No.

In The
Supreme Court of the United States

THE CITY OF TULSA,
Applicant,
v.
JUSTIN HOOPER,
Respondent.

On Application for Stay

EMERGENCY APPLICATION FOR A STAY OF MANDATE PENDING THE FILING AND DISPOSITION OF A PETITION FOR WRIT OF CERTORARI

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July 24, 2023

PARTIES TO THE PROCEEDING AND RELATED PROCEEDINGS

The parties to the proceeding below are as follows:

The applicant is the City of Tulsa, a municipal corporation located in Oklahoma.

Respondent is Justin Hooper, a citizen of the City of Tulsa and a member of the Choctaw Nation, a federally recognized Indian tribe.

The proceedings below are:

1. *Hooper v. City of Tulsa*, 71 F.4th 1270, 2023 WL 4220246 (10th Cir. 2023) – Case No. 22-5034, Judgment entered June 28, 2023;

2. *Hooper v. City of Tulsa*, Case No. 21-CV-165-WPJ-JFJ, Judgment entered April 13, 2022.

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To the Honorable Neil Gorsuch, Associate Justice of the Supreme Court of the United States, and Circuit Justice for the Tenth Circuit.

Pursuant to 28 U.S.C. §2101(f) and Supreme Court Rule 23, Applicant City of Tulsa respectfully requests that this Court stay the Tenth Circuit's mandate from issuing in *Hooper v. City of Tulsa*, No. 22-5034, 71 F.4th 1270, 2023 WL 4220246 (10th Cir. 2023), pending the filing and disposition of Applicant's petition for writ of certiorari.

This Court should grant this application to stay the mandate. In *McGirt v. Oklahoma*, 140 S.Ct. 2452 (2022), this Court held that the City of Tulsa is situated not only within the State of Oklahoma, but also in the Muscogee Reservation. That decision was subsequently applied to the similarly situated Cherokee Reservation, such that 95 percent of the City of Tulsa is Indian Country. Since *McGirt*, numerous issues have surfaced which had lain fallow for more than a century. Among them is whether municipalities, like Tulsa, which incorporated pursuant to the Curtis Act of 1898 (30 Stat. 495), are empowered to apply municipal ordinances equally to all inhabitants of the City.

On June 28, 2023, the Tenth Circuit entered its Opinion and Order and Judgment in *Hooper v. City of Tulsa*, holding that §14 of the Curtis Act was no longer applicable to the City of Tulsa after the City became part of the new State of Oklahoma and no longer incorporated by reference to the incorporative laws of Arkansas. [App. p. 1-36]. The effect of this decision is that the City of Tulsa, and other similar cities throughout eastern and southern Oklahoma, cannot enforce municipal ordinances against Indian inhabitants who violate them within City limits.

The City filed a Motion in the Tenth Circuit to Stay the Mandate. The Court denied the motion on July 19, 2023, without allowing the City the chance to reply to the Respondent's and *Amici* Tribe's responses to the City's Motion. [App. p. 37-38]. Pursuant to Federal Rule of Appellate Procedure 41, absent relief from this Court, the mandate will issue on or before July 26, 2023. Should the mandate issue, the City of Tulsa will no longer be able to enforce violations of municipal ordinances against Indian inhabitants.

In *McGirt*, Justice Roberts noted in dissent that "the Curtis Act established municipalities to govern both Indians and non-Indians," but that issue was not directly before the Court; thus, the applicability of the Curtis Act to present-day cities was not addressed. As the Court observed in *Oklahoma v. Castro-Huerta*, 597 US _, 142 S.Ct. 2486 (2022), "the jurisdictional question has now been called."

The City respectfully submits that this Court is likely to grant *certiorari* as this case contains "an important question of federal law that has not been, but should be, settled by this Court…" S. Ct. R. 10(c). At no time in the 125 years since its enactment has this Court been asked to evaluate and interpret continued municipal jurisdiction under §14 of the Curtis Act. In the wake of *McGirt*, the applicability of the Curtis Act to modern-day cities has become of great importance and warrants this Court's review.

To be clear, the City does not seek a re-examination of *McGirt* or *Castro-Huerta,* which the City acknowledges are settled. Instead, the present case raises the

issue of statutory interpretation and application of §14 of the Curtis Act of 1898, which has never been decided by this Court.

As set forth herein, Applicant also believes it is likely the Court will reverse the judgment below if it grants *certiorari*. By overlooking the plain meaning of Congress's words, the Court below held that Congress's commitment to equal application and protection of the laws in section §14 of the Curtis Act ended upon Statehood. This interpretation of the language of §14 of the Curtis Act is inconsistent with established rules of construction and the purpose and intent of the statute.

