No. 17-1107

IN THE
Supreme Court of the United States

MIKE CARPENTER, INTERIM WARDEN, OKLAHOMA STATE PENITENTIARY
Petitioner,
v.
PATRICK DWAYNE MURPHY
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF AMICI CURIAE THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, THE INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, AND THE NATIONAL SHERIFFS' ASSOCIATION IN SUPPORT OF PETITIONER

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INTERESTS OF THE AMICI CURIAE[1]

The International Municipal Lawyers Association ("IMLA") advocates for local governments and their attorneys by highlighting the critical role that local governments play in the daily lives of millions of people around the world. IMLA has been an advocate and resource for local government attorneys since 1935. Owned solely by its more than 2,500 members, IMLA serves as an international clearinghouse for legal information and cooperation on municipal legal matters.

The International City/County Management Association ("ICMA") is a non-profit professional and educational organization consisting of more than 11,000 appointed chief executives and assistants serving cities, counties, towns, and regional entities. ICMA's mission is to create excellence in local governance by advocating and developing the professional management of local governments throughout the world.

The National Sheriffs' Association (the "NSA") is a non-profit association organized under §501(c)(4). Formed in 1940, the NSA seeks to promote

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[1] Pursuant to Rule 37.6 *amici curiae* affirm that no counsel for a party authored this brief in whole or in part, that no counsel or a party made a monetary contribution intended to the preparation or submission of this brief, and no person other than *amici curiae,* their members, or its counsel made a monetary contribution to its preparation or submission.

The parties' have granted consent to this filing.

the fair and efficient administration of criminal justice throughout the United States, and, in particular, to advance and protect the Office of Sheriff throughout the United States. The NSA has over 20,000 members, and is the advocate for 3,083 sheriffs throughout the United States. The NSA also works to promote the public interest goals and policies of law enforcement throughout the nation. It participates in judicial processes where the vital interests of law enforcement and its members are affected.

Amici's members are the local government officials that manage and advise their clients on matters ranging from zoning and taxation to regulations of marijuana and drones. The nearly four million residents in the state of Oklahoma greatly depend on local governments to provide essential services that are not provided at the federal or state level. The outcome of this case will directly impact *amici's* members and the citizens who rely on them.

SUMMARY OF THE ARGUMENT

It is undeniable that the murder of George Jacobs was brutal, callous, and needless. It is equally undeniable that the circumstances which brought the Creek Nation to Oklahoma were similarly abhorrent. However, the impact of upholding the Tenth Circuit's decision will reverberate far beyond the facts and history of this case. This Court should consider the devastating impact that upholding this decision will have not only on the state, but its political subdivisions and the citizens of Oklahoma as well.

The state of Oklahoma is tasked with providing for the health, safety, and welfare of its citizens. State governments provide this protection through strong cooperative relationships with local governments. Local governments provide the vast majority of services on which citizens rely. For example, through local governments, Oklahomans receive an education, are protected from crime, obtain clean water, access power, acquire necessary business licenses, interact with the justice system, and much more.

Beyond these responsibilities, local governments also serve as the most fundamental and closest form of government for citizens. As a nation founded on the principles of federalism and self-rule, local governments serve as a shining beacon of democracy where citizens come together to make decisions that directly impact their daily lives. By upholding the Tenth Circuit's decision, this Court

could make it impossible for Oklahoma's local governments to fulfill that duty to its citizens.

If this Court affirms the decision below, the mischief wrought by the Tenth Circuit's decision will be magnified, as litigants are likely to test the boundary between this decision in a criminal case and matters involving civil jurisdiction. If applied to civil jurisdiction, at a minimum the functions of local governments could be greatly impaired, if not completely destroyed. The existing funding and taxation schemes, zoning laws, and licensing and regulatory schemes would be dramatically affected. The basic blocks of a democratic society — local governments — could be fundamentally altered if the Tenth Circuit's decision stands.

