No. 21-372

IN THE

Supreme Court of the United States

STATE OF OKLAHOMA,

Petitioner,

v.

CHARLES MICHAEL COOPER,

Respondent.

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

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

STEPHEN H. GREETHAM
Senior Counsel
MEREDITH P. TURPIN
Associate General Counsel
CHICKASAW NATION
Office of Senior Counsel
4001 N. Lincoln Blvd
Oklahoma City, OK 73105

FRANK S. HOLLEMAN, IV
Counsel of Record
DOUGLAS B. L. ENDRESON
SONOSKY, CHAMBERS, SACHSE, ENDRESON & PERRY, LLP
1425 K Street, NW
Suite 600
Washington, DC 20005
(202) 682-0240
fholleman@sonosky.com

Counsel for Amicus Curiae Chickasaw Nation

October 15, 2021

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

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INTEREST OF *AMICUS*[1]

Amicus Chickasaw Nation ("Nation") is a federally-recognized Indian tribe, 86 Fed. Reg. 7,554, 7,557 (Jan. 29, 2021), that resides on and governs the Chickasaw Reservation, its permanent homeland under treaties with the United States, *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. The Nation exercises inherent authority to protect the public by providing "police protection and other governmental services" on the Reservation, *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, growing its capacity and redoubling coordination with other governments in anticipation of the affirmation of its Reservation boundaries. The Nation has fundamental sovereign interests in the success of those efforts and in protecting the treaty promises that established the Reservation.

The State imperils these interests. It disparages tribal and federal success in implementing the *McGirt*

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[1] The Nation certifies that no counsel for a party authored this brief in whole or 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.

decision, opposes additional funding from Congress for those efforts, 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 of the myriad cases in which the State challenges *McGirt*, would jeopardize the Nation's Reservation and unsettle the rule of law that governs the Reservation today. Accordingly, the Nation has unique interests in Oklahoma's petition, and in the implementation of *McGirt*, as well as first-hand experience in the delivery of criminal justice in a multijurisdictional context, all of which will aid the Court's consideration of this petition.

SUMMARY OF ARGUMENT

The petition should be denied for three reasons.[2] First, the federal and tribal governments are successfully implementing *McGirt*. To argue otherwise, the State offers an account of the *status quo* laced with inaccuracies and omissions. The State's tale of woe is

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[2] The State's argument against *McGirt* in this case relies on a petition in another case that has been dismissed. *See* Pet. 6 (citing Pet. 21-32, *Oklahoma v. Bosse*, No. 21-186, *dismissed* Sept. 10, 2021). The State abandoned *Bosse* after the Oklahoma Court of Criminal Appeals ("OCCA") decided *State ex rel. Matloff v. Wallace*, 2021 OK CR 21, and withdrew the opinion on which the State sought certiorari, *Bosse v. State*, 2021 OK CR 23, *withdrawing* 2021 OK CR 3, 484 P.3d 286. (The OCCA has since reaffirmed in another ruling in *Bosse* that the Chickasaw Reservation exists. *See Bosse v. State*, 2021 OK CR 30, ¶¶ 12-13.) The State has reiterated its attack on *McGirt* in its petition in *Oklahoma v. Castro-Huerta*, No. 21-429 ("*Castro-Huerta* Pet."), and seeks to incorporate that argument here, *see Castro-Huerta* Pet. 17-30; Letter from Mithun Mansinghani, Okla. Solicitor Gen., to Scott Harris, U.S. Sup. Ct. Clerk (Sept. 22, 2021). The Nation responds to the State's *Castro-Huerta* petition, though mindful that the Court may not accept the State's practice.

dispelled by the fact that all thirty-three of the cases in which the State has sought certiorari to challenge *McGirt* involve respondents who have either been federally indicted or charged in tribal court. *See infra* at 7-9. But 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 basis for discarding *McGirt*. It argues the dissent in *McGirt* was correct and that the majority was wrong, *Castro-Huerta* Pet. 17, which cannot overcome *stare decisis*, *see Kimble v. 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 asserts intergovernmental cooperation is impossible, that is merely the State Governor's position. The Nation, the State Legislature, the Oklahoma Tax Commission, and local jurisdictions all support such agreements and many are using them to implement *McGirt*. In the end, 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, and we are 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's turnkey is the State Governor's cynical reliance 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. *McGirt* is delivering justice in Oklahoma, and 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 *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. The OCCA has also vacated earlier opinions granting such relief to the extent they conflicted with that ruling. *See, e.g.*, *Bosse*, 2021 OK CR 23; *Bosse*, 2021 OK CR 30, ¶ 13; *Cole v. State*, 2021 OK CR 26, *as corrected*,

2021 OK CR 32, *withdrawing* 2021 OK CR 10, 492 P.3d 11; *Ryder v. State*, 2021 OK CR 25, *withdrawing* 2021 OK CR 11, 489 P.3d 528.

