FILED
COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

JUN - 1 2021

JOHN D. HADDEN
CLERK

IN THE COURT OF CRIMINAL APPEALS
THE STATE OF OKLAHOMA

LOUIS R. YOUNG,	)	
Petitioner,	)	
v.	)	Case No. PC-2020-954
THE STATE OF OKLAHOMA	)	
Respondent.	)	

BRIEF AMICUS CURIAE OF THE OSAGE NATION IN SUPPORT OF THE UNINTERRUPTED AND CONTINUING EXISTENCE OF THE OSAGE RESERVATION

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June 1, 2021

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Osage Nation submits the following brief amicus curiae in support of Petitioner, Louis R. Young, regarding the Osage Nation Reservation,[1] which Congress established in 1872. Congress alone holds the power to disestablish an Indian reservation, not a state or a court, *McGirt v. Oklahoma*, 140 S.Ct. 2452, 2462 (2020), and Congress has never disestablished the Osage Nation Reservation. "If Congress wishes to break the promise of a reservation, *it must say so*." *Id.* (emphasis added). Disestablishment "require[s] that Congress clearly express its intent to do so, 'common[ly] with an '[e]xplicit reference to cession or other language evidencing the present and total surrender of all tribal interests.'" *Id.*, quoting *Nebraska v. Parker*, 577 U.S. 481, 488 (2016).

This Court is correct that its role is "to apply the edict . . . of *McGirt*" and follow *McGirt* to "focus on whether Congress *expressly* disestablished the reservation." *Bosse v. State*, 2021 OK CR 3, ¶ 4 (Lumpkin J., concurring in results) and ¶5 (Hudson, J. concurring in results). The State, however, ignored this Court's order to apply *McGirt*. Instead, it argued that the pre-*McGirt* case of *Osage Nation v. Irby,* 597 F. 3d 1117 (10th Cir. 2010) "precludes relief." *See* Respondent's Supplemental Brief filed on May 3, 2021 at 1. The State chose not to provide a *McGirt* analysis because, as will be shown below, a *McGirt* analysis leads only to the conclusion that the 1872 Osage Nation Reservation remains intact. Preclusion doctrines and *res judicata* should not be used when the reasoning behind the former decision has been "undercut, "qualified," "upended," or "repudiated." *See Herrera v. Wyoming*, 139 S.Ct. 1686, 1695-97 (2019).

I. INTEREST OF THE OSAGE NATION

The Osage Nation has a fundamental interest in this case because its reservation boundaries

[1] The crime with which Mr. Young was convicted is one enumerated under the Major Crimes Act, giving the federal court exclusive non-tribal jurisdiction. The Osage Nation will prosecute Mr. Young in its Courts or in coordination with the U.S. Attorney for the Northern District of Oklahoma.

affect its self-governance, its jurisdiction over crimes committed by Indian offenders, and its ability to ensure the safety and wellbeing of its citizens. Osage Nation and its citizens have occupied this Reservation—which the Nation acquired with its own funds—for the past 150 years. This Reservation is the Osage Nation's homeland.

II. BRIEF HISTORY OF THE OSAGE NATION

The Osage's history, as a people and a government, is a testament to the Nation's perseverance, its adaptability, and its capacity to overcome unrelenting obstacles and endure great hardships. For centuries, the Osage people maintained a common political system designed to achieve both economic independence and preserve a distinct cultural identity. A durable yet adaptable government guided the Nation in early diplomacy with other Native Nations, with European governments, and ultimately with the United States throughout the 19th, 20th, and now 21st centuries. The Osage Nation is a vibrant government that provides important services to its citizens and contributes economically and socially to Oklahoma at large. Osage history, summarized below, presaged the Osage Nation of today.[2]

The Osage, who speak a Dhegiha Siouan language, eventually settled near the Mississippi River in present-day Illinois and Missouri, calling themselves Ni-U-Ko'n-Ska, the Children of the Middle Waters. Over centuries the Osage expanded their territory, establishing new towns and farms on the Missouri and Osage Rivers, and eventually occupying a vast territory that included what are now the states of Missouri, Arkansas, Kansas, and much of Oklahoma and northern Louisiana. By 1750, the Osage had a well-established presence in present-day Oklahoma.[3] The

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[2] Academic historian, Professor Kathleen DuVal, documents Osage history from the first millennium AD to the 1872 removal and resettlement of the Osage on their Indian Territory Reservation, using archaeological evidence, oral histories, and primary and secondary source documents. *See* Att. 1 (Declaration and Report of Kathleen DuVal, Ph. D).