ARGUMENT

The 1866 territorial boundaries of the Creek Nation encompass eight counties of Oklahoma, over 4,600 square miles of land populated by more than 750,000 people, constituting 24.15% of the total population.[2] These eight counties and the greater Tulsa area are home to an American Airlines hub, top

[2] The area within the Creek boundaries as decided by the Tenth Circuit decision include eight counties in the greater Tulsa area. There are four other tribal boundaries that may be implicated as Congress addressed these boundaries through the same legislation. This "implicated area" encompasses forty of the seventy-seven counties in Oklahoma, nearly half of the state by population, and half of the state by land. UNITED STATES CENSUS BUREAU, https://www.census.gov/2010census (last visted July 26, 2018).

research universities, the iconic Golden Driller, and some excellent bar-b-que. Millions of tourists travel to and through Tulsa from around the world each year. In addition to the Creek Nation, the decision of the case could extend to the remaining members of the "Five Civilized Tribes", whose lands collectively make up an area consisting of about 43% of Oklahoma's land mass and which is home to nearly 1.8 million residents.[3] The results of this case will not only impact nearly the entire eastern half of Oklahoma, but will reach far beyond, affecting businesses, visitors, and potentially other states.

I. IN THE WAKE OF THE TENTH CIRCUIT DECISION, PARTIES ARE LIKELY TO TEST THE BOUNDARIES BETWEEN FEDERAL CRIMINAL JURISDICTION AND FEDERAL CIVIL JURISDICTION THROUGH LITIGATION, CASTING DOUBT ON EVERY ASPECT OF MUNICIPAL LAW

The application of federal criminal law to the entire area that the Tenth Circuit deemed "Indian Country"[4] has monumental implications for civil and regulatory jurisdiction that would throw the State of

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[3] THE INTER-TRIBAL COUNCIL OF THE FIVE CIVILIZED TRIBES, http://www.fivecivilizedtribes.org/ (last visited July 19, 2018)

[4] "Indian Country" is defined at 18 U.S.C. § 1151 to delineate the extent of federal criminal jurisdiction over such lands, but this Court recognizes that it also generally applies to issues of civil jurisdiction.

Oklahoma, as well as its many local governments, into chaos.[5] This Court has held that where federal and tribal laws are applied criminally, civil federal, and tribal jurisdiction often follow. *DeCoteau v. Dist. Cty. Court for Tenth Judicial Dist.,* 420 U.S. 427–428 (1975). Even when the line between criminal and civil jurisdiction is less clear, the decision of whether federal or state jurisdiction applies would likely need to be made by the federal court system, which would result in adding to an already overcrowded federal docket and would meanwhile disrupt normal activities in Tulsa and the surrounding communities while federal courts work through this decision.

If this Court affirms the decision below, jurisdiction over nearly half the state of Oklahoma may be ceded from state and local governments to federal and tribal governments. In *DeCoteau*, this Court held that state courts have criminal *and* civil jurisdiction over Native Americans after its reservation designation is terminated because the land is no longer "Indian Country". *Id.* In contrast, where this Court finds that the land involved is still designated as a reservation (or even more generally, as "Indian Country", allotted or otherwise), federal and tribal governments maintain criminal and civil authority, especially when Native Americans are party to the issue. *Iowa Mut. Ins. Co. v. LaPlante,* 480

[5] For respect to the law, this brief will refer to land as defined by 18 U.S.C. § 1151 as "Indian Country". For respect to the Creek Nation and all Native Americans, this brief will use Native Americans and tribes to refer to native peoples.

U.S. 9, 18 (1987); *Montana v. United States,* 450 U.S. 544, 565-566 (1981); *Washington v. Confederated Tribes of Colville Indian Reservation,* 447 U.S. 134 (1980); *Fisher v. District Court,* 424 U.S. 382, 387-389 (1976).

There is a long-standing federal policy of encouraging tribal authority and self-governance of Native American peoples and "Indian Country" lands.[6] This policy reflects the idea that Native Americans retain some attributes of sovereignty over the "Indian Country" lands. Yet, there is no bright line rule for determining when a state or local law applies in "Indian Country". *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136 (1980); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 173 (1973). Further, the ambiguities in federal law are often generously construed in favor of tribal sovereignty and independence.

