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SUMMARY

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Each term, the Supreme Court typically hears arguments in one or more cases concerning the rights and status of Indian tribes and their members. Prominent issues addressed by the Supreme Court in recent terms have included (1) tribes' civil jurisdiction over nonmembers, (2) the scope of tribal sovereign immunity, and (3) termination of Indian parents' rights in adoption cases.

The October 2018 term likewise featured several Indian law issues: the Court heard arguments in three significant cases, each of which implicated the complex relationships among tribal, state, and federal laws. In *Washington State Department of Licensing v. Cougar Den*, the Court upheld a Washington Supreme Court decision permitting a tribe to import fuel without paying state fuel taxes. The right to travel on public highways guaranteed by an 1855 treaty, the Court ruled, included the right to transport goods for sale on the reservation without paying additional taxes to do so. In *Herrera v. Wyoming*, the Court determined that neither Wyoming's admission into the Union nor the designation of the Bighorn National Forest abrogated an earlier treaty preserving tribal hunting rights. Thus, a tribe member's conviction for exercising those hunting rights in violation of Wyoming state law could not stand. Finally, in *Carpenter v. Murphy*, the Court reviewed whether Congress disestablished the Muscogee (Creek) reservation more than a century ago, with potential consequences for Oklahoma's ability to prosecute major crimes in the eastern half of the state. However, the eight Justices considering this case have not yet reached a decision, and the case is scheduled to be reargued in the October 2019 Supreme Court term.

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Each term, the Supreme Court typically hears arguments in one or more cases concerning the rights and status of Indian tribes and their members. Prominent issues addressed by the Supreme Court in recent terms have included (1) tribes' civil jurisdiction over nonmembers,[1] (2) the scope of tribal sovereign immunity,[2] and (3) termination of Indian parents' rights in adoption cases.[3] The October 2018 term likewise featured several Indian law issues: the Court heard arguments in three significant cases, each of which implicated the complex relationships among tribal, state, and federal laws.

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This report discusses each of these three cases in turn, focusing on analyses of the Supreme Court's interpretive rubric for treaties and relevant legislation, statements about the scope of legislative authority and discussions of legislative intent, and possibilities for future congressional action.

Washington State Department of Licensing v. Cougar Den

On March 19, 2019, the Supreme Court upheld a 2017 Washington Supreme Court decision defending a right-to-travel provision in an 1855 treaty (1855 Yakama Treaty) between the United States and the Yakama tribe against a state attempt to impose a motor fuels tax on a Yakama member.[4] The treaty guaranteed the Yakamas the "right, in common with citizens of the United

[1] Dollar Gen. Corp. v. Mississippi Band of Choctaw Indians, 136 S. Ct. 2159, 2159 (2016) (affirming—by an equally divided Court—a tribal court's jurisdiction over a civil suit against a corporation that was allegedly negligent in hiring and failing to supervise an accused nonmember child molester, based on the corporation's lease with the tribe); *see also* Dolgencorp, Inc. v. Mississippi Band of Choctaw Indians, 746 F.3d 167, 175 (5th Cir. 2014) (opinion below); Ed Gehres, *Argument Preview: The Future of Tribal Courts—the power to adjudicate civil torts involving non-Indians*, SCOTUSBLOG (Nov. 30, 2015) https://www.scotusblog.com/2015/11/argument-preview-the-future-of-tribal-courts-the-power-to-adjudicate-civil-torts-involving-non-indians/.

[2] *See, e.g.*, Upper Skagit Indian Tribe v. Lundgren, 138 S. Ct. 1649, 1661 (2018) (remanding case back to state court to assess application of tribal sovereign immunity to off-reservation land held by tribe); Lewis v. Clarke, 137 S. Ct. 1285, 1288 (2017) (holding that, in a suit brought against a tribal employee in his individual capacity, the employee rather than the tribe is the real party in interest; the tribe's sovereign immunity is not implicated).

[3] Adoptive Couple v. Baby Girl, 570 U.S. 637, 647 (2013) [hereinafter The Baby Veronica Case] (holding, among other things, that a biological Indian father's rights could be terminated without heightened showings when he abandoned the child prior to birth and never had physical or legal custody of the child).

[4] Treaty between the United States and the Yakama Nation of Indians, June 9, 1855, 12 Stat. 951 [hereinafter 1855 Yakama Treaty].

States, to travel upon all public highways."[5] Cougar Den, Inc. (Cougar Den)—a business owned by a Yakama member—purchased and transported motor fuel into the state and resold it to on-reservation retailers.[6] The Washington Supreme Court ruled that the treaty insulated Cougar Den from having to pay a Washington State motor fuels tax on that gasoline.[7] The Supreme Court agreed, though in such a way that the limits of the right-to-travel provision in the 1855 Yakama Treaty may still not be perfectly clear.[8] Nonetheless, this case could affect the interpretation of similar provisions in other treaties, and potentially impact state taxation of other activities both on- and off-reservation.[9]

Legal Backdrop: State Taxing Authority over Tribal Activity

In general, states may tax off-reservation activities of Indian tribes unless an explicit federal law exempts those activities. In 1973, the Court decided *Mescalero Apache Tribe v. Jones*, holding that New Mexico could impose a gross receipts tax on a tribal ski resort operated on nonreservation land leased from the federal government.[10] According to the Court in *Mescalero*, "[a]bsent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State."[11]

Although *Cougar Den* involved a state tax imposed on off-reservation activity similar to the tax the Court upheld in *Mescalero*, the case arose against a backdrop of states having difficulty collecting taxes on tribal retailers selling goods to non-Indians on Indian reservations, even where courts had upheld the legality of those taxes. Collecting such taxes without tribal cooperation can be challenging because tribal sovereign immunity may defeat suits against a tribe absent tribal waiver or congressional consent.[12] For example, in *Moe v. Confederated Salish and Kootenai Tribes*, the Supreme Court held that a state could impose record-keeping requirements on tribal retailers to facilitate collecting state taxes from on-reservation cigarette sales to non-Indians.[13] However, in *Washington v. Confederated Tribes of Colville Reservation*, the Court later held that tribal sovereign immunity barred a state's enforcement action to compel a tribe to remit such

[5] *Id.* at 12 Stat. 953.

[6] Cougar Den, Inc. v. Wash. State Dep't of Licensing, 188 Wash. 2d 55, 58 (2017), *cert. granted*, 138 S. Ct. 2671 (2018), and aff'd, No. 16-1498, (U.S. Mar. 19, 2019).

[7] *Id.* at 69.

[8] Wash. State Dep't of Licensing v. Cougar Den, Inc., No. 16-1498, at 1-2 (U.S. Mar. 19, 2019) (describing the makeup of the plurality opinions).

[9] *See, e.g.*, Bethany Berger, *Argument Preview: A tax lion in the Cougar Den?—Treaties versus taxes in federal Indian law*, SCOTUSBLOG (Oct. 23, 2018), https://www.scotusblog.com/2018/10/argument-preview-a-tax-lion-in-the-cougar-den-treaties-versus-taxes-in-federal-indian-law/ (noting similar provisions in treaties with the Nez Percé tribe in Idaho and the Flathead tribe in Montana); *see also* Brief of Amici Curiae States of Idaho et al. at 23, *Cougar Den*, 139 S. Ct. 1000 (2007) (No. 16-1498) (arguing that allowing the Washington Supreme Court decision to stand would impact other states' fuel-tax and cigarette tax regimes).

[10] Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148-49 (1973).

[11] *Id.*

[12] *See, e.g.*, Upper Skagit Indian Tribe v. Lundgren, 138 S. Ct. 1649, 1654 (2018) (remanding for consideration of new sovereign immunity argument because "[d]etermining the limits on the sovereign immunity held by Indian tribes is a grave question; the answer will affect all tribes, not just the one before us"); *see also* CRS Legal Sidebar LSB10169, *Supreme Court Directs State Court to Decide Whether Indian Tribe Can Invoke Sovereign Immunity in Property Dispute*, by Hillel R. Smith.

[13] 425 U.S. 463, 483 (1976).

taxes.[14] And when Oklahoma later argued in *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma* that "decisions such as *Moe* and *Colville* give . . . [states] a right [to levy a tax] without a remedy [to collect the tax],"[15] the Court responded by suggesting that states could tax wholesalers, enter into agreements with tribes for collecting the taxes, or secure congressional legislation to require tribes to remit the taxes.[16]

Factual Background: Washington's Motor Fuels Tax and the 1855 Yakama Treaty

A Washington statute imposes a motor fuels tax upon licensed importers who bring large quantities of fuel into the state by way of ground transportation.[17] As of 2018, all 24 Indian tribes in Washington, other than the Yakamas, had negotiated fuel tax agreements under which they would pay the motor fuels tax to the state.[18] The question before the Supreme Court in *Cougar Den*, then, was whether the 1855 Yakama Treaty forbade a similar tax from being imposed on fuel importation activities by Yakama members, on account of that treaty's protection of tribal members' right to travel off-reservation.[19]

Article III of the 1855 Yakama Treaty contains two clauses. The first clause states that "if necessary for the public convenience, roads may be run through the said reservation; and on the other hand, the right of way, with free access from the same to the nearest public highway, is secured to them." The second clause states that the Tribe also has "the right, in common with citizens of the United States, to travel upon all public highways."[20]

Some special canons of construction apply when courts interpret Indian treaties.[21] According to the Supreme Court, courts must "give effect to the terms [of a treaty] as the Indians themselves would have understood them," considering "the larger context that frames the [t]reaty, including 'the history of the treaty, the negotiations, and the practical construction adopted by the parties.'"[22] Partly because many such treaties (including the 1855 Yakama Treaty) were negotiated and drafted in a language other than the Indians' native language and often involved unequal bargaining power, the Supreme Court has stated that "any doubtful expressions in

[14] 447 U.S. 134, 163-64 (1980).

