No. 14-1406

IN THE
Supreme Court of the United States

NEBRASKA, ET AL.,
Petitioners,

v.

MITCH PARKER, ET AL.,
Respondents.

On Writ of Certiorari To The United States Court of Appeals For the Eighth Circuit

BRIEF FOR *AMICUS CURIAE* VILLAGE OF HOBART, WISCONSIN AND PENDER PUBLIC SCHOOLS IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST

The Village of Hobart is a Wisconsin municipality that lies wholly within land claimed to be part of the Oneida Tribe of Indians of Wisconsin's reservation. Pender Public Schools is a public school district located in Pender, Nebraska, which operates on the land the Omaha Tribe is claiming, in this case, is within its reservation.[1]

While hundreds of miles and several states separate these municipal entities, they share a common concern. Like so many other state and local governments within this country, they both lie within land that used to be designated as a reservation, but long ago lost any semblance of being Indian Country. More than a century ago, these municipal entities began exercising their jurisdiction, without tribal or federal interference over this land. This long-settled state jurisdiction is now being threatened by the ever expanding attempts by tribal governments, often with the aid of

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[1] This *amici* brief is presented pursuant to this Court's Rule 37. The parties have consented to this brief and their consents have been filed with this Court. Pursuant to this Court's Rule 37.6, counsels of record for the *amici* represent they authorized this brief, no counsel for either party authored this brief in whole or in part, and no party or party's counsel made a monetary contribution intended to fund the preparations or submission of this brief. No person or entity other than *amici curiae* or its counsel made a monetary contribution to its preparation or submission.

the federal government, to re-create long ago diminished reservations.

Obviously, Pender and the Pender Public Schools will be directly affected by whether this Court determines diminishment of the Omaha reservation has occurred. As a result of treating the land as reservation land, school districts and other important community services that rely on local and state tax revenue will be more susceptible to loss of funding and face federal and tribal regulation, hampering their ability to operate under the principle of subsidiarity—that the people of Pender, and their duly-elected school board, know what is best for their children. Potential changes to how the school district is operated and its curriculum will also negatively affect the population in the affected area and, in turn, the area's economy.

Hobart and every similarly-situated municipal entity that happens to be on historic reservation land, despite longstanding and uninterrupted state governance, will also be severely disrupted by an affirmance of the lower court's decision. Hobart has consistently argued the Oneida reservation has been disestablished.

Not only does the historical record confirm the Oneida reservation in Wisconsin has been disestablished, this fact has also been confirmed by two federal judges. In 1909, a federal court held "[t]he jurisdiction has been distinctly renounced by the United States, and is now clearly vested in the states." *U.S. v. Hall*, 171 F. 214, 218 (1909). In 1933,

a federal court stated, "[t]herefore, there is no escape from the proposition that the government, in passing and applying the Dawes Act, but conceived itself in duty bound to carry out its provisions in the interest of the tribe and its members. Plainly, this resulted in a discontinuance of the reservation, and a recognition of the power of the state to incorporate the land in the towns in question." *Stevens v. County of Brown*, (C.A. No. 307) (E.D. Wis., November 3, 1933).

Despite these holdings and facts, Hobart finds itself still litigating this issue and fighting to maintain its sovereign control. The Oneida's claim to a reservation and to sovereign control has led to constant jurisdictional disputes relating to taxation, zoning, city planning, policing, public services, and environmental issues. The Oneida will not only take an affirmance of the Eight Circuit's decision as a license to continue efforts to assert its sovereign control over Hobart and its residents, it will enhance those efforts, further disrupting Hobart's ability to govern. A reversal, however, will restrict the Oneida's sovereign control to only those parcels that have been placed into trust through the Indian Reorganization Act (IRA) and ensure the Oneida does not expand its reach to include all of Hobart and its non-tribal residents and businesses.

The amici thus submit this brief to offer their perspectives as municipal entities that will be dramatically harmed by re-creating tribal jurisdiction in areas that have been exclusively under the amici's jurisdiction for generations.

The Village and school system agree with the arguments advanced by the Petitioners. However, the purpose of this amicus brief is to advance a related but alternative argument, which also leads to the conclusion the Omaha Reservation has been diminished. This amicus brief also serves to illustrate the disruptive effect of allowing a tribe to reestablish jurisdiction over land long ago abandoned on local governmental entities, their businesses, and their individual residents.

SUMMARY OF ARGUMENT

City of Sherrill v. Oneida Indian Nation of New York, 544 U.S. 197 (2005) dramatically altered the legal landscape against which tribal land claims are considered and compels the reversal of the lower court's decision. *City of Sherrill* holds an alternative, equitable basis exists to conclude diminishment of a reservation has occurred, separate from the congressional intent analysis under *Solem v. Bartlett,* 465 U.S. 463 (1984). *City of Sherrill* provides that, when state jurisdiction in an area that is distinctly non-Indian in character remains unquestioned for generations, a tribe may not unilaterally re-create its reservation. Because the precise situation found in *City of Sherrill* exists in this case, the Court, consistent with *City of Sherrill*, should prevent the Omaha Tribe from unilaterally reviving its ancient sovereignty, in whole or in part, over that part of the former Omaha Reservation that once existed west of the railroad right-of-way.

