No. 21-502

IN THE

Supreme Court of the United States

STATE OF OKLAHOMA,

Petitioner,

v.

TERRANCE LUCAS COTTINGHAM,

Respondent.

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

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

FRANK S. HOLLEMAN, IV
DOUGLAS B. L. ENDRESON
SONOSKY, CHAMBERS, SACHSE, ENDRESON & PERRY, LLP
1425 K Street, NW, Suite 600
Washington, DC 20005

PATTI PALMER GHEZZI
Attorney at Law
P.O. Box 812
Pawhuska, OK 74056

SARA HILL
Attorney General
CHRISSI NIMMO
Counsel of Record
Deputy Attorney General
CHEROKEE NATION
P.O. Box 948
Tahlequah, OK 74465
(918) 458-6998
chrissi-nimmo@cherokee.org

Counsel for Amicus Curiae Cherokee Nation

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INTEREST OF *AMICUS*[1]

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

The Nation has fundamental interests in protecting the treaty promises under which the Nation, as the

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

[2] The boundaries of the Reservation established by the 1833 Treaty, the 1835 Treaty, and a December 31, 1838 fee patent to the Nation, were modified by the 1866 Treaty, arts. 16, 17, 21, and the Act of Mar. 3, 1893, ch. 209, § 10, 27 Stat. 612, 640-43.

sole tribal signatory of those treaties, resides on and governs the Reservation. Accordingly, even before *Hogner* was decided the Nation began a comprehensive enhancement of its criminal justice system, growing its capacity and redoubling coordination with other governments to meet the expanded responsibilities that it anticipated. That effort continues today, under the ruling in *Hogner*.

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

SUMMARY OF ARGUMENT

The petition should be denied for three reasons.[3] First, *McGirt* has been implemented successfully on the Cherokee Reservation by the Nation and the federal government. A balanced and accurate description of how the Nation is addressing *McGirt* disproves the State's argument that *McGirt* is unworkable.

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

Second, the State waived its right to seek reversal of *McGirt* or the overthrow of the Cherokee Reservation by not challenging the Reservation's existence in the court below and expressly accepting it in other cases. And the District Court has since dismissed the charges against Respondent, mooting this case. Finally, the State provides no basis for discarding *McGirt*. The cases on which it relies are worlds apart from this situation, where *McGirt* has provided a workable standard that is being applied by the courts below, both in the Oklahoma Indian reservation context and elsewhere, the facts and law underlying the decision have not changed, and the opinion was a well-reasoned one that has established reliance interests by the governments that are implementing it.

REASONS FOR DENYING THE PETITION

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

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

Even before *McGirt* was decided, the Nation began preparations to exercise criminal jurisdiction throughout its Reservation. Those preparations accelerated after *McGirt* and came to fruition after *Hogner*. In response to those rulings, Principal Chief Chuck Hoskin Jr. committed the Nation to "building up the largest criminal justice system in our tribe's history in record speed . . . to provide a blanket of protection within the Cherokee Nation Reservation for all citizens." Michael Overall, *The Cherokee Nation's Budget Will Hit a Record $3 Billion as the Tribe Responds to COVID and McGirt*, Tulsa World (Sept. 15, 2021) ("Overall")[4].

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

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[4] https://bit.ly/3apJHaj

[5] https://bit.ly/3v1g6NX

[6] https://bit.ly/3uXpJxf

Tribal Courts Are Handling the Surge in Cases Due to the McGirt Ruling, Tulsa World (July 22, 2021).[7]

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

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

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

The Nation has also continued its long-standing policy of entering into cross-deputization agreements with other governments on the Reservation, under which local and state law enforcement may enforce tribal law and tribal law enforcement may enforce local and state law. Before *McGirt*, the Nation had

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

[8] https://bit.ly/3mFbx8g

[9] https://bit.ly/3vz2DNy

entered twenty-one agreements with over fifty municipalities, counties, and local and state agencies in the Reservation. Since then, the Nation has entered into fifty-eight more such agreements.[10]

