No. 18-9526

In the Supreme Court of the United States

JIMCY MCGIRT, PETITIONER

v.

STATE OF OKLAHOMA

ON WRIT OF CERTIORARI
TO THE COURT OF CRIMINAL APPEALS OF OKLAHOMA

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING RESPONDENT

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
JEFFREY BOSSERT CLARK
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
ERICA L. ROSS
Assistant to the Solicitor General
WILLIAM B. LAZARUS
JAMES A. MAYSONETT
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the State of Oklahoma had criminal jurisdiction to prosecute petitioner, a member of the Seminole Nation, for the sexual assault of a child committed within the boundaries of the Muskogee (Creek) Nation's historic territory.

TABLE OF CONTENTS

Table of Contents—Continued: Page

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Constitution, treaties, and statutes:

Treaty and statutes—Continued: Page

Statutes—Continued: Page

Statutes—Continued: Page

Miscellaneous:

Miscellaneous—Continued: Page

Miscellaneous—Continued: Page

In the Supreme Court of the United States

No. 18-9526

JIMCY MCGIRT, PETITIONER

v.

STATE OF OKLAHOMA

ON WRIT OF CERTIORARI
TO THE COURT OF CRIMINAL APPEALS OF OKLAHOMA

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING RESPONDENT

INTEREST OF THE UNITED STATES

The United States has an interest in whether all lands within the former territory of the Muscogee (Creek) Nation in Oklahoma constitute a present-day Indian reservation subject to federal jurisdiction.

STATEMENT

1. Federal law defines "'Indian country'" to include "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent"; "all dependent Indian communities within the borders of the United States"; and "all Indian allotments, the Indian titles to which have not been extinguished." 18 U.S.C. 1151(a)-(c). Unless Congress has determined otherwise, the federal government generally exercises criminal jurisdiction over crimes committed by or against Indians in Indian country. See 18 U.S.C. 1152. Offenses

by one Indian against another Indian "typically are subject to the jurisdiction of the concerned Indian Tribe." *Negonsott* v. *Samuels*, 507 U.S. 99, 102 (1993); see 18 U.S.C. 1152. The Indian Major Crimes Act, § 9, 23 Stat. 385 (18 U.S.C. 1153), however, gives the federal government jurisdiction over certain serious offenses—including murder, rape, and sexual assault—when an Indian is the perpetrator, even if the victim is an Indian.

Unless Congress has specified otherwise, federal jurisdiction over crimes involving Indians in Indian country is exclusive of state jurisdiction. *United States* v. *John*, 437 U.S. 634, 651 (1978); see U.S. Supp. Br. at 20-21, *Sharp* v. *Murphy*, No. 17-1107 (argued Nov. 27, 2018) (*Murphy* U.S. Supp. Br.). State jurisdiction generally covers only crimes committed by non-Indians against other non-Indians or that are victimless. See *Duro* v. *Reina*, 495 U.S. 676, 680 n.1 (1990).

2. Petitioner is a member of the Seminole Nation. In 1997, he was convicted in Oklahoma state court of the first-degree rape, lewd molestation, and forcible sodomy of a four-year old child. Pet. App. A1; Resp. Br. 4. The Court of Criminal Appeals of Oklahoma (OCCA) affirmed. F-1997-967 Docket entry (Aug. 26, 1998).

3. In 2017, the Tenth Circuit held that all lands within the 1866 boundaries of the Creek Nation constitute a present-day "reservation," with the jurisdictional consequences described above. *Murphy* v. *Royal*, 875 F.3d 896, 937, 966, cert. granted, No. 17-1107 (argued Nov. 27, 2018). Petitioner sought state post-conviction relief based on *Murphy*. The trial court denied the application, Pet. App. B1, and the OCCA affirmed, *id.* at A2-A3.

SUMMARY OF ARGUMENT

I. Petitioner contends that Oklahoma lacked jurisdiction over his crime on the theory that all land within

the Creek Nation's 1866 boundaries, including the fee land on which he committed his crime, constitutes a present-day Indian reservation. That is incorrect.

The history of the Five Tribes in the former Indian Territory is unique. They owned their land communally in fee simple, and governed themselves in the Indian Territory, with no overarching territorial government.

Non-Indian settlers soon overran the Indian Territory, and Congress viewed the resulting law-enforcement and other challenges as requiring the dismantling of the Five Tribes' territories in preparation for creation of a new State. From 1890 through Oklahoma statehood in 1907, Congress achieved that goal through a series of statutes that broke up the Tribes' territories, provided for allotment of almost all of the lands to individual tribal members, abolished the Tribes' courts, greatly circumscribed their governmental authority, applied federal and state law to Indians and non-Indians alike, provided for establishment of towns in which Indians could vote and were subject to municipal laws, distributed tribal funds to individual Indians, and all but dissolved the Nation itself. Those statutes make clear that Congress abolished the tribal territories rather than reconstituting them as five vast federal reservations in the new State of Oklahoma, throughout which the Tribes and the federal government would have jurisdiction to the exclusion of the State over all matters involving Indians.

Congress, the Dawes Commission, and the Creek Nation contemporaneously understood that Congress's actions would disestablish the Nation's territory. And for more than a century, the State has exercised criminal jurisdiction over offenses committed by Indians on unrestricted fee lands within the Creek Nation's former territory, while the United States has never done so.

II. Even if the Creek Nation's former territory might still be recognized in some residual sense, Oklahoma would have jurisdiction over petitioner's crime. Congress provided for state jurisdiction over crimes involving Indians in the former Indian Territory in a series of Acts leading to Oklahoma statehood. Statehood did not abrogate that statutory framework and introduce a new federal regime over Indians.

III. A holding that the Creek Nation's former territory today constitutes an Indian reservation over which the federal government and the Nation have jurisdiction, notwithstanding the statutes vesting criminal and civil jurisdiction in the State regardless of reservation status, would have great adverse consequences. The federal government would be required, for the first time since statehood, to assume jurisdiction over all crimes involving Indians, with the exception of minor crimes between Indians—a massive increase in federal law-enforcement presence and responsibilities. Many prior state convictions would become subject to challenge. Significant civil consequences in such areas as taxation and child welfare would result as well. No basis exists to upend the status quo in eastern Oklahoma 113 years after statehood.

ARGUMENT

OKLAHOMA HAD JURISDICTION OVER PETITIONER'S CRIME

I. THE CREEK NATION'S FORMER TERRITORY DOES NOT CONSTITUTE A PRESENT-DAY INDIAN RESERVATION FOR JURISDICTIONAL PURPOSES

This Court's prior cases have considered whether Congress disestablished or diminished a reservation through "surplus land Acts" that opened land to non-

Indian settlement. *Solem* v. *Bartlett*, 465 U.S. 463, 467 (1984). The "touchstone" for that inquiry is "congressional purpose." *South Dakota* v. *Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998). To "decipher Congress' intentions," the Court considers the language and purpose of the relevant Acts of Congress, the historical context in which they were passed, and the subsequent history of the lands. *Solem*, 465 U.S. at 470-472; see, *e.g.*, *Yankton Sioux Tribe*, 522 U.S. at 343-344; *Hagen* v. *Utah*, 510 U.S. 399, 410-412 (1994). While those principles clearly demonstrate that petitioner's crime did not occur in an Indian reservation, this case is also distinct in critical respects.

The history of the Five Tribes in the Indian Territory is unique. Prior to Oklahoma statehood, the Indian Territory stood "in an entirely different relation to the United States from other Territories," and "for most purposes it [wa]s to be considered as an independent country." *Atlantic & Pac. R.R.* v. *Mingus*, 165 U.S. 413, 435-436 (1897). Unlike most other tribes, the Five Tribes were patented their land in communal fee simple. Congress did not establish any separate government for the Territory, and the Tribes were promised that their land would never be made part of any State.

Thus, when Congress eliminated that status to pave the way for Oklahoma statehood, it did not pass a single surplus land Act that "merely opened reservation land to settlement," *Nebraska* v. *Parker*, 136 S. Ct. 1072, 1079 (2016) (citation omitted), or "formally slice[] a certain parcel of land off one reservation," *Solem*, 465 U.S. at 468. Instead, Congress engaged in the wholly different process of transforming a U.S. territory into a State, as it had done in admitting other States to the Union. From the late 19th century through Oklahoma

statehood in 1907, Congress prepared for creation of a new State through a series of statutes that broke up the former domains of the Five Tribes that composed the Indian Territory, and replaced first the tribal governments and then the federal government—which had functioned as the territorial government—with the new State of Oklahoma. Those statutes, properly read in their historical context and in light of contemporary understandings and subsequent developments, make clear that Congress did not intend to create in the new State five vast reservations throughout which the Tribes and the United States would exercise jurisdiction in all matters affecting Indians.

