No. 21-646

IN THE

Supreme Court of the United States

STATE OF OKLAHOMA,

Petitioner,

v.

DAMEON LAMAR LEATHERS,

Respondent.

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

BRIEF OF *AMICUS CURIAE* THE CHEROKEE NATION IN SUPPORT OF RESPONDENT

FRANK S. HOLLEMAN, IV
DOUGLAS B. L. ENDRESON
SONOSKY, CHAMBERS, SACHSE, ENDRESON & PERRY, LLP
1425 K Street, NW, Suite 600
Washington, DC 20005

PATTI PALMER GHEZZI
Attorney at Law
P.O. Box 812
Pawhuska, OK 74056

SARA HILL
Attorney General
CHRISSI NIMMO
Counsel of Record
Deputy Attorney General
CHEROKEE NATION
P.O. Box 948
Tahlequah, OK 74465
(918) 458-6998
chrissi-nimmo@cherokee.org

Counsel for Amicus Curiae

November 24, 2021

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

INTEREST OF *AMICUS*[1]

Amicus Cherokee Nation ("Nation") is a federally-recognized Indian tribe, residing on a reservation in Oklahoma, where it protects public safety and prosecutes Indian offenders in the exercise of its inherent sovereign authority. *United States v. Wheeler*, 435 U.S. 313 (1978); *United States v. Lara*, 541 U.S. 193 (2008). Under the Treaty of New Echota, Dec. 29, 1835, 7 Stat. 478, the Nation ceded its lands east of the Mississippi, art. 1, in exchange for a new homeland in present-day Oklahoma, *id*. art. 2 (incorporating Treaty with the Western Cherokee, Feb. 14, 1833, 7 Stat. 414), on which it was guaranteed the right to self-government under federal supervision, *id.* art. 5; *see* 1866 Treaty of Washington with the Cherokee, art. 31, July 19, 1866, 14 Stat. 799.[2] The Oklahoma Court of Criminal Appeals ("OCCA") upheld the existence of the Nation's Reservation, *Hogner v. State*, 2021 OK CR 4, analyzing the Nation's unique history and treaties in light of *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020). The State did not seek certiorari in *Hogner*—in fact, the State once accepted *Hogner* as settling the Reservation's existence.

---

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

[2] The boundaries of the Reservation established by the 1833 Treaty, the 1835 Treaty, and a December 31, 1838 fee patent to the Nation, were modified by the 1866 Treaty arts. 16, 17, 21, 14 Stat. 799, and the Act of Mar. 3, 1893, ch. 209, § 10, 27 Stat. 612, 640-43. *See* Pet'r's App. 17a-41a, *Oklahoma v. Spears*, No. 21-323.

The Nation has fundamental interests in protecting the treaty promises under which the Nation, as the sole tribal signatory of those treaties, resides on and governs the Reservation. Accordingly, even before *Hogner* was decided the Nation began a comprehensive enhancement of its criminal justice system, growing its capacity and redoubling coordination with other governments to meet the expanded responsibilities that it anticipated. That effort continues today, under the ruling in *Hogner*.

Now, however, Oklahoma seeks reconsideration and reversal of *McGirt*, boldly declaring it is wrong and challenging the OCCA's decisions upholding the United States' treaty promises to the Nation. To protect those rights and to aid the Court in its disposition of this petition, the Nation turns again to this Court—as it has before, *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832)—and submits this brief to show that certiorari should be denied to protect the Nation's rights and the rule of law on its Reservation.

SUMMARY OF ARGUMENT

The petition should be denied for three reasons.[3] First, *McGirt* has been implemented successfully on the Cherokee Reservation by the Nation and the federal government. A balanced and accurate description

[3] To state its argument against *McGirt* in this case, the State seeks to incorporate its attack on *McGirt* from its petition in *Oklahoma v. Castro-Huerta*, No. 21-429 ("*Castro-Huerta* Pet."), *see* Pet. 6-7. The Nation responds here to that argument, mindful that the Court may not accept the State's practice, which hangs attacks on all Five Tribes' Reservations on a Cherokee Reservation case and diverts attention from the OCCA's analyses of the Cherokee Reservation's status in its published decisions, *see Hogner*; *Spears v. State*, 2021 OK CR 7, 485 P.3d 873.

of how the Nation is addressing *McGirt* disproves the State's argument that *McGirt* is unworkable. Second, the State waived its right to seek reversal of *McGirt* or the overthrow of the Cherokee Reservation by not challenging the Reservation's existence in the court below and expressly accepting it in other cases. And the District Court has since dismissed the charges against Respondent, mooting this case. Finally, the State provides no basis for discarding *McGirt*. The cases on which it relies are worlds apart from this situation, where *McGirt* has provided a workable standard that is being applied by the courts below, both in the Oklahoma Indian reservation context and elsewhere, the facts and law underlying the decision have not changed, and the opinion was a well-reasoned one that has established reliance interests by the governments that are implementing it.

