No. 18-9526

In The
Supreme Court of the United States

JIMCY MCGIRT,

Petitioner,

v.

OKLAHOMA,

Respondent.

On Writ Of Certiorari To The Court Of Criminal Appeals Of Oklahoma

BRIEF OF *AMICI CURIAE* HISTORIANS, LEGAL SCHOLARS, AND CHEROKEE NATION IN SUPPORT OF PETITIONER

SARA HILL
Attorney General
CHRISSI ROSS NIMMO
Deputy Attorney General
Counsel of Record
STACY LEEDS
Special Attorney
CHEROKEE NATION
Post Office Box 1533
Tahlequah, Oklahoma 74465-1533
(918) 458-6998
chrissi-nimmo@cherokee.org

L. SUSAN WORK
Attorney at Law
P.O. Box 1545
Norman, Oklahoma
73070-1545
(405) 209-7856
susan@worklawoffice.com

Counsel for Amici Curiae

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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INTEREST OF *AMICI CURIAE*[1]

Amici Curiae are the following historians and legal scholars, many of whom have expertise in Oklahoma history and who teach and write about federal Indian policy and tribes: Gregory Ablavsky, Assistant Professor, Stanford College of Law; C. Joseph Genetin-Pilawa, Associate Professor of History, George Mason University; Frederick Hoxie, Professor Emeritus of History, University of Illinois, Urbana-Champaign; Tom E. Luebben, former adjunct law professor, University of New Mexico; Devon A. Mihesuah, Cora Lee Beers Price Teaching Professor in International Cultural Understanding, University of Kansas; Lindsay Robertson, Faculty Director, Center for the Study of American Indian Law and Policy, University of Oklahoma College of Law; Casey Ross, Director of the American Indian Law and Sovereignty Center, Oklahoma City University School of Law; Mark R. Scherer, Professor of History at the University of Nebraska-Omaha; and Charles Wilkinson Distinguished Professor Emeritus and Moses Lasky Professor of Law Emeritus, University of Colorado. The Cherokee Nation, one of the "Five Civilized Tribes" (Muscogee (Creek), Cherokee, Choctaw, Chickasaw and Seminole Nations) ("Five Tribes"), is also an *amicus*. *Amici* have an interest in ensuring that this Court is correctly informed as to the legal history of the

[1] Pursuant to Supreme Court Rule 37.6, *Amici Curiae* state that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *Amici Curiae* and their counsel, made any monetary contribution toward the preparation or submission of this brief. All parties have consented to the filing of *amicus* briefs.

Five Tribes. *Amici* file this brief in support of the petitioner.

SUMMARY OF ARGUMENT

The Muscogee (Creek) Nation ("Creek Nation" or "Creeks") has been subject to the same cyclical federal policies as other tribes nationwide. Federal removal policy followed settler invasion of Creek homelands in present day Georgia and Alabama. In accordance with removal policy, Creek citizens were forced to establish a new homeland in Indian Territory, now Oklahoma, in the 1830s. After the tragic effects of the federal removal policy, including the loss of thousands of lives, the Creeks rebuilt and reestablished their government institutions, including a fully-functioning judiciary, on their new reservation.

By the latter part of the nineteenth century, Creek Nation's new reservation was again invaded by settlers. The federal government placed enormous pressure on Creeks Nation to agree to allot its lands, to achieve implementation of federal allotment and assimilation policies. During this time, the United States established federal courts in Indian Territory as a means to deal with crimes committed by non-Indian intruders.

Creek Nation soon found its reservation within the geographic boundaries of Oklahoma. Oklahoma eventually asserted criminal authority over reservation crimes, contrary to federal laws. Federal officials

did not come to Creek Nation's aid, but instead, opposed the 1906 Congressional mandate that continued federal recognition of Creek governmental power. Federal officials aggressively interfered with the continued Creek exercise of governmental authority, making resistance to state control much more difficult. During this time, Creek citizens became victims of state-sanctioned fraudulent land transactions. Oklahoma's unlawful exercise of jurisdiction over reservation offenses provided no protection to Creeks.

By the 1970s and 1980s, Creek Nation benefitted from Congressional promotion of tribal self-governance. Creeks were, once again, rebuilding their government, including the revitalization of tribal courts, under a new Creek constitution. Simultaneously, state and federal courts ruled in several cases that Oklahoma lacked jurisdiction over crimes by or against Indians on restricted allotments, trust allotments, and tribal trust lands in Oklahoma. Today, Creek Nation is thriving and exercising the same governmental authority as other tribes nationwide.

The scope of Creek governmental power is distinct and separate from the Creek reservation boundary inquiry. Over time, the United States has narrowed and expanded recognized tribal government powers through judicial decisions and Congressional action. Recognized Creek Nation government powers have changed depending on federal policy eras, but these changes have nothing to do with reservation disestablishment. As petitioner's brief discusses in detail, the factors that lead to reservation disestablishment

under well-established precedent of this Court are absent in this case. Creek treaties and allotment agreements ceded no lands within the Creek reservation, and Congress therefore had no lands to restore to the public domain. The reservation boundaries of Creek Nation were never disestablished.

ARGUMENT

I. CREEK NATION SURVIVED FEDERALLY FORCED EMIGRATION FROM PRESENT DAY ALABAMA AND GEORGIA TO INDIAN TERRITORY.

Between 1802 and 1833, the Creeks ceded their homelands, which spanned millions of acres, in present day Alabama and Georgia. FRANCIS PAUL PRUCHA, THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS 219-22 (1984) ("PRUCHA"); GRANT FOREMAN, THE FIVE CIVILIZED TRIBES: CHEROKEE, CHICKASAW, CHOCTAW, CREEK, SEMINOLE 210 (1934) ("FOREMAN, TRIBES"); ANGIE DEBO, THE ROAD TO DISAPPEARANCE – A HISTORY OF THE CREEK INDIANS 94 (1941) ("DEBO, ROAD"). Although "the vast majority of Creeks opposed emigration," CHRISTOPHER D. HAVEMAN, "*Last Evening I Saw the Sun Set for the Last Time*," 5 Native South 61 (2012) ("HAVEMAN"), most were removed to Indian Territory by 1836. This achieved the contemporaneous federal policy goal of separating Indians from non-Indians by relocating Indians to permanent reservations. FREDERICK E. HOXIE, A FINAL PROMISE: THE CAMPAIGN TO ASSIMILATE THE INDIANS, 1880-1920 2-3

(1984). After removal, the Five Tribes occupied their land under federal superintendence in an area that was "widely separated from white communities." *Marlin v. Lewallen*, 276 U.S. 58, 60-62 (1928).

