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

BRIEF OF AMICI CURIAE OKLAHOMA SHERIFFS' ASSOCIATION, OKLAHOMA DISTRICT ATTORNEYS ASSOCIATION, AND TEN OKLAHOMA DISTRICT ATTORNEYS IN SUPPORT OF PETITIONER

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INTERESTS OF THE *AMICI CURIAE*

The Oklahoma Sheriffs' Association, the Oklahoma District Attorneys Association, District Attorney O.R. Barris III, District Attorney Paul B. Smith, District Attorney Max Cook, District Attorney Orvil Loge, District Attorney Jack Thorpe, District Attorney Steve Kunzweiler, District Attorney Jeff Smith, District Attorney Chuck Sullivan, District Attorney Matt Ballard, and District Attorney Mike Fields respectfully submit this *amici curiae* brief in support of petitioner.[*]

The Oklahoma Sheriffs' Association is a non-profit that represents elected Sheriffs in all 77 counties of Oklahoma. The association has 4,000 active members and is one of the State's largest law enforcement associations. The association and its predecessors have represented Sheriffs in Oklahoma since statehood. The association's mission is to support the Sheriffs in providing effective and quality law enforcement services to the people they protect and serve.

The Oklahoma District Attorneys Association is a non-profit that represents local elected prosecutors in Oklahoma. The association serves as the voice of the State's prosecutors and supports their efforts to protect the people they serve.

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[*] No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici* made any monetary contribution to the preparation and submission of this brief. The parties consented to the filing of this brief.

District Attorney O.R. "Rob" Barris III is the elected prosecutor for Okmulgee County and McIntosh County. Mr. Barris has worked for more than three decades to make the communities he serves safer and better places to live. He has twice been named Outstanding Prosecutor in the State and he has tried over 200 cases before juries.

District Attorney Paul B. Smith is the elected prosecutor for Seminole County, Hughes County, and Pontotoc County. Mr. Smith has over three decades of prosecution experience and has first chaired more than 100 trials.

District Attorney Max Cook is the elected prosecutor for Creek County and Okfuskee County.

District Attorney Orvil Loge is the elected prosecutor for Muscogee County.

District Attorney Jack Thorpe is the elected prosecutor for Wagoner County, Cherokee County, and Adair County.

District Attorney Steve Kunzweiler is the elected prosecutor for Tulsa County. Mr. Kunzweiler directs a large team of roughly 50 attorneys and 70 support staff. He has overseen the prosecution of hundreds of violent offenders.

District Attorney Jeff Smith is the elected prosecutor for Latimer County and LeFlore County.

District Attorney Chuck Sullivan is the elected prosecutor for Haskell County and Pittsburg County.

District Attorney Matt Ballard is the elected prosecutor for Craig County, Mayes County, and Rogers County.

District Attorney Mike Fields is the elected prosecutor for Blaine County, Canadian County, Garfield County, Grant County, and Kingfisher County. Mr. Fields is a career prosecutor with over two decades of experience. He recently served as the President of the Oklahoma District Attorneys Association.

These associations and local elected prosecutors are deeply concerned about the ramifications of the Tenth Circuit's decision below for law enforcement in the State of Oklahoma. While this case has undeniable implications for the Nation and the State of Oklahoma broadly, *amici* have more immediate concerns—they are tasked with serving Oklahoma communities in the uniquely local responsibility of law enforcement. The prosecutors and sheriffs are directly elected by the communities they serve and are held accountable to ensure crimes occurring within their jurisdictions are thoroughly investigated and prosecuted in accordance with Oklahoma law. The associations, for their part, represent those that carry out the responsibilities of law enforcement for their local communities.

