NOS. 10-929, 10-931, AND 10-932

In the Supreme Court of the United States

DENNIS DAUGAARD, GOVERNOR OF SOUTH DAKOTA, AND MARTY J. JACKLEY, ATTORNEY GENERAL OF SOUTH DAKOTA,
Petitioners
v.
YANKTON SIOUX TRIBE AND UNITED STATES OF AMERICA,
Respondents

SOUTHERN MISSOURI RECYCLING AND WASTE MANAGEMENT DISTRICT,
Petitioner
v.
YANKTON SIOUX TRIBE AND UNITED STATES OF AMERICA,
Respondents

PAM HEIN, CHARLES MIX COUNTY STATE'S ATTORNEY, ET AL.,
Petitioners
v.
YANKTON SIOUX TRIBE AND UNITED STATES OF AMERICA,
Respondents

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether Congress manifested a "clear and plain" intent to disestablish the Yankton Sioux Reservation completely in 1894.

PARTIES TO THE PROCEEDING

Petitioners are Dennis Daugaard, Governor of South Dakota; Marty J. Jackley, Attorney General of South Dakota; Southern Missouri Recycling and Waste Management District; Pam Hein, State's Attorney of Charles Mix County; Keith Mushitz, Member of the Charles Mix County, South Dakota, County Commission; Neil Von Eschen, Member of the Charles Mix County, South Dakota, County Commission; and Jack Soulek, Member of the Charles Mix County, South Dakota, County Commission.

Respondents are the Yankton Sioux Tribe and the United States of America.

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INTRODUCTION

Following a decade and a half of litigation, this case is now reduced to a fact-bound, splitless dispute that concerns only about 37,000 acres of the original Yankton Sioux Reservation and that has far less practical or legal significance than petitioners suggest. Thirteen years ago, this Court held that Congress "diminished" the Yankton Sioux Tribe's reservation in 1894 by removing 168,000 acres from the 430,405-acre reservation. The Court further emphasized that multiple provisions of the 1894 Act evidenced Congress's expectation that the Tribe would continue to have a diminished reservation.

On remand, petitioners nonetheless advanced the extreme position that the 1894 Congress intended to disestablish the reservation completely. After exhaustively reviewing the historical record, the district court and the Eighth Circuit both concluded that Congress intended no such thing, and this Court denied review of that fact-bound ruling of both lower courts in 2000. There is no reason for a different result now.

Only two things have changed since 2000. First, the scope of the parties' dispute has narrowed as the lower courts have considered the reservation status of various parcels of land, with the Eighth Circuit recognizing just 37,000 of the original 430,405 acres as reservation. Second, realities on the ground have adjusted to the existence of a limited reservation, with the Tribe and other governmental officials cooperating to handle criminal law enforcement and other matters. Thus, practical experience over the past decade has only confirmed that the fact-bound

question presented, which implicates no clear split in authority, is not so exceptionally important as to warrant this Court's review.

Indeed, all parties appear to agree that the approximately 37,000 acres now at issue are "Indian country" whether or not they are also reservation lands. Because jurisdiction generally turns on whether land is Indian country, not whether it is also reservation, the question presented has relatively few practical consequences. While the continued existence of a reservation of any size has profound cultural significance to the Yankton Sioux Tribe, whose sovereign existence has been under siege in the courts for over a decade, it lacks exceptional importance for those outside the Tribe.

In addition to failing to account for the Indian country status of the affected lands, petitioners' arguments ignore the strict limits this Court has imposed on Indian authority over non-Indians in Indian country of any kind. Petitioners and their *amici* also focus on lands the Eighth Circuit pointedly did *not* hold to be reservation or other Indian country. Those strained efforts only underscore that the fact-bound question presented lacks any actual exceptional importance. And this Court need not speculate on that point; the experience of the past decade provides the best guide. Revisiting the question now would only destabilize the practical accommodations reached over the last decade.

STATEMENT

A. Historical Background

1. In 1858, the Yankton Sioux Tribe and the United States entered into a treaty which established the original boundaries of the Yankton Sioux Reservation and set aside a homeland for the Tribe and its members. Pet. App. 324.[1] The Tribe ceded to the United States title to more than 11 million acres of its aboriginal lands, and retained 430,405 acres in what is today Charles Mix County, South Dakota, as its reservation. *See id.* at 325.

2. Three decades later, Congress enacted the General Allotment Act of 1887, also known as the Dawes Act, ch. 119, 24 Stat. 388, *repealed in part*, Pub. L. 106-462, § 106, 114 Stat. 1991, 2007 (2000). That Act adopted a federal policy of breaking up Indian reservations into smaller pieces, and eventually opening them up for settlement by non-Indians, through the "allotment" of reservation parcels to individual Tribe members. The United States was to hold each allotted parcel in trust "for the sole use and benefit of the Indian [allottee]" for 25 years; after that time, the Tribe member would assume fee simple ownership of the parcel and could freely alienate it. 24 Stat. at 389. The Dawes Act further authorized the Executive Branch to "negotiate" with the Tribe to purchase, "in conformity with the treaty or statute under which

[1] "Pet. App." refers to the appendix to the petition for certiorari in No. 10-929.

such reservation is held," the *unallotted* portions of the reservation on "just and equitable" terms. *Id.*

The United States allotted over three-fifths of the 1858 Yankton Sioux Reservation under the Dawes Act in a patchwork of scattered, noncontiguous parcels. That left approximately two-fifths of the reservation lands — 168,000 acres — unallotted.

