No. 17-1107

IN THE
Supreme Court of the United States

MIKE CARPENTER, INTERIM WARDEN,
OKLAHOMA STATE PENITENTIARY,

Petitioner,

v.

PATRICK DWAYNE MURPHY,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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CAPITAL CASE

QUESTION PRESENTED

Whether the 1866 territorial boundaries of the Creek Nation within the former Indian Territory of eastern Oklahoma constitute an "Indian reservation" today under 18 U.S.C. § 1151(a).

PARTIES TO THE PROCEEDING

Petitioner Mike Carpenter is the Interim Warden of the Oklahoma State Penitentiary. Petitioner was the respondent in the district court and the appellee in the Tenth Circuit.

Respondent Patrick Dwayne Murphy was the petitioner in the district court and the appellant in the Tenth Circuit.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported at 875 F.3d 896 (10th Cir. 2017). Pet. App. 1a. The district court's opinion is reported at *Murphy v. Sirmons*, 497 F. Supp. 2d 1257 (E.D. Okla. 2007). Pet. App. 134a. The opinion of the Oklahoma Court of Criminal Appeals is reported at *Murphy v. State*, 124 P.3d 1198 (Okla. Crim. App. 2005). Pet. App. 203a.

JURISDICTION

The United States Court of Appeals for the Tenth Circuit entered judgment on August 8, 2017. The court denied rehearing and issued an amended opinion on November 9, 2017. A timely petition was filed on February 6, 2018, and granted on May 21, 2018. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

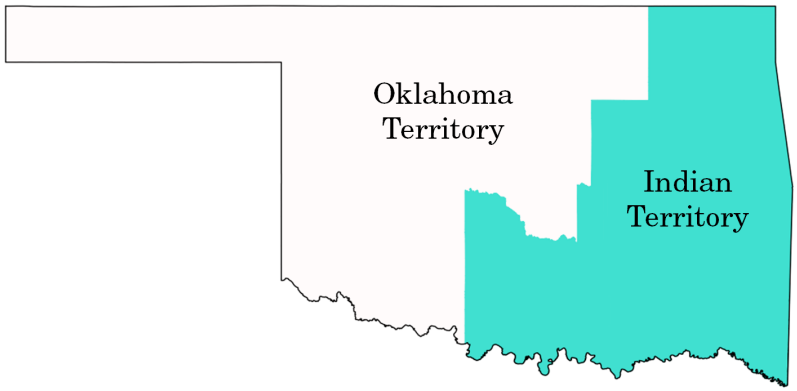
Section 1153(a) of Title 18, United States Code, provides, in relevant part: "Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder … within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States."

Section 1151 of Title 18, United States Code, provides, in relevant part: "[T]he term 'Indian country', as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation."

STATEMENT

The question that precipitated this habeas case is whether respondent should have been tried in state court or federal court for the mutilation and murder of another man on a highway outside Henryetta, Oklahoma, in 1999. Respondent, an enrolled tribal member, contends that he committed his crime on an Indian reservation and therefore within "Indian country," 18 U.S.C. § 1151(a), and that the Major Crimes Act, 18 U.S.C. § 1153(a), precludes state criminal jurisdiction under those circumstances. The Tenth Circuit agreed, holding that over three million acres in eastern Oklahoma are currently an Indian reservation of the Muskogee (Creek) Nation. Because the Creek Nation's history parallels that of the Choctaw, Chickasaw, Seminole, and Cherokee Nations, the decision below likely renders more than 19 million acres in eastern Oklahoma "Indian country."

That cannot be right. Congress created the State of Oklahoma in 1907 by combining Oklahoma Territory from the west and Indian Territory from the east to form a unified State:



If affirmed, the decision below would reincarnate Indian Territory in the form of "Indian country" under 18 U.S.C. § 1151(a), cleaving the State in half. The decision below would create the largest Indian reservation in America today, which would include Tulsa—Oklahoma's second-largest city:

That revolutionary result would shock the 1.8 million residents of eastern Oklahoma who have universally understood that they reside on land regulated by state government, not by tribes.

Affirmance would plunge eastern Oklahoma into civil, criminal, and regulatory turmoil and overturn 111 years of Oklahoma history. Since statehood, not a single criminal case involving an Indian has been tried in federal court on the theory that the eastern half of Oklahoma is a reservation. Rather, upon Oklahoma's creation, Congress directed that the State, not the federal government, would try Indians for local crimes like murder. That's why, starting in 1907, the federal territorial courts immediately transferred all non-federal cases involving Indians to state courts.

Although affirmance would invite a tsunami of jurisdictional consequences, reversal requires this Court only to hold that the decision below misapplied *Solem v. Bartlett*, 465 U.S. 463 (1984), to require particular words to show disestablishment of tribal borders. *Solem* addresses laws that carve off "surplus land" from reservations within existing States, circumstances that bear no resemblance to the dismantlement of the Indian Territory to make way for the merger of two Territories to form a new State.

But even were *Solem* controlling, the result would be the same. All agree that this case boils down to congressional intent. Congress by treaty promised the Five Tribes communal land tenure and territorial sovereignty, which Congress subsequently disestablished in creating the State of Oklahoma. It is inconceivable that Congress would have bothered to create a State comprising both Oklahoma Territory and Indian Territory if the entire Indian Territory was to become reservation land over which the State had limited authority. Singularly fixated on whether Congress expressly eliminated borders and boundaries, the decision below missed the forest for the trees. The court never considered the legal status of the land within those borders and boundaries, *i.e.*, what kind of "reservation" the Creek Nation had, and what remained of that status by the time of statehood. By statehood, what remained of the Five Tribes' territories cannot remotely be called a "reservation" under any conceivable definition of that term.

A. The Formation of Oklahoma

1. The Creek, Cherokee, Choctaw, Chickasaw, and Seminole Nations form their own chapter in American history. "These tribes were collectively

known almost universally as the Five Civilized Tribes because many of them had adopted so many elements of white culture that reformers often pointed to them as models for what assimilation could accomplish." Kent Carter, *The Dawes Commission and the Allotment of the Five Civilized Tribes, 1893–1914*, at 1 (1999).

In the 1830s, the United States forced the Five Tribes to abandon their homes in Georgia, Alabama, and Florida and migrate west to the designated "Indian Territory" in present-day Oklahoma. Grant Foreman, *Indian Removal: The Emigration of the Five Civilized Tribes* (1972 ed.).[1] Congress established the Five Tribes' territories in a unique manner. Normally, the United States creates an Indian reservation by setting aside federal lands for the Indians to live under federal patronage. *See, e.g.*, Treaty with the Omahas art. 1, Mar. 16, 1854, 10 Stat. 1043; Treaty with the Yankton Sioux, Apr. 19, 1858, 11 Stat. 743. But Congress promised each of the Five Tribes, by treaty, communal patents for land to own in fee simple. Congress also promised that as long as the Five Tribes occupied their lands, they would be allowed to govern themselves; they would never be subject to the laws of any State or Territory; and their land would never be made part of any State.[2]

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[1] The Five Tribes occupied 99% of Indian Territory; a collection of tribes at the northeastern tip held the remaining 1%. Arrell Morgan Gibson, *Oklahoma: A History of Five Centuries* 149–50 (2d ed. 1981); Census Bureau, *United States: 2010—Summary Population and Housing Characteristics* 946, tbl.40 (Jan. 2013), goo.gl/jLLVod.

[2] Treaty with the Creeks art. XIV, Mar. 24, 1832, 7 Stat. 368; Convention with the Cherokees pmbl., May 6, 1828, 7 Stat. 311;

After the Creek Nation allied with the Confederacy during the Civil War, the United States forced the Creeks to cede the western half of their land. Treaty with the Creeks pmbl., art III, June 14, 1866, 14 Stat 785, 786 (1866 Treaty). The United States obtained similar cessions from the other four tribes. Parts of those lands were used for settlement of other tribes, but the rest—which became Oklahoma Territory—was eventually opened to non-Indian settlement beginning with the historic land run of 1889. Angie Debo, *And Still the Waters Run: The Betrayal of the Five Civilized Tribes* 6 (1940) (*Waters Run*). The remainder of the Five Tribes' land maintained its status as Indian Territory.

Congressional promises of perpetual independence and seclusion could not withstand the relentless tide of western settlement. Railroads, coal and cattle industries, and the settlement of the Western frontier facilitated migration of non-Indians onto tribal lands. *See Waters Run* 12, 15–18. Within two generations after their arrival west of the Mississippi, Indians were a slim majority of the population in Creek territory, and just 28% of the entire population of the territory of the Five Tribes. Census Office, *Extra Census Bulletin: The Five Civilized Tribes in Indian Territory* 4 (1894).

The tribal governments were ill-equipped to govern the rapidly increasing non-Indian population. Rampant disorder and lawlessness reigned. In the

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Convention with the Chickasaws art. II, May 24, 1834, 7 Stat. 450; Convention between the Choctaws and Chickasaws art. I, Jan. 17, 1837, 7 Stat. 605; Treaty with the Choctaws art. IV, Sept. 27, 1830, 7 Stat. 333; Treaty with the Creeks and Seminoles arts. I, IV, Aug. 7, 1856, 11 Stat. 699–700.

Creek Nation, Indians were subject to harsh laws and penalties under the tribal code, Gibson 137, but non-Indians lived beyond the reach of tribal courts. Federal district courts in neighboring Arkansas (and later in Kansas and Texas) had criminal jurisdiction over cases involving U.S. citizens arising in Indian Territory. *See* Jeffrey Burton, *Indian Territory and the United States, 1866–1906*, at 71 (1995). But given the distance, "only the most depraved—and least fortunate—of bandits were hauled before … 'Hanging Judge' Isaac Parker." Danney Goble, *Progressive Oklahoma* 71 (1980). Violent crime went largely unpunished, and business agreements were effectively unenforceable. *Id.* Congress responded by creating federal territorial courts in Indian Territory and extending Arkansas law to govern non-Indians. Act of Mar. 1, 1889, ch. 333, § 1, 25 Stat. 783; Act of Mar. 1, 1895, ch. 145, § 4, 28 Stat. 696.

Many within and outside Indian Territory also believed that communal land tenure and tribal sovereignty inhibited economic development. H. Craig Miner, *The Corporation and the Indian* 74–75 (1976). Non-Indians could not legally own land in the Territory because communal title was vested in the tribes, and even Indians enjoyed only rights of use or occupation. *Barnett v. Way*, 119 P. 418, 419 (Okla. 1911). Non-Indians—by now a large majority of the population of Indian Territory—were subject to tribal taxes but had no voice in the governments levying those taxes. *Waters Run* 18–19. Thus, the "Boomers" pressured the federal government to end tribal control "so that the land and resources could be developed and a new state created." Carter 36–38.

