CASE NO. 22-5034

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JUSTIN HOOPER,
Plaintiff/Appellant,

VS.

THE CITY OF TULSA,
Defendant/Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA
District Court Case No. 21-CV-165-WPJ-JFJ
The Honorable William P. Johnson, District Judge

PLAINTIFF/APPELLANT'S REPLY BRIEF
ORAL ARGUMENTS ARE REQUESTED
THERE ARE NO ATTACHMENTS TO THIS BRIEF

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I. Municipal Jurisdiction Over Indians Under the Curtis Act Did Not Survive Statehood.

Oklahoma contends that Congress bifurcated section 14 into separate substantive law and jurisdictional components, with only the former ending at statehood, as follows: "Section 14 contains multiple provisions that can be placed into two broad categories: (1) applying Arkansas's substantive law, and (2) granting municipal officials jurisdiction over Indians." Br. of Amicus Curiae State of Oklahoma at 11 ("Oklahoma Br."). According to Oklahoma, the latter survived statehood because "[t]he Enabling Act provision extending Oklahoma territory law affects the Arkansas laws, but it says nothing about a municipality's jurisdiction over Indians," *id*. at 12. The argument is without merit because all of section 14 no longer had effect upon statehood when the Indian Territory ceased to exist and municipalities in the Indian Territory ceased to be federal instrumentalities.

A. Section 14 of the Curtis Act Made Municipal Jurisdiction Over Indians Contingent on Municipal Incorporation Under Federally-Incorporated Arkansas Law.

Oklahoma's attempt to cleave section 14 into provisions that survived statehood and those that did not is at war with the plain text of that provision. Congress created one category of municipal authority under section 14 – municipalities whose criminal jurisdiction was dependent on their incorporation under Arkansas law, and described the applicability of those municipalities'

ordinances to their "inhabitants . . . without regard to race . . . ." Act of June 28, 1898, ch. 517, § 14, 30 Stat. 495, 499. Municipal jurisdiction over Indians under Section 14 was accordingly not severable from municipal organization under Arkansas law, but was instead, as a matter of plain statutory text, expressly contingent upon it.[1]

Section 14 begins by giving cities of sufficient population the option to incorporate under Arkansas law:

> That the inhabitants of any city or town in [Indian] Territory having two hundred or more residents therein may proceed, by petition …, to have the same incorporated as provided [under Arkansas law.]

Id. Every reference to cities and towns thereafter refers back to how "such" city or town authorized and organized under the Curtis Act might exercise authority conferred by Arkansas law or the Curtis Act: "*such* city or town government, *when so authorized and organized*, shall possess all the powers and exercise all the rights of similar municipalities in said State of Arkansas"; the "mayors of *such* cities and towns" possessed the same authority of the U.S. Commissioners in Indian Territory;

[1] Even were this Court to determine that the Curtis Act is ambiguous, a ruling in Appellant's favor would still be appropriate. *See Pub. Serv. Co. of New Mexico v. Barboan*, 857 F.3d 1101, 1108 (10th Cir. 2017) ("A well-established canon of Indian law states that statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." (quotation marks omitted)); *N.L.R.B. v. Pueblo of San Juan*, 276 F.3d 1186, 1191–92 (10th Cir. 2002) ("The canon applies to other statutes, even where they do not mention Indians at all.").

and "the marshal … of *such* city or town" was authorized to execute process. *Id.* (emphases added).

The immediately ensuing language on which Tulsa and Oklahoma rely is no different: "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[.]" *Id.* at 499–500 (emphasis added). This text unambiguously refers back to the cities and towns "so authorized and organized" – i.e., under Arkansas law. *Id.* at 499. *See*, *e.g.*, *Culbertson v. Berryhill*, 139 S. Ct. 517, 522 (2019) ("the adjective 'such'" refers back to "[t]hat or those; having just been mentioned" (quotation marks omitted)); *Navajo Nation v. Dalley*, 896 F.3d 1196, 1210 (10th Cir. 2018) ("'such' … refers unambiguously back to the 'laws and regulations' in the immediately preceding provision"); *United States v. A.B.*, 529 F.3d 1275, 1282 n.9 (10th Cir. 2008) ("Congress used the adjective 'such' to modify the subject ('sentence')…. That usage plainly refers back to the penal sentence mentioned in the previous text[.]" (quotation marks omitted)).