[15] 498 U.S. 505, 512-13 (1991).

[16] *Id.* at 514.

[17] Wash. State Dep't of Licensing v. Cougar Den, Inc. No. 16-1498, at 2 (U.S. Mar. 19, 2019).

[18] *See, e.g.*, WASH. STATE DEP'T OF LICENSING, 2016 TRIBAL FUEL TAX AGREEMENT REPORT (Jan. 2018). https://www.dol.wa.gov/about/docs/leg-reports/2017-tribal-fuel-tax-agreement.pdf.

[19] Wash. State Dep't of Licensing v. Cougar Den, Inc., No. 16-1498, at 2 (U.S. Mar. 19, 2019) (citing 1855 Treaty, 12 Stat. 951 at 953) (describing several reserved rights on nonreservation land).

[20] 1855 Treaty, 12 Stat. at 952-953.

[21] See, e.g., Oneida Cty., N.Y. v. Oneida Indian Nation of New York State, 470 U.S. 226, 247 (1985) ("The canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians. Thus, it is well established that treaties should be construed liberally in favor of the Indians, . . . with ambiguous provisions interpreted to their benefit . . .) (internal citations omitted); cf. Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 766 (1985) (observing that "the standard principles of statutory construction do not have their usual force in cases involving Indian law," and in such cases, relevant "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit").

[22] Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 196 (1999).

[treaties] should be resolved in the Indians' favor."[23] However, courts must still take care not to extend treaty language beyond what it was intended to cover.[24]

Case Background: The Washington Supreme Court's Decision

When considering whether the State of Washington could collect a motor fuels tax against Cougar Den, the Washington Supreme Court had to determine whether the right to travel conferred by the 1855 Yakama Treaty was implicated. Ultimately, a majority of that court held that it was: the State of Washington could not enforce its motor fuels tax against Yakama tribal members because that would infringe on the Tribe's treaty-protected right to travel.[25] Specifically, the majority held that, "in this case, it was impossible for Cougar Den to import fuel without using the highway."[26] Under the majority's view, the motor fuels tax constituted an impermissible burden or condition on tribal members' use of the highways to transport their goods, which violated the treaty.[27] In reaching this decision, the majority relied heavily on a decision rendered by the U.S. Court of Appeals for the Ninth Circuit in *United States v. Smiskin*, which held that a Washington State law prohibiting the transportation and possession of unstamped cigarettes without prior notice to the state impermissibly restricted the right to travel protected by the 1855 Yakama Treaty.[28] The Washington Supreme Court, reviewing the motor fuels tax, interpreted Ninth Circuit precedent to mean that the 1855 Yakama Treaty provision applied to "any trade, traveling, and importation that requires the use of public roads."[29]

By contrast, two dissenting state court justices read Ninth Circuit precedent narrowly. Because the fuel tax was directed against trade in a product, not the travel itself, the dissenting justices would have upheld the tax.[30]

The U.S. Supreme Court's Decision

Washington appealed the Washington Supreme Court's decision to the U.S. Supreme Court, and the High Court granted review on June 25, 2018.[31]

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[23] Choctaw Nation v. Oklahoma, 397 U.S. 620, 631 (1970); *see also* Wash. State Dep't of Licensing v. Cougar Den, Inc., No. 16-1498, at 6 (U.S. Mar. 19, 2019).

[24] For example, the Court has held that treaty language guaranteeing freedom from state law to the Chickasaw Nation and its members "within [the Nation's] limits" could not be stretched by "liberal construction" beyond its stated geographic limit. *See* Okla. Tax Comm'n v. Chickasaw Nation, 515 U.S. 450, 466 (1995) (holding that Oklahoma could thus tax tribal members living outside of the Chickasaw Nation's borders).

[25] *Id.* at 66-67.

[26] *Id.* at 67.

[27] *Id.* at 66-67.

[28] United States v. Smiskin, 487 F.3d 1260, 1272 (9th Cir. 2007).

[29] Cougar Den, Inc. v. Wash. State Dep't of Licensing, 188 Wash. 2d 55, 57 (2017), *cert. granted*, 138 S. Ct. 2671 (2018), *and aff'd*, 139 S. Ct. 1000 (2019) (No. 16-1498).

[30] *Id.* at 76, 79 (Fairhurst, C.J., dissenting). In other words, the dissenting opinion distinguished the right to *travel* provision in the 1855 Yakama Treaty from a right to *trade*; in the dissenting justices' view, the treaty language (interpreted through the lens of Ninth Circuit precedent) covered "trade *only* when it cannot[] be meaningfully separated from travel, not when travel is merely necessary for trade." *Id.* at 74 (emphasis in original).

[31] Wash. State Dep't of Licensing v. Cougar Den, Inc., 138 S. Ct. 2671 (2018) (granting petition for writ of certiorari). Because the case is a decision by the highest court of a state questioning the validity of a treaty, the Supreme Court has jurisdiction under 28 U.S.C. § 1257.

In their arguments before the Court, the parties disagreed over the correct interpretation of the 1855 Yakama Treaty. Specifically, the parties disputed how the Yakama would have originally understood the right-to-travel provision. Citing another Ninth Circuit case, Cougar Den argued that the 1855 Yakama Treaty "guarantees the Yakama Nation and its members the '*right to transport goods to market without restriction*.'"[32] However, the Washington State taxing authority argued for a more literal and narrow interpretation of the treaty language, emphasizing that the right-to-travel provision contains no mention of taxes.[33] In the state's view, because the fuel tax did not restrict tribe members' ability to travel on public highways, and because the 1855 Yakama Treaty "says nothing about a tax exemption at all," the Treaty did not preempt the tax's applicability to tribe members.[34]

The Supreme Court handed down its decision on March 19, 2019.[35] By a 5-to-4 vote, the Court affirmed the Washington Supreme Court's decision, thereby prohibiting Washington from assessing its motor fuels tax against Cougar Den. However, there was no majority opinion; though five Justices voted to affirm, Justices Sotomayor and Kagan joined an opinion by Justice Breyer, while Justice Ginsburg joined a separate opinion by Justice Gorsuch.[36]

Justice Breyer's opinion noted that the treaty was not written in the tribe's native language, which Justice Breyer declared "put the Yakamas at a significant disadvantage."[37] Justice Breyer contended that, based on precedent going back more than 100 years,[38] courts interpreting an Indian treaty must "see that the terms of the treaty are carried out, so far as possible, in accordance with the meaning they were understood to have by the tribal representatives" at the time.[39] Citing the historical record, Justice Breyer explained that the Yakamas would have understood the right to travel as including "the right to travel with goods for purposes of trade."[40] Accordingly, because "to impose a tax upon traveling with certain goods burdens that travel," the motor fuels tax directly burdened Cougar Den's ability to travel with goods for purposes of trade,

[32] Brief of Respondent at 18, 15-26, *Cougar Den*, 139 S. Ct. 1000 (2018) (No. 16-1498) (quoting United States v. Smiskin, 487 F.3d 1260, 1266 (9th Cir. 2007), and King Mountain Tobacco Co. v. McKenna, 768 F.3d 989, 998 (9th Cir. 2014)).

[33] Brief for the Petitioner at 23-24, *Cougar Den*, 139 S. Ct. 1000 (2018) (No. 16-1498).

[34] *Id.* at 18-34.

[35] Wash. State Dep't of Licensing v. Cougar Den, Inc., No. 16-1498, at 3 (U.S. Mar. 19, 2019).

[36] The remaining Justices all signed onto a dissenting opinion by Chief Justice Roberts, *id.* at 14 ("Because Washington is taxing Cougar Den for possessing fuel, not for traveling on the highways, the State's method of administering its fuel tax is consistent with the treaty."), while Justice Kavanaugh also issued a separate dissent joined by Justice Thomas, *id* at 19 (Kavanaugh, J., dissenting) ("Even if the fuel tax is a highway regulation, it is a nondiscriminatory highway regulation. For that reason as well, the fuel tax does not infringe the Tribe's treaty right to travel on the public highways on equal terms with other U.S. citizens.").

[37] *Cougar Den*, 139 S. Ct. 1000 (2019), at 6.

[38] *See* United States v. Winans, 198 U.S. 371 (1905). At least one commentator has noted that Justice Kavanaugh's separate dissent appeared to interpret the treaty language in a way directly contrary to *Winans*. *See, e.g.*, Bethany Berger, *Opinion Analysis: Washington state motor-fuel tax violates Yakama Treaty*, SCOTUSBLOG, (Mar. 20, 2019), https://www.scotusblog.com/2019/03/opinion-analysis-washington-state-motor-fuel-tax-violates-yakama-treaty/ (noting that "*Winans* called the argument that the treaty guaranteed no more than the fishing rights of any white man 'certainly an impotent outcome to negotiations and a convention which seemed to promise more, and give the word of the Nation for more'"; likewise explaining that, "[a]s Breyer's and Gorsuch's opinions noted, the Supreme Court has rejected Kavanaugh's interpretation of the 'in common with' language several times since *Winans*").

[39] *Cougar Den*, 139 S. Ct. 1000 (2019), at 6 (quoting *Tulee v. Washington*, 315 U.S. 681 (1942) (holding that fishing rights reserved in same 1855 treaty preempted state's charging of licensing fee to Yakama fisherman, even though fee did not apply solely to Yakama fishing)).