In 1894, the United States reached an agreement with the Tribe, which Congress ratified in the Act of August 15, 1894 ("1894 Act"), ch. 290, 28 Stat. 286, 319, to purchase those unallotted acres for $600,000. *See* Pet. App. 337-351. A bare majority of the Tribe — 254 out of 458 signatories — ultimately consented to the sale, which whittled down the 430,405-acre reservation to approximately 262,300 acres of non-ceded, allotted lands.

The federal Commissioners who negotiated for the sale made clear that their specific objective was to arrange the purchase of the unallotted lands — and those alone. *Id.* at 232. They informed the Tribe that the government "'only wants you to sell your surplus lands for which you have no use.'" *Id.* at 222. The Commissioners then reported to Congress that the Yankton Sioux Indians "were not selling their whole reservation, but less than two-fifths of it," because "more than three-fifths of it would remain in their possession for such cultivation and improvement as Indians will give to it." *Id.* at 236. In negotiations with the Tribe, the Commissioners had also made numerous references to a "continuing tribal government." *Id.* at 233. The Commissioners further suggested that the Tribe

might "have this reservation organized as a separate county." *Id.*

The 1894 Act provided for the sale of the 168,000 acres of unallotted lands for payment of a sum certain. *Id.* at 229. Article XVIII declared that "[n]othing in this agreement shall be construed to abrogate" the 1858 Treaty establishing the Yankton Sioux Reservation. *Id.* at 347. Article XVII barred alcohol sales on "the lands … ceded and sold to the United States" *and* "any other lands within or comprising the reservation of the Yankton Sioux." *Id.*

Other articles provided for ongoing tribal affairs on the reservation. Article V of the Act provided that certain funds be set aside for, *inter alia*, "schools and educational purposes," "courts of justice," and "other local institutions" of the Tribe. *Id.* at 341. Article VIII required the United States to set aside from white settlement 1,000 acres for "agency, schools, and other purposes" for the support of the Tribe. *Id.* at 342-343.

3. By the early twentieth century, the issuance of fee patents, often well before the 25-year trust period had expired, "left many Indians landless" and impoverished. *Id.* at 11. The federal government also acknowledged that its policy of encouraging assimilation had failed in light of the Indians' "cultural resilience." *Id.* The government therefore extended, re-extended, and then permanently extended the 25-year trust periods on parcels of the Yankton Sioux Reservation that it had continuously held in trust. *See id.* at 10 (citing Exec. Order No. 2363, Apr. 20, 1916; Exec. Order No. 4406, Mar. 30,

1926; Exec. Order No. 5173, Aug. 9, 1929); 25 U.S.C. § 462. In 1929, rather than opening the 1,000 acres of reserved agency trust lands to non-Indian settlers, Congress returned the lands to the Tribe and specifically prohibited their allotment. *See* Act of February 13, 1929, ch. 183, 45 Stat. 1167.

The Indian Reorganization Act of 1934 ("IRA"), ch. 576, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 461 *et seq*.), put an end to further allotment and extended the trust periods for outstanding allotments indefinitely. The IRA also authorized the Secretary of the Interior to acquire additional lands in trust for Indians and Indian tribes. Under the IRA, the federal government has taken nearly 6,500 acres into trust for the benefit of the Yankton Sioux Tribe. Pet. App. 12.

B. Procedural Background

1. This litigation began when the Yankton Sioux Tribe, faced with imminent construction of a waste site on land within the original 1858 boundaries of the reservation, sought to ensure that federal environmental regulations would apply to the site. What began as a modest effort by the Tribe to respond to an unlined landfill transmogrified into litigation posing an existential threat to the Yankton Sioux Reservation.

The dispute reached this Court in *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998). This Court held that the Tribe's agreement to cede 168,000 acres of their unallotted lands to the United States in 1894 had "diminished" the original 1858 reservation. *See id.* at 345. The Court then concluded that, because the proposed waste site lay

on ceded unallotted land, it was not within the boundaries of the diminished reservation and therefore not subject to federal environmental regulation. *Id.* at 340, 358.

This Court expressly declined to reach the broader question whether the 1894 Act had "disestablished" the Yankton Sioux Reservation in its entirety. *Id.* at 358. The Court noted, however, that some clauses of the 1894 Act "contradict[ed]" and "counsel[ed] against finding the reservation terminated." *Id.* at 350. Specifically, the Court observed that it was "'difficult to imagine'" why Congress would have reserved agency trust lands for tribal use "'if it did not anticipate that the opened area would remain part of the reservation.'" *Id.* (quoting *Solem v. Bartlett*, 465 U.S. 463, 474 (1984)). The Court further noted that Article XVII's prohibition against the sale of liquor on ceded lands and other lands within the reservation "signal[ed] a jurisdictional distinction between reservation and ceded land." *Id.*

2. On remand, and after the case was consolidated with another one concerning the reservation's boundaries, the district court conducted an evidentiary hearing. Based on the evidence, the district court concluded that the 1894 Act diminished the reservation only to the extent of the *unallotted* lands the Tribe had ceded to the United States in 1894. *See* Pet. App. 250-320. The court reasoned that nothing in the language of the agreement supported total disestablishment of the reservation, whereas several articles strongly indicated that a diminished reservation would persist. *See id.* at 287-304.

