No. 21-429

IN THE

# Supreme Court of the United States

OKLAHOMA, PETITIONER,

*v.*

VICTOR MANUEL CASTRO-HUERTA

*ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF OKLAHOMA*

## BRIEF FOR CITIZENS EQUAL RIGHTS FOUNDATION AS AMICUS CURIAE SUPPORTING PETITIONER


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## INTEREST OF THE *AMICUS CURIAE*

The Citizen Equal Rights Foundation ("CERF") was established by the Citizens Equal Rights Alliance ("CERA"). Both CERA and CERF are South Dakota non-profit corporations. CERA has both Indian and non-Indian members in 34 states. CERF was established to protect and support the constitutional rights of all people, to provide education and training concerning constitutional rights, and to participate in legal actions that adversely impact constitutional rights of CERA members. CERF is primarily writing this *amicus curiae* brief to explain why federalism as engineered in the structure of the Constitution gives a fundamental answer to the question of whether the State of Oklahoma has criminal jurisdiction over a crime committed by this non-Indian step-father against his "Indian" step-daughter within the boundaries of the Cherokee Reservation within the State of Oklahoma. This case demonstrates how the United States effectively has two sets of laws. The first set of laws are the regular domestic laws that respect the constitutional limitations and apply to all. The second set of laws are those based on continuing territorial war powers over Indians in "Indian country." These laws which began as laws that only applied in a territory are not subject to constitutional or individual rights constraints.[1] Amicus submits this *amicus curiae* brief

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[1] Pursuant to Rule 37.6 of the Court, no counsel for a party has authored this brief, in whole or in part. No person or entity, other than *amicus curiae*, CERF, its members or its parent CERA's members, or its counsel have made any monetary contribution to the preparation or submission of this brief. Both Petitioner and

in this case because CERA/CERF can now explain how this Court's federal land law decisions have created these two sets of contradictory laws.

## SUMMARY OF THE ARGUMENT

Petitioner State of Oklahoma is trying to convince this Court that it has at least concurrent criminal jurisdiction over the murder of one of its citizens by another one of its citizens within the boundaries of the State of Oklahoma. This preposterous reality has come about through the manipulation of Indian land status to completely obfuscate what were supposed to be the personal and in rem jurisdictional elements that form the basis of statutory criminal jurisdiction.

*Amicus* has been arguing for more than twenty-five years that two sets of conflicting laws over Native Americans have existed since the Civil War. This brief will detail exactly how Indian land status was deliberately manipulated first by Southern lawyers in order to preserve a legal means to justify slavery. Then how land status was used during the Civil War by President Lincoln to end slavery and reset the Indian trust relationship that and land status back to the Indians becoming citizens. And finally, to how with President Lincoln's assassination Secretary of War Edwin Stanton reached back to the *Dred Scott* decision of 1857 to deliberately use the obfuscated Indian land status to justify punishing the former rebellious Southern States and to intentionally preserve the

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Respondent have filed blanket consents for all *amicus curiae* briefs.

unlimited territorial war powers in the national government through the 1871 Indian Policy. The discussion of Indian land status will conclude with how the Indian Reorganization Act of 1934 ("IRA") and the Nixon Indian Policy are extensions of the 1871 Indian War Policy. This brief ends by explaining how "Indian country" has become a permanent land status that commandeers the concurrent jurisdiction of Oklahoma and should be declared unconstitutional.

## ARGUMENT

Unfortunately, two groups of people were left in an undefined status when the Constitution of the United States was adopted in 1787. They were the Native Americans we called "Indians" and freed persons of African ancestry, each of which were considered separate "races" from the "white" European settlers. African slaves are not included because they were classified as 3/5ths of "persons" for the census count but clearly classified as "property" under the Constitution. The Constitution's Framers assumed that the Indian tribes would eventually be included as citizens of the States in which they resided. This policy was incorporated into the Northwest Ordinance of 1787. Indian tribes were treated as limited separate governments that had the right and ability to consent to their status and had some undefined right to their land. Freed Blacks had an even less defined status than the Indians.

While leaving the status of these two racial groups undefined under the newly formed governments may have been necessary to get the Constitution ratified, it triggered an ongoing legal conundrum and volatile social debate that remain with us today. Most

Americans now agree that slavery was the biggest reason that we fought the Civil War. President Lincoln freed the slaves and redid federal Indian policy during his just barely over 4 years in office. He used his Indian policy to ensure how Indians were going to be integrated under the personal, land and criminal jurisdiction of the States and national government. The newly freed former slaves brought about three new Constitutional Amendments at the end of the Civil War to define their new status. Only the Thirteenth Amendment, was enforced from its passage by this Court. More than 150 years after the end of the Civil War we must be reminded that "Every Black Life Matters" and still have the Indians classified as wards of the United States under the plenary authority of Congress. *See United States v. Kagama*, 118 U.S. 375, 383-384 (1886). It is long past time to finally resolve the issues that led to Civil War and recognize that all peoples and every individual in the United States are equal before the law. This can be done by further limiting the territorial war power of the Territory Clause and clarifying state and federal criminal jurisdiction over Indians today.

