

[ORAL ARGUMENT NOT SCHEDULED]
No. 26-5306

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

TOHONO O'ODHAM NATION,
Plaintiff-Appellant,

v.

MARKWAYNE MULLIN, in his official capacity as Secretary of U.S. Department
of Homeland Security; RODNEY SCOTT, in his official capacity as
Commissioner of U.S. Customs and Border Protection; and ROSARIO
VASQUEZ, in his official capacity as Chief of U.S. Border Patrol,
Defendants-Appellees

Appeal from the United States District Court
for the District of Columbia
Honorable Richard J. Leon
Case No. 4:26-cv-2127-RJL

**BRIEF OF AMICI CURIAE NATIONAL NATIVE AMERICAN LAW
STUDENTS ASSOCIATION AND UNIVERSITY OF ARIZONA NATIVE
AND INDIGENOUS LAW STUDENTS ASSOCIATION IN SUPPORT OF
PLAINTIFFS-APPELLANT AND REVERSAL**

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), counsel for *amici* certifies as follows:

A. Parties and *Amici*. Except for *amici* NNALSA and NILSA and any other amici, all parties appearing before the district court and in this Court are listed in the Brief for Appellant.

B. Ruling Under Review. The ruling under review is the district court's August 13, 2026 memorandum opinion and order denying the Tohono O'odham Nation's motion for a preliminary injunction. *Tohono O'odham Nation v. Mullin*, No. 26-cv-2127 (RJL) (D.D.C. Aug. 13, 2026), JA 0944-0962.

C. Related Cases. Counsel is not aware of any related cases within the meaning of D.C. Circuit Rule 28(a)(1)(C) other than those identified in the Brief for Appellant.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and 29(a)(4)(A) and D.C. Circuit Rule 26.1, *amici* state as follows: NNALSA is a nonprofit corporation. It has no parent corporation, and no publicly held corporation owns 10% or more of its stock. NILSA is a student organization at the University of Arizona James E. Rogers College of Law. It has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

STATEMENT REGARDING CONSENT TO FILE AND SEPARATE BRIEFING

All parties have consented to the filing of this brief. *See* Fed. R. App. P. 29(a)(2) and D.C. Cir. R. 29(b).

Pursuant to D.C. Circuit Rule 29(d), counsel for *amici* certifies that a separate brief is necessary. *Amici* NNALSA and NILSA are comprised of law students engaged in preparation to represent clients in legal issues involving the sovereignty, rights, and resources of Native American and Indigenous Peoples. The history of land encroachment from non-tribal members is an ongoing concern in study of law and policy as it impacts Native Americans and Indigenous Peoples in the United States. Additionally, NILSA includes student members from several Arizona Tribal Nations, including Tohono O’odham and others in the arid American southwest. Concerns about water security continue to be a huge concern to our Arizona campus community in Tucson, as well as our home communities. As law students, *amici* seek to promote sustainability and stability in resources and law as they embark on their legal careers. This perspectives as the next generation of Indigenous legal advocates is unique and appropriately represented through their own advocacy as *amici*.

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GLOSSARY

Appellant's Br.	Opening Brief of Plaintiff-Appellant Tohono O'odham Nation
IIRIRA	Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, div. C, 110 Stat. 3009-546
JA	Joint Appendix
Nation	Plaintiff-Appellant Tohono O'odham Nation
NILSA	University of Arizona Native and Indigenous Law Students Association
NNALSA	National Native American Law Students Association

INTEREST OF AMICI CURIAE¹

Amicus curiae the National Native American Law Students Association (“NNALSA”), founded in 1970, supports law students interested in the study of federal Indian law, tribal law, and Indigenous governance.

Amicus curiae the University of Arizona Native and Indigenous Law Students Association (“NILSA”) supports Native American and Indigenous law students at the James E. Rogers College of Law in Tucson, Arizona. NILSA fosters community and cooperation among all law students interested in Native American and Indigenous Peoples’ legal issues, and promotes awareness of federal Indian law, international law on the rights of Indigenous Peoples, and laws of Tribal Nations.²

Pursuant to Fed. R. App. P. 29(a)(4)(E), *amici* state that no party’s counsel authored this brief in whole or in part; no party or party’s counsel contributed money that was intended to fund preparing or submitting the brief; and no person other than *amici*, their members, and their counsel contributed money that was intended to fund preparing or submitting the brief.

¹ All parties have consented to the filing of this brief. *See* Fed. R. App. P. 29(a)(2).

² The preparation of this brief was ably assisted by law students who are members and officers of, *inter alia*, NNALSA and NILSA.

SUMMARY OF ARGUMENT

This Court should reverse the district court's denial of the Nation's motion for a preliminary injunction. By doing so, this Court has an opportunity to ensure that fundamental and well-established principles of federal Indian law are followed, including the constitutional and statutory alignment of authority in Congress with respect to the diminishment or disestablishment of Indian reservations. In addition, the historical record, on analysis, supports a finding that the boundaries of the Tohono O'odham Nation's ("Nation") Reservation extend to the international border with Mexico, and any incursion on the integrity of the Nation's homeland can only be made through explicit and clear direction from Congress. The Nation is likely to succeed on the merits. The likelihood of irreparable harm to critical water resources already under tremendous pressure is clear; thus, injunctive relief is necessary.