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

The Nation hopes for similar tribal-state agreements and supports Congressman Tom Cole's proposed legislation that would allow the State and Nation to negotiate tribal-state compacts to define

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[10] All agreements are on file in the Oklahoma Secretary of State's office. *See Tribal Compacts and Agreements*, Okla. Sec'y of State, https://bit.ly/3FRTqoq (last visited Oct. 20, 2021) (enter "Cherokee" into "Doc Type" searchbar and press "Submit"). The State's *amici* call these agreements into question, *see* ODAA Amicus Br. at 16-17, *Oklahoma v. Castro-Huerta*, No. 21-429, but only offer speculation against their effectiveness, which is defeated by our quarter-century of experience with them, and the dozens of agreements we have entered.

[11] Municipal agreements are available on Cherokee Nation's website. *See Legal Status of the Cherokee Nation Reservation*, Cherokee Nation Att'y Gen.'s Office (last accessed Oct. 20, 2021) (follow hyperlinks under "Municipal Agreements").

[12] https://bit.ly/3mJZM0a

[13] https://bit.ly/3pgZ7qh

state and tribal criminal jurisdiction within the Reservation to their mutual benefit. *See* Cherokee Nation and Chickasaw Nation Criminal Jurisdiction Compacting Act of 2021, H.R. 3091, 117th Cong. (2021). However, Oklahoma's Governor opposes it because it would acknowledge the existence of Indian Reservations. Reese Gorman, *Cole Encourages State-Tribal Relations Over State Challenges to McGirt*, Norman Transcript (July 23, 2021).[14] In contrast, Oklahoma's former elected Attorney General accepted *McGirt*, *see* Press Release, Office of Okla. Att'y Gen., Attorney General Hunter Prepares Brief with Court of Criminal Appeals Seeking Guidance on Cases Affected by the McGirt Decision (last visited Oct. 20, 2021),[15] and sought to implement it by "working with federal and tribal partners to make sure criminals are still being arrested and prosecuted," Mike Hunter, Okla. Att'y Gen., *Frequently Asked Questions Related to McGirt v. Oklahoma and the Proposed Legislative Framework Document* 1 (n.d.).[16] The new Attorney General, recently appointed by the Governor, is staunchly opposed to acknowledging or implementing *McGirt*, Joe Tomlinson, *Promised Land Recap: AG O'Connor Focused on Challenging SCOTUS Reservation Ruling*, NonDoc (Sept. 17, 2021).[17] Nevertheless, the Nation still engages with willing state partners. Shortly after *McGirt* was decided, the Nation entered into an agreement with the State Department of Human Services which recognizes the Nation's Reservation and permits the State and Nation to exercise

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[14] https://bit.ly/3ANKfBx

[15] https://bit.ly/3n4S9Si

[16] https://bit.ly/3vuPc1l

[17] https://bit.ly/3FOnJMG

concurrent jurisdiction over Indian child custody on the Reservation. *See* Intergovernmental Agreement Between Okla. & Cherokee Nation Regarding Jurisdiction over Indian Children Within the Nation's Reservation (Sept. 1, 2020).[18] The Nation is also negotiating with the Oklahoma Department of Mental Health and Substance Abuse to reach a mutually beneficial agreement to provide additional resources for mental health treatment on the Reservation.

The Nation has also revised its laws to aid an orderly criminal justice transition by amending or enacting provisions that track state law. *See Tribal Code*, Cherokee Nation Office of Att'y Gen. (last visited Oct. 20, 2021).[19] That includes new traffic, criminal, and juvenile codes that define offenses and crimes similarly to state law. Cherokee Nation Code tits. 10A,[20] 21,[21] 47.[22] The Nation also amended its statute of limitations, so that the limitation period tolls when the State initiated prosecution but then dismissed a prosecution or conviction for lack of jurisdiction. Cherokee Nation Code tit. 22, §§ 154-155.[23]

These investments are delivering justice daily. As of September 30, 2021, the Nation had prosecuted 2,031 felony and misdemeanor cases since the *Hogner* ruling and had issued 1,263 traffic citations. *See* Inter-Tribal Council of Five Civilized Tribes, Res.

