No. 10-___

IN THE

Supreme Court of the United States

OSAGE NATION,

Petitioner,

v.

CONSTANCE IRBY, SECRETARY-MEMBER OF THE OKLAHOMA TAX COMMISSION; THOMAS E. KEMP, JR., CHAIRMAN OF THE OKLAHOMA TAX COMMISSION; AND JERRY JOHNSON, WARDEN, VICE-CHAIRMAN OF THE OKLAHOMA TAX COMMISSION.

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

PETITION FOR A WRIT OF CERTIORARI

PATRICIA A. MILLETT
Counsel of Record
JAMES T. MEGGESTO
KEVIN R. AMER
CYNTHIA Q. PULLOM
AKIN, GUMP, STRAUSS, HAUER & FELD LLP
1333 New Hampshire Avenue, N.W.
Washington, DC 20036
(202) 887-4000
pmillett@akingump.com

QUESTIONS PRESENTED

In *Solem v. Bartlett*, 465 U.S. 463 (1984), this Court held that "only Congress can divest a reservation of its land and diminish its boundaries," and Congress's intent to do so must be "explicit[]" and "unequivocal," *id.* at 470-471. The Questions Presented are:

I. Whether, in determining whether Congress disestablished an Indian reservation, express statutory text, unequivocal legislative history, and the expert view of the Executive Branch are controlling, as the Second, Eighth, and Ninth Circuits have ruled, or whether, instead, other indicia external to the statutory text and federal government's view, such as modern demographics, can override unambiguous statutory text, as the Tenth Circuit and Seventh Circuit have held.

II. Whether the court properly ruled that the Osage Nation's reservation has been disestablished in the absence of unambiguous statutory direction and without obtaining or considering the position of the United States government.

PARTIES TO THE PROCEEDING

All parties to the proceeding are identified in the caption.

RULE 29.6 DISCLOSURES

Petitioner Osage Nation has no parent corporation, and no publicly owned corporation owns ten percent or more of its stock.

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PETITION FOR WRIT OF CERTIORARI

The Osage Nation respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 3a) is reported at 597 F.3d 1117. The order and judgment of the district court (App., *infra*, 24a) are reported at 597 F. Supp. 2d 1250.

JURISDICTION

The court of appeals entered its judgment on March 5, 2010. A timely petition for rehearing was denied on May 25, 2010. App., *infra*, 1a. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reproduced at App, *infra*, 57a-71a.

STATEMENT OF THE CASE

1. The Osage Nation is a federally recognized Indian tribe, and its reservation was formally established by Congress in 1872 in what was then known as "Indian territory." Act of June 5, 1872, ch. 310, 17 Stat. 228. The State of Oklahoma was admitted to the Union by the Oklahoma Enabling Act. 34 Stat. 267 (1906) ("Oklahoma Act"). Section 2 of the Oklahoma Act required apportionment of the Territory into 56 districts, one of which was to be coextensive with the Osage Reservation. *Id.* at 268. That requirement was also incorporated into the Constitution of the State of Oklahoma, which provides that "[t]he Osage Indian Reservation with its present boundaries is hereby constituted one county to be known as Osage County." Okla. Const., art. XVII, § 8. In addition, Section 3 of the Oklahoma Act restricted "the manufacture, sale, barter, giving away * * * of intoxicating liquors within those parts of said State *now known as* * * * *the Osage Indian Reservation* and within any other parts of said State *which existed as Indian reservations*." (emphasis added).

From the Reservation's inception through the present time, the Nation has operated its tribal government from this homeland and has protected important historic and cultural resources on behalf of the Osage people. C.A. App. 26-47 (Osage Nation Constitution). In 1904 and 1905, substantial oil and gas reserves were discovered in the Osage Reservation. *Cohen's Handbook of Federal Indian Law* 311 (Nell Jessup Newton et al. eds., 2005) ("*Cohen*"). To protect the Nation's financial well-being and to prevent exploitation of individual tribal

members, Congress enacted the Osage Allotment Act of June 28, 1906 ("Osage Act"). Unlike many other allotment Acts of the era, which opened Indian lands to settlement by non-Indians, *see* Act of Feb. 8, 1887, 24 Stat. 388 (General Allotment Act), the Osage Act allotted the surface estate in trust exclusively for individual Osage members, while the most valuable part of the Reservation – the subsurface – was reserved in trust for the benefit of the Osage Nation. Osage Act §§ 2-3 (App., *infra*, 59a-67a).

The Osage Act repeatedly referenced the Reservation in the present and future tense. *See* Osage Act § 4 (App., *infra*, 68a) (set aside from oil and gas royalties for "schools on the Osage Indian Reservation * * * conducted for the education of Osage children"); *id.* § 7 (App., *infra*, 70a) (requiring that leases and deeds for lands in the Reservation be subject to approval by the Secretary of the Interior); *id.* § 10 (App., *infra*, 71a) (permitting the establishment of public highways or roads "in the Osage Indian Reservation"); *id.* § 11 (App., *infra*, 71a) (allowing railroad companies to continue the use and benefit of certain lands "in the Osage Reservation").