The State asserts *Wallace* "is not finally settled" because the defendant plans to file a certiorari petition, *Castro-Huerta* Pet. 22, as he has done, *see Parish v. Oklahoma*, No. 21-467. That petition is to be dealt with in that case, not here. Nor can the State deny *Wallace*'s effectiveness, see *New Hampshire v. Maine*, 532 U.S. 742, 749-51, 755-56 (2001), as it has repeatedly and successfully relied on *Wallace* to obtain reversal or denial of post-conviction relief, *see, e.g.*, Notice of Decision, *Cole v. State*, No. PCD-2020-529 (Okla. Crim. App. filed Aug. 26, 2021), https://bit.ly/3kIZRk6; Notice of Decision, *State v. Nelson-Coddington*, No. PC-2021-591 (Okla. Crim. App. filed Aug 16, 2021), https://bit.ly/3Do909o. It then argues that offenders may use *McGirt* to obtain *federal* habeas relief, *Castro-Huerta* Pet. 22, but those efforts have so far been rejected, *see In 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 and duties. Ignoring this point, 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 not recur. *See* Wray Testimony.[3] To be sure, 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 "implement public 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).

Yet, 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

[3] 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*. That would make the federal and tribal governments' *Indian country* workload plainly manageable, especially if they obtain the additional support the State opposes.

tribal law enforcement, asserting "the state did not lose its jurisdiction" after *McGirt*, *see* Gorman,[4] and complains that it does not know how many post-*McGirt* cases "will be reprosecuted by tribal authorities," *Castro-Huerta* Pet. 20-21. This is brinksmanship masked as prudence—the State is attempting to block federal 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 thirty-three cases in which the State has so far sought certiorari.[5] The respondents in these cases have all

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[4] 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 any perceived jurisdictional problems in emergency response situations. *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, despite some local opposition. *See* Letter from Eddy Rice, Okmulgee Cnty. Sheriff, to David Hill, Muscogee (Creek) Nation Principal Chief (Mar. 1, 2021) (on file with Nation); Tres Savage, *Okmulgee Mayor Richard Larabee Emphasizes Cooperation with Muscogee Nation*, NonDoc (Aug. 24, 2021), https://bit.ly/3BvSpzz. Rather than seek to solve this problem, the State uses it to make its case.

[5] The State also formerly sought stays of mandate in two other cases. *Oklahoma v. Cole*, No. 20A167; *Oklahoma v. Ryder*, No. 20A168. Those offenders remain in state prison, *see* Order Staying Issuance of Mandates Indefinitely, *Cole v. State*, et al., Nos. PCD-2020-529, et al. (Okla. Crim. App. May 28, 2021), https://bit.ly/3ANI6GM, their state convictions were reinstated after *Wallace*, *see Cole*, 2021 OK CR 26; *Ryder*, 2021 OK CR 25, and

been indicted in federal or tribal court, and all but two are in federal or state custody.[6] Four have already

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one is under federal indictment, *United States v. Cole*, No. 4:21-cr-00138-CVE (N.D. Okla. filed Apr. 6, 2021).

