

ORIGINAL



IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA **FILED**
COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

MAR 18 2024

JOHN D. HADDEN
CLERK

Case No. S-2023-715

Tulsa Municipal Court Nos. 720766
720766A
720766B
720766C
720766D

CITY OF TULSA,

Appellant,

v.

NICHOLAS RYAN O'BRIEN,

Appellee.

**MOTION OF THE MUSCOGEE (CREEK) NATION
FOR AUTHORIZATION TO FILE A BRIEF AMICUS CURIAE
AND TO PRESENT ORAL ARGUMENT**

Pursuant to Rule 3.4(F)(4) of the Rules of the Oklahoma Court of Criminal Appeals (“OCCA”), the Muscogee (Creek) Nation (“Nation”) respectfully moves this Court for authorization to file a brief amicus curiae in this matter. The Nation also requests that the Court hold oral argument and allow the Nation to participate, pursuant to this Court’s Rule 3.8.

The Nation’s proposed brief has been tendered for filing contemporaneously with this motion. Counsel for Mr. O’Brien does not object to this motion. Counsel for the City of Tulsa (“Tulsa” or “City”) does not object to the Nation’s filing of an amicus brief but does object to the Nation’s request for oral argument.

In support of its motion, the Nation states as follows:

1. The Nation is a federally recognized Indian tribe. *See* 89 Fed. Reg. 944-02, 946 (Jan. 8, 2024). It occupies and governs the Muscogee (Creek) Reservation, which is Indian country under federal law, as confirmed in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020).

2. In the wake of *McGirt* and the Supreme Court’s subsequent decision in *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486 (2022), the State of Oklahoma and certain of its political subdivisions, including the City of Tulsa, have asserted in both state and federal courts that they enjoy criminal jurisdiction over Indians within the Nation’s Reservation, contrary to longstanding principles of federal law affirmed in *McGirt* and not disturbed by *Castro-Huerta*.

3. The Nation has a strong interest in the courts’ continued adherence to those longstanding principles, which secure the Nation’s sovereign authority to enact and enforce its own criminal laws against all Indians within its jurisdiction free of interference from inconsistent or conflicting State laws. *See, e.g., Williams v. Lee*, 358 U.S. 217, 223 (1959) (“There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to

govern themselves.”); *Fisher v. District Court*, 424 U.S. 382, 387 (1976) (“State-court jurisdiction plainly would interfere with the powers of self-government conferred upon the Northern Cheyenne Tribe and exercised through the Tribal Court.”).

4. This case raises legal questions of exceptional public importance in which the Nation has a substantial interest. The Nation believes that its participation as *amicus curiae* could benefit the Court’s resolution of the significant question of state jurisdiction over Indians in Indian country in the wake of *McGirt* and *Castro-Huerta*. See *Valdez v. Oklahoma*, No. PCD 2001-1011, 2001 WL 1715885, at *1 (Okla. Crim. App. Sept. 10, 2001) (permitting *amicus* participation in case addressing “a unique and serious matter involving novel legal issues”). The Nation respectfully submits that its perspective will “be of assistance to the Court,” OCCA Rule 3.4(F)(4), as the Nation is best positioned to address issues of tribal sovereignty and governance implicated by this case.

5. This Court has previously permitted the Nation to participate as an *amicus* in matters concerning disputed jurisdiction over Indian defendants. See Order Granting Mots. of *Amici Curiae* for Leave to File Brs. and Granting Mots. to Associate Counsel (Jan. 18, 2023), *State v. Hull* (No. S-2021-110); Order Granting Mots. of *Amici Curiae* for Leave to File Brs. and Granting Mots. to Associate Counsel (May 1, 2023), *Stitt v. City of Tulsa* (No. M-2022-984). This Court likewise invited the Nation to file a supplemental brief in *Stitt* to “address[] the impact of the *Hooper* decision [and] the impact of *Castro-Huerta* on the possible preemption of municipal jurisdiction in this case, and whether under *Bracker* the City of Tulsa has concurrent jurisdiction over its municipal offenses.” Order Directing Suppl. Briefing and