[3] *See* Louis F. Burns, "Osage (tribe)," The Encyclopedia of Oklahoma History and Culture, https://www.okhistory.org/publications/enc/entry.php?entry=OS001 (visited May 28, 2021).

Osage, who were sovereign within their country, developed one of the most extensive trading systems in North America and wielded enormous power over both Native and European neighbors. When France sold its Louisiana colonial territory to the United States in 1803, the Osage were at the height of their power.

In the decades following the Louisiana Purchase, both Native migrants and non-Native immigrants increasingly pressed into Osage country. The Osages, in a series of treaties with the United States between 1808 and 1818, agreed to share and ultimately cede some of their land to the United States in exchange for the U. S. promise to erect a fort and provide protection from outside interference with Osage towns, farms, and essential hunting and resource-gathering lands. However, inaction on the part of the United States to fulfill its promise led to increased conflicts between the Osage and their neighbors, both Native and non-Native. These conflicts led the Osage to negotiate new treaties whereby the Osage would cede additional land and relocate to different areas of Osage country in exchange for necessary provisions, annuity payments, and additional promises. In the Treaty of 1825, the Osage ceded a vast tract of land spanning four present-day states, including the Indian Territory. In article 2 of this treaty, the Osage reserved a 50-mile strip spanning roughly the southern border of present-day Kansas. *See* Att. 15 (1825 Osage Treaty, 7 Stat. 240.)

After the Osage had negotiated peace agreements with its Native neighbors, the Osage enjoyed a period of prosperity; however, the opening of Kansas Territory in the 1850s brought waves of settlers into the Territory. In the lead up to the Civil War, pro- and anti-slavery partisans flooded into Kansas Territory, bringing violence that spilled over to the reservation. The United States was largely ineffective in preventing predation and protecting the Osage. As settlers continued to migrate to lands adjacent to the Osage Reservation, the Osage were exposed to

cholera, scurvy, measles, and typhoid. In 1855, a smallpox epidemic killed an estimated 300 Osage people.

After the Civil War – a war in which most Osage remained neutral[4] – Kansas settlers were further emboldened to encroach on the Osage Reservation and pressured further cessions. In 1865, the Osage executed a treaty to sell the eastern portion of their Kansas reservation to the United States. The Osage also agreed to place the northern 20-mile-tall strip of the Reservation in trust, and the United States would sell the land to settlers and place the proceeds in the United States treasury for the benefit of the Osage. The Osage would reserve the remaining lands which became the Osage diminished reservation. *See* Att. 17 (1865 Osage Treaty, 14 Stat. 675) But, even before the treaty was ratified, squatters moved onto the diminished reservation with encouragement by Kansas's Governor. By 1870, trespassers even built a town and organized a county—Montgomery County—clearly on the Osage diminished reservation and not far from Osage towns. Again, these trespasses went unchecked by the United States.

The Osage, relying on the government's new promise they would receive a "permanent home" free from the settlers' intrusions, negotiated the purchase of a reservation in the Indian Territory.[5] An 1872 act of Congress established the boundaries of the Osage Reservation as they exist today. *See* Att. 3 (Act of June 5, 1872, 17 Stat. 228, 229) (1872 Act).

