ORIGINAL

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

MARVIN KEITH STITT, Appellant, v. CITY OF TULSA, Respondent.	Case No. M-2022-984 Tulsa Municipal Court No. 7569655

REPLY BRIEF OF AMICI CHEROKEE NATION, CHICKASAW NATION, AND CHOCTAW NATION OF OKLAHOMA IN SUPPORT OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND CONSTITUTIONS

ARGUMENT

Tulsa relies on unpublished federal district court decisions in *Hooper v. City of Tulsa*, No. 21-cv-0165-WPJ-JFJ, 2022 WL 1105674 (N.D. Okla. Apr. 13, 2022), and *Pickup v. District Court*, No. 20-cv-0346-JB-JFJ, 2023 WL 1394896 (N.D. Okla. Jan. 31, 2023), to argue Section 14 of the Curtis Act of 1898, ch. 517, § 14, 30 Stat. 495, 499-500, gives it jurisdiction over Appellant. However, in *Hooper v. City of Tulsa*, No. 22-5034, 2023 WL 4220246, at *13-14 (10th Cir. June 28, 2023), the Tenth Circuit held Section 14 no longer applies to Tulsa, reversed the district court's decision, and rejected the analysis in *Pickup*. That ruling—correct in result and persuasive in reasoning—defeats Tulsa's argument. In any event, neither district court opinion is persuasive, and Tulsa's other arguments are incorrect.

I. The District Court Decisions in *Hooper* and *Pickup* Offer Tulsa No Support, as the Tenth Circuit Reversed in *Hooper* and *Pickup* Was Decided Incorrectly.

A. The Tenth Circuit Persuasively Reversed the District Court in *Hooper* and Rejected the *Pickup* Decision's Reasoning.

Tulsa urges that "this Court is . . . bound by the federal District Court decisions in *Hooper* and *Pickup*." Br. of Appellee City of Tulsa at 6 ("Tulsa Br."). In fact, this Court "view[s] the decisions of the inferior federal courts *as persuasive*." *See Dean v. Crisp*, 1975 OK CR 95, ¶ 4, 536 P.2d 961, 963 (emphasis added), *overruled on other grounds by Edwards v. State*, 1979 OK CR 18, ¶¶ 1-8, 591 P.2d 313, 316-17.[1] And as the Tenth Circuit rejected the district court decisions in *Hooper* and *Pickup*, this Court must now look to the Tenth Circuit's decision for persuasive federal authority. *See Fitzgerald v. State*, 1998 OK CR 68, ¶ 28, 972 P.2d 1157, 1169 (absent

[1] For its contrary standard, Tulsa cites *State v. Littlechief*, 1978 OK CR 2, ¶ 2, 573 P.2d 263, 264. *See* Tulsa Br. 5. The Court's statement there was limited to that case, which considered the weight of a federal district court's prior determination that the state lacked jurisdiction in a criminal case involving the same conduct and parties. *Littlechief*, 1978 OK CR 2, ¶ 2, 573 P.2d at 264.

compelling reason to contrary "we will follow the Tenth Circuit's persuasive opinions" on federal law); *see also Parker v. State,* 2021 OK CR 17, ¶ 35, 495 P.3d 653, 665 ("This Court applies the same Indian status test used by the Tenth Circuit, our federal circuit.").[2] The Tenth Circuit's opinion shows Tulsa's grasp at jurisdiction fails.

In *Hooper*, the Tenth Circuit held that Section 14 no longer grants any authority to Tulsa "[b]ecause Tulsa is no longer organized and authorized according to chapter twenty-nine of Mansfield's Digest." 2023 WL 4220246, at *12. "Based on its plain text, Section 14 grants *a limited set* of municipalities jurisdiction over violations of municipal ordinances by all their inhabitants: municipalities in the Indian Territory that are organized and authorized according to chapter twenty-nine of Mansfield's Digest." *Id.* at *10 (emphasis added). As the court explained

> Section 14 opens by stating '[t]hat the inhabitants of any city or town in [the Indian Territory] . . . may proceed to have the [city or town] incorporated as provided in chapter twenty-nine of Mansfield's Digest of the Statutes of Arkansas, if not already incorporated thereunder[,]' [and then] "proceeds to state 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 [the] State of Arkansas.

