No. 18-9526

In the Supreme Court of the United States

JIMCY MCGIRT, PETITIONER,

v.

STATE OF OKLAHOMA

ON WRIT OF CERTIORARI TO THE OKLAHOMA COURT OF CRIMINAL APPEALS

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether the State of Oklahoma has jurisdiction to prosecute crimes committed by a tribal member on land within the 1866 territorial boundaries of the Creek Nation in the former Indian Territory of eastern Oklahoma.

PARTIES TO THE PROCEEDING

Petitioner Jimcy McGirt was the petitioner in the trial court and in the Oklahoma Court of Criminal Appeals.

Respondent the State of Oklahoma was the respondent in the trial court and in the Oklahoma Court of Criminal Appeals.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Page(s)

Cases—Continued Page(s)

Cases—Continued Page(s)

Cases—Continued Page(s)

Cases—Continued Page(s)

Statutes

Statutes—Continued Page(s)

Statutes—Continued Page(s)

Statutes—Continued Page(s)

Treaties & Agreements

Executive Branch Materials Page(s)

Other Authorities

STATUTES INVOLVED

Pertinent statutory provisions are quoted in the appendix.

INTRODUCTION

The question presented is whether the State of Oklahoma had jurisdiction to prosecute petitioner Jimcy McGirt for the 1996 rape of a four-year-old Seminole girl in a suburb of Tulsa, Oklahoma. McGirt, an enrolled tribal member, contends that he committed his crime on an Indian reservation, such that the Major Crimes Act, 18 U.S.C. § 1153(a), precludes state jurisdiction. His defense relies on the notion that the entire eastern half of Oklahoma is, in fact, the most populous reservation land in the country, which has gone unrecognized for a century. He insists the State has been unlawfully exercising criminal and civil jurisdiction over thousands of Indians while courts, the federal government, and tribes stood idly by, asserting instead that no such reservation existed.

If that premise sounds implausible, that's because it is. Petitioner's theory fails for three reasons, each grounded in Oklahoma's history and congressional enactments for the Creek Nation's former territory, where McGirt committed his crime.

First, petitioner incorrectly assumes that the Creek Nation's former territory was established as a reservation. But this Court has classified the Creeks' prior fee-simple land tenure as a dependent Indian community, not a reservation. Under this Court's precedent, Creek lands only remained a dependent Indian community while the land was both set aside for Indian use and subjected to federal superintendence. *Alaska* v. *Native Vill. of Venetie*, 522 U.S. 520, 530-531 (1998). When Congress ended the Creeks' communal fee patent and lifted federal restrictions on the land, the land was no longer a dependent Indian community.

Second, petitioner tries to erase a decade of legislation through which Congress prepared the Indian Territory for statehood by ending tribal jurisdiction and subjecting all residents to the same laws and the same courts "irrespective of race." Congress transferred that race-neutral jurisdiction to the new state and federal courts. Accordingly, prosecutions in eastern Oklahoma treated all defendants equally. From statehood to today, no criminal case has *ever* been tried in federal court on the theory that eastern Oklahoma consists of Indian reservations.

This was not some epic historical oversight or, as petitioner claims, "lawlessness." Questions of jurisdiction were carefully considered at statehood. Interpreting the relevant statutes, federal courts, state courts, and this Court all agreed that the State had criminal jurisdiction to prosecute Indians for crimes committed in eastern Oklahoma. These jurisdictional statutes provide an independent basis to affirm.

Third, even if petitioner could overcome his first two errors, Congress disestablished any Creek reservation. Petitioner mischaracterizes this Court's disestablishment test by suggesting that, because the key statutes didn't include the word "cession," the inquiry ends. It doesn't. This Court's nuanced appreciation of tribal history has led it to reject reliance on a closed catalogue of words. The disestablishment inquiry, rather, focuses on whether Congress "merely opened reservation land to settlement," or instead "divested [the land] of all Indian interests," thereby ending the reservation. *Nebraska* v. *Parker*, 136 S. Ct. 1072, 1079 (2016) (citations omitted). Text that divests the tribe of its interest in the land is the relevant text.

In the former Indian Territory, Congress enacted laws that stripped the Creek Nation of all "right, title, and interest" in the land; precluded the Tribe from exercising any independent authority over its former domain; and

broke treaty promises that the Tribe's land would never be part of a state. The laws Congress enacted, and the history surrounding them, show that Congress did far more than simply allow non-Indians to settle in the former Indian Territory. Rather, Congress systematically divested the Creek Nation of all its interest in the land to create our nation's forty-sixth state. Petitioner's speculation that the tribes sought to preserve a reservation by agreeing to allotment instead of cession is debunked by the shared contemporaneous understanding of the federal government and the tribes.

Petitioner's revisionist history, if accepted, would cause the largest judicial abrogation of state sovereignty in American history, cleaving Oklahoma in half. The State would lack jurisdiction to prosecute any crime involving an Indian (whether defendant or victim) in eastern Oklahoma. Criminals already sentenced for crimes like murder and rape would see their convictions erased. Thousands of cases like this one wait in the wings. Reversal also would create the most populous Indian reservations in America, shocking the 1.8 million residents of eastern Oklahoma. The civil and regulatory repercussions would reverberate for decades.

That petitioner's novel reservation theory did not surface for more than a century—during which time Congress's intent cemented into reality—should give the Court serious pause. History matters in Indian law. History illuminates the meaning of statutes enacted a century ago. History tells us what Indian tribes understood when they agreed to give up their land. To conclude that Oklahoma lacks jurisdiction over Indians in the State's entire eastern half, history would have to be ignored.

STATEMENT

In 1996, petitioner Jimcy McGirt forcibly raped his wife's four-year-old granddaughter, B.B., at their home in Broken Arrow, Tulsa's largest suburb. During several encounters while his wife was at work, McGirt penetrated B.B.'s vagina with his finger and tongue, and forced B.B. to touch his genitals. McGirt threatened B.B. that if she told anyone what happened, her grandmother would be angry and McGirt would go to jail. B.B. nonetheless summoned the courage to tell her mother, and later her aunt and cousin, about the rape. *McGirt* v. *State*, No. F-97-967 (Okla. Crim. App. Aug. 26, 1998).

McGirt was convicted in state court of first-degree rape, lewd molestation, and forcible sodomy. He was sentenced to 1,000 years plus life imprisonment, in part based on two prior convictions for forcible oral sodomy involving young boys. McGirt's conviction and sentence were affirmed on appeal. McGirt did not assert that state courts lacked jurisdiction to convict him. Nor did he raise that claim during his first 20 years of incarceration.

On June 18, 2018, after this Court granted certiorari in *Sharp* v. *Murphy*, No. 17-1107, McGirt sought state post-conviction relief on the ground that Oklahoma courts lacked jurisdiction over his criminal case because, he claims, he committed his crime on an Indian reservation, and he and his victim are enrolled members of the Seminole Nation. The trial court denied the application. Pet. App. 5a. The Oklahoma Court of Criminal Appeals affirmed on two separate bases. First, McGirt had "not established any sufficient reason why his current grounds for relief were not previously raised." *Id.* at 2a. Second, the Tenth Circuit's decision in *Murphy* was "not a final decision," and McGirt had "cited no other authority that refutes the jurisdictional provisions of the Oklahoma Constitution" that gave state courts the power to convict him. *Id.* at 3a.

SUMMARY OF ARGUMENT

Oklahoma had jurisdiction to prosecute petitioner's crimes for three reasons.

I.A. The Creek Nation's former territory was not established as a reservation. When Congress removed the Creeks to present-day Oklahoma, it did not confine them to reservations, but instead granted them land in communal fee simple. Under the modern categories of Indian country that took shape in the twentieth century, this Court characterized the Creek Nation's former land as a "dependent Indian community," not a reservation. Congress relied on this Court's precedent when it codified the current definition of Indian country, 18 U.S.C. § 1151, which treats dependent Indian communities as distinct from reservations.

B. By asking the wrong question, petitioner applies the wrong test to get the wrong answer. The legal standard for the existence of a dependent Indian community comes from *Venetie*, which considers whether land is both set aside for Indian use and subject to federal superintendence. Though these characteristics once described the Creek domain, Congress ended the Tribes' fee patent, allotted the lands to individual members, and then lifted federal restrictions on the land. Through this process, the land's character became identical to other lands this Court has held do *not* qualify as Indian country any longer.

C. That the land was not a reservation became manifest at statehood. The original Major Crimes Act gave federal courts jurisdiction within states over certain crimes committed by Indians only on "reservations." At statehood federal courts relinquished, and state courts accepted, jurisdiction over such crimes in the former Indian Territory. Dozens of cases show that courts—including this Court—understood Oklahoma as having general jurisdiction over these crimes; petitioner and the Tribe have

been unable to cite a single case to the contrary. Indeed, petitioner's reservation theory would have created an inexplicable jurisdictional gap, in which *no court* would have jurisdiction to prosecute many Indian-on-Indian crimes.

II.A. Regardless of Indian country status, Oklahoma had jurisdiction to prosecute petitioner. In creating the new State, Congress gave Oklahoma jurisdiction over Indians and non-Indians alike. Beginning in 1897, Congress granted territorial courts jurisdiction over all residents, applied federal and Arkansas law "irrespective of race," abolished tribal courts, rendered tribal law unenforceable, and enacted numerous other laws ensuring parity between Indians and their neighbors.

B. When courts in the new State were formed, Congress transferred to them the same race-neutral jurisdiction that territorial courts had exercised. Actual practice at statehood, in which defendants were prosecuted irrespective of tribal status, confirms the race-neutral jurisdiction of state courts. There is no evidence for petitioner's theory that the Major Crimes Act—a paradigmatically race-based law—sprung into effect after statehood to reintroduce racial distinctions Congress had just abolished.

III. Even if a Creek reservation existed, Congress disestablished it. Disestablishment under *Solem* v. *Bartlett*, 465 U.S. 463 (1984), does not require magic words. Rather, *Solem* holistically assesses whether Congress intended to divest land of Indian interests, as opposed to merely opening land for non-Indian settlement. Here, Congress clearly divested the Creek Nation of its interest in its former domain.

A. Allotment expressly divested the Tribe of "all right, title, and interest" in its land. Congress then permitted sale of these allotments to non-Indians, and subjected even Indian-owned land "to taxation and all other

civil burdens" imposed by the State. Congress also rendered tribal law unenforceable; ended the territorial jurisdiction of tribal governments; and broke its promise to the Creek Nation by incorporating its former domain into the State of Oklahoma. At that point, the Creek Nation no longer retained any interest in the land.

Petitioner's main theory is that, in pursuing allotment rather than cession, Congress preserved a reservation. But allotment and cession were not opposites; allotment often went hand-in-hand with disestablishment. Neither Congress nor the Dawes Commission saw a reservation hinging on the different approaches—nor, even more importantly, did the Tribes.

B. Surrounding circumstances confirm the absence of reservation status. In creating a new State to govern all residents, Congress put Indians and non-Indians on the same legal plane. The history of race-blind adjudication of civil and criminal cases reflects a universal contemporaneous understanding that the area was not reservation land. Congress also declared its intention to dissolve tribal government. All of this is irreconcilable with continued reservation status.

Petitioner emphasizes that tribal governments ultimately survived. This misses the point: Congress's intent to disband the Creek government shows that Congress never contemplated a continued reservation, and informs the meaning of Congress's concurrent steps to strip Creek land of Indian interests. The affected tribes never voiced the view that they would be confined to reservations in the new State and instead acknowledged that they would be subject to state law. Contrary to precedent, petitioner's theory requires rejecting the contemporaneous tribal understanding.

C. Subsequent history confirms the lack of reservations—on a scale dwarfing any of this Court's past cases. Oklahoma's civil and criminal jurisdiction over Indians

has gone unquestioned for a century. The affected tribes have accepted this jurisdiction, telling courts, Congress, and the public that they have no reservations—representations on which this Court and Congress have relied.

IV. If accepted, petitioner's argument would forever change the state. Oklahoma would lack jurisdiction to prosecute crimes involving any Indian in eastern Oklahoma. That includes the child rapist in this case and the murderer in *Murphy*—both of whom seek to set aside decades-old convictions—as well as thousands more in state custody. Petitioner's plea that "Congress can fix it" tacitly admits that reversal would create 19 million acres of reservation land that do not currently exist.

