

No. 21-429

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IN THE  
Supreme Court of the United States

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STATE OF OKLAHOMA,

*Petitioner,*

v.

VICTOR MANUEL CASTRO-HUERTA,

*Respondent.*

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On Writ of Certiorari to the  
Oklahoma Court of Criminal  
Appeals

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BRIEF OF *AMICUS CURIAE* THE UNITED  
KEETOOWAH BAND OF CHEROKEE INDIANS  
IN OKLAHOMA IN SUPPORT OF  
RESPONDENT

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April 4, 2022

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## INTERESTS OF *AMICUS CURIAE*

Amicus United Keetoowah Band of Cherokee Indians in Oklahoma (“UKB”) support the Respondent Victor Manuel Castro-Huerta in seeking affirmance of the Oklahoma Court of Criminal Appeals’ decision in *Castro-Huerta v. Oklahoma*, No. F-2017-1203 (Ok. Ct. App. Apr. 29, 2021).<sup>1</sup>

The UKB is a federally recognized Indian tribe with its governmental headquarters in Tahlequah, Oklahoma.

The UKB is descended from the historical Cherokee Indian tribe. *Cherokee Nation v. Bernhardt*, 936 F.3d 1142, 1147 (10th Cir. 2019) cert. denied 141 S. Ct. 130 (2020). As a successor government to the historical Cherokee Nation, the UKB enjoys civil and criminal jurisdiction within the Cherokee Reservation. The decision below relied on the crime taking place within the reservation’s boundaries to determine the state lacked criminal jurisdiction to prosecute respondent. The UKB agrees with the state court’s analysis in general but has an interest in noting for the Court the fact that the Cherokee Nation of Oklahoma (“CNO”) (of which the respondent’s victim is a citizen) is not the sole federally recognized Cherokee government within the Cherokee Reservation.

The decision below does not examine or decide whether the CNO possesses criminal jurisdiction over

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<sup>1</sup> Both Parties have filed blanket consents to the filing of *amicus* briefs. No counsel for a party authored this brief in whole or in part. No counsel for a party authored this brief in whole or in part. No person other than *Amicus*, its members, or its counsel made a monetary contribution to its preparation or submission.

the Cherokee Reservation exclusive of the UKB. It merely held that the federal government has jurisdiction to prosecute the crime and that the state lacks such jurisdiction.

The UKB respectfully asks the Court to refrain from making any determination regarding the nature or the extent of the CNO's criminal jurisdiction within the Cherokee Reservation, which it shares with the UKB. The nature of criminal jurisdiction over a reservation shared by two distinct tribal governments was not at issue below.

### **SUMMARY OF ARGUMENT**

Because two federally recognized Cherokee tribal governments share the reservation on which the crime occurred, and because the nature and extent of the shared jurisdiction was not at issue below, the Court should refrain from deciding whether, for instance, the CNO possesses criminal jurisdiction exclusive of the UKB.

### **ARGUMENT**

#### **I. THE UKB POSSESSES CIVIL AND CRIMINAL JURISDICTION OVER THE CHEROKEE RESERVATION.**

##### **A. The UKB descend from the historical Cherokee Nation.**

The word "Keetoowah" (YSG) is the traditional name for the Cherokee people in the Cherokee language. The UKB traces its history to the Western Cherokees or Old Settlers, the traditional Cherokee people who began moving to the region of the Arkansas Territory in the late 18th century to escape

colonization and to maintain the traditional Cherokee culture, religion, and lifeways. In the west, they established a Cherokee government separate and distinct from the Eastern Cherokee government in the southeastern United States. In 1817, the Western Cherokee received a reservation in the Arkansas Territory. Treaty with the Cherokee, 1817, 7 Stat. 156 (July 8, 1817); Treaty with the Cherokee, 1819, 7 Stat. 195 (Feb. 27, 1819). In 1828, the Western Cherokee government agreed by treaty to relinquish its Arkansas reservation in exchange for a reservation in the Indian Territory, which is today Oklahoma. Treaty with the Western Cherokee, 1828, 7 Stat. 311 (May 6, 1828). Today's Cherokee Reservation in northeastern Oklahoma is the remnant of that 1828 reservation for the Western Cherokee.