Enduring the hardships of removal to land they had ceded to the U.S. in 1825, on what is now the Osage Nation Reservation, the Osage built a successful economy on their new reservation, taking advantage of the rich bluestem grasses to position themselves as a final grazing station on

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[4] The few Osages that volunteered for the South were given complete amnesty by the United States after a group of Osages defeated a group of Confederate officers dispatched to recruit Southwest Indians sympathetic to the South.
[5] The sale of the Osage diminished reservation in Kansas was completed over a series of hotly contested and carefully crafted Congressional Acts. *See* Att. 4, Act of Aug. 11, 1876, 44 Stat., 259; Att. 5, Act of June 16, 1880, 46 Stat. 251; and Att. 6, Act of March 3, 1881, 46 Stat. 149.

cattle drives from Texas to the railheads in Kansas and Missouri.[6] In 1881, the Nation adopted a Constitution that created a three-branch separation-of-powers government, with legislative power vested in a National Council, executive power in a Principal Chief, and judicial power in a supreme court and inferior courts as established by the National Council. *See* Att. 7 (1881 Osage Nation Constitution).

Congress passed the General Allotment Act of 1887 (Att. 8, Act of Feb. 8, 1887, 24 Stat. 388), which was applicable to Indian reservations across the country, but the Osage Nation Reservation was expressly exempted from that act. *See*, 25 U.S.C. §339. Although efforts to allot the Osage Nation Reservation began in 1898, the Osage resisted. Principal Chief Bigheart wanted a promise that allotment legislation would require ratification by the citizens of the Osage Nation. Conservative tribal members were displeased "at practically every feature" of the first bill that was introduced in 1904, complaining that only "mixed bloods and intermarried citizens" had knowledge of the bill's terms. *See* Att. 2 at ¶14.

From 1904-1906, alternative bills were introduced in Congress, various committees met, debates were held, amendments were suggested, including significantly a provision that increased the amount of land each Osage would be allotted, and another provision that reserved subsurface natural resources to the Nation for 25 years, 'the royalty to be paid to said tribe.'" *See* Att. 2 ¶¶ 10-38.

In 1906, a new bill was introduced on which no hearings were ever held by either the House or the Senate. Ultimately this bill became the 1906 Osage Allotment Act. *See* Att. 9 (Act of June 28, 1906, 34 Stat. 539) (Osage Allotment Act). In the end, not one word in the Osage Allotment

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[6] Professor Lindsay G. Robertson describes Osage history from relocation and resettlement in present-day Oklahoma through the allotment period and statehood. *See* Att. 2 (Declaration and Report of Lindsay G. Robertson, M.A.(History), J.D., Ph. D (History), M.A. (Native American Studies)).

Act stated or even suggested that the Osage Nation Reservation would be disestablished. *See* Att. 2 ¶38. In fact, nothing in various versions of the bills negotiated over the four-year period contained anything resembling explicit language of disestablishment. (*See* Att. 2 ¶¶13, 17, 28, 30, 32.)

Less than two weeks before the passage of the Osage Allotment Act, Congress passed an act enabling Oklahoma to become a state. Nothing in the Enabling Act disestablished Indian reservations in Oklahoma. *See McGirt*, 140 S. Ct. at 2477 (discussing the State's misplaced reliance on the Oklahoma Enabling Act). Even after statehood, Osage allotment continued and took four more years to complete.

Upon completion of allotment, the Osage Reservation's surface estate was firmly in the hands of individual Osage citizens, while the mineral estate underlying the entire Reservation continued to be held in held by the United States in trust for the Nation (as it is to this day). In fact, under § 3 of the 1906 Allotment Act, all leases of the mineral estate would be made by the Nation's tribal council with the approval of the Secretary of Interior. With the Osage Allotment Act, Congress reaffirmed Osage Nation's interests in the affected land thus preserving the Osage Reservation intact.

II. THE REQUIRED *MCGIRT* ANALYSIS.

In *McGirt*, the Supreme Court held that only Congress has the power to disestablish a reservation it creates. This decision repudiates the long-held assumption that there are no Indian reservations in Oklahoma. First, the Tenth Circuit Court of Appeals and then the Supreme Court methodically unraveled the basis of that assumption for the Muscogee (Creek) Reservation. *See Murphy v. Royal,* 875 F.3d 896 (10th Cir. 2017), *aff'd Murphy v. Sharp*, 140 S.Ct. 2412 (2020); *McGirt v. Oklahoma*. 140 S.Ct 2452 (2020). The short of it is that there is simply no rule of law that allows long-held assumptions of state or federal officials, or courts, to disestablish a reservation.