Affirming the Tenth Circuit's decision below would effectively turn law enforcement in many parts of Oklahoma on its head. For over one hundred years the people of Oklahoma have placed their trust in locally elected sheriffs and prosecutors to investigate and prosecute crimes occurring in vast regions of the State of Oklahoma that were once held by the Five Tribes

regardless of the identify of victims and perpetrators. The Tenth Circuit's decision below threatens not only to substantially divest local elected officials of this authority going forward in a wide array of matters, it also threatens to undo decades of existing convictions that their efforts have obtained.

The Tenth Circuit's sweeping ruling would likely usurp the role of local law enforcement in all crimes that in any way involve any members of Indian tribes. Federal agents and United States attorneys are not an acceptable substitute for law enforcement carried out and funded at the State level. Congress and the President will not be able to appropriately fund and oversee the enforcement of law in a vast territory with a population of over 1.8 million people that is more than 1,000 miles away from Washington, D.C.

Affirming the Tenth Circuit's decision below will also inflict an enormous undue burden on local sheriffs and prosecutors even in cases that do not actually involve members of Indian tribes. Every potential defendant or convicted individual can raise as a defense their own potential membership in a tribe and also raise the potential membership of any victim of a crime as well. Assessing such claims of Indian involvement in crimes that do not even occur on land owned or held by Indians or tribal governments will divert significant time and energy away from vital law enforcement responsibilities.

The *amici* accordingly submit this brief to assist the Court in consideration of the merits of this case and respectfully urge the Court to reverse.

SUMMARY OF THE ARGUMENT

The history of the treatment of the men and women of Indian descent and their tribal governments is replete with shameful episode after shameful episode. Yet Congress took the final step toward achievement of its objectives concerning the land of the Five Tribes in a manner that for once showed a measure of respect and fidelity to the core principles of the Declaration of Independence. Specifically, for the first and only time in American history Congress provided for members of Indian tribes to be full and equal participants in the creation and admission of a new State.

This unique role of the people of the Five Tribes in the birth of the State of Oklahoma is a distinctive aspect of their heritage that deserves to be honored and celebrated. And the Court should also carefully consider the legal significance of the participation of the people of the Five Tribes in the election of delegates to the constitutional convention, the service of numerous of their own people as delegates at the constitutional convention, and the affirmative ratification votes by majorities in each and every discrete political community in the area that formerly comprised the land of the Five Tribes. If Congress intended the incorporation of the people of the Five Tribes into the body politic that created the new State to dissolve obligations owed to the former sovereign tribal governments, the Court must conclude those treaty obligations did not survive the step Congress took intending to abrogate them. The Court should also assess whether the transfer of sovereignty by the people of the Five Tribes to the new State dissolved obligations owed to tribal governments.

Any lingering doubt over the matter is resolved by the State of Oklahoma's immediate and unchallenged assumption of jurisdiction and plenary exercise of full dominion and sovereignty throughout the succeeding century over lands that formerly had been reserved to the Five Tribes. As the Court long ago, this particular kind of subsequent history is unusually indicative of what Congress intended and what Congress did. For it beggars belief to presume that no one challenged the authority of the new State in capital cases that involved Indians or in the payment of untold sums of taxes levied each and every year for over a century. The subsequent history at issue in this case was not the mere salutary neglect or subtle encroachment that the Court has found is not considerable evidence of what Congress intended in prior cases. Rather, this is the first time the Court has ever been presented with this particular kind of subsequent history evidence. In light of the distinctive and probative value it offers, in this case the Court should give the longstanding exercise of plenary dominion and sovereignty by the State of Oklahoma ample weight in assessing what Congress intended and did.

Accordingly, *amici* urge the Court to reverse the decision of the court below.

ARGUMENT

I. Congress and the people of the Five Tribes together abrogated prior treaties reserving land to tribal governments through the unique process that formed the new State.

