Nos. 17-1159 & 17-1164

In The Supreme Court of the United States

NORTHERN ARAPAHO TRIBE,

Petitioner,

v.

STATE OF WYOMING, ET AL.,

Respondents.

EASTERN SHOSHONE TRIBE,

Petitioner,

v.

STATE OF WYOMING, ET AL.,

Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF *AMICUS CURIAE* THE NATIONAL CONGRESS OF AMERICAN INDIANS IN SUPPORT OF PETITIONERS

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ADDITIONAL *AMICI CURIAE*

Confederated Tribes of the Umatilla Indian Reservation

Eastern Shawnee Tribe of Oklahoma

Great Plains Tribal Chairmen's Association

Habematolel Pomo of Upper Lake

Inter Tribal Association of Arizona

Jamestown S'Klallam Tribe

Kickapoo Tribe in Kansas

Lenape Indian Tribe of Delaware

Navajo Nation

Oglala Sioux Tribe

Quapaw Tribe of Oklahoma (the O-Gah-Pah)

Rincon Band of Luiseño Indians

Rosebud Sioux Tribe

Sac and Fox Nation

Sault Ste. Marie Tribe of Chippewa Indians

Seneca Nation

Stillaguamish Tribe of Indians

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INTEREST OF THE *AMICUS CURIAE*[1]

The National Congress of American Indians ("NCAI"), is the oldest and largest national organization that represents and advocates for American Indians and tribal governments. NCAI's membership includes more than 250 Native American tribes and Alaskan Native villages, and countless individual tribal citizens. NCAI has a longstanding interest and involvement in matters relating to tribal sovereignty and jurisdiction, and in supporting tribes' and Indian peoples' rights to self-determination and self-governance – both dependent on tribal governments' ability to exercise their inherent governmental powers.

Since 1944, NCAI has advised tribal, federal, and state governments on a broad range of tribal and individual Indian issues, including reservation disestablishment and diminishment. NCAI is thus well-positioned to provide this Court with critical context on the law applicable to the recognition, disestablishment, and diminishment of Indian reservations, and

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[1] All parties participating in this appeal have consented to the filing of this brief, either through blanket consents on file with the Clerk of Court or in writing to counsel for *amicus curiae*. Counsel for the *amicus* notified all parties in writing of the NCAI's intention to file this brief at least 10 days prior to filing. *See* Sup. Ct. R. 37.2(a). The City of Riverton, Wyoming, an intervenor in the case before the Tenth Circuit, responded through counsel that it has elected to opt out of this appeal, and that it does not believe its consent is required.

No counsel for a party authored this brief in whole or in part, and no person other than *amicus curiae* and its counsel has made monetary contribution to the preparation or submission of this brief. *See* Sup. Ct. R. 37.6.

the importance to tribal governments and individual Indians of the development of the law in this area.

SUMMARY OF THE ARGUMENT

Whereas states and municipalities can function with confidence about their territorial jurisdiction, Indian tribes face the ever-present specter that by exercising their governmental powers they may draw challenges to their reservation boundaries, and that their Indian country could be terminated at any time as a result of a judicial construction of historical "surplus land acts." Interpreting these laws a century or more after the fact presents unique legal difficulties, in view of the often sparse legislative history and absence of any clear historical record. But the potentially devastating impact of these judicial determinations makes this issue – again before the Court – among the most important to American Indian tribes and their citizens today.

Challenges to Indian tribes' reservations did not begin to emerge with any frequency until relatively recently, causing this Court to attempt to bring consistency and fairness to often difficult questions rooted long in the past and during eras of now-discredited federal policies toward Indian nations. In *Solem v. Bartlett*, 465 U.S. 463 (1984), a three-part framework was established to determine whether Congress had diminished a reservation or had simply opened it up to non-tribal settlers. The Court emphasized that

disestablishment could not be found if there was any uncertainty concerning Congress's intent. Subsequently, however, the analysis was applied inconsistently in the federal courts.

It was under these circumstances that this Court's decision just two years ago in *Nebraska v. Parker*, 136 S. Ct. 1072 (2016), represented new, clear guidance providing certainty in this area. The *Parker* decision reaffirmed that only language such as that "providing for the total surrender of tribal claims in exchange for a fixed payment" or for returning land to the public domain can evince Congress's intent to diminish a reservation, and even then such language creates an *almost insurmountable* presumption of diminishment. Tribes could now look to the surplus lands acts affecting their reservations, and determine that their boundary lines were intact if language of cessation was not accompanied by a fixed payment or in the absence of language transferring Indian land to a public purpose. After a long period of uncertainty, the *Parker* decision marked the beginning of a new era.

