No. 21-429

IN THE

Supreme Court of the United States

STATE OF OKLAHOMA,
Petitioner,
v.
VICTOR MANUEL CASTRO-HUERTA,
Respondent.

On Petition for a Writ of Certiorari to the Oklahoma Court of Criminal Appeals

BRIEF OF *AMICI CURIAE* THE CHICKASAW NATION AND CHOCTAW NATION OF OKLAHOMA IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI*[1]

Amici are federally-recognized Indian tribes residing on Reservations in Oklahoma established for them by Treaties, in exchange for their agreement to remove from their ancestral lands in the southeast. The Treaty of Dancing Rabbit Creek, arts. 2, Sept. 27, 1830, 7 Stat. 333, secured to *Amicus* Choctaw Nation a new homeland that would inure to it "while they shall exist as a Nation and live upon it" and promised that the Choctaw Nation would have "jurisdiction and government of all the persons and property that may be within their limits west, so that no Territory or State shall ever have a right to pass laws for the government of the Choctaw Nation . . . and . . . no part of the land granted them shall ever be embraced in any Territory or State," *id.* art. 4. *Amicus* Chickasaw Nation governs the Chickasaw Reservation, immediately west of the Choctaw Reservation, which was secured to it on the same terms that *amicus* Choctaw Nation holds its Reservation, by the 1837 Treaty of Doaksville, art. 1, Jan. 17, 1837, 11 Stat. 573. In subsequent treaties, the United States reaffirmed the existence of *Amici* Nations' Reservations, with modified boundaries. *See* 1855 Treaty of Washington with the Choctaw and Chickasaw, June 22, 1855, 11 Stat. 611; 1866 Treaty of Washington with the Choctaw and Chickasaw, Apr. 28, 1866, 14 Stat. 769. Today *Amici* Nations exercise inherent sovereign authority on their Reservations to provide "police protection and other governmental

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[1] No counsel for a party authored this brief in whole or part. No one other than *Amici* Nations made a monetary contribution to fund preparation or submission of this brief. The parties' counsels of record received notice of *Amici* Nations' intent to file more than ten days before the date for filing and have consented thereto.

services," *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137-38 (1982), patrol highways, *United States v. Cooley*, 141 S. Ct. 1638 (2021), and punish criminals, *United States v. Wheeler*, 435 U.S. 313 (1978); *United States v. Lara*, 541 U.S. 193 (2004).

After this Court upheld the continuing existence of the Creek Reservation in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), the Oklahoma state courts applied the framework set forth in that decision to cases involving *Amici* Nations' Reservations. The Oklahoma Court of Criminal Appeals ("OCCA") remanded a series of then-pending appeals to state district courts for evidentiary hearings on whether *Amici* Nations' Reservations still exist. The district courts determined, and the OCCA subsequently affirmed, that *Amici* Nations' Reservations were established by the Chickasaw and Choctaw Treaties, were never disestablished by Congress, and still exist today. *See State ex rel. Matloff v. Wallace*, 2021 OK CR 21, ¶ 15. The State was a party in all those cases, yet it bypassed several opportunities to contest the continuing existence of the Choctaw and Chickasaw Reservations and in some cases affirmatively accepted their existence. Similarly, in cases involving the Cherokee, Creek, and Seminole Reservations, the State did not contest the existence of the Reservations, and at times agreed the Cherokee and Creek Reservations exist. The district courts concluded the Reservations existed in these cases, and the OCCA affirmed.

Yet the State now seeks reversal of *McGirt* in this case and nearly forty others, assuming it can challenge *McGirt* in this Court even in cases in which it did not challenge the existence of the reservation in the proceedings below. In this case, the State's proclaimed flagship, it seeks *McGirt*'s reversal in an effort to

negate the OCCA's decision recognizing the existence of the Cherokee Reservation (and does so in several other cases, as well). In other cases, it seeks the negation of the OCCA's decisions on the existence of the Chickasaw, Choctaw and Seminole Reservations, and in still others, the State seeks to challenge the OCCA's rulings that under *McGirt*, the Creek Reservation still exists. In all of these cases it urges that if *McGirt* is reversed none of these reservations will survive, wholly disregarding the independent treaty history of each tribe.

Were this effort to succeed, the treaty promises of new homelands made to *Amici* Nations in order to clear them from the southeast would disappear. And the Five Tribes' work and financial investments to implement *McGirt* and its follow-on cases, made in coordination with federal partners, state agencies, and local governments, would be for naught. *See, e.g.*, Br. of *Amicus Curiae* Chickasaw Nation at 4-15, *Oklahoma v. Beck*, No. 21-373 ("Chickasaw *Beck* Br."); Br. of *Amicus Curiae* Choctaw Nation of Okla. at 9-16, *Oklahoma v. Sizemore*, No. 21-326 ("Choctaw *Sizemore* Br."). As *Amici* Nations explain in this brief, the State's effort fails because none of the State's petitions provides a vehicle to challenge *McGirt*.[2]

SUMMARY OF ARGUMENT

The State's attack on *McGirt* fails because it is chaotic, misleading, and driven by political considerations, not law. In the first place, the State cannot use

[2] *Amici* Nations agree with Respondent's and other *amici*'s explanations why the Court should not consider the State's argument that it has concurrent jurisdiction over crimes by non-Indians against Indians in Indian country.

an attack on *McGirt* to challenge the OCCA's decisions acknowledging Reservations not at issue in *McGirt*. The existence of any one Reservation depends on the enactments that established and affected that Reservation. Simply stated, reservations are not fungible. Basic procedural reasons also doom the State's petitions attacking all Five Tribes' Reservations, including the Creek Reservation. The State must have standing to challenge the existence of any Reservation, but this case and almost every other case in which the State seeks certiorari are moot because the state criminal cases below have been dismissed. The State must also preserve arguments below to advance them here. Yet, it waived its challenges by affirmatively accepting the existence of the Cherokee, Chickasaw, Choctaw, and Creek Reservations and by failing to contest the facts and law showing all Five Tribes' Reservations still exist. For these reasons, the State's petition in this case, and every other one challenging *McGirt* it has filed, should be denied.

