No. 22-5034

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JUSTIN HOOPER,

Appellant,

v.

THE CITY OF TULSA,

Appellee.

On appeal from the United States District Court
for the Northern District of Oklahoma
The Hon. William P. Johnson
No. 21-CV-165

BRIEF OF AMICUS CURIAE STATE OF OKLAHOMA IN SUPPORT OF APPELLEE CITY OF TULSA AND AFFIRMANCE

ZACH WEST
Solicitor General
BRYAN CLEVELAND
Deputy Solicitor General
OFFICE OF ATTORNEY GENERAL
STATE OF OKLAHOMA
313 N.E. 21st Street
Oklahoma City, OK 73105
Phone: (405) 521-3921
bryan.cleveland@oag.ok.gov

Counsel for the State of Oklahoma

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INTRODUCTION

This district court correctly enforced the Curtis Act of 1898 in favor of Tulsa and against Appellant Justin Hooper. Appellant disregards the text of that Act, instead arguing that Tulsa's existence as a state entity means Tulsa can exercise no greater power than the state. His argument ultimately asks this Court to find, by applying a presumption against state jurisdiction, that Congress implicitly repealed the Curtis Act.

Implied repeal arguments are rarely correct, however, and Appellant's theory is squarely foreclosed by the Supreme Court's recent decision in *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486 (2022). States presumptively have jurisdiction over all citizens within their borders, including within Indian country. Oklahoma granted that jurisdiction to Tulsa under its charter, and the federal government expressly declined to preempt Tulsa's jurisdiction as indicated in the Curtis Act.

Congress's decision to allow certain municipalities like Tulsa to avoid preemption is a policy decision within Congress's prerogative. Perhaps Congress intended to keep that policy only temporarily, just as it intended to keep reservations only temporarily, but "just as wishes are not laws, future plans aren't either." *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2465 (2020). The district court correctly applied the plain text of federal statutes allowing Tulsa to exercise jurisdiction here instead of attempting to divine unexpressed congressional intent. This Court should affirm that statutory text controls this case and forecloses Appellant's requested relief.

INTEREST OF THE AMICUS CURIAE[1]

The State of Oklahoma is interested in this proceeding because Appellant and his amici have argued for improper limits on state power and authority. The State seeks to defend its sovereignty.

The district court approached this case in terms of municipal power granted by the federal government, and Tulsa explains why this Court could affirm on that ground. This amicus brief further seeks to explain how even viewing Tulsa's municipal power as granted by the state government, Tulsa still has jurisdiction under the Curtis Act because federal statutes define the scope of federal preemption.

BACKGROUND

Following the U.S. Supreme Court's decision in *McGirt,* the land of the city of Tulsa is now defined as the Indian country of two tribes under 18 U.S.C. § 1151: the Creek and the Cherokee. *McGirt*, 140 S. Ct. at 2459, 2482; *Hogner v. State*, 2021 OK CR 4, ¶ 18, 500 P.3d 629, 635. Appellant is contesting Tulsa's jurisdiction in Creek Indian country alone, but the provisions of law applicable to both tribes are quite similar.

The federal relationship with the Creek and Cherokees involves treaties that Congress has repeatedly abrogated or restricted. As relevant to Oklahoma, Congress entered into treaties with the Creek and the Cherokee in the 1830s, giving both land in what is now the State of Oklahoma. Treaty with the Creeks, 7 Stat. 366 (Mar. 24, 1832);

[1] The State files this brief as permitted by Fed. R. App. P. 29(a)(2).

Treaty with the Cherokee, 7 Stat. 414 (Feb. 14, 1833). Congress then entered into new treaties in the 1860s that heavily modified the 1830s treaties after the Creek and Cherokee sided with the Confederacy in the Civil War. Treaty with the Creek Nation, 14 Stat. 786 (June 14, 1886); Treaty with the Cherokee, 14 Stat. 799 (July 19, 1866); *see also Castro-Huerta*, 142 S. Ct. at 2502 n.7 ("[M]any tribes were also opposed to the Federal Government at least as late as the Civil War."). Starting in the 1880s, Congress sought to pressure many tribes toward allotment of reservations. *McGirt*, 140 S. Ct. at 2463. Its initial approach toward the Five Tribes involved negotiations with the Dawes Commission starting in 1893. *See id.* Dissatisfied with the results of that negotiation, Congress enacted the Curtis Act of 1898, which took many actions adverse to the tribes and to their treaties, such as abolishing their courts and subjecting their legislatures to the supervision and control of the President of the U.S. *Id.* at 2465-66.

