ORIGINAL

IN THE COURT OF CRIMINAL APPEALS
FOR THE STATE OF OKLAHOMA

SHAUN MICHAEL BOSSE,	)	
	)	
Petitioner,	)	
	)	
-vs.-	)	**No. PCD-2019-124**
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Respondent.	)	

AMICUS CURIAE CHICKASAW NATION'S BRIEF IN SUPPORT OF THE CONTINUED EXISTENCE OF THE CHICKASAW RESERVATION AND ITS BOUNDARIES

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INTRODUCTION

The *amicus curiae* Chickasaw Nation ("Nation" or "Chickasaw") is a federally-recognized Indian tribe, *see* 85 Fed. Reg. 5462, 5465 (Jan. 30, 2020), that governs the Chickasaw Reservation under a constitution approved by the Secretary of the Interior, *see* Chickasaw Const.[1] The Nation appears here only to establish that the District Court correctly held, consistent with the United States Supreme Court's decision in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), that the Chickasaw Reservation continues to exist and that all land within its boundaries is Indian country, 18 U.S.C. § 1151(a).[2]

ARGUMENT

I. THE CHICKASAW RESERVATION AND ITS BOUNDARIES WERE ESTABLISHED BY TREATIES THAT ARE THE LAW OF THE LAND.

In *McGirt*, the Court held that Congress established the Creek Reservation by entering into the Creek Treaties, which granted the Creeks a permanent home with defined boundaries, to be held in fee, on which they were promised sovereign autonomy. 140 S. Ct. at 2460-62. For the reasons that follow, the parallel terms of the Chickasaw Treaties established the Chickasaw Reservation.

A. The Chickasaw Treaties Established The Chickasaw Reservation Just As The Creek Treaties Established The Creek Reservation.

The Chickasaw Reservation was established by the 1837 Treaty of Doaksville, arts. 1, 2, Jan. 17, 1837, 11 Stat. 573 ("1837 Treaty"), which made the Treaty of Dancing Rabbit Creek,

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[1] *Available at* https://chickasaw.net/getattachment/Our-Nation/Government/Chickasaw-Constitution/CN_Constituion_Amended2002.pdf.aspx?lang=en-US.

[2] The existence of Indian country relates only to which government has jurisdiction to prosecute a particular crime, not to guilt or innocence. *E.g.*, *McGirt*, 140 S. Ct. at 2460. In this case, the parties stipulated that the crime occurred "within the boundaries set forth in the 1855 and 1866 Treaties between the Chickasaw Nation, the Choctaw Nation, and the United States." District Ct. Op. at 6, Oct. 13, 2020.

Sept. 27, 1830, 7 Stat. 333 ("1830 Treaty") applicable to the Chickasaw. Under the 1830 Treaty, the Choctaw ceded their eastern lands in exchange for a new homeland west of the Mississippi River, *id.* art. 3, to be held in fee for as long as "they shall exist as a nation and live on it," with boundary lines that were explicitly defined. *Id.* art. 2.[3] They were also guaranteed

> 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 of Red People and their descendants; and that no part of the land granted them shall ever be embraced in any Territory or State.

Id. art. 4. These terms were authorized by the Indian Removal Act of 1830, ch. 148, 4 Stat. 411, in which:

> Congress authorized the President "to assure the tribe . . . that the United States will forever secure and guaranty to them . . . the country so exchanged with them." Indian Removal Act of 1830, § 3, 4 Stat. 412. "[A]nd if they prefer it," the [Indian Removal Act] continued, "the United States will cause a patent or grant to be made and executed to them for the same . . . ."

McGirt, 140 S. Ct. at 2460 (quoting Indian Removal Act § 3, 4 Stat. at 412). These Treaty terms established the Choctaw Reservation.

The 1837 Treaty secures these same rights to the Chickasaw Nation.[4] The 1837 Treaty grants the Chickasaw a "district within the limits of [the 1830 Treaty Territory], to be held on the same terms that the Choctaws now hold it, except the right of disposing of it, (which is held in common with the Choctaws and Chickasaws,)" *id.* art. 1, explicitly defines the boundary lines of the Chickasaw district, *id.* art. 2, and grants the Chickasaw Nation "all the rights and privileges"

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[3] In 1842, President John Tyler conveyed fee title to the Treaty Territory to the Choctaw Nation ("1842 Patent") by reciting Article 2 of the 1830 Treaty and expressly reserving the Treaty Territory from sale without the Nation's consent, *Fleming v. McCurtain*, 215 U.S. 56, 58 (1909) (first quoting 1830 Treaty art. 2; then quoting 1842 Patent).

[4] The Chickasaw Nation had earlier ceded their lands east of the Mississippi and agreed to move west. Treaty of Pontitock Creek pmbl., art. 1, Oct. 20, 1832, 7 Stat. 381.

of the Choctaw Nation under the 1830 Treaty. 1837 Treaty art. 1.[5] The Indian Removal Act also authorized these terms, *id.* § 1, 4 Stat. at 411-12 (authorizing the President to establish "districts, for the reception of such tribes or nations of Indians as may choose to exchange the lands where they now reside, and remove there").

