

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

JIMCY MCGIRT,)
)
) Petitioner,)
)
) v.) No. 18-9526
)
OKLAHOMA,)
)
) Respondent.)

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JIMCY MCGIRT,)

Petitioner,)

v.) No. 18-9526

OKLAHOMA,)

Respondent.)

- - - - -

Washington, D.C.

Monday, May 11, 2020

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:00 a.m.

1 APPEARANCES:
2
3 IAN H. GERSHENGORN, Esquire, Washington, D.C.;
4 on behalf of the Petitioner.
5 RIYAZ A. KANJI, Esquire, Ann Arbor, Michigan;
6 for the Muscogee (Creek) Nation, as amicus curiae,
7 supporting the Petitioner.
8 MITHUN MANSINGHANI, Solicitor General,
9 Oklahoma City, Oklahoma;
10 on behalf of the Respondent.
11 EDWIN S. KNEEDLER, Deputy Solicitor General,
12 Department of Justice, Washington, D.C.;
13 for the United States, as amicus curiae,
14 supporting the Respondent.
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1	C O N T E N T S	
2	ORAL ARGUMENT OF:	PAGE:
3	IAN H. GERSHENGORN, ESQ.	
4	On behalf of the Petitioner	4
5	ORAL ARGUMENT OF:	
6	RIYAZ A. KANJI, ESQ.	
7	For the Muscogee (Creek) Nation,	
8	as amicus curiae, supporting	
9	the Petitioner	27
10	ORAL ARGUMENT OF:	
11	MITHUN MANSINGHANI, ESQ.	
12	On behalf of the Respondent	46
13	ORAL ARGUMENT OF:	
14	EDWIN S. KNEEDLER, ESQ.	
15	For the United States, as amicus	
16	curiae, supporting the Respondent	67
17	REBUTTAL ARGUMENT OF:	
18	IAN H. GERSHENGORN, ESQ.	
19	On behalf of the Petitioner	89
20		
21		
22		
23		
24		
25		

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3
4
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6
7
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11
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P R O C E E D I N G S

(10:00 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 18-9526, McGirt versus Oklahoma.

Mr. Gershengorn.

ORAL ARGUMENT OF IAN H. GERSHENGORN
ON BEHALF OF THE PETITIONER

MR. GERSHENGORN: Mr. Chief Justice, and may it please the Court:

This case is resolved by the fundamental proposition that decisions about sovereign rights are for Congress to make and Congress makes those decisions by speaking clearly in the text. The decision below must be reversed because the text makes clear that Congress never terminated the Creek reservation and never transferred federal criminal jurisdiction to Oklahoma.

I have four basic points to make this morning. First, the Creek Nation had a reservation. The relevant treaties reserved the lands from sale and solemnly guaranteed the lands for the Creek to govern. The text of both treaties and statutes expressly identified the

1 Creek land as a reservation. Nothing more was
2 needed.

3 Second, Congress did not establish --
4 disestablish that reservation. Indeed, Congress
5 considered hallmark language of disestablishment
6 and rejected it. Congress initially sought
7 cession yet instead provided only for allotment.
8 Then, when congressional inaction would have
9 dissolved the tribe, Congress instead preserved
10 the tribe and its government for all purposes
11 authorized by law, and it did so against the
12 backdrop of existing tribal authority to
13 legislate over reservation land. Those
14 congressional judgments should be respected.

15 Third, Congress did not transfer
16 criminal jurisdiction to Oklahoma. At
17 statehood, the Major Crimes Act established
18 exclusive federal jurisdiction over enumerated
19 crimes in "any state of the United States."
20 When Congress overrides the Major Crimes Act and
21 transfers jurisdiction to a state, it does so
22 expressly, and it did not do so here.

23 Finally, Oklahoma's rhetoric about
24 disruption does not change the result. On the
25 criminal side, this Court's decision in Ramos is

1 a complete answer, and on the civil side, the
2 main issues are tax and other regulatory issues
3 that are routinely resolved by tribal-state
4 agreements. In any event, Parker makes clear
5 that questions of sovereignty are distinct from
6 claims of reservation status.

7 This Court should resolve the
8 reservation question leaving jurisdictional
9 disputes to Congress, the relevant sovereign,
10 and then for this Court to resolve if and when
11 they arise.

12 So let me start this --

13 CHIEF JUSTICE ROBERTS: Counsel, the
14 State argues that the territory should be
15 analyzed as a dependent Indian community under
16 1151 and not as a reservation. They base this
17 argument on our decisions in Sandoval and Creek
18 Nation and 1151 itself and the fact that the
19 Creeks have always maintained, have been adamant
20 about the fact that they are not reservation
21 Indians.

22 Now you refer, of course, to the many
23 times in which the treaty is referred to as a
24 reservation, but what is your answer to the
25 State's analysis of our precedent?

1 MR. GERSHENGORN: So, Your Honor, I
2 think both the precedent and the language
3 support the idea that this is not a dependent
4 Indian community. What this Court said in
5 Venetie and what then Judge Gorsuch said in
6 Hydro Resources is that the dependent Indian
7 community label is a catchall for tribes that
8 did not have a reservation and are not on
9 restricted lands. The best evidence of what
10 Congress thought about whether Creek lands were
11 a reservation under the statute is that Congress
12 referred to those lands as a reservation under
13 the statute.

14 With respect to Sandoval and the other
15 cases, it is crystal-clear that when Sandoval
16 and those cases are using the term "dependent
17 Indian community" that they are describing
18 tribes and other groups that are within
19 Congress's broad power to legislate for -- for
20 tribes broadly. They are not excluding the --
21 the Creek.

22 Indeed, and --

23 CHIEF JUSTICE ROBERTS: Thank you,
24 counsel.

25 Justice Thomas?

1 JUSTICE THOMAS: Yes, counsel. In
2 Solem and in Parker, those cases only involved
3 the disposition of surplus land. And, here, of
4 course, there's much, much more being done in a
5 whole series of statutes involving both
6 sovereignty and the allotment of land.

7 Can you point to any case in which
8 we've applied the Solem fact framework to a case
9 that does as much as this -- as being -- as is
10 being done in this case?

11 MR. GERSHENGORN: So, Your Honor, I
12 think the key point on -- the -- the -- the key
13 point on the Parker/Solem analysis is, as your
14 -- as Your Honor pointed out in that opinion,
15 that those are not -- that that analysis doesn't
16 derive from anything special about -- about how
17 much work Congress is doing.

18 The reason the Court has always
19 required plain text is because treaty rights are
20 at issue and plain text is required to abrogate
21 treaty rights and because sovereign rights are
22 at issue and plain text is required to abrogate
23 sovereign rights.

24 So there's nothing magic about Parker
25 and Solem in terms of whether they're dealing

1 with surplus lands or not. The key point in
2 Parker and Solem is that plain text is required
3 to do the kinds of transfers that are at issue
4 here.

5 And when you look at the plain text, I
6 think this is a -- this case is even stronger
7 than Your Honor's opinion in Parker for three
8 main reasons. First, of course, is that the
9 tribe was not absent from the land in the same
10 way that the tribe was in Parker.

11 Second, the land here was allotted
12 almost entirely to the tribe -- to tribal
13 members themselves, to Indians.

14 And, third, Congress took steps in
15 1906 to preserve the tribe.

16 And I guess the thing I would point
17 to, Your Honor, when you ask about whether there
18 are cases like this, I think this is stronger
19 than case -- other cases because the question
20 isn't just what did Congress fail to do but how
21 much --

22 JUSTICE THOMAS: I don't mean to
23 interrupt you, but I do want to get this point
24 in, that in -- in Parker, we were only dealing
25 with one allotment statute that was disposing of

1 surplus land. Here, we're dealing with a series
2 of statutes that go both to land, the allotment
3 of land, and to the reduction in the authority
4 of the tribe. That's what I mean.

5 MR. GERSHENGORN: So I understand
6 that, Your Honor. And I think the critical
7 point is that Congress actually preserved the
8 tribe when it had the chance when inaction would
9 have dissolved the tribe. And so, actually, I
10 think that makes this stronger than in other
11 cases because Congress took --

12 CHIEF JUSTICE ROBERTS: Thank you.
13 Thank you, counsel.

14 MR. GERSHENGORN: -- deliberate action
15 when this action dissolved --

16 CHIEF JUSTICE ROBERTS: Thank you.
17 Justice Ginsburg?

18 JUSTICE GINSBURG: Counsel, you don't
19 claim immunity from prosecution for a major
20 crime. I think your position is that the
21 federal prosecutor could have charged your
22 client?

23 MR. GERSHENGORN: That's absolutely
24 correct, Your Honor.

25 JUSTICE GINSBURG: Federal penalties,

1 as I understand it, are at least as harsh as the
2 state and in both forms, state and federal, you
3 would have due process protections.

4 So how are you harmed by the fact that
5 you were tried in the state court rather than
6 the federal court when you were exposed to the
7 same -- at least the same penalties in both?

8 MR. GERSHENGORN: So, Your Honor, I
9 think the harm flows anytime that a defendant, a
10 criminal defendant is tried by a sovereign that
11 lacks jurisdiction. I don't think that we have
12 ever -- that this Court has ever said that
13 there's a kind of harmless error analysis when a
14 -- when a sovereign asserts jurisdiction,
15 particularly criminal jurisdiction, over a
16 defendant and that you would look to see, well,
17 are the penalties the same.

18 Of course, it is a different set of --
19 I mean, it's a different juror pool, it's a
20 different -- it is a different set of potential
21 penalties, and so I guess I don't think that the
22 fact that -- that there would be a rigorous
23 trial in federal court suggests that you would
24 overlook the absence of jurisdiction.

25 Indeed, it seems to me to make this

1 case even easier in some ways because we are not
2 claiming an immunity, as Your Honor pointed out,
3 and, indeed, there would be a retrial in federal
4 court if the Court were to --

5 JUSTICE GINSBURG: Counsel --

6 MR. GERSHENGORN: -- to reverse.

7 JUSTICE GINSBURG: -- what makes this
8 case hard is that there have been hundreds,
9 hundreds of prosecutions, some very heinous
10 offenses of the state law. On your view, they
11 would all become undone.

12 And if you compare that to the
13 situation in our recent Ramos case where there
14 would be -- is a question about redoing already
15 tried cases, here, the Ramos retroactivity pales
16 in comparison to what is involved here, hundreds
17 of prosecutions, for murder, for terrible sexual
18 offenses.

19 These would all have to be done years
20 later when the witnesses may not be there
21 anymore. It's hundreds of cases that --

22 MR. GERSHENGORN: So, Your Honor,
23 there are hundreds of -- there may be hundreds
24 of cases. Actually, in -- in truth, we don't
25 know how many cases the state, which has the

1 numbers, hasn't suggested that there are
2 anything -- been able to document there are
3 anything like hundreds of cases, but there are
4 fewer than in Ramos.

5 And in any event, what this Court said
6 in Ramos was that that provides no reason to
7 disregard the plain text. To be sure, that
8 there would be --

9 CHIEF JUSTICE ROBERTS: Thank you,
10 counsel. Thank you, counsel.

11 Justice Breyer?

12 JUSTICE BREYER: Good morning,
13 counsel. A minor point, but one of the -- one
14 of the arguments, I think, is that whether
15 they're reservation or not, Congress wanted
16 state courts to try the major state crimes.

17 And in reference to that, I think the
18 government cites Felix Cohen, who was a great
19 expert in this area. And I looked at his
20 letter. He does seem to say that.

21 So, if you have any comments about
22 that, about his argument or about that
23 particular aspect of it, I'd like to hear them.

24 MR. GERSHENGORN: So, Your Honor, I
25 think that the -- the -- the law is clear that

1 Congress did not intend for crimes -- for tribal
2 crimes to be tried. And I think this is one of
3 the most straightforward statutory construction
4 cases this Court will see.

5 The Major Crimes Act at statehood
6 provided that it applied to any state of the
7 United States. There is no exception for
8 Oklahoma, and there was none before, at, or
9 after statehood.

10 Second, what they have pointed to,
11 what the other side has pointed to, is what
12 happened before statehood, and what happened
13 before statehood was that crimes were being
14 prosecuted in the name of the United States in
15 courts set up by Congress, applying federal law,
16 which the -- which had adopted Arkansas law as
17 the rule of decision.

18 It is the exact opposite of conferring
19 jurisdiction on the states to try.

20 Third, there was nothing in the
21 Enabling Act that would have changed that.
22 Indeed, the Enabling Act sent to federal courts
23 all cases which, had they been committed in a
24 state, would have been subject to federal
25 prosecution. That describes the Major Crimes

1 Act perfectly.

2 And finally, Your Honor, when Congress
3 transfers jurisdiction to a state, it does so
4 expressly. In Nagonset, which this Court
5 described as the first major transfer of
6 jurisdiction, the language used was jurisdiction
7 is conferred. In Public Law 280, the states
8 shall have jurisdiction.

9 In New York, New York shall have
10 jurisdiction. And even in -- with respect to
11 Oklahoma, in 1908, when they transferred -- when
12 Congress transferred probate jurisdiction, it
13 said the -- that the Oklahoma courts shall have
14 jurisdiction.

15 And so tribal --

16 CHIEF JUSTICE ROBERTS: Thank you,
17 counsel.

18 Justice Alito?

19 JUSTICE ALITO: You referred to the
20 Oklahoma Enabling Act, but the language in that
21 is that a case would be -- a case that was
22 pending in the territorial court at the time of
23 statehood would be sent to one of the new
24 federal district courts or to one of the new
25 state courts depending on where it would have

1 been prosecuted if it had been prosecuted in a
2 state.

3 It doesn't say in a state in Indian
4 Country. It says in a state. So isn't the
5 clear meaning of that that cases in Oklahoma
6 would be treated like cases anyplace else?

7 MR. GERSHENGORN: So, Your Honor, I
8 don't -- they -- treated like anyplace else,
9 meaning it was subject to the Major Crimes Act.
10 So I do -- I agree with you that there is no
11 Oklahoma exceptionalism, but I think that cuts
12 exactly in our favor.

13 What Oklahoma is saying is that
14 uniquely among all the states in the union it's
15 exempt from the Major Crimes Act. I think the
16 Enabling Act, the language Your Honor is citing,
17 does exactly the opposite.

18 JUSTICE ALITO: How about --

19 MR. GERSHENGORN: The language says --

20 JUSTICE ALITO: -- what it said in the
21 1897 statute, which said that "the laws of the
22 United States enforced in the territory shall
23 apply to all persons therein, irrespective of
24 race."

25 And yet you're saying that cases at

1 the time of statehood would be treated based on
2 race. How can that be consistent with the 1897
3 Act?

4 MR. GERSHENGORN: Because I think the
5 1897 Act, Your Honor, extends if -- what the
6 U.S. -- the 1897 Act does is extend both U.S.
7 law and -- and the Arkansas law, regardless of
8 race.

9 But it did not eliminate any language
10 that was in the Major Crimes Act already. That
11 was a portion of U.S. law. But, regardless,
12 Your Honor, of what happened pre-statehood -- I
13 mean, we can debate that, but regardless of what
14 happened pre-statehood, there's no disagreement
15 that the Major Crimes Act applies of its own
16 term at statehood.

17 Statehood itself was a major event
18 that transferred -- that -- that, obviously,
19 transferred Oklahoma from a territory to a
20 state. And at that point --

21 JUSTICE ALITO: What happened after --
22 what happened after statehood? Can you cite a
23 single case under the Major Crimes Act that was
24 transferred to or thereafter prosecuted in
25 federal court?

1 MR. GERSHENGORN: No, Your Honor. But
2 this Court has made clear that events on the
3 ground don't override the text. What --

4 CHIEF JUSTICE ROBERTS: Thank you,
5 counsel.

6 Justice Sotomayor?

7 MR. GERSHENGORN: -- what we never
8 interpret criminal statutes to be --

9 CHIEF JUSTICE ROBERTS: I'm sorry.

10 MR. GERSHENGORN: -- what the
11 executive --

12 CHIEF JUSTICE ROBERTS: Counsel, thank
13 you.

14 Justice Sotomayor?

15 JUSTICE SOTOMAYOR: Counsel, Justice
16 Ginsburg pointed out that some of the penalties
17 in federal court would be higher than those
18 imposed in state court.

19 Am I -- do you disagree that some
20 defendants who might be entitled to -- if you
21 were to win, some defendants who would be
22 entitled to challenge their convictions would
23 choose not to because the risk would be too high
24 for them?

25 MR. GERSHENGORN: I think that's

1 exactly right, Your Honor. I think that there
2 are -- that federal penalties will often be
3 higher. I think a number of defendants will
4 have already served large chunks of their -- of
5 their -- of their sentence. And their ability
6 to seek relief in federal court at least will be
7 limited by AEDPA. So I think there are reasons
8 to doubt the extent of the State's disruption
9 argument here.

10 And, again, remember the numbers are
11 all in the State's control. And so, while we've
12 been hearing, you know, both in the Murphy
13 argument and here about, you know, murders and
14 rapists getting through, in fact, there is no
15 evidence that the State has put forward that
16 they will be in large numbers and the kinds of
17 habeas petitions that one would expect to see,
18 the kind of tsunami that -- that has been
19 predicted just hasn't materialized.

20 So I -- I agree with Your Honor's
21 question there.

22 JUSTICE SOTOMAYOR: Number two,
23 there's so much discussion about the dependent
24 Indian community. Am I to take it that your
25 argument is that that's almost irrelevant?

1 MR. GERSHENGORN: It is almost
2 irrelevant. It's both wrong and irrelevant, but
3 I'll hit the irrelevant point first.

4 Regardless of what you call it, as my
5 colloquy with Justice Thomas tried to get at,
6 the -- the -- the reason we have a plain text
7 requirement has less to do with whether you call
8 it a reservation or a dependent Indian community
9 and everything to do with the fact that these
10 boundaries were set up by Congress, and so, if
11 you are going to undo that, Congress needs to
12 speak and Congress needs to speak clearly.

13 We're talking about transfers of
14 sovereign rights, and that has to be done
15 clearly in the text. And you can call it a
16 reservation or a dependent Indian community.
17 The test would be the same.

18 CHIEF JUSTICE ROBERTS: Thank you,
19 counsel.

20 Justice Kagan?

21 JUSTICE KAGAN: So, if I could pick up
22 on that, Mr. Gershengorn, you said irrelevant
23 and wrong. And the Chief Justice asked you
24 about our two cases, Sandoval and Creek Nation,
25 and I wasn't quite sure I understood your answer

1 to him about how those cases were using the term
2 and whether that is consistent or inconsistent
3 with your argument.

4 MR. GERSHENGORN: So those -- it is
5 consistent with our argument. As I -- as I read
6 both Sandoval and Creek Nation, it is using the
7 term "dependent Indian community" to -- to
8 describe the tribes -- the -- basically, tribes
9 broadly, that those are -- are communities over
10 which Congress has the power to legislate under
11 its -- under its Indian-related powers.

12 In other words, it was not using it in
13 sort of the more narrow and technical sense that
14 Congress did when it enacted the 1948 statute.
15 So, in other words --

16 JUSTICE KAGAN: In other words, it's
17 -- it's supposed to be an umbrella term that in
18 --

19 MR. GERSHENGORN: That's exactly
20 right, Your Honor.

21 JUSTICE KAGAN: -- that integrates our
22 standard reservations?

23 MR. GERSHENGORN: Exactly. It
24 includes standard reservations -- it includes
25 but is not limited to standard reservations.

1 The whole point --

2 JUSTICE KAGAN: And how do we know
3 that?

4 MR. GERSHENGORN: Because that's what
5 the Court said in Sandoval, is that the -- is
6 that -- that it was -- it was trying to figure
7 out whether Congress had the power to legislate
8 for the Pueblos, and -- and what it said was
9 Congress has the power to legislate both
10 domestic and -- old and new communities and use
11 the term "dependent Indian communities."

12 But, again, regardless, the Tribe has
13 always -- the Creek have always been -- the
14 reason the -- the Pueblos were compared to the
15 Creek is because the Creek were assumed to be
16 the quintessential reservation. In other words,
17 the fee patent in the Pueblos couldn't be a
18 problem because it wasn't a problem for the
19 Creeks and everybody understood the Creeks were
20 -- had a reservation. I think that was the
21 sense in which the Court was using the term.

22 CHIEF JUSTICE ROBERTS: Thank you,
23 counsel.

24 Justice Gorsuch?

25 JUSTICE GORSUCH: Hello?

1 CHIEF JUSTICE ROBERTS: Justice
2 Gorsuch?

3 JUSTICE GORSUCH: Thank you, Chief.
4 Counsel, we've heard a little bit
5 about it today, but I'd -- I'd like to give you
6 a chance to discuss further the argument that
7 there are going to be terrible practical
8 consequences that would follow from a ruling for
9 your clients. We can put aside the criminal
10 convictions -- you've addressed those -- but
11 just the on-the-ground difficulties we've heard
12 about in administering Tulsa.

13 A, do you want to respond to the --
14 that parade of horribles generally? And, B, how
15 should that inform our analysis of and
16 interpretation of a statute and a treaty?

17 MR. GERSHENGORN: So, Your Honor, I
18 would -- broadly, here's what I would say:
19 There are -- there -- there will, of course, be
20 consequences from the Court's ruling, as there
21 are from any of the Court's rulings, and those
22 consequences are not trivial, but nor are they
23 existential, nor indeed overly serious.

24 But, more important, they are the
25 kinds of consequences that happen routinely in

1 Indian Country. They are routinely resolved by
2 agreement in Oklahoma, as Representative Coles'
3 brief indicates, and throughout the nation, as
4 the MCI brief and the experience of Tacoma
5 indicates. And -- and these are routinely
6 addressed by Congress.

7 With respect to how it should --
8 should influence the text, it should not affect
9 the reading of the text, and that's true for
10 several reasons. First, the text is what the
11 text is, and this Court's job is to interpret
12 it.

13 Second, in Parker itself, the Court
14 distinguished the two. It separated reservation
15 status from questions of sovereignty and the
16 impact on the ground. And I think this Court
17 should take the same approach. Those two
18 questions are distinct.

19 And then, third, it shouldn't affect
20 this Court's analysis of the text because
21 Congress is in the best place to change the text
22 and add text if it wants. And, indeed, Congress
23 routinely does in Indian Country, and Congress
24 has in Oklahoma. There are Oklahoma-specific
25 statutes that address environmental matters,

1 that take power -- that ensure that power stays
2 with the state, not the tribe. Congress knows
3 how to do this, and the job to fix any
4 consequences if the Court perceives them is with
5 Congress.

6 CHIEF JUSTICE ROBERTS: Thank you,
7 counsel.

8 JUSTICE GORSUCH: Thank you.

9 CHIEF JUSTICE ROBERTS: Justice
10 Kavanaugh?

11 JUSTICE KAVANAUGH: Thank you, Chief.

12 And good morning, Mr. Gershengorn. I
13 want to talk a bit about the history and maybe
14 make a comment, and you and other -- your
15 colleagues can react.

16 But this is not a situation where
17 there's a reservation in an existing state and
18 Congress has arguably diminished a reservation.
19 This is a case with a territory that, by 1890,
20 Indian territory was predominantly white, about
21 60 percent of the population, also a significant
22 black population, about 10 percent, and about
23 30 percent Indian.

