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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF

Oklahoma stands on the brink of the most radical jurisdictional shift since statehood. The United States took the unusual step of urging review without this Court's invitation—for good reason. The State could lose jurisdiction over all crimes involving Native Americans in the eastern half of the State, with a corresponding burden on federal and tribal authorities. Extended to the entire former Indian Territory, the decision below would increase the total amount of reservation land nationwide by 28.3% and *triple* the total population of reservations in the United States. America's largest city on a reservation would no longer be Fife, Washington, population: 9,173; it would be Tulsa, Oklahoma, population: 403,090. Federal and state courts would face challenges to hundreds, if not thousands, of existing criminal convictions—as well as decades of litigation over who has civil and regulatory jurisdiction in eastern Oklahoma.

I. The question presented is important

The sudden and monumental impacts of the decision below are impossible to ignore.

1. Respondent does not dispute that the region at stake—the historical boundaries of the Creek Nation alone—is massive in population and area. Pet. 15-18. Although respondent argues (at 32) that the decision below does not "compel[] the same result" for the other Five Tribes, he offers not *one* distinction that would prevent that outcome. Pet. 17-18. Respondent references broader Five Tribes history when he perceives it beneficial. Opp. 22, 27-28. And other tribes and tribal members have relied on *Murphy* to attack

prior convictions, oppose state criminal jurisdiction, or assert tribal jurisdiction. Pet. 21-23.[1]

Respondent observes (at 31) that the territory in *Solem* covered 1.6 million acres. But the former Indian Territory is nearly *twelve* times as large, covering over 19 million acres. Pet. 16-17. The population of the Cheyenne River Sioux Reservation in *Solem* is 8,090—just 0.45% of the 1.8 million residents of the former Indian Territory, and a fraction of the 750,000 people residing today within the Creek historical boundaries alone. Census Bureau, *Interactive Population Map*, https://goo.gl/YF8sb8.

2. The decision below conflicts with the determination of the State's highest criminal court. Pet. 13; U.S. Br. 3-4. Even without such a split, this Court has granted certiorari in disestablishment cases with consequences that pale in comparison. The federal government filed an uninvited amicus brief to emphasize the "radical[] shift" in criminal jurisdiction and projects a "massive increase" in federal law-enforcement responsibilities. U.S. Br. 5, 21-22. Contrary to respondent's suggestion (at 33-34), the inevitable swell in the federal caseload does not presume that Indians in the historical Creek territory commit crimes (or are victims) at a higher rate. Federal indictments would surge because the decision below increases Oklahoma's Indian Country population by orders of magnitude, and sweeps into federal jurisdiction the City of Tulsa—the city with the State's

[1] The petition notes that the Cherokee Nation cited *Murphy* to assert tribal jurisdiction over non-Indian-owned pharmaceutical companies. Pet. 23. The Cherokee Nation originally invoked tribal jurisdiction on other grounds, *see* Opp. 32, but changed its legal theory to rely on *Murphy* immediately following the Tenth Circuit's decision.

highest incidence of violent crime. Fed. Bureau of Investigation, *January–June Preliminary Semiannual Uniform Crime Report* tbl.4 (2017), https://goo.gl/mLXrkm.

Respondent asserts (at 13) that "Creek law enforcement is formidable." But the Creek Nation's police department predicts a roughly five-fold increase in personnel to police the territory. Jason Salsman, *Increased LTPD jurisdictional duties at the heart of Murphy decision*, Mvskokemedia.com (Dec. 15, 2017), https://goo.gl/k7GG5P. Just one tribal judge presides over *all* civil and criminal cases in the Creek Nation's courts. District Court, Muscogee (Creek) Nation, https://goo.gl/MJYKnw. And the Creek Nation's Supreme Court last issued an opinion in 2015. Supreme Court, Muscogee (Creek) Nation, Orders and Opinions, https://goo.gl/YDQF8r.

3. Respondent contends (at 33) that procedural obstacles to collateral review may mitigate the disruption to state convictions. That is ironic given that respondent himself recently obtained federal habeas relief for the capital murder he committed in 1999.[2] Respondent's speculation is also cold comfort to a State facing 61 collateral attacks and 13 direct appeals *so far* invoking *Murphy*. Pet. 21. And few, if any, procedural barriers preclude *state* post-conviction relief on jurisdictional grounds. Pet. App. 13a-14a n.5. Regardless, the decision below would precipitate years of state and federal post-conviction litigation.

