No. 19-1981

In the
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-WCG.
The Honorable **William C. Griesbach**, Judge Presiding.

AMICI CURIAE BRIEF OF THE NATIONAL CONGRESS OF AMERICAN INDIANS AND THE INDIAN LAND TENURE FOUNDATION IN SUPPORT OF PLAINTIFF-APPELLANT ONEIDA NATION AND REVERSAL OF THE DISTRICT COURT

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 19-1981

Short Caption: Oneida Nation v. Village of Hobart, WI

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

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Indian Land Tenure Foundation, National Congress of American Indians

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

University of Connecticut School of Law

Native American Rights Fund

National Congress of American Indians

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

None

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

None

Attorney's Signature: s/ Joel West Williams Date: 9/20/2019

Attorney's Printed Name: Joel West Williams

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** X **No** ____

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Attorney's Signature: s/ Bethany Berger Date: 9/20/2019

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None

Attorney's Signature: s/ Derrick Beetso Date: 9/20/2019

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INTEREST OF AMICI CURIAE[1]

The National Congress of American Indians ("NCAI") is the oldest and largest national organization addressing American Indian interests. Since 1944, NCAI has worked with tribal governments to strengthen their governmental institutions and enable them to better serve both tribal citizens and non-citizens. Functional tribal institutions depend on cohesive and stable reservation boundaries, which the decision below would wholly undermine.

The Indian Land Tenure Foundation ("ILTF") is a national, community-based 501(c)(3) organization that works with American Indian nations and others toward the recovery, management, and preservation of Native homelands. Since 2002, ILTF has pursued its mission through education, research, partnership, and legal and administrative advocacy. Addressing the economic and community harms of allotment is central to this work.

SUMMARY OF ARGUMENT

The Supreme Court has held repeatedly that clear evidence of congressional intent is necessary to find a reservation diminished. Neither the General Allotment Act of 1887, 24 Stat. 388 ("Dawes Act"), nor the Burke Act of 1906, 34 Stat. 182

[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief.

("Burke Act"), nor the history of the Oneida Reservation provide any evidence that sales of allotted lands alone would diminish a reservation. From the beginning of the allotment period, Congress recognized that more was necessary, and repeatedly showed that it knew how to make its intent to diminish clear. In the same period, the Supreme Court and lower courts established that changes in land tenure alone did not remove land from a reservation. The Indian Country Act of 1948 codifies this case law, and eight modern Supreme Court cases build on this principle. If sale of allotted lands to non-Indians under the Dawes Act and Burke Acts alone constituted diminishment, moreover, reservations throughout the country would be affected, including some whose boundaries the Supreme Court has affirmed.

I. CLEAR EVIDENCE OF CONGRESSIONAL INTENT IS NECESSARY TO DIMINISH A RESERVATION.

In a line of cases spanning nearly a half-century, the Supreme Court has demanded clear evidence of congressional intent to separate land from a reservation. *See Nebraska v. Parker*, 136 S. Ct. 1072, 1078-79 (2016) ("'[O]nly Congress can divest a reservation of its land and diminish its boundaries,' and its intent to do so must be clear."); *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998) (demanding "clear and plain" evidence of intent); *Solem v. Bartlett*, 465 U.S. 463, 470 (1984) ("Congress [must] clearly evince an intent to change boundaries."); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 587 (1977) (same); *DeCoteau v. Dist.*

Cty. Court, 420 U.S. 425, 444 (1975) ("[C]ongressional intent must be clear . . . ."); *Mattz v. Arnett*, 412 U.S. 481, 505 (1973) (stating that without "clear termination language . . . we are not inclined to infer an intent to terminate the reservation."). The clear intent rule in reservation boundary cases comes from three sources: first, the general need for a clear statement before finding that Congress has removed existing governmental rights; second, the more specific canon tempering Congress's plenary power in Indian affairs; and finally, the rule that Congress does not lightly break its treaty promises.

A. The Clear Intent Rule Implements a General Canon of Construction.

Since its earliest Indian law decisions, the Supreme Court has demanded evidence of clear congressional intent before finding termination of tribal rights. *See Worcester v. Georgia*, 31 U.S. 515, 554 (1832) (stating that had a Cherokee treaty been intended to remove tribal self-governance "it would have been openly avowed"). The need for clear evidence was reaffirmed in the allotment era. *See Ex Parte Crow Dog*, 109 U.S. 556, 572 (1883) (asserting federal criminal jurisdiction "requires a clear expression of the intention of congress"); *United States v. Celestine*, 215 U.S. 278, 290-91 (1909) (stating that allotment act must "be construed in the interest of the Indian" to continue guardianship absent "clear" evidence of congressional intent). In the modern era, it has become a mainstay of federal Indian

law. *E.g.*, *Parker*, 136 S. Ct. at 1079-80 (demanding "clear" and "unequivocal" evidence to diminish a reservation); *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 790 (2014) (requiring "clear" and "unequivocal[]" evidence to end tribal sovereign immunity); *Montana v. Blackfeet*, 471 U.S. 759, 765 (1985) (demanding "unmistakably clear" evidence to allow state taxation of tribes). Generations of precedent have firmly established that, in construing federal law, "tribal property rights and sovereignty are preserved unless Congress's intent to the contrary is clear and unambiguous." Cohen's Handbook of Federal Indian Law § 2.02[1], at 113 (Nell Jessup Newton ed., 2012).