24 And the question, as of 1890, how do
25 we get there to that situation, you go back to

1 the treaties of 1832 and 1833 that grant the
2 Creeks and the Five Tribes land, but then the
3 Civil War is key, and the tribes, the Five
4 Tribes, all align with the Confederacy in the
5 Civil War. The tribes have black slaves, lots
6 of black slaves. And then there's a new treaty
7 in 1866 because the United States is not happy
8 that the tribes have aligned with the
9 Confederacy.

10 Why does that matter for us? Because,
11 in that new treaty in 1866, it grants
12 rights-of-way to railroads, the railroads lead
13 to settlements, the settlements lead to new
14 towns that are predominantly white. So, by
15 1890, you have an odd situation of an Indian
16 territory nominally that's predominantly white.

17 So Congress's options at that time are
18 -- are to remove the -- the whites, to remove
19 the Indians. Neither of those was going to
20 happen. So the other remaining options were
21 tribal government over non-Indians, which, of
22 course, is contrary to tradition, or to create a
23 new state. And Congress chose the new state
24 option, it seems, and then had a lot of things
25 that happened over the next 17 years.

1 So I just wanted to get that history
2 out there because I think we're talking about
3 Indian territory and reservations when, in fact,
4 it was 60 percent white, 10 percent black,
5 30 percent Indian in the relevant territory.

6 CHIEF JUSTICE ROBERTS: Counsel, you
7 have time for a very brief comment.

8 MR. GERSHENGORN: So I'll just say
9 very briefly, Your Honor, after statehood the --
10 85 percent of the Indian territory remained in
11 Indian hands, immune from taxation. The idea
12 that statehood and reservation status are
13 inconsistent is refuted by the fact that
14 Tennessee was 75 percent reservation at
15 statehood. At statehood in South Dakota, it was
16 47 percent reservation.

17 I think Your Honor's sense of the
18 history and the incompatibility of reservations
19 with statehood is not historically accurate.

20 CHIEF JUSTICE ROBERTS: Thank you,
21 counsel.

22 Mr. Kanji.

23 ORAL ARGUMENT OF RIYAZ A. KANJI
24 FOR THE MUSCOGEE (CREEK) NATION,
25 AS AMICUS CURIAE, SUPPORTING THE PETITIONER

1 MR. KANJI: Thank you, Mr. Chief
2 Justice, and may it please the Court:

3 I would like to go straight to Justice
4 Thomas's question about the governing framework
5 here and make three points. First, there is
6 nothing radical about the Parker/Solem
7 framework. It fused two ordinary principles of
8 statutory construction and fundamental
9 principles regarding the separation of powers.

10 The state can't win under that test
11 and, hence, it has advocated various amorphous
12 alternatives. I think, Justice Thomas, nothing
13 about the fact that there was a series of
14 statutes here changes the -- the fundamental
15 principles that should apply.

16 There are, to answer your question
17 directly, other cases that have involved a
18 series of statutes, the Mast case involved a
19 tremendous amount about the history of
20 California's series of statutes and executive
21 orders over time.

22 Solem involved the creation of -- of a
23 reservation only eight months before statehood.
24 Every state likes to claim that its history is
25 exceptional, but there's nothing about Oklahoma

1 here that should cause a divergence from this
2 Court's test.

3 In the past, we --

4 CHIEF JUSTICE ROBERTS: Thank you,
5 counsel. I'd -- I'd like to return to Justice
6 Alito's question. Congress passed legislation
7 at the turn of the prior century saying that the
8 United States laws and the laws of Arkansas,
9 which would be applied in Oklahoma, would apply
10 to all persons therein, irrespective of race.

11 Now, if you prevail, the laws in the
12 eastern half of Oklahoma will be different. The
13 applicable law will be different, dependent upon
14 race. So how is that consistent with Congress's
15 legislation?

16 MR. KANJI: Thank you, Mr. Chief
17 Justice. It's a critical question. What the
18 1897 statute did was to apply federal law,
19 irrespective of race, the territorial law and
20 Arkansas law as assimilated.

21 There was nothing radical about that.
22 Under the General Crimes Act and the
23 Assimilative Crimes Act, state law was often
24 applied where federal law did not exist.

25 But then what happens, of course, is

1 this watershed moment of statehood, and
2 statehood always changes the status quo. And
3 when it comes to Indians, what it does typically
4 is reserves federal power over the Indians
5 while, of course, giving state power over
6 non-Indians to the states.

7 And there's nothing in the Enabling
8 Act or the Five Tribes Act that suggests that
9 that status quo, the normal way of dealing with
10 it, was supposed to be departed from.

11 CHIEF JUSTICE ROBERTS: But I -- I
12 would like an answer to the precise question,
13 which is the law would be different in eastern
14 Oklahoma depending upon race, right?

15 MR. KANJI: Well, under the Enabling
16 Act, yes, the -- the transfer to the state was
17 of cases that would arise under state law. What
18 the federal courts retained were cases arising
19 under federal law. And that, of course,
20 included the Major Crimes Act and the -- and the
21 General Crimes Act.

22 CHIEF JUSTICE ROBERTS: Thank you,
23 counsel.

24 Justice Thomas?

25 JUSTICE THOMAS: Yes, Mr. Kanji, a

1 brief question, and this is just -- it's not
2 necessarily dispositive of this case, but I'm
3 interested in your answer.

4 Do you think a tribe can be
5 effectively divested of title to land, to its
6 land and its sovereignty, and still retain the
7 status of reservation?

8 MR. KANJI: It's a -- it's a
9 critically interesting question, Your Honor.
10 All -- all disestablishment cases involve a
11 transformation of title. Whether we're talking
12 about trust cases or fee pay cases, Congress was
13 getting rid of communal title and transferring
14 title to individuals.

15 So the question this Court resolves in
16 that regard is whether Congress also meant to go
17 beyond that and alter reservation boundaries
18 which were so there. And, here, where we simply
19 are talking about the allotment and the opening
20 up of small town sites to non-Indian settlers,
21 that falls squarely into the rubric that this
22 Court has designed where reservations have
23 remained intact.

24 With respect to sovereignty, if a
25 sovereignty was to be completely divested -- and

1 that's not what happened here -- but, if it was,
2 I think the question this Court would ask is
3 whether the federal government still meant to
4 maintain the reservation for its own purposes.

5 If it didn't, then the reservation
6 would dissolve. Here, if the tribe had been
7 dissolved, treaties make very clear that the
8 reservation itself would have evaporated, but --
9 but -- and -- and I understand this is not the
10 premise of your question, that is not what took
11 place here. The 1901 and 1906 acts clearly
12 maintained a quantum of tribal governmental
13 power.

14 JUSTICE THOMAS: Thank you.

15 CHIEF JUSTICE ROBERTS: Justice
16 Ginsburg?

17 JUSTICE GINSBURG: If you -- you are
18 right, then what becomes of all the state tribal
19 cooperative agreements that we're told about if
20 the state lacks authority to apply its own law
21 with increased territory, remaining as is
22 sentenced, that everything except what was -- is
23 it Civil War.

24 Were all of the -- we're told that
25 there are many, many state tribal cooperative

1 agreements, but if the state lacks authority to
2 apply its own law, what becomes of -- of all
3 those state tribe cooperative agreements?

4 MR. KANJI: The -- the agreements,
5 Your Honor, will remain in full force and
6 effect. And this is critical. If we prevail,
7 state law does not evaporate in the reservation.
8 Under this Court's doctrines, state law applies
9 in many situations with respect to -- especially
10 with respect to the non-Indians in the area.

11 And that's what leads to these
12 cooperative agreements. Reservations involve
13 the different jurisdictions all having
14 authority, and that has been the premise of
15 shared jurisdiction as underpinned these
16 cooperative agreements.

17 And the best thing I can point you to
18 is not my words but the words of Congressman
19 Cole's brief. And that's a remarkable brief. I
20 think very few briefs like that have been filed
21 in this Court in the area of state tribal
22 relations where you have senior members of
23 Congress, former governors, former state
24 legislators saying, please do not disestablish
25 this reservation because the exercise of tribal

1 sovereignty in cooperation with the state has
2 underpinned these agreements.

3 And the authors of that brief were the
4 authors of many of the agreements on the state
5 side. And it's this premise of shared
6 jurisdiction that has allowed for shared
7 governance in Oklahoma to the benefit of all
8 citizens there. And just as --

9 CHIEF JUSTICE ROBERTS: Thank you,
10 counsel.

11 Justice Breyer?

12 JUSTICE BREYER: So I'm still
13 interested in this claim the state makes that
14 whether it's a reservation or not a reservation
15 is beside the point, that all we have to decide
16 here is whether Congress gave to a state court
17 the power to try the state criminal crimes.

18 And Felix Cohen points to three things
19 where he thinks the answer to that question is
20 yes, seems to. First, they abolished tribal
21 courts and put the criminal jurisdiction in the
22 Indian court, the Indian territory courts, which
23 are federal courts.

24 Then, in the 1906 Act, it says that
25 those territorial courts, which are federal,

1 have the power to try state law cases. Now
2 they're not called state law cases then.
3 They're called laws of the territory of
4 Oklahoma.

5 And then, in the 1907 Act, which is
6 after, you know, the Enabling Act, it says all
7 causes, civil or criminal, shall be proceeded
8 with, held and determined by the courts of the
9 state coming about, the successors of the
10 district courts of the territory of Oklahoma,
11 and the United States courts in the Indian
12 territory.

13 So it's rather ambiguous, this last
14 thing. But given the practice and given Felix
15 Cohen and given you could read it that way, what
16 do you think?

17 MR. KANJI: I -- Your Honor, it would
18 make my life much easier in this case if I could
19 say there was plain text that had transferred
20 jurisdiction to the state over the Indians. As
21 you know, there would be nothing inconsistent
22 with that in reservation status.

23 JUSTICE BREYER: No.

24 MR. KANJI: But we simply can't find
25 that text. I think the operative text is, as

1 Justice Alito said, ends up being the amended
2 Section 16 of the Enabling Act, prosecutions for
3 all crimes which had they been committed in the
4 state would have been cognizable in the federal
5 courts.

6 CHIEF JUSTICE ROBERTS: Justice Alito?
7 Justice Alito?

8 Justice Sotomayor?

9 JUSTICE SOTOMAYOR: Counsel, could you
10 finish your answer to Justice Breyer, please?

11 MR. KANJI: Absolutely, Justice
12 Sotomayor. The cases that would have been
13 cognizable in federal court, if Oklahoma had
14 been a state, included prosecutions under the
15 Major Crimes Act or the General Crimes Act. The
16 Enabling Act is very clearly saying that those
17 are to be transferred to federal court.

18 As to the practice, this is critical.
19 Nationwide, around the nation, states were
20 arrogating criminal jurisdiction to themselves
21 and the federal government was abdicating it,
22 even in cases where the reservations clearly
23 remained intact. That happened in South Dakota,
24 the Solem case. That happened in Nebraska, the
25 Parker case. That happened in Washington state,

1 the Seymour case. That happened in Mississippi,
2 United States v. John case. In all four of
3 those cases, this Court unanimously, across
4 different eras, different compositions of this
5 Court, paid no heed to that practice, for this
6 fundamental reason: The acts of executive
7 branch officials cannot subvert the will of
8 Congress. Those acts of executive branch
9 officials do not run the gauntlet of
10 bicameralism and presentment.

11 And here is all the more reason not to
12 pay those heed. We know -- we know that federal
13 officials were subverting the will of Congress
14 in Oklahoma. After statehood, they would not
15 allow the Creek Nation to hold elections for its
16 chief for its national council, even though the
17 Five Tribes Act clearly preserved those powers.
18 So why we should paid heed to the acts of
19 federal officials when they were clearly acting
20 illegally is something that the state has -- has
21 never explained.

22 JUSTICE SOTOMAYOR: Counsel, could we
23 go back to Justice Thomas's question? Am I to
24 understand that in existing reservations outside
25 of this Creek Nation issue, there are fee-simple

1 possessions by non-Indians, non-Indians are
2 living, working on those reservations? And am I
3 to understand there's concurrent federal, state,
4 and Indian jurisdiction over many of the issues
5 involved with those people?

6 MR. KANJI: Correct, Your Honor.
7 Wherever there's fee-simple land in -- in a
8 reservation, there is concurrent jurisdiction.

9 JUSTICE SOTOMAYOR: So you really
10 can't tie --

11 CHIEF JUSTICE ROBERTS: So, Justice
12 Alito?

13 JUSTICE ALITO: Am I correct that more
14 than 90 percent of people who live in the area
15 directly affected by this case are not members
16 of the Creek tribe?

17 MR. KANJI: That is correct, Your
18 Honor.

19 JUSTICE ALITO: Well, what would you
20 say to those people when we -- if we decide this
21 case in your -- in your favor? Won't they be
22 surprised to learn that they are living on a
23 reservation and that they are now subject to
24 laws imposed by a body that is not accountable
25 to them in any way?

1 MR. KANJI: There -- there are a
2 number of responses, Your Honor. First, very
3 little will change for them. Certainly, very
4 little to the bad will change for them. They
5 will largely remain subject to state law. They
6 will benefit in significant ways from
7 reservation status. Justice Breyer asked a
8 question at the last argument about the Tulsa
9 businessman. Well, that businessman could wake
10 up the day after the argument and qualify for
11 enterprise grants that attach to reservation
12 status.

13 JUSTICE ALITO: What -- what -- what
14 would be the -- what will be the extent of the
15 tribe's authority over these non-Indians? For
16 example, if any member of the tribe has a
17 contract dispute with a non-member, say it's
18 about an employment contract or a lease or the
19 purchase of goods, will the -- the tribal member
20 be able to sue the non-Indian in tribal court
21 under tribal law?

22 MR. KANJI: In -- no, Your Honor. In
23 -- assuming that this takes place on fee lands,
24 which is the -- as you've noted, the majority of
25 lands in the reservation, under this Court's

1 precedents, it's clear that absent affirmative
2 consent, no, that case would proceed in state
3 court.

4 The tribe presumptively -- tribal law
5 presumptively would not apply to non-Indians
6 with respect to activities taking place on fee
7 land.

8 JUSTICE ALITO: Well, if this were a
9 different reservation and a non-Indian chose to
10 do business there, knew that he or she was
11 entering a reservation, was doing business
12 there, that would be considered to be consent,
13 would it not?

14 MR. KANJI: Well, the -- this Court's
15 precedents are, honestly, a little unclear on
16 that. But if there was some form of affirmative
17 expression of consent, that would bring the case
18 within tribal jurisdiction.

19 JUSTICE ALITO: But there will be --

20 CHIEF JUSTICE ROBERTS: Justice Kagan?

21 JUSTICE KAGAN: Mr. Kanji, could I ask
22 you to continue and -- you're talking about the
23 consequences of this, and focus particularly
24 about adoptions and foster care proceedings,
25 because I know there's been some concern about

1 that.

2 MR. KANJI: Thank you, Your Honor.
3 There -- there has been some, well, frankly,
4 rhetoric about that. But it's misplaced. On
5 the ground, the state agency, the Health and
6 Human Services Agency, and the Nation cooperate
7 in every ICWA case. They have a terrific
8 relationship, and they have both been involved
9 in the placement of Indian children.

10 That will not change if the
11 reservation boundaries are affirmed. There are
12 various mechanisms to formalize that -- those
13 agreements. Section 1919 allows the state and
14 the Nation to continue sharing jurisdiction, for
15 the state courts to retain jurisdiction where
16 there are existing placements, or under
17 Section 1915 for the Nation to ordain those
18 placements.

19 There is simply no cause to think that
20 existing placements will be disrupted. That is
21 not in the interest of the Nation, the parents
22 of the children. And it will not happen.

23 JUSTICE KAGAN: And with respect to
24 all of these disruption questions, what role do
25 you think that our decision in City of Sherrill

1 plays?

2 MR. KANJI: Well, I -- Sherrill has a
3 -- has a -- Sherrill is always in the room when
4 the states and the tribes are negotiating
5 agreements. It's really, honestly a thumb on
6 the scale on the side of the states. So when it
7 comes to all the fabric of cooperative
8 agreements we have in place currently, those
9 will continue. We have terrific working
10 relationships, as the Cole brief exemplifies,
11 and it will continue to play that role.

12 Now, if there were ever a situation
13 where the Nation were to assert sovereignty in a
14 way that went beyond the bounds of those
15 agreements and that the state took umbrage with,
16 you know, Sherrill is an arsenal in -- in the
17 state's --- that states can employ in those
18 stations.

19 But what Sherrill makes very clear, is
20 that there's a clear distinction between
21 reservation boundaries and whether they exist or
22 not and what equitable defenses might apply to
23 the assertion of tribal authority within those
24 boundaries.

25 CHIEF JUSTICE ROBERTS: Justice

1 Gorsuch?

2 JUSTICE GORSUCH: Counsel, there's
3 been a fair amount of discussion so far this
4 morning about the Oklahoma Enabling Act and the
5 suggestion that it's inconceivable that Congress
6 would have admitted a new state to the Union
7 where a significant portion of the state would
8 have been a federal reservation subject to the
9 Major Crimes Act.

10 And I'm not sure we've given you all a
11 fair chance to have at that. So I'd -- I'd
12 appreciate a thorough response to that question.

13 MR. KANJI: Thank you, Justice
14 Gorsuch.

15 There's nothing inconsistent between
16 the advent of statehood and reservation
17 boundaries. The Solem case makes that patently
18 clear. The Cheyenne River reservation and the
19 Rosebud Sioux reservation were ordained eight
20 months before statehood. Congress clearly --
21 and they accounted for about 10 percent of
22 states' land mass alone.

23 Congress clearly understood at this
24 time that states could come into being with
25 significant reservation masses. Arizona became

1 a state shortly after Oklahoma, and that was
2 27 percent of the state's land mass. This
3 Court, by that time, had recognized that state
4 jurisdiction in the criminal area and the civil
5 area could pertain to non-Indians on
6 reservations and had established this framework
7 of concurrent jurisdiction that still persists
8 to today.

9 JUSTICE GORSUCH: Thank you, counsel.

10 CHIEF JUSTICE ROBERTS: Justice
11 Kavanaugh?

12 JUSTICE KAVANAUGH: Thank you, Chief
13 Justice, and good morning.

14 As I mentioned in the last comment, I
15 think we have to understand what the situation
16 was as of 1890, '90, to understand the text of
17 these statutes, but I want to focus on the text.

18 In particular, the text of the statute
19 that abolishes the tribal courts and the text of
20 the statute that creates, in essence, municipal
21 towns within Indian territory during the 1890s
22 and what the significance of those two statutes
23 are for assessing sovereignty, because
24 ultimately the question, as Justice Thomas
25 suggested, I think, is what -- what's the status

1 of legislative, executive, and judicial power.

2 How should we think about those
3 statutes with the tribal courts and the
4 municipal towns?

5 MR. KANJI: Mr. Chief Justice, I need
6 just one minute to answer this question because
7 it's -- it's critical, and it's an excellent
8 question, Justice Kavanaugh. With respect to --

9 CHIEF JUSTICE ROBERTS: That's exactly
10 how much time you have.

11 (Laughter.)

12 MR. KANJI: Thank you. With respect
13 to the courts, it's critical to remember most
14 tribes did not have tribal courts at this period
15 of time. It was a rarity that the Five Tribes
16 did. So, in restricting and eliminating those
17 tribal courts, Congress was merely putting them
18 on the same plane as other tribes.

19 And then more generally speaking, with
20 respect to the quantum of governmental powers,
21 as you know, Justice Kavanaugh, Congress has
22 regularly adjusted the metes and bounds of
23 tribal sovereignty. That's what this Court
24 recognized in Lara but has never equated the
25 quantum of power with the existence of the

1 reservations themselves. And if this --

2 JUSTICE KAVANAUGH: On the tribal
3 courts point, the difference, I think some would
4 say, is that the other tribes were not governing
5 a jurisdiction that was predominantly
6 non-Indian, which is what was going on here.
7 Any reaction to that?

8 MR. KANJI: Yes, look at exactly what
9 happened in 1901 and thereafter with the
10 Allotment Act. The tribal courts were gone but
11 the Secretary of the Interior continued to
12 enforce the tribe's legislative authority.
13 Section 42 made it very clear that that
14 legislative authority persisted. The Secretary
15 enforced the tribal laws. And this Court's
16 decision in Hitchcock and the Eighth Circuit's
17 decision in Buster make it crystal clear that
18 the tribe's legislative authority persisted
19 after the Acts in question were -- were enacted.

20 JUSTICE KAVANAUGH: Thank you.

21 CHIEF JUSTICE ROBERTS: Thank you,
22 counsel.

23 General Mansinghani.

24 ORAL ARGUMENT OF MITHUN MANSINGHANI

25 ON BEHALF OF THE RESPONDENT

1 MR. MANSINGHANI: Thank you, Mr. Chief
2 Justice, and may it please the Court:

3 Oklahoma has jurisdiction over the
4 eastern half of the state because it never was
5 reservation land and is certainly not
6 reservation land today. To start, the land was
7 not public land preserved from sale, where title
8 remains with the United States, but instead
9 patented in fee to the Creek Nation.

10 That is why this Court in U.S. v.
11 Creek Nation called it a former dependent Indian
12 community. And under *Venetie*, it clearly lost
13 that status when the fee patent was dismantled.

14 Now, assuming the land was a
15 reservation, Congress stripped away all
16 semblance of reservation status. *Solem* asks us
17 whether Congress's purpose was to divest the
18 tribe of all its interest in the land, and,
19 here, statute after statute did precisely that.

20 The Curtis Act ended tribal governance
21 of the land, the allotment agreement divested
22 the tribe of all its rights, title, and
23 interest, and the allotments were quickly
24 stripped of federal superintendents. Everyone
25 at the time read these statutes to mean the

1 state had jurisdiction and the land was not a
2 reservation.

3 CHIEF JUSTICE ROBERTS: Thank you,
4 counsel. Mr. Gershengorn, in response to a
5 question from Justice Kagan, argued that
6 "dependent Indian community" was an umbrella
7 term that included reservation. I'd like to get
8 your response to that.

9 MR. MANSINGHANI: I think that
10 definition would completely make 1151(b)
11 surplusage. It would read it right out of the
12 statute. What this Court said in Venetie is
13 that tribes with land in fee are "unlike
14 Indians living on reservations," citing
15 Sandoval, which compares the -- the -- the
16 Pueblos, who had a dependent Indian community,
17 as essentially the same as the Five Tribes.

18 And in Creek Nation, this Court said
19 that the Five Tribes had a fee simple, not the
20 usual Indian right of occupancy, which is what
21 is typical of reservations, and it was a
22 dependent Indian community.

23 And then Congress went out and
24 codified Sandoval as a -- as a type of land
25 status separate and apart from reservations,

1 which is what this Court held in Venetie.

2 CHIEF JUSTICE ROBERTS: Thank you,
3 counsel.

4 Justice Thomas?

5 JUSTICE THOMAS: Yes. Counsel, the --
6 I'm very interested in your point that this --
7 we should characterize this as a dependent
8 nation. First -- I'd like you, first, to say
9 whether -- why you think that and why it
10 matters.

11 And -- and opposing counsel seems to
12 think that it's irrelevant and, as he said, as I
13 recall, that it's also wrong, your assessment of
14 that.

