

No. 21-704

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IN THE  
**Supreme Court of the United States**

STATE OF OKLAHOMA,  
*Petitioner,*

v.

SAMANTHA ANN PERALES,  
*Respondent.*

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

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

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## INTEREST OF *AMICUS*<sup>1</sup>

*Amicus* Cherokee Nation (“Nation”) is a federally-recognized Indian tribe, residing on a reservation in Oklahoma. Under the Treaty of New Echota, Dec. 29, 1835, 7 Stat. 478, the Nation ceded its lands east of the Mississippi, art. 1, in exchange for its Reservation, *id.* art. 2 (incorporating Treaty with the Western Cherokee, Feb. 14, 1833, 7 Stat. 414), on which it was guaranteed self-government under federal supervision, *id.* art. 5; see 1866 Treaty of Washington with the Cherokee, art. 31, July 19, 1866, 14 Stat. 799.<sup>2</sup> The Oklahoma Court of Criminal Appeals (“OCCA”) upheld the existence of the Reservation, *Hogner v. State*, 2021 OK CR 4, analyzing the Nation’s unique history and treaties in light of *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020). The State did not seek certiorari in *Hogner*—in fact, the State once accepted *Hogner* as settling the Reservation’s existence. On the Cherokee Reservation, the Nation protects public safety and prosecutes Indian offenders in the exercise of its inherent sovereignty, *United States v. Wheeler*, 435 U.S. 313 (1978); *United States v. Lara*, 541 U.S. 193 (2008), and in fulfillment of its responsibilities under *Hogner*.

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<sup>1</sup> No counsel for a party authored this brief in whole or in part. No one other than the Nation made a monetary contribution to fund preparation or submission of this brief. The parties’ counsels of record received notice of the Nation’s intent to file more than ten days before the date for filing and consented thereto.

<sup>2</sup> The boundaries of the Reservation established by the 1833 Treaty, the 1835 Treaty, and an 1838 fee patent to the Nation were modified by the 1866 Treaty, arts. 16, 17, 21, and the Act of Mar. 3, 1893, ch. 209, § 10, 27 Stat. 612, 640-43. See Pet’r’s App. 17a-41a, *Oklahoma v. Spears*, No. 21-323.

The Nation has fundamental interests in protecting the treaty promises under which the Nation, as the sole tribal signatory of those treaties, resides on and governs the Reservation. Even before *Hogner* was decided the Nation began a comprehensive enhancement of its criminal justice system and redoubled coordination with other governments. That effort continues today in accordance with *Hogner* and the Nation's laws.

Now, however, Oklahoma seeks reconsideration and reversal of *McGirt*, declaring it is wrong and challenging the OCCA's decisions upholding the United States' treaty promises to the Nation. To protect those rights, the Nation turns again to this Court—as it has before, *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832)—and submits this brief to show that certiorari should be denied, to protect the Nation's rights and the rule of law on its Reservation.

**SUMMARY OF ARGUMENT**

The petition should be denied for three reasons.<sup>3</sup> First, *McGirt* has been implemented successfully on the Cherokee Reservation by the Nation and the federal government. A balanced and accurate description of how the Nation is addressing *McGirt* debunks the State's argument that *McGirt* is unworkable. Second, the State waived its right to seek reversal of *McGirt* or the termination of the Cherokee Reservation by not challenging the Reservation's existence in the court below and by expressly accepting it in other cases. And this case has since become moot. Finally, the State provides no basis for discarding *McGirt* or rejecting the OCCA's decision recognizing the Cherokee Reservation. *McGirt* has provided a workable standard that the courts below properly applied, the facts and law underlying the *McGirt* decision have not changed, and the opinion was a well-reasoned one that has established reliance interests by the governments implementing it.

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<sup>3</sup> To state its argument against *McGirt* in this case, the State seeks to incorporate its attack on *McGirt* from its petition in *Oklahoma v. Castro-Huerta*, No. 21-429 ("*Castro-Huerta* Pet."), see Pet. 6-7. The Nation responds here to that argument, mindful that the Court may not accept the State's practice, which hangs attacks on all Five Tribes' Reservations on a Cherokee Reservation case and diverts attention from the OCCA's analyses of the Cherokee Reservation's status in its published decisions, *Hogner; Spears v. State*, 2021 OK CR 7, 485 P.3d 873.

## REASONS FOR DENYING THE PETITION

### I. The State's Supposed Practical Impacts are Non-Issues.

The State claims that *McGirt* caused criminal justice issues that justify revisiting that decision, but those supposed issues are either non-existent or overblown. The tribal and federal judicial systems are capably managing the jurisdictional changes effected by *McGirt* and the OCCA's follow-on cases recognizing the Reservations of the other Five Tribes (collectively, "Nations"). Their success is evidenced by their efficient use of increased resources to prosecute those crimes and the State's reduced need for such resources. *McGirt* anticipated that shift, noting "it doesn't take a lot of imagination to see how things could work out in the end." 140 S. Ct. at 2480. Here, the Nation illustrates how the transition is being made in an orderly way that protects the public and that the Nation is confident will be successful for all stakeholders.

