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 (Hon. William P. Johnson)

BRIEF OF *AMICI CURIAE* THE CHEROKEE NATION, CHICKASAW NATION, CHOCTAW NATION OF OKLAHOMA, QUAPAW NATION, AND SEMINOLE NATION OF OKLAHOMA IN SUPPORT OF APPELLANT AND SUPPORTING REVERSAL

Frank S. Holleman
SONOSKY, CHAMBERS, SACHSE,
ENDRESON & PERRY, LLP
145 Willow St., Suite 200
Bonita, CA 91902
Tel: 619-267-1306
E-mail: fholleman@sonosky.com

Counsel for Amici Cherokee Nation, Chickasaw Nation, and Choctaw Nation of Oklahoma

Additional Counsel on Following Pages

Sara Hill
Attorney General
CHEROKEE NATION
P.O. Box 948
Tahlequah, OK 74465
Tel: 918-458-6998
E-mail: sara-hill@cherokee.org

Counsel for Amicus Curiae the Cherokee Nation

Stephen H. Greetham
Senior Counsel
CHICKASAW NATION
Office of Senior Counsel
4001 N. Lincoln Blvd.
Oklahoma City, OK 73105
Tel: 580-272-5236
E-mail: stephen.greetham@chickasaw.net

Counsel for Amicus Curiae the Chickasaw Nation

Brian Danker
Senior Executive Officer
DIVISION OF LEGAL & COMPLIANCE
CHOCTAW NATION OF OKLAHOMA
1802 Chukka Hina Dr.
Durant, OK 74701
Tel: 580-642-7423
E-mail: bdanker@choctawnation.com

Counsel for Amicus Curiae the Choctaw Nation of Oklahoma

Robert H. Henry
ROBERT H. HENRY LAW FIRM
512 N. Broadway Ave, Suite 230
Oklahoma City, OK 73102
Tel: 405-516-7824
Email: rh@rhenrylaw.com

Counsel for Amicus Curiae the Quapaw Nation

Valerie Devol
Attorney General
DEVOL & ASSOCIATES
15205 Traditions Lake Parkway
Edmond, OK 73103
Tel: 405-225-2300
E-mail: vdevol@devollaw.com

Counsel for Amicus Curiae the Seminole Nation of Oklahoma

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND CONSTITUTIONS

OTHER AUTHORITIES

INTEREST OF *AMICI CURIAE*[1]

Amici Cherokee Nation, Chickasaw Nation, Choctaw Nation of Oklahoma, Quapaw Nation, and Seminole Nation of Oklahoma ("Nations"), are federally-recognized Indian tribes. *See* 87 Fed. Reg. 4,636, 4,637, 4,639 (Jan. 28, 2022). They occupy and govern Reservations that are Indian country under federal law, *see* 18 U.S.C. § 1151(a), as the Oklahoma Court of Criminal Appeals has squarely held. *See Sizemore v. State*, 2021 OK CR 6, ¶¶ 10-16, 485 P.3d 867, 869-71, *cert. denied* 142 S. Ct. 935 (2022); *Spears v. State*, 2021 OK CR 7, ¶¶ 10-15, 485 P.3d 873, 876-77, *cert. denied* 142 S. Ct. 934 (2022); *Grayson v. State*, 2021 OK CR 8, ¶ 7, 485 P.3d 250, 252, *cert. denied* 142 S. Ct. 934 (2022); *Bosse v. State*, 2021 OK CR 30, ¶ 12, 499 P.3d 771, 774, *cert. denied* 142 S. Ct. 1136 (2022); *State v. Lawhorn*, 2021 OK CR 37, ¶ 5, 499 P.3d 777, 778.

The Nations submit this brief pursuant to Federal Rule of Appellate Procedure 29(a) to vindicate their interest in ensuring that law enforcement and criminal prosecutions on their Reservations are conducted by governments whose actions are authorized under settled principles of federal law.[2] Tulsa never contests that under

[1] The parties consent to the filing of this brief. No party's counsel authored this brief in whole or in part and no party, party's counsel, or other person contributed money intended to fund preparation or submission of this brief.

[2] The Nations also join and support the arguments advanced in the brief filed by *amicus curiae* Muscogee (Creek) Nation, describing why Section 14 of the Curtis Act is no longer in force.

those principles, Oklahoma and its political subdivisions lack jurisdiction over Indians in Indian country absent congressional authorization. Nor does it claim that Congress has ever granted *Oklahoma* jurisdiction over Indians in Indian country. In fact, Oklahoma has never been authorized to exercise jurisdiction over Indians in Indian country. *See Murphy v. Royal*, 875 F.3d 896, 936-37 (10th Cir. 2017) (citing, *inter alia*, *Indian Country, U.S.A., Inc. v. Oklahoma ex rel. Okla. Tax Comm'n*, 829 F. 2d 967, 980 n.6 (10th Cir. 1987)). And as "there has been no express delegation of jurisdiction to [Oklahoma], *a fortiori,* there has been no grant of local jurisdiction." *Ross v. Neff*, 905 F.2d 1349, 1352 (10th Cir. 1990).

