Capital Case
No. 17-1107

IN THE

Supreme Court of the United States

MIKE CARPENTER, INTERIM WARDEN, OKLAHOMA STATE PENITENTIARY,

Petitioner,

v.

PATRICK DWAYNE MURPHY,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

SUPPLEMENTAL REPLY BRIEF FOR *AMICUS CURIAE* MUSCOGEE (CREEK) NATION IN SUPPORT OF RESPONDENT

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I. NO STATUTORY BASIS HAS BEEN IDENTIFIED FOR OKLAHOMA'S PRESENT EXERCISE OF CRIMINAL JURISDICTION OVER CREEK RESERVATION INDIANS.

The Nation has found no statute granting Oklahoma jurisdiction over crimes involving Indians within the Creek Reservation. Creek Supp. 1-3. Petitioner and the United States identify no provision approaching the explicit text Congress has employed when accomplishing that goal elsewhere. In lieu of text, they argue that the 1897 and 1904 Acts applied a uniform body of "local" law – civil and criminal – to Indians and non-Indians in the Indian Territory. Because the Enabling Act transferred (their words) "all civil and criminal cases of a local nature" to state courts, it accordingly transferred all Indian cases to them. Petr. Supp. 5-6; US Supp. 7-12. This effort to buttress criminal with civil jurisdictional arguments misapprehends both.

A. Congress Did Not Apply One Body of Law Uniformly to Indians and Non-Indians in the Indian Territory.

Two threshold points are critical. Despite repeated references in the briefing to "local" cases, Congress did not employ that or any equivalent term in the relevant Acts. Nor did those Acts apply state law. They assimilated provisions of Arkansas law as *federal law*. Creek Supp. 4-6. The United States agrees. US Supp. 4. That Congress applied federal law to Indians in the Territory does not remotely

suggest that Congress *divested* federal jurisdiction over Indians upon statehood.

Equally flawed is the claim that the 1897 and 1904 Acts subjected "*all* individuals in the Indian Territory … to the same substantive laws, both civil and criminal." US Supp. 9-10. The 1897 Act was conditional regarding the Five Tribes, providing that any subsequent agreement would "operate to suspend any provisions of this Act if in conflict therewith as to said nation[.]" 30 Stat. 62, 84. The 1901 Creek Allotment Act and its 1902 Supplement thus "withdrew the lands of the Creeks from the operation" of assimilated Arkansas law not referenced therein. *Marlin v. Lewallen*, 276 U.S. 58, 64-67 (1928). *Accord Longest v. Langford*, 276 U.S. 69, 71 (1928) (Choctaw/Chickasaw agreements).

> The same goes for the 1904 Act, which
>
> > fell far short of manifesting a purpose to make [Arkansas laws] effective as against special laws enacted by Congress for particular Indians, such as the agreements with the Creeks.

Marlin, 276 U.S. at 68. *See also Washington v. Miller*, 235 U.S. 422, 428 (1914) (same); *In re Davis' Estate*, 122 P. 547, 549 (Okla. 1912) (1904 Act did not extend Arkansas law to Indians and non-Indians "all alike" as "[b]oth prior and subsequent legislation … show conclusively that Congress had no such thought").[1]

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[1] Petitioner's selective quotation of *Miller* vastly expands its description of the 1897 Act. *Compare* Petr. Supp. 4 ("'displace

In sum, the 1897 and 1904 Acts simply did not operate as claimed.

B. Statehood Did Not Deliver Indians and Non-Indians Alike to State Jurisdiction.

The United States argues that Congress would not have "*sub silentio*" retained jurisdiction over Indians at statehood. US Supp. 3-4. But the Enabling Act's *first sentence* retains federal authority over the "Indians, their lands, property, or other rights … [as] if this Act had never been passed." § 1, 34 Stat. 267, 267-68. This text – by which "Congress was careful to preserve" its pre-statehood authority "over the Indians," *Tiger v. W. Inv. Co.*, 221 U.S. 286, 309 (1911) – is irreconcilable with the United States' position, and in multiple rounds of briefing neither the government nor Petitioner has ever accounted for it.