Only two years after *Parker*, the Tenth Circuit panel's decision has thrown certainty in this important area of federal law into disarray. Its upshot is that the word "cede" alone can mean diminishment, and the lack of a sum-certain payment or "public domain" language largely is irrelevant. If the decision stands, tribes will again face the possibility that an exercise of their governmental jurisdiction could result in a diminished reservation should a legal challenge arise to which they may not be in a position to fairly defend.

A clear, consistent analysis applied to surplus lands acts – and uniformly applied by the courts of appeals – is necessary to further tribal self-governance and self-determination. *Amicus curiae* the NCAI strongly supports the Petitioners' request for review.

REASONS FOR GRANTING THE WRIT

I. The Tenth Circuit's Decision Has Again Unsettled This Court's Jurisprudence Applicable to Legal Challenges to Reservation Boundaries

This case returns to the forefront a serious challenge for Indian nations that has recurred throughout their American experience – namely, how to protect their Indian lands – their "Indian country" – from being disestablished, diminished, or, effectively terminated through legal challenges. Such legal attacks on tribal jurisdiction did not arise with any regularity until long after reservations were created, and the emergent analytical framework at times was unclear or even incoherent, and not protective of tribes' sovereignty and property rights. This led to the Court's corrective decision in *Parker*, which restored predictability, certainty, and fundamental fairness into this important area of law.

A. An Era of Uncertainty Leading to a Correction by This Court

The United States government began creating Indian reservations in the mid-19th century, but litigation to disestablish or diminish Indian country jurisdiction did not become frequent until well over 100 years later. Such challenges typically rest, as in this case, on the interpretation of statutes known as "surplus lands acts," which were enacted following the Dawes Act of 1887[2] to provide for the opening of Indian lands to settlers. The analysis of these statutes unquestionably presented a difficult problem of interpretation, owing to their historic nature and the dramatic shifts in federal Indian policy that had occurred over time.

Before the 1970s, the federal courts were confronted with the issue of diminishment or disestablishment of reservations in only a handful of cases.[3]

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[2] 24 Stat. 390 (1887).

[3] *See*, *e.g.*, *Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351 (1962) (1906 Act diminished Colville Indian Reservation); *Beardslee v. United States*, 387 F.2d 280 (8th Cir. 1967) (Blackmun, J.) (portion of Rosebud Sioux Reservation not disestablished); *Ellis v. Page*, 351 F.2d 250 (10th Cir. 1965) (Cheyenne and Arapaho Reservation disestablished); *Tooisgah v. United States*, 186 F.2d 93 (10th Cir. 1950) (1900 Act disestablished Kiowa, Comanche, and Apache Reservation); *Confederated Band of Ute Indians v. United States*, 64 F. Supp. 569 (Ct. Cl. 1946) (1880 Act diminished Ute Reservation); *see also*, *e.g.*, *Ash Sheep Co. v. United States*, 252 U.S. 159 (1920) (tribal members released possessory rights to Crow Indian Reservation, but lands were still "Indian lands"); *United States v. Celestine*, 215 U.S. 278 (1909) (1854 and 1855 treaties provided only for conditional alienation

However, in the 1970s the federal courts began to be confronted with the issues of diminishment and disestablishment much more frequently,[4] and the framework for evaluating such cases began to emerge, particularly in a trilogy of cases, *Mattz v. Arnett*, *DeCoteau v. District County Court for the Tenth Judicial Circuit*, and *Rosebud Sioux Tribe v. Kneip*.[5] This trend of an increasing number of diminishment and disestablishment cases continued into the early years of the 1980s.[6]

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of land within Tulalip Indian Reservation); *Johnson v. Gearlds*, 234 U.S. 422 (1914) (1864 and 1867 treaties ceded various portions of Chippewa Reservation); *Perrin v. United States*, 232 U.S. 478 (1914) (1894 Act ceded unallotted portions of Yankton Sioux Indian Reservation); *Dick v. United States*, 208 U.S. 340 (1908) (1894 Act ceded unallotted portions of Nez Perce Reservation).

[4] *See United States v. Long Elk*, 565 F.2d 1032 (8th Cir. 1977) (1913 Act did not diminish Standing Rock Reservation); *United States v. Southern Pac. Transp. Co.*, 543 F.2d 676 (9th Cir. 1976) (1906 Act diminished Walker River Reservation); *United States ex rel. Condon v. Erickson*, 478 F.2d 684 (8th Cir. 1973) (1908 Act did not diminish Cheyenne River Reservation); *City of New Town v. United States*, 454 F.2d 121 (8th Cir. 1972) (1910 Act did not alter boundaries of Fort Berthold Indian Reservation); *United States ex rel. Cook v. Parkinson*, 396 F. Supp. 473 (D.S.D. 1975) (1910 Act diminished Pine Ridge Reservation); *Leech Lake Band of Chippewa Indians v. Herbst*, 334 F. Supp. 1001 (D. Minn. 1971) (1889 Nelson Act did not disestablish Leech Lake Reservation).