Section 14 not only borrowed Arkansas law to define "such" incorporated municipalities' powers, it also expanded and modified the terms of Arkansas law. It provided that municipal laws would apply to inhabitants without regard to race and expanded the powers of mayors, by authorizing them to exercise the authority of United States Commissioners in the Indian Territory. The Oklahoma Supreme

Court, Eighth Circuit, and Tenth Circuit have repeatedly found that statehood not only ended the application of Arkansas law in the new State, but that it also terminated modifications to Arkansas law that Congress enacted, even when they were themselves found nowhere in Arkansas law. *See In re Pigeon's Estate*, 198 P. 309, 317 (Okla. 1921); *Tiger v. Slinker*, 4 F.2d 714, 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). As the Oklahoma Supreme Court put it, allowing such modifications to govern the applicability of Oklahoma state law would require the court to:

> detach from the dead corpse of 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[.]

Pigeon's Estate, 198 P. at 317.

B. Municipalities Empowered Under the Curtis Act Ceased to Exist as Legal Entities Post-Statehood.

As demonstrated above, the Curtis Act subjected Indians to the jurisdiction of "such" municipalities only when "so organized and authorized" under Arkansas law. Nothing in the text of the statute subjects them to the jurisdiction of any municipality *not* so organized and authorized, or to the jurisdiction of any other municipality of any kind. And that is what all Indian Territory municipalities became upon statehood: Municipalities of another kind. Their existence as federal

instrumentalities terminated at statehood, and they then only existed under the laws of the Oklahoma Territory that were extended in force by the Oklahoma Constitution. That is, municipalities empowered under the Curtis Act ceased to exist as legal entities upon statehood – as Oklahoma's founding documents confirm. *See* Okla. Const. Sched. § 10 ("[C]ities and towns, heretofore incorporated under the laws in force … in the Indian Territory, shall continue their corporate existence under the [Oklahoma territorial] laws extended in force in the State"); Okla. Const. art. XVIII, § 3(a) (municipal charters after statehood would be "subject to the Constitution and laws of this State" and would "supersede any existing charter[.]").[2]

Nothing in the Curtis Act or the Enabling Act prevented Oklahoma from establishing its municipalities in these clear and precise terms, and it did so. *See, e.g.*, *Lackey v. State ex rel. Grant*, 116 P. 913, 914 (Okla. 1911) (after statehood, "the powers of such corporations … 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."); *State ex rel. West v. Ledbetter*, 97 P. 834, 835 (Okla. 1908) (upon statehood, "the form of government theretofore existing in the Indian Territory ceased to exist," and the laws under which

[2] Tulsa adopted its new charter in 1908 and it was approved by the Governor of Oklahoma in 1909. *See City of Tulsa v. Sw. Bell Tel. Co.*, 75 F.2d 343, 346 (10th Cir. 1935).

municipalities had exercised their municipal powers there "became inoperative"); *State ex rel. Kline v. Bridges*, 94 P. 1065, 1067 (Okla. 1908) (after statehood, an Indian Territory municipality "could not operate or exercise its powers under the laws in force in the Indian Territory prior to the admission of the state"). None of these controlling interpretations of Oklahoma law is inconsistent with the Curtis Act, which applied only to "such" municipalities "when so organized" under Arkansas law and contained not a word requiring that they remain "so organized" after statehood, and they did not.[3]

II. The Oklahoma Association of Municipal Attorneys' Constitutional Argument is Without Merit.

The Oklahoma Association of Municipal Attorneys ("OAMA") tries to circumvent the effect that statehood had on the power of municipalities. It invents an argument, unsupported by any case law, that when Congress granted