The district court also relied on the context of the Act. Reports of the government's negotiations with the Tribe, the court observed, "memorialized only the consent of the Tribe to sell the surplus [unallotted] lands"; they did not discuss total disestablishment or further diminishment beyond the unallotted lands. *Id.* at 276. Representations by the Commissioners who negotiated the agreement further suggested that the Tribe would retain independent powers of self-government over the lands it did not cede. *See id.* at 276-281. Based on that evidence, the court concluded that the Yankton Sioux Reservation consists, in diminished form, of all land "within the original exterior 1858 Treaty boundaries" that the Tribe did not cede to the United States in the 1894 Act, as well as the agency trust land that the Act specifically reserved from sale. *Id.* at 316.

3. The Eighth Circuit affirmed in part, reversed in part, and remanded for further proceedings. *See id.* at 199-249. The court of appeals agreed that the 1894 Act did not disestablish the Yankton Sioux Reservation. *Id.* at 237-243. At a bare minimum, the Eighth Circuit noted, the agency trust lands, which this Court had specifically highlighted in *Yankton*, remain part of the reservation. *Id.* at 241. The court of appeals disagreed, however, with the Tribe's argument that the original reservation had been diminished only with respect to the ceded, unallotted lands. Rather, the court found the reservation further diminished by subsequent sales of allotted lands to non-Indians — lands that, according to the court, the 1894 Congress "foresaw

would pass into the hands of the white settlers and homesteaders." *Id.* at 243.

4. Both the State and the Tribe sought certiorari. The State maintained its total disestablishment position and the Tribe maintained the position on which it had prevailed in the district court — namely, that the reservation had not been further diminished by sales of allotted lands to non-Indians. The United States "agree[d] with the Tribe" that the reservation had not been further diminished. U.S. Br. in Opp. (Nos. 99-1490, 99-1683) at 21. The United States opposed certiorari, however, noting the absence of a clear split in authority and the interlocutory posture of the case. This Court denied review. *See South Dakota v. Yankton Sioux Tribe*, 530 U.S. 1261 (2000).

5. On remand, the district court determined that various parcels within the original 1858 boundaries maintained reservation status: (1) agency trust lands reserved to the United States in the 1894 Act, then returned to the Tribe in 1929; (2) lands allotted to individual Indians that remain in trust today; (3) lands additionally taken into trust under the 1934 IRA; and (4) lands allotted to individual Indians that are still owned in fee by Tribe members but not held in trust. *See* Pet. App. 122-163. The district court again rejected the defendants' claim that Congress had disestablished the Yankton Sioux Reservation in its entirety. *Id.* at 127-128.

6. The Eighth Circuit largely affirmed. *See id.* at 1-51. The court of appeals held that the diminished reservation included (1) agency trust

lands, (2) allotted lands that remain in trust, and (3) lands taken into trust under the 1934 IRA. *Id*. at 51. The court found further that nearly 175 acres of miscellaneous lands acquired in trust under authorities other than the IRA qualify as dependent Indian communities under the definition of "Indian country" in 18 U.S.C. § 1151(b). *Id.* at 42-43. But the court of appeals vacated the district court's holding that allotted fee lands continuously owned by Indians but not held in trust are also Indian country, reasoning that the lack of a "fully developed record" on such lands meant the issue was not ripe for review. *Id*. at 46.

The court further acknowledged the defendants' renewed efforts to declare the Yankton Sioux Reservation disestablished, but noted that they had offered "no persuasive reasons to revisit" or deem "erroneous" the prior holding, which had been based on "an exhaustive analysis of … historical materials." *Id.* at 21, 23; *see also id.* at 54.

The State and County defendants filed petitions for rehearing and rehearing en banc. Again, defendants renewed their total disestablishment claim — which, the Eighth Circuit noted, they had already "unsuccessfully pressed … twice before the district court … and twice before this court," and each time had been "squarely rejected after thorough study of the record and exhaustive consideration of the precedents." *Id.* at 54, 61.

Defendants also took issue with two sentences in a footnote of the court of appeals' opinion to the effect that former allotments within the original boundaries of the reservation that were patented in

fee after 1948 would have reservation status. The Eighth Circuit issued a revised opinion with an identical judgment that eliminated the footnote, and criticized defendants for objecting to dicta on "issues which the court did not decide and which are beyond the scope of this litigation." *Id.* at 56.

REASONS FOR DENYING THE WRIT

I. The Court of Appeals Applied Well-Established Legal Principles To The Facts Of This Case.

The Eighth Circuit's determination that Congress did not express a clear intent to disestablish the Yankton Sioux Reservation in 1894 reflects a fact-bound application of established legal standards to a detailed evidentiary record. That fact-intensive determination, reflecting the considered views of both lower courts, does not warrant this Court's review. *See* Sup. Ct. R. 10; *cf. Graver Tank & Mfg. Co. v. Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949) (this Court does not "review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error").

The governing standards for disestablishment are well-settled. This Court has adopted "a fairly clean analytical structure" for analyzing disestablishment issues. *Solem*, 465 U.S. at 470. The "first and governing principle" is that "*only Congress* can divest a reservation of its land and diminish its boundaries." *Id.* (emphasis added). "Once a block of land is set aside for an Indian reservation and no matter what happens to the title of individual plots," that whole block retains the

status of reservation "*until Congress* explicitly indicates otherwise." *Id.* (emphasis added).

The Court, meanwhile, has emphasized time and again that Congress's intent to disestablish or even diminish a reservation must be "clear and plain," *United States v. Dion*, 476 U.S. 734, 738 (1986), and cannot "be lightly inferred." *Solem*, 465 U.S. at 470; *see also Mattz v. Arnett*, 412 U.S. 481, 504-05 (1973); *United States v. Celestine*, 215 U.S. 278, 285 (1909). Congressional intent "must be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history." *Mattz*, 412 U.S. at 505; *see also id.* n.22 (giving examples of Congress's "clear language of express termination when that result is desired"). Absent such "substantial and compelling evidence," the "traditional solicitude for the Indian tribes" compels a conclusion that the reservation survives. *Solem*, 465 U.S. at 472.

