No. 19-1981

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

ONEIDA NATION,
Plaintiff/Appellant,

v.

VILLAGE OF HOBART, WISCONSIN,
Defendant/Appellee.

Appeal from the United States District Court
for the Eastern District of Wisconsin
No. 1:16-cv-01217 (Hon. William C. Griesbach)

UNITED STATES' BRIEF AS AMICUS CURIAE IN SUPPORT OF APPELLANT ONEIDA NATION

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The United States respectfully submits this brief as amicus curiae pursuant to Federal Rule of Appellate Procedure 29(a).

INTEREST OF THE UNITED STATES

The United States maintains a government-to-government relationship with the Oneida Nation of Wisconsin (Nation), a federally recognized Indian tribe. In 1838, the United States established the Oneida Reservation (Reservation) in the Wisconsin Territory—a tract of approximately 65,400 acres west of Green Bay—pursuant to a treaty with the Oneidas who had emigrated from New York State. 7 Stat. 566. The present dispute regarding the Reservation arose in 2016 when the Village of Hobart (Village)—a Wisconsin municipality located within the boundaries of the treaty reservation—informed the Nation that it needed to apply for a special events permit in order to hold its annual Big Apple Fest, which is held partly on land held by the United States in trust for the Nation and partly on land owned by the Nation in fee.

The Nation, supported by the United States as amicus curiae, argued in the district court that the Village lacks authority to regulate tribal activities within the Reservation. The district court did not disagree with that proposition, but it held nevertheless that the treaty reservation had been diminished and that the tribal fee land at issue was no longer within the Reservation.

The respective spheres of federal, tribal, and state jurisdiction depend on the boundaries of the Oneida Reservation. The United States has a substantial interest in ensuring that the boundaries of the Reservation established by the 1838 treaty are respected unless and until Congress expressly changes them. The Department of the Interior, which is the primary federal agency charged with carrying out the United States' trust responsibility to American Indians, has (with limited historical exceptions) treated the Reservation as maintaining its ancient boundaries. *See*, *e.g.*, 79 Fed. Reg. 52,226, 52,229 (Sept. 3, 2014) (statement by U.S. Fish and Wildlife Service in approving the Nation's migratory bird hunting regulations that "we disagree with the Village's assertions that the Oneida Reservation has been disestablished or diminished"). And the U.S. Environmental Protection Agency has for decades exercised exclusive regulatory jurisdiction throughout the treaty reservation under several statutes, including permit programs under the Clean Water Act, 40 C.F.R § 123.1(h), and the Clean Air Act, 40 C.F.R. Parts 49 and 71.

STATEMENT OF THE ISSUE

Whether the district court erred in holding that the Oneida Reservation was incrementally diminished—incrementally altering the jurisdictional framework—as the federal government issued fee patents for allotted parcels to Oneida tribal members in the early 1900s or as the tribal members subsequently conveyed the fee-patented parcels to non-Indians.

STATEMENT OF THE CASE

A. Historical background

In 1887, Congress enacted the General Allotment Act (Dawes Act) to authorize the allotment of tribal land to individual Indians residing on reservations nationwide (with a few exceptions not relevant here). Act of Feb. 8, 1887, ch. 119, 24 Stat. 388. Section 5 of the Dawes Act provided that allotments were to be held by the United States in trust for the allottees for a period of 25 years, after which fee patents would be issued; authorized the President "in his discretion" to extend the trust period; and authorized the Secretary of the Interior (Secretary) to negotiate with tribes for the sale of lands not needed for allotment (often referred to as "surplus" lands). *Id.* at 389-90. Section 6 provided that, upon receipt of "patents," the allottees would become United States citizens and would "be subject to the laws, both civil and criminal, of the State or Territory in which they reside." *Id.* at 390. From 1889 through 1891, 1,530 allotments were created on the Oneida Reservation for tribal members, with 80 acres reserved for school purposes and a small additional amount of land retained for additional allotments. *See* Decision 8. Trust patents were issued on June 13, 1892. *Id*. at 8-9.

In 1906, Congress amended Section 6 of the Dawes Act in the Act of May 8, 1906 (Burke Act), ch. 2348, 34 Stat. 182. Responding to the Supreme Court's interpretation of "patents" as trust patents, *In re Heff*, 197 U.S. 488, 502-03 (1905),

Congress provided that an allottee would not become a United States citizen and would not be subject to state or territorial civil and criminal jurisdiction until a fee patent issued upon "expiration of the trust period." 34 Stat. at 182. The Secretary, however, was authorized "in his discretion" to issue a fee patent before the expiration of the trust period when he found an allottee "competent and capable of managing his or her affairs," at which time "all restrictions as to sale, incumbrance, or taxation of said land" would be removed. 34 Stat. at 183. Neither the Dawes Act nor the Burke Act expressly provided that the issuance of fee patents would alter the boundaries of reservations

