

1 First of all, if that was what Congress had
2 in mind, presumably it would have specified some way to
3 know when the tipping point had been reached: Some
4 percentage of land sales, some other measure of success.
5 There's nothing about that in the text. There's nothing
6 about that in the legislative history.

7 Second of all, the concept that Congress
8 could attempt but fail to diminish a reservation, as my
9 friend said that it did in 1872, is a concept that is
10 wholly foreign to this Court's jurisprudence, which
11 makes clear that Congress has plenary power.

12 And finally, I think this Court should be
13 very reluctant to assume that Congress implicitly
14 transferred any part of its authority to change the
15 borders of an Indian reservation to private parties and
16 made it contingent on what this Court in Dakota referred
17 to as uncertain future sales.

18 CHIEF JUSTICE ROBERTS: Well, is that saying
19 there's no such thing as de facto diminishment?

20 MR. KEDEM: I think that de facto
21 diminishment, if you think of it as some sort of
22 freestanding alternative path to change the boundaries
23 of a reservation, I do agree that it doesn't exist.

24 But if you're talking about it --

25 CHIEF JUSTICE ROBERTS: How is that

1 consistent with the language in Solem that
2 Justice Ginsburg read?

3 MR. KEDEM: I -- I think it's a little bit
4 hard to know exactly what the court meant.

5 This Court has never found de facto
6 diminishment. All seven of its surplus land cases were
7 decided on the basis of congressional intent. And then
8 there were sometimes a few sentences thrown in about how
9 the status quo wouldn't change very much.

10 I want to leave you with one more point.

11 JUSTICE SCALIA: What about Sherrill?

12 MR. KEDEM: Pardon?

13 JUSTICE SCALIA: What about Sherrill?

14 MR. KEDEM: Sherrill is very explicit, but
15 it is not a diminishment ruling. There's a footnote in
16 City of Sherrill which makes very clear that it is not
17 deciding the diminishment issue or the jurisdiction of
18 the United States.

19 CHIEF JUSTICE ROBERTS: What's -- what's
20 vague about the language where non-Indian settlers
21 flooded into the opened portion of a reservation and the
22 area has long since lost its Indian character, we have
23 acknowledged that de facto, if not de jure diminishment
24 may have occurred.

25 MR. KEDEM: I think you have to read that

1 sentence in light of Yankton Sioux, which says that when
2 you're talking about the subsequent treatment of the
3 area and the pattern of settlement, those are relevant
4 only insofar as they bear on the touchstone of the
5 inquiry, which is congressional intent.

6 If I can make one final --

7 CHIEF JUSTICE ROBERTS: Well, I think if you
8 look at the passage, it goes on, then, to discuss in
9 addition to that, then we look to subsequent demographic
10 history as an additional clue as to what Congress meant.
11 I -- I read those as the two different paragraphs as
12 making two different points.

13 MR. KEDEM: I think you could definitely
14 read it that way if you just had Solem. I think if you
15 read Solem in light of Yankton Sioux, you reach a
16 different result.

17 If I could make one final point about
18 unsettling expectations. There are more than 300
19 Federally-recognized Indian reservations all throughout
20 the United States. The single most unsettling thing
21 that this Court could do would be to suggest that the
22 borders of those reservations depend not on what
23 Congress said about them, but on shifting demographic
24 patterns or who provides what services where.

25 If there are no further questions.

1 CHIEF JUSTICE ROBERTS: Thank you, counsel.
2 Mr. Smith, you have four minutes remaining.

3 REBUTTAL ARGUMENT OF JAMES D. SMITH

4 ON BEHALF OF THE PETITIONERS

5 MR. SMITH: Thank you, Your Honor.

6 Where do I start?

7 Let's start first with -- pointed out to me
8 by co-counsel that a misstatement I made in response to
9 Justice Kagan. The Eighth Circuit briefs do cite
10 Sherrill in support of the proposition for de facto
11 diminishment. My apology. I hadn't argued at that
12 point, but it is there in the Eighth Circuit.

13 I would cite to the Joint Appendixes so the
14 Court is aware exactly where it can find that
15 undisputed, as far as the demographics, the
16 jurisdictional history, JA 215 to JA 216, JA 318 to JA
17 319, JA 609 to JA 611.

18 The -- the concept that, gee, nothing really
19 big's going to change, having the Tribal police show up
20 in their police vehicles patrolling the streets because
21 it's on Tribal land is going to be a huge disruption of
22 expectations.