Proposals to convert Indian Territory into one or more States had been floated in Congress every year

since 1870. Carter 2. But because Congress had promised the Five Tribes communal land ownership and autonomous governments within their territorial boundaries, eradicating these foundations was a prerequisite for incorporating Indian Territory into a new State. Gibson 193–94; Luther B. Hill, *A History of the State of Oklahoma* 337–45 (1910). The "steady drift across the [Missouri] border for many years, and the presence among the Indians of hundreds of thousands of persons who were outlanders under their own flag finally made it necessary to abolish the tribal organization." Roy Gittinger, *The Formation of Oklahoma* 211 (1939); *see also Marlin v. Lewallen*, 276 U.S. 58, 61 (1928). "Congress finally assumed complete control over [the Creek Nation] and undertook to terminate their government and distribute the tribal lands among the individuals." *McDougal v. McKay*, 237 U.S. 372, 381 (1915).

2. Congress proceeded to dissolve the Five Tribes' communal land tenure and to end self-rule, aiming to "dismember[]" the "tribal government … in stages." Burton 194. In 1893, Congress appointed a commission, led by Senator Henry Dawes, to "enter into negotiations with the [Five Tribes] for the purpose of the extinguishment of the national or tribal title to any lands within that Territory now held by any and all of such nations or tribes," whether by cession, allotment, or some other method, "to enable the ultimate creation of a State or States of the Union which shall embrace the lands within said India[n] Territory." Act of Mar. 3, 1893, ch. 209, § 16, 27 Stat. 645; *see also Jefferson v. Fink*, 247 U.S. 288, 291 (1918); *McDougal*, 237 U.S. at 380–81; *Woodward v. de Graffenried*, 238 U.S. 284, 295 (1915); *Stephens v. Cherokee Nation*, 174 U.S. 445, 446 (1899).

Congress established the Commission "in pursuance of a policy which looked to the final dissolution of the tribal government." *Tiger v. W. Inv. Co.*, 221 U.S. 286, 300 (1911); *Marlin*, 276 U.S. at 61 (same); Gittinger 236. As the Secretary of the Interior told the Commission, "success in your negotiations will mean the total abolition of the tribal autonomy of the Five Civilized Tribes and the wiping out of the quasi-independent governments within our territorial limits. It means, also, ultimately, … the admission of another state or states in the Union." Carter 3 (quoting letter from Secretary Hoke Smith to Henry Dawes). The tribes understood that the Commission would "break up our tribal government and [would] end in the absor[p]tion of our people by the great body of the citizens in the United States." Chief Isparhecher, *The Creek Ultimatum of Isparhecher*, Indian Chieftain, Nov. 11, 1897 (quoting Creek council resolution), goo.gl/c2pzbo.

When negotiations failed because "the tribal governments refused to cooperate in their own demise," the Commission urged Congress to facilitate by legislation the completion of the Commission's work. Carter ix. In annual reports, the Commission painted Indian Territory as plagued by corruption, misrule, and crime. In 1895, the Commission wrote: "It is … the imperative duty of Congress to assume at once the political control of the Indian Territory." S. Rep. 54-12, at 20 (1895). The Commission considered the Five Tribes' "so-called governments … wholly corrupt, irresponsible, and unworthy to be longer trusted" to govern. *Id.* at 19; *see also Woodward*, 238 U.S. at 296–98; *Heckman v. United States*, 224 U.S. 413, 434–35 (1912).

Motivated by a desire to break up the tribes' communal land tenure and in response to the disorder it perceived in Indian Territory, *see Waters Run* 24–25, the Commission recommended the establishment of a territorial government and the extension of U.S. jurisdiction over all matters relating to the use and occupation of tribal lands. S. Rep. 54-12, at 20. Congress thereafter authorized the Commission to survey Indian Territory and enroll tribal members in preparation for allotment, with or without tribal consent. Act of June 10, 1896, ch. 398, § 1, 29 Stat. 339, 343. The federal government thus commandeered one of the most fundamental aspects of tribal sovereignty—the ability to control their own membership and to "define [their] own identity." Carter 52, 108.

Congress also extended the authority of the federal courts while steadily diminishing the tribal courts and tribal laws—a direct repudiation of the United States' treaty promises of tribal self-rule. Hill 318. In a concerted campaign to abolish race-based jurisdictional distinctions in Indian Territory, Congress in 1897 rendered tribal courts obsolete by conferring exclusive jurisdiction on federal courts to try all civil and criminal cases, and by subjecting all people in Indian Territory "irrespective of race" to Arkansas and federal law. Indian Department Appropriations Act of 1897, ch. 3, § 1, 30 Stat. 83; *Marlin*, 276 U.S. at 61–62; *Washington v. Miller*, 235 U.S. 422, 424–25 (1914).

In 1898, Congress passed "An Act for the Protection of the People of Indian Territory, and for Other Purposes"—better known as the Curtis Act, ch. 517, 30 Stat. 495. But "[t]he innocuous-sounding 'other purposes' part was designed to complete the destruction of the tribal governments." Carter 34. Congress

abolished tribal courts and banned federal courts from enforcing tribal law. §§ 26, 28, 30 Stat. 504–05.[3] The Act also directed the Dawes Commission to allot the Five Tribes' land following tribal enrollment, even absent tribal consent. § 11, 30 Stat. 497. The Seminoles, Choctaws, and Chickasaws had already reached allotment agreements with the United States, and the Creeks and Cherokees quickly capitulated. The Creek Allotment Agreement, ch. 676, 31 Stat. 861 (1901), provided "for a permanent enrol[l]ment of the members of the tribe, for appraising most of the lands and allotting them in severalty with appropriate regard to their value, for using the tribal funds in equalizing allotments, for distributing what remained, for issuing deeds transferring the title to the allotted lands to the several allottees, and for ultimately terminating the tribal relation." *Sizemore v. Brady*, 235 U.S. 441, 447 (1914); *accord Marlin*, 276 U.S. at 63.

By authorizing allotment, Congress opened Indian Territory for eventual non-Indian ownership of land. The 1901 Creek Allotment Agreement provided that allotted lands would be alienable within five years, except 40 acres of homestead land for each allottee, which remained inalienable for 21 years. §§ 3, 7, 31 Stat. 862–63. Congress nonetheless relented to

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[3] The Atoka Agreement, ch. 517, 30 Stat. 505 (1897), contemplated the continuation of the Choctaw and Chickasaw courts in limited form. *See* § 29, 30 Stat. 511 (conferring exclusive federal jurisdiction over only certain controversies or offenses). But Congress further diminished those courts in 1904, Act of Apr. 28, 1904, ch. 1824, § 2, 33 Stat. 573 (extending federal jurisdiction over probate matters), and definitively abolished them in 1907, Indian Department Appropriations Act of 1907, ch. 2285, 34 Stat. 1027.

pressure from the Boomers and Indians wishing to sell their land, and quickly lifted most restrictions on alienation. *See* Five Tribes Act, ch. 1876, § 22, 34 Stat. 145 (1906); Act of May 27, 1908, ch. 199, § 1, 35 Stat. 312. Within a decade, "the bulk of the landed wealth of the Indians passed into individual hands," and much of it was soon acquired by non-Indian settlers, by purchase, graft, or speculation. *Waters Run* 92–125.

The Five Tribes' governments were scheduled to terminate by March 4, 1906. Creek Allotment Agreement § 46, 31 Stat. 872; Curtis Act § 29, 30 Stat. 512 (Choctaw and Chickasaw); Act of July 1, 1902, ch. 1375, § 63, 32 Stat. 725 (Cherokee); Act of Mar. 3, 1903, ch. 994, § 8, 32 Stat. 1008 (Seminole). Meanwhile, in 1901, Congress granted U.S. citizenship to "every Indian in Indian Territory." Act of Mar. 3, 1901, ch. 868, 31 Stat. 1447. Citizenship furthered "[t]he policy of the Government to abolish classes in Indian Territory and make a homogeneous population." H.R. Rep. 56-1188, at 1 (1900). By this time, tribal governments "were little more than consulting agents in the management of the business of the tribes." Gittinger 233. The Five Tribes "had ceased to exist except as financial corporations," *id.* at 234, whose assets were being liquidated and affairs wound up. And though some Indians resisted combining with Oklahoma Territory, "Congress ignored [their] protests … and proceeded with a joint statehood project." *Waters Run* 160–62. In 1905, when the Five Tribes proposed a separate Indian state, to be called Sequoyah, Congress rebuffed the overture. Gibson 196.

With the March 4, 1906 termination date approaching, "there were a number of items of unfin-

ished business, such as signing deeds, that would require action by some official tribal entity." Carter 207. Congress also feared that ending tribal government before allotment was complete would trigger the transfer of land to railroad companies that held contingent land grants. *See, e.g.*, 40 Cong. Rec. 2976 (1906) (Sen. McCumber).

Congress was still debating proposed legislation to address these issues on February 26, just six days before the tribal governments were to terminate. Carter 208. On March 2, 1906, Congress temporarily extended the tribal governments, "until all property of such tribes, or the proceeds thereof, shall be distributed among the individual members of said tribes unless hereafter otherwise provided by law." S.J. Res. 37, 59th Cong., 34 Stat. 822.

On April 26, 1906, Congress passed the Five Tribes Act, ch. 1876, 34 Stat. 137, to "provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory." In this "final winding up of tribal affairs," Angie Debo, *The Rise and Fall of the Choctaw Republic* 288 (1934) (*Rise and Fall*), Congress closed the tribal rolls, abolished tribal taxes, took control of tribal schools, and directed the Secretary of the Interior to seize and sell all tribal buildings and furniture. Congress directed the federal government to sell any unallotted lands, with the proceeds applied to tribal debts and any remainder paid out per capita to tribal members. Five Tribes Act §§ 16–17, 34 Stat. 143–44. Congress extended tribal governments, but with severe limitations on their operations and authority. § 28, 34 Stat. 148. In short, "[w]ith the passage of this act the tribal government in every real sense ceased to function." *Rise and Fall* 289.

3. Two months later, Congress enacted the Oklahoma Enabling Act, ch. 3335, 34 Stat. 267 (1906), authorizing the creation of the State through the merger of Indian and Oklahoma Territories. Congress directed the transfer of all cases arising under federal law, pending in territorial courts in the Indian and Oklahoma Territories at the time of statehood, to the newly created U.S. district courts for the Western and Eastern Districts of Oklahoma. § 16, 34 Stat. 276. *All* other cases were transferred to state court. § 20, 34 Stat. 277. Congress also extended the laws of Oklahoma Territory to Indian Territory (supplanting Arkansas law), until the new Oklahoma legislature provided otherwise. § 13, 34 Stat. 275.

The stage was thus set for Oklahoma statehood and for the fading of "a proud but vanishing tribal government, … whose sun [was] now setting, and whose existence [was] now merging into that of general government." *To Save Indian Capitol*, Claremore Progress, July 21, 1906, at 2, goo.gl/aJBZgV. When President Roosevelt signed a proclamation admitting Oklahoma to the Union on November 16, 1907, Indians constituted just 9.1% of the population of the former Indian Territory. Census Bureau, *Population of Oklahoma and Indian Territory* 9 (1907). With Oklahoma's admission to statehood, the Five Tribes "may be said to have passed out of existence as … separate political entit[ies]," and their history "fused with the greater history of the State of Oklahoma." *Rise and Fall* 290.