[6] *Cherokee Nation v. Shriver*, No. CRM-21-56 (Cherokee Dist. Ct. filed Mar. 30, 2021); *Muscogee (Creek) Nation v. Starr*, No. CM-2021-591 (Muscogee (Creek) Dist. Ct. filed Aug 30, 2021); *Muscogee (Creek) Nation v. Epperson*, No. CF-2021-973 (Muscogee (Creek) Dist. Ct. filed Sept. 22, 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. Bosse*, No. 5:21-mj-00203-STE (W.D. Okla. filed Mar. 30, 2021); *United States v. Brown*, No. 6:20-cr-00109-DCJ (E.D. Okla. convicted Sept. 1, 2021); *United States v. Castro-Huerta*, No. 4:20-cr-00255-CVE-2 (N.D. Okla. filed Nov. 2, 2020); *United States v. Cooper*, No. 6:21-cr-00070-JFH (E.D. Okla. filed Apr. 14, 2021); *United States v. Cottingham*, No. 4:20-cr-00209-GKF-1 (N.D. Okla. filed Oct. 5, 2020); *United States v. Davis*, No. 4:20-cr-00316-CVE (N.D. Okla. filed Dec. 8, 2020); *United States v. Fox*, No. 6:21-mj-00251 (E.D. Okla. filed May 17, 2021); *United States v. Grayson*, No. 6:21-cr-00166-RAW (E.D. Okla. filed Apr. 12, 2021); *United States v. Harjo*, No. 6:21-cr-00022-RAW (E.D. Okla. filed Feb. 24, 2021); *United States v. Hathcoat*, No. 6:21-cr-00018-RAW (E.D. Okla. filed Feb. 24, 2021); *United States v. Howell*, No. 4:21-cr-00121-JFH-1 (N.D. Okla. filed Mar. 25, 2021); *United States v. Jackson*, No. 4:20-cr-00310-CVE (N.D. Okla. filed Dec. 7, 2020); *United States v. Janson*, No. 4:21-cr-00197-GKF (N.D. Okla. plea entered June 18, 2021); *United States v. Johnson*, No. 6:21-cr-00183-BMJ (E.D. Okla. filed Apr. 13, 2021); *United States v. Jones*, No. 4:21-cr-00023-GKF (N.D. Okla. convicted June 23, 2021); *United States v. Jones*, No. 6:21-cr-00118-JFH (E.D. Okla. filed Apr. 16, 2021); *United States v. Kepler*, No. 4:20-cr-276-GKF (N.D. Okla. convicted Apr. 26, 2021); *United States v. Martin*, No. 6:21-cr-00221 (E.D. Okla. filed June 9, 2021); *United States v. McCombs*, No. 4:20-cr-00262-1 (N.D. Okla. filed Nov. 3, 2020); *United States v. McDaniel*, No. 6:21-MJ-00372-SPS-1 (E.D. Okla. filed Sept. 22, 2021); *United States v. Mitchell*, No. 4:20-cr-00254-JFH (N.D. Okla. plea entered May 12, 2021); *United States v. Mize*, No. 4:21-

pleaded guilty, *Beck*; *Janson*; *Stewart*; *Mitchell*, and three have already been convicted, *Brown*; *Jones*, No. 4:21-cr-00023-GKF; *Kepler*. These cases demonstrate that the federal government and tribes are bringing criminals to justice without delay and minimizing impacts of retrials on victims and their families.

The Five Tribes' effectiveness in administrating criminal justice is clear: they have 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. Since then, the Nation's prosecutors have filed 1,258 felony, misdemeanor, and traffic cases, and the Chickasaw police force, the Lighthorse, has fielded 73,144 dispatch contacts, handled 3,903 incidents, and made 1,361 arrests. Res. No. 21-34; Press Release, Chickasaw Nation, Inter-Tribal Council Commends Tribal Justice Agencies (Oct. 13, 2021), https://bit.ly/3j3COQH.

Leaving this case behind, the State worries about various "[q]uestions involving the effect of *McGirt* on the State's civil authority. . . ." *Castro-Huerta* Pet. 23-25. *McGirt* decided no such issues, 140 S. Ct. at

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cr-00107-GKF (N.D. Okla. filed Mar. 24, 2021); *United States v. Perry*, No. 4:20-cr-00218-GKF (N.D. Okla. filed Oct. 6, 2020); *United States v. Sizemore*, No. 6:21-cr-00138-RAW (E.D. Okla. filed May 12, 2021); *United States v. Spears*, No. 4:20-cr-00296-GKF (N.D. Okla. filed Nov. 18, 2020); *United States v. Stewart*, No. 4:20-cr-00260-GKF (N.D. Okla. plea entered May 24, 2021); *United States v. Williams*, No. 4:21-cr-00104-JFH (N.D. Okla. filed Mar. 24, 2021).

2480, which are governed by different, fact-dependent 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 none of which are presented by this case. In addition, the cases the State points to are empty vessels. One is a spurious claim, not yet briefed, by a (non-tribal) power plant seeking to avoid ad valorem real property taxes. *Oneta Power, LLC v. Hodges*, No. CJ-2020-193 (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-FHM (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 estimated in April that fewer than ten tax challenges had been filed since *McGirt*, Carmen Forman, *Some Oklahomans Seek Tax Exemptions in Light of McGirt Decision*, Oklahoman (Apr. 5, 2021), https://bit.ly/3mRoLAJ, and recommended "compacts with the tribes" if the number grows, 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*. *Gross Receipts Hit Record High*, Gross Receipts to the Treasury (Okla. State Treasurer, Okla. City, Okla.), Oct. 6, 2021, at 3, https://bit.ly/2YmWdou. 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 in Oklahoma), 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 cooperative federalism program, *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 as well, *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. Were there 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. And if an actual dispute were to arise, this Court's precedents would dispel undue concern. *See Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316 (2008).

