Capital Case
No. 17-1107

IN THE
Supreme Court of the United States

TERRY ROYAL, WARDEN,
OKLAHOMA STATE PENITENTIARY
Petitioner,

v.

PATRICK DWAYNE MURPHY,
Respondent.

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

BRIEF IN OPPOSITION

IAN HEATH GERSHENGORN
ZACHARY C. SCHAUF
KATHRYN L. WYNBRANDT*
JENNER & BLOCK LLP
1099 New York Ave., NW
Suite 900
Washington, DC 20001
(202) 639-6000
igershengorn@jenner.com

* *Admitted only in Illinois. Practicing under the supervision of the partnership of Jenner & Block LLP.*

PATTI PALMER GHEZZI
Counsel of Record
RANDY A. BAUMAN
MICHAEL LIEBERMAN
ASSISTANT FEDERAL PUBLIC DEFENDERS
215 Dean A. McGee
Suite 707
Oklahoma City, OK 73102
(405) 609-5975
patti_p_ghezzi@fd.org

CAPITAL CASE

QUESTION PRESENTED

Whether this Court should "revisit the governing standard for the disestablishment of Indian reservations," Pet. 3, which the Court reaffirmed just two Terms ago in *Nebraska v. Parker*, 136 S. Ct. 1072 (2016), to address the Tenth Circuit's unanimous conclusion that Congress did not disestablish the historic reservation of the Muscogee (Creek) Nation ("Creek Nation").

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

INTRODUCTION

As this Court reaffirmed two Terms ago, *Solem v. Bartlett* provides the "well settled" framework for assessing disestablishment. *Nebraska v. Parker*, 136 S. Ct. 1072, 1078-79 (2016). "[O]nly Congress can divest a reservation of its land," and its intent must be "clear[]." *Solem v. Bartlett*, 465 U.S. 463, 470 (1984). This Court starts with "statutory language" (the "most probative" indication of congressional intent), then turns to "circumstances surrounding the" statutes (less probative), and "subsequent history" (least probative). *Parker*, 136 U.S. at 1079, 1081 (quotation marks omitted). Here, the Tenth Circuit unanimously applied *Solem*'s framework in a meticulous 126-page opinion to conclude the Creek reservation remains intact.

Having lost under this framework, Oklahoma asks this Court to "revisit" *Solem* and create a lower standard for disestablishment based on "Oklahoma's unique history." Pet. 3. This argument, however, does not warrant certiorari. First, it is waived. Oklahoma argued the *Solem* factors below, and the Tenth Circuit applied them; Oklahoma did not challenge *Solem*'s framework until now. Regardless, there is no cause to "revisit" *Solem*'s framework when this Court so recently reaffirmed it.

Oklahoma's "unique" history does not in any event justify jettisoning *Solem*. Every State arguing for disestablishment or diminishment invokes its own unique history. Nebraska did so in *Parker*. But *Solem*'s point, reaffirmed in *Parker*, is to prevent such *ad hoc* resolutions. Instead, the Court has focused in disestablishment cases, as for statutes generally, on the

text Congress enacted. Oklahoma's request to abandon settled law and ignore the text because of "unique" circumstances is better directed to Congress than to this Court, particularly because this request is aimed at reinstating Respondent's death sentence.

Moreover, Oklahoma is not unique in any relevant respect. This Court's disestablishment cases concern statutes from the Allotment Era, just like the statutes here. And contra Oklahoma, had Congress intended disestablishment, the textual indicators this Court has looked for were not uniquely unsuitable for Oklahoma. Quite the opposite: When Congress previously diminished the Creek reservation, it used hallmark language of "cession," and when Congress set goals for the federal agents sent to negotiate with the Creek, it did so again. It is therefore telling that similar language of cession is absent from the statutes Oklahoma claims effected disestablishment. Oklahoma's broader suggestion that disestablishment was a necessary function of Oklahoma's statehood cannot be squared with history: In both States and territories, reservations survived allotment. Oklahoma's statehood theory also contradicts the express acknowledgements by all three branches of the federal government that the Creek reservation continued after Oklahoma became a State.

To the extent Oklahoma seeks to rehash the Tenth Circuit's application of *Solem* to the facts, review is likewise unwarranted. Disestablishment cases are notoriously fact-specific, and this Court's most recent application is hot off the presses. Nor is certiorari warranted because the Tenth Circuit has somehow gone rogue. That court recently held that Oklahoma's Osage

reservation was disestablished during the Allotment Era, and that Wyoming's Wind River reservation was diminished. The Tenth Circuit's careful, unanimous, and correct application of settled law in this case thus warrants no further review.

That leaves the decision's supposedly devastating consequences. But in its brief filed in this Court, the United States argues that reservation status has *no* consequences for state criminal cases: It contends that, regardless, Oklahoma may retain jurisdiction. Oklahoma failed to raise that argument below, and it is not in the Petition. So while Respondent believes the United States' new argument is wrong, that is beside the point here. Oklahoma cannot seek review based on "massive disruption" when it has not preserved or presented legal issues that may bear on whether there is any disruption at all.

Regardless, Oklahoma's claims of mass disruption are overstated and misdirected. For example, although the State purports to fear the impact on existing convictions, habeas courts have already made clear that formidable obstacles preclude most challenges. Going forward, too, effects will be modest. To be sure, some small number of criminal cases will be heard in federal court, rather than state court. But when prior decisions adjusted federal/state jurisdictional lines, similar claims that federal resources would be stretched too thin proved false. Any needed regulatory coordination is no different in kind or degree from contingencies federal, state, and tribal institutions manage routinely. And if any genuine issue develops, Congress can and will

exercise its plenary power to address it, in keeping with the many statutes specific to Oklahoma and its tribes.

STATEMENT OF THE CASE

At a time when it was generally believed Congress lacked authority to alter reservations unilaterally, the Creek negotiated successfully to avoid the language this Court deems characteristic of disestablishment—language Congress had used previously to diminish the Creek reservation, and used contemporaneously to disestablish other reservations. Congress's emissary—the "Dawes Commission"—was charged with securing a cession, if possible, of all or part of the Creek lands but reported that the Nation's resistance forced it to abandon such hopes. Instead, it settled for an agreement that left Creek land in Creek hands. Congress enacted the agreement into law, and in its wake Congress, the executive, and the judiciary all acknowledged that the Nation's reservation boundaries endured within Oklahoma. And while Oklahoma after statehood indeed asserted absolute criminal and civil jurisdiction, it did so in *defiance* of Congress's statutes, in furtherance of one of this country's most shameful episodes of plunder and exploitation.

A. Historical background.

1. The Allotment Era.

This case concerns the "Allotment Era," during which Congress came to believe "tribes should abandon … 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" reservation lands to tribal members and sometimes sold

unallotted "surplus" lands to non-Indians. "Initially, Congress legislated … on a national scale" in the 1887 General Allotment Act, *id.*, but subsequently moved to a "reservation-by-reservation" approach. *Id.* at 467. "[T]o a man," those in Congress "believed … within a short time … the reservation system would cease to exist." *Id.* at 468.

