Nos. 17-1159 and 17-1164

In The Supreme Court of the United States

NORTHERN ARAPAHO TRIBE, ET AL.,

Petitioners,

v.

WYOMING, ET AL.,

Respondents.

EASTERN SHOSHONE TRIBE,

Petitioner,

v.

WYOMING, ET AL.,

Respondents.

On Petitions For Writs Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF LAW PROFESSORS AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE[1]

This brief is filed by and on behalf of teachers and scholars of American Indian law. As Indian law is a complex field, amici have considerable interest in ensuring that federal Indian law decisions consistently and accurately reflect the distinctive history and rules of construction that govern this field.

SUMMARY OF ARGUMENT

The question is whether the 1905 Act of Congress had the clear intent to diminish the Wind River Reservation's boundaries. This is a crucial occasion to apply the canon of interpretation requiring that ambiguous laws are insufficient to impair basic rights of Indian tribes. This Court has held that Congress has plenary authority over tribes. At the time of the 1905 statute, it even held the power unconstrained by the Bill of Rights. This power has never been subjected to democratic consent by Indian votes. Such an extraordinarily undemocratic power to dictate to tribes must require clear statement for its exercise. This rule also accords with the Court's general rule to demand clear statement for Congress to invade the authority of states and

[1] No party or party's counsel authored this brief in whole or in part, and no person other than amici curiae contributed money to fund the preparation or submission of this brief. As required by Rule 37(a)(2), we provided notice to all parties' counsel of record of intent to file this brief more than 10 days before its due date. Our notice was accompanied by a request that each party consent to the filing. All parties consented.

of foreign governments. The Court should grant review in this case to make certain that the rule is properly observed.

ARGUMENT

The judges in the court below and all parties agree that the question in this case is whether the 1905 Act of Congress had the clear intent to diminish the boundaries of the Wind River Reservation. Resolution turns on whether that standard has been met. This is a crucial occasion to apply the canon of interpretation requiring that ambiguous laws are insufficient to impair basic rights of Indian tribes. The majority below conceived of this rule as a garden-variety presumption and undervalued it. The rule is instead essential to protect against an extraordinary abuse of democracy. It must demand more than the confused record of the 1905 statute.

I. Congress's Extraordinarily Undemocratic Power to Dictate to Tribes Must Require Clear Statement for Its Exercise

Consent of the governed is the bedrock of free and democratic government. Declaration of Independence (1776). We could cite many more authorities for this statement, but it seems to us too obvious to need them. Actual governments fall short in various ways, but a hallmark of American constitutional progress has been removal of one barrier to democracy after another. Yet

Congress retains authority over tribes that this Court has repeatedly characterized as plenary.[2] In the era of the 1905 statute, the Court even held the power to be unconstrained by the Bill of Rights.[3]

This extraordinary power has never been subjected to consent by Indian votes. When the nation was founded and Indian people were relatively numerous, they were not citizens and thus could not vote. By the time of the 1905 statute, some were citizens and voters, but by that time their numbers were far too few to have any meaningful influence over Congress. All can vote now, but no member of Congress faces enough tribal votes to fear their retribution at the ballot box.[4] Members' chances for reelection are more likely constrained by tribes' powerful opponents, such as the State of Wyoming.

This congressional power is embedded in government structure, which cannot be altered retroactively by lawsuit. But from the earliest years of the Nation, this Court has perceived that a power so

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[2] *E.g.*, South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 343 (1998).

[3] Lone Wolf v. Hitchcock, 187 U.S. 553, 564 (1903). *Cf.* Choate v. Trapp, 224 U.S. 665, 671 (1912) ("there is a broad distinction between tribal property and private property").

