No. 17-1159

In the
Supreme Court of the United States

NORTHERN ARAPAHO TRIBE,

Petitioner,

v.

STATE OF WYOMING;
WYOMING FARM BUREAU FEDERATION,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF

This Court has found diminishment only when the relevant statute guaranteed a sum-certain payment, expressly restored reservation lands to the public domain, or was buttressed by a historical record unequivocally demonstrating diminishment. Wyoming concedes, and the other respondents barely dispute, that none of these features exists in this case. A divided Tenth Circuit nevertheless held that statutory cession language *alone*, unaccompanied by sum-certain language, satisfies the heavy burden of establishing diminishment, and accordingly concluded that the 1905 Act diminished the Tribes' Reservation by two-thirds while giving the Tribes nothing beyond the promise of proceeds from sales that never materialized. That reasoning conflicts with a long line of this Court's cases, the considered views of two federal agencies, and the Eighth Circuit's decision in *United States v. Grey Bear*, 828 F.2d 1286 (8th Cir. 1987). Moreover, the Tenth Circuit ignored multiple textual features indicating *non*-diminishment, including material differences from earlier acts working a diminishment—a factor this Court deemed critical in *Nebraska v. Parker*, 136 S. Ct. 1072 (2016).

Respondents have little to say about any of that, instead drawing immaterial distinctions and ignoring the significance of sum-certain language, which is not only legally significant but ensures that diminishment will not occur in exchange for nothing. Respondents note that cession language appears in multiple statutes that diminished reservations. But while cession-*plus*-sum-certain language has been found to accomplish diminishment, the relevant question is

whether cession-without-sum-certain language is enough. The answer suggested by this Court's precedents and supplied by two federal agencies and *Grey Bear* is no. Respondents claim that the legislative history in *Grey Bear* did not unequivocally support diminishment, but the same is true here, making the split unavoidable. Respondents' answer to *Parker* is to emphasize that the Lander and Thermopolis Purchases and 1905 Act all use cession language, but only the 1905 Act lacks a sum certain, which is the salient difference here as it was in *Parker*.

On the merits, none of respondents' arguments is persuasive, and none changes the fact that the Tenth Circuit's decision conflicts with this Court's precedent, a published Eighth Circuit decision, and the considered judgments of two executive-branch agencies. The Solicitor General acknowledges those prior determinations in passing, but suggests that the Tenth Circuit's decision is not certworthy without defending the decision on the merits. That approach cannot obscure the reality that both Interior and EPA engaged in exhaustive analyses—22 pages for Interior and 83 pages in the case of the EPA—that squarely conflict with both the legal analysis and ultimate conclusion of the Tenth Circuit. Finally, there is no doubting the importance of this case, as even Wyoming concedes the decision's impact on "a significant amount of land and the rights of many individuals." WY.Opp.35. At a minimum, this case should be held pending *Royal v. Murphy*, No. 17-1107, but the better course would be to grant review and hear these cases going to the heart of tribal and state sovereignty in tandem.

I. The Tenth Circuit's Decision Conflicts With Precedent From This Court And The Eighth Circuit.

A. The Tenth Circuit's attribution of dispositive significance to statutory cession language, absent the promise of a sum certain, has no support in this Court's jurisprudence. Respondents assert that this Court has found diminishment from surplus land acts that *included* cession language. WY.Opp.6-7; Bureau.Opp.11-12; Muni.Opp.7; SG.Opp.15. But petitioners never suggested otherwise. The Tenth Circuit's conflict-creating innovation was to find diminishment from cession language *alone*, absent sum-certain language as in *DeCoteau v. District County Court for Tenth Judicial District*, 420 U.S. 425 (1975), and *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998), or an "unequivocal" historical record, as in *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977).

Citing *Hagen v. Utah*, 510 U.S. 399 (1994), respondents argue that diminishment does not invariably require both cession language and a sum-certain payment. WY.Opp.25; Bureau.Opp.12; Muni.Opp.8-9; SG.Opp.15-16. Again, petitioners never suggested otherwise. *See* Pet.23-24. But in *Hagen*—the only case in which this Court has found diminishment from statutory text without sum-certain language—the statute expressly "restored [land] to the public domain." 510 U.S. at 403-04. Like sum-certain language, public-domain language "evidences a congressional intent … inconsistent with the continuation of reservation status." *Id.* at 414. In contrast, cession language *without* sum-certain or

public-domain language is equally if not more consistent with opening the reservation for settlement, which is why this Court has never held cession language alone sufficient to prove diminishment.[1]

