No. 14-1406

In The
Supreme Court of the United States

STATE OF 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 THE NATIONAL CONGRESS OF AMERICAN INDIANS, *ET AL.* AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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ADDITIONAL *AMICI CURIAE*

Affiliated Tribes of Northwest Indians; Bois Forte Band of Chippewa; Eastern Shoshone Tribe; Ewiiaapaayp Band of Kumeyaay Indians; Elk Valley Rancheria, California; Fond du Lac Band of Lake Superior Chippewa; Great Lakes Indian Fish & Wildlife Commission, Odanah, Wisconsin; Grand Portage Band of Lake Superior Chippewa; Hoopa Valley Tribe; Lac Courte Oreilles Band of Lake Superior Chippewa Indians, Hayward, Wisconsin; Leech Lake Band of Ojibwe; Lower Sioux Indian Community in the State of Minnesota; Mille Lacs Band of Ojibwe; Northern Arapaho Tribe; Minnesota Chippewa Tribe; Oneida Tribe of Indians of Wisconsin; Prairie Island Indian Community; Quapaw Tribe of Oklahoma (the O-Gah-Pah); Red Lake Band of Chippewa Indians; The Sokaogon Chippewa Community, the Mole Lake Band of Lake Superior Chippewa; Swinomish Indian Tribal Community; White Earth Band of Chippewa Indians.

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SECONDARY AUTHORITIES

INTEREST OF *AMICI CURIAE*[1]

The National Congress of American Indians ("NCAI") is the oldest and largest national organization addressing American Indian interests, representing more than 250 American Indian tribes and Alaskan Native villages. Since 1944, NCAI has advised tribal, state and federal governments on a range of Indian issues, including the relevance and legal interpretation of treaties, statutes and executive orders (a) setting aside or establishing reservations as permanent homelands for Indian tribes and (b) providing for the allotment or sale of lands within such reservations. The additional *amici* listed on the inside cover of this brief comprise two tribal organizations and 20 individual tribes, all of whom have direct interests in the interpretation of treaties, statutes and executive orders relating to the boundaries of Indian reservations.

SUMMARY OF ARGUMENT

This Court should reject petitioners' and their *amici*'s invitation to distort or change the "fairly clean analytical structure" summarized in *Solem v. Bartlett*, 465 U.S. 463 (1984), to determine whether

[1] The Parties filed blanket consents to the filing of *amicus* briefs in this case. No counsel for any party authored this brief in whole or in part, and no person or entity, other than *amici*, their members, and their counsel provided any monetary contribution to fund the preparation or submission of this brief.

Congress, in enacting a surplus lands act, intended to diminish an Indian reservation. The Court's long-standing approach recognizes that "[o]nly Congress can divest a reservation of its land and diminish its boundaries," and that, once a block of land is set aside for an Indian reservation, "no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise." *Id.* at 470 (citing *United States v. Celestine*, 215 U.S. 278, 285 (1909)).[2] To determine whether Congress intended to diminish a reservation in a particular surplus lands act, the Court consistently has employed a three-part inquiry, looking first to the language of the statute, then to the surrounding circumstances and lastly (and to a lesser extent) to subsequent events. *Id.* at 470-72 & n.13.

Petitioners would distort the *Solem* test by giving greater weight to the third factor – post-statutory events – which this Court has long held should be given the least weight in interpreting Congress's intent (and which is the least consistent with normal principles of statutory construction). *Amici* Village of

[2] The *Celestine* Court traced this authority to the Property Clause: "By the second clause of § 3, Art. IV, of the Constitution, to Congress, and to it alone, is given 'power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States.' From an early time in the history of the government, it has exercised this power, and has also been legislating concerning Indians occupying such territory." *Id.* at 284.

Hobart and Pender Public Schools go much further, arguing that tribes and the United States should be precluded from asserting any jurisdiction within reservations or portions of reservations that (allegedly) lacked sufficient indicia of Indian character over a long period of time – regardless of whether Congress ever intended to diminish the reservation's boundaries. They invoke *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005), in support of this approach, a case that involved the displacement of an Indian tribe from its ancestral lands in the earliest years of the republic, and that has never been applied to override Congress's intent to preserve (or diminish) a reservation in a late-nineteenth or early-twentieth century surplus lands act.

Both of these arguments should be rejected. As respondents note, no question regarding the continued applicability of the *Solem* test was presented below or in the questions presented to this Court. Moreover, these arguments would distort or repudiate an unbroken line of this Court's precedents in reservation boundary cases, upsetting settled expectations and promoting unnecessary litigation. As the Court recognized in *Solem*, 465 U.S. at 470, the rule that only Congress can alter a reservation's boundaries (and that the issuance of fee patents to reservation lands does not by itself diminish a reservation's boundaries) has its roots in this Court's decisions extending back as far as *Celestine* in 1909. The Court's modern, three-step analysis to ascertain Congress's intent in a particular surplus lands act has been

employed in seven decisions, beginning 53 years ago in *Seymour v. Superintendent of Washington State Penitentiary*, 368 U.S. 351 (1962). This same approach has been applied in more than 20 lower federal court cases involving 17 different reservations, including criminal cases in which jurisdiction depended on whether or not the crime occurred within an Indian reservation. As a result, a significant change in this Court's test could reopen long-settled disputes over reservation boundaries throughout the country; call into question criminal convictions; upset cooperative agreements among federal, state and tribal governments premised on existing boundary determinations; and promote renewed litigation – either by parties to earlier litigation, claiming that a change in the law entitles them to revisit the issue of reservation status, or by non-parties to prior litigation, who would not be bound by earlier rulings under a different test, even as a matter of *stare decisis*.

No change in this Court's test is necessary. Petitioners and their *amici* urge this Court to distort or alter its existing test in order to protect what they allege to be the settled expectations of non-Indian communities. However, changing the Court's settled approach to surplus lands cases, which is rooted in over 100 years of precedent, is hardly the way to protect settled expectations. And, because the current test already permits consideration of events occurring after passage of a surplus lands act, including settlement patterns, where they are of assistance in

ascertaining Congress's intent, the proposed changes are unnecessary.

A finding that a non-Indian community is within the boundaries of a reservation will not have the dire consequences that petitioners and their *amici* fear. According to United States census data, 138 cities, towns and villages overlap or are included within reservation boundaries in 21 states (excluding non-reservation tribal areas in Oklahoma), and very few have expressed the types of the-sky-is-falling concerns articulated by petitioners and their *amici* (who comprise only a single village in Wisconsin, a school district in Pender, and two non-governmental organizations). This is due, in part, to positive interactions between Indians and non-Indians on many reservations, the fiscal benefits tribes bring to non-Indian communities within their reservations, and intergovernmental agreements through which Indian and non-Indian governments provide enhanced services and benefits within reservations. Moreover, as a general matter, state and local governments have jurisdiction over non-Indians within Indian reservations, while tribes have limited authority over non-Indians, especially on non-Indian fee lands. Except as expressly authorized by Congress, tribes have no criminal jurisdiction over non-Indians under *Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978), and generally lack civil jurisdiction over non-Indians on fee lands as well, subject to the two exceptions set forth in *Montana v. United States*, 450 U.S. 544 (1981). And, the Court has rejected tribal claims of tax immunity, such

as those asserted in *City of Sherrill*, on reservation lands that became freely alienable under late-nineteenth and early-twentieth century allotment and surplus lands acts, such as the 1882 Act at issue here. *See, e.g.*, *Cass Cty. v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103 (1998).