[3] *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), recognized the legal severance that statehood represented from the pre-statehood statutory scheme in the Indian Territory. *See, e.g.*, 140 S. Ct. at 2477 (stating that "the statutes the State directs us to [including the Curtis Act] … *say nothing about the division of responsibilities between federal and state authorities after Oklahoma entered the Union*[,]" and rejecting that the Enabling Act "made [Oklahoma's] courts the inheritors of the federal territorial courts' sweeping authority to try Indians for crimes committed on reservations." (emphasis added)). *See also id*. at 2476 (referring to Curtis Act and other pre-statehood statutes as "statutory artifacts from [Oklahoma's] territorial history"); *Jefferson v. Fink*, 247 U.S. 288, 292 (1918) (stating that "Congress was then contemplating the early inclusion of that territory in a new state," and describing the same statutes as "[p]lainly … intended to be merely provisional." (quotation marks omitted)).

municipalities in the Indian Territory authority over inhabitants "without regard to race," it did so under Article I of the Constitution, whereas Congress approved statehood under Article IV, and so statehood abrogated some parts of the Curtis Act, but not others. Br. of Amicus Curiae Oklahoma Association of Municipal Attorneys at 12–13 ("OAMA Br."). This argument suffers a number of fatal flaws. The plain text of the Curtis Act, which OAMA ignores, conferred authority only to "such" municipalities incorporated under Arkansas law. *See supra*, Part I.A. OAMA also ignores that the "without regard to race" provision of the Curtis Act is not a jurisdictional grant specifically keyed to Indians but encompassed *all* inhabitants. For that reason, it was not simply an exercise of Congress's Article I power over Indians and Indian tribes.

OAMA also misunderstands the authority that Congress exercised when it authorized municipalities to incorporate in the Indian Territory and defined the terms on which they could do so. Congress exercised over the territories:

> 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…. Upon 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.

Okla., Kan. & Mo. Interurban Ry. Co. v. Bowling, 249 F. 592, 593–94 (8th Cir. 1918). Given Congress's "combined powers" over the Indian Territory, there is no basis for OAMA's assertion that Congress was rapidly flipping between different powers as it passed the various clauses of section 14 of the Curtis Act.

If that were not enough, OAMA also ignores Supreme Court precedent rejecting the continued existence, in Oklahoma, of provisions of federal law governing purely local matters in the Indian Territory, even where those local matters affected Indians. In *United States v. Wright*, 229 U.S. 226, 236 (1913), the Supreme Court considered whether a pre-statehood federal statute, the Act of March 1, 1895, ch. 145, 28 Stat. 693, which specifically forbade the introduction of liquor by "any person, whether an Indian or otherwise," into the Indian Territory, *id.* § 8, 28 Stat. at 697, continued to govern intrastate transportation of liquor into the former Indian Territory after statehood. 229 U.S. at 227, 236. The *Wright* Court found that it did not. It explained that, when the Indian Territory became part of Oklahoma, the act of statehood "repealed . . . a territorial prohibition applicable to the Indian territory because made so by Congress, irrespective of other considerations[.]" *Id.* at 236. The March 1, 1895 Act "was, by its terms, applicable to the territory as a territory and as a whole, irrespective of whether it was Indian country; and this kind of internal prohibition of the liquor traffic would naturally cease with statehood, because inconsistent with local self-government and with

equality between the states." *Id.* at 237. The statute's application to "any person, whether Indian or otherwise" gave the Supreme Court no pause. Meanwhile, other federal liquor laws that applied to all Indian country, "throughout the states and territories generally," continued to apply in Indian country in Oklahoma, including in the former Indian Territory. *Id.* at 236. (cited in *Bowling*, 249 F. at 594).

That is true here, too. Congress's grant of statehood wiped out the federal laws Congress passed to govern the entire Indian Territory as a territory, such as section 14 of the Curtis Act—including provisions of federal law modifying the scope of Arkansas law throughout the Territory and applying them to all inhabitants regardless of race, *see supra* at 4 (citing *Pigeon's Estate*, 198 P. at 317; *Tiger*, 4 F.2d at 714; *Dunn*, 106 F.2d at 358–59). Meanwhile, the general federal laws that apply in Indian country throughout the entire United States were preserved—including the principle that states and their subdivisions lack authority over Indians in Indian country without express congressional approval.[4] That means all municipalities in

