No. 17-1107

IN THE
Supreme Court of the United States

TERRY ROYAL, WARDEN,
OKLAHOMA STATE PENITENTIARY,
Petitioner,

v.

PATRICK DWAYNE MURPHY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF OKLAHOMA INDEPENDENT PETROLEUM ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

ANTHONY J. FERATE
FERATE PLLC
4308 Echohollow Trail
Edmond, Oklahoma 73025
(202) 486-7211

ROBERT E. DUNN
GIBSON, DUNN & CRUTCHER LLP
1881 Page Mill Road
Palo Alto, California 94304
(650) 849-5300

BLAINE H. EVANSON
Counsel of Record
DANIEL NOWICKI
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, California 90071
(213) 229-7000
bevanson@gibsondunn.com

Counsel for Amicus Curiae
Oklahoma Independent Petroleum Association

QUESTION PRESENTED

Whether the 1866 territorial boundaries of the Creek Nation within the former Indian Territory of eastern Oklahoma constitute an "Indian reservation" subject to federal and tribal jurisdiction and regulation.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Regulations

INTEREST OF AMICUS CURIAE

The Oklahoma Independent Petroleum Association ("OIPA") represents more than 2,200 independent oil and natural gas operators in the state of Oklahoma, as well as a number of oilfield service companies that provide important support to exploration and production activities. [1]

Many of OIPA's members operate within the historical boundaries of the Indian nations traditionally referred to as the Five Civilized Tribes—the Creeks, Cherokees, Choctaws, Chickasaws, and Seminoles. The Tenth Circuit's decision, which held that the land within the 1866 boundaries of the Creek Nation is still a reservation, threatens to render all the land within the historical boundaries of the Five Tribes—the entire eastern half of Oklahoma—"Indian country" under 18 U.S.C. § 1151.

The designation of this huge tract of land as Indian country does far more than replace state criminal jurisdiction with federal criminal jurisdiction. It could subject business owners to tribal taxes, exempt tribes and their members from state taxes, subject non-Indians to tribal land-use

---

[1] The parties in this case received timely notice under Rule 37.2(a) and have consented to the filing of this brief. Pursuant to Supreme Court Rule 37.6, counsel for *amicus* represents that this brief was not authored in whole or in part by counsel for a party and that none of the parties or their counsel, nor any other person or entity other than *amicus*, their members, or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

regulations, affect the alienability of oil and gas leases, and dramatically change the environmental regulation of oil and gas wells—all of which has far-reaching implications for OIPA's members.

SUMMARY OF ARGUMENT

As the petition ably explains, this case has significant implications for criminal jurisdiction within Oklahoma. Nearly half of the state—home to 48% of its population—may now be considered Indian country, depriving Oklahoma of its authority to prosecute crimes committed by or against tribal members on these newly constituted reservations. Pet. at 21–23.

But this case is about far more than criminal jurisdiction. By effectively declaring half the state to be Indian country, the Tenth Circuit's decision will upend practically every aspect of Oklahoma's legal and regulatory regime. The inevitable follow-on litigation the decision invites will create a cloud of uncertainty over an immense amount of economic activity in the state—including the vital oil and gas industry. The Tenth Circuit's decision, if allowed to stand, will replace Oklahoma's mature and stable regulatory regime with a new and uncertain regime of overlapping tribal, federal, and state regulation. It will take years, perhaps decades, of litigation to determine the effects of this new regulatory structure.

Accordingly, this is not merely a habeas case, or a case about the misapplication of this Court's reservation disestablishment doctrine. Rather, this is a case about the economic future of nearly half the

state of Oklahoma—and the many established businesses operating therein.

This Court's review is urgently needed.

REASONS FOR GRANTING THE PETITION

I. The Tenth Circuit's Decision Will Upend Oklahoma's Energy Regulation

Oklahoma has been a leading producer of oil and gas for over a century, and is currently the 5th highest crude oil producing state in the country, and the 3rd highest natural gas producer. U.S. Energy Information Administration, *Oklahoma*, *U.S. Rankings*, *available at* https://tinyurl.com/yc7a5vly. Production occurs across the state, with active oil and gas wells in 71 of Oklahoma's 77 counties—including counties in each of the Five Tribe's historical territory. Indep. Petroleum Ass'n of Am., *The Oil & Gas Producing Industry in Your State*, 92 (November 2016), *available at* https://tinyurl.com/y7z24yrs.