Nor have they grappled with the text of the Act's transfer provisions, preferring the atextual refrain that Congress transferred "local" cases to state jurisdiction. In the criminal context, the Act (as amended) transferred to federal court prosecutions for crimes "which, had they been committed within a State, would have been cognizable in the Federal courts[.]" § 1, 34 Stat. 1286, 1287. No one seriously disputes that the Creek Reservation was intact prior to statehood, as *Morris v. Hitchcock*, 194 U.S. 384 (1904), and *Buster v. Wright*, 135 F. 947 (8th Cir.

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the Creek tribal laws'") *with* 235 U.S. at 425 ("displace the Creek tribal laws of descent and distribution").

1905), make clear.[2] Creek Br. 13-14. Murder by a Creek citizen within the Reservation, "had [it] been committed within a State," would have unquestionably been subject to the Major Crimes Act, § 9, 23 Stat. 362, 385, and thus properly transferred to federal court.

In the civil context, Petitioner's recitation of state cases involving Indians is again no substitute for text. Petr. Supp. 7; US Supp. 15. Even where Congress confers state jurisdiction over such cases, *e.g.*, 28 U.S.C. § 1360(a) (PL-280), that does not "remotely resembl[e] an intention to confer general state civil regulatory control over Indian reservations." *Bryan v. Itasca County*, 426 U.S. 373, 384 (1976). This Court has indeed long applied the same principles regarding state civil jurisdiction over eastern Oklahoma reservations as elsewhere. *E.g.*, *Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 458 (1995).

Petitioner nevertheless claims that Congress's intent to subject all persons to the same laws "was reflected throughout the statehood process." Petr. Supp. 7. For this, Petitioner cites *United States v. Allen*, 171 F. 907, 926 (E.D. Okla. 1909) ("[c]ontinued guardianship of the Indians was incompatible" with statehood). But *Allen* was reversed by the Eighth Circuit, which – after describing the district court as

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[2] Petitioner accordingly declined to make such an argument to the Court. Tr. 6:1-2 ("we don't have to give you a date" for disestablishment).

"invent[ing] a new and dangerous canon of statutory interpretation" – explained that Congress knew how to explicitly "renounce[] its own authority over the Indians, and subject[] them to the laws of the state, both civil and criminal." *United States v. Allen*, 179 F. 13, 19 (8th Cir. 1910). By contrast,

> [i]n its dealings with the Five Civilized Nations, Congress has been at great pains to indicate a different purpose. Here it has …, down to … the provisions which it insisted should be embodied in the [Oklahoma] Constitution … reserved to itself express authority to pass such laws with respect both to the Indians and their lands ….
>
> … An intent to destroy th[at] authority … ought not to be deduced as a mere speculative inference …. Such a radical change of national policy should emanate only from express and unequivocal language.

Id. at 19-20, *aff'd*, *Heckman v. United States*, 224 U.S. 413 (1912).

Petitioner and the United States identify no such language. In sum, their account of a wholesale transfer of criminal and civil jurisdiction to the new State ignores the plain text of the Enabling Act and the limited reach, long recognized by this Court, of the 1897 and 1904 Acts. While the Nation remains committed to forging agreements regarding the optimal allocation of criminal authority on the Reservation, Creek Supp. 9-10, no statutory basis

presently exists for state jurisdiction over crimes involving Indians.

C. Petitioner's Erroneous Arguments About Consequences Cannot Alter the Law.

Petitioner quickly abandons the Court's question, instead pressing arguments about practical consequences. This places the Nation in an awkward position. It does not wish to join Petitioner in flouting this Court's Order. His arguments, moreover, are for Congress, not the courts. *Nebraska v. Parker*, 136 S. Ct. 1072, 1082 (2016). But Petitioner makes unsubstantiated claims that the Nation cannot acquiesce in through silence.

