No. 17-1107

In the Supreme Court of the United States

TERRY ROYAL, WARDEN, PETITIONER

v.

PATRICK DWAYNE MURPHY

(CAPITAL CASE)

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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CAPITAL CASE

QUESTION PRESENTED

Whether the State of Oklahoma has criminal jurisdiction to prosecute respondent, a member of the Muscogee (Creek) Nation, for the murder of another Nation member committed within the Nation's historic territory because (1) Congress disestablished the original territory of the Creek Nation such that respondent's crime did not occur within "Indian country" as defined in 18 U.S.C. 1151(a), or (2) if that territory was not disestablished, Congress nevertheless conferred criminal jurisdiction on Oklahoma without regard to whether the crime occurred within "Indian country."

STATEMENT OF COMPLIANCE WITH SUPREME COURT RULE 37.2(A)

Counsel of record received timely notice of the United States' intent to file this amicus brief ten days before the due date. Pursuant to Rule 37.4, the consent of the parties is not required for the United States to file this brief.

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INTEREST OF THE UNITED STATES

The court of appeals held that the State of Oklahoma lacks jurisdiction to prosecute respondent, a member of the Muscogee (Creek) Nation, for the murder of another Creek member in the Nation's former territory because that former territory constitutes a present-day "reservation" and therefore is "Indian country" under 18 U.S.C. 1151(a). That decision means that the federal government, rather than the State, must investigate and prosecute crimes committed by or against Indians within the Creek Nation's former national domain, which encompasses over three million acres in eastern Oklahoma, including most of the City of Tulsa. In light of the federal government's substantial interest in the

question presented, the United States supported Oklahoma's petition for rehearing en banc in the court of appeals.

STATEMENT

1. Federal law defines "Indian country" to include "land within the limits of any Indian reservation under the jurisdiction of the United States." 18 U.S.C. 1151(a).[1] "Criminal jurisdiction over offenses committed in 'Indian country' 'is governed by a complex patchwork of federal, state, and tribal law.'" *Negonsott* v. *Samuels*, 507 U.S. 99, 102 (1993) (citation omitted). Unless Congress has determined otherwise, the federal government generally exercises jurisdiction over crimes committed by or against an Indian in Indian country. See 18 U.S.C. 1152. Offenses by one Indian against the person or property of another within Indian country "typically are subject to the jurisdiction of the concerned Indian Tribe," *Negonsett*, 507 U.S. at 102; see 18 U.S.C. 1152 ¶ 2, but the Indian Major Crimes Act, ch. 341, 23 Stat. 385 (18 U.S.C. 1153(a) (Supp. I 2013)), gives the federal government jurisdiction over certain serious offenses—such as murder, kidnapping, burglary, and robbery—between Indians. Absent an Act of Congress to the contrary, federal jurisdiction is ordinarily exclusive of the State. The State generally has jurisdiction only over those state-law crimes committed by non-Indians against other non-Indians and over victimless crimes committed by non-Indians. See generally *Duro* v. *Reina*, 495 U.S. 676, 680 n.1 (1990).

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[1] "Indian country" also includes "all dependent Indian communities within the borders of the United States," and "all Indian allotments, the Indian titles to which have not been extinguished." 18 U.S.C. 1151(b) and (c). Those definitions are not at issue here. See Pet. App. 17a & n.10.

2. a. Respondent is a member of the Creek Nation. He was convicted in Oklahoma state court of first-degree murder of another member of the Creek Nation, and was sentenced to death. His conviction was affirmed on appeal. 47 P.3d at 877-880, 888.

In his second application for state post-conviction relief, respondent argued that the federal government had exclusive jurisdiction over his crime because he and the victim were Indians and the crime occurred in Indian country.[2] The Oklahoma Court of Criminal Appeals rejected that argument and affirmed respondent's conviction. Pet. App. 203a, 222a-224a. Respondent sought this Court's review, and in response to the Court's invitation, the United States filed a brief stating its position that Congress extinguished the historic territory of the Creek Nation. U.S. Amicus Br. at 15-20, *Murphy* v. *Oklahoma* (No. 05-10787). This Court denied certiorari. *Murphy* v. *Oklahoma*, 551 U.S. 1102 (2007).

b. Respondent sought relief in federal court pursuant to 28 U.S.C. 2254. Pet. App. 135a. The district court denied the petition, concluding that "[a] careful review of the Acts of Congress which culminated in the grant of statehood to Oklahoma in 1906, as well as subsequent actions by Congress, leaves no doubt the historic territory of the Creek Nation was disestablished." *Id.* at 192a.

c. The Tenth Circuit reversed. Pet. App. 1a-133a. Applying the three-part framework set forth in *Solem* v. *Bartlett*, 465 U.S. 463 (1984), the court held that federal law clearly established that respondent's crime occurred in Indian country—and was subject to exclusive

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[2] Respondent would not be subject to the death penalty in a federal prosecution. See 18 U.S.C. 3598.

federal jurisdiction—because Congress never disestablished the exterior boundaries of the Creek Nation. Pet. App. 78a-133a. In the court's view, the statutes through which Congress allotted the Creek Nation's lands, abolished its courts, and extended the laws of the new State of Oklahoma over the former Indian Territory included none of the "hallmark[]" language present in prior cases finding disestablishment. *Id.* at 96a. The court further reasoned that the historical context and Congress's subsequent treatment of the land could not "overcome the absence of statutory text." *Id.* at 132a; see *id.* at 119a. The court therefore set aside respondent's conviction. *Id.* at 133a.

d. The court of appeals denied the State's petition for rehearing en banc. Pet. App. 228a-229a. Chief Judge Tymkovich concurred, "suggest[ing] this case might benefit from further attention by" this Court. *Id.* at 230a.

