No. 18-9526

IN THE

Supreme Court of the United States

JIMCY MCGIRT,

Petitioner,

v.

STATE OF OKLAHOMA,

Respondent.

On Writ of Certiorari to the Oklahoma Court of Criminal Appeals

BRIEF OF *AMICI CURIAE* ENVIRONMENTAL FEDERATION OF OKLAHOMA, INC., OKLAHOMA FARM BUREAU LEGAL FOUNDATION AND AFFILIATED COUNTY FARM BUREAUS, OKLAHOMA CATTLEMEN'S ASSOCIATION, THE PETROLEUM ALLIANCE OF OKLAHOMA, OKLAHOMA STATE UNION OF THE FARMERS EDUCATIONAL AND CO-OPERATIVE UNION OF AMERICA, INC., OKLAHOMA RURAL WATER ASSOCIATION, OKLAHOMA ASSOCIATION OF ELECTRIC COOPERATIVES, AND STATE CHAMBER OF OKLAHOMA IN SUPPORT OF RESPONDENT STATE OF OKLAHOMA

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INTRODUCTION[1]

The Environmental Federation of Oklahoma, Inc., Oklahoma Farm Bureau Legal Foundation and affiliated county Farm Bureaus, Oklahoma Cattlemen's Association, The Petroleum Alliance of Oklahoma, and State Chamber of Oklahoma, Oklahoma Rural Water Association, Oklahoma Association of Electric Cooperatives, and Oklahoma State Union of the Farmers Educational and Co-Operative Union of America, Inc. (collectively *Amici*) submit this *amici curiae* brief to support the State of Oklahoma under Supreme Court Rule 37.

The Oklahoma Court of Criminal Appeals rejected Petitioner's argument the Oklahoma state courts did not have jurisdiction over his crimes committed on lands claimed to be within the historical boundaries of the Muscogee (Creek) Nation's (Creek Nation or Creek) reservation, as this Court has not ruled in *Sharp v. Murphy*, No. 17-1107. *See Murphy v. Royal*, 875 F.3d 896 (10th Cir. 2017). In *Murphy*, the Tenth Circuit determined the former Creek Nation lands (former Creek territory), established by treaty in 1866, to be a reservation of the Creek Nation, never disestablished by Congress.

While *Amici* have great regard and respect for the Muscogee (Creek) Nation and the others of the Five Civilized Tribes, their reliance on Oklahoma law and regulation compel them to oppose the reservation

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[1] The parties have filed blanket consents to the filing of *amicus* briefs. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amici*, their members, or their counsel made a monetary contribution to its preparation or submission.

status proposed here. *Murphy* upends over a century of criminal, civil, and regulatory jurisdictional understandings in Oklahoma. It ignores long-settled expectations, threatening economically destructive confusion and controversy regarding sovereign rights in Oklahoma. *Amici*'s members are engaged in many activities, governed by Oklahoma law, that developed the new State of Oklahoma in the early twentieth century: farming, ranching, oil and gas development, and small and large business operations. They have invested their energies and moneys in their livelihoods and communities, in reliance on the commonly shared understanding of the regulatory, tax, and adjudicatory authority under which they live and operate.

This case presents essentially the same issue as *Murphy*: did the Tenth Circuit err in ruling Congressional acts between 1893 and 1906 did not disestablish any reservation of the Creek Nation? If not corrected, *Murphy*, and this case if reversed, will cause great uncertainty as it imposes a new civil and criminal jurisdictional order. The former Creek territory covers large portions of Eastern Oklahoma, including much of the city of Tulsa. The decision threatens to authorize tribal taxation or overturn State, county, and municipal taxation of activities and properties; to invest tribal courts with broader jurisdiction or divest state courts of long-accepted authority; and to authorize greater, and potentially exclusive, tribal and federal regulation over lands, businesses, and energy resource development. Because the histories of the Cherokee, Chickasaw, Choctaw, and Seminole Tribes or Nations, the other four of the Five Tribes, are similar in essential respects to that of the Nation, *Murphy* may cause redrawing of jurisdictional boundaries across the Eastern half of Oklahoma. That outcome would create jurisdictional uncertainty and

impose new and additional burdens upon *Amici* and their members.

INTERESTS OF AMICI CURIAE

Amici are Oklahoma farmers, ranchers, oil and gas developers, and business owners; they and others in similar businesses helped develop Oklahoma. Some have interests dating to the days when Eastern Oklahoma was the Indian Territory. All are regulated by, comply with laws promulgated by, and pay taxes to the State of Oklahoma, its counties and municipalities, and, where relevant, the United States. While acknowledging the unique, and sometimes troubled, history of the Creek Nation and the former Indian Territory, none of *Amici* nor their members have ever believed they were living, working, or owning businesses or land within the boundaries of a current Native American reservation—until *Murphy* was decided. If not reversed, *Murphy* would recast the business and legal environment facing *Amici's* members in the Creek Nation's pre-Statehood territory, and across lands of all Five Tribes.

A. Environmental Federation of Oklahoma, Inc.

The Environmental Federation of Oklahoma, Inc. (EFO) is a non-profit corporation providing Oklahoma companies with a voice in the formulation of state and federal environmental laws, regulations, and policies. It has over eighty members. EFO works to ensure that environmental regulations are clear and consistent and properly balance the need for regulation with the interest of responsible economic growth. EFO members' interests in predictable regulation, consistent with their investments in reliance upon State regulation, will be hurt if the Nation or the federal govern-

ment seeks to impose federal or tribal regulations, including environmental regulation, over the activities of nonmembers on fee-owned lands.

