

No. 21-868

---

IN THE

**In the Supreme Court of the United States**

STATE OF OKLAHOMA

*Petitioner,*

—vs—

KEVIN TYLER FOSTER,

*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 St, 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

January 3, 2022

*Counsel for Amicus Curiae*

---

## TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES .....	ii
INTEREST OF <i>AMICUS</i> .....	1
SUMMARY OF ARGUMENT.....	2
REASONS FOR DENYING THE PETITION .....	3
I. The State’s Supposed Practical Impacts are Non-Issues.....	3
II. The State Cannot Use this Moot Case to Challenge the Cherokee Reservation.....	15
III. The State Proffers No Just Basis For Abandoning <i>Stare Decisis</i> to Revisit <i>McGirt</i> .....	20
CONCLUSION.....	24

**TABLE OF AUTHORITIES**

	Page(s)
<b>CASES</b>	
<i>Awuku-Asare v. Garland</i> , 991 F.3d 1123 (10th Cir. 2021), <i>pet. for</i> <i>cert. denied</i> No. 21-5840 (Nov. 15, 2021).....	23
<i>Bench v. State</i> , 2018 OK CR 31, 431 P.3d 929 .....	19
<i>Benjamin v. Coughlin</i> , 905 F.2d 571 (2d Cir. 1990) .....	16
<i>Chandler v. Florida</i> , 449 U.S. 560 (1981).....	15
<i>Cherokee Nation v. Perales</i> , No. CRM-21-261 (Cherokee Nation Dist. Ct. filed Mar. 9, 2021).....	11
<i>Cherokee Nation v. Shriver</i> , No. CRM-21-55 (Cherokee Nation Dist. Ct. filed Feb. 19, 2021).....	11
<i>Cherokee Nation v. Shriver</i> , No. CRM-21-56 (Cherokee Nation Dist. Ct. filed Feb. 19, 2021).....	12
<i>Christian Legal Soc’y v. Martinez</i> , 561 U.S. 661 (2010).....	19
<i>Citizens United v. FEC</i> , 558 U.S. 310 (2010).....	23
<i>City of Tulsa v. Hooper</i> , No. 7470397 (Tulsa Mun. Crim. Ct. Apr. 5, 2021).....	13

**TABLE OF AUTHORITIES—Continued**

	Page(s)
<i>Coopers &amp; Lybrand v. Livesay</i> , 437 U.S. 463 (1978).....	21
<i>Flowers v. Mississippi</i> , 139 S. Ct. 2228 (2019).....	15
<i>Franchise Tax Bd. v. Hyatt</i> , 139 S. Ct. 1485 (2019).....	20-21, 22
<i>Gamble v. United States</i> , 139 S. Ct. 1960 (2019).....	22
<i>Hogner v. State</i> , 2021 OK CR 4 .....	<i>passim</i>
<i>Hooper v. City of Tulsa</i> , No. 4:21-cv-00165-JED-JFJ (N.D. Okla. filed Apr. 9, 2021) .....	12, 13
<i>Janus v. AFSCME, Council 31</i> , 138 S. Ct. 2448 (2018).....	21, 22, 23
<i>Kentucky v. King</i> , 563 U.S. 452 (2011).....	19-20
<i>McGirt v. Oklahoma</i> , 140 S. Ct. 2452 (2020).....	<i>passim</i>
<i>Michigan v. Bay Mills Indian Cmty.</i> , 572 U.S. 782 (2014).....	21
<i>Microsoft Corp. v. Baker</i> , 137 S. Ct. 1702 (2017).....	20
<i>Murphy v. Royal</i> , 866 F.3d 1164 (10th Cir. 2017).....	22
<i>New Hampshire v. Maine</i> , 532 U.S. 742 (2001).....	16-17

## TABLE OF AUTHORITIES—Continued

	Page(s)
<i>Oklahoma Tax Commission v. Chickasaw Nation</i> , 515 U.S. 450 (1995).....	14
<i>Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma</i> , 498 U.S. 505 (1991).....	14
<i>Oklahoma v. Spears</i> , No. 21-323 .....	1
<i>Oneida Nation v. Village of Hobart</i> , 968 F.3d 664 (7th Cir. 2020) .....	23
<i>Penobscot Nation v. Frey</i> , 3 F.4th 484 (1st Cir. 2021) (en banc), <i>pets. for cert. filed</i> Nos. 21-838, 21-840 .....	22
<i>Ramos v. Louisiana</i> , 140 S. Ct. 1390 (2020).....	20, 21, 22
<i>Rojas v. FAA</i> , 989 F.3d. 666 (9th Cir. 2021), <i>pet. for cert. filed</i> No. 21-133.....	23
<i>Sorrell v. IMS Health Inc.</i> , 564 U.S. 552 (2011).....	19
<i>Spears v. State</i> , 2021 OK CR 7, 485 P.3d 873 .....	2, 18, 19
<i>Sprietsma v. Mercury Marine</i> , 537 U.S. 51 (2002).....	17
<i>State ex rel. Matloff v. Wallace</i> , 2021 OK CR 21, 497 P.3d 686 .....	12