## I. INDIAN LAND STATUS WAS INTENTIONALLY AFFECTED BY THE SLAVERY DEBATE.

Before the Civil War, this Court determined that Congress had plenary territorial war power authority to determine the processes and rights of persons in the territories until those territories become States. *See American Insurance Co. v. Canter*, 26 U.S. 511, 542-543 (1828). As inherited from the law of Great Britain, constitutional government was not considered

applicable in the wilderness. Until basic forms of government were in place, the King and Parliament exercised unlimited authority with all of the war powers conceivable under British law. The Framers were the victims of the territorial war powers of Britain. They fought the Revolutionary War to free themselves from the permanent territorial war powers of Great Britain. They intentionally tried to create a new system for domesticating new land areas by applying the principles of the Enlightenment Era. Because constitutional law does not apply in a territory the Framers required that Congress "dispose of the territories." Property or Territory Clause, Art. IV, Sec. 3, Cl. 2. This requirement to dispose of the territory and create new States known as the Equal Footing Doctrine was defined by this Court as allowing the United States to retain territorial land only on a temporary basis. *See Pollard's Lessee v. Hagan*, 44 U.S. 212, 221 (1845). This specific requirement was meant to prevent the United States from being able to use the territorial war powers in domestic law against the States and individuals within the States.

### A. The history of Indian land status before the Civil War.

Since Justice Breyer's majority opinion in *United States v. Lara*, 541 U.S. 193 (2004) this Court has acknowledged that federal Indian law is at least schizophrenic. 541 U.S. at 219 (Thomas, J. dissent. op.). In *Lara*, Justice Breyer made very clear that this Court has accepted the Solicitor Generals' narrative of the facts of the many preceding Indian cases presented over the course of time. Never has this Court stepped back and applied a realistic historical approach to how

and why Indian land status has been so deliberately manipulated. The law's *stare decisis* approach has literally allowed this Court to miss seeing the forest through the trees.

The Indians or Indian tribes that had remained in the original 13 States following the Constitution's ratification presented the new federal government with a major problem. The Framers and our early politicians all understood the difference between domestic law and the territorial laws because of the difficulties they had posed before the Revolutionary War and during the process of forming new States from the territorial lands of the United States. The Territory Clause, Art. IV, Sec.3, Cl. 2 made it very clear that Congress possessed virtually unlimited temporary territorial power to establish future States, which power had been derived from British law. But what were we supposed to do with the Indian tribal areas within the existing original States? The Constitution gave the United States government direct power over commerce with the Indians, Art.1, Sec 8, Cl. 3, but it did not, in any way, define the status of Indian occupied lands within the original States. The Statehood Clause, Art. IV, Sec. 3, Cl. 1, however, limited the territorial power by specifically stating that "no new State shall be formed or erected within the jurisdiction of any other State or parts of State without the consent of the legislatures of the States concerned as well as of the Congress." This meant that Indian lands could not be considered a separate State within a State but it did not necessarily mean that the Indian lands could not be some kind of federal territory.

The same problem existed in determining whether the original States had civil and criminal jurisdiction over the persons as well as the lands of the

Indians within their boundaries. All criminal jurisdiction is decided by whether the governing body in adopting a criminal law has jurisdiction over the person who committed the crime and jurisdiction over the place (physical location or actual land) where the crime occurred. The Constitution of the United States clearly gave the States general jurisdiction over all persons and physical land within their outer physical boundaries. For this reason, the States are deemed to have the general "police powers" as James Madison discussed in the Federalist Papers No. 39. It is why, upon statehood a new State that is formed from a "territory" is endowed under our federal land laws with concurrent jurisdiction over all federal lands within its boundaries. Immediate concurrent federal-state land jurisdiction is supposed to allow state civil and criminal law to immediately be the default position under our constitutional structure for persons who are now State citizens protected under the United States Constitution. But as this case aptly demonstrates, the default position of State concurrent personal and federal land jurisdiction upon statehood is now directly in question on federal land areas considered Indian reservations.

The first federal law asserting federal control over Indians and Indian land was passed by Congress in 1790 and was known as the Non-Intercourse Act. President Washington and his Secretary of War, Henry Knox, were convinced that the federal government should have primary control over the Indian tribes and their lands whether they were situated in States or in the territories. This law prohibited all persons from interacting with the Indian tribes to buy their land and placed criminal penalties on anyone attempting to alter Indian land status. The original States all objected to

the Non-Intercourse Act of 1790. In fact it was only in effect for two years before it was required to be renewed. In total, four short term Non-Intercourse Acts were passed in 1790, 1793, 1796 and 1799, each of which expired by its own terms and was strongly opposed by the original States who claimed to exercise personal and in rem jurisdiction over the tribes within their boundaries. Both the States and federal government were making land cession treaties with the Indian tribes during these early years. Most of the States adopted special laws protecting the Indian lands. Similar to the federal law they declared that only the State government by treaty could negotiate the sale of Indian lands.

