

No. 21-608

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IN THE  
**Supreme Court of the United States**

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STATE OF OKLAHOMA,  
*Petitioner,*

v.

LAURIE JEAN MARTIN,  
*Respondent.*

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

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

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STEPHEN GREETHAM  
*Senior Counsel*

MEREDITH TURPIN  
*Associate General Counsel*  
CHICKASAW NATION  
Office of Senior Counsel  
4001 N. Lincoln Blvd  
Oklahoma City, OK 73105

FRANK S. HOLLEMAN, IV  
*Counsel of Record*

DOUGLAS B. L. ENDRESON  
SONOSKY, CHAMBERS,  
SACHSE, ENDRESON &  
PERRY, LLP  
1425 K Street, NW  
Suite 600  
Washington, DC 20005  
(202) 682-0240  
fholleman@sonosky.com

*Counsel for Amicus Curiae Chickasaw Nation*

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

*Amicus* Chickasaw Nation (“Nation”) is a federally-recognized Indian tribe, 86 Fed. Reg. 7,554, 7,557 (Jan. 29, 2021), residing on and governing the Chickasaw Reservation, its permanent, treaty-guaranteed homeland, *see* 1837 Treaty of Doaksville, Jan. 17, 1837, 11 Stat. 573 (incorporating Treaty of Dancing Rabbit Creek, art. 2, Sept. 27, 1830, 7 Stat. 333); 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. On the Reservation, the Nation exercises inherent sovereign authority to protect the public by providing “police protection and other governmental services,” *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137-38 (1982), and punishing criminals who commit crimes there, *United States v. Wheeler*, 435 U.S. 313 (1978); *United States v. Lara*, 541 U.S. 193 (2004). Following *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), the Nation comprehensively reviewed and enhanced its criminal justice system and redoubled coordination with other governments in anticipation of the affirmation of its Reservation boundaries. The Nation has fundamental sovereign interests in the success of those efforts and in protecting its treaty promises.

The State imperils these interests. It disparages tribal and federal success in implementing the *McGirt* decision, opposes additional funding for those efforts, and counts on a change in the Court’s composition to

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<sup>1</sup> No counsel for a party authored this brief in whole or 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.

secure a grant of certiorari to reconsider *McGirt*. Such a grant, in this or any other of the myriad cases in which the State challenges *McGirt*, would jeopardize the Nation's Reservation and unsettle the rule of law. Accordingly, the Nation has unique interests in Oklahoma's petition, and in the implementation of *McGirt*, as well as first-hand experience in the delivery of criminal justice in a multijurisdictional context, all of which will aid the Court's consideration of this petition.

### SUMMARY OF ARGUMENT

The petition should be denied for three reasons.<sup>2</sup> First, the federal and tribal governments are successfully implementing *McGirt*. To argue otherwise, the State offers an account of the *status quo* brimming with inaccuracies and omissions. The State's tale of woe is dispelled by the fact that thirty-eight of the forty cases in which the State has sought certiorari to challenge *McGirt* involve respondents who have either been federally indicted or charged in tribal court, and prosecutors may still charge the other two. *See infra* at \*.\*. But there is more: the State is estopped from seeking, and waived its right to seek, reversal of *McGirt* or the overthrow of the Chickasaw Reservation by its conduct below and in other cases. Finally, the State provides no valid basis for discarding *McGirt*. It argues the dissent in *McGirt* was correct and the majority was wrong, *Castro-Huerta* Pet. 17, which can-

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<sup>2</sup> To state its argument against *McGirt* in this case, the State seeks to incorporate its attack on *McGirt* from its petition in *Oklahoma v. Castro-Huerta*, No. 21-429 ("*Castro-Huerta* Pet."), *see* Pet. 6-7. The Nation responds here to that argument, mindful that the Court may not accept the State's practice, which uses an attack on the Cherokee Reservation as a basis to attack the Chickasaw Reservation.

not overcome *stare decisis*, see *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 456-57 (2015); *June Med. Servs. LLC v. Russo*, 140 S. Ct. 2103, 2134 (2020) (Roberts, C.J., concurring in judgment). Most problematically, the State relies on a change in the Court’s composition to secure a certiorari grant, disregarding a core value of *stare decisis*, namely “public faith in the judiciary as a source of impersonal and reasoned judgments,” *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 403 (1970). While it alleges intergovernmental cooperation is impossible, that is merely the State Governor’s position and is based on rhetoric, not experience. The Nation, the State Legislature, the Oklahoma Tax Commission, and local jurisdictions all support such agreements, and many are already in use. Ultimately, the State shows only that the proper forum for complaints is Congress, for “a fundamental commitment of Indian law is judicial respect for Congress’s primary role in defining the contours of tribal sovereignty,” *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 803 (2014).