B. Oklahoma Farm Bureau Legal Foundation and County Farm Bureaus

Oklahoma Farm Bureau Legal Foundation is a nonprofit foundation incorporated in 2001 that supports the rights and freedoms of farmers and ranchers by promoting individual liberties, private property rights, and free enterprise. Its sole member is Oklahoma Farm Bureau, Inc. (OKFB), an independent, nongovernmental, voluntary organization of farm and ranch families created in 1942, with 83,836 member families statewide, united for the purpose of analyzing their problems and formulating action to achieve educational improvement, economic opportunity and social advancement, and thereby to promote the national welfare. OKFB has an affiliated county organization in all seventy-seven (77) counties in Oklahoma. The following Oklahoma Farm Bureau affiliated county farm bureaus are *amici*: Atoka, Craig, Delaware, Garvin, Grady, Haskell, Hughes, LeFlore, McCurtain, Mayes, Murray, Nowata, Okfuskee, Okmulgee, Ottawa, Pittsburg, Pottawatomie, Sequoyah, Tulsa, and Washington.

There are 47,740 OKFB member families within the former Five Civilized Tribes historical boundaries. There are 24,129 member families in the *amici*-affiliated county Farm Bureaus. *Amici* counties are concerned about private property rights and potential tribal regulation.

C. Oklahoma Cattlemen's Association

Oklahoma Cattlemen's Association (OCA), a non-profit association, was chartered on March 6, 1950, by a small group of cattle raisers in Seminole County. Today, the OCA includes cattle raising families in all 77 Oklahoma counties. Within the former Creek territory, OCA is affiliated with local Cattlemen's organizations in all counties except Tulsa. Representing thousands of cattle raising families, OCA promotes private property rights, natural resource stewardship, and common sense business policy. OCA is the trusted voice of the Oklahoma cattle industry and exists to support and defend the State's beef cattle industry. *Murphy* threatens to subject members' families and businesses to new and unplanned-for jurisdictional burdens.

D. The Petroleum Alliance of Oklahoma

The Petroleum Alliance of Oklahoma (Alliance) is Oklahoma's oldest and largest oil and natural gas trade association, created by the merger of the Oklahoma Independent Petroleum Association and the Oklahoma Oil & Gas Association. The Alliance is the only trade association in Oklahoma that represents every segment of the oil and natural gas industry, allowing the industry to speak with one voice when advocating for the interests of its members, landowner partners, host communities, and every Oklahoman whose life is touched by the industry.

Members of the Alliance own or operate oil and gas operations in the counties within the former Creek territory, and within former territories of others of the Five Tribes. *Murphy* impairs their interests in stable and predictable regulation and taxation, consistent with the expectations supporting their investments.

E. Oklahoma State Union of the Farmers Education and Co-Operative Union of America, Inc.

The Oklahoma State Union of the Farmers Educational and Co-operative Union of America, Inc., commonly called Oklahoma Farmers Union (OFU), is a general farm organization birthed in 1902. Today it boasts over 59,000 family memberships throughout Oklahoma. A non-profit corporation, OFU uses its three mission areas, legislation, education and cooperation, to promote better conditions for persons engaged in agricultural pursuits, their families, and those benefiting from the business of agriculture and developing rural communities.

OFU was organized before Oklahoma's statehood, and many of its members were integral to drafting the State's constitution. Throughout its history, it has maintained strong positive relationships with tribal governments. OFU respects tribal sovereignty and recognizes the necessity and effectiveness of tribal law enforcement and judicial systems. With a history closely tied to developing Oklahoma's government, continued in-depth involvement in the state's legislative atmosphere, and a deep appreciation for its positive relationship to tribal nations, OFU is concerned this case could have widespread negative implications for both state and tribal governments.

F. Oklahoma Rural Water Association

The Oklahoma Rural Water Association (ORWA) is a non-profit organization whose purpose is to assist water and wastewater systems with day-to-day operational and management problems. Governed by a 16-member unpaid board of directors, ORWA's 29 employees provide on-site training and technical assis-

tance to utility operators throughout the state, conducting approximately 1900 technical assistance visits to water and wastewater systems each year.

Today, over 525 water and/or wastewater utilities are members of the ORWA, serving approximately 1.7 million people in the State of Oklahoma. Safe, reliable, and affordable electric service is crucial to allow ORWA members to supply quality water to meet the needs of rural Oklahoma.

G. Oklahoma Association of Electric Cooperatives

Oklahoma Association of Electric Cooperatives (OAEC) is a non-profit association of rural electric cooperatives, which serve their owner-members throughout rural Oklahoma. OAEC was created to educate the public in the uses and benefits of electric energy, and to advance the development of an ample supply of power to rural electric cooperatives, communities, and other public groups. OAEC is run and controlled by its thirty rural electric cooperatives, which generate and supply the needs for safe, reliable, and affordable electricity throughout all rural areas of the state. Given their obligation to serve throughout rural Oklahoma, and with significant investments in facilities and personnel to do so, these rural electric cooperatives are *amici* to ensure stability in the laws throughout all areas of Oklahoma.

H. State Chamber of Oklahoma

The State Chamber of Oklahoma (SCO) is Oklahoma's statewide chamber of commerce. It represents over 1,500 Oklahoma businesses and their 350,000 employees. It has been the state's leading advocate for business since 1926. SCO provides a voice for Oklahoma businesses and their employees to the executive,

legislative, and judicial branches of government. It is in a unique position to advise the Court of the impact of the civil implications of the regulatory, taxation, and economic development consequences of the decision on its members' interests, and its potential effect on business development within the former Creek territory.

SUMMARY OF ARGUMENT

This brief offers four primary arguments to assist the Court. First, the brief demonstrates the potential civil jurisdictional disruption that will arise if the decision below is reversed and *Murphy* is affirmed. Second, it shows *Amici's* understanding their fee lands and activities are not within reservation boundaries is solidly-grounded in Congressional intent and Creek tribal history. Third, *Amici* explore whether *Murphy* correctly applied the Court's reservation status jurisprudence to the statutes affecting the Creek Nation and the Five Tribes. Fourth, the brief argues *Murphy* erred in discounting Congress' intent as expressed in statutory language is confirmed by contemporaneous understandings of the intended effect of Congressional acts and by later understandings reflected in statutes, judicial decisions, and governmental authority.

