CASE Nos. 07-7068 & 15-7041

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PATRICK DWAYNE MURPHY,

Appellant/Petitioner,

v.

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 Nos.
CIV-03-443-RAW-KEW
CIV-12-191-RAW-KEW

The Honorable Ronald A. White,
District Judge

AMICUS CURIAE MUSCOGEE (CREEK) NATION BRIEF IN OPPOSITION TO PETITION FOR REHEARING EN BANC

Kevin Dellinger
Attorney General
Lindsay Dowell
First Assistant Attorney General
Muscogee (Creek) Nation
Post Office Box 580
Okmulgee, Oklahoma 74447
(918) 732-7600
kdellinger@mcnag.com

Riyaz A. Kanji
David A. Giampetroni
Philip H. Tinker
KANJI & KATZEN, PLLC
303 Detroit Street
Suite 400
Ann Arbor, Michigan 48104
(734) 769-5400
dgiampetroni@kanjikatzen.com

Counsel for Amicus Curiae Muscogee (Creek) Nation

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

I. Introduction

In a thoroughly documented and carefully reasoned 126-page opinion, a panel of this Court applied the Supreme Court's settled framework – recently reaffirmed in *Nebraska v. Parker*, 136 S. Ct. 1072, 1079 (2016) – for assessing reservation disestablishment and concluded that the reservation of the Muscogee (Creek) Nation had not been disestablished. Oklahoma and the United States now seek en banc review, but their arguments fail to justify that extraordinary step. Those arguments consist of (1) unsubstantiated conjecture about the consequences of the decision; (2) a phantom intra-circuit conflict; and (3) the repetition of merits claims that fail to properly acknowledge, let alone successfully grapple with, the Panel's extensively developed reasons for rejecting them.

II. Speculation About the Consequences of the Panel's Decision Does Not Warrant En Banc Review.

Lacking a powerful case on the merits, the State and the United States warn of dire consequences stemming from the Panel's decision. Pet. 1-3; U.S. Br. 2-3. But their unsubstantiated and hyperbolic claims of harm cannot justify en banc review.

At the outset, they look backward, speculating that "[p]otentially every state conviction involving tribal members" within the Reservation will be subject to collateral attack in federal court. Pet. 2; U.S. Br. 3 n.1. But they nowhere explain why the vast majority of those claims would not be barred by the one-year statute

of limitations provided for in the Anti-Terrorism & Effective Death Penalty Act, 28 U.S.C. § 2244(d). Absent that explanation, their claims fall flat.

The arguments of the State and the United States fare no better when they look ahead. The United States speculates, for example, that the decision could require it "to investigate and prosecute hundreds (or even more than a thousand) new cases every year, increasing its caseload by a factor of ten or more." U.S. Br. 2. But the United States provides no support for this contention (indeed the *entire* federal discussion of consequences is devoid of citation to a single authority), and it is easy to understand why.

The United States Attorneys' Offices in the Eastern and Northern Districts of Oklahoma (which the Reservation spans) filed a total of 205 criminal cases in fiscal year 2016,[1] so a tenfold "or more" increase would exceed 2,000 filed cases annually. That number is hard to credit: *nationwide* in 2015, the number of Indian country matters in which United States Attorneys' Offices either brought prosecutions or declined to do so was 2,655. *See* U.S. Dep't of Justice, *Indian Country Investigations and Prosecutions* (2015).[2] Unless the United States is

[1] *See* https://www.justice.gov/usao/page/file/988896/download at 3, Table 1.
[2] *Available online at*: https://www.justice.gov/tribal/page/file/904316/download at 4. This figure includes "the total of Indian country suspects in immediate declinations, suspects in matters terminated (which includes all later declinations), and defendants filed." *Id*. at n.2.

assuming that Indians on the Creek Reservation will commit crimes receiving federal attention at a vastly higher rate than Indians nationwide, the unsubstantiated numbers advanced in its brief amount to pure hyperbole.

