CASE Nos. 07-7068 & 15-7041

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PATRICK DWAYNE MURPHY,

Appellant/Petitioner,

vs.

TERRY ROYAL, WARDEN,
Oklahoma State Penitentiary,

Appellee, Respondent.

Case No. 07-7068
Case No. 15-7041

DEATH PENALTY CASE

On Appeal from the United States District Court for the Eastern District of Oklahoma

District Court Case No.
CIV-03-443-RAW-KEW
CIV-12-191-RAW-KEW

The Honorable Ronald A. White, District Judge

BRIEF *AMICUS CURIAE* OF THE MUSCOGEE (CREEK) NATION AND THE SEMINOLE NATION OF OKLAHOMA

(*Seeking neither affirmance nor reversal*)

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutions and Statutes

Other Authorities

INTRODUCTION AND STATEMENT OF INTEREST

Amici the Muscogee (Creek) Nation and the Seminole Nation of Oklahoma are federally recognized Indian nations that occupy lands within the boundaries of reservations guaranteed to them under treaties entered with the United States in the 19th century. Cohen's Handbook of Federal Indian Law § 4.07[1][a] (2012 ed.).[1] It is undisputed that the land at issue in this case is within the original boundaries of the Creek reservation. What is disputed is whether those boundaries retain their reservation status, a question that this Court expressly left open in *Indian Country, U.S.A., Inc. v. Oklahoma*, 829 F.2d 967, 975 and n.5 (10th Cir. 1987), and has not adjudicated since. Should the Court reach the issue here, its decision will have a direct impact on the sovereign interests of the Creek Nation that will transcend the confines of this case. Due to the parallels between the histories of the Creek and Seminole reservations, the Seminole Nation likewise has a critical interest in any such determination.

After the district court rendered its decision, a unanimous Supreme Court reaffirmed and clarified the analysis that courts must undertake to determine whether a reservation has been diminished. *See Nebraska v. Parker*, 136 S. Ct.

[1] Amici submit this brief by permission of the Court. *See* Order 08/13/2016, 07-7068 (10th Cir). No party's counsel authored this brief in part or in whole. No party or party's counsel or person other than Amici contributed any money to its preparation or submission.

1072, 1078-82 (2016). *Parker* is a watershed decision with direct implications for this Court's resolution of the reservation status issue.

Parker emphatically reaffirmed that "[o]nly Congress has the power to diminish a reservation." *Parker*, 136 S. Ct. at 1082. Under the "well settled" framework applied in *Parker*, *id*. at 1078, the treaty promises by which the United States established the Five Tribes' reservations in exchange for those tribes' vastly larger eastern homelands cannot be abrogated by the march of time, the weight of popular assumptions, or even, as *Parker* makes clear, a century or more of State efforts to assert jurisdiction. Instead, the framework set forth in *Parker* is the sole path to a decision on reservation disestablishment and, as demonstrated below, adherence to that path compels the conclusion that the Creek reservation has not been disestablished.[2]

BACKGROUND

In the early part of the 19th century, the Muscogee (Creek) Nation, the Seminole Nation and three other tribal nations – collectively known then as the Five Civilized Tribes, and today as the Five Tribes – were forcibly removed from their homelands in the southeast United States and relocated to the Indian Territory in the present State of Oklahoma. *See Indian Country, U.S.A.*, 829 F.2d at 970 n.2, 971. In 1832, the Creek Nation entered into a treaty with the United States by

[2] Amici's interest in this case is limited to the reservation status issue. Amici take no position on Petitioner's other claims.

which it ceded its former homeland in exchange for an Indian Territory reservation. Treaty of March 24, 1832, 7 Stat. 366, art. XIV. Congress subsequently granted the Nation a fee simple patent to its reservation, promising that the United States would preserve the Nation's rights to it. Treaty of Feb. 14, 1833, 7 Stat 417, art. III.

In 1866, the Nation ceded the western half of that reservation to the United States in exchange for a sum-certain payment of $975,168. June 14, 1866 Treaty with the Creek Indians, 14 Stat. 785, art. III. Under this treaty, the Nation "retained title to its 'reduced . . . reservation,' which [the United States] promised to be 'forever set apart as a home for said Creek Nation.'" *Indian Country, U.S.A.*, 829 F.2d at 971 (quoting 14 Stat. 785, arts. III, IX) (ellipses in original) (citations omitted). The reservation defined in the 1866 treaty constituted an "Indian reservation" under 18 U.S.C. 1151(a). *See id*. at 973-74 (discussing 1832, 1833, and 1866 Creek treaties and concluding same). The land at issue in this case is within the boundaries of that reservation.

Toward the end of the 19th century, Congress began developing a policy to terminate the Five Tribes' titles to their lands and open the reservations to non-Indian settlement. To that end, Congress established the Dawes Commission in 1893 to negotiate with the Five Tribes to "extinguish tribal land title and develop an allotment plan," but the Tribes "refused to negotiate" regarding those goals. *Id*.

at 977. Congress therefore passed a series of statutes subjecting the Tribes to increasing federal control to "coerce the Creek Nation [and other Tribes] to agree to allotment and cession of tribal lands[.]" *Id.* at 978.

One such statute, the Curtis Act, "abolished the existing Creek court system and rendered then-existing tribal laws unenforceable in the federal courts." *Id.*; *see* Curtis Act, 30 Stat. 495, §§ 26, 28 (1898). This Act also proposed an allotment plan for the Creek Nation, 30 Stat. at 505-07, which Congress ratified but the Nation rejected. *See* Annual Report of the Commission to the Five Civilized Tribes at 9 (1899) (Amici App. A at 3).[3]

In response to this pressure, "[i]n 1901, the Creek Nation finally agreed to the allotment of tribal lands." *Indian Country, U.S.A.*, 829 F.2d at 978. The Nation and the Commission negotiated an allotment agreement, which Congress ratified on March 1, 1901. Creek Allotment Act, 31 Stat. 861 (1901). Under this agreement, the Nation refused to cede any lands to the United States, and the vast majority of tribal lands were allotted in severalty amongst the Nation's citizens. *Id.* ¶ 3.

Because the Nation held fee title to its lands, the Creek Allotment Act required the Nation's principal chief to execute deeds transferring the Nation's "right, title, and interest" in the lands to the individual tribal members, who would

[3] For the convenience of the parties and the Court, *Amici* provide copies of various public documents in the Appendices to this brief.

hold their allotments under federal supervision. *Id*. ¶¶ 7, 23. The Act further reaffirmed that the Nation would have jurisdiction to enact laws and regulations (subject to federal approval) affecting both tribal land and the "lands . . . of individuals after allotment[.]" *Id*. ¶ 42.

