No. 23A73

IN THE

Supreme Court of the United States

CITY OF TULSA,

Applicant,

v.

JUSTIN HOOPER,

Respondent.

On Application to Stay the Mandate Issued by the United States Court of Appeals for the Tenth Circuit

JOINT BRIEF OF AMICI CURIAE MUSCOGEE (CREEK) NATION, SEMINOLE NATION OF OKLAHOMA, CHEROKEE NATION, CHOCTAW NATION OF OKLAHOMA, AND CHICKASAW NATION OPPOSING EMERGENCY APPLICATION FOR A STAY OF MANDATE PENDING THE FILING AND DISPOSITION OF A PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF INTEREST

In *Hooper v. City of Tulsa*, 71 F.4th 1270 (10th Cir. 2023), the United States Court of Appeals for the Tenth Circuit held that the plain language of Section 14 of the Curtis Act conferred powers on cities and towns in the former Indian Territory "when so authorized and organized" under incorporated Arkansas law, that all of Section 14's "grants of power, including the jurisdiction granting provisions at issue in this case, refer back to 'such cities and towns,'" and that "[b]ecause Tulsa is no longer such a city or town, Section 14 no longer grants jurisdiction to Tulsa." *Id.* at 1283–1285 (quoting Curtis Act, ch. 517, § 14, 30 Stat. 495, 499–500). Tulsa now seeks a stay of the Tenth Circuit's mandate pending resolution of its anticipated petition for a writ of certiorari, contending that the word "when," as used in Section 14, means "when, and when not." The Muscogee (Creek) Nation ("Creek Nation") submits this brief amici curiae because, as in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), Mr. Hooper's "personal interests wind up implicating the Tribe's," *id.* at 2460.

Tulsa's application for a stay also implicates the Cherokee Nation's interests, as a substantial portion of Tulsa falls within the boundaries of the Cherokee Nation Reservation that was acknowledged to be Indian country in *Hogner v. Oklahoma*, 500 P.3d 629, 635 (Okla. Crim. App. 2021). The Chickasaw Nation, Choctaw Nation of Oklahoma, and Seminole Nation of Oklahoma likewise occupy and govern Reservations that are Indian country under *McGirt*, *see Bosse v. State*, 499 P.3d 771, 774 (Okla. Crim. App. 2021), *cert. denied*, 142 S. Ct. 1136 (2022); *Sizemore v.*

Oklahoma, 485 P.3d 867, 870–71 (Okla. Crim. App. 2021), *cert. denied*, 142 S. Ct. 935 (2022); *Grayson v. State*, 485 P.3d 250, 254 (Okla. Crim. App. 2021), *cert. denied*, 142 S. Ct. 934 (2022), which include municipalities first incorporated before statehood, and that are bound by the Tenth Circuit's holding.

SUMMARY OF ARGUMENT

Tulsa has identified no valid basis for a stay. It is undisputed that the offense for which Mr. Hooper was prosecuted occurred within the boundaries of the Creek Reservation and that it therefore occurred in Indian country. Because Mr. Hooper is an Indian, the City of Tulsa, as a political subdivision of Oklahoma, lacks criminal jurisdiction over him within the Creek Reservation absent "a clear expression of the intention of Congress" to the contrary, *McGirt*, 140 S. Ct. at 2477 (citation omitted).

Tulsa asserts that the requisite intent appears in Section 14 of the 1898 Curtis Act, which allowed a strictly defined and limited category of cities and towns in the Indian Territory to become federally chartered municipalities and to apply federal law (the substance of which was borrowed from Arkansas statutes) to all of their inhabitants, Indians and non-Indians alike. 30 Stat. at 499–500. But the Tenth Circuit correctly concluded that when Tulsa became organized under Oklahoma law at statehood, it fell outside of that statute's unambiguous and limited jurisdictional grant. It is little wonder that, prior to *McGirt*, Tulsa never once sought to assert jurisdiction over anyone under Section 14 in the entire 113-year post-statehood period. Its attempt to exhume that statutory artifact now as a

basis for jurisdiction over Indians—and only Indians—within Indian country is a patent gambit to evade *McGirt*.

It is unlikely to succeed. To begin, Tulsa's motion identifies no conflict with a decision of this or any other court. Its petition for certiorari will accordingly boil down to a plea for error correction regarding the Circuit's plain-language interpretation of a statute with no applicability outside of eastern Oklahoma. Its prospects for a grant are accordingly dim. *See*, *e.g.*, *Martin v. Blessing*, 571 U.S. 1040, 1045 (2013) (Alito, J., statement respecting denial of certiorari) ("Unlike the courts of appeals, we are not a court of error correction, and thus I do not disagree with the Court's refusal to review the singular policy at issue here."). And even in the unlikely event of certiorari review, the prospect of reversal is remote: As demonstrated below, the Tenth Circuit's statutory analysis is plainly correct.

