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 AMICI CURIAE SEVENTEEN OKLAHOMA DISTRICT ATTORNEYS AND THE OKLAHOMA DISTRICT ATTORNEYS ASSOCIATION IN SUPPORT OF RESPONDENT

Martin T. Booher
Robert D. Cheren
Counsel of Record
BAKER & HOSTETLER LLP
2000 Key Tower
127 Public Square
Cleveland, Ohio 44114
(216) 861-6648
rcheren@bakerlaw.com

Mark W. DeLaquil
BAKER & HOSTETLER LLP
1050 Connecticut Ave., NW
Washington, D.C. 20036
(202) 861-1527

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Oklahoma District Attorneys Steve Kunzweiler, Paul Smith, Chuck Sullivan, Matt Ballard, Max Cook, Orvil Loge, Jack Thorp, Jeff Smith, Mike Fields, Kevin Buchanan, Brian Hermanson, Jason Hicks, Carol Iski, David Thomas, Laura Austin Thomas, Mark Matloff, and Allan Grub, and the Oklahoma District Attorneys Association respectfully submit this *amici curiae* brief in support of petitioner.*

Oklahoma's elected local prosecutors are deeply concerned over the ramifications of McGirt's argument which would effectively turn law enforcement in many parts of Oklahoma on its head. For over a century the people of Oklahoma have placed their trust in local District Attorneys to prosecute crimes occurring in the vast regions of the State of Oklahoma that were once held by the Five Tribes regardless of the identity of victims and perpetrators. But McGirt's argument now threatens not only to substantially divest local elected officials of this authority going forward in a wide array of criminal cases, it also threatens to overturn decades of convictions that they have obtained.

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* No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici* made any monetary contribution to the preparation and submission of this brief. The parties consented to filing of this brief.

McGirt's sweeping argument would usurp the role of local law enforcement in major crimes that in any way involve members of Indian tribes. Federal agents and United States attorneys are not an acceptable substitute for law enforcement carried out and funded at the State level. Congress and the President will not appropriately fund and oversee the enforcement of law in a vast territory with a population of over 1.8 million people that is more than 1,000 miles away from Washington, D.C.

On the other hand, rejecting McGirt's argument will preserve the status quo in Oklahoma where State and tribal governments work well together to meet the needs of all the people of Oklahoma. Given the unique history that formed the State and ensuing success of the tribes in economic and political life, the Five Tribes today are thriving, and cooperative arrangements with tribal governments achieve mutual goals with respect to specific lands they own and a small number of restricted allotments. The significant influence of tribal governments and the cooperative arrangements to enforce the law in Oklahoma will not be lost if the Court rejects McGirt's argument. But the sudden and revolutionary change in the legal status of half of an entire State that McGirt urges the Court set in motion threatens to complicate and impede the provision of government service and protection to all Oklahomans, including the tribal members it purportedly favors.

Contrary to McGirt's framing of this case, there is no reason to believe federal prosecutors are any better suited to prosecute crimes against Indian victims or crimes committed by Indians in eastern Oklahoma.

After all, since the founding of the State members of the Five Tribes have served in every aspect of the State's government. Indeed, McGirt's convictions were obtained by the District Attorney for District 27 at that time—Dianne Barker Harrold—who herself is a member of one of the Five Tribes.

The *amici* accordingly submit this brief to assist in the consideration of the merits of this case and urge the Court to reject this invitation to rewrite Oklahoma history and suddenly erect by decree five reservations encompassing the entire eastern half of the State.[1]

1. As the State argued in *Murphy*, the lands of the Five Tribes did not constitute reservations before statehood due to their unique history and laws Congress passed in the years leading up to statehood. Since *amici* are addressing the effect of the statehood process itself, for ease of presentation *amici* here will refer to the lands of the Five Tribes before statehood as reservations but *amici* do not concede they were reservations at that time.

SUMMARY OF ARGUMENT

Two mysteries combine to make this case difficult. First, it is true that typical dissolutions of reservations through coerced or fairly bought formal cessions by tribes are nowhere to be found. Second, there is not just one but thousands upon thousands of "dogs that did not bark" for over a century because no person or tribe with an interest in the matter seriously thought the entire eastern half of Oklahoma—including vast reaches of land no longer owned or held by Indians or tribes, having been sold after Congress removed the alienation restrictions—consisted of five reservations after the new State of Oklahoma was formed by the union of the Oklahoma Territory and Indian Territory.

Squarely presented, it doesn't take Sherlock Holmes to divine the answer—Congress must have affected the change in the status of the lands of the Five Tribes through an atypical method better suited to the unique history and characteristics of the Five Tribes and the goals of Congress to honor obligations to tribes while at the same time bestowing upon both tribal members and all others in these two territories the blessing of government founded by and for all of the people of the new State of Oklahoma on a truly equal footing.

Congress had various different avenues to achieve its ambitions but the one finally chosen and carried out was fittingly the same method that the leaders of the Five Tribes themselves proposed to use when they sought separate admission of the Indian Territory as the State of Sequoyah.

Specifically, Congress provided for both "citizens of Indian tribes" and all others "to participate freely in the election of" delegates to a constitutional convention which thereby "was clothed with full authority and power." *Proposed State of Sequoyah,* S. DOC. NO. 143, 59th Cong., 1st Sess. 26 (1906). Once the constitution crafted by the convention was ratified by a vote of all of the people of the two territories, "all legal obstacles" including prior treaty promises reserving territory to the tribes were "effectively and satisfactorily removed." *Id.*

So while the history of the treatment of Indians and tribal governments is replete with shameful episodes, Congress took the last step to achieve its objectives concerning the lands of the Five Tribes in a manner that showed respect and fidelity to the core principles of the Declaration of Independence: For the first and only time in American history Congress made members of the Indian tribes full and equal participants in the creation of a new State.