That determination, moreover, is uniquely fact-bound. Each surplus land act that followed the General Allotment Act must be construed in light of "the circumstances underlying its passage." *Solem*, 465 U.S. at 469. Thus, even when treaties with different tribes contain comparable language, "the historical record and … context of the treaty negotiations" may compel different outcomes. *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202 (1999).

The Eighth Circuit applied those "standard rules of interpretation" to the particular facts and circumstances surrounding the surplus land act at issue here. Pet. App. 228. To gauge Congress's

intent, the court correctly looked to the "most probative evidence" — the statutory language — as well as "legislative history" and "events surrounding the statute's passage." *Id.*; *see also id.* at 30-34, 221-222, 224-243. And based on the extensive record amassed by the parties, the Eighth Circuit, like the district court, reasonably concluded that "[n]either the text of the 1894 Act nor evidence of the parties' contemporaneous understandings *clearly establish* an intent to disestablish the Yankton Sioux Reservation." *Id.* at 241 (emphasis added); *see also id.* at 32-34.

The Eighth Circuit, like the district court before it, emphasized that the text of the 1894 Act "refer[red] explicitly *only* to the ceded lands," not to any change in the status of other lands. *Id.* at 229 (emphasis added). Article V, moreover, required that funds be set aside "[f]or the care and maintenance of such orphans, and aged, infirm, or other helpless persons of the Yankton tribe," "schools and educational purposes," "courts of justice," and "other local institutions," *id.* at 341 — suggesting "an intent to preserve tribal self-government." *Id.* at 292. Article VIII required the United States to set aside from white settlement 1,000 acres for "agency, schools, and other purposes" for the support of the Tribe — reflecting Congress's expectation that the federal government would continue to play a significant role in providing "for the welfare of the Tribe." *Id.* at 240, 342-343. And Article XVII, in barring alcohol sales, specifically distinguished between "lands … ceded and sold to the United States" and "any other lands within or comprising the reservation[]." *Id.* at 347. That distinction

would be incoherent unless Congress anticipated that "lands … comprising the reservation[]" would continue to exist. All those articles, the Eighth Circuit and district court concluded, establish Congress's intent to preserve the reservation status of at least some allotted lands.

Both the Eighth Circuit and the district court further observed that the federal Commissioners negotiating the agreement did not view their mission as encompassing disestablishment of the reservation. *See id.* at 232, 276. The Commissioners reported to Congress that the Yankton Sioux Indians "were not selling their whole reservation," as "more than three-fifths of it would remain in their possession." *Id.* at 236. At a meeting with the Tribe, Commissioner Cole declared that "the Great White Father … does not want you to sell your homes that he has allotted to you. He wants you to keep your homes forever." *Id.* at 216. The Commissioners even suggested that the Tribe might have their "reservation organized as a separate county." *Id.* at 233. Accordingly, the Commissioners did not "mention any transfer of the Yanktons' tribal sovereignty," and instead made numerous references to a "continuing tribal government." *Id.* at 233, 236.

As explained in the Conditional Cross-Petition, the Tribe believes that the best reading of Congress's intent is that the reservation was diminished only to the extent of the ceded lands. *See* Conditional Cross-Petition of Yankton Sioux Tribe, No. 10-1058. But the evidence detailed above confirms that the one position that is not reasonable is the one advocated by petitioners — that Congress clearly intended to disestablish the entire reservation. And in any

event, petitioners' contrary arguments amount to no more than a request for fact-bound error correction.

II. There Is No Split In Authority Warranting This Court's Intervention.

The Eighth Circuit's inherently fact-specific assessment of this specific reservation implicates no clear conflict in authority.

A. There Is No Conflict With Supreme Court Precedent.

1. Petitioners strain to conjure a "conflict" with this Court's decision in *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998). *See* State Pet. 23-26; County Pet. 24-27; District Pet. 13. County petitioners, for example, assert that this Court "held that the 1858 reservation boundaries were disestablished in their entirety." County Pet. 25. This Court, of course, held no such thing. The Court made crystal clear that it was not opining definitively on "whether Congress disestablished the reservation altogether." 522 U.S. at 358.

This Court's reasoning, however, strongly suggested that the reservation was *not* disestablished. The Court noted that certain provisions of the Act "contradict[]" and "counsel[] against finding the reservation terminated," including the provisions concerning agency lands and alcohol discussed above. *Id*. at 350. The Court concluded, for example, that it was "'difficult to imagine'" why Congress would have reserved agency trust lands for tribal use "'if it did not anticipate that

the opened area would remain part of the reservation.'" *Id.* (quoting *Solem*, 465 U.S. at 474).[2]

Indeed, the Court's reasoning in finding a diminishment depended in significant respects on there not being a total disestablishment. Provisions of the Act that referenced a continuing reservation could be reconciled with a diminishment finding only if a diminished reservation would continue to exist. In other words, certain provisions of the Act were distinguishable in *Yankton* on the ground that they applied to the portion of the reservation that Congress was not disestablishing in 1894; but they cannot be reconciled with petitioners' position that Congress was completely disestablishing the reservation.

