No. 18-9526

IN THE
Supreme Court of the United States

JIMCY MCGIRT,

Petitioner,

v.

OKLAHOMA,

Respondent.

On Writ of Certiorari
to the Oklahoma Court of Criminal Appeals

BRIEF OF THE CITY OF TULSA AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

DAVID O'MEILIA
CITY ATTORNEY OF THE
CITY OF TULSA
175 East 2nd Street, Suite 1405
Tulsa, Oklahoma 74103

BLAINE H. EVANSON
Counsel of Record
DANIEL NOWICKI
GIBSON, DUNN & CRUTCHER LLP
3161 MICHELSON DRIVE
Irvine, California 92612
(949) 451-3805
bevanson@gibsondunn.com

Counsel for Amicus Curiae
City of Tulsa, Oklahoma

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INTEREST OF AMICUS CURIAE

The City of Tulsa is a municipal corporation that serves a vibrant and diverse community of 403,578 residents—making it the second most populous city in Oklahoma.[1] With an annual budget exceeding $1 billion, the City enacts and enforces a wide variety of local laws, builds and maintains basic infrastructure, and delivers a variety of services—all made possible by the dedicated work of 3,557 employees (over 10% of whom are Native American).

The overwhelming majority of Tulsa's landmass and population lies within the former territory of the Creek and Cherokee Nations. But for over a century, the entirety of the City—with the exception of a few scattered land plots—has not been "Indian country." Shortly before Oklahoma statehood, the Creek and Cherokee tribes agreed to disclaim and convey "all right, title, and interest" in their land to individual landowners, including the residents of the platted townsite of Tulsa. Since then, municipal and state laws have been applied throughout the City to Indian and non-Indian Tulsans alike. Only a handful of plots in Tulsa are treated as "Indian country," because they either are still owned by the tribes themselves or remain subject to unique title restrictions.

Petitioner's arguments, if adopted, would upend Tulsa's system of government and force the City into years of litigation over the most basic exercises of regulatory authority. Tulsa's Police Department would be stripped of jurisdiction to investigate crimes

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[1] Mr. O'Meilia is the chief legal officer of the City of Tulsa, and this brief is submitted "on behalf of a city" under Rule 37.4. Because this brief is governed by Rule 37.4, no motion for leave to file an *amicus* brief is necessary and Rule 37.6 does not apply.

against or involving Indian Tulsans. Numerous lots in residential neighborhoods could suddenly be exempt from zoning. The City's taxing and regulatory authority could be subject to numerous challenges and endless litigation.

Tulsa's prosperity has been built on a system of government and regulation that applies equally to all Tulsa residents, regardless of their tribal membership. Petitioner's argument threatens that system, and would negatively impact the lives of thousands of Tulsans.

SUMMARY OF ARGUMENT

I. For much of the nineteenth century, the Creek Nation owned a wide swath of land in the "Indian territory" that would become eastern Oklahoma. But in 1901, the Creek Nation expressly agreed to convey "all right, title, and interest of the Creek Nation" in its land to individual landowners—both Indian and non-Indian. 31 Stat. 861, 868. And over the ensuing decade, the Creek Nation executed thousands of deeds conveying the land that it had owned as a tribe—and "all" of its "interest" in that land—to the new individual landowners, including the residents of Tulsa. At the time of Oklahoma statehood in 1907, it was obvious that the Creek Nation had no interest in the land it had conveyed—because its own deeds said so.[2]

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[2] A compendium of Creek allotment and townsite deeds are available from the Tulsa County Clerk's office—for example, Book "T" of the compendium contains allotment deeds to Creek citizens, and Books "R" and "W" contain townsite deeds. *See* Tulsa County Clerk, Historical Camera Record Images, http://www.countyclerk.tulsacounty.org/Home/Camera?Length=4 (browse to and open Books "T," "R", or "W").

That language resolves this case. The Creek Nation could not convey "*all* right, title, and interest of the Creek Nation" in land on the one hand, and yet retain some "interest" on which to base "Indian country" status on the other. *See Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584, 597(1977) (agreement whereby tribe conveyed "all their claim, right, title, and interest" demonstrated that territory was not Indian country (internal quotation marks omitted)); *S. Dakota* v. *Yankton Sioux Tribe*, 522 U.S. 329, 344 (1998) (same); *DeCoteau* v. *Dist. County Court for Tenth Judicial Dist.*, 420 U.S. 425, 445 (1975) (same). Petitioner and his *amici* do not mention this language in their briefs—but it is dispositive.

Instead, petitioner and his *amici* argue over whether a hypothetical Creek "reservation" was "disestablished," but this entire line of argument is a red herring. Prior to 1901, the Creek Nation did not reside on a "reservation" of federally owned land—the Creek Nation *owned* its land.

The Creek Nation's former territory was thus never a "reservation" under subsection (a) of 18 U.S.C. § 1151; it was a "dependent Indian communit[y]" under subsection (b). In *Alaska* v. *Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520 (1998), this Court explained that tribes—like the Creek Nation—that "*owned* their land in fee simple" are "*unlike* Indians living on reservations" because they do not live on federally owned land. *Id.* at 528 (emphasis added). These tribes can instead inhabit "dependent Indian communities"—a category of "Indian country" developed in this Court's caselaw to address communal lands "owned" by a tribe "in fee simple." *Id.*

In fact, this Court has *already* held—twice—that the Creek Nation resided on a "dependent Indian

community," not a reservation. In *United States* v. *Sandoval*, 231 U.S. 28 (1913)—the "dependent Indian communities" case that Congress codified in Section 1151—this Court explicitly recognized that the "Five Civilized Tribes" in the pre-Oklahoma Indian territory had been part of such "dependent" communities. *Id.* at 38; *see also Venetie*, 522 U.S. at 530 ("The entire text of § 1151(b), and not just the term 'dependent Indian communities,' is taken virtually verbatim from *Sandoval*[.]"). And in *United States* v. *Creek Nation*, 295 U.S. 103 (1935), Justice Van Devanter—the author of *Sandoval*—contrasted the situation of "[t]he Creek Tribe," which owned its land with "a fee-simple title," with reservation Indians, which merely had "the usual Indian right of occupancy with the fee in the United States." *Id.* at 109. As Justice Van Devanter wrote for the Court, the Creek Nation thus "*was a dependent Indian community* under the guardianship of the United States." *Id.* at 109 (emphasis added).

Petitioner's argument that Congress has not "disestablished" a non-existent Creek "reservation" is thus misguided at best.