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[18] https://bit.ly/2Z2KWdA

[19] https://bit.ly/3APtTsl

[20] https://bit.ly/3jko3jk

[21] https://bit.ly/3DTe6dQ

[22] https://bit.ly/3G5nKfw

[23] https://bit.ly/2Xj23XA

No. 21-34 (Oct. 8, 2021)[24]; @CherokeeNation, Twitter (Oct. 9, 2021, 9:08 AM).[25] These arrests and prosecutions are being undertaken with a respect for the rule of law and the needs of the entire community: "'We protect the tribe, we protect the community,' [CNMS Director] said . . . . 'You'll hear a lot in the media about the world coming to an end,' . . . . 'It really isn't.'" Crawford. The role that tribal justice systems play in punishing criminals rebuts the notion, repeated by Oklahoma, *see Castro-Huerta* Pet. 20, that the federal government's declination of cases results in criminals going free. As the outgoing United States Attorney for the Northern District of Oklahoma explained:

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

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

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[24] https://bit.ly/3AOnb5Q

[25] https://bit.ly/3AsaehJ

[26] https://bit.ly/3E3gD5x

That commitment also includes the handling of cases where offenders have already been prosecuted by the state and jurisdiction has shifted to the United States or the Nation. In those cases, the Nation and federal government are acting swiftly to keep offenders off the street and make sure they are brought to justice in the proper forum. For instance, the Respondent in this case is an Osage citizen[27] who committed robbery with a dangerous weapon on the Cherokee Reservation in 2015. *McGirt* was decided on July 9, 2020, during Respondent's direct appeal of his conviction. On October 5, 2020, before any state or federal court had acknowledged the Cherokee Reservation, the federal government indicted Respondent for robbery in Indian country. *See* Indictment, *United States v. Cottingham*, No. 4:20-cr-00209-GKF-1 (N.D. Okla. guilty plea June 10, 2021), ECF No. 2. On March 11, 2021, the OCCA issued its decision in *Hogner*, acknowledging the Cherokee Reservation. On March 24, the federal district court ordered Respondent to be transferred from state to federal custody, Order Granting Writ of Habeas Corpus Ad Prosquendum for Cause, ECF No. 6, and he was taken into federal custody on May 4, 2021, *see* Returned Arrest Warrant, ECF No. 17. Respondent remains in federal custody. Order of Detention Pending Trial of May 4, 2021, ECF No. 14. On June 10, Respondent pleaded guilty, *see* Plea Agreement, ECF No. 32, and his sentencing hearing is currently scheduled for November 29, *see* Minute Sheet – Mot. Hr'g, ECF No. 40. Although he has indicated he may file a motion to

[27] In its petition, the State mistakenly identifies Respondent as a Cherokee citizen, Pet. 4, but the State stipulated below that Respondent is an Osage citizen, Pet'r's App. 4a.

withdraw his plea, *id.*, Respondent remains in custody and will either face trial or sentencing soon.

That response was no one-off and resulted from an extensive effort by the Nation to ensure that *McGirt* was brought to bear on cases arising on the Reservation in a responsible, orderly manner. In the month after the *McGirt* decision, the Nation assisted the OCCA's consideration of appeals raising *McGirt*-based jurisdictional arguments. It did so by tendering an amicus briefs and appendix in *Hogner* less than a month after *McGirt* was decided and identifying nine then pending appeals raising the claim that the Cherokee Reservation is intact. Cherokee Nation Unopposed Application for Authorization to File Amicus Br.*, Hogner v. State*, 2021 OK CR 4 (filed Aug. 3, 2020) (No. F-2018-138).[28] In each case, the Nation confirmed the location of the offenses and the Indian status of the defendants and victims. Less than two weeks later, the OCCA remanded those cases for evidentiary hearings. As in this case, the State presented no evidence or argument at those hearings that the Reservation was disestablished or that *McGirt* should be overruled. The Nation appeared and participated at the hearings, filing amicus briefs, exhibits, historical documents, and proposed findings of fact and conclusions of law. Each trial court determined the Reservation is intact.