By reserving the subsurface estate for the Nation and limiting allotment to Osage members, Congress ensured continued federal superintendence over the Osage Reservation. That supervision has continued without interruption and has produced a complex and frequently modified scheme of federal regulation and administration of tribal and individual property rights pertaining to the Osage Reservation embodied in a body of federal regulations acknowledging the continued existence of the Osage Reservation. *See*

generally 25 C.F.R. pt. 177 (1938) ("Agricultural and Grazing Leases, Osage Nation, Oklahoma"); 25 C.F.R. pt. 180 (1938) ("leasing of Osage Reservation Lands for Oil and Gas Mining"); 25 C.F.R. pt. 204 (1938) ("Leasing of Osage Reservation Lands, Oklahoma, for Mining, Except Oil and Gas").

2. In 2000, the Oklahoma Tax Commission issued a ruling that asserted a legal claim to collect state income taxes from tribal members who both work and reside on the Reservation. C.A. App. 48-53. The Nation responded by filing suit in the United State District Court for the Northern District of Oklahoma. The complaint sought a declaratory judgment that the Osage Reservation was not disestablished and remains Indian country within the meaning of Section 18 U.S.C. § 1151, and thus federal law precluded the State from taxing those members of the Nation who both earn income and reside within the geographical boundaries of the Nation's Reservation. *See Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 458 (1995).

Respondents initially moved to dismiss on Eleventh Amendment grounds, but, after the Nation amended its complaint to include individual members of the Oklahoma Tax Commission, the Tenth Circuit ruled that the suit could continue against the individual members under *Ex Parte Young*, 209 U.S. 123 (1908).

The district court then granted summary judgment for respondents. App., *infra,* 24a-56a. The court held that the Osage Reservation had been disestablished, relying heavily on the fact that the

land was allotted to individual Osage members and Congress's practice with respect to other Oklahoma tribes during the same time period. App., *infra,* 37a-45a.

3. The court of appeals affirmed. App., *infra,* 3a-23a. The Tenth Circuit acknowledged that "the Act did not open any land for settlement by the non-Osage, there is no sum-certain or any other payment arrangement * * * [and] neither the Osage Allotment Act nor the Oklahoma Enabling Act contain express termination language." App., *infra*, 14a. The court thus concluded that "the operative language of the statute does not unambiguously suggest diminishment or disestablishment of the Osage reservation." App., *infra*, 14a.

The court nevertheless ruled that the Reservation was disestablished, relying on the general history of the allotment process, a few comments in the legislative history of the Osage Act, and "[t]reatises and articles in professional journals." App., *infra*, 17a. The court also relied on modern demographic data. App., *infra*, 21a-22a.

The court then rejected the Nation's citation of additional federal statutes expressly referring to the Osage Reservation and recognition of the Reservation by the Executive Branch as "too far removed temporally from the 1906 Act." App., *infra*, 19a (discussing recognition of the Reservation in a House Report in 2004, a 2005 National Indian Gaming Commission opinion letter, and two compacts between the State of Oklahoma and the Nation).

REASONS FOR GRANTING THE WRIT

The court of appeals held that the same Osage Reservation that was repeatedly recognized in the plain text of the Osage Allotment Act of 1906, was textually discussed in prospective language, and has been acknowledged in subsequent statutes and decades of Executive Branch regulations and positions was disestablished by equivocal references in that Act's legislative history, professorial writings, and demographic statistics. In so ruling, the court of appeals adopted and imposed a legal test for disestablishment that is contrary to this Court's precedent and expands and entrenches a conflict in the circuits concerning the proper legal test for disestablishment. While the Second and Ninth Circuits have held that disestablishment may not be inferred in the absence of "substantial and compelling" contemporaneous evidence of congressional intent, and the Eighth Circuit limits its inquiry to the statutory text and contemporaneous legislative evidence, two other circuits (the Seventh Circuit and now the Tenth Circuit) have permitted non-contemporaneous sources entirely external to the relevant statute and the position of the federal government to effect disestablishments.

The court of appeals' decision is also contrary to repeated recognition of the Reservation's existence and continuance by the Executive Branch. Indeed, its disestablishment ruling was entered without even asking for or considering the United States' view on a disestablishment that only the federal government can effect. Instead, while relying on demographic statistics and professorial writings that post-dated

the 1906 Act by a minimum of several decades, the court of appeals declared that evidence of the federal government's view was irrelevant because it was "too far removed temporally from the 1906 Act" to be considered.

Finally, the question is a recurring one the settled resolution of which is of importance not only to Indian tribes, but also to the federal and state governments. Uncertainty and variability in this area of law equally affects the ability of Indian tribes and state and local governments to plan for and exercise governmental authority and economic development. An issue of such unique federal superintendence, control, and expertise that has such a direct impact on the day-to-day operations of tribal, state, and local governments should have a single federal rule. Only this Court's review can provide that much-needed uniformity.

I. THE COURT OF APPEALS' DECISION EXPANDS AN INTER-CIRCUIT CONFLICT OVER THE LEGAL TEST FOR DISESTABLISHMENT OF A RESERVATION.