ARGUMENT

I. Petitioner and His *Amici* Fail to Refute the Civil Jurisdictional Consequences of Affirming Reservation Status.

A decision affirming *Murphy* threatens to substantially enlarge tribal civil jurisdiction and diminish state jurisdiction over nonmembers in Eastern Oklahoma. If the Court recognizes the Creek Nation holds as a reservation the former Creek territory, civil consequences will upend *Amici*'s longstanding understandings and expectations regarding civil jurisdiction. If allowed to stand, *Murphy* provides a basis for the Nation, and potentially others of the Five Tribes, to assert tribal jurisdiction, and challenge State, county, or municipal tax and regulatory jurisdiction, and for the Tribes and their members to assert adjudicatory jurisdiction in tribal court and contest state court jurisdiction over families, businesses, and property. This potentially duplicative and inconsistent authority would undermine legal foundations underlying private property and investment, creating significant risk and uncertainty.

In an area where most residents and business owners are not members of the Creek Nation (or any of the Five Tribes), and where most land is owned in fee by nonmembers, *Murphy*'s civil regulatory effects would be profound. Tribes lack civil jurisdiction over nonmembers on private fee lands outside of the tribe's "Indian country." But federal law defines "Indian country" as including "all land[s] within the limits of any Indian reservation . . . notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation." 18 U.S.C. § 1151(a). "Indian country" status is pertinent—or sometimes

dispositive—both under federal common law defining whether tribal (and federal) or state powers apply, *see Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 527 (1998) (stating "Indian country" "also generally applies to questions of civil jurisdiction"), and by express delegation employing the term, *see Rice v. Rehner*, 463 U.S. 713, 733 (1983) (in 18 U.S.C. § 1161, "Congress intended to delegate a portion of its authority to the tribes"). The determination that a geographic area is an Indian "reservation" has significant civil jurisdictional effect. *Cf. United States v. Mazurie*, 419 U.S. 544, 557 (1975) (Indian tribes retain "attributes of sovereignty over both their members and their territory").

Reservation status, even without specific statutory reference to "Indian country," can support tribal jurisdictional assertions, even over nonmembers' fee lands within reservation boundaries. *See Montana v. United States*, 450 U.S. 544, 565-66 (1981). *Montana*'s exceptions to the general rule tribes lack jurisdiction over nonmember activities on fee land extend on-reservation tribal jurisdiction to nonmembers "who enter consensual relationships with the tribe or its members" and to those whose conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* The Creek Nation's claim of "political jurisdiction" would affect civil jurisdiction over the entire former Creek territory. *See* Creek Nation Br. 36. Reservation-based civil jurisdiction can extend to taxation, regulation, and court jurisdiction, or be imposed by express federal delegation over reservation lands. The scope of tribal or federal jurisdiction that may be asserted over the former Creek territory by the Creek Nation, or potentially by others of the Five

Tribes, or by the United States, is wide-ranging and would affect the lives and businesses of *Amici*.

Petitioner and his *amici* try to convince the Court that its precedent limits the exercise of tribal jurisdiction over nonmembers—or that the Nation already has this authority. Petitioner extracts a statements from a 2001 decision of this Court asserting it seldom had upheld tribal jurisdiction over nonmembers, Pet. Br. 40, but ignores numerous more recent, and problematic, lower court decisions applying this Court's precedent. *See* Point I.A-D, infra. The Creek Nation's *amicus* brief places heavy reliance on *Buster v. Wright*, a decision addressing status before key statues completed disestablishment leading to Oklahoma's statehood and the events that transferred jurisdiction over much of the former Creek territory to the State. 135 F. 947 (8th Cir. 1905). Creek Nation Br. 18 and n.6. *Buster* approved an annual fee charged by the Creek Nation for nonmembers doing business within the Creek territory, a fee that was more similar to a license than a tax. *Id.* at 949.

While *Buster* has not explicitly been overruled, the Court has not applied its holding for the proposition the Creek Nation asserts. *See Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 653 n.4 (2001) ("[W]e have never endorsed *Buster*'s statement that an Indian tribe's 'jurisdiction to govern the inhabitants of a country is not conditioned or limited by the title to the land which they occupy in it.'") (quoting *Buster*, 135 F. at 951). "Accordingly, beyond any guidance it might provide as to the type of consensual relationship contemplated by the first exception of [*Montana*], *Buster* is not authoritative precedent." *Id.*

The Creek Nation now claims, under *Buster*, it can exercise civil jurisdiction over all nonmembers doing

business within the exterior boundaries of the Creek territory's historical boundaries. *See* Creek Nation Br. 18 n.6. That assertion contradicts the Court's precedents, including *Montana*, and reinforces *Amici*'s concern that the Creek Nation will assert regulatory, taxation, and other jurisdiction over *Amici* and their non-Indian members conducting business on fee land within Creek territory, resulting in double (or sometimes triple) regulatory and tax burdens, or costly and time-consuming lawsuits to challenge the overreach. *See* Cole, et al. Br. 7 n.14 (stating "the existence of tribal civil jurisdiction over non-Indians is determined under a different framework that cannot be applied in the abstract because its application depends on the facts on the ground").

The Creek Nation's brief raises a false issue regarding cooperative agreements between Tribal Nations and the State and local governments. While often beneficial to governmental entities and their citizens, *see* Creek Nation Br. 45-46 (stating the Creek Nation undertakes government activities "in close cooperation with neighboring governments"), and reflecting the need for cooperation given checkerboard landholding patterns, they are not influenced by concerns of Oklahoma and local governments of reservation status. If the Court reverses *Murphy*, there is no reason the cooperative agreements would not continue as they have under pre-*Murphy* legal understandings. *Amici* expect their State and local governments to continue to cooperate with the Creek Nation regarding public safety and services whether or not *Murphy* is affirmed. Contrary to the implication of the Creek Nation's brief, the majority of cooperative law enforcement agreements cited in the Nation's brief were entered into before *Murphy*, and only four were entered later. *See* Creek Nation Br. 46 n.35.