**TABLE OF AUTHORITIES—Continued**

	Page(s)
<i>State v. Foster</i> , No. CF-2018-784 (Okla. Dist. Ct. Aug. 3, 2021), <a href="https://bit.ly/3yVaQgN">https://bit.ly/3yVaQgN</a> .....	19
<i>State v. United Cook Inlet Drift Ass’n</i> , 895 P.2d 947 (Alaska 1995) .....	16
<i>State v. Vaught</i> , No. CF-2015-4067 (Okla. Dist. Ct. May 20, 2021), <a href="https://bit.ly/3GD8XIv">https://bit.ly/3GD8XIv</a> .....	12
<i>Steel Co. v. Citizens for a Better Env’t</i> , 523 U.S. 83 (1998).....	20
<i>TransUnion LLC v. Ramirez</i> , 141 S. Ct. 2190 (2021).....	20
<i>United States v. Babbitt</i> , 104 U.S. 767 (1881).....	20
<i>United States v. Bragg</i> , No. 4:21-cr-0008-JFH (N.D. Okla. filed Mar. 22, 2021) .....	12
<i>United States v. Castro-Huerta</i> , No. 4:20-cr-00255-CVE (N.D. Okla. plea entered Nov. 2, 2020).....	12
<i>United States v. Cottingham</i> , No. 4:20-cr-00209-GKF-1 (N.D. Okla. plea entered June 10, 2021) .....	12
<i>United States v. Foster</i> , No. 4:21-cr-00118-CVE (N.D. Okla. plea entered Nov. 8, 2021).....	12
<i>United States v. Jones</i> , 565 U.S. 400 (2012).....	17

**TABLE OF AUTHORITIES—Continued**

	Page(s)
<i>United States v. Lara</i> , 541 U.S. 193 (2008).....	1
<i>United States v. Leathers</i> , No. 4:21-cr-00163-CVE-1 (N.D. Okla. filed Mar. 19, 2021).....	12
<i>United States v. McCombs</i> , No. 4:20-cr-00262-GKF-1 (N.D. Okla. filed Nov. 3, 2020).....	12
<i>United States v. McDaniel</i> , No. 6:21-cr-00321-SLP-1 (E.D. Okla. filed Sept. 22, 2021) .....	12
<i>United States v. Spears</i> , No. 4:20-cr-00296-GKF (N.D. Okla. Nov. 18, 2020) .....	12
<i>United States v. Vaught</i> , No. 4:21-cr-00202-JFH-1 (N.D. Okla. filed Apr. 2, 2021) .....	12
<i>United States v. Villamonte-Marquez</i> , 462 U.S. 579 (1983).....	20
<i>United States v. Wheeler</i> , 435 U.S. 313 (1978).....	1
<i>White v. State</i> , No. C-2020-113 (Okla. Crim. App. Oct. 28, 2021).....	12
<i>Wood v. Milyard</i> , 566 U.S. 463 (2012).....	17
<i>Worcester v. Georgia</i> , 31 U.S. (6 Pet.) 515 (1832).....	2

**TABLE OF AUTHORITIES—Continued**

	Page(s)
<b>STATUTES, TREATIES AND AGREEMENTS</b>	
1866 Treaty of Washington with the Cherokee, July 19, 1866, 14 Stat. 799 .....	1
Act of Mar. 3, 1893, ch. 209, 27 Stat. 612 .....	1
Addendum to Law Enforcement Agreement Between U.S., Cherokee Nation, and City of Tulsa (Apr. 9, 2014), <a href="https://bit.ly/3DsYnSv">https://bit.ly/3DsYnSv</a> .....	13
Addendum to Law Enforcement Agreement Between U.S., Muscogee (Creek) Nation, and City of Tulsa (May 2, 2006), <a href="https://bit.ly/3uY6Lq6">https://bit.ly/3uY6Lq6</a> .....	13
Curtis Act, ch. 504, 30 Stat. 499 (1898) .....	12, 13
Intergovernmental Agreement Between Okla. & Cherokee Nation Regarding Jurisdiction over Indian Children Within the Nation’s Reservation (Sept. 1, 2020), <a href="https://bit.ly/2Z2KWdA">https://bit.ly/2Z2KWdA</a> .....	8
Okla. Stat. tit. 68, § 346.....	14
Okla. Stat. tit. 68, § 563.....	14
Treaty of New Echota, Dec. 29, 1835, 7 Stat. 478.....	1
Treaty with the Western Cherokee, Feb. 14, 1833, 7 Stat. 414 .....	1



**TABLE OF AUTHORITIES—Continued**

	Page(s)
Tribal Addendum: Addition of Tribe to Deputation Agreement for Law Enforcement in Cherokee Nation (Apr. 27, 2006), <a href="https://bit.ly/3jKkYm6">https://bit.ly/3jKkYm6</a> .....	6
Tulsa, Okla. Code App. C, <a href="https://bit.ly/3nejTDZ">https://bit.ly/3nejTDZ</a> .....	13
<b>TRIBAL INSTRUMENTS</b>	
Cherokee Nation Code tit. 10A, <a href="https://bit.ly/3FttVZI">https://bit.ly/3FttVZI</a> .....	8
Cherokee Nation Code tit. 21, <a href="https://bit.ly/3DTe6dQ">https://bit.ly/3DTe6dQ</a> .....	8
Cherokee Nation Code tit. 22, §§ 154-155, <a href="https://bit.ly/2Xj23XA">https://bit.ly/2Xj23XA</a> .....	9
Cherokee Nation Code tit. 47, <a href="https://bit.ly/3G5nKfw">https://bit.ly/3G5nKfw</a> .....	8
<b>CONSTITUTIONAL AND LEGISLATIVE AUTHORITIES</b>	
Cherokee Nation and Chickasaw Nation Criminal Jurisdiction Compacting Act of 2021, H.R. 3091, 117th Cong. (2021) .....	7
Okla. Const. art. 18, § 3(a) .....	13
<b>RULES</b>	
Rule 14.1(i)(i)-(ii) .....	19