Respondent argues (at 31-32) that this Court should deny certiorari based on the United States'

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[2] That this appeal arose in the AEDPA context is not a reason to postpone review, Opp. 20 n.5, but rather underscores the broad ramifications of the question presented.

secondary argument that, even assuming a Creek reservation, Congress independently left criminal jurisdiction over Indian Country with the State. *See* U.S. Br. 15-20. But respondent then declares that argument unmeritorious and foreclosed by the Tenth Circuit with respect to allotments. Opp. 31, 36-37. Respondent's contradictory arguments only highlight the intolerable uncertainty over who has authority to prosecute criminal offenses in eastern Oklahoma, which will persist unless the decision below is reversed. That state of affairs is unsurprisingly acceptable to respondent because he would not bear the brunt of the jurisdictional tsunami created by the decision below—his capital sentence will be vacated, leaving the state and federal government to pick up the pieces.

Nor would the United States' secondary argument resolve the civil and regulatory implications of the decision below. Litigation over these issues would mire courts for decades. Pet. 19-20; Envtl. Fed'n of Okla. Br. 8-12. Meanwhile, farmers, ranchers, and other businesses would face "significant risk and uncertainty" in areas ranging from taxation to construction permits. Envtl. Fed'n of Okla. Br. 6-13; OIPA Br. 5-15.

It is no answer that "Congress can and will address" the chaos. Opp. 35. Rank speculation that Congress may act someday has never been a reason to deny certiorari. And it is hardly "within [Oklahoma's] power," Opp. 36, to assume jurisdiction under Public Law 280. That law requires the *Creek Nation* to consent to State jurisdiction and to obtain the agreement of a majority of all enrolled Indians in the area. 25 U.S.C. §§ 1321, 1326. To our knowledge, no tribe has ever voluntarily consented under Public Law 280, and the Creek Nation's amicus brief below

strenuously argued *against* state jurisdiction. Pet. App. 22a.

II. This case presents a clean and timely vehicle

Whether the Creek Nation's 1866 boundaries constitute an Indian reservation today is squarely presented, outcome determinative, and ripe for this Court's resolution.

Respondent accuses the State (at i, 18-20) of pressing an argument that was waived and never passed on—that this Court should "revisit" *Solem*. That is a gross mischaracterization. The petition merely restates Chief Judge Tymkovich's concurrence that this case warrants certiorari because the panel considered itself bound by *Solem*, despite differences in context. Pet. 3 (citing App. 232a). The State's "reference to *Solem*[]" below is not waiver. Opp. 19. The State's position remains the same: *Solem*'s three-factor analysis—especially the specific textual indicia the Court deemed characteristic of disestablishment—is ill-suited to Oklahoma's unique history. Okla. C.A. Br. 45-47, 57 & n.18, 94; Pet. 30-31. *Solem* is materially distinguishable and addresses surplus land acts. Okla. C.A. Br. 90-91; Pet. 29-30. But even under *Solem*, Congress disestablished the 1866 Creek borders. Okla. C.A. Br. 56-94; Pet. 31-34.

Respondent argues (at 25) that review is "unwarranted given *Parker*'s recent application of *Solem*." But this case is hardly some one-off application of *Solem*. The decision below threatens to cleave Oklahoma in two. Furthermore, *Parker* too involves a surplus land act and is no more relevant than *Solem*. Pet. 31; U.S. Br. 5. In any event, recent consideration of another case about an Indian reservation is no basis to deny review when otherwise warranted.

III. The decision below is wrong

Given the importance of this case, review is warranted independent of the merits. Regardless, the decision below is wrong.

1. Respondent's suggestion (at 25) that Oklahoma agrees that the Tenth Circuit correctly applied *Solem* to the facts here (assuming *Solem* applies) is puzzling. The petition devotes an entire section to attacking the Tenth Circuit's "flawed" application of *Solem*. Pet. 31-34. Also strange is respondent's suggestion (at 23) that the State rejects reliance on statutory text. The petition argues that, although no statute uses particular disestablishment terms traditionally found in surplus land acts, this case does not involve a surplus land act. Pet. 24; U.S. Br. 5-6. And an avalanche of *other* statutory text reflects unmistakable congressional intent to eliminate the historical boundaries of the Five Tribes to create the State of Oklahoma.

Respondent has no response to the State's observation that statute after statute stripped the tribes of any vestige of sovereignty associated with reservation status. Pet. 24-26. The Creek Nation at the end of this era exercised no independent sovereign functions besides signing deeds for allotment. Pet. 25. Respondent's assertion (at 9) that the Five Tribes Act "expressly disavow[ed] tribal dissolution" ignores the litany of its provisions that reduced the tribal governments' role to winding up their affairs. Pet. 25.