## **REASONS FOR DENYING THE PETITION**

### **I. The Supposed Problems on Which the State Relies Do Not Exist or Are the Deliberate Result of the State’s Litigation Strategy.**

The federal and tribal governments are primarily responsible for implementing *McGirt* and the OCCA’s follow-on cases acknowledging other Reservations. The Nation is rising to those obligations. The State, by contrast, casts the work of implementing *McGirt* as a reason to overrule it and resists its implementation across the board, despite the lack of public alarm, Chris Casteel, *McGirt Decision Not the Most Pressing Issue in Oklahoma, Voters Say*, *Oklahoman* (Oct. 9,

2021), <https://bit.ly/30aWpYB>. This strategy's turnkey is the State Governor's cynical reliance on the Court's recent change in composition. See *Defending State Sovereignty or Psychological Denial? Oklahoma Attorney General Pushes U.S. Supreme Court to Reconsider the McGirt Decision*, Editorial, Tulsa World (Aug. 12, 2021), <https://bit.ly/3Du1udL>. *McGirt* is delivering justice in Oklahoma, and resistance to that high goal is no reason to overturn it.

Nor are there other reasons to do so. While the State urges that “the decision in *McGirt* is threatening convictions in old [cases],” in which state post-conviction relief is sought, *Castro-Huerta* Pet. 22, that threat has expired. In *State ex rel. Matloff v. Wallace*, the OCCA held that under state law *McGirt* is not available to petitioners for state post-conviction relief from convictions that became final before *McGirt* was decided, while reiterating that the Reservations still exist, 2021 OK CR 21, ¶ 15. The OCCA has vacated earlier opinions granting such relief to the extent they conflicted with that ruling. See, e.g., *Bosse v. State*, 2021 OK CR 23, 495 P.3d 669 *withdrawn*, 2021 OK CR 3, 484 P.3d 286; *Bosse v. State*, 2021 OK CR 30, ¶ 13; *Cole v. State*, 2021 OK CR 26, 495 P.3d 670, *as corrected*, 2021 OK CR 32, *withdrawing* 2021 OK CR 10, 492 P.3d 11; *Ryder v. State*, 2021 OK CR 25, 495 P.3d 669, *withdrawing* 2021 OK CR 11, 489 P.3d 528.

The State asserts *Wallace* “is not finally settled” because the defendant plans to seek certiorari, *Castro-Huerta* Pet. 22, as he has done, see *Parish v. Oklahoma*, No. 21-467. That petition is to be dealt with in that case, not here. Nor can the State deny *Wallace*'s effectiveness, see *New Hampshire v. Maine*, 532 U.S. 742, 749-51, 755-56 (2001), as it has repeatedly and successfully relied on *Wallace* to obtain reversal or denial of post-conviction relief, see, e.g., Notice of

Decision, *Cole v. State*, No. PCD-2020-529 (Okla. Crim. App. filed Aug. 26, 2021), <https://bit.ly/3kIZRk6>. It then argues that offenders may use *McGirt* to obtain *federal* habeas relief, *Castro-Huerta* Pet. 22, but those efforts have so far been rejected, see *In re Morgan*, No. 20-6123 (10th Cir. Sept. 18, 2020); *Jones v. Pettigrew*, No. CIV-20-758-F, 2021 WL 640834 (W.D. Okla. Feb. 18, 2021); *Jones v. Pettigrew*, No. CIV-18-633-G, 2021 WL 3854755, at \*3 (W.D. Okla. Aug. 27, 2021), *appeal filed* No. 21-6106 (10th Cir. Sept. 14, 2021).

The State also insists the federal government is overwhelmed by new responsibilities under *McGirt*, relying on the FBI's recent request for increased appropriations. *Castro-Huerta* Pet. 19-20 (citing *Hearing on FBI Budget Request for Fiscal Year 2022 Before the Subcomm. on Commerce, Science, and Related Agencies of the S. Comm. on Appropriations*, 117th Cong. 13 (2021) (statement of FBI Director), <https://bit.ly/3FBxkXc> ("Wray Testimony"). That effort backfires. As the Wray Testimony details, the request is to enable the FBI to address its increased workload and duties. Ignoring this point, the State exaggerates the federal government's prospective case load, saying it will "have up to 7,500 additional cases in 2022 alone," and calling that a trend that "is likely to continue," *Castro-Huerta* Pet. 19-20. That is wrong, as the current backlog of 5,000 cases will never recur. See Wray Testimony.<sup>3</sup> To be sure, no one doubted *McGirt's* implementation