The State also asserts that intergovernmental agreements are not possible solutions. *Castro-Huerta* Pet. 26-28. Not so. 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);[7] Okla. Stat. tit. 10 § 40.7, entered into a civil jurisdictional agreement permitting the State to exercise concurrent jurisdiction over Indian child custody matters within the Reservation, which the agreement expressly acknowledges. *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 all the Nations whose Reservations have recently been reaffirmed, 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 the Oklahoma Governor will not recognize Indian reservations in Oklahoma. *See Castro-Huerta* Pet. 26-27. Chickasaw Nation Governor Anoatubby proposed a process to Governor Stitt for exploring new intergovernmental agreements to address issues raised by *McGirt*, but no response has been forthcoming. Allison Herrera, *'We're Not Going to Give Up Our Jurisdiction': Chickasaw Nation Gov. Anoatubby on McGirt Impact*, KOSU (May 6, 2021), https://bit.ly/3monLlx. Instead, the Oklahoma Governor's special 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.

[7] https://bit.ly/3DnKS6B

(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). His objection: the bill acknowledges Indian Reservations. *See* Gorman.

Nevertheless, the Nation has had significant success in *local* intergovernmental agreements. It has seventy cross-deputization 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 has seven adult inmate and one juvenile detention agreements to house our growing inmate population. These agreements tell a powerful story of intergovernmental cooperation: a full 80% of charges filed by Lighthorse officers are referred to nontribal prosecutors and 60% of the cases the Nation has filed in Tribal court were based on referrals from nontribal law enforcement. These agreements work, and the Nation deepens this engagement every day. *See, e.g.*, Press Release, Chickasaw Nation, Cross-Deputation Agreement Allows Seamless Response to Asphalt Plant Explosion (Oct. 5, 2021), https://bit.ly/3DucerP.

The State's strategy to roll back *McGirt* also explicitly relies on a particularly 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 ("Noting the makeup of the Supreme Court changed with the addition of conservative Justice Amy Coney Barrett, [Attorney General John] O'Connor expressed optimism that the court may review McGirt."). 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.

These statements highlight the real problem: the State is slow walking implementation of *McGirt* and steadfastly opposing congressional assistance in an effort to make reconsideration of *McGirt* palatable to an audience with a new member. These are not grounds for a grant of certiorari.

II. The State is Barred From Challenging the Continuing Existence of the Chickasaw Reservation.

The State has given up any claim that *McGirt* was wrong or improperly applied in this case. The State formerly did not oppose the existence of the Nation's Reservation in the state courts. In another case the State even stipulated that the Chickasaw Reservation exists and is Indian country, which was accepted by the OCCA as consistent with the law and relieved the State of the burden of litigating the facts and law before the state courts. *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 ("the parties agreed that the locations of the crimes charged 'were within the boundaries of the Chickasaw Reservation,' and thus were within 'Indian Country'"); *Ball v. State*, No. F-2020-54, slip op. at 5-6 (Okla. Crim. App. June 3, 2021). Now, under the direction of a new Attorney General, recently appointed by the Governor, the State contends that "under 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.[8] 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.* Having convinced the state courts to accept its stipulation to the opposite position in *Ball* to avoid the burden of an evidentiary hearing on the existence of the Chickasaw Reservation, the State is barred from raising it here, as doing so would give it an unfair advantage against Respondent. See *New Hampshire*, 532 U.S. at 750-51, 755-56.

The State's argument is also barred by its conduct in *this* case. In the courts below, the State neither challenged the existence of the Chickasaw Reservation, nor did it provide the "consideration of history" that it now finds lacking in *McGirt*. 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), which the State has done here, and an

[8] *McGirt* addressed only the Creek Reservation, not all Five Tribes' Reservations. 140 S. Ct. at 2479.

argument waived below is forfeited before this Court. *United States v. Jones*, 565 U.S. 400, 413 (2012).