DISCUSSION

The court of appeals' holding that Oklahoma lacked jurisdiction over respondent's crime is incorrect, conflicts with the decision of the Oklahoma Court of Criminal Appeals in respondent's case, and is extraordinarily important. Contrary to the court's view, Congress disestablished the Creek Nation's historic territory when, in preparation for and granting Oklahoma statehood, it broke up and allotted the Creek Nation's lands, displaced tribal jurisdiction, and provided for application of state law and state jurisdiction. There accordingly is no present-day Creek reservation. In any event, the enactment of the definition of "Indian country" in Section 1151 in 1948 did not repeal Congress's prior grant of jurisdiction to the State to prosecute crimes involving

Indians in the former Indian Territory. If left uncorrected, the decision below will radically shift criminal jurisdiction in cases involving Indians in vast areas of eastern Oklahoma from the State to the federal government, and affect state taxing and other jurisdiction. This Court's review is warranted.

A. Congress Disestablished The Creek Nation's Original Territory

This Court's prior disestablishment cases have considered whether Congress disestablished or diminished a particular reservation through "surplus lands Acts" that opened land to non-Indian settlement. *Solem* v. *Bartlett*, 465 U.S. 463, 467 (1984). In that context, the Court's cases provide "a fairly clean analytical structure for distinguishing those surplus land Acts that diminished reservations from those Acts that simply offered non-Indians the opportunity to purchase land within established reservation boundaries." *Id.* at 470. The Court considers the language and purpose of the relevant Acts of Congress, the historical context in which they were passed, and the subsequent treatment of the relevant lands. *Id.* at 470-472; see also, *e.g.*, *South Dakota* v. *Yankton Sioux Tribe*, 522 U.S. 329, 343-344 (1998); *Hagen* v. *Utah*, 510 U.S. 399, 410-411 (1994).

While those same general principles are relevant here and support disestablishment, this case is also distinct from those the Court has considered before. From the late 19th century through Oklahoma statehood, Congress sought to create a new State encompassing the Oklahoma Territory and Indian Territory. Congress pursued that goal through a series of statutes that provided for the dissolution of the tribal governments and disestablished the national domains of the "Five

Tribes" (the Creeks, Cherokees, Chickasaws, Choctaws, and Seminoles) that occupied the Indian Territory in eastern Oklahoma. Congress abolished the Creek Nation's courts, applied federal and state law to Indians and non-Indians alike in its original territory, provided for the allotment of almost all of its communal lands, and distributed tribal funds to individual Indians.

The court of appeals reached the wrong result because it asked the wrong question. Given the "unique history" of the Five Tribes, *Indian Country, U.S.A., Inc.* v. *Oklahoma*, 829 F.2d 967, 970 (10th Cir. 1987), cert. denied, 487 U.S. 1218 (1988), the critical inquiry is not whether the statutory language included the "hallmarks" found in prior cases, see Pet. App. 95a, 96a, 107a, but rather whether Congress intended to disestablish the Creek Nation's territory as part of the creation of the State of Oklahoma. Cf. *Hagen*, 510 U.S. at 411 (rejecting a "clear-statement rule"). A series of congressional enactments, the unique historical context, and subsequent developments make clear that it did.

1. a. In the 1830s, the Creek Nation was removed from its homeland in the southeastern United States to the then-unsettled region west of Arkansas, in current-day Oklahoma. Unlike many other tribes (including those involved in *Solem* and its progeny), the Creek Nation did not receive or retain its territory as a traditional reservation, but rather was granted it in fee, with the right of perpetual self-government. See *Woodward* v. *de Graffenried*, 238 U.S. 284, 293-294 (1915); *Atlantic & Pac. R.R.* v. *Mingus*, 165 U.S. 413, 436-437 (1897); *Cohen's Handbook of Federal Indian Law* § 4.07[1][a], at 289 (Nell Jessup Newton et al. eds., 2012 ed.) (Cohen 2012). After the Civil War, the Creek Nation ceded the

western portion of its territory, but retained title to the eastern portion and the right to self-government. Treaty with the Creek Nation of Indians, June 14, 1866, arts. III, X, 14 Stat. 786-789.

Over time, law enforcement in the Indian Territory became difficult because tribal courts did not have criminal jurisdiction over the increasing non-Indian population. See *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191, 197-200 (1978). In the Act of May 2, 1890 (1890 Act), ch. 182, 26 Stat. 81, Congress responded by establishing the Territory of Oklahoma in the western portion of the Indian Territory, which had been ceded by the Five Tribes. Ch. 182, §§ 2-28, 26 Stat. 81-93. Congress also expanded the jurisdiction of the United States Court for the Indian Territory, which had been established the previous year, to encompass all civil and criminal cases except those over which the tribal courts had exclusive jurisdiction because both parties were Indians, §§ 29, 31, 26 Stat. 93-94, 96. The 1890 Act further provided that the laws of the United States that prohibited crimes in any place within the sole and exclusive jurisdiction of the United States "shall have the same force and effect in the Indian Territory as elsewhere in the United States." § 31, 26 Stat. 96. With certain exceptions, the criminal laws of Arkansas were extended to the Indian Territory for offenses not governed by federal law. § 33, 26 Stat. 96-97.

b. In 1893, Congress established the Dawes Commission and authorized it to reach agreements with the Five Tribes to "enable the ultimate creation of a Territory of the United States [in the Indian Territory] with a view to the admission of the same as a state in the Union." Act of Mar. 3, 1893, ch. 209, § 16, 27 Stat. 645-646; see *Woodward*, 238 U.S. at 295. Congress envisioned

that to do so the agreements would "overthrow * * * the communal system of land ownership," and "extinguish[] the tribal titles, either by cession * * * or by allotment and division in severalty." *Woodward*, 238 U.S. at 294-295. The Creek Nation and the other Tribes proved reluctant to negotiate. To facilitate allotment, Congress authorized the Dawes Commission to determine citizenship in the Five Tribes, including the Creek Nation. Act of June 10, 1896, ch. 398, 29 Stat. 339-340. And due to the increasing non-Indian population, Congress declared that it was "the duty of the United States to establish a government in the Indian Territory" to "rectify the many inequalities and discriminations now existing in said Territory and afford needful protection to the lives and property of all citizens and residents thereof." Ch. 398, 29 Stat. 340.

