No. 17-1107

IN THE

Supreme Court of the United States

TERRY ROYAL, WARDEN,
OKLAHOMA STATE PENITENTIARY,
Petitioner,

v.

PATRICK DWAYNE MURPHY,
Respondent.

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

BRIEF OF *AMICI CURIAE* ENVIRONMENTAL FEDERATION OF OKLAHOMA, INC., OKLAHOMA CATTLEMEN'S ASSOCIATION, OKLAHOMA FARM BUREAU LEGAL FOUNDATION, MAYES COUNTY FARM BUREAU, MUSKOGEE COUNTY FARM BUREAU, OKLAHOMA OIL & GAS ASSOCIATION, AND STATE CHAMBER OF OKLAHOMA IN SUPPORT OF TERRY ROYAL, WARDEN, OKLAHOMA STATE PENITENTIARY'S PETITION FOR WRIT OF CERTIORARI

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The Environmental Federation of Oklahoma, Inc. (EFO), Oklahoma Cattlemen's Association (OCA), Oklahoma Farm Bureau Legal Foundation (OFBLF), Mayes County Farm Bureau, Muskogee County Farm Bureau (collectively Farm Bureau), Oklahoma Oil & Gas Association (OKOGA), and State Chamber of Oklahoma (SCO) (collectively *Amici*) submit this *amici curiae* brief in support of the Petition for Writ of Certiorari (Petition) filed by Terry Royal, Warden, Oklahoma State Penitentiary, pursuant to Supreme Court Rule 37.[1]

INTRODUCTION

The Petition requests the Court to review and reverse the decision of the Tenth Circuit Court of Appeals declaring the former Creek Nation lands, established by treaty in 1866 (former Creek territory), a reservation of the present Muscogee (Creek) Nation (MCN), never disestablished by Congress. The decision upends a century of criminal, civil, and regulatory jurisdictional understandings in Oklahoma, ignoring long-settled expectations and engendering economically destructive confusion regarding sovereign rights within Oklahoma.

The effects of the decision are potentially profound and affect much of the State of Oklahoma. The geographic scope of the former Creek territory covers large areas of Eastern Oklahoma, including large portions

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[1] The parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the *amici curiae*'s intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

of the City of Tulsa. The decision threatens to authorize tribal taxation of activities and properties, to invest tribal courts with broader jurisdiction, and to authorize greater, or potentially exclusive, tribal and federal regulation over lands within the area. Further, because the applicable statutory actions and histories of the Cherokee, Chickasaw, Choctaw, and Seminole Tribes, the other four of the Five Civilized Tribes, are similar in certain respects to those of the MCN, the decision will be, and already has been, asserted to redraw jurisdictional boundaries across Eastern Oklahoma.

INTERESTS OF *AMICI CURIAE*

Amici and their members are affected by the decision below because their members live, own businesses, and have invested in Eastern Oklahoma. The decision places at risk long-held understandings regarding the governmental entities with adjudicative, regulatory, and legislative jurisdiction over *Amici*'s members, their businesses, and investments. *Amici* are all non-profit associations or foundations whose members reside or own and operate businesses in the former Creek territory and within areas the decision may imply lie within reservations of others of the Five Civilized Tribes.

A. Environmental Federation of Oklahoma, Inc.

EFO is a non-profit corporation providing Oklahoma companies with a voice in the formulation of state and federal environmental laws, regulations, and policies. Its membership includes more than eighty company, affiliate, associate, and appendix affiliate members. EFO works to ensure that environmental regulations are clear and consistent and that they properly bal-

ance the need for environmental regulation with the need for responsible economic growth. EFO members' interests in predictable regulation, consistent with their investments in reliance upon State regulation, will be adversely impacted by the decision if the MCN or federal agencies now seeks to supplant state environmental regulation and to impose federal or tribal regulations over the activities of non-tribal members on fee-owned lands within the Creek or, potentially, the Five Civilized Tribes' former territories.