[5] *Rosebud Sioux Tribe*, 430 U.S. 584 (1977) (1904, 1907, and 1910 Acts diminished Rosebud Reservation); *DeCoteau*, 420 U.S. 425 (1975) (1891 Act diminished Lake Traverse Indian Reservation); *Mattz*, 412 U.S. 481 (1973) (1892 Act did not terminate Klamath River Reservation).

[6] *See*, *e.g.*, *Lower Brule Sioux Tribe v. South Dakota*, 711 F.2d 809 (8th Cir. 1983) (Flood Control Acts did not diminish Lower Brule Sioux Reservation); *White Earth Band of Chippewa Indians*

By that time, this Court was confronting many challenges in these cases, including determining Congress's intent from the language of historic statutes, as opposed to relying on often sparse legislative history reflecting discredited and abandoned allotment and other policies. In the modern diminishment analysis the Court appropriately drew on much older fundamentals, including the canons of federal Indian law.[7] Since the 19th century, the Court had recognized that language in Indian treaties that might tend to undercut tribal authority and sovereignty was to be interpreted narrowly and in such a way as would have been understood by the Indian signatories.[8] These canons

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v. Alexander, 683 F.2d 1129 (8th Cir. 1982) (1889 Act diminished portion of White Earth Indian Reservation); *Confederated Salish & Kootenai Tribes of the Flathead Reservation v. Namen*, 665 F.2d 951 (9th Cir. 1982) (1904 Act did not disestablish Flathead Reservation); *United States v. Minnesota*, 466 F. Supp. 1382 (D. Minn. 1979), *aff'd Red Lake Band v. Minnesota*, 614 F.2d 1161 (8th Cir. 1980) (1889 and 1904 Acts diminished Red Lake Reservation).

[7] *See DeCoteau*, 420 U.S. at 444; *Rosebud Sioux Tribe*, 430 U.S. at 586.

[8] *See*, *e.g.*, *Jones v. Meehan*, 175 U.S. 1, 11 (1899); *Choctaw Nation v. United States*, 119 U.S. 1, 27-28 (1886); *In re Kansas Indians*, 72 U.S. 737, 760 (1866). A leading commentator has noted that

> "[t]aken together, these concepts require an inquiry into whether the Indians understood that they were ceding away a particular interest, rather than whether the United States understood that it was granting that interest to the tribe or whether the language of the treaty provided any seemingly objective answer to this question."

were extended later to statutes as well, such that ambiguities in the language that affect the rights of Indians and tribes are to be construed narrowly to protect tribal interests.[9] In the context of surplus lands cases, this Court had long applied these canons to require that "the legislation of Congress is to be construed in the interest of the Indian,"[10] and accordingly that Congress must clearly express an "intent to change boundaries" before a reservation can be found to be "diminished."[11]

In 1984 the Court issued its seminal decision in *Solem v. Bartlett*,[12] which, consistent with the Indian canons, set forth the now-familiar three-part test to be applied when determining whether a reservation has been diminished or disestablished, with primary emphasis placed on the plain language of the statute and the language of cession.[13] On its face, this primarily

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Phillip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Auth. Over Nonmembers*, 109 Yale L.J. 1, 9 n.33 (1999).

[9] *See, e.g., McClanahan v. State Tax Comm'n of Ariz.*, 411 U.S. 164, 172-73 (1973); *Choate v. Trapp*, 224 U.S. 665, 675 (1912).

[10] *Celestine*, 215 U.S. at 290.

[11] *Rosebud Sioux Tribe*, 430 U.S. at 615.

[12] *Solem*, 465 U.S. 463 (1908 Act did not diminish the Cheyenne River Sioux Reservation).

[13] As the Court explained,

> "[o]ur analysis of surplus land acts requires that Congress clearly evince an intent to change boundaries before diminishment will be found. The most probative evidence of congressional intent is the statutory language used to open the Indian lands. Explicit reference to cession or other language evidencing the present and

textualist framework provided great promise to tribes because it seemed to introduce a measure of certainty into how tribes could evaluate and understand their jurisdictional boundaries in light of a plain reading of the surplus land acts, and tribes could thus be reasonably confident that their jurisdictional boundaries would not be disturbed by later judicial decisions.