REASONS FOR DENYING PETITION

The State's challenge to *McGirt* is political, not legal. In court, the State earlier accepted the existence of most of the Five Tribes' Reservations. It did not argue that those Reservations do not presently exist, either under the Court's decision in *McGirt*, or under the alternative analysis that it now argues the dissent advocated in *McGirt*. *See* Tr. of Evidentiary Hr'g at 9:18-10:1, *State v. Martin*, No. CF-2016-782A (Okla. Dist. Ct. Oct. 9, 2020) (Assistant Attorney General explains that "[t]he State has no position" on the existence of the Chickasaw Reservation and "that is

directly from the Attorney General").[3] But after the elected Attorney General left office, the State's current Governor calculated that the recent change in this Court's composition could give the State another shot at *McGirt*, and he appointed a new Attorney General to further that strategy.[4]

The State then frantically changed gears, and has since filed dozens of petitions in this Court aimed at *McGirt*. That effort is both procedurally infirm and substantively inadequate. Its weakness is illustrated by the State's assertion, purporting to speak for the United States, that the federal government cannot handle the work of implementing *McGirt*, which is a position the United States has neither advanced as a statement of fact nor as a basis for certiorari. *Cf.* Br. for U.S. as *Amicus Curiae* Respecting Appl. for a Stay at 7, 26-27, 29, *Oklahoma v. Bosse*, No. 20A161. That is an argument to be made in Congress; it does not support certiorari. Nor is that argument strengthened by the State's *amici*, who rely on junk science and incorrect, incomplete, and misleading information to assert that implementing *McGirt* simply is impossible

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[3] This transcript is on file with counsel for *Amici* Nations and is available from the state District Court of Carter County as part of the record in *State v. Martin*.

[4] *See Defending State Sovereignty or Psychological Denial? Oklahoma's Attorney General Pushes U.S. Supreme Court to Reconsider the McGirt Decision*, Editorial, Tulsa World (Aug. 12, 2021), https://bit.ly/3Du1udL; Janelle Stecklein, *Experts: Supreme Court Could Clarify McGirt Ruling, Won't Overturn It*, Enid News (Aug. 19, 2021), https://bit.ly/3DovRSS; Carmen Forman, *New Oklahoma AG John O'Connor Talks McGirt, ABA Rating and State's Top Legal Issues*, Oklahoman (Sept. 5, 2021, 5:00 AM), https://bit.ly/3a6xGGz; Dick Pryor, *Capitol Insider: Governor Kevin Stitt On State-Tribal Relations*, KGOU (Feb 5, 2021 5:10 PM), https://bit.ly/3ypYRG5.

so *McGirt* must be reversed. Br. of *Amicus Curiae* Cherokee Nation at 4-12 ("Cherokee *Amicus* Br."); *see* Kevin Canfield, *Mayor Still Mum on Indian Affairs Commission's Request to Pull City's Brief Supporting McGirt Challenge*, Tulsa World (Nov. 2, 2021), https://bit.ly/3kjHvXa. At the same time, the State refuses to accept *McGirt*, and opposes any additional funding or intergovernmental agreements to support the transitional criminal justice challenges the United States and the Five Tribes are working to overcome. *See* Chickasaw *Beck* Br. at 6-7, 13-14. All of this succeeds only in revealing that the State has no basis for asking this Court to revisit *McGirt*.

In fact, *McGirt* is a victory for the rule of law. It was argued by skilled advocates with different views of the law, and it was decided. Its framework was applied by the OCCA to other Reservations. Now the Five Tribes and others are working in good faith toward implementation and criminals are being brought to justice. The State's pending petitions offer no reason to abandon that course.

I. THE STATE CANNOT USE AN ATTACK ON *McGIRT* TO CHALLENGE DECISIONS THAT DO NOT DEAL WITH THE CREEK RESERVATION, OR VICE VERSA.