Even before *McGirt* was decided, the Nation began preparations to exercise criminal jurisdiction throughout its Reservation. Those preparations accelerated after *McGirt* and came to fruition after *Hogner*. In response to those rulings, Principal Chief Chuck Hoskin Jr. committed the Nation to "building up the largest criminal justice system in our tribe's history in record speed . . . to provide a blanket of protection within the Cherokee Nation Reservation for all citizens." Michael Overall, *The Cherokee Nation's Budget Will Hit a Record \$3 Billion as the*

*Tribe Responds to COVID and McGirt*, Tulsa World (Sept. 15, 2021) (“Overall”)<sup>4</sup>.

The Nation is meeting that commitment. Last fiscal year, the Nation spent \$10 million to expand its justice system, including seating two new district court judges, appointing six new prosecutors, and hiring additional victim advocates. *See* Press Release, Cherokee Nation, Cherokee Nation Files 1000th Case in Tribal Court Following McGirt Ruling (June 7, 2021).<sup>5</sup> This fiscal year, the budgets for the Nation’s court system, Attorney General’s office, and Marshal Service more than doubled. *See* Overall. The Nation is also opening two new courts, *see* Samantha Vicent, *Cherokee Nation Highlights Expansion of Legal System on Anniversary of McGirt Ruling*, Tulsa World (updated Aug. 30, 2021),<sup>6</sup> which will add to the well-established Cherokee Nation courts at the W.W. Keeler Tribal Complex, *see* Curtis Killman, *Here’s How Cherokee Tribal Courts Are Handling the Surge in Cases Due to the McGirt Ruling*, Tulsa World (updated July 22, 2021).<sup>7</sup>

This effort significantly relies on local cooperation. The Nation has entered into agreements with counties under which defendants are housed in adult or juvenile detention facilities while they await trial or serve their sentences. *Id.* Those agreements benefit both signatories. As the director of the Cherokee Nation Marshall Service (“CNMS”) explains:

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<sup>4</sup> <https://bit.ly/3apJHaj>

<sup>5</sup> <https://bit.ly/3v1g6NX>

<sup>6</sup> <https://bit.ly/3uXpJxf>

<sup>7</sup> <https://bit.ly/3FscfOK>

The jails have the same people still in them. The only difference is that the tribe pays for the Native Americans in the jail. The jails aren't being overcrowded because of this. Quite frankly, the jails are getting more benefit now, because before McGirt, they had these people in the jails, but the tribe wasn't paying \$42 [per inmate] a day to the jail.

Grant D. Crawford, *CN Marshal Service Rises to Challenge of McGirt*, Tahlequah Daily Press (May 7, 2021) (alteration in original) (“Crawford”).<sup>8</sup> Such agreements are not uncommon—the City of Tulsa has one with the County of Tulsa. See Drake Johnson, *Tulsa County Jail to be Used for City Jail Overflow*, Newson6 (Oct. 4, 2021 5:32 PM).<sup>9</sup>

The Nation has also continued its long-standing policy of entering into cross-deputization agreements with other governments on the Reservation, under which local and state law enforcement may enforce tribal law and tribal law enforcement may enforce local and state law by signing a uniform cross-deputization agreement and filing it with the Oklahoma Secretary of State. Tribal Addendum: Addition of Tribe to Deputation Agreement for Law Enforcement in Cherokee Nation (Apr. 27, 2006).<sup>10</sup> Before *McGirt*, the Nation had entered twenty-one agreements with over fifty municipalities, counties, and local and state agencies in the Reservation. As of

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<sup>8</sup> <https://bit.ly/3mFbx8g>

<sup>9</sup> <https://bit.ly/3vz2DNy>

<sup>10</sup> <https://bit.ly/3jKkYm6>

filing, the Nation has entered into fifty-nine more such agreements since *McGirt* was decided.<sup>11</sup>

The Nation has also entered into agreements with municipalities on the Reservation, whereby the Nation donates revenue from fines and fees paid for tribal law traffic and misdemeanor citations and retains a modest fee equal to the assessment that would be paid to the State if the citation were issued off-Reservation.<sup>12</sup> See Chad Hunter, *Cherokee Nation Marshals, Attorneys Dealing with McGirt Fallout*, Cherokee Phoenix (July 19, 2021);<sup>13</sup> Janelle Stecklein, *Tribes Talk About Intergovernmental Agreements with State Following McGirt Ruling*, Tahlequah Daily Press (Oct. 11, 2021).<sup>14</sup>

The Nation hopes for similar tribal-state agreements and supports Congressman Tom Cole’s proposed legislation that would allow the State and Nation to negotiate tribal-state compacts to define state and tribal criminal jurisdiction within the Reservation. See Cherokee Nation and Chickasaw Nation Criminal Jurisdiction Compacting Act of 2021,

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<sup>11</sup> See *Tribal Compacts and Agreements*, Okla. Sec’y of State, <https://bit.ly/3FRTqoq> (last visited Dec. 9, 2021) (enter “Cherokee” into “Doc Type” searchbar and press “Submit”). The State’s *amici* speculate against these agreements’ effectiveness, see ODAA Amicus Br. at 16-17, *Oklahoma v. Castro-Huerta*, No. 21-429, which is defeated by the Nation’s quarter-century of experience with dozens of such agreements.