In the 1855 Treaty of Washington with the Choctaw and Chickasaw, June 22, 1855, 11 Stat. 611 ("1855 Treaty"), the Choctaw and Chickasaw Nations' common ownership of the "Choctaw and Chickasaw country" was reaffirmed, the boundaries of that country were modified and explicitly set forth, and Congress promised that "pursuant to an act of Congress approved May 28, 1830 [i.e., the Indian Removal Act], the United States do hereby forever secure and guarantee the lands embraced within the said limits, to the members of the Choctaw and Chickasaw tribes," and that "[n]o part thereof shall ever be sold without the consent of both tribes." *Id.* art. 1. The 1855 Treaty also reaffirmed the existence of the Chickasaw district, modified and explicitly defined its boundaries, and established that "[t]he remainder of the country held in common by the Choctaws and Chickasaws, shall constitute the Choctaw district." *Id.* art. 3. In addition, the 1855 Treaty reaffirmed the Chickasaw and Choctaw Nations' rights of self-government, providing that "[s]o far as may be compatible with the Constitution of the United States and the laws made in pursuance thereof, regulating trade and intercourse with the Indian tribes, the Choctaws and Chickasaws shall be secured in the unrestricted right of self-government," with "full jurisdiction," over Tribal members and their property. *Id.* art. 7. Finally, the Choctaw Nation ceded "any and

[5] The rights held under the 1830 Treaty have exceptional force, as shown by *Choctaw Nation v. Oklahoma*, in which the Supreme Court held that the Choctaw and Chickasaw Nations own the banks and bed of the Arkansas River within the 1830 Treaty Territory, rejecting the State's claim of ownership and expressly relying on Article 4 of the 1830 Treaty for that purpose. 397 U.S. 620, 626-27, 631-35 (1970). The Court also recognized that under the 1837 and 1855 Treaties, the Chickasaw held "an undivided one-fourth interest" in the Choctaw lands granted under the 1830 Treaty. 397 U.S. at 626-27.

all lands, west of the one hundredth degree of west longitude;" *id.* art. 9, altering the western boundary of the Treaty Territory, *see id.* art. 1, and the Choctaw and Chickasaw Nations agreed to lease to the United States their lands "west of the ninety-eighth degree of west longitude." *Id.* art. 9.

Following the Civil War, the Chickasaw and Choctaw Nations entered into the 1866 Treaty of Washington with the Chickasaw and Choctaw, Apr. 28, 1866, 14 Stat. 769 ("1866 Treaty"), which provided that "[p]ermanent peace and friendship are hereby established between the United States and said nations." *Id.* art. 1. The Nations also "cede[d] to the United States the territory west of the 98 degrees west longitude" for a sum certain of three hundred thousand dollars, *id.* art. 3. In addition, the Nations' rights of self-government, *id.* art. 7, and all pre-existing Treaty rights not inconsistent with the 1866 Treaty were reaffirmed, *id.* arts. 10, 45.

These Treaty terms mirror those of the Creek Treaties examined in *McGirt*, which "not only 'solemnly guarantied' the land but also 'establish[ed] boundary lines which will secure a country and permanent home to the whole Creek Nation of Indians,'" 140 S. Ct. at 2460 (alteration in original) (first quoting Treaty of Cusseta art. XIV, Mar. 24, 1832, 7 Stat. 366 ("1832 Creek Treaty"); and then quoting Treaty of Fort Gibson pmbl., Feb. 14, 1833, 7 Stat. 417 ("1833 Creek Treaty")), which was to be granted in fee and held by the Creeks "so long as they shall exist as a nation, and continue to occupy the country hereby assigned to them," *id.* at 2461 (quoting 1833 Creek Treaty art. III). Those Treaty promises were made to secure the Creeks' agreement to cede all their lands east of the Mississippi River, and remove west of the River, *id.* at 2460 (quoting 1832 Creek Treaty arts. I, XII), and were authorized by the Indian Removal Act. *Id.* And later "Congress promised that 'no portion' of the Creek Reservation 'shall ever be embraced or included within, or annexed to, any Territory or State,'" *id.* at 2461 (quoting 1856 Treaty of Washington

with the Creeks and Seminoles art. IV, Aug. 7, 1856, 11 Stat. 699, 700 ("1856 Creek Treaty")), and with certain exceptions, also promised "'the unrestricted right of self-government,' with 'full jurisdiction' over enrolled Tribe members and their property," *id.* (quoting 1856 Creek Treaty art. XV).