Petitioners nonetheless accuse the Eighth Circuit of disregarding a supposed "presumption of diminishment/*disestablishment*." County Pet. 22 (emphasis added); *see also* State Pet. 24. But *Yankton* held only that the 1894 Act's cession of the unallotted acres for a sum certain led to a "presumption of *diminishment*" as to those unallotted acres, *not* that there was a further presumption of total disestablishment of all reservation lands. *See* 522 U.S. at 344 ("explicit

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[2] This Court certainly did not hold, as petitioners claim, that the agency trust lands are not reservation lands. Petitioners are correct that this Court held generally that the unallotted lands are not reservation, but it recognized that the agency trust lands (which had been unallotted) are different by emphasizing that Congress must have intended that they "'would remain part of the reservation.'" *Yankton*, 522 U.S. at 350.

language of cession" and "fixed-sum payment" create "'presumption of diminishment'"); *see also Hagen v. Utah*, 510 U.S. 399, 411 (1994) ("statutory expression of congressional intent to diminish" and "sum certain payment" create "presumption that the reservation had been diminished").

Nor would a broader presumption make sense in this case, where the Tribe ceded only 40% of its reservation to the United States. The 1894 agreement to sell those unallotted lands for a sum certain manifested an intent to divest *those* lands from Indian sovereignty, and thus diminish the reservation to that extent. But there is no basis for presuming that Congress intended to further diminish or totally disestablish the reservation with respect to all of the other lands — allotted lands comprising a majority of the original reservation — that the Tribe did *not* cede and for which it did *not* receive a sum certain as payment. *Cf.* Pet. App. 213 (terms "diminishment" and "disestablishment" not "interchangeabl[e]"; "disestablishment generally refers to the relatively rare elimination of a reservation while diminishment commonly refers to the reduction in size").

2. Petitioners also assert a conflict with *DeCoteau v. District County Court*, 420 U.S. 425 (1975), where the Court found the Lake Traverse Indian Reservation disestablished. *See* State Pet. 20-24; County Pet. 33-35; District Pet. 10. But their claim that *DeCoteau* controls "[a]s night follows day," State Pet. 20, is telling. That premise "that similar language in two Treaties involving different parties has precisely the same meaning" is the very assumption that this Court has dismissed as "a

fundamental misunderstanding of basic principles of treaty construction." *Mille Lacs*, 526 U.S. at 202. As the Court has consistently warned, analysis of surplus land acts must be individualized based "on the language of the act and the circumstances underlying its passage." *Solem*, 465 U.S. at 469.

This is a case in point. Any parallels between the Yankton and Lake Traverse agreements do not nullify the stark differences. In *DeCoteau*, "'the face of the Act,' and its 'surrounding circumstances' and 'legislative history,' *all point[ed] unmistakably*" to disestablishment. 420 U.S. at 444-45 (emphasis added). The tribe indicated with marked clarity that the reservation would be terminated. *See id.* at 433-34 ("'We never thought to keep this reservation for our lifetime…. We don't expect to keep reservation.'"); *id.* at 435-436 n.16 ("'This little reservation … was given us as a permanent home, but now we have decided to sell'").

Here, by contrast, the courts' "exhaustive analysis" of the Yankton Sioux Tribe's agreement and the historical evidence uncovered no such unmistakable signs. Pet. App. 23. The negotiating Commissioners never "describe[d] any reservation boundaries or mention[ed] any transfer of the Yanktons' tribal sovereignty." *Id.* at 236. Rather, the Commissioners assured the Tribe that the government "only wants you to sell your surplus lands for which you have no use," *id.* at 222, and "wants you to keep your homes forever." *Id.* at 216. They further suggested that the Tribe's leaders would "retain some governing powers" and might "'have this reservation organized as a separate county.'" *Id.* at 233. Because the context, "content

and wording of the agreements are very different," *id.* at 221, the Eighth Circuit correctly distinguished *DeCoteau*.

3. Finally, petitioners also suggest that the Eighth Circuit's analysis conflicts with this Court's decisions by not giving adequate consideration to post-enactment history and tribal "land in common" in assessing reservation status. *See* State Pet. 22, 24-25, 29-30. As this Court explained in *Solem*, however, when post-enactment treatment is "rife with contradictions and inconsistencies," it is "of no help to either side." 465 U.S. at 478. And this Court already determined that post-1894 understandings of the Yankton Sioux Reservation have been "conflicting," "mixed," and "inconsistent" at best. *Yankton*, 522 U.S. at 354, 356, 358; *see also id.* at 354 & n.5 (noting that Congress in 1896 and even the 1980s and 1990s still referred to the "Yankton Indian Reservation"). Petitioners' one-sided portrayal of the post-enactment history is misleading, and only underscores the fact-bound nature of the question presented. *See infra* p.11-15.

Nor is the apparent lack of tribal ownership of land immediately following the 1894 Act dispositive. This Court stated in *Solem* that reservation status was generally "coextensive with tribal ownership" at the turn of the century. 465 U.S. at 468. But that reference to "tribal ownership" is not limited to land owned by a tribe qua tribe; instead, it reasonably encompasses ownership of allotted parcels by individual tribal members and tribal rights to use and occupancy of agency trust lands, both of which have always been present here. *See* Pet. App. 230. And in any event, tribal retention of land in common

is at most one factor in the broader analysis of congressional intent. *See Yankton*, 522 U.S. at 358 ("The conflicting understandings about the status of the reservation, *together with* the fact that the Tribe continues to own land in common, caution us … to limit our holding") (emphasis added).

