No. 21-773

IN THE

In the Supreme Court of the United States

STATE OF OKLAHOMA

Petitioner,

–vs–

HAROLD DENTON MCCURTAIN,

Respondent.

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

BRIEF OF *AMICUS CURIAE* THE CHOCTAW NATION OF OKLAHOMA IN SUPPORT OF RESPONDENT

BRIAN DANKER
Executive Director of Legal Operations
LINDSAY DOWELL
Staff Attorney
DIVISION OF LEGAL & COMPLIANCE
CHOCTAW NATION OF OKLAHOMA
1802 Chukka Hina Dr
Durant, OK 74701

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
fholleman@sonosky.com
Phone: (202) 682-0240

Attorneys for Amicus Curiae Choctaw Nation of Oklahoma

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INTEREST OF *AMICUS*[1]

Amicus Choctaw Nation of Oklahoma ("Nation") is a federally-recognized Indian tribe, 86 Fed. Reg. 7,554, 7,557 (Jan. 29, 2021), residing on and governing the Choctaw Reservation in southeastern Oklahoma, which was "secure[d] to the said Choctaw Nation of Red People and their descendants" in the Treaty of Dancing Rabbit Creek, art. 4, Sept. 27, 1830, 7 Stat. 333 ("1830 Treaty"). In *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970), this Court explained the terms of the 1830 Treaty that, in exchange for the Choctaws' removal from their ancestral lands, secured to them a new homeland and broad sovereign authority, in the following terms:

> the United States promised to convey the land to the Choctaw Nation in fee simple 'to inure to them while they shall exist as a nation and live on it.' In addition, the United States pledged itself to secure to the Choctaws the '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 that no part of the land granted them shall ever be embraced in any Territory or State.' Treaty of Dancing Rabbit Creek, Sept. 27, 1830, 7 Stat. 333-334.

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[1] 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.

Id. The United States reaffirmed the existence of the Reservation, with modified boundaries, in subsequent treaties with the Choctaw and Chickasaw Nations. *See* Treaty of Doaksville, art. 1, Jan. 17, 1837, 11 Stat. 573; 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. The Nation, along with the Cherokee Nation, Chickasaw Nation, Muscogee (Creek) Nation, and Seminole Nation, is one of the so-called "Five Civilized Tribes," all of whom were "forcibly removed from their native southeast by the federal Government under the Indian Removal Act of 1830," to present-day Oklahoma. *Morris v. Watt*, 640 F.2d 404, 408 n.9 (D.C. Cir. 1981) (citation omitted); *see Choctaw Nation*, 397 U.S. at 622-27.

After the continuing existence of the Creek Reservation was upheld by this Court in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), the state courts in Oklahoma applied that decision to determine, in this case and others, whether the Reservations of the other four of the Five Tribes continue to exist. In each case, the Oklahoma Court of Criminal Appeals ("OCCA") first remanded the case to the state district court for the county in which each case arose, for an evidentiary hearing and the development of a record on that question. In this case, the OCCA determined, following remand to the state district court, that under the analytic framework set forth in *McGirt*, the Choctaw Reservation was established, never disestablished, and still exists today. It has since reaffirmed that determination. *See State ex rel. Matloff v. Wallace*, 2021 OK CR 21, ¶ 3, 497 P.3d 686, 687.

The State now attacks *McGirt* in an effort to restore a legal regime that denied federal rights to Indians and Indian nations in Oklahoma for over a century. Were it to succeed, this Court's decision in *McGirt* would be reduced to an instant in which "the rule of law," not "the rule of the strong," 140 S. Ct. at 2474, determined the existence of the Creek Reservation in Oklahoma, the state courts' faithful application of *McGirt* would be imperiled, and justice would be denied its opportunity to mend a difficult history by reinstating rights long denied and turning back purposeful resistance to their implementation. *Cf. Cooper v. Aaron*, 358 U.S. 1 (1958). The Nation submits this brief to prevent that result, to demonstrate that it is implementing *McGirt* and the decision in this case with diligence and success in cooperation with local governments, and to show that the State's petition should be denied.