[40] *Id.* at 7.

and thus impermissibly violated the 1855 Yakama Treaty.[41] Justice Breyer also concluded that the tax at issue specifically burdened the type of travel the Yakamas had negotiated to protect: travel by public highway.[42] (Washington's motor fuels tax was not assessed on distributors who imported fuel by pipeline or boat.)[43]

Justices Gorsuch, joined by Justice Ginsburg, took a somewhat shorter route to the same conclusion, noting "unchallenged factual findings" from an earlier federal district court case that the Yakamas "understood the right-to-travel provision to provide them 'with the right to travel on all public highways without being subject to any licensing and permitting fees related to the exercise of that right while engaged in the transportation of tribal goods.'"[44] That factual finding, confirmed by a "wealth of historical evidence," in their view required a ruling for the Yakamas.[45]

While five Justices agreed that applying the fuel tax to Cougar Den would violate the 1855 Yakama Treaty, the Court's failure to render an opinion agreed upon by a majority of the Justices leaves some question as to how federal and state courts will construe and apply *Cougar Den*.[46] To the extent that Justice Gorsuch's opinion rests on somewhat narrower grounds than Justice Breyer's, that may be deemed to be the controlling opinion of the Court.[47] Because it relied on unchallenged evidence of the tribe's understanding of the right-to-travel provision, Justice Gorsuch's opinion leaves open the possibility that other, identical terms in other treaties could be interpreted differently, if there is different evidence about the relevant tribes' understanding.[48]

Chief Justice Roberts wrote an opinion on behalf of the four dissenting Justices, objecting that "the mere fact that a state law has an effect on the Yakamas *while* they are exercising a treaty right does not establish that the law impermissibly burdens the right itself."[49] The Chief Justice's dissent went on to express concern that the plurality and concurring opinions could, for example, foreclose the applicability of "law[s] against possession of drugs or illegal firearms" by tribe members on public highways, because tribe members could invoke the treaty-protected right to travel when traveling with such items.[50] The plurality responded to this concern by emphasizing that it did not "hold that the treaty deprives the State of the power to regulate to prevent danger to health or safety occasioned by a tribe member's exercise of treaty rights."[51]

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[41] *Id.* at 7-8.

[42] *Id.* at 5.

[43] *Id.*

[44] *Id.* at 10 (discussing Yakama Indian Nation v. Flores, 955 F.Supp. 1229 (ED Wash. 1997), and explaining that the Court must "give effect to the terms as the Indians themselves would have understood them" (quoting Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 196 (1999))).

[45] *Id.* at 11.

[46] *See, e.g.*, Marks v. United States, 430 U.S. 188, 193 (1977) (discussing the determination of "the holding of the Court" when "a fragmented Court decides a case"); *see also, e.g.*, Ryan C. Williams, *Questioning Marks: Plurality Decisions and Precedential Constraint*, 69 STAN. L. REV. 795, 799 (2017) ("[Q]uestions regarding the proper application of the *Marks* framework have long bedeviled lower courts' efforts to identify the controlling portions of Supreme Court plurality decisions.").

[47] *See supra* note 46.

[48] *Cougar Den*, 139 S. Ct. 1000 (2019), at 10-12.

[49] *Id.* at 14 (Roberts, C.J., dissenting).

[50] *Id.* at 17. (Roberts, C.J., dissenting).

[51] *Id.* at 9.

Implications and Considerations for Congress

The Court's decision in *Cougar Den* might prompt Congress to further consider the ability of states to enforce and collect valid state taxes from Indian tribes. *Cougar Den* involved a considerable amount of tax revenue; in December 2013, Washington assessed $3.6 million in taxes, penalties, and licensing fees against Cougar Den.[52] And there are similar right-to-travel provisions in treaties with other tribes, including the Nez Percé Indians of Idaho and the Flathead, Kootenay, and Upper Pend d'Oreilles Indians of Montana.[53] These similarly worded treaties could give rise to future challenges to state taxing authority over tribe members. Moreover, Congress could choose to act in the event legislators believe that Chief Justice Roberts's fears about health and safety laws are well-founded.[54] Because of Congress's plenary authority over Indian matters, only Congress, not a state, could act to limit or eliminate a right granted by treaty.[55] However, if Congress chooses to do so, its intention must be "clear and plain."[56]

Cougar Den also might prompt further reflection on the differences between state and federal tax exemptions for tribes. Relying on Supreme Court precedent upholding a tax exemption based on explicit language in the General Allotment Act, the Ninth Circuit, for example, has generally held that an exemption from a *federal* tax must be explicit.[57] Accordingly, the Yakama tribe is currently not exempt from federal heavy vehicle and diesel fuel taxes[58] or from the federal excise tax on manufactured tobacco products[59] because the right-to-travel provision in the 1855 Yakama Treaty is not sufficiently explicit to exempt the tribe from federal taxes. Legislation could be drafted either to eliminate or to enshrine that different treatment.

Herrera v. Wyoming

In *Herrera v. Wyoming*,[60] the Supreme Court resolved a disagreement about whether either Wyoming's admission into the Union or the later establishment of the Bighorn National Forest abrogated the Crow Tribe of Indians' treaty rights to hunt on "unoccupied lands of the United States."[61] The Court concluded that neither event categorically affected those treaty rights.[62]

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[52] Wash. State Dep't of Licensing v. Cougar Den, Inc., No. 16-1498, at 3 (U.S. Mar. 19, 2019).

[53] *See* Brief for the United States as Amicus Curiae at 21, *Cougar Den*, 139 S. Ct. 1000 (2018) (No. 16-1498).

[54] *See Cougar Den*, 139 S. Ct. 1000 (2019), at 17 (Roberts, C.J., dissenting).

[55] South Dakota v. Yankton Sioux Tribe, 522 U.S. 329 (1998).

[56] United States v. Dion, 476 U.S. 734, 738 (1986).

[57] United States v. Anderson, 625 F.2d 910, 913 (9th Cir. 1980) ("The intent to exclude must be definitely expressed, where, as here, the general language of the Act laying the tax is broad enough to include the subject-matter" (quoting Choteau v. Burnet, 283 U.S. 691, 696 (1931))).

[58] Ramsey v. United States, 302 F.3d 1074, 1080 (9th Cir. 2002) (finding no "express exemptive language" in the 1855 Treaty).

[59] United States v. King Mountain Tobacco Co., 899 F.3d 954 (9th Cir. 2018), *pet. for cert. filed* (No. 18-984, Jan. 29, 2019).

[60] 139 S. Ct. 1686 (2019). This case involved an appeal from Herrera v. Wyoming, CV 2016-242 (4th Jud. District, Sheridan Cty., Wyo., Apr. 25, 2017), *cert. granted*, 138 S. Ct. 2707 (2018). The opinions of the Wyoming state courts in this case are unpublished, but were reproduced in the appendix to the petition for certiorari. *See* Petition for Writ of Certiorari at 3 & App. 1-43, Herrera v. Wyoming, 139 S. Ct. 1686 (2019) (No. 27-532).

[61] Petition for Writ of Certiorari at i, Herrera v. Wyoming, 139 S. Ct. 1686 (2019) (No. 27-532).

[62] Herrera v. Wyoming, 139 S. Ct. 1686, 1700-03 (2019).

This decision was especially notable because the Supreme Court formally repudiated its 1896 ruling in *Ward v. Race Horse*, which had held that Wyoming's admission into the Union effectively abrogated a similar hunting-rights provision in a treaty between the United States and another Indian tribe.[63] *Race Horse* had already appeared to be in considerable tension with the Court's decision over a century later in *Minnesota v. Mille Lacs Band of Chippewa Indians*, when the Court declared that "[t]reaty rights are not impliedly terminated upon statehood."[64] However, it was not until *Herrera* that the tension was resolved; the Court stated that it was "formaliz[ing] what is evident in *Mille Lacs* itself. While *Race Horse* 'was not expressly overruled' in *Mille Lacs*, 'it must be regarded as retaining no vitality' after that decision."[65] This rejection of *Race Horse* undermined other cases relying on it, causing a domino effect that ultimately led the Supreme Court to reverse the Wyoming state court decisions that had declined to recognize the Crow Tribe's treaty hunting rights.

Case Background: the Wyoming State Court Decisions

The *Herrera* case arose after the petitioner, a Crow Tribe member, tracked several elk beyond the Crow reservation's Montana borders into the Bighorn National Forest in Wyoming.[66] Herrera and his hunting companions eventually killed three elk, and Herrera was criminally charged by Wyoming with violating its state hunting laws.[67]

Herrera moved to dismiss the charges, arguing that he was exercising subsistence hunting rights long protected by the 1868 Treaty of Fort Laramie (1868 Treaty) between the Crow Tribe and the United States.[68] In exchange for ceding much of the territory that would eventually become Wyoming to the United States, the Crow Tribe received a guarantee of "the right to hunt on the unoccupied lands of the United States so long as game may be found thereon . . . ."[69] According to Herrera, this treaty provision provided him with permission to hunt off-reservation in the Bighorn National Forest and prevented Wyoming from going forward with his prosecution under state law.[70] Wyoming disagreed, contending that the hunting rights conferred to Crow Tribe members under the 1868 Treaty were abrogated following Wyoming's 1890 admittance into the Union or, alternatively, the 1897 establishment of the Bighorn National Forest.[71]

Rejecting Herrera's claim of treaty protection, the trial court determined it was bound by a 1995 United States Court of Appeals for the Tenth Circuit (Tenth Circuit) decision in *Crow Tribe of Indians v. Repsis*.[72] That decision held that the 1868 Treaty's hunting-rights provisions had been abrogated for the same reasons as the similarly worded treaty provisions in *Race Horse*.[73] Alternatively, the Tenth Circuit concluded that the establishment of the Bighorn National Forest

[63] 163 U.S. 504, 514-15 (1896).