Nor has Tulsa provided any basis to conclude that a stay is nevertheless warranted to avoid irreparable harm. Its claims of widespread municipal disruption if it must comply with *McGirt* and *Hooper* pending resolution of its petition remain, three years after *McGirt*, conjectural, anecdotal, and hyperbolic. They fly in the face of the fact that, except with respect to traffic enforcement, Tulsa has cooperated through cross-deputization agreements with the Creek and Cherokee Nations on a wide variety of fronts, including referring criminal misdemeanors and felonies to the Nations, with more than 1,000 this year alone to the Creek Nation. That Tulsa has selectively elected not to adhere to those agreements specifically for traffic offenses renders its claims of irreparable harm

hollow and hardly a valid basis for a stay—particularly one that would prolong the City's illegal exercise of jurisdiction over tribal citizens.

ARGUMENT

I. Legal Standard

As "the party requesting a stay," Tulsa "bears the burden of showing that the circumstances justify" one. *Ind. State Police Pension Tr. v. Chrysler LLC*, 556 U.S. 960, 961 (2009) (citation omitted). To carry that burden, Tulsa

> must show (1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay.

Hollingsworth v. Perry, 558 U.S. 183, 190 (2010). Additionally, Tulsa carries the burden of showing that the Tenth Circuit's decision to deny a stay was wrong. *See Conforte v. Comm'r of Internal Revenue*, 459 U.S. 1309, 1311 n.1 (1983) (Rehnquist, J., in chambers).

A petition for a writ of certiorari is granted only for "compelling reasons," Sup. Ct. R. 10, which, in the case of a United States Court of Appeals decision, include that the court

> has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

or

> has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Id. 10(a), (c). Tulsa does not contend that any of these factors exists here except one: that the Tenth Circuit has decided "an important question of federal law that has not been, but should be, settled by this Court." Emergency Appl. for a Stay of Mandate Pending the Filing and Disposition of a Pet. for Writ of Cert. ("Appl.") 2 (quoting Sup. Ct. R. 10(c)).

As shown below, the prospects for a grant of certiorari on this basis and a subsequent reversal on the merits are remote.

II. No Reasonable Probability Exists that This Court Will Grant Certiorari, Nor Is There Any Fair Prospect that It Would Reverse the Decision Below.

The Tenth Circuit concluded that Section 14 of the Curtis Act unambiguously restricts its jurisdictional grant to Indian Territory municipalities authorized and organized under federally incorporated Arkansas law and that upon statehood, Tulsa no longer qualified as such a municipality. That conclusion is hardly the stuff of certiorari—Tulsa seeks only error correction, and the Circuit did not commit error in any event.

A. The Tenth Circuit Properly Concluded that Section 14's Jurisdictional Grant Is Limited to Indian Territory Municipalities Authorized and Organized Under Federally Incorporated Arkansas Law.

Section 14 of the Curtis Act provides in relevant part:

> That the inhabitants of any city or town in said [Indian] Territory having two hundred or more residents therein may proceed … to have

> the same *incorporated as provided in chapter twenty-nine of Mansfield's Digest of the Statutes of Arkansas*, if not already incorporated thereunder; … and *such* city or town government, *when so authorized and organized*, shall possess all the powers and exercise all the rights of similar municipalities in said State of Arkansas…. That mayors of *such* cities and towns, in addition to their other powers, shall have the same jurisdiction in all civil and criminal cases arising within the corporate limits of *such* cities and towns as, and coextensive with, United States commissioners in the Indian Territory …; and the marshal or other executive officer of *such* city or town may execute all processes issued in the exercise of the jurisdiction hereby conferred[.]
>
> … [A]ll inhabitants of *such* cities and towns, without regard to race, shall be subject to all laws and ordinances of *such* city or town governments, and shall have equal rights, privileges, and protection therein.

§ 14, 30 Stat. at 499–500 (emphases added).

By these terms, Congress created a provisional mechanism for cities and towns in the Indian Territory to organize as federal instrumentalities under borrowed Arkansas law, with jurisdiction to apply borrowed Arkansas law to all their inhabitants. *Id*. Under Section 14 of the Curtis Act, that jurisdiction—which Tulsa purports to possess today—was contingent on the municipality being chartered under the borrowed laws of Arkansas pursuant to Section 14 of the Curtis Act. This is so as a matter of Section 14's plain text, as the Tenth Circuit's exacting analysis makes clear, *see* 71 F.4th at 1283–85.

Section 14 allowed the inhabitants of "any city or town" in the Indian Territory "to have the same incorporated as provided in chapter twenty-nine of Mansfield's Digest of the Statutes of Arkansas[.]" 30 Stat. at 499. As the Tenth Circuit recognized,

> [a]ll of Section 14's following grants of power, including the jurisdiction granting provisions at issue in this case, refer back to "such cities and towns." *See*, *e.g.*, *id*. ("That mayors of *such cities and towns*, in addition to their other powers, shall have the same jurisdiction in all civil and criminal cases arising within the corporate limits of *such cities and towns* as, and coextensive with, United States commissioners in the Indian Territory." (emphases added)); *see also id*. ("[A]nd all inhabitants of *such cities and towns*, without regard to race, shall be subject to all laws and ordinances of *such city or town governments,* and shall have equal rights, privileges, and protection therein." (emphases added)). Since prior to the enactment of the Curtis Act, "such" has been defined as "the same as previously mentioned or specified; not other or different." 7 Century Dictionary 6039 (William Dwight Whitney ed., 1889); *see also* 4 Universal Dictionary of the English Language 4525 (Robert Hunter & Charles Morris eds., 1897) (defining "such" as "[t]he same as mentioned or specified; not another or different; so; in the same state or condition")[.]