This unique role of the people of the Five Tribes in the birth of the State of Oklahoma is a distinctive aspect of their heritage that deserves to be honored. It also fully resolves this difficult case. The separate reservations of the Five Tribes were dissolved through the participation of the people of the Five Tribes in electing delegates to the constitutional convention, the service of numerous of their own people as delegates at the convention, and the affirmative ratification votes by majorities in each discrete political community in the area that comprised the lands of the Five Tribes.

Congress intended and understood incorporating the people of the Five Tribes into the body politic that created the new State was a sufficient and appropriate way to unite the land and people of the two territories into a single State while reserving only the traditional federal authority over land that is actually owned and held by Indians and tribes. Congress's incorporation of the tribes in the statehood process disestablished the domains of the Five Tribes under the *Solem* framework.

Were there any lingering doubt it is removed by the State's immediate and unchallenged assumption of jurisdiction and plenary exercise of full dominion and sovereignty throughout the succeeding century over lands that formerly were reserved to the Five Tribes. As the Court recognized long ago, this particular kind of historical evidence is unusually indicative of what Congress intended and accomplished. It beggars belief to presume that no one challenged the authority of the new State in capital cases that involved Indians or in the payment of untold sums of taxes levied each and every year for over a century. The subsequent history at issue in this case was not the mere salutary neglect or subtle encroachment that the Court has found is not considerable evidence of what Congress intended. Rather, this is the first disestablishment case where the Court is presented with this particular kind of powerful subsequent history evidence. In light of its significant probative value, the Court should give the State's longstanding and unchallenged exercise of full dominion and sovereignty ample weight in deciding what Congress intended and achieved through Oklahoma's unique statehood process.

Accordingly, *amici* urge the Court to affirm the decision of the court below and preserve the status of the State of Oklahoma as a single, united State that was formed by and serves all of its people, including the members of the Five Tribes.

ARGUMENT

I. Congress and the people of the Five Tribes together abrogated prior treaties reserving land to tribal governments through the unique process that formed the new State.

Rather than simply renouncing the promises of the United States, unilaterally dissolving reservations by legislative fiat, or forcing the Five Tribes governments to make a solemn and formal statement of capitulation and cession with or without a payment, Congress took a different approach that recognized and respected the fundamental equality, civil abilities, and political dignity of the people of those tribes. Indeed, the chosen approach was originally pioneered and legitimatized by the leaders of the Five Tribes themselves.

Congress made the members of the Five Tribes part of "the people" who convened, formed a constitution for a new State, and ratified that constitution. Congress did so by providing in the Oklahoma Enabling Act that the "members of any Indian nation or tribe . . . are hereby authorized to vote for and choose delegates to form a constitutional convention for [the] proposed State" and that "all persons qualified to vote for . . . delegates shall be eligible to serve as delegates." 34 Stat. 267, 268. Congress also thereby included the members of the Five Tribes among "the people of [the] proposed State" to whom the State's constitution was "submitt[ed] . . . for its ratification or rejection at an election" in which they had a right to vote "for or against the proposed constitution, and for or against any provisions separately submitted." *Id.* at 271.

As Congress directed, members of the Five Tribes participated in the election of the delegates to the constitutional convention on November 6, 1906. Their participation in these elections secured significant and powerful representation at the convention. Indeed, ten Indian members of the Five Tribes were thus elected, including several who served in prominent positions as chairmen of key committees:

- Henry L. Cloud was a Cherokee Indian elected as a delegate from the twenty-third district. Blue Clark, *Delegates to the Constitutional Convention*, 48 CHRONS. OKLA. 400, 407 (1970) ("*Delegates*"); PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE PROPOSED STATE OF OKLAHOMA 13–14 (1907) ("PROCEEDINGS"). He served on the Memorial to Congress Committee, the Deficiency Appropriation Committee, the Suffrage Committee, the Enrolling and Engrossing Committee, the Primary Elections Committee, the State and School Lands Committee, the Revision, Compilation, Style and Arrangement Committee, and the Coal, Oil and Gas Committee. *Id.* 29, 47–48, 52–53, 65, 126. Mr. Cloud presented three petitions to the convention relating to religious liberty, agriculture and education, and liquor traffic. *Id.* 73, 121, 143, 155.
- Oliver P. Brewer was a Cherokee Indian elected as a delegate from the seventy-seventh district. *Delegates* at 407; PROCEEDINGS 13. The convention selected Mr. Brewer to be the Chairman of the Education Committee. Mr. Brewer also served on the Suffrage Committee, the Public Institutions and State Buildings Committee, the Enrolling and

Engrossing Committee, and the State Militia Committee. *Id.* 47–48, 52. He successful introduced a petition at the convention for the convention to request that Congress eliminate certain restraints on alienation of allotted lands, and he introduced petitions on other matters as well. PROCEEDINGS 143, 162.

