No. 23A73

In The
Supreme Court of the United States

THE CITY OF TULSA,
Applicant,
v.
JUSTIN HOOPER,
Respondent.

On Application for Stay

REPLY IN SUPPORT OF EMERGENCY APPLICATION FOR STAY OF MANDATE

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page**

Statutes

Rules

REPLY

There is no dispute by the Respondent or the amici that the interpretation of the Curtis Act and its applicability to cities like Tulsa is an issue of great importance. The fact that the Tribes filed a twenty-five-page amicus brief, despite the Court's rule discouraging amicus responses to emergency applications (S. Ct. R. 37(4)), signals the significance of this issue. In its application for stay the City established that certiorari review will likely be granted by this Court on this important issue and that such review will likely result in reversal of the Tenth Circuit, and thus a stay of the mandate should issue.

The Tribes in response claim that the disruption or harm to the citizens of Tulsa has been overstated based solely on the existence of cross deputization agreements and suggestions of potential cooperative arrangements which do not currently exist. Respondent and the Tribes attempt, without support, to undermine the impact of the mandate issuing in this matter. However, the affidavits provided by Tulsa Police Department Deputy Chief of Operations Eric Dalgleish or Tulsa Fire Department Acting Chief Julie Lynn clearly set forth factual evidence which supports the disruption and safety issues that the inhabitants of the City of Tulsa will experience should the mandate not be stayed.

1. The City has established that this Court will likely grant the City's request for certiorari review and overturn the decision of the Tenth Circuit.

In its application for an emergency stay, the City established that, because the interpretation of §14 of the Curtis Act is an important issue of federal law that has not been decided by this Court, this Court will likely grant certiorari review. The

Tribes' contention that the lack of a circuit split on this issue makes the likelihood of granting certiorari "remote" is without merit. The lack of a circuit split does not diminish the importance of this case, nor does it preclude certiorari review. This Court has not balked at hearing cases which are of great importance to only one state or territory despite the lack of a circuit split. See, e.g., *Sturgeon v. Frost*, 139 S. Ct. 1066 (2019) (Alaska); *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984) (Hawaii); *Fin. Oversight & Mgmt. Bd. for Puerto Rico v. Aurelius Inv., LLC*, 207 L. Ed. 2d 18, 140 S. Ct. 1649 (2020) (Puerto Rico).

The responses of Mr. Hooper and the Tribes misconstrue case law in an effort to underscore the significance of this undecided issue and the likelihood that this Court will grant certiorari review. While citing cases that are clearly distinguishable, both the Respondent and the Tribes fail to address *Ex Parte Webb*, 225 U.S. 663, (1912), the case most closely on point. In *Ex Parte Webb*, the Court addressed the question of whether pre-statehood acts of congress which regulated the sale of inter-state liquor ceased to be enforceable after statehood and the passage of Oklahoma's Enabling Act. The Court held that neither the Oklahoma Enabling Act nor the Oklahoma Constitution repealed an exercise of *Congress' plenary power in the Indian Territory*. *Id*. at 689-690. The Court observed that §1 of the Oklahoma Enabling Act provides "that nothing contained in the state Constitution shall be construed 'to limit or affect the authority of the government of the United States to make any law or regulation respecting such Indians, their lands, property, or other rights by treaties,

agreement, law, or otherwise, which it would have been competent to make if this act had never been passed.'" *Ex Part Webb*, 255 U.S. at 682-683. The Court held:

> We deem it unreasonable to suppose that Congress, possessing the constitutional power and recognizing the moral duty to make laws and regulations respecting the Indians, and having already established laws and regulations of this character applicable in the territory, including some that were established by treaties and agreements, should resolve to wipe them out, and thereby impose upon future Congresses the labor and difficulty of establishing other proper laws and regulations in their stead. In our opinion, the purpose expressed in the proviso to reserve to the government of the United States the authority to make laws and regulations in the future respecting the Indians is, under the circumstances, evidence tending to negative a purpose to repeal by implication the existing laws and regulations on the subject.

There is no dispute that Congress has "plenary power over Indian affairs, including the power to modify or eliminate tribal rights." *S. Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998); see also *Stephens v. Cherokee Nation*, 174 U.S. 445, 446, 19 S.Ct. 722, 722, 43 L.Ed. 1041 (1899); *Cherokee Nation v. Hitchcock*, 187 U.S. 294, 295 (1902) (recognizing that "the power which exists in Congress to administer upon, and guard, the tribal property is political and administrative in its nature, and the manner of its exercise is a question within the province of the legislative branch to determine, and is not one for the courts). Congress utilized that power in enacting §14 of the Curtis Act and establishing that municipalities properly incorporated could enforce municipal ordinances against all inhabitants, regardless of race. As set forth in *Ex Parte Webb*, such power is not diminished or altered by statehood.

