No. 17-1107

IN THE
Supreme Court of the United States

MIKE CARPENTER, INTERIM WARDEN,
OKLAHOMA STATE PENITENTIARY,

Petitioner,

v.

PATRICK DWAYNE MURPHY,

Respondent.

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

REPLY BRIEF FOR PETITIONER

MIKE HUNTER
Attorney General of Oklahoma
MITHUN MANSINGHANI
Solicitor General
JENNIFER CRABB
Asst. Attorney General
MICHAEL K. VELCHIK
RANDALL YATES
Asst. Solicitors General
OKLAHOMA OFFICE OF THE ATTORNEY GENERAL
313 NE Twenty-First St.
Oklahoma City, OK 73105

LISA S. BLATT
Counsel of Record
SALLY L. PEI
STEPHEN K. WIRTH
ARNOLD & PORTER KAYE SCHOLER LLP
601 Mass. Ave., NW
Washington, DC 20001
(202) 942-5000
lisa.blatt@arnoldporter.com

R. REEVES ANDERSON
ARNOLD & PORTER KAYE SCHOLER LLP
370 Seventeenth Street
Suite 4400
Denver, CO 80202

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REPLY BRIEF

Petitioner (at 4, 19–21, 25, 32) invited respondent to explain what attribute of a reservation remained intact for the Five Tribes after statehood in 1907. He offered no answer. What remains undisputed is that, by statehood, Congress expressly destroyed the tribes' communal land patents, their courts, and their jurisdiction over eastern Oklahoma; stripped the tribes of their buildings and furniture, and their ability to determine tribal membership; revoked their power to levy taxes; and subjected the tribes and their members to state law and jurisdiction. These congressional acts amply demonstrate the extinguishment of any reservations of the Five Tribes.

Rather than engage, respondent argues that under *Solem*, allotment does not disestablish reservations absent language equivalent to cession, and that nothing Congress did in the march to statehood expressly dismantled a reservation—a reservation with attributes as of 1907 that respondent never defines. This Court should not risk letting hundreds of violent criminals walk free and divide Oklahoma in half when respondent never explains how any attribute of a reservation survived Congress's 20-year campaign to dismantle Indian Territory.

It is also implausible that immediately upon statehood, federal courts, federal prosecutors, state courts, state prosecutors, this Court, and the Solicitor General mistakenly thought that the State had criminal jurisdiction over Indians. Had eastern Oklahoma been a reservation after 1907, the federal courts would not have transferred scores of Indian prisoners and cases to the State for prosecution—contrary to the Major Crimes Act. But Congress directed that path in the Enabling Act consistent with the reality

that eastern Oklahoma was not a reservation, and everyone acted accordingly. To accept that this area has been a reservation all along makes a mockery of the State's jurisdictional history and would shock the 1.8 million people living in eastern Oklahoma today. Pet. 15–23; Cert. Reply 1–2.

Today, the Five Tribes are flourishing, and state-tribal relations are at their zenith. The tribes owe their current success to Congress's change in Indian policy in 1936—not, as respondent suggests, to tribal jurisdictional boundaries that went unacknowledged for a century. There is no need to upend the status quo and rewrite history by splitting Oklahoma in two.

I. Congress stripped the Five Tribes of any reservation status.

1. Respondent argues (at 28–29) that a reservation is any defined tract of land reserved under federal protection for Indian occupation. Respondent therefore claims (at 28) that the destruction of the patent was meaningless because it merely provided "more protection" for the lands reserved within the 1866 boundaries. But respondent's concept of a reservation is plainly too broad, as it equally describes trust lands and restricted allotments. And boundaries on their own mean nothing without attendant sovereign rights coextensive with the land. Br. 31–32.

Respondent thus elsewhere acknowledges (at 6) that any Creek reservation derives from treaties in 1832, 1833, and 1856 that "guarantee[d] the Nation's rights within its borders." Those rights were "'self-government' and 'jurisdiction over person and property, within [its] limits.'" Resp. 6 (quoting Treaty with the Creeks and Seminoles arts. II, III, Aug. 7,

1856, 11 Stat. 699). It is precisely those rights that Congress ended: Congress destroyed the patent through allotment while dismantling tribal governmental powers and creating a new State. Br. 28–38.