[4] *See McGirt*, 140 S. Ct. at 2459, 2477 (stating that "State courts generally have no jurisdiction to try Indians for conduct committed in 'Indian country" and that the Court "has long 'require[d] a clear expression of the intention of Congress' before the state … may try Indians for conduct on their lands.") (quoting *Ex parte Crow Dog*, 109 U.S. 556, 572 (1883)); *see also Ute Indian Tribe of the Uintah & Ouray Rsrv. v. Utah*, 790 F.3d 1000, 1003–04 (10th Cir. 2015). Oklahoma attempts to exempt Tulsa from this rule based on its status as a "home rule" or "charter" city under Oklahoma law. Oklahoma Br. at 8. This is a red herring. Tulsa derives the totality of its municipal power from Oklahoma. *See Toch, LLC v. City of Tulsa*, 474

Oklahoma, whether in the former Indian Territory or the former Oklahoma Territory, are subject to the same rule: Like the State, they lack authority over Indians in Indian country.

III. Oklahoma's *Castro-Huerta* Arguments Are Not Properly Before This Court.

Oklahoma argues that in its recent decision in *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486 (2022), the Supreme Court held that states possess criminal jurisdiction over Indians in Indian country unless Congress enacts a statute to the contrary. Oklahoma Br. at 5–9. This argument is not properly before this Court.

Tulsa did not raise it below or in its opening brief on appeal and therefore waived it. *See Schrock v. Wyeth, Inc.*, 727 F.3d 1273, 1284 (10th Cir. 2013) ("Arguments that were not raised below are 'waived for purposes of appeal.'" (quoting *Quigley v. Rosenthal*, 327 F.3d 1044, 1069 (10th Cir. 2003)); *United States v. Walker*, 918 F.3d 1134, 1151 (10th Cir. 2019) ("Ordinarily, a party's failure to address an issue in its opening brief results in that issue being deemed waived.").

P.3d 859, 866 (Okla. 2020) (stating, in a case involving Tulsa, that "[m]unicipalities possess and can exercise *only those powers* expressly or impliedly granted *by the state*." (emphasis added) (citations omitted)); *Parmenter v. City of Nowata*, No. 20-5113, 2022 WL 3572435, at *2 (10th Cir. Aug. 19, 2022) ("Oklahoma "has surrendered a portion of *its authority* by giving home-rule cities sovereignty over their municipal affairs." (emphasis added) (quotation marks omitted)).

In fact, Tulsa conceded below that Oklahoma lacked jurisdiction over Appellant and argued instead that it possessed its alleged jurisdiction independent of any state jurisdiction, and the court accepted that argument. *See* App. Vol. 1 at 17 ("Defendant counters, correctly, that 'a municipality may be granted powers by the federal government different than those granted to the state.'"); *see also id.* ("Congress affirmatively granted authority to a municipality that it did not give to the state."). And Tulsa reiterated that position in its brief to this Court, after *Castro-Huerta* was decided. *See* Resp. Brief on Behalf of Appellee City of Tulsa at 24 ("Tulsa Br.") ("[A] municipality may be granted powers by the federal government different than those granted to the state.").

In addition to being waived, the argument was injected into these proceedings solely by an amicus, and it was not incorporated or adopted by Tulsa. The argument does not raise issues about the jurisdiction of this Court or involve principles of federalism or comity, and Oklahoma has not even attempted to identify any other exceptional circumstances by which this Court could properly take up the issue. *See Tyler v. City of Manhattan*, 118 F.3d 1400, 1404 (10th Cir. 1997) ("[I]t is truly the exceptional case when an appellate court will reach out to decide issues advanced not by the parties but instead by *amicus*."); *Animal Legal Def. Fund v. Kelly*, 9 F.4th 1219, 1226 n.6 (10th Cir. 2021) ("[T]his court disfavors amicus briefs presenting arguments forgone by the parties themselves or effectively and unilaterally

expanding the word limits established by rule for a favored party." (quotation marks omitted)); *United States v. Ackerman*, 831 F.3d 1292, 1299 (10th Cir. 2016) (functions of amicus briefs "don't include presenting arguments forgone by the parties").