To achieve its ends, Tulsa seeks to revive a relic from territorial days: Section 14 of the Curtis Act, ch. 517, 30 Stat. 495 (1898), in which Congress authorized incorporation of municipalities in the Indian Territory. Although Oklahoma is now a State, not a Territory, Tulsa relies on this provision to claim authority over Indians in Indian country today. That gambit fails. Oklahoma's admission to statehood extinguished the federal law authority of the limited, provisional municipal governments Congress authorized in the Indian Territory. The powers of municipalities in Oklahoma are now defined solely by state law. And consistent with these principles, the state courts have squarely held that Oklahoma municipalities are governed by state law. *See Lackey v. State*, 116 P. 913, 914 (Okla.

1911); *State ex rel. Kline v. Bridges*, 94 P. 1065, 1067 (Okla. 1908). State law does not and cannot authorize the jurisdiction which Tulsa claims.

The District Court erred in accepting Tulsa's argument. And dozens of other municipalities are now relying in part on the district court's ruling to assert jurisdiction over Indians in Indian country. *See* Def. Municipalities' Second Notice of Supp'l Auth., *Pickup v. Dist. Ct.*, No. 20-cv-346-JB-JFJ (N.D. Okla. filed Apr. 18, 2022), ECF No. 132; City of Owasso's Fourth Notice of Supp'l Auth. in Supp. of Mot. to Dismiss, *Pickup v. Dist. Ct.*, No. 20-cv-346-JB-JFJ (N.D. Okla. filed Apr. 21, 2022), ECF No. 133. That threatens to exponentially multiply the District Court's error, unsettle jurisdictional arrangements throughout eastern Oklahoma, and undermine the Nations' sovereignty throughout their Reservations. The District Court's decision should be reversed, for the following reasons.

ARGUMENT

I. The Nations, in Cooperation with Willing Governmental Partners, Are Exercising Jurisdiction to Ensure that Reservation Roads are Safe.

Tulsa has never argued that it has jurisdiction over Indians in Indian country absent express congressional authorization. Below, it did not challenge the Municipal Court's finding that "[g]enerally, state courts do not have jurisdiction to try Native Americans for conduct committed in 'Indian County.'" App'x 24 (citing *Negonsott v. Samuels*, 507 U.S. 102 (1993)). Nor did it challenge this Circuit's rulings that "[s]tates have no authority over Indians in Indian Country unless it is

expressly conferred by Congress." *Cheyenne-Arapaho Tribes v. Oklahoma*, 618 F.2d 665, 668 (10th Cir. 1980) (citing *Williams v. Lee*, 358 U.S. 217, 220 (1959), and *United States v. Kagama*, 118 U.S. 375, 383-84 (1886)), and that, as a result, local or municipal officials are generally barred from exercising authority over Indians in Indian country, *see Ute Indian Tribe v. City of Myton*, 835 F.3d 1255, 1258, 1260 (10th Cir. 2016) (Gorsuch, J.); *see MacArthur v. San Juan County*, 497 F.3d 1057, 1074 (10th Cir. 2007) ("In its 'governmental capacity' a municipality acts as an arm of the state for the public good on behalf of the state." (quoting *Pueblo Aircraft Serv., Inc. v. City of Pueblo*, 679 F.2d 805, 810 (10th Cir. 1982))).

Nor does Tulsa suggest these rules are incompatible with public safety. That could not be shown, as the Nations have long worked hand in glove with state, county, and municipal law enforcement agencies on their Reservations to protect public safety, and they continue to do so. That includes ensuring that Oklahoma's roads are safe, by policing the roads and enforcing traffic codes and criminal laws that cover vehicle offenses. These efforts are reaping benefits and protecting the public, while Tulsa's grasp for additional authority under Section 14 of the Curtis Act serves only its own interests and would do so at a steep cost to tribal sovereignty and inter-governmental relations.

Pursuant to literally hundreds of cross-deputation agreements, the Nations have agreed that state, county, and municipal law enforcement officers on the

Nations' reservations can arrest or cite offenders who violate tribal law, including Indians, and then refer those cases to tribal prosecutors, who prosecute the cases over which the Nations have jurisdiction.[3] Both the Cherokee Nation and the Muscogee (Creek) Nation have such agreements with Tulsa. *See* City Addendum, Addition of City to Deputation Agreement for Law Enforcement in Cherokee Nation (Mar. 10, 2021)[4]; City Addendum, Addition of City to Deputation Agreement for Law Enforcement in Muscogee (Creek) Nation (Aug. 5, 2020).[5] And under recently-passed state legislation, the Oklahoma Department of Public Safety treats tribal court convictions for traffic offenses the same way that it treats state court convictions for such offenses. *See* H.B. 3501, § 1, 2022 Reg. Sess. (Okla.), *to be codified at* Okla. Stat. tit. 47, § 6-201.2.[6] As a result of this legislation, for instance, a tribal conviction for driving under the influence ("DUI") or unsafe driving will result in suspension of a person's commercial state driver's license, and tribal convictions for DUI offenses will be considered a prior conviction for enhanced state punishment for

[3] These agreements are available on the Oklahoma Secretary of State's website, *see Tribal Compacts and Agreements*, Okla. Sec'y of State https://www.sos.ok.gov/gov/tribal.aspx (last visited July 6, 2022), and can be found by searching "deputization" or "deputation" and a Nation's name in the "Doc Type" search bar.

[4] https://www.sos.ok.gov/documents/filelog/94098.pdf

[5] https://www.sos.ok.gov/documents/filelog/93662.pdf

[6] http://webserver1.lsb.state.ok.us/cf_pdf/2021-22%20ENR/hB/HB3501%20ENR.PDF

DUI. *See id.* § 2, *to be codified at* Okla. Stat. tit. 47, § 6-205.2; Okla. Stat. tit. 47, § 11-902(C)(2)-(5).