ARGUMENT

The lower courts erred by analyzing subsequent demographic and jurisdictional evidence *only* under the third factor of *Solem*, as it relates to evidence of congressional intent of diminishment, and not *also* as substantive proof of equitable diminishment, as recognized by *City of Sherrill*. Evidence supporting equitable diminishment will almost always overlap with evidence supporting the third *Solem* factor, a *post hoc* finding of congressional intent of diminishment derived from demographic evidence such as land use, the Indian or non-Indian character of the area and populace, and the existence or duration of consistent and undisturbed state governance. Yet, the lower courts refused to credit this evidence, claiming *Solem* precludes its use in the absence of some expression or evidence of congressional intent. *See Smith v. Parker*, 996 F.Supp.2d 815, 844 (D. Neb. 2014) ("Even if this demographic evidence did establish diminishment, it cannot overcome my conclusion that the language of the 1882 Act itself does not clearly evince Congress' intent to diminish the Omaha Reservation."); *Smith v. Parker*, 774 F.3d 1166, 1168 (8th Cir. 2014) ("Based on our de novo review, we discern that the district court has thoroughly, thoughtfully, and accurately considered the evidence in light of the guideposts provided by the Supreme Court [in *Solem*] as well as this court."). Not only have the lower courts misinterpreted *Solem,* to unduly limit, if not completely preclude use of this demographic evidence as part of the congressional intent analysis, they failed to properly apply *City of Sherrill,* which

compels the use of this evidence *even in the absence of clear congressional intent*.

I. *City Of Sherrill* Compels Reversal.

The lower courts failed to apprehend the import of *City of Sherrill* which "dramatically altered the legal landscape" against which tribal land claims are considered. *Cayuga Indian Nation of New York, et al. v. Pataki, et al.*, 413 F.3d 266, 273 (2d. Cir. 2005), cert. denied, 547 U.S. 1128 (2006). Prior to the holding in *City of Sherrill*, the means to diminish a reservation was through congressional action. *See* generally *Solem*, 465 U.S. 463. As emphasized in *Solem*, "[t]he first and governing principle is that only Congress can divest a reservation of its land and diminish its boundaries." *Id.* at 470. *City of Sherrill* alters that analysis by providing an alternative to congressional diminishment—equitable diminishment.

The decisions of the lower courts identify the *Solem* factors as the exclusive analysis in determining whether a reservation has been diminished, completely ignoring this Court's subsequent holding in *City of Sherrill*. *Solem* examines whether *congressional intent* of diminishment exists by (1) looking at the statutory language of certain acts for specific evidence of intent to diminish; (2) reviewing the historical context at the time of the act for evidence of intent to diminish; and (3) reviewing the events that occurred after the passage of the act, including "Congress's own treatment of the affected areas," "the manner in

which the Bureau of Indians Affairs and local judicial authorities dealt with unallotted open land," while also recognizing that "who actually moved onto opened reservation lands is also relevant to deciding whether a surplus land act diminished a reservation." *Solem*, 465 U.S. at 471. *Solem* also acknowledged that "*de facto*, if not *de jure*, diminishment" may occur under this third factor, and that the Court will "look to the subsequent demographic history of opened lands as one additional clue as to what Congress expected would happen once land on a particular reservation was opened to non-Indian settlers." *Id.*, at 471-72.

While the evidence relevant to the third factor of *Solem* substantially overlaps the evidence used to find equitable diminishment in *City of Sherrill*, *City of Sherrill* does not simply restate the third factor of *Solem*. Instead, it provides that a tribe may lose sovereign control over ancient reservation land, regardless of congressional intent, when that area has long been regulated, governed, and populated by non-Indian inhabitants.

City of Sherrill held "this long lapse of time, during which the Oneidas did not seek to revive their sovereign control through equitable relief in court, and the attendant dramatic changes in the character of the properties, preclude [the Oneidas] from gaining the disruptive remedy it now seeks." *City of Sherrill,* 544 U.S. at 216-17. The Court came to this conclusion despite the absence of any Congressional Act diminishing the Tribe's original reservation, or

otherwise removing or limiting the Tribe's historic sovereign control over the land.

Invoking traditional theories of equity, the Court found "the distance from 1805 to the present day, the Oneida's long delay in seeking equitable relief against New York or its local units, and developments in the city of Sherrill spanning several generations, evoke the doctrines of laches, acquiescence, and impossibility, and render inequitable the piecemeal shift in governance this suit seeks unilaterally to initiate." *Id.* at 221. Accordingly, this Court held "'standards of federal Indian law and federal equity practice' preclude the Tribe from rekindling embers of sovereignty that long ago grew cold." *Id.* at 214.

