IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JUSTIN HOOPER, Plaintiff/Appellant, v. CITY OF TULSA, Defendant/Appellee.	Case No. 22-5034

RESPONSE BRIEF ON BEHALF OF APPELLEE CITY OF TULSA

On Appeal from the United States District Court
For The Northern District of Oklahoma
The Honorable William P. Johnson, United States District Judge
District Court Case No. 21-CV-165-WPJ-JFJ

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August 12, 2022
Oral Argument Requested

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PRIOR OR RELATED APPEALS

The Appellee represents that there are no prior or related appeals before this Court or other Federal District Courts.

STATEMENT OF JURISDICTION

The District Court has jurisdiction pursuant to 30 Stat. 495 § 14, 28 U.S.C. § 2201 and 28 U.S.C. §§ 1331.

This appeal is taken from a Memorandum Opinion and Order Granting Defendant's Motion To Dismiss and Judgment entered on April 13, 2022, by the Honorable William P. Johnson in the United States District Court for the Northern District of Oklahoma. [App. Vol. 1 at 10[1]]. Plaintiff filed his notice of appeal on May 2, 2022. [App. Vol. 1 at 262]. Pursuant to Federal Rules of Appellate Procedure 4(a)(4)(A), the Plaintiff's Notice of Appeal was timely filed. This Court's jurisdiction derives from 28 U.S.C. § 1291.

STATEMENT OF THE CASE

On April 9, 2021, Appellant, Justin Hooper, filed a Complaint in the Northern District of Oklahoma, Case No. 21-CV-165-JED-JFJ, naming as a Defendant the City of Tulsa. The Complaint alleges that on or about August 28, 2018, Appellant received a traffic citation for speeding within the Tulsa city

[1] Appellee City of Tulsa refers to Plaintiff/Appellant's Appendix, Document 010110704709, filed by Appellant on July 1, 2022. All references herein to this appendix will identify the documents as "App. Vol." and identity the page in which the reference is located within Plaintiff/Appellant's Appendix.

limits. The location where he was pulled over was within the reservation boundaries of the Muscogee (Creek) Nation. Plaintiff paid the preset fine amount of One Hundred Fifty Dollars ($150.00) on August 28, 2018. That payment constituted a waiver of trial rights and a plea of no contest resulting in a finding of guilt.

On December 17, 2020, after the United States Supreme Court's ruling in *McGirt v. Oklahoma*[2], Plaintiff filed his Application for Post-Conviction Relief in the City of Tulsa Municipal Court. Prior to the hearing on the Post-Conviction Relief motion on March 18, 2021, Plaintiff filed his Amended and Second Amended Applications for Post-Conviction Relief. At the March 18, 2021 hearing on Plaintiff's Second Amended Application for Post-Conviction Relief, the Honorable Mitchell McCune, Chief Judge of the Municipal Criminal Court of the City of Tulsa, heard arguments. The Municipal Court denied the Plaintiff's Application for Post-Conviction Relief on April 5, 2021, by way of a written Order finding that pursuant to the Curtis Act, 30 Stat. 495, the municipal court had jurisdiction over Hooper's violation of a municipal ordinance regardless of his Indian status. The Appellant attached Judge McCune's Order as an exhibit to his Complaint in this matter. [App. Vol. 1 at 107].

[2] *McGirt v. Oklahoma*, 140 S. Ct. 2452, 207 L. Ed. 2d 985 (2020)

The Plaintiff then filed a suit seeking civil declaratory relief that the municipal court did not have jurisdiction over him and appealing the municipal court's ruling.

Plaintiff specifically claimed in his Complaint that he is "entitled to Declaratory Judgment that the Curtis Act is inapplicable to present times and confers no jurisdiction to municipalities to prosecute and punish Indians for offenses that occur on an Indian Reservation." [App. Vol. 1 at 105].

Although the Appellant filed his lawsuit in a quasi-civil and quasi-criminal capacity, on May 26, 2021 the City of Tulsa filed a Motion To Dismiss pursuant to civil rule of procedure 12(b)(6) requesting the Court to dismiss Mr. Hooper's lawsuit and find with respect to the request for declaratory judgment that under Section 14 of the Curtis Act, the City clearly has the jurisdiction to enforce its ordinances, including criminal ordinances, against "all inhabitants . . . without regard to race." [App. Vol. 1 at 135].

On February 28, 2022, Federal District Court Judge William P. Johnson who was presiding over this case as a result of the Tenth Circuit Order designating him to hear and preside over cases in the Northern District of Oklahoma, issued an Order requesting supplemental briefing from the parties. [App. Vol. 1 at 225]. On March 14, 2022, both sides filed the requested supplemental briefing. [App. Vol. 1 at 227 and 237]. On April 13, 2022, the Court

issued a Memorandum Opinion and Order granting the City of Tulsa's Motion To Dismiss on the claim of declaratory judgment finding that the clear language of the Curtis Act authorized municipalities properly incorporated to enforce its ordinances against all inhabitants, including Indians, and that the Curtis Act has not been repealed or overturned, and then found Plaintiff's request to appeal moot in light of the Court's ruling on the other issue. [App. Vol. 1 at 9].

PROCEDURAL POSTURE

This lawsuit was brought as both a civil request for declaratory judgment and as an appeal of the municipal court's ruling in the Appellant's post-conviction proceeding. Whether the City of Tulsa has jurisdiction to prosecute Indians for violation of municipal ordinances under the Curtis Act was the only issue raised by Appellant in both the claims for declaratory judgment and appeal of the Order on post-conviction relief. In deciding this matter, the trial court noted that "declaratory judgment is appropriate where 'the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.'" [App. Vol. 1, at 12, quoting *Surefoot LC v. Sure Foot Corp*., 531 F.3d 1236, 1244 (10th Cir. 2008) (citation omitted)]. The Court correctly found that "there is a substantial, real,

and immediate controversy between the adverse parties here, and declaratory judgment is an appropriate avenue to consider." [App. Vol. 1 at 12].

In light of the District Court's finding on the declaratory judgment claim that the City of Tulsa has jurisdiction to prosecute Indians under the Curtis Act, the only issue raised in Appellant's appeal of the Order on this request for post-conviction relief had been decided and the trial court properly found that the appeal was moot.