- Albert S. Wyly was a Cherokee Indian elected as a delegate from the seventy-second district. *Id.* 13–14. The convention selected Mr. Wyly as Chairman of the Public Institutions and State Buildings Committee. *Id.* 47. He also served on the Memorial to Congress Committee, the Legislative Department Committee, the Education Committee, and the Municipal Corporations Committee. *Id.* 46–47, 126. Mr. Wyly submitted a petition on liquor traffic to the convention. *Id.* 150.
- Clement V. Rogers was a Cherokee Indian elected as a delegate from the sixty-fourth district. *Delegates* at 407; PROCEEDINGS 13–14. The convention selected Mr. Rogers to be Chairman of the Salaries and Compensation of Public Officers Committee. *Id.* 48. He also served on the Legislative Department Committee, the Homesteads and Exemptions Committee, the Liquor Traffic Committee, the Counties and County Boundaries Committee, and the Impeachment and Removal from Office Committee. *Id.* 46, 52, 72.
- Gabriel E. Parker was a Choctaw Indian elected as a delegate from the eighty-eighth district. *Delegates* at 407; PROCEEDINGS 14. The convention selected Mr. Parker as Chairman of the Seal of State

Committee, Vice Member of the Liquor Traffic Committee, and Chairman Pro Tem of the Executive Department Committee. *Id.* 183, 187, 246. He also served on the Memorial to Congress Committee, the Education Committee, the Revenue and Taxation Committee, the Mines and Mining, Oil and Gas Committee, the State and School Lands Committee, the County and Township Organization Committee. *Id.* 126, 47, 52–53.

- James Riley Copeland was a Cherokee Indian elected as a delegate from the sixty-second district. *Delegates* at 407; PROCEEDINGS 13–14. He served on the Immigration Committee, the Public Roads and Highways Committee, the Impeachment and Removal from Office Committee, the Convention Accounts and Expenses Committee, the Public Debt and Public Works Committee, and the Coal, Oil and Gas Committee. *Id.* 47, 52–53, 65. Mr. Copeland submitted petitions to the convention relating to marriage and suffrage for women. *Id.* 145, 181.

- Charles O. Frye was a Cherokee Indian elected as a delegate from the eighty-fourth district. *Delegates* at 407; PROCEEDINGS 14. Mr. Frye was nominated by Mr. Cloud for vice president of the convention. PROCEEDINGS 26. He served on the Deficiency Appropriation Committee, the Federal Relations Committee, the Private Corporations Committee, the Convention Accounts and Expenses Committee, and the Public Printing Committee. *Id.* 29, 46, 50, 53, 65. Mr. Frye submitted petitions to the convention relating to county boundaries, uniform taxation, and platted towns. *Id.* 120, 125, 145.

- Benjamin F. Harrison was a Choctaw Indian elected as a delegate from the eighty-eighth district. *Delegates* at 407; PROCEEDINGS 14. He served on the Preamble and Bill of Rights Committee, the Executive Department Committee, the Railroads and Public Service Corporations Committee, the State and School Lands Committee, the Public Debt and Public Works Committee, and the Address to the Public Committee. *Id.* 46–47, 52–53. Mr. Frye submitted a petition relating to religious liberty to the convention. *Id.* 73.

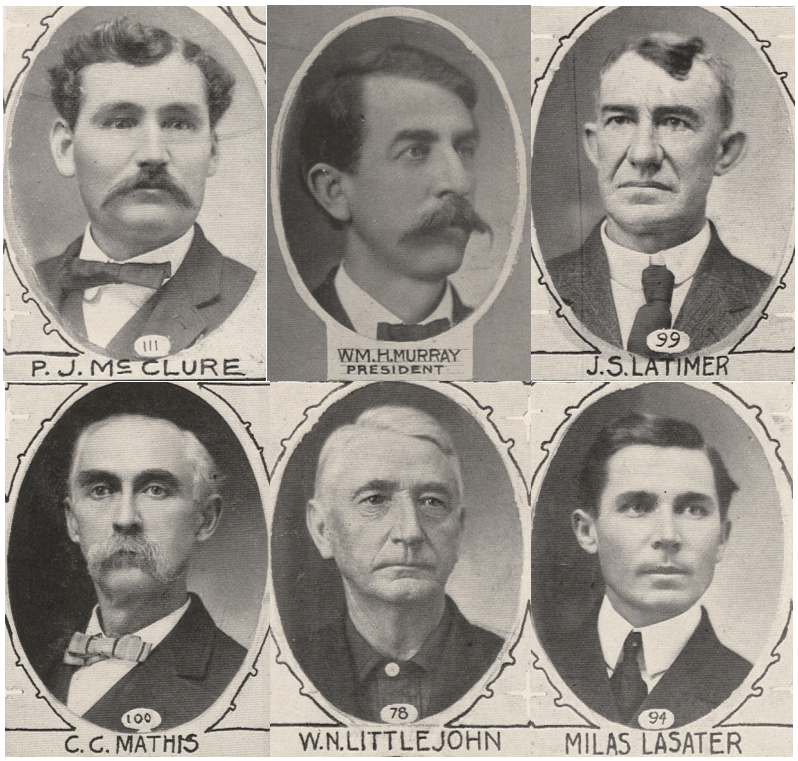
- James Turner Edmondson was a Cherokee Indian elected as a delegate from the sixty-sixth district. *Delegates* at 407; PROCEEDINGS 13–14. He served on the Agriculture Committee, the Executive Department Committee, the Public Roads and Highways Committee, and the Homesteads and Exemptions Committee. *Id.* 46–47, 52.

- Preeman J. McClure was a Choctaw Indian elected as a delegate from the hundred and eleventh district. *Delegates* at 407; PROCEEDINGS 14. Mr. McClure served on the Agriculture Committee and the Homesteads and Exemptions Committee. *Id.* 47, 52.

In addition, the people of the Oklahoma Territory and the Indian Territory elected five members of the Five Tribes by intermarriage as delegates to the convention: William H. Murray (Chickasaw), James S. Latimer (Choctaw), Christopher C. Mathis (Choctaw), William N. Littlejohn (Cherokee), and Milas Lasater (Chickasaw). *See* PROCEEDINGS 13–14. The election of so many members of the Five Tribes led to selection of a member of the Chickasaw Nation as the president of

the convention. William H. Murray, *The Constitutional Convention*, 9 CHRONS. OKLA 126, 133 (1931).

