accessed Feb. 5, 2020).

alcohol and substance abuse, and enhance tribal justice systems.<sup>33</sup> Both amici Nations also receive Indian Child Welfare Act grants to operate Indian child and family service programs on or near their Indian country. 25 U.S.C. §§ 1903(10), 1931(a).

The amici Nations' operation of these programs and services protects public safety, enhances community health and well-being, and prepares children for a bright future, all of which ultimately benefits all eastern Oklahomans. The Nations undertake these governmental operations pursuant to their longstanding and comprehensive conception of tribal sovereignty, which, as expressed in their modern constitutions, is based on boundaries established by treaty. As we discuss next, these and other tribal sovereign functions are exercised within the context of cooperative relationships with the State, built on mutual recognition of, and respect for, state and tribal sovereignty.

**B. The Amici Nations, the Creek Nation, and the State Have Consistently Resolved Issues of Concern Within the Reservations by Inter-Governmental Agreement.**

The State has consistently recognized the Creek and amici Nations' sovereignty in clear terms that provide the foundation for their relations. State policy is to

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<sup>33</sup> Press Release, Office of Pub. Affairs, Dep't of Justice, Justice Department Will Award Up to \$246 Million in Grants to Improve Public Safety in American Indian and Alaska Native Communities (Sept. 19, 2018), *available at* <https://www.justice.gov/opa/pr/justice-department-will-award-246-million-grants-improve-public-safety-american-indian-and>; Dep't of Justice, *Department of Justice Coordinated Tribal Assistance Solicitation FY 18 Combined Award List* 15, 17 (2018), *available at* <https://www.justice.gov/tribal/page/file/1095161/download>.

“recognize[] the unique status of Indian tribes within the federal government and . . . work in a spirit of cooperation with all federally recognized Indian tribes in furtherance of federal policy for the benefit of both the State of Oklahoma and tribal governments.” Okla. Stat. tit. 74, § 1221(B). The Oklahoma Governor and Oklahoma political subdivisions may “negotiate and enter into cooperative agreements” with Indian tribes in the state “to address issues of mutual interest.” *Id.* §§ 1221(C)(1), (D)(1). And in managing tribal-state relations, several Oklahoma agencies rely on a state-produced map that describes the Reservation boundaries of the Creek and amici Nations’—among others—as the bounds of their jurisdiction.<sup>34</sup>

State law also recognizes the Creek and amici Nations’ authority to adjudicate disputes within their Reservations. Rule 30(B) of the Rules for District Courts of Oklahoma, Okla. Stat. tit. 12, ch. 2, App., R. 30(B), provides that

[t]he district courts of the State of Oklahoma shall grant full faith and credit and cause to be enforced any tribal judgment where the tribal court that issued the judgment grants reciprocity to judgments of the courts of the State of Oklahoma, provided, a tribal court judgment shall receive no greater effect or full faith and credit under this rule than would a

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<sup>34</sup> See Planning & Research Div., Okla. Dep’t of Transp., *Tribal Jurisdictions in Oklahoma* (2010), available at [http://www.okladot.state.ok.us/maps/tribal/2010\\_Tribal\\_Jurisdiction\\_Map.pdf](http://www.okladot.state.ok.us/maps/tribal/2010_Tribal_Jurisdiction_Map.pdf); *Office of Tribal Liaison*, Okla. State Dep’t of Health, [https://www.ok.gov/health/Organization/Partnerships\\_for\\_Health\\_Improvement/Office\\_of\\_Tribal\\_Liaison/](https://www.ok.gov/health/Organization/Partnerships_for_Health_Improvement/Office_of_Tribal_Liaison/) (last accessed Feb. 5, 2020) (under “Overview” section, follow “Tribal Jurisdiction Map” hyperlink).

similar or comparable judgment of a sister state.

*See Barrett v. Barrett*, 878 P.2d 1051, 1054 (Okla. 1994). Under this Rule, the State has extended full faith and credit to judgments of all of the Five Tribes. *See Full Faith and Credit of Tribal Courts*, Okla. State Cts. Network, <http://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=458214> (Apr. 18, 2019).