The State presents no argument in this or any other petition as to why the OCCA's determinations as to the Cherokee, Chickasaw, Choctaw, and Seminole Reservations warrant reversal, other than to attack the Court's decision on the Creek Reservation in *McGirt*, state its agreement with the dissent in that case, and make the unsupported factual assertion that all Five Tribes' Reservations were disestablished. Pet. 18. Lacking a sufficient foundation, that argument collapses. Reservations are not uniform, and no non-

Creek Reservation was at issue in *McGirt*. Indeed, *McGirt* plainly rejected the notion that its decision was binding on tribes other than the Muscogee (Creek) Nation:

> If we dared to recognize that the Creek Reservation was never disestablished, Oklahoma and dissent warn, our holding might be used by other tribes to vindicate similar treaty promises. Ultimately, Oklahoma fears that perhaps as much as half its land and roughly 1.8 million of its residents could wind up within Indian country.
>
> It's hard to know what to make of this self-defeating argument. *Each tribe's treaties must be considered on their own terms, and the only question before us concerns the Creek.*

140 S. Ct. at 2478-79 (emphasis added).

Nor was the Creek Reservation at issue in the OCCA decision in this case, or the other cases only dealing with the Cherokee, Chickasaw, Choctaw, and Seminole Reservations. After *McGirt*, the OCCA applied that decision's analytical framework to the treaties and statutes concerning the establishment and continuing existence of *Amici* Nations' Reservations. It found that framework, applied to those enactments, compelled acknowledgment of the Chickasaw and Choctaw Reservations. *Bosse v. State*, 2021 OK CR 3, 484 P.3d 286, *withdrawn on other grounds*, 2021 OK CR 23, 495 P.3d 669, *reservation ruling reaffirmed*, 2021 OK CR 30 (Chickasaw); *Sizemore v. State*, 2021 OK CR 6, 485 P.3d 867 (Choctaw). In the same manner, the OCCA considered and acknowledged the continuing existence of the Cherokee and Seminole Reservations. *Hogner v. State*, 2021 OK CR 4 (Cherokee); *Grayson v. State*,

2021 OK CR 8, 485 P.3d 250, *as corrected* (Apr. 23, 2021) (Seminole).

The OCCA's conclusions that these Nations' Reservations still exist properly relied on the reasoning in *McGirt*. But that does not permit the State to rely solely on *McGirt* to attack those decisions. The State cannot simply ask this Court to assume that if *McGirt* was wrong with respect to the Creek Reservation, other Reservations likewise do not exist. Instead, as *McGirt* acknowledged, the diminishment analysis requires the evaluation of the treaties and statutes that created and affected the Reservation under consideration. *See Nebraska v. Parker*, 577 U.S. 481, 487-88 (2016) (citing *Solem v. Bartlett*, 465 U.S. 463, 467 (1984); *Hagen v. Utah*, 510 U.S. 399, 411 (1994); *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989)). That statutory analysis can and does yield different results in different cases due to the different treaties and statutes at issue in each case. *McGirt*, 140 S. Ct. 2465 (noting congressional abolition of Ponca and Otoe Reservations).

Obviously, the Creek Reservation was established, and its boundaries defined, by treaties *with the Muscogee (Creek) Nation*. *See McGirt*, 140 S. Ct. at 2460-62 (citing Treaty of Cusseta, Mar. 24, 1832, 7 Stat. 366; 1833 Treaty of Fort Gibson with the Creek, Feb. 14, 1833, 7 Stat. 417 ("1833 Creek Treaty"); 1856 Treaty of Washington with the Creeks and Seminoles, Aug. 7, 1856, 11 Stat. 699 ("1856 Creek & Seminole Treaty"); 1866 Treaty of Washington with the Creek, June 14, 1866, 14 Stat. 785). The Chickasaw and Choctaw Reservations were defined by treaties *with Amici Nations*. *See supra* at 1. And while the Creek Reservation was allotted under the 1901 Creek Allotment Agreement after the Muscogee (Creek) Nation refused

to ratify a prior allotment agreement codified in Section 30 of the Curtis Act, Act of June 28, 1898, ch. 517, § 30, 30 Stat. 495, 514-19, *see McGirt*, 140 S. Ct. at 2463-64 (discussing Act of Mar. 1, 1901, ch. 676, 31 Stat. 861), *Amici* Nations' Reservations were allotted according to the Atoka Agreement with *Amici* Nations, which was separately codified in Section 29 of the Curtis Act, *see* 30 Stat. at 505-13, as later modified by the Act of July 1, 1902, ch. 1362, 32 Stat. 641.[5]

In the remanded proceedings, *Amici* Nations presented their unique treaty and allotment histories, explaining their statutes' similarities and differences with the Creek-specific statutes considered in *McGirt* and how the ruling in *McGirt* should be applied to *Amici* Nations' circumstances. *See, e.g.*, *Amicus Curiae* Chickasaw Nation's Br. at 14-26, 29-33, *State v. Bosse*, No. CF-2010-00213 (Okla. Dist. Ct. filed Sept. 23, 2020), https://bit.ly/3BOXXVi; *Amicus Curiae* Choctaw Nation's Br. at 6-18, 29-33, *State v. Sizemore*, No. CF-2016-593 (Okla. Dist. Ct. filed Oct. 9, 2020),

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[5] The other Five Tribes also have unique Reservation histories. The Cherokee Reservation was established and its boundaries defined by treaties and an agreement with the Cherokee Nation, *see* Treaty of New Echota, Dec. 29, 1835, 7 Stat. 478 (incorporating Treaty with the Western Cherokee, Feb. 14, 1833, 7 Stat. 414); 1866 Treaty of Washington with the Cherokee, July 19, 1866, 14 Stat. 799; Act of Mar. 3, 1893, ch. 209, 27 Stat. 612, and allotted under the 1902 Cherokee Allotment Agreement, Act of July 1, 1902, ch. 1375, 32 Stat. 716. The Seminole Reservation was established and its boundaries defined by treaties made with the Seminole (and some also with the Muscogee (Creek)), *see* 1833 Creek Treaty; Treaty of Payne's Landing, Mar. 28, 1833, 7 Stat. 423; 1856 Creek & Seminole Treaty; 1866 Treaty of Washington with the Seminole, Mar. 21, 1866, 14 Stat. 755, and allotted under the 1898 Seminole Allotment Agreement, Act of July 1, 1898, ch. 542, 30 Stat. 567.