ARGUMENT

I. Eastern Oklahoma is not an Indian reservation

Petitioner asks "whether Congress disestablished the reservation of the Muscogee (Creek) Nation." Br. 1. That reframing assumes a critical premise—that the area known as "Creek country" was ever, in fact, a reservation. It wasn't, and petitioner does not try to show that the Tribe thought otherwise. To use modern labels, Creek country had a distinctive status that most closely aligns with the concept of "dependent Indian communit[y]." 18 U.S.C. § 1151(b). Unlike a reservation, that land retained its character as Indian country only so long as it was held communally by the Tribe, or individually by Creek members as restricted allotments. *Venetie*, 522 U.S. at 533. That character ended over a century ago when Congress terminated the Creek communal patent and removed allotment restrictions.

A. Creek country was not established as a reservation

1. Under the federal government's removal policy, the United States compelled the Creek Nation to abandon its aboriginal homeland and migrate to "the country west

of the Mississippi." Treaty with the Creeks art. XII, Mar. 24, 1832, 7 Stat. 367 (1832 Treaty). In exchange, Congress "solemnly guarantied" to the Creek Nation an area it called "Creek country." Art. XIV, 7 Stat. 368. Congress promised to transfer land ownership to the Tribe by "a patent, in fee simple," effective "so long as they shall exist as a nation, and continue to occupy the country hereby assigned them." Treaty with the Creeks art. III, Feb. 14, 1833, 7 Stat. 419 (1833 Treaty). Congress issued the patent on August 11, 1852. *Woodward* v. *De Graffenried*, 238 U.S. 284, 293, 299 n.2 (1915).

This area was universally understood to be "Indian country." Indian country was defined in 1834 to comprise:

> all that part of the United States west of the Mississippi, and not within the states of Missouri and Louisiana, or the territory of Arkansas, and, also, that part of the United States east of the Mississippi river, *and not within any state to which the Indian title has not been extinguished.*

Indian Trade and Intercourse Act of 1834, ch. 161, § 1, 4 Stat. 729 (emphasis added). The italicized language meant that land "continued to be Indian country so long as the Indians had title to it, and no longer." *Bates* v. *Clark*, 95 U.S. 204, 208 (1877). Indian country rapidly eroded as Congress extinguished Indian title to large portions of the West—including after the Civil War, when the Cherokees, Chickasaws, Choctaws, Creeks, and Seminoles (the "Five Tribes") ceded vast estates for allying with the Confederacy. *E.g.*, Treaty with the Creeks pmbl., art. III, June 14, 1866, 14 Stat. 785, 786 (1866 Treaty).

The lands originally conveyed to the Five Tribes were not reservations. It was not until decades after the Tribes received their lands that the Commissioner of Indian Affairs declared a federal reservation policy, wherein tribes "should be compelled constantly to remain until such time

as their general improvement and good conduct may supersede the necessity of such restrictions." Dep't of Interior, Office of Indian Affairs, *Official Report of the Commissioner of Indian Affairs* 4 (1850); see Marc Slonim, Speech, *Indian Country, Indian Reservations, and the Importance of History in Indian Law*, 45 Gonz. L. Rev. 517, 521 (2009/10) (modern concept of Indian reservation "essentially unknown" in 1830s).

The Five Tribes, however, were not subject to the reservation policy, which did not fit their unique circumstances or their communal fee ownership. See Dep't of Interior, Census Office, *Report on Indians Taxed and Indians Not Taxed in the U.S.* 283-284 (1894) (Five Tribes were "not on the ordinary Indian reservation, but on lands patented to them by the United States"). They were considered more "advanced" than other tribes; they had "regularly organized and stable governments and laws well suited to their condition and circumstances." Dep't of Interior, Office of Indian Affairs, *Report of the Commissioner of Indian Affairs* 6 (1857). The Commissioner thus advocated for their continued self-government. *Ibid.*

Formal documents reflected this distinction. The 1866 Treaty referred to the Tribe's remaining territory as "Creek country" or "Creek lands." Arts. III, V, 14 Stat. 786-787. When Congress amended the Indian trader statute to apply "in the Indian country, or on any Indian Reservation," it exempted "the five civilized tribes, *residing in said Indian country*," not on reservations. Act of July 31, 1882, ch. 360, 22 Stat. 179 (emphasis added).

The Five Tribes took pride in their distinctiveness, as the Choctaw Chief explained to Congress:

> There is a widespread tendency to classify the Indians of Indian Territory with the reservation Indians, which are maintained by the Government, in several States, including Oklahoma Territory. … *The Indians of the Five Tribes object to being classified with*

> *the reservation Indians.* … The Indians of the Five Tribes have never been reservation Indians; they have always been self-sustaining.

S. Doc. 59-143, 1st. Sess., at 33 (1906) (emphasis added).

This not a matter of semantics. "[T]he failure to appreciate the historical distinction between the legal meaning of Indian country and Indian reservations threatens to undermine the established framework for determining the current boundaries of Indian reservations." Slonim 518.

2. Though not a reservation, the land of the Five Tribes was understood to be "Indian country" under the 1834 definition. To the extent modern categories apply, this Court repeatedly characterized the Tribes' domains as former "dependent Indian communities." 18 U.S.C. § 1151(b); *United States* v. *Creek Nation*, 295 U.S. 103, 109 (1935). That term "refers to a limited category of Indian lands that are neither reservations nor allotments, and that satisfy two requirements—first, they must have been set aside by the Federal Government for the use of the Indians as Indian land; second, they must be under federal superintendence." *Venetie*, 522 U.S. at 527.

The Creeks' land originally fit this mold. First, the Tribe held treaty lands communally through "a patent, in fee simple," 1832 Treaty art. XIV, 7 Stat. 368, a well-established characteristic of dependent Indian communities. Indeed, the decision originating the term held that the Pueblos of New Mexico owned "a [communal] fee simple title" to their land, and "so the situation is essentially the same as it was with the Five Civilized Tribes." *United States* v. *Sandoval*, 231 U.S. 28, 46-48 (1913); see *Venetie*, 522 U.S. at 528 ("[U]nlike Indians living on reservations, the Pueblos owned their lands in fee simple" and were

"dependent Indian communities").[1] Second, the Creek treaties provided for federal supervision of the land, such as guarantees to remove intruders from Creek country. *E.g.*, Treaty with the Creeks and Seminoles art. XV, Aug. 7, 1856, 11 Stat. 703-704 (1856 Treaty); 1866 Treaty art. X, 14 Stat. 788.

This Court agreed. Following *Sandoval*, the Court reiterated in *Creek Nation* that the Tribe, which "had a fee-simple title, not the usual Indian right of occupancy," was formerly "a dependent Indian community under the guardianship of the United States." 295 U.S. at 109. These references are critical, because "[t]he entire text of § 1151(b), and not just the term 'dependent Indian communities' is taken virtually verbatim from *Sandoval*," and Congress expressly indicated that it enacted § 1151(b) in reliance on that decision. *Venetie*, 522 U.S. at 530. In short, both this Court and Congress understood that Creek lands were best characterized as a former dependent Indian community under § 1151(b), rather than as a reservation under § 1151(a).

In resisting this point, petitioner and his amici elide the myriad differences between Creek country and traditional reservations. Creek country was not "reserved … from sale" from the public domain (Creek Br. 5); it was conveyed to the Creeks by "patent, in fee simple," 1833 Treaty art. III, 7 Stat. 419. The 1832 treaty, which was made before the reservation era, nonetheless explicitly differentiated between "reserve[s]" east of Mississippi and "Creek country" in the west. 1832 Treaty arts. II, XIV, 7 Stat. 366, 368.[2] Neither the President nor Congress

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[1] The Tribe emphasizes (at 7) that federal law imposed restrictions on alienation of patented land, but that was also true of the Pueblos. *Venetie*, 522 U.S. at 528 & n.4.

[2] The Tribe (at 5) points to the word "reservation" in the 1866 Treaty, but that agreement did not reserve any new land for the

ever designated the land as a reservation.[3] See Okla. *Murphy* Br. 23-25. Isolated, colloquial references to a Creek "reservation" in congressional floor statements and judicial *dicta* cannot transform the land into something it never was.[4]

It does not matter that *some* reservations share *some* of these features—that's to be expected, given the overlap between categories of Indian country. *Felix S. Cohen's Handbook of Federal Indian Law* 38 (1982 ed.). Under petitioner's unduly broad definition, all dependent Indian communities would be reservations; every case recognizing a dependent Indian community, including *Sandoval* and *United States* v. *McGowan*, 302 U.S. 535 (1938), would be wrongly decided; and § 1151(b) would be surplusage.

Creeks. Rather, it ceded the western half of Creek country, with "the eastern half of said Creek lands[] being retained by them." 1866 Treaty art. III, 14 Stat. 786. The passing reference to a "reduced … reservation," appears in a provision guaranteeing that the United States would rebuild agency buildings destroyed during the Civil War on the reduced area that the *Creeks* had reserved for their own domain. Art. IX, 14 Stat. 788. The 1866 Treaty did not purport to create a Creek "reservation," in contrast with the contemporaneous establishment of the Osage Reservation in 1872. Act of June 5, 1872, ch. 310, 17 Stat. 228.

[3] NCAI argues (at 7-8) that official designations are unnecessary, citing *Menominee Tribe* v. *United States*, 391 U.S. 404 (1968). But reservation status was not at issue in *Menominee*. In any event, that tribe's 1854 treaty—at the height of the reservation era—promised land "to be held as Indian lands are held," Treaty with the Menominees art. II, May 12, 1854, 10 Stat. 1065, unlike the Creek patent.

[4] In *Maxey* v. *Wright*, 54 S.W. 807, 811 (Ct. App. Indian Terr. 1900) (see NCAI Br. 9), the court's holding was unaffected by "whether [Creek country was] strictly an Indian reservation or not."

B. Creek country lost its communal status as Indian country via allotment and removal of federal restrictions

1. By starting from the wrong premise, petitioner applies the wrong test to evaluate whether the former Creek country remained Indian country. The correct standard comes from this Court's decision in *Venetie*, which asks whether the land remains "set aside for the use of the Indians as Indian land" and subject to federal superintendence. 522 U.S. at 527. Lands privately held by Indians "without any restraints on alienation or significant use restrictions" do not meet the "federal set-aside requirement," and minor federal protections for Indians "simply do not approach the level of superintendence" necessary for Indian country status. *Id.* at 532-534; see *Hydro Res., Inc.* v. *EPA*, 608 F.3d 1131 (10th Cir. 2010) (en banc) (Gorsuch, J.).

Under this test, the Creek Nation's dependent Indian community did not last: its communal fee title was broken up and federal superintendence ended. In 1893, Congress created the Dawes Commission to negotiate with the Five Tribes "for the purpose of the extinguishment of … tribal title" by cession, allotment, or some other mutually agreed-upon method, "with a view to … the ultimate creation of a State or States of the Union." Act of Mar. 3, 1893, ch. 209, § 16, 27 Stat. 645. Congress directed the Commission to "endeavor to procure, first, such allotment" and "secondly, to procure the cession … of any lands not found necessary to be so allotted." §§ 15, 16, 27 Stat. 645-646.

After negotiations proved fruitless, Congress passed the Curtis Act, which instructed the Commission to allot the Five Tribes' land following tribal enrollment, even absent tribal consent. Ch. 517, § 11, 30 Stat. 497 (1898). The Creek eventually consented to an Allotment Agreement,

ch. 676, 31 Stat. 861 (1901), which provided for the "issuing [of] deeds transferring the title to the allotted lands to the several allottees," *Sizemore* v. *Brady*, 235 U.S. 441, 447 (1914). Although these allotments originally included restrictions on alienation and taxation for up to 21 years, Creek Allotment Agreement §§ 3, 7, 31 Stat. 862-863, Congress swiftly removed restrictions on most of the land. *E.g.*, Act of Apr. 21, 1904, ch. 1402, 33 Stat. 204; Five Tribes Act, ch. 1876, § 22, 34 Stat. 145 (1906); Act of May 27, 1908, ch. 199, § 1, 35 Stat. 312. Within 20 years of statehood, roughly 89% of the Five Tribes' former domain was freely alienable. Dep't of Interior, Bureau of Indian Affairs, *Extracts from the Annual Report of the Secretary of the Interior* 24 (1927); Angie Debo, *And Still the Waters Run* 92-125 (1940).