Reservation-wide, case referrals under our agreements with state and local law enforcement have resulted in thousands of traffic citations and criminal charges in the tribal courts. To take just a few examples: Since their Reservations were acknowledged in 2021, the Cherokee Nation has issued 2,987 traffic citations and filed 554 DUI cases, the Chickasaw Nation has issued 804 traffic citations and filed 296 DUIs, and the Choctaw Nation has issued 1,301 traffic citations and filed 314 DUIs. The Cherokee Nation is further implementing its jurisdictional agreements through over a dozen memoranda of understanding with municipalities on its Reservation, under which the Nation shares a portion of fines assessed by tribal law with the municipality in which the offense was committed, equal to the share the municipalities would obtain from fines for offenses committed outside Indian country. *See, e.g.*, Mem. of Agreement Between Cherokee Nation & City of Owasso, § 6(G)-(H) (Oct. 5, 2021).[7]

The Nations are also taking steps to ensure policing on the Reservation is fully funded. All the Nations have made significant investments to expand their law enforcement and prosecutorial capacity. In fiscal year 2020, the Cherokee Nation spent $10 million to expand its justice system; in fiscal year 2021, the budgets for

[7] https://attorneygeneral.cherokee.org/media/0e4bxfkp/owasso-executed.pdf

the Nation's court system, Attorney General's office, and Marshal Service more than doubled.[8] The Choctaw Nation has spent over $24.8 million in response to the affirmation of its Reservation, including by hiring two new judges, forty-seven new police and criminal investigators, and six new prosecutors, and by establishing a public defenders' office.[9] The Chickasaw Nation hired more than thirty new personnel in its Lighthorse Police Department, more than doubled its prosecutorial staff, hired a new criminal investigator and a supervisory probation officer, and established a new Office of Detention Administration to oversee housing its growing prisoner population.[10] The Seminole Nation has increased its court funding by over

[8] Press Release, Cherokee Nation, Cherokee Nation Files 1000th Case in Tribal Court Following *McGirt* Ruling (June 7, 2021), https://anadisgoi.com/index.php/government-stories/601-cherokee-nation-files-1000th-case-in-tribal-court-following-mcgirt-ruling; Michael Overall, *The Cherokee Nation's Budget Will Hit a Record $3 Billion as the Tribe Responds to COVID and McGirt*, Tulsa World (updated Oct. 22, 2021), https://tulsaworld.com/news/state-and-regional/govt-and-politics/the-cherokee-nations-budget-will-hit-a-record-3-billion-as-the-tribe-responds-to/article_33d25a2e-157d-11ec-963e-7ff77df58054.html.

[9] News Release, Choctaw Nation, Choctaw Nation Forms Sovereignty Committee to Guide Future Efforts (Sept. 2, 2020), https://www.choctawnation.com/news/news-releases/choctaw-nation-forms-sovereignty-committee-to-guide-future-efforts/; *McGirt v. Oklahoma Supreme Court Decision*, Choctaw Nation of Okla., https://www.choctawnation.com/about/government/mcgirt-vs-oklahoma/ (last visited July 6, 2022).

[10] Press Release, Chickasaw Nation Pub. Rels. Off., Chickasaw Nation Expands Criminal Justice Capabilities (Mar. 11, 2022), https://www.chickasaw.net/News/Press-Releases/Release/Chickasaw-Nation-expands-criminal-justice-capabili-57980.aspx.

117 percent.[11] And the Quapaw Nation is making historic investments in its tribal court system, law enforcement, and Department of Public Safety.[12]

Law enforcement on the Nations' Reservations is supported by other efforts as well. The Nations have enacted traffic codes which mirror or incorporate state traffic laws, so that the laws that govern traffic are uniform throughout their Reservations. *See* Cherokee Nation Code tit. 47;[13] Chickasaw Nation Code tit. 21;[14] Choctaw Nation Res. No. CB-89-21 (Aug. 20, 2021), *codified at* Choctaw Nation Traffic Code § 17-100;[15] Quapaw Nation Traffic Enforcement Code, Res. No. 031922-B (Apr. 16, 2022).[16] The Quapaw Nation has also assimilated state criminal law into its own criminal code, so that Quapaw and state law uniformly define criminal offenses in the Quapaw Reservation. *See* Quapaw Nation Criminal

---

[11] Affidavit of Valerie Devol (Apr. 4, 2022), https://www.sno-nsn.gov/docs/Affidavit_of_Valerie_R_Devol.pdf.

[12] *Quapaw Nation Building Law Enforcement Network*, Joplin Globe (Feb. 9, 2022), https://www.joplinglobe.com/news/local_news/quapaw-nation-building-law-enforcement-network/article_c9b3ed4c-89f8-11ec-ace2-c7e05591633d.html.

[13] https://attorneygeneral.cherokee.org/media/i2weqkqa/title-47-amendments.pdf

[14] https://code.chickasaw.net/Title-21.aspx

[15] https://www.choctawnation.com/wp-content/uploads/2022/03/cb-89-21.pdf

[16] https://www.quapawtribe.com/DocumentCenter/View/10384/RESOLUTION-031922-B-ENACTING-THE-QUAPAW-NATION-TRAFFIC-ENFORCEMENT-CODE?bidId=

Assimilation Act, Res. No. 121821-A (Dec. 18, 2021).[17] And under state law, Tribal law enforcement officers who obtain proper state certification can be commissioned as state law enforcement officers and can enforce state law on the Reservation against non-Indians. Okla. Stat. tit. 21 §§ 99, 99a(D). Exercising authority under these provisions and jurisdictional agreements, our law enforcement officers have referred thousands of cases involving non-Indians to state prosecutors for prosecution in the state system.