SUMMARY OF ARGUMENT

The State's petition should be denied because the State and its *amici* offer no principled basis for revisiting *McGirt*. This Court's decision in *McGirt* corrected an injustice that had endured for over a century in violation of treaties that Congress had never abrogated. And after *McGirt* was decided the Oklahoma state courts properly applied it to like challenges, after reviewing the treaties and statutes relied on to establish the reservation's continuing existence, based on a record developed in each case. These decisions need no correction. And the Choctaw Nation is now implementing *McGirt* on the Choctaw Reservation with diligence and determination that is producing consistently positive results. By contrast, the argument against *McGirt* on which the State relies does not even address its application

to the Choctaw Reservation. Instead, the State borrows its argument from another case, concerning the Cherokee Reservation. As neither Indian treaties nor Indian reservations are fungible, the State's petition should be denied. Furthermore, this case does not in any event provide a proper vehicle to consider any legal questions concerning *McGirt* because the State is estopped from challenging the Choctaw Reservation as it does here.

REASONS FOR DENYING THE PETITION

I. *McGirt* Corrected A Longstanding Injustice That The State's Petition Would Reinstate.

In this case, the OCCA considered the Choctaw Nation's Treaties and history and held that the Choctaw Reservation continues to exist. Pet'r's App. 4a-6a. That ruling fully accords with this Court's instruction that "[e]ach tribe's treaties" and subsequent histories "must be considered on their own terms," *McGirt*, 140 S. Ct. at 2479. Yet the State relies on its petition in *Oklahoma v. Castro-Huerta*, No. 21-429 ("*Castro-Huerta* Pet."), *see* Pet. 6 (citing *Castro-Huerta* Pet. 17-29), to argue that *McGirt* should be revisited in this case, The Nation urges the Court to reject the State's bait and switch, which also provides the State a strategic litigation advantage foreclosed by the Court's rules.[2] Even if considered—in this case or another—the State's argument fails.

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[2] *Compare* Rule 15.6 (describing time for filing reply briefs), *with* Reply Br. of Pet'r at 2-3, *Oklahoma v. Mize*, No. 21-274 (incorporating by reference arguments not yet made and promising to consolidate reply arguments into a reply in *Castro-Huerta* several weeks after reply would otherwise be due).

This Court's ruling in *McGirt* redeemed the word of the United States, freely given to the Creeks in exchange for their eastern lands, as it was in the treaties the United States entered into with each of the Five Tribes by correcting a deeply entrenched injustice—the exercise of jurisdiction by the State of Oklahoma in violation of treaties that established the Creek Reservation and that Congress had never abrogated. And after *McGirt* was decided, the state courts faithfully applied it in this case and others. Yet, in this and other certiorari petitions, the State seeks to portray its own courts' acknowledgment of the Five Tribes' reservations as a runaway train, adding that "[b]eyond the Five Tribes, other Tribes in Oklahoma are seeking affirmation of their reservation status in state criminal cases." *Castro-Huerta* Pet. 19. What the record actually shows is principled application of the law by Oklahoma's courts, not a crisis requiring correction, much less a need to deny justice before it can be realized by those entitled to it.

In these cases, as here, *see infra* at 19-20 & n.31, the state courts' reservation determinations were based on the state trial courts' evaluation of the historical record, as well as treaties and statutes affecting the Nations' Reservations. That was done pursuant to remands for evidentiary hearings ordered by the OCCA in cases in which petitioners or defendants raised the existence of a Reservation as a defense. At those hearings, the State (through the Attorney General's office and District Attorneys), the criminal defendants, and in many cases the affected Tribe as amicus curiae, participated and had the opportunity to present evidence, stipulations, and legal arguments. The Nation participated in many cases

where the Choctaw Reservation was at issue by providing an amicus brief with an in-depth historical and legal analysis of the creation and continuing existence of the Reservation. After proceedings in each case, the state district courts found that the Cherokee, Chickasaw, Choctaw, and Seminole Reservations still exist, and the OCCA affirmed those rulings after reviewing the District Courts' findings, conclusions and the record on which they were made. *See Hogner v. State*, 2021 OK CR 4 (Cherokee); *Bosse v. State*, 2021 OK CR 3, 484 P.3d 286, *withdrawn on other grounds*, 2021 OK CR 23, *reservation ruling reaffirmed*, 2021 OK CR 30, ¶ 12 (Chickasaw), *pet. for cert. filed on other grounds*, No. 21-6443; *Sizemore v. State*, 2021 OK CR 6, 485 P.3d 867 (Choctaw); *Grayson v. State*, 2021 OK CR 8, 485 P.3d 250 (Seminole). Notably, in cases dealing with the Five Tribes' Reservations, the State's Attorney General did not challenge the existence of the Reservations until June 2021—after the former elected Attorney General was replaced by a new Attorney General, appointed by the Governor, *see* Chris Casteel, *American Bar Association Questioned Oklahoma AG John M. O'Connor's Experience, Judgment*, Oklahoman (July 23, 2021, 4:17 PM).[3]