Shortly thereafter, Congress again addressed allotments in the Act of June 21, 1906 (1906 Appropriations Act), ch. 3504, 34 Stat. 325. Congress reaffirmed the President's authority under the Dawes Act to "continue such restrictions on alienation for such period as he may deem best." *Id.* at 326. With respect to the Oneida Reservation in particular, Congress authorized the Secretary "in his discretion, to issue fee-simple patents" to 56 named Oneida allottees. *Id.* at 380-81. Congress also reiterated the Secretary's discretionary authority under the Burke Act "to issue a patent in fee to any Indian of the Oneida Reservation in Wisconsin for the lands heretofore allotted him, and the issuance of such patent shall operate as a removal of all restrictions as to the sale, taxation, and alienation of the lands so patented." *Id.* at 381. Like the Dawes Act and the Burke Act,

nothing in the 1906 Appropriations Act expressly provided that the issuance of fee patents would alter the boundaries of the Oneida Reservation.

In 1934, Congress repudiated the allotment policy and indefinitely extended the trust period for all allotments through the Indian Reorganization Act (IRA), 25 U.S.C. § 5102. *See* Decision 11.

The overwhelming majority of Oneida Reservation allotments were fee-patented between 1906 and 1934. Most of the fee-patented parcels were eventually conveyed to non-Indians through sale, foreclosure, or enforcement of tax liens. *See Oneida Tribe v. Village of Hobart*, 542 F. Supp. 2d 908, 912 (E.D. Wis. 2008). But as of 1941, 2,308 acres were still owned by tribal members in fee simple, 713 acres were still held in trust for individual tribal members, and another 1,694 acres were held in trust for the Nation (including unallotted tribal trust land and land reacquired in trust pursuant to the IRA). *Id*. By 2017, the land held in trust for the Nation within the treaty reservation boundaries had increased to 14,079 acres. *See* Decision 36.

Some federal statutes governing Indian affairs in the nineteenth century and early twentieth century applied to "reservations" and others applied to "Indian country." Congress defined "Indian country" in 1948, consistent with Supreme Court caselaw, as including three categories of land, the first of which is "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." 18 U.S.C. § 1151; *see also* Decision 17-18. This definition generally applies to civil as well as criminal jurisdiction. *DeCoteau v. District County Court*, 420 U.S. 425, 427 (1975).

B. Proceedings below

The Oneida Nation instituted this action to challenge the Village's authority to enforce its special events permit ordinance against the Nation, and the parties filed cross-motions for summary judgment. The United States, as amicus curiae, supported the Nation's motion. Doc. 126.

In resolving the motions, the district court rejected the Village's argument that the 1838 Treaty did not establish a reservation for the Nation but merely set aside allotments for tribal members. Decision 12-14. The district court also concluded, contrary to the Village's argument, that Congress had not completely *disestablished* the Reservation through the Dawes Act, the Burke Act, or the 1906 Appropriations Act: while the "ultimate intent of the Dawes Act and related legislation" was "complete assimilation of the Indians and the elimination of the reservation system," the allotment statutes "did not themselves abolish the reservations." *Id*. at 21-22. But the court saw in these three statutes "explicit" congressional intent to *diminish* the Oneida Reservation through allotment. *Id*. at 23.

The district court did not clearly explain whether diminishment occurred when the Secretary issued fee patents to Oneida allottees or when the fee-patented allotments were subsequently conveyed to non-Indians. *See id*. at 23 (Congress's intent to diminish "became effectuated with the issuance of fee patents to tribal members and the subsequent sale of the land to non-Indians"); *id*. (the Reservation was incrementally diminished "either" when fee patents were issued "or with the further conveyance of the land to non-Indians."); *id*. at 32 (the "issuance of fee patents and the subsequent transfer of fee title to those lands effectuated" Congress's intent to diminish); *id*. at 37 ("only those portions of the original Reservation held in trust by the United States for the benefit of the Nation, as well as any allotments still under trust patents, constitute Indian country"). In either case, the court concluded that land owned by the tribe in fee was not part of the reservation. *Id*. at 2, 35-36. The district court thus held that the Village could enforce its ordinance against the Nation based on the festival activities conducted on the Nation's fee lands. *Id*. at 36.

SUMMARY OF ARGUMENT

The Supreme Court has held that the enactment and implementation of the generally applicable allotment statutes—the Dawes Act, as amended by the Burke Act—do not evidence congressional intent to diminish a reservation. And neither the text nor the historical context of the Oneida-specific provisions of the 1906

Appropriations Act provides a basis for the district court's conclusion that the Reservation was diminished. The court erred in basing such conclusion on these statutes. The court further erred when it concluded that the evidence of the post-1906 treatment of the Reservation supported a conclusion of diminishment even though it did not support a conclusion of disestablishment.

In addition, the district court misplaced reliance on the Eighth Circuit's flawed and distinguishable analysis of Congress's treatment of the Yankton Sioux Reservation. The court incorrectly interpreted this Court's analysis of Congress's treatment of the Stockbridge-Munsee Reservation to support its conclusion of diminishment, when the analysis actually supports the conclusion that the Oneida Reservation was not diminished. Finally, the district court misperceived the law governing jurisdiction within Indian reservations.