In 1835, a faction of the Eastern Cherokee known as the Ridge Party signed a treaty ceding the Eastern Cherokee lands and agreeing to join the Western Cherokee in Indian Territory. Treaty with the Cherokee, 1835, 7 Stat. 478 (Dec. 29, 1835). The Western Cherokee welcomed these Eastern emigrants. Another faction of the Eastern Cherokee, the Ross Party, objected to the Treaty, but were forcibly removed by the federal government to the Western Cherokee reservation by 1839.

The Ross Party outnumbered the combined Ridge Party and Western Cherokee leading to significant division between the two factions. In 1846, the United States negotiated a treaty merging the two Cherokee governments into one entity, known as the Cherokee Nation. Treaty with the Cherokee, 1846, 9 Stat. 871 (Aug. 6, 1846). Nevertheless, the traditional full-blood Cherokees maintained a Keetoowah Society, which

sought to protect Cherokee traditions, religion, and culture.

In 1859, the Keetoowah National Convention approved a constitution and laws forming a government separate from the 1846 Cherokee Nation government, which the Keetoowahs viewed as representing the interests of less traditional Cherokees. A central goal of this Keetoowah government was to oppose the Cherokee Nation's support of the South in the lead-up to the Civil War.

During the Civil War, the Keetoowahs fought for the Union, while the Cherokee Nation government officially aligned with the Confederacy. *See Treaty with the Cherokees, 1861 Stat. 394 (C.S.A.) (Oct. 7, 1861).*

After the Civil War, in 1866, the United States once again treated with the Keetoowah and Cherokee Nation factions as one government. *Treaty with the Cherokee, 1866, 14 Stat. 799 (July 19, 1866).* The Keetoowah continued to maintain a Keetoowah Society to organize the affairs of the full-blood Cherokees. In 1905, while the United States was winding up the affairs of the historical Cherokee Nation government by, among other things, terminating its courts and closing its membership, the Keetoowah Society obtained a federal charter to assist it in governing Keetoowah affairs. *Certificate of Incorporation of Keetoowah Society, No. 592 (N.D. Ind. Terr. Sept. 20, 1905).*

After the 1936 passage of the Oklahoma Indian Welfare Act ("OIWA"), 49 Stat. 1967 (June 26, 1936), the Keetoowahs began the process of organizing an OIWA tribal government. In 1946, Congress



recognized the “Keetoowahs of the Cherokee Nation of Oklahoma” as “a band of Indians residing in Oklahoma” within the meaning of the OIWA. Act of August 10, 1946, 60 Stat. 976 (Aug. 10, 1946). In 1950, the UKB adopted (and the United States approved) an OIWA Constitution, By-laws, and federal corporate charter. UKB Const. and By-Laws (Oct 3, 1950); UKB Corporate Charter (Oct. 3, 1950).

The UKB constitution identifies the Cherokee Reservation (by the phrase “Old Cherokee Nation”) and its historical districts as the boundaries for the election of officers and district representatives to serve on its Council, the governing body of the UKB. UKB Const. art. II, §§ 1, 2; art. V, § 2. It also requires Council meetings to occur within the Cherokee Reservation. UKB Const. art. III, § 3.

In 1976, descendants of the historical Cherokee Nation who were not UKB members approved a constitution forming a new tribe called the “Cherokee Nation of Oklahoma” (“CNO”), which was recognized by the Bureau of Indian Affairs (“BIA”). Const. of the Cherokee Nation of Okla. (June 26, 1976).

The two tribes are successors to the historical Cherokee Nation, which ceased to exist when its last members died because Congress closed its rolls and never reopened them. *See* Act of March 1, 1901, 31 Stat. 848, § 41 (1901); Act of July 1, 1902, 32 Stat. 716, § 26 (1902); Act of April 26, 1906, 34 Stat. 137, §§ 1, 2. (1906). Both tribes’ ancestors were part of the Cherokee tribe which signed the 1866 treaty with the United States establishing the final boundaries of the Cherokee Reservation.

