No. 18-9526

In the
Supreme Court of the United States

JIMCY MCGIRT,
Petitioner,
v.
OKLAHOMA,
Respondent.

On Writ of Certiorari to the Court of Criminal Appeals of Oklahoma

Amici Curiae Brief for the States of Kansas, Louisiana, Montana, Nebraska, and Texas in Support of Respondent

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QUESTION PRESENTED

Whether the State of Oklahoma has jurisdiction to prosecute crimes committed by a tribal member on land within the 1866 territorial boundaries of the Creek Nation in the former Indian territory of eastern Oklahoma.

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INTEREST OF AMICI STATES

Amici states and Oklahoma have a sovereign obligation to prosecute major crimes, including sex offenses like those at issue in this case, that occur within their respective borders. Oklahoma and Amici States bear the primary duty of operating a functional criminal justice system. This duty is at risk here because Oklahoma stands to lose jurisdiction to prosecute major crimes in well over one-third of its state.

But that is not all that hangs in the balance. Petitioner's invocation of the Tenth Circuit's decision in *Murphy v. Royal*, 875 F.3d 896 (10th Cir. 2017), if successful, will raise a host of jurisdictional consequences for Amici States, which exercise jurisdiction on Indian lands. Settled expectations—by those who govern and who are governed—within Amici States have long treated former reservations as diminished or disestablished. Yet *Murphy*'s formalistic approach may unwind these settled expectations.

Murphy's departure from this Court's test for diminishment or disestablishment of Indian lands under *Solem v. Bartlett*, 465 U.S. 463 (1984), is likely to upend more than a century of settled expectations of state, tribal, and federal jurisdiction in Amici States. Take Kansas for example. In 1854, there were at least 14 Indian reservations, all in the more-populous eastern part of the State. Currently, there are only four resident federally-recognized Indian tribes within its borders. Permitting a challenge to the century-old, unquestioned state jurisdiction on these diminished or disestablished lands would, at best, cause confusion

and impose significant costs. At worst, it would be disastrous.

Amici States' interests also extend to civil legislative, regulatory, and adjudicatory jurisdiction in important areas such as taxation, economic development, energy, public health, and environmental regulation. *Murphy*'s approach to determining whether Indian lands were diminished or disestablished by Congress threatens Amici States' substantial investments in these areas over the last century.

Amici States have a vital interest in the stability of reservation boundaries. They also have an important interest in maintaining a legal test for diminishment and disestablishment that adequately considers all the circumstances surrounding an affected area. The *Solem* framework, when properly applied, accomplishes that goal and yields a predictable and common-sense conclusion. Amici States thus have an interest in this Court reaffirming that *Solem* is a holistic test and arresting its slide into a narrow search for particular statutory words of diminishment or disestablishment.

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SUMMARY OF THE ARGUMENT

In 1997, Petitioner was convicted under Oklahoma law of multiple sex crimes against a four-year-old child entrusted to his care. Now, twenty years later, he seeks postconviction relief on the theory that eastern Oklahoma is a reservation and only the federal government could have prosecuted him. The remedy he seeks is far from modest: the elimination of more than a century of Oklahoma criminal and civil jurisdiction covering much of the State—precisely the type of disruptive remedy this Court has repeatedly rejected. *See, e.g.*, *City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197, 215 & n.9 (2005).

I.A. In *Solem v. Bartlett*, 465 U.S. 463 (1984), this Court outlined a holistic inquiry to use when determining whether Congress has diminished or disestablished an Indian reservation. Yet in *Murphy v. Royal*, 875 F.3d 896 (10th Cir. 2017), the Tenth Circuit truncated this approach, myopically searching for only magic language and ignoring the greater context, including the act's effect and what actually occurred in Oklahoma in the century following the relevant act's passage. Properly applied, *Solem* permits diminishment even when the statutory text is ambiguous.

