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Correction Order, *Stitt* v. *City of Tulsa*,
March 13, 2025

2025 OK CR 6
IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

No. M-2022-984

MARVIN KEITH STITT,
Appellant,
v.
CITY OF TULSA,
Appellee.

Filed: March 13, 2025

CORRECTION ORDER

ROWLAND, Judge.

¶ 1 On March 6, 2025, this Court issued its opinion in the above-referenced case, affirming the Judgment and Sentence in City of Tulsa Municipal Court Citation/Case No. 7569655.

¶ 2 This Court's opinion issued in the above-referenced matter is corrected to add the appearances as follows:

APPEARANCES ON APPEAL – AMICUS CURIAE
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¶ 3 IT IS SO ORDERED.

¶ 4 WITNESS MY HAND AND THE SEAL OF THIS COURT this 13th day of March, 2025.

GARY L. LUMPKIN, Presiding Judge

ATTEST:
/s/ John D. Hadden
Clerk

APPENDIX B: Oklahoma Court of Criminal Appeals,
Summary Opinion, *Stitt* v. *City of Tulsa*,
March 6, 2025

2025 OK CR 5
IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

No. M-2022-984

MARVIN KEITH STITT,
Appellant,
v.
CITY OF TULSA,
Appellee.

Filed: March 6, 2025

SUMMARY OPINION

ROWLAND, Judge.

¶ 1 Appellant, Marvin Keith Stitt, was convicted of Aggravated Speeding (Tulsa, Okla., Rev. Ordinances Title 37, § 617(C) (2021)) following a non-jury trial before the Honorable Mitchell McCune, Municipal Judge, and fined $250.00 in City of Tulsa Municipal Court Citation/Case No. 7569655.

ANALYSIS

¶ 2 Mr. Stitt was issued City of Tulsa (Tulsa) Municipal Citation/Case No. 7569655 on February 3, 2021, alleging he was driving 16–20 miles per hour over the posted speed limit. On June 16, 2022, Tulsa was allowed to file an amended citation alleging Mr. Stitt was guilty of

aggravated speeding for driving more than twenty miles per hour over the posted speed limit (78 miles per hour where the speed limit was 50 miles per hour). (Tulsa, Okla., Rev. Ordinances Title 37, § 617(C) (2021)). Prior to his conviction, Mr. Stitt filed multiple motions to dismiss the charge, arguing Tulsa lacked criminal jurisdiction because he was an enrolled citizen of the federally recognized Cherokee Nation tribe and the alleged crime occurred within the boundaries of the Muscogee (Creek) Nation. See *McGirt* v. *Oklahoma*, 591 U. S. 894, 140 S. Ct. 2452, 207 L. Ed. 2d 985 (2020). Tulsa argued that it retained pre-statehood jurisdiction over Indians pursuant to the Curtis Act of 1898. Curtis Act, ch. 517, § 14, 30 Stat. 495, 499–500 (1898) ("Curtis Act").

¶ 3 The trial court held multiple hearings on Mr. Stitt's motions to dismiss, and on June 15, 2022, Judge McCune denied Mr. Stitt's motions. Tulsa's argument in this case before Judge McCune centered on the United States District Court for the Northern District of Oklahoma's April 13, 2022 order in *Hooper* v. *City of Tulsa*, No. 21-CV-165-WPJ-JFJ, 2022 WL 1105674 (N. D. Okla. Apr. 13, 2022). Judge McCune relied on the Northern District's April 13, 2022 order in *Hooper* adopting Tulsa's identical argument that it retained pre-statehood jurisdiction over Indians pursuant to the Curtis Act. *Id*. at 5. Following a non-jury trial, Mr. Stitt was convicted on October 20, 2022, by Judge McCune and fined $250.00. Mr. Stitt announced his intent to appeal.

¶ 4 Mr. Stitt filed his appeal brief with this Court on April 13, 2023, arguing in two propositions (Proposition A and B) that Section 14 of the Curtis Act did not allow Tulsa jurisdiction over his traffic violation and attacking the federal district court's order in *Hooper*. Tulsa filed its brief on June 12, 2023, repeating its Section 14 argument and relying on the April 13, 2022 *Hooper* order.

¶ 5 On June 28, 2023, the Tenth Circuit reversed the lower court in *Hooper* after finding that Tulsa's Curtis Act claims were without merit. *Hooper* v. *City of Tulsa*, 71 F. 4th 1270, 1285–88 (10th Cir. 2023). The parties in *Hooper* made the same arguments before the Tenth Circuit regarding Section 14 of the Curtis Act and whether it provides Tulsa with criminal jurisdiction over Indian defendants. *Id*. at 1273. The Tenth Circuit ruled that it was dispositive that what powers Tulsa possessed pursuant to Section 14 of the Curtis Act were lost 1) upon statehood and 2) when Tulsa incorporated under the laws of the State of Oklahoma. *Id*. at 1285–87.

¶ 6 On September 19, 2023, this Court entered an order granting Appellee's motion seeking leave to file a supplemental brief addressing the Tenth Circuit's final opinion in *Hooper*. We directed both parties, and invited the amicus parties, to address "the impact of the *Hooper* decision on this appeal" and to address "the impact of [*Oklahoma* v.] *Castro-Huerta* [597 U. S. 629, 142 S. Ct. 2486, 213 L. Ed. 2d 847 (2022)] on the possible preemption of municipal jurisdiction in this case, and whether under [*White Mountain Apache Tribe* v.] *Bracker* [448 U. S. 136, 100 S. Ct. 2578, 65 L. Ed. 2d 665 (1980)] the City of Tulsa has concurrent jurisdiction over its municipal offenses." *See* Order Directing Supplemental Briefing at 2, *Stitt* v. *Tulsa*, No. M-2022-984 (Okl. Cr. September 19, 2023) (not for publication).

¶ 7 On October 19, 2023, Appellant filed a supplemental brief including a Proposition A arguing this Court should rely on the Tenth Circuit's holding in Hooper and deny Tulsa's Curtis Act arguments. This Court recently addressed and denied the same *Hooper* arguments made by Appellant in this case in *City of Tulsa* v. *O'Brien*, 2024 OK CR 31, ¶¶ 36–37, —– P. 3d —–. *O'Brien* noted that while this Court is not bound by Tenth Circuit precedents, we

will follow the guidance of the Tenth Circuit until the United States Supreme Court rules on the issue. *Id*., 2024 OK CR 31, ¶ 37 (citing *McCauley* v. *State*, 2024 OK CR 8, ¶¶ 4–5, 548 P. 3d 461, 464–65; *Davis* v. *State*, 2011 OK CR 29, ¶ 119, 268 P. 3d 86, 119, as corrected (Feb. 7, 2012)). The Tenth Circuit correctly addressed the identical issues raised by Tulsa in this case in *Hooper*, and the analysis in the Tenth Circuit's opinion establishes that the entirety of Tulsa's Curtis Act arguments are without merit. *Hooper*, 71 F. 4th at 1285–87. As a result, Appellant's original Propositions A and B and Supplemental Proposition A are denied.

¶ 8 Appellant's supplemental brief also included a Proposition B maintaining *Castro-Huerta* did "not impact this case in any way." *O'Brien* also addressed and denied virtually the same *Castro-Huerta* arguments made by Appellant in this case. *Id*., 2024 OK CR 31, ¶¶ 13–35. After determining that state jurisdiction was not preempted as a result of *Bracker* balancing, this Court found that Oklahoma has concurrent criminal jurisdiction in Indian country over non-member Indian defendants accused of committing non-major crimes. *Id*., 2024 OK CR 31, ¶ 35. We held that the balance of interests under *Bracker* does not preempt the exercise of state (and thus municipal) jurisdiction. *Id*. Pursuant to this Court's reasoning in *O'Brien*, Tulsa's exercise of jurisdiction in this case does not unlawfully infringe upon tribal self-government and Appellant's claims are without merit. Proposition B in Appellant's supplemental brief is denied.

DECISION

¶ 9 The Judgment and Sentence of the Municipal Court is AFFIRMED. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2025), the

MANDATE is ORDERED issued upon the filing of this decision.

OPINION BY: ROWLAND, J.
LUMPKIN, P.J.: Concur
MUSSEMAN, V.P.J.: Concur
LEWIS, J.: Concur in Part and Dissent in Part
HUDSON, J.: Concur

LEWIS, J., CONCURRING PART AND DISSENTING IN PART:

¶ 1 I concur in the Court's holding regarding the Curtis Act and *Hooper* v. *City of Tulsa*, but respectfully dissent from the remainder of the opinion for reasons stated in my separate opinion in *City of Tulsa* v. *O'Brien*. The Court should reverse this conviction of an Indian defendant in an Oklahoma municipal court for a crime committed within the Muskogee [*sic*] Creek Reservation. Congress has never conferred criminal jurisdiction on the State or its municipal subdivisions to prosecute Indians for crimes committed in Indian Country.

APPENDIX C: Oklahoma Court of Criminal Appeals, Opinion, *City of Tulsa* v. *O'Brien*, December 5, 2024

2024 OK CR 31
IN THE MUNICIPAL CRIMINAL COURT
OF THE CITY OF TULSA

No. S-2023-715

CITY OF TULSA,
Appellant,
v.
NICHOLAS RYAN O'BRIEN,
Appellee.

Filed: December 5, 2024

OPINION

HUDSON, Judge.

¶ 1 Appellee, Nicholas Ryan O'Brien, was charged by Information in the Municipal Criminal Court of the City of Tulsa with the following misdemeanor traffic crimes:

> Case No. 720766, Driving Under the Influence of Alcohol, in violation of City of Tulsa Revised Ordinances Title 37, § 649;
>
> Case No. 720766A, Transporting an Open Container, in violation of City of Tulsa Revised Ordinances Title 37, § 657;

> Case No. 720766B, Operating a Motor Vehicle With an Expired Tag, in violation of City of Tulsa Revised Ordinances Title 37, § 409;
>
> Case No. 720766C, Driving Left of Center, in violation of City of Tulsa Revised Ordinances Title 37, § 637; and
>
> Case No. 720766D, Improper Use of Left Lane, in violation of City of Tulsa Revised Ordinances Title 37, § 640.

¶ 2 The Information alleged these offenses occurred on August 30, 2021, while O'Brien was driving a motor vehicle on a multi-lane public street, at or near 1300 South Denver Avenue, in the city of Tulsa. This traffic stop was conducted by the Tulsa Police Department.

¶ 3 On October 6, 2022, O'Brien through counsel filed a motion to dismiss alleging that the City lacked jurisdiction over his case pursuant to *McGirt* v. *Oklahoma*, 591 U. S. 894 (2020) because he was an enrolled citizen of the federally recognized Osage Nation tribe and the alleged crimes occurred within the boundaries of the Muscogee (Creek) Nation. In *McGirt*, the Supreme Court held that the Creek Reservation in eastern Oklahoma was never disestablished by Congress and, thus, constitutes Indian Country for purposes of federal criminal jurisdiction. *Id*. at 913, 932. The Honorable Mitchell M. McCune, Municipal Judge, denied the motion on January 13, 2023, finding the City had jurisdiction over the case. In his written order, Judge McCune cited a federal district court decision agreeing with Tulsa that Congress granted the city jurisdiction over municipal violations by all its inhabitants, including Indians, through Section 14 of the Curtis Act, 30 Stat. 495

(1898). *See Hooper* v. *City of Tulsa*, 2022 WL 1105674 (N. D. Okla. Apr. 13, 2022).

¶ 4 On June 28, 2023, O'Brien's counsel filed a second motion to dismiss for lack of jurisdiction, this time based on the Tenth Circuit's reversal in *Hooper*. In that decision, the Tenth Circuit held that Section 14 of the Curtis Act no longer grants Tulsa jurisdiction over municipal violations committed by Indians. *Hooper* v. *City of Tulsa*, 71 F. 4th 1270, 1288 (10th Cir. 2023). Tulsa filed a responsive pleading opposing O'Brien's motion to dismiss. Tulsa maintained its previous arguments based on the Curtis Act. In the alternative, the City argued that the State of Oklahoma retained concurrent jurisdiction with the Tribes over criminal offenses committed by Indians on the reservation, and thus Tulsa also had concurrent jurisdiction over Indian offenses as delegated by the State.

¶ 5 Tulsa cited *Oklahoma* v. *Castro-Huerta*, 597 U. S. 629 (2022) to support its claim that there is no federal statute granting exclusive jurisdiction to the Tribes or federal government over non-major crimes committed by Indians in Indian country. Tulsa invoked the balancing test from *White Mountain Apache Tribe* v. *Bracker*, 448 U. S. 136, 142–43 and argued that the balance of tribal interests, federal interests and state interests does not bar the State, and therefore the City, from prosecuting O'Brien's crimes in its courts. Tulsa specifically argued that the exercise of concurrent State-delegated jurisdiction in O'Brien's case does not unlawfully infringe on tribal self-government. *See Castro-Huerta*, 597 U. S. at 649–51.

¶ 6 On August 14, 2023, Judge McCune conducted a telephonic conference with counsel for both parties and advised the parties, for the first time, that he was

dismissing O'Brien's case for lack of subject matter jurisdiction. The Court advised that a written order would follow. Counsel for the City of Tulsa at that time advised that the City would be appealing the court's decision as a reserved question of law concerning subject matter jurisdiction. On August 17, 2023, Judge McCune granted O'Brien's motion to dismiss in a written order. Judge McCune found that the Tenth Circuit's decision in Hooper undermined the City's arguments based on the Curtis Act and that it "must follow the law that is in place at this time." Judge McCune also rejected Tulsa's alternative argument based on *Castro-Huerta* as follows:

> The City of Tulsa asserts that *Oklahoma* v. *Castro-Huerta* . . . confers concurrent jurisdiction to the City for violations of ordinances in the City of Tulsa. However, the *Castro-Huerta* ruling is specifically limited to concurrent jurisdiction to prosecute crimes committed by non-Indians against Indians in Indian Country. No mention is made as to concurrent jurisdiction when the defendant is Indian. Nor, does there appear to be any discussion in *Castro-Huerta* that the General Crimes Act, 18 U. S. C. § 1152 (1948), confers concurrent jurisdiction over defendants who are Indian.
>
> Order at 3.

¶ 7 The City of Tulsa now appeals this ruling pursuant to 22 O. S. 2021, § 1053. Below, we address the merits of Appellee's motion to dismiss Tulsa's appeal for lack of

jurisdiction and then address the merits of the City's substantive claims.[1]

I. MOTION TO DISMISS APPEAL

¶ 8 O'Brien has filed a motion to dismiss the City's appeal for lack of jurisdiction. First, O'Brien argues the City failed to give notice in open court of its intent to appeal as required by Rule 2.1(D), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2024). O'Brien is incorrect. The record shows that Tulsa's counsel gave notice of its intent to appeal during the August 14, 2023, teleconference in which Judge McCune announced, for the first time, that he would be granting O'Brien's motion to dismiss. O'Brien complains that giving notice of intent to appeal to the Court over the phone, during a teleconference, is insufficient to satisfy Rule 2.1(D). We reject this claim and find the City's announcement was sufficient under the circumstances presented here to provide the requisite notice to Judge McCune, his clerk, and O'Brien's counsel when the court announced its oral ruling.

¶ 9 Second, O'Brien claims that Judge McCune did not enter a final appealable order necessary to support this appeal. This claim too lacks merit. Judge McCune entered an order dismissing the municipal prosecution of O'Brien's alleged crimes for lack of subject matter jurisdiction. With this ruling, O'Brien's prosecution came to an end and the case was dismissed with no potential to refile the case in municipal court. On this record, Judge McCune's dismissal order was a final appealable order from which the City of Tulsa could appeal under Section 1053. Under our case

[1] We granted in a separate order the Muscogee (Creek) Nation's request to file an amicus brief in this case.

law, jurisdiction for this appeal is appropriate as an appeal from a decision quashing the Information. 22 O. S. Supp. 2022, § 1053(1). *See State* v. *Ward*, 2022 OK CR 16, ¶¶ 2–3, 516 P. 3d 261, 262; *State* v. *Klindt*, 1989 OK CR 75, ¶ 11, 782 P. 2d 401, 404. We reject O'Brien's request to overrule this precedent.

¶ 10 We further find this appeal is authorized under the plain language of Section 1053(7), which authorizes a state or municipal appeal "[u]pon an order, decision or judgment finding that a defendant is immune from or not subject to criminal prosecution." 22 O. S. Supp. 2022, § 1053(7) (emphasis added). Judge McCune's order dismissing this criminal case found that Appellee was not subject to criminal prosecution based on his Indian status and the situs of the crime on the Muscogee (Creek) Reservation. The plain language of Section 1053(7) does not limit this provision to Stand Your Ground Appeals. Based upon the foregoing, O'Brien's motion to dismiss this appeal for lack of jurisdiction under Section 1053 is denied.

II. STANDARD OF REVIEW

¶ 11 We generally review the lower court's decision in a state appeal for abuse of discretion. The City's challenge to Judge McCune's jurisdictional ruling, however, rests primarily on a series of legal questions relating to federal preemption we review de novo. *See State* v. *Allen*, 2021 OK CR 14, ¶ 6, 492 P. 3d 27, 29.

