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 FOR PETITIONER

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QUESTION PRESENTED

Whether Oklahoma courts can continue to unlawfully exercise, under state law, criminal jurisdiction as "justiciable matter," in Indian Country over Indians accused of major crimes enumerated under the Indian Major Crimes Act—which are under exclusive federal jurisdiction.

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INTRODUCTION

This case is about whether Congress disestablished the reservation of the Muscogee (Creek) Nation. The bedrock rule that answers the question is this: Once a federal Indian reservation is established, only Congress can disestablish it. Hence, once "a block of land is set aside for [a] Reservation and no matter what happens to the title of individual plots," the area "retains its reservation status until Congress explicitly indicates otherwise." *Solem v. Bartlett*, 465 U.S. 463, 470 (1984).

To discern whether Congress made the requisite "explicit[]" statement, *id.* at 477, the Court applies a "well settled" framework that was reaffirmed, unanimously, just four Terms ago. *Nebraska v. Parker*, 136 S. Ct. 1072, 1078-79 (2016). "[W]e start with the statutory text," because "statutory language" is the "most probative" evidence of congressional intent. *Id.* at 1079. We then look to the "history surrounding the [legislation's] passage," and to the "subsequent demographic history of the opened lands," *id.* at 1080-81—but only to see if they supply evidence of congressional intent that is "unequivocal." As always, the text is the lodestar; never has the Court found disestablishment absent clear text.

That much is required because of what is at stake. Indians fought, bled, and died for the reservations established in their treaties. The Creek certainly did, marching the Trail of Tears to modern-day Oklahoma. True, the Constitution gives Congress the authority to break the promises made to induce such sacrifices, and to disestablish even reservations Congress promised to maintain. But for decades and without exception, this

Court has adhered to the rule *Parker* reaffirmed: that choice is for Congress to make—speaking clearly, via statute.

In *Murphy v. Royal*, 875 F.3d 896 (10th Cir. 2017), the Tenth Circuit correctly applied these principles to conclude the Creek reservation endures. The relevant statutes nowhere use the "hallmark" disestablishment language this Court has identified as manifesting Congress's intent to go beyond altering land title and to diminish reservation boundaries, such as "cession" to the United States, restoring lands to the "public domain," and so on. *Parker*, 136 S. Ct. at 1079. And here, the absence of clear disestablishment language is particularly telling, because hallmark language was close at hand. The diminishments of Creek lands in 1832, 1856, and 1866, all used hallmark language of "cession." When Congress set goals for negotiators dispatched to the Creek in 1893, it told them by statute to seek "cession." And when those agents returned, they informed Congress that the Creek refused to "cede any portion of their land." Dep't of the Interior, H.R. Doc. No. 53-1, at LVX (3d Sess. 1894) ("1894 Dawes Report") (*Murphy* J.A. 19). Yet when Congress acted, it chose allotment among Creek citizens—not cession—and used the precise language this Court has held *insufficient* to disestablish.

Faced with this reality, Oklahoma has contended not that any particular statute effected disestablishment, but that this Court should infer disestablishment from the "'overall thrust' of congressional action," which Oklahoma divines "spread out across numerous statutes" that collectively yielded disestablishment "by

statehood" in 1907. Okla. *Murphy* Br. 52; Okla. *Murphy* Reply Br. 15; *Murphy* Arg. Tr. 5-6. Oklahoma emphasizes that Congress allotted Creek lands, provided for statehood, limited Creek government, and even enacted legislation that would have abolished the Creek Nation in the future. From these actions Congress *did* take, Oklahoma would have this Court hold that Congress *also* undertook disestablishment, even though Congress nowhere memorialized that action in a statute. Surely, Oklahoma says, a Congress that took these actions must have wanted to go all the way.

The answer to this argument is the answer to every such argument: the text. This Court "will not presume with [Oklahoma] that any result consistent with [its] account of the statute's overarching goal must be the law." *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1725 (2017). That is because so often—as here—legislation reflects "the art of compromise." *Id.* As a result, the Court "will presume more modestly … 'that [the] legislature says … what it means and means … what it says.'" *Id.*

Put otherwise, what decides this case is that on each critical issue, when the rubber met the road, Congress enacted text that came down decisively on the side of preserving rather than disestablishing the Creek reservation. Having aimed at "cession" of lands to the federal government, Congress accepted allotment among tribal members. After initially legislating to abolish the Creek government, Congress enacted legislation to continue it indefinitely, doing so precisely to prevent the land from entering the "public domain." And while granting settlers' desire for statehood,

Congress preserved tribal rights and federal authority over tribes. Congress, in short, never legislated to disestablish the Creek reservation. And because the Creek reservation endures, the federal government—not Oklahoma—has jurisdiction over Petitioner's alleged crimes. As Chief Judge Tymkovich observed, this Court's "precedent precludes any other outcome." *Murphy*, 875 F.3d at 966 (Tymkovich, J. concurring in denial of rehearing en banc).

Without text to support it, Oklahoma resorts to claims about "settled expectations" and "turmoil," Okla. *Murphy* Br. 3, 56, urging this Court to enact the text that Congress chose not to provide. But *Parker* rejected similar claims, and there is no reason for a different outcome here. For one thing, on inspection, "[i]t turns out . . . that the State's parade of horribles isn't really all that horrible." *Wash. State Dep't of Licensing v. Cougar Den, Inc.*, 139 S. Ct. 1000, 1020 (2019) (Gorsuch, J., concurring). For another, the State ignores equitable doctrines, which this Court cited in *Parker*, that are available should any problems arise. *Parker*, 136 S. Ct. at 1082 (citing *City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197 (2005)).

More important, Oklahoma's proposed cure is worse than the perceived disease. "If a statute needs repair, there's a constitutionally prescribed way to do it. It's called legislation." *Perry v. Merits Sys. Prot. Bd.*, 137 S. Ct. 1975, 1990 (2017) (Gorsuch, J., dissenting). True, it is tempting to short-circuit that process. But "judicial tinkering with legislation is sure only to invite trouble." *Id.* If there are problems with adhering to treaty

promises, it is for Congress—not this Court—to address them.

STATEMENT OF THE CASE

A. Historical Background.

1. The Creek Reservation.

The Creek Nation, one of the "Five Civilized Tribes," once occupied Alabama and Georgia. *Murphy*, 875 F.3d at 932 & n.38. In the 1820s and 1830s, Alabama purported to extend its jurisdiction over Creek lands and attempted to "destroy[] their … form of government"; "[r]oads were to be cut in every direction through their territory; white men were permitted to purchase and take possession of their improvements." *United States v. Creek Nation*, 476 F.2d 1290, 1292-93 (Ct. Cl. 1973). Although "these intrusions … were contrary to Federal law," the federal government "determined it would not oppose" them, *id.*, and ultimately the Creeks were "forcibly remove[d]" to "what is today Oklahoma"—Indian Territory. *Murphy*, 875 F.3d at 932.

Given this history, the Creek demanded the strongest protections for their new reservation. Federal treaties in 1832, 1833, and 1856 guaranteed the Nation's rights within its borders. *Id.* at 932-33. In return for the Nation's "ced[ing] … all their land, East of the Mississippi," Treaty with the Creeks, art. I, Mar. 24, 1832, 7 Stat. 366 ("1832 Treaty"), the government "solemnly guarantied" the "Creek country west of the Mississippi," *id.* art. XIV, reaffirming that it "shall constitute and remain the boundaries of the Creek country." Treaty with the Creeks, arts. II, III, Aug. 7,

1856, 11 Stat. 699 ("1856 Treaty"); *see* Treaty with the Creeks, arts. II, VII, Feb. 14, 1833, 7 Stat. 417 ("1833 Treaty"). These treaties "secured" to the Creek an "unrestricted right of self-government" and "jurisdiction over persons and property, within [its] limits." 1856 Treaty arts. IV, XV; 1832 Treaty art. XIV (similar).

As double protection, the Creek demanded and received a fee-simple patent. The Indian Removal Act provided that tribes could obtain such patents "if they prefer." Act of May 28, 1830, ch. 148, § 3, 4 Stat. 411. The 1833 Treaty authorized a patent for the land "assigned … by this treaty[.]" Art. III. The patent issued in 1852. *Woodward v. De Graffenried*, 238 U.S. 284, 293 (1915).

Twice, the initial reservation boundaries were modified, each time using language of cession. In 1856, the Nation "cede[d]" lands to the Seminoles. 1856 Treaty arts. I, V. In 1866, the Nation "cede[d] … to the United States" lands in return for $975,168. Treaty with the Creek, art. III, June 14, 1866, 14 Stat. 785 ("1866 Treaty"). The rest remained "forever set apart as a home for [the] Creek." *Id.*

2. Allotment Era.

Soon after, the "Allotment Era" swept the West. During this era, "Congress increasingly adhered to the view that the Indians tribes should abandon … communal reservations and settle into an agrarian economy on privately-owned parcels." *Solem*, 465 U.S. at 466. Congress passed statutes that "allotted" some lands to tribal members and opened others to non-Indian settlement. "Initially, Congress legislated … on a

national scale" in the 1887 General Allotment Act, before moving to a "reservation-by-reservation" approach. *Id.* at 467.

In allotment's heyday, Congress's assimilationists believed allotment presaged "the imminent demise of the reservation," and they legislated "partially to facilitate the process." *Id.* at 468. Even so, allotment statutes varied, each reflecting "a unique set of tribal negotiation and legislative compromise." *Id.* at 467. As the 20th century dawned, those compromises increasingly reflected skepticism of assimilationism: The "financial and intellectual forces behind assimilation and allotment were close to exhaustion." *Felix S. Cohen's Handbook of Federal Indian Law* § 1.04, at 78 (Nell Jessup Newton eds. 2012) ("*Cohen's*"). Policymakers began "questioning whether total assimilation was desirable at all." Frederick Hoxie, *A Final Promise: The Campaign to Assimilate the Indians 1880-1920*, at 112-13 (1984).