A. Congress Abolished The Creek Nation's Domain In Preparation For Oklahoma Statehood

1. The Creek Nation's former territory differed in key ways from typical reservations

The Tenth Circuit in *Murphy* began with the assumption that the Creek Nation's former territory was once a "reservation" in the typical sense, and then looked to whether Congress disestablished that reservation. *Murphy* v. *Royal*, 875 F.3d 896, 903-904, 937-938 (2017), cert. granted, No. 17-1107 (argued Nov. 27, 2018). Petitioner, too, begins from that premise (Br. 1), attempting to fit the "square peg" of this Court's prior reservation-disestablishment cases into the "round hole of Oklahoma statehood," *Murphy*, 875 F.3d at 967 (Tymkovich, J., concurring in denial of rehearing en banc).

That effort misunderstands the unique nature of the Indian Territory. Most of this Court's reservation-disestablishment and diminishment cases have concerned lands initially reserved by an Indian tribe from

a cession of their ancestral homelands to the United States, or public lands reserved by the federal government from entry for Indians' residence and use. See, *e.g.*, *Parker*, 136 S. Ct. at 1076; *Yankton Sioux Tribe*, 522 U.S. at 333-334; *Hagen*, 510 U.S. at 402.

The Creek Nation's former domain in the Indian Territory, however, like that of the others of the Five Tribes, did not fit within those typical categories. In the 1830s, the Creek Nation was removed from its ancestral homelands in the southeastern United States to the then-unsettled region west of Arkansas, in current-day Oklahoma. There, the Nation received a patent to lands "in fee simple," which were "taken and considered the property of the whole" "Creek Nation." Treaty of Feb. 14, 1833, arts. III-IV, 7 Stat. 419. The United States, moreover, promised that "no State or Territory shall ever pass laws" for the Nation's government; that "no portion" of its territory "shall ever be embraced or included within, or annexed to, any Territory or State"; and that the Nation's lands would never "be erected into a Territory" without its consent. Treaty of Aug. 7, 1856, art. IV, 11 Stat. 700; see Treaty of Mar. 24, 1832, art. XIV, 7 Stat. 368; *Woodward* v. *de Graffenried*, 238 U.S. 284, 293-294 (1915); *Mingus*, 165 U.S. at 436-437.

After the Civil War, the Creek Nation ceded the western portion of its territory (which became part of the Oklahoma Territory) but retained the eastern portion. Treaty of June 14, 1866, arts. III, X, 14 Stat. 786-789. The United States entered into similar treaties with the others of the Five Tribes. See *Cohen's Handbook of Federal Indian Law* § 4.07[1][a], at 289 (Nell Jessup Newton et al. eds., 2012 ed.) (Cohen). "Under the guaranties" of these treaties, the Five Tribes "establish[ed] and carr[ied] on independent governments

of their own, enacting and executing their own laws, punishing their own criminals, appointing their own officers, [and] raising and expending their own revenues." *Mingus*, 165 U.S. at 436. Consistent with the treaties and in light of the Five Tribes' "distinct modern governments," H.R. Doc. No. 5, 56th Cong., 2d Sess. 10 (1900) (1900 H.R. Doc. 5), Congress established no separate territorial government in the Indian Territory, see, *e.g.*, *Jefferson* v. *Fink*, 247 U.S. 288, 290-291 (1918).

Contemporary sources and courts observed that the Five Tribes were "not on the ordinary Indian reservation," Census Office, U.S. Dep't of the Interior, *Report on Indians Taxed and Indians Not Taxed* 284 (1894), but were instead "sui generis," *Zevely* v. *Weimer*, 82 S.W. 941, 945 (Indian Terr. 1904), aff'd, 138 F. 1006 (8th Cir. 1905) (per curiam); *id.* at 956 (Gill, J., concurring in the judgment). This Court too has recognized the Five Tribes' unique situation. See *United States* v. *Creek Nation*, 295 U.S. 103, 109 (1935) (observing that the Creek Nation did not hold the "usual Indian right of occupancy with the fee in the United States"); see also *United States* v. *Sandoval*, 231 U.S. 28, 39, 48 (1913); *Stephens* v. *Cherokee Nation*, 174 U.S. 445, 447-448 (1899). Congress did so as well, excluding the Five Tribes from statutes governing other Indians. See, *e.g.*, Indian General Allotment Act, § 8, 24 Stat. 391; Act of May 8, 1906 (1906 Act), 34 Stat. 182 (25 U.S.C. 349).

2. Congress viewed dismantling the Creek Nation's territory as a necessary predicate to Oklahoma statehood

Congress's original intention to leave the Five Tribes undisturbed in the Indian Territory changed as hundreds of thousands of non-Indian settlers streamed in.

See *Marlin* v. *Lewallen*, 276 U.S. 58, 61 (1928); see generally S. Rep. No. 377, 53d Cong., 2d Sess. 6 (1894) (1894 Senate Report). And "great railroad systems" "traverse[d]" the "entire length" of the Indian Territory, bringing commerce. 1 H.R. Doc. 5, 54th Cong., 1st Sess. 88 (1895) (1895 H.R. Doc. 5). By 1900, more than 300,000 non-Indians and only 86,000 Indians—including approximately 14,000 Creek Nation members—lived in the Indian Territory. H.R. Rep. No. 1762, 56th Cong., 1st Sess. 1 (1900). By Oklahoma statehood in 1907, more than 700,000 non-Indians lived in the Indian Territory, H.R. Rep. No. 496, 59th Cong., 1st Sess. 9 (1906), and Indians constituted only 9.1% of its population, Bureau of the Census, U.S. Dep't of Commerce & Labor, *Population of Oklahoma and Indian Territory 1907*, at 9 (1907) (1907 Census).

Many of the non-Indians lived in "[f]lourishing towns" containing as many as 5000 residents. 1894 Senate Report 6. Because the Five Tribes held communal title to their domains and could not alienate land without the United States' consent, those non-Indian residents could not own the land on which they lived, worked, and had built "large and valuable" "buildings." S. Misc. Doc. No. 24, 53d Cong., 3d Sess. 7 (1894) (Dawes Commission report); see H.R. Doc. No. 5, 56th Cong., 1st Sess. Pt. 2, at 44, 130-131 (1899) (Dawes Commission report); see also *Tuttle* v. *Moore*, 64 S.W. 585, 588 (Indian Terr. 1901). As the Dawes Commission later explained, "[m]illions of dollars" had been spent, 1895 H.R. Doc. 5, at 89, to "buil[d] villages and towns" by non-Indians who had "no legal status" and "no property rights," H.R. Doc. No. 5, 55th Cong., 2d Sess. 31 (1897).

The non-Indian residents also had no government. Unlike in the Oklahoma Territory, Congress established

no territorial government in the Indian Territory. And "no laws" were in place "for the organization of municipal governments." 1894 Senate Report 6. The growing towns had no police, no local courts, and no ordinances. 1895 H.R. Doc. 5, at 88-90. They could not raise taxes for municipal purposes, and non-Indian residents had no "vote or voice in the election of the rulers, or the making of the laws under which they live[d]." *Id.* at 89. Tribal courts likewise lacked criminal jurisdiction over the increasing non-Indian population. 1894 Senate Report 7; see *Ex parte Kenyon*, 14 F. Cas. 353, 354-355 (C.C.W.D. Ark. 1878) (No. 7720).

Congress regarded these changes to the Indian Territory as "fatal to the old order of things." 1895 H.R. Doc. 5, at 88. In its view, when the Indians "invit[ed] white people to come within their jurisdiction, to become traders, farmers, and to follow professional pursuits," they "must have realized that" they had "abandoned forever" the "policy of maintaining an Indian community isolated from" non-Indians. 1894 Senate Report 7. Congress concluded that the law-enforcement and other challenges in the Indian Territory had a single solution—statehood. It therefore acted to replace the separate national domains and governments of the Five Tribes with a single state domain and state and municipal governments that would govern *all* persons, Indians and non-Indians alike.