If that expectation were enough to "diminish reservations with the passage of every [such] act," few reservations would have survived allotment. *Id.* at 468-69. But the allotment statutes varied widely, and this Court has assessed the "effect of [each such] act," looking closely at "the language" to determine whether the statutes Congress enacted actually accomplished disestablishment. *Id.* at 469. These acts generally memorialized negotiated agreements; indeed, prior to *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903), it was "thought that Indian consent was needed to diminish a reservation." 465 U.S. at 470 n.11. Some acts clearly disestablished reservations, providing reservations were "abolished," Act of April 21, 1904, ch. 1402, Pub. L. No. 58-125, 33 Stat. 189, 218, or that tribes would "cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest," *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 344 (1998) (quoting 28 Stat. 286, 314, art. I); Pet. App. 97a-98a. "[O]ther[s]," lacking such language, "did not" "diminish[] reservations." *Solem*, 465 U.S. at 469.

2. Allotment and the Creek.

The Creek Nation, which once occupied much of Alabama and Georgia, is one of the "Five Civilized Tribes" (with the Choctaw, Chickasaw, Cherokee, and

Seminole). Pet. App. 63a. In the 1830s, the federal government removed the Five Tribes to the "Indian Territory," now Oklahoma. *Id.*

Congress ratified several treaties establishing, then diminishing, the Creek reservation. In 1826, 1832, and 1833, the Creek "'cede[d]'" their eastern lands, receiving in return an Indian Territory reservation, which the Creek held via fee-simple patent. Pet. App. 64a (quoting Treaty with the Creeks, art. 2, Jan. 24, 1826, 7 Stat. 286, 286). In 1856 and 1866, treaties diminished that reservation: The Nation, in return for sum-certain payments, "cede[d]" lands to the Seminoles (1856) and United States (1866). Pet. App. 65a (quoting Treaty with the Creeks, art. 3, June 14, 1866, 14 Stat. 785, 786, 788 ("1866 Treaty")). The 1866 treaty recognized and preserved the Creek's "'reduced … reservation.'" *Id.* (quoting 1866 Treaty arts. 3, 9).

The Indian Territory did not escape the Allotment Era. As elsewhere, non-Indians "pressured Congress to break up the tribal land base, [and] attach freely alienable individual title." Pet. App. 67a. The Creek reservation also faced distinctive problems. For one thing, while treaties provided the Five Tribes' lands should be held "for the equal benefit of the citizens, … in practice" some Creek "appropriate[d] to their exclusive use" the best lands. *Woodward v. De Graffenried*, 238 U.S. 284, 297 (1915); *see Indian Country, U.S.A., Inc. v. Oklahoma ex rel. Okla. Tax Comm'n*, 829 F.2d 967, 977 (10th Cir. 1987) ("problems developed in resolving criminal and civil disputes involving" whites who settled illegally in Indian territory).

Congress hoped to reach agreement with the Creek for a surplus land act, like ones other tribes accepted. In 1893, Congress charged the Dawes Commission with negotiating to "procure, first, … allotment of lands," and "secondly, … cession … of any lands not found necessary to be so allotted …, to the United States." Act of Mar. 3, 1893, ch. 209, § 16, 27 Stat. 612, 646.

The Creek refused. The Commission "abandon[ed] all idea of purchasing" Creek lands because the Creek "would not, under any circumstances, agree to cede any portion of their lands to the Government." Pet. App. 114a (quoting Dep't of the Interior, H.R. Doc. No. 53-1, at LVX (3d Sess. 1894)).

Faced with this refusal, and given the understanding that Congress lacked authority to unilaterally alter tribal land ownership, Congress shifted approach, Pet. App. 114a-115a, enacting laws in 1897 and 1898 that sought (among other things) "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, but not the Five Tribes' legislative jurisdiction over their lands. *Infra* at 9. The 1898 act—the "Curtis Act"—also established a "default allotment scheme," which was to take effect absent a negotiated agreement. Pet. App. 81a-82a. The goal was not to terminate the Nation's treaty-guaranteed reservation; rather, the "manifest purpose," was to ensure that "beneficial use of the tribal domain should be enjoyed equally by all the members of the tribe … according to the true intent and meaning of the early treaties." *Woodward*, 238 U.S. at 305-06.

In 1901, the Creek reached a negotiated allotment agreement, which Congress ratified. Pet. App. 82a. The Commission acknowledged it had not achieved its original aims or what had been accomplished with other tribes. It told Congress that if the Five Tribes had agreed to "a cession to the United States … at a given price," matters would have been "immeasurably simplified," but it emphasized "the great difficulties which have been experienced in inducing the tribes to accept allotment," and stated that "a more radical scheme of tribal extinguishment" was "impossible." Pet. App. 117a (quotation marks omitted).

The agreement succeeded in keeping lands among the Creek: It "provided that '[a]ll lands belonging to the Creek,'" with limited exceptions, *see, e.g.*, Pet. App. 68a-69a, should be allotted "'among the [tribe's] citizens.'" Pet. App. 83a (quoting Act of Mar. 1, 1901, ch. 676, ¶¶ 2–3, 31 Stat. 861, 862 (1901) ("Creek Allotment Agreement")). The Creek thus avoided the cession of "surplus lands" that diminished other reservations.

The 1901 agreement further recognized the Creek government's continued legislative authority over "the lands of the tribe, or of individuals after allotment." Creek Allotment Agreement, ¶ 42. Federal responsibilities also turned on the Nation's borders: The Secretary of Interior was to "collect a grazing tax when cattle were brought 'into the Creek Nation'"; mineral-leasing rules were inapplicable "'in the Creek Nation'"; and the United States agreed to maintain anti-liquor laws "'in said nation.'" Pet. App. 88a (quoting Creek Allotment Agreement, ¶¶ 37, 41, 43). And while the 1901 agreement contemplated dissolution of the tribal

government by March 4, 1906, it made that step "subject to such further legislation as Congress may deem proper." Pet. App. 87a-88a (quoting Creek Allotment Agreement, ¶ 46).

In the meantime, this Court affirmed that neither allotment nor the abolition of tribal courts divested tribal jurisdiction over reservations, and that Congress had instead "permit[ted] the continued exercise" of a tribe's "legislative … power" "within its 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) ("abolition of the tribal courts" did not undermine tribe's "expressly continued legislative power"). In 1905, the Eighth Circuit applied this ruling to the Creek reservation. *Buster v. Wright*, 135 F. 947, 949 (8th Cir. 1905) (upholding "authority" of Creek Nation to govern "within its borders").

Then, in 1906, as the Allotment Era began its slow final phase, Congress passed the 1906 Five Tribes Act, expressly disavowing tribal dissolution and providing that the "present tribal governments … are hereby continued in full force and effect for all purposes authorized by law, until otherwise provided by law[.]" Act of April 26, 1906, ch. 1876, § 28, Pub. L. No. 59-129, 34 Stat. 137, 148 ("Five Tribes Act"); *see* Pet. App. 90a n.54 (interim continuation).

Congress never provided otherwise. Two months later, Congress enacted the Oklahoma Enabling Act. Act of June 16, 1906, ch. 3334, Pub. L. No. 59-233, 34 Stat. 267 ("Enabling Act"); Pet. App. 93a. While paving the way for statehood, Congress mandated that nothing in

the new constitution "limit or impair the rights of person or property pertaining to the Indians of said Territories," or "limit or affect the authority of the Government of the United States to make any law or regulation respecting such Indians, their lands, property, or other rights." Pet. App. 94a (quoting Enabling Act § 1). The Act thus preserved "the control of the United States of the large Indian reservations … of the new state." *Coyle v. Smith*, 221 U.S. 559, 570 (1911).