None of the original States moved to displace the Indian tribes. All considered themselves to have a special trust responsibility to ensure protection of the Native Americans in their traditional areas. This was greatly helped by the respect accorded in the North to the Iroquois Confederacy and in the South to the Five Civilized Tribes. In the South, many freed Blacks associated and inter-married with the Indian tribes. Most Southern States allowed free Black persons to own property and own and operate businesses like blacksmithing. They also prohibited freed Blacks from learning to read or attending schools directly limiting their ability to function in White society. In several Southern States freed Blacks (mostly Gullah Geechee) formed their own communities and successfully petitioned to be treated like Indian tribes on their own land base.

By 1802, there was some cooperation between the States and federal government in regards to the Indian tribes. The first statutory definition of "Indian country" was defined in the Indian Trade and

Intercourse Act of 1802, as being all the lands within the territories as designated by Congress. *See* Act of March 30, 1802, 7th Cong. Sess. I, Ch. 13, 2 Stat. 139-146 at Secs. 1-2, n.(a). Prior to the adoption of this first statute, the Seneca uprising in New York in 1779 required the federal courts to create a temporary federal common law designation to deal with New York's temporary loss of jurisdiction assumed by the United States Army. As a matter of federal Indian common law, the federal courts interpreted these jurisdictional conflict zones as "Indian country." *See generally United States v. Donnelly*, 228 U.S. 243 (1913) (discussing R.S. § 2145). Since in our earliest years the States needed federal help to suppress major tribal uprisings it was necessary for both to find ways to cooperate. The 1802 Trade and Intercourse Act was the first to create some actual balance between the State and federal interests. This act opened general trade with the Indian tribes while protecting the Indian lands as had been done in the Non-Intercourse Acts. Even today 25 U.S.C. § 177 still protects Indian lands. Under both State and federal law, Indian land was protected from sale by requiring a government treaty.

Although Indian lands could not be considered a separate State, it remained uncertain whether the State or federal government had primary civil and criminal jurisdiction over those Indian lands within the original States. This Court finally resolved that issue in *Fletcher v. Peck*, 10 U.S. 87, 118-121 (1810). It held that a State possesses primary jurisdiction over Indian lands within it, by recognizing the state's sovereign preemptive right to such lands inherited from Great Britain. Acknowledging a temporary status of "Indian country" because of an Indian uprising did not change the underlying ownership or jurisdiction of the land.

*See Fletcher*, *supra*. As a matter of federal law, the Seneca lands in the State of New York had never left state jurisdiction. See *United States ex rel Kennedy v. Tyler*, 269 U.S. 13, 16-17 (1925), which supported the notion that individual Indians would one day become full State citizens and Indian country would cease to exist.

Indian land status was made particularly complex by King George III with his Proclamation of 1763. This proclamation acknowledged Indian land title in the Indian tribes and allowed only persons as allowed by the King to negotiate treaties with the Indian tribes. *See Johnson v. M'Intosh*, 21 U.S. 543, 597-598 (1823). While the Proclamation officially applied to the territorial lands West of the Colonies, George III, intentionally gave exclusive trade rights with the Western tribes to Quebec (the "Quebec Act") as one of the Intolerable Acts of 1774. In addition, most of the British Officers who fought against us in the Revolutionary War were paid in land negotiated and ceded by the Indian tribes to the British King, and they brought suits in American courts to get the lands promised to them.

The concept of Indian title was well discussed and defined in British law. This included the Indian right of occupancy until the Indian title was extinguished by the sovereign. This right to extinguish the Indian title was exclusively in the King who under the Doctrine of Discovery was also supposed to have a protective trust relationship with the Native Americans. *See M'Intosh*, 21 U.S. at 573-574. This was the religious doctrine of the Catholic Pope; it did not derive from British law. This direct vesting of sovereign authority in the King was not easy to apply in a dual sovereign system of states and a national

government. It was finally decided in *M'Intosh*, *Id.* at 584-585, that the United States as the victor over the British King in the Revolutionary War won the right to receive the Indian land title exclusively. The reasoning was that because we won the war and the conflict dated back to before the King made his promises to his officers the United States received the Indian title intact. This meant the United States Supreme Court declared void the Indian treaties made between King George III and the Indian tribes giving the United States a clean slate more than 40 years after the Constitution was adopted. This created political pressure to resolve the Indian tribes' status in the original States.

The United States was trying to make a new public lands and Indian policy as the nation grew. The Framers had every reason to reject the British model that never would have allowed them to be equal citizens to the persons born in the British Isles. And, unlike how it is now portrayed by the Department of Justice (DOJ) and the Solicitor General, that is precisely what Congress and President Jackson had intended with the passage of the Removal Act of 1830. This Act allowed federal negotiators with a lot of discretion to accomplish the objective of "removal." From the time the 1802 statute was enacted, the original States had objected to the definition of "Indian country" interfering with their jurisdiction. With the passage of the Louisiana Purchase Act in 1804, this objection was actually included in the statute, along with a promise from the Congress that the Indian tribes that did not want to assimilate would be removed to the Louisiana Territory lands. *See* 2 Stat. 283-289, at Sec. 15. This was the reason the State of Georgia was so upset with the federal government allowing the Cherokee Nation to

start organizing its own tribal government on lands within the State. This also was the reason President Jackson promised the Cherokee Tribe that they would be given the ability to organize their own government in the Indian territory of Oklahoma when they removed there per the 1830 Removal Act.