ARGUMENT

I. THE DISTRICT COURT GAVE FEDERAL UNDERLYING TITLE MORE WEIGHT THAN WARRANTED IN ASSESSING THE 1907 PROCLAMATION'S REACH.

The Government argues that the Nation's lands were available for inclusion in the 1907 Roosevelt Reservation because federal authorities treated them as

public lands before the Papago³ Reservation was established. Relying on the 1934 Interior Solicitor’s opinion, the district court found that the Roosevelt Reservation likely exists along the Nation’s border. But the 1934 Solicitor’s opinion also recognizes Papago occupancy. It does not address whether land subject to that occupancy was susceptible to reservation under the 1907 Proclamation.

A. The 1934 Interior Solicitor’s opinion confirms federal underlying title could coexist with the Nation’s aboriginal right of occupancy.

The 1934 Solicitor’s opinion addressed whether the Nation possessed perfected communal fee and mineral ownership—not whether lands subject to aboriginal occupancy qualified as “public lands” under the 1907 Proclamation. The United States’ underlying title is distinct from an Indian tribe’s right to occupy its ancestral lands. Under *Johnson v. M’Intosh*, discovery gave the United States underlying title and exclusive authority to acquire or extinguish Indian occupancy, but did not automatically terminate that occupancy. *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543, 574, 587 (1823). Thus, the United States could hold underlying title while a tribe retained the right to possess and use the same land. This distinction matters because proof of federal proprietorship does not, by itself,

³ The Tohono O’odham Nation was previously known as the Papago Tribe. In 1986, the Nation adopted a new constitution and changed its name to the Tohono O’odham Nation, asserting the Nation’s cultural sovereignty. See Tohono O’odham Nation, *About the Tohono O’odham Nation*, <https://www.tonation-nsn.gov/about-tohono-oodham-nation/> (last visited Sept. 22, 2026).

establish that land was free of tribal occupancy or available for reservation under the 1907 Roosevelt Proclamation.

Cramer v. United States shows this distinction. *Cramer v. United States*, 261 U.S. 219 (1923). Indian occupancy had not been formally recognized by statute or reservation, but the Court held the occupied land did not pass under a general railroad grant. *Id.* at 227–30. The absence of formal recognition was not determinative because the federal government had long protected Indian occupancy. *Id.* at 227–29. *United States v. Santa Fe Pacific Railroad Co.* is particularly instructive, as it concerned aboriginal lands in Arizona acquired from Mexico. *United States v. Santa Fe Pac. R.R. Co.*, 314 U.S. 339 (1941). The Court held that the ordinary protection of Indian occupancy applied within the Mexican Cession and “plain and unambiguous action” was required to deprive a tribe of that protection. *Id.* at 345–47. Extinguishment of Indian title, the Court cautioned, “cannot be lightly implied.” *Id.* at 354.

These principles provide crucial context for Interior Solicitor Margold’s 1934 opinion. The district court relied on the Solicitor’s opinion in questioning the Nation’s position that its lands were not public lands in 1907. *Tohono O’odham Nation v. Mullin*, No. 26-cv-2127 (RJL), slip op. at 11–12 (D.D.C. Aug. 13, 2026), JA0954–55. But the question presented to Solicitor Margold was whether the Nation held a perfected communal fee title under Spanish or Mexican law,

including ownership of the minerals beneath the land. *Papago—Mineral Deposits*, Op. Sol. M-27656, reprinted in 1 *Opinions of the Solicitor of the Department of the Interior Relating to Indian Affairs, 1917–1974*, at 392, 394 (1979) [hereinafter *Papago—Mineral Deposits*]. The Solicitor framed the issue as whether the Nation’s interest was subordinate to federal proprietorship or instead constituted a perfected fee that prevented the United States from exercising any proprietorship over the land. *Id.* The issue, then, was whether the Nation’s interest constituted perfected fee ownership that included the mineral estate, not whether the Nation retained a right of occupancy.

The Solicitor rejected perfected fee ownership relying partly on decisions involving the communal lands of Spanish and Mexican municipalities. In *Townsend v. Greeley*, the Supreme Court concluded Mexican pueblos’ interests in surrounding lands were not indefeasible fee estates and remained subject to governmental control. *Townsend v. Greeley*, 72 U.S. (5 Wall.) 326, 336 (1867). The Solicitor also cited *United States v. Santa Fe*, which rejected a municipality’s claim that it automatically acquired a vested interest in four square leagues of surrounding land under Spanish and Mexican law. *United States v. Santa Fe*, 165 U.S. 675, 707–11 (1897). The Solicitor extended that reasoning to the Nation’s claim of perfected communal fee ownership.