15 So it gives you an opportunity to both
16 respond to that and to explain to us why it is
17 important.

18 MR. MANSINGHANI: So why is it a
19 dependent Indian community. First, as I said,
20 the -- Venetie said that tribes holding their
21 land under restricted fee are unlike Indians
22 living on reservations. Sandoval and Creek
23 Nation confirmed that. And as far as -- it
24 doesn't meet the definition of a reservation.

25 I'll take the definition from Hagen v.

1 Utah, land belonging to United States that is
2 reserved from sale and set apart for public
3 uses. And in Pine River, this Court said
4 "reserved from sale" means the fee remains in
5 the United States.

6 Well, issuing a fee patent is not
7 reserving it from sale. It's selling it. Why
8 it makes sense. Making land alienable to
9 non-Indians in a dependent Indian community ends
10 the dependent Indian community status. That's
11 what this Court said in Venetie and that's what
12 then Judge -- Judge Gorsuch at the Tenth Circuit
13 said in Hydro Resources on page 1163 in
14 Footnotes 11 and 30 of his opinion.

15 And that makes textual and logical
16 sense because there's a textual difference
17 between 1151(a), which says that a reservation
18 remains one notwithstanding the issuance of any
19 patent, and 1151(b), which doesn't contain that
20 language and defines dependent Indian
21 communities. Again, Judge Gorsuch pointed that
22 out in Hydro Resources.

23 It also makes logical sense because,
24 if what created the land was the fee patent, the
25 opposite of that, the conveyance of the fee

1 patent disestablishes. That's in accordance
2 with this Court's decision in Hagen v. Utah,
3 where it said reservation is reserving land from
4 the public domain, so restoring land to the
5 public domain ends the reservation.

6 CHIEF JUSTICE ROBERTS: Justice
7 Ginsburg?

8 JUSTICE GINSBURG: If -- if the tribe
9 -- if the reservation had been disestablished,
10 would the tribe have any governing authority
11 and, if so, over what? Would the Major Crimes
12 Act apply, or would exclusive prosecutorial
13 authority for state crimes lie in the state
14 courts?

15 MR. MANSINGHANI: So the tribe would
16 have their governments in -- in that they would
17 have control over their own internal affairs and
18 managing their property interests, which, if you
19 look to the tribal understanding at the time, as
20 we -- as we quote in our Respondent's appendix,
21 is exactly what the tribe understood their own
22 authority to be.

23 As far as would they have any
24 authority over land, there is some land that is
25 under their original fee patent, so the River

1 Spirit Casino in Tulsa is built on the riverbed
2 of the Arkansas River because that land was
3 never allotted. So they have governing
4 authority over that land, over trust land, and
5 over restricted allotments, but we think the
6 state, nonetheless, has jurisdiction over all of
7 the state pursuant to the transfer of state --
8 to -- to state jurisdiction in the Enabling Act,
9 which, you know, the -- the -- what Congress had
10 done in the Indian territory is say the Indian
11 territory is an area where Indians and
12 non-Indians are treated alike. Then the
13 Enabling Act in Section 21 extended federal law
14 except where not local -- where locally
15 inapplicable.

16 And it was locally -- the Major Crimes
17 Act was locally inapplicable in the Indian
18 territory because the 1897 Act is the act that
19 conferred jurisdiction, not the Major Crimes
20 Act, which is why Petitioner can't cite a single
21 Major Crimes Act case during this period, before
22 statehood or after.

23 JUSTICE GINSBURG: This question was
24 asked before, but what are -- what are the
25 congressional prescriptions that, in Oklahoma,

1 all residents are subject to the same law,
2 irrespective of race?

3 MR. MANSINGHANI: I think that lays
4 the framework of what Congress was trying to do
5 in make -- in -- in creating the state of
6 Oklahoma, which was to transform the governance
7 of the state and the land ownership of the
8 state, which was exclusively tribal, to a place
9 where both Indians and non-Indians could both
10 own land and be governed by the same state
11 government.

12 If you look at pages 23 -- 22 to 25 of
13 our brief, we lay out that history and -- and
14 lay out that that is what Congress said
15 explicitly in legislative reports, that's what
16 the Dallas Commission report said, and that's
17 what the tribes recognize in their own tribal
18 understanding.

19 CHIEF JUSTICE ROBERTS: Justice
20 Breyer?

21 JUSTICE BREYER: No, thank you.
22 I'll -- I'll pass.

23 CHIEF JUSTICE ROBERTS: Justice Alito?
24 Justice Alito?

25 JUSTICE ALITO: Yes. Mr. Gershengorn

1 has a section of his brief that's labeled The
2 Sky Is Not Falling, and his argument is that you
3 and the federal government are exaggerating the
4 effect of this decision, that it won't have such
5 a major impact either in the criminal or in the
6 civil area.

7 Is he right in that?

8 MR. MANSINGHANI: No, Justice Alito.
9 So let me -- let me put some -- some solid
10 numbers on this. We have currently over 1700
11 inmates whose crimes were committed in the
12 former Indian territory who identify as native
13 American. So the state presumptively would not
14 have jurisdiction over those people and have to
15 release them.

16 And that is probably half the actual
17 number because it doesn't include crimes
18 committed against Indians which the state would
19 not have jurisdiction over, so we're talking
20 here about potentially around 30 -- over 3,000
21 inmates we may have to turn over.

22 As far as future cases go, there were
23 32,000 felonies committed in the former Indian
24 territory, an area that is about 12 percent
25 Native American. So only including crimes

1 committed by native Americans, that would be
2 4,000 new felonies a year that the federal
3 government would have to prosecute, including
4 crimes that -- where the Native American is the
5 victim, you can take that to about 8,000.

6 On the civil side, what -- on the
7 civil side, what happens is it creates precisely
8 the differential legal treatment between
9 non-Indians and Indians that Congress tried to
10 abolish when it -- when it created the state of
11 Oklahoma.

12 So non-Indians would not be subject
13 to -- presumptively to state zoning law, to dog
14 law, as Justice Breyer mentioned, and that
15 creates a disparity between Indians and
16 non-Indians. So now Indian -- non-Indian
17 businesses are competing on an unequal playing
18 field with Indian businesses. That's just one
19 example.

20 The Tulsa brief points out examples
21 of, on restricted allotments, how Indians are
22 erecting billboards in residential
23 neighborhoods, are selling fireworks in them,
24 but -- but that's in the few areas, the 2
25 percent of land that remains restricted

1 allotment.

2 If the entire area is a reservation,
3 then you're -- you're creating the two separate
4 societies that Congress had sought to abolish
5 when it passed the dozen statutes it did in
6 creating Oklahoma.

7 CHIEF JUSTICE ROBERTS: Justice
8 Sotomayor?

9 JUSTICE SOTOMAYOR: Counsel, with the
10 latter part of all of the parade of horrors
11 that you set forth, Congress can come in and
12 change all of that. Congress can give the state
13 jurisdiction over anything it might be missing
14 if we were to hold this was a reservation. They
15 have done so with respect to many other
16 reservations across the country. So this is
17 easily fixable by Congress.

18 Putting that aside, what do we do with
19 the treaty language here that resulted as --
20 after the Trail of Tears with the Creek Nation?
21 That Nation was wrenched from its homeland,
22 marched to Oklahoma, and then given a treaty as
23 recompense which guaranteed its sovereignty.

24 I'm not sure that there's any other
25 dependent Indian community that depends on a

1 treaty right that extends or recognizes
2 sovereignty. So can you point to any, Number 1?
3 Number 2, if there isn't, why aren't we back at
4 Solomon and Parker? Is there anything
5 explicitly that terminated the reservation in
6 the history that you've recounted?

7 MR. MANSINGHANI: Let me try to take
8 those questions in order. Congress can't fix
9 the retroactive consequences here. As far as
10 the -- the -- the dependent Indian community, I
11 think the Pueblos have sovereignty over their
12 land. It may not have been via treaty, but the
13 idea that a dependent Indian community versus
14 reservation turns on treaty rights would
15 actually -- is actually nowhere present in this
16 Court's case law. It -- and -- and -- and on
17 top of that, would actually undermine lots of
18 reservations that were not created by treaty but
19 by executive order. So Petitioner's position
20 would actually undermine Indian Country around
21 the country.

22 And then, third, as far as specific
23 language, I think I'm going to go to Justice
24 Thomas's point, which is cession, as this Court
25 said in *Rosebud Sioux*, means the surrender of

1 territory or jurisdiction. And here you have
2 the explicit surrender of territory and
3 jurisdiction.

4 The Curtis Act said tribal law shall
5 not be enforced. The -- the -- the allotment
6 agreement said all right, title, and interest is
7 divested. You combine those two things
8 together, that's enough to say that there was no
9 reservation status. But on top of that you have
10 a bunch of other statutes that do even more
11 things than that, that make it absolutely clear.
12 The --

13 CHIEF JUSTICE ROBERTS: Justice Kagan?

14 JUSTICE KAGAN: General, if we could
15 go back to this dependent Indian community
16 question, which is a complicated one because, of
17 course, our -- our use of language can change
18 over such an extended period of time, but when I
19 look back at some of these cases that were
20 decided around the same time that Creek Nation
21 was decided, it seems as though the case for
22 Mr. Gershengorn's view, which is that this term
23 was meant to be an umbrella term, is -- is a
24 pretty strong one. And, specifically, a case
25 called McGowan, which relied on another case

1 called Pelican, talked about the broad use of
2 the term "dependent Indian community" and said
3 whether it was -- whether something was a
4 reservation or a colony was irrelevant because
5 both were dependent Indian communities.

6 And then Felix Cohen says in his
7 treatise, speaking of these cases, he says --
8 and I'm quoting here -- "All Indian reservations
9 are also dependent Indian communities, unless
10 they are uninhabited."

11 So could you comment on that?

12 MR. MANSINGHANI: I think you have to
13 read it as well taking into account Venetie,
14 which says that tribal -- tribes with their land
15 in fee are unlike Indians living on
16 reservations.

17 I -- I don't think you could read
18 1151(b) as just completely the same as what's in
19 1151(a) and -- and (c), but more than that, a
20 reservation has to be land reserved from sale.
21 And here the land wasn't reserved from sale. It
22 -- it was sold. It was -- it was given to the
23 Creek Nation in exchange for their lands in fee
24 simple.

25 So if -- if you read the --

1 JUSTICE KAGAN: Well, that's a
2 different kind of argument. Excuse me, General.
3 That's a different kind of argument. That's --
4 that's the argument that fee simple is itself
5 inconsistent with reservation status.

6 And aren't there other tribes that
7 also have been given land in fee simple that
8 have been recognized as reservations?

9 MR. MANSINGHANI: No. And thank you
10 for the opportunity to address that. So the
11 Creek Nation points to the Seneca in New York as
12 having fee simple, but they yielded their land,
13 not by cession but by selling all their right to
14 private parties in 1797 and in 1842.

15 So, under their theory, all of western
16 New York and the city of Buffalo is still an
17 Indian reservation, which would be highly
18 disruptive. The -- they also point to the
19 Wyandotte, an 1887 treaty, but they neglect to
20 mention the 1818 supplemental treaty that
21 relinquished the right to a patent and instead
22 gave them a -- a reservation.

23 So our position would disrupt no land
24 anywhere. And -- and in 2015, by the way, the
25 Second Circuit looked at the Senecas' restricted

1 fee land in the Buffalo area and it said, you
2 know what it is? It's a dependent Indian
3 community. Since then the --

4 CHIEF JUSTICE ROBERTS: Thank you,
5 counsel.

6 Justice Gorsuch?

7 JUSTICE GORSUCH: Counsel, I have four
8 questions. I'm going to tick them off as fast
9 as I can, and you can choose which ones you want
10 to respond to in the time you have.

11 First, can you explain to me why the
12 fact that the land is in fee simple would lead
13 to a less stringent disestablishment test than
14 Solem? I guess I don't understand why that
15 would be the case.

16 Second, at least in the briefs, you
17 make a lot of later demographics and evidence
18 about what's happened. I -- I guess I'm
19 struggling to think why that should be relevant
20 in an interpretation of statutes from the last
21 century, especially when later demographic
22 evidence sometimes shows nothing more than that
23 states have violated Native American rights,
24 including Oklahoma's, for example, enforcement
25 of its state laws on -- on tribal lands against

1 tribal members in the past.

2 And then, third, practical
3 impossibility arguments, if you could address
4 what's wrong with what is in the brief by Robert
5 Henry about how states often work with tribal
6 entities.

7 And then, finally, fourth, I would
8 have thought that after Carpenter versus Murphy,
9 we might have seen a tsunami of -- of cases, if
10 there were a real problem here, that we --
11 haven't we haven't seen.

12 So any of those you want to take up,
13 feel free.

14 MR. MANSINGHANI: I'll do my best,
15 Justice Gorsuch.

16 Why does it mean less protection?
17 We're not saying it's less protection or more
18 protection. That is a false paradigm.
19 Congressional intent controls regardless. 1151
20 is not a sliding scale of protection, with
21 reservations or dependent Indian communities
22 being more or less.

23 Now, they did have more rights with
24 respect to the title, which is why Congress
25 decided they needed tribal agreement, but the

1 tribe agreed to divest itself of that title.
2 But when it comes to dependent Indian
3 communities, what -- what you said in Hydro
4 Resources and what Venetie said in -- is that
5 dependent Indian communities when -- when the
6 land becomes alienable, it's no longer part of
7 the dependent Indian community. And that's
8 based on the text of -- textual differences
9 between 1151(a) and 1151(b).

10 As far as what happened upon
11 statehood, we're not relying on what happened
12 100 years after statehood. We're relying upon
13 the tribal understanding, the federal
14 understanding, and the understanding of federal
15 judges during the process and as the process was
16 being implemented. Federal judges at the moment
17 of statehood transferred cases involving Indians
18 to tribal -- to state courts.

19 And the tribes understood, as we've
20 proven in our Respondent's appendix, they would
21 be subject to state law. So what we're talking
22 about here is the original tribal understanding
23 and the original public meaning, and what they
24 are trying to do is impose a modern lawyerly
25 gloss on statutes enacted 100 years ago.

1 So if you look at the original
2 understanding of how everybody implemented it,
3 it is completely as Oklahoma is doing today.

4 So the fact that there was -- there's
5 no tsunami, we've had 178 people already seek
6 relief under Murphy, even though the Murphy
7 mandate has been stayed and the Oklahoma Court
8 of Criminal Appeals' decision is still binding
9 on state courts. So that 178 cases are just the
10 initial cracks in the dam, and that doesn't even
11 include the state court filings that our office
12 isn't -- isn't notified of. So I -- I don't
13 think that you can say that there's -- there's
14 no tsunami coming.

15 And then as far as practical things,
16 yes, we're going to try to work with the tribes
17 as much as we can regardless of how this
18 decision comes out. We work with the tribes on
19 a day-to-day basis in doing a lot of great
20 things in the state of Oklahoma, but that
21 doesn't --

22 CHIEF JUSTICE ROBERTS: Justice
23 Kavanaugh? Justice Kavanaugh?

24 JUSTICE KAVANAUGH: Thank you, Chief
25 Justice, and good morning, General.

1 I want to pick up on your comment
2 earlier that Congress made clear that Indians
3 and non-Indians were to be treated alike, and to
4 pick up on Justice Gorsuch's reference to
5 demographics, and follow up on what I said in my
6 earlier questions.

7 My understanding is that, as of 1890,
8 this was a very unusual situation because it was
9 already predominantly non-Indian in Indian
10 territory, and that put Congress in a very
11 difficult position of figuring out what to do.
12 And I think that is necessary to understand to
13 figure out what the text of these statutes mean.

14 So I -- I guess my question on
15 demographics is people talk about the
16 demographics now. The demographics in 1890 were
17 also similar. How should that affect what we're
18 thinking about and, more particularly, can you
19 connect that up to the text of the statutes that
20 Congress enacted in that 17-year period to
21 transition to statehood?

22 MR. MANSINGHANI: Certainly, Justice
23 Kavanaugh. I think that's the right way to look
24 at it.

25 By statehood, 90 percent of the area

1 was non-Indian. And I think what that means is
2 that you have to figure out what Congress was
3 trying to do, which is abundantly clear from the
4 -- from the history, which is Congress is trying
5 to un -- undo the tribe's exclusive ownership of
6 the land and exclusive governance of the land,
7 because there was no territorial government, to
8 give it to a new state that would both -- that
9 would govern the land of non-Indians and Indians
10 alike and where -- where non-Indians and Indians
11 alike would -- would own the land.

12 That is nothing like any of this
13 Court's previous cases. Mr. Gershengorn was not
14 able to point to any case that was anything like
15 that. And so how that connects to the statutes,
16 well, if what Congress is trying to do, and this
17 is very clear from the history, Congress was
18 trying to transform both the jurisdiction and
19 the territory -- and the land ownership. Well,
20 the Curtis Act transformed jurisdiction. It
21 said tribal law shall not be in force. And
22 the -- the -- the allotment agreement
23 transformed the land tenure.

24 Now the other side says, well, we
25 could still levy taxes. Taxes were

1 affirmatively abolished in the Five Tribes Act,
2 so they can point to no actual tribal power that
3 existed. The one power they can point to was
4 abolished in the Five Tribes Act.

5 CHIEF JUSTICE ROBERTS: Thank you,
6 counsel.

7 General -- Deputy General Kneedler.

8 ORAL ARGUMENT OF EDWIN S. KNEEDLER
9 FOR THE UNITED STATES, AS AMICUS CURIAE,
10 SUPPORTING THE RESPONDENT

11 MR. KNEEDLER: Thank you, Mr. Chief
12 Justice, and may it please the Court.

13 In preparing the Indian territory for
14 statehood, Congress eliminated all the hallmarks
15 of a reservation. Congress broke up the tribe's
16 national domain and extinguished the tribe's
17 interest in it. Congress likewise eliminated
18 the tribe's territorial sovereignty over that
19 area by abolishing tribal courts and prohibiting
20 enforcement of tribal law in territorial courts.

21 At the same time, Congress eliminated
22 the distinct treatment of Indians under federal
23 law and instead subjected all persons in the
24 territory, irrespective of race, to the same
25 courts and body of law largely incorporated from

1 the state law of Arkansas.

2 And Congress carried forward that
3 framework for the new state. It directed that
4 Oklahoma law would apply throughout the former
5 Indian territory and provided for the transfer
6 of criminal and civil cases involving Indians
7 and non-Indians alike to state court.

8 Congress did not then radically change
9 course and impose a -- a reservation-based
10 jurisdictional regime throughout eastern
11 Oklahoma upon statehood.

12 CHIEF JUSTICE ROBERTS: Mr. Kneedler,
13 the Creek land was owned by the tribe in
14 communal fee, unlike the situation on most
15 reservations. Could you explain the consequence
16 of that for the analysis in this case?

17 MR. KNEEDLER: Yeah, I think it's -- I
18 think it's significant and I think it strongly
19 supports disestablishment here.

20 The -- the tribe had fee ownership as
21 part of setting aside the territory for its
22 nation to be undisturbed, and the -- and the
23 treaties provided that no territory or state
24 would be created there.

25 So, after all the non-Indians moved on

1 to the territory, Congress concluded that was
2 untenable and it had to break up the Nation, and
3 that included both the fee and the -- and the
4 sovereignty.

5 And so what -- when Congress provided
6 for allotment, the tribe specifically ceded its
7 interest in the land, conveyed its interest in
8 the land to the individuals. And because the
9 fee was the hallmark of their sovereignty, what
10 made them separate, the tribe's own conveyance
11 of the fee to individual members and
12 extinguishment of all interest in it
13 extinguished their sovereignty at the same time.

14 CHIEF JUSTICE ROBERTS: Thank you,
15 counsel.

16 Justice Thomas?

17 JUSTICE THOMAS: Yes, thank you.

18 Mr. Kneedler, the -- in Solem and
19 Parker, we had clear reservations, the -- the --
20 and it was pretty standard, and then you had an
21 effort to dispose of or to alienate surplus
22 land.

23 Here, this is entirely different.
24 Have you seen a case like this in which we have
25 applied the Solem and Parker framework?

1 MR. KNEEDLER: I -- I have not. And
2 the point you made earlier that Congress -- in
3 all those earlier cases, the Court was really
4 trying to discern the consequence of a surplus
5 land act standing alone. Here, you have other
6 statutes that specifically address those
7 consequences.

8 Each of those cases arose in deciding
9 whether federal law would apply or state law
10 would apply. Here, Congress answered that
11 question directly. There's no need to infer
12 that from the Surplus Lands Act alone.

13 Congress, in preparation for
14 statehood, provided that the same laws would
15 apply to Indians and non-Indians and then turned
16 over a territory with those attributes to the
17 new state. And immediately upon statehood, when
18 that compact of statehood was entered into, the
19 state courts started to exercise jurisdiction
20 over -- over Indians in that territory in
21 fulfillment of Congress's preparation.

22 And that was done pursuant to an act
23 of Congress. It's not simply a consequence of
24 -- of surplus -- of surplus lands. All of that
25 is a consequence of Congress's preparation for

1 statehood.

2 JUSTICE THOMAS: Thank you.

3 CHIEF JUSTICE ROBERTS: Justice
4 Ginsburg?

5 JUSTICE GINSBURG: What about
6 statements that an allotment conveying the title
7 and interest of the tribe, an allotment, unlike
8 session, doesn't diminish the reservation?

9 MR. KNEEDLER: There's -- there's no a
10 priori test for that -- for that proposition.
11 The important point here is that when Congress
12 started the move towards statehood, the
13 preparation for statehood, it did that in the
14 Dawes Act in 19 -- in 1893, and that act
15 provided that -- for the Dawes Commission to
16 negotiate for session, for allotment, or such
17 other method that -- that could be accomplished
18 in preparation for statehood. Congress regarded
19 whatever method could be worked out as the
20 prelude to statehood.

21 And the reason for prelude to
22 statehood is because Congress was preparing to
23 substitute the state for a territory, just as it
24 has done with all territories in the past. The
25 only difference here was that there was no

1 territorial government separately established.
2 It was the territory's and the government's and
3 the tribe's, which Congress essentially
4 prevented from enforcing their laws and created
5 a situation where the land with that
6 characteristic could then be transferred to the
7 state, with Indians and non-Indians treated
8 alike.

9 JUSTICE GINSBURG: I -- I think this
10 question has been asked before, but, when the
11 tribe, not the United States, the tribe holds --
12 holds title to treaty guaranteed land, you say
13 we should apply a less stringent standard for
14 disestablishment. Why?

15 I -- I would think that you would
16 anticipate an even stronger showing when it is
17 the tribe itself, not the United States.

18 MR. KNEEDLER: I'm -- I'm not -- I'm
19 not saying it's a less standard, it's a -- it's
20 a less stringent standard. What I'm saying is
21 that what Congress did needs to be understood in
22 the historical framework in -- in which it -- in
23 which it acted.

24 And the framework -- that was
25 understood by everybody concerned at the time of

1 statehood. This -- the -- the compact of
2 statehood that -- that provided for this, it
3 wasn't conferring jurisdiction on a state. It
4 was part of the compact under which the state
5 came into the union that in eastern Oklahoma, as
6 was prepared for by Congress, Indians and
7 non-Indians were treated alike.

8 That was the deal. And that was
9 followed through with by transferring cases
10 involving non-Indians. And the -- the prior --

11 CHIEF JUSTICE ROBERTS: Justice
12 Breyer?

13 JUSTICE BREYER: Thank you.

14 If we decide that Solem doesn't apply
15 here or there's an exception, then you would
16 win, I -- I assume. Let's assume that.

