No. 22-5034

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JUSTIN HOOPER,
Appellant

v.

THE CITY OF TULSA,
Appellee

Appeal from the United States District Court
for the Northern District of Oklahoma,
Case No. 21-cv-165-WPJ-JFJ (Hon. William P. Johnson)

BRIEF OF AMICUS CURIAE MUSCOGEE (CREEK) NATION IN SUPPORT OF APPELLANT SEEKING REVERSAL

Oral Argument Requested

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTRODUCTION AND STATEMENT OF INTEREST

The Muscogee (Creek) Nation ("Nation") is a federally recognized Indian tribe that, as a matter of its inherent sovereignty, exercises jurisdiction (often concurrent with the federal government) over crimes committed by Indian defendants within its Reservation.[1] *See Murphy v. Royal*, 875 F.3d 896 (10th Cir. 2017), *aff'd sub nom. Sharp v. Murphy*, 140 S. Ct. 2412 (2020); *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2460 (2020). This includes robust enforcement of traffic laws within the Reservation in close cooperation with local governmental authorities through effective cross-deputization agreements.

In 2018, Appellee City of Tulsa prosecuted Appellant, an Indian, for a traffic offense committed within the Nation's Reservation. But the law is clear: Absent congressional authorization, neither states nor their political subdivisions have jurisdiction over crimes involving Indian defendants committed within the boundaries of an Indian reservation. *Norton v. Ute Indian Tribe of the Uintah & Ouray Reservation*, 862 F.3d 1236, 1248 (10th Cir. 2017). Indeed, "[t]he policy of leaving Indians free from state jurisdiction and control is deeply rooted in this Nation's history." *McGirt,* 140 S. Ct. at 2476 (quotation marks omitted)). Tulsa

[1] No party's counsel authored this brief in part or in whole. No party or party's counsel or person other than Amicus contributed any money to its preparation or submission.

seeks to circumvent that rule by resurrecting a defunct 1898 statute—one the Supreme Court has called a "statutory artifact[] from [Oklahoma's] territorial history," *id.*—that granted then-federally chartered municipalities in the Indian Territory temporary jurisdiction over their inhabitants "without regard to race." Act of June 28, 1898, ch. 517, § 14, 30 Stat. 495, 499. "Plainly," the Supreme Court has stated, that statute "was intended to be merely provisional." *Jefferson v. Fink*, 247 U.S. 288, 292 (1918) (quotation marks omitted).

Yet Tulsa asserts its permanence as a basis for its jurisdiction over Indians on the Nation's Reservation. In doing so, it takes direct aim at the Nation's right of self-government, as just the latest in a series of relentless efforts by Oklahoma, certain of its political subdivisions, and others to eviscerate the force and reach of this Court's landmark decision in *Murphy* and the resounding vindication of that decision in *McGirt*. The Nation (with the consent of the parties and pursuant to Federal Rule of Appellate Procedure 29(a)(2)) seeks amicus status here for the same reason that this Court granted it (as well as the right to participate in oral argument) in *Murphy* and the Supreme Court did in *McGirt*—because the appellant's "personal interests wind up implicating the Tribe's." *McGirt*, 140 S. Ct. at 2460.[2]

[2] The Nation concurs in the arguments of the other amici Tribes filed on this date. It submits this brief separately because Tulsa's arrogation of jurisdiction implicates the Nation's Reservation governance directly. The Nation limits this brief to the

STATEMENT OF THE CASE

I. Historical Background

This Court has thoroughly canvassed the relevant history. "In the 1820's, the federal government adopted a policy to forcibly remove the Five Civilized Tribes from the southeastern United States and relocate them west of the Mississippi River, in what is today Oklahoma." *Murphy*, 875 F.3d at 932 (footnote omitted) (quoting *Indian Country, U.S.A., Inc. v. Oklahoma ex rel. Okla. Tax Comm'n*, 829 F.2d 967, 971 (10th Cir. 1987)). That area came to be called the "Indian Territory." "During the 1880s and 1890s, the white population within the Indian Territory grew dramatically," *id*. at 934 (quoting *Indian Country, U.S.A.*, 829 F.2d at 977), and Congress began to adjust the structure of governance there to prepare for eventual statehood. This involved two predicate measures: (1) bolstering a provisional legal system to account for the increasing non-Indian population until a state government could be formed; and (2) persuading the Five

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issue of Tulsa's ability to assert present-day authority under the 1898 statute referenced above. The Nation takes no position on Appellant's other claims, the retroactive application of *McGirt*, or jurisdictional issues beyond the authority of the district court to issue declaratory relief under 28 U.S.C. §§ 1331 and 2201. Tulsa's assertion of jurisdiction over an Indian within a reservation "presents a federal question that sustains federal jurisdiction," *Ute Indian Tribe v. Lawrence*, 875 F.3d 539, 540 (10th Cir. 2017), as does its reliance on a federal statute as the basis for its action, *see Davoll v. Webb*, 194 F.3d 1116, 1129 (10th Cir. 1999) (where applicability of a federal statute "is genuinely at issue, the federal courts possess jurisdiction").