However, those cases did not involve aboriginal title. They addressed municipal fee ownership. The Solicitor's conclusion did not establish that the Nation lacked aboriginal occupancy. A tribe may lack fee-simple ownership while retaining a legally protected right to possess and use its ancestral lands. *See Pueblo of Jemez v. United States*, 63 F.4th 881, 891 (10th Cir. 2023) (recognizing that a land grant could convey fee title while leaving the grantee's title subject to an aboriginal right of occupancy). The Solicitor's conclusion did not determine whether the Nation's lands qualified as "public lands" under the 1907 Proclamation.

The Solicitor's own language confirms that distinction. He acknowledged that the Nation had "long occupied the Papagueria and should be protected in that occupancy." *Papago—Mineral Deposits, supra*, at 394. He concluded, "the United States acquired title to the land in question subject to an Indian right of occupancy of an area not exactly determined." *Id.* at 398. Thus, the Solicitor's reference to federal "superior proprietorship" did not deny the existence of the Nation's legally protected interest; it distinguished the Nation's occupancy interest from the perfected fee and mineral ownership claimed in the proceeding.

This distinction is directly relevant to the 1907 Roosevelt Proclamation. The Proclamation did not reserve every acre within sixty feet of the international boundary; it reserved only "public lands" within that corridor. Proclamation No.

758, 35 Stat. 2136, 2136 (May 27, 1907). The Solicitor’s conclusion that the United States acquired underlying title through the Gadsden Purchase did not resolve whether lands subject to the Nation’s continuing occupancy were “public lands” available for reservation in 1907. His conclusion did, however, recognize that the Nation’s right of occupancy continued alongside federal title. Together, *Cramer* and *Santa Fe Pacific* demonstrate that neither the United States’ acquisition of underlying title from Mexico nor a general public-land grant extinguishes Indian occupancy unless the federal government clearly acts to terminate that right. *Cramer*, 261 U.S. at 227–30; *Santa Fe Pac.*, 314 U.S. at 345–47, 354. Accordingly, federal underlying title alone does not establish that the Nation’s occupied lands were unencumbered “public lands” available for reservation under the 1907 Proclamation. The 1934 opinion does not establish that the Roosevelt Proclamation attached to the Nation’s occupied lands, an unresolved distinction important to the Nation’s claims because the Secretary’s asserted authority to enter and construct within the sixty-foot corridor depends on the existence and scope of the federal interest purportedly created by the 1907 Proclamation.

The 1934 Solicitor’s opinion does not support assertions or inferences that lands subject to the Nation’s aboriginal occupancy were legally available for inclusion in the Roosevelt Reservation. Rather, it recognizes that federal ownership

coexisted with Papago occupancy. The district court therefore relied erroneously on it to conclude that the 1907 Proclamation likely reserved the disputed lands along the international border.

II. DIMINISHMENT ANALYSIS SHOULD INFORM THE QUESTIONS BEFORE THIS COURT.

Only Congress can diminish a reservation, and its intent must be explicit and unmistakable. The Nation’s brief explains why the statutes on which the Government relies do not confer that power. Appellant’s Br. 41–42, 49–50. Here, we will address the more basic point that the Executive holds no inherent power over reservation boundaries.

Diminishment analysis is often applied to determine land status, resolving which sovereign ultimately has authority to prosecute, regulate, or adjudicate legal issues. This informs questions both in criminal and civil contexts, which often depend on historical evidence establishing the intent of laws driven by obsolete policies favoring assimilation and dispossession of Indian tribes and separating their members from their lands—policies that have long since been repudiated. It is far less common to confront the potential diminishment of reservations through contemporary legislation.

Critically, this case asks whether the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”), Pub. L. No. 104-208, div. C,

110 Stat. 3009-546, diminished the Tohono O’odham Reservation by authorizing construction of a border wall and unavoidable detrimental impacts on the cultural and religious life and sovereignty of the Nation and, ultimately, the integrity of its homeland. IIRIRA does not satisfy the standards for diminishment.

A. The Constitution commits Indian affairs and the disposition of the Territory of the United States to Congress.

The Constitution gives Congress the power to regulate commerce with the Indian tribes, U.S. Const. art. I, § 8, cl. 3, and the power to “dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States,” *id.* art. IV, § 3, cl. 2. *See McGirt v. Oklahoma*, 591 U.S. 894, 903 (2020) (explaining that the Constitution “entrusts Congress with the authority to regulate commerce with Native Americans”). The Supreme Court has affirmed this authority in plain terms: “[T]he executive’s power to convey any interest in these lands must be traced to Congressional delegation of its authority.” *Sioux Tribe of Indians v. United States*, 316 U.S. 317, 326 (1942).

