Capital Case
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

BRIEF FOR RESPONDENT

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CAPITAL CASE

QUESTION PRESENTED

Whether Congress disestablished the reservation of the Muscogee (Creek) Nation.

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INTRODUCTION

Three terms ago, this Court unanimously reaffirmed that *Solem v. Bartlett* provides the "well settled" framework for assessing disestablishment. *Nebraska v. Parker*, 136 S. Ct. 1072, 1078-79 (2016). "[O]nce a block of land is set aside for an Indian Reservation and no matter what happens to the title of individual plots," the whole area "retains its reservation status until Congress explicitly indicates otherwise." *Solem v. Bartlett*, 465 U.S. 463, 470 (1984). Congress's intent to disestablish must be "clear[]." *Id.* This Court starts with the "statutory language" (the "most probative" evidence of congressional intent). *Parker*, 136 S. Ct. at 1079. It then turns to "circumstances surrounding" the statutes (principally, "the manner in which the transaction was negotiated"). *Id.* at 1079, 1081. Last (and least) is "subsequent history." *Id.* at 1081.

Here, the Tenth Circuit correctly and unanimously applied *Solem* to conclude the Creek reservation remained intact. The relevant statutes nowhere use the "hallmark" disestablishment language—"cession" to the United States, restoring lands to the "public domain," and so on—this Court has identified as manifesting Congress's intent to go beyond altering land title to diminish reservation boundaries. *Id.* at 1079. While "magic words" are not required, Pet. App. 62a, the absence of *any* clear disestablishment language here is telling indeed. When Congress diminished Creek lands in 1832, 1856, and 1866, it used hallmark language of "cession." When Congress set goals for negotiators dispatched to the Creek in 1893, it told them by statute to seek "cession." And when those agents returned, they

informed Congress that the Creek refused to "cede any portion of their land." J.A. 19.

Solem's test thus confirms that Congress never disestablished the Creek reservation, and that the federal government, not Oklahoma, had jurisdiction over Respondent's capital murder trial. As Chief Judge Tymkovich observed, this Court's "precedent precludes any other outcome." Pet. App. 230a.

With no real argument under *Solem*, Oklahoma invokes its "unique circumstances," Br. 21, and urges that *Solem* not be "[s]trictly appl[ied]," Br. 18 (quotations omitted). But Oklahoma's circumstances cannot justify jettisoning *Solem*. Every State arguing for disestablishment invokes its own special history. Nebraska did so in *Parker*. But *Solem*'s point, reaffirmed in *Parker*, is to prevent such *ad hoc* and atextual resolutions.

Moreover, the State is wrong that statutes governing Indian reservations in Oklahoma are uniquely exempt from a focus on the text. Like other Allotment Era statutes, the statutes here involve allotment of lands to tribal members, with the sale of additional lands to non-members. This Court has done with those Allotment Era statutes what it *always* does with statutes: It has parsed their text to determine Congress's intent.

Bereft of text, Oklahoma weaves a tale that, as a prerequisite to statehood, Congress eliminated communal land ownership and dissolved the Creek government, thereby abrogating entirely the treaties with the Creek and disestablishing (*sub silentio*) the

Creek reservation. But on every score, Oklahoma is wrong.

The method Congress used to end communal land tenure cuts sharply against—not for—the State. The Creek allotment agreement specified that, aside from about 10,000 acres in "town sites," "[a]ll lands of [the] tribe … shall be allotted among the [tribe's] citizens." Act of Mar. 1, 1901, ch. 676, § 3, 31 Stat. 861 ("Allotment Agreement"). That kept the vast majority of land in Indian hands. When Oklahoma became a State, nearly 85% of Indian Territory—16.6 million acres—remained inalienable and immune from (among other things) state taxation. Congress thus did not share Oklahoma's view that statehood required subjecting tribal lands to full state regulation.

Likewise, Congress's treatment of Creek government proves the opposite of what the State suggests. True, Congress in 1901 provided for eventual dissolution of Creek government. But when dissolution loomed, Congress "continued" the government "in full force and effect for all purposes." Act of Apr. 26, 1906, ch. 1876, § 28, 34 Stat. 137 ("Five Tribes Act" or "FTA"). Moreover, Congress did so precisely to prevent tribal lands from returning to the "public domain"—the very step that would yield disestablishment—because that would have caused a massive, undesired transfer of Indian lands to railroads.

Nor is there anything to the State's suggestion that, if Congress expressly repeals some treaty provisions, it implicitly repeals all the rest. That "breach-one-breach-all" canon of treaty interpretation emerges from whole cloth. Regardless, the Allotment Agreement provides

the opposite, preserving "existing treaties between the United States and said tribe." Allotment Agreement § 44. And Oklahoma's Enabling Act, too, expressly preserved Indian rights.

This case thus illustrates why the Court resists efforts to turn statutory interpretation into a storytelling contest. Oklahoma depicts a single-minded "Congress" doggedly pursuing a single purpose—statehood, with disestablishment as a prerequisite—from 1893 to 1906. But reality was far messier. As the drive for total assimilation gave way to recognition that tribes would endure, battles were waged among many factions—settlers, assimilationists, and tribes, among others, each with congressional allies. The slow but steady reversal of congressional policy saw pro-tribal forces lose some battles but win others. As is often true, legislation reflected "the art of compromise." *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1725 (2017).

That is why the Court "will not presume with petitioners that any result consistent with their account of the statute's overarching goal must be the law." *Id.* Instead, the Court "will presume more modestly … 'that [the] legislature says … what it means and means … what it says.'" *Id.* What decides this case is that on each critical issue, Congress *enacted text* that came down decisively on the side of preserving the Creek reservation. Having aimed at "cession" of lands to the federal government, Congress accepted allotment among tribal members. After legislating to abolish the Creek government, Congress continued it indefinitely. And while granting settlers' wish for statehood,

Congress preserved tribal rights and federal authority over tribes.

With neither text nor tale to support its position, Oklahoma and its *amici* fall back on claims about "settled expectations" and "turmoil." Br. 3, 56. But *Parker* rejected similar claims, and there is no reason for a different outcome here. As to criminal jurisdiction, the federal government has ample resources to handle additional prosecutions. On the civil side, settled doctrines sharply limit or eliminate jurisdictional consequences for non-Indians. If any problem arises, Congress regularly legislates to address state and tribal authority in Oklahoma, and Congress will be equally responsive here. But this Court's precedents reserve that choice *to Congress*.

That brings us back to where we began: Congress. Oklahoma insists that "[a]ll agree that this case boils down to congressional intent." Br. 4. But the parties' approach to determining that intent is quite different. In our view, "parsing statute after statute in search of specific language," Br. 21, is a virtue, not a vice. In our view, there is not one method of statutory interpretation for a "quaint little town such as Pender, Nebraska," Sheriffs' *Amicus* Br. 24, and another for Tulsa. And in our view, appeals to "the 'overall thrust' of congressional action," Br. 52, and "present-day reality," States' *Amicus* Br. 4, are no way to ascertain congressional intent.

The decision below should be affirmed.

STATEMENT OF THE CASE

A. Historical Background.

1. The Creek Reservation.

Along with the Choctaw, Chickasaw, Cherokee, and Seminole, the Muscogee (Creek) Nation is one of the "Five Tribes" that once occupied much of Alabama and Georgia. Pet. App. 63a. In the 1820s and 1830s, the "federal government adopted a policy to forcibly remove" them to "what is today Oklahoma"—Indian Territory. *Id.*

Congress entered into treaties in 1832, 1833, and 1856 guaranteeing the Nation's rights within its borders. Pet. App. 64a-65a. The Nation had "cede[d] … all their land, East of the Mississippi." Treaty with the Creeks, art. I, Mar. 24, 1832, 7 Stat. 366 ("1832 Treaty"). In turn, Congress "guarantied" the "Creek country west of the Mississippi," *id.* art. XIV, reaffirming that it "shall constitute and remain the boundaries of the Creek country." Treaty with the Creeks, arts. II, III, Aug. 7, 1856, 11 Stat. 699 ("1856 Treaty"); *see* Treaty with the Creeks, Feb. 14, 1833, 7 Stat. 417 ("1833 Treaty"). These treaties "secured" to the Creek an "unrestricted right of self-government" and "jurisdiction over persons and property, within [its] limits." 1856 Treaty arts. IV, XV; *see* 1832 Treaty art. XIV (similar).

The Creek also received a fee-simple patent. *Woodward v. De Graffenried*, 238 U.S. 284, 293 (1915). The patent was the dividend of the Trail of Tears. After the federal government told the Creek it was "powerless to prevent" Alabama's incursion on the Nation's land and rights, *United States v. Creek Nation*, 201 Ct. Cl.

386, 391 (1973), the Creek demanded a patent for greater security. It issued in 1852. *Woodward*, 238 U.S. at 293.

The Creek's present reservation boundaries reflect two cessions. In 1856, the Nation "cede[d]" lands to the Seminoles. 1856 Treaty arts. I, V. In 1866, the Nation "cede[d] … to the United States" lands in return for $975,168. Treaty with the Creek, art. III, June 14, 1866, 14 Stat. 785 ("1866 Treaty").

2. The Allotment Era.

Not long after, the "Allotment Era" swept the West. As the 19th century waned, "Congress increasingly adhered to the view that the Indians tribes should abandon their … communal reservations and settle into an agrarian economy on privately-owned parcels." *Solem*, 465 U.S. at 466. Congress passed a series of statutes that "allotted" some lands to tribal members and opened others to non-Indian settlement. "Initially, Congress legislated … on a national scale" in the 1887 General Allotment Act, but it then moved to a "reservation-by-reservation" approach. *Id.* at 467.

In allotment's heyday, assimilationists in Congress believed allotment presaged "the imminent demise of the reservation," and they legislated "partially to facilitate the process." *Id.* at 468. Even so, allotment statutes varied, each reflecting "a unique set of tribal negotiation and legislative compromise." *Id.* at 467.

As the 20th century dawned, those compromises increasingly reflected skepticism toward the assimilationist enterprise: The "financial and intellectual forces behind assimilation and allotment were close to exhaustion." *Felix S. Cohen's Handbook*

of Federal Indian Law § 1.04 at 78 (Nell Jessup Newton eds. 2012) ("*Cohen's*"). Policymakers began "questioning whether total assimilation was desirable at all." Frederick Hoxie, *A Final Promise: The Campaign to Assimilate the Indians 1880-1920*, at 112-13 (2001 ed.). Given all that, the Court has not asked what legislators expected, vaguely, to happen, and it has declined to paint with a broad brush. Instead, it assesses the "effect of [each] act," examining the "language" to determine whether it effected disestablishment. *Solem*, 465 U.S. at 469.

3. Allotment And The Creek.

The Allotment Era played out in Indian Territory as well—its initial ambitions, and Congress's uneven but unmistakable retreat.