1. Petitioner claims the Nation was "false and misleading," Petr. Supp. 8, in stating at argument that disestablishment would significantly impair its governmental activities. Such a charge should not be made lightly, and it lacks basis here. Many of the Nation's programs rely on intergovernmental agreements predicated on an understanding of shared jurisdiction. If this Court eliminates that predicate, the cooperation – and hence the Nation's governance – will falter.

Policing is a prime example. The critical feature of the cross-deputization agreements, absent from Petitioner's telling, is that they enable officers to react to criminal violations, from investigation to pursuit and arrest, *regardless of the identity of the*

suspect.[3] Should this Court hold the Reservation disestablished, the understanding of shared jurisdiction would be overturned, making it extremely difficult for county and municipal officials to cede authority over their constituents to Nation officers. While Petitioner might contend that this would still be legally possible, his arguments go to practical consequences, and in practical terms disestablishment will doom many of the agreements (terminable upon 60 days' notice).[4]

This is not speculative. While agreements commenced in 2000, Tr. 74:17-18, eleven (including with Tulsa County) arose after the decision below, and their consummation depended on the understanding of shared jurisdiction the decision confirmed.[5] That the Nation's police chief has requested additional funding in light of these developments, Petr. Supp. 11 n.3, hardly suggests an understanding that no Reservation exists.

Family Violence Prevention Program. The Nation's FVPP staff provide supportive services to domestic violence and sexual assault victims in non-Indian homes across the Reservation. Creek Br. 28-29. The agreements allowing them to do so absolutely depend on an understanding of shared jurisdiction. As the Muskogee County District Attorney's Office has stated, FVPP delivers essential services "to child

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[3] http://bit.ly/MCN-crossdep §§ 6(A), 8(A)-(D).

[4] http://bit.ly/MCN-crossdep § 4(B).

[5] http://bit.ly/MCN-Lighthorse.

victims and non-offending family members … *in rural communities across the eleven counties that comprise the jurisdictional boundaries of the Muscogee (Creek) Nation*." (emphasis added).[6] Nothing is false or misleading about the critical sense of shared jurisdiction evidenced here.

Infrastructure. Petitioner portrays the Nation as a charity, dispensing dollars for maintenance of "some state- or county-owned roads (typically ones that service tribal facilities such as casinos)[.]" Petr. Supp. 9. This is flatly incorrect. The Nation works with local governments on vital infrastructure throughout the Reservation, setting priorities and allocating responsibilities through intergovernmental agreements, with the Nation often executing projects "cradle-to-grave," from engineering and regulatory review to construction and inspection.[7]

Between 2015 and 2022, only one minor road project will pertain to a Nation casino.[8] Far more typical are a $3 million restoration of Wainwright Road, a major thoroughfare between Muscogee and Okmulgee and the primary access for Wainwright's K-12 school; nearly $2 million in safety improvements to 10th Street, servicing Okfuskee County's K-12 school; and a $3.7 million restoration of K Bar Road, connecting the Nation's Okemah hospital to State

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[6] http://bit.ly/Roberts-Letter.

[7] http://bit.ly/MCN-DOT-Meeting; http://bit.ly/MCN-Transportation-Agreements.

[8] http://bit.ly/MCN-TIP at 11; http://bit.ly/TransProjects.

Highway 27.[9] Petitioner's suggestion that the Nation could engage in the intensive intergovernmental cooperation necessary for these projects absent an understanding of shared jurisdiction is simply fanciful.

The claim that the Nation receives funding for such projects "precisely because" it occupies a "*former* reservation in Oklahoma," Petr. Supp. 9, is likewise baffling. Petitioner's cited statutes include funding for *existing* as well as former reservations, with no pigeonholing of the Nation into the latter. *E.g.*, 25 U.S.C. § 1603(16)(A) ("'reservation' means a reservation … of any Indian tribe"); 25 U.S.C. § 3202(9) (same). *Compare* 113 Stat. 979 (1999) (referencing "former Indian reservation[s]" of several Oklahoma tribes excluding the Nation).