DOCUMENTS NOT PRESENTED TO THE DISTRICT COURT

As an initial matter, the Appellant's Brief In Chief in this matter routinely references and cites to various documents which he included in his Appendix for the first time on this appeal and were never given to or considered by the District Court. See Appellant's Appendix, Ex. 4-16. This Court has held that generally it limits "our review on appeal to the record that was before the district court when it made its decision." *Regan-Touhy v. Walgreen Co*., 526 F.3d 641, 648 (10th Cir. 2008) citing *Boone v. Carlsbad Bancorp., Inc*., 972 F.2d 1545, 1549 n. 1 (10th Cir.1992) ("[w]e will not review [evidence that] was not before the district court when the various rulings at issue were made"). This matter comes before this Court on an appeal of a Rule 12(b)(6) Motion to Dismiss. Any documents not presented to the District Court should not be considered in deciding this matter.

SUMMARY OF THE ARGUMENT

The Curtis Act, 30 Stat. 495, became federal law in 1898. It is undisputed in this matter that the City of Tulsa is properly incorporated as set forth in Section 14 the Curtis Act. Section 14 of the Curtis Act provides that cities or "town governments" properly incorporated "shall possess all the powers and exercise all the rights of similar municipalities in said State of Arkansas." *Id*. Section 14 further stated 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, and shall have equal rights, privileges, and protection therein." Section 14 of the Curtis Act was an exercise of Congress's plenary power over Indian affairs. Section 14 of the Curtis Act has not been repealed, amended, or altered in the more than 100 years since it was enacted.

In the wake of the United States' Supreme Court's ruling in *McGirt v. Oklahoma*, 140 S.Ct. 2452, 207 L.Ed.2d 985 the Appellant and others have challenged the City of Tulsa's jurisdiction to enforce violations of its ordinances against Indians within its City limits. However, the Curtis Act is a federal law that can only be repealed by a subsequent act of congress and no such action has taken place. As set forth in detail herein, Section 14 of the Curtis Act provides the City of Tulsa with continuing jurisdiction to enforce its laws and ordinances as to **all** its inhabitants, including Indians.

For the reasons set forth herein, the Memorandum Opinion and Order of the District Court should be affirmed.

ARGUMENT AND AUTHORITIES

I. THE DISTRICT COURT DID NOT ERR IN GRANTING THE CITY OF TULSA'S MOTION TO DISMISS.

This Court reviews a District Court's granting of a Motion To Dismiss *de novo* applying the same standards as those used by the District Court. *Geoffrey E. Macpherson, Ltd. v. Brinecell, Inc.*, 98 F.3d 1241, 1245 (10th Cir. 1996). "A complaint may be dismissed as a matter of law for two reasons: (1) lack of a cognizable legal theory, or (2) insufficient facts under a cognizable theory." *Kentucky Cent. Life Ins. Co. v. LeDuc*, 814 F. Supp. 832, 835 (N.D. Cal. 1992), citing 2A J. Moore, Moore's Federal Practice ¶ 12,08, at 2271 (2d ed. 1982), cited in *Robertson v. Dean Witter Reynolds, Inc*., 749 F.2d 530, 533–34 (9th Cir.1984). "To withstand a motion to dismiss, a complaint must contain enough allegations of fact 'to state a claim to relief that is plausible on its face.'" *Robbins v. State of Oklahoma, ex rel. Dept. of Human Services*, 519 F.3d 1242 (10th Cir. 2008), citing *Bell Atlantic Corp v. Twombly*, 550 U.S. 544, 570, (2007). Under this standard "the mere metaphysical possibility that some plaintiff could prove some set of facts in support of the pleaded claims is insufficient; the complaint must give

the court reason to believe that this plaintiff has a reasonable likelihood of mustering factual support for these claims." *Id*.

Whether the City of Tulsa Municipal Court had jurisdiction over Plaintiff is purely an issue of law and the law is clear that Section 14 of the Curtis Act granted jurisdiction to the City and has never been repealed. Thus, the District Court appropriately granted the City's Motion To Dismiss.

A. BECAUSE THE CITY OF TULSA WAS ORIGINALLY INCORPORATED PURSUANT TO SECTION 14 OF THE CURTIS ACT WHICH HAS NOT BEEN REPEALED, THE CITY HAS ALWAYS HAD CRIMINAL JURISDICTION OVER ALL RACES OF CRIMINAL VIOLATORS INCLUDING INDIANS.

The crux of the Appellant's argument is that the City has no jurisdiction over criminal offenses committed by Indians within Indian reservations yet, he fails to cite any controlling statute or case law that removes the City's municipal criminal jurisdiction over all races which was originally granted by the Curtis Act in 1898. 30 Stat. 495 §14 (1898) (hereinafter the "Curtis Act"). Until 1898, all offenses committed within Creek reservation boundaries were prosecuted in federal courts and tribal courts as Oklahoma had not yet become a state. However, in 1898, the United States Congress, using its plenary power over Indians, passed the Curtis Act which: (1) in Section 28 abolished the Creek Nation tribal courts and transferred all pending civil and criminal cases from those courts to the U.S. Courts of the Indian Territory; (2) in Section 26 made

the laws of the tribes inapplicable and unenforceable in those U.S. Courts, and (3) in Section 14 thereof, specifically created a mechanism for municipalities located within the reservation boundaries to incorporate and obtain both civil and criminal jurisdiction over all races, including Indians when such cities incorporate as specified in Section 14 of the Curtis Act by petitioning "to the United States court in the district in which such city or town is located … if not already incorporated thereunder[3]."

1. The City of Tulsa was properly incorporated in order to exercise the authority granted by the Curtis Act

The Appellant in this matter has not challenged that Tulsa was properly incorporated pursuant to the requirements of the Curtis Act. The relevant case law also supports a conclusion that Tulsa was appropriately incorporated to exercise the authority granted under Section 14 of the Curtis Act.