The Act also contemplated the dissolution of the Creek Nation's tribal government on March 4, 1906, "subject to such further legislation as Congress may deem proper." *Id*. ¶ 46. However, Congress canceled the dissolution on March 2, 1906, 34 Stat. 822, and on April 26, 1906, provided that the Creek and other Five Tribes' governments would be "continued in full force and effect for all purposes authorized by law, until otherwise provided by law[.]" Five Tribes Act, 34 Stat. 137, § 28 (1906).

As this Court has explained, "[a]lthough Congress at one time may have envisioned the termination of the Creek Nation and complete divestiture of its territorial sovereignty, the legislation enacted in 1906 reveals that Congress decided not to implement that goal, and instead explicitly perpetuated the Creek Nation and recognized its continuing legislative authority." *Indian Country, U.S.A.*, 829 F.2d at 981. The Creek Nation has never been terminated. *Id*. at 971.

ARGUMENT

I. *NEBRASKA v. PARKER* REAFFIRMED AND CLARIFIED THE RESERVATION DIMINISHMENT FRAMEWORK

In *Solem v. Bartlett*, 465 U.S. 463 (1984), the Supreme Court enunciated the principles that control determinations of reservation status:

> The first and governing principle is that only Congress can divest a reservation of its land and diminish its boundaries. Once a block of land is set aside for an Indian Reservation . . . the entire block retains its reservation status until Congress explicitly indicates otherwise.

Id. at 470. Congress's intent to diminish a reservation "will not be lightly inferred" and Congress must "clearly evince an 'intent . . . to change . . . boundaries' before diminishment will be found." *Id*. (ellipses in original) (quoting *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 615 (1977)). Absent evidence of such intent, courts "are bound . . . to rule that diminishment did not take place and that the old reservation boundaries survived." *Id*. at 472.

To implement these principles, *Solem* established a three-step framework that requires courts to look first to the relevant statutory text as the "most probative evidence of congressional intent." *Id*. *Parker* unanimously reaffirmed *Solem*'s framework, 136 S. Ct. at 1079, and clarified the permissible scope of evidence that courts may consider at each step and the weight to be accorded those steps.[4]

[4] *Parker* addressed "only the single question of diminishment" and therefore "express[ed] no view about whether equitable considerations of laches and acquiescence may curtail the Tribe's [governmental] power[s]." 136 S. Ct. at 1082

A. *Solem* Step 1: The Statutory Text Is Paramount

Parker reaffirms the primacy of statutory language in the diminishment analysis. 136 S. Ct. at 1079. Courts must "start with the statutory text, for '[t]he most probative evidence of diminishment is, of course, the statutory language[.]'" *Id*. (quoting *Hagen v. Utah*, 510 U.S. 399, 411 (1994)). The Court's decisions had already established that the hurdle for finding textual evidence of diminishment is high. *See*, *e.g.*, *Solem*, 465 U.S. at 474-75 and n.17 (statutory reference to "reservations thus diminished" was "hardly dispositive. . . . [and] cannot carry the burden of establishing an express congressional purpose" in part because Congress "may well have been referring to" something other than "diminishment of reservation boundaries" (quotation marks omitted)). *See also Hagen*, 510 U.S. at 411 ("Throughout the [diminishment] inquiry, [courts] resolve any ambiguities in favor of the Indians[.]"). A litigant who cannot clear this hurdle has "failed at the first and most important step." *Parker*, 136 S. Ct. at 1080.

Parker summarized the Court's precedents identifying the textual "hallmarks of diminishment." *Id*. at 1079. These "include '[e]xplicit reference to cession or other language evidencing the present and total surrender of all tribal interests' or 'an unconditional commitment from Congress to compensate the

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(citing *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 217-21 (2005)). That issue is likewise not presented here.

Indian tribe for its opened land.'" *Id.* (quoting *Solem*, 465 U.S. at 470). Language "restoring portions of the reservation to the public domain," is another hallmark of diminishment, *id*., because "[i]n the nineteenth century, to restore land to the public domain was to extinguish the land's prior use." *Id. See also Osage Nation v. Irby*, 597 F.3d 1117, 1123 (10th Cir. 2010) (additional "[e]xamples of express termination language" include "reservation is hereby discontinued," "hereby, vacated," and "hereby, abolished" (quotation marks omitted)).

Because the act at issue in *Parker* "bore none of these hallmarks," 136 S. Ct. at 1079, the Court concluded that "Congress did not intend to diminish the reservation," *id*. at 1080.

B. *Solem* Step 2: Surrounding Circumstances Evidence Must "Unequivocally" Demonstrate Disestablishment

Where the statutory text lacks clear expression of Congress's intent to diminish a reservation, a court may examine "the circumstances surrounding" the relevant legislation. *Parker*, 136 S. Ct. at 1079. These circumstances include "the manner in which the [allotment statute] was negotiated" and the legislative history. *See id*. at 1080-81. To support a diminishment finding, such evidence must be "clear and plain" and "unambiguous," and it must "*unequivocally* reveal[] a widely held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation." *Id.* at 1080-81 (emphasis in original) (quotation marks omitted).

Parker makes clear that this requirement is to be applied strictly. There, the legislative history contained statements supporting Congress's intent to diminish the reservation, and others supporting "the opposite conclusion." *Id*. at 1080. Notably, the Court did not weigh the competing evidence, but simply concluded that such "mixed historical evidence . . . cannot overcome the lack of clear textual signal that Congress intended to diminish the reservation." *Id*.

C. *Solem* Step 3: Evidence Of Subsequent Demographics And Subsequent Treatment Of The Lands By Government Officials May "Reinforce" A Finding "Based On The Text"

Under Step 3, a court may look to "subsequent demographic history" and the "subsequent treatment of the disputed land by Government officials" to "reinforc[e] a finding of diminishment or nondiminishment *based on the text*." *Id.* at 1081-82 (emphasis added) (quotation marks omitted). Again, *Parker* applied this limitation strictly. There, the tribe "was almost entirely absent from the disputed territory for more than 120 years," *id*. at 1081, during which time the population had been more than 98 percent non-Indian. *See* Pet. Br., 2015 WL 7294863, at 24-34. Yet the Court unanimously held that "[t]his subsequent demographic history cannot overcome our conclusion that Congress did not intend to diminish the reservation in 1882. And *it is not our role to rewrite the 1882 Act in light of this subsequent demographic history*." 136 S. Ct. at 1081-82 (emphasis added) (quotation marks omitted).

