

No. 21-484

IN THE
Supreme Court of the United States

STATE OF OKLAHOMA,
Petitioner,

v.

SONNY RAYE McCOMBS,
Respondent.

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

**BRIEF FOR AMICUS CURIAE
MUSCOGEE (CREEK) NATION IN SUPPORT
OF RESPONDENT**

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INTEREST OF AMICUS CURIAE

Though the ink is barely dry in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), the Muscogee (Creek) Nation (the “Nation”) again finds its Reservation under assault.¹ Oklahoma has filed over thirty petitions to overrule *McGirt*, all of which ignore the substantial ongoing efforts by the federal government, the Nation, and Oklahoma officials to ensure the continued, orderly administration of criminal justice on the Reservation, and that conjure a portrait of civil upheaval that does not exist. In both *McGirt* and *Sharp v. Murphy*, 140 S. Ct. 2412 (2020), this Court recognized the Nation’s critical interests in defending its Reservation and presenting an accurate portrayal of the discharge of governmental responsibilities thereon, including through enlarged briefing limits and participation in oral argument. The Nation returns to the Court to defend *McGirt* and the integrity of governance on its Reservation.

INTRODUCTION AND SUMMARY OF ARGUMENT

Oklahoma advances the boldest of claims with the weakest of support. It urges the Court to overrule itself just one Term removed from rendering a seminal decision that thoroughly considered the status of

¹ No counsel for any party authored this brief in whole or in part. No one other than amicus curiae made a monetary contribution to its preparation or submission. The parties were timely notified and have consented to its filing.

the Creek Reservation. The claim is all the bolder because the full Court agreed in *McGirt* that it was construing congressional intent on an issue where Congress enjoys plenary power, leaving no obstacle to Congress addressing the consequences of the decision or rejecting it outright. Oklahoma's project shows little regard for the separation of powers, and even less for the integrity of the judicial process.

Oklahoma's justifications sound in fiction rather than fact. The United States, the Nation, and local officials are successfully collaborating to ensure that there is no crisis of criminal justice on the Reservation. Oklahoma cannot conjure one by ignoring their efforts. The Oklahoma Court of Criminal Appeals ("OCCA") has narrowed the universe of cognizable *McGirt*-based conviction challenges to those raised on direct appeal. The United States and the Nation are re-prosecuting where such challenges succeed, and are devoting substantial resources to the investigation and prosecution of new crimes.

Nor has civil society been upended. To advance its narrative, Oklahoma ignores notable successes, including the execution of a Tribal-State child custody compact that preserves existing placements and maintains cooperative jurisdiction going forward. It instead highlights frivolous lawsuits and nervous hand-wringing that hardly connote chaos.

Congress, meanwhile, is taking appropriate action to protect public safety. That it has not deemed it advisable to disestablish the Creek Reservation does not suggest that this Court should take up the

task. A proper respect for Congress's primary role in Indian affairs, and for the promises vindicated in *McGirt*, counsel just the opposite.

REASONS FOR DENYING THE PETITION

I. Oklahoma Confuses the Court for a Political Branch of Government.

Just over one Term ago, this Court affirmed the continued existence of the Nation's Reservation. *McGirt* was unquestionably a carefully rendered decision, one that (considering *Murphy*) followed two full rounds of briefing, supplemental briefing, and two oral arguments. Both the majority opinion and the Chief Justice's dissent extensively explore the Nation's history and Congress's treatment of its Reservation. Oklahoma has no plausible claim that the issues were not fully joined, and indeed limits its argument that *McGirt* is incorrect on the law to two paragraphs of its petitions.

Yet Oklahoma promptly flooded the Court with requests that *McGirt* be overruled. Two related factors underscore the drastic nature of the State's project. First, *McGirt* affirms that decisions to disestablish reservations "belong[] to Congress alone," and in particular that "courts have no proper role in the adjustment of reservation borders." 140 S. Ct. at 2462. On this the majority and dissenting opinions fully agree. *Id.* at 2489 (Roberts, C.J., dissenting) ("No one argues that courts can 'adjust[]' reservation borders."). While the opinions differ in their assessments

of Congress’s treatment of the Creek Reservation, Congress’s intent is undeniably the touchstone of their inquiry. *Id.* at 2462–63; *id.* at 2482, 2485 (Roberts, C.J., dissenting).

Second, “*stare decisis* has ‘special force’ ‘in respect to statutory interpretation’ because ‘Congress remains free to alter what [this Court has] done.’” *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 274 (2014) (quoting *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 139 (2008)). This is particularly so here given the primacy accorded Congress in Indian affairs. *See Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 799 (2014) (“Congress exercises primary authority in this area and ‘remains free to alter what we have done’—another factor that gives ‘special force’ to *stare decisis*.”).

Oklahoma nevertheless asks this Court to overrule itself in short order. In doing so, it confuses the Court for a political branch, its decisions subject to reversal with the change of seasons. Oklahoma’s Governor and Attorney General have publicly acknowledged one of the reasons they believe their strategy might succeed. “The Supreme Court has a new member now, Amy Coney Barrett has replaced Ginsburg, who actually was in favor of the *McGirt* decision, so there’s a possibility the court would overturn [*McGirt*].” Dick Pryor, *Capitol Insider: Governor Kevin Stitt on State-Tribal Relations*, KGOU (Feb. 5,

2021);² *see also* Janelle Stecklein, *Experts: Supreme Court could clarify McGirt ruling, won't overturn it*, *Enid News & Eagle* (Aug. 19, 2021) (“So we have a different configuration [on the Court] that might have a different view of how to approach this,’ [Attorney General] O’Connor said.”).³ But this Court is not a city council and has never viewed a change in composition as a springboard for abandoning precedent. *See, e.g., June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2134 (2020) (Roberts, C.J., concurring in the judgment) (“It has long been an established rule to abide by former precedents ... as well to keep the scale of justice even and steady, and not liable to waver with every new judge’s opinion.... The constraint of precedent distinguishes the judicial method and philosophy from those of the political and legislative process.”).