Most relevant here, Section 14 of the Curtis Act subjected both non-Indians and Indians to municipal jurisdiction in the former Indian Territory, which today, roughly speaking, constitutes all of eastern Oklahoma, including Tulsa. 30 Stat. 495, 499 § 14 (June 28, 1898). Section 14 provided that "all inhabitants of such cities and towns, without regard to race, shall be subject to all laws and ordinances of such city or town governments, and shall have equal rights, privileges, and protections therein." *Id.* Section 14 also extended Arkansas law as the state law in effect in the Indian Territory. *See id.*

After enacting the Curtis Act, Congress entered agreements with the Creek in 1901 and the Cherokee in 1902. 31 Stat. 861 (May 25, 1901) (Creek); 32 Stat. 716 (July 1, 1902) (Cherokee). These agreements restored treaty promises that were not inconsistent with the agreements. 31 Stat 861, 872 ¶ 41; 32 Stat. 716, 727 § 73. Nevertheless, both agreements expressly stated that Section 14 of the Curtis Act would remain in effect against both tribes despite any treaties. 31 Stat 861, 872 ¶ 411; 32 Stat. 716, 727 § 73. The agreements then contemplated that these arrangements with the tribes would last until the end of the tribes and their reservations. 31 Stat 861, 872 ¶ 461; 32 Stat. 716, 725 § 63. Thus, the Curtis Act and the agreements were regarded as part of the process toward abolishing reservations in 1906 in the run-up to statehood.

McGirt, however, held that Congress did not disestablish the Creek reservation despite taking many steps toward that goal. 140 S. Ct. at 2466. The *McGirt* Court held that instead of transitioning from the Curtis Act and the 1901-02 agreements into the abolition of reservations in 1906, Congress extended the 1906 end date to an uncertain future point while still creating a state with new substantive laws. *Id.* Congress then kept adjusting its relationship to the tribes before and after statehood, *McGirt* concluded, without ever revisiting or repealing the jurisdictional provisions of Section 14. *See id.*

ARGUMENT

Appellant contends that, as a state entity, the City of Tulsa exercises state power and thus is subject to the limits on that power. Even assuming Tulsa exercises state power, however, Tulsa would still have authority to prosecute Appellant under these circumstances. Absent federal preemption, the State's authority extends fully into Indian country. Congress has not preempted the exercise of state authority here—to the contrary, it expressly authorized it in Section 14 of the Curtis Act. Contrary to Appellant's suggestions, Section 14 is still good law after statehood. Nothing about statehood implicitly repealed an act of Congress regarding policy toward Indians. In addition, the Oklahoma Enabling Act did not alter Tulsa's jurisdiction, and Appellant identifies no other federal law repealing the Curtis Act. Accordingly, even assuming the city of Tulsa exercises state power in these circumstances, the city correctly exercised that jurisdiction over Appellant.

I. Under *Castro-Huerta*, States presumptively have jurisdiction over Indians absent federal preemption.

A State presumptively has jurisdiction in Indian country, and as explained below, Oklahoma conferred that jurisdiction on Tulsa here. Appellant fails to identify any federal law overcoming that presumption for state jurisdiction, let alone for Tulsa's jurisdiction.

A. Oklahoma presumptively possesses jurisdiction over Indians.

"[A]s a matter of state sovereignty, a State has jurisdiction over all of its territory, including Indian country." *Castro-Huerta*, 142 S. Ct. at 2493. This jurisdiction is not limited by location, by race, or by any other category. *See id.* As a result, "unless preempted, States have jurisdiction over crimes committed in Indian country." *Id.* at 2494. Appellant identifies no federal statute that would preempt the State's presumptive jurisdiction here.