In this case, the Omaha Tribe's liquor ordinance, which, according to petitioners, is the *only* assertion by the Tribe of jurisdiction over non-Indians in the disputed area *ever*, was premised on an express delegation of authority from Congress as interpreted by the Eighth Circuit. *See* 18 U.S.C. § 1161; *City of Timber Lake v. Cheyenne River Sioux*, 10 F.3d 554 (8th Cir. 1993) (Congress's delegation of liquor regulatory authority to tribes in § 1161 extends to non-Indian communities in Indian country), *cert. denied*, 512 U.S. 1236 (1994). This Court has long recognized the unique history surrounding the regulation of liquor in Indian country and Congress's role in allocating federal, state and tribal regulatory authority in this area. *See Rice v. Rehner*, 463 U.S. 713 (1983); *United States v. Mazurie*, 419 U.S. 544 (1975); *see also* 18 U.S.C. §§ 1154, 1156, and 1161. Although the question whether Congress's delegation of regulatory authority to tribes in § 1161 extends to non-Indian communities has not been resolved definitively by this Court,[3] petitioners chose not to argue in this case

[3] *See Mazurie*, 419 U.S. at 553 (dicta suggesting that a liquor establishment "located in a non-Indian community" would be "excepted from tribal regulation"); *see also Pittsburg &*

(Continued on following page)

that the Omaha Tribe's liquor ordinance exceeded the scope of such authority.[4] If tribal authority to regulate liquor sales in non-Indian communities in Indian country is problematic, the solution lies either with Congress or with a proper challenge to the scope of § 1161, not with the revision of this Court's well-established reservation-boundary jurisprudence.

Finally, the changes requested by petitioners and their *amici* to this Court's longstanding test for determining the effect of a surplus lands act are improper because they would displace Congress's paramount constitutional authority over Indian affairs. While allowing for consideration of post-statutory events, this Court's test is focused on ascertaining Congress's intent in enacting a surplus lands act. Replacing the current test with one based solely or primarily on an

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Midway Coal Mining Co. v. Watchman, 52 F.3d 1531, 1544 n.13 (10th Cir. 1995) (same); *but see City of Timber Lake*, 10 F.3d at 557-58 ("[b]y specifically referring to the broad definition of Indian country in § 1151 . . . , the Court in *Rice* . . . made clear that the geographic scope of state and tribal authority extends to a reservation's four corners") (citing *Rice v. Rehner*, 463 U.S. at 715 & n.1).

[4] Petitioners' tactical choice prevents this Court from considering the scope of Congress's statutory delegation of authority to tribes to regulate liquor sales in Indian country in this case, notwithstanding that the tribal liquor ordinance that triggered and remains at the heart of this litigation was expressly adopted by the tribe and approved by the Secretary of the Interior under that statute. The Court's inability to consider the scope of § 1161 is another reason why the Court might wish to consider whether the writ was improvidently granted. *See* Brief for Respondents Omaha Tribal Council at 48 n.6.

assessment of the Indian or non-Indian character of an area after the passage of a surplus lands act would effectively displace Congress's authority to define Indian country and determine the proper allocation of governmental authority within it.

In this case, there is no question that the disputed lands were within the Omaha Indian Reservation before the 1882 Act became law. Subsequent to the 1882 Act, Congress: (a) specifically resolved conflicting case law regarding the effect of allotment and surplus lands acts by defining Indian country to include all lands within a reservation, notwithstanding the issuance of any patent;[5] (b) recognized that under this definition reservations can include entire non-Indian communities;[6] and (c) affirmatively delegated authority to states and tribes to regulate the sale of liquor in Indian country.[7] In this context, to disregard or relegate to a subsidiary consideration whether Congress itself intended to preserve or diminish the Omaha Reservation in the 1882 Act would improperly displace Congress's constitutional authority over Indian affairs, authority this Court repeatedly has described as "plenary and exclusive." *See, e.g.*, *United States v. Lara*, 541 U.S. 193, 200 (2004). And, more specifically, to rely on the presence of a non-Indian community within the original reservation

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[5] 18 U.S.C. § 1151.

[6] *Cf.* 18 U.S.C. § 1151 *with* 18 U.S.C. §§ 1154(c), 1156.

[7] 18 U.S.C. § 1161.

boundaries as a basis for a diminishment finding would be inconsistent with the very result Congress contemplated when it defined Indian country to include all lands within a reservation, notwithstanding the issuance of any patent.

ARGUMENT

I. Changing the Court's Longstanding Test for Determining Whether a Surplus Lands Act Diminished a Reservation Would Upset Settled Expectations and Promote Unnecessary Litigation.

The test for determining whether an Indian reservation has been diminished by a statute opening lands for non-Indian settlement has been the subject of at least seven Supreme Court decisions since 1962: *Seymour v. Superintendent*, 368 U.S. at 351; *Mattz v. Arnett*, 412 U.S. 481 (1973); *DeCoteau v. Dist. Cty. Ct. for the Tenth Judicial Cir.*, 420 U.S. 425 (1975); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977); *Solem v. Bartlett*, 465 U.S. at 463; *Hagen v. Utah*, 510 U.S. 399 (1994), *reh'g denied*, 511 U.S. 1047 (1994); and *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998). In these cases, the Court determined that "'some statutes that opened Indian lands for settlement diminished reservations [while] others did not.'" *Hagen*, 510 U.S. at 410 (quoting *Solem*, 465 U.S. at 469 (citations omitted)). Non-Indian land ownership does not by itself end reservation status: "Once a block of land is set aside for an Indian reservation

and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise." *Solem*, 465 U.S. at 470.

