

No. 21-798

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

STATE OF OKLAHOMA

*Petitioner,*

vs.

STEPHEN TANNER VINEYARD,

*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 CHICKASAW  
NATION IN SUPPORT OF RESPONDENT**

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**TABLE OF CONTENTS**

	Page
INTEREST OF <i>AMICUS</i> .....	1
SUMMARY OF ARGUMENT.....	2
REASONS FOR DENYING THE PETITION.....	3
I. The Supposed Problems On Which The State Relies Do Not Exist Or Are The Deliberate Result Of The State’s Litigation Strategy.....	3
II. This Case Is Moot, And The State Waived Its Right To Challenge The Applicability Of <i>McGirt</i> To Determine The Continuing Existence Of The Chickasaw Reservation.....	16
III. The State’s Request For Reconsideration Of <i>McGirt</i> Ignores <i>Stare Decisis</i> .....	22
CONCLUSION.....	22

## CASES

<i>Adams v. Robertson</i> , 520 U.S. 83 (1997) (per curiam) .....	19, 22
<i>Ball v. State</i> , No. CF-2018-157 (Okla. Dist. Ct. Mar. 26, 2021).....	18
<i>Bench v. State</i> , 2018 OK CR 31 .....	22
<i>Bench v. State</i> , 2021 OK CR 12, 492 P.3d 19, <i>withdrawn on other grounds</i> , 2021 OK CR 24, 495 P.3d 670.....	20
<i>Bosse v. State</i> , 2021 OK CR 3, 484 P.3d 286 .....	19
<i>Bosse v. State</i> , 2021 OK CR 30, <i>pet. for cert. filed</i> No. 21-6443 .....	4
<i>Bragg v. W. Va. Coal Ass'n</i> , 248 F.3d 275 (4th Cir. 2001).....	12
<i>Chafin v. Chafin</i> , 568 U.S. 165 (2013).....	17
<i>Cherokee Nation v. Perales</i> , No. CRM-21-261 (Cherokee Dist. Ct. filed Mar. 9, 2021).....	7
<i>Cherokee Nation v. Shriver</i> , No. CRM-21-56 (Cherokee Dist. Ct. filed Mar. 30, 2021).....	7
<i>Choctaw Nation v. McCurtain</i> , No. CF-21-0150 (Choctaw Dist. Ct. filed Apr. 21, 2021).....	7

**TABLE OF AUTHORITIES–Continued**

	<b>Page(s)</b>
<i>Christian Legal Soc’y v. Martinez</i> , 561 U.S. 661 (2010).....	22
<i>Cole v. State</i> , 2021 OK CR 28, as corrected 2021 OK CR 32, pet. for cert. filed No. 21-6494 .....	4
<i>Granfinanciera, S.A. v. Nordberg</i> , 492 U.S. 33 (1989).....	22
<i>In re Morgan</i> , No. 20-6123 (10th Cir. Sept. 18, 2020).....	4-5
<i>Jones v. Pettigrew</i> , No. CIV-18-633-G, 2021 WL 3854755 (W.D. Okla. Aug. 27, 2021), appeal filed No. 21-6106 (10th Cir. Sept. 14, 2021).....	5
<i>Jones v. Pettigrew</i> , No. CIV-20-758-F, 2021 WL 640834 (W.D. Okla. Feb. 18, 2021) .....	5, 9
<i>June Med. Servs. LLC v. Russo</i> , 140 S. Ct. 2103 (2020).....	3
<i>Kentucky v. King</i> , 563 U.S. 452 (2011).....	17
<i>Kimble v. Marvel Ent., LLC</i> , 576 U.S. 446 (2015).....	2-3
<i>McGirt v. Oklahoma</i> , 140 S. Ct. 2452 (2020).....	<i>passim</i>
<i>Merrion v. Jicarilla Apache Tribe</i> , 455 U.S. 130 (1982).....	1
<i>Michigan v. Bay Mills Indian Cmty.</i> , 572 U.S. 782 (2014).....	3

**TABLE OF AUTHORITIES–Continued**

	<b>Page(s)</b>
<i>Microsoft Corp. v. Baker</i> , 137 S. Ct. 1702 (2017).....	17
<i>Montana v. United States</i> , 450 U.S. 544 (1981).....	10
<i>Moragne v. States Marine Lines, Inc.</i> , 398 U.S. 375 (1970).....	3
<i>Muscogee (Creek) Nation v. Epperson</i> , No. CF-2021-973 (Muscogee (Creek) Dist. Ct. filed Sept. 22, 2021) .....	7
<i>Muscogee (Creek) Nation v. Starr</i> , No. CM-2021-591 (Muscogee (Creek) Dist. Ct. filed Aug. 30, 2021) .....	7
<i>New Hampshire v. Maine</i> , 532 U.S. 742 (2001).....	18
<i>Nicholson v. Stitt</i> , No. CJ-2020-094 (Okla. Dist. Ct. Nov. 24, 2020), <i>pet. in error filed</i> , No. SD- 119270 (Okla. Dec. 18, 2020).....	10
<i>Oklahoma v. Beck</i> , No. 21-373 .....	22
<i>Oklahoma v. Bosse</i> , No. 21-186 .....	7, 21
<i>Oklahoma v. Cole</i> , No. 20A167 .....	7
<i>Oklahoma v. Miller</i> , No. 21-643 .....	8
<i>Oklahoma v. Ned</i> , No. 21-645 .....	8

**TABLE OF AUTHORITIES—Continued**

	<b>Page(s)</b>
<i>Oklahoma v. Ryder</i> , No. 20A168.....	7
<i>Oklahoma v. U.S. Dep’t of Interior</i> , No. 5:21-cv-00719-F (W.D. Okla. filed July 16, 2021).....	12
<i>Oklahoma v. U.S. Dep’t of Interior</i> , No. 5:21-cv-00805-F (W.D. Okla. filed Aug. 16, 2021) .....	12
<i>Oneta Power, LLC v. Hodges</i> , Nos. CJ-2020-193, CV-2021-193 (Okla. Dist. Ct. filed Aug. 21, 2020) .....	10
<i>Pickup v. Dist. Ct.</i> , No. 20-cv-346-JED-SH (N.D. Okla. filed July 20, 2020).....	10
<i>Plains Commerce Bank v. Long Family Land &amp; Cattle Co.</i> , 554 U.S. 316 (2008).....	13
<i>Ryder v. State</i> , 2021 OK CR 36, <i>pet. for cert. filed</i> No. 21-6432 .....	4
<i>Sprietsma v. Mercury Marine</i> , 537 U.S. 51 (2002).....	19, 22
<i>State ex rel. Matloff v. Wallace</i> , 2021 OK CR 21 .....	4
<i>State v. Vineyard</i> , No. CF-2018-424 (Okla. Dist. Ct. Sept. 22, 2021), <a href="https://bit.ly/3D7EJuJ">https://bit.ly/3D7EJuJ</a> .....	16-17, 19
<i>Steel Co. v. Citizens for a Better Env’t</i> , 523 U.S. 83 (1998).....	17

**TABLE OF AUTHORITIES–Continued**

	<b>Page(s)</b>
<i>Stewart v. Territory</i> , 102 P. 649 (Okla. Crim. App. 1909) (per curiam) .....	22
<i>TransUnion LLC v. Ramirez</i> , 141 S. Ct. 2190 (2021).....	17-18, 22
<i>United States v. Babbitt</i> , 104 U.S. 767 (1881).....	17
<i>United States v. Bain</i> , No. 6:20-cr-00139-JFH (E.D. Okla. filed Dec. 8, 2020).....	7
<i>United States v. Ball</i> , No. 6:20-cr-00110-RAW (E.D. Okla. filed Sept. 22, 2020) .....	7
<i>United States v. Beck</i> , No. 6:21-cr-00142-JWD (E.D. Okla. plea entered Oct. 14, 2021).....	7, 9
<i>United States v. Brown</i> , No. 6:20-cr-00109-DCJ-1 (E.D. Okla. convicted Sept. 1, 2021) .....	7, 9
<i>United States v. Bryant</i> , 136 S. Ct. 1954 (2016).....	9
<i>United States v. Castro-Huerta</i> , No. 4:20-cr-00255-CVE-2 (N.D. Okla. plea entered Oct. 15, 2021).....	7, 9
<i>United States v. Coffman</i> , No. 6:21-cr-00324-RAW-1 (E.D. Okla. filed Sept. 16, 2021) .....	7