B. Oklahoma Cattlemen's Association

OCA, a non-profit association, was chartered on March 6, 1950, by a small group of cattle raisers in Seminole County. Today, the OCA includes cattle raising families in all 77 counties in Oklahoma. Within the former Creek territory, OCA is affiliated with local county Cattlemen's organizations in all counties except Tulsa. Representing thousands of cattle raising families, OCA's primary work on behalf of its members promotes private property rights, natural resource stewardship, and common sense business policy. OCA is the trusted voice of the Oklahoma cattle industry and exists to support and defend the State's and Nation's beef cattle industry. The decision threatens to subject members' families and businesses to new and unplanned-for jurisdictional burdens.

C. Oklahoma Farm Bureau Legal Foundation, Muskogee and Mayes County Farm Bureaus

OFBLF is a non-profit foundation, incorporated in 2001, that supports the rights and freedoms of farmers and ranchers in Oklahoma, by promoting individual liberties, private property rights, and free enterprise.

OFBLF's sole member is the Oklahoma Farm Bureau, Inc. (OKFB), an independent, non-governmental, voluntary organization of farm and ranch families formed in 1942. OKFB has 87,950 members, representing agricultural producers who grow a variety of crops and livestock, and every size of operation, from small family farms to large commercial ranches and farms. Its mission is to improve the lives of rural Oklahomans by analyzing their problems and formulating action to achieve educational improvement, economic opportunity, social advancement, and thereby to promote the well-being of the nation. It is non-partisan and non-sectarian.

A significant number of OKFB members are in counties that, under the decision, are fully or partially within the former Creek territory. As of February 19, 2018, 13,237 OKFB member families are in Creek, Hughes, McIntosh, Mayes, Muskogee, Okfuskee, Okmulgee, Rogers, Seminole, Tulsa, and Wagoner Counties. Within the former Five Civilized Tribes area, there are 37,649 OKFB member families. While some of OKFB's members may also be MCN members or members of others of the Five Civilized Tribes, OKFB members who are not tribal members may lack political or legal remedies or resources to address potential grievances caused by new MCN, Five Civilized Tribe, or federal assertions of jurisdiction grounded in previously unheralded reservation status.

Muskogee and Mayes County Farm Bureaus are county affiliates of the OKFB. Muskogee County's 1,702 members have farming and cattle operations. Mayes County's 950 members primarily farm soybeans, hay, and feed grains, and raise cattle and poultry. The interests of members of both County organizations are affected by the decision because it imposes significant

uncertainties as to the law, taxation, regulatory and adjudicatory jurisdiction to which their homes and farms are subject.

D. Oklahoma Oil & Gas Association

OKOGA was formed in 1919 as the Mid-Continent Oil and Gas Association, and is one of the oldest oil and gas industry associations in the United States. OKOGA is a non-profit association composed of oil and natural gas producers, operators, purchasers, pipelines, transporters, processors, refiners, marketers, and service companies which represent a substantial sector of the oil and natural gas industry within Oklahoma. OKOGA's membership also includes the state's largest pipeline, gathering, and processing companies, and all four refiners in the state.

OKOGA addresses industry issues of concern and works toward the advancement and improvement of the domestic oil and gas industry. The activities of OKOGA include support for legislative and regulatory measures designed to promote the well-being and best interests of the citizens of Oklahoma and a strong and vital petroleum industry within the State and throughout the United States. Members of OKOGA own or operate oil and gas operations in the counties within the former Creek territory, as well as within former territories of others of the Five Civilized Tribes. The decision impairs their interests in stable and predictable regulation and taxation, consistent with the expectations supporting their investments.

E. State Chamber of Oklahoma

SCO represents more than 1,500 Oklahoma businesses and 350,000 employees. It has been the state's leading advocate for business since 1926. SCO provides a voice for Oklahoma employees to the executive,

legislative, and judicial branches of government, and is in a unique position to advise the Court of the impact of the civil implications of the regulatory, taxation, and economic development consequences of the decision on its members' interests, and its potential effect on business development within the former Creek territory.

SUMMARY OF ARGUMENT

The Petition should be granted because the decision: 1) involves a question of exceptional importance—whether the former Creek territory remains a reservation of the MCN despite Congress' repeated actions divesting the Creek Nation of essentially all lands and governmental authority as of 1907—the answer to which has staggering jurisdictional consequences for people and businesses in Oklahoma; and 2) offers a vehicle for the Court to clarify application of its analysis in *Solem v. Bartlett*, 465 U.S. 463 (1984), to historical circumstances fundamentally different from the Court's prior disestablishment and diminishment cases, particularly within Oklahoma's unique historical setting.