Moreover, the United States ignores several factors that will significantly limit any impact of the Panel decision on federal law enforcement resources. The federal government does not act alone in Indian country. Crimes not involving Indians will remain subject to State jurisdiction regardless of where committed. *See United States v. Langford*, 641 F.3d 1195, 1197 (10th Cir. 2011). Moreover, the Nation has plenary jurisdiction to enforce its criminal laws against all Indians within the Reservation boundaries. *See United States v. Lara*, 541 U.S. 193, 204 (2004). To their credit, the State and the United States do not question the robustness of the Nation's law enforcement capacity, and for good reason: the Nation's federally trained and fully equipped Lighthorse Police Department, which consists of 39 full-time officers, along with reservists and 3 full-time investigators, possesses the full complement of capabilities characterizing a modern, sophisticated police department.[3]

In addition, the Department has cross-deputization agreements in place with the Bureau of Indian Affairs ("BIA") and the majority of the 40 municipal and county governments within the Reservation boundaries. Those agreements

[3] *See* https://www.mcn-nsn.gov/services/lighthorse-police/.

> [a]uthorize [all] commissioned Officers to provide law enforcement services and make lawful arrests . . . within the geographic area of the Muscogee (Creek) Nation reservation . . . [and] to react immediately to observed violations of the law and other emergency situation[s] regardless of whether such occurrences violate the criminal statutes of the Muscogee (Creek) Nation, the United States, and/or the State of Oklahoma[.][4]

As the federal Indian Law & Order Commission has found, where such "intergovernmental recognition of arrest [and investigative] authority occurs . . . . arrests get made, interdiction of crime occurs, and confidence in public safety improves." *A Roadmap for Making Native America Safer: Report to the President & Congress of the United States* ("Report") 100 (2013).[5]

Agreements are also in place for Lighthorse officers to obtain commissions under the BIA's Special Law Enforcement Commission ("SLEC") program.[6] *See* Report at 103 ("With a [SLEC], a Tribal police officer . . . can exercise essentially the same arrest powers as a [BIA] officer." (footnote omitted)). The Nation also has a cooperative agreement in place with the State of Oklahoma Violent Crimes/Drugs Task Force (Districts 24 and 25).[7] And a Nation prosecutor is

[4] These and other cooperative agreements discussed herein are *available online at*: https://www.mcn-nsn.gov/government/office-of-the-attorney-general/.
[5] *Available online at*: https://www.aisc.ucla.edu/iloc/report/files/A_Roadmap_For_Making_Native_America_Safer-Full.pdf.
[6] *See* fn.4.
[7] *See* fn.4.

deputized as a Special Assistant United States Attorney.[8] *See* Report at 73 (Federally deputized tribal prosecutors "can be key assets for ensuring the timely and successful prosecution of Indian country crime.").

No government, of course, is more concerned with the maintenance of law and order on the Creek Reservation than the government of the Creek Nation. If the United States' unsubstantiated assertions had merit, the Nation would address them. But as they stand, those assertions ignore the robust, interjurisdictional law enforcement authority that is, and will remain, firmly in place on the Reservation.

The remaining practical arguments deserve little weight. The United States suggests, for example, that the increased federal criminal caseload will fall to a "single full-time federal district court judge who sits in the Eastern District of Oklahoma." U.S. Br. 2-3. The assertion is baffling, as the Eastern District seats three district judges and two magistrates; and the Northern District seats four district judges and four magistrates.

Likewise unpersuasive is the State's contention that "the civil rights protections of the U.S. Constitution may now be inapplicable to many Oklahoma citizens[.]" Pet. 3. In accordance with the Indian Civil Rights Act, 25 U.S.C. § 1302, and tribal law, the Nation provides a full complement of judicially

[8] *See* fn.4.

enforced Bill of Rights protections to all criminal defendants subject to its authority. *See* MCN Code, Title 14, §§ 1-204, 1-303, 1-304, 1-501, 1-701.[9]

Finally, speculation that the Panel's decision will implicate "*half* of the State," Pet. 2, or "nearly all of eastern Oklahoma," U.S. Br. 3, misses the mark entirely. Reservation status is determined "case-by-case." *Pittsburg & Midway Coal Mining Co. v. Yazzie*, 909 F.2d 1387, 1395 (10th Cir. 1990) (citing *Solem v. Bartlett*, 465 U.S. 463, 466-76 (1984)). Neither the Panel decision nor any rehearing of it would determine the application of the disestablishment framework to the other Five Tribes, each of which has its own history. *See, e.g.*, Cohen's Handbook of Federal Indian Law 302 and n.773-74 (2005 ed.) (noting substantive differences among Five Tribes' allotment statutes).