These are official portraits of the fifteen members of the Five Tribes that served as convention delegates:



The fifteen members of the Five Tribes who served as delegates were founding fathers of the State of Oklahoma. On the last day when the work of drafting the State's constitution was completed on July 16, 1907, the convention began with an invocation by one of their own, Mr. Cloud. PROCEEDINGS 375. Then all twelve of the members of the Five Tribes who were present that day voted in favor of the final adoption of the constitution by the convention and submission to the people and each of them "affixed their signatures" to the parchment. *Id.* 375, 382–84.

The people of the proposed State of Oklahoma voted on September 17, 1907, to ratify the constitution.

2 OKLAHOMA RED BOOK 292–93 (1912). Members of the Five Tribes participated in this election s "qualified voters for the . . . proposed State." PROCEEDINGS 460. The result of the election were majority votes in favor of ratification in each and every county in the proposed new State, including in areas that had elected Indian delegates to the convention. 2 OKLAHOMA RED BOOK 292–93 (1912). Examining county-by-county results in detail shows there was no strong push for rejection of the Constitution by the members of the Five Tribes. For example, at the time in Adair County there were 818 Indians of voting age but only 385 votes in total were cast to reject the constitution. *See* POPULATION OF OKLAHOMA AND INDIAN TERRITORY 34–35 (1907) ("POPULATION"); 2 OKLAHOMA RED BOOK 292 (1912). Similarly, in Delaware County there were 593 Indians of voting age but only 361 votes in total were cast to reject. *See* POPULATION 34–35; 2 OKLAHOMA RED BOOK 292 (1912).

And so President Roosevelt issued the proclamation of statehood on November 16, 1907. As a result, a new State of Oklahoma comprising "all of that part of the area of the United States" formerly "constituting the Territory of Oklahoma and the Indian Territory" was admitted to the Union "on an equal footing with the original States." 34 Stat. 267, 271.

Thus, the State of Oklahoma was created by a process that Congress ensured included the people of the Five Tribes as full and equal members of the political community. This was not a choice that was foreordained by the Constitution according to the Court's then-governing interpretation of the Fourteenth

and Fifteenth Amendments which permitted denying Indians voting rights. *See Elk v. Wilkins*, 112 U.S. 94 (1884). With that precedent still in force, Congress deliberately enacted the provisions of the Oklahoma Enabling Act that afforded key civil rights to all of the Indians inhabiting the proposed new State.

The Court has never had occasion to consider the effect of Congress's deliberate incorporation of the members of Indian tribes into the body politic as part of the creation of a State because the Oklahoma Enabling Act is the only enabling act Congress passed that enfranchised members of Indian tribes so that they could participate in the statehood process.[2]

The role of the people of the Five Tribes in creating the State of Oklahoma dissolved the reservations that had been created by treaty provisions in two ways.

First, the people of the Five Tribes directly participated in a constitutional convention and ratification of a constitution. By this exercise of political sovereignty they endowed their new State government with the sovereign powers that formerly belonged to various

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2. *See* Ohio Enabling Act, 2 Stat. 173; Louisiana Enabling Act, 2 Stat. 641; Indiana Enabling Act, 3 Stat. 289; Mississippi Enabling Act, 3 Stat. 348; Illinois Enabling Act, 3 Stat. 428; Alabama Enabling Act, 3 Stat. 489; Missouri Enabling Act, 3 Stat. 545; Wisconsin Enabling Act, 9 Stat. 56; Minnesota Enabling Act, 11 Stat. 166; Nevada Enabling Act, 13 Stat. 30; Nebraska Enabling Act, 13 Stat. 47; Colorado Enabling Act, 18 Stat. 474; North Dakota, South Dakota, Montana, and Washington Enabling Act, 25 Stat. 676; Utah Enabling Act, 28 Stat. 107; New Mexico and Arizona Enabling Act, 36 Stat. 557.

tribal governments. As a result, the members of the Five Tribes themselves abrogated prior treaties made by tribal governments on their behalf except to the extent they relate to individual "person or property" so as to have been expressly preserved by Congress in the Enabling Act. 34 Stat. 267.

Second, the intent of Congress in incorporating the people of the Five Tribes is also sufficient to abrogate prior treaty provisions regarding lands that had been conveyed to the Five Tribes. Congress understood and intended the role of the people of the Five Tribes in the statehood process would terminate these provisions of prior treaties, and the Act of Congress employing such means has legal force to achieve those ends.

Whether the legal effect of the role of the people of the Five Tribes is considered directly or through the lens of the intent of Congress, the analysis must begin with the same foundational thesis: "Governments are instituted among Men, deriving their just powers from the consent of the governed" and "it is the Right of the People to alter or to abolish" existing government "and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness." THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). Indeed, the Oklahoma Constitution declares "[a]ll political power is inherent in the people; and government is instituted for their protection, security, and benefit, and to promote the general welfare; and they have the right to alter or reform the same whenever the public good may require it." OKLA. CONST. art. II, § 1.

The retention of the power by the people to reform or replace governments is a "fundamental principle of republican government." THE FEDERALIST NO. 78 (Alexander Hamilton). Exercising this power requires "some solemn and authoritative act" by a "majority of the people." *Id.*; THE FEDERALIST NO. 39 (James Madison). And the traditional method employed for this purpose since the founding era is a constitutional convention drafting and submitting a constitution to the people for ratification.

