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

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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's tribal fee is now a "reservation," threatens to render all the land within the historical boundaries of the Five Tribes—the 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 regulations, affect the alienability of oil and gas leases, and dramatically change the environmental

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[1] The parties in this case received timely notice under Rule 37.3(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.

regulation of oil and gas wells—all of which has far-reaching implications for OIPA's members.

SUMMARY OF ARGUMENT

I. The Tenth Circuit assumed that the Creek lands constituted a "reservation" under 18 U.S.C. §1151, but that was incorrect. A "reservation" is federally-owned land merely "reserved" for tribal occupancy—but the communal lands of the Creek Nation were owned by the Nation itself pursuant to a single fee patent.

A "reservation" under Section 1151 is land "belonging to the United States" which is "reserved from sale and set apart" for a tribe. *Hagen v. Utah*, 510 U.S. 399, 412 (1994). The tribe does not own the "reservation" land, and it depends on federal ownership for a "right [that] amounts to nothing more than a treaty right of occupancy." *Nw. Bands of Shoshone Indians v. United States*, 324 U.S. 335, 338 (1945).

But because the Five Tribes *owned* their land in fee simple, their territory was not a "reservation" of federal land under Section 1151(a). The Tribes' unique control of their territory extended beyond their ownership arrangement, and included the Tribes' "almost independent government" over their lands. *Atl. & P R Co v. Mingus*, 165 U.S. 413, 437 (1897). Thus, prior to statehood, this Court explained that the Five Tribes' territory "stands in an entirely different relation to the United States from other territories, and that for most purposes it is to be considered as an independent country." *Id*. at 435–36; *id*. at 435 ("it is open to serious doubt whether that large tract of land [in future Oklahoma], known distinctively as the 'Indian Territory,' is a territory of the United States," as that term was used by Congress).

Through Oklahoma's acceptance into statehood, Congress extinguished this unique relationship and ended the Indian territory's status as a nearly "independent country." The communal tribal fees—which the Government had guaranteed to the Tribes to enjoy and govern in common—were severally allotted to individuals, the Tribal courts were abolished, and Oklahoma law was applied throughout the former Indian territory. After statehood, the members of the Creek Nation and other Tribes were "full fledged citizens of the State of Oklahoma" and, like other state citizens, subject to its "police protection" and criminal jurisdiction. *Oklahoma Tax Comm'n v. United States*, 319 U.S. 598, 608–09 (1943).

II. Even if the Creek lands were a "reservation" under Section 1151, Congress explicitly disestablished it in the run-up to statehood.

The Tenth Circuit misinterpreted this Court's disestablishment cases as requiring a "hierarchical, three-step framework" under which "particular language" is given talismanic importance (Pet. App. 61a, 97a)—but the Court has rejected such an approach that "erroneously seizes upon several factors and presents them as apparent absolutes." *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 588 n.4 (1977). Rather, the relevant inquiry is whether Congress intended to transfer "Indian country" to state jurisdiction, which must be discerned from the entire course of congressional action, not from the talismanic invocation of a few statutory words. *See id.* at 586 ("The underlying premise is that congressional intent will control.").

Here, there is no doubt that Congress's intent was to place the Indian territory under Oklahoma's jurisdiction. The deliberate allotment and

extinguishment of the tribal fee, imposition of Oklahoma law, and extension of Oklahoma's jurisdiction all effectuated Congress's express purpose: "the extinguishment of the national or tribal title to any lands within that Territory . . . so far as may be necessary, be requisite and suitable to enable the ultimate creation of a State . . . which shall embrace the lands within said Indian Territory." Act of March 3, 1893, ch. 209, 27 Stat. 612, 645.

III. Oklahoma's longstanding exercise of jurisdiction over the Five Tribes territory both "demonstrates a practical acknowledgment" that the Indian territory is no longer "Indian country," and shows that "a contrary conclusion would seriously disrupt the justifiable expectations of the people living in the area." *Hagen*, 510 U.S. at 421.

Oklahoma has exercised jurisdiction and control over the Indian territory for over a century, fostering the growth of numerous businesses and industries—including the oil and gas industry. Replacing Oklahoma's sophisticated regulatory regime with tribal and federal regulation would impose confusing and overlapping tax regimes, a patchwork of varied environmental regulations, and new and possibly inconsistent licensing and zoning regimes. And—perhaps worst of all—the uncertainty surrounding the shift in regulatory authority would spawn near-endless litigation.

To avoid the destabilizing consequences that will inevitably flow from the Tenth Circuit's erroneous decision, this Court should reverse.

BACKGROUND

The term "reservation" has long referred to federally owned land "reserved" for a tribe. Although

a tribe had an equitable right of usage and occupation on a reservation, it did not *own* the land. *See Nw. Bands of Shoshone Indians v. United States*, 324 U.S. 335, 338 (1945) ("Even where a reservation is created for the maintenance of Indians, their right amounts to nothing more than a treaty right of occupancy."); *United States v. Cook*, 86 U.S. 591, 593 (1873) ("The right of the Indians to their occupancy is as sacred as that of the United States to the fee, but it is only a right of occupancy.").

However, the Five Civilized Tribes—including the Creek—held *legal title*, in fee simple, to the land that they occupied and governed. *See Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1441 (D.C. Cir. 1988). As this Court explained in a decision issued shortly after Oklahoma statehood, the title itself was guaranteed by treaty:

> Pursuant to treaty provisions . . . , the Creeks held their lands under letters patent issued by the President of the United States, dated August 11, 1852, *vesting title in them as a tribe*, to continue so long as they should exist as a nation and continue to occupy the country thereby assigned to them.