Tulsa seeks to detour jurisdictional rules and hopscotch the work the Nations are doing to ensure public safety by relying solely on Section 14 of the Curtis Act to establish municipal jurisdiction over Indians in Indian country. App'x 139-43; *see id.* 141 (referring to Tulsa's jurisdiction over Appellant as established by the supposed "Congressionally created grant of authority" of Section 14). Section 14 cannot sustain that weight, however, because it was a provisional enactment that did not last beyond statehood and that was abrogated by Oklahoma's admission to the Union.

II. The Oklahoma Enabling Act and Statehood Abrogated Section 14 of the Curtis Act.

Tulsa's reliance on Section 14 seeks to resurrect a short-lived relic of the territorial era, under which municipalities in the former Indian Territory that

[17] https://quapawnation.com/DocumentCenter/View/10415/Enacting-the-Criminal-Assimilation-ACT?bidId=

organized under federal law exercised authority as federal instrumentalities, as discussed more fully below. That claim fails because the provisions of Section 14 relied on by Tulsa here were "intended to be merely provisional," *Jefferson v. Fink*, 247 U.S. 288, 294 (1918); *accord Shulthis v. McDougal*, 225 U.S. 561, 571 (1912). As courts have long held, these provisions were abrogated when Congress authorized the State of Oklahoma in the Oklahoma Enabling Act, Act of June 16, 1906, ch. 3335, §§ 1-22, 34 Stat. 267, 267-78, (1906) ("Enabling Act"). *See In re Pigeon's Estate*, 198 P. 309, 317 (Okla. 1921). If Section 14 were still in effect, it would establish two systems of municipal laws in Oklahoma, as municipalities in the other half of the State would have no such authority. That would be contrary to the explicit text of the Enabling Act and Congress's intent in authorizing Oklahoma statehood. As a matter of federal and state law, existing municipalities in Oklahoma are now solely governed by *state* law. And state law does not give Tulsa the authority it asserts here.

A. Congress Established the Pre-Statehood Municipalities as a Temporary Measure.

In 1890, Congress established a territorial government for the Oklahoma Territory in what is now western Oklahoma. Oklahoma Organic Act, ch. 182, 26 Stat. 81 (1890) ("Organic Act"). The Oklahoma Territory's Legislature passed laws

governing the incorporation and power of municipalities in the Oklahoma Territory. *See* Okla. Terr. Stats. chs. 14-15 (1893).[18]

In contrast, "[n]o territorial government was ever created in the reduced Indian Territory, and it remained subject directly to tribal and federal governance." *Murphy*, 875 F.3d at 933. Congress directly legislated for the territory and either established or authorized to be established a limited number of federal instrumentalities to assist in governance. For instance, in the Organic Act Congress expanded the jurisdiction of the existing United States Court for the Indian Territory established by the Act of March 1, 1889, ch. 333, 25 Stat. 783,[19] Organic Act § 29, and provided that "certain general laws of the State of Arkansas" were "hereby extended over and put in force in the Indian Territory until Congress shall otherwise provide," Organic Act, § 31. Those included Arkansas laws "relating . . . to municipal corporations, chapter twenty-nine, division one . . . ." *Id.* *Accord* Act of June 7, 1897, ch. 3, 30 Stat. 62, 83 (giving the Indian Territory court jurisdiction to hear all civil and criminal cases and applying Arkansas law to "all persons" in the

[18] https://play.google.com/books/reader?id=ktIwAQAAMAAJ&pg=GBS.PR2&hl=en.

[19] Congress originally established this "special federal court of limited jurisdiction" to deal with "problems of lawlessness" caused by non-Indian intruders in the Indian Territory, over whom tribal courts lacked authority. *Indian Country, U.S.A.*, 829 F.2d at 977. Congress gradually expanded the court's jurisdiction as part of the measures it took to coerce Indian tribes into allotment of their lands. *Id.* at 977-78; *see infra* at 12

Territory). Tulsa first incorporated under Arkansas law as incorporated by these provisions *before* the Curtis Act was passed. *See In re Incorporation of City of Tulsa*, Record No. 10 (Ind. Terr. Jan. 18, 1898), *available at* App'x 38-41.

Congress adjusted this scheme in Section 14 of the Curtis Act. Section 14 was only a small part of the Curtis Act, which was "intended among other things to coerce the Creek Nation to agree to allotment and cession of tribal lands . . . ." *Indian Country, U.S.A.*, 829 F.2d at 978. Section 14 "provide[d] settlers in the Indian Territory a means by which they might exercise some control, political and possessory, over the lands in which they lived." *United States v. City of McAlester*, 604 F.2d 42, 64 (10th Cir. 1979) (en banc). It did so by authorizing cities and towns in the Indian Territory to incorporate under Chapter Twenty-Nine of Mansfield's Digest of the Statutes of Arkansas.[20] Section 14 simply borrowed Arkansas law for that purpose—the municipalities were still federal instrumentalities, not state entities, as the Oklahoma Supreme Court has explained:

> 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 in any manner not forbidden by the federal Constitution, for the purpose of permitting the people of those cities and towns in a measure to control their local affairs.