III. DEO V. PARISH

¶ 12 In its first proposition, Tulsa contends that Judge McCune erred in dismissing O'Brien's case for subject matter jurisdiction. Tulsa cites our recent decision in *Deo* v. *Parish*, 2023 OK CR 20, 541 P. 3d 833, in which we held that Indian country jurisdictional claims do not implicate Oklahoma district courts' subject matter jurisdiction, but rather personal and territorial jurisdiction. *Deo*, 2023 OK CR 20, ¶ 15, 541 P. 3d at 838. Tulsa is not entitled to relief for this claim. Tulsa admits that *Deo* is distinguishable from the present case because, in pertinent part, Appellee filed his formal challenge based on *McGirt* to the trial court's jurisdiction in a timely manner, before the first actual hearing in the case. There is thus no waiver by O'Brien of his Indian country jurisdictional claim, and no basis for relief under *Deo*, despite the lower court's reference to subject matter jurisdiction. *See Deo*, 2023 OK CR 20, ¶ 15, 541 P. 3d at 838. Proposition I is denied.

IV. PREEMPTION OF STATE JURISDICTION

¶ 13 In its second proposition, Tulsa argues that it has criminal jurisdiction in this case derived from the State's jurisdiction and, thus, Tulsa has concurrent jurisdiction with the Tribe over municipal offenses committed by Indians within the Tulsa city limits. Under the Constitution, States have the authority to prosecute crimes committed within their territory "except when preempted (in a manner consistent with the Constitution) by federal law or by principles of tribal self-government." *Oklahoma* v. *Castro-Huerta*, 597 U. S. 629, 652–53 (2022). For the reasons discussed below, we find that the City of Tulsa's criminal jurisdiction to prosecute O'Brien for DUI, and the other

related traffic offenses in this case, was not preempted under federal law or by principles of tribal self-government.

A. State Jurisdiction in Indian Country

¶14 In *Castro-Huerta*, the Supreme Court recognized that "the Constitution allows a State to exercise jurisdiction in Indian country [and] Indian country is part of the State, not separate from the State." 597 U. S. at 636. Indian reservations are no longer viewed as "distinct nations" like in the past. *Id*. (citing *Organized Village of Kake* v. *Egan*, 369 U. S. 60, 72 (1962)). Unless preempted by federal law, "as a matter of state sovereignty, a State has jurisdiction over all of its territory, including Indian country." *Id*. (citing U. S. Const. amend. X). This rule is based on the proposition that "a State is generally 'entitled to the sovereignty and jurisdiction over all the territory within her limits.'" *Id*. (quoting *Lessee of Pollard* v. *Hagan*, 3 How. 212, 228, 11 L. Ed. 565 (1845)). The Supreme Court recognized in *Castro-Huerta* that, "[s]ince the latter half of the 1800s, the Court has consistently and explicitly held that Indian reservations are 'part of the surrounding State' and subject to the State's jurisdiction 'except as forbidden by federal law.'" *Id*. (quoting *Egan*, 369 U. S. at 72).

B. Tribal Sovereignty

¶ 15 "Due to their incorporation into the United States . . . the 'sovereignty that the Indian tribes retain is of a unique and limited character.'" *United States* v. *Cooley*, 593 U. S. 345, 349–50 (2021) (quoting *United States* v. *Wheeler*, 435 U. S. 313, 323 (1978)). Indian tribes are "distinct, independent political communities[.]" *Plains Commerce Bank* v. *Long Family Land & Cattle Co*., 554 U. S. 316, 327 (2008) (quoting *Worchester* v. *Georgia* [*sic*], 6 Pet. 515, 559, 8 L. Ed 483 (1832)). Tribes retain inherent sovereign authority over both their members and their territories.

Ysleta Del Sur Pueblo v. *Texas*, 596 U. S. 685, 689 (2022). Tribal jurisdiction, however, is subject to the overarching control of Congress. *Haaland* v. *Brackeen*, 599 U. S. 255, 272 (2023) ("In a long line of cases, we have characterized Congress's power to legislate with respect to the Indian tribes as 'plenary and exclusive.'" (quoting *United States* v. *Lara*, 541 U. S. 193, 200 (2004))).

¶ 16 "Indian reservations are 'a part of the territory of the United States' and they 'hold and occupy [the reservations] with the assent of the United States, and under their authority.'" *Oliphant* v. *Suquamish Indian Tribe*, 435 U. S. 191, 208–09 (1978) (quoting *United States* v. *Rogers*, 4 How, 567, 571, 572, 11 L. Ed. 2d 1105 (1846)). Tribes nonetheless have the inherent power to regulate their own members and internal affairs through tribal self-government. *White Mountain Apache Tribe* v. *Bracker*, 448 U. S. 136, 142 (1980). This includes the inherent authority "to prescribe laws applicable to tribe members and to enforce those laws by criminal sanctions." *Wheeler*, 435 U. S. at 322. See *Montana* v. *United States*, 450 U. S. 544, 564 (1981).

C. Preemption of State Jurisdiction

¶ 17 Under the Supreme Court's precedent, "a State's jurisdiction in Indian country may be preempted (i) by federal law under ordinary principles of federal preemption, or (ii) when the exercise of state jurisdiction would unlawfully infringe on tribal self-government." *Castro-Huerta*, 597 U. S. at 638.

1. GENERAL CRIMES ACT

¶ 18 O'Brien's crimes are general crimes for purposes of federal Indian law. 18 U. S. C. § 1152.[2] The General Crimes Act "borrows the body of federal criminal law that applies in federal enclaves and extends it to Indian country." *Castro-Huerta*, 597 U. S. at 640. However, nothing in the plain language of the General Crimes Act preempts the State's authority to prosecute crimes in Indian country. *Castro-Huerta*, 597 U. S. at 639–40 and n. 2. As the Supreme Court held in *Castro-Huerta*, "the General Crimes Act does not treat Indian country as the equivalent of a federal enclave for jurisdictional purposes. Nor does the Act make federal jurisdiction exclusive or preempt state law in Indian country." *Id*. at 642. Thus, "[u]nder the General Crimes Act . . . both the Federal Government and the State have concurrent jurisdiction to prosecute crimes committed in Indian country." *Id*. at 639 (footnote omitted).

¶ 19 O'Brien and amicus, the Muscogee (Creek) Nation tribe, both contend that *Castro-Huerta* does not apply here because that decision was limited to deciding whether the State had concurrent jurisdiction with the federal government to prosecute a non-Indian for a reservation crime against an Indian victim. To the contrary, the Supreme

---

[2] Title 18 U. S. C. § 1152 states as follows: Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.

This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.

Court's discussion in *Castro-Huerta* about the ways in which a state's criminal jurisdiction over Indians may be preempted was not limited to criminal cases involving non-Indian defendants and Indian victims. The same is true of the Court's interpretation in *Castro-Huerta* of the plain language of the General Crimes Act, which cannot logically be read to preempt state jurisdiction over Indian defendants, while not preempting state jurisdiction over Indian victims. In *Castro-Huerta*, the Court observed that:

> [t]o the extent that a State lacks prosecutorial authority over crimes committed by Indians in Indian country (a question not before us), that would not be a result of the General Crimes Act. Instead, it would be the result of a separate principle of federal law that . . . precludes state interference with tribal self-government.

Castro-Huerta, 597 U. S. at 639 n.2 (citing *Bracker*, 448 U. S. at 142–43 and *McClanahan* v. *Arizona Tax Comm'n*, 411 U. S. 164, 171–72 (1973)).

2. PUBLIC LAW 280 / OKLAHOMA ENABLING ACT

¶ 20 O'Brien contends that Public Law 280 and the 1906 Oklahoma Enabling Act preempt state, and thus municipal, jurisdiction over his crimes. *Castro-Huerta*, however, held that "Public Law 280 does not preempt any preexisting or otherwise lawfully assumed jurisdiction that States possess to prosecute crimes in Indian country" and that "Public Law 280 contains no language that preempts States' civil or criminal jurisdiction." *Castro-Huerta*, 597 U. S. at 647–48. To the extent O'Brien relies upon the 1906 Oklahoma Enabling Act to show preemption, his argument must similarly fail. In *Castro-Huerta*, the Supreme Court held that statutory language in the

Oklahoma Enabling Act reserving jurisdiction and control to the United States did not divest Oklahoma of criminal jurisdiction over its own territory. Rather, such language was "meant to preserve federal jurisdiction to the extent that it existed before statehood, not to make federal jurisdiction exclusive." *Id*. at 653–55. Appellee's claim that the language in Article 1, § 3, of the Oklahoma Constitution preempts Tulsa's jurisdiction in this case, fails for similar reasons. See *Purdom* v. *State*, 2022 OK CR 31, ¶¶ 9–12, 523 P. 3d 54, 57–58.

3. INDIAN CIVIL RIGHTS ACT

¶ 21 O'Brien's reliance upon Congress's amendment to the Indian Civil Rights Act recognizing "the inherent power of Indian tribes . . . to exercise criminal jurisdiction over all Indians[,]" 25 U. S. C. § 1301(2), does not undermine the State's or the City's jurisdiction in this case. This amendment occurred after the Supreme Court's decision in *Duro* v. *Reina*, 495 U. S. 676 (1990) holding that the retained sovereignty of a tribe to govern its own affairs does not include the authority to prosecute a nonmember Indian for crimes committed on its reservation. *Id*. at 679. The Supreme Court subsequently recognized this amendment does not interfere with the power or authority of any State. *United States* v. *Lara*, 541 U. S. 193, 205 (2004). Nor does the plain language of Section 1301 make an Indian tribe's prosecution authority over nonmember Indians exclusive.

4. TENTH AMENDMENT

¶ 22 The Tribe argues that state laws are generally not applicable to tribal Indians on an Indian reservation except where Congress has explicitly provided state laws apply. The Tribe argues that the Tenth Amendment[3] provides no support for criminal jurisdiction over Indians on the reservation because Congress's power under the Constitution to legislate with respect to Indian tribes is plenary and exclusive. The Tenth Amendment, by contrast, reserves to the States only that residuum of sovereignty not delegated to the United States by the Constitution. Because the Constitution grants a power exclusively to Congress in this realm, the Tribe contends no residuum of state authority remains because States retain sovereignty under the Tenth Amendment only to the extent that the Constitution has not transferred those powers to the federal government. In other words, the Tribe contends that Oklahoma has no authority over Indians for criminal conduct occurring on an Indian reservation.

¶ 23 The Tribe's argument lacks merit. "Under our Federal system, the State possesses primary authority for defining and enforcing the criminal law." *United States* v. *Lopez*, 514 U. S. 549, 561 n. 3 (1995) (internal quotation omitted). See *Metropolitan Life Ins. Co*. v. *Massachusetts*, 471 U. S. 724, 756 (1985) ("The States traditionally have had great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons." (internal quotation omitted)). Oklahoma's authority to exercise its sovereign criminal

[3] The Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U. S. Const. amend. X.

jurisdiction over all its territory, including Indian country, extends from the doctrine "that new States are admitted to the Union on an 'equal footing' with existing States." *Herrera* v. *Wyoming*, 587 U. S. 329, 338 (2019) (internal quotation omitted). *Cf*. *Castro-Huerta*, 597 U. S. at 636 ("a State is generally 'entitled to the sovereignty and jurisdiction over all the territory within her limits.'" (quoting *Lessee of Pollard*, 3 How. at 228)).

¶ 24 The relationship between the state's sovereign authority to exercise jurisdiction over all persons and things within its own territory, and Congress's constitutional authority over the Indian tribes, has been described by the Supreme Court as resting on "fundamental principles . . . of equal dignity, and neither must be enforced as to nullify or substantially impair the other." *Dick* v. *United States*, 208 U. S. 340, 353 (1908). Upon its admission to the Union, a State is on equal footing with every other State that has come before it. *Id*. The Constitution envisions "an indestructible Union, composed of indestructible States." *Gregory* v. *Ashcroft*, 501 U. S. 452, 457 (1991) (quoting *Texas* v. *White*, 7 Wall. 700, 725, 19 L. Ed. 227 (1869)). As part of its sovereign power, the State has "full and complete jurisdiction over all persons and things within its limits, except as it may be restrained by the provisions of the Federal Constitution or by its own Constitution." *Dick*, 208 U. S. at 353. Congress's authority to regulate commerce with tribal governments derives from the express language of the Constitution and is deserving of equal respect in the State's exercise of its traditional police powers. *Id*. See U. S. Const. art. I, § 8. cl. 3.

¶ 25 On this point, the Supreme Court observed:

> In regulating commerce with Indian tribes Congress must have regard to the general authority which the state has over all persons and things within its jurisdiction. So, the authority of the state cannot be so exerted as to impair the power of Congress to regulate commerce with the Indian tribes.

Dick, 208 U. S. at 353.

5. SUPREME COURT CASE LAW (CRIMINAL)

¶ 26 The State's criminal jurisdiction over its own territory and all the people on it have long been recognized as part of its reserved powers under the Constitution. O'Brien and the Tribe cite passages from Supreme Court decisions addressing federal criminal jurisdiction under the Major Crimes Act for the proposition that state courts "generally have no jurisdiction to try Indians for conduct committed in 'Indian country.'" *McGirt*, 591 U. S. at 898 (emphasis added).[4] See also *Negonsott* v. *Samuels*, 507 U. S. 99, 102–03 (1993); *United States* v. *Antelope*, 430 U. S. 641, 642 n. 1

[4] The Tribe also quotes *McGirt* for the proposition that the Supreme Court "has long 'require[d] a clear expression of the intention of Congress' before the state or federal government may try Indians for conduct on their lands[.]" *McGirt*, 591 U. S. at 929 (quoting *Ex parte Crow Dog*, 109 U. S. 556, 572 (1883)). That passage of the opinion focused on territorial criminal jurisdiction in Oklahoma prior to statehood, and invoked the earlier view from *Worchester* v. *Georgia* [*sic*], 6 Pet. 515, 557, 8 L. Ed. 483 (1832) that Indian tribes were viewed as distinct communities occupying their own territories and subject to no state authority. *McGirt*, 591 U. S. at 928–29. This portion of *McGirt*, however, was undermined by *Castro-Huerta* which held that the views expressed in *Worchester* [*sic*] "yielded to closer analysis" and, since the late 1800s, Indian reservations are now considered part of the surrounding state and subject to state jurisdiction except as forbidden by federal law. *Castro-Huerta*, 597 U. S. at 636–37.

(1977). These cases, however, do not interpret the General Crimes Act, let alone the issue before this Court – *viz*., whether state jurisdiction over misdemeanor traffic crimes committed by a non-member Indian on the reservation is preempted – and are thus distinguishable from the present case. Indeed, the quote from *McGirt* by its own terms sets forth a general rule, not a per se rule against criminal jurisdiction of any kind.[5]

[5] The Tribe also cites *Hagen* v. *Utah*, 510 U. S. 399, 401–02 (1994) which held that the Uintah Reservation had been diminished by Congress and the town of Myton, Utah, where the Indian petitioner committed a state narcotics offense, was not Indian country and was subject to state jurisdiction. *Id*. at 401–02, 421–22. This case too did not interpret the General Crimes Act and does not control the decision in this case.

6. SUPREME COURT CASE LAW (CIVIL)

¶ 27 O'Brien and the Tribe also invoke decisions in civil cases like *Michigan* v. *Bay Mills Indian Cmty*., 572 U. S. 782 (2014) and *McClanahan* 411 U. S. 164 (1973) for the broader proposition that "[s]tate laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that State laws shall apply." *McClanahan*, 411 U. S. at 170–71. The Supreme Court's case law, however, does not hold that state criminal jurisdiction which deals in any way with Indians on the reservation is per se preempted by the Indian Commerce Clause, the Treaty Clause or the trust relationship between the United States and the Tribes which informs Congress's exercise of its legislative powers. See *Brackeen*, 599 U. S. at 274–75 (addressing constitutional sources of power for Congress's plenary and exclusive authority to legislate with respect to Indians). *Castro-Huerta* itself dispelled this assertion with its holding that Oklahoma has concurrent jurisdiction in Indian country where non-Indian defendants perpetrate general crimes against Indian victims. "[E]ven on reservations, state laws may be applied unless such application would interfere with reservation self-government or would impair a right granted or reserved by federal law." *Mescalero Apache Tribe* v. *Jones*, 411 U. S. 145, 148 (1973).

7. LIMITED TRIBAL SOVEREIGNTY

¶ 28 The question in Indian country is whether the State's criminal jurisdiction over an Indian reservation that is part of its territory is preempted by federal law. See *Castro-Huerta*, 597 U. S. at 636 (citing U. S. Const. amend. X). The Tribe's argument ignores the Supreme Court's recognition, based on its prior decisions dating back to the 1800s, that Indian reservations are no longer viewed as distinct nations occupying their own territory like in the

past and "States have jurisdiction to prosecute crimes committed in Indian country unless preempted." *Castro-Huerta*, 597 U. S. at 637. The Supreme Court has recognized that "our recent cases have established a 'trend . . . away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal preemption.'" *Rice* v. *Rehner*, 463 U. S. 713, 718 (1983) (quoting *McClanahan*, 411 U. S. at 172 (footnote omitted)). "The modern cases thus tend to avoid reliance on platonic notions of Indian sovereignty and to look instead to the applicable treaties and statutes which define the limits of state power." *McClanahan*, 411 U. S. at 172. The doctrine of Indian sovereignty, premised on the rule that state laws generally are inapplicable on the reservation except where Congress has expressly provided that state law may apply, "has not been rigidly applied in cases where Indians have left the reservation and become assimilated into the general community." *Id*. at 171 (citing *Oklahoma Tax Comm'n* v. *United States*, 319 U. S. 598 (1943)).

