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 PETITIONER

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QUESTIONS PRESENTED

1. Whether any statute grants the state of Oklahoma jurisdiction over the prosecution of crimes committed by Indians 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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SUPPLEMENTAL BRIEF FOR PETITIONER

Petitioner submits this brief in response to the Court's December 4, 2018 order directing supplemental briefing.

I. Oklahoma has criminal, civil, and regulatory jurisdiction within the boundaries of the former Indian Territory.

This Court directed the parties to address: "Whether any statute grants the state of Oklahoma jurisdiction over the prosecution of crimes committed by Indians within the 1866 territorial boundaries of the Creek Nation, irrespective of the area's reservation status." The answer is yes.

1. Statutes enacted in 1897, 1898, 1904, 1906, and 1907 conferred jurisdiction on Oklahoma to prosecute crimes within the 1866 boundaries of the Creek Nation, as well as the historical boundaries of the other Five Tribes. In 1897, Congress conferred exclusive jurisdiction on the U.S. courts in Indian Territory to try all criminal cases and applied U.S. and Arkansas law irrespective of the defendant's race. Indian Department Appropriations Act of 1897 ("1897 Act"), ch. 3, § 1, 30 Stat. 83. This ended disparate treatment in the application of substantive law and jurisdictional determinations on the basis of Indian status in eastern Oklahoma—a policy from which Congress never deviated. *See* U.S. Br. 16.

The Curtis Act in 1898 abolished tribal courts and rendered tribal law unenforceable. Ch. 517, §§ 26, 28, 30 Stat. 504–05. In 1904, Congress confirmed that Arkansas law extended to all persons and estates in Indian Territory, "Indian, freedman, or otherwise." Act of Apr. 28, 1904 ("1904 Act"), ch. 1824, § 2, 33 Stat. 573. And the Oklahoma Enabling

Act, as originally enacted in 1906 and as amended in 1907, directed the transfer of all pending federal criminal cases to the newly created federal courts in Oklahoma, ch. 3335, § 16, 34 Stat. 276, and directed all other cases to the newly created state courts, including cases involving major crimes, §§ 17–20, 34 Stat. 276–77. Accordingly, the laws of Oklahoma Territory (and eventually the State of Oklahoma) supplanted the Arkansas law that had applied to all persons irrespective of race, and the state courts became "the successors" of the territorial courts. *Stewart v. Keyes*, 295 U.S. 403, 409–10 (1935). Federal territorial courts thus transferred all pending non-federal cases to the new state courts, and the state courts also assumed jurisdiction over new prosecutions. Since that time, no case involving Indians has ever been heard in federal court on the theory that the former Indian Territory is reservation land. Br. 38–43. And no act since statehood reinstated distinctions based on Indian status with respect to major crimes committed in the former Indian Territory.

The statutory definition of Indian country (to which the jurisdictional provision of 18 U.S.C. § 1153 applies) includes "land within the limits of any Indian reservation under the jurisdiction of the United States Government." 18 U.S.C. § 1151(a). Under ordinary principles of statutory construction, therefore, even if a reservation-like boundary remained in place, the generally applicable 1948 extension of federal jurisdiction under the Major Crimes Act to lands identified in § 1151 does not supersede the more specific jurisdictional grants of authority to Oklahoma with respect to the former Indian Territory. *See* U.S. Br. 31. And the federal government has not brought a single prosecution under § 1153 in the State's 111-year history based on formal Indian-reservation sta-

tus in Oklahoma as defined by § 1151(a). The State thus has jurisdiction to prosecute crimes committed by tribal members within the 1866 boundaries of the Creek Nation, regardless of the area's reservation status.[1]

2. The first question in the Court's order suggests that the Court could leave open whether the Five Tribes' former territories constitute Indian reservations today. But such a holding would call into question the longstanding status quo: that eastern Oklahoma is not treated as a group of reservations, and federal and tribal governments have primary authority only over scattered parcels of Indian country such as restricted allotments and trust lands. Such a result may in fact have broader ramifications that would extend beyond the criminal context.