In particular, Congress saw the breaking up of the Five Tribes' territories as a critical prerequisite to statehood. "[T]he fact that so extensive an area was held under a system that did not recognize private property in land, presented a serious obstacle to the creation of the State which Congress desired to organize for the

government and development of that part of the country." *Choate* v. *Trapp*, 224 U.S. 665, 667 (1912). Congress thus sought to do something wholly different than what the Court has considered in prior cases, wherein the federal government simply acquired surplus lands from a tribe in an existing State and opened them to non-Indian settlement. Instead, because the Indian Territory was already largely populated by non-Indians, Congress undertook to make a complete transformation to create a new State: "the dissolution of the tribal governments, the extinguishment of the communal or tribal title to the land, the vesting of possession and title in severalty among the citizens of the tribes, and the assimilation of the peoples and institutions of this Territory to our prevailing American standard." H.R. Doc. No. 5, 58th Cong., 2d Sess. Pt. 2, at 5 (1903) (1903 H.R. Doc. 5).

3. Congress transformed the Indian Territory and abolished the national domain of the Creek Nation

Between 1890 and 1907, Congress passed a series of statutes that prepared the Indian Territory for statehood by placing Indians and non-Indians under the same framework of non-tribal and non-Indian-based laws, abolishing the national territories of the Tribes, and eliminating the Tribes' ability to exercise significant governmental authority. Congress furthered the transformation by making Indians in the Indian Territory citizens of the United States and guaranteeing their right to participate in the framing of the new Oklahoma Constitution. It is inconceivable that alongside such fundamental change, Congress—without the slightest intimation—intended to create in the new State of Oklahoma five vast Indian reservations, covering half the State and reinstituting the very regime of

treating Indians and non-Indians separately that Congress had eliminated prior to statehood.

a. Congress's transformation of the Indian Territory into a single, unitary State began by eliminating tribal courts and enforcement of tribal law and replacing them with courts and laws that applied to Indians and non-Indians alike.

In 1890, Congress provided that the laws of the United States prohibiting crimes in any place within the sole and exclusive jurisdiction of the United States would apply in the Indian Territory. Act of May 2, 1890 (1890 Act), § 31, 26 Stat. 96. And, with certain exceptions, the criminal laws of Arkansas were assimilated and extended to the Indian Territory for offenses not otherwise governed by federal law. § 33, 26 Stat. 96-97. The 1890 Act further expanded the jurisdiction of the United States Court for the Indian Territory, which had been established the previous year, to encompass all cases except those over which a tribal court had exclusive jurisdiction because both parties were Indians. §§ 29, 31, 26 Stat. 93-94, 96.

Congress then turned to abolishing the Five Tribes' national territories. In 1893, to pave the way for a new State, Congress established the Dawes Commission and authorized it to "enter into negotiations" with the Five Tribes

> for the purpose of the extinguishment of the national or tribal title to any lands * * * *either* by cession of the same or some part thereof to the United States, *or* by the allotment and division of the same in severalty among the Indians of such nations or tribes, respectively * * * *or* by such other method as may be agreed upon * * * *to enable the ultimate creation of*

> *a State or States of the Union* which shall embrace the lands within said India[n] Territory.

Act of Mar. 3, 1893 (1893 Act), § 16, 27 Stat. 645 (emphases added); see *Woodward*, 238 U.S. at 295-296. When the Five Tribes proved reluctant to negotiate, Congress responded with "strong measures." 35 Cong. Rec. 7204 (1902) (Sen. Stewart). Congress authorized the Dawes Commission to determine citizenship in and fix the final rolls of the Five Tribes, declaring the United States' "duty" "to establish a government in the Indian Territory." Act of June 10, 1896 (1896 Act), 29 Stat. 339-340.

Congress then proceeded to "displace[] the tribal laws and put in force in the Territory a body of laws" "intended to reach Indians as well as [non-Indian] persons." *Marlin*, 276 U.S. at 62. In 1897, Congress vested the U.S. courts in the Indian Territory with "exclusive jurisdiction" to try "all civil causes in law and equity" and all "criminal causes" for the punishment of offenses by "any person" in the Indian Territory. Act of June 7, 1897 (1897 Act), 30 Stat. 83. In the same Act, Congress made the laws of the United States and Arkansas applicable to "all persons [in the Indian Territory], *irrespective of race*." *Ibid.* (emphasis added). The next year, the Curtis Act banned the enforcement of tribal law in the Indian Territory courts, "abolished" "all tribal courts," and required that "all civil and criminal causes then pending" in tribal courts be transferred to the U.S. courts. §§ 26, 28, 30 Stat. 504-505.

b. The Curtis Act also placed nearly a third of the population in the Creek Nation's territory directly under local municipal governments. See pp. 14-15, *infra*. Section 14 authorized "any city or town" within the In-

dian Territory that had at least 200 residents to incorporate according to the municipal laws of Arkansas. 30 Stat. 499. Once incorporated, the local government "possess[ed] all the powers and exercise[d] all the rights of similar municipalities in said State of Arkansas." *Ibid.* "All male inhabitants" over the age of 21, including tribal "citizens," were "qualified voters" in the towns' elections. *Ibid.* And all persons living in those towns, including tribal members, were subject to the town's laws and criminal jurisdiction, "*without regard to race*." *Id.* at 499-500 (emphasis added). The towns' mayors had "the same jurisdiction in all civil and criminal cases" as "United States commissioners in the Indian Territory," who had the powers of justices of the peace under Arkansas law. *Id.* at 499; see 1890 Act § 39, 26 Stat. 98-99; see also, *e.g.*, *Missouri, K. & T. Ry. Co.* v. *Phelps*, 76 S.W. 285, 286 (Indian Terr. 1903); *In re English*, 61 S.W. 992, 993 (Indian Terr. 1901). Congress further ensured that non-Indians could own land in towns in fee simple, with proceeds ultimately being paid per capita to tribal members. Curtis Act § 15, 30 Stat. 500-501. Once lots were sold, the town could tax the lots and improvements thereon, as well as "all other property." § 14, 30 Stat. 500.

As a result, by 1902, approximately 150 towns existed in the Indian Territory, including 25 within the Creek Nation's 1866 boundaries. H.R. Doc. No. 5, 57th Cong., 2d Sess. Pt. 2, at 300 (1903). Those towns included Tulsa and Muskogee, two of Oklahoma's largest cities today. *Ibid.* By statehood in 1907, approximately 44,000 people lived in those 25 towns, out of a total of about 145,000 people living within the Creek Nation's former territory. Compare *ibid.*, with 1907 Census 8, 30-33. Thus, through the Curtis Act, Congress instituted many local

non-Indian governments, while providing for Indians to participate in forming and be subject to municipal laws. See, *e.g.*, *Zevely*, 82 S.W. at 956 (Gill, J., concurring in the judgment); see also *Buster* v. *Wright*, 82 S.W. 855, 869 (Indian Terr. 1904) (Clayton, J., dissenting), aff'd, 135 F. 947 (8th Cir. 1905).[1]

c. In 1901, Congress made "every Indian in [the] Indian Territory" a citizen of the United States, Act of Mar. 3, 1901, 31 Stat. 1447, more than 20 years before it provided citizenship to all native-born Indians, Act of June 2, 1924, 43 Stat. 253. Congress took that step because "[t]he independent self-government of the Five Tribes ha[d] practically ceased," and "[t]he policy of the Government to abolish classes in Indian Territory and make a homogenous population [wa]s being rapidly carried out." H.R. Rep. No. 1188, 56th Cong., 1st Sess. 1 (1900) (1900 H.R. Rep.).

d. Also in 1901, the United States and the Creek Nation entered into the Original Creek Agreement, 31 Stat. 861. That Agreement, as well as a subsequent amendment and related statutes, continued the transformation of the Indian Territory toward a unitary

---

[1] Following the Curtis Act, some courts struggled to determine whether the Five Tribes could continue to require business owners in towns to obtain tribal business licenses and pay taxes—at least where title had not yet passed from the Tribes to non-Indians. See, *e.g.*, *Zevely*, 82 S.W. at 947; *id.* at 954 (Gill, J., concurring in the judgment); *Buster*, 82 S.W. at 859; *Muskogee Nat'l Tel. Co.* v. *Hall*, 64 S.W. 600, 603-604 (Indian Terr. 1901); *In re Grayson*, 61 S.W. 984, 986 (Indian Terr. 1901). But see *Trespassers on Indian Lands*, 23 Op. Att'y Gen. 214, 217, 220 (1900). And this Court upheld the federal government's authority to collect tribal taxes on unallotted land. *Morris* v. *Hitchcock*, 194 U.S. 384, 393 (1904). Tribal taxes were subsequently eliminated in 1906. See p. 17, *infra*; see also Resp. Br. 38-39 (discussing *Hitchcock* and *Buster*).