As the terms of the Chickasaw Treaties parallel those of the Creek Treaties, the *McGirt* Court's conclusion that "[u]nder any definition, this was a reservation," 140 S. Ct. at 2462, equally applies to the Chickasaw Reservation. That the Chickasaw Treaties did not use the word "reservation" to describe the Chickasaw district makes no difference, as "similar language in treaties from the same era [has been held] sufficient to create a reservation." *Id.* at 2461 (citing *Menominee Tribe v. United States*, 391 U.S. 404, 405 (1968)). Indeed, the Supreme Court recognized long ago, in a case concerning the ability of railroads to acquire lands in what is now Oklahoma, that the Indian Territory lands secured to the Choctaw, Cherokee, and Creek Nations under their treaties "were *reserved* lands, within the meaning of [the Act of July 27, 1866, ch. 278, § 2, 14 Stat. 292, 294 ("1866 Act")]," *Atl. & Pac. R.R. v. Mingus*, 165 U.S. 413, 435 (1897) (emphasis added), and held that to acquire those lands the railroad would have to "prov[e] that the Indians were willing to make the cession," relying on § 17 of the 1866 Act, "which authorized the [railroad] company to accept grants from '*any Indian tribe or nation through whose reservation* the road herein provided for may pass,' provided that any such grant" was approved by the President. *Id.* at 438-39 (emphasis added). *Mingus* confirms that the 1830 Treaty Territory is a reservation, and therefore the Chickasaw district established within the Treaty Territory under Article 1 of the 1837 Treaty is also a reservation.

B. The Grant of the Chickasaw Reservation In Fee Does Not Deny It Reservation Status Under Federal Law.

Nor is the Chickasaw Reservation denied reservation status under federal law simply because it is held in fee. As the Court made clear in *McGirt*:

> Just as we have never insisted on any particular form of words when it comes to disestablishing a reservation, we have never done so when it comes to establishing one. *See Minnesota v. Hitchcock*, 185 U.S. 373, 390 (1902) ("[I]n order to create a reservation it is not necessary that there should be a formal cession or a formal act setting apart a particular tract. It is enough that from what has been there results a certain defined tract appropriated to certain purposes"). As long as 120 years ago, the federal court for the Indian Territory recognized all this and rightly rejected the notion that fee title is somehow inherently incompatible with reservation status. *Maxey v. Wright*, 54 S.W. 807, 810 (Indian Terr. 1900).

McGirt, 140 S. Ct. at 2475. Furthermore, the President was expressly authorized to grant the 1830 Treaty Territory in fee, and to establish the Chickasaw district within that Territory, in order to secure the Chickasaw and Choctaw Nations' agreement to remove. Indian Removal Act §§ 1, 3, 4 Stat. at 411-12. It is an "untenable suggestion that, when the federal government agreed to offer more protection for tribal lands, it really provided less." *McGirt*, 140 S. Ct. at 2476.

In *McGirt*, the Court also rejected the argument "that a reservation must be land 'reserved from sale,'" *id.* at 2475 (quoting *United States v. Celestine*, 215 U.S. 278, 285 (1909)), holding that "the [Creek] land *was* reserved from sale in the very real sense that the government could not 'give the tribal lands to others, or to appropriate them to its own purposes,' without engaging in 'an act of confiscation.'" *Id.* at 2475 (quoting *United States v. Creek Nation*, 295 U.S. 103, 110 (1935)) (internal quotation marks omitted). That holding applies *a fortiori* to the Chickasaw Reservation, which was expressly reserved from sale in Article 1 of the 1855 Treaty. The government therefore could not take those lands for itself or others "without engaging in 'an act

of confiscation.'" *McGirt*, 140 S. Ct. at 2475 (quoting *Creek Nation*, 295 U.S. at 110) (quotation marks omitted).

II. THE CHICKASAW RESERVATION HAS NOT BEEN EXTINGUISHED.

In *McGirt*, the Court held that "there simply arrived no moment when any Act of Congress dissolved the Creek Tribe or disestablished its reservation." *Id.* at 2468. That conclusion also applies to the Chickasaw Nation and its Reservation.

A. Only Congress Can Disestablish A Reservation, And Only By Language Evidencing The Surrender Of All Tribal Interests.

In *McGirt*, the Court plainly states the test for determining whether Congress has disestablished a reservation. First, "'[o]nly Congress can divest a reservation of its land and diminish its boundaries,'" *McGirt*, 140 S. Ct. at 2462 (quoting *Solem v. Bartlett*, 465 U.S. 463, 470 (1984))[6] which "require[s] that Congress clearly express its intent to do so, '[c]ommon[ly with an] "[e]xplicit reference to cession or other language evidencing the present and total surrender of all tribal interests."'" *Id.* at 2463 (first alteration added) (quoting *Nebraska v. Parker*, 136 S. Ct. 1072, 1079 (2016)). An "'[e]xplicit reference to cession' or an 'unconditional commitment . . . to compensate the Indian tribe for its opened land,'" *id.* at 2462 (quoting *Solem*, 465 U.S. at 470), or that "direct[s] that tribal lands shall be 'restored to the public domain,'" has been held to do so, *id.* (quoting *Hagen v. Utah*, 510 U.S. 399, 412 (1994)) (quotation marks omitted). "Likewise, Congress might speak of a reservation as being 'discontinued,' 'abolished,' or 'vacated.'" *Id.* at 2463 (quoting *Mattz v. Arnett*, 412 U.S. 481, 504 n.22 (1973)) (quotation marks omitted). In any