The predicate of shared jurisdiction undergirds the Nation's governmental activities in numerous other areas, ranging from education (where it provides policy and technical assistance and specialists in schools throughout the Reservation) to the provision of social services.[10] There is no question that disestablishment would have significant destabilizing consequences.[11]

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[9] http://bit.ly/MCN-Transportation-Agreements; http://bit.ly/TransProjects.

[10] http://bit.ly/MCN-Education-Programming.

[11] The Nation never implied, Petr. Supp. 10, that its judiciary ignores constraints on tribal adjudicatory jurisdiction. *See Plains Commerce Bank v. Long Family Land & Cattle Co.*,

2. Equally ill-conceived are Petitioner's claims regarding the consequences of affirmance.

Demographics. The Nation cannot discern a plausible basis for Petitioner's uncited demographic assertions. Petr. Supp. 12. Demonstrably incorrect is his suggestion that Fife is the largest city after Tulsa affected by reservation boundaries. A significant portion of Tacoma, Washington, lies within the Puyallup Reservation, NCAI 32; just as much, but not all, of Tulsa falls within the Creek Reservation. The Puyallup boundaries include the Port of Tacoma – North America's fourth-largest container gateway, facilitating approximately $50 billion in trade annually[12] – and the City and Tribe enjoy an exemplary relationship, *id*. 32-33. More generally, "millions of acres … [of] non-Indian fee land," *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 648 (2001), exist within reservations, with substantial governmental cooperation benefitting non-Indians and Indians alike, NCAI 27-34.

Taxation. Petitioner has not previously argued that affirmance would threaten budgets, and nothing in the record supports the proposition. What is known is that the Nation *bolsters* state and local budgets through millions of dollars in annual contributions, Creek Br. 26-31, 37, and tellingly not a

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554 U.S. 316, 329-30 (2008). Creek courts exercise jurisdiction throughout the Reservation, and consistent with those constraints, principally do so over tribal citizens and lands.

[12] https://www.portoftacoma.com/100; https://www.portoftacoma.com/about/statistics.

single county or municipality has filed a brief supporting Petitioner. The Nation and State, moreover, have cooperative tax agreements,[13] and are capable of negotiating others. Finally, this Court has never invalidated – under *Bracker* balancing or otherwise – state taxation of non-Indians on reservation fee lands. *Id.* 35-36 & n.33.

Reservation Statutes. Petitioner scrapes the bottom of the barrel here. When even the "compelling" and "justifiable" expectations of non-Indians are matters for Congress alone, *Parker*, 136 S. Ct. at 1082, the purported interest of criminals in engaging in child pornography, domestic violence, and the exploitation of minors free of federal sanction, Petr. Supp. 13-14, surely has no bearing.

No more convincing is Petitioner's grab-bag of federal civil provisions, Petr. Supp. 15 & nn.6-7, apparently designed to unsettle but in truth containing no explanation as to how provisions for homeland security funding, water quality improvement loans and the like (many of them applicable regardless) will disrupt "the daily lives of citizens," *id.* 15. *See also* Resp. Supp. Reply at 10 n.4.

Liquor Regulation. Reservation status does not authorize unilateral regulation of liquor retailers. Even if interested, the Nation could only regulate non-Indian liquor retailers outside of "fee-patented lands in non-Indian communities or rights-of-way through [the] reservation[]," 18 U.S.C. § 1154(c), and then only with Secretarial approval, *id.* § 1161. Petitioner's

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[13] http://bit.ly/MCN-Fuel; http://bit.ly/MCN-Tobacco.

claim rings particularly hollow given the State's demonstrated ability, as in so many other areas, to forge cooperative agreements with tribes.[14]

Gaming. Petitioner did not raise this issue before, presumably because the Nation already operates eight gaming sites in a saturated market under a revenue-sharing Compact with the State. Tr. 72:12-15. If the State is now concerned about additional facilities, that Compact, last amended in August 2018, is subject to renegotiation in 2020.[15]

ICWA. Affirmance will not invalidate ICWA placements. The State, Nation and local agencies and courts enjoy a highly successful partnership. Creek Br. 36-37. Under the federal and Oklahoma Indian Child Welfare Acts, 25 U.S.C. §§ 1911(c), 1912(a); Okla. Stat. tit. 10, § 40.4, the Nation intervenes in every child custody proceeding that may result in the termination of parental rights for a Creek child, and those proceedings have "utilize[d] to the maximum extent possible" Nation services in securing appropriate placements. Okla. Stat. tit. 10, § 40.6.

