IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

In the Matter of: S.J.W., An alleged deprived child, Stephen and Morgan Wilburn, Respondents-Appellants, v. The State of Oklahoma, Appellee.	 No. 119,404

BRIEF OF *AMICUS CURIAE* CHICKASAW NATION AND CHEROKEE NATION

Stephen Greetham (OBA #21510)
Chickasaw Nation
Office of Senior Counsel
4001 N. Lincoln Boulevard
Oklahoma City, OK 73105
(580) 272-5236
stephen.greetham@chickasaw.net
Counsel for Chickasaw Nation

Debra Gee (OBA #17031)
Chickasaw Nation
Office of Tribal Justice Administration
P.O. Box 1548
Ada, OK 74821
(580) 436-7233
debra.gee@chickasaw.net
Counsel for Chickasaw Nation

Sara Hill (OBA #20072)
Chrissi Ross Nimmo (OBA #22248)
Cherokee Nation Office of the Att'y Gen.
PO Box 1533
Tahlequah, OK 74465
(918) 453-5262
sara-hill@cherokee.org
chrissi-nimmo@cherokee.org
Counsel for Cherokee Nation

Glenn Coffee (OBA #14563)
Denise Lawson (OBA #31532)
Lexie Norwood (OBA #31414)
Glenn Coffee and Associates
915 N. Robinson Ave.
Oklahoma City, OK 73102
(405) 601-1616
gcoffee@glenncoffee.com
denise@glenncoffee.com
lexie@glenncoffee.com
Counsel for Chickasaw Nation and Cherokee Nation

August 3, 2021

INDEX

INTRODUCTION

A. Interests of *Amici Curiae* Chickasaw Nation and Cherokee Nation

The Chickasaw Nation and Cherokee Nation (*Amici* Nations) are federally recognized Tribal nations with headquarters in Ada and Tahlequah, Oklahoma, respectively. Each possesses an inherent sovereignty, recognized by Federal law, and each exercises its rights to self-government pursuant to Tribal constitutions, duly formed and ratified by their citizens. *See* Constitution of the Chickasaw Nation (1983), available at https://chickasaw.net/getattachment/Our-Nation/Government/Chickasaw-Constitution/CN_Constituion_Amended2002.pdf.aspx?lang=en-US; Constitution of the Cherokee Nation (1999), available at https://www.cherokee.org/media/lsufapj1/constitution-of-the-cherokee-nation-1999-online.pdf. Each occupies a reservation recognized as Indian country, as defined at 18 U.S.C. § 1151, *Bosse v. Oklahoma*, 2021 OK CR 3 (Mar. 11, 2021) (affirming Chickasaw Nation reservation); *Hogner v. Oklahoma*, 2021 OK CR 4 (Mar. 11, 2021) (affirming Cherokee Nation reservation). *Accord McGirt v. Oklahoma*, 591 U.S. --, 140 S. Ct. 2452 (2020) (affirming Muscogee Creek Nation reservation); and each operates Indian child welfare programs pursuant to its respective sovereignty and the Indian Child Welfare Act (ICWA), 25 U.S.C. § 1901, *et seq*.

Shortly after the United States Supreme Court ruled in *McGirt*, *Amici* Nations each formed parallel agreements with Oklahoma pursuant to ICWA § 1919(a) and duly entered thereto for purposes of authorizing Oklahoma's exercise of jurisdiction under ICWA generally concurrent with *Amici* Nations within their respective reservations. *See* *INTERGOVT'L AGREEMENT BETWEEN THE STATE OF OKLAHOMA AND EACH OF THE FIVE TRIBES REGARDING JURISDICTION OVER INDIAN CHILDREN WITHIN EACH TRIBE'S RESERVATION* (Chickasaw Nation ICWA § 1919(a) agreement) (filed Aug. 7, 2020), available at https://www.sos.ok.gov/

documents/filelog/93637.pdf; *INTERGOVERNMENTAL AGREEMENT BETWEEN THE STATE OF OKLAHOMA AND THE CHEROKEE NATION REGARDING JURISDICTION OF INDIAN CHILDREN WITHIN THE NATION'S RESERVATION* (Cherokee Nation ICWA § 1919(a) agreement) (filed Sep. 1, 2020), also available at https://www.sos.ok.gov/documents/filelog/93672.pdf. Appellants' Proposition I attacks the Chickasaw Nation's ICWA § 1919(a) agreement and therefore, by implication, also attacks the Cherokee Nation's parallel agreement. (Brief in Chief at 4, filed Jun. 22, 2021.)

Amici Nations file this brief with the written consent of the parties pursuant to S. Ct. Rule 1.12(a)(1), copies of which consent are appended to this brief.

B. Summary of the Case

This matter concerns a deprived child adjudication alleging domestic violence, custodial mental health instability, and threats of harm. (Amended Petition in Error, filed Mar. 19, 2021; Brief in Chief at 1.) The child (Minor Child) is a citizen of Muscogee Creek Nation, and the acts asserted are alleged to have occurred within the Chickasaw Nation reservation. (Brief in Chief at 3.)