Woodward v. De Graffenried, 238 U.S. 284, 293–94, (1915) (emphasis added). Rather than "the usual Indian right of occupancy with the fee in the United States," "[t]he Creek Tribe had a fee-simple title" that "was acquired and held under treaties, in one of which the United States guaranteed to the tribe quiet possession." *United States v. Creek Nation*, 295 U.S. 103, 109 (1935).

As reflected in the treaties between the Creek Nation and the United States, the Nation's territory

was defined by its fee patent. *See Creek Nation*, 295 U.S. at 105–06 (defining Creek lands by boundaries of the fee). In the 1832 treaty forcing the Creeks to move west, the government promised it would protect the "Creek country west of the Mississippi" by "caus[ing] a patent or grant to be executed to the Creek tribe." Treaty of March 24, 1832, 7 Stat. 366, Art. XIV. In 1833, the United States delineated the boundary lines of this "Creek country," and committed to granting "a patent, in fee simple, to the Creek nation," by which "the right thus guaranteed by the United States shall be continued to said tribe." Treaty of February 14, 1833, 7 Stat. 417, Art. III. This patent finally issued in 1852, which provided that the United States conveyed to the Creek Tribe the treaty tract "[t]o have and to hold . . . so long as they shall exist as a Nation." August 11, 1852 Patent[2]; *see also* Treaty of August 7, 1856, 11 Stat. 699, Art. III (United States "solemnly guarantee[d]" Creek lands "by the same title and tenure by which they were guaranteed" in the prior treaty articles specifically referring to patents, and in the "letters-patent issued" in 1852 itself).[3]

Thus, unlike Indians whose communal rights flowed from the federal "reservation" of public land for their use, the Creeks—and the other Five Tribes—communally occupied, used, and administered land that the Tribes *owned*. *Shulthis v. McDougal*, 170 F.

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[2] Reprinted in Bledsoe, *Indian Land Laws* (1909) § 92, *available at* https://tinyurl.com/ybol8rh7.

[3] When the Creeks were forced to cede the western half of their lands in 1866 as punishment for their alliance with the Confederacy, they did so by "convey[ing]" their fee title to the United States. Treaty of June 14, 1866, 14 Stat. 785, Art. III; *see also id*. Art. VIII (describing the cession as a "sale of Creek lands to the United States").

529, 533 (8th Cir. 1909) ("The legal title stood in the tribe as a political society[.]").[4] Pursuant to their treaty rights, the Tribes exercised uniquely strong control and governance over their fee territories—so much so that the "Indian Territory" in future Oklahoma was "for most purposes . . . to be considered as an independent country." *Atl. & P R Co v. Mingus*, 165 U.S. 413, 436 (1897). Their unique territory was exempted when Congress passed the General Allotment Act in 1887, which effectuated the new nationwide policy of breaking up *federally owned* reservations. *See Woodward*, 238 U.S. at 294–95; *cf. Hagen v. Utah*, 510 U.S. 399, 424 (1994)

But the Five Tribes' communal ownership of their land "presented a serious obstacle to the creation of the state which Congress desired to organize" in Oklahoma, so Congress decided to "extinguish[]" the tribal fees and thereby end the communal relationship. *Choate v. Trapp*, 224 U.S. 665, 667 (1912). "In 1893 the United States, in pursuance of a policy which looked to the final dissolution of the tribal government, took steps toward the distribution and allotment of the lands among the members of the tribe." *Tiger v. W. Inv. Co.*, 221 U.S. 286, 300 (1911). The 1893 Act simultaneously: (1) extended an open invitation to the Five Tribes to allot their lands themselves, and (2) created the "Dawes Commission," which was empowered "to enter into negotiations with the same tribes for the purpose of extinguishing the tribal titles . . . with a view to the ultimate creation of a state or states of the Union to embrace the lands within the territory." *Woodward*, 238 U.S. at 295.

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[4] The other four tribes occupying the "Indian territory" that would become eastern Oklahoma "held similar patents" and owned their tribal land in fee. *Woodward*, 238 U.S. at 294.

By the early 20th Century, the Dawes Commission—and Congress—had prevailed in securing the Tribes' agreement to the destruction of their own territories. *See Woodward*, 238 U.S. at 295–96 (Commission reports "give a complete and interesting history of the efforts made to further the policy of Congress,-efforts beginning in discouragement, but finally crowned with success"). With respect to the Creek Nation, on May 25, 1901 the Commission succeeded in securing Creek accession to an allotment plan called "the Original Creek Agreement," which was superseded in 1902 by the "Supplemental," and final, Creek Agreement. *Id*. at 312. These agreements were effectuated, and by the time of statehood, "the enrolment and allotment had so far progressed as to make it fair to assume that most, if not all, of the patents had been issued." *Choate*, 224 U.S. at 670.