B. Uncertainty in the Decades Since *Solem* and the Court's Correction in *Parker*

Tribal governments' hope of certainty in the field of diminishment jurisprudence provided by the *Solem* decision quickly proved ephemeral. After this Court issued its decision in *Solem*, the number of diminishment and disestablishment cases increased substantially. More than 20 such cases have been decided by this Court and the lower federal courts since *Solem*.[14] Although guided by the basic framework

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> total surrender of all tribal interests strongly suggests that Congress meant to divest from the reservation all unallotted opened lands. When such language of cession is buttressed by an unconditional commitment from Congress to compensate the Indian tribe for its opened land, there is an almost insurmountable presumption that Congress meant for the tribe's reservation to be diminished."

Id. at 470-71 (internal quotation marks omitted) (citations omitted).

[14] *See Parker*, 136 S. Ct. 1072 (Omaha Indian Reservation not diminished); *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998) (1894 Act diminished Yankton Sioux Reservation); *Hagen v. Utah*, 510 U.S. 399 (1994) (1902 Act diminished Uintah Indian Reservation); *Murphy v. Royal*, 875 F.3d 896 (10th Cir. 2017)

(Muscogee (Creek) Reservation not disestablished); *United States v. Jackson*, 853 F.3d 436 (8th Cir. 2017) (1905 Act did not diminish Red Lake Reservation); *Hackford v. Utah*, 845 F.3d 1325 (10th Cir. 2017) (1910 Act diminished the Uintah and Ouray Indian Reservation); *Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 985 (8th Cir. 2010) (1894 Act did not disestablish Yankton Sioux Reservation); *Osage Nation v. Irby*, 597 F.3d 1117 (10th Cir. 2010) (1906 Act disestablished Osage Reservation); *Wisconsin v. Stockbridge-Munsee Cmty.*, 554 F.3d 657 (7th Cir. 2009) (1871 Act diminished and 1906 Act disestablished Stockbridge-Munsee Reservation); *Shawnee Tribe v. United States*, 423 F.3d 1204 (10th Cir. 2005) (1854 Treaty terminated Shawnee Reservation); *Oneida Indian Nation of New York v. City of Sherill*, 337 F.3d 139 (2d Cir. 2003), *rev'd on other grounds*, 554 U.S. 197 (2005) (1838 Buffalo Creek Treaty did not disestablish Oneida reservation); *United States v. Webb*, 219 F.3d 1127 (9th Cir. 2000) (1894 Act did not diminish Nez Perce Reservation); *Yankton Sioux Tribe v. Gaffey*, 188 F.3d 1010 (8th Cir. 1999) (1894 Act diminished but did not disestablish Yankton Sioux Reservation); *Leech Lake Band v. Cass Cnty.*, 108 F.3d 820 (8th Cir. 1997), *aff'd in part and rev'd in part on other grounds*, 524 U.S. 103 (1998) (Leech Lake Reservation not diminished); *Confederated Tribes of Chehalis Indian Reservation v. Washington*, 96 F.3d 334 (9th Cir. 1996) (1886 Executive Order did not diminish Chehalis Indian Reservation); *Duncan Energy Co. v. Three Affiliated Tribes of Fort Berthold Reservation*, 27 F.3d 1294 (8th Cir. 1994) (1910 Act did not diminish Fort Berthold Indian Reservation); *Pittsburg & Midway Coal Mining Co. v. Yazzie*, 909 F.2d 1387 (10th Cir. 1990) (1908 Act and Executive Orders diminished Navajo Reservation); *United States v. Grey Bear*, 828 F.2d 1286 (8th Cir. 1987), *reh'g denied*, 836 F.2d 1086, *reh'g granted, vacated in part*, 836 F.2d 1088 (8th Cir. 1987) (1904 Act did not disestablish Devil's Lake Indian Reservation); *Cayuga Indian Nation of New York v. Seneca Cnty.*, 260 F. Supp. 3d 290 (W.D.N.Y. 2017) (1838 Treaty of Buffalo Creek did not diminish Cayuga reservation); *Cayuga Indian Nation of New York v. Village of Union Springs*, 317 F. Supp. 2d 128 (N.D.N.Y. 2004) (1838 Treaty of Buffalo Creek did not diminish Cayuga reservation); *Melby v. Grand Portage Band of Chippewa*, No. CIV 97-2065, 1998 WL 1769706 (D. Minn. Aug. 13, 1998) (1889 Nelson Act did not disestablish Grand Portage Reservation); *Thompson v. Cnty. of Franklin*, 987

established in *Solem* and its progeny, these post-*Solem* cases increasingly were decided unevenly, and the results seemingly rested on more of an *ad hoc* analysis than on a consistent framework.

