No. 10-537

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,

Respondents.

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

REPLY BRIEF FOR THE PETITIONER

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ARGUMENT

Three months ago, this Court granted certiorari in *Madison County v. Oneida Indian Nation of New York*, No. 10-72 (cert. granted Oct. 12, 2010) to decide whether the Second Circuit properly analyzed the question of reservation disestablishment. But, on January 10, 2011, an intervening development caused this Court to vacate and remand that case without deciding the question. *Madison County v. Oneida Indian Nation of New York*, 562 U.S. ___, 2011 WL 55360 (Jan. 10, 2011) (per curiam order). This case now allows the Court to answer the important legal question posed by *Madison County*, while at the same time resolving an entrenched and expanding circuit and state-court conflict on the proper legal test for establishing congressional intent to disestablish a reservation.

The continuing need for this Court's review is underscored by the recent filing of multiple petitions for certiorari raising the disestablishment question and the lower-court conflicts in the governing law. *See Yellowbear v. Salzburg*, Pet. at i (second question presented), No. 10-7881 (filed Dec. 2, 2010); *Dauggard v. Yankton Sioux Tribe*, Pet. at i, No. 10-929 (filed Jan. 18, 2011); *Southern Mo. Recycling & Waste Mgmt. Dist. v. Yankton Sioux Tribe*, Pet. at i, No. 10-931 (filed Jan. 18, 2011); *Hein v. Yankton Sioux Tribe*, Pet. at i, No. 10-932 (filed Jan. 18, 2011).

Respondents devote most of their opposition to arguing the merits. Opp. 1, 4-29, 34-35. But that simply begs the question presented of what the proper legal test for documenting congressional intent to disestablish is. That is the question on

which the circuits and state supreme courts are divided and for which this Court's intervention to harmonize the law is needed, just as much as it was in *Madison County*.

Respondents' merits argument, moreover, simply replicates the Tenth Circuit's approach of using post hoc and extra-legislative material to *create* an ambiguity in congressional intent where none exists in the statutory text or legislative record, and then to resolve that extra-statutory ambiguity against the tribe and against the repeatedly expressed views of the United States. Encapsulating the doctrinal problem presented, respondents cast aside the Executive Branch's expert views of the statute's meaning and legislative context as "unfounded and uninformed speculation" (Opp. 26), to be supplanted by the now-controlling views of academicians (Opp. 16, 24-25).

In any event, the question at this juncture is not whether the Tenth Circuit's (or the Seventh Circuit's and South Dakota Supreme Court's similar) test of congressional intent is correct. The question is whether there should be one test for disestablishment or a variety of them that change with circuit- and state-court boundaries. After all, the Second Circuit in the *Madison County* case, the Eighth and Ninth Circuits, and the Wyoming Supreme Court have employed a different legal test that affords primacy to the direction given by the Political Branches. Pet. 8-11. If those courts are wrong, then Madison County, the State of Wyoming, Charles Mix County, the State of South Dakota, and the other governmental and private entities affected by reservation determinations in those jurisdictions

need and deserve the same unified national standard that the Osage Nation seeks here.

1. The Circuits and State Supreme Courts Are In Conflict.

The general test for disestablishment is settled: "only Congress can divest a reservation of its land and diminish its boundaries." *Solem v. Bartlett*, 465 U.S. 463, 470, 478 (1984). Because the Constitution confides disestablishment to the Legislative Branch, courts must presume that reservations remain intact unless "Congress explicitly indicates otherwise" in a "clear statement" of its intent. *Ibid.*; *see South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998) (congressional direction must be "clear and plain").

Since this Court articulated that test in *Solem*, however, a conflict has arisen in the legal test employed by the courts of appeals and state courts to establish the requisite congressional clear statement. That is not surprising because the intervening years have witnessed significant clarification in the precedent governing "clear statement" rules in statutory construction and the primacy of statutory text. *See Morrison v. National Austl. Bank Ltd.*, 130 S. Ct. 2869, 2878, 2881 (2010) (rejecting decisions holding that, when a clear statement is required and the "Act is silent," "it was left to the court to 'discern'" congressional intent; instead, "congressional silence" means Congress has spoken against the proposition); *United States v. Nordic Vill. Inc.*, 503 U.S. 30, 37 (1992) ("If clarity does not exist" in statutory text, "it cannot be supplied by a committee report."); *Ardestani v. I.N.S.*, 502 U.S. 129,

137 (1991) (similar). The evolution in this Court's law thus makes the Court's intervention to reconcile conflicting approaches to the disestablishment "clear statement" rule even more imperative.