As elsewhere, allotment's spur was Congress's rising skepticism of Indians' "communal" land tenure. *Solem*, 465 U.S. at 466. Settlers "pressured Congress to break up the tribal land base, [and] attach freely alienable individual title." Pet. App. 67a. Meanwhile, Congress came to believe that while the Five Tribes' treaties provided that lands should be held "for the equal benefit of the citizens," "in practice" some "appropriate[d] to their exclusive use" the best lands. *Woodward*, 238 U.S. at 297, 299 n.2.

In 1893, Congress charged the Dawes Commission with negotiating changes. Act of Mar. 3, 1893, ch. 209, § 16, 27 Stat. 612 ("1893 Act"). Congress hoped the Creek might agree to "cession of [all] or some part [of its territory] to the United States," as the Creek had done previously. *Id.* Congress directed the Commission to

negotiate "first, … allotment," and "secondly, … cession … of any lands not found necessary to be so allotted." *Id.* Already, Congress saw that the Indian Territory might become a new State—but even at the Allotment Era's height, Congress did not believe statehood required disestablishment. Members did not see why these reservations "might not be respected and protected, and yet have them brought into the Union." 24 Cong. Rec. 268 (1893) (Sen. Perkins). Hence, the Commission assured the Creek that it did not wish "to interfere at all with the administration of public affairs" but only to "secur[e] … their just rights under the treat[ies]." J.A. 23.

Even this softer approach was rejected. The Commission reported back that the Creek "would not, under any circumstances, agree to cede any portion of their lands to the Government." J.A. 19. Given "this unanimity," the Commission "abandon[ed]" this approach. *Id.*

Switching focus to obtaining a "cession"-free allotment agreement, Congress enacted laws in 1897 and 1898 that sought "to coerce tribes to negotiate." *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1441 (D.C. Cir. 1988); Pet. App. 81a-82a. The acts abolished Creek tribal courts, Pet. App. 68a, though not the Creeks' legislative jurisdiction over their lands, *infra* at 10-11. The 1898 act—the "Curtis Act"—also established a "default allotment scheme" to take effect absent agreement. Pet. App. 81a-82a.

This induced a Creek allotment agreement, which Congress ratified in 1901. Pet. App. 82a. The Dawes Commission advised that matters would have been

"immeasurably simplified" had the Five Tribes agreed to "cession to the United States … at a given price." J.A. 19. But it emphasized "the great difficulties which have been experienced in inducing the tribes to accept allotment," and explained "a more radical scheme of tribal extinguishment" was "impossible." *Id.* The Creek Allotment Agreement thus tilted dramatically toward keeping Creek land in Creek hands. While other tribes agreed to sell substantial tracts to non-Indians, the Creek agreement provided that "[a]ll lands … shall be allotted among [Creek] citizens." Allotment Agreement § 3. The sole exception involved "town sites." *Id.* § 2. This land had outsized value, and some towns were home to up to 5,000 people, *see Johnson v. Riddle*, 240 U.S. 467, 476-77 (1916), but this land accounted for only 10,694 acres of the Nation's 3-million-plus-acre reservation. Report of Dep't of Interior, 1910, vol. II, at 69 (1911), http://bit.ly/2pfnmVr.

The agreement preserved the Creek government's authority and rights. It recognized the Creek government's legislative authority over "the lands of the tribe, or of individuals after allotment," and specified that it "shall in no wise effect the provisions of existing treaties … except so far as inconsistent therewith." Allotment Agreement §§ 42, 44. Shortly thereafter, the courts confirmed that Congress's coercive legislation had not divested the Five Tribes' jurisdiction over their reservations, and that Congress had instead "permit[ted] the continued exercise" of the tribes' "legislative … power" "within [their] borders," enforced by federal officials. *Morris v. Hitchcock*, 194 U.S. 384, 389, 393 (1904); *see Morris v. Hitchcock*, 21 App. D.C.

565, 598 (D.C. Cir. 1903). In 1905, the Eighth Circuit applied this ruling to the Creek reservation, affirming Creek authority under the agreement to legislate over non-Indians in towns. *Buster v. Wright*, 135 F. 947, 949 (8th Cir. 1905).

The Allotment Agreement put an expiration date on this authority, providing for dissolution of the tribal government by March 4, 1906. But this only presaged another congressional about-face. The agreement made dissolution "subject to such further legislation as Congress may deem proper." Allotment Agreement § 46. And when the moment came, Congress passed the 1906 Five Tribes Act. Disavowing dissolution, Section 28 "continued" the "present tribal governments … in full force and effect for all purposes authorized by law." FTA § 28. The Act recognized the Nation's continuing authority to pass "act[s], ordinance[s]," or "resolution[s]." *Id.*; *see generally Harjo v. Kleppe*, 420 F. Supp. 1110, 1126-1132 (D.D.C. 1976), *aff'd sub nom. Harjo v. Andrus*, 581 F.2d 949 (D.C. Cir. 1978). In words unimaginable a decade earlier, members proclaimed that it "would be very much better indefinitely and for all time to continue" the tribal governments. 40 Cong. Rec. 3122 (1906) (Sen. Teller).

This reversal was not mere administrative convenience. Congress understood that vast swaths of Indian Territory had been granted conditionally to the railroads "whenever the Indian title shall be extinguished" and "said lands become a part of the public lands of the United States." Act of July 25, 1866, ch. 241, § 9, 14 Stat. 236. Members of Congress thus explained that the land was Indian land "so long as the Indians

exist as a tribe," but that "the moment the tribal interest in the property ceases," it "necessarily revert[s] to the Government," triggering the "railway grant." 40 Cong. Rec. 2976 (Sen. McCumber). And they emphasized that legislation "should be passed extending for a greater or less[er] time the tribal relations, in order that no rights may lapse or no rights may be transferred to railroad companies or to anybody else." *Id.* at 3053 (Sen. Aldrich).

As the push for statehood continued, deep divisions in Congress remained over Indian policy in the new State. The resulting legislation was "replete with compromises and maneuverings that added great complexity and ambiguity to the administration of Indian affairs." Tanis C. Thorne, *The World's Richest Indian: The Scandal over Jackson Barnett's Oil Fortune* 37 (2003) ("Thorne"). Pro-tribal legislators fought to protect Indian rights from those who had interests of non-Indian settlers in mind. *Id.* at 39. The decision to make Oklahoma a State was a substantial victory for settlers. But tribes and their allies won victories too. For one, in a suite of legislative gives-and-takes that encompassed the Five Tribes Act and the Enabling Act, pro-tribal forces "leverage[d] their demand for retroactive federal control over Indians of high blood quantum against the white Oklahomans' desire for statehood." *Id.*; *see* FTA § 19.

An even more important "victory for the [pro-tribal] protectionists" was that the Enabling Act "reinforced … federal authority over Indians," imposing the "condition that the forthcoming Oklahoma state constitution could not limit federal authority over Indians within its

boundaries." Thorne at 41. The Enabling Act thus preserved federal supervision over Indians and required the new State to disclaim any rights over Indian lands. Act of June 16, 1906, ch. 3335, §§ 1, 3, 34 Stat. 267 ("Enabling Act"). These provisions reaffirmed the United States' "control … of the large Indian reservations and Indian population of the new State." *Coyle v. Smith*, 221 U.S. 559, 570 (1911).

At statehood, the Indian Territory remained mostly controlled by Indians and the federal government. Of 19.6 million acres total, more than 16.6 million remained inalienable and immune from state taxation, largely in restricted allotments. H.R. Rep. No. 60-1454, at 2-3 (1908).

4. Assaults On The Creek Nation.

Those who lost battles in Congress refused to accept congressional statutes as the last word. So while the Creek suffered setbacks to land and government in ensuing decades, the reason—in large part—was lawlessness, not law.

The Bureau of Indian Affairs ("BIA") played a part. It opposed Congress's decision to preserve the Creek government. *Harjo*, 420 F. Supp. at 1130. So, in a campaign of "bureaucratic imperialism," it "behaved as though it had been successful" in forestalling that result, making "deliberate attempts" to "prevent [the Nation's government] from functioning." *Id.*

The BIA also did not protect the Creek from worse events on the ground. Oklahomans were determined to squash the nuances in federal policy, and to make the federal role in local affairs temporary and minimal.

Angie Debo, *And Still the Waters Run* 167 (1940). The platform of the Oklahoma Democratic Party (the new State's principal party) put it starkly: "We will take care of our own defectives of whatever race or color." *Id.* at 168.

Then came oil. Its discovery triggered "an orgy of plunder and exploitation probably unparalleled in American history," as Creek citizens were swindled out of allotments. *Id.* at 91; *see* Tim Vollmann & M. Sharon Blackwell, "*Fatally Flawed": State Court Approval of Conveyances by Indians of the Five Civilized Tribes—Time for Legislative Reform*, 25 Tulsa L.J. 1, 5 (1989). There was "legalized robbery" through courts, and entire land companies formed for the "systematic and wholesale exploitation of the Indian through evasion or defiance of the law." Debo at 117, 182. "Every member of the Dawes Commission and nearly every high Interior Department official … was credited with stock in" the land companies. *Id.* at 92, 119-20. State courts and the Executive Branch conspired to undo alienation restrictions on millions of acres of Indian-owned land. *Id.* at 119, 182.

Massive tracts fell victim to the notorious Oklahoma guardianship system, a corrupt system of legalized local plunder of Indian lands. Section 6 of the Restrictions Act of 1908 had given Oklahoma county courts jurisdiction over estates of "minor[s] and incompetent[s]," a seemingly innocuous provision abused to devastating effect. Act of May 27, 1908, ch. 199, § 2, 35 Stat. 312. Many minors, for example, had substantial holdings of privatized lands and trust funds, "possess[ing] an estate varying in value from an average

farm to the great and speculative wealth represented by an oil allotment." Debo at 104. The county courts appointed for these wealthy wards "guardians," who quickly separated these minors from their wealth. "[P]lundering of children" "soon became a lucrative and highly specialized branch of the grafting industry." *Id.* at 103.

The treatment of wealthy adults was, remarkably, worse. Oklahoma county courts regularly appointed guardians for adult, full-blood Indians whose restricted lands held valuable resources. Thorne at 44; Debo at 305. Indeed, it soon became "apparent that all Indians and freedman who owned oil property were mentally defective." Debo at 305. "Within a generation these Indians, who had owned and governed a region greater in area and potential wealth than many an American state, were almost stripped of their holdings." *Id.* at vii.

Meanwhile, Oklahoma made outsized claims about its courts' jurisdiction over Indians, prosecuting Indians for crimes even on restricted allotments. *Ex parte Nowabbi*, 61 P.2d 1139, 1141-42 (Okla. Crim. App. 1936). Today, Oklahoma acknowledges that its prior position was unlawful. *State v. Klindt*, 782 P.2d 401, 404 (Okla. Crim. App. 1989); *State ex rel. May v. Seneca-Cayuga Tribe of Okla.*, 711 P.2d 77, 81 & n.17 (Okla. 1985).

5. Today's Creek Nation.

As congressional policy changed, the "pilot light" of Creek government that Congress preserved, Br. 36, ignited to full flame. With the 1936 Oklahoma Indian Welfare Act, the Creek government "saw many of its powers restored," including judicial powers. Pet. App.

