CASE No. 077068 & 15-7041

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PATRICK DWAYNE MURPHY,

Appellant/Petitioner,

vs.

KEVIN DUCKWORTH,
Interim Warden,
of Oklahoma State Penitentiary,

Appellee/Respondent.

Case No. 07-7068
Case No. 15-7041

DEATH PENALTY CASE

On Appeal from the United States District Court for the Eastern District Oklahoma

District Court Case No.
CIV-03-443-RAW-KEW
CIV-12-191-RAW-KEW

The Honorable Ronald A. White,
District Judge

BRIEF *AMICUS CURIAE* OF THE UNITED KEETOOWAH BAND OF CHEROKEE INDIANS IN OKLAHOMA

(Seeking neither affirmance nor reversal)

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INTRODUCTION AND STATEMENT OF INTEREST

Amicus United Keetoowah Band of Cherokee Indians in Oklahoma ("UKB") is a federally recognized Indian tribe occupying land in eastern Oklahoma. The facts of this case arise on land within the historic boundaries of the Muscogee (Creek) Nation ("Creek Nation") reservation, which is adjacent to the UKB's historic reservation. No court, other than the court below, has found the Creek Nation reservation disestablished.[1] Similarly, no court has found the UKB's historic reservation disestablished. The legal status of the reservation, which Congress has never expressly disestablished, could have direct implications for UKB.[2]

ARGUMENT

I. Non-Indians "justifiable expectations" are insufficient to disestablish a reservation.

In March of this year, the Supreme Court clarified the test for determining whether Congress disestablished a reservation. *Nebraska v. Parker*, 136 S. Ct. 1072, 1082 (2016). Justice Thomas, writing for a unanimous Court, expressly

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[1] This brief uses the terms "diminish" and "disestablish" interchangeably. Diminishment of a reservation means a redrawing of reservation borders, while disestablishment of a reservation means the termination of the reservation border. The legal analyses for determining whether Congress intended to diminish or disestablish a reservation are identical.

[2] No party's counsel authored this brief in part or in whole. No party or party's counsel or person other than amicus has contributed any money to its preparation or submission

rejected the notion (relied on by lower courts, including this Court in *Osage Nation v. Irby*, 597 F.3d 1117, 1127-28 (10th Cir. 2010)) that non-Indians' "justifiable expectations" could lead to reservation disestablishment—even where those expectations are compelling. *Parker*, 136 S. Ct. at 1082. In other words, absent clear Congressional intent to disestablish a reservation, a court cannot use "justifiable expectations" to do so.

> Petitioners' [state's, village's, and retailers'] concerns about upsetting the "justifiable expectations" of the almost exclusively non-Indian settlers who live on the land are **compelling, but these expectations alone, resulting from the Tribe's failure to assert jurisdiction, cannot diminish reservation boundaries. Only Congress has the power to diminish a reservation**. And though petitioners wish that Congress would have "spoken differently" in 1882, "we cannot remake history."

Parker, 136 S. Ct. at 1082 (emphasis added) (internal citations omitted). "Justifiable expectations" are simply insufficient to find Congressional intent to disestablish a reservation.

The Supreme Court first used the phrase "justifiable expectations" in the context of reservation disestablishment in *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 604-605 (1977). The *Rosebud* Court found the Rosebud Sioux Reservation diminished based on the language of the Congressional acts in question. Those acts "clearly evidence[d] congressional intent to diminish the boundaries of the Rosebud Sioux Reservation. *Id.* at 587. But the Court went

further, stating in obiter dictum the subsequent history of the diminished area created "justifiable expectations" for non-Indians, which should not be upset by a forced reading of Congressional intent to keep the reservation intact.

> The longstanding assumption of jurisdiction by the State over an area that is over 90% non-Indian both in population and in land, use, not only demonstrates the parties' understanding of the meaning of the Act, but has created **justifiable expectations** which should not be upset by so strained a reading of the Acts of Congress as petitioner urges. We are simply unable to conclude that the intent of the 1904 Act was other than to disestablish.

