No. 17-1107

IN THE
# Supreme Court of the United States

MIKE CARPENTER, INTERIM WARDEN,
OKLAHOMA STATE PENITENTIARY,

*Petitioner,*

*v.*

PATRICK DWAYNE MURPHY,

*Respondent.*

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

## SUPPLEMENTAL REPLY BRIEF FOR PETITIONER


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## SUPPLEMENTAL REPLY BRIEF FOR PETITIONER

This case is before the Court because, in 2004, a lawyer devised a creative strategy to avoid a client's capital-murder conviction—the notion that Tulsa and the surrounding area was once part of an Indian reservation that Congress never disestablished. Flipping an old maxim on its head, it was deemed better to let one guilty man go free, even if it meant upending the lives of millions of innocent Oklahomans. Having achieved that unsettling result, respondent now dismisses as mere "storytelling" the State's reliance on interrelated statutes, historical context, longstanding practices, and the federal government's unwavering views for a century. Respondent has his own story, and it's to demand that this Court look at statutes in isolation, searching for special words to show disestablishment. To respondent, everything else is irrelevant. But if one ignores enough proof, even the Earth can appear flat.

This case is too important and the stakes too high—for the State, the federal government, and the 1.8 million residents of eastern Oklahoma—to be resolved by "gotcha textualism" that casts aside the universal contemporaneous understanding and implementation of decades of legislative action. No court, no tribe, and no member of Congress recognized that eastern Oklahoma was reservation land. This Court should not countenance the largest abrogation of state sovereignty by a federal court in American history by blinding itself to obvious congressional intent. At stake here is the history and identity of our country's forty-sixth state. The Court should decide—now—that Congress created Oklahoma as one unified state.

The State acknowledges the tragedies Congress inflicted on the Five Tribes during removal, allotment, and the destruction of tribal sovereignty. We are not asking the Court to applaud those choices from long ago, only to recognize what actually transpired—and to understand that Congress's actions had lasting consequences for jurisdiction in Oklahoma that went unquestioned for over a century and persist today.

1. In answering "no" to the Court's first question, respondent and the Tribe argue that everyone over the last century misread the relevant statutes and that Congress was oblivious or indifferent to events on the ground. Respondent asserts (at 9) that the Enabling Act "practically shouts" that state law did not apply to Indians in the former Indian Territory after statehood. But that is not what the text says, much less shouts—and no one for a century heard what respondent hears. Pet. Suppl. Br. 1–2, 7–8; Pet. Br. 39–43.

Respondent thus accuses (at 13–14) everyone at the time of being too evil or ignorant to act on what the law required. But relevant decision-makers were neither. Federal courts transferred criminal cases involving Indians to state courts following Congress's direction in the Enabling Act. Pet. Reply 11–12; Cert. Reply 9–10. And this Court and the Solicitor General understood that Congress transferred jurisdiction over Indians in the former Indian Territory to the State. *Hendrix v. United States*, 219 U.S. 79, 90–91 (1911); Pet. Br. 42–43. If courts and prosecutors were misapplying the law throughout this highly populated area, one would expect some record of ob-

jection. But there was none, not from the tribes, not from members of Congress, not from anyone.[1]

Respondent quotes (at 13–14) from a 1963 Interior Department memorandum stating that Oklahoma "asserted civil and criminal jurisdiction in Indian country … despite the fact that no Federal statutes of relinquishment had been enacted." But that sentiment refers to the State's alleged "doubtful authority" over allotments in *Oklahoma* Territory—*i.e.*, the *western* half of the State. U.S. Br. 8a–9a. For *Indian* Territory—*i.e.*, *eastern* Oklahoma—Interior had long maintained that Congress gave the State jurisdiction over Indians. U.S. Br. 1a–5a. A July 11, 1941 memorandum by the era's foremost Indian-law authority, Felix Cohen, then-Acting Solicitor for the Interior Department, stated:

> [T]hat all offenses by or against Indians [in the former Indian Territory] are subject to state law … is justified, I believe, in view of the acts of Congress cited … particularly the acts abolishing tribal courts and placing criminal jurisdiction over the Indians in the Federal courts at the time of the establishment of the Indian Territory, the proviso in the 1906 act excluding application of that act to the Indian Territory, and the subsequent transfer of jurisdiction from the Federal courts to the State courts upon the establishment of the State of Oklahoma.