Attacking a straw man, respondent argues (at 38) that Congress's destruction of communal ownership and "adjust[ment]" of treaty rights did not "eliminate[] all the Creek's treaty-based rights." But respondent's reliance (at 39) on unidentified "remaining treaty rights" is hollow. Respondent identifies no other salient treaty rights relevant to reservations. The State is not arguing—nor need it prove—that Congress invalidated the treaties in their entirety. To the extent the treaties created a bundle of rights conferring reservation status on the Creek Nation's territory, Congress expressly extinguished every such right.

Respondent contends (at 40–42) that Congress did not actually abrogate its treaty promises because, by allotting Indian Territory, Congress gave effect to the treaties by ensuring that tribal members had equal enjoyment of the land. But whatever other purposes the Dawes Commission and Congress thought allotment served, there is no dispute that allotment in Indian Territory destroyed the Five Tribes' communal land ownership.

Respondent also points (at 41–42) to statements by Congress and the Dawes Commission apparently endorsing the treaties. But the Commission's *raison d'être* was "the final dissolution of the tribal government." *Tiger v. W. Inv. Co.*, 221 U.S. 286, 300 (1911). The Commission's task necessarily demanded the repudiation of the treaties' core promises of communal land tenure, tribal territorial sovereignty, and freedom from statehood. Accordingly, its negotiating

statements indicating that the federal government did not "undertake to deprive any of your people of their just rights" can scarcely be taken at face value. J.A. 23; *see Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1443 (D.C. Cir. 1988) (intent to "abrogate … power[s] of self-government expressly reserved by earlier treaties").

Respondent quotes Senator Perkins for the view that statehood could be compatible with "the rights which have been given to [the Five Tribes] under the treaties." Resp. 40–41 (quoting 24 Cong. Rec. 268 (1893)). But Senator Perkins went on to explain that "if [the tribes] did not consent to Statehood, so much of the treaty would be violated by bringing them into the Union as a State." 24 Cong. Rec. 268.

2. Respondent emphasizes (at 11, 33–34, 42–43) the Creek Nation's political existence after statehood. *See also* Creek Br. 15–19. But no case or principle of Indian law supports the proposition that mere tribal existence is evidence of reservation status or overcomes disestablishment. Br. 36. Respondent points (at 32–33) to Article III of the 1833 treaty as having "pegged the reservation to the Creeks' 'exist[ence] as a nation,' … not any particular government powers." Not so. It was the *fee patent* that Congress pegged to tribal existence. Treaty with the Creeks art. III, Feb. 14, 1833, 7 Stat. 419 ("The United States will grant a patent, in fee simple, to the Creek nation … and the right thus guaranteed by the United States shall be continued to said tribe of Indians, so long as they shall exist as a nation."). No one argues that the Creeks currently own Tulsa and the surrounding area in fee simple.

Respondent argues (at 33) that § 42 of the Creek Allotment Agreement, ch. 676, 31 Stat. 872 (1901),

preserved the Creeks' authority over the land. But the 1901 agreement hobbled the Creek government, declaring that no Creek legislation shall have "any validity" without presidential approval. § 42, 31 Stat. 872. In the same statute, Congress secured the Tribe's agreement to its own demise. § 46, 31 Stat. 872. The Creeks could not enforce their laws against anyone because Congress had abolished Creek courts and banned federal courts from enforcing tribal law. Curtis Act, ch. 517, §§ 26, 28, 30 Stat. 504–05 (1898). Respondent cannot pretend the allotment agreement empowered the Tribe by wishing away the planned March 4, 1906 tribal expiration date or the ongoing dismemberment of tribal government that followed.

Respondent (at 33–34) cites *Morris v. Hitchcock*, 194 U.S. 384 (1904), for the proposition that the Creeks' territorial sovereignty survived the Curtis Act. But *Morris* upheld only the federal government's ability to collect tribal permit taxes on unallotted tribal land—authority that the Curtis Act expressly reserved. *Id.* at 384–85; Curtis Act § 16, 30 Stat. 501–02. *Morris* says nothing about tribal jurisdiction over non-Indians, on non-Indian-owned fee land within the former boundaries of the Indian Territory, after 1907.

While *Buster v. Wright*, 135 F. 947 (8th Cir. 1905) (cited at Resp. 33–34), upheld the Creeks' taxing authority over non-Indian land, Congress subsequently abolished tribal taxes entirely in the Five Tribes Act. Br. 35. Moreover, this Court "never endorsed" *Buster*'s reasoning as to tribal jurisdiction over non-Indians on non-Indian fee land, and has emphasized that *Buster*'s broad reasoning is "not an authoritative precedent." *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 653 n.4 (2001). No one has identified a single

sovereign power the tribes exercised over land or non-Indians in the former territory post-statehood.