Even if Tulsa had argued that *Castro-Huerta* had held that states possess criminal jurisdiction over Indians in Indian country unless Congress expressly provides otherwise, the argument is without merit. The Court in *Castro-Huerta* granted certiorari solely on the question of state jurisdiction over non-Indians. *See id*. at 2492–93 ("[T]his Court granted certiorari to decide whether a State has concurrent jurisdiction with the Federal Government to prosecute crimes committed by non-Indians against Indians in Indian country."). It limited its analysis and holding to that question as well. *See id*. at 2491 ("We conclude that the Federal Government and the State have concurrent jurisdiction to prosecute crimes committed by non-Indians against Indians in Indian country."); *id*. at 2498 n.3 (describing "the distinct question we confront here" as "whether States have concurrent jurisdiction with the Federal Government over non-Indians who commit crimes against Indians in Indian country."); *id*. at 2504 n.9 ("The Court's holding is … States may exercise jurisdiction to prosecute crimes committed by non-Indians against Indians in Indian country."); *id*. at 2500 (describing "non-Indian on Indian crimes" as "the narrow jurisdictional issue in this case").

Not only did *Castro-Huerta* limit its holding and analysis to that issue, it expressly denied any intent to address the law governing state jurisdiction over Indians in Indian country: "[T]his case does not involve … a State's prosecution of crimes committed by an Indian against a non-Indian in Indian country. *We express no view on state jurisdiction over a criminal case of that kind*." *Id*. at 2501 n.6 (emphasis added). *See also id*. at 2495 n.2 (state jurisdiction over Indians is "a question not before us"). "To reiterate, we do not take a position on that question." *Id*. at 2504 n.9.

Thus, the Court should not consider the State's *Castro-Huerta* arguments because they are not properly before this Court. And if they were, *Castro-Huerta* expressly did not reach, and in fact repeatedly disclaimed any intent to reach, the issue of state jurisdiction over Indians as the State contends.

IV. That Appellant is Not A Creek Citizen is Irrelevant.

Oklahoma closes its brief with the assertions that, as a Choctaw citizen, Appellant is "not part of the Creek's 'self' because he is not Creek." Oklahoma Br. at 22. This reasoning, even when better stated, has been expressly rejected by Congress, the Supreme Court, and this Court. As this Court has recognized, the presumption against state criminal jurisdiction over Indians, of any tribal citizenship, within Indian country is grounded in the "[f]ederal protection of tribal self-government[.]" *Kaul v. Stephan*, 83 F.3d 1208, 1216 (10th Cir. 1996). Congress

has in fact recognized that "'powers of self-government' means and includes … the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over *all Indians*[.]" 25 U.S.C. § 1301(2) (emphasis added). *See also United States v. Lara*, 541 U.S. 193, 198 (2004) (Tribes' "'powers of self-government' … include 'the inherent power … to exercise criminal jurisdiction over *all* Indians,' *including nonmembers*." (emphasis added) (quoting 25 U.S.C. § 1301(2)); *Thlopthlocco Tribal Town v. Stidham*, 762 F.3d 1226, 1240 n.7 (10th Cir. 2014) ("[T]he tribe's powers of self-government include … 'jurisdiction over *all* Indians' … in criminal suits." (quoting 25 U.S.C. § 1301(2)).

Oklahoma argues that federal law "expressly declines to oust state jurisdiction," over non-member Indians in Indian country, Oklahoma Br. at 22. But it cites only to 25 U.S.C. § 1304(b)(3), which addresses only tribal domestic violence jurisdiction and states that "Nothing *in this section* … creates or eliminates any Federal or State criminal jurisdiction over Indian country[.]" (emphasis added)). That does not affect Congress's broader determination, codified in Section 1301, that Indian tribes have jurisdiction over all Indians within their Indian country. *See, e.g.*, *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 493 (1987) (a statute's use of "[n]othing *in this section*" does not affect "other provisions of the Act." (quotation marks omitted) (emphasis by the Court)).

