Case Nos. 07-7068 & 15-7041

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PATRICK DWAYNE MURPHY,
Petitioner-Appellant,

v.

TERRY ROYAL, WARDEN,
Respondent-Appellee.

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* IN SUPPORT OF RESPONDENT-APPELLEE TERRY ROYAL, WARDEN'S, PETITION FOR PANEL REHEARING OR REHEARING EN BANC OF THE OKLAHOMA OIL AND GAS ASSOCIATION, OKLAHOMA FARM BUREAU LEGAL FOUNDATION, OKLAHOMA CATTLEMEN'S ASSOCIATION, ENVIRONMENTAL FEDERATION OF OKLAHOMA, INC., AND STATE CHAMBER OF OKLAHOMA

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RULE 26.1 STATEMENT

The Oklahoma Oil and Gas Association is not a publicly held corporation, has no parent corporation, and no publicly held corporation owns 10% or more of the stock of the Oklahoma Oil and Gas Association.

The Oklahoma Farm Bureau Legal Foundation is not a publicly held corporation, has no parent corporation, and no publicly held corporation owns 10% or more of the stock of the Oklahoma Farm Bureau Legal Foundation.

The Oklahoma Cattlemen's Association is not a publicly held corporation, has no parent corporation, and no publicly held corporation owns 10% or more of the stock of the Oklahoma Cattlemen's Association.

The Environmental Federation of Oklahoma, Inc. is not a publicly held corporation, has no parent corporation, and no publicly held corporation owns 10% or more of the stock of the Environmental Federation of Oklahoma, Inc.

The State Chamber of Oklahoma is not a publicly held corporation, has no parent corporation, no publicly held corporation owns 10% or more of the stock of the State Chamber of Oklahoma.

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I. Introduction.

Pursuant to Federal Rule of Appellate Procedure 29, *amici curiae* the Oklahoma Oil and Gas Association (OKOGA), the Oklahoma Farm Bureau Legal Foundation (OFBLF), the Oklahoma Cattlemen's Association (OCA), Environmental Federation of Oklahoma Inc. (EFO), and the State Chamber of Oklahoma (collectively, *Amici*) respectfully move the Court for leave to file a brief *amici curiae* in support of Respondent-Appellee Terry Royal, Warden's, Petition for Panel Rehearing or Rehearing En Banc, filed September 21, 2017 (Petition) of the Court's opinion entered on August 8, 2017 (Opinion).[1]

Counsel for all parties to this suit have been contacted for their position on this motion. Petitioner-Appellant opposes the relief sought in this motion. Respondent-Appellee does not oppose the relief sought in this motion.

In support of this Motion, *Amici* attach hereto the Affidavit of Tom Holcomb.

[1] None of the parties to this suit are members of any of the *Amici*.

II. Interest of *amici curiae.*

The Opinion concluded that the reservation of the Muscogee (Creek) Nation (MCN) (MCN reservation area) was not disestablished by Acts of Congress. The Opinion, which *Amici* argue was wrongly decided, will have consequences far beyond the exercise of criminal jurisdiction. *Amici* support granting the Petition because *Amici*'s members own and operate businesses and invest in Eastern Oklahoma, and the Opinion places at risk long-held understanding regarding the governmental entities with adjudicative, regulatory, and legislative jurisdiction over those businesses and investments.

A. Oklahoma Oil and Gas Association.

OKOGA was formed in 1919 as the Mid-Continent Oil and Gas Association, and is one of the oldest oil and gas industry associations in the United States. OKOGA is a non-profit association composed of oil and natural gas producers, operators, purchasers, pipelines, transporters, processors, refiners, marketers, and service companies which represent a substantial sector of the oil and natural gas industry within Oklahoma. OKOGA's membership represents the most active drillers in the state. Among its members are companies with

substantial activities and properties lying in the areas potentially affected by the jurisdictional consequences of the Opinion. OKOGA's membership also includes the state's largest pipeline, gathering and processing companies, and all four refiners in the state.