State and local laws generally do not apply to Native Americans in "Indian Country" unless expressly provided for by Congress.[7] In *Montana v. United States,* this Court recognized that the sovereign powers of an Indian tribe generally do not

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[6] *See, e.g.*, *Dolgencorp, Inc. v. Mississippi Band of Choctaw Indians*, 746 F.3d 167, 172 (5th Cir. 2014); *Iowa Mut. Ins. Co.*, 480 U.S. 9 at 14, 18; *Three Affiliated Tribes v. Wold Engineering*, 476 U.S. 877, 890 (1986); *Merrion v. Jicarilla Apache Tribe,* 455 U.S. 130, 138, n. 5 (1982); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143–144 & n. 10 (1980); *Williams v. Lee*, 358 U.S. 217, 220–221 (1959).

[7] *McClanahan*, 411 U.S. at 170–71 (1973).

extend to the activities of non-Native Americans in "Indian Country". 450 U.S. at 565. However, the Court further explained that tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Native Americans in "Indian Country". More specifically, "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…" *Montana v. United States,* 450 U.S. 544, 565 (1981); *Williams v. Lee*, 358 U.S. 217, 223 (1959); *Morris v. Hitchcock*, 194 U.S. 384, 391-392 (1904); *Buster v. Wright*, 135 F. 947, 950 (8th Cir. 1905); *Washington,* 447 U.S. 134 at 152–154.

Further complicating this analysis, the Court later held that the "consensual relationship" exception detailed in *Montana* requires that the tax or regulation imposed by the tribe have a nexus to the consensual relationship itself." *Atkinson Trading Co., Inc. v. Shirley,* 532 U.S. 645, 656 (2001). In addition to the exception for consensual relationships, Native Americans and tribes may also "retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct 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 566; *Fisher*, 424 U.S. at 382, 386; *Williams,* 358 U.S. at 220; *Montana Catholic Missions v. Missoula County*, 200 U.S. 118, 128–129 (1906); *Thomas v. Gay*, 169 U.S. 264, 273 (1898). According to this precedent,

courts should weigh factors such as what constitutes a strong enough relationship with or big enough threat to the welfare of the tribe to determine if the tribe has power to regulate the conduct of non-Native Americans tribal lands. The lack of a bright-line rule and the increased complexity of the balancing test will throw nearly every decision, particularly decisions on taxation and licensing, that is made at the local level to federal courts, exacerbating the existing backlog and preventing local governments from functioning normally.

Though, as described above, tribal sovereignty is not unlimited, this Court has consistently acknowledged that "[t]ribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty." *Montana,* 450 U.S. 544 at 565–566; *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987); *Washington v. Confederated Tribes of Colville Indian Reservation,* 447 U.S. 134, 152–153 (1980); *Fisher, 424 U.S.* at 387-389; *Dolgencorp, Inc. v. Mississippi Band of Choctaw Indians*, 746 F.3d 167, 172 (5th Cir. 2014). Lower courts have recognized that if a tribe has authority to regulate non-Native American conduct, that regulation can be done through civil tort law as well as through precisely-tailored regulations. *Attorney's Process & Investigation Services, Inc. v. Sac & Fox Tribe,* 609 F.3d 927, 938 (8th Cir. 2010); *Philip Morris USA, Inc. v. King Mountain Tobacco Co., Inc.,* 569 F.3d 932, 939 (9th Cir. 2009); *Dolgencorp*, 746 F.3d at 172-73. Accordingly, the decision below implicates not

only civil and criminal jurisdiction, but tribal taxation and regulatory authority as well.

For taxation in particular, this Court has held that there is a strong presumption against state and local taxation authority in "Indian Country", especially over Native Americans. *McClanahan v. State Tax Comm'n of Arizona*, 411 U.S. 164, 170–171 (1973). Powers of taxation and licensing are central to local governments. These tools serve as the primary means by which local governments are able to fund the projects and services that maintain local communities. The ability to license also allows local communities, through their local government, to ensure the businesses in their community rise to specific health and safety standards. If the impacted area is deemed to be "Indian Country", this Court would potentially rob local governments of their ability to care for their communities.