Based on the evidentiary records and trial courts' findings, the Nation anticipated the OCCA would vacate convictions and began to coordinate, sometimes in advance of the OCCA opinions, to ensure defendants would be lawfully prosecuted in federal or tribal courts. That effort was successful. Today, the

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[28] https://bit.ly/3DZkOiK

OCCA has vacated twelve state convictions in Cherokee Reservation cases on direct appeal. In every case, federal or tribal prosecution is proceeding. *See Cherokee Nation v. Perales*, No. CRM-21-261 (Cherokee Nation Dist. Ct. filed Mar. 9, 2021); *Cherokee Nation v. Shriver*, No. CRM-21-55 (Cherokee Nation Dist. Ct. filed Feb. 19. 2021); *Cherokee Nation v. Shriver*, No. CRM-21-56 (Cherokee Nation Dist. Ct. filed Feb. 19, 2021); *United States v. Bragg*, No. 4:21-cr-0008-JFH (N.D. Okla. filed Mar. 22, 2021); *United States v. Castro-Huerta*, No. 4:20-cr-00255-CVE (N.D. Okla. guilty plea Nov. 2, 2020); *Cottingham*, No. 4:20-cr-00209-GKF-1; *United States v. Foster*, No. 4:21-cr-00118-CVE (N.D. Okla. filed March 16, 2021); *United States v. Leathers*, No. 4:21-cr-00163-CVE-1 (N.D. Okla. filed Mar. 19, 2021); *United States v. McCombs*, No. 4:20-cr-00262-GKF-1 (N.D. Okla. filed Nov. 3, 2020); *United States v. McDaniel*, No. 6:21-mj-00372-SPS-1 (E.D. Okla. filed Sept. 22, 2021); *United States v. Spears*, No. 4:20-cr-00296-GKF (N.D. Okla. filed Nov. 18, 2020); *United States v. Vaught*, No. 4:21-cr-00202-JFH-1 (N.D. Okla. filed Apr. 2, 2021).

The State worries about "civil jurisdiction of non-Indian municipal courts in eastern Oklahoma under the Curtis Act, ch. 504, § 14, 30 Stat. 499-500 (1898)," citing one pending case, *Hooper v. City of Tulsa*, No. 4:21-cv-00165-JED-JFJ (N.D. Okla. filed Apr. 9, 2021). *Castro-Huerta* Pet. 25. *Hooper*—which deals with *criminal* jurisdiction—arose from a decision of the Municipal Criminal Court of the City of Tulsa, which is located mostly on the Creek and Cherokee Reservations. The municipal court concluded that under the Curtis Act,[29] municipalities on the Creek Reservation

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

which incorporated under that Act before Oklahoma statehood can enforce municipal criminal ordinances against both Indians and non-Indians. *City of Tulsa v. Hooper*, No. 7470397, slip op. at 5-10 (Tulsa Mun. Crim. Ct. Apr. 5, 2021).[30]

The Nation disagrees with that decision. Tulsa is organized under Oklahoma state law pursuant to a charter adopted *after* statehood. *See* Tulsa, Okla. Code App. C;[31] Okla. Const. art. 18, § 3(a). In any event, under existing cross-deputization agreements with Tulsa, tribal and municipal law enforcement officers can enforce applicable tribal, local, and federal laws and refer those cases to the appropriate prosecutors. *See* Addendum to Law Enforcement Agreement Between U.S., Cherokee Nation, and City of Tulsa (Apr. 9, 2014);[32] Addendum to Law Enforcement Agreement Between U.S., Muscogee (Creek) Nation, and City of Tulsa (May 2, 2006).[33] Such agreements are available to any other municipality on a reservation. And since *McGirt*, inter-governmental cooperation with Tulsa police has been intensive. *See* Allison Herrera, *"My Office Will Work Until We Drop": Agencies Vow to Work Together on McGirt Cases*, KOSU (Aug. 12, 2020, 10:02 AM).[34] The Nation is doing all it can to ensure Indians and non-Indians in Tulsa are held accountable to the law.