https://bit.ly/3o2dagX.[6] The District Courts and OCCA, in applying *McGirt*, concluded that these authorities were not ambiguous. If ambiguity had emerged, it would have been proper to resolve it by "consult[ing] contemporaneous usages, customs, and practices to the extent they shed light *on the meaning of the language in question* at the time of enactment," *McGirt*, 140 S. Ct. at 2468 (citing *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 538-39 (2019)) (emphasis added), i.e., the relevant facts surrounding the treatment of each Nation's Reservation. That would be so even where the text of treaties or statutes affecting the Muscogee (Creek) and *Amici* Nations were the same or similar, as application of the Indian canons of construction requires interpreting ambiguities in light of the particular circumstances of their enactment. *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 200, 201-02 (1999); *see Bryan v. Itasca County, Minnesota*, 426 U.S. 373, 392 (1976).

The differences between tribes' legal histories, and their possible relevance to the existence of the reservations, are the very issues that necessitated remanded evidentiary hearings in the first place. *See* Order Remanding for Evidentiary Hr'g at 2, *Castro-Huerta v. State*, No. F-2017-1203 (Okla. Crim. App. Aug. 19, 2020), https://bit.ly/3EWRXvW. And, indeed, after *McGirt* and *Sharp v. Murphy*, 140 S. Ct. 2412 (2020) (per curiam), were decided the State asked the OCCA in this and other cases for supplemental briefing and

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[6] So did the Cherokee and Seminole Nations in cases dealing with their Reservations. *See* Cherokee Nation *Amicus* Br. at 9-25, *State v. Spears*, No. CF-2017-1013 (Okla. Dist. Ct. filed Sept. 21, 2020), https://bit.ly/3bKLxmR; Br. of Seminole Nation as *Amicus Curiae* at 3-8, *State v. Grayson*, No. CF-2015-370 (Okla. Dist. Ct. filed Sept. 23, 2020), https://bit.ly/3qbtsa3.

time to review the record to determine "what, if any, findings have been made by the district court with regard to the *McGirt* issue; and whether any additional findings may be necessary." *E.g.*, Req. to File Resp. to Appellant's Jurisdictional Claim at 1-2, *Castro-Huerta v. State*, No. F-2017-1203 (Okla. Crim. App. filed July 16, 2020), https://bit.ly/3kf1fv2. The State ultimately chose not to contest or engage with history—but if it had, that would have necessitated additional factual development, specific to the tribe whose reservation was being challenged, and legal analysis addressed specifically to those facts. *McGirt* could not be solely relied on for those purposes, because it considered only the Creek Reservation.

Accordingly, the State cannot attack the OCCA's acknowledgements of other Reservations simply by challenging *McGirt*, or vice versa. The State's conclusory assertions that these Reservations were diminished are *ipse dixit*, not legal argument, and do not justify review. *See Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 38 (1989) (refusing to consider argument that petitioner failed to brief and argue adequately before the Supreme Court).

The fact that the State challenges the Creek Reservation in some of its petitions is not an escape hatch, as the State's petitions could not be granted in any case for constitutional and procedural reasons we now explain.

II. THE STATE CANNOT USE MOOT CASES TO CHALLENGE *McGIRT*.

There is no "case or controversy" remaining for the Court to resolve by granting this petition. Accordingly, the State cannot use this petition to make any argument, much less an argument that *McGirt*

should be reconsidered. The case began listing towards mootness on April 29, when the OCCA issued its decision, adopting the District Court's "thorough and well-reasoned" conclusions that the Cherokee Reservation was never disestablished as consistent with the OCCA's own ruling in *Spears v. State*, 2021 OK CR 7, 485 P.3d 873. Pet'r's App. 3a. The State immediately asked the OCCA to stay its mandate. Mot. to Stay Mandate, *Castro-Huerta v. State*, No. F-2017-1203 (Okla. Crim. App. filed Apr. 29, 2021), https://bit.ly/3ERQtmD. After this Court issued an emergency stay in *Oklahoma v. Bosse*, No. 20A161, the State renewed its motion. Renewed Mot. to Stay Mandate (filed May 27, 2021), https://bit.ly/3q6C6Xm. The OCCA then issued a stay, first for three days, Pet'r's App. 19a-20a, then indefinitely, *id.* 21a.

On September 14, after the State dismissed its petition in *Bosse*, Castro-Huerta moved the OCCA to lift the stay in his case. Mot. to Lift Stay & Issue Mandate (filed Sept. 14, 2021), https://bit.ly/3mWRxzv. The State said nothing in response, even though it was then preparing its petition for certiorari in this case, which it filed three days later. A week after Respondent filed his motion with the OCCA, that court lifted its stay and issued the mandate. *See* Order of Sept. 21, 2021, *Castro-Huerta v. State*, No. F-2017-1203 (Okla. Crim. App. Sept. 21, 2021), https://bit.ly/3BTnH2P. The mandate was transmitted to the District Court, where the State remained silent. Six days later, the District Court ordered the "[c]ase dismissed . . . due to lack of jurisdiction," and vacated Respondent's judgment and sentence. *See* Docket Entry, *State v. Castro-Huerta*, No. CF-2015-6478 (filed Sept. 27, 2021), https://bit.ly/3obkGWS.