Similarly, in its consideration of the subsequent treatment of the lands, the Court acknowledged that federal officials "for more than a century" had treated the reservation as terminated, *id*. at 1082, while only limited evidence pointed in the other direction. *Id*. But again, the Court did not weigh this competing evidence. It simply concluded that "[t]his 'mixed record' of subsequent treatment of the disputed land cannot overcome the statutory text[.]" *Id*.[5]

II. UNDER THE *SOLEM* FRAMEWORK, CONGRESS DID NOT DISESTABLISH THE CREEK RESERVATION

A. Step 1: The Statutory Text Does Not Evince Congress's Intent To Disestablish The Reservation

Statutory text is the "most probative evidence" of diminishment. *Parker*, 136 S. Ct. at 1079 (quotation marks omitted). Yet while the district court asserted that "a careful review of the Acts of Congress which culminated in [Oklahoma statehood] in 1906" leaves "no doubt" that the Creek reservation was disestablished, Order and Opinion, Doc. 71 at 52, it did not discuss or even cite

[5] In *Parker*, Nebraska had urged the Court to find "*de facto* diminishment" in light of the subsequent demographic history and government treatment of the disputed lands. Pet. Br., 2015 WL 7294863, at 25-38, 47-48. *Solem* had stated that demographic change can suggest "that *de facto,* if not *de jure,* diminishment may have occurred." 465 U.S. at 471. And *Hagen* found that state jurisdiction and demographic change can lead to a "practical acknowledgment" of diminishment. 510 U.S. at 421. In both cases, however, the Court found clear evidence of diminishment or non-diminishment in the statutory text. To the extent that any uncertainty existed in the Court's prior case law as to whether courts may find diminishment based on demographics or jurisdictional history where that finding is not clearly supported by the text, *Parker* eliminated it. *See* 136 S. Ct. at 1081-82.

those acts, thus bypassing entirely this "first and most important step." *Parker*, 136 S. Ct. at 1080. The State Court of Appeals likewise failed to identify any statutory language supporting its diminishment finding. *Murphy v. State*, 124 P.3d 1198, 1207-08 (Okla. Crim. App. 2005).

As noted, *Parker* identified as the "hallmarks of diminishment" explicit textual reference to a cession of lands to the United States in exchange for a sum certain payment to the tribe, or language restoring the disputed lands to the public domain. 136 S. Ct. at 1079. *See also Solem*, 465 U.S. at 470-71 (same); *Osage Nation*, 597 F.3d at 1123 (same and noting other termination language).

In *Osage Nation v. Irby*, this Court found no such textual evidence of diminishment in the Osage Allotment Act, stating as follows:

> Unlike other allotment acts, the Act did not directly open the reservation to non-Indian settlement. With the exception of certain parcels of trust land reserved for the Osage Nation, the Act allotted the entire reservation to members of the tribe with no surplus lands allotted for non-Indian settlement. As the Act did not open any land for settlement by non-Osage, there is no sum-certain or any other payment arrangement in the Act. And neither the Osage Allotment Act nor the Oklahoma Enabling Act contain express termination language. Thus, the operative language of the statute does not unambiguously suggest diminishment or disestablishment of the Osage reservation.

Id. at 1123-24.

This reasoning applies fully to the Creek Allotment Act. The Act did not directly open the reservation to non-Indian settlement. No mention is made of a

restoration of lands to the public domain. There exists no reference to a cession of lands to the United States (or other express boundary termination language) in exchange for a sum-certain payment to the Nation.

In sum, the Act is devoid of the hallmarks of diminishment. Instead, as demonstrated next, it bears the hallmarks of continued reservation status recognized in *Parker* and *Solem*.

First, the Act was not a "surplus lands act." Like the Osage Act, it allotted the reservation entirely to Creek citizens (subject to a limited exception discussed below). *See* 31 Stat. 861, ¶ 3 ("all lands of said tribe . . . shall be allotted among the citizens of the tribe"). Provisions for tribal members "to obtain individual allotments" in a disputed area suggest continued reservation status for that area. *Solem*, 465 U.S. at 474; *Mattz v. Arnett*, 412 U.S. 481, 504 (1973) (finding it "inescapable [that] [t]he presence of allotment provisions . . . cannot be interpreted to mean that the reservation was to be terminated").

Second, Congress expressly recognized the Creek Nation's continuing territorial jurisdiction over the "lands . . . *of individuals after allotment*" which remained subject to "act[s], ordinance[s], or resolution[s] of the national council of the Creek Nation" as approved by the President of the United States. 31 Stat. 861, ¶ 42 (emphasis added). There is no way to square Congress's express understanding that the Nation would continue to exercise territorial jurisdiction

over allotted reservation lands with a finding that Congress, in that same legislation, disestablished those lands.

Third, the Act set aside lands for tribal purposes. *See, e.g.*, *id.* at ¶ 2 (referring to lands set aside "for Creek schools and public buildings") and ¶ 24 (same for Creek orphanages). Such provisions "strongly suggest" reservation boundaries remain intact. *Solem*, 465 U.S. at 474 (also stating that "[i]t is difficult to imagine why Congress would have reserved lands for [tribal] purposes [including tribal schools] if it did not anticipate that the [affected] area would remain part of the reservation").

Fourth, in *Parker*, the absence of textual evidence of diminishment was "confirmed by the text of [an] earlier treat[y]" that contained a hallmark of diminishment in the form of an explicit cession to the United States in exchange for a sum-certain payment. *Parker*, 136 S. Ct. at 1080. This "undermine[d] [the] claim that Congress intended to do the same with the reservation's boundaries in 1882 as it did in" the earlier treaties. *Id.* That same reasoning applies here. The 1866 treaty contained unequivocal terms of cession to the United States in exchange for a sum-certain payment, resulting in a "reduced Creek reservation." 14 Stat. 785, arts. III, IX) ("[T]he Creeks hereby cede and convey to the United States . . . the west half of their entire domain . . . . and in consideration of said cession . . . the United States agree to pay the sum of [975,168] dollars"). Under

Parker, the inclusion of such terms in the earlier treaty and their absence in the 1901 Allotment Act "undermine[] [the] claim" that Congress intended to disestablish the Creek reservation through the statute. 136 S. Ct. at 1080.

Finally, a narrow exception to the Act's general allotment of lands to Creek citizens likewise supports continued reservation status. The Act permitted tracts within town sites "in the Creek Nation" to be appraised and subject to "disposition and sale" to non-members "for the benefit of the tribe[.]" 31 Stat. 861, ¶ 10. *Parker* addressed a provision with similar effect and noted that "rather than the Tribe's receiving a fixed sum . . . the Tribe's profits were entirely dependent upon how many nonmembers purchased the appraised tracts of land." *Parker*, 136 S. Ct. at 1079. Such provisions "allow non-Indian settlers to own land on the reservation," but "do not diminish the reservation's boundaries." *Parker*, 136 S. Ct. at 1080 (quotation marks and citation omitted). *See also Buster v. Wright*, 135 F. 947, 958 (8th Cir. 1905) ("[P]urchasers of lots in town sites . . . within the original limits of the Creek Nation . . . are still subject to the laws of that nation[.]").

