No. 17-1164

IN THE

Supreme Court of the United States

EASTERN SHOSHONE TRIBE,
Petitioner,

v.

WYOMING, ET AL.,
Respondents.

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

REPLY BRIEF FOR PETITIONER

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ARGUMENT

Review here is warranted because the decision below conflicts with both *United States* v. *Grey Bear*, 828 F.2d 1286 (8th Cir. 1987) (subsequent history omitted), and *Ash Sheep Co.* v. *United States*, 252 U.S. 159 (1920). Pet. App. 38a-39a, 40a-41a (Lucero, J., dissenting). Moreover, this case is "very important" (Wyo. Opp. 34), striking at the heart of the Eastern Shoshone's sovereignty while jeopardizing other tribes as well, *see* NCAI Br. 20-23.

In opposing certiorari, respondents often simply repeat points the Tenth Circuit made—while ignoring the petition's demonstration that those points depart from this Court's precedent or are otherwise wrong.

The few new or genuinely responsive arguments respondents offer lack merit.

I. THE DECISION BELOW CREATES A CIRCUIT CONFLICT

The panel acknowledged that the 1905 Act's cession language is "similar to" the language at issue in *Grey Bear*. Pet. App. 14a n.*******. And it offered no textual basis to distinguish that case. *See* Pet. 12. Nor do respondents. They instead proffer other distinctions. Each is meritless.

1. In its own administrative decision finding no diminishment here, and again in urging the same result on appeal, the government relied on *Grey Bear*. *E.g.*, C.A.J.A. 45 n.17; *see also* Pet. App. 14a n.******* (noting reliance on appeal). Now, however, the government claims (Opp. 21) that the decision below does not conflict with that case because the Tenth Circuit considered not only the 1905 Act's cession language but also its "references to diminishment." That distinction—which even the panel never offered—runs afoul of both Eighth Circuit precedent and *Solem* v. *Bartlett*, 465 U.S. 463 (1984). "*Solem* held that even express reference in a statute to the 'reservation thus diminished' does not demonstrate clear congressional intent to diminish." Pet. 14 n.1 (quoting *Solem*, 465 U.S. at 475). And the Eighth Circuit has similarly held that "the statutory phrase 'as diminished,' standing alone, … does not demonstrate a clear congressional intent to disestablish," *Lower Brule Sioux Tribe* v. *South Dakota*, 711 F.2d 809, 820 (8th Cir. 1983); *accord United States* v. *Jackson*, 697 F.3d 670, 677 n.5 (8th Cir. 2012).

Undeterred, the government makes two attempts to distinguish *Solem*. First, it suggests (Opp. 14) that the diminishment reference that *Solem* deemed ambig-

uous was "isolated," whereas here there are repeated references. Mere repetition of an ambiguous term, however—which is all the government points to—does not eliminate the ambiguity. *See United States* v. *Santos*, 553 U.S. 507, 512 (2008) (plurality opinion).

Second, the government asserts (Opp. 14) that unlike in *Solem*, the Tenth Circuit considered diminishment references "in addition to" a second "aspect[] of the statut[e]," namely, "the express language of cession." In fact, *Solem* also considered diminishment references together with a second "aspect[] of the statut[e]" (*id.*), namely "references to the opened areas as being in 'the public domain,'" 465 U.S. at 475. *Solem* deemed those references, even together with the diminishment references, insufficient to show clear intent to diminish given (among other things) the "presumption" against diminishment, *id.* at 481—a presumption that, save for one passing reference (Farm Bureau Opp. 6), respondents notably ignore.

In a variation on this second proffered distinction of *Solem*, the government states (Opp. 21) that the decision below does not conflict with *Grey Bear* because the panel relied on the "combination" of diminishment references and cession language. That argument itself conflicts with Eighth Circuit precedent: In *United States ex rel. Condon* v. *Erickson*, 478 F.2d 684 (8th Cir. 1973), the court held that a statute with both a diminishment reference and cession language did *not* evince congressional intent to diminish, *see id.* at 687-688 (interpreting Act of May 29, 1908, §2, 35 Stat. 460, 461). And *Solem* cited *Erickson* in explaining why diminishment references (even together with public-domain references) are insufficient. *See* 465 U.S. at 475 & n.17. The government's "combination" argument thus does not eliminate the conflict with *Grey Bear*.