## TABLE OF AUTHORITIES—Continued

	Page(s)
<b>COURT FILINGS</b>	
Appl. to Suppl. Record or, in Alternative, for Evidentiary Hr’g, <i>Foster v.</i> <i>Oklahoma</i> , No. F-2020-149 (filed Sept. 29, 2020), <a href="https://bit.ly/3ppWn9H">https://bit.ly/3ppWn9H</a> .....	17
Br. of <i>Amicus Curiae</i> Cherokee Nation, <i>Oklahoma v. Spears</i> , No. 21-323 .....	20
Br. of Appellant, <i>Foster v. Oklahoma</i> , No. F-2020-149 (Okla. Crim. App. Sept. 29, 2020), <a href="https://bit.ly/3sAvp17">https://bit.ly/3sAvp17</a> .....	17
Cherokee Nation Unopposed Application for Authorization to File <i>Amicus Br.</i> , <i>Hogner v. State</i> , 2021 OK CR 4 (filed Aug. 3, 2020) (No. F-2018-138), <a href="https://bit.ly/3DZkOiK">https://bit.ly/3DZkOiK</a> .....	11
Criminal Compl., <i>United States v. Foster</i> , No. 4:21-cr-00118-CVE (N.D. Okla. filed Mar. 16, 2021), ECF No. 1 .....	10
Exhibit 1 to Complaint, <i>Hooper v. City of</i> <i>Tulsa</i> , No. 4:21-cv-00165-JED-JFJ (N.D. Okla. filed Apr. 9, 2021), ECF No. 1-1 .....	13
Mot. to Stay Br’g Schedule, <i>Foster v.</i> <i>Oklahoma</i> , No. F-2020-149 (Okla. Crim. App. filed Dec. 28, 2020), <a href="https://bit.ly/3svMF7E">https://bit.ly/3svMF7E</a> .....	17, 18
ODAA <i>Amicus Br.</i> , <i>Oklahoma v. Castro-</i> <i>Huerta</i> , No. 21-429 .....	6

**TABLE OF AUTHORITIES—Continued**

	Page(s)
Order Accepting Plea, <i>United States v. Foster</i> , No. 4:21-cr-00118-CVE (N.D. Okla. filed Nov. 8, 2021), ECF No. 47.....	10, 12
Order of Detention Pending Trial, <i>United States v. Foster</i> , No. 4:21-cr-00118-CVE (N.D. Okla. filed Mar. 29, 2021), ECF No. 25 .....	10
Pet. for Writ. Of Cert., <i>Oklahoma v. Castro-Huerta</i> , No. 21-429 .....	<i>passim</i>
Pet’r’s App., <i>Oklahoma v. Spears</i> , No. 21-323 .....	1
Plea Agreement, <i>United States v. Foster</i> , No. 4:21-cr-00118-CVE (N.D. Okla. filed Nov. 8, 2021), ECF No. 48.....	10
Reply Br., <i>Oklahoma v. Castro-Huerta</i> , No. 21-429 .....	19
Suppl. Br. of Appellee after Remand, <i>Foster v. State</i> , No. F-2020-149 (Okla. Crim. App. filed Apr. 19, 2021), <a href="https://bit.ly/3jjP67S">https://bit.ly/3jjP67S</a> .....	15, 18, 19
Suppl. Br. of Appellee after Remand, <i>McDaniel v. State</i> , No. F-2017-357 (Okla. Crim. App. filed Mar. 29, 2021), <a href="https://bit.ly/3lM1Wgz">https://bit.ly/3lM1Wgz</a> .....	16
Texas Amicus Br., <i>Oklahoma v. Castro-Huerta</i> , No. 21-429.....	22

**TABLE OF AUTHORITIES—Continued**

Page(s)

**OTHER AUTHORITIES**

- Allison Herrera, *“My Office Will Work Until We Drop”*: Agencies Vow to Work Together on McGirt Cases, KOSU (Aug. 12, 2020, 10:02 AM), <https://bit.ly/3DKOhg0> ..... 13-14
- 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), <https://bit.ly/3E3gD5x>..... 9-10
- Chad Hunter, *Cherokee Nation Marshals, Attorneys Dealing with McGirt Fallout*, Cherokee Phoenix (July 19, 2021), <https://bit.ly/3mJZM0a> ..... 6
- Curtis Killman, *Here’s How Cherokee Tribal Courts Are Handling the Surge in Cases Due to the McGirt Ruling*, Tulsa World (updated July 22, 2021), <https://bit.ly/3FscfOK> ..... 5
- Drake Johnson, *Tulsa County Jail to be Used for City Jail Overflow*, Newson6 (Oct. 4, 2021 5:32 PM), <https://bit.ly/3vz2DNy>..... 5

## TABLE OF AUTHORITIES—Continued

	Page(s)
Exec. Order 14,053, Improving Public Safety and Criminal Justice for Native Americans and Addressing the Crisis of Missing or Murdered Indigenous People, 86 Fed. Reg. 64,337 (Nov. 18, 2021) .....	24
Grant D. Crawford, <i>CN Marshal Service Rises to Challenge of McGirt</i> , Tahlequah Daily Press (May 7, 2021), <a href="https://bit.ly/3mFbx8g">https://bit.ly/3mFbx8g</a> .....	5, 9
Hicham Raache, <i>Gov. Stitt Says Supreme Court’s McGirt Ruling Created ‘Public Safety Threat’, asks Oklahomans to Share Stories; Cherokee Nation Reacts</i> , KFOR (Apr. 16, 2021, 11:52 AM), <a href="https://bit.ly/2YV7mwS">https://bit.ly/2YV7mwS</a> .....	15
Janelle Stecklein, <i>Tribes Talk About Intergovernmental Agreements with State Following McGirt Ruling</i> , Tahlequah Daily Press (Oct. 11, 2021), <a href="https://bit.ly/3pgZ7qh">https://bit.ly/3pgZ7qh</a> .....	6-7
Joe Tomlinson, <i>Promised Land Recap: AG O’Connor Focused on Challenging SCOTUS Reservation Ruling</i> , NonDoc (Sept. 17, 2021), <a href="https://bit.ly/3FOnJMG">https://bit.ly/3FOnJMG</a> .....	8
<i>Legal Status of the Cherokee Nation Reservation</i> , Cherokee Nation Att’y Gen.’s Office, <a href="https://bit.ly/3qMdZ0n">https://bit.ly/3qMdZ0n</a> (last visited Dec. 31, 2021) .....	6