71 F.4th at 1284.

Tellingly, Tulsa makes *no mention* of these repeated textual limits on Section 14's grant of jurisdiction despite the fact that they form the centerpiece of the Tenth Circuit's textual analysis. But these clear textual limits cannot be wished away. "Congress expresses its intentions through statutory text," *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486, 2496 (2022), and the text of Section 14 unambiguously grants authority *only* to municipalities incorporated under borrowed Arkansas law. It is undisputed that Tulsa is no longer so incorporated.

Ignoring all this, Tulsa aims elsewhere and misfires. According to Tulsa, "[t]he clause 'when so authorized and organized' is used in the simple past tense, to signify the point of departure, after which cities and towns would exercise durable authority[.]" Appl. 13. In other words, Tulsa contends, the phrase "when so authorized and organized" actually means "*once* so authorized and organized and

forever thereafter, even if no longer so authorized and organized." Interpreting Section 14 this way would be akin to interpreting laws authorizing individuals to, say, drive, hunt, or practice law "when" licensed to do so to continue engaging in those activities after their license has lapsed.

In support, Tulsa highlights a dictionary definition of "when" from 1898 purporting to establish its "plain meaning." Appl. 12. But all of the five listed meanings of "when" in that definition comport with the Tenth Circuit's interpretation. *See* 71 F.4th at 1283–84. None of them supports the proposition that "when" can also mean "when not." Only the *fourth* listed meaning ("After the time that"), Appl. 12, provides even a whisker of support for Tulsa's argument, and that support is tenuous at best. The usage example for the fourth meaning is "*When* the act is passed, the public will be satisfied." *Id.* In this example, the public's satisfaction is contingent on the act being in place, which squares with the Tenth Circuit's reasoning. In any event, Tulsa does not explain how a fourth-listed dictionary meaning indicates a word's "plain meaning," *id.*; *see Kellogg Brown & Root Servs., Inc. v. United States ex rel. Carter*, 575 U.S. 650, 658 (2015) (referring to "the primary [dictionary] definition" as indicating how the word "is most commonly used"); *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 603 (2004) (Thomas, J., dissenting) (stating, in case where majority did not discuss dictionary definitions, that a word's "secondary meaning [in a dictionary] is, of course, less commonly used than the primary meaning").

More fundamentally, a word's range of potential meaning is "narrowed by the commonsense canon of *noscitur a sociis*—which counsels that a word is given more precise content by the neighboring words with which it is associated." *United States v. Williams*, 553 U.S. 285, 294 (2008); *see also*, *e.g.*, *McDonnell v. United States*, 579 U.S. 550, 569 (2016) (essentially same). So too here.

In context, the phrase highlighted by Tulsa appears as follows: "and such city or town government, when so authorized and organized, shall possess all the powers and exercise all the rights of similar municipalities in said State of Arkansas." 30 Stat. at 499. Under Tulsa's once-a-Curtis-Act-town, always-a-Curtis-Act-town theory, Tulsa today possesses, and is limited to, the municipal powers defined in Arkansas law in 1898. Indeed, Section 14 provides that "all the laws of said State of Arkansas herein referred to, so far as applicable, are hereby put in force in said Territory" and that the municipalities "shall pass such ordinances as may be necessary for the purpose of making the laws extended over them applicable to them and carrying the same into effect[.]" *Id*. at 500; *see* 71 F.4th at 1284 (discussing same). Under Tulsa's theory, then, it exists to faithfully implement Arkansas law from 1898 and is subject to the strictures of that law. Moreover, under that theory, in Tulsa today, "[a]ll elections shall be conducted under the provisions of chapter fifty-six of said digest," 30 Stat. at 500; Tulsa's city council may "establish and maintain free schools … under the provisions of … said digest," *id*.; and the mayor of Tulsa today wields sweeping executive and judicial powers because "th[e] mayors of such cities and towns … shall have the same jurisdiction in

all civil and criminal cases … as, and coextensive with, United States commissioners in the Indian Territory," *id.* at 499; *see* Act of Mar. 1, 1895, ch. 145, § 4, 28 Stat. 693, 695–96 (defining those powers).

Tulsa possesses none of these obsolete powers. Nor would it acknowledge that its modern-day authority is limited to them. Certainly, Tulsa would not agree that "all" of its elections must be conducted under Arkansas law, yet that is what Section 14 mandates, and it does so *in the same sentence* as the provision on which Tulsa relies. What Tulsa seeks to do here is to preserve only the fragment of Section 14's text that it believes confers the power it claims, while discarding the remainder of the provision as inoperative. But as the Tenth Circuit correctly determined, "Section 14 does not simply direct municipalities to apply Arkansas law in some places and grant them jurisdiction over municipal violations in others. The references to Arkansas law are intertwined with the powers Section 14 grants." 71 F.4th at 1286. No sound principle of textual analysis permits the judicial slice-and-dice dismantling of an act of Congress that Tulsa asks the Court to undertake here.