Negotiations between the State and Indian tribes—including the amici Nations and the Creek Nation—based on these principles have been successful in a number of areas, replacing jurisdictional standoffs with jurisdictional solutions. The State and the amici Nations, for example, negotiated Tobacco Tax Compacts that recognize that under federal law Indian tribes have inherent sovereign rights to pass their own laws and be governed by them<sup>35</sup> and that solve problems through the exercise of that sovereignty. Under these Compacts, each Nation agrees to purchase cigarettes and other tobacco products only from a list of state-licensed wholesalers provided by the State, *e.g.*, Chickasaw-Okla. Tobacco Tax Compact art. II, §§ 2-3, and in lieu of a state tax being levied on tobacco products sold by the Nations on land owned by

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<sup>35</sup> Chickasaw-Okla. Tobacco Tax Compact, art. 1 (Oct. 31, 2013), *available at* <https://www.sos.ok.gov/documents/filelog/89572.pdf>; Choctaw-Okla. Tobacco Tax Compact (Nov. 4, 2013), *available at* <https://www.sos.ok.gov/documents/filelog/89578.pdf>. The State first negotiated tobacco compacts with the Five Tribes in the mid-1990s, and the State and tribes have successfully re-negotiated their compacts several times since then. The State and the Five Tribes engaged in several such re-negotiations during amicus Brad Henry's administration. *See New Oklahoma Tobacco Compacts a Step in the Right Direction*, Oklahoman (Aug. 27, 2014), *available at* <https://newsok.com/article/5336005/new-oklahoma-tobacco-compacts-a-step-in-the-right-direction>.



either Nation or its citizens, the State agrees to share with the Nation a “Compact Payment” equal to the state tax on that product, *id.* §§ 7-8. Thus, the Nations and the State both benefit from this commerce – on clear, specific, and mutually respectful terms.

So too with motor fuel. After this Court held that Oklahoma could not tax the Nations’ motor fuel sales in Indian country, *Chickasaw Nation*, 515 U.S. at 455-56, the State enacted a law to “limit[] litigation” by “allow[ing] both the State of Oklahoma and the Indian tribes to benefit from tax revenues from sales of motor fuel on Indian country” under “mutually beneficial agreements.” Okla. Stat. tit. 68, § 500.63(A)(4).<sup>36</sup> Tribes that enter such agreements agree to include state taxes in their motor fuel sales in “Indian country,” including sales to members, *id.* § 500.63(C)(1), and in exchange receive a portion of those taxes, *id.* § 500.63(C)(2)-(3), which must be used for certain governmental purposes, *id.* § 500.63(C)(5). The amici Nations and the Creek Nation have all entered into such agreements.<sup>37</sup>

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<sup>36</sup> The need for this legislation arose from the potential loss of millions of dollars of motor fuel taxes—which Mr. McCaleb addressed while serving as Transportation Secretary. *See Transportation Head Disputes Tribe’s Figures*, Oklahoman (Feb. 10, 1996), available at <https://newsok.com/article/2530731/transportation-head-disputes-tribes-figures>.

<sup>37</sup> Chickasaw Nation-Okla. Motor Fuels Contract (Sept. 26, 1996), available at <https://www.sos.ok.gov/documents/filelog/50348.pdf>; Choctaw Nation-Okla. Motor Fuels Contract (Sept. 30, 1996). The Muscogee (Creek) Nation did not sign a formal motor fuels contract, but rather accepted the State’s terms by tribal resolution. Muscogee (Creek) Nation, Resolution No. TR 97-19 (Sept. 27, 1997), available at <https://www.sos.ok.gov/documents/filelog/51327.pdf>.