Accordingly, when the people assemble their chosen representatives at a special convention to form a new government, the people unleash "the fountain of all political power," *Benner v. Porter*, 50 U.S. 235, 242 (1850), capable of dissolving all prior legal bonds and obligations and adjusting, casting aside, or preserving existing governments "at their own pleasure," *Luther v. Borden*, 48 U.S. 1, 47 (1849), so long as any new constitution is ratified by the "majority of the people" who would be subject to its authority. THE FEDERALIST NO. 39 (James Madison).

There are some limits to the power of conventions. The scope of a convention's authority is inherently defined by the constituency of "the people" who are represented at it and in the ratification process. *See Minor v. Happersett*, 88 U.S. 162, 167 (1875) ("Disputes have arisen as to whether or not certain persons or certain classes of persons were part of the people . . . ."). The Court has found it legally significant to identify "whom Congress makes members of the political community, and who are recognized as such in the formation of the new State with the consent of

Congress." *Boyd v. Nebraska*, 143 U.S. 135, 170 (1891); *see also United States v. Allen*, 171 F. 907, 920–21 (E.D. Okla. 1909) ("[The Enabling Act's] terms clearly make [the Indian members of the Five Tribes] electors and give them the right to participate in the formation of the state Constitution and state government . . . . [T]herefore, the members of the Five Civilized Tribes are citizens of the United States, with all the rights, privileges, and immunities of citizenship."). The Court has recognized Congress's authority to define the composition of who is and who is not represented in the formation of new States. *Boyd v. Nebraska*, 143 U.S. 135, 175 (1891) ("Before Congress let go its hold upon the Territory, it was for Congress to say who were members of the political community.").

In creating the new State of Oklahoma, Congress required that "members of any Indian nation or tribe" inhabiting the proposed new State had to be "allowed to participate in the direction of the affairs of the state and in the formation of the government" and the "framing of its Constitution, the fundamental laws of the state." *Wah-tsa-e-o-she v. Webster*, 172 P. 78, 79 (Okla. 1918). The Supreme Court of Oklahoma held soon thereafter that it was therefore "the purpose and intent of Congress and of the people of the proposed state in the erection of the state and in creating its government that [the] Indians should become citizens thereof" who therefore must "make their conduct conformable to the laws of the state, except where especially exempted therefrom." *Id.*

Withdrawing sovereignty from the Five Tribes, granting sovereignty to a new State over areas that were previously set aside for the Five Tribes, and subjecting members of the Five Tribes to the laws of that new State squarely abrogated the provisions of treaties between the United States and governments of the Five Tribes that reserved the lands to them and provided they would not become parts of any State. But Congress did not proceed on its own authority alone. Congress instead called for a convention which represented the people of the Five Tribes that thereby had full political and legal authority to take this step.

Critically, the Five Tribes themselves demonstrated to Congress the political and legal legitimacy of using a constitutional convention to unite the areas occupied by the members of the Five Tribes and consolidate all of the inhabitants thereof into one people subject to the authority of a new State. In 1905, leaders of the Five Tribes called for a constitutional convention for all of the area then known as the Indian Territory. *See Governor Haskell Tells of Two Conventions*, 14 CHRONS. OKLA. 187 (1936); Amos Maxwell, *The Sequoyah Convention*, 28 CHRONS. OKLA. 161 (1950); Amos Maxwell, *The Sequoyah Convention (Part II)*, 28 CHRONS. OKLA. 299 (1950). The delegates elected to this convention crafted a constitution which was then ratified by an overwhelming majority of the inhabitants of the area and submitted to Congress in a petition seeking admission of a new State of Sequoyah. *Proposed State of Sequoyah*, S. DOC. NO. 143, 59th Cong., 1st Sess. (1906).

The Sequoyah Constitution declared "[a]ll political power is vested in and derived from the people; is founded upon their will, and is instituted for the good of the whole" and affirmed "[t]he people . . . have the interest and exclusive right to regulate the internal government and police thereof, and to alter and abolish their Constitution and form of government whenever they may deem it necessary to their safety and happiness." *Id.* at 47 (Article I Sections 1 and 2 of the Sequoyah Constitution).

The petition submitting the Sequoyah Constitution to Congress specifically affirmed the representation of both "citizens of Indian tribes" and all others in the process that had crafted and ratified the Sequoyah Constitution "effectively and satisfactorily removed" "all legal obstacles" to creation of a single united State out of the lands of the Five Tribes. *Id*. at 26.

Thus, the leaders of the Five Tribes blazed the path that Congress promptly followed within a few months. Indeed, the Oklahoma Enabling Act bill which would incorporate the members of the Five Tribes in the statehood process that Congress soon passed was first introduced four days after leaders of the Five Tribes, prominently including the Chief of the Creek Nation, endorsed that very same approach in the petition to admit the State of Sequoyah. *See* H.R. 12707, 59th Cong., 1st Sess. (1906).

The successful H.R. 12707 bill notably differed from another bill introduced the month before submission of the Sequoyah petition which *did not* provide for incorporation of the members of the Five Tribes with all others in the statehood process. H.R. 441, 59th

Cong., 1st Sess. (1905). That bill instead included a provision excluding the Five Tribes lands from the new State of Oklahoma until they gave a separate consent to the President. But Congress rejected such an approach which did not guarantee the full inclusion of the tribes in the process of creating the new State and only gave them a choice to "opt in" to join after it was founded without them.

Congress instead chose the approach of H.R. 12707 and followed the Sequoyah precedent by incorporating the people of the Five Tribes *ab initio* into the body politic and thus afforded them ample influence from the outset and throughout the process of forging the constitution and government of the new State.