Respondent contends (at 11, 33–34, 42–43) that, despite years of assaults on tribal sovereignty, Congress reversed decades of federal Indian policy by extending the "present tribal government[]" in § 28 of the Five Tribes Act, ch. 1876, 34 Stat. 148 (1906). That provision, at the end of a statute whose very title and preceding provisions reflect the final disposition of tribal affairs, *e.g.*, §§ 11, 18, 27, 34 Stat. 141, 144, 148, was a stopgap measure to conclude tribal affairs. Br. 36. Respondent does not argue that Congress restored a single power it had stripped away. Everyone understood that tribal authority was limited to winding down their affairs, such as by signing deeds and liquidating tribal property. Br. 36–37; U.S. Br. 15–16.

Congress did not preserve tribal governments out of a newfound concern for tribal sovereignty; rather, Congress knew that allotment had not been completed as early as planned, and wanted to prevent land worth tens of millions of dollars from becoming a "gift to the railroads" through a legal technicality that would be triggered by the dissolution of tribal governments before the Dawes Commission allotted all tribal land. 40 Cong. Rec. 2974 (Sen. Bailey); *see also id.* at 3121 ("Now, I want to state … the purpose I have in this, and I make no concealment of it. I am trying to prevent the railroad from obtaining that land."); *id.* at 2976 (Sen. McCumber) (similar); Br. 12–13.

Congress extended tribal governments "so that no losses will result from the dissolution of the tribes and no new interest will attach, while at the same time we are carrying out the provisions … which we

have been carrying out gradually for the last eight years looking to the dissolution of these tribes." 40 Cong. Rec. 3055 (Sen. McCumber). Respondent cannot transform Congress's eleventh-hour concern about contingent railroad grants into a legislative commitment to preserve tribal reservations.

Respondent relies (at 11, 43) on a 1906 floor statement by Senator Teller that there "is not any necessity … for … dissolution," and that it was "better indefinitely and for all time to continue" tribal governments. Respondent omits key context. The senator stated that there was "not any necessity *just now* for the dissolution of the Indian government," and "[i]t would be very much better indefinitely and for all time to continue the government that exists there *than it would be to take the chance of allowing these lands to be absorbed by the railroad company*." 40 Cong. Rec. 3122 (emphases added). Congress did not thereby reverse decades of federal Indian policy; Congress rather continued the tribal governments to allow allotment to be completed and to prevent railroads from obtaining valuable land for free. Br. 12–13.

3. Respondent sets up another straw man in arguing (at 30–31) that, under *Solem*, allotment alone does not disestablish a reservation. The State has never relied on allotment in a vacuum, and this case is about more than just an isolated surplus land act. *See infra* pp. 14–17. Allotment here divested the Tribe of "all right, title, and interest" in the land, Creek Allotment Agreement § 23, 31 Stat. 868, and was an integral part of a legislative campaign to abrogate treaty promises and supplant the tribes' territorial sovereignty with the authority of a new State.

Respondent also suggests (at 30–31, 36) that, because more than three quarters of the Five Tribes' former territories were held as restricted allotments at statehood, the land's status was materially indistinguishable from a reservation. But after statehood, it remained "doubtful whether lands allotted to Indians remained Indian country." *U.S. Exp. Co. v. Friedman*, 191 F. 673, 676 (8th Cir. 1911). Courts eventually ruled that restricted allotments retained Indian country status. *See United States v. Sands*, 968 F.2d 1058 (10th Cir. 1992); *State v. Klindt*, 782 P.2d 401 (Okla. Crim. App. 1989). But two allotments together do not equal a reservation—nor ten, nor 16 million. Each parcel of land was subject to an individual analysis to determine whether it retained Indian country status.

Had Congress preserved the Five Tribes' territories as reservations, all land within the 1866 external boundaries, not just restricted allotments, would have been Indian country indefinitely. Because that did not occur, state and federal courts have labored to discern the contours of checkerboard jurisdiction in the former Indian Territory ever since statehood. Br. 44–46 (citing cases).[1] Respondent nowhere acknowledges these debates, much less disputes that the decisions would all have been wasted ink had the entire former Indian Territory held reservation status. *Id.*

Even if a snapshot of eastern Oklahoma upon statehood included many restricted allotments, that number soon dwindled. Br. 53. Congress lifted restrictions on alienation sooner than anticipated,