State and state government over *all* citizens, including Indians.

The Agreement provided for allotment to "the citizens of the tribe" of "[a]ll lands belonging to the Creek tribe of Indians in the Indian Territory, except town sites and lands herein reserved for Creek schools and public buildings." §§ 2, 3, 31 Stat. 862; see § 24(a), 31 Stat. 868. It directed the Creek Nation's principal chief to execute a deed to each allottee (and for town sites and other lands) conveying "all right, title, and interest of the Creek Nation and of all other [Creek] citizens" in the land. § 23, 31 Stat. 868. All such conveyances were to be approved by the Secretary of the Interior, which "serve[d] as a relinquishment to the grantee of all the right, title, and interest of the United States" in the land. *Ibid.* And by accepting a deed, each allottee was "deemed to assent to the allotment and conveyance of all the lands of the tribe," and to have "relinquish[ed]" "all his right, title, and interest in and to the same, except in the proceeds of lands reserved from allotment." *Ibid.* The Agreement thus provided for the complete termination of the tribal domain: The Creek Nation ceded all of its interests to individual allottees, who would participate in civic affairs as citizens along with non-Indians.

The Agreement also provided for dissolution of the Creek Nation's government by March 4, 1906. § 46, 31 Stat. 872. Prior to that date, no statute passed by the Nation's council affecting the lands, money, or property of the Tribe (except for "incidental and salaried expenses") or of allottees or other members would "be of any validity until approved by the President of the United States." § 42, 31 Stat. 872. In 1902, the United

States and the Creek Nation entered into a Supplemental Agreement, providing that all Creek Nation funds not needed to equalize the value of allotments were to be paid out on a per capita basis "on the dissolution of the Creek tribal government." § 14, 32 Stat. 503. And in 1904, Congress provided that any surplus lands remaining after allotment would be sold at public auction. Act of Apr. 21, 1904, 33 Stat. 204.

e. In 1904, Congress again confirmed that Arkansas law "continued" to "embrace all persons and estates in [the Indian] Territory, *whether Indian, freedmen, or otherwise*." Act of Apr. 28, 1904 (1904 Act), § 2, 33 Stat. 573 (emphasis added). Congress thereby replaced tribal law with local (Arkansas) law in areas of traditional tribal governance, including marriage and divorce, *e.g.*, *Colbert* v. *Fulton*, 157 P. 1151, 1152 (Okla. 1916), and inheritance disputes between tribal members, *e.g.*, *George* v. *Robb*, 64 S.W. 615, 615-616 (Indian Terr. 1901).

f. In 1906, Congress passed the Five Tribes Act, to "provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory." 34 Stat. 137. The Act abolished tribal taxes and directed the Secretary of the Interior to assume control over the collection of all revenues accruing to the Tribes, including those resulting from the sale of any remaining unallotted lands, and (once all claims against a Tribe were paid) to distribute any remaining funds to tribal members on a per capita basis. §§ 11, 17, 28, 34 Stat. 141, 143-144, 148. The Secretary was directed to take possession of and sell all buildings used for tribal purposes and to take over tribal schools until territorial or state schools were established. §§ 10, 15, 34 Stat. 140-141, 143. Due to delays in enrollment and allotment and po-

tential railroad claims, see pp. 29-30, *infra*, the Act extended the tribal governments "until otherwise provided by law," § 28, 34 Stat. 148, but Congress made clear its continued purpose to "dissol[ve]" them, § 11, 34 Stat. 141.

g. The same year, Congress amended the General Allotment Act, § 6, 24 Stat. 390, to provide that tribal members generally would not be subject to state law until they had received fee patents to their allotments. 1906 Act, 34 Stat. 183. But Congress expressly excepted from that provision "any Indians in the Indian Territory," *ibid.*, who were *already* to be subject to state law.

h. Finally, Congress completed the transformation of the Indian Territory and the Five Tribes' former territories within it by passing the Oklahoma Enabling Act of June 16, 1906, 34 Stat. 267, which authorized the creation of a new State out of the Oklahoma and Indian Territories.

The Enabling Act afforded Indians a unique role in forming the new State. Indians had a right "to vote for and choose delegates to form a constitutional convention for [the] proposed State," to serve as delegates, and ultimately, to vote on the state constitution—which Five Tribes members did. §§ 2, 4, 34 Stat. 268, 271; see 17 Okla. Dist. Attorneys & Okla. Dist. Attorneys Ass'n (Dist. Attorneys) Amicus Br. 8-17. The Enabling Act's provisions for political participation mirrored the Five Tribes' experience in drafting a constitution for the proposed State of Sequoyah, which would have encompassed only the Indian Territory but, like the new State, would have made all residents, Indian and non-Indian, "equal before the law." S. Doc. No. 143, 59th Cong., 1st Sess.

49 (Sequoyah Const. Art. I § 29) (1906); see Dist. Attorneys Amicus Br. 20-23.

Thus, although the treaties between the United States and the Five Tribes had guaranteed that the territories that had been granted to them in fee would never be made part of a State, Congress and the Tribes displaced those provisions through the statutes and agreements culminating in Oklahoma statehood. Nothing suggests that notwithstanding that fundamental change, Congress intended to constitute federal Indian reservations throughout the Tribes' former territories for governmental or jurisdictional purposes.

To the contrary, the Enabling Act ensured that after statehood, as before, members of the Five Tribes were subject to the same laws and court jurisdiction as non-Indians. It extended the laws of the Oklahoma Territory over the Indian Territory, in place of the laws of Arkansas, until the new state legislature provided otherwise. §§ 2, 13, 21, 34 Stat. 268-269, 275, 277-278; see *Fink*, 247 U.S. at 294. And it provided for cases arising under federal law that were pending in the district courts of the Oklahoma Territory and the United States Court for the Indian Territory to be transferred to the newly created United States District Courts for the Western and Eastern Districts of Oklahoma, respectively. § 16, 34 Stat. 276. All other pending cases—*i.e.*, those of a local nature—were to be transferred to the new Oklahoma state courts, the "successors" to the U.S. courts in the Oklahoma and Indian Territories. §§ 16, 17, 20, 34 Stat. 276-277. That category included cases involving Indians on Indian lands, to which the laws of Arkansas had been applied as local law by the Acts of 1897 and 1904 in the same manner as for all other persons. See pp. 13, 17, *supra*. The next year,

Congress amended the Enabling Act to ensure that "[a]ll criminal cases pending in the United States courts in the Indian Territory" not within federal jurisdiction would be "prosecuted to a final determination in the State courts of Oklahoma." Act of Mar. 4, 1907 (1907 Act), § 3, 34 Stat. 1287; see S. Rep. No. 7273, 59th Cong., 2d Sess. 1 (1907); *Murphy* U.S. Supp. Br. 11-12.

B. Contemporaneous Understanding Refutes The Existence Of A Present-Day Reservation Having Jurisdictional Significance

1. Contemporary understanding confirms that Congress dismantled the Creek Nation's domain and eliminated the separate treatment of tribal members in preparation for statehood. By the mid-1890s, Congress had concluded that the system of communal land ownership and tribal government was a "complete failure," *Woodward*, 238 U.S. at 296-297, that could not "continue," 1894 Senate Report 12. In light of the large number of non-Indian settlers and significant law-enforcement problems, Congress determined that change was "imperatively demanded" and required breaking up the Five Tribes' lands and "establish[ing] a government over [non-Indians] and Indians of th[e Indian] Territory in accordance with the principles of our constitution and laws." *Id.* at 12-13. Congress empowered the Dawes Commission to "negotiat[e]" with the Five Tribes "for the purpose of the extinguishment of the national or tribal title to any lands" "to enable the ultimate creation of a State or States of the Union," 1893 Act, 27 Stat. 645, and soon thereafter declared it "the duty of the United States to establish a government in the Indian Territory," 1896 Act, 29 Stat. 340.

