

No. 18-9526

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IN THE  
Supreme Court of the United States

JIMCY MCGIRT,

*Petitioner,*

v.

STATE OF OKLAHOMA,

*Respondent.*

ON WRIT OF CERTIORARI TO THE OKLAHOMA  
COURT OF CRIMINAL APPEALS

**BRIEF *AMICI CURIAE* FOR THE  
INTERNATIONAL MUNICIPAL LAWYERS  
ASSOCIATION AND NATIONAL SHERIFFS'  
ASSOCIATION IN SUPPORT OF THE  
RESPONDENT**

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**INTERESTS OF AMICI CURIAE<sup>1</sup>**

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

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<sup>1</sup> Pursuant to Sup. Ct. R. 37.6, *amici curiae* affirm that no counsel for a party has written this brief in whole or in part, and that no person or entity, other than amicus curiae, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. This brief is filed pursuant to Sup. Ct. R. 37.3(a) and the blanket consent of the petitioner and respondent filed on January 17, 2020, and January 21, 2020, respectively.

*Amici's* members are the local government officials that manage and advise their clients on matters ranging from zoning to taxation. 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.

## INTRODUCTION AND SUMMARY OF THE ARGUMENT

Local governments serve as the most fundamental and closest form of government, where citizens come together to make decisions that directly impact their daily lives. These local governments provide the vast majority of services on which citizens rely. A holding reinstating the 1866 territorial boundary of Creek Nation could seriously undermine municipalities' ability to provide for the health, safety, and welfare of their citizens.

The 1866 territorial boundary of the Creek Nation encompass eight counties of Oklahoma, which account for over 4,600 square miles of land populated by more than 750,000 people, constituting 24.15% of the state's total population.<sup>2</sup> These eight counties include much of the greater Tulsa area. In addition to the Creek Nation, the holding of this case could extend to four other neighboring tribes.<sup>3</sup> Their potential reservation borders could collectively include an area consisting of about 43% of Oklahoma's land mass and a population of nearly 1.8 million residents.

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<sup>2</sup> The 1866 territorial boundary is asserted by the Creek Nation as the proper boundary. MUSCOGEE (CREEK) NATION CONST., art. I, § 2, <http://bit.ly/2ODuKVG>.

<sup>3</sup> The four other tribal boundaries may be implicated because Congress addressed these boundaries through the same legislation as Creek Nation's boundary. 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.

While petitioner’s appeal raises the question of the criminal jurisdiction of Oklahoma, this Court has held that where federal and tribal laws are applied criminally, “it generally applies as well to questions of civil jurisdiction.” *DeCoteau v. Dist. Cty. Court for Tenth Judicial Dist.*, 420 U.S. 425, 428 n.2 (1975). A designation of land as “Indian country” does not defeat all power of Oklahoma and its municipalities over the land and its residents, but it does limit their jurisdiction in many respects. Accordingly, overturning the Oklahoma Court of Criminal Appeals will have a detrimental impact on local governments and the citizens of Oklahoma.

As noted by Justice Breyer, the citizens in the eastern half of Oklahoma have “built their lives . . . on municipal regulations, property law, . . . thousands of details.”<sup>4</sup> Overturning the decision below will create significant problems for municipalities in Oklahoma and the current structure citizens rely upon. An adverse decision could affect existing funding and taxation schemes, zoning laws, and law enforcement. The basic blocks of a democratic society—local governments—could be fundamentally altered. *Amici* urge this Court to prevent that from happening.

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<sup>4</sup> Oral Argument at 36:55, *Carpenter v. Murphy*, No. 17-1107, [https://www.supremecourt.gov/oral\\_arguments/audio/2018/17-1107](https://www.supremecourt.gov/oral_arguments/audio/2018/17-1107).

**ARGUMENT****I. Municipalities may not be able to collect certain taxes to fund vital local programs within the 1866 boundary.**

Municipalities in Oklahoma rely heavily on tax income accounts to provide most of their revenue. For example, in 2019, the combination of sales tax, property tax, franchise tax, use tax, and hotel/motel tax accounted for 75.7% of the total revenues generated by the City of Tulsa.<sup>5</sup> Similarly, the ad valorem taxes, sales tax, and use tax accounted for 70.1% of the total revenues generated by the County of Tulsa.<sup>6</sup> These funds are used for operating the city/county government, providing for public safety and protection, funding public works and transportation, maintaining the health and welfare of its citizens, funding education, and many other vital municipal functions crucial to the lives of its residents and visitors. Reversing the decision below would lead to reduced tax revenues and budget cuts, as well as difficulties with predicting revenue and attracting economic activity.