Finally, the State's suggestion that lurking "[q]uestions" about tribal civil authority are of concern has

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

[31] https://bit.ly/3nejTDZ

[32] https://bit.ly/3DsYnSv

[33] https://bit.ly/3uY6Lq6

[34] https://bit.ly/3DKOhg0

no basis in fact within the Nation's knowledge. *Castro-Huerta* Pet. 25. The Nation has made no effort to exercise civil jurisdiction over anyone on terms that were not already available before *McGirt*, and no such cases are pending in the Nation's courts. The State provides no evidence that any of the challenges to the State's civil jurisdiction elsewhere are even remotely serious. *See id.* at 24-26. If serious disputes were to arise over civil jurisdiction, they should be resolved in those cases, not this criminal case. Resolution of such issues is also available through tribal-state agreement, as the tribes and State have done time and time again, even when the Supreme Court has found the State has overstepped its authority in Indian country. *See, e.g.*, Okla. Stat. tit. 68 § 500.63 (authorizing the State and tribes to enter agreements to share motor fuel tax revenues after *Oklahoma Tax Commission v. Chickasaw Nation*, 515 U.S. 450 (1995)); *id.* § 346 (authorizing State and tribes to enter agreements to share tobacco tax revenues after *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505 (1991)). That this model works is shown by the Nation's recent child custody agreement with the State. *See supra* at **.

The State's reliance on exaggeration is of a piece with the Oklahoma Governor's attempts to stoke hysteria and sensationalism in the media. *See* Hicham Raache, *Gov. Stitt Says Supreme Court's McGirt Ruling Created 'Public Safety Threat', asks Oklahomans to Share Stories; Cherokee Nation Reacts*, KFOR (Apr. 16, 2021, 11:52 AM)[35]; Ray Carter, *McGirt Called Threat to State's Economic Future*, Okla. Council of

[35] https://bit.ly/2YV7mwS

Pub. Affairs (Aug. 16, 2021)[36]; Reese Gorman, *Cole Continues to Advocate for Tribal Sovereignty on Indigenous Peoples' Day*, Norman Transcript (Oct 11, 2021) ("Stitt spokesperson Carly Atchinson said, 'McGirt is the biggest issue that's ever hit any state since the Civil War . . . .'").[37] That provides no ground for certiorari. Furthermore, rewarding this strategy could threaten the fair adjudication of criminal cases arising on Indian country in Oklahoma in the future. *See Flowers v. Mississippi*, 139 S. Ct. 2228, 2254 (2019) (Thomas, J., dissenting); *Chandler v. Florida*, 449 U.S. 560, 580 (1981).

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

The State's effort to undo the Cherokee Reservation is a starkly new position. The State earlier *affirmatively accepted* the Cherokee Reservation, Suppl. Br. of Appellee after Remand at 3, *McDaniel v. State*, No. F-2017-357 (Okla. Crim. App. filed Mar. 29, 2021) ("The State further accepts, in light of this Court's ruling in *Hogner v. State*, . . . that the crimes occurred within the boundaries of the Cherokee Nation Reservation.")[38]; Suppl. Br. of Appellee after Remand at 6, *Foster v. State*, No. F-2020-149 (Okla. Crim. App. filed Apr. 19, 2021) (noting the State stipulated that, under *Hogner*, the Cherokee Reservation exists).[39] In line

[36] https://bit.ly/3vzCs9M

[37] https://bit.ly/3AK839C

[38] https://bit.ly/3lM1Wgz

[39] https://bit.ly/3jjP67S

with its avowed acceptance of *Hogner*, the State did not challenge the Reservation below.[40]

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

Moreover, the State's attack is barred by its conduct in *this* case. When a party does not raise an argument below, and the lower court does not rule on it, it is waived. *See Sprietsma v. Mercury Marine*, 537 U.S.