17 But would that not cause the same
18 practical problems elsewhere in the country?
19 For 35 years, people have lived under Solem. If
20 we change it or make exceptions, won't there be
21 places where people bring lawsuits, people who
22 are in prison, and they say, we were tried in
23 the wrong court? The same circumstances here,
24 we thought we were a tribe, and the prisoner
25 says, no, you're not a tribe and vice versa.

1 So why does the change -- why does the
2 parade of horrors work in only one direction?
3 Departing from Solem, you get the horrors
4 regardless.

5 MR. KNEEDLER: We -- we think this is
6 a compelling case under Solem but -- but also
7 that the Court has to consider the application
8 of Solem with respect to the unique history of
9 -- of Oklahoma. There is no other territory of
10 the United States converted to statehood among
11 the --

12 JUSTICE BREYER: But that isn't quite
13 my question. My question is: If we make an
14 exception from Solem or if we change Solem, is
15 there not likely to be the same kind of parade
16 of horrors elsewhere? I don't know the
17 history of every tribe in the United States, and
18 though you know a great deal about it, I'm not
19 sure that you do.

20 MR. KNEEDLER: But you created a --

21 JUSTICE BREYER: And --

22 MR. KNEEDLER: I'm sorry.

23 JUSTICE BREYER: No, go ahead. You
24 see the point.

25 MR. KNEEDLER: If you created an

1 exception to Solem, it would be an exception
2 that would no doubt be based on the unique
3 circumstances of this case. Again, this -- and
4 unlike in Solem and other cases, there's not
5 just a Surplus Lands Act. You have these other
6 specific statutes directed at the consequences
7 of disestablishment that -- the -- the
8 attributes of disestablishment.

9 And I'm unaware, and we haven't seen
10 in the eight or nine or ten disestablishment
11 cases this Court has had, anything resembling
12 that where there are separate statutes
13 implementing --

14 JUSTICE BREYER: Oh, would you know
15 what happened in, say, Alaska or in Hawaii or in
16 Wyoming? Have you all looked into this and said
17 if you create an exception and there's no one
18 else who could qualify for that exception?

19 MR. KNEEDLER: No one has identified.
20 We -- we -- we have not. Of course, in Alaska,
21 there are no -- no reservations at all. In
22 Wyoming, there's one reservations. So nothing
23 like this has surfaced.

24 And, again, this has been the case for
25 100 years in Oklahoma, more than 100 years,

1 since Oklahoma entered the Union on the
2 understanding that Indians and non-Indians would
3 be treated alike in the eastern half of that new
4 -- of that new state. There's --

5 CHIEF JUSTICE ROBERTS: Justice Alito?

6 MR. KNEEDLER: -- nothing like that --

7 JUSTICE ALITO: Mr. Kneedler, the
8 broad question whether the Creek Nation has a
9 reservation or whether it's a dependent Indian
10 community has all sorts of implications, but
11 what I'd like you to address is whether we can
12 decide this case on a narrow ground because,
13 after all, the only thing that's involved here
14 is a criminal prosecution.

15 So if we were to look at the narrow
16 question whether Congress has provided for the
17 trial of cases like this one in state court,
18 what would an opinion like that look like? What
19 would it look to, the 1897 Act, the 1906
20 Enabling Act and the amendment in 1907, the way
21 these laws have been interpreted for 100 years?
22 What would an opinion like that --

23 MR. KNEEDLER: I think it would --

24 JUSTICE ALITO: -- look like?

25 MR. KNEEDLER: I think it would look

1 at all those things. And, again, what happened
2 prior to statehood is highly relevant because
3 all -- everything Congress did was in
4 preparation for statehood. So the limit -- so
5 subjecting Indians and non-Indians to the same
6 laws was part of the package that Congress
7 incorporated into the new state at statehood, so
8 that 1897 and 1904 Acts are -- are critical, and
9 the Statehood Act, which provided for the
10 transfer of cases to state jurisdiction was
11 contemporaneously construed and applied by those
12 responsible for implementing it.

13 JUSTICE ALITO: What would you say to
14 the argument that we shouldn't look to the way
15 it was interpreted right after statehood or for
16 many decades after that because those people
17 were proceeding in bad faith, the statutes were
18 clear, and they and the state was simply
19 usurping authority, and the federal government
20 was going along with it?

21 MR. KNEEDLER: There's absolutely no
22 basis for that. The -- these are federal
23 judges, federal district judges, federal Indian
24 court judges, and state court judges and -- and
25 state court prosecutors. Everybody on the

1 ground understood that.

2 There was the case in the court called
3 Hendrix, which proceeded on the assumption that
4 an Indian in the Indian territory had committed
5 a crime. This case could have been transferred
6 to state court. There was some special statute
7 that said otherwise, but the premise of the
8 whole case was that his case would have
9 otherwise gone to state court in Oklahoma.

10 And the -- it's important to
11 understand that the tribe understood that. And
12 I urge the Court to look at the statements by
13 the principal chief of the -- of the Creek
14 Nation in 1906, after a -- the Five Tribes Act
15 was passed, and he said: Upon the establishment
16 of a state government, all powers over the
17 governing, even of our landed property, will
18 cease, except insofar as the distribution of our
19 property and money is concerned, which will be
20 entirely under --

21 CHIEF JUSTICE ROBERTS: Justice --
22 Justice Sotomayor?

23 JUSTICE SOTOMAYOR: Mr. Kneedler, I
24 understood that statement was in light of the
25 existing congressional disestablishment

1 legislation that Congress subsequently changed
2 and didn't go through with. But putting that
3 aside, I -- I haven't figured out whether you've
4 accepted the -- Oklahoma's suggestion about the
5 dependent Indian community exception or
6 argument.

7 Are you endorsing that argument?

8 MR. KNEEDLER: No. No -- not -- not
9 in terms, we're not. I mean, this Court has --
10 has discussed dependent Indian community
11 separately. But some of what informs the
12 State's argument we think is very important, as
13 I said before, that the -- the State --

14 JUSTICE SOTOMAYOR: But
15 disestablishment -- but let's go back to, is
16 there a consequence that we're unaware of? If
17 we were to describe this reservation -- this
18 Creek land as dependent Indian community --

19 MR. KNEEDLER: I --

20 JUSTICE SOTOMAYOR: -- what other
21 things would we put in question, what -- what --

22 MR. KNEEDLER: I --

23 JUSTICE SOTOMAYOR: You're saying the
24 things that inform that discussion inform your
25 disestablishment and -- I understand your

1 argument, but why aren't you endorsing the
2 dependent Indian community argument?

3 MR. KNEEDLER: Well, there could be
4 other situations. I mean, for example, in -- in
5 Oklahoma, Congress has provided for various
6 statutes to apply to tribes within their former
7 reservations. And if these were regarded as
8 dependent Indian communities, would statutes
9 like that apply? Now, Congress still referred
10 to them as former reservations.

11 But one -- one point that I think is
12 -- that makes this --

13 JUSTICE SOTOMAYOR: Mr. Kneedler, I
14 hate to cut you off, but I do have one last
15 question here.

16 MR. KNEEDLER: Sure.

17 JUSTICE SOTOMAYOR: Which is what do
18 we do with -- if we say this reservation was
19 disestablished, under what theory would we
20 recognize Indian sovereignty over lands they
21 kept? It was either disestablished or not.

22 And why --

23 MR. KNEEDLER: Well --

24 JUSTICE SOTOMAYOR: -- would all the
25 complex laws that exist now giving the Indians

1 the reservation -- the casino rights and
2 jurisdiction over lands that they own and -- and
3 all of those other things, what would be the
4 basis of keeping all of that --

5 MR. KNEEDLER: Well, it would be --

6 JUSTICE SOTOMAYOR: -- if we held it
7 was disenfranchised?

8 MR. KNEEDLER: It's commonplace that
9 when a reservation is disestablished, those
10 parcels that remain in -- as allotments or
11 tribal trust land or -- or of the sort, remain
12 Indian Country.

13 And so saying the reservation was
14 disestablished, which has been the assumption
15 for over 100 years, would not change anything on
16 the ground because the -- and Oklahoma has
17 always been understood where allotment --
18 allotments are the fulcrum of tribal and
19 individual activities. And this --

20 CHIEF JUSTICE ROBERTS: Thank you,
21 Mr. Kneedler.

22 Justice Kagan?

23 JUSTICE KAGAN: Mr. Kneedler, I
24 understand you want to support Oklahoma's
25 position in this case, but just to follow up on

1 Justice Sotomayor's questions about what Indian
2 -- what dependent Indian communities were or
3 were thought to be in 1935, do you think that
4 those concepts were mutually exclusive, a
5 reservation and a dependent Indian community?

6 MR. KNEEDLER: No, I think there was a
7 lot of overlap and that, you know, sort of the
8 bottom -- Congress -- the Court often described
9 them as in general terms as land validly set
10 apart for the use of Indians as such under the
11 superintendence of the government. And that --
12 that phrase appeared in -- in Potawatomie in
13 describing is there a difference between trust
14 and -- and reservations?

15 So that the same general concept was
16 there, except for a reservation, as opposed to
17 an allotment, for example, it's -- it's owned
18 collectively. And so when the land is broken
19 up, as it was here, particularly when it's
20 broken -- when it's fee land that is broken up
21 and when someone conveys their interest in fee
22 to -- to somebody else, they are conveying all
23 of their interest in it. It's not like trust
24 property on the typical reservation where the --
25 where when it's allotted, the United States

1 retains an interest and therefore on behalf of
2 the tribe in some sense, retains an interest.

3 When it's fee land, it is conveyed out
4 of the tribe and the tribe loses all of its
5 interest in the land. And that's particularly
6 clear under this allotment agreement because it
7 provides that the United States also
8 extinguished -- by approving the deeds,
9 extinguished its interest in the land. And that
10 interest was a reversionary interest for when
11 the tribe was disappearing.

12 And so by -- by relinquishing the
13 United States' interest in that land at the same
14 time it was conveyed to the individual allottee,
15 it made it clear that the tribe as sovereign was
16 being -- sovereign authority over that land was
17 being eliminated.

18 JUSTICE KAGAN: Thank you,
19 Mr. Kneedler.

20 CHIEF JUSTICE ROBERTS: Justice
21 Gorsuch?

22 JUSTICE GORSUCH: Mr. Kneedler, tell
23 me what's wrong with this sequence of -- of --
24 of -- of my understanding, that Congress did
25 establish something it called a reservation with

1 respect to this property at some point in time,
2 that through the 1890s and the early part of the
3 last century, there was an awful lot of debate
4 about how to -- how to end that reservation,
5 whether they could end it in anticipation of
6 Oklahoma becoming part of the union.

7 And that things got very complicated
8 and they came mighty close to ending the
9 reservation but never quite passed the kind of
10 language that we typically see when that
11 happens, reversion of all lands to the public
12 domain or cessation or anything like that.

13 In fact, the Dawes Commission
14 couldn't -- admitted it couldn't quite get
15 there. And so you're really left to rely mostly
16 on a lot of demographic evidence, both then and
17 now, which, while not everybody's acting in good
18 faith, not everybody -- not everybody is acting
19 in bad faith too, as someone pointed out.

20 And it's a mixed bag. And it's very
21 hard to make much of it. And to rely too
22 heavily on demographic evidence is dangerous
23 because you, in some -- in some ways incentivize
24 people to ignore the plain terms of the law.

25 And, for example, as I pointed out

1 earlier, I think it was until the 1970s that
2 Oklahoma continued to try and enforce state law
3 against native Americans on allotted territory.
4 I believe I have that right.

5 So tell me what's wrong with that
6 understanding, please.

7 MR. KNEEDLER: Well, first of all, I
8 think there's a big difference between
9 demographics before and after statehood. The --
10 the overwhelming presence of non-Indians in the
11 territory was precisely the reason why Congress
12 said it won't work, had tribal governments
13 running this and tribes couldn't emphasize
14 jurisdiction over the non-Indians.

15 And what Congress said is, this area
16 needs a government for and by both Indians and
17 non-Indians and it established that in the
18 territory so that it could hand that arrangement
19 over to the new state.

20 And it was contest -- this Court's
21 decisions say that the contemporaneous
22 understanding of what Congress was doing is
23 significant. The original public meaning of
24 what -- what was done, and everybody, the state
25 understood it, the state -- or the -- the state

1 obviously implemented its compact of statehood,
2 the federal government understood it. Felix
3 Cohen understood it. The Commissioner of Indian
4 Affairs at the time said there's only a shell of
5 the government -- of the tribal government left.
6 The tribal chairman -- the tribal chief said the
7 same thing, that all we are in a position to do
8 is distribute the property.

9 And that -- that is -- and even the
10 case that Petitioners and -- and the tribe rely
11 upon, the Harjo versus Kleppe specifically says
12 that the tribe lost its territorial sovereignty
13 even though it had the authority to run its
14 internal affairs.

15 So --

16 CHIEF JUSTICE ROBERTS: Justice
17 Kavanaugh?

18 JUSTICE KAVANAUGH: Thank you, Chief
19 Justice. And good morning, Mr. Kneedler.

20 MR. KNEEDLER: Good morning.

21 JUSTICE KAVANAUGH: I want to follow
22 up on a question Justice Sotomayor asked and one
23 Justice Gorsuch asked.

24 Justice Sotomayor mentioned quite
25 rightly the 1832 and 1833 treaties. My

1 understanding, however, was that the 1866 treaty
2 made clear that those treaty rights were, I
3 don't know if the word is superseded, but
4 diminished because the tribes had aligned and
5 made a treaty with the confederates --
6 Confederate States of America and the treaty
7 language in 1866 said that that had unsettled
8 the treaty relations.

9 Anything you want to add on the 1866
10 treaty, the relevance of that?

11 MR. KNEEDLER: Yeah, I -- I don't
12 think it adds significantly to the point, except
13 that it -- it reflected an assertion of a
14 greater federal responsibility in the territory.
15 And it -- it was contemplated that Congress
16 could pass laws governing the territory.

17 I did want to make one point about
18 practical consequences on the criminal side, not
19 only would -- would this jeopardize all the
20 prior convictions on the state side, but it
21 would impose great burdens on the federal
22 government. It's estimated a 1300 percent
23 increase in criminal prosecutions brought in
24 state court.

25 And then, of course, for the state,

1 there -- there would be questions of taxation
2 and whatnot. And -- and I don't think City of
3 Cheryl, which has been suggested as a solution
4 to that.

5 JUSTICE KAVANAUGH: Can I ask one
6 other question, Mr. Kneedler, to follow up on
7 Justice Gorsuch.

8 My understanding given the
9 demographics as of 1890 was that it would be
10 very hard to have a tribal government over the
11 whole territory because of the population at the
12 time.

13 And my question is: What tribal
14 authority, judicial authority or legislative
15 authority to your knowledge was exercised over
16 the whole territory, including the white
17 settlers in 1890 through 1907?

18 MR. KNEEDLER: It -- it was that --
19 the tribes had no authority over the white
20 settlers, which is why Congress put in place the
21 -- the courts for the Indian territory and it
22 put in place federal law, mostly incorporating
23 Arkansas law, to govern Indians and non-Indians
24 alike.

25 And that is the regime that Congress

1 passed on from the territory to the new state
2 and the new state received and has been
3 faithfully applying that ever since statehood.

4 And --

5 CHIEF JUSTICE ROBERTS: Thank you, Mr.
6 Kneedler.

7 Mr. Gershengorn, you have two minutes
8 for rebuttal.

9 REBUTTAL ARGUMENT OF IAN H. GERSHENGORN
10 ON BEHALF OF THE PETITIONER

11 MR. GERSHENGORN: Thank you, Mr. Chief
12 Justice.

13 A number of things. Justice Gorsuch,
14 first. You're exactly right. This Court may
15 not be able to determine which party had the
16 better reading of events on the ground 120 years
17 ago, but it is surely well-positioned to
18 determine which party has a better reading of
19 the text. And on that score, I submit this case
20 is not close.

21 Second, Justice Ginsburg, two points.
22 With respect to fee title, that was meant to be
23 an additional protection because everyone
24 understood the -- the imperfections in Indian
25 title. The Creek didn't even get their patent

1 until 1852, 20 years after the reservation was
2 -- was given. Elimination of fee title does not
3 eliminate treaty promises. Those have to be
4 disestablished through plain text.

5 In addition, Justice Ginsburg, you're
6 exactly right, the right title and interest
7 language, which is the only text the other side
8 can point to, conveys only proprietary interest,
9 not sovereign interest. And so there is no
10 textual transfer.

11 There has been a lot of talk --
12 discussion this morning about irrespective of
13 race. It is -- one quick point on that.

14 When Congress -- when -- in the
15 Enabling Act in Section 13, what Congress put in
16 place was the laws of the territory of Oklahoma,
17 which did not have the supposedly magic language
18 about "irrespective of race." That suggests
19 that Congress well understood that the arguments
20 the SG and Oklahoma are making on this score are
21 -- are made up for today.

22 Fourth, there was a lot of discussion
23 about whether there's a compromise available on
24 criminal jurisdiction. There is not. Justice
25 Alito listed a number of factors for Mr.

1 Kneedler. One of the missing ones was the text.

2 The text is very clear. I was amazed
3 that Mr. Kneedler said there was no basis for
4 believing that there was -- ignoring the text,
5 Nagonset said that is true. Secretary Udall's
6 memo listed seven states in which it were true.

7 Finally, the numbers today are
8 mind-boggling in back of the envelope. They
9 don't appear in any of the briefs. The only
10 fixed number is 178 petitions. That dwarfs
11 Ramos.

12 I understand the Court's concerns
13 about jurisdictional consequences, but there are
14 no serious disagreements that these disputes are
15 common in Indian Country --

16 CHIEF JUSTICE ROBERTS: Thank you,
17 counsel. The case is submitted.

18 (Whereupon, at 11:32 a.m., the case
19 was submitted.)

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Official - Subject to Final Review

1	<p>1 [1] 57:2 10 [3] 25:22 27:4 43:21 10:00 [2] 1:14 4:2 100 [6] 63:12,25 75:25,25 76:21 81:15 11 [2] 1:10 50:14 11:32 [1] 91:18 1151 [3] 6:16,18 62:19 1151(a) [3] 50:17 59:19 63:9 1151(b) [4] 48:10 50:19 59:18 63:9 1163 [1] 50:13 12 [1] 54:24 120 [1] 89:16 13 [1] 90:15 1300 [1] 87:22 16 [1] 36:2 17 [1] 26:25 17-year [1] 65:20 1700 [1] 54:10 178 [3] 64:5,9 91:10 1797 [1] 60:14 18-9526 [1] 4:4 1818 [1] 60:20 1832 [2] 26:1 86:25 1833 [2] 26:1 86:25 1842 [1] 60:14 1852 [1] 90:1 1866 [5] 26:7,11 87:1,7,9 1887 [1] 60:19 1890 [8] 25:19,24 26:15 44:16 65:7,16 88:9,17 1890s [2] 44:21 84:2 1893 [1] 71:14 1897 [8] 16:21 17:2,5,6 29:18 52:18 76:19 77:8 19 [1] 71:14 1901 [2] 32:11 46:9 1904 [1] 77:8 1906 [5] 9:15 32:11 34:24 76:19 78:14 1907 [3] 35:5 76:20 88:17 1908 [1] 15:11 1915 [1] 41:17 1919 [1] 41:13 1935 [1] 82:3 1948 [1] 21:14 1970s [1] 85:1</p>	<p>32,000 [1] 54:23 35 [1] 73:19</p> <p style="text-align: center;">4</p> <p>4 [1] 3:4 4,000 [1] 55:2 42 [1] 46:13 46 [1] 3:12 47 [1] 27:16</p> <p style="text-align: center;">6</p> <p>60 [2] 25:21 27:4 67 [1] 3:16</p> <p style="text-align: center;">7</p> <p>75 [1] 27:14</p> <p style="text-align: center;">8</p> <p>8,000 [1] 55:5 85 [1] 27:10 89 [1] 3:19</p> <p style="text-align: center;">9</p> <p>90 [3] 38:14 44:16 65:25</p> <p style="text-align: center;">A</p> <p>a.m [3] 1:14 4:2 91:18 abdicating [1] 36:21 ability [1] 19:5 able [4] 13:2 39:20 66:14 89:15 abolish [2] 55:10 56:4 abolished [3] 34:20 67:1,4 abolishes [1] 44:19 abolishing [1] 67:19 above-entitled [1] 1:12 abrogate [2] 8:20,22 absence [1] 11:24 absent [2] 9:9 40:1 absolutely [4] 10:23 36:11 58:11 77:21 abundantly [1] 66:3 accepted [1] 79:4 accomplished [1] 71:17 accordance [1] 51:1 account [1] 59:13 accountable [1] 38:24 accounted [1] 43:21 accurate [1] 27:19 across [2] 37:3 56:16 Act [58] 5:17,20 14:5,21,22 15:1,20 16:9,15,16 17:3,5,6,10,15,23 29:22,23 30:8,8,16,20,21 34:24 35:5,6 36:2,15,15,16 37:17 43:4,9 46:10 47:20 51:12 52:8,13,17,18,18,20,21 58:4 66:20 67:1,4 70:5,12,22 71:14,14 75:5 76:19,20 77:9 78:14 90:15 acted [1] 72:23 acting [3] 37:19 84:17,18 action [2] 10:14,15 activities [2] 40:6 81:19 acts [6] 32:11 37:6,8,18 46:19 77:8 actual [2] 54:16 67:2 actually [7] 10:7,9 12:24 57:15,15,17,20 adamant [1] 6:19</p>	<p>add [2] 24:22 87:9 addition [1] 90:5 additional [1] 89:23 address [5] 24:25 60:10 62:3 70:6 76:11 addressed [2] 23:10 24:6 adds [1] 87:12 adjusted [1] 45:22 administering [1] 23:12 admitted [2] 43:6 84:14 adopted [1] 14:16 adoptions [1] 40:24 advent [1] 43:16 advocated [1] 28:11 AEDPA [1] 19:7 affairs [3] 51:17 86:4,14 affect [3] 24:8,19 65:17 affected [1] 38:15 affirmative [2] 40:1,16 affirmatively [1] 67:1 affirmed [1] 41:11 agency [2] 41:5,6 ago [2] 63:25 89:17 agree [2] 16:10 19:20 agreed [1] 63:1 agreement [6] 24:2 47:21 58:6 62:25 66:22 83:6 agreements [13] 6:4 32:19 33:1,3,4,12,16 34:2,4 41:13 42:5,8,15 ahead [1] 74:23 Alaska [2] 75:15,20 alienable [2] 50:8 63:6 alienate [1] 69:21 align [1] 26:4 aligned [2] 26:8 87:4 alike [9] 52:12 65:3 66:10,11 68:7 72:8 73:7 76:3 88:24 Alito [23] 15:18,19 16:18,20 17:21 36:1,6,7 38:12,13,19 39:13 40:8,19 53:23,24,25 54:8 76:5,7,24 77:13 90:25 Alito's [1] 29:6 allotment [17] 5:7 8:6 9:25 10:2 31:19 46:10 47:21 56:1 58:5 66:22 69:6 71:6,7,16 81:17 82:17 83:6 allotments [5] 47:23 52:5 55:21 81:10,18 allotted [4] 9:11 52:3 82:25 85:3 allottee [1] 83:14 allow [1] 37:15 allowed [1] 34:6 allows [1] 41:13 almost [3] 9:12 19:25 20:1 alone [3] 43:22 70:5,12 already [5] 12:14 17:10 19:4 64:5 65:9 alter [1] 31:17 alternatives [1] 28:12 amazed [1] 91:2 ambiguous [1] 35:13 amended [1] 36:1 amendment [1] 76:20 America [1] 87:6</p>	<p>American [4] 54:13,25 55:4 61:23 Americans [2] 55:1 85:3 amicus [6] 2:6,13 3:8,15 27:25 67:9 among [2] 16:14 74:10 amorphous [1] 28:11 amount [2] 28:19 43:3 analysis [7] 6:25 8:13,15 11:13 23:15 24:20 68:16 analyzed [1] 6:15 Ann [1] 2:5 another [1] 58:25 answer [9] 6:1,24 20:25 28:16 30:12 31:3 34:19 36:10 45:6 answered [1] 70:10 anticipate [1] 72:16 anticipation [1] 84:5 anyplace [2] 16:6,8 anytime [1] 11:9 apart [3] 48:25 50:2 82:10 Appeals [1] 64:8 appear [1] 91:9 APPEARANCES [1] 2:1 appeared [1] 82:12 appendix [2] 51:20 63:20 applicable [1] 29:13 application [1] 74:7 applied [6] 8:8 14:6 29:9,24 69:25 77:11 applies [2] 17:15 33:8 apply [17] 16:23 28:15 29:9,18 32:20 33:2 40:5 42:22 51:12 68:4 70:9,10,15 72:13 73:14 80:6,9 applying [2] 14:15 89:3 appreciate [1] 43:12 approach [1] 24:17 approving [1] 83:8 Arbor [1] 2:5 area [14] 13:19 33:10,21 38:14 44:4,5 52:11 54:6,24 56:2 61:1 65:25 67:19 85:15 areas [1] 55:24 aren't [3] 57:3 60:6 80:1 arguably [1] 25:18 argued [1] 48:5 argues [1] 6:14 argument [32] 1:13 3:2,5,10,13,17 4:4,7 6:17 13:22 19:9,13,25 21:3,5 23:6 27:23 39:8,10 46:24 54:2 60:2,3,4 67:8 77:14 79:6,7,12 80:1,2 89:9 arguments [3] 13:14 62:3 90:19 arise [2] 6:11 30:17 arising [1] 30:18 Arizona [1] 43:25 Arkansas [7] 14:16 17:7 29:8,20 52:2 68:1 88:23 arose [1] 70:8 around [4] 36:19 54:20 57:20 58:20 arrangement [1] 85:18 arrogating [1] 36:20 arsenal [1] 42:16 aside [4] 23:9 56:18 68:21 79:3</p>
2	<p>2 [2] 55:24 57:3 20 [1] 90:1 2015 [1] 60:24 2020 [1] 1:10 21 [1] 52:13 22 [1] 53:12 23 [1] 53:12 25 [1] 53:12 27 [2] 3:9 44:2 280 [1] 15:7</p>			
3	<p>3,000 [1] 54:20 30 [4] 25:23 27:5 50:14 54:20</p>			

