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

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CAPITAL CASE

QUESTIONS PRESENTED

(1) Whether any statute grants the State of Oklahoma jurisdiction over the prosecution of crimes committed by Indians in the area within the 1866 territorial boundaries of the Creek Nation, irrespective of the area's reservation status.

(2) Whether there are circumstances in which land qualifies as an Indian reservation but nonetheless does not meet the definition of Indian country as set forth in 18 U.S.C. § 1151(a).

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The Muscogee (Creek) Nation appreciates the opportunity to address the supplemental questions raised by the Court.

ARGUMENT

I. ALTHOUGH OKLAHOMA DOES NOT PRESENTLY ENJOY CRIMINAL JURISDICTION OVER TRIBAL CITIZENS ON THE NATION'S RESERVATION, CONGRESS HAS PROVIDED A MECHANISM FOR THE CONFERRAL OF SUCH JURISDICTION GOING FORWARD.

The Nation has a paramount interest in maintaining law and order within its Reservation and is committed to working with the State and the United States to ensure that the administration of criminal justice therein will be enhanced, not hindered, should this Court affirm the decision below. To that end, the Nation will continue to explore with its governmental partners, pursuant to congressionally sanctioned mechanisms, the optimal allocation of criminal jurisdiction among the three sovereigns.

The Nation has scoured the statutory record – including the provisions identified by the United States – to determine whether a basis presently exists for State jurisdiction over crimes committed by or against Indians within the Reservation. For the reasons explained below, the Nation has found no such provision.

A. Where Congress Has Authorized State Jurisdiction Within Indian Country, It Has Done So Explicitly.

"[C]riminal offenses by or against Indians [in

Indian country] have been subject only to federal or tribal laws, except where Congress … has expressly provided that State laws shall apply." *Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 470-71 (1979) (citation and quotations omitted). Congress must speak clearly "to effect a significant change in the sensitive relation between federal and state criminal jurisdiction." *Bond v. United States*, 572 U.S. 844, 858-59 (2014) (quotations omitted); *see also Yakima*, 439 U.S. at 484.

Congress has frequently authorized state criminal jurisdiction within Indian country, utilizing language that has left no doubt as to its purpose. For example, the 1940 Kansas Act – "the first major grant of jurisdiction to a State over offenses involving Indians committed in Indian country," *Negonsott v. Samuels*, 507 U.S. 99, 103 (1992) – provides that:

> Jurisdiction is conferred on the State of Kansas over offenses committed by or against Indians on Indian reservations, including trust or restricted allotments, within the State of Kansas, to the same extent as its courts have jurisdiction over offenses committed elsewhere within the State[.]

18 U.S.C. § 3243. During the following decade, Congress used virtually identical language to thrice authorize state criminal jurisdiction over reservations. *See* Act of May 31, 1946, 60 Stat. 229 (North Dakota); Act of June 30, 1948, 62 Stat. 1161 (Iowa); 25 U.S.C. § 232 (1948) (New York); *see also* Act of Oct. 5, 1949, 63 Stat. 705 (California).

Congress's policy of granting specific states jurisdiction over Indians within Indian country culminated in 1953 with Public Law 280 ("PL-280"). Act of Aug. 15, 1953, 67 Stat. 588 (codified at 28 U.S.C. § 1360 and 18 U.S.C. § 1162). As relevant here, PL-280 provided that California, Minnesota, Nebraska, Oregon, Wisconsin, and (in 1958) Alaska "shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country … to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory[.]" 18 U.S.C. § 1162(a). Originally, the law also authorized other states to assume criminal jurisdiction over their Indian country without tribal consent. At least six additional states did so in whole or in part. *Felix S. Cohen's Handbook of Federal Indian Law* § 6.04[3][a] & n.47 (Nell Jessup Newton eds. 2012).

During its PL-280 deliberations, Congress identified Oklahoma as one of eight states that would need to amend the "express disclaimer[] of jurisdiction" over Indian lands in its Constitution before assuming criminal authority over its Indian country. S. Rep. No. 83-699, at 7 (1953). Oklahoma declined to do so, and consequently does not exercise jurisdiction pursuant to PL-280. *See Okla. Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114, 125 (1993).

B. Congress Has Not Authorized State Jurisdiction Over Tribal Citizens Within the Nation's Reservation.

The United States has identified four statutes as "especially significant to Oklahoma's criminal jurisdiction over crimes involving Indians." US Br. 28. The Nation has found no text in those enactments granting Oklahoma jurisdiction over Indians within Indian country.

