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 AMICUS CURIAE MUSCOGEE (CREEK) NATION IN SUPPORT OF PETITIONER

ROGER WILEY
ATTORNEY GENERAL
KYLE HASKINS
FIRST ASSISTANT
ATTORNEY GENERAL
MUSCOGEE (CREEK)
NATION
Post Office Box 580
Okmulgee, OK 74447
(918) 295-9720

RIYAZ A. KANJI
Counsel of Record
DAVID A. GIAMPETRONI
KANJI & KATZEN, PLLC
303 Detroit St., Ste 400
Ann Arbor, MI 48104
(734) 769-5400
rkanji@kanjikatzen.com

CORY J. ALBRIGHT
PHILIP H. TINKER
LYNSEY R. GAUDIOSO
KANJI & KATZEN, PLLC
401 Second Ave. S., Ste 700
Seattle, WA 98104
(206) 344-8100

Counsel for Amicus Curiae Muscogee (Creek) Nation

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INTEREST OF AMICUS CURIAE

The Muscogee (Creek) Nation ("Nation" or "Creek Nation") had no role in the genesis of this litigation, but now finds its Reservation under direct attack.[1] Oklahoma has claimed that the Nation never enjoyed an Indian Territory reservation and that, if it did, the allotment of lands to Nation citizens and the coming of statehood abolished it – despite clear treaty and statutory text to the contrary. Moreover, Oklahoma has suggested that affirmation of the Reservation will render Oklahoma a second-class State.

These claims turn text and history on their head and ignore the robust governmental contributions made by the Nation – undertaken in close cooperation with neighboring governments – to the health, safety, and welfare of all Reservation residents. The Nation files this brief to vindicate its core sovereign interests in its treaty-guaranteed Reservation.

INTRODUCTION AND SUMMARY OF ARGUMENT

In *Nebraska v. Parker*, 136 S. Ct. 1072 (2016), this Court confirmed that fundamental principles of statutory construction apply in determining whether Congress has acted to alter reservation boundaries.

[1] No counsel for any party authored this brief in whole or in part. No one other than amicus curiae made a monetary contribution to fund the preparation or submission of this brief. The parties have consented to its filing.

Parker reaffirms that "[o]nly Congress can divest a reservation of its land and diminish its boundaries, and its intent to do so must be clear," *id.* at 1078 (quotation marks omitted). Accordingly, the analysis hinges on statutory text. "As with any other question of statutory interpretation, we begin with the text, ... the most probative evidence of diminishment." *Id.* at 1079 (quotation marks omitted). While the history surrounding a statute can have bearing, "mixed historical evidence ... cannot overcome the lack of clear textual signal that Congress intended to diminish the reservation." *Id.* at 1080. Nor can "subsequent demographic history ... overcome [a textual] conclusion that Congress did not intend to diminish [a] reservation[.]" *Id.* at 1081-82. Consistent with fundamental separation of powers principles, "it is not our role to rewrite [statutory text] in light of this ... history." *Id.* at 1082 (quotation marks omitted). Evidence of the subsequent jurisdictional treatment of the disputed territory by executive branch officials "likewise has limited interpretive value" because "[o]nly Congress has the power to diminish a reservation." *Id.* (quotation marks omitted).

All this is as it should be. No matter how fervently Oklahoma urges to the contrary, there exists no principled reason why statutes relating to the continued existence of a reservation should be read with less regard for text than other statutes, or why post-enactment developments including demographic shifts and the arrogation of authority by state or executive branch officials should weigh heavily in the balance, especially when those developments so often unfolded in contravention of

Congress's design. In *Carpenter v. Murphy*, No. 17-1107 (argued Nov. 27, 2018), the State mocked this insistence that evidence of disestablishment be found in Congress's words as "gotcha textualism," Okla. *Murphy* Suppl. Reply Br. 1, but insistence on an adherence to statutory text is no cause for derision.

Indeed, skepticism about an atextual approach to reservation decisions is especially warranted given that disestablishment directly implicates tribal sovereignty. Just as this Court elsewhere has required a clear statement of congressional intent to divest core sovereign prerogatives, *see*, *e.g.*, *Bond v. United States,* 572 U.S. 844, 858 (2014), it is "an enduring principle of Indian law ... [that] courts will not lightly assume that Congress in fact intends to undermine Indian self-government," *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 790 (2014).

At each turn the issues presented here can be decided based on treaty and statutory text, and at each turn the surrounding history confirms what the text makes plain. This is as true for the question of reservation establishment as it is for disestablishment. Only two identified junctures exist at which disestablishment might have taken place: 1901 and 1906. At both junctures Congress enacted provisions that, far from abolishing the Reservation, evidenced Congress's intent to preserve it, and at both junctures the surrounding history provides ample confirmation.

In lieu of text, Oklahoma rested in *Murphy* on two pillars that cannot bear the requisite weight. First, it relied on the inference that because Congress

restricted various Creek governmental powers at the turn of the twentieth century (restrictions it subsequently relaxed) it must also have intended to disestablish the Reservation. But this did not distinguish the Nation from other reservation tribes at the time. Federal policy has been characterized by periods of stringent restrictions on tribal government, and this was one of them. And it was understood then, as it is today, that Congress's curtailment of specific tribal powers does not provide a "roving license" for courts to curtail others. *Bay Mills*, 572 U.S. at 794. To the contrary, Congress well knew how to diminish the Creek Reservation (which the United States had done twice before in express terms), just as it well knew how to diminish other reservations (again using express language) in statutes contemporaneous with those at issue here. Congress instead employed language making clear its choice not to, and that choice controls.

Second, the State urged that disestablishment will have destabilizing consequences. In the decades following statehood, Oklahoma assumed criminal jurisdiction over the Reservation. Federal officials, who had opposed Congress's determination in 1906 to preserve the Creek government, acquiesced, and indeed devoted substantial energy to pursuing the termination project that Congress had repudiated, muzzling the exercise of Creek governance in direct contravention of the law. But the Nation endured and has rebuilt a flourishing government that today serves both Indians and non-Indians on the Reservation. The State's claims ignore the threat disestablishment poses to this governance while

exaggerating the implications of Reservation affirmation.

To the extent they hold any water, the State's posited consequences stem from the fact that both executive branch and state officials actively sought to undermine Congress's determination that the Nation's government and territory would endure. The answer to one separation of powers violation (executive overreach) is not to compound it with another (judicial disestablishment). If there are issues of criminal or civil jurisdiction to address because Congress never disestablished the Creek Reservation, Congress is the constitutionally prescribed body to take such action.

ARGUMENT

I. The United States and the Creek Nation Established a Reservation by Treaty.

A. Text

Oklahoma's claim that a Reservation was never established for the Nation in the Indian Territory is divorced from both text and history. The Treaty of 1866 expressly refers to the Nation's Territory as a "Reservation." Art. IX, 14 Stat. 785, 788 (1866). That was no slip of the pen, but rather reflected the defining characteristics of the Creek territory.

The term "reservation" has long been "used in the land law to describe any body of land reserved … from sale for any purpose. It may be a military

reservation, or an Indian reservation ... [W]hen Congress has once established a reservation, all tracts included within it remain a part of the reservation until separated therefrom by Congress." *United States v. Celestine*, 215 U.S. 278, 285 (1909).

The statutory and treaty text creating a new homeland for the Nation establish that it readily satisfies this definition. The Indian Removal Act of 1830 authorized the President to divide public domain lands into defined "districts" for tribes removing to the Indian territory. § 1, 4 Stat. 411, 411-12. It further provided that the United States would "forever secure and guaranty" such lands to the removed tribes, "and if they prefer it … the United States will cause a patent … to be made and executed to them for the same[.]" § 3, 4 Stat. at 412.

Pursuant to the Act, the Treaty of 1832 provided that "country west of the Mississippi shall be solemnly guarantied to the Creek Indians," and "also" that "a patent" would issue once its boundaries were ascertained. Art. XIV, 7 Stat. 366, 368. Using precise geographic terms, the Treaty of 1833 then "establish[ed] boundary lines which will secure a ... permanent home to the whole Creek nation," carving that home out of public domain lands that had been ceded to the United States by the Quapaw, 7 Stat. 176 (1818), and the Osage, 7 Stat. 183 (1818). Preamble, art. II, 7 Stat. 417, 418-19. The Treaty further provided that the United States would "grant a patent, in fee simple" to the Nation. Art. III, 7 Stat. at 419. That patent issued in 1852, reiterating the 1833 boundaries verbatim. Fee Patent, Aug. 11, 1852, Land Title Plant, Muscogee Creek Nation, Book

1:748. After ceding a tract of land to the Seminole Nation in 1856, art. I, 11 Stat. 699, 699 (1856), the Nation ceded the western half of its territory to the United States in 1866, leaving it with what the Treaty termed "the reduced Creek Reservation" that is the subject of this case, art. IX, 14 Stat. at 788.