Official - Subject to Final Review

<p>asks ^[1] 47:16 aspect ^[1] 13:23 assert ^[1] 42:13 assertion ^[2] 42:23 87:13 asserts ^[1] 11:14 assessing ^[1] 44:23 assessment ^[1] 49:13 assimilated ^[1] 29:20 Assimilative ^[1] 29:23 assume ^[2] 73:16,16 assumed ^[1] 22:15 assuming ^[2] 39:23 47:14 assumption ^[2] 78:3 81:14 attach ^[1] 39:11 attributes ^[2] 70:16 75:8 authority ^[22] 5:12 10:3 32:20 33:1,14 39:15 42:23 46:12,14,18 51:10,13,22,24 52:4 77:19 83:16 86:13 88:14,14,15,19 authorized ^[1] 5:11 authors ^[2] 34:3,4 available ^[1] 90:23 away ^[1] 47:15 awful ^[1] 84:3</p>	<p>bottom ^[1] 82:8 boundaries ^[6] 20:10 31:17 41:11 42:21,24 43:17 bounds ^[2] 42:14 45:22 branch ^[2] 37:7,8 break ^[1] 69:2 Breyer ^[16] 13:11,12 34:11,12 35:23 36:10 39:7 53:20,21 55:14 73:12,13 74:12,21,23 75:14 brief ^[12] 24:3,4 27:7 31:1 33:19,19 34:3 42:10 53:13 54:1 55:20 62:4 briefly ^[1] 27:9 briefs ^[3] 33:20 61:16 91:9 bring ^[2] 40:17 73:21 broad ^[3] 7:19 59:1 76:8 broadly ^[3] 7:20 21:9 23:18 broke ^[1] 67:15 broken ^[3] 82:18,20,20 brought ^[1] 87:23 Buffalo ^[2] 60:16 61:1 built ^[1] 52:1 bunch ^[1] 58:10 burdens ^[1] 87:21 business ^[2] 40:10,11 businesses ^[2] 55:17,18 businessman ^[2] 39:9,9 Buster ^[1] 46:17</p>	<p>challenge ^[1] 18:22 chance ^[3] 10:8 23:6 43:11 change ^[12] 5:24 24:21 39:3,4 41:10 56:12 58:17 68:8 73:20 74:1,14 81:15 changed ^[2] 14:21 79:1 changes ^[2] 28:14 30:2 characteristic ^[1] 72:6 characterize ^[1] 49:7 charged ^[1] 10:21 Cheryl ^[1] 88:3 Cheyenne ^[1] 43:18 CHIEF ^[66] 4:3,9 6:13 7:23 10:12,16 13:9 15:16 18:4,9,12 20:18,23 22:22 23:1,3 25:6,9,11 27:6,20 28:1 29:4,16 30:11,22 32:15 34:9 36:6 37:16 38:11 40:20 42:25 44:10,12 45:5,9 46:21 47:1 48:3 49:2 51:6 53:19,23 56:7 58:13 61:4 64:22,24 67:5,11 68:12 69:14 71:3 73:11 76:5 78:13,21 81:20 83:20 86:6,16,18 89:5,11 91:16 children ^[2] 41:9,22 choose ^[2] 18:23 61:9 chose ^[2] 26:23 40:9 chunks ^[1] 19:4 Circuit ^[2] 50:12 60:25 Circuit's ^[1] 46:16 circumstances ^[2] 73:23 75:3 cite ^[2] 17:22 52:20 cites ^[1] 13:18 citing ^[2] 16:16 48:14 citizens ^[1] 34:8 City ^[4] 2:9 41:25 60:16 88:2 civil ^[10] 6:1 26:3,5 32:23 35:7 44:4 54:6 55:6,7 68:6 claim ^[3] 10:19 28:24 34:13 claiming ^[1] 12:2 claims ^[1] 6:6 clear ^[22] 4:16 6:4 13:25 16:5 18:2 32:7 40:1 42:19,20 43:18 46:13,17 58:11 65:2 66:3,17 69:19 77:18 83:6,15 87:2 91:2 clearly ^[11] 4:15 20:12,15 32:11 36:16,22 37:17,19 43:20,23 47:12 client ^[1] 10:22 clients ^[1] 23:9 close ^[2] 84:8 89:20 codified ^[1] 48:24 cognizable ^[2] 36:4,13 Cohen ^[5] 13:18 34:18 35:15 59:6 86:3 Cole ^[1] 42:10 Cole's ^[1] 33:19 Coles' ^[1] 24:2 colleagues ^[1] 25:15 collectively ^[1] 82:18 colloquy ^[1] 20:5 colony ^[1] 59:4 combine ^[1] 58:7 come ^[2] 43:24 56:11 comes ^[4] 30:3 42:7 63:2 64:18 coming ^[2] 35:9 64:14 comment ^[5] 25:14 27:7 44:14 59:</p>	<p>11 65:1 comments ^[1] 13:21 Commission ^[3] 53:16 71:15 84:13 Commissioner ^[1] 86:3 committed ^[7] 14:23 36:3 54:11,18,23 55:1 78:4 common ^[1] 91:15 commonplace ^[1] 81:8 communal ^[2] 31:13 68:14 communities ^[11] 21:9 22:10,11 50:21 59:5,9 62:21 63:3,5 80:8 82:2 community ^[28] 6:15 7:4,7,17 19:24 20:8,16 21:7 47:12 48:6,16,22 49:19 50:9,10 56:25 57:10,13 58:15 59:2 61:3 63:7 76:10 79:5,10,18 80:2 82:5 compact ^[4] 70:18 73:1,4 86:1 compare ^[1] 12:12 compared ^[1] 22:14 compares ^[1] 48:15 comparison ^[1] 12:16 compelling ^[1] 74:6 competing ^[1] 55:17 complete ^[1] 6:1 completely ^[4] 31:25 48:10 59:18 64:3 complex ^[1] 80:25 complicated ^[2] 58:16 84:7 compositions ^[1] 37:4 compromise ^[1] 90:23 concept ^[1] 82:15 concepts ^[1] 82:4 concern ^[1] 40:25 concerned ^[2] 72:25 78:19 concerns ^[1] 91:12 concluded ^[1] 69:1 concurrent ^[3] 38:3,8 44:7 Confederacy ^[2] 26:4,9 Confederate ^[1] 87:6 confederates ^[1] 87:5 conferred ^[2] 15:7 52:19 conferring ^[2] 14:18 73:3 confirmed ^[1] 49:23 Congress ^[103] 4:13,14,17 5:3,4,6,9,15,20 6:9 7:10,11 8:17 9:14,20 10:7,11 13:15 14:1,15 15:2,12 20:10,11,12 21:10,14 22:7,9 24:6,21,22,23 25:2,5,18 26:23 29:6 31:12,16 33:23 34:16 37:8,13 43:5,20,23 45:17,21 47:15 48:23 52:9 53:4,14 55:9 56:4,11,12,17 57:8 62:24 65:2,10,20 66:2,4,16,17 67:14,15,17,21 68:2,8 69:1,5 70:2,10,13,23 71:11,18,22 72:3,21 73:6 76:16 77:3,6 79:1 80:5,9 82:8 83:24 85:11,15,22 87:15 88:20,25 90:14,15,19 Congress's ^[6] 7:19 26:17 29:14 47:17 70:21,25 congressional ^[5] 5:8,14 52:25 62:19 78:25 Congressman ^[1] 33:18</p>
B		C	
<p>back ^[7] 25:25 37:23 57:3 58:15,19 79:15 91:8 backdrop ^[1] 5:12 bad ^[3] 39:4 77:17 84:19 bag ^[1] 84:20 base ^[1] 6:16 based ^[3] 17:1 63:8 75:2 basic ^[1] 4:20 basically ^[1] 21:8 basis ^[4] 64:19 77:22 81:4 91:3 became ^[1] 43:25 become ^[1] 12:11 becomes ^[3] 32:18 33:2 63:6 becoming ^[1] 84:6 behalf ^[9] 2:4,10 3:4,12,19 4:8 46:25 83:1 89:10 believe ^[1] 85:4 believing ^[1] 91:4 belonging ^[1] 50:1 below ^[1] 4:15 benefit ^[2] 34:7 39:6 beside ^[1] 34:15 best ^[4] 7:9 24:21 33:17 62:14 better ^[2] 89:16,18 between ^[8] 42:20 43:15 50:17 55:8,15 63:9 82:13 85:8 beyond ^[2] 31:17 42:14 bicameralism ^[1] 37:10 big ^[1] 85:8 billboards ^[1] 55:22 binding ^[1] 64:8 bit ^[2] 23:4 25:13 black ^[4] 25:22 26:5,6 27:4 body ^[2] 38:24 67:25 both ^[21] 4:24 7:2 8:5 10:2 11:2,7 17:6 19:12 20:2 21:6 22:9 41:8 49:15 53:9,9 59:5 66:8,18 69:3 84:16 85:16</p>	<p>California's ^[1] 28:20 call ^[3] 20:4,7,15 called ^[7] 35:2,3 47:11 58:25 59:1 78:2 83:25 came ^[3] 1:12 73:5 84:8 cannot ^[1] 37:7 care ^[1] 40:24 Carpenter ^[1] 62:8 carried ^[1] 68:2 Case ^[49] 4:4,11 8:7,8,10 9:6,19 12:1,8,13 15:21,21 17:23 25:19 28:18 31:2 35:18 36:24,25 37:1,2 38:15,21 40:2,17 41:7 43:17 52:21 57:16 58:21,24,25 61:15 66:14 68:16 69:24 74:6 75:3,24 76:12 78:2,5,8,8 81:25 86:10 89:19 91:17,18 cases ^[44] 7:15,16 8:2 9:18,19 10:11 12:15,21,24,25 13:3 14:4,23 16:5,6,25 20:24 21:1 28:17 30:17,18 31:10,12,12 35:1,2 36:12,22 37:3 54:22 58:19 59:7 62:9 63:17 64:9 66:13 68:6 70:3,8 73:9 75:4,11 76:17 77:10 Casino ^[2] 52:1 81:1 catchall ^[1] 7:7 cause ^[3] 29:1 41:19 73:17 causes ^[1] 35:7 cease ^[1] 78:18 ceded ^[1] 69:6 century ^[3] 29:7 61:21 84:3 Certainly ^[3] 39:3 47:5 65:22 cessation ^[1] 84:12 cession ^[3] 5:7 57:24 60:13 chairman ^[1] 86:6</p>		

Official - Subject to Final Review

<p>connect ^[1] 65:19 connects ^[1] 66:15 consent ^[3] 40:2,12,17 consequence ^[5] 68:15 70:4,23, 25 79:16 consequences ^[11] 23:8,20,22,25 25:4 40:23 57:9 70:7 75:6 87:18 91:13 consider ^[1] 74:7 considered ^[2] 5:5 40:12 consistent ^[4] 17:2 21:2,5 29:14 construction ^[2] 14:3 28:8 construed ^[1] 77:11 contain ^[1] 50:19 contemplated ^[1] 87:15 contemporaneous ^[1] 85:21 contemporaneously ^[1] 77:11 contest ^[1] 85:20 continue ^[4] 40:22 41:14 42:9,11 continued ^[2] 46:11 85:2 contract ^[2] 39:17,18 contrary ^[1] 26:22 control ^[2] 19:11 51:17 controls ^[1] 62:19 converted ^[1] 74:10 conveyance ^[2] 50:25 69:10 conveyed ^[3] 69:7 83:3,14 conveying ^[2] 71:6 82:22 conveys ^[2] 82:21 90:8 convictions ^[3] 18:22 23:10 87:20 cooperate ^[1] 41:6 cooperation ^[1] 34:1 cooperative ^[6] 32:19,25 33:3,12, 16 42:7 correct ^[4] 10:24 38:6,13,17 couldn't ^[4] 22:17 84:14,14 85:13 council ^[1] 37:16 Counsel ^[37] 6:13 7:24 8:1 10:13, 18 12:5 13:10,10,13 15:17 18:5, 12,15 20:19 22:23 23:4 25:7 27:6, 21 29:5 30:23 34:10 36:9 37:22 43:2 44:9 46:22 48:4 49:3,5,11 56: 9 61:5,7 67:6 69:15 91:17 Country ^[9] 16:4 24:1,23 56:16 57: 20,21 73:18 81:12 91:15 course ^[13] 6:22 8:4 9:8 11:18 23: 19 26:22 29:25 30:5,19 58:17 68: 9 75:20 87:25 COURT ^[70] 1:1,13 4:10 6:7,10 7:4 8:18 11:5,6,12,23 12:4,4 13:5 14: 4 15:4,22 17:25 18:2,17,18 19:6 22:5,21 24:13,16 25:4 28:2 31:15, 22 32:2 33:21 34:16,22 36:13,17 37:3,5 39:20 40:3 44:3 45:23 47:2, 10 48:12,18 49:1 50:3,11 57:24 64:7,11 67:12 68:7 70:3 73:23 74: 7 75:11 76:17 77:24,24,25 78:2,6, 9,12 79:9 82:8 87:24 89:14 Court's ^[15] 5:25 23:20,21 24:11, 20 29:2 33:8 39:25 40:14 46:15 51:2 57:16 66:13 85:20 91:12 courts ^[3] 13:16 14:15,22 15:13, 24,25 30:18 34:21,22,23,25 35:8, 10,11 36:5 41:15 44:19 45:3,13,</p>	<p>14,17 46:3,10 51:14 63:18 64:9 67:19,20,25 70:19 88:21 cracks ^[1] 64:10 create ^[2] 26:22 75:17 created ^[7] 50:24 55:10 57:18 68: 24 72:4 74:20,25 creates ^[3] 44:20 55:7,15 creating ^[3] 53:5 56:3,6 creation ^[1] 28:22 Creek ^[31] 2:6 3:7 4:17,21,24 5:1 6: 17 7:10,21 20:24 21:6 22:13,15, 15 27:24 37:15,25 38:16 47:9,11 48:18 49:22 56:20 58:20 59:23 60: 11 68:13 76:8 78:13 79:18 89:25 Creeks ^[4] 6:19 22:19,19 26:2 crime ^[2] 10:20 78:5 Crimes ^[32] 5:17,19,20 13:16 14:1, 2,5,13,25 16:9,15 17:10,15,23 29: 22,23 30:20,21 34:17 36:3,15,15 43:9 51:11,13 52:16,19,21 54:11, 17,25 55:4 criminal ^[19] 4:18 5:16,25 11:10, 15 18:8 23:9 34:17,21 35:7 36:20 44:4 54:5 64:8 68:6 76:14 87:18, 23 90:24 critical ^[7] 10:6 29:17 33:6 36:18 45:7,13 77:8 critically ^[1] 31:9 crystal ^[1] 46:17 crystal-clear ^[1] 7:15 curiae ^[6] 2:6,13 3:8,16 27:25 67:9 currently ^[2] 42:8 54:10 Curtis ^[3] 47:20 58:4 66:20 cut ^[1] 80:14 cuts ^[1] 16:11</p> <hr/> <p style="text-align: center;">D</p> <hr/> <p>D.C ^[3] 1:9 2:3,12 Dakota ^[2] 27:15 36:23 Dallas ^[1] 53:16 dam ^[1] 64:10 dangerous ^[1] 84:22 Dawes ^[3] 71:14,15 84:13 day ^[1] 39:10 day-to-day ^[1] 64:19 deal ^[2] 73:8 74:18 dealing ^[4] 8:25 9:24 10:1 30:9 debate ^[2] 17:13 84:3 decades ^[1] 77:16 decide ^[4] 34:15 38:20 73:14 76: 12 decided ^[3] 58:20,21 62:25 deciding ^[1] 70:8 decision ^[10] 4:15 5:25 14:17 41: 25 46:16,17 51:2 54:4 64:8,18 decisions ^[4] 4:12,14 6:17 85:21 deeds ^[1] 83:8 defendant ^[3] 11:9,10,16 defendants ^[3] 18:20,21 19:3 defenses ^[1] 42:22 defines ^[1] 50:20 definition ^[3] 48:10 49:24,25 deliberate ^[1] 10:14 demographic ^[3] 61:21 84:16,22</p>	<p>demographics ^[7] 61:17 65:5,15, 16,16 85:9 88:9 departed ^[1] 30:10 Departing ^[1] 74:3 Department ^[1] 2:12 dependent ^[39] 6:15 7:3,6,16 19: 23 20:8,16 21:7 22:11 29:13 47: 11 48:6,16,22 49:7,19 50:9,10,20 56:25 57:10,13 58:15 59:2,5,9 61: 2 62:21 63:2,5,7 76:9 79:5,10,18 80:2,8 82:2,5 depending ^[2] 15:25 30:14 depends ^[1] 56:25 Deputy ^[2] 2:11 67:7 derive ^[1] 8:16 describe ^[2] 21:8 79:17 described ^[2] 15:5 82:8 describes ^[1] 14:25 describing ^[2] 7:17 82:13 designed ^[1] 31:22 determine ^[2] 89:15,18 determined ^[1] 35:8 difference ^[5] 46:3 50:16 71:25 82:13 85:8 differences ^[1] 63:8 different ^[14] 11:18,19,20,20 29:12, 13 30:13 33:13 37:4,4 40:9 60:2,3 69:23 differential ^[1] 55:8 difficult ^[1] 65:11 difficulties ^[1] 23:11 diminish ^[1] 71:8 diminished ^[2] 25:18 87:4 directed ^[2] 68:3 75:6 direction ^[1] 74:2 directly ^[3] 28:17 38:15 70:11 disagree ^[1] 18:19 disagreement ^[1] 17:14 disagreements ^[1] 91:14 disappearing ^[1] 83:11 discern ^[1] 70:4 discuss ^[1] 23:6 discussed ^[1] 79:10 discussion ^[5] 19:23 43:3 79:24 90:12,22 disenfranchised ^[1] 81:7 disestablish ^[2] 5:4 33:24 disestablished ^[6] 51:9 80:19,21 81:9,14 90:4 disestablishes ^[1] 51:1 disestablishment ^[11] 5:5 31:10 61:13 68:19 72:14 75:7,8,10 78: 25 79:15,25 dismantled ^[1] 47:13 disparity ^[1] 55:15 dispose ^[1] 69:21 disposing ^[1] 9:25 disposition ^[1] 8:3 dispositive ^[1] 31:2 dispute ^[1] 39:17 disputes ^[2] 6:9 91:14 disregard ^[1] 13:7 disrupt ^[1] 60:23 disrupted ^[1] 41:20</p>	<p>disruption ^[3] 5:24 19:8 41:24 disruptive ^[1] 60:18 dissolve ^[1] 32:6 dissolved ^[4] 5:9 10:9,15 32:7 distinct ^[3] 6:5 24:18 67:22 distinction ^[1] 42:20 distinguished ^[1] 24:14 distribute ^[1] 86:8 distribution ^[1] 78:18 district ^[3] 15:24 35:10 77:23 divergence ^[1] 29:1 divest ^[2] 47:17 63:1 divested ^[4] 31:5,25 47:21 58:7 doctrines ^[1] 33:8 document ^[1] 13:2 dog ^[1] 55:13 doing ^[5] 8:17 40:11 64:3,19 85:22 domain ^[4] 51:4,5 67:16 84:12 domestic ^[1] 22:10 done ^[9] 8:4,10 12:19 20:14 52:10 56:15 70:22 71:24 85:24 doubt ^[2] 19:8 75:2 dozen ^[1] 56:5 due ^[1] 11:3 during ^[3] 44:21 52:21 63:15 dwarfs ^[1] 91:10</p> <hr/> <p style="text-align: center;">E</p> <hr/> <p>Each ^[1] 70:8 earlier ^[5] 65:2,6 70:2,3 85:1 early ^[1] 84:2 easier ^[2] 12:1 35:18 easily ^[1] 56:17 eastern ^[6] 29:12 30:13 47:4 68: 10 73:5 76:3 EDWIN ^[3] 2:11 3:14 67:8 effect ^[2] 33:6 54:4 effectively ^[1] 31:5 effort ^[1] 69:21 eight ^[3] 28:23 43:19 75:10 Eighth ^[1] 46:16 either ^[2] 54:5 80:21 elections ^[1] 37:15 eliminate ^[2] 17:9 90:3 eliminated ^[4] 67:14,17,21 83:17 eliminating ^[1] 45:16 Elimination ^[1] 90:2 elsewhere ^[2] 73:18 74:16 emphasize ^[1] 85:13 employ ^[1] 42:17 employment ^[1] 39:18 Enabling ^[14] 14:21,22 15:20 16: 16 30:7,15 35:6 36:2,16 43:4 52:8, 13 76:20 90:15 enacted ^[4] 21:14 46:19 63:25 65: 20 end ^[2] 84:4,5 ended ^[1] 47:20 ending ^[1] 84:8 endorsing ^[2] 79:7 80:1 ends ^[3] 36:1 50:9 51:5 enforce ^[2] 46:12 85:2 enforced ^[3] 16:22 46:15 58:5 enforcement ^[2] 61:24 67:20</p>
--	---	--	---