130a. Its new constitution, which the United States ratified, confirmed that Creek "political jurisdiction" is coextensive with its 1866 boundaries. Muscogee (Creek) Nation Const., art. I, § 2, http://bit.ly/2ODuKVG.

The Nation today is thriving. A driver of economic growth, it employs 5,000 people and commands an annual budget of $300 million (Tulsa's entire budget is roughly $800 million).[1] The Nation puts its resources to work for rural communities that, otherwise, would be under-resourced, helping Indians and non-Indians alike. The Nation builds roads, operates community hospitals, offers educational services, and provides other community resources.[2]

The Creek have a federally trained police force, with a dedicated K-9 Unit and a Major Crimes Investigation Division. Creek Nation 10th Cir. Reh'g *Amicus* Br. 8. Officers have cross-deputization agreements with the BIA and most of the 40 local governments within the reservation. *Id.* at 8-9.

The Nation has well-developed courts, whose jurisdiction "extend[s] to all the territory defined in the 1866 Treaty." *Enlow v. Bevenue*, No. SC-94-02, 1994 WL 1048313 at *2 (Muscogee Creek Nat. Sup. Ct. Oct. 13, 1994). A district court exercises criminal and civil jurisdiction, and a seven-member Supreme Court hears

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[1] Jessica McBride, *2018 Budget Passes During Emergency Session*, Mvskoke Media (Sept. 25, 2017), https://mvskokemedia.com/2017-budget-passes-during-emergency-session/.

[2] *See* Muscogee (Creek) Nation, http://www.okmulgee development.com/About-Okmulgee/Muscogee-Creek-Nation.aspx (last visited Sept. 11, 2018).

appeals. Muscogee Code, tit. 27, http://www.creeksupremecourt.com/wp-content/uploads/title27.pdf.

B. Factual Background.

Respondent Patrick Dwayne Murphy, a Creek, was convicted in state court of murdering another Creek. Pet. App. 10a, 15a. The crime occurred within the Creek reservation, near the tribal town of Weogufkee, on land allotted in 1903 to full-blood Creek Lizzie Smith. Pet. App. 7a, 47a, 213a, 224a. Respondent was sentenced to death, and the Oklahoma Court of Criminal Appeals ("OCCA") affirmed. Pet. App. 10a.

Respondent sought state post-conviction relief, arguing that Oklahoma lacked jurisdiction under the Major Crimes Act. Pet. App. 13a. The trial court held state jurisdiction was proper. Pet. App. 16a.

The OCCA affirmed. It noted that the Tenth Circuit had previously reserved the disestablishment question, and stated that if "federal courts remain undecided …, we refuse to step in." Pet. App. 224a; *see Indian Country, U.S.A., Inc. v. Okla. ex rel. Okla. Tax Comm'n*, 829 F.2d 967, 975 & n.3 (10th Cir. 1987). This Court denied certiorari. Pet. App. 18a-19a n.12.

On federal habeas, the district court denied relief on the reservation-status issue. Pet. App. 20a-21a.

The Tenth Circuit reversed. First, it found the OCCA's decision was "contrary to" clearly established federal law. The OCCA required "evidence that the Creek Reservation had not been disestablished," ignoring the "'presumption' that an Indian reservation

continues to exist until Congress acts." Pet. App. 52a (quoting *Solem*, 465 U.S. at 481).

The Tenth Circuit then analyzed disestablishment *de novo*. Pet. App. 56a. The Tenth Circuit began with *Solem*'s "most probative" step—"statutory language." Pet. App. 77a (quoting *Solem*, 465 U.S. at 470). It observed that Oklahoma invoked not "any particular statutory text," or any "'specific section'" indicating disestablishment, but instead "the overall thrust of" various statutes. Pet. App. 77a, 101a. The Tenth Circuit analyzed Oklahoma's statutes and found they "do not, individually or collectively, show" disestablishment. Pet. App. 107a.

The Tenth Circuit exhaustively considered the historical evidence addressing *Solem*'s second and third steps. But Oklahoma's "mixed" and "conflicting" evidence, the court found, "falls short." Pet. App. 109a, 121a.

Oklahoma did not dispute below (as it has not disputed here) that if the Creek reservation survives, Respondent's conviction cannot stand. Hence, the Tenth Circuit granted Respondent's habeas application. Pet. App. 132a-33a.

Today, Respondent remains on death row. Before prison, alcohol shaped his life. Both parents were alcoholics. His mother drank throughout her pregnancy, leaving Respondent with fetal alcohol syndrome, and then put beer in his bottles. The first time a welfare worker came to Respondent's home, his father was shooting at his mother, who was hiding in a ditch with the children. Respondent, too, became an alcoholic,

committing alcohol-related infractions. All paled, however, next to the crime for which Respondent is now incarcerated. After drinking to excess—the State counted 32 beers, Respondent testified to twice that, Trial Tr. at 1047-48—Respondent committed the murder for which he was sentenced to death.

Respondent's crime was undeniably grave. But in prison, Respondent has defeated his alcohol addiction. He has been a model prisoner, and he has been appointed a "run man"—a position of trust that allows him to help officials in the prison's day-to-day operation. Under the Tenth Circuit's decision, Respondent is subject to federal prosecution and life imprisonment without possibility of parole.

SUMMARY OF ARGUMENT

I. As in *Parker*, statutory text decides this case at *Solem*'s first and "most probative" step. In no relevant statute did Congress employ *Solem* and *Parker*'s "hallmark" disestablishment language—or, indeed, *any* clear language to that effect. The reason is not that such language was unsuitable for Creek lands or Oklahoma. Congress employed hallmark language to diminish Creek lands in 1832, 1856, and 1866, and it instructed the Dawes Commission to seek "cession" again. But instead, yielding to Creek demands, Congress retreated and enacted the very language that this Court has held is *insufficient* to diminish—allotment among citizens, plus sales of remaining land to non-Indians.

Oklahoma's tale about the "'overall thrust' of congressional action," Br. 52, cannot overcome the absence of clear text. Regardless, Oklahoma's

arguments are meritless. Oklahoma relies on allotment of Creek lands. But allotment is "completely consistent with continued reservation status." *Mattz v. Arnett*, 412 U.S. 481, 497 (1973). Oklahoma points to Congress's legislation to limit Creek "territorial sovereignty" and eventually dissolve the Creek government. But Congress expressly disavowed dissolution, leaving intact the Creek government and its sovereignty. Oklahoma insists that Congress regarded statehood and reservations as incompatible. But from the 1790s until today, statehood has coexisted with large Indian territories—and in the Enabling Act, Congress explicitly preserved the federal role over Indians and limited the new State's authority. And Oklahoma claims that Congress's express violation of some Creek treaty rights impliedly abrogated Creek rights entirely and disestablished their reservation. But the Allotment Agreement and the Enabling Act expressly preserve those rights.

II. The step-two evidence of surrounding circumstances confirms what the text shows. Far from pursuing a single-minded project from 1893 through 1906, Congress enacted legislation that reflected myriad reversals and hard-fought compromises among contending camps. The legislative history confirms that when Congress made the key choices that preserved the Creek reservation, it understood them as weighty. When the Dawes Commission reported that the Creek rejected "cession," Congress accepted allotment despite understanding that allotment was only half a loaf. When dissolution of the Creek government loomed, Congress legislated to save the Creek government, preserve the

Creek treaties, and prevent the Creek reservation from returning to the public domain, effectuating the pro-tribal view that it was "much better" to continue tribal governments "indefinitely and for all time." And when the question arose whether reservations were consistent with statehood, members answered that these rights could be "respected and protected" in the new State.

III. *Solem*'s third step is the least probative, and this Court "has never relied solely on [it] to find diminishment." *Parker*, 136 S. Ct. at 1081. Likewise here, the record is at worst mixed and cannot support disestablishment. Nor is "turmoil" a basis for disestablishment, as settled doctrines (some discussed in *Parker*) reveal the State's purported concerns to be vastly overblown. Because the State has conceded that Respondent must be retried if a reservation exists, the decision below must be affirmed.

ARGUMENT

I. Under *Solem*'s First And "Most Probative" Step, No Statute Disestablished The Creek Reservation.

Parker confirms that the disestablishment test is stringent and text-focused. "[O]nly Congress can" disestablish; "its intent … must be clear"; and statutory text is the "most 'probative evidence'" of that intent. 136 S. Ct. at 1078-79 (quoting *Solem*, 465 U.S. at 470; *Hagen v. Utah*, 510 U.S. 399, 411 (1994)). Thus *Parker* "beg[a]n with the text" and, finding no diminishment, "conclu[ded] that Congress did not intend to diminish." *Id.* at 1079-80. *Parker* duly examined *Solem*'s two other

factors but was unwilling to let "mixed historical evidence … overcome the lack of clear text[]." *Id.* at 1080. This case demands the same result.

A. *Solem*'s Text-Focused Test Protects Bedrock Principles.

Three principles guide *Solem*'s first step.

First, because only Congress can disestablish reservations, *United States v. Celestine*, 215 U.S. 278, 285 (1909); *see Parker*, 136 S. Ct. at 1078-79, congressional intent is paramount—and statutory text is the only unfailing evidence of Congress's intent. "[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). Across substantive areas, the alpha and omega of statutory interpretation is the text. *E.g.*, *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617, 630-31 (2018); *Ratzlaf v. United States*, 510 U.S. 135, 146-48 (1994). As *Parker* confirms, this remains true in Indian reservation cases. 136 S. Ct. at 1079.

Second, the standard is especially demanding for sovereign rights. This rule, again, is not Indian-specific. *E.g.*, *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 726 (2003) (abrogation of immunity must be "unmistakably clear"); *see Raygor v. Regents of Univ. of Minn.*, 534 U.S. 533, 543-44 (2002). But the rule applies to tribes, too. *Parker*, 136 S. Ct. at 1079; *see Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2031 (2014). Appeals to "vague notions of … 'basic purpose,'" *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 261 (1993), cannot justify abrogating sovereign rights.

Third, Indian-specific principles reinforce these rules. Although a statute "may abrogate Indian treaty rights," Congress "must clearly express its intent." *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202-03 (1999). Likewise, statutes "are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Cty. of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation*, 502 U.S. 251, 269 (1992); *see South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 344 (1998). These principles confirm that the test is the text.

B. The Statutes Show Congress Did Not Disestablish The Creek Reservation.

The simple, dispositive, and undisputed point is that none of the relevant statutes, from 1890 through statehood, contain clear language of disestablishment.

While disestablishment does not require "magic words," Pet. App. 62a, neither does the Court conjure disestablishment from thin air. *Cf.* Br. 27 (Creek reservation "evaporated"). *Parker* surveys this Court's disestablishment cases and catalogs the textual "hallmarks" that embody Congress's intent to go beyond altering land title to "diminish reservation boundaries." 136 S. Ct. at 1079. Congress may provide an "[e]xplicit reference to cession" to the United States, or an "unconditional commitment … to compensate the Indian tribe for its opened land." *Id.* Congress may "restor[e]" portions of a reservation to "the public domain." *Id.* Or Congress may use "other language evidencing the present and total surrender of all tribal interests," *id.*—providing, for example, that a reservation is "discontinued," "abolished," or "vacated." *Mattz,* 412

U.S. at 504 n.22; *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 618 (1977); *Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351, 354 (1962); *see, e.g.*, Act of July 27, 1868, ch. 248, 15 Stat. 221; Act of July 1, 1892, ch. 140, 27 Stat. 63 ("*Seymour* Act"); Act of Apr. 21, 1904, ch. 1402, 33 Stat. 189, 218. Similar formulations may suffice.