¶ 29 Congress's plenary and exclusive authority under the Constitution to legislate in the field of criminal law on the reservation is not in dispute. See *Brackeen*, 599 U. S. at 272–278. Congress's broad Indian affairs power, however, "is not absolute[,]" *id*. at 276 (internal quotation omitted), and does not undermine the States' authority as part of its broad police powers to assert criminal jurisdiction over all its territory, including that portion with Indian reservations unless explicitly prohibited by Congress. That Congress has the power to displace the Indian country criminal jurisdiction of State courts does not mean that it has done so. *Cf*. *Brackeen*, 599 U. S. at 277 ("when Congress validly legislates pursuant to its Article I powers, we have not hesitated to find conflicting state family law preempted, [n]otwithstanding the limited application of federal law in

the field of domestic relations generally.") (internal quotation omitted). Applying ordinary rules of preemption, Congress's failure to exercise its authority to preempt State criminal jurisdiction in Indian country does not thwart the State's exercise of its traditional police powers over Indian country within its own boundaries.

8. SUMMARY

¶ 30 To summarize, "the text of the General Crimes Act . . . does not make federal jurisdiction exclusive or preempt state jurisdiction." *Castro-Huerta*, 597 U. S. at 644. "Public Law 280 contains no language that preempts States' civil or criminal jurisdiction." *Castro-Huerta*, 597 U. S. at 648. "[U]nder the Constitution and [the Supreme Court's] precedents, the default is that States may exercise criminal jurisdiction within their territory. States do not need a permission slip from Congress to exercise their sovereign authority . . . the default is that States have criminal jurisdiction in Indian country unless that jurisdiction is preempted." *Id*. at 653. O'Brien's and the Tribe's view that the State may only act if Congress specifically provides for it "is inconsistent with the Constitution's structure, the States' inherent sovereignty, and the [Supreme] Court's precedents." *Id*. We therefore reject O'Brien's and the Tribe's claim that Oklahoma's criminal jurisdiction, and thus the City of Tulsa's criminal jurisdiction, is preempted because Congress has not expressly authorized it.

V. CRIMINAL BRACKER BALANCING

¶ 31 We now address whether the State's (and thus the City's) exercise of criminal jurisdiction in this case is preempted by principles of tribal self-government.[6] See *Castro-Huerta*, 597 U. S. at 650–52. As in *Bracker*, this requires a balancing of the federal, state and tribal interests. *Bracker*, 448 U. S. at 145. Here, principles of tribal self-government do not bar Tulsa from prosecuting misdemeanor traffic crimes committed by non-member Indians on the Muscogee (Creek) reservation when those offenses occur on public roads and streets in the city of Tulsa.

¶ 32 First, the exercise of state (and municipal) jurisdiction under these circumstances would not infringe on tribal self-government.[7] Tulsa's prosecution of non-member Indians of the Muscogee (Creek) tribe for misdemeanor traffic offenses occurring on public streets and roads in Tulsa does not affect the tribe's authority to regulate its own citizens for violations of Creek tribal law. In fact, such a prosecution would not involve prosecuting any citizen of the Muscogee (Creek) tribe. Further, the city of Tulsa's jurisdiction would be concurrent only and would not displace, or diminish, the tribe's prosecutorial authority to try Indians for violations of local tribal law. Tulsa's prosecution of non-member Indians would bolster the

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[6] We reject Appellee's contention that the record on appeal is inadequately developed for us to conduct this analysis. We find the record is sufficient to support our resolution of this claim on appeal.

[7] The Tribe does not identify in its brief any specific interests for us to weigh in the *Bracker* analysis. Instead, the Tribe argues that federal law prohibits judicial balancing in this case because the defendant is Indian and alternatively, that *Bracker* balancing is impractical in the context of criminal jurisdiction and only properly exercised by Congress. We reject these claims for the reasons discussed earlier.

tribe's strong interest in public safety for its citizens in this part of the Creek reservation. To the extent that Tulsa's exercise of concurrent jurisdiction over non-Creek Indians for misdemeanor traffic offenses committed on the Creek reservation would somehow pose a problem, Congress can seek to alter it.

¶ 33 Second, Tulsa's prosecution of non-member Indians for misdemeanor traffic crimes also would not harm the federal interest in protecting Indians on the Creek reservation. Federal jurisdiction over such crimes would be concurrent to the city's jurisdiction and thus not affected. See 18 U. S. C. §§ 13, 1152. The federal interest in public safety on the reservation for all citizens would be enhanced by Tulsa's assertion of jurisdiction over non-member Indians for these crimes. That is especially so considering Tulsa already has primary responsibility for law enforcement within its own city limits and the limited role of the federal government in prosecuting misdemeanor traffic offenses.

¶ 34 Third, the State of Oklahoma (like Tulsa) has a strong sovereign interest in ensuring public safety on the roads and highways of its territory and in ensuring criminal justice for all citizens – Indian and non-Indian. Tulsa already has primary responsibility for enforcement of the laws within its city limits, particularly misdemeanor traffic offenses. Tulsa's prosecution of non-Creeks for these crimes on the reservation, as part of its concurrent jurisdiction, would enhance the interests of both the State and city in protecting the motoring public, potentially reducing motor vehicle accidents and deaths across its territory, regardless of tribal identity.

¶ 35 We find the balance of interests under *Bracker* does not preempt the exercise of state (and thus municipal) jurisdiction in the present case. Tulsa's exercise of jurisdiction in this case would not unlawfully infringe upon tribal self-government. We therefore find that the City of Tulsa has concurrent jurisdiction to proceed with the prosecution of this case and the lower court's order dismissing this case for lack of subject matter jurisdiction must be reversed. Proposition II is granted.

VI. THE CURTIS ACT

¶ 36 In its third proposition, Tulsa claims jurisdiction in this case based on the Curtis Act of 1898 (Act of June 28, 1898, ch. 517, § 14, 30 Stat. 495, 499–500). We reject Tulsa's arguments on this point. The parties in *Hooper* made virtually the same arguments before the Tenth Circuit regarding Section 14 of the Curtis Act and whether it provides Tulsa with criminal jurisdiction over Indian defendants. See *Hooper*, 71 F. 4th at 1273. The Tenth Circuit ruled that the powers Tulsa possessed pursuant to Section 14 of the Curtis Act were lost 1) upon statehood, and 2) when Tulsa incorporated under the laws of the State of Oklahoma. The Tenth Circuit rejected Tulsa's arguments that Section 14 of the Curtis Act grants Tulsa jurisdiction. *Id*. at 1286–87.

¶ 37 While this Court is not bound by the Tenth Circuit's resolution of this issue, we nonetheless follow the Tenth Circuit's guidance until the United States Supreme Court rules on the issue. See *McCauley* v. *State*, 2024 OK CR 8, ¶¶ 4–5, 548 P. 3d 461, 464–65; *Davis* v. *State*, 2011 OK CR 29, ¶ 119, 269 P. 3d 86, 119. Accordingly, we find the Tenth Circuit in *Hooper* addressed virtually the same issues raised by Tulsa in this case. Further, the analysis in

the Tenth Circuit's opinion establishes that Tulsa's Curtis Act arguments are without merit. Proposition III is denied.

DECISION

¶ 38 Appellee's motion to dismiss this appeal for lack of jurisdiction is denied. The Order of the Municipal Criminal Court of the City of Tulsa dismissing this case is reversed and remanded for reinstatement of the case and further proceedings not inconsistent with this Opinion. Appellee's motion to strike the City of Tulsa's reply brief is denied. The Muscogee (Creek) Nation's request for Oral Argument is denied. Pursuant to Rule 3.15, Rules of the Oklahoma Court of Criminal Appeals, Title 22, Ch. 18, App. (2024), the mandate is ordered issued upon delivery and filing of this decision.

OPINION BY: HUDSON, J.
ROWLAND, P. J.: Concur
MUSSEMAN, V. P. J.: Specially Concur
LUMPKIN, J.: Specially Concur
LEWIS, J.: Concur in Part / Dissent in Part

MUSSEMAN, V. P. J., SPECIALLY CONCURRING:

¶ 1 While my analysis and ultimate holding is not foreclosed by the Court's Opinion today, it is not clear that it necessarily embraces my reasoning in reaching its narrower conclusion. As a result, I write separately to both rebut the dissent's assertion that *Castro-Huerta* does not apply to Indian defendants in Indian country; and demonstrate in detail my rationale for the holding I would reach in this case:

> As a result of *Bracker* balancing, Oklahoma has concurrent criminal jurisdiction in Indian country over non-member Indian defendants accused of committing non-major crimes.

¶ 2 In this Court's first criminal *Bracker* balancing, it is my goal to provide sufficient analytical framework to assist district courts in deploying this balancing test as these issues arise. Because of the Court's narrow holding and limited analysis today, it is my belief that unique permutations will emerge from district courts across Oklahoma with disparate results for communities.

¶ 3 However, I first want to emphasize the narrow extent in which I diverge from the Court regarding preemption of State jurisdiction in Indian country over Indian defendants. I fully join the Court's foundational holding:

> One, there are two forms of preemption that we must address in Indian country:
>
> > (i) by federal law under ordinary principles of federal preemption, and

> (ii) when the exercise of State jurisdiction would unlawfully infringe on tribal self-government.
>
> *Castro-Huerta*, 597 U. S. at 638, 142 S. Ct. 2486.
>
> Two, there is no traditional preemption of State jurisdiction over an Indian committing a non-major crime in Indian country. *Id*. at 639 n.2, 641–42, 142 S. Ct. 2486.
>
> Three, the Court must then apply *Bracker* balancing to determine if State jurisdiction would unlawfully infringe on tribal self-government. *Id*. at 639 n.2, 649, 142 S. Ct. 2486.

¶ 4 Additionally, I join in full the unanimous resolution regarding the sufficiency of the State's notice, the nature of the trial court's order, the timeliness of the State's appeal, and the City's Curtis Act argument.

I.

¶ 5 Turning first to the dissent, it rejects entirely the Court's foundational analysis regarding preemption before even considering *Bracker* balancing. Instead, the dissent retorts that the State requires express permission from Congress to exercise criminal jurisdiction over any Indian in Indian country. *Contra Castro-Huerta*, 597 U. S. at 653, 142 S. Ct. 2486 ("States do not need a permission slip from Congress to exercise their sovereign authority . . . [T]he default is that States have criminal jurisdiction in Indian country unless that jurisdiction is preempted.") (emphasis in original). To do so, the dissent must disregard the plain holding of *Castro-Huerta* and instead rely largely on Justice Gorsuch's dissent and a string of citations to U. S.

Supreme Court precedent that ultimately undermine its own argument.

¶ 6 The dissent would ignore the questions of ordinary federal preemption and judicial preemption under *Bracker* set out in *Castro-Huerta* and would instead follow Justice Gorsuch's dissent that States lack jurisdiction over Indians in Indian country. However, "[c]omments in the dissenting opinion suggesting anything otherwise 'are just that: comments in a dissenting opinion.'" *Id*. at 656, 142 S. Ct. 2486 (quoting *Railroad Retirement Bd*. v. *Fritz*, 449 U. S. 166, 177, n. 10, 101 S. Ct. 453, 66 L. Ed. 2d 368 (1980)). The U. S. Supreme Court plainly set out its holding to the contrary in *Castro-Huerta*:

> To be clear, the Court today holds that Indian country within a State's territory is part of a State, not separate from a State. Therefore, a State has jurisdiction to prosecute crimes committed in Indian country unless state jurisdiction is preempted.

Id. at 655, 142 S. Ct. 2486. It is this holding that the Court is bound by and employs today.

¶ 7 Similarly, the dissent's string of U. S. Supreme Court precedent provides little to no support while three serve to reinforce a strong jurisdictional distinction between member and non-member Indians--a salient point in the Court's analysis, and a critical one in my own. *Fisher* is a child adoption case concerning a member Indian in Indian country in which the U. S. Supreme Court held that the tribal court had jurisdiction to the exclusion of State courts. *Fisher* v. *District Court*, 424 U. S. 382, 387, 389, 96 S. Ct. 943, 47 L. Ed. 2d 106 (1976). *DeCoteau* is an Indian

country case deciding whether the Lake Traverse Indian Reservation in South Dakota was disestablished, but notably also concerned member Indians. *DeCoteau* v. *District County Court*, 420 U. S. 425, 426–27, 95 S. Ct. 1082, 43 L. Ed. 2d 300 (1975). In *McClanahan*, the U. S. Supreme Court found the State lacked the authority to tax member Indians living and working within Indian country. *McClanahan* v. *Arizona State Tax Commission*, 411 U. S. 164, 165, 172, 181, 93 S. Ct. 1257, 36 L. Ed. 2d 129 (1973) ("The question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them.") (emphasis added).

¶ 8 Each of these cases exemplify the importance of member versus non-member Indian status when deciding preemption of State jurisdiction. This is not only illustrated by the U. S. Supreme Court's application of *McClanahan* in *Washington* v. *Confederated Tribes of Colville Indian Reservation*, it is highlighted as the deciding point. The U. S. Supreme Court held "[n]or would the imposition of [the State's] tax on these purchasers contravene the principle of tribal self-government, for the simple reason that nonmembers are not constituents of the governing Tribe. For most practical purposes those Indians stand on the same footing as non-Indians resident on the reservation." *Washington* v. *Confederated Tribes* iof *Colville Indian Rsrv*., 447 U. S. 134, 161, 100 S. Ct. 2069, 65 L. Ed. 2d 10 (1980).

¶ 9 The remaining three U. S. Supreme Court cases cited by the dissent are largely irrelevant to State jurisdiction over Indians. *Williams* concerned tribal jurisdiction over a non-Indian who was required by the Commissioner of Indian Affairs to be licensed to do business with the tribe on the reservation with member Indians. *Williams* v. *Lee*, 358 U. S. 217, 218, 223, 79 S. Ct. 269, 3 L. Ed. 2d 251

(1959). *Pelican* concerned federal criminal jurisdiction over a non-Indian who murdered a member Indian in Indian country that had not been disestablished. *United States* v. *Pelican*, 232 U. S. 442, 444, 450, 34 S. Ct. 396, 58 L. Ed. 676 (1914). *Kagama* recognized the authority of the federal government to legislate and prosecute Indians within a State under an early version of the present-day Major Crimes Act. *United States* v. *Kagama*, 118 U. S. 375, 383–84, 6 S. Ct. 1109, 30 L. Ed. 228 (1886). None of these are relevant to whether a State has concurrent criminal jurisdiction over an Indian in Indian country.

¶ 10 Instead, this Court dutifully applies the binding precedent of *Castro-Huerta*; Oklahoma has criminal jurisdiction in Indian country unless preempted. *Castro-Huerta*, 597 U. S. at 638, 142 S. Ct. 2486. As the Court lays out in detail, no ordinary principle of federal preemption is applicable in this case. The Court then rightly turns to *Bracker* balancing and the final question, does the exercise of State jurisdiction unlawfully infringe on tribal self-government. *Id*.

II.

¶ 11 For reasons analogous to the U. S. Supreme Court's in *Castro-Huerta*, this Court comes to a similar, but narrower, conclusion: Tulsa's prosecution of *O'Brien*, a non-member Indian, for misdemeanor traffic offenses occurring on the public roads of Tulsa in Indian country does not unlawfully infringe on the Muscogee (Creek) Nation's self-government. However, it is at this point in the analysis that I must explain my reasoning and difference in resolution.

A.

¶ 12 First, the Court addresses the Muscogee (Creek) Nation's interest in self-government. It finds that the State's jurisdiction is concurrent and would not displace, nor diminish, the Tribe's prosecutorial authority to try Indians for violations of tribal law. Rather, the State's prosecution would bolster the Tribe's strong interest in public safety for its citizens. This is analogous to the rationale in *Castro-Huerta* for why concurrent State jurisdiction did not harm the federal interest in Indian country. *Id*. at 650–51, 142 S. Ct. 2486.

¶ 13 Ultimately, the Court holds the State's prosecution of non-member Indians under these circumstances does not affect the Muscogee (Creek) Nation's authority to regulate its own citizens for violation of its laws. In fact, such a prosecution would not involve prosecuting any citizen of the Muscogee (Creek) Nation.

¶ 14 At first glance, the change from non-Indian to non-member Indian may appear materially different from *Castro-Huerta* since the tribe lacked prosecutorial authority over the non-Indian defendant in that case. *Id*. at 650, 142 S. Ct. 2486; *see also Oliphant* v. *Suquamish Tribe*, 435 U. S. 191, 195, 98 S. Ct. 1011, 55 L. Ed. 2d 209 (1978). However, when analyzing U. S. Supreme Court precedent regarding the distinction between member and non-member Indians, it becomes clear that prosecution of non-member Indians does not implicate the *self* in tribal self-government. Non-member Indians are, for criminal jurisdiction purposes, similarly situated to non-Indians. Indian tribes are separate and distinct sovereigns, not a fungible amalgamation of Native American peoples.