Given all that, the Court has not asked what legislators expected, vaguely, to happen, and it has declined to paint with a broad brush. Instead, it assesses the "effect of [each] act," examining the "language" to determine whether it effected disestablishment. *Solem*, 465 U.S. at 469.

3. Allotment And The Creek.

The Allotment Era played out in Indian Territory too—its initial ambitions, and Congress's retreat.

As elsewhere, the spur was Congress's skepticism of "communal" land tenure. *Solem*, 465 U.S. at 466. Settlers "pressured Congress to break up the tribal land

base, [and] attach freely alienable individual title." *Murphy*, 875 F.3d at 934. Meanwhile, Congress came to believe that, while the Five Tribes' treaties provided that lands should be held "for the equal benefit of the citizens," "in practice" some tribal members "appropriate[d] to their exclusive use" the best lands. *Woodward*, 238 U.S. at 297, 299 n.2.

In 1893, Congress charged the Dawes Commission with negotiating changes. Act of Mar. 3, 1893, ch. 209, § 16, 27 Stat. 612 ("1893 Act"). Congress hoped the Creek might agree to "cession of [all] or some part [of their territory] to the United States," as before. *Id.* Congress directed the Commission to negotiate "first, … allotment," and "secondly, … cession … of any lands not found necessary to be so allotted." *Id.*

Already, Congress foresaw that the Indian Territory might become a new State—but even at the Allotment Era's height, Congress did not believe statehood required disestablishment. Congressmen did not see why these reservations "might not be respected and protected, and yet have them brought into the Union." 24 Cong. Rec. 268 (1893) (Sen. Perkins). Hence, the Commission assured the Creek that it did not wish "to interfere at all with the administration of public affairs" but only to "secur[e] … their just rights under the treat[ies]." Dep't of the Interior, H.R. Doc. No. 54-5, at LXXXI (1st Sess. 1895) ("1895 Dawes Letter") (*Murphy* J.A. 23).

This approach, too, was rejected. The Commission reported that the Creek "would not, under any circumstances, agree to cede any portion of their lands." 1894 Dawes Report at LVX (*Murphy* J.A. 19). Given

"this unanimity," the Commission "abandon[ed]" this approach. *Id.*

Switching focus to obtaining a "cession"-free allotment agreement, Congress enacted laws in 1897 and 1898 that sought "to coerce the tribes to negotiate." *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1441 (D.C. Cir. 1988); *Murphy*, 875 F.3d at 934. The acts abolished Creek tribal courts, though not the Creeks' legislative jurisdiction over their lands, *infra* at 35-37.

This pressure induced an allotment agreement, which Congress ratified in 1901. 875 F.3d at 934-35. The Dawes Commission advised that matters would have been "immeasurably simplified" had the Five Tribes agreed to "cession to the United States … at a given price." Dep't of the Interior, H.R. Doc. No. 56-5, at 9 (2d Sess. 1900) ("1900 Dawes Report") (*Murphy* J.A. 27). But it emphasized "the great difficulties which have been experienced in inducing the tribes to accept allotment," and explained "a more radical scheme of tribal extinguishment" was "impossible." *Id.* (*Murphy* J.A. 28).

The agreement thus tilted dramatically toward keeping Creek land in Creek hands. While other tribes agreed to sell substantial tracts to non-Indians, the Creek agreement provided that "[a]ll lands … shall be allotted among [Creek] citizens." Act of Mar. 1, 1901, ch. 676, § 3, 31 Stat. 861 ("Allotment Agreement"). The sole exception involved "town sites." *Id.* § 2. These sites had outsized value, and some towns were home to up to 5,000 people, *see Johnson v. Riddle*, 240 U.S. 467, 476-77 (1916), but this land accounted for only 10,694 acres of the Nation's 3-million-plus-acre reservation. Report of

Dep't of Interior, 1910, vol. II, at 69 (1911), http://bit.ly/2pfnmVr.

The agreement recognized the Creek government's legislative authority over "the lands of the tribe, or of individuals after allotment," and specified that it "shall in no wise affect the provisions of existing treaties … except so far as inconsistent therewith." Allotment Agreement §§ 42, 44. Shortly after, courts confirmed that Congress had not divested the Five Tribes' jurisdiction over their reservations, and had instead "permit[ted] the continued exercise" of the tribes' "legislative … power" "within [their] borders," enforced by federal officials. *Morris v. Hitchcock*, 194 U.S. 384, 389, 393 (1904); *see Morris v. Hitchcock*, 21 App. D.C. 565, 598 (D.C. Cir. 1903). In 1905, the Eighth Circuit applied this ruling to the Creek reservation, affirming Creek authority to legislate over non-Indians in towns. *Buster v. Wright*, 135 F. 947, 949 (8th Cir. 1905).

The agreement put an expiration date on this authority, providing for dissolution of the Creek government by March 4, 1906. But this only presaged another reversal. The agreement made dissolution "subject to such further legislation as Congress may deem proper." Allotment Agreement § 46. And when the moment came, Congress passed the 1906 Five Tribes Act. Disavowing dissolution, the Act "continued" the "present tribal governments … in full force and effect for all purposes authorized by law." Act of Apr. 26, 1906, ch. 1876, § 28, 34 Stat. 137 ("FTA"). The Act recognized the Nation's continuing authority to pass "act[s], ordinance[s]," or "resolution[s]." *Id.*; *see generally*

Harjo v. Kleppe, 420 F. Supp. 1110, 1126-32 (D.D.C. 1976).

This reversal was not mere administrative convenience. Congress understood that vast swaths of Indian Territory had been granted conditionally to the railroads "whenever the Indian title shall be extinguished" and "said lands become a part of the public lands of the United States." Act of July 25, 1866, ch. 241, § 9, 14 Stat. 236. Congressmen thus explained that the land was Indian land "so long as the Indians exist as a tribe"; however, "the moment the tribal relation terminates the tribal interest in the property ceases," and it "necessarily revert[s] to the Government," triggering the "railway grant." 40 Cong. Rec. 2976 (1906) (Sen. McCumber). They also emphasized that legislation "should be passed extending … the tribal relations, in order that no rights may lapse or no rights may be transferred to railroad companies or to anybody else." *Id.* at 3053 (Sen. Aldrich).

As the push for statehood continued, deep divisions remained. The resulting legislation was "replete with compromises and maneuverings that added great complexity and ambiguity to the administration of Indian affairs." Tanis C. Thorne, *The World's Richest Indian: The Scandal over Jackson Barnett's Oil Fortune* 37 (2003) ("Thorne"). Pro-tribal legislators fought to protect Indian rights from those who had interests of non-Indian settlers in mind. *Id.* at 39. The decision to make Oklahoma a State was a substantial victory for settlers. But tribes and their allies won victories too. For one, in a suite of legislative gives-and-takes embodied in the Five Tribes Act and the Oklahoma

Enabling Act, pro-tribal forces "leverage[d] their demand for retroactive federal control over Indians of high blood quantum against the white Oklahomans' desire for statehood." *Id.*; *see* FTA § 19.

An even more important "victory for the [pro-tribal] protectionists" was that the Enabling Act "reinforced … federal authority over Indians," imposing the "condition that the forthcoming Oklahoma state constitution could not limit federal authority over Indians within its boundaries." Thorne at 41. The Enabling Act thus preserved federal supervision over Indians and required the new State to disclaim any rights over Indian lands. Act of June 16, 1906, ch. 3335, §§ 1, 3, 34 Stat. 267 ("Enabling Act"). These provisions reaffirmed the United States' "control … of the large Indian reservations and Indian population of the new state." *Coyle v. Smith*, 221 U.S. 559, 570 (1911).

At statehood, the Indian Territory remained mostly controlled by Indians and the federal government. Of 19.6 million acres, more than 16.6 million remained inalienable and immune from state taxation, largely in restricted allotments. H.R. Rep. No. 60-1454, at 2-3 (1908).

4. Assaults On The Creek Nation.

Those who lost battles in Congress refused to accept statutes as the last word. So while the Creek suffered setbacks to land and government in ensuing decades, the reason principally was lawlessness, not law.

The Bureau of Indian Affairs ("BIA") opposed Congress's decision to preserve the Creek government. *Harjo*, 420 F. Supp. at 1129-30. So, in a campaign of

"bureaucratic imperialism," it "behaved as though it had been successful" in forestalling that result, "deliberate[ly] attempt[ing]" to "prevent [the Nation's government] from functioning." *Id.* at 1130. It "usurp[ed] … power over the selection of the [Creek's] Principal Chief," ensured that incumbents "would be compliant with its wishes," and treated these chiefs—not the Creek National Council—as "the sole repository of Creek governmental authority." *Id.* at 1132-33. These steps "considerabl[y] … demoraliz[ed] the Creek government." *Id.* at 1133. Nonetheless, Congress recognized the Council's continuing authority over Creek lands. In 1909, it "ma[de] approval of the National Council a condition precedent for" its plan to equalize allotments. *Id.* The "Council rejected the Congressional scheme," forcing Congress to return five years later. *Id.* at 1133-35.

The BIA also did not protect the Creek from worse events on the ground. Angie Debo, *And Still the Waters Run* 167 (1940). Oil's discovery—found on the Creek reservation in 1901, as the Indian Territory hurtled toward statehood—triggered "an orgy of plunder and exploitation probably unparalleled in American history," as Creek citizens were swindled out of allotments. *Id.* at 91; *see* Tim Vollmann & M. Sharon Blackwell, "*Fatally Flawed": State Court Approval of Conveyances by Indians of the Five Civilized Tribes—Time for Legislative Reform*, 25 Tulsa L.J. 1, 3 (1989). There was "legalized robbery" through courts, and entire land companies formed for the "systematic and wholesale exploitation of the Indian through evasion or defiance of the law." Debo at 117, 182. State courts and the Executive Branch conspired to undo alienation

restrictions on millions of acres of Indian-owned land. *Id.* at 117-20, 182-83.