The Tenth Circuit searched for express "termination language" in Acts or treaties by which Congress unilaterally stated that an Indian reservation was "discontinued," "vacated," or "abolished," or by which one of the governments of the Five Tribes agreed to "cede," "relinquish," or "surrender" a reservation. Pet. App. 97a–98a. In other words, the Tenth Circuit expected at the end of this long saga that Congress would announce or exact some final disgrace, by either expressly renouncing promises of the United States, unilaterally dissolving reservations by legislative fiat, or forcing the governments of the Five Tribes to make some solemn and formal statement of capitulation. While Congress certainly earned such low expectations from its actions over decades and decades, the final Act Congress passed in its dealings with the people of the Five Tribes took a starkly different approach that reflected and respected the fundamental equality, the civil abilities, and the political dignity of the people of those tribes.

Specifically, Congress directly made the members of the Five Tribes part of "the people" who convened, formed a constitution for a new State, and ratified that constitution of the new State. Congress provided in the Oklahoma Enabling Act that the "members of any Indian nation or tribe . . . are hereby authorized to vote

for and choose delegates to form a constitutional convention for [the] proposed State" and that "all persons qualified to vote for . . . delegates shall be eligible to serve as delegates." Oklahoma Enabling Act, 34 Stat. 267, 268. Congress further thereby included the members of the Five Tribes among "the people of [the] proposed State" to whom the constitution was "submit[ed] . . . for its ratification or rejection at an election" in which they had a right to vote "for or against the proposed constitution, and for or against any provisions separately submitted." 34 Stat. 267, 271.

The members of the Five Tribes accordingly participated in the election of delegates to the constitutional convention on November 6, 1906. Their participation in these elections secured for them significant and powerful representation at the constitutional convention. Ten Indian members of the Five Tribes were elected, including several who served in prominent positions as chairmen of key committees:

- Henry L. Cloud was a Cherokee Indian elected as a delegate from the twenty-third district. Blue Clark, *Delegates to the Constitutional Convention*, 48 CHRONS. OKLA. 400, 407 (1970) ("*Delegates*"); PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE PROPOSED STATE OF OKLAHOMA 13–14 (1907) ("PROCEEDINGS"). Mr. Cloud served on the Memorial to Congress Committee, the Deficiency Appropriation Committee, the Suffrage Committee, the Enrolling and Engrossing Committee, the Primary Elections Committee, the State and School Lands Committee, the Revision, Compilation, Style

and Arrangement Committee, and the Coal, Oil and Gas Committee. *Id.* 29, 47–48, 52–53, 65, 126. Mr. Cloud presented three petitions to the convention relating to religious liberty, agriculture and education, and liquor traffic. *Id.* 73, 121, 143, 155.

- Oliver P. Brewer was a Cherokee Indian elected as a delegate from the seventy-seventh district. *Delegates* at 407; PROCEEDINGS 13. The convention selected Mr. Brewer to be the Chairman of the Education Committee. Mr. Brewer also served on the Suffrage Committee, the Public Institutions and State Buildings Committee, the Enrolling and Engrossing Committee, and the State Militia Committee. *Id.* 47–48, 52. He successful introduced a petition at the convention for the convention to request that Congress eliminate the restraints on alienation of allotted lands, and he introduced petitions on other matters as well. PROCEEDINGS 143, 162.

- Albert S. Wyly was a Cherokee Indian elected as a delegate from the seventy-second district. *Id.* 13–14. The convention selected Mr. Wyly to be Chairman of the Public Institutions and State Buildings Committee. *Id.* 47. He also served on the Memorial to Congress Committee, the Legislative Department Committee, the Education Committee, and the Municipal Corporations Committee. *Id.* 46–47, 126. Mr. Wyly submitted a petition on liquor traffic to the convention. *Id.* 150.

- Clement V. Rogers was a Cherokee Indian elected as a delegate from the sixty-fourth district. *Delegates* at 407; PROCEEDINGS 13–14. The convention

selected Mr. Rogers to be Chairman of the Salaries and Compensation of Public Officers Committee. *Id.* 48. He also served on the Legislative Department Committee, the Homesteads and Exemptions Committee, the Liquor Traffic Committee, the Counties and County Boundaries Committee, and the Impeachment and Removal from Office Committee. *Id.* 46, 52, 72.