In the past, this Court assumed that the General Crimes Act preempted state jurisdiction over crimes in Indian country. This Court declared that states presumptively lack jurisdiction in Indian country. *See*, *e.g.*, *Hackford v. Utah*, 845 F.3d 1325, 1327 (10th Cir. 2017); *Ross v. Neff*, 905 F.2d 1349, 1352 (10th Cir. 1990). The Supreme Court's decision in *Castro-Huerta*, however, specifically rejects any presumption against state jurisdiction *and* rejects any application of the General Crimes Act to oust state jurisdiction over Indians. *See* 142 S. Ct. at 2494, 2495 n.2. As the Supreme Court explained, any lack of state prosecutorial authority over Indians arises from so-called *Bracker* balancing, not from federal preemption under the General Crimes Act or any other statute. *See id.* at 2495 n.2 (referencing Part III-B of the opinion (citing *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142-43 (1980)).

The dissent in *Castro-Huerta* suggested that a presumption against state criminal jurisdiction over Indians applies, but the majority rejected that conclusion as "not

accurate." *See id.* at 2504 n.9. The Supreme Court "reiterate[d]" that it was not taking a position on state jurisdiction over Indians solely because of the need for *Bracker* balancing analysis to resolve that question. *See id.* (citing n.6 in Part III-B). Thus, while *Castro-Huerta* stated that there is no presumption against state criminal jurisdiction over Indians and that the General Crimes Act does not preempt such jurisdiction, it left the *Bracker* analysis to lower courts in the first instance.

Appellant acknowledges none of this. He filed his brief after the *Castro-Huerta* opinion issued, and his amici filed a week later, and yet their briefs wholly omit that they are advocating the dissent's position in *Castro-Huerta*. The Creek simply deny *Castro-Huerta* has any relevance to jurisdiction over Indians, *see* Creek Amicus Br. at 16 n.5, adopting the dissent's view that the *Castro-Huerta* majority went out of their way to denounce. Appellant and the other tribes do not mention *Castro-Huerta* at all as they advocate the positions articulated in the *Castro-Huerta* dissent. Arguments that just lost at the Supreme Court are no basis for this Court to reverse a district court.

B. The presumption of jurisdiction applies to Tulsa here.

Appellant denies that Tulsa has jurisdiction over Indians based on the argument that being a state entity means Tulsa can exercise no greater power than the State. He has failed to prove that state jurisdiction is preempted, however, and he is further wrong to deny that the State's presumptive jurisdiction extends to Tulsa. His argument flows from a misunderstanding of state sovereignty and state-municipal relations.

The State has conferred expansive power on Tulsa. Oklahoma law distinguishes between "cities under a charter form of government," sometimes referred to as "home rule" cities with powers defined by a charter, and "cities existing under general law." *City of Tulsa v. Pub. Emps. Rels. Bd.*, 1990 OK 114, 845 P.2d 872, 875; *see* Okla. Const. art 18, § 3(a). Charter cities are empowered "with the freedom to frame their own charters and exercise a considerable degree of autonomy." *City of Tulsa,* 1990 OK 114, 845 P.2d 872, 875. Their charter supersedes state law on any municipal affairs. *City of Tulsa*, 945 P.2d at 875 (citing *Lackey v. State*, 1911 OK 270, 116 P. 913 (1911)).[2] Thus, as a charter city, Tulsa has broad jurisdiction within its borders and does not need a state law on point to exercise criminal jurisdiction.

Typically, to be sure, federal preemption reaches states and cities alike. *See, e.g.*, *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1480 (2018) ("no State or political subdivision thereof" (quoting 49 U.S.C. § 1305(a)(1) (1988)) (emphasis added)). Municipal law is preempted *not* because municipalities are creatures of the state, however, but rather because the federal government has asserted exclusive control over an area of law, ousting all other governments in an express or implied manner. *See id.*

[2] Hooper's amici often seem unaware of this distinction, citing case law on statutory cities that does not apply to a charter city like Tulsa. *See, e.g.*, Creek Br. at 19. Even beyond case law, the Creek quote an Oklahoma Attorney General opinion describing the authority of statutory cities as through it were a description of Tulsa's power, failing to notice that the same opinion goes on to explain that charter cities have *greater* powers. *See id.*; *see also* 19 Okla. Op. Att'y Gen. 215 (1988) at Part IV.