Lastly, the balance of equities favors a stay. The Circuit Court's decision creates a potentially dangerous situation for the citizens of Tulsa and other similar municipalities. Inhabitants of these cities are now subject to areas where the laws enacted for the protection of the health and safety of its residents are only enforceable by the City against some citizens but not others. The perceived lack of Municipal Court jurisdiction has already caused Indian residents to challenge and confront Tulsa Police officers at traffic stops. [App. p. 51]

If the mandate issues in the Circuit Court thus requiring Tulsa Police officers to apply a complex Indian Country jurisdiction analysis to every traffic citation, every criminal citation (typically petit offenses such as trespassing, larceny from a retailer, etc.), and every misdemeanor arrest (typically DUI, public intoxication, etc.), it will change every single stop and extend all stops measurably because of the additional inquiries an officer will now be required to make. The decision will also impact the

City's enforcement of ordinances such as fire safety and building codes, which are measures adopted for the safety of all inhabitants of the City of Tulsa.

For the reasons set forth herein, the City of Tulsa respectfully asks this Court to stay the Tenth Circuit's mandate pending the filing and disposition of the City's petition for certiorari.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported at 71 F.4th 1270, 2023 WL 4220246 (10th Cir. 2023) and is found at pages 1 through 36 of the City's Appendix. The opinion in the United States District Court for the Northern District of Oklahoma is unreported but is found at pages 39 through 48 of the City's Appendix. The opinion in the City of Tulsa Municipal Court is unreported.

JURISDICTION

The judgment of the opinion of the United States Court of Appeals for the Tenth Circuit was entered June 28, 2023. On July 6, 2023, the City filed an Opposed Motion to Stay the Mandate Pending the Filing of a Petition for Writ of Certiorari. On July 19, 2023, the Tenth Circuit issued an Order denying the City's motion to stay the mandate. [App. p. 37-38]. This Court has jurisdiction now to entertain and grant a request for a stay of the mandate pending filing of a petition for *certiorari* under 28 U.S.C. § 2101(f) and S. Ct. R. 23.3.

STATEMENT OF THE CASE

The Curtis Act, 30 Stat. 495, became federal law in 1898. Section 14 of the Curtis Act establishes a pre-statehood process for cities to incorporate as provided in Mansfield's Digest of Arkansas statutes. It is undisputed in this matter that the City of Tulsa properly incorporated as set forth in Section 14 the Curtis Act. Section 14 allowed inhabitants of cities and towns – including Indians – to file petitions for incorporation in the applicable federal district court and then provided that "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." Most important to this case, the Curtis Act provided 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 …."

In its entirety, Section 14 covers a variety of subjects, including establishing the right for all male citizens, including Indians, to vote; detailing the powers of the mayors; providing for the establishment and maintenance of free schools; and prohibiting the sale of intoxicating liquor. Among the topics addressed in this section is a commitment to equal rights for all inhabitants, regardless of Indian status. Section 14 states all inhabitants will not only be subject to all ordinances regardless of race and also "shall have equal rights, privileges, and protection therein." It is undisputed in this case that Section 14 of the Curtis Act has not been repealed or amended in the 125 years since it was enacted.

Justice Roberts, in his dissent in *McGirt*, addressed the Curtis Act and its importance to cities like Tulsa:

> In addition, the Curtis Act established municipalities to govern both Indians and non-Indians. It authorized "any city or town" with at least 200 residents to incorporate. § 14, 30 Stat. 499. The Act gave incorporated towns "all the powers" and "all the rights" of municipalities under Arkansas law. Ibid. "All male inhabitants," including Indians, were deemed qualified to vote in town elections. Ibid. And "all inhabitants"—"without regard to race"—were made subject to "all" town laws and were declared to possess "equal rights, privileges, and protection." Id., at 499–500 (emphasis added). These changes reorganized the approximately 150 towns in the territory—including Tulsa, Muscogee, and 23 others within the Creek Nation's former territory—that were home to tens of thousands of people and nearly one third of the territory's population at the time, laying the foundation for the state governance that was to come. See H. R. Doc. No. 5, 57th Cong., 2d Sess., pt. 2, pp. 299–300, Table 1 (1903); Depts. of Commerce and Labor, Bureau of Census, Population of Oklahoma and Indian Territory 1907, pp. 8, 30–33.

McGirt, 140 S.Ct. at 2490-2491.