Establishing Due Dates (Sept. 19, 2023) at 2, *Stitt* (No. M-2022-984) (directing parties to file briefs and inviting amici Tribal Nations to file same).¹

6. In addition, the Nation respectfully requests that the Court hold oral argument in this matter and that it grant the Nation an opportunity to present its views and address the Court's questions at argument. This Court has authority to call for argument in any matter "if, in the opinion of the judges, oral argument is beneficial or necessary for a determination of the issues presented." Okla. Stat. tit. 22, ch. 18 app., § III, Rule 3.8; *see also* Order Setting Oral Arg. (Feb. 10, 2023), *Foote v. State*, 2023 OK CR 12, 533 P.3d 354 (Case No. F-2022-2) (order directing the parties to present oral argument *sua sponte*). The Nation submits that this is such a case.

7. Since *McGirt*, various parties have placed the issue of State and municipal jurisdiction over Indians in Indian country before this Court. *See, e.g., Hull* (No. S-2021-110); *State v. Brester*, 2023 OK CR 10, 531 P.3d 125; *Stitt* (No. M-2022-984); *Deo v. Parish*, 2023 OK CR 20, 541 P.3d 833. And as noted, this Court has requested the Nation's views on the precise issues presented in this case, Order Directing Suppl. Briefing and Establishing Due Dates (Sept. 19, 2023) at 2, *Stitt* (No. M-2022-984) (directing parties and inviting amici Tribal Nations to file briefs on the applicability of *Castro-Huerta* and Section 14 of the Curtis Act), and has granted the Nation leave to file an amicus curiae brief on *Castro-Huerta's* applicability in cases involving Indian defendants, Order Granting Mots. of Amicus Curiae for Leave to File Brs., and Granting United States's Mot. for an Extension to File Amicus Curiae Br. (Jan. 18, 2023), *Hull*

¹ Indeed, this Court has long permitted Indian Nations to participate as amici in matters concerning disputed jurisdiction over Indian defendants. *See, e.g., State ex rel. Matloff v. Wallace*, 2021 OK CR 21, ¶ 6 n.2, 497 P.3d 686, 688 n.2 (permitting amicus participation of the Cherokee, Chickasaw, Choctaw, and Creek Nations); *Martinez v. State*, 2021 OK CR 40, ¶ 9, 502 P.3d 1115, 1117–18 (Comanche Nation); *Cravatt v. State*, 1992 OK CR 6, ¶ 4, 825 P.2d 277, 278 (Choctaw Nation of Oklahoma and Chickasaw Nation).

(No. S-2021-110). The Nation would welcome the ability to answer this Court's questions and address its concerns in the way that oral argument makes possible. The resolution of this case will have sweeping implications for the Nation. It will determine whether the Nation's Reservation will be treated in accordance with long-accepted principles of law, and the Nation requests the opportunity to speak to the Court in its own voice as to the sovereign interests at stake. *Cf. McGirt*, 140 S. Ct. at 2460 ("At another level, then, Mr. McGirt's case winds up as a contest between State and Tribe.").

8. The United States Supreme Court, the Oklahoma Supreme Court, and the Tenth Circuit have all granted the Nation argument time as an amicus in cases concerning governance and jurisdiction within the Nation's Reservation.

9. The United States Supreme Court has recognized the importance of the Nation's participation in cases concerning the allocation of jurisdiction in the Nation's Reservation and has permitted the Nation to participate in oral argument as an amicus in such cases. Text Order (Mar. 30, 2020), *McGirt* (No. 18-9526) (granting equal argument time to each of the parties, amici the Muscogee (Creek) Nation, and the United States Solicitor General); *Carpenter v. Murphy*, 139 S. Ct. 398 (2018) (granting joint motion of respondent and the Nation for leave for the Nation to participate in oral argument as amicus curiae and for divided argument time).

10. In *Stroble v. Oklahoma Tax Commission*, No. TC-120806 (Okla.), the Oklahoma Supreme Court granted the Nation's motion to hold oral argument and to participate in it. Order Granting Mot. for Oral Arg. (Oct. 10, 2023), *Stroble* (No. TC-120806) (setting oral argument and permitting Nation, as amicus curiae, to argue in matter involving Oklahoma's jurisdiction to impose income taxes on Creek citizens within the Nation's boundaries).