OKOGA discusses and addresses industry issues of concern and work toward the advancement and improvement of the domestic oil and gas industry. The activities of OKOGA include support for legislative and regulatory measures designed to promote both the well-being and best interests of the citizens of this state and a strong and vital petroleum industry within the State of Oklahoma and throughout the United States. Members of OKOGA own or operate oil and gas operations in the counties that are within the MCN reservation area defined by the Opinion, as well within former reservation areas of others of the Five Civilized Tribes, to whom stable and predictable regulatory and taxation jurisdiction are critical.

OKOGA has been granted leave to file briefs amicus curiae in other cases, including in this Court, *El Paso Natural Gas Co. v. Bank of America, N.A.*, No. 16-610 (10th Cir., filed Dec. 30, 2016), and in Oklahoma State courts, *e.g. Charles Pummill, et al. v. Hancock*

Exploration LLC, et al., Okla. Ct. App. No. 114703; *Fent v. Fallin*, Okla. Sup. Ct. No. MA-112,976.

B. Oklahoma Farm Bureau Legal Foundation.

The Oklahoma Farm Bureau Legal Foundation is a non-profit foundation, incorporated in 2001, that supports the rights and freedoms of farmers and ranchers in Oklahoma, by promoting individual liberties, private property rights, and free enterprise. OFBLF's sole member is the Oklahoma Farm Bureau, Inc. (OKFB), which is an independent, non-governmental, voluntary organization of farm and ranch families formed in 1942. OKFB has 87,950 members, representing agricultural producers who grow a variety of crops and livestock, and every size of operation, from small family farms to large commercial ranches and farms. Its mission is to improve the lives of rural Oklahomans by analyzing their problems and formulating action to achieve educational improvement, economic opportunity, social advancement, and thereby to promote the well-being of the nation. It is non-partisan and non-sectarian.

OFBLF is concerned about the Opinion because the MCN may take the position that it has tax and regulatory jurisdiction over

agricultural operations, private property, and water rights. Duplicative and inconsistent taxes and regulatory obligations will significantly harm OKFB members by reducing the profitability of their operations and property values, and creating significant risk and uncertainty as to legal matters implicating their businesses.

A significant number of OKFB members are located in counties that, under the Opinion, are fully or partially within the MCN reservation area: as of September 11, 2017, 15,659 OKFB member families are located in Creek, Hughes, McIntosh, Mayes, Muskogee, Okfuskee, Okmulgee, Rogers, Seminole, Tulsa, and Wagoner Counties. While some of OKFB's members may also be MCN members, OKFB members who are not MCN members may lack political or legal remedies or resources to address potential grievances caused by new MCN or federal assertion of jurisdiction grounded in previously unheralded reservation status.

The OKFB has submitted a brief *amicus curiae* to this Court in prior cases considering tribal jurisdiction in Oklahoma. *See Osage Nation v. Irby*, 597 F.3d 1117 (10th Cir. 2010). The OFBLF has

submitted a brief *amicus curiae* in the Fifth Circuit Court of Appeals in *The Aransas Project v. Shaw*, No. 13-40317 (5th Cir., filed May 9, 2013).

C. Oklahoma Cattlemen's Association.

The Oklahoma Cattlemen's Association, a non-profit association, was officially chartered on March 6, 1950, by a small group of cattle raisers in Seminole County. Since that time, the OCA has grown to include cattle raising families in all 77 counties in Oklahoma. Specifically within the area at issue in this appeal, OCA is affiliated with local county Cattlemen's organizations in all counties except Tulsa. Representing thousands of cattle raising families in the MCN reservation area, OCA's primary work on behalf of its members involves private property rights, natural resource stewardship, and common sense business policy. The OCA is the trusted voice of the Oklahoma cattle industry and exists to support and defend the State's and Nation's beef cattle industry.