Tribal authority over the allotted land terminated and was replaced by state jurisdiction: "As soon as the title, both legal and equitable, to the land in question became vested in [the Creek allottee], it was subject to taxation by the state and county authorities, and [the allottee] had full dominion over the same, notwithstanding in many respects the government still retained a guardianship over him." *Bartlett v. United States*, 203 F. 410, 412 (8th Cir. 1913), *aff'd*, 235 U.S. 72, 35 (1914).[5] Thus, the fee territories of the Creeks and the other Five Tribes were dismantled pursuant to their own consent, clearly abrogating the

[5] Allotments were originally subject to some time-limited restrictions on alienation and taxation, but "after the trust period had expired and both the legal and equitable title had fully vested in the allottee," the land was thereafter under taxation and jurisdiction of "the state and local municipalities." *Bartlett*, 203 F. at 412.

earlier treaties "solemnly guarantee[ing]" communal ownership and enjoyment over the fee lands.

ARGUMENT

I. Congress Abrogated the Treaties with the Five Tribes by Allotting Their Fee and Transferring Jurisdiction to the New State

The Creek territory was never a "reservation" as that term is used in Section 1151 of the Major Crimes Act because the Creek Nation owned the land in fee. And whatever Indian country status the territory may have had was terminated by and through statehood, as Congress invested Oklahoma with full jurisdiction over the former Indian territory, and "passed laws under which [Five Tribes] Indians . . . bec[a]me full fledged citizens of the State of Oklahoma." *Oklahoma Tax Comm'n v. United States*, 319 U.S. 598, 608 (1943).

A. The Creek Territory Was Not a "Reservation" Under Section 1151

The term "reservation," as used in Section 1151 and in earlier Supreme Court decisions, refers to land "reserved" for Indian use but *owned* and ultimately administered by the federal government. The Creek Nation's land, by contrast, was owned by the Tribe itself and independently administered pursuant to this unique arrangement—and was thus not a "reservation" as that term is used in Section 1151.

Interpreting the term "reservation" in Section 1151, this Court explained that "'[f]rom an early period in the history of the government it [was] the practice of the President to order, from time to time,

. . . *parcels of land belonging to the United States* to be *reserved* from sale and set apart for public uses.'" *Hagen*, 510 U.S. at 412 (quoting *Grisar v. McDowell*, 6 Wall. 363, 381 (1868)) (emphasis added). "This power of reservation was exercised for various purposes, including Indian settlement, bird preservation, and military installations, 'when it appeared that the public interest would be served by withdrawing or reserving parts of the public domain.'" *Hagen*, 510 U.S. at 412; *see also Donnelly v. United States*, 228 U.S. 243, 256 (1913) (President could create "reservations" by "setting apart and reserving portions of the public domain in aid of particular public purposes").[6]

Shortly before Section 1151 was passed, this Court equated "reservations" with federally owned land to which tribes have only equitable rights: "Even where a reservation is created for the maintenance of Indians, their right amounts to nothing more than a treaty right of occupancy." *Nw. Bands of Shoshone Indians v. United States*, 324 U.S. 335, 338 (1945); *see also United States v. McGowan*, 302 U.S. 535, 539 (1938) (concluding land was tantamount to a "reservation" when "[t]he government retains title to the lands which it permits the Indians to occupy").[7]

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[6] Section 1151's drafters looked to *Donnelly* when defining the term "reservations." *See Alaska v. Native Vill. of Venetie Tribal Gov't,* 522 U.S. 520, 530 (1998); Notes to 1948 Act, following 18 U.S.C. § 1151, p. 276.

[7] The Historical and Revision Notes also list *McGowan* as one of the cases codified by Section 1151. Notes to 1948 Act, following 18 U.S.C. § 1151, p. 276.

By contrast, lands owned *in fee* by a tribe cannot, by definition, be "reserved" federal lands—and thus are not "reservations" under Section 1151.

The statutory text itself makes clear that an "Indian reservation" does not include territory that owes its Indian nature to a patent conveying the fee to a tribe. The statute specifies that a "reservation" is "Indian country . . . notwithstanding the issuance of any patent," ensuring—as the Court has recognized—that "Indian country" includes public land reserved for Indians even if pieces of the reserved land are patented to individual owners. 11 U.S.C. § 1151(a); *see Seymour v. Superintendent of Washington State Penitentiary*, 368 U.S. 351, 358 (1962). The "notwithstanding" clause confirms that patented land is an *exception* to the general rule that "reservation" land is non-patented, i.e., that it is federal public land. Indeed, it would make little sense to refer to land issued to a tribe *via patent* as Indian country "*notwithstanding* the issuance of *any* patent."

The Court has long understood that the Five Tribes' patented territory was unique, and that the Tribes' ownership and governance of the land made it unlike any "reservation." In *Atlantic & P.R. Co.*, the Court observed that, given the Five Tribes' unique rights (including both ownership and governance) to the so-called "Indian Territory," "a reference to some of the treaties under which it is held by the Indians, indicates that it stands in an entirely different relation to the United States from other territories,

and that for most purposes it is to be considered as an independent country." *Id.* at 435–36.[8]

The Tribes' special ownership rights and independence had practical consequences: the Court held that a Congressional grant to a railroad of land "through the territories of the United States" was *not* a grant through the Five Tribes' land, because of their unique rights. *Mingus*, 165 U.S. at 435 ("Indeed it is open to serious doubt whether that large tract of land, known distinctively as the 'Indian Territory,' is a territory of the United States, within the meaning of the act."). By contrast, just a decade earlier, the Court had held that an identical grant to a different railroad effectively conveyed ownership to Indian *reservation* lands, because reservation "Indians had merely a right of occupancy,-a right to use the land subject to the dominion and contral [sic] of the government." *Buttz v. N. Pac. R. Co.*, 119 U.S. 55, 66 (1886).