Respondent Justin Hooper is a Choctaw Nation and Oklahoma citizen residing in the City of Tulsa. On August 13, 2018, he was given a speeding ticket on fee land within City of Tulsa limits on the Muscogee Creek Nation reservation. Shortly thereafter, Mr. Hooper paid the ticket, constituting a plea of no contest and resulting in a finding of guilt. In July of 2020, this Court issued its ruling in *McGirt*, which prompted Mr. Hooper to request post-conviction relief in the City's municipal court, in December 2020. After his request for post-conviction relief was denied, Mr. Hooper filed an appeal of his post-conviction relief in the Northern District of Oklahoma, and a request for declaratory judgment that the City of Tulsa does not have jurisdiction

to prosecute Indians for violations of City ordinances which occur within City limits and within the Muscogee Creek Reservation boundaries. The District Court granted the City of Tulsa's motion to dismiss the lawsuit, finding that the Curtis Act is applicable and grants the City the authority to enforce its laws equally against all inhabitants. [App. p. 39-48]. In the decision below, the Tenth Circuit reversed the District Court, finding that upon the City of Tulsa's inclusion into the new State of Oklahoma, the Curtis Act no longer provided the City authority to enforce its ordinances against all inhabitants, without regard to race. [App. p. 1-36].

While this Court opined in *McGirt* that congressional action or compromise could correct the fallout from that decision, now three years later, it is clear that neither is likely. This Court should interpret the Curtis Act and review the conflicting decisions below as to whether cities can apply laws equally to all citizens. The consequences for the health and safety of all citizens within these cities are significant.

REASONS FOR GRANTING THE STAY

"The standards for granting a stay pending disposition of a petition for certiorari are well settled." *Deaver v. United States*, 483 U.S. 1301, 1302, 107 S. Ct. 3177, 3178, 97 L. Ed. 2d 784 (1987). "To obtain a stay pending the filing and disposition of a petition for a writ of certiorari, an applicant must show (1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will

result from the denial of a stay." *Hollingsworth v. Perry*, 558 U.S. 183, 190, 130 S. Ct. 705, 709–10, 175 L. Ed. 2d 657 (2010). "In close cases the Circuit Justice or the Court will balance the equities and weigh the relative harms to the applicant and to the respondent." *Id. citing Lucas v. Townsend*, 486 U.S. 1301, 1304, 108 S.Ct. 1763, 100 L. Ed. 2d 589 (1988) (KENNEDY, J., in chambers); *Rostker v. Goldberg*, 448 U.S. 1306, 1308, 101 S.Ct. 1, 65 L. Ed. 2d 1098 (1980) (Brennan, J., in chambers). Applicant meets this test and a stay should issue.

A. There is a reasonable probability that the Court will grant certiorari to determine whether the Curtis Act of 1898 authorizes municipalities to enforce ordinances equally against all inhabitants.

The City's petition will present "an important question of federal law that has not been, but should be, settled by the Court." S. Ct. R. 10(c). There is no reasonable argument that resolution of the important issues in this case turns on settled law. At no time during the briefing in the lower courts has either side identified any case law where this Court has previously reviewed or interpreted the language in §14 of the Curtis Act. While the Curtis Act is not new law, the question of application of the act to modern day enforcement of municipal ordinances against Indians was not brought to the forefront until this Court's decision in *McGirt* turned over 125 years of jurisdictional suppositions and exposed this long-dormant question.

Although this important issue of law is necessarily confined to one circuit, the decision affects municipalities in an area larger than Connecticut, Delaware, New Jersey, New Hampshire, and Rhode Island combined. Further, every judge who has heard the question, including two federal district court judges sitting by designation

(due to over-crowded dockets) in the Northern District of Oklahoma,[1] and a District Court Judge for the State of Oklahoma,[2] agreed that the Curtis Act was still applicable to municipalities. The only Court to hold otherwise was the Tenth Circuit.

The question in this case is not one of repeal. Mr. Hooper and amici tribes have conceded there is no basis to argue the relevant provisions of the Curtis Act were repealed at statehood. Instead, Mr. Hooper and the tribes contend that Congress hid a sunset clause in the text of the Curtis Act.

The Tenth Circuit accepted this argument, holding that Congress intended its grant of jurisdiction and its promise of equal protection to dissolve at statehood. The Court rested its decision on Mr. Hooper's strained reading of the phrase "when so authorized and organized," interpreting it to mean that a city's jurisdiction would last only as long as, or "while" the city is continuously organized under chapter twenty-nine of Mansfield's Digest of the Statutes of Arkansas. [App. p. 28-35].