B. The Tenth Circuit's Decision Comports with Prior Decisions of This Court Regarding the Provisional Nature of Congress's Indian Territory Enactments.

Finding its interpretation of Section 14 at war with the statutory text, Tulsa urges a purposive interpretation: Congress cannot "have meant for its promise of equal protection, which it cultivated and nurtured so assiduously, to simply evaporate at statehood." Appl. 13–14. But "[a]s this Court has repeatedly stated, the text of a law controls over purported legislative intentions unmoored from any

statutory text." *Castro-Huerta*, 142 S. Ct. at 2496. Indeed, *McGirt* confronted the very argument Tulsa makes here:

> These federal territorial courts applied federal law and state law borrowed from Arkansas "to all persons … irrespective of race."… And, Oklahoma says, sending Indians to federal court and all others to state court [upon statehood] would be inconsistent with this established and enlightened policy of applying the same law in the same courts to everyone.

McGirt, 140 S. Ct. at 2476 (first ellipsis in original). And the Court squarely rejected the argument. Those statutes "say nothing about the division of responsibilities between federal and state authorities after Oklahoma entered the Union. *Id*. at 2477. Tulsa can hardly expect this Court to grant certiorari to revisit arguments it so soundly rejected just three Terms ago.

McGirt is not the first time the Court has made clear that the Indian Territory statutes providing for local governance in that Territory were not intended to continue past statehood. Instead, it has described "the purpose" for which Congress passed such legislation as strictly time-limited in nature:

> Congress was then contemplating the early inclusion of that territory in a new state, and the purpose of those acts was to provide, *for the time being*, a body of laws adapted to the needs of the locality and its people in respect of matters of local or domestic concern. There being no local Legislature, Congress alone could act. *Plainly, its action was intended to be merely provisional*.

Jefferson v. Fink, 247 U.S. 288, 292 (1918) (emphases added) (quoting *Shulthis v. McDougal*, 225 U.S. 561, 571 (1912)); *see also S. Sur. Co. v. Oklahoma*, 241 U.S. 582, 584 (1916) (discussing same and stating that "[i]n what was done Congress did not contemplate that this situation should be of long duration"). In construing the plain

text of Section 14 in a manner fully consonant with this purpose, the Tenth Circuit hardly created an occasion for this Court's review.

C. The Tenth Circuit Properly Concluded, Consistent with Decisions of the Oklahoma Supreme Court, that Tulsa Fell Outside of Section 14's Jurisdictional Grant After Statehood.

The Tenth Circuit determined that

> [f]ollowing statehood, in 1908, Tulsa adopted a new charter reincorporating under Oklahoma law…. This new charter "supersed[ed]" Tulsa's previous charter …, and Tulsa ceased to be organized and authorized according to chapter twenty-nine of Mansfield's Digest. *See* Okla. Const. art. XVIII, § 3(a) (stating that following approval of a new charter, the new charter will "become the organic law of such city and supersede any existing charter and all amendments thereof and all ordinances inconsistent with it"). To this day, Tulsa continues to be a political subdivision of the state of Oklahoma, organized and authorized according to Oklahoma law. Because Tulsa is no longer authorized and organized according to chapter twenty-nine of Mansfield's Digest, Tulsa is no longer entitled to Congress's limited grant of jurisdiction in Section 14.

71 F.4th at 1285 (brackets in original) (citations omitted).

This conclusion again supplies no reasonable probability of a grant of certiorari, let alone any fair prospect of reversal. In the Oklahoma Enabling Act, Congress provided that the territorial laws that had been in place in the western half of the new state (the former Oklahoma Territory) would "extend over and apply to said State" upon its admission to statehood. Ch. 3335, § 13, 34 Stat. 267, 275; *see also* § 21, 34 Stat. at 277. Pursuant to Congress's directive, Section 2 of the Schedule to the Oklahoma Constitution provided, in pertinent part, that "[a]ll laws in force in the Territory of Oklahoma at the time of the admission of the State into the Union … shall be extended to and remain in force in the State of Oklahoma[.]"

Okla. Const. Sched. § 2. And with respect to Indian Territory municipalities, Section 10 of the Schedule provided that "cities and towns, heretofore incorporated under the laws in force … in the Indian Territory, *shall continue their corporate existence* under the [Oklahoma territorial] laws extended in force in the State[.]" Okla. Const. Sched. § 10 (emphasis added). This would occur "at the time of the admission of the State into the Union[.]" *Id.*

Admission occurred upon President Roosevelt's proclamation of statehood on November 16, 1907. *See Jefferson*, 247 U.S. at 293. At that moment, the federally chartered municipalities established by Section 14—i.e., "such cities and towns" "so authorized and organized" under "chapter twenty-nine of Mansfield's Digest of the Statutes of Arkansas," 30 Stat. at 499—ceased to exist as legal entities, and Section 14 took its place among the "statutory artifacts from [Oklahoma's] territorial history," *McGirt*, 140 S. Ct. at 2476. As the Oklahoma Supreme Court explained shortly after statehood in terms that could not be clearer,

> the general statutes in force in the Indian Territory side of the state, constituting the charter of such corporations, were superseded by the statutes of Oklahoma Territory, extended in force in the state; and while the municipal corporations of the Indian Territory continued to exist as municipal corporations in the state after its admission, *the powers of such corporations*, except as otherwise provided by the [Oklahoma] Constitution, *are to be found in the general statutes of Oklahoma Territory, extended in force in the state, providing for the organization of municipal corporations and defining their powers*.