B. Placing outsized weight on the first *Solem* factor collapses the inquiry into a narrow search for particular statutory terms of diminishment. This Court has rejected such a clear-statement rule, "never [before] requir[ing] any particular form of words before finding diminishment." *Hagen v. Utah*, 510 U.S. 399, 411 (1994).

C. The wisdom of this Court's flexible, comprehensive approach to disestablishment questions is rooted in history and reality. Each tribe and set of Indian lands has a unique history that requires a case-by-case consideration of all factors that account for that history. Woodenly applying *Solem* in a way that ignores the importance of historical context and present-day realities is a brand of ahistorical literalism that produces an illogical result Congress never intended.

II. Amici States exercise civil and criminal jurisdiction over an array of activities within their borders. Not only do these include the investigation and prosecution of crimes, they comprise the collection of revenue, and the enforcement of health, safety, and environmental regulations. Amici States' ability to govern within stable and recognized geographic areas is vital to the public health and safety of the States' residents and of others temporarily present in the States.

All of the uncertainty and potential disruption that would necessarily follow from adopting the Tenth Circuit's judgment beckons the Court to reject the circuit's application of *Solem*. To do otherwise risks upsetting longstanding expectations for reservation boundaries with potential drastic consequences for Amici States.

* * * * *

ARGUMENT

Two decades after Oklahoma convicted Petitioner of heinous sex crimes he committed against a four-year-old child, he sought postconviction relief by relying on the Tenth Circuit's conclusion in *Murphy v. Royal*, 875 F.3d 896 (10th Cir. 2017), that well over one-third of Oklahoma—including Tulsa—remains Indian country where Oklahoma lacks authority to prosecute his crimes. This Court should reject Petitioner's argument.

I. *Solem* Is a Holistic Test.

A. The *Solem* framework is meant to guide, not restrict, the diminishment and disestablishment inquiry.

1. In *Solem v. Bartlett*, 465 U.S. 463 (1984), the Court distilled from its cases a three-factor framework for determining whether a particular congressional enactment diminished or disestablished an Indian reservation.[1] *Id.* at 470-72. Because "only Congress can divest a reservation of its land and diminish its boundaries," *Solem*'s framework was constructed to determine—based on all the circumstances—whether Congress intended to diminish or disestablish Indian lands. *Id.* at 470.

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[1] Oklahoma argues that *Solem* does not apply in this case because eastern Oklahoma was never an Indian reservation, but a dependent Indian community. Resp. 8-28. But if this Court concludes that *Solem* applies, Amici States argue that the *Solem* analysis must holistically account for *all* relevant circumstances if it is to remain an effective analytical framework that does justice to the "justifiable expectations" of the residents of an affected area. *Hagen v. Utah*, 510 U.S. 399, 421 (1994).

First, "[t]he most probative evidence of congressional intent is the statutory language used to open the Indian lands." *Id.* at 470. Although explicit cession or surrender-of-all-interests language "strongly suggests" congressional intent to diminish or disestablish, *id.*, this Court has rejected a "clear-statement" requirement and has "never required any particular form of words before finding diminishment[.]" *Hagen v. Utah*, 510 U.S. 399, 411 (1994); *Solem*, 465 U.S. at 471; *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 588 n.4 (1977).

Second, courts must also look to "the historical context surrounding the passage" of the legislation, if it sheds light on "the contemporaneous understanding of the particular Act" at issue. *Hagen*, 510 U.S. at 411. Probative evidence may include "the manner in which the transaction was negotiated with the tribes involved and the tenor of legislative reports." *Solem*, 465 U.S. at 471. When those sources "unequivocally reveal a widely-held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation," diminishment may be found if the statute's language is otherwise inconclusive. *Id.* But the historical evidence need not be *literally* unequivocal; that is, the State need not show that no person ever expressed a view at odds with diminishment or disestablishment. Instead, the question is whether a common-sense review of the historical record as a whole shows a clear congressional intent to diminish or disestablish. *See, e.g.*, *Rosebud Sioux Tribe*, 430 U.S. at 591-92, 597-98 & n.20.