23 My background is in criminal law. I know if
24 you have a crime you're investigating, you don't know --
25 not all crimes, you know, there's not a sign saying gee,

1 this was committed by an Indian; this was committed by a
2 non-Indian. You have a lot of who-done-its in which the
3 question is who's supposed to investigate, and you have
4 this overlapping jurisdiction where law enforcement
5 itself is confused as to who's supposed to be
6 investigating when they don't even know, maybe, who the
7 perpetrator is.

8 The idea that a Tribal member of a State
9 governmental authority is somehow shows --

10 JUSTICE SCALIA: Excuse me. Wouldn't --
11 wouldn't the latter be the case with respect to any
12 municipality that's within a reservation? We've been
13 told there are a lot of those. And -- and wouldn't
14 that -- wouldn't that be a problem in all of those,
15 being that you have overlapping jurisdiction of Tribal
16 police and municipal police? And until you know who the
17 perpetrator is, you don't know which one has
18 jurisdiction.

19 MR. SMITH: It's a problem if you know, and
20 chose to live on an Indian reservation. It -- it -- I
21 mean, that exists.

22 What's different in this case is the history
23 is 130 years of people who believe and chose. And they
24 are not living on an Indian reservation; they are living
25 in the State of Nebraska. I call the State patrol. The

1 Tribal police are not patrolling up and down my street.
2 That's the difference. It's the justifiable
3 expectations of the people who live there.

4 JUSTICE BREYER: Their point is, the
5 government says, fine, make that argument. Make it
6 under the rubric City of Sherrill. Maybe you make it
7 when you go down on remand or something, but it is
8 workable to divide the issue into two parts.

9 The first issue is what's the reservation,
10 and the second issue is what can you do on the
11 reservation?

12 When you get to question two, if the Tribe
13 has made no assertion of jurisdiction, nobody even knows
14 about it for 150 years. Maybe it's basically unfair to
15 let them do what they want to do. And that depends on a
16 lot of factors, such as what Congress says.

17 So what do you think of that argument?
18 Let's leave it for later. Nobody's argued it.

19 MR. SMITH: Glad I didn't answer what I
20 thought of that argument.

21 Your Honor, what -- it is still -- invites
22 the litigation over what is the extent of the power.
23 Who's got the power to govern? What is the extent of
24 their power? Uncertainty, when you have expectations,
25 you live in an area where the State governs you, and

1 then to say we can go back and litigate all these issues
2 is -- is just not what the public expects.

3 The people in Pender, this is a big deal.
4 They care about this. They have expectations. It's a
5 big deal whether a Tribe -- Tribal Council has authority
6 over us. We don't get to vote for them. Their
7 Constitution doesn't even allow us to appear at their
8 public meetings.

9 The concept that somehow or other we can't
10 find the right-of-way because it's not on Google is
11 frankly silly. It's very easy to go back, do surveys,
12 find exactly where the right-of-way is.

13 CHIEF JUSTICE ROBERTS: Thank you, counsel.

14 MR. SMITH: Thank you, Your Honor.

15 CHIEF JUSTICE ROBERTS: The case is
16 submitted.

17 (Whereupon, at 11:17 a.m., the case in the
18 above-entitled matter was submitted.)