1. The Appropriations Act of 1897 granted the United States courts in the Indian Territory "original and exclusive jurisdiction and authority to try and determine all … criminal causes for the punishment of any offense," and provided that "the laws of the United States and the State of Arkansas in force in the Territory shall apply to all persons therein, irrespective of race[.]" Act of June 7, 1897, 30 Stat. 62, 83. This latter provision extended application of the body of law that Congress had established in the Indian Territory under the Act of May 2, 1890, §§ 31-37, 26 Stat. 81, 94-98, but from which it had originally exempted cases involving citizens of the same Indian nation, *id.* § 30.

That body of law was plainly federal in character. At the time, Congress frequently borrowed from state laws to supplement the federal criminal code. For instance, under the 1898 Assimilative Crimes Act, the federal criminal code applicable to federal enclaves included "the laws of the State in which such place is situated[.]" § 2, 30 Stat. 717, 717 (codified as amended at 18 U.S.C. § 13). "The effect of the act … was to incorporate the criminal laws of the several States …

into the statute and to make such criminal laws to the extent of such incorporation laws of the United States." *United States v. Press Publ'g Co.*, 219 U.S. 1, 8 (1911); *see also Lewis v. United States*, 523 U.S. 155, 158 (1998).

The same was true for the Act of 1890, which incorporated Arkansas law as federal law to fill gaps in the latter. Thus, it modified the wording of the Arkansas laws "for the purposes of making said laws … applicable to the said Indian Territory" (which Congress plainly could not have done with respect to state law per se), § 32, 26 Stat. at 96; provided that "all prosecutions therein shall run in the name of the 'United States,'" *id.*; and in language making the gap-filling nature of Arkansas law apparent, declared that "where the laws of the United States and the said criminal laws of Arkansas have provided for the punishment of the same offenses the laws of the United States shall govern," *id.* § 33, 26 Stat. at 96-97. *See Indian Country, U.S.A. v. Oklahoma*, 829 F.2d 967, 978 (10th Cir. 1987) (1897 Act provided "that the *body of federal law* in Indian Territory … included the incorporated Arkansas laws" (emphasis added)).

The Nation cannot discern (and the United States has not explained) how applying federal and incorporated Arkansas law to the Indian Territory conferred criminal jurisdiction on the future State of Oklahoma. A 1942 letter from the Assistant Secretary of the Interior suggests that Indian Territory courts enforced both "Territorial" and federal law under the 1890 Act, US Br. 2a, and that the former function was transferred to state courts upon statehood. But the

predicate is incorrect. The 1890 Act established the Oklahoma Territory, including a territorial legislature empowered to enact territorial laws, and vested courts in the Oklahoma Territory with jurisdiction to enforce them. §§ 1, 4, 6, 9, 26 Stat. at 81-87. The Oklahoma Territory therefore was governed by two distinct bodies of law. *See Brown v. United States*, 146 F. 975, 976 (8th Cir. 1906) ("The district courts of the [Oklahoma] territory have a dual jurisdiction, one to administer the local law of the territorial government and the other to administer the laws of the United States[.]"). In the Indian Territory, however, "no organized territorial government was ever established," *S. Sur. Co. v. Oklahoma*, 241 U.S. 582, 584 (1916), and hence the Territory was subject only to federal and tribal laws.

2. The 1898 Curtis Act likewise did not authorize state jurisdiction over the Indian Territory. While it abolished tribal courts and rendered tribal law unenforceable in the federal courts, Act of June 28, 1898, §§ 26, 28, 30 Stat. 495, 504-05, nothing in the Act relinquished federal jurisdiction over Indian Territory offenses.

3. The 1904 Appropriations Act reaffirmed application in the Indian Territory of the incorporated Arkansas laws put in place under the 1890 and 1897 Acts. Act of Apr. 28, 1904, § 2, 33 Stat. 573, 573. It contains no text vesting criminal jurisdiction over Indians in the Territory in a future state government.

4. Finally, the Enabling Act preserved federal jurisdiction over Indians within Indian country:

> [N]othing contained in the said [State]

> constitution shall … 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.

Act of June 16, 1906, § 1, 34 Stat. 267, 267-68. Shortly after statehood, this Court affirmed that this language preserved "existing laws and regulations" pertaining to tribal citizens in the Indian Territory. *Ex parte Webb*, 225 U.S. 663, 683 (1912).