To start with, the statutes discussed above, by their own terms, apply equally to *civil* cases. The 1897 Act granted the federal courts in the Indian Territory exclusive jurisdiction over "all civil causes

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[1] A contrary holding would call into question hundreds, if not thousands, of state convictions. Over 2,000 prisoners in state custody who committed crimes in eastern Oklahoma self-identify as Native American—including 155 murderers, 113 rapists, and over 200 felons convicted of crimes against children. These figures do not include the unknown number of non-Indians convicted of crimes against Indian victims. This information is derived from publicly available data that Oklahoma maintains on all inmates, which lists the inmate's self-identified race, crime of conviction, and county of conviction. Oklahoma Dep't of Corrections, *OK Offender*, https://okoffender.doc.ok.gov/. As the Tenth Circuit noted below, "[i]n Oklahoma, issues of subject matter jurisdiction are never waived" and there are no apparent procedural bars to raising lack of subject matter jurisdiction in state-court collateral challenges to convictions. Pet. App. 13a–14a n.5.

in law and equity" involving "any person" in Indian Territory. 30 Stat. 83. And the direction that Arkansas law would apply to "all persons," "irrespective of race," was not limited to criminal cases. *Id.* The Curtis Act, in banning enforcement of tribal law, likewise applied to civil and criminal substantive law. § 26, 30 Stat. 504. Congress ordered "all civil and criminal causes then pending in any [tribal] court" to be transferred to the territorial courts, where they were adjudicated under Arkansas law. § 28, 30 Stat. 504–05.

Thus, even with respect to civil cases, the 1897 Act, along with the Curtis Act, "operated to displace the Creek tribal laws" and "substitute in their stead [provisions of] Arkansas law." *Washington v. Miller*, 235 U.S. 422, 425 (1914); *Sizemore v. Brady*, 235 U.S. 441 (1914) (affirming Oklahoma Supreme Court decision that Arkansas, not Creek, law governed inheritance); *see also George v. Robb*, 64 S.W. 615 (Indian Terr. 1901) (Arkansas law applied to inheritance dispute between Creek citizens as a result of the abolition of tribal courts and unenforceability of tribal law).

The 1904 Act similarly provided that "*[a]ll* the laws of Arkansas" in force in Indian Territory—including civil and regulatory provisions—were extended to all persons in the Territory, irrespective of race. § 2, 33 Stat. 573 (emphasis added); *see, e.g.*, Mansfield's Digest of the Statutes of Arkansas (1884), ch. 11 (practice of law), ch. 15 (corporations), ch. 94 (legal notices and advertisements). Thus, the 1904 Act, too, applied to civil cases. *Palmer v. Cully*, 153 P. 154 (Okla. 1915) (confirming Arkansas law governed marriage between two tribal members after 1904). And upon statehood, Oklahoma law would supplant Arkansas law. *Jefferson v. Fink*, 247 U.S.

288 (1918) ("It seems very plain that the provisions before quoted from the Enabling Act were intended to result, at the time of the admission of the new state, in the substitution of the Oklahoma law of descent for that of Arkansas theretofore put in force in the Indian Territory.").

The Enabling Act's transfer provisions likewise applied to "all cases." § 17, 34 Stat. 276–77. At oral argument, it was suggested that the 1907 amendment to the Enabling Act "makes clear that the transfer is only of criminal cases." Oral Arg. Tr. 26:5–10. But the 1907 amendment transferred to state court all cases of a local nature, whether "*civil* or criminal." Act of March 4, 1907 ("1907 Act"), ch. 2911, § 2, 34 Stat. 1287 (emphasis added). As originally drafted, § 16 of the Enabling Act directed the transfer of all cases in which the United States was a party to the new federal courts. 34 Stat. 276. But because the United States was a party in all criminal prosecutions in Indian Territory, some members of Congress feared that § 16 could be read to transfer all criminal cases in Indian Territory to federal court. *See* S. Rep. 59-7273 (Feb. 23, 1907); H.R. Rep. 59-8103 (Feb. 26, 1907).

Congress therefore amended the Enabling Act to provide that civil cases in which the United States was a party would be transferred to federal court along with other federal cases, and included new language specifically providing for the transfer of criminal cases to federal court only in cases involving federal crimes—not cases involving local crimes that had been prosecuted by the United States prior to statehood. 1907 Act § 1, 34 Stat. 1286–87. Congress also amended §§ 17 and 20 to reiterate that "all causes, proceedings, and matters, civil or criminal" pending in the territorial courts *not* transferred to the

federal courts under § 16 were transferred to the state successor courts. 1907 Act § 2, 34 Stat. 1287.