The issue in this case is of great importance and should be taken up by this Court.

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[1] See also *Pickup v. District Court of Nowata County*, 2023 WL 1394896 (N.D. Okla. 2023) ("The Court can — and does — 'give effect to both' statutes by concluding that Curtis Act § 14 empowers Oklahoma municipalities to enforce laws and ordinances against all people, including Indians, and that Oklahoma Enabling Act § 21 preserves that authority after Oklahoma Statehood.") (slip opinion at 84).

[2] See *Nicholson v. Stitt*, Case No. CJ-2020-00094 (Okmulgee Co. Dist. Ct. 2020), https://www.oscn.net/dockets/GetCaseInformation.aspx?db=okmulgee&number=cj-2020-94.

B. This Court is likely to reverse the Tenth Circuit's decision.

Respectfully, the Tenth Circuit's decision distorts the plain meaning of Congress's words as well as its goals expressed in the Curtis Act and other territorial legislation.

Enacted nine years prior to Oklahoma's statehood, §14 of the Curtis Act empowered tribal citizens and non-Indians alike to vote to incorporate cities and towns, borrowing incorporative and administrative procedures from the neighboring State of Arkansas. In such cities, including Tulsa, Congress declared:

> "(A)ll 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."

§14, 30 Stat. 499-500. Congress adopted this Equal Protection Clause just thirty years after the States had ratified the Fourteenth Amendment.

Congress has never repealed or amended those words. In fact, Congress expressly affirmed and then reaffirmed them. *See* Act of March 1, 1901, §41, 31 Stat. 872; Act of July 1, 1902, §73, 32 Stat. 727. Mr. Hooper and *Amici* Tribes have conceded that Oklahoma statehood did not repeal Congress's words by implication or otherwise. See also *Ex Parte Webb*, 225 U.S. 663, 683 (1912) (The Oklahoma Enabling Act and the Oklahoma Constitution did not repeal an exercise of Congress' plenary power in the Indian Territory.)

As in *McGirt*, "There is no need to consult extratextual sources when the meaning of a statute's terms is clear. Nor may extratextual sources overcome those terms." 140 S.Ct. 2452 at 2469. Applying the plain meaning of those simple words in

the Curtis Act is the only interpretation consistent with the language used throughout the Act as a whole. It is also the only reading consistent with the purpose of the Curtis Act and other territorial legislation, which was to establish a process to allot tribal lands in severalty, lay out town sites, sanction non-Indians' place in territorial affairs along with Indians, and establish *abiding* conditions conducive to statehood. See *Stephens v. Cherokee Nation*, 174 U.S. 445, 489 (1899). However, where Congress wrote the words to confer lasting jurisdiction on cities and towns and to provide for equal protection, the Tenth Circuit required a synonym.

Mr. Hooper and the Muscogee Creek Nation argued that Congress had hidden a sunset clause in the text of the Curtis Act. The Tenth Circuit accepted this strained reading of the clause "when so authorized and organized," in a preceding paragraph, interpreting it to mean that a city's ordinances would apply to all inhabitants, without regard to race, *only as long as* the city is *specifically and continuously* organized under chapter twenty-nine of Mansfield's Digest of the Statutes of Arkansas. 71 F.4th 1270, 1283-84 (2023). If Congress had intended equal protection of law for all inhabitants to survive statehood, the Tenth Circuit held, instead of "<u>when</u> so authorized and organized," Congress should have said "'<u>after</u> being so authorized and organized' or '<u>once</u> so authorized and organized…." *Id.*

Respectfully, this Court will not likely agree that this clause, in a separate paragraph, served as a *de facto* sunset clause for Congress's commitment that "(A)ll inhabitants…, without regard to race, shall be subject to all laws and ordinances of

… city or town governments, and shall have equal rights, privileges, and protection therein."

This Court will more likely apply the plain meaning of "when".[3] The Webster's Dictionary published in 1898 defines the word "when" as follows:

> 1. At the time. We were present *when* General La Fayette embarked at Havre for New York.
> 2. At what time; *interrogatively*.
> When shall those things be?
> 3. Which time.
> I was adopted heir by his consent;
> Since *when*, his oath is broke.
> 4. After the time that. *When* the act is passed, the public will be satisfied.
> 5. At what time. Kings may
> Take their advantage *when* and how they list.

When, An American Dictionary of the English Language by Noah Webster, LLD, (2nd Ed. 1898).