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[1] Respondent states (at 9) that "[n]o one has ever thought [the Enabling Act] transferred to States criminal jurisdiction over Indian crimes on reservations." True, but that is only because no reservations exist in eastern Oklahoma.

App., *infra*, 1a.[2] In other words, our Nation's preeminent Indian-law expert would have found this an easy case.

2. Skipping over the 1897, 1898, and 1904 Acts, respondent (at 7–8) "[s]tart[s] with the Enabling Act." This bears repeating: respondent's textual argument pretends that the Enabling Act arose in a vacuum. When respondent claims (at 8) that "Oklahoma would be like all other States" that distinguish between crimes committed by Indians and non-Indians on reservations, he omits that Congress had already erased legal distinctions based on Indian status throughout the Indian Territory. Pet. Suppl. Br. 1–4; U.S. Suppl. Br. 6–10. In this regard, respondent's cursory treatment of the 1897 and 1904 Acts misses the point. Those statutes applied the same laws (whether federal or Arkansas law) to Indians and non-Indians alike. Thus, when Congress extended Arkansas law to all persons "irrespective of race," Congress erased the Indian-status-based distinctions that respondent asks this Court to resurrect.

As for the 1898 Curtis Act, respondent insists (at 11) that the abolition of tribal courts did not divest federal jurisdiction over the former Indian Territory. No one is arguing that. Instead, ending tribal courts was a critical step in the process of placing Indians and non-Indians under the same legal framework. At bottom, respondent has no credible answer to the inexplicable jurisdictional gap over Indian-on-Indian crimes that would have existed had the State lacked jurisdiction over such crimes. Pet. Br. 43–44. Con-

[2] On December 24, 2018, the United States provided all parties with this and other recently located documents from the relevant time period.

gress deliberately abolished tribal courts and nonetheless perceived no gap to fill, which only makes sense because *state* jurisdiction filled the void. Pet. Reply 13; U.S. Suppl. Br. 14–15 n.3.

In the wake of the 1897, 1898, and 1904 Acts, it is inconceivable that Congress reimposed Indian-status-based distinctions in a 1907 technical amendment. Resp. Suppl. Br. 8. Respondent's interpretation flies in the face of the legislative history, the contemporaneous interpretation, and the application of the Enabling Act as amended. Pet. Suppl. Br. 5. Congress intended what actually happened: federal crimes were heard in federal court, while local crimes were heard in state courts. The same rules applied to everyone.

Sections 13 and 21 of the Enabling Act likewise did not preserve federal jurisdiction over crimes committed by or against Indians in eastern Oklahoma. Section 13 extended Oklahoma territorial law to the Indian Territory only "as far as applicable" for practical reasons: some Oklahoma territorial laws could not apply in Indian Territory because they conflicted with statutes specific to Indian Territory, such as laws pertaining to liquor and the incorporation of town sites. *E.g.*, Wilson's Revised and Annotated Statutes of Oklahoma, vol. 1, ch. XLIX (1903) (regulations for the sale of liquor in Oklahoma Territory; liquor was prohibited in the Indian Territory, Act of Mar. 1, 1895, ch. 145, § 8, 28 Stat. 693, 697); *id.* ch. XIII, §§ 491–99 (procedures for incorporation of town sites; the Curtis Act and allotment agreements governed incorporation and disposition of town sites in Indian Territory). And § 21 simply confirms the general application of federal law in Oklahoma to the same extent as in other States. In short, no law ab-

rogated the nondiscriminatory jurisdictional framework Congress already had imposed.