Official - Subject to Final Review

<p>enforcing ^[1] 72:4 enough ^[1] 58:8 ensure ^[1] 25:1 entered ^[2] 70:18 76:1 entering ^[1] 40:11 enterprise ^[1] 39:11 entire ^[1] 56:2 entirely ^[3] 9:12 69:23 78:20 entities ^[1] 62:6 entitled ^[2] 18:20,22 enumerated ^[1] 5:18 envelope ^[1] 91:8 environmental ^[1] 24:25 equated ^[1] 45:24 equitable ^[1] 42:22 eras ^[1] 37:4 erecting ^[1] 55:22 error ^[1] 11:13 especially ^[2] 33:9 61:21 ESQ ^[5] 3:3,6,11,14,18 Esquire ^[2] 2:3,5 essence ^[1] 44:20 essentially ^[2] 48:17 72:3 establish ^[2] 5:3 83:25 established ^[4] 5:17 44:6 72:1 85:17 establishment ^[1] 78:15 estimated ^[1] 87:22 evaporate ^[1] 33:7 evaporated ^[1] 32:8 even ^[13] 9:6 12:1 15:10 36:22 37:16 58:10 64:6,10 72:16 78:17 86:9,13 89:25 event ^[3] 6:4 13:5 17:17 events ^[2] 18:2 89:16 everybody ^[7] 22:19 64:2 72:25 77:25 84:18,18 85:24 everybody's ^[1] 84:17 Everyone ^[2] 47:24 89:23 everything ^[3] 20:9 32:22 77:3 evidence ^[6] 7:9 19:15 61:17,22 84:16,22 exact ^[1] 14:18 exactly ^[10] 16:12,17 19:1 21:19,23 45:9 46:8 51:21 89:14 90:6 exaggerating ^[1] 54:3 example ^[6] 39:16 55:19 61:24 80:4 82:17 84:25 examples ^[1] 55:20 excellent ^[1] 45:7 except ^[5] 32:22 52:14 78:18 82:16 87:12 exception ^[8] 14:7 73:15 74:14 75:1,1,17,18 79:5 exceptional ^[1] 28:25 exceptionalism ^[1] 16:11 exceptions ^[1] 73:20 exchange ^[1] 59:23 excluding ^[1] 7:20 exclusive ^[5] 5:18 51:12 66:5,6 82:4 exclusively ^[1] 53:8 Excuse ^[1] 60:2 executive ^[6] 18:11 28:20 37:6,8</p>	<p>45:1 57:19 exemplifies ^[1] 42:10 exempt ^[1] 16:15 exercise ^[2] 33:25 70:19 exercised ^[1] 88:15 exist ^[3] 29:24 42:21 80:25 existed ^[1] 67:3 existence ^[1] 45:25 existential ^[1] 23:23 existing ^[6] 5:12 25:17 37:24 41:16,20 78:25 expect ^[1] 19:17 experience ^[1] 24:4 expert ^[1] 13:19 explain ^[3] 49:16 61:11 68:15 explained ^[1] 37:21 explicit ^[1] 58:2 explicitly ^[2] 53:15 57:5 exposed ^[1] 11:6 expression ^[1] 40:17 expressly ^[3] 4:25 5:22 15:4 extend ^[1] 17:6 extended ^[2] 52:13 58:18 extends ^[2] 17:5 57:1 extent ^[2] 19:8 39:14 extinguished ^[4] 67:16 69:13 83:8,9 extinguishment ^[1] 69:12</p> <hr/> <p style="text-align: center;">F</p> <hr/> <p>fabric ^[1] 42:7 fact ^[13] 6:18,20 8:8 11:4,22 19:14 20:9 27:3,13 28:13 61:12 64:4 84:13 factors ^[1] 90:25 fail ^[1] 9:20 fair ^[2] 43:3,11 faith ^[3] 77:17 84:18,19 faithfully ^[1] 89:3 Falling ^[1] 54:2 falls ^[1] 31:21 false ^[1] 62:18 far ^[8] 43:3 49:23 51:23 54:22 57:9,22 63:10 64:15 fast ^[1] 61:8 favor ^[2] 16:12 38:21 federal ^[49] 4:18 5:18 10:21,25 11:2,6,23 12:3 14:15,22,24 15:24 17:25 18:17 19:2,6 29:18,24 30:4,18,19 32:3 34:23,25 36:4,13,17,21 37:12,19 38:3 43:8 47:24 52:13 54:3 55:2 63:13,14,16 67:22 70:9 77:19,22,23,23 86:2 87:14,21 88:22 fee ^[31] 22:17 31:12 39:23 40:6 47:9,13 48:13,19 49:21 50:4,6,24,25 51:25 59:15,23 60:4,7,12 61:1,12 68:14,20 69:3,9,11 82:20,21 83:3 89:22 90:2 fee-simple ^[2] 37:25 38:7 feel ^[1] 62:13 Felix ^[5] 13:18 34:18 35:14 59:6 86:2 felonies ^[2] 54:23 55:2</p>	<p>few ^[2] 33:20 55:24 fewer ^[1] 13:4 field ^[1] 55:18 figure ^[3] 22:6 65:13 66:2 figured ^[1] 79:3 figuring ^[1] 65:11 filed ^[1] 33:20 filings ^[1] 64:11 Finally ^[4] 5:23 15:2 62:7 91:7 find ^[1] 35:24 finish ^[1] 36:10 fireworks ^[1] 55:23 first ^[15] 4:4,21 9:8 15:5 20:3 24:10 28:5 34:20 39:2 49:8,8,19 61:11 85:7 89:14 Five ^[10] 26:2,3 30:8 37:17 45:15 48:17,19 67:1,4 78:14 fix ^[2] 25:3 57:8 fixable ^[1] 56:17 fixed ^[1] 91:10 flows ^[1] 11:9 focus ^[2] 40:23 44:17 follow ^[5] 23:8 65:5 81:25 86:21 88:6 followed ^[1] 73:9 Footnotes ^[1] 50:14 force ^[2] 33:5 66:21 form ^[1] 40:16 formalize ^[1] 41:12 former ^[8] 33:23,23 47:11 54:12,23 68:4 80:6,10 forms ^[1] 11:2 forth ^[1] 56:11 forward ^[2] 19:15 68:2 foster ^[1] 40:24 four ^[3] 4:20 37:2 61:7 fourth ^[2] 62:7 90:22 framework ^[9] 8:8 28:4,7 44:6 53:4 68:3 69:25 72:22,24 frankly ^[1] 41:3 free ^[1] 62:13 fulcrum ^[1] 81:18 fulfillment ^[1] 70:21 full ^[1] 33:5 fundamental ^[4] 4:12 28:8,14 37:6 further ^[1] 23:6 fused ^[1] 28:7 future ^[1] 54:22</p> <hr/> <p style="text-align: center;">G</p> <hr/> <p>gauntlet ^[1] 37:9 gave ^[2] 34:16 60:22 General ^[13] 2:8,11 29:22 30:21 36:15 46:23 58:14 60:2 64:25 67:7,7 82:9,15 generally ^[2] 23:14 45:19 GERSHENGORN ^[37] 2:3 3:3,18 4:6,7,9 7:1 8:11 10:5,14,23 11:8 12:6,22 13:24 16:7,19 17:4 18:1,7,10,25 20:1,22 21:4,19,23 22:4 23:17 25:12 27:8 48:4 53:25 66:13 89:7,9,11 Gershengorn's ^[1] 58:22</p>	<p>getting ^[2] 19:14 31:13 Ginsburg ^[16] 10:17,18,25 12:5,7 18:16 32:16,17 51:7,8 52:23 71:4,5 72:9 89:21 90:5 give ^[3] 23:5 56:12 66:8 given ^[9] 35:14,14,15 43:10 56:22 59:22 60:7 88:8 90:2 gives ^[1] 49:15 giving ^[2] 30:5 80:25 gloss ^[1] 63:25 goods ^[1] 39:19 Gorsuch ^[20] 7:5 22:24,25 23:2,3 25:8 43:1,2,14 44:9 50:12,21 61:6,7 62:15 83:21,22 86:23 88:7 89:13 Gorsuch's ^[1] 65:4 got ^[1] 84:7 govern ^[3] 4:24 66:9 88:23 governance ^[4] 34:7 47:20 53:6 66:6 governed ^[1] 53:10 governing ^[6] 28:4 46:4 51:10 52:3 78:17 87:16 government ^[19] 5:10 13:18 26:21 32:3 36:21 53:11 54:3 55:3 66:7 72:1 77:19 78:16 82:11 85:16 86:2,5,5 87:22 88:10 government's ^[1] 72:2 governmental ^[2] 32:12 45:20 governments ^[2] 51:16 85:12 governors ^[1] 33:23 grant ^[1] 26:1 grants ^[2] 26:11 39:11 great ^[4] 13:18 64:19 74:18 87:21 greater ^[1] 87:14 ground ^[7] 18:3 24:16 41:5 76:12 78:1 81:16 89:16 groups ^[1] 7:18 guaranteed ^[3] 4:23 56:23 72:12 guess ^[5] 9:16 11:21 61:14,18 65:14</p> <hr/> <p style="text-align: center;">H</p> <hr/> <p>habeas ^[1] 19:17 Hagen ^[2] 49:25 51:2 half ^[4] 29:12 47:4 54:16 76:3 hallmark ^[2] 5:5 69:9 hallmarks ^[1] 67:14 hand ^[1] 85:18 hands ^[1] 27:11 happen ^[3] 23:25 26:20 41:22 happened ^[18] 14:12,12 17:12,14,21,22 26:25 32:1 36:23,24,25 37:1 46:9 61:18 63:10,11 75:15 77:1 happens ^[3] 29:25 55:7 84:11 happy ^[1] 26:7 hard ^[3] 12:8 84:21 88:10 Harjo ^[1] 86:11 harm ^[1] 11:9 harmed ^[1] 11:4 harmless ^[1] 11:13 harsh ^[1] 11:1 hate ^[1] 80:14 Hawaii ^[1] 75:15</p>
--	---	--	--

Official - Subject to Final Review

<p>Health [1] 41:5 hear [2] 4:3 13:23 heard [2] 23:4, 11 hearing [1] 19:12 heavily [1] 84:22 heed [3] 37:5, 12, 18 heinous [1] 12:9 held [3] 35:8 49:1 81:6 Hello [1] 22:25 hence [1] 28:11 Hendrix [1] 78:3 Henry [1] 62:5 high [1] 18:23 higher [2] 18:17 19:3 highly [2] 60:17 77:2 historical [1] 72:22 historically [1] 27:19 history [1] 25:13 27:1, 18 28:19, 24 53:13 57:6 66:4, 17 74:8, 17 hit [1] 20:3 Hitchcock [1] 46:16 hold [2] 37:15 56:14 holding [1] 49:20 holds [2] 72:11, 12 homeland [1] 56:21 honestly [2] 40:15 42:5 Honor [28] 7:1 8:11, 14 9:17 10:6, 24 11:8 12:2, 22 13:24 15:2 16:7, 16 17:5, 12 18:1 19:1 21:20 23:17 27:9 31:9 33:5 35:17 38:6, 18 39:2, 22 41:2 Honor's [3] 9:7 19:20 27:17 horribles [5] 23:14 56:10 74:2, 3, 16 however [1] 87:1 Human [1] 41:6 hundreds [7] 12:8, 9, 16, 21, 23, 23 13:3 Hydro [4] 7:6 50:13, 22 63:3</p> <hr/> <p>I</p> <p>IAN [5] 2:3 3:3, 18 4:7 89:9 ICWA [1] 41:7 idea [3] 7:3 27:11 57:13 identified [2] 4:25 75:19 identify [1] 54:12 ignore [1] 84:24 ignoring [1] 91:4 illegally [1] 37:20 immediately [1] 70:17 immune [1] 27:11 immunity [2] 10:19 12:2 impact [2] 24:16 54:5 imperfections [1] 89:24 implemented [3] 63:16 64:2 86:1 implementing [2] 75:13 77:12 implications [1] 76:10 important [5] 23:24 49:17 71:11 78:10 79:12 impose [3] 63:24 68:9 87:21 imposed [2] 18:18 38:24 impossibility [1] 62:3 inaction [2] 5:8 10:8 inapplicable [2] 52:15, 17</p>	<p>incentivize [1] 84:23 include [2] 54:17 64:11 included [4] 30:20 36:14 48:7 69:3 includes [2] 21:24, 24 including [4] 54:25 55:3 61:24 88:16 incompatibility [1] 27:18 inconceivable [1] 43:5 inconsistent [5] 21:2 27:13 35:21 43:15 60:5 incorporated [2] 67:25 77:7 incorporating [1] 88:22 increase [1] 87:23 increased [1] 32:21 Indeed [7] 5:4 7:22 11:25 12:3 14:22 23:23 24:22 Indian [77] 6:15 7:4, 6, 17 16:3 19:24 20:8, 16 21:7 22:11 24:1, 23 25:20, 23 26:15 27:3, 5, 10, 11 34:22, 22 35:11 38:4 41:9 44:21 47:11 48:6, 16, 20, 22 49:19 50:9, 10, 20 52:10, 10, 17 54:12, 23 55:16, 18 56:25 57:10, 13, 20 58:15 59:2, 5, 8, 9 60:17 61:2 62:21 63:2, 5, 7 65:9 67:13 68:5 76:9 77:23 78:4, 4 79:5, 10, 18 80:2, 8, 20 81:12 82:1, 2, 5 86:3 88:21 89:24 91:15 Indian-related [1] 21:11 Indians [31] 6:21 9:13 26:19 30:3, 4 35:20 48:14 49:21 52:11 53:9 54:18 55:9, 15, 21 59:15 63:17 65:2 66:9, 10 67:22 68:6 70:15, 20 72:7 73:6 76:2 77:5 80:25 82:10 85:16 88:23 indicates [2] 24:3, 5 individual [3] 69:11 81:19 83:14 individuals [2] 31:14 69:8 infer [1] 70:11 influence [1] 24:8 inform [3] 23:15 79:24, 24 informs [1] 79:11 initial [1] 64:10 initially [1] 5:6 inmates [2] 54:11, 21 insofar [1] 78:18 instead [5] 5:7, 9 47:8 60:21 67:23 intact [2] 31:23 36:23 integrates [1] 21:21 intend [1] 14:1 intent [1] 62:19 interest [21] 41:21 47:18, 23 58:6 67:17 69:7, 7, 12 71:7 82:21, 23 83:1, 2, 5, 9, 10, 10, 13 90:6, 8, 9 interested [3] 31:3 34:13 49:6 interesting [1] 31:9 interests [1] 51:18 Interior [1] 46:11 internal [2] 51:17 86:14 interpret [2] 18:8 24:11 interpretation [2] 23:16 61:20 interpreted [2] 76:21 77:15 interrupt [1] 9:23 involve [2] 31:10 33:12</p>	<p>involved [8] 8:2 12:16 28:17, 18, 22 38:5 41:8 76:13 involving [4] 8:5 63:17 68:6 73:10 irrelevant [7] 19:25 20:2, 2, 3, 22 49:12 59:4 irrespective [7] 16:23 29:10, 19 53:2 67:24 90:12, 18 isn't [6] 9:20 16:4 57:3 64:12, 12 74:12 issuance [1] 50:18 issue [4] 8:20, 22 9:3 37:25 issues [3] 6:2, 2 38:4 issuing [1] 50:6 itself [7] 6:18 17:17 24:13 32:8 60:4 63:1 72:17</p> <hr/> <p>J</p> <p>jeopardize [1] 87:19 JIMCY [1] 1:3 job [2] 24:11 25:3 John [1] 37:2 Judge [4] 7:5 50:12, 12, 21 judges [6] 63:15, 16 77:23, 23, 24, 24 judgments [1] 5:14 judicial [2] 45:1 88:14 jurisdiction [47] 4:19 5:16, 18, 21 11:11, 14, 15, 24 14:19 15:3, 6, 6, 8, 10, 12, 14 33:15 34:6, 21 35:20 36:20 38:4, 8 40:18 41:14, 15 44:4, 7 46:5 47:3 48:1 52:6, 8, 19 54:14, 19 56:13 58:1, 3 66:18, 20 70:19 73:3 77:10 81:2 85:14 90:24 jurisdictional [3] 6:8 68:10 91:13 jurisdictions [1] 33:13 juror [1] 11:19 Justice [208] 2:12 4:3, 9 6:13 7:23, 25 8:1 9:22 10:12, 16, 17, 18, 25 12:5, 7 13:9, 11, 12 15:16, 18, 19 16:18, 20 17:21 18:4, 6, 9, 12, 14, 15, 15 19:22 20:5, 18, 20, 21, 23 21:16, 21 22:2, 22, 24, 25 23:1, 1, 3 25:6, 8, 9, 9, 11 27:6, 20 28:2, 3, 12 29:4, 5, 17 30:11, 22, 24, 25 32:14, 15, 15, 17 34:9, 11, 12 35:23 36:1, 6, 6, 7, 8, 9, 10, 11 37:22, 23 38:9, 11, 11, 13, 19 39:7, 13 40:8, 19, 20, 20, 21 41:23 42:25, 25 43:2, 13 44:9, 10, 10, 12, 13, 24 45:5, 8, 9, 21 46:2, 20, 21 47:2 48:3, 5 49:2, 4, 5 51:6, 6, 8 52:23 53:19, 19, 21, 23, 23, 24, 25 54:8 55:14 56:7, 7, 9 57:23 58:13, 13, 14 60:1 61:4, 6, 7 62:15 64:22, 22, 23, 24, 25 65:4, 22 67:5, 12 68:12 69:14, 16, 17 71:2, 3, 3, 5 72:9 73:11, 11, 13 74:12, 21, 23 75:14 76:5, 7, 24 77:13 78:21, 21, 22, 23 79:14, 20, 23 80:13, 17, 24 81:6, 20, 22, 23 82:1 83:18, 20, 20, 22 86:16, 16, 18, 19, 21, 22, 23, 24 88:5, 7 89:5, 12, 13, 21 90:5, 24 91:16</p> <hr/> <p>K</p> <p>Kagan [15] 20:20, 21 21:16, 21 22:2 40:20, 21 41:23 48:5 58:13, 14 60:</p>	<p>1 81:22, 23 83:18 KANJI [25] 2:5 3:6 27:22, 23 28:1 29:16 30:15, 25 31:8 33:4 35:17, 24 36:11 38:6, 17 39:1, 22 40:14, 21 41:2 42:2 43:13 45:5, 12 46:8 Kavanaugh [16] 25:10, 11 44:11, 12 45:8, 21 46:2, 20 64:23, 23, 24 65:23 86:17, 18, 21 88:5 keeping [1] 81:4 kept [1] 80:21 key [4] 8:12, 12 9:1 26:3 kind [6] 11:13 19:18 60:2, 3 74:15 84:9 kinds [3] 9:3 19:16 23:25 Kleppe [1] 86:11 KNEEDLER [45] 2:11 3:14 67:7, 8, 11 68:12, 17 69:18 70:1 71:9 72:18 74:5, 20, 22, 25 75:19 76:6, 7, 23, 25 77:21 78:23 79:8, 19, 22 80:3, 13, 16, 23 81:5, 8, 21, 23 82:6 83:19, 22 85:7 86:19, 20 87:11 88:6, 18 89:6 91:1, 3 knowledge [1] 88:15 knows [1] 25:2</p> <hr/> <p>L</p> <p>label [1] 7:7 labeled [1] 54:1 lacks [3] 11:11 32:20 33:1 land [73] 5:1, 13 8:3, 6 9:9, 11 10:1, 2, 3 26:2 31:5, 6 38:7 40:7 43:22 44:2 47:5, 6, 6, 7, 14, 18, 21 48:1, 13, 24 49:21 50:1, 8, 24 51:3, 4, 24, 24 52:2, 4, 4 53:7, 10 55:25 57:12 59:14, 20, 21 60:7, 12, 23 61:1, 12 63:6 66:6, 6, 9, 11, 19, 23 68:13 69:7, 8, 22 70:5 72:5, 12 79:18 81:11 82:9, 18, 20 83:3, 5, 9, 13, 16 landed [1] 78:17 lands [16] 4:23, 24 7:9, 10, 12 9:1 39:23, 25 59:23 61:25 70:12, 24 75:5 80:20 81:2 84:11 language [15] 5:5 7:2 15:6, 20 16:16, 19 17:9 50:20 56:19 57:23 58:17 84:10 87:7 90:7, 17 Lara [1] 45:24 large [2] 19:4, 16 largely [2] 39:5 67:25 last [6] 35:13 39:8 44:14 61:20 80:14 84:3 later [3] 12:20 61:17, 21 latter [1] 56:10 Laughter [1] 45:11 law [46] 5:11 12:10 13:25 14:15, 16 15:7 17:7, 7, 11 29:13, 18, 19, 20, 23, 24 30:13, 17, 19 32:20 33:2, 7, 8 35:1, 2 39:5, 21 40:4 52:13 53:1 55:13, 14 57:16 58:4 63:21 66:21 67:20, 23, 25 68:1, 4 70:9, 9 84:24 85:2 88:22, 23 laws [15] 16:21 29:8, 8, 11 35:3 38:24 46:15 61:25 70:14 72:4 76:21 77:6 80:25 87:16 90:16 lawsuits [1] 73:21</p>
---	--	---	--