To determine the effect of a particular surplus land act, the Court has developed a "'fairly clean analytical structure.'" *Hagen*, 510 U.S. at 410-11, (quoting *Solem*, 465 U.S. at 470). Under the Constitution, "Congress possesses plenary power over Indian affairs"; "[a]ccordingly, only Congress can alter the terms of an Indian treaty by diminishing a reservation." *Yankton*, 522 U.S. at 343 (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978), and *Celestine*, 215 U.S. at 285).[8] Determining whether a particular act opening Indian lands for settlement diminished a reservation depends upon Congress's intent. *Id.*

In the above line of cases, the Court developed a three-pronged analysis to determine Congress's intent. The most probative evidence is the statutory

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[8] *See also Lara*, 541 U.S. at 200 (describing Congress's constitutional authority over Indian affairs as "plenary and exclusive"); *Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 520, 531 n.6 (1998) (recognizing Congress's "plenary power over Indian affairs" in the context of defining Indian country); *Mazurie*, 419 U.S. 554 n.11 & 555 (referring to Congress's "exclusive constitutional authority to deal with Indian tribes" and noting that, in *Seymour*, Congress's authority to define Indian country broadly so as to include reservation lands patented in fee to non-Indians "went both unchallenged by the parties and unquestioned by this Court").

language itself, which is to be interpreted in accordance with the canons of construction applicable to laws affecting Indians. The language of the statute must clearly evince the intent of Congress to change the boundaries of a reservation. *Solem*, 465 U.S. at 470; *DeCoteau*, 420 U.S. at 447. The cases establish no precise language required for diminishment, but operative terms of absolute cession combined with payment of a sum certain are typically viewed as establishing a presumption of an intent to diminish, as is language which specifically restores opened land to the public domain. *Yankton*, 522 U.S. at 792; *Solem*, 465 U.S. at 470-71; *Hagen*, 510 U.S. at 414; *Seymour*, 368 U.S. at 354-55.

The second prong of the Court's analysis involves examination of the events surrounding passage of the act for evidence of a "widely-held contemporaneous understanding" that Congress intended reservation boundaries to be altered. *Solem*, 465 U.S. at 471. This requires review of the legislative history of the act, reports on negotiations of the land sale, executive and presidential declarations, reports of executive agencies overseeing Indian matters, and the like. *Id.*; *Rosebud*, 430 U.S. at 602; *Seymour*, 368 U.S. at 354-57. In the absence of a clear expression in statutory language relating to the intent of Congress, only unequivocal evidence contained in the surrounding circumstances will allow a finding of diminishment. *Yankton*, 522 U.S. at 351.

The third and least compelling prong of the Court's analysis involves examination of subsequent

jurisdictional and demographic history of the region opened for settlement. *Solem*, 465 U.S. at 471-72. This analysis allows for consideration of "practical advantages" from finding that a reservation remains intact or has been diminished, and can provide an "additional clue" as to what was foreseen by Congress in enacting the legislation at issue. *Id.* at 471-72 & n.12. However, subsequent history and demographics provides an "unorthodox and potentially unreliable method of statutory interpretation." *Id.* at 472 n.13. To result in diminishment, demographic and subsequent history must align with substantial and compelling evidence of Congress's intent to diminish as expressed in the statutory language and legislative history. *Id.* at 472.

In addition to the seven reservation boundary disputes that have been resolved by this Court under the three-part test summarized in *Solem*, many other such disputes have been resolved by the lower federal and state courts under that test. The following 21 federal cases involving 17 reservations are illustrative:

> *Osage Nation v. Irby*, 597 F.3d 1117 (10th Cir. 2010) (1906 Act disestablished Osage Reservation);
>
> *Wisconsin v. Stockbridge-Munsee Cmty.*, 554 F.3d 657 (7th Cir. 2009) (1871 Act diminished and 1906 Act disestablished Stockbridge-Munsee Reservation);

Shawnee Tribe v. United States, 423 F.3d 1204 (10th Cir. 2005) (1854 Treaty terminated Shawnee Reservation);

United States v. Webb, 219 F.3d 1127 (9th Cir. 2000) (1894 Act did not diminish Nez Perce Reservation);

Yankton Sioux Tribe v. Gaffey, 188 F.3d 1010 (8th Cir. 1999) (1894 Act diminished but did not disestablish Yankton Sioux Reservation);

Melby v. Grand Portage Band of Chippewa, No. CIV 97-2065, U.S. Dist. LEXIS 24061; 1998 WL 1769706 (D. Minn. 1998) (1889 Act did not disestablish Grand Portage Indian Reservation);

Leech Lake Band v. Cass Cty., 108 F.3d 820 (8th Cir. 1997) (Leech Lake Reservation has never been disestablished or diminished), *aff'd in part and rev'd in part on other grounds*, 524 U.S. 103 (1998);

Confederated Tribes of Chehalis Indian Reservation v. Washington, 96 F.3d 334 (9th Cir. 1996) (1886 Executive Order did not diminish Chehalis Indian Reservation);

Duncan Energy Co. v. Three Affiliated Tribes of Fort Berthold Reservation, 27 F.3d 1294 (8th Cir. 1994) (1910 Act did not diminish Fort Berthold Indian Reservation);

United States v. Standish, 3 F.3d 1207 (8th Cir. 1993) (1910 Act did not diminish Fort Berthold Indian Reservation);

Pittsburg & Midway Coal Mining Co. v. Yazzie, 909 F.2d 1387 (10th Cir. 1990) (1908 Act and Executive Orders diminished Navajo Reservation);

Colorado River Indian Tribes v. Parker, 705 F. Supp. 473 (D. Ariz. 1989) (1908 Act did not remove Town of Parker from Colorado River Indian Reservation);

United States v. Grey Bear, 828 F.2d 1286 (8th Cir.), *reh'g denied*, 836 F.2d 1086, *reh'g granted, vacated in part*, 836 F.2d 1088 (1987) (1904 Act did not disestablish Devil's Lake Indian Reservation);

Lower Brule Sioux Tribe v. South Dakota, 711 F.2d 809 (8th Cir. 1983) (Flood Control Acts did not diminish Lower Brule Sioux Reservation);

Confederated Salish and Kootenai Tribes of the Flathead Reservation v. Namen, 665 F.2d 951 (9th Cir. 1982) (1904 Act did not disestablish Flathead Reservation);

White Earth Band of Chippewa Indians v. Alexander, 518 F. Supp. 527 (D. Minn. 1981), *aff'd*, 683 F.2d 1129 (8th Cir. 1982) (1889 Act diminished portion of White Earth Indian Reservation);

United States v. Minnesota, 466 F. Supp. 1382 (D. Minn. 1979), *aff'd sub nom. Red Lake Band v. Minnesota*, 614 F.2d 1161 (8th Cir. 1980) (1889 Act diminished Red Lake Indian Reservation);

City of New Town, North Dakota v. United States, 454 F.2d 121 (8th Cir. 1972) (1910 Act did not alter boundaries of Fort Berthold Indian Reservation);

Leech Lake Band of Chippewa Indians v. Herbst, 334 F. Supp. 1001 (D. Minn. 1971) (1889 Act did not disestablish Leech Lake Indian Reservation);

Beardslee v. United States, 387 F.2d 280 (8th Cir. 1967) (Blackmun, J.) (Todd County portion of Rosebud Sioux Reservation not disestablished; land platted as addition to town of Mission in Todd County and owned by a non-Indian was within the Reservation); and

Ellis v. Page, 351 F.2d 250 (10th Cir. 1965) (Cheyenne and Arapaho Reservation disestablished).