Appellant apparently believes that the federal government must automatically and always preempt the power of cities if it preempts the power of states, tying the two powers together. Appellant's Br. at 20. At bottom, though, he fails to identify any law that preempts state power or municipal power, and his argument is really that states presumptively lack jurisdiction. *See id.* With that presumption set aside, *see supra* Part I.A, his argument fails because federal statutes define the scope of preemption, and those statutes expressly restrain preemption from reaching Tulsa here.

Under this proper understanding of state sovereignty and Oklahoma state-municipal-relations, a person challenging municipal power must cite a preemptive federal law that affects all other governments or at least affects cities. Appellant fails this burden because he offers no federal law that would foreclose Oklahoma's jurisdiction, let alone Tulsa's jurisdiction.

II. The Curtis Act was never repealed and permits Tulsa to exercise jurisdiction over Indians.

Not only is there no federal law preempting Tulsa's jurisdiction here, Section 14 of the Curtis Act expressly authorizes that jurisdiction. Unlike the Major Crimes Act—which addresses major crimes—Section 14 squarely applies to the traffic violation here. Because Section 14 of the Curtis Act was never expressly repealed, Appellant points to the Oklahoma Enabling Act and to certain state laws as sources of implied repeal. Neither argument has merit, and the Curtis Act is still good law.

A. The Oklahoma Enabling Act does not repeal the Curtis Act.

As his main statutory argument, Appellant contends that the Enabling Act implicitly repeals Section 14. In particular, Appellant asserts that the extension of Oklahoma territory law into Indian Territory abrogated Section 14. His argument contravenes relevant preemption rules and confuses effects on Arkansas substantive law with effects on federal jurisdictional law. Examining the relevant statutes shows no implied repeal of Tulsa's jurisdiction occurred in the Enabling Act.

There is a presumption against implied repeal of state criminal jurisdiction. As the Supreme Court stated in *Castro-Huerta*, creating a state "necessarily repeals the provisions of any prior statute, or of any existing treaty that is inconsistent with the State's exercise of criminal jurisdiction throughout the whole of the territory within its limits, including Indian country, unless the enabling act says otherwise by express words." *Castro-Huerta*, 142 S. Ct. at 2503 (internal quotation marks and citations omitted).[3] Under this rule, the Oklahoma Enabling Act would not reinstate treaty limits on municipal jurisdiction because it does not contain "express words" to that effect. *See id.* As a result, Appellant's reading that the Enabling Act implicitly limited the State's exercise of criminal jurisdiction is foreclosed under *Castro-Huerta*.

[3] Thus, Hooper's footnote reference to a D.C. Circuit case on implied repeal, Appellant's Br. at 14 n.8 (citing *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1447 (D.C. Cir. 1988)), does not help him here because the cited case only addressed Section 28's stripping of tribal jurisdiction, not Section 14's grant of municipal jurisdiction, and because implied repeal cannot strip a state's criminal jurisdiction under *Castro-Huerta*.

A close examination of the relevant provisions also confirms that no implied repeal of municipal jurisdiction occurred. Section 14 contains multiple provisions that can be placed into two broad categories: (1) applying Arkansas's substantive law, and (2) granting municipal officials jurisdiction over Indians. In the first category, Section 14 permits cities to incorporate under "chapter twenty-nine of Mansfield's Digest of the Statutes of Arkansas," to "possess all the powers and exercise all the rights of similar municipalities in said State of Arkansas," to conduct elections "under the provisions of chapter fifty-six of said digest, to set property tax rates according to "chapter one hundred and twenty-nine of said digest," to "establish and maintain free schools" under the relevant provisions of Arkansas law and exercise "all the powers conferred upon special school districts" in Arkansas. 30 Stat. 495, 499-500. It adds the summary statement that "all the laws of said State of Arkansas herein referred to, so far as applicable, are hereby put in force in said Territory," directing cities to implement the relevant Arkansas laws and giving the federal courts authority to enforce the relevant Arkansas laws. *Id.* at 500.

