No. 18-9526

IN THE
Supreme Court of the United States

JIMCY MCGIRT,
Petitioner,
v.
OKLAHOMA,
Respondent.

On Writ of Certiorari
to the Oklahoma Court of Criminal Appeals

REPLY BRIEF FOR PETITIONER

IAN HEATH GERSHENGORN
Counsel of Record
ZACHARY C. SCHAUF
ALLISON M. TJEMSLAND*
JENNER & BLOCK LLP
1099 New York Ave., NW
Suite 900
Washington, DC 20001
(202) 639-6000
igershengorn@jenner.com

**Not admitted in D.C.; supervised by principals of the Firm*

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INTRODUCTION

After six briefs and argument in *Murphy*, Oklahoma has relegated to last the one argument it pressed there (disestablishment). It leads with a brand-new argument (Creek lands were a "dependent Indian community," never a reservation) that contradicts concessions it made in *Murphy* and that the Solicitor General cannot countenance. Then, Oklahoma follows with an argument it declined to press previously (Congress transferred jurisdiction even over reservations), before closing with the old stand-by that the sky will fall unless Oklahoma gets its way.

Oklahoma can shift arguments, but it cannot dodge the fundamental principles that foreclose its position. Decisions about sovereign rights—when to terminate treaty promises and how to transfer jurisdiction among competing sovereigns—are for Congress. And Congress makes those decisions by speaking clearly in the text. Oklahoma loses because, on each argument, the text refutes its position.

First, the Creek Nation had a reservation. The relevant treaties "solemnly guaranteed" lands for the Creek to govern, and both treaty and statute identified those lands as a "reservation." Nothing more was needed. That is especially true because this Court reads treaties as the Indians would have done. Here, after the Creek insisted on fee patents to bolster their treaty promises of a separate domain, they surely understood that their march on the Trail of Tears would yield *at least* the protections other reservations enjoyed, not the rump Indian lands that Oklahoma reimagines.

Second, Congress did not disestablish that reservation. The problem is not that Congress forgot to use "magic words." It is that Congress had disestablishment language at hand and chose not to use it. Congress considered the "cession" language it had used before in diminishing the Creek reservation and in instructing the Dawes Commission, but acceded to Creek resistance and merely allotted Creek land among members. Likewise, Congress preserved the Creek government "in full force and effect for all purposes authorized by law"—precisely to prevent the lands from entering the public domain.

Oklahoma and Tulsa argue that statutory text accomplished disestablishment when it required the Creek to convey to allottees "all [its] right, title and interest" in the land. Nonsense. That is boilerplate deed language identical to that used—at statehood and today—by Oklahoma and its cities, including Tulsa itself, when conveying property to private parties. Surely Tulsa does not diminish city limits with every land sale. As for Oklahoma's assertion that cession and allotment were essentially the same, that is not textual interpretation but wishful thinking.

Third, Congress did not transfer criminal jurisdiction when Oklahoma became a State. At statehood, the Major Crimes Act ("MCA") established exclusive federal jurisdiction over enumerated crimes by Indians on reservations in "any State." When Congress overrides the MCA and cedes jurisdiction to a State, it does so expressly. Oklahoma and the Solicitor General identify no statutes that uniquely exempted Oklahoma from the MCA; indeed, the relevant text treats

Oklahoma just like its sister States. No surprise, then, that Oklahoma's state and federal courts have rejected this argument for 30 years.

Finally, Oklahoma and the Solicitor General contend that adhering to text will yield disruption. But little evidence backs the rhetoric. Indeed, 30 years ago, they made near-identical claims about half-a-million acres of Oklahoma's Indian lands, prophesying a "return to the state of lawlessness which Congress attempted to alleviate as early as 1889." Cert. Pet. at 45, *Oklahoma v. Brooks* (No. 88-1147). Yet the sky did not fall.

ARGUMENT

I. The Creek Nation Had A Reservation.

In *Murphy*, Oklahoma did "not dispute that the [Creek] reservation was intact in 1900." *Murphy v. Royal*, 875 F.3d 896, 954 (10th Cir. 2017). Now, however, Oklahoma (though not the United States) claims the Creek's domain was "a dependent Indian community, not a reservation." Br. 1. With this relabeling, Oklahoma would duck *Parker* and substitute a test under which allotment alone disestablishes. Br. 14-16. This maneuver fails.

A. The Creek Were Given A "Reservation."

Oklahoma barely tries to square its new story with the statutory text or the *amicus* briefs addressing this point. MCN Br. 5-11; NCAI Br. 4-13. Today's "Indian country" definition, which includes "reservation" lands, dates from 1948. *United States v. John*, 437 U.S. 634, 648 (1978). The best evidence of what Congress understood "Indian country" to encompass is that, in treaties and

statutes before 1948, Congress had identified Creek lands as a "reservation." After the Creek ceded certain lands, an 1866 treaty recognized a "reduced Creek Reservation." 1866 Treaty art. IX; *see* Pet'r Br. 6. Another 1866 treaty did the same, Treaty between United States and Cherokee Nation, July 19, 1866, art. IV, 14 Stat. 799, as did an 1873 statute directing negotiation of a cession from "the Creek reservation," Act of Mar. 3, 1873, ch. 322, 17 Stat. 626, and an 1891 statute describing a cession by referencing the "West boundary line of the Creek Reservation," Act of Feb. 13, 1891, 26 Stat. 749, 750.

Oklahoma has zero evidence that Congress in 1948 intended to *narrow* "reservation" to exclude lands Congress previously identified as such. *Cf.* U.S. Br. 36 (rejecting suggestion that the 1948 codification effected a significant substantive change). Oklahoma also identifies zero statutes that exclude Creek lands from "reservation" status; the only statute it cites referred to the "five civilized tribes[']" lands as "Indian country" without saying they *were not* reservations. Br. 10.