Combining these cases with this Court's decisions, the Court's test for evaluating the effect of surplus lands acts has been applied by the federal courts to determine the status of at least 23 reservations.[9] The Court should not significantly revise or abandon that test in the interest of protecting what petitioners and their *amici* claim to be the settled expectations of

[9] For examples of additional state court cases *see, e.g.*, *State v. Romero*, 142 P.3d 887, 140 N.M. 299 (2006) (1924 Act did not alter Indian country status of Taos or Pojoaque Pueblos); *State v. Davids*, 194 Wis.2d 386, 534 N.W.2d 70 (1995) (1871 Act diminished Stockbridge-Munsee Reservation); *State v. Clark*, 282 N.W.2d 902 (Minn. 1979) (1889 Act did not disestablish White Earth Reservation).

non-Indian communities. States, tribes, and local communities (both Indian and non-Indian) have a substantial interest in avoiding the disruptive effects of revising the Court's well-established approach. A revised test could reopen reservation boundary disputes that have long been settled, call into question criminal convictions premised on the existence or absence of Indian country, undermine cooperative agreements between tribes and local governments,[10] and promote renewed litigation. Under these circumstances, the interest in protecting settled expectations counsels in favor of preserving the Court's longstanding and widely applied approach to determining the effect of late-nineteenth and early-twentieth century surplus lands acts on reservation boundaries.

The potential for re-litigation of settled reservation boundaries is illustrated by the Brief for *Amici Curiae* Village of Hobart, Wisconsin and Pender Public Schools (hereinafter, Hobart and Pender Schools Br.). The brief asserts (at 2) that the Village of Hobart "has consistently argued the Oneida reservation has been disestablished," and (at 3-4) that the federal courts have definitively determined that the Oneida

[10] *See Nevada v. Hicks*, 533 U.S. 353, 393 (2001) (O'Connor, J., concurring) (noting the "host of cooperative agreements between tribes and state authorities to share control over tribal lands, to manage public services, and to provide law enforcement"); Note, *Intergovernmental Compacts in Native American Law: Models for Expanded Usage*, 112 HARV. L. REV. 922, 927 (1999).

Reservation has been diminished, citing cases from 1909 and 1933. However, it does not disclose that in *Oneida Tribe of Indians of Wisconsin v. Village of Hobart, Wis.*, 542 F. Supp. 2d 908 (E.D. Wis. 2008), the Village conceded the Oneida Reservation had not been disestablished. The court stated that "[t]he [Oneida] Tribe contends, *and the Village concedes*, that the Tribe's fee lands constitute 'Indian Country' within the meaning of this section [18 USC §1151]," a concession the court found "quite reasonable" in light of this Court's decision in *Seymour v. Superintendent*, 368 U.S. at 351. 542 F. Supp. 2d at 923 (emphasis added). The Hobart and Pender Schools brief also fails to mention *Oneida Tribe of Indians of Wisconsin v. Village of Hobart, Wis.*, 732 F.3d 837 (7th Cir. 2013), where the court noted that "[t]he village [of Hobart] itself is an enclave in the [Oneida] tribe's reservation," that certain lands held in trust for the Oneida tribe were "within the boundaries of an Indian reservation," and that "[t]he non-Indian parcels in Hobart are technically part of the surrounding Oneida reservation as well." *Id.* at 838. The Village's apparent interest in re-litigating the existence of the Oneida reservation does not provide a compelling reason for the Court to revise its longstanding approach to the interpretation of surplus lands acts.

II. Changing the Court's Longstanding Test for Determining Whether a Surplus Lands Act Diminished a Reservation Is Unnecessary.

In 1948, Congress defined Indian country to include, *inter alia*, "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation." 18 U.S.C. § 1151. In adopting this definition, Congress was aware that it placed non-Indian communities within Indian country. Only one year later, it adopted a narrower definition of Indian country for purposes of statutes prohibiting the introduction or possession of liquor in the Indian country. For purposes of those statutes, Indian country "does not include fee-patented lands *in non-Indian communities* or rights-of-way through Indian reservations." 18 U.S.C. §§ 1154(c), 1156 (emphasis added). Unless the definition of Indian country in § 1151 included non-Indian communities, there would have been no need to exclude "fee-patented lands in non-Indian communities" from §§ 1154, 1156.

Notwithstanding Congress's understanding that Indian country can encompass non-Indian communities, petitioners and their *amici* assert that adverse consequences from including non-Indian communities within Indian country warrant a revision in this Court's longstanding approach to determining whether a surplus lands act diminished a reservation. However, changing this Court's approach is unnecessary for several reasons.

A. The *Solem* Test Already Permits Consideration of Post-Enactment Events.

First, the *Solem* test already permits consideration of events occurring after passage of a surplus lands act, and this Court has not hesitated to consider them in an effort to understand Congress's intent in passing the act. As the *Solem* Court explained:

> To a lesser extent, we have also looked to events that occurred after the passage of a surplus land act to decipher Congress' intentions. Congress' own treatment of the affected areas, particularly in the years immediately following the opening, has some evidentiary value, as does the manner in which the Bureau of Indian Affairs and local judicial authorities dealt with unallotted open lands.
>
> On a more pragmatic level, we have recognized that who actually moved onto opened reservation lands is also relevant to deciding whether a surplus land act diminished a reservation. Where non-Indian settlers flooded into the opened portion of a reservation and the area has long since lost its Indian character, we have acknowledged that *de facto*, if not *de jure*, diminishment may have occurred. . . . In addition to the obvious practical advantages of acquiescing to *de facto* diminishment, we 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.

Solem, 465 U.S. at 471-72 (citations and footnotes omitted).

The Court repeatedly has referenced post-statutory occurrences, often in considerable detail, in assessing whether a particular surplus lands act diminished a reservation. Focusing on events closer in time to the statute's enactment, the Court typically has examined patterns of settlement, assertions of jurisdiction, and actions and pronouncements of relevant agencies and subsequent Congresses. *See*, *e.g.*, *Seymour*, 368 U.S. at 356-57; *DeCoteau*, 420 U.S. at 442-44; *Rosebud*, 430 U.S. at 603-15; *Solem*, 465 U.S. at 478-81; *Hagen*, 510 U.S. at 420-21; *Yankton*, 522 U.S. at 354-57. No doctrinal change is necessary to permit this Court and the lower federal and state courts from doing what they already do in diminishment cases.

B. Petitioners and Their *Amici*'s Concerns Regarding the Inclusion of Non-Indian Communities within Indian Reservations Are Overstated and Misleading.