ARGUMENT

I. THE SIGNIFICANT CIVIL JURISDICTIONAL CONSEQUENCES OF THE DECISION SUPPORT THIS COURT'S REVIEW.

The decision overturns the assumptions underlying civil jurisdiction over persons and businesses within the former Creek territory. More troubling, it does so without addressing Oklahomans' reliance on longstanding understandings and expectations regarding, or the effect of its new ruling upon, civil jurisdiction. If allowed to stand, the ruling provides a basis for the MCN, and potentially other tribes, to assert tax and

regulatory jurisdiction, and for tribes and their members to assert tribal adjudicatory jurisdiction over private property and business. This potentially duplicative and inconsistent regulation and jurisdiction undermine legal foundations underlying private property and investment, creating significant risk and uncertainty for people and businesses.

A. The decision threatens to substantially enlarge tribal civil jurisdiction over nonmembers in Eastern Oklahoma.

Although the criminal jurisdictional consequences of the decision are overwhelming, the question presented also raises confounding civil consequences. In an area where most residents and businesses owners are not members of the MCN (or the other Five Civilized Tribes), and where most land is owned in fee by nonmembers or their businesses, the decision's civil regulatory effects are staggering. Tribes lack civil jurisdiction over nonmembers on fee lands outside reservation boundaries. Hence, the determination that a geographic area is an Indian "reservation" has significant civil jurisdictional effect. *Cf. United States v. Mazurie,* 419 U.S. 544, 557 (1975) (Indian tribes retain "attributes of sovereignty over both their members and their territory").

Federal law defines "Indian county" as including "all lands within the limits of any Indian reservation . . . notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation." 18 U.S.C. § 1151(a). Just as with criminal jurisdiction, federal law defining tribal jurisdiction considers "Indian country" status pertinent—or dispositive—both under federal common law defining whether tribal (and federal) or state powers apply, *see Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S.

520, 527 (1998) (stating "Indian country" "also generally applies to questions of civil jurisdiction"), and by express delegation employing the term, *see Rice v. Rehner*, 463 U.S. 713, 733 (1983) (in 18 U.S.C. § 1161, "Congress intended to delegate a portion of its authority to the tribes"). Reservation status, even without specific statutory reference to "Indian country," also can support tribal jurisdictional assertions. *See Montana v. United States*, 450 U.S. 544, 566-67 (1981) (prescribing two exceptions to its general rule that tribes lack jurisdiction over nonmember activities on fee lands, as "Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians *on their reservations, even on non-Indian fee lands*," including those "who enter consensual relationships with the tribe or its members" and those whose conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe") (emphasis added). Reservation-based civil jurisdiction can extend to taxation, regulation, and court jurisdiction, or can be imposed by express federal delegation over "reservation," or "Indian country" lands.

B. The decision may support tribal taxation.

The decision threatens *Amici* with tribal taxation of nonmembers' fee land and activities in certain circumstances.[2] *See Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645, 659 (2001) (Navajo Nation tax on hotel receipts on reservation fee lands could apply if either *Montana* exception established); *Burlington*

[2] The MCN Tax Code asserts, among other taxes, a Sales Tax, MCN Tax Code § 4-101-4-110, and an Oil and Gas Severance Tax, MCN Tax Code § 8-101-8-118.

N. Santa Fe R. Co. v. Assiniboine & Sioux Tribes of Fort Peck Reservation, 323 F.3d 767, 775 (9th Cir. 2003) (tribe entitled to discovery on whether it could impose *ad valorem* property tax on right-of-way, the equivalent of fee lands, on reservation). Not only does the decision threaten tribal taxation, but it might subject *Amici* to dual state and tribal taxation. *See Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 186-87 (1989) (approving dual state severance tax in addition to tribal severance taxes); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 138 (1982) (tribe may tax on-reservation production even though tribe receives royalty from oil and gas leases). For example OKFB's members are subject to Oklahoma taxation of their agricultural lands and operations, but their livestock feed, machinery to operate a farm or ranch, and other items are exempt from State sales tax. In their historically low-margin industry, any additional taxes would be burdensome.