Contrary to respondent's suggestion (at 28), the Enabling Act's reference to "territory *now* constituting the Cherokee, Creek, and Seminole nations" (emphasis added) is consistent with the notion that the territory was being transformed into a State. *Carcieri v. Salazar*, 555 U.S. 379, 388-89 (2009) (inter-

preting similar temporal language). Likewise, that the Creek allotment agreements defined federal responsibilities for grazing licenses and taxes, mineral leases, and liquor laws by reference to the then-extant "Creek Nation," Opp. at 8, 27, does not prove the entire area would be a reservation post-statehood. Nor did Congress opaquely recognize reservation status in 1906 by referencing the "west boundary line of the Creek Nation." Act of June 21, 1906, ch. 3504, 34 Stat. 325, 364. Tribal boundaries remained relevant for purposes of allotment, which continued post-statehood. Kent Carter, *The Dawes Commission and the Allotment of the Five Civilized Tribes, 1893-1914*, at 151 (1999). The Act resolved a boundary issue that had complicated allotment along the Creek territory's western edge. Mary Jane Warde, *George Washington Grayson and the Creek Nation, 1843-1920*, at 123, 243-44 (1999).

2. Respondent disavows "magic words," Opp. 16, but nevertheless harps (at 7, 24, 26) on the absence of "hallmark diminishment language" of "cession," "compensat[ion]," or return of lands to "the public domain." Respondent's invocation (at 6) of the Creeks' prior cessions of territory to the United States and the Seminoles ignores the distinction between (1) the conveyance of land to another sovereign by treaty and (2) the creation of a State by dissolution of communal land tenure in fee via allotment to individual members. Language of "cession"—or "lump sum payments" by Congress, much less restoration of land to the "public domain"—would have been unnecessary. Pet. 31; U.S. Br. 15.

Pointing to the Creeks' previous agreements to cede land, respondent asserts that the Creeks negotiated to ensure that the 1901 allotment agreement would avoid language of cession or disestablishment

in order to preserve sovereign boundaries. Opp. 7, 24-26. But by 1901, Congress and the Creeks were not negotiating over boundaries within which the Tribe could live in seclusion; nor were they debating opening parcels of Indian Territory to non-Indian settlement. Rather, the 1901 Agreement was one step in a larger congressional scheme to destroy the Five Tribes' sovereignty and boundaries to allow for Oklahoma's creation; destruction and creation were two sides of the same coin. Pet. 4-12, 24-26, 29-31. Indeed, in the very 1901 agreement respondent touts as preserving the Creek Nation, the Tribe agreed to its own dissolution. § 46, ch. 676, 31 Stat. 861, 872. Regardless, it defies credulity that Creek officials anticipated that particular words of cession might acquire jurisprudential significance half a century later. *See Solem*, 465 U.S. at 468. With respect to the Five Tribes, cession and allotment were alternative means to the same end: statehood. Pet. 7, 10, 33.

Respondent claims (at 4-6, 22-24) that Oklahoma statehood is just another unremarkable chapter of the "Allotment Era." But the General Allotment Act exempted the Five Tribes, Pet. 30, and Congress has since treated the Indians of Oklahoma differently, Opp. 35 & n.13; *see also, e.g.*, 25 U.S.C. § 2719(a)(2). Allotment of the Five Tribes' territories was "similar in name though different in nature," such that "there is no precedent or standard in this or any other country by which to judge of the peculiar task that Congress undertook." H.R. Doc. No. 5, 58th Cong., 3d Sess. 3 (1904).

3. Respondent is incorrect (at 9-10, 27-28) that courts and Congress reaffirmed the Five Tribes' authority. Respondent cobbles together snippets from *pre*-statehood cases, *e.g.*, *Morris v. Hitchcock*, 194 U.S. 384 (1904), to assert that Congress permitted the

tribes to continue to exercise legislative power within their borders. But Congress later abolished tribal taxes and eventually eliminated the tribes' independent legislative authority. Five Tribes Act, § 11, 34 Stat. at 141.

Nor does *U.S. Express Co. v. Friedman*, 191 F. 673 (8th Cir. 1911), recognize any reservation within the 1866 boundaries. Opp. 11, 28. That case held that 3,000,000 acres of land *yet to be allotted* remained Indian Country under federal liquor laws. 191 F. at 678-79. If anything, *Friedman* proves our point: whether land remained unallotted would have been irrelevant were the entire area a reservation and therefore Indian Country subject to federal liquor laws. Likewise, the decades-long debate over whether the State has criminal jurisdiction over restricted allotments in the former Indian Territory, *e.g.*, *Ex parte Nowabbi*, 61 P.2d 1139 (Okla. Crim. App. 1936), would have been moot were the tribes' historical boundaries reservations. Concerns about "checkerboard" jurisdiction would have been purely academic if the entire area, as a reservation, were uniformly Indian Country. *United States v. Sands*, 968 F.2d 1058, 1062-63 (10th Cir. 1992).