REASONS FOR DENYING THE PETITION

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

The State's claim that *McGirt* caused criminal justice issues that justify revisiting that decision does not support certiorari because those supposed issues are either non-existent or overblown. The tribal and federal judicial systems are capably managing the jurisdictional changes effected by *McGirt* and the OCCA's follow-on cases recognizing the Reservations of the other Five Tribes (collectively, "Nations"). Their success is evidenced by their efficient use of increased resources to prosecute those crimes and the State's reduced need for such resources. *McGirt* anticipated that shift, noting "it doesn't take a lot of imagination to see how things could work out in the end." 140 S. Ct. at 2480. Here, the Nation illustrates how the transition is being made in an orderly way that protects

the public and that the Nation is confident will be successful for all stakeholders.

Even before *McGirt* was decided, the Nation began preparations to exercise criminal jurisdiction throughout its Reservation. Those preparations accelerated after *McGirt* and came to fruition after *Hogner*. In response to those rulings, Principal Chief Chuck Hoskin Jr. committed the Nation to "building up the largest criminal justice system in our tribe's history in record speed . . . to provide a blanket of protection within the Cherokee Nation Reservation for all citizens." Michael Overall, *The Cherokee Nation's Budget Will Hit a Record $3 Billion as the Tribe Responds to COVID and McGirt*, Tulsa World (Sept. 15, 2021) ("Overall").[4]

The Nation is meeting that commitment. Last fiscal year, the Nation spent $10 million to expand its justice system, including seating two new district court judges, appointing six new prosecutors, and hiring additional victim advocates. *See* Press Release, Cherokee Nation, Cherokee Nation Files 1000th Case in Tribal Court Following McGirt Ruling (June 7, 2021).[5] This fiscal year, the budgets for the Nation's court system, Attorney General's office, and Marshal Service more than doubled. *See* Overall. The Nation is also opening two new courts, *see* Samantha Vicent, *Cherokee Nation Highlights Expansion of Legal System on Anniversary of McGirt Ruling*, Tulsa World (updated Aug. 30, 2021),[6] which will add to the well-established Cherokee Nation courts at the W.W. Keeler Tribal Complex, *see* Curtis Killman, *Here's How*

---

[4] https://bit.ly/3apJHaj

[5] https://bit.ly/3v1g6NX

[6] https://bit.ly/3uXpJxf

Cherokee Tribal Courts Are Handling the Surge in Cases Due to the McGirt Ruling, Tulsa World (updated July 22, 2021).[7]

This effort also significantly relies on local cooperation. The Nation has entered into agreements with counties under which defendants are housed in adult or juvenile detention facilities while they await trial or serve their sentences. *Id.* Those agreements benefit both signatories. As the director of the Cherokee Nation Marshall Service ("CNMS") explains:

> The jails have the same people still in them. The only difference is that the tribe pays for the Native Americans in the jail. The jails aren't being overcrowded because of this. Quite frankly, the jails are getting more benefit now, because before McGirt, they had these people in the jails, but the tribe wasn't paying $42 [per inmate] a day to the jail.

Grant D. Crawford, *CN Marshal Service Rises to Challenge of McGirt*, Tahlequah Daily Press (May 7, 2021) (alteration in original) ("Crawford").[8] Such agreements are not uncommon—the City of Tulsa has one with the County of Tulsa, for instance. *See* Drake Johnson, *Tulsa County Jail to be Used for City Jail Overflow*, Newson6 (Oct. 4, 2021, 5:32 PM).[9]

The Nation has also continued its long-standing policy of entering into cross-deputization agreements with other governments on the Reservation, under which local and state law enforcement may enforce tribal law and tribal law enforcement may enforce

---

[7] https://bit.ly/3FscfOK

[8] https://bit.ly/3mFbx8g

[9] https://bit.ly/3vz2DNy

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

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

---

[10] https://bit.ly/3jKkYm6

[11] *See Tribal Compacts and Agreements*, Okla. Sec'y of State, https://bit.ly/3FRTqoq (last visited Nov. 16, 2021) (enter "Cherokee" into "Doc Type" searchbar and press "Submit"). The State's *amici* call these compacts into question, *see* ODAA Amicus Br. at 16-17, *Oklahoma v. Castro-Huerta*, No. 21-429, but only offer speculation against their effectiveness, which is defeated by the Nation's quarter-century of experience with them and the dozens of agreements the Nation has entered.

[12] Municipal agreements are available on Cherokee Nation's website. *See Legal Status of the Cherokee Nation Reservation*, Cherokee Nation Att'y Gen.'s Office, https://bit.ly/3qMdZ0n (last accessed Nov. 16, 2021) (follow hyperlinks under "Municipal Agreements").