Oklahoma’s petitions have been less nakedly political, claiming instead that *McGirt* has created enormous criminal and civil disruption that only overturning the decision can rectify. But as the next sections demonstrate, these arguments dissolve upon contact with reality and provide an equally inapt basis for abrupt reversal.

² <https://www.kgou.org/politics-and-government/2021-02-05/capitol-insider-governor-kevin-stitt-on-state-tribal-relations>.

³ <https://www.enidnews.com/news/politics/experts-supreme-court-could-clarify-mcgirt-ruling-wont-overturn-it/article-9b06385c-0130-11ec-90e3-0786aebb5a34.html>.

II. There Exists No Crisis of Criminal Jurisdiction on the Creek Reservation.

A. Contrary to Oklahoma’s tale, *McGirt* has not rendered eastern Oklahoma a criminal dystopia. The day it issued, Oklahoma’s three United States Attorneys released a joint statement expressing confidence that “tribal, state, local, and federal law enforcement [would] work together to continue providing exceptional public safety under this new ruling[.]”⁴ The Creek Nation likewise committed to “continu[ing] to work with federal and state law enforcement agencies to ensure” public safety within the Reservation.⁵ As detailed below, the federal government and the Nation have honored these commitments, and Oklahoma’s disregard for the resulting successes provides no basis for review.

Oklahoma’s contrary narrative is driven by hyperbole and unsubstantiated numbers. For example, cases potentially subject to reprosecution after *McGirt* initially included post-conviction cases and convictions still on appeal when *McGirt* issued. The federal government and the Nation took up the task of reprosecuting in both categories.⁶ But as both this

⁴ <https://www.justice.gov/usao-ndok/pr/joint-statement-united-states-attorneys-northern-eastern-and-western-districts-oklahoma>.

⁵ <https://www.muscogeenation.com/muscogee-creek-nation-statement-regarding-u-s-supreme-court-decision/>.

⁶ See, e.g., *Jimcy McGirt Sentenced To Life Imprisonment*, U.S. Attorney’s Office (Aug. 25, 2021), <https://www.justice.gov/usao->

Court, *McGirt*, 140 S. Ct. at 2479, and the Creek Nation, Creek *McGirt* Br. 42, presaged, the OCCA has now held that *McGirt* does not apply retroactively to state post-conviction proceedings. *See State ex rel. Matloff v. Wallace*, 2021 OK CR 21 (Aug. 12, 2021), *petition for cert. filed*, No. 21-467 (U.S. Sept. 29, 2021). The OCCA has since applied *Matloff* to vacate prior grants of post-conviction relief. *See, e.g., Bosse v. State*, 2021 OK CR 23 (Aug. 31, 2021).⁷

The vast majority of prior State convictions will accordingly remain unaffected by *McGirt*. Yet Oklahoma continues to invoke back-of-the-envelope case

[edok/pr/jimcy-mcgirt-sentenced-life-imprisonment](https://www.justice.gov/usao-edok/pr/jimcy-mcgirt-sentenced-life-imprisonment) (detailing Mr. McGirt’s federal re prosecution, conviction, and sentencing to life imprisonment without parole); *Patrick Dwayne Murphy Found Guilty By Federal Jury*, U.S. Attorney’s Office (Aug. 5, 2021), <https://www.justice.gov/usao-edok/pr/patrick-dwayne-murphy-found-guilty-federal-jury>.

⁷ The exception is where the State failed to preserve a procedural bar argument, as in one notorious case that the State has nevertheless sought to capitalize on in press reports. *See Oklahoma v. Priddy*, No. PR-2021-874 (Okla. Crim. App. Sept. 3, 2021) (order declining jurisdiction); Annie Gowen & Robert Barnes, ‘Complete, dysfunctional chaos’: Oklahoma reels after Supreme Court ruling on Indian tribes, *Washington Post* (July 24, 2021). But ill-considered litigation decisions by the State, perhaps borne of its desire to have *McGirt* upended at all costs, do not justify revisiting well-considered precedent, especially where the federal government and the Nation are working to rectify Oklahoma’s mistakes. *See Muscogee (Creek) Nation Charges Woman With 5 Counts Of Murder After State Case Dismissed*, *News On 6* (Apr. 30, 2021), <https://www.news6.com/story/608c6ffb0f30d00bcc254caf/muscogee-creek-nation-charges-woman-with-5-counts-of-murder-after-state-case-dismissed>.

numbers inflated by the very post-conviction challenges foreclosed by *Matloff*. See *Castro-Huerta* Pet. 19–20, 22.⁸ Just as Oklahoma set aside procedural bars to Mr. McGirt’s reservation-based challenge in its zeal to have this Court reach the reservation question, *McGirt*, 140 S. Ct. at 2460, it again disregards such bars in its zeal to have the Court revisit that issue.

B. Cases requiring re prosecution, then, have narrowed to those that were on direct appeal when *McGirt* issued and in which a defendant has raised a *McGirt* claim. See *McGirt*, 140 S. Ct. at 2479 (“defendants may choose to finish their state sentences rather than risk re prosecution in federal court where sentences can be graver”). That is a small set.⁹ And direct appeal cases are, by definition, more recent, mitigating Oklahoma’s concerns about federal or tribal statutes of limitations expiring (regardless of

⁸ The State has made shorthand arguments in every petition (including the instant petition) but one, *Castro-Huerta*, No. 21-429, and has instead asked the Court to refer to its *Castro-Huerta* filing for a full exposition of its arguments. The Nation accordingly cites to that petition throughout.