¶ 15 When we look to criminal jurisdiction in Indian country, the U. S. Supreme Court precedent, as detailed

below, has taken strong categorical approaches along three axes:

1) location is, or is not, Indian country;
2) Indian/non-Indian status of parties; and
3) member status of Indian parties.

These three considerations consistently define the extent of state, tribal, and federal interests.

¶ 16 The first of these, Indian country status, has been a mainstay of the jurisprudence and warrants little discussion beyond addressing its significance. The federal government has created Indian country under its plenary authority over tribal nations. Regardless of Indian status of a party, the State has criminal jurisdiction outside Indian country. *Hagen* v. *Utah*, 510 U. S.399, 421–22, 114 S. Ct. 958, 127 L. Ed. 2d 252 (1994) (after concluding petitioner was an Indian, the U. S. Supreme Court found the location of the crime was "not in Indian country and the Utah courts properly exercised criminal jurisdiction over him."); *Organized Village of Kake* v. *Egan*, 369 U. S.60, 75, 82 S. Ct. 562, 7 L. Ed. 2d 573 (1962) ("It has never been doubted that States may punish crimes committed by Indians, even reservation Indians, outside of Indian country."). Ultimately, the remaining questions are universally irrelevant if the location is not first fixed inside Indian country.

¶ 17 The second consideration, Indian/non-Indian status, informs broad classifications of jurisdiction. For example, despite being within Indian country, the State has criminal jurisdiction over non-Indian defendants. *Castro-Huerta*, 597 U. S. at 655, 142 S. Ct. 2486 (states have concurrent jurisdiction with federal government over non-Indian that commits a crime against an Indian victim in

Indian country); *United States* v. *McBratney*, 104 U. S. 621, 622–24, 26 L. Ed. 869 (1881) (enabling act states has jurisdiction over non-Indian defendants committing crimes against non-Indian victims in Indian country); *People of State* of *New York ex rel*. *Ray* v. *Martin*, 326 U. S. 496, 499, 66 S. Ct. 307, 90 L. Ed. 261 (1946) (original states without enabling act also have jurisdiction over non-Indian defendants committing crimes against non-Indian victims in Indian country).

¶ 18 Conversely, the tribes have no criminal jurisdiction over non-Indians without Congressional grant or recognition of authority. *Oliphant*, 435 U. S. at 212, 98 S. Ct. 1011 (Indian tribal courts do not have criminal jurisdiction to try and punish non-Indian defendants absent Congressional grant or recognition of authority); 25 U. S. C. § 1304(b) and (c) (recognizing tribal concurrent jurisdiction with federal and state governments over non-Indians committing covered crimes, with certain exceptions, in Indian country).

¶ 19 The third consideration in criminal jurisdiction cases is tribal membership. More specifically, whether the tribal membership of the defendant matches the tribal affiliation of the Indian country where the crime was committed.

¶ 20 The U. S. Supreme Court held in *Duro* that tribes lacked jurisdiction over non-member Indians. *Duro* v. *Reina*, 495 U. S. 676, 688, 110 S. Ct. 2053, 109 L. Ed. 2d 693 (1990) (superseded by statute, 25 U. S. C. § 1301(2) as recognized in *United States* v. *Lara*, 541 U. S. 193, 124 S. Ct. 1628, 158 L. Ed. 2d 420 (2004)). Specifically,

> [i]n the area of criminal enforcement, however, tribal power does not extend beyond internal relations among members. Petitioner is not a member of the Pima-Maricopa Tribe, and is not now eligible to become one. Neither he nor other members of his Tribe may vote, hold office, or serve on a jury under Pima-Maricopa authority. Cf. *Oliphant*, 435 U. S. at 194, and n. 4, 98 S. Ct. 1011 . . . . For purposes of criminal jurisdiction, petitioner's relations with this Tribe are the same as the non-Indian's in *Oliphant*. We hold that the Tribe's powers over him are subject to the same limitations.

Id.

¶ 21 While Congress did pass legislation to recognize tribal authority over all Indians in 25 U. S. C. § 1301(2) (i.e. the so-called *Duro* fix statute), this legislation did nothing to eliminate the member versus non-member distinction, nor did it impact the underlying rationale of the U. S. Supreme Court in *Duro* going forward. Rather, the U. S. Supreme Court has continued to use *Duro*'s rationale even after the superseding legislation, clearly indicating Congress merely changed the outcome as it applied to tribal jurisdiction over non-member Indians. However, the underlying rationale remains applicable. As recently as 2021, the U. S. Supreme Court used *Duro* to repeat their same concern regarding non-member Indians being subjected to laws that they had no say in creating – outside the protections and constraints of the U. S. Constitution. *United States* v. *Cooley*, 593 U. S. 345, 352–53, 141 S. Ct. 1638, 210 L. Ed. 2d 1 (2021). The U. S. Supreme Court would go on to equate non-member Indians to non-Indians for criminal jurisdiction purposes. *Id*.

¶ 22 Conversely, Indians became citizens of the United States and held voting rights in Oklahoma beginning in 1924. 8 U. S. C. § 1401(b) ("The following shall be nationals and citizens of the United States at birth: . . . (b) a person born in the United States to a member of an Indian . . . tribe . . . ."); Okla. Const. art. III, § 1 ("Subject to such exceptions as the Legislature may prescribe, all citizens of the United States, over the age of eighteen (18) years, who are bona fide residents of this state, are qualified electors of this state."). Even before then, Indians were also required to both elect and serve as delegates to form a constitutional convention for Oklahoma to become a state. Oklahoma Enabling Act Sec. 2, Chap. 3335, p. 267–68; *See also Wah-tsa-e-o-she* v. *Webster*, 1918 OK 212, 69 Okla. 257, 172 P. 78, 79 ("In the formation of the state it was one of [the] requirements of Congress that these Indians should be allowed to participate in the direction of the affairs of the state and in the formation of the government thereof, also in framing of its Constitution, the fundamental laws of the state.").

¶ 23 The present case is demonstrative of the U. S. Supreme Court's rationale. Appellee – a non-member Indian – is a resident of Tulsa, Oklahoma, with a say in the laws applicable to him at both the municipal and State level. Conversely, there is no evidence that Appellee will ever qualify for citizenship, or be able to participate in tribal government, for the Muscogee (Creek) Nation to any extent to make him a federally recognized member of the tribe. See *Barkus* v. *State*, 2024 OK CR 25, 556 P. 3d 633. Moreover, even if Appellee were not a resident of either Tulsa or Oklahoma, he would be eligible by merely changing his residency. However, he would still be in a court within the framework of the U. S. Constitution and bound by it. The same cannot be said of tribal court where the

defendant is a non-member Indian. *Duro*, 495 U. S. at 693, 110 S. Ct. 2053. ("It is significant that the Bill of Rights does not apply to Indian Tribal governments.... The Indian Civil Rights Act of 1968 provides some statutory guarantees of fair procedure, but these guarantees are not equivalent to their constitutional counterparts.").

¶ 24 While I acknowledge that tribes have since been recognized by Congress to have prosecutorial authority over non-member Indians, and even non-Indians, the U. S. Supreme Court's reasoning still demonstrates such powers are not core to tribal self-government. This strongly demonstrates that a non-member Indian does not trigger the core issue *Bracker* balancing seeks to protect in criminal cases: whether "the exercise of state jurisdiction would unlawfully infringe upon tribal self-government." *Castro-Huerta*, 597 U. S. at 649, 142 S. Ct. 2486. Or put another way, "whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them." *McClanahan*, 411 U. S. at 172, 93 S. Ct. 1257 (quoting *Williams* v. *Lee*, 358 U. S. 217, 219–20, 79 S. Ct. 269, 3 L. Ed. 2d 251 (1959)).

¶ 25 Undeniably, State prosecution does not infringe on the Muscogee (Creek) Nation's ability to make their own laws and to be ruled by them because the Appellee, a non-member Indian, is not a part of the law-making process, nor can he be. Simply stated, a non-member Indian is, for criminal jurisdiction purposes, similarly situated to a non-Indian. Duro, 495 U. S. at 688, 110 S. Ct. 2053 ("For purposes of criminal jurisdiction, [as a non-member Indian,] petitioner's relations with this Tribe are the same as the non-Indian's in Oliphant.").

¶ 26 Ultimately, just as tribes lack criminal jurisdiction over non-Indians absent Congressional approval, so too do tribes lack criminal jurisdiction over non-member Indians absent the same Congressional approval. That targeted Congressional approval came with the Violence Against Women Act for tribal prosecution of non-Indians, and the Duro Fix for tribal prosecution of non-member Indians. Compare Oliphant, 435 U. S. 191, 98 S. Ct. 1011 with Violence Against Women Act, 25 U. S.C. § 1304(b) and (c) and Duro, 495 U. S. 676, 110 S. Ct. 2053 with Duro Fix, 25 U. S. C. § 1301(2). Precisely as described by the U. S. Supreme Court, absent Congressional action, non-Indians and non-member Indians have the same relationship with the tribe, and as such are the same for criminal jurisdiction purposes. Neither status, non-Indian nor non-member Indian, implicates tribal self-government.

¶ 27 As a result, the tribal interest identified in *Castro-Huerta* is largely the same as the one this Court identifies today. Therefore, just as concurrent State jurisdiction over a non-Indian in *Castro-Huerta* did not unlawfully infringe on tribal self-government, neither does concurrent State jurisdiction over a non-member Indian unlawfully infringe on the Muscogee (Creek) Nation's interest in self-government.

B.

¶ 28 Second, concurrent State jurisdiction does not harm the federal interest in ensuring public safety and criminal justice within Indian country. As this Court holds, federal jurisdiction over non-major crimes would be concurrent with State jurisdiction. State prosecution would supplement, rather than supplant, federal authority in Indian country. Again, while the focus has switched from Indian victims to non-member Indian defendants, much of

the U. S. Supreme Court's rationale in *Castro-Huerta*. *Id*. at 650-51, 142 S. Ct. 2486 ("State prosecution would supplement federal authority, not supplant federal authority."). And federal interest in ensuring public safety within Indian country is strongly tied to its interest in protecting Indian victims as identified in *Castro-Huerta*. This is evidenced by both the General Crimes Act and Major Crimes Act, each of which grant the federal government prosecutorial authority over Indians committing crimes within Indian country. See 18 U. S. C. §§ 1152 and 1153.

¶ 29 Moreover, concurrent State criminal jurisdiction is not contradictory to federal law and policy, rather it is consistent with and supports it. As both the U. S. Supreme Court held in *Castro-Huerta* and this Court holds today, no federal law acts to preempt State criminal jurisdiction in Indian country over non-major crimes. Even when Congress enacted the Duro fix to recognize tribal jurisdiction over non-member Indians, the U. S. Supreme Court recognized it did so without affecting State jurisdiction. Lara, 541 U. S. at 205, 124 S. Ct. 1628 ("[T]his case involves no interference with the power or authority of any State."); see also 25 U. S. C. § 1301(2). Perhaps most tellingly is the federal government's relatively recent extension of criminal jurisdiction to tribes over covered criminal conduct by all persons with certain exceptions. 25 U. S. C. § 1304(b). This extended jurisdiction embraces concurrent federal and State jurisdiction. 25 U. S. C. § 1304(b)(2).

¶ 30 Finally, unlike the federal interest in the White Mountain Apache Tribe's logging and hauling operations, described by the U. S. Supreme Court in the Bracker case as comprehensive with day-to-day supervision by the Bureau of Indian Affairs, the same cannot be said regarding criminal jurisdiction in Indian country. *Bracker*, 448 U. S.

at 145, 100 S. Ct. 2578; see also *Ramah Navajo School Bd*., *Inc*. v. *Bureau of Revenue of New Mexico*, 458 U. S. 832, 843, 102 S. Ct. 3394, 73 L. Ed. 2d 1174 (1982). To the contrary, State criminal jurisdiction in Indian country serves as the default assumption. *Castro-Huerta*, 597 U. S. at 653, 142 S. Ct. 2486 ("[T]he default is that States have criminal jurisdiction in Indian country unless that jurisdiction is preempted."); see also *McBratney*, 104 U. S. at 622-24; *Martin*, 326 U. S. at 500–01, 66 S. Ct. 307; *Oliphant*, 435 U. S. at 195, 98 S. Ct. 1011.

¶ 31 All of this is consistent with the U. S. Supreme Court's finding in *Castro-Huerta* which recognized concurrent State jurisdiction in Indian country could further tribal and federal interests in protecting all people, Indian and non-Indian, from crime. As a result, concurrent State criminal jurisdiction over non-member Indians in Indian country would not unlawfully infringe on tribal self-government.

C.

¶ 32 Third, the State's interest is identical to the State's interest in *Castro-Huerta*, namely Oklahoma's police power. "[T]he State has a strong sovereign interest in ensuring public safety and criminal justice within its territory . . . . The State also has a strong interest in ensuring that criminal offenders ... are appropriately punished and do not harm others in the State." *Castro-Huerta*, 597 U. S. at 651, 142 S. Ct. 2486. The Court today seems to find the same interest, noting the reality of the State's interest in exercising its police power on public roadways to protect other motorists.

¶ 33 However, I would hold the State's interest in exercising its police power applies equally across all its

territory within its borders for the protection of all citizens, regardless of their Indian status. To the extent that courts may interpret today's decision to recognize a variable evaluation of the State's interest based on location and who holds primary law enforcement responsibilities, that would be a mistake and would serve only to sow unending confusion. While I do not believe the Court embraces this outcome today, I do believe it fails to do enough to foreclose this dangerous rationale. Instead, the Court does little to provide lower courts the appropriate tools to engage in *Bracker* balancing in the cases to come by leaving the State's interest poorly defined and nebulous.

¶ 34 As such, I would not relegate the State's interest to a heat map of primary law enforcement responsibilities, potentially subject to change on the malleability of superficial line drawing. Rather, I would recognize the true State interest: full exercise of its police power, inherent and central to every sovereign State.

D.

¶ 35 Fourth and finally, we must evaluate the interests identified to answer the ultimate question posed by *Bracker* balancing: whether the exercise of State authority unlawfully interferes with tribal self-government. However, I believe additional context is necessary before we answer this question. After all, the *Bracker* "preemption test is a flexible one sensitive to the particular state, federal, and tribal interests involved." *Cotton Petroleum Corp*. v. *New Mexico*, 490 U. S. 163, 184, 109 S. Ct. 1698, 104 L. Ed. 2d 209 (1989) (citing *Ramah Navajo School Bd*., 458 U. S. at 838, 102 S. Ct. 3394; *Bracker*, 448 U. S. at 145, 100 S. Ct. 2578).

¶ 36 Oklahoma's exercise of criminal jurisdiction in Indian country for over a century warranted neither Congressional correction nor tribal objection. *Castro-Huerta*, 597 U. S. at 647, 142 S. Ct. 2486 (citing *McGirt* v. *Oklahoma*, 591 U. S. 894, 967-68, 140 S. Ct. 2452, 207 L. Ed. 2d 985 (2020) (Roberts, C.J., dissenting)). This unique backdrop in Oklahoma serves to inform *Bracker* balancing, and while I do not believe it is dispositive, it certainly informs our analysis.

¶ 37 Returning to the formation of the *Bracker* balancing question, while the Court asks and answers a narrow version of this question specific to Tulsa's concurrent jurisdiction over misdemeanor traffic offenses on public roadways against the Muscogee (Creek) Nation's self-government, my examination yields a different question, and thus a different answer.

¶ 38 Based on my preceding analysis, I would ask the following:

Does the State's exercise of concurrent criminal jurisdiction over non-member Indians in Indian country unlawfully infringe on tribal self-government?

¶ 39 Considering each of the three interests in answering the *Bracker* balancing question, the result is clear: a resounding no, just as in *Castro-Huerta*. Ultimately, State prosecution of non-member Indians in Indian country, as part of its concurrent jurisdiction with federal and tribal law enforcement, would enhance the interests of each sovereign responsible for public safety within Indian country. *Bracker* balancing will not be different in any application of concurrent State criminal jurisdiction over a non-member Indian committing a non-major crime in Indian

country because State jurisdiction over a non-member Indian does not unlawfully interfere with tribal self-government. *Duro*, 495 U. S. at 688, 110 S. Ct. 2053 ("For purposes of criminal jurisdiction, [as a non-member Indian,] petitioner's relations with this Tribe are the same as the non-Indian's in *Oliphant*."). "[N]onmembers, who share relevant jurisdictional characteristics of non-Indians, should share the same jurisdictional status." *Duro*, 495 U. S. at 696, 110 S. Ct. 2053 (emphasis added).

¶ 40 Although Congress has since recognized tribal authority over non-member Indians, state authority over non-Indians and non-member Indians implicates the same interests in tribal self-government: "A tribe's power to prescribe the conduct of tribal members has never been doubted, and our cases establish that 'absent governing Acts of Congress,' a State may not act in a manner that 'infringed on the right of reservation Indians to make their own laws and be ruled by them.' " *New Mexico* v. *Mescalero Apache Tribe*, 462 U. S. 324, 332, 103 S. Ct. 2378, 76 L. Ed. 2d 611 (1983) (quoting *McClanahan*, 411 U. S. at 171-72, 93 S. Ct. 1257) (emphasis added). Ultimately, a non-member Indian, just as a non-Indian, does not implicate the self in self-government for criminal jurisdiction purposes.