Respondent also suggests (at 9–10) that Congress preserved exclusive federal jurisdiction over Indians across the whole Indian Territory in sections 1 and 3 of the Enabling Act. But those sections say nothing about the status of the underlying land irrespective of Indian ownership. Section 1 merely confirms Congress's power to legislate for the protection of Indians and their property, insofar as Indians are wards of the federal government. Section 3 has nothing to do with jurisdiction; it guarantees that the State has no "right or title" to lands then owned by tribal members or the tribes.[3] These provisions do not speak to the critical question in this case—

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[3] Public Law 280's legislative history is not to the contrary. Respondents and the Creek Nation cite a letter from the Assistant Secretary of the Interior that does not represent the views of Congress with respect to jurisdiction in eastern Oklahoma. *See* Resp. Suppl. Br. 10 n.3 (citing S. Rep. No. 83-699, at 7 (1953)); Creek Suppl. Br. 3 (same). The letter observes that various state constitutions disclaim jurisdiction over Indian lands pursuant to state enabling acts, which could pose "legal impediments to the transfer of jurisdiction over Indians on their reservations." *Id.* But the Oklahoma Constitution contains no such disclaimer. *Compare* Okla. Const. art. I, § 3 (renouncing right and title to public lands and Indian lands, and stating that "until the title to any such *public land* shall have been extinguished by the United States, the same shall be and remain subject to the jurisdiction, disposition, and control of the United States") (emphasis added), *with, e.g.*, Montana Const. art. I ("[A]ll lands owned or held by any Indian or Indian tribes shall remain under the absolute jurisdiction and control of the congress of the United States.").

jurisdiction over *non*-Indian-owned land. Pet. Suppl. Br. 19.[4]

3. All agree that affirmance would have seismic civil consequences. Pet. Suppl. Br. 12–17; U.S. Suppl. Br. 5–10; 15, Resp. Suppl. Br. 23–25; Creek Suppl. Br. 19. Any delay in resolving the original question presented would create an intolerable state of uncertainty. Pet. Reply 13–14. The United States, too, urges this Court to resolve the reservation question now and in Oklahoma's favor. U.S. Suppl. Br. 4, 18 n.5.

The criminal-law implications are even starker. Barriers to federal habeas relief are irrelevant if there are no barriers to *state* relief. Tellingly, the federal defender representing respondent identifies no limits on state collateral review in Oklahoma courts; respondent cites only a general observation from a Minnesota case before punting the issue to the Tribe. Resp. Suppl. Br. 14. The Tribe speculates (at 12) that laches might bar some collateral challenges. But laches and waiver are cut from the same cloth, and the Tribe ignores the mountain of precedent in Oklahoma holding that collateral challenges to subject-matter jurisdiction are never waived and can be raised at *any time*—precedent from which respondent himself benefited. Pet. App. 13a–14a & n.5.[5]

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[4] The same is true of the statement of Senator McCumber, on which Respondent and the Creek Nation rely. Resp. Suppl. Br. 2, 22; Creek Suppl. Br. 21–22.

[5] The unpublished federal district court case the Tribe cites, *McIntosh v. Hunter*, No. 16-460, 2017 WL 3598514 (E.D. Okla. Aug. 21, 2017), which in turn cites an unpublished state case, did not present a question of subject-matter jurisdiction. The Oklahoma court dismissed on the merits the *pro se* litigant's

The Tribe contends (at 11) that state prisoners who successfully challenge their convictions could be retried by the United States. The premise is false, or at least grossly incomplete. Federal statutes of limitation will bar retrial for many convicts. 18 U.S.C. § 3282(a) (five-year limitations period for rape and many other noncapital crimes). We are aware of no basis for tolling years that elapse in state custody. And in many cases, stale evidence will raise formidable hurdles. This case demonstrates the point: the United States would have to retry respondent for a horrific crime he committed two decades ago.

The Tribe's accusation (at 11) that the State "ignores … the Nation's strong interest in public safety" is shocking, as the Tribe advocates a rule that would open the floodgates to countless attacks on convictions for felonies committed *against* Indian victims, like George Jacobs, the Creek victim here. The Tribe cannot adequately prosecute major crimes, because its sentencing authority is limited to three years for any single offense. 25 U.S.C. § 1302(a)(7)(C). The Tribe's assurances of prosecutorial readiness thus ring hollow. The Tribe will not have to resolve collateral challenges, retry thousands of cases, or sort through the 32,000 felonies committed annually in eastern Oklahoma.[6] The two sovereigns that *would* be affected—Oklahoma and the United States—agree that the result would be disastrous.