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[1] *See also Hous. Auth. of Seminole Nation v. Harjo*, 790 P.2d 1098 (Okla. 1990); *Hanes v. State*, 973 P.2d 330 (Okla. Crim. App. 1998); *Cravatt v. State*, 825 P.2d 277 (Okla. Crim. App. 1992).

shortly after statehood. *Id.* In 1908, Congress freed another 8.4 million acres from restrictions, making a majority of the Five Tribes' former lands alienable. *See* Act of May 27, 1908, ch. 199, § 4, 35 Stat. 313; H.R. Rep. 1454, 60th Cong., 1st Sess., at 4 (1908). Within two decades, 89% of the former Indian Territory was unrestricted. Br. 53.

4. Respondent argues (at 12, 37–38) that the Oklahoma Enabling Act was a "victory" for the tribes because it "expressly confirmed that statehood did not divest tribal rights." But the Act preserved only then-existing "rights of person or property pertaining to the Indians of said Territories (so long as such rights shall remain unextinguished)," and acknowledged the federal government's authority over Indian affairs. Ch. 3335, § 1, 34 Stat. 267 (1906). Notably, the provision refers to rights of Indians, not tribes. And the Act never refers to the territories of the Five Tribes as reservations, in contrast to its specific mention of the Osage and other reservations in Oklahoma Territory. §§ 6, 8, 34 Stat. 271, 273. Thus, when this Court in *Coyle v. Smith*, 221 U.S. 559, 570 (1911), noted that the Enabling Act preserved Congress's authority over "large Indian reservations and Indian population of the new State," the Court did not recognize reservation status for the former territories of the Five Tribes. Indeed, the Court has often recognized the opposite. Br. 54–55.

That the federal government retained authority over Indians—who were still members of federally recognized tribes—does not mean the entire Indian Territory retained Indian country status. It is little wonder that respondent's own source describes the purported "victory" in the Enabling Act as "insignificant" when measured against the consequences of

statehood. Tanis C. Thorne, *The World's Richest Indian* 41 (2003).

Respondent's observation (at 35, 37) that reservations are compatible with states generally is unremarkable. He misses the point: here, statehood unquestionably broke the treaty promises that established the Five Tribes' land tenure. Br. 5, 27. Nowhere other than in Oklahoma were allotment and tribal disempowerment part and parcel of the statehood process itself. *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 627 (1970).

II. Congress's transfer of criminal jurisdiction to Oklahoma confirms disestablishment.

The idea that reservations extended to the borders of the former Indian Territory cannot be reconciled with Congress's transfer of criminal jurisdiction to Oklahoma upon statehood. Br. 39–43. Respondent replies (at 45–48) that the State never had jurisdiction to prosecute Indians in eastern Oklahoma, and thus acted illegally. That contention conflicts with the Enabling Act and implausibly speculates that federal courts, federal prosecutors, the State, the Solicitor General, and this Court all were mistaken when they read the Enabling Act as granting state courts criminal jurisdiction over Indians in the former Indian Territory. Respondent cannot dispute this universal understanding at statehood; he merely contends that everyone's understanding was wrong.

1. The Enabling Act directed the federal courts for the Indian Territory to transfer all pending federal-question and diversity cases to the new federal district courts for Oklahoma; all other cases were transferred to state courts. Br. 39. Were the entire former Indian Territory a reservation after statehood, criminal cases involving Indians should have

stayed in federal court under the Major Crimes Act or the General Crimes Act. On that, both sides agree. Br. 39–40; Resp. 45–46.[2]

But those cases did not stay in federal court. Upon statehood, the territorial courts and the newly created federal district court transferred case after case—involving Indians and non-Indians alike—to the new state courts. Br. 39–43 & nn.9–11. From statehood on, state courts have exercised criminal jurisdiction over crimes—major and minor—committed by and against Indians in the former Indian Territory. Br. 42; U.S. Br. 30; Sheriffs Br. 22–24. Federal prosecutors have never once treated the area as a reservation. Br. 42; U.S. Br. 21–22. Neither has the Creek Nation.

This Court and the Solicitor General in *Hendrix v. United States*, 219 U.S. 79 (1911), understood from the outset that Congress transferred jurisdiction over Indians in the former Indian Territory to the State of Oklahoma. Br. 42–43. Respondent does not argue otherwise. *Cf.* Resp. 47 n.10. It is difficult to imagine better evidence of the original meaning of the Enabling Act than the universal understanding implemented by everyone at the time.