[13] https://bit.ly/3mJZM0a

ernmental Agreements with State Following McGirt Ruling, Tahlequah Daily Press (Oct. 11, 2021).[14]

The Nation hopes for similar tribal-state agreements and supports Congressman Tom Cole's proposed legislation that would allow the State and Nation to negotiate tribal-state compacts to define state and tribal criminal jurisdiction within the Reservation to their mutual benefit. *See* Cherokee Nation and Chickasaw Nation Criminal Jurisdiction Compacting Act of 2021, H.R. 3091, 117th Cong. (2021). However, Oklahoma's Governor opposes it because it would acknowledge the existence of Indian Reservations. Reese Gorman, *Cole Encourages State-Tribal Relations Over State Challenges to McGirt*, Norman Transcript (July 23, 2021).[15] In contrast, Oklahoma's former elected Attorney General accepted *McGirt*, *see* Press Release, Office of Okla. Att'y Gen., Attorney General Hunter Prepares Brief with Court of Criminal Appeals Seeking Guidance on Cases Affected by the McGirt Decision (last visited Oct. 20, 2021),[16] and sought to implement it by "working with federal and tribal partners to make sure criminals are still being arrested and prosecuted," Mike Hunter, Okla. Att'y Gen., *Frequently Asked Questions Related to McGirt v. Oklahoma and the Proposed Legislative Framework Document* 1 (n.d.).[17] The new Attorney General, recently appointed by the Governor, is staunchly opposed to acknowledging or implementing *McGirt*. Joe Tomlinson, *Promised Land Recap: AG O'Connor Focused on Challenging SCOTUS Reservation Ruling*,

---

[14] https://bit.ly/3pgZ7qh

[15] https://bit.ly/3ANKfBx

[16] https://bit.ly/3n4S9Si

[17] https://bit.ly/3vuPc1l

NonDoc (Sept. 17, 2021).[18] Nevertheless, the Nation still engages with willing state partners. Shortly after *McGirt* was decided, the Nation entered into an agreement with the State Department of Human Services which recognizes the Nation's Reservation and permits the State and Nation to exercise concurrent jurisdiction over Indian child custody on the Reservation. *See* Intergovernmental Agreement Between Okla. & Cherokee Nation Regarding Jurisdiction over Indian Children Within the Nation's Reservation (Sept. 1, 2020).[19] The Nation is also negotiating with the Oklahoma Department of Mental Health and Substance Abuse to reach a mutually beneficial agreement to provide additional resources for mental health treatment on the Reservation.

The Nation has also revised its laws to aid an orderly criminal justice transition by amending or enacting provisions that track state law. *See Tribal Code*, Cherokee Nation Office of Att'y Gen. (last visited Oct. 20, 2021).[20] That includes new traffic, criminal, and juvenile codes that define offenses and crimes similarly to state law. Cherokee Nation Code tits. 10A,[21] 21,[22] 47.[23] The Nation also amended its statute of limitations, so that the limitation period tolls when the State initiated prosecution but then dismissed a

---

[18] https://bit.ly/3FOnJMG

[19] https://bit.ly/2Z2KWdA

[20] https://bit.ly/3APtTsl

[21] https://bit.ly/3FttVZI

[22] https://bit.ly/3DTe6dQ

[23] https://bit.ly/3G5nKfw

prosecution or conviction for lack of jurisdiction. Cherokee Nation Code tit. 22, §§ 154-155.[24]

These investments are delivering justice daily. As of September 30, 2021, the Nation had prosecuted 2,530 felony and misdemeanor cases since the *Hogner* ruling.[25] These arrests and prosecutions are being undertaken with a respect for the rule of law and the needs of the entire community: "'We protect the tribe, we protect the community,' [CNMS Director] said. . . . 'You'll hear a lot in the media about the world coming to an end,'. . . . 'It really isn't.'" Crawford. The role that tribal justice systems play in punishing criminals rebuts the notion, repeated by Oklahoma, *see Castro-Huerta* Pet. 20, that the federal government's declination of cases results in criminals going free. As the outgoing United States Attorney for the Northern District of Oklahoma explained:

> [S]ome of those cases that people were describing as declinations were actually cases that were being referred to tribal attorneys general to be prosecuted. And I think that when a tribal attorney general decides to prosecute a case that's actually a great exercise of tribal sovereignty and [the] tribal justice system. So, I don't consider that case a declination where justice wasn't pursued. . . . And, I think the tribal court should get our full faith and credit for being the great justice systems that they are.

---

[24] https://bit.ly/2Xj23XA

[25] Documentation is on file with the Nation.