Crucially, *McGirt* makes it clear that, when analyzing a reservation's status, a court cannot resort to non-textual sources in lieu of the plain statutory text. *McGirt*, 140 S.Ct. at 2468. Mere silence by Congress in this context is not enough for a court to infer an intent by Congress to disestablish. "There is no need to consult extratextual sources when the meaning of a statute's terms is clear. Nor may extratextual sources overcome those terms." *Id.* at 2469. The State cannot substitute "stories for statutes." *Id.* at 2470. Courts are not to substitute inferences and expectations for Congress's words. By applying the rule of law as clarified by *McGirt*, the Osage Nation Reservation has existed since 1872.

III. THE TRIAL COURT FAILED TO FOLLOW THIS COURT'S ORDER TO PERFORM A *MCGIRT* ANALYSIS

This Court properly follows the *McGirt* directive that treaties with individual tribal nations must be considered on their own terms to decide reservation status. *McGirt*, 140 S.Ct. at 2479. After similarly remanding other cases, this Court also has properly applied *McGirt* to other Nations' reservations in Oklahoma based on their treaties and statutes.[7]

This Court correctly required the trial court to employ a *McGirt* analysis to determine whether Congress explicitly disestablished the Osage Nation Reservation. Courts cannot use judicial interpretation as a substitute for a statute passed by Congress because they have "no proper role in the adjustment of reservation borders." *Id.* at 2462. Congress cannot rely on judges to "deliver the final push" to disestablish a reservation that Congress considers "inconvenient" but cannot gather the political will to expressly disestablish. *Id.* "[S]aving the political branches the

[7] *See Krafft v. State*, Oklahoma Court of Criminal Appeals Case No. F-2018-340, Order Remanding with Instructions to Dismiss (Feb. 25, 2021) (unpublished order) (Muscogee (Creek)); *Hogner v. State*, 2021 OK CR 4 (Cherokee); *Bosse v. State*, 2021 OK CR 3 (Chickasaw); *Grayson v. State*, 2021 OK CR 8 (Seminole); and *Sizemore v. State*, 2021 OK CR 6 (Choctaw).

embarrassment of disestablishing a reservation is not one of [the courts'] constitutionally assigned prerogatives." *Id.* If Congress wants to disestablish a reservation it must use language that makes it explicitly clear that is what it is doing. *Id.* at 2462-63.

Despite this Court's call for a complete record for a proper *McGirt* analysis, the record contains no treaties or statutes, only one single "hand-out" of the Oklahoma Department of Transportation map, and sparse testimony by the *pro se* criminal defendant. Further, the State side-stepped the issue on remand by raising, at the hearing, a completely new argument based on preclusion and *Osage Nation v. Irby*, 597 F. 3d 1117 (10th Cir. 2010), a case decided before *Nebraska v. Parker*, 577 U.S. 481 (2016), before *Murphy v. Royal*, 875 F.3d 896 (10th Cir. 2017), and before *McGirt.* Based on this sparse record, the trial court chose to forego the *McGirt* analysis ordered by this Court and instead relied on the State's preclusion argument.

IV. UNDER THE *MCGIRT* ANALYSIS, THE OSAGE RESERVATION CONTINUES TO EXIST.

Applying *McGirt* to the Osage Nation Reservation yields the same result as it did for the Muscogee (Creek) Reservation. *McGirt* says disestablishment requires explicit congressional language providing for the "'present and total surrender of tribal interests' in the affected lands." *McGirt*, 140 S.Ct. at 2464. Congress has never even come close to using such language in its treatment of the Osage Nation Reservation. This Court should not infer congressional intent that is not expressed in the text of the act. The Osage Nation Reservation remains intact.