The fundamental problem with respondents' analysis is that it misunderstands the conflict. It is *not* over whether other sources, such as demographic statistics or historians, can ever be consulted to reinforce what statutory text indicates, but whether, under a congressional clear statement rule, such external indicia can *predominate* over statutory text and history.

Here, the Tenth Circuit straightforwardly acknowledged the complete absence of "express termination language" and that "the operative language of the statute does not unambiguously suggest diminishment or disestablishment of the Osage reservation." Pet. App. 14a. The court also confessed that the Osage Allotment Act contains three express indicia supporting continued reservation status: (i) authorization for the Secretary of Interior to set aside lands for tribal purposes; (ii) tribal members permitted to obtain allotments before the land was opened to non-Indians; and (iii) mineral resources reserved for the tribe as a whole. *Id.* at 13a-14a; *see Solem*, 465 U.S. at 474. Thus, the statutory text not only lacks explicit disestablishment direction, but in fact affirmatively "weigh[s] in favor of continued reservation status." Pet. App. 13a.

Nevertheless, the Tenth Circuit declared the Osage Reservation disestablished based on the statement of a single Osage member, not any Member of Congress. Indeed, no Member of Congress mentioned disestablishment. *See* Pet. 19; Pet. App.

15a-16a. The court also relied on historians' "treatises and articles in professional journals" that post-date the 1906 Act, Pet. App. 17a, while casting aside (Pet. App. 18a-19a) the longstanding views of the United States government embodied in statutory text, regulatory text, and agency action, *see* Pet. 22-27. Finally, the court invoked demographic statistics post-dating the Osage Act by 16 to 94 years. Pet. App. 21a.[1]

That is the problem. When the statutory text "weigh[s] in favor of continued reservation status," Pet. App. 13a, the law of the Second, Eighth, and Ninth Circuits and Wyoming Supreme Court is that such non-governmental and post hoc evidence cannot alone establish the required explicit congressional direction. Pet. 8-11.

The rule applied by the Second Circuit 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 (2005) – which this Court was to review in *Madison County* – is that, when there is an "absence of anything in the * * * Treaty's text or legislative history supporting disestablishment," post hoc or non-legislative evidence could not "'unequivocally reveal' the intention necessary to demonstrate disestablishment." *Id.* at 162. Absent any evidence in the treaty's "text [or] the circumstances surrounding its enactment and implementation," the Second Circuit held that the reservation continued.

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[1] The court mentioned Congress's general allotment process, but then admitted that "the Osage were excepted from [it]." Pet. App. 15a. In any event, allotment is "completely consistent with continued reservation status." *Mattz v. Arnett*, 412 U.S. 481, 496, 497 (1973).

Id. at 165. Indeed, respondents admit that the "subsequent treatment of the reservation" did not control in *Oneida* (Opp. 30). But subsequent treatment is all the Tenth Circuit relied on here, Pet. App. 20a-21a, beyond the single Osage member's inscrutable comment at a subcommittee hearing, Pet. 20, and an inapplicable general allotment policy.

The Second Circuit's position, moreover, conformed with the views of the United States. *See* Brief for the United States as Amicus Curiae Supporting Respondents at 16-24, *City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197 (2005) (No. 03-855).

Likewise, the Ninth Circuit in *United States v. Webb*, 219 F.3d 1127 (9th Cir. 2000), found it dispositive that (i) the statutory text contained "no mention of a change in reservation boundaries," *id.* at 1135; (ii) "no legislators mentioned or discussed the boundaries of the reservation or intimated that the boundaries would be changed by ratification of the 1893 Agreement," *id.* at 1136; and (iii) "from the initial 1855 Treaty to the present, the Bureau of Indian Affairs has provided services to the Nez Perce consistent with the existence of a reservation," *id.* at 1135, 1136.