Allison Herrera, *Trent Shores Reflects on his Time as U.S. Attorney, Remains Committed to Justice for Indian Country*, KOSU (Feb. 24, 2021, 4:40 AM).[26]

These efforts also include the handling of cases where offenders have already been prosecuted by the state and jurisdiction has shifted to the United States or the Nation. In those cases, the Nation and federal government are acting swiftly to keep offenders off the street and make sure they are brought to justice in the proper forum. For instance, the Respondent in this case is a Muscogee (Creek) citizen who committed murder on the Cherokee Reservation in 2018. On March 19, 2021, only a week after the OCCA affirmed the Cherokee Reservation in *Hogner*, the federal government filed a criminal complaint against Respondent for murder in Indian country. *See* Crim. Compl., *United States v. Leathers*, No. 4:21-cr-00163-CVE-1 (N.D. Okla. filed Mar. 19, 2021), ECF No. 1. The same day, the federal district court ordered Respondent to be transferred from state to federal custody, Order Granting Writ of Habeas Corpus Ad Prosquendum for Cause, ECF No. 4, and he was taken into federal custody on March 29, 2021, *see* Returned Arrest Warrant, ECF No. 18. Respondent remains in federal custody. Order of Detention Pending Trial of Apr. 2, 2021, ECF No. 16.

That response was no one-off and resulted from an extensive effort by the Nation to ensure that *McGirt* was brought to bear on cases arising on the Reservation in a responsible, orderly manner. In the month after the *McGirt* decision, the Nation assisted the OCCA's consideration of direct appeals raising *McGirt*-based jurisdictional arguments. It did so by

---

[26] https://bit.ly/3E3gD5x

tendering an amicus brief and appendix in *Hogner* less than a month after *McGirt* was decided and identifying nine cases raising the claim that the Cherokee Reservation is intact. Cherokee Nation Unopposed Application for Authorization to File *Amicus* Br., *Hogner v. State*, 2021 OK CR 4 (filed Aug. 3, 2020) (No. F-2018-138).[27] In each case, the Nation confirmed the location of the offenses and the Indian status of the defendants and victims. Less than two weeks later, the OCCA remanded those cases for evidentiary hearings. As in this case, the State presented no evidence or argument at those hearings that the Reservation was disestablished or that *McGirt* should be overruled. (In fact, here the State specifically waived the hearing.) The Nation appeared and participated at each hearing, filing amicus briefs, exhibits, historical documents, and proposed findings of fact and conclusions of law. Each trial court determined the Reservation is intact.

Based on the evidentiary records and trial courts' findings, the Nation anticipated the OCCA would vacate convictions and began to coordinate, sometimes in advance of the OCCA opinions, to ensure defendants would be lawfully prosecuted in federal or tribal courts. That effort was successful. As of today, the OCCA has vacated twelve state convictions in Cherokee Reservation cases on direct appeal. In every case, federal or tribal prosecution is proceeding. *See Cherokee Nation v. Perales*, No. CRM-21-261 (Cherokee Nation Dist. Ct. filed Mar. 9, 2021); *Cherokee Nation v. Shriver*, No. CRM-21-55 (Cherokee Nation Dist. Ct. filed Feb. 19. 2021); *Cherokee Nation v. Shriver*, No. CRM-21-56 (Cherokee Nation Dist. Ct. filed Feb. 19,

[27] https://bit.ly/3DZkOiK

2021); *United States v. Bragg*, No. 4:21-cr-0008-JFH (N.D. Okla. filed Mar. 22, 2021); *United States v. Castro-Huerta*, No. 4:20-cr-00255-CVE (N.D. Okla. plea entered filed Nov. 2, 2020); *United States v. Cottingham*, No. 4:20-cr-00209-GKF-1 (N.D. Okla. plea entered June 10, 2021); *United States v. Foster*, No. 4:21-cr-00118-CVE (N.D. Okla. filed March 16, 2021); *Leathers*, No. 4:21-cr-00163-CVE-1; *United States v. McCombs*, No. 4:20-cr-00262-GKF-1 (N.D. Okla. filed Nov. 3, 2020); *United States v. McDaniel*, No. 6:21-cr-00321-SLP-1 (E.D. Okla. filed Sept. 22, 2021); *United States v. Spears*, No. 4:20-cr-00296-GKF (N.D. Okla. Nov. 18, 2020); *United States v. Vaught*, No. 4:21-cr-00202-JFH-1 (N.D. Okla. filed Apr. 2, 2021).

The State worries about "civil jurisdiction of non-Indian municipal courts in eastern Oklahoma under the Curtis Act, ch. 504, § 14, 30 Stat. 499-500 (1898)," citing one pending case, *Hooper v. City of Tulsa*, No. 4:21-cv-00165-JED-JFJ (N.D. Okla. filed Apr. 9, 2021). *Castro-Huerta* Pet. 25. *Hooper*—which deals with *criminal* jurisdiction—arose from a decision of the Municipal Criminal Court of the City of Tulsa, which is located on the Creek, Cherokee, and Osage Reservations. The municipal court concluded that under the Curtis Act,[28] municipalities on the Creek Reservation which incorporated before Oklahoma statehood can enforce municipal criminal ordinances against both Indians and non-Indians. *City of Tulsa v. Hooper*, No. 7470397, slip op. at 5-10 (Tulsa Mun. Crim. Ct. Apr. 5, 2021).[29]

---

[28] The Curtis Act was one of the statutes passed by Congress to coerce the Five Tribes into agreeing to allotment of their lands. *See McGirt*, 140 S. Ct. at 2465.