The United States points to the Act's case transfer provisions, §§ 16, 20, 34 Stat. at 276-77. US Br. 29. These provisions directed cases pending upon statehood and "arising under the Constitution, laws, or treaties of the United States" to the federal courts, § 16, 34 Stat. at 276, and thus did not shift criminal jurisdiction over federal crimes to the new state courts. That Congress did not intend for these transfer provisions to alter the jurisdictional status quo was reinforced the next year, when Congress amended Section 16 to state that pending criminal cases "which, had they been committed within a State [at the time of commission], would have been cognizable in the Federal courts, shall be transferred to" the new federal courts. Act of Mar. 4, 1907, 34 Stat. 1286, 1287. Crimes involving Indians on reservations within states were cognizable in federal court under the General Crimes Act, as were all major crimes committed by Indians, so again it is difficult to

attribute to this provision any congressional intent to shift jurisdiction. After statehood, Oklahoma, like every state, acquired jurisdiction over Indian country crimes involving only non-Indians. *See United States v. Ramsey*, 271 U.S. 467, 469 (1926). But federal "authority in respect of crimes committed by or against Indians continued after the admission of the state as it was before[.]" *Id.*

The United States also points to Enabling Act provisions extending Oklahoma Territory laws throughout the new state. US Br. 29. The first provision was limited to election laws. § 2, 34 Stat. at 268. The second extended territorial laws throughout the new state "as far as applicable," which only begs the question. § 13, 34 Stat. at 275. The final provided that "the laws of the United States not locally inapplicable shall have the same force and effect within said State as elsewhere within the United States." § 21, 34 Stat. at 277-78. Nothing here indicates that Congress intended to alter the nationwide status quo respecting criminal jurisdiction within Indian country. The Nation has not found legislative text elsewhere accomplishing that end.

C. Congress Has Provided a Mechanism for the United States, the State, and the Nation to Allocate Criminal Jurisdiction Pursuant to a Negotiated Agreement.

Congress has established a clear statutory mechanism as one alternative for allocating criminal jurisdiction going forward. As noted, PL-280 offers states the option of assuming full or partial jurisdiction over Indian country within their borders.

Originally, tribal consent was not required. *See* 67 Stat. 588. Congress has since amended the law to create a more collaborative jurisdictional framework:

> (1) In general. The consent of the United States is hereby given to any State not having jurisdiction over criminal offenses committed by or against Indians in the areas of Indian country situated within such State to assume, with the consent of the Indian tribe occupying the particular Indian country or part thereof which could be affected by such assumption, … jurisdiction over any or all of such offenses committed within such Indian country or any part thereof … to the same extent that such State has jurisdiction over any such offense committed elsewhere within the State, and the criminal laws of such State shall have the same force and effect within such Indian country or part thereof as they have elsewhere within that State.
>
> (2) Concurrent jurisdiction. At the request of an Indian tribe, and after consultation with and consent by the Attorney General, the United States shall accept concurrent jurisdiction to prosecute violations of sections 1152 and 1153 of title 18, United States Code, within the Indian country of the Indian tribe.

25 U.S.C. § 1321(a). Should the Court affirm the decision below, the Nation is committed to consummating appropriate jurisdictional agreements

with the State and federal governments, and PL-280 supplies a framework for doing so. *See Duro v. Reina*, 495 U.S. 676, 697 (1990).

Congress can also pass legislation specifically altering the jurisdictional balance. For instance, six weeks after a state court determined that Colorado lacked criminal jurisdiction over the Southern Ute Indian Reservation, Congress ratified an agreement defining the Reservation's boundaries and allocating criminal and civil jurisdiction in carefully delineated fashion between the federal, state and tribal governments. Act of May 21, 1984, 98 Stat. 201. *See United States v. Burch*, 169 F.3d 666, 669 (10th Cir. 1999). *See also*, *e.g.*, Act of Oct. 19, 1994, § 2, 108 Stat. 3501, 3501-02 (establishing concurrent federal, state, and tribal criminal jurisdiction within the Mohegan Nation in Connecticut).

In sum, although no statute presently accords Oklahoma jurisdiction over crimes involving tribal citizens on the Nation's Reservation, both framework and precedent exist for an agreement providing for the same.

D. Affirming the Nation's Reservation Boundaries Will Not Cause Significant Disruption of Settled Convictions.

At oral argument, counsel for the State predicted that affirmance would result in the release of several thousand prisoners in state custody. Tr. 75-76. These concerns are severely exaggerated.