[6] The authority to breach a treaty "belongs to Congress alone," *id.* (citing *Solem*, 465 U.S. at 470), as the Constitution "entrusts Congress with the authority to regulate commerce with Native Americans, and directs that federal treaties and statutes are the 'supreme Law of the Land.'" *Id.* (citing U.S. Const. art. I, § 8, art. VI, cl. 2).

case, to disestablish a reservation or diminish its boundaries "require[s] that Congress clearly express its intent to do so." *Id.*

The Court further held that "the only 'step' proper for a court of law" to determine if a reservation has been diminished is "to ascertain and follow the original meaning of the law," 140 S. Ct. at 2468 (citing *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 538-39 (2019)), and that neither "historical practices," nor "current demographics can suffice to disestablish or diminish reservations," *id.* (discussing *Solem*, 465 U.S. at 471, 472 n.13, 478).[7]

Second, "Congress does not disestablish a reservation simply by allowing the transfer of individual plots, whether to Native Americans or others." *Id.* at 2464 (citing and quoting *Mattz*, 412 U.S. at 497 ("[A]llotment under the . . . Act is completely consistent with continued reservation status"), and *Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351, 356-58 (1962) ("allotment act 'did no more than open the way for non-Indian settlers to own land on the reservation'"); and *Parker*, 136 S. Ct. at 1079-80 ("'[T]he 1882 Act falls into another category of surplus land Acts: those that merely opened reservation land to settlement . . . . Such schemes allow non-Indian settlers to own land on the reservation' . . . .")).

Third, where "allotment by itself won't work" to prove disestablishment, neither will "congressional intrusions on pre-existing treaty rights" that "f[a]ll short of eliminating all tribal interests in the land." *Id.* at 2465-66. Thus, while "Congress intruded on the Creek's promised

[7] In so holding, the Court rejected Oklahoma's argument that *Solem* "requir[es a court] to examine the laws passed by Congress at the first step, contemporary events at the second, and even later events and demographics at the third." *Id.* "Once a block of land is set aside for an Indian reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status *until Congress explicitly indicates otherwise*." *Id.* (alteration in original) (emphasis added) (quoting *Solem*, 465 U.S. at 470). "There is no need to consult extratextual sources when the meaning of a statute's terms is clear," *id.*, and thus there is no need to do so here, as Congress clearly established a Reservation for the Chickasaw Nation, *see supra* at 1-6, and the plain terms of the allotment era statutes show that the Reservation was not disestablished, see *infra* at 9-16.

right to self-governance during the allotment era" by abolishing Creek tribal courts and providing that Creek ordinances were not valid until approved by the President, these laws did not disestablish the Reservation as they "left the Tribe with significant sovereign functions over the lands in question . . . ." *Id.* And when it enacted the Five Tribes Act, "Congress expressly recognized the Creek's 'tribal existence and present tribal governmen[t]' and 'continued [them] in full force and effect for all purposes authorized by law.'" *Id.* at 2466 (alterations in original) (quoting Five Tribes Act of 1906 § 28, ch. 1876, 34 Stat. 137, 148 ("Five Tribes Act")).

When applied to the Chickasaw Nation and its Reservation, these rules compel the same result as in *McGirt*.

B. Neither The Chickasaw Reservation, Nor Its Boundaries, Were Extinguished By The Allotment Era Legislation.

The Act of Mar. 3, 1893, ch. 209, 27 Stat. 612, 645-46, charged the Dawes Commission with persuading the Five Civilized Tribes[8] either to cede their territory to the United States or to allot their lands to tribal citizens. *See McGirt*, 140 S. Ct. at 2463. After the Commission determined that the Five Tribes would not cede their lands, *id.* (quoting S. Misc. Doc. No. 24, at 7 (1894))[9]; *see also Indian Country, U.S.A.*, 829 F.2d at 977-78, Congress shifted its focus to allotment.

The Chickasaw Reservation was allotted under the Atoka Agreement, set forth in the Act of June 28, 1898, ch. 517, § 29, 30 Stat. 495, 505 ("Curtis Act"), and the Act of July 1, 1902, ch. 1362, 32 Stat. 641 ("1902 Act"). Neither statute disestablished the Chickasaw Reservation or its

[8] The term "Five Civilized Tribes" has been used to refer to the Cherokee, Chickasaw, Choctaw, Creek, and Seminole Nations. *Indian Country, U.S.A., Inc. v. Oklahoma ex rel. Okla. Tax Comm'n*, 829 F.2d 967, 970 n.2 (10th Cir. 1987). We instead use the term "Five Tribes."

[9] *Available at* https://digitalcommons.law.ou.edu/cgi/viewcontent.cgi?article=7309&context=indianserialset.

boundaries as neither "statute evinc[es] anything like the 'present and total surrender of all tribal interests' in the affected lands." *McGirt*, 140 S. Ct. at 2464. Nor did the limited impact of the allotment era legislation on the Chickasaw Nation's rights of self-government do so, as shown by *McGirt*, 140 S. Ct. at 2465-68, and *Morris v. Hitchcock*, 194 U.S. 384 (1904).