These treaties, in sum, set aside lands from the public domain, and while reducing those lands over time, solemnly promised, in the words of the 1866 Treaty, that the remaining territory would "be forever set apart as a home for said Creek Nation[.]" Art. III, 14 Stat. at 786. They ordained a reservation in the classic sense, and the 1866 Treaty called it precisely that.

Oklahoma argues that issuance of a fee patent in 1852 divested the Creek territory of reservation status. But the rule nowhere exists that a tribe cannot possess fee title to a reservation. As the National Congress of American Indians ("NCAI") well explains, nineteenth-century reservations rested on various forms of land tenure, with many substantial reservations held by tribes in fee simple. NCAI Br. 10-13. Neither this Court nor Congress has deemed title determinative of reservation status, *see*, *e.g.*, *In re New York Indians,* 72 U.S. 761, 766-68 (1866) (repeatedly referring to the Seneca Nation's fee simple territories as "reservations"). And in the Nation's case any distinction was insubstantial, as its patent was highly restricted: The Nation could not sell the lands, *see* 25 U.S.C. § 177, and the United States retained both a reversionary interest in and supervisory power over them, §§ 3, 7, 4 Stat. at 412;

see United States v. Creek Nation, 295 U.S. 103, 109-10 (1935).

It was the treaties that "solemnly guarantied" the Nation's lands. Art. XIII, 7 Stat. at 368. Consistent with the Removal Act provision that a patent could "also" issue, the Creeks received one in addition to, not in substitution for, the treaty promises. *See Mo., Kan. & Tex. Ry. Co. v. United States*, 47 Ct. Cl. 59, 119 (1911) (Howry, J., concurring) ("The patents rested on treaties[.]"). Indeed, the 1866 Treaty makes no mention of the patent in "forever set[ting] apart … a home for said Creek Nation[.]" Art. III, 14 Stat. at 786. It is not surprising, then, that the patent argument was rejected long ago:

> The contention that the Creek Nation is not now an Indian reservation is not tenable.... [N]or can it be successfully maintained that because the United States [gave the Nation] a fee-simple title thereto ... it is not in [the] possession of the Creeks as an Indian reservation.

Maxey v. Wright, 54 S.W. 807, 810 (Indian Terr. 1900).

B. Surrounding History

Oklahoma's claim disregards not only text but the surrounding history. The Creek had better reason than most to insist on enhanced protection for treaty promises. By the 1820s, vast treaty cessions had left them with a "last enclave of ancestral lands" in Alabama. *United States v. Creek Nation*, 476 F.2d

1290, 1293 (Ct. Cl. 1973). In 1829, Alabama asserted jurisdiction over those lands and settlers poured in. *Id*. at 1292. Despite an 1826 treaty that "guarantee[d]" the lands to the Creek, art. 13, 7 Stat. 286, 288, executive branch officials claimed to be powerless to protect them and urged them to remove. *Creek Nation*, 476 F.2d at 1293-94. *See also* Grant Foreman, *Indian Removal* 108-09 (1953).

The Removal Act, however, permitted removal only of such tribes "as may choose" to go, § 1, 4 Stat. at 412, and the Creek declined. Foreman at 108. Increasing the pressure, Alabama criminalized the functioning of the Creek government in 1832. *Creek Nation*, 476 F.2d at 1292. Georgia had taken similar actions against the Cherokee and, in January 1832, this Court declared such actions "repugnant to the constitution." *Worcester v. Georgia,* 31 U.S. 515, 520, 561 (1832). But within weeks of that decision, Jackson Administration officials again told the Creek that the government would not protect them and that they should remove.

The Creek then signed the 1832 Treaty. While it required them to cede their eastern lands, art. I, 7 Stat. at 366, it gave them the option to remain and take individual allotments within their former territory, art. II, 7 Stat. at 366. Removal was explicitly voluntary, art. XII, 7 Stat. at 367. And should they stay, the United States promised protection from "[a]ll intruders." Art. V, 7 Stat. at 366. Hence, the Treaty would allow the Creek to "remain on land which they held sacred." *Creek Nation*, 476 F.2d at 1294 (quotation marks omitted).

Or so they thought. Once again the Creek ended up "look[ing] in vain for their promised protection" and their lands "were quickly overrun.... The frauds were spectacular and widespread, making a mockery of the treaty[.]" Francis Paul Prucha, *The Great Father* 222 (1984). Federal agents "gave themselves little concern for the promises made to the Indians[.]" Foreman at 113. The intruders took Creek land, shot their livestock, "burnt and destroyed their houses and corn," and "used violence to their persons." *Id.* at 114. The dispossessed Creeks "still refused to leave[.]" Angie Debo, *The Road to Disappearance* 100 (1941). And so it came to pass that in 1836 – in violation of Congress's decree that removal would only be voluntary, the same promise made in the 1832 Treaty, and this Court's decision in *Worcester* – the Creeks were rounded up by federal troops and forcibly removed to the west. The story of the sufferings they endured on their journey need not be repeated here.

It is not surprising that having experienced, at such enormous cost, the willingness of executive branch officials to disregard treaties, statutes, and judicial commands, the Creek insisted on as much protection as possible for their newly reserved lands. More surprising is how Oklahoma distorts this history and argues that a patent intended to provide additional security for the Creek Reservation dismantled it instead. "[I]t would be anomalous," to say the least, to hold "that the treaties conferring upon the Creek Nation a title *stronger* than the right of occupancy have left the tribal land base with *less* protection, simply because fee title is not formally held by the United States in trust for the

Tribe." *Indian Country, U.S.A., Inc. v. Oklahoma*, 829 F.2d 967, 975-76 (10th Cir. 1987). A treaty is meant to be interpreted "as the [treating tribe] originally understood it ... – not in light of new lawyerly glosses conjured up for litigation ... more than 150 years after the fact." *Wash. State Dep't of Licensing v. Cougar Den, Inc.*, 139 S. Ct. 1000, 1019 (2019) (Gorsuch, J., concurring). Oklahoma's argument fails this test – badly – and should be rejected.

II. The Creek Allotment Act Preserved the Nation's Reservation.

Just as the underlying patent has no bearing on whether the Creek Reservation was established, it is likewise irrelevant to whether the Reservation was later disestablished. Disestablishment cases typically involve statutes transforming communal tenure to individual ownership, and hence transforming the original patent. Whether that patent was held by a tribe in restricted fee or in trust by the United States is of no moment. The question is whether Congress, in altering title within the reservation boundaries, *also* intended to change those boundaries. "Once a block of land is set aside for an Indian reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise." *Solem v. Bartlett*, 465 U.S. 463, 470 (1984). The key to that determination is the language enacted by Congress.

A. Text

While Congress need not use any particular formulation to disestablish a reservation, this Court has drawn a sharp distinction between text evidencing a "present and total surrender of all tribal interests," *Parker*, 136 S. Ct. at 1079 (quotation marks omitted) – including "[e]xplicit reference to cession" or abolition of the reservation, "language providing for the total surrender of tribal claims in exchange for a fixed payment," or language "restor[ing reservation] land to the public domain," *id.* (quotation marks omitted) (brackets in original) – and text simply allotting land among tribal members or "allow[ing] 'non-Indian settlers to own land on the reservation,'" *id.* at 1080 (quoting *Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351, 356 (1962). The Creek Allotment Act of 1901, 31 Stat. 861, falls squarely in the latter category.

The Act allotted almost all land within the Reservation to tribal members. Section 3 provided that "[a]ll lands of said tribe, except as herein provided, shall be allotted among the citizens of the tribe ... to give each an equal share of the whole in value," § 3, 31 Stat. at 862, with ensuing sections detailing the allotment process, §§ 4-9, 31 Stat. at 863-64. The exceptions were limited. Lands were reserved for tribal purposes, including schools, cemeteries, and churches. § 24, 31 Stat. at 868-69. In addition, towns (occupied principally by noncitizens with no prior legal claim to Reservation lands, *Johnson v. Riddle*, 240 U.S. 467, 476-77 (1916)) were to be platted and appraised, § 10, 31 Stat. at 864-66, with the owners of existing improvements "hav[ing]

the right to purchase such lot[s] by paying one-half of the appraised value thereof," § 11, 31 Stat. at 866, and remaining lots to be sold "at public auction to the highest bidder," § 14, 31 Stat. at 866. The proceeds from these sales (which by definition were not fixed in sum) were to be paid "into the Treasury of the United States to the credit of the tribe," § 31, 31 Stat. at 870.

