No. 20-1104

IN THE

Supreme Court of the United States

MAUMEE INDIAN NATION,
Petitioners,
v.

WENDAT BAND OF HURON INDIANS,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRTEENTH CIRCUIT

BRIEF FOR *Respondent*

TEAM 1002

TABLE OF CONTENTS

TABLE OF CONTENTS ..... **I**

TABLE OF AUTHORITIES ..... **III**

STATEMENT OF THE CASE **2**

I. STATEMENT OF THE PROCEEDINGS **2**

II. STATEMENT OF THE FACTS **3**

SUMMARY OF ARGUMENTS **7**

ARGUMENT **12**

I. THE TC REMAINS WITHIN INDIAN COUNTRY ON THE WENDAT RESERVATION BECAUSE THE WENDAT TREATY ESTABLISHED THE AREA AS WENDAT BAND LAND, AND THE 1892 WENDAT ALLOTMENT DID NOT DIMINISH THE RESERVATION; FURTHERMORE, THE MAUMEE NATION CEDED ALL CLAIM TO THEIR LANDS IN THE TC IN THE MAUMEE ALLOTMENT. **12**

A. The TC is part of the Wendat Reservation because the Wendat Treaty includes the land, and judicial treaty interpretation is controlled by the canons of construction, which favors the Wendat Band's exclusive ownership of the TC. **13**

1. Congress expressly included the lands in the TC when they created the Wendat Reservation. **14**

2. The judicially supported canons of construction used in interpreting treaties further establish the Wendat Band's claim to the TC. **15**

B. Alternatively, if the Court finds the Wendat Treaty did not abrogate the Maumee Nation's claim to the TC, the Maumee Allotment did diminish the Maumee Reservation as they expressly ceded their interest in the land through the allotment act; thus, the land would be exclusively within Wendat Band's territory because the Wendat Allotment did not diminish their Reservation. **16**

1. Recent Supreme Court rulings have laid the groundwork that any diminishment of an Indian reservation must include express language ceding or surrendering tribal lands coupled with other clear intent, which is present in the Maumee Allotment but absent in the Wendat Allotment, leaving the Wendat Reservation intact but the Maumee Reservation diminished. **17**

a) The Maumee Allotment includes the required statutory cession language and language to return the land to the public domain, thus establishing clear congressional intent to diminish the reservation. *18*

b) The Wendat Allotment contains a provision to pay the Wendat Band a sum certain for lands declared surplus but lacks the required clear congressional intent to diminish the reservation because there is no express cession language. 19

2. In its move to give more weight to the statutory text to determine diminishment, this Court has shifted away from demographics and other extratextual evidence as enough to prove diminishment or disestablishment, making the extratextual evidence in the present case inconsequential for diminishment purposes. 20

II. THE STATE OF NEW DAKOTA IS BARRED FROM IMPOSING A TPT AND LICENSING FEE ON A TRIBAL BUSINESS UNDER THE FEDERAL INDIAN POLICY OF PREEMPTION AND INFRINGEMENT. 22

A. States have been consistently prohibited from levying a business tax or licensing fee on tribes when engaged in business activities on their own reservation. 22

1. The incidence of the TPT falls directly upon the WCDC. 22

2. This Court has long held that tribal corporations share the sovereign protection from direct state taxation or regulation of tribal business activities on the reservation.....23

B. Additionally, The *Bracker* analysis establishes the TPT preemption as applied to the WCDC if this court finds the incidence falls on non-Indian consumers. 25

1. Misapplication of Bracker risks tribal self-determination and consistency in Federal Indian Law. 25

2. Bracker requires the state to overcome the federal and tribal barriers and ought to be reinforced here. 26

3. This Court Should uphold the Thirteenth Circuit's ruling that Federal regulation and interests preempt the TPT 27

4. The TPT infringes on the Wendat Band tribal sovereignty, self-governance, and economic interest. 31

5. The state's general interest fails to overcome the federal regulation and interests and tribal interests here. 31

C. Alternatively, if this Court finds WCDC is within the Maumee Reservation, the TPT is similarly preempted under Bracker Balancing Test.....33

1. Federal preemption prevents the state taxation under tribal infringement of the Maumee Nation's sovereignty and interferes with federal policy. 33

CONCLUSION 36

APPENDIX 1

§477. Incorporation of Indian tribes; charter; ratification by election 1

TABLE OF AUTHORITIES

Cases

Antoine v. Washington 420 U.S. 194 (1975)……...26

Central Machinery Co. v. Arizona. State Tax Comm'n, 448 U.S. 160 (1980).....……..33

Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989)……12, 26, 32, 35

County of Oneida v. Oneida Indian Nation, 470 U.S. 226 (1985)…….…….15

County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation, 502 U.S. 251 (1992) ……...……....…….24

DeCoteau v. District County Court for Tenth Judicial Dist., 420 U.S. 425 (1975)….8, 19, 20

Dept. of Taxation and Fin. of New York v. Milhelm Attea & Bros., Inc., 512 U.S. 61 (1994).....29

Flandreau Santee Sioux Tribe v. Noem, 938 F.3d 928 (8th Cir. 2019)……...26

Gila River Indian Cmty. v. Waddell, 91 F.3d 1232 (9th Cir. 1996)……..11, 29

Hagen v. Utah, 510 U.S. 399 (1994)……...….8, 17, 18

Herrera v. Wyoming, 139 S.Ct. 1686 (2019)……..13

Lone Wolf v. Hitchcock, 187 U.S. 553 (1903)……..15, 29

Mashantucket Pequot Tribe v. Town of Ledyard, 722 F3d 457 (2013)……..…..11, 25

Mattz v. Arnett, 412 U.S. 481 (1973)…….……19

McClanahan v. State Tax Comm'n. of Arizona, 411 U.S. 164 (1973)…….....10, 15

McGirt v. Oklahoma, 591 U.S. ___, 140 S. Ct. 2452 (2020) 2, 9, 13, 16, 17, 18, 19, 20, 21

Menominee Tribe of Indians v United States 391 U.S. 404 (1968)…….....26

Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982)……...24

Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973)……23, 24, 33

Minnesota v. Hitchcock, 185 U.S. 373 (1902)……..8, 13, 14

Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999)……..……8, 15

Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463 (1976)…….…23, 29, 30, 31

Montana v. Blackfeet Tribe, 471 U.S. 759 (1985)……11, 15, 24, 28

Nebraska v. Parker, 136 S.Ct. 1072 (2016)…….……..17, 19, 20, 21

New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 334 (1983)……...34

Oklahoma Tax Comm'n v Chickasaw Nation, 515 U.S.450 (1995)…….…10, 23, 24

Oklahoma Tax Commissioner v. Sac and Fox Nation, 508 U.S. 114 (1993)……..34

Oneida Indian Nation v. County of Oneida, 414 U.S. 661 (1974) ……...…..…11

Oneida Nation v. Village of Hobart, 968 F.3d 664 (7th Cir. 2020)…….……17

Ramah Navajo School Board, Inc v. Bureau of Revenue, 458 U.S. 838 (1982)……..12, 32, 34

Rice v. Olson, 324 U.S. 786 (1945)…….…22

Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977)……...…20

Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978)……..…22

Seymour v. Superintendent of Washington State Penitentiary, 368 U.S. 351 (1962)……..…16

Solem v. Bartlett, 465 U.S. 463 (1984)……16, 17, 20

Tulalip Tribes v. Washington, 349 F. Supp. 3d 1046 (W.D. Wash. 2018)……..…29

United States v. California Board of Equalization, 650 F.2d 1127 (9th circuit 1981)…..10, 23

United States v. Rickert, 188 U.S. 432 (1908)…….……24

Video Gaming Technologies., Inc. v. Rogers County Board of Tax Roll Corrections., 2019 OK 83, ¶ 35, 475 P.3d 824, *cert denied* 141 S. Ct. 24 (2020)…….…..25, 26

Wagnon v. Prairie Band Potawatomi Nation, 546 U.S. 95 (2005)……...10, 23, 27, 31, 34, 35

Warren Trading Post Co. v. Arizona State Tax Comm'n., 380 U.S. 685 (1965)…..……30, 33

Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979)…….…....13

White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980)...10, 11, 12, 25, 27, 28, 33, 34

Williams v. Lee, 358 U.S. 217 (1959)……..……22, 25, 31

Worcester v. Georgia, 31 U.S. 515 (1832)…….….29

Wyoming v. U.S. Envtl. Protec. Agency, 875 F.3d 505 (10th Cir. 2017)…….…..…16, 19

Constitutions

U.S. Const. Art. I. §8, cl. 3…….…..…11

Law Reviews

Adam Crepelle, *Taxes, Theft, and Indian Tribes: Seeking an Equitable Solution to State Taxation of Indian Country Commerce*, 122(3) W. Va. L. Rev. 999 (2020)…….…34

James Susa, *Arizona Transaction Privilege Tax*, 27 J. St. Tax'n (2009)……22

Statutes

4 N.D.C § 212……..…22, 31, 32

25 CFR §140……..11, 28

25 U.S.C. §§ 461-479……..…18, 28, 35

General Allotment Act, P.L. 49– 105 (Feb. 8, 1887).....4

Treaty of Wauseon, Oct. 4, 1801, 7 Stat. 1404 2

Treaty with the Wendat, March 26, 1859, 35 Stat. 7749 3

Maumee Allotment Act of 1908, P.L. 60-8107 (May 29, 1908) 4

Wendat Allotment Act, P.L. 52-8222 (Jan. 14, 1892) 4

Treatises

1 *Cohen's Handbook of Federal Indian Law* § 2.02[1] (Nell Jessup Newton et al., eds. 2012)……..……13, 14

QUESTIONS PRESENTED

1) Whether the Topanga Cession remains exclusively within the Wendat Reservation after the Wendat Allotment Act, or did the Maumee Indian Nation's Treaty of Wauseon claim to the Topanga Cession survive abrogation by the Treaty with the Wendat's latter boundaries and/or diminishment from the express cession language in the Maumee Allotment act of 1908?