In the *City of Tulsa v. Oklahoma Natural Gas Co*., 4 F.2d 399, 400 (DC., E.D. OK); appeal dismissed, 269 U.S. 527) (1925), the first sentence of the Court's opinion states, as follows:

> The city of Tulsa, Okl., was incorporated under the provisions of chapter 29 of Mansfield Digest of the Compiled Laws of Arkansas 1884, which laws had been extended over and put in force in the Indian Territory

[3] In *Hodel v. Muscogee (Creek) Nation*, 851 F.2d 1439 (D.C. Cir. 1988) the D.C. Circuit found that some of the Curtis Act sections related to tribal courts were repealed by the Oklahoma Indian Welfare Act. However, neither the OIWA, 25 U.S.C. Sec. 503 (now 25 U.S.C. Sec. 5203) nor *Hodel* address municipal jurisdiction granted in Section 14 which continues in force and effect.

> by an Act of Congress of May 2, 1890 (26 Stat. 94). By Act of Congress of June 28, 1898 (30 Stat. 499) [the Curtis Act], power was given to incorporated municipalities to contract and to be contracted with.

In *McGirt v. Oklahoma*, 140 S.Ct. 2452, 2490, 207 L.Ed.2d 985 (2020) Gorsuch, J., delivered the opinion of the Court, in which Ginsburg, Breyer, Sotomayor, and Kagan, JJ., joined. Roberts, C. J., filed a dissenting opinion, in which Alito and Kavanaugh, JJ., joined, and in which Thomas, J., joined, except as to footnote 9. Thomas, J., filed a dissenting opinion. While the majority opinion in *McGirt* does not analyze Section 14 of the Curtis Act, Chief Justice Roberts' dissent, at pp. 2490 - 2491, states the following with respect to municipalities (specifically referencing the City of Tulsa) evidencing, among other things, that the City was properly incorporated pursuant to the Curtis Act:

> The following year, the 1898 Curtis Act "abolished" all tribal courts, prohibited all officers of such courts from exercising "any authority" to perform "any act" previously authorized by "any law," and transferred "all civil and criminal causes then pending" to the U.S. Courts for the Indian Territory. Act of June 27, 1898 (Curtis Act), § 28, *id*., at 504–505. In the same Act, Congress completed the shift to a uniform legal order by banning the enforcement of tribal law in the newly exclusive jurisdiction of the U.S. Courts. See § 26, *id*., at 504 ("[T]he laws of the various tribes or nations of Indians shall not be enforced at law or in equity by the courts of the United States in the Indian Territory."). Congress reiterated yet again in 1904 that Arkansas law "continued" to "embrace *all* persons and estates" in the territory—"whether Indian, freedmen, or

> otherwise." Act of Apr. 28, 1904, ch. 1824, § 2, 33 Stat. 573 (emphasis added). In this way, Congress replaced tribal law with local law in matters at the core of tribal governance, such as inheritance and marital disputes. *See, e.g., George v. Robb*, 4 Ind.T. 61, 64 S.W. 615, 615–616 (1901); *Colbert v. Fulton*, 74 Okla. 293, 157 P. 1151, 1152 (1916).
>
> 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.
>
> *Id*. (Emphasis in original).

Since there is no dispute as to whether Tulsa was incorporated in a manner consistent with the Curtis Act, the primary issues in this case revolve

around whether the authority granted by Section 14 of the Curtis Act has been repealed or altered.

2. The express legislative intent of Section 14 of the Curtis Act was to provide municipalities jurisdiction over *all* inhabitants

Section 14 of the Curtis Act of 1898 makes clear that municipalities have authority over "all inhabitants of such cities and towns, without regard to race" and establishes that all individuals, including tribal members, "shall be subject to all laws and ordinances of such city or town governments…" Curtis Act of 1898, § 14, 30 Stat. 495, 499-500. Because Section 14 of the Curtis Act unequivocally says cities and towns may adopt and enforce municipal ordinances, including criminal ordinances, any argument that the City of Tulsa is without jurisdiction over Appellant for his speeding violation occurring within the Tulsa city limits is legally unfounded, as municipalities are merely exercising their Congressionally created grant of authority.

As referenced by the District Court in its Memorandum Opinion and Order [App. Vol. 1 at 13-14], Section 14 of the Curtis Act empowered the inhabitants of any city or town in Indian Territory to incorporate and provided that "the city or town government ... shall possess all the powers and exercise all the rights of similar municipalities in said State of Arkansas." Curtis Act of 1898, § 14, 30 Stat. 495. Specifically, Section 14 of the Curtis Act provided for

the incorporation of municipalities within the Territory consistent with the laws of Arkansas. Upon Oklahoma's statehood in 1907 together with Congressional approval of Oklahoma's Enabling Act, 34 Stat. 267 (1906), the references to Arkansas law were replaced by references instead to the law of the new State of Oklahoma. Since Oklahoma statehood, there has been no amendment by Congress to Section 14 of the Curtis Act.

The Creek Nation ultimately entered into an allotment agreement with the United States and the treaty agreement was codified as the Act of March 1, 1901. 31 Stat. 861 ("1901 Act"). The 1901 Act specifically revoked Section 13 of the Curtis Act as well as any other section inconsistent with the new Act. The Act, however, specifically retained Section 14 of the Curtis Act. See 190l Act, § 41 ("no Act of Congress or treaty provision inconsistent with this agreement shall be in force in said nation, except section fourteen [of the Curtis Act], which shall continue in force as if this agreement had not been made.").

Realizing the inherent problems with his argument created by the express language of the Curtis Act, the Appellant in his Opening Brief alleges that the intent of Section 14 was to "provide stop-gap remedies" and contends that the provisions of Section 14 were "provisional" and "temporary". However, the United States Supreme Court has made clear that it will not look to legislative intent when the language of the statute is clear and unambiguous.