[20] W.W. Mansfield, *Statutes of Arkansas Embracing All Laws of a General and Permanent Character* (Little Rock, Ark., Mitchell & Bettis 1884), https://www.google.com/books/edition/A_Digest_of_the_Statutes_of_Arkansas/c9VHAQAAIAAJ?hl=en&gbpv=1.

State ex rel. West v. Ledbetter, 97 P. 834, 835 (Okla. 1908). *Accord Okla., Kan. & Mo. Interurban Ry. v. Bowling*, 249 F. 592, 593-94 (8th Cir. 1918) ("Before [territories] are admitted to statehood [Congress] exercises as to them the combined powers of the national and state governments by direct legislation, and also through local legislative bodies whose acts are subject to its supervision, or, as was the case with the Indian Territory, by extending thereto certain of the laws of an organized state.").

Congress further provided in Section 14 that the "such municipalities" as it authorized to incorporate would "possess all the powers and exercise all the rights of similar municipalities in said State of Arkansas" and 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 governments, and shall have equal rights, privileges, and protection therein.

Although Congress authorized the municipal governments to enact such laws and ordinances, rather than passing ordinances itself, Congress was still the ultimate source of power for such ordinances as the municipalities were themselves "agencies of the government of the United States." *Ledbetter*, 97 P. at 835, *see Puerto Rico v. Sánchez Valle*, 579 U.S. 59, 70, 75-76 (2016) ("ultimate source" of authority for a government Congress establishes in a territory "remains the U.S. Congress, just as back of a city's charter lies a state government," while the source of state or tribal power is "'pre-existing' sovereignty" that is "attributable in no way to any delegation

. . . of federal authority" (alteration in original) (quoting *United States v. Wheeler*, 435 U.S. 313, 320, 322, 328 (1978)); *see also Inc. Town of Hartshorne v. Inc. Town of Haileyville*, 104 P. 49, 50 (Okla. 1909) (municipalities are either created by states or, in the territories, by Congress or congressionally empowered territorial governments).

Congress further provided that

> mayors of such cities and towns, in addition to their other powers, shall have the same jurisdiction in civil and criminal cases arising within the corporate limits of such cities and towns as, and coextensive with, United States commissioners in the Indian Territory . . . .

United States commissioners in the Indian Territory had "all the powers of commissioners of the circuit courts of the United States," the power to act "as justices of the peace in criminal cases" with jurisdiction to "hold preliminary examinations and discharge, hold to bail, or commit in cases of offenses which, under the laws applicable to the Territory, amount to felonies," and the power to preside over civil and criminal proceedings according to the procedures defined in Arkansas law, with appeals from commissioners' rulings to the "United States court in the Indian Territory." Act of Mar. 1, 1895, § 4, ch. 145, 28 Stat. 693, 695-96 *see S. Sur. Co. v. Oklahoma*, 241 U.S. 582, 584 (1916); *Hartshorne*, 104 P. at 50-51 (noting Congress authorized "various commissioners" to exercise law enforcement authority).

Since it incorporated under the Organic Act, before the Curtis Act was passed, Tulsa cannot claim rights under the Curtis Act. But in any event, the Curtis Act's system, established only during the brief territorial era between the Organic Act and statehood, no longer exists. It died upon statehood, as explained further below, and so Tulsa can claim no authority under the Curtis Act in the present day.

B. Congress Abrogated Section 14 Upon Oklahoma Statehood.

Tulsa cannot detach the provisional authority of Section 14 once provided from its federal source and resurrect it to exercise authority over Indians in Indian country *today*. Section 14 created only a temporary authority for municipalities that was abrogated upon statehood.

In the Enabling Act, Congress authorized the formation of the state of Oklahoma out of the Oklahoma Territory, Indian Territory, and Public Land Strip. That entirely replaced the transitory scheme Congress had established in the Indian Territory. As a general rule, upon statehood, the federal law Congress enacts to prescribe the formation and functioning of government in a territory becomes "inoperative except as adopted by the[State]," *Sands v. Manistee River Improvement Co.*, 123 U.S. 288, 296 (1887), and is "displaced, abrogated, every part of it," *Benner v. Porter*, 50 U.S. (9 How.) 235, 242-43 (1850) (emphasis added). This displacement occurred in the unique circumstances of the Indian Territory as well.

As the United States Supreme Court has explained, when Congress established the Indian Territory and provided for its governance in acts like the Curtis Act, it was

> contemplating the early inclusion of [the Indian T]erritory in a new state, and the purpose of those acts 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, and not to encroach upon the powers which rightfully would belong to the prospective state.*

Shulthis, 225 U.S. at 571 (emphasis added); *accord Bowling*, 249 F. at 594 (noting that in Oklahoma, "[u]pon attaining statehood the statutes enacted for the territory upon subjects of state, as distinguished from federal, cognizance are automatically abrogated, except so far as they may be affirmatively continued to prevent an interregnum or hiatus").