Gaming is also conducted by tribal-state agreement. Since 1994, the amici Nations have engaged in Indian Gaming Regulatory Act (“IGRA”) Class III Gaming on Indian lands on their Reservations under Gaming Compacts with the State, *see* 25 U.S.C. § 2710(d)(1)(C), and their tribal codes. They, and the Creek Nation, currently do so under Gaming Compacts formed by their acceptance of the State’s model compact, *see* Okla. S.B. 1252, § 22 (May 19, 2004) (“Model Compact”),<sup>38</sup> which acknowledges that each Tribal Nation is a “federally recognized tribal government possessing sovereign powers and rights of self-government,” that Indian gaming revenues support tribal governmental programs, and related economic development in Oklahoma that “extend[s] beyond the

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<sup>38</sup> Available at <https://www.sos.ok.gov/documents/questions/712.pdf>. The Nations’ past and present gaming compacts are available at *Indian Gaming Compacts*, Office of Indian Gaming, U.S. Dep’t of Interior, <https://www.bia.gov/as-ia/oig/gaming-compacts> (last accessed Feb. 5, 2020) (select “Oklahoma” under “US State” and then select “Apply”). Amici Danny Hilliard, Dan Boren, and Kris Steele all voted on the bill establishing the Model Compact, and amicus Mr. Steele participated in the floor debate. Marie Price, *House OKs Gaming Bill*, *Tulsa World* (Feb. 27, 2004), available at [https://www.tulsaworld.com/archives/house-oks-gaming-bill/article\\_8fcb4ce1-ba86-5aeb-bfa9-292a236f929b.html](https://www.tulsaworld.com/archives/house-oks-gaming-bill/article_8fcb4ce1-ba86-5aeb-bfa9-292a236f929b.html); Carolyn McCoy & Lesa Jolly-Borin, Okla. State Regents for Higher Educ., *Legislative Update: 49th Oklahoma Legislature Second Session–2004 1* (Feb. 27, 2004), available at <https://www.okhighered.org/leg-info/2004/Update-02-27-04.pdf>. Amicus Brad Henry signed the bill and was Governor when it was approved in a public referendum. Rhett Morgan, *Tenth Anniversary of Oklahoma’s Tribal Gaming Compact Celebrated*, *Tulsa World* (Nov. 18, 2014), available at [https://www.tulsaworld.com/communities/catoosa/news/tenth-anniversary-of-oklahoma-s-tribal-gaming-compact-celebrated/article\\_56e17719-f7c9-5e83-89a5-0b4668f37bbf.html](https://www.tulsaworld.com/communities/catoosa/news/tenth-anniversary-of-oklahoma-s-tribal-gaming-compact-celebrated/article_56e17719-f7c9-5e83-89a5-0b4668f37bbf.html).

tribe’s lands. . . .”<sup>39</sup> Unsurprisingly, the parties’ political and financial investment in gaming does sometimes lead to disagreements, *see Cherokee Nation v. Stitt*, No. 5:19-cv-01198-D (W.D. Okla. filed Dec. 31, 2019),<sup>40</sup> but no party disputes that tribes in Oklahoma operate IGRA gaming in the exercise of their sovereign powers to self-government and that all of Oklahoma benefits from tribal gaming.

Motor vehicle registration and license tags for the amici Nations’ citizens are also governed by Compacts that recognize the amici Nations’ “inherent sovereign powers of self-government, as secured by and under federal law.”<sup>41</sup> Under these Compacts the amici Nations design Tribe-specific license tags for their members that the State reviews and approves, *e.g.*, Choctaw-Okla. Motor Vehicle Compact, art. II, § 2, and then makes available to eligible amici Nation members, *id.* § 5. And the State remits to each amici Nation 85% of the “basic fees, taxes . . . penalties, and fines” that would go to the State if it produced the tags. *Id.* § 9. The amici Nations and the Creek Nation have also negotiated numerous highway improvement agree-

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<sup>39</sup> Model Compact, pt. 2(1), (5)-(6).

<sup>40</sup> In *Cherokee Nation v. Stitt*, the Governor of Oklahoma and the amici Nations are currently litigating whether the Model Compact signed by the Creek Nation, amici Nations, and the other Oklahoma gaming tribes, is still in effect. *See* Aaron Brillbeck, *House, Senate Records Show Gaming Compacts Automatically Renew*, News9 (Jan. 15, 2020), *available at* <https://www.news9.com/story/41570013/house-senate-records-show-gaming-compacts-automatically-renew>.