When news of Roosevelt's proclamation reached Guthrie, Oklahoma, at 9 AM on November 16, cheering crowds gathered outside the Carnegie Library to witness the union of Indian Territory and Oklahoma Territory in a symbolic wedding ceremony between

"Miss Indian Territory" (played by Anna Bennett, a Cherokee) and "Mr. Oklahoma Territory" (Charles "Gristmill" Jones of Oklahoma City). Hill 369–73. Oklahoma quickly "adopted the cultural heritage of the Indian" and "used it as the background of its own traditions," including by choosing a Choctaw word as the State's name and depicting on the State seal a frontiersman and Indian clasping hands inside a five-pointed star that contains the seals of each of the Five Tribes. *Waters Run* 291–93. In short order, a "large number of Indian citizens [were] elected to important positions in the new state," including the State's second governor and some of Oklahoma's most influential members of Congress. *Id.* at 171, 186, 315.

Statehood launched Oklahoma on the path to economic development. Today, eastern Oklahoma is home to more than 1.8 million people—48% of the State's population—roughly 9% of whom self-identify as Native American. More than half of these Oklahomans reside in and around Tulsa—long a major oil hub, now a vibrant city with expanding aerospace, healthcare, technology, manufacturing, and transportation sectors that drive the State's $186 billion economy. *See* Tulsa Regional Chamber, *2018 Tulsa Largest Employers*, goo.gl/Z6vKCo. From Oklahoma's entrance to the Union to the present day, neither the State, nor the federal government, nor the Five Tribes have treated the former Indian Territory as a reservation.

B. Case Background and Proceedings Below

1. On August 28, 1999, Patrick Murphy mutilated and murdered his girlfriend's former lover, a man named George Jacobs. Both men are members of the

Creek Nation. The crime began when Mr. Murphy used his vehicle to force Mr. Jacobs' car off the road late at night in a rural area of Henryetta, Oklahoma. Mr. Murphy and two accomplices pulled Mr. Jacobs out of the car and began to beat him. Over the course of five minutes, Mr. Murphy and his accomplices severed Mr. Jacobs' genitals with a folding knife and stuffed them into Mr. Jacobs' mouth, pulled Mr. Jacobs into a roadside ditch, slashed his throat and chest, and "tried to stomp on [his] head like a pancake." Pet. App. 140a. They left Mr. Jacobs to die beside the road. Mr. Murphy then instructed his accomplices to drive to a nearby home to kill Mr. Jacobs' son, George Jr. Someone in the house intervened, saving George Jr.'s life. Later that evening, Mr. Murphy confessed to both his girlfriend and his cousin. *Id.* Mr. Murphy was convicted in state court for first-degree murder and sentenced to death. Pet. App. 203a. His conviction and sentence were affirmed on appeal. *Id.*

2. In his second application for state post-conviction relief, in 2004, Mr. Murphy argued that Oklahoma courts lacked jurisdiction to convict him because he is an Indian and, he alleged, he committed his crime on an Indian reservation and thus could only be tried in federal court under the Major Crimes Act, 18 U.S.C. § 1153(a). The state court concluded that Oklahoma's jurisdiction was proper. The Oklahoma Court of Criminal Appeals agreed and denied post-conviction relief, finding no authority to support Mr. Murphy's theory that the 1866 bounda-

ries of the Creek territory remained intact as a "reservation." *See* Pet. App. 222a–24a.[4]

Mr. Murphy petitioned for a writ of certiorari on the question whether his crime was committed within Indian country. *Murphy v. Oklahoma* (No. 05-10787). In response to this Court's invitation, the United States filed a brief expressing the view that Congress has extinguished the historic boundaries of Creek Nation. U.S. Br. at 15–20, 2007 WL 1319320. This Court denied certiorari. 551 U.S. 1102 (2007).

3. On federal habeas review under 28 U.S.C. § 2254, Mr. Murphy asserted that the Oklahoma Court of Criminal Appeals had misapplied federal law on the question whether he committed the crime in Indian country. The district court held that the state court's decision rejecting Mr. Murphy's jurisdictional challenge was neither contrary to nor an unreasonable application of clearly established federal law and denied federal habeas relief. Pet. App. 184a–95a.

4. The Tenth Circuit reversed. The court held that federal law clearly established that Mr. Murphy's crime occurred in Indian country under 18 U.S.C. § 1151(a), because Congress never disestablished the 1866 boundaries of the Creek territory, which encompassed the land where the murder occurred. Pet. App. 132a–33a. The panel applied the three-part framework set forth in *Solem v. Bartlett*, 465 U.S. 463 (1984), which looks to statutory text,

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[4] The state courts also rejected Mr. Murphy's claim that the crime occurred in Indian country under §§ 1151(b) and (c), which pertain to "dependent Indian communities" and "Indian allotments." Pet. App. 215a–25a.

surrounding circumstances, and subsequent history. In an extended analysis of the main statutes at issue, Pet. App. 78a–102a, the court concluded that the State's argument failed at the first step because no text "expressly" disestablished or diminished the boundaries of the Creek Nation. Pet. App. 96a. The court further concluded that the contemporaneous and subsequent history did not "unequivocally reveal[]" congressional intent to erase the historical boundaries of the Creek territory. Pet. App. 107a, 119a (quoting *Nebraska v. Parker*, 136 S. Ct. 1072, 1080 (2016)).[5]

The Tenth Circuit denied rehearing on November 9, 2017. Chief Judge Tymkovich concurred separately to urge review by this Court. Pet. App. 230a. He noted that this "case may present the high-water mark of *de facto* disestablishment" of Indian boundaries and that prior disestablishment cases may be "ill suited" to tackle the unique circumstances of "Oklahoma statehood." *Id*. at 232a. "[S]trictly applying *Solem*'s three-part framework in this context," Chief Judge Tymkovich wrote, "evokes 'the thud of square pegs being pounded into round holes.'" *Id.* at 230a.

SUMMARY OF ARGUMENT

The question presented is whether the land on which respondent murdered his victim in eastern Oklahoma falls within an "Indian reservation." The decision below held that it does—and thus vacated

[5] In his appeal, Mr. Murphy also argued that the crime occurred on an Indian allotment. Because the Tenth Circuit held that the crime occurred on an Indian reservation, the panel did not address Mr. Murphy's allotment argument, Pet. App. 15a, which Mr. Murphy did not reassert as an alternative ground for affirmance when opposing certiorari.

respondent's capital murder conviction—because the panel erroneously believed that Congress never disestablished a Creek Nation reservation as defined by its 1866 borders.

I. The analysis must start with an understanding of what constituted the Creek Nation's "reservation" to determine whether it still exists today. Unlike other Indian tribes, for whom Congress set aside federal land in trust to establish a reservation, the Creek Nation and the other Five Tribes held title to their territory in fee simple pursuant to patents issued by the United States under treaties guaranteeing the tribes communal ownership, territorial sovereignty, and perpetual immunity from statehood.

None of these guarantees survived statehood. By 1907, Congress had explicitly broken up the Five Tribes' land patents by allotting the tribes' communal land to prepare the former Indian Territory for Oklahoma's admission to the Union. Simultaneously, Congress assumed "complete control" over the tribe's affairs and took dramatic steps to "terminat[e] their government." *McDougal*, 237 U.S. at 380–81. Congress stripped the Five Tribes of their most basic executive, legislative, and judicial functions to bestow those powers upon the new State. After the Five Tribes consented to their own demise by March 4, 1906, Congress continued the tribal governments beyond that date due to practical administrative concerns, but left the tribes with no territorial authority except "to sign deeds." S. Rep. 59-5013, pt. 1, at 885 (1907).

Congress's breach of its treaty promises of communal land ownership through fee patents and tribal self-government, combined with the creation of Oklahoma, amply overcomes the presumption that Con-

gress does not lightly abrogate its treaty promises or diminish a reservation. Members of Congress recognized that they had swept away "all the rights [the Five Tribes] have under the treaties which they have been given and guaranteed by the Government of the United States." 31 Cong. Rec. 5593 (1898) (Sen. Bate). By statehood, no law reserved land for any of the Five Tribes with boundaries coextensive with the 1866 borders.

Congress's disestablishment of the Five Tribes' territorial borders comports with the principle that a reservation is defined by a tribe's sovereignty within a specific geographic area. Thus, allotment can coexist with reservation status when a tribe's sovereignty still extends to specified borders. Here, however, Congress expressly abrogated any semblance of self-rule and submitted the Five Tribes to state law, thereby stripping the tribes of jurisdictional sovereignty over the land. Without land or territorial sovereignty, tribal borders after statehood had meaning only as historical references.

II. Congress expressly withdrew the aspect of reservation status at issue here—federal criminal jurisdiction—and bestowed upon the State responsibility for prosecuting local crimes involving Indians. If eastern Oklahoma had constituted a reservation after statehood, the transfer of scores of cases from federal to state courts immediately upon statehood would have violated the Major Crimes Act. And the federal government has never asserted criminal jurisdiction on the theory that eastern Oklahoma is an Indian reservation. "This 'jurisdictional history' … demonstrates a practical acknowledgment that the Reservation was diminished." *Hagen v. Utah*, 510 U.S. 399, 421 (1994). A contrary conclusion would

have created an implausible jurisdictional gap wherein *no* court would have had power to prosecute numerous crimes within the former Indian Territory.

III. The framework of *Solem v. Bartlett*, 465 U.S. 463 (1984)—which focuses on indicia of disestablishment in specific terms used in surplus land acts—is not designed for the unique circumstances of Oklahoma and the Five Tribes. *Solem* examines whether Congress has diminished the boundaries of a traditional Indian reservation by carving off "surplus land" for settlement by non-Indians. But Congress never established this kind of reservation for the Five Tribes, and this case does not involve a "surplus land" act. The court below erred in parsing statute after statute in search of specific language, traditionally found in surplus land acts, that expressly "terminated" or "erase[d]" the Creek Nation's borders. Pet. App. 81a, 93a, 95a–97a, 104a.

Had the decision below examined whether Congress disestablished—that is, rescinded—the type of "Indian country" Congress created in the former Indian Territory for the Five Tribes, the answer would have been plain. Congress expressly repudiated every promise that could have made the area a reservation. Moreover, the contemporaneous historical context is unequivocal that Congress intended to disestablish the Creek borders as a necessary step on the path to Oklahoma statehood. And the post-statehood history and demographics of the region confirm disestablishment. Thus, even under *Solem*, by the time of statehood the Creek Nation had no "reservation" under any conceivable conception of that term.

ARGUMENT: EASTERN OKLAHOMA IS NOT A RESERVATION

In holding that the State failed to overcome the presumption that the former Creek territory holds reservation status today, the court below started with the wrong baseline understanding of what kind of territory Congress created for the Creek Nation in the first place, and thus what kind of domain the State had to show was disestablished. Congress by treaty promised the Creek Nation and the other Five Tribes patents granting communal ownership of the lands at issue and permanent territorial sovereignty, forever insulated from statehood.