That Section 14 was provisional is confirmed by how Congress ultimately wrapped up the business of the Indian Territory in the Enabling Act. That Act terminated the Indian Territory and extinguished the authority that federal instrumentalities could exercise under Section 14. The Enabling Act first made clear that "nothing contained in the [Oklahoma] constitution"

> shall be construed to limit or impair the rights of person or property pertaining to the Indians of said Territories (so long as such rights shall remain unextinguished) or to limit or affect the authority of the Government of the United States to make any law or regulation respecting such Indians, their lands, property, or other rights . . . which it would have been competent to make if this Act had never passed.

Id. § 1.

The Enabling Act then authorized one system of state laws in Oklahoma which did not include Section 14 of the Curtis Act. Section 13 of the Enabling Act provided that, once the State was established, "the laws in force in the Territory of Oklahoma, as far as applicable, shall extend over and apply to said State until changed by the legislature thereof." Section 21 then provided 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, except as modified or changed by this Act or by the constitution of the State, and the laws of the United States not locally inapplicable shall have the same force and effect within said State as elsewhere within the United States.

Section 21 of the Enabling Act thus, by its own terms, ended the effectiveness of Section 14 of the Curtis Act after statehood. First, Section 14 of the Curtis Act was not one of the "law[s] in force in the Territory of Oklahoma" which the Enabling Act made applicable throughout the State. Second, Section 14 was not a statute in effect "elsewhere within the United States," and so was not one of the federal statutes made applicable in Oklahoma in addition to Oklahoma Territory law. Third, Section 21 of the Enabling Act provided that the only modifications or changes to Oklahoma law that would apply after Statehood would be those of "this Act" or "the constitution of the State," and so prior laws like the Curtis Act could not modify the future application of state law.

This abrogation also eliminated any portion of Section 14 that might expand municipal jurisdiction beyond that which a State might, in the normal course,

exercise. As the Supreme Court explained in *Southern Surety*, under the Enabling Act and the state Constitution, "the test of the jurisdiction of the state courts was to be the same that would have applied had the Indian Territory been a state when the offenses were committed." 241 U.S. at 586.[21] Likewise, in *Pigeon's Estate*, 198 P. 309, the Oklahoma Supreme Court concluded that Sections 13 and 21 of the Enabling Act repealed both the Arkansas descendency law Congress had applied to certain unrestricted fee lands in the Indian Territory and the provisos Congress had imposed on the operation of Arkansas law in the Territory, and that applying such provisos would

> require[] the court by an unreasonable rule of construction to detach from the dead corpse of the Arkansas law . . . the provisos . . . and ingraft them onto the laws of Oklahoma without any authority whatever of any legislative act of the Congress or of the state . . . .

Id. at 317. *Accord Tiger v. Slinker*, 4 F.2d 714 (E.D. Okla. 1925), *aff'd sub nom. United States v. Tiger*, 19 F.2d 35, 36 (8th Cir. 1927); *see also Dunn v. Micco*, 106 F.2d 356, 358-59 (10th Cir. 1939) (both adopting the reasoning of *Pigeon* and *Tiger* and following them under *stare decisis*).

In sum, the Enabling Act authorized a new State under a single, uniform set of laws, replacing the provisional measures that Congress had enacted for the Indian

[21] *Southern Surety* "pass[ed] the question" of Oklahoma state courts' authority over "tribal Indians," but that issue has been conceded by Tulsa in this case, *except* for the applicability of Section 14 of the Curtis Act, *see supra* at 3-4.

Territory. Accordingly, just as Tulsa cannot rely on Section 14 of the Curtis Act to conduct its elections under Arkansas law today, it cannot rely on Section 14 to exercise jurisdiction over Indians in Indian country today. The survival of Section 14 would be plainly inconsistent with the establishment of the State and Congress's intent in the Enabling Act to replace the provisional system in the Indian Territory with *"a body of laws applying with practical uniformity throughout the state."*[22] *Jefferson*, 247 U.S. at 292 (emphasis added).

That conclusion holds in all the Nations' Reservations. In Section 29 of the Curtis Act, Congress enacted an agreement between the United States and the Chickasaw and Choctaw Nations that prescribed how those Nations' lands would be allotted. That agreement superseded many of the provisions of the Curtis Act, but also provided that it "shall not in any manner affect the provisions of section fourteen . . . ." 30 Stat. at 505. Congress also later approved an allotment agreement with the Cherokee Nation which provided that Section 14 would "continue in force as if this agreement had not been made." *See* Cherokee Allotment Agreement of 1902, ch.

[22] For similar reasons, the Enabling Act also impliedly repealed Section 14 of the Curtis Act, as when "a later act covers the whole subject of an earlier one and is clearly intended as a substitute, it will operate to repeal the earlier act." *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1445 (D.C. Cir. 1988) (citing *Kremer v. Chem. Const. Co.*, 456 U.S. 461, 469 (1982)) (finding Section 28 of the Curtis Act, which abolished tribal courts, was repealed by the conjunction of a general repealer provision in the Oklahoma Indian Welfare Act of 1936, ch. 831, 49 Stat. 1967, and that Act's express recognition of the authority of Oklahoma tribes to establish constitutions and exercise powers of self-government).

1375, § 73, 32 Stat. 716, 727. As Section 14 was later abrogated by the Enabling Act, those provisions are inoperative. The Enabling Act itself "affect[ed]" Section 14 by making it no longer "in force."[23]

C. State Law Did Not Preserve Municipalities' Section 14 Authority, and Tulsa's Incorporation Under State Law after Statehood Superseded its Pre-Statehood Powers.