In sum, the key textual factors *Parker* and *Solem* identified as supporting continued reservation status apply to the Creek Allotment Act. And this is no surprise. The Act was not a statute returning vast tracts of land to the public domain or otherwise opening the reservation to an influx of non-Indian settlers.

With very limited exceptions, the Act – pursuant to which the Creek Nation received no compensation from the United States – allotted the entirety of the reservation to Creek citizens. All of it would be served by tribal schools and other tribal institutions and subject to the jurisdiction of the Creek Nation under federal supervision. The Act certainly wrought changes within the reservation, but nothing in its terms suggests that it disestablished the reservation boundaries. "Congress must clearly evince the intent to reduce boundaries," *Pittsburg & Midway Coal Mining Co. v. Yazzie*, 909 F.2d 1387, 1393 (10th Cir. 1990), and it did not do so here.

This construction of the statute is not contradicted by the fact that the allotment certificates would transfer the "right, title, and interest" in the allotted reservation lands from the tribe to individual tribal members. *See* 31 Stat. 861, ¶ 23. First, this language does not reflect a cession to the United States which, as discussed above, is a classic hallmark of diminishment. *See*, *e.g.*, *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 344 (1998) (diminishment found where tribe ceded land "to the United States"); *Rosebud*, 430 U.S. at 597 (same); *DeCoteau v. Dist. County Court for Tenth Jud. Dist.*, 420 U.S. 425, 445 (1975) (same). Instead, it simply effectuates an uncompensated change from communal title to title in severalty, and a transfer of title says nothing about reservation boundaries. As this Court has explained, "the distinction between title and boundary was an important

one, and thus, the Supreme Court has required that specific congressional intent to diminish *boundaries* and not just Indian land titles be clearly established" by the statutory text. *Yazzie*, 909 F.2d at 1394-95 (emphasis in original). *Solem* indeed speaks forcefully to this point: "Once a block of land is set aside for an Indian reservation *and no matter what happens to the title of individual plots within the area*, the entire block retains its reservation status until Congress explicitly indicates otherwise." 465 U.S. at 470 (emphasis added). Both *Solem* and *Yazzie* applied this principle to find continued reservation status where Indian title was extinguished and would vest in non-Indians. The principle carries even more force here. The title transfer provision did not, for the vast majority of the reservation, which was allotted to Creek citizens, extinguish Indian title at all.

Furthermore, as noted above, Congress expressly provided for continued jurisdiction of the Nation over "lands . . . of individuals after allotment." 31 Stat. 861, ¶ 42. This provision is flatly incompatible with the notion that Congress intended that the transfer from tribal to individual Indian title would disestablish the reservation or otherwise divest the Nation of its sovereign authority over it. Moreover, the Act's title transfer provision applied to non-Indian purchasers of town sites "in like manner" as it applied to tribal members, *id*. ¶ 23, and those non-Indian purchasers were likewise "subject to the laws of that nation[.]" *Buster*, 135

F. at 958. The Act's title transfer language did not affect the reservation's status or boundaries.

Nor is continued reservation status undermined by the Act's provision for the dissolution of the Creek government in 1906. 31 Stat. 861, ¶ 46. First, that provision was entirely prospective, and expressly "subject to further legislation as Congress may deem proper." *Id*. *Buster* described that provision as "a contract" that the Creek government "shall continue, and that it shall exercise until that time over all persons within the limits of [its] territorial jurisdiction . . . every governmental power it then possessed of which it has not been deprived by the agreement of 1901 or by some subsequent act of Congress." 135 F. at 953.

No "further legislation" ever dissolved the Creek Nation. To the contrary, with the 1906 Five Tribes Act, Congress provided that "the tribal existence and present tribal governments of the . . . Creek . . . [and other Five] tribes or nations are hereby *continued in full force and effect* for all purposes authorized by law, until otherwise provided by law[.]" 34 Stat. 137, § 28 (emphases added). As this Court has explained:

> Although Congress at one time may have envisioned the termination of the Creek Nation and *complete divestiture of its territorial sovereignty*, the legislation enacted in 1906 reveals that *Congress decided not to implement that goal*, and instead explicitly perpetuated the Creek Nation and recognized its *continuing legislative authority*. Congress subsequently repudiated its earlier policies of termination. . . . *It is not for the courts to complete a task that Congress chose not to finish*.

Indian Country, U.S.A., 829 F.2d at 981 (emphasis added) (citation omitted). Under the express terms of the Act, that continuing territorial sovereignty encompassed "lands . . . of individuals after allotment[.]" 31 Stat. 861, ¶ 42. The Act's reference to the never-accomplished dissolution of the tribal government does not suggest that Congress thereby disestablished the reservation.

* * *

Statutory text is "[t]he most probative evidence" of whether Congress intended to disestablish a reservation. *Parker*, 136 S. Ct. at 1079 (quotation marks omitted). The text of the Creek Allotment Act does not support a finding of disestablishment under the standards required by the Supreme Court. It instead strongly supports a finding of continued reservation status.

B. Step 2: The Circumstances Surrounding The Enactment Of The Creek Allotment Act Do Not Unequivocally Show A Widely Held Contemporaneous Understanding That The Reservation Would Be Disestablished

Where, as here, a statute lacks clear language of diminishment, courts may look to the historical circumstances surrounding the passage of the act. *Parker*, 136 S. Ct. at 1080-81. To overcome a lack of textual indicia of diminishment, such evidence must be "unambiguous," and "*unequivocally* reveal[] a widely held, contemporaneous understanding that the affected reservation would shrink as a

result of the proposed legislation." *Id.* (emphasis in original) (quotation marks omitted).

Neither the district court nor the State Court of Appeals identified *any* evidence regarding the historical circumstances surrounding the negotiations and passage of the Creek Allotment Act, let alone evidence unequivocally reflecting a widespread contemporaneous understanding that the reservation would be disestablished as a result of the Act. Order and Opinion, Doc. 71 at 51-53; *Murphy v. State*, 124 P.3d at 1207-08. Nor can it be said that such unequivocal evidence of diminishment exists because, as discussed below, the Creek Nation and the United States never understood or agreed that allotment would result in termination of the reservation boundaries.