Georgia became a state in 1788. 2 BUREAU OF ROLLS AND LIBRARY, WASH. DEP'T OF STATE, *Documentary History of the Constitution of the United States of America* 65-66, 82-85 (1894). By 1802, Creeks were hemmed in on three sides by non-Indian settlements, notwithstanding 1790 treaty guarantees of protection. DEBO, ROAD 72-73; PRUCHA 219. Creek leaders tried unsuccessfully to maintain peace between the invading settlers and those Creek factions who actively resisted the invasion. DEBO, ROAD 76, 78. After internal battles among Creeks began in 1813, Tennessee and Georgia militias and federal troops engaged in the "pitiless extermination" of Creeks, clearing the way for Alabama Territory in 1817 and Alabama statehood in 1819. DEBO, ROAD 79-81, 86.

Although Creeks had long self-governed, a few Creek leaders believed that only the acquisition of the white man's culture would save them from extinction. DEBO, ROAD 85. Even while the states and settlers trampled on Creek rights, the Creek council formally adopted a written code in 1817 that included punishments of Creek offenders for various crimes, including murder of non-Indians, punishable by death. *Id.* In contrast, non-Indians murdered Creek citizens with impunity. *Id.* at 86.

In 1828, approximately 1300 Creeks emigrated to Indian Territory, joining a number who had emigrated in 1817. DEBO, ROAD 87, 95. By the fall of 1828, Alabama threatened to extend state laws over the remaining Creeks. DEBO, ROAD 96. In 1829, Alabama unilaterally added the Creek territory to organized counties and claimed jurisdiction of local courts over Indians. DEBO, ROAD 97; PRUCHA 221. "[T]he Federal Government had ample authority . . . to protect the Creek Nation" but "determined it would not oppose Alabama's actions." *United States v. Creek Nation*, 476 F.2d 1290, 1293 (Ct. Cl. 1973). "The press of white settlers to overtake Indian lands in the Eastern United States . . . found expression in a formal declaration of policy by Congress in the Act of May 28, 1830, 4 Stat. 411 [Indian Removal Act]." *Id*. The United States claimed that the only salvation for the Creeks lay in removal. PRUCHA 221; DEBO, ROAD 98.

This Court issued two seminal decisions in cases involving Cherokee Nation resistance to Georgia citizens' trespasses on Cherokee lands during this same time period. In *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet. 1) 1, 17 (1831), the Court held that the Cherokee Nation is a "domestic dependent nation." In *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), the Court ruled that Georgia laws did not apply on Cherokee Nation land. Despite this Court's decisions, President Jackson persisted in his own executive efforts to free Georgia from the inconveniences caused by the presence of domestic dependent nations within Georgia boundaries.

These events led to the 1832 Creek removal treaty. PRUCHA 221; Treaty with the Creeks, 7 Stat. 366 (1832). The treaty ensured the Creeks' option to reserve ownership in tracts within the ceded area, ranging in size between 320 acres for heads of family and 640 acres for ninety headmen, HAVEMAN 63, but reiterated the United States' desire that Creeks remove west of the Mississippi. Arts. 2, 12, 7 Stat. 366. The treaty prohibited passage of any state or territorial laws "for the government of such Indians" in the western lands, and guaranteed Creek self-governance there "so far as may be compatible with the general jurisdiction which Congress may deem proper to exercise over them." *Id.* at art. 14. "The [treaty] article that the Creeks never forgot was the pledge of future autonomy" in the west. DEBO, ROAD 99; art. 14, 7 Stat. 366.

Although the 1832 treaty provided strong protections for the Creeks, its implementation was "disastrous." PRUCHA 222. Only a small number migrated westward in 1834, and the remaining Creek homelands in the East were quickly overrun by settlers. *Id.* The Creeks who remained in Alabama suffered "spectacular and widespread" land fraud. *Id.* The Alabama courts, which were controlled by land speculators, DEBO, ROAD 103, permitted non-Indians to administer Creek estates and secure title to acreage to which the deceased was entitled, "leaving nothing for his family or heirs." GRANT FOREMAN, INDIAN REMOVAL 129 (1932) ("FOREMAN, REMOVAL"). Land speculators secured deeds to individual Creek lands on a large scale, based on fraudulent transactions certified by federal agents.

Id. at 130-31, 137. Fraudulent schemes included sales by impersonators of the true owners, many of whom were elderly, close to death, or very young; forcing return of payments after sales; threats of imprisonment; and harassment. HAVEMAN 66-69.

During this time, Alabama and Georgia laws purported to strip tribal officials of authority over tribal citizens by threatening them with dire punishment for attempting to enforce Creek laws. FOREMAN, REMOVAL 137. The people of Georgia and Alabama "were absolutely savage" toward dispossessed and destitute Creeks, and "demanded that the government hunt them down like wild beasts." DEBO, ROAD 100. Troops subdued Creek resistance in 1836, and 14,609 Creeks were removed to Indian Territory, including "hostiles" handcuffed, chained, and guarded by soldiers. PRUCHA 223, DEBO, ROAD 101-02. Others were hunted and removed in 1837. DEBO, ROAD 101. Thousands died en route and during the first two to three years after arrival. FOREMAN, TRIBES 211. In the twenty-year period after the 1832 removal treaty, the Creek population decreased by over 10,000 citizens. *Id*.

The Creeks owned their new lands in fee under their 1833 Treaty, which promised that such fee title would continue so long as Creek Nation should exist and occupy the country assigned. Treaty with the Creeks, art. 3, 7 Stat. 417 (1833). This title was later evidenced in a fee patent signed by the President of the United States on August 11, 1852. *Woodward v. De Graffenried*, 238 U.S. 284, 293-94 (1915). "The other four tribes held similar fee patents." *Id*. at 294.

II. CONGRESS THREATENED CREEK SOVEREIGNTY TO FORCE CREEK AGREEMENT TO ALLOT TRIBAL LANDS.

A. Congress Applied the Federal Allotment and Assimilation Policy to Creek Nation in the Late Nineteenth Century.

Creek Nation eventually rebounded after removal. Homes and ranches were built on the Creek reservation; towns and schools were established; and ferries maintained. DEBO, ROAD 17, 19, 110, 116-21, 289, 332-33. Creek Nation operated under a constitutional government, the most recent of which, before statehood, was the 1867 Constitution, with executive, legislative and judicial branches. *Woodward*, 238 U.S. at 293-94; DEBO, ROAD 179-80. Creek Nation established a lighthorse police force and the tribal court exercised civil and criminal jurisdiction, applying an array of Creek statutory and common laws. DEBO, ROAD 181-82.