Employing this approach, the Court "ha[s] been willing to infer that Congress shared the understanding that its action would diminish the reservation," even if the text of the relevant statutes would suggest otherwise. *Solem*, 465 U.S. at 471. "Even in the absence of a clear expression of congressional purpose in the text of a surplus land Act," evidence surrounding its enactment "may support the conclusion that a reservation has been diminished." *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 351 (1998).

Third, the Court has also examined events subsequent to the enactment to decipher an intent to diminish. *Solem*, 465 U.S. at 471. "Congress's own treatment of the affected areas, particularly in the years immediately following the opening, has some evidentiary value, as does the manner in which the Bureau of Indian Affairs and local judicial authorities dealt with unallotted open lands." *Id.*

Related to this third factor, the Court has recognized "de facto" diminishment. *Yankton Sioux Tribe*, 522 U.S. at 356; *Solem*, 465 U.S. at 471. "On a more pragmatic level," who actually moved onto opened reservation lands is an important consideration when determining diminishment or disestablishment of Indian lands. *Solem*, 465 U.S. at 471. Where non-Indian settlers "flooded" into an affected area "and the area has long since lost its Indian character," the Court has recognized "de facto, if not de jure, diminishment." *Id.* That is because which sovereign actually assumed jurisdiction over an affected area can be "the single most salient fact" in considering an area's jurisdictional history. *Rosebud Sioux Tribe*, 430 U.S. at 603. A

showing that neither a tribe nor the federal government has sought to exercise jurisdiction over an area, "or to challenge [a] State's exercise of authority is a factor entitled to weight as part of the 'jurisdictional history.'" *Id.* at 604.

If "an area is predominantly populated by non-Indians with only a few surviving pockets of Indian allotments, finding that the land remains Indian country seriously burdens the administration of State and local governments." *Solem*, 465 U.S. at 471 n.12. And these "'justifiable expectations'" should not be upset by strained readings of relevant congressional enactments. *City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197, 215 (2005) (quoting *Rosebud Sioux Tribe*, 430 U.S. at 604-05); *accord Hagen*, 510 U.S. at 421 ("jurisdictional history" and "the current population situation . . . demonstrat[e] a practical acknowledgment" of reservation diminishment; "a contrary conclusion would seriously disrupt the justifiable expectations of the people living in the area." (internal quotation marks omitted)).

2. In *Murphy*, the Tenth Circuit treated *Solem*'s factors as strictly "hierarchical," giving the second and third factors no outcome-determinative weight. *See Murphy*, 875 F.3d at 931; *Wyoming v. EPA*, 875 F.3d 505, 513 (10th Cir. 2017), *cert. denied sub nom. Northern Arapaho Tribe v. Wyoming*, 138 S. Ct. 2677 (2018). In effect, it interpreted *Solem* to ignore historical context and common sense.

That is a notable departure from how this Court has previously applied *Solem*. For example, in the foundational cases establishing what would come to be

known as the *Solem* framework, the Court described the factors as on equal footing. *Rosebud Sioux Tribe*, 430 U.S. at 587 ("In all case[s], the face of the act, the surrounding circumstances, *and* the legislative history, are to be examined with an eye toward determining what congressional intent was." (internal quotation marks omitted; emphasis added)); *Mattz v. Arnett*, 412 U.S. 481, 505 (1973) ("A congressional determination to terminate must be expressed on the face of the Act *or* be clear from the surrounding circumstances and legislative history." (emphasis added)).

B. Historical context and common-sense realities are vital considerations.

Allotting and selling Indian reservation lands to Indians as well as non-Indian settlers through surplus land acts and the like reflected Congress's "retreat[] from the reservation concept" toward a policy of "dismantl[ing] the territories that it had previously set aside as permanent and exclusive homes for Indian tribes." *Yankton Sioux Tribe*, 522 U.S. at 335. Its intent was to "assimilate the Indians by transforming them into agrarians and opening their lands to non-Indians." *Hagen*, 510 U.S. at 425; *accord Solem*, 465 U.S. at 466-67.