⁹ The State is regularly filing petitions in this Court from direct appeal decisions in which the OCCA has vacated or dismissed a conviction due to *McGirt*. Yet for all the State’s (uncited) protestations that “hundreds” of direct appeal cases are potentially impacted, see *Castro-Huerta* Pet. 22, the State has thus far filed petitions in only thirty-three, and there is no indication in the state court dockets that this number will grow exponentially. Compare, e.g., *Ramos v. Louisiana*, 140 S. Ct. 1390, 1406 (2020) (“hundreds” of direct appeal cases would be impacted).

potential tolling and laches arguments) and evidence growing stale.

And the federal government and the Nation are indeed reprosecuting these matters (often with substantial assistance from local law enforcement).¹⁰ In the thirty-three petitions docketed as of October 27, *every respondent* is being reprosecuted by either the federal government (thirty cases)¹¹ or the relevant

¹⁰ See, e.g., *Shannon Kepler Found Guilty of Using a Firearm in the Commission of Second Degree Murder and of Assault with a Dangerous Weapon in Indian Country*, U.S. Attorney's Office (Apr. 26, 2021), <https://www.justice.gov/usao-ndok/pr/shannon-kepler-found-guilty-using-firearm-commission-second-degree-murder-and-assault> ("The FBI and Tulsa Police Department joined forces to lead the investigation.").

¹¹ Fifteen respondents are being reprosecuted in the Eastern District of Oklahoma (citations are to case numbers): *U.S. v. Brown*, 6:20-CR-00109; *U.S. v. Hathcoat*, 6:21-CR-00018; *U.S. v. Grayson*, 6:21-CR-00166; *U.S. v. Sizemore*, 6:21-CR-00138; *U.S. v. Johnson*, 6:21-CR-00183; *U.S. v. Ball*, 6:20-CR-00110; *U.S. v. Harjo*, 6:21-CR-00022; *U.S. v. Bain*, 6:20-CR-00139; *U.S. v. Beck*, 6:21-CR-00142; *U.S. v. Cooper*, 6:21-CR-00070; *U.S. v. Shawn Jones*, 6:21-CR-00118; *U.S. v. David Martin*, 6:21-CR-00221; *U.S. v. Fox*, 6:21-MJ-00251; *U.S. v. McDaniel*, 6:21-CR-00321; *U.S. v. Laurie Martin*, 6:21-CR-00047. Fifteen respondents are being reprosecuted in the Northern District of Oklahoma: *U.S. v. Davis*, 4:20-CR-00316; *U.S. v. Howell*, 4:21-CR-00121; *U.S. v. Jackson*, 4:20-CR-00310; *U.S. v. Kepler*, 4:20-CR-00276; *U.S. v. Mitchell*, 4:20-CR-00254; *U.S. v. Williams*, 4:21-CR-00104; *U.S. v. Mize*, 4:21-CR-00107; *U.S. v. Spears*, 4:20-CR-00296; *U.S. v. Janson*, 4:21-CR-00197; *U.S. v. Perry*, 4:20-CR-00218; *U.S. v. Jeffrey Jones*, 4:21-CR-00023; *U.S. v. Stewart*, 4:20-CR-00260; *U.S. v. Calhoun et al.*, 4:20-CR-00255 (Castro-Huerta); *U.S. v. McCombs et al.*, 4:20-CR-00262; *U.S. v. Cottingham*, 4:20-CR-00209.

Tribal government (three cases).¹² Ten respondents have already been reconvicted in federal court, including two in the last few weeks alone.¹³ Another nineteen face trial between now and April 5, 2022, including Sonny Raye McCombs, the respondent here.¹⁴ Oklahoma acknowledges none of this in its petitions.

The reprosecutions, moreover, are occurring swiftly, with close attention to public safety. Direct appeal cases raising a *McGirt* claim are typically remanded from the OCCA to the state trial court for an evidentiary hearing regarding Indian status before vacatur by the OCCA. In nine of the cases underlying Oklahoma's petitions, the United States obtained a federal grand jury indictment in anticipation of state dismissal *before* the state trial court had even issued its findings on remand.¹⁵ In others, the government

¹² See *Muscogee (Creek) Nation v. Starr*, CF-2021-0884, CM-2021-0591 (2021), <https://www.muscogeenation.com/wp-content/uploads/2021/10/20211007160624161.pdf>; *Muscogee (Creek) Nation v. Epperson*, CF-2021-0973 (2021), <https://www.muscogeenation.com/wp-content/uploads/2021/10/20211007160405502.pdf>; *Cherokee Nation v. Shriver*, CNCR-CRM-21-56 (2021).

¹³ See *Calhoun* (Castro-Huerta); *Beck*; *Brown*; *Kepler*; *Mitchell*; *Janson*; *Jeffrey Jones*; *Stewart*; *Cottingham*; *Laurie Martin*, *supra* note 11.

¹⁴ See *Davis*; *Hathcoat*; *Howell*; *Jackson*; *Williams*; *Mize*; *Grayson*; *Spears*; *Sizemore*; *Johnson*; *Ball*; *Harjo*; *Perry*; *Bain*; *Cooper*; *Shawn Jones*; *David Martin*; *McCombs*; *McDaniel*, *supra* note 11.

¹⁵ Compare the federal and state dockets for *Kepler*, 4:20-CR-00276 (federal), F-2017-1186 (state); *Mitchell*, 4:20-CR-00254 (federal), F-2018-78 (state); *Ball*, 6:20-CR-00110 (federal), F-

indicted the respondent soon after the trial court issued its findings, and months before the OCCA formally vacated the conviction.¹⁶ And in every federal case, the government filed a complaint or indicted the respondent before the State mandate issued.¹⁷ In sum, Oklahoma’s Chicken Little narrative is just that. As the United States Attorney for the Northern

2020-54 (state); *Perry*, 4:20-CR-00218 (federal), F-2020-46 (state); *Bain*, 6:20-CR-00139 (federal), C-2019-853 (state); *Stewart*, 4:20-CR-00260 (federal), C-2017-1223 (state); *Castro-Huerta* (Calhoun), 4:20-CR-00255 (federal), F-2017-1203 (state); *McCombs*, 4:20-CR-00262 (federal), F-2017-1000 (state); *Cottingham*, 4:20-CR-00209 (federal), F-2017-1294 (state).