These provisions evidence no intent to disestablish the Reservation. This Court has long held that allotment by itself simply transforms the nature of the landholdings within a reservation, and hence that "allotment ... is completely consistent with continued reservation status." *Mattz v. Arnett,* 412 U.S. 481, 497 (1973); *see also Celestine*, 215 U.S. at 288. The same is true for the townsite provisions, §§ 10-22, 31 Stat. at 864-67, which applied to a fraction of the Reservation land base, 1911 Annual Report of the Comm'r to the Five Civilized Tribes, at 391,[2] and fall squarely into *Parker*'s category of non-disestablishing statutes that "merely opened reservation land to settlement and provided that the uncertain future proceeds of settler purchases should be applied to the Indians' benefit," 136 S. Ct. at 1079-80 (quoting *DeCoteau* v. *District Cty. Court for Tenth Judicial Dist.*, 420 U.S. 425, 448 (1975)); *see also Seymour*, 368 U.S. at 359 (townsite provisions fully consistent with continued reservation status).

The Act's land provisions contrast sharply with the Treaties of 1832 and 1866, in which the Nation "cede[d]" territory to the United States. Art. I, 7 Stat. at 366; art. III, 14 Stat. at 786; Resp. *Murphy* Br. 25.

[2] http://bit.ly/MCN-RCTFCT-1911.

In *Parker*, this Court found that a similar contrast between allotment act text and earlier treaty language "undermine[d]" Nebraska's diminishment claim. 136 S. Ct. at 1080. Moreover, Congress passed acts, contemporaneous with the 1901 Act, that demonstrate that when Congress intended allotment to eradicate reservation boundaries it knew how to say so. *See*, *e.g.*, Act of Apr. 21, 1904, § 8, 33 Stat. 189, 217-18 (allotting Ponca and Otoe and Missouria reservations and providing "*further*, That the reservation lines of the said ... reservations … are hereby, abolished; and the territory comprising said reservations shall … become part of [three Oklahoma counties]"). *Mattz* cited this very provision in noting that "Congress has used clear language of express termination when that result is desired," 412 U.S. at 504 n.22, and declaring that "[t]his being so, we are not inclined to infer an intent to terminate [a] reservation," *id.* at 504. The same conclusion follows here.

In fact, even stronger textual evidence of preservation exists because in the Allotment Act Congress expressly recognized the Nation's continuing legislative authority over the Reservation. While Section 47 maintained the Curtis Act's abolition of the Creek courts, "legislative jurisdiction …. is quite a separate matter from jurisdiction to adjudicate," *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 813 (1993) (quotation marks omitted) (Scalia, J., dissenting). And Section 42 made plain that the Nation's legislative authority persevered:

> No act, ordinance, or resolution of the national council of the Creek Nation in

> any manner affecting the lands of the tribe, or of individuals after allotment, or the moneys or other property of the tribe, or the citizens thereof ... shall be of any validity until approved by the President of the United States. When any such act, ordinance, or resolution shall be passed by said council and approved by the principal chief, [it] … shall be immediately transmitted to the President, who shall … approve or disapprove the same.... [I]f approved ... it shall be published in at least two newspapers having a bona fide circulation in the Creek Nation.

§ 42, 31 Stat. at 872.

This provision evidences Congress's clear understanding that in the wake of the Allotment Act the Nation would: (1) retain legislative and executive branches of government, (2) which would continue to pass and approve acts, ordinances, and resolutions, (3) pertaining to a wide variety of issues, including (without limitation) tribal lands, moneys, and other property, and (4) applying to "citizens" (defined in Section 1 of the Act as Nation members) and "individuals." The requirement that notice of new Nation laws be published "in the Creek Nation," and the recognition that the Nation retained legislative jurisdiction over "the lands … of individuals after allotment," underscored that territorial borders would remain intact. So too did Congress's pledge in the following section that the United States would "maintain strict laws *in said nation* … [regarding]

liquors or intoxicants," § 43, 31 Stat. at 872 (emphasis added).[3]

B. Surrounding History

The history surrounding the Allotment Act amply confirms the plain import of its terms. Petitioner has detailed that history, Petr. Br. 7-12; *see also* Creek *Murphy* Br. 8-10, and the Nation will not duplicate that discussion here. The critical point is this: In its statutory charge to the Dawes Commission, Congress sought allotment of a portion of the Reservation to the Creeks and cession of any surplus. Act of Mar. 3, 1893, § 16, 27 Stat. 612, 645-46. But the Creek steadfastly opposed this plan. Having been forced to relinquish their eastern lands and the western half of their Indian Territory domain, the Creek "would not ... agree to cede any portion of their lands to the Government[.]" 1894 Annual Report of the Comm'n to the Five Civilized Tribes, at 14.[4] Resisting the overwhelming power of the government was no mean feat, but so resolute were the Creek, *see id.* at 8, 14, that the United States receded on this point while securing allotment. The

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[3] Subjecting Creek legislation to federal approval undermines none of this. The treaties anticipated such oversight, *see*, *e.g.*, art. X, 14 Stat. at 788-89, which indeed became a staple of federal-tribal relations under the Indian Reorganization Act, 25 U.S.C. §§ 5101-5144, Cohen's Handbook of Federal Indian Law §§ 4.04[3][a], 4.05[3], at 256-58, 271 (Nell Jessup Newton ed., 2012) ("Cohen"). And while Section 46 of the Allotment Act provided for the termination of the tribal government on March 4, 1906, it did so "subject to such further legislation as Congress may deem proper." § 46, 31 Stat. at 872. As discussed below, Congress subsequently overrode this provision.

[4] http://bit.ly/MCN-ARCFCT-1894-1896.

Commission made clear that it could accomplish no more. "When an understanding is had, however, of the great difficulties which have been experienced in inducing the tribes to accept allotment in severalty ... it will be seen how impossible it would have been to have adopted a more radical scheme of tribal extinguishment[.]" 1900 Annual Report of the Comm'n to the Five Civilized Tribes, at 9.[5]

C. *Hitchcock* and *Buster*

In the years immediately following passage of the Allotment Act, two important judicial decisions confirmed that the Nation's Reservation and its legislative authority over it remained intact.

In *Morris v. Hitchcock*, 194 U.S. 384 (1904), the Chickasaw Nation, under a provision materially identical to Section 42, had enacted legislation (enforced by the Secretary) regulating noncitizen activities within its reservation. *See id*. at 391 and n.1. This Court affirmed the D.C. Circuit's rejection of a challenge to the law, stating that the Section 42-like provision was intended to permit the continued exercise of tribal legislative authority. *Id*. at 393. The decision favorably quoted a 1900 Opinion of Attorney General Griggs, *id*. at 392, which stated that purchasers of tracts in the Five Tribes' reservations remained subject to tribal jurisdiction "within their limits.... even if the Indian title to the particular lots sold had been extinguished," 23 Op. Att'y Gen. 214, 216-17 (1900), 1900 WL 1001, at *2.

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[5] http://bit.ly/MCN-1900-ARCFCT.

The following year, in *Buster v. Wright*, 135 F. 947 (8th Cir. 1905), the Eighth Circuit applied *Hitchcock* directly to the Creek Nation, which had enacted legislation (again enforced by the Secretary) imposing conditions on noncitizen owners of town sites for the "privilege of trading within its borders[.]" *Id*. at 949. "Repeated decisions of the courts, numerous opinions of the Attorneys General, and the practice of years place[d] beyond debate" that the Nation possessed authority to enact such legislation. *Id*. (citing *Hitchcock*, 194 U.S. at 392). That authority "remained in full force and effect after ... the agreement of 1901" and was not diminished by "the establishment of town sites nor the purchase ... by noncitizens of lots therein[.]" *Id*. at 953-54.

These conclusions followed because, while Congress had significantly curtailed the Nation's powers (including abolishing its courts), "[t]he fact remains nevertheless that every original attribute of the government of the Creek Nation still exists intact which has not been destroyed or limited by act of Congress[.]" *Id*. at 950. This Court continues to hew to that cardinal principle today. *See, e.g.*, *Puerto Rico v. Sánchez Valle*, 136 S. Ct. 1863, 1872 (2016) ("[U]nless ... Congress withdraws a tribal power," a tribe "retains that authority in its earliest form."); *Bay Mills*, 572 U.S. at 788.[6]

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[6] Since *Buster,* this Court has recognized limitations on a tribe's exercise of authority over non-Indians within its jurisdiction. *See*, *e.g.*, *Plains Commerce Bank v. Long Family Land & Cattle Co*., 554 U.S. 316, 328-29 (2008). But this Court continues to recognize *Buster's* core holding that the Nation retained its

Buster and *Hitchcock* evidence a widespread contemporaneous understanding – on the part of the judiciary, the President (who had approved the tribal laws), the Secretary (who was enforcing them), the Attorney General, and the Nation – that the Allotment Act preserved the Creek Reservation and the Nation's legislative authority over it. The cases formed the legal backdrop against which, as discussed next, Congress enacted legislation in 1906 maintaining the Nation's government and its Reservation indefinitely.