Massive land tracts fell victim to the notorious Oklahoma guardianship system. An 1908 statute had given Oklahoma courts jurisdiction over estates of "minor[s] and incompetent[s]," a seemingly innocuous provision abused to devastating effect. Act of May 27, 1908, ch. 199, § 2, 35 Stat. 312. Many minors had substantial holdings of privatized lands and trust funds, "possess[ing] an estate varying in value from an average farm to the great and speculative wealth represented by an oil allotment." Debo 104. Court-appointed "guardians" quickly separated these minors from their wealth. "[P]lundering of children" "soon became a lucrative and highly specialized branch of the grafting industry." *Id.* at 103.

Adults were treated, remarkably, worse. Oklahoma courts regularly appointed guardians for adult, full-blood Indians whose restricted lands held valuable resources. Debo at 305. Indeed, it soon became "apparent that all Indians and freedman who owned oil property were mentally defective." *Id.* "Within a generation these Indians, who had owned and governed a region greater in area and potential wealth than many an American state, were almost stripped of their holdings." *Id.* at x.

Meanwhile, Oklahoma made outsized claims about its courts' jurisdiction, prosecuting Indians for crimes even on restricted allotments. *Ex parte Nowabbi*, 61 P.2d 1139, 1141-42 (Okla. Crim. App. 1936). Today, Oklahoma's courts acknowledge that their prior position was unlawful. *State v. Klindt*, 782 P.2d 401, 404 (Okla.

Crim. App. 1989); *State ex rel. May v. Seneca-Cayuga Tribe of Okla.*, 711 P.2d 77, 81 & n.17 (Okla. 1985).

5. Today's Creek Nation.

With the 1936 Oklahoma Indian Welfare Act, the Creek government "saw many of its powers restored," including judicial powers. *Murphy*, 875 F.3d at 964-65. Its new, federally ratified constitution confirmed that Creek "political jurisdiction" is coextensive with its 1866 reservation boundaries. Muscogee (Creek) Nation Const., art. I, § 2, http://bit.ly/2ODuKVG.

The Nation today is thriving. A driver of economic growth, it employs 5,000 people and commands an annual budget of $300 million (Tulsa's entire budget is roughly $800 million). The Nation builds roads, operates hospitals, offers educational services, and provides other community resources—helping Indians and non-Indians alike by putting its resources to work for rural communities that, otherwise, would be under-resourced. Creek *Murphy* Merits Br. 26-31.

The Creek have a federally trained police force, and cross-deputization agreements with the BIA and most of the 40 local governments within the reservation. *Id.* at 27. The Nation also has well-developed courts, whose jurisdiction "extend[s] to all the territory defined in the 1866 Treaty." Muscogee Code, tit. 27, § 1-102. A district court exercises criminal and civil jurisdiction; a seven-member Supreme Court hears appeals. *Id.* tit. 27.

6. *Murphy*.

In *Murphy*, the Tenth Circuit held unanimously that Congress never disestablished the Creek reservation.

The court began with the text. It observed that Oklahoma invoked not "any particular statutory text," nor any "'specific section'" indicating disestablishment, but instead "the overall thrust of" various statutes. 875 F.3d at 938-39. The Tenth Circuit analyzed Oklahoma's statutes and found they "do not, individually or collectively, show" disestablishment. *Id.* at 953. The court also scrutinized the history for further evidence of congressional intent. But Oklahoma's "mixed" and "conflicting" evidence, the court found, "falls short" of the unequivocal evidence *Parker* demands. *Id.* at 954. Hence, the Tenth Circuit invalidated the state-court conviction of Patrick Murphy, an enrolled Creek member, for a crime committed on the Creek reservation. *Id.* at 966.

This Court granted certiorari and heard oral argument. *Murphy* remains pending.

B. Factual Background.

Petitioner is an enrolled member of the Seminole Nation of Oklahoma. In 1997, he was convicted of first-degree rape by instrumentation, lewd molestation, and forcible sodomy in connection with acts allegedly committed within the 1866 boundaries of the Creek reservation. Pet. App. 1a. The jury recommended, and the trial court imposed, sentences of 500 years imprisonment on each of the first two charges, and life without the possibility of parole on the third, to be served consecutively. The Oklahoma Court of Criminal Appeals ("OCCA") affirmed. *Id.*

In August 2018, Petitioner—now 71—filed a petition for post-conviction relief based on *Murphy*, which the

Wagoner County district court denied. Pet. App. 5a. Petitioner appealed, and the OCCA affirmed. The OCCA noted Petitioner's argument that "his crimes were committed in … Indian Country, prohibiting Oklahoma courts from exercising jurisdiction." *Id.* at 2a. But the court found that, given this Court's grant of certiorari, "*Murphy* is not a final decision and Petitioner has cited no other authority that refutes [state] jurisdiction[]." *Id.* at 3a.

SUMMARY OF ARGUMENT

I.A-B. As in *Parker*, statutory text decides this case. In no statute did Congress employ "hallmark" disestablishment language—or, indeed, any clear disestablishment language. The reason is not that such language was unsuitable for Creek lands or Oklahoma. Hallmark language was used to diminish Creek lands in 1832, 1856, and 1866, and Congress instructed the Dawes Commission to seek "cession" again. But instead, yielding to Creek demands, Congress retreated and enacted the very language this Court has held is insufficient. The Creek reservation therefore endures.

I.C-D. The "history surrounding the passage of the" relevant statutes, and subsequent history in ensuing years, are no help to Oklahoma. This Court never allows legislative history (much less post-enactment legislative history), to substitute for clear text. And it has never found disestablishment unless some statute spoke clearly to disestablish. But regardless, the context here reinforces the conclusion the text yields. It shows that Congress understood that its retreat from "cession" language was weighty; that Congress believed that statehood and allotment were consistent with continued

reservation status; and that—in repealing the statute providing for the Creek's dissolution—Congress acted precisely to avoid the result Oklahoma claims Congress intended: Shifting control of the Creek reservation to the State. As for subsequent history, the "mixed" evidence does not support disestablishment. *Parker*, 136 S. Ct. at 1080-81.

II. Oklahoma's tale about the "'overall thrust' of congressional action" also cannot overcome the absence of clear text. Oklahoma relies on allotment of Creek lands. But allotment is "completely consistent with continued reservation status." *Mattz v. Arnett*, 412 U.S. 481, 497 (1973). Oklahoma points to Congress's legislation to limit Creek "territorial sovereignty" and eventually dissolve the Creek government. But Congress expressly disavowed dissolution, leaving intact the Creek government and its sovereignty. And Oklahoma insists that Congress regarded statehood and reservations as incompatible. But from the 1790s until today, statehood has coexisted with large Indian territories—and the Enabling Act explicitly preserved the federal role over Indians and limited Oklahoma's authority.

III.A. Oklahoma has urged the Court to discard the result the text yields based on concerns about "settled expectations." *Parker*, however, rejected identical arguments. Moreover, Oklahoma exaggerates the impact and ignores solutions that can minimize the claimed disruptions. To the extent problems remain, the Constitution lets Congress decide whether and how to address them.

III.B. The Solicitor General contends that, even if the Creek reservation endures, Congress gave Oklahoma criminal jurisdiction over Creek lands. But for four decades, this argument has met universal rejection. That is because the statutes foreclose it.

ARGUMENT

I. Congress Did Not Disestablish The Creek Reservation.

A. This Court Will Not Find Disestablishment Absent Clear Statutory Text.

In disestablishment cases, this Court asks whether Congress has eliminated reservations that the United States promised by treaty to preserve and that Tribes sacrificed land and blood to obtain. The test is therefore—as one would expect—stringent, and laser-focused on statutory text. *Parker* makes that clear.

As *Parker* unanimously explained, "'only Congress can'" disestablish; "its intent … must be clear"; and, "as with any other question of statutory interpretation," statutory text is the "'most probative evidence'" of that intent. 136 S. Ct. at 1078-79 (quoting *Solem*, 465 U.S. at 470; *Hagen v. Utah*, 510 U.S. 399, 411 (1994)). Thus *Parker* "beg[a]n with the text." *Id.* at 1079-80. And finding "none of the[] hallmarks of diminishment" that the Court's prior cases had identified, *Parker* "conclu[ded] that Congress did not intend to diminish." *Id.* at 1079-80. *Parker* duly examined "statements [from] legislators" suggesting that the reservation had vanished, and "subsequent demographic history" showing the "Tribe was almost entirely absent … for

more than 120 years." *Id.* at 1080-81. But the Court noted that "our precedents" make relevant only "unequivocal evidence," and the Court was unwilling to let "mixed historical evidence … overcome the lack of clear text[]." *Id.* at 1079-80.

This Court's approach is so rigorous because disestablishment cases sit at the intersection of three principles, each underscoring why this Court demands clarity in the text.

First, because only Congress can disestablish, congressional intent is paramount—and statutory text is the only unfailing evidence of that intent. "[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992); *see New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 543 (2019). Across substantive areas, the alpha and omega of statutory interpretation is the text. *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617, 630-31 (2018); *Ratzlaf v. United States*, 510 U.S. 135, 146-48 (1994). As *Parker* confirms, this remains true in reservation cases. 136 S. Ct. at 1079.

Second, the standard is even more demanding for sovereign rights. This rule, again, is not Indian-specific. *E.g.*, *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 726 (2003) (abrogation of immunity must be "unmistakably clear"); *see Raygor v. Regents of Univ. of Minn.*, 534 U.S. 533, 543-44 (2002). But the rule applies to tribes, too. *Parker*, 136 S. Ct. at 1079; *see Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 789-90 (2014). Appeals to "vague notions of … 'basic purpose,'"

Mertens v. Hewitt Assocs., 508 U.S. 248, 261 (1993), cannot justify abrogating sovereign rights.