The United States Supreme Court in *Oklahoma v. Castro-Huerta*, 142 S.Ct. 2486 (2022) recently addressed whether the State's jurisdiction over Indian victims under the General Crimes Act had been preempted. In *Castro-Huerta* the Court held that "the fundamental problem with Castro-Huerta's implicit intent argument is that the text of the General Crimes act says no such thing." *Id* at 2496. The Court noted that "Congress expresses its intentions through statutory text passed by both Houses and signed by the President (or passed over a Presidential veto)." *Id*. The Court reiterated its previous holdings that "the text of the law controls over purported legislative intentions unmoored from any statutory text." *Id*. The Court made clear that it will presume that "the legislature says what it means and means what it says." *Id*. at 2497, quoting *Henson v. Santander Consumer USA Inc*., 582 U.S. 79, ––––, 137 S.Ct. 1718, 1725, 198 L.Ed.2d 177 (2017) (internal quotation marks and alterations omitted); *see, e.g., McGirt*, 591 U.S., at ––––, 140 S.Ct., at 2465 ("[W]ishes are not laws")

The Appellant can cite to no express language from the Curtis Act which states or indicates that its provisions were intended to be temporary or had any sort of expiration date. Without a further act of congress to alter, amend, or repeal Section 14 of the Curtis Act it remains good law today and properly confers upon the City of Tulsa authority to enforce its ordinances against <u>all</u> inhabitants.

3. Statehood and the Oklahoma Enabling Act had no effect on the authority given to municipalities under the Curtis Act

The Appellant in his Opening Brief details a history related to Oklahoma's statehood and the Oklahoma Enabling Act in an effort to further argue that the Curtis Act was a "temporary" measure and any jurisdiction granted therefrom was altered by Oklahoma's statehood in 1907. However, this argument is not grounded in fact or in law.

The District Court in its Memorandum Opinion and Order correctly found that "Oklahoma's statehood did not put an end to municipalities' powers under the Curtis Act." [App. Vol. 1 at 16]. "The Oklahoma Constitution provided that '[e]very municipal corporation now existing within this State shall continue with all of its present rights and powers until otherwise provided by law, and shall always have the additional rights and powers conferred by the Constitution.' Okla. Const. Art. 18 § 2." [App. Vol. 1 at 16]. The District Court further noted that "the Oklahoma Constitution explicitly permitted the operation of municipal courts" citing Article 7, § 1. [App. Vol. 1 at 16].

While Congress passed the Oklahoma Enabling Act, 34 Stat. 267 (1906) (hereinafter the "Enabling Act") at the beginning of the statehood process and portions of the Enabling Act addressed the transfer of territorial jurisdiction to state and federal jurisdiction, nothing in the Enabling Act rescinded the

authority granted to municipalities by the Curtis Act. *Id*. at 277. Since the Oklahoma Enabling Act was codified in 1906, seven years after the Curtis Act, Congress clearly had the ability to rescind or amend its pronouncements in Section 14 of the Curtis Act but chose not to do so. Similarly, the Oklahoma Constitution which was finalized approximately eight years after the Curtis Act included language which ***specifically reserved*** to the municipalities already in existence, such as Tulsa, "all of its present rights and powers until otherwise provided by law." Okla. Const. Art. 18 § 2.

Neither document expressly repealed nor even addressed the authority granted to the municipalities under Section 14 of the Curtis Act. Congress's intentional decision not to repeal the authority granted under the Curtis Act, and the State's action in specifically stating that the municipalities retain all rights previously conveyed should be seen as an intent to maintain the grant of authority provided under Section 14 of the Curtis Act even after statehood.

Since its passage before Oklahoma statehood and **to this day**, there have been no changes to Section 14 of the Curtis Act. When Oklahoma became a state in 1907, all cities and towns in Indian Territory continued in existence and did not lose any powers or rights despite any change in form. See *WRT Realty, Inc. v. Bos. Inv. Grp. II, L.L.C.,* 2012 OK CIV APP 82, ¶ 11, 287 P.3d 397, 402 ("But, any

such change in the form of municipal government did not change or affect any existing rights. Okla. Const. art. 30, § 1.")

The Appellant contends that Oklahoma case law supports his claim that the provisions of the Curtis Act were temporary until such time as statehood and the enabling act changed the status of municipalities. However, the cited case law does not support this contention.

Appellant, as well as the Amicus Brief filed by the Muscogee Creek Nation ("MCN") in support of the Appellant place great weight on the language of *State ex rel. W. v. Ledbetter*, 1908 OK 196, 97 P. 834. However, both the Appellant and the MCN Amicus misconstrue the language of *Ledbetter*. In *Ledbetter*, the Oklahoma Supreme Court dealt with a situation wherein the City of Muskogee's City Marshal was petitioning for a declaration that he was entitled to keep his office even after statehood.

Appellant quotes a portion of Paragraph 4 of the *Ledbetter* decision and claims that it stands for the proposition that "the authority that had previously been given municipalities and other creates of Congress through territorial management had 'become inoperative'" with statehood. [Appellant's opening brief, p. 12]. However, Appellant does not quote the entire paragraph from which he cites in *Ledbetter* and review of the Appellant's quote in context shows that the Oklahoma Supreme Court makes no such pronouncement. Paragraph

2 of the *Ledbetter* opinion references the Curtis Act generally to discuss the difference between first- and second-class cities. No part of *Ledbetter* addresses Section 14 of the Curtis Act which is at issue in this case. The same paragraph in the *Ledbetter* opinion that references the Curtis Act also states "by section 2 of the Schedule to the Constitution (Bunn's Const. § 451) all the laws in force in the territory of Oklahoma at the time of the admission of the state into the Union which were not repugnant to the Constitution, and which were not locally inapplicable, *were extended in force in the state*." *Ledbetter, supra*, at ¶2 (emphasis added).

Further, Appellant relies upon a portion of paragraph 4 of the *Ledbetter* opinion but fails to include the remainder of that paragraph which states:

> . . .but it is not necessary for us to determine whether Muskogee, as a municipal corporation, would have ceased to exist at said time if no provision had been made in the Constitution continuing its corporate existence, for by section 10 of the Schedule to the Constitution it is provided that:
>
> > "Until otherwise provided by law, incorporated cities and towns, heretofore incorporated under the laws in force in the territory of Oklahoma or in the Indian Territory, shall continue their corporate existence under the laws extended in force in the state, and all officers of such municipal corporations at the time of the admission of the state into the Union shall perform the duties of their respective

> offices under the laws extended in force in the state, until their successors are elected and qualified in the manner that is or may be provided by law: Provided, that all valid ordinances now in force in such incorporated cities and towns shall continue in force until altered, amended or repealed."