Balancing tests and ambiguous precedents such as those detailed above for determining jurisdiction create enormous uncertainty. It is impossible to predict how the decision below will play out long-term because of the lack of precedent on point; never in our nation's history has such a large area of land been ceded back to tribal control. Given the wide range of these precedents, the fallout could very well impact the everyday lives of the nearly two million Oklahoma citizens residing in the half of the state at issue in this case, in realms ranging from criminal and civil jurisdiction to taxation and regulatory authority.

II. MUNICIPALITIES MAY NOT BE ABLE TO COLLECT TAXES TO FUND VITAL LOCAL PROGRAMS WITHIN THE 1866 BOUNDARIES

According to the 2017 State of Oklahoma Comprehensive annual financial report, tax income accounts for 46.3% of the total state revenue.[8] The uncertainty and disruption brought into the current state tax system would have a significant effect on Oklahoma residents and local governments. It is unclear how, if at all, the state and local governments would collect taxes in "Indian Country".

The Indian Sovereignty doctrine recognizes Indian nations as "distinct political communities, having territorial boundaries, within which their authority is exclusive." *Joint Tribal Council of Passamaquoddy Tribe v. Morton,* 388 F. Supp. 649, 657 (1975). In *Oklahoma Tax Comm'n v. Sac & Fox Nation*, this Court held that "absent explicit congressional direction to the contrary, it must be presumed that a state does not have jurisdiction to tax tribal members who live and work in Indian country, whether the particular territory consists of a formal or informal reservation, allotted lands, or dependent Indian communities." 508 U.S. 114, 113 (1993). *See also McClanahan*, 411 U.S. at 178-79. Oklahoma state

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[8] OFFICE OF MANAGEMENT AND ENTERPRISE SERVICES, OKLAHOMA 2017: COMPREHENSIVE ANNUAL FINANCIAL REPORT FOR THE FISCAL YEAR ENDED JUNE 30, 2017 (2017), https://ok.gov/OSF/documents/cafr2017.pdf.

and local governments could lose the authority to impose income tax, sales tax, motor vehicle tax, and registration fees over any tribal member in the impacted area. Even if the state and local governments are not completely stripped of their ability to collect taxes, affirming the area as "Indian Country" would create a complicated patchwork system where local businesses may be subject to overlapping taxation.

In circumstances involving the state and local taxation authority over non-Native Americans in "Indian Country", there is yet another balancing test to apply. In such cases, courts are to examine the language of the relevant federal treaties and statutes "in terms of both the broad policies that underlie them and the notions of sovereignty that have developed from historical traditions of tribal independence." *White Mountain Apache Tribe*, 448 U.S. at 136, 142-45 (1980). In fact, this Court has repeatedly recognized that taxation of non-Native American transactions in "Indian Country" that significantly involve the tribe or its members is "a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law." *Washington*, 447 U.S. 134 at 152 (1980). On the flip side, Congress has similarly recognized that a tribe's power to tax even non-Native Americans is a necessary aspect of their self-government and territorial control. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137-40 (1982). If the boundaries from the decision below are affirmed, Oklahoma could lose a substantial portion of its authority to tax its residents, and therefore a large

portion of the revenue it requires to perform essential governmental functions for its citizens.

A. PUBLIC EDUCATION MAY BE DISRUPTED, CREATING LONG TERM DEFICIENCIES IN STUDENT EDUCATION AND DEVELOPMENT

Upholding the Tenth Circuit's decision could devastate the already struggling education system in Oklahoma. Education accounts for over 20% of the state's total annual expenditures and half of all agency appropriations.[9] However, teachers all over the state have participated in walkouts to advocate for better public school funding, claiming that a significant decrease in spending per student is the direct result of a decade of deep tax and public-service cuts.[10] To address this problem, the Oklahoma legislature passed a series of bills in early 2018 to provide funding increases.[11] These initiatives are funded primarily by tax increases, some of which are collected at the local

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[9] *What Are the Biggest State Government Programs? State Spending For Oklahoma – FY 2018,* https://www.usgovernmentspending.com/oklahoma_state_spending_pie_chart (last visited July 27, 2018).