In the second category, Section 14 gives municipalities authority beyond Arkansas law. It subjects "all inhabitants of such cities and towns, without regard to race" to the municipal laws and ordinances, with the exception that property taxes shall not apply "until after title is secured from the tribe" in allotment. *Id.* at 499-500. It also gives "mayors of such cities and towns" the criminal and civil jurisdiction of United

States commissioners in the Indian Territory. *Id.* at 499. Neither of these provisions had any basis in Mansfield's Digest.

These separate categories are significant because Arkansas law was not responsible for Tulsa's jurisdiction over Indians. As Appellant correctly recognizes, Arkansas municipalities *lacked* jurisdiction over Indians in Indian country. Appellant's Br. at 9. The Arkansas charter did no work in conferring additional jurisdiction over Indians. Instead, it was federal law that was abrogating any treaties preventing jurisdiction. Thus, replacing the Arkansas charter would not alter the additional jurisdiction Tulsa received under federal law.

The Enabling Act provision extending Oklahoma territory law affects the Arkansas laws, but it says nothing about a municipality's jurisdiction over Indians. Rather, it simply states: "the laws in force in the Territory of Oklahoma, as far as applicable, shall extend over and apply to said State until changed by the legislature thereof." 34 Stat. 267, 275 (June 16, 1906). At the time, the substantive law in the Oklahoma territory was essentially Nebraska law, with some modifications made during 16 years of governance by the Oklahoma territorial legislature. *See* 26 Stat. 81, 83 § 4, 87 § 11 (May 2, 1890) (extending Nebraska law and creating territorial legislature). As a result, extending that law into the Indian territory necessarily replaced Arkansas's substantive law with the modified Nebraska laws. The Enabling Act never mentions the jurisdiction of municipal officials, however.

While Appellant spends significant time addressing the loss of Arkansas charters, that change does not answer the jurisdiction question because the charters were not the source of jurisdiction over Indians. The Enabling Act changed the substantive law from Arkansas to modified Nebraska law but did not otherwise address, let alone alter, the jurisdiction of municipalities. As a result, replacing Arkansas law with some other substantive law would have no effect on whether federal law abrogated any Indian treaty provisions on state jurisdiction.

Appellant argues that both the jurisdictional law and the substantive law changed because the Enabling Act intended uniformity in laws. Appellant's Br. at 19, 27-28. His uniformity argument is peculiar because jurisdictional laws are never uniform in a state with Indian country. For example, in the Oklahoma territory, Oklahoma City was not in Indian country and thus had jurisdiction over major crimes by Indians. Under Appellant's view of the law, when the same law was extended from Oklahoma City to Tulsa, Tulsa lost jurisdiction over major crimes by Indians even though Oklahoma City had it. If the Enabling Act made all jurisdictional rules uniform, this disparity would not have occurred. Indeed, pure uniformity would *favor* Tulsa having jurisdiction over Indians, not undermine it.

Appellant also asserts repeal of Section 14 by the Enabling Act provision on federal law. Appellant's Br. at 19. That provision states: "the laws of the United States not locally inapplicable shall have the same force and effect within said State as

elsewhere within the United States." 34 Stat. 267, 278. Appellant does not explain, though, what law of the United States would oust state jurisdiction. Municipal crimes are not major crimes, making 18 U.S.C. § 1153 inapplicable, and neither the General Crimes Act nor Public Law 280 preempt state jurisdiction, *Castro-Huerta*, 142 S. Ct. at 2494-2500. Even if there were a relevant statute, it is unclear why that statute would not be "locally inapplicable" to Tulsa in light of the Curtis Act. 34 Stat. 267, 278. At bottom, Appellant's argument reduces to his errant assumption that any enabling act implicitly reinstates treaty provisions denying state jurisdiction in Indian country. That assumption is contrary to the proper interpretation of an enabling act. Thus, the Enabling Act provision regarding federal laws does not help Appellant because he fails to point to a relevant federal law preempting Tulsa's jurisdiction.

Appellant's implied repeal argument fails because the Enabling Act and the Curtis Act are consistent with one another. The Enabling Act does not contain express words limiting state jurisdiction, as *Castro-Huerta* requires, and Appellant lacks any source for implied preemption in light of that rule. Accordingly, the district court correctly concluded that the Oklahoma Enabling Act did not repeal the Curtis Act and that the Curtis Act continues to abrogate any law preventing Tulsa from exercising jurisdiction.