C. The decision threatens Oklahoma citizens and business with dispute resolution in tribal courts.

The decision potentially subjects fee lands and nonmember activities to tribal adjudicatory jurisdiction. *Strate v. A-1 Contractors*, 520 U.S. 438, 458 (1997). Determining whether tribes have jurisdiction over nonmember activities upon reservation fee lands requires application of the two fact-based and highly subjective exceptions prescribed by *Montana*, which frequently must first be addressed in tribal court. *See Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 17 (1987). To whatever degree dispute resolution shifts to tribal forums, nonmembers enjoy no right to federal court review of deprivations of due process or other civil rights under the Indian Civil Rights Act of 1968, 25

U.S.C. § 1302. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 (1978). If the decision is not reversed, *Amici*'s members may be required either to exhaust their remedies in tribal courts or to litigate there without right of federal or state court review.

The MCN is preparing to exercise its jurisdiction over millions more individuals and businesses. *See* Jason Salsman, *Increased LTPD [Lighthorse Tribal Police Department] jurisdictional duties at the heart of Murphy decision*, Mvsoke Media, Dec. 15, 2017, https://mvskokemedia.com/increased-ltpd-jurisdictional-duties-at-the-heart-of-murphy-decision/. Whether the MCN's courts can handle hundreds more cases from across the former Creek territory remains unknown. Further uncertainty would arise if the decision were extended to the Five Civilized Tribes.

D. The decision threatens Oklahoma citizens and business with tribal regulatory jurisdiction.

The decision threatens to subject nonmember residents and businesses in the former Creek territory to other forms of MCN, and potentially other Five Civilized Tribes, regulatory jurisdiction. *See Montana*, 450 U.S. at 566. While any such assertion would be fact-dependent, tribal regulatory jurisdiction can extend under *Montana* to nonmembers "who enter consensual relationships with the tribe or its members" and those whose conduct "threatens or has some direct effect on the political integrity, the economic security, orthe health or welfare of the tribe." *Id.* In addition,the determination that the MCN has a continuing reservation may trigger claims they retain reserved water rights for a large reservation, *see*

Winters v. United States, 207 U.S. 564 (1908), presenting resource uncertainty.

E. The decision ousts state regulation, subjecting nonmembers to federal or tribal regulation.

While the decision threatens tribal regulatory jurisdiction over fee lands under the fact-dependent *Montana* test, 450 U.S. at 566, by express Congressional directive, reservation status likely triggers reservation-wide ouster of state regulation, supplanting it with exclusive federal authority over nonmember businesses—and may authorize federal administrative delegations of exclusive authority over all "reservation" lands to tribes. Federal law provides tribal regulations may govern the sale of alcohol by restaurants and stores within "Indian country." *See Mazurie*, 419 U.S. at 558 (interpreting 18 U.S.C. § 1161). Consequently, the decision would have precisely the effect of the Omaha Tribe ordinance in *Nebraska v. Parker*, 136 S. Ct. 1072 (2016), not just for a small village but across major portions of Eastern Oklahoma and most of the State's second largest city. It would prohibit the sale of alcoholic beverages without a license issued by the MCN National Council under its federally approved Liquor and Beverage Code. *See* 73 Fed. Reg. 14997 (March 28, 2008).

For businesses that now find themselves within the "reservation" identified by the decision, and potentially the former territories of the other Five Civilized Tribes, obtaining federal permits, licenses, or other authorizations may require participating in, or awaiting, government-to-government consultation between tribes and the federal government. Under the National Historic Preservation Act, consultation is required for historic properties on "tribal land," defined, in

relevant part, as "all land within the exterior boundaries of any Indian reservation." 54 U.S.C. § 300319. While *Amici* do not dispute government-to-government consultation is proper where required, the decision threatens to expand that requirement to most of Eastern Oklahoma. With the consultation requirement comes additional expense, delay, and possible imposition of conditions upon any federal approval required for a development project. These provisions and related federal policies reflect the range of possible unintended, and unexamined, consequences of the decision below.

F. The jurisdictional consequences of the decision will affect *Amici*.

The civil consequences of the decision will have a profound effect on *Amici*. Those consequences overturn the legal environment in which OKOGA's members have invested substantial sums to develop oil and gas operations in the former Creek territory, with implications for the broader Five Civilized Tribes areas. Moreover, the potential for shifting regulation of oil and gas operations, structured in reliance on state regulation, to federal agencies and, potentially to tribes, would impose new regulators, regulatory structures, and increased costs. The consequences for EFO, OFBLF, the county Farm Bureaus, OCA, and SCO members are equally substantial.