Second, the fears expressed by petitioners and their *amici* regarding the inclusion of non-Indian communities within Indian reservations are overstated and misleading. A NCAI statistical analysis of United States census data identified 138 non-Indian cities, towns and villages within Indian reservations

in 22 states (excluding tribal statistical areas in Oklahoma). *See* National Congress of American Indians, Policy Research Center, *Population and Land Area of Cities/Towns within Reservations or Oklahoma Tribal Statistical Areas* (2015), http://www.ncai.org/resources/ncai_publications/analysis-of-cities-and-towns-inside-reservations. Very few non-Indian communities have expressed the types of concerns raised by petitioners and their *amici* in this case, and in at least one case such concerns were expressly found to be unsubstantiated. *See Cty. of Mille Lacs v. Benjamin*, 262 F. Supp. 2d 990, 996 (D. Minn. 2003) (county's challenge to reservation boundary dismissed because county could not show any injury from tribe's assertion that its reservation had not been diminished), *aff'd*, 361 F.3d 460 (8th Cir. 2004), *cert. denied*, 543 U.S. 956 (2004).

For their part, petitioners assert that, if this Court upholds the lower courts' decisions that the 1882 Act did not diminish the Omaha Reservation's boundaries, "the practical consequences will be profound for the residents of the disputed area after over one hundred years of justifiable reliance upon Nebraska and local governmental institutions and services." Brief for Petitioners at 20; *see also id.* at 52 (quoting *Hagen*, 510 U.S. at 420-21, for the proposition that "'when an area is predominantly populated by non-Indians with only a few surviving pockets of Indian allotments, finding that the land remains Indian country *seriously burdens the administration of state and local governments*'") (emphasis added by

petitioners). However, apart from the application of the tribe's liquor ordinance – which, as noted above, was adopted pursuant to a delegation of authority by Congress as interpreted by the Eighth Circuit – petitioners do not identify *any* specific consequences for the residents of the disputed area in this case – profound or otherwise – and do not identify *any* state or local governmental institutions or services that will be disrupted or burdened in *any* way from a decision holding that the Omaha Reservation was not diminished. For several reasons, it is likely that there will be few such consequences or burdens.

First, although state civil jurisdiction over tribal members in Indian country is limited,[11] states have jurisdiction over non-Indians unless such jurisdiction is preempted by federal law or would unlawfully infringe "on the right of reservation Indians to make their own laws and be ruled by them." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142-43 (1980) (citation omitted). Under either of these tests, interactions between non-Indians are almost always within state and local jurisdiction, as are many interactions between non-Indians and tribal members. *See, e.g.*, *Muscogee (Creek) Nation v. Pruitt*, 669 F.3d 1159, 1170 (10th Cir. 2012) (applying state laws to tobacco retailers on Indian reservation). Petitioners identify no state or local laws applicable to

[11] Some states, including Nebraska, have jurisdiction to adjudicate civil disputes involving Indians in Indian country pursuant to Public Law 280, 28 U.S.C. § 1360.

non-Indian residents of the disputed area, or any state or local services provided to such residents, which would be affected in any way by a decision that the Omaha reservation was not diminished.

Second, with respect to criminal jurisdiction, states have plenary jurisdiction over crimes between non-Indians in Indian country. *See New York ex rel. Ray v. Martin*, 326 U.S. 496, 500 (1946); *United States v. McBratney*, 104 U.S. 621, 624 (1882); *cf. Oliphant*, 435 U.S. at 195 (tribes lack criminal jurisdiction over non-Indians). In Public Law 280, 18 U.S.C. § 1162, Congress delegated federal criminal jurisdiction over crimes by or against Indians in Indian country to several states, including Nebraska. In 1969, the Nebraska legislature expressly "retroceded" to the United States "all jurisdiction over offenses committed by or against Indians in the areas of Indian country located in Thurston County, Nebraska," but retained jurisdiction over offenses involving the operation of motor vehicles on public roads or highways. Res. 37, 80th Leg., 1st Sess. (Neb. 1969). Thus, Nebraska took advantage of the reservation status of the area to relieve itself of the burden of prosecutions for major crimes; it did not view federal criminal jurisdiction in Indian country as disruptive or burdensome but as *beneficial*. Notably, in accepting the State's retrocession, the Department of the Interior gave a detailed description of the "Indian country located within the boundaries of the Omaha Indian Reservation in Thurston County," which referenced "the west boundary line of the Omaha Indian

Reservation as originally surveyed." Dept. of Interior, Notice of Acceptance of Retrocession Jurisdiction, 35 Fed. Reg. 16,598 (Oct. 24, 1970). Petitioners have launched no challenge to that definition for the past 45 years, undermining any claim that it imposes a serious burden on the administration of state or local government and creating a justifiable expectation by non-Indians and Indians that the area is Indian country.

Third, while the state has and will retain jurisdiction over non-Indians in the disputed area, tribal law will rarely govern non-Indians on non-Indian fee land. "[T]ribes do not, as a general matter, possess authority over non-Indians who come within their borders. . . . This general rule . . . is particularly strong when the nonmember's activity occurs on land owned in fee simple by non-Indians. . . . " *Plains Commerce Bank v. Long Family Land & Cattle Co*., 554 U.S. 316, 328 (2008); *see also Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 659 (2001) (tribe cannot impose hotel occupancy tax on guests at non-Indian hotel on non-Indian fee land; impact of non-member activity must be "demonstrably serious" and "imperil" the tribe for jurisdiction to exist).

For their part, *amici* Village of Hobart and Pender Schools claim that there are "significant and justified societal expectations" that will "result in severe disruptions to any governmental, business, and resident . . . located within [the] . . . reservation." Hobart and Pender Schools Br. at 12, 18. They first focus on the potential for Indian-owned lands within

the disputed area to be freed from local zoning or other land use controls. *Id.* at 19-21 (citing *City of Sherrill*, 544 U.S. at 220). However, to support that concern, they cite a series of provisions in *Wisconsin statutes* that prohibit the application of such regulations to Indian-owned lands within Indian reservations. *Id.* at 21-24. The fact that the State of Wisconsin has chosen to limit the application of local land use laws within Indian reservations suggests that, at least in the judgment of the Wisconsin legislature, such limitations do not seriously burden the administration of state or local government.

Moreover, neither petitioners nor their *amici* point to any land use concerns involving the very few Indian lands in the disputed area in this case. Such concerns are unlikely given deeply rooted tribal interests in protecting reservation lands, which are reflected in cooperative agreements tribes have entered into with local governments in order to ensure effective land use regulations within their reservations. *See supra* note 10. And, should such concerns arise, state and local governments would not be powerless to address them. *Cf. Gobin v. Snohomish County*, 304 F.3d 909, 917 (9th Cir. 2002) (county could not regulate Indian land use within a reservation absent a showing of exceptional circumstances justifying displacement of tribal regulation), *with Oneida Tribe of Indians v. Village of Hobart*, 542 F. Supp. at 923-26 (Village has authority to condemn and to impose special assessments on Indian fee land within Oneida Reservation).