That dismissal mooted this case. Because the state charges and conviction appealed below have been dismissed and vacated, any decision on their validity would not offer relief. *See Chafin v. Chafin*, 568 U.S. 165, 172 (2013). It would only provide an academic opinion on whether those charges should have been brought. Such an exercise would be purely advisory. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101 (1998). The one exception to mootness which this Court has recognized—capable of repetition yet evading review—does not apply. *See Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1976 (2016). This case deals with a lengthy criminal sentence and so cannot be said to "evade[] review." Nor is there any indication that Castro-Huerta is likely to be prosecuted again for his crimes in state court, since he has been in federal custody on federal charges for his crimes since April 6, 2021, Returned Arrest Warrant, *United States v. Castro-Huerta*, No. 4:20-cr-00255-CVE (N.D. Okla. guilty plea Nov. 2, 2021), ECF No. 33; Waiver of Detention Hr'g & Consent to Order of Detention Pending Further Proceedings, ECF No. 32, and on October 15 pleaded guilty, Plea Agreement, ECF No. 52.

That identical scenario has replayed repeatedly. The State currently seeks certiorari in forty cases involving thirty-nine individuals. Thirty-five of those cases have been mooted by District Court orders below.[7] To date, thirty-seven respondents have been

[7] Many of these orders were issued before the State sought certiorari in these cases, yet the State has never included a dismissal order in its appendices. *Cf.* Rule 14.1(*i*)(i)-(ii). *See State v. Bain*, No. CF-2018-196 (Okla. Dist. Ct. Apr. 22, 2021), https://bit.ly/3GVvilm; *State v. Ball*, No. CF-2018-89 (Okla. Dist. Ct. Apr. 22, 2021), https://bit.ly/3CcSIzb; *State v. Ball*, No. CF-2018-157 (Okla. Dist. Ct. July 28, 2021), https://bit.ly/3qK5BPb;

State v. Beck, No. CF-2017-23 (Okla. Dist. Ct. May 6, 2021), https://bit.ly/3o0T1YE; *State v. Brown*, No. CF-2017-257 (Okla. Dist. Ct. Mar. 25, 2021), https://bit.ly/3HlBIKJ; *Castro-Huerta*, No. CF-2015-6478; *State v. Cooper*, No. CF-2016-535 (Okla. Dist. Ct. Apr. 28, 2021), https://bit.ly/3qEcVeR; *State v. Cottingham*, No. CF-2015-350 (Okla. Dist. Ct. July 8, 2021), https://bit.ly/3mNXVsD; *State v. Davis*, No. CF-2018-1994 (Okla. Dist. Ct. Apr. 22, 2021), https://bit.ly/3wmnnbV; *State v. Epperson*, No. CF-2014-170 (Okla. Dist. Ct. May 18, 2021), https://bit.ly/3BRVDNr; *State v. Fox*, No. CF-2018-7 (Okla. Dist. Ct. Aug. 18, 2021), https://bit.ly/3bJe3Ft; *State v. Harjo*, No. CF-2016-692 (Okla. Dist. Ct. May 10, 2021), https://bit.ly/3kYItc3; *State v. Hathcoat*, No. CF-2016-207 (Okla. Dist. Ct. Mar. 25, 2021), https://bit.ly/3BP6N5A; *State v. Howell*, No. CF-2015-186 (Okla. Dist. Ct. Apr. 16, 2021), https://bit.ly/3BTAZfQ; *State v. Jackson*, No. CF-2014-5892 (Okla. Dist. Ct. Apr. 16, 2021), https://bit.ly/3ELMQ1t; *State v. Janson*, No. CF-2016-5428 (Okla. Dist. Ct. Apr. 28, 2021), https://bit.ly/30310wq; *State v. Johnson*, No. CF-2017-316 (Okla. Dist. Ct. Apr. 22, 2021), https://bit.ly/3qctfUc; *State v. Jones*, No. CF-2017-973 (Okla. Dist. Ct. May 11, 2021), https://bit.ly/3qc3xPI; *State v. Jones*, No. CF-2016-591 (Okla. Dist. Ct. Aug. 10, 2021), https://bit.ly/3GOYgDv; *State v. Kepler*, No. CF-2014-3952 (Okla. Dist. Ct. July 26, 2021), https://bit.ly/3CTLPE6; *State v. Leathers*, No. CF-2018-1340 (Okla. Dist. Ct. Sept. 14, 2021), https://bit.ly/3kcMV6p; *State v. Little*, No. CF-2018-1700 (Okla. Dist. Ct. July 14, 2021), https://bit.ly/3kH0yuX; *State v. Martin*, No. CF-2016-782A (Okla. Dist. Ct. June 16, 2021), https://bit.ly/3kafeCG; *State v. McCombs*, No. CF-2016-6878 (Okla. Dist. Ct. Oct. 12, 2021), https://bit.ly/3o0Zxie; *State v. Mitchell*, No. CF-2015-4207 (Okla. Dist. Ct. Apr. 27, 2021), https://bit.ly/3BQeqbK; *State v. Mize*, No. CF-2017-3891 (Okla. Dist. Ct. Apr. 28, 2021), https://bit.ly/31qlmzW; *State v. Ned*, Nos. CF-2020-23, CM-2020-45 (Okla. Dist. Ct. Aug. 24, 2021), https://bit.ly/31pSB6q; *State v. Perales*, No. CF-2015-355 (Okla. Dist. Ct. Sept. 13, 2021), https://bit.ly/3qGRKsL; *State v. Perry*, No. CF-2018-3720 (Okla. Dist. Ct. Apr. 27, 2021), https://bit.ly/3bJf4NN; *State v. Shriver*, No. CF-2015-395 (Okla. Dist. Ct. Aug. 5, 2021), https://bit.ly/3qAN0ox; *State v. Spears*, No. CF-2017-1013 (Okla. Dist. Ct. Apr. 20, 2021), https://bit.ly/3ooKizy; *State v. Starr*, No. CF-2016-80 (Okla. Dist. Ct. Mar. 22, 2021), https://bit.ly/3wn1iKs; *State v. Stewart*, No. CF-2010-4428 (Okla. Dist. Ct. May 5, 2021),