13,237 OKFB member families live or have business interests located with the former Creek territory. In those same eleven Oklahoma counties, the United States Census Bureau reports 69,928 non-minority owned businesses and 19,499 minority owned busi-

nesses.[3] *See* U.S. Census Bureau, Quick Facts, www.census.gov/quickfacts (last visited March 6, 2018) (search by county). The number of non-Native-owned businesses that may be subject to MCN civil jurisdiction or reservation-based claims of federal jurisdiction is unquestionably substantial. Within the broader Five Civilized Tribes area, the consequences are substantially greater: just within OKFB families, not considering members represented by other *Amici*, there are 37,649 OKFB member families. While tribes may not prevail in some jurisdictional assertions, the Tenth Circuit's failure to address the profoundly unsettling effect of its decision calls out for this Court's review.

The decision opens the proverbial can of worms regarding civil jurisdiction over *Amici* and other, similarly situated, nonmembers and businesses in Eastern Oklahoma. The Court should grant the Petition to address those concerns.

II. THE ISSUE OF CORRECT APPLICATION OF *SOLEM* IS VITALLY IMPORTANT AND NEAR CERTAIN TO RECUR.

The decision struggled to apply a rigid and formulaic test it found in *Solem* to conclude that the former Creek territory remained a reservation despite understandings it was disestablished as of statehood. Tenth Circuit Chief Judge Tymkovich observed, "the square peg" of *Solem* "is ill suited for the round hole of Oklahoma statehood." Pet. App. 232a. But that is only true if the "opened for settlement" fact pattern of *Solem* is the only method by which Congress can act to

[3] The category of minority owned businesses is not limited to businesses owned by MCN members and other Native Americans.

terminate a reservation. That is not the case. To the contrary, the principles *Solem* enunciates contain ample flexibility to encompass Oklahoma's unique history. But the court of appeals misapplied *Solem* because it failed to perceive the different, though more compelling, indications of Congressional intention to disestablish the Creek Nation than were present in *Solem* and its cited diminishment and disestablishment cases.

A. The court of appeals misapplied *Solem*.

Solem summarized a three-part test to determine whether Congress has "diminished" an Indian reservation when it enacted "surplus land acts at the turn of the century to force Indians onto individual allotments carved out of reservations and *to open up unallotted lands* for non-Indian settlement." 465 U.S. at 467 (emphasis added). In each case *Solem* analyzed, Congress had created a reservation for the tribe, the lands in all or a portion of the reservation were allotted and the remainder sold, but the tribe's government would remain in place, retaining all tribal powers over remaining tribal lands and allotments. *See DeCoteau v. Dist. Cnty. Ct.*, 420 U.S. 425, 442 (1975). But Congress went far further in terminating the former Creek government and its territory. As to the Creek Nation, no traditional reservation ever had been created, and Congress unqualifiedly divested the Creek Nation of title to essentially *all* Creek Nation lands, transferred them to individual Creek members as allotments, and stripped the Creek Nation of all vestiges of governmental authority to tax, regulate, or resolve disputes throughout its former territories.

Solem's three-step analysis of Congress' intent starts with the "statutory language used to open the Indian lands." 465 U.S. at 470. The hallmark is

Congressional intent: "The first and governing principle is that only Congress can divest a reservation of its land and diminish its boundaries." *Id.* But the Tenth Circuit overlooked that specific language *is not* required: "[E]xplicit language of cession and unconditional compensation are not prerequisites for a finding of diminishment." *Id.* at 471. The court below, lost in the trees of the "opened for settlement" case fact patterns, missed the forest of Congressional intent embodied in a string of statutes stripping the Creek Nation of its lands and governmental powers. In addition, *Solem* makes clear courts may look at "events surrounding the passage" of Congressional enactments (step two) *and* "events that occurred after" Congress disposed of the lands previously comprising a reservation (step three). *Id.* Steps two and three look to "'unequivocal evidence' of the contemporaneous and subsequent understanding of the status of the reservation by members and nonmembers, as well as the United States and the State . . . ." *Nebraska v. Parker*, 136 S. Ct. 1072, 1079 (2016) (quoting *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 351 (1998)).