**TABLE OF AUTHORITIES–Continued**

	<b>Page(s)</b>
<i>United States v. Cooper</i> , No. 6:21-cr-00070-JFH (E.D. Okla. filed Mar. 19, 2021) .....	7
<i>United States v. Cottingham</i> , No. 4:20-cr-00209-GKF-1 (N.D. Okla. plea entered June 10, 2021) .....	7, 9
<i>United States v. Davis</i> , No. 4:20-cr-00316-CVE-1 (N.D. Okla. filed Dec. 8, 2020).....	7
<i>United States v. Foster</i> , No. 4:21-cr-00118-CVE (N.D. Okla. plea entered Nov. 8, 2021).....	7, 9
<i>United States v. Fox</i> , No. 6:21-mj-00251-KEW-1 (E.D. Okla. filed May 17, 2021) .....	7-8
<i>United States v. Grayson</i> , No. 6:21-cr-00166-RAW-1 (E.D. Okla. filed Apr. 12, 2021) .....	8
<i>United States v. Harjo</i> , No. 6:21-cr-00022-RAW-1 (E.D. Okla. convicted Nov. 16, 2021).....	8, 9
<i>United States v. Hathcoat</i> , No. 6:21-cr-00018-RAW-1 (E.D. Okla. filed Feb. 24, 2021).....	8
<i>United States v. Howell</i> , No. 4:21-cr-00121-JFH-1 (N.D. Okla. filed Mar. 17, 2021).....	8



## TABLE OF AUTHORITIES—Continued

	<b>Page(s)</b>
<i>United States v. Jackson</i> , No. 4:20-cr-00310-CVE-1 (N.D. Okla. plea entered Nov. 10, 2021).....	8, 9
<i>United States v. Janson</i> , No. 4:21-cr-00197-GKF-1 (N.D. Okla. Nov. 30, 2021) .....	8, 9
<i>United States v. Johnson</i> , No. 6:21-cr-00183-BMJ-1 (E.D. Okla. filed Apr. 19, 2021) .....	8
<i>United States v. Jones</i> , No. 4:21-cr-00023-GKF-1 (N.D. Okla. convicted June 23, 2021), <i>appeal</i> <i>docketed</i> No. 21-5079 (10th Cir. filed Oct. 24, 2021) .....	8, 9
<i>United States v. Jones</i> , No. 6:21-cr-00118-JFH-1 (E.D. Okla. filed Mar. 22, 2021).....	8
<i>United States v. Kepler</i> , No. 4:20-cr-276-GKF-1 (N.D. Okla. convicted Apr. 26, 2021) .....	8, 9
<i>United States v. Lara</i> , 541 U.S. 193 (2004).....	1
<i>United States v. Leathers</i> , No. 4:21-cr-00163-CVE-1 (N.D. Okla. filed Mar. 19, 2021).....	8
<i>United States v. Little</i> , No. 4:21-cr-00162-CVE-1 (N.D. Okla. filed Apr. 8, 2021) .....	8

**TABLE OF AUTHORITIES—Continued**

	<b>Page(s)</b>
<i>United States v. Martin</i> , No. 6:21-cr-00047-JFH-1 (E.D. Okla. plea entered July 14, 2021) .....	8, 9
<i>United States v. Martin</i> , No. 6:21-cr-00221-TDD-1 (E.D. Okla. filed May 17, 2021) .....	8
<i>United States v. McCombs</i> , No. 4:20-cr-00262-GKF-1 (N.D. Okla. filed Nov. 3, 2020) .....	8
<i>United States v. McDaniel</i> , No. 6:21-cr-00321-SLP-1 (E.D. Okla. filed Sept. 22, 2021) .....	8
<i>United States v. Mitchell</i> , No. 4:20-cr-00254-JFH-1 (N.D. Okla. Sept. 29, 2021) .....	8, 9
<i>United States v. Mize</i> , No. 4:21-cr-00107-GKF-1 (N.D. Okla. plea entered Dec. 1, 2021) .....	8, 9
<i>United States v. Perry</i> , No. 4:20-cr-00218-GKF-1 (N.D. Okla. filed Oct. 6, 2020) .....	8
<i>United States v. Sizemore</i> , No. 6:21-cr-00138-RAW-1 (E.D. Okla. filed Apr. 19, 2021) .....	8
<i>United States v. Spears</i> , No. 4:20-cr-00296-GKF-1 (N.D. Okla. filed Nov. 18, 2020) .....	8

**TABLE OF AUTHORITIES–Continued**

	<b>Page(s)</b>
<i>United States v. Stewart</i> , No. 4:20-cr-00260-GKF-1 (N.D. Okla. Sept. 16, 2021) .....	8, 9
<i>United States v. Villamonte-Marquez</i> , 462 U.S. 579 (1983).....	17
<i>United States v. Vineyard</i> , No. 6:21-cr-00056-DCJ-1 (E.D. Okla. filed Mar. 29, 2021).....	8
<i>United States v. Wheeler</i> , 435 U.S. 313 (1978).....	1
<i>United States v. Williams</i> , No. 4:21-cr-00104-JFH-1 (N.D. Okla. filed Mar. 24, 2021).....	8
<i>United States v. Yargee</i> , No. 4:21-cr-00313-CVE-1 (N.D. Okla. plea entered Aug. 27, 2021).....	8, 9
<i>White Mountain Apache Tribe v. Bracker</i> , 448 U.S. 136 (1980).....	10
<i>Wood v. Milyard</i> , 566 U.S. 463 (2012).....	19
<b>STATUTES, TREATIES AND AGREEMENTS</b>	
25 U.S.C. § 1919(a).....	13
1837 Treaty of Doaksville, Jan. 17, 1837, 11 Stat. 573 .....	1
1855 Treaty of Washington with the Choctaw and Chickasaw, June 22, 1855, 11 Stat. 611 .....	1

**TABLE OF AUTHORITIES–Continued**

	<b>Page(s)</b>
1866 Treaty of Washington with the Choctaw and Chickasaw, Apr. 28, 1866, 14 Stat. 769 .....	1
Addendum, Addition of Okmulgee Cnty. to Intergov'l Cross-Deputization Agreement (May 8, 2000), <a href="https://bit.ly/3uIs2nz">https://bit.ly/3uIs2nz</a> .....	6
Chickasaw Nation Law Enforcement Agreement with Okla. Dep't of Agric., Food & Forestry (filed June 7, 2021), <a href="https://bit.ly/30FAN6T">https://bit.ly/30FAN6T</a> .....	14
Deputation Agreement (filed Jan. 23, 2006), <a href="https://bit.ly/3ktAXFO">https://bit.ly/3ktAXFO</a> .....	14
Intergov'l Agreement Between Okla. & Each of Five Tribes Regarding Jurisdiction Over Indian Children Within Each Tribe's Reservation (Aug. 7, 2020), <a href="https://bit.ly/3izrZWk">https://bit.ly/3izrZWk</a> .....	13
Okla. Stat. tit. 10 § 40.7.....	13
Treaty of Dancing Rabbit Creek, Sept. 27, 1830, 7 Stat. 333 .....	1
<b>TRIBAL INSTRUMENTS</b>	
Chickasaw Nation Code § 6-201.5(E), <a href="https://bit.ly/3DnKS6B">https://bit.ly/3DnKS6B</a> .....	13
Inter-tribal Council of Five Civilized Tribes, Res. No. 21-34 (Oct. 8, 2021), <a href="https://bit.ly/3iXEyLg">https://bit.ly/3iXEyLg</a> .....	9

**TABLE OF AUTHORITIES–Continued**

	<b>Page(s)</b>
Memo. from Office of Tribal Justice Admin., Chickasaw Nation, to Chickasaw Lighthorse Police & Cross- Commissioned Law Enforcement Agencies (May 10, 2021).....	15
Proclamation, Office of the Governor, Chickasaw Nation (Mar. 11, 2021), <a href="https://bit.ly/3uHEP9W">https://bit.ly/3uHEP9W</a> .....	9
<b>LEGISLATIVE MATERIALS</b>	
Cherokee Nation and Chickasaw Nation Criminal Jurisdiction Compacting Act of 2021, H.R. 3091, 117th Cong. (2021) .....	14
H.B. 2352, 58th Sess. (Okla. 2021).....	13
H.R. Rep. No. 117-83 (2021) .....	6
H.R. Rep. No. 117-97 (2021) .....	6
Statement of FBI Director, <i>Hearing on FBI Budget Request for Fiscal Year 2022 Before the Subcomm. on Commerce, Science, and Related Agencies of the S. Comm. on Appropriations, 117th Cong. 13 (2021)</i> .....	5
<b>RULES</b>	
Rule 14.1(i)(i)-(ii) .....	17
<b>COURT FILINGS</b>	
Br. in Opp. of Resp't, <i>Parish v. Oklahoma</i> , No. 21-467 .....	4
Br. in Opp. to Pet., <i>Christian v. Oklahoma</i> , No. 20-8335 .....	19