Lackey v. State ex rel. Grant, 116 P. 913, 914 (Okla. 1911) (emphases added).

In *State ex rel. West v. Ledbetter*, 97 P. 834 (Okla. 1908), the Court considered a claim by the town of Muskogee identical to that raised by Tulsa here. Muskogee

argued that its status as a Curtis Act municipality, and the powers attendant upon that status, had endured past statehood. The Court rejected the claim in no uncertain terms:

> The municipal corporations of the Indian Territory prior to the admission of the state into the Union were agencies of the government of the United States, created by Congress under its plenary power to govern the territories in any manner not forbidden by the federal Constitution, for the purpose of permitting the people of those cities and towns in a measure to control their local affairs…. *Upon the admission of the state into the Union, the form of government theretofore existing in the Indian Territory ceased to exist, and the laws in force in that territory under which Muskogee held its charter and exercised its municipal powers became inoperative*[.]

Ledbetter, 97 P. at 835 (emphasis added).

The Tenth Circuit fully endorsed *Ledbetter*'s reasoning, *see* 71 F.4th at 1287, and Tulsa nowhere explains why a decision consistent not only with the plain text of Section 14 but with opinions of the Oklahoma Supreme Court describing the effect of statehood on Section 14 powers is a viable candidate for certiorari.

Ledbetter and *Lackey* also square with the settled principle that once a state is admitted to the Union on equal footing with the original states, the territorial laws that governed there are "displaced," *Benner v. Porter*, 50 U.S. (9 How.) 235, 242–43 (1850), and "bec[o]me inoperative *except[] as adopted by*" the state, *Sands v. Manistee River Improvement Co.*, 123 U.S. 288, 296 (1887) (emphasis added); *see also Shulthis*, 225 U.S. at 571 (stating that Congress's actions in providing for local governance under borrowed Arkansas law in the Indian Territory "was intended to be merely provisional …. The situation, therefore, is practically the same as it would be had the corporation laws of Arkansas been adopted and put in force by a

local or territorial legislature"). Here, under both the Enabling Act and the Oklahoma Constitution, only the Oklahoma Territory laws were "adopted by," *Sands*, 123 U.S. at 296, the new state, not those that had governed in the Indian Territory.

Indeed, the Oklahoma Constitution made explicit that, going forward, all Oklahoma municipalities would be governed by the laws adopted by the State:

> Every municipal corporation now existing within this State shall continue with all of its present rights and powers until otherwise provided by law, and shall always have the additional rights and powers conferred by this Constitution.

Okla. Const. art. XVIII, § 2. Tulsa argued below that this reference to "present rights and powers" referred to municipal powers under the Curtis Act. The Tenth Circuit rightly concluded that

> [t]his argument has two fatal shortcomings. First, the Oklahoma Constitution cannot amend an act of Congress. Congress limited its grant of jurisdiction in Section 14 to cities and towns in the Indian Territory organized and authorized according to chapter twenty-nine of Mansfield's Digest. Only Congress had the power to change that limitation. Second, upon statehood, even prior to Tulsa's adoption of a new charter under Oklahoma law, Tulsa ceased to be a municipality organized according to chapter twenty-nine of Mansfield's Digest. The Oklahoma Enabling Act extended Oklahoma Territory laws across the former Indian Territory.... This means, upon statehood, Tulsa became a municipality subject to the laws of the Oklahoma Territory, until the point it was reorganized under Oklahoma state law. So, by its express terms, Section 14 of the Curtis Act no longer applied to Tulsa upon statehood, and Tulsa had no "present rights and powers" stemming from the Curtis Act to be preserved by the Oklahoma Constitution.

71 F.4th at 1286–87 (citation omitted). The Supreme Court of Oklahoma has likewise authoritatively interpreted the Oklahoma Constitution's reference to municipalities' "present rights and powers" to refer to those that vested *upon*, not

prior to, statehood. *See State ex rel. Kline v. Bridges*, 94 P. 1065, 1070 (Okla. 1908) (rejecting that "present rights and powers" refers to "the rights and powers [an Indian Territory municipality] had prior to the admission of the state under the laws of Arkansas" and concluding that the provision instead "guarantees to these municipal corporations all the rights and powers they have under the [Oklahoma Territory] laws extended in force in the state"); *Lackey*, 116 P. at 914 (stating that "present rights and powers" refers to "[t]he rights and powers possessed by municipal corporations of the state at the time of its admission," which "were fixed by the statutes of the territory of Oklahoma, extended in force in the state by the schedule to the Constitution").