III. Congress Deliberately Preserved the Creek Nation and Its Reservation in the Five Tribes Act.

A. Text

On March 2, 1906, as the conditional dissolution of the Nation's government approached, *see supra* note 3, Congress extended its life through a Joint Resolution providing that "the tribal existence and present tribal governments [of the Five Tribes] … are hereby continued in full force and effect … until all property of said tribes, or the proceeds thereof, shall be distributed among the individual members of said tribes," 34 Stat. 822, 822. By its plain terms this was wind-down authority – it preserved the governments until allotment was complete.

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power to tax "nonmembers for the privilege of doing business within the reservation." *Id. at* 332-33.

But Congress went much further in the Five Tribes Act, 34 Stat. 137 (1906), enacted a few weeks later. While various provisions contemplate ultimate dissolution, in Section 28 Congress continued the tribes' existence and their governments indefinitely:

> [T]he tribal existence and present tribal governments of the [Five Tribes] are hereby continued in full force and effect for all purposes authorized by law .... *Provided*, That no act, ordinance, or resolution … of the … legislature of any of said tribes … shall be of any validity until approved by the President[.]

§ 28, 34 Stat. at 148.

The State has argued that this too was simply a wind-up provision. But "we are always reluctant to assume a statute is so worthless that Congress was up to – literally – nothing when it bothered to labor through the grueling process of bicameralism and presentment." *Fletcher v. United States*, 730 F.3d 1206, 1210 (10th Cir. 2013) (Gorsuch, J.). If completion of the allotment process was the concern, the Joint Resolution already had addressed it. Section 28 sweeps more broadly. It echoes Section 42 in confirming that the Creek government would continue to pass "act[s], ordinance[s], or resolution[s]," and further recognizes that the government could act for "all purposes authorized by law[.]" § 28, 34 Stat. at 148. This language was enacted against the backdrop of the Nation's legislative authority over "the lands of the tribe" and "of individuals after allotment" expressly recognized

in Section 42 and confirmed in *Hitchcock* and *Buster*. Indeed, the textual parallels between Sections 42 and 28 underscore that Congress had the former squarely in mind when it enacted the latter. *See Tiger v. W. Inv. Co.*, 221 U.S. 286, 303 (1911) (referencing the "right of legislation" preserved by Section 28).

No language in the Five Tribes Act purports to alter Reservation boundaries. Section 16 provides that after allotment, "the residue of lands in each of said nations not reserved or otherwise disposed of shall be sold by the Secretary," with the indeterminate proceeds credited to the respective nation. § 16, 34 Stat. at 143. This provision simply opened up surplus land on the Reservation for settlement, with no fixed sum in return, and hence falls squarely within the category *Parker* deems exemplary of reservation preservation, 136 S. Ct. at 1079; *see supra* at 12-13. Section 19 increased from 5 to 25 years the period of inalienability for allotments held by any fullblood tribal member. § 19, 34 Stat. at 144; *Tiger*, 221 U.S. at 306. And Section 27 provided that, in the event of tribal dissolution, tribal lands would "not become public lands nor property of the United States, but shall be held in trust by the United States for the benefit of the Indians[.]" § 27, 34 Stat. at 148. Taken separately or together, these provisions do not remotely evidence "the present and total surrender of all tribal interests" in the Reservation, *Parker*, 136 S. Ct. at 1079 (quotation marks omitted).

In *Murphy*, Oklahoma suggested that the provisions in the Act restricting the powers of the tribal governments, including the elimination of tribal taxing (though not of other revenue-raising)

authority, connoted disestablishment. § 11, 34 Stat. 141. But the principle that there exists no "roving license" to extrapolate from the congressional restriction of certain tribal powers the wholesale curtailment of others, *Bay Mills*, 572 U.S. at 794; *see also Buster*, 135 F. at 949-50, has especial force where the claimed result is disestablishment. Congress can and has "enact[ed] legislation that both restricts and, in turn, relaxes … restrictions on tribal sovereign authority," resulting in "major changes in the metes and bounds of tribal sovereignty" over time. *United States v. Lara*, 541 U.S. 193, 202 (2004). But the quantum of power exercised by a tribe within its borders has never been conflated with the separate question whether those borders continue to exist. For while Congress can restore aspects of tribal sovereignty previously curtailed, *id.*, a historic Indian reservation is unique in that once disestablished, its restoration would encounter obstacles legal, practical, and political that would effectively render the disestablishment permanent. This Court's insistence that Congress's intent be clear before it will hold that Congress took the final step of disestablishing a reservation, *Parker,* 136 S. Ct. at 1079, is accordingly critical not only to the protection of tribal powers but also to the protection of Congress's prerogatives to adjust them. Oklahoma's effort to infer from the loss of some territorial authority an intent to eliminate all of it violates this core principle.

B. Surrounding History and *Missouri Railway*

The surrounding history again confirms the textual conclusion. The United States agrees with the Nation and Petitioner that Section 28 was added to the Five Tribes Act late in the legislative process in significant part because Congress realized that restoration of the Five Tribes' reservations to the public domain would result in a massive transfer of lands to two railroad companies. U.S. *Murphy* Br. 27; Petr. Br. 11, 28-29; Creek *Murphy* Br. 17-19 (detailing legislative history). Congress had conditionally granted the companies (whose successor in interest remains a going concern) millions of acres within the reservations. *See Mo., Kan., & Tex. Ry. Co. v. United States*, 235 U.S. 37, 38 (1914); 47 Ct. Cl. at 85-89 (Howry, J., concurring). The grants would vest "whenever the Indian title shall be extinguished" and "said lands become a part of the public lands of the United States." § 9, 14 Stat. 236, 238 (1866); § 9, 14 Stat. 289, 291 (1866); *Mo., Kan., & Tex. Ry.*, 235 U.S. at 39.

The grants, in other words, would vest *upon disestablishment*. *See Parker*, 136 S. Ct. at 1079 (disestablishment occurs by "extinguish[ing] the land's prior use ... as an Indian reservation – and ... return[ing] it to the United States"); *see also id*. at 1080 ("to restore land to the public domain was to extinguish the land's prior use."). Congress focused squarely on this point in its deliberations over Section 28, and continued the Creek and other governments with the specific intent of avoiding that result. Petr. Br. 11, 28-29; Creek *Murphy* Br. 17-19.

This prompted suit by one of the railroads. The suit reached this Court, which in a unanimous opinion by Justice Holmes rejected the claim in a holding in serious tension with the State's arguments here:

> On this literal reading of the [grant] the conditions have not been fulfilled. The land has remained continuously appropriated to the use of the Indians, or has been sold for their benefit. *It never for a moment has become a part of the public domain in the ordinary sense*.... [W]e cannot read [the grant] as preventing the United States from making the change from tribal to several possessions, or dealing with this land in any way deemed most beneficial for those whose rights were treated as paramount. The proviso that the land must become public land shows that *a mere change from tribal title was not enough*.

235 U.S. at 40 (emphases added). In reaching this conclusion this Court cited both the Five Tribes Act and the Creek Allotment Act as "show[ing] in express terms" that the tribal lands had not been returned to the public domain and hence that the railroads' rights had not vested. *Id.* at 41. The opinion betrays no understanding that these statutes had instead been the capstones of a project to dismantle the Reservation.

IV. Statehood Did Not Eradicate the Reservation Boundaries.

A. Text

Oklahoma has credited statehood as central to the inexorable march to disestablishment. This argument again runs headlong into text. Just last Term, this Court reaffirmed that "[t]reaty rights ... are not impliedly terminated upon statehood." *Herrera v. Wyoming,* 139 S. Ct. 1686, 1696 (2019) (quoting *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 207 (1999)). "Statehood is irrelevant ... unless a statehood Act otherwise demonstrates Congress' clear intent to abrogate a treaty[.]" *Id.*

The Oklahoma Enabling Act evidences no such intent. Congress did not countenance the alteration of tribal boundaries in the Act. Instead, the very first section of the Act provides:

> That nothing contained in the [Oklahoma] constitution shall be construed to limit or impair the rights of person or property pertaining to the Indians of said Territories (so long as such rights shall remain unextinguished) or to limit or affect the authority of the Government of the United States to make any law or regulation respecting such Indians, their lands, property, or other rights by treaties, agreement, law, or otherwise,

> which it would have been competent to make if this Act had never been passed.