Even if the Creek Nation's former land was a "reservation" under Section 1151, any right the Nation had to the land was extinguished when the *tribe itself* conveyed "all" of its "right, title, and interest." 31 Stat. 861, 868. While this Court has held that the *federal government*'s conveyance of *its* interest in land may not extinguish a *tribe's* interest, it has never held that the *tribe itself* can agree to convey "all" of its own "interest" in a plot of land and yet retain a "reservation" interest in that same land. There can hardly be a more clear termination of any and all of the Creek Nation's interest than the express

words of the 1901 Agreement and the Nation's own deeds, signed by its principal chief.

In any event, this Court's "reservation disestablishment" cases simply have no application to "dependent Indian communities." Instead, this Court applies a functional two-part test, which asks whether "the land in question" remains under federal "superintendence" (i.e., whether the Indians residing on it are still "dependent") and whether it is "set apart for the use of the Indians" (i.e., whether it is still an "Indian community"). *See Venetie*, 522 U.S. at 531; *see also Hydro Res., Inc.* v. *U.S. E.P.A.*, 608 F.3d 1131, 1134 (10th Cir. 2010) (explaining that *Venetie* established these "two 'requirements' of all 'dependent Indian communities'") (Gorsuch, J.).

Here, there is no doubt that the "land in question" in eastern Oklahoma is neither "set apart" for Indian use nor "dependent" on federal supervision. The former Indian Territory—including the City of Tulsa—is overwhelmingly inhabited by non-Indian residents. And the area's inhabitants, Indian and non-Indian, are first and foremost Oklahomans who rely on the state and its municipalities for services and protection. They are not federal wards.

II. The City of Tulsa and its citizens have long relied on the Creek Nation's express disavowal of any "right, title, and interest" to their former land—and a conclusion that the Creek Nation retains some kind of interest over that land would have far-reaching and disruptive implications.

Most obviously, numerous violent criminals—like petitioner—could escape the consequences of their vicious attacks on their victims. Every offender convicted under Oklahoma's laws would search for

some obscure basis to claim "Indian" status, or claim that their victim was an Indian.

Going forward, Tulsa's ability to protect its citizens—particularly Tulsans who are members of Indian nations—would be seriously impaired. Tulsa is kept safe by over 1,000 sworn officers of the Tulsa Police Department and Tulsa County Sherriff's Office.[3] But if the petitioner's theory is adopted, more than two-thirds of Tulsa's land mass—and over 80% of its people—will be under the jurisdiction of the Creek Nation, whose "Lighthorse" police force has a total of 49 officers, spread out across scattered Indian lands.[4] Although the Lighthorse are a valued partner of the Tulsa Police Department, their presence in Tulsa is largely limited to patrolling the "River Spirit Casino," located on a strip of Creek-owned land on the Arkansas River. They are not equipped to patrol a city of hundreds of thousands.

Moreover, the consequences would reach far beyond criminal law. Any land owned or rented by a tribe member could become a tax haven. Tulsa's ability to enforce the most basic zoning and land use laws would be thrown into question. And the City would endure near-endless litigation over practically

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[3] City of Tulsa, Weekly Departmental Report, July 1, 2019 at 14, https://www.cityoftulsa.org/media/10465/section04departments7-1-19.pdf (913 sworn officers authorized for FY 2020); FBI-UCR 2018 Report, Table 80, Oklahoma, https://ucr.fbi.gov/crime-in-the-u.s/2018/crime-in-the-u.s.-2018/tables/table-80/table-80-state-cuts/oklahoma.xls (Tulsa County had 218 officers in 2018).

[4] Muscogee (Creek) Nation, FY 2020 1st Quarterly Report at 26, https://www.mcn-nsn.gov/fy2020-1st-quarterly-report/ ("The [Lighthorse] department has 49 active patrol officers.")

any exercise of regulatory authority in the newfound "Indian country."

None of this is necessary—or warranted. This Court should decline petitioner's invitation to undo the Creek Agreement's disclaimer of "all right, title, and interest of the Creek Nation" in its lands, and enforce the Agreement according to its terms.

BACKGROUND

Prior to 1901, the Creek Nation, like the other members of the "Five Civilized Tribes," owned a wide swath of land in the "Indian territory" west of Arkansas (what would become eastern Oklahoma). *See Creek Nation*, 295 U.S. at 105–06 (chronicling the Creek Nation's prior ownership in "fee simple" of "a large tract of land in Indian Territory, now Oklahoma").

This differed from the situation on "reservations" of federal land, where the United States government owned the land but reserved it for Indian use. *See Nw. Bands of Shoshone Indians* v. *United States*, 324 U.S. 335, 338 (1945) ("Even where a reservation is created for the maintenance of Indians, their right amounts to nothing more than a treaty right of occupancy."). Rather than "the usual Indian right of occupancy with the fee in the United States"—the "usual" situation on reservations—"[t]he Creek Tribe had a fee-simple title." *Creek Nation*, 295 U.S. at 109.

Largely because of the unique nature of their land ownership, the Five Tribes were exempted when Congress passed the General Allotment Act in 1887, which effectuated the new nationwide policy of breaking up federally owned reservations. *See Woodward* v. *De Graffenried*, 238 U.S. 284, 294–95 (1915).

Yet the tribes' communal ownership of their land "presented a serious obstacle to the creation of the state which Congress desired to organize" in Oklahoma—so in 1893 Congress decided to extinguish tribal communal ownership. *Choate* v. *Trapp*, 224 U.S. 665, 667 (1912). The 1893 Act created the "Dawes Commission," which was empowered "to enter into negotiations ... for the purpose of extinguishing the tribal titles ... with a view to the ultimate creation of a state or states of the Union to embrace the lands within the territory." *Woodward*, 238 U.S. at 295. Because the tribes owned and "held patents for their respective lands," unlike reservation Indians, "it was considered proper, if not indispensable, to obtain the consent of the Indians to the overthrow of the communal system of land ownership." *Id.* at 294.

Despite some resistance, the Dawes Commission—and Congress—ultimately prevailed, and the tribes agreed to convey their collectively owned land to individuals. *See Woodward*, 238 U.S. at 295–96 (Commission's efforts were "finally crowned with success"). On May 25, 1901, the Commission secured the Creek Nation's agreement to a plan to break up and destroy the tribal fee title (*see* 31 Stat. 861), which was supplemented by a further 1902 Agreement (*see* 32 Stat. 500).