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<sup>5</sup> CITY OF TULSA, OKLA., COMPREHENSIVE ANNUAL FINANCIAL REPORT (2019), at 4, <https://www.cityoftulsa.org/media/11968/2019-cafr.pdf>.

<sup>6</sup> CTY. OF TULSA, OKLA., COMPREHENSIVE ANNUAL FINANCIAL REPORT (2019), at 11, [https://www.tulsacounty.org/Audit/CAFR\\_2019\\_web.pdf](https://www.tulsacounty.org/Audit/CAFR_2019_web.pdf).

**A. If eastern Oklahoma becomes “Indian country,” municipalities will be limited in their ability to collect taxes from both tribal members and non-tribal members.**

If the decision below is reversed below and the 1866 territorial boundary is used to define “Indian country,” the state of Oklahoma and local governments will be restricted in their ability to tax a number of transactions in the area.

The Indian Sovereignty doctrine recognizes 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 (D. Mass. 1975). Unless Congress explicitly states otherwise, this Court presumes against a state’s jurisdiction to levy sales and excise taxes on tribal members within “Indian country.” *See Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 480-81 (1976). When ruling on whether a county could levy a tax on tribal held lands, this Court emphasized that only “subjects over which the sovereign power of a State extends are objects of taxation.” *United States v. Rickert*, 188 U.S. 432, 438 (1903). As a general rule, tribal governments maintain the sole ability to tax tribal or tribal member activities conducted in “Indian country.”<sup>7</sup>

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<sup>7</sup> Erik M. Jensen, *Taxation and Doing Business in Indian Country*, 60 ME. L. REV. 1, 56 (2008).

Where non-tribal members are involved in transactions in “Indian country,” there is less clarity as to state and local taxes. While there is a presumption that a state or local government may levy its taxes on non-tribal members doing business on tribal land, that presumption may be rebutted.<sup>8</sup> Courts use a balancing test to determine whether state and local governments have the authority to tax certain economic activity of non-tribal members. The balancing test is one that weighs federal and tribal interests against state interests. *See Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 177 (1989). “[I]f the balance of federal, state, and tribal interests favors the State, and federal law is not to the contrary, the State may impose its levy.” *Okla. Tax Comm’n v. Chickasaw Nation*, 515 U.S. 450, 459 (1995) (citations omitted). However, the Court has found that a state’s action is invalid where the state taxes “threaten the overriding federal objective” of a regulatory scheme. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 149 (1980). Generally, state and local governments have the authority to tax non-tribal members on non-tribal land within “Indian country,” but that is not a blanket authority.<sup>9</sup>

As to state and local ad valorem real property taxes, the designation of the land in “Indian country” is pertinent to tax jurisdiction. Tribal land held in trust is exempt from state and local ad valorem taxes. *Rickert*, 188 U.S. at 437-39. However, land in “Indian country” once held in trust but alienable today may be

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<sup>8</sup> *Id.* at 64.

<sup>9</sup> Jensen, *Taxation and Doing Business in Indian Country*, at 82.



taxed, even if held by tribes or tribal members. *Cass Cty., Minn. v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 113 (1998). Additionally, state and local governments may tax tribal land within “Indian country” that is not held in trust and has lost its “Indian character.” *City of Sherrill, N.Y. v. Oneida Indian Nation of N.Y.*, 544 U.S. 197, 202-03 (2005). The same is true for reservation land “patented in fee” pursuant to the Dawes Act of 1877. *Cty. of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation*, 502 U.S. 251, 270 (1992); Pub. L. 49-105, 24 Stat. 388.

In sum, if this Court reverses the decision below, local governments would lose their authority to impose taxes over the tribes and tribal members that work and reside in the area that would then be considered “Indian country.” Additionally, there may be certain transactions by non-tribal members and property that local governments may no longer be able to tax either. As a result, the local governments would see a decrease in their tax revenue and increased uncertainty as to what is taxable, which will likely result in additional litigation over these issues.<sup>10</sup>

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<sup>10</sup> Any decrease in tax revenue which could result from a decision by this Court to hold that the land in question is “Indian country” would be on top of the hundreds of millions of dollars in lost revenue that local governments will surely face as a result of the current global pandemic and resulting economic crisis. *See, e.g.*, Daniel Beekman, *Seattle government expecting revenue loss of more than \$100 million as result of coronavirus*, SEATTLE TIMES (Mar. 16, 2020, 8:19pm), <https://www.seattletimes.com/seattle-news/politics/seattle-government-expecting-revenue-loss-of-more-than-100-million-as-result-of-coronavirus/>.