Justice Stevens' dissent in *City of Sherrill* confirms the practical effect of the majority's holding by noting: "the Court has done what only Congress may do—it has effectively proclaimed a diminishment of the Tribe's reservation and an abrogation of its elemental right to tax immunity." *Id.* at 224-25 (Stevens, J. dissent). The majority was cognizant of Justice Stevens' dissent and concluded equity provides another means to diminish a tribe's sovereign authority over ancient reservation land. Specifically, the Court held "the Court need not decide today whether . . . the 1838 Treaty of Buffalo Creek disestablished the Oneida's reservation as Sherrill argues . . . [t]he relief [the Oneida] seeks . . . is unavailable because of the long lapse of time, during which New York's governance remained undisturbed, and the present-day and future

disruptions such relief would engender." *Id.* at 215, n.9. In other words, congressional intent did not matter in *City of Sherrill* because reinstitution of the Tribe's sovereign authority was "unavailable" for a completely different reason.

In *City of Sherrill*, regardless of whether a reservation existed or Congress intended to diminish a Reservation, "the longstanding, distinctly non-Indian character of central New York and its inhabitants, the regulatory authority over the area constantly exercised by the State and its counties and towns for 200 years, and the Oneida's long delay in seeking judicial relief against parties other than the United States" provided equitable diminishment. *Id*. at 198.

While demographic evidence may be the "least compelling" factor in *Solem's* "congressional intent" diminishment analysis, that evidence stands on its own under the *City of Sherrill* analysis. Drawing the analysis away from the underlying treaty and Congressional action, *City of Sherrill* held, "when a party belatedly asserts a right to present and future sovereign control over territory, longstanding observances and settled expectations are *prime considerations*." *Id.* at 200. (emphasis added).

This analysis has subsequently been examined and accepted by other courts: "[I]n the wake of this trilogy – *Sherrill*, *Cayuga*, and *Oneida* – it is now well-established that Indian land claims asserted generations after an alleged dispossession are inherently disruptive of state and local governance

and the settled expectations of current landowners, and are subject to dismissal on the basis of laches, acquiescence, and impossibility."[2] *Stockbridge-Munsee Cmty. v. State of New York, et al.*, 756 F.3d 163, 165 (2d. Cir. 2014).[3]

Failing to adhere to the *Stockbridge-Munsee Community* interpretation, the lower courts in this case refused to credit this demographic and jurisdictional evidence, claiming *Solem* precludes its

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[2] The Second Circuit was referring specifically to *City of Sherrill*, 544 U.S. 197; *Cayuga Indian Nation*, 413 F.3d 266 and *Oneida Indian Nation of NY v. Cty. of Oneida*, 617 F.3d 114 (2d. Cir. 2010), cert. denied, ____ U.S. ____, 132 S.Ct. 452 (2011).

[3] Despite this Court's firm holding that equitable diminishment may result from demographic and jurisdictional history alone, even in the absence of congressional intent to diminish, at least one other federal appellate court has seemingly questioned this Court, stating it would ignore demographic and jurisdictional history in the absence of congressional intent to diminish. *See Osage Nation v. Irby*, 597 F.3d 1117, 1122 (10th Cir. 2010) (In other words, "subsequent events and demographic history can support and confirm other evidence but cannot stand on their own.") (citation omitted); *see also Shawnee Tribe v. U.S.*, 423 F.3d 1204, 1223 (10th Cir. 2005) (looking to an area's subsequent demographic history "will not substitute for failure of the instrument's language *or* contemporaneous history to evidence an intention to terminate all or some of the reservation.") (emphasis added.) In both cases, however, the court found the reservations were disestablished. The court did not rely on *City of Sherrill* however, or the Second Circuit's treatment of *City of Sherrill,* in which "subsequent events and demographic history" did stand on its own.

use in the absence of some expression or evidence of congressional intent. Again, *City of Sherrill* does not fall under the third factor of *Solem*; it provides a different, alternative test that precludes reestablishment of sovereign control. The lower courts erred by failing to recognize or analyze *City of Sherrill* in light of the clear applicability to this case.

II. The Scope Of *City Of Sherrill* Is Expansive.

As noted by the Second Circuit, the broad pronouncements in *City of Sherrill* preclude limiting its application:

> The Court's characterizations of the Oneidas' attempt to regain sovereignty over their land indicate that what concerned the Court was the disruptive nature of the claim itself. See *id.* at 1483 ("[W]e decline to project redress for the Tribe into the present and future, thereby disrupting the governance of central New York's counties and towns."); *Id.* at 1491 ("This long lapse of time, during which the Oneidas did not seek to revive their sovereign control through equitable relief in court, and the attendant dramatic changes in the character of the properties, preclude [the Tribe] from gaining the disruptive remedy it now seeks."); *id.* at 1491 n.11 ("[The Oneidas'] claim concerns grave, but ancient, wrongs, and the relief available must be commensurate with that historical reality."). Although we recognize that the Supreme Court did not identify a formal standard for

> assessing when these equitable defenses apply, the broadness of the Supreme Court's statements indicates to us that *Sherrill*'s holding is not narrowly limited to claims identical to that brought by the Oneidas, seeking a revival of sovereignty, but rather, that these equitable defenses apply to "disruptive" Indian land claims more generally.

Cayuga Indian Nation of New York, 413 F.3d at 274.