In 1897, Congress brought Indians in the Indian Territory under the same jurisdictional and substantive laws applicable to non-Indians. Congress vested the United States courts in the Indian Territory with "exclusive jurisdiction" to try "all civil causes in law and equity" and all "criminal causes" for the punishment of offenses by "any person" in the Indian Territory. Act of June 7, 1897 (Indian Department Appropriations Act), ch. 3, 30 Stat. 83. And Congress made the laws of the United States and Arkansas in force in the Indian Territory applicable to "all persons therein, *irrespective of race*." *Ibid.* (emphasis added).

The next year, Congress passed the Curtis Act, ch. 517, §§ 26, 28, 30 Stat. 504-505, which abolished tribal courts in the Indian Territory and banned the enforcement of tribal law in the United States courts there. Thus, congressional enactments "gradually came to the point where they displaced the tribal laws and put in

force in the Territory a body of laws adopted from the statutes of Arkansas and intended to reach Indians as well as [non-Indian] persons." *Marlin* v. *Lewallen*, 276 U.S. 58, 62 (1928).

c. In 1901, the Creek Nation and the United States entered into the Original Creek Agreement. Act of Mar. 1, 1901, ch. 676, 31 Stat. 861. It provided for the termination of the Creek Nation's government within five years and the allotment of almost all tribal lands. §§ 3, 6, 46, 31 Stat. 862-863, 872. For the period before dissolution, the Agreement substantially diminished the power of the tribal government. § 42, 31 Stat. 872. In 1902, a Supplemental Agreement provided that the statutes of Arkansas in effect in the Indian Territory were to govern the descent and distribution of allotments, Act of June 30, 1902, ch. 1323, § 6, 32 Stat. 501, and that all funds of the Creek Nation not needed to equalize the allotments' value were to be paid out on a per capita basis "on the dissolution of the Creek tribal government," § 14, 32 Stat. 503. The Original and Supplemental Creek Agreements thus "embodied an elaborate plan for terminating the tribal relation and converting the tribal ownership into individual ownership." *Marlin*, 276 U.S. at 63. Congress continued that plan in 1904, confirming that "[a]ll the laws of Arkansas heretofore put in force in the Indian Territory are hereby continued and extended in their operation, so as to embrace all persons and estates in said Territory, *whether Indian, freedmen, or otherwise*." Act of Apr. 28, 1904 (1904 Act), ch. 1824, § 2, 33 Stat. 573 (emphasis added).

d. Nearing completion of its project in 1906, Congress passed the Five Tribes Act, ch. 1876, 34 Stat. 137, to "provide for the final disposition of the affairs of the Five * * * Tribes in the Indian Territory." The Act

abolished tribal taxes and directed the Secretary of the Interior to assume control over the collection of all revenues accruing to the Tribes, to sell off any remaining unallotted lands, and (once all claims against a Tribe were paid) to distribute any remaining funds to tribal members on a per capita basis. §§ 11, 17, 28, 34 Stat. 141, 143-144, 148. The Secretary was directed to sell all buildings used for tribal purposes and to take over tribal schools until territorial or state schools were established. §§ 10, 15, 34 Stat. 140-141, 143. Due to delays in the allotment and enrollment processes, the Act extended the tribal governments "until otherwise provided by law." § 28, 34 Stat. 148. But Congress made clear that it continued to intend "dissolution" of the tribal governments. § 11, 34 Stat. 141. In the meantime, Congress prohibited the tribal governments from sitting for more than 30 days per year, barred them from enacting legislation or entering certain contracts without presidential approval, and gave the Secretary authority to replace the principal chief in certain circumstances. §§ 6, 28, 34 Stat. 139, 148.

e. Finally, Congress passed the Oklahoma Enabling Act of June 16, 1906, ch. 3335, 34 Stat. 267, which authorized the creation of a new State out of the Oklahoma and Indian Territories. The Enabling Act provided that cases arising under federal law that were pending in the district courts of the Oklahoma Territory and in the United States courts in the Indian Territory were to be transferred to the newly created United States District Courts for the Western and Eastern Districts of Oklahoma, respectively. *Ibid.* All other pending cases—*i.e.*, those of a local nature—were to be transferred to the new state courts of Oklahoma, the "successors" to the

United States courts in the Oklahoma and Indian Territories. §§ 16, 20, 34 Stat. 276, 277, as amended by Act of Mar. 4, 1907, ch. 2911, § 3, 34 Stat. 1286-1288; see *Southern Sur. Co.* v. *Oklahoma*, 241 U.S. 582, 586 (1916). That included cases involving Indians on Indian lands, to which the laws of Arkansas had been applied in 1897 and 1904 in the same manner as for all other persons. But the Enabling Act extended the laws of the Oklahoma Territory over the Indian Territory, in place of the laws of Arkansas, until the new state legislature provided otherwise. §§ 2, 13, 21, 34 Stat. 268-269, 275, 277-278.

f. This statutory history demonstrates that Congress disestablished the Creek Nation's territory and largely stripped its governmental authority. In contrast to this Court's prior cases finding a continuing reservation, Congress did not merely open the Creek Nation's lands for settlement by non-Indians and make the proceeds available for the continuing benefit of the Tribe or its members. *E.g.*, *Nebraska* v. *Parker*, 136 S. Ct. 1072, 1079 (2016); *Solem*, 465 U.S. at 474-475; *Mattz* v. *Arnett*, 412 U.S. 481, 495-496 (1973); *Seymour* v. *Superintendent of Wash. State Penitentiary*, 368 U.S. 351, 355-356 (1962). Instead, Congress broke up the Creek Nation's domain, substituting individual for communal ownership and distributing the proceeds to individual Indians. Congress also eliminated the Creek Nation's tribal courts and provided for the dissolution of the tribal government, divestment of tribal property, and distribution of tribal funds. These actions demonstrate that Congress did not intend for the Creek Nation's historic lands to constitute a continuing reservation.