**B. Double taxation in “Indian country” will serve as a deterrent for business activity in eastern Oklahoma.**

If the decision below is reversed, stiff tax consequences may inhibit economic development in Oklahoma. While the state and local governments may maintain authority to tax certain activity in “Indian country,” that authority is not exclusive. Many of those transactions may also be taxed by tribal governments as well.

This Court has repeatedly recognized that taxation of the transactions of non-tribal members 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 v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 152 (1980). Tribes maintain the ability to tax the activity of non-tribal members in “Indian country,” so long as they meet certain criteria. When a transaction occurs on trust land and significantly involves the tribe or tribal members, the tribe maintains the power to tax transactions unless divested of it by federal law or necessary implication of their dependent status. *Id.* As to reservation fee land, this Court has held that tribes maintain jurisdiction over a non-tribal member’s commercial transactions occurring on fee land when (1) the non-tribal member enters into a consensual contractual relationship with the tribe or tribal member; or (2) the conduct of the non-tribal member “threatens or has some direct effect on the political integrity, the economic security, or the health and

welfare of the tribe.” *Montana v. United States*, 450 U.S. 544, 565-566 (1981).

As a result, certain transactions of non-tribal members in “Indian country” previously taxed by the federal, state, and local government may additionally be subjected to tribal taxes. This double taxation could serve as a deterrent for non-tribal members to conduct business activity in “Indian country.”<sup>11</sup> The result is that “new business would in almost all instances opt to locate in non-Indian areas to avoid the unique difficulties that are inherent in locating on reservations.”<sup>12</sup> If this Court reverses the court below, the municipalities within the 1866 boundary be subject to double taxation and could suffer similar consequences. To avoid this additional taxation, companies and investors may opt to invest their money outside of the impacted area. Ultimately, the loss in investment could result in a loss of jobs, economic activity, and tax revenue for the municipalities located within the 1866 boundary.

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<sup>11</sup> STAFF OF JOINT COMM. ON TAXATION, 112TH CONG., OVERVIEW OF FEDERAL TAX PROVISIONS RELATING TO NATIVE AMERICAN TRIBES AND THEIR MEMBERS, at 1 (2012).

<sup>12</sup> *Indian Economic Development-Part II: Oversight Hearing Before the Subcomm. on Native American Affairs of the H. Comm. on Nat. Resources*, 103rd Cong. 49 (1993) (supplemental response and testimony of the Navajo Nation).

**C. Reduced and unpredictable revenue could have a negative impact on local governments and their ability to provide valuable services.**

Local governments provide necessary services—ones not provided by the state or federal government—to citizens largely funded by taxes collected at the local level. Local governments are uniquely positioned and best suited to meet the specific needs of their communities. Programs funded through local taxes provide resources that would not exist otherwise.

Budget writing is one of the most important functions of local governments. These budgets not only lay out the planned expenses for the upcoming year, but also reflect the values, virtues, and priorities of the community. The unpredictability in budget writing and decrease in revenue could negatively affect the citizens that rely on the programs that local governments fund.

In the current tax system, hundreds of years of experience have forged a delicate balance between federal, state, and local taxes. This balance fosters an environment of stability and predictability, which allows governments to more easily predict their expected tax revenue. Such predictability allows governments to plan their budgets accordingly. Adding an additional tax collecting entity into the system—the tribal government—could eliminate the certainty that governments rely upon.

In planning and executing these programs, local governments rely on a level of financial certainty, especially when formulating budgets. While revenue streams often fluctuate slightly based on a variety of factors, municipalities are still able to predict the revenue flow with relative confidence. However, no real indication exists as to the amount of tax revenue that would be cut off from these local governments if much, or all, of the land in their boundaries would be considered “Indian country.” It is difficult to predict with any certainty the amount of property or transactions that would suddenly become exempt from local taxes. As a result, municipalities would be left guessing as to the effect this decision would have on their tax revenue. Making matters more difficult, Oklahoma law requires that the budget for each fund used by a city or town be balanced. 2019 Okla. Stat. tit. 11 § 17-206 (2019). The inability to accurately predict their revenue could result in chaos for the municipal budget writing process.

As a result of a reduction in tax revenue, municipal governments could be forced to cut funds for programs across the board. Municipalities operate a number of vital programs that are crucial to the well-being of the citizens of eastern Oklahoma. Some of the largest programs include those that cover the areas of health, transportation/public works, education, and public safety/law enforcement. If tax revenue is reduced, each of these government functions will likely be allocated a decreased budget, which will likely result in negative consequences for the citizens of these municipalities.