The Act again recognized Creek borders: It specified that one House district would "comprise all the territory now constituting the Cherokee, Creek, and Seminole nations." Pet. App. 94a (quoting Enabling Act § 6). Days later, Congress confirmed "the west boundary line of the Creek Nation." Pet. App. 101a (quoting Act of June 21, 1906, ch. 3504, Pub. L. No. 59-258, 34 Stat. 325, 364).

3. Subsequent recognition of Creek reservation boundaries.

The Executive Branch and courts also continued to recognize Creek reservation boundaries. "The [Bureau of Indian Affairs'] annual reports following … Oklahoma statehood consistently included the Creek Nation in tables summarizing reservation statistics." Pet. App. 123a. Likewise, when the Department of Interior produced "Maps Showing Indian Reservations," it included the Nation's 1866 boundaries. *See* Br. *Amicus Curiae* of Muscogee (Creek) Nation, App'x C at 29 (10th Cir. Aug. 12, 2016) (attaching map).

Courts, too, recognized that the reservation endured. After the Enabling Act, *U.S. Express Co. v. Friedman*, 191 F. 673 (10th Cir. 1911), rejected the argument that the "Indian Territory ceased to be Indian country upon the admission of Oklahoma as a state," observing that the Five Tribes "owned about 3,000,000 acres or more of land," and "[i]t would indeed be difficult to show how this land ceased to be Indian country." *Id.* at 678-79.

4. Assaults on the Creek Nation.

In the following decades, the Creek suffered setbacks to land and government. But these occurred despite, not because of, Congress's statutes.

The Bureau of Indian Affairs ("BIA") played a part. It opposed the decision to preserve the Creek government. *Harjo v. Kleppe*, 420 F. Supp. 1110, 1130 (D.D.C. 1976), *aff'd sub nom. Harjo v. Andrus*, 581 F.2d 949 (D.C. Cir. 1978). So, in a campaign of "bureaucratic imperialism," it "behaved as though it had been successful in its efforts to prevent" 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 unfolding on the ground. In the early 20th century, oil was discovered. That yielded "an orgy of plunder and exploitation probably unparalleled in American history," as Creek citizens were swindled out of their allotments. Angie Debo, *And Still the Waters Run* 91 (1940). There was "legalized robbery" through courts, and entire land companies formed solely for the "systematic and wholesale exploitation of the Indian through evasion or defiance of the law." *Id.* at 117, 182.

For its part, in the wake of statehood, Oklahoma made outsized claims about its courts' jurisdiction over Indians, culminating in *Ex parte Nowabbi*. There, Oklahoma prosecuted one Choctaw for murdering another on an allotment, and the Oklahoma Court of Criminal Appeals ("OCCA") held it had authority to do so, rejecting arguments that federal jurisdiction was exclusive. 61 P.2d 1139, 1141-42 (Okla. Crim. App. 1936).

With time, Oklahoma's overreach became clear. Its courts disavowed *Nowabbi* three decades ago. *See State v. Klindt*, 782 P.2d 401, 404 (Okla. Crim. App. 1989); *State ex rel. May v. Seneca-Cayuga Tribe of Oklahoma*, 711 P.2d 77, 81 & n.17 (Okla. 1985). In 1987, the Tenth Circuit held that unallotted Nation-owned lands retained reservation status, reserving whether the full "exterior boundaries" remain intact. *Indian Country*, 829 F.2d at 972, 975 n.3.

5. The Creek Nation today.

The Nation never succumbed. With the 1936 Oklahoma Indian Welfare Act, its government "saw many of its powers restored," including its judicial powers. Pet. App. 130a. The Nation's new constitution, which Congress ratified, confirmed that Creek "political jurisdiction" is coextensive with the 1866 reservation boundaries and based on familiar separation-of-powers principles. Constitution of Muscogee (Creek) Nation, art. I, § 2.

Today, the Nation is thriving. It is a driver of regional economic growth, commands an annual budget

of $300 million, and employs 4,000 people.[1] The Nation operates hospitals, offers educational services, and provides other community resources to Indian and non-Indian citizens.[2] Creek law enforcement is formidable. The federally trained police force—the Lighthorse Tribal Police Department—has a dedicated K-9 Unit and Major Crimes Investigation Division. *See Amicus Curiae* Muscogee (Creek) Nation Br. in Opp. to Pet. for Reh'g En Banc at 8 (10th Cir. Oct. 25, 2017) ("Creek Reh'g *Amicus* Br."). Lighthorse officers work in partnership with the Muskogee County Sheriff's Department and have cross-deputization agreements with the BIA and most of the 40 municipal and county governments within the reservation.[3]

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

---

[1] Mvskoke Media, *2018 budget passes during emergency session* (Sept. 25, 2017), https://mvskokemedia.com/2017-budget-passes-during-emergency-session/; Muscogee (Creek) Nation, Official Guide to the Muscogee (Creek) Nation at 3, http://creektourism.com/wp-content/uploads/2017/01/Guide_Web_MCNTR17.pdf.

[2] *See* Muscogee (Creek) Nation, http://www.okmulgeedevelopment.com/About-Okmulgee/Muscogee-Creek-Nation.aspx (last visited Apr. 3, 2018).

[3] Creek Reh'g *Amicus* Br. at 8-9; Tony Russell, *Muskogee County Sheriff's Office partnering with Lighthorse Police, KJRH* (June 5, 2017), https://www.kjrh.com/news/local-news/muskogee-county-sheriffs-office-partnering-with-lighthorse-police.

criminal and civil jurisdiction, and a seven-member Supreme Court hears appeals. *See* Muscogee Code, tit. 27, http://www.creeksupremecourt.com/wp-content/uploads/title27.pdf.

B. Factual background and proceedings below.

Respondent Patrick Dwayne Murphy, a Creek, was convicted of the murder of another Creek within the Nation's reservation and sentenced to death. Pet. App. 7a, 10a-11a, 14a-15a. The OCCA affirmed. *Id.*

Respondent sought state post-conviction relief, arguing the State lacked jurisdiction under the Major Crimes Act. Pet. App. 13a. That act provides for exclusive federal government jurisdiction to prosecute murders by Indians in "Indian country," which includes, among other things, "Indian reservation[s]" and certain "allotments." 18 U.S.C. §§ 1151, 1153. The OCCA ordered an evidentiary hearing. Pet. App. 14a. The trial court held that state jurisdiction was proper because the crime occurred on state land, Pet. App. 15a, rejecting Respondent's argument that the land was an "allotment"; the court did not address Respondent's reservation argument. Pet. App. 16a.

The OCCA affirmed. It noted that *Indian Country* reserved the disestablishment question, and stated that if "federal courts remain undecided …, we refuse to step in and make such a finding." Pet. App. 224a. This Court denied certiorari. Pet. App. 18a-19a n.12.

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

Respondent appealed.[4] The Tenth Circuit found that the OCCA's "refus[al]" to "make … a finding" was an adjudication "on the merits" under 28 U.S.C. § 2254(d), triggering deferential review under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Pet. App. 49a. It also assumed AEDPA deference applies even to jurisdictional challenges. *Id.*; *cf. Magnan v. Trammell*, 719 F.3d 1159, 1164 (10th Cir. 2013) (reserving question). The Circuit thus required Respondent to show that the OCCA's decision was "contrary to," or an "unreasonable application of" clearly established federal law. Pet. App. 25a-26a (quotation marks omitted).