This clear intent rule is not unique to Indian affairs. It exists in every area in which Congress has power to invade the rights of another government—foreign, state, or tribal. *See* Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 Harv. L. Rev. 381, 415-17 (1993). Like treaties with Indian tribes, treaties with foreign nations "will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed." *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 252 (1984). Similarly, courts will not interpret federal criminal jurisdiction to reach "purely local crimes," *Bond v. United States*, 572 U.S. 844, 860 (2014), or to operate outside the United States unless "the affirmative intention of the Congress [is] clearly expressed," *Morrison v. Nat'l Austl.*

Bank Ltd., 561 U.S. 247, 255 (2010). In such cases, "the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *Bond*, 572 U.S. at 858 (internal quotations omitted).

In Indian affairs in particular, the clear intent rule is buttressed by "the profound importance of the tribes' pre-existing sovereignty," *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1873 n.5 (2016), and the vast power of Congress to affect it. As the Supreme Court has recognized, "proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 60 (1978). Because there are no "clear indications" here, the Oneida Reservation remains intact.

B. The Clear Intent Rule Tempers the Destructive Exercise of Plenary Power During the Allotment Period.

In the diminishment context, the clear intent rule also balances the impact of allotment and assimilation policies forced upon Indian people. Allotment was imposed on Native people at a time when they were not U.S. citizens and could not vote in state or federal elections. *See Elk v. Wilkins*, 112 U.S. 94, 95 (1884). Although tribal consent to federal power had been formerly achieved through treaty-making, Congress ended treaty-making in 1871, 16 Stat. 544, 566 (1871), and did

not universalize Indian citizenship until 1924. 43 Stat. 253 (1924). In the interim, Congress took millions of acres of tribal property unbound by treaty rights or even full constitutional review. *See Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903). As is well known, the allotment policy "quickly proved disastrous for the Indians." *Hodel v. Irving*, 481 U.S. 704, 707 (1987).

But even as the Court gave Congress leeway to undermine tribal rights, it insisted that these new, undemocratic exercises of power would be subject to the clear intent rule and construed in favor of Indian interests. *See Celestine*, 215 U.S. at 290-91 (stating that allotment act must "be construed in the interest of the Indian" to continue guardianship absent "clear" evidence of congressional intent); *Ex Parte Crow Dog*, 109 U.S. at 572 (asserting federal jurisdiction over Indians on reservations "requires a clear expression of the intention of Congress"). The modern Supreme Court has maintained both the doctrine of plenary power and the canons of construction that mitigate it. As *Bay Mills* declared in 2014, "[a]lthough Congress has plenary authority over tribes, courts will not lightly assume that Congress in fact intends to undermine Indian self-government." 572 U.S. at 790. Without clear evidence, therefore, courts may not further the destructive impact of allotment.

C. The Clear Intent Rule Upholds the Faith of the United States in Abiding by its Treaty Promises.

Treaties are the promises of a nation. The intent to break treaty pledges, therefore, "is not to be lightly imputed to the Congress." *Menominee Tribe v. United States*, 391 U.S. 404, 413 (1968). In one of his earliest messages to Congress, President George Washington insisted that Indian treaties, no less than those with foreign nations, should be "executed with fidelity." 1 Annals of Cong. 83 (1789). Secretary of War Henry Knox agreed that the "reputation and dignity" of the nation were at stake in enforcing Indian treaties. Journal Cont'l Cong. vol. 34, 342-343 (July 18, 1788). The modern Supreme Court concurs: "Indian treaty rights are too fundamental to be easily cast aside." *United States v. Dion*, 476 U.S. 734, 738-739 (1986). Accordingly, while "Congress may abrogate Indian treaty rights . . . it must clearly express its intent to do so." *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202 (1999).

The boundaries of the Oneida Reservation in Wisconsin were guaranteed by the Treaty of 1838. 7 Stat. 566, arts. 1 and 2. Before finding that the United States broke this treaty promise there must be "clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty." *Dion*, 476 U.S. at 739-40. Holding that sales under the Dawes Act and Burke Act alone

abrogated Oneida Reservation's treaty-guaranteed boundaries wholly violates this rule of construction. Respect for the faith of our nation demands something more.

II. THE ALLOTMENT-ERA CONGRESS AND COURTS DID NOT INTEND THAT SALES OF ALLOTMENTS TO NON-INDIANS ALONE WOULD DIMINISH A RESERVATION.

Sales of allotted lands to non-Indians alone simply do not diminish a reservation. When Congress wanted to diminish a reservation during this period, it did so directly, through statutes that made its intent clear. Although Congress hoped that allotment would lead to the end of reservations, it believed this would happen gradually, as individual land ownership and living side-by-side with whites would convince Indians to assimilate and dissolve their tribal status. It soon became clear that land ownership would not magically lead to full assimilation. In response, the Executive, supported by the Supreme Court, affirmed that allotment and citizenship did not end Indian-affairs jurisdiction. Before enacting the Dawes Act, moreover, Congress had already established the jurisdictional category of "reservation," which, unlike earlier definitions of "Indian country," was independent of Indian ownership.