D. Environmental Federation of Oklahoma, Inc.

The Environmental Federation of Oklahoma is a non-profit corporation providing Oklahoma companies with a voice in the formulation of state and federal environmental laws, regulations and

policies. Its membership includes more than eighty company, affiliate, associate, and appendix affiliate members. EFO works to ensure that environmental regulations are clear and consistent and that they properly balance the need for environmental regulation with the need for responsible economic growth. EFO members will be adversely impacted by the Opinion if the MCN now seeks to supplant state environmental regulation and to impose its own environmental regulations over the activities of non-tribal members on fee-owned lands now within the MCN reservation area.

OCA and EFO joined in the brief *amicus curiae* to this Court in *Osage Nation v. Irby*, 597 F.3d 1117 (10th Cir. 2010).

E. State Chamber of Oklahoma.

The State Chamber represents more than 1,500 Oklahoma businesses and 350,000 employees. It has been the state's leading advocate for business since 1926. The State Chamber provides a voice for Oklahoma employees to the executive, legislative, and judicial branches of government, and is in a unique position to advise the Court on the impact of civil implications on regulatory, taxation, and economic development matters, as well as the development of business

opportunities within the MCN reservation area. The State Chamber of Oklahoma has been granted leave to file briefs amicus curiae in other cases, including in this Court, *El Paso Natural Gas Co. v. Bank of America, N.A.*, No. 16-610 (10th Cir., filed Dec. 27, 2016).

Amici are in a unique position to present argument to the Court in support of the Petition because they represent businesses that will face significant consequences of the Opinion if it is not reversed. *Amici* members have, for decades, operated within the MCN and Five Civilized Tribes areas under the jurisdiction of the State of Oklahoma. However, if the Opinion is allowed to stand, the change in applicable law could be significant to *Amici*'s members doing business within the exterior boundaries of the area the Opinion recognizes as the MCN reservation area.

III. The brief will assist determination of the petition because it demonstrates that the Opinion (a) fails to address the significant consequences of the decision to Oklahoma; and (b) disregards closely analogous, Oklahoma-based precedent of this Court.

Amici's proposed brief will assist the Court to address the serious and consequential legal and factual issues raised in the Petition. The proposed brief focuses on two issues: (1) the Opinion's inadequate

consideration of the significance of the issues presented to businesses in Eastern Oklahoma, and (2) the Opinion's disregarding this Court's decision in *Osage Nation v. Irby*, 597 F.3d 1117 (10th Cir. 2010), in its analysis under *Solem v. Bartlett*, 465 U.S. 463 (1984), and the need for additional historical background to meet the Supreme Court's standard for applying this test.

While *Amici* support the Petition, their arguments do not mirror those made in the Petition. *Amici* are in a unique position to brief these issues, as the Opinion threatens to upend the legal environment affecting their members' businesses. *Amici* members have long experienced the State of Oklahoma jurisdiction over their business operations on the land that was the reservation of the MCN prior to its disestablishment and the creation of the State of Oklahoma.

Amici submit that the Opinion misapplied the test articulated by the Supreme Court in *Solem* by following caselaw from disestablishment cases which considered profoundly different allotment acts and historical settings than those presented in Eastern Oklahoma, and disregarded the Court's opinion in *Osage Nation v. Irby*, 597 F.3d 1117 (10th Cir. 2010), which addressed contemporaneous statutes

arising from an allotment pattern and historical setting analogous to this case. *Amici* further submit that in reaching its decision, the Opinion relied on a record inadequate to support conclusions having so consequential an effect in Eastern Oklahoma. If the panel or the Court *en banc* do not reverse, remand is required.

IV. Conclusion.

Proposed *Amici* respectfully request permission to submit the foregoing concerns to the Court through filing of the Proposed Brief *Amici Curiae*, attached hereto.

Respectfully submitted,

MODRALL, SPERLING, ROEHL, HARRIS & SISK, P.A.

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CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7) and Section II(I) of this Court's CM-ECF User's Manual, I hereby certify that:

1. This brief contains 1,690 words, exclusive of the items identified in Fed. R. App. P. 32(a)(7)(B)(iii). This figure was calculated through the word count function of Microsoft Word 2010, which was used to prepare this brief.