Oklahoma's oil and gas industry has prospered under a stable, well-developed, and state-wide regulatory regime overseen by the Oklahoma Corporation Commission ("OCC"), which has been vested "with exclusive jurisdiction, power and authority" over oil and gas development in the state. 52 O.S. § 139(B)(1); *Sierra Club v. Chesapeake Operating, LLC*, 248 F. Supp. 3d 1194, 1200 (W.D. Okla. 2017); *see also Republic Nat. Gas Co. v. Oklahoma*, 334 U.S. 62, 63 (1948) ("Since 1913," the OCC "has regulated the extraction of natural gas" in Oklahoma). "The OCC exercises its exclusive jurisdiction over [oil and gas] wells through a comprehensive system of permit

adjudication." *Sierra Club*, 248 F. Supp. 3d at 1200. The OCC also regulates the waste and pollution generated by energy development, and has sole jurisdiction to resolve complaints by private citizens alleging that an oil or gas project violates environmental law. *See id*. at 1209.

This regulatory regime was put in place based on the universal understanding that the historical territories of the Five Tribes are governed by Oklahoma, not tribal, law. *See*, *e.g.*, U.S. Energy Information Administration, *Oklahoma State Energy Profile*, *available at* https://tinyurl.com/ycfnxjzw ("Oklahoma's tribal areas are spread across about three-fourths of the state, but only one of the state's 38 federally recognized Native American tribes has a reservation."). From the State's founding, the tribes did not exercise control over energy development, but were essentially trust organizations that managed tribal funds. *See Harjo v. Kleppe*, 420 F. Supp. 1110, 1124 (D.D.C. 1976), *aff'd sub nom. Harjo v. Andrus*, 581 F.2d 949 (D.C. Cir. 1978). "[T]he abolition of the tribe[s'] territorial sovereignty" has been the legal and regulatory norm for over a century. *Harjo*, 420 F. Supp. at 1143.[2]

---

[2] The primary exception to Oklahoma's state-wide regulation of mineral rights relates to the land underlying the former reservation of the Osage Nation. *See*, *e.g.*, *Phillips Petroleum Co. v. U.S. E.P.A.*, 803 F.2d 545, 549 (10th Cir. 1986). At statehood, Congress "severed the mineral estate from the surface estate of the [Osage] reservation and placed it in trust for the tribe," thus allowing for Osage regulation of mineral and underground rights. *Osage Nation v. Irby*, 597 F.3d 1117, 1120 (10th Cir. 2010); *Phillips Petroleum*, 803 F.2d at 556 n.15. Although the mineral and energy rights were reserved for the tribe, the "Osage reservation has been disestablished." *Osage*

The Tenth Circuit's decision changing this established status quo will upend Oklahoma's unified, statewide oil and gas regulatory regime and throw all economic activity in eastern Oklahoma—including the oil and gas industry—into turmoil, resulting in overlapping and duplicative regulation and severe uncertainty.

A. The Tenth Circuit's Decision Eviscerates Oklahoma's Uniform Regulatory Regime

The decision below will abrogate over a century of uniform state regulation of Oklahoma's vibrant and growing economy, including its energy industry, and shift a significant portion of regulatory authority to the tribes. *See* Pet. 19–20.

1. The Tenth Circuit decided that all territory within the historical 1866 boundaries of the Creek Nation was an "Indian reservation" under 18 U.S.C. § 1151(a). Pet. App. 7a. Section 1151, enacted in 1948, codified the "different categories of Indian country mentioned in [this Court's] prior cases: Indian reservations; dependent Indian communities; and allotments." *Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 530 (1998) (citing *Donnelly v. United States*, 228, U.S. 243, 269 (1913);

Nation, 597 F.3d at 1120. The OCC also lacks regulatory jurisdiction over various "allotments of individual citizens," which are also "Indian country within the express terms of § 1151(c)." *United States v. Sands*, 968 F.2d 1058, 1062 (10th Cir. 1992). However, these scattered pockets of Indian country constitute a very small percentage of Oklahoma's total territory.

United States v. McGowan, 302 U.S. 535, 538–539 (1938); *United States v. Sandoval*, 231 U.S. 28, 46 (1913)).

