No. 17-

IN THE

Supreme Court of the United States

TERRY ROYAL, WARDEN,
OKLAHOMA STATE PENITENTIARY,

Petitioner,

v.

PATRICK DWAYNE MURPHY,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

Whether the 1866 territorial boundaries of the Creek Nation within the former Indian Territory of eastern Oklahoma constitute an "Indian reservation" today under 18 U.S.C. § 1151(a).

PARTIES TO THE PROCEEDING

Petitioner Terry Royal is the Warden of the Oklahoma State Penitentiary. Petitioner was the respondent in the district court and the appellee in the Tenth Circuit.

Respondent Patrick Murphy was the petitioner in the district court and the appellant in the Tenth Circuit.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported at 875 F.3d 896 (10th Cir. 2017). App. 1a. The district court's opinion is reported at *Murphy v. Sirmons*, 497 F. Supp. 2d 1257 (E.D. Okla. 2007). App. 134a. The opinion of the Oklahoma Court of Criminal Appeals is reported at *Murphy v. State*, 124 P.3d 1198 (Okla. Crim. App. 2005). App. 203a.

JURISDICTION

The United States Court of Appeals for the Tenth Circuit entered judgment on August 8, 2017. The court denied rehearing and issued an amended opinion on November 9, 2017. App. 1a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 1153(a) of Title 18, United States Code, provides, in relevant part: "Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder … within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States."

Section 1151 of Title 18, United States Code, provides, in relevant part: "[T]he term 'Indian country', as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation."

STATEMENT

In a decision that strikes at the core of Oklahoma's identity and sovereignty, the Tenth Circuit held that the State lacks jurisdiction to prosecute a capital murder committed in eastern Oklahoma by a member of the Creek Nation. The panel held that Congress never disestablished the 1866 boundaries of the Creek Nation, and all lands within those boundaries are therefore "Indian country" subject to exclusive federal jurisdiction under 18 U.S.C. § 1153(a) for serious crimes committed by or against Indians. This holding has already placed a cloud of doubt over thousands of existing criminal convictions and pending prosecutions.

The former Creek Nation territory encompasses 3,079,095 acres and most of the City of Tulsa. Whether an area this large and populous is an Indian reservation warrants certiorari. But there is more. Litigants have invoked the decision below to reincarnate the historical boundaries of all "Five Civilized Tribes"—the Creeks, Cherokees, Choctaws, Chickasaws, and Seminoles. This combined area encompasses the entire eastern half of the State. The decision thus threatens to effectively redraw the map of Oklahoma.

Prisoners have begun seeking post-conviction relief in state, federal, and even tribal court, contending that their convictions are void *ab initio*. Civil litigants are using the decision to expand tribal jurisdiction over non-members. All of this creates intolerable uncertainty for over 1.8 million Oklahomans who may now live on an Indian reservation, with all the civil, criminal, and regulatory consequences that could flow from that determination.

Chief Judge Tymkovich stated below that "this challenging and interesting case makes a good candidate for Supreme Court review" and that "this may be the rare case where the Supreme Court wishes" to revisit the governing standard for the disestablishment of Indian reservations. App. 232a. The United States joined Oklahoma's petition for rehearing en banc, both because the "panel erred, and because this is a case of exceptional importance" with "significant and wide-ranging implications for law enforcement." U.S. Br. in Supp. of Reh'g at 1–2 (filed Oct. 10, 2017).

The Tenth Circuit believed that this Court's precedents foreclosed the court from fully accounting for Oklahoma's unique history. As Chief Judge Tymkovich observed, "the square peg" of this Court's Indian reservation decisions "is ill suited for the round hole of Oklahoma statehood." App. 232a. But Oklahoma's history is dispositive here. Oklahoma was formed by the merger of Oklahoma Territory to the west and Indian Territory to the east. The latter encompassed the land of all Five Tribes, which covered the eastern half of present-day Oklahoma. To prepare the Indian Territory for statehood, Congress systematically dismantled tribal governments and their communal ownership of lands. The birth of our forty-sixth State marked the culmination of a two-decade legislative campaign to dissolve the Five Tribes' communal territories.

If not corrected, the decision below could result in the largest abrogation of state sovereignty by a federal court in American history. It has been universally understood since statehood that the historical boundaries of the Five Tribes' territories are not reservations. Since its founding, the State has prosecuted offenses committed by or against Indians on lands within the former Indian Territory. Meanwhile, nei-

ther the federal government nor the tribes have prosecuted such crimes under the theory that the land is an Indian reservation. Because the decision below casts that century of precedent aside and has already unleashed a torrent of litigation and confusion, this Court's immediate attention is warranted.

A. Historical background

The Creek, Cherokee, Choctaw, Chickasaw, and Seminole Nations form their own unique chapter in American history. "These tribes were collectively known almost universally as the Five Civilized Tribes because many of them had adopted so many elements of white culture that reformers often pointed to them as models for what assimilation could accomplish." Kent Carter, *The Dawes Commission and the Allotment of the Five Civilized Tribes, 1893–1914*, at 1 (1999).

The Five Tribes once inhabited land stretching across what is now Georgia, most of Alabama, and the Florida panhandle. In the 1830s, the United States forced the Five Tribes to abandon their homes and migrate west to the designated "Indian Territory" in present-day Oklahoma. Grant Foreman, *Indian Removal: The Emigration of the Five Civilized Tribes* (1972 ed.). Unlike other tribes, for whom the United States set aside federal lands as reservations where the Indians would live under federal patronage, *see, e.g.*, Treaty with the Florida Tribes of Indians, Sept. 18, 1823, 7 Stat. 224; Treaty with the Yankton Sioux, Apr. 19, 1858, 11 Stat. 743, the Five Tribes received patents for land in fee simple. The United States promised the Five Tribes that as long as they occupied their lands, they would never be subject to the laws of any State or Territory, and their land would never be made part of any State or

Territory. Treaty with the Creek Tribe of Indians art. XIV, Mar. 24, 1832, 7 Stat. 366, 368.[1]

After the Civil War, in response to the tribe's alliance with the Confederacy, the United States forced the Creek Nation to cede the entire western half of its land. The United States obtained similar cessions from the other four tribes. Parts of those lands were used for settlement of other tribes, but the rest—which became Oklahoma Territory—was eventually opened to non-Indian settlement beginning with the historic land run of 1889. Angie Debo, *And Still the Waters Run* 6 (1940). The remainder of the Five Tribes' land maintained its status as Indian Territory.