2) Whether the Topanga Cession's locus in Indian Country invokes the doctrine of Indian preemption or infringement and therefore prevent the State of New Dakota from imposing its Transaction Privilege Tax against the Wendat tribal corporation?

STATEMENT OF THE CASE

I. Statement of the Proceedings

The Maumee Indian Nation ("Maumee Nation") brought suit against the Wendat Band of Huron Indians ("Wendat Band") on November 18, 2015, in the United States District Court for the District of New Dakota. R. at 8. The Maumee Nation argued that the Wendat Band's commercial development was within the borders of the Maumee Reservation, and therefore the Wendat Band should remit the Transactional Privilege Tax ("TPT") funds to the Maumee Nation. *Id.* at 4. Alternatively, if the court found the Maumee Reservation diminished, the Maumee Nation argued that the Wendat Reservation was also diminished and the Wendat Band development was then outside of Indian Country, and the Maumee Nation would still be entitled to half of the TPT proceeds. *Id.* The Wendat Band argued that the doctrines of infringement and preemption barred the state from imposing the TPT on the commercial development and further asserted that the development was on the Wendat Reservation where state statute would remit the tax to the Wendat Band. *Id.* The District Court concluded that there was no clear evidence of the Topanga Cession ("TC") tract's abrogation from the Treaty of Wauseon, Oct. 4, 1801, 7 Stat. 1404 [hereinafter Maumee Treaty] or that the Maumee Reservation was diminished, and granted the Maumee Nation's requested Declaration that the TC was on the Maumee Reservation and validated the TPT on the Wendat Band development. *Id.* at 9.

The Wendat Band appealed the District Court decision to the United States Court of Appeals for the Thirteenth Circuit on September 20, 2018. *Id.* at 10. The Thirteenth Circuit Court asked the parties to submit supplemental briefs due to the Supreme Court's decision in *McGirt v. Oklahoma*, 591 U.S. ___, 140 S. Ct. 2452 (2020), which came down in the interim from submittal and filing of the present case. *Id.* The parties made the same arguments on

appeal, and after reviewing the revised briefs, the Court of Appeals reversed the District Court's decision. *Id.* The Court of Appeals concluded that the Wendat Treaty abrogated the Maumee Nation's claim to the TC and that there was no cession language to diminish the Wendat Reservation, and the TC was therefore on the Wendat Reservation. *Id.* The Court of Appeals found that the TPT could not be assessed on the Wendat Commercial Development Corporation ("WCDC") development because both preemption and infringement were present in the case. *Id.* at 11. The Court of Appeals remanded the case back to the District Court to reissue the Declaration in favor of the Wendat Band.

The Supreme Court of the United States granted certiorari to determine 1) whether the TC is outside of Indian Country due to diminishment of the Maumee Reservation and/or the Wendat Reservation and 2) assuming the TC is still in Indian Country do the doctrines of preemption or infringement prevent New Dakota from collecting the TPT on the WCDC development. *Id.* at 3.

II. Statement of the Facts

This case is about honoring the sovereignty of Indian tribes over their unabrogated lands and the right to exercise the authority essential to the federal policy of tribal self-determination and self-governance without state interference.

The Wendat Band and the Maumee Nation are federally recognized Indian tribes that reside within Door Prairie County in the state of New Dakota. *Id.* at 4-5. Both tribal nations individually entered into treaties with the United States that reserve land with the Wapakoneta River as an outer boundary marker for their reservations. *Id.* In the 1830s, the intervening years between the Maumee Treaty in 1802 and the Treaty with the Wendat of 1859, the Wapakoneta River migrated three miles westward. March 26, 1859, 35 Stat. 7749 [hereinafter Wendat Treaty]; R. at 5. A reservation boundary conflict arose from the

reservation of lands to the west of the Wapakoneta River in 1802 for the Maumee Nation, and the subsequent reservation of land east of the Wapakoneta River for the Wendat Band in 1859 after the river migrated west. *Id.*; see R. at 12 for a visual graphic. Both tribal nations refer to the disputed tract of land as the "Topanga Cession," although both disclaim knowledge of the name's origins. *Id.* Both parties stipulate that the reason for the river's migration is irrelevant for the resolution of the land dispute. *Id.* Each tribal nation claims the exclusive right to the TC as within their reservation boundaries.

The Maumee Nation and Wendat Band were both subject to allotment after the passage of the General Allotment Act, P.L. 49– 105 (Feb. 8, 1887). *Id.* at 5. Both tribal nations agree that the TC land was declared surplus under an allotment act but disagree on which allotment act applies. *Id.* at 7. In 1892, following a survey, the western half of the Wendat Reservation was opened to allotment. Wendat Allotment Act, P.L. 52-8222 (Jan. 14, 1892) [hereinafter Wendat Allotment]; R. at 15. In 1908, the Maumee Allotment Act ceded the Maumee Nation's interest in lands in the eastern quarter of the Maumee Reservation and returned that land to the public domain for homesteading or homesite settlement. Maumee Allotment Act of 1908, P.L. 60-8107 (May 29, 1908) [hereinafter Maumee Allotment]; R. at 13. Ownership of the land in the TC consists of almost exclusively land owned in fee. *Id.* Virtually no members from either tribe selected allotments in the TC, and Indians who live there now either rent or purchased the land in fee simple. *Id.* at 7. For more than eighty years since the Federal government's last record of allotment in 1934, each tribe has continuously asserted exclusive rights over the TC. *Id.* at 5, 7.

The Maumee Allotment ceded the Maumee Nation's interest in lands in the eastern quarter of the Maumee Reservation back to the public domain. *Id.* at 13. This land was then

opened to settlement by homesteading or homesite. *Id.* Congress compensated the Maumee Nation with roughly two million dollars ($2,000,000) for the sale of approximately four hundred thousand (400,000) acres of the ceded lands between 1908 and 1934, but the records of exact parcels have been lost or spoiled by the federal government. *Id.* at 7. The U.S. government held the funds from the sale of surplus land and credited it to the Indians with 3% interest for the benefit and disbursement to the Maumee Nation at the Secretary of the Interior's discretion. *Id.* at 14. The Wendat Band point to this act as evidence the Maumee Nation had lost all rights to the land when they ceded that section of their reservation in the Maumee Allotment. *Id.* at 8.

The Wendat Allotment opened the western half of the Wendat Reservation for allotment, settlement by non-Indians, leaving the eastern half intact for use by the Wendat Band. *Id.* at 15. Any land not claimed in the western half would be considered surplus and opened for settlement. *Id.* The government would pay the Wendat Band three dollars and forty cents ($3.40) for each acre declared surplus, but this amount was not to exceed the full compensation amount of two million two hundred thousand dollars ($2,200,000). *Id.* The Wendat Band agrees that they were paid this sum for roughly six hundred fifty-thousand (650,000) acres. *Id.* at 5.

The tribes did not seek adjudication from the federal courts on the inter-tribal land conflict until the Maumee Nation sought a declaration that the Wendat Band corporation is subject to state taxation and regulation. *Id.* at 7-8. On December 7, 2013, the Wendat Band purchased one thousand four hundred (1,400) acres in the TC. *Id.* at 7. Less than two years later, on June 16, 2015, the Wendat Band announced, the WCDC, a section 17 corporation, would build and develop several commercial and residential properties on their land in the

TC to improve local access to essential services such as a grocery store with fresh and traditional foods, pharmacy in addition to an increase in tribal government revenue. *Id.* at 7-8.

