No. 18-9526

IN THE

Supreme Court of the United States

JIMCY MCGIRT,

Petitioner,

v.

OKLAHOMA,

Respondent.

ON WRIT OF CERTIORARI TO THE OKLAHOMA COURT OF APPEALS

BRIEF *AMICI CURIAE* OF FORMER UNITED STATES ATTORNEYS TROY A. EID, BARRY R. GRISSOM, THOMAS B. HEFFELFINGER, DAVID C. IGLESIAS, BRENDAN V. JOHNSON, WENDY OLSON, TIMOTHY Q. PURDON, AND DANNY C. WILLIAMS

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QUESTION PRESENTED

Whether Oklahoma courts can continue to unlawfully exercise, under state law, criminal jurisdiction as "justiciable matter," in Indian Country over Indians accused of major crimes enumerated under the Indian Major Crimes Act—which are under exclusive federal jurisdiction.

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INTERESTS OF THE *AMICI CURIAE*[1]

Amici Curiae are all former United States Attorneys, appointed by Republican and Democratic Presidents and confirmed by the United States Senate, with extensive direct experience prosecuting crimes arising in Indian country and well-versed in the jurisdictional interplay among Federal, State and Tribal authorities responsible for public safety and the administration of justice.

Amici have actively participated in the legislative process by which Congress has enhanced coordination and cooperation among Federal, State and Tribal law enforcement jurisdictions by enacting statutes such as the Violence Against Women Act Amendments of 2013, PL-113-4 ("VAWA 13"), and the Tribal Law and Order Act of 2010, Pub.L. 111–211, H.R. 725, 124 Stat. 2258 ("TLOA"). These and other laws attest to Congress' demonstrated recent ability to adjust the appropriate scope of Federal jurisdiction in Indian country when the interests of justice require it, and with due respect and consideration for the public safety needs of States and Tribes alike.

SUMMARY OF THE ARGUMENT

Given the obligations solemnly agreed to by the United States in the Treaty with the Creeks, art. 2, Jan. 24, 1826, 7 Stat. 286, 286, it is Congress' exclusive role to assess and, as may be needed, adjust the

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[1] Pursuant to this Court's Rule 37.6, counsel for *amici curiae* certify that no part of this brief was authored by counsel for any party, and no such counsel or party made a monetary contribution to the preparation or submission of the brief. On January 17 and 21, 2020, counsel for Petitioner and Respondent respectively filed blanket consents for all amici briefs.

jurisdictional division of authority among Federal, State and Tribal law enforcement and prosecutorial authorities on the Muscogee (Creek) Reservation ("Reservation"). Under our Constitution, Congress is the proper forum in which representatives of all three sovereigns can deliberate matters of public safety and the administration of justice on the Reservation, including the appropriate scope of Federal, State and Tribal criminal jurisdiction.

Article I, Section 8 of the United States Constitution expressly delegates to Congress exclusive authority to regulate commerce with Indian tribes. Laws enacted by Congress beginning in the 1790s regulating sales, leases and other conveyances of tribal land and trade and interactions with Indian tribes remain substantially in effect. *See* 25 U.S.C. §§ 177 and 261-264. Many treaties between the United States and Indian tribes – which, like laws enacted by Congress, are the law of the land under the Supremacy Clause of the Constitution – and any abrogation of such treaties are the exclusive province of Congress. *See, e.g., Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202 (1999); and *United States v. Dion*, 476 U.S. 734 (1986). Questions as to how law enforcement and prosecution resources can be most effectively allocated among Federal, State and Tribal officials and institutions do not fall within the province of judges; they are rather the essence of lawmaking. Congress has demonstrated its ability to address the inter-relationship of Federal, State and Tribal jurisdiction in Indian country, including in the recent past by enacting VAWA '13 and TLOA, and through statutes adjusting the scope of jurisdiction on particular reservations.

Congress' plenary power over Indian affairs, including within the treaty-making context, is the Constitution's only avenue for revising the Treaty with the Creeks. Practical or logistical obstacles are of no moment when the Constitution makes a clear assignment of authority to Congress alone.