Thus, even when the Five Tribes' territory was "Indian country," it was *not* a "reservation" as that term is used in Section 1151.

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[8] The Court explained that the Five Tribes had taken their fee lands and "proceeded to establish and carry on independent governments of their own, enacting and executing their own laws, punishing their own criminals, appointing their own officers, raising and expending their own revenues." *Id*. at 436.

B. The Five Tribes' Territory Ceased to Be "Indian Country" When Congress Allotted the Land and Transferred Jurisdiction to Oklahoma

Whatever "Indian country" status the territory of the Five Tribes had in the 19th Century, that status was extinguished through allotment and statehood.

A territory is considered "Indian country" under Section 1151 when "it ha[s] been validly set apart for the use of the Indians as such, under the superintendence of the Government.'" *Venetie*, 522 U.S. at 529 (alteration omitted) (quoting *United States v. Pelican*, 232 U.S. 442, 449 (1914)). The Indians within such "set apart" territory are necessarily separate from state control: "They owe no allegiance to the states, and receive from them no protection." *United States v. Kagama*, 118 U.S. 375, 384 (1886). Further, the *land itself* must be set apart—the Court's "Indian country precedents . . . indicate both that the Federal Government must take some action setting apart the land for the use of the Indians 'as such,' and that it is *the land in question,* and not merely the Indian tribe inhabiting it, that must be under the superintendence of the Federal Government." *Venetie*, 522 U.S. at 531 n.5.[9]

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[9] The Tenth Circuit misunderstood Congress's continuation of the corporate existence of the "Creek Nation" as "recogni[zing] the Reservation's boundaries." Pet. App. 121a. But Congress's continuing recognition of the Creek Tribal *entity* does not show that any "*land in question*" remained Indian country, *Venetie*, 522 U.S. at 531 n.5—particularly in light of the fact that the Act extending the life of the Creek Nation did so to allow the Tribe to wind up its affairs. Blue

Here, Congress clearly intended to eliminate any such Indian community and place "*the land in question*" under the control of the state. By a series of actions continuing through statehood, Congress extinguished the communal fee, invested Oklahoma with full jurisdiction over the former Indian territory, and "passed laws under which [Five Tribes] Indians . . . bec[a]me full fledged citizens of the State of Oklahoma." *Oklahoma Tax Comm'n*, 319 U.S. at 608. Although some time-limited alienation restrictions on *particular* allotments persisted, Congress intended to—and did—ensure that the former Indian territory was not "under the jurisdiction of the United States Government." 18 U.S.C. § 1151(a).

1. Congress's express purpose in creating the Dawes Commission was "the extinguishment of the national or tribal title to any lands within that Territory" held by the Five Tribes "so far as may be necessary . . . to enable the ultimate creation of a State or States of the Union which shall embrace the lands within said Indian Territory." Act of March 3, 1893, ch. 209, 27 Stat. 612, 645.

This purpose was clearly effectuated. Quoting from a 1909 Circuit opinion issued shortly after statehood, this Court recognized that the "division of [the Tribe's] property" necessarily ended "the tribal relations" which were based on "ownership in common." *McDougal v. McKay*, 237 U.S. 372, 383 (1915) ("when, as here, the time came to disband the tribe, its ownership as a political society could no longer continue") (quoting *Shulthis*, 170 F. at 534).

Br. at 12; *Talley v. Burgess*, 246 U.S. 104, 107 (1918) (the 1906 Act continuing the Tribal existence, "as its title indicates, is a comprehensive one for the final disposition of the affairs of the Five Civilized Tribes").

"Under treaty stipulations with the United States the Creek Tribe of Indians as a community for a long time owned and occupied large areas now within the borders of Oklahoma and maintained there an organized government," *but* "Congress finally assumed complete control over them and undertook to terminate their government and distribute the tribal lands among the individuals." *McDougal*, 237 U.S. at 380–81. Numerous contemporary cases similarly recognized that Congress acted to extinguish the Five Tribes' communities through allotment of their previously common property and effective termination of their governance over what had been their land.[10]

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[10] *E.g.*, *Wallace v. Adams*, 204 U.S. 415, 419 (1907) ("The case arises out of the legislation of Congress designed *to secure the disintegration of the tribal organization of the Five Civilized Tribes in the Indian territory*, and the distribution of the property of those tribes among the individual Indians.") (emphasis added); *Gritts v. Fisher*, 224 U.S. 640, 642 (1912) ("During the last twenty years Congress has enacted a series of laws looking to the allotment and distribution of the lands and funds of the Five Civilized Tribes, . . . among their respective members, and to the dissolution of the tribal governments."); *Heckman v. United States*, 224 U.S. 413, 431–32 (1912) (conditions in the Indian territory "led to the enactment of legislation which contemplated the dissolution of the tribal organizations and the distribution of the tribal property"); *see also Longest v. Langford*, 276 U.S. 69, 69–70 (1928) (agreements "set forth a comprehensive scheme for allotting the lands of the two tribes in severalty among their members, distributing the tribal funds and dissolving the tribes"); *Marlin v. Lewallen*, 276 U.S. 58, 63 (1928) (Creek Agreements "taken together, embodied an elaborate plan for terminating the tribal relation and converting the tribal ownership into individual ownership").