This Court's reading of the Curtis Act will bear two observations. First, drafters knew how to write a sunset clause when they wanted one. Section four, for example, allows that non-citizens who made improvements on tribal lands "shall have possession thereof until and including December thirty-first, eighteen hundred and ninety-eight." Second, this Court will observe that drafters used the word "when" 37 out of 37 times to describe the prevailing results of an action, not a narrow window of time, after which something will come to an end. For example:

> The rolls so made, **when** approved by the Secretary of the Interior, shall be final….

[3] "When a term goes undefined in a statute, we give the term its ordinary meaning." *Taniguchi v. Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 566, 132 S. Ct. 1997, 2002, 182 L. Ed. 2d 903 (2012).

* * * * * * * * * * * *

> Said acts ordinances, or resolutions, **when** so approved, shall be published in at least two newspapers having a bona fide circulation in the tribe to be affected thereby, and **when** disapproved shall be returned to the tribe enacting the same.

As this Court has said before, "it is a normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning." *Taniguchi v. Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 571 (2012) (internal quotations omitted).

By contrast, drafters used "*while*" throughout the Curtis Act to describe a window of time, after which something will end. For example:

> All the lands allotted shall be nontaxable **while** the title remains in the original allottee, but not to exceed twenty-one years from date of patent….

The clause "when so authorized and organized" is used in the simple past tense, to signify the point of departure, after which cities and towns would exercise durable authority, but even if it had been written in the continuous tense, this clause does not even modify Congress's declaration that municipal laws will apply to "all inhabitants, regardless of race." It is not even in the same paragraph.

The clause "when so authorized and organized" encumbers the one immediately following it: "shall possess all the powers and exercise all the rights of similar municipalities in said State of Arkansas." It stands to reason that municipalities in a new future state would not continue to have precisely the same powers and rights "of similar municipalities in said State of Arkansas." It does *not*

stand to reason that Congress would have meant for its promise of equal protection, which it cultivated and nurtured so assiduously, to simply evaporate at statehood. Equal application of the laws for Indians and non-Indians alike was the fundamental value underpinning federal Indian legislation after 1887[4] until the New Deal legislation of the 1930s.

Congressional and tribal records are replete with examples. For purposes of this application, suffice to say Congress consistently declared it "the duty of the United States to establish a government in the Indian Territory which shall rectify the many inequalities and discriminations [then] existing in said territory, and afford needful protection to the lives and property of all citizens and residents thereof." Act of June 10, 1896, 29 Stat. 340.

Congress's commitment to equal protection did not waver in forming the new State. For the first time in American history, an enabling act expressly gave Indians full rights to participate in a state's constitutional convention "in the same manner" as all other citizens. Oklahoma Enabling Act §2, ch. 3335, 34 Stat. 268 (1906). How, then, could it be inferred that Congress intended its commitment to equal application and protection of the laws in the Curtis Act to dissolve at statehood, reverting to "the many inequalities and discriminations" existing in the territory before the Act? It cannot. Congress's words reflected its clear intent.

[4] The General Allotment Act of 1887, or Dawes Act, which exempted the Five Tribes, provided that "each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law." §6, 24 Stat. 388 (Feb. 8, 1887).

This Court, therefore, will likely confirm with its typical discipline that Congress "says what it means and means what it says." *Henson v. Santander Consumer USA Inc.*, 582 U.S. 79, 89 (2017) (internal quotations and ellipses omitted).

Congress plainly conferred authority over "all inhabitants, regardless of race," but – additionally and alternatively – this Court has held that, "under the Constitution and this Court's precedents, the default is that States may exercise criminal jurisdiction within their territory." *Castro-Huerta*, 142 S.Ct. at 2503. This Court held that "States do not need a permission slip from Congress to exercise their sovereign authority." *Id.* "In other words, the default is that States have criminal jurisdiction in Indian country unless that jurisdiction is preempted." *Castro-Huerta*, 142 S.Ct. at 2503. The Court "requires clear statutory language to create an exception to that rule." 142 S.Ct. at 2503 (internal quotations omitted).

The Court's "precedents establish that Indian country is part of a State's territory and that, unless preempted, States have jurisdiction over crimes committed in Indian country." *Id.* at 2494. "(A) State's jurisdiction in Indian country may be preempted (i) by federal law under ordinary principles of federal preemption, or (ii) when the exercise of state jurisdiction would unlawfully infringe on tribal self-government."

Far from preemption, Congress's acts and statements preparing for and implementing Oklahoma statehood, *supra*, <u>*confirm*</u> State and local jurisdiction, and the facts of the present case do not infringe on tribal self-government. See *infra* at p.23.