Instead of addressing *Ex Parte Webb*, the Tribes quote from *Jefferson v. Fink*, 247 U.S. 288 (1918) for the proposition that the Court has described "the 'purpose' for which Congress passed such legislation as strictly time-limited in nature." Amici Br. at 11. However, *Jefferson* makes no such pronouncement about the Curtis Act. Instead, the *Jefferson* Court evaluated a territorial statute which conflicted with then existing Oklahoma laws. *Jefferson* specifically relates to an allotment under the Creek Agreement of 1901 which revived the Tribe's laws of descent and distribution. Act of March 1, 1901. 31 Stat. 861 (hereinafter the "1901 Act"); *Fink* at 291. However, the 1901 Act specifically revoked §13 of the Curtis Act as well as any other section inconsistent with the 1901 Act but specifically retained §14 of the Curtis Act. *See* 1901 Act, §41 ("no Act of Congress or treaty provision inconsistent with this agreement shall be in force in said nation, except section fourteen [of the Curtis Act], *which shall continue in force as if this agreement had not been made*") (emphasis added).

The *Fink* Court found that Congress intended for Oklahoma laws of descent to apply in Indian Territory after Statehood. *Fink* at 294. The fact that the *Fink* court found that the Enabling Act required that the laws of the Oklahoma territory would also apply over Indian Territory upon Statehood, *Fink* at 292-93, does not alter the jurisdiction over crimes committed by Indians granted to the City by Congress. That Arkansas' substantive laws would no longer apply to or in the City even after Oklahoma statehood is not in question, and the Curtis Act does not require that the City must maintain an Arkansas corporate identity to retain jurisdiction. *Fink* and

other cases cited by Amici address the substantive law to be applied in the courts, not the jurisdiction of those courts. These cases are clearly distinguishable as the Curtis Act's stated commitment to equal protection of the laws was not an encroachment upon the prospective state and in no way effected the substantive laws of the new state. Instead, it was an act of Congress' plenary power that was not intended to be temporary or to extinguish at statehood.

Similarly, the Tribes rely on cases such as *Lackey v. State*, 1911 OK 270, 116 P. 913, for the proposition that the Curtis Act was merely provisional. However, none of the cases cited by Respondent or the Tribes address whether a congressional commitment to equal protection which is an exercise of Congress' plenary power, such as provided for in the Curtis Act, survived statehood. Instead, *Lackey* and *Jefferson* address situations where a territorial statute which pre-dated statehood conflicted with the now in effect substantive laws of the State of Oklahoma. Neither *Lackey* nor *Jefferson* addresses municipal ordinances or acts of Congress which were within Congress' plenary power.

The Tribes also place great weight on the language of *State ex rel. W. v. Ledbetter*, 1908 OK 196, 97 P. 834. However, the Tribes continue to misconstrue the language of *Ledbetter*. In *Ledbetter*, the Oklahoma Supreme Court dealt with a situation wherein the City of Muskogee's City Marshal was petitioning for a declaration that he was entitled to keep his office even after statehood.

The Tribes quote **a portion** of ¶4 of the *Ledbetter* decision and claim that it stands for the proposition that the authority that had previously been given

municipalities by Congress through territorial management had "become inoperative" with statehood. Amici Br. at p. 13-14. However, the Tribes fail to quote the entire paragraph. The remainder of ¶4 which the Tribes do not cite states:

> . . .but it is not necessary for us to determine whether Muskogee, as a municipal corporation, would have ceased to exist at said time if no provision had been made in the Constitution continuing its corporate existence, for by section 10 of the Schedule to the Constitution it is provided that:
>
> > Until otherwise provided by law, incorporated cities and towns, heretofore incorporated under the laws in force in the territory of Oklahoma or in the Indian Territory, shall continue their corporate existence under the laws extended in force in the state, and all officers of such municipal corporations at the time of the admission of the state into the Union shall perform the duties of their respective offices under the laws extended in force in the state, until their successors are elected and qualified in the manner that is or may be provided by law: Provided, that all valid ordinances now in force in such incorporated cities and towns shall continue in force until altered, amended or repealed.

In other words, the express language of the Oklahoma Constitution, allowed for the laws of the existing municipalities to continue until altered or amended.

Although the amici Tribes argue that this Court has essentially already ruled against the City's position because *McGirt* "made clear that the Indian Territory statutes providing for local governance in that Territory were not intended to continue past statehood," Amici Br. at 11, and that *McGirt* decided those statutes did not speak to the division of responsibilities upon the State entering the Union, that

language is dicta. Further, the dicta cited by the Tribes does not interpret §14 of the Curtis Act or municipal jurisdiction, and thus is distinguishable from the case at bar.

First, in *McGirt*, "the only question before [the Court]" was whether or not the Muscogee Creek Nation's reservation boundaries were intact under the definition of Indian Country as applied under the Major Crimes Act ("the MCA"). *McGirt v. Oklahoma*, 207 L. Ed. 2d 985, 140 S. Ct. 2452, 2480 (2020). The City does not argue that the reservation boundaries do not exist, although if there were ever a diminished and "open" area of an Indian reservation, see *Solem v. Bartlett*, 465 U.S. 463 (1984), the City of Tulsa is it.