## TABLE OF AUTHORITIES—Continued

	Page(s)
Michael Overall, <i>The Cherokee Nation’s Budget Will Hit a Record \$3 Billion as the Tribe Responds to COVID and McGirt</i> , Tulsa World (Sept. 15, 2021), <a href="https://bit.ly/3apJHaj">https://bit.ly/3apJHaj</a> .....	4, 14
Michael Overall, <i>Tulsans of the Year: Tribes Play Vital Role in COVID-19 Emergency Response</i> , Tulsa World (updated Dec. 7, 2021), <a href="https://bit.ly/31DuEJd">https://bit.ly/31DuEJd</a> .....	14
Mike Hunter, Okla. Att’y Gen., <i>Frequently Asked Questions Related to McGirt v. Oklahoma and the Proposed Legislative Framework Document 1</i> (n.d.), <a href="https://bit.ly/3vuPc1l">https://bit.ly/3vuPc1l</a> .....	7
Press Release, Cherokee Nation, Cherokee Nation Files 1000th Case in Tribal Court Following McGirt Ruling (June 7, 2021), <a href="https://bit.ly/3v1g6NX">https://bit.ly/3v1g6NX</a> .....	4
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 Dec. 31, 2021), <a href="https://bit.ly/3n4S9Si">https://bit.ly/3n4S9Si</a> .....	7
Ray Carter, <i>McGirt Called Threat to State’s Economic Future</i> , Okla. Council of Pub. Affairs (Aug. 16, 2021), <a href="https://bit.ly/3vzCs9M">https://bit.ly/3vzCs9M</a> .....	15

**TABLE OF AUTHORITIES—Continued**

	Page(s)
Reese Gorman, <i>Cole Continues to Advocate for Tribal Sovereignty on Indigenous Peoples’ Day</i> , Norman Transcript (Oct 11, 2021), <a href="https://bit.ly/3AK839C">https://bit.ly/3AK839C</a> .....	15
Reese Gorman, <i>Cole Encourages State-Tribal Relations Over State Challenges to McGirt</i> , Norman Transcript (July 23, 2021), <a href="https://bit.ly/3ANKfBx">https://bit.ly/3ANKfBx</a> .....	7
Restatement (Second) of Judgments (1982).....	16
Samantha Vicent, <i>Cherokee Nation Highlights Expansion of Legal System on Anniversary of McGirt Ruling</i> , Tulsa World (updated Aug. 30, 2021), <a href="https://bit.ly/3uXpJxf">https://bit.ly/3uXpJxf</a> .....	4
<i>Tribal Code</i> , Cherokee Nation Office of Att’y Gen. (last visited Dec. 31, 2021), <a href="https://bit.ly/3APtTsl">https://bit.ly/3APtTsl</a> .....	8
<i>Tribal Compacts and Agreements</i> , Okla. Sec’y of State, <a href="https://bit.ly/3FRTqoq">https://bit.ly/3FRTqoq</a> (last visited Dec. 31, 2021) .....	6

## INTEREST OF *AMICUS*<sup>1</sup>

*Amicus* Cherokee Nation (“Nation”) is a federally-recognized Indian tribe, residing on a reservation in Oklahoma. Under the Treaty of New Echota, Dec. 29, 1835, 7 Stat. 478, the Nation ceded its lands east of the Mississippi, art. 1, in exchange for its reservation, *id.* art. 2 (incorporating Treaty with the Western Cherokee, Feb. 14, 1833, 7 Stat. 414), on which it was guaranteed self-government under federal supervision, *id.* art. 5; *see* 1866 Treaty of Washington with the Cherokee, art. 31, July 19, 1866, 14 Stat. 799.<sup>2</sup> The Oklahoma Court of Criminal Appeals (“OCCA”) upheld the existence of the 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. On the Cherokee Reservation, the Nation protects public safety and prosecutes Indian offenders in the exercise of its inherent sovereignty, *United States v. Wheeler*, 435 U.S. 313 (1978); *United States v. Lara*, 541 U.S. 193 (2008), and in fulfillment of its responsibilities under *Hogner*.

---

<sup>1</sup> 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.

<sup>2</sup> The boundaries of the Reservation established by the 1833 Treaty, the 1835 Treaty, and an 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. *See* Pet’r’s App. 17a-41a, *Oklahoma v. Spears*, No. 21-323.



The Nation has fundamental interests in protecting the treaty promises under which the Nation, as the sole tribal signatory of those treaties, resides on and governs the Reservation. Even before *Hogner* was decided the Nation began a comprehensive enhancement of its criminal justice system and redoubled its coordination with other governments. That effort continues today, pursuant to the ruling in *Hogner*, and in accordance with *Hogner* and the Nation's laws.

Now, however, Oklahoma seeks reconsideration and reversal of *McGirt*, declaring it is wrong and challenging the OCCA's decisions upholding the United States' treaty promises to the Nation. To protect those rights, 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.<sup>3</sup> First, *McGirt* has been implemented successfully on the Cherokee Reservation by the Nation and the federal government. A balanced and accurate

---

<sup>3</sup> 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.

description of how the Nation is addressing *McGirt* debunks the State's argument that *McGirt* is unworkable. Second, the State waived its right to seek reversal of *McGirt* or the termination of the Cherokee Reservation by not challenging the Reservation's existence in the court below and by expressly accepting it in other cases. And this case has since become moot. Finally, the State provides no basis for discarding *McGirt*, or rejecting the OCCA's decision recognizing the Cherokee Reservation. *McGirt* has provided a workable standard that the courts below properly applied, the facts and law underlying the *McGirt* decision have not changed, and the opinion was a well-reasoned one that has established reliance interests by the governments implementing it.