Although section 1151 is a criminal statute, its definition of "Indian country" "generally applies as well to questions of civil jurisdiction." *DeCoteau v. Dist. Cty. Court for Tenth Judicial Dist.*, 420 U.S. 425, 428 n.2 (1975); *see also Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 994, 1006 (8th Cir. 2010) ("Reservation land is by definition 'Indian country,' and as a general rule Indian country falls under the primary civil, criminal, and regulatory jurisdiction of the federal government and the resident Tribe rather than the states.") (citing *Venetie*, 522 U.S. at 527 n.1). As a result, when a particular territory is designated "Indian country," the tribe generally has authority to regulate commercial conduct in that territory.

For example, in *Oklahoma Tax Commission v. Sac & Fox Nation*, 508 U.S. 114 (1993), the State of Oklahoma sought to collect income taxes from tribal members residing within a small 800 acre parcel of land in Western Oklahoma allotted to members of the Sac and Fox Nation. *Id.* at 117–19. Oklahoma also sought to impose a vehicle "excise tax" and a "vehicle registration fee for all vehicles registered with the State of Oklahoma," including vehicles owned by tribal members living on tribal land. *Id.* at 118–19. The Tribe sued to enjoin the Oklahoma Tax Commission from collecting these general state-wide taxes on any tribe member living on Sac and Fox land. *Id.* at 120. The Court explained that any tribal member living in "Indian country," as defined in Section 1151, is "outside the State's taxing jurisdiction." *Id.* at 123 (citing 18 U.S.C. § 1151); *see*

also id. at 125 (the "presumption against state taxing authority applies to all Indian country, and not just formal reservations"). The Court thus held that "[a]bsent explicit congressional direction to the contrary, we presume against a State's having the jurisdiction to tax within Indian country," and remanded for further consideration of whether the Sac and Fox members lived in "Indian country." *Id.* at 128.

The "Indian country" designation also *empowers* the tribe to regulate much of the non-Indian activity on the territory. *See*, *e.g.*, *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 327, (2008) ("As part of their residual sovereignty, tribes retain power to legislate and to tax activities on the reservation, including certain activities by nonmembers."). Although a tribe's authority over non-members on a reservation is not unlimited, "'[a] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.'" *Id.* at 329 (quoting *Montana v. United States*, 450 U.S. 544, 565 (1981)).

Thus, in *Kerr-McGee Corp. v. Navajo Tribe of Indians*, 471 U.S. 195 (1985), the Court upheld the authority of the Navajo to "tax business activities conducted on its land," even when those activities were conducted by non-Indian mineral producers. *Id*. at 196; *see also id*. at 201 ("The power to tax members and non-Indians alike is surely an essential attribute of such [tribal] self-government."). Re-affirming that "the 'power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and

territorial management,'" *Kerr-McGee* found no inherent obstacle to tribal taxation of on-reservation conduct by non-Indians. 471 U.S. at 198 (quoting *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982)).

Whether a particular territory is designated "Indian country" also determines which entity has authority to impose environmental regulations. For example, in *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998), "tribal, federal, and state official[s] disagree[d] as to the environmental regulations applicable to a proposed waste site." *Id*. at 340. The Court recognized that if the land on which the landfill was located "no longer constitute[d] 'Indian country' as defined by 18 U.S.C. § 1151(a)," the "State"—not the federal government—would have "primary jurisdiction" to regulate it. *Id*. at 333.

As cases such as *DeCoteau*, *Venetie*, *Sac & Fox Nation*, *Kerr-McGee*, and *Yankton Sioux* make abundantly clear, the designation of land as "Indian country" under Section 1151 has far-reaching consequences beyond criminal jurisdiction.

2. The new authority the Tenth Circuit's designation bestows on the tribes will result in a fundamental shift in regulatory authority from the state of Oklahoma to the tribes.

For example, Oklahoma has historically imposed a nondiscriminatory tax—*i.e.* a tax applying equally to Indians and non-Indians alike—on oil and gas operations taking place within the former boundaries of the Five Civilized Tribes. *In re Gross Prod. & Petroleum Excise Tax Protest of Bruner*, 130 P.3d 767, 770 (Ok. Ct. Civ. App. 2005). This was plainly permissible under Oklahoma's regulatory authority

over non-reservation land. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148–49 (1973).

But states generally do *not* have authority to "tax[] Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation." *Mescalero*, 411 U.S. at 148; *see Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 458 (1995); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144–52 (1980). The Tenth Circuit's decision thus prevents Oklahoma from taxing the sale of oil and gas by any of the Five Tribes or their members within their newly rediscovered reservations. This could cripple the state's ability to raise revenue, and hamper its development of oil and gas infrastructure.