Oklahoma decided in its Constitution to terminate municipalities' authority under laws that applied in the Indian Territory, and so Tulsa also lacks authority as a matter of state law. Section 10 of the Schedule to the Oklahoma Constitution, adopted in 1908, provided that

> [u]ntil otherwise provided by law, incorporated 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 . . . .

Bridges, 94 P. at 1066. The adoption of the state Constitution terminated the laws that governed municipalities in the Indian Territory:

---

[23] The Tulsa Municipal Court concluded that Section 14 of the Curtis Act was not repealed by relying on *Choctaw Nation v. City of Atoka*, 207 F.2d 763 (10th Cir. 1953), and *McAlester*, 604 F.2d 42. *See* App'x 28. Tulsa did not rely on these cases before the District Court, and it could not have done so because those cases arose *before* statehood, and dealt with *Section 11* of the Curtis Act, which allowed municipalities to condemn "lands actually necessary for public improvements, regardless of tribal lines," 30 Stat. at 498. *Atoka* considered whether a city had validly condemned land in 1907 through proceedings in the Court for the Indian Territory. 207 F.2d at 764-66. Similarly, *McAlester* considered whether another city validly condemned an easement in 1903. 604 F.2d at 43. Neither addressed municipalities' *post-statehood* authority.

> The state of Oklahoma is a different government from the government that existed in the Indian Territory prior to the admission of the state, *and the laws for the administration of the affairs of municipal corporations that were in force in the Indian Territory prior to the admission of the state are no more the laws of the state of Oklahoma than they are of any other state of the Union, unless made so by the provisions of the Enabling Act or some provision of the Constitution.* The Enabling Act contains no provision that extends in force in the state after its admission into the Union any of the laws governing municipal corporations that were in force in the Indian Territory prior to its admission, nor does the Constitution adopt or continue in force in the state any of said laws except certain specific laws for certain specific purposes, to which reference will be made later.

Id. at 1067 (emphasis added).

This was further confirmed by *Ledbetter*. There, the Oklahoma Supreme Court explained that while Section 14 put Arkansas law in force in the Indian Territory, the Enabling Act had displaced it with Oklahoma Territory law. 97 P. at 835. "No provision was made in the enabling act or in the Constitution for extending in force in the [Arkansas] laws under which the municipal corporations of the Indian Territory were created, organized, and governed." *Id.* Upon the admission of Oklahoma,

> the form of government theretofore existing in the Indian Territory ceased to exist, and the laws in force in that territory under which [a municipality incorporated during the Indian Territory era] held its charter and exercised its municipal powers became inoperative.

Id. Instead, "the Constitution created them municipal corporations under [Oklahoma Territory] law . . . 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.* As a result, "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 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*, 116 P. at 914.[24] The Oklahoma Supreme Court's conclusions as to the meaning of the state Constitution are binding on this Court, *see Riley v. Kennedy*, 553 U.S. 406, 435 (2008), and its interpretation of the Enabling Act is manifestly correct, as described *supra* at 15-20.

Soon after statehood, Tulsa re-incorporated under the provisions of state law, which then terminated any authority Tulsa may have had under Section 14 prior to statehood. On May 22, 1907, at the request of Tulsa's elected officials, the Governor of Oklahoma issued a proclamation declaring Tulsa to have "all the powers, duties, and privileges of a city of the first class *under the laws of the state of Oklahoma."*

[24] The Oklahoma Constitution art. XVIII, § 2, contains a provision temporarily preserving municipal corporations' "present rights and powers until otherwise provided by law." The "otherwise provided by law" provision was triggered twice over as to Tulsa soon after statehood, first by the Governor's proclamation of Tulsa's incorporation as a city of the first class, and then by Tulsa's re-incorporation under state law. *See infra* at 22-23. Under the state constitution and state law, this superseded Tulsa's pre-statehood powers to the extent they could have survived repeal of the Curtis Act, which they did not for reasons described *supra* at 15-20.

App'x 50 (emphasis added); *see* Tulsa Mun. Code App. C;[25] App'x 94. Then on May 22, 1908, the Oklahoma Legislature enacted a statute, consistent with the Oklahoma Constitution art. XVIII, § 3(a), authorizing any city with a population of more than 2,000 inhabitants to adopt a charter for "its own government," and providing that, upon ratification by voters and approval by the Governor, the charter would "become the organic law of such city and supersede any existing charter and all amendments thereof and all ordinances inconsistent with it." 1908 Okla. Sess. Laws 190-91; App'x 58. Pursuant to the state constitution and this law, Tulsa adopted a charter on July 3, 1908, which the Governor approved on January 5, 1909. Tulsa Mun. Code App. C; *see* App'x 63-69, 94. So, even if provisions of Section 14 had survived statehood—and they did not—Tulsa jettisoned them when it adopted a state law charter that "supersede[d]" its earlier incorporation under pre-statehood law.

III. The District Court's Decision Will Have Negative Consequences for Governance on the Reservations and Tribal Sovereignty, For No Practical Benefit.

The District Court's decision threatens to establish a new presumption in eastern Oklahoma—that municipalities have jurisdiction over Indians within their boundaries. Such a change would upset the hundreds of agreements between tribes

[25] https://library.municode.com/ok/tulsa/codes/code_of_ordinances?nodeId=CD_ORD_APXCINTU

and local governments which currently govern law enforcement and criminal prosecution in Indian country in eastern Oklahoma. *See supra* at 4-5. The Nations' inter-governmental cooperation to ensure law enforcement on the Reservations depends on mutual respect, and recognition of the long-settled principles that assign jurisdiction over activities on the Reservation. Tulsa's argument, and the District Court's decision, would unsettle those principles and strike at the heart of tribal authority.