## **REASONS FOR DENYING THE PETITION**

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

The State claims that *McGirt* caused criminal justice issues that justify revisiting that decision, but 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 efficient use of increased resources to prosecute those crimes and the State's reduced need for such resources. *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”).<sup>4</sup>

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).<sup>5</sup> 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* (updated Aug. 30, 2021),<sup>6</sup> which will add to the well-established Cherokee Nation

---

<sup>4</sup> <https://bit.ly/3apJHaj>

<sup>5</sup> <https://bit.ly/3v1g6NX>

<sup>6</sup> <https://bit.ly/3uXpJxf>

courts at the W.W. Keeler Tribal Complex, *see* Curtis Killman, *Here's How Cherokee Tribal Courts Are Handling the Surge in Cases Due to the McGirt Ruling*, Tulsa World (updated July 22, 2021).<sup>7</sup>

This effort 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”).<sup>8</sup> Such agreements are not uncommon—the City of Tulsa has one with the County of Tulsa. *See* Drake Johnson, *Tulsa County Jail to be Used for City Jail Overflow*, Newson6 (Oct. 4, 2021 5:32 PM).<sup>9</sup>

The Nation has also continued its long-standing policy of entering into cross-deputization agreements with other governments on the Reservation,

---

<sup>7</sup> <https://bit.ly/3FscfOK>

<sup>8</sup> <https://bit.ly/3mFbx8g>

<sup>9</sup> <https://bit.ly/3vz2DNy>

under which local and state law enforcement may enforce tribal law and tribal law enforcement may enforce local and state law by signing a uniform cross-deputization agreement and filing it with the Oklahoma Secretary of State. Tribal Addendum: Addition of Tribe to Deputation Agreement for Law Enforcement in Cherokee Nation (Apr. 27, 2006).<sup>10</sup> Before *McGirt*, the Nation had entered twenty-one agreements with over fifty municipalities, counties, and local and state agencies in the Reservation. As of filing, the Nation has entered into fifty-nine more such agreements since *McGirt* was decided.<sup>11</sup>

The Nation has also entered into agreements with municipalities on the Reservation, whereby the Nation donates revenue from fines and fees paid for tribal law traffic and misdemeanor citations and retains a modest fee equal to the assessment that would be paid to the State if the citation were issued off-Reservation.<sup>12</sup> See Chad Hunter, *Cherokee Nation Marshals, Attorneys Dealing with McGirt Fallout*, Cherokee Phoenix (July 19, 2021);<sup>13</sup> Janelle

---

<sup>10</sup> <https://bit.ly/3jKkYm6>

<sup>11</sup> See *Tribal Compacts and Agreements*, Okla. Sec’y of State, <https://bit.ly/3FRTqoq> (last visited Dec. 31, 2021) (enter “Cherokee” into “Doc Type” searchbar and press “Submit”). The State’s *amici* speculate against these agreements’ effectiveness, see ODAA Amicus Br. at 16-17, *Oklahoma v. Castro-Huerta*, No. 21-429, which is defeated by the Nation’s quarter-century of experience with dozens of such agreements.

<sup>12</sup> Municipal agreements are available on Cherokee Nation’s website. See *Legal Status of the Cherokee Nation Reservation*, Cherokee Nation Att’y Gen.’s Office, <https://bit.ly/3qMdZ0n> (last visited Dec. 31, 2021) (follow hyperlinks under “Municipal Agreements”).

<sup>13</sup> <https://bit.ly/3mJZM0a>

Stecklein, *Tribes Talk About Intergovernmental Agreements with State Following McGirt Ruling*, Tahlequah Daily Press (Oct. 11, 2021).<sup>14</sup>

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 state and tribal criminal jurisdiction within the Reservation. *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).<sup>15</sup> 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 Dec. 31, 2021),<sup>16</sup> 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.).<sup>17</sup> The new Attorney General, recently appointed by the Governor, is staunchly opposed to acknowledging or

---

<sup>14</sup> <https://bit.ly/3pgZ7qh>

<sup>15</sup> <https://bit.ly/3ANKfBx>

<sup>16</sup> <https://bit.ly/3n4S9Si>

<sup>17</sup> <https://bit.ly/3vuPc1l>

implementing *McGirt*, Joe Tomlinson, *Promised Land Recap: AG O'Connor Focused on Challenging SCOTUS Reservation Ruling*, NonDoc (Sept. 17, 2021).<sup>18</sup> 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 concurrent jurisdiction over Indian child custody matters on the Reservation. See Intergovernmental Agreement Between Okla. & Cherokee Nation Regarding Jurisdiction over Indian Children Within the Nation's Reservation (Sept. 1, 2020).<sup>19</sup> 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 Dec. 31, 2021).<sup>20</sup> That includes new traffic, criminal, and juvenile codes that define offenses and crimes similarly to state law. Cherokee Nation Code tits. 10A,<sup>21</sup> 21,<sup>22</sup> 47.<sup>23</sup> The Nation also amended its statute of limitations, so that the limitation period

---

<sup>18</sup> <https://bit.ly/3FOnJMG>

<sup>19</sup> <https://bit.ly/2Z2KWdA>

<sup>20</sup> <https://bit.ly/3APtTsl>

<sup>21</sup> <https://bit.ly/3FttVZI>

<sup>22</sup> <https://bit.ly/3DTe6dQ>

<sup>23</sup> <https://bit.ly/3G5nKfw>

tolls when the State initiated prosecution but then dismissed a prosecution or conviction for lack of jurisdiction. Cherokee Nation Code tit. 22, §§ 154-155.<sup>24</sup>

These investments are delivering justice daily. As of December 6, 2021, the Nation had prosecuted 2,773 felony and misdemeanor cases since the *Hogner* ruling.<sup>25</sup> 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

---

<sup>24</sup> <https://bit.ly/2Xj23XA>

<sup>25</sup> Documentation is on file with the Nation.