The State advanced such challenges in other cases as well, and in some cases lost, and in others prevailed. None are relevant here. Applying the statutory analysis described in *McGirt*, the District Court in Ottawa County has found that three Indian reservations in Ottawa County, Oklahoma still exist today. *State v. Lee*, No. CF-2021-00012 (Okla. Dist. Ct. Mar. 1, 2021), *on review* No. S-2021-206 (Okla. Crim.

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[3] https://bit.ly/3GbTK1i.

App. pet. in error filed May 21, 2021) (Ottawa); *State v. Dixon*, No. CF-2020-00072 (Okla. Dist. Ct. Mar. 1, 2021), *on review* No. S-2021-205 (Okla. Crim. App. pet in error filed May 21, 2021) (Peoria and Miami). The OCCA has affirmed another reservation exists in Ottawa County, as well. *State v. Lawhorn*, 2021 OK CR 37 (Quapaw), *aff'g* No. CF-2020-00189 (Okla. Dist. Ct. Nov. 18, 2020).[4] These rulings do not make up a runaway train. They deal with four Reservations which have a combined total resident population of less than 20,000 and make up a small fraction of northeast Oklahoma. *See* U.S. Census Bureau, Census – Table Results (table created Oct. 6, 2021);[5] U.S. Census Bureau, Census – Map Results (map created Oct. 6, 2021);[6] Okla. Dep't of Trans., *Tribal Jurisdictions in Oklahoma* (2010).[7]

In other cases, which the State notably does not cite, the state courts have found, based on the unique history of each Tribe, that other reservations were diminished, *Bentley v. State*, No. CF-2015-1240

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[4] The State incorrectly says that the affected tribes "are seeking affirmation" of Reservations in all these cases, *Casto-Huerta* Pet. 19. In fact, the Peoria Tribe has not participated in *Dixon*, and only *after* the State made this representation did the Miami Tribe and Ottawa Tribe seek leave to file as *amici* in *Dixon* and *Lee*, respectively, *see* Ottawa Tribe of Okla.'s Mot. for Leave to File *Amicus* Br., *State v. Dixon*, No. S-2021-205 (Okla. Crim. App. filed Oct. 18, 2021), https://bit.ly/3nswdkb; Miami Tribe of Okla.'s Mot. for Leave to File *Amicus* Br., *State v. Lee*, No. S-2021-206 (Okla. Crim. App. filed Oct. 18, 2021), https://bit.ly/3vxYfhW, after not filing briefs or evidence in the district courts.

[5] https://bit.ly/306gXSl.

[6] https://bit.ly/3AfTs5E.

[7] https://bit.ly/3oyO3nX.

(Okla. Dist. Ct. Feb. 24, 2021),[8] *aff'd on other grounds*, No. PC-2018-743 (Okla. Crim. App. Oct. 1, 2021), *pet. for cert. filed on other grounds*, No. 21-6301 (Potawatomi Reservation), or disestablished, *see Codynah v. State*, No. CF-2016-00479 (Okla. Dist. Ct. Apr. 16, 2021),[9] *on review* No. C-2019-293 (Okla. Crim. App. pet. for cert. filed May 30, 2019) (Kiowa-Comanche-Apache Reservation). And although the State cites *Young*, it fails to mention that the district court in that case held that procedural bars prevent Osage tribal citizens from asserting the Osage Reservation exists, and that the OCCA affirmed that decision on other procedural grounds. *See State v. Young*, No. CF-2005-00266A (Okla. Dist. Ct. Apr. 8, 2021) (citing *Osage Nation v. Irby*, 597 F.3d 1117 (10th Cir. 2010)),[10] *aff'd on other grounds* No. PC-2020-954 (Okla. Crim. App. Sept. 20, 2021) (citing *Wallace*).[11] This confirms that the application of *McGirt* by the state courts is proceeding in an orderly fashion, not as a creeping threat, as the State would have it.