In short, the text and statutory history of the 1907 amendments confirm congressional intent to transfer all civil and criminal cases of a local nature to state court. If the Oklahoma-specific jurisdiction-conferring provisions of the 1897, 1898, 1904, 1906, and 1907 Acts supersede § 1153's general direction that federal courts have jurisdiction over major crimes involving Indians on "all land within the limits of any Indian reservation under the jurisdiction of the United States Government," 18 U.S.C. § 1151(a), those same provisions likewise supersede other generally applicable laws that purport to exclude state civil jurisdiction over reservations defined in § 1151.

3. The contemporaneous history confirms the text: Congress erased any distinction between Indians and non-Indians in the former Indian Territory, and later Oklahoma, for purposes of both civil and criminal jurisdiction. In originally extending Arkansas law to all persons in Indian Territory regardless of race, Congress ensured that "[Indian] criminals shall be tried the same as the white men who are now in the territory." 29 Cong. Rec. 2324 (Sen. Berry). The same was true for civil cases. Federal courts would now "decide all the causes that arise between the Indians, as well as between Indians and white men," and "decide all causes of every description … according to the laws of the United States and the laws of the State of Arkansas extended over [the Indian] Territory." 29 Cong. Rec. 2341 (Sen. Vilas). The 1897 Act took away the tribes' "exclusive jurisdiction, where Indians alone are concerned, in both criminal and civil suits … and g[ave] it exclusively to the white man." 29 Cong. Rec. 2310 (Sen. Bate); *see also* 29 Cong. Rec. 2305 (Sen. Vest) ("I would put the

Indians in the Territory under the same laws with the white people."). This purpose was reflected throughout the statehood process. *See* Br. 12, 30–31. For example, unlike in other states, the Enabling Act gave Indians in the former Indian Territory full rights to participate in Oklahoma's constitutional convention and granted them equal civil and political rights. §§ 2–3, 34 Stat. 268–69; *United States v. Allen*, 171 F. 907, 920–21 (E.D. Okla. 1909).

Upon statehood, civil and criminal cases involving Indians were treated identically—Oklahoma courts assumed jurisdiction over such cases. As discussed, criminal cases involving Indians were transferred from federal territorial courts to state court. Br. 39–43. The same was true for civil cases. *E.g.*, *Sweet v. Schock*, 245 U.S. 192 (1917) (affirming state-court decision holding county could tax former allotments sold for townsite purposes); *Brady v. Sizemore*, 124 P. 615 (Okla. 1912); *Gann v. Ball*, 110 P. 1067 (Okla. 1910). And post-statehood, Oklahoma courts immediately considered all civil cases involving Indians and applied state law. *See, e.g.*, *Barnett v. Gross*, 216 P. 153 (Okla. 1923) (contract dispute involving Indian defendant); *Carroll v. Durant Nat'l Bank*, 133 P. 179 (Okla. 1913) (contract suit involving Indian defendant); *Swofford Bros. Dry Goods Co. v. Owen*, 133 P. 193 (Okla. 1913) (shareholder suit involving at least one Indian defendant).[2] And this Court routinely reviewed the decisions of Oklahoma courts,

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[2] The opinion in *Barnett* notes the tribal membership of the defendant. 216 P. at 153. The names of defendants in *Carroll* and *Swofford Bros. Dry Goods Co.* (defendant J. Hamp Willis) appear on the Dawes Rolls. *See* Oklahoma Historical Society, *Search the Dawes Final Rolls and Applications*, www.okhistory.org/research/dawes.

applying Oklahoma law, involving heirship disputes. *See supra* p. 4.

In short, Congress spent a decade erasing any distinction between Indians and non-Indians, for both civil and criminal matters. Members of the Five Tribes "are actually citizens of the State with little to distinguish them from all other citizens except for their limited property restrictions and their tax exemptions." *Okla. Tax Comm'n v. United States*, 319 U.S. 598, 603 (1943). Congress did not radically change course upon statehood and reinstate distinctions based on Indian status in criminal prosecutions and civil disputes in Oklahoma.