## TABLE OF AUTHORITIES–Continued

	<b>Page(s)</b>
Br. in Supp. of Mot. to Stay & Abate Proceedings, <i>Vineyard v. State</i> , No. F- 2020-245 (Okla. Crim. App. filed Aug. 16, 2021), <a href="https://bit.ly/3D6zHig">https://bit.ly/3D6zHig</a> .....	21
Cherokee Nation <i>Amicus Br.</i> , <i>Oklahoma v.</i> <i>Castro-Huerta</i> , No. 21-429.....	9
Chickasaw Nation <i>Amicus Br.</i> , <i>Oklahoma v.</i> <i>Beck</i> , No. 21-373 .....	22
EFO <i>Amicus Br.</i> , <i>Oklahoma v. Castro-</i> <i>Huerta</i> , No. 21-429.....	10
Order, <i>Vineyard v. State</i> , No. F-2020-245 (Okla. Crim. App. filed Aug. 24, 2021), <a href="https://bit.ly/31hmne0">https://bit.ly/31hmne0</a> .....	21
Pet. for Writ. Of Cert., <i>Oklahoma v. Castro-</i> <i>Huerta</i> , No. 21-429.....	<i>passim</i>
Reply Br., <i>Oklahoma v. Castro-Huerta</i> , No. 21-429 .....	17
State’s Pre-Evidentiary Hr’g Br., <i>State v.</i> <i>Vineyard</i> , No. CF-2018-424 (Okla. Dist. Ct. filed May 20, 2021), <a href="https://bit.ly/31LDmoG">https://bit.ly/31LDmoG</a> .....	19, 20
Stips., <i>State v. Vineyard</i> , No. CF-2018-424 (Okla. Dist. Ct. filed May 20, 2021), <a href="https://bit.ly/31hiypa">https://bit.ly/31hiypa</a> .....	19
Suppl. Br. of Appellee After Remand, <i>Ball</i> <i>v. State</i> , No. F-2020-54 (Okla. Crim. App. filed Apr. 26, 2021), <a href="https://bit.ly/3oXHjQG">https://bit.ly/3oXHjQG</a> .....	18

**TABLE OF AUTHORITIES—Continued**

	<b>Page(s)</b>
Suppl. Br. of Appellee After Remand, <i>Vineyard v. State</i> , No. F-2020-245 (Okla. Crim. App. filed Aug. 3, 2021), <a href="https://bit.ly/31dbp9w">https://bit.ly/31dbp9w</a> .....	20-21
Tr. of Evidentiary Hr’g, <i>State v. Vineyard</i> , No. CF-2018-424 (Okla. Dist. Ct. May 20, 2021) .....	20
Unopposed Mot. to Stay Proceedings, <i>Canaan Res. X v. Calyx Energy III, LLC</i> , No. CO-119245 (Okla. filed Mar. 19, 2021), <a href="https://bit.ly/3CCnNwE">https://bit.ly/3CCnNwE</a> .....	10
 <b>OTHER AUTHORITIES</b>	
86 Fed. Reg. 7,554 (Jan. 29, 2021).....	1
Allison Herrera, ‘ <i>We’re Not Going to Give Up Our Jurisdiction’: Chickasaw Nation Gov. Anoatubby on McGirt Impact</i> , KOSU (May 6, 2021), <a href="https://bit.ly/3monLlx">https://bit.ly/3monLlx</a> .....	13-14
Annie Gowen & Robert Barnes, ‘ <i>Complete, Dysfunctional Chaos’: Oklahoma Reels After Supreme Court Ruling on Indian Tribes</i> , Wash. Post (July 24, 2021), <a href="https://wapo.st/38qTD2A">https://wapo.st/38qTD2A</a> .....	6
Barry Porterfield, <i>Tribal Pact Good for Sheriff</i> , Pauls Valley Democrat (Dec. 1, 2021), <a href="https://bit.ly/3dcUJkJ">https://bit.ly/3dcUJkJ</a> .....	15

**TABLE OF AUTHORITIES–Continued**

	<b>Page(s)</b>
Brianna Bailey, <i>Land and Millions of Dollars for Infrastructure are Part of a Deal to Lure a Startup Electric Car Maker to Oklahoma</i> , Norman Transcript (Oct. 13, 2021 5:30 PM), <a href="https://bit.ly/3mTSgQD">https://bit.ly/3mTSgQD</a> .....	11
Carmen Forman, <i>New Oklahoma AG John O’Connor Talks McGirt, ABA Rating and State’s Top Legal Issues</i> , Oklahoman (Sept. 5, 2021 5:00 AM), <a href="https://bit.ly/3a6xGGz">https://bit.ly/3a6xGGz</a> .....	16
Chris Casteel, <i>McGirt Decision Not the Most Pressing Issue in Oklahoma, Voters Say</i> , Oklahoman (Oct. 9, 2021), <a href="https://bit.ly/30aWpYB">https://bit.ly/30aWpYB</a> .....	3
Daniela Ibarra, <i>Gov. Kevin Stitt Speaks to Tulsa Business Community</i> , KTUL (Aug. 26, 2021), <a href="https://bit.ly/2WJxCtx">https://bit.ly/2WJxCtx</a> .....	11
<i>Defending State Sovereignty or Psychological Denial? Oklahoma Attorney General Pushes U.S. Supreme Court to Reconsider the McGirt Decision</i> , Editorial, Tulsa World (Aug. 12, 2021), <a href="https://bit.ly/3Du1udL">https://bit.ly/3Du1udL</a> .....	4
Dick Pryor, <i>Capitol Insider: Governor Kevin Stitt On State-Tribal Relations</i> , KGOU (Feb. 5, 2021 5:10 PM), <a href="https://bit.ly/3ypYRG5">https://bit.ly/3ypYRG5</a> .....	16



**TABLE OF AUTHORITIES–Continued**

	<b>Page(s)</b>
<i>Economy Expands as Energy Prices Surge</i> , Gross Receipts to the Treasury (Okla. State Treasurer, Okla. City, Okla.), Nov. 3, 2021, <a href="https://bit.ly/3HmtiTt">https://bit.ly/3HmtiTt</a> .....	11
First Am. Fin. Corp., SEC Form 10-K (Feb. 16, 2021), <a href="https://bit.ly/2XEkdTA">https://bit.ly/2XEkdTA</a> .....	12
<i>How U.S. Supreme Court Tribal Ruling in Oklahoma Impacts Title Industry, Property Rights</i> , Am. Land Title Ass’n (Sept. 1, 2020), <a href="https://bit.ly/3CHxutS">https://bit.ly/3CHxutS</a> .....	12-13
Janelle Stecklein, <i>Experts: Supreme Court Could Clarify McGirt Ruling, Won’t Overturn It</i> , Enid News (Aug. 19, 2021), <a href="https://bit.ly/3DovRSS">https://bit.ly/3DovRSS</a> .....	16
Joe Tomlinson, <i>State Says Income Tax Exemption For Tribal Citizens on Reservations Inapplicable Despite ‘Existing Law’</i> , NonDoc (Nov. 3, 2021), <a href="https://bit.ly/3dZlJom">https://bit.ly/3dZlJom</a> .....	10-11
Letter from Andrew R. Wheeler, EPA Administrator, to J. Kevin Stitt, Okla. Governor (Oct. 1, 2020), <a href="https://bit.ly/3lowdCf">https://bit.ly/3lowdCf</a> .....	12
Letter from Eddy Rice, Okmulgee Cnty. Sheriff, to David Hill, Muscogee (Creek) Nation Principal Chief (Mar. 1, 2021) .....	6
Melissa Scavelli, <i>Oklahoma Attorney General Mike Hunter Resigns Due to ‘Personal Matters’</i> , KOKH (May 26, 2021), <a href="https://bit.ly/3n1ShmX">https://bit.ly/3n1ShmX</a> .....	20