[64] 526 U.S. 172, 207 (1999).

[65] Herrera v. Wyoming, 139 S. Ct. 1686, 1697 (2019).

[66] *E.g.*, Petition for Writ of Certiorari at 1-2, *Herrera*, 139 S. Ct. 1686 (2019) (No. 27-532).

[67] *See* WYO. STAT. § 23-3-102(d) (prohibiting "Taking an Antlered Big Game Animal Without a License or During a Closed Season"); *id.* § 23-6-205 (prohibiting being an accessory to the same).

[68] Petition for Writ of Certiorari at 9-11, *Herrera*, 139 S. Ct. 1686 (2019) (No. 27-532).

[69] Treaty of Fort Laramie with the Crow ("1868 Treaty"), Sept. 17, 1851, 11 Stat. 749.

[70] *See* Petition for Writ of Certiorari at 4-8, 16, *Herrera*, 139 S. Ct. 1686 (2019) (No. 27-532).

[71] *Id.*at 10.

[72] 73 F.3d 982 (10th Cir. 1995).

[73] Crow Tribe of Indians v. Repsis, 73 F.3d 982, 985 (10th Cir. 1995) (holding that Wyoming's statehood repealed rights reserved under the 1868 Treaty, and tribe members were therefore subject to Wyoming's game laws).

in 1897 rendered those lands "occupied" and therefore no longer subject to the access rights given to Crow tribal members by the 1868 Treaty.[74]

According to the Wyoming court, principles of collateral estoppel prevented Herrera from "attempting to relitigate the validity of the off-reservation treaty hunting right that was previously held to be invalid" by the Tenth Circuit.[75] After Herrera was convicted and denied appeal in a higher Wyoming state court, [76] he sought review in the U.S. Supreme Court,[77] which granted his request.[78]

Legal Backdrop: Court Decisions Interpreting Statehood's Effects on Tribal Treaty Rights

A key issue in *Herrera* concerned the interplay of the Court's prior decisions considering statehood's effect on the continuing viability of treaties between the United States and Indian tribes located within a newly acceded state's territorial boundaries.[79] In *Race Horse*, the Court had taken the view that Congress's legislative action in admitting a state to the Union abrogated earlier treaties conferring tribal rights to nonreservation lands within the new state's territory.[80] This decision was partly premised on the equal footing doctrine—the idea that newly admitted states must enjoy sovereignty equal to that of existing states.[81]

In *Race Horse* itself, the Court held that a hunting right in a Shoshone-Bannock treaty—a provision with language identical to the 1868 Treaty—violated the equal footing doctrine and had been abrogated by legislation admitting Wyoming to the Union.[82] The Supreme Court reasoned that Wyoming's admission to the Union must have impliedly abrogated the treaty right, because "all the states" have the power "to regulate the killing of game within their borders," and the language of the Shoshone-Bannock treaty would impermissibly limit Wyoming's power to do so relative to other states.[83] In other words, the "two facts" of the treaty's hunting rights and of Wyoming's statehood were "irreconcilable, in the sense that the two, under no reasonable

[74] *Id.* at 993 (deciding that "the creation of the Big Horn (*sic*) National Forest resulted in the 'occupation' of the land").

[75] *See* Petition for Writ of Certiorari at 12, *Herrera*, 139 S. Ct. 1686 (2019) (No. 27-532).

[76] *Id.* at 10-11.

[77] *See id.* at 14 (arguing that "[n]othing has abrogated the Tribe's treaty right to hunt on 'unoccupied' federal lands"). If the treaty rights did survive Wyoming's admission into the Union, the Court may proceed to decide the contested question of whether the Bighorn National Forest constitutes "unoccupied lands of the United States." *See id.* at 2 (noting that both state courts relied on an alternative finding that the 1897 establishment of the Bighorn National Forest rendered those lands "occupied" for purposes of treaty interpretation).

[78] Herrera v. Wyoming, 138 S. Ct. 2707 (2018) (granting petition for writ of certiorari).

[79] *See generally, e.g.*, Gregory Ablavsky, *Argument Preview: Tribes, treaties and animals return to the Supreme Cour*t, SCOTUSBLOG (Jan. 2, 2019).

[80] *E.g.*, Ward v. Race Horse, 163 U.S. 504, 511 (1896) ("[T]he language of the act admitting Wyoming into the Union, which recognized her coequal rights, was merely declaratory of the general rule.").

[81] *See, e.g.*, Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212, 223 (1845); Mayor of Mobile v. Eslava, 41 U.S. (16 Pet.) 234, 258-59 (1842) (Catron, J., concurring) (explaining that new states have "equal capacities of self-government with the old states, and equal benefits under the constitution of the United States"); Escanaba & Lake Mich. Trans. Co. v. City of Chicago, 107 U.S. 678, 688-89 (1883) ("[Illinois] was admitted, and could be admitted, only on the same footing with [the original states].").

[82] *Race Horse*, 163 U.S. at 514.

[83] *Id.* (expounding that the treaty's hunting rights would render Wyoming an unequal member of the Union, "shorn of a legislative power vested in all the other states of the Union, a power resulting from the fact of statehood and incident to its plenary existence").

hypothesis, [could] be construed as co-existing."[84] The fact that Congress made no express statement abrogating the Shoshone-Bannock treaty rights did not change that reasoning.[85] As a potentially alternative basis for its decision, the Court explained that because the treaty had been enacted while the land had territory status, it necessarily made only an "essentially perishable . . . temporary and precarious" promise, "intended to be of a limited duration."[86]

The equal footing doctrine's primacy in federal Indian law was short-lived, however. In *United States v. Winans*,[87] less than a decade after *Race Horse*, the Court upheld tribal fishing rights granted to the Yakama tribe under the 1855 Yakama Treaty.[88] The Court specifically concluded that those treaty rights were not displaced by the State of Washington's admission into the Union. According to the *Winans* Court,

> The extinguishment of the Indian title, opening the land for settlement, and preparing the way for future states, were appropriate to the objects for which the United States held the territory. And surely it was within the competency of the [nation] to secure to the Indians such a remnant of the great rights they possessed as "taking fish at all usual and accustomed places." Nor does it restrain the state unreasonably, if at all, in the regulation of the right.[89]

In short, just as Congress had the power to extinguish tribal title to the land, it had the power to reserve fishing rights to the tribes on nonreservation land—and respecting that preservation of rights was a reasonable restraint on, rather a dramatic curtailment of, state sovereignty.

But *Race Horse*'s holding was not explicitly overruled by *Winans*, and roughly a century later, Wyoming charged another Crow Tribe member with illegally hunting elk in the Bighorn National Forest (in a case called *Crow Tribe of Indians v. Repsis*, which predated Herrera's case, but involved similar factual circumstances).[90] The Crow Tribe sought a declaratory judgment in federal court, hoping to resecure the 1868 Treaty hunting and fishing rights.[91] The Tenth Circuit ruled against the tribe, concluding that because the relevant provision of the 1868 Treaty was virtually identical to the one abrogated by the Supreme Court in *Race Horse*, the *Race Horse* decision mandated that the treaty rights be considered abrogated by statehood.[92] In so doing, the Tenth Circuit also emphasized *Race Horse*'s conclusion that the 1868 Treaty granted only "temporary and precarious" rights, such that Congress could not have intended them to be binding on a later-created state.[93]

A few years after *Repsis*, the Supreme Court decided *Minnesota v. Mille Lacs Band of Chippewa Indians*, which involved fishing rights under an 1837 tribal treaty in Minnesota.[94] There, the Court declined to apply *Race Horse* and rejected its reasoning, at least in substantial part.[95] The

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[84] *Id.*

[85] *Id.* at 515-16.

[86] *Id.*

[87] United States v. Winans, 198 U.S. 371 (1905).

[88] This is the same treaty discussed in *Cougar Den. See* Treaty Between the United States and the Yakama Nation of Indians, June 9, 1855, 12 Stat. 951[hereinafter 1855 Yakama Treaty].

[89] *Winans*, 198 U.S. at 384.

[90] Crow Tribe of Indians v. Repsis, 73 F.3d 982, 986 (10th Cir. 1995).

[91] *Id.*

[92] *Id.* at 991-92.

[93] *Id.* at 991.

[94] 526 U.S. 172 (1999).

