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IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

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IN THE COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

THE STATE OF OKLAHOMA,	)	
	)	
Appellant,	)	**No. S-2021-209**
	)	**No. CF-2020-129**
-vs.-	)	
	)	
WINSTON WHITECROW BRESTER,	)	
	)	
Appellee.	)	

BRIEF BY AMICUS CURIAE THE PEORIA TRIBE OF INDIANS OF OKLAHOMA IN SUPPORT OF THE CONTINUED EXISTENCE OF THE PEORIA RESERVATION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

ARGUMENT 2

I. The United States and the Peoria Tribe Created the Peoria Reservation Through Binding Treaty 2

II. The Miami Tribe Removed to the Peoria Reservation but did not Confederate with the Peoria Tribe 7

III. Allotment did not Split the Peoria Reservation 9

IV. The Peoria Reservation Survived Termination 14

A. The Peoria Termination Act had no effect on the Peoria reservation 15

B. Termination does not necessarily disestablish a reservation 19

V. If Termination Affected the Peoria Reservation, Restoration Reinstated It 28

VI. No Further Evidentiary Hearing is Necessary 35

VII. Conclusion 37

TABLE OF AUTHORITIES

Page(s)

Cases

Alaska v. Native Vill. of Venetie Tribal Gov't,
522 U.S. 520 (1998)....................25

Bates v. Clark,
95 U.S. 204 (1887)....................13

Burns v. United States,
501 U.S. 129 (1991)....................30

Carcieri v. Kempthorne,
497 F.3d 15 (1st Cir. 2007)....................33, 34

City of Roseville v. Norton,
219 F. Supp. 2d 130 (D.D.C. 2002)....................34

Club One Casino, Inc. v. Bernhardt,
959 F.3d 1142 (9th Cir. 2020)....................34

Foreman v. Dep't of Revenue,
18 Or. Tax 476 (Magistrate Div. 2005)....................20

Hagen v. Utah,
510 U.S. 399 (1994)....................10, 30

Hydro Res., Inc. v. United States Env't Prot. Agency,
608 F.3d 1131 (10th Cir. 2010) (en banc)....................24

Indian Country, U.S.A., Inc. v. Oklahoma ex rel. Okla. Tax Comm'n,
829 F.2d 967 (10th Cir. 1987)....................6, 7

Kimball v. Callahan,
493 F.2d 564 (9th Cir. 1974)....................19

Klamath Tribes of Oregon v. Pacificorp,
Civil No. 04-644-CO, 2005 WL 8176609 (D. Or. Apr. 14, 2005)....................20

Luna-Gonzales v. State,
2019 OK CR 11....................25

McGirt v. Oklahoma,
591 U.S. ___, 140 S. Ct. 2452 (2020)....................*passim*

Menominee Tribe of Indians v. United States,
391 U.S. 404 (1968)....18, 20, 21

Minnesota v. Hitchcock,
185 U.S. 373 (1902)....6

Nat'l Lab. Rels. Bd. v. Pueblo of San Juan,
276 F.3d 1186 (10th Cir. 2002)....17

Nebraska v. Parker,
577 U.S. 481 (2016)....11

Nevada v. United States,
221 F. Supp. 2d 1241 (D. Nev. 2002)....34

Oregon Dep't of Fish & Wildlife v. Klamath Indian Tribe,
473 U.S. 753 (1985)....18, 21, 22

Rosebud Sioux Tribe v. Kneip,
430 U.S. 584 (1977)....24

Seymour v. Superintendent of Wash. State Penitentiary,
368 U.S. 351 (1962)....13

Solem v. Bartlett,
465 U.S. 463 (1984)....*passim*

South Carolina v. Catawba Indian Tribe, Inc.,
476 U.S. 498 (1986)....27

South Dakota v. Yankton Sioux Tribe,
522 U.S. 329 (1998)....9, 10, 32

St. Cloud v. United States,
702 F. Supp. 1456 (D.S.D. 1988)....27

State v. Gilcrist,
2017 OK CR 25....29

State v. Klindt,
1989 OK CR 75....5

State v. Webster,
338 N.W.2d 474 (Wis. 1983)....30, 31, 32

Surplus Trading Company v. Cook,
281 U.S. 647 (1930)....34

United States v. Antelope,
430 U.S. 641 (1977)....27

United States v. Celestine,
215 U.S. 278 (1909)....6, 12

United States v. Dion,
476 U.S. 734 (1986)....19

United States v. John,
437 U.S. 634 (1978)....22, 23, 24, 31

United States v. Long,
324 F.3d 475 (7th Cir. 2003)....32

Upstate Citizens for Equality, Inc. v. United States,
841 F.3d 556 (2d Cir. 2016)....34

Statutes

18 U.S.C. § 1151....13, 24

18 U.S.C. § 1153....1

Act of March 3, 1873, Pub. L. No. 42-332, 17 Stat. 631....8

Act of March 3, 1877, Pub. L. No. 44-101, 19 Stat. 271....8

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Act of June 7, 1897, Pub. L. No. 55-3, 30 Stat. 62....9, 11

Act of May 31, 1900, Pub. L. No. 56-598, 31 Stat. 221....9

Act of May 27, 1902, Pub. L. No. 57-125, 32 Stat. 245....9

Klamath Termination Act, Pub. L. No. 83-857, 68 Stat. 718 (1954)....18, 20, 21, 22

Menominee Restoration Act, Pub. L. No. 93-196, 87 Stat. 770 (1973)....31

Menominee Termination Act, Pub. L. No. 83-339, 68 Stat. 250 (1954)....18, 20, 21, 31

Modoc, Wyandotte, Peoria & Ottawa Restoration Act, Pub. L. No. 95-281,
92 Stat. 246 (1978)....28, 30, 31, 32, 33

Peoria Termination Act, Pub. L. No. 84-921, 70 Stat. 937 (1956)....*passim*

Treaty with the Creek Nation of Indians, June 14, 1866, 14 Stat. 786....14

Treaty with the Kaskaskia and Peoria, Oct. 27, 1832, 7 Stat. 403 2

Treaty with the Kaskaskia, Peoria, Piankeshaw and Wea, May 30, 1854, 10 Stat. 1082 2

Treaty with the Piankeshaws and Weas, Oct. 29, 1832, 7 Stat. 410 2

Treaty with the Senecas, Mixed Senecas & Shawnees, Quapaws, Confederated Peorias, Kaskaskias, Weas; and Piankeshaws, Ottawas of Blanchard's Fork and Roche de Boeuf, and certain Wyandottes, Feb. 23, 1867, 15 Stat. 513 ....*passim*

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1887 Ann. Rep. of the Comm'r of Indian Affairs, *available* at https://digitalcommons.law.ou.edu/indianserialset/5748 12

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H. Rep. No. 95-1019 (1978) 15

House Resolution Authorizing the Committee on Interior and Insular Affairs to Conduct an Investigation of the Bureau of Indian Affairs, H.R. Rep. No. 2503, 82nd Cong., 2d Sess. (1952), *available at* https://www.google.com/books/edition/_/RarNo QEACAAJ?hl=en 5

Indian Entities Recognized by and Eligible to Receive Services from the United States Bureau of Indian Affairs, 86 Fed. Reg. 7554 (Jan. 29, 2021) 1

Message from the President of the United States, S. Doc. No. 32, 45th Cong., 2d Sess. (1878), *available at* https://digitalcommons.law.ou.edu/indianserialset/8141/ 5

Property, *right* & *obligation*, Merriam-Webster, *each available at* www.merriam-webster.com/dictionary 29

S. Rep. No. 84-2519 (1956) 15, 16, 17

U.S. Const., art. 1, § 8, cl. 17 33

INTRODUCTION

Amicus curiae the Peoria Tribe of Indians of Oklahoma ("Peoria Tribe" or "Tribe"), a federally recognized Indian tribe,[1] respectfully submits this brief in support of the District Court's affirmation of its reservation in Ottawa County, Oklahoma, under *McGirt v. Oklahoma*, 591 U.S. ____, 140 S. Ct. 2452 (2020). Appellant the State of Oklahoma ("State") alleged that Appellee Winston Whitecrow Brester[2] ("Brester") committed criminal offenses at 2204 A Street N.E. in Miami, Oklahoma.[3] (O.R. 3-8). This location, as the State conceded before the District Court, is within the historical boundaries of the reservation established by treaty for the Peoria Tribe. (O.R. 48). Brester moved to dismiss the charges, arguing the State lacked jurisdiction to prosecute him under the federal Major Crimes Act, 18 U.S.C. § 1153, because he is a citizen of the Seneca-Cayuga Nation and his alleged offenses occurred on the Peoria reservation. (O.R. 22-26). The Peoria Tribe appeared as amicus curiae before the District Court in support of Brester's motion. (O.R. 60-66, 89-152). Following an evidentiary hearing, the District Court concluded Congress never disestablished the Peoria reservation and granted Brester's motion. (O.R. 264-268).

The District Court was correct. Following decades of forced migration, the Peoria Tribe purchased a new homeland in the Indian Territory, ratified in the Omnibus Treaty of 1867, to be held in common and protected from alienation as an Indian reservation. That reservation exists today. It has survived allotment, Oklahoma's statehood, the removal of restrictions on alienation

[1]Indian Entities Recognized by and Eligible to Receive Services from the United States Bureau of Indian Affairs, 86 Fed. Reg. 7554, 7556 (Jan. 29, 2021).

[2]This Court's case caption spells Appellee's name as "Bresster." This appears to be a typographical error. *See* O.R. 25 (Appellee's tribal citizenship verification spelling his last name as "Brester").