Review by this Court is warranted because the Tenth Circuit's holding that disestablishment can occur in the absence of any express indication in the statutory text or legislative history and without considering the position of the United States expands a recurring conflict in the courts of appeals over the proper legal test for disestablishment of a

reservation.[1]

The "first and governing" rule, oft repeated by this Court, is that "only Congress can divest a reservation of its land and diminish its boundaries." *Solem v. Bartlett*, 465 U.S. 463, 470 (1984). Congress's intent to disestablish a reservation, moreover, must be "explicit[]." *Ibid.* Unless "Congress explicitly indicates otherwise," land set aside as a reservation retains that status "no matter what happens to the title of individual plots within the area." *Ibid.*; *see id.* at 478 ("clear statement of congressional intent" required).

The conflict has arisen in how courts of appeals determine that Congress has "explicitly" directed the disestablishment of a reservation. In this case, the Tenth Circuit held that, even when the statutory text is silent and unambiguous, courts can determine disestablishment based not on anything *Congress* said or anything the Executive Branch said, but based on academic professorial writings, demographics, and occasional, isolated snippets of equivocal and ambiguous legislative history. App., *infra,* 14a-22a.

That holding squarely conflicts with the law in the Second Circuit, which held in *Oneida Indian Nation of New York v. City of Sherrill*, 337 F.3d 139 (2d Cir. 2003), *rev'd on other grounds*, 544 U.S. 197

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[1] There is no dispute in this case that the Osage Reservation historically existed and was formally recognized by the federal government. *See* Act of June 5, 1872, 17 Stat. 228, 229.

(2005), that the 1838 Treaty of Buffalo Creek did not disestablish the Oneida Indian Nation of New York's reservation. *See also Oneida Indian Nation of New York v. Madison Cnty.*, 605 F.3d 149, 157 n.6 (2d Cir. 2010), *cert. granted*, No. 10-72 (Oct. 12, 2010).

Like the Tenth Circuit in this case, the Second Circuit found no indication in the Treaty's text or negotiation history "of a congressional intention to disestablish the Oneidas' New York reservation." *City of Sherrill*, 337 F.3d at 162. The difference is that the Second Circuit stopped there, holding that the absence of any clear direction in statutory text or negotiating history from Congress or from the Executive Branch foreclosed the court from declaring a reservation disestablished. *See id.* at 160 (noting that, in cases where Supreme Court has found diminishment, it has relied on "a textually grounded intention to diminish"). Directly contrary to the Tenth Circuit's decision here, the Second Circuit expressly refused to permit "certain legislative and administrative documents" postdating the treaty to substitute for the explicit and unequivocal congressional direction that this Court required in *Solem*. *Id.* at 162. Instead, "[g]iven the absence of anything in the Buffalo Creek Treaty's text or legislative history supporting disestablishment," the court "conclude[d] that these later documents do not 'unequivocally reveal' the intention necessary to demonstrate disestablishment." *Ibid.* (quoting *Solem*, 465 U.S. at 471). Accordingly, had the Osage case arisen in the Second Circuit and been governed by Second Circuit law, the outcome would have been exactly the opposite and the Osage Reservation

would not have been declared disestablished.

The Tenth Circuit's decision is also flatly contrary to the law in the Ninth Circuit. That court refused to find disestablishment in the absence of express language in the relevant agreement between the tribe and the United States, notwithstanding "a number of post hoc references to the 'former' reservation" in the record. *United States v. Webb*, 219 F.3d 1127, 1137 n.15 (9th Cir. 2000). Consistent with *Solem* – but in direct conflict with the Tenth Circuit's decision here – the court held that, "[e]ven if it were fully credited, the countervailing evidence at best creates an ambiguity as to congressional intent which would have to be resolved in favor of the tribe." *Ibid.* Here, by contrast, the Tenth Circuit found no ambiguity in statutory text and no unequivocal Executive Branch direction, but nevertheless allowed non-contemporaneous publications by professors, post hoc demographic statistics, and vague legislative history references both to create an ambiguity and then to resolve it against a tribe. The rules of law applied by the two circuits are thus irreconcilable.

Likewise, the law of the Eighth Circuit is the opposite of the Tenth Circuit's. The Eighth Circuit has held that, in the absence of evidence in the "historical and documentary record" that Congress intended to diminish a reservation, "we must conclude that at the time of the Act those lands retained * * * reservation status." *Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 994, 1009 (8th Cir. 2010). While the court did look to evidence of congressional intent beyond the statutory text, it limited that inquiry to governmental documents

contemporaneous with the statute's enactment. *See id.* at 1008-1010. Importantly, the Eighth Circuit confined its consideration of non-textual evidence to bolstering an interpretation that was "reflect[ed]" in the legislation itself. *Id.* at 1009. That approach is incompatible with the reasoning of the Tenth Circuit, which rested its finding on modern-day academic and demographic sources in the absence of any contemporaneous evidence of disestablishment and any statutory indicia of disestablishment.

The conflict even reaches into the state court system. In *Yellowbear v. State*, the Wyoming Supreme Court concluded that the relevant statutory language – which included terms such as "cede, grant, and relinquish" – "[c]learly" evidenced a congressional intent to diminish the reservation at issue. 174 P.3d 1270, 1282 (Wyo. 2008). Only after making that determination did the court look to considerations external to the statute to confirm its understanding of Congress's intent. *See id.* at 1282-1284.