2. Indeed, Congress, the Dawes Commission, and the Creek Nation all contemporaneously understood that Congress's actions would disestablish the Creek Nation's territory. See *Solem*, 465 U.S. at 471.

a. Congress concluded that the current system of communal land ownership and tribal government was a "complete failure." *Woodward*, 238 U.S. at 296-297. Congress therefore determined that change was "imperatively demanded" and required breaking up the Creek Nation's lands and "establish[ing] a government over [non-Indians] and Indians of [the Indian] Territory in accordance with the principles of our constitution and laws." S. Rep. No. 377, 53d Cong., 2d Sess. 12-13 (1894).

b. The Dawes Commission explained that Congress's goal was not simply to open Indian lands to non-Indian settlement, but rather to "clos[e] the history of these [Indian] nations" by "bring[ing] about such changes as would enable * * * the admission of [a new] State of the Union." H.R. Doc. No. 5, 56th Cong., 2d Sess. 162 (1900); Felix S. Cohen, *Handbook of Federal Indian Law* § 6, at 429-430 (1st ed. 1942); see also *Woodward*, 238 U.S. at 296. This goal required not only "the allotment of the land, * * * but also * * * the effacement of the tribal governments." H.R. Doc. No. 5, 59th Cong., 1st Sess. 224-225 (1905).

c. The Creek also recognized that Congress had proposed "disintegrating the land of our people," which would mean "the civil death of the Muscogee Nation" so that it could "be transformed into a State of the Union." Creek Memorial, S. Doc. No. 111, 54th Cong., 2d Sess. 1, 5-6, 8 (1897). The Creek sought simply to "preserve[] unimpaired" their "chief safeguard, the national title to the land patented to us," until they had negotiated an agreement to ensure that they were not "overwhelmed

by an alien and strange population at the first election" and then "robbed by State taxation" and "oppressed by discriminating laws" when "the [Creek] nation ceases." *Id.* at 1-2.

3. Subsequent events underscore that Congress disestablished the Creek Nation's original territory. See *Solem*, 465 U.S. at 471.

a. In the years following Oklahoma statehood, Congress enacted several statutes eliminating certain restrictions on the alienation of Creek allotments and subjecting restricted lands to state-court jurisdiction. *E.g.*, Act of May 27, 1908, ch. 199, 35 Stat. 312; Act of June 14, 1918, ch. 101, 40 Stat. 606; Act of Apr. 10, 1926, ch. 115, 44 Stat. 239-240; Act of Aug. 4, 1947, ch. 458, 61 Stat. 731. Those provisions underscore that Congress had no intention to preserve the entire Indian Territory—including even *unrestricted* lands—as federal Indian country.

Indeed, Congress recognized that the Five Tribes were not living on reservations. It excluded Oklahoma from the Indian Reorganization Act of 1934, 25 U.S.C. 5101 *et seq.*, because that Act "was more adapted to Indian[s] living on reservations, * * * and not Indians [in Oklahoma] residing on allotments." *A Bill to Promote the General Welfare of the Indians of the State of Oklahoma and for Other Purposes: Hearings on S. 2047 Before the Senate Comm. on Indian Affairs*, 74th Cong., 1st Sess. 9 (1935); see also S. Rep. No. 1232, 74th Cong., 1st Sess. 6 (1935) (recognizing, in connection with the Oklahoma Indian Welfare Act, 25 U.S.C. 5201 *et seq.*, that "all Indian reservations as such have ceased to exist"). In a letter to the Attorney General in 1942, the Assistant Secretary of the Interior likewise opined that as a result of statutes culminating in the Enabling Act, the

"Indian reservations" in the "Indian Territory * * * ha[ve] lost their character as Indian country." App., *infra*, 4a. Subsequently, Congress has repeatedly defined "[r]eservation" for specific statutory purposes to encompass "*former* Indian reservations in Oklahoma." 25 U.S.C. 1452(d) (emphasis added).[3]

b. This Court's decisions underscore that the Creek Nation's historic territory does not constitute a "reservation" today. In *Oklahoma Tax Commission* v. *United States*, 319 U.S. 598 (1943), the Court noted that while some "Indian tribes [are] separate political entities with all the rights of independent status," that "condition * * * has not existed for many years in the State of Oklahoma." *Id.* at 602. Members of the Five Tribes, the Court explained, "are actually citizens of the State with little to distinguish them from all other citizens except for their limited property restrictions and their tax exemptions." *Id.* at 603; see *id.* at 608-609; *McClanahan* v. *Arizona State Tax Comm'n*, 411 U.S. 164, 171 (1973) (describing *Oklahoma Tax Commission* as a case in which Indians had "left the reservation and become assimilated into the general community.").[4]

4. The court of appeals therefore erred in holding that the Creek Nation's historic territory constitutes a present-day reservation. Reviewing the statutory text,

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[3] Accord, *e.g.*, 12 U.S.C. 4702(11); 25 U.S.C. 2020(d)(1) and (2), 3103(12), 3202(9); 29 U.S.C. 741(d) (Supp. II 2014); 33 U.S.C. 1377(c) (Supp. II 2014); 42 U.S.C. 2992c(2), 5318(n)(2); see also Cohen 2012 § 4.07[1][b], at 292 n.41.