- Gabriel E. Parker was a Choctaw Indian elected as a delegate from the eighty-eighth district. *Delegates* at 407; PROCEEDINGS 14. The convention selected Mr. Parker to be Chairman of the Seal of State Committee, Vice Member of the Liquor Traffic Committee, and Chairman Pro Tem of the Executive Department Committee. *Id.* 183, 187, 246. He also served on the Memorial to Congress Committee, the Education Committee, the Revenue and Taxation Committee, the Mines and Mining, Oil and Gas Committee, the State and School Lands Committee, the County and Township Organization Committee. *Id.* 126, 47, 52–53.

- James Riley Copeland was a Cherokee Indian elected as a delegate from the sixty-second district. *Delegates* at 407; PROCEEDINGS 13–14. He served on the Immigration Committee, the Public Roads and Highways Committee, the Impeachment and Removal from Office Committee, the Convention Accounts and Expenses Committee, the Public Debt and Public Works Committee, and the Coal, Oil and Gas Committee. *Id.* 47, 52–53, 65. Mr. Copeland submitted petitions to convention relating to marriage and suffrage for woman. *Id.* 145, 181.

- Charles O. Frye was a Cherokee Indian elected as a delegate from the eighty-fourth district. *Delegates* at 407; PROCEEDINGS 14. Mr. Frye was nominated by Mr. Cloud for vice president of the convention. PROCEEDINGS 26. He served on the Deficiency Appropriation Committee, the Federal Relations Committee, the Private Corporations Committee, the Convention Accounts and Expenses Committee, the Public Printing Committee. *Id.* 29, 46, 50, 53, 65. Mr. Frye submitted petitions to the convention relating to county boundaries, uniform taxation, and platted towns. *Id.* 120, 125, 145.
- Benjamin F. Harrison was a Choctaw Indian elected as a delegate from the eighty-eighth district. *Delegates* at 407; PROCEEDINGS 14. He served on the Preamble and Bill of Rights Committee, the Executive Department Committee, the Railroads and Public Service Corporations Committee, the State and School Lands Committee, the Public Debt and Public Works Committee, and the Address to the Public Committee. *Id.* 46–47, 52–53. Mr. Frye submitted a petition relating to religious liberty to the convention. *Id.* 73.
- James Turner Edmondson was a Cherokee Indian elected as a delegate from the sixty-sixth district. *Delegates* at 407; PROCEEDINGS 13–14. He served on the Agriculture Committee, the Executive Department Committee, the Public Roads and Highways Committee, and the Homesteads and Exemptions Committee. *Id.* 46–47, 52.

- Preeman J. McClure was a Choctaw Indian elected as a delegate from the one hundred and eleventh district. *Delegates* at 407; PROCEEDINGS 14. Mr. McClure served on the Agriculture Committee and the Homesteads and Exemptions Committee. *Id.* 47, 52.

In addition, the people of the Oklahoma Territory and the Indian Territory elected five members of the Five Tribes by intermarriage as delegates to the convention: William H. Murray (Chickasaw), James S. Latimer (Choctaw), Christopher C. Mathis (Choctaw), William N. Littlejohn (Cherokee), and Milas Lasater (Chickasaw). *See* PROCEEDINGS 13–14. The election of so many members of the Five Tribes led to the selection of a member of the Chickasaw Nation by intermarriage, William H. Murray, as the president of the constitutional convention. William H. Murray, *The Constitutional Convention*, 9 CHRONS. OKLA 126, 133 (1931).

The members of the Five Tribes who served as delegates were founding fathers of the State of Oklahoma. On the last day when the work of drafting the State's constitution was completed on July 16, 1907, the convention began with an invocation by one of their own, Mr. Cloud. PROCEEDINGS 375. Then all twelve of the members of the Five Tribes who were present that day voted in favor of the final adoption of the constitution by the convention and submission to the people and each of them "affixed their signatures" to the parchment. *Id.* 375, 382–84.