Osage Nation illustrates the type of historical evidence that this Court has identified as supporting diminishment in the absence of clear textual support, evidence which simply does not obtain here. There, this Court found that "all the parties at the table understood that the Osage reservation would be disestablished by the Osage Allotment Act[.]" 597 F.3d at 1125. The evidence submitted indicated that the Osage Nation "approached Congress to begin negotiating a bill to abolish their tribal affairs," because "[t]he Osage were very anxious to bring about the allotment." *Id*. at 1124 (quotation marks omitted). Other evidence indicated that the Osage in fact recognized that their Act "would terminate

reservation status," and that prominent Osage representatives acknowledged the "dissolution of the reserve." *Id*. (quotation marks omitted). While the evidence submitted showed that the Osage attempted to negotiate several terms in the allotment agreement, *id*. at 1125, there was no indication that they sought continuation of their territorial or political rights. As elaborated upon below, the negotiations between the Creek Nation and the Dawes Commission stand in sharp contrast.[6]

1. The Creek Nation consistently rejected the Commission's attempts to terminate the reservation by negotiating a cession of tribal lands for a sum certain payment

Because the Five Tribes held fee title to their reservation lands, "Congress initially believed that tribal consent was a prerequisite to individual land allotment." *Indian Country, U.S.A.*, 829 F.2d at 977. Congress therefore established the Dawes Commission in 1893 to negotiate for "the extinguishment of the national or tribal title to any lands [of the Five Tribes] within [the Indian] Territory . . . either by cession . . . to the United States, or by the allotment and division of the same in severalty among the Indians . . . or by such other method as may be agreed upon[.]" 27 Stat. 612, § 16 (1893). The Tribes initially "refused to negotiate" with the Commission. *Indian Country, U.S.A.*, 829 F.2d at 977. While

[6] The evidence of continuing reservation status in *Osage Nation* was primarily "contemporaneous to th[e] litigation" rather than "evidence regarding widely held understanding of the Osage Allotment Act at the time it was passed[.]" *Id*. at 1125.

they eventually did so, they held steadfast in their refusal to cede their lands, despite that being the United States' preferred option. As the Commission explained in its first Annual Report to the Commissioner of Indian Affairs in 1894:

> Early interviews . . . satisfied us that the Indians would not, under any circumstances, agree to cede any portion of their lands to the Government, but would insist that if any agreements were made for allotment of their lands it should all be divided equally among them. . . . Finding this unanimity among the people against the cession of any of their lands to the United States, we abandoned all idea of purchasing any of it and determined to offer them an equal division of their lands.

Commission to the Five Civilized Tribes, Annual Reports of 1894, 1895, and 1896 at 14 (1897) (Annual Reports 1894-1897) (Amici App. A at 7).

The Commission's annual report for 1900, submitted to the Secretary of the Interior just months after the negotiations of the Allotment Act had concluded, likewise stated as follows:

> Had it been possible to secure from the Five Tribes *a cession to the United States of the entire territory at a given price*, . . . the duties of the commission would have been immeasurably simplified . . . . When an understanding is had, however, of the *great difficulties which have been experienced in inducing the tribes to accept allotment* in severalty . . . it will be seen *how impossible it would have been to have adopted a more radical scheme of tribal extinguishment*, no matter how simple its evolutions.

Seventh Annual Report of the Commission to the Five Civilized Tribes at 9, H. Doc. No. 5, 56th Cong., 2d Sess. (1901) (1900 Commission Report) (Amici App. A. at 12) (emphases added).

The allotment agreement thus reflects the Tribes' rejection of the United States' preference for "a more radical scheme of tribal extinguishment." Congress and the Commission were simply unable to accomplish their desired outcome of "a cession to the United States of the entire territory at a given price." *Id*. That option would have been a "hallmark[] of diminishment," *Parker*, 136 S. Ct. at 1079, "'precisely suited' to terminating reservation status," *Yankton Sioux*, 522 U.S. at 344 (quoting *DeCoteau* 420 U.S. at 445).

These events weigh strongly against disestablishment. In *Mattz*, Congress had allotted the Klamath River reservation in 1892 after repeatedly introducing legislation to "abolish" it. 412 U.S. at 499-501. Reports and legislative history leading up to the 1892 allotment statute were "hostile to continued reservation status[.]" *Id*. at 499. However, the 1892 statute contained no disestablishment language, but instead simply provided for allotment to tribal members, with unallotted lands opened to purchase by non-Indians. *Id*. at 494-95 (citing 27 Stat. 52 (1892)). Because Congress had contemplated, but failed to enact, legislation containing express disestablishment language, the statute represented "a clear retreat from previous congressional attempts to vacate the . . . Reservation in express terms[.]" *DeCoteau*, 420 U.S. at 448 (describing the holding in *Mattz*). This sequence of events "compels the conclusion that efforts to terminate the

reservation by denying allotments to the Indians failed completely." *Mattz*, 412 U.S. at 504.

That reasoning applies here. Congress's "more radical scheme of tribal extinguishment" through a "cession to the United States of the entire territory at a given price" failed, and the Creek Allotment Act – allotting the reservation to Creek citizens and preserving tribal jurisdiction over it – marked a "clear retreat" from Congress's initial termination goals. This history contrasts sharply with the evidence submitted in *Osage Nation*, where this Court found that "all the parties at the table" understood that the reservation would be dissolved.

2. Records of the negotiations between the Creek Nation and the Dawes Commission refute the notion that the Nation believed that allotment would result in termination of the reservation boundaries

Records of the Creek Nation's negotiations with the Commission demonstrate that the Commission and the Nation understood that the Act would preserve the Nation's territorial sovereignty. And contemporaneous opinions of the federal courts and the United States Attorney General confirmed that the Creek Nation retained sovereign authority over its lands after the Act.

In 1895, the Commission wrote to the Five Tribes explaining that it had "not come here to interfere at all with the administration of public affairs in these nations, or to undertake to deprive any of your people of their just rights." Annual Reports 1894-1897 at 61 (Amici App. A at 8). Rather, the Commission sought to

"secur[e]" for the Nations "their just rights under the treaty obligations[.]" *Id*. Those treaty rights included the 1866 treaty promises establishing the reservation boundaries as they stood on the eve of allotment, *Indian Country, U.S.A.*, 829 F.2d at 975, and the Act expressly protected the Nation's "existing treaties," 31 Stat. 861, § 44. The Oklahoma Enabling Act likewise contained express protection for Indian land rights, and preserved the authority of the United States over the Tribes' lands and their treaty rights. 34 Stat. 267, §1 (1906).

The Creek Nation had every reason to believe that its rights – including territorial jurisdiction within its reservation – would be protected after allotment. For example, the 1898 Curtis Act authorized non-Indians to purchase fee lands within town sites in the Creek and other Indian Territory reservations. 30 Stat. 495, § 15. These non-Indian residents were subject to the Tribes' taxing powers (enforced by federal agents). This power was upheld in 1900 by the United States Attorney General with respect to the Creek Nation. *See* 230 Op. Atty. Gen. 214, 217 (1900) (Amici App. A. at 18) (attesting to the validity of the Creek Nation's tax and stating that "the legal right to purchase land within an Indian nation gives the [non-Indian] purchaser no right of exemption from the laws of such nation"). The United States and the Nation, then, understood that the Nation enjoyed territorial jurisdiction over its reservation when they entered negotiations for the

Act. *See S. R. A., Inc. v. Minnesota*, 327 U.S. 558, 562 (1946) (the right of a sovereign to tax "depends primarily upon its territorial jurisdiction over the area").