indicted by federal or tribal authorities.[8] Nine respondents, including Castro-Huerta, have pleaded

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https://bit.ly/3kblnhM; *State v. Williams*, No. CF-2014-4936 (Okla. Dist. Ct. May 4, 2021), https://bit.ly/3k9OMZR; *State v. Yargee*, No. CF-2018-4926 (Okla. Dist. Ct. July 9, 2021), https://bit.ly/3wRdcMT.

[8] *Cherokee Nation v. Perales*, No. CRM-21-261 (Cherokee Nation Dist. Ct. filed Mar. 9, 2021); *Cherokee Nation v. Shriver*, No. CRM-21-56 (Cherokee Dist. Ct. filed Mar. 30, 2021); *Muscogee (Creek) Nation v. Epperson*, No. CF-2021-973 (Muscogee (Creek) Dist. Ct. filed Sept. 22, 2021); *Muscogee (Creek) Nation v. Starr*, No. CM-2021-591 (Muscogee (Creek) Dist. Ct. filed Aug 30, 2021); *United States v. Bain*, No. 6:20-cr-00139-JFH (E.D. Okla. filed Dec. 8, 2020); *United States v. Ball*, No. 6:20-cr-00110-RAW (E.D. Okla. filed Sept. 22, 2020); *United States v. Beck*, No. 6:21-cr-00142-JWD (E.D. Okla. plea entered Oct. 14, 2021); *United States v. Brown*, No. 6:20-cr-00109-DCJ-1 (E.D. Okla. convicted Sept. 1, 2021); *United States v. Castro-Huerta*, No. 4:20-cr-00255-CVE-2 (N.D. Okla. plea entered Oct. 15, 2021); *United States v. Cooper*, No. 6:21-cr-00070-JFH (E.D. Okla. filed Mar. 19, 2021); *United States v. Cottingham*, No. 4:20-cr-00209-GKF-1 (N.D. Okla. plea entered June 10, 2021); *United States v. Davis*, No. 4:20-cr-00316-CVE-1 (N.D. Okla. filed Dec. 8, 2020); *United States v. Fox*, No. 6:21-mj-00251-KEW-1 (E.D. Okla. filed May 17, 2021); *United States v. Grayson*, No. 6:21-cr-00166-RAW-1 (E.D. Okla. filed Apr. 12, 2021); *United States v. Harjo*, No. 6:21-cr-00022-RAW-1 (E.D. Okla. convicted Nov. 16, 2021); *United States v. Hathcoat*, No. 6:21-cr-00018-RAW-1 (E.D. Okla. filed Feb. 24, 2021); *United States v. Howell*, No. 4:21-cr-00121-JFH-1 (N.D. Okla. filed Mar.17, 2021); *United States v. Jackson*, No. 4:20-cr-00310-CVE-1 (N.D. Okla. plea entered Nov. 10, 2021); *United States v. Janson*, No. 4:21-cr-00197-GKF-1 (N.D. Okla. plea entered June 17, 2021); *United States v. Johnson*, No. 6:21-cr-00183-BMJ-1 (E.D. Okla. filed Apr. 19, 2021); *United States v. Jones*, No. 4:21-cr-00023-GKF-1 (N.D. Okla. convicted June 23, 2021), *appeal docketed* No. 21-5079 (10th Cir. filed Oct. 24, 2021); *United States v. Jones*, No. 6:21-cr-00118-JFH-1 (E.D. Okla. filed Mar. 22, 2021); *United States v. Kepler*, No. 4:20-cr-276-GKF-1 (N.D. Okla. convicted Apr. 26, 2021); *United States v. Leathers*, No. 4:21-cr-00163-CVE-1 (N.D. Okla. filed Mar. 19, 2021); *United States v.*

guilty. *Beck*; *Castro-Huerta*; *Cottingham*;[9] *Jackson*; *Janson*; *Martin*, No. 6:21-cr-00047-JFH-1; *Mitchell*; *Stewart*; *Yargee*. Four more have been convicted. *Brown*; *Harjo;* *Jones*, No. 4:21-cr-00023-GKF; *Kepler*. Fourteen are awaiting a trial scheduled in the next three months. *Ball*; *Cooper*; *Davis*; *Grayson*; *Howell*; *Johnson*; *Leathers*; *Little*; *Martin*, No. 6:21-cr-00221-TDD-1; *McCombs*; *McDaniel*; *Mize*; *Perry*; *Williams*. These cases present no basis for review of the state convictions which the State's petitions seek to uphold. The five cases that have not been dismissed below are otherwise procedurally infirm, for reasons that would also doom this petition, were it not moot.