Congressional promises of perpetual independence and seclusion could not withstand the relentless tide of western settlement. Railroads, burgeoning coal and cattle industries, and the settlement of the Western frontier facilitated migration of non-Indians onto tribal lands. Non-Indians could not legally own land in the Five Tribes' territories, since communal title to that land was vested in the tribes, and even Indians enjoyed only rights of use or occupation. *See Barnett v. Way*, 119 P. 418, 419 (Okla. 1911). But that did not stop the encroachment. Within two generations after their arrival west of the Mississippi, Indians were a slim majority of the population in Creek territory, and just 28% of the entire population of the territory of the Five Tribes. Census Office, *Extra*

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[1] Convention with the Cherokees pmbl., May 6, 1828, 7 Stat. 312; Convention with the Chickasaws art. II, May 24, 1834, 7 Stat. 450; Convention between the Choctaws and Chickasaws art. I, Jan. 17, 1837, 7 Stat. 605; Treaty with the Choctaws art. IV, Sept. 27, 1830, 7 Stat. 333; Treaty with the Creeks and Seminoles arts. I, IV, Aug. 7, 1856, 11 Stat. 699, 700.

Census Bulletin: The Five Civilized Tribes in Indian Territory 4 (1894).

The tribal governments were ill-equipped to govern the rapidly increasing non-Indian population. Rampant disorder and lawlessness reigned. In the Creek Nation, Indians were subject to harsh laws and penalties under the tribal code, *see* Arrell Gibson, *Oklahoma: A History of Five Centuries* 137 (2d ed. 1981), but non-Indians lived beyond the reach of tribal courts. Federal district courts in neighboring Arkansas (and later in Kansas and Texas) had criminal jurisdiction over cases involving U.S. citizens arising in Indian Territory. *See* Jeffrey Burton, *Indian Territory and the United States* 71 (1995). But given the distance, "only the most depraved—and least fortunate—of bandits were hauled before … the Fort Smith bench of 'Hanging Judge' Isaac Parker." Danney Goble, *Progressive Oklahoma* 71 (1980). Violent crime went largely unpunished, and business agreements were effectively unenforceable. *Id.* Congress responded by creating federal territorial courts in Indian Territory and extending Arkansas law to govern non-Indians in the Territory. Act of Mar. 1, 1889, ch. 333, § 1, 25 Stat. 783; Act of Mar. 1, 1895, ch. 145, § 4, 28 Stat. 693, 696.

The increasing assertion of federal authority in Indian Territory signaled Congress's broader repudiation of the policy of seclusion in favor of assimilation and eventual statehood for the Indian Territory. Proposals to convert the area—an enclave of mineral-rich, untilled land with a booming non-Indian population—into one or more States had been floated in Congress every year since 1870. Carter, *supra*, at 2. But because Congress had promised the Five Tribes communal land ownership and autonomous governments according to their territorial boundaries, erad-

icating these foundations was a prerequisite for the incorporation of Indian Territory into a new State. Gibson, *supra*, at 193–94; *see also* Luther B. Hill, *A History of the State of Oklahoma* 337–45 (1910).

The "steady drift across the [Missouri] border for many years, and the presence among the Indians of hundreds of thousands of persons who were outlanders under their own flag finally made it necessary to abolish the tribal organization." Roy Gittinger, *The Formation of Oklahoma* 211 (1939); *see also Marlin v. Lewallen*, 276 U.S. 58, 61 (1928). "Congress finally assumed complete control over [the Creek Nation] and undertook to terminate their government and distribute the tribal lands among the individuals." *McDougal v. McKay*, 237 U.S. 372, 381 (1915).

With the goal of statehood in mind, Congress proceeded to dissolve the Five Tribes' communal land tenure and to end self-rule. In 1893, Congress appointed a three-person commission, led by Senator Henry Dawes, to "enter into negotiations with the [Five Tribes] for the purpose of the extinguishment of the national or tribal title to any lands within that Territory now held by any and all of such nations or tribes," whether by cession, allotment, or some other method, "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, ch. 209, § 16, 27 Stat. 612, 645; *see also Jefferson v. Fink*, 247 U.S. 288, 291 (1918); *McDougal*, 237 U.S. at 380–81; *Woodward v. de Graffenried*, 238 U.S. 284, 295 (1915); *Stephens v. Cherokee Nation*, 174 U.S. 445, 446 (1899).

Concomitant with the creation of a new State was "the dissolution of the Five Civilized Tribes." Gittinger, *supra*, at 236. Congress established the Com-

mission "in pursuance of a policy which looked to the final dissolution of the tribal government." *Tiger v. W. Inv. Co.*, 221 U.S. 286, 300 (1911); *Marlin*, 276 U.S. at 61 (same). As the Secretary of the Interior impressed upon the Commission, "success in your negotiations will mean the total abolition of the tribal autonomy of the Five Civilized Tribes and the wiping out of the quasi-independent governments within our territorial limits. It means, also, ultimately, … the admission of another state or states in the Union." Carter, *supra*, at 3 (quoting letter from Secretary Hoke Smith to Henry Dawes).

Negotiations failed, and "when the tribal governments refused to cooperate in their own demise," Congress used its legislative power to force the completion of the Commission's work. *Id.* at ix. In annual congressional reports, the Dawes Commission painted a bleak picture of Indian Territory plagued by corruption, misrule, and crime. In 1895, the Commission wrote: "It is … the imperative duty of Congress to assume at once the political control of the Indian Territory." S. Rep. No. 54-12, at 20. The Commission considered the Five Tribes' "so-called governments … wholly corrupt, irresponsible, and unworthy to be longer trusted" to govern. *Id.* at 19; *see Woodward*, 238 U.S. at 296–98; *Heckman v. United States*, 224 U.S. 413, 434–35 (1912).

Motivated by a desire to break up the tribes' communal land tenure and in response to the disorder it perceived in Indian Territory, *see* Debo, *supra*, at 24–25, the Commission recommended the establishment of a territorial government and the extension of U.S. jurisdiction over all matters relating to the use and occupation of tribal lands, S. Rep. No. 54-12, at 20. Congress thereafter authorized the Commission to survey Indian Territory and enroll tribal

members in preparation for allotment, with or without tribal consent. Act of June 10, 1896, ch. 398, § 1, 29 Stat. 321, 339, 343. Congress extended the authority of the federal courts, while steadily diminishing the tribal courts and tribal laws. Hill, *supra*, at 318. In a concerted campaign to abolish race-based jurisdictional distinctions in Indian Territory, Congress in 1897 rendered tribal courts obsolete by conferring exclusive jurisdiction on federal courts to try all civil and criminal cases, and by subjecting all people in Indian Territory "irrespective of race" to Arkansas and federal law. Indian Department Appropriations Act, ch. 3, § 1, 30 Stat. 62, 83 (1897); *Marlin*, 276 U.S. at 61–62; *Washington v. Miller*, 235 U.S. 422, 424–25 (1914).