[3]The Tribe only appeared in the District Court's case numbered CF-2020-129. The District Court accepted the parties' stipulation that Brester's other criminal matters occurred within the historic reservation of the Ottawa Tribe. (O.R. 265).

and even the termination and restoration of the Peoria Tribe's relationship with the federal government. In the more than 150 years since the Omnibus Treaty was signed, Congress has never affirmatively and explicitly acted to strip the Peoria of their reservation. Under *McGirt*, the State's inability to produce plain, unequivocal disestablishment language in any federal statute resolves this appeal. The Peoria Tribe respectfully asks that this Court affirm the District Court's order recognizing the continued existence of the Peoria reservation.

ARGUMENT

I. The United States and the Peoria Tribe Created the Peoria Reservation Through Binding Treaty

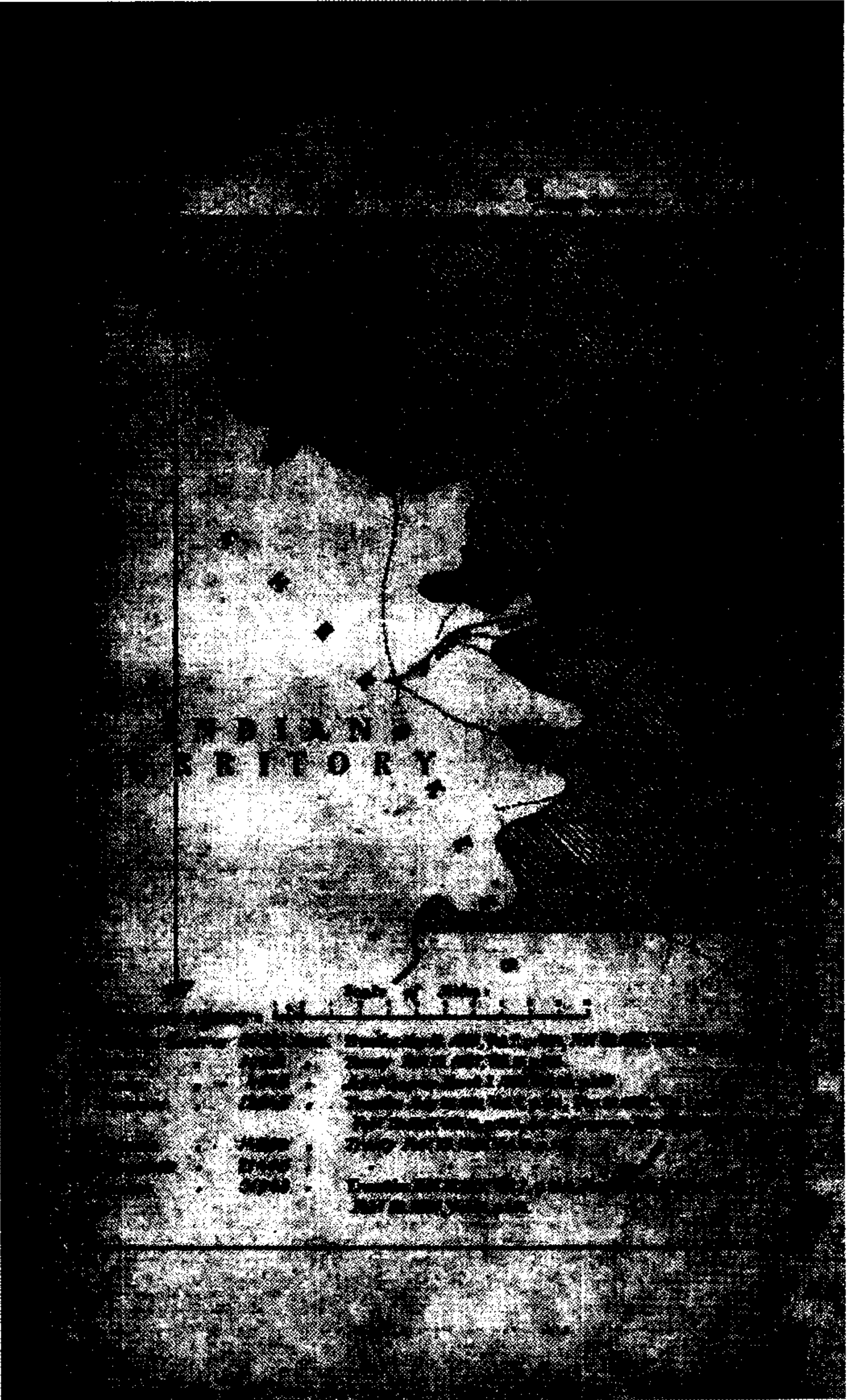
The modern-day Peoria Tribe is a confederation of four component peoples, the Kaskaskia, Piankeshaw, Wea and Peoria, each with origins in the Midwest and Great Lakes regions. The component nations of the Peoria Tribe ceded vast amounts of land to the United States in early 19th century treaties and removed to lands in Kansas guaranteed to them "forever" "for their permanent residence[.]" *See, e.g.*, Treaty with the Piankeshaws and Weas, arts. I & II, Oct. 29, 1832, 7 Stat. 410 (ceding all tribal lands within Missouri and Illinois in exchange for "permanent residence" in Kansas); Treaty with the Kaskaskia and Peoria, arts. I, III & IV, Oct. 27, 1832, 7 Stat. 403 (same). In 1854, the four nations "united themselves into a single tribe" and were recognized as such by the United States. Treaty with the Kaskaskia, Peoria, Piankeshaw and Wea, art. I, May 30, 1854, 10 Stat. 1082. The 1854 treaty shrunk the Tribe's Kansas reservation to ten sections of land held in common and granted 160 acres to each Peoria citizen. *Id.* at art. II.

"Forever, it turns out, did not last very long[.]" *McGirt*, 140 S. Ct. at 2483 (Roberts, C.J., dissenting). The turmoil of the Civil War and increasing American settlement of Kansas made it "desirable[,]" in the words of the United States, for "certain tribes . . . now residing in Kansas . . . to remove to other lands in the Indian country south of that State[.]" Treaty with the Senecas,

Mixed Senecas & Shawnees, Quapaws, Confederated Peorias, Kaskaskias, Weas; and Piankeshaws, Ottawas of Blanchard's Fork and Roche de Boeuf, and certain Wyandottes, pmbl., Feb. 23, 1867, 15 Stat. 513 [hereinafter Omnibus Treaty]. Facing these continuing pressures, the Peoria Tribe agreed to move to a new reservation in the northeast corner of the Indian Territory, what is today Ottawa County.

To create the new Peoria reservation, the United States purchased land from the Seneca and Quapaw tribes. *Id.* at arts. II & IV. The United States then "granted and sold" the former Seneca and Quapaw lands to the Peoria. *Id.* at art. XXII. The Peoria agreed to sell their Kansas lands to pay for "their new homes in the Indian country[,]" to which they were to remove within two years of the treaty's ratification. *Id.* at arts. XXII & XXIII. The Omnibus Treaty describes the land at issue as the Peoria Tribe's "new reservation[.]" *Id.* at art. XXVI. As shown in an 1879 map of the reservations served by the Quapaw Agency, copied below, the Peoria reservation was bordered by Kansas and the Quapaw reservation to the north, Missouri to the east, the Neosho River to the west, and the Ottawa, Shawnee and Modoc reservations to the south. H.R. Exec. Doc. No. 1, Part 5, vol. 1, at 180 (2d Sess. 1879) (O.R. 134).[4] Today, the reservation falls completely within Ottawa County.

[4]*Available at* https://dc.library.okstate.edu/digital/collection/OKMaps/id/4390/ (last visited Dec. 28, 2021).



The Treaty gave the Peoria two choices: remove to the Indian Territory or "remain" in Kansas "and become [American] citizens[.]" *Id.* at art. XXVIII. Any Peoria tribal members who chose to remain in Kansas, sometimes referred to as citizen Peorias, were "entitled to receive the[ir] proportionate share" of the "common property of the [T]ribe[.]" *Id.* Upon receiving their payout, citizen Peorias would "have no further rights in the [T]ribe" and would "become disconnected from the [T]ribe." *Id.* Those who chose to migrate to the new Peoria reservation would retain communal ownership of funds belonging to the Tribe and held in trust by the United States. *Id.* at art. XXIV.

Later federal statutes and documents continued to refer to the Peoria territory as a reservation. The Interior Department surveyed the "Peoria, &c., reservation" in 1878. Message from the President of the United States, S. Doc. No. 32 at 2, 45th Cong., 2d Sess. (1878) (O.R. 137).[5] When Congress allotted Peoria lands in 1889, it used the term "reservation[.]" Act of March 3, 1889, Pub. L. No. 50-422, 25 Stat. 1013, 1014. The Bureau of Indian Affairs described Peoria lands as a reservation well into the 20th century. Report with respect to the House Resolution Authorizing the Committee on Interior and Insular Affairs to Conduct an Investigation of the Bureau of Indian Affairs, H.R. Rep. No. 2503, at 907, 1256-59, 82nd Cong., 2d Sess. (1952) (describing Peoria treaty history and 1950s condition of Peoria Tribe).[6]

Federal law controls the establishment and existence of a reservation. *McGirt*, 140 S. Ct. at 2462 ("States have no authority to reduce federal reservations lying within their borders."); *State v. Klindt*, 1989 OK CR 75, ¶ 9, 782 P.2d 401, 404 (noting federal statutes govern Indian country

[5]*Available at* https://digitalcommons.law.ou.edu/indianserialset/8141/ (last accessed Dec. 28, 2021).

[6]*Available at* https://www.google.com/books/edition/_/RarNoQEACAAJ?hl=en (last accessed Dec. 28, 2021).

status). Congress need not use "any particular form of words . . . when it comes to establishing" a reservation. *McGirt*, 140 S. Ct. at 2475.

> [I]n order to create a reservation, it is not necessary that there should be a formal cession or a formal act setting apart a particular tract. It is enough that from what has been done there results a certain defined tract appropriated to certain purposes. Here the Indian occupation was confined by the treaty to a certain specified tract. That became, in effect, an Indian reservation.