Congress expressly and unequivocally broke each of these promises. After allotment, no operative law existed that reserved land for any of the Five Tribes coextensive with their original borders. And in act after act, Congress expressly dismantled tribal government, leaving the Five Tribes with no courts, no tribal law, no power of self-governance, no schools, no buildings, and no jurisdictional authority over non-Indians on the land. Congress expressly provided that Oklahoma, rather than the federal government, had jurisdiction to prosecute murderers like respondent. In short, by statehood, all that remained within the former Indian Territory were shells of tribal presence without land or territorial sovereignty, with tribal members subject to state prosecution for local crimes.

Although congressional intent is clear, that intent becomes pellucid in light of the equal footing doctrine enshrined in the Enabling Act. § 4, 34 Stat. 271; *Coyle v. Smith*, 221 U.S. 559, 567, 580 (1911). It is inconceivable that Congress created a new State by combining two territories while simultaneously

dividing the jurisdiction of that new State straight down the middle by leaving the former Indian Territory as Indian country. The State would not have had "all the rights of sovereignty, jurisdiction, and eminent domain" over its eastern half comparable to the original 13 states. *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212, 223 (1845). This Court should not assume Congress did so much to accomplish so little.

I. Congress's allotment of tribal land and dismantlement of territorial sovereignty to create Oklahoma is incompatible with reservation status.

Determining whether borders have been disestablished depends on what Congress established within those borders to begin with. The Creek Nation's 1866 geographic borders were defined by land patents in fee simple under treaties promising perpetual communal ownership, self-governance, and seclusion, *i.e.*, insulation from statehood. Congress clearly disestablished those borders, along with the borders of the other Five Tribes, by allotting tribal land and stripping the tribes of territorial sovereignty to prepare the region for statehood.

A. Congress did not establish traditional reservations for the Five Tribes.

Each of this Court's disestablishment cases presupposes federal law that defines the tribe's boundaries as a tract of federal land set apart as a "reservation."[6] In a traditional reservation, "the federal gov-

[6] Act of Mar. 2, 1889, ch. 405, §§ 2, 4, 25 Stat. 888–89 ("the following tract of land … is hereby set apart for a permanent reservation") (*Rosebud*; *Solem*); Executive Order (July 2, 1872), *re-*

ernment holds title to the land in trust on behalf of the tribe." Dep't of Interior, Bureau of Indian Affairs, *Frequently Asked Questions: What Is a Federal Indian Reservation?*, goo.gl/gjw2Xc; *Spalding v. Chandler*, 160 U.S. 394, 402–03 (1896); Felix S. Cohen, *Handbook of Federal Indian Law* § 3.04, at 190–91 (2012 ed.). These lands retain reservation status "until Congress explicitly indicates otherwise" through express abrogation or modification of the underlying document that set aside the reservation for Indian use. *Solem*, 465 U.S. at 470; *United States v. Celestine*, 215 U.S. 278, 285 (1909).

The starting point is fundamentally different for the Creeks and the other Five Tribes. The Creeks "[were] not on the ordinary Indian reservation, but on lands patented to them by the United States." Dep't of Interior, Bureau of Indian Affairs, *Report on Indians Taxed and Indians Not Taxed in the United States* 283–84 (1894); *United States v. Creek Nation*, 295 U.S. 103, 109 (1935). Congress never set aside federal lands to hold in trust as a permanent home for the Creeks. Instead, Congress "solemnly guarantied" a "Creek country west of the Mississippi" by

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printed in 1 Charles J. Kappler, *Indian Affairs, Laws and Treaties* 917 (1904) (area "set apart as a reservation") (*Seymour*); Treaty with the Sioux–Sisseon and Wahpeton Bands art. III, Feb. 19, 1867, 15 Stat. 506 ("set[ting] apart … the following-described lands as a permanent reservation") (*DeCoteau*); Act of May 5, 1864, ch. 77, § 1, 13 Stat. 63 ("the several Indian reservations heretofore made") (*Hagen*); Treaty with the Yankton Sioux arts. I, III, Apr. 19, 1858, 11 Stat. 744 (describing boundaries of "said reservation") (*Yankton*); Executive Order (Nov. 16, 1855), *reprinted in* 1 Kappler 817 (authorizing "the reservation be made as proposed") (*Mattz*); Treaty with the Omahas art. 1, Mar. 16, 1854, 10 Stat. 1043 (describing "the country hereby reserved") (*Parker*).

promising an area delineated by "a patent, in fee simple, to the Creek nation of Indians," within which the Creeks enjoyed the right to self-government and territorial sovereignty. Treaty with the Creeks art. XIV, Mar. 24, 1832, 7 Stat. 368 (1832 Treaty); Treaty with the Creeks art. III, Feb. 14, 1833, 7 Stat. 419. After Congress issued the patent on August 11, 1852, "the title to these lands" was "held by the tribe in trust for the people." *Woodward*, 238 U.S. at 293, 299 n.25. This land became known as "Creek country." Treaty with the Creeks and Seminoles art. II, Aug. 7, 1856, 11 Stat. 700; *cf.* arts. V, VI, 11 Stat. 701 (referring to different Indian lands outside Indian Territory as "reservations").[7]

No other statute or treaty establishes a Creek "reservation." Thus, determining whether Creek borders—*i.e.*, their sovereign territory—still exist turns on Congress's subsequent treatment of the land patent that established tribal borders and Congress's action with respect to its treaty promises of tribal territorial sovereignty. The court below eschewed this approach. Parsing each statute seriatim and in isolation, and mentioning "borders" or "boundaries" 43 times (Pet. App. 74a–107a), the court asked whether they were eradicated without regard to whether anything resembling a "reservation" remained after statehood. The answer was no.

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[7] Because Congress took a similar approach with the other Five Tribes, *supra* note 2, the Choctaw Principal Chief later declared, "The Indians of the Five Tribes have never been reservation Indians." *Statehood for Indian Territory and Oklahoma: Remarks of Robert L. Owen Before the H. Comm. on the Territories*, 58th Cong. 131 (1904) (*Statehood Remarks*) (reproducing letter from Green McCurtain).

B. Congress broke up the land patents that established tribal borders.

The influx of white settlement and a desire for economic development created overwhelming pressure to transform Indian Territory, and thus the great estates of the Five Tribes, into one or more States. *Supra* pp. 6–8. But the tribes' communal land tenure was fundamentally incompatible with the creation of a State encompassing the same land. So long as tribal ownership continued, non-Indians had no legal right to permanently own and develop the land. And because the tribes "held patents for their respective lands, it was considered proper, if not indispensable, to obtain the consent of the Indians to the overthrow of the communal system of land ownership." *Woodward*, 238 U.S. at 294. A mountain of historical scholarship confirms that Congress viewed dissolving tribal land ownership as necessary to achieve statehood. Gibson 193–94; *see also* Gittinger 211–13, 236; Hill 337–45; Carter 36; *Waters Run* 159–80.

The unprecedented work of the Dawes Commission proceeded with the singular purpose of breaking apart the Five Tribes to form one or more States. Congress created the Commission in 1893 to negotiate with the Five Tribes "for the purpose of the extinguishment of … tribal title[,] … either by cession … to the United States, or by … allotment and division … in severalty among the Indians[,] … or by such other method as may be agreed upon between the several … tribes [and] the United States, with a view to the ultimate creation of a State or States of the Union which shall embrace the lands within said India[n] Territory." Act of Mar. 3, 1893, § 16, 27 Stat. 645. Congress's objective was clear: whether by ces-

sion or allotment, Congress intended to terminate the sovereign territories of the Five Tribes.

When negotiations failed, Congress forced allotment on the tribes to extinguish their territory. Congress understood that "if the Indians … decline to consider any change in the present condition of their titles and government, the United States must, without their aid and without waiting for their approval, settle this question of the character and condition of their land tenures and establish a government over whites and Indians of that territory." *Woodward*, 238 U.S. at 299–300 n.2 (quoting S. Rep. 53-377 (1894)). Thus, Congress "[b]y acts passed in 1890, 1893, 1897 and 1898 … manifested its purpose to allot or divide in severalty the lands of the Five Civilized Tribes with a view to the ultimate creation of a state embracing the Indian Territory." *Jefferson v. Fink*, 247 U.S. 288, 291 (1918); Carter ix. The historic allotment process that followed was a laborious undertaking that diminished, parcel by parcel, the land patents held by the tribes. *See generally* Carter 125–53; *Waters Run* 31–60.

Ultimately, the Oklahoma Enabling Act unmistakably broke the treaty promise that Creek land would never be made part of any State. 1832 Treaty art. XIV, 7 Stat. 368; *see, e.g.*, 40 Cong. Rec. at 1514–15 (Rep. Beall); *id*. at 8399 (Sen. Morgan). Congress did not need to pass a separate statute expressly declaring borders disestablished. Tribal boundaries necessarily evaporated when Congress dissolved communal tribal land tenure, abrogated its treaty promises, and merged Indian Territory into the new State of Oklahoma. Once Congress allotted the land as a prelude to statehood, the geographic borders of the Five Tribes' communal territories disappeared

along with the land patents establishing them. As one local reporter wrote following the "last meeting of the Creek Council" on October 11, 1907, "[t]he coming of statehood will obliterate all lines of the once powerful Indian nations." *Last Meeting of Creek Council*, Bixby Bulletin, vol. 3, no. 34, Oct. 11, 1907.

C. Congress rescinded the Five Tribes' territorial sovereignty.

While allotment and statehood extinguished the *physical* borders of the Five Tribes' territories, Congress wiped away all *jurisdictional* borders by systematically dismantling the tribes' territorial sovereignty, leaving no vestige or other indicia of a reservation.

1. By the end of 1907, the Creek Nation had no independence, solitude, or territorial sovereignty. Congress assumed "complete control" over the Creek Nation and took dramatic steps to "terminat[e] their government" to make way for statehood. *McDougal*, 237 U.S. at 381; *Tiger*, 221 U.S. at 300; *Marlin*, 276 U.S. at 61–62. Congress stripped the Five Tribes of the most basic executive, legislative, and judicial functions to bestow those powers upon the new State. *Harjo v. Kleppe*, 420 F. Supp. 1110, 1118 (D.D.C. 1976) (describing Congress's "statutory dismemberment" of the Creek Nation).

The Creek Nation and the other Five Tribes agreed that their governments would terminate by March 4, 1906. *Supra* p. 12. Meanwhile, Congress took sweeping measures to obliterate the Five Tribes' self-government. Congress authorized the President to remove the Five Tribes' principal chiefs and appoint their successors, prohibited tribal governments from congregating more than 30 days per year, and

barred them from enacting legislation or entering into contracts involving their funds or land without presidential approval. Five Tribes Act §§ 6, 28, 34 Stat. 137, 139, 148. Congress directed the Secretary of the Interior to assume control of tribal schools, abolished tribal taxes, and took possession of tribal buildings and sold off all the tribes' property. §§ 10, 11, 15, 34 Stat. 140–41, 143. And the Dawes Commission usurped one of the most foundational attributes of tribal sovereignty—the ability to determine tribal membership. *Supra* p. 10; *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 327 (2008).