[4] See Nell Jessup Newton et al., Cohen's Handbook of Federal Indian Law § 14.02[2][a] (2012 ed.); https://sites.dartmouth.edu/censushistory/2016/01/25/native-americans-and-the-census (1900 census Indian-only population 0.3%); https://www.census.gov/newsroom/releases/archives/2010_census/cb12-cn06.html (2010 census Indian and Native Alaskan population, including multiple race reports, 1.7%).

fundamentally undemocratic must be tempered by a rule of clear statement as a condition of its exercise. It is not a mere presumption to be overcome by assembling the kind of fuzzy pieces cobbled by the court below. Early decisions involved interpretations of Indian treaties.[5] Then the Court demanded clear intent to override treaties.[6] Later the principle was applied to statutes directly governing tribes.[7] Respect for the principle has varied from time to time, but the moral basis for its application is always present. We urge the Court to grant review in this case to make certain that the rule is properly observed.

II. The Clear Intent Rule Implements the Federal Policy to Maintain a Government-to-Government Relationship with the Indian Tribes

The United States began its relationship with Indian nations by recognizing them as nations, as "among those powers who are capable of making treaties."[8] Treaty making ended, but the Government continued to seek Indian consent, to bargain with tribes,

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[5] See, *e.g.*, Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 582 (1832) (M'Lean, J., concurring) ("The language used in treaties with the Indians should never be construed to their prejudice.").

[6] *E.g.*, Ex parte Crow Dog, 109 U.S. 556, 572 (1883).

[7] *E.g.*, Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 766 (1985); United States v. Santa Fe Pac. R.R. Co., 314 U.S. 339, 353-55 (1941); Alaska Pac. Fisheries v. United States, 248 U.S. 78, 89-90 (1918).

[8] Worcester v. Georgia, *supra*, 31 U.S. (6 Pet.) at 559.

and to characterize the association with them as a "government-to government-relationship."[9]

The clear intent rule is not unique to Indian affairs. It exists in every area in which Congress has power to undermine the authority of other governments – foreign, state, or tribal.[10] Like treaties with Indian tribes, treaties with foreign nations "will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed."[11]

Statutes do not operate extraterritorially unless the affirmative intention of the Congress is clearly expressed.[12] Clear evidence of congressional intent is necessary to construe a statute to intrude on state authority.[13] In each area, Congress has power to act, but its actions will undermine traditional boundary lines between governments.

Diminishment would deprive the Eastern Shoshone and Northern Arapaho Tribes of tribal authority

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[9] See, *e.g.*, President George W. Bush, Memorandum for the Heads of Executive Departments and Agencies (Sept. 23, 2004), found at https://www.doi.gov/pmb/cadr/programs/native/Government-to-Government-Relationship-with-Tribal-Governments.

[10] See Philip P. Frickey, Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law, 107 Harv. L. Rev. 381, 415-17 (1993).

[11] Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243, 252 (1984).

[12] Morrison v. National Australia Bank Ltd., 561 U.S. 247, 255 (2010).

[13] Bond v. United States, 134 S. Ct. 2077, 2088-89 (2014).

and federal protection, leaving them without power to protect the welfare of their children and the safety of their people. This is the ultimate intrusion on sovereignty. Clear evidence of congressional intent is necessary to enact such a change.

III. The Tribes' Authority over the Reservation's Non-Indian Residents Does Not Justify an Exception to the Rule

Throughout this litigation, the parties advocating diminishment of the Wind River Reservation have made false and exaggerated claims of tribal power to govern non-Indians in Indian country. They claim a much greater stake in the outcome of this case than can withstand analysis. This Court has held that almost all tribal authority over non-Indians depends on consensual relationships or specific grants from Congress.[14] The clean air law at issue in this case is an example of the latter.[15] However, the EPA grants sought by the tribes would not confer any regulatory authority over non-Indians; they would enable the tribes to develop technical capacity to monitor air quality. Moreover, Congress can repeal or modify the law at any time, and the agency itself must approve tribal authority.[16]

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[14] Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316 (2008); Montana v. United States, 450 U.S. 544 (1981); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978). As these opinions show, tribes do not agree with these rulings, but the Court has been consistent.

[15] 42 U.S.C. § 7410(o).

[16] See 40 C.F.R. part 49 (2017).

And with the State's vigorous backing, local non-Indians have ample access to seek modification of any statute.

CONCLUSION

For the reasons stated, we urge the Court to grant review in these cases.

Respectfully submitted,

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