[29] Exhibit 1 to Complaint, *Hooper v. City of Tulsa*, No. 4:21-cv-00165-JED-JFJ (N.D. Okla. filed Apr. 9, 2021), ECF No. 1-1.

The Nation disagrees with that decision. Tulsa is organized under Oklahoma state law pursuant to a charter adopted *after* statehood. *See* Tulsa, Okla. Code App. C;[30] Okla. Const. art. 18, § 3(a). In any event, under existing cross-deputization agreements with Tulsa, tribal and municipal law enforcement officers can enforce applicable tribal, local, and federal laws and refer those cases to the appropriate prosecutors. *See* Addendum to Law Enforcement Agreement Between U.S., Cherokee Nation, and City of Tulsa (Apr. 9, 2014);[31] Addendum to Law Enforcement Agreement Between U.S., Muscogee (Creek) Nation, and City of Tulsa (May 2, 2006).[32] Such agreements are available to any other municipality on a reservation. And since *McGirt*, inter-governmental cooperation with Tulsa police has been intensive. *See* Allison Herrera, *"My Office Will Work Until We Drop": Agencies Vow to Work Together on McGirt Cases*, KOSU (Aug. 12, 2020, 10:02 AM).[33] So both Indians and non-Indians in Tulsa are being held accountable to the law.

Finally, the State's suggestion that lurking "[q]uestions" about tribal civil authority are of concern has no basis in fact within the Nation's knowledge. *Castro-Huerta* Pet. 25. The Nation has made no effort to exercise civil jurisdiction over anyone on terms that were not already available before *McGirt*, and no such cases are pending in the Nation's courts. The State provides no evidence that any of the challenges to the State's civil jurisdiction elsewhere are even

---

[30] https://bit.ly/3nejTDZ

[31] https://bit.ly/3DsYnSv

[32] https://bit.ly/3uY6Lq6

[33] https://bit.ly/3DKOhg0

remotely serious. *See id.* at 24-26. If serious disputes were to arise over civil jurisdiction, they should be resolved in those cases, not this criminal case. Resolution of such issues is also available through tribal-state agreement, as the tribes and State have done time and time again, even when the Supreme Court has found the State has overstepped its authority in Indian country. *See, e.g.*, Okla. Stat. tit. 68 § 500.63 (authorizing the State and tribes to enter agreements to share motor fuel tax revenues after *Oklahoma Tax Commission v. Chickasaw Nation*, 515 U.S. 450 (1995)); *id.* § 346 (authorizing State and tribes to enter agreements to share tobacco tax revenues after *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505 (1991)). That this model works is shown by the Nation's recent child custody agreement with the State. *See supra* at 8.

The State's reliance on exaggeration is of a piece with the Oklahoma Governor's attempts to stoke hysteria and sensationalism in the media. *See* Hicham Raache, *Gov. Stitt Says Supreme Court's McGirt Ruling Created 'Public Safety Threat', asks Oklahomans to Share Stories; Cherokee Nation Reacts*, KFOR (Apr. 16, 2021, 11:52 AM);[34] Ray Carter, *McGirt Called Threat to State's Economic Future*, Okla. Council of Pub. Affairs (Aug. 16, 2021);[35] Reese Gorman, *Cole Continues to Advocate for Tribal Sovereignty on Indigenous Peoples' Day*, Norman Transcript (Oct 11, 2021) ("Stitt spokesperson Carly Atchinson said, 'McGirt is the biggest issue that's ever hit any state since the Civil War . . . .'").[36] That provides no ground

[34] https://bit.ly/2YV7mwS

[35] https://bit.ly/3vzCs9M

[36] https://bit.ly/3AK839C

for certiorari. Furthermore, rewarding this strategy could threaten the fair adjudication of criminal cases arising on Indian country in Oklahoma in the future. *See Flowers v. Mississippi*, 139 S. Ct. 2228, 2254 (2019) (Thomas, J., dissenting); *Chandler v. Florida*, 449 U.S. 560, 580 (1981).

II. The State Cannot Use this Moot Case to Challenge the Cherokee Reservation.

The State's effort to undo the Cherokee Reservation is a starkly new position. The State earlier *affirmatively accepted* the Cherokee Reservation. Suppl. Br. of Appellee after Remand at 3, *McDaniel v. State*, No. F-2017-357 (Okla. Crim. App. filed Mar. 29, 2021) ("The State further accepts, in light of this Court's ruling in *Hogner v. State*, . . . that the crimes occurred within the boundaries of the Cherokee Nation Reservation.");[37] Suppl. Br. of Appellee after Remand at 6, *Foster v. State*, No. F-2020-149 (Okla. Crim. App. filed Apr. 19, 2021) (noting the State stipulated that, under *Hogner*, the Cherokee Reservation exists).[38]