¶ 41 It is here that my divergence from the Court comes into focus. That difference has less to do with the analysis and more to do with our views on judicial restraint. The Court has prioritized resolving the narrow case before us and thus a limited and piecemeal application of *Bracker* balancing. Because of this application, the Court narrowly holds that Tulsa is not barred from prosecuting misdemeanor traffic crimes committed by non-member Indians on the Muscogee (Creek) reservation

when those offenses occur on public roads and streets within Tulsa's city limits. This approach improvidently leaves lower courts, and this Court, to decide case-by-case vital issues of public safety, determining piecemeal which Oklahoma citizens enjoy the protection of their sovereign and leaving each of the three interested governments (tribal, federal, and State) to guess where their responsibilities lie.

¶ 42 Instead, my view on judicial restraint in this area of law calls for us to widen the scope and recognize that a defendant's non-member Indian status so dominates the *Bracker* balancing analysis that it necessarily controls the result. *Duro*, 495 U. S. at 696, 110 S. Ct. 2053 ("[N]onmembers, who share relevant jurisdictional characteristics of non-Indians, should share the same jurisdictional status."). Doing so recognizes that *Bracker* balancing is not a typical statutory preemption under the Supremacy Clause, but rather a judicially created--common law--preemption, unique to Indian country. It is an awesome power reserved to a court to interpret the interests of tribal, federal, and state sovereigns, absent controlling language from Congress, to preempt state authority. In this case, it is the power to decide when and where Oklahoma can and cannot act like a state; when and where Oklahoma can exercise its core police power central to its sovereignty.

¶ 43 My views on judicial restraint and the judiciary's role in *Bracker* balancing preemption compels me to limit the use of this power by asking a broader question where possible, thus arriving at a more comprehensive conclusion. By doing so, I would answer important and pressing questions about each of the three sovereigns' responsibilities in Indian country; avoid holding the State's police power hostage to a myriad of interpretations below; and

limit the frequency courts use this power, properly reserving it for the rare occasions state jurisdiction may actually infringe on tribal self-government.

¶ 44 However, while the Court does not adopt my conclusion, the analysis that leads to it is not excluded from the Court's holding today. Oklahoma, the tribes, and the federal government must instead wait for the next case--or next several cases--to learn the balance of criminal jurisdiction in Oklahoma.

LUMPKIN, J., SPECIALLY CONCURRING:

¶ 1 I concur in the Court's holding regarding the Curtis Act and *Hooper* v. *City of Tulsa*, but respectfully dissent from the remainder of the opinion for reasons stated in my separate opinion in *City of Tulsa* v. *O'Brien*. The Court should reverse this conviction of an Indian defendant in an Oklahoma municipal court for a crime committed within the Muskogee [*sic*] Creek Reservation. Congress has never conferred criminal jurisdiction on the State or its municipal subdivisions to prosecute Indians for crimes committed in Indian Country.

¶ 2 The term, "tribal sovereignty," has for too long been used in an overly broad manner. If applied under the interpretation urged by the Appellee and Amicus, Oklahoma could functionally cease to be a State. But as the Supreme Court set out in *Castro-Huerta*, a tribe may have qualified sovereignty over tribal matters within its designated reservation, but the reservation is part of the State, not vice versa. This is a limited sovereignty as allowed by Congress and as interpreted by the Supreme Court, with the tribes still bound by federal and state law. Cf. *Chickasaw Nation* v. *United States*, 534 U. S. 84, 87-88, 122 S. Ct. 528, 151 L. Ed. 2d 474 (2001) (holding Indian tribes, unlike states, are not exempt from paying federal taxes on gaming operations). As Chief Justice Marshall said in *Cherokee Nation* v. *Georgia*, 30 U. S. 1, 5 Pet. 1, 8 L. Ed. 25 (1831), to-wit:

> The Indian territory is admitted to compose a part of the United States. In all our maps, geographical treatises, histories, and laws, it is so considered. In all our intercourse with foreign nations, in our commercial regulations, in any attempt at

intercourse between Indians and foreign nations, they are considered as within the jurisdictional limits of the United States, subject to many of those restraints which are imposed upon our own citizens. They acknowledge themselves in their treaties to be under the protection of the United States; they admit that the United States shall have the sole and exclusive right of regulating the trade with them, and managing all their affairs as they think proper; and the Cherokees in particular were allowed by the treaty of Hopewell, which preceded the constitution, 'to send a deputy of their choice, whenever they think fit, to congress.' Treaties were made with some tribes by the state of New York, under a then unsettled construction of the confederation, by which they ceded all their lands to that state, taking back a limited grant to themselves, in which they admit their dependence.

Though the Indians are acknowledged to have an unquestionable, and, heretofore, unquestioned right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government; yet it may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupilage. Their

> relation to the United States resembles that of a ward to his guardian.
>
> *19 They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the president as their great father. They and their country are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United States, that any attempt to acquire their lands, or to form a political connexion with them, would be considered by all as an invasion of our territory, and an act of hostility.

Id., 30 U. S. at 17-18.

¶ 3 Therefore, an analysis must be made to determine what, if any, interference with internal tribal matters occurs when a city located on Indian land charges an Indian with a misdemeanor traffic ticket. As I have said before it would be hard to imagine any action by a state entity in enforcing its traffic safety laws on state or municipal roads interfering with internal tribal matters.

¶ 4 This Court answered the question of subject matter jurisdiction in our recent case of *Deo* v. *Parish*, 2023 OK CR 20, 541 P.3d 833. Therefore, at this juncture the only question is whether the Federal Government has preempted this area of the law and the opinion correctly points out it has not. It is only through conducting an analysis pursuant to *White Mountain Apache Tribe* v. *Bracker*, 448 U. S. 136, 144–45, 100 S. Ct. 2578, 65 L. Ed. 2d 665 (1980), that we may determine whether the City of Tulsa's exercise of jurisdiction over a traffic violation infringes

upon tribal sovereignty. We set out the *Bracker* balancing analysis in *Deo*, 2023 OK CR 20, ¶ 13, 541 P.3d at 837, citing *Oklahoma* v. *Castro-Huerta*, 597 U. S. 629, 649–51, 142 S. Ct. 2486, 213 L. Ed. 2d 847 (2022), as follows: "(1) whether the exercise of state jurisdiction would infringe on tribal self-government, (2) whether state prosecution would harm the federal interest in protecting Indians, and (3) the strength of the state's interest in ensuring public safety and criminal justice within its territory."

¶ 5 The opinion conducts this analysis and determines no infringement in any internal tribal matter occurs due to the city's exercise of jurisdiction over the traffic violation. Truly, how could Tulsa's enforcement of traffic laws that protect both Indian and non-Indian harm or detract from any internal tribal matter? Tribal members are citizens not only of their tribe, but also of their state and of the United States. Accordingly, they are obligated to obey the laws of each entity.

¶ 6 This leaves the court with the concept of concurrent jurisdiction. This is nothing new as the states and Federal Government have shared concurrent jurisdiction for decades. They apply it easily, each respecting the other and applying the separate sovereign doctrine as appropriate,1 with each entity prosecuting its respective interest when crimes are committed. If applicable, it would seem no legal preclusion exists to apply that doctrine in cases of this nature and both the tribe, and the State could prosecute an offense which violates each entity's statute.

¶ 7 This opinion only points out what the law is and recognizes the authority of each party under existing law. The Supreme Court in *Castro-Huerta* not only set forth the status of Indian tribes and reservations in Oklahoma, but

also corrected misperceptions of the law in *McGirt* and provided guidance as to the course the State should follow in future cases. So too does this opinion in a very clear, straight-forward manner, and I join in its analysis and holding.

LEWIS, JUDGE, CONCUR IN PART AND DISSENT IN PART:

¶ 1 I concur that the City's telephonic notice of appeal and the nature of the trial court's order authorize the City's appeal; that Appellee's challenge to the trial court's jurisdiction was timely; and that the City's Curtis Act argument is without merit. However, I respectfully dissent to the remainder of the opinion for reasons I have stated before.

¶ 2 Oklahoma has no jurisdiction of crimes committed by Indians in Indian Country unless it is expressly conferred by Congress. See *Fisher* v. *District Court*, 424 U. S. 382, 386, 96 S. Ct. 943, 47 L. Ed. 2d 106 (1976); *DeCoteau* v. *District County Court*, 420 U. S. 425, 427 n.2, 95 S. Ct. 1082, 43 L. Ed. 2d 300 (1975); *McClanahan* v. *Arizona State Tax Commission*, 411 U. S. 164, 170–172, 93 S. Ct. 1257, 36 L. Ed. 2d 129 (1973); *Williams* v. *Lee*, 358 U. S. 217, 220, 79 S. Ct. 269, 3 L. Ed. 2d 251 (1959); *United States* v. *Pelican*, 232 U. S. 442, 449–450, 34 S. Ct. 396, 58 L. Ed. 676 (1914), and *United States* v. *Kagama*, 118 U. S. 375, 383–384, 6 S. Ct. 1109, 30 L. Ed. 228 (1886). No subject matter jurisdiction, no personal jurisdiction, no territorial jurisdiction, no exclusive jurisdiction, no concurrent jurisdiction. No criminal jurisdiction.

¶ 3 Congress has never granted criminal jurisdiction over Indians in Indian Country to the State of Oklahoma. *Ross* v. *Neff*, 905 F. 2d 1349, 1352 (10th Cir. 1990). The Supreme Court cannot create such jurisdiction from a

footnote to *Castro-Huerta*; and this Court cannot conjure it from the application of *Castro-Huerta* and *Bracker* to an Indian defendant's prosecution for offenses in the City of Tulsa, which lies entirely within Indian Country.

¶ 4 This case is not really about complex concepts of subject matter, territorial, or personal jurisdiction; it is about the fact that Indian Country got a whole lot bigger after *McGirt*. "Historically, the conduct of Indians and interests in Indian property within Indian Country have been matters of federal and tribal concern. Outside Indian Country, state jurisdiction has obtained." *Ahboah* v. *Housing Auth*. *of the Kiowa Tribe*, 660 P. 2d 625, 627 (Okla. 1983). And since the time of Indian Removal, courts have broadly adhered to the principle that "[o]nly the Tribe or the federal government could punish crimes by or against tribal members on tribal lands." *Castro-Huerta*, 597 U. S. 629, 657, 142 S. Ct. 2486, 2505, 213 L. Ed. 2d 847 (2022) (Gorsuch, J., dissenting). *Castro-Huerta* diminished that principle only as to non-Indians who commit crimes against tribal members in Indian Country.

¶ 5 Today, without Congressional authorization, this Court authorizes the criminal prosecution of Indian defendants in the municipal court of a state political subdivision that lies entirely within Indian Country. And while many of the Court's essential points about state sovereignty and territorial jurisdiction and pre-emption and the General Crimes Act make some sense in the context of the actual holding in *Castro-Huerta*, these premises are non-sequiturs in the Court's appraisal of the state's jurisdiction to prosecute Indians in Indian Country.

¶ 6 That is to say, it simply does not follow from the territorial or pre-emption premises of *Castro-Huerta* that

Oklahoma's political subdivisions may assume the criminal prosecution of Indians in Indian Country without express Congressional approval. Even the dissent in *Castro-Huerta* acknowledged what the Supreme Court had not done: it had not recognized Oklahoma's jurisdiction to prosecute Indians under Public Law 280; it had not recognized such power as inherent in Oklahoma's sovereignty; and it had not held that Oklahoma statehood conferred sovereign power to try Indians for crimes in Indian Country. *Castro-Huerta*, 597 U. S. at 692–94, 142 S. Ct. 2486 (2022) (Gorsuch, J., dissenting). *Castro-Huerta* had, indeed, left "undisturbed the ancient rule that States cannot prosecute crimes by Native Americans on tribal lands without clear congressional authorization--for that would touch the heart of 'tribal self-government.'" *Id*., 597 U. S. at 693, 142 S. Ct. 2486 (Gorsuch, J., dissenting).

¶ 7 This Court today admits no such constraints on its reading of *Castro-Huerta* and other supposed authorities. It means to touch the heart of tribal self-government if it can, for it reads *Castro-Huerta*, et al., to authorize the City's infringement of perhaps the most central principle of tribal sovereignty: the right of Indians to make and enforce their own laws and remain free from a state's criminal agents, prosecutors, and courts unless expressly approved by Congress. The Court premises that infringement upon a cursory *Bracker* balancing carried off without an adequate evidentiary record concerning the practical impacts of its ruling on tribal sovereignty; indeed, without even the formality of oral argument as requested by the Indian tribes appearing (with no small irony) as amicis curiae.

¶ 8 And the *Bracker* balance being struck here all-too-predictably aggrandizes the state's prerogatives at the tribe's expense: The prosecutions are (for now) only of

non-Muscogee Creek Indians; the Tribe is faulted for failing to identify in its briefs any "specific interests" it wants this Court to weigh; allowing the City to prosecute Indians will advance tribal public safety even over tribal objections; if state prosecutions of non-member Indians on the Muscogee Creek Reservation "poses a problem," Congress can fix it later; the City's prosecution of non-Muscogee Creek Indians in Indian Country advances city, and thus state and federal, public safety interests, and so on.

¶ 9 In sum, the Court today prefers the illusion of jurisdictional complexity to the clear implications of *McGirt* and the longstanding principles of tribal sovereignty. If all of this was the intent of the Supreme Court's second footnote to *Castro-Huerta*, I shall wait to hear them say it. I respectfully dissent.

APPENDIX D: Oklahoma Court of Criminal Appeals, Order Directing Supplemental Briefing,
Stitt v. *City of Tulsa*, September 19, 2023

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

No. M-2022-984

MARVIN KEITH STITT,
Appellant,
v.
CITY OF TULSA,
Appellee.

Filed: September 19, 2023

ORDER DIRECTING SUPPLEMENTAL BRIEFING AND ESTABLISHING DUE DATES

Following a nonjury trial in Tulsa Municipal Court Case No. 7569655, Appellant was convicted of Aggravated Speeding (in violation of Tulsa Municipal Ordinance Title 37 Section 617(C)) and fined $250.00. On April 13, 2023, Appellant filed his brief in chief in this Court. Appellant argues he is entitled to relief pursuant to *McGirt* v. *Oklahoma*, 140 S. Ct. 2452 (2020). On June 12, 2023, Appellee filed its brief with this Court maintaining it has jurisdiction to prosecute Appellant pursuant to Section 14 of the Curtis Act.

On July 10, 2023, Appellee filed a motion to stay appellate proceedings and/ or in the alternative seeking leave to

file a supplemental brief in this matter.[8] The basis for this request is that on June 28, 2023, the Tenth Circuit issued an opinion in *Hooper* v. *City of Tulsa*, —– F. 4th —–, 2023 WL 4220246 (10th Cir. June 28, 2023) which held Appellee does not have jurisdiction in cases such as Appellant's.

Appellee's motion seeking leave to file a supplemental brief is GRANTED.[9] Appellee and Appellant are hereby directed, and the amicus parties are invited, to file supplemental briefs addressing the impact of the *Hooper* decision on this appeal.[10] *See id.* Further, these briefs shall also address the impact of *Castro-Huerta* on the possible preemption of municipal jurisdiction in this case, and whether under *Bracker* the City of Tulsa has concurrent jurisdiction over its municipal offenses. *See Oklahoma* v. *Castro-Huerta,* 142 S. Ct. 2486, 213 L. Ed. 2d 847 (2022); *White Mountain Apache Tribe* v. *Bracker,* 448 U. S. 136 (1980).

The supplemental briefs shall not consist of more than twenty (20) pages and must be filed in this Court within twenty (20) days of this order.

IT IS SO ORDERED.

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[8] On August 18, 2023, Appellee withdrew its motion for a stay of appellate proceedings and reurged its motion for leave to file a supplemental brief.

[9] On July 3, 2023, the amicus parties (the Muscogee (Creek) Nation and Seminole Nation of Oklahoma; and the Cherokee Nation, Chickasaw Nation, and Choctaw Nation of Oklahoma) each filed motions requesting leave to file reply briefs. In light of this order these motions are denied. The Clerk of this Court is directed to return the reply briefs which were inadvertently filed by this Court's Clerk on July 3, 2023, to the amicus parties.

[10] The amicus parties are not required to file supplemental briefs but may do so if they so choose.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT
this 19th day of September, 2023.

SCOTT ROWLAND, Presiding Judge
ROBERT L. HUDSON, Vice Presiding Judge
GARY L. LUMPKIN, Judge
DAVID B. LEWIS, Judge
(concur in part/dissent in part; writing attached)
WILLIAM J. MUSSEMAN, Judge
(concur in part/dissent in part with separate writing)

ATTEST:
/s/ JOHN D. HADDEN
Clerk

APPENDIX E: Supreme Court of the United States,
Statement of J. Kavanaugh,
City of Tulsa, Okla. v. Hooper, August 4, 2023

IN THE SUPREME COURT
OF THE UNITED STATES

No. 23A73

CITY OF TULSA, OKLAHOMA

v.

JUSTIN HOOPER

Filed: August 4, 2023

The application for stay of the mandate presented to Justice GORSUCH and by him referred to the Court is denied. The order heretofore entered by Justice GORSUCH is vacated.

Statement of Justice KAVANAUGH, with whom Justice ALITO joins, respecting the denial of the application for stay.

The City of Tulsa's application for a stay raises an important question: whether the City may enforce its municipal laws against American Indians in Tulsa. For example, may Indians in Tulsa violate the City's traffic safety laws without enforcement by the City?