¹⁶ Compare the federal and state dockets for *Brown*, 6:20-CR-00109 (federal), C-2018-1118 (state); *Davis*, 4:20-CR-00316 (federal), F-2019-420 (state); *Jackson*, 4:20-CR-00310 (federal), F-2016-453 (state); *Spears*, 4:20-CR-00296 (federal), F-2019-330 (state).

¹⁷ Compare the federal and state dockets for *Hathcoat*, 6:21-CR-00018 (federal), F-2018-898 (state); *Howell*, 4:21-CR-00121 (federal), C-2017-998 (state); *Williams*, 4:21-CR-00104 (federal), F-2016-937 (state); *Mize*, 4:21-CR-00107 (federal), F-2019-68 (state); *Grayson*, 6:21-CR-00166 (federal), F-2018-1229 (state); *Sizemore*, 6:21-CR-00138 (federal), F-2018-1140 (state); *Johnson*, 6:21-CR-00183 (federal), F-2020-208 (state); *Janson*, 4:21-CR-00197 (federal), C-2017-1027 (state); *Harjo*, 6:21-CR-00022 (federal), F-2017-889 (state); *Beck*, 6:21-CR-00142 (federal), F-2019-115 (state); *Cooper*, 6:21-CR-00070 (federal), F-2018-830 (state); *Jeffrey Jones*, 4:21-CR-00023 (federal), F-2017-1245 (state); *Shawn Jones*, 6:21-CR-00118 (federal), F-2017-1309 (state); *David Martin*, 6:21-CR-00221 (federal), F-2016-1030 (state); *Fox*, 6:21-MJ-00251 (federal), F-2019-196 (state); *McDaniel*, 6:21-CR-00321 (federal), F-2017-357 (state); *Laurie Martin*, 6:21-CR-00047 (federal), F-2017-991 (state). In one instance, *McDaniel*, the federal government filed a complaint prior to the mandate, voluntarily dismissed it, and then refiled the complaint the day after the State mandate issued.

District of Oklahoma at the time of *McGirt* and for many months thereafter has put it:

[W]hat we see in actuality is that the sky isn't falling. That we can actually and should be promoting confidence in what is and has been great partnerships among state, tribal and federal law enforcement entities.

Allison Herrera, *Trent Shores Reflects On His Time As U.S. Attorney*, KOSU (Feb. 24, 2021).¹⁸

C. New cases within the Creek Reservation are also being vigorously prosecuted.

1. a. The federal government is securing indictments in hundreds of new cases.¹⁹ Contrary to the State's uncited assertions, *Castro-Huerta* Pet. 20,

¹⁸ <https://www.kosu.org/politics/2021-02-24/trent-shores-reflects-on-his-time-as-u-s-attorney-remains-committed-to-justice-for-indian-country>.

¹⁹ See, e.g., *Federal Grand Jury A Indictments Announced—September*, U.S. Attorney's Office (Sept. 10, 2021), <https://www.justice.gov/usao-ndok/pr/federal-grand-jury-indictments-announced-september>; *United States Attorney's Office For The Eastern District Of Oklahoma Obtains Eighty-Two Indictments From Federal Grand Jury*, U.S. Attorney's Office (May 17, 2021), <https://www.justice.gov/usao-edok/pr/united-states-attorneys-office-eastern-district-oklahoma-obtains-eighty-two-indictments> (“*Eighty-Two Indictments*”); *Eastern District Of Oklahoma Federal Grand Jury Hands Down Record Number Of Indictments*, U.S. Attorney's Office (Apr. 22, 2021), <https://www.justice.gov/usao-edok/pr/eastern-district-oklahoma-federal-grand-jury-hands-down-record-number-indictments>.

those prosecutions are not limited to instances of serious bodily injury.²⁰

To ensure that new cases are fully investigated and prosecuted, the federal government has surged criminal justice resources into eastern Oklahoma. The FBI has sent “140 Special Agents, Investigative Analysts, Victims Specialists and other professional staff to the Muskogee and Tulsa RAs” and “expanded State, local, and tribal participation on task forces ... from 32 agencies to assist with initial response and investigative efforts.” Hearing on Federal Bureau of Investigation Budget Request for Fiscal Year 2022 Before the Subcomm. on Commerce, Justice, Science and Related Agencies of the S. Comm. on Appropriations, 117th Cong. 13–14 (2021) (statement of FBI Director Wray). The United States Attorney’s Offices for the Eastern and Northern Districts have hired additional prosecutors, with plans for more. *Id.* at 14.²¹

²⁰ See, e.g., *Eighty-Two Indictments*, *supra* note 19 (arson, burglary); *Tulsa Resident Pleads Guilty To Robbery In Indian Country*, U.S. Attorney’s Office (Sept. 9, 2021), <https://www.justice.gov/usao-edok/pr/tulsa-resident-pleads-guilty-robbery-in-indian-country>; *Federal Grand Jury A Indictments Announced*, U.S. Attorney’s Office (Oct. 8, 2020), <https://www.justice.gov/usao-ndok/pr/federal-grand-jury-indictments-announced-5> (possession of stolen vehicle, burglary, stalking, robbery).

²¹ See also, e.g., *Hiring Notice: Assistant United States Attorney for the Eastern District of Oklahoma*, <https://www.usajobs.gov/GetJob/ViewDetails/613247900> (last visited Oct. 2, 2021).