Concurrent with the "extinguishment" of the Tribes' communal title, Congress acted "to enable the ultimate creation of a State," by investing the State of Oklahoma with jurisdictional authority that would "embrace" the Indian territory. In the years leading up to statehood, Congress took steps to dismantle the Five Tribes' authority in the Indian territory, including by abolishing tribal courts and replacing Tribal law with the laws of Arkansas (as Oklahoma, not yet a state, did not have its own laws). *See* Blue Br. at 29–30; *Shulthis v. McDougal*, 225 U.S. 561, 571 (1912) ("Congress was then contemplating the early inclusion of that territory in a new state, and the purpose of those acts was to provide, for the time being, a body of laws adapted to the needs of the locality").[11]

Although Congress ousted the tribes of legal jurisdiction in the Indian territory, it "did not contemplate that this situation should be of long duration, but, on the contrary, that the territory should be prepared for early inclusion in a state." *S. Sur. Co. v. State of Oklahoma*, 241 U.S. 582, 584 (1916); *see also Shulthis*, 225 U.S. at 571 ("Plainly, [Congress's] action was intended to be merely provisional, and not to encroach upon the powers

[11] Before the ouster of tribal jurisdiction, "[t]he Creek or Muskogee Nation or Tribe of Indians had, in 1890, a population of 15,000. Subject to the control of Congress, they then exercised within a defined territory the powers of a sovereign people, having a tribal organization, their own system of laws, and a government with the usual branches, executive, legislative, and judicial. The territory was divided into six districts; and each district was provided with a judge." *Turner v. United States*, 248 U.S. 354, 354–55 (1919).

which rightfully would belong to the prospective state.").

Pursuant to that plan, Congress transferred jurisdictional and legal authority to Oklahoma upon statehood. With the exception of exclusively federal crimes, "all causes, proceedings, and matters, civil or criminal, pending in the district courts of Oklahoma territory, or in the United States courts in the Indian Territory" were to be transferred to Oklahoma state court and "proceeded with, held, and determined by the courts of said state." *S. Sur. Co.*, 241 U.S. at 585 (quotations omitted). "In other words, the jurisdiction of the [Oklahoma] state courts was to be the same that would have applied had the Indian Territory been a state when the offenses were committed." *Id.* at 586. And to ensure that "the new state should come into the Union with a body of laws applying with practical uniformity throughout the state, Congress provided in the Enabling Act (section 13) that 'the laws in force in the territory of Oklahoma, as far as applicable, shall extend over and apply to said state until changed by the Legislature thereof,'" thus applying Oklahoma territorial law to the Indian territory upon statehood. *Jefferson v. Fink*, 247 U.S. 288, 292–93 (1918) (quoting Enabling Act of June 16, 1906, c. 3335, 34 Stat. 267); *see also Shulthis*, 225 U.S. at 571–72 (corporation "incorporated in the Indian territory under the Arkansas statutes" was automatically subject to Oklahoma corporate law upon statehood).

Thus, by statehood Congress had divided and extinguished the Tribal fees and granted Oklahoma jurisdiction over the Tribes' former lands as if "the Indian Territory [had] been a state." *S. Sur. Co.*, 241 U.S. at 586; *see also Bartlett*, 203 F. at 412 ("As soon as the title, both legal and equitable, to the land in

question became vested in [the Creek allottee], it was subject to taxation by the state and county authorities"). These actions unequivocally abrogated the United States's treaties with the Five Tribes, which had "solemnly guaranteed" the Tribes' communal ownership and governance over their fee lands, and the exclusion of state control. *See* p. 6, *supra*; *United States v. Dion*, 476 U.S. 734, 739–40 (1986) ("What is essential is clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty.").

The former territories of the Five Tribes have thus not been "under the jurisdiction of the United States" for well over 100 years. 18 U.S.C. § 1151(a); *see Rosebud Sioux*, 430 U.S. at 604–05. Rather, they have been an integral part of Oklahoma.

2. Congress did not renounce all regulatory authority related to Indians in Oklahoma at statehood—but, as contemporary jurists recognized, its limited intervention did not interfere with Oklahoma's jurisdiction over the former Indian Territory.

While Congress broke up the Tribes' communal fees, it temporarily restricted alienation of some allotments belonging to "full-blood" tribe members. *See Tiger*, 221 U.S. at 302 (discussing 1906 Act).[12] But

[12] Other allotments had also been briefly restricted, but most of these restrictions, to the extent they had not already expired, were terminated in 1908. *Goat v. United States*, 224 U.S. 458, 465 (1912); *see also Joplin Mercantile Co. v. United States*, 236 U.S. 531, 548 (1915) (noting that numerous unrestricted allotments were presumably part of the lands

contemporary jurists did not believe that the limited restrictions on alienability amounted to a preservation of Tribal territory—on the contrary, they were certain that the territory was now under state jurisdiction. In a well-cited opinion, Judge Pollock of the then Circuit Court of Eastern District of Oklahoma explained that the restrictions on alienability coexisted with an explicit Congressional policy of subsuming the Indian territory into Oklahoma:

> it must be borne in mind under existing treaty regulations made between the government and the Creek Nation the Congress possessed full power and authority to so legislate with respect to lands by the government allotted to its wards; that although the members of the Five Civilized Tribes of Indians by the act of allotment under existing laws became citizens of the state, and *the lands thus allotted became a part of that great mass of real estate which on the admission of the Indian Country and Oklahoma Territory as the state of Oklahoma passed under the general control of the laws of the state*, yet the state by the terms of the enabling act under which it was admitted expressly

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"taken out of Indian country," but, by contrast, there was still federal jurisdiction over liquor imports to restricted allotments, as later codified in Section 1151(c)); *see also id*. at 546 (holding Congress gave Oklahoma, *not* the federal government, general criminal jurisdiction over intrastate liquor transactions in the Indian territory, as a different construction "would have interfered to a greater extent with the control of the new state over its internal police").