To summarize, this Court is likely to reverse the Tenth Circuit's decision because it disregards Congress's words and intent, and – alternatively – because the State of Oklahoma and local governments have jurisdiction in Indian country, even absent the City of Tulsa's "permission slip from Congress."

C. Absent a stay the City of Tulsa and its residents will suffer irreparable harm.

A stay in this case is essential to protect the health, safety and wellbeing of the residents of the City of Tulsa until this Court can review the Tenth Circuit's decision. Mr. Hooper and the Tribes who have written as *amici* claimed at the Circuit Court that a stay was not necessary, citing the fact that they have 147 officers combined to patrol 25 counties in eastern Oklahoma, or approximately 12,000 square miles. By contrast, the City of Tulsa recruits, hires, equips, trains, and funds 1,182 sworn and non-sworn police personnel, just in city limits, along with building code officials, fire marshals, nuisance code enforcement officers, zoning code officials, and others.

In 2022 alone, the Tulsa Police Department ("TPD") filed approximately 95,986 citations and 10,335 arrests for other charges in the Municipal Court.[5] [App. p. 50, ¶9]. In 2021, those numbers were 45,080 citations and 5,208 other charges. [App. p. 50, ¶8]. The tribes have repeatedly pointed to cross-deputization agreements as a justification for their argument that implementation of the Circuit Court's Order

[5] These numbers do not include State or Federal charges or those charges that are currently sent to the Tribes, which consist primarily of non-federal felony charges and domestic assault and battery misdemeanors and any misdemeanors for which the City does not have an ordinance. [App. p. 50, ¶8a].

would not cause any disruption to the City of Tulsa or its residents. However, cross-deputization agreements are not a magic cure to the harm created by the City's inability to enforce its own ordinances. Notwithstanding cross-deputization agreements, the perceived lack of authority has already resulted in Indians challenging and confronting TPD Officers on traffic stops. A few examples are set forth in the affidavit of Eric Dalgleish, TPD Deputy Chief of Police – Operations Bureau, which is included herewith as part of the City's Appendix [App. p. 49-59].

> On or about February 3, 2021, after showing his Cherokee citizenship card to an Officer who pulled him over for traveling 78 miles per hour in a 50 mile per hour construction zone, a driver stated, in reference to his Cherokee citizenship card, "I thought this was my 'get out of jail free card now, my Indian card."[6] [App. p. 51, ¶11a]
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> * * * * * * * * * * * * * * *
>
> On or about July 14, 2023, a motorcyclist with a passenger followed a marked TPD vehicle for approximately four (4) miles and then passed the TPD vehicle traveling at 77 miles per hour in a 65 mile-per-hour zone. Once stopped, the Officer asked the driver, "What's the speed limit?" and the Indian driver stated, "What's the speed limit for me?" The Officer responded, "Sixty-five just like it is for everybody else." The Indian driver then stated, "Are you sure? What about Hooper versus City of Tulsa?" The driver went on to question the Officer about whether he is appropriately commissioned. [App. p. 51, ¶11b] [7]
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> On or about July 18, 2023, an Indian driver was stopped by TPD Officers, and the driver asked the Officer if the Officer had seen the car's tribal tag, suggesting that the vehicle could not be stopped. The driver had no driver's license on

[6] Video of this encounter is available here: https://bit.ly/TPD-2-3-2021

[7] The video of this incident can be viewed here: https://bit.ly/TPD-7-14-2023

> his person and only a Choctaw Nation tribal enrollment card. [App. p. 51, ¶11c][8]

In addition to the issues officers are already experiencing with the perceived lack of authority to enforce municipal laws, there will also be a significant disruption to the traffic-stop process and misdemeanor arrest process for Tulsa Police.[9] As Chief Dalgleish sets forth in his Affidavit, if TPD officers are required to apply a complicated Indian Country jurisdiction analysis to every citation and every misdemeanor arrest it will change every single stop and extend those stops measurably because of the additional inquiries an Officer will now be required to make. [App. p. 51-52, ¶13]

The first change will be that the Officer will have to inquire as to whether the driver or suspect is Indian. Currently, Officers do not have to ask citizens their race or citizenship on municipal stops. [App. p. 52, ¶14] They simply request a driver's license and insurance. That will change immediately if the mandate issues in *Hooper*. Once the Officer confirms the person is claiming membership in a federally recognized tribe, the Officer must then find a contact number for that Tribe and attempt to confirm whether the driver is a citizen. Although this might not be difficult in reference to every Tribe, Chief Dalgleish notes that TPD Officers have encountered individuals from many Tribes located outside the State. [App. p. 52, ¶14c]. Not all