1. Neither the Atoka Agreement nor the 1902 Act disestablished the Reservation or its boundaries.

The Atoka Agreement was set forth in § 29 of the Curtis Act, which provided that if ratified by the Chickasaw and Choctaw Nations before December 1, 1898, it would supersede any inconsistent provisions of the Curtis Act (except for § 14, which addressed town sites), *id.* § 29, 30 Stat. at 505. The Nations ratified the Atoka Agreement on August 24, 1898, *Woodward v. De Graffenried*, 238 U.S. 284, 308 (1915),[10] which rendered inapplicable to them the Curtis Act's allotment provisions, *id.* § 11, 30 Stat. at 497-98, and the provision that abolished tribal courts and transferred all civil and criminal cases pending in those courts to the U.S. Courts of the Indian Territory, *id.* § 28, 30 Stat. at 504-05.

The Atoka Agreement provided for the allotment of the Chickasaw and Choctaw Nations' lands "so as to give to each member of these tribes so far as possible a fair and equal share thereof," 30 Stat. at 505-06, including a homestead of 160 acres that was inalienable for twenty-one years, *id.* at 507. Title to the allotted lands was to be conveyed by "the principal chief of the Choctaw Nation and the governor of the Chickasaw Nation . . . under their hands and the seals of the respective nations . . . ." *Id.* The Atoka Agreement exempted from allotment lands for the

[10] The Curtis Act also contained a separate agreement with the Creek Nation, *id.* § 30, 30 Stat. at 514, which the Creek did not ratify by the deadline. *Woodward*, 238 U.S. at 311-12. In 1901, the Creek entered into an allotment agreement, *see* Act of June 30, 1902, ch. 676, 31 Stat. 861 ("1901 Creek Agreement"), under which their Reservation was allotted. *McGirt*, 140 S. Ct. at 2463 (citing 1901 Creek Agreement §§ 3, 7, 31 Stat. at 862-64).

Nations' capitol buildings, "all court houses and jails and other public buildings," and lands for specifically identified schools, seminaries, missions, orphanages, and churches. *Id.* at 506. In short, the Atoka Agreement provided for the allotment of the Nations' lands by their leaders, and exempted the lands necessary for the Nations to continue to "exist as . . . nation[s] and live on" their Reservations.

Neither did the Atoka Agreement extinguish the boundaries of the Chickasaw and Choctaw Reservations. Instead, its terms relied on the continued existence of those boundaries. The United States was to maintain records of "land titles in the territory occupied by the Choctaw and Chickasaw tribes," *id.* at 508; all coal and asphalt "within the limits of the Choctaw and Chickasaw nations" was to remain their common property, *id.* at 510; "the United States agree[d] to maintain strict laws in the territory of the Choctaw and Chickasaw tribes against the introduction, sale, barter, or giving away of liquors and intoxicants of any kind or quality," *id.* at 509; and federal jurisdiction was extended for specific purposes over "the territory occupied by the Choctaw and Chickasaw tribes," *id.* at 511. In short, the Atoka Agreement does not "evinc[e] anything like the 'present and total surrender of all tribal interests' in the affected lands," *McGirt*, 140 S. Ct. at 2464, and it therefore did not disestablish the Chickasaw Reservation or its boundaries.

Nor did the Atoka Agreement's limited effect on tribal self-government disestablish the Chickasaw Reservation or its boundaries. By ratifying the agreement before the statutory deadline, the Nation rendered § 28 of the Curtis Act inapplicable, *Marris v. Sockey*, 170 F.2d 599, 602 (10th Cir. 1948), and preserved its courts, *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1441-42 (D.C. Cir. 1988).[11] With respect to tribal legislative jurisdiction, the Atoka Agreement only

[11] The Atoka Agreement had only a limited effect on tribal court jurisdiction. It provided for exclusive federal jurisdiction over "all controversies growing out of the titles, ownership, occupation, possession, or use of real estate, coal, and asphalt in the territory occupied by the Choctaw and Chickasaw tribes; and of all persons charged with

provided that laws of the Chickasaw Nation affecting individually held or tribal land after allotment, or money or other property, or rights to employ labor, "or the rights of any persons who have taken or may take the oath of allegiance to the United States" were not valid "until approved by the President of the United States." 30 Stat. at 512. "Congress would have had no need to subject tribal legislation to Presidential review if the Tribe lacked any authority to legislate." *McGirt*, 140 S. Ct. at 2465-66 (referring to 1901 Creek Allotment Agreement § 42, 31 Stat. at 872). The Atoka Agreement further provided that

> in view of the modification of legislative authority and judicial jurisdiction herein provided, and the necessity of the continuance of the tribal governments so modified, in order to carry out the requirements of this agreement, that the same shall continue for a period of eight years from [March 4, 1898].