2. After this transformation, Creek country ceased to be a dependent Indian community. That is precisely how the effects of allotment and alienation in the former Indian Territory have *always* been understood. In the century-plus since statehood, federal and state courts labored to discern the contours and consequences of "checkerboard" Indian country in eastern Oklahoma, by evaluating ownership and restrictions on specific parcels. *E.g.*, *Ex parte Nowabbi*, 61 P.2d 1139 (Okla. Crim. App. 1936); *Magnan* v. *Trammell*, 719 F.3d 1159 (10th Cir. 2013); *Hous. Auth. of Seminole Nation* v. *Harjo*, 790 P.2d 1098 (Okla. 1990). Checkerboard jurisdiction is the opposite of collective Indian country status.

Although *Nowabbi*'s analysis of restricted allotments was reversed in *State* v. *Klindt*, 782 P.2d 401, 404 (Okla. Crim. App. 1989), the relevant point is that *Nowabbi* and *Klindt* both grappled with how to deal with allotments—a question that would have been wholly irrelevant had the former Indian Territory been a reservation or a dependent Indian community, since both were indisputably Indian country. See *Donnelly* v. *United States*, 228 U.S. 243,

269 (1913). Were petitioner correct that the *entire* former Indian Territory is a reservation, or continued to be a dependent Indian community, all that careful deliberation was "moot and not necessary." *United States* v. *Adair*, 913 F. Supp. 1503, 1515 (E.D. Okla. 1995). Those cases confirm that the land's status as Indian country was based upon allotment restrictions—not reservation or dependent Indian community status.

C. The history of criminal jurisdiction in former Creek country confirms it was not a reservation at statehood

The contemporaneous understanding of the land's status is clearly illustrated by the exercise of criminal jurisdiction at statehood. Specifically, federal and state courts in Oklahoma recognized the inapplicability of the Major Crimes Act, a law that was effective within a state only on "reservations." By contrast, other federal laws that applied more broadly in "Indian country" were given effect so long as allotments remained under federal restrictions.

1. In response to this Court's decision in *Ex parte Crow Dog*, 109 U.S. 556 (1883), Congress enacted the Major Crimes Act of 1885 to create federal jurisdiction over tribal defendants for the most serious crimes committed anywhere "within any Territory of the United States," or committed "within the boundaries of any State of the United States, *and within the limits of an Indian reservation*." Ch. 341, § 9, 23 Stat. 385 (emphasis added). The Act's use of the term "Indian reservation" was significant. Prior statutes, such as the liquor-prohibiting Indian Trade and Intercourse Act of 1834, 4 Stat. 729, applied throughout "Indian country." Congress thus gave the Major Crimes Act a more-targeted reach within state borders. See *United States* v. *John*, 437 U.S. 634, 647 n.16 (1978) (describing legislative history); *United States* v.

Celestine, 215 U.S. 278, 285 (1909) ("[T]he word 'reservation' has a different meaning" from "'Indian country.'").

When Oklahoma became a state in 1907, the Major Crimes Act set up a natural experiment: Which courts would have jurisdiction over major crimes committed by Indians—federal courts or state courts? Absent some other jurisdictional command, the answer would depend on whether the crime occurred "within the limits of an Indian reservation."[5]

The results of that experiment should end this case. Federal offenses that did not turn on reservation status, such as liquor prohibitions, remained in federal court and were prosecuted there. *E.g.*, *United States* v. *Wright*, 229 U.S. 226 (1913). But, consistent with the understanding that the Five Tribes did not have reservations, the State immediately began prosecuting major crimes committed by Indians in the former Indian Territory. *E.g.*, *Bigfeather* v. *State*, 123 P. 1026 (Okla. Crim. App. 1912) (manslaughter). This was no oversight: In *Higgins* v. *Brown*, 94 P. 703 (Okla. 1908), the court observed, in upholding state prosecution of a murder committed in the former Indian Territory, "[i]t is not contended that the alleged crime was committed on any such excepted reservation." *Id.* at 730. Conversely, federal authorities ceased prosecuting offenses that, under petitioner's reservation theory, would have fallen within the Major Crimes Act; in fact, the new federal courts transferred such cases pending at statehood to state courts for prosecution. *Ex parte Buchanen*, 94 P. 943, 945 (Okla. 1908); see Okla. *Murphy* Br. 39-42 (compiling cases). After rounds of briefing—in this case and *Murphy*—petitioner's counsel and the Creek Nation have not identified a single counterexample.

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[5] Not until 1948 did Congress extend the Major Crimes Act to cover all "Indian country." Pub. L. No. 80-772, 62 Stat. 757-758.

This Court shared that understanding. In *Hendrix* v. *United States*, 219 U.S. 79 (1911), a tribal member indicted for murder in Indian Territory had successfully transferred his case to a federal court in Texas, under a special venue statute. *Id.* at 86. After statehood, relying on the Enabling Act's transfer of jurisdiction to state courts, the defendant argued that the federal court lacked jurisdiction to try him. *Id.* at 88-89. This Court rejected that argument, but in doing so did *not* hold that federal courts had exclusive jurisdiction under the Major Crimes Act; instead, the Court assumed that, but for the special venue statute, the defendant's case would have been transferred to Oklahoma court. *Id.* at 90-91. The Solicitor General agreed that, apart from the venue statute, prosecution in state court would be proper. U.S Br. at 12, *Hendrix* v. *United States*, No. 319 (1910).

These prosecutions and convictions "afford the strongest presumption that the Congress of the United States, and the judges who administered those laws," were able "to ascertain [the relevant status of the land] at any time." *Bates*, 95 U.S. at 207. All understood that eastern Oklahoma was not reservation land.

2. Petitioner's only response is to accuse everyone involved of "lawlessness." Br. 12. The historical record shows instead that federal and state courts drew careful distinctions in complying with federal law.

Start with federal liquor laws. These had long prohibited importation or sale of alcohol within "the Indian country." *E.g.*, Act of Jan. 30, 1897, ch. 109, § 1, 29 Stat. 506. Following statehood, courts had to determine whether these prohibitions applied in the former Indian Territory. Their answers depended on the status of the land: Unallotted land was still Indian country, *U.S. Express Co.* v. *Friedman*, 191 F. 673, 678-679 (8th Cir. 1911), while towns

where "the Indian title was extinguished" were "not Indian country," *Swafford* v. *United States*, 25 F.2d 581, 583 (8th Cir. 1928). Rather than lawlessness, the cases show courts consistently understood that the land's "Indian country" status varied by parcel.[6]

Treatment of the Osage Reservation—adjacent to, but not part of, the former Indian Territory—demonstrates how federal and state courts understood the jurisdictional balance in the new State. Two days after statehood, Osage County had the "unique distinction" that "all criminal matters must still be handled by the federal courts for the reason that the entire county composes an Indian reservation." *Unique Distinction of Osage County*, Shawnee News, Nov. 18, 1907. That differential treatment reflects the central jurisdictional fact: Osage County was a reservation; the former Indian Territory was not.

Petitioner's theory—that federal officials abdicated their criminal authority over the most populous Indian reservations in the country—is similarly impossible to square with the federal government's concerted efforts to protect the Five Tribes' interests. See, *e.g.*, *Heckman* v. *United States*, 224 U.S. 413, 415, 418 (1912) (seeking to

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[6] "Some temporary confusion and uncertainly may be unavoidable upon the establishment of a state government under such conditions." *Ex parte Webb*, 225 U.S. 663, 688 (1912). Petitioner, for example, points (at 31-32) to cases where federal prosecutors used overbroad descriptions of "Indian country" after statehood, but the United States did not defend, and this Court did not uphold, the indictments on those grounds. *Joplin Mercantile Co.* v. *United States*, 236 U.S. 531, 548 (1915); *id.* U.S. Br. at 12. Because federal liquor prohibitions were numerous, federal indictments sometimes reflected confusion on the appropriate charge. *E.g.*, *Lewellen* v. *United States*, 223 F. 18, 20 (8th Cir. 1915). Congress ultimately made liquor prohibition in the former Indian Territory a matter of state—not federal—superintendence. Oklahoma Enabling Act, ch. 3335, § 3, 34 Stat. 269 (1906).

"cancel some 30,000 conveyances of allotted lands" unlawfully made). In *Tiger* v. *Western Investment Co.*, 221 U.S. 286 (1911), for example, the United States defended "the interests of all Indians of the Five Civilized Tribes, whose welfare the Government is bound to guard." *Id.* at 294. The United States considered questions of criminal jurisdiction "vital." *Celestine*, 215 U.S. at 281. Yet in the former Indian Territory, the United States actively facilitated state courts' exercise of jurisdiction over Indians—in furtherance of, not hostility to, Congress's commands.

All these cases accepting state jurisdiction are dogs that didn't bark. They're especially striking when compared to recorded uproar over graft of restricted allotments in the former Indian Territory, which elicited loud complaints by the Five Tribes and their advocates. Pet. Br. 13-14; Historians Br. 29-31. As petitioner's amici note, "Congress has paid close attention" to and "heard all about" the former Indian Territory after statehood. Former U.S. Attorneys' Br. 12-14. And yet no one—neither the Tribes, their supporters, Congress, the executive branch, nor the courts—made a peep about Oklahoma's exercise of jurisdiction over Indians in major criminal cases. Why? Because everyone knew the area was not a reservation.[7]

4. Further confirming the error of petitioner's theory, the existence of reservations following statehood would have left an inexplicable jurisdictional gap over the majority of Indian-on-Indian crimes.

At statehood, federal courts could not exercise jurisdiction over non-major crimes "committed [in Indian country] by one Indian against the person or property of

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[7] Regrettably, some state courts facilitated the grafting of allotments. But they could do so only because Congress gave them *jurisdiction* over such matters. Pet. Br. 14; *infra* p.43.

another Indian." Rev. Stat. § 2146 (1875). Creek courts, meanwhile, were abolished in 1898, Curtis Act § 28, 30 Stat. 504-505, and could not be reestablished until after 1936, Act of June 26, 1936, ch. 831, § 3, 49 Stat. 1967. Thus, petitioner's premise is that, for 30 years after statehood, Congress precluded *any* court from exercising jurisdiction over such Indian-on-Indian crimes as assault, bribery, forgery, and rioting in the former Indian Territory due to its reservation status.

Given Congress's focus on preventing crime in the Indian Territory, Congress could not plausibly have intended to create such a gaping "judicial chasm." *Pickett* v. *United States*, 216 U.S. 456, 460 (1910). As this Court explained when construing the transfer of jurisdiction within Oklahoma at statehood, "[a] construction which might result in such deplorable consequences [arising from a jurisdictional gap] should not be adopted if any more sensible meaning can be reasonably given." *Id.* at 461. Here, the alternative explanation is both sensible and historically grounded: Eastern Oklahoma was not reservation land.

II. Congress gave Oklahoma jurisdiction over its eastern half "irrespective of race"

Affirmance is independently warranted because Congress transferred to the State jurisdiction to prosecute petitioner's crime. In a series of statutes leading up to statehood, Congress systematically removed legal distinctions that separated tribal members from non-members in the Indian Territory—subjecting all to the same laws in the same courts. Congress then transferred that race-blind territorial jurisdiction to the new courts upon statehood.

A. Congress removed jurisdictional distinctions in the Territory between Indians and non-Indians

To hear petitioner tell it (Br. 7-12, 27-28), Congress merely altered the Five Tribes' land title to prepare the Indian Territory for statehood. But Congress did much more. It transformed how the land was governed by systematically removing jurisdictional distinctions separating Indians from non-Indians; dismantling tribal authority; and creating a new State to govern irrespective of race.