And prosecutors have been detailed from across the country to supplement this staffing.²²

The federal courts are likewise adding capacity. The Eastern District has designated seven judges from other districts to hear cases through at least the end of this year, General Order 21-10 (May 21, 2021), as well as additional magistrate judges, General Order 21-9 (Apr. 30, 2021). In the longer term, the Judicial Conference has recommended that Congress “authorize three new judgeships in the Eastern District of Oklahoma and two in the Northern District of Oklahoma.” *Judiciary Supplements Judgeship Request, Prioritizes Courthouse Projects*, U.S. Courts (Sept. 28, 2021).²³

The State dismisses these developments, contending that civil trials are delayed in the Northern District, and that the Eastern District has declared an emergency to permit it to use other courtrooms, requiring some “parties in the Eastern District ... to

²² See U.S. Dep’t of Justice, *FY 2022 Budget Request* 1–2, <https://www.justice.gov/jmd/page/file/1398851/download>; *Acting United States Attorney For The Eastern District Of Oklahoma Issues Statement Regarding OCCA Decisions Of Hogner And Bosse*, U.S. Attorney’s Office (Mar. 11, 2021), <https://www.justice.gov/usao-edok/pr/acting-united-states-attorney-eastern-district-oklahoma-issues-statement-regarding-occa>.

²³ <https://www.uscourts.gov/news/2021/09/28/judiciary-supplements-judgeship-request-prioritizes-courthouse-projects>; see also *2021 Judicial Conference Recommendations*, https://www.uscourts.gov/sites/default/files/2021_judicial_conference_recommendations_0.pdf (recommending increases for other districts).

travel to the Western District[.]” *Castro-Huerta* Pet. 21. But the delay in civil trials is no different from that occurring in courthouses across the country due to the pandemic, and parties can elect to proceed before a magistrate judge in the meantime. *Feenstra v. Sigler*, No. 19-CV-00234 (N.D. Okla. July 28, 2021) (minute order). And while some parties may need to travel to Oklahoma City instead of Muskogee, the cities are just two hours apart, and for many Eastern District residents the former is in fact closer. Again, this is hardly the stuff of crisis.

b. Going forward, Congress is taking steps to ensure that federal agencies have ample resources to handle post-*McGirt* caseloads. Oklahoma cites testimony from FBI Director Wray about new demands on the agency, *Castro-Huerta* Pet. 19–20, but does not note that in response the House Appropriations Committee voted to fully fund the Justice Department’s request for additional funding for *McGirt* implementation, including for the Bureau, H.R. Rep. No. 117-97, at 63 (2021);²⁴ *see also* U.S. Dep’t of Justice, *FY 2022 Budget Request* 1–2.²⁵ House Bill 4505, now before the full House, provides \$70 million “to implement public safety measures required to comply with the *McGirt* decision,” H.R. Rep. No. 117-97, at 63, including \$33 million for Oklahoma’s U.S. Attorney’s Offices, DOJ *FY 2022 Budget Request* 2, and \$25.5 million for the FBI, which the FBI reports “will allow

²⁴ <https://www.congress.gov/117/crpt/hrpt97/CRPT-117hrpt97.pdf>.

²⁵ *Supra* note 22.

[it] to effectively address the increased operational need,” FBI, *FY 2022 Budget Request* 122.²⁶ The Committee further directed the Justice Department “to closely monitor the *McGirt*-related enforcement programs and provide the Committee as soon as possible an estimate of [the] long-term costs of sustaining those programs.” H.R. Rep. No. 117-97, at 63.

2. The Creek Nation is likewise committing substantial resources to implementing *McGirt*. In the fifteen months immediately following *McGirt*, the Nation prosecuted 2,771 felony and misdemeanor cases.²⁷ To make this possible, it hired twenty new Lighthorse police officers, ten investigators, two Sexual Offender Registration officers, and six dispatchers.²⁸ Additional hirings will soon follow, with the Lighthorse budget more than doubling since *McGirt*.²⁹

The Nation has also hired six new prosecutors and twelve public defenders.³⁰ It has added a new

²⁶ <https://www.justice.gov/jmd/page/file/1399031/download>.

²⁷ Affidavit of Donna Beaver, <https://www.muscogeenation.com/wp-content/uploads/2021/10/Donna-Beaver.pdf>.

²⁸ Affidavit of Richard Phillips, <https://www.muscogeenation.com/wp-content/uploads/2021/10/Richard-Phillips.pdf>.

²⁹ *Id.*

³⁰ Affidavit of Cynthia Freeman, <https://www.muscogeenation.com/wp-content/uploads/2021/10/Cynthia-Freeman.pdf>; Affidavit of Shannon Prescott, <https://www.muscogeenation.com/wp-content/uploads/2021/10/Shannon-Prescott.pdf>.

district court judge and will soon add a second.³¹ And it has significantly expanded its courthouse and detention facility capacity.³²

Furthermore, the Nation has continued to enter into cross-deputization agreements, including with State agencies, empowering non-Tribal officers to exercise Federal and Tribal authority within the Reservation.³³ The Nation also adopted a new traffic code that deliberately mirrors Oklahoma's, MCNCA tit. 14, ch. 3,³⁴ enabling cross-deputized officers to enforce provisions with which they are familiar.

D. Ignoring all this, Oklahoma resorts to the basest of anecdotes to portray chaos. It cites a claim by an emergency response dispatcher that “callers to 911 are now asked if they are members of a federally recognized tribe,” and that if so, they “are transferred to the Creek Nation” where they are purportedly sometimes put on hold. *Castro-Huerta* Pet. 21–22. But if emergency response dispatchers are being directed (either by State or county dispatchers) to decline emergency assistance based on tribal citizenship, that is patent discrimination in violation of the

³¹ Prescott Affidavit, *supra* note 30.