In other words, the express language of the Oklahoma Constitution, allowed for the laws of the existing municipalities to continue until altered or amended.

The Amicus Brief filed by the Muscogee Creek Nation ("MCN") in support of the Appellant further argues that cases such as *Lackey v. State*, 1911 OK 270, 116 P. 913, *State ex rel. Kline v. Bridges*, 1908 OK 45, 94 P. 1065, and *Jefferson v. Fink*, 247 U.S. 288, 39 S.Ct. 516 (1918) stand for the proposition that the Curtis Act's grant of jurisdiction to municipalities was only temporary until statehood and that the state laws of Oklahoma overrode any laws of the existing municipalities. However, none of these cases stand for the proposition that Section 14 of the Curtis Act was meant to be temporary or provisional or was altered by statehood.

The MCN claims that "the Supreme Court has interpreted the Curtis Act and related Indian Territory statues as 'plainly … intended to be merely provisional' pending statehood." MCN Amicus, p. 8, quoting *Jefferson, supra*. However, *Jefferson* makes no such pronouncement about the Curtis Act.

Instead, the *Jefferson* Court in evaluating a *territorial statute* which conflicted with then existing Oklahoma laws, quoted the case of *Shulthis v. McDougal,* 225 U.S. 561, 32 S.Ct. 704 (1912). The quoted language from *Shulthis* in the *Jefferson* opinion is what is cited by the MCN in their amicus. In *Shulthis*, the Court addressed that the February 18, 1901 Act and others similar to it were not meant to encroach upon the powers of the new "prospective state". The Court likened the pronouncements in the 1901 Act to the "same as it would be had the corporation laws of Arkansas been adopted and put in force by local or territorial legislature." *Id*. at 707. Nowhere in the quoted language is Section 14 of the Curtis Act referenced, nor is the authority given to municipalities prior to statehood.

The MCN presents *Jefferson, Lackey* and the other cases as holding that the Curtis Act was merely provisional and was changed by statehood, however, they fail to mention that none of these cases address whether ***a congressional grant of authority*** survived statehood. Instead, *Lackey* and *Jefferson* address situations where a territorial statute which pre-dated statehood conflicted with the now in effect statutes of the State of Oklahoma. *Lackey* and *Jefferson* neither one address municipal ordinances nor do they speak to the issue of whether the Oklahoma courts or legislature even had the authority to alter or amend rights conferred to a municipality by Congress under its plenary powers. Further,

Lackey deals with issues related to Oklahoma City and the Oklahoma Territory which never fell under the Curtis Act.

State ex rel. Kline, also does not address the issue in this case as it dealt with whether the newly formed Oklahoma legislature had the ability to enact new legislation which potentially changed the way municipal officers are elected.

None of these cases cited address Section 14 of the Curtis Act. None of them stand for the proposition that statehood in any way altered the powers and authorities given to it by Congress under the Curtis Act. Further, to the extent that the MCN in its brief contends that the Oklahoma Supreme Court cases are binding in this matter, the MCN overlooks that the application and interpretation of a federal law such as the Curtis Act is a federal question to be decided by the Federal Courts and state court case law is merely persuasive.

The United States Supreme Court addressed the Oklahoma Enabling Act in its recent decision in *Oklahoma v. Castro-Huerta*, in determining that the State and Federal courts have concurrent jurisdiction over crimes committed by non-Indians against Indians in Indian Country. The Court held that "interpreting a statehood act to divest a State of jurisdiction over Indian country 'wholly situated within [its] geographical boundaries' would undermine 'the very nature of the equality conferred on the State by virtue of

its admission into the Union.'" *Oklahoma v. Castro-Huerta*, 142 S.Ct. 2486, 2503 (2022) quoting *Draper v. U.S.*, 164 U.S. 240, at 242–243, 17 S.Ct. 107(1896). The Court clarified that "clear statutory language" is required to create an exception to that rule. *Castro-Huerta*, 142 S.Ct. at 2503.

Such is the case here. Nothing in the Enabling Act removed the jurisdiction of municipalities to enforce its ordinances against all inhabitants as specifically provided for in the Curtis Act. Oklahoma's transition into statehood did not inherently act to remove the jurisdiction previously granted by Congress. The Appellant cites from various aspects of the Oklahoma Constitution and statements made by Oklahoma's first Governor to claim that the City is "under the laws of the state of Oklahoma." [Appellant's Brief, p. 16]. However, the State recognizing that the City will conform to the laws of the State does not expressly or otherwise remove the City's ability to act on the jurisdiction granted under the Curtis Act.

The Oklahoma Constitution and subsequent laws did not eliminate the City and remake it, but rather, simply recognized the City of Tulsa as it existed before Statehood, confirmed the City's powers and authorities existing prior to Statehood would remain in effect after Statehood, and then adopted the City into the State of Oklahoma under which the City now operates.

A grant of authority by way of a Federal Act of Congress cannot be changed or removed by a statement of a governor or other action taken by the State. What congress gave, only congress can take away. The Appellant fails to cite to anything whatsoever that shows that a State's laws can override an Act of Congress such as the Curtis Act passed under Congress' plenary power over Indian tribes.

The Appellant also claims that the Curtis Act makes no provision for "police courts" and instead gave that authority to "mayors of such cities and towns" and that the present day municipal courts are derivative of police courts which were not contemplated by the Curtis Act. This is a misinterpretation of the law as it has evolved in relation to these Courts.

As the District Court set out in its Memorandum Opinion and Order, Section 14 of the Curtis Act "governs incorporation based on the provisions of ,24" which provides:

> By-laws and ordinances of municipal corporations may be enforced by the imposition of fines, forfeitures, and penalties, on any person offending against or violating such by-laws or ordinances, or any of them; and the fine, penalty, or forfeiture, may be prescribed in each particular by-law or ordinance, or by a general by-law or ordinance made for that purpose; and municipal corporations shall have power to provide in like manner for the prosecution, recovery and collection of such fines, penalties and forfeitures.