Little, No. 4:21-cr-00162-CVE-1 (N.D. Okla. filed Apr. 8, 2021); *United States v. Martin*, No. 6:21-cr-00221-TDD-1 (E.D. Okla. filed May 17, 2021); *United States v. Martin*, No. 6:21-cr-00047-JFH-1 (E.D. Okla. plea entered July 14, 2021); *United States v. McCombs*, No. 4:20-cr-00262-GKF-1 (N.D. Okla. filed Nov. 3, 2020); *United States v. McDaniel*, No. 6:21-cr-00321-SLP-1 (E.D. Okla. filed Sept. 22, 2021); *United States v. Mitchell*, No. 4:20-cr-00254-JFH-1 (N.D. Okla. Sept. 29, 2021); *United States v. Mize*, No. 4:21-cr-00107-GKF-1 (N.D. Okla. filed Mar. 24, 2021); *United States v. Perry*, No. 4:20-cr-00218-GKF-1 (N.D. Okla. filed Oct. 6, 2020); *United States v. Sizemore*, No. 6:21-cr-00138-RAW-1 (E.D. Okla. filed Apr. 19, 2021); *United States v. Spears*, No. 4:20-cr-00296-GKF-1 (N.D. Okla. filed Nov. 18, 2020); *United States v. Stewart*, No. 4:20-cr-00260-GKF-1 (N.D. Okla. plea Sept. 16, 2021); *United States v. Williams*, No. 4:21-cr-00104-JFH-1 (N.D. Okla. filed Mar. 24, 2021); *United States v. Yargee*, No. 4:21-cr-00313-CVE-1 (N.D. Okla. plea entered Aug. 27, 2021). *Amici* Chickasaw Nation has not brought charges against Chandler Ned, *see Oklahoma v. Ned*, No. 21-645, at this time, and the Tribal statute of limitations on his potential charges has not yet run. Bryce Miller, *see Oklahoma v. Miller*, No. 21-643, is currently in state prison and *Amici* Nations understand that federal prosecutors are making a charging decision.

[9] Cottingham has moved to withdraw his plea, *see* Opposed Mot. to Withdraw Plea of Guilty, *Cottingham*, No. 4:20-cr-00209-GKF-1, ECF No. 45, but the court has not yet ruled.

III. THE STATE HAS WAIVED ITS CHALLENGES TO *McGIRT* IN THIS AND ITS OTHER PETITIONS.

Finally, the State's challenges to the application of the law to the facts of the Nations' Reservations cannot be litigated in the first instance in this Court, which is, after all, "one of final review, 'not of first view.'" *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 529 (2009) (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005)). In the courts below, rather than arguing whether each Nation's Reservation still exists, the State never presented evidence of diminishment and typically said nothing. That was true here, as *amicus* Cherokee Nation has explained in its brief, *see* Cherokee *Amicus* Br. at 13-14, and in other cases, *see, e.g.*, Chickasaw *Beck* Br. at 16-19; Choctaw *Sizemore* Br. at 17-21. By deploying this "tactic of passivity" in the state courts, *see* Pet'r's App. 49a, the State has waived any right to challenge the Reservations in its petitions to this Court.

The State itself has explained why its effort to reverse course should fail. Earlier this term, the State urged the Court to deny a petition from a state prisoner who cited *McGirt* to justify review of his state conviction. The State asserted that this Court cannot grant certiorari to consider the applicability of *McGirt* where "petitioner has never presented any court with the *McGirt* claim he advances for the first time here." Br. in Opp. to Pet. for Writ of Cert. at 6, *Christian v. Oklahoma*, No. 20-8335, https://bit.ly/3q8en94. As the State explained, "the longstanding practice of the Court is to refrain from considering a question not pressed or passed upon below," and "[s]trict refusal to consider claims not raised and addressed below furthers the interests of comity by allowing the states the

first opportunity to address federal law concerns and resolve any potential questions on state-law grounds." *Id.* at 5. The Court accordingly denied certiorari. *Christian v. Oklahoma*, No. 20-8335, 2021 WL 4822686 (U.S. Oct. 18, 2021). This Court should do so here too, and in the State's other *McGirt* challenges, as the State consistently failed to litigate the existence of the Nations' Reservations in the state courts.

The State, in a tacit acknowledgment of its waivers, has in some recent cases attempted to walk them back. For instance, in *Ned v. State*, shortly after the former Attorney General left office, the State attempted to justify its decision not to challenge the Chickasaw Reservation in the state courts on the basis that "only the Supreme Court can overrule itself," and asserted that, by simply acknowledging it disagreed with *McGirt* and *Bosse*, it was preserving the right to challenge the existence of the Chickasaw Reservation elsewhere. *E.g.*, State's Br. Preserving [sic] Challenge to *McGirt* at 3-4, *Ned v. State*, Nos. CF-2020-23, CM-2020-45 (Okla. Dist. Ct. filed June 7, 2021), https://bit.ly/301IUdY ("State *Ned* Br."). Disagreement with *McGirt* is not a legal argument. That would require that the State show how its disagreement with *McGirt* would yield a different result in the case under consideration. Furthermore, the decisions recognizing the Cherokee, Chickasaw, Choctaw, and Seminole Reservations were made *by the OCCA*, after reviewing each tribe's unique history in light of *McGirt* and that case's application of bedrock diminishment caselaw. *See, e.g.*, *Bosse*, 2021 OK CR 3, ¶¶ 8-12, 484 P.3d at 289-91, *reaffirmed* 2021 OK CR 30, ¶ 12; *Sizemore*, 2021 OK CR 6, ¶¶ 10-16, 485 P.3d at 869-71. If the State wanted a court to re-evaluate the existence of those Reservations, it was obligated to make its arguments to the OCCA. Instead, it let the