Here, there is nothing. There was no "cession" to the United States. The United States did not unconditionally commit to compensate the Creek for its lands. Never did Congress restore Creek lands to the public domain. And nowhere did Congress declare the Creek reservation discontinued, abolished, or terminated. Under *Solem*'s text-first test, this Court has never found diminishment or disestablishment unless some statute, treaty, or agreement spoke clearly to disestablish.[3]

For two reasons, moreover, the absence of disestablishment language is particularly telling.

First, Congress used the very language this Court has held is *insufficient* to disestablish. The 1901 agreement provided that "[a]ll lands of said tribe, except

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[3] Attribution is the farthest the Court has gone: When one agreement or statute contains express termination language, that text may establish a "baseline" applicable to related statutes. *See Rosebud*, 430 U.S. at 591-98 (1901 agreement and 1904 statute contained express cession language that was "precisely suited" to diminishment and informed 1907 and 1910 statutes); *Hagen*, 510 U.S. at 415 (express termination language "in the 1902 Act survived the passage of the 1905 Act"). While Oklahoma invokes *Rosebud* and *Hagen*, Br. 49, 50, 52, here *no* statute or agreement has express termination language.

as herein provided, shall be allotted among the citizens of the tribe by said commission." Allotment Agreement § 8. Not cession. Allotment among tribal members. And "allotment … is completely consistent with continued reservation status." *Mattz*, 412 U.S. at 497. Likewise, the "except" clause—referencing the 10,000 acres in town sites—merely authorized the Secretary "to act as the Tribe's sales agent." *Solem*, 465 U.S. at 473. "[S]uch provisions" do "no more than to open the way for non-Indian settlers to own land *on the reservation*." *Id.* (emphasis added). That rule reflects a bedrock principle: "[N]o matter what happens to the title of individual plots," once "a block of land is set aside for an Indian Reservation," it "retains its reservation status until Congress explicitly indicates otherwise." *Id.* at 470; *see Mattz*, 412 U.S. at 497 (similar).

Second, the absence of disestablishment language was no oversight. When Congress wanted to diminish Creek borders, it spoke clearly, using hallmark language. In 1832, the Creek "cede[d] to the United States all their land." 1832 Treaty art. I. In 1866, too, the Creek "cede[d] and convey[ed] to the United States … the west half of their entire domain," and "in consideration of said cession," received $975,182. 1866 Treaty art. III; *see* 1856 Treaty art. I (Creek "hereby … cede" land to Seminoles). Then, in 1893, Congress directed the Dawes Commission again to seek "cession" for an "agreed upon" "price." 1893 Act § 16. It speaks volumes that the statutes Congress actually passed lack such language. *Parker*, 136 S. Ct. at 1080 ("conclusion that Congress did not intend to diminish … is confirmed by the text of earlier treaties").

It is no mystery why that happened. Although Congress desired "cession," the Creek "would not, under any circumstances, agree to cede any portion of their lands to the Government," and "insist[ed]" on "allotment" among citizens. J.A. 19. At the time, Congress believed it could not unilaterally terminate a reservation. *Parker*, 136 S. Ct. at 1081 n.1. So faced with Creek "unanimity," Congress "abandon[ed] all idea" of cession and focused on allotment. J.A. 19.

C. Oklahoma Is Wrong That The Textual Hallmarks Of *Solem* And *Parker* Are Unsuited To Oklahoma Or The Creek.

Unable to muster the language this Court deems essential, Oklahoma first suggests its failure is of no moment because this language was uniquely unsuited to the Five Tribes. Br. 48. But to begin, the just-recounted history shows otherwise. *Supra* at 25-26. Across seven decades from 1832 to 1901 and beyond, Congress's enactments foreclose any claim that the Creek and Oklahoma were "anomalies" unsuited for "cession" or *Parker*'s other hallmarks. Br. 46-49.

Oklahoma's specific arguments fare no better.

First, Oklahoma says the *Solem*/*Parker* hallmarks are inapposite because this case does not involve a "surplus land act." But that is no distinction. These statutes are from the same Allotment Era as prior cases, and Congress's motivations were similar. *Supra* at 7-9. Nothing about *Solem* is limited to a particular *type* of statute. *See Parker*, 136 S. Ct. at 1078-79 (*Solem* governs "whether an Indian reservation has been diminished").

Indeed, Oklahoma's whole conceit—a Platonic "surplus land act," which Congress abandoned in Indian Territory—is fiction. Congress's approach was "reservation-by-reservation," each "act employing its own statutory language, the product of a unique set of tribal negotiation and legislative compromise." *Solem*, 465 U.S. at 467. That said, if it *mattered* whether the statutes here fit the model of this Court's prior cases, the answer is yes. The 1901 agreement allotted lands among tribal members, but allowed non-Indians to purchase land in town sites. Then the Five Tribes Act provided that after allotments were complete, the Secretary could sell the remaining lands—ultimately, about 62,000 acres, or 2% of the Creek's 3 million, *see* Report of Dep't of Interior, 1911, vol. II, at 386 (1912), http://bit.ly/2xlyhBw—to non-Indians. FTA § 16.[4] Congress's name for those parcels? "[S]urplus lands." *Id.*

Any differences with this Court's prior cases favor the Creek. Sale of "surplus lands" to non-Indians affected only a sliver of Creek lands, leaving the rest in Indian hands. This is thus a far weaker disestablishment case than this Court's other cases, where the lands at issue overwhelmingly went to non-Indians. *E.g.*, *DeCoteau v. Dist. Cty. Ct. for Tenth Judicial Dist.*, 420 U.S. 425, 427-28 (1975) (85% of land "sold to the United States"); *Yankton*, 522 U.S. at 338 ("unallotted lands"); *Hagen*, 510 U.S. at 404 (same); *Rosebud*, 430 U.S. at 602,

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[4] Congress first authorized sale of "residue" Creek lands in 1904, *see* Act of Apr. 21, 1904, 33 Stat. at 204, but repealed it in 1905, *see* Act of Mar. 3, 1905, ch. 1479, 33 Stat. 1048, 1072. Here, as elsewhere, Congress's policies were full of reversals.

607 ("unallotted lands" and "except[ing] such portions" as were allotted).

Second, Oklahoma says the Creek did not have a "traditional" reservation, with land owned by the government in trust, but held "patents in fee simple." Br. 21, 23. But again, that cuts against the State.

The fee-simple patent gave the Creek more protection, not less. Where most tribes held rights of occupancy based only on a treaty (or executive order), the Creek won—after broken treaty promises triggered the Trail of Tears—both treaty guarantees and a patent. The patent, which issued decades later, did not take away the Creek's independent treaty protections. 1832 Treaty art. XIV ("Creek country … shall be solemnly guaranteed"); 1833 Treaty art. II ("Creek country … shall be embraced within the following boundaries"); 1856 Treaty art. II ("The following shall constitute and remain the boundaries of the Creek country"); *id.* art. XV ("Creeks … shall be secured … within their respective limits"); 1866 Treaty art. III ("Creek lands … shall … be forever set apart as a home"). So again, *Solem*'s directive to seek disestablishment *in the text* applies with full force.

Nor does it matter whether Creek territory was called a "reservation." Br. 23-25. *If* that question mattered, Oklahoma's argument would be waived. *See* Pet. App. 109a ("State 'does not dispute that the reservation was intact in 1900'" (quoting Okla Br. 75 n.25)). Regardless, Creek territory was a "reservation" in every relevant sense. To create an "Indian reservation," it "is enough that" a "defined tract [is] appropriated to … Indian occupation." *Minnesota v.*

Hitchcock, 185 U.S. 373, 390 (1902); *see Cohen's* § 3.04 at 190-91 (reservation is "land set aside under federal protection for the residence or use of tribal Indians, regardless of origin").

Congress reserved the Creek territory from the federal public domain *by conveying title*. Act of May 28, 1830, ch. 148, § 1, 4 Stat. 411 (authorizing President to convey "territory belonging to the United States, west of the Mississippi" to Indians in "exchange [for] lands where they now reside"). That is why Congress's 1866 treaty identified the Creek's remaining lands as a "reduced Creek reservation." 1866 Treaty art. IX. And it is why this Court and Congress repeatedly referred to Five Tribes lands as "reservations." *E.g.*, *Atl. & Pac. R.R. Co. v. Mingus*, 165 U.S. 413, 435, 440 (1897) ("no doubt" that statute applicable to "reserved" lands applied to Indian Territory "reservations"); Treaty between United States and Cherokee Nation, July 19, 1866, art. IV, 14 Stat. 799 ("Creek reservation"); Act of Mar. 3, 1873, ch. 322, 17 Stat. 646 (same); *see also Maxey v. Wright*, 54 S.W. 807, 810 (Ct. App. Ind. Terr. 1900) ("contention that the Creek Nation is not now an Indian reservation is not tenable").

D. The "Overall Thrust Of Congressional Action" Did Not Disestablish The Creek Reservation.

Swapping story for text, Oklahoma asks the Court to examine at step one the "'overall thrust' of congressional action." Br. 52. It contends that Congress (1) "dissolve[d] the Five Tribes' communal land tenure" and (2) "repudiate[d] … the United States' treaty promises of tribal self-rule" to (3) achieve statehood, which

Congress supposedly viewed as incompatible with the Creek's treaty-guaranteed reservation. Br. 8, 10. And by breaking individual treaty promises, Oklahoma says, Congress entirely abrogated the treaties with the Creek and implicitly disestablished the reservation.

This appeal to Congress's "overall thrust" is a long way from *Solem* and *Parker*—the distance, in fact, from textualism to purposivism. Regardless, Oklahoma's story is false—in each chapter, and in its overall suggestion that Congress's actions between 1893 and 1906 reflected a single-minded effort. Congress was divided; its legislation reflected that. *Supra* at 7-8, 11-13. So yes, statehood was a substantial settler victory. But tribes and their congressional allies won victories too—among others, allotment over cession, the Five Tribes Act's preservation of tribal governments and protection for tribal land, and the Enabling Act's guarantee of continuing federal guardianship over Indians. *Supra* at 9-13. Those compromises illustrate why here, as elsewhere, it is critical to respect the actual text Congress enacted, not self-serving readings of the "overall thrust" of congressional action.

1. Ending Communal Tenure Via Allotment Does Not Support Disestablishment.

Oklahoma's story about land, Br. 4, 19, 26-28, is misdirection. Merely eliminating communal tenure never diminishes or disestablishes. *Supra* at 24-25. The question is one of congressional means. The means Congress used to end Creek communal tenure powerfully shows not disestablishment, but its opposite. Congress directed Indian lands into Indian hands,

allotting it among citizens. *Id.* Such changes, being "completely consistent with continued reservation status," do not disestablish. *Mattz*, 412 U.S. at 497. Meanwhile, when Congress directed modest tracts into non-Creek hands, it did not use disestablishment language. It merely allowed "non-Indian settlers to own land on the reservation." *Solem*, 465 U.S. at 473.