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<sup>3</sup> The State also says, "since 2005, at least 76,000 of the non-traffic criminal cases filed in Oklahoma state court have involved an Indian perpetrator or victim," *Castro-Huerta* Pet. 20, which suggests approximately 4,750 cases a year *in the entire state*. That would make the federal and tribal governments' Indian country workload plainly manageable, especially if they obtain the additional support the State opposes.

would require reallocating resources, and Congress is acting to do just that. The House’s appropriation bills for 2022 support the Administration’s request for \$70 million to the FBI to “implement public safety measures required to comply with the *McGirt* decision,” H.R. Rep. No. 117-97 at 63 (2021), and appropriate approximately \$11 million for Bureau of Indian Affairs law enforcement and detention and tribal courts, H.R. Rep. No. 117-83 at 55-56 (2021).

Yet, incredibly, the State “strongly opposes” this funding, saying that would “federalize much of eastern Oklahoma,” and that “there’s no need for a permanent federal fix here” as “uncertainties surrounding this decision . . . are currently working their way to the courts.” Reese Gorman, *Cole Encourages State-Tribal Relations Over State Challenges to McGirt*, Norman Transcript (July 23, 2021), <https://bit.ly/3mNaftI> (“Gorman”). The State also opposes appropriations for tribal law enforcement, asserting “the state did not lose its jurisdiction” after *McGirt*, see Gorman,<sup>4</sup> and

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<sup>4</sup> The State even relies on Okmulgee County’s 911 operators’ refusal to provide service to self-identified Indians. See *Castro-Huerta* Pet. 21-22 (citing Annie Gowen & Robert Barnes, ‘Complete, Dysfunctional Chaos’: Oklahoma Reels After Supreme Court Ruling on Indian Tribes, Wash. Post (July 24, 2021), <https://wapo.st/38qTD2A>). That is the result of a local decision, not *McGirt*. Okmulgee County and the Muscogee (Creek) Nation once had a cross-deputization agreement that would obviate any perceived jurisdictional problems in emergency response situations. See Addendum, Addition of Okmulgee Cnty. to Intergov’l Cross-Deputization Agreement (May 8, 2000), <https://bit.ly/3uIs2nz>. The County Sheriff’s office unilaterally withdrew from that agreement in March 2021, despite some local opposition. See Letter from Eddy Rice, Okmulgee Cnty. Sheriff, to David Hill, Muscogee (Creek) Nation Principal Chief (Mar. 1, 2021) (on file with Nation); Tres Savage, *Okmulgee Mayor Richard Larabee Emphasizes Cooperation with Muscogee Nation*, NonDoc (Aug.



complains that it does not know how many post-*McGirt* cases “will be reprosecuted by tribal authorities,” *Castro-Huerta* Pet. 20-21. This is brinksmanship masked as prudence—the State is attempting to block federal resources for *McGirt*’s implementation to bolster its argument for overturning *McGirt*.

The State’s misleading critique of *McGirt*’s implementation is further belied by the status of the forty cases, involving thirty-nine individual respondents, in which the State is currently seeking certiorari.<sup>5</sup> Thirty-seven of the thirty-nine respondents have been indicted in federal or tribal court.<sup>6</sup> Nine have already pleaded

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24, 2021), <https://bit.ly/3BvSpzz>. Rather than seek to solve this problem, the State uses it to make its case.

<sup>5</sup> The State also formerly sought certiorari in *Oklahoma v. Bosse*, No. 21-186, and stays of mandate in *Oklahoma v. Cole*, No. 20A167, and *Oklahoma v. Ryder*, No. 20A168. Those offenders’ state convictions were reinstated after *Wallace*, see *Bosse*, 2021 OK CR 30; *Cole*, 2021 OK CR 26; *Ryder*, 2021 OK CR 36.

<sup>6</sup> *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

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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. Little*, No. 4:21-cr-000162-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 entered 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). The 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 the Nation understands federal prosecutors are making a charging decision.

guilty, *Beck*; *Castro-Huerta*; *Cottingham*;<sup>7</sup> *Jackson*; *Janson*; *Martin*, No. 6:21-cr-00047-JFH-1; *Mitchell*; *Stewart*; *Yargee*, and four have already been convicted, *Brown*; *Harjo*; *Jones*, No. 4:21-cr-00023-GKF-1; *Kepler*. These cases demonstrate that the federal government and tribes are bringing criminals to justice without delay and minimizing impacts of retrials on victims and their families.