In 1898, Congress passed the Curtis Act, ch. 517, 30 Stat. 495, "to complete the destruction of the tribal governments." Carter, *supra*, at 34. To that end, Congress abolished tribal courts, § 28, 30 Stat. at 504–05, and banned federal courts from enforcing tribal law, § 26, 30 Stat. at 504. Senator William Bate—one of few dissenting voices to the Act's passage—called the Curtis Act the "consummation" of the United States' abrogation of its treaties with the Five Tribes. The Act "sweeps all the laws of the Indians away, all their courts of justice, all their juries, all their local officers, and all the rights they have under the treaties which they have been given and guaranteed by the Government of the United States. … [W]e go along and encroach upon them inch by inch, Congress after Congress, until at last you have got to the main redoubt, and here it is destroyed." 31 Cong. Rec. 5593 (1898).

The Curtis Act also directed the Dawes Commission to allot the Five Tribes' land following tribal enrollment. § 11, 30 Stat. at 497. The Seminoles, Choc-

taws, and Chickasaws had already reached allotment agreements with the United States, and the Creeks and Cherokees quickly capitulated. The Creek Allotment Agreement, ch. 676, 31 Stat. 861 (1901), provided "for a permanent enrollment of the members of the tribe, for appraising most of the lands and allotting them in severalty with appropriate regard to their value, for using the tribal funds in equalizing allotments, for distributing what remained, for issuing deeds transferring the title to the allotted lands to the several allottees, and for ultimately terminating the tribal relation." *Sizemore v. Brady*, 235 U.S. 441, 447 (1914); *accord Marlin*, 276 U.S. at 63. Congress provided that each of the Five Tribes' governments would terminate by March 4, 1906. Creek Allotment Agreement § 46, 31 Stat. at 872; Curtis Act § 29, 30 Stat. at 512 (Choctaw and Chickasaw); Act of July 1, 1902, ch. 1375, § 63, 32 Stat. 716, 725 (Cherokee); Act of Mar. 3, 1903, ch. 994, § 8, 32 Stat. 982, 1008 (Seminole).

All told, the Dawes Commission considered 300,000 claims to tribal membership, enrolled more than 100,000 tribal members, and allotted 15,794,400 acres of land in Indian Territory—an area twice the size of Maryland. Gibson, *supra*, at 195. This "was a vast and difficult undertaking; and no previous disposition of either lands or tribes afforded precedents for guidance." Hill, *supra*, at 323. By this time, tribal governments "were little more than consulting agents in the management of the business of the tribes." Gittinger, *supra*, at 233. The Five Tribes "had ceased to exist except as financial corporations," *id.* at 234, whose assets were being liquidated and affairs wound up.

In April 1906, Congress passed the Five Tribes Act, providing for "the final disposition of the affairs

of the Five Civilized Tribes in the Indian Territory." Ch. 1876, 34 Stat. 137. Congress closed the tribal rolls, abolished tribal taxes, ended the tribes' control of tribal schools, and directed the Secretary of the Interior to seize and sell all tribal buildings and furniture. Unallotted lands were to be sold by the government, with the proceeds applied to the Tribe's debts and any remainder paid out per capita to individual tribal members. §§ 16–17, 34 Stat. at 143–44. Congress extended tribal governments, but with severe limitations on their operations and authority. § 28, 34 Stat. at 148.

As the governor of the Choctaw Nation put it in November 1906, the tribal government was "only a shell of a government, it is hardly anything. … I do not feel any longer that I act as chief, that I have any authority. … Now, the only authority that I have is to sign deeds." S. Rep. No. 59-5013, pt. 1, at 886 (1907). In his 1908 address to the Creek National Council, Chief Moty Tiger said, "the affairs of the Creek are so nearly closed up, insofar as any notion of the tribal authorities will affect the same, that there is but little I can call to your attention." Gaston Litton, *Creek Papers 1870–1930*, at 401 (1937), https://goo.gl/Jm17L6. One federal judge similarly commented that tribal governments were "a continuance of the tribe in mere legal effect, just as in many states corporations are continued as legal entities after they have ceased to do business, and are practically dissolved, for the purpose of winding up their affairs." *United States v. Allen*, 171 F. 907, 921 (E.D. Okla. 1909).

Two months after passing the Five Tribes Act, Congress enacted the Oklahoma Enabling Act, authorizing the creation of the State through the merger of Indian and Oklahoma Territories. Ch. 3335, 34

Stat. 267 (1906). Congress directed the transfer of all cases arising under federal law, pending in territorial courts in Indian and Oklahoma Territory at the time of statehood, to the newly created U.S. district courts for the Western and Eastern Districts of Oklahoma. § 16, 34 Stat. at 276. *All* other cases were transferred to state court. § 20, 34 Stat. at 277. Congress also extended the laws of Oklahoma Territory to Indian Territory (supplanting Arkansas law), until the new Oklahoma legislature provided otherwise. § 13, 34 Stat. at 275.

The stage was thus set for Oklahoma's accession to statehood. When President Theodore Roosevelt signed a proclamation admitting Oklahoma to the Union on November 16, 1907, Indians constituted just 5% of the population of the new State. Census Bureau, *Population of Oklahoma and Indian Territory* 8 (1907). From Oklahoma's entrance to the Union to the present day, the State has exercised criminal jurisdiction over all of its citizens, Indians and non-Indians alike, on the understanding that the former Indian Territory is not a reservation. Conversely, neither federal nor tribal prosecutors have treated the former Indian Territory as a reservation.

B. Factual background and proceedings below

1. On August 28, 1999, Patrick Murphy mutilated and murdered his girlfriend's former lover, a man named George Jacobs. Both men are members of the Creek Nation. The crime began when Mr. Murphy used his vehicle to force Mr. Jacobs' car off the road late at night in a rural area of Henryetta, Oklahoma. Mr. Murphy and two accomplices pulled Mr. Jacobs out of the car and began to beat him. Over the course of five minutes, Mr. Murphy and his accomplices severed Mr. Jacobs' genitals with a folding knife and

stuffed them into Mr. Jacobs' mouth, pulled Mr. Jacobs into a roadside ditch, slashed his throat and chest, and "tried to stomp on [his] head like a pancake." App. 140a. They left Mr. Jacobs to die beside the deserted road. Mr. Murphy then instructed his accomplices to drive to a nearby home to kill Mr. Jacobs' son, George Jr. Someone in the house intervened, saving George Jr.'s life. Later that evening, Mr. Murphy confessed to both his girlfriend and his cousin. *Id.* Mr. Murphy was convicted in state court for first-degree murder and sentenced to death. App. 203a. His conviction and sentence were affirmed on appeal. *Id.*

2. In his second application for state post-conviction relief, in 2004, Mr. Murphy argued that Oklahoma courts lacked jurisdiction to convict him because he is an Indian and, he alleged, he committed his crime within the boundaries of the Creek reservation and thus could only be tried in federal court under the Major Crimes Act. That Act gives federal courts exclusive jurisdiction over certain crimes in "Indian Country," 18 U.S.C. § 1153, and defines "Indian Country" to include an "Indian reservation," *id.* § 1151(a). The state court concluded that Oklahoma's jurisdiction was proper. The Oklahoma Court of Criminal Appeals agreed and denied post-conviction relief, finding no authority to support Mr. Murphy's theory that the 1866 boundaries of the Creek territory remained intact as a "reservation." *See* App. 222a–224a.[2]

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[2] The state courts also rejected Mr. Murphy's claim that the crime occurred in Indian Country under §§ 1151(b) and (c), which pertain to "dependent Indian communities" and "Indian allotments." App. 215a–222a, 224a–225a.