While the Court's *Montana* rulings may indicate limitations on tribal jurisdiction over nonmembers if *Murphy* is not reversed, current precedent lends little comfort to *Amici*, who face unpredictable litigation challenging assertions of tribal jurisdiction, incurring uncertainty, expense, and delay in business activities.

A. Taxation.

If affirmed, *Murphy* threatens tribal taxation of nonmembers' fee land property and activities in certain circumstances. *See Atkinson Trading*, 532 U.S. at 659 (stating Navajo Nation tax on hotel receipts could apply if *Montana* exception established); *Burlington N. Santa Fe R. Co. v. Assiniboine & Sioux Tribes of Fort Peck Reservation*, 323 F.3d 767, 775 (9th Cir. 2003) (tribe entitled to discovery on whether it could impose *ad valorem* property tax under the *Montana* exceptions on federally-granted right-of-way, the equivalent of fee lands, on reservation). If not corrected, *Murphy* might subject *Amici* to dual state and tribal taxation. *See Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 186-87 (1989) (approving dual state and tribal severance tax); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 138 (1982) (tribe may tax on-reservation oil and gas production). OKFB's members are subject to Oklahoma taxation of their agricultural lands and operations, but their livestock feed, machinery, and other items are exempt from State sales tax. *See* 68 Okla. St. Ann. § 1358. In a historically low-margin industry, any additional taxes would be onerous.

In addition, the extension of reservation status to the fee lands within the asserted reservation boundaries could divest the State, its counties, or municipalities of taxing authority over Creek members living or doing business on fee lands within the

area. *See Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 480-81 (1976) (invalidating property taxes, vendor license fees, and cigarette sales taxes applied to acts and goods on the reservation); *Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 458-459 (1995) (voiding state taxes imposed on Indian tribes or members located in "Indian country").[2] State and county taxes could be preempted under a panoply of federal statutes and related Creek Nation or Five Tribes interests. *See White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145 (1980). That may further burden *Amici* as taxpayers, or as recipients of governmental services, as tribal members seek federal court protection from state taxes.

B. Dispute Resolution.

Murphy potentially subjects fee lands and nonmember activities to tribal adjudicatory jurisdiction or divests state courts' jurisdiction. *See Strate v. A-1 Contractors*, 520 U.S. 438, 458 (1997). Determining whether federal law permits tribes to assert jurisdiction over nonmember activities on reservation fee lands requires analysis of the two fact-based and highly subjective exceptions of *Montana*, which frequently first must be addressed in tribal court. *See Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 17 (1987); *FMC Corp. v. Shoshone-Bannock Tribes*, 942 F.3d 916 (9th Cir. 2019) (tribal court jurisdiction under *Montana* first and second exceptions to enforce envi-

[2] As to oil and gas taxation, *Shaw v. Gibson-Zahniser Oil Corp.*, 276 U.S. 575, 582 (1928), rejected that "Congress at a time when it was withdrawing allotted lands from their former exemption in order that Indian citizens might assume the just burdens of state taxation, intended to extend a [State] tax exemption by implication."

ronmental fee agreement against nonmember company on fee lands within reservation); *Hinkle v. Abeita*, 283 P.3d 877, 883 (N.M. Ct. App. 2012) (state court lacks jurisdiction over non-Indian's suit against tribal member for accident on state highway within reservation); *Winer v. Penny Enterprises, Inc.*, 674 N.W.2d 9, 10 (N.D. 2004) (same).

The Nation asserts its courts have jurisdiction over nonmembers. *See* Creek Nation Br. 40; *see also Nat'l Council v. Preferred Management Corp.*, 1 Okla. Trib. 278, 285, 1989 WL 547440 (Muscogee ((Cr.) D. Ct.) (the "Nation [can] exercise Tribal Court jurisdiction over non-Indians"). If dispute resolution shifts to tribal forums, nonmembers enjoy no right to federal court review of deprivations of due process or other civil rights under the Indian Civil Rights Act of 1968, 25 U.S.C. § 1302 (ICRA). *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 (1978); *see also Nevada v. Hicks*, 533 U.S. 353, 383-384 (2001) (Souter, J., concurring) ("[T]here is a definite trend by tribal courts toward the view that they have leeway in interpreting the ICRA's due process and equal protection clauses and need not follow the Supreme Court precedents jot-for-not.") (quotation marks and citations omitted). If *Murphy* is not reversed, *Amici* may have to exhaust their remedies in tribal courts or litigate without the right of federal or state court review, burdening them with risk, delay, and expense.

C. Regulatory Jurisdiction.

Murphy threatens to subject nonmember residents and businesses to other forms of Creek Nation regulatory jurisdiction. *See Montana*, 450 U.S. at 566; *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408, 426 (1989) (White, J.) (plurality opinion) (tribe may zone non-

member fee land in portion of reservation); *FMC Corp.*, 942 F.3d at 941; *FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311, 1314-15 (9th Cir. 1990) (tribe has jurisdiction to enforce tribal employment ordinance on nonmember employer on non-Indian fee land); *Cardin v. De La Cruz*, 671 F.2d 363, 366 (9th Cir. 1982) (tribe has authority to enforce health regulations against nonmember-owned store on fee lands). Any such transfer of regulatory authority would dramatically thwart *Amici*'s long-held understandings that Oklahoma law governed their lands and businesses. *See Marlin v. Lewallen*, 276 U.S. 58, 62 (1928) (stating Congress as to the former Indian Territory enacted "a body of laws. . . and intended to reach Indians as well as white persons").

The Nation requires any "person desiring to engage in the business of selling goods or items of value within the Creek Nation territorial jurisdiction" to secure a vendor's sales license, 36 M(C)N Code § 4-107(A), and to pay sales tax, 36 M(C)N Code § 4-103, and cigarette and tobacco taxes. 36 M(C)N Code §§ 5-108, 5-112. Failure to collect and pay such taxes subjects the vendor to penalties. 36 M(C)N Code § 4-110(A-C). Petitioner's *amici* state the Tribes have not regulated oil and gas but imply, ominously, *Murphy may* lead to tribal oil and gas regulation. *See* Cole, et al. Br. 20 n.47 (citing Tribal Codes with "Oil and Gas Title reserved with no provisions."). While the assertion of any such authority would be fact-dependent, tribal jurisdiction over nonmembers under tribal law may increase significantly.