This conclusion accords with this Court's broad understanding of the term "reservation." Long ago, this Court rejected a technical definition restricting that term to lands reserved from cessions of a tribe's aboriginal lands. *Donnelly v. United States*, 228 U.S. 243, 269 (1913). Instead, a "reservation" "describe[s] any body of land … reserved … from sale for any purpose." *United States v. Celestine*, 215 U.S. 278, 285 (1909); *see Minnesota v. Hitchcock*, 185 U.S. 373, 390 (1902) ("it is enough that from what has been done there results a

certain defined tract appropriated to certain purposes").

Here, from public-domain lands ceded by the Quapaw and Osage, the United States by treaty "establish[ed] boundary lines [to] secure a … permanent home to the whole Creek nation"—"solemnly guarant[eeing] to the Creek" those lands, with the right "to govern themselves." 1832 Treaty art. XIV; 1833 Treaty, Preamble, art. II; *see* Pet'r Br. 5; MCN Br. 6-8. Had the treaties stopped there, no one could dispute that Congress had created a "reservation." *Cf. Donnelly*, 228 U.S. at 269 ("nothing can more appropriately be deemed 'Indian country' … than a tract of land that, being a part of the public domain, is lawfully set apart as an Indian reservation").

Oklahoma, however, says that because the United States secured these lands by *also* issuing a patent, the Creek lack a reservation and forfeit *Parker*'s protections. Br. 12. The text shows that argument is wrong. By statute and treaty, the patent was an *additional* layer of protection, which the Indian Removal Act authorized the Creek to receive "if they prefer." Act of May 28, 1830, ch. 148, § 3, 4 Stat. 411. It did not even issue until 1852. Pet'r Br. 6. Tulsa's assertion that "the fee patent … is the foundation of the land's Indian country status," Tulsa Br. 18-19, is thus baloney. *See United States v. Elliott*, 131 F.2d 720, 724 (10th Cir. 1942) ("The primary basis for the grant to the Cherokee Nation was the treaty. The patent was only a confirmation thereof.").

Meanwhile, prior treaties had created reservations

(and referred to them as such) by providing for fee-simple patents. NCAI Br. 11; *see, e.g.*, Treaty with the Wyandots, etc., arts. VI, X, XX, Sept. 29, 1817, 7 Stat. 160. No Creek in 1832 could have fathomed that, by accepting a backstop fee patent, the Nation would *lose* protections.

Indeed, it wasn't just Congress that understood Creek lands as a reservation. What Oklahoma disparages as "[i]solated, colloquial references," Br. 13, include this Court's contemporaneous statement that it had "no doubt" that a statute governing "reserved" lands applied to Indian Territory "reservations," *Atl. & Pac. R.R. Co. v. Mingus*, 165 U.S. 413, 435, 440 (1897), and the Court of Appeals for the Indian Territory's declaration that the "contention that the Creek Nation is not now an Indian reservation is not tenable," *Maxey v. Wright*, 54 S.W. 807, 810 (Indian Terr. 1900). *Accord Cherokee Nation v. Journeycake*, 155 U.S. 196, 205-07, 212-16 (1894) (Cherokee "reservation"); *Winebrenner v. Forney*, 189 U.S. 148, 152 (1903); *Delaware Indians v. Cherokee Nation*, 193 U.S. 127, 139 (1904); *Montana v. United States*, 450 U.S. 544, 555 n.5 (1981). Myriad congressional and executive documents, including Oklahoma's own, reflect the same view. NCAI Br. 8-9; 47 Cong. Globe 763-64 (1873); 11 Cong. Rec. 2351 (1881); *infra* 7-8.

By contrast, Oklahoma's motley non-statutory sources only *elevate* the Five Tribes' lands over other reservations. An 1894 Census Report says that the Five Tribes' lands were not "*ordinary* Indian reservations"—then refers to the "Chickasaw … Cherokee, … Creek,"

and "Choctaw … reservation[s]," and identifies in maps the Five Tribes' lands as within "[b]oundar[ies] of Indian [r]eservations." Dep't of Interior, Census Office, Report on Indians Taxed and Indians Not Taxed in the U.S. at 242, 252, 261, 284 (1894). Likewise, when a Choctaw chief "object[ed] to being classified with the reservation Indians," it was because he viewed the Choctaw as "self-sustaining"—while acknowledging that the "tendency to classify [Indian Territory] Indians" as "reservation Indians" was "widespread" and "prevail[ed] even in Congress." S. Doc. 59-143, 1st. Sess. at 33 (1906).[1]

B. The Creek Domain Is Not A "Dependent Indian Community."

Oklahoma cannot dodge *Solem* and *Parker* by recharacterizing Creek lands as a "dependent Indian community." Oklahoma emphasizes that the Creek domain "originally" met the two requirements for a "dependent Indian community"—federal set-aside and superintendence. Br. 11. That, however, shows nothing: *All* reservations at inception met these requirements, *see Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 527 (1998), but that does not make them "dependent Indian communities" or render *Solem* and *Parker* inapplicable. Rather, this term is a "catch-all," *Hydro Res., Inc. v. U.S. E.P.A.*, 608 F.3d 1131, 1157, 1159

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[1] Oklahoma errs in suggesting that the test of *Bates v. Clark*, 95 U.S. 204 (1877)—tying "Indian country" status to Indian title—applies because it governed when the Creek received their reservation. Br. 9. This Court has rejected *Bates*' "more technical and limited definition," *John*, 437 U.S. at 649, and applied *Solem* to 19th-century reservations.