The WCDC's project sought to improve the Wendat Band's tribal government revenue for social services that would otherwise be too financially burdensome to provide to tribal members. One hundred percent (100%) of the revenue from the WCDC's profits would go to the tribal government to fund public housing for low-income members, a nursing care facility for elders, a tribal cultural center, and a tribal museum. *Id.* The shopping center would help prevent the area from becoming a food desert and provide revenue for the tribe. The WCDC estimates that the whole project will create three hundred and fifty (350) jobs and earn more than eighty million dollars ($80,000,000) in annual gross sales. *Id.* The projected liability under the TPT on the Wendat Band's gross income is 3%; the total yearly tax liability would be two million four hundred thousand dollars ($2,400,000). Without the entire expected gross income of eighty million dollars ($80,000,000), the Wendat Band believe they will be unable to provide the housing and nursing facility to its members. *Id.* at 8.

The Maumee Nation asserted that the WCDC's development is within the Maumee Reservation because the Wendat Allotment had diminished the Wendat Reservation. The Maumee Nation claimed that the WCDC was liable for the state's TPT and license. *Id.* The Maumee Nation claimed that they needed the funds that would be remitted back to them because their source of revenue, timber harvesting, had been declining in the face of climate change. *Id.* The Maumee Nation asserts the funds they could receive from the Wendat Band's profits through the TPT would help them in their economic development and support of its

tribal members, whom they claimed averaged less in income than the Wendat Band membership. *Id.*

The Transaction Privilege Statue at issue levies taxes on all gross business sales or gross transactions in New Dakota. Any business making over five thousand dollars ($5,000) on transactions must register for a license and pay a twenty-five dollar ($25) annual fee and remit 3% on gross proceeds or gross incomes from the transaction to a general state fund for courts, transportation, and general commerce support. *Id.* at 5-6. Tribes are exempt from registering or paying the tax for businesses on trust lands, and the state will also remit all TPT proceeds to any tribe that has non-Indian businesses operating on their reservation. *Id.* Door Prairie County will remit half of the 3% of the TPT proceeds in the county to the Maumee Nation to recognize their mineral interest release. *Id.*

The Wendat Band disputed the Maumee Nation's Claim over the TC and asserted New Dakota is without jurisdiction to impose the TPT and license under the TPT statute. 4 N.D.C §212 (2019). The Wendat Band challenged the Maumee Nation's claim, as the tribal property and development are within Indian Country, and the state's power to tax and regulate is invalid under federal preemption or barred by the infringement upon the Wendat Band's sovereign powers. *Id.* at 8.

SUMMARY OF ARGUMENTS

The TC lies within the Wendat Band of Huron Indians Reservation because the Wendat Treaty expressly includes this land in its boundaries, effectively abrogating the Maumee Nation's land rights in the Maumee Treaty. Additionally, the Maumee Nation's claim to the land was expressly ceded in the Maumee Allotment, while Congress has never expressly diminished the Wendat Reservation.

The Wendat Reservation was ratified in 1859, using the Wapakoneta River as a western boundary as it ran at that time. Unfortunately, for the Maumee Nation, the new Wendat Reservation boundaries included land that had previously lay west of the river and would have been the Maumee Nation's, had Congress not reserved the tract for the Wendat Band. *Minnesota v. Hitchcock*, 185 U.S. 373, 390 (1902). Regrettable as it is, this land was then implicitly abrogated from the Maumee Treaty and transferred to Wendat Band ownership in the new Wendat Reservation.

Applying the canons of construction to these events strengthens the Wendat Band's claim to the TC. The Wendat Band negotiated and agreed to cede significant lands in the New Dakota Territory, believing that they got lands east of the Wapakoneta as they saw it in 1859. When taking these records into account, we can easily determine that the Wendat Band understood they were getting the land as it laid at that time, and the Court must keep this in mind. *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999). Coupling the canons with the creation of the Wendat Reservation, we can determine that Congress implicitly abrogated the TC from the Maumee Treaty, even if unwittingly, and this land is within the boundaries of the Wendat Reservation.

Even if the Maumee Nation's claim survived the above abrogation, any claim to the TC they had ceased when the Maumee Allotment passed, in which they expressly ceded their interest in the land, and Congress returned the TC to the public domain. This return to the public domain puts the land back into government control, which is in trust as part of the Wendat Reservation. *Hagen v. Utah*, 510 U.S. 399, 412 (1994). The Wendat Allotment lacks any explicit cession of lands in the TC, and thus there was no diminishment of their Reservation because this Court has repeatedly ruled that the allotment of lands like those we

see in the Wendat Allotment fails to establish diminishment on its own, and is more indicative of how non-Indians can own land on reservations. *DeCoteau v. District County Court for Tenth Judicial Dist.*, 420 U.S. 425, 447 (1975).

Recent Court decisions have shifted the *Solem* analysis for diminishment that this Court has depended on in previous cases. The main thrust of a diminishment argument now requires Congress's express textual intent to diminish a reservation. *McGirt*, 591 U.S. ___ at ___, 140 S. Ct. at 2468. Explicit textual intent would include any express cession of land or language surrendering ownership rights to land by a tribe. Further proof such as a sum certain for lands diminished or a return of the lands to the public domain then buttresses the textual proof. Given less weight now is extratextual evidence such as contemporaneous understandings or demographics of the lands in question. Extratextual evidence is now only used for statutory textual interpretation. *McGirt*, 591 U.S. ___ at ___, 140 S. Ct. at 2469. Under McGirt, the Maumee Nation's argument for the diminishment of the Wendat Reservation is made moot in the face of the cession language of the two allotment acts in question.

This Court should find the TPT statute invalid if levied against the WCDC. The TPT licensing fee and business privilege tax on the WCDC by the State of New Dakota is an unlawful exercise of state civil jurisdiction in Indian Country under the infringement and the preemption doctrine. First, the state's taxation is an improper regulatory burden placed upon a tribe engaged in a business within their reservation boundaries infringing upon the tribe's sovereignty. Second, even if the TPT legal incidence falls upon a non-member on either the Wendat Band or Maumee Nation's reservation, the TPT license remains an invalid state imposition under *Bracker* because Federal and Tribal interests outweigh the state's interest.

The New Dakota statute language clearly states that the TPT taxes a business directly. This Court has upheld civil regulation limitations on state taxation on a tribe or tribal property within a reservation as presumptively invalid absent congressional authorization. *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95 (2005). The party intended to pay under the state's tax determines legal incidence; direct taxation on a party exempt from taxation is barred. *Wagnon v. Prairie Band Potawatomi Nation, 546 U.S. 95 (2005); see United States v. California Board of Equalization*, 650 F.2d 1127 1130-31 (9th Cir. 1981);. The state's TPT's clear language places the tax burden on the organization seeking to conduct business in New Dakota, and therefore the burden directly falls upon the WCDC and should be held invalid. Under *McClanahan v. Arizona State Tax Comm'n*, this court has long held a state tax and regulation may not override tribal self-government, especially here, where a state seeks to tax the gross income generated by a tribal business within the reservation boundaries. 411 U.S. 164, 179, 181 (1973). Finally, Congress nor any exception authorize the state's TPT statute's application against the WCDC. Therefore, the incidence of the tax on the WCDC frustrates the per se rule to bar state tax against a tribe.

In deciding the TPT's application against the Tribe, the Thirteenth Circuit ruled correctly in concluding the tax is preempted under a preemption and infringement analysis. Under the *Bracker* analysis, for a state to impose regulation and taxation where the incidence falls on non-Indian business within a reservation, the tax or regulation may still be barred if the state's interest fails to overcome the federal regulation or the tribal and/or the state's interests. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144-145 (1980); *Oklahoma Tax Comm'n v Chickasaw Nation*, 515 U.S.450, 459-460 (1995). As a result of inconsistent application of *Bracker* by some lower courts, the test is often warped to

erroneously weight the state's rights to tax on-reservation non-Indian business and instead requires the tribe to raise a critical service severed explicitly by the business instead of requiring the state to overcome the federal and tribal interests. *Cf. Gila River Indian Cmty. v. Waddell,* 91 F.3d 1232, 1238 (9th Cir. 1996); *Mashantucket Pequot Tribe v. Town of Ledyard*, 722 F3d 457 (2013). Lower court's application of the *Bracker* analysis confuses the established civil regulatory authority of states on tribal reservations and should be rejected.

Even if this court finds the TPT incidence falls on non-Indians, the preemption of state taxation is sufficiently found under the *Bracker* analysis because it relies upon long-held federal policy, statutes, and tribal interest. Balancing interests requires a particularized inquiry of the history, congressional intent, and is evaluated with tribal sovereignty as a backdrop. *Bracker*, 448 U.S. at 144-145. Regulation of economic development and trading with Indians has long been Congress's role under the Indian Commerce Clause and Congressional regulations. *Montana v. Blackfeet Tribe of Indians,* 471 U.S. 759, 764 (1985) (citing U.S. Const. Art. I. §8, cl. 3); see *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974)). A federal statute regulating Indian Trading under 25 CFR §140, and the history of promotion of tribal self-determination without state interference unless authorized illuminates the Court's need to reaffirm the federal and tribal interests as a firm barrier to for the state to impose taxation on a reservation.