In this case, Respondent challenged the State's jurisdiction on direct appeal, citing *Murphy v. Royal*, 866 F.3d 1164 (10th Cir. 2017), *as amended*, 875 F.3d 896 (10th Cir. 2017). Br. of Appellant at 8-10, *Cooper v. State*, No. F-2018-830 (Okla. Crim. App. filed Jan. 7, 2019).[9] After *McGirt* and *Murphy* were decided, the State informed the OCCA that it

> needs time to review the record and pleadings in the case and determine what impact *McGirt* has on this case under the specific circumstances involved; what, if any, findings have been made by the district court with regard to the *McGirt* issue; and whether any additional findings may be necessary,

and requested supplemental briefing "to address *McGirt*'s impact on the Appellant's jurisdictional claim and whether any further findings are necessary." Req. to File a Resp. to Appellant's Jurisdictional Claim at 1-2 (filed July 16, 2020).

The OCCA then remanded for an evidentiary hearing on, *inter alia*, whether the crime occurred in Indian Country and directed the District Court to "follow the analysis set out in *McGirt*" to determine if the Chickasaw Reservation had been disestablished. Pet'r's App. 23a-25a. The OCCA made clear the State should develop evidence in the trial court on Reservation status:

> Recognizing the historical and specialized nature of this remand for evidentiary hearing, we request the Attorney General and District Attorney to work in coordination to

[9] https://bit.ly/3i1B9dS

> effect uniformity and completeness in the hearing process. Upon Cooper's presentation of *prima facie* evidence. . .as to the location of the crime in Indian Country, the burden shifts to the State to prove it has subject matter jurisdiction.

Id. at 24a.

Nevertheless, the State presented no evidence on whether the Chickasaw Reservation had been disestablished. Instead, it stipulated that "[i]f the [District] Court determines that [the Chickasaw Treaties] established a reservation, and if the Court further concludes that Congress never explicitly erased those boundaries and disestablished that reservation, then the crime occurred within Indian Country as defined by 18 U.S.C. § 1151(a)." Stips. at 1-2, *State v. Cooper*, No. CF-2016-0535 (Okla. Dist. Ct. filed Oct. 8, 2020). The Respondent and the Nation then submitted briefs and exhibits, before and during the hearing, showing the establishment and continued existence of the Reservation. Def./Appellant's Remanded Hr'g Br. (filed Oct. 13, 2020); Amicus Curiae Chickasaw Nation's Br. (filed Oct. 14, 2020); Def.'s Evidentiary Hr'g Exs. (filed Oct. 19, 2020). At the hearing, the State again stated that "[t]he State ultimately takes no position on the disestablishment of the reservation. . .but will submit that to [the Court] for a conclusion of law." Tr. of Evidentiary Hr'g, 8:24-9:2 (Oct. 19, 2020). After reviewing the facts, the District Court concluded that it "must follow the analysis of *McGirt*," Pet'r's App. 15a, and

> no evidence was presented to the Court to establish that Congress explicitly erased or disestablished the boundaries of the Chickasaw Nation or that the State of Oklahoma has

> jurisdiction of this matter. No evidence was presented that the Chickasaw reservation was "restored to public domain," "discontinued, abolished, or vacated." Without, [sic] explicit evidence of a present and total surrender of all tribal interests, the Court cannot find the Chickasaw reservation was disestablished.

Id. at 21a.

Back before the OCCA, the State again took no position on Reservation status. *See* Suppl. Br. of Appellee after Remand at 4 (filed Jan. 4, 2021).[10] Instead, it repeated the District Court's finding that the Reservation was not disestablished and asked the OCCA to stay its mandate so the United States Attorney could secure custody of Respondent. *Id.* The OCCA then granted relief to Respondent, concluding that "*McGirt* governs this case and requires us to find the District Court. . .did not have jurisdiction to prosecute Cooper," Pet'r's App. 3a-4a, and that the District Court's findings were consistent with its own in *Bosse* (later reaffirmed, *see* 2021 OK CR 30), Pet'r's App. 3a.

By this conduct, the State forfeited its right to challenge the Chickasaw Reservation, by attacking *McGirt* or otherwise. The OCCA ordered a hearing on the existence of Indian country and requested the State to help develop a record on that question. The State chose not to do so. Neither did it challenge *McGirt*.[11] Instead, the State stipulated that, if the

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[10] https://bit.ly/3EO7zCH

[11] Parties routinely preserve arguments in lower courts that a Supreme Court decision should be reversed. *See, e.g.*, *Citizens United v. FEC*, 530 F. Supp. 2d 274, 278 (D.D.C. 2008), *rev'd* 558

Reservation was never disestablished, it was Indian country. In its post-remand briefing to the OCCA, the State restated the District Court's conclusion that the Reservation exists and asked the OCCA to stay the mandate so the federal government could arrest Respondent.