The Solicitor General contends that the Tenth Circuit did not rely on cession language alone, but also on the 1905 Act's references to a "diminished reserve." SG.Opp.13-14. But the very fact that the SG must resort to a fleeting reference in the last sentence of a footnote, *see* Pet.App.15 n.6, in his effort to find any textual factor beyond cession language in the Tenth Circuit's step-one analysis underscores how fixated the Tenth Circuit was on cession language. The fact remains that the Tenth Circuit—and the Tenth Circuit alone—found cession language, unaccompanied by sum-certain or public-domain language, dispositive. That is why all other textual indications of *non*-diminishment, such as the treatment of school lands and the Boysen provision, were given short shrift. *See* pp.9-11, *infra*.[2] Furthermore, even if the court had relied on those references to a diminished reservation, that would

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[1] The decision below thus conflicts with this Court's cases going back to *Ash Sheep Co. v. United States*, 252 U.S. 159 (1920), where cession language alone was not dispositive. *See* Pet.22-23; Reply Br.6-8, *E. Shoshone Tribe v. Wyoming*, No. 17-1164 (June 4, 2018).

[2] Indeed, not only did the Tenth Circuit give outcome-determinative weight to the language of cession at step one, but it used that same language to truncate any meaningful consideration of the other steps, claiming that it "need not search for" unequivocal historical evidence because "the statute contains express language of cession." Pet.App.21.

only underscore the conflict with this Court's cases, which instruct that it is "impossible to infer … a congressional purpose to diminish" from such references because the term "diminished" was "not yet a term of art in Indian law" and "may well have [referred] to diminishment in common lands and not diminishment of reservation boundaries." *Solem v. Bartlett*, 465 U.S. 463, 475 n.17, 478 (1984).

Respondents offer no excuse for the Tenth Circuit's refusal to acknowledge the stark differences between the 1905 Act and the two earlier purchase acts that diminished the Reservation, even though this Court deemed an analogous "change in language" significant in *Parker*, 136 S. Ct. at 1080. *See* Pet.27-29. Wyoming suggests that the earlier purchase acts are "not meaningfully different [from] the 1905 Act" because they used similar cession language. WY.Opp.26. That argument elides the relevant difference: Congress used sum-certain language in the two earlier acts but *not* in the 1905 Act, which promised payment only to the extent that land sales materialized. Pet.29. The absence of sum-certain language not only distinguishes the earlier Acts, but underscores that the Tenth Circuit found the Reservation diminished in exchange for nothing except sale proceeds that never materialized. Respondents' only other argument—that *Parker* did not involve cession language, WY.Opp.21 n.6; Muni.Opp.9; SG.Opp.17—is even less responsive. The point is not that the statute in *Parker* was identical, but that in both cases, Congress' decision to replace language perfectly suited for diminishment with language equally consistent with merely opening land

for sales undermines the notion that Congress intended to diminish the Reservation.

B. Respondents fare no better in trying to distinguish *Grey Bear*, in which the Eighth Circuit considered virtually identical text but reached exactly the opposite result. Pet.24-27. Respondents claim that *Grey Bear* is distinguishable because there was too little legislative history there to inform the prong-two analysis. WY.Opp.31; Bureau.Opp.7-8; SG.Opp.21. The legislative history here is no different, Pet.31-34, but regardless, the conflict here arises antecedently at prong one: The Eighth Circuit in *Grey Bear* concluded that cession language is not enough to "evince a clear congressional intent to disestablish," 828 F.2d at 1290, while the Tenth Circuit concluded that "practically identical" language, Bureau.Opp.4, "can only indicate … a diminished reservation," Pet.App.16.[3]

Wyoming attempts to distinguish the statute in *Grey Bear* because it did not "specifically define[]" the boundaries of the opened lands due to some unassigned allotments. WY.Opp.32. Wyoming argues that this "difference matters," *id.* at 31, but it did not matter to either the Eighth or Tenth Circuits. Neither court mentioned these attributes—much less ascribed any significance to them—in finding no diminishment (in *Grey Bear*) or distinguishing *Grey Bear* (in the decision below). Wyoming also argues that the *Grey*

[3] Municipal Respondents note that *Grey Bear* involved disestablishment, not diminishment, Muni.Opp.4, but they cite no authority suggesting that the applicable standard differs. Indeed, *Grey Bear* itself refers interchangeably to "disestablishment or diminishment." 828 F.2d at 1289.