Further, TPT imposition on the tribal economic interest that prevents the tribe from regulating internal tribal affairs is an improper state imposition of on-reservation activities. This Court has held a tribe's regulatory protection contract where a tribe goes beyond a reservation but is strongest upon their own reservation. *Oklahoma Tax Comm'n*, 515 U.S. at 458. The on-reservation activities of the WCDC directly serve tribal interests to promote

economic, health, and tribal self-governance because 100% of the gross proceeds return to the Wendat Band Tribal government for the benefit of the government and tribal members. Similarly, the benefits of economic development, cultural services near or on the Maumee Reservation, and their interest in establishing an alternative economic resource on the reservation rise above the state's interest.

Finally, the weight of a state's interest must overcome the federal and tribal interest in a balancing test and show a nexus connection to the levied tax. *Bracker* distinguishes that the federal and tribal interests in sovereignty are inextricably connected in balancing. 448 U.S. at 144, 150. New Dakota, however, has only expressed a generalized interest in raising economic revenue for business development and infrastructure. *Ramah Navajo School Board,* 459 U.S. at 843-45. Unlike *Cotton Petroleum Corp. v. New Mexico*, the services here do not create a nexus with specific services provided and regulated by other state laws. 490 U.S. 163, 176 (1989). This Court has confirmed that generalized interests are not enough to overcome on-reservation self-governance and federal interests and should enforce and confirm the Thirteenth Circuit's holding. Thus, if the TC is found Indian Country, the TPT statue's application on the WCDC may be shown to be preempted by the inherent authority of the tribe's governance of their land and the promotion of their economic self-sufficiency and self-determination pursued by Congress.

ARGUMENT

I. The TC remains within Indian Country on the Wendat Reservation because the Wendat Treaty established the area as Wendat Band land, and the 1892 Wendat Allotment did not diminish the Reservation; furthermore, the Maumee Nation ceded all claim to their lands in the TC in the Maumee Allotment.

Congress expressly created the Wendat Reservation in 1859, and the drawn boundary lines included the land within the area known as the TC; therefore, the ratification of the

Wendat Treaty effectively abrogated the Maumee Nation's claim to that land, and the subsequent Wendat Allotment lacks an express intent of Congress to cede or diminish all of the Wendat Band's lands in the TC. Alternatively, if this court cannot find abrogation of the Maumee Nation's interest in the TC through the Wendat Treaty, the TC tract of the Maumee Reservation was clearly diminished by the Maumee Allotment when the tribe agreed to cede their interest in the eastern quarter of the reservation and have the land returned to the public domain.

A. The TC is part of the Wendat Reservation because the Wendat Treaty includes the land, and judicial treaty interpretation is controlled by the canons of construction, which favors the Wendat Band's exclusive ownership of the TC.

The TC land always has been, and remains, a part of the Wendat Reservation because of the land's inclusion in the original boundary description and the Wendat Band's understanding of the tract to be exclusively theirs when signing the treaty. There is no need for Congress to use specific words when creating a reservation; the critical factor is that a "defined tract" of land is "appropriated to certain purposes" for a tribe. *McGirt v. Oklahoma*, 591 U.S.___, 140 S. Ct. 2452, 2475 (2020) (quoting *Minnesota v. Hitchcock*, 185 U.S. 373, 390 (1902)). When interpreting treaties, a court must apply the canons of construction to liberally construe treaties in favor of Indians and resolve ambiguities in the Indians' favor. 1 *Cohen's Handbook of Federal Indian Law* § 2.02[1] (Nell Jessup Newton et al., eds. 2012) [hereinafter *Cohen's Handbook*]. The canon most important for our case says a treaty must be construed "in the sense in which they would naturally be understood by the Indians." *Herrera v. Wyoming*, 139 S.Ct. 1686, 1699 (2019) (quoting *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 676 (1979)). According to these well-founded legal principles, the Wendat Treaty's ratification abrogated the Maumee Nation's claim to the TC.

1. Congress expressly included the lands in the TC when they created the Wendat Reservation.

One of the statutory methods Congress used to establish Indian reservations was purchasing private land to be reserved for Indian use. *Cohen's Handbook*. While these statutes do not always include the word "reservation," they still authorize a purchase of land, and this Court has held there are no necessary words or language to establish a reservation as mentioned above as Indian Country. *Id.* The vital piece in determining reservation formation is establishing a defined land tract for a specific purpose described in the statute. *Hitchcock*, 185 U.S. at 390.

In essence, the Wendat Treaty was a cession of the occupancy rights of the Wendat Band in a large area of the New Dakota Territory for defined considerations. Purchase of the "Chiefs, Headmen and Warriors" title and interest to the land establishes the treaty's foundation. Wendat Treaty. This foundation is a clearly delineated land tract, which includes "lands East of the Wapakoneta River" and other boundaries further defined. *Id.* Further, in describing the tract of land, the Wendat Treaty names the TC and other lands as "reserved lands." *Id.* While the word "reservation" was not expressly used, Congress's intent is made clear in describing these lands as reserved by the Wendat Band in their cession of other lands surrounding the tract, meeting the specific purpose and reservation determination threshold. *Hitchcock*, 185 U.S. at 390.

The land within the TC was east of the Wapakoneta River at the Wendat Treaty's ratification by Congress and is therefore exclusively Wendat Band land. The TC land status and ratification of the Wendat Treaty acts as a form of abrogation of the Maumee Nation's claim on the tract. When the Wendat Treaty was negotiated and signed, it occurred after the river's shift westward, and thus the piece of the Maumee Reservation in the TC was

implicitly abrogated by Congress at the signing of the Wendat Treaty. Congressional power to change previous treaties was outlined by this Court in *Lone Wolf v. Hitchcock*, stating that Congress has always had plenary authority over tribal relations, to the point of being able to adjust statutory promises and treaty parameters. 187 U.S. 553, 565 (1903).

2. The judicially supported canons of construction used in interpreting treaties further establish the Wendat Band's claim to the TC.

The statutory interpretation has unique considerations when analyzing Indian law cases like this one. *Montana v. Blackfeet Tribe*, 471 U.S. at 766. Language in treaties, statutes, executive orders, and agreements should be liberally construed in favor of Indians when interpreted, and any ambiguities should be "resolved in the Indians favor." *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985); *McClanahan v. State Tax Comm'n. of Arizona*, 411 U.S. 164, 174 (1973). Terms in these various documents are to be analyzed as the Indians would have understood them at the time they were enacted. *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. at 196. This Court established the analysis courts use to determine the principle of fair dealing–the idea that the federal government would have acted with a well-meaning intent when forming these various agreements with Indians–and courts must interpret language with this intent in mind.

Applying the canons to the above argument, Congress abrogated part of the Maumee Reservation in the Wendat Treaty, strengthening the Wendat Band's claim that the TC lies within Indian Country on the Wendat Reservation. Arguably the most crucial piece of the canons, for our purpose, states that treaties are interpreted as the Indians would have understood them at the time they were negotiated and enacted. *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. at 196. When the Wendat Band agreed to cede massive claims to the New Dakota Territory, they did so thinking they would have ownership of the

land reserved east of the Wapakoneta River. Wendat Treaty. Since the Wendat Band signed the treaty at the Wapakoneta River site in 1859, it is hard to imagine that the Wendat Band did not think the agreement included the very land they were standing on. *Id.* When interpreting the language surrounding the Wendat Treaty and other acts in this case, the Court should apply these canons as precedent dictates and resolve any ambiguities, language, and understandings in favor of the Wendat Band to find that while there was no complete abrogation of Maumee Treaty, the Maumee Nation's claim to the TC certainly was abrogated.

B. Alternatively, if the Court finds the Wendat Treaty did not abrogate the Maumee Nation's claim to the TC, the Maumee Allotment did diminish the Maumee Reservation as they expressly ceded their interest in the land through the allotment act; thus, the land would be exclusively within Wendat Band's territory because the Wendat Allotment did not diminish their Reservation.