In sum, rather than establishing the importance of the case, the State and federal assertions serve only – like a burst of squid's ink – to obscure the waters for the arguments that follow. The reasons for this are apparent, as detailed in the remainder of this submission.

III. No Intra-Circuit Conflict Exists.

There exists no conflict between the Panel decision and that of this Court in *Osage Nation v. Irby*, 597 F.3d 1117 (10th Cir. 2010). The State asserts parallels

[9] *Available online at*: http://www.creeksupremecourt.com/wp-content/uploads/title14.pdf.

between the text of the Osage and Creek allotment statutes and argues that Congress therefore cannot have intended "*different* legal treatment[.]" Pet. 4-5. While there are in fact substantial, material differences between the acts, *see* Appellant's Reply 43-45 (filed Jan. 19, 2017), this argument fails on its own terms. Both the Panel and the *Osage Nation* Court found that the text of the respective statutes did *not* evidence Congress's intent to disestablish the reservations, *see* 597 F.3d at 1123-24; Panel Op. 90-101, rendering any claim of a conflict based on the statutory text to be curious at best.

The State and the United States also assert that the Panel's "treatment of the historical evidence" conflicts with *Osage Nation*. U.S. Br. 16; *see also* Pet. 5-6. This assertion likewise lacks merit. The decisions examine two distinct historical records. The *Osage Nation* Court found, based on the record before it, unequivocal evidence 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. By contrast, the Panel here found, based on the record before it, "evidence showing a continuing understanding that the Creek Reservation's borders remained intact[.]" Panel Op. 112. As the United States explained in its amicus brief opposing certiorari in *Osage Nation*:

> It is to be expected that courts examining different statutes and different surrounding circumstances would sometimes find "unequivocal" evidence of disestablishment or diminishment, and

> sometimes would not. . . . [E]ven within the singular context of Oklahoma, *the Osage Nation presents a special case*.

U.S. *Osage Nation* Am. Br. 14-15 (emphasis added) (citation omitted).[10]

Finally, the *Osage Nation* dictum about the Creek Reservation, 597 F.3d at 1124, hardly establishes an intra-circuit conflict. Pet. 5. The Panel directly addressed that one-sentence dictum, Panel Op. n.63, and issued a thoroughly supported *holding* to the contrary, after which no subsequent panel, lower court or litigant could reasonably interpret the dictum as controlling. *See, e.g., Yazzie*, 909 F.2d at 1400 (disregarding "unexamined and unsupported" statement in prior reservation case).

IV. The State and the United States Fail to Address the Panel's Careful Explication of the Relevant Statutory Text.

Shorn of their unsubstantiated claims regarding the consequences of the Panel decision and of a conflict with *Osage Nation*, the State and United States' submissions distill down to the assertion that the Panel erred in its application of the three-step disestablishment test. Error correction is, of course, not normally the stuff of en banc review, and this general rule would seem to apply with especial force in a case where the Panel so meticulously assessed and rejected the State's

[10] *Available online at*: https://www.justice.gov/sites/default/files/osg/briefs/2010/01/01/2010-0537.pet.ami.inv.pdf.

merits arguments. And even if the rule were different, neither the State nor the United States makes a credible claim that the Panel got the merits wrong.

Statutory text is "the most probative evidence" of disestablishment, *Parker*, 136 S. Ct. at 1079 (quotation marks omitted), and a party failing to identify clear textual evidence of Congress's intent to disestablish a reservation has "failed at the first and most important step," *id.* at 1080. The Panel rigorously analyzed the text of all eight statutes relied on by the State (which largely parallel those relied on by the United States), *see* Panel Op. 90-95, and concluded that "not only do the State's statutes lack any language showing disestablishment, *they show Congress's continued recognition of the Reservation's boundaries*," *id*. at 97 (emphasis added). The State and the United States fail to identify any statutory text that the Panel misconstrued in arriving at this conclusion.