To be sure, the conflict in the circuits is not one-sided. The Seventh Circuit takes the same tack as the Tenth Circuit. In *Wisconsin v. Stockbridge-Munsee Community*, 554 F.3d 657 (7th Cir. 2009), the court found a reservation disestablished even though the relevant legislation "included none of the hallmark language suggesting that Congress intended to disestablish the reservation," *id.* at 664. Instead, the court relied entirely on legislative history statements and post-enactment evidence suggesting that the reservation had been treated "for the most part" as though it had been disestablished.

Id. at 665. Although the record was not uniform on that point, the court permitted atextual indicia both to create the ambiguity and to resolve that ambiguity in favor of disestablishment. *Ibid.*

Accordingly, this Court's review is needed to resolve that conflict in the law. When, as here, the legal standard prescribed by this Court requires "explicit[]" congressional direction, that standard necessarily demands a single uniform rule for identifying such explicit direction. But that is not what has happened. The law in this area now varies so substantially by geography that analysis of the same statutory text would produce polar opposite outcomes depending on the circuit in which the case arises or the land happens to lie. That disuniformity empowers courts to step in and make decisions that are constitutionally assigned to the Political Branches and to do so on legal bases that are unhinged from congressional or Executive Branch direction. Only this Court's review can restore the uniformity required by federal law and enforced by *Solem*.

II. THE COURT OF APPEALS' RULE THAT A RESERVATION CAN BE DISESTABLISHED WITHOUT EXPLICIT DIRECTION IN THE STATUTORY TEXT AND WITHOUT CONSIDERING THE EXECUTIVE BRANCH'S POSITION SQUARELY CONFLICTS WITH THIS COURT'S PRECEDENT

1. In *Solem*, this Court established a "fairly clean analytical structure" for determining whether a

reservation's boundaries had been diminished by an act of Congress, holding that Congress, and only Congress, "can divest a reservation of its land and diminish its boundaries. 465 U.S. at 470. Moreover, "[d]iminishment * * * will not be lightly inferred." *Ibid.* Rather, Congress's intent "must be 'clear and plain.'" *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998) (quoting *United States v. Dion*, 476 U.S. 734, 738-739 (1986). "The most probative evidence" of such intent is "[e]xplicit" statutory "reference to cession or other language evidencing the present and total surrender of all tribal interests." *Solem*, 465 U.S. at 470. When such express language is coupled with "an unconditional commitment from Congress to compensate the Indian tribe for its opened land," there is a "presumption" – although not a conclusive one – that Congress intended to diminish the reservation's boundaries. *Id.* at 470-471.[2]

The *Solem* rule concerning the primacy of statutory text is but one example of this Court's rule, applied consistently across many contexts, that clear statement requirements cannot be satisfied by references to extra-textual, second- and third-hand material. *See, e.g., Raygor v. Regents of Univ. of Minn.*, 534 U.S. 533, 545 (2002) ("[G]eneral language * * * [is] insufficient to satisfy clear statement

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[2] Reservation "diminishment" refers to a shrinkage of the boundaries of a reservation, while "disestablishment" refers to the complete elimination of reservation boundaries. The same legal analysis applies to both terms. *See Yankton Sioux,* 522 U.S. at 358.

requirements."); *United States v. Nordic Vill. Inc.*, 503 U.S. 30, 34 (1992) ("[T]he Government's consent to be sued 'must be construed strictly in favor of the sovereign, and not enlarge[d] . . . beyond what the language requires.'") (alteration and omission in original) (citation and some internal quotation marks omitted); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 99 (1984) ("[W]e have required an unequivocal expression of congressional intent to 'overturn the constitutionally guaranteed immunity of the several States.'") (quoting *Quern v. Jordan*, 440 U.S. 332, 342 (1979).

To be sure, in the absence of explicit statutory language, the Court has occasionally looked to legislative history to confirm ambiguous statutory text. The Court has cautioned, however, that such reliance is proper only when contemporaneous legislative events – "particularly the manner in which the transaction was negotiated with the tribes involved and the tenor of legislative reports presented to Congress" – demonstrate "unequivocally" that Congress intended the legislation to disestablish or diminish the reservation. *Solem*, 465 U.S. at 471. The Court has also recognized the relevance to its analysis of the Executive Branch's "unambiguous" views. *Yankton Sioux*, 522 U.S. at 354; *see Solem*, 465 U.S. at 478 (noting contradictory treatment by the Executive).

This Court has made clear, moreover, that, "[w]hen both an act and its legislative history fail to provide substantial and compelling evidence of a congressional intention to diminish Indian lands," courts must "rule that diminishment did not take

place and that the old reservation boundaries survived the opening." *Solem,* 465 U.S. at 472. That is because, under the Constitution, "Congress possesses plenary power over Indian affairs," and thus only Congress can disestablish a reservation. *Yankton Sioux*, 522 U.S. at 343. When Congress itself does not speak to the question of disestablishment, courts cannot interject a disestablishment decision of their own unanchored in text, unequivocal legislative history, or the expert interpretation of the Executive Branch. To rely on such materials to judicially interpolate a decision Congress never made is to take the decision out of Congress's hands. Simply put, Congress's power can be neither plenary nor politically accountable if courts are free to declare disestablishment based on non-legislative sources and without explicit legislative direction.[3]

2. The statutory text in this case expressly acknowledges the Reservation's continued existence. While the 1906 Osage Allotment Act, Pub. L. No. 59-321, 34 Stat. 539, 540 (1906), allotted the surface lands of the Osage Reservation, only Osage tribal members could receive land. In addition, Congress

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[3] While, on occasion, the Court has discussed events postdating the passage of the relevant legislation as confirming congressional intent, *Solem,* 465 U.S. at 471, the Court has made clear that such materials cannot themselves signal disestablishment. *See, e.g.*, *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 351 (1998) (noting that "the context of the Act is not so compelling that, standing alone, it would indicate diminishment," but finding diminishment based on "the statute's plain terms").

granted the entire subsurface mineral estate in trust to the Nation as a whole.