**1. Local governments may lack the funding and authority to administer local health programs and services.**

Local health departments are vital to ensuring the health and safety of local communities. As an example, Tulsa County maintains an extensive array of programs for its residents via the Tulsa Health Department. “[T]he Tulsa Health Department serves as the primary public health agency to more than 600,000 Tulsa County residents, including [thirteen] municipalities and four unincorporated areas.”<sup>13</sup> 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.<sup>14</sup> For example, in 2019, the Tulsa Health Department derived 50.1% of its funding from ad valorem taxes.<sup>15</sup> A reduction in ad valorem taxes collected could directly affect the revenue of the Tulsa Health Department.

The programs at risk, if the ruling below is reversed, are uniquely situated to apply local expertise and resources to solve local problems. For instance, Oklahoma has an infant mortality rate that is higher than the national average, and the Tulsa

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<sup>13</sup> TULSA HEALTH DEP’T, MISSION AND VALUES, <https://www.tulsa-health.org/mission-and-values> (last visited Mar. 18, 2020).

<sup>14</sup> *Id.*

<sup>15</sup> TULSA HEALTH DEP’T, 2018-2019 ANNUAL REPORT, <https://spark.adobe.com/page/xJ9ouuu9Qhexo/> (last visited Mar. 18, 2020).

Fetal and Infant Mortality Review Program uses data from the local population to execute preventive measures working to reduce infant deaths.<sup>16</sup> Child Guidance, a statewide program administered by the Tulsa Health Department, promotes healthy child development by offering resources for medical screenings, immunizations, and treatment to parents.<sup>17</sup> 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 by addressing issues such as childhood obesity and good decision-making.<sup>18</sup> 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. Most fundamentally, the department operates over ten clinics around the county in order to make healthcare 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, which

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<sup>16</sup> TULSA HEALTH DEP'T, TULSA'S FETAL & INFANT MORTALITY, <https://www.tulsa-health.org/community-health/community-programs/tulasas-fetal-infant-mortality> (last visited Mar. 18, 2020).

<sup>17</sup> TULSA HEALTH DEP'T, CHILD GUIDANCE, <https://www.tulsa-health.org/personal-and-family-health/child-guidance> (last visited Mar. 18, 2020).

<sup>18</sup> TULSA HEALTH DEP'T, SCHOOL HEALTH, <https://www.tulsa-health.org/community-health/community-programs/school-health> (last visited Mar. 18, 2020).

they may lose if funding for the health departments decreases due to diminished revenue.

**2. Citizens could suffer from budget cuts to public works and transportation.**

Citizens also rely on municipalities to ensure a high quality of life and safety as they travel for work, school, and other necessary tasks. The budget for transportation expenses is often one of the largest line-items for municipalities. As an example, the City of Tulsa spends \$87.0 million on its Public Works and Transportation programs, which include the departments of Streets and Stormwater, Engineering, Water and Sewer, and Metropolitan Tulsa Transit Authority (MTTA).<sup>19</sup> The City of Tulsa funds the Public Works and Transportation programs primarily through revenue generated by a sales tax.<sup>20</sup> If the City of Tulsa cannot collect as much revenue from the sales tax, it logically follows the expenditures on Public Works and Transportation could suffer. As a result, the existing transportation system could fail to

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<sup>19</sup> CITY OF TULSA, OKLA., COMPREHENSIVE ANNUAL FINANCIAL REPORT (2019), at C-7.

<sup>20</sup> City of Tulsa has a sales tax of 3.65%. Of that 3.65%, the General Fund receives 2.0%, the Sales Tax Funds received 1.1%, and the Vision Transportation Sales Tax Fund receives .085%. *Id.* at FN-13. The Vision Transportation Sales Tax Fund is restricted specifically to funding street maintenance and public transportation. *Id.* As an example, the MTTA receives funding from the General Fund and Vision Transportation Sales Tax Fund as an operating subsidy, while it receives funding from the Sales Tax Fund for capital acquisitions. *Id.* at FN-15.



operate effectively for the benefit of the citizens of Tulsa.

As an example of the importance of transportation funding, the Aero Bus Rapid Transit (Aero BRT) is a high-capacity transit line that operates every day along the Peoria Avenue corridor between 54th Street North and 81st Street South in Tulsa.<sup>21</sup> One in five jobs and one in seven of the city's residents are located within a ten-minute walk of the corridor.<sup>22</sup> Roughly 85,000 people rode the buses during its six-week launch period in 2019.<sup>23</sup> Because of its popularity, Tulsa plans on adding a second route.<sup>24</sup>

Investment in public works and transportation also leads to a higher level of economic output. Investing in public infrastructure means goods and services are produced more efficiently.<sup>25</sup> A 1% increase in investment results in private-sector economic growth by 0.083% in the short term and 0.122% in the long term.<sup>26</sup> Sustained investment in public transportation can result in a \$3.7 billion increase to

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<sup>21</sup> *Id.* at V.