Mr. Murphy petitioned for a writ of certiorari on the question whether his crime was committed within Indian Country. *Murphy v. Oklahoma*, No. 05-10787. In response to this Court's invitation, the United States filed a brief expressing the view that Congress has extinguished the historic boundaries of the Creek Nation. U.S. Br. at 15–20, 2007 WL 1319320. This Court denied certiorari. 551 U.S. 1102 (2007).

3. On federal habeas review under 28 U.S.C. § 2254, Mr. Murphy asserted that the Oklahoma Court of Criminal Appeals had misapplied federal law on the question whether he committed the crime in Indian Country. The district court held that the state court's decision rejecting Mr. Murphy's jurisdictional challenge was neither contrary to nor an unreasonable application of clearly established federal law and denied federal habeas relief. App. 184a–195a.

4. The Tenth Circuit reversed. The court held that federal law clearly established that Mr. Murphy's crime occurred in Indian Country under 18 U.S.C. § 1151(a), because Congress never disestablished the 1866 boundaries of the Creek territory, which encompassed the land where the murder occurred. App. 132a–133a. The panel applied the three-part framework set forth in *Solem v. Bartlett*, 465 U.S. 463 (1984), which looks to statutory text, surrounding circumstances, and subsequent history. In an extended analysis of the main statutes at issue, App. 78a–102a, the Tenth Circuit concluded that the State's argument failed at the first step because no text "expressly" disestablished or diminished the boundaries of the Creek Nation. App. 96a. The court further concluded that the contemporaneous and subsequent history did not "unequivocally reveal"

congressional intent to erase the historical boundaries of the Creek territory. App. 107a, 119a (quoting *Nebraska v. Parker*, 136 S. Ct. 1072, 1080 (2016)).[3]

The Tenth Circuit denied rehearing on November 9, 2017. Chief Judge Tymkovich concurred separately to urge "further attention by the Supreme Court." App. 230a. The panel stayed issuance of the mandate to permit Oklahoma to seek this Court's review. App. 233a.

REASONS THE PETITION SHOULD BE GRANTED

I. The question presented is critically important

The question of whether the historical boundaries of the Creek Nation, or the Five Tribes more generally, constitute Indian Country under 18 U.S.C. § 1151(a) has enormous ramifications for the State, the federal government, the Five Tribes, and over 1.8 million Oklahoma residents. Since the birth of the State, the universal understanding has been that the former Indian Territory, *i.e.*, the eastern half of the State, is not reservation land. The Tenth Circuit upended that understanding in one fell swoop, creating massive disruption. This Court's review is urgently needed to restore stability and certainty regarding the State's ability to govern its citizens.

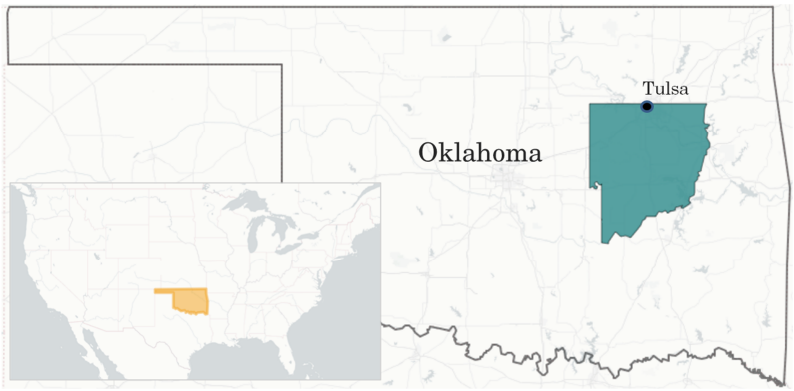
A. The affected area is massive

Whether an Indian reservation exists raises "issues of importance pertaining to this country's relationship to its Indian wards." *Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351, 353–

[3] In his appeal, Mr. Murphy also argued that the crime occurred on an Indian allotment. Because the Tenth Circuit held that the crime occurred on an Indian reservation, the panel did not address Mr. Murphy's allotment argument. App. 15a.

54 (1962). This Court thus routinely grants review to address that question, even absent any apparent conflict among the lower courts. *E.g.*, *id.*; *Parker*, 136 S. Ct. 1072; *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 585 (1977); *Mattz v. Arnett*, 412 U.S. 481, 485 (1973).

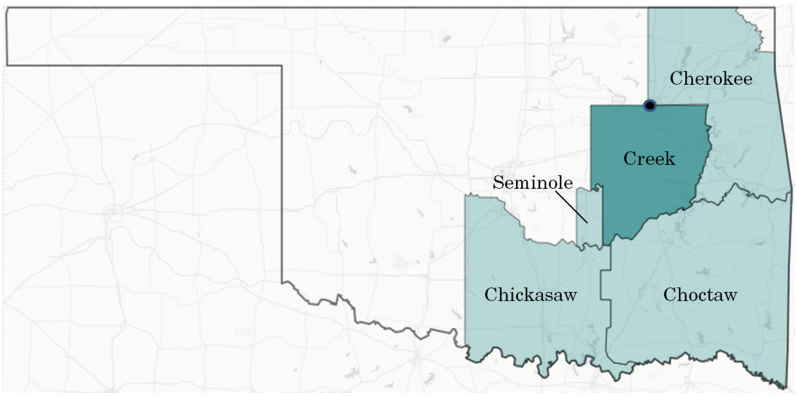
The importance of that issue is magnified exponentially here. The sheer size of the territory sets this case apart from any prior disestablishment dispute in our country's history. The 1866 boundaries of the Creek Nation alone encompass over 4,600 square miles of land populated by more than 750,000 people, as shown below:



The 1866 boundaries also include most of Tulsa, the State's second largest city and home to more than 403,000 Oklahomans. Census Bureau, *QuickFacts: Tulsa city, Oklahoma* (2016), https://goo.gl/2jK19d. A reconstituted Creek territory would be by far the largest Indian reservation by population in the United States. For comparison, the largest reservation is currently the Navajo Nation, with a total population of 174,000, only 4,300 of whom are non-native. Census Bureau, *The American Indian and Alaska Native Population: 2010*, at 14 & tbl.6 (2012), https://goo.gl/Nw37yg.