The application, however, arises in an interlocutory posture. The District Court granted the City's motion to dismiss on the ground that the Curtis Act of 1898, see ch.

517, 30 Stat. 495, gives the City jurisdiction over municipal violations committed by all persons, including Indians. But the Court of Appeals for the Tenth Circuit reversed, holding that the Curtis Act confers no such jurisdiction. The Court of Appeals then remanded the case to the District Court for further proceedings.

Importantly, the Court of Appeals declined for now to reach an additional argument raised by the State of Oklahoma as amicus curiae: that the City may exercise jurisdiction under the reasoning in Oklahoma v. Castro-Huerta, 597 U. S. ––––, 142 S.Ct. 2486, 213 L.Ed.2d 847 (2022). On remand in the District Court, the City may presumably raise that argument. Moreover, as I understand it, nothing in the decision of the Court of Appeals prohibits the City from continuing to enforce its municipal laws against all persons, including Indians, as the litigation progresses

MUSSEMAN, J., CONCURRING IN PART / DISSENTING IN PART:

I concur in today's order insofar as it grants supplemental briefing regarding *Hooper* v. *City of Tulsa*, —– F. 4th —–, 2023 WL 4220246 (10th Cir. June 28, 2023). While I agree the potential impact of *Oklahoma* v. *Castro-Huerta*, 142 S. Ct. 2486 (2022), is highly pertinent, the parties have elected not to present the argument to this Court. As a result, I dissent to the extent this order directs briefing beyond that requested.

LEWIS, JUDGE, CONCUR IN PART AND DISSENT IN PART:

I agree this case should be further briefed on the impact of *Hooper* v. *City of Tulsa*. I respectfully dissent from our sua sponte directive to brief the impact of *Castro-Huerta* and *Bracker*. Neither of those cases provide credible authority for the State or this political subdivision to assert jurisdiction over crimes committed by Indians in Indian Country. For those with ears to hear, "it's long since settled that a state and its subdivisions generally lack authority to prosecute Indians for criminal offenses arising in Indian country." *Ute Indian Tribe* v. *Utah* (*Ute* VI), 790 F. 3d 1000, 1006 (10th Cir. 2015). Congress clearly granted general criminal jurisdiction to some states over Indian Country within their borders, but not Oklahoma. *Ross* v. *Neff*, 905 F. 2d 1349, 1352 (10th Cir. 1990). "If there has been no express delegation of jurisdiction to the state, *a fortiori*, there has been no grant of local jurisdiction." *Id*. Soliciting further briefs to question such firmly established principles of tribal sovereignty is a waste of counsel's and the Court's time.

APPENDIX F: Oklahoma Supreme Court, Order,
Stitt v. *McCune,* August 22, 2022

IN THE SUPREME COURT
OF THE STATE OF OKLAHOMA

No. 120,167

MARVIN KEITH STITT,
Petitioner,
v.
MITCHELL MARION MCCUNE,
CITY OF TULSA,
Respondents.

Filed: August 22, 2022

ORDER

This Cause arises from an individual criminal proceeding pending in the Municipal Criminal Court of the City of Tulsa, Case No. 7569655, Tulsa County.

In *Dutton* v. *City of Midwest City,* 2015 OK 51, ¶ 19, 353 P. 3d 532[,] this Court noted that the prosecution in a municipal court for a violation of a city ordinance involves a criminal matter. This Court also observed that 11 O. S. 2021, § 27–131 does not grant the Supreme Court superintending control to adjudicate individual proceedings in municipal court determining criminal liability. *Id*. at ¶ 28. *See also City of Elk City* v. *Taylor,* 2007 OK CR 15, ¶ 9, 157 P. 3d 1152 ("prosecution in a municipal court for the violation of a city ordinance is a criminal matter as a

finding of guilt carries with it criminal penalties, i.e., incarceration or fines or both").

Accordingly, this Cause is transferred to the docket of the Oklahoma Court of Criminal Appeals. Okla. Const. Art. VII,§ 4.

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE THIS 22ND DAY OF AUGUST, 2022.

/s/ Richard Darby
CHIEF JUSTICE

Darby, C. J., Kane, V. C. J., Kauger, Edmondson, Combs, Gurich, Rowe and Kuehn, JJ., concur.

Winchester, J., dissents.

APPENDIX G: Oklahoma Court of Criminal Appeals, Order Declining Jurisdiction, *Stitt* v. *McCune*, September 2, 2022

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

No. PR-2022-722
No. 120,167

MARVIN KEITH STITT,
Petitioner,
v.
MITCHELL MARION MCCUNE,
CITY OF TULSA,
Respondents.

Filed: September 2, 2022

ORDER DECLINING JURISDICTION

Petitioner's request for extraordinary relief was denied by the Municipal Court of the City of Tulsa in an order filed June 16, 2022. Petitioner's request for extraordinary relief filed with this Court was due for filing with this Court on or before July 17, 2022 but was not filed until August 12, 2022. Petitioner failed to file the request for extraordinary relief with the Clerk of this Court within thirty (30) days from the filing date of the Municipal Court's order as required by Rule 10.1(C), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2022). Petitioner's request was not timely filed. The Court DECLINES jurisdiction and DISMISSES this matter.

CONCUR: Rowland, P. J.; Hudson, V. P. J.; Lumpkin, J.; Lewis, J.; Musseman, J.

APPENDIX H: Tulsa Municipal Criminal Court, Order Denying Defendant's Second Motion to Dismiss, *City of Tulsa* v. *Stitt*, June 16, 2022

IN THE MUNICIPAL CRIMINAL COURT
OF THE CITY OF TULSA

No. 7569655

CITY OF TULSA,
Plaintiff,
v.
MARVIN KEITH STITT,
Defendant.

Filed: June 16, 2022

ORDER DENYING DEFENDANT'S SECOND MOTION TO DISMISS

Before the Court is Defendant's Second Motion to Dismiss and Brief in Support and Request for a Court Order with Specific Findings (hereinafter "Motion") filed on May 23, 2022. The City of Tulsa filed its Motion to Strike or in the Alternative, Response to Defendant's Second Motion to Dismiss and Brief in Support on June 3, 2022. On June 10, 2022, Defendant Surreply and Notification to Plaintiff that Legal Authority Exists in the Controlling Jurisdiction Directly Adverse to Position Claimed by Its Attorneys Re: § 14 of the Act of June 28,1898. On June 14, 2022, City of Tulsa filed its Motion to Strike Defendant's Improper Surreply, or in the Alternative to Covert the 'Surreply' to a Third Motion to Dismiss and City's Request for More Time to Respond to Said Document and to Continue the Hearing

on the Second Motion to Dismiss. On June 15, 2022, Defendant filed his Corrected Surreply and Notification to Plaintiff that Legal Authority Exists in the Controlling Jurisdiction Directly Adverse to Position Claimed by Its Attorneys Re: § 14 of the Act of June 28,1898. On June 15, 2022, City filed its Reply to Defendant's Improper Surreply. On June 15, 2022, the City of Tulsa filed its Reply to Defendant's Improper Surreply.

Finally, on June 15, 2022, the Court conducted a hearing on the Defendant's Motion. At the hearing, the City of Tulsa withdrew its motions to strike and motions for continuances. At the hearing, the parties agreed that Defendant's Second Motion to Dismiss would move forward on the merits with the pleadings as presented to the Court. After a review of the pleadings filed in this matter and having heard oral arguments of the parties, the Court finds that the Defendant's Second Motion to Dismiss is *denied. See Hooper* v. *City of Tulsa*, 2022 WL 1105674 (N. D. Okla. April 13, 2022).

IT IS ORDERED, ADJUDGED AND DECREED that the Defendant's Second Motion to Dismiss is *denied.*

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that this case is set for Jury Trial Sounding Docket on July 1, 2022, at 2:00 P.M.

Dated this 16th day of June, 2022.

/s/ Mitchell M. McCune

APPENDIX I: Tulsa Municipal Criminal Court, Corrected Memorandum Opinion,
City of Tulsa v. *Stitt*, April 22, 2022

2022 WL 22907971
IN THE MUNICIPAL CRIMINAL COURT
OF THE CITY OF TULSA

No. 7569655

CITY OF TULSA,
Plaintiff,
v.
MARVIN KEITH STITT,
Defendant.

Filed: April 22, 2022

CORRECTED MEMORANDUM
OPINION AND ORDER

Before the Court is Defendant's Motion to Dismiss (hereinafter "Motion") filed on December 2, 2021. Defendant filed his Brief in Support of Motion to Dismiss on December 22, 2021. The City of Tulsa filed its Response to Defendant's Motion to Dismiss and Brief in Support (hereinafter "Response") on March 15, 2022. On March 22, 2022, the Court conducted a hearing on the Defendant's Motion. At the hearing, the City of Tulsa and the Defendant presented evidence (via stipulations), Defendant supplemented his Motion with an Appendix, and the parties presented argument. For the reasons set forth below, that Defendant's Motion is *denied*.

Stipulations

The City of Tulsa and the Defendant have stipulated that the Defendant is a registered citizen of the Cherokee Nation. The parties further stipulated that the incident occurred within the Corporate City limits of the City of Tulsa and with the boundaries of the Muscogee (Creek) Nation Reservation.

Background

The Defendant, who is a member of the Cherokee Nation, was allegedly driving a motor vehicle while within the corporate city limits of the City of Tulsa and within the borders of the Muscogee (Creek) Nation Reservation on February 3, 2021. Defendant was stopped by the Tulsa Police Department on said date, for an allegation of Aggravated Speeding in violation of Title 37 Section 617 (C), speeding 78 miles per hour in a 50 miles per hour speed zone. At the conclusion of the stop, the Tulsa Police Officer cited the Defendant for the lesser included offense of simple Speeding, Title 37 Section 617 (A), speeding 70 miles per hour in a 50 miles per hour zone, in violation of the City of Tulsa Revised Ordinances.

Subsequent to his arraignment, Defendant filed his Motion. Defendant asserts, essentially, that pursuant to *McGirt*, the State of Oklahoma and the City of Tulsa lack subject matter jurisdiction over the Defendant. And, that the Curtis Act[1] was limited and temporary and does not provide jurisdiction to the City of Tulsa over the Defendant.

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[1] An "Act for the Protection of the People of Indian Territory and for Other Purposes," 30 Stat. 495, also known as the Curtis Act.

The City of Tulsa asserts that it has subject matter jurisdiction under the Curtis Act,[2] that Congress has not altered or removed the City of Tulsa's Curtis Act jurisdiction, and only Congress has the power to do so.

Analysis

Subject matter jurisdiction is a cornerstone to American Jurisprudence. Subject matter jurisdiction is the power to hear and determine the subject matter in controversy between parties to a suit and to adjudicate or exercise any judicial power over the parties. *State of Rhode Island* v. *Com*, *of Massachusetts*, 37 U. S. 657, 9 L. Ed. 1233 (1838) [*sic*].

Generally, state courts do not have jurisdiction to try Indians[3] for conduct committed in "Indian County." *Negonsott* v. *Samuels*, 507 U. S. 102, 113 S. Ct. 1119, 122 L. Ed. 457 (1993). On July 9,2020 [*sic*], the U. S. Supreme Court held that land reserved to the Muscogee (Creek) Nation since the 19th century remains "Indian County" for the purposes of the Major Crimes Act and that the State of Oklahoma lacked subject matter jurisdiction over a tribal citizen, wherein the offense occurred within the Muscogee (Creek) Nation Reservation boundaries. *McGirt* v. *Oklahoma*, 591 U. S. —–, 140 S. Ct. 2452; 207 L. Ed. 2d 985 (2020). A majority of the City of Tulsa lies within the Muscogee (Creek) Nation Reservation.

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[2] *Id*.

[3] This Court, and as stated by the United States District Court in its opinion in *Hooper*, supra, understands that some may find the term "Indian" offensive. However, the term holds legal significance and was the language used by Congress when enacting statutes relevant to this case.

The City of Tulsa Municipal Criminal Court is a court of record of limited jurisdiction. The Court is charged with the adjudication of traffic and misdemeanor violations of the City of Tulsa Revised Ordinances that occur within the corporate city limits of the City of Tulsa. After reviewing the *McGirt* decision, one might simply assume that the City of Tulsa would lack subject matter jurisdiction over the conduct of Indians within the boundaries of the corporate city limits and the Muscogee (Creek) Nation Reservation or "Indian Country," since the State of Oklahoma lacks subject matter jurisdiction.

As previously stated by the Court, many cases are currently awaiting a determination of the subject matter jurisdiction question before this court. And, the number of cases continue to rise. Applying the assumption that *McGirt* controls would be a quick, simple and less taxing resolution to the issue before the Court. However, the Court is obligated to review all the facts and apply the law in this, and every other case before the Court. And, upon further review, applying the holding in *McGirt* to City of Tulsa cases would create an incorrect result.

The U. S. Congress addressed municipal jurisdiction in Indian Country on June 28, 1898, after passing "An Act for the Protection of the People of Indian Territory and for Other Purposes," 30 Stat. 495. Section 14 of the Curtis Act states as follows:

> SEC. 14. That the inhabitants of any city or town in said Territory having two hundred or more residents therein may proceed, by petition to the United States court in the district in which such city or town is located, to have the same incorporated as provided in chapter twenty-nine of

Mansfield's Digest of the Statutes of Arkansas, if not already incorporated there under; and the clerk of said court shall record all papers and perform all the acts required of the recorder of the county, or the clerk of the county court, or the secretary of state, necessary for the incorporation of any city or town, as provided in Mansfield's Digest, 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. All male inhabitants of such cities and towns over the age of twenty-one years, who are citizens of the United States or of either of said tribes, who have resided therein more than six months next before any election held under this act, shall be qualified voters at such election. 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 may charge, collect, and retain the same fees as such commissioners now collect and account for to the United States; 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, and charge and collect the same fees for similar services as are allowed to constables under the laws now in force in said Territory.

All elections shall be conducted under the provisions of chapter fifty-six of said digest, entitled 'Elections,' so far as the same may be applicable; and 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. Such city or town governments shall in no case have any authority to impose upon or levy any tax against any lands in said cities or towns until after title is secured from the tribe; but all other property, including all improvements on town lots, which for the purposes of this act shall be deemed and considered personal property, together with all occupations and privileges, shall be subject to taxation. And the councils of such cities and towns, for the support of the same and for school and other public purposes, may provide by ordinance for the assessment, levy, and collection annually of a tax upon such property, not to exceed in the aggregate two per centum of the assessed value thereof, in manner provided in chapter one hundred and twenty-nine of said digest, entitled 'Revenue,' and for such purposes may also impose a tax upon occupations and privileges.

Such councils may also establish and maintain free schools in such cities and towns, under the provisions of sections sixty-two hundred and fifty-eight to sixty-two hundred and seventy-six, inclusive, of said digest, and may exercise all the powers conferred upon special school districts in cities and towns in the State of Arkansas by the laws of said State when the same are not in conflict with the provisions of this act.

For the purposes of this section all the laws of said State of Arkansas herein referred to, so far as

> applicable, are hereby put in force in said Territory; and the United States court therein shall have jurisdiction to enforce the same, and to punish any violation thereof, and the city or town councils shall pass such ordinances as may be necessary for the purpose of making the laws extended over them applicable to them and for carrying the same into effect: Provided, That nothing in this act, or in the laws of the State of Arkansas, shall authorize or permit the sale, or exposure for sale, of any intoxicating liquor in said Territory, or the introduction thereof into said Territory; and it shall be the duty of the district attorneys in said Territory and the officers of such municipalities to prosecute all violators of the laws of the United States relating to the introduction of intoxicating liquors into said Territory, or to their sale, or exposure for sale, therein: Provided further, That owners and holders of leases or improvements in any city or town shall be privileged to transfer the same. (Emphasis added).

The City of Tulsa was incorporated under the provisions of the Curtis Act. After incorporating, the City of Tulsa has repeatedly passed and enforced ordinances. And, pursuant to the Curtis Act, the City of Tulsa has had subject matter jurisdiction to hear violations of its ordinances since 1898.

Following the passage of the Curtis Act, on March 1, 1901, the U. S. Congress passed "An Act to Ratify and Confirm an Agreement with the Muscogee or Creek Tribe of Indians, and for Other Purposes," 31 Stat. 861, § 41 (1901) (hereinafter "Creek Agreement"). Notably, the Creek

Agreement expressly provided for the preservation of Section 14 of the Curtis Act. It states, in part:

> 41. The provisions of section thirteen of the Act of Congress approved June twenty-eighth, eighteen hundred and ninety-eight, entitled 'An Act for the Protection of the people of the Indian Territory, and for other purposes,' shall not apply to or in any manner affect the lands or other property of said tribe, or be in force in Creek Nation, and no Act of Congress or treaty provision inconsistent with this agreement shall be in full force in said nation, **except Section Fourteen of said last-mentioned Act, which shall continue in force as if this agreement had not been made**. (Emphasis added).

I. The Curtis Act Grants the City of Tulsa Subject Matter Jurisdiction for Ordinance Violations over All Inhabitants

The Curtis Act authorizes municipalities to assert subject matter jurisdiction over all inhabitants, without regard to race, concerning violations of city ordinances. The language set forth by the U. S. Congress is clear and unambiguous.