As the court of appeals acknowledged, nothing in the 1906 Act's text supports a finding of disestablishment. Quite the opposite, the plain text of the Act repeatedly referred to the Osage "reservation" as continuing in existence. *See* 1906 Act § 4 (App., *infra*, 68a) (set aside from oil and gas royalties for "schools on the Osage Indian Reservation * * * conducted for the education of Osage children"); *id.* § 7 (App., *infra*, 70a) (requiring that leases and deeds for lands in the Reservation be subject to approval by the Secretary of the Interior); *id.* § 10 (App., *infra*, 71a) (permitting the establishment of public highways or roads "in the Osage Indian Reservation"); *id.* § 11 (App., *infra*, 71a) (allowing railroad companies to continue the use and benefit of certain lands "in the Osage Reservation"). The court of appeals' decision, rooted in history articles and statistics is thus at war with the plain statutory text.

Nothing in the balance of the Act's text overcomes that extensive language recognizing the Reservation's continuance. Certainly, the allotment process does not, because this Court "has repeatedly stated and Defendants have conceded that allotment/opening of a reservation alone does not diminish or terminate a reservation." App., *infra*, at 11a.

Other aspects of the 1906 Act, moreover, affirmatively support reservation status. First, rather than opening the Reservation for "the public

domain" as in *Hagen v. Utah*, 510 U.S. 399, 404 (1994), or requiring the payment of a sum certain for lands ceded by the Nation as in *Yankton Sioux*, the Act set aside certain lands for tribal purposes, thereby maintaining federal superintendence of the Reservation. Second, by restricting allotments to Osage members in trust so that they could not be leased or sold without federal approval, *see* Osage Act § 7 (App., *infra*, 70a), "the Act did not directly open the reservation to non-Indian settlement," and instead, it facilitated the maintenance of tribal cohesiveness. App., *infra*, at 14a. Third, the Act reserved tribal mineral resources in trust for the Nation as a whole, which Congress extended in perpetuity in 1978, dramatically demonstrating congressional intent to continue reservation status and federal superintendence for the protection of the Osage people.[4]

Against those powerful textual indicia of continued reservation status, the Act contains none of the express language of termination that is "[t]he most probative evidence" of Congress's intent to diminish a reservation. *Solem*, 465 U.S. at 470. And since the Act "did not open any land for settlement by

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[4] As if more were needed, this Court made clear in *Mattz v. Arnett* that by 1892, "Congress was fully aware of the means by which termination could be effected," 412 U.S. 481, 504 (1973), but failed to use such language. Indeed, in 1870, Congress demonstrated to the Osage how to terminate a reservation's boundaries when it expressly disestablished the Tribe's Kansas reservation, Act of July 15, 1870, ch. 296, § 12, 16 Stat. 335, 362, which included language of cession and sum certain. *Ibid.* No such language appears in the 1906 Act.

non-Osage, there is no sum-certain or any other payment arrangement in the Act." App., *infra*, at 14a. In short, the Act contains nothing approaching the "'clear and plain'" statement of congressional intent that is essential to a finding of diminishment. *Yankton Sioux*, 522 U.S. at 343. Quite the opposite, the court of appeals rightly recognized that the "operative language of the statute does not unambiguously suggest diminishment or disestablishment of the Osage reservation." App., *infra*, 14a.

3. The silence of the statutory text should have been the end of the matter. Only Congress can disestablish the Osage Reservation, and Congress speaks through the laws it passes. When the text is silent, Congress has not "explicitly" disestablished anything. And courts cannot supplant that congressional judgment by invoking post hoc materials never considered by Congress or by isolating equivocal legislative history snippets.

Yet that is precisely what the Tenth Circuit (and the Seventh Circuit in *Stockbridge*) did. Faced with silent and unambiguous statutory text containing none of the recognized indicia of disestablishment, the Tenth Circuit relied on its perception of "the circumstances surrounding the passage of the act," professorial articles, and demographics. App., *infra*, at 14a.

In so ruling, the court of appeals departed sharply from *Solem*'s straightforward holding that legislative history can support disestablishment only if the statutory text is ambiguous and the legislative

history "*unequivocally* reveal[s] a widely-held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation." 465 U.S. at 471 (emphasis added).

First, there is nothing ambiguous about the text of the Osage Act and thus nothing to construe by resort to legislative history.