[10] Dana Goldstein, Elizabeth Dias, *Oklahoma Teachers End Walkout After Wining Raises and Additional Funding,* (April 12, 2018), https://www.nytimes.com/2018/04/12/us/oklahoma-teachers-strike.html.

[11] Michael Leachman, Kathleen Masterson, Eric Figueroa, *A Punishing Decade for School Funding*, Center on Budget and Policy Priorities (Nov. 29, 2017), https://www.cbpp.org/research/state-budget-and-tax/a-punishing-decade-for-school-funding.

level, and are a crucial step towards addressing urgent deficiencies in education.

Upholding the decision below and affirming the 1866 Creek Nation boundaries as "Indian Country" could potentially deprive Oklahoma of a significant source of revenue generated by taxation which would directly impact the education system throughout the state. Within the 1866 boundaries of the Creek Nation alone, there are nearly 200,000 students enrolled in the public school system, and research has shown that decreases in education funding have long-lasting negative effects on the welfare of children in public schools.[12] Moreover, recognition of the 1866 territorial boundaries of the Creek Nation and deprivation of state and local tax jurisdiction may significantly disrupt the tax reform that the Oklahoma legislature recently passed, thereby undermining the state's legislative prerogatives. Without the ability to generate enough revenue through taxation, Oklahoma may be left no means to address the urgent problem in education.

B. LOCAL GOVERNMENT MAY LACK THE FUNDING AND AUTHORITY TO ADMINISTER LOCAL HEALTH PROGRAMS AND SERVICES

Local governments provide necessary services that are not provided by the state or federal government to citizens largely funded by taxes

[12] *Id.*

collected at the local level. Local governments are uniquely positioned and best suited to meet specific needs of their communities. Programs funded through local sales and property taxes provide resources that would not exist without the support from local taxes or local employees and officials. Without the ability to collect these taxes many necessary services would be at risk. All of these initiatives would be detrimentally impacted, if not completely erased, under the 1866 boundaries.

For example, Tulsa County maintains an extensive array of programs for its residents via the Tulsa Health Department. The Tulsa Health Department operates as the "primary public health agency to more than 600,000 Tulsa County residents, including [thirteen] municipalities and four unincorporated areas."[13] Although the agency is an "autonomous health department…with statutory public health jurisdiction throughout Tulsa County and the City of Tulsa," the department's public health benefits could be at risk primarily due to funding concerns. Beyond funding, it is unclear how local government would function under the 1866 boundaries and these programs may also at be risk due to authority and management concerns.

These programs are uniquely situated to apply local expertise and resources to solve local problems. For instance, Oklahoma has an infant mortality rate

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[13] TULSA HEALTH DEPARTMENT, MISSION & VALUES (2018). http://www.tulsa-health.org/about-us/mission-values.

which is higher than the national average, and the Tulsa Fetal and Infant Mortality Review Program studies data from the local population to execute preventive measures working to reduce infant mortality rate. Child Guidance, a statewide program administered by the Tulsa Health Department, promotes healthy child development by offering resources regarding medical screenings, immunizations, and treatment to parents.[14] The School Health program, recognized as a national model practice by other school health officials, helps school-aged children learn good habits to improve future health and lifestyles, addressing issues like childhood obesity or good decision-making.[15] Other focus areas of the department's programs include substance abuse prevention, teen pregnancy prevention, education, and making resources available on topics relating to food safety, personal, family, community, and environmental health. And, most fundamentally, the department operates over ten clinics around the county in order to make health and well-being more accessible to Tulsa county residents.