A. Congress Did Not Believe that Allotment and Fee Sales Alone Would End Reservations.

No one believed that sales of allotments alone would diminish a reservation. In fact, advocates for allotment did not anticipate that Indians would sell their allotments in large numbers at all. The goal of allotment was that Indians would hold

onto their lands and become farmers. Although proponents fervently believed that individual property ownership would result in Indian assimilation, eliminating the need for reservations, they insisted that reservations continue until Congress determined sufficient assimilation had occurred. When it became clear this would not happen, the Executive and the Supreme Court affirmed that allotment alone did not free Indians from federal jurisdiction.

Although a minority in Congress wanted to end reservations immediately, the Dawes Act reflected the "policy of gradualism" that its author, Senator Henry Dawes, and his allies preferred. Frederick E. Hoxie, *A Final Promise: The Campaign to Assimilate the Indians, 1880-1920*, 52 (2001). Allotment's proponents were among the "Friends of the Indian," who believed that individual property would "make restitution to the Indian for all that the white man had done to him in the past." D.S. Otis, *The Dawes Act and the Allotment of Indian Lands* 8 (1973) (hearings on H.R. 7902, 73rd Cong., 2d sess. (1934)). To ensure the beneficial aspects of allotment, the Commissioner of Indian Affairs insisted that "[t]he lines of the reservations should also be maintained, so that the government can retain its control over them." Lands to Indians in Severalty, H.R. Rep. 45-105 (1879). Similarly, Senator Dawes and his supporters agreed, "[e]ach change in the reservation's borders would have to be approved by the Indians." Hoxie, *supra*, at 52. The language of the statute reflects this, providing that after all tribal members

had received their allotments, the Secretary of the Interior could "negotiate with such Indian tribe for the purchase and release by said tribe . . . of such portions of its reservation not allotted as such tribe shall . . . consent to sell." 24 Stat. at 389 § 5.

The supporters of the Dawes Act emphatically did not expect that most allottees would lose their land to non-Indians. The "primary function" of allotment was "to turn the Indians generally into agriculturalists." Francis P. Prucha, *The Great Father: The United States Government and the American Indians* 895 (1984). Widespread land sales to non-Indians would have undermined this fundamental goal. Indeed, a secondary goal of allotment "was to protect the Indian in his present land holding." Otis, *supra*, at 13; *see* H.R. Rep. 45-105 at 2 (letter from Commissioner of Indian Affairs arguing that allotment would provide "protection against the encroachments of whites"). Allotment's advocates were "confident" that government patent would provide allottees "a security which no tribal possession could afford him." Otis, *supra*, at 13.

Proponents believed that allotment would eventually lead to the end of reservations, but only because they thought it would convince Indians to voluntarily give up tribal status. When the Dawes Act was being debated, Senator Henry Teller characterized its proponents as believing that "in twenty-five years they will all be civilized; these people will be churchgoing farmers." *Id*. at 8. But persuading Indians to "civilize" and give up tribal status had long been the goal of federal Indian

policy. *See* Dep't of the Interior, *Report of the Comm'r of Indian Affairs, Accompanying the Annual Report of the Secretary of the Interior* 20 (1856) (asserting that the reservation policy would lead to "the gradual abolition of the tribal character"); Prucha, *supra*, at 439 (quoting 1863 report of the Sioux agent that described a policy to "weaken and destroy the tribal relations, individualize them by giving them separate homes.'"). Like these earlier policies, this hope did not mean that allotment itself ended reservations. As the Supreme Court has recognized, "[a]lthough the Congresses that passed the surplus land acts anticipated the imminent demise of the reservation . . . we have never been willing to extrapolate from this expectation a specific congressional purpose of diminishing reservations." *Solem*, 465 U.S. at 468-469.

Of course—like earlier plans for tribal extinction—allotment failed miserably. Far from enabling Indians to keep their land, allotted Indians "drift[ed] toward complete impoverishment" with many becoming "totally landless." *Readjustment of Indian Affairs: Hearings on H.R. 7902 Before the Committee on Indian Affairs*, 73d Cong. 15, 17 (1934) (statement of Commissioner John Collier). In response, the Executive made clear that allotment and citizenship did not end federal guardianship. Hoxie, *supra*, at 235-36. The Supreme Court agreed: "The act of 1887, which confers citizenship, clearly, does not emancipate the Indians from all control, or abolish the reservations." *Celestine*, 215 U.S. at 287; *United States v. Sandoval*, 231

U.S. 28 at 46 (1913) ("Congress, in pursuance of the long-established policy of the government, has a right to determine for itself when the guardianship which has been maintained over the Indian shall cease.").

In allotting the Oneida Reservation and issuing fee patents for the land, the United States pursued this same misguided policy. The United States hoped that allotments would transform the Oneidas into prosperous farmers who would voluntarily abandon tribal status. This vain hope, however, is not sufficient to diminish a reservation. *See Solem*, 465 U.S. at 468-69.

B. Congress Knew How to Demonstrate Explicit Intent to Diminish, but Did Not Do So in the Dawes Act, the Burke Act, or with Regard to the Oneida Reservation.