First, counsel's estimate assumes that the status of each of the Five Tribes' reservations will be resolved

here. *Id*. However, diminishment is determined case-by-case, and the Tenth Circuit has already limited its decision to the Creek Reservation. *Comanche Nation of Okla. v. Zinke*, No. 17-6247, 2018 U.S. App. LEXIS 35174, at *10 (10th Cir. Dec. 14, 2018) ("Our *Murphy* panel concluded the Creek Reservation remains extant, but it did not address the status of the Chickasaw Reservation at all.") (per curiam).[1]

Second, state prisoners who successfully challenged their convictions would, like Respondent, face the prospect of retrial by the United States. *See Magnan v. Workman*, No. CIV-09-438-RAW-KEW, 2011 U.S. Dist. LEXIS 160272 (E.D. Okla. Aug. 23, 2011) (upholding subsequent federal conviction after state prosecution invalidated on the basis of Indian country jurisdiction). Because federal sentences are often more severe than state ones, *see* Tribal Law & Order Comm'n, *A Roadmap for Making Native America Safer*, Ch. 5, at 119 (2013) (*available at* https://www.aisc.ucla.edu/iloc/report/), many potential claimants may choose not to challenge their existing convictions. And counsel's argument ignores entirely the Nation's strong interest in public safety, including the important role played by Nation prosecutions and its enhanced sentencing authority under the Tribal Law and Order Act. Creek Br. 28.

Third, for those prisoners who would nevertheless pursue habeas relief, both federal and

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[1] Judge Matheson, the author of the opinion below, also sat on the *Comanche* panel.

state law doctrines bar untimely efforts to overturn settled convictions.

Federal habeas petitions must be filed within one year, 28 U.S.C. § 2244(d), and strict limitations exist on the filing of second or successive petitions, *id.* § 2244(b). The Tenth Circuit has already determined that the decision below provides no basis for overcoming these limitations as it is not of constitutional dimension and does not implicate newly discovered evidence. *Boyd v. Martin*, No. 17-6230, 2018 U.S. App. LEXIS 24391, at * 7-8 (10th Cir. Aug. 28, 2018); Order, *In re Brown*, No. 17-7078 (10th Cir. Dec. 21, 2017). For state claims, Oklahoma applies laches to untimely habeas petitions, *see Paxton v. State*, 903 P.2d 325 (Okla. Crim. App. 1995), including those challenging state court jurisdiction, *see McIntosh v. Hunter*, No. CIV 16-460-RAW-KEW, 2017 U.S. Dist. LEXIS 132950, at *6 (E.D. Okla. Aug. 21, 2017) (citing *McIntosh v. State*, PC-2016-343 (Okla. Crim. App. 2016)).

Accordingly, the suggestion that vindicating the Nation's Reservation boundaries will result in the release of thousands of violent criminals is hyperbole and supplies no basis for decision here.

II. WHILE LIMITED CIRCUMSTANCES EXIST WHERE RESERVATIONS DO NOT MEET THE STATUTORY DEFINITION OF INDIAN COUNTRY, THEY ARE NOT PRESENT HERE.

The answer to the Court's second question resides in the plain language of 18 U.S.C. § 1151(a), which provides that "Indian country" includes "all land within the limits of any Indian reservation under

the jurisdiction of the United States Government, notwithstanding the issuance of any patent[.]" This text excludes only reservations not under the jurisdiction of the federal government, and this Court's precedents are clear that when the United States sets aside lands for a tribe under federal control, it retains jurisdiction over the resulting reservation unless Congress affirmatively relinquishes that jurisdiction through disestablishment. Short of such action, the only circumstance where a reservation does not enjoy Indian country status is where it never came under federal jurisdiction in the first instance, as in the case of reservations of land for state-recognized tribes falling under state jurisdiction.[2]

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[2] Approximately 54 tribes enjoy state, but not federal, recognition. *See* http://www.ncsl.org/research/state-tribal-institute/list-of-federal-and-state-recognized-tribes.aspx#State. Courts have consistently rejected claims that state-recognized reservations, or the Canadian components of cross-border reservations, are Indian country under section 1151(a). *See*, *e.g.*, *Grand River Enters. Six Nations, Ltd. v. Pryor*, 425 F.3d 158, 174 (2d Cir. 2005) (portion of Iroquois Confederacy reservation in Canada does not qualify as Indian country under section 1151 regardless of status accorded it by Canada); *City of N.Y. v. Golden Feather Smoke Shop, Inc.*, No. 08-CV-3966 (CBA), 2009 U.S. Dist. LEXIS 20953, at *35-39 (E.D.N.Y. Mar. 16, 2009) (New York-recognized Poospatuck Reservation not Indian country under section 1151); *State v. Piper*, No. CR21-57349, CR21-57446, 1996 Conn. Super. LEXIS 1160, at *15-16 (Conn. Super. Ct. May 3, 1996) (section 1151(a) does not bar state prosecution of member of Connecticut-recognized Paugussett Tribe because the reservation is under state, not federal, jurisdiction).