³² *Id.*; Phillips Affidavit, *supra* note 28.

³³ See Okla. Sec'y of State, *Tribal Compacts and Agreements*, <https://www.sos.ok.gov/gov/tribal.aspx> (last visited Oct. 2, 2021) (enter “Creek” into “Doc Type” and select “Submit,” *see, e.g.*, #50646).

³⁴ <http://www.creeksupremecourt.com/wp-content/uploads/NCA-20-087.pdf>.

law. Nothing in *McGirt* sanctions such behavior, and the Mayor of Okmulgee (which lies in the heart of the Reservation) has rightly denounced it.³⁵ The State’s fervent desire to overturn *McGirt* does not justify arguments grounded in lawlessness. Moreover, the Nation has substantially increased its emergency response capabilities post-*McGirt*, and there is no cognizable basis for the State’s suggestion that calls to the Nation’s dispatch center are answered other than immediately.

In *McGirt*, as now, “Oklahoma warn[ed] of the burdens” the federal government and Tribes “will experience with a wider jurisdiction and increased caseload.” *McGirt*, 140 S. Ct. at 2480. But as this Court observed,

for every jurisdictional reaction there seems to be an opposite reaction: recognizing that cases like Mr. McGirt’s belong in federal court simultaneously takes them out of state court. So while the federal prosecutors might be initially understaffed and Oklahoma prosecutors initially overstaffed, it doesn’t take a lot of imagination to see how things could work out in the end.

³⁵ Tres Savage, *Okmulgee Mayor Richard Larabee emphasizes cooperation with Muscogee Nation*, NONDOC (Aug. 24, 2021), <https://nondoc.com/2021/08/24/okmulgee-mayor-richard-larabee/>.

Id. This well describes developments on the Creek Reservation. Thanks to a great deal of hard work by the federal and Tribal governments, things are working out, and Oklahoma’s unsubstantiated claims to the contrary provide no basis for its extraordinary request of this Court.

III. Civil Society Has Not Plunged into Chaos on the Creek Reservation.

Oklahoma’s claims of civil crisis similarly stretch beyond the breaking point.

A. Most telling about the State’s arguments are the omissions. In *McGirt* and *Murphy*, Oklahoma made heated claims that “[a]ll adoptions and custody disputes involving Indian children ... would fall within the exclusive jurisdiction of tribal courts,” and “[s]ettled child placements [could] be undone.” Okla. *McGirt* Br. 44; Okla. *Murphy* Br. 56. The Nation assured the Court that such warnings were fearmongering, and that existing placements could be preserved and jurisdiction shared through compacting. See Creek *McGirt* Br. 44–45; *McGirt* Oral Arg. Tr. 41. This is precisely what happened. Within a month of *McGirt*, the Nation and the Director of the Oklahoma Department of Human Services and the Executive Director of its Office of Juvenile Affairs (possessing independent authority to act on behalf of the State) entered a child custody compact that preserves existing placements and continues with cooperative jurisdiction going forward. See Intergovernmental Agreement Between the State of Oklahoma and the

Muscogee (Creek) Nation Regarding Jurisdiction Over Indian Children Within the Nation's Reservation (Aug. 4, 2020);³⁶ *see also* H.B. 2352, 2021 Leg., Reg. Sess. (Okla. 2021) (unanimously ratifying the Compact). The State's briefing mentions none of this.

B. The Nation likewise told the Court that claims by Oklahoma and its amici that (a) the Nation would tax and regulate non-Indian individuals and entities within the Reservation, and (b) the State and local governments would correspondingly lose authority over them, ignored the presumptive constraints this Court's jurisprudence places on tribal jurisdiction over non-Indians. *See* Okla. *Murphy* Br. 56; Okla. Suppl. *Murphy* Br. 15; Creek *McGirt* Br. 43–44; Creek *Murphy* Br. 31–36. And in the wake of *McGirt*, Oklahoma points to not a single example of the Nation attempting to tax or regulate non-Indians. The only challenge it cites to its regulatory authority is a flimsy claim by a non-Indian corporation, *Castro-Huerta* Pet. 24 (citing *Canaan Resources X v. Calyx Energy III*, LLC, No. 119,245 (Okla.)), which the State's Corporation Commission has flatly rejected. *See Canaan Resources X v. Calyx Energy III*, LLC, No. CO-119245 (Okla. Corp. Comm'n Nov. 25, 2020).³⁷ That a single non-Indian entity has attempted, and thus far failed, to exploit *McGirt* for its own purposes hardly evidences a crisis. Nor does the smattering of

³⁶ <https://www.sos.ok.gov/documents/filelog/93632.pdf>.

³⁷ <https://www.oscn.net/dockets/GetCaseInformation.aspx?db=appellate&number=119245> (order included in Dec. 8, 2020 petition in error).

other civil cases—four in total, *see Castro-Huerta* Pet. 24–26—cited by Oklahoma. Several are facially flawed, and the State has notched an initial victory in at least one. *See Nicholson v. Stitt*, No. SD-119270 (Okla.). If questionable litigation were the marker of chaos, the entire country would be under a reign of terror. Civil society in eastern Oklahoma is sturdier than the State would have the Court believe.³⁸

C. Under well-established law, reservation status does have consequences for Oklahoma’s taxing authority over some tribal members. But as the Oklahoma Tax Commission has detailed in a report far more measured than the State’s briefing, those impacts again are hardly the stuff of crisis. *See* Oklahoma Tax Commission, *Report of Potential Impact of McGirt v. Oklahoma* (Sept. 30, 2020).³⁹

The Commission estimates a maximum potential annual revenue impact of \$21.5 million in reduced income taxes and \$38.1 million in reduced sales taxes on the Creek Reservation (with corresponding figures of \$72.7 million and \$132.2 million for all Five Tribes total). *Id.* 2, 14–18. The Commission states that

³⁸ The concerns expressed by title insurance companies, *Castro-Huerta* Pet. 24–25, likewise do not remotely signify chaos. If the companies need help with jurisdictional disclaimers, they can look to their colleagues in other states where “millions of acres of non-Indian fee land” are found within reservations. *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 554 U.S. 316, 328 (2008).