4. Notwithstanding the foregoing analysis, the best reading of the statutory text, history, and context is that the former Indian Territory is not a group of reservations, full stop. Br. 38–46; Reply Br. 10–14; *see infra* pp. 18–19. Congress's plain and unwavering purpose—to end jurisdictional distinctions between Indians and non-Indians in eastern Oklahoma—confirms that it did not intend the area to be reservation land.

Any notion that the Five Tribes are treating eastern Oklahoma as consisting of reservations today, that their present powers could be diminished by reversal, or that there could be backsliding with respect to current services offered by the Five Tribes is false and misleading. We fail to understand how any "significant practical disruption" could result from acknowledging the absence of a reservation. Oral Arg. Tr. 63:1–5. Tribes can continue to render whatever services they want to their members (or to nonmembers) anywhere in Oklahoma. Counsel for the Creek Nation stated at oral argument that, with respect to "[t]he Creek's providing healthcare, educa-

tion, infrastructure," "a disestablishment would snuff all that out." Oral Arg. Tr. 73:25–74:3. This statement is simply not true. The Creek Nation offers all these services to members despite the absence of a reservation. None of the healthcare, education, or infrastructure services the Creek Nation currently provides, nor funding for such services, stems from any recognition of a current reservation coextensive with the Creek Nation's 1866 boundaries.

Indeed, the Creek Nation often receives federal funding for these services precisely because they qualify as a tribe with a *former* reservation in Oklahoma. For example, while it is true that the Creek Nation assists with maintenance of some state- or county-owned roads (typically ones that service tribal facilities such as casinos) pursuant to agreements with state or local entities and funded by federal grants, Oral Arg. Tr. 55:6–10, they do so under federal programs made available for roads located "in *former* Indian reservations in the State of Oklahoma." 23 U.S.C. § 202(b)(1)(B)(v) (emphasis added); 25 C.F.R. § 170.5; *see also, e.g.*, 25 U.S.C. § 1603(16)(B)(i)–(ii) (defining "reservation" to include "former reservations in Oklahoma" for purposes of Indian Health Care Act); § 3202(9) (same with regard to child protection and family violence prevention); § 2020(d)(1)–(2) (same with respect to education); § 1452(d) (same with regard to economic development); § 4302(4)(A)–(B) (same with regard to business development and trade promotion); 33 U.S.C. § 1377(c)(3) (same with regard to water pollution prevention and control). None of these programs could possibly be affected by recognizing the status quo—that there are no current reservations in eastern Oklahoma.

The Creek Nation is also wrong to claim that disestablishment could jeopardize tribal policing "pursuant to … cross-deputization agreements." Oral Arg. Tr. 73:23–74:3. These agreements developed in the wake of judicial decisions in the late 1980s and early 1990s holding that the State lacked jurisdiction over restricted allotments and tribal trust lands, thereby creating a "checkerboard" of federal, state, and tribal jurisdiction. *See United States v. Sands*, 968 F.2d 1058, 1062 (10th Cir. 1992); *see also* Reply Br. 12. To avoid jurisdictional disputes on these parcels scattered throughout the former Creek territory (the status of which may be difficult to determine at the time of arrest), the tribes, state and local entities, and federal authorities have entered into cooperative agreements to give all law enforcement officers within the former Creek territory jurisdiction on any given parcel, regardless of whether it is Indian country. *See, e.g.*, Cross-Deputization Agreement Among Hughes County, Oklahoma, the Bureau of Indian Affairs, and the Muscogee (Creek) Nation of Oklahoma (1995), https://bit.ly/2LAHEDd. Thus, it is precisely because everyone has recognized that the entire area is *not* uniformly reservation land, but instead contains a patchwork of isolated pockets of Indian country, that the cross-deputization agreements are useful and expedient. By their plain terms, these agreements will not be affected by a holding that the area is not reservation land.