Thus, with the adoption of the Oklahoma Constitution, all municipalities in the State became organized under the laws of the former Oklahoma Territory extended in force as the new state law. And the Oklahoma Constitution additionally allowed them to thereafter frame home-rule charters of their own:

> Any city containing a population of more than two thousand inhabitants may frame a charter for its own government, consistent with and subject to the Constitution and laws of this State, …. and the Governor shall approve the same if it shall not be in conflict with the Constitution and laws of this State. Upon such approval it shall become the organic law of such city *and supersede any existing charter*[.]

Okla. Const. art. XVIII, § 3(a) (emphasis added).[1]

[1] This is among the provisions referred to in Article XVIII, Section 2's reference to "additional rights and powers conferred by this Constitution." *See Lackey*, 116 P. at 915 (stating same).

As the Tenth Circuit recognized, *see* 71 F.4th at 1281–82, Tulsa did exactly that. *See State ex rel. Burns v. Linn*, 153 P. 826, 827 (Okla. 1915) ("The city of Tulsa, under section 3a, art. 18, of the Constitution, duly adopted a charter prepared as therein provided, which was approved by the Governor and became the organic law of the city." (citation omitted)). Tulsa adopted its original charter in 1908, and it was approved by the Governor "on the 5th day of January, 1909," *Oliver v. City of Tulsa*, 654 P.2d 607, 608–09 (Okla. 1982). That charter specifically states that it was entered "pursuant to the provisions of Article 18 of the Constitution, State of Oklahoma," Charter of the City of Tulsa, 1908, Preamble.[2]

Thus, Tulsa is twice removed from its Curtis Act past: first by statehood, pursuant to which it "continue[d its] corporate existence" under the new state laws, Okla. Const. Sched. § 10; and second by its subsequent adoption of its own home-rule charter, which "supersede[d] *any* existing charter," Okla. Const. art. XVIII, § 3(a) (emphasis added). Either of these transformations in its corporate existence is by itself enough to doom Tulsa's argument for continued jurisdiction over Indians pursuant to its former status as a Curtis Act municipality, rendering Tulsa's claims that this Court is likely to grant certiorari and reverse the Tenth Circuit nothing more than fanciful, and entirely ahistorical, thinking. *Cf. Puerto Rico v. Sanchez Valle*, 579 U.S. 59, 75 (2016) (stating that municipalities do not exert criminal jurisdiction independent of state power "even when they enact and enforce their own criminal laws under their own, popularly ratified charters: Because a State

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[2] https://babel.hathitrust.org/cgi/pt?id=umn.31951002666984t&view=1up&seq=8.

must initially authorize any such charter, *the State is the furthest-back source of prosecutorial power*" (emphasis added)).

* * *

In sum, nothing about the text or context of Section 14 can be squared with Tulsa's position. Even if this Court functioned as one of simple error correction, Tulsa has provided no credible basis to suggest that the Circuit erred, and its claims regarding the prospects for certiorari and reversal fall far short of the mark.

III. Tulsa's Conjectural and Anecdotal Claims of Disruption Provide No Basis for a Stay.

Tulsa contends that a stay "is essential to protect the health, safety and wellbeing of the residents of the City of Tulsa until this Court can review the Tenth Circuit's decision." Appl. 16. The argument suffers from numerous infirmities.

A. Tulsa Offers No Evidence of Present Irreparable Harm Despite that *McGirt* Has Been the Law for Three Years.

The Tenth Circuit's decision holds no new implications for Tulsa that were not already confirmed by *McGirt*. Tulsa has been aware since *McGirt* issued that it lacks jurisdiction over Indians. Indeed, it argued in its amicus brief in *McGirt* that a ruling vindicating the continued existence of the Creek Reservation "would upend Tulsa's system of government" because the city "would be stripped of jurisdiction" over Indians, Brief of the City of Tulsa as Amicus Curiae in Support of Respondent at 1, *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020) (No. 18-9526), 2020 WL 1433475, including with respect to the same array of issues it invokes in its stay application, *compare*, *e.g.*, *id*. at 27–34, *with* Appl. 16–23.

But while *McGirt* was decided three Terms ago, Tulsa offers no evidence of present disruption. It cites only three feeble anecdotes regarding what Tulsa's police officers are "already experiencing," Appl. 17–18—and cannot even bring itself to claim that the hardly extraordinary questions and statements to officers it relates have disrupted its ability to police the streets in any way, *see id*.

B. Tulsa Makes No Credible Case for Future Irreparable Harm.

Tulsa also offers predictions of *future* disruption, *see id*. at 18–22, but those predictions are belied by the fact that with respect to far more significant crimes than traffic enforcement, Tulsa is honoring its cross-deputization agreements with the Creek and Cherokee Nations and to good effect. "The [Creek] Nation has 64 cross-deputization agreements with entities including the United States Bureau of Indian Affairs, the State of Oklahoma, and various Oklahoma agencies and political subdivisions, including numerous Oklahoma municipalities and including specifically the City of Tulsa." Resp. of the Muscogee (Creek) Nation et al. to the City of Tulsa's Opposed Mot. for Stay Pending the Filing of a Pet. for Writ of Cert., Aff. of Att'y General Geraldine Wisner ("Wisner Aff.") ¶ 4, No. 22-5034 (10th Cir. July 17, 2023). The Cherokee Nation has entered into 92 such agreements, again including with the City of Tulsa. *Id.* Decl. of Att'y General Sara Hill ("Hill Decl.") ¶ 7.[3] In 2023 alone, "the [Creek] Nation has received 1,122 criminal felony and criminal misdemeanor referrals from the City of Tulsa Police Department." Wisner

[3] See *Tribal Compacts and Agreements*, Okla. Sec'y of State, https://www.sos.ok.gov/gov/tribal.aspx (last accessed July 30, 2023) (type "Creek" or "Cherokee" into "Doc Type" and press "Submit" to see list).