D. Federal Delegations of Authority within "Indian country."

Federal delegations of authority to tribes also threaten to shift regulatory jurisdiction to the Nation.

As one example, federal law allows tribes to regulate the sale of alcohol within "Indian country." *See Mazurie*, 419 U.S. at 558 (interpreting 18 U.S.C. § 1161); *City of Timber Lake v. Cheyenne River Sioux Tribe*, 10 F.3d 554, 558-559 (8th Cir. 1993) (same). *Murphy* would have the effect of the Omaha Tribe ordinance in *Nebraska v. Parker*, 136 S. Ct. 1072 (2016), but for establishments across major portions of Eastern Oklahoma, including Tulsa, Oklahoma's second largest city. At least since 1926, Oklahoma has regulated liquor sales on fee lands within the former Creek territory, without challenge by the Creek Nation. *See Swafford v. United States*, 25 F.2d 581, 583 (8th Cir. 1928).[3] *See* Resp. Br. 19. *Murphy* would allow the Nation to require hundreds or thousands of licenses from the National Council under its Liquor and Beverage Code. *See* 73 Fed. Reg. 14997-02 (March 28, 2008); 36 M(C)N Code § 7-302(A).

For businesses that may now find themselves within a Creek Nation reservation, obtaining federal authorizations may require government-to-government consultation between Tribes and the federal government. National Historic Preservation Act § 106 consultation with tribes is required for any federal approval potentially affecting historic properties on "tribal land," defined, in relevant part, as "all land within the exterior boundaries of any Indian reservation." 54 U.S.C. § 300319. *Amici* do not dispute that government-to-government consultation is appropriate for actions directly affecting tribes and their lands, but

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[3] Petitioner falsely implies liquor cases considered Tulsa County "Indian country." *See* Creek Br. 33, *citing, e.g.*, *Joplin Mercantile Co. v. United States*, which considered a charge asserting acts in "other parts . . . of Oklahoma which lies within the Indian country." 236 U.S. 531, 548 (1915).

Murphy threatens to expand that requirement to nonmember fee lands activities requiring federal approvals across Eastern Oklahoma. With it comes expense, delay, and possible imposition of conditions on any needed federal approval for development projects.

The Creek Nation's brief argues no such concern exists because a single federal statute provides the Governor a prospective veto of certain federal delegation to a Tribe under specific federal statutes. Nation Br. 44, *citing* Pub. L. No. 109-59, § 10211(a)-(b), 119 Stat. 1144, 1837 (2005). Such an unusual device affords little comfort for *Amici*'s concerns as to other statutes or areas of law. The prospect for future bi-cameral approval of such exceptions under other statutes is, at best, uncertain. Even as to the instance cited, it does not protect from retroactive application to *Amici*'s and other nonmembers' substantial investments, through the design, construction, and operation of facilities, in reliance on regulation under State law before a declaration of reservation status and possible issuance of a gubernatorial veto. *Cf. Okla. Dep't of Envtl. Quality v. E.P.A.*, 740 F.3d 185, 190 (D.C. Cir. 2014) ("[T]he EPA might attach a condition to its approval of Oklahoma's SIP [air quality State Implementation Plan] as applied to Indian country that is inconsistent with Oklahoma's current SIP authority.").

Affirmance of *Murphy* will overturn understandings underpinning livelihoods and properties of more residents and businesses, and greater economic development, than are present in any existing Native American reservation.

II. *Murphy*, Petitioner, and His *Amici* Fundamentally Misapply this Court's Disestablishment Jurisprudence to Statutes Affecting the Creek Nation.

Murphy, Petitioner, and his *amici* disregard statutory text and pertinent history underlying *Amici*'s longstanding reliance on Oklahoma law, taxation, and courts. Ignoring the complete divestiture of all Creek communal title and all pertinent regulatory, taxing, or adjudicative powers, Petitioner and his *amici* focus much of their fire on non-issues: whether the Creek Nation would cede lands or was "pressured" to do so, Nation Br. 9; whether Creek tribal government was terminated as of statehood, *id.* 29; whether applicable statutes specifically referenced "boundaries" or called a reservation "diminished." *Id.* 23. No case of this Court vests the precepts they advance with talismanic significance as to whether Congress terminated a reservation.

It has been unquestioned, since 1903, given Congress' plenary authority over Tribes and their lands, voluntary "cession" by a Tribe is unnecessary to termination or diminishment of a reservation. *See Lone Wolf v. Hitchcock*, 187 U.S. 553, 556-558 (1903). When efforts to negotiate cession fail, Congress "unilaterally" can alter reservation boundaries, and its intent is controlling. *Hagen v. Utah*, 510 U.S. 399, 404 (1994). This Court has "never required any particular form of words," to effect diminishment or disestablishment, *id.* at 411, and Congress' intent may be expressed in multiple statutes. *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 585 (1977). And, in every case of this Court finding reservation termination or diminishment, the tribal government remained and federal trust services

to tribal or allotted trust lands continued. *See, e.g.*, *DeCoteau v. District Cnty. Ct.*, 420 U.S. 425, l442-443 (1975); *S. Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 356 (1998).

Here, in clear and unambiguous terms, Congress declared its intent to divest the Creek Nation of all tribal lands, strip the Creek Nation of all legislative and taxing authority, divest tribal courts of all jurisdiction over all persons, prohibit enforcement of tribal law in all other courts, and transfer the divested authority entirely to the new State of Oklahoma. Though Petitioner and his *amici* impugn the motives of the Interior Department, and even Oklahoma nonmember settlers who may be *Amici*'s predecessors, all participants, including the Nation's leaders, considered the Creek Nation's government to have been divested of any general jurisdiction over lands not held in trust or subject to restrictions for the Nation's allottee members. *Murphy* and Petitioner's arguments threaten to overturn Congress' intent.