[95] *Id.* at 203-05.

earlier decision's equal-footing holding rested on a "false premise," the Court said, and its language about "temporary and precarious" treaty rights was "too broad to be useful."[96] Noting that courts "interpret Indian treaties to give effect to the terms as the Indians themselves would have understood them,"[97] the High Court explained that "Congress may abrogate Indian treaty rights, but it must clearly express its intent to do so."[98] Since there was no "clear evidence" of Congress's intent to abrogate the tribal fishing rights at issue, those rights simply were not abrogated.[99] In the view of the Court, "[t]reaty rights are *not* impliedly terminated upon statehood."[100]

Although highly critical of *Race Horse*, the Court majority in *Mille Lacs* did not expressly overrule the earlier decision (though Chief Justice Rehnquist, writing in dissent, accused the majority of overruling *Race Horse* "*sub silentio*," via "a feat of jurisprudential legerdemain").[101]

The *Herrera* Decision: the Impact of Statehood

Thus, when *Herrera* came before the Supreme Court, the question of whether *Race Horse* would affect the outcome was a point of disagreement between the parties. Herrera argued that "*Mille Lacs* forecloses any suggestion that Wyoming's admission terminated the Tribe's treaty hunting rights."[102] Wyoming disagreed, arguing that at least one aspect of *Race Horse* remained good law—namely, its recognition that rights conferred to tribal members by treaty may be only of a "temporary and precarious nature,"[103] so that the "the proper inquiry is whether Congress intended . . . [those] rights to be perpetual or to expire upon the happening of a clearly contemplated event, such as statehood."[104] According to Wyoming, *Mille Lacs* did not disturb—and indeed, reaffirmed—this aspect of *Race Horse*, which allowed for the conclusion that statehood terminates such temporary rights.[105]

Ultimately, the Supreme Court rejected Wyoming's arguments by a 5-4 vote. Writing for the Court majority, Justice Sotomayor—joined by Justices Ginsburg, Breyer, Kagan, and Gorsuch—acknowledged that *Race Horse* "relied on two lines of reasoning"—namely the equal footing doctrine and the "temporary and precarious" nature of certain treaty rights. The Court determined that *Mille Lacs* had "undercut both pillars of *Race Horse*'s reasoning," and "methodically repudiated that decision's logic."[106] "[T]he crucial inquiry for treaty termination analysis" established by *Mille Lacs* "is whether Congress has expressly abrogated an Indian treaty

[96] *Id.* at 203, 206.

[97] *Id.* at 196 (citing Washington v. Wash, State Commercial Passenger Fishing Vessel Assn., 443 U.S. 658, 675–676 (1979); United States v. Winans, 198 U.S. 371, 380–381 (1905).

[98] *Mille Lacs*, 526 U.S. 172 at 202-203.

[99] *Id.* at 203.

[100] *Id.* at 207 (emphasis added).

[101] *Id.* at 219 (Rehnquist, C.J., dissenting).

[102] Reply Brief for Petitioner at 4, Herrera v. State of Wyoming, 139 S. Ct. 1686 (2019) (No. 17-532).

[103] Ward v. Race Horse, 163 U.S. 504, 515 (1896) (deciding that "the whole argument of the defendant in error rests on the assumption that there was a perpetual right conveyed by the treaty, when, in fact, the privilege given was temporary and precarious").

[104] Brief in Opposition at 206-07, Herrera v. State of Wyoming, 139 S. Ct. 1686 (2019) (No. 17-532) (citing *Mille Lacs*).

[105] *Id*. at 20-22.

[106] Herrera v. Wyoming, 139 S. Ct. 1686, 1694-95 (2019).

right or whether a termination point identified in the treaty itself has been satisfied."[107] Unless the legislation granting statehood "demonstrates Congress's clear intent to abrogate a treaty" or statehood is mentioned in the treaty itself as a termination point, "[s]tatehood is irrelevant" to treaty termination analysis.[108]

Applying the *Mille Lacs* test to Herrera's case thus involved two questions: (1) Did the Wyoming Statehood Act "show that Congress intended to end the 1868 Treaty hunting right"? and (2) Was there any evidence "in the treaty itself that Congress intended the hunting right to expire at statehood"?[109] The Supreme Court concluded that the answer to both questions was "No"—there was "simply . . . no evidence" in either the Wyoming Statehood Act or in the treaty itself that Congress intended the Crow Tribe's hunting rights to end at statehood.[110]

A Procedural Matter: Issue Preclusion

Herrera faced an additional procedural hurdle at the Supreme Court: the parties disagreed over whether he should even be legally allowed to raise his arguments in the first place. The Wyoming state courts had ruled that the Tenth Circuit's 1995 decision in *Repsis* barred Herrera from even being able to litigate the question of whether the Crow Tribe retained any off-reservation hunting rights under the 1868 Treaty. In short, they said that question had already been answered. Thus, much of the briefing at the Supreme Court focused on issue preclusion, a doctrine that prevents parties from resurrecting an issue already directly decided in a previous case.[111] Both Herrera and the United States as amicus curiae argued that preclusion should not apply when there had been an intervening change in the law, like the Supreme Court's *Mille Lacs* decision.[112] Wyoming, however, maintained that *Mille Lacs* had not overruled *Race Horse* in its entirety, and that at least one line of its reasoning survived: in Wyoming's view, issue preclusion should at least attach to the Tenth Circuit's finding in *Repsis* that the 1868 Treaty rights were only temporary. In other words, Wyoming argued that Herrera should not be permitted to relitigate the issue of whether Congress intended the 1868 Treaty's hunting rights to be "temporary" rights that expired after statehood because the Tenth Circuit had already definitively answered that question.[113]

For the same reasons that the Supreme Court disagreed that statehood had necessarily abrogated Herrera's treaty rights, it likewise rejected Wyoming's claim of issue preclusion.[114] *Mille Lacs* constituted a "change in law" that justified "an exception to preclusion in this case."[115] "At a minimum," the Court said, "a repudiated decision does not retain preclusive force."[116]

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[107] *Id.* at 1696.

[108] *Id.*

[109] *Id.* at 1698-99.

[110] *Id.* at 1699.

[111] *See, e.g.*, Brief in Opposition at 14-24, Herrera v. Wyoming, 139 S. Ct. 1686 (2019) (No. 17-532).

[112] Petition for Writ of Certiorari at 30; Brief for the United States as Amicus Curiae at 18-19, Herrera v. Wyoming, 139 S. Ct. 1686 (2019) (No. 17-532).

[113] Brief in Opposition at 6, 20, Herrera v. Wyoming, 139 S. Ct. 1686 (2019) (No. 17-532).

[114] Herrera v. Wyoming, 139 S. Ct. 1686, 1697 (2019).

[115] *Id.* at 1698.

[116] *Id.*

The *Herrera* Decision: the Meaning of "Unoccupied Land"[117]

Having decided that the 1868 Treaty's hunting rights provision remained in effect even after Wyoming statehood, the Court then needed to decide whether the Bighorn National Forest should be considered "unoccupied" land under the terms of the treaty.[118] The Tenth Circuit in *Repsis* had concluded that the establishment of the national forest in 1897 rendered the land "occupied" by the federal government because it was "no longer available for settlement," and the resources from the land could not be used "without federal permission."[119] Wyoming similarly argued that "[c]reation of the Bighorn National Forest was an act of occupation, placing that land outside of the ambit of the Crow Treaty right";[120] in the state's view, because the national forest "is federal property, and the United States decides who may enter and what they may do," the national forest should constitute occupied land on which the 1868 Treaty would grant no special privileges.[121]

On the other hand, Herrera contended that the text and historical record of the 1868 Treaty demonstrate an understanding by the parties that "the term 'occupied' entailed actual, physical settlement of the land by non-Indian settlers."[122] The United States, writing as amicus curiae, agreed.[123] Herrera and the United States noted that, in other cases, the declaration of a national forest had led courts to declare the designated land "open and unclaimed."[124]

The Supreme Court reiterated that provisions of treaties with tribes must be interpreted as they would naturally have been understood by the tribes at the time those treaties were executed.[125] In this case, the Supreme Court concluded "it is clear that the Crow Tribe would have understood the word 'unoccupied' to denote an area free of residence or settlement by non-Indians."[126] That conclusion was based on analysis of the treaty's text, which used variations of the words "occupy" and "settle" at various points, and supported by both contemporaneous dictionary definitions and historical evidence from the time of the treaty negotiation and signing.[127] Accordingly, "President Cleveland's proclamation creating Bighorn National Forest did not

[117] The parties likewise disagreed about whether preclusion attached to the brief discussion in *Repsis* of whether the Bighorn National Forest constituted occupied or unoccupied land. *See, e.g.*, Brief in Opposition at 17, Herrera v. Wyoming, 139 S. Ct. 1686 (2019) (No. 17-532). Though the Supreme Court opinion did not squarely address that question, its discussion of the definition of "unoccupied" strongly suggests that it found no validity in the argument that the issue was precluded. *See, e.g.*, Herrera v. Wyoming, 139 S. Ct. 1686, 1700-03 (2019).

[118] As noted above, the 1868 Treaty granted the Crow Tribe hunting rights only on "unoccupied lands of the United States." Petition for Writ of Certiorari at i, Herrera v. Wyoming, 139 S. Ct. 1686 (2019) (No. 27-532).

[119] Crow Tribe of Indians v. Repsis, 73 F.3d 982, 993 (10th Cir. 1995).

[120] Brief for Respondent at 21, Herrera v. State of Wyoming, 139 S. Ct. 1686 (2019) (No. 17-532).

[121] *Id.* at *60.

[122] Brief for Petitioner at 19, Herrera v. State of Wyoming, 139 S. Ct. 1686 (2019) (No. 17-532).

[123] Brief for the United States as Amicus Curiae Supporting Petitioner at 26, Herrera v. State of Wyoming, 139 S. Ct. 1686 (2019) (No. 17-532) (arguing that the Crow would have understood the creation of the Bighorn National Forest to mean that those lands were no longer available for settlement, and were thus unoccupied).

[124] *See* Reply Brief for Petitioner at 6, Herrera v. State of Wyoming, 139 S. Ct. 1686 (2019) (No. 17-532) (citing State v. Buchanan, 978 P.2d 1070, 1082 (Wash. 1999) (defining "open and unclaimed" lands as "publicly-owned lands, which are not obviously occupied"; State v. Stasso, 563 P.2d 562, 565 (Mont. 1977) (similar); State v. Arthur, 261 P.2d 135, 141 (Idaho 1953) ("National Forest Reserve . . . was 'open and unclaimed land.'")).