Congress also "abolished all tribal courts in the Indian Territory and provided that 'the laws of the various tribes or nations of Indians shall not be enforced at law or in equity by the courts of the United States in the Indian Territory.'" *Miller*, 235 U.S. at 425 (citation omitted); *see also Jefferson*, 247 U.S. at 291. Congress thus "broke the back of tribal government for, without an independent judiciary, the tribes were powerless to delay or seriously influence the course of whatever was ordained by Congress and the Executive of the United States. … Once the courts had been eliminated[,] … none of the Five Tribes held a title stronger than an eight-year lease on a local suboffice of the federal government." Burton 237–38.

In abolishing the Creek judiciary, Congress breached its promise that the tribe would never be subject to the laws of any state or territorial government, but would be "allowed to govern themselves." 1832 Treaty art. XIV, 7 Stat. 368; *see also* 1866 Treaty art. III, 14 Stat. 786–87. This abrogation of self-government was widely acknowledged over many

years in Congress. 29 Cong. Rec. 2305 (1897) (Sen. Vest); *id.* at 2310 (Sen. Bate); *id.* at 2341 (Sen. Vilas); 30 Cong. Rec. 735 (1897) (Sen. Pettigrew); 31 Cong. Rec. at 5593 (Sen. Bate); *Statehood for Oklahoma: Hearing Before the H. Comm. on the Territories*, 58th Cong. 48–49 (1904) (*Statehood Hearing*) (Mr. Doyle); *id.* at 98 (Mr. Howe).

The Creeks understood the implications of the abolition of their courts. Chief Pleasant Porter, addressing the Creek legislature in 1901, reported that Congress had "pos[i]tively" rebuffed the Creeks' attempts to negotiate for the restoration of "some limited measure of government" to the tribal courts. *Message of Pleasant Porter to Members of the House of Kings and Warriors in Council Assembled* (Okla. Hist. Society Catalogue No. 35,667). Chief Porter explained that "[i]t would be difficult, if not impossible, to successfully operate the Creek government now … and the remnant of government now accorded to us can be expected to be maintained only until all settlements of our landed and other interests growing out of treaty stipulations with the government of the United States shall have been settled." *Id.*

So complete was the dismantling of tribal government that, in 1901, Congress issued a blanket grant of U.S. citizenship to "every Indian in Indian Territory." Act of Mar. 3, 1901, 31 Stat. 1447. Citizenship here differed from the treatment of other tribes, for whom Congress tied the grant of citizenship to a tribal member's receipt of an allotment. General Allotment Act of 1887, ch. 119, § 6, 24 Stat. 390. With the Five Tribes, Congress conferred citizenship on all members when allotment had barely begun. The Five Tribes had previously resisted U.S. citizenship "on the ground that they were conducting

governments of their own, which would be weakened by such a step." H.R. Rep. 56-1188, at 1. But Congress recognized that the "independent self-government of the Five Tribes has practically ceased. The policy of the Government to abolish classes in Indian Territory and make a homogeneous population is being rapidly carried out." *Id.*; *see also* Gittinger 234.

The Five Tribes viewed Congress's grant of citizenship as yet another marker of the end of their separate sovereignty. Congress "look[ed] to the breaking up of tribal relations, the establishing of the separate Indians in individual homes, free from national guardianship and charged with all the rights and obligations of citizens of the United States." *In re Heff*, 197 U.S. 488, 499 (1905), *overruled in part by United States v. Nice*, 241 U.S. 591 (1916). As Chief Porter remarked in a 1901 address to the Creek council, the blanket grant of citizenship rendered the Creeks "amenable to [federal] laws and clothed with all the rights of other citizens of the United States. … It will be seen from this that the restitution of the tribal government is now rendered a matter of impossibility." *Message of Pleasant Porter to Members of the House of Kings and Warriors in Council Assembled* (Okla. Hist. Society Catalogue No. 35,667); *accord Interview with Pleasant Porter*, Muskogee Phoenix, Jan. 17, 1901.

2. The conclusion that no reservations existed after statehood is further compelled by the meaning of reservation status under Indian law. An essential marker of reservations is the right of "reservation Indians to make their own laws and be ruled by them." *Williams v. Lee*, 358 U.S. 217, 220 (1959). A reservation requires that a tribe have the "ability to

exercise … sovereign functions" within a defined area of land. *Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue of N.M.*, 458 U.S. 832, 837 (1982). If a tribe has no power to wield over a parcel of land, it lacks *territorial* sovereignty over that land. Borders are relevant only to delineate the tribe's jurisdiction over a defined area. Cohen § 4.01[2][f]. That is, territory is derivative of and defined by the exercise of tribal power. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 557 (1832) (describing "the several Indian nations as distinct political communities, having territorial boundaries, within which their authority is exclusive").

Accordingly, congressional intent with regard to the exercise of governmental authority over activities within a particular area has always been critical in determining whether land is part of a reservation. *Rosebud*, 430 U.S. at 598 n.20. In *Solem*, for example, this Court found significant that a surplus land act did not speak to the issue of "jurisdiction over the opened areas." 465 U.S. at 478. The decision below thus erred gravely in declaring, time and again, that tribal "governance" has no bearing on reservation status. Pet. App. 105a–07a; *see also* 78a, 81a, 82a, 96a, 111a, 113a. The two concepts are inextricable; it is inconceivable that Congress would have intended the latter to continue without the former. Borders cannot exist untethered to any sovereign purpose that makes borders relevant. Because the State has more than overcome any presumption that Congress preserved the Creek land patents and territorial sovereignty, it is incumbent on respondent to specify in what meaningful sense the Creek Nation's historical territory could be considered a "reservation" after statehood.

D. Nothing cited by the court of appeals and respondent is to the contrary.

The arguments marshalled below do not reflect any sovereign characteristic of a reservation.

1. The court below noted that Article IX of the 1866 Treaty once refers to the Creek territory as a "reduced … reservation." Pet. App. 65a. That reference does not set aside federally owned land to be held in trust for the tribe. The reference appears in a provision guaranteeing that the United States would rebuild agency buildings destroyed during the Civil War on the "reduced … reservation." 1866 Treaty art. IX, 14 Stat. 788. Yet when the same treaty delineates the 1866 Creek boundaries, it refers to the territory as "Creek lands," not a reservation. *Id*. art. III, 14 Stat. 786. In any event, reference to the word "reservation" in the 1866 treaty is meaningless when all vestiges of reservation status were destroyed upon statehood.

Respondent also relies on assorted statutory references to the "Creek Nation" leading up to statehood to conclude that the 1866 tribal borders persisted. Opp. 8; *see also* Pet. App. 88a, 102a. But each reference relates to the *then-extant* Creek Nation.[8] Congress naturally referred to that territory in the multi-year process of extinguishing it. And any references to the "Creek Nation" after statehood (Pet. App. 121a) used the term as a historic signifier, not in recognition of contemporary reservation status.

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[8] Creek Allotment Agreement §§ 10, 25, 37, 41–43, 31 Stat. 864, 869, 871–72; *see also* Supplemental Allotment Agreement, ch. 1323, §§ 11, 13, 17–18, 32 Stat. 502–04 (1902); Five Tribes Act §§ 12, 14, 16, 24, 28, 34 Stat. 141–43, 146, 148; Oklahoma Enabling Act § 6, 34 Stat. 272.

See United States v. Okla. Gas & Elec. Co., 318 U.S. 206, 216–17 (1943) ("term 'Kickapoo Reservation'" was not used in "a legal sense" but rather as a historical delineation, "much as one still speaks of the Northwest Territory").

Nor did Congress create or recognize a reservation in June 1906 by referring to the "west boundary line" and "the north line of the Creek Nation." Pet. App. 101a (citing Act of June 21, 1906, ch. 3504, 34 Stat. 364). Congress in the June 1906 act resolved a boundary issue that had complicated allotment along the Creek territory's western edge. *See Creek Nation*, 295 U.S. at 106–10; Mary Jane Warde, *George Washington Grayson and the Creek Nation, 1843–1920*, at 123, 243–44 (1999). And tribal boundaries remained relevant for purposes of allotment, a process that continued post-statehood. Carter 151. Thus, while some maps labeled the Indian Territory as reservations until 1914, Pet. App. 123a; J.A. Vol. II, the Department of the Interior clarified its geological surveys by 1919 to show that the former Indian Territory had *no* reservations. Records of the Bureau of Indian Affairs, Central Map File, Record Grp. 75.26, Entry 414 (Administrative Maps), *Indian Reservations West of the Mississippi River* (1919), goo.gl/1v64Ec. That position has not wavered since. *E.g.*, *id.*, *Indian Reservations West of the Mississippi River* (1923), goo.gl/Ak1d3U; Bureau of Indian Affairs, *Indian Lands of the Federally Recognized Tribes of the United States* (2016), goo.gl/gvbGYY.

2. Respondent attempts to show reservation boundaries from vestigial functions of tribal government. Opp. 9. For example, he mentions that the Creek Allotment Agreement "reserved lands" for unidentified "tribal purposes." Pet. App. 102a (citing

§ 24, 31 Stat. 868–89). The only apparent tribal purposes in the cited provision are tribal schools and "six established Creek courthouses." These *de minimis* individual parcels do not justify cloaking half of Oklahoma in reservation status. Regardless, the Five Tribes Act transferred control of tribal schools to the federal government until they could be replaced with state schools. § 10, 34 Stat. 140. And because the Curtis Act had already abolished the Creek courts, those lands—having no further tribal purpose—were opened for sale. § 24, 31 Stat. 869.

The panel also observed (Pet. App. 70a, 117a–18a) that *Buster v. Wright*, 135 F. 947 (8th Cir. 1905), held that the Creek Nation continued to have taxing authority within its 1866 borders, even after the Creek Allotment Agreement. *Buster* reasoned that extinguishment of title does not necessarily extinguish sovereign powers. *Id.* at 951–52. But immediately following this decision, the Five Tribes Act abolished this taxing authority and required the refund of any taxes levied after December 31, 1905. *See* § 11, 34 Stat. 141. Here too, Congress rendered tribal borders meaningless as markers of jurisdictional authority.

The court below also relied (Pet. App. 90a–93a, 106a–07a) on Congress's indefinite extension of the Five Tribes' governments beyond the original March 4, 1906 termination date. S.J. Res. 37, 59th Cong., 34 Stat. 822; Five Tribes Act § 28, 34 Stat. 148. But Congress merely continued the governments' formal existence; Congress did not restore a single power it had stripped away. Indeed, Congress spelled out its intent in the Five Tribes Act's title: "An Act To provide for the *final disposition* of the affairs of the Five

Civilized Tribes in the Indian Territory." 34 Stat. 137 (emphasis added).

This Court has never required a complete extinction of tribal government to find reservation disestablishment, and Congress's campaign to dissolve the Five Tribes' governments was unprecedented. While it is true that the Creek Nation persisted as a *political* body in skeletal form, Congress's actions "culminat[ed] in the abolition of the tribe's *territorial* sovereignty." *Harjo*, 420 F. Supp. at 1143 (emphasis added). A tribe's political existence does not confer territorial sovereignty. *See, e.g.*, S. Rep. 112-166, at 7 (2012) (noting that "a number of federally recognized Indian tribes do not have a land base"). Congress need not extinguish the pilot light of tribal existence to disestablish reservation borders.