After the U.S. Civil War, westward expansion caused a "shrinking reservoir of 'vacant' land." HOXIE 43. Federal policy began to shift due to political, economic, and commercial expansion. HOXIE 2-3, 11-13. The resulting allotment and assimilation policy became a dominant force in the late 1800s. By assigning to individual Indians a share of the tribal land base, Congress hoped to allow settlers to acquire the lands while helping Indians learn farming and be transformed into prosperous U.S. citizens. D. S. OTIS, THE DAWES ACT AND THE ALLOTMENT OF INDIAN LANDS 8-9, 12-22, 77-80 (1973) ("OTIS"); HOXIE 75.

The allotment and assimilation policy was applied nationwide to tribes located both in federal territories and within state boundaries. Proponents of this policy had several reasons for its implementation. For example, critics characterized Indian reservations (regardless of whether owned by the United States in trust for the benefit of a tribe, or, in the case of Creek Nation, owned by the tribe in fee for the benefit of tribal members) as "communist." OTIS 11, 54-55. This criticism of communal ownership was a major factor in the federal push to allot lands in Indian Territory. *Heckman v. United States*, 224 U.S. 413, 434, 438 (1912); *see also Woodward*, 238 U.S. at 297, 305, 309.

The non-Indian outcry for more land in the western United States by the late nineteenth century was another precipitating factor. As Texas and Kansas "began to be filled up with settlers, longing eyes were turned by many upon this body of land lying between them, occupied only by Indians." *Smith v. Townsend*, 148 U.S. 490, 493 (1893). The non-Indian population flowed into Indian Territory, disregarding the 1879, 1880, 1884, and 1885 proclamations by successive presidents "warning against such entry and occupation." *Marlin*, 276 U.S. at 58, 61-62; *Smith*, 148 U.S. at 495-96. This influx included settlement in towns mostly occupied by non-Indians who, while having no legal claim to the underlying land, erected improvements "worth many thousands of dollars." *Johnson v. Riddle*, 240 U.S. 467, 476-77 (1916). This caused Congressional concern regarding the "equities" between

the tribes who owned the lands and the non-citizens who had built the town site improvements. *Id*. at 477.

As a "logical part" of the allotment policy there were "frequent allusions to the fact that the Indians were of course making no use of natural resources which should be developed in the interests of civilization." OTIS 17-18. The Five Tribes' rich natural resources added to the interest in removing tribal title through allotment and potentially making these resources, some of which were already subject to non-Indian development, even more accessible. These tribal natural resources included coal valued at more than $4.3 billion, timber, lands suitable for grazing and game preserves, and huge tribal oil and gas resources. 40 Cong. Rec. 1257 (1906) (Mr. Reid); 40 Cong. Rec. 3213, 4390-92 (1906) (Sen. LaFollette); DEBO, ROAD 197, 368; LOUIS WELSH ET AL., A HISTORY OF THE GREATER SEMINOLE OIL FIELD 6-7 (1981); "Oil Fields Are Best in the World," Oklahoman, Mar. 26, 1905 at 1.

B. The Fee Patents Held by the Five Tribes, Including Creek Nation, Led to Coercive Congressional Measures to Force Tribal Agreement to Allotment.

In 1887, Congress enacted the General Allotment Act, also known as the Dawes Act. Act of Feb. 8, 1887, ch. 119, 24 Stat. 388. Lands of many tribes were allotted under this law, but it expressly excluded the Five Tribes and a few other Indian Territory tribes. *Id*. at § 8. It was believed that "[r]eservations should be

taken first which are ripest for the work, where the way is clear, the risks small, the complications few." HOXIE 79.

The path to allotment was not clear with the Five Tribes' lands because they owned their reservations in fee title. Members of Congress doubted whether Congress "had any authority to interfere with the rights of those Indians" in Indian Territory. 18 Cong. Rec. 191 (1886) (Mr. Perkins). Although this Court later ruled that the federal government could achieve allotment with or without tribal consent in *Cherokee Nation v. Hitchcock*, 187 U.S. 294, 305 (1902), and *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903), federal officials remained concerned about the potential invalidity of the United States' conveyances of Five Tribes' fee title to their lands. Federal officials took the safer route by seeking allotment agreements that required tribal officials to execute the deeds as an intra-tribal property transfer. *Woodward*, 238 U.S. at 294.

The Five Tribes' steadfast resistance to negotiate for allotment of their lands led to the establishment of the Commission to the Five Civilized Tribes ("Dawes Commission"). Act of Mar. 3, 1893, ch. 209, § 16, 27 Stat. 612, 643-45. It required ten years of negotiations for the Dawes Commission to secure allotment agreements with all Five Tribes – but only after enactment of coercive laws that threatened, among other things, the extinction of tribal courts.

An 1897 statute was the first law "designed to coerce the tribes to negotiate with the Commission,"

Muscogee (Creek) Nation v. Hodel, 851 F.2d 1439, 1441 (D.C. Cir. 1988); Act of June 7, 1897, ch. 3, 30 Stat. 62, 83 ("1897 Act"). The 1897 Act provided that after January 1, 1898, the federal courts in Indian Territory "shall have original and exclusive jurisdiction and authority to try and determine all . . . criminal causes for the punishment of any offense committed" after that date. 30 Stat. 62, 83. However, the 1897 Act included the qualification that any agreement with a tribe, when ratified, would "operate to suspend any provisions of this Act if in conflict therewith as to said nation." *Id.* Congress understood that the threat to abolish exclusive tribal court jurisdiction over tribal citizens, together with this proviso, was "intended to drive them into an agreement with the Dawes Commission, and if they do not agree to it, they shall get this terrible blow. . . ." 29 Cong. Rec. 2310 (1897) (Sen. Bate).[2]

The Act of June 28, 1898, ch. 517, 30 Stat. 495 ("Curtis Act"), contained similar threats to tribal judicial authority. Section 28 threatened the abolishment of "all tribal courts in Indian Territory" and the