1. Criminal jurisdiction in the Indian Territory was originally bifurcated: Tribal courts presided over crimes committed between "members of the same tribe," while other disputes were prosecuted in federal courts in adjoining states. S. Rep. 53-377, at 7 (1894). As non-Indians began overwhelming the Indian population, federal courts were ill-equipped to handle the influx. *Marlin* v. *Lewallen*, 276 U.S. 58, 61 (1928); S. Rep. 52-1079, at 4-5, 8, 14 (1892). The Indian Territory quickly became "the refuge of criminals and desperadoes from all parts of the country." H.R. Rep. 51-66, at 7 (1890). The Dawes Commission relayed its concerns of lawlessness, owing to what it viewed as the failed system of dual governance. S. Misc. Doc. 53-24, 3d Sess., at 1, 8-12 (1894 Dawes Report).[8]

Dissatisfied with the state of affairs, Congress resolved to fix the problem by "put[ting] the Indians in the Territory under the same laws with the white people," 29 Cong. Rec. 2305 (Sen. Vest) (1897), and "establish[ing] a government over whites and Indians of that Territory," S. Rep. 53-377, at 13. Congress intended for members of the Five Tribes to "assume all the responsibilities and enjoy

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[8] "[T]he Commission was in a very real sense 'the eyes and the ears' of Congress in matters pertaining to affairs in the Indian Territory, and legislation was framed with a special regard to its recommendations." *Woodward*, 238 U.S. at 296.

all the privileges of citizens, both of the nation and of a State." S. Rep. 52-1079, at 14. The Commission understood that the objective "in all [its] endeavors" was a "uniformity of political institutions to lay the foundation for an ultimate common government." H.R. Doc. 56-5, 2d Sess., at 11 (1900 Dawes Report). The Creek Nation similarly knew that Congress's "unwavering aim" was to "wipe out the line of political distinction between an Indian citizen and other citizens." P. Porter & A.P. McKellop, *Printed Statement of Creek Delegates*, *in Creek Delegation Documents* 1-3 (Feb. 9, 1893).

2. In 1896, Congress declared it "the duty of the United States to establish a government in the Indian Territory which will rectify the many inequalities and discriminations now existing in said territory and afford needful protection to the lives and property of all citizens and residents thereof." Act of June 10, 1896, ch. 398, § 1, 29 Stat. 340. To that end, Congress systematically erased legal distinctions between Indians and non-Indians in the Territory. In 1897, Congress granted the U.S. courts in the Indian Territory "exclusive jurisdiction" over all civil and criminal cases involving "*any person* in said Territory," and further provided that "the laws of the United States and the State of Arkansas in force in the Territory shall apply to all persons therein, *irrespective of race*." Indian Department Appropriations Act of 1897, ch. 3, § 1, 30 Stat. 83 (emphases added). The Creeks protested such measures as violating their treaty rights to self-governance. S. Doc. 54-190 (1896) (Creek and Seminole Petition); see S. Doc. 54-111, 2d Sess. (1897 Creek Memorial). But Congress was not swayed.

Next, the Curtis Act "abolished" "all tribal courts" and declared that "the laws of the various tribes or nations of Indians shall not be enforced" in the Territory's courts. §§ 26, 28, 30 Stat. 504-505. It also forced allotment of Creek land and allowed for incorporation, under Arkansas

law, of towns within their territory. Indians and non-Indians alike were made eligible to vote in municipal government, and all were subject to town laws "without regard to race." § 14, 30 Stat. 499-500. These acts broadly "displaced the tribal laws and put in force in the Territory a body of laws adopted from the statutes of Arkansas and intended to reach Indians as well as white persons." *Marlin*, 276 U.S. at 62.

3. With statehood looming, Congress took the final steps toward full legal equality. Although the original Creek Allotment Agreement allowed for limited application of Creek law regarding descent and allotment-distribution, Congress reversed course, replacing Creek law with Arkansas law. Supplemental Allotment Agreement, ch. 1323, § 6, 32 Stat. 501 (1902).

Congress also granted U.S. citizenship to all Indians living in Indian Territory, Act of Mar. 3, 1901, ch. 868, 31 Stat. 1447, to further "[t]he policy of the Government to abolish classes in Indian Territory," H.R. Rep. 56-1188, at 1 (1900). Then, in 1904, Congress "continued and extended" operation of Arkansas law to cover all lands and persons "whether Indian, freedmen, or otherwise." Act of Apr. 28, 1904, ch. 1824, § 2, 33 Stat. 573. Congress's commitment to equality extended even to the State's formation: For the first time in American history, an enabling act expressly gave Indians full rights to participate in a state's constitutional convention "in the same manner" as all other citizens. Oklahoma Enabling Act § 2, ch. 3335, 34 Stat. 268 (1906). Many tribal members helped frame the Oklahoma Constitution and took leadership roles in the new state government. See Dist. Attorneys' Br. 14-23.

By statehood, members of the Five Tribes were "citizens of the State with little to distinguish them from all other citizens except for their limited property restrictions and their tax exemptions." *Okla. Tax Comm'n*

v. *United States*, 319 U.S. 598, 603 (1943). Congress quickly undid even those limited civil-law distinctions; it lifted restrictions and subjected Indian property "to taxation and all other civil burdens as though it were the property of other persons than allottees of the Five Civilized Tribes." Act of May 27, 1908, §§ 1, 4, 35 Stat. 312-313.

4. The Enabling Act gave the new state and federal courts the same race-neutral jurisdiction exercised by the predecessor territorial courts. Congress transferred to federal district courts "all causes … arising under the Constitution, laws, or treaties of the United States"—that is, all pending *federal* cases. Oklahoma Enabling Act § 16, 34 Stat. 276. As noted then, murder cases would only "become[] … federal" if "the alleged crime was committed on" federal land, such as "Wichita Reserve, a national park," or "in the Osage nation which as it is not an allotted nation is still under supervision of the United States government." *Court Dockets Heavy*, Okla. Leader, Jan. 2, 1908, ed. 1, at 2. "[A]ll" other pending cases were transferred to state courts, "as the successor of" territorial courts, Oklahoma Enabling Act § 17, 30 Stat. 276—with no exception for major crimes committed in eastern Oklahoma by Indians.

Thus, the Enabling Act did not modify, in any respect, the contours of existing race-neutral criminal jurisdiction over the area. Courts uniformly followed Congress's command: Federal courts transferred cases involving Indians to state courts, and new criminal offenses committed in the former Indian Territory were prosecuted in state court without regard to race. *Supra* Part I.C. This "contemporaneous construction" that the Major Crimes Act did not apply, as determined by those who "set[] its machinery in motion," confirms that Congress gave the new State jurisdiction over all crimes committed in eastern Oklahoma. *Norwegian Nitrogen Prods. Co.* v. *United States*, 288 U.S. 294, 315 (1933).

B. The Enabling Act did not reimpose race-based jurisdiction

Ignoring all this, petitioner claims that the Enabling Act secretly reintroduced race-based distinctions in the former Indian Territory, such that the State lacks jurisdiction over him today. History refutes that theory.

1. Petitioner contends (Br. 45, 48), based on his assumption that the Major Crimes Act applied in the Indian Territory *pre*-statehood, that such jurisdiction was transferred to federal courts *post*-statehood. That assumption is false. Though the Act generally created federal jurisdiction over Indian defendants for serious crimes committed "within any Territory of the United States," § 9, 23 Stat. 385, it never applied in the Indian Territory.

When Congress created the federal courts in the Indian Territory in 1889, it disclaimed federal "jurisdiction over controversies between persons of Indian blood only." Act of Mar. 1, 1889, ch. 333, § 6, 25 Stat. 784; see Act of May 2, 1890, ch. 182, § 30, 26 Stat. 94. Territorial courts thus were *specifically precluded* from deciding cases under the Major Crimes Act involving Indian-on-Indian crimes. Those courts lacked such jurisdiction until the 1897 Act, which expanded their jurisdiction to cover *all* crimes committed within the Indian Territory "irrespective of race." Indian Department Appropriations Act of 1897, § 1, 30 Stat. 83. The Major Crimes Act, which drew sharp racial distinctions, was never a source of jurisdiction in the Indian Territory because it did not fit Congress's race-neutral regime. That is why petitioner cannot cite a single Major Crimes Act prosecution in the Indian Territory.

Because the Major Crimes Act did not apply in the Indian Territory pre-statehood, it would be passing strange if the Act suddenly sprang up at statehood. The Act has been understood as "pre-emptive of state jurisdiction" merely as a background "assumption," *John*, 437

U.S. at 651, not because it says so. That background assumption falls away whenever Congress exercises its "plenary authority to alter these jurisdictional guideposts"—particularly when it does so "in reasonably plain terms." *Negonsott* v. *Samuels*, 507 U.S. 99, 103-104 (1993).

So while petitioner assumes (at 48-50) that the Indian Territory's admission to the Union was identical to every other territory, he fails to account for the numerous laws, specific to the Indian Territory, in which Congress explicitly ended disparate treatment between Indians and non-Indians. These laws defined the very jurisdiction transferred by the Enabling Act. The situation was different in the Oklahoma Territory (and in Montana, Washington, and the Dakotas), where the more-generic provisions of the Major Crimes Act controlled.

2. Petitioner cites no historical evidence to support his theory that race-based jurisdiction reemerged at statehood: no Indian offender whose case was transferred to or prosecuted in federal court; no tribal objection to the State's assertion of jurisdiction; no state or federal official who thought Indians should receive different treatment. Instead, petitioner quotes (at 51) a 1963 Interior Department memorandum criticizing Oklahoma's assertion of jurisdiction over *allotments* in former *Oklahoma* Territory. Much more relevant, though, Interior had long maintained—through Felix Cohen, no less—that Congress gave Oklahoma jurisdiction over all Indian defendants in the former Indian Territory. Okla. *Murphy* Suppl. Reply Br. 3-4.

Petitioner posits (at 51-52) that Oklahoma's exercise of jurisdiction was a unilateral power-grab. But *federal* courts transferred their cases to state courts. If anything, state officials initially resisted their new responsibility, relenting only after judicial resolution of the jurisdictional question. *E.g.*, *Higgins*, 94 P. at 731 (state officials "refused to receive" the Indian murder defendant).

Recall that petitioner's theory—that statehood silently reintroduced racial disparities—would have created a glaring jurisdictional gap. *Supra* Part I.C.4. This gap also would have nullified Congress's instruction in the Enabling Act to transfer *all* cases pending in territorial courts. In petitioner's view, no court could receive transfer of most Indian-on-Indian criminal cases; only major crimes could be transferred. Under petitioner's theory, the Enabling Act was a bridge to nowhere.

Petitioner argues (at 52) that the gap "shows nothing about congressional intent" because "[t]ribal courts nationwide were often absent or ineffective." But here Congress specifically abolished existing tribal courts, which only made sense if state prosecutions were available as an alternative. The BIA's failure to "establish[] by regulation 'Courts of Indian Offenses'" in the former Indian Territory, instead specifically excluding the Five Tribes (Br. 53 & n.8), shows that the BIA, too, thought state criminal law already provided sufficient coverage.

Finally, petitioner's theory fails to account for municipal jurisdiction and the tribes' participation in forming the new state government. Even before statehood, the Curtis Act granted municipalities jurisdiction over Indians. § 14, 30 Stat. 499-500. Rendering Indians subject to *municipal law* but immune from *state law* would be irrational, as municipalities are creatures of state law. Congress also mandated that Indians participate on equal terms in creating the new state constitution, § 2, 34 Stat. 268—only then (according to petitioner) to exempt Indians from the legal structure they had just helped create. These anomalies disappear by recognizing that Indians were subject to state jurisdiction in eastern Oklahoma. That jurisdiction continues today and extends to petitioner's crimes.

III. Congress disestablished Creek borders by divesting the land of tribal interests

Even were this Court to conceive of Creek country as having once been a reservation subject to the Major Crimes Act, Congress disestablished that reservation. This conclusion follows from a proper understanding and application of this Court's disestablishment jurisprudence.

Solem starts by acknowledging that "the notion that reservation status of Indian lands might not be coextensive with tribal ownership was unfamiliar at the turn of the century." 465 U.S. at 468; see *South Dakota* v. *Yankton Sioux Tribe*, 522 U.S. 329, 343-44, 352 (1998) ("Congress did not view the distinction between acquiring Indian property and assuming jurisdiction over Indian territory as a critical one."). Consequently, Congress "seldom detail[ed] whether opened lands retained reservation status" since, at the time, "the distinction seemed unimportant." *Solem*, 465 U.S. at 468. Contrary to petitioner's blinkered search (at 21) for a pre-approved lexical "catalogue[]," *Solem* has "never required any particular form of words," *Hagen* v. *Utah*, 510 U.S. 399, 411-412 (1994), recognizing instead that many textual formulations can demonstrate disestablishment.