Minnesota v. Hitchcock, 185 U.S. 373, 390 (1902); *see also United States v. Celestine*, 215 U.S. 278, 285 (1909) (The term reservation "is used in the land law to describe any body of land, large or small, which Congress has reserved from sale[.]"). In other words, a reservation "simply refers to those lands which Congress intended to reserve for a tribe and over which Congress intended primary jurisdiction to rest in the federal and tribal governments." *Indian Country, U.S.A., Inc. v. Oklahoma ex rel. Okla. Tax Comm'n*, 829 F.2d 967, 973 (10th Cir. 1987).

Under these standards, the Omnibus Treaty created a reservation for the Peoria Tribe. With the intent to remove the Peoria from Kansas, the United States purchased land specifically to serve as "new homes" for the Tribe. Omnibus Treaty, art. XXIII. The land was "granted and sold" to the Peoria, who were instructed to remove thereon within two years of the Treaty's ratification. *Id.* at arts. XXII & XXIII. The Treaty specifically refers to the land as the Tribe's "new reservation[.]" *Id.* at art. XXVI. That the Treaty intended to establish a reservation is bolstered by references to the Peoria reservation in later federal documents & legislation. *See McGirt*, 140 S. Ct. at 2461-62 (looking to terminology in post-treaty federal legislation to determine whether Congress created reservation for Muscogee (Creek) Nation).

The Omnibus Treaty's offer of American citizenship to Peoria members who wished to remain in Kansas also speaks to the intentions of the Treaty parties in creating the reservation. By allowing tribal citizens to disassociate themselves from the Tribe and become American citizens, the Treaty set up a binary choice: renounce tribal citizenship and assimilate into American society

or retain tribal ties and remove to the new Peoria reservation. This choice was one of governance in addition to residence. By remaining in Kansas and becoming American citizens, Peoria tribal members would obtain the same political status as other American citizens. The Peoria who removed to the new reservation would instead retain a measure of independence from state authority. The citizenship provisions of the Omnibus Treaty show that "Congress intended primary jurisdiction" over the new Peoria reservation "to rest in the federal and tribal governments." *Indian Country, U.S.A.*, 829 F.2d at 973.

As in *McGirt*, the treaty & legislative history of the Peoria Tribe shows that Congress established a reservation for the Peoria people. The District Court's finding on this point should be affirmed.[7]

II. The Miami Tribe Removed to the Peoria Reservation but did not Confederate with the Peoria Tribe

The Peoria and Miami peoples have been neighbors and relatives for hundreds of years from before European contact to the present day. At the time the Omnibus Treaty was negotiated, the tribes were situated on adjoining reservations in Kansas. In that Treaty, the Peoria Tribe agreed to allow the Miami to "confederate[] with them upon their new reservation, and own an undivided right in said reservation" proportionate to payment from the Miami. Omnibus Treaty, art. XXVI. In provisions the Senate refused to ratify, the Miami, like the Peoria, were given the option of removing to the Indian Territory or giving up their tribal citizenship to remain in Kansas. *Id.* at arts. XXIX & XXX.

[7]The State did not contest that the Omnibus Treaty established a reservation for the Peoria Tribe before the District Court, O.R. 48, and it now concedes the establishment of the Peoria reservation before this Court. Appellant Br. at 30.

Congress later gave the Miami the option to sell their lands in Kansas and join the Peoria in Indian Territory. Act of March 3, 1873, Pub. L. No. 42-332, 17 Stat. 631. Congress recognized that the Miami and Peoria had entered into a contract concerning the confederation of the two tribes. *Id.* at §§ 4 & 6. It directed the Secretary of the Interior to review and "approve the same with such modifications as justice and equity may require" to facilitate the confederation of the two tribes. *Id.* at § 6. The Secretary approved the contract on November 19, 1874. H.R. Exec. Doc. No. 105 at 2, 44th Cong. 1st Sess. (1876).[8] 72 Miami citizens ultimately chose to remove to the Peoria reservation. *Id.* at 3. Interior estimated the removed Miami—which it referred to as "the Indian party"—needed $23,878.67 to pay for their interest in the Peoria reservation. *Id.* at 4. In 1877, Congress earmarked a slightly higher amount—$24,952—to pay the Peoria Tribe out of funds it held in trust for the Miami. Act of March 3, 1877, Pub. L. No. 44-101, 19 Stat. 271, 292.

Upon Congress's payment to the Peoria on behalf of the Miami, the Omnibus Treaty and the Act of 1873 both contemplated that the tribes would politically confederate.[9] Omnibus Treaty, arts. XXVI & XXIX (providing for confederation into "united tribe" taking "the name of 'Peorias and Miamies' "); Pub. L. No. 42-332, § 6 (providing for "union" of Miami and Peoria into "united tribe" to "be called the United Peorias and Miamis"). However, the political union of the two tribes never came to pass.

As the Miami Tribe has argued throughout this litigation, the Peoria and Miami maintained separate governmental institutions throughout the late 19th and early 20th centuries. *See* O.R.

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[8] *Available at* https://digitalcommons.law.ou.edu/indianserialset/2388 (last visited Dec. 28, 2021).

[9] Congress's payment to the Peoria also secured the Miami interest in the Peoria reservation. At that point, the reservation became jointly owned by the two tribes. Omnibus Treaty, art. XXVI; Act of March 3, 1873, Pub. L. No. 42-332, 17 Stat. 631, 633. For ease of reference, but with no disrespect meant to the Miami Tribe, the Tribe refers to the reservation as the "Peoria reservation" throughout this brief.

200-05; Miami & Ottawa Amicus Br. at 5. Congress likewise described the two tribes as separate entities in allotment legislation. In 1889, it applied a prior allotment statute "to the Confederated Wea, Peoria, Kaskaskia, and Piankeshaw tribes of Indians, ***and*** the Western Miami tribe of Indians, now located in the northeastern part of the Indian Territory and to ***their*** reservation[.]" Act of March 3, 1889, Pub. L. No. 50-422, 25 Stat. 1013, 1014 (emphasis added). Allotments were parceled "out of ***their common reserve***" to tribal members named on lists "furnished . . . by the ***chiefs of said tribes***[]." *Id.* (emphasis added). It is apparent from the statutory text—referring to the tribes in the plural and to the reservation in the singular—that Congress viewed the Peoria and Miami as two tribes sharing a single undivided reservation.

Nor did the tribes confederate after allotment. Congress continued to legislate for the Peoria and Miami separately, while often referring to the joint reservation.[10] In 1899, the Acting Commissioner of Indian Affairs advised Miami leader Thomas Richardville that the federal government had dealt with the Peoria and Miami as separate tribes. (O.R. 217-18). Finally, in 1939, the tribes adopted separate constitutions pursuant to the Oklahoma Indian Welfare Act. The tribes today govern themselves separately.

III. Allotment did not Split the Peoria Reservation

The State, in a scarce two paragraphs, asserts the Act of March 3, 1889, which allotted the Peoria reservation, implicitly divided the reservation. Appellant Br. at 27-28. Congress did no such thing. "[O]nly Congress can alter the terms of an Indian treaty by diminishing a reservation and its intent to do so must be clear and plain." *South Dakota v. Yankton Sioux Tribe*, 522 U.S.

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[10]*See, e.g.*, Act of June 7, 1897, Pub. L. No. 55-3, 30 Stat. 62, 72 (relaxing restrictions on alienation of allotted land "in the Peoria and Miami Indian Reservation"); Act of May 31, 1900, Pub. L. No. 56-598, 31 Stat. 221, 240 (appropriating money to pay Peoria Tribe for treaty obligations); Act of May 27, 1902, Pub. L. No. 57-125, 32 Stat. 245, 263 (permitting tribes to sell surplus lands and requiring Miami to pay expenses incurred by tribal officials).

329, 343 (1998) (cleaned up); *see also McGirt*, 140 S. Ct. at 2463. In determining whether federal legislation modified reservation boundaries, courts are "bound by [the] traditional solicitude for the Indian tribes," *Solem v. Bartlett*, 465 U.S. 463, 472 (1984), to "resolve any ambiguities in favor of the Indians[.]" *Hagen v. Utah*, 510 U.S. 399, 411 (1994). Here, the Act's statutory language does not evince any clear and plain congressional intent to modify the boundaries of the Peoria reservation.[11]

In the Act, Congress extended the General Allotment Act of 1887 to the Peoria and Miami tribes "and to their reservation[,]" providing that each tribal citizen would receive up to 200 acres. 25 Stat. at 1014. "[T]he chiefs of said tribes" were directed to compile lists of citizens who were eligible for allotments, with disputes to be "settled by the chiefs of the respective tribes, subject to the approval of the Secretary of the Interior[.]" *Id.* The allotments were protected from alienation and taxation for 25 years. *Id.* Congress also set caps on the amount of land that could be allotted to citizens of each tribe. *Id.* at 1014-15. Any reservation land remaining after allotment—"the residue of the lands"—was "held in common under present title" by the tribes. *Id.* at 1015. The tribes were empowered to lease the residue and, with certain restrictions, the allotments. *Id.* Finally, Congress permitted the tribes to divide or sell the residue 25 years after the Act's passage with the consent of three-fourths of the tribes' adult citizens. *Id.*

The text of the Act contains no "clear and plain" language showing that Congress intended to split the reservation. *Yankton Sioux Tribe*, 522 U.S. at 343. Conspicuously absent is a description of the reservation's boundaries. The Act does not expressly divide the reservation.

[11]The Tribe agrees with *amici* Miami and Ottawa Tribes that the State waived its partition argument by failing to raise it before the District Court and that the argument should be barred as a matter of judicial estoppel. Miami & Ottawa Amicus Br. at 31-34. This Court should not permit the State to contradict the assurances it gave to the District Court that the joint reservation was never divided. *See id.* at 5 n.14.