Now, under the direction of a newly appointed Attorney General, the State contends that "[u]nder the correct framework . . . Congress disestablished the Creek territory in Oklahoma, as well as the territo-

---

[37] https://bit.ly/3lM1Wgz

[38] https://bit.ly/3jjP67S. The State's decision to accept *Hogner* and not seek certiorari there also suggests its effort to challenge the Reservation is barred by non-mutual collateral estoppel. *See* Restatement (Second) of Judgments § 29 (1982); *B & B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. 138, 148 (2015) (quoting Restatement (Second) of Judgments for collateral estoppel principles); *see also State v. United Cook Inlet Drift Ass'n*, 895 P.2d 947, 951-52 (Alaska 1995); *Benjamin v. Coughlin*, 905 F.2d 571, 576 (2d Cir. 1990).

ries of the rest of the Five Tribes," and that *McGirt* is incorrect. *Castro-Huerta* Pet. 18.[39] That framework, the State insists, requires "[c]onsideration of history . . . because the effect on reservation status of statutes targeting Indian land ownership is inherently ambiguous." *Id.* But this case is moot, and so the State cannot seek to advance any "framework" here. And having taken the contrary position in *McDaniel* to avoid the burden of further litigating the existence of the Reservation, and the OCCA having accepted that position, the State is barred from raising that argument here as part of an unfair appellate ambush. *See New Hampshire v. Maine*, 532 U.S. 742, 750-51, 755-56 (2001).

Moreover, the State's attack is barred by its conduct in *this* case. When a party does not raise an argument below, and the lower court does not rule on it, it is waived. *See Sprietsma v. Mercury Marine*, 537 U.S. 51, 56 n.4 (2002). "Waiver is the intentional relinquishment or abandonment of a known right," *Wood v. Milyard*, 566 U.S. 463, 474 (2012) (cleaned up), which is exactly what the State did here. And an argument waived below is forfeited before this Court. *United States v. Jones*, 565 U.S. 400, 413 (2012).

After *McGirt* and *Sharp v. Murphy*, 140 S. Ct. 2412 (2020) (per curiam), were decided, but before the OCCA decided *Hogner*, the State filed a brief to the OCCA in Respondent's direct appeal, noting that the OCCA had already remanded a "variety of cases" to district courts to "decide . . . whether Congress established a reservation for the Cherokee Nation,

---

[39] *McGirt* addressed only the Creek Reservation, not all of the Five Tribes' Reservations. 140 S. Ct. at 2479.

and if so, whether Congress specifically erased those boundaries and disestablished the Reservation." Mot. to Stay Br'g Schedule at 3, *Leathers v. State*, No. F-2019-962 (Okla. Crim. App. Oct. 23, 2020).[40] The State requested the OCCA stay the briefing schedule "pending [the OCCA's] determination of the Cherokee Nation reservation question." *Id.* at 5. After the OCCA determined that the Cherokee Reservation still exists, it then issued an order in this case, noting the "issue" of Indian Country existence had been "decided in *Spears v. State*, wherein this Court held that Congress established a Cherokee Nation Reservation and that the Cherokee Reservation remains in existence." Pet'r's App. 25a. The OCCA then remanded for an evidentiary hearing and directed the District Court to "consider any evidence the parties provide, including but not limited to treaties, statutes, maps, and/or testimony." *Id.* at 26a-27a.

On remand, the State stipulated with Respondent that "the crimes at issue in this case were committed . . . within the historical boundaries of the Cherokee Nation" established by the Cherokee Treaties, *id.* at 19a, and asked the District Court to waive the evidentiary hearing, *id.* at 18a. The District Court then adopted the stipulation and held that "[t]he parties agreed that the location where the crime occurred was within the Cherokee Nation Reservation boundaries. Based upon the Supreme Court's ruling in *McGirt* . . . this Court concludes that the crime occurred on the Cherokee Nation Reservation which is Indian Country." *Id.* at 15a.

Before the case returned to the OCCA, the Attorney General resigned. *See* Melissa Scavelli, *Oklahoma*

---

[40] https://bit.ly/3HhXnUi

Attorney General Mike Hunter Resigns Due to 'Personal Matters', KOKH (May 26, 2021) ("Attorney General Mike Hunter says he will resign from his position effective June 1st.").[41] Under the direction of a new Acting Attorney General, the State belatedly attempted to change course, asserting in a post-remand brief to the OCCA that "the State strenuously disagrees with the holdings in *McGirt*, *Hogner*, and *Spears*, and preserves the right to ask the Supreme Court to review those holdings." Pet'r's App. 39a n.2. But it again presented no argument about how an alternative analysis would change the outcome, instead making the cursory statement that Congress disestablished all Five Tribes' Reservations. *Id.* It did not ask the OCCA to revisit its rulings in *Hogner* and *Spears* and did not address the effects of its failure to challenge *Hogner* before it became final or the State's previous acceptance of that ruling. The only relief it sought was to ask the OCCA to stay the mandate for twenty days after decision. *Id.* at 40a.