The people of the proposed State of Oklahoma voted on September 17, 1907, to ratify the constitution.

2 OKLAHOMA RED BOOK 292–93 (1912). As "qualified voters for the . . . proposed State" members of the Five Tribes participated in this election. PROCEEDINGS 460. The result of the election were majority votes in favor of ratification in each and every county in the proposed new State, including in areas that had elected Indian delegates to the convention. 2 OKLAHOMA RED BOOK 292–93 (1912). Examining county-by-county results in detail shows there was no strong push for rejection of the Constitution by the members of the Five Tribes. For example, at the time in Adair County there were 818 Indians of voting age but only 385 votes in total were cast to reject the constitution. *See* POPULATION OF OKLAHOMA AND INDIAN TERRITORY 34–35 (1907) ("POPULATION"); 2 OKLAHOMA RED BOOK 292 (1912). Similarly, in Delaware County there were 593 Indians of voting age but only 361 votes were cast to reject the constitution. *See* POPULATION 34–35; 2 OKLAHOMA RED BOOK 292 (1912).

And so President Roosevelt issued the proclamation of statehood on November 16, 1907. As a result, a new State of Oklahoma comprised of "all of that part of the area of the United States" formerly "constituting the Territory of Oklahoma and the Indian Territory" was admitted to the Union "on an equal footing with the original States." 34 Stat. 267, 271.

Thus, the State of Oklahoma was created by a process that Congress ensured included the people of the Five Tribes as full and equal members of the political community. This was not a choice that was foreordained by the Constitution according to the Court's then-governing interpretation of the Fourteenth

and Fifteenth Amendments which permitted denying Indians voting rights. *See Elk v. Wilkins*, 112 U.S. 94 (1884). With that precedent still in force, Congress deliberately enacted the provisions of the Oklahoma Enabling Act that afforded key civil rights to all of the Indians inhabiting the proposed new State.

The Court has never had occasion to consider the effect of Congress's deliberate incorporation of the members of Indian tribes into the body politic as part of the creation of a State because the Oklahoma Enabling Act is the only enabling act Congress passed that enfranchised members of Indian tribes so that they could participate in the statehood process.[1]

The role of the people of the Five Tribes in creating the State of Oklahoma implicates whether the four provisions of treaties at issue in this case survived the statehood process in two ways.

First, the people of the Five Tribes directly participated in a constitutional convention and ratification of a constitution. By this exercise of their political sovereignty they endowed their new State government

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1. *See* Ohio Enabling Act, 2 Stat. 173; Louisiana Enabling Act, 2 Stat. 641; Indiana Enabling Act, 3 Stat. 289; Mississippi Enabling Act, 3 Stat. 348; Illinois Enabling Act, 3 Stat. 428; Alabama Enabling Act, 3 Stat. 489; Missouri Enabling Act, 3 Stat. 545; Wisconsin Enabling Act, 9 Stat. 56; Minnesota Enabling Act, 11 Stat. 166; Nevada Enabling Act, 13 Stat. 30; Nebraska Enabling Act, 13 Stat. 47; Colorado Enabling Act, 18 Stat. 474; North Dakota, South Dakota, Montana, and Washington Enabling Act, 25 Stat. 676; Utah Enabling Act, 28 Stat. 107; New Mexico and Arizona Enabling Act, 36 Stat. 557.

with the sovereign powers that formerly belonged to various tribal governments. As a result, the people of the Five Tribes abrogated prior treaties made by those tribal governments on their behalf except to the extent they relate to individual "person or property" so as to have been expressly preserved by Congress in the Oklahoma Enabling Act. 34 Stat. 267.