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[40] The State's decision to accept *Hogner* and not seek certiorari there also suggests its effort to challenge the Reservation is barred by non-mutual collateral estoppel. *See* Restatement (Second) of Judgments § 29 (1980); *B & B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. 138, 148 (2015) (quoting Restatement (Second) of Judgments for collateral estoppel principles); *see also State v. United Cook Inlet Drift Ass'n*, 895 P.2d 947, 951-52 (Alaska 1995); *Benjamin v. Coughlin*, 905 F.2d 571, 576 (2d Cir. 1990).

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

51, 56 n.4 (2002). "Waiver is the intentional relinquishment or abandonment of a known right," *Wood v. Milyard*, 566 U.S. 463, 474 (2012) (cleaned up), which is exactly what the State did here. And an argument waived below is forfeited before this Court. *United States v. Jones*, 565 U.S. 400, 413 (2012).

After *McGirt* and *Sharp v. Murphy*, 140 S. Ct. 2412 (2020) (per curiam), were decided, the OCCA remanded for an evidentiary hearing and directed the District Court to "follow the analysis set out in *McGirt*" to determine if the Cherokee Reservation had been disestablished. Pet'r's App. 20a. The OCCA made clear that the State should develop evidence below on the question of 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 effect uniformity and completeness in the hearing process." *Id.* at 19a.

Nevertheless, on remand the State did not present *any* evidence or briefing. The Nation submitted an amicus brief and supporting exhibits showing the establishment and continued existence of the Cherokee Reservation, Cherokee Nation Amicus Br. & App., *State v. Cottingham*, No. CF-2015-350 (Okla. Dist. Ct. filed Sept. 25, 2020),[42] and Respondent also briefed the issue, Br. of Def. (filed Oct. 13, 2020).[43] Instead of responding, the State stipulated that the crime occurred within the "geographic area set out" in the Cherokee Treaties, Agreed Stip. at 1 (filed Oct. 13, 2020).[44] After a hearing, the District Court issued its

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[42] https://bit.ly/3aPg0Qi

[43] https://bit.ly/3peMX0M

[44] https://bit.ly/3pi9bPA

decision, noting the arguments made by Respondent and the Nation, Pet'r's App. 17a, and that "[t]he State of Oklahoma, by and through the Oklahoma Attorney General's Office, did not present any evidence or argument as to whether Congress disestablished the Cherokee Reservation," *id.* and concluding that "[t]he Court, having heard no other evidence, must find that the Cherokee Reservation was not disestablished," *id.*

Back before the OCCA, the State simply repeated the District Court's findings, Suppl. Br. of Appellee after Remand at 4-5, *Cottingham v. State*, No. F-2017-1294 (Okla. Crim. App. filed Dec. 15, 2020),[45] reiterated that it "takes no position as to the existence, or absence, of a Cherokee Nation Reservation," *id.* at 5 n.4, and asked that the OCCA stay any order reversing the conviction so that the federal government could take custody of Respondent, *id.* at 5. The OCCA then granted relief to Respondent. It noted that, although Respondent and the Nation submitted briefs to the District Court, "[t]he State, by contrast, did not," Pet'r's App. 3a. The OCCA also noted that, although the District Attorney had "expressed his view [at the hearing] that the continuing existence of a reservation for the Cherokee Nation was inconsistent with the fact of Oklahoma statehood[, t]his argument . . . was not a definitive assertion by the State that it had jurisdiction to prosecute [Respondent] . . . ." *Id.* at 6a n.2.