<sup>41</sup> *See* Choctaw-Okla. Motor Vehicle Registration & License Tag Compact, art. I (Sept. 2, 2014), *available at* <https://www.sos.ok.gov/documents/filelog/90157.pdf>; Chickasaw-Okla. Motor Vehicle Registration & License Tag Compact, art. I (Oct. 23, 2014), *available at* <https://www.sos.ok.gov/documents/filelog/90185.pdf>.

ments with the Oklahoma Department of Transportation<sup>42</sup> that provide, for example, funding for an interchange on Interstate 35 in Chickasaw territory,<sup>43</sup> cost sharing for resurfacing highways in Choctaw territory,<sup>44</sup> signage for the Rising Water Ancient Mountains Scenic Byway,<sup>45</sup> and the construction and funding of roads and transportation-related tourism attractions in the Creek Nation.<sup>46</sup>

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<sup>42</sup> Prior to 2012, the State and tribes entered into these agreements under Okla. Stat. tit. 74, § 1221. However, H.B. 2564 (Apr. 19, 2012), which was supported by amici T.W. Shannon, Danny Hilliard, and Lisa Johnson Billy, *see House Votes*, H.B. 2564, Okla. House of Reps., [http://webserver1.lsb.state.ok.us/cf/2011-12%20SUPPORT%20DOCUMENTS/votes/House/HB2564\\_VOTES.HTM](http://webserver1.lsb.state.ok.us/cf/2011-12%20SUPPORT%20DOCUMENTS/votes/House/HB2564_VOTES.HTM) (last accessed Feb. 6, 2020), streamlined the agreement process by exempting some transportation agreements signed after 2012 from § 1221, meaning that they no longer needed to be approved by the legislature's Joint Committee on State-Tribal Relations to become effective. *See* Okla. Stat. tit. 74, § 1221(C)(1), (D)(5).

<sup>43</sup> Memo. of Agreement Between Chickasaw Nation & Okla. (Aug. 18, 2011), *available at* <https://www.sos.ok.gov/documents/filelog/87955.pdf>.

<sup>44</sup> Agreement Between Choctaw Nation of Okla. & Okla. (Aug. 8, 2008), *available at* <https://www.sos.ok.gov/documents/filelog/87967.pdf>; Intergovernmental Project & Funding Agreement By & Between Okla. Dep't of Transp., & Choctaw Nation of Okla. (Sep. 24, 1998), *available at* <https://www.sos.ok.gov/documents/filelog/87964.pdf>.

<sup>45</sup> Chickasaw Nation-Okla. Scenic Byways Project Agreement (Aug. 19, 2011), *available at* <https://www.sos.ok.gov/documents/filelog/87956.pdf>.

<sup>46</sup> Memo. of Agreement Between Muskogee (Creek) Nation & Muskogee Cty., Okla. (Dec. 10, 2015), and Memo. of Agreement Between Muskogee (Creek) Nation & Okfuskee Cty., Okla. & Okmulgee Cty., Okla. (Dec. 10, 2015), *both available at* <https://www.mcn-nsn.gov/wp-content/uploads/2019/01/MCN-Transportation-Department-Agreements.pdf>; Muskogee (Creek) Nation-

As these agreements show, the Creek and amici Nations' exercise of sovereign authority accommodates the State's jurisdiction on terms which protect both tribal and state interests in, and authority over, eastern Oklahoma. In a number of areas, comity and cooperative sovereignty, manifested through inter-governmental agreements, generate tax revenues that allow the Nations and the State to provide high-quality essential governmental services throughout their Reservations, which furthers the interests of both the Nations and the State. In other areas, the amici Nations' overriding interest is in providing an economic environment that will attract and keep industry to the region, i.e., the oil and gas industry in eastern Oklahoma, which the amici Nations have declined to regulate or tax.<sup>47</sup>

The amici Nations' cooperation with the State and local governments also enhances policing on their Reservations by avoiding jurisdictional confusion and providing clear lines of authority for law enforcement

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Okla. King Coal Depot Tourist Info. Ctr. & Transp. Museum Agreement (Sept. 6, 2007), *available at* <https://www.sos.ok.gov/documents/filelog/87962.pdf>.

