ORIGINAL

IN THE COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

MARVIN KEITH STITT,	)	
	)	
Appellant,	)	
	)	
v.	)	**APPEAL CASE NO. M-2022-984**
	)	
	)	**Tulsa Municipal Court No. 7569655**
CITY OF TULSA,	)	
	)	
Appellee.	)	

REPLY BRIEF OF AMICI CURIAE MUSCOGEE (CREEK) NATION AND SEMINOLE NATION OF OKLAHOMA

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INTRODUCTION

Last week, the Tenth Circuit issued its decision in *Hooper v. City of Tulsa*, No. 22-5034, 2023 WL 4220246 (10th Cir. June 28, 2023), in which it held that "Section 14 of the Curtis Act no longer applies to Tulsa" based on the statute's plain text. *Id.* at *14. In doing so, it dismantled the very arguments Tulsa raises in this case in support of its purported jurisdiction over Indians in Indian country, including arguments Tulsa has made in direct response to the positions taken by *amici* Muscogee (Creek) Nation and the Seminole Nation of Oklahoma. *Amici* explain here why this Court should likewise reject Tulsa's position in keeping with the Tenth Circuit's persuasive reasoning.

I. The Federal Case Law on Which Tulsa Premises its Arguments Has Been Reversed by the Tenth Circuit.

At the time Tulsa filed its brief, the district courts in *Hooper v. City of Tulsa*, No. 21-cv-165-WPJ-JFJ, 2022 WL 1105674 (N.D. Okla. Apr. 13, 2022), and *Pickup v. District Court of Nowata County, Oklahoma*, No. CIV 20-0346 JB/JFJ, 2023 WL 1394896 (N.D. Okla. Jan. 31, 2023), had held that Section 14 of the Curtis Act continues to confer jurisdiction over Indians to former Indian Territory municipalities. Relying on *State v. Littlechief*, 1978 OK CR 2, ¶ 2, 573 P.2d 263, 264, Tulsa urged that this Court is bound by *Hooper* and *Pickup* because, in its view, when a federal court decision "involves interpretation of a federal law, this Court will acknowledge the binding effect of Federal Court decisions." Tulsa Br. at 5. However, *Littlechief* added an important and entirely unsurprising caveat, stating that a federal district court's "determination is binding on the State of Oklahoma unless and until it is overturned by the United States Court of Appeals for the Tenth Circuit or the Supreme Court of the United States." 1978 CR 2, ¶ 2, 573 P.2d at 264.

That condition has come to pass. In its *Hooper* decision, the Tenth Circuit squarely held that "Section 14 of the Curtis Act no longer applies to Tulsa," 2023 WL 4220246 at *11. There, Tulsa made the same arguments regarding Section 14's continuing applicability that it makes to this Court. *Compare id.* at *11 (setting forth Tulsa's three principal arguments), *with* Tulsa Br. at 8–9, 12–16 (same arguments). The Tenth Circuit rejected each of those arguments based on the plain text of Section 14 and the intent of Congress made evident by that text. In doing so, the Tenth Circuit reversed the district court's ruling in *Hooper*, 2023 WL 4220246 at *14, and effectively reversed *Pickup*, *id.* at *13 n.14. According to Tulsa, that means that here the "inquiry is over," Tulsa Br. at 6, and this Court should adopt the Tenth Circuit's holding.

While Tulsa chose (and undoubtedly now regrets) the strongest form of deference this Court has announced to federal court decisions, elsewhere this Court has stated that "absent any compelling reason to the contrary, we will follow the Tenth Circuit's persuasive opinions" on federal law. *Fitzgerald v. State*, 1998 OK CR 68, ¶ 28, 972 P.2d 1157, 1169. *See also, e.g.*, *Knapper v. State*, 2020 OK CR 16, ¶ 83, 473 P.3d 1053, 1079 (finding Tenth Circuit decision on federal law "persuasive and adopt[ing] its reasoning"). The Tenth Circuit's *Hooper* decision amply satisfies this test. As demonstrated below, and as evident in the decision itself, the Tenth Circuit's analysis is a well-reasoned, careful, and straightforward application of Section 14's plain text, both within its historical context and in the context of surrounding state and federal enactments. Tulsa has provided the Court with no reason – much less a compelling one – to depart from the Tenth Circuit's persuasive opinion.