<sup>12</sup> Municipal agreements are available on Cherokee Nation’s website. See *Legal Status of the Cherokee Nation Reservation*, Cherokee Nation Att’y Gen.’s Office, <https://bit.ly/3qMdZ0n> (last visited Dec. 9, 2021) (follow hyperlinks under “Municipal Agreements”).

<sup>13</sup> <https://bit.ly/3mJZM0a>

<sup>14</sup> <https://bit.ly/3pgZ7qh>

H.R. 3091, 117th Cong. (2021). However, Oklahoma’s Governor opposes it because it would acknowledge the existence of Indian Reservations. Reese Gorman, *Cole Encourages State-Tribal Relations Over State Challenges to McGirt*, Norman Transcript (July 23, 2021).<sup>15</sup> In contrast, Oklahoma’s former elected Attorney General accepted *McGirt*, see Press Release, Office of Okla. Att’y Gen., Attorney General Hunter Prepares Brief with Court of Criminal Appeals Seeking Guidance on Cases Affected by the McGirt Decision (last visited Oct. 20, 2021),<sup>16</sup> and sought to implement it by “working with federal and tribal partners to make sure criminals are still being arrested and prosecuted,” Mike Hunter, Okla. Att’y Gen., *Frequently Asked Questions Related to McGirt v. Oklahoma and the Proposed Legislative Framework Document 1* (n.d.).<sup>17</sup> The new Attorney General, recently appointed by the Governor, is staunchly opposed to acknowledging or implementing *McGirt*, Joe Tomlinson, *Promised Land Recap: AG O’Connor Focused on Challenging SCOTUS Reservation Ruling*, NonDoc (Sept. 17, 2021).<sup>18</sup> Nevertheless, the Nation still engages with willing state partners. Shortly after *McGirt* was decided, the Nation entered into an agreement with the State Department of Human Services which recognizes the Nation’s Reservation and permits the State and Nation to exercise concurrent jurisdiction over Indian child custody matters on the Reservation. See Intergovernmental Agreement Between Okla. & Cherokee Nation Regarding Jurisdiction over Indian

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<sup>15</sup> <https://bit.ly/3ANKfBx>

<sup>16</sup> <https://bit.ly/3n4S9Si>

<sup>17</sup> <https://bit.ly/3vuPc1l>

<sup>18</sup> <https://bit.ly/3FOnJMG>

Children Within the Nation's Reservation (Sept. 1, 2020).<sup>19</sup> The Nation is also negotiating with the Oklahoma Department of Mental Health and Substance Abuse to reach a mutually beneficial agreement to provide additional resources for mental health treatment on the Reservation.

The Nation has also revised its laws to aid an orderly criminal justice transition by amending or enacting provisions that track state law. *See Tribal Code*, Cherokee Nation Office of Att'y Gen. (last visited Dec. 9, 2021).<sup>20</sup> That includes new traffic, criminal, and juvenile codes that define offenses and crimes similarly to state law. Cherokee Nation Code tits. 10A,<sup>21</sup> 21,<sup>22</sup> 47.<sup>23</sup> The Nation also amended its statute of limitations, so that the limitation period tolls when the State initiated prosecution but then dismissed a prosecution or conviction for lack of jurisdiction. Cherokee Nation Code tit. 22, §§ 154-155.<sup>24</sup>

These investments are delivering justice daily. As of December 6, 2021, the Nation had prosecuted 2,773 felony and misdemeanor cases since the *Hogner* ruling.<sup>25</sup> These arrests and prosecutions are being undertaken with a respect for the rule of law and the needs of the entire community: “We protect the tribe, we protect the community,’ [CNMS Director] said . . . ‘You’ll hear a lot in the media about the world coming

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<sup>19</sup> <https://bit.ly/2Z2KWdA>

<sup>20</sup> <https://bit.ly/3APtTsl>

<sup>21</sup> <https://bit.ly/3FttVZI>

<sup>22</sup> <https://bit.ly/3DTe6dQ>

<sup>23</sup> <https://bit.ly/3G5nKfw>

<sup>24</sup> <https://bit.ly/2Xj23XA>

<sup>25</sup> Documentation is on file with the Nation.

to an end,' . . . . 'It really isn't.'" Crawford. The role that tribal justice systems play in punishing criminals rebuts the notion, repeated by Oklahoma, *see Castro-Huerta* Pet. 20, that the federal government's declination of cases results in criminals going free. As the outgoing United States Attorney for the Northern District of Oklahoma explained:

[S]ome of those cases that people were describing as declinations were actually cases that were being referred to tribal attorneys general to be prosecuted. And I think that when a tribal attorney general decides to prosecute a case that's actually a great exercise of tribal sovereignty and [the] tribal justice system. So, I don't consider that case a declination where justice wasn't pursued. . . . And, I think the tribal court should get our full faith and credit for being the great justice systems that they are.