B. There Is No Conflict Within The Eighth Circuit.

Petitioners next assert that the Eighth Circuit's decisions are "internally contradictory." State Pet. 31. Even if that were true, which it is not, certiorari would not be warranted because "[i]t is primarily the task of a Court of Appeals to reconcile its internal difficulties." *Wisniewski v. United States*, 353 U.S. 901, 902 (1957). In any event, there are no "internal difficulties" because the Eighth Circuit's decisions are fully consistent.

In *Gaffey*, the Eighth Circuit held that "lands originally allotted to tribal members which have passed out of Indian hands … are not part of the Yankton Sioux Reservation." Pet. App. 247. The court then held that other lands *did* remain part of the reservation, though the court was not prepared to "define the[ir] precise limits" on the scant record at that time. *Id.* at 248-249. It therefore "remand[ed] to the district court with instructions to develop the record … relevant to the status of the remaining categories of land." *Id.* at 17. The Eighth Circuit's subsequent decisions in this case and the companion *Army Corps* case are fully consistent with *Gaffey* for the simple reason that they address issues that *Gaffey* left open for remand.

Petitioners appear to assume that, because private land sales cannot by themselves diminish a reservation, total disestablishment is the only possible explanation for *Gaffey*'s holding that lands sold to non-Indians are no longer reservation. That is clearly wrong because *Gaffey* expressly rejected disestablishment before holding, in the same opinion, that allotted lands sold to non-Indians are no longer reservation. *Id.* at 247.

The Tribe, to be sure, disagrees with the Eighth Circuit's holding to that extent and believes that Congress did not intend any further diminishment. But that context-specific, fact-bound dispute does not warrant further review. It certainly does not warrant further review of petitioners' extreme total disestablishment position.

C. There Is No Clear Conflict With The South Dakota Supreme Court.

Finally, the Eighth Circuit's fact-intensive decisions present no clear and intractable split with decisions of the South Dakota Supreme Court, as the Eighth Circuit itself concluded. *Id.* at 23 n.7.

In *Bruguier v. Class*, 599 N.W.2d 364 (S.D. 1999), a tribal member defendant convicted on a state burglary charge argued on habeas that the state lacked jurisdiction because the offense took place in "Indian country." *Id.* at 365. The South Dakota Supreme Court held that the relevant parcel was not "Indian country" and denied relief. *Id.* at 378. The parties had stipulated that the offense took place on allotted lands which had passed into non-Indian ownership, and the court reasoned that such lands do not have reservation status. *See id.* at 365

("Here we must decide the status of allotted lands which have passed into non-Indian ownership.").

The Eighth Circuit has fully agreed with the South Dakota Supreme Court on that point: "lands originally allotted to tribal members which have passed out of Indian hands … are not part of the Yankton Sioux Reservation and are no longer Indian country." Pet. App. 247. Although the South Dakota Supreme Court's opinion reached out to include the broader rationale that the 1894 Act disestablished the Yankton Sioux Reservation in its entirety, that rationale was unnecessary to the decision of the case, and thus, as the Eighth Circuit observed, it does not present a square conflict. *Id*. at 23 n.7. This Court reviews conflicts in holdings, not in unnecessary reasoning.

Moreover, the Eighth Circuit and the South Dakota Supreme Court apparently agree that the lands at issue in this case — various lands held in trust for the tribal members — are "Indian country." *Bruguier* repeatedly noted, in reasoning that the parcel at issue in that case was not "Indian country," that it was not "trust land." 599 N.W. at 378; *see also id.* at 367 ("none of [Pickstown] is now held … in trust"); *id.* at 369 ("Congress must not have considered Pickstown Indian country taken in trust for the Yankton Tribe or its members"). Accordingly, that court appeared to recognize that trust lands are Indian country. And as explained below, jurisdictional status generally turns on that classification, not on whether land is also within a reservation.

In this and every other reported case, therefore, any difference in reasoning between the two courts has no practical effect. Petitioners' inability to cite any state or federal case over the past decade that was affected by the supposed conflict confirms that there is no meaningful, square conflict. And, in all events, there is no more reason to review this issue now than when this Court last denied certiorari. The split has not deepened and this case remains interlocutory even at this stage. *See* Pet. App. 45 (deeming status of former allotments continuously held in fee by Indians to be not yet "ripe for resolution").

III. The Decision Below Lacks Exceptional Importance.

While the Eighth Circuit's decision has profound cultural significance to the Yankton Sioux Tribe, it is not exceptionally important from a practical or legal standpoint.

1. At the outset, the territorial scope of the parties' dispute has narrowed dramatically over the course of this litigation, including in the 11 years since this Court denied review of the question presented. In the decision below, the Eighth Circuit upheld the reservation status of a mere 37,000 acres — approximately 8.5% of what was once a 430,405-acre reservation set aside as a homeland for the Tribe under the 1858 Treaty. The diminished reservation is located entirely within Charles Mix County, whose population today totals approximately 9,000 — over 30% (2,900) of which are Indian. *See* 2010 Census Data, www.census.gov. Thus, from historical, territorial, and demographic

perspectives, the Eighth Circuit's holding that this 37,000-acre fraction remains part of the Yankton Sioux Reservation raises issues of only limited importance.