These programs are examples of how a local government is specifically working to address pressing issues affecting the community. Hundreds of thousands of residents rely on these services and may

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[14] *See* Tulsa Health Department, *Child Guidance*, http://www.tulsa-health.org/personal-health/child-guidance

[15] *See* Tulsa Health Department, *School Health*, http://www.tulsa-health.org/community-health/school-health.

not be able to continue to do so if local health departments lose a major source of funding – state and local tax revenues. [16]

IV. DRUG, MENTAL HEALTH, AND VETERANS SPECIALTY COURTS COULD BE DISCONTINUED AS FUNDING AND AUTHORITY WILL BE ENDANGERED.

As another example of a vital local government agency, the Tulsa Community Service Council runs the county's specialty courts system, which serves as a court-supervised treatment alternative to incarceration.[17] Tulsa's system is by far the largest, but not the only, system of its kind operating in Oklahoma. The system includes a drug court, DUI court, mental health court, and veteran's treatment court. Out of the seventy-seven counties in Oklahoma, there are similar specialty drug courts in seventy-three, including all but one of the counties in the impacted area, and mental health courts in fourteen counties, twelve of which are in the impacted area.[18]

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[16] Standfield & O'Dell, Tulsa County Health Department Financial Statements and Internal Control and Compliance Report, (November 20, 2015), https://www.sai.ok.gov/olps/uploads/2015_tulsa_citycounty_health_department_single_audit_financial_statements_2hsa.pdf.

[17] *Tulsa Alternative Courts,* Community Service Council., https://csctulsa.org/tulsa-county-courts-program (last visited July 17, 2018).

[18] *Adult Drug Court,* Oklahoma Department of Mental Health and Substance Abuse Services, https://www.ok.gov/odmhsas/

Locally-organized alternative treatment courts such as these transform local communities for the better by rehabilitating past offenders into productive citizens and reducing the burden on taxpayer-financed incarceration programs, saving over $19,000 per offender per year.[19] In Tulsa County alone, over 1,300 offenders have participated in the program.

While specialty court programs receive a small amount of funding from local governments and would also be at risk if taxation authority becomes ambiguous, these courts are further at risk because there is no Article III equivalent to such innovative local solutions. Local governments are able to channel offenders to specialty courts because they maintain criminal jurisdiction to prosecute crimes. If the decision below is affirmed, and the impacted area is deemed to be "Indian Country" under federal jurisdiction, the survival of all alternative courts within the 1866 boundaries may be at risk due not only to financial concerns, but also because the courts may lack the jurisdictional authority to function.

Substance_Abuse/Oklahoma_Drug_and_Mental_Health_Courts/Adult_Drug_Court (last visited July 17, 2018). *Mental Health Court,* Oklahoma Department of Mental Health and Substance Abuse Services, https://www.ok.gov/odmhsas/Substance_Abuse/Oklahoma_Drug_and_Mental_Health_Courts/Mental_Health_Court (last visited July 17, 2018).

[19] *Tulsa Alternative Courts,* Community Service Council., https://csctulsa.org/tulsa-county-courts-program (last visited July 17, 2018).

V. MUNICIPALITIES MAY BE PREVENTED FROM ENFORCING LOCAL ZONING LAWS WHICH COULD LEAVE MANY HEALTH AND SAFETY ORDINANCES UNENFORCED.

Zoning is a primary tool for local governments to maintain the health, safety, and welfare of its citizens. This Court has recognized the importance of zoning to communities, "Zoning is the process whereby a community defines its essential character. Whether driven by a concern for health and safety, esthetics, or other public values, zoning provides the mechanism by which the polity ensures that neighboring uses of land are not mutually-or more often unilaterally-destructive." *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408 (1989) (Stevens, J., announcing the judgment of the Court in part, dissenting in part). The Tulsa Metropolitan Area Planning Commission promulgated hundreds of pages of regulations which are aimed at promoting the safety of the community and improving the lives of the citizens. It is unclear if and how local governments could enforce zoning laws and ordinances in "Indian Country."

As an initial matter, if the area within the 1866 boundaries is determined to be "Indian Country," that determination could oust state and local governments of jurisdiction, including zoning jurisdiction. Moreover, as to the non-Native Americans living on lands within "Indian Country", the Court confirmed in *Montana v. United States* that tribes retain inherent sovereign power to exercise some forms of civil

jurisdiction over non-Native Americans within reservation boundaries.