To downplay the magnitude of disruption, the Tribe contends (at 11) that reservation status for

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theory that the State had "relinquished" jurisdiction by allowing the federal government to prosecute first. *Id*. at *1.

[6] *See* Supreme Court of Oklahoma, Annual Report Fiscal Year 2016, at 12–14, http://www.oscn.net/static/annual-report-2016.pdf.

each of the Five Tribes' former territories requires an individual analysis. But no one has identified any reason why this Court's decision would not apply to the other Five Tribes, or how their statutory histories differ in any material respect.

It is not clear how Congress could preserve thousands of convictions by retroactively conferring subject-matter jurisdiction on the State. Prospectively, any legislative solution is uncertain at best. The Creeks' supposed "commit[ment]" (at 9) to entering into jurisdictional agreements is insufficient: Public Law 280 would require the consent of a majority of all enrolled Indians living in the former Creek territory. 25 U.S.C. §§ 1321, 1326. We know of no tribe that has ever consented to such jurisdiction, and the prospect of obtaining a majority vote from all enrolled Indians is dubious. Pet. Reply 4–5. The speculation that Congress could enact legislation to "specifically alter[] the jurisdictional balance" if the decision below stands, Creek Suppl. Br. 10, only highlights the monumental deprivation of state sovereignty the Tribe seeks here.

4. Oklahoma has never "disavowed" that Congress gave the State jurisdiction over eastern Oklahoma, even if the area consists of reservations. Resp. Suppl. Br. 3. Oklahoma's position is that the statutes and historical context prove no reservations exist in eastern Oklahoma. If, counterfactually, reservations remain, then the same statutes confer jurisdiction nonetheless. The United States agrees with the State. U.S. Suppl. Br. 4, 18 n.5. The State's merits brief never disclaims the argument; it simply makes the point that, under *respondent's* theory, every state conviction involving Indians in eastern Oklahoma over the last century is invalid. The State has not abandoned jurisdiction over half its territory.

5. All agree that a federal Indian reservation necessarily qualifies as Indian country for purposes of § 1151(a). The consensus, however, ends there.

Respondent and the Tribe contend that because the federal government maintained a *de minimis* presence in the former Indian Territory post-statehood, the Creek area constituted a reservation. Not so. Appropriations acts from the early 1900s merely provided for federal oversight of the dissolution of the Five Tribes' territories and winding up of tribal affairs; they do not continue "a comprehensive array of … reservation affairs." Creek Suppl. Br. 25. Notably, none of the indicia of federal superintendence upon which respondent relies persists today.

Nor does federal enforcement of liquor laws in eastern Oklahoma signify reservation status. Resp. Suppl. Br. 22; Creek Suppl. Br. 22–23. Congress prohibited certain liquor transactions in the former Indian Territory, *see Ex parte Webb*, 225 U.S. 663, 691 (1912), as it frequently did on *former* reservation land, *see Dick v. United States*, 208 U.S. 340, 352–55 (1908).

Respondent and the Tribe cite *Joplin Mercantile Co. v. United States*, 236 U.S. 531 (1915), to suggest that the United States continued to prosecute liquor offenses in the former Creek territory because it viewed the entire area, including Tulsa, as Indian country. Resp. Suppl. Br. 22; Creek Suppl. Br. 23–24. But the United States did not defend, and the Court did not uphold, the indictment in *Joplin* on that theory. *Joplin*, 236 U.S. at 548; U.S. Br. at 12, *Joplin Mercantile Co. v. United States*, No. 648 (U.S. 1910).[7]

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[7] In eastern Oklahoma, several liquor prohibitions were potentially applicable to liquor transactions. *Webb*, 225 U.S. at 691. Thus, federal indictments for liquor trafficking sometimes re-

Courts soon clarified that the general federal prohibition on importing liquor into "Indian country" did not apply to non-Indian owned land in Oklahoma, such as town sites, and thus was subject to a parcel-by-parcel analysis. *See, e.g.*, *Swafford v. United States*, 25 F.2d 581, 583 (8th Cir. 1928); *Evans v. Victor*, 204 F. 361, 365 (8th Cir. 1913).