Finally, the government contends (Opp. 21) that *Grey Bear* is distinguishable because here the panel relied partly on *Solem*-step-two evidence. *See also id.* at 16-17 n.7. The government, that is, disputes that the panel's textual holding was dispositive (*see* Pet. 15). But the panel did not find the "unequivocal" step-two evidence (Pet. App. 20a) that is required for a diminishment finding whenever the statutory text is unclear, Pet 5 (citing cases). Hence, unless its decision flatly contradicts this Court's requirement of such evidence, the panel must have found—and indeed Wyoming says it did find (Opp. 27)—that the statutory text unambiguously supports a diminishment finding. In that circumstance, however, step-two evidence is irrelevant, as extratextual evidence cannot overcome clear text. The panel's textual holding therefore was dispositive.

2. Wyoming contends (Opp. 32) that there is no circuit conflict because the 1905 Act "defined the boundaries of the new diminished … Reservation," whereas "the act in *Grey Bear* did not." This distinction has no basis in the Eighth Circuit's opinion, which never mentioned boundaries (or a lack thereof) in its analysis. That silence is unsurprising, because the Eighth Circuit—like this Court—has repeatedly found no diminishment by statutes that delineated specific boundaries. *E.g.*, *Smith* v. *Parker*, 774 F.3d 1166, 1167-1168 (8th Cir. 2014) (subsequent history omitted); *Lower Brule Sioux*, 711 F.2d at 816; *see also Ash Sheep*, 252 U.S. at 164.

3. The Farm Bureau asserts (Opp. 6) that unlike in *Grey Bear*, the panel here "found that Congress *did* … make at least a partial unconditional commitment to pay for the ceded land." To the contrary, the panel said the only payments the 1905 Act provided for were conditioned on and "derived from the proceeds of sales of the ceded lands." Pet. App. 16a; *see also* Pet. App. 37a

(Lucero, J., dissenting), 169a-170a. Indeed, if the Bureau were correct, the panel—in confronting the claim that the lack of "a sum certain payment" was "fatal to a finding of diminishment," Pet. App. 17a—would have simply said there *was* a sum-certain payment. Instead, it said that cession language plus a sum-certain payment is not an absolute prerequisite to a *Solem*-step-one diminishment finding. *Id.* (That is true, but the only exception is where, unlike here, an act expressly restores land to the public domain. Pet. 21-23.)

Nor does the fact that the 1905 Act's conditional payments were to be made "both in lump sum allocations and from proceeds of future sales" (Bureau Opp. 6) distinguish *Grey Bear*. The statute there similarly provided for both a lump-sum payment and future installments. Act of Apr. 27, 1904, art. III, 33 Stat. 319, 322. Nonetheless, as *Grey Bear* recognized, "the tribe was guaranteed reimbursement only for the lands actually disposed of by the government." 828 F.2d at 1290. The same is true of the 1905 Act—but the Tenth Circuit, in conflict with *Grey Bear*, deemed that fact irrelevant given the "language of immediate cession," Pet. App. 18a.

4. Fremont County suggests (Opp. 4) that *Grey Bear* is distinguishable because it involved disestablishment, not diminishment. But *Grey Bear* made clear that the same inquiry applies "before disestablishment or diminishment … will be found." 828 F.2d at 1289; *accord Yankton Sioux Tribe* v. *Gaffey*, 188 F.3d 1010, 1022 (8th Cir. 1999).

In short, respondents' efforts to explain away the conflict with *Grey Bear* fail. Under *Grey Bear*, the 1905 Act's text does not evince the requisite congressional intent to diminish, whereas the Tenth Circuit must have reached the opposition conclusion given its dimin-

ishment finding and its conclusion that the step-two evidence was not unequivocal, Pet. App. 20. The Tenth Circuit's split with *Grey Bear* is clear and was dispositive of this case. *See supra* p.4; Pet. 15.

II. THE PANEL DECISION CONFLICTS WITH *ASH SHEEP*

The Tenth Circuit acknowledged that *Ash Sheep* (like *Grey Bear*) addressed statutory cession language "similar" to that of the 1905 Act. Pet. App. 18a. And it offered (again as with *Grey Bear*) no basis in the two statutes' text to distinguish *Ash Sheep*. Nor do respondents. The claims they do make lack merit.

1. Respondents primarily repeat the Tenth Circuit's reliance on the footnoted dictum in *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584 (1977), that "whether lands became 'public lands'" is "logically separate from [the] question of disestablishment," *id.* at 601 n.24. No respondent, however, says even one word in answer to the petition's detailed, three-part explanation (at 19-20) as to why *Rosebud*'s dictum does not eliminate the conflict with *Ash Sheep*. In brief, *Rosebud*'s dictum—which was supported by no relevant authority—contradicts both prior and subsequent decisions of this Court making clear that diminished lands become part of the public domain. That being so, *Ash Sheep*'s holding that the statute there did *not* make the lands "public" necessarily means there had been no diminishment. Even if *Rosebud*'s footnote were relevant, moreover, neither *Rosebud* nor any other decision of this Court states that statutory language that is too ambiguous to make Indian lands "public lands" could nonetheless be clear enough to show the required intent to diminish. Respondents' complete failure to answer these points is telling.