The decision also advantages oil and gas companies owned by a tribe or by tribal members, and encourages sale of oil and gas operations to tribes for tax advantages. Whereas a tribe-owned oil and gas company would be exempt from state taxes, non-Indian "oil and gas lessees operating on Indian reservations [a]re subject to nondiscriminatory state taxation as long as Congress did not act affirmatively to pre-empt the state taxes." *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 175 (1989) (citing *Oklahoma Tax Comm'n v. Texas Co.*, 336 U.S. 342 (1949)). As a result, a non-Indian operating an oil well in the new "Indian country" would likely owe taxes to Oklahoma while a tribal member would not.

The Tenth Circuit's decision also raises the possibility that the tribes will seek to impose their own taxes and regulations on non-Indian oil and gas lessees. *See Merrion*, 455 U.S. at 133 (upholding the authority of the Jicarilla Apache Tribe to "impos[e] a severance tax on 'any oil and natural gas severed,

saved and removed from Tribal lands'"); *Kerr-McGee Corp.*, 471 U.S. at 198 (upholding tribal tax on business activity within the reservation, including mineral production); *South Dakota v. Bourland*, 508 U.S. 679, 689 (1993); *Montana*, 450 U.S. at 566 (discussing tribes' "inherent power to exercise civil authority" over reservation land held in fee by non-Indians when the fee-holder's "conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe"). For instance, the tribes may attempt to enact zoning ordinances that would affect OIPA's members. *See*, *e.g.*, *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408 (1989) (resolving dispute over validity of Yakima Nation zoning ordinance). This additional tax and regulatory burden could bankrupt producers already operating on thin margins.[3]

3. Designating half the state as Indian country also has implications for the scope of federal regulatory authority over the Oklahoma economy, including the oil and gas industry.

Environmental programs critical to the oil and gas industry have historically been overseen by Oklahoma state regulators. For example, the Safe Drinking and Water Act ("SDWA"), like many other environmental statutes, allows states to assume

---

[3] Approximately 10% of the oil produced in Oklahoma comes from wells that produce no more than ten barrels of oil per day during a twelve-month period. *Marginal Wells: Fuel for Economic Growth*, Interstate Oil and Gas Compact Commission, 2015; *see also* Nicole Friedman, *'Strippers' Pose Dilemma for Oil Industry*, Wall Street Journal (September 7, 2015), *available at* https://tinyurl.com/ y7mynqau.

primary responsibility for implementing and administering certain environmental protection programs. *See Phillips Petroleum*, 803 F.2d at 548; *see also* Robert V. Percival, *Environmental Federalism: Historical Roots and Contemporary Models*, 54 Md. L. Rev. 1141, 1174 (1995) (explaining that many environmental statutes, including "the Clean Air Act, the Clean Water Act, RCRA, and the Safe Drinking Water Act" allow for states to implement and administer environmental regulatory programs, with the EPA establishing only "minimum national standards").

The SDWA allows states to assume primary responsibility for regulating the injection of effluents into the ground—a process used to improve oil and gas production. *See Phillips Petroleum*, 803 F.2d at 549. Oklahoma has used this authority to implement a state-wide regulatory regime for underground injection—with the sole exception being the federally overseen Osage mineral trust. *See id.*; n.2, *supra*.

But under the Indian Mineral Leasing Act and Indian Mineral Development Act, the *Secretary of the Interior* has ultimate authority to approve and disapprove mineral mining leases or energy development contracts involving certain Indian lands. *See* Indian Mineral Leasing Act of 1938 ("IMLA"), ch. 198, 52 Stat. 347 (codified at 25 U.S.C. §§ 396a–396g); Indian Mineral Development Act of 1982 ("IMDA"), Pub.L. No. 97–382, 96 Stat. 1938 (codified at 25 U.S.C. §§ 2101–08). And under the SDWA, the EPA may grant a tribe "primary enforcement responsibility" over the water in its tribal territory. *See* 42 U.S.C.A. § 300h-1(e); *Phillips Petroleum*, 803 F.2d at 552 ("The 1986 amendments

to the SDWA resolve any doubt concerning coverage of the SDWA by expressly including Indian tribes."). The Clean Air Act ("CAA") similarly allows the EPA to "delegate[] to tribes the authority to regulate air quality in areas within the exterior boundaries of a reservation." *Arizona Pub. Serv. Co. v. E.P.A.*, 211 F.3d 1280, 1285 (D.C. Cir. 2000) (citing Tribal Authority Rule, 59 Fed. Reg. 43,956 (1994)).