2. There were no privacy redactions made to this brief as there were none required by any privacy policy;

3. The digital submission is an exact copy of the written document filed that is being mailed to the clerk this date for filing; and

4. The digital submission has been scanned for viruses with Sophos Anti-Virus, which was last updated on September 16, 2017 and, according to the program, is free of viruses.

Dated: September 28, 2017

/s/Lynn H. Slade
Lynn H. Slade

CERTIFICATE OF SERVICE

I hereby certify that on September 28, 2017, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

Patti Palmer Ghezzi
Randy A. Bauman
Michael Lieberman
Mithun Mansinghani

I further certify that, on September 28, 2017, and in accordance with 10th Cir. R. 31.5, I forwarded, via Next-Day Federal Express, an original and seven (7) hard copies of the foregoing brief exactly as filed to:

Elisabeth A. Shumaker
Clerk of Court
Byron White United States Courthouse
1823 Stout Street
Denver, Colorado 80257

Dated: September 28, 2017

/s/Lynn H. Slade
Lynn H. Slade

W3051896.DOCX

STATE OF OKLAHOMA)
) ss;
COUNTY OF CREEK)

AFFIDAVIT

On the 27th day of September, 2017, Affiant upon her oath states as follows:

1. My name is Tom Holcomb. I am over the age of eighteen. I am a rancher and a co-owner, with my wife, Phyllis Holcomb, of H & H Livestock, a cattle ranch and hay farm in Creek County, Oklahoma.

2. I have personal knowledge of all the facts and matters stated in this declaration as a rancher, co-owner of a ranching business, and longtime resident of Creek County. All of the facts and matters stated herein are true and correct. Running our ranch and farm requires me to ensure that H & H Livestock complies with the relevant taxation and regulatory laws.

3. H & H Livestock is a member of the Oklahoma Farm Bureau and does business in Oklahoma in Creek County.

4. My family has owned the land on which H & H does business since 1939, and I have been involved in ranching here for sixty-five years. H & H Livestock's ranching and agricultural operations are within the geographical boundaries of the Muscogee (Creek) Nation ("MCN") Reservation as defined by the Panel Opinion in *Murphy v. Royal*, 866 F. 3d 1164 ("declared reservation area").

5. To my knowledge the MCN has never asserted any kind of taxing, environmental, or regulatory jurisdiction, over my family's ranching operations within the declared reservation area, nor the operations of H & H Livestock.

6. To my knowledge, the MCN has never asserted that it required my family H & H Livestock to have any type of license or permit to do business on land within the declared reservation area.

7. Neither my family nor H & H Livestock has ever been required to obtain any kind of federal permit or approval, or to comply with any federal regulation, based on the contention that our Creek County ranching business was within an Indian reservation area or in any way related to the MCN.

8. To my knowledge, the State of Oklahoma or its agencies, including Creek County, has exercised all of the taxing or regulatory jurisdiction over my family and H & H Livestock's operations since 1939.

9. My family and H & H Livestock have relied on State—not MCN

or, as described above, federal—jurisdiction over its operations in investing in, and in structuring ranching and agricultural operations within the declared reservation area.

10. Further affiant sayeth not.

Tom Holcomb

Tom Holcomb

I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 27, 2017

Tom Holcomb

Tom Holcomb

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[PROPOSED] BRIEF *AMICI CURIAE* IN SUPPORT OF RESPONDENT-APPELLEE TERRY ROYAL, WARDEN'S, PETITION FOR PANEL REHEARING OR REHEARING EN BANC OF THE OKLAHOMA OIL AND GAS ASSOCIATION, OKLAHOMA FARM BUREAU LEGAL FOUNDATION, OKLAHOMA CATTLEMEN'S ASSOCIATION, ENVIRONMENTAL FEDERATION OF OKLAHOMA INC., AND STATE CHAMBER OF OKLAHOMA

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I. Interest of *Amici Curiae*.