Aff. ¶ 7. And the Cherokee Nation has received 866 referrals since the *Hogner* decision. Hill Decl. ¶ 11. Tulsa nowhere claims that the agreements are not working with respect to such crimes and offers no reason why they cannot work with respect to traffic enforcement too.

Tulsa indeed has no answer for the fact that other municipalities within the Creek and Cherokee Nation Reservations are successfully collaborating with the Nation on traffic law enforcement. *See*, *e.g.*, Wisner Aff. ¶¶ 11–12; Hill Decl. ¶ 9. Under its cross-deputization agreements, the Creek Nation both refers non-Indian traffic offenses (more than 200 since *McGirt*) to non-tribal municipalities and receives referrals (more than 1,200 since *McGirt*) of Indian traffic offenses from those municipalities. Wisner Aff. ¶¶ 9–12. The Cherokee Nation also charges traffic offenses by Indians referred to it by municipalities within its Reservation and has further entered into memoranda of understanding with twenty-three municipalities on its Reservation. Under these agreements, the Nation processes offenses by Indians, charged within municipalities (including entering traffic pleas submitted to the municipal court as tribal court judgments) and allows the municipality to retain all the fees, fines, and costs for the offense, minus a thirty-dollar fee, which is the same that municipalities must remit to the State. Hill Decl. ¶ 9. And to facilitate cooperative enforcement of traffic laws throughout its Reservation, the Creek Nation revised its traffic code in 2020 in response to *McGirt* so that it mirrors Oklahoma's code. *See* Muscogee (Creek) Nation Code Annotated

20-087.[4] The Cherokee Nation did the same in 2021. *See* Cherokee Nation Code tit. 47 Amendments.[5]

For reasons unknown to the Nations, Tulsa has nevertheless declined to refer municipal traffic matters either to the Creek Nation, *see* Wisner Aff. ¶ 13, or to the Cherokee Nation, Hill Decl. ¶ 13. But Tulsa cannot premise an irreparable harm argument on the alleged inadequacy of intergovernmental agreements to address traffic safety, Appl. 16–17, that it has not even tried to implement as to traffic violations. As *McGirt* recognizes:

> With the passage of time, Oklahoma and its Tribes have proven they can work successfully together as partners. Already, the State has negotiated hundreds of intergovernmental agreements with tribes, including many with the Creek. These agreements relate to taxation, law enforcement, vehicle registration, hunting and fishing, and countless other fine regulatory questions. No one before us claims that the spirit of good faith, comity and cooperative sovereignty behind these agreements will be imperiled by an adverse decision for the State today any more than it might be by a favorable one.

McGirt, 140 S. Ct. at 2481 (quotation marks and citations omitted). The same reasoning applies here. The Creek and Cherokee Nations stand ready, in the spirit of good faith, comity, and cooperative sovereignty, to discuss with Tulsa any additional cooperative measures Tulsa believes are needed in the area of traffic safety and enforcement—it lacks only a willing partner in Tulsa.

Compounding these fundamental inadequacies in Tulsa's irreparable harm argument, its particulars are overblown. Tulsa asserts that if its officers "are

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[4] http://www.creeksupremecourt.com/wp-content/uploads/NCA-20-087.pdf.
[5] https://attorneygeneral.cherokee.org/media/i2weqkqa/title-47-amendments.pdf.

required to apply a complicated Indian country jurisdiction analysis to *every* citation and *every* misdemeanor arrest it will change *every single stop* and extend those stops measurably because of the additional inquiries an Officer will now be required to make." Appl. 18 (emphases added). But Tulsa cannot plausibly contend that every Tulsan will claim Indian status in encounters with Tulsa police such that "every single stop" will be burdened by extended jurisdictional analysis. Indeed, it cannot plausibly contend that *any* stop will be so burdened. Under the cross-deputization agreements, all cross-deputized officers, tribal and non-tribal, possess arrest authority within the Reservation over all persons, Indian and non-Indian alike, and for tribal law and non-tribal law offenses alike. Wisner Aff. ¶ 4; Hill Decl. ¶ 7. Thus, law enforcement officers need not undertake jurisdictional analyses in the field, or "wait … hours on the side of the road," Appl. 19 (quotation marks omitted), while such analyses are undertaken by others. Tulsa's assertions in this regard are irreconcilable with the cross-deputization agreements to which the city itself is a signatory *and that it is already implementing for more serious criminal offenses*.