The Secretary of the Interior and the EPA may thus displace Oklahoma's previously uniform environmental regulation with a patchwork of tribal enforcement plans. Under the SDWA and CAA, all "areas within the exterior boundaries of a tribe's reservation [are] per se within the tribe's jurisdiction" for environmental regulation. *Arizona Pub. Serv.*, 211 F.3d at 1288; *cf.* Pub. L. No. 109-59, 119 Stat. 1144, § 10211(a) (providing that, under certain circumstances, the EPA Administrator may approve a request by Oklahoma to apply its State Implementation Plan under the Clean Air Act to "areas of the State that are in Indian country").

In short, the result of the Tenth Circuit's decision will be replacement of Oklahoma's mature and uniform regulatory scheme with a patchwork of federal, state, and tribal regulation. OIPA's members, which operate in a heavily regulated industry, will bear the brunt of this dramatic shift in regulatory authority.

B. The Cost of This Regulatory Shift and Attendant Uncertainty Will Be Severe and Extensive

The economic consequences of transforming energy regulation in Oklahoma will be severe. An oil

producer operating in what was previously open land may now be faced with a tribe's claim that its wells lie in tribal lands—and that any rights it holds to the land are invalid, because they were never approved under the IMLA or IMDA. *Cf. Quantum Expl., Inc. v. Clark*, 780 F.2d 1457, 1459 (9th Cir. 1986) (finding, in the context of the IMDA, that "language requiring governmental approval of Indian agreements ... has been interpreted to mean that the agreements simply are invalid absent the requisite approval"). A tribe could make such a claim against any pre-existing oil or gas development within the newly reconstituted reservations—even if the developer has never before interacted with the tribe. *Cf. Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 765 n.3 (1985) (noting that the Court has broadly interpreted the language of predecessor Indian land management statutes to extend the Secretary of the Interior's approval authority to include practically all reservation territory).

Oil and gas producers in eastern Oklahoma will now have to expend significant effort ensuring their compliance with any number of new environmental regulations promulgated by the Five Tribes under the SDWA and CAA. Indeed, some producers with wells scattered across the state could find themselves subject to six separate regulatory regimes—those of the Five Tribes and Oklahoma's. The cost of compliance with these overlapping, duplicative, and possibly conflicting regulations will unavoidably stifle economic activity—and force many smaller and less profitable operators out of business.

Moreover, the Tenth Circuit's decision does not effectuate a clean transfer of authority from the state to the tribes and federal government, and the

uncertainty regarding the boundaries of the competing regulatory bodies will cast a dark cloud over economic activity in Oklahoma.

"[T]here is no rigid rule by which to resolve the question whether a particular state law may be applied to an Indian reservation or to tribal members." *White Mountain Apache*, 448 U.S. at 142. As a result, case-by-case analysis is required to determine whether "a State [may] assert[] authority over the conduct of non-Indians engaging in activity on the reservation." *Id.* at 144. In these cases, the preemption "inquiry is not dependent on mechanical or absolute conceptions of state or tribal sovereignty, but has called for a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law." *Id*. at 145. As a result, the question of what conduct Oklahoma will be allowed to regulate (and how) in the eastern half of the state will be litigated for decades to come.

Tribal authority to tax and regulate non-Indians is similarly indeterminate. Tribal regulation and taxation must be at least "fairly related to the services provided by the Tribe," and here the relevant tribes may rely heavily on established state services and provide few of their own. *Merrion*, 455 U.S. at 157 & n.23. In order to tax the millions of non-Indians who own land within the boundaries of these newly constituted reservations, the Five Tribes will have to show that the non-Indians either (1) "enter[ed] consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements," or (2) engaged in conduct that "threatens or has some direct effect on

the political integrity, the economic security, or the health or welfare of the tribe." *Montana*, 450 U.S. at 565–66; *Plains Commerce Bank*, 554 U.S. at 329. Satisfying these requirements—and demonstrating that any particular tax levied by a tribe is "fairly related to the services provided"—will require fact-dependent and case-specific inquiry. *Merrion*, 455 U.S. at 157.