Allison Herrera, *Trent Shores Reflects on his Time as U.S. Attorney, Remains Committed to Justice for Indian Country*, KOSU (Feb. 24, 2021, 4:40 AM).<sup>26</sup>

These efforts also include the handling of cases where offenders have already been prosecuted by the state and jurisdiction has shifted to the United States or the Nation. In those cases, the Nation and federal government are acting swiftly to keep offenders off the street and make sure they are brought to justice in the proper forum. For instance, the Respondent in this case is an Osage citizen who, in 2015, crashed her car on the Cherokee Reservation while under the influence of methamphetamine, killing another driver. On March 9, 2021, the Nation filed a criminal

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<sup>26</sup> <https://bit.ly/3E3gD5x>

complaint against Respondent for manslaughter, possession of a controlled dangerous substance, and possession of drug paraphernalia. *Cherokee Nation v. Perales*, No. CRM-21-261 (Cherokee Nation Dist. Ct. filed Mar. 9, 2021). The Cherokee Nation District Court issued an arrest warrant on March 30, 2021, ordering Respondent held without bond, and she is currently in the Nation's custody awaiting trial.

That response was no one-off and resulted from an extensive effort by the Nation to ensure that *McGirt* was brought to bear on cases arising on the Reservation in a responsible, orderly manner. In the month after the *McGirt* decision, the Nation assisted the OCCA's consideration of direct appeals raising *McGirt*-based jurisdictional arguments. It did so by tendering an amicus brief and appendix in *Hogner* less than a month after *McGirt* was decided and identifying nine cases raising the claim that the Cherokee Reservation is intact. Cherokee Nation Unopposed Application for Authorization to File Amicus Br., *Hogner v. State*, 2021 OK CR 4 (filed Aug. 3, 2020) (No. F-2018-138).<sup>27</sup> In each case, the Nation confirmed the location of the offenses and the Indian status of the defendants or victims. Less than two weeks later, the OCCA remanded those cases for evidentiary hearings. As in this case, the State presented no evidence or argument at those hearings that the Reservation was disestablished or that *McGirt* should be overruled. The Nation appeared and participated at each hearing, filing amicus briefs, exhibits, historical documents, and proposed findings of fact and conclusions of law. Each trial court determined the Reservation is intact.

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<sup>27</sup> <https://bit.ly/3DZkOiK>

The Nation then acted to ensure defendants would be lawfully prosecuted in federal or tribal courts. That effort was successful. Since its ruling in *Hogner*, the state courts have entirely vacated the convictions of twelve offenders in Cherokee Reservation cases. In every case, federal or tribal prosecution is proceeding. *See Perales*, No. CRM-21-261; *Cherokee Nation v. Shriver*, No. CRM-21-55 (Cherokee Nation Dist. Ct. filed Feb. 19, 2021); *Cherokee Nation v. Shriver*, No. CRM-21-56 (Cherokee Nation Dist. Ct. filed Feb. 19, 2021); *United States v. Bragg*, No. 4:21-cr-0008-JFH (N.D. Okla. filed Mar. 22, 2021); *United States v. Castro-Huerta*, No. 4:20-cr-00255-CVE (N.D. Okla. plea entered Nov. 2, 2020); *United States v. Cottingham*, No. 4:20-cr-00209-GKF-1 (N.D. Okla. plea entered June 10, 2021); *United States v. Foster*, No. 4:21-cr-00118-CVE (N.D. Okla. filed March 16, 2021); *United States v. Leathers*, No. 4:21-cr-00163-CVE-1 (N.D. Okla. filed Mar. 19, 2021); *United States v. McCombs*, No. 4:20-cr-00262-GKF-1 (N.D. Okla. filed Nov. 3, 2020); *United States v. McDaniel*, No. 6:21-cr-00321-SLP-1 (E.D. Okla. filed Sept. 22, 2021); *United States v. Spears*, No. 4:20-cr-00296-GKF (N.D. Okla. Nov. 18, 2020); *United States v. Vaught*, No. 4:21-cv-00202-JFH-1 (N.D. Okla. filed Apr. 2, 2021).<sup>28</sup>

The State worries about “civil jurisdiction of non-Indian municipal courts in eastern Oklahoma under

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<sup>28</sup> The OCCA also struck down one state court conviction in *White v. State*, No. C-2020-113 (Okla. Crim. App. Oct. 28, 2021), but upheld convictions for other related charges, for which the defendant is still imprisoned. A state district court dismissed Vaught’s conviction on collateral review before the OCCA decided *State ex rel. Matloff v. Wallace*, 2021 OK CR 21, *see State v. Vaught*, No. CF-2015-4067 (Okla. Dist. Ct. May 20, 2021), <https://bit.ly/3GD8XIV>, and the State did not appeal or file a petition for certiorari.

the Curtis Act, ch. 504, § 14, 30 Stat. 499-500 (1898),” citing one pending case, *Hooper v. City of Tulsa*, No. 4:21-cv-00165-JED-JFJ (N.D. Okla. filed Apr. 9, 2021). *Castro-Huerta* Pet. 25. *Hooper*—which deals with *criminal* jurisdiction—arose from a decision of the Municipal Criminal Court of the City of Tulsa. The municipal court concluded that under the Curtis Act,<sup>29</sup> municipalities on the Creek Reservation which incorporated before Oklahoma statehood can enforce municipal criminal ordinances against both Indians and non-Indians. *City of Tulsa v. Hooper*, No. 7470397, slip op. at 5-10 (Tulsa Mun. Crim. Ct. Apr. 5, 2021).<sup>30</sup>