Moreover, the decision below could extend to the other tribes whose lands collectively constituted Indian Territory. "The history of the removal of the Muskogee or Creek Nation from their original homes to land purchased and set apart for them … in the territory west of the Mississippi river does not differ greatly from that of the others of the Five Civilized Tribes." *Woodward*, 238 U.S. at 293. The Five Tribes confronted the same issues that culminated in the allotment of their lands, the dissolution of their governments, and the merger of all their former territory with Oklahoma Territory to form Oklahoma. *Id*. at 293–96. Thus, although details vary from tribe to tribe, the Five Tribes share an overlapping statutory history that reflects Congress's deliberate extinguishment of their territorial sovereignty during the period leading up to Oklahoma statehood.

The land constituting the Five Tribes in the former Indian Territory covers nearly *half the State* in terms of area and population:



The 1866 boundaries of the Five Tribes include 29,965 square miles, about 43% of Oklahoma's land mass. The current population of this region is over 1.8 million—roughly 48% of Oklahoma's population.

See Census Bureau, *Interactive Population Map*, https://goo.gl/YF8sb8.

B. The question presented implicates fundamental questions of sovereignty

Whether this vast expanse of land is now Indian Country under 18 U.S.C. § 1151(a) strikes at the heart of Oklahoma's sovereignty.

1. The implications for criminal jurisdiction—the context of this case—are staggering. States lack criminal enforcement jurisdiction over offenses in Indian Country if either the defendant or victim is an Indian, regardless whether the Indian is an enrolled member of the tribe whose land is at issue. *Solem,* 465 U.S. at 463 n.2; Dep't of Justice, *Indian Country Criminal Jurisdictional Chart* (2017), https://goo.gl/uXKgQT. The federal government has exclusive criminal jurisdiction in such cases, aside from certain minor offenses subject to tribal court jurisdiction when both defendant and victim are Indians. 18 U.S.C. §§ 1152–53; 25 U.S.C. § 1302(a)(7). For over a century, Oklahoma has prosecuted offenses committed by or against Indians on the understanding that no reservations exist in the former Indian Territory. That will change overnight if this Court does not grant review.

Approximately 9% of Tulsa residents self-identify as Native American. That percentage is the highest of any large city in the United States other than Anchorage, Alaska. Census Bureau, *American Indian*, *supra*, at 12. Losing jurisdiction over crimes committed by or against Native Americans throughout a large and populous part of the State would inflict an enormous blow to the State's power to prosecute within its own borders. That result would impose a corresponding burden on federal authorities

and courts. In urging rehearing below, the United States estimated that the Tenth Circuit's decision could require federal authorities to investigate and prosecute hundreds (if not more than a thousand) of new cases *each year* within the boundaries of the Creek Nation alone—amounting to a tenfold increase in the caseload in the Northern and Eastern Districts of Oklahoma. U.S. Br. in Supp. of Reh'g, *supra*, at 2. These new responsibilities would overwhelm current federal resources in the region. *Id*. (noting that the FBI has the equivalent of just seven agents for all of eastern Oklahoma).

2. "Although [the] definition [of Indian Country] by its terms relates only to federal criminal jurisdiction," this Court has recognized "that it also generally applies to questions of civil jurisdiction." *Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 527 (1998). Absent this Court's review, the decision below will open up a Pandora's Box of questions regarding the State's regulatory power. For example, the State has limited power to tax tribal members on reservations. *See Okla. Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114, 126 (1993). Reservation status also calls into question the State's ability to regulate non-Indians in areas ranging from taxation to natural resources. *See White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142–43 (1980) (balancing test for State regulatory jurisdiction over non-Indians on reservations). Likewise, regulatory jurisdiction under major federal environmental statutes could shift from the State to the U.S. Environmental Protection Agency, absent EPA approval to delegate such responsibilities to the State. *See Okla. Dep't of Envtl. Quality v. Envtl. Prot. Agency*, 740 F.3d 185, 190–91, 194 (D.C. Cir. 2014) (Clean Air Act).

Moreover, affected residents and businesses would suddenly discover that their legal rights were radically altered overnight because they now reside on a reservation. *Cf. Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 56 (1978). For instance, they would potentially be subject to tribal regulatory jurisdiction for matters ranging from taxation and tribal liquor ordinances, *e.g.*, *Parker*, 136 S. Ct. 1072; *Rice v. Rehner*, 463 U.S. 713 (1983), to land-use, zoning, and employment codes, *see Montana v. United States*, 450 U.S. 544, 565–66 (1981). Non-members could be subject to tribal-court jurisdiction in civil cases involving tribal members and may have to exhaust jurisdictional challenges in tribal court before litigating in federal court. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 16–19 (1987); *Dolgencorp, Inc. v. Miss. Band of Choctaw Indians*, 746 F.3d 167, 171–77 (5th Cir.), *aff'd by an equally divided court sub nom. Dollar Gen. Corp. v. Miss. Band of Choctaw Indians*, 136 S. Ct. 2159 (2016) (extent to which tribal courts have jurisdiction to adjudicate tort claims against non-members).

Indeed, some federal statutes vest tribal courts with *exclusive* jurisdiction over disputes arising within a reservation, despite the presence of non-Indian parties. *See, e.g.*, Indian Child Welfare Act of 1978, Pub. L. No. 95-608, § 101(a), 92 Stat. 3069, 3071. And while non-Indians will be subject to tribal jurisdiction, they have no role in shaping tribal laws that could apply to them. Non-members may not vote in tribal elections, and only Creek citizens with at least one-quarter blood quantum may hold office. Muscogee (Creek) Nation Const. art. III, § 4; *id.* art. IV.

C. The decision below is creating enormous disruption and uncertainty

1. The Tenth Circuit's decision has already triggered a wave of litigation, including dozens of collateral challenges to existing convictions. To date, criminal defendants have invoked the decision, in at least 46 cases in both Oklahoma state and federal courts, arguing that their crimes occurred on a reservation and thus fall outside state jurisdiction. *See, e.g.*, *Wade v. Martin*, No. WH-17-12 (Beckham Cty., Okla.) (Choctaw member claiming two 1986 murders occurred on Creek reservation); *Sims v. State*, No. F-17-635 (Okla. Crim. App.) (claiming victim was a member of Creek Nation); *In re Brown*, No. 17-7078 (10th Cir.) (claiming victim may have been a member of Cherokee Nation).

Although the State will resist any attempts to overturn valid convictions, the Tenth Circuit's decision raises the specter that hundreds or thousands of state convictions involving tribal members in the eastern half of Oklahoma will be subject to collateral attack. If any convictions are vacated, federal prosecutors must decide whether to retry those cases, many of which are decades old. Because older convictions typically include the most heinous crimes, violent criminals that the federal government is either unwilling or unable to retry may be released into the public. Inmates have even taken the unprecedented step of suing Oklahoma in *tribal court*. For instance, a Cherokee member convicted in 1989 for first-degree murder has sought a declaratory judgment in tribal court that the Cherokee reservation boundaries have not been diminished and that his conviction was void *ab initio*. *Mitchell v. Hunter*, No. CV-17-680 (Cherokee Nation Dist. Ct.). Although that challenge was

ultimately unsuccessful, such litigation will only multiply absent this Court's review.