For the executive-order reservations of the nineteenth and early twentieth centuries, the source of authority was never expressly granted. The Supreme Court found it in congressional silence: the power to reserve its lands rested on a delegation that “could be spelled out from long continued Congressional acquiescence in the executive practice.” *Id.* (describing *United States v. Midwest*

Oil Co., 236 U.S. 459 (1915)). Even while that practice continued, its legal footing was doubted. The Attorney General acknowledged that whether a President could “abolish, in whole or in part, Indian reservations once created by him” had been “seriously questioned . . . and not without strong reasons.” 34 Op. Att’y Gen. 171, 176 (1924), *quoted in Sioux Tribe*, 316 U.S. at 326 n.8. Authority inferred from congressional silence lasts only as long as the silence. Once Congress speaks, there is nothing left to infer.

B. Section 398d ended the practice of unilateral executive modification of executive-order reservations.

Congress spoke in the Act of March 3, 1927, ch. 299, § 4, 44 Stat. 1347, 1347 (codified as amended at 25 U.S.C. § 398d), which provides:

Changes in the boundaries of reservations created by Executive order, proclamation, or otherwise for the use and occupation of Indians shall not be made except by Act of Congress.

The Supreme Court described the provision in exactly those terms: “In 1927 Congress added a provision that any future changes in the boundaries of executive order reservations should be made by Congress alone.” *Sioux Tribe*, 316 U.S. at 325 n.6. The Executive Branch’s own legal authorities have recognized the same limit. *See* 57 I.D. 219, 227 (1940); *Revocation of Prior Monument Designations*, 2025 WL 1719535, at *28 (O.L.C. 2025).

Congress reaffirmed the rule half a century later. As enacted in 1927, § 398d carried a proviso addressed to temporary withdrawals by the Secretary of the Interior. In 1976, in the Federal Land Policy and Management Act, Congress struck it. Pub. L. No. 94-579, tit. VII, § 704(a), 90 Stat. 2743, 2792. What remains is a rule that changes in the boundaries of a reservation “for the use and occupation of Indians shall not be made except by Act of Congress.” 25 U.S.C. § 398d.

This history matters because it shows the statute was aimed to address an existential problem. The Government may point to *Midwest Oil* and *Sioux Tribe* for the proposition that Presidents once restored the land of executive-order reservations to the public domain by executive order. That is true, but Congress ended the practice through affirmative legislation. In *Sioux Tribe* itself, executive orders of 1879 and 1884 “restored [reservation land] to the public domain” by the President’s signature alone, and the Court held the tribe was owed no compensation. 316 U.S. at 323. Section 398d closes that course for every executive-order reservation in existence. And the Supreme Court has explained what the older practice accomplished: “In the 19th century, to restore land to the public domain was to extinguish the land’s prior use—its use, for example, as an Indian reservation—and to return it to the United States either to be sold or set aside for other public purposes.” *Nebraska v. Parker*, 577 U.S. 481, 488–89 (2016) (citing *Hagen v. Utah*, 510 U.S. 399, 412–13 (1994)). That is the effect § 398d

withdrew from the Executive's hands. The Secretary's corridor would accomplish by construction what those orders accomplished by signature: it would end the land's use as a reservation and devote it to another federal purpose.

C. The case law is uniform that only Congress may diminish a reservation.

The rule that only Congress may change a reservation's boundaries is not confined to executive-order reservations or to any one era. It is, in the Supreme Court's words, "[t]he first and governing principle" of its diminishment decisions: "only Congress can divest a reservation of its land and diminish its boundaries." *Solem v. Bartlett*, 465 U.S. 463, 470 (1984). Once land is set aside as a reservation, "the entire block retains its reservation status until Congress explicitly indicates otherwise." *Id.* The Court applied that rule unanimously in *Parker*, 577 U.S. at 488, and reaffirmed it in *McGirt*, 591 U.S. at 914.

The rule is old. "[W]hen Congress has once established a reservation," the Court held more than a century ago, "all tracts included within it remain a part of the reservation until separated therefrom by Congress." *United States v. Celestine*, 215 U.S. 278, 285 (1909). It has been repeated without variation since. *See Parker*, 577 U.S. at 494 (citing *DeCoteau v. Dist. Cnty. Ct.*, 420 U.S. 425, 449 (1975)) ("Only Congress has the power to diminish a reservation."); *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998) (citation and internal quotation

marks omitted) (“[O]nly Congress can alter the terms of an Indian treaty by diminishing a reservation, and its intent to do so must be clear and plain.”).

McGirt closes off every alternative. “Under our Constitution, States have no authority to reduce federal reservations lying within their borders.” 591 U.S. at 903. Nor may courts do so: “courts have no proper role in the adjustment of reservation borders.” *Id.* The Court explained why. “Mustering the broad social consensus required to pass new legislation is a deliberately hard business under our Constitution,” and legislators “might seek to pass laws that tiptoe to the edge of disestablishment and hope that judges . . . will deliver the final push.” *Id.* “But wishes don’t make for laws.” *Id.*

D. The Nation’s Reservation is an executive-order reservation that Congress ratified and expanded.

None of this depends on how a reservation was initially established. Section 398d protects reservations “created by Executive order, proclamation, or otherwise for the use and occupation of Indians,” 25 U.S.C. § 398d, and the Supreme Court has never treated executive origin as a reason to relax the standard for diminishment. The same standard for diminishment applies to reservations established by executive order. *Mattz v. Arnett*, 412 U.S. 481, 496–97, 504–05 (1973) (applying standard diminishment analysis to an executive-order reservation); *Donnelly v. United States*, 228 U.S. 243, 258 (1913).