In part, such inconsistency was doubtless due to the variations in statutory language employed in the various treaties and acts of Congress – it was hardly conceivable when these statutes were passed that they would give rise to boundary disputes a century later – and also to the historical peculiarity that when Congress passed the various statutes at issue it almost certainly did not anticipate that federal Indian policy would change from the allotment system to the very different framework of tribal reorganization several decades later.[15] The vagaries involved with legislative histories are precisely why this Court, in its more recent jurisprudence, has strongly preferred reliance on statutory text. *See*, *e.g.*, *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring) (noting reliance on legislative history is "more likely to confuse than to clarify"). The need for textual reliance is especially

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F. Supp. 111 (N.D.N.Y. 1997) (1824 and 1825 conveyance agreements diminished St. Regis Reservation); *Colo. River Indian Tribes v. Town of Parker*, 705 F. Supp. 473 (D. Ariz. 1989) (1908 Act did not diminish Colorado River Indian Reservation).

[15] *See Hagen*, 510 U.S. at 426 (Blackmun, J., dissenting) ("As a result of the patina history has placed on the allotment Acts, the Court is presented with questions that their architects could not have foreseen."); *Yankton Sioux Tribe*, 188 F.3d at 1028 ("The Act could not foresee all that would happen in the future with population movement, state development, and changing Indian policy. . . .").

strong here where Congress did not consider disestablishment cases at the time it passed the surplus lands acts. *See*, *e.g.*, *Henson v. Santander Consumer USA, Inc.*, 137 S. Ct. 1718, 1725 (2017) (Gorsuch, J., for a unanimous Court) (explaining the Court should not "speculat[e] about what Congress might have done had it faced a question that, on everyone's account, it never faced").

However, it became readily apparent that this inconsistency was also the result of courts taking differing approaches in applying the *Solem* test, with many courts giving undue weight to legislative history and other factors as opposed to the plain language of the statute.[16] The result was that the outcome of any particular boundary dispute was anything but predictable. Suffice it to say, when confronted with such an uncertain terrain presented by the patchwork of case law on this subject, a greater measure of certainty was needed for tribes to exercise their sovereignty and conduct their affairs.

This Court took a step forward toward providing such needed certainty in its recent decision in *Parker*, where it set forth a clearer framework, at least with respect to a certain subset of diminishment and disestablishment cases. 136 S. Ct. at 1079-80. The *Parker* decision, decided on statutory language and circumstances not unlike those underlying this case, represented – and was regarded by Indian tribes as – a major correction in this jurisprudence. In *Parker*, the

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[16] *See*, *e.g.*, *Stockbridge-Munsee Cmty.*, 554 F.3d at 664-65.

Court clearly and succinctly underscored the specific roles in the framework to be given to each of the three factors. *See Parker*, 136 S. Ct. at 1079-81.

Specifically, in reaffirming that only clear language such as that "providing for the total surrender of tribal claims *in exchange for a fixed payment*" and/or restoring or transferring tribal lands to the public domain could evince Congress's intent to diminish a reservation, this Court gave far greater certainty to the analysis. *Id*. at 1079. *Parker* was thus heralded by tribes for restoring a measure of certainty lacking in the rulings since *Solem* that sometimes appeared inconsistent and *ad hoc*. The *Parker* decision made it once again possible to apply a more objective and predictable analysis to the statutory text to determine whether a surplus act potentially diminished or disestablished reservation boundaries.

The result was that tribes could review their surplus land acts and determine if those acts contained certain language, such as language of cession without a sum certain payment or without an intent to transfer the land for public use. If an act fit that category, then under *Parker* a tribe could be reasonably confident that the reservation boundaries would not be disturbed or upended by judicial decision. However, this certainty has been eviscerated by the Tenth Circuit's decision, which employed an unpredictable analysis that failed to give proper emphasis to the plain language of the statute.

II. Changes in the Established Diminishment Jurisprudence Have Far-Reaching Impacts on the Rights of Indian People and Tribes

What is at risk for American Indian tribal governments in reservation diminishment and disestablishment cases is not merely changes to boundary lines on maps, but the loss of their traditional and historic land areas, and much more. Indian lands represent tribal jurisdiction, and the loss of reservation or other lands terminates tribes' Indian country jurisdiction under federal law. But far more than the abrupt loss of jurisdiction, the loss of reservation lands, from the perspective of tribes, repeats the loss of their homelands and Indian sovereignty that occurred once before in American history.[17]

Today in the era of self-governance, Indian tribes function the same as any other governments, exerting the same types of jurisdiction and performing the same types of services. Services offered by many of today's 573 federally recognized Indian tribes are indistinguishable from those of states, including services