Applying that state-friendly standard, the Tenth Circuit reversed. First, it found the OCCA's decision was "contrary to" clearly established federal law. Among other things, 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 to disestablish" it, and it failed to consider *Solem*'s "three … factors." Pet. App. 52a (quoting *Solem*, 465 U.S. at 481).

The Tenth Circuit thus analyzed disestablishment *de novo*. Pet. App. 56a. It "appl[ied] the *Solem* framework," doing so after Oklahoma "recognize[d]

---

[4] Respondent also pressed a claim under *Atkins v. Virginia*, 536 U.S. 304 (2002). The OCCA rejected this claim, and Respondent sought federal habeas. Pet. App. 21a. The district court treated Respondent's petition as a "second and successive" application and transferred it to the Tenth Circuit, which "ordered a partial remand." Pet. App. 21a n.15 (citing *In re Murphy*, No. 12-7055, at 2 (10th Cir. Nov. 1, 2012)). Then–Judge Gorsuch was on the panel.

Solem [a]s controlling," "defend[ed] the substantive correctness of the OCCA's decision by reference to *Solem*'s three-part test," and "[n]owhere … argue[d] that some other legal framework applie[d]." Pet. App. 44a-45a, 74a.

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 did "not rely on any particular statutory text," or any "'specific section'" indicating disestablishment, but rather "the cumulative force of … eight statutes." Pet. App. 77a, 101a. The court did not require "magic words." Pet. App. 101a (quoting *Wyoming v. EPA*, 849 F.3d 861, 869-70 (10th Cir. 2017)). Rather, it analyzed all eight statutes and concluded that they "do not, individually or collectively, show" disestablishment. Pet. App. 107a. Instead, they "show[ed] Congress's continued recognition of the Reservation's boundaries." Pet. App. 103a; *see* Pet. App. 101a-102a; *supra* at 8-10.

Next, the Tenth Circuit explained that even absent "clear textual evidence," "contemporary historical evidence" can "reveal that Congress has disestablished … a reservation," if "'unambiguous evidence' … 'unequivocally reveals' congressional intent." Pet. App. 107a-08a (quoting *Parker*, 136 S. Ct. at 1080-81 (some quotation marks omitted)). The Tenth Circuit had recently relied on such "step-two evidence to find disestablishment" of another Oklahoma reservation. Pet. App. 108a (citing *Osage Nation v. Irby*, 597 F.3d 1117, 1125 (10th Cir. 2010)). But here, the "mixed evidence … falls short." Pet. App. 109a.

Last, the Tenth Circuit considered "step-three" evidence—"Congress's own treatment of the affected areas" in the immediately following years; the approach of "the [BIA] and local judicial authorities"; and "demographic facts." Pet. App. 120a-21a (quoting *Solem*, 465 U.S. at 471). It recognized this Court's decisions deem such evidence less important and have "never relied solely on this third consideration to find diminishment." Pet. App. 121a (quoting *Parker*, 136 S. Ct at 1081). Nonetheless, the court of appeals exhaustively analyzed the step-three evidence, concluding that the "conflicting" evidence did not show disestablishment. *Id.*

The Tenth Circuit "conclude[d] Congress has not disestablished the Creek reservation." Pet. App. 132a. Oklahoma had nowhere argued that Respondent's conviction might stand even if the reservation remained, and thus the court held that Oklahoma "lacked jurisdiction." Pet. App. 133a. Oklahoma sought rehearing *en banc*, which was denied without dissent. Pet. App. 229a. Concurring, Chief Judge Tymkovich, who sat on the unanimous panel, explained it had "faithfully applied Supreme Court precedent," which "precludes any other outcome." Pet. App. 230a.

Today, Respondent remains on death row. Before prison, alcohol had been a constant—from when Respondent's mother subjected him to it in utero, put beer in his baby bottles, and allowed him to get drunk from the age of 4, to when Respondent, intoxicated, committed the murder for which he was sentenced to death. The facts of Respondent's crime are undeniably grave. But in prison, Respondent has successfully

defeated his alcohol addiction and has converted to Christianity. He has generally been a model prisoner, exhibiting such responsibility that his unit manager appointed him the "run man"—reserved for inmates who have earned prison officials' trust. Under the Tenth Circuit's decision, Respondent is subject to prosecution by federal authorities and life imprisonment without the possibility of parole.

REASONS FOR DENYING THE PETITION

Oklahoma seeks certiorari so this Court can "revisit the governing standard for … disestablishment," and create a lower, atextual standard based on "Oklahoma's unique history." Pet. 3. Oklahoma asks this Court to deem *Solem* applicable only to alleged disestablishments arising out of the "General Allotment Act that spawned surplus land acts," and hold *Solem* does not govern here because "Oklahoma statehood" was Congress's aim. Pet. 3, 30. This argument is unworthy of certiorari. It is waived, because Oklahoma never argued below that *Solem*'s framework was inapplicable. It is not the subject of any split, as no court has reached a contrary result outside of Respondent's case or adopted a one-off exception of the type Oklahoma seeks. And it is especially ill-timed because this Court just reaffirmed *Solem* in *Parker*, after hearing similar arguments about the need to account for Nebraska's unique history.

In reality, Oklahoma's request to "revisit the … standard," Pet. 3, is just a Trojan horse for further review of the Tenth Circuit's factbound application of *Solem*. But certiorari is not warranted to review careful, and correct, application of settled law. Oklahoma thus falls back on claims about practical effects. Yet it has

forfeited an argument—flagged by the United States—that (if correct) would largely eliminate those effects. Regardless, on inspection, Oklahoma's alarmism proves vastly overstated and provides no basis for review.

I. Certiorari is not warranted to address Oklahoma's waived argument seeking to revisit "well settled" doctrine.

A. Oklahoma's argument is waived.

Oklahoma waived the argument it now presses. The Tenth Circuit was express:

> Despite its arguments that there is no clearly established law, the State's brief recognizes *Solem* is controlling. It defends the substantive correctness of the OCCA's decision by reference to *Solem*'s three-part test. Nowhere does the State argue that some other legal framework applies.

Pet. App. 45a. That forecloses Oklahoma from seeking certiorari to "revisit" *Solem*'s framework as "not designed to analyze this situation." Pet. 3, 31.

Oklahoma asserts that it "argued below that *Solem* was inapposite." Pet. 31 n.8. But the cited pages confirm the Tenth Circuit was right. The parties briefed two issues. First, Oklahoma raised an AEDPA argument that no "clearly established federal law" existed because the "'facts'" of this Court's cases were insufficiently "'similar.'" Br. of Respondent-Appellee at 46-67 (10th Cir. Nov. 4, 2016) ("Okla. Br."). Oklahoma's cited pages address that argument, which the Tenth Circuit

rejected. Pet. App. 45a.[5]

Second, Oklahoma argued that, "de novo," the Creek reservation was disestablished. Okla. Br. 56. That is the only issue raised in the Question Presented. Pet. i. And with respect to that argument, Oklahoma "defend[ed] … the OCCA's decision by reference to *Solem*'s three-part test." Pet. App. 45a; *see* Okla. Br. at 57, 68, 76 (*Solem*'s three parts).