2. Respondent cites (at 46–47) instances in which other States unlawfully prosecuted crimes committed by and against Indians. But in none of those examples did federal courts immediately transfer all cases involving Indians to newly formed state courts. Respondent cannot explain why, on his theo-

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[2] Respondent also argues (at 45, 48) that violations of Arkansas law committed in Indian Territory would be considered "federal" crimes, too. Were that true, all crimes committed in Indian Territory before statehood would have been federal, and no criminal cases would have been transferred to state court.

ry, federal courts and prosecutors abdicated their responsibility to prosecute federal crimes in eastern Oklahoma for the past 111 years. Br. 42–43.

Respondent claims (at 47) that the State "*concedes*" that it illegally prosecuted some Indian crimes after statehood, at least on restricted allotments. We do not. For decades, Oklahoma courts held that restricted allotments in the former Indian Territory were not Indian country. Br. 45 (citing *Ex parte Nowabbi*, 61 P.2d 1139 (Okla. Crim. App. 1936)). No court held otherwise for half a century. *Id.* (citing *Sands*, 968 F.2d 1058; *Klindt*, 782 P.2d 401). Again, respondent does not dispute that the debate over jurisdiction for crimes committed on Indian allotments would have been moot if the whole former Indian Territory had been a reservation.

Respondent argues (at 45) that the Enabling Act's transfer provisions "applied only to 'causes pending' at statehood, not *new* cases." Of course only pending cases were transferred. All new cases post-statehood were brought in the "successor" state courts. Enabling Act § 19, 34 Stat. 277. Congress could not plausibly have intended to transfer all pending cases involving Indians to state court, while directing all new cases involving Indians to federal court.

3. Had reservations survived statehood, no court would have had jurisdiction over most crimes committed by Indians against Indians within the former Indian Territory until Congress reauthorized tribal courts in 1936. Br. 43–44; U.S. Br. 30–31. Respondent argues (at 47–48) that federal courts retained jurisdiction to enforce Arkansas law against Indians even after statehood—based on an 1897 statute that extended Arkansas law to all people in Indian Terri-

tory, regardless of race. Act of June 7, 1897, ch. 3, 30 Stat. 83. But the Enabling Act superseded the 1897 Act by extending the laws of Oklahoma Territory to the former Indian Territory, supplanting Arkansas law, until the new state legislature provided otherwise. §§ 2, 13, 21, 34 Stat. 268–69, 275, 277–78. It is implausible that Congress intended Arkansas law to govern eastern Oklahoma indefinitely—even after the new State's legislature enacted generally applicable criminal laws for the entire State.

Respondent (at 48) is also wrong that the State's position creates a jurisdictional gap of its own on the basis that the State could not prosecute Indian-on-Indian crimes on restricted allotments. As noted, no court defined Indian country to include restricted allotments in former Indian Territory until long after Congress reauthorized tribal courts. Br. 44–45; *supra* pp. 8, 12. Respondent's suggestion (at 48–49) that the Bureau of Indian Affairs could have closed any gap by establishing Courts of Indian Offenses supports petitioner. That the BIA *could* have established such courts *but did not* proves the State's point: the federal government saw no gap to close because eastern Oklahoma was not Indian country. *See also* Cert. Reply 10–11.

4. The United States argues alternatively that Oklahoma had jurisdiction to try Indians in the former Indian Territory even if the area were one giant reservation. U.S. Br. 32–33. Oklahoma has not pressed that argument for three reasons. First, the best way to reconcile the Major Crimes Act and the Enabling Act is to conclude that eastern Oklahoma is not a reservation, full stop. Br. 38–39. Second, a holding by this Court that leaves for another day whether eastern Oklahoma is a reservation would do nothing to ameliorate uncertainty caused by the de-

cision below, including as to civil jurisdiction. *See* Pet. 19–20; Envtl. Fed. Okla. Br. 7–15; IMLA Br. 5–10; States Br. 20–25 & n.1. Third, adopting the United States' argument virtually guarantees that Indians prosecuted by the federal government on restricted allotments since 1992 will collaterally attack their convictions on the theory that the *State* should have prosecuted them.

III. Even *Solem* confirms disestablishment.

1. The State is not asking this Court to "consign[]" *Solem* "to the waste bin," Resp. 59, but instead to recognize what that line of precedent stands for, Br. 46–48. *Solem* and its progeny involve gleaning congressional intent from clues in surplus land acts that spoke only to land title, to determine whether those acts also "divested … all Indian interests." *Solem v. Bartlett*, 465 U.S. 463, 468 (1984). No surplus land acts are involved here.