[4] Demographic evidence further supports disestablishment. See *Parker*, 136 S. Ct. at 1078-1079, 1081-1082; *Solem*, 465 U.S. at 471. Even by 1906, "four-fifths of the inhabitants of the [Indian] Territory ha[d] no connection whatever with the tribes and [we]re [non-Indian] people." H.R. Rep. No. 496, 59th Cong., 1st Sess. 10 (1906).

the court unduly focused on the "traditional textual signs" and "hallmarks" that this Court has found telling in prior disestablishment cases. Pet. App. 59a, 102a; see *id.* 74a, 76a, 95a. But in the unique context of the Five Tribes and the creation of the State of Oklahoma—in which Congress did not merely open Indian lands to non-Indian settlement, but instead broke up the Creek Nation's domain, eliminated its courts, and provided for the dissolution of its government, the divestment of its property, and the distribution of its funds—it was unnecessary for Congress to use the words "lump sum payment" or "public domain," or provide for the tribe to "cede" land to the United States. *Id.* at 76a. Such verbal formulations would have been ill-suited to Congress's purpose and the way in which it chose to disestablish the Tribe's territory. The court of appeals also gave insufficient weight to the contemporaneous understanding of Congress, the Dawes Commission, and the Creek people, as well as to the subsequent practice in the state and federal courts, all of which confirm the disestablishment of the Creek Nation's historic domain.

B. The State Of Oklahoma In Any Event Has Jurisdiction Over Respondent's Crime

Even if the Creek Nation's original territory could somehow be considered a present-day reservation in some sense, Oklahoma still would have criminal jurisdiction over respondent's crime. The statutory history of Oklahoma jurisdiction over crimes involving Indians in the former Indian Territory is unique. Nothing in Congress's subsequent enactment in 1948 of the general definition of "Indian country" as including Indian reservations, 18 U.S.C. 1151(a), reveals an intent to implicitly repeal the relevant Acts of Congress and divest state jurisdiction.

1. Four of the Acts discussed above are especially significant. First, in 1897, Congress granted the United States courts in the Indian Territory "exclusive jurisdiction" to try "all civil causes in law and equity" and all "criminal causes" involving offenses by "any person" "irrespective of race." Indian Department Appropriations Act, ch. 3, 30 Stat. 83. The goal was "to place Indians upon precisely the same plane as the [non-Indians], giving them the same rights" under the law. 29 Cong. Rec. 2324 (1897) (Sen. Berry); see *id.* at 2305 (Sen. Vest).

Second, the Curtis Act abolished all tribal courts in the Indian Territory and barred enforcement of tribal law in the U.S. courts. §§ 26, 28, 30 Stat. 504-505.

Third, the 1904 Act confirmed that the application of Arkansas law "embrace[d] all persons and estates in [the Indian] Territory, whether Indian, freedman, or otherwise." § 2, 33 Stat. 573.

Fourth, the Enabling Act extended the territorial laws in force in the Oklahoma Territory over the entire State. §§ 2, 13, 21, 34 Stat. 268-269, 275, 277-278; see also *Stewart* v. *Keyes*, 295 U.S. 403, 409-410 (1935); *Jefferson* v. *Fink*, 247 U.S. 288, 292-293 (1918). And it sent pending criminal cases that did not arise under federal law—that is, cases of a local nature—to the new Oklahoma state courts. Enabling Act §§ 16, 20, 34 Stat. 276, 277. The Enabling Act thus brought the members of the Five Tribes under the jurisdiction and substantive laws of the State.

2. After statehood, the federal and state courts consistently interpreted these Acts to confer broad criminal jurisdiction on the State. Judge Campbell of the new United States District Court for the Eastern District of Oklahoma ordered that "all prisoners" then

awaiting trial "in the custody of the United States marshals" be delivered to the "state authorities," except where the offense was "of a federal character," on the ground that the Enabling Act had deprived the federal courts of jurisdiction over such cases. *Ex parte Buchanen*, 94 P. 943, 945 (Okla. 1908); *Many May Escape Law*, Muskogee Times-Democrat, Dec. 4, 1907, at 1. The Supreme Court of Oklahoma held that state courts had assumed jurisdiction of all crimes "not of a federal character" in the former Indian Territory—which it described as crimes not committed "within a fort or arsenal or in such place in said territory over which jurisdiction would have been solely and exclusively within the jurisdiction of the United States, had it at that time been a state." *Ex parte Buchanen*, 94 P. at 944. And Oklahoma state courts regularly exercised criminal jurisdiction over crimes involving Indians in the former Indian Territory. *E.g.*, *McGlassen* v. *State*, 130 P. 1174, 1174 (Okla. Crim. App. 1913); *Rollen* v. *State*, 125 P. 1087, 1088 (Okla. Crim. App. 1912); see Pet. 27-28 & nn.5-6.

This Court's decision in *Hendrix* v. *United States*, 219 U.S. 79 (1911), also supports the understanding that the State obtained general criminal jurisdiction over Indians in the former Indian Territory. There, an Indian defendant indicted for murder prior to statehood had successfully moved to transfer his case from the Court for the Indian Territory to a federal court in Texas, under a special statute to protect against bias. Following statehood, he contended that the Enabling Act prohibited the Texas federal court from trying him and required the transfer of his case to state court in Oklahoma. The Court rejected that argument, concluding that the statute permitting transfer continued to permit

the defendant's prosecution in the Texas court. *Id.* at 90-91. But the Court did not question the premise of the defendant's argument that criminal cases involving Indians pending in the Court for the Indian Territory were to be transferred to state court.

3. If state courts did not have jurisdiction over crimes committed by Indians against other Indians following statehood, then *no court* would have had jurisdiction. Federal jurisdiction over such crimes was limited to listed major crimes, Indian Major Crimes Act § 9, 23 Stat. 385, and the tribal courts had been abolished since 1898. Thus, if the decision below were correct, then from statehood through the reestablishment of the tribal courts years later, see *Muscogee (Creek) Nation* v. *Hodel*, 851 F.2d 1439, 1443-1447 (D.C. Cir. 1988) (holding that the Oklahoma Indian Welfare Act authorized reestablishment of the Creek Nation's courts), cert. denied, 488 U.S. 1010 (1989), *no* court would have had jurisdiction over many crimes committed by Indians in the former Indian Territory.