Accordingly, the judgment of the district court should be reversed.

ARGUMENT

I. The district court's conclusion of diminishment is inconsistent with Supreme Court precedent.

The Supreme Court's well-established framework for determining whether Congress intended to disestablish or diminish the boundaries of an Indian reservation—as opposed to merely allotting the reservation and enabling non-Indian settlement and ownership of reservation lands—precludes a conclusion of either disestablishment or diminishment in this case.

The "framework" used by the Supreme Court to determine whether an Indian reservation has been disestablished or diminished is "well settled." *Nebraska v. Parker*, 136 S. Ct. 1072, 1078 (2016). The "first and governing principle is that only Congress can divest a reservation of its land and diminish its boundaries." *Solem v. Bartlett*, 465 U.S. 463, 470 (1984). And "its intent to do so must be clear." *Nebraska*, 136 S. Ct. at 1079. Accordingly, the status of disputed land is one of federal statutory law: "Once a block of land is set aside for an Indian reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise." *Id*.; *see also United States v. Celestine*, 215 U.S. 278, 285 (1909) ("when Congress has once established a reservation, all tracts included within it remain a part of the reservation until separated therefrom by Congress"). The Supreme Court has articulated a three-step analysis, often referred to as the *Solem* framework.

First, the "most probative evidence of diminishment is, of course, the statutory language used to open the Indian lands." *Hagen v. Utah*, 510 U.S. 399, 411 (1994). No particular words are required, but the statute must "establish an express congressional purpose to diminish." *Id*. (quoting *Solem*, 465 U.S. at 475). Statutes "that simply offer[] non-Indians the opportunity to purchase land within established reservation boundaries" do not provide evidence of congressional

intent to diminish a reservation. *Solem*, 465 U.S. at 470. By contrast, "[e]xplicit reference to cession or other language evidencing the present and total surrender of all tribal interests strongly suggests that Congress meant to" diminish. *Id.*

Second, courts may look to "the historical context surrounding the passage" of the legislation, to the extent that it sheds light on "the contemporaneous understanding of the particular Act" at issue. *Id*. Probative evidence may include negotiations with the involved tribe "and the tenor of legislative Reports." *Solem*, 465 U.S. at 471. Where those sources "unequivocally reveal a widely held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation," diminishment may be found if the statute's language is otherwise inconclusive. *Id*.

Third, once a court has reviewed the statute's text and context, the court will normally be in a position to resolve the diminishment question: "If both an Act and its legislative history fail to provide substantial and compelling evidence of a congressional intention to diminish Indian lands, [courts] are bound to rule that diminishment did not take place and that the old reservation boundaries survived the opening." *Id*. at 472. Nevertheless, a court may, "to a lesser extent," rely on "the subsequent treatment of the area in question and the pattern of settlement there." *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 344 (1998). While those considerations are "an unorthodox and potentially unreliable method of

statutory interpretation," they may provide "one additional clue as to what Congress expected." *Solem*, 465 U.S. at 472 & n.13.

Using this three-step framework, courts must determine whether Congress clearly intended to change reservation boundaries, as opposed to merely allotting reservation lands and enabling non-Indian settlement and ownership. There is a "presumption" against diminishment. *Solem*, 465 U.S. at 481. "Throughout this inquiry," a court must "resolve any ambiguities in favor of the Indians" and "will not lightly find diminishment." *South Dakota*, 522 U.S. at 344.

Applying its well-established framework, the Supreme Court has held in four cases that Congress did not intend to disestablish or diminish a reservation when it enacted an allotment statute: *Seymour v. Superintendent of Washington State Penitentiary*, 368 U.S. 351 (1962) (Colville Reservation); *Mattz v. Arnett*, 412 U.S. 481 (1973) (Klamath River Reservation); *Solem*, 465 U.S. at 472-81 (Cheyenne River Reservation); *Nebraska*, 136 S. Ct. at 1078-82 (Omaha Reservation). In each of these cases, Congress allotted reservation lands to individual Indians, and authorized the sale of unallotted lands to non-Indians in fee-simple ownership, without changing the reservation's boundaries. The Court consistently held that although Congress intended that allotment would result in the issuance of fee patents—presumptively after 25 years unless the President acted to lengthen the trust period or the Secretary acted to shorten the trust period—and

knew that fee-patented parcels could then be sold to non-Indians, such intent and knowledge did not amount to a clear intent to diminish any reservation.

Curiously, the district court discussed two older decisions in which the Supreme Court held that allotment did not result in diminishment under the facts of those cases—that is, where the allotments remained in trust and the tribal members remained in possession. Decision 23-24 (discussing *Celestine* and *United States v. Pelican*, 232 U.S. 442, 450-51 (1914)). But the district court completely failed to grapple with *Seymour*, *Mattz*, *Solem*, and *Nebraska*—all of which held that neither the issuance of a fee patent nor the conveyance of a parcel to a non-Indian (whether a fee-patented allotment or a parcel sold as surplus land) incrementally diminishes a reservation.