(10th Cir. 2010) (Gorsuch, J.), for "a limited category of Indian lands that are neither reservations nor allotments" but still are "Indian country," *Venetie*, 522 U.S. at 528. No "catch-all" is needed for the Creek domain—by treaty and statute, it was a reservation.

Oklahoma urges the Court to look beyond "semantics." Br. 11. But as substance, Oklahoma's position fares worse. The one thing everyone knew in the 19th century was that the Creek enjoyed *greater* federal protection than other tribes. *Supra* 5. And the one thing uniting all the "dependent Indian communities" this Court has addressed is their *lack* of similar federal treaty promises of territorial integrity and self-government. Pet'r Br. 20-21. In *United States v. Sandoval*, 231 U.S. 28 (1913), the United States had not signed treaties creating the borders of the New Mexico Pueblos; Spain and Mexico had. *Id.* at 39. In *United States v. McGowan*, 302 U.S. 535 (1938), the Reno Indian Colony was trust land "purchased … by Congress to provide … for needy Indians"; they concededly had "no reservation." *Id.* at 537 & n.5. And in *Venetie*, Congress had "revoked the Venetie Reservation." 522 U.S. at 527. The treaty-protected Creek domain is in a different league.

There is nothing to Oklahoma's attempts to denigrate these protections. First, Oklahoma relies on the Creeks' fee patent, Br. 9-12, but fee title does not separate dependent Indian communities from reservations. The *McGowan* tract was a dependent Indian community even though the "government retain[ed] title." 302 U.S. at 539. Meanwhile, Congress

has (as noted) created reservations from fee lands. *Supra* 5-6. Oklahoma would wreak havoc by relegating all such lands nationwide to a less-protected status. Certainly, *Sandoval* does not suggest that all fee-held lands are "dependent Indian communities." When *Sandoval* observed that the Pueblos' "fee … patents" were "essentially the same as … the Five Civilized Tribes[']," 231 U.S. at 46, 48, it meant just that: They had the same *form of title*, not that the Pueblos were like the Creek in all respects.

Second, Oklahoma invokes *United States v. Creek Nation*, 295 U.S. 103 (1935). But when *Creek Nation* called the Creek a "dependent Indian community," it was only commenting that the Nation was "under the guardianship of the United States," like all federally recognized tribes. *Id.* at 109.

Third, Oklahoma asserts that the Creek treaties preceded the 1850s "federal reservation policy." Br. 9-10. But this Court has understood earlier treaties as creating reservations. *E.g.*, *Spalding v. Chandler*, 160 U.S. 394, 407 (1896) (1820 treaty); *The New York Indians*, 72 U.S. (5 Wall.) 761, 766 (1866) (1784 and 1842 treaties). Many earlier treaties and statutes used the *word* "reservation."[2] And here, the treaties and statutes show that Congress understood the Creek lands in the same way.

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[2] Treaty with the Weas, Oct. 2, 1818, art. 2, 7 Stat. 186; Act of Feb. 28, 1809, 2 Stat. 527; Act of May 26, 1824, 4 Stat. 75; Act of June 30, 1834, 4 Stat. 740.

Finally, Oklahoma would not prevail even if its relabeling succeeded. This Court has never heard a "dependent Indian community" disestablishment case, and Oklahoma offers no reason that treaty-protected lands should be subject to lower disestablishment standards just because of labels. *Cf. State v. Romero*, 142 P.3d 887, 894 (N.M. 2006) (applying *Solem* to Pueblos). The Creek lands received the strongest possible protections, irrespective of what Oklahoma now calls them.

C. Oklahoma's "Dependent Indian Community" Theory Does Not Explain Post-Statehood Events.

Oklahoma claims its theory explains post-statehood prosecutions. Br. 16-21. Not so. Oklahoma acknowledges that lands subject to "restraints on alienation" remained dependent Indian communities and "Indian country." Br. 14-15. And post-statehood, substantial Creek land remained restricted—yet Oklahoma prosecuted Indian crimes there anyway. Pet'r Br. 12, 14. Regardless, Oklahoma's practice proves nothing. As we explained—yet Oklahoma ignores—States during the early 20th century illegally exercised civil and criminal jurisdiction over reservations and Indian country in 10 States, including Oklahoma. Pet'r Br. 51. And in 1942, the Interior Department acknowledged that Oklahoma's courts "assumed jurisdiction" over Oklahoma's Indian country, without

legal justification. Pet'r Br. 51-52.[3]

The same is true of Oklahoma's "jurisdictional gap" argument. Br. 20. Oklahoma's "dependent Indian community" theory (like its disestablishment argument) does not *avoid* a gap as to minor Indian-on-Indian crimes: Oklahoma lacked jurisdiction over restricted allotments and tribally owned lands—yet neither tribal nor federal courts had jurisdiction over minor crimes. That States everywhere prosecuted Indian country crimes anyway, *supra* 10, readily explains why Congress did not focus on Oklahoma's theoretical gap. Similar gaps were common nationwide. Pet'r Br. 52-53. Indeed, Congress in 1885 removed "assault and battery" from the MCA's list of covered crimes while recognizing that doing so risked creating gaps for those crimes. 16 Cong. Rec. 934 (1885). Congress deemed the availability of "the court of Indian offenses" sufficient to address such "trivial violations." *Id.*

II. Congress Never Disestablished The Creek Reservation.

It is no wonder Oklahoma has demoted its disestablishment argument: Under this Court's text-first test, Oklahoma cannot prevail.

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[3] The federal government prosecuted on the Osage Reservation briefly post-statehood because it was "not … allotted" until later. Br. 25. That reflected confusion that tribal ownership and reservation status might be coextensive, no more. *Infra* 13.