Tribes to agree to the allotment of their massive communal estates, which they resisted but which Congress viewed as necessary for statehood. *See id*. at 933–35; *Indian Country, U.S.A.*, 829 F.2d at 976–78.

Congress's first major adjustment was to bifurcate the Indian Territory. "In 1890, Congress carved the Territory of Oklahoma out of the western half of the Indian Territory. The lands in the east held by the Five Civilized Tribes remained Indian Territory[.]" *Murphy*, 875 F.3d at 933–34 (quoting *Indian Country, U.S.A.*, 829 F.2d at 977). While Congress established a territorial government in the Oklahoma Territory, "[n]o territorial government was ever created in the reduced Indian Territory, and it remained subject directly to tribal and federal governance." *Id*. at 933 n.40 (quoting *Indian Country, U.S.A.*, 829 F.2d at 974). However, also in 1890, "Congress expanded the civil and criminal jurisdiction of the special United States court in the diminished Indian Territory…. [and] provided that certain laws from neighboring Arkansas would apply in Indian Territory." *Id*. at 934 (quoting *Indian Country, U.S.A.*, 829 F.2d at 977).

"In 1893, reflecting federal policies to forcibly assimilate Indians … and to eventually create a new state in the Indian Territory, Congress created the Dawes Commission to negotiate with the Five Civilized Tribes" for the allotment of their lands. *Id*. (quoting *Indian Country, U.S.A.*, 829 F.2d at 977). *See* Act of March 3, 1893, ch. 209, §§ 15–16, 27 Stat. 612, 645. At that point, the incorporated

Arkansas laws did not apply to matters involving only tribal members. *Murphy*, 975 F.3d at 934. However, because the Tribes "refused to negotiate" over allotment, *Indian Country, U.S.A.*, 829 F.2d at 977, Congress sought "to coerce" them to do so, *id.* at 978, and "imposed several measures to force [tribal] agreement to the allotment policy," *Murphy*, 875 F.3d at 934, including applying Arkansas law to tribal members. Thus, in 1897, Congress provided "that the body of federal law in Indian Territory, which included the incorporated Arkansas laws, was to apply irrespective of race[.]" *Id.* (quotation marks omitted). And in 1898, Congress enacted the Curtis Act, section 14 of which allowed towns of over 200 residents in the Indian Territory to incorporate consistent with the provisions of Arkansas law, and further provided (in a passage central to this dispute) that "all inhabitants of such cities and towns, without regard to race, shall be subject to all laws and ordinances of such city or town[.]" § 14, 30 Stat. at 499.

All of this was intended to be temporary, pending "the ultimate creation of a state embracing the Indian Territory[.]" *Jefferson*, 247 U.S. at 291. Indeed, the Supreme Court has explained "the purpose" for which Congress enacted this series of statutes for the Indian Territory and "their status there":

> Congress was then contemplating the early inclusion of that territory in a new state, and the purpose of those acts [i.e., including the Curtis Act] was to provide, *for the time being*, a body of laws adapted to the needs of the locality and its people in respect of matters of local or domestic concern. There being no local Legislature, Congress alone could act. *Plainly, its action was intended to be merely provisional*.

Id. at 292 (emphases added) (quoting *Shulthis v. McDougal*, 225 U.S. 561, 571 (1912)).

"Oklahoma won statehood in 1907," *McGirt*, 140 S. Ct. at 2477, and by then Congress had accomplished its goal of coercing the Tribes to agree to allotment, *see*, *e.g.*, *Indian Country, U.S.A.*, 829 F.2d at 978 ("In 1901, the Creek Nation finally agreed to the allotment of tribal lands.").[3] Thus, the "merely provisional" statutes applying Arkansas law irrespective of race, including section 14 of the Curtis Act, had served their purpose. In their place, as discussed below, statehood extended the laws of the former Oklahoma Territory across Oklahoma and rendered all of its municipalities wholly state entities deriving their powers solely from the new state.

II. The District Court's Decision

In 2018, Appellant "received a speeding ticket from the City of Tulsa within the boundaries of the Creek Reservation" and "was found guilty by Tulsa's municipal criminal court and was ordered to pay a $150 fine[.]" *Hooper v. City of Tulsa*, Case No. 21-cv-165-WPJ-JFJ, 2022 WL 1105674, at *1 (N.D. Okla. Apr. 13, 2022). He later appealed that decision in the district court, challenging Tulsa's

[3] All of the Five Tribes agreed to allotment between 1898 and 1902. *See* § 29, 30 Stat. at 505–13 (1898) (Choctaw and Chickasaw); Act of July 1, 1898, ch. 545, 30 Stat. 567 (Seminole); Act of July 1, 1902, ch. 1375, 32 Stat. 716 (Cherokee).

jurisdiction over him. *Id.* The district court found section 14 of the Curtis Act—conferring jurisdiction on municipalities incorporated under the Act over "all inhabitants … without regard to race," § 14, 30 Stat. at 499—to provide the legal basis for Tulsa's jurisdiction. *Id*. at *3 ("The plain meaning of this phrase is to cover *everyone* inhabiting the city or town.").