Moreover, Congress expressly terminated all relevant "Indian interests" in the former Indian Territory. Searching for words such as "cession" or returning lands to the "public domain" in a single statute distracts from the bigger picture. Br. 48–49; U.S. Br. 23–25. We have far more than an isolated surplus land act. Congress divested all Indian interests in the Five Tribes' historical territories by explicitly and unambiguously destroying tribal title, jurisdiction, seclusion, and the foundations on which the Creek Nation's territorial sovereignty had been grounded.

Respondent contends (at 27) that this *is* a surplus land act case, because the Five Tribes Act permitted sale of remaining "surplus" unallotted land to non-members. But the proceeds of those sales, after tribal debts were satisfied, were distributed to individual tribal members per capita, Five Tribes Act

§ 17, 34 Stat. 143–44—not expended annually by the Secretary of the Interior to benefit the tribe, which might suggest a reservation, *see, e.g.*, *Nebraska v. Parker*, 136 S. Ct. 1072, 1077 (2016). Disbursement to individual members confirms that the Creek communal tribal estate was liquidated and divided among individual members. Respondent's narrow focus on surplus lands attempts to divert attention from two decades of legislation divesting the tribes of communal land, territorial sovereignty, and independence from statehood.

Invoking the "Allotment Era," respondent contends (at 26) that Oklahoma's history should be analyzed no differently than this Court's surplus land act cases. *See also* Historians Br. 4–8. But the General Allotment Act excluded the Five Tribes because Congress doubted it "had any authority to interfere with the rights of those Indians" in Indian Territory due to their unique land ownership. 18 Cong. Rec. 191 (1886) (Sen. Perkins). The State does not rely on allotment alone to show disestablishment; allotment was concomitant with the destruction of tribal sovereignty and the creation of Oklahoma. That the dissolution of the Five Tribes happened contemporaneously with allotment elsewhere and involved a superficially similar mechanism does not erase the unique purposes for which Congress pursued allotment in the Indian Territory. *See supra* pp. 2–10.

2. Respondent heavily relies (at 24–26, 31–32) on the fact Congress did not use statutory language of "cession" as opposed to allotment. But *Hagen v. Utah*, 510 U.S. 399 (1994), held that no particular formulation was required to effectuate disestablishment. Here, the relevant text is spread out across numerous statutes that expressly and unambiguous-

ly abrogated the Tribes' treaty promises of land tenure and territorial sovereignty.

Respondent contends (at 31–32) that cession and allotment were not equivalent, pointing to the Dawes Commission's observation that cession would have "immeasurably simplified" matters. To be sure, conveyance of the entire tract of land for one lump sum payment would have been far easier than the decades-long and unprecedented ordeal of enrollment and piecemeal allotment. Kent Carter, *The Dawes Commission and the Allotment of the Five Civilized Tribes, 1893–1914*, at 125–53 (1999). Recognition that one path is harder does not disprove that Congress saw allotment and cession as alternative means to the same end: the "extinguishment of … tribal title" to create a new State. Act of Mar. 3, 1893, ch. 209, § 16, 27 Stat. 645. A less "radical scheme of tribal extinguishment," Resp. 40, is still extinguishment.

Because the Five Tribes were not on traditional reservations, but on lands patented to them in fee simple, Br. 24, Congress could not simply "vacate[] and restore[]" Creek land to the "public domain," as it could with other reservations, Resp. 31 (citing *Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351, 354 (1962)). In yielding to Creek resistance to cession, Congress did not agree that the Creek territory should remain intact. Quite the contrary, Congress tasked the Dawes Commission with using whatever means necessary to extinguish tribal territory to create a new State. Respondent offers no historical evidence that anyone at the time thought that the difference between cession and allotment was determinative of reservation status. Any such notion is disproven by the Creeks' consent in the 1901 Allotment Agreement to the termination of

their government. Respondent never explains why, if the Creeks believed they had thwarted disestablishment by opposing cession, they nevertheless agreed to the death of their own government. *See* Br. 51.

3. The historical context confirms what the statutory language expressly accomplished: Congress acted to dismantle the Five Tribes, brick by brick, to pave the way for statehood. Respondent and the Tribe cast aspersions on "pop historians" and contemporaneous chroniclers of Oklahoma's history. Resp. 39; Creek Br. 3. But respondent's *amici* rely on the same scholars, *see* Historians Br. ix, and the sources that respondent cites agree: "The U.S. government betrayed its treaty with the Creek. The Creek institutions were crushed and the nation's resources stolen." Thorne 15. The "destructive wave" of allotment left "little … of the Five Civilized Tribes' treaty rights, their political and educational institutions, or their landed estate." *Id.* at 36.