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[2] Although lacking in clarity, the 1897 Act threatened an implied repeal of provisions protecting tribal courts in the Act of May 2, 1890, ch. 182, 26 Stat. 81 ("1890 Act"). The 1890 Act established and authorized a non-Indian territorial government for Oklahoma Territory in the western portion of Indian Territory. *Id.*, §§ 1-28. Sections 30 and 31 of the 1890 Act expressly preserved exclusive jurisdiction in the Five Tribes over all cases involving tribal members as the sole parties in the reduced Indian Territory. *Id.*; *see Talton v. Mayes*, 163 U.S. 376, 381 (1896) (finding that the Cherokee Nation had exclusive jurisdiction over an 1892 Cherokee murder in the Cherokee Nation under its treaties and the 1890 Act).

transfer of tribal court cases to the federal court in Indian Territory, but provided an escape mechanism for Choctaws, Chickasaws, and Creeks. It ratified allotment agreements included in sections 29 and 30 for those tribes, subject to ratification by tribal citizens by December 1, 1898. The Creek Agreement included a provision in ¶ 37 that would have expressly protected Creek courts. The Creeks did not ratify their agreement by the deadline, and their final allotment agreement expressly provided that it was not to be construed to revive or reestablish the Creek courts. 31 Stat. 861, ¶ 47; *Woodward*, 238 U.S. at 311-12.

Notwithstanding this punitive treatment of the Creeks, Congress did not view tribal court termination as a pre-requisite to statehood. This is demonstrated by varying Congressional treatment of the courts of the other four of the Five Tribes. The Choctaws and Chickasaws approved their agreement on August 24, 1898, before the deadline established in the Curtis Act. 1899 Ann. Rep. Comm. Five Civ. Tribes 9 ("1899 FCT Rep.").[3] Their agreement did not abolish tribal courts, instead authorizing only a limited grant of federal court jurisdiction over certain land matters, homicide, embezzlement, bribery, disturbance of the peace, and carrying weapons. § 29, 30 Stat. 495.[4] The Seminole Agreement contained a similar limited grant of federal

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[3] http://images.library.wisc.edu/History/EFacs/CommRep/AnnRep99p2/reference/history.annrep99p2.i0004.pdf.

[4] *See Hodel*, 851 F.2d at 1441-42. An appropriations act, Act of Mar. 1, 1907, ch. 2285, 34 Stat. 1015, 1027, later purportedly abolished Choctaw and Chickasaw Nation courts.

jurisdiction, and expressly protected Seminole courts. Act of July 1, 1898, ch. 542, 30 Stat. 567. The final Cherokee agreement, unlike earlier versions, did not abolish Cherokee courts and expressly preserved only two Curtis Act sections unrelated to tribal judicial functions. Act of July 1, 1902, ch. 1375, § 73, 32 Stat. 716; *compare* Act of Mar. 1, 1901, ch. 675, pmbl. and § 72, 31 Stat. 848 (agreement not effective because not ratified by Cherokees), 1900 Ann. Rep. Comm. Five Civ. Tribes 13, 37, 45, Appendix No. 1, § 80;[5] 1899 FCT Rep. 49, 57, Appendix No. 2, § 71.

The abolition of Creek Nation courts placed the Creeks in the same position as numerous other tribes without tribal courts nationwide. For those tribes, Department of the Interior ("DOI") Courts of Indian Offenses exercised criminal jurisdiction over Indian offenders. The status of tribal courts nationwide has fluctuated significantly over time, and is unrelated to the inquiry of reservation disestablishment.

Notwithstanding these details, federal officials found it expedient in subsequent years to erroneously proclaim that the Curtis Act abolished the tribal courts of all of the Five Tribes, but the pendulum of ever-changing federal policy continued to swing. After battles with DOI over the exercise of tribal judicial authority under its 1979 constitution, the Creeks finally won in 1988. In *Hodel*, the D.C. Circuit ruled that section 9 of the OIWA, now codified at 25 U.S.C. § 5209,

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[5] http://images.library.wisc.edu/History/EFacs/CommRep/AnnRep1900p2/reference/history.annrep1900p2.i0003.pdf.

repealed the Curtis Act and re-established Creek judicial authority, "subject to limitations imposed by statutes generally applicable to all tribes." *Hodel*, 851 F.2d at 1446-47. The court recognized that federal policy requires the recognition of Creek sovereign authority on an equal level with other tribes, and expressly rejected DOI's statutory interpretation that "would result in a perpetuation of the piecemeal legislation rather than its elimination." *Id*. at 1445-46. Creek Nation has exercised criminal jurisdiction in Indian country, mostly misdemeanors by Indian offenders, for more than thirty years.

III. FEDERAL LEGISLATION GOVERNING FEDERAL COURT JURISDICTION IN THE STATE OF OKLAHOMA CONTINUES FEDERAL JURISDICTION OVER CRIMES BY AND AGAINST INDIANS ON THE CREEK RESERVATION.

A. Congress Enacted the General Crimes Act and Major Crimes Act to Address Crimes Arising on Indian Country throughout the United States.

The United States' policy concerning "the Indian country" criminal prosecutions began with federal enactments as early as 1796. *Ex parte Crow Dog*, 109 U.S. 556, 571 (1883). As of 1883, this federal policy was embodied in the General Crimes Act ("GCA"), Rev. Stat. §§ 2145 and 2146, codified at 18 U.S.C. § 1152. *See Ex parte Crow Dog*, 109 U.S. at 558. Offenses enumerated and defined under the general laws of the United

States which were committed in "the Indian country" by Indians against "white persons," and by "white persons" against Indians, were federal offenses, and those by Indians against each other in "the Indian country" were left to each tribe according to its local laws and customs. *Id.* at 568, 571-72 (Indian on Indian murder on Sioux reservation subject to tribal, rather than federal, jurisdiction under Rev. Stat. § 2146).