In reliance on those spare facts, Minor Child's counsel moved this Court to dismiss, arguing ICWA denies Oklahoma jurisdiction over child custody proceedings involving Indian children domiciled within the Chickasaw Nation reservation. (Motion to Dismiss, filed Apr. 7, 2021; First Amended Motion to Dismiss, filed Apr. 21, 2021; Notice to the Court and Supplement to First Amended Motion to Dismiss, filed May 3, 3031.) The Court deferred ruling on the motion until it resolved this petition (Order, Jun. 10, 2021), but Appellants have adopted the Minor Child's argument as their Proposition I (Brief in Chief at 4) (*Accord* Response to Minor Child's Motion to Dismiss, filed Apr. 30, 2021.). Based thereon,

Appellants' have asked the Court to "reverse the adjudication below and remand the case with instructions to dismiss for lack of subject matter jurisdiction." (Brief in Chief at 4.)

Separately, Appellants' Proposition II argues the adjudication below should be dismissed for the district court's failure to complete proceedings within one hundred eighty (180) days, in violation of 10 O.S. § 1-4-601.

C. Summary of *Amici*'s Argument

Appellants are correct on two points—namely, *one*, the Chickasaw Nation reservation continues for purposes of determining jurisdiction, *Bosse*, 2021 OK CR 3, ¶¶ 12 & 29; and, *two*, ICWA vests exclusive jurisdiction in Tribal courts with respect to child custody proceedings involving Indian children domiciled within a reservation, 25 U.S.C. § 1911(a); *see also* 25 U.S.C. § 1903(10) (defining "reservation"). Petitioners' argument fails, however, in its misconstruction and dismissal of the agreement authorized by ICWA § 1919(a) and lawfully entered by the Chickasaw Nation and Oklahoma pursuant to Chickasaw Nation Code § 6-201.5 and 10 O.S. § 40.7, respectively.

Oklahoma and Tribal nations have a tradition of intergovernmental cooperation. The particular agreement Appellants challenge grew out of substantive engagement among *Amici* Nations, other Tribal governments, and Oklahoma and operates to vest Oklahoma, by agreement sanctioned by Federal law, with ICWA jurisdiction generally concurrent with Chickasaw Nation throughout the Chickasaw Nation reservation outside of trust, restricted, and retained original treaty lands. The parties entered this agreement pursuant to express authorization under ICWA and parallel provisions of Oklahoma and Chickasaw Nation law. What is more, the Oklahoma Legislature ratified this agreement when recently amending

Oklahoma's implementing statute, and lawyers for the State have argued it was lawfully formed. There is no basis in law to dismiss the agreement's validity and force.

Further, the agreement Appellants challenge manifests collaboration of Tribal and State governments in complex and, in some ways, challenging multijurisdictional context solely for purposes of ensuring Native children would be protected as we work to implement *McGirt* in accord with law. As such, the agreement offers a solid reminder of what Oklahoma and Tribal nations can do when they choose to work together in common interest. Appellants' attack on this agreement is accordingly not only wrong; it is misguided.

Finally, Appellant urges error below with respect to the district court's alleged failure to adjudicate the matter within a time period established by Oklahoma statute. *Amici* Nations offer no view on this proposition other than to observe that the application of *any* Oklahoma procedural requirement would presuppose Oklahoma jurisdiction, a conclusion that would run directly counter to Appellants' position on Proposition I.

ARGUMENT

A. Tribal-State Agreements Are Important and Appropriate Intergovernmental Tools that Have Long Served to Avoid Unnecessary Conflict in Oklahoma.

Intergovernmental relations between States and Tribal nations have long presented political and jurisdictional complexities that frequently have resulted in litigated and other conflict. However, the broad arc of those relations shows a trend of increased reliance on durable intergovernmental agreements to provide predictability and certainty while affording proper respect to the competing rights, authorities, and interests of separate sovereigns.

1. ***States and Tribes have long turned to mutually agreeable intergovernmental agreements to provide certainty and predictability.***

For decades, States and Tribal nations throughout the country have increasingly turned to managing differences through cooperative agreements. *E.g.*, Reid Peyton Chambers, "Reflections on Changes in Indian Law, Federal Indian Policies and Conditions on Indian Reservations Since the Late 1960s," 46 *ARIZ. ST. L. J.* 729, 762. The overall trend has generally moved *away* from case-by-case conflict and *toward* negotiated and mutually acceptable collaborative agreements, an approach that offers many advantages.

> In the face of potentially overlapping or conflicting jurisdictional claims, tribal-state cooperative agreements offer both sets of governments the opportunity to coordinate the exercise of authority, share resources, reduce administrative costs, deliver services in more efficient and culturally appropriate ways, address future contingencies, and save costs of litigation. They also enable governments to craft legal arrangements reflecting the particular circumstances of individual Indian nations, rather than relying on uniform national rules. Insofar as cooperative agreements create a stable legal environment conducive to economic development, they may appeal to the common interests of tribes and states.

COHEN'S HANDBOOK OF FEDERAL INDIAN LAW (COHEN'S) § 6.05, at 588-89 (Nell Jessup Newton ed., 2021). *Accord* Council of Western Attorneys General (CWAG), *AMERICAN INDIAN LAW DESKBOOK* § 14 at 1092 (2020) ("Often the litigation mode has not proven the best means to resolve the core uncertainties and distrust between states and tribes. Rather than spend resources and goodwill in litigation, it can be more fruitful to attempt to find a cooperative way to solve the underlying problem."). Federal policy often supports negotiated intergovernmental approaches to conflict resolution and provides "significant potential for cooperation between Tribal and State governments in addressing . . . shared concerns." CWAG § 14 at 1092-92.