2. This Court's review also is urgently needed to remove the jurisdictional cloud over current criminal prosecutions—*i.e.*, those that have yet to become final—as well as over any crimes that occur in the future. The decision below has inspired numerous defendants in ongoing state-court trials or direct-appeal proceedings to claim that either the defendant or the victim was a tribal member and that the crime occurred on a reservation of the Five Tribes. For example, a Choctaw tribe member under indictment for murder in the drowning death of his two-year-old daughter has cited the decision below, claiming the crime occurred on the Choctaw reservation and thus requesting transfer to federal court. *State v. Sizemore,* CF-16-593 (Pittsburg Cty., Okla.). Many similar examples exist.[4]

Perhaps as a sign of things to come, days after the Tenth Circuit issued its decision, one defendant—a former police officer charged with killing his daughter's boyfriend—obtained identification documents from the Creek Nation, claiming to be 1/128th Creek, and argued to the Oklahoma state court that the crime occurred on the Creek reservation. *See State v. Kepler*, CF-14-3952 (Tulsa Cty., Okla.); Samantha Vicent, *Shannon Kepler cites Creek Nation citizenship, 'Indian Country' ruling in asking for*

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[4] *See, e.g.*, *State v. Martin*, CF-16-782A (Carter Cty., Okla.) (Choctaw member claiming manslaughter occurred on Chickasaw reservation); *State v. Shriver*, CF-15-395 (Rogers Cty., Okla.) (Cherokee defendant claiming crimes, including second degree murder, occurred on Cherokee reservation); *State v. Mize*, CF-17-3891 (Tulsa Cty., Okla.) (Indian defendant claiming manslaughter occurred on Creek reservation).

murder case to be tossed, Tulsa World, Aug. 11, 2017, https://goo.gl/F2zwSn. He was recently convicted and sentenced to 15 years in prison but has filed his notice of appeal. The jurisdictional uncertainty clouding this and similar cases cries out for this Court's review.

3. The disruption also extends into the civil arena. The Cherokee Nation has cited the decision below to assert tribal-court jurisdiction over a dispute involving pharmaceutical companies on the theory that the borders of the Cherokee Nation were never disestablished. Suppl. Mem., *McKesson Corp. v. Hembree*, No. 17-cv-323 (N.D. Okla. Aug. 16, 2017); *id*., 2018 WL 340042 (N.D. Okla. Jan. 9, 2018) (enjoining tribal-court proceedings). And the Comanche Nation has sued the federal government in an attempt to undo the acquisition of land into trust for the Chickasaw Nation, alleging, based on *Murphy,* that the Chickasaw's territorial borders were never disestablished. *Comanche Nation of Oklahoma v. Zinke,* No. 17-cv-887 (W.D. Okla.). Absent this Court's intervention, the decision below will impose intolerable and destabilizing uncertainty throughout half the State.

II. The decision below is wrong

Oklahoma's accession to statehood in 1907 marked the culmination of Congress's elimination of the boundaries of the Five Tribes' territories. Congress did not retain, in the form of "Indian Country" under Section 1151, a replica of the Indian Territory that Congress spent the prior twenty years dismantling. The notion that the tribes had sovereignty that could oust the State of jurisdiction over its citizens, or that the federal government bore responsibility to prosecute Indians living in former Indian Territory,

would have been anathema to the Congress that enabled Oklahoma to join the Union.

In reaching a contrary result as to the Creek Nation, the Tenth Circuit held that, under the three-part test set forth in *Solem*, 465 U.S. 463, Congress never disestablished the tribe's external borders. App. 132a–133a. But *Solem* addressed individual surplus land acts, and its application makes little sense here. The creation of Oklahoma on equal footing with other States stripped the external boundaries of Oklahoma's two constituent territories—as well as the internal tribal boundaries in Indian Territory—of any jurisdictional significance, including criminal jurisdiction.

Oklahoma was not required to prove disestablishment by pointing to talismanic statutory language or a magic date. The Five Tribes' political existence was founded on treaty promises guaranteeing independent, sovereign governments and the right to occupy land patented to them in fee simple as long as the tribes existed. To convert the Indian Territory to a new State, Congress supplanted the Five Tribes' communal land tenure, dismantled all material vestiges of tribal governments, and ensured that the State would thereafter prosecute its citizens regardless of race. Nothing more was needed. By statehood, tribal boundaries were a historical artifact.

A. Congress dismantled Indian Territory and tribal boundaries to create Oklahoma

Indian reservations are defined by "the right of reservation Indians to make their own laws and be ruled by them," *Williams v. Lee*, 358 U.S. 217, 220 (1959), and by tribal "ability to exercise … sovereign functions" within reservation borders, *Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue of N.M.*, 458 U.S.

832, 837 (1982). This case fails that standard by a long shot. The Five Tribes had lost all indicia of territorial sovereignty by 1907. Congress had stripped the tribal governments of their most basic executive, legislative, and judicial functions in order to bestow those powers upon the new State.

Beginning in 1893, Congress engaged in an extensive and systematic legislative campaign to abolish tribal courts, eliminate tribal law, and dissolve tribal government—all to pave the way for Oklahoma's entry to the Union. Congress authorized the Interior Secretary to remove the principal chiefs of the Five Tribes and to appoint their successors, prohibited tribal governments from congregating more than 30 days per year, and barred them from enacting legislation or entering into contracts involving their funds or land without the President's approval. Five Tribes Act §§ 6, 28, 34 Stat. at 139, 148. Congress abolished tribal taxes, § 11, 34 Stat. at 141, and commandeered tribal schools until they could be replaced with state schools, § 10, 34 Stat. at 140. Congress took possession of tribal buildings and sold all their furniture. § 15, 34 Stat. at 143. And the Dawes Commission dramatically usurped one of the most foundational attributes of tribal sovereignty—the ability to determine tribal membership. *Supra* pp. 6–11. Congress continued the tribal governments beyond 1906 because the Dawes Commission had yet to finish the rolls, but tribal powers were limited to "winding up their affairs." *Allen*, 171 F. at 921. In the end, the tribes were left with no authority except "to sign deeds." S. Rep. No. 59-5013, pt. 1, at 886.

The court below brushed aside this 20-year history on the ground that tribal governance had no bearing on reservation status. App. 105a–107a. But whether Congress intended the State to have "juris-

diction over the disputed areas" or, conversely, whether Congress intended tribes to retain governmental authority over activities within that territory, has always been essential to determining whether tribal borders persist. *Rosebud*, 430 U.S. at 599 n.20. Thus, in *Solem*, this Court found significant that a surplus land act did not speak to the issue of "jurisdiction over the opened areas." 465 U.S. at 478. By contrast, congressional intent here is unmistakable: Congress stripped the Five Tribes of any meaningful vestige of sovereignty. By statehood, the land formerly occupied by the Creek Nation was not an Indian reservation in any sense of that term.