The District Court noted that "additionally, the same chapter grants jurisdiction to 'police courts' reminiscent of the municipal court at issue in this case: 'The police judge shall provide over the police court, and perform the duties of judge thereof, and shall have jurisdiction over all cases of misdemeanor arising under this act, and all ordinances passed by the city council in pursuance thereof.' " [App. Vol. 1 at 15]. The Court, reading these two sections together, correctly found that it is "quite clear that the Curtis Act, which incorporates the provisions of Mansfield's Digest by reference, explicitly authorizes the jurisdiction of a variety of municipal courts and court functions."

4. The City, as a political subdivision is not limited to the jurisdiction given to the State

The Appellant complains that the City of Tulsa is a political subdivision of the State and thus, cannot have jurisdiction over a matter when the state does not. However, Plaintiff's unfounded belief that municipalities should not have different powers or rights than the state in which they reside, is not the basis for a legal claim.

As the District Court ruled in its Memorandum Opinion and Order, citing *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320 (1958), a municipality may be granted powers by the federal government different than those granted to the state. In *City of Tacoma*, the Supreme Court found that the federal

government gave the power to condemn state land to the City of Tacoma because it "has dominion, to the exclusion of the States, over navigable waters of the United States." *Id*. at 334. The State of Washington argued that "Tacoma, as a creature of the State of Washington, cannot act in opposition to the policy of the State or in derogation of its laws." *Id*. at 328. However, the Supreme Court ruled that the City of Tacoma could have authority distinct from, and even contrary to, that of the State of Washington because authority over navigable waters was "under the domination of the United States." *Id*. at 339.

Like its power over navigable waters, Congress has "plenary power over Indian affairs, including the power to modify or eliminate tribal rights." *S. Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998); see also *Stephens v. Cherokee Nation*, 174 U.S. 445, 446, 19 S.Ct. 722, 722, 43 L.Ed. 1041 (1899); *Cherokee Nation v. Hitchcock*, 187 U.S. 294, 295 (1902) (recognizing that "the power which exists in Congress to administer upon, and guard, the tribal property is political and administrative in its nature, and the manner of its exercise is a question within the province of the legislative branch to determine, and is not one for the courts). Congress may wield this power however it wishes. With the passage of the Curtis Act, Congress chose to allow

municipalities in Indian Territory to exercise jurisdiction over all individuals, including Indians, and only Congress can rescind that grant of power[4].

5. The City of Tulsa was permitted under the Curtis Act, and subsequent legislation, to expand its boundaries through annexation

The Appellant in his Opening Brief claims that the Curtis Act did not authorize municipal jurisdiction over area acquired from expansion post-statehood. However, the Appellant fails to cite any controlling case law or language in Section 14 which would impose such a restriction.

There is no limiting language in the Curtis Act on the size or expansion of Section 14 cities. Importantly, Section 14 also provides that cities incorporated pursuant to the Curtis Act "shall possess all the powers and exercise all the rights of similar municipalities in said State of Arkansas." Curtis Act at § 14. At that time, municipalities in the State of Arkansas had the authority to annex land. Mansfield's Digest, Vol. 1 of 2, § 916 et seq., 1884. The 1898 Arkansas annexation process, which is like the City's process today, allowed individuals to petition to have their lands become part of the City. *Id*. at § 916. Individuals

[4] In exercising its plenary authority, Congress can empower cities, independent of state authority, but Congress' plenary power cuts both ways. Congress can also dis-empower cities, independent of state authority. For example, the City of Tulsa owns the Tulsa International Airport and the City's state-approved charter empowers the City to tax and regulate within its jurisdictional boundaries. Yet, Congress, in an exercise of its preemptive authority under the Interstate Commerce Clause, has constrained the City's authority to tax and regulate at its own airport property. See, for example, *City of Burbank v. Lockheed Air Terminal Inc*., 411 U.S. 624 (1973) (affirming that municipal jet noise and curfew ordinance was unconstitutional on Supremacy Clause and Commerce Clause grounds).

who did not want the annexation were allowed to object to it, *Id*. at § 918, and ultimately the town's council had to approve the acceptance of the annexation after no objections were laid or after a hearing on the objections whichever applied. *Id*. at § 920.

The City could also annex contiguous property by majority vote of the electors after giving 30 days' notice of the election and allowing objections to the annexation prior to the vote. *Id*. at § 922. Under § 14, Indians within the City were given the right to vote in City elections and thus were permitted to vote in any annexation election. In both types of annexation, the laws provided that "the territory shall be deemed and taken to be a part and parcel of the limits of such city or town, and the inhabitants residing therein shall have and enjoy all the rights and privileges of the inhabitants within the original limits of such city or town." *Id*. at § 921 and 922.

It was clear that Congress intended cities to grow and prosper as 1900 legislation authorizing the Secretary of the Interior to appoint townsite commissions and permit the authorities of any town to survey, lay out, and plat a town site, Congress accounted for "the reasonable prospective growth" of incorporated cities and towns:

> It shall not be required that the townsite limits established in the course of the platting and disposing of townsite lots and the corporate limits of the town, if

> incorporated, shall be identical or coextensive, but such townsite limits and corporate limits shall be so established as to best subserve the then present needs and the reasonable prospective growth of the town, as the same shall appear at the times when such limits are respectively established.
>
> Act of May 31, 1900, 56 Cong. Ch. 598, May 31, 1900, 31 Stat. 221, 238

Although Tulsa's municipal boundaries have clearly expanded since 1898, this is no surprise to anyone, and no Indian or Indian tribe objected to those expansions, or if they did, they either prevailed at the hearings and the annexation did not occur, or they did not prevail, and the annexation occurred long ago. Such expansion through annexation cannot be complained of now. All expansions of the City have occurred with public notice and an opportunity to be heard given to all citizens. Any arguments that any expansions of the City are somehow now invalid should be barred by laches and acquiescence. The Supreme Court has stated that "long acquiescence may have controlling effect on the exercise of dominion and sovereignty over territory." *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197 (2005).