Having been presented with no request to overrule *Hogner* and *Spears* or revisit the existence of the Cherokee Reservation, the OCCA made no mention of the State's late attempt at preserving its attack on the Reservation and upheld the District Court's ruling under *Spears* and *McGirt*. *Id.* at 7a. Then, on September 14, 2021, before the State filed its petition for certiorari in this case, the District Court issued an order vacating and dismissing the criminal charges in the District Court. *See* Docket Entry, *State v.*

[41] https://bit.ly/3n1ShmX

Leathers, No. CF-2018-1340 (Okla. Dist. Ct. Sept. 14, 2021).[42]

Because the criminal charges giving rise to this case have been dismissed, it is moot. The dismissal ended the controversy between the State and Respondent, and so any decision this Court issues on the State's ability to bring the now-dismissed charges will not give the State any relief, *Chafin v. Chafin*, 568 U.S. 165, 172 (2013), and would only be advisory, *see Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101 (1998).[43]

The State also forfeited its anti-Reservation position here, including its attack on *McGirt*, by waiving it below. The State first asked the OCCA to stay briefing in the case until it issued a binding decision in other cases as to whether the Cherokee Reservation exists. When *Hogner* and *Spears* decided that issue, the State chose not to challenge the existence of the Cherokee Reservation on remand, instead avoiding a hearing entirely by entering stipulations, which was consistent with its earlier approach of accepting *Hogner* and *Spears*. Its first challenge to the Cherokee Reservation came in its post-remand briefing to the OCCA, where it stated in a footnote, a cursory position on *McGirt* that did not explain why the rule it sought to

---

[42] https://bit.ly/3om1KF1. The State did not include this order in its appendix, despite its connection to the judgment and clear relevance to this Court's jurisdiction. *See* Rule 14.1(*i*)(i)-(ii).

[43] The only exception to mootness that the Court has recognized—"capable of repetition yet evading review"—is inapplicable in this case, which deals with the validity of a criminal conviction, not a transient injury too short to be litigated but likely to be repeated. *See United States v. Sanchez-Gomez*, 138 S. Ct. 1532, 1540 (2018); *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1976 (2016).

apply would give a different result than *Hogner*, *Spears*, and the District Court's order. In short, the State's effort here to reverse its earlier decisions not to challenge the existence of the Cherokee Reservation "comes too late in the day" to be considered. *See Sorrell v. IMS Health Inc.*, 564 U.S. 552, 563 (2011); *accord Bench v. State*, 2018 OK CR 31, ¶ 96, 431 P.3d 929, 958 ("As Appellant has not provided any argument or authority supporting this claim, we find that he has forfeited appellate review of the issue.").

III. The State Proffers No Just Basis For Abandoning *Stare Decisis* to Revisit *McGirt*.

The State claims this is a "paradigmatic" example of when *stare decisis* should yield but relies on cases that are worlds apart from this one. *Castro-Huerta* Pet. 28 (citing *Ramos v. Louisiana*, 140 S. Ct. 1390, 1405 (2020); *Franchise Tax Bd. v. Hyatt*, 139 S. Ct. 1485, 1499 (2019); *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2485-86 (2018)). When the "factors to consider" in deciding whether to overturn precedent are applied to this case, namely "the quality of the decision's reasoning; its consistency with related decisions; legal developments since the decision; and reliance on the decision," *Hyatt*, 139 S. Ct. at 1499, *McGirt* does not yield.

In the cases the State cites, the Court overturned prior *constitutional* precedents, acknowledging that *stare decisis* "is at its weakest when we interpret the Constitution." *Ramos*, 140 S. Ct. at 1405; *Hyatt*, 139 S. Ct. at 1499; *Janus*, 138 S. Ct. at 2478. Here *stare decisis* has special force, as Congress may exercise its primary authority over Indian affairs to alter the Court's decisions by legislation. *Michigan v. Bay Mills*

Indian Cmty., 572 U.S. 782, 799 (2014).[44] Yet, in this case the State asks the Court to do Congress's business by accepting its view of funding and policy debates. The political nature of this attack is underscored by its timing, which follows the appointment of a new Attorney General. That is a call for prospective legislation, not grounds for certiorari.

McGirt is also well-reasoned, in contrast to the decisions overruled in *Ramos*, 140 S. Ct. at 1404-06, *Hyatt*, 139 S. Ct. at 1499, and *Janus*, 138 S. Ct. at 2463-65, 2483. *McGirt* rests on a comprehensive analysis of law and history—despite the State's claim to the contrary, *Castro-Huerta* Pet. 17-18—and its ruling is based on the language of the treaties and congressional enactments at issue, rather than the State's interpretation of subsequent events that are urged to overcome statutory text.[45] The Court's conclusion was no outlier, as it is consistent with the

---

[44] This, and the reliance costs of implementation of *McGirt*, *see infra* at 22-23, rebut the State's assertion that "the recent nature of the decision entitles it to less stare decisis weight." *Castro-Huerta* Pet. 28 (citing constitutional cases where reliance interests, if they existed, were weakened by lower courts' confused applications of precedent).