Nowhere is their failure more glaring than with respect to the Creek Allotment Act of 1901 (supplemented in 1902). This is the only statute advanced by the State that directly addressed the Creek lands. The Panel accordingly gave it "particular attention," Panel Op. 73, and the United States agrees that it is "the most important," U.S. Br. 7.

The Panel concluded that the Act "repeatedly recognized the continuing existence of the Creek Nation's borders," Panel Op. 84, and that it affirmed the Nation's continuing jurisdiction over "'*the lands of the tribe*'" and "'*of individuals*

after allotment,'" *id.* at 81-82 (quoting § 42, 31 Stat. 861, 872 (1901)) (emphasis added):

> A continuing role for the tribal government was apparent in a provision recognizing Creek legislative authority over both unallotted tribal lands and allotted lands. ¶ 42, 31 Stat. at 872. "[A]ct[s], ordinance[s], [and] resolution[s]" of the Creek National Council remained subject to presidential approval, but the Agreement recognized the Creek government's authority to regulate "the lands of the tribe" as well as lands belonging to "individuals after allotment." *Id.*
>
> . . . .
>
> [T]he Agreement [also] assigned powers and responsibilities to the United States, many of which were expressly tied to the Creek Nation's territorial boundaries. For example, the Secretary was authorized to collect a grazing tax when cattle were brought "into the Creek Nation" and grazed on unallotted lands. ¶ 37, 31 Stat. at 871. Revenue from the tax was "for the benefit of the tribe." *Id.*

Panel Op. 81-83 (final brackets added).

The State tellingly makes no specific mention of the 1901 Act or of the Panel's extensive analysis of it. For its part, the United States ignores the key provisions discussed by the Panel, and instead points to others providing for (1) allotment and title transfer; (2) the possibility of tribal dissolution; and (3) restrictions on tribal authority. *See* U.S. Br. 7-8.

However, the Panel addressed each of these provisions and rejected any argument that they evidence an intent to disestablish the Reservation. Regarding allotment and title transfer, the Panel stated:

> Allotment can be "completely consistent with continued reservation status." *Mattz*, 412 U.S. at 497 . . . . [The State's] focus on the extinguishment of tribal title and the shift to individual ownership misses the mark because "the Supreme Court has required that specific congressional intent to diminish *boundaries* and not just Indian land titles be clearly established." *Yazzie*, 909 F.2d at 1394-95. As the Creek Nation explains, the allotment of Creek lands "effectuate[d] an uncompensated change from communal title to title in severalty," but this "transfer of title sa[id] nothing about reservation boundaries." Creek Nation Br. at 15.

Panel Op. 98-99 (first brackets added). The United States has no response, and such silence cannot make out a claim of error.

Regarding the possibility of tribal dissolution and changes in governance, the Panel reasoned that

> even if the State could show that dissolution of a tribal government is relevant to disestablishing a reservation . . . . Congress never dissolved the Creek government. Even when Congress contemplated the *future* dissolution of the Creek government, it continued to recognize the Tribe's governmental authority within the Reservation's boundaries. *See, e.g.*, Original Agreement, ¶ 42, 31 Stat. at 872.

Id. at 100. The United States again has no response.

In addition to the 1901 Act, the Panel emphasized the Appropriations Act of June 21, 1906, which post-dated *all* the statutes relied upon by the State and the United States and expressly recognized the extant boundaries of the Creek Reservation through specific references to "'the west boundary line of the Creek Nation'" and "'the north line of the Creek Nation.'" *Id.* at 95 (quoting Act of June 21, 1906, 34 Stat. 325, 343, 364). As the Panel explained, Congress

> discussed Creek boundaries in direct terms immediately following passage of the State's final statute. . . . These references to the lines and boundaries of the Creek Nation undercut the State's contention that its eight statutes cumulatively disestablished the Creek Reservation.