There is no language defining which portions of the reservation would be assigned to each tribe. Neither tribe ceded any land to the other, nor did Congress purchase any land from either tribe to sell to the other as a reservation. In fact, the Act contains none of the "[c]ommon textual indications of Congress' intent to diminish reservation boundaries" such as "explicit reference to cession[,] . . . [or] language providing for the total surrender of tribal claims in exchange for a fixed payment[.]" *Nebraska v. Parker*, 577 U.S. 481, 488 (2016) (cleaned up).

A mere eight years after allotment, Congress referred to a joint reservation shared by the Peoria and Miami—not two separate reservations. In 1897, Congress permitted "adult allottees of land in the Peoria and Miami Indian ***Reservation*** in the Quapaw Agency" to sell portions of their allotments. Act of June 7, 1897, Pub. L. No. 55-3, 30 Stat. 62, 72 (emphasis added). By referring to the joint reservation in the singular, the 55th Congress certainly did not view its predecessor's allotment legislation as having split the reservation.

The State appears to rely on a single clause from the Act. Appellant Br. at 28.

> [I]n making allotment under this act no more in the aggregate than [17,083] acres of said ***reservation*** shall be allotted to the Miami Indians, nor more than [33,218] acres in the aggregate to the United Peoria Indians; and said amounts shall be treated in making said allotments in all respects as the extent of the reservation of each of said tribes, respectively.

25 Stat. at 1014-15 (emphasis added). Although the State focuses on the language regarding "the extent of the reservation" (while ignoring the clause's initial reference to the reservation in the singular), the Act's land caps would have been far more salient to Congress and the tribes. The caps were roughly equivalent to the proportion of each tribe's population. According to the Commissioner of Indian Affairs' 1887 report—the most current population statistics available to Congress at the time it passed the Act in 1889—the Miami numbered 64 and the Peoria 154. 1887

Ann. Rep. of the Comm'r of Indian Affairs at 173.[12] At 154 citizens, the Peoria constituted 70.6% of the 218 residents of the reservation. The Act allowed the Peoria 33,218 acres in potential allotments, constituting 66% of the reservation's 50,301 acres. This clause is most plausibly interpreted not as dividing the joint reservation, but instead as ensuring that allotment of the reservation would proceed equitably between the Peoria and Miami.

To interpret this clause as splitting the reservation along allotment boundaries makes little legal or practical sense. For one, such an interpretation would contravene more than a century of federal case law holding that an allotment statute, by itself, does not modify reservation boundaries. *See McGirt*, 140 S. Ct. at 2463-64; *see also Celestine*, 215 U.S. at 285 ("[W]hen Congress has once established a reservation, all tracts included within it remain a part of the reservation until separated therefrom by Congress.").

Moreover, the impracticalities associated with the State's interpretation should not escape this Court's notice. It would be highly unusual for Congress to create reservation boundaries dependent on individual tribal citizens' allotment selections. If a Peoria citizen, for example, selected an allotment surrounded by Miami allotments, would the Peoria reservation include that allotment as an exclave? As the Miami Tribe noted in another case before this Court, related Peoria and Miami families, naturally enough, sometimes selected allotments near one another. Miami Amicus Br. at 13, *State v. Lee*, S-2021-206. But under the State's theory, this easily predictable allotment pattern would have hopelessly snarled tribal jurisdictional boundaries.

The State's interpretation also runs headlong into Congress's choice to maintain the tribes' communal ownership of the residual unallotted lands. 25 Stat. at 1015. Did Congress intend to create two separate reservations and a jointly shared residue? If tribal citizens selected

[12]*Available* at https://digitalcommons.law.ou.edu/indianserialset/5748 (last visited Dec. 28, 2021).

noncontiguous allotments—a common practice in the allotment era, as tribal citizens often selected allotments based on agricultural productivity or other factors, rather than contiguity with other allotments—the boundaries of the separate reservations and the residue would be difficult to ascertain. Nothing in the Act or in later federal legislation referring to the Peoria reservation suggests Congress intended to create reservation boundaries so challenging to determine or manage. *Cf. Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351, 358 (1962) (refusing to create "impractical pattern of checkerboard jurisdiction" at state's urging).

The clause at issue is better interpreted to simply underscore the assumptions of the time on Indian land ownership. "The notion that reservation status of Indian lands might not be coextensive with tribal ownership was unfamiliar at the turn of the century." *Solem*, 465 U.S. at 468. When the Act was passed in 1889, the Supreme Court had recently defined Indian country as the "lands alone to which the Indian title has not yet been extinguished[.]" *Bates v. Clark*, 95 U.S. 204, 208 (1887); *see also Solem*, 465 U.S. at 468 ("Indian lands were judicially defined to include only those lands in which the Indians held some form of property interest[.]"). Against this backdrop, Congress likely concluded that, by allotting joint reservation lands to the Peoria and Miami as separate tribal nations, it was defining the scope of tribal lands on the joint reservation. By equating Indian ownership of allotted land with reservation status in the Act, Congress did nothing more than restate the then-prevailing law governing the extent of Indian country.[13]

The drive-by partitioning the State theorizes is also inconsistent with Congress's typical reservation division tactics. Congress frequently split reservations in the 19th century to provide

[13]Today, of course, reservation status is not coextensive with tribal land ownership. *Solem*, 465 U.S. at 468; *see also* 18 U.S.C. § 1151. The Supreme Court has therefore held that not all allotment-era statutes alter reservation boundaries, only those that "clearly express [congressional] intent to do so." *McGirt*, 140 S. Ct. at 2463.

land for other tribal nations. For example, as described above, Congress divided the Seneca and Quapaw reservations in 1867 to acquire land for the Peoria reservation. Omnibus Treaty, arts. II, IV & XXII. In another example, Congress divided the reservations of the Five Tribes following the Civil War and purchased the excess land to provide reservations for other tribes the United States intended to settle in the Indian Territory. *See, e.g.*, Treaty with the Creek Nation of Indians, art. III, June 14, 1866, 14 Stat. 786 ("[T]he Creeks hereby cede and convey to the United States, to be sold to and used for homes for such other civilized Indians . . . the west half of their entire domain[.]"). Had Congress intended to partition the Peoria reservation for the purpose of establishing a separate reservation for the Miami, it likely would have used this tried-and-true method instead of making a cryptic suggestion in allotment legislation.

The State's case for partition asks this Court to infer Congress's intentions based on a single statutory clause that, under the State's theory, would produce a wholly anomalous outcome with significant practical consequences. In contrast, the Tribe's interpretation avoids practical upheaval and is consistent with Congress's own post-allotment statutes concerning the Peoria reservation and the Supreme Court's interpretation of allotment-era legislation. The Act of March 3, 1889, simply does not evince the clear congressional intent necessary to divide the Peoria reservation.

IV. The Peoria Reservation Survived Termination

The State's sole argument for reversal—and, indeed, the only factor that distinguishes this case from *McGirt*—is that termination disestablished the Peoria reservation. This contention cannot be squared with the Supreme Court's precedent governing either disestablishment or Indian treaty rights. The Peoria Termination Act says nothing at all about the Peoria reservation. Because it has no clear statutory language evincing Congress's intent to disestablish the Peoria reservation, the State instead asks this Court to infer that the Termination Act disestablished the reservation *sub silentio*. *McGirt* and long-standing Supreme Court precedent requiring lower courts to

interpret treaty rights in favor of tribal interests flatly prohibit such blatant disregard of the Tribe's treaty rights.

A. The Peoria Termination Act had no effect on the Peoria reservation

Termination refers to the era of federal Indian policy in which Congress ended the United States' political relationship with certain tribal nations. Congress terminated the federal relationship with the Peoria Tribe in 1956. Peoria Termination Act, Pub. L. No. 84-921, 70 Stat. 937. In its report in favor of the Act, the Senate Committee on Interior and Insular Affairs described the Peoria as "almost completely integrated into the non-Indian community" and noted that "[o]nly 180 individuals . . . live on or in the vicinity of ***the reservation***." S. Rep. No. 84-2519, at 3 (1956) (emphasis added). The Committee further claimed that the Peoria had consented to termination. *Id.* at 1-3. However, in 1978, the Secretary of the Interior, in a letter to a House committee considering legislation to restore the Peoria Tribe to federal recognition, wrote that the Tribe was selected for termination because it was "among the politically weaker tribes who were not able to effectively resist termination." H. Rep. No. 95-1019, at 7 (1978). It further appears that the Peoria Tribe's consent to termination was coerced. The Secretary informed Congress that the Tribe's consent was based "on the understanding that their tribal claims before the Indian Claims Commission would be expeditiously settled in exchange for termination." *Id.*

The Termination Act's purpose was "to provide for the termination of Federal supervision over the affairs of the Peoria Tribe of Indians located in northeastern Oklahoma and the individual members thereof[.]" Pub. L. No. 84-921, § 1, 70 Stat. 937. Specifically, the Act:

- Removed all Peoria land from trust or restriction and "pass[ed] the titles in fee simple[.]"[14] *Id.* at § 2.
- "[T]erminate[d]" "[t]he Federal trust relationship to the affairs of the Peoria Tribe and its members[.]" *Id.* at § 3(a). Peoria citizens were no longer "entitled to any of the services performed by the United States for Indians because of their status as Indians[,]" specifically including the Oklahoma Indian Welfare Act ("OIWA") and the Indian Reorganization Act. *Id.* "[A]ll statutes of the United States which affect Indians because of their status as Indians" were deemed inapplicable to "members of the tribe" and the "laws of the several States" were applied "to the tribe and its members in the same manner as they apply to other citizens or persons[.]" *Id.*
- Revoked the "corporate charter" issued to the Tribe after its incorporation pursuant to the OIWA. *Id.* at § 4(a).
- Forbade federal officials from taking, reviewing or approving any action under the Peoria Constitution. *Id.* at § 4(b).
- Terminated any power conferred on the Tribe by its constitution "inconsistent" with the Termination Act. *Id.* Any "power of the [T]ribe to take any action under its constitution and bylaws . . . consistent" with the Termination Act was expressly left unaffected. *Id.*

The Act did not reference the Tribe's reservation or the Omnibus Treaty.