A. Statutes Affecting the Creek Nation Unambiguously Terminated the Creek Nation's Landholdings and Authorities.

Congress enacted a series of statutes to prepare the Creek Nation for the divestiture of tribal lands and unqualified incorporation into the Oklahoma Territory, and ultimately the State of Oklahoma. With these statutes, Congress *both* divested the Creek Nation of title to essentially all of the lands comprising the former Creek territory, transferring the lands to individual Creek members as allotments, *and* stripped the Creek Nation of all vestiges of governmental authority, including the powers to tax, regulate, or resolve disputes throughout the former Creek territory. *See* Act of March 3, 1893, ch. 209, 27 Stat. 612,

646, (authorizing allotment of Five Tribes' lands, *id.* § 15, for the "purpose of the extinguishment of the national or tribal title to any lands within [Indian] Territory," *id.* § 16); Act of June 7, 1897, ch. 3, 30 Stat. 62, 83-84 (granting "the United States courts . . . original and exclusive jurisdiction . . . [over] all civil . . . and all criminal causes [in the Indian Territory] . . . irrespective of race," and any "acts, ordinances, and resolutions of the Council of [any] of the Five Tribes" shall be subject to disapproval by the President); Curtis Act, ch. 517, 30 Stat. 495, 504-505 (June 28, 1898) (prohibiting enforcement of Five Tribes laws in federal courts in the Indian Territory, § 26 "abolishing" all tribal courts, and transferring all causes pending "to the United States court in said Territory," § 28); Act of March 1, 1901, ch. 676, 31 Stat. 861 (First Allotment Agreement) ("all lands of [the Creek Nation] shall be allotted among the citizens of the tribe," § 8; by a deed "conveying . . . all rights, title and interest of the Creek Nation," §23, and further providing for the sale of former tribal lands to form townsites, § 10; providing Creek National Council acts or ordinances could pertain *only to tribal property interests*—and only if approved by the President, § 42; and disclaiming the Agreement could "revive or reestablish the Creek courts which have been abolished by former Acts of Congress," § 47) (emphasis added); Act of June 30, 1902, ch. 1323, 32 Stat. 500, § 6 (replacing Creek law of descent and distribution with Arkansas law, § 6; providing for the federally appointed Dawes Commission, not the Creek Nation, to determine roles tribal establishing membership and entitlement to allotments, § 9; and providing all residual funds of the Creek Nation not needed for allotment be paid out, not to the Creek Nation, but ratably to its members, § 14); Five Tribes Act, ch. 1876,

34 Stat. 137 (April 26, 1906) (requiring Secretary to assume control of tribal revenues, schools, § 10; limiting terms of Councils and requiring President's approval of ordinances, § 28). Finally, the Oklahoma Enabling Act, ch. 3335, 34 Stat. 267, § 13 (June 16, 1906), extended the laws of the Territory of Oklahoma to all portions of the new State.[4]

This Court has recognized Congress may express unambiguous intent in multiple statutes affecting a specific Tribe. In *Rosebud Sioux Tribe*, the Court analyzed all three applicable acts and their interplay to ascertain Congressional intent to diminish: "We conclude that the Acts of 1904, 1907, and 1910 did clearly evidence Congressional intent to diminish the boundaries of the [reservation]." 430 U.S. at 587; *id.* at 592 (stating the 1904 Act "cannot, and should not, be read as if it were the first time Congress had addressed itself to the diminution of the [reservation]"); *see also Hagen*, 510 U.S. at 403-406, 415 (1902, 1904, and 1905 legislation about the Uintah Reservation "must . . . be read together"). A similar analysis clarifies Congress' unwavering intent to terminate Creek, and Five Tribes, communal land holdings and incorporate that land into the new State.

Congress did not create ambiguity simply by expressing its intent about the Creek Nation in multiple statutes with the same purpose: terminating tribal authority and vesting all authorities in State government. Some of Congress's actions directly addressed the Creek Nation, and others addressed all Five

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[4] A contemporaneous statute applicable to Indians in the states or territories holding allotments under "exclusive federal jurisdiction" provided it "shall not extend to Indians within the former Indian territory." Act of May 8, 1906, ch. 2348, § 6, 34 Stat. 183.

Civilized Tribes whose lands comprised the Indian Territory. As the Oklahoma Enabling Act completed incorporation of the former Indian Territory into the new State, all applicable acts sought the same end articulated in 1893: "the extinguishment of the tribal title to any lands within that [Indian] Territory," by cession or allotment, "to enable the ultimate creation of a State of the Union within that Territory." Act of March 3, 1893, ch. 209, § 16.

Neither *Solem* nor any other decision of this Court has required the use of specific language alone to determine Congressional intent. Statutory text "consists of words living 'a communal existence,' . . . the meaning of each word informing the others and 'all in their aggregate tak[ing] their purport from the setting in which they are used.'" *U.S. Nat. Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 454-55 (1993) (quoting *NLRB v. Federbush Co.*, 121 F.2d 954, 957 (2d. Cir. 1941)); *see Erlenbaugh v. United States*, 409 U.S. 239, 243 (1972) (discussing *in pari materia* doctrine). Congress' disestablishing the former Creek reservation in a series of laws, rather than a single act, does not deprive the statutes of their expressed intent. *See Osage Nation v. Irby*, 597 F.3d 1117, 1124 (10th Cir. 2010), *cert. denied*, 564 U.S. 1046 (2011) (observing Congress "disestablished the Creek and other Oklahoma reservations").