A. No Text Disestablished The Creek Reservation.

Oklahoma and the Solicitor General start by rewriting the governing test. Oklahoma says text takes a back seat to a "holistic[]"—read: nontextual—inquiry into what Congress "intended" based on the State's account of "historical context," Br. 6, 35, and the Solicitor General relegates *Parker* to a cameo, *see* U.S. Br. 5, 7. But *Parker* controls, and it reaffirms that, in disestablishment cases as elsewhere, text governs. Nor can Oklahoma gainsay that this Court has never found disestablishment without clear text. It cites *Hagen* and *Rosebud* as finding diminishment even though "Congress contemplated cession, but went another route." Br. 32. Each, however, relied on express statutory text. *Hagen v. Utah*, 510 U.S. 399, 412 (1994) ("restored to the public domain"); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 597 (1977) ("[C]ede, surrender, grant, and convey to the United States."); *see* Pet'r Br. 21-22 & n.1.

Oklahoma next attacks a strawman, claiming Petitioner demands "magic words." Br. 6, 29-30; *see* U.S. Br. 25. But Oklahoma's problem is not the absence of magic words. Br. 2. It is that *Parker* requires a "textual indication of … intent to diminish reservation boundaries," *Nebraska v. Parker*, 136 S. Ct. 1072, 1079 (2016), not simply to transfer "title of individual plots," *Solem v. Bartlett*, 465 U.S. 463, 470 (1984). Oklahoma cannot identify *any* clear text—and that failure is telling, because Creek-related treaties and statutes in 1856, 1866, and 1893 used hallmark language of

"cession." Pet'r Br. 24. Congress abandoned such language due to Creek resistance, not because "cession" was "out of place" given Congress's goals. U.S. Br. 26; *see* Pet'r Br. 25 (refuting this argument, without answer from Solicitor General).

Oklahoma pleads for a more lenient standard because turn-of-the-century Congresses supposedly did not grasp how to disestablish or understand that reservation status "might not be coextensive with tribal ownership." Br. 29 (quoting *Solem*, 465 U.S. at 468). But *Solem* and *Parker* grappled with the same arguments. This Court responded by delineating which land transfers disestablished and which did not based on statutory text—distinguishing cession from allotment. Oklahoma's protestation that Congress saw nothing "hinging on the differen[ce]" between cession and allotment, Br. 7; *see* U.S. Br. 21, deprives words of their meaning and defies the entire thrust of this Court's cases.

The distinction between cession and allotment also explains why Oklahoma's sole textual argument fails. Oklahoma concedes that the 1901 allotment agreement provides the key text. Br. 2. Yet the text Oklahoma invokes is simply an allotment provision, requiring deeds to convey "to [the allottee] all right, title and interest of the Creek Nation." Allotment Agreement § 23; Pet. Br. 9. Everywhere, allotment's *point* was to convey such title and interest in land. While Oklahoma suggests that this provision uniquely conveyed *governmental* interests with land ownership, Br. 32, it merely followed the boilerplate that deeds *must* employ.

Mosier v. Momsen, 74 P. 905, 906 (Okla. 1903); Okla. R.L. § 1170 (1911); Okla. Stat. Ann. tit. 16, § 18. Tulsa used near-identical language to transfer properties *it* owned. Add. 1a, 3a. Presumably, Tulsa did not thereby surrender sovereign powers or diminish city limits. *Accord Henry v. City of Muskogee*, 986 P.2d 1151, 1152-53 (Okla. Civ. App. 1999) ("City [of Muskogee]" in 1907 conveyed to church "all right, title and interest in" tract purchased "from the Creek Nation"). Oklahoma's theory is especially bizarre because, if Creek deeds transferred such powers, they directed them to recipients—allottees—who could not *exercise* them. By contrast, this Court has found disestablishment only when tribes "cede[d] *to the United States* all their claim, right, title, and interest." *DeCoteau v. Dist. Cty. Court for Tenth Judicial Dist.*, 420 U.S. 425, 445 (1975) (emphasis added).

Double proof that Congress did not divest the Creek of all sovereign interests comes from Section 42, which recognized continuing Creek authority to legislate over "the lands of the tribe, or of individuals after allotment, or the moneys or other property of the tribe, or of the citizens thereof," subject to presidential veto. Allotment Agreement § 42. Oklahoma says Section 42 covers only "tribal *property* interests," Br. 38, when the plain text is not so limited. Oklahoma calls Petitioner's reading "strained," *id.*, without acknowledging this Court's statement that identical language in the Choctaw agreement "permit[ted] the continued exercise" of "legislative … power" "within [tribal] borders," which federal officials could enforce. *Morris v. Hitchcock*, 194 U.S. 384, 389, 393 (1904). And Oklahoma blinds itself to

the point of *Buster v. Wright*, 135 F. 947, 949-50 (8th Cir. 1905), which applied *Morris* to non-Indian land in Creek townsites. Oklahoma notes that this Court has not followed *Buster*'s broad interpretation of tribal authority over non-Indian fee land. Br. 39. What matters, however, is *Buster*'s holding that, whatever power tribes have on reservations, the Creek retained it after allotment.