Id. (alterations and ellipsis in opinion) (footnote omitted). In accord with that plain text:

> All of Section 14's following grants of power, including the jurisdiction granting provisions at issue in this case, refer back to 'such cities and towns.' . . . Congress's choice to grant jurisdiction only to 'such cities and towns' limits Section 14's jurisdictional grant to the cities and towns previously described—cities and towns in the Indian Territory organized and authorized according to chapter twenty-nine of Mansfield's Digest and empowered to 'possess all the powers and exercise all the rights of similar municipalities in . . . Arkansas.'

[2] Tulsa also points to the dismissal order in *Nicholson v. Stitt*. Tulsa Br. at 3. There, the district court dismissed for lack of subject matter jurisdiction, but also dismissed on the basis of the Curtis Act with no analysis, *see* No. CJ-2020-094, slip op. at 1-2 (Okla. Dist. Ct. Nov. 24, 2020), and the Oklahoma Supreme Court did not pass on that question, 2022 OK 35, ¶ 13 n.6, 508 P.3d 442, 448 n.6. The district court's bare statement is dicta, *Brown v. State*, 2018 OK CR 3, ¶ 47, 422 P.3d 155, 167, and because it is unsupported by any analysis, has no persuasive value.

Id. at *11. Since Tulsa adopted a charter in 1908 under which it "reincorporat[ed] under Oklahoma law" and "continues to be a political subdivision of the state of Oklahoma, organized and authorized according to Oklahoma law," Tulsa is "no longer entitled to Congress's limited grant of jurisdiction in Section 14." *Id.* at *12. In fact, Tulsa "ceased to be a municipality organized according to chapter twenty-nine of Mansfield's Digest . . . even prior to [its] new charter," as:

> upon statehood, Tulsa became a municipality subject to the laws of the Oklahoma Territory, until the point it was reorganized under Oklahoma state law. So, by its express terms, Section 14 of the Curtis Act no longer applied to Tulsa upon statehood, and Tulsa had no "present rights and powers" stemming from the Curtis Act to be preserved by the Oklahoma Constitution.

Id. at *13 (quoting *State ex rel. West v. Ledbetter*, 1908 OK 196, ¶ 4, 97 P. 834, 835 ("Upon the admission of the state into the Union, the form of government theretofore existing in the Indian Territory ceased to exist, and the laws in force in that territory under which Muscogee held its charter and exercised its municipal powers became inoperative.")). And the Oklahoma Constitution could not have changed the limited applicability of Section 14 in any event, as "the Oklahoma Constitution cannot amend an act of Congress. . . . Only Congress has the power to change that limitation." *Id.*

Neither district court—*Hooper* nor *Pickup*—acknowledged these textual limitations on Section 14's jurisdictional grant, much less undertook their reasoned analysis, as did the Tenth Circuit. *See King v. State*, 2008 OK CR 13, ¶ 7, 182 P.3d 842, 844 ("We should be guided by the text of the statutes."). The Tenth Circuit also read Section 14 in its appropriate context, which Tulsa fails to do. *See* 2023 WL 4220246, at *12 n.13 (citing U.S. Supreme Court precedent holding that Congress intended Section 14 and related statutes to be "merely provisional," pending creation of a new state).