In direct response to *Crow Dog*, Congress enacted the Major Crimes Act, Act of Mar. 3, 1885, ch. 341, § 9, 23 Stat. 362, 385 ("MCA"), codified at 18 U.S.C. § 1153; *see United States v. Kagama*, 118 U.S. 375, 382-83 (1886); *United States v. John*, 437 U.S. 634, 649, n.18 (1978). The MCA conferred federal jurisdiction over certain enumerated major crimes by an Indian offender against an Indian or non-Indian victim, including murder, when committed on an "Indian reservation" within a state or federal territory. § 9, 23 Stat. 362, 385. Like many other laws governing Indian affairs, this law has evolved over time.[6]

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[6] Reservation lands include fee lands within reservation boundaries. *United States v. Celestine*, 215 U.S. 278, 284-87 (1909). In 1948, the MCA was amended to replace the term "reservation" with the broader term "Indian country," which was "used in most of the other special statutes referring to Indians. . . ." *See John*, 437 U.S. at 647, n.16, 649 (citing 18 U.S.C. § 1153). The 1948 amendments also added a definition of "Indian country" based on this Court's definitions of Indian country in decisions issued after enactment of the MCA. 18 U.S.C. § 1151; *see Donnelly v. United States*, 228 U.S. 243 (1913) (reservations); *United States v. Sandoval*, 231 U.S. 28, 47 (1913) (dependent Indian communities); *United States v. Pelican*, 232 U.S. 442 (1914) (trust allotments); and *United States v. Ramsey*, 271 U.S. 467, 469 (1926) (restricted allotments).

B. Beginning in 1877, Congress Enacted a Number of Laws Establishing Federal Court Jurisdiction in Indian Territory and Expanding that Jurisdiction.

In its 1866 treaty, Creek Nation agreed to such legislation as Congress deemed "necessary for the better administration of justice and the protection of the rights of person and property within the Indian Territory," provided that such legislation would not interfere with Creek organization, rights, laws, privileges, and customs. Treaty with the Creek Indians, art. 10, 14 Stat. 785 (1866). The federal government did not recognize tribal law enforcement authority over U.S. citizens, and as Indian Territory became "the refuge of thousands of evil-doers" who had fled the states, federal protection was needed. 1886 Ann. Rep. Comm'r Ind. Aff. 91.[7] The "Indian police," under federal agency supervision, assisted United States marshals and tribal police with law enforcement. ANGIE DEBO, THE RISE AND FALL OF THE CHOCTAW REPUBLIC 185, 189 (1934).

Congress began implementing federal criminal jurisdiction in Indian Territory in 1877. Congress utilized federal courts in the bordering states of Arkansas

[7] https://digitalcommons.law.ou.edu/cgi/viewcontent.cgi?article=6746&context=indianserialset.

and Texas, as well as a federal court in Muskogee, Indian Territory.[8] When Congress carved Oklahoma Territory out of Indian Territory in 1890, Congress specified the jurisdiction to be exercised by these courts over the reduced federal Indian Territory. § 33-35, 26 Stat. 81. The 1890 Act authorized federal courts to enforce certain Arkansas laws, except "if in conflict with this act or with any law of Congress" and to enforce Arkansas criminal laws "as far as they are applicable." §§ 31, 33, 26 Stat. 81.

Federal courts in Indian Territory had authority to enforce general federal laws, such as the GCA, consistent with the 1890 Act's requirement that "all general laws of the United States which prohibit crimes and misdemeanors in any place within the sole and exclusive jurisdiction of the United States . . . shall have the same force and effect in the Indian Territory as elsewhere in the United States." § 31, 26 Stat. 81. In cases where the laws of the United States and Arkansas laws concerned the same offense, "the laws of the United States shall govern as to such offense." *Id*. at § 33. "The [Five] tribes, however, retained exclusive

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[8] *See* Act of Jan. 31, 1877, ch. 44, 19 Stat. 230 (federal court in Ft. Smith, Arkansas); Act of Jan. 6, 1883, ch. 13, § 3, 22 Stat. 400 (federal court for northern district of Texas with jurisdiction over offenses in described areas not set apart for any of the Five Tribes "against any of the laws of the United States now or that may hereafter be operative therein"); Act of Mar. 1, 1889, ch. 333, §§ 1, 5, 25 Stat. 783 (federal court in Muskogee, Indian Territory, with jurisdiction over "all offenses against the laws of the United States committed within the Indian Territory . . . not punishable by death or by imprisonment at hard labor.").

jurisdiction over all civil and criminal disputes involving only tribal members, and the incorporated laws of Arkansas did not apply to such cases. *See id.* § 30, 26 Stat. at 94." *Indian Country, U.S.A., Inc. v. Oklahoma ex rel. Oklahoma Tax Comm'n*, 829 F.2d 967, 977-78 (10th Cir. 1987), *cert. denied*, 487 U.S. 1218 (1988); *see also* § 31, 26 Stat. 81.

In 1895, Congress repealed all laws that previously conferred jurisdiction on the federal courts in Arkansas, Kansas, and Texas over offenses committed in Indian Territory, effective September 1, 1896. Act of Mar. 1, 1895, ch. 145, § 9, 28 Stat. 693 ("1895 Act"). Under the 1895 Act, "the jurisdiction now conferred by law upon said courts is hereby given from and after said date aforesaid to the United States court in Indian Territory," including jurisdiction over "all offenses against the laws of the United States" committed in Indian Territory. *Id*. The 1895 Act further provided that the laws of the United States and Arkansas "heretofore put in force in said Indian Territory" were to remain in "full force and effect" in Indian Territory, except so far as they were in conflict with the 1895 Act. *Id*. at § 13.

C. The 1906 Oklahoma Enabling Act Did Not Authorize State Jurisdiction over Crimes by or Against Indians on the Creek Reservation.

Section 13 of the Oklahoma Enabling Act, Act of June 16, 1906, ch. 3335, 34 Stat. 267 ("Enabling Act"),

replaced the application of Arkansas laws after statehood with "the laws in force in the Territory of Oklahoma, *as far as applicable* . . . until changed by the legislature thereof." (emphasis added). This enabled Oklahoma courts, until such time as Oklahoma adopted its own criminal laws, to apply Oklahoma Territory criminal laws to crimes subject to state jurisdiction, such as crimes by non-Indians against non-Indians on Indian country, and crimes by anyone outside Indian country. *See United States v. McBratney*, 104 U.S. 621, 624 (1881).

The "laws in force" in Oklahoma Territory referenced in section 13 of the Enabling Act, 34 Stat. 267, included federal laws, such as the GCA and the MCA. In accordance with the continued applicability of federal laws in the new state, section 16 of the Enabling Act, as amended in 1907, required the transfer to the new federal courts of prosecutions of "all crimes and offenses" committed within Indian Territory "which, had they been committed within a State, would have been cognizable in the Federal courts." Act of Mar. 4, 1907, ch. 2911, § 1, 34 Stat. 1286. This includes crimes under the GCA and the MCA. *See Ramsey*, 271 U.S. at 469. Conversely, section 20 of the Enabling Act, as amended in 1907, established Oklahoma courts as successors to federal courts in Indian Territory for those civil and criminal cases that were not otherwise transferred to the new federal courts. § 3, 34 Stat. 1286.