2. The Dawes Commission also understood that Congress's goal was to "bring about such changes as would

enable" "the admission of [a new] State." 1900 H.R. Doc. 5, at 9. The Commission explained that the "object of Congress from the beginning has been the dissolution of the tribal governments, the extinguishment of the communal or tribal title to the land, the vesting of possession and title in severalty among the citizens of the tribes, and the assimilation of the peoples and institutions of this Territory to our prevailing American standard." 1903 H.R. Doc. 5, at 5. While petitioner cites (Br. 9, 25) the Dawes Commission's observation that cession to the United States would have "simplified" the process, the Commission understood that the 1893 Act put "allotment" and "cession" on equal footing as "changes" that would accomplish Congress's goals of disestablishment and statehood. 1900 H.R. Doc. 5, at 9.

3. Contemporary statements of the Creek Nation are in accord. In 1893, a Creek Chief observed that Congress's "unwavering aim" was to "'wipe out the line of political distinction between an Indian citizen and other citizens of the Republic'" so that the tribal governments could be "'absorbed and become a part of the United States.'" P. Porter & A.P. McKellop, *Printed Statement of Creek Delegates*, *reprinted in Creek Delegation Documents* 8-9 (Feb. 9, 1893). By 1897, the Creek Nation recognized that Congress proposed to "disintegrat[e] the land of our people" and "transform[]" "our domestic dependent states" "into a State of the Union." S. Doc. No. 111, 54th Cong., 2d Sess. 5, 8. The Creek sought simply to "preserve[] unimpaired" their "chief safeguard, the national title to the land patented to us," until they had negotiated an agreement to ensure that they were not "overwhelmed by an alien and strange population," "robbed by State taxation," and "oppressed by discriminating laws" before they became

"accustomed to State law." *Id.* at 1-2. In preparation for statehood, the Creek people preferred allotment to cession not because they believed it would preserve the Nation's territory, but so that "each [could] sell his share of the lands and receive the money for it" directly. S. Misc. Doc. No. 24, at 7.

C. Subsequent Acts Of Congress And Other Events Confirm That There Is No Reservation Today

1. "Congress' own treatment of the affected areas," *Solem*, 465 U.S. at 471, confirms that it did not constitute all the lands formerly within the Five Tribes' territories as Indian reservations under federal and tribal jurisdiction. Congress enacted several statutes eliminating restrictions on the alienation of Creek allotments and subjecting restricted lands to state-court jurisdiction. *E.g.*, Act of May 27, 1908, 35 Stat. 312; Act of June 14, 1918, 40 Stat. 606; Act of Apr. 10, 1926, 44 Stat. 239-240; Act of Aug. 4, 1947, 61 Stat. 731; see *Fink*, 247 U.S. at 290-294. Those provisions would make little sense if Congress intended for all of the former Indian Territory—including *unrestricted* lands—to be federal Indian country.

Later, in 1934, Congress excluded Oklahoma from the Indian Reorganization Act, 25 U.S.C. 5101 *et seq.*, because that Act "was more adapted to Indian[s] living on reservations," "and not Indians [in Oklahoma] residing on allotments." *To Promote the General Welfare of the Indians of Oklahoma: Hearings Before the Senate Comm. on Indian Affairs*, 74th Cong., 1st Sess. 9 (1935); see S. Rep. No. 1232, 74th Cong., 1st Sess. 6 (1935) (recognizing, in connection with the Oklahoma Indian Welfare Act, 25 U.S.C. 5201 *et seq.*, that "all Indian reservations as such have ceased to exist"); *To Promote the General Welfare of the Indians of Oklahoma*: *Hearings*

Before the House Comm. on Indian Affairs, 74th Cong., 1st Sess. 241 (1935) (Rep. Nichols of Oklahoma) (distinguishing between "reservation Indians" in western Oklahoma and the Five Tribes); see also S. Rep. No. 216, 101st Cong., 1st Sess. 47 (1989) (stating that Congress, through "allotment," "opened the way for Oklahoma to become a state," such that "[w]hen Oklahoma entered the union on September 17, 1907, Indian reservations [in the Indian Territory] were destroyed").

Similarly, in 1942, Assistant Secretary (later Secretary) of the Interior Oscar Chapman opined that due to statutes culminating in the Enabling Act, the "Indian reservations" in the "Indian Territory" "ha[ve] lost their character as Indian country." App., *infra*, 4a. That position reflected the position of Felix Cohen, the Acting Solicitor of the Interior and the Nation's leading authority on Indian law. See *Murphy* Pet. Supp. Reply Br. App. 1a. Subsequently, Congress included the Five Tribes under various federal statutes, such as the Indian Gaming Regulatory Act, by making the statutes applicable to "*former* reservation[s]" "in Oklahoma." 25 U.S.C. 2719(a)(2) (emphasis added); see Cohen § 4.07[1][b], at 292 n.41. Those many statutes confirm Congress's own actions and the judgment of all concerned that Oklahoma statehood did not reinstate special reservation-based jurisdictional rules for Indians throughout eastern Oklahoma.

2. This Court's decisions underscore the point. In *Washington* v. *Miller*, 235 U.S. 422 (1914), the Court described a Creek allotment as "lands within what until recently was the Creek Nation in the Indian Territory." *Id.* at 423; see *Woodward*, 238 U.S. at 285 (referring to land in Muskogee County as "formerly part of the do-

main of the Creek Nation"). In *Oklahoma Tax Commission* v. *United States*, 319 U.S. 598 (1943), the Court noted that while some "Indian tribes a[re] separate political entities with all the rights of independent status," that "condition" "has not existed for many years in the State of Oklahoma." *Id.* at 602. Instead, members of the Five Tribes have "little to distinguish them from all other citizens except for their limited property restrictions and their tax exemptions." *Id.* at 603.

3. The manner in which "local judicial authorities" treated the land, *Solem*, 465 U.S. at 471, likewise demonstrates that no reservation exists. Immediately following statehood—and for more than a century since—the United States and Oklahoma have operated on the understanding that, under the relevant statutes, the State has jurisdiction to try offenses by or against Indians within the former territories of the Five Tribes, with the limited exception, since the late 1980s, of trust lands and remaining restricted allotments. See pp. 36-37, *infra*. Following statehood, the new Oklahoma legislature immediately passed laws confirming that cities and towns incorporated under the Curtis Act were now cities and towns of the new State, which were authorized to regulate the conduct of Indians and non-Indians alike. See 1907-1908 Okla. Sess. Laws 184, 189. Oklahoma's continuous "assumption of jurisdiction over the territory" "reinforces" that it is not "Indian country" today. *Yankton Sioux Tribe*, 522 U.S. at 357-358.[2]

---

[2] Petitioner suggests (Br. 31-32) that following statehood, federal prosecutors indicted liquor offenses on the premise that "the Creek reservation remain[ed] 'Indian country.'" But federal supervision over liquor transactions did not depend upon reservation status, and the former Indian Territory remained subject to an 1895 liquor prohibition. See *Murphy* U.S. Supp. Reply Br. 9-11.

Oklahoma's jurisdiction also extended to civil disputes involving Indians. Following statehood, Oklahoma courts applied Oklahoma law to disputes between Indians on subjects like family law that elsewhere would have fallen under tribal jurisdiction. See, *e.g.*, *Palmer* v. *Cully*, 153 P. 154, 157-158 (Okla. 1915) (per curiam) (Oklahoma law governed marriage between two Seminole members); see also *Stevens* v. *United States*, 146 F.2d 120, 122 (10th Cir. 1944) (finding it "clear that the marriage relations of Creek Indians in Oklahoma are subject to the laws of the state").

Demographic evidence is in accord. See, *e.g.*, *Solem*, 465 U.S. at 471. By Oklahoma statehood in 1907, more than 90% of the Indian Territory's population was non-Indian. See p. 9, *supra*. No decision of this Court concerning reservation status involved remotely comparable circumstances of non-Indians far outnumbering Indians (and fully intermingled among them) even *before* Congress acted, or measures by Congress deliberately designed to replace tribal and federal authority with a new State to govern Indians and the vastly larger non-Indian population alike following allotment. And today, approximately 1.8 million people live in the eastern half of Oklahoma, roughly 9% of whom self-identify as Native American. Resp. Br. 3, 43.