Around the turn of the twentieth century, Congress shifted away from pursuing its forced-assimilation-through-allotment program on a national scale and began dealing with surplus Indian land questions "on a reservation-by-reservation basis, with each surplus land act employing its own statutory language, the product of a unique set of tribal negotiation and legislative compromise." *Solem*, 465 U.S. at 467.

Because of these unique circumstances that resulted from individual negotiations and compromise, the Court has repeatedly explained the fundamental problem with searching only for particular words to discern diminishment or disestablishment. *See*, *e.g.*, *Yankton Sioux Tribe*, 522 U.S. at 343 (quoting *Solem*, 465 U.S. at 468) (citation omitted) (recognizing that Congress did not legislate in such a way to clarify whether it was acquiring land or assuming jurisdiction over it). Indeed, in *Rosebud Sioux Tribe*, this Court said there are no "absolutes." 430 U.S. at 588 n.4. Rather, the "touchstone . . . is congressional purpose"—not any one particular *Solem* factor. *Yankton Sioux Tribe*, 522 U.S. at 343; *accord Rosebud Sioux Tribe*, 430 U.S. at 587 ("[T]he face of the Act, the surrounding circumstances, and the legislative history, are to be examined with an eye toward determining what congressional intent was." (internal quotation marks omitted)). The text of the relevant statutes is important, but it is only one of the factors; it should not be isolated in a way that is inconsistent with contemporary understandings or present, well-settled expectations. *See City of Sherrill*, 544 U.S. at 202-03; *Yankton Sioux Tribe*, 522 U.S. at 343-45; *Rosebud Sioux Tribe*, 430 U.S. at 586-88 & n.4.

These contextual factors illuminate that these statutes were enacted at a time when neither Congress nor this Court had conceptualized the distinction between tribal ownership and reservation status. Congress also presumed that the idea of separate tribal-governed lands would soon be extinct, so it understandably felt no need to express that assumption in the text of statutes. In the *Solem* line of cases, the

Court assumed Congress expected tribal extinction within decades or a generation. *See* 465 U.S. at 468.

This Court need not strain to divine an intent when, for over a century, Oklahomans and the Nation have treated the former reservation land as disestablished. This Court recently rejected a similar effort to extrapolate an illogical result from language that contravened legislative intent, referring to it as an exercise of "ahistorical literalism." *See Franchise Tax Bd. of California v. Hyatt*, 139 S. Ct. 1485, 1498-99 (2019) (explaining that there are several "constitutional doctrines that are not spelled out in the Constitution but are nevertheless implicit in its structure and supported by historical practice[,]" such as judicial review, intergovernmental tax immunity, executive privilege, executive immunity, and the President's removal power).

Yet that is what the Tenth Circuit did by limiting the influence of historical context and the contemporaneous understanding of the text. *See Yankton Sioux Tribe*, 522 U.S. at 343-44; *see also id.* at 346 (emphasizing the importance of viewing statutes in light of the "common understanding of the time: that tribal ownership was a critical component of reservation status").

C. Determining diminishment and disestablishment requires flexibility.

Exemplifying the need for a holistic and flexible test is the sheer diversity among the histories of the various Indian lands across the United States. As even a brief survey shows, the cases involving these lands each

come with their own characteristics, legal history, and varying degree of clarity and specificity in their governing texts.

Since 1962, the Court has considered at least seven cases involving the classic diminishment situation—where the question was whether a reservation had been diminished by a surplus land statute that opened lands for non-Indian settlement: *Nebraska v. Parker*, 136 S. Ct. 1072 (2016); *Yankton Sioux Tribe*, 522 U.S. 329 (1998); *Hagen*, 510 U.S. 399 (1994); *Solem*, 465 U.S. 463 (1984); *Rosebud Sioux Tribe*, 430 U.S. 584 (1977); *DeCoteau v. District County Courts*, 420 U.S. 425 (1975); *Mattz*, 412 U.S. 481 (1973); *Seymour v. Superintendent of Washington State Penitentiary*, 368 U.S. 351 (1962).