Oklahoma urges that Congress viewed allotment and cession as equivalent, so a decision to allot "achieve[d] the same result as cession." Br. 48. But a century of law refutes that claim. *Mattz*, 412 U.S. at 497; *Celestine*, 215 U.S. at 285-86. *Solem*'s whole point is that allotment does not effect disestablishment or have the same result as cession. 465 U.S. at 470. Indeed, the Dawes Commission *told Congress* that allotment and cession were different, J.A. 27-28, and in the real world, the two demonstrably were not "alternative means to the same end." Land ceded by the tribes or restored to the public domain was alienable and subject to state taxation; land allotted to the Creek that remained in Creek hands was *inalienable* and *immune* from taxation. Nobody at the time—not Congress, the State, or Tribes—believed Oklahoma's false equivalence.

Nor is there anything to Oklahoma's suggestion that "cession" did not fit Congress's goals. Br. 48-49; *cf.* U.S. Br. 24. If Congress wanted (as Oklahoma suggests) to allot land among members while terminating the reservation, it had a model: The 1892 statute in *Seymour* "vacated and restored" a reservation section "to the public domain," then provided for "allot[ments] to each Indian." *Seymour* Act §§ 1, 4; *see Seymour*, 368 U.S. at 354. When the Dawes Commission told Congress that

"cession" would have "immeasurably simplified" matters, J.A. 27-28, it described that model: The Creek would "ce[de] … the entire territory," from which the government would return to Creek citizens "a stipulated amount" plus "cash." J.A. 27. Congress had this model at hand; acceding to Creek resistance, Congress chose not to use it.

2. Congress Preserved The Creek Government And Its Territorial Jurisdiction.

Congress's 1901 legislation to dissolve the Creek government, invoked by Oklahoma, puts into sharp relief that Oklahoma's claims lack merit.

True, dissolution would have been fateful: The Creek held their reservation "so long as they shall exist as a nation." 1833 Treaty art. III. But recognizing the stakes, Congress deferred dissolution for five years, making it "subject to such further legislation as Congress may deem proper." Allotment Agreement § 46. Then, Congress reversed course. The Five Tribes Act's Section 28 "continue[d] in full force and effect for all purposes authorized by law" the Creek's "tribal existence and present tribal government[]." Thus, at a time when Congress's assimilationist faction continued to believe tribes and their governments would (and should) disappear, *Solem*, 465 U.S. at 466, Congress legislated to preserve the Creek.

Oklahoma insists that even though the Creek government endured, its "territorial sovereignty" did not. Br. 28. But first, the treaties pegged the reservation to the Creeks' "exist[ence] as a nation," 1833

Treaty art. III, not any particular government powers. Regardless, the statutes continued the Creek's territorial jurisdiction. The 1901 Agreement recognized the Nation's jurisdiction over "lands of the tribe, or of individuals after allotment," which would remain subject to the Nation's "act[s], ordinance[s], or resolution[s]," provided the President approved. Allotment Agreement § 42. And when the Five Tribes Act continued the Creek's "present tribal government[]" "for all purposes authorized by law," FTA § 28, it preserved this jurisdiction.

Oklahoma is not the first to argue that, by limiting government powers, Congress abolished the Five Tribes' reservations and territorial sovereignty. In *Morris v. Hitchcock*, non-Indians claimed that the Chickasaw Nation lacked power to impose a "license fee or tax" within its borders, relying—like Oklahoma—on allotment and the Curtis Act's steps to pressure agreement to allotment: "abolish[ing] … tribal courts" and "den[ying]" tribal laws "enforcement in [federal] courts." 21 App. D.C. at 568, 593. The D.C. Circuit, however, explained that the tribe retained its "expressly continued legislative power," which federal officials could enforce. *Id.* at 598. This Court affirmed, emphasizing that the tribe's territorial jurisdiction remained intact even where allotment placed "absolute owner[ship]" of land outside the tribe. *Hitchcock*, 194 U.S. at 389, 392-93. The Eighth Circuit applied *Hitchcock* to the Creek, upholding the "authority of the Creek" to govern "within its borders" and explaining the tribe retained "every governmental power … of which it

has not been deprived," including over land owned by non-Indians in fee. *Buster*, 135 F. at 953, 958.

This Court "presume[s] Congress [i]s aware of … the state of the law" when it legislates. *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 259 (2009). And after these decisions holding that the Five Tribes' jurisdiction endured, the only reading of the Five Tribes Act is that it preserved Creek territorial sovereignty. While Oklahoma observes that the Act "abolish[ed]" "taxes accruing under tribal laws" after 1905, FTA § 11; *see* Br. 35, there is more to government than taxes. If anything, by singling out taxes, Congress confirmed that other powers continued. "[U]nless and until Congress withdraws a tribal power … the Indian community retains that authority." *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1872 (2016).

Downplaying Congress's choice, Oklahoma observes that Congress had specific "practical" purposes in extending the Creek government, such as "sign[ing] deeds" or avoiding "transfer of land to railroad companies [via] contingent land grants." Br. 36. But what matters is that Congress acted, not whether Oklahoma deems Congress's reasons worthy of respect. Congress's reasons, moreover, underscore that it deliberated carefully. In particular, the railroad debates show that Congress focused on the need to preserve the Creek government *precisely* to prevent land from returning to the public domain. *Supra* at 11-12; *infra* at 42-43. That is, Congress acted to thwart the very result Oklahoma claims Congress's actions accomplished.

Nor is Oklahoma correct that Congress did the bare minimum to achieve its "practical" ends. On March 2,

1906, Congress enacted legislation preserving tribal governments "until all property of such tribes, or the proceeds thereof, shall be distributed." S.J. Res. 37, 59th Cong., 34 Stat. 822 (1906). Were Congress interested only in preserving "wind-up authority," that was enough. But Congress shortly thereafter preserved the Five Tribes *indefinitely*.

The limits imposed on the Creek government do not help Oklahoma. Br. 29. Many predate the Five Tribes Act and *Hitchcock* and *Buster*'s holdings that territorial jurisdiction endured. *Compare* Br. 29 ("presidential approval" for legislation), *with* Allotment Agreement § 42 (same), *and* Br. 29 (limit on "ability to determine … membership"), *with* Act of June 10, 1896, ch. 398, 29 Stat. 321, 339 (similar). And while Oklahoma claims Congress's 1901 grant of U.S. citizenship reflected "dismantling of tribal government," Br. 30, "citizenship is [not] inconsistent with" reservation status. *Celestine*, 215 U.S. at 287. Nationwide, *all* Indians who received allotments received citizenship. Br. 30.

Doubtless, the Creek government found its powers limited and suffered countless indignities—many from the BIA's "bureaucratic imperialism," *supra* at 13, but some from Congress. That, however, is not the same as abolishing the Creek reservation. When Congress legislates to leave the "pilot light" on, Br. 36, this Court may not snuff it out.

3. Statehood Did Not Disestablish The Creek Reservation.

Also wrong is the claim that Congress viewed statehood and Indian lands as incompatible, so

"disestablish[ing] the Creek borders [w]as a necessary step [for] Oklahoma statehood." Br. 21.

To begin, at statehood more than three-quarters of Five Tribes' lands—16 million acres—remained inalienable, largely in restricted allotments. *Supra* at 13. State jurisdiction over such lands is limited, as Oklahoma concedes. Br. 45; *supra* at 15; *infra* at 47. So the result Oklahoma depicts as inconceivable—nearly "half" the "new State" being "Indian country," Br. 23—is the result Congress *legislated* in the Enabling Act even on Oklahoma's theory.[5]

Founding-era Congresses agreed that broad areas of Indian jurisdiction are compatible with statehood. In 1796, Congress admitted Tennessee on "equal footing" as the first territory to become a State. Act of June 1, 1796, ch. 47, 1 Stat. 491, 491-92. Yet *three-quarters* was Indian country, guaranteed to the Chickasaw and Cherokee Nations. Treaty with the Cherokee, art. IV, July 2, 1791, 7 Stat. 39; Treaty with the Chickasaw, art. III, Jan. 10, 1786, 7 Stat. 24, 24-25. Congress debated whether it should exclude that territory. 1 Annals of Cong. 1312. But Congress admitted the whole State, including land beyond Tennessee's "ordinary jurisdiction." Act of May 19, 1796, ch. 30, § 19, 1 Stat. 469.

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[5] While Congress lifted some restrictions in 1908, Act of May 27, 1908, ch. 199, § 1, 35 Stat. 312, what matters is that Congress did not view those restrictions, and the jurisdictional limits they imposed, as incompatible with statehood. *See* S. Rep. No. 60-575, at 1 (1908) (noting that 1908 legislation leaves "about half of the lands of eastern Oklahoma nonalienable and nontaxable").

There thus is nothing to Oklahoma's claim that Congress disestablished the Creek reservation by admitting Oklahoma on "equal footing." Enabling Act § 4; *see* Br. 22. Today, *every* reservation is within at least one State. And many reservations existed before statehood and continued after, including those in *Seymour*, 368 U.S. at 354, *DeCoteau*, 420 U.S. at 427, *Rosebud*, 430 U.S. at 586, *Solem*, 465 U.S. at 465, *Hagen*, 510 U.S. at 402-03, *Yankton*, 522 U.S. at 333, and *Parker*, 136 S. Ct. at 1077-78. Oklahoma wants not "equal footing," Br. 22, but special treatment.

Mille Lacs rejected much the same argument. Minnesota argued that Indian treaty "rights"—there, hunting and fishing rights—were "irreconcilable" with statehood and thus were "extinguished" when Congress admitted Minnesota on "equal footing." 526 U.S. at 202. But this argument "rest[ed] on a false premise." *Id.* These "treaty rights … [we]re not irreconcilable with a State's sovereignty," as was clear from the many instances in which such rights *in fact* coexisted with state authority. *Id.* So statehood was "insufficient to extinguish" them. *Id.* at 205. Likewise here, States and reservations coexist everywhere.

Indeed, the Enabling Act expressly confirmed that statehood did not divest tribal rights. Congress mandated that the new constitution could not "limit or impair the rights of person or property pertaining to the Indians of said Territories" or "limit or affect the authority of the [federal] Government … to make any law or regulation respecting such Indians, their lands, property, or other rights." Enabling Act § 1. Congress also required the State to "disclaim all right and title …

to all lands … owned or held by any Indian, tribe, or nation." *Id.* § 3. As this Court summarized, such provisions reaffirmed the United States' "control … of the large Indian reservations and Indian population of the new State." *Coyle*, 221 U.S. at 570.