The statutes evaluated in *Seymour*, *Mattz*, *Solem*, and *Nebraska* stand in sharp contrast to other statutes that the Supreme Court has determined did indeed disestablish or diminish the reservation at issue: *DeCoteau*, 420 U.S. at 445-46 (1891 statute ratifying agreement with tribe to "cede, sell, relinquish, and convey" the lands of the Lake Traverse Indian Reservation in exchange for a sum certain reflected congressional intent to disestablish the reservation); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977) (1904 statute providing that tribe would "cede, surrender, grant, and convey to the United States all their claim, right, title, and interest in and to all that part of the Rosebud Indian Reservation" that remained

unallotted in Gregory County diminished the Rosebud Reservation); *Hagen*, 510 U.S. at 414 (1902 statute requiring certain lands to be "restored to the public domain" reflected congressional intent to diminish the Uintah Indian Reservation); and *South Dakota*, 522 U.S. at 344-58 (1894 statute ratifying agreement with tribe to "cede, sell, relinquish, and convey" unallotted lands of the Yankton Sioux Reservation in exchange for a sum certain reflected congressional intent to diminish the reservation).

The district court relied on none of these cases because each is obviously distinguishable. The Supreme Court discerned congressional intent to disestablish a reservation or change its boundaries in statutory text that called for either (1) the complete and immediate cession of tribal lands or (2) both cession and payment of a sum certain for ceded land, as well as in historical context and post-enactment evidence that is not present here.[1]

[1] The Supreme Court is currently considering whether Congress disestablished the historic territory of the Muscogee (Creek) Nation within the former Indian Territory (now part of the State of Oklahoma). *Sharp v. Murphy*, No. 17-1107 (formerly styled *Carpenter v. Murphy*). In *Murphy*, the State and the United States have argued that Congress disestablished the historic Creek territory by enacting statutes between 1890 and 1907 to, among other things, eliminate the Creek Nation's tribal courts, greatly circumscribe its governmental authority, divest tribal property, and distribute tribal funds. The Dawes Act, the Burke Act, and the Oneida provisions of the 1906 Appropriations Act include no such provisions.

A. Neither the text nor the historical context of the Dawes Act, as amended by the Burke Act, evidences clear congressional intent to incrementally diminish any reservation.

The district court's conclusion that the issuance of fee patents under the Dawes Act (as amended by the Burke Act) or the subsequent conveyance of the fee-patented parcels to non-Indians incrementally diminished the Oneida Reservation is flatly inconsistent with *Seymour*, *Mattz*, *Solem*, and *Nebraska*. Diminishment must be grounded in something more than the mere fact that fee patents were issued to allottees or that such fee-patented lands were subsequently conveyed to non-Indians.

The district court gave short shrift to these decisions on the asserted ground that they addressed only the sale of surplus lands, which did not occur on the Oneida Reservation. Decision 21 ("this case does not arise under a surplus land act"). The district court erred in two fundamental respects. First, these decisions addressed statutes, including the Dawes Act, that authorized both the allotment of tribal lands to tribal members and the sale of surplus lands to non-Indians. Second, the Supreme Court has never suggested that the difference between allotment and the sale of "surplus" lands affects the diminishment analysis. Indeed, if congressional authorization of the sale of surplus parcels directly to non-Indians does not necessarily result in diminishment, as the Supreme Court has repeatedly held, there is no reason why authorization of fee patents to allottees—which will

not always be followed by conveyances to non-Indians—necessarily results in diminishment. A fee patent lifted the restrictions on alienation and taxation, but it would go too far to suggest that Congress *intended* allottees to sell their fee-patented parcels to non-Indians. Indeed, it is not clear that Congress even *expected* that a significant number of allottees would do so.

One need look no farther than *Seymour* to conclude that the district court erred in its diminishment analysis. The question there was whether the State of Washington had jurisdiction over a burglary committed on a parcel of non-Indian fee land within a townsite on the Colville Reservation. *See Seymour v. Schneckloth*, 346 P.2d 669, 670 (Wash. 1959). Congress undisputedly had diminished the Colville Reservation through an 1892 statute that restored most of the northern half of the original reservation to the public domain. 368 U.S. at 354. The issue was whether the remaining reservation was completely disestablished or further diminished by a 1906 statute that provided for the allotment of the remaining reservation to tribal members "under the provisions of the general allotment law of the United States" followed by the Secretary's sale of surplus land to non-Indians. *Id*. at 355. The Supreme Court held that the 1906 statute did *not* disestablish the reservation, explaining that it "did no more than open the way for non-Indian settlers to own land on the reservation in a manner which the Federal

Government, acting as guardian and trustee for the Indians, regarded as beneficial to the development of its wards." *Id*. at 356.