Second, the only statements by members of Congress regarding the Osage Act relate to the allotment of tribal lands and monies. App., *infra*, at 15a-16a. None of the statements even mentions disestablishment of the Reservation, much less expresses an unequivocal intention to accomplish that result. The allotment of tribal property itself is "completely consistent with continued reservation status" and, in fact, the allotment policy was intended to "continue the reservation system and the trust status of Indian lands." *Mattz v. Arnett*, 412 U.S. 481, 496, 497 (1973); *see also*, *e.g.*, *Solem*, 465 U.S. at 470. Thus, whether or not a single legislator said that Congress needed "to bring about the allotment at the earliest possible time," is irrelevant, App., *infra*, at 16a, and says nothing about Congress's intention with respect to the Reservation's boundaries.

Third, with the exception of a single-sentence statement by a single Osage member opposed to the legislation, the court of appeals cited no contemporaneous statements from the Nation, its leadership, or any other members indicating their understanding that Congress intended to effect disestablishment through the Act. Moreover, the

statement of the single Osage member, which was read into the record through an interpreter, is itself strikingly ambiguous. App., *infra*, at 16a (citing 1 Division Hearings, at 6 (statement of Black Dog) ("Indians in Oklahoma living on their reservations who have had negotiations with the Government[,] since they have been compelled to take their allotments[,] they are not doing as well as the Indians who live on the reservations."). By treating that single cryptic sentence as relevant evidence of disestablishment – particularly in the absence of any statutory language or agency determination to that effect – the Tenth Circuit cast aside this Court's repeated direction that any atextual evidence of congressional intent must be "unequivocal," *Yankton Sioux,* 522 U.S. at 351; *Solem,* 465 U.S. at 471, and, necessarily, must reflect the views of *Congress* and not just of a private individual. *See Solem*, 465 U.S. at 478 ("a few phases scattered through the legislative history" cannot support disestablishment).

Fourth, the Tenth Circuit improperly relied on conclusory statements by historians decades removed from the passage of the Act as evidence of the "contemporaneous understanding" of the legislation's effect. *Solem*, 465 U.S. at 471; *see* App., *infra*, at 15a-18a. This Court has never rested a finding of disestablishment or diminishment on *post hoc* academic conjecture. And that is for good reason. If "the views of a subsequent *Congress* form a hazardous basis for inferring the intent of an earlier one," *Yankton Sioux*, 522 U.S. at 355 (emphasis added) (quoting *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 348-349 (1963)), the views of

subsequent historians are an even more treacherous guide, especially when, as here, they replace (rather than just clarify) congressional direction.

The Tenth Circuit compounded that error by selectively relying on post-enactment demographic data as evidence of Congress's supposed intent decades earlier to disestablish the Reservation. Disestablishment is fundamentally a question of statutory construction; non-contemporaneous statistical studies simply have nothing to say about that. Indeed, this Court has decried such materials as an "unorthodox and potentially unreliable method of statutory construction," *Solem*, 465 U.S. at 472 n.13, and "the least compelling" of the *Solem* factors. *Yankton Sioux*, 522 U.S. at 356.[5]

4. In support of its conclusion that post-enactment non-governmental indicia support disestablishment, the Tenth Circuit relied on statements by a single, local Bureau of Indian Affairs superintendent referring to the land as a "former reservation." App., *infra*, at 20a. But this Court held in *Solem* that even a *congressional* reference to a "former" reservation will not suffice to effect disestablishment. 465 U.S. at 479.

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[5] At most, such data can be a third-hand tool for confirming – not replacing – statutory text and contemporaneous legislative history. *See, e.g.*, *Hagen v. Utah*, 510 U.S. 399, 420 (1994) ("[O]ur 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."); *Yankton Sioux*, 522 U.S. at 351 (demographic data "not so compelling that, standing alone, it would indicate diminishment").

By the same token, the comment of a single regional official cannot hijack Congress's disestablishment authority, especially when they contradict the plain text of numerous federal statutes enacted between 1917 and 1942 referring specifically to the Osage Reservation in the present tense or otherwise reflecting Congress's intent to retain federal superintendence over the Reservation. Indeed, this Court has held that "Congress's own treatment of the affected areas * * * has some evidentiary value." *Solem*, 465 U.S. at 471; *see, e.g.,* 25 U.S.C. § 398 (1924) (providing for the leasing of unallotted land on Indian reservations "other than lands of the Five Civilized Tribes and the Osage Reservation"); 25 U.S.C. § 396f (1938) (excepting from certain leasing provisions "the Crow Reservation in Montana, the ceded lands of the Shoshone Reservation in Wyoming, the Osage Reservation in Oklahoma"); 25 U.S.C. § 373c (1942) (excepting certain probate procedures from the "Five Civilized Tribes or the Osage Reservation"); Reaffirmation Act of 2004, Pub. L. No. 108-431; Osage C.A. Br. 31, 36 & n.14 (citing statutes).