[45] The State's and supporting *amici*'s position that *McGirt* should be reversed because the disestablishment analysis involves "inherently ambiguous" statutes is self-defeating. *See* Texas Amicus Br. at 13-20, *Oklahoma v. Castro-Huerta*, No. 21-429. The judicial interpretation of ambiguous statutes fosters certainty and predictability in their application and enforcement, which is an argument for sparingly revisiting such interpretations. *See Gamble v. United States*, 139 S. Ct. 1960, 1986 (2019) (Thomas, J., concurring). And even if the State were right that *McGirt* involved inherent ambiguities, *McGirt* resolved them through a thorough review of the circumstances surrounding the enactment and implementation of statutes affecting the Muscogee (Creek) Nation. 140 S. Ct. at 2470-74.

federal court decisions that have applied the *Solem* disestablishment factors, including the Tenth Circuit panel in *Murphy v. Royal*, 866 F.3d 1164 (10th Cir. 2017), *as amended on denial of rehr'g en banc* 875 F.3d 896 (10th Cir. 2017). Unlike *Hyatt* and *Janus*, no intervening decision affects the law on which *McGirt* is based or calls *McGirt*'s reasoning into question. *Hyatt*, 139 S. Ct. at 1499; *Janus*, 138 S. Ct. at 2484-85. In fact, subsequently, multiple circuits have repeatedly relied on *McGirt*'s approach to statutory interpretation as a touchstone in their own analyses, both in and outside of the Indian law context.[46] Nor have there been any later factual developments that call the *McGirt* decision's reasoning into question. *Cf. Janus*, 138 S. Ct. at 2465-66, 2482-83; *Citizens United v. FEC*, 558 U.S. 310, 364 (2010) (massive changes in political media landscape undermined poorly-reasoned First Amendment precedent). Indeed, the relevant facts showing the Creek Reservation's existence could not have changed in the past year. Perhaps most significantly, the Oklahoma courts have applied *McGirt* with precision and without difficulty. And the Nations and the federal governments have successfully implemented *McGirt* and the OCCA's decisions to bring criminals to justice, which proves *McGirt* is not "unworkable."

Reliance interests are present here too. *McGirt* palliates injustice, honors the treaty promises of the United States, restores to Congress its constitutional prerogative to decide whether and how to change those promises, and demonstrates that this Court will not permit "the rule of the strong" to triumph over

---

[46] *See, e.g.*, *Penobscot Nation v. Frey*, 3 F.4th 484, 493-94 (1st Cir. 2021); *Awuku-Asare v. Garland*, 991 F.3d 1123, 1128 (10th Cir. 2021); *Rojas v. FAA*, 989 F.3d. 666, 689 (9th Cir. 2021) (Wardlaw, J., concurring in part and dissenting in part).

the rule of law, 140 S. Ct. at 2474. While the State relies heavily on the "century of reliance interests that *McGirt* upset," *Castro-Huerta* Pet. 28, the correction of a century of injustice cannot entirely avoid doing so. And the Nations, federal government, state courts, local governments, and other public servants have invested great time and resources to make the recognition of the Nations' treaty rights in *McGirt* and its follow-on cases meaningful by protecting public safety and punishing wrongdoers. The commitment will continue. *See*, *e.g.*, Exec. Order 14,053, § 3(ii), Improving Public Safety and Criminal Justice for Native Americans and Addressing the Crisis of Missing or Murdered Indigenous People, 86 Fed. Reg. 64,337, 64,338-39 (Nov. 18, 2021). Reversing course now would leave all those efforts without purpose or meaning—affecting the public's confidence in the justice system, wasting tens of millions of dollars and substantial administrative investments, and imposing costs of re-arresting, re-transferring, and re-prosecuting thousands of offenders. These are the interests that are now on the line, and they are threatened by efforts to overthrow *McGirt*, not efforts to adhere to it.

CONCLUSION

The petition should be denied.

Respectfully submitted,

FRANK S. HOLLEMAN, IV
DOUGLAS B. L. ENDRESON
SONOSKY, CHAMBERS, SACHSE, ENDRESON & PERRY, LLP
1425 K Street, NW, Suite 600
Washington, DC 20005

PATTI PALMER GHEZZI
Attorney at Law
P.O. Box 812
Pawhuska, OK 74056

SARA HILL
Attorney General
CHRISSI NIMMO
Counsel of Record
Deputy Attorney General
CHEROKEE NATION
P.O. Box 948
Tahlequah, OK 74465
(918) 458-6998
chrissi-nimmo@cherokee.org

Counsel for Amicus Curiae

November 24, 2021