V. Affirming the District Court Would Not Result in Needed Uniformity in the Law.

Tulsa claims that affirming the district court would result in the uniform enforcement of municipal law. *See* Tulsa Br. at 31–32. This is not true. As a threshold matter, the Curtis Act, as discussed above, authorized municipalities to exercise jurisdiction over inhabitants of only "*such* cities and towns" that incorporated under Arkansas law pursuant to section 14. § 14, 30 Stat. at 499. But many towns never incorporated under section 14, meaning that they never had section 14 jurisdiction. *See* Appellant's Br. at 27 n.13. Moreover, in the Cherokee Nation, specifically, the City of Owasso—a major suburb of Tulsa—and nine other municipalities have signed agreements with the Cherokee Nation in which they agree that "the State of Oklahoma, and its municipalities do not have jurisdiction over crimes occurring on the Cherokee Reservation involving Indian defendants" and "Indian perpetrators who offend within the [municipalities] are subject to the Cherokee Nation's criminal laws and the jurisdiction of the Cherokee Nation's courts." *See, e.g.*, Memorandum of Agreement Between Cherokee Nation and City of Owasso, § 1 (October 13, 2021).[5] So they are at odds with Tulsa's view, and perhaps other municipalities are, as well.

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

Moreover, the Curtis Act extended municipal jurisdiction over "all *inhabitants* of such cities and towns[.]" § 14, 30 Stat. at 499 (emphasis added). Tulsa breezes past this fact. "An individual is almost universally held to be an inhabitant of the place in which he dwells[.]" *Galveston, H. & S.A. Ry. Co. v. Gonzales*, 151 U.S. 496, 504 (1894). As then-Judge Stephen Breyer explained for the First Circuit in interpreting the word "inhabitant" in a 19th century statute, although courts "have interpreted the word 'inhabitant' to cover a range of different relationships between a person and a place":

> we have examined dictionary definitions of the word "inhabitant," definitions found both in general and legal dictionaries, both modern dictionaries and nineteenth century dictionaries…. All of them define the word in terms of "dwelling" in a place, which … they define in terms of "living in," "having a habitation in," or "residing in," a place. None of these terms can be used to describe a daytime visit by one who lives elsewhere.

United States v. Maravilla, 907 F.2d 216, 224 (1st Cir. 1990) (Breyer, J.).

So, would section 14 confer jurisdiction on Tulsa over an Indian motorist who lives elsewhere and is just passing through on Interstate 44, or there for a short stay at a friend's house or a hotel? Apart from the plain meaning of "inhabitant" described above, the Curtis Act strongly suggests that it would not, as it allows those same "inhabitants" to petition for municipal incorporation, and confers municipal voting rights on "inhabitants of such cities and towns[.]" § 14, 30 Stat. at 499. Far from promoting uniformity in the law, accepting Tulsa's position would add another

potentially complex layer of inquiry to every traffic or other police stop. *Compare*, *e.g.*, Black's Law Dictionary, 622 (1st ed. 1890) ("INHABITANT. One who resides actually and permanently in a given place, and has his domicile there."),[6] *with Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 48 (1989) ("one can reside in one place but be domiciled in another"). *See also Maravilla*, 907 F.2d at 224 ("courts, in the past, have interpreted the word 'inhabitant' to cover a range of different relationships between a person and a place."); Webster's New International Dictionary of the English Language, 1109 (1923) (defining "Inhabitant" to mean "One who dwells or resides permanently in a place, as distinguished from a transient lodger or visitor; as, an *inhabitant* of … a town," but noting that "*Inhabitant* is not a term of exact meaning. It ordinarily implies more fixity of abode than *resident*[.]").[7]

Tulsa endorses yet another new layer of confusion by proposing a new appellate system, under which anyone inhabiting section 14 municipalities in the former Indian Territory must appeal their municipal convictions to federal district court. Tulsa Brief at 32–34. The City relies on *Missouri, K & T Ry. Phelps*, 76 S.W. 285, 286 (Indian Terr. 1903), to support this argument, but *Phelps* was a *pre-*

[6] https://archive.org/details/blacks-law-dictionary-1st-edition-1891/page/621/mode/2up?view=theater.

[7] https://archive.org/details/webstersnewinter00unse_0/page/1108/mode/2up.

statehood case that addressed appeals to the United States Court for the Indian Territory, not the United States District Courts. Tulsa has identified no procedural mechanism (and Appellant is aware of none) that permits those convicted of a municipal violation to file a direct appeal with the federal district court. That is the precise reason that Appellant sought declaratory relief as a part of his claim, and the district court never addressed this question. *See* App. Vol. 1 at 11–12.