> consented the general government should reserve to itself and exercise its power of regulation and control over the disposition of such allotted lands to the exclusion of or in conformity with the power possessed by the state over the property of its citizens.

Bell v. Cook, 192 F. 597, 603–04 (C.C.E.D. Okla. 1911) (emphasis added).[13] This Court later agreed with Judge Pollock's view that the time-limited restrictions on a selection of allotments supplemented, rather than contradicted, the policy of absorbing the Indian territory into Oklahoma and merely reflected Congress's concern for the supposedly most unsophisticated Indians. *See Heckman v. United States*, 224 U.S. 413, 446–47 (1912) ("The placing of restrictions upon the right of alienation was an essential part of the plan of individual allotment" in order to protect certain Indians from "incompetence and thriftlessness.").

What limited allotment restrictions persisted were not of independent jurisdictional significance—they did not run with the land and, by their own terms, would "be terminated by the lapse of varying periods of time." *Bartlett*, 235 U.S. at 79 (holding restriction on Creek allotment expired and was not resurrected). As the Court observed in a case

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[13] Other federal courts treated Judge Pollock's *Bell* opinion as the definitive word on Congressional intent. *E.g.*, *Cully v. Mitchell*, 37 F.2d 493, 498 (10th Cir. 1930) ("We are of the opinion that Judge Pollock, who has had wide experience in Indian litigation, correctly stated the real intent of Congress, and of the general understanding of that intent[.]"); *see also United States v. Ferguson*, 247 U.S. 175, 179 (1918) (approvingly citing *Bell*).

involving an Oklahoma Indian with a restricted "homestead" allotment, "[i]t is evident that, as respects his property other than his homestead, his status is not different from that of any citizen of the United States." *Choteau v. Burnet*, 283 U.S. 691, 695 (1931). Congress's time-limited restrictions on certain allotments merely represented its efforts to regulate the affairs of individual Indians—the restrictions were *not* "an incident attached to the land itself." *Williams v. Johnson*, 239 U.S. 414, 419 (1915) (quotations omitted) (rejecting argument that personal alienation restrictions ran with the land); *see also Venetie*, 522 U.S. at 531 n.5 ("it is *the land in question*, and not merely the Indian tribe inhabiting it, that must be under the superintendence of the Federal Government" for land to constitute Indian country).[14]

Thus, in *Oklahoma Tax Commission*, this Court held that Congress intended for Oklahoma to exercise its jurisdiction over the Indian Territory despite any lingering alienation restraints. Concluding that Oklahoma had full authority to impose an estate tax on land transfers of members of the Five Tribes, the Court explained that although states may not be able to "regulate the conduct of persons in Indian territory on the theory that the Indian tribes were separate political entities with all the rights of independent status," this is "a condition *which has not existed for*

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[14] *See also United States v. Dowden*, 194 F. 475, 482 (C.C.E.D. Okla. 1911) (rejecting argument that allotments were tribal land subject to permanent restrictions, because any "restrictions upon the alienation which attached to the tribal title must be held to have ceased with the extinguishment of that title"); *Goat*, 224 U.S. at 470 ("The inalienability of the allotted lands was not due to the quality of the interest of the allottee, but to the express restriction imposed").

many years in the State of Oklahoma." *Oklahoma Tax Comm'n*, 319 U.S. at 602 (emphasis added).

Moreover, the remaining alienation restrictions on *some* allotments did not oust Oklahoma of authority over the *entire* former Indian territory. Although other cases had recognized such a purpose when the relevant land was, in fact, communal Indian country, "[t]he underlying principles on which these decisions are based do not fit the situation of the Oklahoma Indians." *Oklahoma Tax Comm'n*, 319 U.S. at 603; *see also id*. at 601–03. The members of the Five Tribes were unlike Indians on separate reservations outside of the control of state government. Rather, after statehood they were "actually citizens of the State with little to distinguish them from all other citizens except for their limited property restrictions and their tax exemptions." *Id*. at 603; *see also id.* at 608–09 ("Oklahoma supplies for them and their children schools, roads, courts, police protection and all the other benefits of an ordered society.").[15]

In short, when Congress abrogated the United States's treaties with the Five Civilized Tribes it ensured that the Tribes' members became "full fledged citizens of the State of Oklahoma." *Id.* at 609. Like other state citizens, members of the Five Tribes are thus subject to the state's "police protection" and criminal jurisdiction. *Id.* at 608–09. The Court should

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[15] The "tax exemptions" referred to were not general immunities from taxation, but specific exemptions which, like the alienation restrictions, were personal to particular allottees and merely temporary. *See Choate*, 224 U.S. at 679 n.†; *Fink v. Bd. of Comm'rs of Muskogee Cnty.*, 248 U.S. 399, 403–04 (1919).

reverse the Tenth Circuit's decision holding that Respondent could not be prosecuted by the state.