Five years later, the Second Circuit had another opportunity to revisit the holding of *City of Sherrill* in *Oneida Nation of New York v. County of Oneida*, 617 F.3d 114 (2d. Cir. 2010). The Second Circuit confirmed it is the disruptive nature of the claim itself that controls whether or not the claim may be barred by laches, acquiescence or impossibility:

> The equitable defense recognized in *Sherrill* and *Cayuga* is not limited to "possessory" claims – to claims premised on the assertion of a current possessory right to tribal lands held by others on the theory that the original transfer of ownership of the lands was in some way flawed. Rather, the defense is properly applied to bar any ancient land claims that are disruptive of significant and justified societal expectations that have arisen as a result of a lapse of time during which the plaintiffs did not seek relief. See *Sherrill*, 544 U.S. at 215 n.9, 125 S.Ct. 1478 ("The relief [the New York Oneidas] seek [ ]

> … is unavailable because of the long lapse of time, during which New York's governance remained undisturbed, and the present-day and future disruption such relief would engender.").

Oneida v. Oneida County, 617 F.3d at 135.

The Second Circuit continued:

> Under the reasoning employed in *Cayuga*, then, the equitable defense originally recognized in *Sherrill* is potentially applicable to *all* ancient land claims that are disruptive of justified societal interests that have developed over a long period of time, of which possessory claims are merely one type, and regardless of the particular remedy sought.

Id. at 136. (emphasis added).

The reason underlying a tribe's or the federal government's delay in attempting to resurrect reservation status is also instructive:

> Our inquiry is informed by the understanding that, at the turn of this century, Congress did not view the distinction between acquiring Indian property and assuming jurisdiction over Indian territory as a critical one, in part because "[t]he notion that reservation status of Indian lands might not be coextensive

> with tribal ownership was unfamiliar," *Solem*, 465 U.S. at 468, 104 S.Ct. at 1164, and in part because Congress then assumed that the reservation system would fade over time. "Given this expectation, Congress naturally failed to be meticulous in clarifying whether a particular piece of legislation formally sliced a certain parcel of land off one reservation." *Ibid.*; see also *Hagen*, 510 U.S. 399, 426, 114 S.Ct. 958, 973, 127 L.Ed.2d 252 (1994). (Blackmun, J., dissenting) ("As a result of the patina history has placed on the allotment Acts, the Court is presented with questions that their architects could not have foreseen").

South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 343-44 (1998).

> Congress retreated from the reservation concept and began to dismantle the territories that it had previously set aside as permanent and exclusive homes for Indian tribes. See *Solem v. Bartlett*, 465 U.S. 463, 466, 104 S.Ct. 1161, 1163-1164, 79 L.Ed.2d 443 (1984). The pressure from westward-bound homesteaders, and the belief that the Indians would benefit from private property ownership, prompted passage of the Dawes Act in 1887, 24 Stat. 388. The Dawes Act permitted the Federal Government to allot tracts of tribal land to individual Indians and, with tribal consent, to open the remaining holdings to non-Indian

> settlement. Within a generation or two, it was thought, the tribes would dissolve, their reservations would disappear, and individual Indians would be absorbed into the larger community of white settlers. See Hearings on H.R. 7902 before the House Committee on Indian Affairs, 73d Cong., 2d Sess., 428 (1934) (statement of D.S. Otis on the history of the allotment policy).

South Dakota, 522 U.S. at 325.

> The notion that reservation status of Indian lands might not be coextensive with tribal ownership was unfamiliar at the turn of the century. Indian lands were judicially defined to include only those lands in which the Indians held some form of property interest: trust lands, individual allotments, and, to a more limited degree, open lands that had not yet been claimed by non-Indians.

Solem, 465 U.S. at 468.

In other words, the application of a defense based on laches, acquiescence or impossibility hardly works an undue hardship on a tribe, when, at the time these Acts were passed, everyone knew their purpose was to make the reservations "disappear" and "fade" away. The fact the economics of the situation have now changed, so that tribes currently have the ability to try to resurrect the existence of long departed reservations, cannot overcome more

than a century's worth of acknowledgment that the reservations no longer exist.

As a result, the mere fact that congressional acts disposing of reservation land may be ambiguous or silent as to Congress' intent relating to diminishment or disestablishment, cannot overcome the equitable prohibition against a tribe's disruptive attempt to reinstate sovereign authority over ancient reservation land that has long since passed to and has been governed by state and local governments.

III. This Case Contains Factors Identical To Those Used By *City Of Sherrill* To Preclude The Resuscitation Of Sovereign Control.

For the same reasons the Court found equitable diminishment in *City of Sherrill*, it should find it here. The parallels are patent and application should be identical. *City of Sherrill* noted its continuity of governance by confirming that, "[f]or the past two centuries, New York and its county and municipal units have continuously governed the territory." *City of Sherrill,* 544 U.S. at 216. Similarly, Nebraska and Pender exercised 125 years of uninterrupted governance over this area. "From 1882 until 2006, the State of Nebraska consistently, and exclusively, exercised civil and criminal jurisdiction over Pender, Nebraska and its surrounding areas . . . without contest or objection from the Omaha Tribe of Nebraska . . . or the United States." Pet. Br. 2 (citing J.A. 204, 206, 208, 364-68). In fact, "[n]either Pender nor its citizens have ever been subjected to the

jurisdiction of the Tribe." Pet. Br. 25 (citing J.A. 215-16).