As the State recites, Br. at 26, Congress must clearly express its intent to disestablish a reservation.

> Sometimes, legislation has provided an explicit reference to cession or an unconditional commitment to compensate the Indian tribe for its opened land.

[14]Section 2 was gratuitous. As Congress recognized in the Act's legislative history, all restrictions against alienation of Peoria allotted land expired in 1915, passing title in fee simple to allottees. S. Rep. No. 84-2519, at 4 (1956).

> Other times, Congress has directed that tribal lands shall be restored to the public domain. Likewise, Congress might speak of a reservation as being discontinued, abolished, or vacated. Disestablishment has never required any particular form of words. But it does require that Congress clearly express its intent to do so, commonly with an explicit reference to cession or other language evidencing the present and total surrender of all tribal interests.

McGirt, 140 S. Ct. at 2462-63 (cleaned up).

One searches the Termination Act in vain for any language evincing congressional intent to disestablish the Peoria reservation. Quite the opposite: the Act does not mention the Peoria reservation at all. Section 2, the only portion of the Act addressing land status, merely removed "restrictions on the sale or encumbrance of trust or restricted land" owned by Peoria citizens. Pub. L. No. 84-921, § 2. But the Supreme Court "has explained repeatedly that Congress does not disestablish a reservation simply by allowing the transfer of individual plots, whether to Native Americans or others." *McGirt*, 140 S. Ct. at 2464. Indeed, "[o]nce a block of land is set aside for an Indian Reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise." *Solem*, 465 U.S. at 470. Under well-settled precedent, § 2 could not have disestablished the reservation.

The lack of explicit disestablishment language in the Act is all the more notable given that Congress was aware the Peoria held a reservation when it drafted the Act. Congress expressly referred to the Peoria reservation in the Act's legislative history. S. Rep. No. 84-2519, at 3 (1956) ("Only 180 [Peoria] individuals . . . live on or in the vicinity of ***the reservation***.") (emphasis added). Had Congress truly intended to disestablish the reservation, it could have said so. After all, "Congress knows how to withdraw a reservation when it can muster the will." *McGirt*, 140 S. Ct. at 2462. "Tellingly," however, no "language expressly ending reservation status" is found in the Termination Act. *Id.* at 2465. The Act is silent as to the Peoria reservation and "silence does not work a divestiture of tribal power." *Nat'l Lab. Rels. Bd. v. Pueblo of San Juan*, 276 F.3d 1186,

1196 (10th Cir. 2002) (en banc); *see also Solem*, 465 U.S. at 472 (without "substantial and compelling evidence of a congressional intention" to disestablish a reservation, courts are "bound . . . to rule . . . that the old reservation boundaries survived[.]").

This is in stark contrast with the statutes terminating two prominent victims of the termination era: the Menominee and Klamath tribes. Unlike the Peoria Act, the Menominee and Klamath termination statutes expressly provide for the dismantling of their reservations. The Menominee, a Wisconsin nation, were to develop a plan "for the future control of the tribal property[,]" subject to the approval of the Secretary of the Interior. Menominee Termination Act, Pub. L. No. 83-339, § 7 68 Stat. 250, 251 (1954). The Secretary was directed to "transfer to the tribe . . . the title to all property, real and personal, held in trust by the United States for the tribe" in accordance with the plan, including if the Menominee set up a corporate entity to hold the property. *Id.* at § 8. With the encouragement of the United States, the Menominee agreed to transfer their reservation lands to a corporation and submit to state jurisdiction. *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 408-09 (1968).

The Klamath Termination Act, Pub. L. No. 83-857, 68 Stat. 718 (1954), similarly addressed the Klamaths' Oregon reservation directly. As described by the Supreme Court, the Act "required members of the Tribe to elect either to withdraw from the Tribe and receive the monetary value of their interest in tribal property, or to remain in the Tribe and participate in a non-governmental tribal management plan." *Oregon Dep't of Fish & Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 761 (1985). Portions of the Klamath reservation were to be sold to pay the withdrawing tribal members, with the remainder transferred "to a private trustee." *Id.* at 762.

The Peoria Termination Act did none of this. It merely purported to remove restrictions on alienation from Peoria allotments. Unlike in the Menominee or Klamath termination statutes,

Congress did not otherwise address the status of the Peoria reservation. Moreover, Congress was well aware in 1956 that allowing Indians to alienate reservation land did not disestablish a reservation. In 1948, less than a decade before it enacted the Peoria Termination Act, Congress had "uncouple[d] reservation status from Indian ownership, and statutorily define[d] Indian country to include lands held in fee by non-Indians within reservation boundaries." *Solem*, 465 U.S. at 468 (citing 18 U.S.C. § 1151).

When Congress ended the federal relationship with the Peoria Tribe in 1956, it knew the Peoria held a reservation. Yet in the Termination Act, Congress did nothing more than allow Peoria citizens to freely alienate allotted lands on that reservation. That undoubtedly left the Peoria's treaty-protected reservation intact. Courts must not "construe statutes as abrogating treaty rights in a backhanded way; in the absence of explicit statement, the intention to abrogate or modify a treaty is not to be lightly imputed to the Congress. Indian treaty rights are too fundamental to be easily cast aside." *United States v. Dion*, 476 U.S. 734, 739 (1986) (cleaned up). Because Congress did not expressly address the Peoria reservation in the Termination Act, the reservation survived.

B. Termination does not necessarily disestablish a reservation

Instead of engaging with the text of the Peoria Termination Act, *see McGirt*, 140 S. Ct. at 2462 ("To determine whether a tribe continues to hold a reservation, there is only one place we may look: the Acts of Congress."), the State points to three Supreme Court cases in an attempt to show disestablishment by implication. Termination, the State argues, necessarily disestablishes a

reservation, regardless of the language used in the termination statute.[15] This Court, therefore, should simply acknowledge that "the Peoria reservation ended when termination became effective" and declare the reservation disestablished. Appellant Br. at 31. This deceptively simple reasoning is unsupportable. Even setting aside the Supreme Court's admonition that "courts have no proper role in the adjustment of reservation borders," *McGirt*, 140 S. Ct. at 2462, none of the cases the State relies on come close to establishing the rule it asks this Court to implement.

The State first points to *Menominee*, in which the Supreme Court concluded the Menominee Termination Act did not extinguish treaty-protected hunting and fishing rights. The Court drew a careful distinction between termination's effects on the applicability of federal Indian statutes and the existence of treaty rights.

> The provision of the Termination Act . . . that all statutes of the United States which affect Indians because of their status as Indians shall no longer be applicable to the members of the tribe plainly refers to the termination of federal supervision. The use of the word "statutes" is potent evidence that no treaty was in mind.

Menominee, 391 U.S. at 412-13 (cleaned up). The Court further noted its skepticism that "Congress, without explicit statement, would subject the United States to a claim for compensation by destroying a property right conferred by treaty[.]" *Id.* at 413.

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[15]The State further relies on three nonbinding lower court cases. Appellant Br. 32-33. None aid its case. *Kimball* merely held that Klamath treaty rights survived termination and refers to the Klamaths' "former reservation[.]" *Kimball v. Callahan*, 493 F.2d 564, 569 (9th Cir. 1974). As explained below, the Klamath Termination Act materially differed from the Peoria Termination Act, rendering the court's dicta especially inapplicable. *Pacificorp* straightforwardly applied Oregon law to a Klamath suit, as required by the Klamath Termination Act, and has nothing to say about reservation status. *Klamath Tribes of Oregon v. Pacificorp*, Civil No. 04-644-CO, 2005 WL 8176609 (D. Or. Apr. 14, 2005). And *Foreman*, issued by an Oregon state tax court magistrate, rests on the particular language of the Klamath Indian Tribe Restoration Act, not on any generalizable principle of Indian law. *Foreman v. Dep't of Revenue*, 18 Or. Tax 476 (Magistrate Div. 2005). None of the cases the State cites for its supposed consensus that termination necessarily disestablishes a reservation support such a rule.

Menominee confirms a bedrock principle of Indian law: if Congress truly intends to strip a tribe of a treaty right—such as the Peoria reservation conferred by the Omnibus Treaty—its intent to do so must be crystal clear. Simple termination language does not, of itself, abrogate a treaty right. Applied to this case, *Menominee* counsels in favor of reaffirming the Peoria reservation. Like the hunting and fishing rights at issue in *Menominee*, the Peoria reservation is a treaty-protected right, not a gift granted by statute. The Peoria Termination Act—which, like its Menominee counterpart, expressly terminates tribal eligibility only for federal Indian statutes—contains no language explicitly disestablishing the Peoria reservation or otherwise abrogating any treaty right. This Court should follow the Supreme Court's lead and "decline[] to construe the Termination Act as a backhanded way of abrogating" the Peoria reservation. *Menominee*, 391 U.S. at 412.

Instead of grappling with *Menominee*'s actual holding, the State seizes on the following dicta:

> The Termination Act by its terms provided for the orderly termination of Federal supervision over the property and members of the tribe. The Federal Government ceded to the State of Wisconsin ***<u>its power of supervision over the tribe and the reservation lands</u>***, as evident from the provision of the Termination Act that the laws of Wisconsin shall apply to the tribe and its members in the same manner as they apply to other citizens or persons within (its) jurisdiction.

