

No. 25-7600

In the
Supreme Court of the United States

HAZEN HUNTER WINCKLER,
Petitioner,

v.

STATE OF SOUTH DAKOTA,
Respondent.

**On Petition for Writ of Certiorari to the
Supreme Court of South Dakota**

**REPLY BRIEF IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI**

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	ii
INTRODUCTION.....	1
REPLY ARGUMENT.....	2-15
I. THE STATE CANNOT IDENTIFY THE CLEAR CONGRESSIONAL LANGUAGE <i>McGIRT</i> REQUIRES	
II. THE INCREMENTAL DIMINISHMENT THEORY CONFLICTS WITH SEVENTH CIRCUIT AND SUPREME COURT PRECEDENT	
III. THE DECISION BELOW DECIDED AN IMPORTANT FEDERAL QUESTION WARRANTING THIS COURT’S REVIEW	
CONCLUSION.....	14

TABLE OF AUTHORITIES

Cases:

<i>Bruguier v. Class</i> , 1999 S.D. 122, 599 N.W.2d 364.....	1, 10, 11, 12, 13
<i>Clairmont v. United States</i> , 225 U.S. 551 (1912).....	4
<i>Highrock v. Gavin</i> , 179 N.W. 12 (S.D. 1920).....	6
<i>McGirt v. Oklahoma</i> , 591 U.S. 894 (2020).....	1, 2, 3, 5, 6, 7, 9, 10, 14, 15
<i>Nebraska v. Parker</i> , 577 U.S. 481 (2016).....	3
<i>Oneida Nation v. Vill. of Hobart</i> , 968 F.3d 664 (7th Cir. 2020).....	7, 8, 9, 10, 11, 13
<i>Solem v. Bartlett</i> , 465 U.S. 463 (1984).....	2, 3, 9
<i>South Dakota v. Yankton Sioux Tribe</i> , 522 U.S. 329 (1998).....	2, 3, 6, 9
<i>State v. Winckler</i> , 2026 S.D. 19, 33 N.W.3d 58.....	1, 10, 12, 13
<i>United States v. Nice</i> , 241 U.S. 591 (1916).....	4, 5
<i>United States v. Pelican</i> , 232 U.S. 442 (1914).....	4
<i>Yankton Sioux Tribe v. Gaffey</i> , 188 F.3d 1010 (8th Cir. 1999).....	7, 8, 9
<i>Yankton Sioux Tribe v. Podhradsky</i> , 606 F.3d 994 (8th Cir. 2010).....	9, 12

Constitutional Provisions:

S.D. Const. Art. XXII.....	6
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Treaties and Acts:

Treaty with the Yankton Sioux, Apr. 19, 1858, 11 Stat. 743....	1, 3, 5, 6, 10, 12, 13, 14
Act of Aug. 15, 1894, ch. 290, 28 Stat. 286, 314-319.....	1, 2, 3, 4, 5, 6, 7, 9, 10, 13, 14

Statutes:

18 U.S.C. § 1151(a).....	5
18 U.S.C. § 1151(c).....	4, 5

INTRODUCTION

This case presents a recurring question of national importance: whether private real estate transactions can accomplish what this Court held in *McGirt v. Oklahoma* only Congress can do: divest Indian country status through clear statutory language. *Id.*, 591 U.S. 894, 903-904 (2020). Here, the 1894 Act ceded only “unallotted lands” while explicitly guaranteeing the Yankton Sioux “undisturbed and peaceable possession of their allotted lands,” promising that “Congress shall never pass any act alienating any part of these allotted lands from the Indians,” and reaffirming the 1858 Treaty. App. B-2 (Petition’s Appendix), 28 Stat. 286, at 314-318; App. B-1, 11 Stat. 743. Yet the South Dakota Supreme Court held these textual guarantees were overcome by subsequent events, demographic changes, and private conveyances to non-Indians – precisely the extratextual methodology *McGirt* condemns.

The State asks this Court to bless a state supreme court’s declaration that a federally created reservation was “effectively terminated” without clear congressional intent. App. A-1, *State v. Winckler*, 2026 S.D. 19, ¶¶ 24-26; App. A-4, *Bruguier v. Class*, 1999 S.D. 122, ¶¶ 1-40. Even Justice Salter, concurring below, expressly rejected the disestablishment holding as “not correct,” observed the Yankton Sioux Reservation may continue to exist in allotted lands, and questioned state court authority to declare reservations terminated. App. A-1; 2026 S.D. 19, ¶¶ 78-83. This internal split on an important federal question of this character, underscores the need for this Court’s review. The decision below conflicts with Seventh and Eighth Circuit precedent and directly challenges this Court’s Indian country jurisprudence.