Neither circumstance applies here. The Creek Reservation was established and brought under federal jurisdiction by the Treaties of 1832 and 1833. Moreover, accepting for present purposes the assumption embedded in the Court's question (that the Creek lands still qualify as a reservation), Congress has not taken the steps necessary to remove the Reservation from federal jurisdiction. As explained below, this would be so even if Congress had conferred criminal jurisdiction on the State.

A. Section 1151(a) Includes All Indian Reservations Set Aside by the United States That Have Not Been Disestablished by Congress.

Section 1151(a) finds its origins in the 1885 Major Crimes Act, which established federal jurisdiction over seven felony offenses committed by Indians "within the limits of any Indian reservation[.]" Act of Mar. 3, 1885, § 9, 23 Stat. 362, 385. Congress amended the Act in 1932 to include additional felony offenses and to refine its application to "any Indian reservation *under the jurisdiction of the United States Government*[.]" Act of June 28, 1932, 47 Stat. 336, 337 (emphasis added). The scant legislative history indicates that the 1932 amendment was introduced at the request of the Secretary of the Interior, but tells us nothing further about the added language, which Congress carried forward in section 1151(a) in 1948. *See* S. Rep. No. 72-746 (1932); S. Rep. No. 72-1446 (1932) (no mention of this phrase).

In *Carcieri v. Salazar*, 555 U.S. 379, 388 (2009), this Court determined that the term "now" in the

phrase "now under Federal jurisdiction," 25 U.S.C. § 479, had a well-known meaning when the Indian Reorganization Act was enacted in 1934 by looking primarily to Webster's New International Dictionary (1934). "Jurisdiction" likewise had a commonly understood meaning when the 1932 amendment was passed:

> 2. Authority of a sovereign power to govern or legislate; power or right to exercise authority; control. 3. Sphere of authority; the limits, or territory, within which any particular power may be exercised.

Webster's New International Dictionary 1347 (2d ed. 1934). This definition endures today, *see* Webster's Third New International Dictionary 1227 (2002), and in *United States v. Rodgers*, 466 U.S. 475 (1984), this Court used it to interpret the phrase "within the jurisdiction of any department or agency of the United States" as it appears in 1934 amendments to the federal criminal code:

> "Jurisdiction" is not defined in the statute.... Webster's Third New International Dictionary 1227 (1976) broadly defines "jurisdiction" as, among other things, "the limits or territory within which any particular power may be exercised: sphere of authority." A department or agency has jurisdiction, in this sense, when it has the power to exercise authority in a particular situation.

Id. at 478-79.

Thus, a reservation "under the jurisdiction of the United States Government" would have been understood, both in 1932 and 1948, as one subject to the authority of the federal government. It was further understood that this authority resided principally in Congress, which then as now was recognized to enjoy "broad general powers to legislate in respect to Indian tribes, powers that we have consistently described as 'plenary and exclusive.'" *United States v. Lara*, 541 U.S. 193, 200 (2004); *see also Ramsey*, 271 U.S. at 471 ("Congress possesses the broad power of legislating for the protection of the Indians wherever they may be within … the United States[.]").

The federal government establishes a "reservation [as] Indian country … [by] validly set[ting it] apart for the use of the Indians … under the superintendence of the Government." *United States v. Pelican*, 232 U.S. 442, 449 (1914); *see also Donnelly v. United States*, 228 U.S. 243, 269 (1913). And once a reservation is established, Congress's authority remains in place and coextensive with its boundaries until Congress indicates otherwise. In an 1894 Major Crimes Act case arising on land claimed by the State of Wisconsin, the Court explained:

> But, *independently of any question of title*, we think the court below had jurisdiction of the case. The Indians of the country are considered as the wards of the nation, and whenever the United States set apart any land of their own as an Indian reservation, … they have full authority to pass such laws

> and authorize such measures as may be necessary to give to these people full protection … within such reservations.