If the Wendat Treaty did not reclassify the land's status in the TC as Wendat Band land, the Maumee Allotment should because the Maumee Nation ceded their claim to that land, something the Wendat Band never did. Under the Constitution, states and courts have no authority to divest tribes of lands reserved for them or reduce federal reservations and their borders. *McGirt*, 591 U.S. ___ at ___, 140 S. Ct. at 2462. The power to "divest a reservation of its land and diminish its boundaries" lies exclusively with Congress. *Solem v. Bartlett*, 465 U.S. 463, 465 (1984). The land maintains its reservation status unless Congress explicitly diminishes or abrogates the reservation regardless of what happens to individual plots' ownership status within the reservation. *Id.* at 470. This Court has held that merely opening lands up for settlement by non-Indians does not diminish a reservation; it does no more than create the framework for non-Indians to own land on a reservation, and that allotments only sold and disposed of lands *within the exterior boundaries of an Indian reservation*. *Wyoming v. U.S. Envtl. Protec. Agency*, 875 F.3d 505, 514–15 (10th Cir. 2017) (citing *Seymour v. Superintendent of Washington State Penitentiary*, 368 U.S. 351, 354-356

(1962) (emphasis added). The established principles of diminishment leave the Wendat Reservation fully intact and the Maumee Nation without a legal claim to the TC.

1. **Recent Supreme Court rulings have laid the groundwork that any diminishment of an Indian reservation must include express language ceding or surrendering tribal lands coupled with other clear intent, which is present in the Maumee Allotment but absent in the Wendat Allotment, leaving the Wendat Reservation intact but the Maumee Reservation diminished.**

This Court has yet to determine a hardline rule for diminishment, but the recent *McGirt* decision requires the presence of express cession language to establish diminishment. *McGirt*, 591 U.S. ___ at ___, 140 S. Ct. at 2462. The most important aspect in determining diminishment now lies in the statutory text. The implications and the effects of *McGirt* ripple through the courts to raise interpretation questions for the Solem test. The decision has recently been read "as adjusting the *Solem* framework to place a greater focus on statutory text, making it even more difficult to establish the requisite congressional intent to disestablish or diminish a reservation." *See Oneida Nation v. Village of Hobart*, 968 F.3d 664, 668 (7th Cir. 2020). To determine whether a reservation has been diminished, we first look to the statutory text to determine if there are "common textual indications of Congress' intent to diminish reservation boundaries." *Nebraska v. Parker*, 136 S.Ct. 1072, 1079 (2016). The first of these textual indications of diminishment would include any language of explicit cession or "present and total surrender" of tribal interests. *Solem*, 465 U.S. at 470. In addition, to express cession language, any text that includes a commitment from Congress to compensate a tribe for surrendered land also indicates intent to diminish a reservation in the act. *Id.* In *Parker*, the Court's framework for diminishment also included any language in an act or provision that restored reservation lands to the public domain. 136 S.Ct. at 1079 (citing *Hagen v. Utah*, 510 U.S. 399, 414 (1994)). Using the framework from *Parker* and *McGirt*, we can assess the current situation first on whether there is any language of express cession

in the Wendat Allotment or the Maumee Allotment, and if so, is there other clear congressional intent to diminish either reservation.

a) The Maumee Allotment includes the required statutory cession language and language to return the land to the public domain, thus establishing clear congressional intent to diminish the reservation.

In the Maumee Allotment, the critical language states that the "Indians have agreed to consider the entire eastern quarter surplus and to *cede* their interest in the surplus lands to the United States." Maumee Allotment § 1 (emphasis added). The use of the word "cede" in this act leaves no doubt that the congressional intent was to diminish that piece of the reservation and constituted a surrender of tribal interests in the land. *McGirt*, 591 U.S. ___ at ___, 140 S. Ct. at 2463. If the Maumee Nation had maintained rights to the TC after the Wendat Reservation's placement over the top of the Maumee Reservation, then the Maumee Nation expressly ceded their interest in the TC through this act.

Section one of the Maumee Allotment goes on to read, "where it may be returned to the *public domain* by way of this act." Maumee Allotment (emphasis added). Several cases point to express cession of lands coupled with a commitment from Congress to pay a tribe for the ceded lands as insurmountable proof of diminishment, but this Court has ruled that this is not always necessary to prove diminishment. *Hagen*, 510 U.S. at 412. *Hagen* establishes that Congress's intent to return the lands to the public domain, coupled with the clear cession language, is enough to establish a reservation's diminishment. *Id.* at 414. Lands returned to the public domain revert back to federal government control. *Id.* at 412. In the present case, the government holds those lands in trust for the Wendat Band per the Wendat Treaty. The Indian Reorganization Act ("IRA") finished the TC Indian Country classification when the IRA restored the TC surplus-opened Indian lands to Wendat Band tribal ownership. 25 U.S.C. §§ 461-479.

b) The Wendat Allotment contains a provision to pay the Wendat Band a sum certain for lands declared surplus but lacks the required clear congressional intent to diminish the reservation because there is no express cession language.

The language in the Wendat Allotment is clear in that the United States will pay "the sum of three dollars and forty cents for every acre declared surplus" up to a maximum of just over two million dollars, but there is nothing in the Act where the Wendat Band agree to cede any land or relinquish any rights. Wendat Allotment. The lack of the common textual indications of "Congress' intent to diminish the reservation boundaries" fails to meet the insurmountable presumption that the reservation was diminished and is more akin to opening lands within the reservation for non-Indian settlement. *Parker*, 136 S.Ct. at 1079. This Court has ruled that this settlement framework only propagates the scheme that allows non-Indians to own land on a reservation without diminishing exterior boundaries. *Parker*, 136 S.Ct. at 1079-80 (citing *DeCoteau v. District County Court for Tenth Judicial Dist.*, 420 U.S. 425, 448 (1975)).

This lack of clear congressional intent to cede or relinquish lands sets up a situation where "the statutes merely opened a reservation to settlement by non-Indians or authorized the Secretary of the Interior to act as a "sales agent" for the Native American tribes." *Wyoming*, 875 F.3d at 515. This sale of lands did not change the exterior boundaries of the Wendat Reservation, leaving the TC clearly within Indian Country, more specifically on the Wendat Reservation. As in *DeCoteau,* the Wendat Allotment is an act that opened the land for settlement and paid the tribe the proceeds from *future* sales from land removed from the reservation "only if continued reservation status were inconsistent with the mere opening of lands to settlements." *DeCoteau*, 420 U.S. at 447 (citing *Mattz v. Arnett*, 412 U.S. 481, 502 (1973)). Since *McGirt* has shifted the *Solem* analysis to place a greater emphasis on the

statutory text around clear cession, and this Court has since upheld that allotment alone is not enough to establish diminishment, the Wendat Allotment failed to meet the new threshold to establish diminishment of the Wendat Band land; therefore the TC is on the Wendat Reservation. *McGirt*, 591 U.S. ___ at ___, 140 S. Ct. at 2464.

2. In its move to give more weight to the statutory text to determine diminishment, this Court has shifted away from demographics and other extratextual evidence as enough to prove diminishment or disestablishment, making the extratextual evidence in the present case inconsequential for diminishment purposes.

We would be remiss if we did not address how the *McGirt* decision adjusted how the *Solem* framework views extratextual evidence in their diminishment decisions and how this shift weakens what will most likely be our opponent's argument for diminishment. The *McGirt* decision is new in the judicial stage, and while it dealt with criminal jurisdiction, it still guides courts in evaluating additional evidence in determining whether reservation diminishment occurred.

The *McGirt* precedent moves away from finding congressional intent, in the light of the "common understanding that reservations would cease to exist someday," enough to establish reservation diminishment simply because non-Indian settlers had taken over much of the ownership on a reservation. *Solem*, 465 U.S. at 470-71 (citing *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 588 (1977); *DeCoteau*, 420 U.S. at 428). In *Parker,* we see language going against the practice of giving the history surrounding the passage of acts such power when the Court said the "evidence relied upon by the parties cannot overcome the lack of clear textual signal that Congress intended to diminish the reservation." 136 S.Ct. at 1080. The Court seized on language in *Solem* to show that this evidence does not establish diminishment on its own, without the textual support in the statute. *Id. Parker* goes on to further pick at the *Solem* decision when the Court states "subsequent demographic history

cannot overcome our conclusion that Congress did not intend to diminish the reservation" and the Court's job was not to rewrite the Act in light of the "subsequent demographic" makeup of the reservation in question. *Parker*, 136 S.Ct. at 1082-83.

In 2020 this Court dealt the final blow to the extratextual evidence of the *Solem* analysis when it said that the essential piece of this analysis is the clear intent to diminish in the statutory text. *McGirt*, 591 U.S. ___ at ___, 140 S. Ct. at 2468. Under this ruling, the contemporaneous history around the passage of an act and any subsequent or current reservation demographics is irrelevant in the absence of clear textual intent, and that such evidence could only be used to establish the meaning of the language in the statute. *Id.* The ruling further asserted that there is no need to address these sources when there is clear meaning in the statute's text regarding cession of land or surrendering land rights. *Id.*

In the Maumee Nation and Wendat Band case, the Maumee Nation presented extensive irrelevant extratextual evidence to find diminishment. This Court has been presented with the legislative history surrounding the TC and a census conducted by both tribes on the TC and respective reservations' demographic makeup. The Petitioners will likely use much of this evidence in their argument to find diminishment of both reservations to favor their taxation claim. However, the recent *McGirt* decision should help the Court hold that this analysis has shifted, and only relevant evidence in this diminishment argument is suitable to resolve this dispute. That evidence clearly indicates the diminishment of the Maumee Reservation, and none in the Wendat Reservation and therefore the Wendat Band's fee land and WCDC project is on Indian Country within the Wendat Reservation's boundaries.