The Court also rejected the State's alternative argument that, even if the Colville Reservation were not disestablished, "its limits would be diminished by the actual purchase of land within it by non-Indians because land owned in fee by non-Indians cannot be said to be reserved for Indians." *Id*. at 357. Although the Court acknowledged that the contention was "not entirely implausible on its face," it concluded that it was "squarely put to rest" by Congress's enactment in 1948 of 18 U.S.C. § 1151, which defines "Indian country" to include "all land within the limits of any Indian reservation under the jurisdiction of the United States government, *notwithstanding the issuance of any patent*." *Id*. at 357-58 (emphasis added). The Court rejected the State's effort to limit the application of the italicized phrase to patents issued to Indians, discerning no basis in the text or purpose of § 1151 for distinguishing patents issued to Indians from patents issued to non-Indians. *Id*. at 358.

Importantly, the Court applied § 1151 without regard to whether parcels were conveyed to non-Indians before or after the enactment of § 1151. *See also Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 477-79 (1976) (concluding that, in light of "more modern legislation," Section 6 of the Dawes Act may not be read to grant the state jurisdiction for all purposes over Indians on fee-

patented parcels within the Flathead Reservation because that would mean that the reservation was substantially diminished, contrary to *Seymour*). The district court misconceived the relevant question to be "whether the Oneida Reservation was disestablished or diminished *before § 1151 became effective*." Decision 18 (emphasis added). Under *Seymour* and *Moe*, a question of state jurisdiction within a reservation—including as a result of asserted disestablishment or diminishment—is determined under the law in effect when the question arises, i.e., now.

Also relevant here is the Supreme Court's rejection of the State of Washington's second alternative argument—that a townsite established within the Colville Reservation under a provision of the 1906 statute was excluded from the reservation when the townsite plot was filed with the county. The Court explained that "this contention is nothing more than a variation of the State's first alternative contention for it simply attempts to make a special case for excluding from a reservation lands owned by towns as opposed to lands owned by individual non-Indians." 368 U.S. at 358-59. This analysis undercuts the district court's reliance on the Wisconsin Legislature's creation of the towns of Hobart and Oneida in 1903 as a basis for diminishment. *See* Decision 9, 34. Congress did not authorize the state legislature's action and, at that time, all the allotments were in trust status and were expected to remain in trust status until at least 1917. If a congressionally authorized townsite owned by the town in fee simple remained part of the Colville

Reservation, there is no basis for concluding that the Village did not remain part of the Oneida Reservation.

Seymour squarely rejected the district court's incremental diminishment theory more than 50 years ago. The reservation status of a parcel is not terminated by the issuance of a fee patent to an allottee or by conveyance to a non-Indian.

The district court's error is underscored by *Mattz*, which involved the State of California's authority to enforce its fishing regulations against a tribal member within the Klamath River Reservation. The Supreme Court rejected the State's argument that the reservation had been disestablished by an 1892 statute that provided for allotting reservation land to tribal members under the Dawes Act and for selling the remaining land to non-Indians. 412 U.S. at 505-06. As in *Seymour*, the Court explained that Congress intended in 1887 "to continue the reservation system and the trust status of Indian lands, but to allot tracts to individual Indians for agriculture and grazing" and to make unallotted land "available to non-Indians with the purpose, in part, of promoting interaction between the races and of encouraging Indians to adopt white ways." *Id*. at 496. The Court observed that Congress anticipated that "the reservation could be abolished" when "all the lands had been allotted and the trust expired," *id*., but that situation never came to pass on the Klamath River Reservation. The Court further explained that the 1892 statute did not "differ materially from" the Dawes Act. *Id*. at 497.

In *Solem*, a dispute over criminal jurisdiction within the Cheyenne River Reservation, the Supreme Court rejected the State of South Dakota's argument that a 1908 statute that authorized allotments for certain tribal members and opened up a portion of the reservation for sale to non-Indians excluded the opened portion from the reservation. 465 U.S. at 481. The Court made it clear that diminishment could not be based on Congress's general expectation that Indian reservations would one day cease to exist: "Although the Congresses that passed the surplus land Acts anticipated the imminent demise of the reservation and, in fact, passed the Acts partially to facilitate the process, we have never been willing to extrapolate from this expectation a specific congressional purpose of diminishing reservations with the passage of every surplus land Act." *Id*. at 468-69. The district court nodded to this admonition but failed to heed it. Decision 28-29.

In its most recent decision, involving tribal liquor regulation in the western portion of the Omaha Reservation, the Supreme Court unanimously reaffirmed the *Solem* framework and held that an 1882 statute providing for allotments to tribal members and for opening up the western portion of the Omaha Reservation (approximately 50,000 acres) for sale to non-Indians did not diminish the reservation. *Nebraska*, 136 S. Ct. at 1077-80. The Court so held even though there was *no* trust land in that western area after 1919. *See Smith v. Parker*, 996 F. Supp. 2d 815, 827 (D. Neb. 2014).