The application of the laws in force in Oklahoma Territory "as far as applicable" under section 13 of the Enabling Act, 34 Stat. 267, also authorized federal

courts, in the exercise of federal jurisdiction under the GCA and the MCA, to apply Oklahoma Territory law in the absence of a federal law governing a specific offense. Two years after statehood, Proclamation of Nov. 16, 1907, 35 Stat. 2160-61, the Assimilative Crimes Act similarly authorized federal courts, in their exercise of federal jurisdiction, to apply state laws defining offenses and punishments to crimes in Indian country within a state, in the absence of a federal law defining such offenses. Act of Mar. 4, 1909, ch. 321, 35 Stat. 1145, codified at 18 U.S.C. § 13; *see Williams v. United States*, 327 U.S. 711, 718-19 (1946). Although the applicability of federal and state criminal laws in the exercise of federal or state court jurisdiction in Indian country nationwide is fairly complex, the jurisdictional parameters are clearly defined by federal law as amended from time to time.[9]

Additionally, the Enabling Act preserved federal jurisdiction over Indians and their lands, and required Oklahoma to disclaim all right and title to such lands. §§ 1, 3, 34 Stat. 267. The Oklahoma Constitution contains the required disclaimer. Okla. Const. art. 1, § 3. DOI accordingly continued to fund the Indian police in the former Indian Territory after statehood. 1911 Ann. Rep. Comm. Five Civ. Tribes. 437;[10] *see also*

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[9] *See* Indian Country Criminal Jurisdictional Chart, W.D. Okla. (December 2010 version) at https://www.justice.gov/sites/default/files/usao-wdok/legacy/2014/03/25/Indian%20Country%20Criminal%20Jurisdiction%20ChartColor2010.pdf.

[10] http://images.library.wisc.edu/History/EFacs/CommRep/AnnRep11/reference/history.annrep11.i0005.pdf.

1909 Ann. Rep. Comm'r Ind. Affs. 106, 108-09, Table 39.[11]

IV. CREEK NATION RESISTED FEDERAL AGENCY OBSTRUCTION AND BATTLED STATE-COURT SANCTIONED FRAUDULENT LAND TRANSACTIONS FOR DECADES AFTER STATEHOOD.

A. Federal Officials Unlawfully Obstructed Creek Exercise of Governmental Powers Until Barred by the *Harjo v. Kleppe* Decision in 1976.

Even before Oklahoma statehood, federal policy began to shift from treating Indian affairs as a national concern to viewing Indian affairs as a regional concern. This increased the political power of legislators from states and territories west of the Mississippi. HOXIE 11, 12, 36-37, 104. As western states with significant Indian populations (North and South Dakota, Montana, Washington, Utah, Wyoming, Idaho, Oklahoma, Arizona, and New Mexico) entered the union between 1889 and 1912, they assumed an important role in Indian policy. *Id*. at 108, 111. By the early twentieth century, assimilation was no longer the central concern of policy makers, and the western legislators were hostile to it. HOXIE 111-13. "Optimism and a desire for rapid incorporation were pushed aside by racism, nostalgia, and disinterest." *Id*. at 113.

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[11] http://images.library.wisc.edu/History/EFacs/CommRep/AnnRep09/reference/history.annrep09.i0002.pdf.

DOI and its agency, the Bureau of Indian Affairs ("BIA"), repeatedly and unlawfully interfered with the continuing functions of the Creek government after statehood for decades, until issuance of a decision in 1976 of great significance to the Creeks, *Harjo v. Kleppe*, 420 F. Supp. 1110 (D.D.C. 1976), *aff'd sub nom. Harjo v. Andrus*, 581 F.2d 949 (D.C. Cir. 1978). That decision contained a detailed and well-documented description of Creek struggles with DOI.

Shortly before Oklahoma statehood in 1907, DOI began claiming that the continuance of Five Tribes governments in section 28 of the Act of Apr. 26, 1906, ch. 1876, 34 Stat. 137 ("Five Tribes Act"), only applied to present incumbents in office. *Harjo*, 420 F. Supp. at 1129, 1131-32, 1137. It also misinterpreted section 6 of the Five Tribes Act to justify its refusal to recognize any elected Chief absent a federal appointment, although that section only permitted appointments when necessary to prevent disruption of the signing of allotment deeds in the absence of elected tribal chiefs. *Id*. at 1126-27, 1132, 1138, 1141. For many years, DOI refused to recognize tribal elections to fill tribal legislative vacancies, refused to recognize the Chief's authority to call regular Council sessions without DOI approval, often treated the Chief as the sole Creek governmental authority, and interfered with the Creek government's expenditure of tribal funds. *Id*. at 1114, 1133-34, 1139.

The Creeks "refused to abandon their tribal government and political life," and began to hold the first of many annual "Creek Conventions" ("Convention") in

1909. *Harjo*, 420 F. Supp. at 1133. Regularly scheduled Conventions continued for decades, often without BIA recognition of legitimacy. *Id*. at 1133-38. Between 1934 and 1951, the Chief, who was elected by the Creek people and then appointed by DOI, and the Convention functioned much as the Council and Chief had earlier. *Id.* at 1136. The BIA briefly refused to recognize Creek government under a constitution and bylaws approved by the Convention in 1944, but recognized in 1946 that the Convention had been acting as the official governing body of the Creeks since 1924. *Id*. at 1137-38. In the early 1950s BIA again shifted direction, and dealt with a Council appointed by the Chief, instead of the elected Convention. *Id*. at 1138-39.

In the mid-1950s BIA returned to the unlawful practice of treating federally appointed Chiefs as the sole embodiment of Creek governmental authority. *Harjo*, 420 F. Supp. at 1139. Congress, by Act of Oct. 22, 1970, Pub. L. No. 91-495, 84 Stat. 1091, finally addressed the problem by recognizing the right of Five Tribes citizens to elect their chiefs "by popular selection." BIA, in a "determined use of its raw power," nevertheless persisted in claiming that Creek Nation was a "government by Principal Chief alone." *Id.* at 1143.