³⁹ <https://oklahoma.gov/content/dam/ok/en/tax/documents/re-sources/reports/other/McGirt%20vs%20OK%20-%20Potential%20Impact%20Report.pdf>.

these estimates are likely high due to data limitations and the uncertain assumption that all eligible tribal citizens will seek the available exemptions.⁴⁰ *Id.* 16–18. The Commission estimates minimal impact on other taxes, including motor vehicle taxes, gross production and petroleum excise taxes, and ad valorem taxes. *Id.* 3, 11–13, 19.⁴¹

A maximum annual impact of approximately \$200 million will not “decimate” State tax budgets, Okla. *McGirt* Br. 44. Overall state revenues (excluding higher education) exceeded \$64.5 billion in fiscal year 2020–21, with general fund revenues exceeding \$47.3 billion.⁴² Tax revenues for that period exceeded \$16.8 billion.⁴³ Indeed, so confident are State leaders in the State’s fiscal condition that a \$500 million income tax cut “sailed through the Oklahoma House of

⁴⁰ To be clear, individuals are not now “refusing” to pay income and sales tax, *Castro-Huerta* Pet. 24. Under state and federal law, Oklahoma is no longer permitted to tax tribal citizens for on-reservation activities. Some tribal citizens are thus following the State process to file for exemptions.

⁴¹ Under Oklahoma state law, tribal citizens can also recover up to three years of prior income tax payments, *Castro-Huerta* Pet. 24, with refunds coming from the State’s “Income Tax Withholding Refund Account,” Okla. Stat. tit. 68, § 2373. Even if every eligible tribal citizen claimed the refund, that would amount at most to an additional one-time impact of \$214 million. Oklahoma Tax Commission Report, *supra* note 39, at 16–17.

⁴² See *State Revenue*, OK.gov, <https://stories.opengov.com/oklahomastate/published/XzJD1j7zP> (last visited Oct. 2, 2021).

⁴³ *Id.*

Representatives” this past spring.⁴⁴ And the State Treasurer recently reported that the State’s “[g]ross receipts demonstrate a resilient and expanding state economy,” with “[e]very major revenue stream, including income taxes, exceed[ing] collections from 2019.”⁴⁵

Further, any tax impacts will be offset by savings in other areas, including reduced State prosecution and incarceration needs. *See* Oklahoma Justice Reform Task Force, *Final Report* 3 (Feb. 2017) (discussing the “extraordinary” cost of incarceration for the State).⁴⁶ And Oklahoma continues to ignore the benefits to reservation residents, Indian and non-Indian, from significant Tribal governmental expenditures, Creek *McGirt* Br. 36–40; Chickasaw and Choctaw *McGirt* Br. 8–13.

Any tax impacts to Oklahoma could be further alleviated through compacting. *See McGirt*, 140 S. Ct.

⁴⁴ Randy Krehbiel, *Oklahoma House passes \$500 million income tax reduction*, Tulsa World (Mar. 11, 2021), https://tulsa-world.com/news/state-and-regional/govt-and-politics/oklahoma-house-passes-500-million-income-tax-reduction/article_1b1323c6-82b9-11eb-a093-3702ce3e7488.html.

⁴⁵ Kevin Severin, *Substantial gains anticipated for future Oklahoma collection*, Fox 25 (Aug. 4, 2021), <https://okcfox.com/news/local/substantial-gains-anticipated-for-future-oklahoma-collections>; *Fossil Fuels Drive Gross Receipts Higher*, Office of State Treasurer (Sept. 2, 2021), https://www.ok.gov/triton/modules/newsroom/newsroom_article.php?id=222&article_id=64782.

⁴⁶ [https://s3.amazonaws.com/content.newsok.com/documents/OJRTFFinalReport%20\(1\).pdf](https://s3.amazonaws.com/content.newsok.com/documents/OJRTFFinalReport%20(1).pdf).

at 2481; Oklahoma Tax Commission Report 3, 20–21 (stating that tax compacts “could significantly mitigate the impact of the expanded Creek Reservation boundaries under *McGirt*”; that compacts “have been a powerful tool for facilitating cooperation and revenue-sharing between tribal and state governments”; and that “[d]uring the last two fiscal years, the State received over \$73 million in cigarette and tobacco tax collections as a result of compact sales”). Focused as it is on overturning *McGirt*, Oklahoma has not sought to engage in tax negotiations since the decision issued; but as the history of successful State-Tribal compacting (so recently reprised in the child custody context) demonstrates, this need not remain a permanent state of affairs.

D. As *McGirt* acknowledged, there may be implications for the application of various federal statutes on the Creek Reservation, 140 S. Ct. at 2480, but again Oklahoma has pointed to nothing portending chaos. The State mentions only that the Department of the Interior has asserted that federal implementation of the Surface Mining Control and Reclamation Act, 30 U.S.C. §§ 1201–1328, is appropriate within the Reservation, *Castro-Huerta* Pet. 25, but nowhere explains why this spells doom for Oklahoma. In fact, the State has challenged Interior’s action on the grounds that *McGirt* has no civil application. See Complaint, *Oklahoma v. Department of Interior*, No. CIV-21-719-F (W.D. Okla. July 16, 2021). While the Nation firmly believes that Oklahoma is incorrect, the State is hardly in a position to claim that overruling *McGirt* represents its “only” possible relief from civil

chaos, *Castro-Huerta* Pet. 28, at the same time that it is proclaiming *McGirt*'s civil irrelevance (presumably in good faith) in the lower courts.