Many mistakes were made as this new land policy evolved, but after they were made with the Cherokee the federal Removal Act negotiators became more flexible. Indeed, as the result of the negative publicity over the trail of tears, no more military forced removals were undertaken. More than half of the New York Indians remained in New York as will be explained further down in this brief.

The early 1830's was also the time period during which the fight over the proposed Nullification Doctrine from Senator John Calhoun took place. Calhoun was then beginning to become concerned that more Free States were being created in the Western territories than Slave States. If the Free States became a clear majority they could move to amend the Constitution to ban slavery. Within all this turmoil, Southern lawyers ultimately realized that the only legal argument capable of protecting what they considered a right to own slaves could be formed from the virtually unlimited territorial war power the King had used against the colonists.

### B. From the 1830's to the start of the Civil War, Indian land law was caught up in the greater fight over slavery.

This discussion must start with explaining how the so-called Marshall trilogy has been manipulated to avoid the slavery overlap discussion. The first case of

the Marshall trilogy was the 1823 Indian title decision of *Johnson v. M'Intosh*, *supra*. As already said, finally clearing up the Indian title problem created major political pressure for the United States to finally resolve the Indian jurisdiction problem in the original States. The Cherokee Nation situation in Georgia became ground zero for the fight. The situation began with Georgia passing laws to survey and protect land in the Cherokee occupied area where gold had been discovered. Chief Justice Marshall ruled on the conflict creating some rights in the Cherokee Nation as a "domestic dependent nation" but denied it had the jurisdiction to enjoin officers of Georgia from exercising authority on Cherokee land. *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831). This case is the second case of the so-called Marshall trilogy so often cited by the DOJ in modern Indian law. These two cases are very consistent in making new American law regarding Indian land status.

Just a few months after deciding *Cherokee Nation*, Chief Justice Marshall began to make some extraordinary moves to gain jurisdiction over a case being heard in the state courts of Georgia over a preacher named Worcester. Both Jackson and Marshall were Southerners and slave owners. But they agreed on little else. President Jackson was no fan of Senator Calhoun. Chief Justice Marshall was not as quick to reject Calhoun's rantings, even though he rejected Calhoun's nullification of federal laws argument. He seemed to agree with Calhoun that the long term outlook for maintaining slavery in the South was bleak at best. By 1832 it was known that the western territories across the Mississippi River had climates that were not good for the crops that made slavery economically feasible. Eventually, the Free states were

going to outnumber the Slave states in the union of the United States. Senator Calhoun was looking for a legal argument to preserve slavery when the South would be in the minority.

In *Worcester v. Georgia*, 31 U.S. 515 (1832), the Chief Justice opined that the "Indian trust" included an unlimited federal territorial war power that made Georgia's laws over the Cherokee lands "extra-territorial." *Worcester*, 31 U.S. at 542. This was the first time that federal territorial power under the Territory Clause was allowed to apply in an original State to displace State concurrent jurisdiction over the Indians and their lands. Chief Justice Marshall justified his sabotage against the constitutional structure of federalism by reaching for international law in creating a new trust duty for the United States over Indians, and by revising how the 1763 Proclamation of King George III should thereafter be interpreted. He certainly knew the same sort of "trust" argument could be used to infer the United States had a trust duty to support slavery.

The *Worcester* decision caused an uproar in all of the other original States. President Jackson refused to enforce the decision by saying it was made without jurisdiction. From a land status perspective, *Worcester* contradicted the prior two decisions of the so-called trilogy. More significantly, however, the Court simply ignored that it had unleashed on the American people the very power that made it impossible for the citizens of the Colonies to ever have the same legal status as "Englishmen," which had triggered the Revolutionary War. It was no accident that another slave owner, Chief Justice Taney, in 1857 primarily relies on this trust argument in *Worcester* in his majority opinion in *Dred Scott v. Sandford*, 60 U.S. 393 (1857), to declare that the

national government has a duty to protect the private property of citizens, including slaves, and thus, to forever protect slavery in the territories of the United States. *Dred Scott*, 60 U.S. at 446-452. Sadly, the *Worcester* decision did force Georgia to demand that the Cherokee Indians be physically removed, preventing a solution similar to that which the treaties of Buffalo Creek had worked out in New York.