City of Sherrill highlighted the non-Indian character of the land in question, finding "[t]he city of Sherrill and Oneida County are today overwhelmingly populated by non-Indians." *City of Sherrill,* 544 U.S. at 219. The Village of Pender has a similarly non-Indian character. "Since the early twentieth century, non-Indians have comprised over 98% of the disputed area's population and the United States conveyed over 98% of the land in the disputed area to non-Indians." Pet. Br. 2 (citing J.A. 189, 215-16, 369-73). In fact, the "Tribe has no office, operates no schools, industries, or businesses in the disputed area and has not conducted any government or ceremonial activities there . . . has no mineral rights or other claims to land . . . and the Tribe has never enforced tribal ordinances west of the railroad right-of-way." Pet. Br. 17 (citing J.A. 215-16). Just like the residents of Sherrill developed justifiable expectations of self-governance, the Nebraskans living within Pender, likewise, justifiably expect that they will continue to govern themselves through democratically-elected representatives.

Where a great period of time has elapsed since sovereign control has been exercised by the Tribe; where a State has exercised uninterrupted governance over that area the entire time; where re-creating tribal sovereign control would be unduly disruptive to a predominantly non-Indian area and population; and where justifiable expectations of self-governance exist through development of an area

under this self-governance—this Court should not countenance a tribe's attempt to rekindle the "embers of sovereignty that long ago grew cold." *City of Sherrill*, 544 U.S. at 214. Just as this Court refused to allow the Oneida Tribe from reinstating sovereign control over the Oneida's historic reservation in *City of Sherrill*, it should refuse to allow the Omaha Tribe and federal government to do so in this case.

IV. Affirmation Of The Decision Below Will Result In Severe Disruptions To Any Government, Business, And Resident Individually Located Within An Ancient Reservation.

This case is not *just* about the tribal regulation of non-Indians who operate businesses in Pender, Nebraska. This case is about the wisdom of resuscitating sovereign jurisdiction over former reservation land throughout the entire United States, land that, for generations, has been under the exclusive jurisdiction of the state and local governments, and left undisturbed by both tribal and federal interests. This case is about the executive branch's continued attempts to usurp state and local authority. This case is about disrupting the justifiable expectations developed by all who have decided to live and establish businesses on land governed by known rules—rules they had a hand in creating.

A. Courts Have Consistently Confirmed The Disruptive Effects Of Re-Establishing Sovereign Control Over An Ancient Reservation Land.

City of Sherrill warned that "[i]f [the Oneida] may unilaterally reassert sovereign control and remove these parcels from the local tax rolls, *little would prevent the Tribe from initiating a new generation of litigation* to free the parcels from local zoning or other regulatory controls that protect all landowners in the area." *City of Sherrill,* 544 U.S. at 220. (emphasis added). Disruption will abound.

The district court for the Northern District of New York, well versed in federal Indian law, came to the same conclusion:

> If avoidance of taxation is disruptive, avoidance of complying with local zoning and land use laws is no less disruptive. In fact, it is even more disruptive. The Supreme Court clearly expressed its concern about the disruptive effects of immunity from state and local zoning laws, even to the point of citing to this case as an example. *See City of Sherrill*, 125 S.Ct. at 1493 n. 13. Even the lone dissenter, Justice John Paul Stevens, opined that local taxation was the "least disruptive to other sovereigns," and noted that "[g]iven the State's strong interest in zoning its land without exception for a small number of Indian-held properties arranged in checkerboard fashion, the balance of

> interests obviously supports the retention of state jurisdiction in this sphere." *Id.* at 1497 n. 6, 161 L.Ed.2d 386 (Stevens, J., dissenting) (citing *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 215, 107 S.Ct. 1083, 94 L.Ed.2d 244 (1987)).

Cayuga Indian Nation of New York v. Village of Union Springs, 390 F. Supp.2d 203, 206 (N.D.N.Y. 2005).

The New York District Court concluded:

> The Nation is seeking relief that is even more disruptive than non payment of taxes. The Supreme Court's strong language in *City of Sherrill* regarding the disruptive effect on the every day administration of state and local governments bars the Nation from asserting immunity from state and local zoning laws and regulations.

Id.

Nearly ten years after this Court's ruling in *City of Sherrill*, the Second Circuit held: "[i]t is now well-established that Indian land claims asserted generations after an alleged dispossession are *inherently disruptive* of state and local governance and the settled expectations of current landowners, and are subject to dismissal on the basis of laches, acquiescence, and impossibility." *Stockbridge-Munsee Cmty.*, 756 F.3d at 165. (emphasis added).

Moreover, an affirmance of the non-diminishment decision of the lower court would license every tribe within the United States to do the exact same thing—attempt to reassert sovereign control at the expense of state and local governments. This *inherent disruption* will occur everywhere. This is not hyperbole. Real life examples of these disruptive effects also abound.

Both Hobart and Pender Public Schools will feel these effects, the former through the Oneida's attempts to seize sovereign control from Hobart by continuing to claim reservation status, and the latter directly through the potential insertion of Omaha sovereignty over Pender and its various municipal entities. The decision of this Court will either sanction tribal intrusions into the traditional sovereign powers of municipal entities and ensure "a new generation of litigation," or preclude this conduct, and assure municipalities, businesses, and individuals that they will be allowed to control and regulate themselves through their representative governments.