[125] Herrera v. Wyoming, 139 S. Ct. 1686, 1701 (2019) (citing Washington v. Wash. State Comm'l Passenger Fishing Vessel Ass'n, 443 U.S. 658, 676, modified sub nom. Washington v. United States, 444 U.S. 816 (1979)).

[126] Herrera v. Wyoming, 139 S. Ct. 1686, 1701 (2019).

[127] *Id.* at 1701-02.

'occupy' that area within the treaty's meaning. To the contrary, the President 'reserved' the lands 'from entry or settlement.'"[128]

The *Herrera* Decision: Dissent and Limitations

The majority opinion in *Herrera* noted that its scope was limited in two distinct ways. First, the majority held only "that Bighorn National Forest is not categorically occupied, not that all areas within the forest are unoccupied."[129] This leaves open the possibility that some parts of the Bighorn National Forest contain enough indicia of settlement to be considered "occupied," even though the rest of the forest is not—which would preclude exercise of Crow tribal hunting rights in those areas. Second, the Supreme Court declined to consider arguments that Wyoming could regulate the exercise of hunting rights to promote conservation purposes.[130] Because those arguments were not considered by the state appellate court, the Supreme Court did "not pass on the viability of those arguments" in its opinion. That may leave open another avenue by which Wyoming could limit the exercise of tribal hunting rights within its borders.

A dissent written by Justice Alito was joined by the remaining three members of the Court.[131] The four dissenting Justices would have determined that the Tenth Circuit's decision in *Repsis* ("holding that the hunting right conferred by [the 1868 Treaty] is no longer in force") was still binding, such that "no member of the Tribe will be able to assert the hunting right that the Court addresses."[132] In other words, the dissent would have started with the parties' issue preclusion arguments, and would have determined that Herrera had no right to relitigate an issue that had already been settled by a court.[133]

More specifically, although the dissent expressed some doubt that *Mille Lacs* represented a sufficient change in the law to foreclose *Repsis*'s conclusion that Wyoming statehood abrogated the 1868 Treaty rights, it would not have reached that question.[134] Instead, the dissent would have given preclusive effect to *Repsis*'s alternate legal conclusion, which it says existed independently of *Race Horse*—namely, that the *Repsis* court decided the Bighorn National Forest was not "unoccupied" within the treaty's meaning.[135]

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[128] *Id.* at 1702.

[129] *Id.* at 1703.

[130] *Id.* The Supreme Court has previously opined that states may be able to "regulate" hunting and fishing rights "in the interest of conservation," as long as a state can show "that its regulation is a reasonable and necessary conservation measure" and "does not discriminate against the Indians." Antoine v. Washington, 420 U.S. 194, 207 (1975) (internal quotations omitted).

[131] *Herrera*, 139 S. Ct. at 1703.

[132] *Id.* at 1703 (Alito, J., dissenting).

[133] *Id.* at 1707 (Alito, J., dissenting) ("Herrera asserts the same hunting right that was actually litigated and decided against his Tribe in *Repsis* . . . And, because Herrera's asserted right is based on his membership in the Tribe, a judgment binding on the Tribe is also binding on him. As a result, the Wyoming appellate court held that *Repsis* bound Herrera and precluded him from asserting a treaty-rights defense. That holding was correct.").

[134] *Id.* at 1709 (Alito, J., dissenting) ("Although the majority in the present case believes that *Mille Lacs* unquestionably constitutes a sufficient change in the legal context . . . there is a respectable argument on the other side. I would not decide that question because Herrera and other members of the Crow Tribe are bound by the judgment in *Repsis* even if the change-in-legal-context exception applies.").

[135] *Id.* (Alito, J., dissenting).

Implications and Considerations for Congress

Congress's plenary authority to govern interactions with Indian tribes remains clear. Congress may at any time expressly disavow any provision of the 1868 Treaty, or may plainly reaffirm its commitment to any Indian treaty that remains in effect. To the latter end, Congress could, if it wished, clarify that the Bighorn National Forest (or other national forests) should be treated as unoccupied lands for the purposes of construing Indian treaty rights. By contrast, Congress could also choose to broadly abrogate hunting and fishing rights in national forests or other areas, but *Herrera* reaffirms that if Congress does so, it must clearly state that intention.[136]

Carpenter v. Murphy

In *Carpenter v. Murphy*, the Supreme Court is reviewing a decision by the U.S. Court of Appeals for the Tenth Circuit (Tenth Circuit) concerning whether Oklahoma could legally charge and convict Patrick Murphy, a member of the Muscogee (Creek) Nation who was convicted of killing a fellow tribe member.[137] The validity of Murphy's murder conviction may turn on whether his crime was committed within the boundaries of the Muscogee (Creek) reservation—a reservation that Oklahoma says ceased to exist in the early 1900s.[138] Although the Oklahoma state courts rejected Murphy's efforts to overturn his conviction, the Tenth Circuit concluded that the crime did occur on reservation land, and that Oklahoma thus lacked authority to prosecute Murphy.[139]

Although the Supreme Court heard oral arguments in *Carpenter v. Murphy* at the end of 2018,[140] it ordered the case restored to the calendar and set for reargument in the October 2019 term.[141] Whether the Court will ultimately agree with the Tenth Circuit's decision is uncertain, but if it does, the decision could have significant consequences beyond Murphy's case. The land where the crime occurred would then be "Indian country" under federal law, which Oklahoma says would significantly limit its criminal jurisdiction over offenses committed by Indians on such land.[142] Such a decision could prompt additional litigation concerning the status of other tribal lands within Oklahoma.[143]

The Major Crimes Act and "Indian Country"

The parties have asked the Supreme Court to decide whether the land that was historically designated as belonging to the Muscogee (Creek) Nation constitutes "Indian country," and if so, whether Oklahoma has any criminal jurisdiction over crimes like Murphy's. The federal government (and Congress in particular) has long been recognized as having plenary authority over Indian affairs,[144] so states generally cannot exercise criminal jurisdiction over Indians in

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[136] *Id.* at 1698 ("If Congress seeks to abrogate treaty rights, 'it must clearly express its intent to do so.'" (quoting *Mille Lacs*, 526 U.S. at 202)).

[137] Murphy v. Royal, 875 F.3d 896, 905-07 (10th Cir. 2017), *cert. granted*, 138 S. Ct. 2026 (2018).

[138] *Id.* at 915-17, 923.

[139] *Id.* at 966.

[140] *See* Carpenter v. Murphy, No. 17-1107 (U.S. Nov. 27, 2018).

[141] *See* Order, Carpenter v. Murphy, No. 17-1107 (U.S. June 27, 2019).

[142] Brief for Petitioner at 3, Carpenter v. Murphy, 139 S. Ct. 398 (2018) (No. 17-1107).

[143] *See, e.g.*, *id.* at 6 (explaining that the United States negotiated similar treaties with four other tribes, all of whom maintained rights to reservation land in what would later become the State of Oklahoma).

[144] *See, e.g.*, Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 561 (1832) (Marshall, C.J.) (federal Indian law is both

"Indian country" without federal permission.[145] A federal statute defines "Indian country" to mean (1) all land within an Indian reservation, (2) all dependent Indian communities, and (3) all Indian allotments that still have Indian titles.[146] An area qualifies as Indian country if it fits within any of these three categories, meaning a formal designation of Indian lands as a "reservation" is not required.[147]

Federal law establishes parameters for when states may prosecute certain crimes committed within Indian country. Most relevant to this case, the Major Crimes Act reserves federal jurisdiction over certain serious crimes, like murder and kidnapping, when committed by an Indian within Indian country.[148] Federal jurisdiction under the Major Crimes Act generally forecloses overlapping state (though not tribal) jurisdiction, though legislative exceptions permit some states to exercise jurisdiction over such crimes.[149]

The Tenth Circuit Decision

The Supreme Court has explained that Congress alone has the power to change or erase reservation boundaries.[150] Once land is designated as a reservation, it generally stays that way until Congress eliminates ("disestablishes") or reduces ("diminishes") it.[151] Appealing his state murder conviction to the Tenth Circuit, Murphy contended that the Muscogee (Creek) reservation had never been disestablished and therefore constituted "Indian country," precluding state jurisdiction over his offense.[152] The Tenth Circuit agreed.[153]

In its decision, the Tenth Circuit briefly described the history of the Muscogee (Creek) reservation.[154] In the 1820s, the federal government forcibly relocated the tribe's members (and members of several other tribes) to what is now present-day Oklahoma. As part of that relocation,

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exclusive and preemptive of state law); *see also* Lone Wolf v. Hitchcock, 187 U.S. 553, 564-65 (1903) (addressing breadth of congressional authority over disposition of tribal lands); South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 343 (1998) ("Congress possesses plenary power over Indian affairs, including the power to modify or eliminate tribal rights."); United States v. Rogers, 45 U.S. (4 How.) 567, 572 (1840) (congressional policy decisions dealing with Indians may not be questioned by judiciary); *but see* United States v. Alcea Band of Tillamooks, 329 U.S. 40, 54, (1946) ("The power of Congress over Indian affairs may be of a plenary nature; but it is not absolute."). *See also generally, e.g.*, Nell Jessup Newton, *Federal Power over Indians: Its Sources, Scope, and Limitations*, 132 U. PENN. L. REV. 195 (1984).