This renders irrelevant Oklahoma's assertion that reservations cannot endure when tribes lose "both title *and* sovereignty." Br. 31. The statutes cannot be read as divesting the Creek of all power over their land—perhaps why the United States carefully says only that Creek "governmental authority" was "greatly circumscribed." U.S. Br. 3. References to the Creek's "shell of a government," and the "suspen[sion]" of Creek laws, Br. 39, merely recognized practical realities: Creek laws were subject to presidential veto, these laws depended on the executive branch for enforcement, and the necessary cooperation was not forthcoming given the executive's "deliberate attempts to frustrate [Creek] government[]." *Harjo v. Kleppe*, 420 F. Supp. 1110, 1130 (D.D.C. 1976). If succumbing to such pressure disestablished, the United States would have few reservations left. Everywhere, federal officials were squashing tribal governments while seeking "to end the tribe as a separate political … unit." MCN Br. 33; Pet'r Br. 35.

Oklahoma suggests that statehood contributed to disestablishment. Br. 31. But Congress routinely admitted States that were half Indian country, Pet'r Br.

38-39, and Congress created the reservation *Solem* confirmed just before statehood, MCN Br. 26. Indeed, the notion that statehood is inconsistent with broad expanses of Indian country is particularly risible here: At statehood, 83% of Eastern Oklahoma was indisputably "Indian country" (as restricted allotments), and nearly half remained so in 1908. Pet'r Br. 12; *Murphy* Resp. Br. 36 n.5.[4]

Oklahoma conjures disestablishment from the assertion that statehood "violat[ed] Congress's promise that tribal land would never be part of a state." Br. 31; *see* U.S. Br. 19. But this breach-one-breach-all approach to treaty interpretation inverts the governing canons of construction. Statutes and treaties are "construed liberally in favor of the Indians." *Oneida Cty. v. Oneida Indian Nation of N.Y.*, 470 U.S. 226, 247 (1985). This Court will not read statutes to abrogate *more* treaty promises than their text compels.[5]

B. Oklahoma's "Context" Arguments Fail.

Oklahoma's description of the historical "context"

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[4] The Solicitor General (at 11, 15) invokes the grant to the Creek of U.S. citizenship and participation rights in the Oklahoma constitutional convention. But shortly after, Congress granted full "citizenship to all native-born Indians." U.S. Br. 15. It is perplexing why he believes this step disestablished only the Creek reservation. *See Celestine*, 215 U.S. at 289-90.

[5] The State contrasts the Enabling Act's reservation of federal rights with language in other statehood acts. Br. 34. As this Court has explained, however, those formulations "were considered interchangeable." *Organized Vill. of Kake v. Egan*, 369 U.S. 60, 70 (1962).

fails to provide the "unequivocal evidence," *Parker*, 136 S. Ct. at 1080, this Court demands. Oklahoma relies principally on cherry-picked statements about events that *did not* happen. For example, the 1897 Creek Memorial lamenting that the Creek must "become accustomed to State laws" did so while contemplating "the civil death of the Muscogee Nation." S. Doc. 54-111, 2d Sess. at 1-2 (1897). And it was dissolution that Congress equated with "abrogation of all the former treaties" and the end of federal "control over the property of th[e] Indians," which would instead "be controlled by the new State." 40 Cong. Rec. 2977 (1906) (Sen. McCumber); *Statehood for Oklahoma: Hearing Before the H. Comm. on the Territories*, 58th Cong. 137 (1904) (Mr. Howe). Meanwhile, everywhere "the turn-of-the-century assumption" was that Indian reservations shortly "would cease to exist." *Solem*, 465 U.S. at 468. It is therefore neither surprising nor probative that Oklahoma can cite statements prophesying the end. *E.g.*, *id.* at 478 (legislative history referencing "reduced," "diminished" reservation); Nebraska *Parker* Br. 45 (similar).

By contrast, Petitioner cites specific understandings of events that *actually happened*. Oklahoma emphasizes Congress's motives for reversing dissolution. Br. 37. What matters, however, is that Congress sought to avoid precisely the result that Oklahoma claims Congress *intended*: ceding Creek domains to "control[] by the new State." 40 Cong. Rec. 2977 (1906) (Sen. McCumber). Likewise, Petitioner invokes the negotiating history to show that Congress chose allotment, not "cession," Pet'r Br. 27, while Oklahoma

can only speculate that Congress did not believe its textual choices mattered. Br. 32-33.

Nor can Oklahoma gain by invoking the post-statehood transfer of Indian cases to Oklahoma courts. We have answered that already: Treating practice as probative makes no sense when myriad States were exercising jurisdiction Congress never conferred, *supra* 10, and Oklahoma, aided by federal indifference, was engaged in "systematic and wholesale exploitation of the Indian through evasion or defiance of the law." Angie Debo, *And Still the Waters Run* 117 (1940); Pet'r Br. 51.[6]

C. Oklahoma's "Subsequent History" Arguments Fail.

Oklahoma's "subsequent history," Br. 40, floats past the critical point. "[T]his Court has never relied solely on this third consideration to find diminishment," *Parker*, 136 S. Ct. at 1081, not even in *Parker*, where the "Tribe was almost entirely absent … for more than 120 years," *id.* at 1081-82.

A few examples underscore that Oklahoma's "'mixed record' of subsequent treatment," 136 S. Ct. at 1082, does not advance the ball.

First, Oklahoma neglects *Congress's* understanding. Congress in 1906 resolved boundary disputes with reference to the "west boundary line of the Creek

[6] Oklahoma notes that a few federal officials upheld their duties. Br. 19-20. But loose anecdotes are no answer to the relentless lawlessness and dereliction documented by Debo and *Harjo*.

Nation," 34 Stat. at 343, which would be incomprehensible if Creek boundaries had dissolved, *see* MCN Br. 26-27 (similar examples). Oklahoma and the Solicitor General also rely on self-serving legislative history from Oklahoma's Senator and Representative declaring all Oklahoma reservations extinct, Br. 41; U.S. Br. 22, while ignoring that the statute Congress *actually passed* recognized "existing Indian reservations" in Oklahoma. Act of June 26, 1936, ch. 831, § 1, 49 Stat. 1967; Pet'r Br. 31; *see Murphy* Resp. Br. 51 n.13 (addressing 25 U.S.C. § 1452(d)).