REPLY ARGUMENT

I. THE STATE CANNOT IDENTIFY THE CLEAR CONGRESSIONAL LANGUAGE *McGIRT* REQUIRES

A. The 1894 Act's Express Guarantees to the Tribe Preclude Any Finding That Congress Divested Allotted Lands of Indian Country Status.

This Court's review is warranted because the decision below conflicts with *McGirt*'s holding that only Congress can disestablish a reservation and divest Indian country status, and the congressional intent to do so "must be clear," requiring "language evidencing the present and total surrender of all tribal interests" in the affected lands. *Id.*, 591 U.S. 894, at 903-904, 906-907, 914-916, 928-929; *Solem v. Bartlett*, 465 U.S. 463, 470 (1984). The 1894 Act's plain language demonstrates that Congress did not intend to divest allotted lands of Indian country status.

Articles I and II explicitly provide that the Yankton Sioux cede "all their claim, right, title, and interest in and to all the *unallotted lands*" within the reservation for the sum of \$600,000. App. B-2; 28 Stat. 286, 314-315 (emphasis added); *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 338 & n.2 (1998). This Court held those provisions diminished the reservation only to the extent of the ceded surplus, unallotted lands. *Id.*, 522 U.S., at 344, 358. The State concedes Articles I and II's express limitation applying only to unallotted lands. Brief in Opposition "BIO" at 16-17. The Act contains no parallel cession language for allotted lands.

The 1894 Act separately addressed allotted lands through express guarantees incompatible with disestablishment: Article XIII guaranteed the Yankton Sioux "the undisturbed and peaceable possession of their allotted lands" including "all the rights

and privileges of the tribe”; Article XIV promised that “Congress shall *never* pass any act alienating any part of these allotted lands from the Indians” (emphasis); and Article XVIII reaffirmed that the 1858 Treaty (App. B-1; 11 Stat. 743) – which established the Reservation, recognized the Tribe’s “Title,” and promised federal protection of their “quiet and peaceable possession” – “shall be in full force and effect.” App. B-2; 28 Stat. at 317-318. The State’s reliance on *Yankton Sioux Tribe* for the statement that Article XVIII pertains to “the continuance of annuities, not the 1858 boarders,” (BIO at 15), misconstrues that decision. The Court in *Yankton Sioux Tribe* addressed Article XVIII only as to *unallotted surplus lands*, not whether it preserved tribal sovereign interests in *allotted Reservation lands*. 522 U.S. at 358. The Court recognized provisions in the 1894 Act that “counsel[.] against finding the reservation terminated,” including Article VIII’s reservation of agency and school lands. 522 U.S. at 350. *A fortiori*, Articles XIII, XIV, and XVIII’s promises for allotted lands require the same, indeed stronger, conclusion.

The State offers no textual foundation for extending diminishment to allotted lands that Articles XIII and XIV explicitly **guaranteed** to the Tribe in perpetuity. Explicit cession language accompanied by sum-certain payment creates a presumption that Congress divested the reservation of the affected lands, *Solem*, 465 U.S., at 470-471, which is entirely lacking for the allotted lands here. It is not a court’s role to “rewrite” the clear statutory text based on extratextual considerations, subsequent demographic history or later treatment of the disputed land. *McGirt*, 591 U.S., at 915-916; *Nebraska v. Parker*, 577 U.S. 481, 493 (2016). The absence of

parallel cession language for allotted lands is not ambiguity requiring resort to extratextual sources – it is **clarity** that those lands were not ceded.

The 1894 Act's structure confirms the distinction. It ceded unallotted lands through Articles I and II while preserving tribal sovereign interests in allotted lands through Articles XIII, XIV, and XVIII.

B. Allotment-Era Cases Required Congressional Action, Not Private Conveyance.

The State's reliance on *Clairmont v. United States*, *United States v. Pelican*, and *United States v. Nice* misses the critical distinction between individual title and tribal sovereign title preserved by the 1894 Act, Articles XIII, XIV, and XVIII.