II. The State of New Dakota is barred from imposing a TPT and licensing fee on a Tribal business under the Federal Indian Policy of preemption and Infringement.

New Dakota's imposition of the TPT and licensing fee on the WCDC should be rejected under precedent limiting state civil regulatory authority on-reservations. This court's precedent supports the prohibition of the licensing fee and tax directly on a tribal business as a sovereign arm of the tribe. Under *Williams v. Lee* and *White Mountain Apache Tribe v. Bracker,* federal regulation and policy interest, as well as the interference with tribal sovereignty and governance interest, serve as a barrier that the state of New Dakota fails to overcome.

A. States have been consistently prohibited from levying a business tax or licensing fee on tribes when engaged in business activities on their own reservation.

The court ought to reject the New Dakota's taxation and licensing fee imposed on the WCDC's business activities within the Wendat Reservation in recognition of the consistent application of federal prohibition of states directly taxing Indian tribes. Deeply rooted in federal Indian law is "the policy of leaving Indians free from state jurisdiction and control." *Rice v. Olson*, 324 U.S. 786, 789 (1945). Tribes possess the sovereign right of self-governance and self-determination within their reservation boundaries. *Williams v. Lee*, 358 U.S. 217, 223 (1959).

1. The incidence of the TPT falls directly upon the WCDC.

The Wendat Band is a federally recognized tribe that possesses inherent sovereignty to self-govern. Only Congress holds power to make deals with or entreat tribal nations; this is confirmation of the rule barring state regulation and tax imposition that interferes with tribal autonomy and self-governance. *Santa Clara Pueblo v. Martinz,* 436 U.S. 49, 59 (1978). The TPT is a business privilege tax levied directly upon a business for the privilege of engaging in commerce in the state. 4 N.D.C.§212(1). The direct effect of a transactional privilege tax is

upon the business being taxed, absent any specific language requiring collection from a consumer or collection for the state. *see* James Susa, Arizona Transaction Privilege Tax, 27 J. St. Tax'n 21, 21 (2009). In this case, the TPT is directly applied to the tribal business. WCDC. Any state taxation levied on a tribe or tribal business should be barred because it imposes the incidence of a tax directly on a tribe. The legal incidence of the tax is evaluated by determining the party responsible for paying and remitting the tax to the state. *Wagnon*, 546 U.S. at 111-12; *Moe*, 425 U.S. at 482; *see also United States v. California board of eq.,* F.2d 1127 at 1130-31. The per se rule prohibits direct state regulation or taxation of tribes within their own reservation if the legal incidence falls upon the tribe absent congressional explicit authorization. *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. at 459.

2. This Court has long held that tribal corporations share the sovereign protection from direct state taxation or regulation of tribal business activities on the reservation.

The WCDC, a tribally held business, is afforded the same sovereign protection for on-reservation activities as the tribe. In *Mescalero,* Justice White enumerated, "Tax immunity cannot be made to turn on the particular form in which the tribes choose to conduct its business," where the court did not find the record revealed the incorporation method of the tribal business. 411 U.S. at 157 n.13. While the method of incorporation of the WCDC business is not dispositive to finding that state taxation is preempted, as a rule, this court has affirmed closely-held tribal corporations enjoy the same status as tribal nations. *Id.* at 157. Therefore, as a tribal corporation, the WCDC enjoys the same protection under tribal sovereignty and federal preemption as the tribe against State taxation directly on the business.

Tribal sovereignty stands as a bar to the state's exercise of civil regulatory control imposed upon a tribe or business. This Court has upheld the prohibition of state civil

regulation of on-reservation businesses because tribes have the power to manage and use their own territory by both members and non-members and to undertake the economic activity within the reservation. *Merrion v. Jicarilla Apache Tribe,* 455 U.S. 130, 137 (1982). An exception may allow states to tax the physical property of member-owned fee lands within a reservation, however, they are unable to regulate or tax the activities, permanent improvements, or transactions that occurred upon the land. *County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 270 (1992).

States must assert an off-reservation interest to overcome tribal sovereignty and federal preemption. In overcoming a tribe's inherent power and sovereignty, the state must assert an off-reservation interest to overcome tribal sovereignty and federal preemption. *See generally Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973). The state's TPT statute cites to no interests other than a generalized interest in promoting commerce and regulating businesses engaged in commerce in the state; therefore, it should be held invalid.

Congress must authorize state jurisdiction to tax tribal interests through intentions that are express and "unmistakably clear." *Montana v. Blackfeet Tribe*, 471 U.S. at 759; *accord Chickasaw Nation* 515 U.S. at 458 (1992). Petitioners cite no federal authorization the state taxation directly on the WCDC. Even on non-trust fee lands owned by the tribe, the state is prohibited from regulating or imposing excise taxation on the land absent specific exceptions. *County of Yakima*, 502 U.S. at 258. This Court in *Mesclaero* found a state property use tax imposed on an off-reservation tribal business enterprise preempted because the permanent property improvement was so inextricably connected to the land. 411 U.S. at 158. When the land itself is not subject to state taxation, the permeant improvements are also not taxable. *United States v. Rickert*, 188 U.S. 432, 442 (1908). The New Dakota TPT tax is

profits arising from the proposed development on tribally owned land in the reservation and should be invalidated.

The lack of federal preemption coupled with the tribal corporation's protection of tribal sovereignty and the incidence of the tax falling upon the tribe establishes the TPT should be prevented from imposition upon the WCDC.

B. Additionally, The *Bracker* analysis establishes the TPT preemption as applied to the WCDC if this court finds the incidence falls on non-Indian consumers.

This court established the *Bracker* test for taxation where the incidence of a state tax falls upon a non-Indian business engaged in economic activity on-reservation. 448 U.S. at 114; *Oklahoma Tax Comm'n*, 515 U.S. at 458. Two "barriers" set for a state to overcome in order to extend regulatory control to tax non-Indians sales on a reservation: 1) Federal preemption, whether implicit or explicit; and 2) the infringement of the tribe to self-govern subject to the interests of Congress and the tribal sovereignty.

As the Wendat Band asserts, in cases where the incidence of a tax falls directly upon a tribe in Indian country, the taxation is barred by invoking strong protection of tribal sovereignty. *Williams* 358 U.S. at 223. However, as the Wendat Band disputes and the petitioners assert, if the legal incidence falls upon a non-Indian business–assuming for the sake of argument either the court finds the tax's legal burden is upon non-Indians, or under WCDC's treatment as a non-Indian business, if within the Maumee Reservation–the *Bracker* must be applied to resolve the controversy.

1. Misapplication of Bracker risks tribal self-determination and consistency in Federal Indian Law.

Lower courts have conflated the two criteria or flipped the party to whom the burden is posed by misapplying the importance of the property's location on-reservation. However, the basis of the test establishes the barriers are "independent but related" in a "particularized

inquiry" that a state must overcome to impose regulatory taxation authority where the incidence of a tax falls upon a non-Indian business on-reservation. *Bracker* 448 U.S. at 114-145*; accord Video Gaming Technologies., Inc. v. Rogers County Board of Tax Roll Corrections*., 2019 OK 83, ¶ 35, 475 P.3d 824, *cert denied* 141 S. Ct. 24 (2020) [hereinafter *VGT*]; *cf:* Mashantucket Pequot Tribe v. Town of Ledyard (Mashantucket II), 722 F.3d 457 (2nd Cir. 2013). In *VGT*, the Oklahoma Supreme Court criticized *Mashantucket II* by clarifying the *Bracker* analysis' need to refocus on the locus of the property:

> "Focusing only on the ownership of the property separate from the property itself--especially in this case where the property would not be located in the county, but for its possession by Nation for its exclusive leased use for Indian gaming-- would be incongruous with *Bracker* and its progeny."

see VGT, ¶ 35, 475 P.3d at 829. As the Oklahoma Supreme Court distinguished, the geographic nature and the effective incidence of the tax are essential within the balance of the "particularized inquiry" involved for either tribal self-governance as a sovereign or as an improper interference to Federal interest in tribal economic growth under IGRA. *Id*. This Court ought to reaffirm the weight of facts in the "particularized inquiry" to establish the state's burden to outweigh the Federal and or tribal interests involved.