In *Mattz v. Arnett*, the Klamath River Reservation had been established by executive order in 1855. The Court applied the ordinary diminishment analysis and held an 1892 Act opening the land to homestead entry did not terminate it. *Mattz*, 412 U.S. at 496–97, 504–05. And an executive-order reservation is Indian country on the same footing as any other. *See Donnelly*, 228 U.S. at 269 (explaining that nothing is more appropriately “Indian country” than “a tract of land that, being a part of the public domain, is lawfully set apart as an Indian reservation”).

The Nation’s Reservation began with executive action, and Congress has since recognized and added to it. *See* Act of May 25, 1918, ch. 86, § 2, 40 Stat. 561, 569; Act of May 21, 1928, ch. 645, 45 Stat. 617; Appellant’s Br. 6–7 (describing later additions from 1926 to 1978); *cf. Donnelly*, 228 U.S. at 258–59 (treating Congress’s ongoing actions regarding executive-order reservations as recognition of their lawful existence). The Reservation is thus protected on two independent grounds. Section 398d guards it against unilateral executive change because it was created by executive order, and the diminishment cases guard it against any change not clearly expressed by Congress because Congress has recognized it. On either ground, the answer to who may alter its boundaries is the same: no one but Congress.

III. THE DIMINISHMENT STANDARDS REQUIRE CLEAR CONGRESSIONAL TEXT, AND NONE EXISTS HERE.

Following the clear limitations on who has authority to change a reservation's boundaries, the requirements for confirming that Congress has done so are also well established. The Supreme Court's diminishment decisions ask whether Congress has said, in statutory text, that a reservation has been reduced. No Act of Congress speaks to the boundaries of the Nation's Reservation while bearing any recognized mark of diminishment. That should end the inquiry.

A. The framework starts with statutory text.

The framework is “well settled.” *Parker*, 577 U.S. at 487–88 (citing *Solem*, 465 U.S. at 470–72). It begins with the text: “[t]o assess whether an Act of Congress diminished a reservation, we start with the statutory text.” *Id.* at 488. The statutory language is the “most probative evidence” of congressional intent. *Solem*, 465 U.S. at 470; accord *Hagen*, 510 U.S. at 411. *McGirt* put the point in its plainest form: “To determine whether a tribe continues to hold a reservation, there is only one place we may look: the Acts of Congress.” 591 U.S. at 903. And diminishment “will not be lightly inferred.” *Solem*, 465 U.S. at 470.

The Court has identified the indicators by which Congress ordinarily signals it has reduced a reservation. The first is “[e]xplicit reference to cession or other language evidencing the present and total surrender of all tribal interests.” *Parker*, 577 U.S. at 488–89 (quoting *Solem*, 465 U.S. at 470). The second is “an

unconditional commitment from Congress to compensate the Indian tribe for its opened land.” *Id.* Language of either kind creates “an almost insurmountable presumption that Congress meant for the tribe’s reservation to be diminished.” *Id.* (quoting *Solem*, 465 U.S. at 470–71). The third is a provision restoring land to “the public domain.” *Id.* (citing *Hagen*, 510 U.S. at 414). No particular formula is required. Disestablishment has “never required any particular form of words,” but it “does require that Congress clearly express its intent to do so.” *McGirt*, 591 U.S. at 904 (citation omitted). Congress has spoken of reservations as “discontinued,” “abolished,” or “vacated.” *Id.* (quoting *Mattz*, 412 U.S. at 504 n.22). What every formulation shares is Congress addressing, in text, the status of the land.

First, we find no such language here. Second, we must bring the appropriate context into the analysis by considering what the Secretary’s corridor would do. Extinguishing a reservation’s use and setting the land aside for other public purposes is itself a hallmark of diminishment; it is consistent with what Congress accomplished, in the nineteenth century, when it used the words “public domain.” *Parker*, 577 U.S. at 488–89. The corridor would produce the very result that public-domain language once produced: the extinction of the land’s use as a reservation and its devotion to another federal purpose, without any statutory text authorizing it. Congress knows how to bring about that result; when it does, it says so. Congress has never provided any indication that it intends to do so.

B. Where the text is absent, the Secretary's position fails at the threshold.

Where the text is silent, the analysis stops. In *Parker*, the Court concluded that the challengers had “failed at the first and most important step”: “[t]hey cannot establish that the text of the 1882 Act evinced an intent to diminish the reservation.” 577 U.S. at 490. *McGirt* confirmed that context and subsequent history enter only to resolve ambiguity in the text: “There is no need to consult extratextual sources when the meaning of a statute’s terms is clear. Nor may extratextual sources overcome those terms.” 591 U.S. at 916. In *McGirt*, the State could not “point to any ambiguous language in any of the relevant statutes that could plausibly be read as an Act of disestablishment.” *Id.* The Secretary here can point to no language at all, ambiguous or otherwise.