The district court did not address what the Supreme Court has determined to be Congress's "provisional" intentions in enacting the Curtis Act, *Jefferson*, 247 U.S. at 292 (quotation marks omitted). It instead found section 14 still in effect based on its interpretation of the Oklahoma Constitution. Specifically, "Oklahoma's statehood did not put an end to municipalities' powers under the Curtis Act" because the Oklahoma Constitution preserved the "'present rights and powers'" of municipalities upon statehood. 2022 WL 1105674, at *4 (quoting Okla. Const. art. XVIII, § 2). That is, the district court interpreted the Constitution's preservation of municipalities' "present" powers to refer to those possessed by municipalities in the Indian Territory prior to the adoption of the Constitution.

As discussed below, this very interpretation of the Oklahoma Constitution has been considered and rejected by the Oklahoma Supreme Court. In fact, statehood and the adoption of the Oklahoma Constitution did put an end to

municipalities' powers under the Curtis Act and replaced them with the more limited powers under Oklahoma state law—all by Congress's express design.

ARGUMENT

Tulsa's contention in this case is as straightforward as it is incorrect. It argues that it has greater authority than the State of Oklahoma to prosecute Indians for crimes committed on the Nation's Reservation because the Curtis Act endowed it with such power. However, statehood terminated the authority of Indian Territory municipalities under the Curtis Act based on three clear and related bases: (1) it resulted in Oklahoma territorial law being adopted as state law and extended over the entire state; (2) which rendered all municipalities in Oklahoma wholly creatures of state law; and (3) in keeping with accepted principles of municipal authority and federalism, those municipalities accordingly possessed only the powers lawfully delegated to them by the State (which, as a matter of law, cannot have included jurisdiction over Indians within Indian reservations), an allocation of authority Congress nowhere sought to upset. The following sections address these three points in turn.

I. Statehood Extended the Law of the Oklahoma Territory as State Law over the Entire State.

As discussed above, the Supreme Court has interpreted the Curtis Act and related Indian Territory statutes as "[p]lainly … intended to be merely provisional" pending statehood, *Jefferson*, 247 U.S. at 292 (quotation marks omitted). That

interpretation is controlling. *See James v. City of Boise*, 577 U.S. 306, 307 (2016) (per curiam) ("It is this Court's responsibility to say what a [federal] statute means, and once the Court has spoken, it is the duty of other courts to respect that understanding of the governing rule of law." (brackets in original) (quotation marks omitted)). The provisional force of those statutes came to an end upon statehood in 1907.

Congress's enactment of the Oklahoma Enabling Act in 1906, ch. 3335, 34 Stat. 267, marked the first step in that process. The Act authorized "the inhabitants of … the Territory of Oklahoma and the Indian Territory" to "adopt a constitution and become the State of Oklahoma," § 1, *id*. at 267, and provided that, upon statehood, "the laws in force in the Territory of Oklahoma … shall extend over and apply to" the entire state, § 13, *id*. at 275. As the Supreme Court has explained,

> Each territory had a distinct body of local laws. Those in the Indian Territory [i.e., including the Curtis Act] … had been put in force there by Congress. Those in the territory of Oklahoma had been enacted by the territorial Legislature. Deeming it better that the new state should come into the Union with a body of laws applying with practical uniformity throughout the state, Congress provided in the Enabling Act … that 'all laws in force in the territory of Oklahoma at the time of the admission of said state into the Union shall be in force throughout said state[.]'

Jefferson, 247 U.S. at 292–93.

The people of Oklahoma thereafter followed the course set by Congress in the Enabling Act. They first adopted a "Schedule to the Constitution," which was

"a component part of the Constitution." *State v. Carter*, 186 P. 454, 456 (Okla. 1919).[4] Section 2 of the Schedule provided that "All laws in force in the Territory of Oklahoma at the time of the admission of the State into the Union, which are not repugnant to this Constitution, and which are not locally inapplicable, shall be extended to and remain in force in the State of Oklahoma until they expire by their own limitation or are altered or repealed by law." Okla. Const. Sched. § 2.