Bear statute is distinguishable because what "appears to be clear language of cession" is rendered "ambiguous" by the language addressing allotments. WY.Opp.32. Again, neither the Eighth nor Tenth Circuits adopted this view, and understandably so. Once the allotments were assigned, everything that remained unallotted was "ceded." *Grey Bear*, 828 F.2d at 1290. The only question was whether that "explicit reference to cession" could effect diminishment without an "unconditional commitment by Congress to pay the tribe." *Id.* (emphasis omitted). The Eighth Circuit concluded that it could not, while the Tenth Circuit here concluded that it did.

Some respondents insist that Congress *did* make an "unconditional commitment to pay" in the 1905 Act by including "lump sum allocations." Bureau.Opp.6; *see* Muni.Opp.3. But as the dissent below explained, the "lump sum allocations" were not guaranteed sum-certain payments; they were either advance payments that the Tribes were required to pay back from "the proceeds of sales of the ceded lands," or they were payments wholly contingent on those sales. Pet.App.17; *see* Pet.App.42 (Lucero, J., dissenting). For example, while the Act allocated a lump sum for the purchase of livestock, the allocation was of "fifty thousand dollars *of the moneys derived from the sale of the ceded lands*." Pet.App.256 (emphasis added)). Thus, here as in *Grey Bear*, the Tribe was entitled to unconditional funds "only for the lands actually disposed of by the government." 828 F.2d at 1290.

C. Respondents argue that the decision below is consistent with certain Wyoming Supreme Court decisions. WY.Opp.17-20; Muni.Opp.4-6; SG.Opp.19-

20. But the conflict with this Court's precedents, *Grey Bear*, and two federal agencies more than suffices. Indeed, this Court regularly grants review in diminishment cases without *any* split of authority, including just last month. *Royal v. Murphy*, __ S. Ct. __ (2018); *see also Parker*, 136 S. Ct. 1072; *Rosebud*, 430 U.S. 584; *Mattz v. Arnett*, 412 U.S. 481 (1973).

In all events, respondents overstate the relevance and persuasiveness of the state cases. The SG, for example, cites *Yellowbear v. State*, 174 P.3d 1270, 1274 (Wyo. 2008), but neglects to mention that the federal government previously repudiated that decision because, among other things, the decision did not "consider[] all of the relevant factors," was not made on a "fully developed record," and did not "consider … language … suggesting an absence of intent to diminish" or "compare the 1905 Act to" earlier purchase acts. Pet.App.193-94.[4] Respondents invoke *State v. Moss*, 471 P.2d 333 (Wyo. 1970), WY.Opp.17-18; Muni.Opp.5; SG.Opp.19, but that decision is unpersuasive in multiple respects, as it predated this Court's modern diminishment framework and wrongly equated extinguishment of tribal title with diminishment of a reservation. *See* Pet.App.193 n.76 (federal government criticizing *Moss*).

[4] Respondents note that the Tenth Circuit declined to disturb *Yellowbear* on habeas review. WY.Opp.19-20; Muni.Opp.5-6; SG.Opp.19-20. But the unpublished denial of a habeas petition is not precedential, implicates stringent post-conviction legal standards, and only underscores the conflict between the Tenth and Eighth Circuits.

In the end, there is no denying that the decision below has no precedent in this Court's diminishment jurisprudence and "creat[es] a needless circuit split." Pet.App.45 (Lucero, J., dissenting). There likewise is no denying that the two federal agencies to exhaustively consider the issue concluded the Reservation was undiminished by the 1905 Act. Given all that and the Tenth Circuit's stark conclusion that the 1905 Act extinguished tribal sovereignty over two-thirds of the Tribes' long-held sacred lands in exchange for nothing, plenary review is plainly warranted.

II. The Tenth Circuit's Conclusion Is Wrong.

The decision below not only implicates multiple conflicts; it is wrong. The text of the 1905 Act and its surrounding circumstances do not reflect the "clear and plain" congressional purpose required to overcome the "presumption that Congress did not intend to diminish the Reservation." *Solem*, 465 U.S. at 481.

A. The 1905 Act contains neither sum-certain nor public-domain language, and it markedly differs from prior purchase acts that diminished the Reservation. Pet.27-30. Respondents largely ignore other textual indicators of non-diminishment like the provision allowing members to remain on the opened lands, the absence of a school-lands provision, and the Boysen provision. Indeed, the Bureau, the Municipal Respondents, and the SG *do not even mention* those provisions, much less explain how they are consistent with the necessary "clear textual signal" that

Congress intended to diminish the reservation. *Parker*, 136 S. Ct. at 1080.[5]

Wyoming does address the provisions, but its explanations are unpersuasive and conflict with this Court's treatment of similar provisions. Wyoming speculates that Congress allowed tribal members to remain on the opened lands only because it would be "unfair" to force them off. WY.Opp.29. The notion that Congress was animated by fairness in passing a law that, by Wyoming's telling, diminished the Reservation by two-thirds without any guaranteed compensation is fanciful at best. Regardless, Wyoming's argument conflicts with *Solem*, where this Court found a similar provision "strongly suggest[ive]" of *non*-diminishment. 465 U.S. at 474; Pet.30.