**TABLE OF AUTHORITIES–Continued**

	<b>Page(s)</b>
Okla. Tax Comm’n, <i>Report of Potential Impact of McGirt v. Oklahoma</i> (2020), <a href="https://bit.ly/3yvAgzU">https://bit.ly/3yvAgzU</a> .....	11
Open Letter from Jonathan S. Small, President & Larry V. Parman, Chairman, Okla. Council of Pub. Affairs, to Okla. Cong. Delegation (Oct. 8, 2020), <a href="https://bit.ly/3CKzYHZ">https://bit.ly/3CKzYHZ</a> .....	12
Randy Krehbiel, <i>Official Expects State Economic ‘Explosion’</i> , Tulsa World (Sep. 28, 2021) .....	11
Ray Carter, <i>McGirt Called Threat to State’s Economic Future</i> , Okla. Council of Pub. Affs. (Aug. 16, 2021), <a href="https://bit.ly/3uzev1F">https://bit.ly/3uzev1F</a> .....	14
Reese Gorman, <i>Cole Encourages State-Tribal Relations Over State Challenges to McGirt</i> , Norman Transcript (July 23, 2021), <a href="https://bit.ly/3mNaftI">https://bit.ly/3mNaftI</a> .....	6
Rhett Morgan, <i>‘Beginning of a New Wave’: MidAmerica Industrial Park Wants to Capitalize on Canoo Investment in Pryor</i> , Tulsa World (June 20, 2021) .....	11
Sarah Roubidoux Lawson & Megan Powell, Opinion, <i>Unsettled Consequences of the McGirt Decision</i> , Regulatory Review (Apr. 1, 2021), <a href="https://bit.ly/3u8ieDl">https://bit.ly/3u8ieDl</a> .....	12

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

*Amicus* Chickasaw Nation (“Nation”) is a federally-recognized Indian tribe, 86 Fed. Reg. 7,554, 7,557 (Jan. 29, 2021), residing on and governing the Chickasaw Reservation, its permanent, treaty-guaranteed homeland, *see* 1837 Treaty of Doaksville, Jan. 17, 1837, 11 Stat. 573 (incorporating Treaty of Dancing Rabbit Creek, art. 2, Sept. 27, 1830, 7 Stat. 333); 1855 Treaty of Washington with the Choctaw and Chickasaw, June 22, 1855, 11 Stat. 611; 1866 Treaty of Washington with the Choctaw and Chickasaw, Apr. 28, 1866, 14 Stat. 769. On the Reservation, the Nation exercises inherent sovereign authority to protect the public by providing “police protection and other governmental services,” *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137-38 (1982), and punishing criminals who commit crimes there, *United States v. Wheeler*, 435 U.S. 313 (1978); *United States v. Lara*, 541 U.S. 193 (2004). Following *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), the Nation comprehensively reviewed and enhanced its criminal justice system and redoubled coordination with other governments in anticipation of the affirmation of its Reservation boundaries. The Nation has fundamental interests in the success of those efforts and in protecting its treaty promises.

The State imperils these interests. It disparages tribal and federal success in implementing the *McGirt* decision, opposes additional funding for those efforts,

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<sup>1</sup> No counsel for a party authored this brief in whole or part, and no one other than the Nation made a monetary contribution to fund its preparation or submission. 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.

and counts on a change in the Court's composition to secure a grant of certiorari to reconsider *McGirt*. Such a grant, in this or any other case in which the State challenges *McGirt*, would jeopardize the Nation's Reservation and unsettle the rule of law. Accordingly, the Nation has unique interests in Oklahoma's petition and in the implementation of *McGirt*, as well as experience in the delivery of criminal justice in a multijurisdictional context, all of which will aid the Court.

### SUMMARY OF ARGUMENT

The petition should be denied for three reasons.<sup>2</sup> First, the federal and tribal governments are successfully implementing *McGirt*. To argue otherwise, the State offers an account of the *status quo* brimming with inaccuracies and omissions. The State's tale of woe is dispelled by the fact that forty-two of the forty-four cases in which the State has sought certiorari to challenge *McGirt* involve respondents who have either been federally indicted or charged in tribal court, and prosecutors may still charge the other two. See *infra* at 8 n.7. There is more: the State is estopped from seeking, and waived its right to seek, reversal of *McGirt* or the overthrow of the Chickasaw Reservation by its conduct below and in other cases. Finally, the State provides no valid basis for discarding *McGirt*. It argues the dissent in *McGirt* was correct and the majority was wrong, *Castro-Huerta* Pet. 17, which cannot overcome *stare decisis*, see *Kimble v.*

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<sup>2</sup> To state its argument against *McGirt* here, 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 to that argument, mindful that the Court may not accept the State's practice.

*Marvel Ent., LLC*, 576 U.S. 446, 456-57 (2015); *June Med. Servs. LLC v. Russo*, 140 S. Ct. 2103, 2134 (2020) (Roberts, C.J., concurring in judgment). Most problematically, the State relies on a change in the Court’s composition to secure a certiorari grant, disregarding a core value of *stare decisis*, namely “public faith in the judiciary as a source of impersonal and reasoned judgments,” *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 403 (1970). While it alleges intergovernmental cooperation is impossible, that is based on rhetoric, not experience. The Nation, the State Legislature, the Oklahoma Tax Commission, and local jurisdictions all support such agreements, and many are already in use. Ultimately, the State shows only that the proper forum for complaints is Congress, for “a fundamental commitment of Indian law is judicial respect for Congress’s primary role in defining the contours of tribal sovereignty,” *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 803 (2014).

## **REASONS FOR DENYING THE PETITION**

### **I. The Supposed Problems On Which The State Relies Do Not Exist Or Are The Deliberate Result Of The State’s Litigation Strategy.**

The federal and tribal governments are primarily responsible for implementing *McGirt* and the OCCA’s follow-on cases acknowledging other Reservations. The Nation is rising to those obligations. The State, by contrast, casts the work of implementing *McGirt* as a reason to overrule it and resists its implementation across the board, despite the lack of public alarm, Chris Casteel, *McGirt Decision Not the Most Pressing Issue in Oklahoma, Voters Say*, Oklahoman (Oct. 9, 2021), <https://bit.ly/30aWpYB>. This strategy

cynically relies on the Court's recent change in composition. *See Defending State Sovereignty or Psychological Denial? Oklahoma Attorney General Pushes U.S. Supreme Court to Reconsider the McGirt Decision*, Editorial, Tulsa World (Aug. 12, 2021), <https://bit.ly/3Du1udL>. But *McGirt* is delivering justice in Oklahoma. Resistance to that high goal is no reason to overturn it.

Nor are there other reasons to do so. While the State urges that “the decision in *McGirt* is threatening convictions in old [cases],” in which state post-conviction relief is sought, *Castro-Huerta* Pet. 22, that threat has expired. In *State ex rel. Matloff v. Wallace*, the OCCA held that under state law *McGirt* is not available to petitioners for state post-conviction relief from convictions that became final before *McGirt* was decided, while reiterating that the Reservations still exist, 2021 OK CR 21, ¶ 15. Relying on *Wallace*, the OCCA has vacated earlier opinions granting such relief and upheld state convictions that became final before *McGirt* was decided. *See, e.g., Bosse v. State*, 2021 OK CR 30, *pet. for cert. filed* No. 21-6443; *Cole v. State*, 2021 OK CR 28, *as corrected* 2021 OK CR 32, *pet. for cert. filed* No. 21-6494; *Ryder v. State*, 2021 OK CR 36, *pet. for cert. filed* No. 21-6432. Although *Wallace* is being challenged in a certiorari petition, *see Castro-Huerta* Pet. 22, in that case the State argues certiorari should not be granted, *See Br. in Opp. of Resp't, Parish v. Oklahoma*, No. 21-467.<sup>3</sup>

The State then argues that offenders may use *McGirt* to obtain *federal* habeas relief. *Castro-Huerta* Pet. 22. Those efforts have so far been rejected, *see In*

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<sup>3</sup> The petitions in *Bosse*, *Cole*, and *Ryder* ask the Court to hold those cases until it decides *Parish*.

*re Morgan*, No. 20-6123 (10th Cir. Sept. 18, 2020); *Jones v. Pettigrew*, No. CIV-20-758-F, 2021 WL 640834 (W.D. Okla. Feb. 18, 2021); *Jones v. Pettigrew*, No. CIV-18-633-G, 2021 WL 3854755, at \*3 (W.D. Okla. Aug. 27, 2021), *appeal filed* No. 21-6106 (10th Cir. Sept. 14, 2021).