Respondents' only answer is to say (Opp. 31) that *Webb* did not "mechanically" reject "evidence of contemporaneous understanding." That misses the point. The conflict concerns what contemporaneous evidence controls when the text favors or, at best, is silent about continued reservation status. While the Ninth Circuit in *Webb* recognized that "[t]he evidence is not unequivocal," it discounted the post hoc evidence on the ground that "events after

ratification" comprise "the category deemed least probative by the Supreme Court." *Id.* at 1137 n.15. That approach is precisely the opposite of that taken by the Tenth Circuit here.

Likewise, the Eight Circuit's decision in *Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 994 (8th Cir. 2010), is incompatible with the decision below. The Eighth Circuit confined its analysis of extra-textual sources to *congressional* documents that were contemporaneous with the legislation, *id.* at 1008-1010, and even then only to corroborate what was already "reflect[ed]" in the statutory text, *id.* at 1009. "Having found no congressional intent in the 1894 Act to divest [the] lands of their reservation status," the court could "only conclude that they remain reservation to this day." *Id.* at 1010. The Tenth Circuit, by contrast, deemed congressional silence an invitation to engage in the same "judicial-speculation-made-law" that this Court held in *Morrison* cannot satisfy a congressional clear-statement requirement. 130 S. Ct. at 2881.

Yankton Sioux, moreover, underscores the widespread contradictions in the law of disestablishment because the Eighth Circuit's ruling preserving the Yankton Sioux Reservation directly conflicts with the decision of the South Dakota Supreme Court in *Bruguier v. Class*, 599 N.W.2d 364 (S.D. 1999), holding that it was disestablished. The difference in outcomes encapsulates the doctrinal fault line in the conflicting court decisions. While the Eighth Circuit accorded primacy to statutory text and direct records of congressional intent, the South Dakota Supreme Court held that same reservation was "effectively terminated," *id.* at 378, because that

court afforded "persuasive bearing" to a post-legislative "change in regional character," *id.* at 375, notwithstanding the "uncertain provisions" in the relevant statute and "inconsistencies" in the historical record, *id.* at 374.

Respondents' citation (Opp. 31) of *Yankton Sioux Tribe v. Gaffey*, 188 F.3d 1010 (8th Cir. 1999), confirms the problem. Again, the Eighth Circuit relied on the text and Senate Reports to hold that "the 1894 Act did not clearly disestablish the Yankton Sioux Reservation," and looked to post-enactment sources only as "further evidence that the nonceded lands retained their reservation status," *id.* at 1028. Tellingly, the Eighth Circuit also relied upon the historical and contemporary views of the federal government– evidence that the Tenth Circuit held here is "too far removed" (Pet. App. 19a). *See* 188 F.3d at 1029 (the United States "continues to argue today[] that the Yankton Sioux reservation was not completely disestablished in 1894").

Finally, respondents make no effort (Opp. 33 n.22) to address the conflict created by the Seventh Circuit's decision in *Wisconsin v. Stockbridge-Munsee Community*, 554 F.3d 657 (7th Cir. 2009). *See* Pet. 11-12. Like the Tenth Circuit and the South Dakota Supreme Court, the Seventh Circuit rested its disestablishment inference on evidence originating "[i]n the aftermath of the act," even though that evidence indicated disestablishment only "for the most part." *Stockbridge-Munsee*, 554 F.3d at 665. *Contrast Webb*, 219 F.3d at 1137 n.15 ("Even if it were fully credited, the countervailing evidence at best creates an ambiguity which would have to be resolved in favor of the tribe.").

In short, respondents' understandably abbreviated effort to downplay the conflict misses the central contradiction in the law. That is (i) whether, even when the statutory text and statutory indicia are silent about disestablishment (or weigh in its favor), courts can judicially infer a clear *congressional* direction from evidence like the statements of Mr. Black Dog, four "Historian[s]," and statistics from 1920 and 2000, Pet. App. 16a-18a, and (ii) whether the views of the United States could be discarded as "unfounded and uninformed speculation" (Opp. 26; *see* Pet. App. 18a-19a). That is not a mere "difference[] in the records." Opp. 33. It is a fundamental divergence in how courts enforce *Solem*'s demand for "explicit[]" congressional direction, 465 U.S. at 470, and the legal significance accorded statutory text and the views of the Political Branches. That question merited this Court's review three months ago in *Madison County, supra*, and does even more so today.

2. The Tenth Circuit Decision Is Wrong And Contrary To This Court's Precedent.

Respondents' lengthy effort to defend the merits of their position is, alternatively, at war with the very decision they purport to defend, and a replication of the court of appeals' errors.