1. An Osage Reservation was Established in the Indian Territory.

This Court's inquiry begins with the treaties and statutes that show Congress created an Osage Nation Reservation within the Indian Territory. *McGirt*, 140 S.Ct. at 2479. The Osage Reservation was purchased from Cherokee Nation. The land was made available under Article 16 of the Cherokee Treaty of July 19, 1866, which allowed settlement of "friendly Indians" in the

Cherokee country west of the 96° meridian for "such price as may be agreed on" by the parties in interest. *See* Att. 10, Treaty with the Cherokee, July 19, 1866, 14 Stat. 799) (1866 Cherokee Treaty) Art. 16. In 1870, Congress expressly provided for the Secretary of Interior to advance costs to remove and relocate the Osage from their reservation in Kansas to their "permanent home" in the Indian Territory. *See* Att. 11 (Act of July 15, 1870, 16 Stat. 335, 362, §12) (1870 Removal Act). Congress used the proceeds from the sale of the Osage Nation's own reservation lands in Kansas to purchase its new reservation from the Cherokee Nation in the Indian Territory. *See* Att. 3 (Act of June 5, 1872, 17 Stat., 228, 229) (1872 Act). The 1872 Act used precise geographic terms to describe the boundaries of the new Osage Nation Reservation, stating that its lands are "hereby set apart for and confirmed as their *reservation*." 1872 Act at 229 (emphasis added). Those geographic terms are close to the boundaries of Osage County.

2. Osage Nation's Reservation Has Not Been Disestablished.

McGirt provides only Congress can disestablish a reservation. This Court must decide whether any federal treaty or statute expressly disestablishes the Osage Nation Reservation. *McGirt*, 140 S.Ct. at 2462. In this analysis, courts do not lightly infer that Congress has exercised its power to disestablish a reservation. *Id.* There is a "presumption" against it. *Murphy*, 875 F.3d at 918. The only proper "step" for a court to take is "to ascertain and follow the original meaning of the law." *McGirt*, 140 S.Ct. at 2468.

To disestablish a reservation, Congress must use language with an "[e]xplicit reference to cession" or an "unconditional commitment . . . to compensate the Indian tribe for its opened land," *id.* at 2462, or a directive that tribal lands be "'restored to the public domain,'" *id.*, citing *Hagen v. Utah*, 510 U.S 399, 412 (1994), or that a reservation is "'discontinued,'" "'abolished,'" or "'vacated,'" *id.*, at 2463, citing *Mattz v. Arnett*, 412 U.S. 481, 504 (1973). *See also DeCoteau v. District County Court for Tenth Judicial Dist.*, 420 U.S. 425, 439–40 n.22 (1975).

Disestablishment requires language of "present and total surrender of all tribal interests." *McGirt*, 140 S.Ct. at 2464.

After the Osage Nation Reservation was created, Congress passed only one statute affecting the lands in the reservation: the Osage Allotment Act. *See* Att. 9 (Act of June 28, 1906, 34 Stat 539 (Osage Allotment Act)). There is absolutely no language in the Osage Allotment Act which disestablishes the Osage Nation Reservation. *See generally* Osage Allotment Act and Att. 2 (describing allotment provisions). The only purpose of the Osage Allotment Act was to allot the entirety of the Osage Nation Reservation to tribal citizens individually, except for small areas reserved from allotment for other purposes, including an Indian boarding school, tribal and federal buildings, town sites for Gray Horse, Hominy, and Pawhuska,[8] and railroad properties. Moreover, the minerals under the entire Reservation were reserved for the benefit of the Osage Nation.

A detailed reading of the Osage Allotment Act shows that it is an allotment act and not a disestablishment act. There is no language of cession or compensation to the Nation for "opened land" or any other text establishing "the present and total surrender of all tribal interests." *See McGirt*, 140 S. Ct. at 2464. There is no language in the Osage Allotment Act "that could plausibly be read as an act of disestablishment" of the Osage Nation Reservation. *See McGirt*, 140 S.Ct. at 2468 (reaching same conclusion as to Muscogee (Creek) Nation).