1. Statutory language reflects Congress' intent to divest the Creek Nation of all governmental authority over its former lands.

Beginning in 1893, Congress passed a series of acts with the intent of dismantling the Creek government and territory and ending tribal jurisdiction. While the decision reviewed several statutes seriatim, *see* Pet App. 75a-107a, it sidestepped searching inquiry into Congressional intent reflected in the series of enactments, insisting intent be expressed as in a specific statute precisely in terms accepted in this Court's

prior cases. But those cases considered tribes with very different histories, none fitting a pattern instructive at Creek or across the Five Civilized Tribes.

The decision disregards that the 1893-1906 Congresses addressing the Creek Nation unfailingly prescribed, in a series of eight acts, the fundamental criteria of non-reservation status: divestiture of *both* communal tribal title to all lands *and* all governmental authority over the area. *See* Act of March 3, 1893, ch. 209, 27 Stat. 612, 646 (the goal of "ultimate creation of a Territory of the United States with a view to the admission of the same as a state of the Union"); Act of June 7, 1897, ch. 3, 30 Stat. 62, 83 ("the United States courts. . . shall have original and exclusive jurisdiction. . . [over] all civil. . . and all criminal causes"); Curtis Act, ch. 517, 30 Stat. 495, 504-505 (June 28, 1898) (prohibiting enforcement of tribal law in United States courts and abolishing tribal courts); Act of March 1, 1901, ch. 676, 31 Stat. 861, § 42 (1901 Act) (the Creek national council acts or ordinances could pertain only to tribal or allotted lands or tribal members—if approved by the President); *id.* § 47 (disclaiming the Agreement could "revive or reestablish the Creek courts which have been abolished by former Acts of Congress"); Act of June 30, 1902, ch. 1323, 32 Stat. 500, § 6 (1902 Act) (replacing Creek law of descent and distribution with Arkansas law); Five Tribes Act, ch. 1876, 34 Stat. 137, §§ 10, 16 (April 26, 1906) (requiring Secretary to assume control of tribal revenues, schools); *id.* § 28 (limiting terms of councils and requiring President's approval of ordinances). Finally, the Oklahoma Enabling Act, ch. 3335, 34 Stat. 267, § 13 (June 16, 1906), extended the laws of the Territory of Oklahoma to all portions of the new State.

The decision sought doggedly to apply the *Solem* framework, but erred in its application by concluding Congressional intent to disestablish can *only* be found when previously accepted language is contained in a single statute. *See* Pet. App. 107a (stating each of the analyzed statutes "lack any of the 'hallmarks of diminishment'" (quoting *Parker*, 136 S.Ct. at 1079)). Although it denied doing so, the decision sought to find "magic words" in any single Congressional act, holding Congress had failed to meet the panel's created test for reservation disestablishment. *See* Pet. App. 101a. *Solem* imposed no textual straight-jacket, and this Court has never mandated such a narrow and rigid test for determining Congressional intent. Statutory text "consists of words living 'a communal existence,' in Judge Learned Hand's phrase, the meaning of each word informing the others and 'all in their aggregate tak[ing] their purport from the setting in which they are used.'" *U.S. Nat. Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 454-55 (1993) (quoting *NLRB v. Federbush Co.*, 121 F.2d 954, 957 (2d. Cir. 1941)). "Statutory construction is a holistic endeavor, and, at a minimum, must account for a statute's full text, language as well as punctuation, structure, and subject matter." *Id.* at 455 (quotation marks and citations omitted).

The decision tried to pigeonhole the unique historical setting of the Creek Nation, the Five Civilized Tribes, and Eastern Oklahoma into patterns that arose in prior, fundamentally different cases in other portions of Indian country, while discarding *Osage Nation v. Irby*, 597 F.3d 1117, 1123 (10th Cir. 2010), *cert. denied*, 564 U.S. 1046 (2011), a highly relevant precedent. *See* Pet. App. 61a. *Irby*, on a substantially similar historic record, found disestablishment when the relevant statutes "did not directly open the reser-

vation to non-Indian settlement." 597 F.3d at 1123. The same applies here. "Under settled principles of statutory construction," statutes that are "*in pari materia*—that is, pertain to the same subject— . . . should therefore be construed 'as if they were one law.'" *Erlenbaugh v. United States*, 409 U.S. 239, 243 (1972) (quoting *United States v. Freeman*, 3 How. 556, 564 (1845)). By failing to read and construe together the long line of Congressional acts expressing the intent to terminate the Creek communal landholdings and government and end tribal authority over people and lands in the new State, the decision ignored this Court's longstanding teachings.