[8] Although the conversation can be difficult to hear, the video of this incident can be viewed here: https://bit.ly/TPD-7-18-2023

[9] The Wall Street Journal noted many of these problems in a recent article, "No Speed Limit For Native Americans". https://www.wsj.com/articles/oklahoma-mcgirt-supreme-court-neil-gorsuch-native-americans-traffic-laws-justin-hooper-e9c88dbd

the almost 600 federally recognized Indian tribes have 24-hour contacts for their enrollment offices, and there is no single centralized database in the country that includes all Tribal citizens. Thus, some officers have waited only one or two minutes for Tribal confirmation, while others have waited hours and even days to determine if someone is indeed a member by blood of a federally recognized Indian Tribe. [App. p. 52, ¶14c]. Chief Dalgleish explains that "an Officer cannot wait days or hours on the side of the road to determine citizenship." [App. p. 52, ¶14c].

The next issue officers will face will be deciding if the location of the stop is in a Tribal jurisdiction. Nearly three-fourths (3/4) of the City's landmass is within Muscogee Creek Nation ("MCN") reservation boundaries. Most of the remaining area of the City to the north of the MCN Reservation was determined to be within the Cherokee Nation's reservation boundaries. *Hogner v. State*, 500 P.3d 629 (Ok. Crim. App. 2021).

Although determining where a crime occurred might be a rather simple task in some areas of the City, it is not an easily answered question as one gets closer to where the Cherokee and MCN Tribal boundaries meet. [App. p. 53, ¶15]. As Chief Dalgleish describes in his Affidavit, when approaching the 21-mile-long boundary between tribes there is no agreed upon line, requiring an officer to have to place calls to both tribes to try to ascertain who has jurisdiction. [App. p. 53, ¶15]. Chief Dalgleish notes that "a request for an agreed-upon boundary has been made, but none has been provided." [App. p. 53, ¶15b].

As an example, Chief Dalgleish's affidavit notes that the jurisdictional map from the Cherokee Nation's website at approximately 39 North Peoria shows the boundary line running through the southernmost building of the AirGas Company. [App. p. 53, ¶15b]. In contrast, the MCN's mapping software for the same location shows the boundary line running through the *northernmost* building of AirGas. *Id*. Should there be a misdemeanor trespass at AirGas by an Indian person, it would result in a complicated jurisdictional issue between the tribes, which a TPD Officer cannot resolve and which would take an unknown amount of time. [App. p. 53, ¶15b]. By contrast, adhering to the Curtis Act's grant of municipal jurisdiction over "all inhabitants," there is no jurisdictional complication because the trespass would clearly be within city limits.

The next disruption to officers, assuming they could ascertain Indian citizenship and determine the correct Tribal jurisdiction would be to determine what law applies, if any. Each of the Tribes has its own set of laws with different numbering systems and different language, such that some actions that are a crime in one area of the City under one Tribe's law are not a crime in other parts of the City. [App. p. 53-54, ¶16].

Once an Officer can identify the appropriate Tribal law, the Officer would be unable to use electronic citations (e-cites) to refer cases to tribal prosecutors, and so would have to write a unique paper citation for traffic or criminal offenses. Without reprogramming the City's e-cite system which will require an unknown amount of time and money, the system will automatically populate the Municipal Court

information into the e-cites and automatically transmit them to the Municipal Prosecutor; therefore, paper citations will need to be completed for all Indian citizen citations to make sure the correct court location and date information is on the citation and to ensure it goes to the proper court in the form each court requires. [App. p. 54, ¶17]. Chief Dalgleish identified various issues associated with requiring unique tribal citations for Indian citizens, the most troubling of which is the length of time it will extend traffic stops and the additional time officers will have to be away from their jobs to travel to tribal courts in distant counties to testify regarding traffic citations or other offenses. [App. p. 54-57].

The safety concern to the general public caused by persons believing they can speed without repercussion is clear. But the issue is even more grave considering the fact that the City has seen a significant increase in traffic collisions, including fatality collisions, since *McGirt*. In 2021, the City set a record for fatality collisions. There were 11,509 collisions reported to TPD, 299 resulting in severe injuries, and 69 deaths occurred on Tulsa streets. [App. p. 51, ¶12].