McGirt makes clear that allotment does not equate to disestablishment of a reservation. *Id.* at 2464, citing *Mattz*, 412 U.S. at 496-97 (explaining that Congress's expressed policy during the

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[8] These three towns remain the traditional sites for Osage ceremonial events, including the i'n-lon-schka held each June at each location. The Osage at Gray Horse received the I'n-lon-schka dance, traditions and drum in the mid-1880's. Howardean Rhodes, "Gray Horse" The Encyclopedia of Oklahoma History and Culture, https://www.okhist.org/publications/enc/entry/php?entry=OS001 (visited May 28, 2021); *See* Att. 12 (2006 Osage Nation Constitution, Art. 14) .

allotment era "was to continue the reservation system," and that allotment can be "completely consistent with continued reservation status"). Allotment-era statutes "did not abrogate the federal government's authority and responsibility, nor allow jurisdiction by the State of Oklahoma" over Muscogee (Creek) allotments. *United States v. Sands*, 968 F.2d 1058, 1061-62 (10th Cir. 1992). The Muscogee (Creek) Allotment Act did not the disestablish the Muscogee (Creek) Reservation in *McGirt*. By the same reasoning, the Osage Allotment Act did not disestablish the Osage Reservation.

As a further indication that the Osage Reservation was meant to remain intact, termination of the Osage government was not even contemplated in the Osage Allotment Act. Osage Allotment Act at § 9. Instead, the Osage Allotment Act specifically recognizes the continuing existence of the Osage Nation government, contemplates future elections, *id*, and, as noted above, expressly affirms an active role of the Osage Council in leasing the Nation's mineral estate. *Id.*, at § 3.

3. Without the Required Express Language of Disestablishment, the Analysis Ends.

Because the Osage Allotment Act has no language that disestablishes the Osage Nation Reservation, a court may not search outside statutory text for evidence of congressional intent to disestablish. Congress' silence is not an invitation to comb through historical events, current trends or demographics. That was the misstep taken by the *Irby* court. *McGirt* made it clear that such an extratextual search is wrong: "There is no need to consult extratextual sources when the meaning of a statute's terms is clear. The only role such materials can properly play is to help ***'clear up ... not create' ambiguity*** about a statute's original meaning." *Id.* at 2469 (emphasis added.).

The *Irby* court read the Osage Allotment Act's silence on disestablishment as implicitly creating an ambiguity that needed clarification with extratextual sources. *McGirt*'s one-step-only approach completely repudiates this analysis. Courts cannot substitute their own inferences and

expectations for Congress's words. Congress is fully capable of explicitly stating its intent to disestablish a reservation.

Congress has demonstrated its ability to disestablish an Osage Nation reservation when it wants to do so. When it moved the Osages from its ancestral lands to Kansas, and again later when it disestablished the Kansas reservation, Congress used clear language. *See* Att. 13 (1808 Osage Treaty, 7 Stat. 107) ("In consideration of the lands relinquished" and "we do further cede and relinquish to the United States forever"); Att. 14 (1818 Osage Treaty, 7 Stat. 183) ("cede to the United States, and forever quit claim"); Att. 15 (1825 Osage Treaty, 7 Stat. 240) ("do hereby cede and relinquish" and "said land herein ceded"); Att. 16 (1839 Osage Treaty, 7 Stat. 576) ("make the following cession . . . of all titles of interest in any reservation heretofore claimed"); and Att. 17 (1865 Osage Treaty, 14 Stat. 675) ("hereby grant and sell to the United States"). No such language or anything remotely similar is found in the Osage Allotment Act.

Under *McGirt*, there is no language sufficient to disestablish the Osage Nation Reservation that Congress established in 1872 to be the Osage Nation's permanent home, using the Osage Nation's own money to pay for it. This Court should hold Congress to its word.

V. PRECLUSION DOCTRINES CANNOT BE USED TO IGNORE INTERVENING CHANGES IN THE LAW

The State must avoid *McGirt* to avoid losing. The State attempts to do that by arguing that preclusion doctrines and the decision in *Osage Nation v. Irby,* 597 F. 3d 1117 (10th Cir. 2010), prevent any analysis under *McGirt.* The State ignores that under the Constitution, Congress alone holds the power to disestablish a reservation it has created. *McGirt* repudiates *Irby's* three-step weighted approach from *Solem v. Bartlett*, 465 U.S. 463, 471 (1984), calling that approach mistaken and makes clear a court must not invade Congress' authority under the guise of statutory interpretation. Therefore, when this Court is presented with the choice between the Tenth Circuit

panel decision in *Irby* and the United States Supreme Court's decision in *McGirt,* the choice is clear. This Court cannot use preclusion doctrines to avoid following *McGirt,* when *McGirt* repudiated the reasoning and analysis used by the *Irby* court. *See Herrera*, 139 S. Ct. at 1695, 1697.