II. The Nation Is Acting To Implement McGirt.

The State tries to paint eastern Oklahoma as a land descended into uncertainty and fear simply by the shifting of some criminal jurisdiction away from the State and back to the federal government and Indian tribes. *Castro-Huerta* Pet. at 2-3, 18-23. The exact opposite is true. The Nation is implementing *McGirt* to protect the public and uphold the rule of

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

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

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

[11] https://bit.ly/2YzNShK.

law. And that effort is providing certainty and dissolving fear across the Reservation. The State's effort to inveigle this Court into striking down *McGirt* and the Choctaw Reservation seeks to substitute chaos for justice.

For nearly two years before the OCCA acknowledged the Choctaw Reservation in this case, the Nation had been preparing for the jurisdictional shifts that would accompany such a ruling. *See* Chris Casteel, *Choctaw, Seminole Reservations Recognized by Oklahoma Appeals Court*, Oklahoman (Apr. 1, 2021, 4:27 PM) ("Casteel").[12] In January 2020, the Nation arranged for its Assistant Prosecuting Attorney to be named a Special Assistant United States Attorney for the Eastern District of Oklahoma, which allowed him to pursue federal charges if and when the Nation's Reservation was acknowledged by a judicial decision, as it has been. Choctaw Nation Sovereignty for Strong Communities Comm'n, *Commission Report April 2021*, at 3 (2021) ("Commission Report").[13] The Nation also secured federal funding to hire four new tribal prosecutors and established a Public Defender's Office. *Id.* Through these and other measures, the Nation prepared for the result later reached in *McGirt* and did not seek its reckless implementation.

Indeed, immediately after this Court decided *McGirt* and *Sharp v. Murphy*, 140 S. Ct. 2412 (2020) (per curiam), the leaders of the Five Tribes, including Choctaw Nation Chief Gary Batton, acknowledged its historic significance, and made clear that

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[12] https://bit.ly/3n1A6fU.

[13] https://bit.ly/2YXNCsm.

> [t]he Nations and the State are committed to ensuring that Jimcy McGirt, Patrick Murphy, and all other offenders face justice for the crimes for which they are accused. We have a shared commitment to maintaining public safety and long-term economic prosperity for the Nations and Oklahoma.

Press Release, Choctaw Nation, U.S. Supreme Court Announces McGirt v. Oklahoma Decision (July 9, 2020).[14] At the same time, Chief Batton sought to clarify what had changed and what had not, stating that

> [t]his decision directly addresses the Creek Nation's Reservation and criminal jurisdiction. Nothing has immediately changed for the Choctaw Nation or southeastern Oklahoma. *McGirt* does not change individual property ownership, business taxation, or any citizen's responsibility to uphold the law.

ChoctawNationOK, *Chief Batton Special Report: McGirt vs Oklahoma*, YouTube (July 14, 2020) (beginning at 1:00).[15] Anticipating recognition of its own reservation following *McGirt* and *Murphy*, the Nation then allocated $2 million to address the immediate impacts of such recognition, including hiring ten additional police and patrolmen and establishing the Sovereignty for Strong Communities Commission to study how the Nation could implement *McGirt* while protecting public safety and to make recommendations to policymakers. Press Release, Choctaw Nation Pub. Relations, Choctaw

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[14] https://bit.ly/3je6GKj.

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

Nation Chief Announces Formation of Sovereignty Committee (Sept. 2, 2020, 2:58 PM).[16]

After the state courts applied *McGirt* to the Choctaw Reservation, the Nation followed through on its responsibility and commitment to protect the public by ensuring that criminal offenders in the Choctaw Reservation are held accountable. Immediately after the ruling in *Sizemore*, 2021 OK CR 6, 485 P.3d 867, the Nation met with all the District Attorneys in the Reservation to develop a system of case identification and correspondence between tribal and state prosecutors to "prevent any currently incarcerated individual from being released based solely on a McGirt jurisdictional claim." Casteel; *see* Commission Report at 3. The Nation is also working with tribal, local, and state law enforcement to ensure the law is enforced properly and fairly on the Reservation, and that officers understand jurisdictional issues and ensure the proper judicial system is charging and prosecuting offenders. The Nation developed virtual training materials for tribal, local, and state law enforcement and has been providing trainings using those materials since November 2020, and also established a 24-hour hotline that officers can call to verify suspects' tribal citizenship. Commission Report at 3, 5. In addition, the Nation entered into agreements with all county jails in the Reservation to ensure people arrested by tribal officers anywhere on the Reservation can be safely detained in the county where the offense occurred. *Id.* at 5; Derrick James, *Choctaw Nation's Top*

[16] https://bit.ly/2YWFxVx.