Second, in *McGirt*, the Court noted that it has long "require[d] a clear expression of the intention of Congress" before the state or federal government may try Indians for conduct on their lands. *McGirt* at 2477, *citing Ex parte Crow Dog*, 109 U.S. 556, 572, 3 S.Ct. 396, 27 L.Ed. 1030 (1883). The Court went on to find that the MCA expressly excluded State jurisdiction over major crimes committed by Indians and placed exclusive jurisdiction in the federal government, holding that:

> Nor has Congress ever passed a law conferring jurisdiction on Oklahoma. As a result, the MCA applies to Oklahoma according to its usual terms: Only the federal government, not the State, may prosecute Indians for major crimes committed in Indian country."

McGirt at 2478. However, in this case, unlike the language of the MCA, Congress in the Curtis Act expressly committed to equal protection and application of the laws to all inhabitants of cities and towns properly incorporated. Congress thus granted

criminal and civil jurisdiction over Indians, along with all other inhabitants, within those cities lying within the reservation boundaries.

Most importantly, the amici's argument ignores this Court's follow-up case to *McGirt* which significantly affected Indian Country criminal jurisdiction. See *Oklahoma v. Castro-Huerta*, 597 U.S. _, 142 S. Ct. 2486 (2022). Under *Castro-Huerta*, the City asserts that there is concurrent jurisdiction over nonmember Indians, such as Mr. Hooper, who commit crimes within the reservation, because there is no federal preemption of such jurisdiction. This argument was not raised in *McGirt* where the State sought exclusive jurisdiction over major crimes committed by tribal members which were later determined to be within Indian Country reservations under the MCA.

The *McGirt* Court found that the Oklahoma Enabling Act "sent state-law cases to state court and federal-law cases to federal court. And serious crimes by Indians in Indian country were matters that arose under the federal MCA and thus properly belonged in federal court from day one, wherever they arose within the new State." *McGirt* at 2478. However, the Oklahoma Enabling Act did not address municipal jurisdiction over Indians as granted in the Curtis Act as it did not need to transfer those cases to any other court. Municipal courts maintained jurisdiction over all inhabitants after Statehood.

As set forth in the City's Application for Stay the Tenth Circuit's decision distorts the plain meaning of Congress's words and this Court will likely reverse the Circuit's decision.

2. The balance of equities weighs in favor of a stay.

While the Tribes seek to minimize the impact of the Circuit Court's decision to the inhabitants of the City of Tulsa, the irreparable harm is clear. The affidavits of Deputy Chief Dalgleish and Deputy Chief Lynn describe in significant detail the impact and disruption that would be caused by the mandate issuing in this case. The Tribes attempt to gloss over issues like the additional time and complexity that would be demanded at each traffic stop, however, Deputy Chief Dalgleish has described in detail the issues that officers will face should the mandate issue.

It is without doubt that <u>every traffic stop</u> would require officers to inquire into tribal status which they are not currently required to do. While this may not be a lengthy inquiry in some cases where the person does not claim Indian status, in situations where the person is Indian, or claims Indian status in an effort to avoid being ticketed, officers are then required to engage in a lengthy set of inquiries. This includes requiring the officer to attempt to verify tribal status (which, as set forth in Chief Dalgleish's affidavit, is not always a fast or efficient process); to determine whether the location of the stop is on tribal land; identifying on which tribe's land the stop occurred, which can differ depending on which map is used; and then determining what law would be applicable for inclusion on citation or report, the form of which would have to be modified to suit each court. Additional issues are created if the tribe pursues charges and the officer has to appear in Court. Appearing in tribal court could require taking an officer out of his assigned patrol while he drives hours to appear in tribal court situated in Okmulgee or Tahlequah, Oklahoma.

But to be clear, this case is not just about traffic citations as the City's ordinances address all misdemeanor crimes. The importance of the stay is exemplified by the fact that even after the application for stay was filed, and the Tenth Circuit withheld its mandate, criminal offenders, both Indian and non-Indian, have raised Indian Country jurisdiction as a reason both police and security officers cannot address their violations.

The Tribes also attempt to minimize the importance of the lack of tribal codes similar to the City's fire, electrical, and building codes amongst other ordinances which address the health and safety of the City's inhabitants by claiming that they have been "willing to adjust tribal laws in response to public safety concerns…" Amici Br. at 25. However, this unsupported statement that the tribes could, in the future adjust their laws, does nothing to protect the health and safety of the citizens of Tulsa in the immediate future should the mandate issue. At the present, the Tribes have no corresponding codes of mechanism to enforce these important health and safety codes. This is a serious issue which warrants stay of the mandate.

Again, the City claims concurrent jurisdiction with the Tribes, and Respondent is a nonmember Indian who committed a crime within the Muskogee Creek Nation reservation boundaries. Prosecution of Mr. Hooper by the City of Tulsa does not infringe on the Tribe's sovereignty.

CONCLUSION

For the foregoing reasons and those set forth in the City's Emergency Application for a Stay, the Court should stay the issuance of the mandate pending the filing and resolution of the City's petition for certiorari.

Respectfully Submitted,

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