[145] *See, e.g.*, Langley v. Ryder 778 F.2d 1092, 1095-96 (5th Cir. 1985) ("Federal protection of tribal self-government precludes criminal jurisdiction of state courts over Indians or their property absent the consent of Congress.") (citing Fisher v. District Court, 424 U.S. 382, 386 (1976)); *see also* Williams v. Lee, 358 U.S. 217, 220 (1959) (noting that as a general rule, states have no jurisdiction within Indian country absent an authorizing act of Congress); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 208 n. 17 (1978) (explaining that state exercise of criminal jurisdiction within Indian country requires a clear and unequivocal federal grant of that authority).

[146] 18 U.S.C. § 1151.

[147] *E.g.*, United States v. McGowan, 302 U.S. 535, 538-39 (1938) (holding that a "colony" that was "validly set apart for the use of the Indians" constituted Indian country, despite not being designated as a "reservation").

[148] *See* 18 U.S.C. § 1153.

[149] *See, e.g.*, *id.* § 1162 (granting several states, though not Oklahoma, "jurisdiction over offenses committed by or against Indians in the [specified] areas of Indian country . . . to the same extent that such State has jurisdiction over offenses committed elsewhere within the State").

[150] South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 330 (1998).

[151] *See id.*

[152] Murphy v. Royal, 875 F.3d 896, 903 (10th Cir. 2017), *cert. granted*, 138 S. Ct. 2026 (2018).

[153] *Id.*

[154] *Id.* at 932.

the government signed a series of treaties with the Muscogee (Creek) Nation, ultimately giving the tribe a vast area of land roughly equivalent to present-day Oklahoma.[155]

That tract of land was later reduced.[156] The final reduction occurred after the Civil War, when the Treaty of 1866 required the Muscogee (Creek) Nation to transfer the western half of its new lands back to the United States.[157]

Though the Muscogee (Creek) Nation later experienced many changes in its relationship with the federal government—most notably related to tribal governance and a push for individual ownership of the land—the boundaries of the Muscogee (Creek) land remained generally unchanged until at least the early 1900s.[158] At that point, the "unique history" of Oklahoma began to transition toward statehood, effectively merging eastern Indian lands and western non-Indian lands into a single geographic entity.[159]

To determine whether Congress intended to disestablish the Muscogee (Creek) reservation land, the Tenth Circuit applied a three-step analysis employed in the Supreme Court's 1984 decision, *Solem v. Bartlett*.[160] Under this framework, courts examine (1) the language of the governing federal statute; (2) the historical circumstances of the statute's enactment; and (3) subsequent events such as Congress's later treatment of an affected area.[161] Importantly, the *Solem* framework instructs courts to resolve any uncertainty in favor of the tribes: if the evidence is not clear, courts "are bound by our traditional solicitude for the Indian tribes to rule that diminishment did not take place and that the old reservation boundaries survived . . . ."[162]

Using this framework, the Tenth Circuit agreed with Murphy that his criminal conduct occurred in Indian country, and Oklahoma therefore lacked jurisdiction over it.[163] Although Oklahoma referenced eight separate federal acts that it viewed as collectively disestablishing the Muscogee (Creek) reservation,[164] the Tenth Circuit ruled that none of those statutes clearly referred to disestablishment, and in some instances reflected Congress's continued recognition of the reservation's borders.[165] Oklahoma's evidence that Congress intended to change its governance over the Muscogee (Creek) reservation failed to convince the Tenth Circuit that Congress also intended to erase the reservation boundaries.[166] Similarly, the Tenth Circuit concluded that events

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[155] *Id.* at 932-33 ("In sum, by the mid-nineteenth century, treaties with the federal government had given the Creek Nation a vast tract of land in modern Oklahoma") (citing Treaty with the Creeks, art. 2, Jan. 24, 1826, 7 Stat. 286, 286,; Treaty with the Creeks, Mar. 24, 1832, 7 Stat. 366; Treaty with the Creeks, art. 3, Feb. 14, 1833, 7 Stat. 417, 419).

[156] *Id.* at 933 ("After the Creek Nation's relocation west, its land was diminished on multiple occasions in the mid-nineteenth century.") (citing Indian Country, U.S.A. v. Oklahoma, 829 F.2d 967, 971 (10th Cir. 1987); Treaty with the Creek and Seminole Tribes, art. 4, Aug. 7, 1856, 11 Stat. 699, 700)).

[157] *Id.* (citing Treaty with the Creeks, arts. 3, 9, June 14, 1866, 14 Stat. 785, 786, 788).

[158] *Id.*at 934.

[159] Petition for Writ of Certiorari at 3, Carpenter v. Murphy, 139 S. Ct. 398 (2018) (No. 17-1107).

[160] *Murphy*, 875 F.3d at 937 (citing Solem v. Bartlett, 465 U.S. 463, 471 (1984)).

[161] Solem v. Bartlett, 465 U.S. 463, 469-72 (1984).

[162] *Id.* at 472.

[163] *Murphy*, 875 F.3d at 966.

[164] *Id.* at 939-48 (citing Act of March 3, 1893, ch. 209, 27 Stat. 612 ("1893 Act"); Act of June 10, 1896, ch. 398, 29 Stat. 321 ("1896 Act"); Act of June 7, 1897, ch. 3, 30 Stat. 62 ("1897 Act"); "Curtis Act," ch. 517, 30 Stat. 495 (June 28, 1898); "Original Allotment Agreement," ch. 676, 31 Stat. 861 (March 1, 1901); "Supplemental Allotment Agreement," ch. 1323, 32 Stat. 500 (June 30, 1902); "Five Tribes Act," ch. 1876, 34 Stat. 137, April 26, 1906; and "Oklahoma Enabling Act," ch. 3335, 34 Stat. 267 (June 16, 1906)).

[165] *Id.* at 939.

[166] *Id.* at 960.

subsequent to legislation cited by Oklahoma insufficiently supported the argument that Congress intended the Muscogee (Creek) reservation to be disestablished.[167] In sum, the Tenth Circuit did not find that Congress clearly intended to disestablish the Muscogee (Creek) reservation, so it concluded that Oklahoma lacked jurisdiction to convict Murphy for a murder occurring on those lands.

Appeal to the Supreme Court

Oklahoma petitioned for certiorari review of the Tenth Circuit's decision, which the Supreme Court granted on May 21, 2018.[168] In its brief to the Court, Oklahoma claimed that no one has treated the relevant land like a reservation since Oklahoma became a state in 1906.[169] It also argued that because Congress broke certain promises in the treaties that had established the reservation, Congress must have intended to disestablish it. According to Oklahoma, it "is inconceivable that Congress created a new State by combining two territories while simultaneously dividing the jurisdiction of that new State straight down the middle by leaving the former Indian Territory as Indian country."[170] In other words, in Oklahoma's characterization of the matter, Congress could not have intended the state to lack jurisdiction over major crimes in half its land mass.[171] Finally, Oklahoma contended that the *Solem* framework should be inapplicable in the unique context of Oklahoma statehood.[172]

The federal government made similar arguments in a brief it filed in support of Oklahoma.[173] However, the federal government additionally claimed that Congress had elsewhere granted Oklahoma broad criminal jurisdiction over Indian country, which it said should enable prosecution of cases like Murphy's—regardless of whether his crime was committed in Indian country.[174] More specifically, the United States argued that Congress had eliminated tribal jurisdiction and evinced an intent to have all crimes prosecuted by the same entity (whether committed by or against a tribal member or not) throughout the territory that became Oklahoma; in the United States' view, that intent should not be "implicitly" repealed by later statutes like the Major Crimes Act.[175]

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[167] *Id.*

[168] Royal v. Murphy, 138 S. Ct. 2026 (2018).

[169] Brief of Petitioner at 15, Carpenter v. Murphy, 139 S. Ct. 398 (2018) (No. 17-1107) ("From Oklahoma's entrance to the Union to the present day, neither the State, nor the federal government, nor the Five Tribes have treated the former Indian Territory as a reservation").

[170] *Murphy*, 138 S. Ct. at 2026.

[171] Brief of Petitioner at 51, *Murphy*, 139 S. Ct. 398 (2018) (No. 17-1107).

[172] *Id.* at 4, 21.

[173] *See* Brief for the United States as Amicus Curiae Supporting Petitioner at 6-22, *Murphy*, 139 S. Ct. 398 (2018) (No. 17-1107) (arguing that the Creek reservation was disestablished, and Congress could not have intended the State of Oklahoma to be without jurisdiction over major crimes).

[174] *Id.* at 28-38 (citing Indian Department Appropriations Act, 30 Stat. 83 (1897) (granting U.S. courts in Indian Territory exclusive jurisdiction over all civil and criminal cases); Curtis Act, §§ 26, 28, 30 Stat. 504 (1898) (abolishing tribal courts in Indian Territory); 1904 Act, § 2, 33 Stat. 573 (making Arkansas law applicable throughout Indian Territory); Enabling Act, §§ 2, 13, 21, 34 Stat. 268-269, 275, 277-278 (1906) (sending cases not arising under federal law to newly created Oklahoma state courts); 1907 Act § 3, 34 Stat. 1287)). According to the United States, the Enabling Act "thus brought the members of the Five Tribes under the jurisdiction and substantive laws of the State."

[175] *See, e.g.*, *id.* at 28 (arguing that Congress treated Indians the same as non-Indians, from a criminal jurisdiction perspective, both before and after statehood; "[n]othing in Congress's subsequent enactment [of the Major Crimes Act] . . . reveals an intent to implicitly repeal the relevant Acts of Congress and divest state jurisdiction.").

Supplemental Briefing Ordered by the Supreme Court

Following oral argument, the Supreme Court ordered both Oklahoma and Murphy to address whether or not Oklahoma would have criminal jurisdiction over cases like Murphy's if the crimes were found to have been committed in Indian country.[176] It also asked the parties to address whether a reservation could ever *not* qualify as Indian country.[177] These questions might be relevant if, for example, the Court sought additional information to clarify whether it would need to find that the Muscogee (Creek) reservation had been disestablished in order to conclude that Oklahoma could exercise jurisdiction over Murphy.