B. Congress conferred judicial authority over Indian Territory to Oklahoma

Congress systematically transferred to the State general criminal jurisdiction over Indians in the former Indian Territory. Beginning in 1897, Congress abolished tribal courts, made tribal law unenforceable, and established federal territorial courts to hear criminal cases under Arkansas law regardless of the defendant's race. *Supra* p. 9; Act of Apr. 28, 1904, ch. 1824, § 2, 33 Stat. 573 (mandating that Arkansas law "embrace all persons and estates in Indian Territory, whether Indian, freedman, or otherwise"). The Oklahoma Enabling Act then transferred all pending federal-question and diversity cases to the newly created federal courts in Oklahoma. § 16, 34 Stat. at 276. But, significantly, Congress transferred *all* other cases to the newly created state courts. §§ 17–20, 34 Stat. at 276–77. These statutory provisions render it inconceivable that Congress dismantled Indian Territory but simultaneously created a jurisdictional "Indian Country" in its wake.

If any of the Five Tribes' territories remained intact as a reservation, the jurisdictional transfer to state courts would have clashed with the Major Crimes Act, which conferred "exclusive jurisdiction" to federal courts for any major crime committed in a State by an Indian "within the limits of any Indian reservation." Ch. 341, § 9, 23 Stat. 362, 385 (1885) (codified as amended at 18 U.S.C. § 1153(a)). Because the Enabling Act directed a different course, state courts became the "legal successor" to the territorial courts for offenses committed before statehood, even by Indians. *Haikey v. State*, 105 P. 313, 314 (Okla. Crim. App. 1909).

For instance, in *Jones v. State*, 107 P. 738 (Okla. Crim. App. 1910), a federal grand jury indicted a Choctaw tribal member for murder occurring before statehood, but he "was tried after statehood by the district court of Atoka county." *Id.* at 738–39.[5] And another case involving a defendant, victim, and witnesses, "all being Indians," transferred from territorial court to state court after statehood. *Phillips v. United States*, 103 P. 861, 861 (Okla. Crim. App. 1909). Many similar cases exist.[6] Likewise, the State assumed jurisdiction over major crimes committed by

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[5] Mr. Jones identified himself as a Choctaw in his brief before this Court. Mot. for Leave to File Pet. for Writ of Habeas Corpus at 4, *In re Jonas Jones*, 231 U.S. 743 (1913).

[6] *Sharp v. United States*, 118 P. 675 (Okla. Crim. App. 1911); *Wilson v. United States*, 111 P. 659 (Okla. Crim. App. 1910); *Bailey v. United States*, 104 P. 917 (Okla. Crim. App. 1909); *Keys v. United States*, 103 P. 874 (Okla. Crim. App. 1909); *Price v. United States*, 101 P. 1036 (Okla. Crim. App. 1909). The Indian identity of defendants in these cases and in *Haikey*, *supra*, appears on the Dawes rolls. *See* Oklahoma Historical Society, *Search the Final Dawes Rolls and Applications*, http://www.okhistory.org/research/dawes.

Indians in former Indian Territory immediately after statehood. *E.g.*, *Rollen v. State*, 125 P. 1087, 1088 (Okla. Crim. App. 1912) (defendant "was a Cherokee citizen"); *Bigfeather v. State*, 123 P. 1026 (Okla. Crim. App. 1912).

This Court, too, understood from the outset that Oklahoma had jurisdiction over Indians in the former Indian Territory. In *Hendrix v. United States*, 219 U.S. 79 (1911), an Indian defendant indicted for murder in Indian Territory had successfully moved to transfer his case to a federal court in Texas, under a special venue statute for fair trials. Relying on the Enabling Act's transfer of jurisdiction to state courts, the defendant argued after statehood that the federal court lacked jurisdiction to try him. *Id.* at 89. In rejecting that argument, the Court notably did not hold that federal courts had exclusive jurisdiction under the Major Crimes Act, but rather that the specific venue statute continued to apply to pending cases. *Id.* at 90–91. The United States acknowledged that, but for the temporal venue provision, Congress gave the State jurisdiction over crimes involving Indians. U.S. Br. at 12, *Hendrix v. United States*, No. 319 (U.S. 1910) ("[T]he enabling act … and the subsequent organization of the State withdrew [Indian Territory] from the exclusive jurisdiction of the United States.").

The purported existence of reservations following statehood also would have left an implausible jurisdictional gap given the abolition of Creek courts in 1898. After statehood, federal courts had jurisdiction over *major* crimes committed by Indians against Indians on reservations. Ch. 341, § 9, 23 Stat. at 385. If, on the Tenth Circuit's theory, state courts possessed no criminal jurisdiction over Indians in the former Indian Territory, *no* court could have prosecuted In-

dians for committing such crimes as assault, bribery, forgery, and rioting against other Indians within the former Creek territory until Congress authorized the reestablishment of tribal courts in Oklahoma in 1936. *See* Act of June 26, 1936, ch. 831, § 2, 49 Stat. 1967. Given Congress's hyper-focus on rampant lawlessness in Indian Territory, *supra* p. 6, Congress could not plausibly have created a jurisdictional gap that would reintroduce the very misrule that Congress spent decades trying to eradicate.

C. *Solem* does not support the decision below

Notwithstanding this overwhelming evidence of congressional intent, the panel below held that the State could not prevail under the three-part framework set forth in *Solem*, 465 U.S. 463, because no singular statutory provision contained sufficiently clear language of land cession and because the contemporaneous and subsequent historical evidence of disestablishment was "mixed." App. 74a. That holding is wrong for two reasons. First, the panel erred at the threshold in holding *Solem* was the sole lens through which the court could ascertain congressional intent. Second, clear congressional intent is discernable even applying *Solem*.

1. This Court's *Solem* cases involve whether land designated by the federal government as Indian reservations within a pre-existing State retained reservation status when Congress opened the area for non-Indian settlement of surplus lands remaining after allotment.[7] In considering whether Congress al-

[7] *See, e.g.*, *Parker*, 136 S. Ct. 1072 (Omaha Indian Reservation in Nebraska); *Solem*, 465 U.S. 463 (Cheyenne Reservation in South Dakota); *Mattz*, 412 U.S. 481 (Klamath River/Hoopa Val-

tered the boundaries of a reservation by "special legislation in order to assure a particular reservation was in fact opened to allotment," *Mattz*, 412 U.S. at 496–97, this Court has held that land presumptively retains reservation status "until Congress explicitly indicates otherwise." *Solem*, 465 U.S. at 470; *see United States v. Celestine*, 215 U.S. 278, 285 (1909). This presumption reflects the notion that allotment and non-Indian settlement may be "completely consistent with continued reservation status" "in a manner which the Federal Government … regarded as beneficial to the development of its wards." *Mattz*, 412 U.S. at 497. *Solem* thus governs how to determine whether "any particular surplus land act" "formally sliced a certain parcel of land off one reservation." *Solem*, 465 U.S. at 468, 472; *see also South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998).