Congressman Tom Cole, who formerly served as Oklahoma's Secretary of State from 1995 to 1999, recently spoke to lessons he learned from his experience in government and

Tribal-State relations: "I think you're always better to work it out. Tribes aren't going anywhere, the state of Oklahoma is there. When we partner, we do some pretty amazing things together. When we go to war, it's not good for the state and it divides us." Reese Gorman, "Cole encourages state-tribal relations over state challenges to *McGirt*," *NORMAN TRANSCRIPT* (Jul. 23, 2021), available at https://www.normantranscript.com/news/cole-encourages-state-tribal-relations-over-state-challenges-to-mcgirt/article_e15e2378-eb4b-11eb-80f4-c39595196dbb.html. The Congressman's simple observation points to the basic wisdom of working in good faith toward effective intergovernmental cooperation.

2. *Oklahoma and Tribal governments have a tradition of managing multijurisdictional challenges through intergovernmental agreement.*

Oklahoma and Tribal nations have not always collaborated. Tribal-State relations in Oklahoma in the 1980s and 1990s, in fact, were marked by intense inter-sovereign litigation. During this period, however, the United States Supreme Court ruling in *Oklahoma Tax Commission v. Citizen Potawatomi Nation*, 498 U.S. 505 (1991), proved pivotal.

This case turned on Oklahoma's attempt to enforce its tax laws against a sovereign Tribe. In making its case, Oklahoma urged the Court to rewrite or abandon basic Federal Indian law principles in favor of claimed State sovereignty interests and argued that the controlling rules were unworkable, leaving it "with a right without any remedy." *Id.*, 498 U.S. at 514. Unpersuaded, the Court stuck to its precedent. It observed Oklahoma retained various enforcement tools, if it chose to use them, or it could seek recourse in Congress; more importantly, though, the Court noted Oklahoma remained free to "enter into agreements with the tribes to adopt a mutually satisfactory regime for the collection of this sort of tax." *Id.* Having ridden this horse to the end of the road, Oklahoma and several Tribes took up the

Court's commonsense advice and started talking, which produced Oklahoma's first statutory framework to address a Tribal-State tax dispute. 68 O.S. § 346.

The results were immediate. By the end of the following year, 1992, four (4) Tribes had entered tobacco tax agreements with Oklahoma under this statute—including *Amici* Nations; the next year, 1993, eight (8) more Tribes signed such agreements—including the Citizen Potawatomi Nation, the litigant-Tribe in the most recent dispute; and by 2001, twenty-eight (28) Tribes had signed tobacco tax pacts. *See Tribal Compacts and Agreements*, Okla. Sec'y of State, https://www.sos.ok.gov/gov/tribal.aspx (last visited July 29, 2021). Tribal nations continue today to operate and license tobacco retail enterprises and make payments to Oklahoma in lieu of taxes under agreements formed following *Citizen Potawatomi*. *Id.*

Of course, periodic litigated conflict has of course occasionally re-occurred, but more frequently, Tribes and the State have substantively collaborated and cooperated. Over the years, Oklahoma and Tribal nations have formed and entered nearly nine hundred (900) intergovernmental agreements that are now on file with the Oklahoma Secretary of State, covering a broad range of subjects. *Id.* Payments Oklahoma receives under several of those agreements (e.g., payments in lieu of taxes with respect to tobacco product sales, 68 O.S. § 346; revenues derived from Tribal non-contestation of State motor fuel taxation of Indian country sales to third-party consumers, 68 O.S. § 500.63; and monies received as revenue-share payments from Tribal governments in relation to certain of their Tribal gaming operations, 3A O.S. §§ 280, 280.1, & 281) all contribute significantly to Oklahoma's fiscal health, and as the Supreme Court recognized in *Citizen Potawatomi*, Oklahoma would have no lawful claim to collect *any* of those monies without a negotiated and "mutually satisfactory regime." 498 U.S. at 514. What is more, these agreements support regulatory stability conducive to Tribal

government operations and economic development while fostering predictability and neutralizing certain disputes that previously gave rise to seemingly intractable litigation.

It is worth noting Oklahoma has formally embraced this collaborative approach, setting forth this preferred policy for Tribal-State relations in statute.

> The State of Oklahoma recognizes the unique status of Indian tribes within the federal government and shall work in a spirit of cooperation with all federally recognized Indian tribes in furtherance of federal policy for the benefit of both the State of Oklahoma and tribal governments.

74 O.S. § 1221(b). *Cf.* 68 O.S. § 500.63(A)(4) ("It is mutually beneficial to the State of Oklahoma and the federally recognized Indian tribes of this state, exercising their sovereign powers, to enter into contracts as set forth in subsection B of this section, for the purpose of limiting litigation on the issue of state government taxation of motor fuel sales made by Indian tribes. It is in the interest of this state to resolve disputes between the state and federally recognized Indian tribes on this issue by entering into contracts under which the Indian tribes are in part compensated for any tribal motor fuel tax revenues the Indian tribes might lose by reason of the adoption and enforcement of this act. Such mutually beneficial agreements allow both the State of Oklahoma and the Indian tribes to benefit from tax revenues from sales of motor fuel on Indian country.")

In considering this track record, the United States Supreme Court recently offered a heartening followup to its advice in *Citizen Potawatomi*:

> With the passage of time, Oklahoma and its Tribes have proven they can work successfully together as partners. Already, the State has negotiated hundreds of intergovernmental agreements with tribes . . . . These agreements relate to taxation, law enforcement, vehicle registration, hunting and fishing, and countless other fine regulatory questions.