4. The statutory definition of "Indian country" to include "land within the limits of any reservation under the jurisdiction of the United States," 18 U.S.C. 1151(a), does not alter this analysis. Congress enacted that definition as part of its comprehensive revision of the federal criminal code in 1948. Act of June 25, 1948, ch. 645, 62 Stat. 757. That general provision does not specifically address or aptly describe the unique situation of the Five Tribes in the former Indian Territory, and there is no indication that Congress intended to repeal the existing jurisdictional framework there. See, *e.g.*,

National Ass'n of Home Builders v. *Defenders of Wildlife*, 551 U.S. 644, 662 (2007) ("repeals by implication are not favored") (citation omitted).[5]

5. Thus, for 80 years—from Oklahoma statehood until the late 1980s—the United States and Oklahoma understood that the State had jurisdiction over crimes involving Indians in the former Indian Territory. The state courts exercised that jurisdiction regularly, and the issue appeared settled in 1936, when the Oklahoma Court of Criminal Appeals held (albeit on a different theory) that the State had jurisdiction over the murder of one Choctaw Indian by another on a restricted allotment. *Ex parte Nowabbi*, 61 P.2d 1139, 1156.

In the late 1980s, however, the Oklahoma courts held that the State "does not have jurisdiction over crimes committed by or against an Indian" on restricted allotments within the former Indian Territory, *State* v. *Klindt*, 782 P.2d 401, 403 (Okla. Crim. App. 1989), relying on the definition of "Indian country" enacted in 1948 to include "all Indian allotments, the Indian titles to which have not been extinguished," 18 U.S.C. 1151(c). Accord *Cravatt* v. *State*, 825 P.2d 277, 279 (Okla. Crim. App. 1992); *State* v. *Brooks*, 763 P.2d 707, 710 (Okla. Crim. App. 1988), cert. denied, 490 U.S. 1031 (1989). The Tenth Circuit reached the same conclusion in 1992. *United States* v. *Sands*, 968 F.2d 1058, 1061-1063, cert. denied, 506 U.S. 1056 (1993).

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[5] The Secretary of the Interior reached the same conclusion, stating in a 1963 opinion that codification of the "Indian country" definition "does not appear to require revision" of the Secretary's earlier determination that Oklahoma maintained jurisdiction "over offenses committed by and against Indians on restricted allotments" in the former Indian Territory. App., *infra*, 8a.

In its amicus brief in support of the certiorari petition in *Brooks* (No. 88-1147), and its response to the petition in *Sands* (No. 92-6105), the United States argued that the State possessed jurisdiction over crimes committed by or against Indians throughout the former Indian Territory, including on restricted allotments. This Court, however, denied the petitions, and the United States has exercised jurisdiction over crimes committed by or against Indians on trust lands and restricted allotments in the former Indian Territory since 1992. The United States did not urge this Court to grant review on the question of jurisdiction over allotments when respondent sought certiorari from the denial of his state habeas petition. U.S. Br. at 15 & n.8, *Murphy* v. *Oklahoma*, 551 U.S. 1102 (2007) (No. 05-10787). That question turns on the enactment of 18 U.S.C. 1151(c) in 1948 and is not directly presented here. Pet. App. 17a & n.10. There accordingly is no occasion for the Court to address the United States' jurisdiction over allotments in this case.

C. The Question Presented Is Extremely Important

The decision below has wide-ranging and serious implications for law enforcement. For more than a century, the United States and Oklahoma have operated on the understanding that the State has jurisdiction to try offenses committed by Indians within the original boundaries of the Creek Nation. The United States has not exercised law enforcement authority over such offenses —except since the late 1980s on trust lands and remaining restricted allotments, which comprise less than five percent of the land within the Creek Nation's former territory. Nor has the Creek Nation exercised other forms of governmental authority over unrestricted lands within its former territory.

If the decision below were permitted to stand, it would vastly increase the scope of federal jurisdiction over crimes involving Indians in eastern Oklahoma. The federal government would have exclusive jurisdiction over most crimes by or against Indians in most of eight counties, including the City of Tulsa, with a total population of about 950,000 people.[6] That expansion could result in a massive increase in the federal government's Indian-related law-enforcement responsibilities: In 2017, federal prosecutors in the Eastern District of Oklahoma brought just three felony indictments based on Indian country jurisdiction; that number could increase to more than 500 indictments annually under the Tenth Circuit's decision.[7] Misdemeanor prosecutions

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[6] These counties include Tulsa, Creek, Wagoner, Okmulgee, Okfuskee, Muskogee, McIntosh, and Hughes. The original boundaries of the Creek Nation also extend slightly into the Northern District of Oklahoma in northern Tulsa County (outside the City of Tulsa) and small portions of Rogers and Mayes Counties. For population estimates, see U.S. Census Bureau, U.S. Dep't of Commerce, *Quick Facts*, https://www.census.gov/quickfacts/fact/table/US/PST045217.

[7] In 2016, the Oklahoma district attorney's office in Tulsa County filed 7851 felony indictments, The Supreme Court of Oklahoma, *Annual Report Fiscal Year 2016*, at 14, http://www.oscn.net/static/annual-report-2016.pdf; Tulsa County's population was approximately 640,000 people, U.S. Census Bureau, U.S. Dep't of Commerce, *Quick Facts*: *Tulsa County*, *Oklahoma*, https://www.census.gov/quickfacts/fact/table/tuslacountoklahoma/PST045216. Applying the resulting felony-indictment rate of 1.23% to the roughly 43,000 Creek Nation members who live within the Nation's original territory, see The Muscogee (Creek) Nation, *Facts and Stats* (Apr. 18, 2016), http://www.mcn-nsn.gov/services/citizenship/citizenship-facts-and-stats/, yields an estimate of 529 felony indictments against Nation members each year. This estimate does not include indictments against members of other tribes residing in the area, or indictments

would add even more to the caseload. The federal government lacks sufficient investigatory and prosecutorial resources in the area to handle that volume of cases; the FBI currently has the equivalent of seven agents for all of eastern Oklahoma. What is more, the decision below "raises the specter that hundreds or thousands of state convictions involving tribal members in the eastern half of Oklahoma will be subject to collateral attack." Pet. 21.[8]

The Tenth Circuit's reasoning could well extend to the original territories of each of the Five Tribes, expanding federal jurisdiction over nearly *all* of eastern Oklahoma. See Pet. 17-18. And it could have significant implications for application of state tax and other civil laws to Indians in the former Indian Territory. See, *e.g.*, *Oklahoma Tax Comm'n* v. *Sac & Fox Nation*, 508 U.S. 114 (1993). The decision below thus threatens to disrupt the distribution of governmental authority in nearly half of Oklahoma.