II. Under the Court's "Disestablishment" Jurisprudence, the Former Creek Territory Is Not Indian Country

Given that the Creek Territory was never a "reservation," this Court's disestablishment cases do not apply here. But even if they did, their proper application demonstrates that Congress abolished any "Indian country" that existed prior to statehood and granted Oklahoma jurisdiction over the former Indian territory.

A. There Is No "Hierarchical" Test for Determining Congressional Intent to Vest the State with Jurisdiction over Former "Indian Country"

The Tenth Circuit labored under the misimpression that disestablishment requires a particular statutory talismanic incantation: "whether it's 'public domain' or whether it's the word 'cede' or whether it's a lump-sum payment." Pet. App. 76a; *id*. ("We're looking for specific language."). It also believed its analysis was dictated by a strict "hierarchical, three-step framework," and that the absence of the purported magic words essentially decided the case. *Id*. at 61a.

But the Tenth Circuit's demand for "particular statutory language," as well as its "*hierarchical*, three-step framework" are directly contrary to this Court's precedent. As the Court has repeatedly explained, there is only one question to answer: did Congress intend to invest the state with jurisdiction? *See Rosebud Sioux*, 430 U.S. at 586 ("congressional

intent will control"); *S. Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998) ("Our touchstone to determine whether a given statute diminished or retained reservation boundaries is congressional purpose."). And the answer to that question requires considering a variety of sources: "In all case[s], 'the face of the Act,' the 'surrounding circumstances,' and the 'legislative history,' are to be examined with an eye toward determining what congressional intent was." *Rosebud Sioux*, 430 U.S. at 587.

Accordingly, no single factor outweighs all others, and there is no need to invoke "particular statutory language." In a passage that applies with equal force here, the *Rosebud Sioux* Court rejected "the notion that such express language in an Act is the only method by which congressional action may result in disestablishment." 430 U.S. at 588 n.4 ("The dissent erroneously seizes upon several factors and presents them as apparent absolutes. This, however, misapprehends the nature of our inquiry . . . ."). There is no "'clear-statement rule'" for disestablishment, and the Court has "never required any particular form of words before finding diminishment." *Hagen*, 510 U.S. at 411–12.

B. The History of Oklahoma Regulation Confirms That Congress Gave Oklahoma Authority over the Five Tribes' Former Territory

By its allotment and extinguishment of the tribal fee, imposition of Oklahoma law, and extension of Oklahoma's jurisdiction, Congress effectuated its express goal: "the extinguishment of the national or tribal title to any lands within that Territory . . . so far as may be necessary, be requisite and suitable to

enable the ultimate creation of a State . . . which shall embrace the lands within said Indian Territory." Act of March 3, 1893, ch. 209, 27 Stat. 612, 645; *see* pp. 13–14, *supra*.

If there were any ambiguity in the congressional record, the history of regulation—including oil and gas regulation—over the past 100 years confirms that Congress gave Oklahoma jurisdiction over the former territory of the Five Tribes. *Rosebud Sioux*, 430 U.S. at 604 (the "State's [long-accepted] exercise of authority is a factor entitled to weight as a part of the 'jurisdictional history'").

1. 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. *Oklahoma*, *U.S. Rankings*, U.S. Energy Info. Admin., *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, for over a century, has wielded "exclusive jurisdiction, power and authority" over oil and gas development in the state. Okla. Stat. tit. 52, § 139(B)(1); *Sierra Club v. Chesapeake Operating, LLC*, 248 F. Supp. 3d 1194, 1200 (W.D. Okla. 2017); *see also Republic Nat'l Gas Co. v. Oklahoma*, 334 U.S. 62, 63 (1948) ("[s]ince 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 energy development pollution, and has sole jurisdiction to resolve complaints alleging that an oil or gas project violates environmental law. *See id*. at 1208–09.

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. Although the narrow alienation restrictions on certain allotments temporarily affected some oil and gas leases, they expired on their terms. *Pluto Oil & Gas Co. v. Miller*, 219 P. 303, 305 (Okla. 1923); *United States v. Gypsy Oil Co*., 10 F.2d 487, 491 (8th Cir. 1925).[16] Similarly, lands throughout the Indian territory were subject to Oklahoma's tax on "the production of oil and gas," absent specific tax exemptions. *Shaw v. Gibson-Zahniser Oil Corp*., 276 U.S. 575, 577 (1928) ("full blood Creek Indian" subject to Oklahoma production tax); *id*. at 582 (Congress intended "that Indian

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[16] 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. The OCC also lacks regulatory jurisdiction over various individual allotments under Section 1151(c). *United States v. Sands*, 968 F.2d 1058, 1062 (10th Cir. 1992).

citizens might assume the just burdens of state taxation").[17]

Oklahoma's exercise of taxation and regulation has long been based on the assumption that no reservation exists. For example, Oklahoma's nondiscriminatory gas taxes would not be permitted in Indian country, as 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 Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973).