Clairmont, 225 U.S. 551 (1912), directly supports Petitioner's position. There, the Court concluded that "by virtue of the agreement between the United States and the Indians this land was freed from the Indian right of occupancy" because the confederate tribes "surrendered and relinquished to the United States" their treaty interest and title to the affected land in consideration of \$16,000. *Id.*, 225 U.S., at 556. *Clairmont* required a sovereign act of cession to extinguish Indian title – mere fee conveyance to a non-Indian was legally insufficient. 18 U.S.C. § 1151(c) likewise distinguishes individual ownership from the sovereign encumbrance of Indian title, but the State conflates the two.

Pelican, 232 U.S. 442 (1914), did not decide whether Congress disestablished a treaty reservation or whether private conveyances can diminish Indian lands. The State converts a case preserving federal jurisdiction over trust allotments into a rule allowing private conveyances to accomplish reservation disestablishment.

Nice, 241 U.S. 591 (1916), held that the allotment statutes there “recognized the existence of the tribe” and “plainly disclosed that the tribal relation...was not to be terminated by the making or taking of allotments.” *Id.*, at 596-597. *Nice* did not decide that a reservation had been disestablished, did not interpret the 1894 Act, and did not hold that private conveyances can accomplish what only Congress may do.

McGirt explains that § 1151(a) “expressly contemplates private land ownership within reservation boundaries” and it does not matter whether individual parcels have passed to non-Indians. *McGirt*, 591 U.S. 894, at 906; *see also* 18 U.S.C. § 1151(c) (defining Indian country to include “all Indian allotments, the Indian titles to which have not been extinguished”). “Congress does not disestablish a reservation simply by allowing the transfer of individual plots, whether to Native Americans or others.” *Id.*, at 906-907. “To accomplish that would require an act of cession, the transfer of a sovereign claim from one nation to another.” *Id.* (citation omitted).

C. *McGirt*’s Methodology Applies Regardless of Treaty-Specific Language.

The State’s attempt to put form over substance to distinguish *McGirt* fails. BIO at 18-20. *McGirt*’s holding does not rest on the talismanic phrase “secure forever,” but on the principle that extratextual sources “cannot overcome” clear statutory terms. 591 U.S. at 913-16. Here, the meaning of the 1894 Act’s guarantees is equally clear: Congress expressly guaranteed tribal rights to allotted lands (Art. XIII), promised that it would “*never*” alienate those lands (Art. XIV), and reaffirmed the 1858 Treaty (Art. XVIII). Whether those promises used the phrase “secure forever”

is beside the point; they express statutory guarantees by Congress that cannot be overridden by subsequent demographic changes or private conveyances.

Article XIV's promise that "Congress shall **never** pass any act alienating any part of these allotted lands from the Indians" (emphasis added), is an express, perpetual, unqualified prohibition on future congressional alienation. "Never" is not limited by a trust period; it is unlimited in time. The State points to no limiting language in the statute itself. Instead, the State's interpretation, that "never" really means "for 25 years" based on general allotment-era expectations, requires inserting temporal limitations Congress omitted and ignoring promises Congress expressly included. That is precisely the extratextual methodology *McGirt* forbids.

Moreover though, the Yankton Sioux 1858 Treaty affirmatively recognizes the Tribe's "Title" to the reserved lands – most of which were allotted to Tribe members, *Yankton Sioux Tribe*, 522 U.S., at 336 – and guarantees their "quiet and peaceable possession." App. B-1; 11 Stat 743 (Arts. I-II, IV). The 1894 Act expressly reaffirmed those protections, promising to the Tribe the reservation allotted lands in perpetuity. App. B-2; 28 Stat. at 317-318 (Arts. XIII-XIV, XVIII).

The State cannot square these textual guarantees with its theory that private conveyances accomplished what only Congress can do. South Dakota constitutionally disclaimed jurisdiction over Yankton Sioux lands as a condition of statehood, providing Indian lands "shall remain under the absolute jurisdiction and control of the United States" until Indian title is extinguished **by Congress**. S.D. Const. Art. XXII; *Highrock v. Gavin*, 179 N.W. 12, 25 (S.D. 1920). South Dakota cannot now

claim that private real estate transactions accomplished what its own Constitution requires Congress to do.

Missing in all this is a statute evincing anything like the “present and total surrender of all tribal interests” in the affected lands – Yankton Sioux allotted lands. *McGirt*, 591 U.S., at 906. The South Dakota Supreme Court’s departure from *McGirt*’s text-first methodology presents an important federal question under Rule 10(c), where a state court of last resort has decided an important federal question in a way that conflicts with relevant decisions of this Court.