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).<sup>26</sup>

These efforts also include 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 a Cherokee citizen who committed murder and associated crimes on the Cherokee Reservation in 2018. Shortly after the OCCA issued its decision in *Hogner*, the federal government filed a criminal complaint against Respondent in the Northern District of Oklahoma for murder in Indian country. *See* Criminal Compl., *United States v. Foster*, No. 4:21-cr-00118-CVE (N.D. Okla. filed Mar. 16, 2021), ECF No. 1. After he was taken into custody by the federal government, Respondent pleaded guilty to second degree murder in Indian country, which carries a maximum sentence of life in prison. Plea Agreement at 1, 10 (filed Nov. 8, 2021), ECF No. 48; Order Accepting Plea (filed Nov. 8, 2021), ECF No. 47. He is currently in federal custody awaiting sentencing. *See* Order of Detention Pending Trial (filed Mar. 29, 2021), ECF No. 25.

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

---

<sup>26</sup> <https://bit.ly/3E3gD5x>

Reservation in a responsible, orderly manner. In the month after the *McGirt* decision, the Nation assisted the OCCA's consideration of direct appeals raising *McGirt*-based jurisdictional arguments. It did so by tendering an amicus brief and appendix in *Hogner* less than a month after *McGirt* was decided and identifying nine cases 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).<sup>27</sup> In each case, the Nation confirmed the location of the offenses and the Indian status of the defendants or 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. When a hearing was held, the Nation appeared and participated at each hearing, filing amicus briefs, exhibits, historical documents, and proposed findings of fact and conclusions of law. Each trial court determined the Reservation is intact.

The Nation then acted to ensure defendants would be lawfully prosecuted in federal or tribal courts. That effort was successful. Since its ruling in *Hogner*, the state courts have entirely vacated the convictions of twelve offenders in Cherokee Reservation cases. 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);

---

<sup>27</sup> <https://bit.ly/3DZkOiK>

*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. plea entered Nov. 2, 2020); *United States v. Cottingham*, No. 4:20-cr-00209-GKF-1 (N.D. Okla. plea entered June 10, 2021); *Foster*, No. 4:21-cr-00118-CVE; *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-cr-00321-SLP-1 (E.D. Okla. filed Sept. 22, 2021); *United States v. Spears*, No. 4:20-cr-00296-GKF (N.D. Okla. Nov. 18, 2020); *United States v. Vaught*, No. 4:21-cr-00202-JFH-1 (N.D. Okla. filed Apr. 2, 2021).<sup>28</sup>

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. The municipal court concluded that

---

<sup>28</sup> The OCCA also struck down one state court conviction in *White v. State*, No. C-2020-113 (Okla. Crim. App. Oct. 28, 2021), but upheld convictions for other related charges, for which the defendant is still imprisoned. A state district court dismissed Vaught’s conviction on collateral review before the OCCA decided *State ex rel. Matloff v. Wallace*, 2021 OK CR 21, 497 P.3d 686, *see State v. Vaught*, No. CF-2015-4067 (Okla. Dist. Ct. May 20, 2021), <https://bit.ly/3GD8XIv>, and the State did not appeal or file a petition for certiorari.

under the Curtis Act,<sup>29</sup> municipalities on the Creek Reservation which incorporated 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).<sup>30</sup>

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;<sup>31</sup> 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);<sup>32</sup> Addendum to Law Enforcement Agreement Between U.S., Muscogee (Creek) Nation, and City of Tulsa (May 2, 2006).<sup>33</sup> 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

---

<sup>29</sup> 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.

<sup>30</sup> 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.

<sup>31</sup> <https://bit.ly/3nejTDZ>

<sup>32</sup> <https://bit.ly/3DsYnSv>

<sup>33</sup> <https://bit.ly/3uY6Lq6>

*McGirt Cases*, KOSU (Aug. 12, 2020, 10:02 AM).<sup>34</sup> The Nation’s commitment to protecting both Indians and non-Indians in Tulsa is clear. See Michael Overall, *Tulsans of the Year: Tribes Play Vital Role in COVID-19 Emergency Response*, Tulsa World (updated Dec. 7, 2021)<sup>35</sup> (acknowledging Chief Hoskin as a “Tulsan of the Year” for the Nation’s COVID-19 response and public policy role in Tulsa).

Finally, the State’s suggestion that lurking “[q]uestions” about tribal civil authority are of concern has no basis in fact within the Nation’s knowledge. *Castro-Huerta* Pet. 25. The Nation has made no effort to exercise civil jurisdiction 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 its 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. Resolution of such issues is also available through tribal-state agreement, as the tribes and State have done time and time again, after the Supreme Court has found the State overstepped its authority in Indian country. See, e.g., Okla. Stat. tit. 68 § 500.63 (authorizing the tribal-state agreements to share motor fuel tax revenues after *Oklahoma Tax Commission v. Chickasaw Nation*, 515 U.S. 450 (1995)); *id.* § 346 (authorizing tribal-state 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

---

<sup>34</sup> <https://bit.ly/3DKOhg0>

<sup>35</sup> <https://bit.ly/31DuEJd>

the Nation's recent child custody agreement with the State. *See supra* at 8.