In the primary 1901 Agreement, Congress and the Creek Nation agreed that "the principal chief" of the Creek Nation would convey to each Creek allottee "*all right, title, and interest* of the Creek Nation and of all other citizens [of the Creek Nation] in and to the lands embraced in [the] allotment certificate." 31 Stat. 861, 868 (emphasis added); *see also id.* at 862 (defining "citizens" in the Agreement). The Agreement further provided that *non*-Creeks who resided in platted

townsites (like Tulsa) could also purchase their land from the Nation. *Id.* at 866. These townsite residents would likewise receive deeds from the principal chief conveying the Creek Nation's title and interest. *See Ibid.* (like the allotment deeds to Creek members, all other conveyances provided for in the agreement—such as townsite deeds to non-Creeks—would be executed "in like manner and with like effect" by the "principal chief").[5]

As promised, the Creek Nation executed thousands of deeds to individual Creek citizens and non-Creek townsite residents. The allotment deeds to individual Creeks stated, pursuant to the agreement, that "I ... the Principal Chief of the Muskogee (Creek) Nation, by virtue of the power and authority vested in me by the aforesaid Act of the Congress of the United States [i.e., the 1901 Agreement] ... do grant and convey unto the said [allottee] *all right, title, and interest of the Muskogee (Creek) Nation* and of all other citizens of said Nation in and to the follow described land ...." *E.g.*, Allotment Deed to James L. Grayson, recorded Dec. 20, 1902 (emphasis added), *available at* https://tinyurl.com/veatlnu. Likewise, the deeds to non-Creek townsite residents stated that "I ... the Principal Chief of the Muskogee (Creek) Nation, do ... hereby grant, sell, and convey unto the said [purchaser], successors and assigns *forever*, *all the right, title, and interest of Muskogee (Creek) Nation*,

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[5] The 1902 supplemental agreement did not alter this section of the original 1901 agreement, and the Creek Nation's allotment and townsite deeds state that they are executed by the principal chief "by virtue of the power and authority" granted him by the 1901 agreement. *See* 32 Stat. 500 (supplemental agreement); Townsite Deed to the Town of Tulsa, recorded July 30, 1906, *available at* https://tinyurl.com/sqanrjp.

aforesaid, in and to [the townsite plot]." *E.g.*, Townsite Deed to the Town of Tulsa, *supra* (emphasis added) (Townsite deed conveying the Creek Nation's title and interest to the plot of Tulsa's original city hall).

"[T]he enrolment and allotment had so far progressed as to make it fair to assume that most, if not all, of the patents had been issued" by the time of statehood. *Choate*, 224 U.S. at 670.

Thus, the fee territories of the Creeks and the other Five Tribes were dismantled and allotted to both Creek allottees and non-Creek townsite residents, who collectively took their place as "full fledged citizens of the State of Oklahoma." *Oklahoma Tax Comm'n* v. *United States*, 319 U.S. 598, 608–09 (1943).

ARGUMENT

I. The Creek Nation Conveyed Its Own Interest in Its Land, And Oklahoma Took Jurisdiction Over It

The plain language of the Creek Agreement controls this case. The Creek Nation expressly agreed to convey—and in fact conveyed—"*all* right, title, and interest of the Creek Nation" to each and every allotment and townsite in its former territory. The Creek Nation no longer has *any* "interest" in the land that would suffice to make it Indian country—and that is dispositive here.

Petitioner's arguments about whether a supposed "reservation" has been "disestablished" are only misdirection. *Even if* such a "reservation" existed, it would have obviously been disestablished (or at least hopelessly diminished) by the conveyance of "all" the

Creek Nation's "interest" in the overwhelming majority of the land.

Moreover, the Creek Nation's former land simply never was a "reservation" to begin with, at least as that term was used by Congress in Section 1151. Instead, the Nation inhabited a dependent Indian community, a distinct category of land that is only Indian country if it is both under federal superintendence and set aside for the use of an Indian tribe. And that status terminated long ago, when the Nation gave up its interest in its own land and its citizens became citizens of the state of Oklahoma—not federal wards.

A. The Creek Nation Expressly Conveyed "All" of Its "Interest" in Its Former Land

This case should begin and end with the plain language of the Creek Nation's agreement with Congress.

The 1901 Creek Agreement expressly provides that "the principal chief" of the Creek Nation shall convey "*all right, title, and interest of the Creek Nation*" to each Creek allottee and non-Creek townsite resident. 31 Stat. 861, 868 (emphasis added). Pursuant to this agreement, Pleasant Porter, the Creek Nation's principal chief, executed numerous deeds conveying "all right, title and interest of the Muskogee (Creek) Nation and of all other citizens of said Nation in and to the following described land ...." *E.g.*, Allotment deed to James L. Grayson, *supra*.

As this Court has consistently held, "the express cession and relinquishment of 'all' of the tribe's 'claim,

right, title and interest'" is "precisely suited" to demonstrating the destruction of Indian country status. *DeCoteau*, 420 U.S. at 445, 448; *Yankton Sioux*, 522 U.S. at 344 (same); *Rosebud Sioux*, 430 U.S. at 597 (same). So too here.

Of course, there are differences between the Sioux agreements at issue in *DeCoteau*, *Yankton Sioux*, and *Rosebud Sioux* and the Creek agreement here—because the Sioux tribes resided on "reservations" of land owned by the federal government while the Creek owned the very land they were conveying. But this does not change the result—if anything, the fact that the Creek Nation directly conveyed its interest to private owners *itself* is even stronger evidence that it retained no rights to the land.

The Sioux did not directly convey their land to individuals because they could not. On reservations, the federal government was the landowner and the executor of the allotment deeds. *See* General Allotment Act, 24 Stat. 388, 389 (providing that allotments under the General Allotment Act shall issue from "the Secretary of the Interior" and stating that the "United States does and will hold the thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the [allottee] ... and that at the expiration of said period the United States will convey the same by patent to said Indian"). The only action the Sioux *could* take was to disclaim their tribal right to occupy unallotted land and thus free that federal land from its "reservation" status—which is what they did. *See*, *e.g.*, *DeCoteau*, 420 U.S. at 445 ("Dakota or Sioux Indians hereby cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to all the

unallotted lands within the limits of the reservation set apart to said bands of Indians."). By ceding their rights to the land back to the federal government, they returned this land to the "public domain," freeing the government to dispose of it later as it saw fit. *See id.* at 446.

The Creek Nation, by contrast, owned its land, and so could dispose of its interest in its territory by direct conveyance—which it agreed to do by executing deeds directly granting its entire interest in each deeded plot to each new owner. *See* 31 Stat. 861, 868. The Creek Nation thus disavowed "all" of its "interest" in its land plot by plot, and deed by deed. And, unlike on reservations, the land never passed to the "public domain," because it was never "public" at all—it went straight from the Creek Nation to individual owners.