II. THE INCREMENTAL DIMINISHMENT THEORY CONFLICTS WITH SEVENTH CIRCUIT AND SUPREME COURT PRECEDENT

A. *Oneida Nation* Squarely Rejected Incremental Diminishment.

The State defends the South Dakota Supreme Court’s holding that the Yankton Sioux Reservation was “effectively terminated” through a “two-stage process”: “immediate diminishment through cession of unallotted lands” and “further diminishment” through allotment and subsequent conveyance to non-Indians. BIO at 17-18. This “incremental diminishment” theory to disestablishment finds no support in the 1894 Act’s text and was directly rejected by the Seventh Circuit in *Oneida Nation v. Village of Hobart*, 968 F.3d 664 (7th Cir. 2020).

In *Oneida Nation*, the Seventh Circuit held that “the theory of incremental diminishment embraced in *Gaffey* – in which individual parcels of land would be removed from the reservation as they passed into the hands of non-Indians – is at odds with *Seymour*, *Moe*, and the Supreme Court’s hostility toward rules that would create checkerboard jurisdiction.” *Id.*, 968 F.3d at 680-681 (discussing *Yankton Sioux*

Tribe v. Gaffey, 188 F.3d 1010, 1013 (8th Cir. 1999)). This holding directly rejects the analytical framework the South Dakota Supreme Court applied below.

The State acknowledges this conflict but attempts to minimize it by characterizing the issue as limited to “this single parcel of land.” BIO at i, 36, 39. This badly understates the scope and importance of the question presented. Most of the 1858 Treaty lands were parceled out to Tribe members in the form of allotments, and general allotment practices affected reservations nationwide. The Seventh Circuit’s rejection of incremental diminishment was not limited to cases lacking a surplus land act; it was a rejection of the *analytical framework* under which individual conveyance can divest reservation status. The Seventh Circuit detailed this Court’s Indian country cases and concluded that allowing parcels to exit reservation status based on private ownership and the happenstance of conveyance to non-Indians conflicts with a long line of this Court’s precedents, creates unpredictability, and facilitates the type of impermissible checkboard jurisdiction this Court has condemned. *Oneida Nation*, 968 F.3d at 675-681. The Seventh Circuit’s express rejection of the incremental diminishment framework that both South Dakota and the Eighth Circuit’s *Gaffey* decision employ presents fundamental conflict over methodology and legal framework, not mere factual distinction. Whether individual conveyances can serve as a mechanism for reservation diminishment and result in termination of Indian interests, is an important recurring federal question on which there is a clear circuit-circuit and state-federal split.

The fact that the Eighth Circuit previously adopted incremental diminishment in *Gaffey* does not eliminate the split – it confirms it. This direct conflict over the permissibility of incremental diminishment warrants review under Rule 10(a)-(c). Additionally, the Eighth Circuit in *Yankton Sioux Tribe v. Podhradsky* found that the reservation was not disestablished and continues to exist, noting this Court has indicated the 1894 Act “suggests Congress envisioned an ongoing reservation,” *Id.*, 606 F.3d 994, 997, 1006-1010 (8th Cir. 2010) (citing *Yankton Sioux Tribe*, 522 U.S. at 350)). That conclusion conflicts with the South Dakota Supreme Court’s adherence to disestablishment, further demonstrating a clear state-federal split over an important federal question that warrants review under Rule 10(b)-(c).

B. Congress Could Not Have “Clearly Expressed” Intent to Diminish at Unknown Future Dates.

The incremental diminishment theory creates an insurmountable problem. How can a court “say that Congress *clearly intended* to do something (diminish the Reservation) when it had no idea when or to what extent the Reservation would be diminished?” *Oneida Nation*, 968 F.3d at 679, n. 10 (emphasis and parenthesis original). Congress in 1894 could not have “clearly expressed” an intent to diminish allotted lands at unknown future dates depending on individual allottees’ unpredictable decisions to sell. Yet that is precisely what the decision below requires.

Solem and *McGirt* require that Congress “clearly evince” its intent before diminishment will be found. An intent contingent on unknowable future events – the unpredictable decisions of individual allottees to sell decades later – cannot satisfy the “clear” expression requirement this Court demands.