Even if, as the Tribe insists (at 23–24), the Creek Nation was not a "late tribe" because its existence had been "nominally continued," 42 Cong. Rec. 2585 (1908) (Sen. Owen), neither respondent nor the Tribe identifies what functions the government exercised apart from signing deeds and winding down tribal affairs, *see id.* at 2586 (Sen. Curtis).

4. The subsequent history confirms disestablishment. The Creek Nation cites no instance where it has publicly claimed, from 1907 until this litigation, that a Creek reservation existed after statehood. The Cherokee Nation has gone further, advising the public that "[t]he Cherokee Nation is *not* a reservation." Cherokee Nation, *Frequently Asked Questions*, https://bit.ly/2RRptM3. Respondent invokes (at 16) the "new" Creek constitution, but even

that document—merely "approved" by the Secretary of the Interior in 1979 as being not "contrary to applicable laws," 25 U.S.C. § 5123(d)(1)—asserts only "political jurisdiction." Until this case, the Creek Nation has never expressed that it had a reservation or any rights of territorial sovereignty coextensive with the 1866 boundaries. The Creeks may have founded Tulsa, *see* Creek Br. 11, but they have not treated that city as part of an Indian reservation in the past century.

Sporadic references to reservations or the Creek Nation are unavailing. Respondent suggests (at 51) that the Oklahoma Indian Welfare Act's use of the phrase "within or without existing Indian reservations" acknowledged a Creek reservation. The statute—which applies to all tribes, statewide—does not recognize any reservation of the Five Tribes. So, too, with references to "the Creek Nation" by Congress and the Interior Department. Resp. 50–52. No one disputes that the Creek Nation persisted as a federally recognized tribe; specific references to its land were merely historic signifiers. Br. 33–34.

A passing mention in an Interior Department report to an oil field in "the Creek Reservation" is eclipsed by discussion in the same report of the near-completion of allotment and the dissolution of tribal affairs. Dep't of the Interior, *Administrative Reports*, vol. II, at 42 (1913). The 1924 mining lease rules, *see* Resp. 51, applied to "*unallotted land* on Indian reservations other than lands of the Five Civilized Tribes and the Osage Reservation." Act of May 29, 1924, ch. 210, 43 Stat. 244 (emphasis added). At most, Congress clarified that the tiny fraction of land remaining in the Five Tribes' hands in 1924 was not subject to the new rules; but Congress did not recognize a Creek reservation.

Statements by courts about "Indian country" in Oklahoma after statehood, Resp. 52–53, undercut respondent's position because, as stated, *supra* p. 8, those courts necessarily proceeded from the assumption that no reservation existed. In *United States v. Wright*, 229 U.S. 226, 232 (1913), for example, the Court accepted that "the effect of allotment would be … that the lands allotted would cease to be Indian country." To enforce anti-liquor laws in what was soon to be the former Indian Territory, Congress amended the federal liquor statute to provide that, for these purposes, the "term [Indian country] shall include any Indian allotment while the title to the same shall be held in trust by the government, or while the same shall remain inalienable by the allottee without the consent of the United States." *Id*. at 231. If all of Muskogee County had been a reservation after allotment, such terminology would have been unnecessary.

The same is true of *Friedman*, 191 F. at 679, in which the court observed that "about 3,000,000 acres" of "unallotted and undisposed" land still owned by the Five Tribes had not "ceased to be Indian country." This parcel-by-parcel analysis belies the existence of a reservation.

Respondent and the Tribe blame an "orgy of lawlessness" for the dispossession of Creek lands. Resp. 53–54; Creek Br. 22. But it was Congress's hasty lifting of restrictions that enabled plunder. And Congress allowed state courts (as "federal instrumentalities," Resp. 52) to exercise jurisdiction over restricted allotments by applying state law to heirship and partition, even as Congress elsewhere placed such issues under federal administrative control pursuant to federal regulations. Br. 53–54.