Instead of imposing an ahistorical "clear-statement rule," *Hagen*, 510 U.S. at 411, the central focus of *Solem* is whether Congress intended land to be "divested of all Indian interests," as opposed to "merely opened … to settlement." *Parker*, 136 S. Ct. at 1079 (quotation marks omitted); see *Yankton*, 522 U.S. at 344-45, 352 (characterizing the "total surrender of tribal claims" as a "hallmark[] of congressional intent to diminish"); *Solem* 465 U.S. at 469 n.10 (noting no "unconditional divestiture of Indian interest in the lands" in *Seymour* v. *Superintindent of Wash. State Penitentiary*, 368 U.S. 351 (1962)); *DeCoteau*

v. *District Cty. Ct.*, 420 U.S. 425, 445, 476-477 (1975) (finding disestablishment because tribe conveyed "all of their interest in all of their unallotted lands"). Here, statutory text, historical context, and subsequent history confirm that Congress divested Creek country of all tribal interests.

A. Text

1. The Creek Allotment Agreement broke up the Tribe's fee patent and required conveyance to allottees of "all right, title, and interest of the Creek Nation." § 23, 31 Stat. 868. All interest in the land thereafter rested in the allottee alone. See *DeCoteau*, 420 U.S. at 448-49 & n.22 (relying on "cession and relinquishment of 'all' of the tribe's 'claim, right, title, and interest' in the unallotted lands," and noting other "virtually identical" examples).

Following allotment, the federal government exercised temporary superintendence over allotted land in the form of restrictions on alienation and state taxation. Creek Allotment Agreement § 7, 31 Stat. 863-864. But Congress quickly removed those restrictions, allowing the land to be alienated and subjecting it "to [the same] taxation and all other civil burdens" as non-Indian land. Act of May 27, 1908, § 4, 35 Stat. 312. As a result, 98% of the Five Tribes' former territory became unrestricted. Dep't of Interior, *Statement on H.R. 2606* (Nov. 14, 2018), https://www.doi.gov/ocl/hr-2606-1. Thereafter, allottees could relinquish Indian interests altogether by selling the land.

The simultaneous jurisdictional shift in the Indian Territory further divested Indian interests in the land. Congress "abolished" "all tribal courts" and declared tribal law "shall not be enforced" in the Territory's courts. Curtis Act §§ 26, 28, 30 Stat. 504-505. In statute after statute, Congress ended tribal governance, supplanted tribal law, and left the Tribes powerless to exert sovereignty

over their former domains. *Supra* Part II; accord *Washington* v. *Miller*, 235 U.S. 422, 425 (1914); *Jefferson* v. *Fink*, 247 U.S. 288, 291 (1918). By this point, the Creeks were not unlike the tribe in *Venetie*: "sovereign entities for some purposes, but as sovereigns without territorial reach." 522 U.S. at 526 (citation omitted).

Petitioner deems this jurisdictional transformation insignificant, claiming (at 34) that "this Court's disestablishment cases have never looked to government powers." That is wrong; tribal sovereignty has always been relevant to the disestablishment analysis. *E.g.*, *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584, 597 (1977) ("'cession' refers to a voluntary surrender of territory or jurisdiction"); *id.* at 591 n.10 ("jurisdiction, title, or boundaries"); *DeCoteau*, 420 U.S. at 446. In *Yankton*, for instance, reservation status was determined in light of Congress's intentions as to "tribal governance within the original reservation boundaries." 522 U.S. at 348; *id.* at 342, 353. And the Court in *Parker* cited *Yankton* as an example of unambiguous diminishment. 136 S. Ct. at 1081. Petitioner, meanwhile, cannot identify any instance in which a tribe was divested of all interest in the land—including both title *and* sovereignty—and yet retained a reservation.

Finally, Congress made the Indian Territory part of Oklahoma, unequivocally violating Congress's promise that tribal land would never be part of a state, 1832 Treaty art. XIV, 7 Stat. 368; 1856 Treaty art. IV, 11 Stat. 700. These features—divestiture of tribal title, territorial sovereignty, and freedom from state jurisdiction—combine in stark contrast to cases in which Congress "did no more," "only," and "simply" opened land for non-Indians to settle. *Parker*, 136 S. Ct. at 1078; *Solem*, 465 U.S. at 464, 469-470 & n.10, 473; *Seymour*, 368 U.S. at 356. Petitioner's contrary claim "evokes 'the thud of square pegs being pounded into round holes.'" *Murphy* v. *Royal*, 875

F.3d 896, 966 (10th Cir. 2017) (Tymkovich, C.J., concurring).

2. Petitioner argues (at 22-24) that because Congress did not use the word "cession," allotment must have preserved reservation status. But allotment is not the "opposite" of cession. Pet. Br. 23. Although allotment *can be* "consistent with continued reservation status," *Mattz* v. *Arnett*, 412 U.S. 481, 497 (1973), it can also be an integral part of disestablishment. See *DeCoteau*, 420 U.S. at 437-439; *Rosebud*, 430 U.S. at 629. Indeed, this Court's cases often acknowledge that allotted lands were removed from a reservation. *E.g.*, *Yankton*, 522 U.S. at 358; *Solem*, 465 U.S. at 467 n.8; *Rosebud*, 430 U.S. at 615 n.48. Even where Congress contemplated cession, but went another route, this Court has found diminishment. *Hagen*, 510 U.S. at 402-404; *Rosebud*, 430 U.S. at 597-598, 608-614.

The historical record contradicts petitioner's theory that Congress preserved a "reservation" by forgoing cession. Cession is significant precisely because it divests the tribe of its interest in the land; cession connotes "present and total surrender of all tribal interests." *Yankton*, 522 U.S. at 344. The specific form of allotment Congress used in Creek country served the exact same end: Congress conveyed "all right, title, and interest of the Creek Nation" while simultaneously divesting the land of any remaining tribal interests.

The 1893 Act that created the Dawes Commission contemplated several means of breaking up the communal patent—cession, allotment, or "such other method as may be agreed upon," § 16, 27 Stat. 645—and there is no evidence that Congress believed the choice among them would determine reservation status. Nor does petitioner offer any evidence that the Commission, the Tribes, or non-Indians agitating for statehood thought allotment would continue a reservation. When the Commission stated, in hindsight, that it would have preferred cession,

that was only because allotment was arduous and expensive. H.R. Doc. 56-5, at 9. The Commission's statement (cited at Pet. Br. 9) that cession was "a more radical scheme of tribal extinguishment" only confirms that allotment was still "extinguishment." *Ibid.* In that same discussion, the Commission characterized allotment, too, as a "radical … change." *Id.* at 12. And it recognized that allotment in the Indian Territory was in "striking contrast with that of allotting to Indians on reservations." *Id.* at 13.

The tribes did not perceive allotment as a victory that preserved a reservation—far from it. The Creeks recognized that allotment meant "giving up the rights" to "our beloved public domain." 1897 Creek Memorial 4. Some tribal members rebelled at allotment: Scores attempted to resurrect their full-fledged government and conspired to arrest, imprison, whip, and fine any Creek who accepted his allotment. *United States* v. *Harjo*, Crim. Dkt. No. 5581 (N.D. Indian Terr. Mar. 1, 1902), https://catalog.archives.gov/id/63809143. The Tribe understood that "disintegrating the land of our people by allotment and town-site division mean ultimate State government"—in other words, its members must "become accustomed to State law." 1897 Creek Memorial 5-6; see H.R. Doc. 57-5, 2d Sess., at 216 (1901 Dawes Report) (Message of Chickasaw Governor). Subjection to state law is fundamentally inconsistent with tribal understanding that they preserved a reservation by choosing allotment.

True, some members preferred allotment, but only because it enabled them to retain their share of tribal wealth, whereas cession for a lump sum could allow tribal officers to "swindle" communal proceeds or, worse, trigger preexisting railroad land grants. S. Misc. Doc. 53-24, 3d Sess., at 7 (1894 Dawes Report).

Interpreting the absence of "cession" language as preserving a reservation also makes no sense of the

Tribe's contemporaneous agreement to dissolve their government, § 46, 31 Stat. 872—a result petitioner acknowledges would have ended any reservation, Pet. Br. 28. The point is not that a change in tribal government is *necessary* to reservation disestablishment; rather, it illuminates intent behind concurrent changes that Congress made, including to the land's status, in preparation for statehood.

3. The Enabling Act does not advance petitioner's cause. Pet. Br. 35. To start, the Enabling Act never refers to the territories of the Five Tribes as reservations, despite its references to the Osage and other "reservations" in Oklahoma Territory. §§ 6, 8, 34 Stat. 271, 273.

Section 3 did not preserve any Creek reservation by requiring the state to disclaim "all right and title" to lands "owned or held by any Indian, tribe, or nation." 34 Stat. 270. The Creek, after all, had already yielded "all right, title, and interest" in allotted lands. Such a "disclaimer of right and title by the State was a disclaimer of proprietary rather than governmental interest." *Organized Village of Kake* v. *Egan*, 369 U.S. 60, 69 (1962).

Section 1 similarly preserved then-existing "rights of person or property pertaining to the Indians of said Territories," but only "so long as such rights shall remain unextinguished"—that is, until the land was sold. 34 Stat. 267. The provision, notably, refers to rights of Indians, not tribes. Section 1 also acknowledged federal authority over Indians—as is the case always, everywhere, both on- and off-reservation, see *Tiger*, 221 U.S. at 315. In fact, this Court has noted the difference between the Oklahoma Enabling Act and other enabling acts in which the United States retained "*absolute* jurisdiction and control." *Egan*, 369 U.S. at 67-71. And while Congress provided for "exclusive federal jurisdiction" over Indian allottees nationwide, it *exempted* those living in the Indian Territory. Act of May 8, 1906, ch. 2348, § 6, 34 Stat. 183.

B. Historical context

At *Solem*'s second step, this Court considers historical context. "Even in the absence of a clear expression of congressional purpose in the text, … unequivocal evidence derived from the surrounding circumstances may support the conclusion that a reservation has been diminished." *Yankton*, 522 U.S. at 351. Such evidence includes "widely-held, contemporaneous understanding[s]," *Parker*, 136 S. Ct. at 1081, "the manner in which the transaction was negotiated with the tribes involved and the tenor of legislative reports presented to Congress," *Solem*, 465 U.S. at 471.

1. The universal contemporaneous understanding was that the area was not a reservation. That understanding is reflected by federal courts repeatedly transferring criminal cases involving Indians to state courts upon statehood. Petitioner can't identify a single prosecution—or even an objection to jurisdiction—premised on the theory that the land was a reservation. *Supra* Part I.C. The same is true of civil cases. See Okla. *Murphy* Suppl. Br. 7. The Enabling Act supplanted Arkansas law with Oklahoma law, § 13, 34 Stat. 275, and all agreed the Act supplied "the new state … with a body of laws applying with practical uniformity throughout the state," including to Indians. *Jefferson*, 247 U.S. at 292; accord *Stewart* v. *Keyes*, 295 U.S. 403, 410 (1935). So while petitioner asserts (at 50) that the Enabling Act "practically shouts" that Oklahoma law did not apply to the former Indian Territory because it was a reservation, no one heard then what petitioner hears now.

The surrounding circumstances and legislative reports show that Congress deliberately transformed the governance of the territory by ending legal distinctions between Indians and non-Indians to create a new state government for all, irrespective of race. *Supra* Part II.A; *Stephens* v. *Cherokee Nation*, 174 U.S. 445, 447-453

(1899). Petitioner all but ignores this decade of legislative action. The negotiating history similarly reveals that the tribes understood they would be subject to state law—a result they initially resisted but eventually capitulated to. *Supra* Part III.A.2.

Liquor laws again illuminate the point. Congressional understanding that allotment would destroy the Territory's Indian country status explains why Congress chose to enact special liquor protections in the former Indian Territory. Before statehood, Congress was aware that "the effect of allotment would be … that the lands allotted [in the Indian Territory] would cease to be Indian country," so Congress in 1895 passed yet another law to prohibit the importation of liquor into "the Indian Territory," "employing [a] territorial test, *irrespective of whether it was or continued to be Indian country*." *Wright*, 229 U.S. at 233 (emphasis added). Of course, if Congress thought that it was preserving a Creek reservation, such a law would have been pointless. *Yankton*, 522 U.S. at 350-351.