* * *

It is difficult to overstate the importance of the Tenth Circuit's decision to Oklahoma's economic future, and particularly to the independent oil and gas operators who form the backbone of Oklahoma's energy industry. The extreme importance of the legal question presented in the petition warrants this Court's review.

II. The Tenth Circuit's Decision Was Wrong

The historical record makes clear that Congress had eliminated the boundaries of the Five Tribes' territories by the time of Oklahoma's accession to statehood in 1907. *See* Pet. 23–29. The Tenth Circuit's decision to ignore the Five Tribes' history, and instead mechanically apply this Court's decision in *Solem v. Bartlett*, 465 U.S. 463 (1984), is as puzzling as it is incorrect.

The issue in *Solem* was whether a particular surplus land act—the Cheyenne River Act—"diminished the boundaries of the Cheyenne River Sioux Reservation or simply permitted non-Indians to settle within existing Reservation boundaries." *Id.* at 464. The Court recognized that when Congress was enacting the surplus land acts around the turn of the 20th Century, it often failed to specify

"whether a particular piece of legislation formally sliced a certain parcel of land off one reservation." *Id.* at 468. The Court thus clarified the "analytical structure for distinguishing those surplus land acts that diminished reservations from those acts that simply offered non-Indians the opportunity to purchase land within established reservation boundaries." *Id.* at 470.

But that "analytical structure" has little relevance to this case, because Respondent's habeas petition did not turn on whether any particular surplus land act had diminished the Creek reservation. Rather, the relevant question was whether the Creek reservation existed at all after statehood. As the petition makes clear, it did not. Pet. 23–34.

The Tenth Circuit's focus on *Solem* is also perplexing in light of this Court's clear statement that the reservations of the Five Tribes were unequivocally disestablished at statehood. In *Oklahoma Tax Commission v. United States*, 319 U.S. 598 (1943), the Court affirmed Oklahoma's authority to tax members of the Five Tribes living on former tribal land, holding that other cases which upheld the immunity of Indian territory from state taxation "do not fit the situation of the Oklahoma Indians." 319 U.S. at 603. Contrasting the situation of the Five Tribes with those of tribes that still had reservations, the Court explained that although "a state might not regulate the conduct of persons in Indian territory," such independent Indian territory is "a condition *which has not existed for many years* in the State of Oklahoma." *Id*. at 602 (emphasis added). Indeed, the Court recognized that the Five Tribes "have no effective tribal autonomy" and that

the members of the tribes "are actually citizens of the State with little to distinguish them" from non-Indians. *Id.*; *cf. McClanahan v. State Tax Comm'n of Arizona*, 411 U.S. 164, 171 (1973) (Indian sovereignty does not apply "in cases *where Indians have left the reservation* and become assimilated into the general community") (emphasis added).

The Tenth Circuit itself has also stated that the Five Tribes' reservations were disestablished: "In preparation for Oklahoma's statehood, the Dawes Commission had already implemented an allotment process with the Five Civilized Tribes that extinguished national and tribal title to lands within the territory *and disestablished the Creek and other Oklahoma reservations*." *Osage Nation v. Irby*, 597 F.3d 1117, 1124 (10th Cir. 2010) (emphasis added); *see also Osage Nation v. Oklahoma ex rel. Oklahoma Tax Comm'n*, 597 F. Supp. 2d 1250, 1259 (N.D. Okla. 2009) ("The language of the Oklahoma Enabling Act and its incorporation of the Oklahoma Organic Act support the conclusion that *there are no Indian reservations in Oklahoma*.") (emphasis added), *aff'd sub nom*, *Irby* 597 F.3d 1117.

In short, the Tenth Circuit's erroneous decision, which ignored both history and precedent to overturn the decision of the Oklahoma Court of Criminal Appeals—in the context of deferential AEDPA review—cries out for correction.

CONCLUSION

This Court should grant the petition and reverse the Tenth Circuit's decision.

Respectfully submitted,

ANTHONY J. FERATE
FERATE PLLC
4308 Echohollow Trail
Edmond, Oklahoma 73025
(202) 486-7211

ROBERT E. DUNN
GIBSON, DUNN & CRUTCHER LLP
1881 Page Mill Road
Palo Alto, California 94304
(650) 849-5300

BLAINE H. EVANSON
Counsel of Record
DANIEL NOWICKI
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, California 90071
(213) 229-7000
bevanson@gibsondunn.com

Attorneys for Amicus Curiae
Oklahoma Independent Petroleum Association

March 9, 2018