Contrary to the opinion below, the Dawes Act and Burke Act reveal no "explicit . . . intent to diminish" any reservation. *Oneida Nation v. Village of Hobart*, 371 F. Supp.3d 500, 515 (E.D. Wis. 2019). Congress knew how to explicitly diminish a reservation, and did so repeatedly during the allotment period. Yet neither these acts nor the history of the Oneida Reservation reveal any such explicit intent. This contrast militates against finding diminishment here.

In the years surrounding the passage of the Dawes Act in 1887, Congress repeatedly diminished reservations with language making its intent clear. These statutes use different language, but each clearly diminishes reservation boundaries. In 1884, for example, Congress declared that the vast Moses-Columbia Reservation

in Washington would be "restored to the public domain," implementing an agreement in which the tribe agreed to "relinquish all claim upon the Government for any land situate elsewhere." 23 Stat. 79, 79-80 (1884). In 1888, the United States acquired 17.5 million acres from tribes in Montana, providing that they would "cede and relinquish to the United States all their right, title, and interest in and to all the [ceded] lands . . . reserving to themselves only the reservations herein set apart for their separate use and occupation." *See* 25 Stat. 113, 114 (1888). The 1889 statute dividing the Great Sioux Nation into seven separate reservations specified that "all the lands . . . outside of the separate reservations herein described are hereby restored to the public domain" and that the act was a "release of all title on the part of the Indians." 25 Stat. 94, §§ 16, 21 (1889). In 1891, Congress diminished the Fort Berthold Reservation with an agreement to "cede all right, title, and interest" outside certain boundaries, declaring it "the policy of the Government to reduce to proper size existing reservations when entirely out of proportion to the number of Indians existing thereon." 26 Stat. 1032 (1891). In 1892, another statute declared that the northern half of the Colville Reservation was "vacated and restored to the public domain, notwithstanding any [law] whereby the same was set apart for a reservation." 27 Stat. 62 (1892). All of these statutes provided the tribes with a sum certain in exchange for their lands.

The sum-certain language became less universal after *Lone Wolf*, which held tribal consent was not necessary to allot treaty land. However, Congress still made its intent to diminish explicit. A 1904 statute, for example, provided that after allotment under the Dawes Act was complete, "the reservation lines of the Ponca and Otoe and Missouria Indian reservations . . . are hereby, abolished." 33 Stat. 218 (1904). Similarly, a 1908 statute provided that "whenever the President is satisfied that all the Indians in any part of the Navajo Indian Reservation in New Mexico and Arizona created by Executive Orders [of 1907 and 1908] have been allotted, the surplus lands in such part of the reservation shall be restored to the public domain." Act of May 29, 1908, 35 Stat. 444, 457 § 25; *Pittsburgh & Midway Mining v. Yazzie*, 909 F.2d 1387, 1391-93 (10th Cir. 1990) (holding reservation diminished).

Courts have found diminishment from statutes whose language was less explicit, but only when those statutes included both (1) unusual language; and (2) a legislative history providing clear evidence of intent regarding *that specific reservation*. In *Rosebud Sioux Tribe*, for example, the Court held the Rosebud reservation was diminished because (1) the relevant statutes provided the tribe would "cede, grant, and relinquish to the United States all claim, right, title, and interest in and to all that part of the Rosebud Indian Reservation" and (2) legislative history showed the statutes ratified a 1901 agreement that all parties agreed was intended to diminish the reservation, and which provided a sum certain. 430 U.S. at 591-592;

see also Hagen v. Utah, 510 U.S. 399, 403-404 (1994) (finding diminishment in statute that: (1) provided that unallotted lands would be "restored to the public domain," and (2) implemented an act seeking "relinquishment to the United States" of unallotted lands). In 2016, the Supreme Court sharpened the test, holding that the "lack of clear textual signal that Congress intended to diminish the reservation" can only be overcome by evidence that "unequivocally reveal[s] a widely held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation." *Parker*, 136 S. Ct. at 1080.

Congress used none of these commonplace Allotment-Era mechanisms for expressing intent to diminish here. There is neither a "clear textual signal" in the statutes, nor evidence that "unequivocally reveals a widely held, contemporaneous understanding" that the Oneida reservation would be diminished. *Cf. Parker*, 136 S. Ct. at 1080. The only Oneida-specific provision is a paragraph in the 1906 Indian Appropriation Act authorizing the Secretary of the Interior "in his discretion, to issue a patent in fee to any Indian of the Oneida Reservation in Wisconsin for the lands heretofore allotted" removing "all restrictions as to the sale, taxation, and alienation of the lands so patented." 34 Stat. 381 (1906). It says nothing about cession of all tribal interests, restoration to the public domain, or reservation boundaries. This is virtually the same authorization that the same Congress gave the Secretary to issue

a fee patent to any allottee in the Burke Act, 34 Stat. at 182-183 (1906), yet no court (before the court below) has held that the Burke Act alone diminishes a reservation.