As the Oklahoma Supreme Court has stated, "[t]he effect of the Schedule was … [that] laws being already in force in Oklahoma Territory, were to remain in force in that portion of the state … and were to be extended to that portion of the state formerly known as the Indian Territory[.]" *Patterson v. Rousney*, 159 P. 636, 637 (Okla. 1916). Thus, "[t]he state was admitted into the Union November 16, 1907; and thereupon the laws of the territory of Oklahoma … became laws of the state." *Jefferson*, 247 U.S. at 293. *See also*, *e.g.*, *Murphy*, 875 F.3d at 947–48 ("Upon Oklahoma's admission as a State, the territorial laws in force within the Territory of Oklahoma would take effect statewide[.]").

Consistent with the provisional status of the Curtis Act and other Indian Territory laws, then, statehood resulted in their replacement through the statewide

[4] The Schedule is available at https://www.oscn.net/applications/oscn/index.asp?ftdb=STOKCN&level=1.

adoption of the laws of the Oklahoma Territory. Tulsa's argument, which would endow the Curtis Act with enduring force, cannot be reconciled with this fact.

II. The Statewide Adoption of Oklahoma Territorial Law Rendered Every Municipality in the State a Creature of State Law.

Municipalities in the Oklahoma Territory were territorial entities, exercising powers under Oklahoma territorial law. *See*, *e.g.*, *State ex rel. West v. Ledbetter*, 97 P. 834, 835–36 (Okla. 1908) (discussing Oklahoma territorial statutes governing municipalities). Those in the Indian Territory, by contrast, were wholly federal entities established under federal law, *see Murphy*, 875 F.3d at 934 (referring to "the body of federal law in Indian Territory, which included the incorporated Arkansas laws" (citation omitted)), under which "the jurisdiction hereby conferred" by Congress was federal jurisdiction, § 14, 30 Stat. at 499.

The extension of Oklahoma territorial law as state law throughout the State—as mandated by the Enabling Act—transformed all Oklahoma municipalities into state entities. Section 10 of the Schedule expressly provided that "cities and towns, heretofore incorporated under the laws in force in the Territory of Oklahoma or in the Indian Territory, shall continue their corporate existence under the laws extended in force in the State"—i.e., the Oklahoma Territory laws. Okla. Const. Sched. § 10.

Accordingly, the Oklahoma Constitution provided that "[a]ny city … [of over 2,000] inhabitants may frame a charter for its own government, consistent with and subject to the Constitution and laws of this State," which charter would "become the organic law of such city and *supersede any existing charter*[.]" Okla. Const. art. XVIII, § 3(a) (emphasis added). As the Supreme Court of Oklahoma has explained in terms that could not be clearer,

> the general statutes in force in the Indian Territory side of the state, constituting the charter of such corporations, were superseded by the statutes of Oklahoma Territory, extended in force in the state; and while the municipal corporations of the Indian Territory continued to exist as municipal corporations in the state after its admission, the powers of such corporations, except as otherwise provided by the [Oklahoma] Constitution, are to be found in the general statutes of Oklahoma Territory, extended in force in the state, providing for the organization of municipal corporations and defining their powers.

Lackey v. State ex rel. Grant, 116 P. 913, 914 (Okla. 1911).

This was certainly the case for Tulsa. "Tulsa became a city of the first class under the laws of Oklahoma on December 30, 1907. On July 3, 1908, Tulsa adopted a special charter. It was approved by the governor on January 5, 1909." *City of Tulsa v. Sw. Bell Tel. Co.*, 75 F.2d 343, 346 (10th Cir. 1935). Thus, Tulsa's new charter "supersede[d]" its Curtis Act charter, Okla. Const. art. XVIII, § 3(a), its powers under the Curtis Act thereby came to an end, and it would thereafter "continue [its] corporate existence under the laws extended in force in the State," *id.* Sched. § 10.

As noted above, the district court held otherwise, stating that "Oklahoma's statehood did not put an end to municipalities' powers under the Curtis Act" because

> [t]he Oklahoma Constitution provided that "[e]very municipal corporation now existing within this State shall continue with all of its *present rights and powers* until otherwise provided by law, and shall always have the additional rights and powers conferred by the Constitution." Okla. Const. Art. 18 § 2.

Hooper, 2022 WL 1105674, at *4 (emphasis added). That is, the district court interpreted the Constitution's reference to municipalities' "present" powers as being to "municipalities' powers under the Curtis Act." *Id*. This interpretation cannot be squared with the Constitution's command that municipal charters adopted under the Constitution would "supersede any existing charter," Okla. Const. art. XVIII, § 3(a). Nor can it be squared with the Supreme Court's authoritative interpretation of the Curtis Act as "[p]lainly … intended to be merely provisional" while Congress "contemplate[ed] the early inclusion of that territory in a new state," *Jefferson*, 247 U.S. at 292, or with its description of the Act and related pre-statehood statutes as "artifacts from [Oklahoma's] territorial history," *McGirt*, 140 S. Ct. at 2476.

Most fundamentally, the district court's interpretation of the Oklahoma Constitution cannot be squared with the Oklahoma Supreme Court's authoritative interpretation of that document. In *State ex rel. Kline v. Bridges*, 94 P. 1065 (Okla.