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);<sup>36</sup> Ray Carter, *McGirt Called Threat to State's Economic Future*, Okla. Council of Pub. Affairs (Aug. 16, 2021);<sup>37</sup> Reese Gorman, *Cole Continues to Advocate for Tribal Sovereignty on Indigenous Peoples' Day*, Norman Transcript (Oct 11, 2021).<sup>38</sup> That provides no ground for certiorari. Furthermore, rewarding this strategy could threaten the fair adjudication of future criminal cases arising on Indian country in Oklahoma. *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 has already *affirmatively accepted* the existence of the Reservation, Suppl. Br. of Appellee after Remand at 6, *Foster v. State*, No. F-2020-149 (Okla. Crim. App. filed Apr. 19, 2021) ("State Suppl. Br.") (noting the State stipulated that, under *Hogner*, the Cherokee

---

<sup>36</sup> <https://bit.ly/2YV7mwS>

<sup>37</sup> <https://bit.ly/3vzCs9M>

<sup>38</sup> <https://bit.ly/3AK839C>

Reservation exists);<sup>39</sup> see 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.”).<sup>40</sup>

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.<sup>41</sup> 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 below to avoid the burden of litigating the Reservation’s existence, and the OCCA having accepted that position, the State is barred from raising that argument here to attempt to gain later litigation advantage. See *New Hampshire v. Maine*, 532 U.S. 742, 750-51,

---

<sup>39</sup> <https://bit.ly/3jjP67S>. 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 (1982); 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).

<sup>40</sup> <https://bit.ly/3lM1Wgz>

<sup>41</sup> *McGirt* addressed only the Creek Reservation, not all Five Tribes’ Reservations. 140 S. Ct. at 2479.

755-56 (2001). Moreover, because the State did not raise its anti-Reservation argument below, and the lower courts did not rule on it, it is waived. *See Spritsma v. Mercury Marine*, 537 U.S. 51, 56 n.4 (2002). “Waiver is the intentional relinquishment or abandonment of a known right,” *Wood v. Milyard*, 566 U.S. 463, 474 (2012) (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).

On Respondent’s direct appeal, he raised his Cherokee tribal citizenship and the existence of the Cherokee Reservation to contest the State’s jurisdiction to prosecute him, Br. of Appellant at 8-13, *Foster v. Oklahoma*, No. F-2020-149 (Okla. Crim. App. Sept. 29, 2020),<sup>42</sup> and requested that the OCCA either accept extra-record material showing these facts or order an evidentiary hearing, Appl. to Suppl. Record or, in Alternative, for Evidentiary Hr’g (filed Sept. 29, 2020).<sup>43</sup> In response, the State filed a motion to stay briefing, in which it did not dispute that the crimes “occurred within the historical boundaries of the Cherokee Nation,” Mot. to Stay Br’g Schedule at 5 (filed Dec. 28, 2020),<sup>44</sup> but argued that the OCCA should stay briefing until it decided whether the Cherokee Reservation still exists in other pending cases, *id.* at 6-7, and represented that the State “has no position regarding the existence, or absence, of a Cherokee Nation Reservation,” *id.* at 8 n.6.

---

<sup>42</sup> <https://bit.ly/3sAvp17>

<sup>43</sup> <https://bit.ly/3ppWn9H>

<sup>44</sup> <https://bit.ly/3svMF7E>



The OCCA then remanded for an evidentiary hearing. Pet'r's App. 24a-29a. On remand, the State and Respondent entered into Agreed Stipulations, *id.* at 12a-15a, in which they agreed that, "[a]s recognized by the decision of the Oklahoma Court of Criminal Appeals in *Hogner v. State*, Congress established a Cherokee Reservation within the above-referenced boundaries and never specifically erased those boundaries or disestablished the Cherokee Reservation." *Id.* at 14a. The District Court accepted this stipulation and incorporated it into an order. *Id.* at 10a.

Back before the OCCA, the State asserted that "[t]he district court's Order, by incorporating the parties' stipulations, therefore disposed of the questions posed by this Court. . . . [T]he defendant's crimes occurred within the boundaries of the Cherokee Nation's Reservation." State Suppl. Br. at 6-7 (citing *Spears* and *Hogner*). The State noted it "still strongly believes that *McGirt* was wrongly decided," *id.* at 7 n.3, but said nothing about why it was wrong, whether *Spears* or *Hogner* were wrongly decided, or why the State should not be bound by its stipulations below, which it acknowledged resolved the case.

The OCCA noted that "[t]his Court has determined that the Cherokee Reservation was not disestablished and is Indian Country," Pet'r's App. 2a-3a (citing *Spears*), and that "[t]he parties also stipulated to the location of the crimes, and that the location is within the boundaries of the Cherokee Nation and the Cherokee Reservation; that the Cherokee Reservation has never been disestablished by Congress; and that the crimes occurred in Indian Country," *id.* at 3a. The court then found that "the crime

was committed within the boundaries of the Cherokee Nation Reservation,” *id.*, and that “[w]hile not formally conceding the issue, Appellee recognizes that there is no further justiciable issue in the case,” *id.* at 4a. The OCCA then remanded to the District Court. The State took no further action, and on August 3, 2021, the District Court dismissed. *See State v. Foster*, No. CF-2018-784 (Okla. Dist. Ct. Aug. 3, 2021).<sup>45</sup>

As the record makes clear, the State conceded the Reservation’s existence, thereby waiving the right to challenge it here. Before the OCCA, the State did not make any effort to argue *McGirt* was wrong, but only made a cursory statement that it disagreed with *McGirt*, which waived that position as a matter of state law. *See Bench v. State*, 2018 OK CR 31, ¶ 96, 431 P.3d 929, 958. And even though *Spears* and *Hogner* were decisions of the OCCA, the State did not ask the OCCA to reconsider them and repeatedly represented they resolved the case. The State’s effort to reverse its earlier decisions to accept and stipulate to the Reservation’s existence thus “comes too late in the day” to be considered. *See Sorrell v. IMS Health Inc.*, 564 U.S. 552, 563 (2011); *Christian Legal Soc’y v. Martinez*, 561 U.S. 661, 676-77 (2010).