Prior to the passage of the Removal Act of 1830, about half of the New York Indians had decided to move to the Territory of Wisconsin. The 1838 Treaty of Buffalo Creek, the main Removal Act Treaty for all of the New York Indians, not only includes the terms of removal for the Indians that remained in New York but also for the Indians in Wisconsin. Jan.15, 1838, 7 Stat. 550. The Treaty of Buffalo Creek says that other treaties with the various Indian groups would be done to complete the removal process creating a set of treaties from Buffalo Creek. All of these secondary treaties allowed for the creation of individual Indian allotments on the lands where the Indians chose to remain in New York and Wisconsin. *See* Treaty for Oneidas of Green Bay, Feb. 3, 1838, 7 Stat. 566. The United States in the Removal Act treaties established Indian allotments that set a term of years before those allotments could be sold. They stated that the lands remained under federal trust until the set term expired and the individual land patents were issued to individual Indians. Since the Indians were not being physically removed from the States East of the Mississippi, Congress kept its promise to the States by enacting the Indian Trade and Intercourse Act of 1834, 4 Stat. 729, which defined Indian country as only existing West of the Mississippi River.

This explanation is intended to prove that, following the Cherokee Trail of Tears debacle, the primary purpose of the 1830 Removal Act changed from physically removing Indians to removing the Indian country designation over the Indian lands to allow the States to exercise their jurisdiction without federal interference. All had agreed that the definition of Indian country would only be a temporary territorial designation, because the federal Indian policy was an assimilation policy. Once the Indian country definition was removed there was no dispute the Constitution applied to the remaining Indian lands and the States had civil and criminal jurisdiction.

New York was partly created from the Massachusetts colonial grant made by King George II. The two colonies agreed to sell and share some of the profits of the Ogden Land Company as a means to resolve their disputes over the sale of lands in western New York. The Ogden Land Company could not sell any Indian lands until the Indian title to those lands was extinguished by the United States as this Court, in *M'Intosh*, required. Federal negotiators commissioned under the Removal Act of 1830 to extinguish the Indian title claims, offered the remaining New York Indians land West of the Mississippi River (Kansas) or to pay for the Indian title and use that money to buy the underlying fee of some of the lands in New York for the Indians to own as private property owners. Most of the New York Seneca Indians chose the latter option preferring, in lieu of cash, actual fee land that would belong to them individually. Because the Indians had never before "owned" their land, the federal negotiators decided that there should be a learning period with the lands restricted from sale. This period was negotiated as being from 5 to 25 years depending

on what was finally agreed on an individual basis. The fee patents would not issue from the United States until this "trust" period expired. Since the Indian Trade and Intercourse Act of 1834 had already altered the definition of Indian country to apply only to Indian lands west of the Mississippi, the New York Indians were under the jurisdiction of New York.

In 1852, Mr. Fellows of the Ogden Land Company physically ejected an Indian holding land past the point of the restriction against alienation. The Indian filed suit against the Ogden Land Company arguing that only the United States could remove him from the land. The courts of New York heard the case all the way through their highest court, which found the Ogden Land Company could not eject the Indian holder without paying for the substantial improvements he had made to the property. The case was then appealed to the United States Supreme Court in 1856. Without much explanation this Court, in *Fellows v. Blacksmith*, 60 U.S. 363, 371 (1857), upheld the lower court rulings. It concluded that only the United States could physically remove an Indian because the Indian was in a state of pupilage under the "care and protection of" the United States, as opined in *Worcester*.

The *Fellows* decision does not at all explain where the authority to have exclusive jurisdiction over the Indians comes from. This decision impliedly legitimates the *Worcester* decision by essentially using its rationale of the federal trust relationship, but conspicuously does not cite it. The *Fellows* decision unleashed the unlimited territorial war powers against the States while it essentially destroyed the viability of the 1830 Removal Act by completely ignoring the Treaty of Buffalo Creek. Counsel must point out that the *Fellows* decision is only 30 pages from the published

*Dred Scott* decision in which the *Worcester* opinion, although referenced, is conspicuously not cited. 60 U.S. at 541. *Dred Scott* like *Worcester* had some serious underlying jurisdictional issues about how Chief Justice Taney created five holdings in the case. Usually an opinion ends when the main issue is decided. The *Worcester*, *Fellows* and *Dred Scott* decisions do not adhere to this norm. The *Worcester* decision was decided the moment Chief Justice Marshall ruled that the laws of Georgia over the Cherokee and their lands were extra-territorial. But no prior Court decision had ever denied concurrent jurisdiction over resident Indians to the State. The opinion had to continue to actually create the rationale to deny Georgia's jurisdiction using the federal trust argument. The *Worcester* decision uses true circular reasoning to create the opinion. In *Fellows* the Court upholds the state court rulings then goes on to add an alternative federal holding that actually contradicts the state jurisdiction it had just upheld. *Dred Scott* is reasoned like *Worcester*. Chief Justice Taney clearly did not want any former slaves to ever be able to become citizens. He opines they cannot become citizens whether they were free or slaves using the amorphous unlimited territorial power argument from *Fellows* to compare and contrast the rights of the Indians to those of the Blacks to make the law that justifies his main holding.