Here's the relevant takeaway: after statehood, the former Indian Territory was a checkerboard of federal, state, and tribal jurisdiction. Countless judicial opinions spanning decades analyzed whether particular plots of land were Indian country. Those fact-intensive disputes would have been pointless had the *entire area* been reservation land, rendering it automatically Indian country. *See* Pet. Br. 44–46. Respondent's briefing has consistently ignored the import of these cases—four generations of jurists understood that no reservations in the former Indian Territory survived statehood. Sometimes the most obvious and common-sense conclusion is the right one: there are no reservations in eastern Oklahoma today.

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flected confusion as to the appropriate charge for a given act. *See, e.g.*, *Lewellen v. United States*, 223 F. 18, 20 (8th Cir. 1915).

## CONCLUSION

The decision below should be reversed.

Respectfully Submitted,

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January 11, 2019

# APPENDIX

## APPENDIX

**UNITED STATES**
**DEPARTMENT OF THE INTERIOR**
**OFFICE OF THE SOLICITOR**
**WASHINGTON**

July 11, 1941

MEMORANDUM for the Commissioner
of Indian Affairs.

The attached letter to the Attorney General in response to his letter of April 28 provides a comprehensive statement concerning State and Federal jurisdiction over that part of Oklahoma which was formerly the Indian Territority. I am not satisfied, however, with the statements at the close of the letter concerning State and Federal jurisdiction in the remainder of the State of Oklahoma. I am, therefore, returning the letter for further consideration and elaboration of that part of the letter.

The statement concerning present jurisdiction in the former Indian Territory concludes that all offenses by or against Indians are subject to State laws. Such a statement is justified, I believe, in view of the acts of Congress cited in the letter and in the supplementary memorandum, particularly the acts abolishing tribal courts and placing criminal jurisdiction over the Indians in the Federal courts at the time of the establishment of the Indian Territory, the proviso in the 1906 act excluding the application of that act to the Indian Territory, and the subsequent transfer of jurisdiction from the Federal courts to the State courts upon the establishment of the State of Oklahoma.

The statements on page five of the letter concerning present jurisdiction in the former Territory of Oklahoma suggest that the State has concurrent jurisdiction with the Federal Government over crimes by and against Indians defined by Federal law and complete jurisdiction over other crimes by and against Indians. This statement is not supported by the acts cited in the letter or in the supplementary memorandum. There was no law abolishing the jurisdiction of the tribes over their own members in the Territory of Oklahoma. In fact, the tribal jurisdiction was recognised in the establishment of the Territory of Oklahoma. There has been no law disclaiming Federal jurisdiction over the Indians in that area such as the proviso in the 1906 act with respect to the Indian Territory. This implication in the limited wording of the Oklahoma Enabling Act is not sufficient, in my opinion, to constitute a relinquishment of Federal jurisdiction, particularly in view of section 1 of the Enabling Act which provides that Federal authority over the Indians should not be impaired. In the case of *United States* v. *Ramsey*, 271 U.S. 467, the Supreme Court stated that Federal authority with respect to crimes committed by or against Indians "continued after the admission of the State as it was before." (Page 469.) The case of *Ex Parte Nowabbi*, 61 P.(2d) 1139, which analyses at considerable length the law governing jurisdiction in Oklahoma of crimes by and against Indians, expressly finds that restricted allotments in the former Territory of Oklahoma are still Indian country as that term is used in the Federal statutes by virtue particularly of the main provisions of the 1906 act.

I see no compelling reason why this Department should suggest that, as a matter of law, restricted Indian land in Oklahoma outside the former Indian

Territory is not Indian country to the same extent as restricted Indian lands in other States. You will note that the chief counsel of your office, in his informal memorandum of June 9, concurs in the opinion that such lands are still Indian country. If you wish to propose as an administrative recommendation that a different result be brought about, by legislation if necessary, there would be no objection to requesting the assistance of the Department of Justice to that end.

Please note the minor pencil corrections on pages four and five of the letter.

(Sgd.) FELIX S. COHEN

Acting Solicitor.

Attachment.