<sup>47</sup> Notwithstanding each amici Nation's long-standing and federally approved constitutions affirming territories that are co-extensive with treaty-defined reservation boundaries, neither of the amici Nations has enacted laws or otherwise sought to regulate or tax oil and gas production on any land within their boundaries. *See Tribal Codes*, Choctaw Nation, <https://www.choctawnation.com/government/judicial-branch/tribal-codes> (last accessed Feb. 10, 2020) (providing links to Choctaw laws), with no oil and gas code; Chickasaw Code tit. 15, ch. 5, *available at* <https://code.chickasaw.net/Title-15.aspx> ("Oil and Gas" chapter reserved with no provisions); Muscogee Code tit. 43, *available at* <http://www.creeksupremecourt.com/wp-content/uploads/title43.pdf> ("Oil and Gas" title reserved with no provisions).

to act when necessary. Under state law, tribal police who have been commissioned by the Bureau of Indian Affairs (“BIA”) and certified by the Council on Law Enforcement Education and Training (“CLEET”) “shall have state police powers to enforce state laws” on fee land owned by an Indian tribe, or in Indian country. Okla. Stat. tit. 21, § 99a(D).<sup>48</sup> The amici Nations and Creek Nation have also negotiated dozens of cross-deputization agreements with municipalities on their Reservations.<sup>49</sup> Under these agreements, trib-

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<sup>48</sup> Amicus Lisa Johnson Billy authored the bill that amended § 99a to include this provision for tribal officers, *see* Okla. H.B. 1871 (May 13, 2013), and amicus T.W. Shannon voted for it, *House Votes*, H.B. 1871, Okla. House of Reps., [http://webserver1.lsb.state.ok.us/cf/2013-14%20SUPPORT%20DOCUMENTS/votes/House/HB1871\\_VOTES.HTM](http://webserver1.lsb.state.ok.us/cf/2013-14%20SUPPORT%20DOCUMENTS/votes/House/HB1871_VOTES.HTM) (last accessed Feb. 6, 2020). Amicus Kris Steele earlier co-authored a bill, Okla. S.B. 1208 (Mar. 30, 2004), signed by amicus Brad Henry, making it easier for cross-deputized tribal police to obtain CLEET certification. *See Week in Review*, Okla. Sen., [http://www.oksenate.gov/news/week\\_in\\_review/week\\_in\\_review\\_2004/wir2004030104.html](http://www.oksenate.gov/news/week_in_review/week_in_review_2004/wir2004030104.html) (last accessed Feb. 6, 2020); Travis Snell, *New Oklahoma Law Makes CLEET Certification Easier for Marshals*, Cherokee Phoenix (July 9, 2004, 9:09 AM); *available at* <https://www.cherokee-phoenix.org/Article/index/549>.

<sup>49</sup> *See Tribal Compacts and Agreements*, Okla. Sec’y of State, <https://www.sos.ok.gov/gov/tribal.aspx> (last accessed Feb. 5, 2020) (type “deputization” in “Doc Type” bar and select “Submit”); Tony Choate, *Lighthorse, Narcotics Bureau Ink Cross-Deputization*, Chickasaw Times 1, 27 (June 2007) (reporting comments of amici T.W. Shannon and Lisa Johnson Billy on a Chickasaw-Oklahoma cross-deputization agreement), *available at* <http://www.nancyhanks.lincolnpublishing.com/user/image/018-chickasaw-times-june-2007.pdf>; *see also* D.E. Smoot, *County and Creek Law Enforcers Approve Agreement*, Muskogee Phoenix (June 11, 2017), [http://www.muskogee-phoenix.com/news/county-and-creek-law-enforcers-approve-agreement/article\\_4d5539fe-69ca-586b-9411-a1a34266a7be.html](http://www.muskogee-phoenix.com/news/county-and-creek-law-enforcers-approve-agreement/article_4d5539fe-69ca-586b-9411-a1a34266a7be.html).

al law enforcement officers commissioned by the BIA can enforce federal law in Indian country, and if also commissioned by a municipality, can enforce state and local law within that jurisdiction. This *reduces* jurisdictional confusion at the most important level, namely on the street, and in so doing enhances public safety.