§ 1, 34 Stat. 267, 267-68 (1906). Oklahoma, moreover, was required to "forever disclaim all right and title ... to all lands ... owned or held by any Indian, tribe, or nation[.]" § 3, 34 Stat. at 270. Far from using statehood as a vehicle to dismantle the Reservation, then, "Congress was careful to preserve the authority of … the United States over the Indians, their lands and property, which it had prior to the passage of the [Enabling] act." *Tiger*, 221 U.S. at 309.

B. Surrounding History

That Congress did not understand it to be necessary to abrogate the Reservation at statehood is not surprising. As Petitioner details, ample precedent existed for the admission of states with sizable reservations intact. Indeed, not only was South Dakota admitted with forty-seven percent of its land in reservation status, Petr. Br. 38, but the Cheyenne River Sioux Reservation, confirmed by this Court in *Solem*, was set aside by Congress in March 1889, 25 Stat. 888, immediately on the eve of statehood in November of that year.

This understanding was on display again, just five days after enactment of the Oklahoma Enabling Act, when Congress passed the Act of June 21, 1906, 34 Stat. 325. There, Congress sought to resolve a boundary dispute by "declar[ing]" an 1871 survey line mandated by the Treaty of 1866 "to be *the west boundary line of the Creek Nation*," 34 Stat. at 364 (emphasis added), and established a judicial

recording district with reference to the "north line of the Creek Nation," *id.* at 343. This would have been strange language for Congress to use had it just dismantled the Creek Nation, especially given that in the same statute it made reference to "what was formerly the north half of the Colville Indian Reservation," *id.* at 379.

C. The United States' Criminal Transfer Argument Lacks Textual Basis.

The United States (joined by the State) has argued that various statutory provisions, including the criminal transfer provisions in the Enabling Act, conveyed criminal jurisdiction over the Reservation to the State. If that had happened, it would not by itself have been inconsistent with reservation status, and the Nation would accept Congress's edict and move on. But "[t]he trouble is, nothing in the statute says anything like that." *SAS Inst., Inc. v. Iancu,* 138 S. Ct. 1348, 1355 (2018). Petitioner well explains why none of the provisions cited by the United States comes close to evidencing the clear intent necessary to transfer criminal jurisdiction over Creek members to the new State. The Nation will not repeat that analysis, but wishes to emphasize two central points.

The United States argues that before statehood a series of territorial laws resulted in Indians and non-Indians being tried under the same laws in the same courts. Any outcome, it posits, in which non-Indians and Indians would have been tried in different courts post-statehood would have altered the status quo and would have required legislation to

that effect. But this ignores the fact that the courts in which Indians and non-Indians were tried pre-statehood were federal (territorial) courts, and the law applied was federal law. That statehood would transfer non-Indians to state court jurisdiction was long-settled law. *United States v. McBratney,* 104 U.S. 621, 624 (1881). But subjecting tribal members to state jurisdiction would have marked a dramatic change in the status quo, one this Court has countenanced only where Congress "has expressly provided that State laws shall apply," *Washington v. Confederated Bands and Tribes of Yakima Indian Nation*, 439 U.S. 463, 470-71 (1979) (quotation marks omitted). The Enabling Act did nothing of the sort.

The lack of regard for text manifests itself in an even more fundamental way. In *Murphy,* the State and the United States urged this Court to disestablish the Reservation even if it agreed with their reading of the Enabling Act's jurisdictional transfer provisions. Okla. *Murphy* Suppl. Br. 8; U.S. *Murphy* Suppl. Br. 18 n.5. But if those provisions truly operate as they say, there would be no warrant for going beyond them to address disestablishment in this case. Congress would have transferred criminal authority over the Creek Reservation to the State, as it has done with respect to other reservations, *see*, *e.g.*, 18 U.S.C. § 1162; 25 U.S.C. § 232, and whether the Reservation has retained its status would properly be a question for another day. Only because text is ultimately incidental to their arguments can the State and the United States claim otherwise.

* * *

It is not surprising that at oral argument in *Murphy* the State could not identify the date (that is, the statutory enactment) when disestablishment occurred. *Murphy* Arg. Tr. 5-6. One does not exist. As the Tenth Circuit recognized three decades ago:

> Although Congress at one time may have envisioned the termination of the Creek Nation and complete divestiture of its territorial sovereignty, the legislation enacted in 1906 reveals that Congress decided not to implement that goal, and instead explicitly perpetuated the Creek Nation and recognized its continuing legislative authority.... It is not for the courts to complete a task that Congress chose not to finish.

Indian Country, 829 F.2d at 981.

V. The Nation's Post-Statehood Presence and Exercise of Governmental Power Confirm the Continued Existence of Its Reservation.

In *Parker*, the Omaha Tribe had been "almost entirely absent from the disputed territory for more than 120 years." 136 S. Ct. at 1081. It maintained no governmental, social, or cultural presence there. *Id.* And "for more than a century" the federal government had "treated the disputed land as Nebraska's." *Id.* at 1082. But a unanimous Court held that none of this was sufficient to overcome the lack of textual support for alteration of the reservation boundaries, because

"[o]nly Congress has the power to diminish a reservation." *Id.* (quotation marks omitted).

These principles apply with even greater force here. Contrary to facts at play in *Parker*, the Nation and its members have maintained a significant and continuous presence throughout the Reservation ever since statehood, and the Nation exercises substantial governmental authority for the benefit of all Reservation residents. To be sure, post-statehood the Nation governed far less robustly than it does today. But the reason lay not in the law but in its nullification.

A. The Muzzling of the Nation's Government in the Immediate Post-Statehood Period Does Not Connote Disestablishment.

In *Murphy,* Oklahoma argued that the Nation's curtailed governance in the immediate wake of statehood connoted disestablishment. The contention falters in conflating the quantum of governance with the existence of reservation boundaries. *Supra* at 22.

Moreover, Oklahoma understated Creek governance within the Reservation during this period. Congress well understood that the Nation retained legislative authority. Hence, in 1909, Congress made approval by the "Creek National Council" a "condition precedent" to congressional legislation seeking to equalize the value of Creek allotments throughout the Reservation. 35 Stat. 781, 805. The Creek Council continued to enact laws and

submit them for presidential approval, including laws regarding appropriations; the conduct of Council members; the restructuring of government offices; and the naming of delegates for a diplomatic mission to Washington.[7]

As Petitioner describes, the Nation and its members endured a sustained, illegal assault on their landholdings during this period. Petr. Br. 13-14. Not surprisingly, the Creek government's efforts focused on turning back that assault wherever possible, even as the Interior Department frequently turned a blind eye, or worse yet, joined in the plunder. *Id.* The Nation directed its National Attorneys to investigate and litigate fraudulent town lot sales and embezzlement in probate and guardianship matters. *See*, *e.g.*, 1907 Annual Report of the Indian Inspector for Indian Territory, at 369; 1908 Annual Report of the Comm'r of Indian Affairs, at 111-12; 1909 Annual Report of the Comm'r to the Five Civilized Tribes, at 421; 1915 Annual Report of the Superintendent for the Five Civilized Tribes, at 412-13.[8] Moreover, under a 1924 statute authorizing "the Creek Indian Nation" to bring treaty claims against the United States, 43 Stat. 139, 139, the Nation successfully sued the government for taking lands in violation of the 1866 Treaty – hardly the act of a defunct sovereign. *See United States v. Creek Nation*, 295 U.S. 103 (1935).

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[7] http://bit.ly/MCN-Council-Resolutions-1907-1916.

[8] http://bit.ly/MCN-1907-RIIIT; http://bit.ly/MCN-1908-ARCOIA; http://bit.ly/MCN-1909-RCTFCT; http://bit.ly/MCN-1915-RSTFCT. *See also* http://bit.ly/MCN-Attorney-Letter-1915-Probate.

There is no question, however, that the Nation's governance was not nearly as vibrant as it is today. But this was in significant part the result of actions seeking to thwart, not effectuate, the laws enacted by Congress. The Secretary of the Interior had strenuously opposed Section 28 and petitioned Congress instead to "vest[] in the Secretary" exclusive jurisdiction over the Five Tribes and their lands. 40 Cong. Rec. 2959, 2978-79 (1906). After losing that battle, executive branch officials proceeded as though they had won. For decades thereafter the Department maintained that "[j]urisdiction over their tribal affairs rest[ed] in the Secretary," including "all matters relative to their tribal property or interests[.]"[9]

During this time, the Department refused to allow the Nation to hold elections for Principal Chief, frequently prevented the Creek Council from meeting by requiring prior Department approval and refusing to grant it, and declined to transmit Creek legislation to the President for approval. *See Harjo v. Kleppe*, 420 F. Supp. 1110, 1130-36 (D.D.C. 1976) (discussing Department's "deliberate" efforts to "debilitate" Creek government).[10] To survive, the Creek formed an underground government, the Creek General Convention (which drew from the traditional Creek Talwa (or Town) structure, which "remained strong," *id*. at 1135), as the Department had "successfully pre-empted the constitutional processes of the tribe for its own purposes," *id*. at 1132.