The OCCA then concluded that "[a]fter thorough consideration of this proposition and the entire record before us on appeal including the original record, transcripts and the briefs of the parties," the District Court had properly concluded the Cherokee

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[45] https://bit.ly/3jcI4BL

Reservation was never disestablished, Pet'r's App. 7a-8a. After the OCCA issued its decision, the District Court dismissed the charges against Respondent. *See Cottingham v. State*, No. CF-2015-350 (Okla. Dist. Ct. July 8, 2021).[46]

Because the criminal charges giving rise to this case have been dismissed, it is moot. The dismissal ended the controversy between the State and Respondent, and so any decision this Court issues on the State's ability to bring the now-dismissed charges will not give the State any relief, *see Chafin v. Chafin*, 568 U.S. 165, 172 (2013), and would only be advisory, *see Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101 (1998).[47]

The State also forfeited its anti-Reservation position under principles of waiver. The OCCA ordered a hearing on the Reservation's existence and requested that the State help develop a record on that question. The State chose not to do so, did not challenge *McGirt*,[48] expressly took no position, and presented no

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[46] https://bit.ly/2YWOXzO. The State did not include this order in its appendix, despite its connection to the judgment and clear relevance to this Court's jurisdiction. *See* Rule 14.1(*i*)(i)-(ii).

[47] The only exception to mootness that the Court has recognized—"capable of repetition yet evading review"—is inapplicable in this case, which deals with the validity of a criminal conviction, not a transient injury too short to be litigated but likely to be repeated. *See United States v. Sanchez-Gomez*, 138 S. Ct. 1532, 1540 (2018); *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1976 (2016).

[48] The State began attempting to reserve its right to challenge *McGirt* only after the former Attorney General left office, thereby implicitly acknowledging its earlier waivers. *See, e.g.*, Br. in Supp. of Mot. to Stay & Abate Proceedings at 5 n.3, *Russell v. State*, No. F-2019-892 (Okla. Crim. App. filed June 24, 2021), https://bit.ly/3jbOhOh. Of course, an attempt to preserve an

evidence on the existence of the Cherokee Reservation. In its post-remand briefing to the OCCA, the State raised no challenge to the District Court's Indian country ruling. By knowingly waiving every opportunity to challenge the Cherokee Reservation below, the State forfeited its right to do so here, by attacking *McGirt* or otherwise. In short, the State's effort to reverse its earlier decisions not to challenge the existence of the Cherokee Reservation "comes too late in the day" to be considered. *See Sorrell v. IMS Health Inc.*, 564 U.S. 552, 563 (2011).

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

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

In the cases the State cites, the Court overturned prior constitutional precedents, acknowledging that *stare decisis* "is at its weakest when we interpret the Constitution." *Janus*, 138 S. Ct. at 2478; *Hyatt*, 139 S. Ct. at 1492; *Ramos*, 140 S. Ct. at 1404-08. Here *stare decisis* is most potent, as Congress has plenary

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argument, regardless of whether it could prevent waiver, cannot succeed if the argument is estopped or *already* waived.

authority to revisit what the Court has done and, exercising its primary authority over Indian affairs, to reverse or modify the Court's decisions. *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 799 (2014).[49] Yet, in this case the State asks the Court to do Congress's business by accepting its view of funding and policy debates. The political nature of this attack is underscored by its timing, which follows the appointment of a new Attorney General. That is a call for prospective legislation, not grounds for certiorari.

McGirt is also well-reasoned, in contrast to the decisions overruled in *Hyatt*, 139 S. Ct. at 1499, *Janus*, 138 S. Ct. at 2463-65, 2483, and *Ramos*, 140 S. Ct. at 1404-08. *McGirt* rests on a comprehensive analysis of law and history—despite the State's claim to the contrary, *Castro-Huerta* Pet. 18-19—and its ruling is based on the language of the treaties and congressional enactments at issue, rather than the State's interpretation of subsequent events that are urged to overcome statutory text.[50] The Court's conclusion was

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[49] This, and the reliance costs imposed by work to implement *McGirt*, *see infra* at **, rebut the State's assertion that "the recent nature of the decision entitles it to less stare decisis weight." *Castro-Huerta* Pet. 28 (citing constitutional cases where reliance interests, if they existed, were weaken by lower courts' confused applications of precedent).