Prosecutor Outlines McGirt Process, McAlester News-Capital (Apr. 10, 2021) ("James").[17]

These efforts are a continuation of the Nation's longstanding cooperation with local law enforcement. Since 1994, the Nation has signed cross-deputization agreements with eleven state agencies, forty-five municipalities, and eleven of the thirteen counties fully or partially on the Reservation, which allow state, local, and tribal police to enforce state, local, and tribal criminal laws against all offenders on the Reservation, regardless of Indian status. *See Tribal Compacts and Agreements*, Okla. Sec'y of State, https://www.sos.ok.gov/gov/tribal.aspx (last visited Oct. 25, 2021) (enter "Choctaw" into "Doc Type" searchbar and select "Submit"). Since the decision below, the Nation has cross-deputized at least 794 officers in 54 agencies on the Reservation pursuant to those agreements. Austin Breasette, *Tribal Attorneys Discuss Changes Within Tribes 13 Months After McGirt Ruling*, KFOR (Aug. 18, 2021, 4:30 AM) ("Breasette").[18] Notably, cross-deputization is exactly the approach that the Oklahoma Sheriffs' Association recommended after the decision in *McGirt* was handed down. *See Guidance for Oklahoma Law Enforcement Following McGirt v. Oklahoma*, Okla. Sheriffs' Ass'n (July 14, 2020).[19] As a result of this history and the efforts of local governments and the Nation, for most of the law enforcement personnel on the Reservation, the transition after *McGirt* and *Sizemore* has been simple:

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[17] https://bit.ly/2Xm6Vvf.

[18] https://bit.ly/3FVxp8f.

[19] https://bit.ly/3lMaRyK.

> Both Pittsburg County Sheriff Chris Morris and McAlester Police Chief Kevin Hearod spoke with the News-Capital following a decision by the Oklahoma Court of Criminal Appeals [that] applied the U.S. Supreme Court's analysis in McGirt v. Oklahoma to the Choctaw Nation, which gives the federal government and the tribe criminal jurisdiction over Native Americans within the tribe's boundaries.
>
> "For the majority of the stuff, it'll be business as usual for us," Hearod said.
>
> ….
>
> "We're ready," Hearod said, "But, you know, it's like anything new, sometimes some things may be a little trial and error. There may be a mistake, an honest mistake made here or there, but for the most part, all my guys got this down."

Derrick James, *'Business as Usual': Local Law Enforcement Detail Post-McGirt Policing*, McAlester News-Capital (Apr. 3, 2021).[20] Other Sheriffs in other parts of the Reservation agree that the Nation and local police can work together to ensure public safety. In the words of Choctaw County Sheriff Terry Park:

> Choctaw County Sheriff's Office working relationship with the Choctaw Nation Tribal Police is excellent. The Choctaw County Sheriff's Office deputies back Tribal Units as do[] the Tribal Officers back our deputies all the

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

> time. We have been working together for numerous years. Our office has no complaints with the Choctaw Nation Tribal Police. We look forward to working with Choctaw Nation Tribal Police for years to come.

Statement of Choctaw Cnty. Sheriff Terry Park (Oct. 25, 2021) (on file with Nation).