Petitioner repeatedly argues that the absence of the word "cession" in the Creek Agreement somehow indicates that the Nation retained an interest in the land. Petitioner's Br. at 17, 22. But this argument depends on completely ignoring—as petitioner does—the Creek Nation's agreement to convey "*all* right, title, and interest of the Creek Nation" to individual landowners, Creek and non-Creek. 31 Stat. 861, 868 (emphasis added). Petitioner does not and cannot explain how a conveyance of *all* the tribe's interest to a landowner could possibly reserve *some* interest for the tribe. And this Court has never held that. Given the unequivocally broad scope of the agreement and

the deeds, the use (or non-use) of the word "cession" is simply irrelevant.[6]

Thus, petitioner's repeated argument that "allotment" somehow preserves a tribe's right to Indian country is fundamentally misguided. In *Mattz* v. *Arnett*, 412 U.S. 481 (1973), this Court held that allotment of the Klamath River Indian Reservation, conducted pursuant to the General Allotment Act, did not diminish the reservation. *See id.* at 503–04. This makes sense—the General Allotment Act simply provides that the federal government, as landowner, will allot *its interest* to the land to individual Indians. Allotment patents issued pursuant to the General Allotment Act explicitly state that the "United States," as grantor, is allotting its title to "the Land" to particular tribe members. *E.g.*, Patent to Sophia Blake, dated June 26, 1919, https://tinyurl.com/s4y9g5v (BLM records of allotment patent of Klamath River Reservation). The tribe is not mentioned—because it is not involved.

Here, by contrast, the Creek Nation *itself* is the deed grantor—and it is conveying *its entire interest* in the land. *See* Creek Allotment deed to James L. Grayson, *supra* (the "Creek Nation" conveys its entire "right, title and interest" to the allottee). This is not

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[6] The likely reason the words "cede" or "cession" were not used is that the tribe's lands were not being "ceded" to a sovereign (i.e., the United States), but rather transferred to private individuals. *See Rosebud Sioux*, 430 U.S. at 597 ("'[C]ession' refers to a voluntary surrender of territory or jurisdiction" to another "sovereign"); *Mitchel* v. *United States*, 34 U.S. 711, 734 (1835) ("[A] treaty of cession was a deed or grant by one sovereign to another."); *see also* Treaty with the Creeks, June 14, 1866, 14 Stat. 785 (Creek "cede" land "to the United States").

a situation like *Mattz* in which the United States conveys its title but the tribe keeps its own rights. And petitioner cannot point to any case—because there is none—holding that a tribe's direct conveyance of "*all* of its right, title, and interest" is not, in fact, a conveyance of *all* of the tribe's interest in the land.

By the plain language of the 1901 Agreement and the deeds issued pursuant to it, the Creek Nation has no "interest" in its former land—and it cannot be "Indian country." *See DeCoteau*, 420 U.S. at 445, 448.

B. The Creek Territory Was Not a "Reservation" under Section 1151—It Was a "Dependent Indian Community"

Petitioner and his *amici* ignore the language of the Creek Agreement regarding the Nation's "right, title, and interest." Instead they claim that the Creek Nation's land was a "reservation" and that a "reservation" cannot be "disestablished" by a conveyance of title to individual plots of land. *See, e.g.*, Petitioner's Br. at 23.

This argument fails on its own terms, given that the Creek Nation expressly conveyed "all" of its "interest"—not just the legal title—to its land. *See Rosebud Sioux*, 430 U.S. at 597; pp. 11–15, *supra*.

But petitioner's argument has another fundamental problem. The Creek Nation's land in the pre-Oklahoma Indian territory also was *never* a "reservation" as that term is used in Section 1151. This Court's precedents—codified by Section 1151—make clear that the land owned by the tribe was not a "reservation," but formed part of a "dependent Indian community" that has long since ceased to exist.

1. Prior to 1948 and the adoption of Section 1151, there was no statutory definition of "Indian country," even though several federal criminal statutes used the term.[7] When presented with cases involving these statutes, this Court was forced to create its own definition of "Indian country," which it ultimately defined as including three different categories of territory: "reservations," "dependent Indian communities," and restricted "allotments" that could not be freely alienated by their Indian owners. *See Venetie*, 522 U.S. at 530.

When Congress passed a statutory definition of "Indian country" in Section 1151, it adopted "the three different categories of Indian country mentioned in [the] prior cases: Indian reservations, *see Donnelly* v. *United States*, 228 U.S. 243, 269 (1913); dependent Indian communities, *see United States* v. *McGowan*, [302 U.S. 535,] 538–539 [(1938)]; *United States* v. *Sandoval*, at 46; and allotments, *see United States* v. *Pelican*, [232 U.S. 442,] 449 [(1914)]." *Venetie*, 522 U.S. at 530. As *Venetie* recognized, the statute did not *create* these categories; it adopted the definitions and criteria from this Court's caselaw. *Donnelly*, *McGowan*, *Sandoval*, and *Pelican* are thus explicitly referenced in the "Historical and Revision Notes to the statute that enacted § 1151." *Id.*

"Reservations" are addressed in *Donnelly*, which makes clear that a "reservation" is *public* land

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[7] The Indian Intercourse Act of 1834 had defined "Indian country" as only land "to which the Indian title has not been extinguished." *Ex parte Kan-gi-shun-ca* ("*Crow Dog*"), 109 U.S. 556, 560 (1883). But that definition was repealed and not replaced until Congress finally passed Section 1151. *Cf. id.* at 561.

reserved for the use and occupancy of a tribe. *Donnelly* involved the federal prosecution of a murder in the Hoopa Valley Reservation in California—a reservation of public land "retained by the United States." *See Donnelly*, 228 U.S. at 255 (quoting statute empowering president to create reservations in California on retained land); *see also id.* at 253 (listing executive orders creating the reservation). The defendant argued that "the term 'Indian country,'" as used in the relevant federal criminal statute, was "confined to lands to which the Indians retain their original right of possession, and is not applicable to those set apart as an Indian reservation out of the public domain." *Id.* at 268. The Court rejected that argument, and held that a "reservation" of "a part of the public domain," like the Hoopa Valley Reservation, was the paradigmatic example of Indian country. *Id.* at 269 ("And, in our judgment, nothing can more appropriately be deemed 'Indian country,' ... than a tract of land that, being a part of the public domain, is lawfully set apart as an Indian reservation.").