Third, the standard is stricter still because of the "canons of construction applicable in Indian law," "rooted in the unique trust relationship [with] Indians." *Oneida Cty. v. Oneida Indian Nation of N.Y.*, 470 U.S. 226, 247 (1985). Treaties are "construed liberally in favor of the Indians," and the Court "refuse[s] to find that Congress has abrogated Indian treaty rights" "[a]bsent explicit statutory language." *Id.*; *see Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202-03 (1999). The same canon applies to statutes. *Cty. of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 269 (1992).

B. Congress Did Not Disestablish The Creek Reservation In The Relevant Statutes.

Here, as in *Parker*, the simple, dispositive, and undisputed fact is that none of the relevant statutes, from 1890 through statehood, contain clear language of disestablishment.

First, the relevant statutes contain none of the textual "hallmarks"—or any other clear text—that reveal Congress's intent to go beyond altering land title to "diminish reservation boundaries." 136 S. Ct. at 1079. In *Parker*, the Court catalogued examples of such language. Congress may provide an "[e]xplicit reference to cession" to the United States, or an "unconditional commitment … to compensate the Indian tribe for its opened land." *Id.* Alternatively, Congress may "restor[e]" tracts to "the public domain." *Id.* Or

Congress may use "other language evidencing the present and total surrender of all tribal interests." *Id.* Congress has often done so by providing that reservations are "discontinued," "abolished," or "vacated." *Mattz*, 412 U.S. at 504 n.22; *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 618 (1977); *Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351, 354 (1962); *see, e.g.*, Act of July 27, 1868, ch. 248, 15 Stat. 221; Act of July 1, 1892, ch. 140, 27 Stat. 62 ("*Seymour* Act"); Act of Apr. 21, 1904, ch. 1402, 33 Stat. 189, 218.

As in *Parker*, the relevant statutes here "b[ear] none of these hallmarks." 136 S. Ct. at 1079. There was no "cession" to the United States. The United States did not unconditionally commit to compensate the Creek for its lands. Never did Congress restore Creek lands to the public domain. And nowhere did Congress declare the Creek reservation discontinued, abolished, or terminated. This Court has never found diminishment or disestablishment unless some statute, treaty, or agreement spoke clearly to do so.[1]

Second, the language Congress actually used in addressing Creek lands is the very language this Court has deemed *insufficient* to diminish. Again, *Parker* is

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[1] Attribution is the farthest the Court has gone: When one agreement or statute contains express termination language, that text may establish a "baseline" applicable to related statutes. *See Rosebud*, 430 U.S. at 591-98 (1901 agreement and 1904 statute contained express cession language that was "precisely suited" to diminishment and informed 1907 and 1910 statutes); *Hagen*, 510 U.S. at 415 (express termination language "in the 1902 Act survived … the 1905 Act").

instructive. There, the Court noted that the relevant legislation "'merely opened reservation land to settlement'" by "'non-Indian settlers'" without "diminish[ing] the reservation's boundaries." *Id.* at 1079-80 (citations omitted). Here, the case against disestablishment is stronger. Whereas the *Parker* statute flung open the reservation to non-Indian settlement, the 1901 agreement provided that "[a]ll lands of said tribe, except as herein provided, shall be allotted *among the citizens of the tribe*." Allotment Agreement § 3. Allotment among tribal members is the opposite of cession and is "completely consistent with continued reservation status." *Mattz*, 412 U.S. at 497.

Likewise, the "except" clause—referencing the 10,000 acres (of 3 million) in town sites—merely authorized the Secretary "to act as the Tribe's sales agent." *Solem*, 465 U.S. at 473. The same goes for the Five Tribes Act's later authorization to sell to non-Indians any "surplus lands" remaining after allotment, which covered another 62,000 acres. FTA § 16; Report of Dep't of Interior, 1911, vol. II, at 386 (1912), http://bit.ly/2xlyhBw. As in *Parker*, "such provisions" do "no more than to open the way for non-Indian settlers to own land *on the reservation*." 136 S. Ct. at 1080; *Solem*, 465 U.S. at 473. The result was that, before statehood, non-Indians could purchase only scattered tracts of Creek lands—in contrast to this Court's other cases, where Congress directed the contested lands overwhelmingly to non-Indians. *E.g.*, *DeCoteau v. Dist. Cty. Ct. for Tenth Judicial Dist.*, 420 U.S. 425, 427-28 (1975) (85% of land "sold to the United States"); *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 338 (1998)

("unallotted lands"); *Hagen*, 510 U.S. at 404 (same); *Rosebud*, 430 U.S. at 602, 607 ("unallotted lands" and "except[ing] such portions" as were allotted).

Third, the Creek history underscores that when the federal government wanted to diminish Creek borders, it spoke clearly, using hallmark language. In 1832, the Creek "cede[d] to the United States all their land." 1832 Treaty art. I. In 1866, the Creek "cede[d] and convey[ed] to the United States … the west half of their entire domain." 1866 Treaty art. III; *see* 1856 Treaty art. I (Creek "hereby … cede" land to Seminoles). Then, in 1893, Congress directed the Dawes Commission again to seek "cession" for an "agreed upon" "price." 1893 Act § 16. Yet the later agreements and statutes contain no such language. In *Parker*, the "conclusion that Congress did not intend to diminish the reservation in" one statute was "confirmed by the text of earlier treaties" that spoke "unequivocal[ly]" of cession. 136 S. Ct. at 1080. The same goes here.

This absence was neither oversight nor happenstance. Although Congress desired "cession," the Creek "would not, under any circumstances, agree to cede any portion of their lands to the Government," and "insist[ed]" on "allotment" among citizens. 1894 Dawes Report at LVX (*Murphy* J.A. 19). At the time, Congress believed it could not unilaterally terminate a reservation. *Parker*, 136 S. Ct. at 1081 n.1. So faced with Creek "unanimity," Congress "abandoned all idea" of cession and focused on allotment. 1894 Dawes Report at LVX *(Murphy* J.A. 19).

Congress's actions elsewhere confirm that its textual choices matter. In *Murphy*, Oklahoma argued that *Parker*'s "hallmark" language ("cession," etc.) did not fit Congress's goals for the Creek (distributing lands among Creek members, not transferring them to the United States). Okla. *Murphy* Br. 48-49. But the history shows that, when Congress pursued the goal Oklahoma imagines—allotment plus disestablishment—it used *Parker*'s hallmark language. In 1904, on the eve of Oklahoma's statehood, Congress allotted the Ponca and Otoe reservations in modern-day Oklahoma and provided "*further*, That the reservation lines of the said ... reservations … are hereby, abolished." Act of April 21, 1904, at 217-18; *see Mattz*, 412 U.S. at 504 n.22 (provision exemplifies "clear language of express termination"). Likewise, the 1892 statute in *Seymour* "vacated and restored" a reservation section "to the public domain," then provided for "allot[ments] to each Indian." *Seymour* Act §§ 1, 4; *see Seymour*, 368 U.S. at 354. When the Dawes Commission told Congress that "cession" would have "immeasurably simplified" matters, it described that model: The Creek would "ce[de] … the entire territory," from which the government would return to Creek citizens "a stipulated amount" plus "cash." 1900 Dawes Report at 9 (*Murphy* J.A. 27-28). Congress thus had disestablishment models at hand. But acceding to Creek resistance, it chose not to use them.

As in *Parker*, therefore, Oklahoma "fail[s] at the first and most important step." 136 S. Ct. at 1080.

C. The Historical Evidence Reinforces The Text.

Evidence from "the history surrounding the passage of the" statutes, *id.*, reinforces the text. Of course, such evidence is distinctly secondary, as with legislative history generally. *Id.*; *see Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1814 (2019). While the Court has said that "unequivocal evidence" from "surrounding circumstances" "may support" disestablishment, it has never relied on such evidence unless it "perceive[d] … intent to diminish … in the plain statutory language." *Yankton*, 522 U.S. at 351. And "mixed historical evidence" does not advance the ball. 136 S. Ct. at 1080.

Here, the history supports Petitioner. *Id.* True, during the key period, many Congressmen believed that Indian Territory reservations—like all reservations—"were a thing of the past" to be extirpated. *Solem*, 465 U.S. at 468. Congress even legislated to dissolve Creek government. *Supra* 10. So, naturally, Oklahoma can cite statements from Congressmen and certain Creek officials prophesying the end. But read as a whole, the history confirms that Congress understood that the steps its statutes *actually took* would not disestablish and instead preserved the Creek and their rights.

That is especially true because not all history is equal. As *Parker* explains, negotiating history provides "[m]ore illuminating" contextual evidence than "cherry-picked statements by individual legislators." 136 S. Ct. at 1081; *accord Va. Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1906-07 (2019). Here, Petitioner has described the

key negotiating history: Congress's directive to the Dawes Commission to seek "cession"; the Creek's rejection of cession; Congress's acquiescence; and the Commission's stark reminder that a "cession"-based approach would have "immeasurably simplified" matters. *Supra* 8-9, 25. When Congress has considered but not enacted "bills [that] expressly provided for … termination," this Court will not infer an "intent to terminate." *Mattz*, 412 U.S. at 504.

Congress took this bargain because it could achieve important goals without cession. Congress aspired to create a new State but did not believe statehood required disestablishment. Congressmen observed that "these reservations" have been "guaranteed … by treaty stipulations" and that

> I do not know why the rights which have been given to them under the treaties … might not be respected and protected, and yet have them brought into the Union as a State.

24 Cong. Rec. at 268 (Sen. Perkins).

Congress *was* worried about communal land tenure, but addressing it did not require disestablishment. *Woodward* canvassed the legislative history—a dozen Commission reports and myriad committee reports. 238 U.S. at 296 n.1, 299 n.2. What motivated Congress, this Court found, was the view that "'under treaty provisions'" tribal lands "'were to be held for the use and benefit of [tribal] members,'" yet a few individuals had "appropriate[d] to their exclusive use" the best lands. *Id.* at 297, 299 n.2 (quoting H.R. Rep. No. 55-593 (1898)). In forcing changes to Creek land tenure, Congress's

"manifest purpose" thus was to implement "the true intent and meaning of the early treaties." *Id.* at 306; *see id.* at 299 n.2 (similar). Allotment (without cession) fulfilled that goal. Doubtless, it also addressed settlers' demands for "freely alienable individual title," as allotments would *eventually* become alienable. 875 F.3d at 934. But none of Congress's goals—altruistic, or otherwise—demanded disestablishment.