The Nation's commitment to inter-governmental cooperation of course extends to the State, though it only works when the State reciprocates that commitment. To that end, shortly after *McGirt* was decided the Nation entered into an agreement with the State, which acknowledges the existence of the Nation's Reservation and gives the State and Nation concurrent jurisdiction over Indian child custody matters in the Reservation. *See* Intergovt'l Agreement Between Okla. & Choctaw Nation of Okla. Regarding Jurisdiction over Indian Children Within the Tribe's Reservation (Aug. 17, 2020).[21] Since *McGirt* was decided, the Nation has also worked with the state Office of Juvenile Affairs to ensure there is no disruption to vital education and treatment services to juvenile offenders on the Reservation. The Nation also renewed its Hunting and Fishing Compact with the State, which requires the Nation to regulate the management of wildlife resources within its jurisdiction and authorizes the Nation, in exchange for payments to the State, to issue hunting and fishing licenses to Choctaw citizens that allow them to hunt and fish within the Nation's jurisdiction. *See* Extension Agreement of Hunting & Fishing Compact Between Okla. & Choctaw Nation

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[21] https://bit.ly/2Z0B2Zn.

(Dec. 7, 2020).[22] (Unfortunately, and against the wishes of the Nation, the Oklahoma Governor since decided not to renew the Hunting and Fishing Compact, which will cost the State millions of dollars annually. *See* Molly Young, *Oklahoma Gov. Stitt Won't Renew Hunting, Fishing Compacts with Cherokee, Choctaw Tribes*, Oklahoman (updated Dec. 15, 2021 9:04 AM).[23])

The Nation has also committed huge resources to ensure a seamless transition from state to tribal prosecution of criminal offenders. To handle prosecutions, the Nation has doubled the size of its prosecutor's office by hiring six full-time prosecutors, added two full-time tribal District Court judges, and is opening a juvenile court. Breasette. The criminal process in the Nation's courts is now much like the process followed under state jurisdiction:

> [O]nce a person is taken into custody, an initial appearance will be held within 48 hours and a Choctaw Nation District Judge will set bail. If a defendant can't afford an attorney, then an attorney from the Office of the Choctaw Nation of Oklahoma Public Defender will be assigned to the defendant's case.
>
> "For misdemeanors, we have a disposition hearing thereafter and for felonies, we have a preliminary hearing conference and then later a preliminary hearing," [Choctaw Nation Tribal Prosecutor Kara] Bacon said. "So it moves along the same lines as the state."

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

[23] https://bit.ly/3sbx4Kj.

James. The Nation also amended its Criminal Code, *see* Choctaw Nation Res. CB-10-21 (Oct. 14, 2020),[24] to strengthen its ability to prosecute violent crimes by increasing the range of punishment for certain violent crimes, including murder and domestic violence, and to increase its ability to enhance sentencing for habitual offenders. The Nation also became the first tribe in Oklahoma to enact a Public Defenders Code to guarantee the right to counsel and provide counsel for defendants in Choctaw Nation District Court. *See* Choctaw Nation Res. CB-13-21 (Oct. 14, 2020).[25] And it amended the Nation's Juror Code to more clearly define those eligible to serves as jurors in Choctaw courts and clarify the process by which a jury is seated. *See* Choctaw Nation Res. CB-07-21 (Oct. 14, 2020).[26]

The Nation's efforts are working. As of December 21, 2021, since the Nation's Reservation was acknowledged it has brought 1,342 felony and misdemeanor cases in tribal court and issued an additional 772 traffic citations.[27] In short: "We are responsible. We are stepping up." *Inter-Tribal Council McGirt Decision*, Choctaw Nation (July 14, 2021).[28] And the Nation will continue to do so.

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[24] https://bit.ly/3pgjRyb.

[25] https://bit.ly/3vVCQQ4.

[26] https://bit.ly/2XkEUnF.

[27] Documentation on file with Nation.

[28] https://bit.ly/3pb6r6B.