Tulsa further sets forth a range of bare allegations as to the various difficulties that may result if it cannot exercise criminal jurisdiction over Indians in Indian country. Tulsa Br. at 29–32. The City's failure to offer any supporting evidence for its claims suggests the City itself is not convinced of the seriousness of these risks—and for good reason. The City's concerns over "ad hoc exemptions," Tulsa Br. at 32, are unfounded non sequiturs, as the inapplicability of municipal authority to Indians in Indian country is based on clearly and firmly pre-established factors: the existence of Indian country and citizenship in a tribe. The City's concerns about traffic violations by Indians within its limits are directly addressed by its cross-deputization agreements with the Muscogee (Creek) and Cherokee Nations, as the tribal *amici* have explained. *See* Br. of Amicus Curiae Muscogee (Creek) Nation at 24–25 ("MCN Br."); Br. of Amici Curiae Cherokee Nation et al. at 4–5 ("Amici Nations Br."). Indeed, this Court has rejected arguments such as Tulsa's on these very grounds where a tribe sought an injunction against state and county

enforcement of traffic laws in Indian country against Indians, and the state and county invoked the same concerns Tulsa invokes here:

> [T]he State and Wasatch County argue an injunction would impede their ability to ensure safety on public rights-of-way. But this concern is not as portentous as [they] would have it…. It isn't because nothing in the requested temporary injunction would prevent the State and County from patrolling roads like the ones on which Ms. Jenkins was stopped, from stopping motorists suspected of traffic offenses to verify their tribal membership status, from ticketing and prosecuting non-Indians for offenses committed on those roads, from referring suspected offenses by Indians to tribal law enforcement, or from adjudicating disputes over the Indian status of accused traffic offenders when meaningful reasons exist to question that status.

Ute Indian Tribe, 790 F.3d at 1007 (quotation marks and citation omitted).

Finally, the City's belated concern that individual Indians may be confused over what law applies within its boundaries is misplaced: The boundaries of the Cherokee Nation and Muscogee (Creek) Nation Reservations are clear, and both tribes' traffic codes mirror Oklahoma's. *See* MCN Br. at 24–25; Amici Nations Br. 8–9. Really, it is the City that offers confusion. Tulsa's proposed solution is for municipalities organized under section 14 to possess concurrent jurisdiction with tribes. All Indians would also remain subject to tribes' criminal jurisdiction under 25 U.S.C. § 1301(2), *supra* at 14. Municipal law enforcement would retain authority under cross-deputization agreements to arrest Indians and, in truly *ad hoc* fashion, make unaccountable decisions either to refer them to tribal law enforcement for prosecution under tribal law or send Indians to municipal courts for prosecution

under the municipal code. Indians in Tulsa would have no way to anticipate what system is favored by the police officers they happen to encounter.

VI. The Curtis Act Does Not Authorize a Municipality to Expand Its Jurisdiction Through Annexation.[8]

It is essential to realize that the offense of which the Appellant was convicted in municipal court occurred at a location that was not annexed into the city of Tulsa until 1966. This fact is undisputed. What is disputed is what jurisdiction over Indians, if any, follows these annexations. It is true that the laws of Arkansas permitted cities to annex land, but there is no language in either Arkansas law or in the Curtis Act that allows a city to increase its jurisdiction over Indians by exercising

[8] The City complains about the Appellant's submission of documents supporting this history. The documents are all public legal documents whose accuracy cannot reasonably be questioned, and Tulsa does not question their accuracy. So, the Court can take judicial notice of them regardless of whether they were submitted to the district court. *See Warnick v. Cooley*, 895 F.3d 746, 754 n.6 (10th Cir. 2018) (on an appeal of decision on Rule 12(b)(6) motion, Court of Appeals may consider "matters of which a court may take judicial notice" (quoting *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007))); *In re Calder*, 907 F.2d 953, 955 n.2 (10th Cir. 1990) (quoting Fed. R. Evid. 201(b)(2)); *see also Winzler v. Toyota Motor Sales U.S.A., Inc.*, 681 F.3d 1208, 1213 (10th Cir. 2012) (taking judicial notice of documents showing mootness without remanding to district court, because remand would be pointless where "a case's mootness is readily apparent" based on the noticed documents). A brief survey of these documents shows that they are gubernatorial proclamations, the application of the City of Tulsa to incorporate to the federal courts, the order incorporating them to the federal courts, documents supporting their incorporation to the state of Oklahoma, and maps showing Tulsa's growth through annexations. Appellant provided them in an appendix for this Court's convenience.

jurisdiction over Indians on that annexed land. The United States Supreme Court "require[s] a clear expression of the intention of Congress" before the state or federal government may prosecute Indians for offenses committed in Indian country. *McGirt*, at 2477 (citing *Ex parte Crow Dog*, 109 U.S. 556 (1883)).