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[9] http://bit.ly/MCN-1931-DOI-Letter.
[10] *See also* http://bit.ly/MCN-Elections-Letters-1907-1912.

Any conclusion that the lack of robust governance during this period signified Congress's termination of the Reservation would accordingly draw the wrong lessons from history. For the second time in less than a century executive branch officials waged an all-out war on the Creek and sought to crush their governmental institutions – not in furtherance of Congress's design but rather in contravention of it.

Moreover, the early twentieth-century assault was hardly unique to the Nation or to Oklahoma. Departmental policy nationwide sought "to end the tribe as a separate political and cultural unit" to "assure that … Indian civilization died[.]" Cohen, *supra* note 3, § 1.04, at 75. If the lack of governance during this assimilationist era was a hallmark of disestablishment, very few reservations would remain.

In congressional debates leading up to the Indian Reorganization Act of 1934 ("IRA"), Commissioner of Indian Affairs John Collier described Interior control of reservations during the assimilationist era as "administrative absolutism." *Readjustment of Indian Affairs: Hearing on H.R. 7902 Before the H. Comm. on Indian Affairs*, 73d Cong. 18 (1934) ("Hearing"). The Department acted "as a nonrepresentative governing authority" on reservations, *id*. at 22, wielding "absolute discretionary powers over all organized expressions of the Indians. Their tribal councils exist[ed] by its sufferance and ha[d] no authority except as … granted by the Department," *id.* at 52. Tribes were denied even the most basic territorial powers as

federal officials, for example, assumed the "unlimited power to exclude, and the Indians ha[d] no say[.]" *Id.* at 83; *see Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 141 (1982) (describing "power to exclude" as "a hallmark of Indian sovereignty").

In enacting the IRA in 1934 and the Oklahoma Indian Welfare Act ("OIWA") in 1936, Congress sought to revitalize powers of tribal self-government "which Congress ha[d] never seen fit to abrogate." Hearing at 23. In the changed climate, the Creek sought permission in 1934 to conduct their first tribal election since 1906, and Commissioner Collier consented.[11]

The new era, however, was short-lived. As early as "the late 1930s," the seeds were sown for the Termination era, "the most concerted drive against Indian property and Indian survival since the removals following the act of 1830 and the liquidation of tribes and reservations following 1887." Cohen, *supra* note 3, § 1.06, at 85 (quotation marks omitted). During this period, which peaked in the post-war years, federal officials again sought "the abolition of tribal self-government" and engaged in "unauthorized authoritarianism on Indian reservations." Felix S. Cohen, *The Erosion of Indian Rights, 1950–1953: A Case Study in Bureaucracy*, 62 Yale L.J. 348, 357, 361 (1953). Thus, the Department reverted to prohibiting Creek elections and ignoring the Creek legislature. *See Harjo*, 420 F. Supp. at 1139.

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[11] http://bit.ly/MCN-Elections-Letter-1934.

President Nixon brought an end to the Termination policy with his watershed Special Message on Indian Affairs (July 8, 1970).[12] The United States would "break decisively with the past" and promote tribal "self-determination." Four months later, Congress reaffirmed the authority of the Five Tribes to directly select their chiefs, and Creek elections resumed. 84 Stat. 1091, 1091.

The new policy required time to take root. In 1979, the Nation adopted a new Constitution, which sought to renew its tripartite system of government, and in 1982 it requested funding to reestablish its courts. *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1442 (D.C. Cir. 1988). The Interior Department, however, declared that the Nation lacked such authority. *Id*. at 1440. *See* Statement of President Ronald W. Reagan on American Indian Policy (Jan. 24, 1983) (outdated executive branch policies still "inhibited the political ... development of the tribes.").[13] In 1988, the *Hodel* Court held that – in light of the Creek treaties, the Five Tribes Act, and the OIWA – the Nation enjoyed "all powers associated with self-government." *Hodel*, 851 F.2d at 1443-45. That long-delayed vindication augured a marked resurgence in the Nation's governmental institutions.

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[12] http://bit.ly/MCN-Nixon-Message-Indian-Affairs.

[13] http://bit.ly/MCN-Reagan-Message-Indian-Affairs.

B. Present-Day Governance and Demographic Presence

Today, there is no gainsaying that the Nation and its citizens maintain a robust presence across the Reservation. The Nation is the fourth most populous Indian nation in the United States, with 89,271 citizens.[14] Nation members live throughout the Reservation.[15] Under the Nation's Constitution, the Reservation is divided into eight legislative districts, each of which serves as a home voting district for Nation citizens and sends two representatives to the National Council. MCN Const. art. IV, § 9; art. VI, §§ 1-2.[16]

The Constitution maintains the tripartite, separation-of-powers government first established in 1867, with a democratically elected Principal Chief, Second Chief, and National Council, and a judiciary appointed by the executive branch and confirmed by the legislature. *Id*. arts. IV-VII. The Constitution, which was approved by the Interior Department in 1979, provides that "[t]he political jurisdiction of the [Nation] shall be as it geographically appeared in 1900 which is based upon those Treaties entered into by the [Nation] and the United States[.]" *Id*. art. I, § 2. Consistent with this definition, the Nation's government, which has an annual budget of more than $350 million and employs over 2,000 people,[17]

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[14] http://bit.ly/MCN-First-Quarter-Report-2020, at 38.
[15] http://bit.ly/MCN-Citizenship.
[16] http://bit.ly/MCN-Constitution.
[17] http://bit.ly/MCN-First-Quarter-Report-2020, at 1; http://bit.ly/MCN-Budget-2020; http://bit.ly/MCN-Budget-Approval.

exercises authority throughout the Reservation and ensures access (for both Indians and non-Indians) to quality services that otherwise would not be available.

The Nation's Lighthorse Police Department, for example, plays a pivotal role in coordinated law enforcement efforts on the Reservation. The Nation is party to an Intergovernmental Cross-Deputization Agreement with the United States and virtually all of the counties and municipalities within the Reservation, including both the City and County of Tulsa.[18] Pursuant to the agreement, the Lighthorse respond to criminal and emergency situations throughout the Reservation, regardless of the Indian or non-Indian status of those involved, and regardless of the fee or trust status of the lands where the incidents arise. Given the sophistication of both its regular and specialized units, the Lighthorse are frequently called on to assist other law enforcement agencies, including in the more rural areas of the Reservation; that cooperation has yielded notable successes and numerous accolades for the Department.[19] A vivid example occurred just days before the filing of this brief, when the Lighthorse received a request from the Okfuskee County Sheriff's Office and the Oklahoma State Bureau of Investigations to search for the suspect in a double homicide and arson. Ten Lighthorse officers, including members of its investigations and K-9

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[18] *See* http://bit.ly/MCN-Lighthorse.

[19] *See, e.g.*, http://bit.ly/lighthorse-police; http://bit.ly/Lighthorse-Negotiation; http://bit.ly/inmate-capture. *See also Murphy* Creek Br. 27-28.

units, tracked the suspect for nearly twelve hours through the snow before apprehending him. The suspect is non-Indian, and the crime, search, and arrest all took place on fee land.[20]

The Nation also coordinates with local governments on vital infrastructure. They work together to establish infrastructure priorities, allocate project responsibilities, and fund construction and maintenance throughout the Reservation.[21] Much of the focus is on roads and bridges sorely in need of repair or replacement. State and county officials frequently credit this partnership of "government entities working hand-in-hand together to provide a benefit to the citizens here."[22] Federal officials likewise recognize the value of the Nation's efforts, with the Chief of the Bureau of Indian Affairs Division of Transportation underscoring that the Nation's "bridge rehabilitation and reconstruction projects … will improve access to reliable, safe, and affordable transportation for all rural Oklahomans[.]"[23]

The Nation's governmental activities enhance the quality of life for Reservation residents in myriad other ways. In 2019, the health-care system operated by the Nation's Department of Health provided a full array of medical services for more than 180,000 patient visits at its three state-of-the-art hospitals (all

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[20] http://bit.ly/MCN-Lighthorse-Arrest-Feb-6-2020.

[21] *See, e.g.*, http://bit.ly/MCN-Transportation-Agreement-Lamar-Road; http://bit.ly/MCN-DOT-Meeting; http://bit.ly/MCN-Transportation-Agreements.

[22] http://bit.ly/MCN-Transportation-Project-Mission-Road.