The Village of Hobart and Pender Schools also focus on Congress's allocation of jurisdiction to protect the environment under the Clean Water Act and the Clean Air Act, but do not show that any issues regarding environmental jurisdiction have arisen in the disputed area in this case.[12] Hobart and Pender Schools Br. at 25-27. These hypothetical concerns are best addressed to Congress, which has established and can adjust the special statutory scheme allocating environmental authority in Indian country, taking into consideration legitimate federal, tribal, and state interests.

Finally, the Village of Hobart and Pender Schools cite several cases in which the courts have *rejected* tribal assertions of jurisdiction over local schools. Hobart and Pender Schools Br. at 28-29. They cite no similar assertions of jurisdiction in this case, and the cases they do cite indicate that assertions of jurisdiction over school districts such as Pender, which operates on fee lands, would be unsuccessful.

Notably, in asserting that the potential harms to a non-Indian community from being located within an Indian reservation warrant a revision in this Court's settled approach to determining the effect of surplus

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[12] The claim that the Environmental Protection Agency "issued draft permitting authority to the Oneida [Tribe]," Hobart and Pender Schools Br. at 25-26, is mistaken. The cited permit was a draft NPDES permit issued *by EPA* to the Oneida Tribe for the Tribe's storm water discharges, and did not confer any "permitting authority" on the Tribe. *See id.* at 26 n.4.

lands acts on reservation boundaries, the Village of Hobart and Pender Schools fail to acknowledge the positive impacts of being included within an Indian reservation. For example, as of 2010 the Oneida Tribe, within whose reservation the Village of Hobart is located, was the fifth largest employer in Brown County, Wisconsin, employing 3085 people of whom 42% (1296) were non-native. *See* Wisconsin State Tribal Relations Initiative, *Oneida Nation of Wisconsin Tribal Profile*, 1 (2010), http://witribes.wi.gov/docview.asp?docid=5637&locid=57. The positive economic effects on surrounding communities of a wide variety of enterprises operated by 36 tribes around the nation are summarized in Mark Fogarty, "The Growing Economic Might of Indian Country," Indian Country Today, (March 15, 2013), http://indiancountrytodaymedianetwork.com/2013/03/15/growing-economic-might-indian-country-148196. These benefits include direct employment, opportunities for non-Indian contractors and service providers, development of community infrastructure, increased federal, state and local tax revenues, and other spillover effects. Reservation status assists in securing these benefits because (among other things) the federal government provides tax benefits for reservation businesses. *See, e.g.*, 26 U.S.C. § 168(j).

Petitioners and their *amici* also fail to acknowledge that many tribes, states and local governments have addressed the types of concerns that they raise here through intergovernmental agreements. Both the Omaha Tribe, whose reservation is at issue in this

case, and the Oneida Tribe, about whose reservation the Village of Hobart complains, have entered into a number of such agreements.[13] These agreements

[13] The Omaha Tribe entered into these agreements, among others:

1. *Interlocal Agreement for the Formulation of the Northeast Nebraska Enterprise Zone Association under the Nebraska Enterprise Zone Act* (1994), http://omaha-nsn.gov/wp-content/uploads/2013/06/Appendix-I-Northeast-Nebraska-Enterprise-Zone-Association.pdf;
2. *Child Welfare, Adult and Child Protection and Safety Services, and Juvenile Services Contract* (2011), http://dhhs.ne.gov/children_family_services/Contracts/47253O4OmahaAPSCPS.pdf;
3. *Indian Child Welfare, Adult and Child Protections and Safety Services, and Juvenile Service Agreement* (2010), http://dhhs.ne.gov/children_family_services/Contracts/36969O4Omaha2010.pdf; and
4. *Agreement for the Collection and Dissemination of Motor Fuel Taxes* (2005), http://revenue.nebraska.gov/fuels/legal/Agreement%20with%20Omaha%20Tribe%20Sept%202005.pdf.

The Oneida Tribe has entered into these agreements, among others:

1. *Service Agreement Between Oneida Tribe of Indians of Wisconsin and City of Green Bay* (2009), https://oneida-nsn.gov/uploadedFiles/wwwroot/Government/Laws_and_Policies/CityofGreenBayServiceAgreement.pdf (reciting that the "Tribe and the City have been good neighbors and desire the spirit of cooperation between the two governments to continue");
2. *Cooperation Agreement* [*with the City of Green Bay*] (1984), https://oneida-nsn.gov/uploadedFiles/wwwroot/Government/Laws_and_Policies/CITYof

(Continued on following page)

GreenBayOHACooperationAgreement.43184.pdf (providing for tribal payments in lieu of City taxes);

3. *Exchange of Services Agreement Between Oneida Tribe of Indians of Wisconsin and Brown County* (2012), https://oneida-nsn.gov/uploadedFiles/wwwroot/Government/Laws_and_Policies/BrownCountyExchangeofServicesAgreement.pdf (providing for tribal payments in lieu of county taxes and reciting that "the Tribe and the County enjoy a relationship of mutual trust and respect");
4. *Service Agreement Between Oneida Tribe of Indians of Wisconsin and Brown County* (2008), https://oneida-nsn.gov/uploadedFiles/wwwroot/Government/Laws_and_Policies/BrownCountyServiceAgreementandAmendments.pdf (relating to construction of telecommunications structures and reciting that "the Tribe and the County enjoy a relationship of mutual trust and respect");
5. *Service Agreement Between Oneida Tribe of Indians of Wisconsin and Town of Oneida* (2012), https://oneida-nsn.gov/uploadedFiles/wwwroot/Government/Laws_and_Policies/TownofOneidaServiceAgreement.07.27.2012.pdf (reciting that the "Tribe and the City have been good neighbors and desire the spirit of cooperation between the two governments to continue");
6. *Intergovernmental Service Agreement Between Oneida Tribe of Indians of Wisconsin and Outagamie County Drainage Board* (2009), https://oneida-nsn.gov/uploadedFiles/wwwroot/Government/Laws_and_Policies/OutagamieCountyDrainageBoardIntergovernmentalService.pdf (reciting that "the Tribe and the Board have been good neighbors and desire the spirit of cooperation between the two governments to continue"); and
7. *Service Agreement Between Oneida Tribe of Indians of Wisconsin and Village of Ashwaubenon*

(Continued on following page)

provide a mechanism for sovereigns to resolve the kind of disruption petitioners and their *amici* fear and, instead, to provide for *enhanced* governmental services and facilities within a reservation.[14] As the Seventh Circuit recently observed, "the Village [of Hobart] doesn't . . . deny the feasibility of cooperative arrangements between it and the tribe, which has signed cooperative service agreements with other government bodies in the area." *Oneida Tribe of Indians of Wisconsin v. Village of Hobart*, 732 F.3d at 841. This Court itself has indicated that cooperative agreements are the preferred method of balancing the interests of states and tribes within Indian country. *See Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 514 (1991). Justice O'Conner listed examples of such agreements in *Hicks*, 533 U.S. at 393 (O'Connor, J., concurring).