In *Brendale,* Justice Stevens, joined by Justice O'Connor, for the Court denied that a tribe has absolute authority to enforce zoning as to non-Native American-owned fee land (i.e., land allotted to Native Americans in fee simple and sold to non-Native Americans), the Court did recognize that there are two "exceptions" noted by *Montana* to this general principle. First, a tribe may regulate activities of non-Native Americans who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases or other arrangements. *Montana*, 450 U.S. 544 at 566. Second, a tribe may also "retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* Under those exceptions, in a highly divided opinion, this Court found that a tribe had authority to zone fee land in a closed area of a reservation, but not in a more open area that was owned in significant part by non-Native Americans. *Brendale*, 492 U.S. 408, 433 (Stevens, J., announcing the judgment of the Court in part, dissenting in part).

Therefore, under *Brendale*, if the disputed area is determined to be "Indian Country", a tribe may attempt to enact and enforce new zoning ordinances within at least some parts of this area, rendering it subject to a balancing test with different outcomes

depending on the nature and purpose of the zoning law at issue and the character of the land. Indeed, the split decision in *Brendale* illustrates the difficulty that courts will have in determining the applicability of zoning laws to non-Native Americans who own land in "Indian Country".

Adding to this difficulty, under the current "checkerboard zoning" scheme, Oklahoman local governments already must manage intermittent enforcement throughout communities as isolated land plots are exempt from state and local regulation due to their status as "Indian Country".[20] This alone creates tension and problems. If the 1866 boundaries are restored, rendering a large swath of Oklahoma "Indian Country", the question of whose zoning ordinance applies within this area might very well depend on the identity of the property owner, rather than simply on the location of the property, undermining the very purpose of the zoning.

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[20] "Checkerboard zoning" occurs as a result of "checkerboard lands" where tribal trust allotments are spread among parcels owned by non-Native Americans in fee simple. Checkerboard zoning occurs when local zoning regulations apply to the lots owned by non-Native Americans, but those regulations do not apply to adjacent properties because which are lands held in tribal trust and treated as "Indian Country". *See* Rebecca Tsosie, *Land, Culture, and Community: Reflections on Native Sovereignty and Property in America*, 34 Ind. L. Rev. 1291 (2001). *See also* Judith V. Royster, *The Legacy of Allotment*, 27 Ariz. St. L.J. 1, 56 (1995).

The Tulsa Zoning Code provides detailed rules and regulations which prevent the potentially hazardous overlaps of industrial districts and residential districts. This is particularly important in the greater Tulsa area, as the energy industry maintains many industrial sites such as oil and gas wells. The Code also details regulations which govern waste storage and removal, proper safety requirements for maintaining both indoor and outdoor gun ranges, providing safe and available parking for residential and commercial districts, and the appropriate placement of liquor stores and sexually oriented businesses. Tulsa enforces these regulations through a series of penal actions beginning with fines and culminating in abatement and other court-enforced remedies.[21]

While it is unclear what would happen to these regulations if the Tenth Circuit's decision was upheld, it is clear is that the enforcement mechanism used by local governments to enforce zoning codes and other regulations would at a minimum be disrupted. If local governments were made incapable, overnight, of enforcing the rules and regulations that maintain order in their communities, communities would be greatly harmed. Even if all zoning regulation would not disappear, the ability for the local governments to enforce its zoning ordinances will at a minimum be

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[21] CITY OF TULSA, OKLA., MUN CODE (2016) http://www.incog.org/Land_Development/Documents/Tulsa%20Zoning%20Code%206.30.17%20Updates%20with%20bookmarks.pdf.

questioned through potentially long and cumbersome litigation in federal courts.

CONCLUSION

Upholding the Tenth Circuit's decision may rob Oklahomans of access to the most fundamental source of resources and governance by seriously impairing the ability of local governments to function. For the foregoing reasons, the judgment below should be overturned.

Respectfully submitted,

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