There are many provisions contained in the Curtis Act. Many have been repealed by Acts of Congress. This Court has found no federal statutes which specifically repeal Section 14 of the Curtis Act. This Court has found no United States Court of Appeals Tenth Circuit [*sic*] cases that state that Section 14 of the Curtis Act has been repealed.

There are two (2) Curtis Act cases found by the Court which were heard by the U. S. Court of Appeals, 10th Circuit. These cases are *U. S*, v. *City of McAlester*, *Okl*., 604 F. 2d 42 (10th Cir. 1979) [*sic*] and *Choctaw & Chickasaw Nations* v. *City of Atoka*, *Okl*., 207 F. 2d 763 (10th Cir.1953). Each of these cases dealt with the power granted to municipalities under the Curtis Act to condemn land in Indian Country for municipal purposes. In each case, the Court found for the municipalities. Neither case held that the Curtis Act was repealed.

In contrast, the United States Court of Appeals, D. C. Circuit, in *Muscogee* (*Creek*) *Nation* v. *Hodel*, 851 F. 2d 1439 (D. C. Cir. 1988) made a finding that the Curtis Act was repealed. However, a closer review of the *Hodel* decision sheds more light on the subject.

While it is clear that *Hodel* determined that the Oklahoma Indian Welfare Act ("OIWA"), Act of June 26,1936,49 Stat, 1967 [*sic*], repealed the portion of the Curtis Act dealing with tribal courts, an accurate finding, it is also clear that the Court in *Hodel* was issue specific. The Court in *Hodel* never addressed the multiple provisions of the Curtis Act dealing with municipalities.

The 10th Circuit made it perfectly clear that the Curtis Act had multiple subjects addressed therein. The 10th Circuit held in *U. S*, v. *City McAlester*, *Old*., [*sic*] the following:

> **It is true that one principal object of the Curtis Act was the allotment of land to individual Indians. But it is also true that important provisions of the statute concerned the developing cities and towns in the Indian Territory. Section 14 of the same Act, reproduced in part in**

> **the Appendix, went to lengths to provide for the creation of cities and towns and the powers to be exercised by them.**

U. S, v. *City of McAlester*, *Okl*. 604 F. 2d at 51 (Emphasis added).

The Court in *Hodel* concentrated its efforts on the issue of the establishment of tribal courts through the Oklahoma Indian Welfare Act of 1936 (hereinafter "OIWA", codified at 25 U. S. C. §§ 501 *et seq.* (1983)). The D. C. Circuit specifically ruled on Section 28 of the Curtis Act concerning tribal courts. The Court further held that since OIWA did away with allotment and established a tribal government, it "appeared" the whole subject of the Curtis Act was covered, thus repealing the same. *Hodel*, 851 F. 2d at 1445. Once again, no discussion of municipalities or Section 14 of the Curtis Act was entertained by the D. C. Circuit.

It is compelling that the OIWA is not silent on the question of the repeal of prior laws. Section 9, [*sic*] of the OIWA provides that only those Acts or parts of Acts that are "inconsistent" with the OIWA are repealed. While, the *Hodel* decision is persuasive, it is not controlling on this Court.

Since the hearing on this matter, the United States District Court for the Northern District of Oklahoma upheld the City of Tulsa's claim of jurisdiction under the Curtis Act after the Defendant Justin Hooper appealed this Court's ruling in his case and sought declaratory relief. In *Justin Hooper* v. *City of Tulsa*, the United States District Court for the Northern District of Oklahoma, echoing this Court's previous decision, found that ". . . the Curtis Act grants municipalities in its scope jurisdiction over violations of municipal ordinances by any inhabitant of those

municipalities, including Indians." *Hooper* v. *City of Tulsa*, No. 21-CV-165-WPJ-JFJ, 2022 WL 1105674 at *5 (N. D. Okla. Apr. 13, 2022).

II. Congress, Through Its Plenary Powers over Tribal Matters, Can Grant Municipalities Jurisdiction over Indians, even when the State has No Such Grant of Jurisdiction

It is undisputed that Congress, alone, has plenary power over tribal matters. While it is a general rule that a municipality may not have power that exceeds that derived from the state, the Supremacy Clause, U. S. Const. Art. VI, cl. 2, authorizes the federal government to grant municipal governments powers or funds. Surprising to many, the Supremacy Clause further empowers Congress to grant powers and/or funds to municipalities, even when such a grant is contrary to the wishes of the state, who created the municipality. *See City of Tacoma* v. *Taxpayers of Tacoma*, 357 U. S. 320, 78 S. Ct. 1209. 2 L. Ed. 2d 1345 (1958).

In this instance, Congress granted the municipalities in Indian Country, through the Curtis Act power to incorporate, conduct elections, pass of ordinances [*sic*], enforce ordinances, build infrastructure and create free public schools, to name a few. The powers granted municipalities were clearly designed to empower unified municipalities to grow and grant <u>all</u> inhabitants rights and privileges, without regard to race.

While some cases state that some powers or funds granted municipalities from the federal government can be blocked if it is expressly forbidden by state law, this Court has found no Oklahoma state law which forbids

municipalities from enforcing its ordinances against all persons, including Indians.

In fact, the Oklahoma Constitution states:

> **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 additional rights and powers conferred by the Okla. Constitution. Okla. Const. Section XVIII–2 (Emphasis added).

The Oklahoma Constitution accounted for the preexisting rights and powers municipalities had prior to statehood. This would include the jurisdiction granted the City of Tulsa under the Curtis Act.

This Court finds that pursuant to the Supremacy Clause and the supporting case law that the United States Congress had the plenary power to grant the City of Tulsa jurisdiction under Section 14 of the Curtis Act. This Court further finds that the powers granted to the municipalities under Section 14 of the Curtis Act were not dissolved by the Enabling Act or the Oklahoma Constitution.

Finally, the City of Tulsa's jurisdiction does not conflict with *McGirt*. The Unites [*sic*] States District Court for the Northern District of Oklahoma stated in *Hooper* v. *City of Tulsa*, the following:

> In contrast, Congress passed the Curtis Act to, among other things, give municipalities jurisdiction over local ordinance violations—a classification of crimes entirely distinct from the MCA's

> litany of serios offenses. *See* 18 U. S. C. § 1153 (MCA). Plenty of other criminal violations do not trigger the MCA's jurisdiction . . . It is not contradictory that Congress granted federal jurisdiction over major crimes through the MCA and municipal jurisdiction over violations of local ordinances through the Curtis Act. *McGirt*'s implications for the former do not demonstrate an effect on the latter.

Hooper, WL–1105674 at *5.

III. Defendant has an Avenue to Appeal

In 1903, in the case of *Missouri*, *K. & T. Ry. Co*. v. *Phelps*, 4 Ind. T. 706, 76 S. W. 285, 286 (Indian Terr. 1903), the Court of Appeals for the Indian Territory stated that the appeal from a case rendered under the Curtis Act would be to the U. S. Federal District Court. Subsequent, to the ruling above, the Oklahoma Supreme Court, in 1908, upheld the settled law that an appeal under the Curtis Act would be heard in the United States District Court. *Baker* v. *Marcum & Toomer*. 1908 OK 171, 22 Okla. 21, 97 P. 572, 573 (1908).

This Court finds that an appeal forum for violations of municipal ordinances under the jurisdiction granted by the Curtis Act has been established and is supported by case law. Therefore, this Court finds there would be no violation of the Defendant's appellate rights under the Curtis Act.

Conclusion

For the reasons set forth above, this Court finds that Section 14 of the Curtis Act provides the City of Tulsa subject matter jurisdiction over all inhabitants, without regard to race, including Indians, alleged to have committed ordinance violations within the corporate city limits of the City of Tulsa and within the boundaries of the Muscogee (Creek) Nation Reservation. Accordingly, the Defendant's Motion is *denied.*

As this Court has previously stated, nothing in this opinion should be read to condone the wretched history of the treatment of Indians by the United States government.

ORDER

IT IS ORDERED, ADJUDGED AND DECREED the Defendant's Motion to Dismiss is *denied.*

Dated this 22nd day of April 2022.

/s/ Mitchell M. McCune
MITCHELL M. MCCUNE, JUDGE
TULSA MUNICIPAL CRIMINAL COURT

APPENDIX J: Tulsa Municipal Criminal Court, Memorandum and Order, *City of Tulsa* v. *Shaffer*, February 2, 2021

2021 WL 12271580
IN THE MUNICIPAL CRIMINAL COURT
OF THE CITY OF TULSA

No. 6108204

CITY OF TULSA,
Plaintiff,
v.
SAMANTHA SHAFFER,
Defendant.

Filed: February 2, 2021

MEMORANDUM AND ORDER

Before the Court is Defendant's Verified Motion to Dismiss for Lack of Subject Matter Jurisdiction (hereinafter "Motion") filed August 10, 2020. The City of Tulsa filed its Response to Defendant's Motion to Dismiss and Brief in Support (hereinafter "Response") on October 30, 2020. The Defendant filed her Reply to City of Tulsa's Response to Motion to Dismiss For Lack of Subject Matter Jurisdiction on December 1, 2020. On December 4, 2020, the City of Tulsa filed its Surreply. On January 4, 2021, the Court conducted a hearing on the Defendant's Motion. At the hearing, the City of Tulsa and the Defendant presented evidence (via stipulations) and argument. I find, for the reasons set forth below, that Defendant's Motion is denied.

Stipulations

The City of Tulsa and the Defendant have stipulated to the facts in their respective Motion and Response, except as to the tribal membership of the Defendant, at the time of the citation

Background

The Defendant, who is an alleged member of the Cherokee Nation, was cited for a violation of Title 27 Section 2003, Larceny of Merchandise from Retailer or Wholesaler - Punishment - Second Offense, of the City of Tulsa Revised Ordinances on September 30, 2019. The alleged offense occurred within the corporate city limits of the City of Tulsa and within the boundaries of the Muscogee (Creek) Nation reservation. The charge was filed on October 8, 2019. On July 9, 2020, the Unites States Supreme Court decided the case of *McGirt* v. *Oklahoma*, 591 U. S. ––; 140 S. Ct. 2452; 207 L. Ed. 2d 985 (2020).

Analysis

Subject matter jurisdiction is a cornerstone to American Jurisprudence. Subject matter jurisdiction is the power to hear and determine the subject matter in controversy between parties to a suit and to adjudicate or exercise any judicial power over the parties. *State of Rhode Island* v. *Com*. *of Massachusetts*, 37 U. S. 657, 9 L. Ed. 1233 (1838).

Generally, state courts do not have jurisdiction to try Indians for conduct committed in "Indian County." *Negonsott* v. *Samuels*, 507 U. S. 102, 113 S. Ct. 1119, 122 L. Ed. 457 (1993). On July 9, 2020, the U. S. Supreme Court held that land reserved to the Muscogee (Creek) Nation since the 19th century remains "Indian County" [*sic*] for the purposes of the Major Crimes Act and that the State of Oklahoma lacked subject matter jurisdiction over a tribal

citizen, wherein the offense occurred within the Muscogee (Creek) Nation Reservation boundaries. *McGirt* v. *Oklahoma*, 591 U. S. —–, 140 S. Ct. 2452; 207 L. Ed. 2d 985 (2020). A majority of the City of Tulsa lies within the Muscogee (Creek) Nation Reservation.

The City of Tulsa Municipal Criminal Court is a court of record of limited jurisdiction. The Court is charged with the adjudication of traffic and misdemeanor violations of the City of Tulsa Revised Ordinances that occur within the corporate city limits of the City of Tulsa. After reviewing the *McGirt* decision, one might simply assume that the City of Tulsa would lack subject matter jurisdiction over the conduct of Indians within the boundaries of the corporate city limits and the Muscogee (Creek) Nation Reservation or "Indian Country," since the State of Oklahoma lacks subject matter jurisdiction.

Hundreds of cases are currently awaiting a determination of the subject matter jurisdiction question before this court And, the number of cases continue to rise daily. Applying the assumption that *McGirt* controls would be a quick, simple and less taxing resolution to the issue before the Court. However, the Court is obligated to review all the facts and apply the law in this, and every other case before the Court. And, upon further review, applying the holding in *McGirt* to City of Tulsa cases would create an incorrect result.

The U. S. Congress addressed municipal jurisdiction in Indian Country on June 28, 1898, after passing "An Act for the Protection of the People of Indian Territory and for Other Purposes," 30 Stat. 495. Section 14 of the Curtis Act states as follows:

SEC. 14. That the inhabitants of any city or town in said Territory having two hundred or more residents therein may proceed, by petition to the United States court in the district in which such city or town is located, to have the same incorporated as provided in chapter twenty-nine of Mansfield's Digest of the Statutes of Arkansas, if not already incorporated there under; and the clerk of said court shall record all papers and perform all the acts required of the recorder of the county, or the clerk of the county court, or the secretary of state, necessary for the incorporation of any city or town, as provided in Mansfield's Digest, 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. All male inhabitants of such cities and towns over the age of twenty-one years, who are citizens of the United States or of either of said tribes, who have resided therein more than six months next before any election held under this act, shall be qualified voters at such election. 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 may charge, collect, and retain the same fees as such commissioners now collect and account for to the United States; 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, and charge and collect the same

fees for similar services as are allowed to constables under the laws now in force in said Territory.

All elections shall be conducted under the provisions of chapter fifty-six of said digest, entitled 'Elections,' so far as the same may be applicable; *and 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*. Such city or town governments shall in no case have any authority to impose upon or levy any tax against any lands in said cities or towns until after title is secured from the tribe; but all other property, including all improvements on town lots, which for the purposes of this act shall be deemed and considered personal property, together with all occupations and privileges, shall be subject to taxation. And the councils of such cities and towns, for the support of the same and for school and other public purposes, may provide by ordinance for the assessment, levy, and collection annually of a tax upon such property, not to exceed in the aggregate two per centum of the assessed value thereof, in manner provided in chapter one hundred and twenty-nine of said digest, entitled 'Revenue,' and for such purposes may also impose a tax upon occupations and privileges.

Such councils may also establish and maintain free schools in such cities and towns, under the provisions of sections sixty-two hundred and fifty-eight to sixty-two hundred and seventy-six, inclusive, of said digest, and may exercise all the

> powers conferred upon special school districts in cities and towns in the State of Arkansas by the laws of said State when the same are not in conflict with the provisions of this act.
>
> For the purposes of this section all the laws of said State of Arkansas herein referred to, so far as applicable, are hereby put in force in said Territory; and the United States court therein shall have jurisdiction to enforce the same, and to punish any violation thereof, and the city or town councils shall pass such ordinances as may be necessary for the purpose of making the laws extended over them applicable to them and for carrying the same into effect: Provided, That nothing in this act, or in the laws of the State of Arkansas, shall authorize or permit the sale, or exposure for sale, of any intoxicating liquor in said Territory, or the introduction thereof into said Territory; and it shall be the duty of the district attorneys in said Territory and the officers of such municipalities to prosecute all violators of the laws of the United States relating to the introduction of intoxicating liquors into said Territory, or to their sale, or exposure for sale, therein: Provided further, That owners and holders of leases or improvements in any city or town shall be privileged to transfer the same. (Emphasis Added).

The City of Tulsa was incorporated under the provisions of the Curtis Act. After incorporating, the City of Tulsa has repeatedly passed and enforced ordinances. And, pursuant to the Curtis Act, the City of Tulsa has had subject matter jurisdiction to hear violations of its ordinances since 1898.

Following the passage of the Curtis Act, on March 1, 1901, the U. S. Congress passed "An Act to Ratify and Confirm an Agreement with the Muscogee or Creek Tribe of Indians, and for Other Purposes," 31 Stat. 861, § 41 (1901) (hereinafter "Creek Agreement"). Notably, the Creek Agreement expressly provided for the preservation of Section 14 of the Curtis Act. It states, in part:

> 41. The provisions of section thirteen of the Act of Congress approved June twenty-eighth, eighteen hundred and ninety-eight, entitled 'An Act for the Protection of the people of the Indian Territory, and for other purposes,' shall not apply to or in any manner affect the lands or other property of said tribe, or be in force in Creek Nation, and no Act of Congress or treaty provision inconsistent with this agreement shall be in full force in said nation, *except Section Fourteen of said last-mentioned Act, which shall continue in force as if this agreement had not been made*. (Emphasis added).

I. THE CURTIS ACT GRANTS THE CITY OF TULSA SUBJECT MATTER JURISDICTION FOR ORDINANCE VIOLATIONS OVER ALL PERSONS, WITHOUT REGARD TO RACE

The Curtis Act authorizes municipalities to assert subject matter jurisdiction over all inhabitants, without regard to race, concerning violations of city ordinances. The language set forth by the U. S. Congress is clear and unambiguous.

There are many provisions contained in the Curtis Act. Many have been repealed by Acts of Congress. This Court has found no federal statutes which specifically repeal

Section 14 of the Curtis Act. This Court has found no cases that state that Section 14 of the Curtis Act has been repealed.

There are two (2) Curtis Act cases found by the Court which were heard by the U. S. Court of Appeals, 10th Circuit. These cases are *U. S.* v. *City of McAlester*, *Okl.*, 604 F. 2d 42 (10th Cir. 1979) and *Choctaw & Chickasaw Nations* v. *City of Atoka*, *Okl.*, 207 F. 2d 763 (10th Cir.1953). Each of these cases dealt with the power granted to municipalities under the Curtis Act, to condemn land in Indian Country for municipal purposes. In each case, the Court found for the municipalities. Neither case held that the Curtis Act was repealed.