Id. The State and United States make no mention of the 1906 Act, and their failure to grapple with clear congressional language recognizing the continued existence of the Reservation boundaries underscores the weakness of their arguments.

Unable to find fault with the Panel's interpretation of any specific text, the United States is left to argue that the Panel "wrongly limited its review to searching the statutes for the 'traditional textual signs'" of disestablishment. U.S. Br. 12. This argument is simply not credible. In the Panel's own words:

> As we recently said in *Wyoming*, "[t]here are no magic words of cession required to find diminishment. Rather, the statutory language, whatever it may be, must 'establish an express congressional purpose to diminish.'" 849 F.3d at 869-70 (quoting *Hagen*, 510 U.S. at 411). There are no traditional textual signs of disestablishment in any of the statutes, *and our review uncovers no other language to overcome the presumption that the Creek Reservation continues to exist*.

Panel Op. 95 (emphasis added) (brackets in original). Nor is there any merit to the United States' generalized assertion that the Panel "*fail[ed] to account* for both the unique statutory language . . . and the complex history of the Creek Nation and the State of Oklahoma." U.S. Br. 12 (emphasis added). A fair appraisal of the Panel decision demonstrates that the Panel accounted for those matters in extraordinary

depth, *see* Panel Op. 58-101, and the United States identifies not a single error or omission in that detailed account.

In sum, the State and the United States have failed to demonstrate any error in the Panel's analysis at step one of the disestablishment framework, let alone one that would warrant en banc review.

V. The State's and United States' "Continuity in Purpose" Arguments Are Deeply Flawed and Provide No Warrant for Further Review.

The State does not dispute that it "concedes that not one of the eight statutes contains particular language that disestablished the Creek Reservation." Panel Op. 92. To circumvent this inconvenient truth, it asserts that "the Supreme Court has recognized" that it is possible to show "a 'continuity in purpose' to disestablish a reservation *regardless* of the clarity of statutory language." Pet. 7-8 (emphasis added) (quoting *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 592-606 (1977)).

The Court has "recognized" no such thing. *Rosebud* did not find disestablishment "regardless" of textual clarity. It found a continuity in purpose between a 1901 agreement and later statutes where Congress's "intent to disestablish . . . *was unquestionably manifested in the 1901 Agreement*[.]" 430 U.S. at 605 (emphasis added); *id*. at 592 (The 1901 text evidenced "an unmistakable baseline purpose of disestablishment."). *See also, e.g.*, *Hagen v. Utah*, 510 U.S. 399, 415 (1994) (finding intent to diminish where "*the baseline intent to diminish the reservation expressed in the 1902 Act* survived the passage of

the 1905 Act" (emphasis added)). The State has identified no comparable language on which to base a "continuity in purpose" argument. *See* Panel Op. 72 ("THE COURT: Well, so your answer is that you don't have any language? THE STATE: I do not have a specific section[.]").[11]

For its part, the United States faults the Panel for ignoring the purported difference between this case, which "turns on a series of statutes," U.S. Br. 4, and the Supreme Court's diminishment cases, which "ordinarily turn on the interpretation of a single statute," *id.* at 1. This attempt to evade the governing legal framework is unavailing. Both *Rosebud* and *Hagen*, for example, considered multiple statutes. *See Rosebud*, 430 U.S. at 587 (premising disestablishment finding on "the Acts of 1904, 1907, and 1910"); *Hagen*, 510 U.S. at 416 ("The two statutes – as well as those that came in between – must therefore be read together."). But as noted above, both cases premised their conclusions on what is absent here: explicit language of disestablishment.

These fatal deficiencies in their "continuity in purpose" theory aside, the State and the United States also fail to show the statutes shared any sustained purpose of the type they posit. For example, a pillar of their theory is that the

[11] As the United States explained in its brief in *Parker*, where the Court has found diminishment or disestablishment, it "*has relied on explicit language designed to achieve that purpose*." Brief for Appellee-Respondent, *Nebraska v. Parker*, 136 S. Ct. 1072 (2016) (No. 14-1406), 2015 U.S. S. Ct. Briefs LEXIS 4659, at *36-37 (emphasis added) (discussing "continuity in purpose" reasoning of *Rosebud*).

statutes "extended state law over the original territory of the Creek Nation[.]" U.S. Br. 4. *See* Pet. 8-9 (Congress "imposed U.S. and Arkansas law in place of Creek law[.]"). They cite an 1897 appropriations act that extended federal and Arkansas law to all persons in the Indian Territory "'irrespective of race.'" U.S. Br. 6 (quoting Act of 1897, 30 Stat. 62, 83); State's Br. 59 (filed Nov. 4, 2016) (same).