Id. (cleaned up) (emphasis added). As noted above, the Menominee Termination Act required the federal government to transfer title to tribal property to the tribe or its state-chartered corporate designee, which, like the Menominee themselves, would then fall under state jurisdiction. This paragraph is nothing more than the Supreme Court's summary of the Termination Act's provisions. It does not purport to establish a rule that termination necessarily disestablishes a reservation. In fact, *Menominee*'s holding points to the opposite conclusion. If the Menominee Termination Act's language wasn't clear enough to abrogate treaty rights, then the Peoria

Termination Act—which, as the State notes, contains the same provision subjecting tribal members to state law—should not be read to disestablish the treaty-guaranteed Peoria reservation.

The State next turns to the Klamath example. But the Supreme Court in *Klamath Indian Tribe* was not interpreting the Klamath Termination Act. The case concerned Klamath claims to hunting and fishing rights on lands ceded to the United States long before the termination era. 473 U.S. at 762-63. In fact, the Court mentioned the Termination Act only in dicta, to illustrate that "Indians may enjoy special hunting and fishing rights that are independent of any ownership of land," especially where Congress expressly provides for such rights, as it did in the Act. *Id.* at 765-66. Nevertheless, the Court twice stated that the Act "terminated the Klamath Reservation." *Id.* at 761, 68.

These dicta do not, as the State suggests, establish a general rule that termination alone dissolves a reservation. The four words the State relies on—"terminated the Klamath Reservation"—do not so much as hint that every termination statute contains a hidden reservation disestablishment clause. Like surplus land acts, some of which "diminished reservations" while others "did not," *Solem*, 465 U.S. at 469, each termination statute must be evaluated separately to determine if it affected the terminated tribe's reservation. In stating that Congress terminated the Klamath reservation, the Supreme Court was simply describing the particular termination statute before it. The Klamath Termination Act, unlike its Peoria counterpart, contained a detailed plan for liquidating reservation lands, which the Court may have taken as congressional evidence of disestablishment. In contrast, Congress used no language indicating disestablishment in the Peoria Termination Act.

Finally, the State turns to *United States v. John*, 437 U.S. 634 (1978). *John*, the State claims, establishes that "federal superintendence is a necessary element of reservation status."

Appellant Br. at 32. When termination withdrew federal supervision and ended its trust relationship with the Peoria Tribe, the argument goes, the Peoria reservation necessarily dissolved.[16] The State overreads *John*. Although *John* explains much about the formation of a reservation—a process requiring "superintendence of the Government[,]" *John*, 437 U.S. at 649 (cleaned up)—it says nothing about reservation disestablishment. Relying on *John* to disestablish the Peoria reservation would contravene well-established Supreme Court precedent leaving the fate of a reservation to Congress.

In *John*, the Supreme Court considered whether Mississippi or the United States had jurisdiction to prosecute a Mississippi Choctaw man for an offense taking place on the Choctaw reservation. 437 U.S. at 635. In the early 20th century, the United States purchased land in fee simple for the Mississippi Choctaw, descendants of those who remained in Mississippi after the general Choctaw population was removed to the Indian Territory in the 1830s. *Id.* at 644-45. Congress took the lands into trust and the Interior Department declared the lands to be a reservation. *Id.* at 646.

In response to Mississippi's contention that the Mississippi Choctaw lands were not "Indian country" for purposes of federal jurisdiction, the Supreme Court noted it had previously resolved such questions by asking "whether the land in question 'had been validly set apart for the use of the Indians as such, under the superintendence of the Government.' " *Id.* at 649 (quoting

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[16]The Termination Act did not wholly remove the federal government from Peoria affairs. By limiting the Peoria Tribe's governmental authority to take "action . . . consistent" with the Act, Congress preserved a role for the federal government to supervise the exercise of the Tribe's sovereignty. Pub. L. No. 84-921, § 4(b), 70 Stat. 937, 938. Had the Tribe transgressed the limits imposed by Congress, the federal government would have been the enforcing sovereign. The federal government therefore retained some ember of supervision over the Tribe, if only in enforcing the provisions of the Termination Act. If reservation status is truly dependent on federal superintendence as the State claims, the Peoria reservation would have still survived termination.

United States v. Pelican, 232 U.S. 442, 449 (1914)). The Court held that the Mississippi Choctaw reservation easily met this standard, noting that Congress took the reservation into trust for the Choctaw, "who were at that time under federal supervision." *Id.* Mississippi, citing "the long lapse in the federal recognition of a tribal organization in Mississippi[,]" also challenged the federal government's power to subject the Mississippi Choctaw to federal criminal jurisdiction. *Id.* at 652. The Court rejected this argument. It concluded that the "fact that federal supervision over [the Mississippi Choctaws] ha[d] not been continuous" did not "destroy[] the federal power to deal with them." *Id* at 653.

While *John* makes clear that a political relationship between a tribal nation and the federal government is necessary to establish a federal reservation, it says nothing at all about the process of disestablishing a reservation. This omission is all the more curious given that, when *John* was decided in 1978, the Supreme Court had developed "well-established legal principles" to resolve reservation disestablishment cases, based on the "underlying premise . . . that congressional intent will control" with "doubtful expressions . . . resolved in favor" of tribal interests. *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 586 (1977) (cleaned up). In fact, *Kneip*, predating *John* by only a year, did not hold that a reservation must be under constant federal superintendence to justify its continued existence. Moreover, *John* rejects that very logic. Federal supervision over tribal affairs need not be "continuous[,]" the *John* Court held, to justify the exercise of federal power over a tribal nation. *John*, 437 U.S. at 653. Interpreting *John* to hold that termination—the suspension of federal supervision over a tribal nation's affairs—destroys a reservation is at odds with what the Court wrote in its opinion.

The State's notion that land retains reservation status only so long as it is under federal superintendence, aside from being unsupported by its cited authority, also does violence to the

Indian country framework set out in 18 U.S.C. § 1151. In that statute, Congress defined three categories of Indian country: reservations, allotments and "dependent Indian communities[.]" 18 U.S.C. § 1151. Section 1151 reflects that Congress may create Indian country "by declaring land to be part of a reservation, or by authorizing its distribution as Indian allotments." *Hydro Res., Inc. v. United States Env't Prot. Agency*, 608 F.3d 1131, 1151 (10th Cir. 2010) (en banc) (Gorsuch, J.). To create a dependent Indian community, however, the federal government must both set aside land "for the use of the Indians as Indian land" and maintain that land "under federal superintendence." *Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 527 (1998). If federal superintendence over a plot of land ends, the land loses its status as a dependent Indian community. *Id.* at 533-34 (holding Alaskan land did not qualify as a dependent Indian community in part because federal statute ended superintendence over land).

If accepted, the State's argument would collapse the distinction between a reservation and a dependent Indian community. And this Court "avoids any statutory construction which would render any part of a statute superfluous or useless." *Luna-Gonzales v. State*, 2019 OK CR 11, ¶ 4, 442 P.3d 171, 173 (cleaned up). Reservations are created and disestablished in specific ways that may differ from dependent Indian communities. *Compare McGirt*, 140 S. Ct. at 2463 (Congress must "clearly express its intent" to disestablish reservation) *with Venetie*, 522 U.S. at 533-34 (noting that Congress's withdrawal of federal superintendence ended potential dependent Indian community). The State does not dispute that the Omnibus Treaty created a reservation for the Peoria. Accordingly, if Congress intended to disestablish the reservation, it needed to "say so[,]" not merely suspend federal superintendence. *McGirt*, 140 S. Ct. at 2463.

The State's attempt to contort these three cases into a rule that the diminishment of tribal sovereignty necessarily entails the diminishment of a reservation fails for another reason: it is

inconsistent with *McGirt*. There, the Supreme Court considered the effect of federal statutes sharply restricting the Muscogee (Creek) Nation's "promised right to self-governance" on the Muscogee reservation. *McGirt*, 140 S. Ct. at 2465. Congress abolished the Muscogee tribal courts, subjected Muscogee legislation to presidential approval, curtailed the length of the Muscogee legislature's sessions, gave the President the authority to remove and replace the Muscogee principal chief and confiscated Muscogee tribal schools and properties. *Id.* at 2465-66. The *McGirt* dissenters described Congress as "having stripped the [Muscogee] Nation of its laws, its powers of self-governance, and its land[.]" *Id.* at 2492 (Roberts, C.J., dissenting). But despite these "serious blows to the [Muscogee,]" the Supreme Court did not locate congressional intent to disestablish the Muscogee reservation in these laws attacking Muscogee sovereignty. *Id.* at 2466.

Although Congress's treatment of the Muscogee Nation resembled termination in some respects, the Peoria Termination Act arguably restricted tribal sovereignty less. In the Peoria Termination Act, Congress merely subjected Peoria citizens to state law and restricted the Tribe from acting pursuant to its constitution in a manner "inconsistent with the provisions" of the Act. Pub. L. No. 84-921, §§ 3(a) & 4(b), 70 Stat. 937, 937-38. Congress did not require federal approval of Peoria legislation, empower the federal government to replace the Peoria chief, or otherwise meddle with the internal workings of the Peoria government. In fact, the Act expressly did "not affect the power of the tribe to take any action under its constitution and bylaws . . . consistent with th[e] Act[,]" so long as the federal government was not involved. *Id.* at § 4(b). While the Act removed Peoria citizens from the ambit of federal Indian statutes, it did not, by its own terms, curtail the Tribe's right to internal self-governance, in contrast to Congress's approach to the Muscogee Nation.