1908), a party argued, echoing the district court's reasoning precisely, "that the effect of this section of the Constitution [art. XVIII, § 2] is to continue the city of Chickasha as a municipal corporation after the admission of the state, with all the rights and powers it had prior to the admission of the state under the laws of Arkansas in force in the Indian Territory pertaining to municipal corporations[.]" *Id*. at 1069. The Oklahoma Supreme Court disagreed:

> The city of Chickasha, as a municipal corporation, after the admission of the state into the Union, could not operate or exercise its powers under the laws in force in the Indian Territory prior to the admission of the state, unless such laws were extended to and kept in force in the state.… The only laws in force in the state *at the time of its admission* under which incorporated cities and towns theretofore existing in the Indian Territory could operate were the laws of the territory of Oklahoma extended in force in the state.

Id. at 1067 (emphasis added).

Indeed, the Oklahoma Supreme Court has repeatedly held that the Constitution's reference to the "present rights and powers" of municipal corporations is to "[t]he rights and powers possessed by municipal corporations of the state *at the time of its admission* … [which] were fixed by the statutes of the territory of Oklahoma, extended in force in the state by the schedule to the Constitution[.]" *Lackey*, 116 P. at 914 (emphasis added). That Court—specifically discussing municipalities established under the Curtis Act—has elsewhere elaborated:

> The municipal corporations of the Indian Territory prior to the admission of the state into the Union were agencies of the government of the United States, created by Congress under its plenary power to govern the territories …. Upon the admission of the state into the Union, the form of government theretofore existing in the Indian Territory ceased to exist, and the laws in force in that territory under which [the municipality of] Muskogee held its charter and exercised its municipal powers [i.e., the Curtis Act and the incorporated laws of Arkansas] became inoperative[.]

Ledbetter, 97 P. at 835. Thus, "the corporate existence of said cities … continued, after the admission of the state, under the laws extended in force, *and not under the laws theretofore in force in the Indian Territory*." *Id.* at 836 (emphasis added).

The district court grappled with none of this. But *Lackey*, *Ledbetter*, and *Bridges* represent definitive holdings by Oklahoma's highest court concerning the legal status of Oklahoma's political subdivisions under Oklahoma's Constitution and laws. "A State's highest court is unquestionably the ultimate exposito[r] of state law." *Riley v. Kennedy*, 553 U.S. 406, 425 (2008) (brackets in original) (quotation marks omitted)). The district court erred badly in adopting Tulsa's argument that it retains its powers under the Curtis Act when the Oklahoma Supreme Court has so clearly construed the Oklahoma Constitution to the contrary.

III. The District Court's Holding Contravenes Fundamental Principles of Municipal Power and Federalism.

Tulsa did not argue below, and the district court did not hold, that Tulsa's continuing jurisdiction over Indians is derived from the State of Oklahoma. This

was for good reason. The law is clear that, "absent a special grant of jurisdiction, states lack authority over crimes by tribal members committed in Indian country[.]" *Norton*, 862 F.3d at 1248 (citing *Ross v. Neff*, 905 F.2d 1349, 1352 (10th Cir. 1990)); *see also*, *e.g.*, *United States v. Baker,* 894 F.2d 1144, 1146 (10th Cir. 1990) ("States have no authority over Indians in Indian country unless it is expressly conferred by Congress" (quoting *Cheyenne-Arapaho Tribes v. Oklahoma*, 618 F.2d 665, 668 (10th Cir.1980)).[5]

Rather, Tulsa urges, and the district court held, that Tulsa's jurisdiction over Indians such as Appellant exists *in addition to* powers derived from the State. *See Hooper*, 2022 WL 1105674, at *4 ("[A] municipality may be granted powers by the federal government different than those granted to the state[.]" (citation omitted)). As established above, this argument defies the United States Supreme Court's authoritative construction of the Curtis Act as provisional, and the Oklahoma Supreme Court's authoritative construction of the Oklahoma Constitution as providing for the laws of the Oklahoma Territory to supersede the Curtis Act and other Indian Territory statutes. In addition, the argument flies in the face of fundamental principles of municipal power and of federalism.

[5] The Supreme Court's recent decision in *Oklahoma v. Castro-Huerta*, No. 21-429, 2022 WL 2334307 (U.S. June 29, 2022), addressed state jurisdiction over crimes by non-Indians and explicitly did not upset settled law regarding state jurisdiction over crimes involving, as here, only Indians. *See id*. at *6 n.2, *11 n.6.