If subdivisions of the State had jurisdiction over crimes by Indians on the Nations' Reservations, it would infringe on tribal self-government by subjecting reservation Indians to an additional criminal justice system, with different laws applied by different courts, in which punishment would be meted out by municipalities. It would be difficult to imagine a greater intrusion on tribal self-government. The adjudication of any case arising on the Reservation involving Indians "by any nontribal court . . . infringes upon tribal lawmaking authority." *Iowa Mut. Ins. Co. v LaPlante*, 480 U.S. 9, 16 (1987). Such an adjudication "cannot help but unsettle a tribal government's ability to maintain authority." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 60 (1978).

Moreover, if Section 14 were still in effect, it would senselessly wedge municipalities into the federal court system, which would raise constitutional concerns. Section 14 gave mayors of municipalities the authority to act as United

States commissioners, who could enforce federal criminal law and hold hearings in and preside over federal criminal proceedings.[26] If municipal officials somehow retained that authority, they could effectively operate as federal courts in the absence of any state law authorization. Shanghaiing the State's municipal courts in this manner without the State's consent would violate the rule that

> when a new state is admitted into the Union, it is so admitted with all of the powers of sovereignty and jurisdiction which pertain to the original states, and that such powers may not be constitutionally diminished, impaired, or shorn away by any conditions, compacts, or stipulations embraced in the act under which the new state came into the Union, which would not be valid and effectual if the subject of congressional legislation after admission.

Coyle v. Smith, 221 U.S. 559, 573 (1911); *see Gregory v. Ashcroft*, 501 U.S. 452, 462 (1991) (State has "constitutional responsibility for the establishment and operation of its own government" in which federal courts avoid interfering).

---

[26] In addition to the powers expressly described in the Act of March 1, 1895, *see supra* at 14, the "powers of commissioners of the circuit courts" established by federal law when the Curtis Act was passed were in relevant part:

> [t]o take acknowledgments of bail and affidavits, and also to take depositions of witnesses in civil cases . . . [and] all the powers that any justice of the peace, or other magistrate, of any of the United States may now exercise in respect to offenders for any crime or offense against the United States, by arresting, imprisoning, or bailing the same, under and by virtue of [the Judiciary Act of 1789, ch. 20, § 33, 1 Stat. 73, 91-92.]

Act of Aug. 23, 1842, § 1, ch. 188, 5 Stat. 516, 516-17.

The District Court's reasoning could have unanticipated impacts on the federal courts. The Act of March 1, 1895, which authorized appeals of United States commissioners' decisions to federal courts, does not limit appeals to cases involving Indians. This means *anyone* tried in a municipal court could seek an appeal to district court. There is no indication in the Enabling Act that Congress, after substituting the Indian Territory for a new State governed by uniform state law, intended to establish a permanent system in Oklahoma where municipalities in half the State would act as federal criminal courts whose decisions could be appealed to the Article III courts.

CONCLUSION

For the foregoing reasons, the Court should reverse the District Court's decision.

Dated: July 7, 2022

Respectfully submitted,

/s/ Frank S. Holleman

Frank S. Holleman
SONOSKY, CHAMBERS, SACHSE,
ENDRESON & PERRY, LLP
145 Willow St., Suite 200
Bonita, CA 91902
Tel: 619-267-1306
E-mail: fholleman@sonosky.com

Counsel for Amici Cherokee Nation, Chickasaw Nation, and Choctaw Nation of Oklahoma

Additional Counsel on Following Pages

Sara Hill
Attorney General
CHEROKEE NATION
P.O. Box 948
Tahlequah, OK 74465
Tel: 918-458-6998
E-mail: sara-hill@cherokee.org

Counsel for Amicus Curiae the Cherokee Nation

Stephen H. Greetham
Senior Counsel
CHICKASAW NATION
Office of Senior Counsel
4001 N. Lincoln Blvd.
Oklahoma City, OK 73105
Tel: 580-272-5236
E-mail: stephen.greetham@chickasaw.net

Counsel for Amicus Curiae the Chickasaw Nation

Brian Danker
Senior Executive Officer
DIVISION OF LEGAL & COMPLIANCE
CHOCTAW NATION OF OKLAHOMA
1802 Chukka Hina Dr.
Durant, OK 74701
Tel: 580-642-7423
E-mail: bdanker@choctawnation.com

Counsel for Amicus Curiae the Choctaw Nation of Oklahoma

Robert H. Henry
ROBERT H. HENRY LAW FIRM
512 N. Broadway Ave, Suite 230
Oklahoma City, OK 73102
Tel: 405-516-7824
Email: rh@rhenrylaw.com

Counsel for Amicus Curiae the Quapaw Nation

Valerie Devol
Attorney General
DEVOL & ASSOCIATES
15205 Traditions Lake Parkway
Edmond, OK 73103
Tel: 405-225-2300
E-mail: vdevol@devollaw.com

Counsel for Amicus Curiae the Seminole Nation of Oklahoma

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B)(i), I hereby certify that this brief was prepared in Microsoft Word 365 version 2205 and contains 6,447 words, as determined by the word processing software.

/s/ Frank S. Holleman
Frank S. Holleman