The State also insists the federal government is overwhelmed by new responsibilities under *McGirt*, relying on the FBI's recent request for increased appropriations. *Castro-Huerta* Pet. 19-20 (citing *Hearing on FBI Budget Request for Fiscal Year 2022 Before the Subcomm. on Commerce, Science, and Related Agencies of the S. Comm. on Appropriations*, 117th Cong. 13 (2021) (statement of FBI Director)), <https://bit.ly/3FBxkXc> ("Wray Testimony"). That effort backfires. As the Wray Testimony details, the request is to enable the FBI to address its increased workload. Ignoring that, the State exaggerates the federal government's prospective case load, saying it will "have up to 7,500 additional cases in 2022 alone," and calling that a trend that "is likely to continue," *Castro-Huerta* Pet. 19-20. That is wrong, as the current backlog of 5,000 cases will never recur. *See* Wray Testimony.<sup>4</sup> No one doubted *McGirt's* implementation would require reallocating resources, and Congress is acting to do just that. The House's appropriation bills for 2022 support the Administration's request for \$70 million to the FBI to "implement public

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<sup>4</sup> The State also says, "since 2005, at least 76,000 of the non-traffic criminal cases filed in Oklahoma state court have involved an Indian perpetrator or victim," *Castro-Huerta* Pet. 20, which suggests approximately 4,750 cases a year in the entire state. The federal and tribal share of that workload is plainly manageable, especially with the additional support the State opposes.

safety measures required to comply with the *McGirt* decision,” H.R. Rep. No. 117-97 at 63 (2021), and appropriate approximately \$11 million for Bureau of Indian Affairs law enforcement and detention and tribal courts, H.R. Rep. No. 117-83 at 55-56 (2021).

Incredibly, the State “strongly opposes” this funding, saying that would “federalize much of eastern Oklahoma,” and that “there’s no need for a permanent federal fix here” as “uncertainties surrounding this decision. . . are currently working their way to the courts.” Reese Gorman, *Cole Encourages State-Tribal Relations Over State Challenges to McGirt*, Norman Transcript (July 23, 2021), <https://bit.ly/3mNaftI> (“Gorman”). The State also opposes appropriations for tribal law enforcement, asserting “the state did not lose its jurisdiction” after *McGirt*, see Gorman,<sup>5</sup> and complains that it does not know how many post-*McGirt* cases “will be reprocessed by tribal authorities,” *Castro-Huerta* Pet. 20-21. This is brinkmanship masked as prudence—the State is attempting to

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<sup>5</sup> The State even relies on Okmulgee County’s 911 operators’ refusal to provide service to self-identified Indians. See *Castro-Huerta* Pet. 21-22 (citing Annie Gowen & Robert Barnes, ‘Complete, Dysfunctional Chaos’: Oklahoma Reels After Supreme Court Ruling on Indian Tribes, Wash. Post (July 24, 2021), <https://wapo.st/38qTD2A>). That is the result of a local decision, not *McGirt*. Okmulgee County and the Muscogee (Creek) Nation once had a cross-deputization agreement that would obviate perceived jurisdictional problems in emergency response. See Addendum, Addition of Okmulgee Cnty. to Intergov’l Cross-Deputization Agreement (May 8, 2000), <https://bit.ly/3uIs2nz>. The County Sheriff’s office unilaterally withdrew from that agreement in March 2021. See Letter from Eddy Rice, Okmulgee Cnty. Sheriff, to David Hill, Muscogee (Creek) Nation Principal Chief (Mar. 1, 2021) (on file with Nation). Rather than seek to solve this problem, the State uses it to make its case.



block resources for *McGirt's* implementation to bolster its argument for overturning *McGirt*.

The State's misleading critique of *McGirt's* implementation is further belied by the status of the forty-four cases, involving forty-three individual respondents, in which the State is currently seeking certiorari.<sup>6</sup> These cases show the federal government and tribes are bringing criminals to justice without delay and minimizing impacts of retrials on victims and their families. Forty-one of the forty-three respondents have been indicted in federal or tribal court.<sup>7</sup>

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<sup>6</sup> The State also formerly sought certiorari in *Oklahoma v. Bosse*, No. 21-186, and stays of mandate in *Oklahoma v. Cole*, No. 20A167, and *Oklahoma v. Ryder*, No. 20A168. Those state convictions have been reinstated, *see supra* at 4.

<sup>7</sup> *Cherokee Nation v. Perales*, No. CRM-21-261 (Cherokee Dist. Ct. filed Mar. 9, 2021); *Cherokee Nation v. Shriver*, No. CRM-21-56 (Cherokee Dist. Ct. filed Mar. 30, 2021); *Choctaw Nation v. McCurtain*, No. CF-21-0150 (Choctaw Dist. Ct. filed Apr. 21, 2021); *Muscogee (Creek) Nation v. Epperson*, No. CF-2021-973 (Muscogee (Creek) Dist. Ct. filed Sept. 22, 2021); *Muscogee (Creek) Nation v. Starr*, No. CM-2021-591 (Muscogee (Creek) Dist. Ct. filed Aug. 30, 2021); *United States v. Bain*, No. 6:20-cr-00139-JFH (E.D. Okla. filed Dec. 8, 2020); *United States v. Ball*, No. 6:20-cr-00110-RAW (E.D. Okla. filed Sept. 22, 2020); *United States v. Beck*, No. 6:21-cr-00142-JWD (E.D. Okla. plea entered Oct. 14, 2021); *United States v. Brown*, No. 6:20-cr-00109-DCJ-1 (E.D. Okla. convicted Sept. 1, 2021); *United States v. Castro-Huerta*, No. 4:20-cr-00255-CVE-2 (N.D. Okla. plea entered Oct. 15, 2021); *United States v. Coffman*, No. 6:21-cr-00324-RAW-1 (E.D. Okla. filed Sept. 16, 2021); *United States v. Cooper*, No. 6:21-cr-00070-JFH (E.D. Okla. filed Mar. 19, 2021); *United States v. Cottingham*, No. 4:20-cr-00209-GKF-1 (N.D. Okla. plea entered June 10, 2021); *United States v. Davis*, No. 4:20-cr-00316-CVE-1 (N.D. Okla. filed Dec. 8, 2020); *United States v. Foster*, No. 4:21-cr-00118-CVE (N.D. Okla. plea entered Nov. 8, 2021); *United States v. Fox*, No. 6:21-mj-00251-KEW-1 (E.D.

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Okla. filed May 17, 2021); *United States v. Grayson*, No. 6:21-cr-00166-RAW-1 (E.D. Okla. filed Apr. 12, 2021); *United States v. Harjo*, No. 6:21-cr-00022-RAW-1 (E.D. Okla. convicted Nov. 16, 2021); *United States v. Hathcoat*, No. 6:21-cr-00018-RAW-1 (E.D. Okla. filed Feb. 24, 2021); *United States v. Howell*, No. 4:21-cr-00121-JFH-1 (N.D. Okla. filed Mar. 17, 2021); *United States v. Jackson*, No. 4:20-cr-00310-CVE-1 (N.D. Okla. plea entered Nov. 10, 2021); *United States v. Janson*, No. 4:21-cr-00197-GKF-1 (N.D. Okla. Nov. 30, 2021); *United States v. Johnson*, No. 6:21-cr-00183-BMJ-1 (E.D. Okla. filed Apr. 19, 2021); *United States v. Jones*, No. 4:21-cr-00023-GKF-1 (N.D. Okla. convicted June 23, 2021), *appeal docketed* No. 21-5079 (10th Cir. filed Oct. 24, 2021); *United States v. Jones*, No. 6:21-cr-00118-JFH-1 (E.D. Okla. filed Mar. 22, 2021); *United States v. Kepler*, No. 4:20-cr-276-GKF-1 (N.D. Okla. convicted Apr. 26, 2021); *United States v. Leathers*, No. 4:21-cr-00163-CVE-1 (N.D. Okla. filed Mar. 19, 2021); *United States v. Little*, No. 4:21-cr-00162-CVE-1 (N.D. Okla. filed Apr. 8, 2021); *United States v. Martin*, No. 6:21-cr-00221-TDD-1 (E.D. Okla. filed May 17, 2021); *United States v. Martin*, No. 6:21-cr-00047-JFH-1 (E.D. Okla. plea entered July 14, 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. Mitchell*, No. 4:20-cr-00254-JFH-1 (N.D. Okla. Sept. 29, 2021); *United States v. Mize*, No. 4:21-cr-00107-GKF-1 (N.D. Okla. plea entered Dec. 1, 2021); *United States v. Perry*, No. 4:20-cr-00218-GKF-1 (N.D. Okla. filed Oct. 6, 2020); *United States v. Sizemore*, No. 6:21-cr-00138-RAW-1 (E.D. Okla. filed Apr. 19, 2021); *United States v. Spears*, No. 4:20-cr-00296-GKF-1 (N.D. Okla. filed Nov. 18, 2020); *United States v. Stewart*, No. 4:20-cr-00260-GKF-1 (N.D. Okla. Sept. 16, 2021); *United States v. Williams*, No. 4:21-cr-00104-JFH-1 (N.D. Okla. filed Mar. 24, 2021); *United States v. Vineyard*, No. 6:21-cr-00056-DCJ-1 (E.D. Okla. filed Mar. 29, 2021); *United States v. Yargee*, No. 4:21-cr-00313-CVE-1 (N.D. Okla. plea entered Aug. 27, 2021). The Nation has not brought charges against Chandler Ned at this time, *see Oklahoma v. Ned*, No. 21-645, and the Tribal statute of limitations has not yet run. Bryce Miller, *see Oklahoma v. Miller*, No. 21-643, is currently in state prison and the Nation understands federal prosecutors are making a charging decision.