While Mr. Hooper's claims arose from a traffic citation, the scope of the Circuit Court's decision is far reaching and extends to more areas of City governance than just traffic violations. Importantly, neither Tribe has any codes which can be enforced in relation to many issues common in a major city, such as fire safety codes, building structural and mechanical codes, and zoning laws. Although the MCN might argue that its Supplemental Crimes Act allows application of Municipal law in Tribal courts, it only allows for application of those laws that were passed prior to January

1, 2021, so no new ordinances to address emerging issues can be enforced against Indians.[10] The Cherokee Nation has no such law.

As set forth in the Affidavit of Julie Lynn, Deputy Chief of the Tulsa Fire Department ("TFD") and acting Fire Chief as of the time of the Affidavit (included herewith in City's Appendix at pages 60 - 62), the issues created by the issuance of the mandate would not only affect the Police Department. The Tulsa Fire Department is on track to conduct approximately 5,000 inspections this year related to the Fire Prevention Code. [App. p. 61, ¶13]. The department also conducts around 500 fire investigations a year. As Chief Lynn sets forth in her Affidavit, in 2022, TFD conducted 549 fire investigations. [App. p. 60-61, ¶8] As a result of those investigations, TFD filed 72 cases in the Municipal Court. Of those cases, 45 were related to Fire Investigations and 27 were related to Code Enforcement. *Id.*

Chief Lynn's Affidavit makes clear that, without jurisdiction to enforce City ordinances, TFD lacks adequate enforcement mechanisms and cannot uniformly enforce the Fire Prevention Code to provide for fire safety within the corporate limits of the City of Tulsa. [App. p. 61, ¶15]. Such is also true of the City departments that enforce zoning codes, building codes, health and safety ordinances, and noise/nuisance ordinances. These basic health and safety codes are in place for protection, not only of the property owner, but also neighbors and visitors to the property. The impact of a building used for a business open to the public, but which is not subject to enforcement of building or electrical codes, creates a potentially

[10] http://www.creeksupremecourt.com/wp-content/uploads/NCA-22-048.pdf

dangerous situation for the residents of Tulsa as well as visitors who frequent such an establishment.

The tribes have claimed that a stay in this matter would "prolong the arrogation of the Nation's authority…" Motion of Amici Tribes for Leave to File a Response to the City of Tulsa's Opposed Motion for Stay, below, at 3. However, this matter does not threaten the integrity of tribal self-government — the right of tribal citizens to make their own laws and be governed by them.

The City of Tulsa is vastly more "open" than any reservation community in the United States.[11] Importantly, Mr. Hooper is not a citizen of the Muscogee Creek Nation, where the stop occurred. He is a citizen of the Choctaw Nation, whose tribal court is 166 miles away (farther than the distance from Washington D.C. to Philadelphia). Tulsa asserts concurrent, not exclusive, jurisdiction over Mr. Hooper, as a city of Tulsa resident and non-member Indian. 25 U.S. Code §1301(2); *U.S. v. Lara*, 541 U.S. 193 (2004). The Muscogee Creek Nation's interest in stopping a speeding motorist within its jurisdiction is certainly no greater than the City of Tulsa's and the State of Oklahoma's, and that interest was served by the City's diligent enforcement.

[11] By 1910, beyond the original platted townsite, every acre in the current city of Tulsa was allotted in severalty. Hastain's Township Plats of the Creek Nation (1910), https://www.okhistory.org/research/hastains. Today, less than one-tenth of one percent of the City's land area is held in trust for tribes according to county assessor records. Compare *Brendale v. Confederated Tribes*, 492 U.S. 408, 444-45 (1989) ("…the 'subsequent alienation' of about half of the property in the open area has produced an integrated community that is not economically or culturally delimited by reservation boundaries. Because the Tribe no longer has the power to exclude nonmembers from a large portion of this area, it also lacks the power to define the essential character of the territory.").

As a Tulsa resident, Mr. Hooper can serve on a municipal court jury. He can vote for a city council representative and a mayor to make and enforce local laws, or even stand for office himself. As a resident of the Muscogee Creek Nation Reservation, he cannot vote for a tribal council representative or a principal chief or otherwise participate in the prerogatives of tribal government. *Compare Duro v. Reina*, 495 U.S. 676, 688 (1990).

In this context, deference is warranted to Congress's commitment to equal application of municipal ordinances, without regard to race, and its commitment to equal rights, privileges, and protection in municipal government.

CONCLUSION

For these reasons, the balance of equities weighs in favor of granting the stay in this matter until the filing and decision on the City's Petition for Writ of Certiorari.

Respectfully Submitted,

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