Nor are we aware of any basis for the implication that Creek tribal courts have been exercising jurisdiction over non-Indians or non-Indian lands extending to their 1866 boundaries since 1936. Oral Arg. Tr. 75:3–14. The Creek courts were not reinstated until the early 1980s, and since then, the courts have purposefully declined to decide whether the tribe

may assert such jurisdiction. *See Muscogee (Creek) Nation ex rel. Beaver v. Am. Tobacco Co.*, No. CV-97-27, 1998 WL 1119774, at *7 (Muscogee (Cr.) D. Ct. Feb. 12, 1998).[3]

Finally, a ruling that the area is not reservation land would preserve the status quo with respect to restricted allotments, over which the federal government since 1992 has exercised criminal jurisdiction in cases involving Indian defendants or victims. U.S. Br. 32–33. If this Court holds that the State has criminal jurisdiction over Indians regardless of whether the area is "an Indian reservation" for purposes of §§ 1151(a) and 1153, federal prisoners will inevitably argue that this Court's holding applies equally to restricted allotments, notwithstanding § 1151(c). Thus, ruling on the alternative grounds suggested in this first question risks undermining the convictions of many federal prisoners who are tribal members or who committed their crime against Indians on restricted allotments or trust lands. And because, as discussed above, this conclusion applies equally to civil and criminal jurisdiction, such a holding may also undermine federal and trib-

[3] Contrary to the representation of counsel for the Creek Nation that, since 2000, the Creek Nation has been carrying out law enforcement and other activities in "almost the entire area" in dispute in this case, Oral Arg. Tr. 74:10–23, the Creek Nation's own Executive Branch quarterly report recognizes that this case "has the potential to expand MCN jurisdiction within the tribe's 11-county borders." Muscogee (Creek) Nation Executive Branch FY 2018 First Quarterly Report (Jan. 22, 2018), at 23, https://bit.ly/2LFcY3S. If the decision below is upheld, that result could require the Creek Nation to "triple the size of Lighthorse staff and officers in addition to associated impacts on facilities, equipment, administrative support and training." *Id.* at 24.

al authority currently exercised on restricted allotments and trust lands.

In other words, it is far from certain that an affirmative answer to this Court's first question would be a narrower result than the recognition that the Creek Nation's former territory is not an Indian reservation today. On the contrary, in the criminal arena, such a ruling would arguably be broader than a holding that the area is not an Indian reservation, as it would open the door to litigation by defendants challenging the federal government's jurisdiction over crimes committed on restricted allotments. On the civil side, the implications of leaving unanswered the reservation status of eastern Oklahoma would—at a minimum—create confusion and disarray, as explained below. And a holding that the Oklahoma-specific grants of state jurisdiction supersede 18 U.S.C. § 1153's application to lands defined in § 1151 could suddenly throw into question the jurisdictional treatment of cases generally thought to be within tribal jurisdiction in the civil context, such as disputes between Indians on tribal trust lands or restricted allotments.

5. Before the decision below, not *once* in Oklahoma's 111-year history had any court—federal, state, or tribal—recognized a reservation in the former Indian Territory. Let there be no mistake: neither respondent, nor the Creek tribe, nor any amici question that affirmance would increase the total amount of reservation land nationwide by 28.3% and *triple* the total population of reservations in the United States. America's largest city encompassed by a reservation would no longer be Fife, Washington, population: 9,173; it would be Tulsa, Oklahoma, population: 403,090.

Thus, while reversal in this case preserves the status quo for both the State and the Five Tribes and allows settled expectations to remain undisturbed, leaving open the question whether eastern Oklahoma consists of Indian reservations within the meaning of § 1151(a) would invite significant uncertainty and litigation. "While § 1151 is concerned, on its face, only with criminal jurisdiction, the Court has recognized that it generally applies as well to questions of civil jurisdiction." *DeCoteau v. Dist. Cty. Ct.*, 420 U.S. 425, 427 n.2 (1975).

For example, states generally cannot collect income taxes from tribal members who live and work in Indian country. *Okla. Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114, 123 (1993). States similarly cannot collect sales or other excise taxes from tribal members for transactions on reservations, at least where the legal incidence of the tax falls on the tribe or tribal members. *Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 453 (1995). Because around 10% of the population in this area identifies as Native American, leaving open whether the area constitutes Indian reservations threatens to decimate state and local budgets and the services they fund. Meanwhile, other transactions, including those involving non-Indians, would be subject to a multifactor balancing test to determine whether the State may tax. *See White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144–45 (1980).