D. Petitioner's Contrary Arguments Lack Merit

1. Against all of this, petitioner primarily contends that the Creek Nation's former territory constitutes a modern-day reservation because the "relevant statutes" lack "'hallmarks'" of disestablishment. Br. 21 (citation omitted). But this Court has rejected petitioner's "magic words" approach. See, *e.g., Hagen*, 510 U.S. at 411-412. And the cases petitioner cites focused on sur-

plus land Acts, applicable to ordinary reservations in already-admitted States, not the wholesale transformation of a territory of the United States encompassing five independent tribal territories into half of a new State. Especially given the sui generis nature of the Indian Territory, the absence of hallmark language does not suggest, much less "command," "reservation status" "in the face of congressionally manifested intent to the contrary." *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584, 587 (1977).

a. Petitioner's search for language of "cession," *e.g.*, Br. 22, 24, 27, fundamentally misses the point. Petitioner assumes that Congress initially "aimed at 'cession'"—which he concedes would have disestablished the Creek Nation's territory—but later settled for allotment, as it "did not believe statehood required disestablishment." Br. 3, 27; see Br. 24. The 1893 Act and contemporaneous congressional statements refute each premise: Congress viewed disestablishment of the Five Tribes' territories as necessary for statehood, and it considered *either* cession to the United States *or* allotment to tribal members appropriate to do so. See pp. 8-13, *supra*; see also, *e.g.*, *Choctaw Nation* v. *Oklahoma*, 397 U.S. 620, 627 (1970); *Choate*, 224 U.S. at 667. Congress thus viewed the two as equivalent.

Indeed, language of cession would have been entirely out of place on the path that Congress ultimately chose. In preparation for Oklahoma statehood, the Tribes' former territories were not conveyed to the United States; the land or its proceeds were distributed directly to tribal members. And the Original Creek Agreement ensured that allotment extinguished the Nation's, the United States', and all other tribal members' claims to

each separate plot of allotted land. In turn, the individual tribal members who received an allotment, as citizens of the new State, continued to be subject to the same law (now that of Oklahoma) as the non-Indians among whom they lived, just as before statehood.

To the extent language of cession can also connote a relinquishment of tribal governmental authority over land, see *Rosebud Sioux Tribe*, 430 U.S. at 597-598, Congress here eliminated the Creek Nation's ability to exercise significant governmental power, provided for its dissolution, and continued its existence only to wind up its affairs. Correspondingly, Congress withdrew general federal governance of the former Indian Territory and the Five Tribes' former territories that comprised it, and the Arkansas law that had been assimilated as federal law was replaced by the state law of Oklahoma. Thereafter, federal law was essentially limited to restrictions on alienation and tax exemptions for individual allottees, which were soon largely lifted, and special liquor regulation called for in the allotment agreements.

b. It is similarly irrelevant that the United States did not "restore" the Creek Nation's lands to the "public domain." But see Pet. Br. 22. Its former territory had not been "reserved" from the "public domain" to begin with, and it was not "restored" to the United States.

c. The phrases "lump sum payment" and "sum certain," see, *e.g.*, *Yankton Sioux Tribe*, 522 U.S. at 343, likewise would have been inapposite. Those phrases denote "an unconditional commitment from Congress to compensate the Indian tribe for its opened land." *Solem*, 465 U.S. at 470. But Congress did not acquire the Creek Nation's communal land and open it to non-Indian set-

tlement; it instead broke up the Nation's domain by allotting almost all of it directly to individual tribal members, and distributing any additional proceeds to them.

2. Petitioner seeks support (Br. 38) from the Enabling Act. That Act, however, preserved only the then-existing "rights of person or property pertaining to the Indians of [the Oklahoma and Indian] Territories (so long as such rights shall remain unextinguished)," and provided that the State could not limit the authority of the United States to regulate such Indians, their lands, or property. 34 Stat. 267; cf. § 25, 34 Stat. 279 (maintaining Congress's "absolute jurisdiction and control" over Indian lands in the proposed State of Arizona). Nothing in that language abrogated the Acts of Congress that had *already* placed Indians and non-Indians under the same laws in the Indian Territory. And although the Enabling Act also required the State to disclaim right and title to all lands "owned or held by any Indian, tribe, or nation," § 3, 34 Stat. 270, this case does not involve tribal or restricted Indian lands at all.

Petitioner observes (Br. 31) that Congress elsewhere made a handful of references to the Creek Nation's territory or boundaries. But a 1906 provision defining the boundary line between "the Creek Nation" and "the Territory of Oklahoma" merely corrected a survey line "erroneous[ly]" drawn in 1871. Act of June 21, 1906, 34 Stat. 364; S. Rep. No. 2561, 59th Cong., 1st Sess. 54 (1906). And the other examples petitioner cites (Br. 31) used "the Creek Nation" as a convenient geographic descriptor, rather than an expression of congressional intent that, contrary to all the statutes Congress enacted, the former tribal territory would be constituted going forward as a reservation subject to federal and tribal jurisdiction. Cf. *Yankton Sioux Tribe*, 522 U.S. at 355-

356. Finally, while some Interior Department maps labeled the Indian Territory as including reservations until 1914, as of 1919 the Department's maps made clear that the former Indian Territory did not include any reservations, Records of the Bureau of Indian Affairs, *Central Map File, Record Grp. 75.26, Entry 414 (Administrative Maps), Indian Reservations West of the Mississippi River* (1919).

3. Petitioner emphasizes (Br. 29) that while the Original Creek Agreement provided that the tribal government would expire on March 4, 1906, Congress extended that deadline, with no fixed termination date, in the Five Tribes Act, § 28, 34 Stat. 148. That modest extension in an Act providing for the "final disposition" of the Five Tribes' affairs, see p. 17, *supra*, plainly did not embody a congressional decision to constitute their former territories as reservations under tribal and federal jurisdiction.

By the time of the Act's passage, Congress had provided for the closing of the Creek Nation's membership rolls and allotment of its lands; abolished the Nation's courts and barred enforcement of its laws there; greatly circumscribed its legislative authority; provided for municipalities governing Indians and non-Indians alike; and put Indians on equal footing with non-Indians by making them citizens of the United States, applying the same laws to them, and subjecting them to the same courts' jurisdiction. See *Marlin*, 276 U.S. at 63 (describing Congress's "elaborate plan for terminating the tribal relation"); *McDougal* v. *McKay*, 237 U.S. 372, 381 (1915) (Congress "undertook to terminate their government."); Charles F. Wilkinson & Eric R. Biggs, *The Evolution of the Termination Policy*, 5 Am. Indian L. Rev. 139, 144 (1977) (describing Five Tribes as "[t]he closest

historical precedent for [the] outright termination" policy of the 1950s and 1960s).

Congress's decision not to finally dissolve the tribal government in these circumstances was based on narrow practical considerations. With the deadline for termination of the tribal governments looming, allotment was incomplete and title to some land remained in the Tribes. 40 Cong. Rec. 2975-2976 (1906) (Sen. Teller). Also, in 1866, Congress had granted several railroad companies a right-of-way across the Indian Territory, Act of July 25, 1866, § 9, 14 Stat. 238; Congress was concerned that if Indian title was extinguished prior to allotment, title would vest automatically in the railroads. *Harjo* v. *Kleppe*, 420 F. Supp. 1110, 1128-1129 (D.D.C. 1976), aff'd, 581 F.2d 949 (D.C. Cir. 1978); see 40 Cong. Rec. at 2973-2978. Congress therefore extended the tribal governments to ensure that conveyances by the Tribes to allottees could be completed and that valuable coal lands would not revert to the railroads—not because it had abandoned dismantling the Creek Nation's territory. See 40 Cong. Rec. at 2974 (Sen. Bailey); see also *Harjo*, 420 F. Supp. at 1129; Francis E. Leupp (Commissioner of Indian Affairs, 1905-1909), *The Indian and His Problem* 336 (1910) ("The only present shadow or fiction of the survival of the [Five Tribes] as tribes is their grudging recognition till all their property, or the proceeds thereof, can be distributed among the individual members.").