In the five months following the Sequoyah petition and introduction of H.R. 12707 before it was enacted on June 16, 1906, there is another revealing "dog that did not bark." For when efforts were made during prior sessions of Congress to enact a statehood bill for Oklahoma, the Five Tribes had sent formal protests to Congress objecting. But no such protest was submitted following the Sequoyah petition because by this point the Five Tribes acquiesced to joint statehood through a process where their members would be represented.

Indeed, before the Sequoyah Convention leaders of the Five Tribes convened at the Turner Hotel in 1905 and agreed in writing that if their efforts to obtain a separate state for the Five Tribes failed in Congress they would support and not oppose the formation of a single state composed of the lands they occupied and the land of the neighboring Oklahoma Territory. *See Governor Haskell Tells of Two Conventions*, 14 CHRONS.

OKLA. 187, 198 (1936); Amos Maxwell, *The Sequoyah Convention*, 28 CHRONS. OKLA. 161, 182 (1950); Amos Maxwell, *The Sequoyah Convention (Part II)*, 28 CHRONS. OKLA. 299, 331 (1950).

When Congress did not move to admit the proposed State of Sequoyah out of just Indian Territory and proceeded instead with combining the two territories as a single State of Oklahoma, the Speaker of the House invited the leaders of the Five Tribes to file a formal "protest against joint statehood." *See Governor Haskell Tells of Two Conventions*, 14 CHRONS. OKLA. 187, 203 (1936). In keeping with the 1905 agreement, the leaders of the Five Tribes declined to protest and informed the Speaker of the House that "if Congress would not give them separate statehood they would be satisfied with single statehood." *Id.*

The role of the Sequoyah Convention and members of the Five Tribes in the formation of the State of Oklahoma was unique and powerful. The provisions of the Sequoyah Constitution are largely embodied in the Oklahoma Constitution. Maxwell, 28 CHRONS. OKLA. at 327–29. From the outset of the new government the members of the Five Tribes have served in key roles, including one of the first elected Oklahoma Senators and the District Attorney who prosecuted McGirt.

As a lasting tribute to the role of the Five Tribes in founding Oklahoma, the constitutional convention included a provision in the Oklahoma Constitution creating the Great Seal of the State of Oklahoma incorporating a five-pointed star emblazoned with the ancient seals of the Five Tribes:

See OKLA. CONST. art. VI, § 35. Fittingly, this design was adapted from the seal designed at the Sequoyah Convention which paved the path Congress followed:

See 1 OKLAHOMA RED BOOK 667–668 (1912); S. DOC. NO. 143, 59th Cong., 1st Sess. 82 (1906) (Sequoyah Constitution Article XVI Section 1).

The Great Seal of the State of Oklahoma is an apt illustration of the appropriate and lawful method that Congress used to achieve statehood for Oklahoma and the admission of the members of the Five Tribes as fully part of American life in the new State they played a key role in founding. Congress did not fail to achieve its ends by choosing a unique legal approach over less respectful means.

II. The express incorporation of members of the Five Tribes into the body politic that created the State of Oklahoma meets the *Solem* disestablishment test.

A. The text of the Oklahoma Enabling Act expresses Congress's intent to dissolve the reservations through a popular transfer of political sovereignty and no provisions of the Enabling Act or the Five Tribes Act contradict or negate this intention.

Having settled on the approach pioneered by the Sequoyah Convention and legitimatized by leaders of the Five Tribes to transfer political sovereignty and dissolve five separate reservations created in treaties by incorporating members of the Five Tribes into the statehood process, Congress addressed in the very first section of the Enabling Act the key legal question of what if anything would survive from prior treaties entered into by the tribal governments on behalf of their members. While summoning a convention of delegates representing the members of the Five Tribes along with all others who were therefore empowered to dissolve all prior legal bonds and obligations and adjust, cast aside, or keep their existing governments "at their own pleasure," *Luther v. Borden*, 48 U.S. 1, 47 (1849), Congress carefully provided the convention would not "limit or impair the rights of person or property pertaining to the Indians." 34 Stat. 267. But Congress did not "preserve[] *tribal* rights" from the awesome sweep of the constitutional force of the people acting in a convention as McGirt claims. Pet. Br. 4 (emphasis added).

Congress protected the individual "rights of person or property" created by treaties and agreements with the Five Tribes and other tribal governments since it would have been inappropriate and inconsistent with due process for such rights to be unilaterally dissolved. But Congress chose not to undercut its very purpose in the Oklahoma Enabling Act—to unite all the lands of the Five Tribes in the Indian Territory together with the lands of the Oklahoma Territory to form a single state—by preserving from the sweep of the convention's force the sovereign and treaty rights of tribal governments.

As a result of the distinction Congress drew in the first section of the Enabling Act between "rights of person or property" and rights of tribal governments which were not preserved, the obligations imposed on the United States in treaties with the Five Tribes that survived statehood are those giving individuals rights. For example, a treaty with the Creek Nation gave three specific individuals lifetime annuities, 7 Stat. 366, 367, and the Creek Allotment Agreement gave each member of the tribe the right to a homestead of forty acres of land that "shall be nontaxable . . . for twenty-one years." 31 Stat. 861, 863. These "rights of person or property" are protected by the first section of the Enabling Act. But Article IV of the 1856 treaty with the Creeks and Seminoles, 11 Stat. 699, 700—upon which McGirt principally relies for his claim that there remains today an undissolved Creek reservation where he committed his crimes—was a right of the Creek and Seminole tribal governments, not a right of person or property, and that treaty provision was thus not saved by the first section of the Enabling Act.