* * *

If allotment under the Dawes Act, as amended by the Burke Act, were sufficient by itself to diminish a reservation, virtually no major Indian reservation would remain intact. *Seymour*, *Mattz*, *Solem*, and *Nebraska* do not countenance that result.

B. Neither the text nor the historical context of the 1906 Appropriations Act evidences clear congressional intent to diminish the Oneida Reservation.

Apparently appreciating that diminishment may not be grounded solely in the general allotment statutes, the district court placed most weight on the 1906 Appropriations Act. Decision 23 ("The intent to diminish was born out by Congress singling out the Oneida Reservation, in particular, and allowing the Secretary to quickly issue fee patents at his discretion."). But these provisions cannot bear this weight.

The 1906 Appropriations Act authorized the Secretary, *in his discretion*, to issue fee patents before the end of the presumptive trust period to named allottees on many different reservations, including 56 named allottees on the Oneida Reservation (i.e., 3.7% of the original 1,530 allottees). *See* 34 Stat. at 380-81 (named Oneida and Red Cliff allottees in Wisconsin); *id.* at 351, 356-58, 361, 365, 373-74, 378-79 (allottees from other tribes in other states). The district court was the first court to base diminishment on such provisions. The 1906 Appropriations

Act more generally authorized the Secretary, "in his discretion, to issue a patent in fee to any Indian of the Oneida Reservation in Wisconsin for the lands heretofore allotted him," and provided that "the issuance of such patent shall operate as a removal of all restrictions as to the sale, taxation, and alienation of the lands so patented." 34 Stat. at 381. But this provision merely reiterated the Burke Act's similar provision enacted the prior month. *See supra* p. 4. The district court failed to note that the 1906 Act also reiterated the Dawes Act's provision authorizing the President to exercise his discretion to *extend* the trust period. 34 Stat. at 326. The 1906 Act does not provide any more evidence of congressional intent to change the boundaries of the Oneida Reservation than does the Dawes Act and Burke Act.

The 1906 Appropriations Act *directed* the Secretary to issue fee patents to "mixed bloods" on the White Earth Reservation and to full-blood allottees upon application. 34 Stat. at 353. Notably, even this mandatory provision was rejected as a basis for diminishment. *State v. Clark*, 282 N.W. 2d 902, 907 (Minn. 1979); *see also White Earth Band of Chippewa Indians v. Alexander*, 683 F.2d 1129, 1133-35 (8th Cir. 1982).

Because the text of the 1906 Appropriations Act does not clearly express congressional intent to diminish the Oneida Reservation, diminishment may be premised on the legislation's surrounding circumstances only if "events surrounding the passage . . . unequivocally reveal a widely-held, contemporaneous

understanding" of Congress's intent to change the Reservation's boundaries. *Solem*, 465 U.S. at 471; *accord Mattz*, 412 U.S. at 498 (considering whether legislative history "compel[led] the conclusion that Congress intended to terminate the reservation"). There is no evidence of any unequivocally revealing event here. The district court broadly asserted, unsupported by record citations, that allottees ("including members of the Oneida Tribe") "repeatedly petitioned the federal government for legislation granting the individual members fee simple title to their land." Decision 9. This sentence suggests that all Oneida allottees were united in their desire for fee-simple patents. As the Nation's expert explained, however, some Oneida allottees desired early fee-patenting, but a significant number were opposed. *See* Doc. 92-2 at 99-106. This split led Interior to advocate for legislation reflecting a "middle course" that would authorize the issuance of fee patents to those who wanted them and give the Secretary discretionary authority to issue fee patents to others if they later requested. *Id*. at 102. The district court did not reject this evidence. It simply ignored it.

In sum, diminishment may not be based on the 1906 Appropriations Act.

C. The post-1906 evidence does not support diminishment of the Oneida Reservation.

The subsequent treatment of a reservation is the "least compelling evidence" in a diminishment analysis. Decision 33 (quoting *Nebraska*, 136 S. Ct. at 1082). Indeed, the Supreme Court "has never relied solely on this third consideration to

find diminishment." *Nebraska*, 136 S. Ct. at 1081. This Court should not do so here. The parties "presented volumes of material" on the treatment of the Oneida Reservation after 1906. Decision 32-33. Inconsistencies in the subsequent treatment of an area do not tip the balance in favor of finding congressional intent to disestablish or diminish a reservation. *Solem*, 465 U.S. at 478.

Here, the record was mixed, as the district court acknowledged in concluding that the evidence did not support *disestablishment*. Decision 33. But the court then concluded that the record supports *diminishment*. *Id*. at 34. This makes no sense. In this case, disestablishment and the district court's incremental diminishment theory would both reduce the treaty reservation to "Indian country" consisting of only tribal trust land and trust allotments. The evidence cannot support one conclusion but not the other. Moreover, the district court cherry-picked a few bits of evidence from the "volumes" the parties presented, Decision 34-35, and simply ignored the rest, including the federal government's positions noted above (p. 2). This approach does not come close to satisfying the Supreme Court's exacting standard for concluding that a reservation was diminished.