Second, the intent of Congress with regard to the effect of the incorporation of the people of the Five Tribes by itself is sufficient to abrogate prior treaty provisions concerning lands that had been conveyed to the Five Tribes. If Congress intended for the role of the people of the Five Tribes in the statehood process to terminate these provisions of prior treaties, the Act of Congress employing such means has legal force to achieve those ends.

Whether the legal effect of the role of the people of the Five Tribes is considered directly or through the lens of the intent of Congress, the analysis must begin with the same foundational thesis: "Governments are instituted among Men, deriving their just powers from the consent of the governed" and "it is the Right of the People to alter or to abolish" existing government "and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness." THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). Indeed, the Constitution of the State of Oklahoma itself declares "[a]ll political power is inherent in the people; and government is instituted for their protection, security, and benefit, and to promote the general welfare; and

they have the right to alter or reform the same whenever the public good may require it: Provided, Such change be not repugnant to the constitution of the United States." OKLA. CONST. art. II, § 1. The retention of the power by the people to reform or replace their government is a "fundamental principle of republican government." THE FEDERALIST NO. 78 (Alexander Hamilton). Exercising this power requires "some solemn and authoritative act" by a "majority of the people." *Id.*; THE FEDERALIST NO. 39 (James Madison). The traditional method employed for this purpose since the founding era is a constitutional convention drafting and submitting a constitution to the people for ratification.

Accordingly, when the people assemble their chosen representatives at a special convention to form a new government, the people unleash "the fountain of all political power," *Benner v. Porter*, 50 U.S. 235, 242 (1850), capable of dissolving all prior legal bonds and obligations and adjusting, casting aside, or preserving existing governments "at their own pleasure," *Luther v. Borden*, 48 U.S. 1, 47 (1849), so long as any new constitution is ratified by the "majority of the people" who would subject to its authority. THE FEDERALIST NO. 39 (James Madison).

There are some limits to the power of conventions. The scope of a convention's authority is inherently defined by the constituency of "the people" who are represented at it and in the ratification process. *See* THE FEDERALIST NO. 39 (James Madison) (observing ratification of the United States constitution "must result from the *unanimous* assent of the several States

that are parties to it" as reflected in the votes at each State's individual ratifying convention); *Minor v. Happersett*, 88 U.S. 162, 167 (1875) ("Disputes have arisen as to whether or not certain persons or certain classes of persons were part of the people . . . ."). Accordingly, the Court has found it legally significant to identify "whom Congress makes members of the political community, and who are recognized as such in the formation of the new State with the consent of Congress." *Boyd v. Nebraska*, 143 U.S. 135, 170 (1891); *see also United States v. Allen*, 171 F. 907, 920–21 (E.D. Okla. 1909) ("[The Enabling Act's] terms clearly make [the Indian members of the Five Tribes] electors and give them the right to participate in the formation of the state Constitution and state government . . . . [T]herefore, the members of the Five Civilized Tribes are citizens of the United States, with all the rights, privileges, and immunities of citizenship."). The Court has also explicitly recognized the authority of Congress to define the composition of who is and who is not represented in the formation of new States. *Boyd v. Nebraska*, 143 U.S. 135, 175 (1891) ("Before Congress let go its hold upon the Territory, it was for Congress to say who were members of the political community.").

In creating the new State of Oklahoma, Congress required that "members of any Indian nation or tribe" inhabiting the proposed new State had to be "allowed to participate in the direction of the affairs of the state and in the formation of the government" and the "framing of its Constitution, the fundamental laws of the state." *Wah-tsa-e-o-she v. Webster*, 172 P. 78, 79 (Okla. 1918). The Supreme Court of Oklahoma held

soon thereafter that it was therefore "the purpose and intent of Congress and of the people of the proposed state in the erection of the state and in creating its government that [the] Indians should become citizens thereof" who therefore must "make their conduct conformable to the laws of the state, except where especially exempted therefrom." *Id.*

Withdrawing sovereignty from the Five Tribes, granting sovereignty to a new State over areas previously set aside for the Five Tribes, and subjecting members of the Five Tribes to the laws of that new State squarely contravened core provisions of treaties between the United States and the governments of the Five Tribes. But Congress did not proceed on its own authority alone. Congress called for a convention which represented the people of the Five Tribes that thereby had full political and legal authority to take this step despite various provisions of prior treaties made on their behalf by the tribal governments.