Eleven have already pleaded guilty, *Beck*; *Castro-Huerta*; *Cottingham*; *Foster*; *Jackson*; *Janson*; *Martin*, No. 6:21-cr-00047-JFH-1; *Mitchell*; *Mize*; *Stewart*; *Yargee*, and four have already been convicted, *Brown*; *Harjo*; *Jones*, No. 4:21-cr-00023-GKF-1; *Kepler*.

The Five Tribes' effectiveness in administering criminal justice is clear: as of September 30, 2021, they had filed over 6,965 felony and misdemeanor cases and issued 2,700 traffic citations since their Reservations were reaffirmed. Inter-tribal Council of Five Civilized Tribes, Res. No. 21-34 (Oct. 8, 2021), <https://bit.ly/3iXEyLg>. The Chickasaw Nation asserted criminal jurisdiction immediately after its Reservation was acknowledged in March 2021. See Proclamation, Office of the Governor, Chickasaw Nation (Mar. 11, 2021), <https://bit.ly/3uHEP9W>. Through December 9, the Nation's prosecutors had filed 1,717 felony, misdemeanor, and traffic cases in Chickasaw tribal court, and the Chickasaw police force, the Lighthorse, has fielded 93,718 dispatch contacts, handled 6,812 incidents, and made 1,663 arrests.<sup>8</sup> The State's supporting *amici* make unsourced assertions that some crimes are going unpunished, but they do not square with the aggregate picture.<sup>9</sup>

Traveling further afield, the State and some of its *amici* worry about "[q]uestions involving the effect of *McGirt* on the State's civil authority . . . ." *Castro-*

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<sup>8</sup> Documentation on file with Nation.

<sup>9</sup> As the State allows most violent crimes in Oklahoma to go unpunished and often fails adequately to punish crime against Indians, see *Cherokee Nation Amicus Br.* at 6, 9-10, *Oklahoma v. Castro-Huerta*, No. 21-429; accord *United States v. Bryant*, 136 S. Ct. 1954, 1960 (2016), the State's *amici*'s anecdotes do not show that state jurisdiction is required to fill a void.

*Huerta* Pet. 23-25; see EFO Amicus Br. at 14-17, *Oklahoma v. Castro-Huerta* No. 21-429. *McGirt* decided no such issues, 140 S. Ct. at 2480, which are governed by different frameworks, see, e.g., *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144-45 (1980); *Montana v. United States*, 450 U.S. 544, 565-66 (1981), and which are not presented here. Additionally, the cases they point to are empty vessels. One is a spurious claim by a (non-tribal) power plant seeking to avoid ad valorem real property taxes. *Oneta Power, LLC v. Hodges*, Nos. CJ-2020-193, CV-2021-193 (Okla. Dist. Ct. filed Aug. 21, 2020). One of the two cases seeking refunds of fees, fines, and restitution has been dismissed, see *Nicholson v. Stitt*, No. CJ-2020-094 (Okla. Dist. Ct. Nov. 24, 2020), *pet. in error filed*, No. SD-119270 (Okla. Dec. 18, 2020), while motions to dismiss are pending in the other, see *Pickup v. Dist. Ct.*, No. 20-cv-346-JED-SH (N.D. Okla. filed July 20, 2020). The final case, purportedly concerning “the State’s power to regulate oil and gas,” has been stayed because the appellant is under the control of a receivership which is selling off its assets, see Unopposed Mot. to Stay Proceedings, *Canaan Res. X v. Calyx Energy III, LLC*, No. CO-119245 (Okla. filed Mar. 19, 2021), <https://bit.ly/3CCnNwE>. These anemic challenges do not threaten civil governance. Cf. *Castro-Huerta* Pet. 24.

The State’s other concerns are ill-informed exaggerations. The State claims people are refusing to pay state taxes, *Castro-Huerta* Pet. 24, but the Oklahoma Tax Commission says it is unclear how many people are seeking exemptions due to *McGirt*, see Joe Tomlinson, *State Says Income Tax Exemption For Tribal Citizens on Reservations Inapplicable Despite ‘Existing Law’*, NonDoc (Nov. 3, 2021),

<https://bit.ly/3dZlJom>, and recommends “compacts with the tribes” if the number is substantial stating that “[h]istorically, tribal compacts have been a powerful tool for facilitating cooperation and revenue-sharing between tribal and state governments, allowing the State to avoid the otherwise difficult task of administering and enforcing state taxes on tribal lands.” Okla. Tax Comm’n, *Report of Potential Impact of McGirt v. Oklahoma* 3 (2020), <https://bit.ly/3yvAgzU>. Regardless, the State’s tax revenue has *increased* post-*McGirt*. *Economy Expands as Energy Prices Surge*, Gross Receipts to the Treasury (Okla. State Treasurer, Okla. City, Okla.), Nov. 3, 2021, at 3, <https://bit.ly/3HmtiTt>. And, Oklahoma’s Governor and Secretary of Commerce boast of the State’s “thriving” economy, budget surplus, attractiveness for out-of-state companies to relocate (including to Indian reservations), and a significant tax cut enacted after *McGirt*. See Randy Krehbiel, *Official Expects State Economic ‘Explosion’*, Tulsa World (Sep. 28, 2021), <https://bit.ly/3iuARwz>; Daniela Ibarra, *Gov. Kevin Stitt Speaks to Tulsa Business Community*, KTUL (Aug. 26, 2021), <https://bit.ly/2WJxCtx>; Brianna Bailey, *Land and Millions of Dollars for Infrastructure are Part of a Deal to Lure a Startup Electric Car Maker to Oklahoma*, Norman Transcript (Oct. 13, 2021 5:30 PM), <https://bit.ly/3mTSgQD>; Rhett Morgan, *‘Beginning of a New Wave’: MidAmerica Industrial Park Wants to Capitalize on Canoo Investment in Pryor*, Tulsa World (June 20, 2021), <https://bit.ly/3BGSrVy>.

The State also says the “Department of the Interior has moved to seize control over surface coal mining and reclamation in the State.” *Castro-Huerta* Pet. 25. Hardly. The United States is pursuing the orderly

transition of authority over coal mining and reclamation on the Choctaw, Creek, and Cherokee Reservations under the Surface Mining Control and Reclamation Act (“SMCRA”), see *Oklahoma v. U.S. Dep’t of Interior*, No. 5:21-cv-00719-F (W.D. Okla. filed July 16, 2021); *Oklahoma v. U.S. Dep’t of Interior*, No. 5:21-cv-00805-F (W.D. Okla. filed Aug. 16, 2021). While the State calls this an “attack” on the “State’s authority under cooperative-federalism programs,” *Castro-Huerta* Pet. 25, this transition is also part of SMCRA’s system of cooperative federalism, see *Bragg v. W. Va. Coal Ass’n*, 248 F.3d 275, 288-89 (4th Cir. 2001). Meanwhile, cooperative federalism has *expanded* the State’s environmental regulatory authority on Oklahoma Indian reservations, see Letter from Andrew R. Wheeler, EPA Administrator, to J. Kevin Stitt, Okla. Governor (Oct. 1, 2020), <https://bit.ly/3lowdCf>.