McGirt, 140 S. Ct. at 2481. Intergovernmental differences and disagreements still occur (and *always* will occur), but the core policy of "cooperation . . . in furtherance of federal policy for

the benefit of both the State of Oklahoma and tribal governments" remains Oklahoma's only codified policy in this area. 74 O.S. § 1221.

To fulfill their purpose, Tribal-State agreements can only work when entered lawfully and with a manifest mutual respect for the sovereign interests of the government parties. *Amici* Nations suggest the historical record shows when Oklahoma and Tribal nations have found ways to work together, all Oklahomans—both Tribal and non-Tribal—have benefitted.

B. The Chickasaw Nation's ICWA § 1919(a) Agreement Was Properly Formed and Entered, Controls, and Vests Oklahoma with Jurisdiction Concurrent with Chickasaw Nation in this Adjudication.

Appellants' Proposition I attacks the lawfulness of the Oklahoma Department of Human Services' and Office of Juvenile Affairs' entry on Oklahoma's behalf to an ICWA § 1919(a) agreement with the Chickasaw Nation. Appellants contend Oklahoma lacks jurisdiction in this matter as it arises from acts committed within the Chickasaw Nation reservation. Petitioner is correct in that the Chickasaw Nation reservation continues and constitutes Indian country for jurisdictional purposes. Petitioner is also correct that ICWA vests exclusive jurisdiction in the Chickasaw Nation over Indian child welfare matters arising within its reservation. Past that point, Petitioner is in error.

Congress empowered Tribes to take control, as self-governing sovereigns, of how they may choose to implement their exclusive jurisdiction in this area. Congress did this by expressly authorizing Tribal-State agreements to allocate jurisdiction case-by-case or, more broadly, to establish concurrent jurisdiction. Likewise, Oklahoma and Chickasaw Nation law provide State and Tribal authorizations, respectively, for such agreements. Acting on and in accord with this trio of authorizations, Oklahoma and the Chickasaw Nation have formed and entered an agreement that permits Oklahoma to exercise jurisdiction which Federal law

otherwise denies it. If this were not enough to put any reasonable question to rest, the Oklahoma Legislature and Governor Stitt ratified the agreement recently amending 10 O.S. § 40.7, and Oklahoma's attorneys have consistently argued for its validity and legal effect. In short, Appellant's adopted legal argument is wrong.

1. ***ICWA establishes exclusive Tribal jurisdiction and authorizes Tribal-State concurrent jurisdiction agreements.***

ICWA creates the jurisdictional framework that controls the adjudication of Indian child custody proceedings. In establishing this framework, Congress provided for exclusive Tribal jurisdiction within Indian country. 25 U.S.C. § 1911(a); *see also* 25 U.S.C. § 1903(10) (defining "reservation"). Accordingly, following the jurisdictional clarification offered in *Bosse*, which affirmed the Nation's continuing reservation, 2021 OK CR 3, ¶¶ 12 & 29, ICWA vests exclusive jurisdiction in the Chickasaw Nation. However, our story does not end there.

In affirming exclusive Tribal court jurisdiction under ICWA, Congress expressly provided for meaningful Tribal self-determination:

> States and Indian tribes are authorized to enter into agreements with each other respecting care and custody of Indian children and jurisdiction over child custody proceedings, including agreements which may provide for orderly transfer of jurisdiction on a case-by-case basis *and agreements which provide for concurrent jurisdiction between States and Indian tribes*.

25 U.S.C. § 1919(a) (emphasis added). *See generally In re Parental Rights as to S.M.M.D.*, 272 P.3d 126 (Nev. 2012) (recognizing ICWA § 1919(a) "authorizes jurisdictional agreements for concurrent jurisdiction where it would not otherwise exist"); *cf. Doe v. Doe*, 349 P.3d 1205 (Idaho 2015) (recognizing *S.M.M.D.* but concluding record in case at bar did not provide "basis for determining the existence of an agreement to exercise concurrent jurisdiction under 25 U.S.C. § 1919(a)"). *Accord* CWAG § 14 at 1093 ("Some federal acts, such as the . . . Indian Child Welfare Act, include provisions authorizing or requiring states and tribes to enter into

cooperative agreements for the promotion of the specific legislation's purpose."). In other words, Congress has *expressly sanctioned* Tribal government engagement with State governments on how a Tribe may choose to implement its ICWA jurisdiction.

2. *Oklahoma and Chickasaw Nation laws authorize ICWA § 1919 agreements, and the State and Tribal governments lawfully entered this agreement.*

Congressional authorization, of course, is only one leg of the stool on which an ICWA § 1919(a) agreement sits. As demonstrated by this Court's rulings in *Treat, et al., v. Stitt*, 2020 OK 64 (striking purported gaming agreements as invalid) (*Treat I*) and *Treat, et al., v. Stitt*, 2021 OK 3 (same) (*Treat II*), a Tribal-State agreement may only be valid if lawfully formed and entered. *See generally* CWAG §§ 14:2-14:3 (2020 ed.). In the present case, there is no reasonable question as to *either* Oklahoma's *or* the Chickasaw Nation's having joined this agreement, nor can there be reasonable allegation that either did so without proper authority.

First, paralleling Congress's language, Oklahoma law provides:

> The Director of the Department of Human Services and the Executive Director of the Office of Juvenile Affairs are authorized to enter into agreements on behalf of the state with Indian tribes in Oklahoma regarding care and custody of Indian children and jurisdiction over child custody proceedings including agreements which provide for orderly transfer of jurisdiction on a case by case basis and *agreements which provide for concurrent jurisdiction between the state and the Indian tribe*, as authorized by the Federal Indian Child Welfare Act, 25 U.S.C. Section 1919.