Amici Curiae Oklahoma Oil and Gas Association (OKOGA), Oklahoma Farm Bureau Legal Foundation (OFBLF), Oklahoma Cattlemen's Association (OCA), Environmental Federation of Oklahoma Inc. (EFO), and State Chamber of Oklahoma (SCO) are interested because their members own and operate businesses and have investments within Oklahoma where the State's jurisdiction has been called into question by the Panel's Opinion entered August 8, 2017 (Opinion or Op.).[1] In holding that the Muscogee (Creek) Nation (MCN) reservation (MCN reservation area) remains intact, the Opinion raises an inference that the other four of the Five Civilized Tribes—the Cherokee, Chickasaw, Choctaw, and Seminole Tribes of Oklahoma—may have retained reservations long understood as disestablished by Congress. The Opinion will significantly upend long-settled expectations regarding taxation, environmental, and other civil regulatory authority, and engender economically destructive confusion regarding sovereign rights within Oklahoma.

[1] No party's counsel authored this brief in whole or in part, or contributed money to fund its preparation or filing. No person or entity other than Amici and their members contributed money to fund this brief's preparation or filing.

Amici are all non-profit associations or foundations whose members reside or own and operate businesses in the MCN reservation area as well as within areas the Opinion may imply lie within reservations of others of the Five Civilized Tribes.

OKOGA's members own or operate oil and gas operations within the MCN reservation area. OFBLF's sole member is the Oklahoma Farm Bureau, Inc., which has 15,659 members whose agricultural lands are, under the Opinion, fully or partially within the MCN reservation area. OCA has members in every county in Oklahoma, including thousands of members that do business on the MCN reservation area. EFO members include those who operate businesses within the MCN reservation area. The State Chamber of Oklahoma represents businesses active within the MCN reservation area.

II. Summary of Argument

The Petition should be granted because the Opinion: 1) involves a question of exceptional importance—whether the MCN reservation was disestablished as of 1906—which, if left as decided would have significant consequences for businesses in Oklahoma; and 2) conflicts with Tenth Circuit precedent. *See* Fed. R. App. P. 35 (b)(1).

III. Argument

A. The Opinion inadequately considered the significance of the issues presented and consequences to Oklahoma businesses.

The Opinion overturns the assumptions underlying civil jurisdiction over persons and businesses on the alleged MCN reservation. More troubling, doubtless due to its habeas corpus setting, it does so without addressing reliance on longstanding understandings and expectations, or the effect of its new rule, on jurisdiction.

In an area where most businesses and residents are nonmembers of MCN, and where most land is owned in fee by nonmembers, the Opinion's civil regulatory effects are immense. Tribes lack civil jurisdiction over nonmembers on fee lands outside reservation boundaries. The Opinion's holding that those lands now lie within the reservation, however, potentially affects taxation, *Osage Nation v. Irby*, 597 F.3d 1117, 1127 (10th Cir. 2010), adjudicatory jurisdiction, *Strate v. A-1 Contractors*, 520 U.S. 438, 458 (1997), regulatory jurisdiction, *Montana v. United States*, 450 U.S. 544, 566 (1981), and federal authority over nonmember businesses. Under the Clean Water Act, 33 U.S.C. §§ 1251–1388, and every other major federal environmental

statute, the conclusion that fee lands lie within a reservation shifts primary regulatory jurisdiction from the State to the Environmental Protection Agency, which then may delegate primary regulatory authority to the applicable tribe. *See* 33 U.S.C. § 1377(e); *see* *https://www.epa.gov/sites/production/files/2016-09/documents/epa-direct-implementation-indian-country.pdf.*

The Opinion's civil regulatory consequences profoundly affect *Amici*. Not only would OKOGA's members potentially be subject to tribal taxation on severance of oil and gas, *see Merrion v. Jicarilla Apache Tribe,* 455 U.S. 130 (1982), but they also might be subject to "dual" state and tribal taxation, *see Cotton Petroleum Corp. v. New Mexico,* 490 U.S. 163, 185 (1989). In addition, on-reservation legal disputes assertedly may be subject to dispute resolution in tribal courts. *See Montana*, 450 U.S. at 565–66; *Strate*, 520 U.S. at 458.