C. The Decision Below Allows Private Transactions to Accomplish What Only Congress Can Do.

The decision below allows private transactions to determine whether land retains Indian country status, inverting the constitutional allocation of power by permitting private parties to divest Indian land without any congressional involvement, and conflicting with this Court’s Indian country precedents. *McGirt*, 591 U.S., at 903-904; *Oneida Nation*, 968 F.3d at 675-681 (citing cases).

The 1894 Act’s language shows Congress intended to preserve tribal title as a sovereign interest in the allotted lands, independent of individual fee ownership. Articles XIII and XIV’s express language guaranteeing the allotted lands to the Tribe in perpetuity combined with Article XVIII’s explicit reaffirmation that “all the provisions of the [1858 Treaty] shall be in full force and effect” is incompatible with the State’s theory that the 1894 Act terminated the Reservation.

III. THE DECISION BELOW DECIDED AN IMPORTANT FEDERAL QUESTION WARRANTING THIS COURT’S REVIEW

A. The State’s Contradictory Vehicle Characterizations Demonstrate the Need for Review.

The State characterizes this case as involving “this single parcel of land,” yet defends a decision which expressly held that the Yankton Sioux Reservation was “effectively terminated” and that “no lands within the former 1858 boundaries now constitute a reservation under 18 U.S.C. § 1151.” App. A-1; *State v. Winckler*, 2026 S.D. 19, ¶¶ 24-26, 32-34, 39, 44-45 (citing *Bruguier v. Class*, 1999 S.D. 122, ¶¶ 1, 40 (App. A-4)). These are not dicta or unnecessary musings – they constitute the foundation upon which the jurisdictional determination rests. The court’s adherence

to *Bruguier's* disestablishment framework together with its endorsement of incremental diminishment to find state jurisdiction over this parcel, necessarily required deciding that the reservation no longer exists and that hundreds of thousands of acres of tribal allotted lands have been terminated from Indian country status. The State cannot defend a sweeping disestablishment holding while simultaneously claiming the case presents no important federal question.

The State cannot have it both ways. Either (1) the decision below held the reservation was disestablished as the opinion expressly states – in which this Court's review is essential to determine whether a state court may declare a federal reservation terminated without clear congressional authorization and resolve the conflict with the Eighth Circuit which held the reservation continues – or (2) it applied a race-based, ownership-contingent rule – in which case the decision conflicts with *Onieda Nation* and creates exactly the impermissible checkerboard jurisdiction this Court has condemned. 968 F.3d at 675-681 (citing cases). Either framing warrants review under Rule 10.

The decision's effect on the specific 200-acre allotted parcel of tribal lands where Petitioner's offenses occurred (App. C-1; Exhibit 3) followed directly from the South Dakota Supreme Court's disestablishment holding, or incremental approach to termination of Indian country. The broader disestablishment/termination question is central to – not peripheral to – the jurisdictional determination. This case squarely presents the important federal question of whether Congress expressly intended to disestablish the Yankton Sioux Reservation and divest allotted lands of Indian

country status, *see* Petition at 1, 22-35, affecting hundreds of thousands of acres and thousands of tribal members in a rural area (App. C-1; Exhibits 12 & 22), and determining whether the State or Federal Government possesses criminal jurisdiction over Indians there. The State offers no principled distinction between this parcel and other reservation allotments compromising 1858 Treaty lands.

B. Justice Salter’s Concurrence Demonstrates Why Review is Warranted.

Justice Salter’s concurrence confirms the need for review. He expressly wrote that *Bruguier’s* disestablishment holding is “not correct,” noting doctrinal instability and constitutional concerns in the court’s approach, and expressing skepticism that a state court could authoritatively declare reservation lands disestablished. App. A-1; *Winckler*, 2026 S.D. 19, ¶¶ 78-83. Justice Salter observed that allotted Reservation parcels “persist today, as if outside of time, exactly as they did generations ago.” *Id.*, at ¶ 81. A concurring Justice’s published doubt about the foundational premise of the very decision under review – on a pure question of federal law affecting hundreds of thousands of acres and determining the division of criminal jurisdiction between sovereigns – is a red flag compelling this Court to settle the question authoritatively.