Having discarded cession, Congress maintained that its goals did not require abrogating its treaty promises. In 1895, Senator Dawes "assure[d]" the Five Tribes that the federal government did not "undertake to deprive any of your people of their just rights," but to "secur[e] … their just rights under the treat[ies]." 1895 Dawes Letter at LXXXI (*Murphy* J.A. 23). Thereafter, Congressmen maintained that their actions were consistent with treaty obligations, modifying them only with Creek consent. *Statehood for Oklahoma: Hearing Before the H. Comm. on the Territories*, 58th Cong. 137 (1904) (*Statehood Hearing*) (Mr. Havens) (disputing "that the Congress has ever violated its treaties"); *id.* at 139 (same); *see* 29 Cong. Rec. 2341 (1897) (Sen. Platt) ("Men of great legal ability who have gone into it … do not believe … there is any violation of any treaty").

Especially telling is that Congress came to the brink of allowing one step that might have yielded disestablishment—dissolving the Creek government—and reversed course. Congress understood the treaties as tying their rights to the Creek's continued existence. *See* 29 Cong. Rec. 2305 (Sen. Vest) (treaties "gave to those Indians the occupation of this Territory … so long

as they maintained their tribal relations"); *Statehood Hearing* 98 (Mr. Howe) (equating "abolition of tribal government" with "abrogation of all the former treaties"); *id.* at 144 (Mr. Havens) ("treaty is still in effect" "until that time" as "tribal relations shall cease"). Indeed, Congressmen believed that the "moment the tribe ceases to exist," the federal government would "have no further control over the property of those Indians," which would "be controlled by the new State." 40 Cong. Rec. 2977 (Sen. McCumber).

That is the result Oklahoma claims Congress intended—yet Congress enacted legislation to *avoid* it. Concerns that dissolution might return Creek lands to the public domain and trigger contingent land grants held by railroads, or abruptly close tribal schools, focused Congress's attention. 40 Cong. Rec. 3053 (Sen. Aldrich); *see id.* at 3052 (Sen. Spooner). After careful consideration, Congress reversed the 1901 agreement in relevant part, concluding that there "is not any necessity … for … dissolution." *Id.* at 3122 (Sen. Teller). And when it did, Congress understood that it did more than just resolve the important crises of the day. Instead, it was "continu[ing] … all … matters connected with" tribal governments, *id.* at 3054 (Sen. Clark), because it was "better indefinitely and for all time to continue" the tribal governments, *id.* at 3122 (Sen. Teller); *see id.* at 3061 (Sen. Teller) (similar).

D. The Subsequent Demographic History, If Relevant, Does Not Demonstrate Disestablishment.

"[S]ubsequent demographic history" and the United States' "treatment of the affected areas … in the years

immediately following" the statutes also are no help to Oklahoma. *Parker*, 136 S. Ct. at 1081. Indeed, *Parker* slammed the door on using such "evidence" for anything beyond "reinforc[ing]" the text. And properly so. Such evidence shares the flaws of post-enactment legislative history, which is a poor indicator of congressional intent—generally, *Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 242 (2011), and in diminishment cases, *Solem*, 465 U.S. at 472 n.13; *Yankton*, 522 U.S. at 355-56; *Hagen*, 510 U.S. at 420. *Parker* thus found no diminishment even though the Omaha "Tribe was almost entirely absent … for more than 120 years" and did "not enforce any … regulations" or provide "any social services," and even though the federal government "for more than a century and with few exceptions … treated the disputed land as Nebraska's." 136 S. Ct. at 1081-82.

Here, skepticism is especially warranted. The BIA had "strenuous[ly] object[ed]" to Congress's decision to preserve the Creek government and acted "as though it had been successful in its efforts to prevent" it. *Harjo*, 420 F. Supp. at 1129-30. Meanwhile, Oklahoma was engaged in an "an orgy of plunder and exploitation" through "evasion or defiance of the law." Debo 91, 117, 182. So yes, Oklahoma can point to decades in which it asserted jurisdiction over the Creek reservation. But no, that does not advance Oklahoma's disestablishment argument. If such evidence has relevance, it is as an "additional clue as to what Congress expected would happen." *Solem*, 465 U.S. at 472. We do not presume that Congress expects lawlessness and plunder.

Moreover, substantial post-statehood evidence shows a widely shared understanding that the Creek

reservation remained intact. After the Enabling Act, Congress repeatedly enacted text recognizing the reservation's borders. It did so in 1906 (confirming "the west boundary line of the Creek Nation," Act of June 21, 1906, ch. 3504, 34 Stat. 325, 364); in 1909 (appropriating funds for "equalization of allotments in the Creek Nation," Act of Mar. 3, 1909, ch. 263, 35 Stat. 781, 805), and in 1918 (appropriating funds for "schools in the … Creek … Nation[]," Act of May 25, 1918, ch. 86, 40 Stat. 561, 581). The 1936 Oklahoma Indian Welfare Act authorized the Secretary to acquire lands in Oklahoma "within or without existing Indian reservations," Act of June 26, 1936, ch. 831, § 1, 49 Stat. 1967 (codified at 25 U.S.C. § 501),[2] and authorized restoration of many government powers Congress had restricted, *id.* § 3. Congress thus recognized both that tribal boundaries endured and that tribal governments remained intact to exercise power over them.

Prosecutors also indicted liquor offenses premised on the Creek reservation remaining "Indian country." *E.g.*, *Joplin Mercantile Co. v. United States*, 236 U.S. 531, 548 (1915) (indictment alleging unlawful importation into "the city of Tulsa, Tulsa county, Oklahoma, which … is now a part of what is known as the Indian country"); *Ammerman v. United States*, 216 F. 326, 328 (8th Cir. 1914) (charging unlawful importation into "'the county of

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[2] The statute thus rejected the view of the Senate Report, submitted by Oklahoma's senator, opining that "all Indian reservations as such have ceased to exist." S. Rep. No. 74-1232, at 6 (1935).

Tulsa'" which "'at all times was and is now a part of the Indian Country'").

Meanwhile, through 1918, the Department of Interior's "Maps Showing Indian Reservations" continued to show the Five Tribes' reservations, including the Creek. App. 1a-35a. Likewise, the BIA "consistently included the Creek Nation in tables summarizing reservation statistics." *Murphy*, 875 F.3d at 961; Creek *Murphy* 10th Cir. Merits Br., App. B.

Courts did the same. The Eighth Circuit rejected the argument that the former Indian Territory land "ceased to be Indian country upon" statehood. *United States Express Co. v. Friedman*, 191 F. 673, 678 (8th Cir. 1911). So did this Court, explaining that the Indian Territory, including "county of Muskogee," remained "Indian country." *United States v. Wright*, 229 U.S. 226, 226-27, 236 (1913).

II. Oklahoma's Disestablishment Arguments Fail.

Oklahoma's principal response is to ask this Court to ignore the text. It thus suggests that a text-first test is inappropriate in light of its supposedly "unique circumstances," Okla. *Murphy* Br. 21, and invites the Court to infer disestablishment from the "'overall thrust' of congressional action." *Id.* at 52. The Court summarily rejected such arguments in *Parker*, and it should do so again.

A. Oklahoma Is Not Uniquely Immune From *Parker*'s Textual Hallmarks.

The claim that *Parker*'s textual hallmarks are uniquely unsuited to Oklahoma may be quickly rejected. We know that prior treaties used hallmark "cession" language for the Creek reservation, and that Congress instructed the Dawes Commission to seek the same. *Supra* 6, 8-9. Nor does anything in the lead-up to statehood render a textual focus inapt. Here, the relevant statutes are from the same Allotment Era as the Court's prior cases; Congress's motivations were similar; and the statutes did the same thing—ending "communal" title by allotting some lands to tribal members and opening others to non-Indian purchase. *Parker*, 136 S. Ct. at 1077; NCAI *Murphy* Br. 18-23. The Creek's history is not, of course, identical to those of tribes in this Court's prior cases. But *Solem* and *Parker* recognize that Congress's approach was "reservation-by-reservation," each "act employing its own statutory language, the product of a unique set of tribal negotiation and legislative compromise." 465 U.S. at 467; 136 S. Ct. at 1078-79. Always, the question is how that history is reflected in the text.

B. The "Overall Thrust" Of Congressional Action Did Not Disestablish.

If the Court turns from the text, Oklahoma has a story to tell. It contends that Congress (1) "dissolve[d] the Five Tribes' communal land tenure" and (2) "repudiate[d] … the United States' treaty promises of tribal self-rule" to (3) achieve statehood, which Congress supposedly viewed as incompatible with the Creek's

treaty-guaranteed reservation. Okla. *Murphy* Br. 8, 10. From there, Oklahoma would have the Court infer that Congress implicitly disestablished the reservation "by statehood," when it apparently "evaporated." *Id.* at 27; *Murphy* Arg. Tr. 5-6.

This appeal to Congress's "overall thrust" is a long way from *Solem* and *Parker*—the distance, in fact, from textualism to purposivism. Regardless, Oklahoma's story is false—in each chapter, and as overall tale.

Land tenure. Here, little need be said: When Congress ended communal tenure, it chose precisely the approach that does not disestablish. *Supra* 22-23.