[23] http://bit.ly/MCN-Transportation-BIA-Letter-of-Support.

in rural areas and serving both Indians and non-Indians) and six medical clinics,[24] with the Nation having invested more than $85 million in these facilities in recent years.[25] The Nation's Family Violence Prevention Program ("FVPP") provides significant assistance to victims of domestic violence, sexual assault, and stalking.[26] The FVPP (widely recognized by police departments, state court judges, the U.S. Department of Justice, and others for the quality and importance of its efforts)[27] serves Indian and non-Indian clients alike, and in many areas of the Reservation is the only agency to provide such services.[28] The Nation also makes vital contributions to education on the Reservation, operating Head Start and WIC programs (again for Indians and non-Indians alike)[29] and partnering through its Department of Education with local school districts and the Oklahoma Department of Education to improve educational outcomes for all students.[30]

The Reservation-wide presence of the Nation's government evidences itself in ways going beyond the important programs it offers. "The territorial jurisdiction of the Muscogee Courts ... extend[s] to all

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[24] http://bit.ly/MCN-Dept-of-Health ("Hospitals" and "Clinics"); http://bit.ly/MCN-First-Quarter-Report-2020, at 6-7.
[25] http://bit.ly/MCN-Construction-Projects-Report; http://bit.ly/CreekNation-ER-Expansion.
[26] http://bit.ly/family-violence-prevention.
[27] *See* http://bit.ly/MCN-FVPP-Letters-of-Support; Creek *Murphy* Br. 28-29.
[28] http://bit.ly/MCN-FVPP-Clients; http://bit.ly/FVPP-Map.
[29] http://bit.ly/MCN-Head-Start; http://www.mcn-nsn.gov/services/wic/.
[30] http://bit.ly/MCN-First-Quarter-Report-2020, at 11-13; http://bit.ly/MCN-Education-Collaborative-Workshop.

the territory defined in the 1866 Treaty with the United States," MCN Code tit. 27, § 1-102(a),[31] and the Nation's courts accordingly exercise jurisdiction over causes of action involving tribal members that arise within the Reservation's boundaries, including on fee lands, *see Walker v. Tiger*, No. SC 2003-01, 2004 WL 7081139, at **1, 3, 6 (Muscogee (Creek) May 12, 2004) ("Trust property residency is not a requirement for the Muscogee (Creek) Nation Court to meet the definition of Indian country within the boundaries of the Muscogee (Creek) Nation."). *See also* MCN Code tit. 6, § 3-401 (district court has full civil jurisdiction to issue protection orders for and against those residing in its territorial jurisdiction).

Finally, and again in stark contrast to the facts in *Parker,* the Nation maintains governmental offices (which, among other things, administer social services) and community centers (which host important cultural events and are hubs for activities such as language preservation) across the Reservation, along with hospitals, health care clinics, Lighthorse police stations, and economic development ventures. *See* Appendix (Map of the Muscogee (Creek) Nation).[32] Far from casting doubt on the textual conclusion that Congress never disestablished the Reservation, the extent of the Nation's presence and governmental activity within the Reservation amply confirms it.

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[31] http://bit.ly/MCN-Code.

[32] http://bit.ly/MCN-Map.

VI. The State's Exaggerated Arguments About Consequences Provide No Support for Disestablishment.

In *Murphy*, the State and its amici, including the United States, suggested a host of consequences that would follow if this Court were to allow the Reservation to remain in place. These suggestions share three things in common: (1) they are addressed to the wrong branch of government; (2) they are overstated, and overlook entirely the significant intergovernmental cooperation already in place; and (3) they fail to account for the disruption in governance that would result if the Reservation were disestablished.

A. Criminal Consequences

In *Murphy*, the Nation suggested that in the event of an affirmance, it would continue to explore with the United States, the State, and Congress the optimal allocation of criminal jurisdiction on the Reservation. The United States seized on this as an "effective[] acknowledg[ment] … that affirmance would constitute a sea change[.]" U.S. *Murphy* Suppl. Br. 7. Not so. The Nation has no hesitation in reiterating what it said previously: It has a paramount interest in maintaining law and order within its Reservation, and firmly believes that, if there are adjustments to be made to criminal jurisdiction, then Congress is the constitutionally empowered body to do so. "[I]n our constitutional order the job of writing new laws belongs to Congress, not the courts." *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1413 (2018) (Gorsuch, J., concurring). Ample

precedent exists for congressional action in this area. U.S. Att'ys *Murphy* Br. 6-9; Creek *Murphy* Suppl. Br. 8-10.

The United States and Oklahoma argued that even if criminal jurisdictional issues are addressed in a satisfactory manner going forward, affirming the Nation's reservation status would "open the floodgates to countless attacks on convictions," Okla. *Murphy* Suppl. Reply Br. 8. But federal habeas petitions must be filed within one year, 28 U.S.C. § 2244(d), with strict limitations on second or successive petitions, *id.* § 2244(b). The Tenth Circuit has already determined that *Murphy* provides no basis for overcoming these limitations. *See Dopp v. Martin*, 750 F. App'x 754, 757 (10th Cir. 2018); *Boyd v. Martin*, 747 F. App'x 712, 716-17 (10th Cir. 2018).

Petitioner, who has a clear self-interest in making the argument, and Oklahoma, which has perhaps a short-sighted one, contend that there are no analogous barriers in the State system. Petr. Br. 43 & n.5; Okla. *Murphy* Suppl. Reply Br. 7; *see also Wackerly v. State*, 237 P.3d 795, 797 (Okla. Crim. App. 2010). But in an unpublished opinion the State Court of Criminal Appeals has already found at least one *Murphy* claim "waived and procedurally barred." *Johnson v. Oklahoma*, No. PC-2018-343 (Okla. Crim. App. July 24, 2018). And while Petitioner's case is of course before this Court, the decision below can fairly be described as a judicial curiosity: Rather than holding Petitioner's claim, it denied it on the grounds that this Court had not yet decided *Murphy*, and in doing so did not squarely address procedural bars.

The Oklahoma courts plainly have unfinished business in this area.

Moreover, if any State prisoners ultimately succeed in challenging their convictions, they would be subject to re-prosecution by the United States, *see United States v. Magnan*, 863 F.3d 1284, 1291 (10th Cir. 2017), and the Nation. The Nation understands that various factors will come into play in making re-prosecution decisions, but surely the existence of such factors does not suffice to disestablish a Reservation over a century after Congress made a concerted decision not to do so.

B. Civil Consequences

Claims of significant disruption from the vindication of the Reservation's boundaries cannot be sustained in light of on-the-ground reality and this Court's precedents. "[M]illions of acres … [of] non-Indian fee land," *Atkinson Trading Co. v. Shirley,* 532 U.S. 645, 648 (2001), exist within reservations across the country. As NCAI well explains, these include sizeable portions of largely non-Indian cities like Tacoma, Washington that have thrived with the affirmation of reservation status and the opportunities for economic development that it brings. NCAI Br. 25-29.

This Court's precedents render hollow any claims of civil legal disruption as they presumptively constrain the exercise of tribal authority over non-Indians on fee lands (in areas ranging from regulation to taxation to adjudication) while providing that the corollary state authority remains intact. *Id.* 26; Creek

Murphy Br. 31-36. Even with respect to on-reservation tribal members, Oklahoma retains considerable power, including the authority to levy property taxes on fee land. *Id.* 35-36. An Oklahoma-specific tribal statute (of which there are many) precludes any argument that the Nation could usurp state environmental regulation on the Reservation. Pub. L. No. 109-59, § 10211(a)-(b), 119 Stat. 1144, 1937 (2005). And claims of disruption appear particularly misplaced given the extensive intergovernmental cooperation between the State and tribes in eastern Oklahoma, Boren et al. *Murphy* Br., including the Nation in particular. *See supra* at 37-39.

With so little to aim at, Oklahoma trained considerable rhetorical fire in *Murphy* on the Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901 *et seq.*, claiming that child custody determinations would be undone in the event of an affirmance. Okla. *Murphy* Br. 56. This was unfortunate. A far better indicator regarding State-Nation cooperation under ICWA comes in a brief filed recently by Oklahoma and twenty-five other states in support of the Act's constitutionality. That brief emphasizes that "ICWA creates an important framework that has allowed robust state-tribal collaboration in improving the health and welfare of Indian children. Amici States have employed ICWA as a means of strengthening and deepening their important, government-to-government relationships with tribes in this critical area."[33]

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[33] http://bit.ly/MCN-States-Amicus-Brief-ICWA, at 25.

This captures the situation well. Oklahoma, the Nation, and local agencies and courts enjoy a highly successful partnership on child custody. Under ICWA and its state counterpart, 25 U.S.C. §§ 1911(c), 1912(a); Okla. Stat. tit. 10, § 40.4, the Nation intervenes in every custody proceeding involving a Creek child, and those proceedings already "utilize to the maximum extent possible" Nation services in securing appropriate placements, *id.* § 40.6.