Petitioner State of Nebraska expressly authorizes state agencies to enter into intergovernmental agreements with tribes in Neb. Rev. Stat. § 13-1501 *et seq.* (the State-Tribal Cooperative Agreements Act),

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(2013), https://oneida-nsn.gov/uploadedFiles/wwwroot/Government/Laws_and_Policies/Service%20Agreement%20with%20Ashwaubenon%202014.pdf (reciting that "the Tribe and the Village have been good neighbors and desire the spirit of cooperation between the two governments to continue").

[14] They also provide an alternative to the "threat of protracted and expensive litigation." Hobart and Pender Schools Br. at 29 n.5.

and has availed itself of this option. *See, e.g.*, *Cross-Deputization Agreement By and Between the Bureau of Indian Affairs, the Nebraska State Patrol, and the Winnebago Tribe of Nebraska* (2001), https://www.walkingoncommonground.org/state.cfm?topic=12&state=NE. More than 20 states have recognized the advantages of these agreements, adopting legislation authorizing state and local agencies to enter into intergovernmental agreements with tribes. *E.g.*, Ariz. Rev. Stat. § 11-952; Minn. Stat. § 471.59(1); Mont. Code Ann. § 18-11-101 *et seq.*; Okla. Stat. tit. 74 § 1221; SDCL 10-12A; Wyo. Stat. § 16-1-101.

In sum, the concerns expressed by petitioners and their *amici* are overstated and misleading, and provide no basis for altering this Court's well-established and widely applied approach to determining the effects of late-nineteenth or early-twentieth century surplus lands acts on reservation boundaries.

III. Petitioners' and Their *Amici*'s Attempts to Distort or Replace This Court's Long Established Approach to Determining the Effect of a Surplus Lands Act Would Improperly Displace Congress's Constitutional Role in Indian Affairs.

There is a third problem with petitioners' and their *amici*'s requests to distort or replace this Court's longstanding approach to determining the effect of surplus lands acts. Petitioners want to place greater weight on the third *Solem* factor, which has the least evidentiary value in ascertaining Congress's intent.

Their *amici* want to disregard Congress's intent altogether if the area in question allegedly lacked sufficient Indian character over a long period of time. Each request would displace Congress's plenary constitutional authority to determine reservation boundaries and define Indian country. This would be a radical departure from this Court's precedents and cannot be justified in the interests of protecting settled expectations.

A. Petitioners' Attempt to Change the Weight Given to the *Solem* Factors Is Inconsistent with Sound Principles of Statutory Construction.

The Court has consistently limited reliance on post-statutory events under the *Solem* test, especially events occurring long after passage of the statute to be interpreted, because the controlling factor is congressional intent. For example, in *Solem* the Court explained that, while subsequent events might "[t]o a lesser extent" provide a "clue" as to Congress's intentions, the use of post-enactment events as a tool of statutory interpretation is "unorthodox and potentially unreliable," and should be employed only as "a necessary expedient" where other evidence of congressional intent is lacking. *Solem*, 465 U.S. at 471-72 n.13 (citation omitted).

Indeed, the Court has noted that, especially over long periods of time, post-enactment events and pronouncements often embody conflicting and

inconsistent interpretations and approaches. In *Yankton*, the Court noted that over the years following the surplus lands act at issue in that case, "both Congress and the Executive Branch have described the reservation in contradictory terms and treated the region in an inconsistent manner." 522 U.S. at 354. "The mixed record we are presented with 'reveals no consistent, or even dominant, approach to the territory in question,' and it 'carries but little force'" when compared with the other two prongs of the *Solem* analysis. *Id.* at 356 (quoting *Rosebud*, 430 U.S. at 605 n.27). *Solem* itself found that the post-enactment record of subsequent treatment of the contested territory was so "rife with contradictions and inconsistencies as to be of no help to either side." 465 U.S. at 478.

In *Hagen*, this Court similarly found, after reviewing post-statutory events, that "[t]he subsequent history is less illuminating than the contemporaneous evidence." *Hagen*, 510 U.S. at 420. In reviewing inconsistent approaches that a subsequent Congress took with regard to the contested lands, the Court stated that this reinforced the Court's longstanding observation that "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *Id.* (citing *United States v. Philadelphia Nat. Bank*, 374 U.S. 321, 348-49 (1963)); *see also Chapman v. United States*, 500 U.S. 453, 464 n.4 (1991) (subsequent legislative history is "an unreliable guide to legislative intent").

Finally, as a practical matter, the Court noted in *Yankton* that the mere surge of non-Indian settlement and the resulting lessening of the Indian character of opened lands following a surplus lands act is insufficient in itself to be determinative of Congress's intent in passing the law: "This final consideration [post-enactment occurrences] is the least compelling for a simple reason: Every surplus land Act necessarily resulted in a surge of non-Indian settlement and degraded the 'Indian character' of the reservation, yet we have repeatedly stated that not every surplus land Act diminished the affected reservation." *Yankton*, 522 U.S. at 356.

Petitioners' request to give greater weight to the third *Solem* factor disregards these considerations and, by elevating the factor that is *least* probative of Congress's intent, would effectively displace Congress's constitutional authority to define Indian country and determine reservation boundaries. *See supra* note 8 and accompanying text; *see also King v. Burwell*, 135 S. Ct. 2480, 2496 (2015) ("in every case [the Court] must respect the role of the Legislature, and take care not to undo what it has done").

The Court has never suggested that *Solem*'s third factor can be used in this manner. In *Solem*, where the Court noted that there might be practical advantages from a finding that a reservation was (*or was not*) diminished, 465 U.S. at 471 & n.12, it went on to hold that there were "limits to how far we will go to decipher Congress's intention in any particular surplus land act." *Id.* at 472. In particular, "[w]hen

both an Act and its legislative history fail to provide substantial and compelling evidence of *a congressional intention* to diminish Indian lands, we are bound by our traditional solicitude for the Indian tribes to rule that diminishment did not take place and that the old reservation boundaries survived the opening." *Id.* (emphasis added). Similarly, in *Hagen*, where the Court quoted *Solem*'s observation regarding burdens on state and local governments if an area of Indian country is largely populated by non-Indians, 510 U.S. at 420-21, it did so in the context of an inquiry into congressional intent: "our conclusion that the statutory language and history indicate *a congressional intent* to diminish is not controverted by the subsequent demographics of the Uintah Valley area." *Id.* at 420 (emphasis added).

Where, as here, the controlling inquiry is one of congressional intent, the Court should not revise its longstanding approach to place greater weight on the evidence that is least probative of congressional intent.