Congress's reasons for continuing tribal government were purely practical. As the March 4, 1906 date approached, the Dawes Commission had not completed allotment. Carter 170–71. Because the tribes held title to undistributed land, some form of tribal government may have been necessary to sign deeds conveying allotments. 40 Cong. Rec. at 3064 (Sen. Nelson); *see also id.* at 1241 (Sen. Curtis); *Statehood Hearing* 117 (Mr. Howe). Congress also aimed to ensure that the tribal schools would not abruptly disappear, 40 Cong. Rec. at 3054 (Sen. Long), and to prevent the possible transfer of land to railroad companies that held contingent land grants, *id.* at 2976 (Sen. McCumber); *id.* at 5046 (Sen. Clapp). Continuing tribal existence did not restore any sovereign powers.

Contemporaneous statements by tribal leaders confirm that tribal governments could exercise no

territorial authority except to sign deeds. As Chief Porter wrote to the Creek Nation in June 1906, after Congress extended tribal government:

> We are now under the control and government of the United States. The Creek laws have long since been suspended so far as the administration of civil or criminal affairs are concerned. The only laws now in force are the treaties made for the distribution and allotment of our lands. It is well known that any other government will never be established for the government of the Indians, except such government as the United States shall or may establish. … To hope for, or look for any other than this, is utterly useless, and can never be realized.

Letter of Pleasant Porter to Creek Nation, Indian Journal (Indian Territory), June 15, 1906 (*Porter Letter*). Similarly, the Choctaw governor testified in November 1906 that his tribe had "only a shell of a government, it is hardly anything. … I do not feel any longer that I act as chief, that I have any authority. … Now, the only authority that I have is to sign deeds." S. Rep. 59-5013, pt. 1, at 885. This sentiment was echoed by the Cherokees' attorney, who testified that "the tribal government shall cease, and they have already ceased to all intents and purposes. There is nothing of tribal governments left now but a shell. They have no authority except to sign the deeds transferring title from the tribe to the allottee … ." *Statehood Remarks* 33.

It was universally understood that tribal governments were "a continuance of the tribe in mere legal effect, just as in many states corporations are continued as legal entities after they have ceased to

do business, and are practically dissolved, for the purpose of winding up their affairs." *United States v. Allen*, 171 F. 907, 921 (E.D. Okla. 1909). Any other conclusion ignores history. As historian Angie Debo described the situation for the Choctaw Nation, with the passage of the Five Tribes Act, "tribal government in every real sense ceased to function." *Rise and Fall* 289.

The dim flicker of tribal government at statehood does not prove that the Creek Nation possessed a reservation. Quite the opposite. By showing that Congress breached its treaty promises through dissolving tribal lands, subjecting the territory to statehood, and stripping the tribes of their territorial sovereignty, the State has easily overcome any presumption that the land patents modified in 1866 demarcate a current reservation.

II. Congress's transfer of jurisdiction over Indians to Oklahoma state courts is incompatible with reservation status.

Congress expressly withdrew the aspect of reservation status at issue in this case—federal criminal jurisdiction—over Indians residing in the former Five Tribes' territories.

1. Beginning in 1897, Congress abolished tribal courts, made tribal law unenforceable, and established federal territorial courts to hear criminal cases under Arkansas law, regardless of the defendant's race. Indian Department Appropriations Act of 1897, ch. 3, § 1, 30 Stat. 83; *Marlin*, 276 U.S. at 61–62; *Miller*, 235 U.S. at 424–25; Act of Apr. 28, 1904, ch. 1824, § 2, 33 Stat. 573. If the Creek Nation's territory had remained intact as a "reservation" post-statehood, criminal cases involving Indians would

have remained in federal court under the Major Crimes Act of 1885, ch. 341, § 9, 23 Stat. 385 (codified as amended at 18 U.S.C. § 1153(a)).

Congress in the Oklahoma Enabling Act directed a different course. Congress transferred all pending federal-question and diversity cases to the newly created federal courts in Oklahoma, § 16, 34 Stat. 276, and *all* other cases to the newly created state courts, §§ 17–20, 34 Stat. 276–77. The only way to reconcile the Enabling Act with the Major Crimes Act is to conclude that the Major Crimes Act was irrelevant because the area in former Indian Territory was not, in fact, an Indian reservation.

That conclusion is also the only way to reconcile what actually transpired with criminal jurisdiction at statehood. State courts became the "legal successor" to the territorial courts for criminal offenses committed before statehood, even by Indians. *Haikey v. State*, 105 P. 313, 314 (Okla. Crim. App. 1909). Respondent concedes that "Oklahoma after statehood indeed asserted absolute criminal and civil jurisdiction," Opp. 4, which is "[t]he single most salient fact," *Rosebud Sioux*, 430 U.S. at 603.

Upon statehood, the territorial courts transferred pending nonfederal cases to state courts—including cases involving major crimes that ordinarily would have been subject to federal jurisdiction had the entire former Indian Territory remained Indian country. For instance, in *Jones v. State*, 107 P. 738 (Okla. Crim. App. 1910), a federal grand jury before statehood had indicted a Choctaw tribal member for murder committed in Choctaw country, but he "was tried after statehood by the district court of Atoka county."

Id. at 738–39.[9] Another case involving a pre-statehood crime with the defendant, victim, and witnesses, "all being Indians," was likewise transferred from territorial court to state court after statehood. *Phillips v. United States*, 103 P. 861, 861 (Okla. Crim. App. 1909). These cases are the tip of the iceberg. Reported opinions from Oklahoma state courts shortly after statehood provide numerous examples of criminal cases involving Indians transferred from territorial to state courts.[10]

Records of the federal territorial courts from the time of statehood are replete with others. Chepan Harjo, Webster Harjo, and Houston Watts, all tribal members, were charged with assault to kill in the U.S. Court for the Indian Territory, Western District, on June 25, 1907. The territorial court transferred the case to state court on February 10, 1908. Criminal Bench Docket for the Indian Territory, Western District 40, Docket Entry No. 9433, 21-OK-TN29. Newman Boone, a tribal member, was charged with murdering another Indian in the Western District in July 1907; his case was transferred to state court on April 8, 1908. *Id.* at 26, Docket Entry No. 9379.

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[9] Mr. Jones identified himself as a Choctaw member in his brief before this Court. Mot. for Leave to File Pet. for Writ of Habeas Corpus at 4, *In re Jonas Jones*, 231 U.S. 743 (1913).

[10] *Sharp v. United States*, 118 P. 675 (Okla. Crim. App. 1911); *Wilson v. United States*, 111 P. 659 (Okla. Crim. App. 1910); *Bailey v. United States*, 104 P. 917 (Okla. Crim. App. 1909); *Keys v. United States*, 103 P. 874 (Okla. Crim. App. 1909); *Price v. United States*, 101 P. 1036 (Okla. Crim. App. 1909). The Dawes Rolls indicate the Indian identity of the defendants in these cases and in *Haikey*, 105 P. 313. *See* Oklahoma Historical Society, *Search the Dawes Final Rolls and Applications*, www.okhistory.org/research/dawes.

Ramsey Bass, a tribal member, was charged with the murder of another Indian in the Western District on July 30, 1907; his case was transferred to state court on February 13, 1908. *Id.* at 36, Docket Entry No. 9417. Tom Phillips, a tribal member, was charged on February 14, 1907, in the U.S. Court for Indian Territory, Central District, with assault to kill; he was subsequently tried in state court. *United States v. Phillips*, No. 6213 (Okla. Dist. Ct., Pittsburg County). And Will Prewett was charged on August 30, 1907, with the murder of tribal member Sam Tobley in the U.S. Court for Indian Territory, Central District. The state court issued a new indictment after statehood, on January 6, 1908.[11] So complete was this transfer of jurisdiction to the State that by 1908, the federal prison at Fort Smith, Arkansas, had "become nearly empty … by reason of the admission of Oklahoma to statehood." Dep't of Justice, *Annual*

[11] The tribal membership of these defendants or their victims is noted on the indictment form or mentioned in contemporaneous newspaper articles. *See An Epidemic of Crime*, Shawnee News, Aug. 6, 1907, at 4 (noting that Ramsey Bass was charged with the murder of Willie Johnson, "a young Indian" shot to death near an Indian church), goo.gl/L3s4t9; *Try Outlaw Stunt*, Shawnee News, July 2, 1907, at 7 (describing Chepan Harjo, Webster Harjo, and Houston Watts as "three Indian boys" detained in federal prison and charged with intent to kill), goo.gl/bpZLHp; *Cases Are Postponed: Two Eufala Murder Trials Are Put Off*, Oklahoma State Capital, Mar. 24, 1909, at 1 (noting that the case of Newman Boone, charged with killing "another Indian" in July 1907, had been "postponed until the next term of district court"), goo.gl/ssMFMb. The National Archives facility in Fort Worth houses the case files from the territorial courts, as well as criminal bench dockets for the Western and Southern Districts for Indian Territory.

Report of the Attorney General of the United States 16 (1908).

Likewise, the State assumed jurisdiction over new prosecutions for major crimes committed by Indians in the former Indian Territory immediately after statehood. *E.g.*, *Rollen v. State*, 125 P. 1087, 1088 (Okla. Crim. App. 1912) (defendant "was a Cherokee citizen"); *Bigfeather v. State*, 123 P. 1026 (Okla. Crim. App. 1912). Conversely, the federal authorities ceased prosecuting such offenses. The criminal case files from the new federal district court for the Eastern District of Oklahoma, for instance, include only prosecutions for offenses arising under federal law, such as violations of postal law. The State is aware of no cases from statehood to today where federal authorities prosecuted an Indian on the premise that the former Indian Territory was a reservation.

This Court, too, understood from the outset that Congress transferred jurisdiction over Indians in the former Indian Territory to the State of Oklahoma. In *Hendrix v. United States*, 219 U.S. 79 (1911), a tribal member indicted for murder in Indian Territory had successfully moved to transfer his case to a federal court in Texas under a special venue statute for fair trials. Relying on the Enabling Act's transfer of jurisdiction to state courts, the defendant argued after statehood that the federal court lacked jurisdiction to try him. *Id.* at 89. This Court rejected that argument, but in doing so did *not* hold that federal courts had exclusive jurisdiction under the Major Crimes Act. Rather, the Court held that the specific venue statute continued to apply to pending cases. *Id.* at 90–91. The United States acknowledged that, but for the special venue provision, Congress gave the State jurisdiction over crimes involving Indians. U.S.

Br. at 12, *Hendrix v. United States*, No. 319 (U.S. 1910) ("[T]he enabling act … and the subsequent organization of the State withdrew [Indian Territory] from the exclusive jurisdiction of the United States.").

2. If the former territory of the Creek Nation were a reservation after 1907, none of these transfers would have occurred, none of these convictions would have been valid, and the federal government would have inexplicably ignored its authority to prosecute major crimes involving Indians in eastern Oklahoma for the past 111 years. Respondent has no answer other than to state the implausible: that Oklahoma asserted criminal jurisdiction illegally over tens of thousands of cases spanning the last century. Opp. 28–29 n.7. But that ignores the express transfers of jurisdiction in the Enabling Act. And even without that Act, a far more plausible explanation for the contemporaneous transfer of criminal cases involving Indians is that the former Indian Territory was not a reservation subject to the Major Crimes Act.