<sup>22</sup> *Id.*

<sup>23</sup> Reagan Ledbetter, *Tulsa's Aero Bus Had Roughly 85,000 Riders During Launch*, NEWS ON 6 (Jan. 7, 2020, 6:04 AM), <https://www.newson6.com/story/41529399/tulasas-aero-bus-had-roughly-85000-riders-during-launch>.

<sup>24</sup> *Id.*

<sup>25</sup> JEFFREY M. STUPAK, CONG. RESEARCH SERV., R44896, ECONOMIC IMPACT OF INFRASTRUCTURE INVESTMENT 15-16 (2018).

<sup>26</sup> *Id.* at 9 (citing Pedro Bom and Jenny Lighthart, *What Have We Learned From Three Decades of Research on the Productivity of Public Capital?*, 28 J. ECON. SURVS. 889, 902-05 (2013)).

the national gross domestic product for every \$1 billion invested annually.<sup>27</sup> This economic growth generally leads to increased employment, and vice versa.<sup>28</sup>

Due to the lost tax revenue, many local governments may be faced with cutting investments in public transportation. Along with causing a decline in economic output, this reduction in transportation investments could lead to decreased employment and cause the greatest harm to disadvantaged populations. People with disabilities, the elderly, and individuals living below the poverty line receive the most benefit from a robust public transportation system.<sup>29</sup> Budget cuts to the public transportation system may affect these individuals' ability to travel to work, attend school, receive medical care, and other necessities.

If a municipality does not wish to cut public transportation services, there are a number of alternative routes it can take.<sup>30</sup> The most common approaches include increasing fares for using public

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<sup>27</sup> AM. PUB. TRANSP. ASS'N, ECONOMIC IMPACT OF PUBLIC TRANSPORTATION INVESTMENT 45 (2014), <https://www.apta.com/wp-content/uploads/Resources/resources/reportsandpublications/Documents/Economic-Impact-Public-Transportation-Investment-APTA.pdf>.

<sup>28</sup> Edward S. Knotek, II, "How Useful is Okun's Law?" 92 FED. RES. BANK OF KAN. CITY ECON. REV. 73, 73 (2007).

<sup>29</sup> FANG ZHAO AND THOMAS GUSTAFSON, FED. TRANSIT ADMIN., TRANSPORTATION NEEDS OF DISADVANTAGED POPULATIONS: WHERE, WHEN, AND HOW? 1-2 (2013).

<sup>30</sup> *Id.* at 72.

transportation and increasing or creating new taxes.<sup>31</sup> However, both of these approaches tend to be regressive and inequitable in nature.<sup>32</sup> No matter the approach, communities will suffer from a decrease in tax revenue available to invest in public transportation.

**3. Public education may be disrupted, creating long term deficiencies in student education and development.**

Reversing the decision below could have a detrimental impact on the Oklahoma public education system. The two largest providers of K-12 educational funding, county and state governments, could suddenly be without a significant portion of their previous revenue.

In the eight counties within the 1866 boundary of the Creek Nation, there are over 310,000 students enrolled in the public school system.<sup>33</sup> Like many other states, Oklahoma relies heavily on local sources to fund its K-12 education. According to the U.S. Census Bureau, the overall K-12 funding for Oklahoma in Fiscal Year 2017 was \$6.2 billion, which

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<sup>31</sup> Todd Litman, *Evaluating Public Transportation Local Funding Options*, 17 J. PUB. TRANSP., 43, 67-68 (2014).

<sup>32</sup> *Id.* at 49-50, 52-53.

<sup>33</sup> OKLA. STATE DEPT OF EDUC., STATE PUBLIC ENROLLMENT TOTALS, FY 2019/2020 DISTRICT ENROLLMENT, <https://sde.ok.gov/documents/state-student-public-enrollment> (last visited Mar. 18, 2020).

amounts to \$7,940 in per pupil spending.<sup>34</sup> Roughly 42.3% of that funding came from local sources, while 46.6% came from state sources.<sup>35</sup> Property taxes accounted for 77.0% of the local funding in Oklahoma.<sup>36</sup> Because K-12 education funding is such a large expense for both state and local governments, a decrease in revenue due to the inability to collect certain taxes could lead to cuts in the K-12 education budget.