B. State law does not prevent Tulsa from exercising jurisdiction.

Without preemptive federal law, Appellant resorts to state law to show that Tulsa's power is limited by the State rather than preempted by the federal government. Appellant points to Tulsa's charter and related proclamation, and his amici try to assist by pointing to the Oklahoma Constitution. It is doubtful, to say the least, whether these state law claims are properly resolved in a federal question case about the ongoing vitality of the Curtis Act. No authority supports the proposition that a state charter or state constitution can repeal a federal law—nor could it—meaning that the judgment below on the applicability of the Curtis Act would be correct regardless of the state law provisions. At best, if state law conflicted with federal law, then the district court arguably needed to reach the *Tacoma* line of cases to resolve the jurisdiction question.

Nevertheless, the State addresses these issues for the sake of clarity because there is no conflict between state and federal law here, and this Court need not reach *Tacoma* to affirm. Once examined, neither Tulsa's charter and related proclamation nor the Oklahoma Constitution undermines Tulsa's jurisdiction.

1. Tulsa's charter does not limit Tulsa's jurisdiction here.

Appellant merely assumes that the 1908 charter excludes Curtis Act power because it is a state charter, Appellant's Br. at 16-17, 20, essentially repeating his faulty Enabling Act and state power arguments. Contrary to Appellant's errant assumptions, the charter is only relevant if it denies power to Tulsa that the Curtis Act would

otherwise allow. If state and city interests are aligned, then this Court only needs to answer whether the federal government preempted use of power that the State has granted.

The text of the 1908 charter confirms that the State gave its presumptive civil and criminal jurisdiction over *all* inhabitants, *see supra* Part I, to Tulsa. "The City of Tulsa shall have power to enact and to enforce ordinances necessary to protect health, life and property and to prevent and summarily abate and remove nuisances, and to preserve and enforce the good government, order and security of the city and the inhabitants of said city." 1908 Tulsa Charter at 3 ¶ 2.[4] It further provides that "the specifications of particular powers herein authorized shall never be construed as a limitation upon the general powers being granted," fulfilling express intent that Tulsa "shall have and exercised all powers of municipal government not prohibited to it by this Charter, or by some general law of the State of Oklahoma, or by the provisions of the Constitution of the State of Oklahoma." *Id.* The charter's plain text authorizes the same actions that the Curtis Act preserves from preemption, allowing the exercise of jurisdiction over all inhabitants. Nothing in the accompanying gubernatorial proclamation alters this grant.

If the charter limited Tulsa's jurisdiction, as Appellant claims, then this Court would have to address whether the federal government can grant municipal power over

[4] Available at https://babel.hathitrust.org/cgi/pt?id=umn.31951002666984t

Indians despite objections of the State. A series of cases have held that the federal government can grant authority to cities to implement federal projects on navigable waters without state approval. The initial Supreme Court case, *First Iowa Hydro-Elec. Co-op. v. Fed. Power Comm'n*, held that an Iowa utility cooperative with a federal license to construct and operate a dam on navigable waters did not need to comply with state licensing law. 328 U.S. 152, 156 (1946). The Ninth Circuit applied this case to the City of Tacoma, Washington, holding that Tacoma did not need to comply with state law before using a federal license to construct and operate a dam. *State of Wash. Dep't of Game v. Fed. Power Comm'n*, 207 F.2d 391, 396 (9th Cir. 1953). The Supreme Court denied certiorari, 347 U.S. 936 (1954), and then enforced that judgment in a collateral case. *See City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 337 (1958). As the D.C. Circuit has explained, *City of Tacoma* is read as more than a res judicata case because some of the Supreme Court's additional commentary indicated a very narrow view of state power to restrict cities managing federal projects under a federal license. *See Pub. Util. Dist. No. 1 of Pend Oreille Cnty. v. Fed. Power Comm'n*, 308 F.2d 318, 322–23 (D.C. Cir. 1962).