That is not all. At least ten criminal statutes in Title 18 refer to Indian country under § 1151, five of which could expose the 1.8 million eastern Oklahomans to new federal criminal prohibitions. *See* 18 U.S.C. § 1164 (destroying boundary signs); § 1460 (sale of obscene matter); § 2252 (exploitation of mi-

nors); § 2252A (child pornography); § 2261 *et seq.* (domestic violence).[4]

Additionally, restaurants, bars, and stores selling alcohol in eastern Oklahoma would potentially be subject to federal criminal penalties or tribal regulation for distribution or possession of liquor in a newly created Indian reservation—subject to extensive, fact-dependent litigation over whether each establishment falls on fee land in a "non-Indian communit[y]." *See* 18 U.S.C. §§ 1154, 1156, 1161. Tribal laws already set forth licensing schemes for sale of alcoholic beverages on tribal land. *See, e.g.*, Muscogee (Creek) Nation Liquor and Beverage Code, tit. 36, §§ 7-101, 7-201, 7-202 (regulating sale and possession of alcoholic beverages in "Muscogee (Creek) Nation Indian Country as defined by federal law"). And the Five Tribes could operate casinos on any land within their 1866 boundaries that is subject to tribal jurisdiction. *See* 25 U.S.C. §§ 2703(4), 2710 (Indian Gaming Regulatory Act applies to "all lands

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[4] *See also* 18 U.S.C. § 2265(e) (granting tribal courts civil jurisdiction to issue and enforce protective orders in domestic-violence cases arising in Indian country); § 2345 (forbidding civil actions by state attorneys general to enforce tobacco-trafficking prohibition against tribes or Indians in Indian country); § 3559(c)(96) (creating exception to mandatory life imprisonment for certain offenders where federal jurisdiction over the offense was predicated only on Indian country jurisdiction, unless tribe elects to have the mandatory rule apply); § 3598 (similar with respect to capital sentences); § 5032 (similar with respect to federal procedures governing juvenile delinquency). It is far from clear whether and how these (and potentially other) statutes might apply if this Court declines to determine whether the entire former Creek territory is a reservation.

within the limits of an Indian reservation" within the tribe's jurisdiction).[5]

At least two dozen other federal statutes refer to Indian country, within the meaning of 18 U.S.C. § 1151, for civil and criminal purposes.[6] More than 100 other civil and criminal provisions of the U.S. Code, many of which affect the daily lives of citizens, refer to the term Indian "reservation."[7]

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[5] Counsel for the Creek Nation stated at oral argument that affirmance "would not" expand IGRA's reach "in the sense that there is a compact in place between the nation and the state already." Oral Arg. Tr. 72:13–18. But the gaming compact between the Creek Nation and the State of Oklahoma authorizes tribal gaming on all Indian lands as defined in 25 U.S.C. § 2703(4), the scope of which would be significantly broadened if the Court holds that eastern Oklahoma comprises a group of reservations. Tribal Gaming Compact Between the Muscogee (Creek) Nation and the State of Oklahoma, pmbl. & Part 5(L) (Feb. 4, 2005), https://bit.ly/2Q3a3Cv.

[6] Here are six examples: 6 U.S.C. §§ 606, 601(4)(A)(iii)(IV) (authorizing homeland-security grants to tribes "the jurisdiction of which includes not less than 1,000 square miles of Indian country"); 15 U.S.C. § 1175(a) (prohibiting manufacture, transport, or use of gambling devices within Indian country, except for gaming conducted under Tribal-State compact, *see* 25 U.S.C. § 2710(d)(6)); 15 U.S.C. § 1245 (forbidding possession, manufacture, or sale of ballistic knives in Indian country); 16 U.S.C. §§ 3372(a)(1), 3371(c) (prohibiting import or sale of fish or wildlife taken in violation of any tribal rules enforceable "within Indian country"); 21 U.S.C. § 387t(c) (creating exception to FDA's ability to direct tobacco-related record inspections "on Indian country" absent tribal consent); 25 U.S.C. § 1304(c) (allowing tribes to exercise "special" criminal jurisdiction over certain acts of domestic violence occurring "in the Indian country of the participating tribe").