**B. The UKB has land held in trust for its benefit by the United States within the Cherokee Reservation.**

The federal government recently accepted a 76-acre parcel in trust for the benefit of the UKB. See *Cherokee Nation v. Bernhardt*, 936 F.3d 1142 (10th Cir. 2019) *cert. denied* 141 S. Ct. 130 (2020). On this land, the UKB operates its tribal government, tribal courts, a child-care center, a traditional dance ground, and other community services. The UKB Lighthouse Police patrols the area. The UKB exercises both civil and criminal jurisdiction over the trust land. *Id.* at 1162 n.21 (“The Assistant Secretary relied on the IRA Amendment to support the proposition that the UKB share the ‘privileges and immunities available’ to other Indian tribes; in this case, the right to assert jurisdiction over its tribal lands.”).

**II. THE QUESTION OF SHARED CRIMINAL JURISDICTION WITHIN THE CHEROKEE RESERVATION IS NOT BEFORE THE COURT.**

The decision below did not raise or address the question of whether the CNO exercises criminal jurisdiction within the Cherokee Reservation or whether such jurisdiction could be *exclusive of* the UKB. The only questions relevant to the decision below were whether the victim was an Indian and whether the crime occurred within the Cherokee Reservation. *Castro-Huerta v. Oklahoma*, No. F-2017-1203, 2 (Ok. Ct. Crim. App Apr. 29, 2021).<sup>2</sup>

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<sup>2</sup> The Oklahoma Court of Criminal Appeals, applying *McGirt*, recently held that the Cherokee Reservation has not been

Though not common, tribes do share jurisdiction over reservations. *Cherokee Nation v. Bernhardt*, 936 F.3d at 1161 (“The Assistant Secretary then referenced other instances of tribes sharing jurisdiction over trust lands.”). Prior to *McGirt*, the Tenth Circuit addressed shared jurisdiction in the context of the CNO and UKB. It found that the Assistant Secretary did not act arbitrarily or capriciously in deciding that the UKB may exercise exclusive jurisdiction over its trust land or, alternatively, may share jurisdiction with the CNO.

We find the Assistant Secretary’s analysis sufficient to withstand the narrow standard of arbitrary and capricious review. The Assistant Secretary was justified in relying on the 1994 IRA Amendment and the 1999 Appropriations Act as bases for changing the BIA’s stance on the exclusivity of [CNO] jurisdiction over former Cherokee reservation land.

. . . And neither the district court nor the Region confronted the Assistant Secretary’s alternative theory that a

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disestablished, but did not rule on the exclusive or shared nature of tribal jurisdiction over the Cherokee Reservation. *Hogner v. State*, 2021 OK CR 4, ¶ 18 (“We also find the District Court appropriately applied *McGirt* to determine that Congress did establish a Cherokee Reservation and that no evidence was presented showing that Congress explicitly erased or disestablished the boundaries of the Cherokee Reservation or that the State of Oklahoma had jurisdiction in this matter.”).

shared-jurisdiction arrangement could be implemented. Accordingly, we reverse the district court's holding that the BIA abused its discretion in its consideration of the jurisdictional-conflicts criterion.

*Cherokee Nation v. Bernhardt*, 936 F.3d at 1161 (cleaned up).

While on the ground the UKB exercises exclusive jurisdiction over its trust land and the CNO exercises exclusive jurisdiction over its trust land, the question of shared jurisdiction within the remainder of the Cherokee Reservation remains open. The decision below did not address that question and the Court should refrain from addressing it until the issue is properly before the Court.

## CONCLUSION

For the foregoing reasons the Court should find in favor of Respondent but should not delineate the exclusive or shared nature of CNO and UKB tribal criminal jurisdiction within the Cherokee Reservation boundary.

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