To be sure, "subsequent demographic history" may be an "additional clue as to what Congress expected would happen." Decision 33 (quoting *Solem*, 465 U.S. at 471-72). The district court noted a 2017 census estimate that the Village was 12.2% "American Indian and Alaska Native alone." *Id*. at 3. But the court did not

refer to any demographic data for the Reservation as a whole even though its diminishment holding is not limited to the Village. Nor did the court explain how the demographic data supports diminishment when the Supreme Court held in *Nebraska* that the Omaha Reservation had not been diminished even though the percentage of non-Indians residing in the western area was 98%. *Smith v. Parker*, 996 F. Supp. 2d at 828; *accord Nebraska*, 136 S. Ct. at 1081 ("the Tribe was almost entirely absent from the disputed territory for more than 120 years").

In sum, The district court's conclusion of diminishment is inconsistent with longstanding precedent of the Supreme Court.

II. Circuit-level precedent likewise does not support diminishment.

A. The Eighth Circuit's analysis of the Yankton Sioux Reservation does not support the district court's conclusion that the Oneida Reservation was diminished.

The district court devoted most attention to, and relied most heavily on, the Eighth Circuit's decisions relating to the Yankton Sioux Reservation, namely, *Yankton Sioux Tribe v. Gaffey*, 188 F.3d 1010 (8th Cir. 1999), and *Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 994 (8th Cir. 2010). *See* Decision 26-31. These decisions are flawed and, in any event, distinguishable.

Gaffey concluded that Congress did not intend to disestablish the reservation through the 1894 statute at issue, but that it intended to diminish the reservation "by the land which it foresaw would pass into the hands of the white settlers and

homesteaders," 188 F.3d at 1027—a result that no party had proposed, *id*. at 1030. *Gaffey*'s diminishment holding was based on (1) the absence of textual or other evidence "suggest[ing] that any party anticipated that the Tribe would exercise jurisdiction over non-Indians who purchased land after it lost its trust status"; (2) provisions subjecting allottees to state or territorial law upon the issuance of fee patents; (3) a provision indicating that a fund for "helpless and infirm tribal members" would not be needed once tribal members had received "complete title to their allotted lands and shall have assumed all the duties and responsibilities of citizenship"; and (4) a provision that certain sections of land undisputedly ceded to the United States "would be reserved for common schools." *Id*.

The first rationale does not comport with *Solem*'s admonition against "extrapolat[ing]" specific intent to diminish a reservation from "the turn-of-the-century assumption that Indian reservations were a thing of the past," 465 U.S at 468, an admonition the Eighth Circuit had observed in concluding that the reservation had not been *disestablished*, 188 F.3d at 1024. As for the second rationale, the Supreme Court has repeatedly held, as explained in Section I.A. above, that fee-patenting under the general allotment statutes—which resulted in the conferral of United States citizenship on allottees and the extension of some state or territorial laws over fee-patented parcels—was not inconsistent with reservation status. As for the other referenced provisions of the 1894 statute,

whether or not they were indicative of congressional intent to diminish the Yankton Sioux Reservation, no similar provisions were enacted with respect to the Oneida Reservation.

The district court noted that in the subsequent appeal, *Podhradsky*, it was "virtually unquestioned" that non-Indian fee lands were no longer part of the reservation. Decision 31. But that is only because the question had been decided in *Gaffey*. This Court should not follow the Eighth Circuit's flawed approach in these two cases.[2]

B. This Court's analysis of the Stockbridge-Munsee Reservation supports the conclusion that the Oneida Reservation was not diminished.

The district court mistakenly believed that its diminishment holding was "consistent with, if not compelled by," this Court's decision in *Wisconsin v. Stockbridge-Munsee Community*, 554 F.3d 657 (7th Cir. 2009). *See* Decision 24-25. In that case, this Court concluded that Congress *diminished* the Stockbridge-Munsee Reservation through an 1871 statute, and then Congress *disestablished* the remaining reservation through the Stockbridge-Munsee provisions of the 1906 Appropriations Act. These two statutes are readily distinguishable.

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[2] When South Dakota and the Yankton Sioux Tribe sought review of *Gaffey* in the Supreme Court, the United States (though opposing review) argued that the Eighth Circuit had not correctly applied the Court's decisions in reaching its conclusion of diminishment. Brief for the United States in Opposition 21-23, *South Dakota v. Yankton Sioux Tribe*, 530 U.S. 1261 (2000) (No. 99-1490).