4. Congress Did Not Disestablish The Creek Reservation By Supposedly Breaking Other Promises.

None of the actions invoked by Oklahoma—concerning "communal ownership," "territorial sovereignty," or "statehood"—thus indicate disestablishment. Nonetheless, Oklahoma argues that because these actions supposedly broke "treaty promise[s]" in some respects, Congress eliminated *all* the Creek's treaty-based rights and thereby disestablished its reservation. Br. 27.

To start, Oklahoma's premise is questionable: The Creek *agreed* to much of what Oklahoma depicts as promise-breaking, including ending communal ownership. Allotment Agreement §§ 2-3, 47. Regardless, history shows that when Congress adjusted Creek treaty rights, it was not coy. While Congress legislated many changes to Creek land and government, it did not legislate disestablishment. And by violating a treaty—even repeatedly—a party does not dissolve the treaty or the other party's remaining rights. *See Restatement (Second) of Foreign Relations Law of the United States* § 158(1)(c) (1965); *see Restatement (Second) of Contracts* § 241 (1981). Here, moreover, the Allotment Agreement and Enabling Act *protected* Indian treaty rights. *Supra* at 10, 13, 37-38. Any

individual treaty violations thus left the Creek's remaining treaty rights, including their treaty-protected reservation, undisturbed.[6]

II. The Step-Two Evidence Confirms That Congress Did Not Disestablish The Creek Reservation.

At step two, "unequivocal evidence" from "surrounding circumstances" "may support" diminishment. *Yankton*, 522 U.S. at 351. But this Court has never relied on such evidence unless it "perceive[d] … intent to diminish … in the plain statutory language." *Id.* *Parker* confirms that "mixed historical evidence" does not advance the ball. 136 S. Ct. at 1080.

Moreover, not all "historical context," Br. 51, is equal. "More illuminating" is negotiating history. *Parker*, 136 S. Ct. at 1081 (quoting *Solem*, 465 U.S. at 471). Less so are "dueling remarks by individual legislators." *Id.* Less relevant still are Oklahoma's secondary sources—untested, and of dubious probity—(mis)characterizing the history.

A. The Most Probative Step-Two Evidence Confirms What Statutory Text Shows.

Oklahoma uses pop historians to draw history as a straight line: Congress "proceeded with [a] singular purpose," accomplishing by 1906 goals it set in 1893 and carried through in between. Br. 26. The real story,

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[6] *Yankton* found diminishment despite a "savings clause" only because the statute contained hallmark "cession" language. 522 U.S. at 344. *Yankton* would not "read the saving clause in a manner that eviscerates" this hallmark language. *Id.* at 346.

however, is about reversals. Having aimed at reservation-diminishing "cession," Congress retreated. Having legislated to dissolve Creek government, Congress saved it. And while granting statehood, Congress enacted important protections over Indian lands. The step-two evidence confirms that Congress understood each reversal as weighty.

Respondent has described how Congress confronted whether the Creek agreement would include disestablishment language—Congress's directive to the Dawes Commission to seek "cession"; the Creek's refusal; and Congress's acquiescence. *Supra* at 8-10, 25-26. Congress, moreover, understood that its retreat *mattered*. The Commission starkly conveyed the point, observing that, while "cession" would have "immeasurably simplified" matters, Congress should accept allotment because tribal resistance made "a more radical scheme of tribal extinguishment" "impossible." J.A. 27-28; *see Mattz*, 412 U.S. at 504 (when Congress considered but did not enact "bills [that] expressly provided for … termination," Court will not infer "intent to terminate").

Congress took this bargain because it could achieve important goals without cession. Congress aspired to create a new State but did not believe statehood required disestablishment. Members observed that "these reservations" have been "guaranteed … by treaty stipulations" and that

> I do not know why the rights which have been given to them under the treaties … might not be respected and protected, and yet have them brought into the Union as a State.

24 Cong. Rec. at 268 (Sen. Perkins).

Congress *was* worried about communal land tenure, but addressing it did not require cession. *Woodward* canvassed the legislative history—a dozen Commission reports and myriad committee reports. 238 U.S. at 296 n.1, 299 n.2. What drove Congress, this Court found, was the view that "'under treaty provisions'" tribal lands "'were to be held for the use and benefit of [tribal] members,'" yet a few individuals had "appropriate[d] to their exclusive use" the best lands. *Id.* at 297, 299 n.2 (quoting H.R. Rep. 55-593 (1898)). In forcing changes to Creek land tenure, Congress's "manifest purpose" thus was to implement "the true intent and meaning of the early treaties." *Id.* at 306; *see id.* at 299 n.2 (similar). Allotment (without cession) fulfilled that goal, ensuring each Creek received a fair share. Doubtless, it also addressed settlers' demands for "freely alienable individual title," as allotments would *eventually* become alienable. Pet. App. 67a. What matters, however, is that none of Congress's goals—altruistic, or base—demanded disestablishment.

Having discarded cession, Congress maintained that its goals did not require "abrogat[ing] its treaty promises." Br. 27. In 1895, Senator Dawes "assure[d]" the Five Tribes that the federal government did not "undertake to deprive any of your people of their just rights," but to "secur[e] … their just rights under the treat[ies]." J.A. 23. And thereafter, members of Congress maintained that their actions were consistent with treaty obligations, modifying them only with Creek consent. *Statehood for Oklahoma: Hearing Before the H. Comm. on the Territories*, 58th Cong. 137 (1904)

(*Statehood Hearing*) (Mr. Havens) (disputing "that the Congress has ever violated its treaties"); *id.* at 139 (same); *see* 29 Cong. Rec. 2341 (1897) (Sen. Platt) ("Men of great legal ability who have gone into it … do not believe … there is any violation of any treaty"). Oklahoma's view that "Congress expressly repudiated every [treaty] promise," Br. 21, was not Congress's.[7]

True, members understood that *one* enactment—dissolving the Creek government—could be fateful. The treaties tied rights to the Creek's continued existence. *See* 29 Cong. Rec. 2305 (Sen. Vest) (treaties "gave to those Indians the occupation of this Territory … so long as they maintained their tribal relations and continued to live there"); *Statehood Hearing* 98 (Mr. Howe) (equating "abolition of tribal government" with "abrogation of all the former treaties"); *id.* at 144 (Mr. Havens) ("treaty is still in effect" "until that time" as "tribal relations shall cease"). Indeed, members believed that the "moment the tribe ceases to exist," the federal government would "have no further control over the property of those Indians," which would "be controlled by the new State." 40 Cong. Rec. 2977 (Sen. McCumber).

That is the result Oklahoma claims Congress intended—yet Congress acted to *avoid* it. Concerns that dissolution might trigger contingent land grants held by railroads, or abruptly close tribal schools, focused Congress's attention. 40 Cong. Rec. 3053 (Sen. Aldrich);

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[7] Oklahoma can cite members holding different perspectives, but that is why this Court discounts "cherry-picked statements by individual legislators." *Parker*, 136 S. Ct. at 1081.

see also id. at 3052 (Sen. Spooner) (urging prompt legislative action). After careful consideration, Congress reversed the 1901 agreement, concluding that there "is not any necessity … for … dissolution." *Id.* at 3122 (Sen. Teller). And when it did so, Congress understood that it was doing more than just resolving the important crises of the day, but was instead "continu[ing] … all … matters connected with" tribal governments. *Id.* at 3054 (Sen. Clark); *see also id.* at 3122 (Sen. Teller) ("better indefinitely and for all time to continue" tribal governments); *id.* at 3061 (Sen. Teller) (similar).

B. Oklahoma's Evidence Is Unpersuasive.

"[M]ixed historical evidence" never supports disestablishment, *Parker*, 136 S. Ct. at 1080, but even on its own terms, Oklahoma's evidence is unpersuasive.

Naturally, Oklahoma can stitch together quotations full of hostility to the Creek and anticipating the tribe's disappearance. Everywhere, Congress's assimilationist faction "anticipated the imminent demise of the reservation." *Solem*, 465 U.S. at 468-69. And Congress had legislated in 1901 to dissolve the Creek government. So *of course* people contemplated "civil death of the Muscogee Nation." Br. 50 (quoting S. Doc. 54-111); *see also* Br. 9 (Sec'y Smith letter, Isparhecher statement); Br. 30 (Sen. Pettigrew, Mr. Howe statements); Br. 37 (Cherokee attorney statement). But history proved wrong those who believed reservations were relics of the past, and Congress reversed course to preserve the Creek government. The Court cannot "extrapolate" disestablishment from "expectation[s]," *Solem*, 465 U.S. at 468, that went unrealized.

Oklahoma's remaining evidence illustrates why legislative history earns its bad name. Many statements come from the 1890s—irrelevant because, as all agree, the Creek reservation endured into the 20th century. *Supra* at 28; *see* Br. 9, 10, 12, 20, 27, 30, 50. Other statements concern measures that plainly *did not* disestablish—like statehood, Br. 27 (Rep. Beall statement), U.S. citizenship, Br. 12, 30-31 (discussing H.R. Rep. 56-1188), or abolition of tribal courts, Br. 30 (Sen. Vilas statement); *id.* (Pleasant Porter statement). Of Oklahoma's most colorful statements, many come from *opponents* of Congress's policies, especially Senator Bate. Br. 20, 30 (twice), 52. Theirs would not be the first dissents to inflate results they opposed.[8]

C. Criminal Jurisdiction Does Not Suggest Disestablishment.

Oklahoma also asks the Court to infer from post-statehood criminal jurisdiction that Congress did not understand Creek lands to remain a reservation. First, it says "Congress … directed" Indian criminal cases to state courts, which Oklahoma claims is inconsistent with reservation status. Br. 39. Second, Oklahoma contends the new State "actually" exercised such jurisdiction, supposedly reflecting Congress's intent. *Id.* Third, Oklahoma claims that if a reservation endured, a

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[8] Sometimes, Oklahoma resorts to pure omission. For example, it quotes a chief's statement that he had "hardly any[]" authority besides signing deeds—omitting his caveat that "I can call my council together; my council can come together and pass such laws as they think fit these people should have," provided they received "the approval of the President." S. Rep. No. 59-5013, pt. 1, at 885 (1907).

"jurisdictional gap" would have existed. Br. 43-44. But again, Oklahoma errs at each step. Its musings do not compensate for the absence of clear diminishment language.

1. Congress did not send crimes involving Indians on reservations to state court. Post-statehood, the Major Crimes Act applied to "reservations" in "any State" and directed crimes to federal court. Act of Mar. 3, 1885, ch. 341, § 9, 23 Stat. 362. It applied in Oklahoma, like everywhere else. The Enabling Act did not "direct[] a different course," Br. 39, as it applied only to "causes pending" at statehood, not *new* cases. Enabling Act § 16.