Famously, Chief Justice Taney announced the decision in *Dred Scott* months before any written opinion was made available. It is likely that the Chief Justice waited to make his written opinion in *Dred Scott* until after the opinion *Fellows v. Blacksmith* to be able to make the arguments he made in *Dred Scott* using the trust status of the Indians and their lands. Chief Justice Taney twisted our entire early land history to strike

down the Northwest Ordinance of 1787 as unconstitutional for banning slavery. *Scott* at 452. This was unprecedented and created major credibility issues for the Supreme Court. Abraham Lincoln rose to national prominence pointing out all the major flaws in the *Dred Scott* decision. Lincoln believed there was a conspiracy of lawyers working with the Supreme Court and the administration of James Buchanan that had engineered the reasoning in *Dred Scott* in an effort to perpetually protect the institution of slavery. The famous debates between Abraham Lincoln and Senator Stephen Douglas are all about the *Dred Scott* decision and the use of the amorphous unlimited territorial war power to perpetuate slavery.

Since the *Dred Scott* decision there have been two sets of case law in the United States. The first set follows from the beginning of the Constitution running forward. The second set starts at *Dred Scott* and is based on the unlimited territorial war powers being applied as domestic law to displace state jurisdiction. While *Dred Scott* itself may be overruled as applying to Black persons (*See Saenz v. Roe*, 526 U.S. 489, 503, n.15 (1999)), the two underlying cases of *Worcester* and *Fellows* that were relied on to rationalize a new trust to protect slavery in *Dred Scott* have not been overruled. Today, *Elk v. Wilkins*, 112 U.S. 94 (1894) and *Kagama*, *supra*, are still the law proving that the amorphous unlimited territorial war power survives in federal Indian law. This case challenging Oklahoma's general jurisdiction over a non-Indian in Indian country would not exist if *Fellows* and *Worcester* were not still good law.

This is the legal reality of how this jurisdictional mess in Oklahoma that gives rise to this case and *McGirt v. Oklahoma*, 140 S.Ct. 2452 (2020) was created.

Unfortunately, this Court chose to extend the *Dred Scott* case line in deciding *McGirt* in favor of the unlimited territorial war power that displaces state jurisdiction. This Court has gotten much better at identifying the underlying land status of lands called an Indian reservation. Generally, this Court since the ruling in *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197, 199, 214 (2005) looks closely at how the DOJ characterizes the land status and what legal theories are behind that classification like the so-called unification theory in the *Sherrill* case. The "unification theory" that fee land could again become federal Indian territory if the land reacquired by the Indian tribe was within the former reservation boundaries, is a direct application of the unlimited territorial war powers that come from *Fellows*. It also was no accident that the *City of Sherrill* case is from New York where *Fellows* extended the federal trust power to cancel all benefits of cleaning up the jurisdictional conflict that was supposed to come from the Removal Act of 1830. This is the reason New York was directly attacked for three decades by the DOJ trying to rekindle the federal Indian land claims.

Finally, the Solicitor General and DOJ have admitted that they are holding the Indians in this permanent state of pupilage.[2] Are we going to continue to think that enforcing old Indian treaties is more

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[2] *See, e.g.*, Brief for the Federal Respondents in Opposition, *Brackeen v. Haaland*, on Petition for a Writ of Certiorari to the Fifth Circuit Court of Appeals (Dec. 2021), Dkt. No. 21-380, at 24-25; Brief for the Federal Respondents in Opposition, *Texas v. Haaland*, on Petition for a Writ of Certiorari to the Fifth Circuit Court of Appeals (Dec. 2021), Dkt. No. 21-378, at 13-14.

important than having equal rights under the law? The DOJ with the Nixon Indian policy has done a terrific job of selling the special federal trust relationship with the Indians to avoid the constitutional issues.

Abraham Lincoln was correct that there was a Southern conspiracy to preserve the institution of slavery. The legal arguments unleashing the unlimited territorial war powers were all complete and in place before the Civil War. President Lincoln set up a way out of this mess as will be explained in the next section of this brief. Unfortunately, as many times previously said in CERF amicus briefs, Lincoln's Secretary of War, Edwin Stanton, wanted to preserve the unlimited territorial war powers after the war and created the United States DOJ to enforce his viewpoint.

## II. THE LINCOLN INDIAN POLICY WAS IN PLACE BEFORE THE 1871 INDIAN POLICY AND HAS NEVER BEEN ADDRESSED BY THIS COURT

As President Lincoln promised in his 1862 annual address, he was going to promote a new federal Indian policy that would include all Native Americans in the major changes he was starting to make to end slavery and restore and expand the principles embodied in the Constitution. In his 1863 annual address he proclaimed that he had accomplished the creation of this inclusive federal Indian policy. The main statute of the Lincoln Indian policy was passed in the Removal Act of 1863, attached to the Indian appropriations act. *See* 12 Stat. 792-794. The policy was very much a modernized assimilation policy to give Native Americans a real path to land ownership and full state and federal citizenship. The Lincoln Indian policy was passed after the Sioux

uprising in Minnesota in 1862 forced Lincoln to address how the Indians were going to fit in to his plans for freeing the slaves. The Lincoln Indian policy is and was the alternative to the 1871 Indian policy that Secretary of War Stanton advocated to preserve the unlimited territorial war powers in the national government.