IV. Congress Is Actively Engaged in Eastern Oklahoma and Remains Fully Capable of Protecting Public Safety on the Creek Reservation.

Having conjured illusory chaos in eastern Oklahoma, the State then waves its wand in the other direction, claiming that Congress's ability to address it has evaporated, leaving the Court no choice but to usurp the legislative function. *See id.* ("As a practical matter, therefore, only this Court has the power to bring an end to the chaos in Oklahoma by overruling *McGirt*.").

Notwithstanding the grave separation-of-powers implications of that argument, its premise is demonstrably invalid. Congress has actively engaged in eastern Oklahoma post-*McGirt*. For example, as discussed above, a bill to fully fund the Justice Department's increased responsibilities is currently advancing through Congress. *Supra* at 15–16. Oklahoma does not mention this. Nor does it mention that Oklahoma's Governor opposes the bill because, according to his special counsel, "there are uncertainties surrounding this [*McGirt*] decision, that are currently working their way to the courts So there's no need

for a permanent federal fix here.”⁴⁷ These words hardly reflect a state in crisis.

The House Appropriations Committee also approved the Interior Department’s fiscal year 2022 request, *see* H.R. 4502, 117th Cong. (1st Sess. 2021), for \$11 million in Bureau of Indian Affairs (“BIA”) funding for Tribes “to implement public safety changes resulting from [*McGirt*.]” H.R. Rep. No. 117-83, at 55–57 (2021).⁴⁸ And the Committee has directed the BIA “to provide a longer term cost estimate ... to implement the *McGirt* decision within 120 days of enactment of this Act.” *Id.* at 55. The bill passed the full House on July 29 and is before the Senate.⁴⁹ The Governor’s office opposes this as well, stating that “[b]ased upon the [*McGirt*] decision itself, there’s no need to provide additional funding to the tribes, because the state did not lose its jurisdiction[.]”⁵⁰

Congressional action has gone beyond appropriations. On May 11, 2021, Congressman Cole

⁴⁷ Reese Gorman, *Cole encourages state-tribal relations over state challenge to McGirt*, The Norman Transcript (Jul. 23, 2021), https://www.normantranscript.com/news/cole-encourages-state-tribal-relations-over-state-challenges-to-mcgirt/article_e15e2378-eb4b-11eb-80f4-c39595196dbb.html.

⁴⁸ <https://www.congress.gov/congressional-report/117th-congress/house-report/83/1?q=%7B%22search%22%3A%5B%22h.+rept.+117-83%22%5D%7D&s=1&r=1>.

⁴⁹ <https://www.congress.gov/bill/117th-congress/house-bill/4502/actions>.

⁵⁰ Gorman, *supra* note 47.

introduced legislation to authorize the Cherokee and Chickasaw Nations to enter compacts providing for concurrent State criminal jurisdiction on their reservation fee lands. H.R. 3091, 117th Cong. (1st Sess. 2021). Congressman Cole would no doubt be surprised to learn that he believes a bill into which he put “many, many months of work”⁵¹ was dead on arrival, *Castro-Huerta* Pet. 27, and the article cited by the State says nothing of the sort.⁵² Rather, it attests to the Congressman’s view that the bill will become law only with considerable work, which is hardly surprising since “pass[ing] new legislation is a deliberately hard business under our Constitution,” *McGirt*, 140 S. Ct. at 2462. Senator Lankford of Oklahoma is also actively discussing potential legislative approaches to the allocation of criminal jurisdiction.⁵³

The Creek Nation has not yet endorsed any legislative adjustment of criminal jurisdiction, but rather is focused on prosecuting reservation crimes in conjunction with the federal government, and on assessing the effectiveness of that collaboration. There is nothing untoward about such deliberation (or about

⁵¹ Chris Casteel, *With Oklahoma tribes deeply divided, Rep. Tom Cole’s McGirt bill faces long road*, *The Oklahoman* (June 14, 2021), <https://www.oklahoman.com/story/news/2021/05/16/oklahoma-tribes-divided-over-tom-cole-bill-addressing-mcgirt-ruling/5063947001/>.

⁵² *Id.*

⁵³ Kelci McKendrick, *Lankford visits Enid, discusses various topics*, *Enid News & Eagle* (Aug. 19, 2021), https://www.enid-news.com/news/lankford-visits-enid-discusses-various-topics/article_0769c2ac-015e-11ec-b799-d3018ac1cd29.html.

the fact that the different Tribes might take varying policy positions on these serious issues). Determining the optimal approach to public safety within the Creek Reservation is a governmental priority of the highest order, one that calls for careful consideration rather than Oklahoma's preferred approach of a rush to judgment—or a rush back to this Court.

Especially in the absence of demonstrated need, legislation takes time. What will facilitate any necessary legislation (and further cooperative agreements) is if the Court disabuses Oklahoma of the notion that a precedent of this Court can be dismissed as an unwelcome house guest, here today but hopefully gone tomorrow. For one thing is clear from the congressional record: There has been no groundswell in Congress to disestablish the Creek or the other Five Tribes' reservations after *McGirt*. Rather, there exists a solemn appreciation of the importance of abiding by the treaty promises vindicated by this Court while providing the resources necessary to do so. With Congress not inclined to disestablish, Oklahoma has returned to this Court and urged it to do what "only Congress" properly can. *McGirt*, 140 S. Ct. at 2474. The invitation not only rests on narratives ungrounded in fact, but betrays a lack of respect for both the integrity of the judicial process and our constitutional separation of powers. This Court should decline to walk that path.

CONCLUSION

The petition for a writ of certiorari should be denied.

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