III. The State Cannot Challenge The Existence Of The Choctaw Reservation In This Case.

This case provides no vehicle for the State to assert any position because it is moot. After the OCCA held that the State lacked jurisdiction to prosecute Respondent, the District Court dismissed the criminal charges. *See State v. McCurtain*, No. CF-2019-76 (Okla. Dist. Ct. Sept. 20, 2021), https://bit.ly/3EQOKhS.[29] The State has asserted elsewhere that "the dismissal of a criminal case after an intermediate appellate court issues its mandate does not 'moot' the case for purposes of further appellate review." *See* Reply Br. at 6 n.*, *Oklahoma v. Castro-Huerta*, No. 21-429 (citing *Kentucky v. King*, 563 U.S. 452, 458 n.2 (2011)). That contention misses the mark. Neither *King*, nor the decision on which it relies, *see United States v. Villamonte-Marquez*, 462 U.S. 579 (1983), purport to unsettle the longstanding rule that "when a decree was rendered by consent, no errors would be considered here on an appeal which were in law waived by such a consent." *United States v. Babbitt,* 104 U.S. 767, 768 (1881); *see Microsoft Corp. v. Baker*, 137 S. Ct. 1702, 1717 (2017) (Thomas, J., concurring in judgment). Both here and in other cases dealing with the Choctaw Reservation, the State consented to dismissal of the charges, either by taking no position on Reservation existence or, as it did in this case, standing mute when the lower courts dismissed for lack of jurisdiction. Thus, the Court cannot issue the State any relief, *Chafin v. Chafin*, 568 U.S. 165, 172 (2013), so any opinion it renders would only be advisory, *see*

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[29] Notably, the State did not include this order in its appendix. *See* Rule 14.1(*i*)(i)-(ii).

Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 101 (1998), "[a]nd federal courts do not issue advisory opinions." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021).

Even if that were not so, the State is estopped from claiming that *McGirt* was wrong or improperly applied to the Choctaw Reservation. Before it filed this or any other certiorari petition seeking the overthrow of the Choctaw Reservation, the State, through its Attorney General, elsewhere filed stipulations and briefing accepting that the Choctaw Reservation exists in order to avoid the burden of litigating that issue. *See* Br. of *Amicus Curiae* Choctaw Nation of Okla. at 18-20, *Oklahoma v. Sizemore*, No. 21-326; Br. of *Amicus Curiae* Choctaw Nation of Okla. at 18-19, *Oklahoma v. Miller*, No. 21-643. And since then, the State has stipulated that the Reservation exists to avoid the burden of re-prosecuting, after mistrial, a non-Indian who killed a Choctaw citizen on the Choctaw Reservation. *See State v. Savage*, slip op. ¶ 5, No. CF-2019-51 (Okla. Dist. Ct. Apr. 23, 2021), https://bit.ly/3efrmP7. Now the State seeks to challenge the Choctaw Reservation, here and elsewhere. That effort is barred, because it is an unfair reversal that appears to be part of a larger effort by the State to game the courts for litigation advantage. *See New Hampshire v. Maine*, 532 U.S. 742, 750-51, 755-56 (2001).

Finally, the State waived a challenge to *McGirt* in this case, including its argument that the *McGirt* framework is incorrect. The State now 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.[30] 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 court below, however, the State took an entirely different tack, by rejecting the notion that the result in *McGirt* proves or disproves other Nations' reservations existence and then relying on the *McGirt* framework to make its case as to the Choctaw Reservation. The Assistant District Attorney below explained that:

> To argue that because the United States Supreme Court found in *McGirt v. Oklahoma* . . . that the Creek Nation is now and always was a reservation therefore the Choctaws must also have a reservation encompassing their historical boundaries is to ignore the structure with which the majority in *McGirt* reached that conclusion. The Court made it clear that this was not a decision that automatically extended to the other four civilized tribes in Oklahoma. On page 2479 of the opinion, the Court stated that "[e]ach tribe's treaties must be considered on their own terms, and the only question before us concerns the Creek." To determine whether or not the Choctaw Nation was originally granted, and still retains, a reservation, we must examine the historical documents and statutes.

Br. of Appellant at 6-7, *State v. McCurtain*, No. S-2020-533 (Okla. Crim. App. filed Nov. 2, 2020), https://bit.ly/31NIVTy. The Assistant District Attorney then proceeded to follow the analytical

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[30] *McGirt* and its dissent addressed only the Creek Reservation. 140 S. Ct. at 2479.

framework described in *McGirt*. Citing to the plain text of the Atoka Agreement, the Five Tribes Act, and the Curtis Act, and without relying on subsequent history or alleged ambiguities in the statutory language, he argued that the Reservation was disestablished. *See id.* at 10-11.[31] The OCCA correctly found he was wrong—relying on *McGirt* and applying it and the OCCA's prior rulings to the facts of the Choctaw Reservation—and held that the Choctaw Reservation was not disestablished. Pet'r's App. 6a.