Wyoming's response to the absence of a school-lands provision—routinely included in acts found to diminish—is that "absent diminishment, Congress would have had no need to discuss the effect of the 1905 Act on Sections 16 and 36." WY.Opp.30. Exactly. The 1905 Act *did not* discuss those sections, precisely because Congress *was not diminishing* the Reservation and therefore was not obligated to grant those sections to Wyoming. Pet.30-31.

Finally, Wyoming argues that Congress included the Boysen provision because it believed diminishment would terminate Boysen's rights and it wanted to prevent that "inequity." WY.Opp.29. But as the Senate reported, the provision was included to avoid "cast[ing] a cloud over the title of the lands

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[5] Notably, while disclaiming the need for review, the SG does not defend the decision below on the merits.

enumerated in" Boysen's lease. S. Rep. No. 58-4263, at 2 (1905). That concern about unclear title would not have arisen had Congress unequivocally diminished the Reservation in the 1905 Act, because Boysen's lease expressly provided that it would *terminate* upon diminishment. Pet.30; Pet.App.129-134. In the event of diminishment, there would be no lease, no cloud, and no uncertainty. The Boysen provision is thus contemporaneous evidence that the 1905 Congress did not believe it was unambiguously diminishing the Reservation, and thus took clarifying action consistent with retention of reservation status (and Boysen's continuing leasehold).

B. Respondents essentially concede that the legislative history lacks the "unequivocal" evidence required to "overcome the lack of clear textual signal" of diminishment. *Parker*, 136 S. Ct. at 1080. Most significant, *not one respondent* defends the Tenth Circuit's misguided theory that Congress maintained an intent to diminish the Reservation during the 14-year stretch between the unratified 1891 agreement and the 1905 Act notwithstanding the intervening Thermopolis Purchase—even though this theory predominated the court's historical analysis. *See* Pet.App.22-30; Pet.33-34. Respondents also have no answer to the Tenth Circuit's acknowledgement that the legislative history of the Boysen and school-lands provisions "may cut against … diminishment," Pet.App.30 n.14, or to other passages in the legislative history—ignored by the Tenth Circuit—that underscore the absence of *unequivocal* evidence of intent to diminish. Pet.31-32.

C. Respondents barely dispute the Tenth Circuit's conclusion that the subsequent treatment of the opened lands is too equivocal to support diminishment. Pet.App.32. Wyoming merely "asserts" its disagreement in a footnote without citing any evidence or refuting the evidence in the Petition. WY.Opp.23 n.7; *see* Pet.34-35. Similarly, the Municipal Respondents simply state that the evidence "was not fully explored." Muni.Opp.12-13. At bottom, respondents' non-defense of the Tenth Circuit's analysis under prong two and their non-responsiveness under prong three confirm that this case turns on prong one, underscoring the need for this Court to resolve whether cession language alone suffices for diminishment.[6]

III. This Case Is Exceptionally Important.

No respondent disputes the exceptional importance of this case. To the contrary, Wyoming concedes that this case "is very important" and "concerns a significant amount of land and the rights of many individuals." WY.Opp.34-35. A decision finding that the sovereign territory of two Tribes was diminished by two-thirds in exchange for nothing would merit this Court's plenary review even in the absence of a split in authority. Here, however, the

[6] Wyoming and the SG note that some of the opened lands have been expressly "restored" to the Tribes. WY.Opp.14-16; SG.Opp.4-6. But that neither supports diminishment nor lessens the importance of this case. To the contrary, those subsequent developments just underscore that the anticipated land sales never materialized and that the decision below creates a jurisdictional patchwork over the lands addressed by the 1905 Act, which in the main have never been subject to sales or settlement.

Tenth Circuit's decision conflicts with this Court's cases, Eighth Circuit precedent, and the considered judgments of two federal agencies. The need for this Court's review could not be clearer.[7]

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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[7] As noted, the Court should, at a minimum, hold this case for *Royal v. Murphy*, No. 17-1107, in which petitioner has asked this Court to alter the *Solem* framework. That said, rather than send the signal that the Court is more receptive to state petitions seeking diminishment than tribal petitions seeking to preserve boundaries, the Court should grant the petitions here and consider hearing this case in tandem with *Royal*.