Id. at 605.

The Court followed *Rosebud* with *Solem v. Bartlett*, 465 U.S. 463 (1984), which did not use the phrase "justifiable expectations" or rely on non-Indian's expectations to determine whether the reservation at issue had been disestablished. *Id.* Instead, the Court constructed the following three-part analysis for finding Congressional intent to disestablish a reservation.

- Does the statutory text "present an explicit expression of congressional intent" to disestablish the reservation? *Solem*, 465 U.S. at 470-71.
- If not, do "[t]he circumstances surrounding the passage" of the statute "establish a clear congressional purpose to diminish the [r]eservation"? *Solem*, 465 U.S. at 471.

- If not, do "events that occurred after the passage" of the statute, including jurisdictional and demographic events, "decipher Congress's intentions" or provide an "additional clue as to what Congress expected would happen once land on a particular reservation was opened"? *Solem*, 465 U.S. at 471-72.

Again, non-Indians' "justifiable expectations" played no role in *Solem's* inquiry into whether Congress intended to disestablish the reservation.

In applying the three-part analysis, the *Solem* Court first analyzed the operative provisions of the statute. The operative provisions included references to "the public domain" and "the reservation thus diminished," which seem to suggest Congressional intent to diminish the reservation. But that language alone was insufficient to find Congress's intent. The Court looked beyond the "operative" provisions and read the statute as whole. Read as such, the Court found the statute's limited goal was to open lands to non-Indians for purchase and nothing more. So the statutory text could not support a finding that Congress clearly intended to diminish the reservation. *Solem*, 465 U.S. at 474-76.

> Undisputedly, the references to the opened areas as being in "the public domain" and the unopened areas as comprising "the reservation thus diminished" **support petitioner's view that the Cheyenne River Act diminished the reservation. These isolated phrases, however, are hardly dispositive.** And, when balanced against the Cheyenne River Act's **stated and limited goal of opening up reservation lands for sale** to non-

> Indian settlers, **these two phrases cannot carry the burden of establishing an express congressional purpose to diminish**. The Act of May 29, 1908, read as a whole, **does not present an explicit expression of congressional intent** to diminish the Cheyenne River Sioux Reservation.

Solem, 465 U.S. at 475-76 (emphases added) (internal citations omitted).

Because the Court found no Congressional intent to disestablish the reservation it moved on to the second prong of its disestablishment analysis: the circumstances surrounding the statute's passage. Once again, key provisions of the legislative history supported the argument for diminishment. For instance, both House and Senate Reports refer to a "reduced reservation" and provide that the "lands reserved for the use of the Indians upon both reservations as diminished … are ample … for the present and future needs of the respective tribes." *Solem*, 465 U.S. at 478 (quoting S.Rep. 439, 60th Cong., 1st Sess., 6 (1908) and H.R.Rep. No. 1539, 60th Cong., 1st Sess., 7 (1908)). Nevertheless, the Court recognized these statements' ambiguity because Congress may have been referencing the reduction of Indian-owned lands rather than the diminishment of reservation boundaries. *Id.* Because the legislative history and events surrounding the statute's passage were ambiguous and contained no explicit statement of intent to alter the reservation boundaries, the Court declined to find that Congress intended the statute to effect diminishment.

> Without evidence that Congress understood itself to be entering into an agreement under which the Tribe committed itself to cede and relinquish all interests in unallotted opened lands, and **in the absence of some clear statement of congressional intent to alter reservation boundaries**, it is impossible to infer from a few isolated and ambiguous phrases a congressional purpose to diminish the Cheyenne River Sioux Reservation.

Solem v. Bartlett, 465 U.S. at 478 (emphasis added).