Nor can later history or changed circumstances fill the gap. The Omaha Tribe in *Parker* was almost entirely absent from the disputed land for more than 120 years, and government officials had for a century treated the land as part of the State. The Court nonetheless held the reservation intact. Subsequent demographic history “cannot overcome our conclusion that Congress did not intend to diminish the reservation,” and the “mixed record” of the government’s treatment of the land “cannot overcome the statutory text.” 577 U.S. at 493; *see also Yankton Sioux*, 522 U.S. at 355–56 (calling demographic history “the least compelling” evidence and later treatment of the land of “limited interpretive value”); *Oneida Nation v. Vill. of*

Hobart, 968 F.3d 664, 689 (7th Cir. 2020) (holding that the reservation was not diminished by allotment and later settlement). When the petitioners wished that Congress had “spoken differently,” the Court answered that “we cannot remake history.” *Parker*, 577 U.S. at 494 (quoting *DeCoteau*, 420 U.S. at 449).

C. The extratextual sources are irreconcilable with the Secretary’s position.

Congress has not referred to the Roosevelt Reservation when discussing the Nation’s boundaries or appropriating funds for fences along the Reservation boundaries. Even these extratextual sources indicate Congress appropriated funds for infrastructure and expansions of the Nation’s Reservation that are irreconcilable with the Roosevelt Reservation.

The Act of May 25, 1918. Congress made no mention of the Roosevelt Reservation when appropriating funds to construct a fence along the Nation’s Reservation boundaries adjoining the U.S.–Mexico border. Instead, Edgar B. Meritt, Assistant Commissioner of Indian Affairs, recommended the construction of the fence to facilitate U.S. trust responsibilities “so as to save the cattle of the Indians.” *Indian Appropriation Bill, 1919: Hearings on H.R. 8696 Before the S. Comm. on Indian Aff.*, 65th Cong. 112 (1918) (statement of Edgar B. Meritt, Assistant Comm’r, Office of Indian Aff.), <https://perma.cc/FE5A-4N8R>. Additionally, the Senate recognized that only part of the Nation’s Reservation

required fencing due to the southern boundary's terrain when addressing cost-related concerns. *Id.* at 113 (colloquy between Sen. Gronna and Mr. Meritt).

The Act of May 21, 1928. Once again, Congress made no mention of the Roosevelt Reservation when evaluating appropriations to build a fence along the east boundary of the Nation's Reservation. The House Report acknowledges the Nation's Reservation "adjoin[s] the international boundary line" and that the fence would improve livestock interests. H.R. Rep. No. 70-1248, at 2 (1928).

The Act of July 28, 1937. This expansion of the Nation's Reservation included an agnostic savings clause, stating that the additions "shall not affect . . . the reservation of a strip of land sixty feet wide along the United States-Mexico boundary made by proclamation of the President dated May 27, 1907." Act of July 28, 1937, ch. 527, 50 Stat. 536, 536. A savings clause was reasonable given that Congress was aware of fraudulent and "vast" private land claims on the Nation's Reservation, as Senator Ashurst requested that a memorandum be printed into the record encouraging the Department of the Interior to denounce fraudulent titles within the Nation's Reservation. 72 Cong. Rec. 9329 (1930). Moreover, Under-Secretary of Interior Charles West proposed the expansion to allow the Superintendent of the Papago to prevent cattle entry. S. Rep. No. 75-468, at 2 (1937).

The minutes of the remaining acts related to expansion of the Nation's Reservation mention neither the Roosevelt Reservation nor the international boundary line.⁴

D. Section 398d's "changes in the boundaries" should be read functionally.

Section 398d should be read for what it protects. It does not use the word "diminish," and it does not confine itself to formal redrawings of a map. It forbids "[c]hanges in the boundaries" of reservations "created . . . for the use and occupation of Indians." 25 U.S.C. § 398d. The purpose clause tells the reader what a boundary is for: it marks the line within which land is set apart for use and occupation of the tribe. A "change" in that boundary is naturally understood to include any act that takes land out of that setting-apart, whether or not anyone redraws a line on a map.

The Secretary's corridor would change the boundary in that sense. Land that is permanently closed to the Nation, land the Nation may not enter, use, or occupy, is not set apart for the Nation's use and occupation. It has been set apart for something else. That is the effect the Supreme Court has associated with a

⁴ See Act of June 28, 1926, ch. 701, 44 Stat. 775, 775; Act of Feb. 21, 1931, ch. 267, § 2, 46 Stat. 1202, 1202; Act of June 13, 1939, ch. 203, § 2, 53 Stat. 819, 819; Act of Sept. 10, 1978, Pub. L. No. 95-361, 92 Stat. 595, 595.

diminished reservation: “free[ing]” the land of “its reservation status.” *Parker*, 577 U.S. at 483 (quoting *Solem*, 465 U.S. at 467).