The Creek Nation and the United States likewise understood that the Act would not terminate this sovereign territorial power. In *Buster*, the Eighth Circuit explained that the parties considered the taxes affirmed by the Attorney General in 1900 when they negotiated the Allotment Act:

> It was under this state of facts that the United States and the Creek Nation made the agreement of 1901. . . . The subject of these taxes was presented to the minds of the contracting parties and was considered during the negotiation of the agreement . . . . But they made no provision that noncitizens who engaged in the mercantile business in the Creek Nation should be exempt from these taxes. . . . [T]he conclusive presumption is that they intended to make no such contract, and that the power of the Creek Nation to exact these taxes, and the authority of the Secretary of the Interior and of his subordinates to collect them, were neither renounced, revoked, nor restricted, but that they remained in full force and effect after as before the agreement of 1901.

Buster, 135 F. at 954.

Unlike *Osage Nation*, where this Court found that "all parties to the table" understood that the Osage Act would disestablish the reservation, the United States and the Creek Nation held the opposite understanding; namely, that the Nation's territorial jurisdiction over its reservation would survive passage of the Act. Thus, while the Commission may have initially desired to wholly terminate the Nation's reservation, "it is impossible to say that the [Nation] agreed to th[ose] terms." *Solem*, 465 U.S. at 476-77. As the Commission acknowledged after negotiations

of the Act concluded, "it would have been [impossible] to have adopted a more radical scheme of tribal extinguishment." 1900 Commission Report at 9 (Amici App. A at 12).

In sum, nothing in the history of the negotiations or implementation of the Act reflects the "clear congressional intent and [tribal] understanding that the reservation would be disestablished" that this Court found with respect to the Osage Allotment Act. *Osage Nation*, 597 F.3d at 1124. No unequivocal evidence exists of a "widely held, contemporaneous understanding that the [Creek] reservation would shrink as a result of the proposed legislation." *Parker*, 135 S. Ct. at 1081. Thus, just as the requisite evidence of disestablishment does not exist under Step 1 of the *Solem* framework, so too is it entirely lacking under Step 2. Under *Parker,* that should mark the end of the inquiry. 136 S. Ct. at 1081 (Court has "never relied solely on [Step 3 factors] to find diminishment").

C. Step 3: The Post-Allotment Treatment Of The Lands And Demographic History Cannot Override, And In Fact Reinforces, The Absence Of Textual Evidence Of Disestablishment

The district court did not analyze any statutory language or surrounding circumstances but instead grounded its decision in Step 3 factors. Order and Opinion, Doc. 71 at 51-53. That decision, which was handed down before *Parker*, simply cannot be squared with it. Without either clear textual evidence of Congress's intent to disestablish a reservation or "unequivocal" evidence of the

same in the surrounding circumstances, *Parker*, 136 S. Ct. at 1080-81, courts "are bound . . . to rule that diminishment did not take place and that the old reservation boundaries survived," *Solem*, 465 U.S. at 472. Because the statutory language and surrounding circumstances fall far short of unequivocally establishing diminishment under the Creek Allotment Act, Step 3 evidence cannot be utilized to establish diminishment, no matter how compelling. *See Parker*, 136 S. Ct. at 1082. And as shown next, even if Step 3 evidence could bear such weight, those factors militate in favor of continued reservation status.

1. Post-allotment treatment of the Creek reservation by Congress, the BIA, and federal courts supports continued reservation status

"Congress' own treatment of the affected areas, particularly in the years immediately following the opening," as well as "the manner in which the Bureau of Indian Affairs and local judicial authorities" treated the lands can indicate how Congress understood the allotment statute would operate with respect to reservation boundaries. *Solem*, 465 U.S. at 471.

In the years following allotment, Congress commonly referred to the Five Tribes' allotted lands as "reservations" or in other terms connoting geographically defined sovereignty – *i.e.*, referring to lands "*in*" those "Nations." For example, "seventeen years after statehood, Congress still referred to the lands of the Five Civilized Tribes as included in the generic category of 'Indian reservations.'"

Indian Country, U.S.A., 829 F.2d at 975 (citing 43 Stat. 244 (1924)). And the 1936 Oklahoma Indian Welfare Act authorized the Secretary of the Interior to acquire agricultural lands for Indians in Oklahoma "within or without *existing Indian reservations*[.]" 25 U.S.C. § 501 (1936) (emphasis added). *See also*, *e.g.*, 33 Stat. 189, 204 (1904) (authorizing sale of certain "lands in the Creek Nation"); 35 Stat. 781, 805 (1909) (regarding "allotments in the Creek Nation"); 40 Stat. 561, 581 (1918) (appropriating funds for "the common schools in the Cherokee, Creek, Choctaw, Chickasaw, and Seminole Nations").

In light of these post-allotment statutes, the district court's conclusion that legislation enacted after 1906 "leaves no doubt," Order and Opinion, Doc. 71 at 52, that the Creek reservation was disestablished does not withstand scrutiny. The district court does not explain how the statutes it cites in support of this assertion indicate diminishment, and they do not. For example, the Act of June 14, 1918, 40 Stat. 606, § 2 (cited at Order and Opinion, Doc. 71 at 52), provides that "the laws of the State of Oklahoma" pertaining to heirship and partition will apply to restricted Creek allotments. But nothing about applying discrete provisions of state law to individual allotments is inconsistent with reservation status. In *United States v. Sands*, this Court held that pre-1906 statutes applying State laws relating to "alienation, partition, and heirship" to Five Tribes' allotments "did not abrogate the federal government's authority and responsibility, nor allow jurisdiction by the

State of Oklahoma" over those allotments. 968 F.2d 1058, 1061-62 (10th Cir. 1992). *See also United States v. Hellard*, 322 U.S. 363, 366 (1944) ("[W]e do not think that Congress did more by those provisions [of the 1918 Act] . . . than to grant the Oklahoma state courts jurisdiction over partition proceedings.").

Nor does a 1935 senate committee report, cited by the district court for the proposition that "'all Indian reservations . . . have ceased to exist' in Oklahoma,'" Order and Opinion, Doc. 71 at 53 (quoting S. Rep. No. 1232, 74th Cong., 1st Sess. 6 (1935)) (Amici App. A at 45) (quotation marks omitted), support that conclusion. That report pertained to legislation that would become the Oklahoma Indian Welfare Act, which, as quoted above, referred to "existing Indian reservations" in Oklahoma. 25 U.S.C. § 501. Congress plainly rejected the proposition that all reservations had "ceased to exist" in Oklahoma.