However, as the Panel explained, the 1897 Act provided that any subsequent tribal agreement with the Dawes Commission "would 'suspend' any provisions of the 1897 Act inconsistent with the agreement." Panel Op. 76. The Creek Nation, of course, entered a subsequent agreement with the Dawes Commission and, as the Supreme Court has explained:

> It is apparent from the terms and scope of the [1901 and 1902 Creek] agreements that *they were in the nature of a comprehensive treaty rather than a mere supplement to the fragmentary legislation which preceded them*[.]

Marlin v. Lewallen, 276 U.S. 58, 63 (1928) (emphasis added). As a result, the agreements "*withdrew the lands of the Creeks*" from the 1897 Act's application of state law to the Indian Territory. *Id*. at 67 (emphasis added). Far, then, from demonstrating a continuity in purpose with "the fragmentary legislation which preceded them," *id.* at 63, the Creek agreements represent a "comprehensive" and Creek-specific break in purpose, one that operated prospectively as well. *See id*. at 67-68; *Washington v. Miller*, 235 U.S. 422, 428 (1914) (1904 statute extending state law to Indian Territory did not "supersede or displace" Creek-specific

agreements); *In re Davis' Estate*, 122 P. 547, 549 (Okla. 1912) (discussing same and stating that "[b]oth prior and subsequent legislation . . . show conclusively that Congress had no such thought").

In a similar vein, the State and United States insist that Congress's treatment of the tribal courts, references to tribal dissolution and other limitations on tribal governance evidence a continuing purpose to disestablish. However, in *Buster v. Wright*, 135 F. 947 (8th Cir. 1905), the Eighth Circuit directly addressed and rejected that premise specifically with respect to the Creek Reservation:

> Between the years 1888 and 1901 the United States by various acts of Congress deprived this tribe of all its judicial power, and curtailed its remaining authority until its powers of government have become the mere shadows of their former selves. *Nevertheless its authority to fix the terms upon which noncitizens might conduct business within its territorial boundaries guarantied by the treaties of 1832, 1856, and 1866 . . . remained undisturbed.*

Id. at 951 (emphasis added). And this authority "remained in full force and effect *after as before* the agreement of 1901." *Id*. at 954 (emphasis added). The Panel discussed *Buster* at length, Panel Op. 65, 110-11 and n.65, but the State and United States do not mention the case, much less suggest why the Panel's discussion of it was misplaced.

In sum, the State's and the United States' wholly unsupported "continuity in purpose" theory provides no warrant to revisit the Panel's thoroughly supported rejection of it.

VI. The United States' Flawed Arguments Regarding Historical Circumstances Suggest No Basis for Revisiting the Panel's Careful Analysis.

Absent clear statutory text evidencing disestablishment at step one of the framework, a court may, at step two, find disestablishment only where there exists "unequivocal" evidence of a widespread understanding that Congress intended to disestablish the reservation. *Parker*, 136 S. Ct. at 1079. The Panel concluded this criterion not to be met here because (1) the State's step-two evidence did "not show that Congress understood it was disestablishing the Creek Reservation," and (2) the Creek Nation "present[ed] counter evidence showing a continuing understanding that the Creek Reservation's borders remained intact[.]" Panel Op. 112. Neither the State nor the United States challenges the Panel's specific assessment of the evidence on which these conclusions are based.