In *Hagen v. Utah*, the state's immediate and longstanding "assumption of authority" over "the opened lands" was powerful evidence of diminishment. 510 U.S. at 421. The Court highlighted the "sharp contrast to the situation in *Solem*, where 'tribal authorities and Bureau of Indian Affairs personnel took primary responsibility for policing … the opened lands during the years following 1908.'" *Id.* (quoting *Solem*, 465 U.S. at 480). The Court held that Utah's "'jurisdictional history' … demonstrates a practical acknowledgment that the Reservation was diminished." *Id.*

3. The existence of reservations following statehood would have left an implausible jurisdictional

gap over the vast majority of Indian-on-Indian crimes. Federal courts have no jurisdiction over non-major crimes "committed [in Indian country] by one Indian against the person or property of another Indian." 18 U.S.C. § 1152; Dep't of Justice, *Indian Country Criminal Jurisdictional Chart* (2017), goo.gl/uXKgQT. And Creek courts were abolished in 1898.

If, on respondent's theory, state courts also possessed no jurisdiction over Indians in the former Indian Territory, then *no* court could have overseen prosecutions of Indians for committing such crimes as assault, bribery, forgery, and rioting against other Indians within the former Indian Territory until Congress authorized the reestablishment of tribal courts in Oklahoma in 1936. *See* Act of June 26, 1936, ch. 831, § 2, 49 Stat. 1967. Given Congress's hyper-concern about rampant crime in Indian Territory—one of the primary reasons Congress embarked on the formation of the State of Oklahoma, *supra* pp. 6–7—Congress could not plausibly have intended to create a jurisdictional void that would reintroduce the very misrule that Congress spent decades trying to eradicate. In short, the entire history of criminal prosecution in Oklahoma has been premised on the universal acknowledgment that the Five Tribes' former territories are not "Indian country" by virtue of reservation status.

4. Respondent's contention would also render inexplicable the numerous cases that delineated "Indian country" in the former Indian Territory following statehood. For nearly a century, court battles raged over whether the State had criminal jurisdiction over restricted allotments in the former Indian Territory, or whether such allotments constituted "Indian coun-

try" subject to federal jurisdiction. *See, e.g.*, *Ex parte Nowabbi*, 61 P.2d 1139 (Okla. Crim. App. 1936) (holding that restricted allotments in the former Indian Territory did not constitute "Indian country" for purposes of the General Crimes Act of 1817, ch. 92, 3 Stat. 383 (codified as amended at 18 U.S.C. § 1152)); *State v. Klindt*, 782 P.2d 401 (Okla. Crim. App. 1989) (holding that restricted allotments are "Indian country" under 18 U.S.C. § 1151(c)); *United States v. Sands*, 968 F.2d 1058 (10th Cir. 1992) (same).

Those debates would have been moot were the *entire* former Creek territory—indeed the entire Indian Territory—a reservation after statehood. Any piece of land within old tribal boundaries would be Indian country by virtue of its "reservation" status; courts would have had no need to engage in the laborious process of identifying whether "isolated tracts" in the "checkerboard" of federal jurisdiction constituted Indian country. *DeCoteau v. District Cty. Ct.*, 420 U.S. 425, 429 n.3 (1975); *see, e.g.*, *Magnan v. Trammell*, 719 F.3d 1159, 1171 (10th Cir. 2013) (considering whether restrictions on mineral interests established that a particular plot of land was Indian country); *United States v. Roberts*, 185 F.3d 1125 (10th Cir. 1999) (similar with respect to trust-land status). "[I]f the land or area in question was an Indian reservation," a determination that the land constituted Indian country for some other reason "would be moot and not necessary." *United States v. Adair*, 913 F. Supp. 1503, 1515 (E.D. Okla. 1995) (concluding that land was not a dependent Indian community and therefore not Indian country).

The same logic applies to *U.S. Express Co. v. Friedman*, 191 F. 673 (8th Cir. 1911) (cited at Opp. 11, 22, 28). That case held that 3,000,000 acres of

land yet to be allotted remained Indian country under federal liquor laws. 191 F. at 678–79. Whether land remained unallotted would have been irrelevant were the entire area a reservation subject to federal oversight.

III. The court below erred in applying *Solem*.

The court below assumed this dispute was an ordinary reservation-diminishment case governed by the framework set forth in *Solem*, 465 U.S. 463. Pet. App. 74a. It is thus no surprise that the court, scouring the historical record for inapposite indicia of legislative intent, did not find what it was looking for. And even were *Solem*'s framework the sole lens through which a court could ascertain congressional intent, Congress's intent to disestablish the Creek Nation's geographic and sovereign borders is clear and unambiguous.

A. *Solem* does not govern the dissolution of the Five Tribes in preparation for Oklahoma Statehood.

This Court's *Solem* cases involve a specific fact pattern: whether Congress diminished land set aside by the federal government as an Indian reservation within an existing State when Congress opened the area for non-Indian settlement on surplus lands following allotment.[12] This question became relevant because Congress in the late 19th century adopted

[12] *See, e.g.*, *Parker*, 136 S. Ct. 1072 (Omaha Indian Reservation, Nebraska); *Solem*, 465 U.S. 463 (Cheyenne River Sioux Reservation, South Dakota); *Mattz v. Arnett*, 412 U.S. 481 (1973) (Klamath River/Hoopa Valley Reservation, California); *Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351 (1962) (Colville Reservation, Washington).

"the view that the Indian tribes should abandon their nomadic lives on the communal reservations and settle into an agrarian economy on privately owned parcels of land." *Solem*, 465 U.S. at 466. Congress enacted the General Allotment Act to open traditional reservations across the country for settlement through allotment and the subsequent sale of unallotted lands. 24 Stat. 387. *Solem* thus guides courts in determining whether "any particular surplus land act" "formally sliced a certain parcel of land off one reservation." *Solem*, 465 U.S. at 468, 472; *see South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998); *Mattz*, 412 U.S. at 496–97.

Solem assumes a reservation exists and proceeds to determine what particular lands retain that status. That is not the situation here, where respondent cannot identify what sort of reservation he thinks continues to exist post-statehood, given that Congress clearly extinguished the Five Tribe's land patents, abrogated the material promises in treaties that established their territories, and dissolved tribal sovereignty. *Compare Yankton*, 522 U.S. at 345–46 (finding disestablishment despite Congress's preservation of treaty that established reservation).

In ordinary disestablishment cases, "surplus land acts themselves seldom detail whether opened lands retained reservation status or were divested of all Indian interests." *Solem*, 465 U.S. at 468; *see also Yankton*, 522 U.S. at 343–44. But here, Congress explicitly extinguished the Creeks' territorial sovereignty altogether. In such circumstances, Congress had no reason also to include express language erasing tribal boundaries; those borders vanished as a logical extension of taking all sovereign power from the tribe and bestowing it on the new State.

This case also involves no ordinary allotment. Congress exempted the Five Tribes from the General Allotment Act. § 8, 24 Stat. 391. Nor is this case about the sale of surplus land to non-Indians. Rather, allotment of the Five Tribes' lands was inextricably intertwined with Congress's systematic and deliberate liquidation of the Five Tribes as territorial sovereigns to pave the way to create a new State. Hence, "'[a]nomaly' is the best single word to characterize Oklahoma history. Oklahoma has more anomalies—has deviated more from the general pattern of state evolution—than any other state." Gibson 3. These distinctions show why Chief Judge Tymkovich suggested that "the square peg of *Solem* is ill suited for the round hole of Oklahoma statehood." Pet. App. 232a. At a minimum, the panel erred in holding that the state court's decision was contrary to clearly established federal law under 28 U.S.C. § 2254(d). Pet. App. 44a.

Considering the unique measures it took to dissolve the Five Tribes' land tenure, Congress did not need to use the traditional "hallmark" language of diminishment to extinguish the Creek boundaries: words equivalent to "cede," a "lump-sum payment," or restoration of the land to "public domain." Pet. App. 76a–77a. Because Congress expressly viewed allotment and cession as alternative means to the same end, Act of Mar. 3, 1893, § 16, 27 Stat. 645, the jurisdictional result was the same: disestablishment. Words of cession and purchase in surplus land acts show diminishment, but such words were unnecessary here, where Congress used allotment to achieve the same result as cession, *i.e.*, elimination of tribal territory. And Congress could not have "restored" to the "public domain" lands that had not been reserved

out of the public domain, but that were conveyed to the tribes in communal fee. Likewise, Congress had no need to offer a "lump-sum payment" to the tribe because tribal dissolution was imminent and the Five Tribes' lands were conveyed through allotment to their own members rather than to the federal government.

B. Creek boundaries were disestablished even under *Solem*.

Congress disestablished the Creek Nation's borders even under *Solem*. The "touchstone to determine whether a given statute diminished or retained reservation boundaries is congressional purpose." *Yankton*, 522 U.S. at 343. *Solem*'s three-factor test is simply a guide for discerning that intent. *Hagen*, 510 U.S. at 410–11; *Rosebud*, 430 U.S. at 588 & n.4. A "traditional approach to diminishment cases" thus requires an examination of "all the circumstances surrounding the opening of a reservation." *Hagen*, 510 U.S. at 412.

1. At *Solem*'s step one—statutory text—the evidence is overwhelming that no reservations exist in eastern Oklahoma today. Congress expressly repudiated every material promise made to the Five Tribes that could be said to make the area a "reservation" to begin with. Congress expressly dismantled tribal title to land. Act of March 3, 1893, § 16, 27 Stat. 645; Curtis Act § 11, 30 Stat. 497; Creek Allotment Agreement § 3, 31 Stat. 862; Supplemental Allotment Agreement §§ 2, 4, 32 Stat. 500–01. Congress expressly revoked the tribes' jurisdiction over their members and property. Curtis Act §§ 26, 28, 30 Stat. 504–05; Five Tribes Act §§ 16–17, 34 Stat. 143–44. Congress expressly made the Indian Territory

part of a State. Oklahoma Enabling Act § 1, 34 Stat. 267. And Congress expressly granted state courts (and withheld from federal courts) jurisdiction over cases like this one. §§ 16–17, 34 Stat. 276–77.

Respondent errs in speculating (Opp. 4, 8, 24) that, because language of "cession" is absent in the run-up to statehood, the tribes successfully negotiated for allotment as opposed to cession to keep their territorial borders intact. The tribes acknowledged that allotment and cession were equivalent, and that allotment to achieve statehood meant "giving up the rights" to "our beloved public domain." S. Doc. 54-111, at 4 (1897). The tribes' express agreement to their own governments' termination would have been inexplicable had they believed that they chose allotment to preserve their territorial sovereignty. *Supra* p. 12. Even though tribal governments continued, this agreement shows Congress's "purpose of disestablishment," and "there is no indication that Congress intended to change anything" about that purpose with later acts. *Rosebud*, 430 U.S. at 591–95; *Hagen*, 510 U.S. at 415.