Critically, the Five Tribes themselves demonstrated to Congress the political and legal legitimacy of using a constitutional convention to unite the areas occupied by the members of the Five Tribes and consolidate all of the inhabitants thereof into one people subject to the authority of a new State. In 1905, leaders of the Five Tribes called for a constitutional convention for all of the area then known as the Indian Territory. *See Governor Haskell Tells of Two Conventions*, 14 CHRONS. OKLA. 187 (1936); Amos Maxwell, *The Sequoyah Convention*, 28 CHRONS. OKLA. 161 (1950); Amos Maxwell, *The Sequoyah Convention (Part II)*, 28 CHRONS. OKLA. 299 (1950). The delegates elected to

this convention crafted a constitution which was then ratified by an overwhelming majority of the inhabitants of the area and submitted to Congress in a petition seeking admission of a new State of Sequoyah. 1 OKLAHOMA RED BOOK 623–74 (1912) (Constitution of the State of Sequoyah); *Proposed State of Sequoyah*, S. DOC. NO. 59-143 (1906). The Sequoyah Constitution declared "[a]ll political power is vested in and derived from the people; is founded upon their will, and is instituted for the good of the whole," and affirmed that "[t]he people of this State have the interest and exclusive right to regulate the internal government and police thereof, and to alter and abolish their Constitution and form of government whenever they may deem it necessary to their safety and happiness; provided, such change be not in conflict with the Constitution of the United States." 1 OKLAHOMA RED BOOK 623 (1912). Thus, the leaders of the Five Tribes blazed a path that Congress promptly followed.

Moreover, before the Sequoyah Convention leaders of the Five Tribes convened at the Turner Hotel in the summer of 1905 and agreed in writing that if their efforts to obtain a separate state for the Five Tribes failed in Congress they would support and not oppose the formation of a single state comprised of the lands they occupied and the land of the neighboring Oklahoma Territory. *See Governor Haskell Tells of Two Conventions*, 14 CHRONS. OKLA. 187, 198 (1936); Amos Maxwell, *The Sequoyah Convention*, 28 CHRONS. OKLA. 161, 182 (1950); Amos Maxwell, *The Sequoyah Convention (Part II)*, 28 CHRONS. OKLA. 299, 331 (1950). When Congress rejected admission of the State of Sequoyah and proceeded with forming and

admitting the State of Oklahoma, the Speaker of the House of Representatives invited the leaders of the Five Tribes to file a "protest against joint statehood." *Governor Haskell Tells of Two Conventions*, 14 CHRONS. OKLA. 187, 203 (1936). In keeping with the agreement they had entered into, they declined and informed the Speaker that "if Congress would not give them separate statehood they would be satisfied with single statehood." *Id.*

The founding fathers of the new State of Oklahoma recognized that the role of the people of the Five Tribes in the formation of the State was highly unique and important. And as a lasting tribute, they included a provision in the Oklahoma Constitution creating the Great Seal of the State of Oklahoma comprised of a five-pointed star emblazoned with the ancient seals of each of the Five Tribes:

See OKLA. CONST. art. VI, § 35. Fittingly, this design was adapted from the seal designed at the Sequoyah Convention to represent the proposal of the leaders of the Five Tribes which paved the path Congress later followed:

See 1 OKLAHOMA RED BOOK 667–668 (1912).

Thus, Congress selected a respectful and lawful method to achieve both statehood for Oklahoma and the admission of the members of the Five Tribes as fully part of American life in a State they played a key role in founding. Congress did not fail to achieve its ends simply by choosing this unique legal approach over other less respectful means.