2. The only "historical context" on which petitioner relies is Congress's decision to allow tribal governments to continue, from which he deduces that Congress also must have retained a reservation. Br. 28-29, 34-35; Creek Br. 19-22. In every case where this Court found disestablishment, the tribe continued to exist; this Court has never required total extinguishment of tribal existence. Shortly after statehood, the Eighth Circuit rejected the argument that "this land is Indian country[] because Congress has continued in force the tribal organization and government of the Creek Nation," holding "it would be flying in the face of a long line of uniform decisions of the Supreme Court to make these facts the criterion of Indian country." *Evans* v. *Victor*, 204 F. 361, 365 (8th Cir. 1913).[9]

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[9] Creek treaties never pegged tribal existence to reservation status. Rather, those treaties guaranteed "*fee title* would continue so long as

More broadly, petitioner misses the point of *Solem*'s step two. That Congress planned for, and the Tribe agreed to, tribal dissolution provides critical context showing that preserving a (nonexistent) reservation was never the aim. Even petitioner admits that Congress's motive to continue tribal government had nothing to do with reservations. All agree Congress extended the governments to prevent triggering railroad land-grants and to allow allotment to continue. Pet. Br. 11; Okla. *Murphy* Br. 12-13, 36. Senator McCumber, whom petitioner quotes liberally (at 29), acknowledged that the railroad land-grab would be forestalled "while at the same time we are carrying out the provisions … which we have been carrying out gradually for the last eight years looking to the dissolution of these tribes." 40 Cong. Rec. 3055 (1906).[10]

Congress acted accordingly. Tribal governments were preserved in an act that, as expressed in its title, otherwise provided for "final disposition" of the Five Tribes' affairs: It authorized the President to remove tribal chiefs and appoint their successors; prohibited tribal governments from congregating more than 30 days per year; directed the Interior Secretary to assume control of tribal schools; abolished tribal taxes; took possession of tribal buildings; and sold off tribal property. Five Tribes Act, 34 Stat. 137-148. Later statutes continued—not reversed—this policy. In 1908, Congress amended the act to require

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[the] Creek Nation should exist." Historians Br. 8 (citing 1833 Treaty art. III, 7 Stat. 417); see *Woodward*, 238 U.S. at 293. This promise of tribal fee title obviously was broken.

[10] McCumber's concern about control of Indian "property" (Pet. Br. 29) focused on the potential inefficacy of alienation restrictions. 40 Cong. Rec. 2977. The famous "McCumber Amendment" extended restrictions for allottees with high blood quantum and was celebrated as a tribal victory. Br. 11-12; Debo 141. By contrast, the historical record lacks reference to any victory in preserving a reservation.

tribal members and officers to surrender all tribal property, money, and records. Act of May 27, 1908, § 13, 35 Stat. 316.

Petitioner argues (at 10) that § 42 of the Creek Allotment Agreement, 31 Stat. 872, recognized the Tribe's continuing authority. That is a strained reading of a provision declaring that "no act, ordinance or resolution" of the Tribe "affecting the lands of the tribe, or of individuals after allotment," "moneys," or "other property of the tribe," shall have "any validity" without presidential approval except for certain "appropriations." This list plainly refers to tribal *property* interests—*i.e.*, rights conferred by the Allotment Agreement—especially given that the Curtis Act had made tribal law unenforceable. So while the Five Tribes Act extended the "present tribal government[]" in restricted form, § 28, 34 Stat. 148, Congress understood this was "not the old government that existed some years ago, but the mere shell of the government as it exists now." 40 Cong. Rec. 3121 (Sen. McCumber); see Okla. *Murphy* Br. 12-13, 30-31; *United States* v. *Allen*, 171 F. 907, 921 (E.D. Okla. 1909).

Petitioner contends (at 10, 35-36) that the Tribe retained broad taxing authority. But in *Morris* v. *Hitchcock*, 194 U.S. 384 (1904), the Court upheld only the *federal government's* ability to impose and collect tribal taxes on *unallotted* tribal land, *id.* at 384-385—authority that the Curtis Act expressly conferred, § 16, 30 Stat. 501. This was based largely on the U.S. government's ability to exclude intruders trespassing on tribally owned land. The Court certainly did not suggest the Tribes could eject non-Indians who lawfully purchased land within their former territory—and (we hope) the Tribe doesn't claim it could evict non-members from Tulsa today. Defying *Morris*'s command, 194 U.S. at 392-393, the Interior Department in *Buster* v. *Wright*, 135 F. 947 (8th Cir. 1905), collected taxes on *non-Indian* land in townsites, *id.* at 949-950. But

Buster "is not an authoritative precedent," and this Court "never endorsed" its theory that non-Indian land is subject to tribal taxation. *Atkinson Trading Co.* v. *Shirley*, 532 U.S. 645, 653 n.4 (2001). Congress, too, abrogated *Buster* in the Five Tribes Act by retroactively abolishing tribal taxes entirely, § 11, 34 Stat. 141. The one tribal power to which petitioner points was thus definitively terminated.

Critically, the Tribe understood its authority solely in terms of continued property interests under the Allotment Agreement. In 1906, after the continuation of tribal government, the Creek Chief lamented that all Creek civil and criminal "laws have long been suspended," such that "[t]he only laws now in force are the treaties made for the distribution and allotment of our lands." Resp. App'x 11a; see *id.* at 16a (1908 Address by Moty Tiger); *id.* at 13a-15a (1906 Porter Message to Council); *id.* at 6a-8a (1901 Porter Message to Council). The Choctaw Governor similarly mourned his "shell of a government," his sole remaining authority being to "sign deeds." S. Rep. 59-5013, pt. 1, at 885 (1907). The Cherokees' attorney expressed the same sentiment. *Statehood for Indian Territory and Oklahoma: Remarks of Robert L. Owen Before the H. Comm. on the Territories*, 58th Cong. 33 (1904). This aligns with what the Tribe actually *did* after statehood: passing resolutions winding down their government, making expenditures, and asserting their property interests under the Allotment Agreement.[11]

Thus, as with every disputed historical point in this case—the significance of allotment over cession, the

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[11] Petitioner speculates (at 37) that the Creek Nation did not assert sovereignty post-statehood because tribal efforts would have been "futil[e]," ignoring that the Tribe tried to exercise other powers. *Harjo* v. *Kleppe*, 420 F. Supp. 1110, 1131-1136 (D.D.C. 1976).

State's jurisdiction over Indians, the existence of a reservation—the Tribe's contemporaneous understanding accords with the view Oklahoma advances today. This is key: Tribal agreements "should be understood as bearing the meaning that the [tribe] understood it to have" at the time. *Wash. State Dep't of Licensing* v. *Cougar Den, Inc.*, 139 S. Ct. 1000, 1011-1012 (2019); see *id.* at 1016 (Gorsuch, J., concurring). Notably, *never once* does petitioner cite to contemporaneous tribal understanding. This should remove any doubt that petitioner's view doesn't align with what the Tribe "originally understood," but instead represents "new lawyerly glosses conjured up for litigation a continent away and more than [100] years after the fact." *Id.* at 1019.

C. Subsequent history and demographics

At step three, this Court considers subsequent history and demographics—a "practical acknowledgement" of disestablishment—to avoid upsetting "the justifiable expectations of the people living in the area." *Hagen*, 510 U.S. at 421. A "longstanding assumption of jurisdiction by the State" is inconsistent with reservation status. *Rosebud*, 430 U.S. at 604-605.

1. Oklahoma has asserted jurisdiction over the former Indian Territory for nearly a century, unchallenged by the federal government or the Tribe. In that time, no one has treated the area as reservation land. *Osage Nation* v. *Irby*, 597 F.3d 1117, 1125 (10th Cir. 2010) (collecting authority). That silence is remarkable in an area of 1.8 million people, including over 100,000 tribal members—populations that dwarf this Court's prior disestablishment cases. Cf. *Parker*, 136 S. Ct. at 1078 (town of 1,300 people; less than 2% were tribal members); *Yankton*, 522 U.S. at 339 (fewer than 500 voting tribal members). Nowhere did tribes have more incentive and opportunity to assert reservation status than in eastern Oklahoma; they "had

every reason to bring [it] up," *Herrera* v. *Wyoming*, 139 S. Ct. 1686, 1699 (2019). Yet no one did.

Instead, the Five Tribes repeatedly proclaimed the opposite, telling Congress that there are no reservations in Oklahoma. Resp. App'x 18a-20a (collecting tribal statements). The Creeks have made the same representations to federal courts. In asserting immunity from state taxation for cigarette shipments "*between* the Nation's Indian country," the Tribe told the Tenth Circuit it has only "'checkerboard' Indian country within its *former* reservation boundaries." Appellant's Reply, *Muscogee (Creek) Nation* v. *Okla. Tax Comm'n*, 611 F.3d 1222 (10th Cir. 2010), 2009 WL 5069097 (emphasis added). Similarly, in this Court, the Chickasaw Nation contrasted its "fragmented and checker-boarded" territory with "the large and contiguous reservations of virtually all other Indian country states." Opp. at 9, *Okla. Tax Comm'n* v. *Chickasaw Nation*, No. 94-771 (Nov. 29, 1994).

This Court, too, repeatedly described the Creeks' 1866 territory as their "former" domain. *Grayson* v. *Harris*, 267 U.S. 352, 353 (1927); see *Miller*, 235 U.S. at 423; *McClanahan* v. *State Tax Comm'n of Ariz.*, 411 U.S. 164, 167-168, 170 (1973); *Okla. Tax Comm'n*, 319 U.S. at 602-603. Petitioner extols *Woodward* for having "canvassed" the relevant history (at 27), and that case also described the land as "formerly part of the domain of the Creek Nation." 238 U.S. at 285. [12]

Congress similarly recognized that "all Indian reservations as such have ceased to exist" in Oklahoma, S. Rep. No. 74-1232, at 6 (1935), including by defining the term

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[12] By contrast, this Court's observation in *Coyle* v. *Smith*, 221 U.S. 559, 570 (1911), that the Enabling Act preserved Congress's authority over "large Indian reservations and Indian population of the new State," referred to actual reservations like the Osage, not the former territories of the Five Tribes.

"reservation," for certain statutory purposes, to include "*former* Indian reservations in Oklahoma." *E.g.*, 25 U.S.C. § 1452(d) (emphasis added). Since statehood, the Executive Branch has never deviated from its position that no Indian reservations exist in the Five Tribes' former territory. U.S. *Murphy* Br. 21-22. And the twentieth century's greatest Indian law scholars and historians agreed that Oklahoma has jurisdiction over Indians in the former Indian Territory, a land without reservations. *Supra* p. 27 (Felix Cohen); Francis Paul Prucha, *The Great Father*, Vol. II 757 (1995 ed.).

Congress's decision to give the State *even more* jurisdiction after statehood "reinforce[s]" the point. *Parker*, 136 S. Ct. at 1081. Congress not only removed most remaining alienation and taxation restrictions on allotments, it also placed restricted allotments under state control. Act of May 27, 1908, § 1, 35 Stat. 312; Act of June 14, 1918, ch. 101, 40 Stat. 606. Subjecting restricted allotments to *state law*, as determined by *state courts*, would make no sense if Congress intended to immunize the Five Tribes from state jurisdiction by preserving their land as a reservation. Meanwhile, for other tribes, Congress contemporaneously reserved federal authority over allotments. See Act of June 25, 1910, ch. 431, §§ 1, 2, 36 Stat. 856.

2. To counter this century of history, Petitioner offers (at 30-32) a handful of stray comments and some maps that end in 1917—notoriously inconsistent evidence, as this Court has noted. See *Parker*, 136 S. Ct. at 1082; *Yankton*, 522 U.S. at 355; *DeCoteau*, 420 U.S. at 442. We have our own maps showing no reservations in eastern Oklahoma once allotment concluded. Oklahoma addressed each of these minor points in *Murphy*, and they need not be repeated here. Okla. *Murphy* Br. 33-34, 55-56; Reply 18-20.

IV. Turning eastern Oklahoma into reservations would transform the State

Reversal would force a sea-change in the balance of federal, state, and tribal authority in eastern Oklahoma. Petitioner's amici speak as if this case involves *erasing* a reservation. But since 1907, the Tribes, the State, and the federal government have never treated eastern Oklahoma as reservation land.

Petitioner brushes aside (at 42) the staggering ramifications of his position for criminal jurisdiction. Over 9% of Oklahomans identify as Native American, with another 6% identifying as two or more races.[13] Federal and tribal courts would acquire criminal jurisdiction over crimes committed by *or* against any Indians, in an area of 1.8 million residents. Meanwhile, dozens of federal criminal laws would immediately spring into effect across eastern Oklahoma, ranging from hunting and fishing restrictions, 18 U.S.C. § 1165; to requirements for reporting child abuse, § 1169, to prohibitions on selling obscene material, § 1460, and stalking, § 2262. Reversal also risks reopening thousands of state convictions, just like this case—cases that the federal government may be unable to retry because of statutes of limitations, stale evidence, or insufficient resources. Petitioner acknowledges that Oklahoma allows collateral challenges to subject-matter jurisdiction at any time—a rule that petitioner himself invokes. Br. 43 & n.5.