These consequences disrupt the legal and regulatory environment in which OKOGA's members have invested substantial sums to develop oil and gas operations in the MCN reservation area, with implications for the broader Five Civilized Tribes areas. Moreover, the costs and consequences of environmental regulation on oil and gas operations,

structured in reliance upon ODEQ regulation, would have profound consequences and increased costs if shifted to the EPA and, potentially, to tribes.

The consequences for OFBLF's, OCA's, EFO's, and the State Chambers' members are equally substantial. For farmers and ranchers operating on tight budgets, the prospect for greater, and potentially duplicative, taxation and regulation will have a significant impact. Increased and unpredictable environmental regulation, resulting from a shift from state jurisdiction to federal or potentially to tribal jurisdiction, will adversely affect Oklahoma businesses.

B. The Opinion inadequately considered *Irby* and misapplied *Solem*.

Strikingly, the Opinion followed caselaw that analyzed fundamentally different "opened for settlement" allotment acts from lands and historical settings far afield from Eastern Oklahoma, while disregarding this Court's opinion in *Irby*. *Irby* addressed contemporaneous statutes arising from an allotment pattern and historical setting remarkably analogous to this case. The panel or the Court *en banc* should rehear this matter to address the irreconcilable conflict between *Irby* and the Opinion and remand this case to the

district court for further development of the historical record to address broader concerns not presented.[2]

In *Irby*, this Court applied *Solem v. Bartlett*, 465 U.S. 463 (1984), to hold that Congress disestablished the Osage Nation reservation, and in doing so stated that Congress "disestablished the Creek and other Oklahoma reservations." 597 F.3d at 1124, 1127. *Irby* is this Court's most closely analogous case applying the *Solem* test and compels the conclusion of disestablishment. *See* Fed. R. App. P. 35(a)(1) (rehearing *en banc* is "necessary to secure or maintain uniformity of the court's decisions").

1. Statutory language reflects disestablishment intent.

The Opinion identified the "well settled" *Solem* framework to determine disestablishment, but erred in applying it, by concluding Congressional intent to disestablish can *only* be grounded in specific statutory language. This ignores that the disestablishment lodestar is Congressional intent—and Congress never prescribed a narrow litmus

[2] *See United States v. Jackson*, 697 F.3d 670, 671 (8th Cir. 2012) (remanding to district court to permit state to make record for *Solem* analysis); 853 F.3d 436, 441 (8th Cir. 2017) (stating that, on remand, the parties and *amicus curiae* "presented substantial testimony, exhibits, and briefing to address these issues at a two-day evidentiary hearing").

for its expression of intent. The Opinion pigeonholed the unique historical setting of the MCN, the Five Civilized Tribes, and Eastern Oklahoma into patterns that arose in prior, fundamentally different cases in other portions of Indian country, while discarding *Irby*, a highly relevant precedent. *See* Op. 73. *Irby*, on a near identical historic record, found disestablishment, though "[u]nlike other allotment acts, the Act did not directly open the [Osage] reservation to non-Indian settlement. With the exception of certain parcels of [tribal] trust land . . . the Act allotted the entire reservation to members of the tribe with no surplus lands allotted for non-Indian settlement." *Irby*, 597 F.3d at 1123. The same applies here.

The Opinion's *Solem* analysis sidesteps searching inquiry into Congressional intent by insisting intent be expressed as in prior Supreme Court cases considering tribes with very different histories. The Opinion disregards that the 1893–1906 Congresses addressing the MCN unfailingly prescribed the fundamental criterion of non-reservation status: Territorial or, later, State jurisdiction, rather than tribal. *See* Act of March 3, 1893, ch. 209, 27 Stat. 612, 646 (the goal of "ultimate creation of a Territory of the United States with a view to the