The Five Tribes are effectively administering criminal justice: as of September 30, 2021, they had filed over 6,965 felony and misdemeanor cases and issued 2,700 traffic citations since their Reservations were reaffirmed. Inter-tribal Council of Five Civilized Tribes, Res. No. 21-34 (Oct. 8, 2021), <https://bit.ly/3iXEyLg>. The Chickasaw Nation asserted criminal jurisdiction immediately after its Reservation was acknowledged in March 2021. *See* Proclamation, Office of the Governor, Chickasaw Nation (Mar. 11, 2021), <https://bit.ly/3uHEP9W>. Through November 14, the Nation's prosecutors had filed 1,552 felony, misdemeanor, and traffic cases in Chickasaw tribal court, and the Chickasaw police force, the Lighthouse, has fielded 86,389 dispatch contacts, handled 5,845 incidents, and made 1,559 arrests. @Chickasaw Nation, Twitter (Nov. 22, 2021 6:15 PM), <https://bit.ly/3xdrQ0R>. The State's supporting *amici* make unsourced assertions that crimes are going unpunished, but those individual stories do not square with the aggregate picture.<sup>8</sup>

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<sup>7</sup> 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.

<sup>8</sup> Unfortunately, the State allows most violent crimes in Oklahoma to go unpunished, and often fails adequately to punish crimes against Indians, *see* Cherokee Nation *Amicus* Br. at 6, 9-10, *Oklahoma v. Castro-Huerta*, No. 21-429; accord *United States v. Bryant*, 136 S. Ct. 1954, 1960 (2016), and so the State's *amici*'s

Leaving this case behind, the State and some of its *amici* worry about various “[q]uestions involving the effect of *McGirt* on the State’s civil authority . . . .” *Castro-Huerta* Pet. 23-25; see EFO Amicus Br. at 14-17, *Oklahoma v. Castro-Huerta* No. 21-429. *McGirt* decided no such issues, 140 S. Ct. at 2480, which are governed by different, fact-dependent frameworks, see, e.g., *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144-45 (1980); *Montana v. United States*, 450 U.S. 544, 565-66 (1981), and none of which are presented by this case. In addition, the cases they point to are empty vessels. One is a spurious, not yet briefed, claim by a (non-tribal) power plant seeking to avoid ad valorem real property taxes. *Oneta Power, LLC v. Hodges*, No. CJ-2020-193 (Okla. Dist. Ct. filed Aug. 21, 2020). One of the two cases seeking refunds of fees, fines, and restitution has been dismissed, see *Nicholson v. Stitt*, No. CJ-2020-094 (Okla. Dist. Ct. Nov. 24, 2020), *pet. in error filed*, No. SD-119270 (Okla. Dec. 18, 2020), while motions to dismiss are pending in the other, see *Pickup v. Dist. Ct.*, No. 20-cv-346-JED-FHM (N.D. Okla. filed July 20, 2020). The final case, purportedly concerning “the State’s power to regulate oil and gas,” has been stayed because the appellant is under the control of a receivership which is selling off its assets, see Unopposed Mot. to Stay Proceedings, *Canaan Res. X v. Calyx Energy III, LLC*, No. CO-119245 (Okla. filed Mar. 19, 2021), <https://bit.ly/3CCnNwE>. These anemic challenges do not threaten civil governance. *Cf. Castro-Huerta* Pet. 24.

The State’s other concerns are ill-informed exaggerations. The State claims people are refusing to pay state taxes, *Castro-Huerta* Pet. 24, but the Oklahoma

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anecdotes do not provide evidence that state jurisdiction is required to fill a void.

Tax Commission estimated in April that fewer than ten tax challenges had been filed since *McGirt*, Carmen Forman, *Some Oklahomans Seek Tax Exemptions in Light of McGirt Decision*, *Oklahoman* (Apr. 5, 2021), <https://bit.ly/3mRoLAJ>, and recommended “compacts with the tribes” if the number grows, stating that “[h]istorically, tribal compacts have been a powerful tool for facilitating cooperation and revenue-sharing between tribal and state governments, allowing the State to avoid the otherwise difficult task of administering and enforcing state taxes on tribal lands.” Okla. Tax Comm’n, *Report of Potential Impact of McGirt v. Oklahoma* 3 (2020), <https://bit.ly/3yvAgzU>. Regardless, the State’s tax revenue has *increased* post-*McGirt*. *Economy Expands as Energy Prices Surge*, Gross Receipts to the Treasury (Okla. State Treasurer, Okla. City, Okla.), Nov. 3, 2021, at 3, <https://bit.ly/3HmtiTt>. And, Oklahoma’s Governor and Secretary of Commerce boast of the State’s “thriving” economy, budget surplus, attractiveness for out-of-state companies to relocate (including to Indian reservations in Oklahoma), and a significant tax cut enacted after *McGirt*. See Randy Krehbiel, *Official Expects State Economic ‘Explosion’*, *Tulsa World* (Sept. 28, 2021), <https://bit.ly/3iuARwz>; Daniela Ibarra, *Gov. Kevin Stitt Speaks to Tulsa Business Community*, *KTUL* (Aug. 26, 2021), <https://bit.ly/2WJxCtx>; Brianna Bailey, *Land and Millions of Dollars for Infrastructure are Part of a Deal to Lure a Startup Electric Car Maker to Oklahoma*, *Norman Transcript* (Oct. 13, 2021 5:30 PM), <https://bit.ly/3mTSgQD>; Rhett Morgan, *‘Beginning of a New Wave’: MidAmerica Industrial Park Wants to Capitalize on Canoo Investment in Pryor*, *Tulsa World* (June 20, 2021), <https://bit.ly/3BGSrVy>.