Instead, the United States asserts that the Panel too "quickly abandoned" its step-two discussion, U.S. Br. 17, a conclusory claim that flies in the face of the Panel's extensive step-two discussion. *See* Panel Op. 101-13. More disturbingly, the United States asserts that the historical record "was not well-developed in this case" and that "many relevant documents were not presented to the panel." U.S. Br. 14. These are serious charges, and they suggest a deep-seated disrespect not only for the substantial historical submissions of the parties and amici at the merits

stage (where the United States could have sought to participate), but also for the Panel's own independent, detailed assessment of the historical record.

One would expect accusations of this dimension to be backed up by the submission of compelling historical materials, but instead the documents that the United States seeks belatedly to inject into these proceedings are largely inapposite and entirely mischaracterized. They do nothing to undermine the Panel's analysis.

The United States first asserts that, in an 1897 Memorial to Congress, the Creek Nation "expressed [its] understanding" that "*these acts*" – *i.e.*, the statutes relied on by the United States and the State – would disestablish the reservation. U.S. Br. 14-15 (emphasis added). It then stitches together quoted sentence fragments into a narrative purporting to support that assertion. *See id*. However, the Memorial was not discussing "these acts" but was instead expressing the Creeks' understanding of a specific proposal of the Dawes Commission made four years before the Creek Allotment Act – *and doing so in the course of rejecting it*. Indeed, the very title of the document is a "Memorial of the . . . Creek Tribe or Nation of Indians in Relation to *Their Rejection of the Agreement Submitted by the [Dawes Commission]* and Accompanying Correspondence," S. Doc. No. 54-111, at 1 (1897) (emphasis added); and in accompanying correspondence, the Creeks insisted that any new arrangement include "protection against future State law," *id*.

at 9, and protection of "the property rights and political privileges of our people," *id*. at 6-7.

The United States similarly plucks a sentence fragment from an 1894 Senate Committee report for the proposition that "Congress concluded . . . that the United States '*must . . . establish a government over whites and Indians of [the Indian] Territory*[.]'" U.S. Br. 15 (emphasis added) (second ellipses and brackets in original) (quoting S. Rep. No. 53-377, at 13 (1894)). *See also* State's Br. 70 (filed Nov. 4, 2016) (same). In fact, the Committee was discussing land monopolization and tribal governance problems on the Five Tribes' reservations and the Dawes Commission's efforts to negotiate solutions that would preserve the goals of the treaty provisions that created the reservations. *See Woodward v. De Graffenried*, 238 U.S. 284, 296-306 and n.2 (1915). In that discussion, the Committee stated:

> But ***if*** *the Indians decline to treat with that Commission and decline to consider any change in the present condition of their titles and government* the United States must . . . settle this question . . . and establish a government over whites and Indians of that Territory[.]

Id. at 299 n.2 (emphasis added).

Thus, the language advanced by the United States as having been overlooked by the Panel was in fact premised on a contingency (overlooked by the United States) that did not come to pass. The Creek Nation did *not* "decline to treat with that Commission" and did not "decline to consider" changes to its titles and government. *Id*. Under the Creek Allotment Act the titles changed from

communal to individual, § 3, 31 Stat. at 862, and under both that Act and the Five Tribes Act the Creek government was subject to significant modifications, *see* § 42, 31 Stat. at 872; § 28, 34 Stat. 137, 138 (1906). But those same two provisions also protected, as the Creeks had insisted all along, their "property rights and political privileges." *See*, *e.g.*, §§ 42, 44, 31 Stat. at 872 (protecting "existing treaties" and acknowledging tribal authority over tribal and allotted lands); § 28, 34 Stat. at 148 (preserving Creek government "in full force and effect"). And Congress promptly thereafter affirmed the extant "boundary line[s] of the Creek Nation." 34 Stat. 325, 343, 364.

These provisions clearly reflect that Congress had arrived at a more durable conception of the Nation and its Reservation than is suggested by the selectively curated statements from the earlier days of the Dawes Commission relied on by the State and the United States. Indeed, the fierce resistance of the Creek Nation to negotiating its own annihilation is well chronicled and the effectiveness of that resistance is palpable in the Commission's annual report for 1900, issued just months after the years-long negotiations with the Creeks had concluded:

> "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[.]"