Nor, under this Court's precedent, can it trump the views of higher-level Executive Branch officials. *See, e.g., Hagen*, 510 U.S. at 417-418. The Department of the Interior has consistently and from the earliest days of the Reservation administered its statutory duties and performed trust obligations consistent with the Osage Reservation's continued recognized existence. For example, the Solicitor of Interior issued an opinion in 1935 in conjunction with a murder investigation and prosecution on the Osage

Reservation that, for purposes of jurisdiction, the lands in question "may be regarded as within the limits of the Indian reservation" and that "[s]o far as I am advised no act of Congress has severed these lands from the reservation. In the absence of such Congressional action the lands not only remain with the reservation but also qualify as 'Indian country' under the rule that 'Indian country' remains such until the Indian title is extinguished unless other wise [sic] provided by Congress." Memorandum to the Commission of Indian Affairs from Nathan R. Margold, Solicitor, 1 Opinions of the Solicitor 591-92 (December 17, 1935); *see also* C.A. App. 170 (Letter from Penny J. Coleman, National Indian Gaming Commission, to Richard Meyers, Dep't of Interior (July 28, 2005), quoting Letter from Harold D. Cox, Associate Commission for Support Services, to Senator Henry Vellman (Mar. 9, 1971) ("[i]n reviewing the situation, we have not found any Act of Congress which expressly or otherwise terminated the reservation status or operated to remove the boundaries thereof"); C.A. App. 184 (Letter to Honorable Robert S. Kerr, Jr. from Tim Vollman, Regional Solicitor (Feb 15, 1994) (advising the Oklahoma Water Resources Board that it "has no jurisdiction or authority to adjudicate the rights of the Osage Tribe to use the water appurtenant to its reservation")).[6]

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[6] Contrary to the court of appeals' conclusion, App., *infra,* 20a, the isolated statements in the regional reports suggesting that state and county officials had "primar[y]" law enforcement responsibilities within the territory during a given period, are wholly inadequate to resolve the jurisdictional question. *See*

Recently, Interior has been called upon to administer and enforce federal liquor laws based upon its formal position regarding the continued existence of the Reservation. For example, the Assistant Secretary for Indian Affairs certified the Osage Tribe Liquor Control Ordinance, and published the ordinance in the Federal Register, 70 Fed. Reg. 3054 (Jan. 19, 2005), pursuant to 18 U.S.C. § 1161. Section 4 of the Nation's ordinance approved by Interior states: "The Osage Tribal Council, as the sole governing body of the Osage Tribe of Indians, hereby affirmatively declares, asserts, and extends the jurisdiction of the Osage Tribe over the Osage Indian Reservation and all Indian country, as defined in 18 U.S.C. § 1151, *within the exterior boundaries of the Osage Indian Reservation, as described in the Act of June 5, 1872*." 70 Fed. Reg. at 3055.

Moreover, Interior recently approved a Tribal-State Gaming Compact, as it is required to do pursuant to federal law, between the Osage Nation and the State of Oklahoma. 70 Fed. Reg. 13535 (Mar. 21, 2005). The Compact authorizes the Nation to conduct gaming on its Indian lands, as defined by IGRA, *see infra* p. 26 n.7, which include "all lands within the limits of any Indian reservation." 25 U.S.C. § 2703(4). Since 2005, the Nation has operated gaming operations on parcels of fee land within the boundaries of the Osage Reservation, in

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Solem, 465 U.S. at 465 n.2 & 479 n.23 (noting the law enforcement roles States can exercise on Indian land and citing a study indicating that "Federal, Tribal, and State courts shared jurisdiction over the opened areas in the decades following opening").

accordance with the Gaming Compact. From 2005 through January 2009, the Nation remitted to the State of Oklahoma revenue sharing payments and fees for gaming on fee land totaling $4,235,204.00. C.A. App. 412.

Finally, maps produced by the Department of the Interior and the U.S. Geological Survey depict the Osage Reservation as the only Indian reservation in Oklahoma. App., *infra*, 72a. Some maps not only represent the continued existence of the Osage Reservation, but depict every other tribe in Oklahoma as "Federal Indian Groups Without Reservation." *See* U.S. Geological Survey, Indian Lands 1992, *available at* https://store.usgs.gov/yimages/PDF/101502.pdf (last visited Oct. 21, 2010).

Interior is not alone. The National Indian Gaming Commission ("Commission") is a federal agency charged by Congress with regulating Indian gaming and, if necessary, enforcing the statute against a tribe or gaming management company that may be operating in violation of federal law.[7] When questions arise regarding whether the conduct of Indian gaming is occurring on gaming eligible Indian lands, the government's position on the status of an Indian reservation is critically important and often dispositive.[8] In fulfillment of this statutory duty, the

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[7] The NIGC was created by Congress pursuant to the Indian Gaming Regulatory Act, 25 U.S.C. § 2701, *et seq.* ("IGRA") to regulate Indian gaming activity on Indian land.

[8] The IGRA provides, among other things, that tribal gaming is lawful if conducted on the statutorily defined term

Commission issued an opinion letter concluding that the Osage Nation may conduct gaming on certain parcels of fee land in North Tulsa, Oklahoma, because "they lie within the Tribe's reservation." C.A. App. 166. The opinion is based on historical documents and official records from Interior acknowledging that the Osage Reservation boundaries have not been disestablished.

In addition, the Commission separately approved the Nation's gaming ordinance authorizing gaming activities to be conducted on the Nation's Indian lands as defined by IGRA. *See* Letter from Philip N. Hogen, National Indian Gaming Comm'n, to Chief James R. Gray, *et al.* (Feb. 27, 2007), *available at* www.nigc.gov/Portals/0/NIGC%20Uploads/ReadingRoom/gamingordinances/osagenation/osageordamend022707.pdf (last visited Oct. 21, 2010); 25 U.S.C. § 2703(4) (defining Indian lands as "all lands within the limits of any Indian reservation . . . .").