And in each of these cases the Court recognized the importance of the unique historical context of the statutes in question. True, this Court has attempted, when possible, to categorize the surplus land acts as being either a "sell and dispose" act, a "restore to the public domain" act, or an express "cession" act. *See, e.g.*, *Parker*, 136 S. Ct. at 1079-80. These labels have provided some consistency in how the Court treats similar surplus land acts. For example, in *Hagen* the Court said that "a statutory expression of congressional intent to diminish, coupled with the provision of a sum certain payment, . . . establish[es] a nearly conclusive presumption that the reservation had been diminished." 510 U.S. at 411. And in *Solem*, the Court explained that "[e]xplicit reference to cession or other language evidencing the present and total surrender of all tribal interests strongly suggests that Congress

meant to divest from the reservation all unalloted opened lands." *Solem*, 465 U.S. at 470. While these labels are helpful shorthand, they do not oblige a particular finding. *Rosebud Sioux Tribe*, 430 U.S. at 598 n.20, 603.

City of Sherrill exemplifies this. There, the Oneidas had a reservation established in a treaty with the federal government, but they sold most of what remained of their lands to New York State and non-Indians throughout the early nineteenth century. *City of Sherrill*, 544 U.S. at 203, 205-07, 211. Nearly 200 years later, the Tribe repurchased some parcels on its former reservation areas (then occupied by the 99% non-Indian City of Sherrill, New York), built commercial enterprises on the parcels, and refused to pay property taxes, asserting the parcels were Indian country exempt from State taxation. *Id.* at 211-12. The Court distinguished the case from a classic reservation diminishment situation and ultimately invoked principles of equity to "preclude the Tribe from rekindling embers of sovereignty that long ago grew cold." *Id.* at 214-215.

Rosebud Sioux Tribe provides another example of this Court's holistic approach. Instead of isolating the relevant statutory language, the Court looked at the parties' historical understanding of the agreements—including a never-ratified treaty and historical context more generally—to conclude that portions of the Rosebud Reservation were disestablished. *Rosebud Sioux Tribe*, 430 U.S. at 591-92, 605-06 & n.30. Notably, Justice Marshall based his dissent in that case on the same rationale as the

Murphy decision—that "the absence of any express provision [of cession] in the Rosebud Acts strongly militates against [disestablishment]." *Id.* at 620 (Marshall, J., dissenting). But the majority rejected that view as "misapprehend[ing] the nature of our inquiry," which required considering the totality of the circumstances. *Id.* at 587 n.4.

As in *City of Sherrill* and *Rosebud Sioux Tribe*, Oklahoma's unique circumstances underscore the importance of maintaining and clarifying this Court's holistic approach to tribal lands cases. The State of Oklahoma was formed in part by merger of the former Indian Territory to which the Five Tribes had been removed decades earlier. *Cohen's Handbook of Federal Indian Law* § 4.07[1] (Nell Jessup Newton et al. eds., 2012 ed.). As Respondent ably explained (Resp. 30-34), the reservation disestablishment arose here not from surplus land acts, but from a series of acts culminating in Oklahoma's statehood and the complete displacement of tribal authority in the newly created State. Along the way, Congress systematically dismantled tribal government in the region, declaring tribal law unenforceable, and providing for "the final disposition" of the Five Tribes' affairs. Resp. 23, 37. A comparable statehood event is not featured in any of the situations described in *Solem* and its progeny.