United States v. Thomas, 151 U.S. 577, 585 (1894) (emphasis added).

Just as "it rests with Congress" to decide whether to relinquish federal jurisdiction over particular groups of Indians, *United States v. Nice*, 241 U.S. 591, 598 (1916), so too is it for Congress to determine whether to relinquish federal jurisdiction over reservation lands. Thus, in *United States v. Celestine*, 215 U.S. 278, 285-86 (1909), this Court addressed whether federal jurisdiction existed pursuant to the Major Crimes Act over a crime committed on patented lands in the federally established Tulalip Reservation. It held that the patents did not operate as "a surrender of jurisdiction," *id*. at 290, because "when Congress has once established a reservation all tracts included within it remain a part of the reservation until separated therefrom by Congress," *id.* at 285.

These decisions are the pillars on which section 1151(a) stands. *See* 18 U.S.C. § 1151, Reviser's Notes (citing *Donnelly* and *Pelican*); *United States v. John*, 437 U.S. 634, 649 (1978) (citing *Celestine* in holding that the Mississippi Choctaw possess a "reservation" under section 1151(a)). And subsequent to its passage, this Court authoritatively distilled the scope of section 1151(a) in *Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351 (1962). There, Washington argued that non-Indian fee land within a townsite had passed out of federal jurisdiction when the townsite was platted. *Id*. at 357-59. This Court

disagreed, citing the absence of any language in section 1151 "which lends the slightest support to the idea that by creating a townsite within an Indian reservation the Federal Government lessens the scope of its responsibility for the Indians living on that reservation." *Id*. at 359. *See also Kills Plenty v. United States*, 133 F.2d 292, 293 (8th Cir. 1943) (cited in Reviser's Notes) (rejecting argument that "'within the limits of any Indian reservation'" refers only to land "'the Indian title to which has not been extinguished,'" and thus upholding federal jurisdiction over crime committed on non-Indian townsite).

The rule, then, is straightforward. Once the federal government has established an Indian reservation, only Congress – as the principal repository of federal power over Indian affairs – may surrender federal jurisdiction over it. Congress's intent to do so is not supplied by statehood, *Pelican*, 232 U.S. at 445; *Donnelly*, 228 U.S. at 271; citizenship, *Celestine*, 215 U.S. at 289-90; allotment, *Mattz v. Arnett*, 412 U.S. 481, 504 (1973); or fee patents "issued to non-Indians and Indians alike," *Seymour*, 368 U.S. at 358.[3]

This Court has unanimously held that a state's assumption of jurisdiction, even with the acquiescence

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[3] Congress's express exclusion, for the limited purposes of 18 U.S.C. §§ 1154 and 1156, of "fee-patented lands in non-Indian communities" from "Indian country" underscores that section 1151(a) includes such lands.

of executive branch officials, likewise does not substitute for the congressional action needed to place a reservation beyond the reach of section 1151(a):

> We assume … as does the United States, that there have been times when Mississippi's jurisdiction over the Choctaws and their lands went unchallenged. But … we do not agree that Congress and the Executive Branch have less power to deal with the affairs of the Mississippi Choctaws than with the affairs of other Indian groups. Neither the fact that the Choctaws in Mississippi are merely a remnant of a larger group of Indians, long ago removed from Mississippi, nor the fact that federal supervision over them has not been continuous, destroys the federal power to deal with them.

John, 437 U.S. at 652-53; *cf. Carcieri*, 555 U.S. at 397 (Breyer, J., concurring) ("[A] tribe may have been 'under Federal jurisdiction' in 1934 even though the Federal Government did not believe so at the time.").

Perhaps most importantly for present purposes, Congress does not remove a reservation from section 1151(a)'s scope by conferring criminal jurisdiction or other specific authority on a state. Indian country status marks the bounds of both criminal and civil jurisdiction, and is used by Congress and the courts to determine issues ranging from state taxing authority, *Okla. Tax Comm'n*, 508 U.S. at 123, 128, to tribal authority under the Violence Against Women Act, 25 U.S.C. § 1304(a)(3); 18 U.S.C. § 2265(e). Thus, even

where Congress has conferred state criminal jurisdiction over on-reservation Indian crimes, *see supra* at 2-3, the reservations remain Indian country. *See* PL-280, 18 U.S.C. § 1162(a) (providing for state criminal jurisdiction over crimes involving Indians "*in the areas of Indian country* listed" (emphasis added)). Any contrary holding would have seismic consequences, as it would call into question the Indian country status of at least 195 reservations in the 22 states where Congress has conferred criminal authority, upending the well-settled balance of federal, state, and tribal authority that goes with it.[4]