The Tenth Circuit likewise correctly rejected the argument—also made here, *see* Tulsa Br. 8-9—that the reference to municipalities' "present" powers in Article 18, § 2 of the Oklahoma Constitution refers to powers conferred under the Curtis Act. It instead refers to the powers conferred at statehood, at which time "Tulsa became a municipality subject to the laws of the Oklahoma Territory" and "Section 14 of the Curtis Act no longer applied to Tulsa," which therefore "had no 'present rights and powers' stemming from the Curtis Act to be preserved by the Oklahoma Constitution." 2023 WL 4220246, at *13 (citing *Ledbetter*, 1908 OK 196, ¶ 4, 97 P. at 835). That accords with the Oklahoma Supreme Court's repeated conclusion on the effect of statehood on municipal authority. *Lackey v. State ex rel. Grant*, 1911 OK 270, ¶ 3, 116 P. 913, 914; *State ex rel. Kline v. Bridges*, 1908 OK 45, ¶ 10, 94 P. 1065, 1066-67; *Ledbetter*, 1908 OK 196, ¶ 4-6, 97 P. at 835-36. Tulsa has given this Court no reason to depart from the Oklahoma Supreme Court's well-reasoned results. And departure would be unwarranted, given Congress's clear design in the Enabling Act that "the new state should come into the Union with a body of laws applying with practical uniformity throughout the state," namely the Oklahoma Territory laws, and the affirmance of that decision in the state constitution, which provided the laws of the Oklahoma Territory "extended to," and "remain[ed] in force" throughout, the entire new state. *Jefferson v. Fink*, 247 U.S. 288, 292 (1918).

The Tenth Circuit also rejected the argument, again made here, *see* Tulsa Br. 11-13, that the Enabling Act somehow swapped Oklahoma's laws for those of Arkansas while still allowing municipalities to exercise pre-statehood jurisdiction:

> Tulsa cites no portion of the Oklahoma Enabling Act or other act of Congress making such a change. The Oklahoma Enabling Act provided Oklahoma Territory law would extend across the entire state of Oklahoma, including the former Indian Territory, but did not address retention or amendment of Section 14 of the Curtis Act.

2023 WL 4220246, at *12. The Tenth Circuit further held that Section 14's municipal jurisdiction provision cannot be separated from its substantive law provisions, as "Section 14 does not simply direct municipalities to apply Arkansas law in some places and grant them jurisdiction over municipal violations in others. The references to Arkansas law are intertwined with the powers Section 14 grants," and the powers granted upon incorporation under Arkansas law "continue when municipalities are 'so authorized and organized,'" not beyond. *Id.* This too accords with Congress's and the people's intent to replace the pre-statehood regime with one body of state law, as shown by the text of the Enabling Act and the Constitution. *See supra* at 4.

The court further rejected the contention, which Tulsa urges here, that Section 14 requires municipal court decisions to be appealed to federal district courts. The appellant in *Hooper* styled one of his claims as an appeal under Section 14 of the Curtis Act. *See* 2023 WL 4220246, at *14. But the Tenth Circuit ruled that the federal district court lacked jurisdiction over that claim "[b]ecause Section 14 no longer grants Tulsa jurisdiction over municipal violations committed by Indians, and accordingly the appeal procedures under Section 14 do not apply . . . ." *Id.*[3]

The Tenth Circuit concluded by expressly overruling the *Hooper* district court's dismissal order, which it found "erred" by determining that Tulsa had jurisdiction under Section 14, and further directed the district court to dismiss the Section 14 appeal on remand for lack of federal court jurisdiction because district courts are not authorized "to exercise appellate jurisdiction over state-court judgments." *Id.* (quotation omitted). The court also rejected *Pickup* as it is "not persuasive here because the district court in *Pickup* analyzed whether Congress repealed Section

[3] Since federal courts cannot exercise appellate jurisdiction under *Hooper*, Tulsa's argument that this Court lacks appellate jurisdiction effectively asks this Court to deny municipal court defendants any right to appeal municipal court decisions.

14 but did not address the issue raised by Mr. Hooper: the conditions Congress placed on Section 14's grants of power." *Id.* at *13 n.14. Thus, the district court decisions neither permit Tulsa to assert that Section 14 confers any powers on it, nor allow it to claim that Section 14 requires municipal court decisions to be appealed to federal court. *See* Tulsa Br. at 26-27.