A. Principles of Municipal Power

This Court, the United States Supreme Court, and the Oklahoma Supreme Court agree that municipalities may exercise only those powers lawfully delegated to them by their states. This principle is "well settled." *Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597, 607–08 (1991). *See also*, *e.g.*, *Puerto Rico v. Sanchez Valle*, 579 U.S. 59, 75 (2016) (municipalities do not exert criminal jurisdiction independent of state power "even when they enact and enforce their own criminal laws under their own, popularly ratified charters: Because a State must initially authorize any such charter, *the State is the furthest-back source of prosecutorial power*" (emphasis added)); *United Bldg. & Constr. Trades Council of Camden Cty. & Vicinity v. Mayor and Council of Camden*, 465 U.S. 208, 215 (1984) ("[A] municipality is merely a political subdivision of the State from which its authority derives.").

This Court, just last month, explained that municipalities "can only act via state law" because they "'are creatures of the laws of the state of which they are a part, and their powers are derived *solely* therefrom.'" *Dear v. Nair*, No. 21-2124, 2022 WL 2165927, at *2 (10th Cir. June 16, 2022) (emphasis by this Court) (quoting *Purcell v. City of Carlsbad*, 126 F.2d 748, 751 (10th Cir. 1942)). *See also*, *e.g.*, *Large v. Fremont Cty.*, 670 F.3d 1133, 1146 (10th Cir. 2012) (stating that municipalities "are created by the State … 'for exercising such of the

governmental powers *of the state* as may be entrusted to them'" (emphasis by this Court) (quoting *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 71 (1978) (quoting *Hunter v. Pittsburgh*, 207 U.S. 161, 178 (1907))), and are "'instrumentalities created by the State to assist in the carrying out of *state* governmental functions,'" *id*. (emphasis by this Court) (quoting *Reynolds v. Sims*, 377 U.S. 533, 575 (1964))).

This principle was also well settled at the time of Oklahoma statehood. As the United States Supreme Court explained in 1907:

> Municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers *of the state* as may be intrusted to them…. The number, nature, and duration of the powers conferred upon these corporations … rests in the absolute discretion of the state.

Hunter, 207 U.S. at 178 (emphasis added). *See also*, *e.g.*, *Sailors v. Bd. of Educ. of Kent Cty.*, 387 U.S. 105, 108 (1967) (quoting same); *City of Trenton v. New Jersey*, 262 U.S. 182, 185–86 (1923) (same); *City of Pawhuska v. Pawhuska Oil & Gas Co.*, 250 U.S. 394, 397 (1919) (same).[6]

The Supreme Court of Oklahoma has likewise recognized that

> [m]unicipalities *possess and can exercise only those powers expressly or impliedly granted by the state*. A city has no power to enact an ordinance that includes *persons* or principles not clearly within the terms of the delegated powers.

[6] *See also City of Herriman v. Bell*, 590 F.3d 1176, 1185 (10th Cir. 2010) (stating that, subject to later determinations by the Court that states and their subdivisions may not violate federal constitutional rights, "*Hunter* remains good law").

Toch, LLC v. City of Tulsa, 474 P.3d 859, 866 (Okla. 2020) (emphases added) (citations omitted). *See also*, *e.g.*, *City of Chickasha v. Foster*, 48 P.2d 289, 292 (Okla. 1935) (stating, in case involving former Indian Territory town, that "[b]eing a creature of the state … a municipal corporation possesses such powers and such only as the state confers upon it" (quotation marks omitted)); *Y & Y Cab Serv. v. Oklahoma City*, 28 P.2d 551, 552 (Okla. 1933) ("*All the power that a municipality has* … is such as may be delegated to it by the Constitution of the state, or … by the Legislature." (emphasis added) (citation omitted)); 19 Okla. Op. Att'y Gen. 215 (1988) (same).

The district court relied on *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320 (1958), asserting that the Court there upheld a statute by which "Congress affirmatively granted authority to a municipality that it did not give to the state" in circumstances "analogous" to those here. *Hooper*, 2022 WL 1105674, at *4.

But this is not correct. First, the Court did not affirm Tacoma's disputed authority. It instead disposed of the case without reaching the merits. *See Williams Nat. Gas Co. v. Oklahoma City*, 890 F.2d 255, 261–62 (10th Cir. 1989). More fundamentally, the case is in no way "analogous." As the Supreme Court noted, the statute at issue in the Tacoma case expressly required that a municipal applicant for a hydroelectric dam license must have "'submitted satisfactory

evidence *of compliance with the requirements of all applicable State laws insofar as necessary to effect the purposes of a license* for the project; and it is a municipality within the meaning of s 3(7) of the Act.'" *City of Tacoma*, 357 U.S. at 337 (emphasis added) (footnote omitted) (quoting Act of June 10, 1920, ch. 285, § 9(b), 41 Stat. 1068). It then noted that

> [u]nder s 3(7) of the Act 'municipality' means … a city 'competent under the laws (of the State) to carry on the business of developing, transmitting, utilizing, or distributing power.' 41 Stat. 1063. It is no longer disputed that Tacoma is expressly authorized by R.C.W. 80.40.050 to carry on such business, and that it has done so for many years.

Id. at n.18 (citations omitted).