B. The Creek Reservation Remains Under Federal Jurisdiction.

The Creek Reservation came "under the jurisdiction of the United States Government" upon its establishment and remains Indian country today. The 1830 Removal Act promised federal "superintendence and care" for any removed tribe in the possession of its new lands. Act of May 28, 1830, § 6, 4 Stat. 411, 412. The Creek treaties affirmed this commitment, subjecting Creek self-government to

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[4] The state numbers include mandatory and optional PL-280 states where full retrocession has not occurred, as well as other states with statutory conferrals of criminal jurisdiction. The reservation numbers include affected reservations in those states. The Nation compiled these numbers with reference to the relevant statutes; *Cohen's Handbook of Federal Indian Law* § 6.04[3][a], [g], [4] (2012); and Carole Goldberg, *Tribal Jurisdictional Status Analysis*, Tribal Law and Policy Institute (Feb. 16, 2010) (*available at* http://www.tribal-institute.org/lists/tjsa.htm).

"the general jurisdiction which Congress may think proper to exercise over them." Act of Mar. 24, 1832, art. XIV, 7 Stat. 366, 368; *see also* Act of Feb. 14, 1833, art. I, 7 Stat. 417, 418 (recognizing federal obligation of "care and protection"). The 1866 Treaty confirmed the continuing federal authority to enact "such legislation as Congress and the President … may deem necessary" for the Creeks and their lands. Act of June 14, 1866, art. X, 14 Stat. 785, 788. It further directed the erection of federal agency buildings on "the reduced Creek reservation, under the direction of the superintendent of Indian affairs." *Id*. art. IX, 14 Stat. at 788.

These treaties evidence quintessential federal control over the Creek Reservation – control that Congress kept in place both before and after statehood. For example, the 1901 Allotment Act subjected Creek legislation to presidential veto. Act of Mar. 1, 1901, § 42, 31 Stat. 861, 872. *See also Morris v. Hitchcock*, 194 U.S. 384, 388 (1904) (upholding authority of Secretary to enforce federal and tribal regulations "within [the] borders" of the Chickasaw Nation); *Buster v. Wright*, 135 F. 947 (8th Cir. 1905) (same for Creek Nation). And when Congress preserved the Creek government in the Five Tribes Act, it continued to subject to presidential veto not only Creek legislation, but also all contracts affecting Creek property. Act of Apr. 26, 1906, § 28, 34 Stat. 137, 148.

Indeed, Congress enacted section 28 specifically to maintain federal control "over the property of [the] Indians" and to prevent that property from being

"controlled by the new State." 40 Cong. Rec. 2959, 2977 (1906) (Sen. McCumber); *Tiger v. W. Inv. Co.*, 221 U.S. 286, 306 (1911) (describing Act as "a comprehensive system of protection as to such Indians"). Accordingly, the Enabling Act provided that statehood would have no effect on "the authority of the Government of the United States to make any law or regulation respecting such Indians, their lands, property, or other rights … which it would have been competent to make if this Act had never been passed." § 1, 34 Stat. at 267-68. Congress was thus "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 act." *Tiger*, 221 U.S. at 309; *see also Coyle v. Smith*, 221 U.S. 559, 570 (1911).

Petitioner's narrative of the wholesale surrender of federal jurisdiction over Creek lands was rebuffed immediately in the wake of statehood. *See* Creek Br. 23-25 (describing defeat of Owen amendment); 42 Cong. Rec. 2576, 2586 (1908) (Sen. Curtis) (rejecting Owen argument that the Five Tribes' lands had come under Oklahoma's jurisdiction because "[t]he Government still has control of those lands"). As this Court has explained, Congress recognized that "the Government of the United States was under a duty to the inhabitants of the Indian Territory different from its duty to the inhabitants of the other territory that went to form the new State." *Webb*, 225 U.S. at 686.

Thus, Congress's commitment in the 1901 Allotment Act "to maintain strict [liquor] laws in said [Creek] nation," § 43, 31 Stat. at 872, continued in full force after statehood, including within the City of

Tulsa, which had been platted as a townsite under the Act. Creek Br. 11. In *Joplin Mercantile Co. v. United States*, 236 U.S. 531 (1915), this Court upheld a conviction for conspiracy under a statute prohibiting the introduction of liquor into "Indian country." Notably, the federal indictment charged the defendants with conspiring:

> "to commit an offense against the United States of America, to wit, … to introduce … liquors into the Indian country which was formerly the Indian Territory and now is included in a portion of the State of Oklahoma, and into *the City of Tulsa* … which was formerly within and *is now a part of what is known as the Indian country*, and into other parts and portions of that part of Oklahoma which lies within the Indian country."