10 O.S. § 40.7 (emphasis added). Accordingly, by this statute's plain and explicit terms, the Legislature vested authority in two specific state offices, i.e., the Oklahoma Department of Human Services and Office of Juvenile Affairs, "to enter into agreements on behalf of the state" in relation to a defined subject, i.e., care, custody, and jurisdiction under ICWA. And on July 15, 2020—a mere six days after the United States Supreme Court ruled in *McGirt*—the State lawfully bound itself to this agreement with the Chickasaw Nation.

Similarly, the Chickasaw Nation Code provides:

> The Chickasaw Nation is duly authorized to enter into agreements with other tribal nations or states with respect to the care and custody of Indian children and jurisdiction over child custody proceedings, including, but not limited to, agreements which may provide for orderly transfer of jurisdiction on a case-by-case basis and agreements which provide for concurrent jurisdiction between the tribal nations and states.

Chickasaw Nation Code, § 6-201.5.E at p.6-88 & 6-89, available at https://code.chickasaw.net/Title-06.aspx.[1] While the Chickasaw Nation Code does not specify the office through which Tribal entry to the agreement is to be made, the Chickasaw Nation Constitution does, *see* Chickasaw Nation Const., art. XI, § 1 ("The Governor shall perform all duties appertaining to the office of the Chief Executive. He shall sign official papers on behalf of the Nation."), and on July 16, 2020, the Chickasaw Nation bound itself to this agreement on July 16, 2020, which was then filed with the Oklahoma Secretary of State on August 7, 2021.

Accordingly, pursuant to and in compliance with this trio of statutory authorizations, the Chickasaw Nation and Oklahoma lawfully formed and entered the ICWA § 1919(a) agreement that controls in this case. Without more, this agreement is valid and controlling.

3. *The Oklahoma Legislature ratified this ICWA § 1919(a) agreement, and the State's attorneys have supported its validity and legal effect.*

Congress's authorization for ICWA § 1919(a) concurrent jurisdiction agreements is explicit. The Oklahoma and Chickasaw Nation authorizations for this *particular* agreement are equally clear. Of course, some degree of circumspection may be nonetheless appropriate given

[1] Likewise, the Cherokee Nation Code provides: "The Principal Chief of Cherokee Nation or his designee is authorized to enter into agreements with the State of Oklahoma regarding care and custody of Indian children as authorized by the federal Indian Child Welfare Act, 25 U.S.C. § 1919, as amended." Cherokee Nation Code 10 C.N.C.A. § 40.7 at p.116, available at https://attorneygeneral.cherokee.org/media/5upcrg3j/word-searchable-full-code.pdf.

recent controversies surrounding Tribal-State relations. *E.g.*, *Treat I* and *II*. But even with a cautious eye, Oklahoma's lawful and binding entry and its ongoing commitment to this agreement could not be clearer.

In April 2021, the Oklahoma Legislature enacted H.B. 2352, including an emergency clause to provide immediate effect, and Governor Stitt signed it into law. *See* Oklahoma Legislature, Bill Information for HB 2352, available at http://www.oklegislature.gov/BillInfo.aspx?Bill=hb2352&Session=2100. Presumably responding to arguments such as what Appellants urge on this Court, the Oklahoma Legislature acted to ensure 10 O.S. § 40.7 embraced a scope *at least as* broad as ICWA § 1919(a). Notwithstanding prior acrimony between the State's political branches over how the State may enter a compact with a Tribal nation, Oklahoma's Legislature and Governor came together on a measure to ratify this agreement and others like it:[2]

> The State of Oklahoma hereby ratifies all agreements in conformity with the Federal Indian Child Welfare Act executed prior to the enactment of this act, and any such agreement shall be enforceable in any case filed or pending at the time that an agreement vesting concurrent jurisdiction is entered into between the state and an Indian tribe.

H.B. 2352, codified at 10 O.S. § 40.7. There is simply no legitimate question as to this agreement's validity.

---

[2] In addition to *Amici* Nations' and Muscogee Creek Nation's ICWA § 1919(a) agreements, all of which have already been cited, Oklahoma entered into an agreement with the Choctaw Nation of Oklahoma prior to the enactment of H.B. 2352. *See* *INTERGOVERNMENTAL AGREEMENT BETWEEN THE STATE OF OKLAHOMA AND THE CHOCTAW NATION OF OKLAHOMA REGARDING JURISDICTION OVER INDIAN CHILDREN WITHIN THE TRIBE'S RESERVATION* (filed Aug. 17, 2020), available at https://www.sos.ok.gov/documents/filelog/93655.pdf. Oklahoma formed an agreement to address ICWA jurisdiction with the Seminole of Oklahoma after the passage of H.B. 2352. *See* *LIMITED CONCURRENT JURISDICTION AGREEMENT* (filed Jul. 15, 2021), available at https://www.sos.ok.gov/documents/filelog/94409.pdf. This fifth agreement, however, differs from the other four.