The decision fails to address whether statutory divestiture of all recognized tribal communal lands and governmental powers, by a series of statutes providing exclusively for Territorial and State law and non-tribal courts, both 1) unambiguously contemplated the termination of any prior reservation status of the former lands, and 2) provides powerful contemporaneous evidence Congress intended to terminate. *See Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 604-606 (1977). The decision's unexamined insistence on facts far different from Eastern Oklahoma history led it to ignore compelling expressions of Congressional intent. Congress allotted substantially all Creek lands to members, contemplating the widespread transfers to nonmembers that ensued, with the intent that all would reside—and do business—in Oklahoma, a non-reservation environment.

Instead, the decision emphasizes immaterial factors: whether the Creek Nation's tribal existence was terminated,[4] Pet. App. 96a-98a; whether the Creek

[4] The decision incorrectly relies on scattered references to the "Creek Nation," which, in context, is plainly a mere "convenient

Nation retained limited jurisdiction over tribal or trust or restricted allotted lands, *id.* 105a-107a; and whether the United States continued to discharge trust responsibilities over tribal or trust or restricted allotted lands, *id.* 102a-103a. However, those facts existed in every case in which this Court found disestablishment or diminishment. *See, e.g.*, *Rosebud Sioux*, 430 U.S. at 604; *DeCoteau*, 420 U.S. at 442-43.

The decision below stands in stark contrast to *Irby*, which applied *Solem* to hold Congress disestablished the Osage Nation reservation, also effective upon 1907 Statehood, while observing that Congress "disestablished the Creek and other Oklahoma reservations." *Irby*, 597 F.3d at 1124. *Irby*'s analysis gave due weight to factors unique to Oklahoma history. In ignoring the plain Congressional intent and history specific to the MCN. the Tenth Circuit fundamentally misapplied *Solem.*

2. Contemporaneous understanding reflects Congress disestablished any former Creek Nation reservation.

Solem step two requires a court look to "contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation," *Solem*, 465 U.S. at 471, including "the manner in which the transaction was negotiated" with the tribes involved and the tenor of legislative reports presented to Congress, *id.* In *Irby*, the Tenth Circuit's analysis relied on a similar series of Congressional acts and legislative history, including the Oklahoma Enabling Act, to establish that the Osage Allotment Act was "passed at a time where the United States sought

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geographical description" to define the geographic area within which prescribed transfers or federal services for the Creek would apply. *Yankton Sioux*, 522 U.S. at 356.

dissolution of Indian reservations, *specifically the Oklahoma tribes' reservations*." *Irby*, 597 F.3d at 1124 (emphasis added).

First, the decision's conclusion that pre-1901 legislative history did "little to advance the analysis because the State does not dispute that the reservation was intact in 1900," Pet. App. 109a (quotation marks, citation omitted), ignores the continuity of intent in multiple statutes. The intent to disestablish the Creek Nation reservation expressed in the pre-1901 acts remained and was executed by the 1901 and 1902 Acts and confirmed in 1906 by the Five Tribes Act and the Oklahoma Enabling Act. Congress' pre-1901 enactments, and their legislative histories, declared the policy of the United States toward the Five Civilized Tribes, which, for the Creek, led to the enactment of the 1901 and 1902 Acts. Consequently, the pre- and post-1901 enactments demonstrate a continuity of purpose the decision minimized or ignored.