ARGUMENT

I. The authority to abrogate treaties is exclusively vested in Congress.

"The first and governing principle is that only Congress can divest a reservation of its land and diminish its boundaries." *Solem v. Bartlett*, 465 U.S. 463, 470 (1984). That "first and governing principle" is the alpha and the omega of analysis in this case. "[T]hough petitioners wish that Congress would have spoken differently . . . we cannot remake history." *Nebraska v. Parker*, 136 S. Ct. 1072, 1082 (2016) (quotation omitted).

"Once a block of land is set aside for an Indian Reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise." *Id.*

The act of abrogating a treaty or disestablishing a reservation is of the utmost seriousness, requiring "an act of Congress, passed in the exercise of its constitutional authority. . . clear and explicit." *United States v. Dion*, 476 U.S. 734, 738 (1986), quoting *Fong Yue Ting v. United States*, 149 U.S. 698, 720 (1893).

"The whole intercourse between the United States and [the Tribe], is, by our constitution and laws, vested in the government of the United States."

Worcester v. The State of Georgia, 31 U.S. 515, 561 (1831). Any state law or action to the contrary "is consequently void." *Id.* "With the adoption of the Constitution, Indian relations became the exclusive province of federal law." *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 234 (1985). "This Court has repeatedly rejected state attempts to assert sovereignty over Indian lands." *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 148 n.40 (1996).

Against this long history and constitutional text, Respondent offers only practical objections. But judicial determinations as to the actual or perceived resource needs of law enforcement officers and prosecutors on Indian reservations are not an appropriate ground for abandoning well-established constitutional principles. Many other important legal principles have "controversial public safety implications," including all constitutional and other legal provisions "that impose restrictions on law enforcement and on the prosecution of crimes." *McDonald v. City of Chicago*, 561 U.S. 742, 783 (2010). The exclusionary rule, for example "generates substantial social costs which sometimes include setting the guilty free and the dangerous at large." *Hudson v. Michigan*, 547 U.S. 586, 591 (2006) (quotation omitted). And in any event, the burdens on law enforcement imagined by Oklahoma in this and other cases are unsubstantiated.

Likewise, "Indian treaty rights are too fundamental to be easily cast aside." *Dion*, 476 U. S. at 739. "From the commencement of our government, congress has passed acts to regulate trade and intercourse with the Indians; which treat them as nations, respect their rights, and manifest a firm purpose to afford that protection which treaties stipulate." *Worcester*, 31 U.S. at 556-57. These are fundamental

principles rooted in the separation of powers and the authority of Indian tribes as sovereign states. *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 675, *modified sub nom. Washington v. United States*, 444 U.S. 816 (1979) ("A treaty, including one between the United States and an Indian tribe, is essentially a contract between two sovereign nations.").

Respondent's arguments are properly addressed to Congress. The give-and-take of the legislative process provides the proper forum in which to deliberate and address the varied interests of Federal, State and Tribal officials. The Constitution demands no less, and does so to address a fundamental flaw in the text of the Articles of Confederation, which read: "The United States in Congress assembled shall also have the sole and exclusive right and power of…regulating the trade and managing all affairs with the Indians, not members of any of the States, provided that the legislative right of any State within its own limits be not infringed or violated."[2] This provision in the Articles gave authority to regulate trade with Indians to both the Continental Congress and to the States within their borders.

In the Federalist No. 42, James Madison described the purpose of the Indian Commerce Clause:

> The regulation of commerce with the Indian tribes is very properly unfettered from two limitations in the articles of Confederation, which render the provision obscure and contradictory. The power is there restrained

[2] Articles of Confederation, Art. IX, 1 U.S.C. Organic Laws.

> to Indians, not members of any of the States, and is not to violate or infringe the legislative right of any State within its own limits. What description of Indians are to be deemed members of a State, is not yet settled, and has been a question of frequent perplexity and contention in the federal councils. And how the trade with Indians, though not members of a State, yet residing within its legislative jurisdiction, can be regulated by an external authority, without so far intruding on the internal rights of legislation, is absolutely incomprehensible.

The Federalist No. 42, at 268-69 (James Madison) (Clinton Rossiter ed., 1961). This Court should not upset the Founders' decision to entrust Congress alone with regulating the country's relationship with Indian Tribes.