Research has shown that decreases in public education funding have negative effects on the welfare of children.<sup>37</sup> As funding for K-12 education is cut, test scores fall and fewer students go to college. The approximately 310,000 public school children currently attending schools in this region could face such circumstances if their school districts' funding were to be cut even modestly. If this territory were found to be a part of "Indian country," these communities would lose the ability to collect the same level of revenue they do now and their children may suffer as a consequence.

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<sup>34</sup> UNITED STATES CENSUS BUREAU, 2017 PUBLIC ELEMENTARY-SECONDARY EDUCATION FINANCE DATA, <https://www.census.gov/data/tables/2017/econ/school-finances/secondary-education-finance.html> (last visited Mar. 18, 2020).

<sup>35</sup> *Id.* The remaining 11.1% came from federal funding sources.

<sup>36</sup> *Id.*

<sup>37</sup> C. Kirabo Jackson, et al., *Do School Spending Cuts Matter? Evidence from the Great Recession* 13-15 (Nat'l Bureau of Econ. Research, Working Paper No. 24203, 2018), <http://www.nber.org/papers/w24203> ("Overall, a \$1000 decline in per-pupil spending reduced test scores by about 0.045 $\sigma$  and reduced college-going rates by about 3 percentage points.").

**4. Drug, mental health, and veterans' specialty courts could be discontinued.**

Many municipalities have developed alternative paths to incarceration. The Tulsa Community Service Council runs the county's alternative courts system, a court-supervised treatment alternative to incarceration.<sup>38</sup> Tulsa's system is not the only, but is by far the largest system of its kind operating in Oklahoma. The system includes a drug court, DUI court, mental health court, and veterans' 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 there are mental health courts in fourteen counties, twelve of which are in the impacted area.<sup>39</sup>

Locally organized alternative treatment courts transform local communities for the better by

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<sup>38</sup> *More than 40 Tulsans Graduate from CSC's Alternative Courts Program this Fall*, CMTY. SERV. COUNCIL, <https://csctulsa.org/news/more-than-40-tulsans-graduate-from-cscs-alternative-courts-program-this-fall/> (last visited Mar. 18, 2020).

<sup>39</sup> OKLA. DEP'T OF MENTAL HEALTH AND SUBSTANCE ABUSE SERVS., ADULT DRUG COURT, [https://www.ok.gov/odmhsas/Substance\\_Abuse/Oklahoma\\_Drug\\_and\\_Mental\\_Health\\_Courts/Adult\\_Drug\\_Court](https://www.ok.gov/odmhsas/Substance_Abuse/Oklahoma_Drug_and_Mental_Health_Courts/Adult_Drug_Court) (last visited Mar. 18, 2020); OKLA. DEP'T OF MENTAL HEALTH AND SUBSTANCE ABUSE SERVS., MENTAL HEALTH COURT [https://www.ok.gov/odmhsas/Substance\\_Abuse/Oklahoma\\_Drug\\_and\\_Mental\\_Health\\_Courts/Mental\\_Health\\_Court](https://www.ok.gov/odmhsas/Substance_Abuse/Oklahoma_Drug_and_Mental_Health_Courts/Mental_Health_Court) (last visited Mar. 18, 2020).

rehabilitating past offenders and reducing the burden on taxpayer-financed incarceration programs, saving over \$19,000 per offender per year.<sup>40</sup> In Tulsa County alone, over 1,300 offenders have participated in the program.

These courts are at risk because no Article III equivalent to such innovative local solutions exists. State courts are currently able to channel offenders to specialty courts because they maintain criminal jurisdiction to prosecute crimes. If the 1866 territorial boundary is reinstated, criminal jurisdiction in these areas would move to federal courts, thereby reducing the number of potential participants using these specialty local courts. When combined with the reduction in tax revenue, the decrease in authority of specialty court programs could make them potential targets for budget cuts. If the decision below is reversed, and state courts have reduced jurisdiction over some criminal offenders, the specialty courts may be at risk.

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<sup>40</sup> *More than 50 Tulsans Graduate from CSC's Alternative Courts this October*, CMTY. SERV. COUNCIL, <https://csctulsa.org/news/more-than-50-tulsans-graduate-from-community-service-councils-alternative-courts/> (last visited Mar. 18, 2020).

**II. 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, as “[z]oning is the process whereby a community defines its essential character. Whether driven by a concern for health and safety, aesthetics, 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, 434 (1989) (Stevens, J., announcing the judgment of the Court in part, dissenting in part). The Tulsa Metropolitan Area Planning Commission promulgates 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.”