The State also says the “Department of the Interior has moved to seize control over surface coal mining

and reclamation in the State.” *Castro-Huerta* Pet. 25. Hardly. The United States is pursuing the orderly transition of authority over coal mining and reclamation on the Choctaw, Creek, and Cherokee Reservations under the Surface Mining Control and Reclamation Act (“SMCRA”), see *Oklahoma v. U.S. Dep’t of Interior*, No. 5:21-cv-00719-F (W.D. Okla. filed July 16, 2021); *Oklahoma v. U.S. Dep’t of Interior*, No. 5:21-cv-00805-F (W.D. Okla. filed Aug. 16, 2021). While the State calls this an “attack” on the “State’s authority under cooperative-federalism programs,” *Castro-Huerta* Pet. 25, this transition is also part of SMCRA’s system of cooperative federalism, see *Bragg v. W. Va. Coal Ass’n*, 248 F.3d 275, 288-89 (4th Cir. 2001). Meanwhile, cooperative federalism has *expanded* the State’s environmental regulatory authority on Oklahoma Indian reservations, see Letter from Andrew R. Wheeler, EPA Administrator, to J. Kevin Stitt, Okla. Governor (Oct. 1, 2020), <https://bit.ly/3lowdCf>.

The State conjures up threats to title insurance, see *Castro-Huerta* Pet. 24-25, relying on unsupported advocacy, see Open Letter from Jonathan S. Small, President & Larry V. Parman, Chairman, Okla. Council of Pub. Affairs, to Okla. Cong. Delegation (Oct. 8, 2020), <https://bit.ly/3CKzYHZ>, an opinion piece suggesting title insurance companies might be affected if they underwrote policies for fee lands over which tribes have jurisdiction, Sarah Roubidoux Lawson & Megan Powell, Opinion, *Unsettled Consequences of the McGirt Decision*, Regulatory Review (Apr. 1, 2021), <https://bit.ly/3u8ieDl>, and a financial report raising similar concerns, First Am. Fin. Corp., SEC Form 10-K at 22 (Feb. 16, 2021), <https://bit.ly/2XEkdTA>. If there were an actual threat, the American Land Title Association suggests intergovernmental cooperation to resolve it. *How U.S. Supreme Court Tribal Ruling in Oklahoma*

*Impacts Title Industry, Property Rights*, Am. Land Title Ass'n (Sept. 1, 2020), <https://bit.ly/3CHxutS> (cited in *Castro-Huerta* Pet. 24). And if any of these issues were to arise, this Court's precedents should dispel undue concern. See *Plains Com. Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316 (2008).

The State asserts also that intergovernmental agreements are not possible solutions, *Castro-Huerta* Pet. 26-28, but practice proves otherwise. Soon after *McGirt*, the State and Nation, authorized by federal, tribal, and state law, 25 U.S.C. § 1919(a); Chickasaw Nation Code § 6-201.5(E);<sup>9</sup> Okla. Stat. tit. 10 § 40.7, entered into a civil jurisdictional agreement permitting the State to exercise concurrent jurisdiction over Indian child custody matters within the Reservation, which the agreement expressly acknowledges. See Intergov'l Agreement Between Okla. & Each of Five Tribes Regarding Jurisdiction Over Indian Children Within Each Tribe's Reservation (Aug. 7, 2020), <https://bit.ly/3izrZWk>. The State has since entered into agreements with all the other Five Tribes, and the Oklahoma Legislature recently strengthened the state law foundation for these agreements. H.B. 2352, 58th Sess. (Okla. 2021), <https://bit.ly/3gLmEdK>.