The State conjures up threats to title insurance, see *Castro-Huerta* Pet. 24-25, relying on unsupported advocacy, see Open Letter from Jonathan S. Small, President & Larry V. Parman, Chairman, Okla. Council of Pub. Affairs, to Okla. Cong. Delegation (Oct. 8, 2020), <https://bit.ly/3CKzYHZ>, an opinion piece suggesting title insurance companies might be affected if they underwrote policies for fee lands over which tribes have jurisdiction, Sarah Roubidoux Lawson & Megan Powell, Opinion, *Unsettled Consequences of the McGirt Decision*, Regulatory Review (Apr. 1, 2021), <https://bit.ly/3u8ieDl>, and a financial report raising similar concerns, First Am. Fin. Corp., SEC Form 10-K at 22 (Feb. 16, 2021), <https://bit.ly/2XEkdTA>. If there were an actual threat, the American Land Title Association suggests intergovernmental cooperation to resolve it. *How U.S. Supreme Court Tribal Ruling in Oklahoma Impacts Title Industry, Property Rights,*

Am. Land Title Ass'n (Sept. 1, 2020), <https://bit.ly/3CHxutS> (cited in *Castro-Huerta* Pet. 24). And if any of these issues were to arise, this Court's precedents should dispel undue concern. See *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316 (2008).

The State asserts also that intergovernmental agreements are not possible solutions, *Castro-Huerta* Pet. 26-28, but practice proves otherwise. Soon after *McGirt*, the State and Nation, authorized by federal, tribal, and state law, 25 U.S.C. § 1919(a); Chickasaw Nation Code § 6-201.5(E);<sup>10</sup> Okla. Stat. tit. 10 § 40.7, entered into a civil jurisdictional agreement acknowledging the Reservation and permitting the State to exercise concurrent jurisdiction over Indian child custody matters within the Reservation. See Intergov'l Agreement Between Okla. & Each of Five Tribes Regarding Jurisdiction Over Indian Children Within Each Tribe's Reservation (Aug. 7, 2020), <https://bit.ly/3izrZWk>. The State has since entered into agreements with the other Five Tribes, and the Oklahoma Legislature recently strengthened the state law foundation for these agreements. H.B. 2352, 58th Sess. (Okla. 2021), <https://bit.ly/3gLmEdK>.

Further compacting has not occurred because Oklahoma Governor Stitt refuses to recognize Indian reservations in Oklahoma. See *Castro-Huerta* Pet. 26-27. Chickasaw Nation Governor Anoatubby proposed a process for exploring new intergovernmental agreements, but no response has been forthcoming. Allison Herrera, 'We're Not Going to Give Up Our Jurisdiction': Chickasaw Nation Gov. Anoatubby on *McGirt*

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<sup>10</sup> <https://bit.ly/3DnKS6B>.

*Impact*, KOSU (May 6, 2021), <https://bit.ly/3monLlx>. Instead, the Oklahoma Governor’s counsel has asserted that “[t]he state can’t negotiate its sovereignty away. . . .” Ray Carter, *McGirt Called Threat to State’s Economic Future*, Okla. Council of Pub. Affs. (Aug. 16, 2021), <https://bit.ly/3uzev1F>. The Governor even opposes a congressional bill to authorize the State and Nation to allocate criminal jurisdiction by intergovernmental agreement, *see* Cherokee Nation and Chickasaw Nation Criminal Jurisdiction Compacting Act of 2021, H.R. 3091, 117th Cong. (2021), because it acknowledges Indian Reservations, *see* Gorman.

Nevertheless, the Nation has had significant success in *local* intergovernmental agreements. It has seventy-two jurisdiction-sharing agreements with non-tribal law enforcement on the Reservation, including with thirty-nine of the forty-three incorporated communities within its Reservation that have police forces, and eight adult inmate and one juvenile detention agreements so we may house our growing inmate population. State or local law enforcement agencies may enter jurisdictional agreements by signing a uniform cross-deputization agreement the Nation and State approved in 2006 or a uniform law enforcement commissioning agreement the Nation offered to non-tribal law enforcement after *Bosse* and filing it with the Oklahoma Secretary of State. *See* Deputation Agreement (filed Jan. 23, 2006), <https://bit.ly/3ktAXFO>; Chickasaw Nation Law Enforcement Agreement with Okla. Dep’t of Agric., Food & Forestry (filed June 7, 2021), <https://bit.ly/30FAN6T>.

The Nation provides detailed information to each law enforcement office that is cross-deputized with it,



describing: how to verify whether a perpetrator or victim is Indian by calling the Chickasaw Lighthouse 24/7 dispatch line, federal law enforcement, or other tribes; how to compile all information required by the Chickasaw Nation prosecutors for tribal court proceedings; where and how to jail Indian perpetrators and report their arrests to Chickasaw prosecutors; how to obtain probable cause and search warrants from the Nation's Office of Tribal Justice Administration ("OTJA"), issue bonds, make tribal law traffic citations, assess traffic fees, and report them to the Nation; how to enforce protective orders under tribal law; how to handle juvenile arrests; and how to extradite Indian offenders from tribal to state courts. *See* Memo. from Office of Tribal Justice Admin., Chickasaw Nation, to Chickasaw Lighthouse Police & Cross-Commissioned Law Enforcement Agencies (May 10, 2021) (on file with Nation). OTJA provides in-person trainings for other law enforcement agencies on implementation of these practices, in which several agencies have already asked to participate.

The implementation of these agreements tells a powerful story. As one Sheriff in the Reservation recently put it:

This allows us to continue business as usual like before *McGirt*. We're still taking calls and providing a service to our citizens. We have the authority to proceed with investigations or any calls. This bridges the gap and allows us to take care of our citizens. That's really what this is all about – taking care of the citizens.

Barry Porterfield, *Tribal Pact Good for Sheriff*, Pauls Valley Democrat (Dec. 1, 2021), <https://bit.ly/3dcUJkJ>.

The State's strategy also relies on a cynical view of this Court. The Attorney General says that, due to the recent death of Justice Ginsburg, "we have a different configuration that might have a different view of how to approach this, . . ." Janelle Stecklein, *Experts: Supreme Court Could Clarify McGirt Ruling, Won't Overturn It*, Enid News (Aug. 19, 2021), <https://bit.ly/3DovRSS>. See Carmen Forman, *New Oklahoma AG John O'Connor Talks McGirt, ABA Rating and State's Top Legal Issues*, Oklahoman (Sept. 5, 2021 5:00 AM), <https://bit.ly/3a6xGGz>. The Governor is more direct: "The Supreme Court has a new member now, Barrett has replaced Ginsburg, who actually was in favor of the *McGirt* decision, so there's a possibility the court would overturn this and reverse their decision, as well." Dick Pryor, *Capitol Insider: Governor Kevin Stitt On State-Tribal Relations*, KGOU (Feb. 5, 2021 5:10 PM), <https://bit.ly/3ypYRG5>.

This highlights the real problem: the State is slow walking implementation of *McGirt* and opposing congressional assistance to try to make reconsideration of *McGirt* palatable to an audience with a new member. These are grounds to deny certiorari, not to grant it.

## **II. This Case Is Moot, And The State Waived Its Right To Challenge The Applicability Of *McGirt* To Determine The Continuing Existence Of The Chickasaw Reservation.**

This case provides no vehicle for asserting any position because it is moot. After receiving the OCCA's mandate, the District Court dismissed the criminal charges on September 22, 2021, without challenge by the State. See *State v. Vineyard*, No. CF-2018-424

(Okla. Dist. Ct. Sept. 22, 2021), <https://bit.ly/3D7EJuJ>.<sup>11</sup> 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 Chickasaw Reservation. Across the board, the State consented to dismissal of charges, either by taking no position on Reservation existence or, as it did here, accepting the existence of the Reservation and waiving opportunities to challenge it, and by standing mute when the lower courts dismissed for lack of jurisdiction. Neither *King*, nor the decision on which it relies, see *United States v. Villamonte-Marquez*, 462 U.S. 579 (1983), 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 judgment). The State also waived its right to challenge the Reservation as a matter of state law, see *infra* at 22, and so this Court’s reversal of the *McGirt* analysis could not reinstate Respondent’s convictions. 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

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<sup>11</sup> Notably, the State did not include this order in its appendix. See Rule 14.1(i)(i)-(ii).

opinions.” *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021).