### A. The Lincoln Indian Policy was intended to end the territorial power over Indians and to confer full Citizenship Rights to all Native Americans

The Lincoln Indian policy begins with the paragraph starting with the words "For Intercourse with the various Indian Tribes" and runs to the end of the statute. *See* 12 Stat. 792-794. This policy expanded upon and softened the assimilation policy of the 1830 Removal Act. The Lincoln Indian policy in the first section makes three major changes. The Secretary of the Interior is made the Secretary over the Indians removing the Indians from being under the Secretary of War. It also created a whole new kind of treaty making, treaties made solely to maintain peaceful relations with the Indian Tribes that did not require any land cessions or even discussion of land cessions. The new policy also allowed the President and Secretary of the Interior the discretion to negotiate as they saw fit with different bands of Indians instead of lumping all the various Indian bands that composed one Indian Tribe together under a single tribal treaty negotiation. This allowed each Indian band to be treated individually by the United States greatly enhancing the ability to make a treaty that maintained peaceful relations.

The majority of the Lincoln Indian policy statute deals with the actual displacement of specific Indian tribes that occurred before and during the Civil War. The specific section for relief of the Indians that had been removed to Kansas and had their allotments overrun after the passage of the Kansas Nebraska Act of 1854, 10 Stat. 277, is the basis of the Kansas Indians case. *See The Kansas Indians*, 72 U.S. 5 Wall. 737 (1866). The other significant part of the statute addresses what was supposed to happen in the Indian Territory once hostilities ceased and loyal Indians could be relocated – namely, "the extinction of their titles to lands held in common within the State." 12 Stat 793 at Sec. 4. Last term the Solicitor General actually argued for state jurisdiction to apply over the Choctaw Indians in *McGirt*, but failed to cite the Lincoln Indian policy statute as the basis for continuing to make the Indians in the Indian Territory state citizens following the Civil War. A separate statute was passed following the Civil War extending the Lincoln Indian policy to other Indian tribes that had been hostile to the United States with the Great Peace Commission. *See* 15 Stat. 17-18.

The first application of the Lincoln Indian policy's peace treaties was with the Mille Lacs Band of Minnesota Chippewa. None of Minnesota Chippewa Bands had joined in the Sioux uprising. Article 12 of the 1863 Treaty with the Mille Lacs Band of Chippewa, 12 Stat. 1249, specifically says that the Indians need not be physically removed from the lands they occupy but can remain where they are. This 1863 Removal Act was specifically set up to end the "Indian country" designation to remove federal jurisdiction over the Indian lands.

The Lincoln Indian policy as the continuation and expansion of the federal Indian assimilation policy

gives an explanation for the phrase "Indians not taxed" in the Fourteenth Amendment. Since the Indians were being assimilated it was only a matter of time before they would own their own lands and be subject to state taxes as the Indian country designations were removed. "Indians not taxed" were Indians that were not yet full citizens under the assimilation policy and still being treated as being under the federal territorial trust authority. Since this designation under the assimilation policy was considered a temporary designation allowing the Indians time to adjust to the required changes and to be educated to join the citizenry, the phrase was intended to stop the instant inclusion of all Indians as full citizens. Lincoln had set a new objective—equality of citizenship for all Americans- that included the Indians.

Lincoln understood how the legal mechanics of personal and in rem jurisdiction work. Once the Indians were under unlimited territorial war powers as a matter of British common law they became "federal instrumentalities" just like members of the armed forces. Lincoln in his Emancipation Proclamation turned the former slaves in the rebellious territories into federal instrumentalities to alter their status as "property" using the direct war powers like the territorial war powers of the Discovery doctrine. Under the war powers he had land jurisdiction over the rebellious territories and asserted that jurisdiction to create the personal jurisdiction over the slaves by declaring them to be federal instrumentalities. The Thirteenth Amendment was required to make them citizens as a matter of federal law.

Lincoln's Indian policy removed the Indians from being under the direction of the Secretary of War. By removing the Indians from being under war

authority jurisdiction he effectively ended them being classified as federal instrumentalities. This allowed the Secretary of Interior to treat the Indians like wards capable of becoming citizens. Under federal law "federal instrumentalities" must wait for the United States to release them. Lincoln's Indian policy executed that release by placing the Indians under the Secretary of Interior. Stanton after the war had to restore their federal instrumentality status by statute to put them back under the territorial war powers. *See* 16 Stat. 544. Under the 1871 Indian policy the Indians are still federal instrumentalities.

### B. Lincoln's Indian policy was intended to end "Indian country" and restricted fee lands as separate federal territory solely subject to the territorial war powers and restore State concurrent jurisdiction.