Like Congress, the Bureau of Indian Affairs regarded the Five Tribes' allotted lands as reservations well into the 20th century. For instance, the Annual Reports of the Commissioner of Indian Affairs included tables compiling "General data for each Indian reservation" through 1920 (after which these tables were apparently discontinued). These tables consistently included the Creek Nation's and the other Five Tribes' allotted territories amongst those "Reservation[s]." Amici App. B. Through at least 1914 the Annual Reports included an annually updated "Map showing Indian Reservations within the Limits of the United States"

that consistently identified the Five Tribes allotted lands as "Reservation[s]" which had not been "opened." Amici App. C.[7]

Contemporaneous federal court decisions likewise recognized that the allotted Creek lands retained reservation status. In 1905, as discussed above, the Eighth Circuit upheld the authority of federal agents to collect taxes on behalf of the Creek Nation on non-Indians "trading *within its borders*." *Buster*, 135 F. at 949 (emphasis added). The court expressly acknowledged the Nation's sovereign power "to govern the people within its borders." *Id*. at 952. *See Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 332–33 (2008) (*Buster* addressed Nation's authority "within the reservation"). That federal officials, with the sanction of the federal courts, were enforcing the Creek Nation's sovereign taxing powers "within its borders" reinforces in compelling fashion the clear evidence of non-diminishment in the text of the Act. And these events notably occurred in "the years immediately following" the Creek Allotment Act. *Parker*, 136 S. Ct. at 1081.

As Oklahoma transitioned to statehood in 1907, the allotted Creek lands continued under federal supervision. Federal officials continued to maintain "control and direction of the schools among the Five Civilized Tribes," Report of the Commissioner of Indian Affairs at 95 (1907) (citing 34 Stat. 137 (1906))

[7] These maps were included in the Annual Reports until 1919. Counsel for *Amici* were unable to locate post-1914 copies of these maps of usable quality.

(Amici App. A. at 26), approve mineral leases for the Tribes, *id*. at 98 (Amici App. A. at 29), and "collect the taxes and royalties belonging to the several tribes," *id*. at 103 (Amici App. A. at 34). And with the support of Congress, the Department continued to maintain a heavy presence within the Five Tribes' territories even after statehood, employing a "clerical force" and "district agents" to administer land sales and leases, removing intruders from restricted allotments, and maintaining and enlarging tribal schools. 35 Stat. 781, 803-04 (1909). These manifestations of federal supervision again weigh in favor of continued reservation status. *See Solem*, 465 U.S. at 480 (finding no diminishment based in part on evidence that the Tribe and the United States "took primary responsibility for policing and supplying social services" in the allotted reservation).

The foregoing are examples of Congress, the courts, and executive branch officials treating the Creek lands as a reservation in the years following allotment. And even if this Court is presented with examples to the contrary, a "'mixed record' of subsequent treatment of the disputed land cannot overcome the statutory text," *Parker*, 136 S. Ct. at 1082, where, as here, that text lacks the hallmarks of diminishment or other express termination language and instead is replete with provisions that the Supreme Court has found to indicate continued reservation status.

2. Subsequent unsupported statements, including by this Court in *Osage Nation*, do not undermine continued reservation status

As the 20th century progressed, the understanding that the Five Tribes' allotted lands remained reservations gave way to the increasingly prevalent view that those reservations had been disestablished. But this view was not grounded in the text of any act of Congress. It was instead an assumption premised, in part, on the assimilationist goals of the allotment era. *See*, *e.g.*, Francis Prucha, The Great Father 746-57 (1984) (suggesting that as a result of the allotment process and Oklahoma statehood the Five Tribes "failed to preserve their national existence," omitting any mention of Congress's express continuation of those governments in 1906).

Federal courts in the decades after allotment sometimes subscribed to this erroneous assumption. For example, in 1916 the United States Court of Claims found that the "Creek Nation of Indians kept up their tribal organization and customs and had a system of laws . . . until the year 1906, at which date the tribal government was terminated by the general provisions of the act of March 1, 1901[.]" *Turner v. United States*, 51 Ct. Cl. 125, 127 (1916). The Supreme Court affirmed that finding in 1919, stating that "[o]n March 4, 1906, the [Creek] tribal organization was dissolved pursuant to Act of March 1, 1901." 248 U.S. 354, 356 (1919) (citation omitted). In a clear indication of just how shaky such judicial

assumptions were, the Supreme Court rejected this erroneous interpretation of law and Creek history in 1943. *Bd. of County Comm'rs v. Seber*, 318 U.S. 705, 718 and n.23 (1943) (noting that the "Act of March 1, 1901 . . . provided for the dissolution of the Creek Tribe on March 4, 1906, but this provision was revoked by . . . the Act of April 26, 1906"). This Court later did the same in *Indian Country, U.S.A.* 829 F.2d at 981 ("[T]he legislation enacted in 1906 reveals that Congress decided not to implement that goal [of termination], and instead explicitly perpetuated the Creek Nation and recognized its continuing legislative authority").

This Court expressed the same assumption in *Osage Nation*, where it stated:

> In preparation for Oklahoma's statehood, the Dawes Commission had already implemented an allotment process with the Five Civilized Tribes that extinguished national and tribal title to lands within the territory and disestablished the Creek and other Oklahoma reservations. *See* H.R. Rep. No. 59–496, at 9, 11 (1906).

597 F.3d at 1124. This statement plainly was not, and could not have been, a holding in the case, as the status of the Creek and other Five Tribes' reservations was not at issue. Moreover, neither the Creek Nation, the Seminole Nation, nor any of the other Five Tribes were party to that litigation, and accordingly it can have no binding or preclusive effect on them here. *Pelt v. Utah*, 539 F.3d 1271, 1281 (10th Cir. 2008) ("It is a fundamental rule of civil procedure that one who was not a party to an action is not bound by the judgment.").

Nor was the statement the product of the mandatory *Solem* framework. It makes no reference to statutory language. Rather, it cites one congressional report, which says nothing about disestablishing the Creek or other reservations. The report references the Dawes Commission's authority "for the extinguishment of the national or tribal title to any lands" of the Five Tribes, and reproduces a report to Congress that such work "is well advanced toward completion." H. Rep. No. 496, 59th Cong., 1st Sess. at 9, 11 (1906) (Amici App. A. at 48, 50). But, as explained above, references to changes in *title* do not support an inference of a change to reservation *boundaries*. *Yazzie*, 909 F.2d at 1394-95; *see also supra* at 15-16. The report also notes that "agreements have been made with the Five Civilized Tribes providing for . . . the abolition of tribal governments[.]" H. Rep. No. 496, 59th Cong., 1st Sess. at 10-11 (1906) (Amici App. A. at 49-50). But, as again explained above, "Congress decided not to implement that goal, and instead explicitly perpetuated the Creek Nation and recognized its continuing legislative authority." *Indian Country, U.S.A.*, 829 F.2d at 981. The assertion in *Osage Nation* that Congress "disestablished the Creek and other Oklahoma reservations," 597 F.3d at 1124, should therefore play no role in this Court's deliberations here. *See Yazzie*, 990 F.2d at 1400 (declining to be bound by "unexamined and unsupported" statement in prior reservation diminishment case).