Furthermore, this case is moot because the State acquiesced to dismissal. The State has asserted elsewhere that “the dismissal of a criminal case after an intermediate appellate court issues its mandate does not ‘moot’ the case for purposes of further appellate review.” *See Reply Br.* at 6 n.\*, *Oklahoma v. Castro-Huerta*, No. 21-429 (citing *Kentucky v. King*,

---

<sup>45</sup> <https://bit.ly/3yVaQgN>. The State failed to include this order in its appendix. *See* Rule 14.1(i)(i)-(ii).

563 U.S. 452, 458 n.2 (2011)). That misses the mark because the State consented to dismissal by accepting the Reservation’s existence and admitting its existence is conclusive.<sup>46</sup> Neither *King*, nor the decision on which it relies, see *United States v. Villamonte-Marquez*, 462 U.S. 579 (1983), purport to unsettle the longstanding rule that “when a decree was rendered by consent, no errors would be considered here on an appeal which were in law waived by such a consent.” *United States v. Babbitt*, 104 U.S. 767, 768 (1881); see *Microsoft Corp. v. Baker*, 137 S. Ct. 1702, 1717 (2017) (Thomas, J., concurring in the judgment). In addition, the State has waived its right to challenge the Reservation as a matter of state law, see *supra* at 9, and so this Court’s reversal of the *McGirt* analysis could not reinstate convictions in the state courts. Any decision this Court issues on the State’s ability to bring the now-dismissed charges would thus only be advisory, see *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 101 (1998), “[a]nd federal courts do not issue advisory opinions.” *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021).

### **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 *Ramos v. Louisiana*, 140 S. Ct. 1390, 1405 (2020); *Franchise Tax Bd. v. Hyatt*, 139 S. Ct.

---

<sup>46</sup> That is also true in other cases, in some of which the State affirmatively sought dismissal. See Br. of *Amicus Curiae* Cherokee Nation at 18-19, *Oklahoma v. Spears*, No. 21-323.

1485, 1499 (2019); *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2485-86 (2018)). 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.” *Ramos*, 140 S. Ct. at 1405; *Hyatt*, 139 S. Ct. at 1499; *Janus*, 138 S. Ct. at 2478. Here *stare decisis* has special force, as Congress may exercise its primary authority over Indian affairs to alter the Court’s decisions by legislation. *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 799 (2014).<sup>47</sup> Yet, in this case the State asks the Court to do Congress’s business by accepting its view of funding and policy debates. “Such policy arguments, though proper for legislative consideration, are irrelevant to the issue” presented on the State’s petition. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 470 (1978). The political nature of this attack is underscored by its timing, following the appointment of a new Attorney General. That is a call for prospective legislation, not grounds for certiorari.

---

<sup>47</sup> This, and the reliance costs of implementation of *McGirt*, *see infra* at 23-24, 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 weakened by lower courts’ confused applications of precedent).

*McGirt* is also well-reasoned, in contrast to the decisions overruled in *Ramos*, 140 S. Ct. at 1404-06, *Hyatt*, 139 S. Ct. at 1499, and *Janus*, 138 S. Ct. at 2463-65, 2483. *McGirt* rests on a comprehensive analysis of law and history—despite the State’s claim to the contrary, *Castro-Huerta* Pet. 17-18—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.<sup>48</sup> The Court’s conclusion was no outlier, as it is consistent with the federal court decisions that have applied the disestablishment factors, including the Tenth Circuit panel in *Murphy v. Royal*, 866 F.3d 1164 (10th Cir. 2017). Unlike *Hyatt* and *Janus*, 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.<sup>49</sup> Nor have there been

---

<sup>48</sup> The State’s and supporting *amici*’s position that *McGirt* should be reversed because the disestablishment analysis involves “inherently ambiguous” statutes is self-defeating. See Texas *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 enactment and implementation of statutes affecting the Muscogee (Creek) Nation. 140 S. Ct. at 2470-74.

<sup>49</sup> See, e.g., *Penobscot Nation v. Frey*, 3 F.4th 484, 493-94 (1st Cir. 2021) (en banc), *pets. for cert. filed* Nos. 21-838, 21-840;

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 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

---

*Awuku-Asare v. Garland*, 991 F.3d 1123, 1128 (10th Cir. 2021), *pet. for cert. denied* No. 21-5840 (Nov. 15, 2021); *Oneida Nation v. Village of Hobart*, 968 F.3d 664, 673-75 & n.4, 684-85 (7th Cir. 2020); *Rojas v. FAA*, 989 F.3d. 666, 689 (9th Cir. 2021) (Wardlaw, J. concurring in part and dissenting in part), *pet. for cert. filed* No. 21-133.

meaningful by protecting public safety and punishing wrongdoers. The commitment will continue. *See, e.g.*, Exec. Order 14,053, § 3(ii), Improving Public Safety and Criminal Justice for Native Americans and Addressing the Crisis of Missing or Murdered Indigenous People, 86 Fed. Reg. 64,337, 64,338-39 (Nov. 18, 2021). 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 St, 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

*Attorneys for Amicus Curiae Cherokee Nation*

January 3, 2022