Nor did the Enabling Act send pending, pre-statehood cases elsewhere. It transferred to *federal* court cases "arising under the Constitution, laws, or treaties of the United States," including criminal cases. *Id.* Major Crimes Act crimes are such cases. So are crimes under the General Crimes Act, which "extend[s] to the Indian country" the "general laws of the United States" for federal enclaves. Rev. Stat. § 2145. So, too, were the laws of Mansfield's Digest of Arkansas law that Congress had applied to Indian Territory Indians as "incorporated" federal law, *Indian Country*, 829 F.2d at 978; *see* Act of June 7, 1897, ch. 3, 30 Stat. 62, 83.[9] And to be double-clear, Congress in 1907 amended the Enabling Act to confirm the transfer to federal courts of "[p]rosecutions for all crimes and offenses … pending …

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[9] Where general federal and Arkansas law defined the same offense, federal definitions "govern[ed]." Act of May 2, 1890, ch. 182, § 33, 26 Stat. 81.

upon … admission … which, had they been committed within a State, would have been cognizable in the Federal courts." Act of Mar. 4, 1907, ch. 2911, 34 Stat. 1286, 1287. Congress did not give Oklahoma uniquely broad jurisdiction. *See S. Surety Co. v. Oklahoma*, 241 U.S. 582, 586 (1916) (state courts' jurisdiction "was to be the same [as if] the Indian Territory been a State when the offenses were committed").

2. Noting that Oklahoma prosecuted Indian crimes, wherever committed, the State asserts that disestablishment is "the only way to reconcile what actually transpired with criminal jurisdiction at statehood." Br. 39. History refutes that claim. Nationwide, on intact reservations, States often exercised jurisdiction that Congress had not conferred. Kansas for decades exercised "jurisdiction over all offenses committed on Indian reservations." *Negonsott v. Samuels*, 507 U.S. 99, 106-07 (1993). So did Nebraska. Mark R. Scherer, *Imperfect Victories: The Legal Tenacity of the Omaha Tribe*, 1945-1995, 15-17 (1999) (Nebraska "erroneously exercis[ed] criminal jurisdiction … for some seventy years"). And Washington and South Dakota did the same on the *Seymour* and *Solem* reservations. *E.g.*, *State ex rel. Best v. Super. Ct. for Okanogan Cty.*, 181 P. 688, 689 (Wash. 1919); *United States v. La Plant*, 200 F. 92, 94 (D.S.D. 1911); *State v. Sauter*, 205 N.W. 25, 28 (S.D. 1925); *Lafferty v. State ex rel. Jameson*, 125 N.W.2d 171, 174 (S.D. 1963); *State v. Barnes*, 137 N.W.2d 683, 684 (S.D. 1965).

Nowhere are such prosecutions less revealing than Oklahoma. One reason is its lawless treatment of Indians generally—the post-statehood "orgy of plunder

and exploitation," in which state and federal officials together plundered Creek citizens and lands. *Waters Run* 91. But the more important reason is that as to jurisdiction specifically, Oklahoma undisputedly overstepped. Recall that 16 million acres, or three-quarters of eastern Oklahoma, remained in Indian hands in 1907, and Oklahoma today *concedes* it lacks jurisdiction over Indian crimes on such lands. Br. 45; *see Klindt*, 782 P.2d at 404. That means Oklahoma's "iceberg" of prosecutions, Br. 40, was overwhelmingly *unlawful*, as one of the Solicitor General's cases shows. *McGlassen v. State*, 130 P. 1174, 1174 (Okla. Crim. App. 1913) (crime on "allotment"); U.S. Br. 30.[10]

3. Nor is there anything to Oklahoma's purported "jurisdictional gap." The State's argument goes something like this. Congress had dissolved tribal courts, and the federal government generally lacks authority to prosecute minor Indian-on-Indian crimes. Thus, if the Creek reservation endured and the new State lacked jurisdiction over such crimes, no court would have had such jurisdiction. That "jurisdictional gap," Oklahoma contends, reveals that Congress must have believed that the reservation was disestablished. Br. 43-44. But even assuming that an implicit "belief" of Congress could disestablish, Oklahoma's argument dissolves on inspection.

To start, Congress's statutes did not dictate a "jurisdictional gap." True, the General Crimes Act *normally* did not provide federal authority to prosecute

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[10] *Hendrix v. United States*, 219 U.S. 79 (1911), did not discuss, much less decide, reservation issues.

non-major "crimes committed by one Indian against … another." Rev. Stat. § 2146. But in Indian Territory, Congress rendered "the laws of the United States" and the "incorporated" Arkansas law, *Indian Country*, 829 F.2d at 978, applicable to Indians "irrespective of race," Act of June 7, 1897, ch. 3, 30 Stat. 62, 83. Congress thus reached minor and major crimes with federal law—what one would expect with Congress poised to eliminate the tribal courts that normally handle minor crimes. And while statehood ended general federal criminal authority over non-Indians, *United States v. Ramsey*, 271 U.S. 467, 469 (1926), it endured in Indian cases. The Enabling Act preserved federal authority "to make any law or regulations respecting … Indians [or] their lands." Enabling Act § 1. This Court interpreted that section to preserve not just forward-looking power, but "established [federal] laws and regulations" concerning Indians. *Ex parte Webb*, 225 U.S. 663, 683 (1912); *see Ramsey*, 271 U.S. at 469 (federal "authority in respect of crimes committed by or against Indians continued … as it was before").

In any event, any jurisdictional gaps show nothing about Congress's views. For one thing, Oklahoma's theory likewise has a jurisdictional gap: Oklahoma concedes (as its courts have held) that its state courts lacked jurisdiction over crimes committed on restricted allotments. The existence *vel non* of a jurisdictional gap thus says nothing about what Congress thought of the Creek reservation.

Moreover, tribal courts nationwide were often absent or ineffective, yielding the same "gap." That is why, in 1883, the BIA began establishing by regulation

"Courts of Indian Offenses": The Major Crimes Act did not "reach [many] crimes or offenses," and thus reservations "without … a court" "would be without law or order." Report of Secretary of Interior, 1885, vol. II, at 21 (1885) (U.S. Ser. Set vol. 2379); *see Colliflower v. Garland*, 342 F.2d 369, 372 (9th Cir. 1965); *Tillett v. Lujan*, 931 F.2d 636, 639 (10th Cir. 1991). These BIA courts could "try and punish any Indian … for any misdemeanor …, as defined in the laws of the State or Territory within which the reservation may be located." H.R. Exec. Doc. No. 1, part 5, vol. II, 52d Cong., 2d Sess., at 30.[11] While the BIA's regulations excluded tribes with functioning judicial systems (as the Five Tribes had when those regulations were promulgated), a pen stroke could change that. *E.g.*, *Law and Order on Indian Reservations*, 44 Fed. Reg. 37,502 (1979) (BIA's establishment of courts after Oklahoma's courts rejected State's unlawful exercises of jurisdiction in western Oklahoma). So a jurisdictional gap for minor crimes would have been neither a novel nor a practical problem.

With Indian jurisdiction, practical problems have always been Congress's focus. For example, only when Kansas's authority "was called into question" did Congress address the quandary from its unlawful prosecutions. *Negonsott*, 507 U.S. at 106-07. Likewise, *Duro v. Reina*, 495 U.S. 676 (1990), found that a jurisdictional gap had existed for a century—because tribal, federal, and state courts all lacked jurisdiction over non-major crimes by nonmember Indians. *Id.* at

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[11] Oklahoma is thus wrong that these courts *only* addressed practices "considered 'heathen.'" Okla. Cert. Reply 10-11.

697; *see id.* at 704-05 (Brennan, J., dissenting). Congress fixed the problem when it arose. H.R. Rep. No. 102-61, at 3-4 (1991).

That said, the Court need not decide how best to read these jurisdictional tea leaves. Disestablishment requires that Congress speak "clearly." *Solem*, 465 U.S. at 470. Given the absence of hallmark or other direct disestablishment language, Oklahoma's self-serving claims of what Congress must have believed cannot provide the textual clarity that *Solem* and *Parker* demand.

III. Step-Three Evidence Does Not Show Clear Congressional Intent To Disestablish.

Oklahoma relies heavily on post-statehood events. Br. 37-38, 39-43, 44-45, 52-56. But this Court "has never relied solely on this third consideration to find diminishment." *Parker*, 136 S. Ct. at 1081. For good reason. Post-enactment history is a poor indicator of congressional intent—generally, *Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 242 (2011), and in diminishment cases, *Solem*, 465 U.S. at 472 n.13; *Yankton*, 522 U.S. at 355; *Hagen*, 510 U.S. at 420. Equivocal post-enactment history cannot substitute for textual clarity.

A. Probative Step-Three Evidence Indicates Congress Did Not Disestablish.

After the Enabling Act, Congress repeatedly recognized the Creek reservation's borders. It did so in 1906 (confirming "the west boundary line of the Creek Nation," Act of June 21, 1906, ch. 3504, 34 Stat. 325, 364);

1909 (appropriating funds for "equalization of allotments in the Creek Nation," Act of Mar. 3, 1909, ch. 263, 35 Stat. 781, 805), and 1918 (appropriating funds for "schools in the … Creek … Nation[]," Act of May 25, 1918, ch. 86, 40 Stat. 561, 581).

While Oklahoma claims these references were merely "historic signifier[s]" that lacked legal significance, Br. 33-34, Congress saw things differently. In 1924, Congress established mining rules for "Indian reservations other than lands of the Five Civilized Tribes"—underscoring that, absent the exclusion, "reservations" would encompass Five Tribes' land. Act of May 29, 1924, ch. 210, 43 Stat. 244, 244 (codified at 25 U.S.C. § 398). The 1936 Oklahoma Indian Welfare Act authorized the Secretary to acquire lands in Oklahoma "within or without existing Indian reservations," Act of June 26, 1936, ch. 831, § 1, 49 Stat. 1967 (codified at 25 U.S.C. § 501),[12] and authorized restoration of many government powers Congress had restricted, *id.* § 3. Congress thus recognized both that tribal boundaries endured and that governments remained intact to exercise power over them.[13]

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[12] The statute thus rejected the view of the Senate Report, submitted by Oklahoma's senator, opining that "all Indian reservations as such have ceased to exist." Br. 55.

[13] When Congress elsewhere defined "reservations" to include "former Indian reservations in Oklahoma," 25 U.S.C. § 1452(d), it merely recognized *some* Oklahoma reservations were disestablished. *E.g.*, *Ellis v. Page*, 351 F.2d 250, 252 (10th Cir. 1965). Regardless, the *Solem* reservation remained intact even though Congress called it a "former" reservation. 465 U.S. at 479.

Executive-branch officials maintained the oversight of Creek lands that accords with a reservation. After statehood, federal officials retained "control and direction of the schools among the Five Civilized Tribes," approved mineral leases, and "collect[ed] the taxes and royalties belonging to the several tribes." J.A. 46, 51, 60-61.

Although no friend of the Five Tribes, the Interior Department recognized the Creek reservation endured. Through 1918, its "Maps Showing Indian Reservations" continued to show the Creek. J.A.79-117. Indeed, those maps paint *the same* understanding of Oklahoma's geography—the east, covered by reservations—Oklahoma says "cannot be right." Br. 2. Likewise, the BIA "consistently included the Creek Nation in tables summarizing reservation statistics." Pet. App. 123a; *see* Creek Nation 10th Cir. Merits Br., App. B. Oklahoma emphasizes that these statistics quantified "unallotted" lands, Br. 55—but that is only because that metric was important to the agency charged with allotting lands. These tables cannot be squared with Oklahoma's view that the Creek reservation vanished "by … statehood." Br. 4; *see* Report of Dep't of Interior, 1913, vol. II, at 42 (1914) (reporting oil production from "new … field, located within the Creek Reservation"), http://bit.ly/2xkncAu.