The Nation disagrees with that decision. Tulsa is organized under Oklahoma state law pursuant to a charter adopted *after* statehood. See Tulsa, Okla. Code App. C;<sup>31</sup> Okla. Const. art. 18, § 3(a). In any event, under existing cross-deputization agreements with Tulsa, tribal and municipal law enforcement officers can enforce applicable tribal, local, and federal laws and refer those cases to the appropriate prosecutors. See Addendum to Law Enforcement Agreement Between U.S., Cherokee Nation, and City of Tulsa (Apr. 9, 2014);<sup>32</sup> Addendum to Law Enforcement Agreement Between U.S., Muscogee (Creek) Nation, and City of Tulsa (May 2, 2006).<sup>33</sup> Such agreements

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<sup>29</sup> The Curtis Act was one of the statutes passed by Congress to coerce the Five Tribes into agreeing to allotment of their lands. See *McGirt*, 140 S. Ct. at 2465.

<sup>30</sup> Exhibit 1 to Complaint, *Hooper v. City of Tulsa*, No. 4:21-cv-00165-JED-JFJ (N.D. Okla. filed Apr. 9, 2021), ECF No. 1-1.

<sup>31</sup> <https://bit.ly/3nejTDZ>

<sup>32</sup> <https://bit.ly/3DsYnSv>

<sup>33</sup> <https://bit.ly/3uY6Lq6>

are available to any other municipality on a reservation. And since *McGirt*, inter-governmental cooperation with Tulsa police has been intensive. See Allison Herrera, “My Office Will Work Until We Drop”: Agencies Vow to Work Together on *McGirt* Cases, KOSU (Aug. 12, 2020, 10:02 AM).<sup>34</sup> The Nation’s commitment to protecting both Indians and non-Indians in Tulsa is clear. See Michael Overall, *Tulsans of the Year: Tribes Play Vital Role in COVID-19 Emergency Response*, Tulsa World (updated Dec. 7, 2021)<sup>35</sup> (acknowledging Chief Hoskin as a “Tulsan of the Year” for the Nation’s COVID-19 response and public policy role in Tulsa).

Finally, the State’s suggestion that lurking “[q]uestions” about tribal civil authority are of concern has no basis in fact within the Nation’s knowledge. *Castro-Huerta* Pet. 25. The Nation has made no effort to exercise civil jurisdiction on terms that were not already available before *McGirt*, and no such cases are pending in the Nation’s courts. The State provides no evidence that any of the challenges to its civil jurisdiction elsewhere are even remotely serious. See *id.* at 24-26. If serious disputes were to arise over civil jurisdiction, they should be resolved in those cases. Resolution of such issues is also available through tribal-state agreement, as the tribes and State have done time and time again, after the Supreme Court has found the State overstepped its authority in Indian country. See, e.g., Okla. Stat. tit. 68 § 500.63 (authorizing the tribal-state agreements to share motor fuel tax revenues after *Oklahoma Tax Commission v. Chickasaw Nation*, 515 U.S. 450

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<sup>34</sup> <https://bit.ly/3DKOhg0>

<sup>35</sup> <https://bit.ly/31DuEJd>

(1995)); *id.* § 346 (authorizing tribal-state agreements to share tobacco tax revenues after *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505 (1991)). That this model works is shown by the Nation’s recent child custody agreement with the State. *See supra* at 8-9.

The State’s reliance on exaggeration is of a piece with the Oklahoma Governor’s attempts to stoke hysteria and sensationalism in the media. *See* Hicham Raache, *Gov. Stitt Says Supreme Court’s McGirt Ruling Created ‘Public Safety Threat’, asks Oklahomans to Share Stories; Cherokee Nation Reacts*, KFOR (Apr. 16, 2021, 11:52 AM)<sup>36</sup>; Ray Carter, *McGirt Called Threat to State’s Economic Future*, Okla. Council of Pub. Affairs (Aug. 16, 2021);<sup>37</sup> Reese Gorman, *Cole Continues to Advocate for Tribal Sovereignty on Indigenous Peoples’ Day*, Norman Transcript (Oct 11, 2021).<sup>38</sup> That provides no ground for certiorari. Furthermore, rewarding this strategy could threaten the fair adjudication of future criminal cases arising on Indian country in Oklahoma. *See Flowers v. Mississippi*, 139 S. Ct. 2228, 2254 (2019) (Thomas, J., dissenting); *Chandler v. Florida*, 449 U.S. 560, 580 (1981).