2. More importantly, even within those acres, the nature of the jurisdictional dispute between petitioners and the Tribe is narrow. As noted above, the Eighth Circuit, the Supreme Court of South Dakota, and the parties all agree that the allotted lands continuously held in trust for the Tribe and its members are "Indian country" under 18 U.S.C. § 1151. *E.g.*, Pet. App. 226. Petitioners view the lands as being Indian country within the meaning of § 1151(c), which covers "all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same." The Tribe views the lands as being Indian country under both § 1151(c) and § 1151(a), which covers "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation."[3]

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[3] The court of appeals separately addressed the status of different categories of lands and in some instances gave additional, contextual reasons for holding each to be Indian country. For example, the court of appeals concluded that lands taken into trust under the IRA are Indian country whether or not they are also reservation, *see* Pet. App. 37, and that certain other lands are "dependent Indian communities" comprising Indian country under 18 U.S.C. § 1151(b). Pet. App. 159-60. The court thereby made clear that all of these lands are Indian country whether or not they are reservation.

For the Tribe, the distinction between "reservation" land and land that is "Indian country" but not "reservation" land is vital to preserving the Tribe's cultural heritage. As the Eighth Circuit recognized, "[w]hatever the size of the remaining reservation lands," the record reflects that those lands hold "continuing relevance and importance to the Yankton Sioux Tribe as a touchstone linking tribal members with each other and with their common culture, history, and heritage." Pet. App. 14. The Indian character of these lands has persisted since 1894, and the "population of Indians living on and adjacent to the Yankton Sioux Reservation" has actually "increased during the 1990's," continuing to rise today. *Id.* at 315.

The Indian population has fueled demands for housing, elementary school education, and other services. *See* U.S. Br., *Gaffey*, at 41 (quoting Tr. of May 20, 1998 Evidentiary Hearing at 22, 72, 73, 76). Further, the Tribe is the largest employer in the county, assembling a workforce that is 75% Indian. *Id.* at 42 (quoting Tr. 69). Thus, the successful efforts of the Tribe to maintain a homeland for its

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Those holdings are not within the scope of the question presented, which asks only whether Congress completely disestablished the reservation in 1894. *See, e.g.,* State Pet. i. Petitioners had good reason not to include those rulings concerning specific categories of lands in the question presented, because they are even less important and less deserving of this Court's review than petitioners' total disestablishment position. Thus, the practical importance of the question presented is limited to the difference between reservation and other types of Indian country — a distinction that, as explained in the text, lacks exceptional importance.

members, to preserve its cultural heritage, and to protect its integrity and self-determination would be thoroughly undermined by a finding that the Yankton Sioux Reservation ceased to exist in 1894.

Apart from the cultural significance to the Tribe of having a reservation, however, the distinction between sub-provisions of Section 1151 lacks practical significance in this case. Petitioners fail to articulate any significant jurisdictional distinction between lands within an Indian reservation and other Indian country. Jurisdictional consequences generally flow from whether land is "Indian country," not from whether it is "reservation" or is Indian country for some other reason. *See, e.g., Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 453 n.2 (1995); *Okla. Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114, 123 (1993); *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 511 (1991); *Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 528-30 (1998).

The practical difference between Indian country under § 1151(a) and § 1151(c) is that Indian country under the former remains part of the reservation even when sold to non-Indians, whereas Indian country under the latter loses its Indian country status upon any sale to a non-Indian going forward. At this point in time, however, it is nearly inconceivable that the Tribe would sell the remaining acres at issue to non-Indians, especially considering that the government holds them in trust for the benefit of the Indians.

Thus, there is no real consequence to whether the lands are Indian country for the one reason as

opposed to another. So long as the trust lands are classified as Indian country for any reason, the Tribe and the federal government have primary jurisdiction. *See Citizen Band*, 498 U.S. at 511; *United States v. McGowan*, 302 U.S. 535 (1938); *United States v. Pelican*, 232 U.S. 442 (1914). But under any classification, an Indian tribe's authority over non-Indians is sharply limited under this Court's precedents.

A tribe's inherent sovereign powers "do not extend to the activities of nonmembers of the tribe." *Montana v. United States*, 450 U.S. 544, 565 (1981); *see also id.* at 564 ("exercise of tribal power [does not go] beyond what is necessary to protect tribal self-government or to control internal relations"). The "general rule" is that "Indian tribes lack civil authority over the conduct of nonmembers," even on "non-Indian land within a reservation." *Strate v. A-1 Contractors*, 520 U.S. 438, 446 (1997); *see also Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645, 650 (2001) ("Indian tribe power over nonmembers on non-Indian fee land is sharply circumscribed.").

The *only* civil authority tribes may exercise over non-members on non-Indian fee lands within a reservation is limited to two narrow exceptions: (1) activities of non-members who enter consensual commercial dealing, contract, or lease relationships with the tribe or its members, and (2) conduct of non-members that menaces the tribe's "political integrity," "economic security," or "health or welfare." *Montana*, 450 U.S. at 565-66; *see also* Cohen's Handbook of Federal Indian Law § 4.02[3][c], at 233 (2005 ed.) (noting "elevated threshold for satisfying the two *Montana*

exceptions"). And this Court has construed those exceptions narrowly. *See Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 341 (2008); *Atkinson*, 532 U.S. at 656.

Amici's claim that the Eighth Circuit has given the Tribe "criminal jurisdiction over the affected lands — period" is similarly foreclosed by settled law. *Amicus* Br. for Colin Soukup et al., at 17. This Court long ago established, in a case involving non-Indian residents *on a reservation*, that "Indian tribes do not have inherent jurisdiction to try and to punish non-Indians." *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 212 (1978), *superseded in part by statute on other grounds as stated in United States v. Lara*, 541 U.S. 193, 205-07 (2004); Cohen's Handbook § 4.02[3][b], at 226.