Comparison with other provisions of the 1906 Appropriation Act is instructive. The paragraphs regarding Oneida come just before the provision that the entire Stockbridge-Munsee reservation would be allotted immediately in fee. 34 Stat. at 383. This Court found that language indicated explicit intent to diminish, but only because of the combination of (1) this unusual provision (immediate fee status), and (2) legislative history showing the statute implemented an agreement that allotments were "a full and complete settlement of all obligations ... due to said tribe ... from whatever source the same may have accrued...." *Wisconsin v. Stockbridge-Munsee Cmty.*, 554 F.3d 657, 661 (7th Cir. 2009). By contrast, the Oneida paragraph does not provide that all allotments were made in fee, and does not implement an agreement to end federal responsibilities.

The 1906 Appropriations Act also included a provision for issuing fee patents on the White Earth Reservation that is even broader than the Oneida provision. 34 Stat. 353. The White Earth provision immediately removed "all restrictions as to sale, incumbrance, or taxation," provided for fee-simple patents for all mixed-blood allottees, and gave the Secretary discretion to issue such patents on all allotments held by full-blood allottees. *Id.* As a result, most of the reservation today is non-Indian fee land. White Earth Dep't of Transportation, *White Earth Reservation Base*

Map (2014), https://whiteearth.com/assets/img/community/White%20Earth%20Base%20Map%2024x36%20w_Allotments.pdf. Nevertheless, courts agree that this land remains part of the reservation. *State v. Clark*, 282 N.W.2d 902 (Minn. 1979) (holding that reservation was not diminished and that the state lacked jurisdiction over Indian hunting and fishing on non-Indian land); *see also White Earth Band of Chippewa Indians v. Alexander*, 518 F. Supp. 527 (D. Minn. 1981) (holding that state could enforce fishing laws against tribal citizens in townships formally ceded by 1889 Nelson Act, but could not within the reservation).

In short, at the same time Congress was enacting the Dawes and Burke Acts and providing for patenting Oneida allotments, it repeatedly enacted statutes making its intent to diminish other reservations clear. But it used none of this diminishment language in the Dawes Act, the Burke Act, or with respect to the Oneida Reservation specifically. This failure militates against finding diminishment of the Oneida Reservation. *See*, *e.g.*, *Parker*, 136 S. Ct. at 1080 (holding that fact that Congress had previously diminished the Omaha Reservation in "unequivocal terms" "undermine[d] the claim" that an 1882 Act did so).

C. Before Allotting the Oneida Reservation, Congress and the Courts Established that "Reservations" Did Not Depend on Land Ownership.

When the Oneida Reservation was allotted, it was already established that reservations were not dependent on land ownership. The opinion below therefore erred by relying on early decisions regarding "Indian country" to define the term "reservation." *See Oneida Nation*, 371 F. Supp. 3d at 512. During the allotment period, "reservation" had a broader definition than "Indian country," and was not dependent on Indian title. Before enacting the Dawes Act, Congress began to use "reservation" rather than, or in addition to, "Indian country" in its jurisdictional statutes. Courts quickly upheld broad jurisdiction on reservations without relying on land tenure. In enacting 18 U.S.C. § 1151 in 1948, Congress did not create a new definition of reservation. Instead, it codified the broad judicial definition of reservation, and clarified that it encompassed Indian country for all purposes.

By the time Congress enacted the Dawes Act, it had defined "reservation" as a distinct jurisdictional category that was broader than "Indian country." Before this, statutes used the term "Indian country" to define Indian affairs jurisdiction. *E.g.*, 10 Stat. 269, 270 (1854). But Congress had last defined "Indian country" in 1834, and had not updated the statute to reflect changes in federal Indian policy. *See* 4 Stat 729 (1834) (defining "Indian country" as territory "not within any State to which the Indian title has not been extinguished"). In 1877, the Supreme Court held that

because liquor statutes were only effective in "Indian country," they did not apply to lands where Indian title had been extinguished. *Bates v. Clark*, 95 U.S. 204, 209 (1877). In response, Congress began to use the term "reservation" as an alternative locus for jurisdiction. In 1882, Congress amended part of the Indian trader laws to provide that they would apply not only in "Indian country," but also "on any Indian reservation." 22 Stat. 179 (1882). In 1885, when Congress enacted the Major Crimes Act, it used the term "Indian reservation" rather than "Indian country" to describe the scope of its jurisdiction. 23 Stat. 362, 385 (1885). Significantly, the Dawes Act used the term "reservation" rather than "Indian country" to describe where allotments would take place. 28 Stat. 387, 387-391 (1887).

Courts soon affirmed that reservations were not dependent on land tenure. One of the earliest cases originated in Wisconsin. In *United States v. Thomas*, 151 U.S. 577 (1894), the Supreme Court considered whether the federal government could prosecute a Chippewa man for a murder on land within the Lac Courte Oreilles Reservation that had been set apart for the state as school lands. *Id*. at 582. The Court upheld the prosecution, declaring that federal jurisdiction existed on the reservation "independently of any question of title." *Id*. at 585. Later, *Celestine*, established the related rule that "when Congress has once established a reservation, all tracts included within it remain a part of the reservation until separated therefrom by Congress." 215 U.S. 284. *Celestine* did not even specify who owned the land on

which the crime had been committed; the only relevant fact was that it occurred within the Tulalip Reservation. *Id*. at 285-86 ("The tract subsequently allotted to defendant, as well as that upon which the crime was committed, are within the boundaries prescribed in this executive order.").[2]