Id. at 534-35 (emphases added) (quoting indictment). While the Court upheld the conviction on other grounds, the United States clearly viewed Tulsa as Indian country under its jurisdiction and acted on that understanding. *See also*, *e.g.*, *United States v. Birdsall*, 233 U.S. 223, 233 n.2 (1914) (describing federal liquor statute enforcement efforts by "Indian agents and superintendents and their Indian police" in the Indian Territory, including special agents "sent to Oklahoma … [to] supplement the efforts of superintendents in charge of reservations" (quotations omitted)); *Ammerman v. United States*, 216 F. 326, 328 (8th Cir. 1914) (indictment charged defendant with importing liquor into "'the county of

Tulsa'" which "'at all times was and is now a part of the Indian Country'").[5]

Congress continued to exercise its jurisdiction in other key areas, including in the maintenance of tribal schools, a hallmark of federal reservation status. *Solem v. Bartlett*, 465 U.S. 463, 474 (1984) (schools maintained "for the benefit" of Indians indicate "area would remain part of the reservation" (quotations omitted)). Petitioner asserts that after statehood Congress left the Creek Nation with "no schools, no buildings," Br. 22, an oft-repeated claim of popular historians. However, in its first appropriations act after statehood, Congress authorized monies "[f]or the maintenance, strengthening, and enlarging of the tribal schools of the [Five Tribes] … and the establishment of new schools under the control of the Department of the Interior[.]" Act of Apr. 30, 1908, 35 Stat. 70, 91. Such provisions appeared regularly in annual Indian appropriations acts well after Oklahoma established a public school system. *See*, *e.g.*, Act of Mar. 3, 1921, § 18, 41 Stat. 1225, 1243 (appropriating monies "for such repairs, improvements, or new buildings as he may deem essential for the proper conduct of the several schools of said [Five] tribes"). Congressional superintendence

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[5] Today, liquor transactions are permitted in Indian country so long as they conform with state law and any tribal ordinance approved by the Secretary of the Interior. *See* 18 U.S.C. § 1161; *Rice v. Rehner*, 463 U.S. 713, 733-35 (1983); *United States v. Mazurie*, 419 U.S. 544, 547 (1975).

over a comprehensive array of other reservation affairs – including tribal government, infrastructure improvements, tribal and allotted lands, tribal police, legal and financial affairs, mineral leasing, building rentals, child welfare, and tribal hospitals – likewise continued.[6]

Oklahoma, of course, asserted jurisdiction as well, including criminal jurisdiction over Indians on the Reservation, and often with the acquiescence of executive branch officials. As discussed above, however, the non-sanctioned assumption of jurisdiction by a state, with or without the approval of federal officials, does not erase a reservation's Indian country status under section 1151(a). *See John*, 437 U.S. at 652. Since *United States v. McBratney*, 104 U.S. 621 (1882), this Court has recognized that "control of offenses committed by white people against whites" on Indian reservations passes to states upon their admission. *Donnelly*, 228 U.S. at 271. And, as discussed above, Congress has frequently and expressly conferred on states criminal jurisdiction over reservation Indians. But given that these *lawful* exercises of state authority do not call into question the Indian country status of reservations, the unlawful exercise of state authority does not either. Indian reservations set aside by the federal

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[6] *See*, *e.g.*, 35 Stat. 781, 803-07 (1909); 36 Stat. 269, 281-82 (1910); 36 Stat. 1058, 1069-70 (1911); 37 Stat. 518, 530-34 (1912); 38 Stat. 77, 95-97 (1913); 38 Stat. 582, 598-602 (1914); 39 Stat. 123, 146-49 (1916); 39 Stat. 969, 983-86 (1917); 40 Stat. 561, 579-84 (1918); 41 Stat. 3, 21-25 (1919); 41 Stat. 408, 426-28 (1920); 41 Stat. 1225, 1242-43 (1921).

government remain "under the jurisdiction of the United States Government" until Congress says otherwise, and Congress has never so spoken with respect to the Creek Reservation.

CONCLUSION

The Tenth Circuit's judgment should be affirmed.

Respectfully submitted,

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