The respondents first argue (Opp. 8-16) that the statutory text commands disestablishment. The short answer is that even the Tenth Circuit disagrees. Pet. App. 13a-14a ("[N]either the Osage Allotment Act nor the Oklahoma Enabling Act contain express termination language," while the *Solem* factors "weigh[] in favor of continued

reservation status."). Whether respondents agree or disagree, the problem presented to this Court is that the Tenth Circuit has now adopted a legal test for judicially inferring a clear congressional statement without regard to such text that conflicts with the law of other circuits and state courts.

Respondents are, in any event, wrong. Their unsupported assertion (Opp. 9) that the Osage Act reserved the tribal mineral estate for the benefit of individual tribal members, rather than for the Osage Nation, defies both text and precedent. *See* Osage Act § 2 (Pet. App. 63a) ("reserved to the use of the tribe"); *id.* § 3 (Pet. App. 66a) ("reserved to the Osage tribe"); *ibid.* ("royalties [are] to be paid to the Osage tribe"); *West v. Oklahoma Tax Comm'n*, 334 U.S. 717, 721 (1948) ("Section 3 of the Act stated that the minerals * * * were to be reserved to the Osage Tribe.").

In addition, the fact that the Act permitted individuals to sell their allotted lands upon the issuance of certificates of competency (Opp. 11) proves petitioner's point. By making certificates of competency a prerequisite to sales, and by requiring federal approval before allottees could lease their property, Osage Act § 7 (Pet. App. 70a), Congress expressly maintained federal superintendence over the reservation lands.

Respondents' reliance on the Oklahoma Act (Opp. 14) fares no better. That legislation provided for the admission of Oklahoma to the Union, not the cession of tribal property. Nor does the statute's creation of a district coextensive with the Osage Reservation, Pub. L. 59-234 § 1, 34 Stat. 267, 268 (1906), indicate an intent to disestablish. *See Seymour v.*

Superintendent of Washington State Penitentiary, 368 U.S. 351, 358-359 (1962) (reservation continued even though land fell within townsite plot).

The Oklahoma Act's grant of rights associated with citizenship to Tribe members (Opp. 15-16) is equally consistent with continued reservation status. *See United States v. Celestine*, 215 U.S. 278, 289-290 (1909) ("[A]lthough made a citizen of the United States and of the state, it does not follow that the United States lost jurisdiction over him for offenses committed within the limits of the reservation.").

Finally, respondents' reliance (Opp. 1) on cases addressing the taxation of Osage members is misplaced. The results in *Leahy v. State Treasurer of Oklahoma*, 297 U.S. 420 (1936), and *Choteau v. Burnet*, 283 U.S. 691 (1931), were mandated by the Osage Act, which authorized taxation of allottees who received certificates of competency. No original allottees with certificates of competency are still living, and *Leahy* and *Choteau* are inapplicable to their descendents. *See County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation*, 502 U.S. 251, 262-263 (1992) (declining to extend the General Allotment Act's grant of *in personam* jurisdiction over original allottees to subsequent Indian owners). The Court in *United States v. Mason*, 412 U.S. 391 (1973), expressly did not decide the taxability of an Indian estate's under the Osage Act, but only whether the United States breached its fiduciary duties by paying such tax. *Id.* at 397. And the holding in *West* was specifically limited to the estate-tax context, which "rests upon a basis different from that underlying a property tax." 334 U.S. at 727.

Thus, rather than help their cause, respondents' arguments underscore the fundamental defects in the Tenth Circuit's analysis and the problems that arise when courts resort to judicial discernment and third-party indicia to establish "explicit" congressional intent. When the statutory text contains no statement, let alone a clear statement; when the statute's content weighs in favor of continued reservation status; and when no Member of Congress whispered disestablishment-connoting words, basic separation of powers principles require the courts to stop there in their hunt for explicit congressional direction, as the Second, Eighth, and Ninth Circuits, and Wyoming Supreme Court have done. The contrary approach of the Tenth and Seventh Circuits and South Dakota Supreme Court, under which judicial inference substitutes for legislative direction and displaces the views of the Executive Branch, should be rejected.

CONCLUSION

For the foregoing reasons, and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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January 25, 2011

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