2. Bracker requires the state to overcome the federal and tribal barriers and ought to be reinforced here.

Under *Bracker*, Federal preemption is not limited to express statements prohibiting the tax, the evaluation engages a factual inquiry with the backdrop of tribal sovereignty to determine if the state's interest overcomes the federal. *Cotton Petroleum*, 490 U.S. at176; *accord Flandreau Santee Sioux Tribe v. Noem,* 938 F.3d 928, 932 (8th Cir. 2019). This Court has held states are required to assert a more than a generalized interest in raising revenues because under the Federal Indian Law canons of construction ambiguities must be resolved in favor of the Indians when interpreting treaty or statutory interpretation. *see Menominee*

Tribe of Indians v United States 391 U.S. 404 (1968); *Antoine v. Washington* 420 U.S. 194 (1975). Instead, some lower courts flipped the burden to tribes to overcome the state taxation authority of non-Indians within a reservation absent explicit federal preemption and ignoring the backdrop of tribal sovereignty. *See generally Noem,* 938 F.3d at 932. In finding the TPT preempted under federal regulation, this court ought to enumerate and expand the explanation of tribal sovereignty as a barrier to overcome for state taxation even where federal preemption is not explicit.

Finally, evaluation determines if the state's imposition of their regulatory authority infringes upon the tribal self-governance of "the right of [tribes] to make their own laws and be ruled by them." *Bracker*, 448 U.S. at 142. This court has established the resolution of state and taxation disputes is not predicated upon the balance of state or tribal sovereignty, but the test requires the balance of tribal sovereignty as a backdrop. *Wagnon,* 546 U.S. 95 at 112.

In the present case, TC's status as within either the Wendat Reservation and the Maumee Reservation boundaries both have interests as governing sovereign in building economic opportunities for members, support access to necessary food, health, and cultural resources, and self-governance in the TC. Petitioners oppose the Thirteenth Circuits holding infringement and preemption of the imposed TPT taxation exists under *Bracker*; however, this proposition is in opposition of the analysis, whether the TC is within the Wendat Reservation or Maumee Reservation.

3. This Court Should uphold the Thirteenth Circuit's ruling that Federal regulation and interests preempt the TPT

The Court should reject TPT's application to the WCDC, even if they find the legal incidence falls upon a non-Indian entity instead of the tribal corporation. Federal preemption need not be explicit; instead, a particularized inquiry of the history, congressional intent, is viewed

with tribal sovereignty as a backdrop. *Bracker*, 448 U.S. at 144-145. The state's interest fails to outweigh the federal and tribal interests involved as the state's interest. Thus, the TPT is insufficient to overcome federal and tribal interest under both federal regulation or tribal self-governance and interest in economic development as a sovereign.

The petitioners contend that the Thirteenth Circuit erred in finding preemption existed to prevent the State's taxation on the WCDC, ignores the factual basis substantiating the preemption balancing test under *Bracker*, related to congressional regulation and history for tribal self-governance. Acts of Congress, such as the IRA and the Indian Trader Statutes, provide evidence of Congressional intent to support tribes' economic self-sufficiency and self-determination. *Bracker*, 448 U.S. at 143; App. at 1. The IRA created a system for tribes to "interact with and adapt to a modern society" and to enable tribes to create business and government structures to support tribal governance. 25 U.S.C. §§ 461-479. Congress similarly sought to promote the Wendat Band's adaption to "civilization" through allotment of a portion of their reservation to promote self-sufficiency. R. at 19-22 The utilization of the Wendat Band's incorporation of the WCDC under the IRA's §17 corporation provision further enumerates the tools afford to tribes engage in economic self-determination without sacrificing tribal sovereignty. 25 U.S.C § 477 (2019); App. at 1.

The prohibition of state taxation is not enough to overcome the federal interest in prohibiting the tax. In *Montana v. Blackfeet Tribe of Indians,* this Court analyzed the mineral statute and found absent explicit preemption of state taxation authorization or prohibition, the arose from the absence of authorization in the legislation because ambiguity must be construed in favor of the Indians. 471 U.S. at 771. Similarly, the Indian Trader Statutes were created to protect tribes and their members from nefarious white traders either seeking to

swindle tribal members of money or take advantage of the government's remote payment process for tribal members. 25 CFR §104 (2019); App. at 1. While federal preemption here arises from the historical-paternalistic protection of tribes, it highlights the continuous tribes face forcing federal action. *Worcester* 31 U.S. 515; *Lone Wolf* 187 U.S. 553.

In the present case, the state's imposition of taxation over the TC, a landmass claimed as within two reservations, aligns with the recent precedent of states and local governments seeking to expand their regulatory power to tax tribal businesses or non-Indian businesses engaged in on-reservation economic activities. *e.g., see Gila River Indian Community* 91 F.3d at 1237; *Tulalip Tribes v. Washington*, 349 F. Supp. 3d 1046, 1057 (W.D. Wash. 2018)

The federal interests furthered by the WCDC project comport with the federal acts and the legislative history encouraging the Wendat Band's self-sufficiency. In the congressional record for the "act for the relief and civilization of the Wendat Band of Huron Indians," congress expressed a desire to promote the "civilization" of the band to comport with capitalism sentiments of land ownership and self-sufficiency. R. at 19-22, 29-30. The WCDC project's goals of establishing economic revenue aligns directly with the congressional statutes and intent to promote tribal self-determination.

This court's precedent has upheld generally applicable state taxes even where federal interest in tribal economic self-sufficiency was at issue. These cases are distinguishable because the tax's permissibility was based upon policy issues not present here. *Moe* This court incorporated policy factors into the *Bracker* analysis to find state interests in preventing taxation dodging or advertising tax loopholes to non-Indian businesses in frustration of state policy and flouting a legal obligation. *Department of Taxation and Financing of New York v. Milhelm Attea & Bros., Inc*., 512 U.S. 61 (1994); *accord Moe* 425 U.S. at 482. Instead, the

WCDC is an independent and non-Indian business not in direct contract with the tribe but still serves a distinct advantage to the tribe and its members' interests. Since no policy goals are implicated, the taxation is not a policy exception and is invalid.

Business privilege taxes service a different state interest than excise taxations levied on consumers. This Court distinguished the excise cigarette tax in *Moe*, from Arizona's TPT in *Warren Trading Post* to distinguish the tax's burden. 425 U.S. at 482. Like in *Warren*, the New Dakota TPT is levied upon the retailer trading on a reservation where the tax consequences to a tribes' self-sufficiency are frustrated by state interference without specific state interest. *Warren Trading Post Co. v. Arizona State Tax Comm'n.*, 380 U.S. 685 (1965).

Finally, Congressional policy encourages tribal initiatives to internally care for the health, safety, and welfare of a tribe to limit the economic support provided by the federal government. Further, as a policy consideration, the nature of the WCDC's business aligns with congressionally appropriated and funded programs for health, housing, and medical welfare for tribal members. *e.g.*, s*ee generally Public Law No: 116-6 (02/15/2019), 113 Stat. 13. (appropriation bill enumerating the funding and services descriptions for funding tribal programs).* General federal regulation under the Indian Trader act, IRA, and the policy interests of Congress are in connected with the services the Wendat Band seeks to provide through local grocery stores, housing, funding for a nursing home, and a pharmacy. The regulation of commerce in Indian Country historically protected tribal economic interests through Congress' regulations and laws for the promotion of self-governance and effectively occupy the field to protect the WCDC's tribal business from state taxation. Therefore, the imposition of a TPT on the Wendat Band should be found invalid.

4. The TPT infringes on the Wendat Band tribal sovereignty, self-governance, and economic interest.

States are limited to impose the collection of permissible sales taxes on-reservations businesses. *Moe*, 425 U.S. in dicta 482. This court has long recognized the basic prohibition of state-imposed taxation collection for sales of goods to Indians by on-reservation businesses. *Moe*, 425 U.S. 463; *Wagnon*, 546 U.S. 95. First, tribal self-governance to make laws and be ruled by them encompass the foundation of a tribal business interest against state taxation. Tribal sovereignty limits the imposition of a state tax on a tribe. *Williams*, 358 U.S. 217. The tax imposed upon all gross receipts by New Dakota, even if the incidence falls in some non-Indians, impacts tribal members. Therefore, even where states may permissibly require tax collection for non-Indians, the taxation does not apply to tribal members.

The remittance of the tax poses a direct conflict with the Wendat Band's sovereignty under the TPT because the exception ignores limitations on taxation of Indians on a reservation. 4 N.D.C. §212. If this court finds the TPT's legal incidence falls on non-Indians, then the tribe remains only responsible for paying the taxation for the non-Indian consumers. Even though the tax would be returned to the Wendat Band or WCDC, the tax imposition over both non-Indian and Indian customers is an impermissible exercise of the state's civil regulatory control for an on-reservation business. Therefore, the tax infringes on the sovereignty and self-governance of the Wendat Band and ought to be found invalid.