Moreover, although the federal government has "primary jurisdiction" over environmental regulation in "Indian country," environmental programs critical to the oil and gas industry have historically been overseen by Oklahoma state regulators. *Cf. Yankton Sioux*, 522 U.S. at 333. For example, the Safe Drinking and Water Act ("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. Although the EPA may grant a tribe "primary enforcement responsibility" over the water in its tribal territory, Oklahoma—not the Five Tribes—has implemented a state-wide

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[17] Lingering tax exemptions on individual allotments (*see* n. 15, *supra*) were ended by Congress in 1928. *See United States v. Hester*, 137 F.2d 145, 146–47 (10th Cir. 1943) (explaining effect of Act of May 10, 1928); *see also id*. at 147 ("Indians residing in Oklahoma are citizens of that State, and they are amenable to its civil and criminal laws.").

regulatory regime under the SDWA for underground injection. *See id*.[18]

The history of mineral leasing also demonstrates the plenary nature of Oklahoma's jurisdiction over the former territories of the Five Tribes. The Indian Mineral Leasing Act and Indian Mineral Development Act give the Secretary of the Interior 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). But the Secretary does not exercise such authority in eastern Oklahoma—the state does. *See Sperry Oil & Gas Co. v. Chisholm*, 264 U.S. 488, 497–98 (1924) (still-effective allotment restrictions required Secretarial lease approval, but when restrictions expired, leasing of Indian-held land was "under the laws of the State, just as the property of other citizens").

The long history of state regulation over Oklahoma's iconic oil & gas industry is powerful evidence that Congress terminated whatever "Indian

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[18] The sole exception is the Osage mineral trust. *See* n. 16, *supra*. Although the Safe, Accountable, Flexible, Efficient Transportation Equity Act (SAFETEA) of 2005, Pub. L. No. 109–59, 119 Stat. 1144, section 10211(a), provides that Oklahoma may exercise environmental authority in Indian country, it is unclear if Oklahoma could use this provision to displace Tribal Implementation Plans that the Five Tribes would presumably enact in their new "reservations," and use of the SAFETEA provision requires separate EPA approval. *See Oklahoma Dep't of Envtl. Quality v. E.P.A.*, 740 F.3d 185, 190 (D.C. Cir. 2014).

country" designation the Five Tribes' territory may have had before statehood. Thus, even if this Court's disestablishment cases were on point (which they are not), the Tenth Circuit plainly erred in concluding that a Creek reservation exists today.

III. The Tenth Circuit's Decision, if Allowed to Stand, Would Throw Oklahoma's Regulatory Regime into Chaos

The Tenth Circuit's designation of half of Oklahoma as "Indian Country" would result in a fundamental shift in regulatory authority from the state of Oklahoma to the tribes and the federal government. This Court resists novel judicial recognition of "Indian country" when such a "conclusion would seriously disrupt the justifiable expectations of the people living in the area." *Hagen*, 510 U.S. at 421; *Rosebud*, 430 U.S. at 605 ("justifiable expectations [] should not be upset" by unjustified imposition of federal authority). Yet the Tenth Circuit's decision, if upheld, would "seriously disrupt" the expectations of millions of Oklahomans.

In the oil and gas field alone, the reservation would disrupt Oklahoma's taxation regime and create new Indian tax shelters. For example, a non-Indian operating an oil well in the new "Indian country" would likely owe taxes to Oklahoma while a tribal member would not. *See Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 175 (1989). The Tribes could also impose their own taxes and regulations on non-Indian oil and gas lessees. *See Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 133 (1982) (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. v. Navajo Tribe of Indians, 471 U.S. 195, 198 (1985) (upholding tribal tax on business activity within reservation, including mineral production); *South Dakota v. Bourland*, 508 U.S. 679, 689 (1993). The Tribes may also attempt to enact zoning ordinances that would impact energy production. *See*, *e.g.*, *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408 (1989). This additional tax and regulatory burden could bankrupt producers already operating on thin margins.[19]

The Tenth Circuit's decision could also expose oil producers operating in what was open land to claims that their wells lie in tribal lands—and that their rights to the land are invalid because they were never approved under the IMLA or IMDA. *Cf. Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 765 n.3 (1985) (Secretary of the Interior's approval authority could include practically all reservation territory); *Quantum Expl., Inc. v. Clark*, 780 F.2d 1457, 1459 (9th Cir. 1986) ("language requiring governmental approval of Indian agreements . . . has been interpreted to mean that the agreements simply are invalid absent the requisite approval"). The Five Tribes could also promulgate any number of regulations under the SDWA and Clean Air Act

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[19] 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, 2016, 9, *available at* https://tinyurl.com/y94c7xvk; *see also* Nicole Friedman, *'Strippers' Pose Dilemma for Oil Industry*, Wall Street Journal (September 7, 2015), *available at* https://tinyurl.com/ y7mynqau.

("CAA"), leaving producers with wells scattered across the state subject to six separate regulatory regimes—those of the Five Tribes and Oklahoma's.[20] The cost of compliance with these overlapping, duplicative, and possibly conflicting regulations could force smaller operators out of business.

Moreover, because "there 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," the Tenth Circuit has created a recipe for near endless litigation. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980). Case-by-case analysis will be required to determine whether Oklahoma may "assert[] authority over the conduct of non-Indians engaging in activity" on these newly discovered reservations. *Id.* at 144. This is because the "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.

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[20] Similar to the SDWA, the CAA 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)). 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.

Tribal authority to tax and regulate non-Indians is similarly indeterminate. 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," 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. Satisfying these requirements—and determining whether 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.

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The Tenth Circuit's decision cannot be reconciled with the historical record, contemporary practice, or this Court's precedent. To prevent Oklahoma's legal regime from being thrown into chaos, the Court should reverse the Tenth Circuit's decision and hold that the Five Tribes' lands are not "Indian country" under 18 U.S.C. § 1151.

CONCLUSION

The decision of the Tenth Circuit should be reversed.

Respectfully submitted,

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