Enactments affecting the Creek Nation, and the Five Tribes, are unique within Indian history, as they *both* divested tribal government of lands *and* expressly transferred all governmental authorities to a newly created State. The combined effects of divestitures of tribal power *and* lands do not conflict with, but rather reinforce, the more modest expressions of intent of leading surplus land act cases. *See,*

e.g., *Seymour v. Superintendent*, 368 U.S. 351, 356 (1962) ("The Act did no more than open the way for non-Indian settlers to own land on the reservation in a manner which the Federal Government . . . regarded as beneficial to the development of its wards."); *accord Nebraska v. Parker*, 136 S. Ct. at 1079-1080 (2016); *Mattz v. Arnett*, 412 U.S. 481, 497 (1973).

B. This Court's Surplus Lands Act Decisions Compel Termination by the Statutes Applicable Here.

The Tenth Circuit's decision in *Murphy* sought to apply the *Solem* disestablishment analysis, focusing myopically on the *methods* Congress employed, but failing to address Congress' overriding intent in its enactments. That narrow view led it to miss Congress' point in the series of statutes related to the Creek Nation. *Solem* reviewed cases interpreting "surplus lands acts," statutes passed "to force Indians onto individual allotments carved out of reservations and to open up unallotted lands for non-Indian settlement." *Solem*, 465 U.S. at 467. In each case, Congress had created a reservation for the tribe, later allotted a portion of its land, with the remainder sold or "opened for settlement and entry," but the tribe's government remained in place and retained all governmental powers over remaining allotments and, sometimes, tribal lands. *See DeCoteau*, 420 U.S. at 442 (Tribe shall "cede, sell, relinquish, and convey . . . all the unallotted land within the reservation"); *Seymour*, 368 U.S. at 355 (unallotted "surplus lands" patented as homesteads and opened for mineral entry); *Mattz*, 412 U.S. at 495 (unallotted lands declared "subject to settlement, entry, and purchase under"); *Hagen*, 501 U.S. at 403-306 ("restored to the public domain"). The surplus land acts affected tribal *lands*, leaving tribal govern-

ment and its authorities whole and intact regarding the reduced tribal or allotted lands.

This case, however, presents Congress' expressions in a confluence of actions, *both* divesting a tribe of all communal lands through allotment and sale, *and* stripping the tribe of its sovereign powers over allotments or any other lands and transferring authority to the State. Congress did not simply *diminish* the Creek "reservation" or Treaty territories, leaving some areas in "reservation" status. By unambiguous enactments, it allotted lands to every tribal member, required all other lands, and all other Creek national property, be sold for townsites or as surplus, and divested the Creek Nation of all general governmental authorities: these actions terminated any reservation status of all Creek Nation lands.

Murphy, and Petitioner, overlook this case fits well into the mold of *DeCoteau*, in which the Sisseton-Wahpeton Tribe agreed, as here, that allotments be issued to all tribal members, and the remaining tribal lands be sold "outright." *DeCoteau*, 420 U.S. at 435. The allotments were "scattered in a random pattern," and "the remainder of the reservation land [would be] purchased from the United States," *id.* at 428, precisely as here. The Eighth Circuit, relying on *Mattz*, 412 U.S. at 504, applied the analysis Petitioner advances, to find the reservation not terminated: "[c]lear language such as that discussed in *Mattz* expressing intent to discontinue the Lake Traverse reservation is nowhere to be found in the 1891 Act here involved [and legislative reports] do not discuss the proposed boundaries." *U. S. ex rel. Feather v. Erickson*, 489 F.2d 99, 102 (8th Cir. 1973), *rev'd sub nom. DeCoteau*. Although the Tribe in *DeCoteau* negotiated for a cession, and Congress was not required to act unilater-

ally, as it did in parts of the legislation here, after *Lone Wolf v. Hitchcock*, that distinction matters not: Congress has unquestioned authority to act unilaterally, provided its intent is clear, as it is here. *See Rosebud Sioux*, 430 U.S. at 599 ("Congress was relying on *Lone Wolf* in making this unilateral declaration.") Critical here, as in *DeCoteau*, is that both acts divested the tribes "of all, rather than simply a major portion of, the affected tribe's unallotted lands," and terminated the reservation *in toto* as to both allotted lands and the unallotted lands sold. *DeCoteau*, 420 U.S. at 446. *Murphy*, like Petitioner, did not grasp that, whether total divestiture was accomplished by cession, restoration to public domain, redrawn boundaries—or Congressional mandate—is not material.

What is irrelevant is whether the Creek Nation's tribal existence was terminated, the Creek Nation retained some limited authority over tribal or trust or restricted allotted lands while in restricted status, or the United States continued to discharge trust responsibilities over tribal or allotted trust or restricted lands are irrelevant to the analysis. Those facts existed in every case in which this Court found disestablishment or diminishment. *See, e.g.*, *Rosebud Sioux*, 430 U.S. at 599; *DeCoteau*, 420 U.S. at 442-43.

C. Congress' Texts are Reinforced by Contemporaneous Circumstances and Subsequent Events.

1. Contemporaneous Understandings Reinforce Congress' Intent.

The historical record establishes that the United States, the Creek Nation, and knowledgeable participants uniformly believed that, on statehood, the

former Creek (and Five Tribes) territory no longer existed as a reservation. After Congress mandated allotments divesting the Nation of its land ownership and vesting Oklahoma with jurisdiction over the land, nonmembers could lease ranching land from allottee landowners and, on removal of restrictions, purchase land. The Nation received no benefit from nonmember ranching or farming on the former territory. *See Groom v. Wright*, 121 P. 215, 219 (Okla. 1912) (Congress permitted allottees to lease their lands, "bringing about a change in both the land tenures and forms of government among the members of the Five Civilized Tribes").

Oil development in the former Creek territory began in the early twentieth century. At statehood, authority over oil and gas development transferred to Oklahoma, except on allotted lands. *See* Okla. Enabling Act, 34 Stat. 267, § 8 (granting the State authority over all minerals, gas, and oil under lands granted to the State). The Oklahoma Corporation Commission was granted jurisdiction in 1915 over oil and gas exploration and extraction, 52 Okla. St. Ann. § 243, and state courts addressed oil and gas disputes. *See, e.g.*, *Eldred v. Okmulgee Loan & Trust Co.*, 98 P. 929 (Okla. 1908). And neither history nor Petitioner's or his *amici*'s briefs record any objection. The Nation and the Five Tribes have accepted that status. *See infra* at 29 n.6.