In situations where Congress intended for a town or a type of property to be limited in its size, it specifically stated so. For instance, referring to those towns to be created along the railroad lines, Congress provided, "[T]he Secretary of the Interior is hereby authorized at any time before allotment to

set aside and reserve from allotment any lands [in the Five Tribes reservations] 160 acres in any one tract, at such stations as are or shall be established . . . ." Act of May 1, 1900, 31 Stat. 221. Congress also provided that schools, churches, and charitable institutions could be set aside from the tribal lands with a limit of five acres for schools and one acre for other buildings. Curtis Act at § 11. The United States Supreme Court has held that it will "presume" that the "legislature says what it means and means what it says." *Henson v. Santander Consumer USA Inc.*, 582 U.S. 79, 139 S.Ct. 1894, 1907 (2019). Thus, if Congress intended to limit the size of Section 14 cities only to a number of acres or only to their original plat, Congress clearly could have done so but instead, chose not to.

6. The City's exercise of jurisdiction under the Curtis Act is neither "unworkable" nor "counterintuitive"

Appellant contends that allowing Tulsa to continue with the jurisdiction over all inhabitants which it has had for over 100 years would create "odd" and "unworkable" results. Appellant sets forth several reasons for this argument all focused on the fact that the Appellant claims this would lead to inconsistency and a "piecemeal approach" since not all cities or tribes fall under Section 14. However, it is the Appellant who is proposing a system where municipal laws would only apply to some inhabitants, but not others, depending on a complex algorithm with variables based on tribal membership of a defendant as well as

discrete geographies within the City limits. Such a system is clearly more "unworkable" and "counterintuitive" than a clear system where all inhabitants of the City are treated equally for municipal violations.

The Curtis Act has been in effect for over 100 years and has yet to create what the Appellant contends is an unworkable result. The Appellant cites to no case law or authority that would support a claim that this Court can ignore the express congressional grant of authority because he believes it is unworkable. In fact, the argument that criminal jurisdiction would become complicated and difficult if the Muscogee Creek Nation obtained reservation status was raised by the municipal, State, and federal governments in *McGirt*, to which the Supreme Court responded that difficulty in application of a law is not a reason to change it, and Courts should not "be taken by the 'practical advantages' of ignoring the written law." *McGirt* at 2474.

In *Castro-Huerta*, the Supreme Court recognized the significant issues created by the *McGirt* decision yet refused to grant certiorari review to reconsider its general holding in *McGirt.* Instead, the Court granted only limited certiorari review of one issue not covered by the decision in *McGirt. Castro-Huerta*, 142 S.Ct. at 2492; See *Oklahoma v. Castro-Huerta*, 142 S.Ct. 877 (Mem)(2022)(Order granting limited review).

Consistent enforcement of municipal laws and ordinances within the City limits for everyone, regardless of Indian status is more "workable" than the current framework laid out by *McGirt* without the Curtis Act. Within the City of Tulsa, an Indian cannot always know which tribe's law applies because there are currently two tribal reservation areas, the MCN and the Cherokee Nation, within the City limits with a potential third tribe, the Osage Nation, having reservation area within the City limits at a future point. By applying the varying tribal laws within a single City, an Indian person must know the differences between the different laws and know which tribe's law applies on which street. Applying the City's municipal code equally to all people across the entire City makes it easier for the Indian person to know that the same law applies as long as the Indian person is within the City limits as well as making it easier for a police officer to know which law applies to every person.

Exempting a large segment of Tulsa's population from basic municipal regulations would also impair the shared benefits that only exist through consistent application of a common regulatory framework. In Tulsa, that common regulatory framework has developed and been consistently applied to tribal member and non-member alike for more than a century. The potential negative impacts of the activities regulated by the City are not contained to an

individual parcel. Ad hoc exemptions would threaten the quiet enjoyment of every nearby resident in their home or business[5].

With respect to traffic violations, which is what Mr. Hooper complains of, such violations are a serious issue within a City's limits as reckless driving and excessive speed can result in significant injuries and casualties. If Tulsa cannot police its own streets then the safety situation that would be created is not just "unworkable" but creates a serious risk to other drivers.

Appellant further argues that the Curtis act creates an "unworkable" situation as far as the process for appeals of municipal citations which are allowed under the Curtis Act. The Appellant contends that appellate courts for the State of Oklahoma would not have jurisdiction over this case because of *McGirt*.[6] In any case, the United States District Court has jurisdiction of the appeal from the City of Tulsa Municipal Criminal Court because the Curtis Act

[5] For example, the City's Nuisance Code (Title 24 of Tulsa's Revised Ordinances) defines nuisances affecting public health and safety, such as pools of stagnant water, accumulation of trash, inoperable vehicles, high weeds, excessive noise, and burned structures. Other City regulations include:

- Building codes (structural, electrical, mechanical, plumbing) and fire codes – Titles 14, 15, 53, 56, and 59
- Animal control – Title 2
- Stormwater regulations – Title 11A
- Environmental and health regulations – Title 17
- Property Maintenance – Title 55
- Comprehensive planning and zoning – Title 42

[6] The Oklahoma Court of Criminal Appeals has already heard multiple appeals from Oklahoma District Courts regarding subject-matter jurisdiction over crimes involving Indians in Indian Country post-McGirt. See, e.g., *Bosse v. State*, 2021 OK CR 3 (2021).

is still in force and applies to the proceedings of the City of Tulsa Municipal Court involving Indians. Under the Curtis Act, the courts of properly incorporated Section 14 municipalities had the same powers and jurisdiction as the Courts of the Indian Commissioners. Curtis Act, 30 Stat. at 499. Appeals from the Indian Commissioners were made to federal court. *Missouri, K & T Ry. Co. v. Phelps, 4 Indian Terr*., 706, 76 S.W. 285, 286 (Indian Terr. 1903). In *Phelps*, the Court of Appeals for Indian Territory held that an appeal from the Municipal Court of Caddo, I.T. to the Court of Appeals for Indian Territory was proper under the Curtis Act. *Id*. Accordingly, appeals from municipalities incorporated within Indian Country were heard in the Federal Court. *Id.*

Thereafter, the Oklahoma Enabling Act established that the federal courts for the State of Oklahoma would be the successors to the federal courts of the Indian Territory. Oklahoma Enabling Act, 34 Stat. 267, 276 (1906). Defendant states without authority that the Northern District of Oklahoma does not have a process for appeals from Tulsa Municipal Court and that "there is no way to appeal to federal court." Yet, this case arises from the Appellant's request for declaratory relief ***and appeal*** of his traffic citation to the Federal Court. Appellant asks this Court to ignore the plain language of the Curtis Act because there is no "procedure" in place for appeals to the Federal Courts, yet, the procedure by which appeals are processed in the Federal Court is not before

this Court in this matter. The simple fact is that Congress provided jurisdiction over Indians for violations of municipal law and has never altered or repealed that grant. Whether there currently exists a procedure, or whether a procedure can be created, to allow for appeals (which are likely rare) should not weigh in any way on this Court's decision to uphold the clear congressional grant of authority.