Tacoma, in sum, was authorized under state law to exercise the power it sought. Here, there is no plausible argument that Tulsa is authorized under Oklahoma law to exercise criminal jurisdiction over Indians when the State itself lacks such jurisdiction, and there is no way to view the Curtis Act as merely conferring on municipalities authority to carry out federal policy in a manner already permitted by state law. *City of Tacoma* is inapposite and does not undermine the fact that the district court's holding contravenes fundamental understandings of municipal power.

B. Principles of Federalism

The district court's holding is also untenable as a matter of federalism: To affirm it would be to impute to Congress the radical intention that some of

Oklahoma's municipalities would be hybrid instruments of both state *and federal* sovereignty. But as the United States Supreme Court has explained, the Curtis Act and related Indian Territory statutes were "intended to be merely provisional, *and not to encroach upon the powers which rightfully would belong to the prospective state*." *Shulthis*, 225 U.S. at 571 (emphasis added).

Indeed, because the powers of political subdivisions "rest[] in the absolute discretion of the state," *Large*, 670 F.3d at 1147 (quoting *Hunter*, 207 U.S. at 178), "interfering with the relationship between a State and its political subdivisions strikes near the heart of State sovereignty," *City of Abilene v. F.C.C.*, 164 F.3d 49, 52 (D.C. Cir. 1999). Congress accordingly will not be held to have intruded on that relationship unless it "has manifested its intention with unmistakable clarity." *Id.*; *see also Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (Congress "must make its intention to do so 'unmistakably clear *in the language of the statute*.'" (emphasis added) (citation omitted)).

Here, the Curtis Act cannot possibly be held to evince—much less with unmistakable clarity—Congress's intent to render Oklahoma municipalities hybrid state-federal entities because Oklahoma *did not exist* when Congress enacted the statute. The Curtis Act conferred *federal* authority on *federal* entities to apply *federal* law to be enforced in *federal* courts, nine years before statehood. § 14, 30 Stat. at 499–500. It said not a whit about the relationship between a state—which

in 1898 was still an abstract concept, even for the heartiest booster—and its political subdivisions.

In the same vein, not a word of the 1906 Enabling Act remotely suggests that Congress harbored any intent to transfer that federal authority to *state* political subdivisions applying *state* law enforceable in *state* courts—much less to do so for some of Oklahoma's political subdivisions but not others. To the contrary, the Enabling Act embodies Congress's clear mandate "that the new state should come into the Union with a body of laws applying with practical uniformity throughout the state," *Jefferson*, 247 U.S. at 292.

The Supreme Court has aptly described the Curtis Act and other Indian Territory acts as "statutory artifacts from [Oklahoma's] territorial history." *McGirt*, 140 S. Ct. at 2476. This Court should reverse the district court's unprecedented attempt to exhume one of those artifacts after more than a century and engraft it onto modern political entities that this Court and the United States and Oklahoma Supreme Courts all agree are creatures of the State and limited to exercising powers derived *from the State*—which powers as a matter of law do not include criminal jurisdiction over Indians within Indian reservations.

IV. Tulsa's Assertion of Jurisdiction Is Not Driven by Any Legitimate Law Enforcement Imperative and Upholding It Will Give Rise to Significant Adverse Consequences.

Nothing about this case suggests any legitimate law enforcement imperative

behind Tulsa's arrogation of the Nation's jurisdiction over Appellant. The Nation presently exercises highly effective criminal law enforcement throughout its Reservation—including in traffic matters—in close cooperation with other governments. Reversing the district court's decision will allow that cooperative enforcement to continue to flourish, while affirmance will lead to a range of unwelcome consequences.

A. The Nation's Law Enforcement Within Its Reservation Is Robust and Effective.

Both prior and subsequent to the Supreme Court's decision in *McGirt*, the Nation has committed, and continues to commit, substantial resources to law enforcement within its Reservation. Since *McGirt*, this has involved dramatic increases in law enforcement staffing—including new judges, police officers, prosecutors, investigators, dispatchers, and related personnel—as well as in law enforcement facilities and infrastructure. *See* Affidavit of Muscogee (Creek) Nation Attorney General Geri Wisner ("Wisner Aff.") ¶ 4.[7] All of this has resulted in correspondingly significant increases in successful criminal prosecutions throughout the Reservation, both within and outside of chartered municipalities, including Tulsa. *Id*. ¶¶ 5–7, 9–10.

[7] https://www.muscogeenation.com/wp-content/uploads/2022/07/Affidavit-of-Attorney-General-Geri-Wisner.pdf.