Even if that were not the case, the State is estopped from claiming that *McGirt* was wrong or improperly applied. It has stipulated elsewhere that the Reservation exists in order to avoid the burden of litigating that issue in state court. *See Ball v. State*, No. CF-2018-157 (Okla. Dist. Ct. Mar. 26, 2021), <https://bit.ly/2X4eSoA>; Suppl. Br. of Appellee After Remand at 4, *Ball v. State*, No. F-2020-54 (Okla. Crim. App. filed Apr. 26, 2021), <https://bit.ly/3oXHjQG>. Under the direction of a new Attorney General, recently appointed by the Governor, the State has attempted to circumvent that earlier admission. That effort is barred, because it is an unfair reversal that appears to be part of a larger effort by the State to game the courts for litigation advantage. *See New Hampshire v. Maine*, 532 U.S. 742, 750-51, 755-56 (2001).

If more were needed, the State’s conduct in this case bars its attack on the Chickasaw Reservation. Now, the State contends that “[u]nder the correct framework . . . Congress disestablished the Creek territory in Oklahoma, as well as the territories of the rest of the Five Tribes,” and that *McGirt* is incorrect. *Castro-Huerta* Pet. 18.<sup>12</sup> That framework, it says requires “[c]onsideration of history . . . because the effect on reservation status of statutes targeting Indian land ownership is inherently ambiguous.” *Id.* In the courts below, however, the State did not preserve that argument, nor did it provide any “consideration of history.” When a party does not raise an argument

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<sup>12</sup> *McGirt* and its dissent addressed only the Creek Reservation. 140 S. Ct. at 2479.

below, and the lower court does not rule on it, it is waived. See *Sprietsma v. Mercury Marine*, 537 U.S. 51, 56 n.4 (2002). “Waiver is the intentional relinquishment or abandonment of a known right,” *Wood v. Milyard*, 566 U.S. 463, 474 (2012) (cleaned up), which the State did here by stating it was not challenging the existence of the Reservation. As the State has acknowledged in another post-*McGirt* case, “[s]trict refusal to consider claims not raised and addressed below furthers the interests of comity by allowing the states the first opportunity to address federal law concerns and resolve any potential questions on state-law grounds.” Br. in Opp. to Pet. at 5, *Christian v. Oklahoma*, No. 20-8335, <https://bit.ly/3q8en94> (citing *Adams v. Robertson*, 520 U.S. 83, 90 (1997) (per curiam)).

On March 26, 2021, the OCCA remanded for an evidentiary hearing on whether the crime occurred in Indian Country. Pet’r’s App. 17a. The State then stipulated that the crime occurred within the boundaries recognized in the Nation’s treaties, that “the [OCCA] recently held in *Bosse v. State*, 2021 OK CR 3, [484] P.3d [286], that Congress established a reservation for the Chickasaw Nation in said treaties, and never erased the boundaries and disestablished the Chickasaw Nation Reservation,” and “the State is not challenging the [OCCA]’s holding that the Chickasaw Nation has a reservation,” Stips. ¶ 2 & n.1, *State v. Vineyard*, No. CF-2018-424 (Okla. Dist. Ct. filed May 20, 2021), <https://bit.ly/31hiypa>. Simultaneously the State filed a brief taking the same positions, State’s Pre-Evidentiary Hr’g Br. at 2 (filed May 20, 2021), <https://bit.ly/31LDmoG>, and noting the State disagreed with *McGirt*, but neither explaining why *McGirt* or *Bosse* were wrong, nor contradicting its

stipulation that it was not challenging the Chickasaw Reservation's existence. *Id.* at 3.

The District Court held an evidentiary hearing, at which Respondent's counsel emphasized that the State was "not challenging the finding of the non-establishment of the Chickasaw Nation." Tr. of Evidentiary Hr'g at 3:9-23 (May 20, 2021).<sup>13</sup> The District Attorney, appearing for the State, said "I can't disagree with the stipulations, Judge." *Id.* at 6:16-17.<sup>14</sup> The District Court later concluded, based on the stipulations and the OCCA's rulings in *Bosse* and *Bench v. State*, 2021 OK CR 12, 492 P.3d 19, *withdrawn on other grounds*, 2021 OK CR 24, 495 P.3d 670, that the Chickasaw Reservation exists. Pet'r's App. 13a & n.2.

After the District Court issued its findings, the elected Attorney General resigned.<sup>15</sup> Thereafter, the State belatedly scrambled to change course. Back before the OCCA, the State filed a brief, stating that it disagreed with *McGirt* and *Bosse*, that it agreed with the *McGirt* dissent's statement that all Five Tribes' reservations were disestablished, and that it might challenge *McGirt* and *Bosse* in this Court. Suppl. Br. of Appellee After Remand at 1 n.2, *Vineyard v. State*, No. F-2020-245 (Okla. Crim. App. filed Aug. 3, 2021),

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<sup>13</sup> The transcript is available from the District Court as part of the record.

<sup>14</sup> He also noted "we obviously had a change in justices on the Supreme Court that could very well cause [the ruling in *McGirt*] to go five/four the other way if they can figure out a way to reconsider it," *id.* at 5:23-6:1, but provided no basis for reconsideration.

<sup>15</sup> Melissa Scavelli, *Oklahoma Attorney General Mike Hunter Resigns Due to 'Personal Matters'*, KOKH (May 26, 2021), <https://bit.ly/3n1ShmX>.

<https://bit.ly/31dbp9w>. Although the OCCA had decided *Bosse*, the State did not seek to revisit *Bosse* or argue why it was wrong. At the same time, the State acknowledged its stipulation that *Bosse* decided the Reservation's existence, *id.* at 4-5, repeated the District Court's findings, *id.* at 5-6, and asked the OCCA to stay temporarily any mandate dismissing the conviction, *id.* at 6.

Shortly thereafter, the State asked the OCCA to stay proceedings pending the outcome of its petition for certiorari in *Bosse*, No. 21-186. Br. in Supp. of Mot. to Stay & Abate Proceedings (filed Aug. 16, 2021), <https://bit.ly/3D6zHig>. It presented a truncated argument that *McGirt* was wrongly decided and made the conclusory assertion that “[u]nder the correct framework . . . it is clear that Congress disestablished the reservations of the” Five Tribes, *id.* at 1-2, but did not explain why, nor why it could avoid its stipulation and waiver of a challenge to the Reservation below. The OCCA denied the stay because the State’s “possible success in *Bosse* forms no basis for delaying these proceedings.” Order (filed Aug. 24, 2021), <https://bit.ly/31hmne0>. The State later dismissed its *Bosse* petition.

The OCCA subsequently granted relief to Respondent, noting that the State had stipulated to the Chickasaw Nation’s historical boundaries, acknowledged the decision in *Bosse*, and presented no evidence that the Reservation does not exist. Pet’r’s App. 4a-5a.

By its conduct, the State forfeited its right to challenge the existence of the Chickasaw Reservation here. At the District Court, it stipulated that the Reservation exists and disclaimed any challenge to it. Back before the OCCA, after the opportunity to

litigate the existence of the Reservation had passed, it made only a skeletal effort to preserve an attack on *McGirt*, without addressing *Bosse* or its own stipulations. The state courts never ruled on this cursory challenge. The State’s petition still says nothing substantive about why *Bosse* was wrong. That does not preserve or properly present an attack on the Reservation to this Court or the OCCA. *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 38 (1989); *Bench v. State*, 2018 OK CR 31, ¶ 96, 431 P.3d 929, 958; *Stewart v. Territory*, 102 P. 649, 649 (Okla. Crim. App. 1909) (per curiam) (“[I]t is the duty of counsel, in presenting their cases upon appeal, to . . . clearly point out the special error complained of, and show that it was prejudicial to their clients. Unless this is done, the alleged errors will be treated as waived.”); see *Christian Legal Soc’y v. Martinez*, 561 U.S. 661, 676-77 (2010). The State’s attack on the Chickasaw Reservation and *McGirt* should therefore not be considered here. *Sprietsma*, 537 U.S. at 56 n.4; *Adams*, 520 U.S. at 90; *TransUnion*, 141 S. Ct. at 2210 n.6.

### **III. The State’s Request For Reconsideration Of *McGirt* Ignores *Stare Decisis*.**

Having failed to establish a basis for certiorari, the State insists that *McGirt* should be reconsidered because it is wrong. For the reasons the Nation described in Section III of its *amicus* brief in *Oklahoma v. Beck*, No. 21-373, the State has provided no reason to discard *stare decisis*.

### **CONCLUSION**

The petition should be denied.

Respectfully submitted,



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