B. Re-Establishing Sovereign Control Over Ancient Reservation Land Will Result In Numerous And Varied Losses Of State Jurisdiction.

Several states, including Wisconsin, have promulgated regulations limiting a local municipality's ability to regulate land that is within a reservation. Chapter SPS 361 of the Wisconsin Administrative Code was promulgated to "protect the

health, safety and welfare of the public and employees by establishing minimum standards for the design, construction, maintenance and inspection of public buildings, including multifamily dwellings, and places of employment." Wis. Admin. Code SPS § 361.01. Despite this admirable objective, this building code does not, by its express terms, apply to "[b]uildings or structures located on Indian reservation land that are held either in trust by the United States, or in fee by the tribe or a tribal member . . . ." Wis. Admin. Code SPS § 361.02(3)(b).

Chapter SPS 314 of the Wisconsin Administrative Code governs "Fire Prevention." However, this chapter does not apply to "[b]uildings or structures located on Indian reservation lands that are held either in trust by the United States, or in fee by the tribe or a tribal member . . . ." Wis. Admin. Code SPS § 314.01(1)(c)(3)(a).

The code section regulating "Flammable, Combustible, and Hazardous Liquids," was enacted "to provide fire and life safety through the safe storage, display, installation, operation, use, maintenance and transportation of flammable, combustible and hazardous liquids and the equipment, facilities, buildings and premises that are used to store, transfer and dispense them." Wis. Admin. Code ATCP § 93.010(1). Similarly, this safety regulation does not apply to "[f]acilities located on Indian reservation land that are held either in trust by the United States, or in fee by the tribe or a tribal member . . . ." Wis. Admin. Code ATCP § 93.020(6)(u).

Chapter SPS 318 governs "Elevators, Escalators, and Lift Devices," and was promulgated "to establish minimum safety standards for the design, construction, installation, operation, inspection, testing, maintenance, alteration, repair, and replacement of conveyances." Wis. Admin. Code SPS § 318.1001. The Chapter does not apply to "[b]uildings or structures located on Indian reservation land that are held either in trust by the United States, or in fee by the tribe or a tribal member." Wis. Admin. Code SPS § 318.1003(1)(d)1.

The State's law related to "Erosion Control, Sediment Control and Storm Water Management," was created "to establish uniform standards and criteria for the design, installation and maintenance of erosion and sediment control practices at building construction sites and minimum performance standards for post construction storm water management on building sites . . . so as to protect the waters of the state." Wis. Admin. Code SPS § 360.01. Under Wis. Admin. Code SPS § 360.10, which governs "Governmental oversight," an annotation provides: "This code does not apply to . . . buildings on Indian reservations . . . ." Wis. Admin. Code SPA § 360.10(2)(c), note.

The Wisconsin Statute entitled "Tribal Law Enforcement Officers; Powers and Duties" defines reservation lands to mean "all lands within the exterior boundaries of an Indian reservation in this state." Wis. Stat. § 165.92(1)(a). The statute goes on to state, that with some exceptions, a tribal law

enforcement officer's powers and duties may be exercised "only on the reservation of the tribe or on trust lands held for the tribe or for a member of the tribe that employs the officer." Wis. Stat.§ 165.92(2)(b). Once again, the labeling of an area as "reservation" has profound effects. The conflicts in policing jurisdiction, between various law enforcement agencies and the confusion of the public relative to that authority is well known to Hobart and will be triggered wherever the resurrection of a reservation is allowed to occur.

Every one of the above-referenced Code Sections and Statutes are designed to protect the health, safety and welfare of the public, via the local elected government, but do not apply if the land is deemed to be part of a "reservation." If an area of land is able to regain the title of "reservation," rendering all of these public protections inoperative, the disruption to state and local municipalities will be significant.

Similar to the tax levied in Pender, the Oneida have attempted to control business activity through licensing and fees. By way of example, the Oneida informed the Hobart Veterans of Foreign Wars (VFW) it must obtain a building permit from the Oneida instead of a Hobart building permit, to construct a building. The Oneida's rationale was that the VFW's fee land was on a reservation. This sort of jurisdictional dispute will continue to be experienced wherever there is an "expansion" of what can be considered reservation land.

In Hobart, the Oneida have been instructing its tribal members to reject Hobart's provision of services for the properties the Tribe contends are on its reservation, and instead select the Tribe's sanitation services. With fewer residents using services provided by Hobart, Hobart cannot benefit from certain lower "group" rates when it contracts for services, which will result in an obvious adverse financial impact on Hobart and impact its ability to provide these services to the community. This will be compounded by expansion of what is considered the "reservation."

Federal laws also greatly curtail local jurisdiction on land once it is labeled a "reservation." The Clean Water Act (CWA), 33 U.S.C. § 1251 et seq., requires NPDES permit coverage for stormwater discharges from construction, industrial and municipal sources to prevent pollutants from entering surface waters in storm runoffs. Permits are issued by the Environmental Protection Agency (EPA) or by state agencies. *See* 33 U.S.C. § 1342. The CWA grants authority to states to establish water quality standards for waters within their boundaries, to certify compliance, and to issue and enforce discharge permits. The State of Wisconsin has enacted its own federally-approved comprehensive water pollution regulatory system. EPA has stated that "NPDES permits for discharges in Indian Country are issued by EPA."