This case is markedly different. The General Allotment Act that spawned surplus land acts excluded the Five Tribes. Ch. 119, § 8, 24 Stat. 388, 391 (1887). The Five Tribes' territories also were not "reservations" in the traditional sense, but rather lands held by the tribe through patents in fee simple. *See* Census Office, *Report on Indians Taxed and Not Taxed* 298 (1894). This case does not involve a sale of surplus land to non-Indians. In short, Oklahoma prosecuted Mr. Murphy not because he committed a crime on a parcel of land that Congress opened to non-Indian settlement, but because the exterior and internal boundaries of Indian Territory had evaporated by the formation of Oklahoma.

Allotment of the Five Tribes' lands was inextricably intertwined with Congress's systematic and de-

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ley Reservation in California); *Seymour*, 368 U.S. 351 (Colville Reservation in Washington).

liberate liquidation of the Five Tribes as territorial sovereigns to pave the way for the merger of Indian Territory and Oklahoma Territory to create a new State. *Solem*'s framework was not designed to analyze this situation. At a minimum, the panel erred in holding that the state court's decision was contrary to clearly established federal law under 28 U.S.C. § 2254(d). App. 44a.[8]

The court of appeals also erroneously faulted the State for not identifying specific language in a given statute that extinguished the Creek boundaries with words equivalent to "cede," a "lump-sum payment," or restoration of the land to "public domain." App. 76a. Those terms would have been unnecessary or senseless under these unique circumstances. Congress would not have "restored" to the "public domain" lands that were not federal domain, but rather communally owned fee lands with tribal deeds. Congress did not need to use the term "cede," when it was not seeking cession of lands but rather the dissolution of communal ownership. Likewise, Congress would never offer a "lump-sum payment" because the Tribes' lands were conveyed through allotment to their own members rather than to the government. As a jurisdictional matter, the result was identical. By dissolving the Tribes' communal title and distributing communal property through allotment while also divesting the Tribes of governmental authority, Congress eliminated territorial boundaries.

2. The Tenth Circuit's application of *Solem* was also flawed. The "touchstone to determine whether a

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[8] The State argued below that *Solem* was inapposite. Okla. C.A. Br. 46–47, 91; *see also* App. 44a–45a (addressing State's arguments).

given statute diminished or retained reservation boundaries is congressional purpose." *Yankton*, 522 U.S. at 343. *Solem*'s factors are just a guide for discerning that intent. *Hagen v. Utah*, 510 U.S. 399, 411 (1994); *Rosebud*, 430 U.S. at 588 & n.4. A "traditional approach to diminishment cases" requires an examination of "all the circumstances surrounding the opening of a reservation." *Hagen*, 510 U.S. at 412. "Even in the absence of a clear expression of congressional purpose in the text of a surplus land Act, unequivocal evidence derived from the surrounding circumstances may support the conclusion that a reservation has been diminished." *Yankton*, 522 U.S. at 351. Thus, this Court has insisted that related statutes be read together. *Rosebud*, 430 U.S. at 606 n.30; *accord Hagen*, 510 U.S. at 415. In *Rosebud*, although the legislation opening the reservation did not explicitly diminish the reservation, an earlier but unratified agreement had established an "unmistakable baseline purpose of disestablishment" that was "carried forth and enacted" in subsequent legislation. 430 U.S. at 591–92.

The panel below misapplied these principles in parsing each statute seriatim and in isolation, thereby looking for one specific statute with specific terminology. That exercise missed the forest for the trees: Congress had spent the better part of two decades eviscerating tribal governments and destroying communal land tenure to form Oklahoma. Congress created the Dawes Commission in the first place to "enter into negotiations with [the Five Tribes] *for the purpose of the extinguishment of the national or tribal title* to any lands within that Territory … 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, ch. 209, § 16, 27

Stat. 612, 645 (emphasis added). That extinguishment of title could be effected "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." *Id*. (emphasis added). Congress viewed cession and allotment as equivalent means to the same end.

Congress reaffirmed this intent in later statutes allotting the land of the Creek Nation and divesting the tribe of each and every important feature of its sovereignty. *Supra* pp. 6–11. Additionally, in contrast to surplus land acts in which Congress directed the Treasury to retain proceeds for the tribe's benefit, allotment in the Five Tribes' territories mandated the division of all tribal land among tribal members as a prelude to the dissolution of the tribal government. *E.g.*, Creek Allotment Agreement §§ 3, 9, 31 Stat. at 862, 864. Congress directed any remaining tribal funds be distributed pro rata among the tribe's members. Supplemental Allotment Agreement, ch. 1323, § 14, 32 Stat. 500, 503 (1902); *see also* Five Tribes Act § 17, 34 Stat. at 143.

The *Solem* cases also require careful consideration of subsequent history and demographics—a "practical acknowledgement" of disestablishment—to avoid upsetting "the justifiable expectations of people living in the area." *Hagen*, 510 U.S. at 421; *accord Rosebud*, 430 U.S. at 604–05; *see also Yankton*, 522 U.S. at 356–57; *DeCoteau v. District Cty. Ct.*, 420 U.S. 425, 449 (1975). A "longstanding assumption of jurisdiction by the State" is inconsistent with reservation status. *Rosebud*, 430 U.S. at 604–05; *see also Yankton*, 522 U.S. at 357.

After statehood, Congress stripped away restrictions on alienation of most allotments, subjected

unrestricted allotments to state taxation regardless whether the allotments were still owned by tribal members, and applied state laws of succession and disposition on the remaining restricted allotments. Act of May 27, 1908, ch. 199, §§ 1, 4, 35 Stat. 312; *see also* Act of Apr. 10, 1926, ch. 115, § 1, 44 Stat. 239; Act of Aug. 4, 1947, ch. 458, § 1, 61 Stat. 731. Moreover, Congress required the tribes, on pain of fine or imprisonment, to transfer possession of all tribal property and funds, and for all tribal officers and representatives to surrender "all books, documents, records or any other papers" to the Secretary of the Interior. Act of May 27, 1908, ch. 199, § 13, 35 Stat. 312, 316.

These events extend beyond simple "de facto" disestablishment. App. 230a–232a. For a century, Oklahoma has governed the former Indian Territory, and no court until now has held that the State lacks criminal jurisdiction over Indians across the entire former Creek territory. Stripping Oklahoma of criminal jurisdiction over all Indians in this densely populated area, or even worse, in the entire eastern half of the State, would render Oklahoma a fractured, second-class State. *Cf. Coyle v. Smith*, 221 U.S. 559 (1911).

CONCLUSION

The Court should grant the petition.

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