## **II. The State Cannot Use this Moot Case to Challenge the Cherokee Reservation.**

The State’s effort to undo the Cherokee Reservation is a starkly new position. The State earlier *affirmatively accepted* the Reservation, Suppl. Br. of Appellee after Remand at 3, *McDaniel v. State*, No. F-2017-357 (Okla. Crim. App. filed Mar. 29, 2021) (“The State

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<sup>36</sup> <https://bit.ly/2YV7mwS>

<sup>37</sup> <https://bit.ly/3vzCs9M>

<sup>38</sup> <https://bit.ly/3AK839C>

further accepts, in light of this Court’s ruling in *Hogner v. State*, . . . that the crimes occurred within the boundaries of the Cherokee Nation Reservation.”);<sup>39</sup> Suppl. Br. of Appellee after Remand at 6, *Foster v. State*, No. F-2020-149 (Okla. Crim. App. filed Apr. 19, 2021) (noting the State stipulated that, under *Hogner*, the Cherokee Reservation exists).<sup>40</sup>

Now, under the direction of a newly-appointed Attorney General, the State contends that “[u]nder the correct framework . . . Congress disestablished the Creek territory in Oklahoma, as well as the territories of the rest of the Five Tribes,” and that *McGirt* is incorrect. *Castro-Huerta* Pet. 18.<sup>41</sup> That framework, the State insists, requires “[c]onsideration of history . . . because the effect on reservation status of statutes targeting Indian land ownership is inherently ambiguous.” *Id.* But this case is moot, and so the State cannot seek to advance any “framework” here. And having taken the contrary position elsewhere to avoid the burden of litigating the Reservation’s existence, and the OCCA having accepted that position, the State is barred from raising that argument here. *See New Hampshire v. Maine*, 532 U.S. 742, 750-51, 755-56 (2001).

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<sup>39</sup> <https://bit.ly/3lM1Wgz>

<sup>40</sup> <https://bit.ly/3jjP67S>. The State’s decision to accept *Hogner* and not seek certiorari there also suggests its effort to challenge the Reservation is barred by non-mutual collateral estoppel. *See* Restatement (Second) of Judgments § 29 (1982); *see also State v. United Cook Inlet Drift Ass’n*, 895 P.2d 947, 951-52 (Alaska 1995); *Benjamin v. Coughlin*, 905 F.2d 571, 576 (2d Cir. 1990).

<sup>41</sup> *McGirt* addressed only the Creek Reservation, not all Five Tribes’ Reservations. 140 S. Ct. at 2479.

Moreover, the State’s attack is barred by its conduct in *this* case. When a party does not raise an argument below, and the lower court does not rule on it, it is waived. See *Sprietsma v. Mercury Marine*, 537 U.S. 51, 56 n.4 (2002). “Waiver is the intentional relinquishment or abandonment of a known right,” *Wood v. Milyard*, 566 U.S. 463, 474 (2012) (cleaned up), which is exactly what the State did here. And an argument waived below is forfeited before this Court. *United States v. Jones*, 565 U.S. 400, 413 (2012).

After *McGirt* was decided, the OCCA remanded for an evidentiary hearing, directed the District Court to “follow the analysis set out in *McGirt*” to determine if the Reservation had been disestablished, and requested “the Attorney General and District Attorney to work in coordination to effect uniformity and completeness in the hearing process.” Pet’r’s App. 26a.<sup>42</sup>

On remand, Respondent and the Nation both filed briefs with the state district court, explaining that the Cherokee Reservation was never disestablished. Cherokee Nation *Amicus Br.*, *State v. Perales*, No. CF-2015-355 (Okla. Dist. Ct. filed Sept. 28, 2020)<sup>43</sup>; Def./Appellant’s Remanded Hr’g Br. (filed Oct. 14, 2020)<sup>44</sup>. The State did not file a brief, but rather stipulated that “the crime[s] in this case occurred . . . within the geographic area set out” by the Cherokee

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<sup>42</sup> Shortly before the remand, the Nation sought leave to file an *amicus* brief with the OCCA. See Cherokee Nation Unopposed App’l for Authorization to File *Amicus Br.*, *Perales v. State*, No. F-2018-383 (filed Aug. 3, 2020), <https://bit.ly/3I6D8cA>. The OCCA denied that request as moot after the hearing. See Pet’r’s App. 6a n.2.

<sup>43</sup> <https://bit.ly/3o5JuAM>

<sup>44</sup> <https://bit.ly/3lmjGyq>

Treaties. *See* Stips. ¶ 2 (filed Oct. 14, 2020).<sup>45</sup> On October 14, the District Court held a hearing at which the Respondent and Nation presented arguments and submitted exhibits showing the Reservation exists. Tr. of Proceedings at 16:18-28:3 (Oct. 14, 2020)<sup>46</sup> The Assistant Attorney General, appearing for the State, informed the court that “we’re not taking a position whether or not the reservation for the Cherokee existed in the first place[] [a]nd if it did, whether or not that reservation remains intact.” *Id.* at 10:4-7; *see* Pet’r’s App. 5a. The District Attorney, also appearing for the State, noted what he anticipated could be the practical results of *McGirt* (although few of those results ultimately occurred), *see* Tr. at 10:15-14:8, but made no legal argument or request for legal relief, *see id.* at 30:23-24, and even commended the Nation on its efforts to bring criminals to justice and on “what they’re doing to try and be a partner to the State and to the federal government through this process,” *id.* 28:20-29:12.

Based on the stipulations, exhibits, briefing, and argument, the District Court concluded that “Congress established a reservation for the Cherokee Nation” and “has not erased the boundaries of the reservation . . . .” Pet’r’s App. 23a. For that reason, Respondent’s crimes were “committed in Indian Country” and the State lacked jurisdiction to prosecute her. *Id.*

When the case returned to the OCCA, the State said nothing to challenge this conclusion. Rather, it simply repeated the District Court’s findings and asked that

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<sup>45</sup> <https://bit.ly/3o69X12>

<sup>46</sup> The transcript is available from the District Court as part of the record in this case.