2. The government also suggests (Opp. 18) that *Ash Sheep* is distinguishable because it "addressed the

status of *unsold* land." But nothing in *Ash Sheep* suggests it turned on the land's unsold status. The government's argument, moreover, rests on *Solem*-step-three argument, i.e., that even if *Ash Sheep* mandates a no-diminishment finding here at step one, there is no conflict because of the land's subsequent treatment (step three). That contravenes this Court's precedent. Step-three evidence can only "'reinforc[e]' a finding of diminishment or nondiminishment based on the text," and hence this Court "has never relied solely on this third [step] to find diminishment." *Nebraska* v. *Parker*, 136 S. Ct. 1072, 1081 (2016) (second alteration in original). It is therefore unsurprising that the Tenth Circuit never offered this purported distinction from *Ash Sheep*, nor does any other respondent.

3. Fremont (Opp. 11) and the Farm Bureau (Opp. 9) assert that *Ash Sheep* has been superseded by statute, and that *Solem* so recognized. In reality, *Solem* recognized only that after *Ash Sheep*, Congress expanded the definition of "Indian country" to include reservation lands owned by non-Indians. 465 U.S. at 468. That does not affect *Ash Sheep*'s holding, for two reasons. First, Congress's *expansion* of the definition of "Indian country" could not undermine *Ash Sheep*'s holding that the lands there remained Indian lands under a more *restrictive* definition. Second, the definition of "Indian country" is irrelevant to whether the language in a surplus-lands act evinced congressional intent to transform Indian lands into public lands. *See Ash Sheep*, 252 U.S. at 163 ("Whether the described lands were Indian or Public lands depends upon the construction to be given the Act of Congress[.]").

4. The Farm Bureau echoes (Opp. 9-10) the panel's claim, Pet. App. 19a, that *Ash Sheep* can be disregarded because this Court has rarely cited it. But as

the petition explained (at 18) and the Bureau ignores, that reasoning itself conflicts with this Court's precedent. Review is thus warranted not only to reaffirm *Ash Sheep* and correct the Tenth Circuit's departure from it, but also to provide an evidently-needed reminder that lower courts must "leav[e] to this Court the prerogative of overruling its own decisions," *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989).

III. THE DECISION BELOW IS WRONG

The petition argued (at 21-27) that a proper application of this Court's precedent precludes a diminishment finding here, and that the Tenth Circuit made such a finding only by failing to: consider the statutory text "as a whole," *Solem*, 465 U.S. at 476; resolve ambiguities "to the benefit" of tribes, *DeCoteau* v. *District County Court for Tenth Judicial District*, 420 U.S. 425, 447 (1975), and apply the "broadest possible" presumption against diminishment, *id.* Respondents never address many of the petition's arguments about the panel's errors—and the government never even says that the decision below is correct. The assertions respondents do make, which largely parrot the Tenth Circuit's reasoning while ignoring the petition's explanations of the flaws in that reasoning, are meritless.

Respondents principally contend (*e.g.*, U.S. Opp. 13-15) that the Tenth Circuit did consider the statute as a whole, because it addressed not only the "cede, grant, and relinquish" language but also—in a footnote and one text sentence, *see* Pet. App. 14a n.******, 19a—the Act's scattered "diminishment" references. As an initial matter, however, even if the panel considered two textual features, that would not mean it construed the statute "as a whole," in light of the many other relevant

features (discussed in the petition yet all but ignored by respondents) that at a minimum create ambiguity, foreclosing a step-one diminishment finding.

In any event, respondents' suggestion that the panel actually gave weight to the diminishment references, rather than ruling solely based on the cession language, is baseless. As the petition explained (at 12), the panel stated that "Congress's use of the words, 'cede, grant, and relinquish' can only indicate one thing—a diminished reservation," Pet. App. 15a. The government tries to explain away that absolutist statement by arguing (Opp. 15 n.6) that the court was "respon[ding] to the argument that the 1905 Act did not diminish the Reservation because Article I does not include the words "sell" or 'convey.'" That is irrelevant. Whatever the court was responding to, it unambiguously stated that the cession language dictates a diminishment finding, irrespective of anything else in the statute. That statement (in addition to conflicting with *Ash Sheep* and *Grey Bear*) derogates this Court's insistence on holistic statutory interpretation.