admission of the same as a state of the Union"); Act of June 7, 1897, ch. 3, 30 Stat. 62, 83 ("the United States courts. . . shall have original and exclusive jurisdiction. . . [over] all civil. . . and all criminal causes"); "Curtis Act," ch. 517, 30 Stat. 495, 504–505 (June 28, 1898) (prohibiting enforcement of tribal law in federal courts and abolishing tribal courts); Act of March 1, 1901, ch. 676, 31 Stat. 861, § 42 ("1901 Act") (MCN national council acts or ordinances could pertain only to tribal or allotted lands or tribal members—if approved by the President), *id. at* § 47 (disclaiming the Agreement could "revive or reestablish the Creek courts which have been abolished by former Acts of Congress"); Act of June 30, 1902, ch. 1323, 32 Stat. 500, § 6 ("1902 Act") (replacing Creek law of descent and distribution with Arkansas law); Act of April 26, 1906, ch. 1876, 34 Stat. 137, §§ 10, 16 (requiring Secretary to assume control of tribal revenues, schools); *id. at* § 28 (limiting terms of councils and requiring President's approval of ordinances). Finally, the "Oklahoma Enabling Act," ch. 3335, 34 Stat. 267, § 13 (June 16, 1906), extended the laws of the Territory of Oklahoma to all portions of the new State.

The Opinion fails to address whether prohibition of all recognized tribal governmental powers, by statutes providing exclusively for Territorial and State law, non-tribal courts, and the transfer of almost all lands from tribal to allotted ownership, ultimately to nonmembers, both 1) unambiguously contemplated the termination of prior reservation boundaries, and 2) provides powerful contemporaneous evidence Congress intended to terminate. *See Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 604–606 (1977). The Opinion does not seek to reconcile its conclusion with *Irby*. Its insistence on facts far different from those driving Eastern Oklahoma history led it to overlook compelling expressions of Congressional intent. As at Osage, Congress allotted substantially all Creek lands to members, contemplating the widespread transfers to nonmembers that ensued, with the intent that all would reside—and do business—in Oklahoma, a non-reservation environment.

Instead, the Opinion emphasizes immaterial factors: whether the MCN's tribal existence was terminated,[3] Op. 99–101; whether the MCN

[3] The Opinion incorrectly relies on scattered references to the "Creek Nation," which, in context, is plainly a mere "convenient geographical description" to define the geographic area within which prescribed

retained jurisdiction over tribal or trust or restricted allotted lands, *id.* at 100; and whether the United States continued to discharge trust responsibilities over tribal or trust or restricted allotted lands, *id.* at 96. However, those facts existed in every case in which the Supreme Court, or this Court, found disestablishment. *See, e.g.*, *Rosebud Sioux Tribe*, 430 U.S. 584; *Irby*, 597 F.3d 1117.

2. The contemporaneous understanding was that the eight Acts of Congress disestablished the MCN's reservation.

Solem step two requires the Court look to "contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation," *Irby*, 597 F.3d at 1122 (quoting *Solem*, 465 U.S. at 471), including "the manner in which the transaction was negotiated" with the tribes involved and the tenor of legislative Reports presented to Congress, *id.* In *Irby*, the Court's analysis relied heavily on a series of Congressional acts and legislative histories, including the Oklahoma Enabling Act, to establish that the Osage Allotment Act was "passed at a time where the United States sought dissolution of Indian reservations, *specifically the Oklahoma tribes' reservations*." *Id.*

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transfers or federal services for the Creek would apply. *See South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 356 (1998).

(emphasis added). *Irby* relied on the fact that the Five Civilized Tribes' reservations, including the MCN's, had been allotted and disestablished. *Id.* (citing H.R. Rep. No. 59-496, at 9, 11 (1906)). The Opinion's disregard for *Irby*'s similar factual circumstances led it to misapply *Solem*, and undermines its rejection of the State's materials demonstrating the widely-held, contemporaneous understanding the MCN reservation would be disestablished.