The State and the amici Nations also recently settled a dispute over the Nations' rights to water on their Reservations. *See* State of Okla., Choctaw, Chickasaw, City of Okla. City Water Settlement (Aug. 2016) ("Settlement").<sup>50</sup> The Settlement addresses water appropriation and use in the "Settlement Area," defined as bounded by the South Canadian River, the Oklahoma-Texas state line, the Oklahoma-Arkansas state line, and the 98th meridian—that is, the Nations' Reservations. *See* Settlement § 1.58 (defining Settlement Area), 1866 Treaty, art. 3 (defining patent boundaries); *see also* Settlement § 2.1.1.5 (referencing treaties as source of Nations' claims). Congress approved the Settlement, *see* Water Infrastructure Improvements for the Nation Act of 2016, Pub. L. No. 114-322, § 3608, 130 Stat. 1628, 1796-1814, and that Act expressly recognizes the boundaries of the Settlement Area, *id.* § 608(b)(18), 130 Stat. at 1798-99.

Under the Settlement, the State issues permits and administers water rights in the Settlement Area, Settlement § 5.1, on terms that "enhance water availability for use within the Settlement Area, to support recreation, [and] fish and wildlife needs," *see id.* §§ 5-6, and the Nations secured their rights to existing uses of water and to appropriate water in the future, *id.* § 7. Rather than maximizing their water demand, the

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<sup>50</sup> Available at <https://www.waterunityok.com/media/1075/agreement-160808.pdf>.

Nations' approach benefits all water users. Indeed, the Settlement expressly affirms as a shared policy objective, "a common interest in in the long-term sustainability of Settlement Area Waters," which amici Nations and the State pledge to pursue through coordinated resource planning and study efforts for their mutual benefit throughout the Settlement Area. Settlement at § 9.1.2. The Settlement further seeks to implement cooperation on shared sovereign interests through the establishment of a Settlement Commission responsible for evaluating and providing the threshold report on any proposed out-of-state use of Settlement Area Waters, *id.* §§ 5.3.3.2, 5.3.3.3, and by establishing a Water Preservation Infrastructure Fund, which is to be comprised of any revenues that may be derived from an approved out-of-state use of Settlement Area Waters and expended only for purposes of jointly valued projects, i.e., water and wastewater infrastructure throughout the State, *id.* § 5.3.3.5.1, with an express prioritization for projects "located within or serving the Settlement Area," *id.* § 5.3.3.5.2.4.

The regulation of water quality in eastern Oklahoma pursuant to federal law is also done cooperatively. Section 10211 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users of 2005, Pub. L. No. 109-59, 119 Stat. 1144, 1937, requires that when the EPA approves Oklahoma state environmental regulatory plans under federal environmental laws, it must also approve Oklahoma's authority to administer the program in Indian country. *Id.* § 10211(a). And EPA may grant a Tribe in Oklahoma "treatment as a state" to regulate water quality under the provisions of the Clean Water Act, 33 U.S.C. § 1377(e), or the Safe Drinking Water Act, 42 U.S.C. §§ 300j-11(a), (b)(1), 300h-1(e), only if the State and Tribe have entered a cooperative agree-



ment, approved by EPA, to jointly administer the program. Pub. L. No. 109-59, § 10211(b)(2), 119 Stat. at 1937.

In sum, the Nations' sovereignty protects and advances, not hinders, the interests the Nations share with the State, local governments, and non-Indians in eastern Oklahoma in strengthening Oklahoma's economy and improving quality of life for Indians and non-Indians alike. To the extent that the Respondent or its supporting amici may urge otherwise in arguing that the judgment of the court below should be affirmed, that argument should be rejected. And the framework that has made tribal-state relations in Oklahoma so successful should be protected.

### CONCLUSION

The judgment of the Court of Criminal Appeals of the State of Oklahoma should be reversed.

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