Further tribal-state compacting has not occurred because the Oklahoma Governor refuses to recognize Indian reservations in Oklahoma. See *Castro-Huerta* Pet. 26-27. Chickasaw Nation Governor Anoatubby proposed a process to Governor Stitt for exploring new intergovernmental agreements, but no response has been forthcoming. Allison Herrera, 'We're Not Going to Give Up Our Jurisdiction': *Chickasaw Nation Gov. Anoatubby on McGirt Impact*, KOSU (May 6, 2021),

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<sup>9</sup> <https://bit.ly/3DnKS6B>

<https://bit.ly/3monLlx>. Instead, the Oklahoma Governor's special counsel has asserted that "[t]he state can't negotiate its sovereignty away . . . ." Ray Carter, *McGirt Called Threat to State's Economic Future*, Okla. Council of Pub. Affs. (Aug. 16, 2021), <https://bit.ly/3uzev1F>. The Governor even opposes a congressional bill to authorize the State and Nation to allocate criminal jurisdiction by intergovernmental agreement, see Cherokee Nation and Chickasaw Nation Criminal Jurisdiction Compacting Act of 2021, H.R. 3091, 117th Cong. (2021). His objection: the bill acknowledges Indian Reservations. See Gorman.

Nevertheless, the Nation has had significant success in *local* intergovernmental agreements. It has seventy-one jurisdiction-sharing agreements with non-tribal law enforcement on the Reservation, including thirty-nine of the forty-three incorporated communities within its Reservation that have police forces, and eight adult inmate and one juvenile detention agreements so the Nation may house its growing inmate population. State or local law enforcement agencies may enter jurisdictional agreements by signing a uniform cross-deputization agreement the Nation and State approved in 2006 or a uniform law enforcement commissioning agreement the Nation offered to non-tribal law enforcement after *Bosse* and filing it with the Oklahoma Secretary of State. See Deputation Agreement (filed Jan. 23, 2006), <https://bit.ly/3ktAXFO>. Chickasaw Nation Law Enforcement Agreement with Okla. Dep't of Agric., Food & Forestry (filed June 7, 2021), <https://bit.ly/30FAN6T>.

The Nation provides detailed information to each law enforcement office that is cross-deputized with the Nation, describing: how to verify whether a perpetrator or victim is Indian by calling the Chickasaw



Lighthouse 24/7 dispatch line, federal law enforcement, or other tribes; how to compile all information required by the Chickasaw Nation prosecutors for tribal court proceedings; where and how to jail Indian perpetrators and report their arrests to Chickasaw prosecutors; how to obtain probable cause and search warrants from the Nation's Office of Tribal Justice Administration ("OTJA"), issue bonds, make tribal law traffic citations, assess traffic fees, and report them to the Nation; how to enforce protective orders under tribal law; how to handle juvenile arrests; and how to extradite Indian offenders from tribal to state courts. *See* Memo. from Office of Tribal Justice Admin., Chickasaw Nation, to Chickasaw Lighthouse Police & Cross-Commissioned Law Enforcement Agencies (May 10, 2021) (on file with Nation). OTJA provides in-person trainings for other law enforcement agencies on implementation of these practices, in which several agencies have already asked to participate.

The intergovernmental implementation of these agreements tells a powerful story: a full 70% of charges filed by Lighthouse officers are referred to nontribal prosecutors and 60% of the cases the Nation has filed in Tribal court were based on referrals from nontribal law enforcement. The Nation deepens this engagement every day. *See, e.g.*, Press Release, Chickasaw Nation, Cross-Deputation Agreement Allows Seamless Response to Asphalt Plant Explosion (Oct. 5, 2021), <https://bit.ly/3DucerP>.

The State's strategy to roll back *McGirt* also relies on a particularly cynical view of this Court. The Attorney General says that, due to the recent death of Justice Ginsburg, "we have a different configuration that might have a different view of how to approach this,' . . . ." Janelle Stecklein, *Experts: Supreme*

*Court Could Clarify McGirt Ruling, Won't Overturn It*, Enid News (Aug. 19, 2021), <https://bit.ly/3DovRSS>. See 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> (“Noting the makeup of the Supreme Court changed with the addition of conservative Justice Amy Coney Barrett, [Attorney General John] O'Connor expressed optimism that the court may review McGirt.”). The Governor is more direct: “The Supreme Court has a new member now, Barrett has replaced Ginsburg, who actually was in favor of the *McGirt* decision, so there's a possibility the court would overturn this and reverse their decision, as well.” Dick Pryor, *Capitol Insider: Governor Kevin Stitt On State-Tribal Relations*, KGOU (Feb. 5, 2021 5:10 PM), <https://bit.ly/3ypYRG5>.

These statements highlight the real problem: the State is slow walking implementation of *McGirt* and steadfastly opposing congressional assistance in an effort to make reconsideration of *McGirt* palatable to an audience with a new member. These are not grounds for a grant of certiorari and in fact offer solid evidence as to why certiorari should be denied.