And yet the Supreme Court held that Congress's harsh restrictions on Muscogee sovereignty did not suffice to disestablish the Muscogee reservation. *McGirt*, 140 S. Ct. at 2468. The Court demanded an "Act of Congress [that] dissolved the [Muscogee] Tribe or disestablished its reservation." *Id.* Here, there is simply no Act of Congress that dissolved the Peoria Tribe or disestablished its reservation. If subjecting the Muscogee Nation to nigh-imperial control—abolishing its courts, appointing its leaders, vetoing its legislation—is not enough to degrade its sovereignty such that its reservation is deemed disestablished, it is difficult to understand how the comparatively gentler Peoria Termination Act could have disestablished the Peoria reservation. *McGirt* teaches that the collateral effects of sovereignty-reducing legislation cannot disestablish by themselves. Statutory text showing explicit congressional intent to disestablish a reservation is necessary.

All this is not to say that termination's withdrawal of federal supervision was meaningless. Many federal cases describe the legal impacts. *See, e.g.*, *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 507-09 (1986) (subjecting terminated Catawba Indian Tribe to state statute of limitation); *United States v. Antelope*, 430 U.S. 641, 646 n.7 (1977) (recognizing that citizens of terminated tribes are not subject to federal criminal jurisdiction for Indian Country crimes). These decisions, as well as the plain text of the Termination Act, teach that the State had full jurisdiction over Peoria citizens during the termination period, regardless of the status of their reservation. *See St. Cloud v. United States*, 702 F. Supp. 1456, 1464-66 (D.S.D. 1988) (overturning federal conviction of citizen of terminated Ponca Tribe for lack of federal jurisdiction). The reason for these effects is simple: Congress mandated that citizens of terminated tribal nations were no longer to be subject to federal Indian statutes, but instead to state jurisdiction. *See* Peoria Termination

Act, Pub. L. No. 84-921, § 3(a). The reason termination did not impact the Peoria reservation is equally simple: Congress did not expressly alter the status of the reservation.

At its core, the State's case for termination, relying on esoteric interpretations of inapplicable case law, runs into a fundamental problem: Congress does not disestablish a reservation by implication. "If Congress wishes to break the promise of a reservation, it must say so." *McGirt* 140 S. Ct. at 2462. Here, Congress has said nothing of the sort.

V. If Termination Affected the Peoria Reservation, Restoration Reinstated It

For all the reasons given above, the Peoria Tribe maintains that termination did not affect the status of its reservation at all. But in the end, that doesn't matter. Even if termination did impact the Peoria reservation in some way, that impact was completely undone when Congress restored the United States' political relationship with the Peoria Tribe. In 1978, Congress repealed the Peoria Termination Act and "reinstated ***all rights and privileges*** . . . which may have been diminished or lost" under termination. Modoc, Wyandotte, Peoria & Ottawa Restoration Act, Pub. L. No. 95-281, § 1(c), 92 Stat. 246 (1978) (emphasis added) [hereinafter Peoria Restoration Act]. The State's attempts to qualify this expansive language and manufacture constitutional concerns notwithstanding, the Restoration Act's language is clear. Whatever the Peoria Tribe had before termination, it regained upon restoration, including its reservation.

The text of the Restoration Act is straightforward. First, it "extended or confirmed" "Federal recognition" to the Peoria Tribe. *Id.* at § 1(a). It next repealed the Peoria Termination Act. *Id.* at § 1(b)(2). In the Act's reinstatement provision, its most substantive, Congress wrote:

> There are hereby reinstated all rights and privileges of [the Peoria Tribe] and [its] members under Federal treaty, statute, or otherwise which may have been diminished or lost pursuant to the [Termination] Act relating to them which is repealed by subsection (b) of this section. Nothing contained in this Act shall diminish any rights or privileges enjoyed by [the Peoria Tribe] or [its] members

> now or prior to enactment of such Act, under Federal treaty, statute, or otherwise, which are not inconsistent with the provisions of this Act.

Id. at § 1(c). The Act does provide an exception to its reinstatement provision. "[N]othing contained in this Act shall alter any property rights or obligations, any contractual rights or obligations, including existing fishing rights, or any obligation for taxes already levied." *Id.* at § 1(d). Finally, the Act declared the Peoria again eligible "to participate in the programs and services provided by the United States to Indians because of their status as Indians[.]" *Id.* at § 4.

Through reinstatement, Congress sought to restore "***all*** rights and privileges . . . under Federal treaty, statute, ***or otherwise***[.]" *Id.* at § 1(c) (emphasis added). The reinstated rights are further described as any "which ***may have been*** diminished or lost[.]" *Id.* (emphasis added). With this language, Congress eliminated any confusion that it intended to restore not only rights it knew were affected by termination, but also those on which termination's impacts were unclear. The Act also refers to rights that were "diminished or lost[,]" reinstating rights that termination may have infringed in addition to those it extinguished. *Id.* The expansive text of the Act makes clear that Congress intended to restore to the Peoria whatever termination had taken or degraded. The Peoria reservation undoubtedly falls within the Act's broad categories of rights Congress intended to restore.

Despite acknowledging the Act's "broad language of reinstat[ment,]" the State contends the most natural reading of that broad language is actually quite narrow. Appellant Br. at 34. Instead, the State insists that the Court interpret the reinstatement of the Peoria reservation as an alteration of property rights or obligations, thus removing it from the Act's scope. This Court interprets statutes "according to the plain and ordinary meaning of their language." *State v. Gilcrist*, 2017 OK CR 25, ¶ 14, 422 P.3d 182, 185 (cleaned up). The dictionary definitions of property rights and obligations accord with the everyday usage: ownership interest or a required

course of action with respect to something one owns.[17] But by reinstating the reservation, the Act did not alter ownership of any property, restrict or expand the rights of any property owner or create or diminish any obligation with respect to property. The Act did not take any land into federal trust for the Tribe or Peoria citizens. No land owned by Peoria citizens in fee simple became exempt from state regulation or taxation. No fee land owned by non-Indians was transferred to Peoria ownership. The State contests none of this—it merely states, without example or evidence, that reinstating the Peoria reservation "necessarily alters property rights by subjecting use of the land to federal or tribal limitations." Appellant Br. at 34. What these "limitations" might be, the State does not say.

The State next suggests that the Restoration Act's silence with respect to the Peoria reservation should be read to preclude reinstatement of the reservation. It notes that Congress directly addressed reservation status in other restoration acts, whether by establishing or denying reservations. *Id.* at 35. The simplest explanation for Congress' silence as to the Peoria reservation in the Restoration Act is that termination did not disestablish the reservation, as the Tribe argues above. Or perhaps Congress felt satisfied the extraordinarily broad reinstatement language it used in the Act was sufficient to restore the reservation. In any event, "[a]n inference drawn from congressional silence certainly cannot be credited when it is contrary to all other textual and contextual evidence of congressional intent." *Burns v. United States*, 501 U.S. 129, 136 (1991), *abrogated on other grounds by United States v. Booker*, 543 U.S. 220 (2005). Moreover, courts are tasked with interpreting federal statutes affecting Indians in the Indians' favor. *Hagen*, 510 U.S. at 411. These canons of statutory interpretation lead to the same outcome in this matter: the

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[17] *Property, right & obligation*, Merriam-Webster, *each available at* www.merriam-webster.com/dictionary (last visited Dec. 28, 2021).

Court should take Congress at its word without attempting to divine anything from its silence. The plain meaning of the Restoration Act is clear. The Peoria reservation, as a "right[]" of the Peoria Tribe "under Federal treaty. . . which may have been diminished or lost[,]" was reinstated by the Restoration Act, if indeed it was ever affected by termination. Pub. L. No. 95-281, § 1(c).

This interpretation of the Restoration Act is consistent with those of other courts interpreting restoration statutes. In *State v. Webster*, 338 N.W.2d 474 (Wis. 1983), Menominee tribal citizens challenged traffic tickets issued to them for conduct on Wisconsin state highways within the Menominee reservation. *Id.* at 475. Wisconsin gained jurisdiction over the reservation highways as a result of termination, but the state argued it retained that jurisdiction "when the Menominee Reservation ***was reestablished pursuant to the Restoration Act***" because termination permanently transferred ownership of the highway right-of-way to the state. *Id.* at 480 (emphasis added).

The Wisconsin Supreme Court rejected this argument under two theories. First, the court pointed out that explicit language in the termination statute or its accompanying plan for the winding up of the reservation would be required to "permanently . . . remove the roads from the Reservation." *Id.* at 430. But as in the Peoria Termination Act, there was no language in the Menominee termination plan evincing congressional intent to extinguish reservation status as to the highway at issue. *Id.* at 431. Second, the court noted that the broad reinstatement language of the Menominee Restoration Act—virtually identical to the reinstatement language of the Peoria Restoration Act—demonstrated that "Congress intended to restore the Menominee's rights to that land" even assuming that termination "somehow removed the underlying land from the

reservation[.]"[18] *Id.* "Any doubts as to the effect of" termination, the court held, were "resolved" by the reinstatement provision. *Id.* In other words, restoration reinstated reservation status for the highway right-of-way, even if it did not return ownership of the right-of-way to the Menominee.[19]

The leading federal case on the effects of restoration also attests to its broad impact. In *United States v. Long*, the Seventh Circuit considered whether the Menominee Tribe, after its restoration, exercised its inherent sovereign authority or acted as an arm of the federal government in criminally prosecuting a tribal citizen. 324 F.3d 475, 476 (7th Cir. 2003). The court asked: "what was 'terminated'—certain powers of the tribe, or the sovereign existence of the tribe itself[?]" *Id.* at 479. Relying on the restoration act's expansive reinstatement provision, the court held that termination merely constricted the Menominee's sovereignty, rather than extinguishing it altogether.

> The most reasonable reading of the Restoration Act is as an effort by Congress to place the Menominee back in the position they held before the Termination Act. Any other result would place the Menominee on different footing than those tribes newly recognized by Congress, as well as those tribes that by chance were spared the termination experiment. . . . We see no sense to such a distinction.

Id. at 482.