II. The State of Oklahoma's assumption of jurisdiction and exercise of dominion and sovereignty for over a century confirms the abrogation of prior treaty provisions reserving land to tribal governments.

Under the Court's precedents, a sovereign State's long-standing assumption of jurisdiction is "entitled to considerable weight." *See Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 605 n.28 (1977) ("A showing of long-standing assumption of jurisdiction is, in the related area of state boundary disputes, entitled to considerable weight."). This is particularly true where, as here, the State demonstrates its intent to assume jurisdiction by exercising significant dominion and sovereignty over an area such as where a State holds elections, assesses and collects taxes, constructs highways and public buildings, enforces state laws, or establishes a state police force, to name just a few examples. *See, e.g.*, *Rhode Island v. Massachusetts*, 45 U.S. 591, 638 (1846) (Massachusetts "claimed and took possession" and "steadily maintained" disputed area for more than two centuries); *Louisiana v. Mississippi*, 202 U.S. 1, 55, 57 (1906) (Louisiana exercised "complete dominion" over disputed area, including creating a police force); *Michigan v. Wisconsin*, 270 U.S. 290, 306–07 (1926) (Wisconsin assessed and collected taxes, constructed highways and public buildings, held elections, and enforced state law); *Massachusetts v. New York*, 271 U.S. 65, 95–96 (1926) (New York exercised dominion and sovereignty over disputed area for almost 150 years); *Arkansas v. Tennessee*, 310 U.S. 563, 567 (1940) (residents of disputed area voted in Tennessee

elections, paid Tennessee taxes, obtained Tennessee marriage certificates, were mandated to perform road work under Tennessee authority, and were educated by Tennessee public schools). The State of Oklahoma has consistently exercised all of these traditional state functions in all of the areas of Oklahoma that are not currently owned or held by members of Indian tribes or tribal governments.

Indeed, the State has prosecuted major crimes involving members of Indian tribes in its jurisdiction for the last 111 years. Pet'r's Br. 3. Meanwhile, the federal government has not tried one single criminal case involving an Indian on the theory that Oklahoma is a reservation since the State's creation. *Id.* These facts alone demonstrates a long-standing assumption of jurisdiction and uncontested exercise of dominion and sovereignty that is highly indicative of what Congress intended and what Congress did.

This Court's decision in *Solem* is inapposite. There, the state and federal government *both* had exerted criminal jurisdiction over major crimes involving members of Indian tribes in the disputed area—an entirely different situation than the present case where the State of Oklahoma alone has exercised full criminal authority in all areas of the State that are not owned or held by members of Indian tribes or tribal governments.

Likewise, this is not a case of mere salutary neglect by a tribal government and inconsequential inclusion of a small village within the wider regulatory ambit of a State as the Court addressed in *Nebraska v. Parker*.

A quaint little town such as Pender, Nebraska, can easily escape the notice of a rightful tribal authority for decades and also avoid giving any person or entity a vital and pressing interest to contest its status as either on or not on a reservation. In absolute and utter contradistinction, the vast reaches of Oklahoma which are implicated in this case have seen an uncountable number of circumstances routinely occurring from the very moment of statehood in which it would have been inconceivable for tribal governments, people accused of serious crimes, and taxpayers to fail contest the State's authority in court.

The subsequent history here cannot be reasonably explained other than by concluding that every interest concerned in the matter for decades must certainly have thought there was not even the faintest cloud of a doubt over the State's authority. This is especially probative evidence that Congress must have intended to and in fact did abrogate the prior treaty obligations that Mr. Murphy and the Tenth Circuit below rely on.

In short, while the assumption of jurisdiction may not be dispositive in all circumstances, the State of Oklahoma's uncontested exercise of dominion and sovereignty here is entitled to considerable weight. *Rosebud*, 430 U.S. at 605 n.28.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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