The relevant comparison is between the two statutes held to have diminished the respective reservations. The 1871 statute bears no resemblance to the Oneida provisions of the 1906 Appropriations Act. The 1871 statute carved out three quarters of the Stockbridge-Munsee treaty reservation for immediate sale by public auction, providing that the government would purchase any land not sold after two years. 554 F.3d at 660. This Court also looked to the "circumstances surrounding the passage" of the 1871 statute, which showed that "it was more than a run-of-the mill allotment act." *Id*. at 663. The Oneida Reservation, in contrast, was never subjected to anything more than run-of-the-mill allotments acts.

The district court ignored the analysis of the 1871 statute and focused instead on the Stockbridge-Munsee provisions of the 1906 Appropriations Act, 34 Stat. at 382, which this Court held *disestablished* the remaining quarter of the reservation. Decision 25-26. But the district court acknowledged that the Oneida provisions of the 1906 Act did not disestablish the Oneida Reservation. Moreover, the Stockbridge-Munsee provisions in the 1906 Appropriations Act, which immediately followed the Oneida provisions, are materially different from the Oneida provisions. Congress did not merely provide discretionary authority to shorten the allotment trust period, but directed the immediate issuance of fee patents to all Stockbridge-Munsee allottees. *Id*.

In contrast to the Oneida Reservation, there was no tribal trust land that remained unallotted. That meant that "upon allotment and patenting no trust land would remain." *Wisconsin v. Stockbridge-Munsee, Community*, 366 F. Supp. 2d 698, 724 (E.D. Wis. 2004). It was not just the timing of the fee patents, but the fact that upon implementation of the 1906 Stockbridge-Munsee provisions, the entirety of the 1856 treaty reservation would necessarily be in fee-simple status: "By 1910, *all* the land in the 1856 reservation was sold to non-Indians [under the 1871 statute] or allotted in fee simple, which meant that Congress paved the way for non-Indians to own *every* parcel within the original reservation and *ensured* that the reservation could be *immediately* extinguished." 554 F.3d at 665 (emphasis added).

The district court also failed to appreciate that the circumstances surrounding the enactment of the Oneida provisions in the 1906 Appropriations Act were materially different from those surrounding the Stockbridge-Munsee provisions (described in great detail at 366 F. Supp. 2d at 719-24 and at 554 F.3d at 664). Finally, the district court's cursory attention to the post-1906 treatment of the Oneida Reservation, Decision 34-36, failed to acknowledge that the post-1906 treatment of the Stockbridge-Munsee Reservation (described in great detail at 366 F. Supp. 2d at 724-43 and at 554 F.3d at 665) was significantly different.

In sum, far from "compel[ing]" the conclusion that the Oneida Reservation was diminished, this Court's analysis of Congress's treatment of the Stockbridge-Munsee Reservation supports the conclusion that Congress *did not intend* to diminish the Oneida Reservation.

III. The district court misunderstood the nature of jurisdiction within Indian reservations.

The district court's diminishment holding appears to have been motivated by its perception that respecting the boundaries of the treaty reservation would have "breathtaking" implications. Decision 37 (opining that the Nation would have "primary jurisdiction over land largely populated by people who have no say in its governing body"). The district court was simply mistaken that the Oneida Reservation presents an unusual jurisdictional situation that required resolution by a judicial declaration of diminishment.

This case involves the Village's authority over the Nation's tribal activities within its reservation. As a general matter, "primary jurisdiction over land that is Indian country rests with the federal Government and the Indian tribe inhabiting it, not with the States." *Alaska v. Native Village of Venetie*, 522 U.S. 520, 527 n.1 (1998). The scope of *state* authority over the *activities of tribes* within their reservations is thus extremely limited without express congressional authorization.

But the district court expressed concern about the different question of *tribal* jurisdiction over *nonmembers* within Indian reservations. While tribes "retain

considerable control over nonmember conduct on tribal land," tribes generally "lack civil authority over the conduct of nonmembers on non-Indian land within a reservation, subject to [the] two exceptions" articulated in *Montana v. United States*, 450 U.S. 544, 565 (1981). In contrast, states may exercise substantial civil jurisdiction over the activities of nonmembers on non-Indian fee land within a reservation. *Strate v. A-1 Contractors*, 520 U.S. 438, 454 (1997). Tribes generally lack criminal jurisdiction over non-Indians. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 195, 212 (1978).

When jurisdictional disputes arise, tribes, states, and municipalities frequently negotiate intergovernmental agreements to address these issues. *See*, *e.g.*, *Nevada v. Hicks*, 533 U.S. 353, 393 (2001) (noting the "host of cooperative agreements between tribes and state authorities"). The district court's decision disregards the entire body of Supreme Court precedent on the respective jurisdiction of governmental authorities within Indian reservations.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This amicus brief complies with the type-volume limitation of Circuit Rule 29 because it contains 6,960 words (excluding the parts of the brief exempted by Fed. R. App. P. 32(f)).

This amicus brief complies with the typeface requirements and type style requirements of Federal Rule of Appellate Procedure 32(a) because it has been prepared using 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

I hereby certify that on September 19, 2019, I electronically filed the foregoing amicus brief with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit using the appellate ECF system and that all participants in this case were served through that system.

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