II. Congress has regularly exercised its authority to adjust the scope of criminal jurisdiction in Indian country, both nationally and locally.

Congress has demonstrated its ability to address the division of responsibility and authority among Federal, State and Tribal officials through the legislative process, including with respect to the scope of criminal jurisdiction and resources among the three sovereigns. To give just two examples, Congress enacted TLOA "to clarify the responsibilities of Federal, State, tribal, and local governments with respect to

crimes committed in Indian country; . . . (3) to empower tribal governments with the authority, resources, and information necessary to safely and effectively provide public safety in Indian country; (4) to reduce the prevalence of violent crime in Indian country and to combat sexual and domestic violence against American Indian and Alaska Native women." TLOA § 202.

TLOA provides that Tribes may impose sentences of more than one year (but not more than three years) if they "provide to the defendant the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution; and at the expense of the tribal government, provide an indigent defendant the assistance of a defense attorney licensed to practice law by any jurisdiction." *Id.* at § 234(c)(2). Tribes must also provide a judge who is law trained and a licensed attorney, publish their criminal codes, and maintain a record of the proceeding. *Id.* at § 234(c)(3)-(5). Other key TLOA provisions include training requirements so that Tribal law enforcement may be Federally deputized to enforce Federal criminal law within Indian country.

VAWA '13 recognizes Tribes' inherent jurisdiction over non-Indians in certain domestic violence cases. 25 U.S.C. § 1304; 25 U.S.C. § 1304 note 2. Under this legislation, Tribes electing to do so may assume jurisdiction over non-Indians on tribal lands to prosecute several specific domestic violence offenses under tribal law. 25 U.S.C. § 1304. VAWA '13 partially repeals this Court's decision in *Oliphant v. Suquamish Tribe of Indians,* 435 U.S. 191 (1978), which held that Indian tribes lack criminal jurisdiction over non-Indians. As with TLOA, VAWA '13 requires participating

tribes to respect all constitutional rights of the defendants including the provisions of counsel for indigent defendants and to have a judge licensed in the practice of law. *Id.* at § 1304(d); 25 U.S.C. § 1302(c).

VAWA '13 is shaping the scope of concurrent Federal-Tribal jurisdiction in Oklahoma and other states. As of February 2020, 25 Federally recognized tribes have prosecuted non-Indian criminal defendants pursuant to VAWA '13, resulting in 266 arrests, 99 convictions and six acquittals.[3] The populations of the reservations of the participating tribes range from almost entirely Native American to fewer than 23 percent and include the Tribe and other tribal governments in Oklahoma. *Id.* at 18.

These are just the most recent in a long string of legislative enactments dealing with criminal jurisdiction in Indian country. *See for example*, the General Crimes Act of 1817, 18 U.S.C. § 1152; the Major Crimes Act (1883), 18 U.S.C. § 1153, Public Law 83-280 (1953, amended 1968), 18 U.S.C. § 1162; 25 U.S.C. § 1360, and the Indian Civil Rights Act (1968), 25 U.S.C. § 1301.

Congress has also demonstrated its ability to address the scope of Federal, State and Tribal criminal jurisdictional issues by adjusting specific reservation boundaries. For example, PL-98-290, 98 Stat. 201 (May 21, 1984), demarcated the boundaries of the highly allotted Southern Ute Indian Tribe's reserva-

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[3] Draft updates to National Congress of American Indians, VAWA 2013's Special Domestic Violence Criminal Jurisdiction Five-Year Report (March 20, 2018) at 7, available at *http://www.ncai.org/resources/ncai-publications/SDVCJ_5_Year_Report.pdf*.

tion in southwestern Colorado and clarified the allocation of criminal jurisdiction within those boundaries. Notably the largest community on that reservation, the Town of Ignacio, was specifically placed under state criminal and civil jurisdiction at the request of the tribe and with its consent, PL-98-290 § 5.

More recently, PL 113-232, the Blackfoot River Land Exchange Act of 2014 was enacted "to resolve the land ownership and land use disputes resulting from realignment of the River by the [U.S. Army] Corps of Engineers during calendar year 1964 pursuant to the project described in subsection (a)(4)(A); and (2) to achieve a final and fair solution to resolve those disputes." PL 113-232, § 2(b).