Having accepted *McGirt* below—albeit applying it incorrectly to the facts—the State cannot now argue that some other framework ought to apply. 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 not challenging *McGirt* below. 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. at 5, *Christian v. Oklahoma*, No. 20-8335, https://bit.ly/3q8en94 (citing *Adams v. Robertson*, 520 U.S. 83, 90 (1997) (per curiam)). The State's

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[31] Another Assistant District Attorney made an identical argument before the District Court, *see* State's Resp. to Mot. to Dismiss for Lack of Subject Matter Juris. at 2-6, *State v. McCurtain*, No. CF-2019-76 (Okla. Dist. Ct. Aug. 3, 2020), https://bit.ly/3IxdUUK, which the District Court and OCCA also rejected, *see* Pet'r's App. 4a-5a, 11a-12a.

petition makes no argument that under *McGirt* the OCCA and District Court's conclusions were wrong. And because the State earlier expressly acknowledged the distinction between Indian Reservations and the need to treat them independently under the *McGirt* framework, the State cannot now attempt to erase those distinctions and rely on its petition in *Castro-Huerta*, where it attacks the Cherokee Reservation, to attack the Choctaw Reservation. *Cf.* Pet. at 3.

The State's position, stated elsewhere, is that it did not need to preserve its argument that *McGirt* was wrong below, but that in any case it did preserve the argument for this Court's review when it "expressly informed the lower court of its position that McGirt was wrongly decided." Br. in Reply at 5-6, *Oklahoma v. Castro-Huerta*, No. 21-429. This position obfuscates the State's failed and belated efforts to preserve the issue below and also ignores that, after *Sizemore*, the binding precedent on the Choctaw Reservation was an OCCA case, that the OCCA had the power to reconsider. *See*, *e.g.*, Resp. to Appellant's Appl. to Suppl. Appeal R. at 5, *Miller v. State*, No. F-2020-406 (Okla. Crim. App. filed Apr. 7, 2021), https://bit.ly/3quPm8g. The State also misstates the law. Litigants can and do preserve arguments that Supreme Court case law is wrongly decided in the lower courts, *see*, *e.g.*, *Citizens United v. FEC*, 530 F. Supp. 2d 274, 278 (D.D.C. 2008), *rev'd* 558 U.S. 310 (2010); *compare Allen v. Cooper*, 140 S. Ct. 994, 1003 (2020), *with* Corrected Substitute Opening/Resp. Br. at *36-40, *Allen v. Cooper*, 895 F.3d 337 (4th Cir. 2018) (Nos. 17-1522, 17-1602), 2018 WL 1525021. But in this case the State failed to preserve an attack on *McGirt* because it *relied on McGirt*'s analytical

framework to make an anti-Reservation argument. And the proper standard for waiver, set out in this Court's precedents, discussed *supra* at 20,[32] controls here. Accordingly, the State's attempt to avoid waiver fails.

For these reasons, this case is not a proper vehicle to reconsider the existence of the Choctaw Reservation.

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[32] Under the proper standard, the State also failed to preserve its argument in every other case where it disavowed a challenge to the Choctaw Reservation's status, relied on *McGirt* for rules of law, or stipulated that the Choctaw Reservation constituted Indian country if the district court found it was never disestablished by Congress. *See* Stip. of Parties at 2, *State v. Sizemore*, No. CF-2016-593 (Okla. Dist. Ct. filed Oct. 14, 2020), https://bit.ly/3awX6gM; Suppl. Br. of Appellee After Remand at 3 n.2, *Fox v. State*, No. F-2019-196 (Okla. Crim. App. filed Nov. 12, 2020), https://bit.ly/3pBL1zL; Suppl. Br. of Appellee After Remand at 6, 14 n.6, *Coffman v. State*, No. F-2018-1268 (Okla. Crim. App. filed Nov. 2, 2020), https://bit.ly/3DXp7KS.

CONCLUSION

The petition should be denied.

Respectfully submitted,

BRIAN DANKER
Executive Director of Legal Operations
LINDSAY DOWELL
Staff Attorney
DIVISION OF LEGAL & COMPLIANCE
CHOCTAW NATION OF OKLAHOMA
1802 Chukka Hina Dr
Durant, OK 74701

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
fholleman@sonosky.com
Phone: (202) 682-0240

Attorneys for Amicus Curiae Choctaw Nation of Oklahoma

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