Tulsa's speculative warnings of jurisdictional confusion regarding the boundary between the Cherokee and Creek Nations, Appl. 19–20, are likewise misplaced. Although Tulsa is implementing its cross-deputization agreements for misdemeanor and felony offenses, it points to no example of this supposed issue ever arising before. *See id.* And even if the issue did arise for the first time and a Tulsa law enforcement officer, for example, were to refer an Indian criminal

defendant to the Creek Nation and the situs turns out to have been within the Cherokee Reservation, it would be a simple matter for the Creek to refer it to the Cherokee, and vice versa. Tulsa's assertion that this could "result in a complicated jurisdictional issue between the tribes," *id.* at 20, answers itself. It would be a matter for the Nations to resolve between themselves, which they are willing and able to do. Tulsa fails to explain how that could add anything to *its* quotient of purportedly irreparable harm.

Tulsa's argument reduces to rhetoric. It asserts that "[t]he safety concern to the general public caused by persons believing they can speed without repercussion is clear." Appl. 21. What is not clear is whether anyone holds such misconceptions beyond Tulsa's anecdotes involving speeding, one of which involved a motorcyclist acceding to a police officer's authority when the officer stated he was cross-commissioned with both Nations, *id.* at 17 & n.7. And to the extent anyone holds such beliefs, the circumstance could be remedied by cooperative public education efforts by the Nations and Tulsa, were Tulsa willing to engage in such efforts, instead of amplifying, in publicly filed legal briefs, press accounts with titles like "No Speed Limit for Native Americans."[6]

Abandoning all caution, Tulsa asserts that "the issue is even more grave considering the fact that the City has seen a significant increase in traffic collisions, including fatality collisions, since *McGirt*," *id.* at 21. But innuendo does not amount

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[6] *No Speed Limit for Native Americans*, Wall Street Journal (July 6, 2023), No Speed Limit for Native Americans - WSJ; *see* Appl. 18 n.9 (citing same).

to irreparable harm. Tulsa does not even attempt to support its veiled suggestion that Indians and *McGirt* are somehow to blame for the increase in traffic collisions. Nor can it. Since 2020, traffic fatalities have increased at record levels throughout the United States for reasons that have nothing to do with Indian country jurisdiction in eastern Oklahoma.[7]

C. Tulsa's Claims Regarding Other Municipal Laws Fare No Better.

Tulsa contends that, under *Hooper*, Indians will be free to act contrary to Tulsa's municipal codes pertaining to fire safety, building and mechanical codes, and zoning. Appl. 21–22. But under Tulsa law, violations of those provisions carry criminal penalties. *See*, *e.g.*, Tulsa Code of Ordinances tit. 59 (Mechanical Code), ch. 1, § 108.4 ("Any person violating any of the provisions of this code shall be guilty of a misdemeanor offense" punishable by fine and/or incarceration); *id.* tit. 14 (Fire Prevention Code), ch. 1, § 110.4 (similar); *id.* tit. 42 (Zoning Code), ch. 85, § 85.040(A) (similar). And just as the Creek Nation, in the spirit of comity and cooperative sovereignty, amended its traffic code to mirror Oklahoma's after *McGirt*, it likewise amended its criminal code to incorporate as Creek law "any criminal offense" prescribed by other governments within its Reservation boundaries—including Tulsa, *see* Muscogee (Creek) Nation Code Annotated 22-048.[8]

[7] Michael Wayland, *More People Are Dying on U.S. Roads, Even As Cars Get Safer. Here's Why It's a Tough Problem To Solve* (May 22, 2022), U.S. roadway deaths rise, even as cars get safer (cnbc.com) ("Compared to 2019, fatality rates have increased 18%—the highest two-year increase since 1946[.]").
[8] http://www.creeksupremecourt.com/wp-content/uploads/NCA-22-048.pdf.

And the Cherokee Nation has long made it a crime to "maintain[] or commit[] any public nuisance," *see* Cherokee Nation Code tit. 21, § 1191.[9]

Tulsa notes that the assimilative crimes provision of Creek law is limited to laws that were in place prior to January 1, 2021. Appl. 21–22. That is correct. The Creek Nation cannot lawfully adopt new criminal laws of other governments *prospectively*—i.e., without yet knowing their substance—as that would outsource the Nation's legislative function to those governments. But this limitation hardly undermines the value of the provision to address Tulsa's stated concerns. Tulsa's claim that "no new ordinances [enacted after January 1, 2021] to address emerging issues can be enforced against Indians," *id.* at 22, not only fails to identify any recent enactments that implicate this concern but flies in the face of experience. Both the Creek and Cherokee Nations have been demonstrably willing to adjust tribal laws in response to public safety concerns—including the amendments to their criminal and traffic codes in response to *McGirt* and *Hogner*. If emergent issues result in new criminal provisions under Tulsa law, nothing prevents the City from working cooperatively with the Nations to ensure public safety through lawful means that respect each government's powers and rights.

CONCLUSION

The amici Nations respectfully request that the application be denied.

[9] https://attorneygeneral.cherokee.org/media/q5wjvyoa/title-21-amendments-updated-2021-04-06.pdf.

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