The provision on which McGirt's case rests specifically gave a right of consent to "the legislative authority of the tribe." *Id.* This right of tribal governments was simply not among the "rights of person or property" Congress preserved in the Enabling Act, and it thus was displaced and superseded by the actions of a constitutional convention representing the people of the Creek Nation which therefore "was clothed with full authority and power." S. DOC. NO. 143, 59th Cong., 1st Sess. 26 (1906).

The exclusion of the rights of tribal governments in the preservation provision speaks volumes, as does the near silence of McGirt and supporting *amici* on the provision in which Congress carefully included only "the rights of person or property" but excluded the distinct and separate rights of tribal governments. *See* Pet. Br. 38 (quoting language without any analysis or discussion); Muscogee (Creek) Nation Amicus Br. 25–26 (block quoting language).

McGirt and supporting *amici* refer more to section three of the Enabling Act which contains the common directive to States concerning the status of land when it is "owned or held by any Indian, tribe, or nation." 34 Stat. 269–70; *see, e.g.*, Pet. Br. 12; Cherokee Nation Amicus Br. 22. But this very common directive in an enabling act to include a disclaimer in a new State's constitution of Indian owned or held land does nothing more than it says and does not govern the land at issue here that is no longer "owned or held by any Indian, tribe, or nation." Moreover, the rejected H.R. 441 bill contained language that would actually have excluded the lands of the Five Tribes from the new State—

H.R. 441 would have expressly provided the new State did not "include any territory which by treaty with such Indian tribe is not without the consent of such tribe to be included within the territorial limits or jurisdiction of any State or Territory, but all such territory shall be excepted out of the boundaries and constitute no part of the State of Oklahoma until said tribe shall signify their assent to the President of the United States to be included within said State." H.R. 441, 59th Cong., 1st Sess., § 1 (1905). And in further contrast to the Enabling Act that Congress did adopt, this proposed measure requiring a separate assent by each tribe *did not* provide for incorporation of all the members of the Five Tribes into the body politic that came together in convention to form a new state. *See* H.R. 441, 59th Cong., 1st Sess. § 2 (1905). These were alternative approaches, and Congress chose to follow the lead of the Five Tribes in the Sequoyah statehood effort to use a single body politic to form a state rather than have separate assent given by each of the tribes.

McGirt and *amici* also neglect to mention or explain a key omission in Oklahoma's Enabling Act of the language giving Congress "absolute jurisdiction" over lands owned and held by Indians and Indian tribes that is included in the enabling acts of eight states and the part of the Oklahoma Enabling Act that addressed the Arizona and New Mexico territories. *Compare* 34 Stat. 270, *with* 25 Stat. 676, 677 ("Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States"); 28 Stat. 108 (same); 34 Stat. 279 (same); 36 Stat. 559, 569 (similar); 82 Stat. 339 (similar).

To be sure, the Federal government maintained its power over Indian affairs in Oklahoma and elsewhere, as section one of the Enabling Act affirms, 34 Stat. 267–68, and that power includes an ongoing authority concerning lands that are in fact actually owned or held by Indian tribes or encompassed within Indian reservations. This is true within every State and does not at all contravene the intent of Congress for the incorporation of the Five Tribes into the body politic in the statehood process to achieve a true union of the lands of the Five Tribes and the Oklahoma Territory.

McGirt and supporting *amici* also rely very heavily on Section 28 of the Five Tribes Act which provided "the tribal existence and present tribal governments" of the Five Tribes were "continued in full force and effect for all purposes authorized by law." 34 Stat. 148 (1906). But this provision was enacted on April 26, 1906, after tribal leaders demonstrated and confirmed statehood could be legally and appropriately achieved by incorporation of the tribes into the body politic and a constitutional convention without having to first abolish the tribal governments. And there were many salutary reasons to keep the governments in existence even though all of their lands were slated to be united together within the Oklahoma Territory into the State of Oklahoma.

In particular, federal authority over restricted land continued long after statehood to deal with certain members of the tribes that Congress and the leaders of the tribes recognized were not yet ready to have the restrictions and federal protections removed. For the specific lands that would still be within the special

responsibility of the federal government for decades, it was useful and helpful to have tribal governments to look after and carry out federal policy concerning these specific lands and their owners who required continued assistance and protection.

In all events, the Five Tribes Act predated passage of the Oklahoma Enabling Act by over a month and it would be well over a year before the constitution was drafted and ratified to create a new State government. Both of these events would not occur until after the statutorily set expiration of the tribal governments on March 4, 1906. Creek Allotment Agreement, 31 Stat. 861, 872 ("The tribal government of the Creek Nation shall not continue longer than March fourth, nineteen hundred and six, subject to such future legislation as Congress may deem proper."); Cherokee Allotment Agreement, 31 Stat. 848, 858; Indian Appropriation Act, 32 Stat. 982, 1008; Curtis Act, 30 Stat. 495, 512. The tribal government termination deadlines were set beginning with the Curtis Act with a view toward the lands of the Five Tribes being "prepared for admission as a State to the Union" and that process was nearly but not quite complete by March 4, 1906. 30 Stat. 512. Congress extended the deadlines indefinitely since statehood was not yet achieved. But Congress never disclaimed the effect the coming statehood process incorporating the people of the Five Tribes would have on the status of tribal governments and reservations by virtue of passage of the Enabling Act, the election of the delegates to the constitutional convention, the framing of the Oklahoma Constitution, and ratification by a vote of all of the people of the two territories.

B. The contemporaneous view expressed by the Creek Nation Chief and other leaders of the Five Tribes affirmed that Congress could dissolve reservations and unite the lands of the Five Tribes and the Oklahoma Territory by incorporating the members of the tribes in the statehood process.