[7] 42 U.S.C. § 2000e-2(i) exempts from federal antidiscrimination laws "any business or enterprise on or near an Indian reservation" that preferences "an Indian living on or near a reser-

One statute bears special focus given the breathtaking consequences of leaving open whether half of Oklahoma consists of Indian reservations. The Indian Child Welfare Act provides exclusive tribal-court jurisdiction over child welfare determinations where an Indian child is domiciled or resides on a reservation, *even if every party objects*. 25 U.S.C. § 1911(a). ICWA further allows any tribe, parent, or Indian child to petition to invalidate a final decision for foster placement or termination of parental rights on the basis that the state court lacked jurisdiction. *Id.* § 1914. Thus, in *Mississippi Band of Choctaw Indians v. Holyfield*, this Court invalidated an adoption *three years* after the fact because the adoption pro-

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vation." Other examples include 7 U.S.C. § 1926(a)(1) (authorizing loans to "Indian tribes on Federal and State reservations" for purpose of improving water and waste practices); 15 U.S.C. § 6312(b)(1) (allowing tribes to "regulate professional boxing matches held within the[ir] reservation[s]"); 16 U.S.C. § 3378(c)(3) (federal fish-and-wildlife controls do not supersede State or tribal authority over activity "within Indian reservations"); 18 U.S.C. § 1853 (prohibiting destruction of trees growing "upon any Indian reservation" without consent of United States); 25 U.S.C. § 318a (appropriation of funds for construction and maintenance of "[r]oads on Indian reservations"); 25 U.S.C. § 381 (authority to regulate irrigation of lands within any Indian reservation for agricultural purposes); 25 U.S.C. § 1680n(b)(1) (giving priority to "Indian lands," including "all lands within the limits of any Indian reservation," for the establishment of certain facilities and employment projects); 26 U.S.C. § 4225 (tax exemption for certain crafts "manufactured or produced by Indians on Indian reservations"); 43 U.S.C. § 315 (forbidding creation of grazing districts on Indian reservations); 49 U.S.C. § 47123(b)(1)(B) (preferential employment of Indians living on or near a reservation for projects or contracts at an airport on an Indian reservation); and 52 U.S.C. § 10503(b)(2)(A)(i)(III) (bilingual election requirements "in the case of a political subdivision that contains all or any part of an Indian reservation").

ceedings took place in state court, not tribal court. 490 U.S. 30, 53 (1989).

Between July 1, 2017, and June 30, 2018, 2,010 Native American children in Oklahoma were placed outside the home in foster care; of those, 1,032 placements were adjudicated in eastern Oklahoma and may be subject to challenge under ICWA, including 284 placements in Tulsa alone. Okla. Dep't of Human Servs., *Fiscal Year 2018 Annual Report Tables*, tbl.15, https://bit.ly/2SG7Y0S. Another 184 to 923 Native American children statewide were adopted in adjudicated proceedings. *Id*. tbl.16 (listing adoptees that are "American Indians" or "two or more races"). Leaving open whether eastern Oklahoma is a reservation would unsettle the security of every child and family involved in these cases—and countless others from prior years.

II. Federal Indian reservations are Indian country under 18 U.S.C. § 1151(a).

The Court also directed the parties to address: "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)." The answer is no.

1. Section 1151(a), titled "Indian country defined," provides that "all land within the limits of any Indian reservation under the jurisdiction of the United States Government" is Indian country. We do not see how the Five Tribes could have formal reservations that fail to meet the definition of Indian country set forth in § 1151(a). This provision is a definition, and it expressly defines "Indian country" to include "any Indian reservation under the jurisdiction of the United States Government." "[R]ead naturally, the word 'any' has an expansive meaning, that

is, 'one or some indiscriminately of whatever kind.'" *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 219 (2008) (quoting *United States v. Gonzales*, 520 U.S. 1, 5 (1997)).

The modifying phrase "under the jurisdiction of the United States Government" does not lead to a different conclusion. That phrase clarifies that only reservations under federal protection qualify as "Indian country" under § 1151(a). Felix S. Cohen, *Handbook of Federal Indian Law* § 3.04[2][c][ii] (2017 ed.); *see also* § 3.02[9] (distinguishing state-recognized tribes and reservations). Oklahoma has never created an Indian reservation under state law, and the Creek Nation asserts only a federal reservation that Congress set aside for them by treaty. Creek Br. 4; *see also* Resp. 6.