Before passage of the Five Tribes Act, the Nation could tax development within its territory, including grazing, mining, and businesses of nonmembers.[5] The

[5] *Morris v. Hitchcock*, 194 U.S. 384 (1904), and *Buster*, 135 F. 947, *see* Nation's Br. 17-18, are not to the contrary. To the degree the cases have precedential weight, they only address tribal authorities as of the First Allotment Agreement; they do not

Five Tribes Act abolished that right. 34 Stat. 137, §§ 10, 16. The Oklahoma Constitution declared State taxing authority of all property except "such property as may be exempt by reason of treaty stipulations, existing between the Indians and the United States government, or by federal laws, during the force and effect of such treaties or federal laws." Okla. Const. Art. X, § 6; *see* Okla. Enabling Act, 34 Stat. 267, § 25, 2nd. No such treaty stipulation or federal laws apply. With the Act of May 27, 1908, §§ 6, 8, 35 Stat. 312, the United States authorized early lifting of restrictions on conveyances of allotments, expanding the lands subject to Oklahoma's taxation authority. *See Fink v. Bd. of Comm'rs of Muskogee Cty.*, 248 U.S. 399, 404 (1919).

The jurisdictional transfer did not happen *sub silentio*. As the enabling act contemplated, Five Tribes members participated vigorously in the Constitutional Convention forming the new state. *See* District Attorneys' Br. *passim*. And, it was widely understood, with Creek leaders concurrence, that the State, and not the tribes, would exercise regulatory and adjudicatory jurisdiction over nonmembers and all land not otherwise held by the United States, expressly granted to a tribe, or held in allotment subject to restriction.[6]

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reflect contemporaneous understandings in light of Congress' subsequent enactments leading to Statehood.

[6] Creek leaders' contemporaneous statements reflect they fully shared this understanding and urged, successfully, their members accept it as in their best interest. *See* Resp. Br. 39, Resp. App'x 8a-9a, 12a, 15a-17a.

2. Subsequent Treatment of the Former Creek Territory Reinforces Disestablishment.

Amici's members exemplify the widely held understanding Creek Nation jurisdiction does not exist beyond any remaining tribal or allotted trust or restricted land. *Amici* have lived, invested, entered commercial arrangement, and structured their conduct in the belief they did so in an area where Oklahoma law, taxation, and dispute resolution unqualifiedly applied. Their reliance is all the more reasonable given, at least until very recent times, official statements of the Creek Nation, and this Court, reflected concurrence in their understandings. *See* Resp. Br. 41.

Congress' actions after statehood reinforced this understanding. *See, e.g.*, Act of May 27, 1908, 35 Stat. 312, §§ 6, 8 (providing earlier removal or restrictions); Act of June 14, 1918, c. 101, § 2, 40 Stat. 606, compiled at 25 U.S.C. § 355 (applying State law to land held by one of the Five Tribes could later be partitioned); Act of April 10, 1926, § 2, 44 Stat. 239 (subjecting allotted lands to Oklahoma State court jurisdiction, including State statutes of limitations). Further recognizing there were no reservations in Oklahoma, Congress excluded the Creek and other Oklahoma Tribes from the Indian Reorganization Act of 1934, *see* Act of June 18, 1934, c. 576, § 13, 48 Stat. 986, compiled at 25 U.S.C. § 5118. Congress later extended it, in modified form, through the Oklahoma Indian Welfare Act (OIWA) to "any recognized tribe or band of Indians residing in the State of Oklahoma." *See* Act of June 26, 1936, c. 831, § 3, 49 Stat. 1967, compiled at 25 U.S.C. § 5203; *see also*, *e.g.*, 25 U.S.C. § 1603(16)(B)(i) (defining the term "reservation," for the Indian Health

Care Act, to include "former reservations in Oklahoma"). While the Creek Nation's brief, at 29-36, enumerates current tribal authorities, most of those came into being only after it organized under the OIWA, in 1979. Those powers do not reflect upon the intent of the statutes at issue here.

Over a century of uncontested reliance by predominately nonmember residents[7] and businesses in the former Creek territory reflect the intractable "impracticability of returning to Indian control land that generations earlier passed into numerous private hands." *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 219 (2005). The equitable doctrines that led *City of Sherrill* to conclude "long delay . . . and developments in the [area] spanning several generations, . . . render inequitable [a] piecemeal shift in governance." *Id.* at 221. As the Court confirmed in *Nebraska v. Parker*, while modern treatment of an area alone cannot show disestablishment, finding disestablishment is not *solely* dependent on clear statutory language. 136 S. Ct. at 1081-82 (emphasis added).

For decades, ranchers, farmers, oil and gas developers, and companies of all stripes doing business in the former Creek territory have been subject to State tax,

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[7] The estimated population of Tulsa County in 2018 was 648,360. *See* U.S. Census Bureau, Quick Facts, Tulsa County, Oklahoma, available at https://www.census.gov/quickfacts/fact/table/tulsacountyoklahoma/PST045219 (last visited March 13, 2020). The Nation reports 11,194 of its members live in Tulsa County as of 2019. *See* Muscogee (Creek) Nation, Citizenship Board, Facts & Stats, available at http://www.mcn-nsn.gov/services/citizenship/citizenship-facts-and-stats/ (last visited March 13, 2020). Less than two percent of Tulsa County's residents are members of the Nation.

environmental, and other regulation, and their disputes resolved in State courts. The consequences for the vast majority of the population residing within the former Creek, and Five Tribes, territory are far too significant to ignore their long reliance.

CONCLUSION

The decision of the Oklahoma Court of Criminal Appeals should be affirmed, and the Tenth Circuit Court of Appeals decision in *Murphy* reversed.

Respectfully submitted,

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