For a time, the narrow definition of Indian country still applied to statutes dependent on the term, but even that began to give way. In 1912, the Supreme Court held that because federal liquor statutes only applied within "Indian country," they did not apply on rights-of-way within reservations. *Clairmont v. United States*, 225 U.S. 551, 560 (1912). But the following year, in a case regarding the Major Crimes Act, *Donnelly v. United States*, 228 U.S. 243 (1913), it suggested that the broader term "reservation" was eclipsing the older definition: "[T]he term [Indian country] cannot now be confined to land formerly held by the Indians, and to which their title remains unextinguished. . . . [N]othing can more appropriately be deemed 'Indian country,' within the meaning of those provisions of the Revised Statutes that relate to the regulation of the Indians and the government of the Indian country, than a tract of land that . . . is lawfully set apart as an Indian reservation." *Id*. at 269; *see also Kills Plenty v. United States*, 133 F.2d 292 (8th Cir. 1943) (upholding federal

[2] The opinion below incorrectly stated that the crime had been committed on the defendant's allotment. *Oneida Nation*, 371 F. Supp.3d at 515.

criminal jurisdiction over a crime committed on non-Indian land within reservation boundaries).

Other cases from the period affirmed that neither land ownership nor Indian citizenship diminished special Indian affairs jurisdiction. Both the courts and Executive, for example, agreed that the Five Civilized Tribes retained jurisdiction on non-Indian owned land within their reservations.[3] In 1904, the Supreme Court held that Chickasaw grazing laws still applied to non-Indians on fee lands within the Chickasaw Reservation. *Morris v. Hitchcock,* 194 U.S. 384, 392 (1904). The Court quoted favorably an Attorney General opinion that stated that tribes retained jurisdiction "even if the Indian title to the particular lots sold had been extinguished." 23 Op. Att'y Gen. 214, 216 (1900). The Eighth Circuit similarly upheld Creek jurisdiction over fee lands within the Creek Reservation. *Buster v. Wright*, 135 F. 947, 951 (8th Cir. 1905). Although the non-Indian defendant argued that jurisdiction was extinguished by his purchase of his land, the court affirmed that "jurisdiction to govern the inhabitants of a country is not conditioned or limited by the title to the land which they occupy in it." *Id.* Subsequently, the Supreme Court held that the United States retained jurisdiction to set aside a sale of allotted fee land, even though the land had been sold to a non-Indian several years before. *Tiger v. Western Inv.*

[3] The Supreme Court later limited tribal jurisdiction over non-Indians on fee lands, but with the understanding that those lands remained part of the reservation. *See*, *e.g.*, *Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001).

Co., 221 U.S. 286 (1911). Next, in *Sandoval*, 231 U.S. 28, the Court held that Pueblo lands were "Indian country" subject to federal liquor restrictions even though the Pueblos were citizens and owned their land in fee. *Id.* at 48.

When Congress enacted 18 U.S.C. § 1151 in 1948, it codified these earlier broad definitions of reservation. *See* 18 U.S.C. § 1151 (Reviser's Note: "Definition is based on latest construction of the term by the United States Supreme Court in *U.S. v. McGowan*, 58 S. Ct. 286, 302 U.S. 535, following *U.S. v. Sandoval*, 34 S. Ct. 1, 5, 231 U.S. 28, 46. *See also Donnelly v. U.S.*, 33 S. Ct. 449, 228 U.S. 243; and *Kills Plenty v. U.S.*, 133 F.2d 292 . . . ."). The statute also made clear that reservations were "Indian country" for all purposes, regardless of whether the statute explicitly mentioned reservations. *Id.* Contrary to the decision below, *Oneida Nation*, 371 F. Supp.3d at 512, therefore, although the definition of "Indian country" changed in 1948, the definition of "reservation" did not. Instead, the statute affirmed the definition of "reservation" that Congress understood and courts had applied throughout the allotment period.

III. IF SALES OF ALLOTTED LANDS ALONE DIMINISHED RESERVATIONS, THE IMPACT WOULD BE "BREATHTAKING."

Because the District Court erroneously conflated reservation status with tribal jurisdiction, it stated that upholding reservation status would have "breathtaking" results. *Oneida Nation*, 371 F.3d at 523. This is incorrect: for non-Indians,

jurisdiction over fee lands within reservations is little different from jurisdiction outside them.[4] Instead, it is the opinion below that would have a breathtaking impact: reservations throughout the country would be diminished, even some that the Supreme Court has held remain intact. This cannot be correct.

A. If Adopted Elsewhere, the District Court's Holding Would Diminish Reservations Allotted Under Either Tribe-Specific Acts or Solely Under the Dawes Act.

The opinion below had it exactly backward by suggesting that allotment under a tribe-specific act, rather than the Dawes Act alone, would exempt a reservation from its holding. All allotments after 1887 were made to implement the intent of the Dawes Act. *See Mattz*, 412 U.S. at 496-97 (describing tribe-specific acts as implementations of the Dawes Act). All were subject to the provisions of the Burke Act. 34 Stat. at 183 (applying to "any Indian allottee"). If those acts alone provide sufficient evidence of congressional intent to diminish, reservations throughout the country would be affected.