B. The Court Should Not Abandon the *Solem* Test in Favor of a Test Based on *City of Sherrill* that Ignores Congressional Intent.

Amici Village of Hobart and Pender Public Schools go much further than petitioners and argue that, regardless of Congress's intent to preserve or diminish a reservation in a surplus lands act, tribes

should simply be barred from asserting any jurisdiction whatsoever in areas that allegedly lacked sufficient Indian character since the passage of the act. They invoke *City of Sherrill*, 544 U.S. 197 (2005), a case that involved efforts by a tribe to assert sovereignty in the form of an immunity from taxation on lands from which it had been displaced more than 200 years ago through violation of the Indian Non-Intercourse Act of 1790, 25 U.S.C. § 177. However, *City of Sherrill* has never been applied to ignore Congress's intent to preserve or diminish a reservation in a late-nineteenth or early-twentieth century surplus lands act. In the name of "preserving settled expectations," *amici* Village of Hobart and Pender Public Schools would not only jettison the analytical approach this Court has applied to reservation diminishment cases over the past half-century, but would eliminate, in favor of the judiciary, Congress's constitutionally mandated role in regulating Indian affairs, including its authority to define Indian country and to establish and diminish reservations. *See supra* note 8 and accompanying text.

In *City of Sherrill*, this Court held that the Oneida Tribe could not unilaterally revive its ancient sovereignty, including immunity from state taxation of fee land it purchased on the open market, within territory it ceased to occupy or govern two centuries earlier. *See City of Sherrill*, 544 U.S. at 203. The Court acknowledged that the Tribe might have suffered a great wrong when its lands were sold in violation of the Non-Intercourse Act, but held that it

was not entitled to a remedy due to equitable considerations, including massive changes in the lands at issue since the founding days of the Republic, nearly two hundred years of acquiescence to non-Indian jurisdiction on the part of the Tribe, and the extreme disruption to the justified expectations of others that would result from such a remedy. *Id.* at 213-21.

The Court's opinion in *City of Sherrill* contains no suggestion that the Court no longer adhered to the three-pronged analysis summarized in *Solem* and applied in its seven cases regarding the effect of late-nineteenth and early-twentieth century surplus lands acts on reservation boundaries. The Court did not question Congress's paramount role in establishing or diminishing reservations, or the relevance of Congress's intent in enacting surplus land laws. To the contrary, the *City of Sherrill* opinion cited *Solem*, *Rosebud* and *Hagen*. *City of Sherrill*, 544 U.S. at 215-16 & n.9. The Court stated that in "the different, but related, context of the diminishment of an Indian reservation," the longstanding assumption of jurisdiction by a state over an area that is overwhelmingly non-Indian may create justifiable expectations of reservation diminishment. *Id.* at 215. There was no suggestion, however, that such expectations would by themselves trump Congress's intent. Rather, in the context of New York's uncontested 200-year exercise of jurisdiction in former Oneida territory, such justifiable expectations "merit[ed] heavy weight." *Id.* at 215-16.

No other court has applied *City of Sherrill* to avoid the *Solem* test in a case involving a late-nineteenth or early-twentieth century surplus land act. Although *City of Sherrill* has been cited in recent diminishment cases, it has not been employed as an excuse to ignore Congress's intent. For example, in *Osage Nation v. Irby*, 597 F.3d 1117 (10th Cir. 2010), cited by *amici* Village of Hobart and Pender Public Schools, the Tenth Circuit explicitly followed the *Solem* test. As part of its discussion of the third prong of the *Solem* analysis, the Tenth Circuit noted that the Osage Nation conceded that Oklahoma had long asserted jurisdiction in Osage County, now a predominantly non-Indian area, and that this might have created "justifiable expectations" that "merit heavy weight." *Osage Nation*, 597 F.3d at 1128. Ultimately, however, the court did not bar the Osage Nation's claims based on laches. Instead, it concluded that the Osage reservation had been disestablished *by Congress*. *Id.* at 1127-28.

The resort to equitable principles to thwart Congress's intent in a surplus lands act is particularly inappropriate given Congress's affirmative legislation in this area. Congress's 1948 definition of Indian country was specifically intended to resolve issues that had arisen from allotment and surplus lands acts, "consolidat[ing] numerous conflicting and inconsistent provisions of law into a concise statement of the applicable law." 18 U.S.C. § 1151 note. One of the conflicts Congress addressed was whether reservation lands patented in fee to Indians

or non-Indians pursuant to allotment and surplus lands acts were "within the limits of [an] Indian reservation" for purposes of the Act of March 3, 1885, § 9, 23 Stat. 362, 385 (Major Crimes Act). Two federal courts held they were, *see Kills Plenty v. United States*, 133 F.2d 292 (8th Cir. 1943); *United States v. Frank Black Spotted Horse*, 282 F. 349 (D.S.D. 1922), while some state courts held they were not. *See, e.g.*, *State v. Johnson*, 212 Wis. 301, 249 N.W. 284 (1933). By defining Indian country to include all lands within a reservation, "notwithstanding the issuance of any patent," 18 U.S.C. § 1151, Congress's 1948 definition followed *Kills Plenty*, which held that an offense committed within the town-site of Mission, South Dakota, was within a reservation even though the Indian title to the town-site had been extinguished. *See* 18 U.S.C. § 1151 note (citing *Kills Plenty* in list of cases on which the definition was based). Moreover, as discussed above, in amending the liquor statutes in 1949, Congress recognized that its definition of Indian country could include not just fee-patented non-Indian lands, but entire non-Indian communities established within Indian reservations as a result of allotment and surplus lands acts. *See* 18 U.S.C. §§ 1154(c), 1156. It would be strange if the very result contemplated by Congress in defining Indian country – the inclusion of non-Indian communities within Indian reservations subjected to allotment or surplus lands acts – could serve as the basis for the invocation of equitable principles that led to the opposite result.

It is also noteworthy that the specific assertions of tribal authority at issue in *City of Sherrill* and this case have each been addressed by Congress in its Indian country, allotment and surplus lands legislation. As noted above, in allotment and surplus lands acts, Congress has made lands patented in fee subject to state and local taxation, *see Cass Cty.*, 524 U.S. at 103, and in 18 U.S.C. §§ 1154, 1156, and 1161 it has specifically addressed federal, state and tribal liquor regulation within Indian country. Accordingly, this case would be a particularly inappropriate case in which to discard this Court's long-established approach to the interpretation of surplus lands acts, with its premise that only Congress can diminish an Indian reservation, and to resort instead to equitable principles that disregard Congress's intent to preserve or diminish a reservation.

CONCLUSION

For the above reasons as well as those given by respondents, the Court should decline the invitation by petitioners and their *amici* to distort or replace this Court's well-established approach to determining

the effect of allotment and surplus lands acts on the boundaries of an Indian reservation.

Respectfully submitted,

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