As recognized in *Harjo*, DOI's "bureaucratic imperialism," through its "deliberate attempts to frustrate, debilitate, and generally prevent from functioning" the Creek tribal government was contrary to Congress's express preservation of tribal governments in section 28 of the Five Tribes Act, including the right to elect chiefs and exercise legislative functions. *Harjo*, 420

F. Supp. at 1118, 1141-43. In 1979, the Creeks reorganized under the Oklahoma Indian Welfare Act and adopted a new constitution. Act of June 26, 1936, ch. 831, 49 Stat. 1967 ("OIWA"), codified at 25 U.S.C. §§ 5201-5210;[12] *Indian Country, U.S.A., Inc.*, 829 F.2d at 970-71. During this same period, Congress enacted the 1975 Indian Self-Determination Act, the first of many federal laws promoting development of Creek Nation and other tribes. Act of Jan. 4, 1975, Pub. L. No. 96-638, 88 Stat. 2203, codified at 25 U.S.C. §§ 5301, *et seq*.

B. Creek Nation's Attempts to Protect Creek Citizens from Fraudulent Land Transactions Sanctioned by Oklahoma Courts Were Hindered by the Unlawful Exercise of Oklahoma Criminal Jurisdiction.

DOI interference with Creek government occurred simultaneously with the theft of Creek allotments through exploitation and fraudulent land transactions sanctioned by the Oklahoma courts. After oil was discovered in 1901, land companies were formed in Indian Territory for the unlawful exploitation of Indians. ANGIE

[12] The OIWA was enacted two years after the Indian Reorganization Act ("IRA"), which officially ended the allotment era for all tribes. Act of June 18, 1934, ch. 576, Pub. L. No. 96-363, 48 Stat. 985, codified at 25 U.S.C. §§ 5101, *et seq*. Section 13 of the IRA provided that five IRA sections were inapplicable to Oklahoma tribes. 25 U.S.C. § 5118 (listing sections codified at 25 U.S.C. §§ 5107, 5110, 5123, 5124, and 5125, concerning some matters later addressed in the OIWA). All other IRA provisions applied in Oklahoma.

DEBO, AND STILL THE WATERS RUN – THE BETRAYAL OF THE FIVE CIVILIZED TRIBES, 86-87, 117 (1940) ("DEBO, WATERS"). A 1903 investigation revealed that every member of the Dawes Commission and nearly every DOI official in Indian Territory held stock in one or more of these companies, and most were listed as officers and directors. *Id*. at 118.

Under the 1901 and 1902 Creek allotment agreements, the allottees would own their allotments in fee, subject to federal statutory restrictions against alienation ("restricted allotments") for a five-year period, and, in the case of forty-acre homesteads, for twenty-one years. Act of Mar. 1, 1901, ch. 676, ¶ 7, 31 Stat. 861; Act of June 30, 1902, ch. 1323, § 16, 32 Stat. 500. This protection of restricted allotments was seemingly strengthened when the Five Tribes Act increased the restricted period for fullblood allottees to twenty-five years. § 19, 34 Stat. 137, 144. This was the same protected period established in the Dawes Act for allotments held in trust by the United States on behalf of citizens of other tribes ("trust allotments"). § 5, 24 Stat. 388.

However, federal policy was already shifting toward reducing allotment protections. Shortly before the Five Tribes Act, Congress began eroding the Dawes Act's protection of trust allotments, by authorizing the Secretary to issue fee patents to "competent" allottees. Act of May 8, 1906, ch. 2348, 34 Stat. 182 ("Burke Act"), codified at 25 U.S.C. § 349. In 1910, competency commissions started visiting reservations nationwide, and in the following two years more than 200,000 acres of

trust land was shifted to local tax rolls. HOXIE 176. Sales of trust allotments also increased, with 775,000 acres of inherited land being sold between 1902 and 1910, which represented "only a fraction of the total territory lost during those years." *Id*. at 160.

Following the national trend of increasing accessibility to Indian land, Congress removed restrictions on all Five Tribes allotments of Indians of less than one-half Indian blood, freedmen and intermarried whites. Act of Apr. 21, 1904, ch. 1402, 33 Stat. 180; Act of May 27, 1908, ch. 199, §§ 1, 4, 35 Stat. 312. The 1908 statute gave Oklahoma courts authority over the person and property of minor Five Tribes allottees and authority to approve conveyances of restricted lands of the heirs of deceased allottees, acting as federal instrumentalities. §§ 2, 6, 9, 35 Stat. 312. *See Springer v. Townsend*, 336 F.2d 397, 400 (10th Cir. 1964); *United States v. Gypsy Oil Co.*, 10 F.2d 487 (8th Cir. 1925).[13]

In a manner reminiscent of the land fraud inflicted on individual Creeks with Alabama state court assistance in the 1830s, the Oklahoma courts were often complicit in the steady stream of fraudulent land transactions. The Creek government attempted to protect the land of its citizens against these illegal conveyances, notwithstanding DOI's ongoing interference with its

[13] The United States still maintains a significant role in state court proceedings involving restricted lands, including, among others, notice requirements and the right to remove certain state proceedings to federal court. *See* Act of Aug. 4, 1947, ch. 458, §§ 1, 3, 4, 61 Stat. 731; Act of Dec. 31, 2018, Pub. L. No. 115-399, 132 Stat. 5333.

government. In 1925, M. L. Mott, an attorney for the Creeks, provided a report to Congress that updated a 1912 report related to state court proceedings involving Creek citizens' lands. M. L. Mott, "A National Blunder" 3, 11, 16 ("Mott Rep."); *see Murphy v. Royal*, Case No. 15-7041 (10th Cir.), Appellant's Br., App'x E (filed Aug. 5, 2016). The report was based on an examination of the files in pending guardianship cases in several counties. DEBO, WATERS 232-34. Adult Indians, upon coming suddenly into large incomes by reason of oil or mineral development of their property, were taken into court and declared incompetent. Mott Rep. 16-44. Non-Indian guardians charged Indian estates "the unprecedented" sum of 19.3 percent of their value, compared with 2.3 percent of the value of non-Indian estates. DEBO, WATERS 233; Mott Report 3. Many Indian guardianship costs ran from 30 percent to 60 percent, and these "unconscionable and unjustified" costs resulted exclusively from the state courts' allowance of attorney and guardian fees. Mott Report 4.