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[18]*Compare* Menominee Restoration Act, Pub. L. No. 93-196, § 3(b) 87 Stat. 770 (1973) ("The [Menominee Termination Act] is hereby repealed and there are hereby reinstated all rights and privileges of the tribe or its members under Federal treaty, statute, or otherwise which may have been diminished or lost pursuant to such Act.") *with* Peoria Restoration Act, Pub. L. No. 95-281, § 1(c), 92 Stat. 246 (1978) ("There are hereby reinstated all rights and privileges of [the Peoria Tribe] and [its] members under Federal treaty, statute, or otherwise which may have been diminished or lost pursuant to the [Termination] Act[.]").

[19]The State attempts to discredit *Webster* on the unconvincing grounds that it did not engage with *John* and that the Menominee Restoration Act materially differs from its Peoria counterpart. Appellant Br. at 33 n.13. As demonstrated above, *John* did not make federal superintendence a factor in a disestablishment analysis. And while the Menominee Restoration Act did take land into trust for the tribe, unlike the Peoria Act, reservation status is not dependent on land ownership. *Webster*, relying on reinstatement language identical to that in the Peoria Act, held that restoration reinstates reservation status, regardless of land ownership. The same outcome obtained for the Peoria.

So too for the Peoria. As with the Menominee, the "survival of the [Peoria] Tribe in some sovereign capacity after the Termination Act is an uncontroversial proposition. . . . The Termination Act did not abolish the *tribe* or its membership." *Id.* at 481 (cleaned up) (emphasis in original). The Peoria Restoration Act, then, was not creating a tribal nation or a reservation anew; it merely relaxed the restrictions termination placed on the Peoria. Restoration was "an effort by Congress to place the [Peoria] back in the position they held before the Termination Act." *Id.* at 482. "Congress was exercising its legislative prerogative to undo the effects of the earlier Termination Act." *Id.* at 483. As the Seventh Circuit recognized, Congress's intent in restoring terminated tribes is clear: to reinstate what was, or may have been, taken by termination. For the Peoria, that includes their reservation.

Unable to rely on the text of the Peoria Restoration Act or restoration case law in its quest to show Congress did not reinstate the Peoria reservation, the State resorts to conjuring constitutional claims. The State asserts that reinstating the Peoria reservation amounts to "declar[ing] lands be reserved for Indians by fiat, stripping a state of a measure of its sovereignty and jurisdiction" without its consent, in violation of the Constitution's Enclave Clause. Appellant Br. at 37. In the State's view, reinstating the Peoria reservation without federal title to the land and consent from the state raises "serious questions of Congress's constitutional authority[.]" *Id.* at 38. "But what the State considers unthinkable turns out to be easily imagined." *McGirt*, 140 S. Ct. at 2478. Federal cases uniformly hold that creating an Indian reservation does not implicate the Enclave Clause's requirement for state consent. Under these cases, the State's constitutional

concerns need not detain this Court long—reinstating the Peoria reservation raises no constitutional problems.[20]

The Enclave Clause empowers Congress to "exercise exclusive Legislation in all Cases whatsoever . . . over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings[.]" U.S. Const., art. 1, § 8, cl. 17. As an initial matter, it is dubious whether constitutional text that speaks of purchasing land to build military installations governs Indian reservations. *See Carcieri v. Kempthorne*, 497 F.3d 15, 40 (1st Cir. 2007), *rev'd on other grounds by Carcieri v. Salazar*, 555 U.S. 379 (2009) (Reservation land "does not fall within the plain language of the Enclave Clause.").

Even setting the textual incongruity aside, however, courts have long held that Indian lands do not constitute the sort of territories subject to exclusive federal jurisdiction that require state consent under the Enclave Clause. In *Surplus Trading Company v. Cook*, 281 U.S. 647 (1930), the Supreme Court made clear that Indian reservations were not subject to the Enclave Clause. The Court noted that reservations "are part of the state within which they lie" and that non-Indians residing or owning property on a reservation remain subject to state, not federal or tribal, jurisdiction, despite the reservation. *Id.* at 650-51. This residual state jurisdiction removes an Indian reservation from the Enclave Clause's purview. "[S]tate consent is needed only when the federal government takes 'exclusive' jurisdiction over land within a state." *Upstate Citizens for Equality, Inc. v. United States*, 841 F.3d 556, 571 (2d Cir. 2016). Because Indian lands remain subject to some state authority, courts have unanimously held that creating Indian lands does not

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[20]Of course, if this Court concludes that the termination statute contains no explicit disestablishment language and that the Peoria reservation survived termination, the State's constitutional claims need not be addressed.

require state consent under the Enclave Clause. *See, e.g.*, *Club One Casino, Inc. v. Bernhardt*, 959 F.3d 1142, 1151 (9th Cir. 2020); *Upstate Citizens for Equality*, 841 F.3d at 570-72; *Carcieri*, 497 F.3d at 40; *City of Roseville v. Norton*, 219 F. Supp. 2d 130, 149-52 (D.D.C. 2002); *Nevada v. United States*, 221 F. Supp. 2d 1241, 1251 (D. Nev. 2002). Reinstating the Peoria reservation is no different. Congress had no obligation to seek the State's consent before restoring the reservation.

VI. No Further Evidentiary Hearing is Necessary

The State asks this Court to remand this case for further evidentiary proceedings to "investigate[] what the tribes' historic understanding was regarding how reservation lands were divided between them" and determine whether Brester's offense occurred on the Peoria or Miami reservations. Appellant Br. at 38-39. A remand would serve no purpose. As described above, Congress did not divide the Peoria reservation and there is no dispute that Brester's offense in case number CF-2020-129 occurred within the historic reservation boundaries.[21] And because termination did not affect the Peoria reservation or the Peoria Tribe's interest therein, whether Brester's offense occurred on either side of a purportedly partitioned reservation is immaterial. In either circumstance, the offense occurred on reservation land, removing it from state jurisdiction.

The State further suggests additional evidence is needed to determine if Brester's offense occurred on "unallotted parcels" which may have been "received" by either the Peoria or Miami tribes as "part of their reservation." Appellant Br. at 39. But whether a plot of land was originally allotted to a tribal citizen has no bearing on whether it is today within Indian country. "[L]ands

[21]Nor would the tribes' understanding of the split, had it occurred, be determinative. Whether the allotment Act of March 3, 1889, modified the boundaries of the Peoria reservation must be answered with reference to the Act's text and, if the text presents ambiguity, "contemporaneous usages, customs, and practices to the extent they shed light on the meaning of the language in question at the time of enactment." *McGirt*, 140 S. Ct. at 2468. The Act, read against the backdrop of then-prevailing law on Indian land ownership, evinces no intent to divide the Peoria reservation.

held in fee by non-Indians within reservation boundaries" are within Indian country, whether or not the lands were tribal allotments at one time. *Solem*, 465 U.S. at 468. The title history of the offense site in this case will not answer the question of whether the site falls within reservation boundaries.

The State's incorrect contention that the Peoria reservation was divided, coupled with its inability to identify any statutory or treaty text setting boundaries for separate reservations, suggests that it intends to ask the District Court on remand to define reservation borders. That prerogative is reserved to Congress. Neither states nor courts are empowered to modify reservation boundaries. *McGirt*, 140 S. Ct. at 2462. Moreover, creating jurisdictional boundaries between the Peoria and Miami tribes would be an exceedingly delicate task with significant ramifications beyond the allocation of criminal jurisdiction, requiring careful study and government-to-government negotiations between the two tribal nations and the United States, none of which are parties to this case. The District Court could not accommodate these interests. Asking it to try would not only be beyond its authority, but would delay the resolution of Brester's alleged criminal offenses and profoundly prejudice the Peoria and Miami tribes.

Fortunately, the Oklahoma judiciary need not employ cartographers to resolve this case. The Omnibus Treaty of 1867 set clear, definite boundaries for the Peoria reservation and Congress has not modified them since. *See* H.R. Exec. Doc. No. 1, Part 5, vol. 1, at 180 (2d Sess. 1879) (O.R. 134).[22] The State has not and cannot produce any statutory text to the contrary. Further evidentiary proceedings would be futile.

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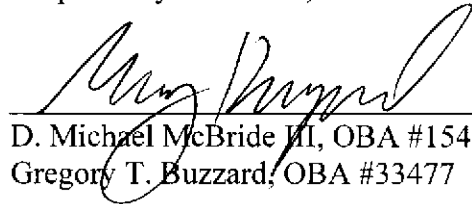
[22]*Available at* https://dc.library.okstate.edu/digital/collection/OKMaps/id/4390/ (last visited Dec. 28, 2021).

VII. Conclusion

In 1867, Congress and the Peoria Tribe established a reservation for the Peoria through binding treaty. In the more than 150 years since, "Congress has never withdrawn the promised reservation." *McGirt*, 140 S. Ct. at 2482. No federal statute throughout the allotment, termination or restoration eras evinces congressional intent to disestablish the Peoria reservation. The reservation exists today. The Peoria Tribe therefore respectfully asks this Court to affirm the District Court's order recognizing the Peoria reservation.

Respectfully submitted,



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CERTIFICATE OF SERVICE

This is to certify that on the 6th day of January, 2022, a true and correct copy of the foregoing was sent via U.S. Mail to counsel for Appellee and counsel for the Miami Tribe of Oklahoma and the Ottawa Tribe of Oklahoma at the below addresses. Service was made upon the Attorney General through mailing to the Clerk of the Court of Criminal Appeals for submission to the Attorney General pursuant to Rule 1.9(B) of the Rules of the Court of Criminal Appeals.

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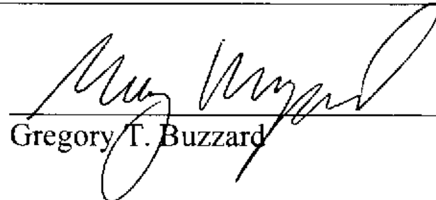

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