5. The state's general interest fails to overcome the federal regulation and interests and tribal interests here.

State's interests must be more than a generalized interest for a state to overcome the state tax's effective burden imposed upon a tribe. The State's justification for the taxation of the on-reservation activity must be "functions or services performed by the state in connection with the on-reservation activity. *Ramah Navajo School Board*, 458 U.S. at 843

n7. The state's stated interest in the TPT statute is too broad to apply to the WCDC's project. *Ramah Navajo School Board* held that the state must assert a specific regulatory function related to the taxed activity. 458, U.S. at 843-45. First, the TPT is not specific to benefits provided to the tribe; second, the TPT is not in direct nexus with the tribal interest. 4 N.D.C. §212(1). The state deposits the tax revenue a general revenue fund to supports broad programs for "collection of debt, maintenance of roads, transportation infrastructure, and other commercial purposes but is not specified for the tribe and no directed to specific programs in serving the tribe, business, or tribal members.

Second, the TPT's listed program funding is not in nexus with the tribe or its members for off-reservation services related to the WCDC's activity. 4 N.D.C. §212. A state or county must show a direct nexus through evidence or services directly provided to the party the state seeks to tax. *Ramah Navajo School Board*, 458 U.S. at 844. Transportation is a general supportive service provided to all state residents, whereas the TPT taxes general transactions unrelated to transportation directly. Unlike a gas excise taxation in *Cotton Petroleum,* where transportation is required to transport for processing petroleum off-reservation, the WCDC activities do not invoke the same environmental concerns as oil and gas production and transportation considerations. 490 U.S. 163. Therefore, the state does not provide sufficient specific benefits to justify taxation.

Finally, the state's interest in collecting payment and remitting tax revenue of non-Indian businesses within the Maumee Nation conflicts with the tribe's sovereignty and precedent barring taxation of non-Indians. The general rule barring states from taxing a Tribe absent congressional authorization controls here, like in *Warren Trading Post*, a tax directly on the Indian retailer related to on-reservation actions was prohibited by the trader statute

preempting taxation by regulation. 380 U.S. at 691. Therefore, when balanced upon the federal regulation and interests and tribal interest in self-governance above, the state's TPT taxation should be held invalid if levied upon the WCDC.

C. Alternatively, if this Court finds WCDC is within the Maumee Reservation, the TPT is similarly preempted under Bracker Balancing Test.

Following *Bracker*, this court has extended the preemption of taxation over a third-party non-Indian business on a reservation. When tribes go beyond their reservation boundaries, this court has determined they are generally subject to state regulation absent congressional preemption. *Mescalero Apache Tribe*, 411 U.S. 145. Similarly, a tribal business engaging in economic activities on another tribe's reservation is considered a non-Indian for taxation regulation analysis. *Mescalero Apache Tribe*, 411 U.S. at 157. Therefore, if the court holds the WCDC project is with the Maumee Reservation, the organization is considered non-Indian for a preemption analysis.

Under the *Bracker* analysis, even where the state imposes a tax on a non-Indian retailer engaged in on-reservation sales, a tax may "disturb and disarrange the statutory plan Congress setup in order to protect Indians" against the fair and reasonable deals sought for tribes. *Central Machinery Co. v. Arizona State Tax Comm'n*, 448 U.S. 160, 164 n.3, (1980). Therefore, as with the Wendat Band analysis above, the Maumee Nation's interest under their inherent sovereignty and the federal regulation are weighed against the state's interests.

1. Federal preemption prevents the state taxation under tribal infringement of the Maumee Nation's sovereignty and interferes with federal policy.

This court's precedent has upheld the bar on taxation over non-members engaged in economic activities upon a tribal reservation unless Congress authorizes the taxation or the state asserts an off-reservation excepted interest. *Wagnon*, 546 U.S. at 110-11; *Bracker*, 448 U.S. at 136, 144-45. The Maumee Nation's inherent sovereignty and the history of the

Federal-tribal relationship establish the foundation of tribal self-determination and self-sufficiency. *Bracker,* 448 U.S. at 143. This foundation serves as the backdrop for *the Bracker* analysis in weighing upholding tribal independence and economic development. *Ramah Navajo School Board,* 458 U.S. 838. If this court finds the TC is within the Maumee Reservation, the TPT statute's tax imposition impedes the Maumee Nation's ability to make their own laws and be ruled by them as supported by federal interests on tribal economic development.

The per se rule establishes that State lacks jurisdiction within Indian Country. *Oklahoma Tax Commissioner v. Sac and Fox Nation*, 508 U.S. 114, 128 (1993). The divergence to narrow the scope of federal preemption that arose under the particularized inquiry applies to excise taxation at the expense of tribal sovereignty. *New Mexico*, 462 U.S. at 334. The emergence and development of federal policy promoting tribal self-determination coincides with the decline in upholding tribal sovereignty as a bar to state taxation. Adam Crepelle, *Taxes, Theft, and Indian Tribes: Seeking an Equitable Solution to State Taxation of Indian Country Commerce*, 122 W. Va. L. Rev. 999, 1000, 1025 (2020). Even where federal government regulations do not overwhelming occupy a field, the courts found the tax preempted. *see Ramah Navajo School Board*, 458 U.S. 838.

Federal policies that prohibit regulations by states in Indian Country bar set the standard and bar for the state's imposition of the TPT over the WCDC's project. As discussed above, the federal statutes regulating trade and commerce on reservations serve as the barrier the New Dakota must overcome to impose the TPT. e.g., 25 U.S.C. §§ 461-479. The Maumee Nation seek alternative revenue sources due to declining revenue from timber and coal resource loss during allotment. States and tribes may impose dual taxation on non-Indian

businesses; however, dual taxation poses an economic barrier to tribes attracting non-member businesses. *Cotton Petroleum*, 490 U.S. at 209, Fn13. To comport with the federal interest in the economic development of tribes, the existence of a comprehensive shopping center with healthy and culturally relevant food, pharmacy, and additional local services serve the tribe and its members by the business's existence.

Rebalanced analysis accepted by lower courts allows even minimal generally provided services as enough of a service to collect high revenue tax from a tribe's economic interest in opposition to the *Bracker* precedent. *See Cotton Petroleum* 490 U.S. 163 ($90,000 in state services was sufficient to tax on-reservation oil revenue of $2,000,000). Instead, the Maumee Nation benefits from the WCDC, where successful business encourages further economic development and revenue for the state and tribe. The Maumee Nation already receives half of the tax proceeds from non-Indian businesses in Prairie County, raising a question about if the tax intended to tax the Maumee Nation and its interest. Finally, the Maumee Nation's low-income depressed income and tribal members would benefit from the job prospects predicted under the WCDC development.

The State's generalized interest fails to overcome the federal and tribal interests when the state's generalized interest is weak where the interest in raising revenue is not specifically in nexus with the development. *Wagnon*, 546 U.S. 95. Here, the goal of the WCDC is to raise revenue, but the interest involved is for the benefit of area residents to access essential services. Where the State's interest fails to overcome the federal and tribal interests, the taxation is invalid. Therefore, this court should reject the State's taxation over the WCDC where the state's interest fails to overcome the Maumee Nation and federal interest involved.

CONCLUSION

Therefore, this court should uphold the decision of the United States Court of Appeals for the Thirteenth Circuit and hold: 1) the Topanga Cession is within Wendat Band's reservation because the creation of the Wendat Reservation abrogated the Maumee Nation's claim to the Topanga Cession and the Wendat Reservation was never diminished by Congress; 2) the TPT is barred by either federal preemption or tribal sovereign infringement under tribal sovereignty and federal preemption.

APPENDIX

Statutes:

Licensed Indian Traders, 25 CFR § 140 (2012):

§ 140.1 Sole power to appoint.

The Commissioner of Indian Affairs shall have the sole power and authority to appoint traders to the Indian tribes. Any person desiring to trade with the Indians on any reservation may, upon establishing the fact, to the satisfaction of the Commissioner of Indian Affairs, that he is a proper person to engage in such trade, be permitted to do so under such rules and regulations as the Commissioner of Indian Affairs may prescribe.

Indian Reorganization Act, 25 U.S.C.A. § 477 (2019):

§477. Incorporation of Indian tribes; charter; ratification by election

The Secretary of the Interior may, upon petition by any tribe, issue a charter of incorporation to such tribe: *Provided*, That such charter shall not become operative until ratified by the governing body of such tribe. Such charter may convey to the incorporated tribe the power to purchase, take by gift, or bequest, or otherwise, own, hold, manage, operate, and dispose of property of every description, real and personal, including the power to purchase restricted Indian lands and to issue in exchange therefor interests in corporate property, and such further powers as may be incidental to the conduct of corporate business, not inconsistent with law; but no authority shall be granted to sell, mortgage, or lease for a period exceeding twenty-five years any trust or restricted lands included in the limits of the reservation. Any charter so issued shall not be revoked or surrendered except by Act of Congress.