## **II. The State Waived Its Right to Challenge the Applicability of *McGirt* to Determine the Continuing Existence of the Chickasaw Reservation in this Moot Case.**

This case provides no vehicle for asserting any position because it is moot. After the OCCA issued its decision below, it issued its mandate and remanded. The District Court then dismissed the criminal charges against Respondent on June 16, 2021, long before the State filed its petition. See *State v. Martin*, No. CF-

2016-0782A (Okla. Dist. Ct. June 16, 2021).<sup>10</sup> Thus, any decision this Court issues on the State's ability to bring the now-dismissed charges in this case 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) (citations omitted).<sup>11</sup>

But even if that were not so, the State is estopped from claiming that *McGirt* was wrong or improperly applied, because it has stipulated elsewhere that the Chickasaw Reservation exists and is Indian country in order to avoid the burden of litigating that issue in the state courts below. See *Ball v. State*, No. CF-2018-157 (Okla. Dist. Ct. Mar. 26, 2021), <https://bit.ly/2X4eSoA>; 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>. Now, under the direction of a new Attorney General, recently appointed by the Governor, the State attempts to escape that earlier admission. That effort is barred, because it is an unfair reversal that appears to be part of a larger effort by the State to mislead the courts to gain momentary litigation advantage in post-*McGirt* cases. See *New Hampshire v. Maine*, 532 U.S. 742, 750-51, 755-56 (2001).

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<sup>10</sup> <https://bit.ly/3HdOqv3>. Notably, despite this order's clear relevance to the Court's jurisdiction, the State did not include it in its appendix. See Rule 14.1(i)(i)-(ii).

<sup>11</sup> The only exception to mootness that the Court has recognized—capable of repetition yet evading review—is inapplicable here, as this case deals with the State jurisdiction to impose a lengthy criminal sentence, rather than 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).

If more were needed, the State’s conduct in *this case* bars its attack on the Chickasaw Reservation. Now, the State contends that “[u]nder the correct framework . . . Congress disestablished the Creek territory in Oklahoma, as well as the territories of the rest of the Five Tribes,” and that *McGirt* is incorrect. *Castro-Huerta* Pet. 18.<sup>12</sup> That framework, it says requires “[c]onsideration of history . . . because the effect on reservation status of statutes targeting Indian land ownership is inherently ambiguous.” *Id.* In the courts below, however, the State did not preserve that argument. 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 the State did here by failing to present properly a challenge to the Chickasaw Reservation. Moreover, as the State has acknowledged in another post-*McGirt* case, “[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.” Br. in Opp. to Pet. for Writ of Cert. at 6, *Christian v. Oklahoma*, No. 20-8335, <https://bit.ly/3q8en94> (citing *Adams v. Robertson*, 520 U.S. 83, 90 (1997) (per curiam)).

In this case, Respondent challenged the State’s jurisdiction on direct appeal, citing *Murphy v. Royal*, 866 F.3d 1164 (10th Cir. 2017), *as amended*, 875 F.3d 896 (10th Cir. 2017). Br. of Appellant at 6-31, *Martin*

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<sup>12</sup> *McGirt* and its dissent addressed only the Creek Reservation. 140 S. Ct. at 2479.

*v. State*, No. F-2017-991 (Okla. Crim. App. filed May 16, 2018).<sup>13</sup> After *McGirt* was decided, the State informed the OCCA that it

needs time to review the record and pleadings in the case and determine what impact *McGirt* has on this case under the specific circumstances involved; 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,

and asked for supplemental briefing “to address *McGirt*’s impact on the Appellant’s jurisdictional claim and whether any further findings are necessary.” Req. to File a Resp. to Appellant’s Jurisdictional Claim at 1-2 (filed July 16, 2020).<sup>14</sup>

The OCCA remanded for an evidentiary hearing on whether the crime occurred in Indian Country and directed the District Court to “follow the analysis set out in *McGirt*” to determine if the Chickasaw Reservation had been disestablished. Pet’r’s App. 27a. On remand, Respondent and the Nation submitted extensive briefs, and in the Nation’s case, a 500-page appendix of evidence, showing the establishment and continued existence of the Chickasaw Reservation. *Amicus Curiae* Chickasaw Nation’s Br., *State v. Martin*, No. CF-2016-782A (Okla. Dist. Ct. filed Oct. 7, 2020);<sup>15</sup> Chickasaw Nation’s App. (filed Oct. 7, 2020);<sup>16</sup> Def./Appellant’s Remanded Hr’g Br. (filed Oct. 9, 2020).<sup>17</sup>

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<sup>13</sup> <https://bit.ly/3F4Fu9q>