In *Brendale v. Confederated Tribes*, the Court denied that a tribe has absolute authority to enforce zoning as to fee land owned by non-tribal members but noted two “exceptions” to this general principle. *Id.* at 428 (citing *Montana*, 450 U.S. at 565). First, a tribe may regulate activities of non-tribal members who enter consensual relationships with the tribe or its members, through commercial dealing, contracts,

leases, or other arrangements. *Montana*, 450 U.S. 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 in *Brendale* 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-tribal members. 492 U.S. at 433.

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-tribal members who own land in “Indian country.”

Adding to this difficulty, 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.”<sup>41</sup> This alone

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<sup>41</sup> 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).



creates tension and problems. If the 1866 boundary is 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, which undermines the very purpose of the zoning.

The Tulsa Zoning Code provides detailed rules and regulations which prevent the potentially hazardous exposure to residential districts.<sup>42</sup> 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 junk or salvage yards, shooting ranges, parking, alcoholic beverage sales and service, and sexually oriented business establishments.<sup>43</sup> Tulsa enforces these regulations through a series of penal actions beginning with fines and culminating in abatement and other court-enforced remedies.<sup>44</sup>

While it is unclear what would happen to these regulations if the decision below is overturned, it is clear that the enforcement mechanism used by local governments to enforce zoning codes and other regulations could be disrupted. If local governments were incapable of enforcing the rules and regulations that maintain order in their communities, communities could be greatly harmed. Even if not all

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<sup>42</sup> See CITY OF TULSA, OKLA., ZONING CODE § 45.100-B (2020).

<sup>43</sup> *Id.* at § 35.070-D, § 35.050-B, § 55, § 45.110, § 40.370.

<sup>44</sup> *Id.* at § 85.

zoning regulation would not disappear, the ability for local governments to enforce its zoning ordinances could be questioned through potentially long and cumbersome litigation in federal courts.

**III. The 1866 boundary could create problems for public safety and law enforcement, as it could undermine cross-deputization agreements.**

Reversing the decision below may also limit the ability of municipalities to enforce laws and promote public safety. While the reduction in tax revenue will affect the amount of funds going toward law enforcement, returning to the 1866 boundary would also create jurisdictional problems.

Jurisdiction in and around “Indian country” is dictated by a patchwork of tribal, state, and federal laws.<sup>45</sup> Judicial decisions have held that Oklahoma, and by extension local authorities, lacks “jurisdiction over a criminal offense committed by one Creek Indian over another in Indian country.” *United States v. Sands*, 968 F.2d 1058, 1062 (10th Cir. 1992) (citations omitted). However, the federal government does have authority over these criminal offenses. *Id.* “Officers working in jurisdictions where tribal communities are located are often forced to determine their current location, location of the offense, the political identity of the alleged victim and perpetrator, plus the nature

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<sup>45</sup> UNITED STATES DEP’T OF JUSTICE, OFFICE OF CMTY. ORIENTED POLICING SERVS., CROSS-DEPUTIZATION IN INDIAN COUNTRY 1 (2018), <https://www.sheriffs.org/publications/Cross-Deputization-Indian-Country>.

of the alleged crime, all before determining if any action can be taken.”<sup>46</sup> For this reason, law enforcement in and around “Indian country” has struggled with addressing crime.<sup>47</sup> However, cross-deputization agreements “may assist in filling a jurisdictional void.” *Sands*, 968 F.2d at 1063.

Cross-deputization agreements enable officers to react to criminal violations regardless of the political identity of the suspect.<sup>48</sup> Through these agreements, tribal law enforcement officers can be empowered to enforce laws in “Indian country” regardless of the suspect’s tribal status.<sup>49</sup> Additionally, state, county, and municipal law enforcement agencies can provide aid and assistance with tribal partners for crimes in which the tribe has jurisdiction.<sup>50</sup> This intergovernmental cooperation has many benefits: it is more cost-effective and culturally appropriate, and it has better arrest and prosecution rates.<sup>51</sup> These agreements are generally recognized as beneficial for local, state, and tribal law enforcement.<sup>52</sup>

Currently, Creek Nation and its Lighthorse Tribal Police are party to the Intergovernmental Cross-Deputization Agreement (“Agreement”) with over forty different counties, cities, and towns in

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<sup>46</sup> CROSS-DEPUTIZATION IN INDIAN COUNTRY, at 1.

<sup>47</sup> *Id.* at 3.

<sup>48</sup> Muscogee (Creek) Nation Amicus Br. 37.

<sup>49</sup> CROSS-DEPUTIZATION IN INDIAN COUNTRY, at 1.

<sup>50</sup> *Id.* at 1.

<sup>51</sup> *Id.* at 5.