Congress's post-statehood decisions about restricted allotments, Br. 42, show the opposite of what Oklahoma hopes. Congress gave state courts jurisdiction over restricted allotments as "federal instrumentalit[ies]." *Murphy* Resp. Br. 53-54. Outside of reservations, Congress does not generally deputize state courts as *federal* actors. Likewise, allotted lands—once free of alienation restrictions—were taxable because of Congress's authorization. Five Tribes Act § 19; Pet'r Br. 10; *see* Act of May 27, 1908, ch. 199, § 4, 35 Stat. 312. That happened on many reservations, including *Parker*'s. *Murphy* Resp. Br. 54.

As to judicial decisions, Oklahoma cannot show the evidence is other than mixed. Petitioner cited cases recognizing the Creek Nation's continuing boundaries. Pet'r Br. 32. By contrast, Oklahoma relies on decisions that inaccurately imply the Nation ceased to exist. *Murphy* Resp. Br. 53 n.14 (addressing cases).

As to the executive branch, Oklahoma can only

dismiss the federal liquor indictments across the Creek reservation, Pet'r Br. 31-32, as reflecting an "overbroad" understanding of "Indian country" and "confusion." Br. 19 n.6. And it dismisses the federal maps recognizing the Nation's reservation as "inconsistent," Br. 42—ignoring *Parker*'s point that inconsistent, subsequent-history evidence cannot support disestablishment.

III. Congress Did Not Transfer To Oklahoma Jurisdiction Over The Creek Reservation.

Reprising their hand-wavy disestablishment arguments, Oklahoma and the Solicitor General alternatively insist that Congress conferred on Oklahoma jurisdiction even over Indian reservations—invoking a smattering of statutes they deem "especially significant." Br. 21; U.S. Br. 32. But at statehood, the MCA recognized exclusive federal jurisdiction over qualifying crimes on "any Indian reservation" or "Indian country" within "any State." Pet'r Br. 45. The question therefore is not whether the Enabling Act "reintroduced" exclusive federal jurisdiction. Br. 26. It is whether Congress gave Oklahoma then-unprecedented jurisdiction over its "Indian country." The answer is no, as state and federal courts have concluded for 30 years. Pet'r Br. 44.

1. Oklahoma ultimately concedes that Congress must speak in "'plain terms'" to alter the MCA. Br. 27 (quoting *Negonsott v. Samuels*, 507 U.S. 99, 103-04 (1993)). But it ignores what this standard means. Whenever Congress has shifted Indian-country jurisdiction to States, it has spoken clearly to say that "[j]urisdiction is conferred on" the State—including in

Oklahoma, where Congress in 1908 transferred limited jurisdiction over restricted allotments by saying that they "shall ... be subject to [state-court] jurisdiction." Pet'r Br. 46-47.

There is no clear transfer here. Oklahoma says that an 1897 statute giving "the United States courts in [Indian Territory] … jurisdiction" over civil and criminal cases, and applying "the laws of the United States and the State of Arkansas … to all persons therein, irrespective of race," Act of June 7, 1897, ch. 3, 30 Stat. 62, 83, gave "Oklahoma jurisdiction over" Indian reservations post-statehood "irrespective of race." Br. 21. But unlike the MCA, the 1897 statute does not speak to post-statehood jurisdiction. And giving federal territorial courts adjudicatory jurisdiction over offenses defined in an assimilated body of federal law, as the 1897 statute did with Arkansas law, is very different from giving a State plenary jurisdiction to legislate and adjudicate on reservations. Pet'r Br. 48. Oklahoma pronounces that it would be "passing strange" for the MCA to create distinctions after statehood that did not exist before. Br. 26. But it has no answer to Petitioner's showing that statehood *always* had that effect, Pet'r Br. 48-49, simply asserting that the "situation was different," Br. 27.[7]

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[7] The United States (at 13-14) invokes the Curtis Act's "town site" provisions, but they did not extend state criminal law to Indians. Town sites were established under federal authority, and towns could only enact ordinances punishable by fines and could only jail offenders (for 30 days) when authorized by statute. Mansfield's Digest of Statutes of Arkansas, ch. 29, §§ 745, 746, 765 (1884).

Indeed, the textual problem is worse. At statehood, Congress provided that "the laws in force in the Territory of Oklahoma, as far as applicable, shall" apply. Enabling Act § 13; *see* Pet'r Br. 12. With Congress having chosen to apply after statehood the *Oklahoma Territory's* law—where the MCA indisputably applied, Br. 27—it is incoherent to say that today an 1897 *Indian Territory* statute governs jurisdiction over Eastern Oklahoma's Indian country.

Oklahoma contests whether the MCA applied to pre-statehood Indian Territory, incorrectly claiming that Petitioner's argument is "based on [the] assumption that the [MCA]" applied pre-statehood. Br. 26. To be clear: Our argument is based on the MCA's unambiguous post-statehood application in "any State." Pet'r Br. 45. That said, the relevant, pre-statehood jurisdictional grant was an 1890 statute (not the 1889 statute Oklahoma cites) that excluded jurisdiction only over matters where "members of [an Indian] nation [were] the only parties"—leaving ample sweep for the MCA. Act of May 2, 1890, ch. 182, § 30, 26 Stat. 81. Hence, the federal government's longstanding position is that the MCA applied. U.S. *Murphy* Br. 2a-3a.