“[s]hould [the OCCA] find the defendant is entitled to relief based on the district court’s findings,” it stay any order reversing the convictions for thirty days. Supp’l Br. of Appellee After Remand at 3-4, No. F-2018-383 (Okla. Crim. App. Dec. 7, 2020).<sup>47</sup> The OCCA then affirmed, finding that the District Court’s conclusions were “supported by the entire record” and that the OCCA had “previously held” in *Hogner* and *Spears* that the Cherokee Reservation “has not been disestablished by Congress.” Pet’r’s App. 5a-6a. Then, on September 14, 2021, the District Court vacated and dismissed the criminal charges against Respondent. *See Order, State v. Perales*, No. CF-2015-355 (Okla. Dist. Ct. Sept. 13, 2021).<sup>48</sup>

This case is moot because the State acquiesced to the dismissal of the criminal charges giving rise to this case, and those charges have been dismissed by the state court for lack of jurisdiction. Simply stated, the dismissal ended the controversy between the State and Respondent. The State has asserted elsewhere that “the dismissal of a criminal case after an intermediate appellate court issues its mandate does not ‘moot’ the case for purposes of further appellate review.” *See Reply Br. at 6 n.\**, *Oklahoma v. Castro-Huerta*, No. 21-429 (citing *Kentucky v. King*, 563 U.S. 452, 458 n.2 (2011)). That contention misses the mark, both here and in other cases dealing with the Cherokee Reservation, because here, and in those other cases, the State consented to dismissal by taking no position on Reservation existence and standing mute when

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<sup>47</sup> <https://bit.ly/3I9hp3J>

<sup>48</sup> <https://bit.ly/32NkOF9>. The State did not include this order in its appendix. *See* Rule 14.1(i)(i)-(ii).

the lower courts dismissed for lack of jurisdiction.<sup>49</sup> Neither *King*, nor the decision on which it relies, see *United States v. Villamonte-Marquez*, 462 U.S. 579 (1983), purport to unsettle the longstanding rule that “when a decree was rendered by consent, no errors would be considered here on an appeal which were in law waived by such a consent.” *United States v. Babbitt*, 104 U.S. 767, 768 (1881); see *Microsoft Corp. v. Baker*, 137 S. Ct. 1702, 1717 (2017) (Thomas, J., concurring in the judgment). In addition, the State has waived its right to challenge the Reservation across the board as a matter of state law, see *infra* at 20-21, and so this Court’s reversal of the *McGirt* analysis could not reinstate convictions in the state courts. Any decision this Court issues on the State’s ability to bring the now-dismissed charges would thus not give the State any relief, *Chafin v. Chafin*, 568 U.S. 165, 172 (2013), would only be advisory, see *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 101 (1998), “[a]nd federal courts do not issue advisory opinions.” *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021).

The State also forfeited its anti-Reservation position here, including its attack on *McGirt*, by waiving it below. The State never challenged the existence of the Reservation below and knowingly gave up any opportunity in the District Court or OCCA to present evidence or argument on its existence. The State’s effort to reverse its earlier decisions not to challenge the existence of the Cherokee Reservation “comes too late in the day” to be considered. See *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 563 (2011); accord *Bench v. State*, 2018 OK CR 31, ¶ 96, 431 P.3d 929, 958 (“As

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<sup>49</sup> In some cases, the State even sought dismissal by motion. See Br. of *Amicus Curiae* Cherokee Nation at 18-19, *Oklahoma v. Spears*, No. 21-323.

Appellant has not provided any argument or authority supporting this claim, we find that he has forfeited appellate review of the issue.”).

### **III. The State Proffers No Just Basis For Abandoning *Stare Decisis* to Revisit *McGirt*.**

The State claims this is a “paradigmatic” example of when *stare decisis* should yield but relies on cases that are worlds apart from this one. *Castro-Huerta* Pet. 28 (citing *Ramos v. Louisiana*, 140 S. Ct. 1390, 1405 (2020); *Franchise Tax Bd. v. Hyatt*, 139 S. Ct. 1485, 1499 (2019); *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2485-86 (2018)). When the “factors to consider” in deciding whether to overturn precedent are applied to this case, namely “the quality of the decision’s reasoning; its consistency with related decisions; legal developments since the decision; and reliance on the decision, *Hyatt*, 139 S. Ct. at 1499, *McGirt* does not yield.

In the cases the State cites, the Court overturned prior *constitutional* precedents, acknowledging that *stare decisis* “is at its weakest when we interpret the Constitution.” *Ramos*, 140 S. Ct. at 1405; *Hyatt*, 139 S. Ct. at 1499; *Janus*, 138 S. Ct. at 2478. Here *stare decisis* has special force, as Congress may exercise its primary authority over Indian affairs to alter the Court’s decisions by legislation. *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 799 (2014).<sup>50</sup> Yet, in this case the State asks the Court to do Congress’s busi-

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<sup>50</sup> This, and the reliance costs of implementation of *McGirt*, see *infra* at 23-24, rebut the State’s assertion that “the recent nature of the decision entitles it to less *stare decisis* weight.” *Castro-Huerta* Pet. 28 (citing constitutional cases where reliance interests, if they existed, were weakened by lower courts’ confused applications of precedent).

ness by accepting its view of funding and policy debates. “Such policy arguments, though proper for legislative consideration, are irrelevant to the issue” presented on the State’s petition. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 470 (1978). The political nature of this attack is underscored by its timing, following the appointment of a new Attorney General. That is a call for prospective legislation, not grounds for certiorari.