B. The *Pickup* Decision's Alternative Analysis Is Wrong.

The Tenth Circuit rejected *Pickup* for the reasons described above.[4] *Pickup* is also unpersuasive because in focusing on implied repeal, the district court failed to consider the bedrock rule that at statehood, "the Territorial government [i]s displaced, abrogated, every part of it; and . . . no power of jurisdiction exist[s] within her limits, except that derived from the State authority, and that by force and operation of the Federal Constitution and laws of Congress . . . ." *Benner v. Porter*, 50 U.S. 235, 242-43 (1850); *see* Br. of Amici Cherokee Nation, et al. in Supp. of Appellant ("Nations' Br.") at 13. That rule applies to the laws enacted by Congress to govern the Indian Territory prior to statehood, and Section 14 was therefore abrogated upon statehood. *See Okla., Kan. & Mo. Interurban Ry. v. Bowling*, 249 F. 592, 593-94 (8th Cir. 1918).

Pickup also erred in finding that Section 14 permitted incorporation of towns "in the Oklahoma Territory," and then relying on the Enabling Act to find that provision was preserved and extended to the entire State after statehood. 2023 WL 1394896, at *84. The Curtis Act applied only to *the Indian Territory*. *See Hooper*, 2023 WL 4220246, at *10 n.10. Sections 13 and 21 of the Enabling Act, ch. 3334, 34 Stat. 267, 275, 277 (1907), were enacted to establish "practical

[4] Tulsa's reliance on *Pickup* as "binding," Tulsa Br. at 5-6, also fails because the *Pickup* court first held that it lacked jurisdiction over the case, *Pickup*, 2023 WL 1394896, at *1, 57, 60, 65, then, in case the Tenth Circuit ruled otherwise, offered "alternative analyses," including its Section 14 analysis, *id.* at *65. This "alternative analysis" is nonbinding dicta, *see Brown*, 2018 OK CR 3, ¶ 47, 422 P.3d at 167, which ignores principles of statutory interpretation, *Hooper*, 2023 WL 4220246, at *13 n.14, and the effect of statehood on territorial governance laws.

uniformity" in state law by preserving and extending *Oklahoma Territory* law, *Jefferson*, 247 U.S. at 292-93, and said nothing of *Indian Territory* law. That precludes reliance on *Pickup*. The Enabling Act's text also defeats Tulsa's assertion, relying on *Jefferson*, that Section 14 defines municipal jurisdiction after statehood, Tulsa Br. at 12-13, which is also contrary to the Oklahoma Supreme Court's ruling in *Ledbetter*, 1908 OK 196, ¶ 4, 97 P. at 835, that municipalities continued their corporate existence "under the laws extended in force in the state"—i.e., Oklahoma Territory laws.[5] *See Lackey*, 1911 OK 270, ¶ 3, 116 P. at 914; *Hooper*, 2023 WL 4220246, at *13.

Pickup, citing *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486 (2022), further asserted that "only 'clear statutory language' can divest a State of its territorial authority after Statehood." 2023 WL 1394896, at *85 (quoting *Castro-Huerta*, 142 S. Ct. at 2503). That is a plain misreading, as pre-statehood territorial authority is held exclusively by Congress, U.S. Const., art. IV, § 3, cl. 2, and *Castro-Huerta* says nothing to unsettle the bedrock rule that statehood extinguishes powers held under the federal laws that governed a territory prior to statehood, *see Benner*, 50 U.S. at 242-43. Furthermore, the portion of *Castro-Huerta* referred to by the *Pickup* court, *see* 2023 WL 1394896, at *85 (quoting *Castro-Huerta*, 142 S. Ct. at 2503), is irrelevant here. The *Castro-Huerta*