11. The Tenth Circuit has likewise permitted the Nation to file amicus briefs and

participate in oral argument with respect to the question of State jurisdiction over Indians within the Nation's Reservation boundaries, *see* Order (Aug. 3, 2016), *Murphy v. Royal*, 875 F.3d 896 (10th Cir. 2017) (Nos. 07-7068, 15-7041) (granting unopposed motion to file over-length brief); Order (Feb. 15, 2017), *Murphy* (Nos. 07-7068, 15-7041) (granting oral argument time to Nation as amicus curiae), including to address many of the same Curtis Act arguments that Tulsa raises here, Text Order (July 8, 2022), *Hooper v. City of Tulsa*, 71 F.4th 1270 (10th Cir. 2023) (No. 22-5034) (authorizing Nation to file an amicus brief); Order (Feb. 2, 2023) *Hooper* (No. 22-5034) (granting Nation's request for oral argument time to address the question of Tulsa's jurisdiction to prosecute Indians in the Nation's Reservation).

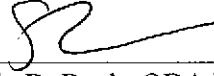
12. The Nation's amicus participation is equally warranted here. As in *Murphy*, *McGirt*, *Stitt*, and *Hooper*, the Nation had no role in the genesis of this litigation. And as in those matters, the parties here have pressed arguments that could directly, and potentially gravely, impact the Nation's sovereignty, with an individual litigant the sole party positioned against a non-Tribal government asserting jurisdiction within Reservation boundaries. *See McGirt*, 140 S. Ct. at 2460 (“[T]he Creek Nation participates [as amicus curiae] because Mr. McGirt’s personal interests wind up implicating the Tribe’s.”); *id.* (“At another level, then, Mr. McGirt’s case winds up as a contest between State and Tribe.”).

For the foregoing reasons, the Nation respectfully requests authorization from this Court to file the Brief Amicus Curiae that has been tendered for filing with this motion and to present oral argument to this Court with respect to the issues raised therein.

Dated: March 18, 2024

Geraldine Wisner, OBA No. 20128
Attorney General
MUSCOGEE (CREEK) NATION
P.O. Box 580
Okmulgee, OK 74447
(918) 295-9720
gwisner@mcnag.com

Respectfully submitted,



Stephanie R. Rush, OBA No. 34017
KANJI & KATZEN, P.L.L.C.
P.O. Box 2579
Sapulpa, OK 74067
(206) 486-8211
vrush@kanjikatzen.com

Riyaz A. Kanji, PHV No. 2024-101
David A. Giampetroni, PHV No. 2024-102
Philip H. Tinker, PHV No. 2024-103
KANJI & KATZEN, P.L.L.C.
P.O. Box 3971
Ann Arbor, MI 48106
(734) 769-5400
rkanji@kanjikatzen.com
dgiampetroni@kanjikatzen.com
ptinker@kanjikatzen.com

Counsel for Amicus Curiae Muscogee (Creek) Nation

CERTIFICATE OF SERVICE

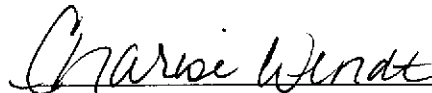
I certify that on March 18, 2024, this document was served on all parties or their counsel of record by placing a true and correct copy in the United States mail, postage prepaid, to their address of record:

Kristina L. Gray, OBA No. 21685
Litigation Division Manager
Becky M. Johnson, OBA No. 18282
Senior Assistant City Attorney
City of Tulsa, OK
175 East 2nd St., Ste. 685
Tulsa, OK 74103
(918) 596-7717
kgray@cityoftulsa.org
beckyjohanson@cityoftulsa.org

Counsel for Appellant City of Tulsa

Brett Chapman, OBA No. 30334
15 West 6th St., Ste. 2800
Tulsa, OK 74119
(918) 928-2119
bac@brettachapman.com

Counsel for Appellee O'Brien



Charise Wendt
Paralegal
KANJI & KATZEN, P.L.L.C.
P.O. Box 2579
Sapulpa, OK 74067
(833) 467-3316
cwendt@kanjikatzen.com