Government powers. Oklahoma in *Murphy* placed near-dispositive weight on Congress's restrictions on Creek government, which it characterized as eliminating "territorial sovereignty." Okla. *Murphy* Br. 22. But this Court's disestablishment cases have never looked to government powers—and this case underscores why. Disestablishment is forever. Tribal powers, by contrast, may wax and wane, subject to Congress's "plenary control." *Bay Mills*, 572 U.S. at 788. Thus here, Congress sharply limited Creek powers (*i.e.*, abolishing Creek courts), then provided that dissolution would occur in 1906—only to reverse each step by legislating to prevent dissolution and then, in 1936, restoring many governmental powers. *Supra* 10, 15.

Congress did so elsewhere in Indian Country too, first limiting tribal powers then reversing course. *E.g.*, *Metlakatla Indian Cmty. v. Egan*, 369 U.S. 45 (1962); Dep't of the Interior, *Rules and Regulations for Annette*

Islands Reserve, 12 (1915); Metlakatla Indian Community Constitution (1994). Indeed, the Five Tribes were distinctive principally in that they held out longer than other tribal governments that were being crushed nationwide. *Cohen's* § 1.04, at 72-78; Russell L. Barsh & J. Youngblood Henderson, *Tribal Courts, the Model Code, and the Police Idea in Modern Indian Policy*, 40 Law Contemp. Probs. 25, 37-39 (1976). The 1934 Indian Reorganization Act augured a brief renaissance—only for the 1950s' Termination Era to bring more suppression, until the tides changed again with the rise of Indian self-determination. *Cohen's* §§ 1.05-1.07, at 79-108; U.S. Comm'n on Civil Rights, *The Indian Civil Rights Act: A Report of the United States Comm'n on Civil Rights*, 29-32 (1991). With government powers so malleable, restrictions on such powers cannot substitute for statutes effecting disestablishment.

Regardless, the statutes refute Oklahoma's claim that Congress ended Creek "territorial sovereignty." The Creek retained legislative jurisdiction, albeit with significant pragmatic obstacles to its exercise. First, the 1901 Agreement recognized the Nation's jurisdiction over "lands of the tribe, or of individuals after allotment," which would remain subject to the Nation's "act[s], ordinance[s], or resolution[s]"—with the practical caveat that legislation required presidential approval. Allotment Agreement § 42.

Meanwhile, courts rejected arguments that Congress, by limiting government powers, abolished the Five Tribes' reservations and sovereignty. In *Morris v.*

Hitchcock, non-Indians claimed that the Chickasaw Nation lacked power to impose a "license fee or tax" within its borders, relying—like Oklahoma—on allotment and Congress's "aboli[tion of] … tribal courts" and bar on enforcing tribal law in federal courts. 21 App. D.C. at 568, 593, 596. The D.C. Circuit, however, explained that the tribe retained its "expressly continued legislative power." *Id.* at 598. And it could enforce these laws with "assistance of the executive officers of the United States," who had "the right, if it were not [their] duty, to enforce" tribal laws. *Id.* at 598-99. This Court affirmed, emphasizing that the tribe's territorial jurisdiction remained intact even where allotment placed "absolute owner[ship]" of land outside the tribe. *Hitchcock*, 194 U.S. at 389, 392-93. The Eighth Circuit in 1905 applied *Hitchcock* to the Creek, upholding the "authority of the Creek" to govern "within its borders" and explaining the tribe retained "every governmental power … of which it has not been deprived," including over land owned by non-Indians in fee. *Buster*, 135 F. at 950, 953.

Then, against this backdrop, the Five Tribes Act continued the Creek's "present tribal government[]" "for all purposes authorized by law," FTA § 28, and so preserved these powers—an especially striking choice given that a large congressional faction continued to believe tribes would (and should) disappear. *Solem*, 465 U.S. at 466. Indeed, Congress's decision to remove only a *single* government power—"taxes accruing under tribal laws" after 1905, FTA § 11—confirms that Congress left other powers untouched: "[U]nless and until Congress withdraws a tribal power … the Indian

community retains that authority." *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1872 (2016).

Oklahoma's real argument is that, immediately post-statehood, the Creek did not *actually pass* laws that sufficiently manifested jurisdiction. But *Parker* rejected the same argument, declining to find disestablishment even though the Omahas did not, during their "120 years" of absence, "enforce … any … regulations" in the "disputed territory." 136 S. Ct. at 1081. And unlike in *Parker*, Creek legislation did not end with statehood. Especially telling, Congress in 1909 and 1914 made approval by "the Creek National Council" a "condition precedent" to the operation of federal legislation equalizing the value of Creek allotments. Act of March 3, 1909, 35 Stat. at 805; Act of Aug. 1, 1914, ch. 222, 38 Stat. 582, 598, 601; *see Harjo*, 420 F. Supp. at 1133-35 (detailing these and other legislative actions). Why did the Creek not legislate more? The obvious answer is practical reality. Nationwide, the exercise of tribal authority confronted substantial state and federal resistance. *Supra* 34-35. And for the Creek, in particular, any legislation, or request for enforcement, had to go through an "Interior Department" that opposed the Creek government's continuation and was "behav[ing] as though it had been successful in" obliterating the Creek. *Harjo*, 420 F. Supp. at 1130. So true enough: The Creek did not, while fighting for survival, engage in futilities. But as in *Parker*, this pragmatic choice cannot substitute for a statute effecting disestablishment.

Statehood. Oklahoma's last argument is that "disestablish[ing] the Creek borders [w]as a necessary step [for] Oklahoma statehood." Okla. *Murphy* Br. 21. But again, both text and history show otherwise. In the Enabling Act, Congress provided that Oklahoma's new constitution could not "limit or impair the rights of person or property pertaining to the Indians of said Territories" or "limit or affect the authority of the [federal] Government … to make any law or regulation respecting such Indians, their lands, property, or other rights." Enabling Act § 1. Congress also required the State to "disclaim all right and title … to all lands … owned or held by any Indian, tribe, or nation." *Id.* § 25. As this Court summarized, such provisions reaffirmed the United States' "control … of the large Indian reservations and Indian population of the new state." *Coyle*, 221 U.S. at 570.

Congress made these textual choices because there was nothing unusual about States with substantial reservations. When Congress in 1796 admitted Tennessee as the first territory to become a State, *three-quarters* was Indian country. Act of June 1, 1796, ch. 47, 1 Stat. 491, 491-92; Treaty with the Cherokee, art. IV, July 2, 1791, 7 Stat. 39; Treaty with the Chickasaw, art. III, Jan. 10, 1786, 7 Stat. 24. Congress did so, moreover, after debating whether to exclude that territory—it decided to admit the whole State, including land beyond Tennessee's "ordinary jurisdiction." Act of May 19, 1796, ch. 30, § 19, 1 Stat. 469. Likewise, at South Dakota's 1889 admission, it was 47 percent reservation; when Arizona was admitted in 1912, it was a quarter

reservation.[3] No wonder, then, that Congressmen did not regard statehood as requiring disestablishment. *Supra* 27; *accord Mille Lacs*, 526 U.S. at 202 (rejecting argument that Indian treaty rights were "extinguished" at statehood); *Herrera v. Wyoming*, 139 S. Ct. 1686, 1695-97 (2019) (same).

III. Other Arguments For State Jurisdiction Fail.

With neither text nor tale to support their disestablishment claims, Oklahoma and the Solicitor General each offered an argument to avoid this result's implication—that the federal government, not Oklahoma, has jurisdiction over major crimes like Petitioner's. These arguments lack merit.

A. The Sky Is Not Falling.

Oklahoma avers that, to avoid upsetting "settled expectations," the Court must discard the result that the text and caselaw require. Okla. *Murphy* Br. 56. *Parker*, however, rejected similar arguments. Despite deeming concerns about "'justifiable expectations'" "compelling," *Parker* unanimously held that such expectations "cannot diminish reservation boundaries." 136 S. Ct. at 1081-82. True, Tulsa is not Pender. But neither does this Court

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[3] Office of Indian Affairs, Dep't of the Interior, *Annual Report of the Comm'r of Indian Affairs for the Year 1889*, at 485; Office of Indian Affairs, Dep't of the Interior, *Annual Report of the Comm'r of Indian Affairs for the Year 1912*, at 112; Census Bureau, United States, State Area Measurements & Internal Point Coordinates, https://www.census.gov/geographies/reference-files/2010/geo/state-area.html (last visited Feb. 3, 2020).

interpret statutes one way for cities and another for countryside.

Oklahoma's claims of "turmoil," Okla. *Murphy* Br. 3, are in any event mostly rhetoric. On fee land—the only land affected by reservation status—tribal civil jurisdiction over non-Indians is "presumptively invalid." *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 330, 341 (2008); *Montana v. United States*, 450 U.S. 544, 565 (1981) (identifying narrow circumstances in which Tribes have jurisdiction over nonmembers on fee land). "[W]ith one minor exception," this Court has "never upheld under *Montana* the extension of tribal civil authority over nonmembers on non-Indian land." *Nevada v. Hicks*, 533 U.S. 353, 360 (2001). Meanwhile, States retain jurisdiction over non-Indians absent specific preemption under *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142-43 (1980)—which this Court, again, has *never* applied to find preemption on fee lands. No surprise, then, that cities thrive within reservations. *See, e.g.*, NCAI *Murphy* Br. 31-34; Creek *Murphy* Supp. Reply Br. 10.

Here, disruption is particularly unlikely because Creek government is so embedded in the community. Many non-Indians in rural Oklahoma receive government services—"medical centers," "emergency response teams," and paved roads—only because the Nation provides them. *Murphy*, 875 F.3d at 965; *supra* 15. If an accident occurs on the Nation-paved roads that criss-cross Creek country, Creek police officers may be the first responders, and injuries may be treated at a community hospital built and run by the Creek.

Meanwhile, Oklahoma and tribes already collaborate closely: Around five hundred tribal compacts govern cooperation on taxes, fire services, environmental protection, and more. *See* Okla. Sec'y of State, Tribal Compacts and Agreements, https://www.sos.ok.gov/gov/tribal.aspx (last visited Feb. 3, 2020).