Congress's last-minute continuation of the tribal governments in skeletal form for limited purposes thus did not cause reservations and their jurisdictional consequences to spring into being and reverse all that Congress had accomplished by that point in breaking up the former territories of the Five Tribes and preparing to

transfer governmental authority to what was to be a new State. Indeed, it is well-established that tribes may be federally recognized absent a reservation. See Bureau of Indian Affairs, U.S. Dep't of the Interior, *Frequently Asked Questions*, https://www.bia.gov/frequently-asked-questions; Cohen § 3.02[8][a], at 163-164; see also, *e.g.*, *DeCoteau* v. *District Cnty. Court for the Tenth Judicial Dist.*, 420 U.S. 425, 427-428, 443-444 (1975) (holding reservation terminated despite continued existence of tribal government).

Decades later, as part of a broader shift in Indian policy, Congress authorized the Tribes to re-form governments and reconstitute tribal courts. 25 U.S.C. 5203; see *Muscogee (Creek) Nation* v. *Hodel*, 851 F.2d 1439, 1443-1447 (D.C. Cir. 1988), cert. denied, 488 U.S. 1010 (1989). But that restoration did not detract from Congress's actions culminating in Oklahoma statehood that extinguished the Creek Nation's former territory, or reconstitute that territory as a modern-day Indian reservation.

II. OKLAHOMA IN ANY EVENT HAD JURISDICTION OVER PETITIONER'S CRIME

Even if the former territory of the Creek Nation might still be recognized in some skeletal sense, Oklahoma would have criminal jurisdiction over petitioner's crime. As explained above, Congress enacted statutes for the Indian Territory that differed from those in other U.S. territories, and it ensured that Indians in the Indian Territory—and later, in Oklahoma—were subject to the same laws and court jurisdiction as non-Indians. No Act of Congress abrogated that jurisdictional framework for the new State. See *Murphy* U.S. Supp. Br. 4-18; *Murphy* U.S. Supp. Reply Br. 2-8.

A. Five of the Acts discussed above are especially significant to Oklahoma's jurisdiction over crimes involving Indians. *First*, in 1897, Congress granted the U.S. courts in the Indian Territory "exclusive jurisdiction" to try "all civil causes in law and equity" and all "criminal causes" involving offenses by "any person" "*irrespective of race*," 1897 Act, 30 Stat. 83 (emphasis added), with the law largely supplied by assimilating the state law of Arkansas. The goal was "to place Indians upon precisely the same plane as [non-Indians], giving them the same rights" under the law. 29 Cong. Rec. 2324 (1897) (Sen. Berry).

Second, the Curtis Act "abolished" "all tribal courts in Indian Territory" and banned enforcement of tribal law there. §§ 26, 28, 30 Stat. 504. The Curtis Act's town site provisions also placed Indians and non-Indians under the same municipal laws "without regard to race." § 14, 30 Stat. 499-500.

Third, the 1904 Act reconfirmed the equal treatment of all individuals under a uniform body of assimilated state law, "whether Indian, freedman, or otherwise." § 2, 33 Stat. 573.

Fourth, the Enabling Act extended the laws of the Oklahoma Territory over the Indian Territory, and all of its inhabitants, to govern matters of a local nature until the new state legislature acted. §§ 2, 13, 21, 34 Stat. 268-269, 275, 277-278; see *Stewart* v. *Keyes*, 295 U.S. 403, 409-410 (1935). The Act also sent pending criminal cases of a local nature—including those involving Indians—to the new Oklahoma state courts, the "successors" to the U.S. courts in the Indian Territory. §§ 16, 17, 20, 34 Stat. 276-277; see also 1907 Act § 3, 34 Stat. 1287.

Fifth, in 1906, Congress provided that a general statutory directive that allottees would not be subject to state law until a fee patent issued did not apply to Indians in the Indian Territory, who were already to be subject to state law. See p. 18, *supra*.

B. After statehood, the federal and state courts consistently interpreted these Acts to provide for broad criminal jurisdiction in the State. The sole judge of the new United States District Court for the Eastern District of Oklahoma ordered that "all prisoners" awaiting trial "in the custody of United States marshals" be delivered to the "state authorities," except where the offense was "of a federal character," because the Enabling Act had deprived the federal courts of jurisdiction over such cases. *Ex parte Buchanen*, 94 P. 943, 945 (Okla. 1908); see *Many May Escape Law*, Muskogee Times-Democrat, Dec. 4, 1907, at 1. The Supreme Court of Oklahoma held that state courts had assumed jurisdiction of all crimes "not of a federal character" in the former Indian Territory, *i.e.*, crimes not committed "within a fort or arsenal or in such place in said territory over which jurisdiction would have been solely and exclusively within the jurisdiction of the United States, had it at that time been a state." *Buchanen*, 94 P. at 944. And Oklahoma courts regularly exercised criminal jurisdiction over crimes involving Indians in the former Indian Territory. *E.g.*, *McGlassen* v. *State*, 130 P. 1174, 1174-1175 (Okla. Crim. App. 1913); *Rollen* v. *State*, 125 P. 1087, 1088 (Okla. Crim. App. 1912); see also *Ex parte Nowabbi*, 61 P.2d 1139 (Okla. Crim. App. 1936).

This Court's decision in *Hendrix* v. *United States*, 219 U.S. 79 (1911), likewise reflects the understanding that the State obtained general criminal jurisdiction over Indians in the former Indian Territory. An Indian

defendant indicted for murder prior to statehood had successfully moved to transfer his case from the Indian Territory court to a federal court in Texas, under a special statute to protect against bias. *Id.* at 86. Following statehood, he contended that the Enabling Act required transferring his case to Oklahoma state court. *Id.* at 88-89. This Court disagreed, concluding that the pre-statehood statute continued to govern. *Id.* at 90-91. But neither the Court nor the United States questioned the premise that criminal cases involving Indians pending in the Indian Territory courts generally were to be transferred to state court. See *Murphy* U.S. Supp. Br. 13-14; see also *id.* at 13 n.2 (discussing *Jones* v. *State*, 107 P. 738 (Okla. Crim. App. 1910), petition for habeas corpus denied, 231 U.S. 743 (1913)).

C. If state courts did not have jurisdiction over crimes by Indians against other Indians following statehood, then *no* court would have had jurisdiction over most such crimes. Even if the Major Crimes Act had applied after 1897, but see pp. 34-35, *infra*, it limited federal jurisdiction to listed major crimes, § 9, 23 Stat. 385, and tribal courts, which would have had jurisdiction over non-major crimes, had been abolished since 1898. Thus, on petitioner's theory, from statehood through the reestablishment of the tribal courts eighty years later, see *Hodel*, 851 F.2d at 1444-1447, *no* court would have had jurisdiction over such crimes between Indians in the Creek Nation's former territory.[3]

D. Petitioner does not dispute (Br. 47-48) that prior to statehood, Congress subjected Indians and

---

[3] Petitioner suggests (Br. 53 n.8) that the Interior Department could have provided for Courts of Indian Offenses. But the Department's failure to do so confirms that it (like Congress, federal and state courts, and the State) perceived no jurisdictional gap.

non-Indians in the Indian Territory to the same criminal laws and court jurisdiction. Instead, he dismisses (Br. 48) that action because the law at issue was assimilated Arkansas law. But by abolishing tribal courts, banning enforcement of tribal law, and subjecting Indians to the same laws and courts as non-Indians, Congress "removed the essential characteristic of the Indian country"—"the application of tribal laws within the area"—and "superseded" the Major Crimes Act and the General Crimes Act, 18 U.S.C. 1152, there with special statutes. App., *infra*, 3a.

Petitioner suggests that following statehood, crimes involving Indians should have been tried in federal court because they arose "under the Constitution, laws, or treaties of the United States." Br. 49 (quoting Enabling Act § 16, 34 Stat. 276). That argument ignores the contemporaneous and century-long understanding of federal and state courts and prosecutors;[4] assumes that the Major Crimes Act and General Crimes Act simply sprang to life in eastern Oklahoma at statehood to reintroduce the very distinctions between Indians and non-Indians that Congress had eliminated; and presumes that Congress created a significant jurisdictional gap, despite its longstanding concern with law enforcement in the area.

---

[4] Petitioner observes (Br. 51-52) that States mistakenly exercised jurisdiction over other Indian reservations and suggests that Oklahoma might have been mistaken here. But petitioner points to no example of the exercise of state criminal jurisdiction remotely of the magnitude that has occurred here, or a situation where an Act of Congress providing for the *transfer* of cases from federal to state court was contemporaneously construed to include cases involving Indians.