<sup>52</sup> *See id.* at 13.

eastern Oklahoma.<sup>53</sup> The Agreement allows the state, local, and tribal police to respond to criminal and emergency situations throughout the Reservation, regardless of the tribal status of those involved, and regardless of the fee or trust status of the lands where the incidents arise.<sup>54</sup> The Agreement went into effect as early as 2000.<sup>55</sup> A majority of the parties signed onto the Agreement before the Tenth Circuit issued its opinion in *Murphy v. Royal* in August 2017. 866 F.3d 1164 (2017). The understanding prior to the Tenth Circuit's decision was that the "Indian lands within the Muscogee (Creek) Nation" in the Agreement referred to the land currently controlled by the Creek Nation, not the 1866 boundary.<sup>56</sup> Even following the Tenth Circuit's decision, there was still no certainty

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<sup>53</sup> INTERGOVERNMENTAL CROSS-DEPUTIZATION AGREEMENT BETWEEN THE UNITED STATES, THE MUSCOGEE (CREEK) NATION, AND POLITICAL SUBDIVISIONS OF THE STATE OF OKLA., <https://www.mcn-nsn.gov/government/office-of-the-attorney-general/#1536968156610-dfa18c0f-de0e>.

<sup>54</sup> *Id.* at § 1(2)-(3).

<sup>55</sup> According to the Agreement posted on the Muscogee (Creek) Nation website, the earliest signatory that is still party to the Agreement is the County of McIntosh, which signed the Agreement in June 2000. *See id.* The most recent signatory is the Town of Calvin, which signed the Agreement in May 2019. *See id.*

<sup>56</sup> INTERGOVERNMENTAL CROSS-DEPUTIZATION AGREEMENT at Recitals; *see* Nicole Marshall, *Common ground found by officers*, TULSA WORLD (Dec. 12, 2010), [https://www.tulsaworld.com/news/local/common-ground-found-by-officers/article\\_72938327-38e9-580f-9ebc-84aaa5a6782e.html](https://www.tulsaworld.com/news/local/common-ground-found-by-officers/article_72938327-38e9-580f-9ebc-84aaa5a6782e.html) (noting that the Creek Nation Lighthorse Police Chief did not intend to have his officers conduct patrols over parts of Tulsa that was not considered tribal land, even though they are within the 1866 boundaries).

that the boundaries for the Agreement meant the 1866 boundary.

Reversing the decision below would alter the jurisdiction of the tribal police to such a degree that it could change the nature of the Agreement. Currently, the Agreement is primarily used for activity that occurs near or on the Creek Reservation. If the 1866 boundary went into effect and many of these municipalities became part of “Indian country,” the cross-deputization agreement would likely need to be used for entire municipalities, not just the areas near the current Reservation. This expansion could cause problems for both the Creek Nation Lighthorse Tribal Police and the local and state police.

Cross-deputization is currently conducted for only selected officers. The Lighthorse Tribal Police currently has forty-seven officers who are cross-deputized, but expect that they would need at least 200 deputies to patrol the new tribal lands.<sup>57</sup> For state and local police, the officers currently without a cross-deputization commission can simply avoid going near tribal land to prevent the possibility of infringing on tribal sovereignty. If the 1866 boundary were in place however, those without the cross-deputization commission would instead be limited in their ability to investigate and arrest tribal members in their entire jurisdiction. Requiring these police officers without

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<sup>57</sup> Simon Montlake, *Oklahoma murder case spotlights tribal sovereignty*, CHRISTIAN SCI. MONITOR (Sep. 10, 2018), <https://www.csmonitor.com/USA/Justice/2018/0910/Indian-territory-again-An-old-Oklahoma-murder-case-spotlights-tribal-sovereignty>.

the cross-deputization commission to determine the tribal status of each arrestee would defeat one of the central purposes of the Agreement, which was to ensure more efficient law enforcement.

State and local entities could be confronted with a logistical dilemma: (1) cross-deputizing every police officer; or (2) accepting the patch-work jurisdiction where those officers without cross-deputized commission could not conduct certain arrests or investigations. Either route could change the fundamental nature of the relationship between the parties so much that it could undermine the existing Agreement.

However, affirming the decision below would maintain the status quo for the Agreement. Many of the parties joined the Agreement when the expectation was that the cross-deputization would be relevant on and around the current Creek land. The parties have been coordinating for years as to the balance to strike between the tribal, state, and local officers. Maintaining the current system would be the best path to ensuring the continuity of law enforcement under the Agreement.

**CONCLUSION**

For the foregoing reasons, *amici* respectfully request this Honorable Court affirm the decision of the Oklahoma Court of Criminal Appeals.

Respectfully Submitted,

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