30 Stat. at 512.[12] In short, it relied on tribal self-government to implement its terms.

The 1902 Act did not extinguish the Chickasaw Reservation or its boundaries either. It modified the allotment provisions of the Atoka Agreement by providing for each member's allotment to be of "land equal in value to three hundred and twenty acres of the [Nations'] average allottable land," *id.* § 11, 32 Stat. at 642, which was to include a 160-acre homestead that was inalienable during the allottee's lifetime, but not longer than twenty-one years, *id.* § 12, 32 Stat. at 642. The remainder of each member's allotment was alienable under a schedule triggered by issuance of the allottee's patent. *Id.* § 16, 32 Stat. at 643. The 1902 Act further provided for Mississippi Choctaw to settle "within the Choctaw-Chickasaw country" by obtaining an allotment there. *Id.* § 41, 32 Stat. at 651.

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homicide, embezzlement, bribery, and embracery, breaches, or disturbances of the peace, and carrying weapons, hereafter committed in th[at] territory." 30 Stat. at 511.

[12] The Five Tribes' governments were subsequently continued in existence by Joint Resolution No. 7 of Mar. 2, 1906, 34 Stat. 822, and then by the Five Tribes Act.

The 1902 Act also reserved from allotment lands for the capitol of each Nation, *id.* § 26(i), (o), 32 Stat. at 645, lands for "all tribal court-houses and jails and other tribal public buildings," *id.* § 26(s), 32 Stat. at 645, "[o]ne acre for any church under the control of and used exclusively by the Choctaw or Chickasaw citizens," *id.* § 26(u), 32 Stat. at 645, and "[o]ne acre each for all Choctaw or Chickasaw schools under the supervision of the authorities of the Choctaw or Chickasaw nations and officials of the United States," *id.* § 26(v), 32 Stat. at 646. Thus, it too exempted the lands necessary for the Nations to "exist as . . . nation[s] and live on" their Reservations.

When all allotments had been made, the remaining lands that were not exempt from allotment were to be sold and the proceeds applied to equalize Tribal members' allotments, with any remaining funds paid to the credit of the Chickasaw and Choctaw Nations for distribution to their members. *Id.* § 14, 32 Stat. at 642. Under settled law, that did not diminish the reservation boundaries. Statutes that "open[] reservation land to settlement and provide[] that the uncertain future proceeds of settler purchases should be applied to the Indians' benefit," *Parker*, 136 S. Ct. at 1079 (quoting *DeCoteau v. Dist. Cnty. Ct.*, 420 U.S. 425, 448 (1975)), "allow 'non-Indian settlers to own land on the reservation,'" *id.* at 1080 (quoting *Seymour*, 368 U.S. at 356), "[b]ut in doing so, they do not diminish the reservation's boundaries," *id.* As the *McGirt* Court explained, the federal government issued land patents to homesteaders, "but no one thinks any of this diminished the United States's claim to sovereignty over any land. To accomplish that would require an act of cession, the transfer of a sovereign claim from one nation to another." 140 S. Ct. at 2464 (citation omitted). And "there is no reason why Congress cannot reserve land for tribes in much the same way, allowing them to continue to exercise governmental functions over land even if they no longer own it communally." *Id.* That reasoning directly applies to the 1830 Treaty

Territory, whose boundaries are subject to the same rules that apply to a "boundary between nations or states," *Choctaw Nation*, 397 U.S. at 631 n.8 (quoting *Barney v. Keokuk*, 94 U.S. 324, 337 (1877)), within which the Chickasaw Reservation was established, 1837 Treaty arts. 1, 2.[13]

The Supreme Court's decision in *Morris* confirms that neither the Atoka Agreement nor the 1902 Act extinguished the Chickasaw Reservation or its boundaries.[14] The Court upheld the validity of a privilege tax on livestock enacted by the Chickasaw Nation, ruling that "the right of [the Chickasaw Nation] to control the presence within the territory assigned to it of persons who might otherwise be regarded as intruders" was held under Articles 7 and 14 of the 1855 Treaty and Article 8 of the 1866 Treaty, and that "under the authority of these treaties, the Chickasaw Nation has exercised the power to attach conditions to the presence *within its borders* of persons who might otherwise not be entitled to remain within the tribal territory." *Morris*, 194 U.S. at 389 (emphasis added). Addressing the Atoka Agreement, the Court held that one of its objectives

> was to permit the continued exercise, by the legislative body of the tribe, of such a power as is here complained of, subject to a veto power in the President over such legislation, as a preventive of arbitrary and injudicious action.

Id. at 393. *Morris* upholds the Chickasaw Nation's right to exercise sovereign authority within its borders.