In fact, both the language of the Dawes Act and a wealth of precedent show that a tribe-specific act is more likely to result in diminishment than allotment under

[4] On fee land—the only land affected by reservation status *vis-à-vis* non-Indians—tribal jurisdiction over non-Indians is "presumptively invalid," *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 554 U.S. 316, 330 (2008), while state jurisdiction over non-Indians is presumptively valid absent meaningful federal or tribal involvement. *See, e.g.*, *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 185 (1989) (upholding state oil and gas severance taxes).

the Dawes Act alone. Under the Dawes Act, tribe-specific acts were necessary to seek "purchase and release" of "portions of its reservation." 24 Stat. at 388, §5. "[P]urchase and release," of course, is the equivalent of the cession and sum-certain transactions that the Supreme Court holds show intent to diminish a reservation. *Solem*, 465 U.S. at 470. By contrast, courts have consistently found that fee land opened to non-Indian purchase under acts like the Dawes Act, which simply allot land in a particular area, leaving some open to non-Indian purchase immediately or after removal of trust status, remain part of pre-existing reservations. *See, e.g.*, *Parker*, 136 S. Ct. at 1079-1080; *Mattz*, 412 U.S. at 497; *Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351, 473.

Before the Supreme Court made this proposition clear, lower courts regularly specified that without a tribe-specific act, sale to non-Indians did not diminish a reservation. As future Supreme Court Justice Harry Blackmun stated in upholding federal jurisdiction over non-Indian fee land within the undiminished portion of the Rosebud Reservation:

> Other courts almost uniformly have upheld federal jurisdiction or denied state jurisdiction, where the offense was committed by an Indian within the boundaries of a reservation but on particular land not owned by an Indian. Disestablishment thus is not effected by an allotment to an Indian or by conveyance of the Indian title to a non-Indian.

Beardslee v. United States, 387 F.2d 280, 286 (8th Cir. 1967) (string-cite omitted). Similarly, the Tenth Circuit recognized early on the "well-established principle[]"

that "allotment of lands in severalty or the conveyance of land to non-Indians did not operate to disestablish the reservation or create a state jurisdictional enclave within the limits of the reservation." *Ellis v. Page*, 351 F.2d 250, 252 (10th Cir. 1965) (citing *Tooisgah v. United States*, 186 F.2d 93 (10th Cir. 1950)). A tribe-specific act, ceding all tribal interests in the territory, was necessary to do that. *Id.*

Under the opinion below, however, fee lands on reservations of tribes across the nation would be diminished with or without a tribe-specific act. The impact would be vast. By 1935, the U.S. Department of the Interior reported, "of 213 reservations which exist today, 118 have been allotted, and more than three-fourths of Indians have been brought under the provisions of the [Dawes Act]." Dep't of the Interior, Office of Indian Affairs, Indian Land Tenure, Economic Status, and Population Trends 5 (1935). Even at that early date, 23 million acres of fee-patented Indian allotments had been lost to non-Indians. *Id.* at 6. On sampled reservations, the government found, "only 3 to 20 percent of the fee-patented land has remained in Indian ownership." *Id.* If all of this land were diminished, between 80% and 97% of all of those reservations would no longer be reservation land.

B. Even if the District Court's Reasoning Applied Only to Reservations Expressly Allotted under the Dawes Act, It Would Diminish Dozens of Reservations, Including Some the Supreme Court Has Affirmed.

Even if the District Court's reasoning applied only to tribes specifically allotted under the Dawes Act, the impact would be staggering. Although Congress enacted numerous statutes carving out parts of existing reservations for special treatment, many reservations were allotted under the Dawes Act directly, or the Dawes Act plus other statutes. The Indian Land Tenure Foundation has identified forty-five reservations allotted as a result. *Land Tenure History: Tribe/Reservation Allotment Legislation*, ILTF, https://iltf.org/land-issues/history/ (last visited Sept. 20, 2019). No court has held these reservations diminished as a result of allotment and alienation alone.[5]

The Supreme Court has even affirmed the boundaries of one such reservation by relying on the non-diminishing effect of the Dawes Act. In 1892, Congress provided for allotments "under the provisions of the act of February eighth, eighteen hundred and eighty-seven, entitled 'an act to provide for the allotment of lands in severalty,'" (now known as the Dawes Act), on the Klamath Reservation established for the Yurok and Hoopa tribes. 27 Stat. 52, 53 (1892). Many years later, state police

[5] Reservations of some of these tribes, such as the Siletz of Oregon, were disestablished during the Termination Era, and others, such as the Ponca and Otoe Missouria in Oklahoma, were disestablished by later allotment-era statutes. 33 Stat. 218.

arrested a Yurok man, Raymond Mattz, for fishing with a gill net and seized his equipment. *Mattz*, 412 U.S. at 484. The seizure occurred on land owned by the Simpson Timber Company rather than Mattz's allotment. Brief for Petitioner at 4, Mattz v. Arnett, 1973 WL 172525 (1973) (No.17-1182). The Supreme Court held that although owned by non-Indians, the land remained part of the reservation. *Mattz*, 412 U.S. at 485. The Court expressly relied on the fact that the 1892 statute had the same effect as the Dawes Act: "Its allotment provisions, which do not differ materially from those of the [Dawes Act], and which in fact refer to the earlier Act, do not, alone, recite or even suggest that Congress intended thereby to terminate the Klamath River Reservation." *Id*. at 497. The holding below cannot be squared with *Mattz*.