Oklahoma also cites (at 31 n.8) page 91 of its brief below, apparently referencing the statement that "this case presents a very different situation" from the Court's prior cases. Okla. Br. 91. But Oklahoma merely asserted a supposed factual distinction that it believed strengthened its argument under *Solem*'s framework. It never argued that the framework was inapplicable or needed "revisit[ing]." Pet. 3. Indeed, Oklahoma identified as "[t]he most closely analogous case" the Tenth Circuit's *Irby* decision deeming the Osage Nation's reservation disestablished. Okla. Br. 91 (citing *Irby*, 597 F.3d at 1120). That case was on point, Oklahoma believed, because the Osage was also "exempt

---

[5] Oklahoma has not sought review of the Tenth Circuit's AEDPA analysis. Pet. i. In one sentence, Oklahoma alludes to AEDPA's "clearly established" standard. Pet. 31. But if Oklahoma included this sentence as a wedge to raise AEDPA arguments at the merits stage, it is insufficient to preserve the argument. And Oklahoma's implicit threat to make this an AEDPA case is another reason to deny certiorari. The AEDPA issue Oklahoma lost is factbound. And if Oklahoma raises AEDPA issues, Respondent reserves the right to raise the AEDPA arguments he briefed to the Tenth Circuit. This Court should not grant certiorari with those complications looming.

from the General Allotment Act," and the "Osage Allotment Act" coincided with the Oklahoma Enabling Act. *Id.* And in *Irby*, the Tenth Circuit "appl[ied] the three-part test … in *Solem*." *Irby*, 597 F.3d at 1122.

This Court does not grant certiorari to address arguments not pressed or passed upon below. *Sprietsma v. Mercury Marine*, 537 U.S. 51, 55-56 (2002). If Oklahoma wishes to pursue its new argument, it can allow lower courts to weigh it in a case where Oklahoma has not told them the opposite. This Court is "a court of review, not of first view." *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005).

B. Oklahoma's argument does not implicate any split, is meritless, and does not warrant certiorari.

Oklahoma's argument amounts to special pleading. It claims Oklahoma's "unique history" and Congress's overarching intent "to create a new state" render *Solem* inapplicable; Oklahoma would limit *Solem* to "surplus land acts." Pet. 3, 24, 31. But Oklahoma does not identify a split on these issues. It cites no decision deeming *Solem* inapplicable to cases involving Oklahoma's statehood. Indeed, Oklahoma cites no case recognizing *any* flavor of one-off exception from *Solem*. Federal circuits have applied *Solem*'s framework to all diminishment or disestablishment claims, whether or not based on surplus land acts. *E.g.*, *United States v. Jackson*, 853 F.3d 436, 439 (8th Cir. 2017) (act "was not a surplus lands act"), *cert. denied*, 138 S. Ct. 975 (2018); *Irby*, 597 F.3d at 1123 ("no surplus lands"); *Shawnee Tribe v. United States*, 423 F.3d 1204, 1219 (10th Cir. 2005) (1854 treaty); *Oneida Indian Nation of N.Y. v.*

City of Sherrill, 337 F.3d 139, 158-65 (2d Cir. 2003) (1838 treaty), *rev'd and remanded on other grounds*, 544 U.S. 197 (2005).

The Court heard similar special pleading in *Parker*, where Nebraska asserted that relevant statutes "predate and differ from" the "run-of-the-mill allotment act[s]." Br. for Pet'r's at 44, 46, *Parker*, 136 S. Ct. 1072 (2016) (No. 14-1406), 2015 WL 7294863. Those claims did not impress this Court, and *Parker* unanimously reaffirmed *Solem*. 136 S. Ct. at 1079. Two years later, no split has developed, and such arguments are not worthy of reconsideration.

In fact, courts have rejected the conclusion Oklahoma's argument yields. Oklahoma argues that *Solem*'s framework is inapplicable, and disestablishment occurred, based on Congress's supposed overarching intent to "liquidat[e] the Five Tribes as territorial sovereigns." Pet. 31. If that were correct, no Five Tribes land would have remained reservations, including tribally owned lands. But for a century, courts have held otherwise: The Tenth Circuit in 1911 explained that "[a]t the time of [its] decision," the Five Tribes "owned about 3,000,000 acres," and it would "be difficult to show how this land ceased to be Indian country." *Friedman*, 191 F. at 679. That was consistent with *Buster*'s conclusion that "the borders of th[e Creek] nation" endured. 135 F. at 950, 953. *Indian Country* likewise held that Creek-owned lands "retain their reservation status." 829 F.2d at 976.

Oklahoma's argument is thus a ruse. It teases this case as a chance to "revisit the governing [disestablishment] standard." Pet. 3. But Oklahoma

does not identify any *other* standard to apply. And it is difficult to imagine what alternative exists, apart from abandoning *Solem*'s text-based inquiry. That would be at odds with this Court's approach to interpreting statutes; would revive the atextual and amorphous approach to disestablishment *Solem* (and *Parker*) sought to inter; and would ignore the bedrock Indian-law rule that to abrogate tribal treaty rights, Congress must not just speak, but speak clearly. *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202-03 (1999). Instead, although Oklahoma purports to serve up a legal question concerning "governing standard[s]," Pet. 3, it really seeks to relitigate the application of settled law.

Oklahoma's argument that *Solem*'s framework should not apply also lacks merit. Its refrain is "statehood is different." Pet. 3, 6, 7, 12, 17, 23, 24, 26, 27, 28, 33. But reservations routinely persist inside States, and even if Congress viewed *allotment* as necessary for statehood, "allotment" can be "completely consistent with continued reservation status." *Mattz v. Arnett*, 412 U.S. 481, 497 (1973). *Solem*'s framework exists precisely to identify which such acts altered reservation status. 465 U.S. at 468-69.

Especially strained is Oklahoma's attempt to avoid *Solem* by distinguishing the statutes here from "surplus land acts." Pet. 24. These statutes are from the same Allotment Era (1890 through 1910), and the motivations for allotment were similar. *Supra* at 4-7.[6] *Solem*'s

---

[6] *Hagen v. Utah*, 510 U.S. 399, 402-07 (1994) (early 1900s); *Yankton*

admonition to look to text for clear indications of congressional disestablishment thus applies equally.

Indeed, the absence of a surplus land act makes the State's case for disestablishment weaker here. Congress hoped the Commission could negotiate a surplus land act—"first, … allotment" and "secondly, … cession of any lands not … so allotted." Act of Mar. 3, 1893, ch. 209, § 16, 27 Stat. 612, 646. But the Creek negotiated to avoid cession, ensuring the entire body of Creek lands would remain intact and (with limited exceptions) be allotted to Creek citizens, and that the 1901 agreement would include no language characteristic of disestablishment, such as "[e]xplicit reference to cession" to the United States, a commitment "to compensate the tribe for its land with a fixed sum," or language restoring lands to "the public domain." *Parker*, 136 S. Ct. at 1079 (quotation marks omitted). The absence of text effecting disestablishment was no accident.