<sup>14</sup> <https://bit.ly/3wCI0k5>

<sup>15</sup> <https://bit.ly/2YANuiK>

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

<sup>17</sup> <https://bit.ly/31UE3Mv>

The State filed a brief in which it took no position “as to whether the Chickasaw Nation had or has a reservation,” State’s Br. on Remand for Evidentiary Hr’g at 6 (filed Oct. 14, 2020), <https://bit.ly/3c4mGdS>,<sup>18</sup> but requested that the District Court follow *McGirt*, “which—pursuant to the OCCA’s Remand Order—this Court is to apply in analyzing Appellant’s jurisdictional claim,” *id.* at 9. The State then provided what it called a “Brief, Relevant History of the Chickasaw and Choctaw Nations,” summarizing the removal of those Nations, their treaties, and—drawing heavily on the majority opinion in *McGirt*—the history of the allotment era and statehood in Oklahoma. *Id.* at 11-17. It then reiterated that “the State takes no position on whether a reservation was ever created or created then disestablished.” *Id.* at 17.

At the hearing, the Assistant Attorney General first said that the State was standing on its brief and that “the State can take no position on whether or not a reservation was ever created or if created was disestablished.” Tr. of Evidentiary Hr’g at 9:18-21.<sup>19</sup> When pressed by the court, *id.* 9:22-23, the State clarified that “[t]he State has no position, and that is directly from the Attorney General,” *id.* 9:24-10:1. The District Attorney suggested that “all of the reasons the [Attorney General] could think of to say it’s been disestablished, they’ve already tried that argument from [sic] the Supreme Court, and they’ve got nothing new on this particular Indian tribe.” *Id.* 10:15-19.

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<sup>18</sup> The State’s brief was submitted to the Court on October 8 but only formally filed on October 14. See Tr. of Evidentiary Hr’g at 9:11-14 (Oct. 9, 2021).

<sup>19</sup> The Transcript is available from the District Court as part of the record in this case.

Thereafter, the District Court found “[i]n applying the reasoning used by the United States Supreme Court in *McGirt* to the case at bar, it is abundantly clear that Congress established a reservation for the Chickasaw Nation,” Pet’r’s App. 22a (cleaned up). When the case returned to the OCCA, the State did not challenge that conclusion. Instead, it asked the OCCA to “make a final determination as to the merits of the defendant’s jurisdictional claim by considering the district court’s Findings of Fact and Conclusions of Law . . . and the stipulations of the parties.” Suppl. Br. of Appellee after Remand at 5 (filed Dec. 21, 2020).<sup>20</sup> The OCCA then found that “[b]ased upon the record before us, the District Court’s Findings of Fact and Conclusions of Law are supported by the evidence presented at the evidentiary hearing,” Pet’r’s App. 8a, noting that “the State presented no stipulation, argument or evidence regarding the existence of the Chickasaw Reservation,” *id.*

By this conduct, the State forfeited its right to challenge the Chickasaw Reservation here, by attacking *McGirt* or otherwise. In the District Court, the State said the court was required to follow *McGirt* and took no position on the Chickasaw Reservation’s existence. The District Court then concluded that the Chickasaw Reservation was not disestablished and the crime occurred within Indian country. The State could have challenged those conclusions before the OCCA, but did not, and the OCCA affirmed. The State therefore forfeited its right to challenge the Reservation in this petition, and its effort to reverse course “comes too late in the day” to be considered here, *see Sorrell v. IMS Health Inc.*, 564 U.S. 552, 563 (2011); *accord*

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<sup>20</sup> <https://bit.ly/3Dk5m0k>

*TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2210 n.6 (2021).

**III. The State's Request for Reconsideration of *McGirt* Ignores *Stare Decisis*.**

Having failed to establish a basis for certiorari, the State insists that *McGirt* should be reconsidered because it is wrong. For the reasons the Nation described in Section III of its *amicus* brief in *Oklahoma v. Beck*, No. 21-373, the State has provided no reason to discard *stare decisis*.

**CONCLUSION**

The petition should be denied.

Respectfully submitted,

STEPHEN GREETHAM  
MEREDITH TURPIN  
CHICKASAW NATION  
Office of Senior Counsel  
4001 N. Lincoln Blvd  
Oklahoma City, OK 73105

FRANK S. HOLLEMAN, IV  
*Counsel of Record*  
DOUGLAS B. L. ENDRESON  
SONOSKY, CHAMBERS,  
SACHSE, ENDRESON &  
PERRY, LLP  
1425 K Street, NW  
Suite 600  
Washington, DC 20005  
(202) 682-0240  
fholleman@sonosky.com

*Counsel for Amicus Curiae Chickasaw Nation*

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