7. Analysis and application of *McGirt* and *Castro-Huerta*

The United States Supreme Court has recently decided two main cases relating to jurisdiction over Indians, a review of which is instructive in deciding the case presently before this Court.

In July 2020, the Supreme Court issued its ruling in *McGirt v. Oklahoma* regarding "the statutory definition of 'Indian country' as it applies in federal criminal law under the Major Crimes Act, 18 U.S.C. § 1153."[7] *McGirt*, 140 S.Ct. at 2477 (emphasis added). Specifically, the Major Crimes Act ("MCA") addressed jurisdiction over crimes committed by any Indian in "Indian Country" which is defined as "all land within the limits of any Indian reservation under the jurisdiction of the United States Government." In evaluating the issue before it, the Supreme Court in *McGirt* looked at the Acts of Congress in determining

[7] At the District Court the Appellant alleged that *McGirt* repealed the Curtis Act which is clearly erroneous as the holding in *McGirt* was very limited. The Appellant does not seem to be presenting that argument as a basis for his appeal to this Court.

whether a tribe continues to hold a reservation. The Court made clear that Congress established a reservation for the Creek Nation and since "has broken more than a few of its promises to the Tribe." *Id.* at 2462. The Court found that it has long held that "the Legislature wields significant constitutional authority when it comes to tribal relations, possessing even the authority to breach its own promises and treaties." *Id*. "But that power, this Court has cautioned, belongs to Congress alone." *Id*.

In determining whether Congress had maintained or disestablished a reservation, the Court relied on rules of statutory construction holding that "[w]hen interpreting Congress's work in this arena, no less than any other, our charge is usually to ascertain and follow the original meaning of the law before us." *McGirt* at 2468 *citing New Prime Inc. v. Oliveira*, 586 U. S. ––––, ––––, 139 S.Ct. 532, 538–539, 202 L.Ed.2d 536 (2019). A Court may not "favor contemporaneous or later practices instead of the laws Congress passed." *McGirt*, 140 S. Ct. at 2468. The *McGirt* Court went on to state "[t]here is no need to consult extratextual sources when the meaning of a statute's terms is clear." *Id*. at 2469. "…Once a reservation is established it remains that status 'until Congress explicitly indicates otherwise.'" *Id*. at 2469. (internal citations omitted). The Court ultimately held that Congress established the Creek

reservation and while that reservation has been diminished or restricted over time, "Congress has never withdrawn the promised reservation." *Id*. at 2482.

In June 2022, the Court issued its ruling in *Oklahoma v. Castro-Huerta*[8] which held that the Federal Government and State have concurrent jurisdiction to prosecute crimes committed by non-Indians against Indians in Indian Country. 142 S.Ct. 2486 (2022). The Court looked at the text of two federal laws, the General Crimes Act and Public Law 280, to evaluate Castro-Huerta's argument that the State's authority had been preempted. As set forth in earlier argument above, the Court looked to the actual text of the federal laws and rejected argument by Castro-Huerta that the legislative intent should be controlling. The Court found that "the text of a law controls over purported legislative intentions unmoored from any statutory text." *Id*. at 2496.

These cases are instructive in that in both the Supreme Court made clear that it will look to the plain language of a federal law or act of congress to determine what has (or has not been) granted or taken away. The Court has

[8] The Court in *Castro-Huerta* noted why Courts are just now addressing these jurisdictional issues related to laws that have been unchallenged for decades:

> Until the Court's decision in *McGirt* two years ago, this question likewise did not matter much in Oklahoma. Most everyone in Oklahoma previously understood that the State included almost no Indian country. *McGirt*, 590 U.S., at ––––– – ––––, 140 S.Ct., at 2498–2499 (ROBERTS, C.J., dissenting). But after *McGirt*, about 43% of Oklahoma—including Tulsa—is now considered Indian country. Therefore, the question of whether the State of Oklahoma retains concurrent jurisdiction to prosecute non-Indian on Indian crimes in Indian country has suddenly assumed immense importance. The jurisdictional question has now been called.
>
> *Castro-Huerta*, 142 S.Ct. at 2499.

also repeatedly made clear that it will presume that Congress says what it means and means what it says and that absent clear statements to the contrary, the Court will uphold acts of Congress that remain unchanged.

Applying the analysis in these cases to the issue before this Court, the only conclusion is that the Curtis Act was a congressional grant of authority to cities like Tulsa who were properly incorporated which has never been repealed or amended. Looking at the plain, unambiguous text of the Curtis Act, the District Court was correct in finding that Tulsa has jurisdiction over all its inhabitants, including Indians, to enforce its laws and ordinances.

CONCLUSION

For the reasons fully set forth above, the District Court did not err in granting the City of Tulsa's Motion To Dismiss as to the Appellant's claim for declaratory relief and, in light of that finding, determining that the appeal was moot. Accordingly, the City of Tulsa respectfully requests this Court to affirm the District Court's Order.

RESPECTFULLY SUBMITTED,

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STATEMENT CONCERNING ORAL ARGUMENT

Appellee City of Tulsa believes oral argument would be helpful in this matter as the important issue of whether the City has jurisdiction under the Curtis Act to enforce its laws and ordinances against Indians has the potential to have a significant impact on the City as well as its citizens.

Date: August 12, 2022

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I hereby certify that with respect to the foregoing:

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Date: August 12, 2022

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CERTIFICATE OF SERVICE

I hereby certify that on August 12, 2022 I electronically filed the foregoing using the court's CM/ECF system which will send notification of such filing to the following:

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Mr. Brian R. Danker
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