Oklahoma says the Court should not expect to find the language *Solem* contemplates because Creek lands were not traditional reservations but were held "in fee simple." Pet. 30. Congress, however, characterized those lands as a "reservation" in the 1856 and 1866 treaties, and diminished its boundaries using express language of "cession." *Supra* at 6; *see* Treaty with the

---

Sioux Tribe, 522 U.S. at 329 (1894 Act); *Solem*, 465 U.S. at 464 (1908 Act); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 585 (1977) (1904, 1907, and 1910 acts); *DeCoteau v. Dist. Cty. Ct. for Tenth Judicial Dist.*, 420 U.S. 425, 441-42 (1975) (1891 Act); *Mattz*, 412 U.S. at 484-85 (1892 Act); *Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351, 354 (1962) (1906 Act).

Creek and Seminole Tribes, arts. 1, 3, 6, 11 Stat. 699, 700; 1866 Treaty art. 3. Likewise, the Commission's instructions were to negotiate for "cession" at "a given price." *Supra* at 7; Pet. App. 117a. Such language was absent from the ensuing statutes not due to unique features of Creek land or Oklahoma history, but because the Creek refused to assent to disestablishment, as Congress believed was required.

* * *

The argument on which Oklahoma urges this Court to grant review is thus waived, not subject to any split, and meritless.

II. Certiorari is not warranted to address the Tenth Circuit's correct application of settled law.

Oklahoma does not argue certiorari is warranted to address the Tenth Circuit's application of *Solem*. The Tenth Circuit duly applied *Solem* in a 126-page exegesis of statutes, caselaw, and history. Pet. App. 1a-133a. That analysis is factbound, and lower courts' application of a "well settled" "framework," *Parker*, 136 S. Ct. at 1078, generally warrants no further review. Although this Court has on occasion reviewed reservation cases without splits, Pet. 16, factbound review here is especially unwarranted given *Parker*'s recent application of *Solem*. Moreover, this is not a case where a circuit is systematically misapplying a general standard in ways meriting intervention absent a split. Twice since 2010, the Tenth Circuit has found reservations disestablished or diminished, including an

Oklahoma reservation. *Irby*, 597 F.3d at 1120; *Wyoming*, 849 F.3d at 865 (Tymkovich, C.J.).

The Tenth Circuit was also correct. As Chief Judge Tymkovitch observed, "Supreme Court precedent precludes any other outcome." Pet. App. 230a. Oklahoma concedes it cannot identify any "specific terminology" effecting disestablishment. Pet. 32; *see* Pet. App. 77a. That is because the Creek negotiated to avoid such language. *Supra* at 7. Its absence is especially telling because when Congress diminished the Creek reservation in 1856 and 1866, it used hallmark diminishment language, *supra* at 6—"undermin[ing the] claim that Congress intended to do the same with the reservation's boundaries in [the later statute] as it did in [the earlier]." Pet. App. 100a (quoting *Parker*, 136 S. Ct. at 1080) (alterations in original).

Contemporaneous events make the absence yet more significant. Congress instructed the Commission to seek "a cession, for such price … as shall be agreed upon"—hallmark disestablishment language and the very language Oklahoma asserts "would have been unnecessary or senseless under [Oklahoma's] unique circumstances." Pet. 31; *supra* at 7; Pet. App. 80a. But the Creek refused, and Congress—still believing tribal consent necessary to alter reservations—enacted the 1901 Allotment Agreement lacking such provisions. *See Parker*, 136 S. Ct. at 1081 n.1 ("[W]hat the tribe agreed to [before *Lone Wolf*] has been significant"). After *Lone Wolf*, Congress could have returned to effect disestablishment—as, elsewhere, it did. *Hagen v. Utah*, 510 U.S. 399, 416-17 (1994). But it did not. Hence,

Oklahoma "failed at the first and most important step." *Parker*, 136 S. Ct. at 1080.

Other relevant "text" and "surrounding circumstances," Pet. 32 (quoting *Hagen*, 510 U.S. at 412), point the same way and certainly do not "unequivocally" show disestablishment, *Solem*, 465 U.S. at 470-71. While some federal officials may have hoped to strike an agreement with language characteristic of disestablishment, the Commission "abandon[ed]" such hopes. *Supra* at 7. The legislative history is replete with evidence that the legislation that Congress *actually ratified* aimed to fulfill "the true intent and meaning" of the Creek treaties by placing "each and every member of the tribes … in possession of his share of the common lands." *Woodward*, 238 U.S. at 299 & n.2, 306 (quoting House Report).

Oklahoma relies on a purported "dissolution of the tribal government," Pet. 33, that never occurred and "Congress later expressly repudiated," *Indian Country*, 829 F.2d at 979—and it disregards Congress's recognition that so long as the Creek government persisted, its reservation did too. The allotment agreements recognized both the Nation's continuing jurisdiction over "lands … of individuals after allotment" and the continuing force of its boundaries—distinguishing lands "in the Creek Nation" for purposes of cattle management, liquor laws, and mineral leasing. Creek Allotment Agreement, ¶ 42; Pet. App. 89a-90a; *supra* at 8-10. Decisions in 1904 and 1905 recognized that allotment had not eliminated the jurisdiction of the Five Tribes and the Creek Nation "within [their] borders." *Morris*, 194 U.S. at 389; *Buster*, 135 F. at 950.

And in 1906, Congress preserved that status quo indefinitely. *Supra* at 9; *see also Friedman*, 191 F. at 678-79 (stating in 1911 that under the Five Tribes Act the "tribal governments still exist" and continue to hold millions of acres of "Indian country" (quoting Enabling Act)).

The Oklahoma Enabling Act, too, specified the "territory now constituting the … Creek … nation[]" for inclusion in a House district, and stipulated that statehood would not "limit" Indian rights or the United States' authority over Indians. Pet. App. 94a (quoting Oklahoma Enabling Act). Such caveats reflected "the control of the United States of the large Indian reservations and Indian population of the new state." *Coyle*, 221 U.S. at 570. Days later, Congress confirmed the Nation's "boundary line." *Supra* at 10. Oklahoma's claim that the Nation's reservation "evaporated by the formation of Oklahoma," Pet. 30, is thus refuted by history.[7]

---

[7] Oklahoma's "clash[]" with the Major Crimes Act, Pet. 27, is nonexistent. Oklahoma contends the Enabling Act transferred only "federal-question and diversity" *civil* cases to newly created federal courts, sending "*all* other cases" to state courts, including criminal cases covered by the Major Crimes Act. Pet. 26. But the Enabling Act sent to federal court "all causes pending … arising under the … laws … of the United States," § 16, 34 Stat. at 276—which includes federal *criminal* cases. Indeed, that provision was amended in 1907 to make clear that prosecutions of "all crimes" of a federal nature should go to the new federal courts. Act of Mar. 4, 1907, ch. 2911, Pub. L. No. 59-246, 34 Stat. 1286, 1287. Oklahoma cites a handful of cases where Oklahoma courts exercised jurisdiction. Pet. 27-28 & nn.5-6. But that shows only what was already clear from cases like

Mostly, Oklahoma relies on *Solem*'s third consideration—"treatment of the affected areas, particularly in the years immediately following the opening." *Solem*, 465 U.S. at 471-72. But "this Court has never relied solely on this third consideration to find diminishment," *Parker*, 136 U.S. at 1081 (quoting *Mattz*, 412 U.S. at 505), and doing so here would be particularly inappropriate given the lawless plunder and overreach that characterized the early post-statehood era. Regardless, while Oklahoma invokes "justifiable expectations" based on its "century" asserting jurisdiction, Pet. 33-34 (quotation marks omitted), *Parker* rejected the same argument: "[E]xpectations alone … cannot diminish reservation boundaries." 136 S. Ct. at 1082.