II. The Tenth Circuit Properly Analyzed the Text of Section 14.

The Tenth Circuit took the same text-focused, "plain language" approach to statutory interpretation utilized by this Court. *Compare Hooper*, 2023 WL 4220246, at *10 (standard of

review), *with Newlun v. State*, 2015 OK CR 7, ¶ 8, 348 P.3d 209, 211 ("Legislative intent is determined first by the plain and ordinary language of the statute."). It noted that Section 14 begins by permitting Indian Territory cities and towns to "incorporate[] as provided in chapter twenty-nine of Mansfield's Digest of the Statutes of Arkansas[.]" *Hooper*, 2023 WL 4220246, at *10 (quoting Curtis Act, 30 Stat. 495, 499 (1898)). Section 14 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 said State of Arkansas." [30 Stat. 495, 499 (1898).] Here, Section 14's requirement that a city or town government be "so authorized and organized" refers to the preceding requirement that the city or town be authorized and organized according to chapter twenty-nine of Mansfield's Digest. *Id.*...
>
> 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." *See, e.g., id.* .... 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[.]

Hooper, 2023 WL 4220246, at *10–11.

After setting forth the scope of Section 14's jurisdictional grant, the Tenth Circuit explained that "[f]ollowing statehood, in 1908, Tulsa adopted a new charter reincorporating under Oklahoma law." *Id.* at *12. "To this day, Tulsa continues to be a political subdivision of the state of Oklahoma, organized and authorized according to Oklahoma law.... Because Tulsa is no longer authorized and organized according to chapter twenty-nine of Mansfield's Digest, Tulsa is no longer entitled to Congress's limited grant of jurisdiction in Section 14." *Id.*

In sum, the Tenth Circuit persuasively explicated "the plain and ordinary language of the statute," *Newlun*, 2015 OK CR 7, ¶ 8, 348 P.3d at 211, as being limited to federal territorial municipalities "so authorized and organized" under borrowed Arkansas law. Tulsa has pointed to no text in the statute that can plausibly be read as conferring jurisdiction beyond that express

limit. And the Tenth Circuit's conclusion that Tulsa – as an Oklahoma chartered municipality – no longer fits within the category of municipalities identified as subject to the statute's force is correct, a fact that Tulsa effectively concedes. *See Hooper*, 2023 WL 4220246, at *12 ("Tulsa does not dispute that it is no longer authorized and organized according to chapter twenty-nine of Mansfield's Digest").

III. The Tenth Circuit Persuasively Rejected the Three Key Premises of Tulsa's Arguments to This Court.

Tulsa argued to the Tenth Circuit the same three main contentions it urges upon this Court in support of its continued jurisdiction under Section 14. *See id.* at *11 ("Tulsa argues Section 14 still grants it authority because (1) following Oklahoma's statehood the references to Arkansas law in Section 14 were replaced with references to Oklahoma law; (2) the Oklahoma Constitution reserved municipalities' preexisting rights and powers, including the jurisdiction granted by Section 14; and (3) Congress never repealed Section 14."). *See also* Tulsa Br. at 8–9, 12–16 (arguing same). The Circuit rejected each contention, and each time did so persuasively.

First, Tulsa argues, as it did in *Hooper*, that "[w]hen Oklahoma became a State pursuant to the Enabling Act, 34 Stat. 267 (1906), the laws of the State of Oklahoma replaced the laws of Arkansas." Tulsa Br. at 9. The Tenth Circuit rejected that argument as a basis for Tulsa's continued jurisdiction under Section 14 on terms equally applicable here:

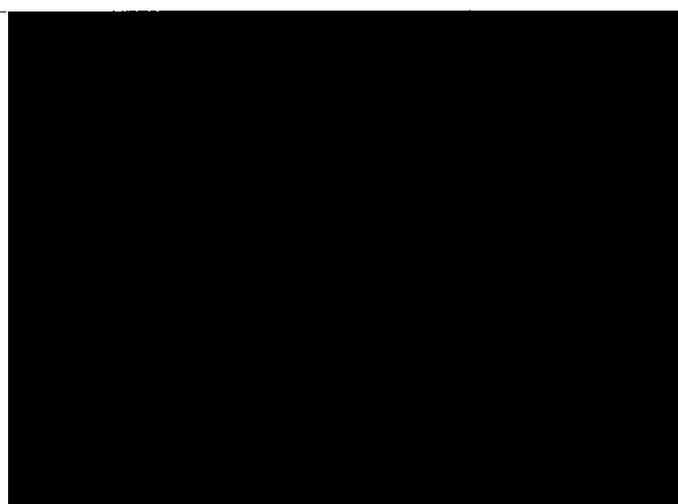
> Tulsa cites no portion of the Oklahoma Enabling Act or other act of Congress making such a change. The Oklahoma Enabling Act provided Oklahoma Territory law would extend across the entire state of Oklahoma, including the former Indian Territory, but did not address retention or amendment of Section 14 of the Curtis Act. *See* Oklahoma Enabling Act, § 13, 34 Stat. 267, 275 (1906). *Congress's silence is not fairly interpreted as a directive to amend Section 14 of the Curtis Act to remove the conditions Congress expressly placed on municipalities' rights and powers in the former Indian Territory.*

Hooper, 2023 WL 4220246, at *12 (emphasis added). *Accord Newlun*, 2015 OK CR 7, ¶ 9, 348 P.3d at 212 ("[I]t is not our place to interpret a statute to address a matter the Legislature chose not to address[.]"). Tulsa can only counter weakly that "it was presumed that the laws of the soon-to-be State of Oklahoma would apply to the Curtis Act cities because Indian Territory was to become part of the State," Tulsa Br. at 9, but it tellingly omits any citation for its naked assertion of what "was presumed" at the time. Such atextual speculation is not the way to interpret a statute. *See, e.g.*, *State v. Brester*, 2023 OK CR 10, ¶ 24 ("'the text of a law controls over purported legislative intentions unmoored from any statutory text' and we 'will presume' that 'the legislature says what it means and means what it says'" (quoting *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486, 2496 (2022))). The Tenth Circuit's rejection of Tulsa's first argument is squarely grounded in Congress's enacted text rather than Tulsa's conjecture as to understandings and motives, and accordingly represents the far more persuasive approach to statutory interpretation.[1]

Second, Tulsa asserts that:

> The Oklahoma Constitution … preserved the City's rights and authorities which were acquired pre-statehood. Article 18, § 2 of the Constitution provides that "[e]very municipal corporation now existing within this State shall continue with all its present rights and powers until otherwise provided by law."

[1] Relatedly, the Court rejected Oklahoma's argument (endorsed by Tulsa here, *see* Tulsa Br. at 11) that statehood abrogated Section 14's references to substantive Arkansas law but left undisturbed Section 14's jurisdictional grant. As the Circuit explained, "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," which are conditioned on municipalities' incorporation under Arkansas law. *See Hooper*, 2023 WL 4220246, at *12.



Tulsa Br. at 8–9 (brackets in original). Thus, according to Tulsa, under Article 18, § 2, "the City maintained its [pre-statehood] jurisdiction over Indians at the time of Statehood." *Id.* at 9. The Tenth Circuit squarely rejected the argument:

> This argument has two fatal shortcomings. First, the Oklahoma Constitution cannot amend an act of Congress. Congress limited its grant of jurisdiction in Section 14 to cities and towns in the Indian Territory organized and authorized according to chapter twenty-nine of Mansfield's Digest. Only Congress had the power to change that limitation. Second, upon statehood, even prior to Tulsa's adoption of a new charter under Oklahoma law, Tulsa ceased to be a municipality organized according to chapter twenty-nine of Mansfield's Digest. The Oklahoma Enabling Act extended Oklahoma Territory laws across the former Indian Territory.... This means, 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. *See State ex rel. West v. Ledbetter*, 97 P. 834, 835 (Okla. 1908) ("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.").

Hooper, 2023 WL 4220246, at *13.[2]

The Tenth Circuit's conclusion fully comports with that of the Supreme Court of Oklahoma, which on two occasions has authoritatively interpreted the reference in Article 18, § 2 of the Oklahoma Constitution to municipalities' "present rights and powers" to refer to those that vested *upon* statehood, not to those that pre-existed it. *See Lackey v. State ex rel. Grant*, 1911

[2] Tulsa asserts that "no part of the [*Ledbetter*] case involved Section 14[.]" Tulsa Br. at 20. But Tulsa is wrong. The Curtis Act references chapter twenty-nine of Mansfield's Digest *only* in Section 14. *See generally* 30 Stat. 495 (1898). That is the very provision *Ledbetter* discusses, *see* 1908 OK 196, ¶ 2, 97 P. at 835 ("By an act of Congress approved June 28, 1898 ... chapter 29 of Mansfield's Digest ..., on corporations, was put in force in the Indian Territory. Under the provisions of this chapter ..."), and it is the very provision it refers to when it states that "[n]o provision was made in the enabling act or in the Constitution for extending in force in the state laws under which the municipal corporations of the Indian Territory were created, organized, and governed," *id.*, and that those same laws "became inoperative," at statehood, *id.* ¶ 4, 97 P. at 835.