The contemporaneous legal view expressed in the petition submitted to Congress to admit Sequoyah right before introduction and passage of the Enabling Act was that incorporating members of the Five Tribes into the process by giving them the right to elect and serve as delegates and vote on the constitution was a sufficient and appropriate means of obtaining the consent of the tribes to the dissolution of the rights of tribal governments to the five treaty-created domains in the Indian Territory. This direct evidence of how the tribal leaders viewed the matter at the time is highly probative. *Washington State Department of Licensing v. Cougar Den, Inc.*, 139 S. Ct. 1000, 1016, 1019 (2019) (Gorsuch, J., concurring).

The national councils of only three of the five tribes passed resolutions to approve and give consent to the Sequoyah Constitution. S. DOC. NO. 143, 59th Cong., 1st Sess. 25–26, 44–46 (1906). Even so, Creek Nation Chief Pleasant Porter affirmed in the petition to admit Sequoyah that since "all electors of the Indian Territory" including "citizens of Indian tribes" participated in electing delegates and ratifying the constitution that they crafted, the Sequoyah Convention "was clothed with full authority and power" to unite the five domains of the Indian Territory into a single state. *Id.* at 26.

Chief Porter specifically asserted in the petition that the process that did not include separate consent given by the national councils of the Creek Nation and the Seminole Nation to the Sequoyah Constitution nonetheless "effectively and satisfactorily removed" "all legal obstacles," which most prominently included treaty provisions concerning the status of the lands of these two tribes. *Id.*

This powerful evidence of contemporaneous legal understanding expressed by no less than the Chief of the Creek Nation in his capacity as the President of the Sequoyah Convention in a petition to Congress—which likely may well have been the impetus behind the selection of the atypical approach to dissolving the reservations which Congress soon adopted—is highly probative confirmation that the reservations were dissolved successfully through the incorporation of the members of the Five Tribes into the statehood process.

Moreover, judicial opinions that were issued within living memory of Oklahoma's highly unique statehood process likewise attributed proper significance to the decision of Congress to take the approach that had been originally pioneered by leaders of the Five Tribes. *See United States v. Allen*, 171 F. 907, 920–21 (E.D. Okla. 1909); *Wah-tsa-e-o-she v. Webster*, 172 P. 78, 79 (Okla. 1918).

C. The State's exercise of dominion and sovereignty for over a century confirms disestablishment.

As the Court has long recognized in disestablishment and other analogous cases, a State's long-standing assumption of jurisdiction and exercise of sovereignty is "entitled to considerable weight." *See Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 605 n.28 (1977). This is particularly true where the State demonstrates its intent to assume jurisdiction by exercising significant dominion and sovereignty over an area, such as where a State holds elections, assesses and collects taxes, constructs highways and public buildings, enforces state laws, or establishes a state police force, to name just a few examples. *See, e.g.*, *Rhode Island v. Massachusetts*, 45 U.S. 591, 638 (1846); *Louisiana v. Mississippi*, 202 U.S. 1, 55, 57 (1906); *Michigan v. Wisconsin*, 270 U.S. 290, 306–07 (1926); *Massachusetts v. New York*, 271 U.S. 65, 95–96 (1926); *Arkansas v. Tennessee*, 310 U.S. 563, 567 (1940). Here, the State of Oklahoma consistently exercised all these traditional state functions in all of the areas of Oklahoma that were not owned or held by members of Indian tribes or tribal governments from the moment of statehood on through today.

Indeed, Oklahoma has prosecuted major crimes involving members of Indian tribes in its jurisdiction for the last 112 years. Pet'r's Br. 3. Meanwhile, the federal government has not charged a single case involving an Indian on McGirt's theory that eastern Oklahoma has been five separate reservations and part of Indian country since the State's creation. *Id.*

The decision in *Solem* is inapposite. There, the state and federal governments *both* had prosecuted major crimes involving members of Indian tribes in the disputed area—an entirely different situation than the present case where the State alone exercised criminal authority in all the areas not owned or held by Indians and tribal governments.

Likewise, this is not a case of mere salutary neglect by a tribal government and inconsequential inclusion of a small village within the wider regulatory ambit of a State as the Court addressed in *Nebraska v. Parker*. A quaint little town such as Pender, Nebraska, can easily escape the notice of a rightful tribal authority for decades and also avoid giving any person or entity a vital and pressing interest to contest its status as either on or not on a reservation. In absolute and utter contradistinction, the vast reaches of Oklahoma which are implicated in this case have seen an uncountable number of circumstances routinely occurring from the very moment of statehood in which it would have been inconceivable for tribal governments, people accused of serious crimes, and taxpayers to fail to contest the State's authority in court. This history cannot be reasonably explained other than by concluding every interest concerned in the matter for decades must certainly have thought there was not even the faintest cloud of a doubt over the State's authority. This is especially probative evidence Congress must have intended to and did dissolve the reservations through the statehood process. As the Court noted long ago, this kind of evidence does deserve ample weight in disestablishment cases. *Rosebud*, 430 U.S. at 605 n.28.

CONCLUSION

The Court should affirm.

Respectfully submitted,

Martin T. Booher
Robert D. Cheren
Counsel of Record
BAKER & HOSTETLER LLP
2000 Key Tower
127 Public Square
Cleveland, Ohio 44114
(216) 861-6648
rcheren@bakerlaw.com

Mark W. DeLaquil
BAKER & HOSTETLER LLP
1050 Connecticut Ave., NW
Washington, D.C. 20036
(202) 861-1527

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