The principle expressed in *Donnelly* that a "reservation" was public land "reserved" for Indian occupancy—but still owned by the United States—was hardly controversial, and was oft-repeated in the caselaw. *See*, *e.g.*, *Pine River Logging & Imp. Co.* v. *United States*, 186 U.S. 279, 284 (1902) ("the fee to the lands comprised within Indian reservations is in the United States, subject to a right of occupancy on the part of the Indians"); *United States* v. *Cook*, 86 U.S. 591, 594 (1873) (federal government could sue for conversion of timber on "public lands" reserved for Indians, because their "rights in the land of their reservations" were only rights of "occupancy"). Only a

few years before Section 1151 was passed, this Court again explained that "reservations" are plots of federally owned land in which the resident Indians have a right of occupancy, not ownership: "Even where a reservation is created for the maintenance of Indians, their right amounts to nothing more than a treaty right of occupancy." *Nw. Bands of Shoshone*, 324 U.S. at 338.

Congress understood this concept—as demonstrated by its use of *Donnelly* as the foundational "reservation" case—and recognized the distinction between *ownership* of the land and *occupancy* of the reservation in the text of Section 1151(a). The statute specifies that an "Indian reservation" remains Indian country "notwithstanding the issuance of any patent." 18 U.S.C. § 1151(a). The "patent" referred to in the statute is the patent of fee land from the United States (the owner of reservation land) to an individual—and the "notwithstanding" clause confirms that patented land is an *exception* to the general rule that "reservation" land is non-patented, i.e., that it is public land owned by the federal government. See *Kills Plenty* v. *United States*, 133 F.2d 292, 295 (8th Cir. 1943) (explaining that "patented lands within the limits of Indian reservations" remain Indian country); *see also* Notes to 1948 Act, following 18 U.S.C. § 1151, p. 276 (listing *Kills Plenty* as a case codified by the statute). By contrast, it would be particularly confusing to refer to land issued to a tribe *via fee patent*—like the Creek Nation's land, first conveyed to it in the fee patent of 1851—as Indian country "*notwithstanding* the issuance of any patent." When a tribe owns its own land in fee, the fee patent conveying that land to the tribe is the foundation of

the land's Indian country status. *See Woodward*, 238 U.S. at 293 ("the Creeks held their lands under letters patent issued by the President of the United States, dated August 11, 1852, vesting title in them as a tribe").

2. Congress recognized that land held in fee by a tribe could be "Indian country" under this Court's precedents—even though such land would not be a "reservation." As a result, Congress codified a *second* category of Indian country, adopting the term that this Court had used to describe tribe-owned land: "dependent Indian communities." 18 U.S.C. § 1151(b).

This Court discussed "dependent Indian communities" in *Sandoval*, which is quoted almost "verbatim" in Section 1151(b). *See Venetie*, 522 U.S. at 530. *Sandoval* addressed whether a statute prohibiting the introduction of "liquor into the Indian country" applied to the lands of the Pueblo Indians in New Mexico. *Sandoval*, 231 U.S. at 37. As the Court explained, the pueblo lands were not reservations of federal land, but were instead "held in communal, fee-simple ownership" by the relevant tribe. *Id.* at 39; *see also id.* at 39-40 (contrasting the fee-simple lands *owned* by the Pueblo Indians with the "reservations" of "public lands" that were "adjacent" to the tribe-owned land). Although the tribe-owned land was not a reservation, it was part of a network of "dependent communities entitled to [the federal government's] aid and protection." *Id.* at 47. Recognizing that such tribe-owned land was Indian country, *Sandoval* held that the federal government thus had jurisdiction "over all dependent Indian communities within its borders, whether within its original territory or

territory subsequently acquired, and whether within or without the limits of a state." *Ibid.*; *see also* 18 U.S.C. § 1151(b) (codifying this holding).

Critically for present purposes, the *Sandoval* court *expressly invoked* the Five Tribes' former territory in Oklahoma as an example of a non-reservation dependent community. Rejecting the argument that non-reservation lands were not "Indian country" because the resident tribes owned their territory under "a fee simple title," the Court explained that the lands owned by the Pueblo were dependent communities, "and so *the situation is essentially the same as it was with the Five Civilized Tribes*, whose lands, although owned in fee under patents from the United States, were adjudged subject to the legislation of Congress enacted in the exercise of the government's guardianship over those tribes and their affairs." *Id.* at 48 (emphasis added).

Sandoval—the foundational "dependent Indian communities" case codified by Section 1151—thus invoked the Five Tribes' former territory as a paradigmatic example of a dependent Indian community. And in *Creek Nation*—an opinion written by Justice Van Devanter, the author of the *Sandoval* opinion—this Court explicitly held that the Creek and its territory "*was a dependent Indian community* under the guardianship of the United States." 295 U.S. at 109 (emphasis added); *see also Choctaw Nation* v. *Atchison, T. & S. F. Ry. Co.*, 396 F.2d 578, 581 (10th Cir. 1968) ("Each of these tribes 'was a dependent Indian community.'" (quoting *Creek Nation*, 295 U.S. at 109)). That is surely enough to demonstrate what Section 1151 "category" the Five

Tribes' territory fell under. *See Venetie*, 522 U.S. at 527.

3. Ignoring *Sandoval*, *Creek Nation*, and Section 1151's text, petitioner and his *amici* argue that any colloquial reference to the Creek's territory as a "reservation" establishes it as such. Petitioner's Br. at 32; NCAI Br. at 8. But these colloquial references are irrelevant. What matters is that Congress adopted this Court's clear distinction between a "reservation" of public land and a "dependent" community, and codified *Sandoval*—the case holding that the Five Tribes' territory *was*, and is no longer, a group of "dependent Indian communities."

The National Congress of American Indians also claims that "fee-simple ownership is in no way inconsistent with reservation status"—but, like petitioner and the other *amici*, does not cite *a single case* holding that Section 1151 "reservations" include land that is owned in fee simple by a tribe. *See* NCAI Br. at 10-13. The fact that Congress has occasionally granted fee simple patents to *other* Indian nations merely suggests that the Five Tribes were not the only "dependent Indian communities."

Similarly, the Creek Nation cites an Indian Territory court case holding the Creek Nation had the power to tax non-members on its territory—which the territorial court called a "reservation." *See* Creek Nation Br. at 8 (citing *Maxey* v. *Wright*, 54 S.W. 807, 810 (Indian Terr. 1900)). But *Maxey* used the word "reservation" simply as a shorthand for territory under Indian jurisdiction—indeed, the court recognized that the Creek Nation's territory might *not* be "strictly an Indian reservation" as that term was

typically used. *Id.* at 811. *Maxey* has no bearing whatsoever on the meaning of Section 1151 or Congress's adoption of this Court's distinction between "reservations" of public land and "dependent Indian communities."