Official - Subject to Final Review

<p>lawyerly ^[1] 63:24 lay ^[2] 53:13,14 lays ^[1] 53:3 lead ^[3] 26:12,13 61:12 leads ^[1] 33:11 learn ^[1] 38:22 lease ^[1] 39:18 least ^[4] 11:1,7 19:6 61:16 leaving ^[1] 6:8 left ^[2] 84:15 86:5 legal ^[1] 55:8 legislate ^[5] 5:13 7:19 21:10 22:7, 9 legislation ^[3] 29:6,15 79:1 legislative ^[6] 45:1 46:12,14,18 53:15 88:14 legislators ^[1] 33:24 less ^[8] 20:7 61:13 62:16,17,22 72:13,19,20 letter ^[1] 13:20 levy ^[1] 66:25 lie ^[1] 51:13 life ^[1] 35:18 light ^[1] 78:24 likely ^[1] 74:15 likes ^[1] 28:24 likewise ^[1] 67:17 limit ^[1] 77:4 limited ^[2] 19:7 21:25 listed ^[2] 90:25 91:6 little ^[4] 23:4 39:3,4 40:15 live ^[1] 38:14 lived ^[1] 73:19 living ^[5] 38:2,22 48:14 49:22 59:15 local ^[1] 52:14 locally ^[3] 52:14,16,17 logical ^[2] 50:15,23 longer ^[1] 63:6 look ^[15] 9:5 11:16 46:8 51:19 53:12 58:19 64:1 65:23 76:15,18,19, 24,25 77:14 78:12 looked ^[3] 13:19 60:25 75:16 loses ^[1] 83:4 lost ^[2] 47:12 86:12 lot ^[8] 26:24 61:17 64:19 82:7 84:3, 16 90:11,22 lots ^[2] 26:5 57:17</p>	<p>23,24 47:1 48:9 49:18 51:15 53:3 54:8 57:7 59:12 60:9 62:14 65:22 many ^[9] 6:22 12:25 32:25,25 33:9 34:4 38:4 56:15 77:16 marched ^[1] 56:22 mass ^[2] 43:22 44:2 masses ^[1] 43:25 Mast ^[1] 28:18 materialized ^[1] 19:19 matter ^[2] 1:12 26:10 matters ^[2] 24:25 49:10 McGIRT ^[2] 1:3 4:5 McGowan ^[1] 58:25 MCI ^[1] 24:4 mean ^[9] 9:22 10:4 11:19 17:13 47:25 62:16 65:13 79:9 80:4 meaning ^[4] 16:5,9 63:23 85:23 means ^[3] 50:4 57:25 66:1 meant ^[4] 31:16 32:3 58:23 89:22 mechanisms ^[1] 41:12 meet ^[1] 49:24 member ^[2] 39:16,19 members ^[5] 9:13 33:22 38:15 62:1 69:11 memo ^[1] 91:6 mention ^[1] 60:20 mentioned ^[3] 44:14 55:14 86:24 merely ^[1] 45:17 metes ^[1] 45:22 method ^[2] 71:17,19 Michigan ^[1] 2:5 might ^[4] 18:20 42:22 56:13 62:9 mighty ^[1] 84:8 mind-boggling ^[1] 91:8 minor ^[1] 13:13 minute ^[1] 45:6 minutes ^[1] 89:7 misplaced ^[1] 41:4 missing ^[2] 56:13 91:1 Mississippi ^[1] 37:1 MITHUN ^[3] 2:8 3:11 46:24 mixed ^[1] 84:20 modern ^[1] 63:24 moment ^[2] 30:1 63:16 Monday ^[1] 1:10 money ^[1] 78:19 months ^[2] 28:23 43:20 morning ^[10] 4:4,21 13:12 25:12 43:4 44:13 64:25 86:19,20 90:12 most ^[3] 14:3 45:13 68:14 mostly ^[2] 84:15 88:22 move ^[1] 71:12 moved ^[1] 68:25 much ^[10] 8:4,4,9,17 9:21 19:23 35:18 45:10 64:17 84:21 municipal ^[2] 44:20 45:4 murder ^[1] 12:17 murders ^[1] 19:13 Murphy ^[4] 19:12 62:8 64:6,6 Muscogee ^[3] 2:6 3:7 27:24 must ^[1] 4:15 mutually ^[1] 82:4</p>	<p>Nagonset ^[2] 15:4 91:5 name ^[1] 14:14 narrow ^[3] 21:13 76:12,15 Nation ^[30] 2:6 3:7 4:21 6:18 20:24 21:6 24:3 27:24 36:19 37:15, 25 41:6,14,17,21 42:13 47:9,11 48:18 49:8,23 56:20,21 58:20 59:23 60:11 68:22 69:2 76:8 78:14 national ^[2] 37:16 67:16 Nationwide ^[1] 36:19 native ^[6] 54:12,25 55:1,4 61:23 85:3 Nebraska ^[1] 36:24 necessarily ^[1] 31:2 necessary ^[1] 65:12 need ^[2] 45:5 70:11 needed ^[2] 5:2 62:25 needs ^[4] 20:11,12 72:21 85:16 neglect ^[1] 60:19 negotiate ^[1] 71:16 negotiating ^[1] 42:4 neighborhoods ^[1] 55:23 Neither ^[1] 26:19 never ^[8] 4:17,18 18:7 37:21 45:24 47:4 52:3 84:9 New ^[23] 15:9,9,23,24 22:10 26:6, 11,13,23,23 43:6 55:2 60:11,16 66:8 68:3 70:17 76:3,4 77:7 85:19 89:1,2 next ^[1] 26:25 nine ^[1] 75:10 nominally ^[1] 26:16 non-Indian ^[7] 31:20 39:20 40:9 46:6 55:16 65:9 66:1 non-Indians ^[29] 26:21 30:6 33:10 38:1,1 39:15 40:5 44:5 50:9 52:12 53:9 55:9,12,16 65:3 66:9,10 68:7, 25 70:15 72:7 73:7,10 76:2 77:5 85:10,14,17 88:23 non-member ^[1] 39:17 none ^[1] 14:8 nonetheless ^[1] 52:6 nor ^[2] 23:22,23 normal ^[1] 30:9 noted ^[1] 39:24 Nothing ^[14] 5:1 8:24 14:20 28:6, 12,25 29:21 30:7 35:21 43:15 61:22 66:12 75:22 76:6 notified ^[1] 64:12 notwithstanding ^[1] 50:18 nowhere ^[1] 57:15 number ^[9] 19:3,22 39:2 54:17 57:2,3 89:13 90:25 91:10 numbers ^[5] 13:1 19:10,16 54:10 91:7</p>	<p>OKLAHOMA ^[49] 1:6 2:9,9 4:5,19 5:16 14:8 15:11,13,20 16:5,11,13 17:19 24:2,24 28:25 29:9,12 30:14 34:7 35:4,10 36:13 37:14 43:4 44:1 47:3 52:25 53:6 55:11 56:6, 22 64:3,7,20 68:4,11 73:5 74:9 75:25 76:1 78:9 80:5 81:16 84:6 85:2 90:16,20 Oklahoma's ^[4] 5:23 61:24 79:4 81:24 Oklahoma-specific ^[1] 24:24 old ^[1] 22:10 on-the-ground ^[1] 23:11 one ^[26] 9:25 13:13,13 14:2 15:23, 24 19:17 45:6 50:18 55:18 58:16, 24 67:3 74:2 75:17,19,22 76:17 80:11,11,14 86:22 87:17 88:5 90:13 91:1 ones ^[2] 61:9 91:1 only ^[13] 5:7 8:2 9:24 28:23 54:25 71:25 74:2 76:13 86:4 87:19 90:7, 8 91:9 opening ^[1] 31:19 operative ^[1] 35:25 opinion ^[5] 8:14 9:7 50:14 76:18, 22 opportunity ^[2] 49:15 60:10 opposed ^[1] 82:16 opposing ^[1] 49:11 opposite ^[3] 14:18 16:17 50:25 option ^[1] 26:24 options ^[2] 26:17,20 oral ^[9] 1:13 3:2,5,10,13 4:7 27:23 46:24 67:8 ordain ^[1] 41:17 ordained ^[1] 43:19 order ^[2] 57:8,19 orders ^[1] 28:21 ordinary ^[1] 28:7 original ^[5] 51:25 63:22,23 64:1 85:23 other ^[30] 6:2 7:14,18 9:19 10:10 14:11 21:12,15,16 22:16 25:14 26:20 28:17 45:18 46:4 56:15,24 58:10 60:6 66:24 70:5 71:17 74:9 75:4,5 79:20 80:4 81:3 88:6 90:7 otherwise ^[2] 78:7,9 out ^[20] 8:14 12:2 18:16 22:7 27:2 48:11,23 50:22 53:13,14 55:20 64:18 65:11,13 66:2 71:19 79:3 83:3 84:19,25 outside ^[1] 37:24 over ^[42] 5:13,18 11:15 21:9 26:21, 25 28:21 30:4,5 35:20 38:4 39:15 47:3 51:11,17,24 52:4,4,5,6 54:10, 14,19,20,21 56:13 57:11 58:18 67:18 70:16,20,20 78:16 80:20 81:2, 15 83:16 85:14,19 88:10,15,19 overlap ^[1] 82:7 overlook ^[1] 11:24 overly ^[1] 23:23 override ^[1] 18:3 overrides ^[1] 5:20 overwhelming ^[1] 85:10</p>
M		O	
<p>made ^[9] 18:2 46:13 65:2 69:10 70:2 83:15 87:2,5 90:21 magic ^[2] 8:24 90:17 main ^[2] 6:2 9:8 maintain ^[1] 32:4 maintained ^[2] 6:19 32:12 Major ^[21] 5:17,20 10:19 13:16 14:5,25 15:5 16:9,15 17:10,15,17,23 30:20 36:15 43:9 51:11 52:16,19, 21 54:5 majority ^[1] 39:24 managing ^[1] 51:18 mandate ^[1] 64:7 MANSINGHANI ^[15] 2:8 3:11 46:</p>	<p>N</p>		

Official - Subject to Final Review

<p>own ^[1] 17:15 32:4,20 33:2 51:17, 21 53:10,17 66:11 69:10 81:2</p> <p>owned ^[2] 68:13 82:17</p> <p>ownership ^[4] 53:7 66:5,19 68:20</p> <hr/> <p style="text-align: center;">P</p> <hr/> <p>package ^[1] 77:6</p> <p>PAGE ^[2] 3:2 50:13</p> <p>pages ^[1] 53:12</p> <p>paid ^[2] 37:5,18</p> <p>pales ^[1] 12:15</p> <p>parade ^[4] 23:14 56:10 74:2,15</p> <p>paradigm ^[1] 62:18</p> <p>parcels ^[1] 81:10</p> <p>parents ^[1] 41:21</p> <p>Parker ^[12] 6:4 8:2,24 9:2,7,10,24 24:13 36:25 57:4 69:19,25</p> <p>Parker/Solem ^[2] 8:13 28:6</p> <p>part ^[7] 56:10 63:6 68:21 73:4 77:6 84:2,6</p> <p>particular ^[2] 13:23 44:18</p> <p>particularly ^[5] 11:15 40:23 65:18 82:19 83:5</p> <p>parties ^[1] 60:14</p> <p>party ^[2] 89:15,18</p> <p>pass ^[2] 53:22 87:16</p> <p>passed ^[5] 29:6 56:5 78:15 84:9 89:1</p> <p>past ^[3] 29:3 62:1 71:24</p> <p>patent ^[9] 22:17 47:13 50:6,19,24 51:1,25 60:21 89:25</p> <p>patented ^[1] 47:9</p> <p>patently ^[1] 43:17</p> <p>pay ^[2] 31:12 37:12</p> <p>Pelican ^[1] 59:1</p> <p>penalties ^[6] 10:25 11:7,17,21 18:16 19:2</p> <p>pending ^[1] 15:22</p> <p>people ^[11] 38:5,14,20 54:14 64:5 65:15 73:19,21,21 77:16 84:24</p> <p>perceives ^[1] 25:4</p> <p>percent ^[16] 25:21,22,23 27:4,4,5,10,14,16 38:14 43:21 44:2 54:24 55:25 65:25 87:22</p> <p>perfectly ^[1] 15:1</p> <p>period ^[4] 45:14 52:21 58:18 65:20</p> <p>persisted ^[2] 46:14,18</p> <p>persists ^[1] 44:7</p> <p>persons ^[3] 16:23 29:10 67:23</p> <p>pertain ^[1] 44:5</p> <p>Petitioner ^[10] 1:4 2:4,7 3:4,9,19 4:8 27:25 52:20 89:10</p> <p>Petitioner's ^[1] 57:19</p> <p>Petitioners ^[1] 86:10</p> <p>petitions ^[2] 19:17 91:10</p> <p>phrase ^[1] 82:12</p> <p>pick ^[3] 20:21 65:1,4</p> <p>Pine ^[1] 50:3</p> <p>place ^[9] 24:21 32:11 39:23 40:6 42:8 53:8 88:20,22 90:16</p> <p>placement ^[1] 41:9</p> <p>placements ^[3] 41:16,18,20</p> <p>places ^[1] 73:21</p>	<p>plain ^[10] 8:19,20,22 9:2,5 13:7 20:6 35:19 84:24 90:4</p> <p>plane ^[1] 45:18</p> <p>play ^[1] 42:11</p> <p>playing ^[1] 55:17</p> <p>plays ^[1] 42:1</p> <p>please ^[7] 4:10 28:2 33:24 36:10 47:2 67:12 85:6</p> <p>point ^[30] 8:7,12,13 9:1,16,23 10:7 13:13 17:20 20:3 22:1 33:17 34:15 46:3 49:6 57:2,24 60:18 66:14 67:2,3 70:2 71:11 74:24 80:11 84:1 87:12,17 90:8,13</p> <p>pointed ^[8] 8:14 12:2 14:10,11 18:16 50:21 84:19,25</p> <p>points ^[6] 4:20 28:5 34:18 55:20 60:11 89:21</p> <p>pool ^[1] 11:19</p> <p>population ^[3] 25:21,22 88:11</p> <p>portion ^[2] 17:11 43:7</p> <p>position ^[6] 10:20 57:19 60:23 65:11 81:25 86:7</p> <p>possessions ^[1] 38:1</p> <p>Potawatomie ^[1] 82:12</p> <p>potential ^[1] 11:20</p> <p>potentially ^[1] 54:20</p> <p>power ^[15] 7:19 21:10 22:7,9 25:1,1 30:4,5 32:13 34:17 35:1 45:1,25 67:2,3</p> <p>powers ^[5] 21:11 28:9 37:17 45:20 78:16</p> <p>practical ^[5] 23:7 62:2 64:15 73:18 87:18</p> <p>practice ^[3] 35:14 36:18 37:5</p> <p>pre-statehood ^[2] 17:12,14</p> <p>precedent ^[2] 6:25 7:2</p> <p>precedents ^[2] 40:1,15</p> <p>precise ^[1] 30:12</p> <p>precisely ^[3] 47:19 55:7 85:11</p> <p>predicted ^[1] 19:19</p> <p>predominantly ^[5] 25:20 26:14,16 46:5 65:9</p> <p>prelude ^[2] 71:20,21</p> <p>premise ^[4] 32:10 33:14 34:5 78:7</p> <p>preparation ^[6] 70:13,21,25 71:13,18 77:4</p> <p>prepared ^[1] 73:6</p> <p>preparing ^[2] 67:13 71:22</p> <p>prescriptions ^[1] 52:25</p> <p>presence ^[1] 85:10</p> <p>present ^[1] 57:15</p> <p>presentment ^[1] 37:10</p> <p>preserve ^[1] 9:15</p> <p>preserved ^[4] 5:9 10:7 37:17 47:7</p> <p>presumptively ^[4] 40:4,5 54:13 55:13</p> <p>pretty ^[2] 58:24 69:20</p> <p>prevail ^[2] 29:11 33:6</p> <p>prevented ^[1] 72:4</p> <p>previous ^[1] 66:13</p> <p>principal ^[1] 78:13</p> <p>principles ^[3] 28:7,9,15</p> <p>prior ^[4] 29:7 73:10 77:2 87:20</p> <p>priori ^[1] 71:10</p>	<p>prison ^[1] 73:22</p> <p>prisoner ^[1] 73:24</p> <p>private ^[1] 60:14</p> <p>probably ^[1] 54:16</p> <p>probate ^[1] 15:12</p> <p>problem ^[3] 22:18,18 62:10</p> <p>problems ^[1] 73:18</p> <p>proceed ^[1] 40:2</p> <p>proceeded ^[2] 35:7 78:3</p> <p>proceeding ^[1] 77:17</p> <p>proceedings ^[1] 40:24</p> <p>process ^[3] 11:3 63:15,15</p> <p>prohibiting ^[1] 67:19</p> <p>promises ^[1] 90:3</p> <p>property ^[6] 51:18 78:17,19 82:24 84:1 86:8</p> <p>proposition ^[2] 4:12 71:10</p> <p>proprietary ^[1] 90:8</p> <p>prosecute ^[1] 55:3</p> <p>prosecuted ^[4] 14:14 16:1,1 17:24</p> <p>prosecution ^[3] 10:19 14:25 76:14</p> <p>prosecutions ^[5] 12:9,17 36:2,14 87:23</p> <p>prosecutor ^[1] 10:21</p> <p>prosecutorial ^[1] 51:12</p> <p>prosecutors ^[1] 77:25</p> <p>protection ^[5] 62:16,17,18,20 89:23</p> <p>protections ^[1] 11:3</p> <p>proven ^[1] 63:20</p> <p>provided ^[11] 5:7 14:6 68:5,23 69:5 70:14 71:15 73:2 76:16 77:9 80:5</p> <p>provides ^[2] 13:6 83:7</p> <p>Public ^[8] 15:7 47:7 50:2 51:4,5 63:23 84:11 85:23</p> <p>Pueblos ^[5] 22:8,14,17 48:16 57:11</p> <p>purchase ^[1] 39:19</p> <p>purpose ^[1] 47:17</p> <p>purposes ^[2] 5:10 32:4</p> <p>pursuant ^[2] 52:7 70:22</p> <p>put ^[9] 19:15 23:9 34:21 54:9 65:10 79:21 88:20,22 90:15</p> <p>putting ^[3] 45:17 56:18 79:2</p> <hr/> <p style="text-align: center;">Q</p> <hr/> <p>qualify ^[2] 39:10 75:18</p> <p>quantum ^[3] 32:12 45:20,25</p> <p>question ^[38] 6:8 9:19 12:14 19:21 25:24 28:4,16 29:6,17 30:12 31:1,9,15 32:2,10 34:19 37:23 39:8 43:12 44:24 45:6,8 46:19 48:5 52:23 58:16 65:14 70:11 72:10 74:13,13 76:8,16 79:21 80:15 86:22 88:6,13</p> <p>questions ^[9] 6:5 24:15,18 41:24 57:8 61:8 65:6 82:1 88:1</p> <p>quick ^[1] 90:13</p> <p>quickly ^[1] 47:23</p> <p>quintessential ^[1] 22:16</p> <p>quite ^[5] 20:25 74:12 84:9,14 86:</p>	<p>24</p> <p>quo ^[2] 30:2,9</p> <p>quote ^[1] 51:20</p> <p>quoting ^[1] 59:8</p> <hr/> <p style="text-align: center;">R</p> <hr/> <p>race ^[11] 16:24 17:2,8 29:10,14,19 30:14 53:2 67:24 90:13,18</p> <p>radical ^[2] 28:6 29:21</p> <p>radically ^[1] 68:8</p> <p>railroads ^[2] 26:12,12</p> <p>Ramos ^[6] 5:25 12:13,15 13:4,6 91:11</p> <p>rapists ^[1] 19:14</p> <p>rarity ^[1] 45:15</p> <p>rather ^[2] 11:5 35:13</p> <p>react ^[1] 25:15</p> <p>reaction ^[1] 46:7</p> <p>read ^[7] 21:5 35:15 47:25 48:11 59:13,17,25</p> <p>reading ^[3] 24:9 89:16,18</p> <p>real ^[1] 62:10</p> <p>really ^[4] 38:9 42:5 70:3 84:15</p> <p>reason ^[8] 8:18 13:6 20:6 22:14 37:6,11 71:21 85:11</p> <p>reasons ^[3] 9:8 19:7 24:10</p> <p>REBUTTAL ^[3] 3:17 89:8,9</p> <p>recall ^[1] 49:13</p> <p>received ^[1] 89:2</p> <p>recent ^[1] 12:13</p> <p>recognize ^[2] 53:17 80:20</p> <p>recognized ^[3] 44:3 45:24 60:8</p> <p>recognizes ^[1] 57:1</p> <p>recompense ^[1] 56:23</p> <p>recounted ^[1] 57:6</p> <p>redoing ^[1] 12:14</p> <p>reduction ^[1] 10:3</p> <p>refer ^[1] 6:22</p> <p>reference ^[2] 13:17 65:4</p> <p>referred ^[4] 6:23 7:12 15:19 80:9</p> <p>reflected ^[1] 87:13</p> <p>refuted ^[1] 27:13</p> <p>regard ^[1] 31:16</p> <p>regarded ^[2] 71:18 80:7</p> <p>regarding ^[1] 28:9</p> <p>regardless ^[8] 17:7,11,13 20:4 22:12 62:19 64:17 74:4</p> <p>regime ^[2] 68:10 88:25</p> <p>regularly ^[1] 45:22</p> <p>regulatory ^[1] 6:2</p> <p>rejected ^[1] 5:6</p> <p>relations ^[2] 33:22 87:8</p> <p>relationship ^[1] 41:8</p> <p>relationships ^[1] 42:10</p> <p>release ^[1] 54:15</p> <p>relevance ^[1] 87:10</p> <p>relevant ^[5] 4:22 6:9 27:5 61:19 77:2</p> <p>relied ^[1] 58:25</p> <p>relief ^[2] 19:6 64:6</p> <p>relinquished ^[1] 60:21</p> <p>relinquishing ^[1] 83:12</p> <p>rely ^[3] 84:15,21 86:10</p> <p>relying ^[2] 63:11,12</p>
--	--	---	---