These examples do not include recent acts of Congress taking land into trust on behalf of Tribes, recognizing or restoring Tribes, or approving water rights settlements – all of which deal with specific issues of Indian reservation boundaries and property rights.[4]

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[4] For example in 2018 the Senate Committee on Indian Affairs held at least six hearings on land legislation specific to individual tribes, *See*, United States Senate Committee on Indian Affairs website: Hearings (listing committee hearings and providing links to testimony and materials), available at https://www.indian.senate.gov/hearings; *Legislative Hearing to receive testimony on S. 2154, S. 3060 and S. 3168* (July 18, 2018)(regarding S. 2154, Kickapoo Tribe in Kansas Water Rights Settlement Agreement Act and S. 3168, A bill to amend the Omnibus Public Land Management Act of 2009 to make Reclamation Water Settlements Fund permanent); *Legislative Hearing to receive testimony on S. 2599* (July 11, 2018)(regarding S. 2599, the Leech Lake Band of Ojibwe Reservation Restoration Act); *Business Meeting to consider H.R. 597, the Lytton Rancheria Homelands Act of 2017* (July 11, 2018); *Business Meeting to consider H.R.*

It is not necessary to construe the historic statutes relied on by Respondent in "a backhanded way," *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 412 (1968), when Congress continuously demon-

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1491, the Santa Ynez Band of Chumash Indians Land Affirmation Act of 2017 (June 13, 2018); *Legislative Hearing to receive testimony on the following bills: H.R. 597 & H.R. 1491* (April 25, 2018)(regarding H.R. 597, A bill to take lands in Sonoma County, California, into trust as part of the reservation of the Lytton Rancheria of California, and for other purposes; and H.R. 1491, A bill to reaffirm the action of the Secretary of the Interior to take land into trust for the benefit of the Santa Ynez Band of Chumash Mission Indians, and for other purposes); *Business Meeting to Consider S. 995 & S. 1953* (Feb. 14, 2018) (regarding S. 995, the Spokane Tribe of Indians of the Spokane Reservation Equitable Compensation Act S. 1953, the Tribal Law and Order Act Reauthorization and Amendments Act of 2017). During the same period, the Committee also held hearings on issues and legislation related to criminal justice in Indian country. *See*, United States Senate Committee on Indian Affairs website: Hearings (listing committee hearings and providing links to testimony and materials), available at https://www.indian.senate.gov/hearings; *Oversight Hearing on "Justice for Native Youth: The GAO Report on 'Native American Youth Involvement in Justice Systems and Information on Grants to Help Address Juvenile Delinquency' "* (Sep. 26, 2018); *Oversight Hearing on "Protecting the Next Generation: Safety and Security at Bureau of Indian Education Schools"* (May 16, 2018); *Oversight Hearing on "Opioids in Indian Country: Beyond the Crisis to Healing the Community" (Mar. 14, 2018); A Listening Session on "Addressing Gaps in Protections and Services for Native Women"* (Feb. 12, 2018); and *Business Meeting to Consider S. 995 & S. 1953* (Feb. 14, 2018)(regarding S. 995, the Spokane Tribe of Indians of the Spokane Reservation Equitable Compensation Act S. 1953, the Tribal Law and Order Act Reauthorization and Amendments Act of 2017).

strates its ability to use the legislative process to address the balance of powers among the three sovereigns.[5]