Petitioner basically argues for precisely the magic-words rule this Court has rejected. *See Hagen*, 510 U.S. at 411; *Solem*, 465 U.S. at 471; *Rosebud Sioux Tribe*, 430 U.S. at 588 n.4. But the diverse history among Indian lands, and the diverse statutory language employed by Congress in dealing with them, are

precisely why this Court has rejected a clear-statement rule for diminishment or disestablishment cases. *See Hagen*, 510 U.S. at 410-11 (declining to abandon traditional "examine all the circumstances" approach in the face of variations among surplus land acts). The history summarized in this section and elsewhere in this brief punctuates the need for a holistic analytical framework that seeks to determine Congress's intent with respect to reservation status of the affected lands.

II. Finding No Congressional Intent to Diminish Will Result in Serious Criminal and Civil Jurisdictional Consequences.

Although Petitioner's claim to postconviction relief is based on 18 U.S.C. § 1151, which "on its face [is concerned] only with criminal jurisdiction, it also "applies . . . to questions of *civil* jurisdiction." *DeCoteau v. District County Court*, 420 U.S. 425, 427 n.2 (1975) (emphasis added). And the questions of civil jurisdiction run the gamut: from taxing and zoning laws, to health and environmental regulations. The scope of "legislative" or regulatory jurisdiction, in turn, sets the outer limit of tribal-court adjudicatory jurisdiction. *See Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 330 (2008) ("[A] tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction." (internal quotation marks omitted)).

The prospect of resurrecting long unrecognized reservation boundaries raises the specter of countless state, tribal, and federal jurisdictional questions that lack clear answers. *Compare Kerr-McGee Corp. v. Navajo Tribe of Indians*, 471 U.S. 195, 201 (1985)

(permitting tribal sales taxes on nonmember businesses within the reservation because the "power to tax members and non-Indians alike is . . . an essential attribute of such self-government"), *with Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 653 (2001) (seeking to reconcile several prior decisions and holding that "[a]n Indian tribe's sovereign power to tax—whatever its derivation—reaches no further than tribal land"); *see also Negonsett v. Samuels*, 507 U.S. 99, 102 (1993) (discussing the "complex patchwork" of federal, State, and tribal law governing criminal jurisdiction in Indian country); *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408 (1989) (holding in splintered opinions that the tribe could limit some uses of non-Indian fee land through zoning regulations).

Indian tribes are "'distinct, independent political communities" with residual sovereign power "to legislate and to tax activities on the reservation, including certain activities by nonmembers." *Plains Commerce Bank*, 554 U.S. at 327 (quoting *Worcester v. Georgia*, 31 U.S. 515, 559 (1832)). This includes the "inherent sovereign power to exercise some forms of civil jurisdiction . . . on non-Indian fee lands" within the outer boundaries of their reservations. *Montana v. United States*, 450 U.S. 544, 565-66 (1980). To be sure, tribes' legislative, regulatory, and adjudicatory authority are broadest when exercised over tribe members' activities on tribal land, and rather limited when it comes to exercising jurisdiction over nonmembers' activities within a reservation's borders, particularly when the nonmember's activity occurs on land owned in fee simple by nonmembers. *See Plains*

Commerce Bank, 554 U.S. at 328 (describing the "general rule" that "restricts tribal authority over nonmember activities taking place on the reservation, [which] is particularly strong when the nonmember's activity occurs on land owned in fee simple by non-Indians").

But a "tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Montana*, 450 U.S. at 565-66. A tribe "may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health and welfare of the tribe." *Id.* at 566.

Although the precise breadth of the *Montana* exceptions remains unsettled, Amici States take some comfort in the Court's cases that emphasize these two "exceptions" to the "general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe" are very "limited." *See Plains Commerce Bank*, 554 U.S. at 329-30; *Strate v. A-1 Contractors*, 520 U.S. 438, 445 (1997). But it is cool comfort. Tribal authority in various areas—including the authority to tax, *see Kerr-McGee*, 471 U.S. 195; *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982); the imposition of zoning restrictions, *Brendale*, 492 U.S. at 444 (opinion of Stevens, J.); and the regulation of natural resources, *see New Mexico v. Mescalero Apache Tribe*, 462 U.S.