[50] The State's and its supporting *amici*'s position that *McGirt* should be reversed because the disestablishment analysis involves "inherently ambiguous" statutes is self-defeating. *See* Tex. Amicus Br. at 13-20, *Oklahoma v. Castro-Huerta*, No. 21-429. The judicial interpretation of ambiguous statutes fosters certainty and predictability in their application and enforcement, which is an argument for sparingly revisiting such interpretations. *See Gamble v. United States*, 139 S. Ct. 1960, 1986 (2019) (Thomas, J., concurring). And even if the State were right that *McGirt* involved inherent ambiguities, *McGirt* resolved them through a thorough review of the circumstances surrounding the

no outlier, as it is consistent with the federal court decisions that have applied the disestablishment factors, including the panel in *Murphy*. Unlike *Janus* and *Hyatt*, no intervening decision affects the law on which *McGirt* is based or calls *McGirt*'s reasoning into question. In fact, subsequently, multiple circuits have repeatedly relied on *McGirt*'s approach to statutory interpretation as a touchstone in their own analyses, both in and outside of the Indian law context.[51] Nor have there been any later factual developments that call the *McGirt* decision's reasoning into question. *Cf. Janus*, 138 S. Ct. at 2465-66, 2482-83; *Citizens United v. FEC*, 558 U.S. 310, 364 (2010) (massive changes in political media landscape undermined poorly-reasoned First Amendment precedent). Indeed, the relevant facts showing the Creek Reservation's existence could not have changed in the past year. Perhaps most significantly, the Oklahoma courts have applied *McGirt* with precision and without difficulty. And the Nations and the federal governments have successfully implemented *McGirt* and the OCCA's decisions to bring criminals to justice, which proves *McGirt* is not "unworkable."

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

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enactment and implementation of statutes affecting the Muscogee (Creek) Nation. 140 S. Ct. at 2470-74.

[51] *See, e.g.*, *Rojas v. FAA*, 989 F.3d. 666, 689 (9th Cir. 2021) (Wardlaw, J. concurring in part and dissenting in part); *Awuku-Asare v. Garland*, 991 F.3d 1123, 1128 (10th Cir. 2021); *Penobscot Nation v. Frey*, 3 F.4th 484, 493-94 (1st Cir. 2021).

rule of law, 140 S. Ct. at 2474. While the State relies heavily on the "century of reliance interests that *McGirt* upset," *Castro-Huerta* Pet. 28, the correction of a century of injustice cannot entirely avoid doing so. And the Nations, federal government, state courts, local governments, and other public servants have invested great time and resources to make the recognition of the Nations' treaty rights in *McGirt* and its follow-on cases meaningful by protecting public safety and punishing wrongdoers. Reversing course now would leave all those efforts without purpose or meaning—affecting the public's confidence in the justice system, wasting tens of millions of dollars and substantial administrative investments, and imposing costs of re-arresting, re-transferring, and re-prosecuting thousands of offenders. These are the interests that are now on the line, and they are threatened by efforts to overthrow *McGirt*, not efforts to adhere to it.

CONCLUSION

The petition should be denied.

Respectfully submitted,

FRANK S. HOLLEMAN, IV
DOUGLAS B. L. ENDRESON
SONOSKY, CHAMBERS, SACHSE, ENDRESON & PERRY, LLP
1425 K Street, NW, Suite 600
Washington, DC 20005

PATTI PALMER GHEZZI
Attorney at Law
P.O. Box 812
Pawhuska, OK 74056

SARA HILL
Attorney General
CHRISSI NIMMO
Counsel of Record
Deputy Attorney General
CHEROKEE NATION
P.O. Box 948
Tahlequah, OK 74465
(918) 458-6998
chrissi-nimmo@cherokee.org

Counsel for Amicus Curiae
Cherokee Nation

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