The Supreme Court’s treatment of the public-domain formula confirms that boundary changes are measured by their effect on the land’s use. To restore land to the public domain, the Court explained, “was to extinguish the land’s prior use—its use, for example, as an Indian reservation.” *Parker*, 577 U.S. at 488–89 (citing *Hagen*, 510 U.S. at 412–13). That is a description of what the words accomplished, not merely of which words were used.

E. The “opened but undiminished” cases are distinguishable.

The line of cases holding that an Act opening reservation land to non-Indian ownership did not diminish the reservation does not change the result here. *See Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351, 356, 358 (1962); *Parker*, 577 U.S. at 489. Such schemes allow “non-Indian settlers to own land on the reservation,” but “in doing so, they do not diminish the reservation’s boundaries.” *Parker*, 577 U.S. at 489 (quoting *Seymour*, 368 U.S. at 356).

Those decisions rest on a premise absent here. In each, non-Indian ownership coexisted with the tribe’s continuing jurisdiction over the land as reservation land. That is why, when Congress “only enabled nonmembers to purchase land within the reservation,” “federal, state, and tribal authorities share jurisdiction over these ‘opened’ but undiminished reservation lands.” *Parker*, 577

U.S. at 487. As *McGirt* put it, “there is no reason why Congress cannot reserve land for tribes in much the same way, allowing them to continue to exercise governmental functions over land even if they no longer own it communally.” 591 U.S. at 907. The corridor is different in kind. It would be physically closed to the Nation, Appellant’s Br. 47–48, and no tribal governmental function can be exercised over land the Nation cannot enter.

The district court found it significant that no decision addresses a border wall. JA0956–57. That observation misframes the question. No such decision exists because the Government has never before tried to build a wall on a reservation. Appellant’s Br. 47. The diminishment cases do not ask what instrument was used; they ask whether Congress has spoken. Novelty is no reason to depart from a rule stated in terms that do not depend on the instrument used.

In short, Congress has said nothing about the boundaries of the Nation’s Reservation that could support the Government, and the diminishment cases do not permit a court to supply what Congress has not written. The corridor would accomplish an effect that only Congress may bring about, and § 398d bars the Executive from commanding it alone. The Secretary’s construction project therefore cannot rest on any inherent executive authority.

IV. THE CONSTRUCTION OF THIS PORTION OF THE BORDER WALL WILL HARM THE NATION'S WATER SECURITY.

A. The construction will consume substantial water resources.

Environmental impact reviews provided for in the National Environmental Policy Act were waived pursuant to section 102 of IIRIRA, *see* IIRIRA § 102(c), 8 U.S.C. § 1103, and no current environmental assessment evaluates the construction's water demand. However, the Government's prior estimates provide some insight. A 2008 Environmental Assessment for a 5.2-mile border fence near Lukeville, Arizona, estimated that construction would require 1.7 to 3.7 million gallons of water, up to roughly 710,000 gallons per mile. U.S. Dep't of Homeland Sec., Customs & Border Prot., *Final Environmental Assessment for the Proposed Installation, Operation, and Maintenance of Primary Pedestrian Fence Near Lukeville, Arizona*, at 4-1 (Feb. 2008). Correspondingly, the 62 miles of wall planned along the Nation's border could consume approximately 20 to 44 million gallons of water.

B. Drawing from local groundwater for construction presents a threat the Government has already recognized.

Water for construction will almost certainly be drawn from groundwater appurtenant to the construction site. For example, Organ Pipe project contractors pumped from existing wells and proposed drilling new ones along the border.

Ariana Brocious, *New Border Wall Could Further Deplete Groundwater Supplies*,

Ariz. Pub. Media (Sept. 4, 2019),

<https://news.azpm.org/p/newsfeature/2019/9/4/157554-new-border-wall-could-further-deplete-groundwater-supplies/>. The Government recognizes the threat this pumping poses. In August 2026, contractors in New Mexico were ordered to stop drilling new wells after ranchers warned that pumping groundwater for concrete endangered their livestock. Mikella Schuettler, *Contractors Building Border Wall Ordered to Stop Drilling Wells in Drought-Stricken New Mexico*, ABC News (Aug. 4, 2026), <https://abcnews.com/US/wireStory/contractors-building-border-wall-ordered-stop-drilling-wells-135339508>.