The district court cited one of those four cases, and it correctly stated the rule. *See* App.17.[5] In the district court's view, the federal government has plenary authority

[5] In a somewhat different position from both Appellant and Tulsa, the State is interested in revisiting the *Tacoma* line of cases. The *Tacoma* cases may not have demonstrated adequate understanding of state sovereignty. But reconsideration of this Supreme Court rule was not cognizable in the district court and is not an issue for this Court.

over both navigable waters and Indians, and that plenary authority allows it to confer additional power on cities in either category. *See* App.17. Appellant does not deny any of this analysis; he simply argues that *Tacoma* does not reach this case if this Court finds the Curtis Act inapplicable. Appellant's Br. at 12-13.[6]

The State believes that this Court can apply the Curtis Act and still avoid the *Tacoma* issues. The problem with the district court's analysis is that the federal government has a superior power to states over federal projects on navigable waters, *First Iowa*, 328 U.S. at 911-12, while criminal jurisdiction is reserved to the states absent preemption concerning Indians, *see supra* Part I. Thus, the navigable waters cases concern *conferral* of power, whereas this case concerns *refusal to preempt* power. Extending *Tacoma* beyond navigable waters, as the district court did, raises difficult questions of what areas of federal authority allow the federal government to interfere with state sovereignty over cities. By contrast, in a preemption case like this one, the state and city interests are completely aligned, and the Court need only answer whether the federal government preempted use of power that the State has granted.

[6] Specifically, he reprises his argument that the Curtis Act was temporary and asserts that intent controls over text. Appellant's Br. at 12-13. At a basic level, he is wrong on the law because "[t]he text of a law controls over purported legislative intentions unmoored from any statutory text." *Castro-Huerta*, 142 S. Ct. at 2496. On this issue in particular, he also fails to grapple with the fact that any intent to keep the Curtis Act temporary was tied to an intent to end reservations in 1906. *See supra* Background. *McGirt* tells us that none of that potential latent intent overrides text. 140 S. Ct. at 2465.

Under this corrected understanding, this Court should not reach the *Tacoma* issue because it is unnecessary to resolve the case. Oklahoma granted Tulsa jurisdiction over all inhabitants in the text of the 1908 charter, and Congress with the Curtis Act prevented any treaty provisions from preempting Tulsa's use of that jurisdiction on Indians. These facts show federal facilitation of state sovereignty, not federal interference with state sovereignty. The lack of a conflict means no extension of *Tacoma* is needed to show that Tulsa has jurisdiction over Indians.

In short, the state presumptively has jurisdiction, it has granted that jurisdiction to Tulsa under the charter, and the federal government has declined to preempt that jurisdiction when used by Tulsa as indicated in the Curtis Act and the 1901-02 agreements.

2. The Oklahoma constitution does not limit Tulsa's jurisdiction here.

Appellant's amici advance the additional argument that the Oklahoma Constitution does not allow for the continuance of Curtis Act power for Tulsa. *See* Creek Br. at 14-15. This argument does no independent work from Appellant's Enabling Act argument.

Appellant's amici appear to raise this issue in response to the district court's holding that the Curtis Act power was preserved by the Oklahoma Constitution. App.16. Specifically, the court applied a provision stating "[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." *Id.* (citing Okla. Const. art. 18, § 2). The district court found that this provision and another provision, Okla. Const. art. 7, § 1 continued Tulsa's municipal courts from the Curtis Act. *Id.*

Appellant's amici complain that the present rights and powers preserved by the Oklahoma Constitution were defined by the Enabling Act. *See* Creek Br. at 14-15. Their argument and authorities still beg the question, though, as to whether the Enabling Act altered substantive law and jurisdictional law or just substantive law. *See supra* Part II.A. The Oklahoma Supreme Court has aligned interpretation of the Oklahoma Constitution with the Enabling Act's language, but such alignment alone does not answer what the Enabling Act actually did.

This argument can also do no independent work because the core issue is one of federal law. The Enabling Act could repeal another federal statute, but no authority allows a state constitution to repeal a duly enacted federal statute. Appellant's amici emphasize that the Oklahoma Supreme Court is interpreting state law, Creek Br. at 15, Cherokee et al. Br. at 22, but even if the Oklahoma Supreme Court had narrowed the state Constitution away from the Curtis Act—although it has not—such interpretation would not repeal the Curtis Act. At best, it would raise a *Tacoma* issue about federal-state conflict. This result would support the district court's decision to address *Tacoma*, but it would not help Appellant's appeal.