2. Moreover, it is not clear what it would mean to say that land is a formal federal Indian reservation but somehow not Indian country under § 1151(a). Both terms describe land over which the federal government and the tribes, not states, generally exercise primary jurisdiction. *See Alaska v. Native Vill. of Venetie*, 522 U.S. 520, 527 n.1, 530 (1998). The decision below explained that "[t]he term Indian reservation has come to describe federally-protected Indian tribal lands, meaning those lands which Congress has set apart for tribal and federal jurisdiction." Pet. App. 28a (brackets and citation omitted). Other forms of Indian country—such as allotments and tribal trust lands—likewise are characterized by tribal and federal jurisdiction with corresponding limits on state jurisdiction. *E.g.*, *Native Vill. of Venetie*, 522 U.S. at 530; *Sac & Fox Nation*, 508 U.S. at 124–126; *United States v. Ramsey*, 271 U.S. 467, 471 (1926).

In other words, the term "Indian reservation" has significance only to the extent it is a basis for tribal or federal jurisdiction over non-Indian-owned land, to the general exclusion of state jurisdiction. That is why this Court's disestablishment cases distinguish an Indian reservation from land over which a tribe cannot exercise sovereignty or jurisdiction because Congress has "divested [it] of all Indian interests." *Solem v. Bartlett*, 465 U.S. 463, 468 (1984).[8] Because surplus land acts, by definition, extinguish Indian *title* to the land, the only other Indian "interest" at stake is *sovereign* interest over non-Indian-owned land. *See South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 348 (1998) (savings clause did not "maintain exclusive tribal governance within the original reservation boundaries"); *id.* at 352–53 (tribe understood that congressional act "dissolved tribal governance"); *Nebraska v. Parker*, 136 S. Ct. 1072, 1081 (2016) (citing this language from *Yankton Sioux*); Br. 32. Although after statehood the Five Tribes existed and retained some control over internal governance and disbursement of assets, the Five Tribes had no power over non-Indian owned *land*, nor did they attempt to exercise any. Reply Br. 2–10.

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[8] *See also Solem*, 465 U.S. at 469 n.10 (searching for text that "severed the tribe from its interest" in non-Indian owned fee land); *id.* at 470 ("Explicit reference to cession or other language evidencing the present and *total surrender of all tribal interests* strongly suggests that Congress meant to divest from the reservation all unallotted opened lands.") (emphasis added); *id*. at 474 ("Nowhere else in the Act is there specific reference to the cession *of Indian interests in the opened lands* or any change in existing reservation boundaries.") (emphasis added); *id*. at 478 ("complete cession of tribal interests" in non-Indian owned fee land and "cede and relinquish all interests" in such land).

This Court's questions envision a scenario in which Congress may have preserved a reservation while vesting the State with plenary jurisdiction to the exclusion of the tribes and the federal government. But land that Congress has divested of tribal title, jurisdiction, and sovereignty, and of federal authority, is no longer a reservation. By extinguishing the territory's reservation-like status (in the jurisdictional sense), Congress not only ousted tribal jurisdiction—and introduced state jurisdiction—over non-Indian-owned lands within that area, it also ousted federal jurisdiction and supervision over those lands. It would be confusing and disruptive for such lands still to be denominated a "reservation." The federal government has always agreed with Oklahoma that the former Indian Territory lost any reservation status after statehood. And in none of this Court's other disestablishment cases did Congress dismantle tribal sovereignty in a manner commensurate with its decades-long campaign to dissolve the Five Tribes' territory and jurisdiction to make way for a new State.

3. Finally, were this Court to hold that the Five Tribes have Indian reservations that are not Indian country under § 1151(a), it would be venturing into uncharted territory. No precedent exists for such a concept, and it is unclear what rules would apply to a "non-§ 1151(a) federal reservation" outside the criminal context. At a minimum, the creation of this new concept would lead to uncertainty and litigation in the civil arena. Myriad statutes apply to the term "reservation" alone. *See supra* n.6. Accordingly, even were eastern Oklahoma not "Indian country," reservation status would leave the 1.8 million residents of eastern Oklahoma potentially subject to a host of new statutory and regulatory requirements, and

would impose significant new burdens on the federal government.

CONCLUSION

The decision below should be reversed.

Respectfully Submitted,

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