The pillaging of children's estates was also common, often as a result of unconscionable contracts between land companies and parents, and the theft of their property through the Oklahoma probate courts. DEBO, WATERS 104, 106. In 1923, an Oklahoma Bar Association committee recognized the severity of this situation in a resolution criticizing the dissipation of estates of Five Tribes citizens by the Oklahoma court appointment of guardians and administrators "wholly incapable of handling business affairs, many of them graduates of the bankruptcy court," and by appointment of attorneys "on fat salaries . . . while the widows,

orphans and wards go hungry and poorly clad." DEBO, WATERS 329.

"[T]he entire Five Tribes area was dominated by a vast criminal conspiracy to wrest a great and rich domain from its owners." DEBO, WATERS 196-97. It was "not only useless but positively dangerous" to prosecute related crimes in the state legal system, as recognized by federal attorneys prosecuting the murder of an Osage on a restricted Osage allotment in northern Oklahoma in the mid-1920s – one of the many Osage murders motivated by greed for the great wealth of Osage mineral headright owners. DAVID GRANN, KILLERS OF THE FLOWER MOON – THE OSAGE MURDERS AND THE BIRTH OF THE FBI 214 (2017) ("GRANN"). Their decision to file the prosecution in federal court occurred after an investigation ordered by J. Edgar Hoover, who wanted to avoid scandal and protect his 1924 appointment as the director of the "Bureau of Investigation." *Id*. at 116, 120. The prosecution resulted in this Court's 1926 decision recognizing federal court jurisdiction over the prosecution of non-Indians for the murder of an Osage on a restricted Osage allotment – a decision which applies to federal criminal jurisdiction on restricted Creek allotments. *Ramsey*, 271 U.S. at 471-72.

As demonstrated by the Osage case, the value of oil property was a great inducement to crime related to Five Tribes restricted allotments as well. Speculators who had secured illegal leases resorted to forgery, kidnapping, and murder to acquire permanent possession. DEBO, WATERS 181, 200. In 1935, John Collier, Commissioner of Indian Affairs, testified about the

continued plundering of Five Tribes allotted lands. *Hearings before the Comm. Ind. Affs.*, House of Rep., 74th Cong., 1st Sess. on H.R. 6234, "A Bill to Promote the General Welfare of the Indians of the State of Oklahoma and for Other Purposes" (May 7, 1935) at 194-216. He described numerous cases, including one that involved a minor Creek heir of valuable oil lands, who was kidnapped by conspirators working for an oil company, taken across state lines, forced to sign relinquishment of her oil allotment while intoxicated, and raped. *Id*. at 197. She was paid $1,000 and given clothing in exchange for the property, which produced $315,178.41 in royalties. *Id*. A state court found the conveyance valid; the rapist was indicted but not convicted; and disbarment proceedings against an attorney involved in the case failed. *Id.*

The state exercised unlawful criminal jurisdiction over Indian country within its borders for fifty years after the *Ramsey* decision. This changed beginning in 1978, when an Oklahoma court held that a Kiowa trust allotment was Indian country under 18 U.S.C. § 1151(c), and that prosecution of a Kiowa for the murder of a Kiowa was subject to federal jurisdiction. *State v. Littlechief*, 573 P.2d 263, 265 (Okla. Crim. App. 1978). This led to other state and federal court decisions recognizing federal jurisdiction over major crimes by Indians on restricted allotments in both western and eastern Oklahoma. *See United States v. Burnett*, 777 F.2d 593 (10th Cir. 1985) (Osage); *State v. Klindt*, 782 P.2d 401 (Okla. Crim. App. 1989) (Cherokee) (overruling *Ex parte Nowabbi*, 61 P.2d 1139 (Okla. Crim. App.

1936)); *Cravatt v. State*, 825 P.2d 277, 279 (Okla. Crim. App. 1992) (Chickasaw); *United States v. Sands*, 968 F.2d 1058, 1061-62 (1992), *cert. denied*, 506 U.S. 1056 (1993) (Creek).

The Indian country status of trust allotments in western Oklahoma is so well settled that for the past twenty years the Office of the United States Attorney, Western District of Oklahoma, has maintained an Indian country misdemeanor docket for certain federal offenses in Indian country in western Oklahoma, particularly those where a non-Indian is the perpetrator and there is an Indian victim. United States' Attorney's Office, W.D. Okla., "Indian Country Misdemeanor Prosecution Project," *Tribal Justice*, Issue 2 (2012) at 2.[14] The United States Attorneys for the Eastern and Northern Districts of Oklahoma also actively prosecute federal crimes under federal laws governing crimes in Indian country.[15]

[14] *See* https://turtletalk.files.wordpress.com/2012/11/tribal-justice-issue-2-final.pdf.

[15] "Indian Country," U.S. Atty. Off., N.D. Okla.: https://www.justice.gov/usao-ndok/indian-country; "Indian Country" news articles, U.S. Atty. Off. E.D. Okla.: https://search.justice.gov/search?query=indian+country&op=Search&affiliate=justice-usao-oke

CONCLUSION

The United States failed to fulfill its trust responsibility to protect Creek Nation and Creek citizens from the destructive actions of the States of Georgia, Alabama, and Oklahoma, during much of its government-to-government relationship with Creek Nation. Creek Nation successfully navigated destructive eras of federal policies, and not only survived, but flourished. It is disheartening that the United States and Oklahoma once again misapply federal laws enacted during the allotment era to support its new and unsupported claim of reservation disestablishment. Their position would require the departure from this Court's precedents regarding reservation disestablishment. Further, Oklahoma's position cannot be reconciled with prior decisions involving the Indian country status of restricted allotments, tribal trust lands, and tribal fee lands in eastern Oklahoma. Their position also ignores the federal policy of tribal self-governance in effect since the late 1970s – a policy that has encouraged Creek Nation's work with Oklahoma and federal officials to develop and implement intergovernmental relationships beneficial to all Oklahoma citizens. The Oklahoma conviction of petitioner should be reversed and the case dismissed for lack of jurisdiction so that

the case may be addressed by federal and tribal authorities.

Respectfully submitted,

SARA HILL
Attorney General
CHRISSI ROSS NIMMO
Deputy Attorney General
Counsel of Record
STACY LEEDS
Special Attorney
CHEROKEE NATION
Post Office Box 1533
Tahlequah, Oklahoma 74465-1533
(918) 458-6998
chrissi-nimmo@cherokee.org

L. SUSAN WORK
Attorney at Law
P.O. Box 1545
Norman, Oklahoma
73070-1545
(405) 209-7856
susan@worklawoffice.com

Counsel for Amici Curiae

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