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[5] Indeed, Amici have variously testified individually before Congress on these topics numerous times as Congress carefully considers the experiences of the stakeholders, including law enforcement officers. *See e.g.*, *Examining Federal Declinations to Prosecute Crimes in Indian Country: S. Hrg. 110-683 Before the S. Comm. on Indian Affairs*, 110th Cong. 31 (2008)(statement of Thomas B. Heffelfinger); *Hearing on S. 1763, Stand Against Violence and Empower Native Women Act; S. 872, A Bill to Amend the Omnibus Indian Advancement Act to Modify the Date as of which Certain Tribal Land of the Lytton Rancheria of California is Considered to be Held in Trust and to Provide for the Conduct of Certain Activities on The Land*; S. 1192, *Alaska Safe Families and Villages Act*, S. Hrg. 112-489, 112th Cong. 22 (2011) (statement of Thomas B. Heffelfinger); *Law Enforcement in Indian Country, Hearing Before the S. Comm. On Indian Affairs*, S. Hrg. 110-136, 110th Cong. 62 (2007) (statement of Thomas B. Heffelfinger); *Tribal Law and Order One Year Later: Have We Improved Public Safety and Justice Throughout Indian Country, Oversight Hearing Before the Senate Committee on Indian Affairs*, 112th Cong. 31-32 (Sept. 22, 2011) (statement of Brendan V. Johnson, U.S. Attorney, District of South Dakota); *Tribal Law and Order One Year Later: Have We Improved Public Safety and Justice Throughout Indian Country, Oversight Hearing Before the Senate Committee on Indian Affairs*, 112th Cong. (Sept. 22, 2011) (testimony of Troy A. Eid, Chairman, Indian Law and Order Commission); *Oversight Hearing on the Law and Order Commission Report: "A Roadmap for Making Native America Safer": Before the S. Comm. on Indian Affairs*, 113th Cong., 2nd Session (2014)(testimony of Timothy Q. Purdon, U.S. Attorney, District of North Dakota); *Oversight Hearing on the Law and Order Commission Report: "A Roadmap for Making Native America Safer": Before the S. Comm. on Indian Affairs*, 113th Cong., 2nd Session (2014) (testimony of Troy A. Eid, Chairman, Indian Law and Order Commission).

Congress has paid close attention to the Creek Reservation following Oklahoma's statehood and made a constant slew of adjustments relating to inheritance rules, taxability of minerals, and other matters. The one thing that Congress has not adjusted is the Reservation boundaries, despite zealous advocacy by the State and its citizens to do so:

> Oklahoma with 1,500,000 population, became a State on November 16, 1907 upon a pledge contained in her constitution that she would never question the jurisdiction of the Federal Government over the Indians and their lands or its power to legislate by law or regulation concerning their rights or property. Immediately she had a delegation in Congress and at once began a determined campaign to further repeal the laws enacted for the protection of the Indians. The main argument employed was that the Indians were competent to care for their property and needed no legislative protection against improvidence; that the State could be trusted to afford them all the protection they required and that Federal guardianship and supervision should cease, as an interference with the personal privileges and rights of citizens of Oklahoma.[6]

And when Congress deigned to experiment with removing some restrictions, disaster ensued:

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[6] The American Indian in the United States, Period 1850-1914, 142 (Warren K. Moorehead, 1914).

THE CRISIS IN OKLAHOMA ... The lengths to which a few people went in order to despoil the Indians seems incredible in this day of Christianity and civilization. Some men made contracts with Indians on a basis of fees of high percentage and sought to secure control of Indian moneys in the United States Treasury. Others made contracts with thousands of Indians to represent them in the sale of vast tribal estates—tens of millions of dollars—on a liberal commission basis. Others became guardians and administrators of estates; there were thousands of these professional guardians. The thing became a national scandal. Covetousness overwhelmed eastern Oklahoma. Now and then some man sought to stem the tide. A judge was assaulted in court by a grafter. He called upon his court officers. They, sympathizing with the assailant, did not aid his honor, but merely looked on while the grafter beat the judge insensibly.

An editor commented upon a certain county judge, before whom guardians and administrators had appeared, and told some plain truths concerning the manner in which minors' estates were being dissipated. The judge drew a knife and stabbed the editor. In neither of these cases were the guilty persons punished. What went on throughout the length and breadth

> of eastern Oklahoma seems incredible.[7]

And Congress heard all about it. *See, e.g.*, *Congressional Record* for 1914: Jan. 22; Feb. 10, 11, 12, 13, 16, 17, 19, 20, 26, 28; March 10, 11, 12, 21, 26, 27, 28, 31; Apr. 24, 28, 29; May 4. *See also* Veto Message of the President of the United States, without approval Senate Bill 7978, entitled "An Act Relating to inherited estates in the Five Civilized Tribes in Oklahoma." Senate Doc. 899, 62nd Congress, 2nd Session, August 6, 1912; The Five Civilized Tribes—Why They Employ Attorneys—Speech of Hon. William H. Murray, *Congressional Record,* No. 78, Vol. 51, Feb. 11, 1914.