Enshrining eastern Oklahoma as a reservation also would trigger federal obligations for:

- homeland security, 6 U.S.C. §§ 601, 606,
- nutritional programs, 7 U.S.C. §§ 2012, 2013(b),
- drug enforcement, 10 U.S.C. § 284,
- tobacco regulation, 15 U.S.C. § 376(a)(3),
- timber protection, 16 U.S.C. § 594,

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[13] U.S. Census Bureau, *QuickFacts: Oklahoma* (July 1, 2019), https://bit.ly/38J6pXM.

- disability programs, 20 U.S.C. § 1411,
- schools, 20 U.S.C. § 1443,
- highways, 23 U.S.C. § 120,
- roads, 23 U.S.C. § 202(a)(8)(B),
- natural resources, 25 U.S.C. § 162a(d)(8),
- land surveys, 25 U.S.C. § 176,
- trade with Indians, 25 U.S.C. § 262,
- vocational training, 25 U.S.C. § 309,
- primary care clinics, 25 U.S.C. § 1616e-1(a),
- cultural artifacts, 25 U.S.C. § 3001 et seq.,
- waste management, 25 U.S.C. § 3903,
- housing assistance, 25 U.S.C. § 4131,
- hunger, obesity, and diabetes, 42 U.S.C. § 1769d,
- capital repairs, 49 U.S.C. § 5324(b)(1),
- airspace, 49 U.S.C. § 47125(b)(3), and
- historical preservation, 54 U.S.C. § 302704.

On the civil side, effects will extend from taxation to family law. The State generally lacks the authority to tax Indians in Indian country, *Okla. Tax Comm'n* v. *Sac & Fox Nation*, 508 U.S. 114 (1993), so turning half the State into Indian country would decimate state and local budgets. All adoptions and custody disputes involving Indian children residing or domiciled within the 1866 boundaries would fall within the exclusive jurisdiction of tribal courts, even over both parents' objections. 25 U.S.C. § 1911(a). Settled child placements can be undone. § 1914; *Miss. Band of Choctaw Indians* v. *Holyfield*, 490 U.S. 30 (1989). Thus, like criminal law, civil implications have their own retroactivity problems: from tribal members seeking millions in tax refunds, to non-members facing enormous penalties if state-issued environmental permits were suddenly invalid. In short, Indian country status creates two societies: State law generally applies to non-Indians (though even this has exceptions subject to a multifactor balancing test), while Indians are generally immune from

state law. See *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136, 144-145 (1980).

And then there's tribal law. Tribes have criminal jurisdiction over non-Indians for domestic-violence offenses against Indians committed on a reservation. NCAI Br. 32; Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 904, 127 Stat. 54; see NIWRC Br. 16-19. As petitioner's amici note, reversal would instantly and "significantly increase" criminal tribal jurisdiction over millions of acres of land. NCAI, *VAWA 2013's Special Domestic Violence Criminal Jurisdiction Five-Year Report* 56 n.31 (2018). The Choctaw and Chickasaw Nations assert the right to regulate and tax the oil and gas industry. Cole Br. 20 & n.47. In other areas, the doctrine of *Montana* v. *United States*, 450 U.S. 544, 565-566 (1981), for determining when tribes can exercise "civil jurisdiction over non-Indians on their reservations," offers little certainty. This Court has declined to impose bright-line rules, and courts will be flooded with litigation over whether non-Indians have "enter[ed] consensual relationships with the tribe or its members," or whether any given tribal regulation targets "conduct [that] threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Ibid.*

Though it is unclear how Congress could fix these retroactive problems, petitioner asserts that the solution to all this disruption is "another statute." Br. 41. That tacitly acknowledges the chaos waiting in the wings—and reveals that petitioner, not the State, seeks to overturn the status quo. If the Tribe wants the President or Congress to establish reservations in eastern Oklahoma, it can ask them.

While the Five Tribes' present-day provision of governmental services alongside state and local authorities is laudable, Pet. Br. 40-41; Creek Br. 45-47, that system has developed without formal reservations. The State bears

ultimate responsibility for seeking justice for Indian crime victims, including on behalf of the Indian victim in this case. Affirmance will not prevent tribes from providing governmental services. Okla. *Murphy* Suppl. Br. 8-12. Nor will it undermine collaborations between tribal and state officials that exist now. But adopting petitioner's theory would plunge the State into uncertainty for decades to come.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted.

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MARCH 13, 2020

APPENDIX

APPENDIX A:
18 U.S.C. § 1151

§ 1151. Indian country defined

Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

APPENDIX B:
18 U.S.C. § 1153

§ 1153. Offenses committed within Indian country

(a) Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping, maiming, a felony under chapter 109A, incest, a felony assault under section 113, an assault against an individual who has not attained the age of 16 years, felony child abuse or neglect, arson, burglary, robbery, and a felony under section 661 of this title within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.

(b) Any offense referred to in subsection (a) of this section that is not defined and punished by Federal law in force within the exclusive jurisdiction of the United States shall be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense.

APPENDIX C:
18 U.S.C. § 3242

§ 3242. Indians committing certain offenses; acts on reservations

All Indians committing any offense listed in the first paragraph of and punishable under section 1153 (relating to offenses committed within Indian country) of this title shall be tried in the same courts and in the same manner as are all other persons committing such offense within the exclusive jurisdiction of the United States.

APPENDIX D: MESSAGE OF PLEASANT PORTER, PRINCIPAL CHIEF, MUSKOGEE (CREEK) NATION, TO THE CREEK NATIONAL COUNCIL (MAY 7, 1901)

As reprinted in:

THE INDIAN JOURNAL
Eufaula, Indian Territory
Friday, May 10, 1901
J.N. Thornton, Editor

MESSAGE OF PLEASANT PORTER

Okmulgee, May 7.

The Creek council met today. Senator Quarles and Congressman Curtis were present. Chief Porter delivered his treaty address this afternoon. He said in part:

"On March 9, 1901, I issued a proclamation for the assembling of the national council in extra session in order that it might take action upon the agreement entered into between the United States and the Creek Nation which agreement was ratified by Congress and approved by the president March 1, 1901.

"Now, therefore, I, Pleasant Porter, principal chief of the Muskogee or Creek Nation, do heretoby, in virtue of the authority vested in me by the foregoing provisions of the act of congress aforesaid, call an extra session of the Muskogee of [sic] Creek national council to meet at Okmulgee, the capital of said nation May 7, 1901, at 10 o'clock of said day. All members of said, national council are hereby notified to be present in their prespective [sic] houses at that time and place. When said council is so assembled I will, in virtue of the authority aforesaid, lay before the same the said agreement and the act of congress ratifying it for such action, in reference to said agreement,

as said council may deem proper as provided in said act of congress.

"In view of the fact that it is of the highest importance that the people should be well advised as to the terms and provisions of the agreement I thought it necessary to have the full text of the agreement translated into the Creek language. This has been done and I have caused the same to be distributed throughout the country in order that the members of the council and all citizens of the Creek Nation might have the opportunity of reading and understanding it. In presenting this agreement for your consideration and action thereon it devolves upon me as your chief executive to discuss its provisions.

The Various Creek Treaties

"It is a fact well known to you that in 1893 congress passed an act declaring a change of policy toward the Indians of the Indian Territory, and instead of the treaty stipulation, up to that time subsisting, providing that the Creek and Seminoles shall be secured in the unrestricted right of self-government and have full jurisdiction over persons and property within their respective limits, which had reference to their own citizens, and that they should hold their lands in common, as was guaranteed to them in the patent issued to them August 7, 1852, that new agreements should be made with the Five Civilized Tribes, providing for a change in their land tenure from tenure, in common to that of individual tenure, and their guaranteed rights of self-government changed and modified so as to culminate in statehood and the assumption of United States citizenship.

"It is needless to trace the steps taken by the government through it commission known as the Five Civilized Tribes, which was created by virtue of the act of congress of 1893. It will suffice to say that after many conventions

with our authorities, which were fruitless of results, that in 1897 an agreement was framed which received the unqualified approval of congress. This agreement, however, was rejected by the Creek people. In February, 1899, another agreement was made upon which congress took no action, it containing provisions discriminating against certain classes of our citizens, and was, therefore, impossible of approval by the United States government. The present agreement signed March 8, 1900, was the third one framed and with its present changes and modifications has been approved by congress and tendered to our people for ratification.

Still Some Defects in the Treaty

"At our last council a delegation was appointed to try to secure certain changes prior to its passage by congress. While there were some changes made bettering its terms and removing certain dangers which would threaten the property rights of the individual citizens after allotment, there are still defects which ought to be remedied by supplemental agreement. But in the main, the present agreement, touching the more important matters of interest, that is, the equitable distribution of our landed property and unsettled money interests with the government of the United States, the agreement is fair upon the theory that in the partition of the lands each citizen of the Creek Nation shall receive an equal share in value.

"The method pursued by the government of the United States in the distribution of its own lands to its citizens would have been entirely satisfactory. That method has been to permit its citizens to select homes for allotment or homestead upon the public lands at the same price without regard to any classification of valuation, based upon its productive capacity or location. This method has rendered the securing of homes on the public

lands of United States easy and feasible, and has resulted in the rapid and immense development of the country, and if it had been made applicable to the individualizing of our lands the same would have been satisfactory.

"There are some errors of date as to the time of closing the rolls of Creek citizens. Provision is made for the enrollment of certain full blood Creek Indians residing in the Creek Nation who have recently removed from the state of Texas and also for the enrolling of certain recognized Creek citizens found upon the Creek rolls who, by reason of non-residence at the time of the passage of the Curtis act were not permitted to enroll, who should in good faith, return to the Creek Nation before the commission had completed the rolls of citizenship." Also the agreement provides that no person shall be enrolled after the ratification of this agreement. It will be seen that while provision is made to enroll these classes of people, that at the moment the commission becomes authorized by law to do so it closes the roll, rendering it impossible to place these classes of people upon the rolls. This certainly will be remedied in a supplemental agreement, as it would be unreasonable to assume that congress provided a way to do a thing and at the same time rendered its accomplishment impossible.

To Make the Rolls Correct

"I understand that the commission is making a roll of these people so as to be able to present the names of the persons wronged by this error of date in the agreement. Again, the infants born up to the date of the ratification of the agreement, being citizens from the time of their birth, could not rightfully be denied the right to receive their distributive share equal with other citizens. The agreement provides for their enrollment only up to July 1, 1900, which should have been up to the date of the ratification

of the agreement. This will undoubtedly be remedied, as it is so manifestly unjust. The commission will also make a roll of this class of persons and reserve lands form them [sic] until this error is corrected. There are also other defects of less consequence which can also be remedied by supplemental agreement.

"It was the desire of the council that some limited measure of government should be restored to our courts. Your delegation presented this matter with all the argument that could be put forward, but without result. The government in all its branches postively [sic] refused to re-establish that portion of government which was withdrawn from us by certain acts of congress. It would be difficult, if not impossible to successfully operate the Creek government now, inasmuch as the conditions have so rapidly changed of late by the peopling of our country with a foreign element; and the remnant of a government now accorded to us can be expected to be maintained only until all settlements of our landed and other interests growing out of treaty stipulations with the government of the United States shall have been settled.

Indians as Citizens

"Congress at its recent sitting passed an act declaring all Indians in the Indian Territory citizens of the United States. Therefore, we are now amenable to its laws and clothed with all the rights of other citizens of the United States. Such rights as shall be maintained under the provisions of the agreement can only be insofar as they do not conflict with the general laws of the United States affecting other citizens in the Indian Territory. It will be seen from this that the restitution of the tribal government is now rendered a matter of impossibility.

"In the treaty of 1866 provision is made that congress and the president of the United States may when deemed

necessary, legislate for the better protection, of person and property in the Indian Territory, and presume the reason why we are now declared citizens of the United States is that it is deemed necessary for the better protection of our persons and property.