In sum, nothing in the Enabling Act, in Tulsa's charter and related gubernatorial proclamation, or in the Oklahoma Constitution entitles Appellant to a declaratory judgment "that the Curtis Act is inapplicable." App.105. The district court correctly denied relief.

III. Federal statutes control any *Bracker* balancing.

Beyond traditional preemption analysis, Indian law preemption analysis also contemplates the application of *Bracker* balancing. *See Castro-Huerta*, 142 S. Ct. at 2501 (citing *Bracker*, 448 U.S. at 142-43). In *Bracker* balancing, a court considers whether "state jurisdiction would unlawfully infringe upon tribal self-government." *Id.* The court evaluates the state interest in the law at issue, the tribal interest in self-government, and the federal interest in fulfilling its trust relationship with the tribes. *See id.* The analysis is typically applied to states, but nothing prevents application of the analysis to municipalities.

If this Court affirms the district court's application of the Curtis Act, then no *Bracker* balancing is needed. The statute dictates the federal interest and abrogates any contrary tribal interest. *See Lone Wolf v. Hitchcock*, 187 U.S. 553, 567-68 (1903). When a federal statute expressly supports city jurisdiction, in other words, the *Bracker* balancing inevitably follows the statute.

In contrast, if this Court found the Curtis Act was repealed, then this Court would need to wade into novel questions of Indian law without an adequate record.

Tulsa has a "strong interest" in "ensuring public safety and criminal justice within its territory." *Castro-Huerta*, 142 S. Ct. at 2501. The federal interest in traffic violations in Tulsa is unclear, and at best, it might have concurrent jurisdiction that would not be harmed by the exercise of Tulsa's jurisdiction. *See id.* The trickier question in that situation would be whether the Creek have a treaty-based self-government interest in this case. At the outset, Appellant cites no Creek treaty provision that would oust state jurisdiction over the Creek. Even assuming there is such a provision, the State has found no treaty provision that gives the Creek self-government rights over a member of a different tribe like Appellant, who is Choctaw. He is, by definition, not part of the Creek's "self" because he is not Creek. To be sure, federal statutes have granted the Creek additional governance authority beyond their treaty-based self-government right. *See* 25 U.S.C. § 1301(2); *id.* § 1304(b)(1). But that statute expressly declines to oust state jurisdiction. *Id.* § 1304(b)(3). If this Court does not apply the Curtis Act, balancing the state's interest in safety on its roads would likely outweigh any tribal interest on this record, but this Court would have to answer that novel question in the first instance with little record on point and with no relevant decision from the district court.

Of course, this Court need not wade into that messy analysis here because the Curtis Act is still good law. It was never repealed, is in force today, and controls the analysis in favor of Tulsa's jurisdiction.

CONCLUSION

This Court should affirm the judgment of the district court.

s/ *Bryan Cleveland*

ZACH WEST
Solicitor General
BRYAN CLEVELAND
Deputy Solicitor General
OFFICE OF ATTORNEY GENERAL
STATE OF OKLAHOMA
313 N.E. 21st Street
Oklahoma City, OK 73105
Phone: (405) 521-3921
bryan.cleveland@oag.ok.gov

Counsel for the State of Oklahoma

CERTIFICATE OF COMPLIANCE

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s/ *Bryan Cleveland*
BRYAN CLEVELAND

CERTIFICATE OF DIGITAL SUBMISSION

All required privacy redactions have been made as required by 10th Cir. R. 25.5 and the ECF Manual. Additionally, this filing was scanned with Crowdstrike antivirus using the latest version updated on July 29, 2022.

s/ *Bryan Cleveland*
BRYAN CLEVELAND

CERTIFICATE OF SERVICE

I certify that on August 17, 2022, I caused the foregoing to be filed with this Court and served on all parties via the Court's CM/ECF filing system. The seven required paper copies, each of which is an exact replica in form and content, will be dispatched via commercial carrier for receipt within five business days after the court issues a notice that the electronic version is accepted for filing.

s/ *Bryan Cleveland*
BRYAN CLEVELAND