The problem in applying the territorial war powers from the ratification of the Constitution forward came from the Indians or Indian tribes that remained in the original States as argued earlier in this brief. It was no accident that Lincoln's Indian policy was a major improvement and extension to the 1830 Removal Act. The only way to end the unlimited territorial war powers applying to the Indians and the all powerful Indian trust relationship was to make the Indians full citizens just like Lincoln did with the former slaves. This meant that tribe by tribe the Indians needed to be incorporated into the state political system. Allowing the tribes to be further distinguished into their distinct bands made this objective much easier and more realistic. Immediately restoring state concurrent jurisdiction over the Indians

was the first step. Lincoln chose Minnesota as the first place to apply his new policy because by federal statute there was no Indian country. The Lincoln investigation into the Sioux uprising had found that Congress in its enabling statute for the 1855 treaty with the Chippewa had decided that once the Minnesota Chippewa treaty was executed that all Indian lands in Minnesota and Wisconsin would cease to be Indian country. 10 Stat. 598. It could not be argued that Minnesota did not at least have concurrent jurisdiction over the Indians and their lands.

The Lincoln Indian policy was definitely targeted to restore concurrent state jurisdiction over the Indians and their lands. This is proven by the change in how new treaties were to be made. The very idea of making "peace treaties" created a safety valve for the tribes being placed under concurrent state jurisdiction. If they were being mistreated or needed some special federal assistance the Indian tribes were empowered to contact the Secretary or President. Regular day to day business assumed the Indians were interacting with the local governments and people. The peace treaties literally allowed for a peaceful transition from ward to citizens like everyone else. The innovation of allowing peace treaties is similar to Section 5 of the Fourteenth Amendment that creates a duty in the United States to prevent discrimination. This specific provision of the Lincoln policy had to be stopped to keep the Indians and their lands under exclusive federal jurisdiction. Stanton succeeded in getting the 1871 Indian war policy established piece by piece in legislation culminating with the complete end of all treaty making in 1871. Act of March 3, 1871, 16 Stat. 544, 566. Stanton did not succeed in ending the assimilation policy. The two federal Indian policies have

run parallel creating the two separate case lines that exist today.

Stanton wanted to use the unlimited territorial war powers to punish the Southern States and Indians that had fought for the Confederacy. Stanton created the DOJ to preserve this legacy. The DOJ did expand these unlimited territorial powers by creating the reserved rights doctrine over water and Indian treaties. The DOJ also helped in passing the IRA to forever extend the trust periods made in the Dawes or General Allotment Act of 1887 just as was done in *Fellows*. The Nixon Indian policy as declared in 1970 grossly expanded the Stanton/ DOJ use of the territorial war powers as domestic law. This insidious expansion of the territorial war powers is aptly demonstrated by what CERF refers to as the Nixon Memo that was prepared to convince the new President Gerald Ford to continue the Nixon Indian policy. The Memorandum entitled "At What Level Tribal Sovereignty?" restates the history of dealings with the Indian tribes omitting all of the key facts refuting that the territorial war powers have always been applied by the United States over the Indians. All of this extra-constitutional power is still based on how the Indians are still separate under *Worcester v. Georgia* and *Fellows v. Blacksmith* from being included as People under the Constitution.

## III. THIS COURT CAN DECLARE THAT A PERMANENT LAND CLASSIFICATION OF INDIAN COUNTRY IS UNCONSTITUTIONAL.

The Framers of the Constitution believed that keeping the territorial war powers separated from the

operation of the domestic laws of a constitutional government was crucial to protecting individual rights. An entire constitutional structure separating powers and creating checks and balances was designed to prevent the power of the people from being usurped. This Court recently recognized a new and powerful tool it identified as the "anticommandeering doctrine" to fight the national government's structural overreach. This new right to public accountability is capable of preventing the United States from commandeering those jurisdictional powers the Constitution's dual-sovereignty-based structure deliberately left to states and local governments to make decisions that protect individual rights and liberty interests. *See Murphy v. NCAA*, 138 S.Ct. 1461, 1477 (2018) ; *Printz v. United States*, 521 U.S. 898, 918-919, 921, 925 (1997); *Monaco v. Mississippi*, 292 U.S. 313, 322 (1934); *Bond v. United States*, 564 U.S. 221-224 (2011); *Collins v. Yellen*, 141 S. Ct. 1761, 1780 (Jun. 23, 2021).

The solution to this case and frankly to the whole jurisdictional mess created by the *McGirt* decision, is to restore concurrent state jurisdiction over the Indians and their lands in all civil and criminal situations. We need to restore the general jurisdiction of the States over all the people and lands within their borders. This can be done by declaring "Indian country" unconstitutional using the anti-commandeering doctrine. This Court created Indian country as a temporary land designation that was never intended to be a permanent federal land status as was allowed in *Fellows*, and more recently by statute in18 U.S.C. § 1151-1152. As a permanent land status, Indian country violates the express language of the Territory Clause requiring Congress to dispose of the territories. This preservation of the territorial war powers

commandeers concurrent state jurisdiction. *See Puerto Rico v. Sanchez Valle*, 136 S.Ct. 1863 (2016); *Puerto Rico v. Aurelius Investment LLC, et al.*, 140 S.Ct.1649 (2020).

## CONCLUSION

The judgement of the Oklahoma Court of Criminal Appeals should be reversed.

Respectfully submitted,
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