When a new decision repudiates the reasoning of an earlier decision, then *res judicata* does not apply. *Res judicata* does not apply when there has been an intervening "'change in [the] applicable legal context.'" *Bobby v. Bies*, 556 U.S. 825, 834 (2009) (quoting Restatement (Second) of Judgments, §28, Comment c). A "modification or growth in legal principles as enunciated by [the Supreme] Court" cannot be "ignored by blind reliance" upon rules of preclusion. *Commissioner v. Sunnen*, 333 U.S. 591, 600 (1948). "At a minimum, a repudiated decision does not retain preclusive force." *Herrera*, 139 S. Ct. at 1698.

McGirt bluntly rejects the "three-step" approach taken by the *Irby* Court (where a court can fail, at step *one*, to find textual evidence showing a clear intent to disestablish, but still proceed to steps *two* and/or *three* to infer such intent). This approach is "mistaken." *McGirt*, 140 S. Ct. at 2468.[9] Courts cannot "deliver the final push" to disestablish a reservation when Congress itself has not done so with explicit language. *Id* at 2462. *McGirt* rejects the *Solem* approach used by *Irby* that disestablishment can be shown by extratextual materials. *Id.* at 2469. Historical practices, demographics and population trends do not add up to disestablishment. *Id.* at 2468 ("Our charge is usually to ascertain and follow the original meaning of the law before us … [t]hat is the only 'step' proper for a court of law."). What is plain is that under *McGirt*, the *Irby* court should have stopped at the words of Congress—step one—once it determined "[n]either the Osage Allotment

[9] "[The State] reads *Solem* as requiring us 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. On the State's account, we have so far finished only the first step; two more await. … This is mistaken." *McGirt*, 140 S. Ct. at 2468.

Act nor Oklahoma Enabling Act contain express termination language." *Osage Nation,* 597 F.3d at 1123-34. [10] Thus, the *Irby* Court went too far in its analysis. It took the same approach that *McGirt* described as "mistaken." Under the change-in-law exception to the preclusion doctrine, *McGirt's* rejection of the *Solem*'s three-step approach, that permitted extratextual evidence to outweigh the text, prevents this Court from applying *Irby* here.

This Court has previously determined that *McGirt* is a significant change in the law.[11] *See Bosse*, 2021 OK CR 3 ¶ 5, and it is not alone in that determination. Writing for the dissenters in *McGirt*, Justice Roberts declares that the majority "announces *a new approach* sharply restricting consideration of contemporaneous and subsequent contextual evidence of congressional intent", *McGirt*, 140 S.Ct. at 2487 (emphasis added), and that the majority "starkly departs from the Court's precedents." *Id.* at 2489. Likewise, other Courts have recognized this significant change too. *See e.g. Oneida Nation v. Vill. Of Hobart*, 968 F. 3d 664, 684-85 (7th Cir. 2020) (holding Oneida Nation's Reservation was not disestablished; and recognizing *McGirt's* "textual approach" adjusted the *Solem* framework in a manner that "turned what was a losing proposition for the Village into a nearly frivolous one").

The State recognizes the exception to preclusion doctrines with a passing cite to *Herrera*, but tries to avoid the unavoidable by downplaying the significance of *McGirt's* textual approach.

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[10] The *Irby* court found nothing in the Allotment Act suggesting disestablishment. To the contrary, the *Irby* court found (1) that the Osage Allotment Act did not directly open the Reservation to non-Indian settlement, allotting only to members of the tribe with no surplus land made available for non-Indian settlement and, therefore, also did not provide for any sum-certain or other payment to the Nation for the sale of its land; and (2) that, in fact, the Allotment Act contained provisions "weighing in favor of continued reservation status". *Irby*, 597 F.3d at 1123-24. Notwithstanding these findings, the *Irby* court, quoting *Solem v. Bartlett*, 465 U.S. 463, 471 (1984), held, "The Court will infer diminishment or disestablishment despite statutory language that would otherwise suggest unchanged reservation boundaries when events surrounding the passage of [the] act 'unequivocally reveal a widely-held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation.'" *Id. McGirt* completely repudiates that reasoning from *Solem*.