As a result, and despite the fact the Oneida Reservation in Wisconsin was long ago disestablished, the Region 5 Office of the EPA issued

draft permitting authority to the Oneida. The draft permit provided to the Oneida in Wisconsin "covers discharges of the storm water from . . . the Oneida Reservation.[4]

Once again, the EPA's, and therefore the Tribe's, jurisdiction, is linked to the purported existence of a "reservation." To further illustrate the jurisdictional conflicts and confusion that result from the re-creation of a disestablished or diminished reservation, EPA granted the same draft NPDES permit to Hobart. Hobart's permit also "covers discharge of the storm water from . . . the Oneida Reservation." *Id*. Disruption is sure.

With respect to the Clean Air Act (CAA), 42 U.S.C. § 7401 et seq., in *Oklahoma Dept. of Environmental Quality v. E.P.A.*, 740 F.3d 185 (D.C. Cir. 2014), the U.S. Court of Appeals for the District of Columbia Circuit recently held:

> a state has regulatory jurisdiction under the Clean Air Act over all land within its territory and outside the boundaries of an Indian reservation except insofar as an Indian tribe or the EPA has demonstrated a tribe has jurisdiction. Until such a demonstration has been made, neither a tribe nor the EPA standing in the shoes of a tribe may displace a state's implementation

[4] U.S. Envt'l Protection Agency, Public Notice of Draft NPDES Permits to discharge into waters of the United States, http://www3.epa.gov/region5/water/npdestek/pdfs/pnofwims4prmts.pdf (last accessed 11/19/15).

> plan with respect to a non-reservation area of the state. We therefore grant Oklahoma's petition for review and vacate the Indian Country NSR Rule with respect to non-reservation Indian country.

Id. at 195. The Court also noted that the Oklahoma Department of Environmental Quality sought review of a final rule promulgated by the EPA "establishing a federal implementation plan for the attainment of national air quality standards in 'Indian country.'" *Id.* at 187. The Court further stated:

> "[j]urisdiction to implement the Clean Air Act lies initially in either a state or an Indian tribe. The EPA may in certain circumstances implement a federal program in Indian country, see 42 U.S.C. § 7601(d), but when it does so, in our view, it is subject to the same jurisdictional limitations as the tribe in whose shoes it stands. Because the EPA requires a tribe to show it has jurisdiction before regulating Indian country outside a reservation, yet made no demonstration of tribal jurisdiction before itself regulating those areas, we hold the agency was without authority to displace Oklahoma's state implementation plan in non-reservation Indian country."

Id. In other words, had the land at issue in *Oklahoma Dept. of Environmental Quality* been confirmed to have been within a "reservation," the State would have lost jurisdiction.

Pender Public Schools' interest is also manifest. Issues related to self-governance and regulation of activities on reservation land will necessarily involve operation of public school districts on reservation land. Recent cases show this to be the case. In *Red Mesa Unified School District v. Yellowhair*, No. CV–09–8071, 2010 WL 3855183 (D. Ariz. Sep. 28, 2010), the Red Mesa and Cedar School districts, "which are nonmembers of the Navajo Nation by virtue of their status as Arizona political subdivisions, [] challenged the authority of the defendants to invoke Navajo tribal law to review their personnel decisions." *Id.* at *2. While the court found the "Navajo Nation has no regulatory or adjudicative jurisdiction over Red Mesa and Cedar's employment-related decisions," the trend toward assertion of jurisdiction is evident. *Id.* at *5.

Similarly, in *Belcourt Pub. Sch. Dist. v. Davis*, 997 F.Supp.2d 1017 (D. N.D. 2014) (aff'd in part and rev'd in part), a local school district was forced to engage the courts and incur legal expenses to resist a tribe's attempts to assert its jurisdiction. "The School District commenced these actions, seeking a declaration that the tribal court lacks jurisdiction over the School District and its employees." *Id.* at 1018. In that case, the court found the tribe did have jurisdiction." *Id.* Although the Eight Circuit Court of Appeals recently reversed that decision, the court did not foreclose the possibility of a tribe attempting to assert its jurisdiction in other cases. *Belcourt Pub. Sch. Dist. v. Davis*, 786 F.3d 653 (8th Cir. 2015); *See also Fort Yates Public School Dist. No. 4 v. Murphy*

ex rel. C.M.B., 786 F.3d 662 (8th Cir. 2015) (reversing district court decision agreeing to tribal jurisdiction over public schools).