First, the Opinion's conclusion that the pre-1901 legislative history did "little to advance the analysis because the State does not dispute that the reservation was intact in 1900," Op. 109 (quotation marks, citation omitted), ignores the intent to disestablish the MCN reservation expressed in the pre-1901 Acts remained and was executed by the 1901 and 1902 Acts. Congress' pre-1901 enactments, and their legislative histories, "declared the policy of the United States" toward the Five Civilized Tribes, which, for the Creek, led to the enactment of the 1901 and 1902 Acts. Consequently, as in *Wyoming v. United States Envt. Prot. Agency*, 849 F.3d 861, 878 (10th Cir. 2017), the pre-1901 evidence demonstrates a "continuity of purpose" that the Opinion minimized or ignored.

Second, and contrary to the Opinion's limited review, the legislative histories from the cases the State cites reflect that Congress' goal was to transfer jurisdiction from the MCN to the State, and abolish communal landholdings in favor of individual ownership under State law and courts, a goal entirely inconsistent with continued reservation status. *See, e.g.*, *United States v. Hayes*, 20 F.2d 873, 878–80 (8th Cir. 1927) (reviewing the "course of legislation, from its beginning to end," and concluding its "main purpose was to do away with the tribal governments" to be replaced by state or territorial government); H.R. REP. NO. 57-2495, 1 (June 14, 1902) (Committee on Indian Affairs report discussing the 1902 Act, stating it "will permit the Government to close up the affairs of the Creek tribe of Indians, make all of their allotments, and finish the work of the Dawes Commission in said nation . . . .").

The Opinion did not consider thoroughly the legislative histories that demonstrate Congress intended to disestablish the Creek reservation and substitute State jurisdiction and individual land ownership for tribal government and communal title. Given the consequences of the Opinion, rehearing and reversal or remand to the

district court to develop a fuller record regarding the Congress' intent as evidenced by the legislative history is warranted.

3. Subsequent treatment of the former MCN reservation demonstrates an understanding that it was disestablished.

The Opinion inadequately considered *Irby*'s subsequent treatment analysis, where the Court found land ownership and demographic shifts and treatment of the affected lands by federal and state authorities after enactment of the Osage Allotment Act, indicative of disestablishment. *Irby*, 597 F.3d at 1126. *Irby*'s rationale applies equally here and confirms disestablishment.

The Opinion took too cursory a look at the *Solem* step three evidence. The State's unquestioned exertion of jurisdiction over the predominantly non-Indian, nonmember population residing on MCN lands since 1901, *see* Brief of Resp.-App., 79–80, strongly supports a conclusion of reservation disestablishment. *See Rosebud Sioux*, 430 U.S. at 604–05. The Court did not consider evidence that the duty of maintaining order and enforcing laws has been primarily in the hands of the County and State officials, not tribal government. *See Hagen*, 510 U.S. at 421.

For decades, companies doing business in this area have been subject to State jurisdiction for taxation, environmental, and other regulation. *See* Affidavit of Tom Holcombe, Motion for Leave. The consequences for the majority of the population residing within MCN lands are far too significant for the Court to decree disestablishment without considering a fully developed record regarding the *Solem* step three analysis on remand.

The Opinion dismissed the State's evidence on Congressional intent and subsequent history. As the Supreme Court confirmed in *Nebraska v. Parker*, evidence of congressional intent and of subsequent treatment figure significantly in the *Solem* analysis, and, while modern treatment of an area alone is insufficient to show disestablishment, finding disestablishment is not dependent on clear statutory language alone. 136 S. Ct. 1072, 1080–81 (2016). The Opinion erred in failing to accord adequate weight to *Solem* steps 2 and 3.

IV. Conclusion

The Petition for Panel Rehearing or Rehearing En Banc should be granted.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7) and Section II(I) of this Court's CM-ECF User's Manual, I hereby certify that:

1. This brief contains 2,594 words, exclusive of the items identified in Fed. R. App. P. 32(a)(7)(B)(iii). This figure was calculated through the word count function of Microsoft Word 2010, which was used to prepare this brief.

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Dated: September 28, 2017

/s/Lynn H. Slade
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