This constant Congressional attention resulted in continuing Federal law enforcement on the Creek Reservation. One example was the massive devotion of Federal resources to liquor prosecutions, as noted by the Court in *United States v. Birdsall*, 233 U.S. 223 n.4 (1914) (recounting that the criminal docket had become so crowded with liquor-related cases that it threatened the availability of a timely trial). To address the criminal "traffic in intoxicating liquors," Congress initially appropriated $25,000 in 1906, which grew to $40,000 in 1909 and $70,000 in 1911. *Ibid.* The freshly appropriated funds allowed federal law enforcement to hire additional personnel and build a team of 159 officers. *Ibid.* In 1912, Congress gave these agents the powers of United States marshals and deputy marshals. Act of August 24, 1912, 37 Stat. 518, 519. These efforts marked a substantial devotion of Federal law enforcement resources, nearly unprecedented in their time.

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[7] *Id.* at 136-137.

Likewise, the Congress' keen interest made plain to the Solicitor of the Department of the Interior (and author of the foremost Indian Law treatise), Felix Cohen, that the Creek Reservation and Federal interests therein persisted: "The entry of Oklahoma into statehood did not disturb the interests of the United States over the Indians for 'Congress was careful to preserve the authority of the Government of the United States over the Indians, their lands and property, which it had prior to the passage' of the Oklahoma enabling act of June 16, 1906 (34 Stat. 267)." Opinion of Acting Solicitor Felix M. Cohen, Department of the Interior, August 24, 1942, M-30582. Cohen continued, finding that allotment and creation of permanent homes for Creeks "did not terminate the guardianship relation existing between the Indians and the United States and they continued to be subject to the legislation of Congress enacted in the exercise of the Government's relationship over the nations and their affairs."[8]

Congress is no less interested in the Creek Reservation today. Indeed, this case is in the headlines in Oklahoma and beyond. The undersigned observed two United States Senators, including Senator Lankford (Okla.) at the *Carpenter v. Murphy* oral argument before the Court in November 2018. When Chief Justice Roberts pressed counsel for the Muscogee (Creek) Nation about the potential pace of Federal-State-

[8] The Interior Solicitor's Office had confirmed this similar understanding in Opinion M-7996 (August 2, 1922): finding that Congress had not released any of the Federal powers as to Indians that it had retained at Oklahoma's statehood and determining that Oklahoma probate courts could not displace the Department's "free and untrammeled control of Indians of the restricted class which it had therefore exercised."

Tribal negotiations to resolve these issues, a bipartisan group of Senators was already looking on.

III. Congress is best situated to determine the public safety needs and requirements of the Reservation with due consideration of Federal, State and Tribal concerns.

"It is emphatically the province and duty of the judicial department to say what the law is," *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), but only within the limited options presented by the case before the Court. Here, the Court faces a binary choice: Either a rural home in Broken Arrow, Oklahoma is part of the Creek Reservation or it is not, and thus either the State court had criminal jurisdiction or it did not.

Congress has no such limitations. It is not constrained to debate the meaning and purpose of Allotment Era statutes; instead, Congress has the authority to hold hearings on the present capacity of the Tribe to provide criminal justice services, and to take testimony from both State and Tribal officials and others regarding how they would prefer to distribute responsibility and jurisdiction. Congress is the only branch of government that has the tools at its disposal to reach a solution regarding the Creek Reservation that is respectful and practical.

More specifically, Congress has numerous options when faced with issues such as the appropriate scope of Federal, State and Tribal criminal jurisdiction in Oklahoma. For instance, Congress might leave the Reservation fully or partially intact and provide additional funding and support for tribal and federal law enforcement. The Federal government already funds

several important programs to improve criminal justice in Indian country, and these or similar programs could be expanded to address the concerns raised by the State of Oklahoma and others.