4. At bottom, interpreting Section 1151's application to the Creek Nation's former territory requires a straightforward application of precedent. This Court has long held that there is a clear distinction between "Indians living on reservations" and Indians who "owned their lands in fee simple"—with the latter falling under the category of "dependent Indian communities." *Venetie*, 522 U.S. at 528. And this Court has long held that "the Five Civilized Tribes, whose lands, although owned in fee under patents from the United States, were adjudged subject to the legislation of Congress enacted in the exercise of the government's guardianship," were "dependent communities." *Sandoval*, 231 U.S. at 47-48.

Thus, "[t]he Creek Tribe," which "had a fee simple title, not the usual Indian right of occupancy with the fee in the United States," was, as this Court has held, "a dependent Indian community." *Creek Nation*, 295 U.S. at 109. And Congress understood this when it adopted this Court's "dependent Indian communities" precedents in Section 1151. *See Venetie*, 522 U.S. at 530 ("[Section] 1151's definition of Indian country is based 'on [the] latest construction of the term by the United States Supreme Court.'" (quoting Notes to 1948 Act, following 18 U.S.C. § 1151, p. 276)).

C. The Creek Nation's Territory Ceased to Be a "Dependent Indian Community" When It Allotted Its Land and Congress Transferred Jurisdiction to Oklahoma

As *Sandoval* suggested, although the Five Tribes' territories *were* dependent Indian communities in the Nineteenth Century, that status was extinguished in the early 1900s. *See Sandoval*, 231 U.S. at 48 (using the past tense to describe the situation "*as it was* with the Five Civilized Tribes" (emphasis added)). After the Creek Nation deeded "all" of its interest to individual landowners, its dependent Indian community status ceased.

Evaluating whether a "dependent Indian community" continues to exist is a functional inquiry. Territory ceases to be a "dependent Indian community" unless it remains *both* an "Indian community" and "dependent" on federal supervision. *See Venetie*, 522 U.S. at 531. In other words, "the land in question" must remain "validly set apart for the use of the Indians as such," and the land must remain "under the superintendence of the Federal Government." *Id.* at 531–32. The Five Tribes' former land in eastern Oklahoma has long been "neither of these things." *Hydro Res.*, 608 F.3d at 1135.

In *Venetie*, the land in question was owned by the tribe in fee, but it was nevertheless *not* a dependent community because it was open to "non-Natives" and free for use "for non-Indian purposes." *Venetie*, 522 U.S. at 524, 533. Here, there is even *less* indicia of a "set-aside" than in *Venetie*—in fact, there is none at all. Since the Creek Nation gave up and disclaimed *all* interest in its own land, there has not been *any* set-

aside for over a hundred years. Nor is there any federal "superintendence" or segregation of Creek members from other Oklahomans—to the contrary, "Congress has passed laws under which Indians have become full fledged citizens of the State of Oklahoma." *Oklahoma Tax Comm'n*, 319 U.S. at 608.

1. Congress's express purpose in creating the Dawes Commission was "the extinguishment of the national or tribal title to any lands within [Oklahoma Indian] Territory" held by the Five Tribes "so far as may be necessary ... to enable the ultimate creation of a State or States of the Union which shall embrace the lands within said Indian Territory." Act of March 3, 1893, 27 Stat. 612, 645. And it accomplished that purpose when it secured the Creek Nation's agreement to deed and convey "all" of its "right, title, and interest" in its land to individual landholders—including non-Creek townsite residents. 31 Stat. 861, 868.

Once the communal tribal title was conveyed, the territories of the Five Tribes were no longer "distinctly Indian communities." *See Sandoval*, 231 U.S. at 46, 48 ("distinctly Indian communities" require "a communal title, no individual owning any separate tract"). The "division of [the Tribe's] property" necessarily ended "the tribal relations" which were based on "ownership in common." *McDougal* v. *McKay*, 237 U.S. 372, 383 (1915). Numerous contemporary cases recognized that Congress had acted to extinguish the Five Tribes' communities through allotment of their previously common

property.[8] And there is no doubt that the Creek Nation's land is no longer "set apart for the use of the Indians as such." *Venetie*, 522 U.S. at 532.

2. A "dependent Indian community" must satisfy *both* of *Venetie*'s "set aside" and "superintendence" requirements. *Hydro Res.*, 608 F.3d at 1134. As a result, the fact that the Creek Nation's land has now been scattered among numerous individual landowners is enough to demonstrate that no set aside, and thus no Indian community, exists.

But the "superintendence" requirement is obviously not met either. Since statehood, Oklahoma and its municipalities have exercised full jurisdiction over the Five Tribes' former territory—and the Five Tribes' members have become "full fledged citizens of the State of Oklahoma." *Oklahoma Tax Comm'n*, 319 U.S. at 608.

To prepare the Indian territory for statehood, Congress took steps to dismantle the Five Tribes' authority in the Indian Territory, including by

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[8] *E.g.*, *Gritts* v. *Fisher*, 224 U.S. 640, 642 (1912) ("During the last twenty years Congress has enacted a series of laws looking to the allotment and distribution of the lands and funds of the Five Civilized Tribes, ... among their respective members, and to the dissolution of the tribal governments."); *Heckman* v. *United States*, 224 U.S. 413, 431–32 (1912) (conditions in the Indian territory "led to the enactment of legislation which contemplated the dissolution of the tribal organizations and the distribution of the tribal property"); *see also Longest* v. *Langford*, 276 U.S. 69, 69–70 (1928) (agreements "set forth a comprehensive scheme for allotting the lands of the two tribes in severalty among their members, distributing the tribal funds and dissolving the tribes"); *Marlin* v. *Lewallen*, 276 U.S. 58, 63 (1928) (Creek Agreements "taken together, embodied an elaborate plan for terminating the tribal relation and converting the tribal ownership into individual ownership").

abolishing tribal courts and replacing Tribal law with the laws of Arkansas. *See* Respondents Br. at 23, 30; *Shulthis* v. *McDougal*, 225 U.S. 561, 571 (1912) ("Congress was then contemplating the early inclusion of that territory in a new state, and the purpose of those acts was to provide, for the time being, a body of laws adapted to the needs of the locality ....").