Finally, *Amici* Nations call the Court's attention to the consistent argumentation of Oklahoma's attorneys in support of this particular agreement. Specifically, we refer the Court to the *BRIEF OF OKLAHOMA ATTORNEY GENERAL OF OKLAHOMA AS AMICUS CURIAE IN OPPOSITION TO MOTION TO DISMISS*, filed to the Oklahoma District Court for Carter County in *In the Matter of [S.R.]*, JD-2020-31 (Apr. 26, 2021) (asserting Federal authorization for concurrent jurisdiction agreements under ICWA in support of the validity of the Chickasaw Nation's ICWA § 1919(a) agreement and noting also H.B. 2352's affirmation of it), as well as to the *RESPONSE TO APPELLANT'S MOTION TO REATAIN [sic] APPEAL IN SUPREME COURT* filed by the Pontotoc District Attorney to this Court in *In the Matter of [C.C. & D.C.]*, No. 119,612 (Jun. 10, 2021) (same). In these instances, government attorneys for the State of Oklahoma argued in support of the validity and legal effect of the Chickasaw Nation's ICWA § 1919(a) agreement with Oklahoma.

4. *The Chickasaw Nation's ICWA § 1919(a) agreement with Oklahoma controls in this case, and Appellants' Proposition I is without merit.*

Turning to the substance of the agreement, the Chickasaw Nation's ICWA § 1919(a) agreement permits Oklahoma's exercise of concurrent jurisdiction over the deprived child adjudication relating to Minor Child. No argument has been made that this case does not arise within ICWA's jurisdictional scope; Minor Child is an Indian child, 25 U.S.C. § 1903(4), this is a child custody proceeding, 25 U.S.C. § 1903(1), and the acts alleged in support of the proceedings below are admitted to have occurred within the Chickasaw Nation reservation. 25 U.S.C. § 1903(10); *accord Bosse*, 2021 OK CR 3, ¶¶ 12 & 29. Subject to specifically enumerated exceptions—namely, "Indian allotments," trust lands, and retained original treaty lands—section IV of the agreement provides "the State of Oklahoma and [Chickasaw Nation] shall share concurrent jurisdiction over any Indian child domiciled within its reservation."

Unless and, even then, only to the extent some portion of the acts alleged occurred on excepted lands, the agreement permits Oklahoma's exercise of jurisdiction in this case.

5. *Appellant's remaining arguments to derail implementation of the Chickasaw Nation's § 1919(a) agreement are little more than red herrings.*

By adopting Minor Child's arguments in the deferred motion to dismiss (Brief in Chief at 4), Appellants also adopt two other apparent arguments aimed at derailing implementation of the Chickasaw Nation's § 1919(a) agreement—namely, that the agreement, *one*, alters the definition of "reservation" and, *two*, waives ICWA's procedural protections for non-Chickasaw Indian children. Both arguments are red herrings.

First, the Chickasaw Nation's ICWA § 1919(a) agreement does not change the definition of "reservation." Indeed, it does not even define the term. It merely (but critically) recites the Chickasaw Nation's and Oklahoma's:

> (1) recognition that the Nation has "exclusive jurisdiction over any child custody proceeding involving an Indian child domiciled *within the boundaries of [its] reservation* as provided for in 25 U.S.C. § 1911(a)" (emphasis added); and
>
> (2) agreement that "the State of Oklahoma and [Nation] shall share concurrent jurisdiction over any Indian child domiciled *within its reservation*, except as follows," which exceptions define categories of lands within which the Chickasaw Nation's jurisdiction remains exclusive of Oklahoma's.

Chickasaw Nation ICWA § 1919(a) agreement at § IV (emphasis added). Appellants' adopted argument is not clear, but *Amici* Nation's submit that nothing in ICWA § 1919(a) can be read as precluding the Nation from *retaining exclusive jurisdiction* over portions of its reservation while *sharing concurrent jurisdiction* with the State in other areas. Such retention of enclaves

of exclusive jurisdiction simply does not change—or even relate to—the fundamental status or definition of the Nation's reservation.

Next, *Amici* Nations question Appellants' standing to invoke the unspecified procedural rights of a hypothetical Tribal government whose hypothetical child citizen is domiciled within the Chickasaw reservation. Nonetheless, Minor Child's Tribe is Muscogee Creek Nation (Brief in Chief at 3), and Muscogee Creek has formed an ICWA § 1919(a) agreement with Oklahoma that comports for all relevant purposes with the Chickasaw Nation's agreement. *See* INTERGOVERNMENTAL AGREEMENT BETWEEN THE STATE OF OKLAHOMA AND THE MUSCOGEE (CREEK) NATION REGARDING JURISDICTION OVER INDIAN CHILDREN WITHIN THE NATION'S RESERVATION (Aug. 4, 2020), available at https://www.sos.ok.gov/documents/filelog/93632.pdf. That these two Nations have entered parallel agreements makes it hard to glean what procedural injury one might claim against the other with respect to implementation of their respective agreements as they may relate to their respective child citizens.

Regardless, Appellants' vague argument simply lacks merit. Nothing in the Chickasaw Nation's § 1919(a) agreement waives or even touches on the procedural rights ICWA secures to any other Tribal government. In any ICWA case, including the present one, a non-domiciliary child, the child's custodian, or the Tribe of which child is a member or citizen may petition the district court for transfer of the proceedings to the court of the non-domiciliary child's Tribe. 25 U.S.C. § 1911(b). Likewise, the Indian child's tribe has the right to intervene in an ICWA proceeding. 25 U.S.C. § 1911(c). If Appellants mean to suggest another Tribe has a broad right to have their custody matters respecting their child citizens heard in *Chickasaw* court, such right does not exists—under Federal or Chickasaw law. There is also nothing in the agreement between Chickasaw and Oklahoma that forecloses any separate concurrent

jurisdiction that another tribe may have over its member children located on the Chickasaw Reservation. In short, Appellants invoke a vague phantom of an argument that lacks any merit.