The Nation is committed to preserving current placements, and ready options exist for it to do so. As the States' ICWA brief notes, the State and Nation can compact to allocate jurisdiction over custody proceedings,[34] and any such compact could recognize continuing state court authority over existing placements. *See* 25 U.S.C. § 1919(a); Okla. Stat. tit. 10, § 40.7. The Nation can also establish enforceable placement preferences, including provisions conferring presumptive validity on existing placements under Nation law. 25 U.S.C. § 1915(c). The Nation and the State share the same goals on this issue, and overheated litigation rhetoric will not prevent their realization.

C. The State Ignores the Detrimental Effects that Disestablishment Would Have on Reservation Governance.

As detailed above, the Nation engages in substantial governmental activities for the benefit of Indians and non-Indians alike on the Reservation and

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[34] http://bit.ly/MCN-States-Amicus-Brief-ICWA, at 25-26.

does so in close cooperation with neighboring governments. A disestablishment holding would interfere significantly with these activities, because it would undermine the sense of shared jurisdiction that underpins the cooperation. Under existing intergovernmental agreements, for example, the Nation's Lighthorse Police participate in and make significant contributions to police operations that result in the arrests of non-Indians on fee land within the Reservation; the Nation's Transportation Department collaborates in the prioritization, planning, and execution of infrastructure projects on county roads and bridges whose repair is essential to the safety of thousands of Reservation residents; and the Nation's FVPP staff arrive in the middle of the night to help address grave situations of family violence or sexual abuse involving non-Indians on fee land. Loss of access to these services would follow disestablishment. It would not be possible for officials of the State or its political subdivisions to share authority with respect to their constituents in this manner absent an understanding of overlapping jurisdiction.

And this is not simply speculative. While cooperative law enforcement agreements commenced in 2000, fourteen were executed after the Tenth Circuit's decision in *Murphy*,[35] their consummation bolstered by the understanding of shared jurisdiction the decision confirmed. Similarly, individuals and entities ranging from a Sheriff to state court judges to the Okmulgee Police Department have praised the FVPP's work because it embodies "a holistic and

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[35] *See* http://bit.ly/MCN-Lighthorse.

collaborative approach in rural communities across the eleven counties that comprise the jurisdictional boundaries of the Muscogee (Creek) Nation."[36] Recently, the Lighthorse Police took over the patrol operations in the City of Mannford for an entire day to enable all police officers there to attend the funeral of their slain chief.[37] That sort of thing simply does not happen absent an understanding of the Nation's authority.

In *DeCoteau,* this Court stated that "competing pleas [regarding practical consequences] are not for us to adjudge," 420 U.S. at 449, a conclusion this Court reiterated in *Parker*. Text governs the proper resolution of this case, but if consequences are to be considered, they militate in favor of affirmation of the Nation's Reservation, not its disestablishment.

CONCLUSION

The judgment below should be reversed.

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[36] *See* http://bit.ly/MCN-FVPP-Letters-of-Support.

[37] *See* http://bit.ly/MCN-Lighthorse-Patrol-Mannford.

Respectfully submitted,

ROGER WILEY
ATTORNEY GENERAL
KYLE HASKINS
FIRST ASSISTANT
ATTORNEY GENERAL
MUSCOGEE (CREEK)
NATION
Post Office Box 580
Okmulgee, OK 74447
(918) 295-9720

RIYAZ A. KANJI
Counsel of Record
DAVID A. GIAMPETRONI
KANJI & KATZEN, PLLC
303 Detroit Street, Ste 400
Ann Arbor, MI 48104
(734) 769-5400
rkanji@kanjikatzen.com

CORY J. ALBRIGHT
PHILIP H. TINKER
LYNSEY R. GAUDIOSO
KANJI & KATZEN, PLLC
401 Second Ave. S., Ste 700
Seattle, WA 98104
(206) 344-8100

Counsel for Amicus Curiae Muscogee (Creek) Nation

February 11, 2020

APPENDIX

ROGERS
MAYES
TULSA
WAGONER
CREEK
OKMULGEE
MUSKOGEE
OKFUSKEE
MCINTOSH
SEMINOLE
HUGHES

Family Violence
Family Violence
Tulsa Head Start
Tulsa Child Development Center
Tulsa Indian Community Center
River Spirit Casino
Lighthorse Police
Riverwalk
Child Support Center
Citizenship Office
Sapulpa Child Development Center
Sapulpa Indian Community Center
Nutrition
Family Violence
Sapulpa Indian Health Center
Kellyville Indian Community
Glenpool Indian Community Center
CNG Station
Koweta Indian Community Center: Nutrition
Koweta Food Distribution
Koweta Health Facility
Family Violence
Bristow Casino
Bristow Indian Community Center: Nutrition
Duck Creek Casino
Duck Creek Indian Community Center
Twin Hills Convenience Plaza
Twin Hills Indian Community Center
Muscogee Indian Community Center: Nutrition
Family Violence
Muscogee Regional Office
Muscogee Travel Plaza
Muscogee Casino
Physical Rehabilitation Center
Muscogee (Creek) Nation
Tribal College
Lighthorse Police
Child Support
Welcome Center
Council House
Health Administration
MCN Medical Center
Family Violence
Morris Indian Community Center
MCN Tax Commission/Motor Vehicle Registration
Okmulgee Indian Health Center
Express Care Clinic
Clubhouse
Okfuskee Indian Community Center
Wilson Indian Community Center
Checotah Casino
Checotah Indian Community Center
Checotah Head Start
Dewar Indian Community Center: Nutrition
Reintegration Program
WIC Program
Okemah Head Start
Okemah Child Development Center
Okemah Casino
Okemah Creek Nation Community Hospital
Okemah Indian Community Center: Nutrition
Fountainhead: Golf Course Pro Shop Clubhouse Grill
Cromwell Indian Community Center
Yardeka Indian Community Center
Weleetka Indian Community Center: Nutrition
Eufaula Indian Community Center: Nutrition
Eufaula Indian Health Center
Eufaula Child Development Center
Eufaula Head Start
Family Violence
Eufaula Casino
Dustin Indian Community Center
Wetumka Indian Community Center: Nutrition
Wetumka Indian Health Center
Family Violence
Southern Regional Office
Food Distribution
Tribal Driveways
Lighthorse Police
Hanna Indian Community Center
Hanna Farm
Dustin Farm
Holdenville Indian Community Center: Nutrition
Holdenville Casino
Holdenville Child Development Center

OKMULGEE, OKLAHOMA

OKLAHOMA

MUSCOGEE (CREEK) NATION

1 - TRIBAL COMPLEX - MCCOMBS
2 - COMMERCE
3 - FINANCE
4 - VETERANS
5 - EXECUTIVE BRANCH
6 - TRANSIT
7 - MOUND
8 - ATTORNEY GENERAL
9 - HEAD START
10 - WIC
11 - EDUCATION AND TRAINING
12 - CHILD DEVELOPMENT CENTER
13 - COMMUNITY AND HUMAN SERVICES
14 - LIGHTHORSE POLICE
15 - TRIBAL DRIVEWAYS
16 - INDIAN HEALTH SERVICES
17 - MVSKOKE MEDIA
18 - GSA
19 - BIA FIREHOUSE
20 - FLEET MANAGEMENT

MUSCOGEE (CREEK) NATION
GEOSPATIAL DEPARTMENT
JANUARY 2020

DATA SOURCES:
ESRI
MCN GEOSPATIAL
OU GEO INFORMATION SYSTEMS

0 2.5 5 10 15 20 Miles

MAP LEGEND

MUSCOGEE (CREEK) NATION
MCN HEALTH CLINICS & HOSPITAL
FAMILY VIOLENCE LOCATIONS
CASINO
NUTRITION CENTER
HEAD START
CHILD DEVELOPMENT CENTER
TRIBAL FARM
HOUSING AUTHORITY
LIGHTHORSE POLICE
TRIBAL FACILITY
INDIAN COMMUNITY CENTERS
COUNTY SEATS
CITIES

TURNPIKE
BROKEN ARROW TURNPIKE
CREEK TURNPIKE
INDIAN NATIONS TURNPIKE
MUSKOGEE TURNPIKE
MAJOR ROADS

MCN VOTING DISTRICTS
CREEK
MCINTOSH
MUSKOGEE
OKFUSKEE
OKMULGEE
ROGERS, MAYES, WAGONER
TULSA
TUKVPVTCE
MUSCOGEE (CREEK) NATION
TOWNSHIP
COUNTY
CITY LIMITS

MUSCOGEE (CREEK) NATION

2020

PRINCIPAL CHIEF DAVID HILL

SECOND CHIEF DEL BEAVER