[11] Oklahoma's reliance on *In re Morgan*, No. 20-6123 (10th Cir. Sept. 18, 2020) to support its argument that *McGirt* "did not purport to change the law regarding reservation disestablishment" fails. *See Ryder v. State,* 2021 OK CR 10, ¶12 n. 3 (finding Oklahoma's reliance on *Morgan* to be misplaced).

McGirt bluntly repudiated the approach used in *Irby*. Yet, the State selectively ignores the parts of *McGirt* that show how significantly the *Solem* framework was changed. *McGirt*, 140 S. Ct. at 2468. As it has in past, this Court must decline the State's invitation to ignore the changes to the law in *McGirt* – states and courts – "have no proper role in the adjustment of reservation borders." *Id.* [12] Given the repudiation of the *Irby* reasoning, preclusion doctrines are not applicable in this case.

VI. CONCLUSION

The Constitution gives Congress plenary power over Indian Nations. Congress alone holds the power to disestablish an Indian reservation it has established. There is no statute whereby Congress disestablished the Osage Nation Reservation that it created in 1872. That is the final word on the subject. Neither procedural defenses, preclusion doctrines, cases with "repudiated reasoning," demographics or population trends can change Congress's final word. The Osage Nation Reservation remains.

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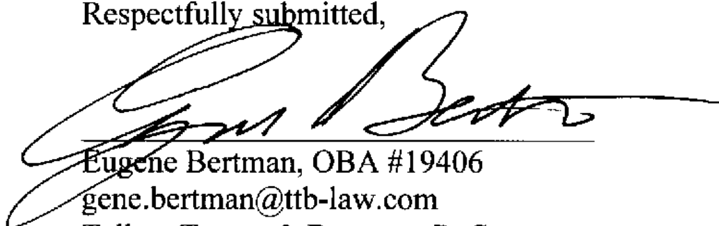
[12] The Nation recognizes the State wants this Court to use general principles of *res judic*ata and collateral estoppel to create a kind of universal privity. In our brief, the Nation cannot fully address the various sub-issues Oklahoma raises, except to say: 1) the only question before this Court, as it was in *McGirt*, "concerns the statutory definition of Indian country as it applies in federal criminal law under the MCA," *see McGirt*, 140 S.Ct. at 2480; 2) the court in *Irby* was addressing a civil/regulatory/tax issue involving whether Osage citizens were exempt from state personal income taxes; 3) whether the federal criminal "Indian country" statute can be borrowed for civil and regulatory actions cannot "skew [the] interpretation of the MCA," *id.* at 2480 (noting "nothing requires civil statutes or regulations to rely on federal criminal law").

The claims and the issues were different in the two cases. And, there is certainly no privity between Young and the Osage Nation. Young was not a plaintiff and was never informed of litigation. He would not have had standing in any event, because he is not an Osage citizen. Beyond those obvious roadblocks, Oklahoma offers no evidence of *any* association Young has with the Osage Nation, except that he committed a crime on the Osage Nation Reservation.

Respectfully submitted,



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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of BRIEF AMICUS CURIAE OF THE OSAGE NATION IN SUPPORT OF THE UNINTERRUPTED AND CONTINUING EXISTENCE OF THE OSAGE RESERVATION was mailed to the following persons, postage prepaid, on the 1st day of June 2021:

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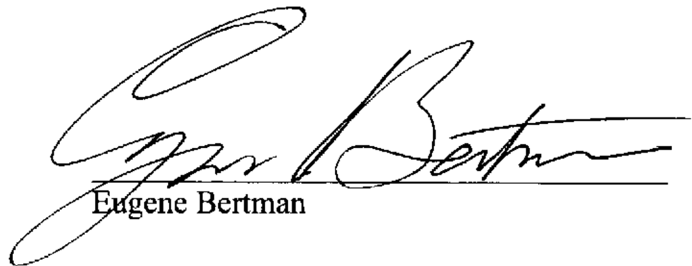

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