Congress then transferred jurisdictional and legal authority to Oklahoma upon statehood. With the exception of exclusively federal crimes, "all causes, proceedings, and matters, civil or criminal, pending in the district courts of Oklahoma territory, or in the United States courts in the Indian Territory" were to be transferred to Oklahoma state court and "proceeded with, held, and determined by the courts of said state." *S. Sur. Co.* v. *State of Oklahoma*, 241 U.S. 582, 585 (1916). "In other words," the jurisdiction of Oklahoma's courts was to be the same as if "the Indian Territory [had] been a state when the offenses were committed." *Id*. at 586. And "Congress provided in the Enabling Act (section 13) that 'the laws in force in the territory of Oklahoma, as far as applicable, shall extend over and apply to said state until changed by the Legislature thereof,'" thus applying Oklahoma territorial law to the Indian Territory at statehood. *Jefferson* v. *Fink*, 247 U.S. 288, 292–93 (1918) (quoting Enabling Act of June 16, 1906, c. 3335, 34 Stat. 267); *see also Shulthis*, 225 U.S. at 571.

Thus, by statehood, the Tribes had conveyed away their communal lands, and Congress had granted Oklahoma jurisdiction over the Tribe's former lands as if "the Indian Territory had been a state." *S. Sur. Co*., 241 U.S. at 586. The territories of the Five Tribes were no longer distinct and federally dependent

"Indian communities" or "under the jurisdiction of the United States," 18 U.S.C. § 1151. *See Sandoval*, 231 U.S. at 48. Rather, they were an integral part of Oklahoma.

II. The History of State and Municipal Regulation Confirms That Congress Gave Oklahoma Authority over the Five Tribes' Former Land

The past 100 years of regulatory history confirms that Congress gave Oklahoma jurisdiction over the former land of the Five Tribes. *Rosebud*, 430 U.S. at 604 (the "State's exercise of authority is a factor entitled to weight as a part of the 'jurisdictional history'"). And a novel judicial recognition of "Indian country" would "seriously disrupt the justifiable expectations of the people living in the area." *Hagen* v. *Utah*, 510 U.S. 399, 421 (1994); *Rosebud*, 430 U.S. at 605 ("justifiable expectations [] should not be upset" by unjustified imposition of federal authority). If petitioner's arguments prevail and a previously non-existent "reservation" were created, the lives and self-governance of hundreds of thousands of Tulsans—and millions of Oklahomans—would be "seriously disrupt[ed]."

For over a hundred years, the City of Tulsa has served and protected its community—which includes a population of over 400,000 Tulsans, both Indian and non-Indian. Today, more than 40,000 Tulsans are also members of Indian tribes, including numerous proud members of the Creek Nation.

Tulsa provides numerous services and resources to its citizens throughout the City—predicated on a legal understanding that the City generally has

jurisdiction regardless of whether a particular plot is owned by a non-Indian or Indian Tulsan. That is not to say that there has never been *any* "Indian country" in Tulsa—there are several restricted allotments and trust lands that remain Indian country under Section 1151(c), and even a casino located on land "still owned by the Creek Nation." *Indian Country, U.S.A., Inc.* v. *State of Okl. ex rel. Oklahoma Tax Comm'n*, 829 F.2d 967, 972 (10th Cir. 1987).[9] But the vast majority of Tulsa's land area is not Indian country—and has not been treated as such for over a hundred years.

If petitioner prevails, all that will change. The Creek Nation's historic fee lands include over two-thirds of Tulsa's land mass and over *eighty percent* of its population. And the Cherokee Nation's historic fee includes another quarter of Tulsa's land and sixteen percent of its people.[10] If the Court were to resurrect the tribes' long-extinct fee as new "reservations," nearly 95% of Tulsa's land and *over 98%* of its population would suddenly find themselves in the jurisdictional and regulatory morass that is "Indian country."[11]

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[9] *Indian Country* confusingly referred in dicta to a "Creek reservation," but the only question presented was whether a small strip of land *still owned* by the Creek Nation—which had never been conveyed by the tribe—was Indian country. *See* 829 F.2d at 975 n.3, 980 n.5.

[10] The Cherokee Agreement with Congress, like the Creek agreement, includes a provision mandating that the Cherokee principal chief shall execute patents "conveying all the right, title, and interest of the Cherokee Nation" to each patented plot. 32 Stat. 716, at 725.

[11] *See* "Demographic Summary Report: Tulsa, OK." DemographicsNow, Gale. Accessed Feb. 28, 2020. This is in

Aside from the specter of releasing hundreds of violent criminals like petitioner, the most obvious and immediate consequence would be the severe disruption of Tulsa's ability to protect its citizens. At present, Tulsa's Police Department has full jurisdiction to protect Tulsans and enforce city and state law in all but a few scattered plots of land. But if the entire City is "Indian country," state criminal jurisdiction would be stripped in any crime involving an Indian perpetrator or victim. *See Solem* v. *Bartlett*, 465 U.S. 463, 465 n.2 (1984).

Although cross-deputization agreements with the tribes would allow the Tulsa Police Department to enforce tribal law in crimes involving Indians, these agreements cannot address the most fundamental problems created by turning Tulsa into "Indian country"—including the loss of a tax base to support Tulsa's Police and government. Tulsa and its courts still could not enforce Oklahoma law in crimes involving Indians. And even with a cross-deputization agreement, Tulsa's law enforcement officers could be powerless to obtain warrants and investigate crimes in wide swaths of the city. *See United States* v. *Baker*, 894 F.2d 1144, 1146 (10th Cir. 1990) (state search warrant invalid, because property sought to be searched "was located within Indian country" and "rented by an enrolled member of the Southern Ute Tribe").

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stark contrast to Tacoma, Washington, which the Creek Nation claims is a comparable "non-Indian cit[y]" covered by Indian country. Creek Nation Br. 43. In fact, *less* than 13% of Tacoma's population, and under 19% of its land, is in Indian country. "Demographic Summary Report: Puyallup, WA & Tacoma, WA." DemographicsNow, Gale. Accessed Feb. 28, 2020.

The Creek Nation's brief attempts to flip this argument on its head, suggesting that the cooperative law enforcement agreements between the City and the Nation are somehow dependent on the existence of a "reservation"—and that *not* recognizing a reservation would actually be more disruptive. *See* Creek Nation Br. at 45-47. This is simply wrong. These agreements developed in the wake of judicial decisions that held Oklahoma state and municipal authorities lacked jurisdiction over *restricted allotments* and *tribal trust lands*, creating a "checkerboard of Indian and non-Indian land." *United States* v. *Sands*, 968 F.2d 1058, 1063 (10th Cir. 1992). In order to police and administer this patchwork of allotments, the tribes and state authorities—including the Creek Nation and Tulsa—entered into cooperative law enforcement agreements that allow city officers to enforce tribal law on restricted allotments, and deputized Creek Nation officers to enforce Oklahoma law. These agreements have no relationship to a purported "reservation" that has never been recognized.