opportunity slip by and, at most, simply told the OCCA it disagreed with that court's Reservation decisions and might ask the Supreme Court to reverse them. *See, e.g.*, State *Ned* Br. at 3-4. That presented the OCCA with no argument, and nothing to rule on. *See, e.g.*, *Ned v. State*, No. C-2020-789, slip op. at 4 n.2 (Okla. Crim. App. Aug. 5, 2021), https://bit.ly/3H04ws7. Such weak efforts to turn back the clock must fail, both under the case law of this Court, *see* Cherokee *Amicus* Br. at 13-14, and state law procedural bars, *see, e.g.*, *Bench v. State*, 2018 OK CR 31, ¶ 96, 431 P.3d 929, 958 (state law of waiver for failure to support argument before OCCA); *TRW/ Reda Pump v. Brewington*, 829 P.2d 15, 24-25 (Okla. 1992) (state law of waiver of arguments on appeal); *Pinkstaff v. State*, 488 P.2d 624 (Okla. Crim, App. 1971) (OCCA bound by district court findings of fact when appellant made no assignments of error or offered of proof); *Carris v. John R. Thomas & Assocs., P.C.*, 896 P.2d 522, 527-28 (Okla. 1995) (state law of defensive non-mutual collateral estoppel).

If more were needed, the State's effort to challenge *McGirt* here and elsewhere is also forfeited by its prior *affirmative acceptance* of the Chickasaw, Cherokee, Choctaw, and Creek Reservations in other cases. *See* Suppl. Br. of Appellee After Remand at 4, *Ball v. State*, No. F-2020-54 (Okla. Crim. App. filed Apr. 26, 2021), https://bit.ly/3oXHjQG (State "stipulated that . . . the location of the crimes charged 'were within the boundaries of the Chickasaw Reservation,' and thus were within 'Indian Country'");[10] *State v. Martin*, No. CF-

[10] The State noted in this brief in *Ball* that it believed *McGirt* and *Murphy* (but not *Bosse*) were wrongly decided but that they were binding on the lower courts, and provided no analysis of how its preferred approach would resolve the question of whether the

2014-14, slip op. at 2 (Okla. Dist. Ct. Oct. 1, 2020) (accepting parties' stipulations that "the charged crimes occurred on the Creek Reservation"), https://bit.ly/3bNafD4; Suppl. Br. of Appellee after Remand at 3, *McDaniel v. State*, No. F-2017-0357 (Okla. Crim. App. filed Mar. 29, 2021) ("The State further accepts, in light of this Court's ruling in *Hogner v. State*,. . . that the crimes occurred within the boundaries of the Cherokee Nation Reservation."), https://bit.ly/3lM1Wgz; State's Pre-Evidentiary Hr'g Br. at 2-3, *State v. Miller*, No. CF-2019-284 (Okla. Dist. Ct. filed May 20, 2021), https://bit.ly/31M6cW0 ("The State also acknowledges that the OCCA recently held in *Sizemore* . . . that Congress established a reservation for the Choctaw Nation . . . and never erased the boundaries and disestablished the Choctaw Nation Reservation" and asking the district court not to hold an evidentiary hearing);[11] Stip. of Parties at 2, *State v. Sizemore*, No. CF-2016-593 (Okla. Dist. Ct. filed Oct. 14, 2020), https://bit.ly/3awX6gM (stipulating that if the District Court found that the Choctaw Nation's treaties "established a Reservation, and if the Court further concludes that Congress never explicitly erased those boundaries and disestablished that [Choctaw] Reservation, then" the crime in that case "occurred within Indian Country

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Chickasaw Reservation exists. *Id.* at 4 n.2. It said nothing to avoid its stipulation that the Chickasaw Reservation exists. *See Christian Legal Soc'y v. Martinez*, 561 U.S. 661, 677 (2010) (a party who enters into a stipulation undertakes "to be bound by the factual stipulations it submits").

[11] The State in *Miller* noted that it believed *McGirt* was wrongly decided but that it was binding on the lower courts. *Id.* at 3. It provided no analysis to explain why the Choctaw Reservation would not exist if a different analysis were employed or why it could avoid its stipulation in *Sizemore* that the Choctaw Reservation exists.

as defined by 18 U.S.C. § 1151(a).”). Having conceded the Reservations’ existence to avoid the burden of litigation below, the State is barred from attacking the existence of the Cherokee, Chickasaw, Choctaw, and Creek Reservations in this Court. That would give it an unfair litigation advantage, apparently based on strategically misleading the courts. *See New Hampshire v. Maine*, 532 U.S. 742, 750-51, 755-56 (2001); Cherokee *Amicus* Br. at 13 & n.26.

CONCLUSION

For the foregoing reasons, the Court should deny the State’s petition.

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