324, 337 (1983) (approving tribal licensing requirements for hunting and fishing on tribal land); *Montana*, 450 U.S. at 566 (tribe lacks authority to regulate nonmember hunting and fishing on non-Indian fee land)—have all been repeatedly litigated under the two *Montana* exceptions. But there remain more questions than answers. *Cf. Dollar Gen. Corp. v. Mississippi Band of Choctaw Indians*, 136 S. Ct. 2159 (2016) (affirming judgment below by an equally divided court on question of scope of *Montana* exceptions in context of tort claims against nonmembers).

In some of these areas, confusion and conflict will come from overlapping regulation by multiple sovereigns. *See, e.g.*, *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 186-87 (1989) (permitting duplicative state and tribal severance taxes). In others, technical questions of statutory drafting, regulatory considerations, and impact on tribal self-governance will create the jurisdictional turmoil. *See, e.g.*, *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 453 (1995) ("[A] State's excise tax is unenforceable if its legal incidence falls on a Tribe or its members for sales made within Indian country.").

And this is to say nothing of tribal health and environmental regulations that could conflict with State and local regulations. *See Montana*, 450 U.S. at 566 (tribes "may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the *health and welfare* of the tribe" (emphasis added)). While *Plains*

Commerce has established a high bar for this exception's applicability, its scope in any particular situation can, and likely will, produce significant, resource-depleting litigation. *See* 554 U.S. at 341 (citing favorably a treatise which observed "'th[e] elevated threshold for application of the second *Montana* exception suggests that tribal power must be necessary to avert catastrophic consequences'").

Amici Nations reference several cooperative agreements between Oklahoma and Indian tribes, including those relating to tobacco, motor fuel sales tax, gaming, motor vehicle and license tags, water rights, and water quality that greatly benefit their members.[2] Nations Br. 15-24. They suggest that the continued effect of these agreements are predicated upon this Court's recognition of reservation status. Not so. Since these cooperative agreements are not connected to an Indian tribe's possession of a reservation, they will continue to remain in effect if the Court rules in Oklahoma's favor. But if this Court reverses, the undoubted result will be increased litigation between Indian tribes and Oklahoma governmental entities. Indeed, those small parcels of recognized Indian country in Oklahoma have historically generated significant litigation.[3] *See, e.g.*, *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 456 (1995). Finding

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[2] As Amicus National Congress of American Indians Fund notes, Oklahoma tribes are some of the wealthiest in the nation despite the fact that they have never been recognized as a reservation. NCAIF Br. 26.

[3] Amici Nations' brief notes one such lawsuit that they recently filed against Oklahoma. Nations Br. 18 n.40.

that much of eastern Oklahoma is a reservation will greatly increase litigation between Indian tribes and Oklahoma.

Moreover, Amici National Indigenous Women's Resource Center suggest States fail to prosecute crimes that fall outside of Indian country. NIWRC Br. 15. Amicus National Congress of American Indians Fund even argues that reverting much of Tulsa to Indian country will *improve* law enforcement in the city. NCAIF Br. 30-34. But the former point says nothing about prosecutions in Indian country, and the latter is implausible in light of studies that have "led many researchers, policymakers, and police professionals to conclude that reservation policing is in crisis." Stewart Wakeling et al., Nat'l Inst. of Justice, *Policing on American Indian Reservations* vii-viii (2001). Put simply, uniform state prosecution of major crimes historically enhances, not diminishes, the safety and welfare of Amici States' citizens.

All in all, the Indian lands at issue in this case were dismantled more than a century ago, and accepting Petitioner's position will "rekindl[e] embers of [tribal] sovereignty" and inter-sovereign jurisdictional conflict "that long ago grew cold," at great cost to Amici States and their residents who live and work on former tribal lands. *City of Sherrill*, 544 U.S. at 214.

CONCLUSION

The judgment of the Oklahoma Court of Criminal Appeals should be affirmed.

Respectfully submitted,

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