The Tenth Circuit correctly held this case should not be the first to find disestablishment based on *Solem*'s third factor. At most, the evidence is "conflicting." Pet. App. 123a; *see* Pet. App. 121a-132a. Congress continued to pass laws recognizing the Nation's boundaries, and courts continued to affirm that the Nation retained authority over its reservation. *Supra* at 8-10. The Department of Interior and BIA continued to include the reservation on tables and maps. *Supra* at 10. Meanwhile, the "Creek Nation has maintained a significant and continuous presence within the Reservation," including inhabiting a "capital complex," providing "extensive services within [its] borders," and exercising its significant law-enforcement function. Pet.

Nowabbi—that Oklahoma exercised Indian country jurisdiction without congressional authorization.

App. 130a; *supra* at 12-14. That makes this case "much stronger … than" *Parker*, where "'the Tribe was almost entirely absent … for more than 120 years." Pet. App. 130a (quoting *Parker*, 136 S. Ct. at 1081).[8]

III. Oklahoma's unsupported claims of "disruption" do not warrant certiorari.

With no legal question warranting review, Oklahoma raises the specter of "disruption" and "uncertainty." Pet. 21. Such claims are stock features in disestablishment cases,[9] and have never proven true.

---

[8] Oklahoma observes that the federal government generally lacks jurisdiction to prosecute minor Indian-on-Indian crimes, and that Congress abolished Creek courts in 1898. Pet. 28-29. Had Oklahoma courts not asserted jurisdiction, Oklahoma says, "*no* court" would have had jurisdiction after statehood, resulting in a "jurisdictional gap." *Id.* But there was no gap. After the Creek courts' abolition, the federal territorial courts had jurisdiction over Indian-on-Indian minor crimes, unlike on most reservations. And this Court has explained that federal "authority in respect of crimes committed by or against Indians continued after the admission of the state as it was before." *United States v. Ramsey*, 271 U.S. 467, 469 (1926); *see Tiger v. W. Inv. Co.*, 221 U.S. 286, 309 (1911). Even had a "gap" existed, moreover, it is not one that would have concerned Congress. In 1883, the BIA began establishing "Courts of Indian Offenses" on reservations where tribal courts were absent or deemed deficient. *Colliflower v. Garland*, 342 F.2d 369, 372 (9th Cir. 1965) (quotation marks omitted); *see Tillett v. Lujan*, 931 F.2d 636, 639 (10th Cir. 1991). While the BIA did not initially include the Fives Tribes, the availability of this off-the-rack solution meant that Congress had no need to fear on-reservation "jurisdictional gaps."

[9] Case in point are the state's briefs in *Solem*. *Compare* Reply Brief of Pet'r's at 9, *Solem*, 465 U.S. 463 (1984) (No. 82-1253) ("*Solem* Reply") (constraints on federal "resources" will mean "many …

And Oklahoma emphasizes the Creek reservation's physical size, Pet. 15-18—but ignores the 1.6 million acre reservation recognized in *Solem*, where similar sky-is-falling claims proved unfounded. 465 U.S. at 464; *supra* n.9.

Indeed, although the Petition invokes the purported "implications for criminal jurisdiction" of the decision below, Pet. 18, the United States argues that there are none: even if the Creek reservation endures, "Oklahoma still would have criminal jurisdiction." U.S. Br. 15. This argument was not presented below, or in the Petition, and this Court should not entertain it. *See*, *e.g.*, *Bell v. Wolfish*, 441 U.S. 520, 531 (1979). And the State had good reason not to raise the issue. Federal and state courts have rejected the United States' position, and this Court has denied certiorari when the United States urged review. *See infra* at 37. But the United States may raise the argument in future cases, and the fact that the State's principal amicus believes that the decision

---

crimes may go unpunished"), *with* Pet. 19 ("new responsibilities would overwhelm current federal resources"); *compare Solem* Reply at 10 (specter of "tribal civil and regulatory authority over non-Indians"), *with* Pet. 20 (non-Indian "residents … would potentially be subject to tribal regulatory jurisdiction"); *compare Solem* Reply at 11 ("[n]on-Indians must also resort to tribal courts … to litigate claims against Indians"), *with* Pet. 20 (broader "tribal-court jurisdiction"); *compare Solem* Reply at 9 (land has "not been regarded as reservation … for several decades"), *with* Pet. 34 ("[f]or a century, Oklahoma has governed the former Indian Territory"). This Court heard similar arguments about the Nez Perce Reservation, Br. of Lewis Cty., Idaho as *Amicus* Curiae in Support of Pet'r at 3-4, *Webb v. United States*, 531 U.S. 1200 (2001) (No. 00-8166), 2001 WL 34125377, yet denied certiorari.

below will have no consequences for criminal jurisdiction saps a Petition based on "consequences," Pet. 2, of its force.

Even Oklahoma's hand-picked examples of disruption prove misleading on inspection. Oklahoma implies, for example, that in *State v. Kepler*, CF-14-3952, the defendant cynically "obtained identification documents … claiming to be 1/128th Creek" to dismiss based on *Murphy*. Pet. 22. In fact, the defendant has been a Creek citizen since 1989 and merely received a new identification card. Verified Mot. to Dismiss, Ex. A, *State v. Kepler*, CF-14-3952 (Okla. Cty. Dist. Ct. Aug. 11, 2017). Similar is *McKesson*, where the Cherokee sued a pharmaceutical company in tribal court. Oklahoma implies Cherokee jurisdiction turns on a *Murphy* theory that the Cherokee reservation was "never disestablished." Pet. 23. In fact, the Cherokee sued before *Murphy* was decided, and a federal court enjoined that suit after *Murphy* for reasons unrelated to *Murphy*. *McKesson Corp. v. Hembree*, No. 17-CV-323-TCK-FHM, 2018 WL 340042, at *9 & n.7 (N.D. Okla. Jan. 9, 2018).

Nor is Oklahoma correct that *Murphy* compels the same result for the Cherokee and the other Five Tribes. "[R]eservation disestablishment" is "inherently statute-specific and fact-bound." Br. for United States as Amicus Curiae at 9, *Osage Nation v. Irby*, 564 U.S. 1046 (2011) (No. 10-537), 2011 WL 2135025; *see* Pet. 17 (statutes and history "vary from tribe to tribe"); *Cohen's Handbook of Federal Indian Law* § 4.07[1][c], at 302 & n.773-74 (2005 ed.) (noting differences among Five Tribes' allotment statutes).

Similarly overstated is Oklahoma's assertion about the number of "state convictions [that] will be subject to collateral attack." Pet. 21. AEDPA's statute of limitations bars virtually any action not filed within one year after state proceedings conclude. 28 U.S.C. § 2244(d)(1). Any defendant who *previously* filed a federal petition must meet the strict "second or successive" requirements. *Id.* § 2244(b)(2)(A), (b)(2)(B)(i). Already, the Tenth Circuit has held that a *Murphy*-based successive petition could not do so. Order at 3, *In re Brown*, No. 17-7078 (10th Cir. Dec. 21, 2017); *see In re Wackerly*, No. 10-7062, 2010 WL 9531121, at *3 (10th Cir. Sept. 3, 2010). State courts, too, limit defendants from challenging long-final convictions. *See, e.g.*, Okla. Stat. tit. 22 § 1086 (requiring "sufficient reason" to consider successive petition); *Paxton v. State*, 903 P.2d 325, 327 (Okla. Crim. App. 1995) ("laches" may "prohibit the consideration" of challenges to long-final convictions).