OK 270, 116 P. 913, 914 ("present rights and powers" referred not to pre-existing powers, but to "[t]he rights and powers possessed by municipal corporations of the state *at the time of its admission* ... [which] were ... extended in force in the state by the schedule to the Constitution" (emphasis added)); *State ex rel. Kline v. Bridges*, 1908 OK 45, 94 P. 1065, 1069–70 (rejecting that under Article 18, § 2, an Indian Territory municipality retained "all the rights and powers it had prior to the admission of the state" and stating that "no such meaning was intended by the framers of the Constitution"). Despite being put on notice of these holdings by the Nations' brief here, *see* Muscogee (Creek) Nation and Seminole Nation Amicus Brief ("MCN Br.") at 10–12 (May 31, 2023), Tulsa makes no attempt to reconcile its arguments under Article 18, § 2 of the Oklahoma Constitution with them.

Instead, and demonstrating just how estranged from the governing text its arguments are, Tulsa points to Article 7, § 1 of the Oklahoma Constitution as confirming that Indian Territory municipalities' Section 14 jurisdiction over Indians "would continue after Statehood." Tulsa Br. at 14. *See also id.* at 22 (stating that same provision "recognized ... that Curtis Act cities continued to have such powers"). That provision said nothing of the sort because it did not exist until half a century after statehood: It was added to the Oklahoma Constitution in 1967.[3] Because the Tenth Circuit's rejection of Tulsa's second contention is again grounded in (the correct) text enacted by Congress, and is in full keeping with the interpretations of the Oklahoma Supreme Court, it is again persuasive here.

[3] *See* Okla. Const., art. VII, § 1 (ed. note at PDF p. 56), https://oksenate.gov/sites/default/files/2019-12/AllOKConstitutionArticles.pdf.

Third, as to Tulsa's contention that Section 14 has not been repealed, the Tenth Circuit correctly concluded that Tulsa's repeal argument overlooks the threshold and dispositive question of whether the terms of Section 14 continue to apply to Tulsa:

> Tulsa notes that "[s]ince its passage before Oklahoma statehood and to this day, there have been no changes to Section 14 of the Curtis Act." Appellee's Br. at 16 (emphasis omitted). Tulsa further contends that only Congress can repeal or amend a federal grant of jurisdiction. Although Tulsa cites these principles in support of its argument that the jurisdictional grant from Section 14 survived statehood, *Tulsa fails to appreciate that because Congress has not amended or repealed Section 14, the plain text of Section 14, including its limitations on the grant of jurisdiction, also still applies*. Based on this text, Section 14 does not confer jurisdiction upon Tulsa in its current form.

Hooper, 2023 WL 4220246, at *13 (emphasis added; brackets in original). That is, Tulsa's no-repeal argument simply assumes away the fact that Tulsa (like other former Indian Territory municipalities) does not today fall within the plain text of Section 14's jurisdictional grant. But Tulsa has no magic wand to wave. Section 14 plainly and unambiguously limits its jurisdictional grant to municipalities incorporated under, and applying, Arkansas law. Tulsa, again by its own admissions, is neither of those things today. *See Hooper*, 2023 WL 4220246, at *12. As the Tenth Circuit correctly concluded, "[r]eading Section 14 the way Tulsa ... suggest[s] would require this court to ignore the express limitations Congress placed on the jurisdictional grant." *Id.* *See King v. State*, 2008 OK CR 13, ¶ 7, 182 P.3d 842, 844 ("In order to give effect to the Legislature's expressed intentions we construe statutes using the plain and ordinary meaning of their language.").[4]