4. Another powerful indicator of disestablishment is Congress's decision to transfer to the State jurisdiction over Indians for nonfederal crimes committed in the former Indian Territory. Pet. 26-29. Respondent has no response other than to surmise (at 28-29 n.7) that Oklahoma illegally exercised jurisdiction over tens of thousands of cases for the last century. But immediately upon statehood, the federal territorial courts themselves transferred Indian defendants to state courts rather than to the new federal district courts. Pet. 27-28 & nn.5-6; U.S. Br. 16-17. The United States told this Court in *Hendrix v.*

United States, 219 U.S. 79 (1911), that Congress withdrew Indian Territory from exclusive federal jurisdiction, and this Court apparently agreed. Pet. 28. Respondent offers silence. Respondent identifies no case—from statehood to today—where federal authorities prosecuted an Indian based on the premise that the former Indian Territory was a reservation. The State, after scouring federal and state court records, has found no such case.

The existence of reservations following statehood would have left an inexplicable jurisdictional gap for the vast majority of Indian-on-Indian crimes. Pet 28-29; U.S. Br. 18. Respondent (at 30 n.8) points to the federal territorial courts' jurisdiction but ignores that the Enabling Act abolished those courts. Pet. 26. Respondent's quotation (at 30 n.8) from *United States v. Ramsey*, 271 U.S. 467 (1926), is a red herring. *Ramsey* concerned an offense by non-Indians on an Osage allotment, outside the former Indian Territory, over which the General Crimes Act conferred federal jurisdiction; the case says nothing about Indian-on-Indian crimes, *i.e.*, the gap that would have existed if the decision below were correct.

Respondent's suggestion (at 30 n.8) that the Bureau of Indian Affairs could have closed the jurisdictional gap by establishing Courts of Indian Offenses is baffling. The fact that the BIA could have established such courts *but did not* only proves the State's point: the federal government saw no gap to close because no reservations existed. Moreover, the Courts of Indian Offenses had nothing to do with general criminal jurisdiction. These "courts" were "mere educational and disciplinary instrumentalities," *United States v. Clapox*, 35 F. 575, 577 (D. Or. 1888), with narrow jurisdiction over practices considered "heathen and barbarous," such as the sun dance, which

were criminalized to "destroy the tribal relations as fast as possible." Comm'r of Indian Affairs, *Annual Report* xxi (1885); *see* Dep't of Interior, Regulations of the Indian Office Effective April 1, 1904 § 584.

5. Respondent offers no response to Congress's post-statehood enactments that lifted restrictions on allotment and dissolved tribal affairs. Pet. 33-34. Instead, respondent asserts (at 29) that Congress and the courts continued to recognize a Creek "reservation." The statutes and cases on which respondent relies do not support that proposition. *Supra* pp. 6-9. And the fact that a Creek "reservation" appeared on maps after statehood proves nothing. Those maps also show the former Osage reservation, which was disestablished in preparation for statehood. *See Osage Nation v. Irby*, 597 F.3d 1117, 1127 (10th Cir. 2010), *cert. denied*, 564 U.S. 1046 (2011). Since the Administration of Theodore Roosevelt, the Executive Branch has never wavered in its position that no reservations exist in the former Indian Territory. Pet. 28; U.S. Br. 13-14, 19 n.5. Likewise, "Oklahoma after statehood [has] asserted absolute criminal and civil jurisdiction." Opp. 4.

The restoration of tribal government after the 1936 Oklahoma Indian Welfare Act, *see* Opp. 12-14, 29-30, is irrelevant. The Creek Constitution, adopted in 1979 and approved by the Secretary of the Interior (not by Congress, as respondent states, Opp. 12), merely asserts "political jurisdiction" coextensive with the Creek Nation's historical boundaries. Creek Const. art. I § 2. But the Creeks' self-described "political" authority in recent decades does not reverse Congress's disestablishment of their former territory on the path to statehood.

Finally, respondent's contention (at 29) that the State "[m]ostly … relies on *Solem*'s third factor" is wrong. Rather, the region's subsequent history and demographics corroborate Congress's intent to dismantle the Five Tribes' territories. Pet. 33-34. Today, Oklahoma exists as Congress envisioned: a unified community of Oklahomans. Unless this Court intervenes, the decision below threatens to resurrect Oklahoma's pre-statehood status as two Territories rather than one State, undoing Congress's promise to the people of Oklahoma over a century ago.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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