Second, and contrary to the decision's limited review, the legislative histories from the eight statutes reflect Congress' goal was to transfer jurisdiction from the Creek Nation to the State, abolish communal landholdings in favor of individual ownership, and subject all such lands and residents to State law and courts, a goal entirely inconsistent with continued reservation status. *See*, *e.g.*, *United States v. Hayes*, 20 F.2d 873, 879-880 (8th Cir. 1927) (reviewing, as relevant to the Creek government, the "course of legislation, from its beginning to end," and concluding its "main purpose was to do away with the tribal governments"); H.R. Rep. No. 57-2495, 1 (June 14, 1902) (Committee on Indian Affairs report summarizing that the 1902 Act "will permit the Government to close up the affairs of the Creek tribe of Indians, make

all of their allotments, and finish the work of the Dawes Commission in said nation . . . .”). The decision did not consider thoroughly the legislative histories that demonstrate Congress intended to disestablish the Creek Nation “reservation” and substitute State criminal, civil, taxing, and adjudicatory jurisdiction and individual land ownership. The contemporary understandings of the 1901 and 1902 Acts, and the enactments culminating in Statehood in 1907, was that the Creek Nation lost jurisdiction over any of its former territory (except that expressly retained for the tribe by Congress).

3. Subsequent treatment of the former Creek territory reflects the understanding it was disestablished.

The decision took too cursory a look at the *Solem* step three evidence and inadequately considered subsequent treatment of the former Creek territory by Congress and the State of Oklahoma. The State's unquestioned exertion of jurisdiction over the predominantly non-Indian, nonmember population residing on former Creek Nation lands since Statehood in 1907 strongly supports a conclusion of reservation disestablishment. *See Rosebud Sioux*, 430 U.S. at 604-6; *see also Creek Nation v. United States*, 24 Ind. Cl. Comm. 238, 250 (1970) (upon the passage of acts to dissolve the Creek Nation, “[t]he United States assumed the task of terminating the Nation's mode of life include its manner of holding its lands”). The court of appeals did not consider evidence that the duty of maintaining order and enforcing laws has almost exclusively resided in the hands of county and State officials, not tribal government. *See Hagen v. Utah*, 510 U.S. 399, 421 (1994).

Over a century of unqualified reliance by predominately nonmember residents and businesses in

the former Creek territory reflects the intractable "impracticability of returning to Indian control land that generations earlier passed into numerous private hands." *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 219 (2005). The equitable doctrines that led this Court to conclude in *City of Sherrill* that "long delay . . . and developments in the [area] spanning several generations, . . . render inequitable [a] piecemeal shift in governance," *id.* at 221, appropriately figure in a *Solem* step three analysis on the record presented here. The court of appeals failed to address that extended reliance.

For decades, companies doing business in the former Creek territory have been subject to State taxation, regulation, and dispute resolution in State courts. The decision dismissed the State's evidence on Congressional intent and subsequent history. The Court confirmed in *Nebraska v. Parker* evidence of congressional intent and of subsequent treatment figure significantly in the *Solem* analysis, but found modern treatment alone of the Omaha area was insufficient to show disestablishment in light of a statute "devoid of any language indicative of an intent to diminish." 136 S. Ct. at 1082. The Tenth Circuit failed to distinguish between *Parker* and evidence below of compelling statutory texts and the unequivocal indications of involved participants that the Creek Nation had no remaining reservation. The decision erred in failing to accord adequate weight to *Solem* steps two and three.

B. The Court should review whether *Solem* affords latitude to determine Congress' intent in factual settings different from *Solem*'s, a question that will recur.

As the Petition shows, the former Creek territory was never a reservation, because the Tribe held the land in fee. *See* Petition 30. The same is true of the other Five Civilized Tribes. Rote application of the three *Solem* factors as they were applied in "opened for settlement" cases was inappropriate to determine Congressional intent as to the Creek Nation "reservation," as it will be in cases likely to follow. The evidence is compelling. Congress intended to strip the Creek Nation of essentially all governmental authorities *and* land holdings. Finding a reservation now because Congress did not replicate the pattern of reservations "opened for settlement" is a serious error that this Court should correct.

The eight statutes far more thoroughly divested tribal lands and powers of the Creek Nation than did those in *Solem*, which described the "surplus lands acts" it considered as intended merely "to force Indians onto individual allotments carved out of reservations and to open up unallotted lands for non-Indian settlement." *Solem*, 465 U.S. at 467. The Court should issue its writ to review the decision below and address how *Solem*'s structured analysis may be applied to address Congressional acts that did not fit the pattern of surplus lands acts in areas "opened" to non-Indians.

CONCLUSION

The Petition for Certiorari should be granted.

Respectfully submitted,

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