Perhaps recognizing that the Tenth Circuit did rest exclusively on the cession language, Wyoming alternatively asserts (Opp. 25) that the cession language "could not" be clearer in expressing "intent to diminish." That ignores the examples of clearer language that the petition cited from this Court's cases (at 21). Respondents also suggest that exclusive reliance on the cession language is permissible because this Court has "recognized that language of cession" can by itself evince congressional intent to diminish. U.S. Opp. 15; *see also*, *e.g.*, *id.* at 9; Bureau Opp. 11-12. The three cases they cite provide no support whatsoever for that claim. Two involved cession language plus language guaranteeing sum-certain payments. *See South Dakota* v. *Yankton*

Sioux Tribe, 522 U.S. 329, 344 (1998); *DeCoteau*, 420 U.S. at 448. And as *Solem* explained, the statute in the third case (*Rosebud*) did *not* demonstrate intent to diminish; diminishment was found "notwithstanding … statutory language that would otherwise suggest reservation boundaries remained unchanged." *Solem*, 465 U.S. at 471. Rather, *Rosebud* turned on the step-*two* evidence "unequivocally reveal[ing] a widely held, contemporaneous understanding" that the statute would diminish the reservation. *Id.* The petition (at 26) explained all this in addressing the Tenth Circuit's similar claim, yet respondents—as with so many other points—simply parrot the panel without acknowledging, let alone answering, the petition's responses.

Wyoming relatedly mischaracterizes the petition (Opp. 25) as arguing "that a surplus land act must contain two of the three 'common textual indications of Congress' intent' to find diminishment." In fact, the petition argued (at 21, 22-23) that before the decision below, no federal court—including this one—had *ever* found diminishment without either (1) language restoring land to the public domain or (2) cession language plus a sum-certain payment. Respondents' failure to cite any counterexample confirms the Tenth Circuit's error.

Lastly, several respondents argue (*e.g.*, U.S. Opp. 19-20) that the decision below aligns with Wyoming Supreme Court cases upholding certain state criminal jurisdiction over the lands at issue. That does not show the decision below was correct, because the Wyoming decisions were themselves flawed—as the government explained in detail in its administrative decision here (a fact its opposition does not disclose). *See* C.A.J.A. 106-107 & nn.76-77. The Wyoming decisions, moreover, do nothing to reconcile the decision below with either *Grey Bear* or *Ash Sheep*.

IV. THE CASE IS ENORMOUSLY IMPORTANT

This case is "very important." Wyo. Opp. 34. Two judges have stripped the Shoshone—a "separate sovereign[] preexisting the Constitution," *United States* v. *Bryant*, 136 S. Ct. 1954, 1962 (2016)—of reservation land that Congress promised it in perpetuity, and that is at the heart of the tribe's sovereignty and cultural heritage. The decision below also disrupts the long-standing distribution of government authority over the land.

The government disputes the last point, arguing (Opp. 21-22) that it has long declined to assert criminal jurisdiction over the land. But this is not a criminal case. And federal agencies *have* exercised civil and regulatory jurisdiction over the land, based on its reservation status. Pet. App. 33a; *see also* C.A.J.A. 3709-3832, 4281, 4329-4356. So have the Shoshone, particularly on environmental matters like that underlying this case. *See* C.A.J.A. 3833-4138, 4147-4280.

This case is also important to other tribes. The panel's decision invites litigation challenging numerous tribes' sovereign interests, *see* NCAI Br. 20-23, including tribes affected by other surplus-land acts that (like the 1905 Act) contain cession language but no sum-certain payment, *see* Pet. 33. Respondents' only counterargument (U.S. Opp. 22; Wyo. Opp. 35) is to re-assert that the Tenth Circuit did not rest on the Act's cession language. As explained, that is wrong. The risk the decision poses to tribes nationwide, and the need for uniformity in Indian law, warrant this Court's review.*

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* This Court recently granted review in *Royal* v. *Murphy* (No. 17-1107), which concerns whether portions of an Oklahoma

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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reservation were disestablished. That grant is not a reason to deny review here. Although the two cases involve somewhat-overlapping issues (enough that a hold would be warranted here if the Court declined immediate review), there are important differences. For example, whereas this case turns on the application of *Solem*'s three-step analysis, in *Royal* both petitioner and the government contended (Petitioner's Cert.-Stage Reply 5; U.S. Cert.-Stage Br. 6) that *Solem*'s analysis is inapplicable there. Granting review here would therefore fallow this Court to provide more comprehensive guidance to lower courts regarding tribal-state territorial disputes.