Finally, while Congress later relaxed the restrictions imposed on the alienation of allotted lands by allottees of all of the Five Tribes, *see* Act of May 27, 1908 § 1, ch. 199, 35 Stat. 312

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[13] Indeed, the 1902 Act relied on the 1830 Treaty Territory's boundaries to implement its terms. *See, e.g., id.* § 25, 32 Stat. at 644 (land office to be opened "in both the Choctaw and the Chickasaw nations"); *id.* § 41, 32 Stat. at 651 (Mississippi Choctaw to select land "within the Choctaw-Chickasaw country"); *id.* § 45, 32 Stat. at 652 (referring "to town sites in the Choctaw and Chickasaw nations"); *id.* § 51, 32 Stat. at 653 (referring to lots in "any town site in the Choctaw and Chickasaw nations"); *id.* § 55, 32 Stat. at 653 (granting authority to municipal corporations "in the Choctaw and Chickasaw nations").

[14] *Morris* was decided after the Atoka Agreement and the 1902 Act had been enacted. *See Morris v. Hitchcock*, 21 App. D.C. 565, 597 (D.C. Cir. 1903) (describing "changes in respect of allotments" made by the 1902 Act).

("1908 Act"); *McGirt*, 140 S. Ct. at 2463, that did not diminish the Reservation either. As in *McGirt*, "[m]issing in all this . . . is a statute evincing anything like the 'present and total surrender of all tribal interests' in the affected lands," 140 S. Ct. at 2464.

2. The Five Tribes Act did not extinguish the Chickasaw Reservation or its boundaries.

In the Five Tribes Act Congress declared "[t]hat the tribal existence and present tribal governments of the [Five Tribes] are hereby continued in full force and effect for all purposes authorized by law, until otherwise provided by law." *Id.* § 28, 34 Stat. at 148.[15] Congress also expressly protected the Five Tribes' legislatures' authority to pass laws, subject to approval by the President of the United States and a thirty-day limit on tribal legislative sessions. Five Tribes Act § 28, 34 Stat. at 148. Section 28 thus preserved the Chickasaw Nation's rights of self-government within its borders.[16]

To be sure, the Five Tribes Act had an impact on the Five Tribes' autonomy, by authorizing the President to remove and replace principal chiefs, directing the Secretary of the Interior to assume control of their schools, and "provid[ing] for the handling of the [Five] Tribe[s'] funds, land, and legal liabilities in the event of dissolution." *McGirt*, 140 S. Ct. at 2466 (citing Five Tribes Act §§ 6, 10, 11, 27, 28, 34 Stat. at 139-41, 148). But in the end, "Congress expressly

[15] The "purposes authorized by law" for which the Chickasaw tribal government was continued "in full force and effect," included that the Chickasaw would "exist as a nation" on the Chickasaw Reservation, 1830 Treaty art. 2; 1837 Treaty art. 1; be free from state interference, 1830 Treaty art. 4; 1837 Treaty art. 1; *Choctaw Nation*, 397 U.S. at 635; and hold their rights under the 1855 and 1866 Treaties that were expressly upheld in *Morris*, of which Congress was presumed to be aware when the Five Tribes Act was enacted in 1906, *see Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990).

[16] Indeed, the Five Tribes Act relied on the Treaty Territory boundaries to implement its terms, reserving lands from allotment in the "Choctaw Nation, Indian Territory," *id.* § 7, 34 Stat. at 139, providing for coal and asphalt royalties "in the Choctaw and Chickasaw nations" to be used to fund schools, *id.* § 10, 34 Stat. at 140, and making provision for public highways "in the Choctaw, Chickasaw, and Seminole nations," which were to be paid for by the Secretary of the Interior "from the funds of the tribe or nation in which such public highways or roads are established," *id.* § 24, 34 Stat. at 145-46.

recognized the Creek's 'tribal existence and present tribal governmen[t]' and 'continued [them] in full force and effect for all purposes authorized by law.'" *Id.* (alterations in original) (quoting Five Tribes Act § 28, 34 Stat. at 148). So too for the Chickasaw.

"In the years that followed, Congress continued to adjust its arrangements with the [Creek] Tribe," *id.* "For example, in 1908, the Legislature required Creek officials [and those of the other Five Tribes] to turn over all 'tribal properties' to the Secretary of the Interior." *Id.* (quoting 1908 Act § 13, 35 Stat. at 316). And in 1907, the Chickasaw Nation's courts were abolished. *See* Indian Department Appropriations Act of 1907, ch. 2285, 34 Stat. 1015, 1027. But "none of [these] adjustments would have made any sense if Congress thought it had already" terminated the tribal government. *McGirt*, 140 S. Ct. at 2466.

As "with time, Congress changed course completely," *id.* at 2467, by enacting the Oklahoma Indian Welfare Act of 1936, ch. 831, 49 Stat. 1967 (codified at 25 U.S.C. §§ 5201-5210) ("OIWA"), which "did away with allotment and included a provision for establishing a tribal government." *Hodel*, 851 F.2d at 1445. OIWA confers on Oklahoma tribes "all powers associated with self-government," except as limited by statutes of general applicability, *id.*, and gives those tribes "the same legal status," *id.*, and "the same powers as all other tribes, regardless of the source of those powers," including the power to establish tribal courts, *id.* at 1446.