So, while some lower courts have found the existence of tribal jurisdiction in public school cases and some have not, the trend has and continues to be the assertion of tribal sovereignty over the operation of school districts on reservation land. The inclusion of Pender Public Schools into the reservation, after generations of uninterrupted self-governance, will provide the Omaha Tribe the leverage to continue this national trend. The school district will be faced with legal expenses it simply cannot afford. [5] Additionally, like anyone, Pender Public Schools wants accountability through democratically-elected officials, judges, and representatives, who are

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[5] The threat of protracted and expensive litigation over these issues is very real. Constant legal battles over jurisdiction and regulatory authority are hard on small municipalities like Pender and Hobart which usually do not have the economic resources to fight these battles, despite their obligation to assert jurisdiction for the benefit of the communities they represent. A comparison between the 2015 budgets for Hobart and the Oneida highlights the disproportionate resources between the entities. Hobart has total budgeted expenditures of $7,935,705.00 compared to the Oneida's $409,579,523.00 2015 budget. See 2015 Village of Hobart Operating Budget, adopted Nov. 25, 2014, http://www.hobart-wi.org/ (follow "Finance and Budget", then "Annual Village Operating Budget") (last accessed 11/19/15); and Oneida Tribe of Indians of Wisconsin, Resolution and Statement of Effect FY2015 Budget, http://oneidaeye.com/wp-content/uploads/2015/01/OTIW-FY2015-Resolution-Statement-of-Effect.pdf (last accessed 11/19/15)

selected through open elections—not by a completely unfamiliar justice and legal system that precludes the ability of a non-Indian to have any say.

Additionally, the aggrieved businesses who have been assessed with a liquor tax in Pender will want to move to a locale where they are not taxed by multiple sovereignties. Other current and prospective businesses will fear a similar tribal tax will be assessed against them. With the potential for additional taxes, Pender becomes an undesirable place to create and maintain a business, and with less business, and fewer jobs, less revenue will exist to fund the Pender Public Schools. This will occur even before the Omaha Tribe begins the process to have land within the Village of Pender placed into trust and off the tax rolls, under the IRA.

Hobart and Pender are not alone in experiencing these ever-escalating attempts to expand tribal control over fee land within a purported reservation. In 2010, the Standing Rock Sioux Tribe, located in North and South Dakota issued a letter to non-tribal business owners operating on their own fee land within the reservation, indicating a new tribal code "requires any person or entity that engages in or intends to engage in Business on the Standing Rock Reservation to obtain a Business License form the Tax Department."[6] In a related Public Notice, that a

[6] Standing Rock Sioux Tribe Tax Department, Letter to Business Owners, http://tax.standingrock.org/data/upfiles/programs/files/Dear%20Owners%20Revised.pdf (last accessed 11/20/15).

Tribe claimed "it is unlawful for any person or entity to conduct business within the Standing Rock Reservation without a valid Business License." The letter and Public Notice informed the non-tribal businesses that they were mandated to obtain a business license from the Tribe to operate, even on their own fee land. The Tribe supported its mandate by citing Section 16-201 of the Tribe's Constitution, in which the Tribe granted itself the ability to "levy license fees on members and non-members of the tribe who conduct business within the Standing Rock Reservation."

On April 21, 2015, the Confederated Tribes and Bands of the Yakama Nation informed the City of Toppenish, Washington, that the Tribe had "identified" the City as "a business operating within the jurisdiction of the Yakama Nation," citing to the Confederated Tribes and Bands of the Yakama Nation – Tribal Codes and Resolutions § 30.02.07. Toppenish is not the only entity the Yakama Nation is attempting to regulate and tax. On June 1, 2015, the Yakima Herald reported: "[I]n an apparent effort to assert sovereignty and raise revenue, the Yakama Nation is now requiring all nontribal business and municipalities on the reservation to obtain a tribal business license, at an annual $205 cost, in order to operate."[7] Once again, this demand was based upon the claimed existence of a reservation.

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[7] Phil Ferolito, Yakamas seek operating licenses from non-tribal entities, Yakima Herald (Jun. 1, 2015) http://www.yakimaherald.com/news/local/yakamas-seek-operating-licenses-from-nontribal-entities/article_309c94fc-079a-11e5-8799-c3ac88f80414.html.

It is far from speculation that the Pender Public Schools will also receive a notice that it has been "identified" as a business operating on a reservation and is therefore "required" to obtain a license from the Omaha Tribe to continue its operations, a license that comes with fees, curriculum, tribal hiring preferences and other mandates.

These examples of various tribes' attempts to regulate non-tribal members and local municipalities—because they live on or conduct business within a reservation—are not made to suggest such regulations will always be inappropriate. These examples merely emphasize the significant ramifications resulting from a determination that an area of land is still considered to be within a "reservation." Those ramifications may be far less significant, and more appropriate, in an area that has always been treated as a reservation, over which tribal and federal jurisdiction has never been abandoned. However, the disruptive nature of such actions cannot be overstated in areas such as Pender, Nebraska, where none of the occupants of the historic reservation ever dreamed their land could somehow revert back to being part of a current reservation, and thereby subject them to a tribal sovereignty that has never previously been known.

CONCLUSION

The Eighth Circuit ignored this Court's ruling allowing for equitable diminishment as explained in *City of Sherrill*. Additionally, as the Petitioners argue, the Eight Circuit misapplied this Court's

diminishment test as explained in *Solem*. Both of these errors require reversal of the lower court's ruling and a finding that the Omaha Reservation was diminished.

Respectfully submitted,

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November 23, 2015