Courts reached the same result. *United States Express Co. v. Friedman*, 191 F. 673, 678 (8th Cir. 1911) (rejecting argument that former Indian Territory land "ceased to be Indian country upon" statehood); *see United States v. Wright*, 229 U.S. 226, 226, 236 (1913)

(former Indian Territory, including "county of Muskogee," remained "Indian country").[14]

B. Oklahoma's Other Post-Enactment Evidence Sheds Little Light On Congress's Intent.

A "mixed record" "cannot overcome the statutory text," *Parker*, 136 S. Ct. at 1082, and Oklahoma's step-three evidence has little probative value anyway.

1. Oklahoma claims Congress's actions lifting restrictions, giving state courts authority over Indian lands, and permitting taxation of reservation lands "confirms disestablishment." Br. 53. But when Congress lifted certain "restrictions on alienation" in 1908, *id.*, that was no different than "offer[ing] non-Indians the opportunity to purchase [Indian] land," *Solem*, 465 U.S. at 470. That does not diminish. *Id.*; *see Mattz*, 412 U.S. at 504-05.

Likewise, when Congress authorized state courts to decide questions concerning allotments, heirship, and partition, it made them "federal instrumentalit[ies]." *United States v. Goldfeder*, 112 F.2d 615, 616 (10th Cir. 1940) (1908 act); *see Springer v. Townsend*, 222 F. Supp. 231, 236 (N.D. Okla. 1963) (1926 and 1947 acts), *aff'd*, 336 F.2d 397 (10th Cir. 1964); *State ex rel. Miller v. Huser*, 184 P. 113, 122 (Okla. 1919) (1918 act). That shows the

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[14] By contrast, Oklahoma relies on irrelevant dicta. Several of its cases inaccurately imply that the Creek Nation ceased to exist, *Grayson v. Harris*, 267 U.S. 352, 353-54 (1925); *Washington v. Miller*, 235 U.S. 422, 423 (1914); *McDougal v. McKay*, 237 U.S. 372, 383-84 (1915), and another merely notes that the Nation no longer owned the fee, *Woodward*, 238 U.S. at 285-86.

opposite of disestablishment. Outside reservations, Congress does not generally deputize state courts as *federal* actors.

Taxes are similar. Br. 53-54. Allotted lands, once free of restrictions, were taxable because Congress *authorized* it. FTA § 19; Act of May 27, 1908, ch. 199, § 4, 35 Stat. 312. That happened on many reservations, including in *Parker*. Act of May 6, 1910, ch. 202, 36 Stat. 348; *see Yakima*, 502 U.S. at 263; *Cass Cty. v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 113 (1998). This congressional authorization shows that Congress maintained authority over the reservation and merely permitted States to tax portions.

2. Oklahoma notes that it *actually* exercised authority over Indians and their lands and removed many allotment restrictions. Br. 53; *id.* at 54-55 (discussing *Oklahoma Tax Commission v. United States*, 319 U.S. 598, 602 (1943)). But that exercise was infected with usurpation, greed, and abuse of congressional authority. *Supra* at 13-15. And Oklahoma criminal courts asserted jurisdiction that the State today concedes was unlawful. *Supra* at 15, 47. Oklahoma wanted Indian lands, at any cost. But that is no basis for divining congressional intent.

3. Oklahoma falls back on claims about "settled expectations" and "turmoil." Br. 3, 56. But *Parker* rejected similar arguments. There, "the Tribe was almost entirely absent," while for "a century and with few exceptions," the federal government and Nebraska treated the land as the State's. 136 S. Ct. at 1081. Yet despite "compelling" concerns about "'justifiable expectations,'" *Parker* unanimously held that

expectations "cannot diminish." *Id.* at 1082 (citation omitted).

The same result follows here. Indeed, unlike the absent Omaha in *Parker*, the Creek Nation "has maintained a significant and continuous presence within the Reservation," where its capital has remained since the Civil War. Pet. App. 130a. And today, many non-Indians in rural Oklahoma receive government services—"medical centers," "emergency response teams," and paved roads, *id.*; *supra* at 16—only because the Nation provides them.

As for "turmoil," Oklahoma's claims are mostly rhetoric. The decision below only modestly realigns criminal jurisdiction. Only 9% of Oklahomans identify as Indian, Br. 15, and Oklahoma will continue to prosecute crimes by non-Indians that are against non-Indians or are "victimless." Dep't of Justice, Indian Country Criminal Jurisdictional Chart, 2010, http://bit.ly/2GQZgav. Minor Indian offenses will proceed in the Nation's courts. *Id.*; *supra* at 16-17. The United States will prosecute major crimes. 18 U.S.C. § 1153. Tellingly, the United States no longer asserts this increase will be significant. *See* BIO 34 (detailing United States' changing, unsupported estimates).

"[C]ivil" implications, Br. 56, are not directly at issue in this capital case—but there, too, Oklahoma's claims are overblown. Oklahoma pretends as if non-Indians have never lived within reservations. Br. 56. Nationwide, however, hundreds of thousands of non-

Indians do so, including in cities.[15] State authority over non-Indians on fee land, accounting for the overwhelming majority of Creek lands, continues largely unchanged: the State retains jurisdiction unless specifically preempted. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142-43 (1980); *see Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980) (taxes); *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989) (zoning). As for tribal authority, the Creek Nation can *already* regulate its members. Over nonmembers, tribal regulation is presumptively "invalid" even within reservations. *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 330 (2008); *see Montana v. United States*, 450 U.S. 544 (1981) (regulatory jurisdiction); *Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001) (taxes). While Oklahoma's *amici* fret that even this "'limited'" authority will spur litigation, States' *Amicus* Br. 23 (quoting *Plains Commerce*, 554 U.S. at 329-30), this Court dismissed the same claims in *Parker*, citing a doctrine purpose-built to address such claims: *City of Sherrill v. Oneida Indian Nation of New York*. *Parker*, 136 S. Ct. at 1082; *see Sherrill*, 544 U.S. 197, 217-21 (2005) (holding that even where a reservation endures, "equitable considerations of laches and acquiescence may curtail … [t]rib[al] power").

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15 Palm Springs, California, Wikipedia, https://en.wikipedia.org/wiki/Palm_Springs,_California (last visited Sept. 11, 2018); Puyallup people, Wikipedia, https://en.wikipedia.org/wiki/Puyallup_people (last visited Sept. 11, 2018).

In reality, there is no risk of genuine disruption. When litigators step aside, Oklahoma and tribes collaborate closely: 654 tribal compacts govern cooperation on taxes, fire services, environmental protection, and more. *See* Okla. Sec'y of State, Tribal Compacts and Agreements, https://www.sos.ok.gov/gov/tribal.aspx (last visited Sept. 11, 2018).

If Congress perceived a shortcoming, it could address it tomorrow. Already, the statute books are filled with Oklahoma-specific Indian laws. *E.g.*, 25 U.S.C. §§ 5201-5210; *Cohen's* § 4.07(1)(c), at 300-01. For one, tribes can administer some federal environmental programs in Indian country, but Congress gave Oklahoma—uniquely—a veto. *See* Safe, Accountable, Flexible, Efficient Transportation Equity Act (SAFETEA), Pub. L. No. 109–59, § 10211(a)-(b), 119 Stat. 1144, 1937 (2005). Precisely because Congress's power is so broad, and carries such consequence, it is critical to ensure Congress *actually exercised* its power. That is *Solem*'s point.

IV. If The Creek Reservation Endures, The Court Must Affirm.

1. The Court cannot reverse based on the Solicitor General's argument that Respondent's conviction may stand because Congress supposedly gave Oklahoma criminal jurisdiction regardless of whether the Creek reservation survives. U.S. Br. 28.

First, that issue is not before the Court. At the certiorari stage, the Solicitor General proposed adding a question presented to address it. U.S. Cert. Br. i. The Court refused. Last Term, the Court confronted the

same situation, and "declined" the Government's merits-stage request to revisit the issue. *Lucia v. SEC*, 138 S. Ct. 2044, 2051 (2018). That approach is wise. Parties and *amici* should focus on questions the Court grants, not those it rejects. *Cf.* BIO 36-37 (noting previous unsuccessful government efforts to obtain certiorari on this very issue).

Second, the issue is waived. The parties litigated this case, and the Tenth Circuit decided it, on the premise that, if the Creek reservation endures, Oklahoma lacks jurisdiction to try Respondent. Pet. App. 6a-7a, 132a-133a. Oklahoma raised no contrary argument below or in its petition. And despite the Solicitor General's certiorari-stage brief, Oklahoma's sophisticated counsel (sensibly) did not raise the issue in the certiorari-stage reply or opening merits brief. *Cf.* BIO 20 n.6 (noting issue).[16]

2. AEDPA provides no basis to affirm. That is, if the Creek reservation remains, the Court cannot affirm on the ground that the law violated by the OCCA was not "clearly established." Oklahoma has not preserved that

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[16] Regardless, Congress did not give Oklahoma general criminal jurisdiction over crimes by Indians on reservations. At Oklahoma's statehood, the Major Crimes Act conferred federal jurisdiction over qualifying crimes on reservations within "any State." *Supra* at 45. The United States observes that, before statehood, Congress "appli[ed] Arkansas law" to Indians, and after, "extended the territorial laws in force in the Oklahoma Territory over the entire State." U.S. Br. 29. But as explained, the Enabling Act directed crimes by Indians on reservations to *federal* court. *Supra* at 45-46. And it extended Oklahoma territorial law only "as far as applicable." Enabling Act § 13. Oklahoma territorial law did not apply to Indian crimes on reservations.

argument. Its Question Presented does not mention clearly established law, Pet. i, and its brief devotes exactly one sentence to the point, Br. 48. The reason for that strategic decision is clear. Seeking review based on AEDPA would not have met this Court's certiorari criteria or resolved the "uncertainty" that Oklahoma posits. Br. 56.

Regardless, the Tenth Circuit correctly reviewed *de novo*. *Solem* provides the "well settled" disestablishment "framework." *Parker*, 136 S. Ct. at 1078-79. The OCCA not only failed to apply *Solem*, but "flipped the presumption" that a reservation continues "until Congress acts," Pet. App. 52a-53a—a presumption that Oklahoma concedes applies. Br. 19-20. That contradicted clearly established law. *De novo* review was thus appropriate. *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000); Pet. App. 56a-57a.

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Oklahoma opens its brief with a full-color picture of Tulsa. Br. 3. And understandably so: Its legal arguments are squarely foreclosed. But Oklahoma's appeal to "unique circumstances" and "present-day reality" is a call for equitable relief, not a theory of statutory construction. Congress and the Court have ways to address those concerns that do not involve consigning *Solem* and *Parker* to the waste bin.

CONCLUSION

The Tenth Circuit's judgment should be affirmed.

Respectfully submitted,

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September 19, 2018