C. Oklahoma and the Chickasaw Nation Crafted this Agreement to Protect the Best Interests of Indian Children while Continuing to Work toward Long-term Implementation of the *Bosse* and *McGirt* Rulings.

ICWA serves the critical purpose of protecting Indian children and their families. Congress enacted ICWA to reverse generations of intrusion and bureaucratic violence committed against Native families. And in so doing, as already described, ICWA empowers Tribes to work with State government partners to implement its provisions in a manner best suited—in the Tribe's judgment—to accomplishing statutory goals. *Cf.* COHEN'S § 6.05 at 588 (recognizing Tribal-State cooperative agreements "enable governments to craft legal arrangements reflecting the particular circumstances of individual Tribal nations, rather than relying on uniform national rules"). As such, ICWA § 1919(a) provides a critical and flexible tool for implementing a broad Federal statutory jurisdictional framework and program.

In the years and months that preceded the *McGirt* ruling, *Amici* Nations evaluated civil and criminal jurisdiction issues that might arise in the event the Supreme Court ruled as it eventually did. In this, we worked closely with representatives of the others of the Five Tribes and engaged also with the Oklahoma Attorney General and representatives of the offices of the Oklahoma House Speaker, Senate President *Pro Tem*, and Governor. In our work, all parties expressly recognized the *McGirt* litigation's significance to questions of both criminal and civil jurisdiction and explored cooperative means for avoiding conflict and uncertainties. ICWA was a particular subject of discussion, and through our talks, we established an intergovernmental commitment to *ensuring the protection of Native children*. To implement our commitment, we identified 25 U.S.C. § 1919(a), 10 O.S. § 40.7, and Chickasaw Nation Code § 6-201.5 as combining to provide a key tool for effective collaboration.

We memorialized all this in a model agreement, which Oklahoma and the Chickasaw Nation executed and filed with the Oklahoma Secretary of State on August 7, 2020—less than one month after the Supreme Court ruled in *McGirt*:

> The Indian Child Welfare Act of 1978 was passed by Congress to reverse the trend of the destruction of Indian families. The intent of the Act was to protect Indian children and families by defining how cases involving Indian children should be handled. The Act's provisions respected the broad authority that Indian tribes had long exercised over Indian children located within Tribal jurisdictions, and the United States Supreme Court recognized that, "the ICWA designates the tribal court as the exclusive forum for the determination of custody and adoption matters for reservation-domiciled Indian children, and the preferred forum for nondomiciliary Indian children." Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 52-53 (1989).
>
> This agreement is a result of a partnership formed by each of the Five Tribes and the State of Oklahoma. The intent of this Agreement is to further streamline the jurisdictional provisions put forth in the Indian Child Welfare Act and create concurrent jurisdiction on the respective reservations of the Five Tribes with the State of Oklahoma and its political subdivisions.

See Chickasaw Nation ICWA § 1919(a) agreement, Preamble. *Accord* Cherokee Nation ICWA § 1919(a) agreement, Preamble.

We respectfully ask the Court to reflect on this context in its deliberations. We further ask the Court to recognize that Appellants' challenge does not reach *only* this agreement or jurisdiction *only* in this case; instead, it reaches an entire series of lawful and carefully formed ICWA § 1919(a) agreements intended to protect Native children and which govern the jurisdiction over child welfare cases *throughout eastern Oklahoma*. *Supra*, n.2 and accompanying text. Those agreements are not products of some archaic Federal law; they are the authorized product of Tribal and State talks that manifest an intentional commitment to the rule of law in a sensitive, multi-jurisdictional context. The agreements afford proper respect to the separate sovereignties of the State and Tribal nations while serving the shared public interest in avoiding confusion or uncertainty that may leave Native children vulnerable. While

such considerations do not control in this case, we suggest they are nonetheless relevant. *Cf., e.g.*, *Hawkins v. Hurst*, 1970 OK 56, 467 P.2d 159, 162 (emphasizing fundamental nature of court's obligation to ensure proper jurisdiction); *Williams Nat. Gas Vo. v. State Bd. of Equalization*, 1994 OK 150, 891 P.2d 1219, 1221 (justifying review with reference to potential for "adverse impact . . . if the controversy is not rapidly resolved" and the judicial economy served by avoiding litigation of same "central issues" in other cases).

D. Appellants' Proposition II Presumes Oklahoma Had Jurisdiction in the Adjudication Below but Erred in Its Exercise of It.

Finally, Appellants assert in Proposition II that the district court erred by not timely resolving the adjudication below. In support, Appellants cite 10A O.S. § 1-4-601, which prescribes timelines for the disposition of child custody proceedings. (Brief in Chief at 4.) *Amici* Nations have no opinion on the merits of this argument. We offer, however, that for such rules to apply in *this* proceeding, *Oklahoma must have had jurisdiction in the first instance.*

As we have argued: Oklahoma *did* have jurisdiction concurrent with the Chickasaw Nation, which jurisdiction it was permitted by operation of the Chickasaw Nation's ICWA § 1919(a) agreement and controlled in this case to the extent no act alleged occurred in an excepted area. However it may rule on the merits of Appellants' Proposition II, we urge the Court to affirm the validity and effect of the Chickasaw Nation's ICWA § 1919(a) agreement as prerequisite to any application of 10A O.S. § 1-4-601 in the proceedings below.