[17] The federal policies in the late 19th century intended to remove Indian nations from their homelands and confine Indians to reservations represented an era "in which the American Indian was deprived of political, economic, and cultural autonomy and subjected to very strong pressures to assimilate," and " '[k]ill the Indian in him and save the man' was the slogan, and any means to this end seemed acceptable." Klaus Frantz, *Indian Reservations in the U.S.: Territory, Sovereignty & Socioeconomic Change* at 17 (Univ. Chicago Press 1999). *See generally Cohen's Handbook of Federal Indian Law* § 1.04, at 71-78 (2012 ed.) (surveying allotment and assimilation era in federal Indian policy) [hereinafter *Federal Indian Law*].

related to education, law enforcement, emergency response, physical and mental health, transportation infrastructure, courts and justice systems, elder care, housing, and family and social assistance, among many others.[18] Tribes provide these services among an estimated 6.7 million Native Americans in the United States, about 22% percent of whom live in Indian country.[19]

Any loss of a tribe's Indian country has the same impact that a state would suffer if its land were determined to be within the borders of another state. As is the case with other governmental boundaries, reservation boundaries define tribal jurisdiction, service areas, and the limits within which a state could attempt to raise revenue to fund essential governmental services.[20] *See Federal Indian Law* § 6.06, at 718. Thus, when reservation lands are diminished or disestablished, it erodes the authority of a tribe to exercise

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[18] *See generally* Veronica E. Tiller, *Tiller's Guide to Indian Country: Economic Profiles of Indian Reservations* (3d ed. 2015) (surveying services and enterprises of Indian nations).

[19] *See* U.S. Census Bureau, *Annual Estimates of the Resident Population by Sex, Age, Race & Hispanic Origin for the U.S.: Apr. 1, 2010 to July 1, 2016* (June 2017); U.S. Census Bureau, *Facts for Features: Am. Indian & Alaska Native Heritage Month, Nov. 2013* (October 31, 2013).

[20] Indian tribes, as governments, have the power to levy taxes, and many rely on taxation to provide governmental funding. *See Federal Indian Law* § 8.04, at 718. However, as a result of allotment, most tribes already have relatively small land areas in which to develop tax bases, and they face other obstacles in this area, including concurrent state taxing authority. *See id*. at § 8.05, at 728.

self-governance, to provide governmental services, and to raise governmental revenues.

But the loss of tribal reservation lands means much more to a tribe than just damage to its ability to govern. Reservations are lands deeply connected to a tribe's history and culture. Lands within a tribe's Indian country contain sacred sites, burial areas, ceremonial grounds, and other historical locations that are special to a tribe's culture in a way often not understood or respected by non-Indian society. Thus with the diminishment of reservation lands comes the loss of tribal culture and identity.[21] The United States government recognized this early on when attempting to forcibly assimilate Indian people into American society by enacting the allotment policy leading to the loss of some 90 million acres of tribal land. *See Federal Indian Law* § 1.04, at 72-74. When courts make a modern-day determination that reservations have been diminished, it is viewed by Indian people as a renewal or continuation of the historical federal policies designed to erase tribal autonomy and identity.

The significance of reservation boundaries to tribal self-governance and identity is further demonstrated by tribes' rights to assert jurisdiction over members on certain criminal, civil, and regulatory

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[21] Lands losing reservation status could immediately result in the inability of tribes to protect these historical cultural sites, because the jurisdiction of Tribal Historic Preservation Officer programs is determined by the boundaries of a tribe's reservation under the National Historic Preservation Act. *See* 54 U.S.C. §§ 302702 & 300319.

matters within their Indian country. Outside of reservation boundaries, tribes exercise little, if any, jurisdiction over their members.[22] *See Federal Indian Law* § 3.04, at 183. Tribes have authority to exercise criminal jurisdiction over their members when the crime occurs in Indian country, which is defined to include lands "within the limits of any Indian reservation." *See* 18 U.S.C. § 1151. Thus, if a reservation boundary is disestablished a tribe is forced to cede criminal jurisdiction over its members to state authorities. This cession of criminal jurisdiction to state authorities directly contradicts the federal laws Congress has enacted to protect tribal self-governance over criminal matters.[23]

The loss of reservation lands also diminishes a tribe's civil and adjudicatory jurisdiction, such as that over matters related to family disputes, divorce, probate, land use, and other general civil and regulatory matters. One illustration of the negative impacts on self-governance and identity caused by a loss of such jurisdiction is the loss of a tribe's authority derived

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[22] For example, reservation boundaries largely determine the scope of tribes' criminal jurisdiction. *See* 18 U.S.C. § 1151. *See generally Federal Indian Law* §§ 3.04 & 9.04, at 183 & 765 (discussing tribal criminal jurisdiction).