Nor must the Court take these points on faith, as any lingering concerns have answers. *Parker* itself gave one answer: While claims of "disruption" are irrelevant to disestablishment, the doctrine of *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197 (2005), can address such claims. *Sherrill* held that "equitable considerations of laches and acquiescence may curtail" Tribes' ability to exercise rights that would disrupt settled expectations. *Parker*, 136 S. Ct. at 1082.

The better answer, however, is the more conventional one under our separation of powers. If the jurisdictional divisions resulting from Congress's statutes prove disruptive, the solution is another statute. *E.g.*, *Wis. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2074 (2018) ("Congress alone has the institutional competence, democratic legitimacy, and (most importantly) constitutional authority to revise statutes in light of new social problems and preferences."); *see also Cougar Den*, 139 S. Ct. at 1020-21 (Gorsuch, J., concurring) (noting role of federal regulation in addressing State's concerns). Unlike courts, Congress can make bespoke revisions that account for both historical practice and today's realities. And it will. Congress often acts to reallocate jurisdiction on

particular reservations.[4] Indeed, the statute books are filled with Oklahoma-specific Indian laws. *E.g.*, 25 U.S.C. §§ 5201-5210; *Cohen's* § 4.07(1)(c), at 300-01; *see also* Safe, Accountable, Flexible, Efficient Transportation Equity Act (SAFETEA), Pub. L. No. 109–59, § 10211(a)-(b), 119 Stat. 1144, 1937 (2005) (Oklahoma-specific veto provision under environmental statutes).

The same answer largely holds on the criminal side. Reservation status affects only Indian crimes; Oklahoma will continue to prosecute crimes by non-Indians that are against non-Indians or are "victimless." Dep't of Justice, Indian Country Criminal Jurisdictional Chart, 2010, http://bit.ly/2GQZgav. Minor Indian offenses will proceed in the Nation's courts. *Id.*; *supra* 15. The United States will prosecute major crimes by Indian offenders. 18 U.S.C. § 1153. There is no credible claim that the federal government cannot handle the additional prosecutions. And if the Justice Department prefers not to do so, it will find an attentive audience in Congress.

Nor should the Court be moved by Oklahoma's back-of-the-envelope alarmism about existing convictions. *Murphy* Tr. 75. This Court regularly hears similar claims, without departing from the result the law requires. *E.g.*, Br. of Court-Appointed Amicus Curiae at 3, *Welch v. United States*, No. 15-6418 (Mar. 8, 2016)

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[4] Examples can be found throughout the U.S. Code. *Cohen's* § 6.04(3)(a), at 537 n.45, 538 n.50, 539 n.51, 52 & 56; § 6.04(4)(c), at 582 n.343, 582-83 n.347.

(warning of "the release of hundreds or thousands of dangerous criminals"); *see Welch v. United States*, 136 S. Ct. 1257, 1266-69 (2016) (rejecting Amicus's position). And here, Oklahoma has offered no reason to believe the effects will be large. Even state prisoners who *could* bring claims will think twice: Success will subject them to federal prosecutions—which often yield harsher sentences. Those who proceed will find the door to federal habeas largely shut given AEDPA's one-year limitations period and restrictions on second or successive petitions. *See* Order, *In re Brown*, No. 17-7078 (10th Cir. Dec. 21, 2017) (rejecting successive petition based on *Murphy*). And while Oklahoma has made a different choice for state habeas,[5] it cannot fairly invoke that choice to demand this Court distort federal disestablishment law.

B. Congress Did Not Give Oklahoma Criminal Jurisdiction Over Indian Country.

Reiterating an argument "frequently raised, but never accepted," *United States v. Sands*, 968 F.2d 1058, 1061 (10th Cir. 1992), the Solicitor General contends that even if the Creek reservation endures, Congress gave

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[5] *Murphy*, 875 F.3d at 907 n.5 ("In Oklahoma, 'issues of subject matter jurisdiction are never waived and can therefore be raised on a collateral appeal'" (citation omitted)); *see* Resp. to Deft's Pro Se Application for Post-Conviction Relief at 2 (Okla. Crim. App. Aug. 17, 2018) (concession in Petitioner's case that "[j]urisdictional claims are not subject to … waiver" and if "the *Murphy* ruling becomes law, [Petitioner] may seek post-conviction relief").

Oklahoma criminal jurisdiction over the former Indian Territory's Indian country.

To begin, if practicalities are the Court's concern, this argument has little appeal. Even the Solicitor General concedes that his approach would have "destabilizing effects," U.S. *Murphy* Supp. Br. 18 n.5, by encouraging challenges to federal convictions procured since 1992 on restricted allotments and trust lands, U.S. *Murphy* Merits Br. 32-33; "rais[ing] questions about the application of federal, tribal, and state law more generally to … [such] lands," U.S. *Murphy* Supp. Br. 18 n.5; and leaving unresolved the reservation question for fee lands. Unsurprisingly, in *Murphy*, Oklahoma did "not press[] th[is] argument." Okla. *Murphy* Reply 13.

Regardless, it is for good reason that this argument has met universal rejection in both state and federal courts (and this Court has denied certiorari repeatedly).[6] The relevant statutes foreclose this argument. Under the Major Crimes Act, the United States has exclusive jurisdiction over qualifying crimes on "any Indian reservation" or "Indian country" within "any State." Nowhere did Congress exempt Oklahoma from this rule.

The Solicitor General's argument to the contrary is the jurisdictional equivalent of Oklahoma's disestablishment argument: It asks the Court to infer a shift of jurisdiction away from the federal government

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[6] *Cravatt v. State*, 825 P.2d 277, 279 (Okla. Crim. App. 1992); *Klindt*, 782 P.2d at 403-04; *State v. Brooks*, 763 P.2d 707, 710 (Okla. Crim. App. 1988), *cert. denied*, 490 U.S. 1031 (1989); *State ex rel. May*, 711 P.2d at 81 & n.17; *see Sands*, 968 F.2d at 1061-63, *cert. denied*, 506 U.S. 1056 (1993).

and to Oklahoma based on several statutes it deems "especially significant," U.S. *Murphy* Merits Br. 28—without identifying any text effecting that result. And it points to Oklahoma's practice following statehood, while ignoring the context that renders that practice irrelevant to the interpretive task at hand. That approach is wrong for disestablishment, and wrong for jurisdiction.

The baseline rule is that the federal government generally has, by statute, exclusive jurisdiction over crimes involving Indians on reservations. At statehood and today, the Major Crimes Act has conferred federal jurisdiction—"pre-emptive of state jurisdiction," *United States v. John*, 437 U.S. 634, 651 (1978)—over qualifying crimes "commit[ed] … within the boundaries of any State of the United States" and "within the limits of any Indian reservation." Act of Mar. 3, 1885, ch. 341, § 9, 23 Stat. 362; *see* 18 U.S.C. § 1153(a) (jurisdiction over major crimes in "Indian country"); *id.* § 1151 ("Indian country" includes reservation lands). The General Crimes Act confers jurisdiction over most other crimes. Rev. Stat. § 2145 (1875); 18 U.S.C. § 1152. States lack jurisdiction over such crimes, reflecting these statutes' preemptive force and the "deeply rooted" principle that Indians on reservations are "free from state jurisdiction." *McClanahan v. State Tax Comm'n of Ariz.*, 411 U.S. 164, 168 (1973); *accord Negonsott v. Samuels*, 507 U.S. 99, 102-03 (1993). The Solicitor General thus must show that Congress nullified the Major Crimes Act in Oklahoma.

When Congress takes such steps, its statutes are—and must be—bell-clear. *See McClanahan*, 411 U.S. at

170-71 (statutes will be read to divest tribal and federal rights on reservations only if "Congress has expressly provided"). In 1940, Congress enacted what this Court described as "the first major grant of jurisdiction to a State over offenses involving Indians committed in Indian country." *Negonsott*, 507 U.S. at 103. It spoke in no uncertain terms:

> Jurisdiction is conferred on … Kansas over offenses committed by or against Indians on Indian reservations … to the same extent as its courts have jurisdiction over offenses committed elsewhere within the State….

Id. (quoting Act of June 8, 1940, ch. 276, 54 Stat. 249 (codified at 18 U.S.C. § 3243)). Congress enacted statutes with near-identical language for North Dakota, Iowa, New York, and California's Agua Caliente reservation, plus several other states under "Public Law 280." Act of May 31, 1946, ch. 279, 60 Stat. 229; Act of June 30, 1948, ch. 759, 62 Stat. 1161; Act of July 2, 1948, ch. 809, 62 Stat. 1224; Act of Oct. 5, 1949, ch. 604, 63 Stat. 705; Act of Aug. 15, 1953, Pub. L. No. 83-280, ch. 505, §§ 2, 7, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162).

Nothing rendered Congress uniquely unable to speak clearly on jurisdictional matters in Oklahoma. When Congress allowed Oklahoma courts (acting as federal instrumentalities) to exercise jurisdiction over Indians and their lands, it was express. *E.g.*, Act of May 27, 1908, ch. 199, § 6, 35 Stat. 312 ("persons and property of minor allottees of the Five Civilized Tribes shall … be

subject to the jurisdiction of [Oklahoma] probate courts"). Yet, with respect to criminal jurisdiction, none of the Solicitor General's statutes contain express language—nor do they otherwise repeal the Major Crimes Act.

Arkansas law. The Solicitor General starts with pre-statehood statutes that applied to the Indian Territory aspects of Arkansas law. In 1890, Congress borrowed "Mansfield's Digest of the Statutes of Arkansas" as "incorporated" federal law for the Indian Territory to fill the gaps in federal criminal statutes—but excepted Indian cases. Act of May 2, 1890, ch. 182, § 31, 26 Stat. 81 ("1890 Act"); *see Indian Country, U.S.A., Inc. v. Okla. ex rel. Okla. Tax Comm'n*, 829 F.2d 967, 975 & n.3 (10th Cir. 1987). Then, in 1897, Congress gave the Indian Territory's courts jurisdiction over offenses by "any person" and made "the laws of the United States and the State of Arkansas" applicable "to all persons ..., irrespective of race." Act of June 7, 1897, ch. 3, 30 Stat. 62, 83 ("1897 Act"). The Solicitor General claims that, after statehood, this 1897 act functioned to subject Indians to Oklahoma law. U.S. *Murphy* Supp. Br. 3.