Oklahoma also implies that, because the MCA draws race-based classifications, it could not survive the 1897 act applying federal and Arkansas law "irrespective of race." Br. 26. This statute, however, merely provided that federal and Arkansas law *reached* everyone. Despite Oklahoma's attractive-sounding tale of "race-blind adjudication," it was not understood to eliminate racial classifications. *Scott v. Epperson*, 284 P. 19, 20

(Okla. 1930) (applying to Creek an Arkansas law invalidating inter-racial marriages). Nor was post-statehood Oklahoma a "race-neutral" society. Br. 26; *e.g.*, *Dowell v. School Bd. of Okla. City Pub. Sch.*, 219 F. Supp. 427, 431-47 (W.D. Okla. 1963).

2. Oklahoma fares no better with the Enabling Act. The section Oklahoma invokes addresses only transfers of pending cases—and it provides only that "all causes … arising under the Constitution, laws, or treaties of the United States" go to federal court. Enabling Act § 16. This says nothing about whether, post-statehood, Indian crimes on reservations remained subject to exclusive federal jurisdiction.[8]

Worse, Oklahoma remarkably fails to mention Congress's 1907 amendment that directed to federal courts prosecutions for crimes "which, had they been committed within a State, would have been cognizable in the Federal courts." Act of Mar. 4, 1907, ch. 2911, § 1, 34 Stat. 1286. This directive to treat Oklahoma *like* other States is the opposite of Oklahoma's claim that Congress made Oklahoma *different from* every other State. Oklahoma's insistence that Indian cases were *in fact* transferred to state court, Br. 25, proves nothing given

[8] Contra Oklahoma (Br. 25), the Enabling Act did not say that state courts were "successors" to territorial courts for all cases—just cases properly transferred to state court. In other instances, it identified federal courts as successors. *Murphy* Resp. Supp. Reply 6-7 (citing sources).

the same unlawful prosecutions occurring nationwide.[9]

IV. Oklahoma's Claims About Consequences Are Overstated.

As in many cases this Court hears, its decision will have consequences. Deeming the Creek reservation disestablished risks disrupting the services the Creek provide in underserved areas of Eastern Oklahoma where the Creek exercise sovereign rights. MCN Br. 45-47. The opposite result may trigger certain rules applicable on Indian reservations that Oklahoma and the federal government do not recognize today. Oklahoma's brief, however, confirms that its claims of a "sea change," Br. 43, are overstated.

On the criminal side, Oklahoma and its *amici* offer no genuine reason for concern. *Cf.* MCN Br. 41-43; NCAI Br. 25, 31-34. Tulsa says the Nation's Lighthorse Police Department cannot replace the Tulsa Police Department, but it acknowledges that cross-deputization agreements already exist. Tulsa Br. 30. That means policing can continue as before. MCN Br. 37-38. The United States observes that additional prosecutions will come its way, offering *yet another* unsupported, back-of-the-envelope estimate. Br. 38-39 & n.5; *see Murphy* Resp. Br. 55. But it makes no credible argument that the federal government cannot handle the additional prosecutions. Regardless, Congress has

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[9] Congress did not exempt Oklahoma from the MCA in the Burke Act, Act of May 8, 1906, ch. 2348, § 6, 34 Stat. 183; *see* Br. 34. This Act excluded the Five Tribes because the *General Allotment Act*, which it was amending, did so.

means available—which it has used before—to fix any problems. Pet'r Br. 46.

Only for existing convictions is Congress's authority more limited. There, Oklahoma's brief exposes its argument as rhetoric. The Tenth Circuit decided *Murphy* nearly three years ago. In every *Murphy* challenge, Oklahoma is the respondent. If the actual number were large, Oklahoma would have given the Court a *number*. When Oklahoma just asserts a "risk[]" to "thousands" of convictions, Br. 43, it concedes it has no evidence of large effects.

On the civil side, Oklahoma does not dispute (Br. 44-45) that the Creek have virtually no jurisdiction to regulate non-Indians, or that this Court has *never* preempted the application of state law to non-Indians on fee land. Pet'r Br. 40; *see* MCN Br. 43-44; MCN *Murphy* Br. 32-34; NCAI *Murphy* Br. 28. It points to "taxation" of Indians, Br. 44, but all unrestricted fee lands on reservations are subject to state taxes. MCN Br. 44. On other tax issues, Oklahoma routinely compacts with tribes. NCAI Br. 24. Meanwhile, Oklahoma tellingly ignores *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197 (2005), which this Court invoked in *Parker*. 136 S. Ct. at 1082. Oklahoma makes much of jurisdiction over "adoptions and custody disputes," Br. 44, but ignores the Creek brief addressing those concerns, MCN Br. 44-45.

If such claims of disruption sound familiar, they should. When Oklahoma courts 30 years ago held that the federal government had exclusive jurisdiction over

restricted allotments, the Solicitor General claimed "[l]aw enforcement would be rendered very difficult," and there would be "grave uncertainty regarding the application" of "the State's taxing, regulatory and other laws." U.S. Br. at 13-14, *Oklahoma v. Brooks* (No. 88-1147). During the intervening decades, none of that proved true.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

IAN HEATH GERSHENGORN
Counsel of Record
ZACHARY C. SCHAUF
ALLISON M. TJEMSLAND*
JENNER & BLOCK LLP
1099 New York Ave., NW
Suite 900
Washington, DC 20001
(202) 639-6000
igershengorn@jenner.com
**Not admitted in D.C.; supervised by principals of the Firm*

Counsel for Petitioner

April 10, 2020

ADDENDUM

#19

The City of Tulsa
to
C.W. Robertson, Sr.