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<p style="text-align: center;">A</p> <p>a.m 1:13 3:2 54:17 above-entitled 1:11 54:18 absolutely 15:17 41:20 acceded 13:21 accurate 42:17 acknowledged 8:4 12:2 15:25 49:23 acres 23:10 47:22 act 3:23 5:4,6 8:1 17:15,17,25 18:1 18:3,8 20:10,11 22:3,5 24:16 26:22 27:9 acted 11:11 action 20:19 27:8 activities 13:24 acts 10:15,16,20 17:12 addition 50:9 additional 9:24 50:10 address 47:18 administered 39:7 administering 40:10 admitted 16:2 28:18 adverse 5:19 6:22 agencies 16:3 agency 9:6 18:15 40:10,14 ago 3:19 10:19 19:11,19,20 agree 7:7 18:21,25 20:23 48:23 agreement 32:20 32:23 41:11 agreements 33:14 AL 1:3,6 alcohol 32:10 36:18 41:6 alcoholic 8:11,12 31:17</p>	<p>alike 38:22 ALITO 12:5 33:21 33:24 34:19 ALLON 1:19 2:9 38:8 allotment 23:23 24:23 25:2,4,23 25:25 allotments 22:22 23:1,2,12,15,22 24:1,9,19,22 25:3 25:9,13,16,19 allow 23:21,23 54:7 allowed 23:16 25:13,15 alternative 27:7 28:5 29:4 48:22 ambiguity 13:7,9 15:4 amici 28:16 analysis 10:17 animal 10:16 40:11 answer 15:10 25:1 53:19 anymore 46:7 apology 51:11 appear 54:7 APPEARANCES 1:14 Appendix 35:18 Appendixes 51:13 application 44:17 applied 43:17 applies 7:3 19:13 44:10 45:22,22,24 apply 4:5 29:13 43:9,15,16,18 44:2,20,24 45:2 45:16,16 Appreciate 17:23 apprehended 35:21 approval 9:1 14:12 approve 44:11 approved 8:22 9:5 area 3:11,17,18,23 4:12 5:21 6:16</p>	<p>8:3 9:20,25 10:15 11:25 12:11,24 16:23 17:5 18:4,5 18:8,9,12,20 24:4 26:25 30:12 32:12 35:7,11 38:15,24 41:19,24 45:13 46:7 49:22 50:3 53:25 areas 18:4 argue 21:13 argued 51:11 53:18 arguing 4:11 6:21 6:21,24 argument 1:12 2:2 2:5,8,11 3:3,6 7:7 7:12 21:2,4,4,16 21:23 23:18,19 28:12,13,15,18,19 38:8 39:22 40:6 42:18 51:3 53:5 53:17,20 arguments 7:10 arising 36:21 aside 38:13 asked 20:22 33:7 asking 4:1,4,5 aspect 36:6 assert 5:17 6:4 31:9 47:14 assertion 28:7 53:13 assistant 1:19 46:23 assume 31:15 48:13 assumption 6:16 24:11 attempt 11:4 48:8 attempted 4:14 attorney 46:23 auspices 39:7 authorities 33:19 35:23 37:22 authority 4:15 6:5 9:7 10:1 11:23,25 12:1,2,3,7 13:7,8</p>	<p>13:12,18 14:15 15:1,3,5,15,18 19:24 21:15 28:8 32:4,17 33:3,11 33:25 34:3 35:4,7 35:9 36:12,19,22 37:3,12,22 41:4 43:6,6,19,20 44:9 45:12 48:14 52:9 54:5 authorized 44:6 authorizes 44:8 available 25:3 aware 41:15 51:14 awfully 14:2</p> <hr/> <p style="text-align: center;">B</p> <p>back 10:3,18 19:10 19:11 30:9 41:7 54:1,11 background 44:1 44:19 51:23 Bancroft 39:2 Bancroft-Rosalie 39:6 Bartlett 38:12 based 7:20 basic 10:23 basically 53:14 basis 39:15 45:25 49:7 bear 50:4 beg 44:13 behalf 1:16,17,20 2:4,7,10,13 3:7 21:24 38:9 51:4 belatedly 6:4 believe 7:13 10:15 13:16,16 40:17 52:23 best 17:22 46:12 beverage 8:11 30:24 31:17 beverages 8:12 Beyond 41:6,13 big 11:13,16,22</p>	<p>27:16,20,23 28:1 42:21 54:3,5 big's 51:19 bisected 23:24 bit 10:6 49:3 blank 47:9 block 38:13,15 border 24:23 borders 45:24 48:15 50:22 boundaries 22:4,8 34:15 48:22 boundary 22:20 23:20,24 24:21 26:5 30:18,20 34:23 38:1 BREYER 53:4 brief 4:10 7:14 46:22 47:20 briefs 51:9 bring 7:21 13:12 28:17 broad 15:9 brought 42:19 bullpen 18:13 bunch 46:2 burdens 46:16 businesses 16:1 buy 19:10 buying 33:1 buys 36:15</p> <hr/> <p style="text-align: center;">C</p> <p>C 2:1 3:1 call 5:2 12:16,19 21:6 35:22 52:25 called 12:20 39:2,3 39:6 care 54:4 case 3:4 4:22,25 5:1 6:5,7,8,11,15 7:2 7:4 15:12 22:2 26:12 28:14 29:10 30:8 31:18 32:1 35:1 36:21 41:16 42:19 43:1 52:11</p>
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