3. The Nation's continuing presence within the boundaries of its 1866 reservation supports continued reservation status

"[E]vidence of the changing demographics of disputed lands is 'the least compelling' evidence in our diminishment analysis, for [e]very surplus land Act necessarily resulted in a surge of non-Indian settlement and degraded the Indian character of the reservation, yet we have repeatedly stated that not every surplus land Act diminished the affected reservation." *Parker*, 136 S. Ct. at 1082 (quotations omitted). *Parker* underscores just how little weight changing demographics, including assertions of state jurisdiction, may bear in the absence of clear textual evidence of diminishment. There, the tribe "was almost entirely absent from the disputed territory for more than 120 years," had not enforced any tribal regulations or otherwise asserted governmental authority there, and had maintained no social or official presence, *id.* at 1081. Indeed, "[l]ess than 2% of Omaha tribal members ha[d] lived [in the disputed area] since the early 20th century." *Id.* at 1078. In addition, "for more than a century and with few exceptions, reports from the Office of Indian Affairs and . . . opinion letters from Government officials treated the disputed land as Nebraska's," while only scattered references pointed in the opposite direction. *Id.* at 1082.

None of this mattered to the Court. It summarily dispatched with this evidence, stating that the "subsequent demographic history cannot overcome our conclusion that Congress did not intend to diminish the reservation in 1882," *id.*,

and that the "'mixed record' of subsequent treatment of the disputed land cannot overcome the statutory text." *Id.*

In sharp contrast to the virtual absence of the Omaha Tribe and its members in *Parker*, the Creek Nation has maintained a "strong Tribal presence," *Solem*, 465 U.S. at 480," within its reservation to the present day. In 1979, the Nation adopted, and the United States ratified, a constitution confirming that its "political jurisdiction" is coextensive with the 1866 reservation boundaries. *See* Constitution of the Muscogee (Creek) Nation, art. I, § 2.[8] The "territorial jurisdiction" of the Nation's courts likewise "extend[s] to all the territory defined in the 1866 Treaty with the United States." *Enlow v. Bevenue*, 1994 WL 1048313 at *2 (MCN Supreme Court Oct. 13, 1994) (quoting Nation law). The seat of the Creek Nation government is in Okmulgee, Oklahoma, in the heart of the 1866 reservation, and more than half of the Nation's 80,000 members live within or near those boundaries. Amici App. D. at 2 (map of Creek Nation tribal headquarters in Okmulgee, Oklahoma).[9] *See Solem*, 465 U.S. at 480 (that "[t]he seat of tribal

[8] http://www.creeksupremecourt.com/index.php/mcn-constitutiion.

[9] The Creek Nation Citizenship Board publishes a map of Creek Nation citizen residency by county in Oklahoma (last updated on April 20, 2016). According to that map, more than 40,000 of the Nation's 80,000 citizens live within the eight counties making up the vast majority of the 1866 boundaries. Portions of some of these counties fall outside of the 1866 boundaries, so some of these Creek citizens likely live just outside of this territory. http://www.muscogeenation-nsn.gov/services/citizenship/.

government is now located in a town" in the disputed area where "roughly two thirds of the Tribe's enrolled members live" weighs against diminishment). Moreover, the Nation maintains tribal community centers, health centers, and emergency management response teams throughout its 1866 territory. Amici App. D. at 3-6. It also applies its traffic laws throughout this territory. Muscogee (Creek) Nation Code Annotated, tit. 22, § 1-106.[10] The Nation further provides financial support for "Muscogee (Creek) Nation Traditional Churches" and "established Ceremonial Grounds." There are "sixteen (16) established Ceremonial Grounds which are located within the Nation's jurisdictional boundaries." Muscogee (Creek) Nation Code Annotated, tit. 5, § 2-103(A).[11] *See Solem*, 465 U.S. at 480 (finding that "most important tribal activities take place" in disputed area weighs in favor of continued reservation status).

The State also asserts considerable governmental authority over the Creek reservation. The district court relied heavily on this fact.[12] But *Parker* again – in a

[10] http://www.creeksupremecourt.com/images/code/webver/title22.pdf.
[11] http://www.creeksupremecourt.com/images/pdf/Code_amendments/T5-NCA10-009.PDF.
[12] Indeed, the United States and the State of Oklahoma have consistently attempted to justify the State's wholesale assertion of jurisdiction over Indian lands in Oklahoma, notwithstanding that this Court and state courts have been rejecting these theories for decades. *See*, *e.g.*, *Indian Country, U.S.A.*, 829 F.2d at 978 (rejecting arguments that statues passed during the allotment period "abolish[ed] Creek Nation jurisdiction over tribal lands . . . or . . . permit[ted] the assertion of jurisdiction by the State of Oklahoma"); *Sands*, 968 F.2d at 1061 (rejecting the United States' "frequently raised, but never accepted, argument that the State of

context where Nebraska was exercising exclusive and unchallenged jurisdiction – repudiates the notion that assertions of state jurisdiction, regardless of how comprehensive or sustained, and regardless of the popular expectations that accompany them, can diminish a reservation. "[T]hese expectations alone, [even if] resulting from the Tribe's failure to assert jurisdiction, cannot diminish reservation boundaries. Only Congress has the power to diminish a reservation." *Parker*, 136 S. Ct. at 1082. *See also Indian Country, U.S.A.*, 829 F.2d at 974 (federal government's "past failure to challenge" state jurisdiction over disputed lands "or to treat them as reservation lands, does not . . . negate Congress' intent" as to reservation status).

CONCLUSION

Nothing in the text of the Creek Allotment Act indicates that Congress intended for that Act to disestablish the Nation's reservation boundaries. The surrounding circumstances do not unequivocally support a diminishment finding, and the thoroughly mixed subsequent jurisdictional history cannot overcome the lack of textual diminishment language. Accordingly, should this Court reach the merits of Petitioner's reservation boundaries claim, the well-established analytical framework strongly reaffirmed in *Parker* leaves no doubt that "[t]he presumption

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Oklahoma retained jurisdiction over criminal offenses in Indian country"); *State v. Klindt*, 782 P.2d 401, 403-04 (Okla. Crim. App. 1989) (overturning 1936 precedent that had allowed State of Oklahoma to exercise criminal jurisdiction over tribal members within Indian country).

that Congress did not intend to diminish the Reservation," *Solem*, 465 U.S. at 481, should stand.

Respectfully submitted this 12nd day of August, 2016.

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