CONCLUSION

Amici Nations and others will be implementing the *McGirt* decision for a long time to come. As we do, tools such as our ICWA § 1919(a) agreements will play an important role. We are proud of what we have done so far, and we believe appropriate intergovernmental

work, as manifest in our agreements with Oklahoma to ensure protections for Native children, demonstrate Tribal and State governments *can* and *do* work together in common interest for a common good. We believe, in fact, we have done this sort of work more often than not, despite what periodic noise and heat may otherwise suggest.

As argued, Congress expressly authorized the type of agreement Appellants challenge in Proposition I, and the Chickasaw Nation and Oklahoma lawfully formed and entered such an agreement for the purpose of protecting Native children. All this was done lawfully and in accord with Federal, Tribal, and State law. Accordingly, the challenged agreement—and the parallel agreements signed by others of the Five Tribes—are lawful and serve an important public good. Appellants' Proposition I is without merit and should be rejected.

Respectfully submitted,

Stephen Greetham (OBA #21510)
Chickasaw Nation
Office of Senior Counsel
4001 N. Lincoln Boulevard
Oklahoma City, OK 73105
(580) 272-5236
stephen.greetham@chickasaw.net
Counsel for Chickasaw Nation

Debra Gee (OBA #17031)
Chickasaw Nation
Office of Tribal Justice Administration
P.O. Box 1548
Ada, OK 74821
(580) 436-7233
debra.gee@chickasaw.net
Counsel for Chickasaw Nation

Sara Hill (OBA #20072)
Chrissi Ross Nimmo (OBA #22248)
Cherokee Nation Office of the Att'y Gen.
PO Box 1533
Tahlequah, OK 74465
(918) 453-5262
sara-hill@cherokee.org
chrissi-nimmo@cherokee.org
Counsel for Cherokee Nation

Glenn Coffee (OBA #14563)
Denise Lawson (OBA #31532)
Lexie Norwood (OBA #31414
Glenn Coffee and Associates
915 N. Robinson Ave.
Oklahoma City, OK 73102
(405) 601-1616
gcoffee@glenncoffee.com
denise@glenncoffee.com
lexie@glenncoffee.com
Counsel for Chickasaw Nation
and Cherokee Nation

CERTIFICATE OF MAILING

This is to certify that on August 3, 2021, a true and correct copy of this brief and appended consents of the parties was sent by first-class mail with the U.S. Postal service to the following:

Jessica Dice, Assistant District Attorney
Office of the District Attorney
Carter County Annex #1
101 1st Avenue SW
Ardmore, OK 73401
Counsel for Appellee (State of Oklahoma)

Phillip P. Owens II
Owens Law Office, PC
6907 NW 122nd Street
Oklahoma City, OK 73142
Counsel for Appellant (Parents)

DeAnn Taylor
P.O. Box 1749
Ardmore, OK 73402
Counsel for Minor Child

Roger Wiley, Attorney General
Shanna Burgin, Assistant Attorney General
Muscogee (Creek) Nation Department of Justice
P.O. Box 580
Okmulgee, OK 74447
Counsel for Minor Child's Tribe

Denise Lawson

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

In the Matter of:	)
	)
S.J.W.,	) Supreme Court Case #119404
	) Carter County Case #JD-2020-34
An Alleged Deprived Child,	)
	)
Stephen and Morgan Wilburn,	)
Appellants,	)
-vs-	)
	)
The State of Oklahoma,	)
Appellee.	)

WRITTEN CONSENT OF APPELLATE PARTIES FOR AMICUS CURIAE TO FILE BRIEF

Appellants, Stephen and Morgan Wilburn, Appellee, the State of Oklahoma and the minor child, consent to Amicus Curiae, the Chickasaw Nation, filing a brief in this action pursuant to Rule 1.12(a)(1) of the Oklahoma Supreme Court Rules, 12 Okla. Stat. Ann., Ch. 15 App. 1.

Dated: June ___ 2021

Phillip Owens
Attorney for Appellants
6907 N.W. 122nd Street
Oklahoma City, OK 73142

DeAnn Taylor
Attorney for the Child
P.O. Box 1749
Ardmore, OK 73402-1749

Jessica Dice
Carter County Office of District Attorney
107 1st Ave. SW
Ardmore, OK 73401

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

In the Matter of:	)	
	)	
S.J.W.,	)	Supreme Court Case #119404
	)	Carter County Case #JD-2020-34
An Alleged Deprived Child	)	
	)	
Stephen and Morgan Wilburn,	)	
Appellants,	)	
-vs-	)	
	)	
The State of Oklahoma,	)	
Appellee.	)	

WRITTEN CONSENT OF APPELLATE PARTIES FOR AMICUS CURIAE TO FILE BRIEF

Appellants, Stephen and Morgan Wilburn, Appellee, the State of Oklahoma and the minor child consent to Amicus Curiae, the Cherokee Nation, filing a brief in this action pursuant to Rule 1.12(a)(1) of the Oklahoma Supreme Court Rules, 12 Okla. Stat. Ann., Ch. 15 App. 1.

Dated: July 29, 2021

Phillip Owens
Attorney for Appellants
6907 N.W. 122nd Street
Oklahoma City, OK 73142

DeAnn Taylor #19004
Attorney for the Child
P.O Box 1749
Ardmore, OK 73402-1749

Jessica Dice
Carter County Office of the District Attorney
107 1st Ave. SW
Ardmore, OK 73401