Having found no Congressional intent to diminish the reservation under the first or second prong of its disestablishment framework, the *Solem* Court moved on to the third prong: subsequent events. The Court actually broke the third prong into two separate inquiries: first the Court reviewed the jurisdictional events following passage of the statute. Although Congress, the courts, and the Executive had all treated the opened lands as diminished in one way or another, the Court also found examples of Congress, the courts, and the Executive treating the opened lands as part of the reservation. Such ambiguity, the Court found, was insufficient to find Congressional intent to diminish the reservation. *Solem*, 465 U.S. at 478-80.

Finally, after analyzing the subsequent jurisdictional events, the Court looked to historical demographic events—the types of events used to find "justifiable expectations" in *Rosebud*. *Solem*, 465 U.S. at 479-80. Even though half the population of the opened lands was non-Indian, the *Solem* Court did not even mention the non-Indian's "justifiable expectations" in living outside tribal

jurisdiction. *Id.* The Court simply recognized the historical demographic events were insufficient to find Congressional intent to diminish the reservation. *Id.* There was no analysis of the investments, labor, or feelings of non-Indians who settled in the area and who reasonably may have believed they were not settling within a reservation over which the tribal and federal governments would have extensive jurisdiction. *Id.* In sum, non-Indian's "justifiable expectations" were simply not a part of the *Solem* analysis.

The *Solem* test does not involve looking for Congressional intent to keep reservation boundaries intact. Instead, the Court must find clear Congressional intent to diminish the reservation. If such intent is absent, there can be no diminishment.

II. In *Hagen*, the Supreme Court did not rely on non-Indians' "justifiable expectations."

Ten years after *Solem*, the Supreme Court applied its reservation disestablishment test again in *Hagen v. Utah*, 510 U.S. 399 (1994). The *Hagen* Court stated that it would follow the *Solem* analysis and described the analysis as follows:

> In determining whether a reservation has been diminished, our precedents in the area have established a fairly clean analytical structure, directing us to look to three factors. The most probative evidence of diminishment is, of course, the statutory language used to open the Indian lands. We have also considered the historical context surrounding the passage of the surplus

> land Acts, although we have been careful to distinguish between evidence of the contemporaneous understanding of the particular Act and matters occurring subsequent to the Act's passage. Finally, on a more pragmatic level, we have recognized that who actually moved onto opened reservation lands is also relevant to deciding whether a surplus land Act diminished a reservation. Throughout the inquiry, we resolve any ambiguities in favor of the Indians, and we will not lightly find diminishment

Hagen, 510 U.S. at 410–11 (internal quotations and citations omitted). Non-Indians' "justifiable expectations" are not an element in this restating of the *Solem* test.

As one reads the Hagen application of the *Solem* test, it becomes clear the non-Indian's "justifiable expectations" were not a key factor, and the same result (a finding of Congressional intent to diminish the reservation) would have been reached without any mention of "justifiable expectations." In the first step of the *Solem* analysis, the *Hagen* Court found Congressional intent to diminish the reservation because the relevant statute restored the lands to the public domain. "[T]he restoration of unallotted reservation lands to the public domain evidences a congressional intent with respect to those lands inconsistent with the continuation of reservation status. Thus, the existence of such language in the operative section of a surplus land Act indicates that the Act diminished the reservation." *Hagen*, 510 U.S. at 414.

Because it had found Congressional intent to diminish the reservation in the first prong of the *Solem* analysis, the Court did not need to address the second or third prongs. However, the *Hagen* petitioner argued a later statute changed the first's meaning, an argument the Court found unconvincing. *Hagen*, 510 U.S. at 415-16.

Nevertheless, the Court viewed any doubt cast by the petitioner's argument as being cleared away by the final two *Solem* factors. And the Court set out how each of those factors supported its decision that the statutory text alone contained the requisite language for finding Congressional intent to diminish the reservation. *Hagen*, 510 U.S. at 416-21. On the second factor, after working through the contemporaneous events surrounding the act's passage, the Court stated "the textual **and contemporaneous evidence** of diminishment is clear." *Hagen*, 510 U.S. at 420. But the Court also stated the contemporaneous evidence "**supports our conclusion** that Congress intended to diminish the Uintah Reservation" *Hagen*, 510 U.S. at 416 (emphasis added), meaning the Court had already found the necessary intent in its textual analysis. *Id.* at 414.