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for offenses by non-Indians against Indians, which would be subject to exclusive federal jurisdiction under the decision below.

[8] The Tenth Circuit previously held that a decision shifting Indian country jurisdiction from federal to state courts would not apply retroactively on collateral review. *United States* v. *Cuch*, 79 F.3d 987, 995, cert. denied, 519 U.S. 963 (1996). But the State in this case did not argue non-retroactivity as to respondent, and the court granted relief on collateral review, reasoning, in dicta, that the *Solem* framework it applied was not new. Pet. App. 57a-58a n.36.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

NOEL J. FRANCISCO
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JEFFREY H. WOOD
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MARCH 2018

APPENDIX A

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SECRETARY
WASHINGTON

Office of the Solicitor

Aug. 17, 1942

The Honorable

The Attorney General.

Sir:

In a letter of April 28, 1941, from the Assistant Attorney General (your file WB:CAP:vng 90-2-017-60) the views of this Department were requested respecting the jurisdiction of the State and Federal courts in Oklahoma in cases involving crimes committed by and against Indians on the restricted Indian allotments in the area which was the Indian Territory and those in the area which was the Oklahoma Territory.

A mass of statutory provisions showing the changing and developing jurisdiction of courts in these areas has been found and most of the relevant provisions have been summarized or quoted in the attached memorandum. Because of the complexities of the matter this Department cannot speak with certainty with respect to the present jurisdiction but is presenting the following analysis and conclusions for your consideration.

Prior to the creation of the Oklahoma Territory and the Indian Territory by the act of May 2, 1890 (26 Stat. 81), the whole area was known as the Indian Territory. During this period the Government recognized the ex-

clusive jurisdiction of the Indian tribes over their own members and even over nonmembers within their territories. There were a few statutes defining crimes within this Territory and providing for a United States court for the prosecution of these crimes. However, as indicated in the reference to these statutes in paragraphs 1, 2, and 3 of the attached memorandum, these statutory provisions excluded from their application crimes committed by Indians. The act of March 3, 1885 (23 Stat. 385, 18 U.S.C. sec. 548), probably did not apply to the old Indian Territory, since there were no Territorial organization, laws and courts to function under the statute (*In re Jackson*, 40 Fed. 372. C.C. Kans., 1889).

Upon organization under the act of May 2, 1890, the United States district courts in the Oklahoma Territory and the Indian Territory were given jurisdiction by sections 12 and 36, respectively, of crimes by Indians against Indians of other tribes to the same extent as if such crimes were committed by citizens. This grant of jurisdiction increased the jurisdiction which I believe these courts automatically obtained under section 548 of title 18 of the named crimes committed by Indians against Indians or others. These district courts had a dual role. As United States courts they enforced the Federal laws and as Territorial courts they enforced the Territorial laws, being at the outset the laws of Nebraska in the Oklahoma Territory and the laws of Arkansas in the Indian Territory. As United States courts enforcing Federal law they had jurisdiction over crimes committed by white persons against either Indians or other persons under section 217 of title 25 of the United States Code (*Brown v. United States*, 146 Fed. 975 (C.C.A. 8th, 1906)). As Territorial courts

they could enforce section 548 of title 18 by the trial of the Indians committing the crimes named therein in the same manner as such crimes were tried when committed by other persons. As Territorial courts they could also try Indians for crimes committed against Indians not members of the tribe in the same manner as in the case of other persons.

The act of June 7, 1897 (30 Stat. 83), and subsequent statutes relating to the Indian Territory completely altered the situation in that Territory with respect to jurisdiction over Indian crimes. The 1897 act placed in the district courts jurisdiction over all crimes committed by any person in the Indian Territory, and the laws of Arkansas in force in the Territory were made to apply to all persons, regardless of race. Subsequent acts abolished the Indian courts and tribal jurisdiction and organization. These acts, therefore, removed the essential characteristic of the Indian country, which was the application of tribal laws within the area. Since the Territorial laws were made to apply to all persons in the Indian Territory, both section 548 of title 18 and section 217 of title 25 were apparently superseded. This conclusion is fortified by the act of March 3, 1901 (31 Stat. 1447), which gave citizenship to every Indian in the Indian Territory and by the last proviso in the act of May 8, 1906 (34 Stat. 182), which provided that the Indians in the Indian Territory should not be covered by the provision subjecting all Indian allottees to the exclusive jurisdiction of the United States until the issuance of fee simple patents. No similar changes in jurisdiction were made in the Oklahoma Territory.

Upon the organization of the State of Oklahoma pursuant to the Enabling Act of June 16, 1906 (34 Stat. 267), the State courts succeeded to the jurisdiction of the Territorial courts, except as to the crimes defined by Federal law which were placed within the jurisdiction of the Federal courts. The State courts, therefore, apparently acquired jurisdiction of all Indian crimes in that part of the State which had been the Indian Territory. In that part of the State which had been Oklahoma Territory it is my opinion that the second part of section 548 of title 18 had immediate application, placing in the Federal courts jurisdiction of the named crimes committed by Indians in Indian reservations in the States. This part of section 548 did not apply to the Indian Territory part of the State, since the Indian reservations therein had lost their character as Indian country.