Official - Subject to Final Review

<p>remain [4] 33:5 39:5 81:10,11 remained [3] 27:10 31:23 36:23 remaining [2] 26:20 32:21 remains [4] 47:8 50:4,18 55:25 remarkable [1] 33:19 remember [2] 19:10 45:13 remove [2] 26:18,18 report [1] 53:16 reports [1] 53:15 Representative [1] 24:2 required [4] 8:19,20,22 9:2 requirement [1] 20:7 resembling [1] 75:11 reservation [85] 4:17,22 5:1,4,13 6:6,8,16,20,24 7:8,11,12 13:15 20:8,16 22:16,20 24:14 25:17,18 27:12,14,16 28:23 31:7,17 32:4,5,8 33:7,25 34:14,14 35:22 38:8,23 39:7,11,25 40:9,11 41:11 42:21 43:8,16,18,19,25 47:5,6,15,16 48:2,7 49:24 50:17 51:3,5,9 56:2,14 57:5,14 58:9 59:4,20 60:5,17,22 67:15 71:8 76:9 79:17 80:18 81:1,9,13 82:5,16,24 83:25 84:4,9 90:1 reservation-based [1] 68:9 reservations [29] 21:22,24,25 27:3,18 31:22 33:12 36:22 37:24 38:2 44:6 46:1 48:14,21,25 49:22 56:16 57:18 59:8,16 60:8 62:21 68:15 69:19 75:21,22 80:7,10 82:14 reserved [5] 4:22 50:2,4 59:20,21 reserves [1] 30:4 reserving [2] 50:7 51:3 residential [1] 55:22 residents [1] 53:1 resolve [2] 6:7,10 resolved [3] 4:11 6:3 24:1 resolves [1] 31:15 Resources [4] 7:6 50:13,22 63:4 respect [16] 7:14 15:10 24:7 31:24 33:9,10 40:6 41:23 45:8,12,20 56:15 62:24 74:8 84:1 89:22 respected [1] 5:14 respond [3] 23:13 49:16 61:10 Respondent [7] 1:7 2:10,14 3:12,16 46:25 67:10 Respondent's [2] 51:20 63:20 response [3] 43:12 48:4,8 responses [1] 39:2 responsibility [1] 87:14 responsible [1] 77:12 restoring [1] 51:4 restricted [6] 7:9 49:21 52:5 55:21,25 60:25 restricting [1] 45:16 result [1] 5:24 resulted [1] 56:19 retain [2] 31:6 41:15 retained [1] 30:18 retains [2] 83:1,2 retrial [1] 12:3 retroactive [1] 57:9 retroactivity [1] 12:15 return [1] 29:5</p>	<p>reverse [1] 12:6 reversed [1] 4:16 reversion [1] 84:11 reversionary [1] 83:10 rhetoric [2] 5:23 41:4 rid [1] 31:13 rightly [1] 86:25 rights [12] 4:13 8:19,21,21,23 20:14 47:22 57:14 61:23 62:23 81:1 87:2 rights-of-way [1] 26:12 rigorous [1] 11:22 risk [1] 18:23 River [4] 43:18 50:3 51:25 52:2 riverbed [1] 52:1 RIYAZ [3] 2:5 3:6 27:23 Robert [1] 62:4 ROBERTS [50] 4:3 6:13 7:23 10:12,16 13:9 15:16 18:4,9,12 20:18 22:22 23:1 25:6,9 27:6,20 29:4 30:11,22 32:15 34:9 36:6 38:11 40:20 42:25 44:10 45:9 46:21 48:3 49:2 51:6 53:19,23 56:7 58:13 61:4 64:22 67:5 68:12 69:14 71:3 73:11 76:5 78:21 81:20 83:20 86:16 89:5 91:16 role [2] 41:24 42:11 room [1] 42:3 Rosebud [2] 43:19 57:25 routinely [5] 6:3 23:25 24:1,5,23 rubric [1] 31:21 rule [1] 14:17 ruling [2] 23:8,20 rulings [1] 23:21 run [2] 37:9 86:13 running [1] 85:13</p> <hr/> <p style="text-align: center;">S</p> <hr/> <p>sale [7] 4:23 47:7 50:2,4,7 59:20,21 same [23] 9:9 11:7,7,17 20:17 24:17 45:18 48:17 53:1,10 58:20 59:18 67:21,24 69:13 70:14 73:17,23 74:15 77:5 82:15 83:13 86:7 Sandoval [9] 6:17 7:14,15 20:24 21:6 22:5 48:15,24 49:22 saying [10] 16:13,25 29:7 33:24 36:16 62:17 72:19,20 79:23 81:13 says [11] 16:4,19 34:24 35:6 50:17 59:6,7,14 66:24 73:25 86:11 scale [2] 42:6 62:20 score [2] 89:19 90:20 Second [7] 5:3 9:11 14:10 24:13 60:25 61:16 89:21 Secretary [3] 46:11,14 91:5 Section [7] 36:2 41:13,17 46:13 52:13 54:1 90:15 see [5] 11:16 14:4 19:17 74:24 84:10 seek [2] 19:6 64:5 seem [1] 13:20 seems [5] 11:25 26:24 34:20 49:11 58:21 seen [4] 62:9,11 69:24 75:9</p>	<p>selling [3] 50:7 55:23 60:13 semblance [1] 47:16 Seneca [1] 60:11 Senecas' [1] 60:25 senior [1] 33:22 sense [7] 21:13 22:21 27:17 50:8,16,23 83:2 sent [2] 14:22 15:23 sentence [1] 19:5 sentenced [1] 32:22 separate [4] 48:25 56:3 69:10 75:12 separated [1] 24:14 separately [2] 72:1 79:11 separation [1] 28:9 sequence [1] 83:23 series [5] 8:5 10:1 28:13,18,20 serious [2] 23:23 91:14 served [1] 19:4 Services [1] 41:6 session [2] 71:8,16 set [7] 11:18,20 14:15 20:10 50:2 56:11 82:9 setting [1] 68:21 settlements [2] 26:13,13 settlers [3] 31:20 88:17,20 seven [1] 91:6 several [1] 24:10 sexual [1] 12:17 Seymour [1] 37:1 SG [1] 90:20 shall [7] 15:8,9,13 16:22 35:7 58:4 66:21 shared [3] 33:15 34:5,6 sharing [1] 41:14 shell [1] 86:4 Sherrill [5] 41:25 42:2,3,16,19 shortly [1] 44:1 shouldn't [2] 24:19 77:14 showing [1] 72:16 shows [1] 61:22 side [11] 5:25 6:1 14:11 34:5 42:6 55:6,7 66:24 87:18,20 90:7 significance [1] 44:22 significant [6] 25:21 39:6 43:7,25 68:18 85:23 significantly [1] 87:12 similar [1] 65:17 simple [6] 48:19 59:24 60:4,7,12 61:12 simply [5] 31:18 35:24 41:19 70:23 77:18 Since [3] 61:3 76:1 89:3 single [2] 17:23 52:20 Sioux [2] 43:19 57:25 sites [1] 31:20 situation [9] 12:13 25:16,25 26:15 42:12 44:15 65:8 68:14 72:5 situations [2] 33:9 80:4 Sky [1] 54:2 slaves [2] 26:5,6 sliding [1] 62:20 small [1] 31:20 societies [1] 56:4</p>	<p>sold [1] 59:22 Solem [20] 8:2,8,25 9:2 28:22 36:24 43:17 47:16 61:14 69:18,25 73:14,19 74:3,6,8,14,14 75:1,4 solemnly [1] 4:23 Solicitor [2] 2:8,11 solid [1] 54:9 Solomon [1] 57:4 solution [1] 88:3 somebody [1] 82:22 someone [2] 82:21 84:19 sometimes [1] 61:22 sorry [2] 18:9 74:22 sort [3] 21:13 81:11 82:7 sorts [1] 76:10 Sotomayor [22] 18:6,14,15 19:22 36:8,9,12 37:22 38:9 56:8,9 78:22,23 79:14,20,23 80:13,17,24 81:6 86:22,24 Sotomayor's [1] 82:1 sought [2] 5:6 56:4 South [2] 27:15 36:23 sovereign [10] 4:13 6:9 8:21,23 11:10,14 20:14 83:15,16 90:9 sovereignty [19] 6:5 8:6 24:15 31:6,24,25 34:1 42:13 44:23 45:23 56:23 57:2,11 67:18 69:4,9,13 80:20 86:12 speaking [3] 4:14 45:19 59:7 special [2] 8:16 78:6 specific [2] 57:22 75:6 specifically [4] 58:24 69:6 70:6 86:11 Spirit [1] 52:1 squarely [1] 31:21 standard [7] 21:22,24,25 69:20 72:13,19,20 standing [1] 70:5 start [2] 6:12 47:6 started [2] 70:19 71:12 state [119] 5:19,21 6:14 11:2,2,5 12:10,25 13:16,16 14:6,24 15:3,25 16:2,3,4 17:20 18:18 19:15 25:2,17 26:23,23 28:10,24 29:23 30:5,16,17 32:18,20,25 33:1,3,7,8,21,23 34:1,4,13,16,17 35:1,2,9,20 36:4,14,25 37:20 38:3 39:5 40:2 41:5,13,15 42:15 43:6,7 44:1,3 47:4 48:1 51:13,13 52:6,7,7,8 53:5,7,8,10 54:13,18 55:10,13 56:12 61:25 63:18,21 64:9,11,20 66:8 68:1,3,7,23 70:9,17,19 71:23 72:7 73:3,4 76:4,17 77:7,10,18,24,25 78:6,9,16 79:13 85:2,19,24,25,25 87:20,24,25 89:1,2 State's [6] 6:25 19:8,11 42:17 44:2 79:12 statehood [49] 5:17 14:5,9,12,13 15:23 17:1,16,17,22 27:9,12,15,15,19 28:23 30:1,2 37:14 43:16,20 52:22 63:11,12,17 65:21,25 67:14 68:11 70:14,17,18 71:1,12,13,18,20,22 73:1,2 74:10 77:2,4,7,9,15 85:9 86:1 89:3</p>
--	---	---	---

Official - Subject to Final Review

<p>statement ^[1] 78:24</p> <p>statements ^[2] 71:6 78:12</p> <p>STATES ^[35] 1:1,14 2:13 3:15 5:19 14:7,14,19 15:7 16:14,22 26:7 29:8 30:6 35:11 36:19 37:2 42:4,6,17 43:24 47:8 50:1,5 61:23 62:5 67:9 72:11,17 74:10,17 82:25 83:7 87:6 91:6</p> <p>states' ^[2] 43:22 83:13</p> <p>stations ^[1] 42:18</p> <p>status ^[16] 6:6 24:15 27:12 30:2,9 31:7 35:22 39:7,12 44:25 47:13,16 48:25 50:10 58:9 60:5</p> <p>statute ^[13] 7:11,13 9:25 16:21 21:14 23:16 29:18 44:18,20 47:19,19 48:12 78:6</p> <p>statutes ^[25] 4:25 8:5 10:2 18:8 24:25 28:14,18,20 44:17,22 45:3 47:25 56:5 58:10 61:20 63:25 65:13,19 66:15 70:6 75:6,12 77:17 80:6,8</p> <p>statutory ^[2] 14:3 28:8</p> <p>stayed ^[1] 64:7</p> <p>stays ^[1] 25:1</p> <p>steps ^[1] 9:14</p> <p>still ^[8] 31:6 32:3 34:12 44:7 60:16 64:8 66:25 80:9</p> <p>straight ^[1] 28:3</p> <p>straightforward ^[1] 14:3</p> <p>stringent ^[3] 61:13 72:13,20</p> <p>stripped ^[2] 47:15,24</p> <p>strong ^[1] 58:24</p> <p>stronger ^[4] 9:6,18 10:10 72:16</p> <p>strongly ^[1] 68:18</p> <p>struggling ^[1] 61:19</p> <p>subject ^[8] 14:24 16:9 38:23 39:5 43:8 53:1 55:12 63:21</p> <p>subjected ^[1] 67:23</p> <p>subjecting ^[1] 77:5</p> <p>submit ^[1] 89:19</p> <p>submitted ^[2] 91:17,19</p> <p>subsequently ^[1] 79:1</p> <p>substitute ^[1] 71:23</p> <p>subvert ^[1] 37:7</p> <p>subverting ^[1] 37:13</p> <p>successors ^[1] 35:9</p> <p>sue ^[1] 39:20</p> <p>suggested ^[3] 13:1 44:25 88:3</p> <p>suggestion ^[2] 43:5 79:4</p> <p>suggests ^[3] 11:23 30:8 90:18</p> <p>superintendence ^[1] 82:11</p> <p>superintendents ^[1] 47:24</p> <p>superseded ^[1] 87:3</p> <p>supplemental ^[1] 60:20</p> <p>support ^[2] 7:3 81:24</p> <p>supporting ^[6] 2:7,14 3:8,16 27:25 67:10</p> <p>supports ^[1] 68:19</p> <p>supposed ^[2] 21:17 30:10</p> <p>supposedly ^[1] 90:17</p> <p>SUPREME ^[2] 1:1,13</p> <p>surely ^[1] 89:17</p> <p>surfaced ^[1] 75:23</p> <p>surplus ^[9] 8:3 9:1 10:1 69:21 70:</p>	<p>4,12,24,24 75:5</p> <p>surplusage ^[1] 48:11</p> <p>surprised ^[1] 38:22</p> <p>surrender ^[2] 57:25 58:2</p> <hr/> <p style="text-align: center;">T</p> <hr/> <p>Tacoma ^[1] 24:4</p> <p>talked ^[1] 59:1</p> <p>tax ^[1] 6:2</p> <p>taxation ^[2] 27:11 88:1</p> <p>taxes ^[2] 66:25,25</p> <p>Tears ^[1] 56:20</p> <p>technical ^[1] 21:13</p> <p>ten ^[1] 75:10</p> <p>Tennessee ^[1] 27:14</p> <p>Tenth ^[1] 50:12</p> <p>tenure ^[1] 66:23</p> <p>term ^[11] 7:16 17:16 21:1,7,17 22:11,21 48:7 58:22,23 59:2</p> <p>terminated ^[2] 4:17 57:5</p> <p>terms ^[4] 8:25 79:9 82:9 84:24</p> <p>terrible ^[2] 12:17 23:7</p> <p>terrific ^[2] 41:7 42:9</p> <p>territorial ^[8] 15:22 29:19 34:25 66:7 67:18,20 72:1 86:12</p> <p>territories ^[1] 71:24</p> <p>territory ^[45] 6:14 16:22 17:19 25:19,20 26:16 27:3,5,10 32:21 34:22 35:3,10,12 44:21 52:10,11,18 54:12,24 58:1,2 65:10 66:19 67:13,24 68:5,21,23 69:1 70:16,20 71:23 74:9 78:4 85:3,11,18 87:14,16 88:11,16,21 89:1 90:16</p> <p>territory's ^[1] 72:2</p> <p>test ^[5] 20:17 28:10 29:2 61:13 71:10</p> <p>text ^[35] 4:15,16,24 8:19,20,22 9:2,5 13:7 18:3 20:6,15 24:8,9,10,11,20,21,22 35:19,25,25 44:16,17,18,19 63:8 65:13,19 89:19 90:4,7 91:1,2,4</p> <p>textual ^[4] 50:15,16 63:8 90:10</p> <p>themselves ^[3] 9:13 36:20 46:1</p> <p>theory ^[2] 60:15 80:19</p> <p>there's ^[32] 8:4,24 11:13 17:14 19:23 25:17 26:6 28:25 30:7 38:3,7 40:25 42:20 43:2,15 50:16 56:24 64:4,13,13 70:11 71:9,9 73:15 75:4,17,22 76:4 77:21 85:8 86:4 90:23</p> <p>thereafter ^[2] 17:24 46:9</p> <p>therefore ^[1] 83:1</p> <p>therein ^[2] 16:23 29:10</p> <p>thinking ^[1] 65:18</p> <p>thinks ^[1] 34:19</p> <p>Third ^[6] 5:15 9:14 14:20 24:19 57:22 62:2</p> <p>Thomas ^[14] 7:25 8:1 9:22 20:5 28:12 30:24,25 32:14 44:24 49:4,5 69:16,17 71:2</p> <p>Thomas's ^[3] 28:4 37:23 57:24</p> <p>thorough ^[1] 43:12</p> <p>though ^[5] 37:16 58:21 64:6 74:18 86:13</p>	<p>three ^[3] 9:7 28:5 34:18</p> <p>throughout ^[3] 24:3 68:4,10</p> <p>thumb ^[1] 42:5</p> <p>tick ^[1] 61:8</p> <p>tie ^[1] 38:10</p> <p>title ^[15] 31:5,11,13,14 47:7,22 58:6 62:24 63:1 71:6 72:12 89:22,25 90:2,6</p> <p>today ^[6] 23:5 44:8 47:6 64:3 90:21 91:7</p> <p>together ^[1] 58:8</p> <p>took ^[4] 9:14 10:11 32:10 42:15</p> <p>top ^[2] 57:17 58:9</p> <p>towards ^[1] 71:12</p> <p>town ^[1] 31:20</p> <p>towns ^[3] 26:14 44:21 45:4</p> <p>tradition ^[1] 26:22</p> <p>Trail ^[1] 56:20</p> <p>transfer ^[7] 5:15 15:5 30:16 52:7 68:5 77:10 90:10</p> <p>transferred ^[11] 4:18 15:11,12 17:18,19,24 35:19 36:17 63:17 72:6 78:5</p> <p>transferring ^[2] 31:13 73:9</p> <p>transfers ^[4] 5:21 9:3 15:3 20:13</p> <p>transform ^[2] 53:6 66:18</p> <p>transformation ^[1] 31:11</p> <p>transformed ^[2] 66:20,23</p> <p>transition ^[1] 65:21</p> <p>treated ^[8] 16:6,8 17:1 52:12 65:3 72:7 73:7 76:3</p> <p>treaties ^[6] 4:22,25 26:1 32:7 68:23 86:25</p> <p>treatise ^[1] 59:7</p> <p>treatment ^[2] 55:8 67:22</p> <p>treaty ^[22] 6:23 8:19,21 23:16 26:6,11 56:19,22 57:1,12,14,18 60:19,20 72:12 87:1,2,5,6,8,10 90:3</p> <p>tremendous ^[1] 28:19</p> <p>trial ^[2] 11:23 76:17</p> <p>tribal ^[50] 5:12 9:12 14:1 15:15 26:21 32:12,18,25 33:21,25 34:20 39:19,20,21 40:4,18 42:23 44:19 45:3,14,17,23 46:2,10,15 47:20 51:19 53:8,17 58:4 59:14 61:25 62:1,5,25 63:13,18,22 66:21 67:2,19,20 81:11,18 85:12 86:5,6,6 88:10,13</p> <p>tribal-state ^[1] 6:3</p> <p>tribe ^[42] 5:9,10 9:9,10,12,15 10:4,8,9 22:12 25:2 31:4 32:6 33:3 38:16 39:16 40:4 47:18,22 51:8,10,15,21 63:1 68:13,20 69:6 71:7 72:11,11,17 73:24,25 74:17 78:11 83:2,4,4,11,15 86:10,12</p> <p>tribe's ^[9] 39:15 46:12,18 66:5 67:15,16,18 69:10 72:3</p> <p>tribes ^[34] 7:7,18,20 21:8,8 26:2,3,4,5,8 30:8 37:17 42:4 45:14,15,18 46:4 48:13,17,19 49:20 53:17 59:14 60:6 63:19 64:16,18 67:1,4 78:14 80:6 85:13 87:4 88:19</p> <p>tried ^[7] 11:5,10 12:15 14:2 20:5 55:9 73:22</p> <p>trivial ^[1] 23:22</p>	<p>true ^[3] 24:9 91:5,6</p> <p>trust ^[5] 31:12 52:4 81:11 82:13,23</p> <p>truth ^[1] 12:24</p> <p>try ^[7] 13:16 14:19 34:17 35:1 57:7 64:16 85:2</p> <p>trying ^[8] 22:6 53:4 63:24 66:3,4,16,18 70:4</p> <p>tsunami ^[4] 19:18 62:9 64:5,14</p> <p>Tulsa ^[4] 23:12 39:8 52:1 55:20</p> <p>turn ^[2] 29:7 54:21</p> <p>turned ^[1] 70:15</p> <p>turns ^[1] 57:14</p> <p>two ^[10] 19:22 20:24 24:14,17 28:7 44:22 56:3 58:7 89:7,21</p> <p>type ^[1] 48:24</p> <p>typical ^[2] 48:21 82:24</p> <p>typically ^[2] 30:3 84:10</p> <hr/> <p style="text-align: center;">U</p> <hr/> <p>U.S. ^[4] 17:6,6,11 47:10</p> <p>Udall's ^[1] 91:5</p> <p>ultimately ^[1] 44:24</p> <p>umbrage ^[1] 42:15</p> <p>umbrella ^[3] 21:17 48:6 58:23</p> <p>un ^[1] 66:5</p> <p>unlike ^[1] 48:13</p> <p>unanimously ^[1] 37:3</p> <p>unaware ^[2] 75:9 79:16</p> <p>unclear ^[1] 40:15</p> <p>under ^[29] 6:15 7:11,12 17:23 21:10,11 28:10 29:22 30:15,17,19 33:8 36:14 39:21,25 41:16 47:12 49:21 51:25 60:15 64:6 67:22 73:4,19 74:6 78:20 80:19 82:10 83:6</p> <p>undermine ^[2] 57:17,20</p> <p>underpinned ^[2] 33:15 34:2</p> <p>understand ^[13] 10:5 11:1 32:9 37:24 38:3 44:15,16 61:14 65:12 78:11 79:25 81:24 91:12</p> <p>understanding ^[14] 51:19 53:18 63:13,14,14,22 64:2 65:7 76:2 83:24 85:6,22 87:1 88:8</p> <p>understood ^[16] 20:25 22:19 43:23 51:21 63:19 72:21,25 78:1,11,24 81:17 85:25 86:2,3 89:24 90:19</p> <p>undisturbed ^[1] 68:22</p> <p>undo ^[2] 20:11 66:5</p> <p>undone ^[1] 12:11</p> <p>unequal ^[1] 55:17</p> <p>uninhabited ^[1] 59:10</p> <p>union ^[5] 16:14 43:6 73:5 76:1 84:6</p> <p>unique ^[2] 74:8 75:2</p> <p>uniquely ^[1] 16:14</p> <p>UNITED ^[23] 1:1,14 2:13 3:15 5:19 14:7,14 16:22 26:7 29:8 35:11 37:2 47:8 50:1,5 67:9 72:11,17 74:10,17 82:25 83:7,13</p> <p>unless ^[1] 59:9</p> <p>unlike ^[5] 49:21 59:15 68:14 71:7 75:4</p> <p>unsettled ^[1] 87:7</p> <p>untenable ^[1] 69:2</p>
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Official - Subject to Final Review

<p>until ^[2] 85:1 90:1 unusual ^[1] 65:8 up ^[19] 14:15 20:10,21 31:20 36:1 39:10 62:12 65:1,4,5,19 67:15 69: 2 81:25 82:19,20 86:22 88:6 90: 21 urge ^[1] 78:12 uses ^[1] 50:3 using ^[5] 7:16 21:1,6,12 22:21 usual ^[1] 48:20 usurping ^[1] 77:19 Utah ^[2] 50:1 51:2</p> <hr/> <p style="text-align: center;">V</p> <hr/> <p>validly ^[1] 82:9 various ^[3] 28:11 41:12 80:5 Venetie ^[8] 7:5 47:12 48:12 49:1, 20 50:11 59:13 63:4 versa ^[1] 73:25 versus ^[4] 4:5 57:13 62:8 86:11 via ^[1] 57:12 vice ^[1] 73:25 victim ^[1] 55:5 view ^[2] 12:10 58:22 violated ^[1] 61:23</p> <hr/> <p style="text-align: center;">W</p> <hr/> <p>wake ^[1] 39:9 wanted ^[2] 13:15 27:1 wants ^[1] 24:22 War ^[3] 26:3,5 32:23 Washington ^[4] 1:9 2:3,12 36:25 watershed ^[1] 30:1 way ^[9] 9:10 30:9 35:15 38:25 42: 14 60:24 65:23 76:20 77:14 ways ^[3] 12:1 39:6 84:23 well-positioned ^[1] 89:17 western ^[1] 60:15 whatever ^[1] 71:19 whatnot ^[1] 88:2 Whereupon ^[1] 91:18 Wherever ^[1] 38:7 whether ^[25] 7:10 8:25 9:17 13:14 20:7 21:2 22:7 31:11,16 32:3 34: 14,16 42:21 47:17 49:9 59:3,3 70: 9 76:8,9,11,16 79:3 84:5 90:23 white ^[6] 25:20 26:14,16 27:4 88: 16,19 whites ^[1] 26:18 whole ^[5] 8:5 22:1 78:8 88:11,16 will ^[25] 14:4 19:2,3,6,16 23:19 29: 12,13 33:5 37:7,13 39:3,4,5,6,14, 19 40:19 41:10,20,22 42:9,11 78: 17,19 win ^[3] 18:21 28:10 73:16 within ^[5] 7:18 40:18 42:23 44:21 80:6 witnesses ^[1] 12:20 word ^[1] 87:3 words ^[6] 21:12,15,16 22:16 33:18, 18 work ^[6] 8:17 62:5 64:16,18 74:2 85:12 worked ^[1] 71:19</p>	<p>working ^[2] 38:2 42:9 wrenched ^[1] 56:21 Wyandotte ^[1] 60:19 Wyoming ^[2] 75:16,22</p> <hr/> <p style="text-align: center;">Y</p> <hr/> <p>year ^[1] 55:2 years ^[11] 12:19 26:25 63:12,25 73: 19 75:25,25 76:21 81:15 89:16 90: 1 yielded ^[1] 60:12 York ^[4] 15:9,9 60:11,16</p> <hr/> <p style="text-align: center;">Z</p> <hr/> <p>zoning ^[1] 55:13</p>
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