The Nation's effectiveness in this regard is enhanced by the numerous cross-deputization agreements it has entered into with the United States Bureau of Indian Affairs and the State of Oklahoma, and with municipalities (including Tulsa), counties, and other non-tribal governmental entities throughout its Reservation.[8] These cooperative agreements confer enforcement authority on Nation officers over non-Indians for violations of non-tribal laws, and confer like authority on non-Nation officers over Indians for violations of Nation laws—with subsequent referrals in each case to the government with jurisdiction. *Id.* ¶¶ 8–9. As a result, all cross-deputized officers, tribal and non-tribal, possess arrest authority within the Reservation over all persons, Indian and non-Indian alike. The Nation presently has 64 cross-deputization agreements in place, including with the City of Tulsa. *Id.* ¶ 8. Since *McGirt*, the Nation has referred approximately 4,162 criminal matters to non-Indian governments, and has received 4,136 referrals from non-Indian governments. *Id.* ¶ 10.

These agreements operate fully in the context of traffic laws. *Id*. ¶ 12. Indeed, to ensure clear and seamless cooperative enforcement of traffic laws throughout the Reservation, the Nation revised its traffic code in 2020 so that it

[8] *See* Okla. Sec'y of State, *Tribal Compacts and Agreements*, https://www.sos.ok.gov/gov/tribal.aspx (last visited July 6, 2022) (enter "Creek" into "Doc Type" and select "Submit," *see*, *e.g.*, #51712).

mirrors Oklahoma's code. *See* Muscogee (Creek) Nation Code Annotated 20-087.[9] Since *McGirt*, the Nation has issued 1,001 civil and criminal sanctions for traffic violations within its Reservation, and has referred 155 such matters to non-tribal governments. Wisner Aff. ¶ 13.

The Nation's agreement with Tulsa allows Tulsa to refer traffic offenses by Indians to the Nation for prosecution. *Id.* ¶ 17.[10] That it declines to do so is not driven by any law enforcement imperative, and reversing the district court's decision will result in no diminishment of effective law enforcement within the Nation's Reservation. It will simply facilitate Tulsa's participation in what *McGirt* extols as "the spirit of good faith, 'comity and cooperative sovereignty' behind these agreements," *McGirt*, 140 S. Ct. at 2481.

B. Affirmance Would Engender Enormous Practical Problems.

Affirmance of the decision below would give rise to a host of difficult questions that the district court did not even begin to address. To begin with, section 14 is not limited to traffic offenses but sweeps in "*all* laws and ordinances of such cit[ies]." § 14, 30 Stat. at 499 (emphases added). As applied to Indians, the effect would be to blow a Tulsa-sized hole in *McGirt* and riddle it with additional exemptions elsewhere. *See McGirt*, 140 S. Ct. at 2490 (section 14

[9] http://www.creeksupremecourt.com/wp-content/uploads/NCA-20-087.pdf.
[10] https://www.sos.ok.gov/documents/filelog/63941.pdf.

applied to "approximately 150 towns in the [Indian] territory") (Roberts, C.J., dissenting).

Moreover, because section 14 was not limited to Indians, the implications of affirmance for the federal docket are staggering. Section 14 subjected "*all* inhabitants" to "all" municipal laws and ordinances. § 14, 30 Stat. at 499 (emphasis added). The purported section 14 authority upheld by the district court, then, sweeps in every municipal resident, Indian and non-Indian alike, and every ordinance and offense—civil and criminal, from the petty to the grave—within its scope. According to Tulsa, every decision of every municipal court in Oklahoma with section 14 jurisdiction, on even the pettiest of these matters with no other federal dimension, will be appealable to federal district court, *see* App. at 143 ("This Court has jurisdiction of the appeal from the City of Tulsa Municipal Criminal Court because … the Curtis Act is still in force[.]"), and then presumably to this Court, 28 U.S.C. § 1291.

The implications for the coherence of the law are no less bracing. To take just a few examples, under the district court's holding, if a municipality were to enforce an ordinance or law against a non-Indian, would it be doing so under the federally conferred authority of section 14 or under Oklahoma law? Certainly, it could not selectively act under section 14 against only Indians. In addition to

obvious constitutional obstacles, section 14 itself guaranteed that "all inhabitants … shall have equal rights, privileges, and protection" under the municipal laws. § 14, 30 Stat. at 499–500.

Moreover, if those municipalities exercised federally conferred authority over non-Indians under the essentially boundless terms of section 14, would that authority be subject to Oklahoma's constitutional and statutory limits on the State's own powers over non-Indians? Under the district court's holding it would not be, *see Hooper*, 2022 WL 1105674, at *4 ("Congress affirmatively granted authority to a municipality that it did not give to the state."), further underscoring the enormous federalism problems inherent in that holding.

This Court need not resolve such issues (or the many others that would inevitably arise) to conclude that Congress cannot have intended to engender such complications when it instead "[d]eem[ed] it better that the new state should come into the Union with a body of laws applying with practical uniformity throughout the state[.]" *Jefferson*, 247 U.S. at 292.

CONCLUSION

The Nation respectfully requests that the Court reverse the decision of the district court.

Respectfully submitted this 7th day of July, 2022.

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