The State's effort to reverse its earlier decisions not to challenge the existence of the Reservation "comes too late in the day" to be considered. *See Sorrell v. IMS Health Inc.*, 564 U.S. 552, 563 (2011); *Christian Legal Soc'y v. Martinez*, 561 U.S. 661, 677 (2010). Nor can it back out of its stipulation now. Litigants "are entitled to have their case tried upon the assumption that facts, stipulated into the record, were established" and "[t]his entitlement is the bookend to a party's undertaking to be bound by the factual stipulations it submits." *Martinez*, 561 U.S. at 676-77 (cleaned up); *see id.* at 715 (Alito, J., dissenting). "This Court has accordingly refused to consider a party's argument that contradicted a joint stipulation entered at the outset of the litigation." *Id.* at 677 (cleaned up). Thus, the Court should deny the petition.

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. But "for precedent to mean anything, [*stare decisis*] must give way only to a rationale that goes beyond whether the case was decided correctly," *June Med. Servs.*, 140 S. Ct. at 2134 (Roberts,

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U.S. 310 (2010); *compare Allen v. Cooper*, 140 S. Ct. 994, 1003 (2020), *with* Corrected Substitute Opening/Resp. Br., 2018 WL 1525021 at *36-40, *Allen v. Cooper*, 895 F.3d 337 (4th Cir. 2018) (Nos. 17-1522, 17-1602).

C.J., concurring); *Kimble*, 576 U.S. at 455 ("it is not alone sufficient that we would decide a case differently now than we did then"). And under *stare decisis*, the Court revisits rulings only for "strong reasons," *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2460 (2018), or a "special justification," *see Payne v. Tennessee*, 501 U.S. 808, 842 (1991) (Souter, J., concurring) (quoting *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984)). Furthermore, "[c]onsiderations of stare decisis have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done." *Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73 (1989). The same rule applies in Indian affairs, as "Congress exercises primary authority in this area," and the Court maintains "judicial respect" for that "primary role in defining the contours of tribal sovereignty" by resisting requests to revise its tribal sovereignty rulings when Congress has not done so. *Bay Mills*, 572 U.S. at 799, 803.

The State provides no rationale that could overcome *stare decisis*. Its assertions of impacts are overblown, and were rejected in *McGirt* as a basis for dodging the law, 140 S. Ct. at 2478-82. The State also argues that *McGirt* was incorrect because "under the correct framework" Congress disestablished the Five Tribes' reservations and that "the effect on reservation status of statutes targeting Indian land ownership is inherently ambiguous." *Castro-Huerta* Pet. 18. *McGirt* rejected that argument as to the Creek Reservation, relying on bedrock precedent that the alienation of land does not change reservation status. 140 S. Ct. at 2463-65. And in the courts below, the State waived the opportunity to oppose the continuing existence of the Chickasaw Reservation.

The State ripostes "*McGirt* is a paradigmatic example of when stare decisis must yield" because in its view the majority opinion "did not itself adhere to the Court's prior precedents on congressional disestablishment of Indian reservations." *Castro-Huerta* Pet. 28. That is a paradigmatic example of an argument to which *stare decisis* should *not* yield. A party's assertion that prior precedent is wrong is not a reason to revisit it. That is especially true here, where Congress has sole power to determine treaty reservation boundaries, as *McGirt* noted. 140 S. Ct. at 2481-82.

Really, the State is not leaning on these weak reeds. It has a political motive, based on a cynical and superficial assessment of individual Justices' presumed proclivities. But *stare decisis* "permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact." *Vasquez v. Hillery*, 474 U.S. 254, 265-66 (1986).

CONCLUSION

The petition should be denied.

Respectfully submitted,

STEPHEN H. GREETHAM
Senior Counsel
MEREDITH P. TURPIN
Associate General Counsel
CHICKASAW NATION
Office of Senior Counsel
4001 N. Lincoln Blvd
Oklahoma City, OK 73105

FRANK S. HOLLEMAN, IV
Counsel of Record
DOUGLAS B. L. ENDRESON
SONOSKY, CHAMBERS, SACHSE, ENDRESON & PERRY, LLP
1425 K Street, NW
Suite 600
Washington, DC 20005
(202) 682-0240
fholleman@sonosky.com

Counsel for Amicus Curiae Chickasaw Nation

October 15, 2021