Indeed, that's the way the *Solem* analysis works. If the text evinces clear Congressional intent to diminish or disestablish, the Court need not resort to the second or third *Solem* factors.

On the third factor, the *Hagen* Court briefly addressed the subsequent demographic and jurisdictional changes to the opened lands. *Hagen*, 510 U.S. at 420-21. The state had exercised jurisdiction over the opened lands and the open lands had become majority non-Indian since the act's passage. The Court recognized those events supported its conclusion that Congress intended to disestablish the reservation.

In closing its application of the *Solem* analysis, the Court addressed non-Indians' justifiable expectations" and cited the use of that phrase in *Rosebud. Hagen*, 510 U.S. at 421. The Court said: "This 'jurisdictional history,' as well as the current population situation in the Uintah Valley, demonstrates **a practical acknowledgment** that the Reservation **was diminished**; a contrary conclusion would seriously disrupt the **justifiable expectations** of the people living in the area." *Hagen*, 510 U.S. at 421 (emphases added).

The Court did not claim non-Indians' "justifiable expectations" would change the result if the analysis of the first two prongs had gone differently. The Court did not claim "justifiable expectations" were a part of the *Solem* analysis. The Court merely commented in passing to support its conclusion that Congress clearly intended to diminish the reservation and said so in the statutory text.

III. *Sherrill* was not a disestablishment case and did not apply the *Solem* three-part test.

In *City of Sherrill, N.Y. v. Oneida Indian Nation of New York*, 544 U.S. 197 (2005), the Supreme Court considered a novel legal theory raised by the Oneida Indian Nation. The Nation had purchased tracts of land from non-Indians within its reservation boundary. The Nation theorized its ownership in fee unified with its aboriginal title to give the tribal government sovereign immunity from real property taxes imposed by New York municipalities. *Id.* at 213-17.

The Court rejected the Nation's theory based on equitable considerations of laches, acquiescence, and impossibility.

> [T]he distance from 1805 to the present day, the Oneidas' long delay in seeking equitable relief against New York or its local units, and developments in the city of Sherrill spanning several generations, evoke the doctrines of laches, acquiescence, and impossibility, and render inequitable the piecemeal shift in governance this suit seeks unilaterally to initiate.

Sherrill, 544 U.S. at 221.

While the *Sherrill* court relied on the demographic history and "justifiable expectations" of non-Indians to reject the Nation's legal theory, it did not find those features had disestablished the Oneida's reservation. In fact, the *Sherrill* Court clearly stated the case before it was not a disestablishment case. *Sherrill*, 544 U.S. at 215-16 (explaining "[t]his Court has observed **in the different, but related, context of the diminishment of an Indian reservation** . . . ."). Further,

the Court clearly stated it was **not** deciding whether the Oneida's reservation had been disestablished. "The Court **need not decide today whether**, contrary to the Second Circuit's determination, the 1838 Treaty of Buffalo Creek **disestablished the** Oneidas' **Reservation** . . . ." *Sherrill,* 544 U.S. at 216 n.9 (emphasis added) (internal citations omitted).

Sherrill's "justifiable expectations" discussion simply has no bearing on the *Solem* disestablishment framework. The Supreme Court said as much in *Parker.*

IV. *Parker* confirmed the *Solem* disestablishment framework continues to govern disestablishment cases.

Despite *Sherrill's* emphasis on non-Indians' "justifiable expectations," the *Parker* Court soundly rejected the importance of those expectations in the *Solem* disestablishment framework. *Parker*, 136 S. Ct. at 1082. "[C]oncerns about upsetting the "justifiable expectations" of the **almost exclusively non-Indian settlers** who live on the land are **compelling**, but these expectations alone, resulting from the Tribe's failure to assert jurisdiction, cannot diminish reservation boundaries. **Only Congress has the power to diminish a reservation**." *Id.* (emphases added) (internal citations omitted). Indeed, even though the non-Indians "justifiable expectations" were "compelling", the Court found them unconvincing where the first prong of the *Solem* test—the statutory text—failed to demonstrate Congressional intent to diminish the reservation. *Id.* "And though petitioners wish

that Congress would have 'spoken differently' in 1882, '**we cannot remake history**.'" *Parker*, 136 S. Ct. at 1082.