In Murphy's supplemental brief, he began by stressing that Oklahoma had disavowed the argument that it could exercise criminal jurisdiction over him if the Muscogee (Creek) reservation endured.[178] Murphy then argued that Congress has never given Oklahoma jurisdiction to prosecute crimes committed by Indians, and—anticipating the assertion that several statutes could be read together to implicitly accomplish that result—declared that "when Congress transfers jurisdiction to States, its statutes are bell-clear."[179] None of the statutes mentioned by the United States in its briefing, Murphy argued, do anything like clearly grant criminal jurisdiction over tribes and tribal members to the State of Oklahoma.[180]

Oklahoma adopted the United States' view that it had jurisdiction to prosecute crimes regardless of the Muscogee (Creek) land's status, based on a series of laws passed by Congress between 1897 and 1907.[181] However, the state asked the Court not to "leave open whether [Muscogee (Creek) and other historical territories] constitute Indian reservations today," arguing that such a decision "risks undermining the convictions of many federal prisoners" and "may also undermine federal and tribal authority currently exercised on restricted allotments and trust lands."[182]

Both Murphy and Oklahoma answered the Court's second question in the negative: they agreed, under current law a federally established reservation always constitutes "Indian country" under the governing statute.[183]

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[176] Order, *Murphy*, No. 17-1107 (U.S. Dec. 4, 2018).

[177] *Id.*

[178] Supplemental Brief for Respondent at 3, *Murphy*, 139 S. Ct. 398 (2018) (No. 17-1107) ("Having made the tactical judgment to invoke solely its reservation argument . . . Oklahoma cannot now claim entitlement to execute [Murphy] based on arguments it abandoned.").

[179] *Id.* at 5-6 (citing Act of June 8, 1940, ch. 276, 54 Stat. 249 (conferring certain criminal jurisdiction over tribes and tribe members on State of Kansas); Act of May 31, 1946, ch. 279, 60 Stat. 229 (same as to North Dakota); Act of June 30, 1948, ch. 759, 62 Stat. 1161 (same as to Iowa); Act of July 2, 1948, ch. 809, 62 Stat. 1224 (same as to New York); Act of Oct. 5, 1949, ch. 604, 63 Stat. 705 (same as to California); Act of Aug. 15, 1953, Pub. L. No. 83-280, ch. 505, §§ 2, 7, 67 Stat. 588 (1953) (codified as amended at 18 U.S.C. § 1162) (conferring California, Minnesota, Nebraska, Oregon, Wisconsin, and Alaska with broad authority to exercise criminal jurisdiction over tribes and tribal members within their territory); *see also supra* note 149 and accompanying text.

[180] *Id.*at 7-12.

[181] Supplemental Brief for Petitioner at 1-3, *Murphy*, 139 S. Ct. 398 (2018) (No. 17-1107); *see also supra* note 174.

[182] Supplemental Brief for Petitioner at 3, 11-12, *Murphy*, 139 S. Ct. 398 (2018) (No. 17-1107).

[183] *Id.* at 17 ("[W]ere this Court to hold that [certain] Indian reservations . . . are not Indian country . . . it would be venturing into uncharted territory. No precedent exists for such a concept . . . ."); Supplemental Brief for Respondent at 15-16, *Murphy*, 139 S. Ct. 398 (2018) (No. 17-1107) ("Recognizing a previously unknown category of federal reservations that are not 'Indian country' would violate [the statute defining 'Indian country']'s plain text, depart from this Court's precedent, unsettle established jurisdictional understandings, and enmesh courts in decades of litigation.").

Anticipating the U.S. Supreme Court's Decision

The Supreme Court heard oral arguments in this case on November 27, 2018.[184] Justice Gorsuch was not present at oral arguments and is not slated to participate in deciding the case—presumably because he participated in earlier discussions about this case while he was still a judge on the Tenth Circuit.[185] A decision was expected by the end of the Supreme Court's 2018 term, but on June 27, 2019, the Court ordered this case restored to the calendar for reargument in the next term.[186]

If the Supreme Court reverses the Tenth Circuit and finds that the Muscogee (Creek) reservation was disestablished, Murphy's conviction and death sentence would be reinstated, and Oklahoma would presumably continue to prosecute cases like Murphy's. But if the Supreme Court agrees with Murphy and the Tenth Circuit that the Muscogee (Creek) reservation has not been disestablished, the decision's ramifications for federal, state, and tribal jurisdiction in the eastern half of Oklahoma might be significant, and could extend well beyond the Muscogee (Creek) reservation. In addition to the Muscogee (Creek) Nation, several other tribes were forcibly relocated to Oklahoma under similar circumstances and under the same or similar treaties.[187] The parties in *Murphy* filed a joint appendix containing several historical maps depicting reservation boundaries in Oklahoma in the early 1900s.[188] Oklahoma has argued that, if those statutes did not disestablish the Muscogee (Creek) reservation, similar arguments could be maintained with respect to other lands comprising most of eastern Oklahoma.[189] If the Supreme Court agrees with the Tenth Circuit that Congress never disestablished reservations like the one in this case, Oklahoma argues that its ability to prosecute many crimes in the eastern part of the state would be significantly narrowed. According to Oklahoma and some amici, the Tenth Circuit's decision "would create the largest Indian reservation in America today . . . . That revolutionary result would shock the 1.8 million residents of eastern Oklahoma who have universally understood that they reside on land regulated by state government, not by tribes."[190] If a significant part of Oklahoma is Indian country, then the burden would shift to the federal and tribal governments to prosecute many offenses involving Indian offenders or victims[191]—at least, absent other federal statutory authority allowing the state to prosecute.

However, other amici have joined Murphy in arguing that the Tenth Circuit's decision should be upheld. Some, including the Muscogee (Creek) Nation, contend that recognition of the Muscogee (Creek) reservation's continued existence would leave intact most state and local functions on those lands.[192] For example, the Muscogee (Creek) Nation argues that even on reservation land,

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[184] *See* Carpenter v. Murphy, No. 17-1107 (U.S. Nov. 27, 2018).

[185] *See* Order, Carpenter v. Murphy, No. 17-1107 (U.S. Dec. 4, 2018).

[186] *See* Order, Carpenter v. Murphy, No. 17-1107 (U.S. June 27, 2019).

[187] Murphy v. Royal, 875 F.3d 896, 932 (10th Cir. 2017), *cert. granted*, 138 S. Ct. 2026 (2018) ("In the 1820's, the federal government adopted a policy to forcibly remove the Five Civilized Tribes from the southeastern United States and relocate them west of the Mississippi River, in what is today Oklahoma.").

[188] Joint Appendix Vol. II, Carpenter v. Murphy, No. 17-1107 (U.S. July 23, 2018),

[189] Supplemental Brief for Petitioner at 2-6, 22-24, *Murphy*, 139 S. Ct. 398 (2018) (No. 17-1107).

[190] Brief of Petitioner at 3, *Murphy,* 139 S. Ct. 398 (2018) (No. 17-1107).

[191] *See* 18 U.S.C. § 1153; *see also supra* note 145.

[192] *See, e.g.*, Brief for Amicus Curiae Muscogee (Creek) Nation in Support of Respondent at 34, *Murphy,* 139 S. Ct. 398 (2018) (No. 17-1107).

state and local governments retain most civil jurisdiction, including taxing and zoning authority.[193]

The Supreme Court might also seek to avoid the question of whether the Muscogee (Creek) reservation still exists. For example, the Supreme Court could decide either to reassess the approach it endorsed in *Solem*, or—as suggested by Tenth Circuit Chief Judge Tim Tymkovich—conclude that the *Solem* framework is ill-suited to the unique circumstances surrounding Oklahoma's statehood.[194] Alternatively, the Court could adopt the federal government's argument that Oklahoma had jurisdiction to prosecute Murphy because earlier statutes granted such jurisdiction,[195] thereby rendering the Major Crimes Act inapplicable.

Implications and Considerations for Congress

Regardless of the Supreme Court's decision, the choice to disestablish a reservation still lies solely with Congress. If the Supreme Court agrees that the Muscogee (Creek) reservation still exists, a statute clearly disestablishing it would limit this case's applicability in the future. Congress could also pass a law[196] expressly giving Oklahoma jurisdiction to prosecute major crimes in Indian country if the Supreme Court holds that no such law currently exists.

If the Supreme Court disagrees with the Tenth Circuit and holds that the Muscogee (Creek) reservation no longer exists, Congress could—depending on the exact grounds of the ruling—countermand that decision by reestablishing or clarifying the continued existence of the Muscogee (Creek) reservation.

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[193] *Id.* at 32-33.

[194] Order Denying Rehearing en Banc at 3, Murphy v. Royal, Nos. 07-7068 & 15-7041 (10th Cir. Nov. 9, 2017) (Tymkovich, C.J., concurring) (claiming that this "case may present the high-water mark of *de facto* disestablishment" such that it "may be the rare case where the Supreme Court wishes" to adjust its test "if it can be persuaded that the square peg of *Solem* is ill suited for the round hole of Oklahoma statehood").

[195] *See supra* notes 174-75 and accompanying text.

[196] *See, e.g.*, Negonsott v. Samuels, 507 U.S. 99, 103 (1993) (noting that "Congress has plenary authority to alter the[] jurisdictional guideposts" of authority to prosecute major crimes).

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