The Nation is committed to preserving current placements, and the means exist to do so. The Nation can establish placement preferences enforceable in state and tribal courts, 25 U.S.C. § 1915(c), including provisions conferring presumptive validity on existing placements under Nation law. In addition, the State and Nation can compact to allocate jurisdiction over

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[14] http://bit.ly/CPN-Liquor-Compact.

[15] http://bit.ly/MCN-Gaming-Compact Part 15(B); http://bit.ly/MCN-Gaming-Compact-Amendment.

custody proceedings, including "concurrent jurisdiction between [them]." 25 U.S.C. § 1919(a); Okla. Stat. tit. 10, § 40.7. Such a compact could recognize continuing state court authority over existing placements. Thus, such placements will be preserved, and the effective intergovernmental partnership will continue. To portend otherwise is simply reckless.

Consistent with *Parker*, this case should not be decided based upon competing pleas about consequences. But if this Court looks in that direction, it should not do so based on Petitioner's exaggerated claims about the consequences of an affirmance, or his efforts to discredit the Nation's legitimate concerns about disestablishment.

II. UNLESS CONGRESS DISESTABLISHES THE CREEK RESERVATION, IT REMAINS INDIAN COUNTRY.

The supplemental briefs are unanimous regarding the Court's second question: all reservations set aside for federally recognized tribes qualify as Indian country under section 1151(a); the phrase "under the jurisdiction of the United States" excludes only state-recognized reservations; and a new category of federal reservations with diminished status would engender significant complications. Petr. Supp. 17-18, 20-21; US Supp. 18-19 & n.6; Resp. Supp. 15-17, 24-25.

Petitioner, however, reiterates the oral argument claim that, for its Reservation to endure, the Nation must demonstrate its authority over *non-Indian-owned fee land* on the Reservation "to the

general exclusion of state jurisdiction." Petr. Supp. 19; Tr. 6:7-10, 10:7-8, 22:8-11. This is an extraordinary argument, because on-reservation "efforts by a tribe to regulate nonmembers, especially on non-Indian fee land, are presumptively invalid." *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 330 (2008) (quotation marks and citation omitted). Conversely, state jurisdiction over non-Indian land is fully consistent with reservation status and commonplace. Creek Br. 34-38. A state's on-reservation authority is generally excluded *only* as to Indians, *see*, *e.g.*, *Nevada v. Hicks*, 533 U.S. 353, 361-62 (2001), whereas tribal authority "centers on the land held by the tribe and on tribal members," *Plains Commerce Bank*, 554 U.S. at 327. Congress, meanwhile, enjoys broad power to legislate for the benefit of Indians, *United States v. Lara*, 541 U.S. 193, 200 (2004), making reservation status significant for reasons unrelated to jurisdiction (federal or tribal) over non-Indian fee lands. The numerous reservation statutes cited by Petitioner, *see* Petr. Supp. 15 & nn.6-7, well illustrate this point.

Petitioner's argument, then, requires the Nation to demonstrate authority over non-Indian fee lands that it presumptively lacks. The law is not so one-sided, and such a requirement has never played a role in this Court's disestablishment cases. The real test, espoused by this Court for over a century and reiterated so recently in *Parker*, is whether Congress clearly intended to disestablish the Reservation. Petitioner's attempt to substitute a different, impossible-to-meet standard should fare no better

than his other efforts to distract from the absence of the requisite congressional intent in this case.

CONCLUSION

The Tenth Circuit's judgment should be affirmed.

Respectfully submitted,

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