[4] The Tenth Circuit similarly rejected as "not persuasive," *Hooper*, 2023 WL 4220246, at *13 n.14, the reasoning of *Pickup*, which, like the district court's decision in *Hooper*, held that former Indian Territory municipalities retain jurisdiction over Indians under Section 14. As Tulsa does before this Court, the district court in *Pickup* assumed away the clear textual limits on Section 14's jurisdictional grant and thus failed to address whether modern Oklahoma municipalities continue to fall within those limits after statehood. *See id.* ("*Pickup* analyzed

IV. The Tenth Circuit's Conclusions Regarding Congress's Purpose in Enacting Section 14 Are Correct.

Finally, in addition to the "fatal shortcomings" of its textual arguments, *Hooper*, 2023 WL 4220246, at *13, Tulsa has offered this Court no explanation as to why Congress in 1898 would provide for the power of certain territorially-chartered municipalities to endure with respect to jurisdiction over Indians post-statehood, in what would amount to a major affront to basic principles of federalism. MCN Br. at 14–18. There is no explanation because the notion makes no discernible sense. By contrast, the Tenth Circuit placed Section 14 in its proper historical context, explaining that its limitation to municipalities "when so authorized and organized" under chapter twenty-nine of Mansfield's Digest of Arkansas law

> makes sense considering Section 14's historical context. Referring to an act of Congress putting the corporation laws of Arkansas in effect in the Indian Territory, the Supreme Court noted that this was but one of "a series of acts of that character" where "[Congress's] action was intended to be merely provisional" because Congress "was then contemplating the early inclusion of that territory in a new state, and the purpose of those acts was to provide, for the time being, a body of laws adapted to the needs of the locality and its people in respect of matters of local or domestic concern." *Shulthis v. McDougal*, 225 U.S. 561, 571 (1912).

Hooper, 2023 WL 4220246, at *12 n.13 (brackets in original). The Supreme Court of Oklahoma has similarly recognized that

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whether Congress repealed Section 14 but did not address ... the conditions Congress placed on Section 14's grants of power. *See* [2023 WL 1394896] at *83–86."). While *Pickup*'s reasoning regarding Section 14 was pure dicta because the court determined as a threshold matter that it lacked jurisdiction, *see* 2023 WL 1394896 at *1 ("the Court concludes that the Rooker-Feldman doctrine prevents it from exercising jurisdiction"), *Pickup* is completely irreconcilable with, and therefore cannot survive, the Tenth Circuit's decision in *Hooper* with respect to its interpretation of Section 14. *Pickup*'s Section 14 dicta – like the district court's holding in *Hooper* – is not good law in the Tenth Circuit.

> [t]he Indian Territory was without a local Legislature to legislate to meet the local needs. The noncitizen [i.e., non-Indian] had taken up his abode there, and built towns and cities .... [S]ection 14 was enacted to afford immediate local municipal government.

Inc. Town of Hartshorne v. Inc. Town of Haileyville, 1909 OK 240, 104 P. 49, 50. And the United States Supreme Court, discussing Congress's pre-statehood enactments for local governance in the Indian Territory, has likewise explained: "In what was done Congress did not contemplate that this situation should be of long duration, but, on the contrary, that the territory should be prepared for early inclusion in a state." *S. Sur. Co. v. Oklahoma*, 241 U.S. 582, 584 (1916).

The United States Supreme Court, the Tenth Circuit, and the Oklahoma Supreme Court, then, fully agree regarding the temporary purposes Congress intended to serve with Section 14 and related statutes establishing a framework of governance in the Indian Territory prior to statehood. *See King*, 2008 OK CR 13, ¶ 7, 182 P.3d at 844 ("If the Legislature designs a statute for a specific situation, we should give effect to that intent."); *Newlun*, 2015 OK CR 7, ¶ 8, 348 P.3d at 211 ("A statute should be given a construction according to the fair import of its words taken in their usual sense, in conjunction with the context, and with reference to the purpose of the provision." (citation omitted)). Tulsa has given this Court no basis to diverge from those courts' persuasive analysis.

CONCLUSION

For the reasons stated above, in the Tenth Circuit's well-reasoned opinion, and in the Nations' amicus curiae brief, this Court should reverse the decision of the municipal court.

Dated: July 3, 2023

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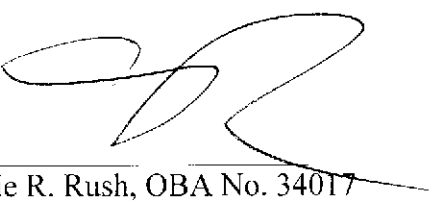

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