[23] *See*, *e.g.*, Pub. L. No. 102-137, 105 Stat. 646 (codified at 25 U.S.C. § 1301(2) (the "Duro-Fix"); Pub. L. No. 90-284, § 406, 82 Stat. 73 (codified at 25 U.S.C. § 1321 *et seq*.) (ending Public Law 280 state jurisdiction over tribes without tribal consent); Pub. L. No. 113-4, 127 Stat. 54 (Mar. 7, 2013) (codified, in part, at 25 U.S.C. § 1304) (the "Violence Against Women Act").

from the Indian Child Welfare Act.[24] 25 U.S.C. §§ 1901 *et seq*. ("ICWA"). Rights of an Indian tribe to exercise jurisdiction in child custody proceedings involving an Indian child is directly tied to situations in which the child is "domiciled within the reservation of such tribe. . . ." *See* 25 U.S.C. § 1911(a). With the loss of reservation lands, tribes lose primary jurisdiction over adoption and other proceedings relating to Indian children, thus depriving tribal families of the protections provided by ICWA.

The circumstances underlying this case serve as a prime example of the type of sovereign rights tribes stand to lose through reservation diminishment or disestablishment. This case arose because the tribes were attempting to assume congressionally recognized authority to participate in federal environmental programs.[25] A tribe's management of environmental programs is vital to ensure the health and safety of the people who rely on reservation resources. It should not

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[24] Recognizing that "there is no resource more vital to the continued existence and integrity of Indian tribes than their children," Congress enacted ICWA to deter the irreversible detrimental impacts on removing Native American children from tribal families by giving tribes the authority to determine placement and treatment of neglected and abandoned Indian children. *See* 25 U.S.C. § 1901.

[25] The United States Environmental Protection Agency (the "EPA") reports that hundreds of tribes have assumed some role in environmental protection in Indian country, a strong indication of the potentially far-reaching implications of the Tenth Circuit's decision. *See* EPA, *Profile of Tribal Government Operations* (Summer 2007) (available at http://purl.access.gpo.gov/GPO/LPS100783).

be forgotten that tribes and their people often were forced onto reservations a fraction of the size of (and often far-away from) their home territories. If a tribe's home territory is no longer considered a reservation, the tribe loses the ability even to monitor conditions that may threaten its lands and resources.

Indian reservations are the last remaining place on earth where tribes may exercise their governmental authority, where Indian people can participate in tribal culture subject only to their tribe's authority, and where tribal citizens may take advantage of many of the services offered by their tribal governments. Even though Congress ended its policy of termination and assimilation long ago, federal courts continue to shrink Indian reservations today, causing the deterioration of self-governance and tribal identity. With the Tenth Circuit's new "low-water mark in diminishment jurisprudence," the eradication of tribal lands and identity will only be exacerbated.[26]

III. The Tenth Circuit's Decision Warrants Review Because It Conflicts with this Court's Diminishment Framework and Invites New Challenges to Tribal Self-Governance

Long ago the federal government turned away from ill-conceived policies designed to reduce reservation land bases, to terminate tribal nations, and to assimilate Indians into the broader society. Yet, no

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[26] *Wyoming v. U.S. Envtl. Prot. Agency, et al*., Nos. 14-9512 & 14-9514 slip op. at 44 (Feb. 22, 2017) (Lucero, J., dissenting).

legal issue today can pose a greater threat to tribal governance and sovereignty than the ongoing possibility of judicial termination of Indian country. The Tenth Circuit's decision, contrary to *Parker*, lowers the requirements for a diminishment finding and reintroduces uncertainty into this jurisprudence, and thereby invites new challenges to Indian country that tribes will bear the sometimes difficult burden of defending.

Since the turn of the 20th century, the federal courts have addressed reservation disestablishment or diminishment claims (directly or indirectly) in approximately 50 reported decisions.[27] Of these cases, only about six were decided before 1960 and only about three more before 1970. During most of this same time period, the federal government pursued official policies that were, from the perspective of American Indian people and tribes, disastrous, including allotment and assimilation (1871 to 1928) and termination (1943 to 1961).[28]

The era of self-determination and self-governance in Indian policy began in the 1960s, and subsequently Indian nations began gradually to rebuild and strengthen their governments and to pursue economic development on their reservations and within their

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[27] *See supra* notes 3-6 & 14.