Similarly, the Creek Nation's suggestion that it already polices a "Reservation" (which does not exist) is incorrect. *See* Creek Nation Br. at 45. The Creek Nation's law enforcement arm, known as the Lighthorse, is a small department that is focused on policing Creek Nation lands, which in Tulsa is largely limited to the Nation's riverfront casino. Although the Lighthorse is a reliable and trusted partner of the Tulsa Police Department and Tulsa County Sheriff's department, it is only a fraction of the size of those departments. *See* p. 6, *supra* (Lighthorse has only 49 officers, while Tulsa Police Department and Sheriff

have over 1,000). The Lighthorse simply are not equipped to police a city of more than 400,000.

The consequences of a decision for petitioner would reach far beyond upending criminal jurisdiction. Like all local governments, one of Tulsa's most important functions is managing land use throughout the City—in 2019 alone, Tulsa processed 2,464 land-use cases, plan adjustments, and related permits. A recognition of a new "reservation" covering nearly the entirety of Tulsa could threaten the City's ability to enforce the most basic land-use and zoning laws. Whether a county or tribe has zoning jurisdiction over "reservation" land is a question with no clear answer—as evidenced by this Court's fractured decision in *Brendale* v. *Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408 (1989). *Id.* at 447–48 (it is "impossible to articulate precise rules that will govern whenever a tribe asserts that a land use approved by a county board is preempted by federal law") (opinion of Stevens, J.). Subjecting Tulsa's zoning authority to *Brendale*'s fractured reasoning would muddle the City's comprehensive planning and zoning administration—arguably "the most essential function performed by local government." *Village of Belle Terre* v. *Boraas*, 416 U.S. 1, 13 (1974) (Marshall, J., dissenting).

Similarly, a new two-tiered taxation regime would spring into existence overnight, even creating new Indian tax shelters. Although non-Indians would continue to owe taxes to the City and state, a tribal member might not. *See Cotton Petroleum Corp.* v. *New Mexico*, 490 U.S. 163, 175 (1989). And the Creek and Cherokee Nations could even impose their own taxes and regulations on non-Indian Tulsans. *See*

Kerr-McGee Corp. v. *Navajo Tribe of Indians*, 471 U.S. 195, 198 (1985) (upholding tribal tax on business activity within reservation).

Moreover, because "there is no rigid rule by which to resolve the question whether a particular state law may be applied to an Indian reservation or to tribal members," petitioner would create a recipe for near endless litigation. *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136, 142 (1980). Case-by-case analysis will be required to determine whether Tulsa may "assert[] authority over the conduct of non-Indians engaging in activity" on these newly discovered reservations. *Id.* at 144–45 (practically any regulatory action in Indian country requires "a particularized inquiry into the nature of the state, federal, and tribal interests at stake"). As a result, the question of what conduct Tulsa will be allowed to regulate (and how) will be litigated for decades to come.

The potential for conflicts, major and minor, is not just theoretical. The few restricted allotments scattered across the city have already generated conflict and near-intractable regulatory difficulties—and these issues will only grow exponentially if the *entire city* is "Indian country."

- The City's zoning code prohibits billboards outside of freeway corridors.[12] Yet, in 2018, a 50-foot billboard with a flashing video screen appeared on a restricted tribal lot, in an established neighborhood zoned for single-

[12] City of Tulsa Zoning Code, Section 60.080-F, Off-premise Outdoor Advertising Signs, tulsaplanning.org/plans/TulsaZoningCode.pdf.

family homes.[13] The Creek Nation government, located in another county, was not responsive to neighbors' concerns, and the video billboard still towers over the modest homes. *See also Shivwits Band of Paiute Indians* v. *Utah*, 428 F.3d 966, 981 (10th Cir. 2005) (holding that Utah could not regulate even *non*-Indian owned billboards in "Indian country").

- In 2012, the Kialegee Tribal Town (distinct but historically associated with the Creek Nation) broke ground for casino construction on restricted Indian land in Tulsa's largest suburb, Broken Arrow—despite overwhelming opposition from Broken Arrow citizens, who demanded their own city council resign over its failure to stop the casino.[14] After prolonged litigation, Kialegee suspended its casino plans.[15]
- Another Creek citizen's allotment in a residential area of Tulsa has been used as a fireworks retailer, notwithstanding city ordinances banning possession or use of fireworks within city limits.[16] The use of the allotment (by non-Indian business operators) to frustrate city law offers an example of how *any*

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[13] *Billboard near 41st and Yale on Native-owned land draws criticism from neighbors*, Tulsa World, Aug. 15, 2018, https://tinyurl.com/t8ejdud.

[14] *Councilors are asked to resign over their handling of a planned casino*, Tulsa World, Feb. 8, 2012, https://tinyurl.com/u4fcmbw.

[15] *Dance hall and restaurant with possible gambling proposed for Broken Arrow tribal land near abandoned casino*, Tulsa World, Oct. 18, 2016, https://tinyurl.com/r38ph2c.

[16] *Fireworks buyers told to expect confiscation*, Tulsa World, June 28, 2012, https://tinyurl.com/wttwesq.

> plot of land owned or rented by a member of an Indian tribe may be used if the entire City is declared "Indian country."

These disruptive but rare conflicts, isolated to a few restricted Indian allotments, would become the norm if 190 square miles (nearly 95 per cent) of Tulsa were declared Creek and Cherokee reservations. And the fact that these conflicts have been rare—and focused on restricted allotments—demonstrates a shared understanding that this land has *not* been "Indian country."

* * *

Petitioner's argument cannot be reconciled with the 1901 Agreement, the actual conveyance of the Creek Nation's interest in its land, or this Court's precedent. To prevent Tulsa's governmental and legal regime from being thrown into chaos, the Court should enforce the Creek Agreement as written, and hold that its former territory is not "Indian country" under 18 U.S.C. §1151.

CONCLUSION

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

Respectfully submitted,

DAVID O'MEILIA
CITY ATTORNEY OF THE
CITY OF TULSA
175 East 2nd Street, Suite 1405
Tulsa, Oklahoma 74103

BLAINE H. EVANSON
Counsel of Record
DANIEL NOWICKI
GIBSON, DUNN & CRUTCHER LLP
3161 MICHELSON DR.
Irvine, California 92612
(949) 451-3805
bevanson@gibsondunn.com

Attorneys for Amicus Curiae
City of Tulsa, Oklahoma

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