Nor is petitioner correct that for new cases involving Indians, federal law should have applied because Congress applied Oklahoma law "as far as applicable." Br. 50 (quoting Enabling Act § 13, 34 Stat. 275). That provision extended the law of the Oklahoma *Territory* to the former Indian Territory until the state legislature acted. Petitioner provides no reason to think that Congress's use of the quoted phrase in that transitional provision undid Congress's work over the preceding decade in "abolish[ing] classes in Indian Territory and mak[ing] a homogenous population." 1900 H.R. Rep. 1.

E. As part of its comprehensive revision of the federal criminal code in 1948, Congress defined "'Indian country'" to include "land within the limits of any Indian reservation under the jurisdiction of the United States." Act of June 25, 1948, 62 Stat. 757 (18 U.S.C. 1151(a)). That general provision does not address or aptly capture the unique status of the Five Tribes' former territories, which had been broken up and *removed* from general federal (and tribal) jurisdiction. And nothing suggests that Congress in 1948 implicitly repealed that existing jurisdictional framework in eastern Oklahoma.

Indeed, from Oklahoma statehood until the late 1980s, the United States and Oklahoma understood that the State had jurisdiction over crimes involving Indians throughout the former Indian Territory. The state courts regularly exercised that jurisdiction, and in 1936, the OCCA confirmed that the State had jurisdiction over the murder of one Choctaw Indian by another even on a restricted allotment. *Nowabbi*, 61 P.2d at 1156.

In the late 1980s, however, Oklahoma courts held that the State lacked "jurisdiction over crimes committed by or against an Indian" on restricted allotments within the former Indian Territory. *State* v. *Klindt*,

782 P.2d 401, 403 (Okla. Crim. App. 1989). *Klindt* rejected *Nowabbi*'s reasoning and found that any "existing doubts" were "extinguish[ed]" with enactment of Section 1151(c) in 1948. *Id.* at 404; see 18 U.S.C. 1151(c) (defining "'Indian country'" to include "all Indian allotments, the Indian titles to which have not been extinguished"). The Tenth Circuit later agreed. *United States* v. *Sands*, 968 F.2d 1058, 1061-1063 (1992), cert. denied, 506 U.S. 1056 (1993).

In its amicus brief in support of certiorari in *State* v. *Brooks*, 763 P.2d 707, 710 (Okla. Crim. App. 1988), cert. denied, 490 U.S. 1031 (1989), and in its response to the certiorari petition in *Sands*, the United States argued that Oklahoma had jurisdiction over such crimes. This Court denied the petitions, and the United States has exercised jurisdiction over crimes committed by or against Indians on trust lands and restricted allotments in eastern Oklahoma since 1992.

Because petitioner does not contend that his crime occurred on a restricted allotment, this case does not involve jurisdiction over such lands. But the statutes through which Oklahoma succeeded to and has long exercised criminal jurisdiction over the Creek Nation's former territory have never been repealed, and their application to *unrestricted* fee lands—which constitute more than 95% of the land in the area, including the City of Tulsa—was never questioned for more than a century until *Murphy*.

III. A DECISION IN FAVOR OF PETITIONER WOULD HAVE SIGNIFICANT ADVERSE CONSEQUENCES

A. In the 113 years since Oklahoma statehood, the United States and Oklahoma have operated on the understanding that the State has exclusive jurisdiction to

try offenses committed by or against Indians on unrestricted fee lands in eastern Oklahoma. A determination that all of that vast area today constitutes Indian reservations over which the federal and tribal governments have jurisdiction, notwithstanding the statutes vesting criminal and civil jurisdiction in the State regardless of reservation status, would have grave consequences.

The federal government would be required to investigate and prosecute all crimes by or against Indians (with the exception of non-major crimes between Indians) in the Creek Nation's former territory. Although existing data make it difficult to estimate the exact impact, the Executive Office for United States Attorneys has informed this Office that the Northern and Eastern Districts of Oklahoma collectively could expect approximately a five-fold increase in annual felony prosecutions.[5] That estimate is conservative: it assumes federal prosecutors would refer all misdemeanors committed by Indian defendants to the Creek Nation, and does not include the many crimes involving non-Indian defendants and Indian victims, which also would be subject to exclusive federal jurisdiction. If the Court's decision were applied to all Five Tribes, the District Courts and U.S. Attorneys' Offices for the Northern and

---

[5] The figures in this paragraph reflect the average number of state felony cases filed in each impacted county between 2014 and 2016, available in the *Supreme Court of Oklahoma's Annual Reports* (http://www.oscn.net/news/archive), multiplied by the percentage of American Indian and Alaska Native population in each affected county from the 2018 U.S. Census estimate. They differ somewhat from the figures that the government provided in *Murphy*, which were based on Tulsa County, used 2016 rather than three-year-average data, and did not include members of other Tribes residing in the area. See *Murphy* U.S. Cert. Amicus Br. 21 n.7.

Eastern Districts of Oklahoma could expect approximately 13 times as many felony cases annually. A decision in petitioner's favor thus would require a great increase in the dockets of federal district courts and federal law-enforcement presence and resources.

Such a decision also would result in numerous challenges to existing state convictions involving Indian defendants or Indian victims and the possible release of thousands of state prisoners. See Resp. Br. 43. Petitioner takes the position (Br. 43 & n.5) that Oklahoma law would permit such challenges, regardless of the age of the prior conviction, making any limitations on federal habeas relief irrelevant. While petitioner suggests (Br. 43) that state prisoners "will think twice" before bringing such challenges, his own case refutes the point. And in raising the possibility of federal re-prosecution (*ibid.*), petitioner ignores statutes of limitation, stale evidence, impacts on victims, and the increased burden on federal courts and prosecutors.

B. A determination that the Five Tribes' former territories now constitute federal Indian reservations also would upend over a century of state taxation and civil regulatory authority. For example, for the last 113 years, Oklahoma has had the authority to levy taxes on tribal members' activities on fee lands there, including income taxes, sales taxes, and motor fuel and other excise taxes. If this Court holds that all of eastern Oklahoma constitutes reservations in the traditional sense, the State would lose that authority where the legal incidence of the tax falls on tribal members, and expose the State to claims for taxes collected in the past. See, *e.g.*, *Oklahoma Tax Comm'n* v. *Chickasaw Nation*, 515 U.S. 450, 458-459 (1995); *Moe* v. *Confederated Salish & Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463 (1976);

McClanahan v. *Arizona State Tax Comm'n*, 411 U.S. 164 (1973). State civil adjudicatory authority over cases against Indians would also be subject to challenge. See *Williams* v. *Lee*, 358 U.S. 217 (1959). And adoptions and foster-care proceedings involving Indian children residing on the newly-recognized reservations would fall within exclusive tribal court jurisdiction. 25 U.S.C. 1911(a).

C. Petitioner suggests (Br. 4, 41) that this Court's decision in *City of Sherrill* v. *Oneida Indian Nation of New York*, 544 U.S. 197 (2005), could curtail the "Tribes' ability to exercise rights that would disrupt settled expectations." But see Creek Nation Amicus Br. (declining to cite *Sherrill*). *Sherrill* is not the panacea petitioner suggests. The Court's decision there was grounded in the case's distinct facts, which "evoke[d] the doctrines of laches, acquiescence, and impossibility." 544 U.S. at 221. And *Sherrill* focused on a tribe's ability to obtain equitable relief; it could not sustain the many state criminal convictions that would be challenged if this Court accepted petitioner's argument, provide the State with taxing or regulatory authority or civil jurisdiction that it otherwise would lack, or remove federal authority in Indian country.

CONCLUSION

The judgment of the Court of Criminal Appeals of Oklahoma should be affirmed.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General
JEFFREY BOSSERT CLARK
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
ERICA L. ROSS
Assistant to the Solicitor General
WILLIAM B. LAZARUS
JAMES A. MAYSONETT
Attorneys

MARCH 2020

APPENDIX

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SECRETARY
WASHINGTON

Office of the Solicitor

Aug. 17, 1942

The Honorable

The Attorney General.

Sir:

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

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

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

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

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

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

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

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

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

The conclusions of the Department may be summarized as follows:

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

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

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

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

Very truly yours,

(Sgd.) OSCAR L. CHAPMAN
Assistant Secretary.

Enclosure 690427.
CTL:mvp