Prospectively, there is no risk crimes will go unpunished; at most, *Murphy* realigns responsibility. Oklahoma retains full jurisdiction in non-Indian cases. Dep't of Justice, Indian Country Criminal Jurisdictional Chart, 2010, http://bit.ly/2GQZgav. "[M]inor offenses" involving Indians will proceed in the Nation's robust courts. Pet. 18; *supra* at 13-14. The United States will prosecute major crimes involving Indians. 18 U.S.C. § 1153.

There is nothing to Oklahoma's claim that "new [federal] responsibilities" will "overwhelm current resources." Pet. 19. Citing the United States' *en banc* brief, Oklahoma hypothesizes a "tenfold increase" in

Oklahoma's Northern and Eastern Districts. *Id.* But that figure has no support. Those offices filed 205 criminal cases in fiscal 2016, so a tenfold increase would mean 2,000 cases.[10] In 2015, U.S. Attorney's offices prosecuted or declined to prosecute 2,655 Indian country matters *nationwide*.[11] Oklahoma's figure thus requires believing that Indians on the Creek reservation will commit crimes at a vastly higher rate than Indians nationwide. Even the United States, having casually asserted that figure below, has now abandoned it. U.S. Br. 21. Instead, the United States offers a new back-of-the-envelope calculation, U.S. Br. 21 n.7; but that figure has no more credibility than the unsupported and now-discarded calculation it asked the Tenth Circuit to believe. Indeed, the United States' claims should sound familiar. When Oklahoma courts reversed *Nowabbi*, the federal government complained that the decision affected "413,000 acres" and if "the United States [were] required to exercise jurisdiction," "[l]aw enforcement would be rendered very difficult." Br. for United States as *Amicus Curiae* Supporting Petitioner at 13, *Oklahoma v. Brooks*, 490 U.S. 1031 (No. 88-1147), http://www.justice.gov/sites/default/files/osg/briefs/1988/01/01/sg880200.txt. This Court denied certiorari, and the government's dire predictions proved unfounded.[12]

---

[10] Dep't of Justice, U.S. Attorneys' Annual Statistical Report, Fiscal Year 2016, at 3 Table 1, http://bit.ly/2FFlOvk.

[11] Dep't of Justice, Indian Country Investigations and Prosecutions, 2015, at 4, http://bit.ly/2HRC11e.

[12] A Creek Nation prosecutor is already deputized as a Special

Oklahoma likewise overstates its claims of "disruption … extend[ing] into the civil arena." Pet. 22-23 (citation omitted). With narrow exceptions, tribal efforts to regulate nonmembers are "invalid," even within reservations. *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 330 (2008) (quotation marks omitted). Even where tribes would otherwise have regulatory power, "equitable considerations of laches and acquiescence may curtail … [t]rib[al] power to" regulate after a "century-long" period of state jurisdiction. *Parker*, 136 S. Ct. at 1082; *see City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197, 217-21 (2005).

Indeed, there is no real risk of disruption. Congress can and will address any genuine issues. Already, the statute books are filled with Oklahoma-specific Indian laws.[13] Consider the "federal environmental statutes" Oklahoma invokes. Pet. 19. Tribes can administer some federal environmental programs in Indian country, but Congress gave Oklahoma—uniquely—a veto to allow Oklahoma to administer its generally applicable State programs in Indian country. *See* Safe, Accountable,

---

Assistant U.S. Attorney, and more can be added. *See* Creek Reh'g Amicus Br. at 4-5; Indian Law and Order Comm'n, *A Roadmap for Making Native America Safer: Report to the President & Congress of the United States* 73 (2013) (such prosecutors are "key assets"), http://bit.ly/2CqYcvD.

[13] *See, e.g.*, 25 U.S.C. §§ 5201-5210 (Chapter 45A of Title 25 entitled "Oklahoma Indian Welfare"); *Cohen's Handbook of Federal Indian Law* § 4.07[1][c][ii], at 307-08 (enumerating Oklahoma-specific laws for "statutes of limitations, wills, heirship, probate and estate administration, guardianship, and partition").

Flexible, Efficient Transportation Equity Act (SAFETEA) of 2005, Pub. L. No. 109–59, § 10211(a)-(b), 119 Stat. 1144, 1937.

Moreover, a congressionally sanctioned option *already* exists for Oklahoma to address any practical consequences arising from the decision below. Under Public Law 280, Oklahoma can gain "limited civil and broad criminal jurisdiction" in the Creek Nation's "Indian country," by agreement with the Nation. *Indian Country*, 829 F.2d at 980; *see* 18 U.S.C § 1162; 25 U.S.C. §§ 1321-1326; 28 U.S.C. § 1360. Oklahoma does not acknowledge this possibility, and this Court should not credit Oklahoma's effect-based arguments when it has not fully explored steps within its power.

IV. The Court should not grant certiorari on the question presented by the United States.

In no event should the Court grant the United States' second Question Presented. As noted, that issue was not presented to the Tenth Circuit or in the Petition, and it is now waived. Moreover, the United States is simply trying to bypass the usual certiorari process by raising in an uninvited amicus brief an issue this Court has repeatedly deemed unworthy of review after Oklahoma's state and federal courts rejected the United States' position. *See United States v. Sands*, 968 F.2d 1058, 1061-63 (10th Cir. 1992) (U.S. position "frequently raised, but never accepted"), *cert. denied*, 506 U.S. 1056 (1993); *State v. Brooks*, 763 P.2d 707 (Okla. Crim. App. 1988), *cert. denied*, 490 U.S. 1031 (1989); *see also Cravatt v. State*, 825 P.2d 277, 279 (Okla Crim. App. 1992) ("no foundation for … position," which "has been previously rejected by the courts of this State"). While the United

States suggests that these cases are different because they involve allotments, U.S. Br. 20, nothing in its theory provides for allotments to be treated differently from the reservation land at issue here. *See* U.S. Br. 19. In any event, the government's resort to pure *ipse dixit* as it tries to distinguish this mound of adverse precedent just underscores that introducing a new question presented at this stage of the litigation is entirely inappropriate.

CONCLUSION

The petition should be denied.

Respectfully submitted,

IAN HEATH GERSHENGORN
ZACHARY C. SCHAUF
KATHRYN L. WYNBRANDT*
JENNER & BLOCK LLP
1099 New York Ave., NW
Suite 900
Washington, DC 20001
(202) 639-6000
igershengorn@jenner.com

** Admitted only in Illinois. Practicing under the supervision of the partnership of Jenner & Block LLP.*

PATTI PALMER GHEZZI
Counsel of Record
RANDY A. BAUMAN
MICHAEL LIEBERMAN
ASSISTANT FEDERAL PUBLIC DEFENDERS
215 Dean A. McGee
Suite 707
Oklahoma City, OK 73102
(405) 609-5975
patti_p_ghezzi@fd.org