The *Parker* Court refused to find reservation diminishment even in the face of compelling "justifiable expectations" of non-Indians. Those compelling expectations arose from the extensive and ongoing treatment of the opened lands as outside the reservation for over a century. Today, the opened lands are almost entirely populated by non-Indians. The Tribe exercised no jurisdiction over the land for over 120 years. The Tribe maintained no office, provided no social services, and hosted no tribal celebrations or ceremonies on the opened lands. And the federal and state governments almost continuously treated the land as being jurisdictionally outside the reservation. *Parker*, 136 S. Ct. at 1081-82.

Yet, even in the face of those subsequent demographic and jurisdictional events, the *Parker* Court found this third prong of the *Solem* analysis could not overcome the lack of any Congressional intent within the statutory text to diminish the reservation. The Court stated plainly the third prong is "the least compelling evidence in our diminishment analysis" and subsequent events are of "limited interpretive value." *Parker*, 136 S. Ct. at 1082.

V. The district court misapplied the *Solem* disestablishment framework.

The district court spilled no ink in its analysis of the first prong or second prong of the *Solem* disestablishment test. *Murphy v. Sirmons*, 497 F. Supp. 2d

1257, 1286-92 (2007). Instead, the court jumped straight into the third prong, which is supposed to be the "least compelling" and "of limited interpretive value" according to the Supreme Court in *Parker*, 136 S. Ct. at 1082. *Murphy*, 497 F. Supp. 2d at 1290. Here is the entirety of the district court's *Solem* analysis to determine whether the Creek Nation reservation had been disestablished:

> While Petitioner is correct that the question of disestablishment "turns on the facts and circumstances under which the treaties between the Creek Nation and the United States were signed," **another important consideration is the subsequent treatment of the lands**. A careful review of the Acts of Congress which culminated in the grant of statehood to Oklahoma in 1906, as well as subsequent actions by Congress, **leaves no doubt the historic territory of the Creek Nation was disestablished as a part of the allotment process.** For these reasons, this Court finds the Oklahoma Court of Criminal Appeals' decision refusing to find the crime occurred on an Indian "reservation" **is not contrary to nor an unreasonable application of Federal law as determined by the United States Supreme Court**.

Murphy, 497 F. Supp. 2d at 1290 (emphases added) (internal citations omitted). That's it. There was no meaningful inquiry into the three factors required by *Solem*. The statutory text—the most important of the *Solem* factors—is not even quoted.

Supreme Court precedent requires more. And, according to *Parker* and its predecessors, if the *Solem* analysis reveals no clear Congressional intent to

disestablish the Creek Nation reservation, then the reservation boundary still exists today, regardless of the resident non-Indians' "justifiable expectations."

CONCLUSION

A proper application of the *Solem* disestablishment test, as recently used by the Supreme Court in *Parker*, would reveal no Congressional intent to disestablish the Creek Nation reservation. Non-Indians' "justifiable expectations" alone cannot create Congressional intent where otherwise there is none. The unanimous *Parker* Court made clear such expectations cannot overcome even a century of non-Indian jurisdiction, settlement, and investment. In sum, if the statutory text reveals no Congressional intent to disestablish a reservation, divining such intent from contemporary or subsequent events is a nearly insurmountable obstacle.

Respectfully submitted this day of 6th day of September, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on September 6, 2016 I electronically filed the foregoing using the court's CM/ECF system which will send notification of such filing to the following:

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Date: September 6, 2016

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