Creek Am. Br. 21 (filed Aug. 12, 2016) (ellipses in original) (quoting Annual Report of the Commission to the Five Civilized Tribes, H. Doc. No. 56-5, at 9 (1900)). The Panel aptly described this statement as "the Dawes Commission reflect[ing] on what its negotiations had – and had not – achieved[.]" Panel Op. 110.

The State and the United States have failed to demonstrate any error in the Panel's analysis of the historical evidence, much less one that would warrant the extraordinary step of en banc review.

VII. The United States' Step-Three Arguments Provide No Warrant for Further Review.

While the State does not challenge the Panel's disposition of step-three evidence, the United States faults the Panel for giving it "too little weight." U.S. Br. 18. It then discusses step-three evidence not presented to the Panel.

First, it asserts that later statutes lifting some restrictions on the sale of allotments "demonstrat[e]" disestablishment. U.S. Br. 18. *But see Parker*, 136 S. Ct. at 1080 (merely permitting sale to non-Indians does "not diminish the reservation's boundaries"); 18 U.S.C. § 1151 (reservation lands remain Indian country "notwithstanding the issuance of any patent").

Second, the United States attributes to "Congress" the statement of a single senator at a 1935 hearing on the Oklahoma Indian Welfare Act, 49 Stat. 1967 (1936). U.S. Br. 18-19. But the statement is contradicted by language from the

ensuing legislation, *see* 49 Stat. at 1967 (referring to "existing Indian reservations" in Oklahoma), again confirming the wisdom of the Supreme Court's caution against relying on "cherry-picked statements by individual legislators," *Parker*, 136 S. Ct. at 1081.

Finally, the United States faults the Panel's conclusion that the demographic evidence cannot "'overcome'" the absence of clear statutory indicia of disestablishment. U.S. Br. 19 (quoting Panel Op. 125). But here again the Panel scrupulously adhered to the Supreme Court's teachings. *See Parker*, 136 S. Ct. at 1081-82 (subsequent demographics "cannot overcome" absence of statutory text).

In sum, the scattered step-three evidence belatedly advanced by the United States does nothing to undercut the Panel's careful analysis of the statutory text and contemporaneous history regarding the Creek Reservation, and falls far short of providing any warrant for en banc review.

VIII. Conclusion

"It is not for the courts to complete a task that Congress chose not to finish." *Indian Country, U.S.A., Inc. v. Oklahoma*, 829 F.2d 967, 981 (10th Cir. 1987). The Creek Nation respectfully urges this Court to deny the State's Petition.

Dated this 24th day of October, 2017.

Respectfully Submitted,

By: /s/ David A. Giampetroni

Kevin Dellinger
Attorney General
Lindsay Dowell
First Assistant Attorney General
Muscogee (Creek) Nation
Post Office Box 580
Okmulgee, Oklahoma 74447
(918) 732-7600
kdellinger@mcnag.com

Riyaz A. Kanji
David A. Giampetroni
Philip H. Tinker
KANJI & KATZEN, PLLC
303 Detroit Street
Suite 400
Ann Arbor, Michigan 48104
(734) 769-5400
dgiampetroni@kanjikatzen.com

Counsel for Amicus Curiae Muscogee (Creek) Nation

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of the Court's Order of September 27, 2017 because:

> this brief contains 5,193 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

> this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14 point Times New Roman font.

/s/ David A. Giampetroni
David A. Giampetroni

CERTIFICATE OF SERVICE

I hereby certify that on October 24, 2017, I electronically filed the foregoing with the Clerk of Court for the Tenth Circuit Court of Appeals, using the Court's CM/ECF system. All participants in this matter are registered CM/ECF users, and will accordingly be served by the CM/ECF system.

/s/ David A. Giampetroni
David A. Giampetroni

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing:

(1) all required privacy redactions have been made per 10th Cir. R. 25.5;

(2) if required to file additional hard copies, that the ECF submission is an exact copy of those documents;

(3) the digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program, Webroot Secure Anywhere antivirus software, version 9.0.18.34, last updated October 24, 2017, and according to the program are free of viruses.

/s/ David A. Giampetroni
David A. Giampetroni