Indeed, under the District Court's rationale, all fee land within the Sioux reservations of North and South Dakota is no longer Indian country. The 1889 Act breaking the Great Sioux Reservation into seven smaller reservations provided that the reservations should be allotted and "each and every allottee . . . shall be entitled to all the rights and privileges and be subject to the provisions of section 6 of" the Dawes Act. 25 Stat. 888, 891 §11 (1889). The Supreme Court and lower courts have found that some *later* acts opening portions of those reservations to non-Indian purchase diminished them and others did not. *Compare Solem*, 465 U.S. 463 (Cheyenne River Sioux Reservation not diminished), *United States v. Grey Bear*,

836 F.2d 1088 (8th Cir. 1987) (Devil's Lake Sioux Reservation not diminished), *and Beardslee*, 387 F.2d 280 (interior portion of Rosebud Sioux Reservation not diminished), *with Yankton Sioux*, 522 U.S. 329 (Yankton Sioux Reservation diminished) *and DeCoteau*, 420 U.S. 425 (exterior portion of Rosebud Sioux diminished). No court, however, has found that alienation of allotments pursuant to the extension of the Dawes Act alone equaled diminishment.

Lower courts have held the same regarding the White Earth Reservation. In 1904, Congress specified that allotments there "shall be, and the patents issued therefor, in the manner and having the same effect as the [Dawes] Act . . ." 33 Stat. 539 (1904). Most of the patented land was alienated, and in the 1970s the state arrested tribal citizens for violating state game or fish laws on non-Indian fee lands within the reservation. *Clark*, 282 N.W.2d at 903-904. The Minnesota Supreme Court held that because no statute had disestablished the reservation, "all lands within its exterior boundaries are 'Indian country' as defined by 18 U.S.C.A. § 1151." *Id.* at 907; *see also White Earth*, 518 F. Supp. at 534, 538 (holding that tribal citizens were "entitled to hunt, fish, and gather wild rice" without state regulation on the Reservation, although all but a small fraction was non-Indian fee land).

We have found no other cases involving tribes allotted under the Dawes Act alone, because no court—before this one—has suggested that alienation without a tribe-specific act diminishes a reservation. To the contrary, those tribes are actively

involved in managing all land within their boundaries. For example, the Winnebago Tribe of Nebraska has spent millions of dollars buying back land alienated under the Act to restore it to tribal control. Kevin Abourezk, *Tribe reclaiming land lost after the Homestead Act*, Lincoln Journal Star (May 20, 2012), https://journalstar.com/news/state-and-regional/nebraska/tribe-reclaiming-land-lost-after-the-homestead-act/article_08f42e25-0aee-5e08-9519-b274e7d5fc77.html. The Iowa Tribe of Kansas and Nebraska, whose reservation was once 90% in non-Indian ownership, has now bought back 30% of its reservation land. David Hendee, *Iowa Tribe regains part of its reservation in Nebraska in deal with Nature Conservancy*, Omaha World Herald (April 5, 2018), https://www.omaha.com/news/nebraska/iowa-tribe-regains-part-of-its-reservation-in-nebraska-in/article_4921e9f4-3709-57d8-a00b-2146fcf0ec2e.html. If the opinion below were right, these concerted tribal efforts to restore their reservations are in vain.

These tribes – as well as federal, state, and local governments – are relying on generations of Supreme Court and lower court precedent establishing that allotment and alienation under the Dawes Act and Burke Act alone do not diminish a reservation. The holding of the District Court below would upend that long-held understanding. This radical reversal of existing law cannot stand.

CONCLUSION

For the forgoing reasons, the decision below should be reversed.

Respectfully submitted this 20th day of September, 2019.

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CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to Fed. R. App. P. 32(g)(1), that this document, "***AMICI CURIAE* BRIEF OF THE NATIONAL CONGRESS OF AMERICAN INDIANS AND THE INDIAN LAND TENURE FOUNDATION IN SUPPORT OF PLAINTIFF-APPELLANT ONEIDA NATION AND REVERSAL OF THE DISTRICT COURT**":

(1) complies with the page limitation set forth in Fed. R. App. P. 29(a)(5) and 7th Circuit Rule 29 because it contains 6,969 words; and

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Dated: September 20, 2019

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CERTIFICATE OF SERVICE

I hereby certify that on September 20, 2019, pursuant to Fed. R. App. P. 25(c)(2) and the 7th Circuit Rule 25(a), I electronically filed the foregoing, "***AMICI CURIAE* BRIEF OF THE NATIONAL CONGRESS OF AMERICAN INDIANS AND THE INDIAN LAND TENURE FOUNDATION IN SUPPORT OF PLAINTIFF-APPELLANT ONEIDA NATION AND REVERSAL OF THE DISTRICT COURT**" with the Clerk of the Court for the United States Court of Appeals for the 7th Circuit via the Court's appellate CM/ECF system. Participants in the case who were registered CM/ECF users were served by the CM/ECF system at that time.

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