"After a careful analysis of the provisions touching other matters and things with which this agreement deals, and in view of all the conditions with which we are confronted and embarrassed, I am convinced that it has become our duty, both to ourselves and to our posterity, to ratify the agreement, even though we have thus far failed to secure all the changes that seemed to us desirable, trusting that whatever defects it now contains, or may hereafter develop will be remedied by supplemental agreement. We are assured by the government authorities with whom we have thus far conferred that upon the adoption of this agreement, which is an acceptance of this government's policy toward our people, that if there appears to be any lack of justice or equity in the carrying out of this agreement, the purpose of congress being to do full justice to our people, it will afford such remedies as are found to be necessary."

APPENDIX E: MESSAGE OF PLEASANT PORTER, PRINCIPAL CHIEF, MUSKOGEE (CREEK) NATION, TO THE PEOPLE OF THE CREEK NATION (JUNE 9, 1906)

As reprinted in:

THE INDIAN JOURNAL
Eufaula, Indian Territory
Friday, June 15, 1906
Thirtieth year, No. 34
Geo. A. Raker, Editor

LETTER OF PLEASANT PORTER TO CREEK NATION

Muskogee, I.T.
June 9th '06

To the people of the Creek Nation.

The Hon. Lewis McGilbray is the bearer of letters from the U.S. Indian Agent, respecting the matters of various rumors circulating among our people. The purpose of his mission to the people is to give correct information as to the desire of the Agent, that the people harmoniously accept and demean themselves in harmony with the policy of the government. It has come to the knowledge of the Agent that various rumors have been circulated among the people, among other things that the Chief has been or is to be disposed or set aside, and that another government is to be established, and that will be a return to their old form of government now forgotten by the people; that the allotment of lands was not the policy of the government, and that the holding of lands in common will be re-established by them, and that certain persons of the Creeks are in possession of this knowledge and which they claim is approved by the U. S. Government.

These among other disturbing rumors calculated to render a state of unrest among the people, and disturb them in their individual pursuits, are erroneous and must not be given any heed. As I have heretofore admonished the people to disregard all such statements, as they are unauthorized by any person in authority. We are now under the control and government of the United States. The Creek laws have long since been suspended so far as the administration of civil or criminal affairs are concerned. The only laws now in force are the treaties made for the distribution and allotment of our lands.

It is well known that any other government will never be established for the government of the Indians, except such government as the United States shall or may establish, and that at present we are under the jurisdiction of the Courts of the United States, Indian Agents and Inspectors. The Dawes Commission is especially charged by the laws of the United States to distribute the property and landed interests, by alloting the lands to the Indians, and thereafter the moneys belonging to the several tribes will be distributed to the individual members of such tribes, and the Indians by the allotment treaty are declared to be citizens of the United States, and will be so treated or dealt with.

To hope for, or look for any other than this, is utterly useless, and can never be realized.

The letter of the Indian Agent referred to is one that meets with my fullest endorsement.

Mr. McGilbray should be given due credence wherever he appears, and I advise all law-abiding citizens to do so.

So soon as matters of legislation affecting Indian affairs have been completed by Congress, by the passing of

the Appropriation Bill, I shall take occasion in a general way to summarize the full status that we now occupy.

I thought proper to advise the public through this letter to Mr. McGilbray, of these matters.

Very Respectfully,
Your obedient servant,
P. PORTER
Principal Chief of Muskogee
(Creek) Nation.

APPENDIX F:
EXCERPT OF MESSAGE OF PLEASANT PORTER, PRINCIPAL CHIEF, MUSKOGEE (CREEK) NATION, TO THE CREEK NATIONAL COUNCIL (OCT. 18, 1906)

As reprinted in:

THE NEW STATE TRIBUNE
Muskogee, Indian Territory
October 18, 1906
12th year, No. 52
Chas. N. Haskell, Editor

MESSAGE OF P. PORTER

To the Honorable Members of the House of Kings and the House of Warriors of the Muskogee Nation:

Gentlemen:

You are again convened by provision of Creek Law in annual session, which provides that the Creek Council shall convene in regular annual session on the first Tuesday in October of each year.

Before the dissolution of tribal government by treaty agreement March 4, 1906, tribal government was continued by joint resolution of Congress, which joint resolution was modified by an act of Congress approved by the president April 26, 1906, which reads as follows:

"Sec. 28. That the tribal existence and present tribal governments of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes or nations are hereby continued in full force and effect for all purposes authorized by law, but the tribal council or legislature in any of the said tribes or nations, shall not be in session for a longer period than thirty days in any one year: Provided, That no act, ordinance, or resolution (except resolutions of adjourn-

ment) of any of said tribes or nations shall be of any validity until approved by the President, of the United States: Provided further, That no contract involving the payment or expenditure of any money or affecting any tribes or nations made by them or any of them or by any officer thereof, shall be of any validity until approved by the President of the United States."

From this you will observe that the power and authority of the council is limited and circumscribed, and that the matter of making laws for our government is not within the scope of our authority. We have limited authority in making appropriations and passing resolutions respecting our wishes with regard to any matter that concerns our people and its property now in the process of distribution.

You will observe that the Act of Congress approved April 26, 1906, known as the Curtis Act, provided that the tribal council or legislture[sic] of any of the said Indian tribes or nations shall not be in session for a longer period than thirty days in any one year. I take it that the intent of this act is to economize time and money spent by the council of the nation, and as there will be less work for this council to do, and as there may be occasion for again convening within the year to act upon important matters as may be submitted to the nation through me, that it would be wise to be in session at this meeting for as limited a period as possible, thus saving time for such session as may become necessary.

[…]

Believing that it would be of great advantage to the citizens of the Creek nation to have in their own language, the law passed by Congress April 26, 1906, known as the Curtis Act, which law provides for the final disposition of the affairs of the Five Civilized Tribes I have had the work done by one of our best translators, Mr. Grayson, and I

herewith present you this law in order that all of our people may learn the law themselves, and be guided by it.

Again an Act was passed June 16, 1906, to enable the people of Oklahoma and Indian Territory to frame a constitution and state government. Part of the act which relates to Oklahoma and the Indian Territory, has been translated into the Creek language also, and will be distributed among the people.

The carrying into effect of the enabling act, and under its provision, the adoption of a constitution, the framing of a system of laws, and the election of persons to fill the various offices, administrative, legislative and judicial to operate government, has begun. I call your attention to this fact in order that you may see the importance of fully understanding the enabling act, so as to act in harmony as becomes us upon entering the new and more enlarged citizenship. Upon the establishment of a state government, all powers over the governing even of our landed property will cease, except in so far as the distribution of our property and money is concerned, which will be entirely under the supervision of the government of the United States.

[…]

There are other matters that I shall call your attention to in separate communication with recommendation.

Drafts of acts making the necessary appropriations, which is within our power to do, are herewith presented to you for your legislative action thereon.

Trusting that the council will expeditiously act upon all maters to which attention has been called, I am your obedient servant,

P. Porter,
Principal Chief of Muskogee
(Creek) Nation.

APPENDIX G:
ADDRESS BY MOTY TIGER, PRINCIPAL CHIEF, MUSKOGEE (CREEK) NATION, TO THE CREEK NATIONAL COUNCIL (OCT. 8, 1908)

As reprinted in:

THE INDIAN JOURNAL
Eufaula, Oklahoma
Friday, October 9, 1908
Thirty-second year, No. 50

EDITORIAL ON ADDRESS BY MOTY TIGER

Chief Tiger in his annual address delivered Thursday, the second day's session of the Creek National Council, at Okmulgee, urges his people to face the new conditions that confront them, to participate in elections and take up the white man's burdens that they might secure a creditable place in the present day affairs of the country and in history, to retain their lands and keep their homes.

Following is the introductory to his message:

"The affairs of the Creek people as a tribe are so nearly closed up, insofar as any action of the tribal authorities will affect the same, that there is but little I can call to your attention or recommend for your consideration.

However much a large number of our citizens may regret and oppose the abandonment of our old tribal form of government, and however much they may resist the present conditions, and however much they may appeal to the government at Washington to alter its purpose to wipe out all tribal government among the five civilized tribes, I say to you in candor, truth and sincerity that it all will be to no purpose.

"Many of our people have believed and no doubt, may still hold to the belief that there is some means and some

way by which our old tribal government and the holding of our lands in common can be reclaimed. I feel that I would fail in my duty to myself, as well as to our people did I not say that such a hope or belief if utterly impossible of realization, and I wish to say further that any contributions for any such purpose is just that much money thrown away, and further all attorneys at Washington or elsewhere who encourage and receive any part of such contributions do it knowing that they can give no return or service for same and that they take such money fraudulently and dishonestly."

Chief Tiger advised his people to hold to their lands and homes, to cultivate and improve them, send their children to school, familarize [sic] themselves with state and national affairs, participate in the elections, vote their convictions and permit no undue or improper influence. Such a course he assured them would insure to the Creeks a respectab1e and creditable place in the present day affairs of the country and history.

Ellis Childers was formerly elected speaker of the House of Warriors to succeed Alexander Davis, deceased.

There were about 100 members of both houses. in attendance. It is believed the council will remain in session for thirty days.

APPENDIX H:
LIST OF REMARKS BY THE FIVE TRIBES REGARDING RESERVATION STATUS

1. "Seminole and Wyandotte in Oklahoma pointed out that there are no reservations in Oklahoma."

Theodore W. Taylor, Dep't of the Interior, *The States and Their Indian Citizens* 275 (1972) (recounting statement of Seminole Tribe), https://files.eric.ed.gov/fulltext/ED087583.pdf.

2. "We are not a reservation tribe. We have a jurisdictional operating area. We also do have a substantial amount of trust land, and we have individually allotted land that is held in trust by the U.S. Government for the benefit of the individual Indian family … ."

Statement of Ross Swimmer, Principal Chief, Cherokee Nation of Oklahoma, Hearing Before the Sen. Select Committee on Indian Affairs, 97th Cong., 2d Sess., at 99 (Sept. 22, 1982), https://hdl.handle.net/2027/pur1.32754070366855.

3. "I am the governor of the Chickasaw Nation, and we are located in Oklahoma, which, of course, is not a reservation State."

Statement of Hon. Bill Anoatubby, Governor, Chickasaw Nation of Oklahoma, Ada, OK, Hearing Before the Sen. Select Committee on Indian Affairs, 100th Cong., 2d Sess., at 83 (Apr. 20, 1988).

4. "I want to talk about the Indian Reservation Roads program. The name sort of implies it's restricted to reservation states, which Oklahoma is not. We have no surface reservations in Oklahoma, notwithstanding the large populations that I just mentioned.

"So my remarks this morning will be threefold. One, the justification, the justifiable application of the program to nonreservation tribes, not only in Oklahoma, but across the United States."

Testimony of Neal McCaleb (Chickasaw Advisor), Hearing Before the House Committee on Transportation and Infrastructure, 112th Cong., 1st Sess. 13-14 (Feb. 24, 2011, https://www.govinfo.gov/content/pkg/CHRG-112hhrg65737/pdf/CHRG-112hhrg65737.pdf.

5. "I spent much of my childhood growing up in towns within the former reservation boundaries of the Chickasaw Nation, including Purcell and Ada."

Statement of Kevin Washburn, Chickasaw Nation Member, Nominee for the position of Assistant Secretary for Indian Affairs, Department of the Interior, Before the Senate Committee on Indian Affairs (Sept. 14, 2012), https://www.indian.senate.gov/sites/default/files/upload/files/Kevin-Washburn-testimony.pdf.

6. "The Inter-Tribal Council of the Five Civilized Tribes supports the Seminole Nation of Oklahoma in having its former reservation lands officially recognized by the United States as Seminole Nation of Oklahoma former reservation lands."

Resolution 16-19, Inter-Tribal Council of the Five Civilized Tribes, adopted July 8, 2016, http://www.fivecivilizedtribes.org/Docs/Resolutions/2016/16-19.pdf.

7. "It is important to note that unlike other parts of Indian Country, there are no reservations in Oklahoma. People from many backgrounds are neighbors who live, work, play and worship together. Without the aid of survey maps it is virtually impossible for the layperson to dis-

tinguish between tribal and other governmental or privately held lands. As a result, there is a sense that we all share in a common destiny in our communities. This bond that has helped immeasurably as tribes and other stakeholders seek to improve our collective economic fortunes."

Testimony of Hon. Bill Anoatubby, Governor, The Chickasaw Nation, Before the House Subcommittee on Indian, Insular and Alaska Native Affairs (Feb. 24, 2016), https://republicans-naturalresources.house.gov/uploadedfiles/testimony_anoatubby.pdf.