3. The lack of exceptional practical importance is confirmed by the strained efforts of petitioners and *amici* to pose academic questions that are not actually presented by the decision below. They attack a statement in a footnote in the court of appeals' original opinion stating that allotted lands that were first transferred to non-Indians after 1948 remain reservation lands. County Pet. 19-20 & n.4; *see also* State Pet. 34-35, 37; Dist. Pet. 6-9; *Amicus* Br. for Colin Soukup et al., at 9-25; *Amicus* Br. for Wagner Cmty. Sch. Dist., at 4-5. Indeed, many of the briefs, including the District's petition and most of the *amici* briefs, appear to rely entirely on such allotted lands for their assertions of harm. But as petitioners begrudgingly acknowledge, the Eighth Circuit removed that footnote from its final amended opinion.

In deleting the footnote, the Eighth Circuit criticized petitioners for spinning out "possible consequences of a decision which the court has not reached" and raising a "virtual smokescreen" and "straw man to attack." Pet. App. 54, 56, 59-60. The two sentences were mere "dicta" that "did not speak to any matter actually litigated or decided." *Id.* at 54-55.

Petitioners and *amici* now attack the same straw man even though the straw man is now a phantom lacking even the weight of straw in light of the Eighth Circuit's deletion of the footnote. Notwithstanding vague allusions to a residual "rationale" in the amended opinion, *see* County Pet. 20 n.4, District Pet. 9, petitioners have not identified any holding about the lands in question that this Court could review, because there is none. Indeed, the very multitude of estimated acreages of post-1948 lands bandied about — "5,900" (State Pet. 35), "6,000" (County Pet. 19), "7,000" (District Pet. 6), and "8,000" (*Amicus* Br. of Wagner Cmty. Sch. Dist., at 4) — confirms that no court has yet to consider the post-1948 fee lands. As the court determined, the "record remains inadequate to decide the status of such lands." Pet. App. 60.

Accordingly, that issue is not ripe for this Court's review. *Cf., e.g.*, *Amicus* Br. of Wagner Cmty. Sch. Dist., at 5 (language "will undoubtedly be used in future litigation to argue that post 1948 fee lands are within the limits of an 18 U.S.C. § 1151(a) reservation"). If and when the issue is litigated, a court delivers a binding judgment, and actual consequences materialize, the issue will be ripe for this Court to decide whether to review it. In the

interim, petitioners' focus on this phantom only underscores that the actual decision below has insufficient importance to warrant review. This Court "reviews judgments, not statements in opinions." *Black v. Cutter Labs.*, 351 U.S. 292, 297 (1956). *A fortiori*, it does not review statements that have been deleted from opinions.

4. The Eighth Circuit's decisions below also have little impact on other Indian reservations nationwide. Petitioners claim that the decision creates "the prospect of thousands or perhaps tens of thousands of such permanent 'mini-reservations' nationally" because many "terminated areas of reservations contain allotted land." State Pet. 36. But such assertions not only adopt the fallacy that all surplus land acts are the same, they also forget that the Eighth Circuit engaged in a careful, category-by-category analysis of the reservation status of each type of trust lands precisely to avoid a broad-brush rationale that would extend beyond this particular reservation. *See* Pet. App. 34-44.

And the "checkerboard" shape of the Yankton Sioux Reservation is by no means unprecedented. From the Red Lake Indian Reservation and Bois Forte Indian Reservation in Minnesota, to the Paiute Indian Reservation in Utah, to the Laguna Pueblo, Zia Pueblo, and Jemez Pueblo Reservations in New Mexico, numerous Indian reservations across the United States have long consisted of scattered, non-contiguous parcels. *See, e.g., Montana*, 450 U.S. at 559 (plurality opinion); *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408, 421 (1989); *Ute Indian Tribe of Uintah & Ouray*

Reservation v. Utah, 114 F.3d 1513, 1530 (10th Cir. 1997).

That should come as no surprise, because the allotment policy had the inevitable effect of producing non-contiguous reservations, as non-Indians purchased some parcels while Indians retained others. Thus, this Court has rejected the contention that "it is not to be supposed that Congress has intended to maintain the Federal jurisdiction over hundreds of allotments scattered through territory other portions of which were open to white settlement." *Pelican*, 232 U.S. at 449-50. "Nor does the territorial jurisdiction of the United States depend upon the size of the particular areas which are held for Federal purposes." *Id.* at 450.

Jurisdiction in the Yankton Sioux Reservation, as in other non-contiguous reservations, has proven workable. In the 12 years since *Gaffey*, federal, state, and tribal authorities have all cooperated effectively and harmoniously. For many years, the Yankton Sioux Tribe has entered cooperative agreements with the County and State on public matters ranging from road maintenance and fire protection, to use of the same jail, to emergency dispatch services — agreements that, by their terms, expressly set aside jurisdictional disagreements for the safety and benefit of residents. Tribal and federal law enforcement officials, meanwhile, have been exercising jurisdiction over crimes committed on tribal trust lands and individual trust properties without incident — as confirmed by the absence of an actual conflict in authority between the federal and state courts.

Over a decade ago, when *Gaffey* was newly decided, the Tribe sought certiorari because it appeared that the Eighth Circuit's decision would have exceptionally important practical consequences. The past decade of on-the-ground experience has shown those concerns to be misplaced. And now that tribal, federal, and local authorities have adapted to this regime, changing it would be among the most destabilizing options of all.

CONCLUSION

This Court should deny the petitions for a writ of certiorari.

Respectfully submitted,

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