C. The State’s Remaining Objections Lack Merit.

The State claims “no split” exists because South Dakota and the Eighth Circuit both employ incremental diminishment. BIO at 35-36. This mischaracterizes the conflict. First, the Eighth Circuit in *Yankton Sioux Tribe v. Podhradsky* (2010) held the Reservation *continues to exist* and was *not disestablished*, 606 F.3d at 997, 1006. This directly contradicts South Dakota’s holding that the Reservation was “effectively

terminated” such that “no lands within the 1858 Treaty boundaries now constitute a reservation.” App. A-1; *Winckler*, 2026 S.D. 19, ¶¶ 24-26; App. A-4; *Bruguier*, 1999 S.D. 122, ¶¶ 1, 40. Second, the Seventh Circuit in *Oneida Nation* squarely rejected the incremental-diminishment approach both courts employ, holding it “at odds with *Seymour*, *Moe*, and the Supreme Court's hostility toward rules that would create checkerboard jurisdiction.” 968 F.3d 664, at 680-681. This presents direct conflict over methodology and legal framework, not mere factual distinctions.

Thus, the State’s claim of ‘longstanding consensus’ (BIO at i) is contradicted by the authorities themselves: the South Dakota Supreme Court holds the reservation “effectively terminated,” the Eighth Circuit holds the reservation continues to exist but diminished, and the Seventh Circuit holds the analytical framework both employ is “at odds” with this Court’s precedents. This is not consensus. The authorities reveal fundamental conflict about the scope and effect of the 1894 Act and the proper analytical framework under this Court’s Indian country precedents, warranting certiorari under Rule 10.

Next, the State’s interpretation of Article XIV (BIO at 37) cannot be squared with Article XIV’s explicit promise that “Congress shall *never* pass any act alienating any part of these allotted lands from the Indians.” (emphasis added). “Never” is not limited by a trust period. It is perpetual. That Congress chose ‘never’ for the congressional-alienation prohibition while referencing ‘trust period’ elsewhere in the Act demonstrates the perpetual nature of the tribal sovereign interest.

Finally, the State argues that granting certiorari would “resurrect a reservation” and create jurisdictional chaos. BIO at 38-40. This argument conflates two questions: whether the reservation was disestablished, and what the practical consequences of that legal conclusion should be. The latter concern cannot override the requirement that courts faithfully interpret the statutes Congress enacted.

This Court has repeatedly held that purported practical difficulties cannot justify deviating from statutory text. In *McGirt*, the State of Oklahoma made similar arguments about disruptive consequences of recognizing that the Creek Reservation had not been disestablished. The Court explained that “the only ‘step’ proper for a court of law” is to interpret the laws Congress enacted and apply it to the facts of the case. *Id.*, 591 U.S., at 914, 932-937. The Court held that “later practices” cannot “overcome congressional intent as expressed in statute.” *Id.*, at 914-916.

The State’s assertion of jurisdiction is based on an erroneous notion that the Yankton Sioux Reservation was disestablished. But that practice ratified by the decision below, cannot convert an unlawful exercise of jurisdiction into a lawful one. If Congress wishes to alter the jurisdictional framework established by the 1858 Treaty and preserved by the 1894 Act, it must do so through legislation that satisfies the clear-statement requirement this Court’s precedents demand.

CONCLUSION

The State defends an approach that treats general allotment-era expectations, subsequent demographic changes, private conveyances, and a state’s assertion of jurisdiction as sufficient to terminate a reservation Congress established by treaty

and further protected through statute, which is precisely the methodology this Court rejected in *McGirt*.

The Petition satisfies Rule 10's criteria: it presents a conflict between the Seventh and Eighth Circuits and the South Dakota Supreme Court over the permissibility of incremental diminishment (Rule 10(a)-(b)); conflict between the Eighth Circuit and South Dakota Supreme Court over whether the Yankton Sioux Reservation has been disestablished or continues to exist (Rule 10(b)-(c)); it raises an important federal question affecting reservations nationwide, and challenges a state court's departure from this Court's methodology in *McGirt*. Rule 10(c).

The question is important, recurring, and squarely presented. It affects reservations nationwide, divides courts, and presents a challenge to foundational principles of federal Indian law. The decision below conflicts with this Court's repeated holdings that only clear congressional action can disestablish a reservation and divest Indian country status. For these reasons, and those stated in the Petition, this Court should grant certiorari, reverse the judgment below, and hold that the State lacked jurisdiction to prosecute an enrolled Tribe member for conduct occurring on lands Congress expressly guaranteed to the Yankton Sioux Tribe in perpetuity.

Dated: August 4th, 2026.

Respectfully submitted,

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