The text does not support this claim. Congress did not provide that *if* the Indian Territory became a State, the new State would be exempt from the Major Crimes Act and its exclusive federal jurisdiction. The Solicitor General seeks to fill this gap by analogizing Arkansas law to "local law[]," implying that its application to Indians before statehood is equivalent to the application of Oklahoma law post-statehood. *Id.* at 8. But first, this

argument ignores that the 1897 Act continued the application to Indians of "the laws of the United States," which included the Major Crimes Act and other Indian-specific laws.[7] And even insofar as Arkansas law applied to Indians, the Solicitor General's analogy is inapt: using "Mansfield's Digest" is nothing like subjecting Indians on reservations to *state* jurisdiction. These criminal laws were chosen by Congress, were enforced by prosecutions "in the name of the 'United States,'" 1890 Act § 32, and were adjudicated in "United States Courts" created and controlled by Congress, *Southern Surety Co. v. Oklahoma*, 241 U.S. 582, 584 (1916); *see* 1897 Act, 30 Stat. at 83.

The Solicitor General suggests that, if Congress before statehood subjected Indians to "the same laws and … same court" as non-Indians, it must have intended that to continue after statehood. U.S. *Murphy* Supp. Br. 3. But statehood *always* created new jurisdictional wedges between Indians and others that did not exist in territories (where all governments were ultimately *federal* governments). *See United States v. Ramsey*, 271 U.S. 467, 469 (1926) (noting that the general "authority of the United States … to punish crimes … not committed by or against Indians, [i]s ended by the grant of statehood," but federal "authority in respect of crimes committed by or against Indians continue[s] … as it was before"). For one, the Major Crimes Act does so. In territories, it subjected Indians "to the laws of such Territory relating to [the

[7] If general federal law and Arkansas law defined the same offense, federal definitions "govern[ed]." 1890 Act § 33.

enumerated] crimes," to "be tried … in the same courts … as are all other persons." 23 Stat. 362 § 9. So Indians in Oklahoma Territory were tried for Oklahoma Territory murder, in Washington Territory for Washington Territory murder—in short, "the same criminal laws" in "the same courts" as non-Indians. U.S. Supp. Br. 1; *see Ex parte Gon-shay-ee*, 130 U.S. 343, 352 (1889). But at statehood, the Major Crimes Act dictates separate rules for Indians.

Enabling Act. The Solicitor General turns next to the Enabling Act, which he says provides "that Indians and non-Indians were to be treated alike following statehood." U.S. *Murphy* Supp. Br. 11. But the statute says the opposite.

As to pending cases, the Enabling Act directed the transfer to *federal* court of cases "arising under the Constitution, laws, or treaties of the United States," which includes criminal cases under the Major Crimes Act and General Crimes Act. Enabling Act § 16. Then, to be double-clear, Congress in 1907 amended the Act to confirm the transfer to federal courts of "[p]rosecutions for all crimes and offenses … pending … upon … admission … which, had they been committed within a State, would have been cognizable in the Federal courts." Act of Mar. 4, 1907, ch. 2911, 34 Stat. 1286, 1287. Congress thereby treated Oklahoma like *other states*, where the federal government prosecutes Indian crimes on reservations.

For new cases, the United States suggests that Congress directed the application of state law to Indians

by providing that "the laws in force in the Territory of Oklahoma" would be the post-statehood default until the new legislature acted. U.S. *Murphy* Supp. Br. 10. But Congress merely made Oklahoma law the default "as far as applicable." Enabling Act § 13. This caveat practically shouts that Congress was not extending state law to anywhere it normally would *not* apply, including crimes concerning Indians on reservations. Indeed, near-identical language appears in the enabling act for Montana, Washington, North Dakota, and South Dakota—which no one has ever thought transferred jurisdiction. Act of Feb. 22, 1889, ch. 180, § 24, 25 Stat. 676, 683; *cf. Seymour*, 368 U.S. at 352 (Major Crimes Act prosecution in Washington).

Other provisions of the Enabling Act—recounted above—confirm the point. Section 1 prohibited Oklahoma from limiting federal authority "to make any law or regulation respecting … Indians, their lands, property, or other rights"—which this Court interpreted to preserve "established [federal] laws and regulations" concerning Indians. *Ex parte Webb*, 225 U.S. 663, 682-83 (1912); *see Ramsey*, 271 U.S. at 469; *see also Sands*, 968 F.2d at 1062 (chiding government for "ignor[ing] § 1"). Section 3 required Oklahoma to "forever disclaim all right" to "all lands … owned or held by any Indian, tribe, or nation." And Section 21 confirmed that federal laws "not locally inapplicable shall have the same force and effect … as elsewhere." These are not the words of a statute effecting a then-unprecedented shift of jurisdiction to a State.

Practice. The Solicitor General also seeks support from Oklahoma's practice of prosecuting reservation crimes. But practice merits no weight here. One reason is that—again—we know Oklahoma was engaged in "systematic and wholesale exploitation of the Indian through evasion or defiance of the law," aided by the malign indifference of federal officials charged with protecting Indians. Debo 117, 182; *supra* 13-14. But the point isn't only about Oklahoma. States nationwide routinely exercised criminal jurisdiction that Congress never conferred. Kansas exercised "jurisdiction over all offenses committed on Indian reservations." *Negonsott*, 507 U.S. at 106-07. Nebraska "erroneously exercis[ed] criminal jurisdiction … for some seventy years." Mark R. Scherer, *Imperfect Victories: The Legal Tenacity of the Omaha Tribe, 1945-1995*, 15-17 (1999). New York, too, "regularly exercised or claimed the right to exercise jurisdiction over the New York reservations." *Cohen's* § 6.04(4)(a), at 578.

This was a well-known problem. A 1963 Interior Department memorandum recounted how "several States had asserted civil and criminal jurisdiction in Indian country …, despite the fact that no Federal statutes of relinquishment and transfer had been enacted[,] [including] Michigan, Oklahoma, North Carolina, and Florida," as well as "counties in … Washington, Nevada, and Idaho," and "[o]fficials of both Oklahoma and North Carolina." U.S. *Murphy* Merits Br. 7a-8a. A 1942 memorandum on Oklahoma acknowledged "[t]he legal uncertainties … present" "since statehood" after "the state courts" simply "assumed jurisdiction in the [former] … Indian

Territory," with "[m]any Indians" having been "tried, convicted, sentenced, and executed … without … the jurisdictional question being raised." Resp. *Murphy* Supp. Reply 1a. While this memorandum addressed restricted allotments, it underscores that Oklahoma—like other States—simply acted. The quest for legal justification came later.

Jurisdictional gap. Last, the Solicitor General claims that if Oklahoma courts lacked jurisdiction, then no court had jurisdiction over minor Indian-on-Indian crimes. Per the Solicitor General, such crimes fell outside the Major Crimes Act; the General Crimes Act excepted "crimes committed by one Indian against the person or property of another Indian," Rev. Stat. § 2146 (1875); and the Creek lacked tribal courts to hear such cases. U.S. *Murphy* Supp. Br. 14.

But this purported "gap" cannot provide the "express[]" statement required to effect a jurisdictional transfer. *McClanahan*, 411 U.S. at 170-71. To begin, it is unclear whether the tangle of pre-statehood jurisdictional statutes dictated such a gap: The *Murphy* respondent proposed an interpretation allowing the federal government to prosecute Indian-on-Indian crimes, at least as plausible as the Solicitor General's theory. *Murphy* Resp. Br. 47-48.

More important, such a gap shows nothing about congressional intent. Tribal courts nationwide were often absent or ineffective, yielding the same gap. *E.g.*, *Readjustment of Indian Affairs: Hearings on H.R. 7902 Before H. Comm. on Indian Affairs*, 73d Cong. 323

(1934) (Rep. Fahey) ("large gap" concerning non-major crimes); *id.* at 324 ("void"). When such gaps became apparent, the solution was two-fold. First, since 1883 the BIA had been establishing by regulation "Courts of Indian Offenses"—precisely because the Major Crimes Act did not "reach [many] crimes or offenses," and thus reservations "without … a court" "would be without law or order." Report of Secretary of Interior, 1885, vol. II, at 21 (1885) (U.S. Ser. Set vol. 2379); *see Tillett v. Lujan*, 931 F.2d 636, 639 (10th Cir. 1991); *Colliflower v. Garland*, 342 F.2d 369, 372 (9th Cir. 1965). These courts could "try and punish any Indian … for any misdemeanor …, as defined in the laws of the State or Territory within which the reservation may be located." H.R. Exec. Doc. No. 1, part 5, vol. II, 52d Cong., 2d Sess., at 30.[8] Congress knew the BIA had this off-the-shelf solution at hand.

Second, where States proceeded to prosecute Indian crimes, Congress understood that legitimizing these prosecutions required express legislation. For example, Congress enacted the Kansas Act when informed that there were "no tribal courts" and that Kansas was prosecuting "all minor offenses" in prosecutions of doubtful "legality." S. Rep. No. 76-1523, at 2 (1939). Similar gaps motivated the transfers in North Dakota, Iowa, and New York. H.R. Rep. No. 79-2032, at 2 (1946); H.R. Rep. No. 80-2356, at 1, 3 (1948); *New York Indians: Hearings on S. 1683 Before S. Subcomm. on Interior and*

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[8] While BIA regulations excluded tribes with functioning judicial systems (as the Five Tribes had when those regulations were promulgated), a pen stroke could change that.

Insular Affairs, 80th Cong., 3 (1948). These statutes would have been redundant had Congress expected courts to torture the relevant enabling acts to avoid jurisdictional gaps.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

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