In the years 2014 and 2015, BIA funding for law enforcement programs was $213.0 million and $212.0 million, with 37% spent on BIA direct service programs and the remainder on tribally run programs.[9] BIA funding for detention and corrections programs was $105.4 million and $108.9 million and for tribal courts was $29.3 million and $29.4 million. *Id.* Other programs are run out the Department of Justice, including the Tribal Courts Assistance Program, which provides grants to support tribal justice systems, authorized by 25 USC § 3689(a) (Public Law 106-559) (25 USC 3689(a)) and the Tribal Civil and Criminal Legal Assistance Program (TCCLA), authorized by 25 U.S.C. 3651, *et seq*. (Public Law 106-559). Congress can provide additional funding to the Creek Tribe to help it take on its increased responsibilities. And, of course, it can expand the Federal law enforcement resources available in this part of Oklahoma.

Second, Congress could pass specific legislation regarding the division of responsibilities and criminal jurisdiction between the Tribal, State and federal governments. Just as PL-98-290 carved out the largest town on the Southern Ute Reservation and placed it under state criminal jurisdiction, Congress could

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[9] Bureau of Indian Affairs – Office of Justice Services, Report to the Congress on Spending, Staffing, and Estimated Funding Costs for Public Safety and Justice Programs in Indian Country (Sept. 17, 2017) at 2, available at https://www.bia.gov/sites/bia.gov/files/assets/bia/ojs/ojs/pdf/Report_Final-Cleared.pdf.

place the city of Tulsa and surrounding communities under State criminal jurisdiction or provide for concurrent jurisdiction. Congress might alternatively provide for concurrent state and tribal jurisdiction over the state of Oklahoma just as it has for Alaska, California, Minnesota, Nebraska, Oregon and Washington in PL-83-280 (18 U.S.C. § 1162, 25 U.S.C. § 1360).

Third, Congress could redraw the boundaries of the Creek Reservation to include areas that remain heavily Creek, while excluding areas that have a predominantly non-Indian character. Because Congress's powers extend beyond simply drawing boundaries, such legislation could include provisions that would recognize, support and expand the sovereignty of the Tribe on its remaining reservation, such as assisting with the reacquisition of Tribal trust lands, and strengthening Tribal civil jurisdiction and taxing authority.

Another issue which has not been emphasized by litigants or *amici*, but which might lend itself to deliberation in the Congressional law-making process, is the application of 18 U.S.C. § 3598, which provides that "no person subject to the criminal jurisdiction of an Indian tribal government shall be subject to a capital sentence under this chapter for any offense the Federal jurisdiction for which is predicated solely on Indian country (as defined in section 1151 of this title) and which has occurred within the boundaries of Indian country, unless the governing body of the tribe has elected that this chapter have effect over land and persons subject to its criminal jurisdiction." Under this Federal statute, capital punishment may only be

imposed for crimes arising on the Reservation committed by Indians if the Tribe consents. While not applicable to Petitioner, this concern is evident in other cases and again, is appropriately a judgement for Congress to adjust if it so determines.

These examples are illustrative only; amici do not suggest that they are necessary or desirable. Whichever combination of scenarios that might arise in response to the decision by the court below, "[t]he first and governing principle is that only Congress can divest a reservation of its land and diminish its boundaries." *Solem*, 465 U.S. at 470.

As in the interstate commerce context, Congress has the final say over reservation boundaries and it can change the rule challenged here based on its considered review of the issues and priorities involved. The Congressional forum is best suited to ensure participation by the State and the Tribe in that dialogue. Congress alone has the constitutional expertise and authority to address changes to the reservation policies that have persisted for several hundred years.

CONCLUSION

However grudging the continued existence of the Creek Reservation may have been in early the 20th Century, as a matter of Federal law enforcement practice, Department of the Interior understanding, and Congress' plain words, the Reservation persisted. Even if the Court believes Congress has been unclear or delinquent as to the status of the Reservation, it is not for this Court to fashion a remedy—that is the sole province of Congress. The Tenth Circuit's holding in *Murphy v. Royal*, 875 F.3d 896 (10th Cir. 2017) should be affirmed.

Respectfully submitted.

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