The Defendant asserts that the Curtis Act has been repealed. In support of this position, the Defendant cites *Muscogee* (*Creek*) *Nation* v. *Hodel*, 851 F. 2d 1439 (1988). The language in *Hodel* supports the Defendant's contention. However, a closer review of the *Hodel* decision sheds more light on the subject.

While it is clear that *Hodel* determined that the OIWA repealed the portion of the Curtis Act dealing with tribal courts, an accurate finding, it is also clear that the Court in *Hodel* was issue specific. The Court in *Hodel* never addressed the multiple provisions of the Curtis Act dealing with municipalities.

The 10th Circuit made it perfectly clear that the Curtis Act had multiple subjects addressed therein. The 10th Circuit held in *U. S.* v. *City of McAlester*, *Okl.*, the following:

> *It is true that one principal object of the Curtis Act was the allotment of land to individual Indians. But*

> *it is also true that important provisions of the statute concerned the developing cities and towns in the Indian Territory. Section 14 of the same Act, reproduced in part in the Appendix, went to lengths to provide for the creation of cities and towns and the powers to be exercised by them.*

U. S. v. *City of McAlester*, *Okl.* 604 F. 2d at 51 (Emphasis added).

The Court in Hodel concentrated its efforts on the issue of the establishment of tribal courts through the Oklahoma Indian Welfare Act (OIWA), Act of June 26, 1936, 49 Stat. 1967 (codified at 25 U. S. C.§§ 501 et seq. (1983)). The D. C. Circuit Court specifically ruled on Section 28 of the Curtis Act concerning tribal courts. The Court further held that since OIWA did away with allotment and established a tribal government, it "appeared" the whole subject of the Curtis Act was covered, thus repealing the same. *Hodel*, 851 F. 2d at 1445. Once again, no discussion of municipalities or Section 14 of the Curtis Act was entertained by the Court.

Finally, it is compelling that the OIWA is not silent on the question of the repeal of prior laws. Section 9, [*sic*] of the OIWA provides that only those Acts or parts of Acts that are "inconsistent" with the OIWA are repealed. While, the *Hodel* decision is persuasive, it is not controlling on this Court.

This Court finds that the Curtis Act grants the City of Tulsa jurisdiction for violations of its ordinances over all persons, without regard to race. This Court further finds that Section 14 of the Curtis Act is not inconsistent with the

OIWA. Finally, this Court finds that the OIWA does not repeal Section 14 of the Curtis Act.[1]

II. CONGRESS, THROUGH ITS PLENARY POWERS OVER TRIBAL MATTERS, CAN GRANT MUNICIPALITIES JURISDICTION, EVEN WHEN THE STATE HAS NO SUCH GRANT OF JURISDICTION

It is undisputed that Congress, alone, has plenary power over tribal matters. While it is a general rule that a municipality may not have power that exceeds that derived from the state, the Supremacy Clause, U. S. Const. Art. VI, cl. 2, authorizes the federal government to grant municipal governments powers or funds. Surprising to many, the Supremacy Clause further empowers Congress to grant powers and/or funds to municipalities, even when such a grant is contrary to the wishes of the state, who created the municipality. See *City of Tacoma* v. *Taxpayers of Tacoma*, 357 U. S. 320, 78 S. Ct. 1209. 2 L. Ed. 2d 1345 (1958).

In this instance, Congress granted the municipalities in Indian Country power to incorporate, conduct elections, pass of ordinances, enforce ordinances, and create free public schools, to name a few. The powers granted municipalities were clearly designed to empower unified municipalities to grow and grant their citizens rights and privileges, without regard to race.

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[1] In fact, the Okmulgee County District Court, in a recent decision, cited the "Curtis Act" when granting motions to dismiss in favor of municipalities in a civil lawsuit seeking the refund of money (essentially from fines and costs incurred for violation of city ordinances) for Native Americans. See Nicholson et al.,v. Stit, et al., Okmulgee County District Court, Case No. CJ-2020- 00094 (2020). This decision, while persuasive, is not controlling on the Court.

While some cases state that some powers or funds granted municipalities from the federal government can be blocked if it is expressly forbidden by state law, the Court found no Oklahoma state law which forbids municipalities from enforcing its ordinances against all persons, including tribal members.

In fact, the Oklahoma Constitution states:

> *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 additional rights and powers conferred by the Okla. Constitution. Okla. Const. Section XVIII–2 (Emphasis added).

The Oklahoma Constitution accounted for the preexisting rights and powers municipalities had prior to statehood.

This Court finds that pursuant to the Supremacy Clause and the supporting case law that the United States Congress had the plenary power to grant the City of Tulsa jurisdiction under Section 14 of the Curtis Act. This Court further finds that the powers granted to the municipalities under Section 14 of the Curtis Act were not dissolved by the Enabling Act or the Oklahoma Constitution.

III. UNDER THE CURTIS ACT DEFENDANTS HAVE AN AVENUE TO APPEAL THIS COURTS JUDGEMENTS AND SENTENCES

Under *McGirt* v. *Oklahoma*, the State of Oklahoma would not have jurisdiction to hear an appeal of a Native American who allegedly committed a municipal offense in

Indian Country. However, there is a forum for appealing municipal judgments and sentences.

In 1903, in the case of *Missouri*, *K. & T. Ry. Co.* v. *Phelps*, 4 Ind. T. 706, 76 S. W. 285, 286 (Indian Terr. 1903), the Court of Appeals for the Indian Territory stated that the appeal from a case rendered under the Curtis Act would be to the U. S. Federal District Court. Subsequent, to the ruling above, the Oklahoma Supreme Court, in 1908, upheld the settled law that an appeal under the Curtis Act would be heard in the United States District Court. *Baker* v. *Marcum & Toomer*. 1908 OK 171, 22 Okla. 21, 97 P. 572, 573 (1908).

This Court finds that an appeal forum for violations of municipal ordinances under the jurisdiction granted by the Curtis Act has been established and is supported by case law. Therefore, this Court finds there would be no violation of the Defendant's appellate rights under the Curtis Act.

Conclusion

For the reasons set forth above, this Court finds that Section 14 of the Curtis Act provides the City of Tulsa subject matter jurisdiction over all persons, without regard to race, including Native Americans, alleged to have committed ordinance violations within the corporate city limits of the City of Tulsa and within the boundaries of the Muscogee (Creek) Nation Reservation. Since this Court has found that this Court has subject matter jurisdiction in this case, it is unnecessary to determine the tribal membership status of the Defendant. Accordingly, the Defendant's Motion is *Denied*.

Nothing in this opinion should be read to condone the wretched history of the treatment of Native Americans by

the United States government. In the darkness of such treatment, there appeared to be a glimmer of hope in Section 14 of the Curtis Act - the idea that all people would be treated the same way under similar circumstances, without regard to race. For when a government does not apply the law to all citizens without regard to race or even gives the appearance that it does not apply the law to all citizens without regard to race, then the government at a minimum creates disenfranchised citizens or at the most violates constitutional rights, eroding public trust.

ORDER

IT IS ORDERED, ADJUDGED AND DECREED the Defendant's Verified Motion to Dismiss for Lack of Subject Matter Jurisdiction is denied.

Dated this 2nd day of February 2021.

/s/ Mitchell M. McCune
MITCHELL M. MCCUNE, JUDGE
TULSA MUNICIPAL CRIMINAL

APPENDIX K: Oklahoma Court of Criminal Appeals, Order Denying Petition for Rehearing, *Stitt* v. *City of Tulsa*, April 7, 2025

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

No. M-2022-984

MARVIN KEITH STITT,
Appellant,
v.
CITY OF OKLAHOMA CITY [*sic*],
Appellee.

Filed: April 7, 2025

ORDER DENYING PETITION FOR REHEARING

On March 26, 2025, Appellant Marvin Keith Stitt filed a Petition for Rehearing in this case. He is challenging this Court's March 6, 2025 decision affirming his Judgment and Sentence in the City of Tulsa Municipal Court Case No. 7569655. A petition for rehearing cannot be filed, as a matter of course, but only for the following reasons:

> (1) some question decisive of the case and duly submitted by the attorney of record has been overlooked by the Court, or
>
> (2) the decision is in conflict with an express statute or controlling decision to which the attention of this Court was not called either in the brief or in oral argument.

Rule 3.14(B), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2025).

Appellant has failed to allege a sufficient basis for rehearing. He has not established that some submitted question decisive of this case was overlooked by this Court, or that the decision is in conflict with an express statute or controlling decision not presented to our attention in the briefs. The decision handed down in this case adequately disposed of the issues raised relying upon appropriate authority and the record on appeal. All questions duly submitted, including the issues raised in amicus briefs, were reviewed by the Court prior to rendering the decision in this case. Therefore, Appellant's Petition for Rehearing is DENIED.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 7th day of April, 2025.

GARY L. LUMPKIN, Presiding Judge
WILLIAM J. MUSSEMAN, Vice Presiding Judge
DAVID B. LEWIS, Judge
ROBERT L. HUDSON, Judge
SCOTT ROWLAND, Judge

ATTEST:
/s/ JOHN D. HADDEN

APPENDIX L: Compiled Statutory Provisions

U S. Const. art. VI, cl. 2

The Supremacy Clause to the Federal Constitution provides in relevant part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Okla. Const. art. I, § 3

Oklahoma's constitution provides in relevant part:

> The people inhabiting the State do agree and declare that they forever disclaim all right and title . . . to all lands lying within said limits owned or held by any Indian, tribe, or nation; and that until the title to any such public land shall have been extinguished by the United States, the same shall be and remain subject to the jurisdiction, disposal, and control of the United States.

18 U. S. C. § 1151

Section 1151 of Title 18 of the United States Code defining Indian country provides as follows: "[T]he term 'Indian country' . . . means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government . . . (b) all dependent Indian communities

within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished[.]"

18 U. S. C. § 1152

The General Crimes Act provides in relevant part:

> Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States . . . shall extend to the Indian country.
>
> This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.

18 U. S. C. § 1153

Section 1153 of Title 18 of the United States Code provides in relevant part: "Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping, [felony] maiming . . . incest, a felony assault . . . an assault against an individual who has not attained the age of 16 years, felony child abuse or neglect, arson, burglary, robbery, and a felony . . . within the Indian

country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States."

25 U. S. C. § 1301

Section 1301 provides the following relevant definitions:

> (1) "Indian tribe" means any tribe, band, or other group of Indians subject to the jurisdiction of the United States and recognized as possessing powers of self-government;
>
> (2) "powers of self-government" means and includes all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed, including courts of Indian offenses; and means the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians;
>
> (3) "Indian court" means any Indian tribal court or court of Indian offense; and
>
> (4) "Indian" means any person who would be subject to the jurisdiction of the United States as an Indian under section 1153, Title 18, if that person were to commit an offense listed in that section in Indian country to which that section applies.

25 U. S. C. § 1302

Section 1302 of Title 25 of the United States Code provides in relevant part:

(b) Offenses subject to greater than 1-year imprisonment or a fine greater than $5,000

A tribal court may subject a defendant to a term of imprisonment greater than 1 year but not to exceed 3 years for any 1 offense, or a fine greater than $5,000 but not to exceed $15,000, or both, if the defendant is a person accused of a criminal offense who--

(1) has been previously convicted of the same or a comparable offense by any jurisdiction in the United States; or

(2) is being prosecuted for an offense comparable to an offense that would be punishable by more than 1 year of imprisonment if prosecuted by the United States or any of the States.

25 U. S. C. § 1304

Section 1304(b) of Title 25 of the United States Code provides in relevant part:

(b) Nature of the criminal jurisdiction

(1) In general. Notwithstanding any other provision of law, in addition to all powers of self-government recognized and affirmed by sections 1301 and 1303 of this title, the powers of self-government of a participating tribe . . . include the inherent power of that tribe, which is hereby recognized and affirmed, to exercise special Tribal criminal jurisdiction over all persons.

25 U. S. C. § 1321

Section 1321 governing state assumption of jurisdiction in Indian country provides in relevant part:

(a) Consent of United States

(1) In general

The consent of the United States is hereby given to any State not having jurisdiction over criminal offenses committed by or against Indians in the areas of Indian country situated within such State to assume, with the consent of the Indian tribe occupying the particular Indian country or part thereof which could be affected by such assumption, such measure of jurisdiction over any or all of such offenses committed within such Indian country or any part thereof as may be determined by such State to the same extent that such State has jurisdiction over any such offense committed elsewhere within the State, and the criminal laws of such State shall have the same force and effect within such Indian country or part thereof as they have elsewhere within that State.

(2) Concurrent jurisdiction

At the request of an Indian tribe, and after consultation with and consent by the Attorney General, the United States shall accept concurrent jurisdiction to prosecute violations of sections 1152 and 1153 of Title 18 within the Indian country of the Indian tribe.

25 U. S. C. § 1324

Section 1324 provides in relevant part:

> Notwithstanding the provisions of any enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, where necessary, their State constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil or criminal jurisdiction in accordance with the provisions of this subchapter. The provisions of this subchapter shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their State constitution or statutes, as the case may be.

18 U. S. C. § 1162

Section 1162 governing state jurisdiction over offenses committed by Indians in Indian country provides in part:

> (a) Each of the States . . . listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State . . . to the same extent that such State . . . has jurisdiction over offenses committed elsewhere within the State . . . and the criminal laws of such State . . . shall have the same force and effect within such Indian country as they have elsewhere within the State[]:

State or Territory of	Indian country affected
Alaska……	All Indian country within the State, except that on Annette Islands, the Metlakatla Indian community may exercise jurisdiction over offenses committed by Indians in the same manner in which such jurisdiction may be exercised by Indian tribes in Indian country over which State jurisdiction has not been extended
California……	All Indian country within the State
Minnesota……	All Indian country within the State, except the Red Lake Reservation
Nebraska……	All Indian country within the State
Oregon……	All Indian country within the State, except the Warm Springs Reservation
Wisconsin……	All Indian country within the State

. . . .

(b) The provisions of sections 1152 and 1153 of this chapter shall not be applicable within the areas of

Indian country listed in subsection (a) of this section as areas over which the several States have exclusive jurisdiction.

(c) Indian tribe, and after consultation with and consent by the Attorney General –

(1) sections 1152 and 1153 shall apply in the areas of the Indian country of the Indian tribe; and

(2) jurisdiction over those areas shall be concurrent among the Federal Government, State governments, and, where applicable, tribal governments.

U.S.-Muscogee Treaty of 1832

Article XIV of the Treaty with the Creeks, Mar. 24, 1832, 7 Stat. 366 provides in relevant part:

> The Creek country west of the Mississippi shall be solemnly guarantied to the Creek Indians, nor shall any State or Territory ever have a right to pass laws for the government of such Indians, but they shall be allowed to govern themselves, so far as may be compatible with the general jurisdiction which Congress may think proper to exercise over them.

U.S.-Muscogee Treaty of 1833

Article III of the Treaty with the Creeks, Feb. 14, 1833, 7 Stat. 417-18 provides in relevant part:

> The United States will grant a patent, in fee simple, to the Creek nation of Indians for the land assigned said nation by this treaty . . . and the right thus guaranteed by the United States shall be continued to said tribe of Indians, so long as they shall exist as a nation, and continue to occupy the country hereby assigned them.

U.S.-Muscogee Treaty of 1856

Articles IV and XV of the Treaty with the Creeks, Aug. 16, 1856, 11 Stat. 699 provides:

> The United States do hereby solemnly agree and bind themselves, that no State or Territory shall ever pass laws for the government of the Creek or Seminole tribes of Indians, and that no portion of either of the tracts of country defined in the first and second articles of this agreement shall ever be embraced or included within, or annexed to, any Territory or State, nor shall either, or any part of either, ever be erected into a Territory without the full and free consent of the legislative authority of the tribe owning the same.
>
> So far as may be compatible with the constitution of the United States, and the laws made in pursuance thereof, regulating trade and intercourse with the Indian tribes, the Creeks and Seminoles shall be secured in the unrestricted right of self-government, and full jurisdiction over persons and property, within their respective limits; excepting, however, all white persons, with their property, who are not, by adoption or otherwise, members of either the Creek or Seminole tribe;

> and all persons not being members of either tribe, found within their limits, shall be considered intruders, and be removed from and kept out of the same by the United States agents for said tribes, respectively; (assisted, if necessary, by the military;) with the following exceptions, viz: such individuals with their families as may be in the employment of the government of the United States; all persons peaceably travelling, or temporarily sojourning in the country, or trading therein under license from the proper authority of the United States; and such persons as may be permitted by the Creeks or Seminoles, with the assent of the proper authorities of the United States, to reside within their respective limits without becoming members of either of said tribes.

Ordinance

Section 617 of Title 37 of the City of Tulsa's Revised Ordinances provides:

> Aggravated speeding is defined as any speed greater than twenty (20) miles per hour over the speed limit . . . 'Aggravated speeding' is hereby declared unlawful and any person violating this subsection shall be guilty of an offense and, upon conviction thereof, shall be punished by a fine of not more than Five Hundred Dollars ($500.00), excluding costs, fees and assessments, and/or by imprisonment in the City jail for a period of not more than ten (10) days."