III. OKLAHOMA HAS NO JURISDICTION OVER DEFENDANT'S CRIMES, AND JUSTICE WEIGHS AGAINST OKLAHOMA'S NOVEL ARGUMENT.

Oklahoma asks this Court to recognize concurrent state criminal jurisdiction over *all* non-Indians in Indian country. *See* Resp.Br. at 13-21. Settled law rejects this position.

Federal criminal jurisdiction under both the General Crimes Act ("GCA"), 18 U.S.C. § 1152, and the Major Crimes Act ("MCA"), 18 U.S.C. § 1153, is *exclusive* of state jurisdiction.

See McGirt, 140 S. Ct. at 2479 ("States are otherwise free to apply their criminal laws in cases of non-Indian victims *and* defendants, including within Indian country.") (emphasis added). The Supreme Court has "expressly stated that" the GCA and MCA *limit* "state criminal jurisdiction in Indian country . . . to crimes committed '*by non-Indians against non-Indians . . . and victimless crimes by non-Indians.*'" *Ross v. Neff*, 905 F.2d 1349, 1353 (10th Cir. 1990) (quoting *Solem*, 465 U.S. at 465 n.2); *accord Williams v. United States*, 327 U.S. 711, 714 & n.10 (1946).[17]

Congress can of course provide otherwise. As the Tenth Circuit has found, the State of Kansas has criminal jurisdiction in Indian country under the Kansas Act, 18 U.S.C. § 3243, because Congress "*conferred jurisdiction*" on the state over "*non-major state offenses committed by or against Indians* on Indian reservations located in the State of Kansas." *Iowa Tribe v. Kansas*, 787 F.2d 1434, 1440 (10th Cir. 1986) (emphasis added). That is notable, because the Kansas Act's conferral of jurisdiction would have served no purpose if Kansas had already possessed concurrent jurisdiction over crimes committed by non-Indians against Indians in Indian country. Thus, by expressly conferring such jurisdiction on Kansas, Congress modified the otherwise controlling jurisdictional allocation established by the GCA. *See id.* at 1439. Oklahoma has no such statutory reallocation of jurisdiction.

We do not lightly offer these observations. The Nation has no interest in delaying justice for a Chickasaw family.[18] However, as *McGirt* makes plain, Oklahoma has long asserted criminal

[17] The State argues *McGirt*'s textual analysis justifies ignoring prior judicial reasoning, *see* Resp.Br. at 20-21, but *McGirt* held that the Court's reservation diminishment precedent required a textual analysis, which the State's prior assumptions about the reservation's existence could not overcome, not that a textual analysis overrules prior precedent, *McGirt*, 140 S. Ct. at 2462-65. In analyzing that question in *McGirt*, the Court rejected policy-based arguments in favor of hewing to its own longstanding disestablishment precedents. *See id.* at 2478-82.

[18] Based on consultations with the U.S. Attorney for the Eastern District of Oklahoma, we are confident Defendant will face immediate federal prosecution and eventually conviction.

jurisdiction in violation of federal law, 140 S. Ct. at 2470-71, which is itself an injustice that goes to the heart of the criminal justice system.

Rather than accept the State's invitation to bend the law, the Nation supports the Oklahoma Attorney General's call for cooperation to seek congressional authorization for tribes and states to allocate criminal jurisdiction by compact. Press Release, Okla. Att'y Gen., Attorney General Hunter Recommends Federal Legislation for Optional State-Tribal Compacting on Criminal Matters, https://oag.ok.gov/articles/attorney-general-hunter-recommends-federal-legislation-optional-state-tribal-compacting (last visited Nov. 3, 2020); Allison Herrera, *Attorney General Recommends Optional State-Tribe Compacting on Criminal Jurisdiction Post-McGirt*, KOSU (Oct. 21, 2020), https://www.kosu.org/post/attorney-general-recommends-optional-state-tribe-compacting-criminal-jurisdiction-post-mcgirt (including comments of Chickasaw Nation Governor Bill Anoatubby). As the Supreme Court itself noted, tribes and the State have resolved myriad issues through compact. *McGirt*, 140 S. Ct. at 2481-82 & n.16. However, though compacting would ultimately be the better path, the preemptive effects of the MCA and GCA currently set the applicable rules of law and cannot be changed by agreement.

CONCLUSION

For the foregoing reasons, the Chickasaw Nation respectfully submits that the Chickasaw Reservation continues to exist, that its boundaries continue to be defined by the 1855 Treaty, and that all land within the Chickasaw Reservation constitutes Indian country under federal law, 18 U.S.C. § 1151(a).

Dated: November 4, 2020 By: 

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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of November 2020, a true and correct copy of this AMICUS CURIAE CHICKASAW NATION'S BRIEF IN SUPPORT OF THE CONTINUED EXISTENCE OF THE CHICKASAW RESERVATION AND ITS BOUNDARIES was served via first-class mail to each of the following:

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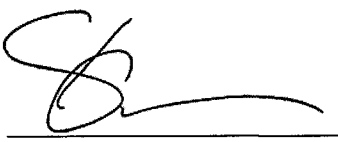

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