[5] Tulsa tries to escape *Ledbetter* by asserting that "no part of the [*Ledbetter*] case involved Section 14," and that its "only reference to the Curtis Act is a general discussion of the difference between first- and second-class cities." Tulsa Br. at 20. The Curtis Act references chapter twenty-nine of Mansfield's digest *only* in Section 14 of the Curtis Act, and that is the very provision *Ledbetter* discusses. 1908 OK 196, ¶ 2, 97 P. at 835. Further, *Ledbetter* relied on Section 10 of the Schedule to the Oklahoma Constitution to reject the argument that "Muskogee continued to exist, after the admission of the state, as a city of the second class," because that class of city existed only "under the laws theretofore in force in the Indian Territory," which had no force after statehood. 1908 OK 196, ¶ 6, 97 P. at 836. "[T]he difference between first and second-class cities" was central to *Ledbetter*'s holding that cities of the second class in the former Indian Territory—including Tulsa—operated only under *Oklahoma Territory* laws upon statehood. *Id.* *Hooper* relied on *Ledbetter*'s reasoning to illustrate why municipalities in Oklahoma were no longer organized under Mansfield's Digest after statehood. *See Hooper*, 2023 WL 4220246, at *13.

Court held that "the Federal Government and the State have concurrent jurisdiction over crimes committed by non-Indians against Indians in Indian country." 142 S. Ct. at 2504 (footnote omitted). The Court found no "clear statutory language" that would divest the State of that jurisdiction, which it acquired at statehood in accord with the decisions in *United States v. McBratney*, 104 U.S. 621 (1881), and *Draper v. United States*, 164 U.S. 240 (1896). *See Castro-Huerta*, 142 S. Ct. at 2503-04. Those decisions make clear that a state "acquire[s] criminal jurisdiction over its own citizens and other white persons throughout the whole of its territory within its limits" upon statehood. *Draper*, 164 U.S. at 243 (quoting *McBratney*, 104 U.S. at 624). They do not bear on state jurisdiction over Indians in Indian country.[6]

II. Tulsa's Efforts to Distinguish Binding Supreme Court Case Law Fail.

Tulsa attempts to explain away *Benner* and other binding Supreme Court cases that hold statehood terminates temporary modes of territorial governance such as Section 14 of the Curtis Act, *see* Tulsa Br. at 15. Even if correct, these arguments would not unsettle the Tenth Circuit's conclusion in *Hooper*—but they are also wrong. First, while Tulsa says these cases involved different states with "varying enabling language and constitutional provisions," *id.*, they describe Congress's Article IV Territory Clause powers, which apply to *all* territories. *See John v. Paullin*,

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[6] With respect to that question, the Enabling Act expressly provides that:

> nothing contained in the [Oklahoma] constitution shall be construed to limit or impair the rights of person or property pertaining to the Indians of said Territories (so long as such rights shall remain unextinguished) or to limit or affect the authority of the Government of the United States to make any law or regulation respecting such Indians, their lands, property, or other rights . . . which it would have been competent to make if this Act had never been passed.

Enabling Act § 1, 34 Stat. at 267-68. "Section one is a general reservation of federal and tribal jurisdiction over 'Indians, their lands, [and] property,' except as extinguished by the tribes or the federal—not state—government." *Indian Country, U.S.A., Inc. v. Oklahoma. ex rel. Okla. Tax Comm'n*, 829 F.2d 967, 979 (10th Cir. 1987) (alteration in original) (quoting Enabling Act § 1).