While Respondent observes (at 54) that unrestricted allotments became subject to state taxation only because the 1908 Act so provided, § 4, 35 Stat. 313, the Five Tribes Act had already provided that allotted lands would become subject to state taxation after they passed from the original allottee, § 19, 34 Stat. 144. The 1908 Act removed this alienation requirement in order to accelerate the transfer of the former Indian Territory to Oklahoma's taxing authority. H.R. Rep. 1454, at 1–2. Again, the point is that such extensive State taxation of the former lands of the Five Tribes would have been incongruous with an intent that the area remain a reservation. Br. 54.

5. Affirmance would force a sea change in the balance of federal, state, and tribal authority in eastern Oklahoma, in everything from criminal jurisdiction to the regulation of Oklahoma's oil industry. Br. 56; *see also* OIPA Br. 29-32; IMLA Br. 11–23; Envtl. Fed. Okla. Br. 8–15; States Br. 19–25. Respondent's *amici* speak as if this case involves taking away a reservation. But from 1907 to today, the Five Tribes, the State, and the federal government have never treated eastern Oklahoma as a reservation, not once, not for any purpose, not ever.

Respondent claims (at 55) that affirmance would "only modestly realign[] criminal jurisdiction" because only 9% of Oklahomans identify as Indian. But 9% is an extraordinary figure, particularly considering that criminal jurisdiction would shift in cases involving crimes committed either by *or* against Native Americans in an area of 1.8 million residents. Respondent brushes past other immediate effects of affirmance: the vacatur of his capital conviction for a brutal murder and the risk of reopening hundreds of other convictions that the federal government may

be unable to retry. Pet. 18–23. An onslaught of collateral attacks already exists. Cert. Reply 3.

Other ramifications abound. Respondent's *amici* highlight that tribes have criminal jurisdiction over non-Indians for domestic violence offenses committed on a reservation. NCAI Br. 36 (citing Violence Against Women Act Reauthorization Act of 2013, Pub. L. No. 113-4, § 904, 127 Stat. 54); *see also* NIWRC Br. 1. As they note, affirmance would instantly and "significantly increase" criminal tribal jurisdiction over millions of acres of land. NCAI, *VAWA 2013's Special Domestic Violence Criminal Jurisdiction Five-Year Report* 56 n.31 (2018); *see* NIWRC Br. 1.

As for civil jurisdiction, all adoptions and custody disputes involving Indian children who reside or are domiciled within the 1866 boundaries would now be within the exclusive jurisdiction of tribal courts. Br. 56; 25 U.S.C. § 1911(a). And the Seminole Nation recently issued letters purporting to assert permitting authority over all oil and gas activity within their 19th century borders. *Seminole Nation issues 8% severance fee notice*, OIPA News (Oct. 15, 2018), https://bit.ly/2CrCTcL. Affirmance would usher in a jurisdictional revolution.

Respondent states (at 5) that "Congress regularly legislates to address state and tribal authority in Oklahoma," and that "Congress will be equally responsive here." Those reassurances tacitly acknowledge the chaos waiting in the wings. Even respondent's belief (at 57) that all will be well as long as "litigators step aside" confirms the looming tide of litigation that will mire federal and state courts for decades. IMLA Br. 5–10; States Br. 20–25.

While the Five Tribes' present-day provision of governmental services alongside state and local authorities is laudable, Resp. 55; Creek Br. 26–31; Boren Br. 8–10, that system has developed without formal reservations. Accordingly, the State bears the responsibility to seek justice for Indian victims of crime, including on behalf of the Indian victim in this case—justice respondent seeks to escape. Reversal of the decision below will not change the tribes' ability to continue providing governmental services; nor will it undermine the collaboration between tribal and State officials that exists now. But affirmance would throw the State into disarray for decades to come.

CONCLUSION

The decision below should be reversed.

Respectfully Submitted,

MIKE HUNTER
Attorney General of Oklahoma
MITHUN MANSINGHANI
Solicitor General
JENNIFER CRABB
Asst. Attorney General
MICHAEL K. VELCHIK
RANDALL YATES
Asst. Solicitors General
OKLAHOMA OFFICE OF THE ATTORNEY GENERAL
313 NE Twenty-First St.
Oklahoma City, OK 73105

LISA S. BLATT
Counsel of Record
SALLY L. PEI
STEPHEN K. WIRTH
ARNOLD & PORTER KAYE SCHOLER LLP
601 Mass. Ave., NW
Washington, DC 20001
(202) 942-5000
lisa.blatt@arnoldporter.com

R. REEVES ANDERSON
ARNOLD & PORTER KAYE SCHOLER LLP
370 Seventeenth Street
Suite 4400
Denver, CO 80202

Counsel for Petitioner

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