[28] *See generally Federal Indian Law* §§ 1.04 & 1.06, at 71 & 84 (surveying periods of 20th century federal Indian policy).

Indian country jurisdictions.[29] The vast majority of the reported decisions in litigation addressing challenges to reservation boundaries – in some 38 cases – have been made since 1970. Indeed, at least 12 of these cases have reached a decision stage since 2000.[30]

Perhaps unremarkably, this suggests that as tribal governments have advanced in the self-governance era, and increasingly have asserted their inherent jurisdiction to a greater extent and have increasingly expanded services, the challenges to their Indian country jurisdiction, including by non-Indian governments, have increased. This underscores the importance of the primary issue of federal law in this case – the need to return the framework for analyzing surplus lands acts to the certainty recognized in *Parker* and to a more consistent and uniform application in the courts of appeals.

The culmination of a half-century of decisions addressing diminishment jurisprudence was *Parker*, a

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[29] *See generally Federal Indian Law* § 1.07, at 93 (discussing development and purpose of the federal policy of self-determination).

[30] *See Parker*, 136 S. Ct. 1072 (2016); *Murphy*, 875 F.3d 896 (10th Cir. 2017); *Jackson*, 853 F.3d 436 (8th Cir. 2017); *Hackford*, 845 F.3d 1325 (10th Cir. 2017); *Yankton Sioux Tribe*, 606 F.3d 985 (8th Cir. 2010); *Irby*, 597 F.3d 1117 (10th Cir. 2010); *Stockbridge-Munsee Cmty.*, 554 F.3d 657 (7th Cir. 2009); *Shawnee Tribe*, 423 F.3d 1204 (10th Cir. 2005); *City of Sherill*, 337 F.3d 139 (2d Cir. 2003); *Webb*, 219 F.3d 1127 (9th Cir. 2000); *Cayuga Indian Nation*, 260 F. Supp. 3d 290 (W.D.N.Y. 2017); *Village of Union Springs*, 317 F. Supp. 2d 128 (N.D.N.Y. 2004).

decision that was well-received in Indian country.[31] It permitted tribal governments faced with challenges to their jurisdictional boundaries to evaluate – and defend – them under reasonably straightforward aspects of the text commonly found in surplus lands acts, including whether such enactments provided for a sum-certain to be paid for lands and whether such laws contained language returning Indian land to the public domain. If *Parker* set forth a clear means by which tribal governments can determine the status of their boundaries, the Tenth Circuit panel's decision does the opposite. The undue reliance it places on language of cession – typical language in many surplus lands acts – provides no indication of whether Indian country boundaries are subject to termination.

The Tenth Circuit's decision, if permitted to stand, promises to make more Indian country boundaries the subject of challenges. This can be particularly threatening to tribal governments that lack sufficient resources to adequately defend such legal challenges. Moreover, these claims can present an extremely difficult legal problem to defend. These challenges are based not on factual errors in surveys or some other objective criteria, but on long-delayed legal arguments concerning the meaning of 100-year-old congressional enactments. Legislative history – to the extent it even

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[31] *See*, *e.g.*, Bethany R. Berger, *Hope for Indian Tribes in the U.S. Supreme Court?: Menominee, Nebraska v. Parker, Bryant, Dollar General . . . and Beyond*, 2017 U. Ill. L. Rev. 1901, 1920-26, 1938-41 (2017) (discussing strength of the *Parker* decision in supporting sovereignty and examining how it might have resulted in different results in past diminishment adjudications).

exists – and other external evidence that might be otherwise be available originated in an era in which the federal government was attempting to assimilate or eliminate Indians and tribes, and therefore often provides no valid interpretative information about the actual text of these acts.[32] To the extent *any* part of the legislative history indicates an intent to *not* diminish or disestablish a reservation, such ambiguity is dispositive against diminishment or disestablishment. *See Parker*, 136 S. Ct. at 1079 (noting legislative history must be "unequivocal" in support of diminishment).

This case presents the needed opportunity for the Court to re-affirm the clarity it provided in *Parker* concerning the application of statutory text in the interpretation of surplus lands acts. Such a reaffirmation would go a long way in providing security and certainty for Indian tribes that are the subject of statutes that did nothing more than open their reservations to non-Indian settlors. A return to the pre-*Parker* era of uncertainty would result in a wave of new boundary challenges – each of which would target invaluable sovereignty rights tribes have increasingly exercised in the era of self-governance and self-determination.

[32] *See generally* Susan D. Campbell, *Reservations: The Surplus Lands Acts & the Question of Reservation Disestablishment*, 12 Am. Indian L. Rev. 57, 61, 76-96 (1984) (surveying issues relating to legislative histories of surplus lands acts).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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