C. Arizona's water supply is already in crisis.

In Arizona, a Drought Emergency Declaration has been in place since 1999. Ariz. Dep't of Water Res., *Interagency Coordinating Group*, <https://www.azwater.gov/drought/interagency-coordinating-group> (last visited Sept. 22, 2026). Arizona draws its water from four sources: groundwater, the Colorado River, in-state rivers, and reclaimed water. Groundwater and the Colorado River together supply roughly three-quarters of the State's water. Ariz. Dep't of Water Res., *FY 2014 Annual Report* 1, https://prism.lib.asu.edu/system/files/c16/122420/2014_Annual_Report.pdf (last visited Sept. 22, 2026). The Colorado River is currently at historically low levels, and Arizona's allocation will be cut by 760,000 acre-feet annually under new

federal guidelines. David Iversen, *Arizona Hit Hardest by Colorado River Cuts*, KTAR News (Aug. 21, 2026), <https://ktar.com/arizona-water-news/arizona-colorado-river-cuts>. The Nation is directly impacted by the cuts to Arizona's Colorado River allocation, as a portion of its water right settlement is met through the Central Arizona Project's delivery of Colorado River water to southern Arizona. *See infra* Part IV.D.

Arizona has worked hard to protect, reclaim and reuse water since 1926; today as much as two-thirds of treated wastewater goes back into use for purposes such as irrigation and power generation. WateReuse Ass'n, *Arizona*, <https://watereuse.org/sections/watereuse-arizona/> (last visited Sept. 22, 2026).

Arizona reduced its water useage to under 7 million acre-feet of water a year, about 3 percent less than it used almost sixty years ago, even as its population has grown nearly 500 percent since 1957. Ariz. Dep't of Water Res., *AZ's Groundwater Management Act of 1980* (Nov. 18, 2016), <https://www.azwater.gov/news/articles/2017-01-23-3>.

D. The Nation already faces significant water insecurity.

The Santa Cruz River runs through the San Xavier District, feeding ditches used by generations of O'odham farmers. Tony Davis, *For O'odham, Water Will Return*, Ariz. Daily Star (Tucson), May 6, 2006, https://tucson.com/news/local/govt-and-politics/article_4ce71e07-30ea-52f1-b28b-900051afbb61.html (last

visited Sept. 23, 2026). From the 1950s through the early 2000s, the City of Tucson, ASARCO, Farmers Investment Company, and roughly 1,800 other pumpers depleted the water table beneath the Nation's Reservation. San Xavier Dist., Tohono O'odham Nation, *Comments on the Post-2026 Colorado River Reservoir Operations Draft EIS 2* (Mar. 2, 2026), <https://www.usbr.gov/ColoradoRiverBasin/post2026/draft-eis/docs/PublicComments/Tribes/SanXavierDistrictTohonoOodhamNation-007500.pdf>. The River and ditches ran dry, and farming on the Nation's Reservation disappeared by the 1980s. Davis, *supra*. In 1975, the United States brought litigation on the Nation's behalf, leading to the Southern Arizona Water Rights Settlement Act of 1982, Pub. L. No. 97-293, tit. III, 96 Stat. 1261, 1274. *See United States v. City of Tucson*, No. CV 75-39 TUC FRZ (D. Ariz. 1975). Beyond San Xavier, the Nation depends heavily on groundwater. Tohono O'odham Util. Auth., *Water Services*, <https://toua.net/water/> (last visited Sept. 22, 2026).

E. Groundwater overdraft and deficit are well documented in this region.

Congress directed federal and state researchers to study the aquifers shared across the border. United States–Mexico Transboundary Aquifer Assessment Act, Pub. L. No. 109-448, 120 Stat. 3328 (2006). A 2025 study conducted under that Act ranked the Sonoyta–Puerto Peñasco–San Simon Wash System, which

underlies the Nation, as the highest-priority aquifer in the Arizona–Sonora region. Elia M. Tapia-Villaseñor et al., *Prioritizing Transboundary Aquifers in the Arizona–Sonora Region*, 17 Water 443, at 3, 8 (2025). The study found an annual groundwater deficit of 83.72 million cubic meters and a 19.2 percent increase in aridity. *Id.* at 8 tbl.1, 9.

The same study found inconsistent well monitoring and a lack of flow meters in the border region preventing reliable measurement of groundwater extraction. *Id.* at 7, 10. The adjacent aquifer beneath Organ Pipe Cactus National Monument, where the last round of wall construction took place, has no groundwater available for additional extraction and shows the most severe drying trend of the eight aquifers studied. *Id.* at 8 tbl.1. Once water is drawn from an aquifer in this condition, it cannot be replaced, quantified, or compensated.

The proposed construction would pump tens of millions of gallons from an aquifer already in severe overdraft, without environmental review or measurement of volumes extracted. Additional extraction of this already overdrawn supply without oversight presents a significant threat to water security and imperils the suitability of the Nation’s Reservation as a permanent homeland. This injury is unacceptable.

CONCLUSION

For the foregoing reasons, *amici* respectfully urge this Court to reverse the district court's denial of the Nation's motion for a preliminary injunction.

Dated: September 23, 2026

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) and D.C. Circuit Rule 32(e)(1), it contains 6006 words.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

Dated: September 23, 2026

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CERTIFICATE OF SERVICE

I hereby certify that on September 23, 2026, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the appellate CM/ECF system. All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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