The historical record is full of acknowledgements from the tribes that allotment signaled the end of tribal sovereignty and was the functional equivalent of cession. In their memorial to the Dawes Commission in 1897, the Creeks acknowledged that allotment "unavoidably involves a change of government" and was the harbinger of "the civil death of the Muscogee Nation." S. Doc. 54-111, at 1, 4. Chief Porter, addressing the Creek legislature in 1904, described the allotment acts as "acts of dissolution of our tribal government and the partition of our common property," noting that "[a]s soon as our landed and monied interests have been distributed, our government will

come to an end." *Message of Pleasant Porter to the Honorable Members of the House of Kings and Warriors*, Muskogee Phoenix, Oct. 4, 1904. Even after Congress extended the tribal governments, *supra* pp. 12–13, Chief Porter explained to members that there was no longer—and would never be—anything left of the Creek Nation's sovereignty once allotment was complete. *Porter Letter*.

Likewise, the court below erred in contrasting allotment for statehood with the Creeks' earlier express cessions of land to the United States. *See* Pet. App. 99a–100a. Again, the act creating the Dawes Commission expressly conceived of allotment and cession as alternative means to extinguish tribal title to pave the way for statehood. Act of Mar. 3, 1893, § 16, 27 Stat. 645.

2. At step two, this Court considers the historical context of the relevant statutes. Thus, "[e]ven in the absence of a clear expression of congressional purpose in the text of a surplus land Act"—and again, this is not a surplus land act case—"unequivocal evidence derived from the surrounding circumstances may support the conclusion that a reservation has been diminished." *Yankton*, 522 U.S. at 351.

Throughout negotiations and the legislative process, Congress, the executive branch, and tribal leaders all understood that Congress—through a series of statutes—was abrogating the treaties, destroying tribal sovereignty, ending Indian interests in the land, and creating a new State through undifferentiated union with the Oklahoma Territory. No one believed that Congress left the entire eastern half of this new State as Indian country in perpetuity. *Supra* pp. 23–32.

The court below mistakenly assumed that dissolution must occur in a single step and thus searched for one specific statute disestablishing the Creek territory at one specific time. *Contra Rosebud*, 430 U.S. at 606 n.30; *Hagen*, 510 U.S. at 415. In *Rosebud*, the legislation opening reservation lands to settlement did not explicitly diminish the reservation; nevertheless, this Court held that an earlier but unratified agreement established an "unmistakable baseline purpose of disestablishment" that was "carried forth and enacted" in subsequent legislation. 430 U.S. at 590–92.

The decision below also criticized the State for relying on the "overall thrust" of congressional action, insisting instead that petitioner single out "particular statutory language" that alone effected disestablishment. Pet. App. 77a. But death by a thousand cuts is still death, and both Congress and the tribes acknowledged this hard truth. *Supra* pp. 29–31; 31 Cong. Rec. at 5593 (Sen. Bate) ("[W]e go along and encroach upon them inch by inch, Congress after Congress, until at last you have got to the main redoubt, and here it is destroyed.").

3. At step three, *Solem* requires careful consideration of subsequent history and demographics—a "practical acknowledgement" of disestablishment—to avoid upsetting "the justifiable expectation of people living in the area." *Hagen*, 510 U.S. at 421; *accord Rosebud*, 430 U.S. at 604–05; *see also Yankton*, 522 U.S. at 356–57; *DeCoteau*, 420 U.S. at 449. A "longstanding assumption of jurisdiction by the State" is inconsistent with reservation status. *Rosebud*, 430 U.S. at 604–05; *see also Yankton*, 522 U.S. at 357.

Oklahoma's post-statehood history confirms disestablishment in spades. Soon after statehood, Congress required the tribes, on pain of fine or imprisonment, to transfer possession of all tribal property and funds, and for all tribal officers and representatives to surrender all "books, documents, records or any other papers" to the Secretary of the Interior. Act of May 27, 1908, ch. 199, § 13, 35 Stat. 316. Congress stripped away most of the remaining restrictions on alienation of allotments, and subjected unrestricted allotments to state taxation regardless of whether the allotments were still owned by tribal members. §§ 1, 4, 35 Stat. 312; *see also* Act of Apr. 10, 1926, ch. 115, § 1, 44 Stat. 239–40; Act of Aug. 4, 1947, ch. 458, § 1, 61 Stat. 731; *Waters Run* 178–79; Carter 176. Within twenty years of statehood, roughly 89% of the former territories of the Five Tribes was free from any restrictions on alienation. *See* Dep't of Interior, Bureau of Indian Affairs, *Extracts from the Annual Report Relating to the Bureau of Indian Affairs* 24 (1927).

Congress soon placed even restricted allotments under state control. Congress made conveyances by full-blood and half-blood tribal members subject to state-court approval. Act of May 27, 1908, § 1, 35 Stat. 315; Act of April 10, 1926, § 1, 44 Stat. 239; Act of Aug. 4, 1947, § 1, 61 Stat. 731. In 1918, Congress granted Oklahoma state courts jurisdiction over heirship determinations in cases involving members of the Five Tribes, and subjected full-blooded tribal members' allotments to Oklahoma law regarding the partition of real property. Act of June 14, 1918, ch. 101, 40 Stat. 606. Vesting control over the disposition of even restricted allotments in *state courts*—particularly when Congress reserved federal authori-

ty over such matters with regard to lands held by members of other tribes, *see* Act of June 25, 1910, ch. 431, §§ 1, 2, 36 Stat. 856—would make little sense had Congress intended to preserve the entirety of the Five Tribes' former territories as a reservation.

Oklahoma's assertion of state regulatory power over its territory confirms that the Five Tribes had lost anything resembling reservation status. States could not levy property taxes on reservation lands. *See Worcester*, 31 U.S. (6 Pet.) at 592; *The Kansas Indians*, 72 U.S. (5 Wall.) 737 (1866). But that blanket prohibition never applied to eastern Oklahoma after statehood. Rather, Oklahoma's taxing power was limited only by specific legislation exempting restricted lands from taxation. Five Tribes Act § 19, 34 Stat. 144; Act of May 27, 1908, ch. 199, § 4, 35 Stat. 313; Okla. Const. art. X, § 6; *see also Board of Cty. Comm'rs v. Seber*, 318 U.S. 705 (1943). "As soon as the title … to the land in question became vested in [the allottee], it was subject to taxation by the state and county authorities … ." *Bartlett v. United States*, 203 F. 410, 412 (8th Cir. 1913).

Since statehood, courts have understood that no reservations exist in Oklahoma. *Osage Nation v. Irby*, 597 F.3d 1117, 1125 (10th Cir. 2010) (collecting authority). In 1914, this Court heard "a suit to quiet the title to lands within what *until recently was* the Creek Nation in Indian Territory." *Miller*, 235 U.S. at 423 (emphasis added); *Grayson v. Harris*, 267 U.S. 352, 353 (1927) (describing land "lying within the former Creek Nation"); *Woodward*, 238 U.S. at 285 (describing land "formerly part of the domain of the Creek Nation"). Additionally, the Court wrote in *Oklahoma Tax Comm'n v. United States*, 319 U.S. 598 (1943), that Indian tribes were once "separate politi-

cal entities with all the rights of independent status—a condition which has not existed for many years in the State of Oklahoma." *Id.* at 602. This Court continued: "[The tribes] have no effective tribal autonomy" and "are actually citizens of the State with little to distinguish them from all other citizens except for their limited property restrictions and their tax exemptions." *Id.* at 603; *see also McDougal*, 237 U.S. at 383 ("[W]hen … the time came to disband the tribe, its ownership [of tribal property] as a political society could no longer continue … .") (quoting *Shulthis v. McDougal*, 170 F. 529 (8th Cir. 1909)).

Likewise, Congress has recognized that "all Indian reservations as such have ceased to exist" in Oklahoma, S. Rep. 74-1232, at 6 (1935), and accordingly has defined the term "reservation" for certain statutory purposes to include "*former* Indian reservations in Oklahoma." 25 U.S.C. § 1452(d) (emphasis added); *accord* 12 U.S.C. § 4702(11); 16 U.S.C. § 1722(6)(C); 25 U.S.C. §§ 2020(d)(1)–(2), 3103(12), 3202(9); 29 U.S.C. § 741(d); 33 U.S.C. § 1377(c)(3)(B); 42 U.S.C. §§ 2992c(3), 5318(n)(2). And the executive branch—from statehood to today—has never deviated from its position that no Indian reservations now exist in Oklahoma. U.S. Cert. Br. 13–14, 19 n.5.

Respondent observes (Opp. 10) that annual reports by the Bureau of Indian Affairs list the Creek Nation on schedules "showing each Indian reservation." Creek C.A. Amicus Br., Ex. B. If anything, these tables reinforce that allotment disestablished the Creek boundaries by whittling away the tribal patent. The tables define the "area" of the purported Creek reservation as lands "not allotted nor specially reserved." *Id.* at 10. The Creek "area" diminished from 3,079,086 acres in 1902 (*i.e.*, the full patent), to

626,044 acres in 1906, leaving a mere 503 acres by 1913, when allotment was concluding. *Id.* at 2, 8, 20.

Finally, the decision below upsets a century of settled expectations across half of Oklahoma, including the major metropolitan area around Tulsa. The criminal implications would be seismic. U.S. Cert. Br. 20–22. So would the civil ones. 1.8 million Oklahomans live in eastern Oklahoma. Their lives would be drastically changed if this Court were suddenly to declare them all residents of an Indian reservation. *See* Pet. 18–20; Cert. Reply 4. Local farmers, ranchers, and other businesses already worry about "significant risk and uncertainty" in topics ranging from taxation to construction permits under the decision below. *See, e.g.*, Envtl. Fed'n of Okla. Cert. Amicus Br. 6–13; OIPA Cert. Amicus Br. 5–15. Consider just the effect on family-law matters. Under the Indian Child Welfare Act of 1978, Pub. L. No. 95-608, 92 Stat. 3069, tribes have "jurisdiction exclusive as to any State" over custody proceedings involving any child eligible for tribal membership "who resides or is domiciled" on a "reservation." 25 U.S.C § 1911(a). Tribal courts would become the sole arbiter of parental rights, child custody, foster care, and adoptive placement if the child met the broad definition of an "Indian child." *See*, *e.g.*, *Adoptive Couple v. Baby Girl*, 570 U.S. 637 (2013).

It is no overstatement to say that affirming the decision below would forever redefine the State's identity and redraw the map of Oklahoma into a simulacrum of its pre-statehood form.

* * *

The Five Tribes' former territories are today an integral part of the State of Oklahoma, home to nearly half of the State's population, and an engine of economic growth. Over the century since statehood, generations of tribal members and non-Indians—together, equal, unified—have built their lives in Oklahoma on the understanding that the former Indian Territory and Oklahoma Territory merged to form a new, undivided State, and that, in the process, the Five Tribes' territorial sovereignty and boundaries became legacies of the past, giving way to a single state government. To hold that Congress never achieved this long-sought goal would deny the extraordinary and difficult history that the Five Tribes endured, and betray the promises made to the people of Oklahoma more than a hundred years ago.

CONCLUSION

The decision below should be reversed.

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