231 U.S. 583, 584-86 (1913); *Frantz v. Autry*, 1907 OK 65, ¶¶ 5-6, 9, 12, 91 P. 193, 202-04; *Fuller & Fuller Co. v. Johnson*, 1899 OK 73, ¶¶ 4-8, 58 P. 745, 747 (looking to *Benner* and other cases to describe nature of territorial and state governments in what is now Oklahoma). Second, that also disposes of Tulsa's next point, that the states in these cases entered the Union before the Curtis Act was passed, as the Curtis Act is subject to the constitutional principles of these cases. Third, Tulsa's argument that these cases concerned federal court jurisdiction does not alter the controlling effect of their principles. *Benner* turned on the legal principle that the territorial government and laws established by Congress terminate at statehood, and so a cause cannot be brought in territorial court after statehood. 50 U.S. at 242-43. In *Koenigsberger v. Richmond Silver Mining Co.*, 158 U.S. 41, 48 (1895), the Court considered whether a case was properly transferred to a federal district court at statehood under the Dakota Enabling Act after "the territorial government and courts cease[d] to exist" at statehood. In *Permoli v. Municipality No. 1*, 44 U.S. (3 How.) 589, 610 (1845), the Court found it could not review an appeal alleging that state law violated a federal law that governed pre-statehood territories because it had no application after statehood.

Fourth, Tulsa's argument that the above cases did not concern Congress's plenary power over Indians is irrelevant because Section 14 of the Curtis Act was enacted under the Territory Clause power.[7] "The authority of Congress over the territories of the United States" was exercised

[7] Tulsa incorrectly compares this case to *Herrera v. Wyoming*, 139 S. Ct. 1686 (2019). *See* Tulsa Br. at 15-16. *Herrera* concerned an Indian treaty Congress entered into pursuant to the Treaty Clause, which the Court held survived statehood and would only be abrogated by a subsequent statute that shows "clear evidence that Congress actually considered the conflict between its intended action on one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty." *Herrera*, 139 S. Ct. at 1698 (quoting *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202-03 (1999)). By contrast, laws Congress enacts to govern a territory terminate at statehood. Tulsa's attempt to equate its argument with the Supreme Court's reservation existence ruling in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), also fails, *see* Tulsa

in "the case [of] the Indian Territory, by extending thereto certain of the laws of an organized state," *Bowling*, 249 F. at 593, and "[t]he municipal corporations of the Indian Territory prior to the admission of the state into the Union were agencies of the government of the United States, created by Congress under *its plenary power to govern the territories* . . . ." *Ledbetter*, 1908 OK 196, ¶ 4, 97 P. at 835 (emphasis added). Section 14 addresses how the population of those federal agencies can "control their local affairs," *id.*, and it defines their power over "all inhabitants," without reference to Indians. That is an enactment pursuant to the Territory Clause, which gives Congress "considerable power over Indians on federal territory," distinct from Congress's power over Indians and tribes *within states* that it exercises under the treaty, spending, and commerce clauses of Article I. *Haaland v. Brackeen*, 143 S. Ct. 1609, 1653 (2023) (Gorsuch, J., concurring).

Tulsa also wrongly asserts that *McGirt v. Oklahoma*, which establishes that the portion of Tulsa where Appellant committed his traffic offense is Indian country, "only applied to the Major Crimes Act[("MCA").]" Tulsa Br. at 19. As this Court (in keeping with others) recently made clear, while *McGirt* involved a crime covered by the MCA, that holding is not limited to offenses addressed by that statute. *See Sizemore v. State*, 2021 OK CR 6, ¶¶ 7-8, 485 P.3d 867, 869, *cert. denied* 142 S. Ct. 935 (2022).[8]

CONCLUSION

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

Br. at 17, as the rules that govern reservation disestablishment are different than those applicable to Section 14, which in any event is by its own terms inapplicable to Tulsa now.

[8] Tulsa does not support its drive-by attack on the Nations' law enforcement and governing capabilities, Tulsa Br. at 27. To the contrary, as explained at length in *amici*'s briefs, the Nations have extensive intergovernmental agreements, including with Tulsa, that allow municipalities and the Nations to work together to protect the public, have devoted substantial resources to that effort, and have enacted comprehensive codes to police their reservations. Nations' Br. at 27-29; Br. of Amici Curiae Muscogee (Creek) Nation & Seminole Nation of Okla. at 28-30.

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