In further defense, the city argues that any challenge to the expansion of the city should be barred by laches and acquiescence. In support of this contention, the city offers the case of *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197 (2005). But the City waived any reliance on *Sherrill*. The City never discussed or even mentioned *Sherrill* or the equitable principles discussed that case to the district court, and "[a]n issue is waived if it was not raised below in the district court," *Wilburn v. Mid-S. Health Dev., Inc.*, 343 F.3d 1274, 1280 (10th Cir. 2003) (citing *Walker v. Mather*, 959 F.2d 894, 896 (10th Cir. 1992)). *Accord Singleton v. Wulff*, 428 U.S. 106, 120 (1976) ("a federal appellate court does not consider an issue not passed upon below").

What's more, *Sherrill* is distinguishable. The case concerned an Indian tribe's effort to obtain prospective relief against future taxation by a local government. The tribe argued that, by purchasing lands within its historical reservation that it had abandoned decades earlier, the tribe had re-established its sovereignty over those lands. In rejecting that claim, the Supreme Court found that a municipality could raise equitable defenses in litigation against the tribe's claim for a prospective

remedy because the tribe had abandoned the reservation long ago. *See* 544 U.S. at 206–07, 213. This case is different for many reasons. It does not concern tribal authority based on the possession of land, which is an essential element of a *Sherrill* claim. *Cf. Oneida Indian Nation of N.Y. v. County of Oneida*, 617 F.3d 114, 125–26 (2d Cir. 2010); *Cayuga Indian Nation of N.Y. v. Pataki*, 413 F.3d 266, 273–78 (2d Cir. 2005). Instead, the scope of municipal authority over Mr. Hooper is determined by the definition of "Indian country" in a federal statute, which includes all Indian reservations regardless of the ownership of that land. 18 U.S.C. § 1151(a). *Sherrill* itself acknowledged that even the tribe in that case could exercise the sovereign power it sought if it did so according to a federal statute. 544 U.S. at 220–21. Moreover, the Appellant is not seeking the type of prospective remedy at issue in *Sherrill*. *Sherrill* concerned the availability of certain remedies, not the existence of underlying rights. *See Canadian St. Regis Band of Mohawk Indians v. New York*, No. 5:82-cv-0783, 2022 WL 768669, at *2 (N.D.N.Y. Mar. 14, 2022). Finally, unlike the tribe in *Sherrill*, Muscogee (Creek) Nation (and the other tribes in Oklahoma, for that matter) "maintain[s] a strong and active presence" on its Reservation and has never engaged in the "out-and-out abandonment of a reservation" that had occurred in *Sherrill*. *Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wis. v. Evers*, No. 21-1817, 2022 WL 3355076, at *7

(7th Cir. Aug. 15, 2022). The analysis in *Sherrill* offers no guide for resolving Mr. Hooper's claims.

CONCLUSION

Appellant respectfully urges that for the reasons stated above and in its opening brief, as well as the arguments contained in the briefing of Appellant's amici, which Appellant adopts, the decision of the district court be reversed.

Respectfully submitted this day of September 2, 2022.

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CERTIFICATE OF COMPLIANCE

As required by Fed. R. App. 32(a) (7)(c), I certify that this brief is proportionally spaced and contains 4,987 words.

I relied on my word processor to obtain the count and it is Microsoft Word Office 16, Times New Roman 14 point font.

I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

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CERTIFICATE OF DIGITAL SUBMISSION

I certify that all required privacy redactions have been made, and, with the exception of those redactions, every document submitted in digital form or scanned PDF format is an exact copy of the written document filed with the clerk.

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