*McGirt* is also well-reasoned, in contrast to the decisions overruled in *Ramos*, 140 S. Ct. at 1404-06, *Hyatt*, 139 S. Ct. at 1499, and *Janus*, 138 S. Ct. at 2463-65, 2483. *McGirt* rests on a comprehensive analysis of law and history—despite the State’s claim to the contrary, *Castro-Huerta* Pet. 17-18—and its ruling is based on the language of the treaties and congressional enactments at issue, rather than the State’s interpretation of subsequent events that are urged to overcome statutory text.<sup>51</sup> The Court’s conclusion was no outlier, as it is consistent with the federal court decisions that have applied the disestablishment factors, including the Tenth Circuit panel in *Murphy v. Royal*, 866 F.3d 1164 (10th Cir.

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<sup>51</sup> The State’s and supporting *amici*’s position that *McGirt* should be reversed because the disestablishment analysis involves “inherently ambiguous” statutes is self-defeating. See *Texas Amicus Br.* at 13-20, *Oklahoma v. Castro-Huerta*, No. 21-429. The judicial interpretation of ambiguous statutes fosters certainty and predictability in their application and enforcement, which is an argument for sparingly revisiting such interpretations. See *Gamble v. United States*, 139 S. Ct. 1960, 1986 (2019) (Thomas, J., concurring). And even if the State were right that *McGirt* involved inherent ambiguities, *McGirt* resolved them through a thorough review of the circumstances surrounding the enactment and implementation of statutes affecting the Muscogee (Creek) Nation. 140 S. Ct. at 2470-74.

2017). Unlike *Hyatt* and *Janus*, no intervening decision affects the law on which *McGirt* is based or calls *McGirt*'s reasoning into question. In fact, subsequently, multiple circuits have repeatedly relied on *McGirt*'s approach to statutory interpretation as a touchstone in their own analyses, both in and outside of the Indian law context.<sup>52</sup> Nor have there been any later factual developments that call the *McGirt* decision's reasoning into question. *Cf. Janus*, 138 S. Ct. at 2465-66, 2482-83; *Citizens United v. FEC*, 558 U.S. 310, 364 (2010) (massive changes in political media landscape undermined poorly-reasoned First Amendment precedent). Indeed, the relevant facts showing the Creek Reservation's existence could not have changed in the past year. Perhaps most significantly, the Oklahoma courts have applied *McGirt* with precision and without difficulty. And the Nations and the federal governments have successfully implemented *McGirt* and the OCCA's decisions to bring criminals to justice, which proves *McGirt* is not "unworkable."

Reliance interests are present here too. *McGirt* palliates injustice, honors the treaty promises of the United States, restores to Congress its constitutional prerogative to decide whether and how to change those promises, and demonstrates that this Court will not permit "the rule of the strong" to triumph over the rule of law, 140 S. Ct. at 2474. While the State relies

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<sup>52</sup> See, e.g., *Penobscot Nation v. Frey*, 3 F.4th 484, 493-94 (1st Cir. 2021) (en banc), *pets. for cert. filed* Nos. 21-838, 21-840; *Awuku-Asare v. Garland*, 991 F.3d 1123, 1128 (10th Cir. 2021), *pet. for cert. filed* No. 21-5840; *Oneida Nation v. Village of Hobart*, 968 F.3d 664, 673-75 & n.4, 684-85 (7th Cir. 2020); *Rojas v. FAA*, 989 F.3d. 666, 689 (9th Cir. 2021) (Wardlaw, J. concurring in part and dissenting in part), *pet for cert. filed* No. 21-133.

heavily on the “century of reliance interests that *McGirt* upset,” *Castro-Huerta* Pet. 28, the correction of a century of injustice cannot entirely avoid doing so. And the Nations, federal government, state courts, local governments, and other public servants have invested great time and resources to make the recognition of the Nations’ treaty rights in *McGirt* and its follow-on cases meaningful by protecting public safety and punishing wrongdoers. The commitment will continue. *See, e.g.*, Exec. Order 14,053, § 3(ii), Improving Public Safety and Criminal Justice for Native Americans and Addressing the Crisis of Missing or Murdered Indigenous People, 86 Fed. Reg. 64,337, 64,338-39 (Nov. 18, 2021). Reversing course now would leave all those efforts without purpose or meaning—affecting the public’s confidence in the justice system, wasting tens of millions of dollars and substantial administrative investments, and imposing costs of re-arresting, re-transferring, and re-prosecuting thousands of offenders. These are the interests that are now on the line, and they are threatened by efforts to overthrow *McGirt*, not efforts to adhere to it.

**CONCLUSION**

The petition should be denied.

Respectfully submitted,

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