Quit Claim Deed

This indenture made this 25th day of June, 1906, between the City of Tulsa, Indian Territory, party of the first part, and C.W. Robertson, Sr. party of the second party witnesseth:

That for and in consideration of the sum of One Dollar ($1.00) to it duly paid, the receipt of which is hereby acknowledged, the said party of the first part has remised, released, conveyed and quit-claimed, and by these present does quit-claim unto the said party of the second part, and to his heirs and assigns forever, all its right, title and interest both at law and equity, in and to the following described property, to-wit:

The East forty (40) feet of Lot No. Six (6) in Block No. Nine (9) in the City of Tulsa, Indian Territory, as shown by the official plat thereof.

To have and to hold the said described premises, together with all and singular the tenements, here determents and appurtenances therewith belonging, or in any wise appertaining, unto the said C.W. Robertson Sr., his heirs and assigns, forever.

In witness whereof the said party of the first part has caused these presents to be signed in its name by its

Mayor, and its corporate seal to be affixed, attested by its Recorder at Tulsa, the day and year first above written.

The City of Tulsa, I.T.
(Corporate Seal) By John O. Mitchell, Mayor
Attest: W. D. Abbott Recorder

Indian Territory, Western District.

Be it remembered, that on the 3rd day of June, 1906, before me, a Notary Public, in and for said district and Territory, duly commissioned and acting, personally appeared John O. Mitchell, to me known to be the Mayor of the City of Tulsa, and the identical person who subscribed the name of said City and his own name to the foregoing deed as its Mayor and acknowledged to me that he signed and executed the same as his free and voluntary act and deed and as the free and voluntary act and deed of said corporation for the consideration and purposes therein mentioned and set forth.

(Seal) Tulsa, Ind Terr. L.D. Marr.
My commission expires 6/18/1910 Notary Public
Files for record July 5, 1906, at 9:00 a.m.

Otis Larton
Deputy Clerk and Ex. Officio Recorder

Tulsa County Clerk - Michael Willis
Doc # 2019011300 Page(s): 2 Recorded 02/12/2019 04:17:48 PM
Receipt # 19-7517 Fees: $15.00

8383

QUIT CLAIM DEED

KNOW ALL MEN BY THESE PRESENTS:

THAT the **CITY OF TULSA**, an Oklahoma municipal corporation, of 175 E. 2nd Street, Tulsa, Oklahoma, 74103 hereinafter referred to as Grantor, in consideration of the sum of Ten and No/100 Dollars ($10.00) and other good and valuable consideration, receipt of which is hereby acknowledged, does by these presents, quitclaim, grant, bargain, sell and convey unto **DANE M. JACKSON**, a single man, of 9344 E. 3rd Place, Tulsa, Oklahoma, 74112-2412, hereinafter referred to as Grantee, his successors and assigns, all of Grantor's right, title, interest and estate, both at law and in equity, of, in and to the following described property (hereinafter referred to as the "Property"), to-wit:

Lot Two (2), Block Nine (9), MEADOWOOD ADDITION, to The City of Tulsa, Tulsa County, State of Oklahoma, according to the recorded plat thereof,

Together with all the hereditaments and appurtenances thereunto belonging.

This conveyance is subject to all rights-of-way, easements, leases, deed and plat restrictions, partitions, severances, encumbrances, licenses, reservations and exceptions which are of record as of the date hereof, and

is further subject to all rights of persons in possession, and to physical conditions, encroachments and possessory rights which would be evident from an inspection of the Property and is subject to existing outstanding mineral interests owned by third parties, if any.

The Property is conveyed "AS IS", and Grantor makes no warranty that any of the Property is safe or suitable for any purpose or use. The Property may be unsuitable for any use for reasons, including, but not limited to, rough, unnatural and unstable surfaces, inadequate subjacent or lateral support, circumstances relating to the environmental quality of the Property, or other conditions arising out of the prior use of the Property. Grantee shall take title to the Property subject to the exceptions and reservations first above mentioned and subject to physical conditions, encroachments and possessory rights which would be evident from an inspection of the Property.

TO HAVE AND TO HOLD the Property unto the Grantee, his successors and assigns, forever, subject to the terms, conditions, reservations and exceptions set forth herein, without warranty.

NO DOCUMENTARY STAMPS REQUIRED: TAX EXEMPT - Title 68 O.S. §3202(11)

AFTER RECORDING RETURN TO:
Guaranty Abstract Company
320 South Boulder
Tulsa, OK 74103
E-258138

IN WITNESS WHEREOF, the name of the Grantor is hereunto affixed this 28th day of January, 2019.

THE CITY OF TULSA,
an Oklahoma municipal corporation

By: /s/ G.T. Bynum, Mayor
G.T. Bynum, Mayor

ATTEST:

/s/ Deputy
City Clerk

ACKNOWLEDGEMENT

STATE OF OKLAHOMA)
) ss:
COUNTY OF TULSA)

Before me, the undersigned, a Notary Public, in and for said County and State on this 28th day of January, 2019, personally appeared G.T. Bynum, as Mayor of the City of Tulsa, Oklahoma, to me known to be the identical person who executed the within and foregoing instrument on behalf of the City of Tulsa as its Mayor, and acknowledged to me that he executed the same as his free and voluntary act and deed, and as the free and voluntary act and deed of the City of Tulsa for the uses and purposes therein set forth.

Given under my hand and seal of office the date and year above written.

/s/
Notary Public

My commission expires: 2/15/21

My commission number: #17001552

APPROVED AS TO FORM:

/s/ (Ms. Swiney)
Senior Assistant City Attorney

Deed presented for filing by:
Guaranty Abstract Company/ Karen Weddington
File Number: 258138
Title Insurer: Fidelity