Third, the United States has taken a formal litigation position in *Osage Nation v. United States*, currently pending in the United States Court of Federal Claims, that the Osage Reservation was not disestablished. Department of Justice and Interior attorneys entered into Stipulations of Fact with the Nation that set forth that "[t]he Osage Reservation is located in northern Oklahoma. The Reservation covers roughly 1.47 million acres. The boundaries of the Osage Reservation are co-extensive with the

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"Indian lands," which in most cases means land within a Tribe's reservation boundaries.

boundaries of present-day Osage County, Oklahoma." C.A. App. 176. This stipulated fact was adopted by the Court on September 21, 2006.

The Tenth Circuit, however, completely ignored that extensive and longstanding congressional and Executive Branch recognition of the continued existence of the Osage Reservation. Indeed, the court's legal test gave far greater weight to the views of private scholars and statisticians, App., *infra*, 15a-18a; 21a-22a, than it did to the four federal statutes and longstanding views of two expert federal agencies. That makes no sense. Under *Solem,* only Congress's words can disestablish a reservation, yet the Tenth Circuit leaves no room in its legal standard for what Congress said four times, and thus its test bears no resemblance to this Court's rule that congressional intent is dispositive. Nor does the Tenth Circuit's test factor in the formal position of agencies charged by Congress with administering the relevant laws, unlike *Solem* and *Yankton Sioux.*

This Court's review thus is needed because the court's decision defies Congress's repeated recognition in numerous statutes of the Osage Reservation's continued existence. In addition, federal agencies need a single, consistent answer to whether and when a reservation, like the Osage's, has been disestablished so that they can carry out their important federal responsibilities. For example, the Department of Interior provides services directly, or through contracts, grants or compacts, to 564 federally recognized tribes with a combined service population of approximately 1.9 million American Indians and Alaska Natives in nearly every state.

Moreover, programs administered on scores of Indian reservations throughout the country by Interior include social services, law enforcement and detention services, and natural resources management on 55 million acres of trust lands and 57 million acres of subsurface minerals estates. Commonly, the proper administration of these programs depends upon Interior's official position regarding the status of the Indian reservation where the program is to be applied. But the status of the Osage's Reservation is now unsettled, with the court of appeals on the one hand, and Congress and the Executive Branch on the other providing different answers.

III. THE QUESTION PRESENTED IS IMPORTANT AND RECURRING

The questions presented in this case are fundamental to the United States' relationship with Indian tribes and, more importantly, the United States' ability to carry out its federally mandated trust relationship with the Osage Nation and other tribes. *See Yankton Sioux*, 522 U.S. at 357 (noting the "present-day understanding of a 'government-to-government relationship between the United States and each Indian tribe'") (quoting 25 U.S.C. § 3601). The Tenth Circuit's divergence from this Court's precedent and inconsistency with other circuits will wreak havoc on the congressionally designated agencies' ability to consistently carry out their duties and uphold their fiduciary responsibilities to Indian tribes throughout the country.

Furthermore, questions of reservation diminishment and disestablishment are recurring

and important. They have arisen in federal courts of appeals and state courts of last resort across the Country, with three decisions addressing disestablishment issued by three different courts of appeals in 2010 alone. *See* App., *infra*, 3a; *Yellowbear, supra*; *Podhradsky, supra*. Such decisions are vitally important, moreover, directly affecting the day-to-day operations of federal, state, local, and tribal agencies.

In fact, this Court's recent grant of certiorari in *Madison County v. Oneida Indian Nation*, 79 USLW 3062 (U.S. Oct. 12, 2010) (No. 10-72), confirms the importance of the question. There, this Court granted review to address, *inter alia*, whether the Oneida reservation in New York was disestablished. Petition for Writ of Certiorari at i, *Madison Cnty. v. Oneida Indian Nation*, No. 10-72 (U.S. July 9, 2010). That grant of certiorari reflects the importance of such disestablishment questions.

It also reinforces the need for review in this case for two reasons. First, it is not at all clear that this Court will find it necessary to address the disestablishment question in that case, since the issue is presented only secondarily and was not decided by the court of appeals in that case, 605 F.3d at 157 n.6. Second, even if the Court were to reach that question, it is narrowly confined to evaluating factually the status of the Oneida reservation. This case, by contrast, presents an overarching legal question about the proper standard for holding that a reservation has been disestablished that cuts across many States and virtually all tribes.

In the alternative, this petition should be held pending this Court's disposition of *Madison County,* with the appropriateness of certiorari taken under review following the Court's decision in that case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted. In the alternative, the petition should be held pending this Court's decision in *Madison County v. Oneida Indian Nation*, 79 USLW 3062 (U.S. Oct. 12, 2010) (No. 10-72), and disposed of as appropriate following this Court's decision in that case.

Respectfully submitted,

Patricia A. Millett
Counsel of Record
James T. Meggesto
Kevin R. Amer
Cynthia Q. Pullom
AKIN, GUMP, STRAUSS,
HAUER & FELD LLP
1333 New Hampshire
Avenue, N.W.
Washington, DC 20036
(202) 887-4000
pmillett@akingump.com

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