The conclusions of this Department thus follow substantially the decision of the Supreme Court in the case of *United States v. Ramsey*, 271 U.S. 467, and the opinion of the Oklahoma Supreme Court in *Ex parte Nowabbi*, 61 P.(2d) 1139. The *Ramsey* case held that a restricted allotment on the Osage Reservation, which had been a part of the Oklahoma Territory, was Indian country within the meaning of section 217 of title 25, and that therefore the Federal court had jurisdiction of a crime committed by a white person against an Indian. Of course, any jurisdiction under section 217 of crimes exclusively involving white persons on the Indian reservations was lost by the acquisition of statehood, as in the case of other States. The *Nowabbi* case held that the State courts had jurisdiction over a crime by one Indian against another committed on a restricted allotment in the area formerly the Indian Territory.

The conclusions of the Department may be summarized as follows:

(1) In that part of Oklahoma which was the Indian Territory a restricted Indian allotment is no longer Indian country and section 217 of title 25 does not apply to give the Federal courts jurisdiction of crimes against Indians and section 548 of title 18 does not apply to give the Federal courts jurisdiction of the named crimes by Indians. Jurisdiction of all crimes by and against Indians is in the State courts.

(2) In that part of the State which was Oklahoma Territory a restricted Indian allotment continues to have the character of Indian country in the same manner as restricted allotments and reservations elsewhere in the country, with the possible exception of crimes committed by Indians against nonmember Indians, which crimes are apparently within the jurisdiction of the State courts as a result of the 1890 statute. On these allotments both section 217 of title 25 and section 548 of title 18 apply. Crimes between Indians of the same tribe which are not covered by section 548 remain subject to tribal jurisdiction.

The presentation of these legal conclusions should be accompanied by some statement of the practical situation. None of the tribes in Oklahoma has exercised criminal jurisdiction in recent years and none has a court of Indian offenses established either by the tribe or under the regulations of this Department. It is therefore important that some definite criminal procedure be established for crimes not embraced by Federal or State law. In view of the complexities of jurisdiction in Oklahoma and in view of this practical problem this Department would be glad to receive your suggestions

as to the substance of a bill which might be presented to Congress on the subject.

Very truly yours,

(Sgd.) OSCAR L. CHAPMAN
Assistant Secretary.

Enclosure 690427.
CTL:mvp

APPENDIX B

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SECRETARY
WASHINGTON 25, D.C.

Mar. 27, 1963

Dear Mr. Attorney General:

On November 29, 1962, you wrote me seeking an opinion as to whether it would be a constructive measure for the Department of Justice to appear *amicus curiae* or on behalf of Indians in court cases where States, under questionable authority, have asserted criminal jurisdiction over offenses committed by Indians in Indian country.

Mr. Barry, the Solicitor of the Department of the Interior, has spoken informally with Assistant Attorney General Clark in the interval since your letter was received, pointing out that our reply would be delayed because of the complicated nature of the problem and the need for giving it additional study.

As you are no doubt aware, several States had asserted civil and criminal jurisdiction in Indian country prior to the passage of Public Law 280, 83d Congress, despite the fact that no Federal statutes of relinquishment and transfer had been enacted. Foremost among these were Michigan, Oklahoma, North Carolina, and Florida. Jurisdiction was also been asserted by certain counties in such States as Washington, Nevada, and Idaho. Following the enactment of Public Law 280, Nevada, Washington, and Florida passed legislation either bringing Indian country under their jurisdiction, or

permitting tribes to petition for such jurisdiction, or providing local option for the assumption of jurisdiction by individual counties. The other States mentioned above did not take such action, although they have continued to assert jurisdiction. Officials of both Oklahoma and North Carolina have contended in letters to this Department that they have criminal jurisdiction over the Indians of their States irrespective of the fact that they do not have such jurisdiction under a specific Federal statute, and the States themselves have not taken positive action under the provisions of Public Law 280.

On August 17, 1942, the views of this Department concerning the jurisdiction of the State of Oklahoma over offenses committed by and against Indians on restricted Indian allotments in the State was furnished your Department. Your reference on the matter was WB:CAP 90-2-017-60. The adoption in 1948 of the current statutory definition of Indian country in 18 U.S.C. § 1151 does not appear to require revision of the jurisdictional conclusions stated in our 1942 letter and summary. These conclusions were that restricted Indian allotments in the part of Oklahoma which was formerly Indian Territory were no longer Indian country, but that such allotments in the part of the State which was formerly Oklahoma Territory continued to have the character of Indian country in the same manner as restricted allotments elsewhere in the country, with the possible exception of crimes committed by Indians against non-member Indians. In the latter instance, it was pointed out that such crimes apparently were within the jurisdiction of the State courts as a result of the Act of May 2, 1890 (26 Stat. 81).

It is generally true that in the areas where States are exercising criminal jurisdiction under doubtful authority, the Indian tribes are not in a financial position to assume any law and order responsibility for themselves. Furthermore, the Bureau of Indian Affairs at this time does not have sufficient staff nor funds to take over law enforcement for them. If, however, the jurisdiction of the States within Indian country were to be successfully challenged by the Federal Government, it would then appear incumbent on our Department to provide the Indians appropriate substitute systems of law and order. In this connection, we would need to explore present capabilities for establishing reservation courts, and you would undoubtedly wish to consider the impact that the prosecution of petty offenses under 16 U.S.C. § 1132 would have upon your United States Attorneys and the Federal Courts. Consideration will also have to be given to the fact that many of those Indians have long since abandoned tribal self- government and have become accustomed to looking to the State for the maintenance of law and order in their communities.

I therefore feel it vital to the overriding interest of the Indians in the maintenance of law and order that members of our two Departments confer on what presently can be done by our Departments to see that where States are determined not to have criminal jurisdiction over Indians in Indian country, a breakdown of law enforcement will not occur. I am suggesting that Solicitor Barry designate someone to represent his office in such discussions, and shall also ask Commissioner of Indian Affairs Phillco Rash to select a representative for this Bureau. These persons will, I am sure, be available to explore this matter further at a time agree-

able with you and whichever officials for the Department of Justice you may designate as your representatives.

Sincerely yours,

(Sgd.) STEWART L. UDALL
Secretary of the Interior

Hon. Robert F. Kennedy
Attorney General
Department of Justice
Washington 25, D.C.

Followup PRS 0755